

STATE OF NEW HAMPSHIRE



**CHRISTOPHER SUNUNU
GOVERNOR**

**LAW ENFORCEMENT MANUAL
2020 EDITION**

Department of Justice

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PREFACE

Since 1957, New Hampshire law has required the Attorney General to prepare and distribute a law enforcement manual. The Legislature has specifically directed that the “manual shall contain interpretations of law pertaining to the duties of peace officers, law of arrest, admissibility of evidence, trial procedure, instructions in the handling of missing child and missing adult cases, and other material the attorney general deems necessary.” RSA 7:6-a. The Attorney General first produced the manual in 1959 with revisions in 1979, 1984, 1993, and 2008.

I am pleased to present the 2020 version of the Law Enforcement Manual. Its content not only meets the statutory requirements, but also addresses topics of current concern to both law enforcement and the public we serve. There are sections discussing implicit bias, fair and impartial policing, body-worn cameras, the rights of crime victims, child abuse and neglect, elder abuse and neglect, human trafficking, and consumer fraud.

This version of the Law Enforcement Manual is the result of a significant effort by the following current and former members of the Attorney General’s Office: Benjamin Agati, James Boffetti, Scott Chase, Heather Cherniske, Joseph Cherniske, Nicole Clay, Julie Curtin, Stephen Fuller, Annie Gagne, Brandon Garod, Kate Giaquinto, Shane Goudas, Meghan Hagaman, Peter Hinckley, John Kennedy, Kathleen Kimball, Sean Locke, Benjamin Maki, Susan Morrell, Sunny Mulligan Shea, Jesse O’Neill, Lynda Ruel, Danielle Sakowski, Danielle Snook, Joshua Speicher, Timothy Sullivan, Allison Vachon, Geoffrey Ward, Lisa Wolford, and Elizabeth Woodcock. We were also assisted by the following interns: Michael Albalah, Katheryn Dumais, Chaim Herbstman, Elias Papakostas, and Laura Raymond.

This version would not have been produced but for the exceptional efforts of a few individuals. Deputy Attorney General Jane Young and Solicitor General Daniel Will marshalled the resources necessary to complete this project and exercised expert editorial oversight. Our superb Paralegal, Maggie Keene, spent countless hours skillfully proofreading and formatting the document. Finally, Assistant Attorney General Erin Fitzgerald deserves special recognition and praise for her extraordinary efforts in coordinating and synthesizing the work of many into this final version.

New Hampshire’s law enforcement officers serve with professionalism, dedication and courage. On behalf of the Attorney General’s Office, I hope that the 2020 Law Enforcement Manual is a useful resource to assist and guide these officers in their service to the people of New Hampshire.



Gordon MacDonald
New Hampshire Attorney General

November 5, 2020

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I. THE DUTY OF PEACE OFFICERS

The start of every law enforcement officer's career coincides with making and subscribing to the oath of office, through which every police officer promises to bear faith and true allegiance to the constitutions of the United States and the State of New Hampshire.¹ That promise includes agreeing to comply with all the rules and regulations set forth in both constitutions.² An officer who willfully violates that oath, who willfully breaks that promise, shall be dismissed from office.³ This Law Enforcement Manual is designed, in part, to help officers keep that promise. The rules of criminal procedure as set forth under the United States and New Hampshire constitutions should never be looked at as obstacles in your path to success. They should be looked at *as* the path to success.⁴

The term "police officer" includes all police officers, regular, special, and auxiliary, as well as constables.⁵ The duties of police officers are those of conservators of the peace.⁶ As such, police officers have the authority, and in some circumstances, the obligation, to act expeditiously to protect the public.⁷ Protecting the public includes not only detecting and investigating criminal offenses, but also providing various types of assistance to the citizenry. This Manual focuses on the investigation and enforcement of criminal laws in New Hampshire.

¹ In the event of a conflict between this Manual and relevant case law and statutes, the case law and statutes will control.

² RSA 42:1 (2012); N.H. Const. pt. II, art. 84.

³ RSA 42:1 (2012).

⁴ Paraphrased from the Dedication in: Randy Means, *The Law of Policing*, LRIS Publications, 2007.

⁵ *State v. Swan*, 116 N.H. 132, 133 (1976).

⁶ *State v. Grant*, 107 N.H. 1, 2 (1966).

⁷ *State v. Theodosopoulos*, 119 N.H. 573, 580 (1979).

II. IMPLICIT BIAS

A. Introduction

All law enforcement officers have a duty to respect and protect the constitutional rights of all individuals during law enforcement contacts or enforcement actions.⁸ Law enforcement officers should treat all people with whom they interact with the courtesy and dignity that is inherently due to every person.

Biased policing is a threat to the integrity of all law enforcement officers. Biased policing damages the relationships between law enforcement and those communities that law enforcement has sworn to protect and serve. Biased policing risks discouraging crime victims from reporting offenses out of fear that they may become targets of biased policing.

Fair and impartial policing assures the public that all are afforded equal protection. Fair and impartial policing assures the public that people will not become subject to arbitrary law enforcement contacts on the basis of race, ethnicity, background, age, gender, sexual orientation, religion, economic status, cultural group, or any other prejudicial basis. Fair and impartial policing supports the development of trust between law enforcement officers and the communities that they have sworn to protect and serve. Law enforcement should always engage in fair and impartial policing.

B. Definitions

Biased policing is the arrest, detention, interdiction, or other disparate treatment of an individual without reasonable suspicion or on the basis of the race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of such individual, except when such status is used in combination with other identifying factors in seeking to apprehend a specific suspect whose racial or ethnic status is part of the description of the suspect.

⁸ The information contained in this chapter is largely drawn from the New Hampshire Department of Safety Division of State Police, Fair and Impartial Policing policy.

Fair and impartial policing is engaging in law enforcement contact or law enforcement action only when reasonable suspicion is present and the sole basis for that reasonable suspicion is not the individual's race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of such individual.

For the purposes of these definitions, reasonable suspicion, also known as articulable suspicion, is more than a mere hunch.⁹ Reasonable suspicion is based upon a set of articulable facts and circumstances that would warrant a person of reasonable caution in believing that an infraction of the law has been committed, is about to be committed, or is in the process of being committed, by the person or persons under suspicion.¹⁰ In forming reasonable suspicion, an officer can rely upon that officer's observations in combination with the officer's training and experience and/or reliable information received from credible outside sources.¹¹

C. Encouraging Fair And Impartial Policing

One of the best methods to support and encourage fair and impartial policing is to recognize the existence of biased policing and prohibiting such practices. This includes adopting policies that effectively prohibit biased policing, providing training to educate officers about biased policing, and developing systems for reviewing complaints of and disciplining biased policing.

1. Prohibiting Biased Policing

The core of any prohibition on biased policing is the requirement that law enforcement officers be able to clearly articulate the specific law enforcement or public safety purpose of any arrest, detention, stop, or other contact free from biased assumptions

⁹ *State v. McKinnon-Andrews*, 151 N.H. 19, 26 (2004).

¹⁰ *State v. McKinnon-Andrews*, 151 N.H. 19, 25-26 (2004).

¹¹ *State v. McKinnon-Andrews*, 151 N.H. 19, 26 (2004); *State v. Sousa*, 151 N.H. 297, 299 (2004).

based upon the race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of the individual contacted. Although not an all-inclusive list, prohibiting biased policing includes prohibiting the following:

- Stops or detentions based solely upon race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of such individual;
- Detention of any individual when such detention is not supported by reasonable suspicion;
- Use of actual or perceived race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of such individual as the sole basis for developing reasonable suspicion;
- Use of actual or perceived race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of such individual in deciding upon the scope and substance of post-stop action;
- Detaining a motorist or other individual who has been cited or warned beyond the point when reasonable suspicion of unlawful activity has expired;
- Searches of people or property, including vehicles, that are not supported by a warrant, consent, or a legally recognized exception to the warrant requirement;
- Relying upon race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of such individual as motivation for pursuing asset seizure and forfeiture.

Prohibiting biased policing does not mean, however, that law enforcement officers are prohibited from considering race, ethnic background, age, gender, sexual orientation, religion, economic status, cultural group, or other identifiable group of such individual when determining whether reasonable suspicion exists when one or more of those factors are part of the description of a known or suspected offender wanted in connection with a specific criminal or suspicious incident.

Requiring law enforcement officers to document the basis for arrests, stops, detentions, searches, and other contacts furthers the goals of fair and impartial policing. Policies prohibiting biased policing should consider requiring officers to be able to clearly

articulate their basis for initiating an arrest, stop, detention, search, or other contact. In the context of consent searches, policies should favor officers getting signed forms acknowledging that the individual consented and in the absence of a signature, officers should note that consent had been obtained.

2. Fair And Impartial Policing And Immigration Status

Fair and impartial policing practices extend to prohibiting law enforcement officers from stopping or detaining individuals based upon a belief that those individuals may have violated civil immigration laws. State and local law enforcement officers lack the legal authority to enforce federal immigration laws, violations of which are civil in nature. Fair and impartial policing means that law enforcement will not initiate an investigation into an individual based solely upon information or suspicion that the individual lacks the proper authorization or documentation to be in the United States. Accordingly, a fair and impartial policing policy should prohibit officers from stopping, investigating, detaining, or questioning an individual solely for determining whether that individual has the proper authorization or documentation to be in the United States.

When investigating civil violations, law enforcement officers should never ask an individual about the individual's citizenship status. This prohibition generally applies to the investigation of criminal offenses, as well. Law enforcement officers with reasonable suspicion who are conducting an investigation should not inquire about a suspect's immigration status, unless it is relevant to the investigation. After a suspect has been arrested for a criminal violation, however, a law enforcement officer may inquire about the suspect's citizenship status. Officers should not inquire about a complainant's or witness's citizenship status.

3. Training

Law enforcement officers should receive regular training on the harms of bias-based policing and discrimination, the fair and impartial policing practices adopted by their department, and the expectation that they report violations of fair and impartial policing practices. In addition to other possible disciplinary action, diversity and sensitivity training should be developed and required for officers who have had complaints of bias or discrimination against them sustained.

4. Complaints And Discipline

Law enforcement agencies should take steps to facilitate receiving and reviewing complaints related to biased policing. Officers should report allegations of biased policing, racial profiling, discrimination, or an illegal stop or search to their supervisor. Members of the public who wish to make a complaint of biased policing or discrimination against an officer should be given the name of the officer's immediate supervisor to facilitate making the complaint. Supervisors who receive official complaints should follow their department's procedures for internal investigations. All complaints of biased policing, formal or informal, should be reviewed.

Law enforcement agencies, in addition to providing additional training in diversity, and fair and impartial policing, should impose discipline for violation of the fair and impartial policing policies consistent with established department requirements. Law enforcement agencies should also implement discipline for officers who have observed violations of the department's fair and impartial policing policies and failed to report those violations.

III. BODY-WORN CAMERAS

A. Introduction

The use of body-worn cameras is an option to be elected by each individual law enforcement agency.¹² “Every law enforcement agency that elects to equip its officers with [body-worn cameras] shall adopt policies and procedures relating to the use of [body-worn cameras] and the retention and destruction of data consistent with” RSA chapter 105-D.¹³ If an agency elects to use body-worn cameras, the cameras shall be used only by officers who are “in uniform,”¹⁴ and any recordings or data taken by the camera, along with the camera itself and any other equipment associated with the use of the camera, are the property of the law enforcement agency.¹⁵ For purposes of RSA chapter 105-D, the chapter governing body-worn cameras, an officer is “in uniform” if the officer is “wearing any officially authorized uniform,” or if the officer “is visibly wearing articles of clothing, a badge, tactical gear, gun belt, a patch, or other insignia that he or she is a law enforcement officer acting in the course of his or her duties.”¹⁶

Recordings made with body-worn cameras in accordance with RSA chapter 105-D do not violate the wiretap statute.¹⁷

¹² RSA 105-D:2, I (Supp. 2019).

¹³ RSA 105-D:2, I (Supp. 2019).

¹⁴ RSA 105-D:2, IV (Supp. 2019).

¹⁵ RSA 105-D:2, II (Supp. 2019).

¹⁶ RSA 105-D:1, III (Supp. 2019).

¹⁷ RSA 570-A:2, II(m) (Supp. 2019).

B. When The Camera Must Be Used

Officers must activate their body-worn cameras “and start recording upon arrival on scene of a call for service or when engaged in any law enforcement-related encounter or activity.”¹⁸ These activities include, but are not limited to:

- Traffic stops;
- Pedestrian stops;
- Arrests;
- Searches;
- Interrogations;
- Investigations;
- Pursuits;
- Crowd control;
- Traffic control;
- Non-community caretaking interactions with an individual while on patrol;
- Any time the officer is enforcing the law; and
- The activation of lights and siren, if required by policy.

Once the officer activates the body-worn camera, he or she must continue recording “until the event is completed” or until deactivation is otherwise required by law.¹⁹ If, for some reason, the recording is interrupted or there is a malfunction, the reason the recording is not complete must be documented in the officer’s report.²⁰

¹⁸ RSA 105-D:2, V (Supp. 2019).

¹⁹ RSA 105-D:2, X (Supp. 2019).

²⁰ RSA 105-D:2, XI (Supp. 2019).

During encounters with the public, officers must inform individuals that they are being recorded as soon as it is practical to do so.²¹ If an officer does not do so, the officer must note in the report why the notification was not given.²²

C. When People Have The Right Not To Be Recorded

There are several situations in which people must be informed that the body-worn camera is recording, and given the option to have the camera deactivated. In those circumstances, the officer *must* inform the person of that option. If the person then wishes not to be recorded, the officer *must* deactivate the camera and document the reason why no recording was made in the report connected to the incident.²³

1. Interviews With Crime Victims

Below are a few of the main requirements set forth in RSA 105-D:2 relative to law enforcement officers interactions while interviewing victims of crime while wearing body-worn cameras.

- No interview with a crime victim shall be recorded, unless the victim has given “*express consent*” “*before the recording is made.*”
- All recordings of victim interviews “shall be consistent with the New Hampshire attorney general’s model protocol for response to adult sexual assault cases, the New Hampshire attorney general’s domestic violence protocol for law enforcement, the New Hampshire attorney general’s stalking protocol for law enforcement, and the New Hampshire attorney general’s child abuse and neglect protocol, as applicable.”²⁴ These protocols can be found at the following website:

<https://www.doj.nh.gov/criminal/victim-assistance/protocols.htm>.

- *However*, the rule prohibiting interviews with crime victims may be waived by the head of the law enforcement agency “when the parent or

²¹ RSA 105-D:2, VIII (Supp. 2019).

²² RSA 105-D:2, VIII (Supp. 2019).

²³ RSA 105-D:2, V, IX (Supp. 2019).

²⁴ RSA 105-D:2, VII(d) (Supp. 2019).

legal guardian is the subject of the investigation to which a juvenile is a victim or witness.”²⁵

2. Anonymous Reporters Of Crimes

Below are a few of the main requirements set forth in RSA 105-D:2 relative to law enforcement officers interactions while taking anonymous reports of crimes while wearing body-worn cameras.

- The officer must, “as soon as practicable,” ask the person if the person wants to be recorded on the body-worn camera.
- If the person does not wish to be recorded, the officer *must* deactivate the camera.²⁶

3. Anyone Having A Reasonable Expectation Of Privacy

Below are a few of the main requirements set forth in RSA 105-D:2 relative to law enforcement officers interactions with persons who have a reasonable expectation of privacy.

- Any person may decline to be recorded anywhere the person has a reasonable expectation of privacy, such as a residence, a restroom, or a locker room.²⁷
- If the person does not wish to be recorded, the officer *must* deactivate the camera.
- If the person does not wish to be recorded, “any images shall, as soon as practicable, be permanently distorted or obscured.”²⁸
- *However*, a citizen may *not* decline to be recorded if the recording is being made while the officer is “executing an arrest warrant, or a warrant issued by a court, or the officer is in the location pursuant to a judicially-recognized exception to the warrant requirement.”²⁹

²⁵ RSA 105-D:2, VII(d) (Supp. 2019).

²⁶ RSA 105-D:2, VII(e) (Supp. 2019).

²⁷ RSA 105-D:2, IX (Supp. 2019).

²⁸ RSA 105-D:2, IX (Supp. 2019).

²⁹ RSA 105-D:2, IX (Supp. 2019).

D. When The Camera Shall Not Be Used

“Recordings shall be specific to an incident,” and “[o]fficers shall not indiscriminately record entire duties or patrols.”³⁰ Body-worn cameras shall not be used to record:

- “Communications with other police personnel except to the extent such communications are incidental to a permissible recording.”
- Communications with officers working undercover or confidential informants, “unless expressly directed to be included as part of the investigation.”
- Strip searches and body-cavity searches.
- “While on the grounds of any public, private, or parochial elementary or secondary school, except when responding to an imminent threat to life or health or a call for service.”
- “When on break or otherwise engaged in personal activities.”
- Whenever the officer believes that there is an explosive device that could be triggered by electrostatic interference from the body-worn camera.³¹
- When the officer is simply completing paperwork.
- When the officer is performing community caretaking functions,^{32, 33} *i.e.*, “an articulable act unrelated to the investigation of a crime.”³⁴ Community caretaking functions include:
 - Participating in town halls or other community outreach;
 - Helping children find their parents;
 - Providing death notifications;
 - Giving directions or other assistance to people; and
 - Performing in-home or hospital well-being checks on the sick, elderly, or persons presumed missing.³⁵

³⁰ RSA 105-D:2, VI (Supp. 2019).

³¹ RSA 105-D:2, VII (Supp. 2019).

³² RSA 105-D:2, V (Supp. 2019).

³³ RSA 105-D:1, VI (Supp. 2019).

³⁴ RSA 105-D:1, II (Supp. 2019).

³⁵ RSA 105-D:1, II (Supp. 2019).

E. Use And Disclosure Of Recordings

Any recordings made with body-worn cameras “shall be for law enforcement purposes only.”³⁶ “Recordings shall not be divulged or used by a law enforcement agency for any commercial or other non-law enforcement purpose.”³⁷ Access to the recordings “shall be authorized by the head of the law enforcement agency,” and only for purposes allowed under RSA chapter 105-D.³⁸

No one, including law enforcement officers, “shall edit, alter, erase, delete, duplicate, copy, subject to automated analysis or analytics of any kind, including but not limited to facial recognition technology, share, display, or otherwise distribute in any manner any body-worn camera recordings or portions thereof,” unless authorized by RSA chapter 105-D, *except* that a still image may be taken from a recording and distributed “to help identify individuals or vehicles suspected of being involved in a crime.”³⁹

Any recording made by a body-worn camera is exempt from the public records law, RSA chapter 91-A, *except* when the recording depicts:

- Any restraint or use of force by a law enforcement officer; or
- The discharge of a firearm; or
- An encounter in which there is an arrest for a felony.⁴⁰

However, even these recordings will be exempt from disclosure under the public records law if releasing the recording would “constitute an invasion of privacy” or the recording is exempt under a different provision of the law.⁴¹

³⁶ RSA 105-D:2, XIII (Supp. 2019).

³⁷ RSA 105-D:2, XV (Supp. 2019).

³⁸ RSA 105-D:2, XIII (Supp. 2019); *see also* RSA 105-D:2, XIV (Supp. 2019) (allowing for the restriction of access of officers involved in officer-involved shootings and suspected wrongdoings).

³⁹ RSA 105-D:2, XII (Supp. 2019).

⁴⁰ RSA 91-A:5, X (Supp. 2019).

⁴¹ RSA 91-A:5, X (Supp. 2019).

F. Storage And Retention Of Recordings

“All recordings shall be securely stored no later than the end of each shift, or as soon thereafter as is reasonably practicable, in conformity to the most recent security policy” of the Criminal Justice Information Services (CJIS) division of the Federal Bureau of Investigation (FBI).⁴² If an agency uses a third party to store its recordings, there are statutory restrictions on what that third party may do with the recordings.⁴³ Furthermore, no party “shall subject any recording to analysis or analytics of any kind, including without limitation facial recognition technology and data mining.”⁴⁴

In all cases, recordings must be retained for a minimum of thirty days.⁴⁵ However, recordings must be retained for a minimum of three years if:

- The recording includes images involving an officer’s use of deadly force or deadly restraint; or
- The recording includes images involving the discharge of a firearm, except for the destruction of an animal; or
- The recording includes images involving death or serious bodily injury; or
- Within thirty days of the encounter, the police department has received a complaint regarding the encounter recorded by the camera; or
- The recording is “evidence in a civil or criminal case or as part of an internal affairs investigation or as part of an employee disciplinary investigation”;⁴⁶ or
- By law, administrative rule, or court order, the recording is connected to ongoing litigation, in which case the recording will be retained for as long as it is required.⁴⁷

⁴² RSA 105-D:2, XV (Supp. 2019).

⁴³ RSA 105-D:2, XV (Supp. 2019).

⁴⁴ RSA 105-D:2, XV (Supp. 2019).

⁴⁵ RSA 105-D:2, XVI (Supp. 2019).

⁴⁶ RSA 105-D:2, XVI(b) (Supp. 2019).

⁴⁷ RSA 105-D:2, XVII(a) (Supp. 2019).

The chief of a law enforcement agency may also order the recording retained if it is to be used as a training tool. In that case, either all images of people and license plate numbers must be “permanently deleted, distorted, or obscured,” or all persons in the recording must be given “an opportunity in writing to decline to have” their images and vehicle license plate numbers used. After the necessary deletions and edits are made, the recording “may be viewed solely by officers for training purposes only.”⁴⁸

Any unauthorized recordings made with body-worn cameras “shall be immediately destroyed,” and they “shall not be admissible as evidence in any criminal or civil legal or administrative proceeding, except in a proceeding against an officer for violating” RSA chapter 105-D.⁴⁹ If a recording is used in such a proceeding, it must be destroyed immediately after the proceeding and all available appeals have ended.⁵⁰

In all other cases, recordings shall be retained for a maximum of 180 days.⁵¹

⁴⁸ RSA 105-D:2, XVII(b) (Supp. 2019).

⁴⁹ RSA 105-D:2, XVIII (Supp. 2019).

⁵⁰ RSA 105-D:2, XVIII (Supp. 2019).

⁵¹ RSA 105-D:2, XVI (Supp. 2019).

IV. THE USE OF PHYSICAL FORCE

A. Introduction

The law specifically defines when it is permissible to use physical force in self-defense, in defense of another, and in the course of law enforcement activities. If anyone, including a law enforcement officer, uses physical force in a situation or manner that is not authorized by law, that person could be subject to criminal liability. A police officer could also face civil liability for the wrongful use of force. However, certain circumstances defined by law permit a person to use force against another, and thus, this permission “constitutes a defense to any offense.”⁵² For these reasons, it is important that law enforcement officers understand the law governing the permissible use of force against another.

The use of force is governed, in large part, by two statutes: RSA 627:4 and RSA 627:5. In general, the law concerning the use of force against another is divided into two categories: (1) the use of physical force by civilians, and (2) the use of physical force by law enforcement officers. Police officers have the same right to use force as civilians, but may also use force under some circumstances when a civilian could not legally do so.

The law also differentiates between the use of deadly force and the use of non-deadly force. The term “deadly force” includes any assault or confinement that a person commits with the purpose of causing death or serious bodily injury, or which the person knows will create a substantial risk of death or serious bodily injury.⁵³ It specifically includes the act of purposely firing a firearm in the direction of another person or at a vehicle that the shooter believes is occupied, provided that the firearm is capable of causing death or serious bodily injury.⁵⁴ The term “non-deadly force” covers any type of force that

⁵² RSA 627:1 (2016).

⁵³ RSA 627:9, II (2016).

⁵⁴ RSA 627:9, II (2016).

does not rise to the level of deadly force.⁵⁵ Non-deadly force covers a wide range of conduct, including:

- Producing or displaying a weapon;⁵⁶
- Using an electro-muscular disruption weapon, such as a Taser;
- Grabbing a person's wrist;
- Handcuffing a person; and
- Using oleoresin capsicum (OC) spray to subdue a person.

The use of force against another is justified only if it is supported by a reasonable belief that the force was necessary under the circumstances. In practical terms, that means if a law enforcement officer uses force against another in the course of the officer's duties, a review of the officer's conduct will include looking at the immediate circumstances surrounding the incident to determine whether the officer actually believed that force was necessary and, if so, whether that belief was reasonable.

Whether the use of force against another person is justified in a particular situation is highly dependent on the specific circumstances. For example, the *reasonableness of the use of force* will depend on such factors as:

- The nature of the threat;
- The relative size and physical condition of the assailant and the person using force;
- Whether there were other people present;
- The location; and
- Whether the person using force had any viable alternatives.

It is not possible to establish any bright-line rules about when the use of force is warranted. Rather, as discussed above, the reasonableness of any use of force by an officer will require consideration of the immediate circumstances surrounding the incident. The examples that follow are generic, and do not address the multitude of circumstances that

⁵⁵ RSA 627:9, IV (2016).

⁵⁶ RSA 627:9, IV (2016).

an officer may be presented with. *These examples are offered solely to illustrate the various legal principles. They should not be used as definitive guides to when force may be used.*

B. The Right Of Civilians To Use Non-Deadly Force

1. Non-Deadly Force In Defense Of A Person

The law permits civilians to use non-deadly force against others in order to defend themselves or others from what they reasonably believe to be the imminent use of unlawful non-deadly force.⁵⁷ The threat of force being defended against must be imminent.⁵⁸ In other words, the person acting in self-defense must reasonably believe that the other person is actually about to use force. Additionally, the degree of force should not be any greater than what is reasonably necessary to fend off the threatened or actual force.

2. Non-Deadly Force In Defense Of Premises

A person may use non-deadly force against another—to the extent the person reasonably believes it is necessary—“to prevent or terminate the commission of a criminal trespass” upon a premises.⁵⁹ However, this is permissible only if the person using the force possesses or controls the property, or is privileged or licensed to be on the property.⁶⁰

3. Non-Deadly Force In Defense Of Property

A civilian may use non-deadly force against another when the person reasonably believes it is necessary to prevent an unlawful taking of his or her property, to retake his or her property immediately after its taking, or to prevent criminal mischief. The amount of force must be reasonable under the circumstances.⁶¹

⁵⁷ RSA 627:4, I (2016).

⁵⁸ RSA 627:4, I (2016).

⁵⁹ RSA 627:7 (2016).

⁶⁰ RSA 627:7 (2016).

⁶¹ RSA 627:8 (2016).

4. Non-Deadly Force By Merchants

The law permits a merchant, or the merchant's agent, such as an employee or security guard, to detain a person on the premises when there are reasonable grounds to believe that the person has committed the crime of willful concealment. The manner of detention must be reasonable, and the person may be detained only so long as it is necessary to turn the person over to the police.⁶²

The law also permits the owner of a movie theater, or the owner's agent, to detain a person when there are reasonable grounds to believe that the person was engaged in unauthorized recording, as defined in RSA 644:19, in the theater. The manner of detention must be reasonable, and the person cannot be held longer than is necessary to surrender the person to the police.⁶³

5. Non-Deadly Force By County Fair Security Guards

A county fair security guard is authorized to detain any person that the guard has reasonable grounds to believe committed a violation of New Hampshire law on the premises of the county fair association. The manner of detention must be reasonable and last only so long as is necessary to surrender the person to law enforcement.⁶⁴ This provision does not apply, unless the security guard has completed the part-time officer training.⁶⁵

⁶² RSA 627:8-a, I (2016).

⁶³ RSA 627:8-a, II (2016).

⁶⁴ RSA 627:8-b, I (Supp. 2019).

⁶⁵ RSA 627:8-b, II (Supp. 2019).

6. Non-Deadly Force By Persons With Special Responsibilities

The law permits certain people with special responsibilities to care for others to use physical force when necessary to meet those responsibilities. For example:

- A parent, guardian, or other person “responsible for the general care and welfare of a minor is justified in using force against such minor when and to the extent that he reasonably believes it necessary to prevent or punish such minor’s misconduct.”⁶⁶
- A teacher is permitted to use necessary force against a minor when the minor is creating a disturbance or refuses to leave the premises.⁶⁷

7. Non-Deadly Force As A Warning

It is not a crime to respond “to a threat which would be considered by a reasonable person as likely to cause serious bodily injury or death to the person or to another by displaying a firearm or other means of self-defense with the intent to warn away the person making the threat.”⁶⁸

8. Limitations On The Right Of Civilians To Use Non-Deadly Force

a. Provocation

The use of non-deadly force against another will not be justified if the person using force in self-defense (“the actor”) provoked the other person into using non-deadly force, and the actor did so with the purpose of creating a situation where the actor could respond with force and cause physical harm.⁶⁹

⁶⁶ RSA 627:6, I (Supp. 2019).

⁶⁷ RSA 627:6, II(a) (Supp. 2019).

⁶⁸ RSA 627:4, II-a (2016).

⁶⁹ RSA 627:4, I(a) (2016); *see State v. Gorham*, 120 N.H. 162, 164 (1980).

b. Initial Aggressor

The use of non-deadly force against another will not be justified if the actor was the initial aggressor.⁷⁰ However, if, after the initial act of aggression, the actor withdraws from the encounter and effectively communicates to the other party that he is doing so, but the other person continues to use or threatens to use unlawful, non-deadly force, then the actor may be justified in responding with non-deadly force.⁷¹

c. Combat By Mutual Consent

Self-defense is not justified when “[t]he force involved was the product of a combat by agreement not authorized by law.”⁷² Combat “authorized by law” appears to refer to collegiate wrestling, sanctioned professional boxing, and other legitimate forms of physical combat.

C. The Right Of Civilians To Use Deadly Force

1. Imminent Use Of Unlawful Deadly Force

A civilian is entitled to use deadly force against another person when he or she reasonably believes that the other person is about to use unlawful, deadly force against him or her or a third person.⁷³

2. Use Of Unlawful Force During A Burglary

A civilian is entitled to use deadly force against another person when he or she reasonably believes that the other person is likely to use any unlawful force against a person present while committing or attempting to commit a burglary.⁷⁴

⁷⁰ RSA 627:4, I(b) (2016).

⁷¹ RSA 627:4, I(b) (2016).

⁷² RSA 627:4, I(c) (2016).

⁷³ RSA 627:4, II(a) (2016).

⁷⁴ RSA 627:4, II(b) (2016).

3. To Prevent A Kidnapping Or Forcible Sex Offense

A civilian is also permitted to use deadly force against another person when he or she reasonably believes that the other person is committing or about to commit kidnapping or a forcible sex offense.⁷⁵

4. To Prevent A Felony Within The Actor's Dwelling

A civilian is entitled to use deadly force against another person when he or she reasonably believes that the other person is likely to use any unlawful force in the commission of a felony against the civilian within the civilian's dwelling or its curtilage.⁷⁶ *However, this applies only if the assailant is an intruder. It does not apply if the assailant is someone who also lives in the dwelling.*⁷⁷

5. Limitations On The Right of Civilians To Use Deadly Force

a. The Duty To Retreat

A person cannot lawfully use deadly force in self-defense if the person knows that he or she can retreat from the encounter with complete safety.⁷⁸ *However, retreat is not required, and deadly force may be used in self-defense, if the person "is within his or her dwelling, its curtilage, or anywhere he or she has a right to be, and was not the initial aggressor."*⁷⁹

There is also no duty to retreat when the actor is a law enforcement officer or a person assisting a law enforcement officer at the officer's direction.⁸⁰

⁷⁵ RSA 627:4, II(c) (2016).

⁷⁶ RSA 627:4, II(d) (2016).

⁷⁷ *State v. Warren*, 147 N.H. 567, 570 (2002).

⁷⁸ RSA 627:4, III(a) (2016).

⁷⁹ RSA 627:4, III(a) (2016).

⁸⁰ RSA 627:4, III(d) (2016).

b. The Actor Has Provoked The Use Of Force

The use of deadly force is not justified when the actor has provoked another person into using deadly force, and did so with the purpose of creating an opportunity to use deadly force against the person and cause death or serious bodily harm.^{81, 82}

D. The Use of Non-Deadly Force By Law Enforcement Officers

There are some circumstances in which a law enforcement officer is justified in using physical force against another, but a civilian is not. A law enforcement officer is justified in using non-deadly force against other persons:

when and to the extent that he [or she] reasonably believes it necessary to effect an arrest or detention or to prevent the escape from custody of an arrested or detained person, unless he [or she] knows that the arrest or detention is illegal, or to defend himself [or herself] or a third person from what he [or she] reasonably believes to be the imminent use of non-deadly force encountered while attempting to effect such an arrest or detention or while seeking to prevent such an escape.⁸³

E. The Use Of Deadly Force By Law Enforcement Officers

A law enforcement officer is justified in using deadly force against other persons when, and to the extent that, the officer reasonably believes it is necessary to accomplish the following:

- To defend himself or herself or a third person from what the officer reasonably believes is the imminent use of deadly force.⁸⁴
- To effect an arrest or prevent an escape. A law enforcement officer is justified in using deadly force against another when the officer reasonably

⁸¹ RSA 627:4, III(c) (2016).

⁸² RSA 627:4, III(b) (2016) and RSA 627:4, III(c) (2016) set out two additional limitations on the use of deadly force, neither of which arises with any degree of frequency: when the actor can surrender property to a person asserting a right thereto, and when the actor can comply with a demand that the actor abstain from performing an act the actor is not obliged to perform.

⁸³ RSA 627:5, I (2016).

⁸⁴ RSA 627:5, II(a) (2016).

believes such force is necessary to effect the arrest of, or prevent the escape from custody of, a person, if the officer reasonably believes the person:

- Committed or is committing a felony involving the use of force or violence;⁸⁵ or
- Is using a deadly weapon in attempting to escape; or
- Is otherwise indicating that he or she is likely to seriously endanger human life or inflict serious bodily injury, unless he or she is apprehended without delay.⁸⁶

Before an officer can use deadly force to effect an arrest or prevent an escape, however, the officer must make reasonable efforts to advise the person that he or she is a law enforcement officer and is attempting to make an arrest. The officer must also have reasonable grounds to believe that the person is aware of these facts.⁸⁷

RSA 627:5, VIII, states that “[d]eadly force shall be deemed reasonably necessary . . . whenever the arresting law enforcement officer reasonably believes that the arrest is lawful and there is apparently no other possible means of effecting the arrest.”⁸⁸ This paragraph seems to suggest that there are no limitations on the use of deadly force to effect an arrest. However, the United States Supreme Court has held that it is unconstitutional to use deadly force to *arrest or prevent the escape of a suspect if the suspect poses no immediate threat of harm to the officer or others*. The Court’s holding raises some question as to the constitutionality of RSA 627:5, VIII.⁸⁹ *Accordingly, officers should not rely upon RSA 627:5, VIII, and should use deadly force to effect an arrest or prevent an escape only under the circumstances discussed in the previous section to defend himself or herself or a third person from what the officer reasonably believes is the imminent use of deadly force.*

⁸⁵ “A reasonable belief that another has committed an offense means such belief in facts or circumstances which, if true, would in law constitute an offense by such person. If the facts and circumstances reasonably believed would not constitute an offense, an erroneous though reasonable belief that the law is otherwise does not make justifiable the use of force to make an arrest or prevent an escape.” RSA 627:5, VI (2016).

⁸⁶ RSA 627:5, II(b)(1) (2016).

⁸⁷ RSA 627:5, II(b)(2) (2016).

⁸⁸ RSA 627:5, VII (2016).

⁸⁹ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

On July 16, 2020, the Governor signed a criminal justice reform bill. The bill prohibits law enforcement officers from using chokeholds, unless an officer believes such use is necessary to defend himself or herself or a third person from what he or she reasonably believes is the imminent use of deadly force. This law took effect immediately on July 16, 2020.⁹⁰ Additionally, the criminal justice reform bill also requires law enforcement officers to report misconduct by other law enforcement officers. Such reports must be made in writing immediately or as soon as is practicable after observing the misconduct. As used in the bill, the term “misconduct” means assault, sexual assault, bribery, fraud, theft, tampering with evidence, tampering with a witness, use of a chokehold, or excessive and illegal use of force as defined by the New Hampshire criminal code. This law goes into effect on January 1, 2021.⁹¹

F. The Right Of Civilians To Use Force When Acting At The Direction Of A Police Officer

Under certain circumstances, a civilian may be justified in using force against someone in response to a law enforcement officer’s request for assistance.

1. The Use Of Non-Deadly Force

When a police officer requests a civilian to assist in arresting someone or preventing someone’s escape from custody, that civilian may use non-deadly force when and to the extent necessary to carry out the officer’s directions.⁹² However, the use of force is not permissible if the civilian believes the arrest is illegal.

⁹⁰ See House Bill 1645, http://gencourt.state.nh.us/bill_status/billText.aspx?sy=2020&id=1264&txtFormat=pdf&v=current (last visited Oct. 5, 2020).

⁹¹ See House Bill 1645, http://gencourt.state.nh.us/bill_status/billText.aspx?sy=2020&id=1264&txtFormat=pdf&v=current (last visited Oct. 5, 2020).

⁹² RSA 627:5, III(a) (2016).

2. The Use Of Deadly Force

When complying with a law enforcement officer's request to assist in arresting someone or preventing a person's escape, a civilian is permitted to use deadly force if he or she reasonably believes such to be necessary to defend himself or herself or a third person from what he or she reasonably believes to be the imminent use of deadly force, or the officer directs the civilian to use deadly force and the civilian believes the officer would be permitted to use deadly force under the circumstances.⁹³

G. The Right Of A Civilian, Acting On His Or Her Own, To Use Force To Arrest Or Prevent Escape From Custody

A civilian, acting on his or her own, is justified in using non-deadly force against another if the civilian reasonably believes that the person has committed a felony, the person has in fact committed a felony, and the civilian believes the use of force is necessary to arrest or prevent that person's escape from custody.⁹⁴

H. Investigation Of An Officer's Use Of Deadly Force

Law enforcement officers are granted special authority to use deadly force in the course of their duties. With this special authority comes the expectation that officers will be accountable for their use of deadly force. The Attorney General, as the chief law enforcement officer for the State, has a responsibility to ensure that whenever a law enforcement officer uses deadly force, that officer's actions were in conformity with the law.⁹⁵

In keeping with that responsibility, the Attorney General has established a protocol for the investigation of use-of-deadly-force incidents. The protocol applies in any situation when an officer has used deadly force during the course of the officer's duties and a person

⁹³ RSA 627:5, III(b) (2016).

⁹⁴ RSA 627:5, IV (2016).

⁹⁵ RSA 7:6 (2013); RSA 21-M:3-b (Supp. 2019).

is injured, even if the subject of the deadly force survived. It also applies when death results from an officer's use of non-deadly force. The protocol explains the investigative process that will be followed, thereby assisting officers in understanding the process in the event they are involved in a deadly-force incident. *See* Officer Deadly Force Investigation Protocol, page 415.

V. PREPARATION AND EXECUTION OF A SEARCH WARRANT

A. Introduction

Absent an exception to the warrant requirement,⁹⁶ police officers may not conduct a search⁹⁷ without a properly authorized warrant supported by probable cause. Courts strongly favor searches conducted pursuant to a warrant. When reviewing the legality of a search warrant, reviewing courts are highly deferential to the probable cause determination made by the issuing judge.⁹⁸ They are not required to extend the same level of deference to police officers when reviewing the legality of a warrantless search. Therefore, it is good practice to obtain a warrant prior to conducting a search when feasible, even if there may be an applicable exception to the warrant requirement.

B. The Probable Cause Standard

A search warrant cannot be issued unless the issuing judge determines there is probable cause to search. Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the proposed search and will aid in a particular apprehension or conviction.⁹⁹ There are three basic elements to a finding of probable cause to search:

- Probable cause to believe that a crime has been committed;
- Probable cause to believe that evidence of that crime exists; and
- Probable cause to believe that the evidence will presently be found in a particular location.

⁹⁶ See Chapter VI, The Law of Warrantless Searches.

⁹⁷ For a discussion of the legal definition of a search, see Chapter VI, pages 81-85 (Definition Of A Search section).

⁹⁸ See *State v. Jaroma*, 128 N.H. 423, 428 (1986) (noting that search warrants are preferred and that close questions of probable cause will be decided in favor of the legality of searches when conducted pursuant to a warrant).

⁹⁹ N.H. Const. pt. I, art. 19; *State v. Doe*, 115 N.H. 682, 685 (1975).

The judge makes a probable cause determination based upon the information set forth in the search warrant application and supporting affidavit. The mere fact that a person has been indicted for a crime, standing alone, is insufficient to establish probable cause for the issuance of a search warrant.¹⁰⁰

C. General Types Of Evidence For Which Search Warrants May Be Obtained

Before issuing a warrant, the judge must be convinced there is a substantial likelihood that either:

- Contraband or evidence of a crime will presently be found in the location or on the person identified in the warrant application; or
- If not contraband or evidence of a crime, the evidence sought will aid in the apprehension of a criminal or prosecution of a crime.¹⁰¹

If the basis of the warrant is challenged, the trial court will review whether, given all the circumstances set forth in the affidavit, the issuing judge had a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime would be found in the particular place described in the warrant.¹⁰²

D. Applying For Search Warrants

1. Overview

A search warrant can be issued by any neutral and detached New Hampshire circuit or superior court judge.¹⁰³ It may be issued, upon application, to any sheriff, deputy sheriff, state police officer, or municipal police officer in New Hampshire.¹⁰⁴ A search warrant is valid statewide, so an officer may apply to any judge within the State. However, in most instances, it is preferable to file the application with a judge whose court has jurisdiction

¹⁰⁰ *State v. Kellenbeck*, 124 N.H. 760, 765-66 (1984).

¹⁰¹ *State v. Cannuli*, 143 N.H. 149, 151-52 (1998).

¹⁰² *In re Search Warrant for 1832 Candia Road, Manchester, New Hampshire*, 171 N.H. 53, 56-57 (2018).

¹⁰³ RSA 595-A:1 (2001).

¹⁰⁴ RSA 595-A:2 (Supp. 2019); RSA 595-A:3 (2001).

over the location to be searched, or who resides close to that location. This practice makes it easier in the event a supplemental warrant or clarifying order must be obtained.

2. Territorial Jurisdiction

With one exception discussed below relating to electronic evidence,¹⁰⁵ a court can only issue a warrant for a search to be conducted within the territorial limits of the State. A court has the authority to authorize a search of any building or place located within the State. It may also issue a warrant for any person, vessel, or vehicle, even if its location is presently unknown, provided it is found within the State.¹⁰⁶

3. Evidence That May Be Obtained By Warrant

Law enforcement officers may apply for a warrant to search for and seize any property that is:

- Stolen, embezzled, or fraudulently obtained;
- Designed or intended for use or which is or has been used as the means of committing a criminal offense;
- Contraband; or
- Evidence relating to the crime identified in the search warrant application.¹⁰⁷

Moreover, in addition to all sorts of “conventional” evidence, such as drugs and drug paraphernalia, phones, electronic devices, child sexual abuse images, financial records, and photographs of private locations, etc., a search warrant can be used to obtain blood, saliva, and hair from a person.¹⁰⁸

¹⁰⁵ See pages 74-75 (Searching For Electronic Evidence).

¹⁰⁶ RSA 595-A:2 (Supp. 2019).

¹⁰⁷ RSA 595-A:1 (2001).

¹⁰⁸ *State v. Doe*, 115 N.H. 682, 684-86 (1975).

4. The Application Process In Detail

The application process for obtaining a search warrant is fairly straightforward. The applicant (law enforcement officer) must submit a completed application form and supporting affidavit to a judge for review, either in person, by fax, or electronic transmission.¹⁰⁹ The affidavit must be sworn to under oath. If the application documents have been submitted by fax or electronic transmission, the oath may be administered by the judge telephonically or electronically, and may include an electronic signature.¹¹⁰

If the judge has questions or requires additional information from the applicant, the judge is permitted to take oral testimony from the applicant under oath. Any supplemental information that the judge considers, which is not contained in the application or affidavit, must be documented in writing and attached to the application.¹¹¹ This is critical because when a court reviews a search warrant in response to a motion to suppress, the court can only consider the information set forth in the search warrant application and any other attached documentation to determine whether the warrant was supported by probable cause. It cannot consider any information that might have been provided orally to the issuing magistrate, unless that information was documented.¹¹²

The court will issue one original signed warrant. The warrant may be issued by fax or in person. The officer in charge of the search should retain this document as it will need to be filed with the designated court, along with a completed return, following completion of the search. Copies of the warrant should be made for the agency file and for each person and location identified in warrant.

If the warrant application documents were submitted by fax or electronic transmission, the requesting agency must forward the original documents to the issuing

¹⁰⁹ RSA 490:27-a (2010).

¹¹⁰ RSA 490:27-a (2010).

¹¹¹ RSA 595-A:4 (2001); RSA 490:27-a (2010).

¹¹² *State v. Canelo*, 139 N.H. 376, 382 (1995).

judge by the next business day.¹¹³ The issuing judge is required to file the application form, supporting affidavit, and notes of supplemental testimony with the court where the warrant return is to be filed.¹¹⁴ As a general practice, if applying for the search warrant in person, the applicant should make a copy of the search warrant application form and supporting affidavit before submitting them to the court.

5. Securing The Premises Or Detaining Persons To Be Searched While Obtaining A Warrant

Because the search warrant application process takes some time, there may be circumstances when it is necessary to temporarily secure a dwelling or other location to protect any potential evidence pending the issuance of the warrant. If, for example, while law enforcement officers are in the process of obtaining a search warrant for a particular premises, the owner or resident of the premises seeks to enter the home, the officers may prevent that person from entering. Note, however, that there is a fundamental difference between securing or controlling the perimeter of a dwelling from the outside and entering a dwelling in order to conduct a protective sweep and secure the premises from within.

Police may enter a dwelling without a warrant to secure it solely if they have an objectively reasonable belief that evidence will be removed or destroyed, unless preventative measures are immediately taken or if other exigent circumstances exist. If such exigent conditions exist, the police have the authority to make a limited intrusion into the premises to dispel the exigent circumstances by requiring persons inside to leave the premises or, if necessary, by remaining inside with those persons until the warrant is obtained. Police should make such intrusions as limited as possible and leave the premises as soon as the threat to the evidence or other exigent circumstances are dispelled. If necessary, officers are also authorized to bar a homeowner from entering his or her residence pending the arrival of warrant.

¹¹³ RSA 490:27-a (2010).

¹¹⁴ RSA 595-A:4 (2001).

Officers should make sure to document the circumstances in their report. This should include how the premises was secured, the reasons why the exigent circumstances were suspected, and any interactions with the detainees or occupants while the securing took place.

E. Completing The Application Forms

There are several forms that must be presented to the judge when applying for a search warrant, including a search warrant application and an accompanying affidavit in support of the search warrant application. Both the application and affidavit must be completed in full. The actual search warrant issued by a judge contains much of the same information as is in the search warrant application and affidavit, and can be filled in before the application packet is submitted to the judge. *See Standard Application, Warrant, and Return Forms*, page 431.

While the search warrant application form includes a section for the applicant's affidavit, it is common practice for the affiant, the person writing the affidavit, to create the affidavit as a separate document and to attach it to the application form. If that practice is followed, the affidavit can be structured using the following form. *See Affidavit Form*, page 435.

F. Writing The Affidavit

The affidavit is the written testimony of one officer. It is a key component of the search warrant application because it sets out the factual basis for the warrant request. From the information contained in an affidavit, the court will determine whether there is probable cause to believe that:

- A crime has been committed;
- Evidence of the crime exists; and
- The evidence presently can found at the targeted location or in the possession of the targeted individual.

1. Use Separately Numbered Paragraphs

Separately numbered paragraphs are the best way to organize the information in the affidavit. Each paragraph should deal with a separate subject matter, source of information, or topic.

2. Identify The Source Of Information

The affidavit should specifically identify the source of every piece of information contained in the document. If the information is based upon the affiant's personal knowledge or observations, it should be identified as such. For example:

- I went to the scene of the accident and observed . . .
- I have personal knowledge that John Doe is the owner of the gas station located at 45 North Street.
- I know that cell phones are used by most members of the community, and that their operation creates records retained by the cell phone's service provider.

If the information is derived from another person, the affidavit should identify the source and state how that person obtained the information, *i.e.*, by personal observation or from another source. For example:

- I spoke to John Smith, who lives next door to the target house. Mr. Smith told me that he saw the following . . .
- Portsmouth Police Officer Bob Smith informed me that he was dispatched to a domestic call at 123 Maple Street and upon his arrival he saw the following . . .
- Somersworth Police Officer David Jones told me that he spoke to Jane Colby, who is a friend of the victim. Ms. Colby told Officer Jones the following . . .
- I read a report written by Trooper Timothy Miller, which indicated the following . . .

3. Establish The Credibility And Reliability Of The Sources

The affidavit must provide sufficient information from which the reviewing court can assess the credibility of the person giving information and the reliability of that information. The amount and type of information necessary will depend on the identity of the particular source.

As a general rule, law enforcement officers are presumed to be a reliable source of information. Similarly, the victim of a crime and any eye-witnesses to a crime are generally considered reliable sources of information about the crime being investigated. “Absent some indication that the witness may not be telling the truth, such as the clear presence of bias, the police are not obligated to inquire into or to demonstrate the witness’ credibility.”¹¹⁵

Similarly, information provided by concerned citizens—people who identify themselves to the police and volunteer information—is generally presumed to be reliable. The affidavit should include the person’s name and address and indicate whether the person’s information was third-hand or based upon personal knowledge.

Information supplied by anonymous sources and confidential informants is considered the most suspect. Officers may include information from such sources in an affidavit, but they must include additional information in an affidavit to demonstrate the credibility of the source and the reliability of the information. The types of information typically used to demonstrate that include:

- **Basis of Knowledge:**

Whether the information is based on the informant’s personal knowledge or third-hand accounts.

- **Previous Track Record With Law Enforcement:**

Whether the person has previously supplied accurate information to the police. The information should be fairly specific; for example, the number of times and types of investigations involved, whether it led to

¹¹⁵ *State v. Corey*, 127 N.H. 56, 59 (1985); *See State v. Doe*, 115 N.H. 682, 684-85 (1975).

arrests or successful prosecutions and, if not, how it was determined to be accurate.

- **Statements Against Interest:**

Admissions or other information provided by the informant that could subject him or her to criminal liability.¹¹⁶ Although an admission of criminal activity might appear to detract from the credibility of the informant, it is indicative of the reliability of the informant's information because informants would be unwilling to provide false information against a third person when part of that information also implicates themselves.¹¹⁷

- **Corroboration Of Informant Information:**

Any evidence that confirms the accuracy of information provided by the informant will assist in demonstrating its reliability; for example, controlled drug buys with an identified drug dealer, telephone or other types of records, statements from other individuals, or police surveillance.¹¹⁸ Even corroboration of “innocent detail[s]” provided by the informant can be important to bolster the credibility of the informant.¹¹⁹

Keep in mind that the absence of additional information demonstrating the veracity of an informant does not preclude a finding of probable cause if other indications of reliability, such as corroborating observations made by police officers, may be used to “supply the missing factors relative to the informant and the informant's information,” in determining whether probable cause exists.¹²⁰

- **Existence Of Cooperation Agreement:**

Whenever an informant is providing information under a cooperation agreement, that information must be included in the affidavit.

¹¹⁶ *State v. Davis*, 133 N.H. 211, 213-14 (1990) (“we recognize that some degree of support accrues even to an unnamed plea-bargaining informer who makes admissions against his own penal interest. . . . for he thereby incurs the residual risk and opprobrium of having admitted criminal conduct”) (internal citations omitted); *State v. Hazen*, 131 N.H. 196, 201 (1988).

¹¹⁷ *State v. Hazen*, 131 N.H. 196, 201-02 (1988).

¹¹⁸ *State v. Caicedo*, 135 N.H. 122, 125-26 (1991); *State v. Carroll*, 131 N.H. 179, 187 (1988).

¹¹⁹ *State v. Davis*, 133 N.H. 211, 213 (1990); *State v. Hazen*, 131 N.H. 196, 201 (1988).

¹²⁰ *State v. Fierley*, No. 2008-0540, 2009 WL 10643719, at *1 (N.H. May 7, 2009) (citing *State v. Silvestri*, 136 N.H. 522, 525-26 (1992)).

4. Establish Why There Is Reason To Believe Evidence Will Be Found At The Targeted Location

It is not sufficient to demonstrate simply that a crime has been committed and the suspect has some tie to the targeted location. An affidavit needs to demonstrate probable cause to believe that:

- Evidence related to the crime exists; and
- That it will presently be found at the location to be searched.

Often, the description of the suspected criminal activity, by itself, will demonstrate the likely existence of evidence, thus, satisfying the first prong of the probable cause showing. For example, in a theft investigation, the victim may have provided a list of stolen property; an assault victim may have provided the description of the perpetrator's clothes or the use of a particular weapon; or an informant may have described seeing marijuana in the targeted location.

Another means of establishing the likelihood that particular evidence exists is through the affiant's training and experience. For example, an officer trained in drug investigations can attest that drug dealers are known to keep ledgers, scales, cash, drug paraphernalia, etc., in support of their dealings.¹²¹ Similarly, officers trained in the investigation of sexual/physical assaults can attest in their warrants, based upon training and experience, that trace evidence is commonly transferred during an assault and deposited on clothing.

Probable cause to believe that a person has committed a crime does not establish probable cause to search all property belonging to that person.¹²² The affidavit needs to establish a logical link, or nexus, between the suspected criminal activity and the place actually described in the warrant. The New Hampshire Supreme Court has held that information establishing that a person is a drug dealer, standing alone, does not create probable cause to believe that evidence of drug trafficking will be found in the person's

¹²¹ *State v. McMinn*, 144 N.H. 34, 39 (1999); *State v. Fish*, 142 N.H. 524, 529-30 (1998).

¹²² *State v. Maxfield*, 121 N.H. 103, 106 (1981) (internal citations omitted).

home.¹²³ There must be some additional information tying the criminal activity to the residence, such as information that the suspect stores drugs in the residence, or sells drugs from the residence, or that the suspect uses personal electronic devices to send illicit images from the residence.¹²⁴

Because physical evidence can be moved or destroyed, it is not sufficient to establish in the affidavit simply that the evidence sought was at the targeted location in the past. Such information would be considered “stale” because it does not establish a substantial likelihood that the evidence sought will be at the place described in the warrant when the search warrant is executed.¹²⁵

Whether information is impermissibly stale, so as to not support a finding of probable cause, will depend on the nature of the crime and the nature of the evidence sought.¹²⁶ A lapse in time between the crime and the application and execution of the search warrant is not enough on its own to negate a finding of probable cause, but will be considered with all the other circumstances. For example, certain items, such as drugs, liquor, or cash, are likely to be disposed of quickly, so probable cause to believe that these items will be found at a given location diminishes rapidly over time. Other items are less likely to be disposed of quickly and, therefore, probable cause to believe that these items remain on the premises does not dissipate quickly. Such items include business records,¹²⁷

¹²³ *State v. Silvestri*, 136 N.H. 522, 527 (1992).

¹²⁴ *State v. Ball*, 164 N.H. 204, 208 (2012).

¹²⁵ *See State v. Valenzuela*, 130 N.H. 175, 192 (1987).

¹²⁶ *State v. Marcotte*, 123 N.H. 245, 248 (1983).

¹²⁷ *State v. Marcotte*, 123 N.H. 245, 248 (1983) (citing *Andreson v. Maryland*, 427 U.S. 463, 478-79 n.9 (1976) (3-month delay between illegal transactions and issuance of warrants for business records does not render probable cause stale); (citing *Matter of Independent Oil Products, Inc.*, 444 A.2d 291, 295 (Del. Super. 1982) (finding probable cause to search for corporate records despite 18 to 26 month lapse between alleged criminal activity and date of warrants)).

child sexual abuse images, which tends to be “hoarded” by “collectors,”¹²⁸ guns,¹²⁹ evidence stored on a computer, and certain types of trace evidence, which can be extremely difficult for suspects to locate and destroy. Some illustrative examples follow:

- An informant’s observation of a suspect offering cocaine to guests at a party in his home one night would not likely support probable cause to believe that cocaine would be found in the target’s home several days later because of the likelihood that the cocaine would have been consumed. If, however, the informant said he purchased cocaine from the target at the residence, that information may support probable cause to believe that the target is storing drugs at the residence and evidence will be found for a period of time after the sale.¹³⁰
- Information that a suspect committed a stabbing on a particular night would likely support probable cause to believe that trace evidence of the crime, *i.e.*, blood and fiber evidence, would be found on the suspect’s premises several days later.
- Evidence maintained on a computer will generally not become “stale” for an indefinite period after it has been created because electronic evidence in a computer is extremely difficult to completely erase or destroy.
- Where a suspect told an informant that prior to setting his business on fire eleven months earlier, the suspect moved the business records to a relative’s house, it was reasonable to conclude that he moved the records to safeguard them and, because business records have an enduring value, the records would likely still be located in the same place.¹³¹
- When the criminal activity involves an on-going course of conduct, as opposed to a single transaction, there may be reasonable grounds to believe that the evidence sought in the warrant will be found in the specified location for an extended time after the last observation of criminal activity.¹³²

¹²⁸ *State v. Kirsch*, 139 N.H. 647, 650-51 (1995).

¹²⁹ *State v. Marcotte*, 123 N.H. 245, 248 (1983) (probable cause to believe that defendant had gun in his house had not dissipated four months later when the defendant had no reason to dispose of the gun quickly after its purchase).

¹³⁰ *State v. Moreau*, 113 N.H. 303, 307-08 (1973).

¹³¹ *State v. Cannuli*, 143 N.H. 149, 154 (1998).

¹³² *State v. Grimshaw*, 128 N.H. 431, 436 (1986) (information disclosed by an informant that he had observed the defendant in possession of drugs on many occasions over a long period of time, and that he had purchased drugs from the defendant, led to a reasonable inference that the defendant was a drug dealer

5. Describe The Location Or Person To Be Searched

The person, place, vessel, or vehicle to be searched must be described with sufficient specificity, both in the application and the warrant, to allow an officer to locate and identify the intended target with reasonable effort. In general, the following should be sufficient:

- If a person is the intended target of the search, identify the person by name and any known aliases. It is a good practice to include the person's date of birth, physical description, and address, if known.
- If the intended target is a vehicle or vessel, include a physical description, license plate number, and vehicle identification number (VIN) or serial number.
- If the targeted location is a single family home or building, include the street address and a physical description, such as the color, number of floors, and building material. The applicant may refer to distinctive features such as the presence of a porch, swimming pool, and number or sign affixed to the exterior. The physical description may be supplemented with a photograph or information from property tax records.
- If the targeted location is in a multi-unit building, *i.e.*, an apartment building or office building, the application must identify the specific unit(s) or room(s) for which there is probable cause to search. The unit should be described by unit number, physical location, and any other identifying features to include the layout of the interior, if known. For example:
 - Apartment 1-A of multi-unit apartment building located at 3 Spring Street in Smithville, the apartment being on the first floor, in the southwest corner of the building, the entrance to which is the second door on the left as you enter the common hallway from the front entrance, and is designated by the number "1-A" on the door.
 - The business of U-Rent-It, located in a multi-unit strip mall at 28 East Street, Smithville. The business is in the third unit from the left, looking at the mall from the parking lot, with a sign

and that there was probable cause to believe that drugs were kept at his home); *State v. Moreau*, 113 N.H. 303, 307-308 (1973) (holding that probable cause to believe that drugs would be present existed three days after last controlled buy when evidence showed ongoing course of conduct).

hanging in the front window that reads “U-Rent-It,” and a number “28-C” on the front entrance.

- If the target of the search is a property and there are out-buildings on the property, those buildings should be specifically referred to in the description of the property, provided there is probable cause to believe that evidence may be found in them, or that suspect(s) have access to the building and whether that access is exclusive.

6. Specifically Describe The Targeted Evidence

RSA 595-A:1 authorizes the issuance of search warrants for the following types of property:

- Contraband;
- Stolen, embezzled, or fraudulently obtained property;
- Property designed or intended for use, or which is being or has been used as the means of committing a criminal offense (“Instrumentalities”); and
- Property which is evidence relating to the crime(s) identified in the search warrant.

The application, the affidavit, and the warrant must describe the property being sought in as much detail as is practical.¹³³ The purpose of this requirement is to prevent generalized searches and to limit, to the extent possible, the amount of discretion the executing officers have in deciding what they can seize.¹³⁴ A failure to include the specific description of the evidence sought *in the body of the warrant itself*, and not merely in the supporting documents, will likely be fatal to the validity of the warrant either partially or in its entirety.¹³⁵ Use descriptive criteria for distinguishing the items sought which will have evidentiary significance.¹³⁶

¹³³ See RSA 595-A:2 (Supp. 2019); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979).

¹³⁴ *State v. Tucker*, 133 N.H. 204, 206-07 (1990).

¹³⁵ *Groh v. Ramirez*, 540 U.S. 551, 556-57 (2004); *State v. Folds*, 172 N.H. 513, 520 (2019).

¹³⁶ *State v. Page*, 172 N.H. 46, 54-55 (2019) (citing *State v. Tucker*, 133 N.H. 204, 206-07 (1990)).

The level of specificity required in a warrant depends on the type of evidence that is sought.¹³⁷ As a general rule, generic descriptions are inadequate whenever it is reasonably possible for the police to use descriptive criteria to distinguish objects with evidentiary significance from similar items that have no such value.

a. Contraband

Where the targeted items are contraband, things that are illegal to produce or possess, a fairly general description of the items should suffice. For example, a generic description such as “controlled drugs,” “marijuana,” “counterfeit recordings,” or “automatic weapons” would likely be sufficient because all items fitting any of those descriptions would be illegal.¹³⁸

b. Stolen, Embezzled, Or Fraudulently Obtained Property

Because items that could fall into this category are not necessarily contraband until they have been illegally acquired, they must be described with more specificity in the warrant, so that officers executing the warrant can distinguish the targeted items from those legally obtained. To the extent possible, the warrant should include a specific physical description of each piece of property, as well as any identifying features, such as a serial number, brand name, size, and distinctive marks. In some cases, it may be helpful to attach a photograph or drawing to the affidavit and warrant.

If the targeted items can only be described generically, and are likely to be found alongside similar items that have not been illegally obtained (*i.e.*, illegal fireworks being sold alongside legal fireworks), the affidavit must establish probable cause to believe that a large collection of the targeted items will be present. This requirement increases the likelihood that any items seized pursuant to the warrant are, in fact, illegal.¹³⁹

¹³⁷ *State v. Salsman*, 112 N.H. 138, 142 (1983).

¹³⁸ *State v. Tucker*, 133 N.H. 204, 206 (1990).

¹³⁹ *State v. Fitanides*, 131 N.H. 298, 301 (1988), *cert. denied*, 490 U.S. 1080 (1989).

c. Instrumentalities And Evidence Of A Crime

Sometimes the nature of the crime makes it difficult to specifically describe the items being sought. In those instances, a general description of the items, read in conjunction with other information in the affidavit, will give officers sufficient information to seize only those items related to or involved in illegal activity.¹⁴⁰

For example, the New Hampshire Supreme Court upheld the following list of sought-after items in a search warrant: “Photos of nude and seminude males and females, restraining devices, jack knife with yellow handle, wooden ladle, paddle, ruler, rubber straps, rubber underclothes and other devices used in S & M sexual activity, *i.e.*, Polaroid type camera.”¹⁴¹ The Court said that the phrase “devices used in S & M sexual activity, *i.e.*: Polaroid type camera,” standing alone, might have been too general to meet the specificity requirement. However, the phrase was included at the end of a list of numerous specific items and, read in that context, was clearly intended to indicate other items of similar nature.

Similarly, in a search warrant targeting the residence of a suspected drug trafficker, a description of targeted items could include, for example, fentanyl, cocaine, baggies, scales, and all books, address books, papers, records, documents, monies, implements, and paraphernalia related to the distribution of controlled drugs. In a case involving a stabbing in a residence, the description of the targeted items might include the phrase “blood-stained items.” In a case involving an illegal bookmaking operation, the description might include “telephone records, betting slips, ledgers, and other records relating to illegal gambling.” In any case involving establishing ownership of property or an individual’s past location, the description might include “paperwork, bills, mail, photos, and other records demonstrating ownership, residency, or control of the premises.”

¹⁴⁰ *State v. Fitanides*, 131 N.H. 298, 301-02 (1988), *cert. denied*, 490 U.S. 1080 (1989).

¹⁴¹ *State v. Emery*, 123 N.H. 630, 632, 633 (1983).

Whether the description of property to be seized is sufficient in a particular case will depend, in large part, on whether the police could have provided a more detailed description. The New Hampshire Supreme Court has found the following descriptions sufficient, noting in each case that there was no practical way for the police to be more specific:

- “Pornographic or erotic materials, to include but not limited to books, magazines, articles, photographs, slides, movies, albums, letters, diaries, sexual aids or toys, or other items relating to sexual acts or sexual acts with children. Additionally, photographs of the alleged crime scene.”¹⁴²
- U.S. currency.¹⁴³

d. Description Of Images Of Child Sexual Abuse Images

Because the possession of images of naked people is not necessarily a crime, it is difficult for a court to determine whether there is probable cause to issue a search warrant for child sexual abuse images, unless the court either views some of the allegedly pornographic images, or makes an assessment based on a detailed, factual description of the images.¹⁴⁴ However, if a suspect admits that he possesses child sexual abuse images, the suspect’s admission that the material is child pornography is sufficient by itself to establish probable cause to believe that the material being sought is, in fact, child sexual abuse images.¹⁴⁵

One of the most common means by which police develop probable cause to believe that child sexual abuse images will be found in a given location is by the inadvertent discovery of what appears to be child sexual abuse images in plain view. If possible, police should seize such evidence and attach it to their application for a search warrant. Failing this, police should take care to fully describe the photographs, avoiding conclusory

¹⁴² *State v. Kirsch*, 139 N.H. 647, 652 (1995).

¹⁴³ *State v. Fitantes*, 131 N.H. 298, 301 (1988), *cert. denied*, 490 U.S. 1080 (1989).

¹⁴⁴ *United States v. Brunette*, 256 F.3d 14, 18 (1st Cir. 2001).

¹⁴⁵ *State v. Dowman*, 151 N.H. 162, 165 (2004).

language such as “obscene images,” “pornography,” or “sexually explicit.” A good description of child sexual abuse images would be something similar to the following:

- A photograph of a blonde pre-pubescent female child who, based on my training and experience, appears to be under six years of age. A dark-haired male who appears to be an adult is engaging the child in vaginal intercourse. The child’s undeveloped breasts are exposed, and the child does not have pubic hair.

Where the evidence being sought includes photographs taken by the suspect, *i.e.*, a child molester who photographs or videotapes his or her victims, the police may wish to search for flash drives, hard drives, DVDs and CDs, undeveloped rolls of film or view recordings. Because the law in this area is unclear, it is good practice in such cases to specifically request in the warrant permission to search the drives, view any media, or develop the film, using language similar to the following:

- Images of children engaged in sexual activities with other children and/or with adults; undeveloped but exposed rolls of film (including the authority to develop and print the film).

G. Executing The Warrant

1. Who May Execute A Search Warrant

While search warrants are valid throughout the state, most law enforcement officials, other than sheriffs and their deputies,¹⁴⁶ do not have statewide authority to execute them. As a general rule, when a search warrant is issued to an officer for a location outside his or her territorial jurisdiction, the officer should not take charge of executing the warrant, but rather should work cooperatively with the local officials and assist them in the execution.¹⁴⁷

¹⁴⁶ RSA 106-B:12 (Supp. 2019).

¹⁴⁷ See *State v. Titus*, 107 N.H. 215, 218 (1966).

While state police officers are “constables throughout the state,”¹⁴⁸ as a general rule, they have no jurisdiction to act in cities and towns with a population in excess of 3,000 except when enforcing a motor vehicle law.¹⁴⁹ There are exceptions to the general rule, however, under which a state police officer would be authorized to execute or assist in the execution of a search warrant, including:

- When an officer has been detailed to assist another law enforcement agency;¹⁵⁰
- When an official of a local law enforcement agency requests the officer’s assistance;¹⁵¹ or
- When ordered to do so by the Governor.¹⁵²

Law enforcement officers authorized to execute search warrants “may take with [them] suitable assistants and suffer no others to be with [them].”¹⁵³ Those assisting in the execution of a warrant should include only law enforcement officers and civilians who have a specific case-related reason to be present.¹⁵⁴ For example, if the search involved the seizure and documentation of blood spatter and trace evidence, it might be prudent to request the assistance of a criminalist from the forensic laboratory.

Under New Hampshire law, it is the law enforcement officers, not the property owners, who are responsible for ensuring that the search does not exceed that authorized by the warrant.¹⁵⁵ Therefore, during searches, property owners should not be permitted to

¹⁴⁸ RSA 106-B:12 (2013).

¹⁴⁹ RSA 106-B:15 (Supp. 2019).

¹⁵⁰ RSA 106-B:11 (2013).

¹⁵¹ RSA 106-B:15 (Supp. 2019).

¹⁵² RSA 106-B:15 (Supp. 2019).

¹⁵³ RSA 595-A:8 (2001).

¹⁵⁴ *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (“It is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.”).

¹⁵⁵ *State v. Cavanaugh*, 138 N.H. 193, 196-97 (1993).

“second guess” officers on the appropriate scope of the search or interfere in any way with officers while they conduct the search.

2. Displaying The Warrant

There is no requirement that law enforcement officers have a search warrant in hand before initiating a search.¹⁵⁶ Nonetheless, whenever practicable, it is sound practice to show the warrant to the subject(s) of a search before commencing the search. Doing so has two important benefits:

- It informs the subject of the search that the search has been duly authorized, and, therefore, reduces the chance of resistance to the search; and
- It avoids subsequent claims that the manner of execution of the search warrant was unreasonable and, therefore, unconstitutional.

3. Knock And Announce Rule

The “knock and announce” rule requires that officers knock and identify themselves and their purpose before demanding entry to execute a search warrant.¹⁵⁷ After doing so, the police must wait a reasonable period of time for an occupant to respond before entering the premises. The purpose of this rule is protect people’s rights to privacy in their homes and to prevent unnecessary violence that could result from unannounced entries.¹⁵⁸

4. Daytime Or Nighttime Search

The search warrant form contains the following language: “We therefore command you in the daytime (or at any time of the day or night) to make an immediate search.” If magistrate issues a warrant without the word “night” or the entire parenthetical phrase

¹⁵⁶ *State v. Cavanaugh*, 138 N.H. 193, 195 (1993).

¹⁵⁷ *Wilson v. Arkansas*, 514 U.S. 927, 931-36 (1995); *State v. Jones*, 127 N.H. 515, 518-20 (1985) (the knock and announce rule is a product of New Hampshire common law).

¹⁵⁸ *State v. Sconsa*, 161 N.H. 113, 118-19 (2010); *State v. Jones*, 127 N.H. 515, 517-518 (1985).

crossed out, the warrant authorizes a daytime search only. Otherwise, a warrant may be executed at any time.¹⁵⁹ If a search is begun under a daytime warrant, but is not completed by nightfall, it is not necessary to terminate the search.

5. The Scope Of The Search

The police must limit their search to the person(s), premises, or location described in the warrant. If the warrant is for only a location, the police have no authority to search any individual that may be present at the time. The officers may, however, conduct a pat-down frisk of persons present at the scene for weapons if there is reason to believe that such persons are armed and may present a danger to officer safety.¹⁶⁰

When searching a location, the police can search only the portions of the premises described in the warrant. Within those bounds, they can search wherever they may reasonably expect to find the evidence described in the warrant.¹⁶¹ For example, if the warrant authorizes a search for large items such as a television set, officers would be permitted to look in closets and other large compartments where such an item might be secreted, but not in small drawers or coat pockets. If the warrant authorizes a search for small items, such as cocaine or jewelry, police have broad authority to search nearly all parts of the premises. If police are searching for an unknown quantity of an item, such as drugs, the search may continue until each place in the premises where drugs could be found has been completely searched.¹⁶² If searching for a specific item or a given quantity of an item, however, the search must cease when the specified evidence has been found.

In a premises search, officers may search any container that could conceal an item listed in the warrant, even if someone other than the owner/tenant of the premises claims ownership. The only exception to this rule is if the person is wearing or in actual physical

¹⁵⁹ *State v. Barron*, 137 N.H. 29, 31-32 (1993).

¹⁶⁰ *State v. Coons*, 137 N.H. 365, 367 (1993).

¹⁶¹ *State v. DeCoteau*, 137 N.H. 106, 110 (1993).

¹⁶² *State v. Folds*, 172 N.H. 513, 517-18 (2019).

possession of the container and that person is not named in the warrant.¹⁶³ Under those circumstances, if the police have probable cause to believe that evidence will be found in such a container, the appropriate course of conduct would be to secure the container pending the issuance of a search warrant specifically authorizing its search.

If officers attempt in good faith to stay within the boundaries of an inherently broad search warrant, the search as a whole will be held to be reasonable, even if certain items, upon reflection, should not have been seized.¹⁶⁴

New information that negates the original probable cause terminates an officer's ability to proceed with a valid search warrant.¹⁶⁵ Officers are required to stop searching when information is learned that clearly and unambiguously dispels the facts that supported the initial probable cause to conduct the search, regardless if that information is learned:

- After the warrant was issued, but before the search began, or
- In the midst of the search.¹⁶⁶

6. Requesting An Additional Warrant Based On Evidence Found During The Search

If, in the course of the search, officers come upon evidence of a crime other than that identified in the search warrant, and there is probable cause to believe that additional evidence of that crime may be found in the premises, it is good practice to suspend the search and request an updated warrant from the issuing judge. The officer can call the judge and provide oral testimony under oath to supplement the written affidavit.

¹⁶³ *State v. Leiper*, 145 N.H. 233, 234 (2000).

¹⁶⁴ *State v. Valenzuela*, 130 N.H. 175, 198 (1987) (quoting *United States v. Heldt*, 668 F.2d 1238, 1269 (D.C. Cir. 1981)).

¹⁶⁵ *State v. Schultz*, 164 N.H. 217, 227 (2012).

¹⁶⁶ *State v. Schultz*, 164 N.H. 217, 227 (2012).

7. The Receipt, Inventory, And Return

Whenever items are seized pursuant to a search warrant, the executing officer must leave a receipt for the items along with a copy of the warrant. If the evidence was taken from a person, the receipt and warrant should be given to that individual. If the evidence was taken from a location, the receipt and warrant should be given to the occupant. If no one is present at the location, the documents should be left at the location.¹⁶⁷

Although the statutory language does not expressly address the issue of timing, the police should provide the subject of the search with a copy of the warrant prior to terminating the search and leaving the premises.¹⁶⁸ The requirement that officers leave a receipt and copy of the warrant becomes operative only if “property was taken.” Thus, after a wholly unsuccessful search, no documents need be left or given.

The statute does not require that the police provide the subject of the search with the supporting documents for the search warrant, such as the affidavit. Police should use their discretion in this matter. If a copy of the affidavit can be provided without compromising the investigation or endangering witnesses, police may do so. If, however, premature disclosure of the information contained within the affidavit might cause such consequences, police should merely provide the subject of the search with a copy of the warrant itself. Keep in mind that when the return is filed, all information in the supporting documents, the warrant, and the return itself will be available to the public, unless legal steps have been taken to seal or otherwise limit the disclosure of the contents of the documents.

No later than 7 days after the warrant was issued, the police must file the original warrant and a completed return form with the court designated on the warrant.¹⁶⁹ A sample

¹⁶⁷ RSA 595-A:5 (2001).

¹⁶⁸ *See State v. Cavanaugh*, 138 N.H. 193, 195 (1993) (noting that “the police fulfilled their statutory obligation by providing the defendant with a copy of the warrant prior to the termination of the search”).

¹⁶⁹ RSA 595-A:7 (2001).

return form can be found on the last page of the search warrant application form. This form may be completed and printed from your computer. *See* Return Form, page 434.

One section of the return form is the inventory, which is a listing of all property taken pursuant to the warrant.¹⁷⁰ The inventory must be completed in the presence of either:

- The officer who applied for the warrant and the person from whose body or premises the property was taken; or
- In the absence of one of the above, at least one creditable person other than the applicant for the warrant or the person from whose possession or premises the property was taken.

The officer who collected the property must verify the inventory under oath. In some instances, that may be the same officer who applied for the warrant.¹⁷¹

8. No “Good Faith Exception” In New Hampshire

Unlike many jurisdictions, there is no “good faith exception” to the warrant requirement under New Hampshire law. This means that even if police rely in good faith on a defective search warrant, any evidence seized pursuant to the defective warrant will be subject to suppression.¹⁷²

¹⁷⁰ RSA 595-A:5 (2001) provides as follows:

The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one creditable person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The justice of a court of record shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. The justice of a court of record shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the court to which the warrant is returnable.

¹⁷¹ *State v. Sands*, 123 N.H. 570, 606 (1983) (citing RSA 595-A:5).

¹⁷² *State v. Canelo*, 139 N.H. 376, 383 (1995).

H. Motion To Seal Search Warrants

Generally, search warrants and the supporting documentation become public record once they are filed with the court. There may be circumstances, however, when public release of the documents could jeopardize an on-going investigation. For example, disclosure could impede law enforcement efforts to obtain untainted statements from potential witnesses, prompt potential suspects to coordinate a story, make witnesses who have already provided information reluctant to cooperate in the future, or lead to the destruction of evidence.¹⁷³ When any of those circumstances are present, a judge has the authority to temporarily seal the search warrant documents at the police officer's request.

A motion to seal should be submitted to the judge along with the search warrant application, so that the motion can be acted upon immediately. The motion should explain why there is a need to seal the records in the particular investigation and specifically request that the application, supporting affidavit, warrant, and other related documents be sealed. Typically, a motion will request that the records be sealed for a set period of time, such as 30, 60, or 90 days. However, if it is anticipated that the investigation will be on-going for an extended period, an officer may request to have the records sealed until such time as the State moves to have the documents unsealed or an indictment is returned.¹⁷⁴ See Sample Motion to Seal, page 436.

I. Anticipatory Search Warrants

An anticipatory search warrant is “a warrant that has been issued before the necessary events have occurred which will allow a constitutional search of the premises.”¹⁷⁵ The affidavit in support of an anticipatory warrant must establish: “(1) that it

¹⁷³ *In re State (Bowman Search Warrants)*, 146 N.H. 621, 623 (2001).

¹⁷⁴ See *In re State (Bowman Search Warrants)*, 146 N.H. 621, 629 (2001).

¹⁷⁵ *State v. Canelo*, 139 N.H. 376, 380 (1995) (quoting *United States v. Garcia*, 882 F.2d 699, 702 (2d Cir. 1989)).

is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will* be on the described premises (3) when the warrant is executed.”¹⁷⁶

Anticipatory warrants are only valid if a “triggering event” occurs that creates probable cause to believe that evidence will be found at the specified location.¹⁷⁷ Such warrants are most commonly used when law enforcement officers have information indicating that contraband will be delivered to a given location in the near future. The New Hampshire Supreme Court has held that an anticipatory warrant issued under those circumstances is valid only if the search warrant application establishes that the contraband was on a “sure and irreversible” course to its destination.¹⁷⁸

However, in *United States v. Grubbs*, the United States Supreme Court held that under the Fourth Amendment, the affidavit must only establish probable cause to believe that the triggering event itself will likely happen.¹⁷⁹ It remains to be seen whether the New Hampshire Supreme Court will follow the United States Supreme Court’s lead in *Grubbs* and require that affiants need only establish probable cause that the triggering event will occur.

J. Searching For Electronic Evidence

As cellular phones, tablets, laptops, and other computers have become pervasive in our society, searching them is quickly becoming a regular task for police officers. Due to the many technical aspects involved in properly seizing and searching computers, whenever possible, law enforcement officials should consult with a properly trained law enforcement officer prior to conducting any search or seizure of electronic evidence. The United States Department of Justice also has additional resources for front-line officers on

¹⁷⁶ *United States v. Grubbs*, 547 U.S. 90, 96 (2006) (emphasis in original).

¹⁷⁷ If the triggering event does not transpire, the warrant is void. *State v. Canelo*, 139 N.H. 376, 380 (1995).

¹⁷⁸ *State v. Canelo*, 139 N.H. 376, 382 (1995).

¹⁷⁹ *United States v. Grubbs*, 547 U.S. 90, 96 (2006).

best practices related to lawfully seizing and searching electronic evidence which can be found at:

<https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf>

Information—including sample language for search warrants and preservation letters—relating to the use of search warrants to obtain cellular telephone information may be found in the manual.

1. Probable Cause For Electronic Evidence

Fortunately, there is no need to reinvent the legal wheel in order to obtain a warrant and then conduct a proper search for computerized evidence. Searching for and seizing electronic evidence is subject to the same familiar principles of basic search and seizure law that are discussed in this Manual. That being said, searching for and seizing computerized evidence does present certain practical issues.

2. Preparation Of Affidavit To Search For Electronic Evidence

At the most basic level, any officer preparing an affidavit in support of a computer search warrant needs to be able to demonstrate three things in simple and clear terms:

- Probable cause to believe that a crime has been committed;
- Probable cause to believe that electronic evidence of that crime exists;
and
- Probable cause to believe that electronic evidence will presently be found in a particular location at the time of the search.

In the context of a search for electronic evidence, the “location” means either a specific computer, cellular phone, or other electronic storage device such as a flash drive, DVD/CD, Micro SD card, etc., or the records maintained by an internet service provider, cloud-based web service, social media provider, or other online entity.

In many cases it will be relatively easy to establish probable cause to believe that evidence of a crime will be found on a suspect's computer or the related local storage devices. For example, if police discovered evidence of a drug operation being run out of a dwelling that contains a personal computer, an experienced narcotics investigator would likely be able to establish probable cause that evidence of drug dealing would likely be stored in the suspect's computer, because computers are frequently used in drug operations to maintain records of inventory, customers, sales, and expenses.

On the other hand, it can be more complex and difficult to establish that electronic records will be located in the files maintained by internet service providers or other online entities. In order to establish probable cause to believe that records will be found in such electronic "locations," it may be necessary to establish that incriminating e-mails were sent from the suspect's computer through the internet service provider to a third party, or that child sexual abuse images were downloaded from a website. The proper techniques for use by law enforcement to establish probable cause for the search of such online locations is beyond the scope of this Manual.

3. One Search Warrant Or Two?

A question that often arises with searches of cellular phones or computers, is whether it is necessary to obtain two warrants to search a computer; in other words, does one always need one warrant to seize the computer and a second warrant to search its contents for targeted files? The simple answer to this question is "no" if the warrant requests to both seize and search the device. It is not necessary to get two warrants in every instance of a search of an electronic device. Rather, the necessity for a second warrant is dependent upon circumstances that will vary from case to case.

Officers should carefully consider whether the facts presented to justify the initial seizure of the computer and storage media will also justify a detailed search of the contents of the computer and storage media for specific computer files. For example, in a child sexual abuse images case, if the affiant is able to describe to the magistrate the address to

be searched, facts regarding an identifiable computer within that address, and specific facts regarding child sexual abuse images having been seen by a witness on the identifiable computer, the affiant has presented sufficient information to justify the issuance of a warrant both to seize the computer and to search within the computer for child sexual abuse images. In such a case, one warrant should suffice, provided it clearly authorizes not only the seizure of the computer, but also a search of the computer's electronic contents.

If, on the other hand, police unexpectedly come across a computer in plain view during a search and have probable cause to believe that evidence will be located in the computer, a second warrant should be obtained before searching the computer. The affidavit in support of the second warrant should incorporate the information used to justify the initial seizure, describe where and how the computer at issue has been secured, and then detail how the investigation has progressed to justify a search of the contents of the computer.

4. Expansion Of The Search For Evidence Not Specified In The Initial Search Warrant Application

While conducting a forensic examination on an electronic device seized for evidence of one crime, police often develop probable cause to believe that the computer or device contains evidence of another crime. In such circumstances, the officers should stop the search and obtain a supplemental warrant authorizing seizure of evidence of the second crime before going any further.

5. Contents Of The Search Warrant Return For Electronic Evidence

When computers and other electronic devices are seized pursuant to a search warrant, the property taken under the warrant should be described in the inventory and return with sufficient particularity so that the subject of the search may file a motion to return the property. For example, "One Dell computer, model 12345, two Kingston 32GB flash drives marked 'Pat – age 9' and 'Jamie – age 11,' and a CD marked 'Kiddie Porn,'"

would be sufficiently particular to comply with the relevant statute.¹⁸⁰ The results of the analysis of the electronic evidence should be disclosed to the defendant as part of the discovery process in accordance with the applicable rules of criminal procedure. However, the results need not be included on the inventory.

6. Time During Which Analysis Of The Computer Must Be Conducted

The seven-day limitation for filing the return should not be translated into a seven-day limitation for conducting the forensic analysis of the evidence.¹⁸¹ Law enforcement officers must conduct a forensic analysis of the evidence within a constitutionally permissible “reasonable” time.¹⁸² Accordingly, law enforcement officers need not seek prior permission to complete the analysis of electronic evidence more than seven days after its seizure, if such a delay is reasonable.¹⁸³

¹⁸⁰ RSA 595-A:5 (2001).

¹⁸¹ See, e.g., *Commonwealth v. Kaupp*, 899 N.E.2d 809, 819-20 (Mass. 2009); *United States v. Triumph Capital Group, Inc. et al.*, 211 F.R.D. 31, 66 (D. Conn. 2002) (holding that “neither Rule 41 [the Federal rule governing the time period permitted for filing search warrant returns] nor the Fourth Amendment impose any time limitation on the government’s forensic examination of the evidence seized. Thus, [the Federal agent] was not required to complete the forensic examination of the hard drive within the time period required by Rule 41 for return of the warrant.”) (internal citations omitted); see also *United States v. Habershaw*, 2002 WL 33003434, at *8 (D. Mass. May 13, 2002) (holding that “This execution of the warrant, namely the seizure of the electronic information on the hard drive, took place well within the ten days allowed by Rule 41. Further forensic analysis of the seized hard drive image does not constitute a second execution of the warrant or a failure to ‘depart the premises’ as defendant claims, any more than would a review of a file cabinet’s worth of seized documents”); accord *United States v. Hernandez*, 183 F.Supp.2d 468, 480 (D.P.R. 2002); *United States v. Albert*, 195 F.Supp.2d 267, 278-279 (D. Mass. 2002).

¹⁸² See Hon. Robert H. Bohn, Jr., *The Dawn of the Computer Age: How the Fourth Amendment Applies to Warrant Searches and Seizures of Electronically Stored Information*, 8 SUFFOLK J. TRIAL & APP. ADV. 63, 72 (2003) (“Searches for electronically stored information . . . are probably not subject to the statutory requirement that the search be completed within seven days. They may, however, be subject to some test of reasonableness.”).

¹⁸³ *United States v. Syphers*, 426 F.3d 461, 469 (1st Cir. 2005), cert. denied 547 U.S. 1156 (2006).

7. Exception To Territorial Limitation For Searches Of Electronic Evidence In The Hands Of Providers Of Electronic Communications Or Remote Computing Services

Recently, the New Hampshire Supreme Court has confirmed that the trial courts have authority to issue extraterritorial search warrants to the extent constitutionally permissible.¹⁸⁴ This permits officers to request search warrants for electronic or cellular service records held by companies whose corporate headquarters are not located in New Hampshire. Officers should contact service providers to discover any preferences or language they need to comply fully with requests for information. Officers should then research with the New Hampshire Secretary of State's NH Quickstart website,

<https://quickstart.sos.nh.gov/online/Account/LandingPage>,

to determine if the company has a registered agent in New Hampshire, in which case the company is an "in-state corporation." If the company does not have an in-state registered agent, then the officer should consult with their local prosecutor to determine whether the state where the company is located has a reciprocity statute that would honor a New Hampshire search warrant.

Some federal statutes provide an extension to the territorial limitation of state judges to issue legal process to obtain information from providers of electronic communications or remote computing services. Law enforcement officers seeking to obtain information from telephone companies or internet service providers located outside of New Hampshire, if not accessible above, should carefully adhere to the procedure described in the applicable federal statutes.¹⁸⁵ Moreover, law enforcement officers should be aware of the notice requirements contained in 18 U.S.C. § 2705, which requires the account holder to be noticed within 90 days of the warrant with few exceptions.

¹⁸⁴ *In re Search Warrant for Records from AT & T*, 170 N.H. 111, 116 (2017).

¹⁸⁵ *See* 18 U.S.C. §§ 2701-2705.

VI. THE LAW OF WARRANTLESS SEARCHES

A. Introduction

As a general practice, a law enforcement officer should obtain a warrant before conducting a search. The New Hampshire Supreme Court has gone so far as to say that “if there is time to get a warrant, it is the only safe way to proceed.”¹⁸⁶

Courts have long expressed a preference for searches conducted pursuant to a warrant. When the legality of a search warrant is challenged, the reviewing court is required to pay great deference to the probable cause determination made by the issuing magistrate.¹⁸⁷ Warrantless searches, on the other hand, are *per se* unreasonable, unless they fall within one of the recognized exceptions to the warrant requirement.¹⁸⁸ When a defendant challenges the legality of a warrantless search, the State carries the burden of proving the search was constitutionally permissible.¹⁸⁹

Nevertheless, warrantless searches have the advantage of speed, efficiency, and informality. If emergency or “exigent” circumstances are present, law enforcement officers may simply not have the time to prepare a search warrant application and present it to a neutral magistrate for review. Similarly, officers may be able to conduct a search based upon a person’s consent even if they would not otherwise have the required probable cause to search. For this reason, officers should be familiar with the exceptions to the search warrant requirement and should understand the circumstances under which they might apply.

¹⁸⁶ *State v. Beede*, 119 N.H. 620, 627 (1979), *cert. denied*, 445 U.S. 967, *reh’g denied*, 446 U.S. 993 (1980).

¹⁸⁷ *State v. Sands*, 123 N.H. 570, 604 (1983).

¹⁸⁸ *State v. Theodosopoulos*, 119 N.H. 573, 578 (1979), *cert. denied*, 446 U.S. 983 (1980).

¹⁸⁹ *State v. Graca*, 142 N.H. 670, 673 (1998).

B. Definition Of A Search

Before determining whether there is an applicable exception to the search warrant requirement, law enforcement officers must understand when their actions will legally constitute a “search.” Obviously, if no search is to take place, there is no need to determine whether there is an applicable exception that would allow the police to act without a warrant.

There is no concise definition of a search. Under both the New Hampshire and United States constitutions, a search occurs when a governmental official intrudes upon a person’s reasonable expectation of privacy or when law enforcement officers intrude upon a person’s private property, regardless of the person’s expectation of privacy.¹⁹⁰

Under the expectation of privacy analysis, such an expectation of privacy can attach to:

- A person’s body;¹⁹¹
- A place, such as one’s home or car;¹⁹²
- An item, such as a wallet or suitcase;¹⁹³
- An activity, such as a private conversation;¹⁹⁴ or
- Electronically stored information, such as files contained in a cell phone or location held by a cell phone service provider.¹⁹⁵

¹⁹⁰ *United States v. Jones*, 565 U.S. 400, 404 (2012) (physical intrusion upon private property); *State v. Goss*, 150 N.H. 46, 48-49 (2003) (reasonable expectation of privacy).

¹⁹¹ *State v. Stern*, 150 N.H. 705, 708 (2004) (taking a blood sample is a search).

¹⁹² *State v. Grey*, 148 N.H. 666, 668-69 (2002).

¹⁹³ *State v. Webber*, 141 N.H. 817, 819 (1997).

¹⁹⁴ *Katz v. United States*, 389 U.S. 347, 352 (1967) (telephone conversation in a telephone booth).

¹⁹⁵ *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (collection of location data from cell phone provider constitutes a search); *Riley v. California*, 573 U.S. 373, 386 (2014) (concluding law enforcement officers must generally secure a search warrant before searching the content of a cell phone).

A reasonable expectation of privacy arises when:

- The person has an actual, or subjective, expectation of privacy; and
- That expectation is one that society is prepared to recognize as objectively reasonable.¹⁹⁶

1. Situations In Which There Is A Reasonable Expectation Of Privacy

There is no bright-line rule as to when a person has a reasonable expectation of privacy. Rather, in determining whether police conduct in a particular instance has intruded upon a person's expectation of privacy, and thus, constituted a search, courts will consider factors such as:

- Whether the place was a common area;
- Whether the place was freely accessible to others besides the defendant;
- Whether the defendant took steps to keep the item or activity private, or to control access to the area; and
- Whether the general public is invited on the premises, as with business or commercial premises.

People have a heightened expectation of privacy in their homes, and courts will carefully scrutinize police entries into private dwellings.¹⁹⁷ That elevated scrutiny extends to the curtilage of a dwelling. Curtilage includes “those outbuildings which are directly and intimately connected with the habitation and in proximity thereto, and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment.”¹⁹⁸

¹⁹⁶ *State v. Goss*, 150 N.H. 46, 49 (2003) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (*Harlan, J.*, concurring)).

¹⁹⁷ *State v. Grey*, 148 N.H. 666, 668-69 (2002).

¹⁹⁸ *State v. Pinkham*, 141 N.H. 188, 190-91 (1996) (quoting *State v. Hanson*, 113 N.H. 689, 690-91 (1973)).

People have an expectation of privacy in hotel rooms comparable to their expectation of privacy in their homes. However, this expectation of privacy only remains reasonable until checkout time.¹⁹⁹

New Hampshire is one of a small minority of jurisdictions that holds that individuals have a reasonable expectation of privacy in the trash that they have left out for collection.²⁰⁰ New Hampshire also follows the minority position that a canine search of the exterior of an automobile is a search for constitutional purposes.²⁰¹

Courts in various jurisdictions have also recognized a reasonable expectation of privacy in the following places:

- A locked hallway in an apartment under the exclusive control of the defendant;
- A locked mailbox;
- Luggage left unclaimed for three hours by a passenger with a claim ticket at an airport;
- Private conversations in an apartment overheard from a basement crawlspace used only for the housing and repair of utilities and not accessible by tenants or the public;
- Contents of a dumpster in a fenced and locked alley next to the defendant's commercial premises, which was neither accessible nor visible to the public; and
- Contents of a soft-sided, opaque canvas bag placed directly above the defendant's seat and likely to be moved, but not firmly squeezed by other bus passengers.²⁰²

¹⁹⁹ *State v. Watson*, 151 N.H. 537, 540 (2004) (citing *Minnesota v. Olson*, 495 U.S. 91, 96, 99 (1990) (“whether it be a hotel room, or the home of a friend,” the defendant’s “status as an overnight guest is alone enough” to create a reasonable expectation of privacy)). *But see United States v. Jackson*, 585 F.2d 653, 658 (4th Cir. 1978) (holding that a guest in a hotel or motel loses his reasonable expectation of privacy after his rental period has terminated, regardless of whether the guest may have left property in the hotel).

²⁰⁰ *State v. Goss*, 150 N.H. 46, 49 (2003).

²⁰¹ *State v. Pellicci*, 133 N.H. 523, 532-33 (1990). Note, however, that because such searches are considered unique, officers must only possess reasonable suspicion before utilizing a canine to sniff “search” the exterior of a motor vehicle.

²⁰² *Bond v. United States*, 529 U.S. 334, 336-39 (2000).

Even if a person lacks a reasonable expectation of privacy, a search warrant is required if law enforcement officers intrude upon that person's private property rights to execute the search for, or the seizure of, items or information. For example, although a person may not have a reasonable expectation of privacy in where they travel, law enforcement officers must have a search warrant to place a global positioning system (GPS) tracking device upon the person's vehicle because such placement constitutes a trespass upon the person's private property rights.²⁰³

2. Situations In Which There Is No Reasonable Expectation Of Privacy

A person does not have a reasonable expectation of privacy in things the person exposes to public view. For instance, there is no reasonable expectation of privacy for a conversation held on the street, if that conversation can be overheard by the naked ear. Similarly, there is no reasonable expectation of privacy for activities in which a person engages in front of an open, uncovered window. In both instances, the person has not exhibited any subjective expectation that the conversation, conduct, or item would be kept private. But, even if the person actually had some expectation of privacy, it would likely not be considered an objectively reasonable one under the circumstances.

Courts have held that individuals have no reasonable expectation of privacy from police surveillance when they engage in activities on public streets, in public parks, or in areas of buildings open to the public. Moreover, there is no societally recognized expectation of privacy in "open fields," and a person cannot create such an expectation of privacy by posting the property with "No Trespassing" signs.²⁰⁴

²⁰³ *United States v. Jones*, 565 U.S. 400, 410 (2012).

²⁰⁴ *Oliver v. United States*, 466 U.S. 170, 179 (1984).

There is no reasonable expectation of privacy in the phone numbers dialed to make outgoing telephone calls.²⁰⁵ Therefore, the use of a “pen register”²⁰⁶ is not legally considered to be a search,²⁰⁷ although it must be authorized by the superior court.²⁰⁸ Similarly, people have no expectation of privacy in the billing records maintained by telephone companies, and these records may, therefore, be obtained without a search warrant.²⁰⁹

Courts in various jurisdictions have also held that there is no reasonable expectation of privacy in the following situations:

- The cellar or other common areas of an apartment building to which all tenants had access;
- The dropped ceiling in the common hallway of an apartment building;
- An unlocked common hallway in an apartment building;
- A locked common area hallway of a multi-unit apartment building with many tenants;
- A canteen that was open to all hospital employees;
- Observation through the window of a van that was parked in a lot behind a store;
- An alleyway between apartment buildings;
- A parking lot shared by tenants of several apartment buildings;
- A grassy area outside a condominium complex accessible to all;
- Private conversations carried on in an apartment that can be overheard unaided from a common hallway or an adjoining staircase;

²⁰⁵ *State v. Valenzuela*, 130 N.H. 175, 189 (1987).

²⁰⁶ A pen register is a device that records the telephone numbers dialed by a phone. *See State v. Gubitosi*, 152 N.H. 673, 677 (2005).

²⁰⁷ *State v. Valenzuela*, 130 N.H. 175, 189 (1987).

²⁰⁸ RSA chapter 570-B (2001).

²⁰⁹ *State v. Gubitosi*, 152 N.H. 673, 677 (2005). *But see Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (requiring a warrant for collection of certain location data maintained by cell phone providers).

- A person who stays past checkout time in a hotel regardless of whether he or she is present in the room at the time of search;²¹⁰
- A bedroom that the defendant stayed in but did not rent, where others had access to the room and where the defendant had abandoned the premises;
- Naked-eye observations of a greenhouse from a helicopter within navigable air space;²¹¹
- The braking system of a motor vehicle lawfully towed and impounded by police;
- The license plate on a car;
- The common locker room at a fire station;
- Inserting a key into the lock of a room or apartment, accessible from a common hallway, and turning the key to see whether it fits;
- Inserting a key into the lock of a car and turning the key to see whether it fits;²¹² and
- Telephone calls of state prison inmates.

C. Consent Searches

When a person validly consents to a search of their person, home, or belongings, it serves as a waiver of the person's right to insist that the police obtain a search warrant and establish probable cause to search.²¹³ When a defendant challenges the legality of a consent search, either in terms of the validity of the consent or the scope of the search, the State carries the burden of proving the search was legal.²¹⁴ In evaluating such a claim, a court may consider the totality of the surrounding circumstances. To ensure that the State can demonstrate all the relevant circumstances to the court, it is important that the officers who

²¹⁰ *United States v. Huffhines*, 967 F.2d 314, 318 (9th Cir. 1992); *see, e.g., United States v. Jackson*, 585 F.2d 653, 658 (4th Cir. 1978).

²¹¹ *Florida v. Riley*, 488 U.S. 445, 450-52 (1989).

²¹² *State v. Robinson*, 158 N.H. 792, 796-97 (2009).

²¹³ *State v. Watson*, 151 N.H. 537, 540 (2004).

²¹⁴ *State v. Johnston*, 150 N.H. 448, 453 (2004).

have conducted searches pursuant to consent document in a report all the circumstances surrounding the giving of consent to search, including:

- Who was present;
- What information the officers gave to the defendant when requesting consent, including:
 - whether the defendant was informed of the right to refuse consent, and
 - whether the police explained any alternative avenues they would pursue in the absence of consent;
- What the defendant said or did in response, including any questions asked or gestures made;
- Whether the defendant objected or protested at any point to any part of the search;
- The defendant's age;
- any notable characteristics or conditions such as impairment, intoxication, or immaturity;
- The tone of the interaction between the officers and the defendant; and
- Whether the defendant had prior experience with the police.

1. Voluntariness Of Consent

To be valid, the person's consent must be given freely, knowingly, and voluntarily.²¹⁵ Consent that is not given voluntarily is not valid.

While officers may not use coercive tactics to obtain a person's consent, they may explain a person's realistic alternatives in the event a person refuses to consent, such as securing the place and applying for a search warrant.²¹⁶ Police officers are not required to inform people that they have a right to refuse consent. However, the New Hampshire Supreme Court has stated that it is good policy to do so and, in some situations, such as a "knock and talk procedure," the Court has considered requiring it as a prerequisite to valid

²¹⁵ *State v. Patch*, 142 N.H. 453, 458 (1997).

²¹⁶ *State v. Patch*, 142 N.H. 453, 459 (1997).

consent.²¹⁷ That a person was informed of the right to refuse before giving consent is an important factor in favor of a finding of voluntariness.²¹⁸

The fact that a person is in custody does not make that person incapable of giving voluntary consent.²¹⁹ It is, however, a factor that will weigh against a finding that the person acted voluntarily.

Consent given after an initial refusal can still be valid, provided the person's change in position was not the result of improper police conduct.²²⁰

2. Express Or Implied Consent

Consent to search can be either express or implied. Express consent means consent that is explicitly stated either orally or in writing. Implied consent means that by conduct, gestures, or other indicators, a person indicates that they consent to a search. Implied consent can be found in a variety of different actions, such as opening a door for the police, nodding in answer to police questions about the permissibility of searching, or pointing to an area to indicate that it is permissible for the police to search there.²²¹

Whatever the person's actions, they must "unambiguously manifest consent to enter."²²² For example, a person's standing aside or failure to object or protest when an officer entered the person's home is not sufficient to establish consent. There must be some indication that the person was affirmatively agreeing to the officer's actions, rather than simply giving in.

²¹⁷ *State v. Johnston*, 150 N.H. 448, 455 (2004).

²¹⁸ *State v. Watson*, 151 N.H. 537, 541 (2004).

²¹⁹ *State v. Patch*, 142 N.H. 453, 459 (1997).

²²⁰ *State v. Patch*, 142 N.H. 453, 459 (1997); *State v. Prevost*, 141 N.H. 647, 651 (1997).

²²¹ *But see State v. Diaz*, 134 N.H. 662, 665 (1991) ("Accepting an invitation to return to one's residence in order to produce identification sufficient to answer an officer's questions is significantly different from inviting the police to enter a private area and observe all subsequent activities.").

²²² *See State v. Sawyer*, 145 N.H. 704, 708 (2001) (suspect did not unambiguously consent to search when she simply entered her apartment and the officer followed her), *cert. denied*, 537 U.S. 822 (2002).

Because the State has the burden to prove that a person gave valid consent to a search, officers should always try to get express consent rather than relying upon a person's implied consent. Ideally, the consent should also be in writing.

The following sample consent forms are accessible here for reference and located in the Appendices:

- Consent to Search Form, page 438;
- Customer Consent and Authorization for Disclosure of Financial or Credit Records Form, page 439;
- Consent to Search a Computer, page 440;
- Consent to Search a Cellular Phone, page 441; and
- Consent to Search Cloud-Based/Remote-Storage Accounts, page 442.

If the police rely upon a person's implied consent to conduct a search, it is imperative that the circumstances surrounding the consent be documented in a report. A court will carefully scrutinize the conduct the police relied upon as implied consent and, if it was ambiguous in any way, the court may determine that the person did not in fact consent, and, therefore, find that the search was unconstitutional.²²³

3. Authority To Consent

Consent to search is valid only if it is given by someone who has authority to do so. Generally, a person who occupies a location, owns it, or has control over it has the authority to consent to a search. Often, in criminal investigations, the person who has the authority to consent to a search of the targeted location is also the suspect in the investigation. However, it may be that consent to search can be lawfully granted by a "third party" who is not the suspect.²²⁴

²²³ *State v. Sawyer*, 145 N.H. 704, 707 (2001); *State v. Diaz*, 134 N.H. 662, 664 (1991).

²²⁴ *State v. Collins*, 133 N.H. 609, 614 (1990).

When a third party has equal rights to, and control of, the targeted property along with the suspect, then that third party may validly consent to a search.²²⁵ However, if co-occupants control property, both are present, and one occupant consents to a police search while the other occupant refuses, the police may not rely upon the authority of the consenting co-occupant to enter.²²⁶ In other words, if co-occupants disagree as to whether the police may enter to conduct a search, the police may not rely upon consent to gain entry.²²⁷

Although there are exceptions, the following rules generally apply as to authority to consent:

- Consent of one co-owner or co-occupant is valid as to the other, unless both are present and one refuses consent.
- A landlord, custodian-janitor, or manager has the authority to consent to a search of that portion of the building that is not exclusively leased to the tenant-defendant, *i.e.*, common stairways, halls, garages, basements, furnace rooms, attics, or any other portion of the building not leased to the tenant-defendant.²²⁸
- A landlord cannot consent to the search of a tenant's apartment.
- A tenant can validly give consent to a search of the tenant's apartment, even if the search is for the purpose of gathering evidence against a landlord-defendant.
- An employer may have the authority to consent to a search of an employee's work area, desk, or computer. Many employers include in their personnel policies a provision concerning whether employees have any reasonable expectation of privacy in such areas. For example, an employer may have a policy providing that an employee has no expectation of privacy in the contents of a computer's various drives, which can be subject to search at any point.

²²⁵ *State v. Coolidge*, 106 N.H. 186, 195 (1965).

²²⁶ *Georgia v. Randolph*, 547 U.S. 103, 114-15 (2006).

²²⁷ *See State v. Tarasuik*, 160 N.H. 323, 328-30 (2010).

²²⁸ *United States v. Kelly*, 551 F.2d 760 (8th Cir. 1977), *cert. denied*, 433 U.S. 912 (1981).

- An employer cannot usually consent to the search of an employee's personal property, even if the personal property is located at the employee's work.
- An employee cannot validly consent to the search of his or her employer-defendant's premises, unless the employee exercises control over the premises, such as a general manager, plant superintendent, or, in the case of a corporate defendant, a director or president.
- When a husband and wife each have equal right of possession and control of their property, either can give consent to search that will be valid against the other spouse, unless the spouse is present and objects.²²⁹
- A person to whom the owner lends a vehicle without restrictions as to use may give consent to permit a search that will be valid against the owner.
- A parent may consent to search on behalf of a child, except to any area over which the child has exclusive control.
- University officials cannot consent to a police search of a student's dormitory room or personal property.

4. Doctrine Of Apparent Authority To Consent

New Hampshire has adopted the doctrine of apparent authority, under which a consensual search will be considered valid if the police reasonably, but mistakenly, believed that a third party consenting to the search had the authority to do so. Apparent authority exists when, "under the totality of the circumstances available to the police at the time, it was objectively reasonable to believe that the third party had authority to consent to the search of the property in question."²³⁰ However, police officers are not permitted to blindly accept a person's consent to search. If the circumstances would cause a reasonable person to doubt that the person actually had authority to consent, then the officers have an obligation to make further inquiry. For example, it would not be reasonable for a police officer to believe that a driver's consent to search his vehicle extended to a purse in the

²²⁹ See *Georgia v. Randolph*, 547 U.S. 103, 114-15 (2006); *State v. Tarasuik*, 160 N.H. 323, 328-30 (2010).

²³⁰ *State v. Sawyer*, 147 N.H. 191, 196 (2001).

back seat of a car, where the only female occupant of the car was the passenger.²³¹ On the other hand, if the container in the back seat was something along the lines of a gym bag and there was no other reason to believe that the container belonged to someone else, it would be reasonable for the officer to believe that it was covered by the driver's consent, provided the owner did not come forward and object.

5. The Scope Of A Search Based On Consent

“When the police are relying upon consent as a basis for their warrantless search, they have no more authority than they have been given by the consent.”²³² The search must be limited in scope to those areas or items covered by the consent. If the police exceed the permitted scope of consent, a court may find that the search, or a portion of it, was invalid and unconstitutional.

In deciding whether the scope of consent was exceeded in a particular case, a court will assess whether, “under the circumstances surrounding the search, it was objectively reasonable for the officers conducting the search to believe that the defendant had consented to it.”²³³

For example, in rejecting a claim that the police exceeded the scope of consent to search when they opened a zippered knapsack in the trunk of the defendant's car, the court found that under the circumstances, it was objectively reasonable for the police to believe that the defendant had consented to a search of the knapsack. The court noted that the officers made clear they were searching for drugs and it was logical to assume that when the defendant consented to the search of the trunk, he was consenting to a search of anything that might contain drugs.²³⁴ On the other hand, where a defendant signed a consent

²³¹ *State v. Sawyer*, 147 N.H. 191, 195 (2001).

²³² *State v. Pinder*, 126 N.H. 220, 224 (1985) (quoting W. LaFare, *Search and Seizure* § 8.1(c), at 624 (1978)).

²³³ *State v. Baroudi*, 137 N.H. 62, 66 (1993).

²³⁴ *State v. Baroudi*, 137 N.H. 62, 66 (1993).

to search form for his “premises” or “residence” and specifically told the police that he did not have a key for a locked outbuilding, the court found that the police could not reasonably understand that he was giving consent to a search of the outbuildings on the property.²³⁵

The person consenting to a search may withdraw consent at any time. The search must then cease, but any items seized prior to consent being withdrawn may be retained by the police.

D. Plain View

In certain limited circumstances, law enforcement officers may seize evidence without a warrant when that evidence is in “plain view.” To seize evidence under the plain-view exception, these three conditions must be met:

- The officer must have observed the item from a place where the officer was lawfully entitled to be;
- The discovery of the evidence must have been inadvertent; and
- The incriminating nature of the evidence must have been immediately apparent.

Although the New Hampshire Supreme Court has not ruled on the issue, other courts have recognized that the same analysis applies when determining whether officers may seize objects that they have found by “plain feel,” or “plain smell.”²³⁶

1. An Officer Must View The Item From A Place Where The Officer Is Lawfully Entitled To Be

If an officer is not lawfully in a location when the officer observes the evidence, the officer cannot rely upon the plain view exception to seize the evidence.

For example, an officer who legally enters the residence to do a sweep for potential gunshot victims could rely upon the exception if, during the sweep, the officer observes

²³⁵ *State v. Pinder*, 126 N.H. 220, 224 (1985).

²³⁶ See e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (plain touch); *United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006) (plain smell); *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir. 1992) (plain smell).

contraband in plain view. However, if the officer conducts the sweep, confirms the absence of any victims, and then remains in the home to look around, the officer no longer has a lawful justification for being in the house without a search warrant. Under these circumstances, the officer could not rely upon the plain view exception to seize evidence.²³⁷

In *Arizona v. Hicks*, the United States Supreme Court held that although the police had lawfully entered an apartment in response to a report that a gun had been fired through the apartment floor into the apartment below, the police had not been justified in moving a television set to check its serial number as part of this entry.²³⁸ Because the serial number would not have been visible to the police without manipulating or moving the television, and their search was necessarily limited to searching the premises for the shooter or victims, the court held that the evidence derived from the observation of the serial numbers should have been suppressed.

The use of a flashlight to illuminate what would otherwise be exposed to public viewing, such as the interior of a car, does not transform the viewing into a search.²³⁹

2. The Discovery Of Incriminating Evidence Must Be Inadvertent

Although it is no longer a requirement under federal law, in New Hampshire, the plain view exception includes a requirement that the discovery of incriminating evidence be inadvertent.²⁴⁰ The New Hampshire Supreme Court has held, however, that the inadvertency requirement does not apply to “drugs, weapons, and other items ‘dangerous in themselves.’”²⁴¹

For example, if an officer who has knowledge of a suspect’s drug dealing executes a search warrant in the suspect’s home, then even if the warrant did not authorize a search

²³⁷ *State v. Slade*, 116 N.H. 436, 438 (1976).

²³⁸ *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987).

²³⁹ *United States v. Dunn*, 480 U.S. 294, 305 (1987).

²⁴⁰ *State v. Murray*, 134 N.H. 613, 615 (1991).

²⁴¹ *State v. Folds*, 216 A.3d 58, 63 (N.H. 2019); *State v. Nieves*, 160 N.H. 245, 250 (2010).

for drugs specifically, that officer can still seize any illegal drugs that are discovered in plain view because the discovery of drugs need not be inadvertent.

In other contexts, however, inadvertency remains a requirement to satisfy the plain view exception. A “discovery is inadvertent if, immediately prior to the discovery, the police lacked sufficient information to establish probable cause to obtain a warrant to search for the object.”²⁴² Thus, even if officers may have suspected that certain evidence might be found at a particular place, it would not preclude them from seizing the evidence under the plain view exception.

If, however, in the course of executing a warrant, officers discover evidence in plain view, such as child sexual abuse images, which in combination with other information available to the police would be sufficient to establish probable cause to search for additional child sexual abuse images, the officers should temporarily stop the search and secure a supplemental warrant, rather than rely upon the plain view exception to seize any other child sexual abuse images that they might find.

3. The Incriminating Nature Of The Evidence Must Be Immediately Apparent

Before an item in plain view may be seized, it must be immediately apparent to the officer that the item is contraband or incriminating evidence.²⁴³ This requirement is met “if, at the time of the seizure, the officer has probable cause to believe that the object seized is incriminating evidence.”²⁴⁴ As with other probable cause determinations, officers are entitled to rely upon their expertise and draw reasonable inferences from the facts available to them to decide whether an object is contraband or incriminating.²⁴⁵

²⁴² *State v. Davis*, 149 N.H. 698, 701 (2003) (quoting *State v. Cote*, 126 N.H. 514, 526 (1985)).

²⁴³ *State v. Ball*, 124 N.H. 226, 236 (1983).

²⁴⁴ *State v. Davis*, 149 N.H. 698, 701 (2003).

²⁴⁵ *State v. Davis*, 149 N.H. 698, 701 (2003).

For example, an officer who is trained in the identification and packaging of controlled drugs could look at a small transparent bag of white powder and determine that there was a reasonable probability that it was contraband.²⁴⁶ However, the New Hampshire Supreme Court has held that the mere observation of a “hand-rolled cigarette,” without additional corroborating facts such as the smell of marijuana, does not establish probable cause to believe that the item is contraband, and thus, it would not justify seizing the item under plain view.²⁴⁷

E. Probable Cause And Exigent Circumstances

Police officers are not required to obtain a search warrant when they have probable cause to believe that evidence of a crime will be found in a particular place and the officers are faced with exigent circumstances.²⁴⁸ Exigent circumstances exist when “the delay caused by obtaining a search warrant would create a substantial threat of imminent danger to life or public safety or likelihood that evidence will be destroyed.”²⁴⁹ The term refers to “those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search, or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization.”²⁵⁰

²⁴⁶ *State v. Murray*, 134 N.H. 613, 616 (1991).

²⁴⁷ *State v. Ball*, 124 N.H. 226, 236-37 (1983).

²⁴⁸ *State v. Gay*, 169 N.H. 232, 240 (2016).

²⁴⁹ *State v. Stern*, 150 N.H. 705, 709 (2004).

²⁵⁰ *State v. Stern*, 150 N.H. 705, 709 (2004).

The following are illustrative situations in which a warrantless search based upon exigent circumstances is permissible:

- A warrantless blood draw to obtain a blood sample from the defendant, who was under arrest for driving while intoxicated (DWI) following a collision in the middle of the night, where the delay caused by obtaining a warrant could deprive the State of reliable evidence of the defendant's intoxication.²⁵¹
- A warrantless entry into the defendant's apartment to search for a sniper who had shot through the front window of the police department and injured two people, where there was probable cause to believe that the sniper was in the apartment.²⁵²
- A warrantless seizure of a car where there was probable cause to believe the car contained a large quantity of drugs and the defendant was driving the car and believed to be headed out of town.²⁵³
- A warrantless inspection of the hidden vehicle identification number (VIN) on the defendant's car where there was probable cause to believe that the car, which the defendant was driving, was stolen.²⁵⁴
- A warrantless entry into the curtilage of a home to allow a scent-tracking canine to follow the scent of a suspect fleeing a murder scene.²⁵⁵
- A warrantless entry into a home to apprehend an armed fleeing felon.²⁵⁶

The exigent circumstances exception to the warrant requirement is applicable only when the exigency was unforeseeable.²⁵⁷ The police may not intentionally create or wait for exigent circumstances to develop and then rely upon the exigent circumstances to

²⁵¹ *State v. Stern*, 150 N.H. 705, 710 (2004); *see also State v. Steimel*, 155 N.H. 141, 148 (2007) (exigency can apply in the context of drug or alcohol consumption). *Cf. Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (reemphasizing the totality of the circumstances analysis, and rejecting a *per se* rule that the natural dissipation of alcohol in the blood establishes exigency).

²⁵² *State v. Theodosopoulos*, 119 N.H. 573, 579 (1979).

²⁵³ *State v. Gallant*, 133 N.H. 138, 145-46 (1990).

²⁵⁴ *State v. Camargo*, 126 N.H. 766, 770 (1985).

²⁵⁵ *State v. Gay*, 169 N.H. 232, 243 (2016).

²⁵⁶ *Welch v. Wisconsin*, 466 U.S. 740, 752 (1984).

²⁵⁷ *State v. Gay*, 169 N.H. 232, 242 (2016).

justify acting without a warrant.²⁵⁸ It would be impermissible, for instance, for an officer to knock on a suspected drug dealer's door and then immediately search without a warrant on the grounds that occupants might destroy the evidence.²⁵⁹

The scope of a warrantless entry or search based upon exigent circumstances must be narrowly tailored to the exigency. In other words, if officers enter a home without a warrant to apprehend a fleeing felon, they must limit their search to areas in which a person could be found. Once the person is located, the search must be terminated.

If evidence is inadvertently found in plain view during a search based upon probable cause and exigency, the evidence may be seized. However, once the exigency justifying the search has dissipated, police must secure the scene and obtain a warrant before looking for further evidence.

F. “Community Caretaking” Or “Emergency Aid” Exceptions

Although often referred to as a type of exigent circumstances exception, community caretaking and emergency-aid exceptions are separate and distinct exceptions to the warrant requirement.²⁶⁰

Under the community caretaking exception, the officer must be able to “point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the community caretaking activity.”²⁶¹ Specific and articulable facts that justify the community caretaking exception are those that support concern for the safety of others or their property.²⁶² For example, if an officer is concerned about the well-being of a person in a house, the concern for well-being may outweigh an intrusion onto

²⁵⁸ *State v. Robinson*, 158 N.H. 792, 798 (2009) (“[I]f no exigency existed before the police became involved, the police cannot themselves create the exigency to justify a warrantless entry.”).

²⁵⁹ *See State v. Morse*, 125 N.H. 403, 408 (1984) (evidence was suppressed when the police intentionally created exigent circumstances by knocking on the suspect's door).

²⁶⁰ *State v. MacElman*, 149 N.H. 795, 797-98 (2003).

²⁶¹ *State v. D'Amour*, 150 N.H. 122, 127 (2003).

²⁶² *See State v. LaBarre*, 160 N.H. 1, 8 (2010).

that property.²⁶³ Similarly, protecting property with no identifiable owner may also justify a warrantless search.²⁶⁴ A search of an abandoned car, for example, may be justified as a means to identify the owner.

The emergency-aid exception is closely related to the community care exception. It recognizes that police officers regularly engage in “community caretaking function[s] . . . such as helping stranded motorists, returning lost children to anxious parents, and assisting and protecting citizens in need,” that are unrelated to the “detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”²⁶⁵

In the course of performing those duties, it may be necessary, for example, for an officer to seize a person’s property to safeguard it against theft or destruction,²⁶⁶ or to enter a person’s property to respond to a reported emergency.²⁶⁷ Provided that the officer’s conduct was not a subterfuge for a criminal investigation, it would fall within the emergency-aid exception to the warrant requirement.

To prove that a particular search or seizure was justified under the emergency-aid exception, the State must show three things:

- The officers had objectively reasonable grounds to believe that there was an emergency at hand, and there was an immediate need for their assistance for the protection of life or property.²⁶⁸
- There was an objectively reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

²⁶³ *State v. LaBarre*, 160 N.H. 1, 8 (2010).

²⁶⁴ *State v. Denoncourt*, 149 N.H. 308, 310 (2003).

²⁶⁵ *State v. MacElman*, 149 N.H. 795, 798 (2003) (quotations omitted); *see also State v. Craveiro*, 155 N.H. 423, 427 (2007).

²⁶⁶ *State v. Psomiades*, 139 N.H. 480, 481 (1995).

²⁶⁷ *State v. MacElman*, 149 N.H. 795, 798 (2003); *see also State v. Eldridge*, No. 2018-0551, 2020 WL 812924, at *7-8 (N.H. Feb. 19, 2020).

²⁶⁸ The New Hampshire Supreme Court has interpreted this requirement very narrowly. Only a “compelling need for immediate official action and a risk that the delay inherent to obtaining a warrant will present a substantial threat of imminent danger to life or public safety.” *State v. Seavey*, 147 N.H. 304, 307 (2001) (quoting *State v. Theodosopoulos*, 119 N.H. 573, 580 (1979)).

- The search was not primarily motivated by an intent to arrest or seize evidence.²⁶⁹

In *State v. Brunelle*, the New Hampshire Supreme Court dealt with a fairly common circumstance of community caretaking, or emergency aid, that led to the discovery of illegal behavior.²⁷⁰ In that case, after assisting in moving a stalled car off the highway, a trooper asked the driver for his license and registration. The trooper discovered that the driver's license had been suspended and subsequently arrested the driver for operating after certification as a habitual offender. The driver sought to suppress the evidence of the stop, claiming that he was illegally seized without reasonable suspicion at the point that the trooper requested his license and registration. On appeal, the Court held that the trooper's actions were part of her community caretaking function, and thus, they fell within an exception to the warrant requirement. The trooper made the request to document her contact with the driver, which was in accordance with State Police policy.

Although the emergency-aid exception applies to community caretaking functions, it may apply even in situations where the police are also conducting a criminal investigation. The critical factor in making the exception applicable is that, with respect to the particular challenged conduct, the police had an independent, caretaking reason for undertaking it, and it was not simply a pretext for engaging in a criminal investigation.²⁷¹

For example, if while investigating a criminal mischief complaint, a police officer saw a briefcase lying on the street, and there was no basis to believe it was connected to their investigation, they could search it for the purpose of safeguarding it and identifying its owner.

²⁶⁹ *State v. MacElman*, 149 N.H. 795, 798 (2003).

²⁷⁰ *State v. Brunelle*, 145 N.H. 656, 659 (2000).

²⁷¹ *State v. LaBarre*, 160 N.H. 1, 8 (2010); *State v. D'Amour*, 150 N.H. 122, 126 (2003).

G. Automobiles

Recently, the New Hampshire Supreme Court has adopted a limited motor vehicle exception to the search warrant requirement.²⁷² This is a significant change from the Court's earlier interpretations of the New Hampshire Constitution.²⁷³ The limited motor vehicle exception that the New Hampshire Supreme Court has adopted is far narrower in scope than the motor vehicle exception recognized under the United States Constitution.²⁷⁴ Under New Hampshire's motor vehicle exception, law enforcement officers may enter a car to seize evidence if the following two factors have been met:

- The officers stop the motor vehicle in transit pursuant to a lawful stop; and
- The officers have probable cause to believe that a plainly visible item in the vehicle is contraband.²⁷⁵

The "in transit" portion of the first factor does not limit the exception to situations where law enforcement officers stop motor vehicles actively traveling on the roadways, but instead, includes most situations where the officers can reasonably conclude that the motor vehicle is traveling between two locations.²⁷⁶ For example, a police officer who has stopped a motor vehicle for a traffic violation and sees drugs on the passenger's seat while interacting with the driver may seize those drugs. Similarly, a police officer who stops to investigate a car parked at a gas station that has been closed for several hours and sees a hypodermic needle in the lap of a driver who admits it contains drugs can seize the needle.²⁷⁷

²⁷² *State v. Cora*, 170 N.H. 186, 196-97 (2017).

²⁷³ *State v. Sterndale*, 139 N.H. 445, 449 (1995), *abrogated by State v. Cora*, 170 N.H. 186 (2017).

²⁷⁴ *State v. Cora*, 170 N.H. 186, 196 (2017) (rejecting the federal motor vehicle exception).

²⁷⁵ *State v. Cora*, 170 N.H. 186, 196 (2017).

²⁷⁶ *State v. Glavan*, 171 N.H. 457, 460 (2018).

²⁷⁷ *See State v. Glavan*, 171 N.H. 457, 460 (2018).

A police officer may not, however, rely upon the motor vehicle exception to seize contraband from a parked and unoccupied car or a car parked in a person's driveway, even if the driver is in the car, because neither vehicle would be "in transit."

In addition to the limited motor vehicle exception, law enforcement officers may rely upon the exigent circumstances exception to the search warrant requirement to search non-impounded motor vehicles.

The fact that a motor vehicle is inherently mobile does not, in and of itself, create exigent circumstances. Rather, police must demonstrate facts in each specific case that support why there is an emergency that justifies immediately searching for evidence without obtaining a warrant first. For example, if the police have probable cause to believe that a person is transporting drugs in his or her car, and there is reason to believe that the person is driving out of town and will remove the drugs, officers would be justified in stopping and searching the car under the exigent circumstances exception.²⁷⁸ Under those circumstances, the delay caused by obtaining a warrant could result in the removal or destruction of evidence.

If, however, a vehicle is not in transit because, for example, the driver has been arrested, there is no longer any exigency. The vehicle should be secured while a search warrant is obtained.

Generally, where exigent circumstances justify a warrantless search of a motor vehicle, the search should be conducted immediately. When, however, there are public safety or law enforcement concerns that make it ill-advised to conduct the search on the roadside, the police are permitted to remove the vehicle to a police station or other safe location where the search should be conducted immediately. Circumstances that would warrant the seizure and removal of a vehicle include concern that a roadside search could endanger life or physical well-being, or a fear that a public search would tip off a co-conspirator and jeopardize an on-going investigation.²⁷⁹

²⁷⁸ *State v. Camargo*, 126 N.H. 766, 770 (1985).

²⁷⁹ *State v. Gallant*, 133 N.H. 138, 147 (1990).

Concern that evidence will be destroyed if a vehicle is left unattended for a period of time is not sufficient to justify the warrantless seizure and search under the exigency exception if the police could reasonably overcome this difficulty by posting an officer to guard the motor vehicle while a warrant is obtained.²⁸⁰

H. Searches Incident To A Lawful Arrest

The search-incident-to-arrest exception allows a police officer to conduct a contemporaneous warrantless search of an arrested person and the area immediately surrounding that person at the time of arrest. The exception applies only if the search is conducted in relation to a lawful arrest. Any evidence obtained as a result of an illegal arrest, for example, without an arrest warrant where a warrant was legally required, will be inadmissible in court.²⁸¹

To fall within the search-incident-to-arrest exception, the search must be conducted very close in time to the arrest. It could occur before the arrest, provided it is “substantially contemporaneous” with the arrest.²⁸² The types of situations in which pre-arrest searches are acceptable usually involve additional exigent circumstances, such as a suspect’s engaging in furtive movements or the officer’s observing a weapon protruding from a dangerous suspect’s waistband. Under such circumstances, the police could immediately search the suspect pursuant to the search-incident-to-arrest exception to the warrant requirement, even though the formal arrest may not yet have actually occurred. The justification for the exception is three-fold:

- To prevent harm to the arresting officer;
- To prevent the arrestee from destroying evidence; and

²⁸⁰ *State v. Camargo*, 126 N.H. 766, 770 (1985).

²⁸¹ *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

²⁸² *State v. Degrenier*, 128 N.H. 547, 548-49 (1986).

- To ensure that the arrestee does not have, or cannot gain, any means to escape.²⁸³

Thus, any search conducted pursuant to this exception must be limited to those areas within which the arrestee might reasonably gain possession of a weapon, means of escape, or evidence that could be destroyed—the arrestee’s person and the area within the arrestee’s immediate control at the time of arrest, commonly referred to as the person’s “wingspan” or “lunging distance.”

The exception would not extend, for example, to a search of rooms in a house other than that in which an arrest occurs, or even to closed or concealed areas within the room where the arrest took place. Neither of those places would be within the defendant’s immediate control. The exception also does not extend to information contained in an electronic device. Although the police may seize the device itself if it is within the arrestee’s immediate control, they may not search the device recovered in that seizure.²⁸⁴

When executing an in-residence arrest, if an officer has reasonable suspicion to believe that there is another person in the residence that poses a danger to the officers, an officer is permitted to expand a search beyond that very limited “wingspan” or “lunging distance” area, and conduct a “protective sweep” of other rooms. The protective sweep may entail only a cursory inspection of those spaces where a person may be found and must not extend beyond that necessary to dispel the suspicion of danger.²⁸⁵

When reviewing the legality of searches based upon the search-incident-to-arrest exception, the New Hampshire Supreme Court has looked closely at whether the search served the intended purpose. In *State v. Sterndale*, the Court held that a warrantless search of the passenger’s compartment of the defendant’s car was not justified under the search-incident-to-arrest exception because at the time of the search, the defendant had already been handcuffed and placed in a cruiser. Thus, there was no danger that the defendant could

²⁸³ *State v. Murray*, 135 N.H. 369, 374 (1992).

²⁸⁴ *Riley v. California*, 573 U.S. 373, 385-86 (2014).

²⁸⁵ *Maryland v. Buie*, 494 U.S. 325, 335-36 (1990); *State v. Smith*, 141 N.H. 271, 276 (1996).

gain access to any evidence, weapons, or elements of escape that might have been present in the car.²⁸⁶

Similarly, in *State v. Murray*, the Court held that a search of the defendant's purse, conducted after the defendant was in the custody of ambulance attendants, was not justified under the search-incident-to-arrest exception.²⁸⁷ "Because whatever was in her purse could not at the time have posed a threat to the welfare of the officer, aided her in effecting an escape, or been destroyed by her, the common-sense factors underlying the rationale for the search incident to arrest exception were not present."²⁸⁸

I. Inventory Searches

1. Post-Arrest Detention Search

The police may conduct a warrantless search of an arrested person, and the arrested person's personal effects, as part of a routine administrative procedure incident to booking and detention.²⁸⁹ Such a search serves four valid purposes:

- To protect the arrestee's property while the arrestee is in custody;
- To protect the police from fraudulent claims that they have stolen or failed to adequately safeguard the arrestee's property;
- To discover objects that may be used to facilitate an escape or that could be used to cause injury; and
- To ascertain or verify the identity of the arrestee.²⁹⁰

The permissible scope of a post-arrest detention search is broad. The New Hampshire Supreme Court has held, for example, that in the course of such a search, it was permissible for police to search a closed film canister that had been in the possession of an

²⁸⁶ *State v. Sterndale*, 139 N.H. 445, 448 (1995).

²⁸⁷ *State v. Murray*, 135 N.H. 369, 374 (1992).

²⁸⁸ *State v. Murray*, 135 N.H. 369, 374 (1992).

²⁸⁹ *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983).

²⁹⁰ *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983).

arrestee,²⁹¹ and to read the hidden contents of a notebook that had been seized incident to an arrest.²⁹²

2. Inventory Searches Of Persons Detained In Protective Custody

Although the police are permitted to do an inventory search of a person being held in protective custody, the permissible scope of such a search is narrower than it would be for a person detained for a criminal offense. The person and that person's personal effects can be searched solely for the limited purpose of identifying the detainee and reducing the likelihood of injury to the detainee and others.²⁹³

Thus, if the person has been identified, the police would not be justified in searching the contents of the person's wallet.²⁹⁴ Similarly, it would be difficult to justify the search of the contents of a notebook, unless there was some basis to believe that it held a weapon.

3. Inventory Searches Of Automobiles

When the police impound a motor vehicle, they are permitted to conduct a warrantless inventory search of the vehicle. This type of warrantless search is justified for "the protection of the owner's property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger."²⁹⁵

To be valid as an inventory search, however, the search must be done pursuant to established department policy.²⁹⁶ Unless the department has a policy that expressly permits

²⁹¹ *State v. Maxfield*, 121 N.H. 103, 105-06 (1981).

²⁹² *State v. Cimino*, 126 N.H. 570, 574-75 (1985).

²⁹³ RSA 172-B:3, VII (2014). See *State v. Toto*, 123 N.H. 619, 623 (1983) (holding that it was permissible to search a large plastic bag possessed by the detainee because such a bag could hold a gun or other weapon).

²⁹⁴ *State v. Harlow*, 123 N.H. 547, 549-52 (1983).

²⁹⁵ *South Dakota v. Opperman*, 428 U.S. 364, 369 (1970) (internal citations omitted).

²⁹⁶ *State v. Newcomb*, 161 N.H. 666, 672 (2011); *State v. Finn*, 146 N.H. 59, 62 (2001); *State v. Hale*, 136 N.H. 42, 45 (1992).

it, an officer may not open closed containers found in a vehicle during an inventory search.²⁹⁷ Nor may an officer search trunks or other luggage compartments during an inventory search, unless the department has a policy that expressly permits such a search.²⁹⁸

The existence of an established policy ensures that inventory searches are conducted in a consistent manner by limiting an officer's discretion as to when and how such a search will be done. Thus, it is important that officers become very familiar with their agency's inventory search policy and adhere to it.

To serve its purpose, an inventory search must result in a complete written inventory of the items found in the vehicle, which can be validated by the owner. Failure to create a written inventory, or the creation of an incomplete inventory, could lead to a claim that the search was not a valid inventory search.

If, during the course of conducting an inventory search, officers develop probable cause to believe that evidence of criminal activity may be found in the car, then they should suspend the search and obtain a search warrant. Failing to do so may result in a legal challenge to the search on the ground that it exceeded its permissible scope.

J. Administrative Searches

Some state and local agencies have the statutory authority to conduct inspections of private dwellings, vehicles, or business premises, or to inspect certain records pursuant to an administrative search warrant. For example:

- Bailiffs are permitted to search persons entering the courthouse;²⁹⁹
- The Division of Motor Vehicles may inspect vehicles and car lots, dealers, etc.;
- The Division of Public Health may inspect businesses for compliance with health requirements;³⁰⁰

²⁹⁷ *State v. Finn*, 146 N.H. 59, 62 (2001).

²⁹⁸ *State v. Newcomb*, 161 N.H. 666, 672 (2011).

²⁹⁹ *State v. Plante*, 134 N.H. 585, 588-89, *cert. denied*, 502 U.S. 984 (1991).

³⁰⁰ *See, e.g.*, RSA 313-A:21, I (Supp. 2019).

- The Pari-Mutuel Commission may inspect all charitable organization records;³⁰¹
- The Fire Marshal or local fire chief may inspect buildings for code compliance;³⁰²
- The Department of Health and Human Services may visit aid recipients to ensure conformity with use requirements;³⁰³ and
- Local ordinances may authorize police officers to check pawn shops for stolen merchandise.³⁰⁴

An administrative search warrant should not be used in the course of, or to further a, criminal investigation, nor should it be used to circumvent the criminal search warrant requirements.³⁰⁵

K. School Searches

1. Searches Of Students And School Facilities

Searches of students and school premises by law enforcement officers are governed by the same constitutional principles as any other search, and a warrant is required for such searches in the absence of an applicable exception to the warrant requirement.

However, a school official, not a law enforcement official, will ordinarily be justified in searching a student or a location on school premises without a warrant when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules and regulations of the school. The search will be permissible in its scope when the measures adopted are reasonably

³⁰¹ RSA 287-E:9, VI (2016).

³⁰² RSA 153:4-a (2014).

³⁰³ *See, e.g.*, RSA 170-E:8, III (Supp. 2019).

³⁰⁴ RSA 398:13 (2017).

³⁰⁵ *State v. Sidebotham*, 124 N.H. 682, 689 (1984).

related to the objectives of the search and are not excessively intrusive in light of the age and gender of the student and the nature of the infraction.³⁰⁶

While the warrant requirement does not apply to school officials generally, it would apply if a school official acted as an agent of the police in searching a student.³⁰⁷ In assessing whether a school official was acting as a police agent, a court will consider whether there was a prior agreement between the police and the school official and whether the police requested or induced the school official to obtain the evidence.³⁰⁸

In *State v. Heirtzler*, the New Hampshire Supreme Court suppressed evidence obtained as a result of an interrogation and warrantless search conducted by a school official, finding that the school official's actions had been induced by law enforcement.³⁰⁹ The school official searched the student based upon information from the school resource officer that a teacher had seen the student engaged in a suspicious, potentially drug-related, act. The Court based its ruling on the fact that there was an understanding between the school and the police that information in the hands of the school resource officer about potential criminal activity that did not amount to probable cause would be passed on to the school administration for action.

The *Heirtzler* opinion illustrates how important it is for school resource officers to exercise caution in working with school officials concerning potentially criminal behavior.

³⁰⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985); *State v. Tinkham*, 143 N.H. 73, 75-76 (1998); *State v. Drake*, 139 N.H. 662, 666 (1995).

³⁰⁷ *State v. Heirtzler*, 147 N.H. 344, 348 (2001).

³⁰⁸ *State v. Nemser*, 148 N.H. 453, 455 (2002).

³⁰⁹ *State v. Heirtzler*, 147 N.H. 344, 348 (2001).

2. Searches Of Dormitory Rooms

In the collegiate context, dormitory rooms constitute a “home away from home,” and the full privacy protections of the Fourth Amendment are applicable. Accordingly, to conduct a search of a dormitory room, the police must have a search warrant or act pursuant to a recognized exception to the warrant requirement.

Many school officials are authorized, by school policy or residence hall contract, to inspect dorm rooms without the student’s consent.³¹⁰ However, as discussed above, if a school official conducts a search “in conjunction with or at the behest of law enforcement agencies,”³¹¹ or as an agent of the police, the warrant requirement would apply.³¹²

L. Electronic Devices

In accordance with many of the judicially recognized exceptions to the warrant requirement, law enforcement officers may seize electronic devices—most commonly cellular phones—from suspects, arrestees, or criminal defendants. Generally, the exceptions that allow for the seizure of the physical cellular phone do not allow law enforcement officers to search the electronic data stored on the cellular phone, unless the officers first get a search warrant. Officers may search the physical phone, however, for items such as razor blades, which may be used to harm the officers.

In *Riley v. California*, the United States Supreme Court held that “a warrant is generally required before a search, even when a cellular phone is seized incident to arrest.”³¹³ In analyzing the issues present in that case, the Court stated that other exceptions to the warrant requirement may not apply or would be exceptionally rare in the context of searching a cellular phone.

³¹⁰ *Commonwealth v. Nielson*, 666 N.E.2d 984, 987 (Mass. 1996).

³¹¹ *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985).

³¹² *State v. Nemser*, 148 N.H. 453, 457 (2002).

³¹³ *Riley v. California*, 573 U.S. 373, 401 (2014).

The Court found that the digital data stored on a cellular phone “cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.”³¹⁴ It further found that simple precautions, such as placing the cellular phone in “airplane mode” or storing it in a Faraday bag, could prevent the remote destruction of data.³¹⁵

The Court did acknowledge that “[i]f the police [were] truly confronted with a now or never situation,” the officers may have the necessary exigency to search the cellular phone under the exigent circumstances exception.³¹⁶ Given the Court’s language and discussion of efforts to prevent destruction of information, however, it is likely that such “now or never” situations would be extraordinarily rare. Thus, the best practice in such circumstances would be to secure the cellular phone from outside interference and applying for a search warrant. Additionally, in an effort to preserve the cellular phone records while seeking a search warrant or while continuing the investigation, officers should submit a preservation letter to the cellular phone carrier company. *See* Sample Preservation Letter, page 443.

³¹⁴ *Riley v. California*, 573 U.S. 373, 387 (2014).

³¹⁵ *Riley v. California*, 573 U.S. 373, 390-91 (2014).

³¹⁶ *Riley v. California*, 573 U.S. 373, 391 (2014) (quotations omitted).

VII. REQUESTS FOR AUTHORIZATION OF “ONE-PARTY” INTERCEPTS UNDER RSA 570-A:2

A. Introduction

In general, the interception of telecommunications and oral communications without the consent of all parties to the communication is prohibited by RSA chapter 570-A. However, the Attorney General has the authority to permit investigative or law enforcement officers to intercept “telecommunications” and “oral communications” where only one party to the communication has consented to the interception.³¹⁷ These terms are defined by statute.³¹⁸

A “telecommunication” is “the transfer of any form of information in whole or in part through the facilities of a communications common carrier.”³¹⁹ Thus, “telecommunications” include telephone calls (whether by landline or a wireless service), video calls, and messages sent by e-mail, Short Message Service (SMS) (*i.e.*, text messages), or any kind of instant messaging system, among other services.

An “oral communication” is “any verbal communication uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such expectation.”³²⁰ Thus, whether the interception of a specific communication is prohibited by RSA chapter 570-A will often depend on the specific circumstances surrounding the communication.

If there is any doubt regarding whether it would be lawful to intercept a particular communication, an officer should first consult the county attorney’s office for the relevant jurisdiction or the Attorney General’s Office.

³¹⁷ RSA 570-A:2, II(d) (Supp. 2019).

³¹⁸ RSA 570-A:1, I-II (Supp. 2019).

³¹⁹ RSA 570-A:1, I (Supp. 2019).

³²⁰ RSA 570-A:1, II (Supp. 2019).

It is also important to note that a civilian’s “filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities,” is protected by the First Amendment to the United States Constitution,³²¹ and does not violate RSA chapter 570-A, regardless of whether the officers have given consent.

B. Criminal Offenses For Which One-Party Interceptions May Be Authorized

Authorizations for one-party interceptions can be granted to facilitate the investigation of only the following offenses:

- Solid waste violations (RSA 149-M:9, I, II);
- Harassing or obscene telephone calls (RSA 644:4);
- Organized crime (RSA 570-A:1, XI);
- Homicide (RSA 630);
- Kidnapping (RSA 633:1);
- Gambling (RSA 647:2);
- Theft (RSA chapter 637);
- Corrupt practices (RSA chapter 640);
- Computer pornography & child exploitation (RSA chapter 649-B);
- Criminal violations of the securities laws (RSA 421-B:3, RSA 421-B:4, RSA 421-B:5, RSA 421-B:19, RSA 421-B:24);
- Criminal violations of the securities takeover disclosure laws (RSA 421-A:3, RSA 421-A:7, RSA 421-A:8, RSA 421-A:11, RSA 421-A:13);
- Robbery (RSA 636:1);
- Arson (RSA 634:1);
- Hindering apprehension or prosecution (RSA 642:3);
- Tampering with witnesses and informants (RSA 641:5);
- Aggravated felonious sexual assault (RSA 632-A:2);
- Felonious sexual assault (RSA 632-A:3);
- Escape (RSA 642:6);

³²¹ *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

- Bail jumping (RSA 642:8);
- Insurance fraud (RSA 638:20);
- Dealing in narcotic drugs, marijuana, or other dangerous drugs (RSA chapter 318-B);
- Hazardous waste violations (RSA 147-A:4, I); and
- Conspiracy to commit any of the listed offenses.³²²

1. Limitations Of Authority

Authorization for a one-party interception cannot be granted in connection with the investigation of an *attempt* to commit any of the listed crimes or in connection with being an *accomplice* to any of the listed crimes. In addition, assault crimes and other offenses under RSA chapter 631 are not among the crimes listed in RSA chapter 570-A.

The Attorney General may delegate to county attorneys the authority to approve interceptions in the investigation of drug-related offenses as defined in the Controlled Drug Act, RSA chapter 318-B.³²³ Therefore, a county attorney may exercise authority under RSA 570-A:2 only in the county where the county attorney serves, and only in instances where the crime under investigation is defined by RSA chapter 318-B. If authorization is sought for an interception that will take place in another county, the requesting officer should seek approval from the county attorney in that county. If an officer reasonably anticipates that the interception will cross into another county, *i.e.*, the non-consenting party will likely be in another county at the time of the intercept, the officer should seek approval from the Attorney General's Office.

Finally, if an officer is requesting authorization for an interception in a non-drug-related investigation, or knows that non-drug-related offenses may be discussed during the intercepted communication, the officer should seek approval from the Attorney General's Office.

³²² RSA 570-A:2, II(d) (Supp. 2019); RSA 570-A:7 (Supp. 2019).

³²³ RSA 570-A:2, II(e) (Supp. 2019).

2. Prerequisites To Granting Authorization For A One-Party Interception

A law enforcement officer may intercept a telecommunication or oral communication when all of the following circumstances exist:

- The officer is a party to the conversation, or one of the parties to the communication, *i.e.*, a victim or a confidential informant, has consented to the interception;
- There is reasonable suspicion to believe that evidence of a violation of a listed crime will be derived from the interception; and
- An authorized member of the Attorney General's Office or a county attorney's office has authorized the specific interception.³²⁴

Before requesting approval for a one-party interception from either the Attorney General's Office or a county attorney's office, an officer should consider the following:

- Whether there is an adequate basis for a finding of reasonable suspicion;
- Whether an informant's reliability or trustworthiness has been established, and whether the informant has an incentive to provide information to the police;
- Whether the police have independently corroborated any of the informant's information, especially any incriminating information;
- Whether a party to the conversation has consented to the interception, and whether that consent is written or recorded;
- Whether it is likely that unknown persons may be intercepted;
- What a reasonable timeframe for the interception will be;
- Whether both telephonic and in-person interceptions should be requested; and
- Whether another jurisdiction (state or county) may be involved in the interception.

³²⁴ RSA 570-A:2, II(d), (e) (Supp. 2019).

“Reasonable suspicion” is suspicion based on specific, articulable facts, together with inferences reasonably drawn from those facts.³²⁵ Reasonable suspicion exists when specific and articulable facts, taken together with reasonable inferences from those facts, lead the authorizing official to believe that evidence of criminal conduct will be derived from the interception.³²⁶ “In determining whether the [authorizing attorney] properly authorized the intercept, [a court will] look to the totality of the circumstances, which includes an examination of the overall reasonableness of the authorization.”³²⁷

The determination of whether there is reasonable suspicion for the interception will be made by the assistant county attorney or the assistant attorney general who considers the application for the interception. That attorney will consider the same factors that a judge would consider in evaluating whether an investigative stop was supported by reasonable suspicion.

“Articulable facts” supporting reasonable suspicion may come from:

- The firsthand account of a credible witness;
- Corroborating information from other witnesses;
- In drug cases, previous successful controlled buys by a confidential informant or undercover officer; and
- The target’s previous contacts with law enforcement.³²⁸

3. Reasonable Suspicion Based On Informants

If a one-party interception request is based on an informant’s tip, the determination of reasonable suspicion will be based on the informant’s reliability, credibility, and basis of knowledge.³²⁹ It is important to note that “[a]n informant who has personally observed

³²⁵ *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Vadnais*, 141 N.H. 68, 70 (1996).

³²⁶ *State v. Corrado*, 154 N.H. 43, 45 (2006).

³²⁷ *State v. Conant*, 139 N.H. 728, 730 (1995).

³²⁸ See e.g., *State v. Hood*, 141 N.H. 196, 198-99 (1996); *State v. Pellicci*, 133 N.H. 523, 530 (1990).

³²⁹ *State v. Conant*, 139 N.H. 728, 730 (1995).

incriminating behavior has a stronger basis of knowledge than does an informant who relates not what he knows personally, but what he has heard others say.”³³⁰

“Police corroboration of part of an informant’s tip may compensate for an informant’s lack of credibility and basis of knowledge.”³³¹ Also relevant “is whether the police have other incriminating evidence and whether the person implicated by the informant’s tip has a criminal reputation.”³³² “A bare allegation that a person has engaged in criminal activity in the past . . . without specifying the nature of the acts and how recently they occurred, does not support a finding of reasonable suspicion.”³³³

4. Documentation Requirements For One-Party Authorizations

An attorney authorized to issue one-party authorizations may give oral authorization for an interception. Within 72 hours of granting the authorization, however, the attorney must complete a written memorandum setting out the reasons for the attorney’s decision that reasonable suspicion existed.³³⁴ This memorandum will also define the type of interception that was granted, and the time period when the authorization was valid. The memorandum must be kept on file in the Office of the Attorney General.

³³⁰ *State v. Conant*, 139 N.H. 728, 731 (1995).

³³¹ *State v. Conant*, 139 N.H. 728, 731 (1995).

³³² *State v. Conant*, 139 N.H. 728, 731 (1995) (citations omitted).

³³³ *State v. Conant*, 139 N.H. 728, 731 (1995).

³³⁴ RSA 570-A:2, II(d) (Supp. 2019).

5. Exclusion Of Evidence Where There Was No One-Party Authorization

No communication that has been intercepted in violation of RSA chapter 570-A can be used as evidence in any judicial or legislative proceeding.³³⁵ The function of this exclusionary rule is “to discourage unconstitutional conduct and to insure integrity in the judicial process by disregarding evidence produced through an impermissible procedure.”³³⁶ These purposes are served by excluding any evidence of the illegal recording and any evidence derived from the recording.³³⁷

6. When One-Party Authorization Is Not Required

When a law enforcement officer communicates directly over the phone with a suspect, but no eavesdropping, wiretapping, or recording of that wire communication has taken place, no authorization is required.³³⁸ In such a case, the communication has not been “intercepted,” but instead, a suspect, “by speaking into their telephone[], intended the person[] receiving the call to hear what was said,” and therefore has consented to the officer’s aural acquisition of the communications.³³⁹ This is the case even if the officer has misrepresented his or her identity to the caller.³⁴⁰

³³⁵ RSA 570-A:6 (2001) states:

Whenever any telecommunication or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

³³⁶ *State v. MacMillan*, 152 N.H. 67, 71 (2005) (quoting *State v. Smith*, 242 N.W.2d 184, 186 (Wis. 1976)).

³³⁷ *State v. MacMillan*, 152 N.H. 67, 72 (2005).

³³⁸ *State v. Lamontagne*, 136 N.H. 575, 578 (1992).

³³⁹ *State v. Lamontagne*, 136 N.H. 575, 578-79 (1992).

³⁴⁰ *State v. Lamontagne*, 136 N.H. 575, 578 (1992).

VIII. REQUESTS FOR TELECOMMUNICATION AND INTERNET RECORDS UNDER RSA 7:6-b

A. Introduction

Pursuant to RSA 7:6-b the Attorney General has authority to require communications common carriers to furnish certain information maintained by such carriers upon a finding of “reasonable grounds for belief that the service furnished to [the targeted] person or [targeted] location by such communications common carrier has been, is being, or may be used for an unlawful purpose.”³⁴¹

RSA 570-A:1, IX, defines “communications common carrier” as:

[A] person engaged in providing communications services to the general public through transmission of any form of information between subscribers by means of wire, cable, radio or electromagnetic transmission optical or fiber-optic transmission, or other means which transfers information without physical transfer or medium, whether by switched or dedicated facilities. A person engaged in radio or television broadcasting or any other general distribution of any form of communications shall not thereby be deemed a communications common carrier.

When the offense under investigation is defined in RSA chapter 318-B or RSA chapter 649-B, the Attorney General may delegate his or her authority under this section to a county attorney. A county attorney may further delegate authority under this section to any assistant county attorney in the county attorney’s office. The county attorney may exercise this authority only in cases within the jurisdiction of that county attorney.³⁴²

³⁴¹ RSA 7:6-b, I (2013).

³⁴² RSA 7:6-b, III (2013).

B. Process For Obtaining An RSA 7:6-b Administrative Subpoena

RSA 7:6-b states that:

The attorney general shall adopt rules, pursuant to RSA 541-A, relative to:

- (a) Circumstances under which an assistant attorney general, a county attorney, or an assistant county attorney may issue such demands to communications common carriers
- (b) The procedures for applying for such demands.
- (c) The records of such demands which shall be kept and maintained.³⁴³

These procedures are codified in the New Hampshire Code of Administrative Rules, Ch. Jus 1500.

1. Application For An RSA 7:6-b Administrative Subpoena

To obtain an RSA 7:6-b administrative subpoena, law enforcement officers will need to provide the following information in writing to the Attorney General's Office or to the county attorney's office with jurisdiction:

- Your name and title;
- The name and address of the law enforcement agency for which you work;
- The date of the application;
- The alleged unlawful conduct under investigation;
- The telephone number, screen name, subscriber name, or other subscriber identifier for the service about which information is being sought;
- The name, address, telephone, and fax number of the communications common carrier from whom information is being sought;
- The specific information sought from the communications common carrier, limited to the following, which is reasonably related to the investigation of the alleged unlawful conduct:
 - The name and addresses of persons to whom stated listed or unlisted telephone numbers are assigned;

³⁴³ RSA 7:6-b, III (2013).

- The names and addresses of persons to whom any stated or identified services are provided;
- Any local and long distance billing records for any subscribers to, or customer of, telephone service or wireless telephone service as defined in RSA 638:21, XI;
- The length of service provided to a subscriber or customer by the communications common carrier;
- The types of services provided to the subscriber or customer by the communications common carrier; and
- The telephone number or other subscriber number or identity;
- A narrative description of the facts that form reasonable grounds to believe that the identified service being furnished by the communications common carrier has been, is being, or may be used for an unlawful purpose; and
- If not evident from the facts, an explanation of how the conduct is tied to New Hampshire or the respective county attorney's jurisdiction.³⁴⁴

2. Form Of Approval Or Denial Of Applications

The Attorney General or authorized delegate reviewing the application shall approve the application if:

- The information provided establishes reasonable grounds to believe that the service being furnished by the communications common carrier to the targeted person or location identified in the application has been, is being, or may be used for an unlawful purpose; and
- The information being sought from the communications common carrier falls within one or more of the categories designated in RSA 7:6-b, I(a)-(f).³⁴⁵

³⁴⁴ *N.H. Code Admin. R.*, Jus 1506.03.

³⁴⁵ *N.H. Code Admin. R.*, Jus 1507.03(a).

If an application is approved, the authorized person shall complete a memorandum of approval, prior to the issuance of a demand letter. The memorandum shall contain the following:

- The applicant's name;
- The name and address of the law enforcement agency with whom the applicant is employed;
- The date of the application;
- The alleged unlawful conduct under investigation;
- The telephone number, screen name, subscriber name, or other subscriber identifier for the service about which information is being sought;
- The name, address, telephone, and fax number of the communications common carrier from whom information is being sought;
- The specific information sought from the communications common carrier, limited to the following, which is reasonably related to the investigation of the alleged unlawful conduct:
 - The names and addresses of persons to whom stated listed or unlisted telephone numbers are assigned;
 - The names and addresses of persons to whom any stated or identified services are provided;
 - Any local and long distance billing records for any subscriber to, or customer of, telephone service or wireless telephone service as defined in RSA 638:21, XI;
 - The length of service provided to a subscriber or customer by the communications common carrier;
 - The types of services provided to the subscriber or customer by the communications common carrier; and
 - The telephone number or other subscriber number or identity;
- The factual basis for the authorized person's reasonable grounds for belief that the service being furnished by the communications common carrier to the targeted person or location has been, is being, or may be used for an unlawful purpose; and
- The authorized person's signature.³⁴⁶

³⁴⁶ *N.H. Code Admin. R.*, Jus 1507.03(b).

Conversely, an application must be denied if the authorized person determines that:

- The information being sought from the communications common carrier does not fall within any of the categories designated in RSA 7:6-b, I, (a)-(f); or
- The information contained in the application does not establish reasonable grounds to believe that the service being furnished by the communications common carrier to the targeted person or location identified in the application has been, is being, or may be used for an unlawful purpose.³⁴⁷

If the application is denied, the Attorney General, or authorized delegate, shall notify the applicant—either orally or by facsimile, letter, or e-mail—and explain the basis for the denial. If the notification is done orally, the Attorney General, or authorized delegate, shall also document the denial and the basis thereof, either by notation on the written application or in a separate memorandum.³⁴⁸

C. The Types Of Information That Can Be Obtained With An RSA 7:6-b Administrative Subpoena

Pursuant to RSA 7:6-b, I, the information that can be obtained with an RSA 7:6-b administrative subpoena is limited to the following:

- The names and address of persons to whom stated listed or unlisted telephone numbers are assigned;
- The names and addresses of persons to whom any stated or identified services are provided;
- Any local and long distance billing records for any subscriber to, or customer of, telephone service or wireless telephone service as defined in RSA 638:21, XI;
- The length of service provided to a subscriber or customer by the communications common carrier;
- The types of services provided to the subscriber or customer by the communications common carrier; and

³⁴⁷ *N.H. Code Admin R.*, Jus 1507.02(a).

³⁴⁸ *N.H. Code Admin. R.*, Jus 1507.02(b).

- The telephone number of other subscriber number or identity.³⁴⁹

D. Information That Cannot Be Obtained With An RSA 7:6-b Administrative Subpoena

The following information *cannot* be obtained with an RSA 7:6-b administrative subpoena, but can instead be obtained only by search warrant, grand jury subpoena, or court order:

- Log on/off dates and times;
- Web sites visited;
- Names, subscriber information for those who sent e-mail to the targeted person;
- Names, subscriber information for those to whom the targeted person sent e-mail;
- The content of any e-mail or other communications; and
- Any information for a telephone number, e-mail address, or other subscriber service where there is not reasonable suspicion that the service is, or will be used to engage in criminal activity.

E. Issuance Of Written Demand To The Communications Common Carrier

Once approval of the RSA 7:6-b administrative subpoena has been obtained, written demand must be issued to the communications common carrier for the information sought.³⁵⁰ The written demand shall be issued either on the letterhead of the Attorney General's Office or the letterhead of the county attorney's office.³⁵¹ The written demand must contain a statement indicating that the person making the written demand is authorized to do so, either pursuant to a delegation of authority by the Attorney General or the county attorney.³⁵²

³⁴⁹ RSA 7:6-b, I(a)-(f) (2013).

³⁵⁰ RSA 7:6-b, I (2013).

³⁵¹ *N.H. Code Admin. R.*, Jus 1508.01, *N.H. Code Admin. R.*, Jus 1508.02.

³⁵² *N.H. Code Admin. R.*, Jus 1508.03(a).

In addition, the written demand must include:

- A statement that the person making the written demand has reasonable grounds for belief that the service being furnished to the targeted person or location by the communications common carrier has been, is being, or may be used for an unlawful purpose;
- A list of the specific information being sought from the communications common carrier, as designated in RSA 7:6-b, I(a)-(f);
- A statement indicating that the written demand shall constitute an administrative subpoena for purposes of determining compliance with federal law; and
- A statement indicating to whom the requested information shall be provided and the requested format in which the information shall be furnished.³⁵³

The written demand must then be transmitted to the communications common carrier either:

- In person;
- By first class mail;
- By fax; or
- By other electronic means.³⁵⁴

F. Record Keeping Requirements

The records associated with RSA 7:6-b administrative subpoenas are required to be kept in either electronic or paper format for a period of 10 years either by the Attorney General or the issuing county attorney's office.³⁵⁵ The records shall include:

- A register of the assistant attorneys general to whom the attorney general has designated authority and/or a register of assistant county attorneys to whom the county attorney has delegated authority;
- A copy of each application for written demand submitted to the respective offices;

³⁵³ *N.H. Code Admin. R.*, Jus 1508.03(b)-(e).

³⁵⁴ *N.H. Code Admin. R.*, Jus 1508.04.

³⁵⁵ *N.H. Code Admin. R.*, Jus 1509.01, 1509.02.

- Each written memorandum of denial or approval; and
- A copy of each demand letter issued by the Attorney General or county attorney.³⁵⁶

³⁵⁶ *N.H. Code Admin. R.*, Jus 1509.01.

IX. THE LAW REGARDING ON-THE-STREET ENCOUNTERS AND INVESTIGATIVE DETENTIONS

A. Introduction

Police interactions with the public can range from a casual conversation to a full-blown arrest. An officer's constitutional obligations and authority will vary, depending on the nature of the interaction. In general, the more intrusive the encounter, the greater the level of suspicion required to justify the officer's action and the greater the constitutional protections afforded to the individual. This chapter discusses the limitations on a police officer's authority during an "on-the-street" encounter with a member of the public and during a temporary seizure, commonly known as a *Terry*³⁵⁷ stop or an investigative stop.

B. The Initial Encounter

The constitutional protections against unreasonable seizures do not come into play until a person is "seized" in the constitutional sense. "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons."³⁵⁸ Law enforcement officers, like any other person, are free to approach members of the public and engage them in conversation. An officer does not seize a person "by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer questions, [or] by putting questions to him if the person is willing to listen."³⁵⁹ The officer may request to examine an individual's identification or may ask for consent to search the individual or the individual's belongings without legally seizing the suspect, provided the police do not in any way convey a message that the person must comply with their request. "[S]o long

³⁵⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁵⁸ *State v. Sullivan*, 157 N.H. 124, 130 (2008) (quoting *State v. Cote*, 129 N.H. 358, 364 (1987)).

³⁵⁹ *State v. Riley*, 126 N.H. 257, 263 (1985) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)).

as a reasonable person would feel free to disregard the police and go about his business,” no seizure has occurred.³⁶⁰

C. When An Encounter Constitutes A Seizure

Whenever an encounter between the police and a member of the public rises to the level of a seizure, constitutional protections are triggered. The nature of the seizure will determine what constitutional rights are implicated. For example, the level of suspicion required to justify the police action will hinge upon whether the seizure is temporary or constitutes full-blown custody. Thus, it is important for police officers to understand when, and to what degree, a person has been seized.

For constitutional purposes, a seizure occurs when a reasonable person, facing the same circumstances, would not feel free to ignore the law enforcement officer’s questions and leave.³⁶¹ This happens when an officer, by means of a show of authority or the use of physical force, in some way restrains the liberty of a person.³⁶²

1. Factors Relevant In Determining Whether A Person Has Been Seized

When deciding whether a person has been seized, officers need to look at the totality of the surrounding circumstances, including:

- Whether officers told the person that he or she were free to leave;
- Whether officers were in plainclothes or in uniform;
- Whether officers displayed their weapons or badges;
- Whether the police touched the person or restrained the person in any way, or made any show of force;
- The number of officers present;
- Whether the officers used their blue lights or siren;

³⁶⁰ *State v. Beauchesne*, 151 N.H. 803, 809 (2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

³⁶¹ *State v. Beauchesne*, 151 N.H. 803, 810 (2005); *State v. Riley*, 126 N.H. 257, 262 (1985).

³⁶² *State v. Cote*, 129 N.H. 358, 364 (1987).

- The character and tone of the conversation between the person and the officers;
- The time of day when the stop occurred;
- The location of the stop and the person’s familiarity with that location;
- Whether other people were in the area;
- The duration of the stop,³⁶³ and
- The race of the officers and the person.³⁶⁴

If, in light of the circumstances, a reasonable person would not have felt free to leave the encounter, then the person has been seized for constitutional purposes.

New Hampshire courts have taken a broad view when determining the point at which an encounter between a law enforcement officer and a member of the public turns into a seizure. A seizure can occur in the absence of any display of weapons, physical contact with the person, or physical restraint of the person, if the words used by an officer convey the message that the person is not free to leave.³⁶⁵ For instance, the New Hampshire Supreme Court found that a man had been seized by the police, and thus, entitled to constitutional protection when, at 1:15 a.m., the police called out to him, “Hey, you, stop,” as he was walking along the street and, when the man did not respond, the officer called out, “Hey, I want to speak to you.” The Court reasoned that at that time of night, on a deserted street, no reasonable person would have felt free to ignore the police and walk away.³⁶⁶

³⁶³ *State v. McKenna*, 166 N.H. 671, 677–85 (2014) (detailing several of the considerations).

³⁶⁴ *State v. Jones*, 172 N.H. 774, 780 (2020) (“[W]e observe that race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis.”); *see also State v. Hight*, 146 N.H. 746, 750-51 (2001) (considering races of Caucasian police officer and African-American suspect in deciding whether State purged taint of an unlawful detention followed by consent to search).

³⁶⁵ *State v. Quezada*, 141 N.H. 258, 260 (1996); *see also State v. Sullivan*, 157 N.H. 124, 130 (2008) (distinguishing *Quezada*).

³⁶⁶ *State v. Quezada*, 141 N.H. 258, 260 (1996); *see also State v. Sullivan*, 157 N.H. 124, 130-31 (2008) (emphasizing the importance of the “police communications” in determining a seizure).

2. Submission Is Not Necessary For A Seizure To Occur

Unlike the United States Supreme Court and many state courts, New Hampshire does not require that a person submit to a law enforcement officer's show of authority or use of physical force in order for a constitutional seizure to occur.³⁶⁷ If the officer's actions would lead a reasonable person to believe that they were not free to leave, a seizure has occurred, regardless of whether the person being targeted actually submitted to the officer's authority. Thus, for example, a person who runs away from an identified police officer who has ordered him to stop may have effectively been seized for constitutional purposes, regardless of the fact that the person did not comply with the officer's order.

D. Investigative Or *Terry* Stops

An investigative stop, commonly known as a *Terry* stop, is a temporary seizure of limited scope, designed to allow an officer to confirm or dispel a reasonable and articulable suspicion that the targeted person is involved in illegal activity.³⁶⁸

1. An Investigative Stop Must Be Supported By Reasonable Suspicion

To make a lawful investigative stop, an officer must have a reasonable suspicion that the person being stopped has been, is, or is about to be engaged in illegal activity.³⁶⁹ It is not enough that an officer has a general sense or a hunch that someone is doing something wrong.³⁷⁰ The officer must be able to point to specific facts and reasonable inferences drawn from those facts to support a significant possibility of specific wrongdoing.

³⁶⁷ Compare *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (holding that a seizure does not occur until a suspect yields to police authority), with *State v. Beauchesne*, 151 N.H. 803, 812-13 (2005) (focusing the analysis on police conduct rather than a suspect's actions).

³⁶⁸ *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *State v. Beauchesne*, 151 N.H. 803, 809 (2005).

³⁶⁹ *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *State v. Wiggin*, 151 N.H. 305, 308 (2004); *State v. Maya*, 126 N.H. 590, 595 (1985).

³⁷⁰ *State v. Pepin*, 155 N.H. 364, 366 (2007).

However, it is not necessary that the information rise to the level of probable cause.³⁷¹ Nor is it necessary that the officer rule out all innocent explanations for the suspicious conduct before making the stop. The purpose of an investigative stop is to confirm or dispel the officer's suspicion.³⁷²

If a defendant challenges the factual basis for an investigative stop, the reviewing court will look at all the facts articulated by the police officer to determine whether the stop was supported by reasonable suspicion.³⁷³ Therefore, police officers should be careful to document in their reports all the facts that gave rise to their suspicion that the defendant was engaged in a violation of the law.

2. General Factors That May Support Reasonable Suspicion To Justify A Terry Stop

Whether a *Terry* stop was supported by reasonable suspicion is highly dependent upon the facts. Every case is unique. It is possible, for instance, that a law enforcement officer might see a person running down the street covered with blood. Those facts, standing alone, would justify an investigative stop. In general, police officers should consider the suspect's behavior in the context of the surrounding circumstances to determine whether it may be indicative of involvement in criminal activity.

Factors that are commonly relied upon include the following:

- Time of day;
- The presence or absence of furtive behavior; and
- Character of the area where the officer makes the observations.³⁷⁴

³⁷¹ *State v. Galgay*, 145 N.H. 100, 103 (2000).

³⁷² *See State v. Galgay*, 145 N.H. 100, 103 (2000).

³⁷³ *State v. Wiggin*, 151 N.H. 305, 308 (2004).

³⁷⁴ *See State v. Roach*, 141 N.H. 64, 66 (1996) (suspect's location in Manchester's "combat zone" contributed to his reasonable suspicion).

For example, an officer may consider that a particular neighborhood is known to house drug traffickers or that vehicle traffic around businesses in very early morning hours may be more suspicious than vehicle traffic in a residential neighborhood.

Although each of these factors may be relevant, none of them is necessarily indicative of criminal activity. While an officer may consider the character of an area with respect to the specific type of offense under investigation, the officer should not base his or her suspicion on the fact that an area is simply impoverished or has a higher crime rate in general than other areas.

Similarly, although a person's reaction upon seeing the police may contribute to an officer's suspicions, innocent citizens may also attempt to avoid contact with or observation by the police. Finally, although it might be appropriate for an officer's suspicions to be aroused when a suspect's attire, demeanor, or behavior does not seem to "fit" the area, a suspect's race, ethnicity, or gender, standing alone, may not be considered as a factor.³⁷⁵ See Chapter II, Implicit Bias.

3. Specific Factors That May Support Reasonable Suspicion To Justify A Terry Stop

The following are some factors that New Hampshire courts have specifically recognized as permissible types of information upon which reasonable suspicion can be based:

a. The Officer's Personal Knowledge And Observations

An officer's personal knowledge and observations can serve as the basis for reasonable suspicion. For example, an officer who, while patrolling in plain clothes, sees a group of individuals conferring with each other, and sees them individually walk up and

³⁷⁵ See *Commonwealth v. Grinkley*, 688 N.E.2d 458, 463 (Mass. App. Ct. 1997) ("Unparticularized racial descriptions, devoid of distinctive or individualized physical details—even were they of a certain person and not, as here, of an entire group—cannot by themselves provide police with adequate justification for stopping an individual member of the identified race who happens to be in the general area described by the informant.").

down the street to look into a store window multiple times each before they confer with each other some more, has reasonable suspicion that those individuals may be planning a crime.³⁷⁶ Note, however, that personal observations can be relied upon only if the officer was lawfully in the place from which the observations could be made.³⁷⁷

b. The Officer's Training And Experience

In determining whether there is justification to conduct a *Terry* stop, officers are permitted to rely on their experience and training, and to draw inferences from the circumstances that might not be apparent to an untrained civilian. For example, while a civilian might not be aware of increased burglary reports in a particular neighborhood, an officer who sees a heavily laden vehicle drive away from a residence at high speed could consider that information to infer that the vehicle's presence raised concern.³⁷⁸

c. Information Obtained From Other Law Enforcement Personnel

“[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and . . . officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.”³⁷⁹ For that reason, police officers are permitted “to rely on information from a fellow officer”³⁸⁰ or a police “flyer or bulletin.”³⁸¹ “An officer who receives a flyer or radio dispatch may take it at face value and act upon it

³⁷⁶ *Terry v. Ohio*, 392 U.S. 1, 5-6, 22-23 (1968).

³⁷⁷ See *Texas v. Gonzalez*, 388 F.2d 145, 147 (5th Cir. 1968) (an arrest was invalid when the police trespassed onto the defendant's property and then observed suspicious conduct through the defendant's windows).

³⁷⁸ *United States v. Anderson*, 923 F.2d 450, 455 (6th Cir. 1991).

³⁷⁹ *United States v. Hensley*, 469 U.S. 221, 231 (1985) (quoting *United States v. Robinson*, 536 F.2d 1298, 1299 (9th Cir. 1976)).

³⁸⁰ *State v. Carroll*, 131 N.H. 179, 189 (1988).

³⁸¹ *United States v. Hensley*, 469 U.S. 221, 232-33 (1985).

forthwith.”³⁸² The officer need not have independent grounds for suspecting criminal activity, but may rely upon the information in the bulletin.

In other words, an officer with articulable suspicion may transfer that articulable suspicion to another officer, who can then act upon it. Likewise, one officer’s observations or information can be transferred to, and supplemented by, another officer in order to develop articulable suspicion. This concept is commonly known as “imputed knowledge of the police.”

“Assuming the police make a *Terry* stop in objective reliance on a flyer or bulletin, . . . the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop.”³⁸³

d. Information Obtained Through Eyewitnesses

Police officers can “reasonably rely on information provided by an eyewitness.”³⁸⁴ “Absent some indication that the witness may not be telling the truth, such as the clear presence of bias, the police are not obligated to inquire into or to demonstrate the witness’ credibility.”³⁸⁵ If an eyewitness to a crime reports face-to-face what the eyewitness has seen, the police do not need to learn the identity of the eyewitness in order act upon the information, because the eyewitness is considered “identifiable.”³⁸⁶

³⁸² *State v. Case*, 884 P.2d 1274, 1277 n.5 (Utah Ct. App. 1994); see also *United States v. Hensley*, 469 U.S. 221, 232-33 (1985); *State v. Salato*, 47 P.3d 763, 768 (Idaho Ct. App. 2001).

³⁸³ *United States v. Hensley*, 469 U.S. 221, 233 (1985).

³⁸⁴ *Welch v. Dir., N.H. Div. of Motor Vehicles*, 140 N.H. 6, 8 (1995) (citing *State v. Corey*, 127 N.H. 56, 59 (1985)).

³⁸⁵ *State v. Corey*, 127 N.H. 56, 59 (1985).

³⁸⁶ *State v. Gowen*, 150 N.H. 286, 288 (2003).

e. Information Obtained Through Confidential Informants And Anonymous Tips

It is permissible for law enforcement to rely upon information provided by confidential informants and anonymous tipsters as the basis for investigative stops.³⁸⁷ The reasonableness of the officer's action will depend, in large part, upon the reliability and credibility of the person providing the information. Because the police typically know the identity of a confidential informant, and can thus, hold the informant accountable if the information proves to be false, an informant is viewed as more credible than an anonymous tipster.

Nonetheless, if an officer relies upon information from a known informant as justification for an investigative stop, the officer should take care to document in a report any information relating to that informant's track record with the police, the degree to which the informant's tip could be corroborated, the basis of the informant's knowledge, and any other factors that demonstrate the informant's reliability and credibility. If the investigative stop is later challenged, a reviewing court can take that information into account in evaluating whether the stop was justified.

Anonymous tips—tips given by people who fail or refuse to identify themselves—can be problematic. “Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.”³⁸⁸ Therefore, before officers conduct an investigative stop based upon an anonymous tip, they should assess whether, given the nature of the tip and the surrounding circumstances, there is a basis to conclude that the tip is reliable and credible.

³⁸⁷ *State v. Melanson*, 140 N.H. 199, 201-02 (1999).

³⁸⁸ *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (quotation and citation omitted); *see also State v. Kennison*, 134 N.H. 243, 246-48 (1991).

There are a number of factors that officers can consider in making that assessment:

- Whether the tip was based on the anonymous tipster's personal observations, rather than third-hand reports;
- Whether the information was of a type not readily available to the public;
- Whether the anonymous tipster was providing information about an ongoing event;
- Whether the tip includes a level of intimate detail that reasonably implies first-hand knowledge;
- Whether the anonymous tipster was predicting future events, suggesting they were privy to the target's private affairs;³⁸⁹
- Whether the tip provides "an explicit and detailed description of alleged wrongdoing, [which] is entitled to greater weight than a general assertion of criminal activity";³⁹⁰
- Whether the police are able to corroborate portions of the tip; and
- Whether the police have independent information that the person implicated by the tip has been engaged in recent criminal conduct.³⁹¹

f. Information Obtained Through Anonymous Reports Of Driving While Intoxicated Or Reckless Operation

Officers are frequently called upon to act upon anonymous reports of erratic motor vehicle operation or drunk driving. It is permissible to conduct a vehicle stop based upon such an anonymous tip, provided there is reasonable suspicion to justify the stop. Courts will look at the following factors to determine if the officer had reasonable suspicion to justify the stop:³⁹²

- Whether there was sufficient information such as the vehicle's make, model, license plate number, location, and direction to ensure that the vehicle was the one that the tipster identified;
- The amount of time between receiving the tip and locating the vehicle;

³⁸⁹ See *State v. Christy*, 138 N.H. 352, 357 (1994).

³⁹⁰ *State v. Conant*, 139 N.H. 728, 731 (1995).

³⁹¹ See *State v. Conant*, 139 N.H. 728, 731 (1995).

³⁹² *State v. Sousa*, 151 N.H. 297, 302-04 (2004).

- Whether the tip was based upon contemporaneous eyewitness observations;
- Whether the tip was sufficiently detailed to permit the reasonable inference that the tipster actually witnessed an ongoing motor vehicle offense; and
- Whether, and to what extent, the information of erratic operation was corroborated by an officer's personal observations.

g. Other Third-Hand Information

Information obtained third-hand can be the basis for reasonable suspicion. The officer must look at the original source of the information and make a determination, based upon the factors listed above, whether, under the totality of the circumstances, the information appears reliable. For example, the officer needs to consider whether the source of the information is anonymous or identified, whether the person conveying the information is credible, and whether any of the information has been corroborated.³⁹³

E. Permissible Law Enforcement Activities During An Investigative Stop

The purpose of an investigative stop is to confirm or dispel the officer's suspicion of criminal activity. The stop must be carefully limited to that purpose and must last no longer than is necessary to serve that purpose.³⁹⁴ If the officer exceeds the permissible scope of an investigative stop, any evidence obtained as a result will be suppressed at trial.³⁹⁵

³⁹³ See *Draper v. United States*, 358 U.S. 307, 311-13 (1959).

³⁹⁴ *State v. Morrill*, 169 N.H. 709, 715 (2017).

³⁹⁵ *State v. Morrill*, 169 N.H. 709, 717 (2017).

1. Pat-Down Search

An officer can conduct a pat-down search or “frisk” of a person’s outer clothing for weapons if the officer “reasonably believes that he might be in danger if such person possessed a dangerous weapon.”³⁹⁶ The purpose of a protective frisk is not to search for evidence of crime, but to allow the officer to conduct the stop without fear of violence.³⁹⁷ The search cannot extend beyond what is minimally necessary to discover the presence of a weapon.³⁹⁸ If it extends beyond that, it is no longer valid and any evidence obtained as a result will be suppressed.³⁹⁹

Officers should consider the following factors when determining whether to frisk a suspect for weapons:

- Observation of bulges in the suspect’s clothing;
- Observation of an object that might be a weapon;
- Extreme nervousness, hostile or furtive behavior;
- Otherwise inexplicable sudden movement towards a pocket or other place where a weapon could be concealed;
- Awareness that the suspect has been armed in the past;
- Reliable information that the suspect is armed; and
- Any reason causing a police officer to reasonably believe that they are in danger.

³⁹⁶ RSA 594:3 (2001); *see also State v. Roach*, 141 N.H. 64, 66-67 (1996) (“Our cases allowing investigatory stops based on reasonable suspicion are intended to allow a limited intrusion for a limited purpose, and to permit a pat-down for weapons if there is a reasonable risk of danger to the officer while undertaking that limited investigation.”).

³⁹⁷ *State v. Broadus*, 167 N.H. 307, 310-11 (2015); *State v. Roach*, 141 N.H. 64, 67 (1996).

³⁹⁸ *See State v. Broadus*, 167 N.H. 307, 310 (2015); *State v. Roach*, 141 N.H. 64, 67 (1996).

³⁹⁹ *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (citing *Sibron v. New York*, 392 U.S. 40, 65-66 (1968)) (“If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.”).

2. Questioning The Person

Officers are permitted to ask a detainee a “moderate number of questions to determine [the detainee’s] identity and to try to obtain information confirming or dispelling the officer’s suspicions.”⁴⁰⁰ If, during the course of the stop, additional information comes to light that creates a reasonable suspicion of other criminal activity, the officer can expand the scope of questioning to address those concerns.⁴⁰¹ Officers must be careful, however, not to move beyond the focused questions to a more generalized inquiry. The courts have not set an outer limit on the duration of a detention, so long as the investigation is continuing and the officer’s suspicions have not been dispelled.

An officer’s questioning should be guided by the following considerations:

- Is the question reasonably related to the initial justification for the stop?
- If the answer is no, is there a reasonable, articulable suspicion that would justify the question?
- In the absence of a reasonable connection to the purpose of the stop or a reasonable, articulable suspicion, in light of all the circumstances, will the question impermissibly prolong the detention or change its fundamental nature?⁴⁰²

3. Searching The Interior Of A Motor Vehicle

New Hampshire has recognized a limited motor vehicle exception to the warrant requirement.⁴⁰³ This limited motor vehicle exception allows an officer, without a warrant, to enter an automobile when:

⁴⁰⁰ *State v Turmel*, 150 N.H. 377, 383 (2003); *see also* RSA 594:2 (2001) (amended 2019) (authorizing detentions based upon an officer’s reasonable suspicion).

⁴⁰¹ *State v. Morrill*, 169 N.H. 709, 715 (2017) (“The scope of a stop may be expanded to investigate other suspected illegal activity only if the officer has a reasonable and articulable suspicion that other criminal activity is afoot.” (Quotation omitted)).

⁴⁰² *State v. McKinnon-Andrews*, 151 N.H. 19, 25-26 (2004).

⁴⁰³ *State v. Cora*, 170 N.H. 186, 196-97 (2017).

- The officer has stopped the motor vehicle “in transit” pursuant to a lawful stop; and
- The officer has probable cause to believe that a plainly visible item in the vehicle is contraband.⁴⁰⁴

When those two conditions are met, an officer may enter the vehicle to seize the plainly visible contraband without a warrant.⁴⁰⁵

It is not uncommon for officers to request consent to search a vehicle during the course of a motor vehicle stop. If such a request is inconsistent with the initial justification for the stop, and no further information has been developed that would support such a request, any evidence obtained during the course of the consensual search could be suppressed.⁴⁰⁶ In other words, the fact that a driver has given consent to search a vehicle will not protect evidence from suppression if the officer requesting consent did not have reasonable and articulable suspicion to justify the request.

In determining whether a request for consent to search a vehicle is appropriate, an officer must understand that the scope of an investigative stop is limited by the underlying justification for the stop. An officer may use the stop to confirm or dispel the officer’s suspicions that prompted the stop, but may not detain an individual longer than necessary to confirm or dispel those suspicions.⁴⁰⁷ For example, if an officer stops an individual who is speeding, then the stop’s scope is limited to allowing the officer to confirm or dispel suspicions related to the driver’s speeding.

This does not mean, however, that the officer cannot develop reasonable suspicion that other crimes have occurred, and then expand the scope of the stop to confirm or dispel

⁴⁰⁴ *State v. Cora*, 170 N.H. 186, 196 (2017); *see also State v. Glavan*, 171 N.H. 457, 460 (2018) (discussing the “in transit” factor).

⁴⁰⁵ For more discussion on New Hampshire’s motor vehicle exception to the search warrant requirement *see* pages 101-03 (Automobiles section).

⁴⁰⁶ *State v. Morrill*, 169 N.H. 709, 715 (2017); *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014); *State v. McKinnon-Andrews*, 151 N.H. 19, 25 (2004); *State v. Hight*, 146 N.H. 746, 748 (2001).

⁴⁰⁷ *State v. Morrill*, 169 N.H. 709, 715 (2017); *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014).

those suspicions.⁴⁰⁸ Using the speeding example, if, while questioning the driver about the speeding, the officer sees scales, large amounts of cash, corner baggies, and other signs of drug distribution, then the officer may develop reasonable suspicion that the driver is selling drugs and may be justified in requesting consent to search the car.

However, if all the officer sees is a family traveling together, then the officer likely does not have justification to request consent to search the car for evidence of drug distribution.⁴⁰⁹ Thus, it is important for officers to document in their reports any information they developed in the course of a stop that established a reasonable and articulable suspicion to justify the request for consent.

4. Seizing Contraband Or Incriminating Evidence

If a law enforcement officer, while lawfully conducting an investigative stop discovers contraband in plain view, the officer may seize it.⁴¹⁰ Similarly, if during the course of a lawful frisk of a person, a law enforcement officer feels an object and immediately, without manipulating it, recognizes it as contraband, the office may seize it.⁴¹¹

⁴⁰⁸ *State v. Morrill*, 169 N.H. 709, 715 (2017) (“The scope of a stop may be expanded to investigate other suspected illegal activity only if the officer has a reasonable and articulable suspicion that other criminal activity is afoot.”).

⁴⁰⁹ *See State v. Morrill*, 169 N.H. 709, 716-17 (2017).

⁴¹⁰ *Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993) (“Regardless of whether the officer detects the contraband by sight or by touch, . . . the Fourth Amendment’s requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.”); *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (“During a lawful *Terry*-type search, police officers may seize an object in ‘plain view’ without a warrant if they have probable cause to believe it is contraband without conducting some further search of the object, *i.e.*, if its incriminating character is ‘immediately apparent.’”); *see also State v. Cora*, 170 N.H. 186, 196 (2017) (on seizing contraband in plain view during motor vehicle stops).

⁴¹¹ *Minnesota v. Dickerson*, 508 U.S. 366, 377 (1993).

5. Requesting Identification

During a *Terry* stop, an officer may ask the person to provide their name, address, destination, and business.⁴¹² However, in situations other than motor vehicle stops, the person has no obligation to respond.⁴¹³ An officer may not arrest the person solely because that person refused to provide the requested information.⁴¹⁴

Automobile drivers must provide law enforcement officers with their driver's license,⁴¹⁵ name, address, date of birth, and name and address of the owner of the vehicle, if requested.⁴¹⁶ Failure to comply with such a request would be grounds for arrest.⁴¹⁷

6. Use Of Force

An officer may use reasonable and necessary non-deadly force when detaining a suspect.⁴¹⁸ However, the use of force is a factor that the court will consider when determining whether the seizure was merely an investigative stop or whether the detention reached the level of intrusiveness of an arrest.⁴¹⁹

7. *Miranda* Warnings And Custodial Interrogations

Because a person is not necessarily in police "custody" during an investigative stop, an officer has no obligation to inform the person of the *Miranda* rights.⁴²⁰ However,

⁴¹² RSA 594:2 (Supp. 2019).

⁴¹³ *State v. Webber*, 141 N.H. 817, 819-20 (1997).

⁴¹⁴ RSA 594:2 (Supp. 2019).

⁴¹⁵ RSA 265:4, I(f) (2014).

⁴¹⁶ RSA 265:4, I(a) (2014); *see also State v. Robbins*, 170 N.H. 292, 298 (2017) (citing officer safety as a basis for asking for identification and conducting warrant checks).

⁴¹⁷ RSA 265:4, II (2014); RSA 594:10 (2001).

⁴¹⁸ RSA 594:4 (2001); RSA 627:5, I (2016).

⁴¹⁹ *State v. Gay*, 169 N.H. 232, 244 (2016) (considering the use of force to determine whether a suspect was in custody); *State v. McKenna*, 166 N.H. 671, 693 (2014) (*Lynn, J.*, dissenting) (same); *see also United States v. McCarthy*, 77 F.3d 522, 530 (1st Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997).

⁴²⁰ *See Terry v. Ohio*, 392 U.S. 1, 20-29 (1968); *State v. Turmel*, 150 N.H. 377, 383 (2003).

because investigative stops can “metamorphose into an overly prolonged or intrusive detention (and, thus, become unlawful)”⁴²¹ or “evolve over time into custodial questioning,”⁴²² it is good practice to inform suspects of their *Miranda* rights if there is a reasonable possibility that the detention might later be considered by a court to have transformed into a custodial arrest.

In determining whether a detention falls into the realm of an investigatory stop—where *Miranda* warnings are unnecessary—or that of a custodial interrogation—where *Miranda* warnings are necessary—courts will scrutinize the facts of the stop and consider such factors as:

- Whether the defendant was physically restrained;
- Whether the officer was diligent in addressing the purpose of the stop;
- Whether the stop was unnecessarily lengthy;
- Whether the defendant was told he or she was free to leave or that he or she was not under arrest;
- Whether any officer present displayed a weapon;
- Whether the defendant was frisked;
- Whether the defendant was familiar with location of the detention; and
- The number of officers that were in the defendant’s immediate vicinity.⁴²³

Each investigative stop, however, must be handled on a case-by-case basis, and officers must use their discretion to determine whether to advise a suspect of the suspect’s *Miranda* rights.

⁴²¹ *United States v. Lee*, 317 F.3d 26, 31 (1st Cir. 2003), *cert. denied*, 538 U.S. 1048 (2003); *see also State v. McKenna*, 166 N.H. 671, 677 (2014) (“What may begin as noncustodial questioning may evolve over time into custodial questioning.”).

⁴²² *State v. McKenna*, 166 N.H. 671, 677 (2014).

⁴²³ *In re E.G.*, 171 N.H. 223, 232-38 (2018); *State v. Gay*, 169 N.H. 232, 243-44 (2016) (citing *State v. Turmel*, 150 N.H. 377, 384-85 (2003)); *State v. McKenna*, 166 N.H. 671, 677-78 (2014); *State v. Jennings*, 155 N.H. 768, 772 (2007).

Although the result is generally the same—the suppression of evidence—the question of whether an investigatory stop has transformed into a custodial interrogation differs from the question of whether an officer has unlawfully expanded the scope of an investigatory stop.⁴²⁴

8. Asking Occupants To Step Out Of The Vehicle

Police officers are permitted to ask the driver of a motor vehicle to step out of the vehicle following an investigative stop.⁴²⁵ Although the New Hampshire Supreme Court has not directly addressed the issue, the United States Supreme Court has held that it is also permissible for an officer to ask the passengers of a vehicle to step out of the vehicle, as a matter of officer safety.⁴²⁶

9. Canine Sniffs

Unlike under the United States Constitution, a canine sniff is considered a search under the New Hampshire Constitution.⁴²⁷ However, because it is less intrusive than a typical search, the New Hampshire Supreme Court has held that a canine search of the exterior of a motor vehicle during an investigative stop need not be supported by probable cause.⁴²⁸ Rather, it is permissible if the following conditions are met:

⁴²⁴ See pages 145-46 (Unlawful Expansion Of An Investigatory Stop section).

⁴²⁵ *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977); *State v. Turmel*, 150 N.H. 377, 383 (2003) (citing *State v. Hamel*, 123 N.H. 670, 676 (1983)). *But see State v. Morrill*, 169 N.H. 709, 716 (2017) (identifying the officer’s request that the defendant “step out of the vehicle as the relevant point of expansion of the stop”).

⁴²⁶ *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997). The New Hampshire Supreme Court has considered officer safety as a justification for asking a person detained during a motor vehicle stop for identification and conducting warrant checks, *State v. Robbins*, 170 N.H. 292, 298 (2017), but has not yet considered whether officer safety justifies ordering a detained person out of a motor vehicle.

⁴²⁷ *State v. Pellici*, 133 N.H. 523, 534 (1990) (plurality opinion).

⁴²⁸ *State v. Pellici*, 133 N.H. 523, 534 (1990).

- The investigative stop is properly based upon reasonable suspicion;
- The use of the dog does not increase the time necessary for the moderate questioning allowed for investigative stops; and
- The use of the canine itself is based on a reasonable and articulable suspicion that the motor vehicle contains controlled substances.⁴²⁹

The Court has not had an opportunity to decide whether a canine sniff, conducted independent of a motor vehicle stop, is reasonable if supported by reasonable suspicion.

F. Unlawful Expansion Of An Investigative Stop

The purpose of an investigative stop is to allow police officers to confirm or dispel their suspicions of criminal activity. “The scope of such an investigative stop must be carefully tailored to its underlying justification, must be temporary, and last no longer than is necessary to effectuate the purpose of the stop.”⁴³⁰ If the officer is able to determine that the initial suspicion justifying a stop was unfounded, the stop must end at that point. An officer cannot expand the scope of a stop to investigate other suspected illegal activity, unless the officer has developed reasonable suspicion to believe that other illegal activity is afoot.⁴³¹

If an investigative stop exceeds its permissible scope, it becomes an illegal detention. Any evidence obtained as a result will likely be suppressed, unless the State can prove that there was probable cause to support the person’s arrest or, for example, in the context of a consent search, that the consent was not obtained through exploitation of an unlawfully expanded detention.⁴³²

⁴²⁹ *State v. Pellici*, 133 N.H. 523, 534-35 (1990).

⁴³⁰ *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014) (quotation and brackets omitted).

⁴³¹ *State v. Blesdell-Moore*, 166 N.H. 183, 187 (2014); *State v. Hight*, 146 N.H. 746, 748-49 (2001); *State v. Noel*, 137 N.H. 384, 389-90 (1993).

⁴³² *State v. Morrill*, 169 N.H. 709, 717 (2017).

To determine whether the scope of an otherwise valid stop has been exceeded by the officer's questioning, the court will ask whether:

- The question was reasonably related to the initial justification for the stop;
- The officer had a reasonable, articulable suspicion to justify the questions; and
- In light of all the circumstances, the question impermissibly prolonged the detention or changes its fundamental nature.⁴³³

Therefore, to avoid unlawfully expanding the scope of a stop, an officer's questions must either be reasonably related to the purpose of the stop or be supported by a reasonable suspicion that another offense has been detected. If either of these has occurred, then no unlawful expansion has occurred. If neither of these has occurred, then the court will consider, in light of all the circumstances and common sense, whether the question impermissibly prolonged the stop or changed its fundamental nature. If the court concludes that the question was not justified *and* prolonged the stop or changed its fundamental nature, then the officer has unlawfully expanded the scope of the stop.⁴³⁴ For that reason, officers should make every effort to minimize the length of investigative stops and carefully focus their inquiries to the specific suspicions that led to the stop.

G. Roadway Checkpoints

Both the United States and New Hampshire supreme courts have recognized that under certain limited circumstances, it is constitutional to conduct a brief, suspicionless seizure of motor vehicles on the roadways to address a specific law enforcement concern.⁴³⁵ Specifically, the courts have held that properly conducted roadway checkpoints for the purposes of combating drunk driving are constitutional.⁴³⁶ The United States Supreme

⁴³³ *Blesdell-Moore*, 166 N.H. at 187 (citing *State v. McKinnon-Andrews*, 151 N.H. 19, 25 (2004)).

⁴³⁴ *State v. Morrill*, 169 N.H. 709, 716 (2017) (citing *State v. McKinnon-Andrews*, 151 N.H. 19, 25 (2004)).

⁴³⁵ *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *State v. Hunt*, 155 N.H. 465, 473 (2007).

⁴³⁶ *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976); *State v. Hunt*, 155 N.H. 465, 473 (2007).

Court has also upheld a roadway checkpoint that was conducted for the purpose of obtaining information from motorists about a hit-and-run fatality that occurred one week earlier at the same location and time of day,⁴³⁷ and has suggested that a checkpoint to thwart an imminent terrorist threat or to apprehend a dangerous criminal may also be constitutionally permissible.⁴³⁸ However, a checkpoint program whose primary purpose was to detect evidence of general criminal conduct—interdiction of illegal drugs—did not pass constitutional scrutiny.⁴³⁹

The test for determining the reasonableness of a checkpoint program requires that the court consider three factors:

- The gravity of the public concern addressed by the checkpoint;
- The degree to which the checkpoint advances the public interest; and
- The severity of the interference with the individual motorist's liberty.⁴⁴⁰

In other words, a checkpoint program must be designed to focus on a specific and serious law enforcement concern, the police must demonstrate that it is an effective means to address that concern, and the duration of the seizure to which motorists are subjected must be minimal.

The Attorney General's Office has issued guidelines for law enforcement agencies on how to conduct sobriety checkpoints. *See* Guidelines for Sobriety Checkpoints, page 444. However, because any roadway checkpoint program poses a number of constitutional issues, no law enforcement agency should conduct such a program without first consulting with the local county attorney or the Attorney General's Office.

⁴³⁷ *Illinois v. Lidster*, 540 U.S. 419, 423 (2004).

⁴³⁸ *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (“Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control.”).

⁴³⁹ *Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000).

⁴⁴⁰ *State v. Hunt*, 155 N.H. 465, 470 (2007); *State v. Koppel*, 127 N.H. 286, 293 (1985).

X. DRUG INVESTIGATIONS

A. Introduction

Over the past several years, New Hampshire law enforcement have confronted an opioid epidemic that has crossed all socio-economic, age, gender, and racial lines. Progressing from prescription pills to heroin and then to fentanyl, these drugs have claimed lives in New Hampshire at a rate that eclipses most other states. In addition to opioids, of late, New Hampshire has seen an influx of methamphetamine within the State. The State has also seen changes in the law, with the decriminalized of marijuana in certain amounts and the legalization of hemp.

RSA 318-B:2 and RSA 318-B:26, lay out the majority of drug crimes and penalties available within New Hampshire. Many of the search and seizure components that are relevant to drug investigations are discussed elsewhere in this Manual and should be utilized and incorporated in drug investigations. The purpose of this chapter is to discuss investigative techniques that can be critical in large-scale drug investigations and overdose death investigations.

B. Supplemental Search Warrants

It is not uncommon to discover drugs, or evidence of drug distribution, while executing a search warrant for other items or while conducting an inventory search. In the event that drugs are found during these types of searches, the search should be paused while a supplemental (or initial) search warrant is obtained.

Additionally, evidence of a drug crime does not, in and of itself, create probable cause to search for illegal weapons or firearms. If, while conducting a lawful search for drugs, evidence of firearms or illegal weapons is discovered, and possession of that firearm or weapon is evidence of a crime, *i.e.*, the owner/possessor is a convicted felon, the search should similarly be paused while a supplemental search warrant for firearms and/or illegal weapons is sought.

C. Proving Ownership

In proving a possession or possession with intent to sell case where the drugs are not found on the defendant's person, seizing and documenting other evidence of ownership and/or control is critical.

In vehicles, officers should document who the vehicle is registered to; whether the defendant had physical access to the drugs, either through control of the keys or vehicle or based upon physical proximity; and any other items, nefarious or otherwise, that demonstrate that the defendant had custody and control of the vehicle and/or the space in the vehicle where the drugs were found.

- **Example:**

In a case where the defendant was a front passenger, and the charged drugs were found in the glovebox, officers should document the defendant's physical proximity to the glovebox, the fact that the defendant was seen using a key to the vehicle to open the driver's side door for the driver, and that the vehicle was registered to the defendant's mother, who was not in the vehicle at the time of the drug seizure.

The same is true for residences. Efforts should be made, especially where there are other occupants, to document items that show the defendant's presence in and control over the residence, or a part of the residence. This can include mail addressed to the defendant at that address, the presence of the defendant's wallet or other identified property in an area, clothing known to belong to the defendant, *i.e.*, the defendant always wore a red hoodie to meet with the confidential informant (CI) and during the search warrant a red hoodie is found near or with contraband. When obtaining search warrants for drugs, officers should include in their request items like those mentioned above so that they can be seized, if appropriate, and photographed. In addition to seizing and photographing evidence that shows custody and control by the defendant, those types of observations should be well documented in the report.

- **Example:**

In a case where drugs were found in a concentrated area in an apartment shared by multiple individuals, officers documented that the defendant was sleeping in the area where drugs and a large amount of cash was found when the warrant was executed in the early morning hours. While a defendant's presence where drugs are found is not enough to prove knowing possession, information such as the above can help prosecutors prove that the defendant controlled and had custody over the area where drugs were found.

D. Overdose Death Investigations

The New Hampshire Attorney General's Office and the United States Drug Enforcement Administration (DEA) staff on call phones 24-hour a day, every day, for purposes of assisting with overdose death investigations. If officers believe a death is the result of a drug overdose they can reach the on-call attorney for The New Hampshire Attorney General Office and/or the DEA.

Responding law enforcement should also notify the on-call Assistant County Attorney in their county while responding to an overdose death scene. If a case is prosecutable, it most likely will be prosecuted by the County Attorney's Office in the respective county, however, the Attorney General's Office and DEA can provide initial legal and investigative support and guidance.

Overdose death scenes should be treated like crime scenes. The scene should be comprehensively photographed and all relevant evidence, to include all possible drug packaging, needles, scales, etc., should be seized and catalogued. The victim's cellular phone should be seized and searched, and preservation letters should be submitted to cellular phone carriers and social media platforms utilized by the victim and the suspect(s). Officers should consult with the Attorney General's Office and/or their respective County Attorney's Office regarding what is searched, how items/locations are searched, and what preservation requests are made.

Please see a copy of the New Hampshire Attorney General's Overdose Death Investigation Pocket Card, *see* page 453.

E. Hemp Legalization/Decriminalization of Marijuana In Certain Amounts

In July of 2019, New Hampshire legalized hemp, following the federal government's legalization in December of 2018. RSA 439-A:3 makes it legal for hemp to be "grown as a crop, processed, possessed, and commercially traded in New Hampshire. Any grower, processor, or commercial trader of hemp shall be licensed by the United States Department of Agriculture." The statute defines "hemp" as "the plant *Cannabis sativa* L. and any part of the plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration (THC) of not more than 0.3 percent on a dry weight basis." Also, in July of 2019, RSA 318-B:2-c (Personal Possession of Marijuana) was amended to read, "Marijuana shall not include hemp grown, processed, marketed, or sold under RSA 439-A." RSA 318-B:2-c, I(a).

As of the date of publication of this Manual, the New Hampshire State Police Forensic Laboratory is not equipped to test for the quantity of THC contained in a marijuana or hemp sample. NMS Laboratories can currently conduct the necessary testing, but the cost of paying for that testing will fall to the law enforcement agency. Officers should confer with the prosecutor on their cases regarding testing.

In 2020, in *State v. Perez*, the New Hampshire Supreme Court held that in light of the decriminalization of marijuana in certain amounts, the odor of marijuana, without more, does not amount to reasonable suspicion.⁴⁴¹ In the event that an officer is looking to make an arrest or a search on the basis of an odor of marijuana, every reasonable/legal effort should be made to observe and subsequently document any evidence that the amount of marijuana may be in excess of the decriminalized amount and/or evidence of intent to sell or distribute said marijuana.

⁴⁴¹ *State v. Perez*, No. 2018-0647, 2020 WL 2503707, at *6 (N.H. May 15, 2020).

F. Forfeiture of Drug-Related Currency

In general, whether money seized pursuant to a lawful search is forfeited or not, the location, amount, and denomination of currency should be documented in reports and ideally photographed. A forfeiture pursuant to RSA 318-B:17-b has strict notice and filing requirements. Specifically, the claimant of the money must be served with a 7-day letter within 7 days of the property being seized, *not* the property being discovered. For example, if a car is seized pending a search warrant, and money is located during that search warrant, the 7-day clock begins when the vehicle was seized, not when the money was discovered. The New Hampshire Attorney General's Office has 60 days from the date of seizure to file a petition in superior court seeking to forfeit the money. As a result of that strict filing deadline, it is important to forward all reports and search warrants to the Attorney General's Office as soon as possible.

All drug-related forfeitures must be handled by the Attorney General's Office. Police officers cannot have items forfeited to police departments. For more information, please refer to Chapter XXIX of this Manual, which addresses drug forfeitures in detail, as well as the New Hampshire Attorney General's Office Asset Forfeiture Guidelines, available at:

<https://www.doj.nh.gov/criminal/documents/drug-asset-forfeiture-guidelines.pdf>.

G. The "Good Samaritan Law"

In 2015, the New Hampshire legislature passed RSA 318-B:28-b, which serves to immunize drug overdose victims and those who make a timely request for medical assistance for someone who is overdosing from prosecution for possession of a controlled drug, in violation of RSA 318-B:2. This immunity applies for both the caller and the victim in instances where the evidence for a charge of possession of a controlled drug was gained as a proximate (or direct) result of the request for medical assistance. Many towns and cities in New Hampshire dispatch police along with medical personnel for suspected

overdoses, which can lead to a scenario where law enforcement officers make observations of a potential crime while standing by for and/or assisting emergency medical workers.

In 2020, the New Hampshire Supreme Court affirmatively held that RSA 318-B:28-b “does not extend to the offense of possession with intent to sell a controlled drug.”⁴⁴² Thus, if observations/evidence of possessing drugs with the intent to sell, *i.e.*, packaging materials, scales, cut, finger presses, large amounts of currency, etc., are also present during a call for medical service, police are not prevented from investigating and pursuing a charge of possessing a controlled drug with the intent to sell.

⁴⁴² *State v. Brian Eldridge*, No. 2018-0551, 2020 WL 812924, at *3 (N.H. Jan. 14, 2020).

XI. DRIVING UNDER THE INFLUENCE

A. Elements Of Driving Under The Influence

Driving under the influence (DUI) is a term commonly used to describe several types of criminal activity encompassing operating a vehicle while under the influence of an impairing substance to any degree.⁴⁴³ The charge of DUI consists of four elements the State must prove to convict an offender. The elements are that the person:

- Drive;
- A vehicle;
- Upon a way; and
- While under the influence of drugs or liquor, which impairs a person's ability to drive, or with an excess alcohol concentration.⁴⁴⁴

Each element has its own definition and must be proven beyond a reasonable doubt to secure a conviction.

1. Drive

The element of “drive” means to operate or be in actual physical control of a motor vehicle, off highway recreational vehicle (OHRV), or snowmobile.⁴⁴⁵ In most circumstances, it will be apparent that the driver is in fact driving when they are operating the vehicle on a road. However, a person can still drive a vehicle when it is parked, if the driver is in *actual physical control* of the vehicle.

A driver has actual physical control of a vehicle when they have the “capacity bodily to guide or exercise dominion over the vehicle *at the present time.*”⁴⁴⁶ This means that a person does not necessarily need to be causing the vehicle to move in order to be driving

⁴⁴³ RSA 265-A:2 (2014); RSA 265-A:3 (2014); *State v. MacDonald*, 156 N.H. 803, 804 (2008).

⁴⁴⁴ RSA 265-A:2, I (2014).

⁴⁴⁵ RSA 259:24 (2014).

⁴⁴⁶ *State v. Willard*, 139 N.H. 568, 571 (1995).

it.⁴⁴⁷ A sleeping person can be found to be driving a vehicle if there is evidence that the person started the car before falling asleep.⁴⁴⁸ If someone demonstrates an intent to drive even when parked, they can be in actual physical control of the vehicle where it is “reasonable to assume that the person will, while under the influence, jeopardize the public by exercising some measure of control over the vehicle.”⁴⁴⁹

- A person can be in actual physical control of a vehicle by unlocking the door, sitting in the driver’s seat, pushing in the clutch, moving a gear selector to neutral, starting the engine, and turning on the heater before falling asleep.⁴⁵⁰
- A vehicle may not even need to be able to operate in order for it to be driven under the definition of drive.⁴⁵¹
- A person who puts a vehicle in motion by coasting, even if it is inoperable, is in actual physical control of the vehicle.⁴⁵²

Recently, however, the legislature amended RSA chapter 265-A, stating: “‘Drive,’ or ‘attempt to drive,’ or ‘actual physical control’ shall not include sleeping, resting, or sheltering in place in a vehicle parked in any place where parking is permitted, provided that the person is not seated at the controls of the vehicle.”⁴⁵³

2. Vehicle

Generally, what constitutes a “vehicle” is apparent. Any mechanical device by which a person or property may be transported are vehicles.⁴⁵⁴ However, for the purposes of a DUI investigation, electronic personal assistive mobility devices (EPAMD) are not

⁴⁴⁷ *State v. Winstead*, 150 N.H. 244, 248 (2003); *State v. Holloran*, 140 N.H. 563, 565 (1995).

⁴⁴⁸ *State v. Willard*, 139 N.H. 568, 571 (1995).

⁴⁴⁹ *State v. Holloran*, 140 N.H. 563, 565 (1995).

⁴⁵⁰ *State v. Winstead*, 150 N.H. 244, 248 (2003).

⁴⁵¹ *State v. Osgood*, 135 N.H. 436, 437 (1992).

⁴⁵² *State v. Osgood*, 135 N.H. 436, 438 (1992).

⁴⁵³ RSA 265-A:1, VI (2014) (amended 2020).

⁴⁵⁴ RSA 259:122 (2014).

vehicles.⁴⁵⁵ EPAMD's are "self-propelled device[s], regardless of the number of wheels, designed to transport only one person, solely powered by an electric propulsion system, with a maximum speed of less than 20 miles per hours."⁴⁵⁶ Despite being mechanical devices which can transport a person or property, bicycles do not fall under the definition of something someone can drive because they are not capable of being self-propelled.⁴⁵⁷

A person can be charged for operating a boat while under the influence.⁴⁵⁸ A boat is any type of "watercraft capable of being used as a means of transportation on the water."⁴⁵⁹ This means anything that can be driven, paddled, rowed, or exercised control over, unless it is anchored, docked, made fast, or moored.⁴⁶⁰

3. Way

What constitutes a "way" for the purposes of DUI is specifically defined by statute as:

[A]ny public highway, street, avenue, road, alley, park, parking lot or parkway; any private way laid out under authority of statute; ways provided and maintained by public institutions to which state funds are appropriated for public use; any privately owned and maintained way open for public use; and any private parking lots, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public.⁴⁶¹

The definition of "way" has been further defined to include "any property to which the public has access."⁴⁶² For the purposes of being charged with a DUI, the definition of "way" is so broad it encompasses certain private roadways, such as those in a private

⁴⁵⁵ RSA 269:2 (2014).

⁴⁵⁶ RSA 269:1 (Supp. 2019)).

⁴⁵⁷ RSA 259:24 (2014); RSA 259:60 (Supp. 2019).

⁴⁵⁸ RSA 265-A:2, II (2014).

⁴⁵⁹ RSA 265-A:1, II (2014).

⁴⁶⁰ RSA 265-A:1, V (2014).

⁴⁶¹ RSA 259:125, II (2014).

⁴⁶² *State v. Lathrop*, 164 N.H. 468, 470 (2012).

lakeside community where residents, guests, and certain invitees could access the roadway.⁴⁶³ The expansion of the definition of “way” for purposes of DUI has led the New Hampshire Supreme Court to comment: “Though there remain private driveways, paths, and roads in New Hampshire upon which an individual may drive while impaired with impunity, this State’s expansive definition of a ‘way’ renders them few and far between.”⁴⁶⁴

4. Under The Influence

To be considered under the influence, a person need only be “impaired to any degree.”⁴⁶⁵ The range of substances a person can be impaired by for the purposes of a DUI charge is broad.⁴⁶⁶ New Hampshire Law criminalizes driving under the influence of:

- Intoxicating liquor; or
- Any controlled drug, prescription drug, over-the-counter drug; or
- Any other chemical substance, natural or synthetic;
- Which impairs a person’s ability to drive; or
- Any combination of intoxicating liquor and controlled drugs, prescription drugs, over-the-counter drugs, or any other chemical substances, natural or synthetic, which impair a person’s ability to drive.⁴⁶⁷

A driver’s impairment is generally shown through their observable behavior. Limitations in coordination, judgment, and alertness are commonly associated with impairment.⁴⁶⁸ An investigating officer should pay close attention to any behaviors they believe to be consistent with impairment.

⁴⁶³ *State v. Lathrop*, 164 N.H. 468, 470 (2012).

⁴⁶⁴ *State v. Sage*, 170 N.H. 605, 617 (2018).

⁴⁶⁵ *State v. MacDonald*, 156 N.H. 803, 804 (2008).

⁴⁶⁶ RSA 265-A:2, I (2014).

⁴⁶⁷ RSA 265-A:2, I (2014).

⁴⁶⁸ *State v. Arsenault*, 115 N.H. 109, 111 (1975).

a. Alcohol Concentration Of 0.08 Or More

Alternatively, a person is also under the influence when he or she has an alcohol concentration of 0.08 or more or in the case of a person under the age of 21, 0.02 or more.⁴⁶⁹ A person's alcohol concentration is determined through a chemical test. New Hampshire law authorizes the chemical testing of breath, blood, or urine.⁴⁷⁰ The common chemical tests used are breath and blood tests. Urine tests are rarely, if ever, used.

When there is evidence a driver has an alcohol concentration over the legal limit, that driver should also be charged with an alternative theory of driving under the influence. The State has the authority to bring forward multiple theories of a charge arising from the same criminal episode.⁴⁷¹ Because a driver who has an alcohol concentration over the legal limit typically displays physical signs of impairment, it is proper for the State to charge the driver with both driving under the influence and driving with an excess alcohol concentration.

b. Aggravated Driving Under the Influence

Aggravated DUI charges have the same elements of a standard or "simple" DUI, but have an additional element or aggravating factor.⁴⁷² The aggravating factors are:

- Traveling at more than 30 miles over the *prima facie* limit;
- Causing a collision resulting in serious bodily injury;
- Attempting to elude pursuit;
- Carrying a passenger under the age of 16;⁴⁷³ and
- Having an alcohol concentration of 0.16 or more.⁴⁷⁴

⁴⁶⁹ RSA 265-A:2, I(b) (2014).

⁴⁷⁰ RSA 265-A:4 (Supp. 2019).

⁴⁷¹ *State v. Currier*, 148 N.H. 203, 206 (2002).

⁴⁷² RSA 265-A:3 (2014).

⁴⁷³ RSA 265-A:3 (2014).

⁴⁷⁴ RSA 265-A:3, III (2014).

B. The Initial Investigation

1. The Stop

The investigation of a DUI offense generally has several stages. From the initial observations, which draw the attention of the investigating officer, through the time a subject is arrested, processed, and released, the investigating officer should be cognizant of indicators of impairment. Each stage of contact with a DUI suspect is ripe with opportunity to collect evidence of impairment.

Not all DUI investigations begin with the person driving.⁴⁷⁵ There are times when police contact with a driver in a parked car can lead to a DUI investigation without detention of the driver.⁴⁷⁶ In circumstances where an investigating officer does not have reasonable suspicion that criminal activity is afoot, it is important to limit any action that may curtail a driver's freedom to terminate the contact.

For example, if there is a vehicle stopped in a breakdown lane, an officer can make contact with the driver of a vehicle without effecting a "seizure" by not activating the front facing emergency blue lights of a cruiser or ordering the driver not to leave.⁴⁷⁷ Moreover, an officer can make contact with a person sitting in a parked car without effecting a "seizure," provided the officer does not make any orders or show of authority to detain the driver.⁴⁷⁸ An officer should further be careful not to block a driver's car with a cruiser when there is no reasonable articulable suspicion the driver has, is, or is about to commit a crime.⁴⁷⁹

Often, a DUI investigation begins with an officer's observations of a vehicle in motion. At this stage, an officer should be paying close attention to any unusual driving.

⁴⁷⁵ See *State v. Winstead*, 150 N.H. 244 (2003); *State v. Holloran*, 140 N.H. 563 (1995); *State v. Willard*, 139 N.H. 568 (1995).

⁴⁷⁶ *State v. Steeves*, 158 N.H. 672, 676 (2009); *State v. Licks*, 154 N.H. 491, 493 (2006).

⁴⁷⁷ *State v. Steeves*, 158 N.H. 672, 675 (2009); *State v. Beauchesne*, 151 N.H. 803, 815 (2005).

⁴⁷⁸ *State v. Licks*, 154 N.H. 491, 494 (2006).

⁴⁷⁹ *State v. Licks*, 154 N.H. 491, 494 (2006).

In order to stop a vehicle, an officer must have reasonable suspicion that an offense has, is, or is about to be committed.⁴⁸⁰

Most often, the grounds for a stop will be based upon a motor vehicle violation. However, an officer may also draw on individual training and experience when determining the reasonableness of the suspicion.⁴⁸¹ In which case, an officer may be able to articulate grounds for a stop based upon facts giving rise to reasonable suspicion the driver is impaired, rather than a direct violation of the law.

For example, an investigating officer may observe drifting or swerving within a lane, the inability to maintain speed, turning with a wide radius, or unnecessary braking or acceleration, all which may indicate a driver is impaired.⁴⁸²

Once an officer determines that there is reasonable suspicion to stop the vehicle, careful attention must be given to the actions of the driver through the entire stop sequence.

Evidence of impairment may include:

- Any movement, or lack thereof, the driver makes in response to the activation of the officer's emergency lights;
- The period of time it takes the driver to react;
- The manner in which the driver stops the vehicle;
- Where the driver stops the vehicle; and
- Whether the driver uses a directional signal, if required.⁴⁸³

Additionally, evidence of two of the aggravating factors for the offense of aggravated DUI may be observed during the vehicle-in-motion stage, namely, traveling 30 miles per hour over the posted speed limit and attempting to elude.⁴⁸⁴ Notably, although a driver can commit aggravated DUI by traveling 30 miles an hour over the speed limit,

⁴⁸⁰ *State v. Joyce*, 159 N.H. 440, 446 (2009).

⁴⁸¹ *State v. Joyce*, 159 N.H. 440, 446 (2009).

⁴⁸² National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing* (2018).

⁴⁸³ National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing* (2018).

⁴⁸⁴ RSA 265-A:3, I(a), (c) (2014).

continuing to travel over the speed limit after being signaled to stop would be insufficient to satisfy the requirements of eluding. The statute specifically requires the driver to attempt to elude by *increasing* speed.⁴⁸⁵ In other words, in order to satisfy the aggravating element of attempting to elude by increasing speed, there must be evidence that the speed of the driver's car actually increased.

2. Personal Contact

After the vehicle is stopped, the next step is to make contact with the driver. As the investigating officer approaches, it is important to observe how many people are in the vehicle and where they are. The investigating officer should be aware that, in the context of a DUI investigation, these people may be a source of any odors that may be coming from the car and the officer may need to isolate the driver to determine the actual source of the odor.

If any of the people in the car appear young, it will be important for the investigating officer to determine their ages in an admissible way in order to find out if there is an aggravating element of carrying a passenger under the age of 16.⁴⁸⁶ If the youthful passenger is clearly a child or baby riding in a child restraint seat, the investigating officer should make note of this. In the event the passenger appears youthful, but may be near the age of 16, the best course of action is to ask the driver who the passengers are, their ages, and dates of birth. Asking only the passengers for their ages can result in issues of proof at trial due to witness cooperation and hearsay issues.⁴⁸⁷

The initial contact must be narrowly tailored to the grounds for the stop, and remain narrowly tailored, unless the officer's observations give rise to facts which support reasonable articulable suspicion to expand the scope of the stop.⁴⁸⁸ In the context of a DUI,

⁴⁸⁵ RSA 265-A:3, I (a), (c) (2014).

⁴⁸⁶ RSA 265-A:3, I(d) (2014).

⁴⁸⁷ *N.H. R. Ev.* 802.

⁴⁸⁸ *State v. McKinnon-Andrews*, 151 N.H. 19, 23 (2004).

the grounds for the stop are often a motor vehicle violation, such as speeding or a stop sign violation, where the officer does not have any reasonable articulable suspicion of impairment.

The grounds for expanding the scope of the stop develop through keen observations by the investigating officer. The odor of alcohol, slurred speech, diminished dexterity, and the inability to divide attention during simple tasks, such as answering a question while searching for a driver's license, are examples of facts which may support reasonable suspicion to expand the scope of the stop.⁴⁸⁹ The suspect's manner of operation can also be taken into account in developing reasonable articulable suspicion.⁴⁹⁰ Although no single fact, taken in isolation, can give rise to reasonable suspicion to expand the scope of the stop, several facts taken together can.⁴⁹¹

For example, speeding, coupled with the odor of alcohol, red watery eyes, and inconsistent explanations regarding travel, taken together, are sufficient to support the legal expansion of a speeding stop into a DUI investigation.⁴⁹² Although the individual facts supporting reasonable suspicion may have innocent explanations by themselves, when viewed together along with the reasonable inferences an experienced officer can draw from those facts, reasonable suspicion can still be supported.⁴⁹³ In fact, an officer does not need to rule out innocent explanations, as long as the facts support a reasonable suspicion that criminal activity is afoot.⁴⁹⁴ Once the officer has sufficient observations to expand the scope of the stop into a DUI investigation, the investigating officer may ask the driver to step out of the vehicle to perform some tests.

⁴⁸⁹ *State v. Sage*, 170 N.H. 605 (2018), *State v. Ducharme*, 167 N.H. 606, 612 (2015); National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing* (2018).

⁴⁹⁰ *See State v. Sage*, 170 N.H. 605, 610 (2018).

⁴⁹¹ *State v. Sage*, 170 N.H. 605, 611 (2018).

⁴⁹² *State v. Sage*, 170 N.H. 605, 610 (2018).

⁴⁹³ *State v. Sage*, 170 N.H. 605, 610-11 (2018).

⁴⁹⁴ *State v. Sage*, 170 N.H. 605, 610-11 (2018).

Once an officer has made the decision to investigate a DUI, the officer will seek to determine if the driver is impaired to any degree, and if that impairment is caused by a substance. In the case of alcohol impairment, the odor of an alcoholic beverage is generally an indicator as to the impairing substance the driver has ingested. When investigating a driver for impairment by alcohol, it is important to try to determine the amount of alcohol the driver has ingested. The investigating officer should try to determine how many drinks the driver consumed, what type of alcohol the driver consumed, how large the drinks were, when the driver began and stopped drinking, and if the driver has had anything to eat with the alcohol.

If an officer suspects a driver to be impaired by a substance other than alcohol, the officer should investigate what substance or substances were ingested, how much the driver ingested, how it was ingested, how long ago it was ingested, and how often and with what frequency does the driver take the substance.

As the driver exits the vehicle, the officer should pay close attention to the way the driver gets out. Any difficulty the driver has exiting the vehicle, such as difficulty unlocking the door, using the door handle, opening the door, getting out of the driver's seat, or standing outside the vehicle is evidence of impairment.⁴⁹⁵ Also, while the driver walks to the rear of the vehicle, the officer should pay close attention to the way the driver moves. This is a ripe opportunity to collect evidence of impairment. The officer should look for things such as, difficulty balancing, staggering, and using the vehicle for balance by putting a hand on the vehicle or leaning on it.

3. Pre-Arrest Screening

Generally, once the driver is in a position for further testing, an officer will administer field sobriety tests. A person is not in custody or under arrest at this time and the field sobriety tests are neither compelled nor testimonial.⁴⁹⁶ Because of these

⁴⁹⁵ *State v. Kelley*, 159 N.H. 449, 451 (2009).

⁴⁹⁶ *State v. Arsenault*, 115 N.H. 109, 113 (1975).

considerations, *Miranda* warnings are not necessary during the pre-arrest screening.⁴⁹⁷ The purpose of the tests is to provide the officer with an opportunity to make observations to determine if the driver's behavior is consistent with impairment.⁴⁹⁸

Typically, the field sobriety tests administered by a police officer include the Standardized Field Sobriety Tests (SFST) as recommended by National Highway Traffic Safety Administration (NHTSA). This series of tests consists of three standardized tests with certain clues of impairment associated with specific behaviors of a driver while performing the tests.⁴⁹⁹ The specific tests are:

- Horizontal gaze nystagmus (HGN) test;
- The walk and turn test; and
- The one-leg stand test.⁵⁰⁰

The SFSTs, when considered together, have been scientifically validated through studies conducted in laboratories and in the field to be reliable indicators of impairment when correctly administered.⁵⁰¹

It is important for the officer who is administering the SFSTs to do so in accordance with the NHTSA prescribed methods. Particular care must be given when administering the HGN test. For the results of the HGN test to be admissible at trial, the State must demonstrate that the officer who administered the test was trained in the procedure and properly administered and scored the test at the time.⁵⁰²

Officers who engage in administering the HGN test should be prepared to testify with particularity how they were trained and how they administered the test with a

⁴⁹⁷ *State v. Arsenault*, 115 N.H. 109, 113 (1975).

⁴⁹⁸ *State v. Arsenault*, 115 N.H. 109, 111 (1975).

⁴⁹⁹ National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing* (2018).

⁵⁰⁰ National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing*, Session 1, p. 21 (2018).

⁵⁰¹ National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing*, Session 8, p. 5-17 (2018).

⁵⁰² *State v. Dahood*, 148 N.H. 723, 734 (2002).

particular driver. To ensure the admissibility of the HGN test results, officers should periodically attend refresher SFST trainings. Although these strict requirements for admissibility have only been applied to the results of the HGN test, officers should be prepared to administer and testify to the walk and turn and one-leg stand tests with the same particularity.

While administering the SFSTs, officers should pay close attention to the number of times and the exact way a driver shows each validated clue while documenting the validated clues. There is an important distinction between the standardized, validated clues of the SFSTs and other indicators of impairment. For example, if a driver steps off the line during the walk and turn test, it is important to document how far off the line the step was. Similarly, if a driver's arms come up more than six inches from his or her side it is important to document how far his or her arms came up and the way they came up. Some common descriptions are:

- The driver stepped off the line by falling to the right and placing his or her foot down so his or her heel was nearly six inches off the line; and
- The driver's arms quickly came up to just under shoulder height as he or she leaned heavily to his or her left.

In order to maximize the effectiveness of the field sobriety tests, officers should pay close attention to the validated clues, the number of times each clue occurs, and the way the driver causes the clue.

There are times a driver may not agree to engage in field sobriety tests. However, probable cause can still be developed through other observations of impairment.⁵⁰³ In *State v. Ducharme*, the New Hampshire Supreme Court found that the officer had sufficient evidence to support probable cause the defendant was impaired when the officer observed the defendant had bloodshot and red eyes, a distinct odor of alcohol on his breath, difficulty balancing, and the odor of alcohol followed him when he sat in the officer's cruiser.⁵⁰⁴

⁵⁰³ *State v. Ducharme*, 167 N.H. 606, 614 (2015).

⁵⁰⁴ *State v. Ducharme*, 167 N.H. 606, 614 (2015).

When a driver is suspected of driving under the influence of an impairing substance other than alcohol, an investigating officer should take steps to determine the driver is impaired by a substance. A driver being impaired by a substance can be supported through evidence collected at the scene. Admissions by the driver of consumption of a substance, an impairing substance discovered in the vehicle, and paraphernalia for the preparation and consumption of an impairing substance are evidence that support that the driver was impaired by a substance.

Moreover, an investigating officer should pay close attention to physical manifestations of impairment by a substance. Certain behaviors and physical characteristics may be of assistance to a toxicologist determining if the driver's behavior is consistent with a person who is impaired by a particular substance.

For example, certain chemical substances affect a person's pupils in different ways. An investigating officer should pay close attention to whether the driver's pupils are dilated or constricted, or if their eyelids are drooping. Certain substances, such as cannabis, may cause eyelid or leg tremors.

C. Arrest

After the pre-arrest screening, if the investigating officer has formed probable cause to believe that the driver was impaired by a substance, the officer may arrest the driver for DUI. The New Hampshire Supreme Court has stated that the preferred practice is for the officer to clearly inform the driver he or she is in fact under arrest for DUI.⁵⁰⁵ Even after a driver is arrested, the arresting officer should continue to focus on collecting evidence of impairment.

For example, the driver's reaction to the arrest, balance while being escorted to the cruiser, manner in entering the cruiser, and any odor continuing to come from the driver are potential evidence of impairment. While transporting the driver to a booking facility, the arresting officer should be aware of the driver's behavior and any odors, particularly of

⁵⁰⁵ *State v. Ducharme*, 167 N.H. 606, 614 (2015).

an alcoholic beverage, that are in the cruiser that were not present prior to the driver being there.

After transportation, evidence of impairment may be seen while the driver is getting out of the cruiser and walking to the booking room. Once in the booking room, the investigating officer should check to see if the odor of alcohol has continued to follow the driver and is now present in the booking room if it were not present prior to bringing the driver in. Further evidence of impairment may be gathered during the post-arrest testing phase.

D. Post-Arrest Testing

By driving, or attempting to drive, on the ways of New Hampshire, or operating or attempting to operate a boat on New Hampshire waters, a person is deemed to have given consent to physical or chemical tests if they are arrested for DUI.⁵⁰⁶ The chemical tests include tests of the driver's blood, breath, or urine.⁵⁰⁷

For any post-arrest testing to be admissible in court, the driver must be informed of certain rights.⁵⁰⁸ Specifically, the driver must be informed of the right to have an additional test or tests of his or her blood by a person of his or her choosing, be given an opportunity to request such additional test, and be informed of the consequences of his or her refusal to submit to the requested testing.⁵⁰⁹ The requirement to inform a driver of these rights is satisfied by a complete reading of the form DSMV 426, the so-called "ALS Rights Form."

The officer has the authority to ask the driver to submit to physical tests, or tests for blood, breath, or urine, or any combination of these tests.⁵¹⁰ It is considered best practice for the officer to inform the driver which test or tests will be requested. After being

⁵⁰⁶ RSA 265-A:4 (Supp. 2019).

⁵⁰⁷ RSA 265-A:4 (Supp. 2019).

⁵⁰⁸ RSA 265-A:8 (Supp. 2019).

⁵⁰⁹ RSA 265-A:8 (Supp. 2019).

⁵¹⁰ RSA 265-A:4 (Supp. 2019).

informed of the rights, the driver may choose to submit to the requested testing, or refuse. A driver does not have a right to consult with an attorney when making a decision whether to submit to a test or refuse.⁵¹¹

If a driver chooses to submit to the requested testing, the protocols will differ depending on which tests the officer is requesting. If the officer is requesting physical tests, the person administering these tests must be specifically trained to do so.⁵¹² Typically, post-arrest physical testing will be the SFSTs done again in the more controlled environment of the police department.

In the case of a breath test, the person administering the test must be a currently certified breath test operator.⁵¹³ For a blood test, only a licensed physician, registered nurse, certified physician's assistant, phlebotomist, or qualified medical technician or medical technologist acting at the request of a law enforcement officer, may draw the driver's blood.⁵¹⁴ Urine is not a preferred method of testing in New Hampshire.

1. Breath Test

If the driver agrees to submit to a breath test, the breath test operator must observe the driver for a twenty-minute period before administering the test.⁵¹⁵ Prior to the observation period, the breath test operator must inform the driver not to place anything in his or her mouth.⁵¹⁶ Moreover, the breath test operator must assure the driver does not vomit, regurgitate, or belch, and that no external materials enter the driver's mouth.⁵¹⁷

⁵¹¹ *State v. Greene*, 128 N.H. 317, 320 (1986).

⁵¹² RSA 265-A:6 (2014).

⁵¹³ RSA 265-A:5 (Supp. 2019); *N.H. Admin R. Saf-C* 9004.02.

⁵¹⁴ RSA 265-A:5, II (Supp. 2019).

⁵¹⁵ *N.H. Admin R. Saf-C* 9003.02(b).

⁵¹⁶ *N.H. Admin R. Saf-C* 9003.02(b).

⁵¹⁷ *N.H. Admin R. Saf-C* 9003.02(b).

After the twenty-minute waiting period, the breath test operator should have the driver blow into the breath test instrument at least twice to complete a test.⁵¹⁸ If the first two samples do not agree within ± 0.02 g/210 L, a third subject sample must be collected.⁵¹⁹ If the breath samples result in different values, but they are still within the permissible ± 0.02 g/210 L, the reported values will be the lower number.⁵²⁰

Notably, the breath test instruments in service in New Hampshire are regularly checked to assure they are calibrated to detect alcohol concentrations within permissible ranges.⁵²¹ For known alcohol concentrations less than 0.10 g/210 L, the accuracy of the readings cannot be more than ± 0.005 g/210 L.

In other words, a reported value may be more or less than the driver's actual alcohol concentration by ± 0.005 g/210 L. As a result, a reported 0.08 could be a 0.085 or a 0.075. Because of this permissible variance, a breath result of 0.08 g/210 L cannot be proven beyond a reasonable doubt to be actually an alcohol concentration of 0.08 or more. In order to proceed with a charge of driving with an excess alcohol concentration, a breath test must reveal a concentration of 0.09 g/210 L or more.

Once a properly administered breath test reveals an alcohol concentration of more than 0.08—or, in the case of a person under the age of 21, an alcohol concentration of more than 0.02—the breath test operator will record the results in Section V of the DSMV 426.⁵²² The DSMV 426 must include the completed Section V “Sworn Report.”⁵²³ The sworn report must contain the officer's sworn signature. In other words, the officer must appear before a notary public or justice of the peace, raise his or her right hand and swear to the truth and accuracy of the contents of the sworn report and sign the form accordingly.

⁵¹⁸ *N.H. Admin R. Saf-C 9003.02(d).*

⁵¹⁹ *N.H. Admin R. Saf-C 9003.02(d).*

⁵²⁰ *N.H. Admin R. Saf-C 9003.03.*

⁵²¹ *N.H. Admin R. Saf-C 9003.04.*

⁵²² *N.H. Admin R. Saf-C 2803.01.*

⁵²³ *N.H. Admin R. Saf-C 2803.01.*

The officer will then serve immediate notice on the driver, take the driver's New Hampshire driver's license, and issue the DSMV 426 as a thirty-day temporary driving permit.⁵²⁴ In the case of an out-of-state driver, the driver's license shall not be confiscated, and the temporary driving permit shall not be issued.⁵²⁵

A driver who submits to a breath test has a right to an additional test of their blood at their own expense.⁵²⁶ The officer will inform the driver of this right by reading the DSMV 426 to the driver. Moreover, the driver must be provided contact information for individuals and the nearest facilities that make themselves available to draw and test blood.⁵²⁷ The provided information must be for those individuals who have a reasonable probability of performing the blood draw within two hours of the initial breath sample.⁵²⁸

The New Hampshire Department of Safety promulgates a list of such individuals. This list is regularly updated with any changes. Any officer presenting this list to a driver should make sure it is the most current version of the list for his or her area.

The driver must also be presented with a form DSSP 428 "Request for Additional Test."⁵²⁹ The driver may then choose to request an additional test or waive the right to an additional test.⁵³⁰

The driver will sign accordingly on the form by affixing his or her signature and the date of the signature in the appropriate section. The officer will also sign as a witness next to the driver's signature along with the date and time of the signing.⁵³¹ The officer will retain the copy of the DSSP 428 marked "Police."⁵³²

⁵²⁴ *N.H. Admin R. Saf-C 2803.01.*

⁵²⁵ *N.H. Admin R. Saf-C 2803.05.*

⁵²⁶ RSA 265-A:7 (Supp. 2019).

⁵²⁷ RSA 265-A:7 (Supp. 2019).

⁵²⁸ RSA 265-A:7 (Supp. 2019).

⁵²⁹ *N.H. Admin R. Saf-C 9005.01.*

⁵³⁰ *N.H. Admin R. Saf-C 9005.01.*

⁵³¹ *N.H. Admin R. Saf-C 9005.01.*

⁵³² *N.H. Admin R. Saf-C 9005.01.*

If the driver requests an additional test, the officer will supply the driver with an additional test collection kit and complete the pre-labeled, postage paid invoice postcard with the individual's name, address, and telephone number, and mail it to the State Police Forensic Laboratory.⁵³³

The failure or inability of the driver to obtain an additional test does not make the State's evidence inadmissible at trial.⁵³⁴ However, the State does have to provide the driver with a reasonable opportunity to request an additional test.⁵³⁵ What constitutes a reasonable opportunity will depend on the circumstances of the case.⁵³⁶

The New Hampshire Supreme Court has held that the State did not violate the rights of a driver who, while in custody, asked for a phone to make arrangements for an independent blood draw and was given an opportunity to use a phone.⁵³⁷ The Court then highlighted that the defendant did not request any further assistance from the police.⁵³⁸ The Court left open the question of what would be required if a driver were to have asked for specific assistance, such as assistance with arranging testing.⁵³⁹ However, the Court has not had an opportunity to address how the elimination of the sample capture tubes may change this analysis.⁵⁴⁰

⁵³³ *N.H. Admin R. Saf-C 9005.01(f)*.

⁵³⁴ RSA 265-A:7 (Supp. 2019).

⁵³⁵ RSA 265-A:8 (Supp. 2019).

⁵³⁶ *State v. Winslow*, 140 N.H. 319, 322 (1995).

⁵³⁷ *State v. Winslow*, 140 N.H. 319, 322 (1995).

⁵³⁸ *State v. Winslow*, 140 N.H. 319, 322 (1995).

⁵³⁹ *State v. Sage*, 170 N.H. 605, 613 (2018).

⁵⁴⁰ *State v. Sage*, 170 N.H. 605, 613 (2018) (highlighting that in both *Sage* and *Winslow* the defendants were also provided breath test sample capture tubes).

2. Drug Test

When a driver is suspected of being impaired by a substance other than alcohol and a breath test supports that suspicion, an investigating officer should request a Drug Recognition Expert (DRE) to do an evaluation. In New Hampshire, each county dispatch center has a list of available DREs to call for evaluations. A DRE has received specialized training in investigating if a person is impaired by a category or categories of drugs. This specialized training may be invaluable in demonstrating the driver is impaired by a drug. As part of the DRE's evaluation, the driver will be requested to submit to physical, breath, and blood tests.

If the driver agrees to submit to a blood test, the driver's blood must be drawn by an authorized individual.⁵⁴¹ The amount of blood drawn must be enough to allow for two tests.⁵⁴² The State Police Forensic Laboratory issues test tube canisters for officers to present to authorized individuals for the purposes of collecting blood evidence. These canisters contain two gray top blood sample collection tubes containing preservatives and anticoagulants.⁵⁴³

The canisters also contain a DSSP 325 "Blood Sample Collection Form." This form is to be completed by the person who collects the blood sample.⁵⁴⁴ The original copy of the completed form shall be retained by the submitting agency and a copy shall be given to the person who drew the sample.⁵⁴⁵ Officers should make sure the form is filled out properly and legibly. Officers should also be sure to document the name of the person who drew the blood in their report.

The canisters also contain a tamperproof evidence bag to assure the blood tubes are not tampered with after the samples are drawn. Officers should follow their department's

⁵⁴¹ RSA 265-A:5 (Supp. 2019).

⁵⁴² RSA 265-A:7 (Supp. 2019).

⁵⁴³ *N.H. Admin R. Saf-C 6402.04.*

⁵⁴⁴ *N.H. Admin R. Saf-C 6402.04.*

⁵⁴⁵ *N.H. Admin R. Saf-C 6402.04.*

evidence collection and retention protocols with regard to the collection and storage of the tubes. However, the tubes should be stored in a refrigerated storage area pending transportation to the State Police Forensic Laboratory.

When transported to the State Police Forensic Laboratory, the tubes must be accompanied by an evidence examination request form.⁵⁴⁶ This form is contained in each blood evidence collection canister. The form must include, the department case number, the name and date of birth of the subject of the sample, the subject's address, the name of the submitting agency, and a request to check for alcohol, drugs, or both alcohol and drugs.⁵⁴⁷ The evidence examination request form also serves as the record of chain of custody of the blood tubes beginning with the person who drew the blood, to the officer, and to each person who had possession or control over the evidence until it is tested at the laboratory.

If a driver chooses not to submit to a requested test, the driver will be considered a refusal.⁵⁴⁸ A refusal may be used as evidence in civil and criminal actions or proceedings arising out of the acts alleged to have been committed by that driver while driving under the influence.⁵⁴⁹ What constitutes a refusal may depend on the driver's behavior.⁵⁵⁰ Certainly, a statement of express refusal to submit to a requested test is a refusal. However, a person's behavior can also constitute a refusal.⁵⁵¹ The New Hampshire Supreme Court has held that "a driver must comply with all the procedures necessary to produce accurate measurements of breath-alcohol levels, and that he or she refuses to submit to the test if he or she expresses consent while intentionally preventing accurate testing."⁵⁵²

⁵⁴⁶ *N.H. Admin R. Saf-C 6402.05.*

⁵⁴⁷ *N.H. Admin R. Saf-C 6402.05.*

⁵⁴⁸ RSA 265-A:14 (2014).

⁵⁴⁹ RSA 265-A:10 (2014).

⁵⁵⁰ *Jordan v. State*, 132 N.H. 34, 36-37 (1989).

⁵⁵¹ *Jordan v. State*, 132 N.H. 34, 36 (1989).

⁵⁵² *Jordan v. State*, 132 N.H. 34, 36 (1989).

In *Jordan v. State*, the driver agreed to submit to a breath test and was instructed not to contaminate his oral cavity in any way, including not to belch for the twenty-minute observation period.⁵⁵³ After the twenty-minute observation period, but before the breath test was administered, the driver belched.⁵⁵⁴ The officer informed the driver they needed to start the observation period over, and warned the driver that if he were to contaminate his oral cavity again he would be deemed a refusal.⁵⁵⁵ Fifteen minutes into the second observation period, the driver belched and was deemed a refusal.⁵⁵⁶

The court held that the driver's behavior constituted a refusal, stating: "A driver who intentionally prevents compliance with [the rules for breath testing] chooses not to take the test as much as a driver who explicitly refuses the test."⁵⁵⁷ However, a refusal should not be inferred, unless the driver "manifests a decision not to cooperate."⁵⁵⁸ A refusal must be a specific failure to cooperate with the testing procedure and not necessarily with the completion of the ALS form.⁵⁵⁹ When a driver expresses confusion regarding the ALS rights and does not express a decision to test or not, it is a failure to cooperate with the completion of the form and is not necessarily the same as a refusal to take a test.⁵⁶⁰ This is so especially when the driver expresses a desire to take a test moments later.⁵⁶¹

A driver may also recant a refusal. However, an officer is not required to perform a chemical test once a driver has refused to test.⁵⁶² The reasonableness of the officer's decision not to accept a recantation may depend on the time between the refusal and

⁵⁵³ *Jordan v. State*, 132 N.H. 34, 35 (1989).

⁵⁵⁴ *Jordan v. State*, 132 N.H. 34, 35 (1989).

⁵⁵⁵ *Jordan v. State*, 132 N.H. 34, 35 (1989).

⁵⁵⁶ *Jordan v. State*, 132 N.H. 34, 35 (1989).

⁵⁵⁷ *Jordan v. State*, 132 N.H. 34, 37 (1989).

⁵⁵⁸ *Wensley v. Director, N.H. Div. of Motor Vehicles*, 140 N.H. 560, 563 (1995).

⁵⁵⁹ *Wensley v. Director, N.H. Div. of Motor Vehicles*, 140 N.H. 560, 563 (1995).

⁵⁶⁰ *Wensley v. Director, N.H. Div. of Motor Vehicles*, 140 N.H. 560, 563 (1995).

⁵⁶¹ *Wensley v. Director, N.H. Div. of Motor Vehicles*, 140 N.H. 560, 562-63 (1995).

⁵⁶² *Harlan v. State*, 113 N.H. 194, 195 (1973).

recantation.⁵⁶³ For the purposes of an Administrative License Suspension, the chemical test must be administered without unreasonable delay.⁵⁶⁴ Although what constitutes an unreasonable delay is not well defined, a recantation an hour after a refusal has been found to be unreasonable.⁵⁶⁵

Although a refusal is admissible in court, the defendant's reason for refusing can affect the weight of the refusal as it pertains to consciousness of guilt.⁵⁶⁶ The weight to be given a refusal is left to the finder of fact.⁵⁶⁷ If a defendant wishes to explain the reasoning behind a refusal, the court will consider the reasonableness of the refusal.

In *State v. Parmenter*, the defendant stated she refused the test because she learned from television that one drink could put her over the legal limit.⁵⁶⁸ In response, the arresting officer informed the defendant what she had learned from television was not true, and why.⁵⁶⁹ The court commented that the defendant's reasoning was not based upon any realistic expectation regarding the accuracy of the breath test.⁵⁷⁰

However, in *State v. Lorton*, the defendant explained that he refused because he learned from television the breath test is inaccurate.⁵⁷¹ The court stated that, without any significant corroborating evidence of impairment the inference that a refusal shows consciousness of guilt is diminished.⁵⁷² The court in *Lorton* distinguished *Parmenter* by highlighting that *Parmenter* showed significant signs of impairment and made admissions

⁵⁶³ *Harlan v. State*, 113 N.H. 194, 196-97 (1973); *Wensley v. Director, N.H. Div. of Motor Vehicles*, 140 N.H. 560, 563 (1995).

⁵⁶⁴ *Harlan v. State*, 113 N.H. 194, 196 (1973).

⁵⁶⁵ *Harlan v. State*, 113 N.H. 194, 197-98 (1973).

⁵⁶⁶ *State v. Lorton*, 149 N.H. 732, 735 (2003); *State v. Parmenter*, 149 N.H. 40, 44 (2002); *State v. Johnson*, 157 N.H. 404, 409-10 (2008).

⁵⁶⁷ *State v. Johnson*, 157 N.H. 404, 410 (2008).

⁵⁶⁸ *State v. Parmenter*, 149 N.H. 40, 44 (2002).

⁵⁶⁹ *State v. Parmenter*, 149 N.H. 40, 44 (2002).

⁵⁷⁰ *State v. Parmenter*, 149 N.H. 40, 44 (2002).

⁵⁷¹ *State v. Lorton*, 149 N.H. 732, 735 (2003).

⁵⁷² *State v. Lorton*, 149 N.H. 732, 735 (2003).

regarding impairment and Lorton did not.⁵⁷³ As a result, an investigating officer should document any statements made by the driver at the time of refusal.

E. Hospital Blood

In some situations, a driver will be transported to a hospital for treatment as a result of a DUI offense. If a driver receives treatment at a hospital or medical provider, there is a significant chance the driver's blood will be drawn as part of that treatment. The blood drawn by the hospital and the results of laboratory tests are available to law enforcement by law for the purposes of investigating a DUI offense.⁵⁷⁴

An investigating officer can also retrieve the hospital evidence through a warrant by first asking the hospital to preserve the blood and records for a reasonable amount of time so that the officer may secure a search warrant. The request for preservation should be made in writing and delivered to the hospital laboratory or legal department before the investigating officer leaves the hospital. The warrant for the hospital blood should be completed as soon as reasonably possible and any blood evidence brought to the State laboratory for testing.

F. Driving Under the Influence Crashes Resulting In Serious Bodily Injury Or Death

When a DUI offense results in a death or serious bodily injury (SBI), it is a felony.⁵⁷⁵ When investigating a crash that resulted in death or SBI, an investigating officer should look to all the circumstances to determine if there is probable cause to believe the driver caused the crash and is impaired.

If an investigating officer is unable to establish probable cause that the driver is impaired, the best practice is to request consent from the driver to submit to a blood draw.

⁵⁷³ *State v. Lorton*, 149 N.H. 732, 735 (2003).

⁵⁷⁴ RSA 329:26 (2017); *State v. Bazinet*, 170 N.H. 680, 685 (2018); *State v. Davis*, 161 N.H. 292, 297 (2010).

⁵⁷⁵ RSA 630:2 (Supp. 2019); RSA 630:3 (2016); RSA 265-A:3, I(b), II(b) (2014).

If the driver consents to a blood draw, the consent should be documented on a standard consent to search form. *See* Consent to Search Form, page 438. Attempting to document the driver's consent with anything else, such as an ALS form, will risk making any results from the consented-to blood test inadmissible against the driver at trial. Regardless of whether the driver consented, the investigating officer should continue to remain vigilant for any signs of impairment.

When the investigating officer has determined that there is probable cause that the driver was impaired and caused the crash resulting in death or SBI, the officer should arrest the driver for felony DUI. Once the driver is arrested, the investigating officer should read the DSMV 437 Felony Administrative License Suspension Rights form to the driver and request a qualified individual to draw the driver's blood using a state-issued blood evidence collection kit.⁵⁷⁶ *See* Felony Administrative License Suspension Rights (DSMV 437 Form), page 454.

The investigating officer should then immediately begin drafting a warrant application for additional blood draws. The warrant should be for two blood draws, one hour apart or as close as practicable. Moreover, when an investigating officer has probable cause to believe that the driver caused the crash that resulted in death or SBI, the officer must ask a licensed physician, registered nurse, certified physician's assistant, or qualified medical technician or medical technologist to take another blood draw for statistical purposes.⁵⁷⁷

It is also vital for an investigating officer to report on all the circumstances surrounding the investigation, particularly any circumstances which delayed the completion and submission of the warrant application to a judge for review.

⁵⁷⁶ RSA 265-A:5 (Supp. 2019).

⁵⁷⁷ RSA 265-A:16 (2014).

Circumstances to consider may include:

- The time of day;
- The location of the crash;
- The number of officers available to assist;
- Any reason for:
 - Limited manpower;
 - Scene security;
 - Lifesaving measures;
 - Delays in establishing probable cause; and
 - Delays caused by rescue personnel; and
- Anything else outside the investigating officer's ability to control which reasonably delayed the ability to apply for a warrant for the blood draw.

Finally, the investigating officer should seek to obtain the hospital blood as outlined above. *See* page 176 (Hospital section).

Provided the investigating officer was successful in collecting the blood evidence in a death or SBI investigation, there should be a total of four blood canisters, each containing two gray-topped blood tubes. With the addition of the hospital blood, there should be a total of five distinct sources of blood evidence before the end of the investigation. To avoid confusion, each tube should be labeled according to its purpose. In other words, the tubes for the ALS draw should be labeled as the ALS draw, the tubes from the warrant should be labeled to identify them as the warrant draws and the order in which they were drawn, and the draw for statistical purposes should be clearly marked.

For cases involving SBI, the State will need evidence to support the seriousness of an injury.⁵⁷⁸ "Serious bodily injury" is defined as "any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body."⁵⁷⁹

⁵⁷⁸ RSA 265-A:3 (2014).

⁵⁷⁹ RSA 625:11, VI (2016).

The aggravated DUI statute criminalizes causing SBI to anyone, even the driver.⁵⁸⁰ In the event the SBI is suffered by another driver, passengers, or pedestrians, the victims will typically consent to the State's receiving medical records to support the seriousness of the injury. In the case of the DUI suspect-driver having suffered SBI, consent to access of the driver's medical records is not typically given.

In any event, where the State seeks access to medical records without consent, a warrant will be required. Warrants for medical records have particular procedural requirements.⁵⁸¹

Any warrant for medical records must order the medical provider to produce the medical records under seal for *in camera* review by the trial court.⁵⁸² The trial court will then notify the patient that the records have been produced and give the patient and the medical provider an opportunity to object to their disclosure.⁵⁸³ If the patient or medical provider object to the disclosure, the State will have to demonstrate there is an "essential need" for the information provided in the records. This is generally done during a special hearing.

At the hearing, the State will have to show that there is a compelling justification for the disclosure, and that the information is not available through other sources.⁵⁸⁴ The New Hampshire Supreme Court has found that "the investigation of felonies and the search for relevant evidence constitute a compelling justification."⁵⁸⁵ To show that there are no reasonable alternative sources of evidence of SBI, the State must show that any available alternative evidence is not admissible at trial, that the available alternative evidence is insufficient for any rational trier of fact to find the element of SBI beyond a reasonable

⁵⁸⁰ RSA 265-A:3 (2014).

⁵⁸¹ *In re Search Warrant (Med. Records of C.T.)*, 160 N.H. 214, 222–23 (2010).

⁵⁸² *In re Search Warrant (Med. Records of C.T.)*, 160 N.H. 214, 226 (2010).

⁵⁸³ *In re Search Warrant (Med. Records of C.T.)*, 160 N.H. 214, 226 (2010).

⁵⁸⁴ *In re Search Warrant (Med. Records of C.T.)*, 160 N.H. 214, 226 (2010).

⁵⁸⁵ *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436, 443 (2004).

doubt, and that the State made adequate efforts to investigate alternative sources of evidence of SBI.⁵⁸⁶

The admissibility and weight of alternative evidence may be outside the control of an investigating officer. However, an officer must “make substantial, good faith efforts to discover alternative sources of competent evidence.”⁵⁸⁷ This does not mean that an investigating officer has to “exhaust investigative avenues that offer only slight potential for revealing competent alternative evidence.”⁵⁸⁸ The New Hampshire Supreme Court has suggested that interviewing neighbors and co-workers to investigate the cause and extent of injuries may be necessary to show an adequate investigation.⁵⁸⁹

In the case of an unconscious driver, an investigating officer should follow up to try to determine how long the driver remained unconscious after a crash.⁵⁹⁰ If feasible, an investigating officer should try to interview the driver to determine if the driver sustained any injuries in the crash, what those injuries were, and the extent the injuries have impacted the functioning of any part of the driver’s body. If the driver is represented by a lawyer, an investigating officer should request an interview with the driver through the lawyer.

G. Administrative License Suspension

If a driver who has been arrested for DUI agrees to submit to a chemical test which discloses an alcohol concentration of 0.08 or more—or, in the case of a person under the age of 21, a BAC of 0.02 or more—that person’s license shall be suspended.⁵⁹¹ Similarly, if the person refuses to submit to the requested testing, that person’s license shall be suspended.⁵⁹² However, any driver whose license is suspended under the implied consent

⁵⁸⁶ *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436, 443-44 (2004).

⁵⁸⁷ *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436, 443 (2004).

⁵⁸⁸ *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436, 443 (2004).

⁵⁸⁹ *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436, 445 (2004).

⁵⁹⁰ *In re Grand Jury Subpoena for Med. Records of Payne*, 150 N.H. 436, 446 (2004).

⁵⁹¹ RSA 265-A:30 (2014).

⁵⁹² RSA 265-A:14 (2014).

law does have the ability to challenge that suspension in either an administrative review or a hearing.⁵⁹³

Typically, these challenges come in the form of a hearing. If the driver requests a hearing, the scope of the hearing is limited to:

- Whether the officer had reasonable grounds to believe the arrested person had been driving, attempting to drive, or was in actual physical control of a vehicle upon a way while under the influence of intoxicating liquor, narcotics, or drugs;
- The facts that underlay the officer's reasonable grounds for belief;
- Whether the person was arrested;
- Whether the person refused to submit to the test upon request, or whether a properly administered test or tests disclosed an alcohol concentration above the "legal limit";
- Whether the officer informed the arrested person of the right to have a similar test or tests conducted by a person of his or her own choosing; and
- Whether the officer informed the arrested person of the fact that refusal to permit the test, or a test over the "legal limit," would result in license suspension.⁵⁹⁴

However, certain constitutional concerns, such as whether there was reasonable suspicion to detain the driver, are not within the scope of the hearing.⁵⁹⁵

Officers should be prepared to testify that they properly swore to the truth and accuracy of the information in § V of the DSMV 426 before a notary public or justice of the peace, and then to the facts within the scope of the hearing listed above.

⁵⁹³ RSA 265-A:31 (2014).

⁵⁹⁴ RSA 265-A:31 (2014).

⁵⁹⁵ *Lopez v. Dir., N.H. DMV*, 145 N.H. 222, 225 (2000); *Jacobs v. Dir., N.H. DMV*, 149 N.H. 502, 505 (2003).

XII. PRE-TRIAL IDENTIFICATION PROCEDURE

A. Introduction

A pre-trial identification in which the police show an eyewitness or victim of a crime a photograph array of individuals is a common investigative tool. Such an identification can be valuable evidence in a criminal trial. However, unless the identification process complies with a suspect's constitutional rights to due process, any resulting identification may be suppressed.

B. Right To Counsel

The right to counsel attaches at the commencement of adversary judicial proceedings—typically when a complaint is filed or an indictment returned. From that point forward, a defendant has a right to consult with counsel and have counsel present at any critical stage in the criminal process. A pre-trial identification procedure that involves the in-person showing of a defendant to a witness or victim is considered a critical stage. Thus, a defendant who has been formally charged with a crime must be given the opportunity to confer with counsel, or waive the right to counsel, before being involved in an in-person identification procedure.⁵⁹⁶ The right to counsel does not apply to photograph identifications,⁵⁹⁷ thus, a photograph array can be used to obtain an identification at any point in the criminal investigative/pre-trial process without concern for the suspect's right to counsel.

C. Due Process

The use of a pre-trial identification can constitute a violation of a defendant's due process right if the process used to obtain the identification was “unnecessarily suggestive

⁵⁹⁶ *State v. Fecteau*, 133 N.H. 860, 868 (1991).

⁵⁹⁷ *United States v. Ash*, 413 U.S. 300, 320-21 (1973).

and conducive to irreparable mistaken identification.”⁵⁹⁸ In determining whether an out-of-court identification procedure was unnecessarily suggestive, a court will evaluate “whether the police have implicitly conveyed their opinion of the criminal’s identity to the witness.”⁵⁹⁹

A defendant who challenges the fairness of a pre-trial identification procedure has the burden to prove that the process used was unnecessarily suggestive. A defendant must also show that it was law enforcement conduct that created the unnecessarily suggestive circumstances.⁶⁰⁰ If the defendant is successful in making that showing, evidence of the identification will be suppressed, unless the State can prove that the identification is nonetheless reliable, because it was based upon factors that were uninfluenced by the police.⁶⁰¹ There are certain factors that courts will consider in making that determination:⁶⁰²

- The witness’s opportunity to view the suspect;
- The lighting at the time of the viewing;
- The proximity of the witness to the perpetrator at the time of the viewing;
- Whether there was anything blocking or interfering with the witness’s view;
- The duration of time that the witness was able to view the suspect;
- The witness’s degree of attention;
- The reason for which the witness looked at the suspect;
- The reason for which the witness was focused on the suspect;
- The detail and accuracy of the witness’s identification;
- The witness’s level of certainty at the time of the identification; and
- The lapse in time between the crime and the identification.

⁵⁹⁸ *State v. Philbrick*, 135 N.H. 729, 730 (1992).

⁵⁹⁹ *State v. Rezk*, 135 N.H. 599, 601 (1992) (quoting *State v. Duff*, 129 N.H. 731, 736 (1987)).

⁶⁰⁰ *State v. Webster*, 166 N.H. 783, 788-89 (2014).

⁶⁰¹ See *State v. Philbrick*, 135 N.H. 729, 730-31 (1992).

⁶⁰² *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *State v. Whitley*, 134 N.H. 310, 312 (1991).

Because these factors may be critical to the use of the identification as evidence at trial, officers should cover each of the factors during an interview with the witness and document the witness's responses in a report.

D. Photograph Arrays

A photograph array involves showing a witness a series of photographs, including one of which is the person suspected of committing the crime under investigation, to see if the witness is able to identify the suspect. The photograph array is developed based upon a witness's description of a suspect. It should consist of a photograph of at least seven other "filler" photographs of other individuals who resemble the suspect in addition to a photograph of the suspect. The photographs are shown to the witness either as a group or in sequence, and the witness is instructed to view the photographs and determine whether any of the individuals is the person he or she observed.

To eliminate possible suggestiveness in a photograph array, there are a number of guidelines that officers should follow in constructing and conducting an array.

1. Constructing The Array

The photograph array should consist of a minimum of eight photographs, including that of the suspect. When available, the photograph of the suspect should resemble his or her appearance at the time of the incident being investigated.

The filler photographs should be of individuals who generally fit the witness's description of the suspect with respect to race, age, height, and weight. If the witness has highlighted particular features of the suspect in his or her description, the filler photographs should, to the extent possible, resemble the suspect with respect to those specific features. For example, if a witness specifically recalls that the suspect had a thick neck, wore glasses, or had a neck tattoo, officers should attempt to use filler photographs that are consistent with that characteristic.

The photograph array should contain only one suspect's photograph. If there are multiple suspects in an investigation, a separate photograph array should be constructed for each.

Officers should attempt to use all black and white or all color photographs. To the extent possible, the photographs should be consistent with respect to the background, pose, and lighting. Any prejudicial information, such as a booking number, arrest date, or police department name should be removed or hidden from view.

2. Presenting The Array

It is preferable that the officer who presents the photograph array to a witness has no knowledge of the suspect's identity or the location of the suspect's picture in the array. That eliminates the possibility that the officer might unintentionally influence the witness's selection of a particular photograph. However, given the staffing levels of most law enforcement agencies in the State, as well as the practical reality that in many investigations all available officers will know the suspect's identity, this type of "blind presentation" may not be feasible. Under those circumstances, any officer presenting a photograph array must exercise caution to refrain from saying anything, or exhibiting any behaviors, that points out or suggests a particular photograph to the witness.

Before presenting the array, officers should include the following information in their instructions to the witness:

- The photographs are in random order;
- The person who committed the crime may or may not be included in the array, so the witness should not feel compelled to make an identification;
- The investigation will continue, regardless of whether or not the witness makes an identification;
- At the completion of the process, the witness will not be given any feedback on the results of the process;
- The witness should take as much time as he or she needs; and

- If the person's photograph is present in the array, it is possible that his or her appearance may have changed from the time of the event, as features such as clothing and head/facial hair are subject to change.

In the event that a witness recognizes someone's photograph, the officer should ask the witness to explain how he or she knows the person and to describe his or her degree of certainty of the identification. The witness should be asked to initial and date the selected photograph.

Upon completion of the process, the witness should not be given any feedback as to whether the "correct" selection was made. Officers should document the entire process in a report, and include a copy of the array. The report should include information about the instructions given to the witness, whether or not the witness selected any photograph and, if a selection was made, the witness's own words regarding the identification.

If more than one witness is going to view the array, the presentations should be made separately. Officers should take steps to prevent any witness who has viewed the array from talking to other witnesses prior to their being shown the array.

The New Hampshire Supreme Court has held that releasing a booking photograph to the media which is later seen by a witness prior to making an identification does not constitute an unnecessarily suggestive photograph array.⁶⁰³

The Attorney General's Office has developed a Model Policy on Eyewitness Identification, which includes additional information relative to photograph arrays, as well as guidelines for in-person line-up and voice identification procedures,⁶⁰⁴ please see page 455.

⁶⁰³ *State v. Webster*, 166 N.H. 783, 789 (2014).

⁶⁰⁴ Because police departments do not frequently use line-up and voice identifications, this Chapter does not directly address the relevant guidelines for these identification procedures. For more discussion on these identification procedures, please see the Model Policy on Eyewitness Identifications at page 455.

XIII. THE LAW OF INTERROGATION

A. Introduction

Both the state and federal constitutions provide protection for suspects in criminal investigations when law enforcement officers interview them.⁶⁰⁵ Those constitutional protections permit the admission of a suspect's statement as evidence in a later criminal prosecution, only if:

- The statement was made voluntarily; and
- If the statement was made during custodial interrogation, the suspect was
 - Advised of the *Miranda*⁶⁰⁶ rights; and
 - Knowingly, intelligently, and voluntarily waived those rights. If the case goes to trial, the jury will determine if the suspect made the statement(s) voluntarily.

A statement made by a suspect can be extremely valuable evidence. To ensure that such evidence will be admissible at trial, a law enforcement officer needs to understand:

- The concept of "voluntariness" as it relates to a suspect's statements.
- When a suspect must be advised of *Miranda*, and
- What constitutes a valid waiver of *Miranda*.

B. Voluntariness Of A Suspect's Statement

The State can use a suspect's statements as evidence against that person only if the suspect gave the statements voluntarily.⁶⁰⁷ This is true regardless of whether the suspect was in custody at the time he or she made the statements. As discussed below, if a suspect voluntarily makes a statement in response to police questioning, the statement will be admissible even if the police did not advise the suspect of his or her *Miranda* rights, *so*

⁶⁰⁵ See U.S. Const. amend. V; N.H. Const. pt. I, art. 15.

⁶⁰⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶⁰⁷ *State v. Cloutier*, 167 N.H. 254, 258 (2015); *State v. Rezk*, 150 N.H. 483, 486 (2004); *State v. Beland*, 138 N.H. 735, 737 (1994); *State v. Laurie*, 135 N.H. 438, 444, *cert. denied*, 506 U.S. 886 (1992).

*long as the suspect was not in custody.*⁶⁰⁸ Conversely, a court can find that a suspect's statement, made while the suspect was not in custody, was involuntary.⁶⁰⁹ If this happens, the statement will be inadmissible even though the police advised the suspect of his or her *Miranda* rights and the suspect waived those rights.⁶¹⁰

While there is no single definition of voluntariness, the determining factor is whether the suspect's statement was "the product of a will overborne by police tactics, or of a mind incapable of conscious choice."⁶¹¹ "To be considered voluntary, a confession must be the product of an essentially free and unconstrained choice and not extracted by threats, violence, direct or implied promises of any sort, or by exertion of any improper influence."⁶¹²

If a defendant challenges the voluntariness of a statement, the State has the burden to prove, beyond a reasonable doubt, that it was voluntarily given.⁶¹³ Because the State has the burden of proving the voluntariness of a suspect's statement beyond a reasonable doubt, law enforcement officers should be aware of the factors the court will consider in determining voluntariness and document all facts that may be relevant to that determination.

There is no bright-line rule that can be applied under all circumstances to determine whether a suspect's statement was voluntary or coerced. Rather, courts will examine the totality of the surrounding circumstances, including both the characteristics of the suspect

⁶⁰⁸ *State v. Sachdev*, 171 N.H. 539, 548 (2018).

⁶⁰⁹ *State v. Bilodeau*, 159 N.H. 759, 764 (2010) (compliance with *Miranda* is one factor consider in determining if the statement was provided voluntarily).

⁶¹⁰ *See State v. Portigue*, 125 N.H. 352, 362-63 (1984) (In some special circumstances, the behavior of law enforcement in a non-custodial interrogation could so overbear a suspect's will to resist as to make a statement involuntary and inadmissible).

⁶¹¹ *State v. Hernandez*, 162 N.H. 698, 706 (2011).

⁶¹² *State v. Cloutier*, 167 N.H. 254, 258 (2015) (citing *State v. Zwicker*, 151 N.H. 179, 186 (2004)).

⁶¹³ *State v. Cloutier*, 167 N.H. 254, 258-59 (2015); *see also State v. Rezk*, 150 N.H. 483, 486 (2004).

at the time the statement was made and the details of the circumstances of the interrogation.⁶¹⁴

1. Characteristics Of The Suspect

Courts will examine the characteristics of the suspect to decide whether the suspect's statement was voluntary. Factors relevant to that analysis include:

- The suspect's age;⁶¹⁵
- Whether the suspect was educated or had sufficient intelligence to understand that he or she was making a voluntary statement;⁶¹⁶
- Whether the suspect was under the influence of any drugs or alcohol;⁶¹⁷
- Whether the suspect had any past experience with law enforcement;
- The suspect's character;⁶¹⁸ and
- The suspect's physical and emotional condition.⁶¹⁹

⁶¹⁴ *State v. Cloutier*, 167 N.H. 254, 258 (2015) (citing *State v. Belonga*, 163 N.H. 343, 351 (2012)); see also *State v. Monroe*, 142 N.H. 857, 864 (1998), *cert. denied*, 525 U.S. 1073 (1999).

⁶¹⁵ *State v. Benoit*, 126 N.H. 6, 19 (1985) (a juvenile's statement will be admissible only if the juvenile was properly advised of *Miranda* rights in simplified language, now known as the *Benoit* warning, as discussed below).

⁶¹⁶ *State v. Dumas*, 145 N.H. 301 (2000) (an adult suspect of low intellect can voluntarily waive his or her rights, but it may be advisable to use the juvenile form).

⁶¹⁷ *State v. Chapman*, 135 N.H. 390, 401 (1992) (the police did not take advantage of an intoxicated defendant).

⁶¹⁸ *State v. Hernandez*, 159 N.H. 394, 484 (2009) (jury instruction on factors to consider in determining whether the suspect's statement was voluntary).

⁶¹⁹ *State v. Bilodeau*, 159 N.H. 759, 762-63 (2010) (mental illness "does not, as a matter of law, render a confession involuntary" (quoting *State v. Hammond*, 144 N.H. 401, 405 (1999))); see also *State v. Belonga*, 163 N.H. 343, 353 (2012) ("a defendant's emotional response to an interview does not render a confession involuntary").

2. Characteristics Of The Interview

Courts will also examine the nature and circumstances of the interview to decide whether the police engaged in improper or coercive conduct that overbore the suspect's will. Factors relevant to that analysis include:⁶²⁰

- The tone of the interview;
- The tenor of the questions;
- Whether the suspect was properly advised of the *Miranda* rights;
- Whether the suspect expressly agreed to the questioning;
- The number of law enforcement officers that were present for the questioning;⁶²¹
- The duration of the interview;⁶²²
- The location of the interview;⁶²³
- Whether the suspect was offered food, water, and bathroom breaks and at what intervals;
- Whether the suspect was afforded an opportunity to smoke cigarettes;
- Whether the suspect was sufficiently in control of the interrogation to be able to refuse to answer questions or to offer an exculpatory story;⁶²⁴
- Whether the suspect was told that he or she was free to leave at any time,⁶²⁵ and
- How many times the suspect was told that he or she was free to leave.

⁶²⁰ See *State v. Belonga*, 163 N.H. 343, 351-57 (2012); *State v. Hernandez*, 159 N.H. 394, 484 (2009).

⁶²¹ *State v. Marin*, 172 N.H. 154, 160 (2019).

⁶²² *State v. Belonga*, 163 N.H. 343, 356 (2012) (a 6½-hour interview, in itself, does not render a statement involuntary).

⁶²³ *State v. Marin*, 172 N.H. 154, 159 (2019).

⁶²⁴ *State v. Rezk*, 150 N.H. 483, 489 (2004) (noting that the defendant was able to refrain from divulging the names of individuals that the police pressed him on for information).

⁶²⁵ See *State v. McKenna*, 166 N.H. 671, 680 (2014).

3. Express Or Implied Promises

Also significant in determining whether a suspect's statement was given voluntarily is whether the statement was "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence."⁶²⁶ If threats or promises are made to the suspect, the court must determine whether the police exerted a level of influence that overbore the suspect's will.⁶²⁷

A promise of confidentiality or immunity is *per se* unduly influential and will render a confession made in reliance on that promise involuntary.⁶²⁸ A specific promise of leniency in exchange for a statement, which is akin to a threat for harsher punishment if the suspect remains silent, is viewed in the same way.⁶²⁹

On the other hand, a promise to bring a suspect's cooperation to the attention of the prosecutor, or to recommend release on personal recognizance bail, is generally not considered the type of promise that might coerce a person into confessing.⁶³⁰ "General encouragement to cooperate is far different from specific promises of leniency."⁶³¹ Encouraging a defendant to "help himself out" by providing a statement "is an encouragement to tell the truth and *does* not constitute an impermissible hope of benefit."⁶³²

⁶²⁶ *State v. Portigue*, 125 N.H. 352, 363-64 (1984) (citations omitted).

⁶²⁷ *State v. Rezk*, 150 N.H. 483, 487-92 (2004) (specific promises of leniency made by law enforcement as an inducement to the suspect to provide a statement renders the statement involuntary, as does a threat by law enforcement of harsher punishment if the suspect refuses to provide a statement).

⁶²⁸ *State v. Carroll*, 138 N.H. 687, 691 (1994) (an implied promise of leniency or conditional promises of protection may not be coercive); *see also State v. Hernandez*, 162 N.H. 698, 705 (2011) (statement to suspect during interrogation, "between me and you," hinted at confidentiality, but did not explicitly promise it).

⁶²⁹ *State v. Rezk*, 150 N.H. 483, 490 (2004).

⁶³⁰ *State v. Rezk*, 150 N.H. 483, 489-90 (2004) ("While an officer can ordinarily tell a suspect that it is better to tell the truth, the officer crosses the line if he tells the suspect what advantage is to be gained or is likely from making a confession." (Quotations omitted.)); *State v. Spencer*, 149 N.H. 622, 628 (2003) (statement to a defendant that the officer would ask for PR bail because of her cooperation was not coercive, but a statement to a defendant that *if she cooperated* the officer would recommend PR bail would have been coercive).

⁶³¹ *State v. Rezk*, 150 N.H. 483, 489 (2004).

⁶³² *State v. Pyles*, 166 N.H. 166, 171 (2014) (emphasis added).

C. When *Miranda* Warnings Are Required

The Fifth Amendment privilege against self-incrimination prohibits using as evidence statements that were given by a suspect during “custodial interrogation,” unless the suspect was first advised of his or her rights.⁶³³ Because the admissibility of potentially critical evidence may hinge on whether a suspect was properly advised of, and waived, the *Miranda* rights, it is imperative that law enforcement officers understand when *Miranda* is required and how to ensure that they have obtained a valid waiver.

The right to *Miranda* warnings arises only when a person is in custody *and* subject to interrogation by the police.⁶³⁴ Thus, the two key questions that law enforcement officers must consider when determining if they are required to advise a suspect of his or her *Miranda* rights are:

- Is the suspect in “custody”?
- Am I “interrogating” the suspect?

1. Custody

“Custody” entitling a person to *Miranda* protections means either that the person has been formally arrested, or that the person’s freedom of movement has otherwise been restrained to the degree associated with formal arrest.⁶³⁵ Whether there is custody in the absence of a formal arrest is determined by evaluating the facts and circumstances from the suspect’s point of view—whether a reasonable person in the suspect’s position would understand that he or she was under arrest.⁶³⁶

⁶³³ *Illinois v. Perkins*, 496 U.S. 292, 296 (1990); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁶³⁴ *State v. Marin*, 172 N.H. 154, 159 (2019); *State v. Grey*, 148 N.H. 666, 670 (2002).

⁶³⁵ *State v. Marin*, 172 N.H. 154, 159 (2019); *Sachdev*, 171 N.H. at 548; *State v. McKenna*, 166 N.H. 671, 676–77 (2014); *State v. Locke*, 149 N.H. 1, 6 (2002), *cert. denied*, 538 U.S. 1043 (2003).

⁶³⁶ *State v. Marin*, 172 N.H. 154, 159 (2019); *State v. Gay*, 169 N.H. 232, 243–44 (2016); *State v. McKenna*, 166 N.H. 671, 676–77 (2014); *State v. Turmel*, 150 N.H. 377, 383 (2003).

An investigative stop does not constitute custody for purposes of *Miranda*.⁶³⁷ Thus, an officer is not required to give *Miranda* warnings during a *Terry*⁶³⁸ stop. However, a non-custodial encounter between a person and law enforcement officers can become custodial.⁶³⁹ For example, a traffic stop that begins as an investigative stop may become custodial if, after the police have obtained the information necessary to dispel their initial suspicions, they continue to detain the individual.⁶⁴⁰

Similarly, a person who voluntarily goes to a police station to answer questions in response to an officer's request is not in custody, and a *Miranda* advisement is not required. However, a voluntary interview can become custodial if, during the interview, the police directly accuse the suspect of a crime, or engage in heated and confrontational questioning behind a locked door, or otherwise restrain the suspect's freedom of movement.⁶⁴¹ "The location of questioning is not, by itself, determinative: a defendant may be in custody in his own home but not in custody at a police station."⁶⁴²

No single fact or set of circumstances will determine if or when a particular encounter has become the equivalent of an arrest. Rather, the courts scrutinize the facts of each detention to determine if the purpose of the original encounter was exceeded or the character of the encounter became more akin to arrest.⁶⁴³ Courts will consider factors such as:⁶⁴⁴

⁶³⁷ *State v. Gay*, 169 N.H. 232, 244-45 (2016); *State v. Turmel*, 150 N.H. 377, 383 (2003).

⁶³⁸ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁶³⁹ *State v. McKenna*, 166 N.H. 671, 676 (2014); *State v. Turmel*, 150 N.H. 377, 383 (2003).

⁶⁴⁰ *State v. Szczerbiak*, 148 N.H. 352, 355-56 (2002).

⁶⁴¹ *State v. McKenna*, 166 N.H. 671, 671 (2014).

⁶⁴² *State v. Marin*, 172 N.H. 154, 159 (2019); *State v. McKenna*, 166 N.H. 671, 761-62 (2014).

⁶⁴³ *State v. Marin*, 172 N.H. 154, 160 (2019); *State v. McKenna*, 166 N.H. 671, 677 (2014); *State v. Turmel*, 150 N.H. 377, 383 (2003).

⁶⁴⁴ *State v. Marin*, 172 N.H. 154, 160 (2019).

- The degree of physical restraint used;⁶⁴⁵
- Whether the suspect was allowed access to his or her phone;
- The suspect's familiarity with the surroundings;
- The characteristics of the location of the interview;
- If at the police station, how the suspect arrived there;
- The number of officers present;
- The duration of the stop or interview;
- The nature and tone of questioning;⁶⁴⁶
- Whether the questioning was accusatory;
- Whether there was a show of authority;
- Whether the officers were in uniform and visibly armed;
- Whether the officers were diligent in addressing the purpose of the *Terry* stop, if it flowed from a *Terry* stop;
- Whether the police told the suspect he or she was free to leave;
- How often the suspect was told that he or she was free to leave; and
- Whether the suspect was patted down.

The restraint required to create a custodial situation must be imposed by law enforcement.⁶⁴⁷ A person who is confined to a hospital bed while being questioned by police is not in custody simply because the person cannot walk away.⁶⁴⁸ Nor is a voluntary encounter between the police and an incarcerated individual custodial simply because of

⁶⁴⁵ *State v. McKenna*, 166 N.H. 671, 763 (2014) (the restraint does not need to be physical, but can be effected with verbal, psychological, or situational restraint); *State v. Cook*, 148 N.H. 735, 740 (2002) (courts will consider “the degree to which the suspect’s freedom of movement was curtailed”).

⁶⁴⁶ *Stansbury v. California*, 511 U.S. 318, 325 (1994) (“Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.”).

⁶⁴⁷ *State v. Tucker*, 131 N.H. 526, 530 (1989).

⁶⁴⁸ *State v. Tucker*, 131 N.H. 526, 530 (1989).

restrictions imposed by the jail.⁶⁴⁹ In either situation, there must be an additional degree of interference with the suspect's freedom imposed by the police for custody to arise.⁶⁵⁰

2. Interrogation

The *Miranda* safeguards come into play when a person in custody is subject to interrogation.⁶⁵¹ The term "interrogation" encompasses more than the mere questioning of a suspect. It also includes the functional equivalent of interrogation, which is "any practice that the police should know is reasonably likely to evoke an incriminating response from a suspect."⁶⁵²

There is no bright-line rule about what amounts to the functional equivalent of interrogation. To understand the types of conduct that might fall within that category, it is helpful to review circumstances that courts have found constitute the functional equivalent of interrogation:

- An officer who walked into a cellblock and yelled, "Hey, Jay," expecting the defendant to answer, engaged in the functional equivalent of interrogation. The defendant had been arrested for robbery and the officer was aware that witnesses to the crime reported that one of the perpetrators was called "Jay." The officer knew that by calling out the name, it was reasonably likely that the defendant would answer, and thereby provide incriminating evidence.⁶⁵³
- While transporting a murder suspect to his arraignment, a police officer said, "[S]ince we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who

⁶⁴⁹ *State v. Ford*, 144 N.H. 57, 63-64 (1999).

⁶⁵⁰ *State v. Tucker*, 131 N.H. 526, 531 (1989).

⁶⁵¹ *State v. Gravel*, 135 N.H. 172, 177 (1991).

⁶⁵² *State v. Gravel*, 135 N.H. 172, 177 (1991) (brackets omitted) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)); see *State v. Thelusma*, 167 N.H. 481, 484-85 (2015) (an officer would not reasonably know that advising a defendant of the forfeiture process would elicit incriminating statements regarding the pending drug charge).

⁶⁵³ *State v. Dellorfano*, 128 N.H. 628, 633-34 (1986). *But see State v. Spencer*, 149 N.H. 622, 625-26 (2003) (answering a defendant's questions about why she was arrested is not the functional equivalent of interrogation).

was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.”⁶⁵⁴ The United States Supreme Court held that this comment was the functional equivalent of interrogation, because “[t]here can be no serious doubt . . . that [the detective] deliberately and designedly set out to elicit information from [the suspect] just as surely as—and perhaps more effectively than—if he had formally interrogated him.”⁶⁵⁵

- An officer engaged in the functional equivalent of interrogation when, after a murder, the defendant invoked his right to counsel, the officer said to him, “I cannot ask you any more questions. As much as I’d like to, I can’t do that. If you have a change of heart and you want to stand up and be the man you want to be and let us know where those body parts are so that family can rest, then you have to tell somebody when you go downstairs that you want to talk to the Detectives.” Even though the officer told the defendant not to speak right away, the comments were clearly designed to persuade to elicit incriminating evidence.⁶⁵⁶
- The New Hampshire Supreme Court has disapproved of the police practice of summarizing the evidence against a suspect before receiving a waiver of *Miranda* rights from the suspect. The court held that this “unorthodox” practice creates a “serious risk” that the suspect would make an incriminating response that would be considered to have been the product of the functional equivalent of questioning.⁶⁵⁷

The definition of “interrogation is not so broad as to capture within *Miranda*’s reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges.”⁶⁵⁸ Courts have held that the

⁶⁵⁴ *Brewer v. Williams*, 430 U.S. 387, 392-93 (1977).

⁶⁵⁵ *Brewer v. Williams*, 430 U.S. 387, 399 (1977) (known as the “Christian burial speech”).

⁶⁵⁶ *State v. Plch*, 149 N.H. 608, 612, 614-15, *cert. denied*, 540 U.S. 1009 (2003).

⁶⁵⁷ *State v. Torres*, 130 N.H. 340, 343 (1988); *State v. Lewis*, 129 N.H. 787, 795-96 (1987).

⁶⁵⁸ *United States v. Payne*, 954 F.2d 199, 202 (4th Cir.), *cert. denied*, 503 U.S. 988 (1992).

following did not constitute interrogation, even though in each case police words or conduct led the defendant to make an incriminating statement:

- Statements to a defendant that agents had seized approximately 600 lbs. of cocaine and that the defendant “was in serious trouble” were attendant to arrest and custody and were not the functional equivalent of interrogation.⁶⁵⁹
- When an officer picked up and examined evidence in front of a defendant after he refused to talk, it was not the functional equivalent of interrogation.⁶⁶⁰
- Statement to a defendant that he was the subject of an investigation, that the police knew he had sold crack cocaine to an undercover agent, and that the police wanted him to cooperate, was not the functional equivalent of interrogation.⁶⁶¹
- Advising the defendant of the second-degree murder charge against him was not the equivalent of custodial interrogation.⁶⁶²
- Statement to a defendant that he or she was facing two additional charges was not reasonably calculated to elicit an incriminating response.⁶⁶³
- Showing a defendant surveillance photographs prior to giving *Miranda* warnings was not interrogation.⁶⁶⁴

Each case is different and a court’s ruling on whether interrogation occurred will turn on the specific facts of the case, including the conduct of the law enforcement officers and the specific questions asked. An officer’s “intent in making the remarks, while not conclusive, is relevant in determining whether the remark was reasonably likely to elicit an incriminating response.”⁶⁶⁵ When an officer’s actions or statements do not seek or

⁶⁵⁹ *United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994).

⁶⁶⁰ *Kennedy v. State*, 540 S.E.2d 229, 231 (Ga. Ct. App. 2000).

⁶⁶¹ *United States v. Jackson*, 189 F.3d 502, 511 (7th Cir.), *cert. denied*, 528 U.S. 979 (1999).

⁶⁶² *State v. Plch*, 149 N.H. 608, 612, 614, *cert. denied*, 540 U.S. 1009 (2003).

⁶⁶³ *State v. Guajardo*, 135 N.H. 401, 403-04 (1992).

⁶⁶⁴ *State v. Spencer*, 149 N.H. 622, 626 (2003).

⁶⁶⁵ *United States v. Crisco*, 725 F.2d 1228, 1232 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984).

require a response, the officer “surely cannot be held accountable for the unforeseeable results of [his or her] words or actions.”⁶⁶⁶ When an officer could not reasonably have anticipated that his or her comment would elicit a confession, the officer has not engaged in the functional equivalent of interrogation.

Words or actions “normally attendant to arrest and custody” are not included within the definition of interrogation.⁶⁶⁷ Law enforcement officers are entitled to ask standard biographical questions to complete the booking and pretrial process, including the following:⁶⁶⁸

- Name;
- Address;
- Height;
- Weight;
- Eye color;
- Date of birth; and
- Age.

3. The Public Safety Exception

In *New York v. Quarles*, the United States Supreme Court held that the *Miranda* warnings do not have to be given if a suspect’s refusal to answer questions may pose an immediate risk to public safety.⁶⁶⁹ In *Quarles*, a police officer took a rape suspect into custody in a supermarket. When the officer frisked him and found an empty shoulder

⁶⁶⁶ *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980).

⁶⁶⁷ *Thelusma*, 167 N.H. at 485; *Moreno-Flores*, 33 F.3d at 1169 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

⁶⁶⁸ *State v. Chrisicos*, 148 N.H. 546, 548-49 (2002) (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990)).

⁶⁶⁹ *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

holster, he asked where the gun was, without giving the suspect *Miranda* warnings. The defendant answered, “The gun is over there.” Under these facts, the Court held that the officer’s fear that either an accomplice or bystander would find the gun and injure someone justified dispensing with the *Miranda* warnings.⁶⁷⁰

The New Hampshire Supreme Court has not addressed if or when the public safety exception applies under the New Hampshire Constitution.⁶⁷¹ Police officers should be cautious in relying upon the exception and should give *Miranda* warnings unless the suspect’s refusal to cooperate would pose an immediate and serious danger to the officer’s or the public’s safety. When such a danger exists, officers must restrict their questions solely to those necessary to secure the safety of the officers and the public.⁶⁷²

4. The Application Of *Miranda* In Driving Under The Influence Stops

The right against self-incrimination does not extend to the production of incriminating physical evidence. So, police officers are under no constitutional obligation to provide *Miranda* warnings before asking a DUI suspect to perform field sobriety tests.⁶⁷³ “In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*.”⁶⁷⁴

Similarly, *Miranda* warnings are not required before any implied consent questioning. Those questions are, like booking questions, considered “normally attendant to arrest” and do not constitute interrogation. Any statements offered by a defendant in response to such questioning are admissible, provided they were made voluntarily.⁶⁷⁵

⁶⁷⁰ *New York v. Quarles*, 467 U.S. 649, 657 (1984).

⁶⁷¹ *State v. Lopez*, 139 N.H. 309, 311 (1994) (decided under the United States Constitution).

⁶⁷² *State v. Lopez*, 139 N.H. 309, 312 (1994).

⁶⁷³ *State v. Arsenault*, 115 N.H. 109, 113 (1975).

⁶⁷⁴ *State v. Goding*, 128 N.H. 267, 274 (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1983)).

⁶⁷⁵ *State v. Ducharme*, 167 N.H. 606, 614 (2015) (citing *State v. Goding*, 128 N.H. 267, 274 (1986)).

D. The *Miranda* Warnings

Under *Miranda*, a person in custody is entitled to be informed of the following before being interrogated:

- You have the right to remain silent;
- Anything you say can be used against you in court;
- You have the right to talk to an attorney for advice before any questioning and to have the attorney with you during the questioning;
- If you cannot afford an attorney and you desire to hire an attorney, one will be appointed for you without cost or charge to you, to be present and advise you before any questioning; and
- If you decide to answer questions now without an attorney present, you still have the right to stop answering at any time.⁶⁷⁶

Officers should read the *Miranda* rights directly from a written form, to ensure that each right is covered. However, there are no precise words required to communicate the substance of the *Miranda* rights, as long as the rights are reasonably conveyed to the person being questioned.⁶⁷⁷

If the suspect asks a question about one of the rights, that question must be answered immediately. The officer should not continue to read the remaining rights and then seek a waiver before answering the question. The waiver is valid only if it is made knowingly, intelligently, and voluntarily. A suspect who has a question about his or her rights cannot provide a valid waiver. The practice of reviewing the entire form before answering the suspect's questions is not advisable.

Miranda warnings should be given *before* the commencement of custodial interrogation, and should be repeated:

- At regular intervals during a lengthy interrogation;

⁶⁷⁶ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

⁶⁷⁷ *California v. Prysock*, 453 U.S. 355, 359-61 (1981) (noting that “no talismanic incantation” is required to satisfy *Miranda*); *State v. Plch*, 149 N.H. 608, 612, 618, *cert. denied*, 540 U.S. 1009 (2003) (citing *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)).

- If the interrogation is interrupted for more than a short period of time;
- If there is a significant amount of time between giving the *Miranda* rights and questioning (two hours has been held to be too long);⁶⁷⁸ and
- If police officers from another jurisdiction continue the interrogation.

Police officers are not, however, required to repeat the warnings simply because the focus of the interrogation shifts to a different crime.⁶⁷⁹

E. The Waiver Of *Miranda* Rights

It is not sufficient for an officer merely to advise a suspect of the *Miranda* rights. The suspect must validly waive those rights before questioning. If a defendant later claims that the police engaged in questioning in violation of *Miranda*, any evidence obtained as a result of the questioning will be suppressed, unless the State proves beyond a reasonable doubt that the defendant was advised of and knowingly, intelligently, and voluntarily waived his or her *Miranda* rights.⁶⁸⁰

For that reason, it is strongly recommended that officers use a *Miranda* waiver form and obtain a signed waiver from a suspect whenever practicable. *See Miranda Waiver Form*, page 468.

Although preferable, an express waiver of *Miranda* is not required in order to make the waiver valid. A suspect may also give an implied waiver; that is, the suspect can, by words or gestures, indicate a willingness to waive the rights and answer questions. However, mere silence on the suspect's part in response to the *Miranda* warnings is not sufficient to demonstrate that the suspect validly waived his or her rights.⁶⁸¹ If police officers rely upon an implied waiver from a suspect, it is important that the officers document in a report all of the circumstances of that waiver.

⁶⁷⁸ *State v. Torres*, 130 N.H. 340, 344 (1988).

⁶⁷⁹ *Commonwealth v. Medeiros*, 479 N.E.2d 1371, 1377 (Mass. 1985) (describing the “prevailing view” that *Miranda* “does not entitle the defendant to new warnings if the questioning turns to a different crime”).

⁶⁸⁰ *State v. Tapply*, 124 N.H. 318, 322 (1983).

⁶⁸¹ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

If the invocation of the right to remain silent or the request for a lawyer is not clear, the police must clarify the suspect's intent.⁶⁸² Clarifying questions will minimize the chance that any statements will be suppressed.⁶⁸³ Police should not, however, ask why the suspect either wants to be silent or to speak to an attorney.⁶⁸⁴ Like implied waivers, ambiguous statements and clarifying questions should also be documented in a report.

To be valid, a person's *Miranda* waiver must not only be voluntary—that is, not the product of coercion—it must also be knowing and intelligent.⁶⁸⁵ Police officers should be alert to the presence of factors that might lead a court to conclude that a waiver was not knowing and intelligent. For example, if the suspect displays any of the following, it may indicate an inadequate understanding of the *Miranda* rights:

- Poor command of English;
- Being under the influence of alcohol or drugs;
- Diminished mental capacity; and
- Mental illness.

If any of these factors is present, officers should take extra care to make certain that the suspect understands the warnings. For example, after reading each right, an officer should ask if the suspect has any questions. The officer could ask the suspect to explain the right in his or her own words. The officer could use the language from the *Benoit*⁶⁸⁶ juvenile waiver form if a suspect appears to be lacking in intellect. An officer could obtain a *Miranda* waiver form written in the suspect's native language. Any efforts that officers

⁶⁸² *State v. Lynch*, 169 N.H. 689, 693-94 (2017) (citing *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)); *State v. Jeleniewski*, 147 N.H. 462, 465 (2002); *State v. Grant-Chase*, 140 N.H. 264, 267 (1995); see also *Davis v. United States*, 512 U.S. 452, 461 (1994).

⁶⁸³ *Davis v. United States*, 512 U.S. 452, 461 (1994).

⁶⁸⁴ See *Commonwealth v. Contos*, 754 N.E.2d 647, 656-58 (Mass. 2001) (statements were suppressed when the police continued to question why the defendant wanted to stop talking, and ignored his statement about a lawyer; the “why” questions were not clarifying in nature).

⁶⁸⁵ *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

⁶⁸⁶ *State v. Benoit*, 126 N.H. 6 (1985).

take to ensure that a suspect understands the *Miranda* rights should be documented in a report.

Conversely, courts consider the following factors as weighing in favor of a finding that a suspect's *Miranda* waiver was knowing and intelligent:

- A history of involvement with the police;
- Experience in the criminal justice system;
- Obvious intelligence or advanced education; and
- Whether the suspect asked questions about the rights.

Accordingly, police officers should document these factors when appropriate.

F. Invocation Of The Right To Counsel

One of the rights included in the *Miranda* warning is the right to consult with an attorney and to have one present during questioning. "Whenever a suspect indicates by any means or in any manner that he seeks the assistance of counsel, law enforcement officers have a duty to see to it that an opportunity to consult with counsel is provided before further questioning."⁶⁸⁷ When a suspect has invoked the right to counsel, all interrogation must *immediately* cease. The police may not initiate further questioning, unless and until the suspect has conferred with an attorney and either has counsel present or waives the presence of an attorney.⁶⁸⁸

The right to counsel is fundamental, and law enforcement officers should not discourage a suspect from exercising that right.⁶⁸⁹ Questions such as: "Do I need a lawyer for this before I talk to you?" or "Should I have a lawyer?" have been held to be valid invocations of the right to counsel under New Hampshire law.⁶⁹⁰ Where a defendant repeatedly mentioned talking to a lawyer, but never explicitly invoked his right to counsel

⁶⁸⁷ *State v. Tapply*, 124 N.H. 318, 325 (1983).

⁶⁸⁸ *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990); *Arizona v. Roberson*, 486 U.S. 675, 682-83 (1988).

⁶⁸⁹ *State v. Tapply*, 124 N.H. 318, 325 (1983).

⁶⁹⁰ *State v. Tapply*, 124 N.H. 318, 324 (1983).

and continued to talk, the Court concluded that he “never explicitly” stated that he wanted to end the conversation and consult a lawyer.”⁶⁹¹ The New Hampshire Supreme Court has cautioned that “officers would be well advised to respond to any reference to counsel, however ambiguous, by repeating that the suspect may have counsel if he wishes and reminding him that he may request counsel at any time.”⁶⁹²

If, after invoking the right to counsel, a suspect later initiates further contact with the police, an officer may engage in further questioning provided that:

- The contact was initiated *solely* by the suspect, without any prompting by the police;
- The police re-advise the suspect of the *Miranda* rights; and
- The suspect waives those rights.⁶⁹³

If the suspect invoked the right to counsel earlier, the suspect’s subsequent waiver of that right must be express—that is, the suspect must expressly waive the right or respond to a question affirming he/she is waiving the right.⁶⁹⁴ For example, after a suspect has invoked his right to counsel, police may speak to him or her if the suspect later volunteers that he or she wishes to talk to the police without a lawyer present.⁶⁹⁵

Even when a suspect has waived the right to have counsel present, the police have a duty, under certain circumstances, to inform the suspect if an attorney attempts to make

⁶⁹¹ *State v. Lynch*, 169 N.H. 689, 697-98 (2017).

⁶⁹² *State v. Carpentier*, 132 N.H. 123, 128 (1989); *see also State v. Lynch*, 169 N.H. 689, 694-95 (2017).

⁶⁹³ *State v. Bilodeau*, 159 N.H. 759, 763 (2010) (defendant asked to speak with detectives two months after asserting his right to counsel); *State v. Plch*, 149 N.H. 608, 617, *cert. denied*, 540 U.S. 1009 (2003); *Smith v. Illinois*, 469 U.S. 91, 95 (1984).

⁶⁹⁴ *State v. Plch*, 149 N.H. 608, 617, *cert. denied*, 540 U.S. 1009 (2003).

⁶⁹⁵ *State v. Plch*, 149 N.H. 608, 617, *cert. denied*, 540 U.S. 1009 (2003).

contact with the suspect during an interrogation.⁶⁹⁶ This duty arises if the following circumstances occur:

- An attorney personally calls or arrives at the police station;
- The attorney speaks to someone who has the authority to contact the interrogating officers; and
- The attorney states that he or she *has been retained* as counsel for the suspect.⁶⁹⁷

At that point, the police have a duty to stop the interrogation and inform the suspect that the attorney has been retained and is available to provide assistance.

The police are not required to terminate the questioning because the attorney requests or orders them to do so.⁶⁹⁸ Nor are they required to relay a message from the attorney to the suspect directing the suspect not to speak with the police.⁶⁹⁹ Their duty is limited to telling the suspect of the attorney's availability. It is up to the suspect to decide how to proceed. If the suspect opts to speak with the attorney, then all questioning must cease. If the suspect opts to continue without the attorney present, the police may continue questioning.

G. Invocation Of The Right To Remain Silent

Like an invocation of the right to counsel, when a suspect invokes the right to silence, the police must immediately stop the interrogation.⁷⁰⁰ However, unlike when a suspect expresses a desire to consult with an attorney, an invocation of the right to silence does not constitute an absolute prohibition against further police questioning.⁷⁰¹ The police may reinitiate questioning at a later time, provided that the suspect's initial invocation was

⁶⁹⁶ *State v. Roache*, 148 N.H. 45, 52 (2002).

⁶⁹⁷ *State v. Roache*, 148 N.H. 45, 52 (2002).

⁶⁹⁸ *State v. Roache*, 148 N.H. 45, 52 (2002).

⁶⁹⁹ *State v. Roache*, 148 N.H. 45, 52 (2002).

⁷⁰⁰ *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966); *State v. Jeleniewski*, 147 N.H. 462, 465 (2002).

⁷⁰¹ *Michigan v. Mosley*, 423 U.S. 96, 104 (1975); *State v. Laurie*, 135 N.H. 438, 411, *cert. denied*, 506 U.S. 886 (1992).

“scrupulously honored.”⁷⁰² In determining whether the police fulfilled that requirement, courts will look for the existence of four factors:

- Whether the police immediately stopped the interrogation when the suspect expressed the desire to terminate questioning;
- Whether a significant amount of time lapsed between the invocation and the re-initiation of questioning (two hours has been held sufficient);⁷⁰³
- Whether the suspect was again advised of and waived the *Miranda* rights; and
- Whether the police restricted the questioning to topics unrelated to the crime for which the suspect was originally interrogated.⁷⁰⁴

The first three factors are critical to the analysis and the absence of any one of them would likely result in a finding that the police failed to scrupulously honor a suspect’s right to remain silent. The absence of the fourth factor, while significant, is not as critical. The police may reinitiate questioning concerning the same crime about which the suspect was interrogated earlier, provided the facts strongly support a finding that they were careful to honor the suspect’s rights.⁷⁰⁵ “[T]he defendant himself may initiate further conversation and thereby waive the right he had previously invoked.”⁷⁰⁶

As with the right to counsel, suspects must clearly and unambiguously invoke their right to remain silent.⁷⁰⁷ The same standards that apply “for determining when an accused has invoked the *Miranda* right to remain silent” also apply to the invocation of the right to counsel.⁷⁰⁸

⁷⁰² *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

⁷⁰³ *Michigan v. Mosley*, 423 U.S. 96, 103-06 (1975).

⁷⁰⁴ *Arizona v. Roberson*, 486 U.S. 675, 683 (1988).

⁷⁰⁵ *State v. Laurie*, 135 N.H. 438, 442-43, *cert. denied*, 506 U.S. 886 (1992).

⁷⁰⁶ *State v. Gribble*, 165 N.H. 1, 10-14 (2013).

⁷⁰⁷ *State v. Watson*, 170 N.H. 720, 726–27 (2018) (citing *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010)); *see also Salinas v. Texas*, 570 U.S. 178, 188–91 (2013) (standing mute is not an assertion of the right to silence).

⁷⁰⁸ *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010).

H. Recording A Custodial Interrogation

No rule or standard procedure governs recording custodial interviews. It is typically a matter of department policy or individual preference, although some states, such as Massachusetts, now require that all custodial interviews be recorded. In New Hampshire, in order for the State to admit the audio recording at trial, the police must record everything after the suspect waived his or her *Miranda* rights.⁷⁰⁹ If only a portion of the post-*Miranda* questioning was recorded, the partial recording is inadmissible. The police officers will still be permitted to testify about what the defendant said during the interview, but the audio recording of the interview itself will not be admitted into evidence.⁷¹⁰

I. Interrogation Of Juveniles

A juvenile can be subjected to a non-custodial interview. The police are not required to notify the juvenile's parent, but this is one factor the court will consider to determine if the juvenile was in custody and entitled to be advised of the *Miranda* rights.⁷¹¹ To determine if a juvenile is in custody, the Court will consider the factors listed in *McKenna*.⁷¹² These factors include: the number of officers present; the degree to which the suspect is physically restrained; the duration and character of the interview; and the suspect's familiarity with the surroundings.⁷¹³ The Court will also consider the juvenile's age in determining whether a reasonable juvenile would believe that he or she was in

⁷⁰⁹ *State v. Barnett*, 147 N.H. 334, 338 (2001); accord *State v. Dupont*, 149 N.H. 70, 74 (2003).

⁷¹⁰ *State v. Barnett*, 147 N.H. 334, 338 (2001).

⁷¹¹ *In re E.G.*, 171 N.H. 223, 237-38 (2018).

⁷¹² *State v. McKenna*, 166 N.H. 671 (2014).

⁷¹³ *In re E.G.*, 171 N.H. 223, 229-30 (2018) (citing *State v. McKenna*, 166 N.H. 671, 677 (2014)).

custody.⁷¹⁴

If a juvenile is in custody and subjected to interrogation, the juvenile must first be advised of the *Miranda* rights using the *Benoit* form (described below).⁷¹⁵ By statute,⁷¹⁶ in both criminal and juvenile matters, law enforcement “*shall immediately* secure from the arrestee the name of a parent, near relative, friend, or attorney with whom the person may desire to consult and *immediately notify* such person.”⁷¹⁷ If this procedure is not followed, “the absence of an opportunity to consult with an adult shall be given greater weight when assessing the totality of the circumstances surrounding a juvenile waiver.”⁷¹⁸ In addition, if a parent arrives at the site of the custodial detention and requests to see a juvenile in custody, the interrogation must cease, the juvenile must be notified, and the parent must be allowed in the room.⁷¹⁹

“[B]ecause accused citizens must understand their rights in order to effectuate a valid waiver, the greatest care must be taken to assure that children fully understand the substance and significance of their rights”⁷²⁰ before waiving them. To further protect children in the area of interrogation and *Miranda* rights, the New Hampshire Supreme Court developed a Juvenile Rights Form, commonly called the *Benoit* form that police officers are required to use. *See* Juvenile Rights Form, page 469.

In addition to requiring the use of the more detailed form, the Court has adopted a fifteen-factor test for evaluating the validity of a juvenile’s *Miranda* waiver. To be valid, a juvenile’s waiver must have been given voluntarily, intelligently, and with full knowledge

⁷¹⁴ *In re E.G.*, 171 N.H. 223, 229-33 (2018).

⁷¹⁵ *In re B.C.*, 167 N.H. 338, 342 (2015).

⁷¹⁶ RSA 594:15 (2001).

⁷¹⁷ *State v. Farrell*, 145 N.H. 733, 737 (2001) (quoting *State v. Benoit*, 126 N.H. 6, 19 (1985)) (internal quotation marks omitted) (emphasis added).

⁷¹⁸ *State v. Farrell*, 145 N.H. 733, 738 (2001).

⁷¹⁹ *State v. Farrell*, 145 N.H. 733, 739 (2001).

⁷²⁰ *State v. Benoit*, 126 N.H. 6, 18 (1985).

of the consequences.⁷²¹ In deciding whether a particular *Miranda* waiver meets those criteria, a court must consider each of the following factors:⁷²²

- The juvenile's chronological age;
- The juvenile's apparent mental age;
- The juvenile's educational level;
- The juvenile's physical condition;
- The juvenile's previous dealings with the police or court appearances;
- The extent of the explanation of the rights;
- The language of the warnings;
- The methods of interrogation;
- The length of time the juvenile was in custody;
- Whether the juvenile was held incommunicado;
- Whether the juvenile was afforded the opportunity to consult with an adult;
- The juvenile's understanding of the charged offense;
- Whether the juvenile was warned of the possibility of transfer to adult court; and
- Whether the juvenile later repudiated the statement.

Police are also strongly encouraged to video record custodial interrogations of juveniles.

Although a failure to fulfill any of these obligations will not necessarily lead a court to conclude that a juvenile's *Miranda* waiver was invalid, that failure will weigh heavily against a finding of a valid waiver. Conversely, compliance with the fifteen factors will weigh heavily in favor of finding a valid waiver.⁷²³

⁷²¹ *State v. Benoit*, 126 N.H. 6, 18-19 (1985).

⁷²² *State v. Benoit*, 126 N.H. 6, 15 (1985).

⁷²³ *State v. Garcia*, 162 N.H. 423, 427-30 (2011).

XIV. REPORT WRITING

Report writing is a critical part of every law enforcement officer's job. A report is the way an officer communicates information about his or her activities to others, and preserves information for future use. Police reports are routinely provided to the defendant's lawyer in discovery. Reports should be accurate and comprehensive so that defense counsel has a complete understanding of what the officer's testimony will be. In addition to court proceedings, reports are used by a variety of people, including other officers, supervisors, victims, the public, and the media. Failing to write a report may result in discovery and proof issues during trial. When more than one officer is involved in an investigation, each officer should write his or her own narrative detailing his or her own actions and observations.

Each incident requires its own report. Officers should not copy and paste the content of one report into another. The use of copy and paste may be tempting in cases that are similar, but it is inaccurate and potentially dishonest, especially if the officer does not diligently change all information. A report should include only what the author of that report observed or heard. The report should not include something learned from another officer without attributing it to the officer. It is each officer's responsibility to write a report detailing his or her involvement and observations in the case.

Because law enforcement officers encounter so many people during any given day, there is little likelihood that they will remember all of the important details of any particular encounter, investigation, or interview, without some sort of written reminder. Officers should keep a notebook on hand to make notes about their activities, observations, conversations, and the statements of others. These notes will be the raw material from which the officer will write a detailed report. For the same reason, officers should strive to write their reports as soon as possible to ensure accuracy and completeness.

Once a report is finished, the officer should compare the report and the notes to ensure that the report is accurate. There is no established rule for whether or not to retain notes once a report has been written. Some law enforcement agencies have an established

policy concerning the retention of notes. In the absence of a policy, it is up to the individual officer to decide what practice to follow. Regardless of how an officer chooses to handle the issue, he or she should follow a consistent policy of either retaining or destroying notes. If retained, the notes should be maintained in a consistent fashion and their existence made known to the prosecutor. An officer's notes are potentially discoverable during the course of a civil or criminal trial. An inconsistent practice may lead to an officer being challenged on whether notes were selectively destroyed.

Most law enforcement agencies have developed their own agency report forms. All reports, regardless of the form used, should begin with some basic information:

- The reporting officer's name and rank;
- The date the report was written;
- The date of the investigative activities being reported;
- The date, time and nature of the complaint, offense, or situation under investigation; and
- The name of any other officer who was present, provided assistance, or participated in the activities being reported.

In addition to the above information, the body of the report should include a narrative description of the officer's actions and observations, the information obtained, and the source(s) of that information. If possible, the source(s) should be identified by name, address, telephone number, and date of birth; the one exception to that rule being confidential informants. The narrative should be organized in a chronological manner, listing and describing events and interviews in the order they occurred. In describing each event or interview, officers should include facts explaining "who, what, when, where, and why." If the report documents a criminal investigation resulting in charges, facts establishing all elements of each offense should be included. The narrative should include all significant or relevant information, including information that may be viewed as favorable to a suspect or inconsistent with the officer's theory of what occurred. The State is required to provide such exculpatory information to the defendant during the course of a criminal prosecution.

A report should be a factual account of an event. It should not include the officer's opinions about things like witness credibility or theories of the case. An officer should not, for example, state in a report that he or she thinks that a particular witness is withholding information or lying. Instead, the report should include what the witness said and any observations of the witness's behavior, such as the witness appeared nervous or evasive when answering questions.

The use of pronouns, such as "he" and "she," can be very confusing in a report if the report refers to several people. For example, if the report describes the activities of three males and there are references to "him," it may not be clear to the reader which person the word "him" refers to. This can lead to a significant lack of clarity. To avoid that, when writing about more than one person, it is helpful to refer to each person by name. Additionally, officers should not assume gender, as a person's physical appearance may not be indicative of which pronoun should be used. A person may also adopt they/them/theirs as preferred pronouns as opposed to he/his or she/her.

When any action taken by the reporting officer requires a constitutional predicate such as: "reasonable suspicion," or "probable cause," or "reasonable use of force," the facts and circumstances establishing such predicate should be set forth in the officer's report. It is not sufficient to merely state, "I had probable cause to believe John Doe had committed a crime, and therefore, I arrested him." The facts and circumstances establishing probable cause must be clear.

Other tips for effective report writing include:

- Use short, concise sentences;
- Do not use big words when small ones will suffice;
- Avoid using "cop-speak"/police jargon or slang;
- Include all relevant information, even it appears to contradict or be inconsistent with other information obtained;
- Be precise. It is better to include too many details than not enough; and
- Do not use quotation marks unless the statement is an exact quote.

XV. HATE CRIMES, CIVIL RIGHTS VIOLATIONS, AND HATE-MOTIVATED INCIDENTS

A. Introduction

Criminal and other unlawful acts prompted by hate toward the victim because of the victim’s race, sexual orientation, nationality, gender identity, or membership in another protected class have a traumatic impact on both the victim and those who share in that protected class. The Attorney General’s Office has developed a protocol for law enforcement on responding to and investigating hate-crimes, civil rights violations, and other animus-motivated incidents, which can be found at:

<https://www.doj.nh.gov/civil-rights/documents/protocols.pdf>.

This section highlights the most important aspects of that protocol, elaborates upon the impact of hate-motivated incidents, and provides guidance on responding to potential hate-motivated incidents. If you suspect that you are investigating a potential hate-motivated incident, work with your department’s civil-rights designee and report the incident to the Attorney General’s Office’s Civil Rights Unit, which can provide additional support.

B. Hate-Crime Sentencing Enhancement

In New Hampshire, when criminal acts are motivated by hatred toward the victim because the victim is a member of a protected class, the defendant can be subject to a sentencing enhancement.⁷²⁴ Specifically, the enhancement can be applied when the defendant “[w]as substantially motivated to commit the crime because of hostility towards the victim’s religion, race, creed, sexual orientation as defined in RSA 21:49, national origin, sex, or gender identity as defined in RSA 21:54.”⁷²⁵ The sentencing enhancement

⁷²⁴ RSA 651:6, I(f) (Supp. 2019).

⁷²⁵ RSA 651:6, I(f) (Supp. 2019). RSA 21:49 (2020) defines “sexual orientation” to mean “having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality.” RSA 21:54 (2020) defines “gender identity” to mean “a person’s gender-related identity, appearance, or behavior, whether or

applies even when the hostility derives from the defendant's perception of the victim's religion, race, creed, sexual orientation, national origin, sex, or gender identity regardless of whether the defendant's perception is correct or not.⁷²⁶ The critical piece to identifying a hate-crime is identifying that hostility toward the protected class motivated the crime.⁷²⁷

The hate-crime sentencing enhancement extends the term of imprisonment for misdemeanor-level and higher offenses.⁷²⁸ For misdemeanor offenses, such as criminal threatening,⁷²⁹ certain instances of criminal mischief,⁷³⁰ and certain instances of disorderly conduct,⁷³¹ the hate-crime enhancement allows for an extended term of imprisonment for a period of 2 to 5 years.⁷³² For felony offenses, such as assault,⁷³³ certain instances of arson,⁷³⁴ or interference with a cemetery or burial ground,⁷³⁵ the hate-crime enhancement allows for an extended term of imprisonment for a period of 10 to 30 years.⁷³⁶ For manslaughter and murder, the hate-crime enhancement allows for an extended period of 20 to 40 years and life, respectively.⁷³⁷ It is important to remember and keep in mind that

not that gender-related identity, appearance, or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth.”

⁷²⁶ *State v. Costella*, 166 N.H. 705, 709-11 (2014).

⁷²⁷ *State v. Costella*, 166 N.H. 705, 711 (2014) (“The significant community harm resulting from a hate crime flows from the defendant's bias-motivated actions, rather than the victim's actual status as a member of a protected class.”).

⁷²⁸ RSA 651:6, III (Supp. 2019).

⁷²⁹ RSA 631:4, II(b) (2016).

⁷³⁰ *See, e.g.*, RSA 634:2, II-a (2016); RSA 634:2, III (2016).

⁷³¹ RSA 644:2, VI (2016).

⁷³² RSA 651:6, III(a) (Supp. 2019).

⁷³³ *See, e.g.*, RSA 631:1 (Supp. 2019).

⁷³⁴ RSA 634:1, II, III (Supp. 2019).

⁷³⁵ RSA 635:6 (2016); RSA 635:8 (2016).

⁷³⁶ RSA 651:6, III(a) (Supp. 2019).

⁷³⁷ RSA 651:6, III(c), III(d) (Supp. 2019).

the crimes of attempt,⁷³⁸ solicitation,⁷³⁹ and conspiracy⁷⁴⁰ can be subject to the hate-crime enhancement as well.

In the context of misdemeanor-level offenses, seeking an extended term of imprisonment because the underlying offense is a hate-crime changes the criminal proceeding dramatically. Because the extended term of imprisonment for misdemeanor-level offenses exceeds the term of imprisonment that the Circuit Court can impose,⁷⁴¹ all criminal charges for which a hate-crime enhancement would be sought must be brought in the Superior Court.⁷⁴² For similar reasons, if the State seeks an extended term of imprisonment because the underlying misdemeanor-level offense is a hate-crime, then the State must bring those charges through a grand jury indictment.⁷⁴³ The State cannot rely upon an information or complaint and file a separate notice of intent to seek enhanced penalties.

For all offenses where the State seeks an extended term of imprisonment because the underlying offense is a hate-crime, the State must provide written notice at least twenty-one days in advance of jury selection. The State may do this through the indictment⁷⁴⁴ or another written means that “give[s] the defendant an opportunity to offer evidence to refute

⁷³⁸ RSA 629:1 (2016).

⁷³⁹ RSA 629:2 (2016).

⁷⁴⁰ RSA 629:3 (2016).

⁷⁴¹ See RSA 502-A:11 (Supp. 2019); RSA 592-A:6 (2001) (defining the criminal jurisdiction of the district courts).

⁷⁴² *State v. Blunt*, 164 N.H. 679, 686 (2013) (declaring a notice of intent to seek enhanced penalties filed in the Circuit Court as null because the Circuit Court’s jurisdiction is defined by the possible penalties for the criminal offense and the enhanced penalties exceed that jurisdiction).

⁷⁴³ *State v. Ouellette*, 145 N.H. 489, 490-91 (2000) (requiring an indictment when the “sentencing enhancement factor is related to the offense itself”).

⁷⁴⁴ *State v. Diallo*, 169 N.H. 355, 358 (2016); see also *State v. Marshall*, 162 N.H. 657, 665 (2011) (distinguishing federal cases that require including enhancement elements in an indictment as limited to federal crimes).

the findings required by the statute.”⁷⁴⁵ The State must also prove the allegations underlying the sentencing enhancement beyond a reasonable doubt.⁷⁴⁶

In the context of a scenario where a juvenile committed a hate-motivated crime and a delinquency petition has been filed, the extended term of imprisonment would not apply because delinquency petitions do not result in terms of imprisonment akin to those faced by adults convicted of crimes.⁷⁴⁷ Knowledge of the hate-based motivation remains an important factor for law enforcement in those petitions, however, because it may inform the services and support that the juvenile needs or the protection that must be afforded to the victim.

C. The New Hampshire Civil Rights Act

Augmenting the criminal hate-crime sentence enhancement is the New Hampshire Civil Rights Act.⁷⁴⁸ The Civil Rights Act recognizes that “[a]ll persons have the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire.”⁷⁴⁹ It prohibits interference with those rights through threatened or actual physical force, property damage, or trespass when the “actual or threatened conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability.”⁷⁵⁰ In the context of the Civil Rights Act, threatened conduct “is a communication, by physical conduct or by declaration, of an intent to inflict harm on a

⁷⁴⁵ *State v. Russo*, 164 N.H. 585, 597 (2013) (quotation omitted).

⁷⁴⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); *State v. Dansereau*, 157 N.H. 596, 600-01 (2008) (detailing amendments to RSA 651:6 to bring it into accord with *Apprendi*).

⁷⁴⁷ RSA 169-B:19 (Supp. 2019) (defining the scope of dispositions that the Circuit Court may impose if it finds a juvenile delinquent).

⁷⁴⁸ RSA 354-B:1 (Supp. 2019), *et seq.*

⁷⁴⁹ RSA 354-B:1, I (Supp. 2019).

⁷⁵⁰ RSA 354-B:1, I (Supp. 2019).

person or a person's property by some unlawful act with a purpose to terrorize or coerce.”⁷⁵¹ Additionally, unlike the hate-crime sentencing enhancement, the Civil Rights Act protects people with disabilities and prohibits the use of actual or threatened conduct against people based on skin color and ancestry.⁷⁵²

The Civil Rights Act permits only the Attorney General to bring a civil enforcement action against the suspect.⁷⁵³ The enforcement action can seek fines of up to \$5,000; and injunctive relief that will prevent further violations and protect the rights secured by the Civil Rights Act, which could include prohibiting contact with the victim, restitution for the victim, and other appropriate equitable relief.⁷⁵⁴ Any such injunction can remain in place for up to three years.⁷⁵⁵ Violating the injunction is a class A misdemeanor.⁷⁵⁶ Civil Rights Act enforcement actions can be brought against both adults and juveniles and actions against juveniles will be confidential.⁷⁵⁷

Once the Attorney General’s Office initiates an enforcement action or brings a charge for violating the injunction, the matter has priority on the court’s schedule.⁷⁵⁸ Because the enforcement action is civil in nature, the suspect can be compelled to testify, but the suspect’s testimony cannot be used in any criminal proceeding based upon the same event.⁷⁵⁹ Similarly, the civil nature of the enforcement action requires the Attorney General’s Office to prove the allegations by clear and convincing evidence instead of beyond a reasonable doubt.⁷⁶⁰

⁷⁵¹ RSA 354-B:1, I (Supp. 2019).

⁷⁵² Compare RSA 651:6, I(f) (Supp. 2019), with RSA 354-B:1, I (Supp. 2019).

⁷⁵³ RSA 354-B:2, I (2009).

⁷⁵⁴ RSA 354-B:3, I-III (2009).

⁷⁵⁵ RSA 354-B:4, II (2009).

⁷⁵⁶ RSA 354-B:4, I (2009).

⁷⁵⁷ RSA 354-B:5 (2009); RSA 354-B:2, II (2009).

⁷⁵⁸ RSA 354-B:4, IV (2009).

⁷⁵⁹ RSA 354-B:2, III (2009).

⁷⁶⁰ RSA 354-B:2, IV (2009).

A Civil Rights Act enforcement action is a powerful tool for the protection of the public and has several advantages. First, it moves quickly, which affords faster protection to the victim. Second, the suspect can be compelled to testify, which allows for the closure of evidentiary gaps. Third, it has a lower burden of proof, which can allow for protection when evidence of the hate-motivation is weaker. Fourth, enforcement actions can be brought against juveniles, which can augment services the Circuit Court may order with protection for the victim and those who share the victim's identity. Fifth, the equitable relief allows for creative remedies that may not be available in criminal actions. Last, the injunction carries the threat of criminal prosecution to deter future violations.

A Civil Rights Act enforcement action can augment a criminal prosecution. It can be an avenue for relief when a victim does not wish to pursue a criminal prosecution, but would like some protection from the suspect. The law requires, however, that the Attorney General's Office bring the enforcement action, which makes it critical that law enforcement and prosecutors communicate with the Attorney General's Office when suspected hate-motivated incidents occur in their communities. The protections afforded by the Civil Rights Act have little meaning without that communication.

D. Significance Of Hate-Motivated Incidents

The United States Supreme Court, addressing a challenge to a hate-crime sentence enhancement similar to New Hampshire's, recognized that hate-motivated criminal acts are "thought to inflict greater individual and societal harm."⁷⁶¹ This is in large part because "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."⁷⁶² Similarly, the New Hampshire Supreme Court recognized that "[t]he significant community harm resulting from a hate crime flows from the defendant's bias-motivated actions, rather than the

⁷⁶¹ *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).

⁷⁶² *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993).

victim's actual status as a member of a protected class.”⁷⁶³ “Society is harmed by a bias-motivated crime.”⁷⁶⁴

The greater harm caused by hate-crimes lies in the message that the perpetrator seeks to send to the victim and other members of the victim's community. Hate-crimes and other hate-motivated acts often occur because the perpetrator believes:

- that society does not care about the victim,
- society may applaud the incident,
- the marginalized group that the victim belongs to has committed some perceived slight,
- the marginalized group that the victim belongs to poses a threat to the perpetrator's way of life, or
- the perpetrator must harm the victim(s) because the marginalized group is subhuman and the perpetrator has a moral duty to harm the victim(s).

Without intervention, lower-level incidents can escalate into more serious crimes.

At their core, hate-crimes and civil rights violations attack fundamental rights. They seek to discourage members of marginalized groups from embracing their identity and exercising their rights. This can range from simply living their lives and working in their communities to worshipping freely or trying to vote. Identifying and addressing these offenses is crucial to allow members of impacted communities to feel safe and welcome in New Hampshire.

E. Responding To Hate-Motivated Incidents

When an officer responds to a potential or suspected hate-motivated act, that officer has two important duties. First, a responding officer should identify and document any and all evidence that suggests the offender's conduct might have been motivated by a particular identity or hostility towards the victim's identity. Second, a responding officer should

⁷⁶³ *State v. Costella*, 166 N.H. 705, 711 (2014).

⁷⁶⁴ *State v. Costella*, 166 N.H. 705, 711 (2014).

respond to the victim's unique needs and determine whether additional resources are needed at the scene and beyond.

1. Identifying And Documenting Evidence Of Hate-Motivation

Similar to finding evidence of intent generally, identifying evidence of hate-motivation is one of the more difficult aspects of investigating a potential hate-crime. It is also the most important. The presence of one or more of the factors discussed in this section may indicate that an incident was hate-motivated.

Factors to consider in determining hate-motivation come from the identities of the victim(s) and perpetrator(s). A responding officer should identify and document identity-based differences between the victim and suspect. This includes differences in race, religion, ethnicity, disability status, gender identity, or sexual orientation between the victim and perpetrator. A responding officer should identify and document whether the victim is a member of a group that is outnumbered in the area where the incident occurred and whether the victim is new to the area. Even when the victim is not a member of a targeted group, a responding officer should identify and document whether the victim is part of an advocacy group that supports the targeted group or in the company of members of the targeted group.

Beyond differences in identity, the context of the incident could provide clues to the perpetrator's hate-motivation. A responding officer should identify and document whether the incident coincided with a holiday or date of particular significance to the victim's perceived group, such as LGBTQ+ Pride or Juneteenth. A responding officer should identify and document whether the incident occurred in proximity to a place of importance to or gathering for the victim's perceived group, such as a synagogue or an event-space catering to the LGBTQ+ community. A responding officer should also identify and document the existence or lack of an obvious or apparent hate-related motive for the incident.

The incident itself could provide significant clues to determine the presence of hate-motivation. A responding officer should:

- Identify and document whether the perpetrator made identity- or bias-related comments, written statements, or gestures;
 - These could include racial slurs or other derogatory or threatening comments.
- Identify and document the existence of identity- or bias-related drawings, markings, symbols, or graffiti left at the scene;
 - These could include symbols meant to threaten or intimidate, such as swastikas, or those that express support for hate groups and causes.⁷⁶⁵
- Identify and document what activities the victim had been engaged in just before the incident occurred; and
 - **Example:**
If a victim had been speaking a language other than English before being assaulted, then that could be an indication of hate-motivation based upon the victim's perceived race or national origin.
- Identify and document the victim or other witnesses' perception of the incident as identity- or hate-motivated.

A history of similar incidents in the same area or against the same targeted group could provide clues to determine the presence of hate-motivation. A responding officer should:

- Identify and document whether the victim was visiting a location where previous incidents had been committed against members of the victim's community;
- Identify and document whether several incidents targeting members of the victim's community had occurred in the same area;
- Identify and document whether the victim or members of the victim's community had received harassing mail or phone calls or had experienced verbal abuse based upon affiliation with the victim's community; and

⁷⁶⁵ The Anti-Defamation League maintains a searchable database of hate-symbols and icons that is a useful resource for law enforcement trying to identify common or uncommon hate-symbols. The database is available at <https://www.adl.org/hate-symbols>.

- Identify and document whether there have been recent crimes or news that may have sparked a retaliatory hate-crime.

The perpetrator could serve as an important source of clues to demonstrate the existence of hate-motivation. A responding officer should:

- Identify and document whether the perpetrator bears symbols associated with hate or bias in the form of tattoos, jewelry, or clothing, among other sources; and
- Identify and document whether the perpetrator has made public or private statements attacking members of the victim's community in public forums or on social media.

Although hate groups do commit hate crimes and civil rights violations, many hate crimes are committed by individuals who are unaffiliated with organized hate groups. Nevertheless, a responding officer should identify and document objects or items that represent the work of organized hate groups found at the scene or in the perpetrator's possession. A responding officer should identify and document other indications that a hate group was involved, such as whether a hate group has claimed responsibility for the crime or was active in the neighborhood. A responding officer should identify and document whether the perpetrator is a known member of a hate group.

These initial steps⁷⁶⁶ will assist the responding officer in determining whether the incident was hate-motivated. If a responding officer has suspicions that an incident is hate-motivated, the officer should work closely with the department's civil rights designee and the Attorney General's Civil Rights Unit to advance the investigation.

2. Supporting Victims Of Hate-Motivated Incidents

Victims of hate-motivated acts, like victims of crime generally, are in high-stress situations and, in the context of a hate-motivated incident, that stress may be compounded by fear that the perpetrator or other like-minded individuals may commit further criminal acts against the victim's community. A responding officer must be supportive, unbiased,

⁷⁶⁶ This section discusses some of the more common sources of evidence to support or dispel hate-motivation. It is by no means an exhaustive list of all possible sources or evidence.

empathetic, and transparent when interacting with the victim or members of the victim's community. Doing so will help guarantee the cooperation of the victim and the support of the victim's community. Failure to do so may alienate the victim and sow mistrust between law enforcement and the victim's community.

When responding to a suspected hate-motivated incident and interacting with the victim a responding officer should take the necessary steps to create a space where the victim feels comfortable and safe explaining what had happened. This includes engaging with the victim and using open-ended questions to encourage the victim to tell the story in the victim's own words. Be sure to ask the victim if he or she has any idea why the crime occurred, but avoid asking the victim if he or she believes what happened was a hate-crime or not.

If the victim needs interpretive services to explain what happened, the responding officer is responsible for making those services available to the victim. It is not the victim's responsibility to provide an interpreter. It is not the victim's family's responsibility to provide or serve as an interpreter. That responsibility rests with law enforcement. If necessary, many services can provide interpretation over the phone. If it is not safe for an interpreter to come to the scene, then a responding officer should arrange for a safe space to conduct the interview with the victim.

A responding officer should take steps to show the victim that the department is supportive. This means that a responding officer should ask if the victim has any friends, family, or community members who can support them, inform the victim of the steps that can be taken to enhance the victim and the community's safety, and reassure the victim that the officer will protect the victim's identity to the best of the officer's ability. It also means that a responding officer should provide information about community and department resources available to protect and support the victim, the victim's family, and members of the community. It also means ensuring a transparent process by informing the victim about the probable sequence of events in the investigation and keeping the victim informed about the progress of the investigation.

Creating a supportive environment means that responding officers need to set aside their own personal views. A responding officer should never criticize the victim's behavior; should never make assumptions about the victim's identity, culture, religion, sexual orientation, gender, or disability; should never allow personal value judgments about the victim's behavior, identity, or culture to affect the officer's objectivity; should never rely upon stereotypes or biased terms; and should never question or minimize the seriousness of the incident, especially if the perpetrator was a juvenile. These considerations remain true throughout the investigation and during all interactions with the victim.

XVI. THE LAW OF ARREST

A. Introduction

The law defines an arrest as “the taking of a person into custody in order that he may be forthcoming to answer for the commission of a crime.”⁷⁶⁷ Except under certain circumstances discussed below, the police must make an arrest pursuant to an arrest warrant. The affidavit in support of the arrest warrant must establish probable cause to believe that a crime was committed *and* that the person being arrested committed the crime.

Most arrests are intentionally executed and formally announced to the person being arrested. However, there are situations when, because of the surrounding circumstances, a person will be considered in custody even if the officer did not make any such statement and, perhaps, even when the officer did not believe an arrest had been made. Because a person is entitled to certain constitutional protections when placed in custody, it is important for law enforcement officers to understand what constitutes an arrest and how to conduct a legal arrest.

This Chapter highlights numerous topics associated with arrest, including what constitutes an arrest, arrest warrants, the execution of an arrest, and exceptions to the warrant requirement.

B. What Constitutes An Arrest

“An arrest is effected by an actual or constructive seizure or detention of the person arrested or by his voluntary submission to custody, both of which subject him to the actual control and will of the person making the arrest.”⁷⁶⁸ Not all seizures constitute arrests. An investigative or “*Terry*” stop, for example, effectuates a seizure, but not, without more, an

⁷⁶⁷ RSA 594:1, I (Supp. 2019).

⁷⁶⁸ *State v. Riley*, 126 N.H. 257, 261 (1985).

arrest.^{769,770} It is a more intrusive type of seizure than an investigative stop because, unlike a *Terry*⁷⁷¹ stop—which must be limited in duration and in scope—a person under arrest is being held to answer for a crime.

No “magic words” or the filing of specific charges is necessary for an arrest to occur.⁷⁷² Whether an arrest has occurred will depend on the objective facts and circumstances of each particular case. The officer’s subjective belief about the person’s legal status is not determinative, although it may have some relevance.⁷⁷³ As a result, a court could find that a person was placed under arrest in a particular situation, even if it was not the officer’s intent to do so. The key question is whether a reasonable person standing in the shoes of the defendant would have believed that he or she was restrained to the degree commonly associated with an arrest.⁷⁷⁴

Unlike a *Terry*-stop-like “seizure,” which can occur even if the person does not submit to authority, a person will not be considered under arrest until the police actually detain the person by physical restraint or voluntary submission. For example, by repeatedly demanding that a person stop and speak with them, the police may have “seized” the person,⁷⁷⁵ but it is unlikely that a court would find, under those circumstances, that a person was under arrest if the police had not gained actual control over the person.

In one case, for example, the police suspected that the defendant and his partner might have stolen some furniture, although they did not have probable cause for an arrest. They gave the defendant the choice of either being immediately arrested or, in the alternative, dropping the furniture off at the police station while the police continued their investigation. While the suspect was in the process of dropping off the furniture, the police

⁷⁶⁹ *State v. Hamel*, 123 N.H. 670, 675 (1983).

⁷⁷⁰ For a discussion of investigative or *Terry* stops, see pages 130-37 (Investigative Or *Terry* Stops section).

⁷⁷¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁷⁷² *State v. Schofield*, 114 N.H. 454, 456 (1974).

⁷⁷³ *State v. Riley*, 126 N.H. 257, 263 (1985).

⁷⁷⁴ *State v. Riley*, 126 N.H. 257, 262 (1985).

⁷⁷⁵ *State v. Beauchesne*, 151 N.H. 803, 812-13 (2005).

developed probable cause and formally placed him under arrest. The Court held that although having to choose between arrest or dropping off the furniture at the police station might have resulted in some loss of freedom for the defendant, the police had not actually or constructively seized the defendant, and thus, no arrest had occurred, until the police actually placed the defendant in custody.⁷⁷⁶

C. Factors In Determining Whether An Arrest Has Occurred

In the absence of a formal arrest, courts will consider all the circumstances surrounding a person's seizure to determine if and when an arrest actually occurred. Some of the circumstances commonly considered in making that determination include:

- Whether the person was physically restrained;
- Whether the person was told that they were free to leave;
- The number of police officers involved in the encounter;
- Whether the officers displayed weapons;
- The character and tone of the interaction;
- Whether the officers were directly accusatory or simply asking questions;
- Whether the person was allowed to leave at the conclusion of the encounter;
- Whether the person confessed to a crime during the encounter; and
- Whether the person was advised of the *Miranda* rights.

It is possible that an encounter that began as an investigative stop could transform into custody simply based on changing circumstances.⁷⁷⁷ For example, if the tone of an officer's questioning changed from conversational to confrontational and accusatory, or if an interview continued for hours with changing teams of investigators, a court could find that at some point, the suspect had effectively been taken into custody.

⁷⁷⁶ *State v. Noel*, 137 N.H. 384, 389 (1993).

⁷⁷⁷ *In re E.G.*, 171 N.H. 223, 229 (2018).

D. The Probable Cause Requirement

To be lawful, an arrest must be supported by probable cause to believe that a crime was committed *and* that the person being arrested committed the crime. An arrest made without probable cause violates the state and federal constitutional rights of the arrestee, and any evidence obtained as a consequence of the arrest will be suppressed.⁷⁷⁸

“Probable cause to arrest exists when the arresting officer has knowledge and trustworthy information sufficient to warrant a person of reasonable caution and prudence in believing that the arrestee has committed an offense.”⁷⁷⁹ Where there is lawful cause to arrest, the arrest will be lawful even if the arresting officer incorrectly identified the offense that was committed.⁷⁸⁰

Probable cause to arrest requires a greater degree of certainty than reasonable suspicion to support a *Terry* stop, but less than proof beyond a reasonable doubt.⁷⁸¹ The police are not required to have sufficient evidence to convict or even to prove all the elements of the crime before they are justified in making an arrest. Rather, the available information must lead to a conclusion that there is a reasonable probability that the suspect committed a crime. For example, circumstantial evidence that a defendant illegally possessed an item may be sufficient for an arrest, even if at the time of arrest there is insufficient evidence that the defendant “knowingly” possessed the item.⁷⁸²

As with reasonable suspicion for an investigative stop, officers can rely upon information from a variety of sources to form probable cause to arrest.⁷⁸³

⁷⁷⁸ *State v. Lantagne*, 165 N.H. 774, 778 (2013); *State v. White*, 119 N.H. 567, 571 (1979).

⁷⁷⁹ *State v. Jaroma*, 137 N.H. 562, 567 (1993) (quoting *State v. Vachon*, 130 N.H. 37, 40 (1987)).

⁷⁸⁰ RSA 594:13 (2001).

⁷⁸¹ *State v. Hutton*, 108 N.H. 279, 287 (1967).

⁷⁸² *State v. Jaroma*, 137 N.H. 562, 567 (1993); *see, e.g., United States v. Ruigomez*, 702 F.2d 61, 66 (5th Cir. 1983) (probable cause to arrest for possession of a handgun existed without firm proof that the handgun belonged to the defendant when the police found the gun on the passenger’s side of the car in which the defendant was sitting).

⁷⁸³ Please refer to the discussion in Chapter IX, The Law Regarding On-The-Street Encounters And Investigative Detentions, on the factors that form the basis for reasonable suspicion justifying a *Terry* stop.

NOTE: The New Hampshire Supreme Court has held that under the disorderly conduct statute, someone other than the arresting officer must be disturbed for there to be a public disturbance.⁷⁸⁴

E. Arrest Pursuant To A Warrant

An arrest warrant is a written order issued by a judge or other competent authority, commanding that a specific individual be arrested and brought before a court. Although a warrant is not a prerequisite to a valid arrest, there is a clear judicial preference for arrests made pursuant to a warrant. An arrest warrant ensures that a determination of probable cause has been made by an impartial judicial officer, rather than by a police officer who is involved in the case.⁷⁸⁵

If an arrest is later challenged, a court is more likely to uphold its validity if it was made pursuant to a warrant. A valid arrest will enable prosecutors to use any evidence gained as a result of that arrest.⁷⁸⁶ For that reason, the United States Supreme Court has advised that police officers “may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate.”⁷⁸⁷

⁷⁸⁴ *State v. Murray*, 135 N.H. 369, 373 (1992); *see also State v. Gaffney*, 147 N.H. 550, 554 (2002); RSA 644:2, III(a) (2016).

⁷⁸⁵ *See United States v. Watson*, 423 U.S. 411, 417-24 (1976).

⁷⁸⁶ *State v. Jones*, 127 N.H. 515, 522-23 (1985).

⁷⁸⁷ *United States v. Watson*, 423 U.S. 411, 423 (1976).

1. Authority To Issue A Warrant

An arrest warrant can be issued by any justice of the peace, or any justice of the supreme, superior, or circuit courts of New Hampshire, provided that the justice is neutral and detached.⁷⁸⁸ The warrant may be issued for the arrest of a person charged with an offense that was committed within the state or is prosecutable within the state.⁷⁸⁹ The warrant is directed to the sheriff of any county or any police officer, and has statewide effect.⁷⁹⁰ Although not expressly included in the language of the statute, state troopers, conservation officers, special agents of the New Hampshire Liquor Commission and other similar officers are *ex officio* constables, and thus, are also authorized to execute New Hampshire arrest warrants.

2. Application For An Arrest Warrant

The process for obtaining an arrest warrant is substantially similar to the process for applying for a search warrant.⁷⁹¹ Before issuing a warrant, the judge or justice of the peace must determine, based on the information provided by the officer, whether there is probable cause to believe that a crime was committed and that the person named in the warrant committed the crime.

When submitting an application for an arrest warrant to a justice of the peace, it is the officer's responsibility to confirm that the justice of the peace understands what constitutes probable cause. Failure to do so could render the warrant invalid if it is later challenged in court.

An officer can provide information in support of the warrant either through oral testimony, a written affidavit, or both. The preferable course—and the course that some

⁷⁸⁸ RSA 592-A:5 (2001); RSA 592-A:8 (Supp. 2019); RSA 592-B:4 (Supp. 2019). *See Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (a search warrant was invalid where it was signed by the attorney general, whose office was overseeing the underlying investigation).

⁷⁸⁹ RSA 625:4 (2016).

⁷⁹⁰ RSA 592-A:5 (2001); RSA 592-A:8 (Supp. 2019).

⁷⁹¹ *See* Chapter V, Preparation And Execution Of A Search Warrant.

judges may require—is that the officer prepare a written affidavit setting out all the facts and circumstances known to the officer in support of a finding of probable cause.

If an officer provides oral testimony to the judge, either in lieu of an affidavit or as a supplement to the affidavit, the officer should ensure that the judge documents the information in writing and attaches the notes to the application.⁷⁹² If an arrest warrant is challenged in a later criminal prosecution, the reviewing court will typically limit its review to the information contained in, or appended to, the warrant application. If the issuing judge took additional testimony from an officer, but did not document it for the record, the reviewing court cannot consider that testimony in determining whether the warrant was supported by probable cause.

The warrant application requires the affiant to specify the crimes for which there is probable cause to arrest. Thus, an officer must consider the available information and determine which specific offenses are supported by the evidence. However, if a court later determines that the information did not support probable cause to arrest on the specified crime, the arrest will still be lawful if the information set forth in the affidavit established probable cause to believe that some other crime had been committed.⁷⁹³

3. Execution Of The Warrant

Once an arrest warrant has been issued, it can be executed anywhere in the state.⁷⁹⁴ The executing officer does not need to have the warrant in hand at the time of the arrest. It is sufficient that the officer have knowledge that there is an active warrant for the person. However, if requested, the warrant must be shown to the arrestee as soon as it is practicable.⁷⁹⁵

⁷⁹² RSA 595-A:4 (2001).

⁷⁹³ RSA 594:13 (2001).

⁷⁹⁴ As discussed previously, absent exigent circumstances or a separate search warrant, this does not include the authority to enter a third party's home to arrest the person named in the warrant.

⁷⁹⁵ RSA 594:9 (2001).

Law enforcement officers have the authority to execute arrest warrants beyond the jurisdiction of their particular department or agency.⁷⁹⁶ However, as a matter of professional courtesy and officer safety, officers planning to execute a warrant in a town or city other than their own should contact the police department in that jurisdiction before taking any action, and seek their assistance.

F. Executing An Arrest

1. The Use Of Force

Every person has a “legal duty to submit to an arrest and refrain from using force or any weapon” to resist, regardless of whether the arrest is legally justified.⁷⁹⁷ Despite this duty, some individuals resist an officer’s effort to effectuate an arrest. In those circumstances, or in the interests of officer and public safety, police officers are permitted to use *reasonable* and *necessary* force or other means of restraint in order to make an arrest.⁷⁹⁸ The use of physical force is discussed in detail in Chapter IV, The Use Of Physical Force. More specifically, officers are justified in using non-deadly force when reasonably necessary to:

- Make a lawful arrest;
- Prevent the escape from custody of an arrested or detained person; and
- To defend themselves or other people from the imminent use of non-deadly force in the course of effecting an arrest or detention.⁷⁹⁹

The degree of force used in executing an arrest must be reasonable and should not exceed that which is necessary to safely gain control of the person being arrested.⁸⁰⁰ Whenever an officer uses force in the course of an arrest, the officer should incorporate a

⁷⁹⁶ RSA 594:7 (2001).

⁷⁹⁷ RSA 594:5 (2001).

⁷⁹⁸ RSA 627:5, I (2016).

⁷⁹⁹ RSA 627:5, I (2016).

⁸⁰⁰ RSA 594:4, I (2001).

detailed explanation in the arrest report. The officer should describe the degree of force used and the reason that such force was necessary.

2. Requesting Assistance From Civilians

If an officer needs assistance in the course of making any arrest, the officer may legally require a bystander to provide suitable aid. Any person who fails to comply with such a request is guilty of a violation.⁸⁰¹

3. Executing An Arrest In A Third Party's Home

Except under the limited circumstances discussed below, the police may not enter a residence to conduct a warrantless arrest.⁸⁰² If the police have an arrest warrant, they are permitted to enter the home of the person for whom the warrant has been issued in order to take that person into custody. However, the arrest warrant does not give law enforcement officers authority to enter someone else's home to arrest the person named in the warrant.

To execute an arrest warrant for a person in someone else's residence, the police must obtain *both* an arrest warrant and a search warrant.⁸⁰³ A valid arrest warrant eliminates any legitimate expectation of privacy on the part of the person named in the warrant. However, it does not affect the privacy interests of the person whose home is being entered. For that reason, the police must obtain a search warrant based upon probable cause to believe that the suspect is located in the third party's dwelling. As with other searches,⁸⁰⁴ no warrant is necessary if the police have an authorized individual's consent to enter, or if there are exigent circumstances justifying immediate police action.

⁸⁰¹ RSA 594:6 (2001).

⁸⁰² For a discussion on the circumstances under which law enforcement may make a warrantless arrest, *see* pages 241-45 (Warrantless Arrests section).

⁸⁰³ *Steagald v. United States*, 451 U.S. 204, 213-14 (1981).

⁸⁰⁴ *See* Chapter VI, The Law Of Warrantless Searches.

4. The “Knock And Announce” Rule

The “knock and announce” rule prohibits police officers from making an unannounced entry into a dwelling to execute a warrant.⁸⁰⁵ The requirements for executing an arrest warrant under this rule are the same as those for executing a search warrant.⁸⁰⁶

5. Issuing A Summons In Lieu Of Placing Someone Under Arrest

Whenever an officer has grounds to conduct a warrantless arrest for a misdemeanor or violation-level offense, the officer has the authority to instead issue the person a summons.⁸⁰⁷

G. Procedure After Arrest

1. Notification To Family, Friends, Or An Attorney

Once an arrested person is taken to a police station or jail, the police must obtain the name of a parent, relative, friend, or attorney with whom the prisoner may wish to consult.⁸⁰⁸ When possible, the officer shall immediately notify that person of the arrest. Failure to make the required notification is a misdemeanor.⁸⁰⁹ In addition, at least with respect to juvenile arrestees, failure to make the required notification could result in a court later finding that a juvenile’s otherwise voluntary waiver of the *Benoit* rights, the juvenile version of *Miranda*, was not valid.^{810,811} If the police are not able to make the required notification, they should document their notification efforts in a report so their actions may be defended in a subsequent proceeding, if necessary.

⁸⁰⁵ *State v. Sconsa*, 161 N.H. 113, 117 (2010).

⁸⁰⁶ See Chapter V, Preparation and Execution Of A Search Warrant.

⁸⁰⁷ RSA 594:14, I (Supp. 2019) (statute includes sample language for summons).

⁸⁰⁸ RSA 594:15 (2001).

⁸⁰⁹ RSA 594:17 (2001).

⁸¹⁰ *State v. Farrell*, 145 N.H. 733, 738-39 (2001).

⁸¹¹ For a discussion on custodial interrogation of juveniles, see pages 207-09 (Interrogation Of Juveniles section).

2. Consultation With An Attorney Or Family Members

A person being held in custody is entitled to consult privately with an attorney at all reasonable times. Note, however, that a person arrested for driving under the influence is not entitled to consult with counsel before deciding whether to take a blood-alcohol test or breath-alcohol test.⁸¹² Police departments and jails are required to establish regular visiting hours during which a person in custody is allowed to consult with relatives and family members.⁸¹³

3. Bail

Except in certain circumstances described in RSA 597:1-c, RSA 597:1-d, RSA 597:2, and RSA 173-B:9, an arrested person is entitled to be released on bail pending trial.⁸¹⁴ A bail commissioner, appointed by the circuit court, can set and receive bail.⁸¹⁵ The bail commissioner can release a person on personal recognizance, cash, an unsecured bond, or a secured bond, and any combination of conditions. Conditions of bail should always include a requirement that the person not commit a crime while on release, and may also include conditions to ensure the safety of others—such as prohibiting the defendant from having any contact with the victim—and the defendant’s appearance at trial—such as requiring the defendant to report to the local probation office on a weekly basis.⁸¹⁶

In cases involving domestic violence, stalking, or sexual assault, officers should consider asking the bail commissioner or court to use the bail form entitled “Domestic Violence/Stalking Criminal Order of Protection Including Orders and Conditions of Bail” (CBPO), *see* page 472. In certain domestic violence or stalking cases, however, a person will not be entitled to bail. A defendant must be detained pending a court arraignment if

⁸¹² *State v. Greene*, 128 N.H. 317, 320 (1986).

⁸¹³ RSA 594:16 (2001).

⁸¹⁴ RSA 597:1 (2001).

⁸¹⁵ RSA 597:15-a (Supp. 2019); RSA 597:18 (2001).

⁸¹⁶ RSA 597:2 (Supp. 2019).

the person is charged with a violation of a domestic violence protective order issued under RSA chapter 173-B, a stalking order issued under RSA 633:3-a, or an out-of-state order that is enforceable under RSA chapter 173-B.⁸¹⁷ A bail commissioner is not permitted to set bail under those circumstances.⁸¹⁸ Detailed discussions of domestic violence, stalking, and adult sexual assault can be found in Chapters XVIII, XXII, and XIX, respectively.

If a person is unable to make bail, or has been charged with an offense for which bail cannot be set, the person must be brought to court to be arraigned on the charges without unreasonable delay, not to exceed 24 hours (not including Saturdays, Sundays, and holidays).⁸¹⁹ Defendants charged with misdemeanors by complaint must be brought to a circuit court; those charged with felonies and misdemeanor and violation-level charges directly related to those felonies must be brought to a superior court. In some counties, arraignments are conducted by video teleconferencing, which eliminates the need to transport a detainee to the court. At arraignment, the court may amend the bail order.

H. Arrest Of A Foreign National

If the arrested person is a citizen of a country other than the United States, that person may be entitled to certain protections under the Vienna Convention on Consular Relations (VCCR), a treaty to which the United States is a party. The VCCR requires that whenever a foreign national is arrested or detained in the United States, certain procedures must be followed to ensure that the person's government can offer the person appropriate consular assistance.

Foreign nationals must be advised of their right to contact their native country's consulate. Depending on the person's nationality, the person may have additional rights under the VCCR. The United States Department of State has developed a Standard

⁸¹⁷ RSA 173-B:9, I(a) (2014); RSA 597:2, VI (Supp. 2019).

⁸¹⁸ For a further discussion of protective orders, refer to the Model Protocol for Law Enforcement Response to Domestic Violence Cases, which can be found at <https://www.doj.nh.gov/criminal/victim-assistance/documents/law-enforcement-protocol.pdf>.

⁸¹⁹ RSA 594:20-a (Supp. 2019).

Operating Procedure for law enforcement agencies setting out how to comply with the VCCR. This Standard Operating Procedure can be found at:

https://travel.state.gov/content/dam/travel/cna_pdf/CNA%20Standard%20Operating%20Procedure.pdf

I. Detaining Juveniles

An officer taking a minor into custody may release the minor to a parent, guardian, or custodian pending arraignment.⁸²⁰ If no parent, guardian, or custodian is available, the court may release the juvenile under the supervision of a relative or friend, or to the custody of the Department of Health and Human Services for placement in a foster home or other residential placement.⁸²¹ “If the minor is not released within 4 hours of being taken into custody, the court shall be notified, and thereupon, placement, until arraignment, shall be determined by the court.”⁸²²

Alternatively, the court may determine that continued detention of the juvenile is required in order:

- To insure the presence of the juvenile at a subsequent hearing;
- To provide care and supervision for a minor who is in danger of self-inflicted harm when no parent, guardian, custodian, or other suitable person or program is available to supervise and provide such care; or
- To protect the personal safety or property of others from the probability of serious bodily harm or other harm.⁸²³

⁸²⁰ RSA 169-B:11, I (2014).

⁸²¹ RSA 169-B:11, II (2014).

⁸²² RSA 169-B:11, I (2014).

⁸²³ RSA 169-B:14, I(e)(2) (Supp. 2019).

If an officer seeks to have a juvenile detained after arrest, a Detention Assessment Screening Instrument must be completed by following the associated instructions before contacting a judge.⁸²⁴ See Detention Assessment Screening Instrument and Instructions, page 476.

If a juvenile is taken into custody as a child in need of services (CHINS), rather than as a child charged with delinquency, the rules governing release or placement are similar to those discussed above.⁸²⁵ However, a child detained as a CHINS cannot be detained in a facility that has locked doors and physical features designed to restrict movement.⁸²⁶

J. Protective Custody

Taking a person into protective custody is legally distinct from placing a person under arrest. Protective custody is a civil status, which is not necessarily connected to any suspicion that a person has engaged in criminal conduct. Its purpose is to protect the safety of the individual taken into custody, the safety of the public, or both. Because protective custody is a civil status, the probable cause requirements for arrest do not apply.

1. Mentally Ill Individuals

An officer may take a person into protective custody when the officer sees the person engage “in behavior which gives the peace officer reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that unless the person is placed in protective custody the person poses an immediate danger of bodily injury to himself or others.”⁸²⁷ A person taken into protective custody under these circumstances must be taken promptly to a hospital emergency room or an approved

⁸²⁴ <https://www.courts.state.nh.us/forms/nhjb-2581-df.pdf> (last visited Oct. 6, 2020) (form) <https://www.courts.state.nh.us/forms/nhjb-2577-df.pdf> (last visited Oct. 6, 2020) (instructions).

⁸²⁵ RSA 169-D:10 (2014).

⁸²⁶ RSA 169-D:9-b (2014).

⁸²⁷ RSA 135-C:28, III (Supp. 2019).

facility. For a list of approved facilities, please inquire at your police department. There, mental health professionals will determine whether to seek the person's involuntary emergency admission to the hospital.⁸²⁸

2. Intoxicated And Incapacitated Individuals

An officer who encounters a person who appears either intoxicated or incapacitated by alcohol or drugs may take that person into protective custody.⁸²⁹ A person is intoxicated if the person's mental or physical functioning is substantially impaired as a result of the presence of drugs or alcohol in the person's blood.⁸³⁰ A person is incapacitated if, as a result of drugs or alcohol, the person is intoxicated or mentally confused because of withdrawal, such that the person needs medical or professional care to assure the person's safety, or the person presents a direct threat to the safety of others.⁸³¹

Officers are permitted to obtain proper identification from the person, as well as to search the person in order to reduce the likelihood of injury.⁸³² However, if the person's identity has already been determined, a search only for evidence of identification is not permitted.⁸³³ When taking a person into protective custody for either condition, officers may use reasonable and necessary force to protect themselves, the person, or others.⁸³⁴ If force is used, officers should document in a report the type of force used and the reason it was warranted.

If a person under the age of eighteen is taken into protective custody for intoxication or incapacitation and no treatment is available or necessary, the minor's parent or guardian must be notified immediately. Pending the arrival of the parent or guardian, the minor must

⁸²⁸ RSA 135-C:28, III (Supp. 2019).

⁸²⁹ RSA 172:15, I, II (2014); RSA 172-B:3, I, II (2014).

⁸³⁰ RSA 172:1, XXVII (2014); RSA 172-B:1, X (2014).

⁸³¹ RSA 172:1, XXVI (2014); RSA 172-B:1, IX (2014).

⁸³² RSA 172:15, VII (2014); RSA 172-B:3, VII (2014).

⁸³³ *State v. Harlow*, 123 N.H. 547, 552 (1983).

⁸³⁴ RSA 172:15, VII (2014); RSA 172-B:3, VII (2014).

be held in an area separate from where any adults or any minors charged with juvenile delinquency are detained.⁸³⁵

If a person over the age of eighteen is taken into protective custody, the person's family or next of kin must be notified as promptly as possible. If, however, the person requests that the police not notify anyone, the request must be honored.⁸³⁶

a. Intoxicated Individuals

If the person appears intoxicated, the officer can take whichever of the following actions is most appropriate under the circumstances:

- Help the person home, if the person consents;
- Take the person to an approved alcohol or drug treatment program, or other appropriate location, provided the person consents;
- Release the person to someone who will assume responsibility for the person; or
- Protect the person by housing the person in a local jail or county correctional facility for up to 24 hours, or until the person is no longer intoxicated.⁸³⁷

b. Incapacitated Individuals

The options available to officers are broader if the person appears to be in the more serious state of incapacitation. The officer may, without the person's consent:

- Take the person to an approved alcohol or drug treatment program with detoxification capabilities;
- Take the person to a hospital emergency room;
- Release the person to an approved alcohol or drug counselor at a location mutually agreeable to the officer and the counselor;
- House the person in a local jail or county correctional facility for up to 24 hours, or until the person is no longer incapacitated, or until an approved

⁸³⁵ RSA 172:15, V (2014); RSA 172-B:3, V (2014).

⁸³⁶ RSA 172:15, VI (2014); RSA 172-B:3, VI (2014).

⁸³⁷ RSA 172:15, I (2014); RSA 172-B:3, I (2014).

alcohol or drug counselor has arranged transportation for the person to an approved alcohol or drug treatment program or a hospital emergency room; and

- Release the person at any point that the person no longer appears incapacitated.⁸³⁸

3. Abused And Neglected Children

Police officers may take a child into protective custody if:

- The child is in circumstances or surroundings that present an imminent danger to the child's health or life; and
- Immediate action is required; and
- There is insufficient time to file a petition for a court order.⁸³⁹

Officers need not seek the consent of a parent or guardian before taking action in these circumstances. When a child is taken into protective custody under these circumstances, the police must promptly notify the circuit court, which can authorize continued protective custody pending a hearing.⁸⁴⁰ The police should also immediately notify the Division of Children, Youth and Families (DCYF), which will assist in finding a placement for the child. If the child was removed from the custody of someone other than the parent or legal guardian, the police must also make every reasonable effort to notify the parent or legal guardian of the child's whereabouts.⁸⁴¹

K. Warrantless Arrests

A police officer's authority to conduct a warrantless arrest depends on the nature of the suspected offense and the location where the arrest is to take place. As a general rule, officers have broader authority when the suspected offense rises to the level of a felony. However, regardless of the level of suspected offense, an officer may not make a

⁸³⁸ RSA 172:15, II (2014); RSA 172-B:3, II (2014).

⁸³⁹ RSA 169-C:6, I (Supp. 2019).

⁸⁴⁰ RSA 169-C:6, II (Supp. 2019).

⁸⁴¹ RSA 169-C:6, II(d) (Supp. 2019).

warrantless entry into a home, without consent, to conduct a warrantless arrest, unless the situation falls within a narrow set of circumstances.

1. Misdemeanors And Violation-Level Offenses

A law enforcement officer is authorized to make a warrantless arrest for a misdemeanor or violation-level offense whenever the officer has probable cause to believe any of the following:⁸⁴²

- The person to be arrested committed a misdemeanor or violation in the officer's presence. It is not sufficient that the officer viewed the offense on video, the officer must have actually seen the offense occur.⁸⁴³
- Within the past 12 hours, the person to be arrested committed an act of domestic abuse, as defined in RSA 173-B:1, I, against a person eligible for protection under RSA 173-B:1.⁸⁴⁴
- Within the past 12 hours, the person to be arrested committed an assault, criminal trespass, criminal mischief, or other criminal act in violation of a domestic violence restraining order or a marital restraining order.
- Within the past 12 hours, the person to be arrested violated the stalking statute, RSA 633:3-a.
- The person to be arrested committed a misdemeanor or violation, and, the officer has probable cause to believe that if the person is not arrested immediately, the person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property.

⁸⁴² RSA 594:10, I (Supp. 2019).

⁸⁴³ *Forgie-Buccioni v. Hannaford Brothers, Inc.*, 413 F.3d 175, 180 (1st Cir. 2005).

⁸⁴⁴ Persons eligible for protection under RSA 173-B:1 include the actor's family or household member (spouse, ex-spouse, person currently or formerly cohabiting, and parents) and current or former intimate partner. See Chapter XVIII, Domestic Violence (Joshua's Law), for more information.

2. Felonies

A law enforcement officer is authorized to make a warrantless arrest for a felony whenever a felony has actually been committed by the person arrested, regardless of the reasons that led the officer to make the arrest, or the officer has probable cause to believe that the person has committed a felony.⁸⁴⁵

3. Arrests Within A Dwelling

An officer may enter a dwelling to make a warrantless arrest only when the officer has probable cause to do so *and* “exigent circumstances” exist, or when the officer is in “hot pursuit” of the suspect.⁸⁴⁶

a. Exigent Circumstances

Officers are permitted to make warrantless arrests in a dwelling when there are exigent circumstances, *i.e.*, “situations in which law enforcement agents will be unable or unlikely to effectuate an arrest . . . for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization.”⁸⁴⁷ Officers should consider the following factors when determining whether exigent circumstances exist to justify a warrantless entry to effect an arrest:⁸⁴⁸

- Is there probable cause to believe that a felony has been committed and the suspect is in the dwelling?
- Is there a likelihood that the suspect will escape if not immediately apprehended?
- Was the crime one of violence?

⁸⁴⁵ RSA 594:10, II (Supp. 2019). The statute requires “reasonable ground to believe that the person arrested has committed a felony,” but in this context, the New Hampshire Supreme Court has interpreted this to be the same as “probable cause.” *State v. Rodrigue*, 127 N.H. 496, 498 (1985).

⁸⁴⁶ *State v. Ricci*, 144 N.H. 241, 243 (1999).

⁸⁴⁷ *State v. Stern*, 150 N.H. 705, 709 (2004) (quoting *State v. Graca*, 142 N.H. 670, 673 (1998)).

⁸⁴⁸ See *State v. Matos*, 135 N.H. 410, 411-12 (1992) (“there are several well-recognized exceptions [to the warrant requirement], including exigent circumstances, flight, and safety”).

- Is there reason to believe that the suspect is armed and dangerous?
- Is there a reasonable basis for believing that the delay necessitated by seeking a warrant would subject officers or others to physical harm, or likely result in evidence being destroyed?

It is not necessary that each of these factors be satisfied in order for an exigency to exist. Rather the issue is whether the potential harm of waiting to secure a warrant outweighs the privacy interests of those in the dwelling. The exigency necessitating warrantless entry may not be created by police; for example, officers cannot purposely delay obtaining a warrant so that some future emergency will provide exigent circumstances.⁸⁴⁹ In determining whether the police were justified in making a warrantless entry, the courts will consider the reasonableness of the officers' behavior before entry.⁸⁵⁰ Exigent circumstances are unlikely to justify a warrantless entry into a residence to make an arrest for a non-jailable offense.⁸⁵¹

b. Hot Pursuit

Under the "hot pursuit" exception, the police are permitted to make a warrantless entry into a dwelling to make an arrest if they are in pursuit of a suspect who attempts to elude them by retreating into a private dwelling.⁸⁵² For this exception to apply, however, the pursuit must have been immediate and continuous from the scene of a crime,⁸⁵³ and law enforcement must have begun pursuit while the suspect was outside the dwelling.⁸⁵⁴ Also, the hot-pursuit exception does not apply when the underlying offense is a violation-level offense.⁸⁵⁵

⁸⁴⁹ *State v. Santana*, 133 N.H. 798, 807 (1991).

⁸⁵⁰ *State v. Santana*, 133 N.H. 798, 804 (1991).

⁸⁵¹ *State v. Rodriguez*, 157 N.H. 100, 106 (2008).

⁸⁵² *United States v. Santana*, 427 U.S. 38, 42-43 (1976).

⁸⁵³ *State v. Ricci*, 144 N.H. 241, 244 (1999).

⁸⁵⁴ *State v. Morse*, 125 N.H. 403, 408 (1984).

⁸⁵⁵ *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984).

Law enforcement officials may not avoid the warrant requirement by knocking on a suspect's door and then arresting the suspect when he or she retreats back into the home after answering the door.⁸⁵⁶

L. Cross-Border Warrantless Arrests

Maine,⁸⁵⁷ Massachusetts,⁸⁵⁸ and Vermont⁸⁵⁹ have all enacted statutes permitting New Hampshire police officers to enter those states to make an arrest when:

- The officer is in fresh pursuit of the suspect; and
- The officer believes that the suspect committed a felony.

In Maine and Vermont, a New Hampshire officer is also authorized to enter the state to effect an arrest when the suspect is believed to be driving while intoxicated by drugs or alcohol.

When feasible, before a New Hampshire law enforcement officer enters another state in fresh pursuit of a suspect, the officer should notify law enforcement officials in the host jurisdiction of the situation. Following the arrest, the suspect must be held in the host state's custody pending a court hearing on extradition. New Hampshire law enforcement officers should consult with law enforcement officers of the host jurisdiction to learn where the suspect should be taken and held pending the court hearing.

Police officers from Massachusetts, Vermont, and Maine have similar authority to cross into New Hampshire in fresh pursuit, to make an arrest of a suspect believed to have committed a felony.⁸⁶⁰ Officers from Vermont and Maine also have authority to do so if the suspect is believed to be driving while intoxicated.⁸⁶¹

⁸⁵⁶ *State v. Morse*, 125 N.H. 403, 408 (1984).

⁸⁵⁷ Me. Rev. Stat. Ann. tit. 15 § 154 (2016).

⁸⁵⁸ Mass. Gen. Laws Ann. ch. 276, § 10A (West 2014).

⁸⁵⁹ Vt. Stat. Ann. tit. 13 § 5042 (West Supp. 2018).

⁸⁶⁰ RSA 614:1 (Supp. 2019).

⁸⁶¹ RSA 614:1-a (Supp. 2019). The New Hampshire fresh pursuit authority applies to out-of-state law enforcement officials only if the other state grants reciprocal authority. Because Massachusetts law does not include a provision for an out-of-state officer to enter Massachusetts in fresh pursuit of someone

If a cross-border arrest is made in New Hampshire, the arresting officer is required to take the arrestee before a New Hampshire superior or circuit court without unnecessary delay.⁸⁶² If the court determines that the arrest was lawful, it can either detain the person pending issuance of an extradition warrant by the governor of the state in which the crime was committed, or it can order the person released on bail.⁸⁶³

suspected of DWI, the New Hampshire fresh pursuit law does not apply to Massachusetts officers under those circumstances.

⁸⁶² RSA 614:2 (2001).

⁸⁶³ RSA 614:2 (2001).

XVII. RIGHTS OF CRIME VICTIMS AND ADVOCACY

A. Introduction

A police officer is often the first person a crime victim will interact with when the criminal justice process commences. That process can be confusing and frightening for many involved, but especially victims, who have recently been traumatized by crime. When responding to crimes involving victims, an important set of goals for law enforcement should be to minimize the trauma, revictimization, and impact that the criminal justice system can have upon victims. To that end, the legislature adopted the Rights of Crime Victims,⁸⁶⁴ often referred to as the Crime Victim Bill of Rights, which outlines the rights victims have under the law. Law enforcement should be familiar with these rights and diligent in protecting these rights throughout a criminal investigation and beyond.

B. History Of The Rights of Crime Victims Statute

To address the needs of crime victims, the State created the Victims' Assistance Fund in 1989, adopted the Crime Victim Bill of Rights in 1991, and established victim/witness advocacy programs in all counties by 1993. Before the creation of these laws and programs, sexual assault victims had to pay the costs of having a rape-kit performed—a cost that could be sent to a collections agency, domestic violence victims were turned away to resolve their family affairs on their own, and crime victims were denied the opportunity to speak at sentencing and would often learn about the progress of their cases in the news. These laws and programs became the starting point for standardizing services and support for victims of crime across the State and minimizing the trauma concomitant with being the victim of a crime.

⁸⁶⁴ RSA 21-M:8-k (2020).

C. The Rights of Crime Victims Statute

1. Applicability

The Crime Victim Bill of Rights applies broadly to those who have been impacted by criminal activity. The law includes in the definition of victim “a person who suffers direct or threatened physical, emotional, psychological or financial harm as a result of the commission or the attempted commission of a crime” and immediate family of minor victims, incompetent victims, and homicide victims.⁸⁶⁵ Immediate family includes the surviving partner of a civil union.⁸⁶⁶

For the purposes of the Crime Victim Bill of Rights, “crime” includes:

- All felonies;
- Crimes where the perpetrator may be punished by imprisonment for more than one year;
- Misdemeanor sexual offenses;
- Offenses listed in RSA 173-B:1, I, which include:
 - Assault and reckless conduct (RSA 631:1 - RSA 631:3);
 - Criminal threatening (RSA 631:4);
 - Sexual assault (RSA 632-A:2-632-A:5);
 - Interference with freedom (RSA 633:1, RSA 634:2);
 - Unauthorized entry (RSA 635:1 – RSA 635:2);
 - Harassment (RSA 644:4); and
 - Cruelty to animals (RSA 644:8);
- Violations of protective orders issued under RSA chapter 173-B; and
- Violation of protective orders issued under RSA 458:16, III.⁸⁶⁷

⁸⁶⁵ RSA 21-M:8-k, I(a) (2020).

⁸⁶⁶ RSA 21-M:8-k, I(a) (2020).

⁸⁶⁷ RSA 21-M:8-k, I(b) (2020).

Although the definition of crime does not cover all offenses for which a victim may exist, law enforcement should, to the best of the department's abilities, honor the rights guaranteed by RSA 21-M:k-8.

2. Protections Afforded By Rights of Crime Victims Statute

From the outset, the Crime Victim Bill of Rights confers substantial protections upon crime victims. Throughout the criminal justice process, crime victims are entitled, first and foremost, to the right to be:

- To be consulted about the disposition of the case;⁸⁶⁸
- To have inconveniences associated with participation in the criminal justice process minimized;⁸⁶⁹
- To be informed about available resources, financial assistance and social services;⁸⁷⁰
- Of confidentiality of the victim's address, place of employment, and other personal information;⁸⁷¹
- To the prompt return of property when no longer needed as evidence;⁸⁷² and
- To all federal and state constitutional rights guaranteed to all crime victims on an equal basis.

⁸⁶⁸ RSA 21-M:8-k, II(f) (2020); *see also* RSA 21-M:8-k, II(l) (2020).

⁸⁶⁹ RSA 21-M:8-k, II(g) (2020).

⁸⁷⁰ RSA 21-M:8-k, II(i) (2020).

⁸⁷¹ RSA 21-M:8-k, II(m) (2020).

⁸⁷² RSA 21-M:8-k, II(n) (2020).

Many of the remaining rights relate to the process in court both before and after conviction. The rights afforded to crime victims throughout the court process include the right to:

- Reasonable and timely notice of all court proceedings, including post-conviction and administrative proceedings;⁸⁷³
- Attend trial and all other court proceedings, including post-conviction proceedings, on the same basis as the accused—meaning that if the accused may be present, then so may the victim(s);⁸⁷⁴
- Confer with the prosecution and be consulted about the disposition of the case, including through plea bargain,⁸⁷⁵ and be informed about case progress;⁸⁷⁶
- Be notified if the victim’s presence in court is not required;⁸⁷⁷
- Be provided a secure, but not necessarily separate, waiting area during court proceedings;⁸⁷⁸
- Have input into the probation presentence report impact statement;⁸⁷⁹
- Appear and be heard, orally or in writing, at any proceeding involving the release, plea, sentence, or parole of the accused without facing questioning by defense counsel;⁸⁸⁰ and
- Have the prosecutor notify the victim’s employer of the necessity of the victim’s cooperation and testimony.⁸⁸¹

⁸⁷³ RSA 21-M:8-k, II(d) (2020).

⁸⁷⁴ RSA 21-M:8-k, II(e) (2020).

⁸⁷⁵ RSA 21-M:8-k, II(f) (2020).

⁸⁷⁶ RSA 21-M:8-k, II(l) (2020).

⁸⁷⁷ RSA 21-M:8-k, II(h) (2020).

⁸⁷⁸ RSA 21-M:8-k, II(k) (2020).

⁸⁷⁹ RSA 21-M:8-k, II(o) (2020).

⁸⁸⁰ RSA 21-M:8-k, II(p) (2020); *see also* RSA 21-M:8-k, II(r) (2020) (applying this right to sentence review and reduction hearings); RSA 21-M:8-k, II(t) (2020) (applying this right to parole board hearings); RSA 21-M:8-k, II-a (2020) (defining the scope of the victim impact statement and conferring the right of a victim to have a representative speak on the victim’s behalf).

⁸⁸¹ RSA 21-M:8-k, II(x) (2020).

The rights afforded to crime victims post-conviction include the right to:

- Be notified of an appeal along with an explanation of the appeal process;⁸⁸²
- Be notified about the time, place, and outcome of the appeal;⁸⁸³
- Attend the appeal hearing, if any occurs;⁸⁸⁴
- Be notified, when requested, of any change of status such as prison release, permanent interstate transfer, escape, and the date of any parole board hearing;⁸⁸⁵
- Be informed of the filing of a petition for post-conviction DNA testing under RSA chapter 651-D;⁸⁸⁶
- Full and timely restitution, victim's compensation, or the benefit of any other state law to recoup financial losses;⁸⁸⁷
- Access restorative justice programs offered through the Department of Corrections.⁸⁸⁸

⁸⁸² RSA 21-M:8-k, II(q) (2020).

⁸⁸³ RSA 21-M:8-k, II(q) (2020).

⁸⁸⁴ RSA 21-M:8-k, II(q) (2020).

⁸⁸⁵ RSA 21-M:8-k, II(s) (2020).

⁸⁸⁶ RSA 21-M:8-k, II(w) (2020).

⁸⁸⁷ RSA 21-M:8-k, II(j) (2020).

⁸⁸⁸ RSA 21-M:8-k, II(v) (2020).

XVIII. DOMESTIC VIOLENCE (“JOSHUA’S LAW”)

A. Introduction

Situations involving domestic violence are some of the most challenging and dangerous for law enforcement officers. The Attorney General’s Office has developed a protocol for law enforcement on responding to domestic violence situations, which can be found at:

<https://www.doj.nh.gov/criminal/victim-assistance/protocols.htm>.

This chapter highlights the most important aspects of that protocol, as well as the mandatory law enforcement provisions relative to domestic violence. It is strongly encouraged that officers refer to the protocol for more detailed guidance in handling domestic violence cases.

B. Body-Worn Cameras

For officers using body-worn cameras, once the officer determines who the primary physical aggressor is, the victim must give express consent before the officer may continue recording the interview with the victim. Express consent can be obtained orally, and should be recorded.

When the officer has obtained express consent from the victim, the officer can then continue the recorded interview. If the victim does not give consent, the victim’s decision must be honored, and all recording devices must be deactivated. The reason for deactivation shall be documented in the associated police report.⁸⁸⁹

C. The Initial Response And Officer Safety

Responding to a domestic violence call can be one of the most dangerous activities in which an officer engages. Parties to a domestic disturbance are commonly experiencing a variety of emotions including anger, frustration, and fear. The responding officer can

⁸⁸⁹ RSA 105-D:2, VII(d) (Supp. 2019).

suddenly become the target for all that hostility. For those reasons, responding officers should always approach with caution.

Officers should obtain all available information from the dispatcher before arriving at the scene, and should notify the dispatcher upon arrival. Officers should avoid using emergency lights and sirens when they are close to the scene, unless they have reason to believe that someone is in imminent danger of serious bodily injury.

Whenever possible, a minimum of two officers should respond to a domestic violence call. When approaching the premises, they should keep in mind that threats to their safety may often be waiting outside.

Absent exigent circumstances, such as an ongoing assault, that would require a forced entry, officers should knock, identify themselves, and request to be allowed in. If entry is refused, or if there is no response, the officers should determine whether there are exigent circumstances justifying a nonconsensual entry.⁸⁹⁰ This determination will include consideration of the probability of danger to others, the nature of any past calls to the residence, and whether there is reason to believe someone in the residence may be armed.

Once inside, officers should establish control of the situation by taking the following measures:

- Separating the parties;
- Removing the parties from areas of the home that could present a significant threat, such as the kitchen where knives and other weapons are readily accessible;
- Identifying and taking control of weapons to ensure everyone's safety;
- Establishing the location of any other people in the home;
- Assessing the condition of any children in the home; and
- Assessing injuries, administering first aid, and requesting medical services.

⁸⁹⁰ For the law on the exigent-circumstance exception to the requirement of a warrant, *see* Chapter VI, The Law of Warrantless Searches.

D. The On-Scene Investigation

In conducting an investigation, officers should refer to the Domestic Abuse Investigation Checklist, *see* page 483.

Officers should interview the victim and the assailant as fully as the circumstances allow. Whenever possible, these interviews should be done outside the presence of other people. Officers should audio or video record the interview of the victim in order to obtain the most accurate account of the incident. Using written statements from victims is not considered best practice. However, a victim may refuse recording.

If children must be interviewed, the interview should be kept to just minimal facts. Questions to consider when conducting a minimal-facts interview include:

- What happened?
- Who was there when it happened?
- Where were you when it happened?
- What did you hear?
- What did you see?

Law enforcement should refer the case to a Child Advocacy Center for a comprehensive interview. If a child was present during this incident or a previous incident, law enforcement should report the incident to the Division for Child, Youth and Families (DCYF) Central Intake at:

1-800-894-5533

or

603-271-6556

This report should be made immediately if the child/ren is in imminent danger.

Officers should take evidentiary photographs of the victim, the suspect, and the scene, and collect and preserve all physical evidence reasonably necessary to support a prosecution, such as weapons and torn clothing. Evidence supporting the nature of the relationship between the parties should also be collected in order to charge a crime of domestic violence under RSA 631:2-b.

Officers should determine whether there is a protective order in effect against the assailant, whether issued by a court in this state or any other.⁸⁹¹ If such an order exists, officers should ask the victim if he or she has a copy of the order. “Law enforcement personnel may rely on the statement of the person protected by the order that the order remains in effect as written.”⁸⁹²

E. The Lethality Assessment Program

The Lethality Assessment Program (LAP) Maryland Model, should be used as a best practice response in domestic violence cases.⁸⁹³ A LAP screen should be used in calls involving intimate relationships when an officer believes there has been a crime or an attempted crime as listed in RSA 173-B:1, and when the officer believes that if immediate intervention does not take place, it is likely that the victim will be seriously injured or killed.

A LAP screen should be conducted whenever a suspect has been arrested in a domestic violence case. Officers should initiate the LAP screen near the conclusion of the on-scene investigation when the scene has been secured, the predominant physical aggressor has been identified, the victim has been interviewed, and evidence has been collected.

Because the LAP screen is a supplemental measure taken by the officer to assess for victim safety, officers should turn off their body-worn cameras or other recording devices that may have been used during the interview with the victim. Additionally, the

⁸⁹¹ Refer to the Attorney General’s Domestic Violence Protocol for a discussion about the enforceability of foreign protective orders, beginning on page 40.

⁸⁹² RSA 173-B:13, VI (2014).

⁸⁹³ “The Lethality Assessment Program—Maryland Model (LAP), created by the Maryland Network Against Domestic Violence (MNADV) in 2005, is an innovative strategy to prevent domestic violence homicides and serious injuries. It provides an easy and effective method for law enforcement . . . to identify victims of domestic violence who are at the highest risk of being seriously injured or killed by their intimate partners, and immediately connect them to the local community-based domestic violence service program.” See Lethality Assessment Program, <https://lethalityassessmentprogram.org/about-lap/how-lap-works/> (last visited July 7, 2020).

conversation that occurs between the victim and the crisis center advocate is privileged under RSA chapter 173-C, and it is imperative that none of that conversation is recorded so that the privilege is not compromised.

If during the course of the LAP screen, the victim shares information that the officer may want to investigate further, the officer may turn the recording device back on, but only after the conversation between the victim and the crisis center advocate has concluded and the victim has given consent to begin recording again.

F. Mandatory Arrests

If the police have probable cause to believe that the assailant has violated any temporary or permanent protective orders listed below, the police *must* arrest that person, even if the victim does not want the assailant arrested. This arrest may be made without a warrant if the arrest happens within 12 hours after the violation occurs.⁸⁹⁴ The relevant temporary or permanent protective orders include:

- Domestic violence protective orders granted under RSA chapter 173-B;
- Stalking protective orders granted under RSA 633:3-a;
- Protective orders contained in a divorce decree under RSA 458:16;
- Protective orders contained as part of a parenting plan under RSA chapter 461-A; and
- Protective orders issued by another state, territorial, or tribal court.⁸⁹⁵

If a protective order—issued under RSA chapter 173-B, RSA 458:16, or RSA 633:3-a—is violated and the committed act is listed in RSA 633:3-a, II(a), the assailant can be charged with stalking.⁸⁹⁶

⁸⁹⁴ RSA 173-B:9, I(a) (2014); RSA 597:7-a, I-a (Supp. 2019); RSA 633:3-a, V (Supp. 2019).

⁸⁹⁵ RSA 173-B:9, I(a) (2014); RSA 597:7-a, I-a (Supp. 2019); 18 U.S.C. § 2265 (2018).

⁸⁹⁶ RSA 633:3-a, I(c) (Supp. 2019). The acts listed in RSA 633:3-a, II(a) (Supp. 2019) are:

- (1) Threatening the safety of the targeted person or an immediate family member.
- (2) Following, approaching, or confronting that person, or a member of that person's immediate family.

If the assailant has fled, but is apprehended within 12 hours of the incident, officers may execute an arrest without a warrant.⁸⁹⁷ Upon expiration of the 12-hour period, however, officers must obtain an arrest warrant.

NOTE: If the assailant is located in another person's home, the police cannot enter the home to make an arrest, unless they obtain the homeowner's consent or a search warrant, even if it is within 12 hours of the incident.

Anyone who is arrested for a violation of a protective order issued or enforced under RSA chapter 173-B, RSA 169-C:7-a, RSA 169-C:16, RSA 169-C:19, or RSA 633:3-a must be detained until arraignment.⁸⁹⁸

NOTE: Violations of protective orders issued under the Child Protection Act,⁸⁹⁹ also qualify for a mandatory arrest and may be made without a warrant if the violation occurred within 6 hours.

G. Discretionary Arrests

Unless there are compelling reasons not to do so, officers should make an arrest if there is probable cause to believe that one of the parties committed an offense defined in RSA 173-B:1, I. If the assailant has fled and there is probable cause to believe that he or she has committed an offense of abuse, officers should take steps promptly to pursue and

(3) Appearing in close proximity to, or entering the person's residence, place of employment, school, or other place where the person can be found, or the residence, place of employment or school of a member of that person's immediate family.

(4) Causing damage to the person's residence or property or that of a member of the person's immediate family.

(5) Placing an object on the person's property, either directly or through a third person, or that of an immediate family member.

(6) Causing injury to that person's pet, or to a pet belonging to a member of that person's immediate family.

(7) Any act of communication, as defined in RSA 644:4, II.

⁸⁹⁷ RSA 633:3-a, V (Supp. 2019).

⁸⁹⁸ RSA 173-B:9, I(a) (2014).

⁸⁹⁹ See RSA 169-C:7-a (2014); RSA 169-C:16 (2014); RSA 169-C:19 (2014).

apprehend the assailant. If the assailant is apprehended within 12 hours of the incident, officers may arrest the person without a warrant.⁹⁰⁰ If the 12-hour time period has expired, the police must obtain an arrest warrant.

NOTE: If the assailant is located in another person's home, officers cannot enter the home to make an arrest, unless they obtain the homeowner's consent or a search warrant, even if it is within 12 hours of the incident.

When an officer has probable cause to believe that the two parties involved in a domestic violence situation have committed abuse against each other, the officer should not arrest both of them. Rather, the officer should arrest only the person who was the primary physical aggressor.⁹⁰¹ In determining who the primary physical aggressor was, the officer shall consider:

- The intent of the statute to protect victims of domestic violence;
- The relative degree of injury or fear inflicted on the people involved; and
- Any prior history of domestic violence between the persons.⁹⁰²

Other factors that can assist an officer in determining the primary physical aggressor include:

- The strength and size of the persons involved;
- Whether the injuries were defensive or offensive;
- The seriousness of the injuries;
- Criminal records;
- Prior contacts with law enforcement;
- Information from witnesses;
- Active or prior protective orders;
- Which party utilizes threat and intimidation in the relationship; and
- Consistency between a person's statements and an officer's observations.

⁹⁰⁰ RSA 594:10, I(b) (Supp. 2019).

⁹⁰¹ RSA 173-B:10, II (2014).

⁹⁰² RSA 173-B:10, II (2014).

If an officer decides not to make an arrest, the incident report must include a detailed explanation for that decision. Likewise, if an officer determines there is probable cause to arrest both parties, the officer should write and file a separate report for each arrest explaining the probable cause for each arrest.

However, if a protective order has been violated, the violator must be placed under arrest.

H. Charging

The crime of domestic violence—defined in RSA 631:2-b—became law in New Hampshire on January 1, 2015.⁹⁰³ The intent of the statute was to make New Hampshire law compatible with federal laws regarding firearm prohibitions, and to make it easier to identify domestic violence offenders for use in bail arguments and sentencing.

For an offense to qualify under RSA 631:2-b, the victim must be related to the defendant either as a “family or household member” or as an “intimate partner.”⁹⁰⁴ Generally, to violate the statute, the assailant must use, attempt to use, or threaten to use physical force or a deadly weapon.⁹⁰⁵ As a best practice, law enforcement should pursue charges under RSA 631:2-b whenever it is possible, but there may be instances when it is not. For example, when the relationship status is unclear or the physical force component is missing. In those circumstances, of course, assailants should still be charged under the appropriate sections of the Criminal Code.

I. Bail And Criminal Orders Of Protection

In general, an arrested person is entitled to be released on bail pending trial.⁹⁰⁶ However, if the arrested person has been charged with violating a protective order issued

⁹⁰³ 2014 N.H. Laws 152:2, :11.

⁹⁰⁴ RSA 631:2-b, I (Supp. 2019).

⁹⁰⁵ RSA 631:2-b, I(a)–(k) (Supp. 2019).

⁹⁰⁶ N.H. Const. pt. I, art. 33; RSA 597:1 (2001); RSA 597:2 (Supp. 2019).

under RSA chapter 173-B, a stalking order issued under RSA 633:3-a, an order under RSA 169-C, or an out-of-state order that is enforceable under RSA chapter 173-B, the person must be denied bail until arraignment.⁹⁰⁷

When bail is permitted in a case involving domestic violence, officers should request that the bail commissioner or the court use the bail form entitled “Domestic Violence/Stalking Criminal Order of Protection Including Orders and Conditions of Bail” (CBPO) instead of the standard bail form. *See* CBPO Form, page 472. In addition to the standard bail conditions, the CBPO form contains conditions similar to those available in a domestic violence protective order, such as restricting personal contact and prohibiting the possession of firearms and weapons. Unlike the standard bail form, the CBPO form can be entered into both the state protective order registry and National Crime Information Center (NCIC), thus, ensuring that the information will be available to law enforcement officers statewide, as well as in other states.

Because a CBPO is issued as a bail order, it should not be considered a substitute for a civil domestic violence protective order under RSA chapter 173-B. For instance, a CBPO will not contain conditions of child support, visitation, or possession of the family home. Officers should still advise domestic violence victims of their option to apply for a protective order under RSA 173-B.

Whenever a bail commissioner issues a CBPO, the law enforcement officer should fax a copy to the State Police for entry into the state registry. A copy of the CBPO form should also be filed in the district division of the circuit court along with the criminal complaint.

In general, a CBPO must be enforced as a bail order, not a domestic violence protective order. If a person violates a condition of a CBPO, officers should seek modification or revocation of the bail order. However, under certain circumstances, a

⁹⁰⁷ RSA 173-B:9, I(a) (2014); RSA 597:2, VI (Supp. 2019).

defendant who is subject to a CBPO and who violates a condition of that order by engaging in an act listed in RSA 633:3-a, II(a) may be charged with stalking.⁹⁰⁸

NOTE: For the purposes of a CBPO, “intimate partner” is defined under federal law narrowly than it is under RSA chapter 173-B or RSA 631:2-b.⁹⁰⁹

J. Seizure Of Firearms, Ammunition, And Deadly Weapons

After making an arrest for domestic abuse or for a violation of a protective order, the police *must* seize any firearms and ammunition that are in the control, ownership, or possession of the defendant, and any deadly weapons that have been used or threatened to be used.⁹¹⁰

⁹⁰⁸ RSA 633:3-a, I(c) (Supp. 2019).

⁹⁰⁹ Under federal law, the term “spouse or intimate partner” includes:

(A) for purposes of—

(i) sections other than 2261A—

- (I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or
- (II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship; and

(ii) section 2261A—

- (I) a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; or
- (II) a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship.

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

18 U.S.C. § 2266(7) (2018).

⁹¹⁰ RSA 173-B:10, I(a) (2014) (mandates seizure after law enforcement makes an arrest for domestic abuse); RSA 173-B:9, I(b) (2014) (mandates seizure after law enforcement makes an arrest for violation of a protective order).

NOTE: Absent exigent circumstances or consent, officers may not conduct a search of the premises for weapons, unless a search warrant is obtained. However, if the officers are lawfully present in the home, they may seize any weapons in plain view.

K. Obligations To The Victim

Whenever there is probable cause to believe that a person has been the victim of domestic abuse, the police are required to use all reasonable means to prevent further abuse, including, but not limited to, the following:

- Confiscating any deadly weapons used or threatened to be used in the abuse;
- Confiscating any firearms or ammunition in the defendant's control, ownership, or possession;
- Transporting or obtaining transportation for the victim and any child to a designated place to meet a counselor, family member, or friend;
- Assisting the victim in removing personal hygiene items, clothing, medication, business equipment, and other items ordered by the court;
- Giving immediate and written notice of the rights, remedies, and services available to victims of domestic violence, a copy of which can be accessed here:

<https://www.doj.nh.gov/criminal/victim-assistance/publications.htm>,⁹¹¹
and

- Immediately informing victims of abuse of their right to seek a protective order and to seek a private criminal complaint.⁹¹²

⁹¹¹ RSA 173-B:10, I (2014).

⁹¹² RSA 173-B:11, I (2014).

L. Remaining At The Scene

Officers must remain at the scene until they reasonably believe there is no immediate threat of physical harm and all appropriate measures have been taken to protect the parties. They may remain for the protection of one or more individuals as long as those individuals desire protection, or long enough to make an arrest.

If an arrest is mandated or advisable and the suspect has left the scene, officers should take steps to ensure the safety of the victim and others entitled to protection. This should include a discussion of safety options, such as alternative safe housing and a recommendation that the victim call the local crisis center. It may also include transporting the victim to the police station or the local crisis center, and obtaining an emergency telephonic protective order.

M. Emergency Telephonic Orders Of Protection

If a person has been threatened with harm, a civil domestic violence protective order may provide the victim with essential protections. Officers should follow the procedure described below to seek an emergency telephonic protective order for the victim.⁹¹³ This procedure should ordinarily be used only during hours when court is not in session. It should not be used as a substitute for arrest, or for asking a court or bail commissioner to detain a defendant pending arraignment or for the issuance of a criminal protective order.

- The victim must complete and sign the “allegation of abuse” section of the Emergency Order of Protection and Affidavit of Service form; detailing specific dates, times, and events. Officers shall not make the determination whether an allegation qualifies for a protective order. That decision is for a judge.
- The officer must contact the after-hours judge for the court where the matter would be heard, identify himself or herself, and read the victim’s allegations of abuse. If possible, the victim should be present with the officer to answer any questions the judge may have.

⁹¹³ RSA 173-B:4, I (Supp. 2019).

- If the judge determines that there is an immediate and present danger of abuse, the judge will indicate which blocks on the form need to be checked. The officer must check those blocks and sign the form where indicated.
- The officer must provide the victim with a copy of the order and explain that the defendant will also receive a copy of the order.
- The officer must explain to the victim that the order remains in effect only until the close of the next court business day, and inform the victim of the hours and location of the court to obtain a new petition and order.
- The officer must immediately fax a copy of the protective order to the Department of Safety at **603-271-1153**.
- The officer must promptly serve the order, or have it served, on the defendant.
- The officer must file the return of service at the court of jurisdiction for the victim's residence. If the court is not open, the return should be filed at the opening of business on the next business day.

N. Serving Protective Orders

Emergency and temporary protective orders must be promptly served on the defendant. Because service of such orders involves the potential for violence, officers should obtain as much information about the defendant as possible before serving the order. The court issuing the order should have a "Defendant Information Sheet" containing information about the defendant, which the officer should review.

Before serving the order, the officer should review the order to determine whether it includes a requirement that the defendant relinquish all firearms and ammunition. If it does not, the officer shall not attempt to remove weapons or ammunition.

If the order requires the defendant to relinquish all firearms and the defendant refuses to do so, if the officer has probable cause to believe that the defendant is in possession of firearms, the officer should secure the premises and obtain a search warrant.

NOTE: Under no circumstances should the victim's location or address be revealed to the defendant.

O. Civil Standbys

When an officer has probable cause to believe a victim has been abused as defined in RSA 173-B:1, he or she is required to assist “the victim in removing toiletries, medication, clothing, business equipment, and any other items determined by the court.”⁹¹⁴ If the victim has left the residence, this statute does not require notification to, or permission from, the defendant to remove the items specified. Nor does it require that the defendant be present.

When a protective order is in place, RSA 173-B:4, I(a)(2) restrains the defendant from entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer and is allowed entry by the plaintiff/victim for the sole purpose of retrieving personal property specified by the court.

In this instance, the defendant must make arrangements through the local law enforcement agency to retrieve any property specified by the court. The law enforcement agency should contact the victim and arrange for a convenient time for the defendant and the law enforcement officer to proceed to the residence to retrieve only the items designated.

For the personal safety of law enforcement and the victim, the officer should physically remain in the presence of the defendant.

P. Firearms Storage And Return

When a defendant is required to relinquish firearms and ammunition, relinquishment must be to a police officer. A defendant can request a court order authorizing storage of the firearms at a federally licensed firearms dealer, at the defendant’s expense. If the defendant obtains such an order and provides it to the police department,

⁹¹⁴ RSA 173-B:10, I(c) (2014).

the department shall transfer the firearms to the designated firearms dealer. The defendant is not permitted to turn the firearms over to the dealer directly.⁹¹⁵

Firearms, ammunition, and other weapons seized as a result of a domestic violence situation shall not be released, unless the law enforcement agency receives a court order authorizing the release and specifying to whom they may be released. If guns are being stored by a firearms dealer, the law enforcement agency must retrieve them and, in turn, release them in accordance with the court order. A defendant is not permitted to retrieve guns from the firearms dealer directly.⁹¹⁶

⁹¹⁵ RSA 173-B:5, X(c) (Supp. 2019).

⁹¹⁶ RSA 173-B:5, X(c) (Supp. 2019).

XIX. ADULT SEXUAL ASSAULT

A. Introduction

Sexual violence in our society crosses all socio-economic, age, gender, and racial lines. It occurs in both New Hampshire's urban and rural communities. Sexual violence has a tremendous impact on a victim's life, affecting him or her physically and emotionally. Coping with the assault and requesting assistance can be extremely traumatic and challenging for a victim. The criminal justice system's response to reports of sexual assault is critical to minimize further trauma to the victim, to assist in his or her healing, and ensure successful prosecution of sexual offenders.

RSA chapter 632-A sets forth the three levels of sexual assault offenses in this State: aggravated felonious sexual assault, felonious sexual assault, and sexual assault.⁹¹⁷ The Attorney General's Office has developed a protocol for law enforcement on responding to and investigating sexual assaults, which can be found at:

<https://www.doj.nh.gov/criminal/victim-assistance/protocols.htm>.

This chapter highlights some of the most important aspects of that protocol. It is strongly encouraged that officers refer to the protocol for more detailed guidance in handling sexual assault cases.

B. The Role Of Law Enforcement In Adult Sexual Assault Cases

The role of law enforcement in cases of adult sexual assault is to ensure the immediate safety and security of the victim, to arrange for medical treatment, to obtain information, and to preserve evidence. Law enforcement's primary responsibility is to investigate and determine if a sexual assault meets the criteria for a crime as defined by New Hampshire law. Determining whether an assault satisfies the criteria for a crime involves putting together a factual history by collecting statements from the victim, any witnesses, and suspect(s), as well as collecting any physical and supporting evidence.

⁹¹⁷ RSA 632-A:2-:4 (Supp. 2019).

Crimes of sexual violence should be recognized as “critical incidents” and victims should be treated in a respectful and non-judgmental way. In many, if not most, sexual assaults there are no eyewitnesses and there is no physical evidence. This does not mean the case cannot be proven beyond a reasonable doubt. In fact, New Hampshire law states a victim’s testimony need not be corroborated.⁹¹⁸ Notwithstanding this law, it is important for investigators to look for evidence to support the victim’s report in the form of:

- Medical evidence;
- Physical evidence;
- Witnesses who may have seen or heard something around the time of the incident;
- Witnesses the victim and/or suspect may have talked to after the assault;
- Photographic and/or video documentation of the scene(s);
- Information about the suspect’s behavior, including efforts to groom or isolate the victim prior to the assault; and
- Evidence of the existence of power dynamics in the relationship.

C. Best Practice Guidelines For Law Enforcement Response To Adult Victims Of Sexual Assault

1. Initial Statement

The initial victim statement is typically taken upon first contact with the victim. Taking this initial *verbal* statement from the victim is an opportunity for law enforcement to obtain basic information and establish the location and elements of the crime. This “minimal facts interview” is *not* an opportunity to conduct a comprehensive interview. Rather, it is used to assess safety and health needs, ascertain jurisdiction, identify, and preserve sources of evidence and determine next steps.

⁹¹⁸ RSA 632-A:6, I (Supp. 2019).

In taking this verbal statement, here are suggested questions to ask:

- What happened and when?
- Who did it?
- Where is he or she now?
- Where did it start and where did it end?
- Were any weapons shown or threatened?
- Were you “choked”? If yes, get the victim medical attention as soon as possible.
- Identify any potential witnesses, evidence, and additional scenes.

Sexual assault victims have experienced a trauma and in the moments immediately following the trauma may have difficulty remembering or providing details of their experience. As such, according to best practice, victims of sexual assault should never be asked to provide a written statement about the assault, especially during the initial phase of their report to law enforcement. Rather, a victim’s statements should be given verbally, and officers should thoroughly document these statements in their police reports.

2. Collaborative Response

When law enforcement is the first contact for an adult victim of sexual assault a collaborative response should be initiated by calling the local crisis center for an advocate. This could be at the scene, at the police department, at the hospital, or another location.

If the victim is at a hospital, confirm that the crisis center has been called. The crisis center should be contacted whether a victim chooses to have a sexual assault exam or not. All sexual assault victims should be encouraged to seek medical attention as soon as possible and assistance with transportation to a medical facility should be provided, as appropriate.

3. Role During The Medical/Forensic Examination

The victim should always be allowed to determine who is present during the medical/forensic exam. Law enforcement should not be present in the room when the Sexual Assault Nurse Examiner (SANE) or other medical care provider is taking a medical history of the victim or conducting the exam. If a Sexual Assault Evidence Collection Kit is used during the exam, it will be signed over to law enforcement for transportation to the New Hampshire State Police Forensic Laboratory.

4. The First Responder

There are responsibilities that apply to all first responders in adult sexual assault investigations. Some of these responsibilities include the following:

- **Initial Responsibilities:**
 - Intervene in any in-progress assaults and separate all parties;
 - Detain or apprehend the suspect;
 - Call for emergency medical care for the victim, if necessary; and
 - Request additional personnel to respond, as appropriate.

- **Additional Priorities:**
 - Attend to the victim. Use appropriate language and sensitivity for a sexual assault investigation;
 - Remove the victim to a neutral, safe place away from the scene when appropriate;
 - Be careful not to stigmatize the victim by speaking loudly or calling unnecessary attention to the victim in any way;
 - Conduct a Minimal Facts Interview with the victim. *Refer above for helpful tips;* and
 - Recommend to the victim that he or she seek medical treatment.
 - Inform the victim that there could be immediate and long-term health concerns that result from the assault, and that he or she can seek medical care whether he or she wants evidence collected or not.

- Advise the victim that a sexual assault survivor has a right to: not be prevented from, or charged for, receiving a medical examination.⁹¹⁹
 - Assist with transportation to the medical facility.
 - If the victim decides to have a medical/forensic exam, encourage the victim not to shower, wash up, eat or drink, change his or her clothes, etc., until evidence can be collected by a SANE or other trained professional at the hospital.
 - Secure and protect the scene(s) until additional personnel arrive to assist.
- **During The Initial Contact With The Victim First Responders Should:**
 - Attempt to determine if a crime occurred;
 - Contact the local crisis center for an advocate to respond for the victim;
 - Explain to the victim what will happen as the process continues and who will be responsible from the department for case follow up, including who might be contacting the victim to schedule a more comprehensive interview;
 - Provide the victim with telephone numbers for the police department investigator handling the case; and
 - Document officer involvement and observations clearly and in detail as soon as possible.

5. Investigation And Follow-Up

Officers assigned to conduct follow-up to reports of adult sexual assault should contact the victim as soon as practical following the initial report in order to check on the victim's welfare and safety, and to review the direction of the investigation. This contact may also serve as an opportunity to schedule a comprehensive interview with the victim.

⁹¹⁹ RSA 21-M:18, I(a) (2020).

6. Conducting A Comprehensive Interview

Whenever possible, the comprehensive interview should be performed by law enforcement personnel with specialized training in sexual assault interviews. The interview should take place *after* the medical/forensic exam has been completed. In cases of timely reports, best practice recommends waiting 24 to 48 hours after the victim's disclosure, if possible, to conduct a comprehensive interview. In New Hampshire, best practice would also allow for a crisis center advocate to be present during the interview, if the victim so desires. The role of the crisis center advocate is to provide support to the victim, *not* to participate in the actual interview process.

Law enforcement should allow ample time to conduct a thorough victim interview. The comfort and needs of the victim should be taken into consideration throughout the course of the interview process. Law enforcement should consider that trauma, cultural differences, cognitive ability, fear, self-blame, and other factors can influence the victim's ability to provide clear and concise details about the assault.

This interview presents an opportunity for the victim to provide additional information he or she may not have remembered initially, may have been afraid or embarrassed to share, or may have suppressed immediately following the assault. It presents an opportunity for law enforcement to:

- Verify, clarify, and expand on the initial minimal facts interview;
- Confirm and establish the elements of the crime;
- Establish the identity of the suspect, the elements of force, threat, or coercion, and the issue of consent; and
- Develop supporting details related to the assault and the circumstances surrounding it.

Sexual offenders often target victims whom they perceive as vulnerable and lacking credibility. Victims may have a previous criminal history, abuse alcohol and/or drugs, or have physical, cognitive, or mental disorders. Victims may also fear not being believed. Officers must recognize these issues and attempt to make the victim comfortable by:

- Acknowledging the impact of trauma on the victim during the interview;
- Establishing a rapport before beginning the interview;
- Explaining how the investigative process works and why certain questions are necessary;
- Avoiding victim blaming questions – such as “why did you” or “why didn’t you”- unless the context and purpose of such a question is explained to the victim before it is asked;
- Encouraging the victim to provide as complete and comprehensive a statement of the event as they can provide with only minimal interruption by the interviewer;
 - This is done with the understanding that follow up questions will be necessary for clarification of various points throughout the statement;
- Identifying any reason(s) for a delay in reporting to law enforcement by the victim if the reason is not readily apparent during the interview;
 - Delayed reporting is common in sexual assault cases and should be thoroughly investigated as it would in any other case; and
- Ensuring that the victim, with assistance from a crisis center, has a safety plan in place regarding what to do if the suspect contacts, or attempts to contact, the victim especially if a threat was made during the assault incident.

7. Anticipating Potential Defenses During The Comprehensive Interview

In some instances, investigators may be able to identify possible defenses during the early stages of the investigation that might be raised should the case be prosecuted. These might include consent, denial by the suspect, or misidentification, depending on whether the victim and suspect are strangers or non-strangers to each other. Keep in mind that a victim may know a suspect only by a first name or nickname and be unable to provide complete information regarding full name or address. When learning the details of the assault, a potential defense may become apparent. This defense may be addressed through various lines of questioning.

a. The Consent Defense - “It Was Consensual”

The defense of consent is always a possibility if the victim and suspect know each other. Accordingly, a comprehensive history regarding the relationship between the parties and the specific facts of the incident should be obtained. Because the issue of prior sexual contact may be admissible, limited inquiry into this area may also be necessary. Due to the sensitive nature of this topic, discretion is advised. Another area of inquiry is the short- and long-term impacts of the assault on the victim’s life. Evidence of adverse consequences following the assault, *i.e.*, inability to focus, difficulty maintaining personal relationships, loss of a job, and dropping out of school, may be helpful in responding to a consent defense.

When consent is a possible defense, consider the following areas of inquiry during the comprehensive interview with the victim:

- What is the victim *able* to tell about his or her experience?
- Follow up with: “Tell me more.” “Tell me more about that.”
- If the encounter began as consensual, at what point did the suspect’s behavior change?
- Obtain any information the victim can provide that is inconsistent with consensual behavior.
- Ask the victim to explain how he or she let the suspect know it was not consensual. *Remember, passivity can be a sign of non-consent.*
- If force (physical, threat, or coercion) was involved, what was it and how was it applied on the victim? How did it make the victim feel? Does the victim have any bruises, scratches, marks, or signs of genital injuries?
- Ask the victim to talk about specific threats, tone of voice used, and any gestures and/or looks given to the victim. How did the victim react to this?
- What were the victim’s thoughts and feelings during the assault?
- What was the victim seeing, hearing, feeling, and tasting during the assault?
- Ask the victim to describe the suspect’s physical size and strength in comparison to the victim and why the victim may not have been able to physically resist.

- Ask the victim to describe the location of the assault, including, but not limited to, the surrounding area, *i.e.*, isolated, near a noisy party, etc.
- Ask the victim to describe the suspect's actions, statements, and demeanor following the assault.
- What, if anything, can the victim *not* forget about their experience?
- What was the victim experiencing, thinking, feeling the day after the assault? A week after? Currently?

b. The Denial Defense - "It Didn't Happen"

When a sexual assault is charged, a critical element of the crime that must be proven is that a sexual act (contact or penetration) occurred between the victim and the suspect. Investigators should be prepared to deal with suspects who can be both persuasive and adamant that sexual contact or penetration did not occur. In these cases, it is important for an investigator to obtain as many corroborating details of the victim's account as possible. Investigate thoroughly and document/collect all available evidence. An investigative tool in these cases could be a suspect polygraph conducted by an examiner with experience in criminal examinations.

NOTE: The Violence Against Women Act (VAWA)⁹²⁰ has a mandate that strictly prohibits any adult, youth, or child victim of a reported sexual offense from being asked to submit to a polygraph examination or other truth telling device as a condition of proceeding with the investigation. Failure to abide by this mandate may result in New Hampshire losing VAWA funding.

⁹²⁰ The VAWA was originally passed in 1994, and seeks to "improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault and stalking in the United States." National Domestic Violence Hotline, <https://www.thehotline.org/resources/vawa/> (last visited July 21, 2020).

c. The Identity Defense - “It Wasn’t Me”

This defense is usually used in cases where the victim and suspect do not know each other. The suspect can easily claim that, “It wasn’t me.” The victim interview in this type of case should focus on:

- Establishing a detailed timeline to combat an alibi defense;
- Obtaining as much information as possible about the suspect’s method of operation to compare it to other available information, *i.e.*, Violent Criminal Apprehension Program (ViCAP), Fusion Centers, sex offender registries, etc. Methods of operation may include:
 - Method of approach;
 - Method of control;
 - Amount/type of force or restraint used on the victim;
 - Victim resistance;
 - Sexual dysfunction;
 - Type and sequence of acts performed;
 - Suspect’s verbal statements;
 - Any changes in suspect’s attitude or demeanor; and
 - Any items taken from the victim or scene after the assault;⁹²¹
- Obtaining a complete physical description of the suspect, including clothing, facial features, any scars, marks or tattoos, distinctive gait or other habits, sensory descriptions like smell, taste, and feel, to make a suspect identification; and
- Obtaining a description of the suspect’s vehicle or residence, if known.

This investigative strategy should also focus on the collection of DNA or trace evidence that might connect the suspect to the victim or the crime scene.

⁹²¹ *A Pocket Guide for Police Response to Sexual Assault*, New York State Coalition Against Sexual Assault (NYSCASA).

8. Other Investigative Considerations

In addition to conducting a comprehensive interview, investigators should concentrate efforts to develop a thorough and complete investigation by focusing on:

- Thorough documentation of the scene(s) by sketch, photographs, and/or video;
- Use of proper evidence collection and preservation techniques;
- Ensuring follow-up documentation/photography of any injuries to the victim from the assault after 24, 48, or 72 hours, including bruises, scratches, bite marks, or signs of strangulation;
 - Whenever possible, and if any of these injuries are in intimate areas of the victim's body (as may be reported by the victim), a SANE or medical provider should take these follow-up photographs;
 - The investigator and an advocate could accompany the victim to the medical facility if the victim wishes;
 - Obtain a medical release of information from the victim to obtain a copy of the medical documentation in these circumstances to include in the investigative file;
- Identifying all potential witnesses to conduct interviews, including a neighborhood canvas, when appropriate;
- Identifying any surveillance cameras in the vicinity of the crime scene and collecting video footage for the relevant time;
- Determining when it is appropriate in the investigative process to conduct an interview with the suspect;
- Depending on case circumstances, considering consultation with a prosecutor on the course of action involving the suspect, *i.e.*, evidence collection, use of a one-party intercept, interview, arrest, detention, grand jury, etc.;
- Obtaining any corroborating information/evidence mentioned during interviews with the victim, witnesses, and/or suspect;
- Obtaining written consent or search warrants when appropriate. A search warrant should not be used to obtain evidence from a victim's body;
- Obtaining any appropriate electronic evidence;

- Remember to submit preservation requests to appropriate technology providers;
- If the victim sought medical attention after the assault, obtaining a signed written release from the victim for all medical records, including photographs;
 - Law enforcement *must* get a “Release of Information” form from the specific hospital or medical provider where the victim was seen;
 - The additional records *must* be obtained through the hospital’s Medical Record Department during business hours;
 - Medical providers are prohibited from releasing any medical records at the time of the examination and kit collection;
- Creating thorough written reports; and
- Ensuring compliance with RSA 21-M:18, the Crime Victim Bill of Rights.

Refer to the checklists at the beginning of the model protocol for additional investigative follow-up suggestions.

9. Suspect Evidence Collection

When evaluating potential sources of evidence, there is a tendency to focus on anything that might have transferred from the suspect to the victim; thus, forensic examinations of the victim are critically important. However, keep in mind that evidence may also be *transferred from the victim to the suspect*. Therefore, depending on the type of contact involved in a sexual assault offense, the suspect’s body may be another source of probative evidence. In many cases, the clothing worn by the suspect during the sexual assault is still available and, depending on the specific case history and the time since the assault, it may be another source of evidence in addition to the forensic examination of the victim.

The decision to conduct a suspect examination should not be based solely upon an understanding of how long trace and biological evidence might be available on the

suspect's body. In most sexual assault cases where consent is going to be the primary issue, any evidence that provides corroboration of the victim's account is critical.

As a result, the determination of whether to obtain a suspect examination or not can only come from careful consideration of the case history. Investigators must think through the facts of the case and determine what kinds of evidence might prove useful and for what purposes. *See* Suspect Exam Evidence Collection Considerations, page 485. At a minimum, it is recommended that a forensic examination of the suspect by a SANE, *in the presence of law enforcement*, at a medical facility should be conducted if:

- The suspect is arrested shortly after the sexual assault, generally 3 days;
- The law enforcement investigator believes that the suspect has not bathed since the sexual assault, however, keep in mind that depending on the type of assault, an exam may still be warranted even if the suspect has bathed;
- There is reason to believe there might still be evidence of injury to the suspect; or
- The victim was able to describe physical characteristics of the perpetrator that could be confirmed by a physical examination.

Factors to consider in addition to those listed above include the nature of the assault and the likelihood that cells, fluid, or other types of biological or trace evidence were transferred from the victim to the suspect.

If the suspect consents to such evidence collection at a medical facility, documentation of voluntary consent should be captured in the police report and a departmental written consent form should be signed by the suspect prior to photographing and seizing evidence.

If the suspect is in custody and a search warrant has been obtained to collect evidence, it is recommended that law enforcement read the suspect his or her *Miranda* rights prior to any medical history questions being asked.⁹²² The suspect does have a right to remain silent, including refusing to answer any questions regarding his or her medical

⁹²² For a further discussion on a person's *Miranda* rights, please refer to Chapter XIII, The Law Of Interrogation.

history. The examination to collect physical evidence should continue. If the suspect is not in custody, technically *Miranda* rights do not apply. However, it is recommended that the investigator clearly document that the suspect was free to decline any part of the examination and to leave at any time.

All evidence collected from a suspect should be appropriately packaged, stored, and/or transported to the forensic laboratory for analysis according to existing protocols. The collection of the evidence and its chain of custody must also be clearly documented.

Depending on case circumstances, it may also be possible to collect certain types of evidence from a suspect without going to a medical facility (*i.e.*, known DNA sources such as hair, articles of clothing, and documentation of visible marks or injuries). In such instances, it is important to obtain proper releases or follow a search warrant, use proper collection and preservation techniques, maintain chain of custody, and complete thorough documentation.

10. Report Writing

When documenting adult sexual assault cases, clearly summarize all the evidence uncovered during the investigation from the crime scene(s), forensic examinations of the victim and suspect, and statements provided by the victim, suspect, witnesses, and others.

An important technique for effective report writing in these cases is to avoid using the language of consensual sex to describe or imply positive, mutual interactions or affection between a victim and a suspect. When possible, use the exact words used by a victim to describe the assault and put those words in quotation marks. If the victim uses slang or street language, those are the words and phrases that should be documented. Do not minimize or sanitize victim statements to “clean it up.” In other words, the report should clearly describe the *parts of the body* and *what the victim was forced to do with those parts of the body*.⁹²³

⁹²³ For a further discussion on report writing, please refer to Chapter XIV, Report Writing.

D. Recantation

It is not uncommon for sexual assault victims to be reluctant about reporting to law enforcement and participating in the criminal justice system. Victims who are reluctant often feel they have no other choice but to recant to disengage from the criminal justice system. Law enforcement must recognize the tremendous cost to a victim who participates in the criminal justice system and understand that *recantation of one or more aspects of a prior statement does not necessarily mean false reporting.*

NOTE: Law Enforcement should be aware of the possibility that recantation could be the result of criminal threatening, witness tampering, or other crimes.

E. Drug And Alcohol Facilitated Sexual Assault

A drug or alcohol facilitated sexual assault occurs when a person is unable to consent to sexual activity because he or she was incapacitated due to drugs or alcohol. Ingestion can be voluntary, involuntary, or without his or her knowledge. Alcohol is, by far, the most used substance in these cases.

Victims of drug- or alcohol-facilitated sexual assault may experience confusion, drowsiness, reduced inhibitions, impaired judgment, and impairment of their motor skills, among other symptoms. Following the assault, victims may:

- Think they have been assaulted, but not be sure;
- Feel their level of intoxication does not match the amount of alcohol they consumed;
- Have unexplained injuries;
- Report “feeling like I’ve had sex, but I don’t remember it”; and
- Have unexplained loss or re-arrangement of their clothing.

This confusion or uncertainty leads to victims of drug/alcohol facilitated sexual assaults being less likely to report to law enforcement.

Another significant challenge is the short time it takes for the ingested substance to be eliminated from the body. *It is especially important for medical providers to request*

that victims give their informed consent for toxicology samples to be collected as soon as possible in any case of a suspected drug/alcohol facilitated sexual assault. Samples should be collected even if a victim is undecided at the time about reporting to law enforcement. If the potential evidence is not collected during the short window of time, it will not be available later when the victim decides to make the report. Urine samples allow for longer detection times than blood samples. Urine samples should be placed on ice or in the freezer immediately until transportation to the forensic laboratory. Winter weather temperatures do not constitute adequate evidence storage conditions.

The ability of a toxicology test to detect alcohol or drugs will depend on:

- The type and amount of drug ingested;
- The victim's body size and metabolism rate;
- If the victim has food in his or her stomach;
- If the victim has urinated since the assault; and
- How much time passed between the ingestion and the taking of the sample.

It is important to remember that the sexual assault is about one person exercising control over another. Victims may be chosen because they are “easy targets” who may be unable to resist the sexual advances and who are unable to clearly remember the incident afterwards. The victim should be told that he or she is not responsible for the sexual assault, but rather the suspect is responsible for his or her own behavior.

Victims also should be encouraged to be truthful about their drug and/or alcohol use when making a report. *A victim's voluntary use of any illegal substance should not be grounds for his or her arrest, nor should it be a factor when determining the validity of the sexual assault.* The victim's truthfulness about drug use may add to his or her credibility.

F. Technological Evidence Collection

Technology plays a significant role in society. This is particularly relevant when investigating adult cases of sexual violence. Computers and cell phones are a considerable source of evidence in many contemporary abuse cases. Law enforcement can seize computers, cell phones, or other electronic devices used in the crime for forensic inspection.

Law enforcement should seize any electronic device that contains evidence in the form of text messages, emails, and videos, either by consent, which can be withdrawn at any time, or search warrant. Whenever possible, tools, such as Cellebrite® or Paraben®, may be used to extract this data from the device by seeking assistance from a trained forensic examiner. It should be noted, however, that data is not always able to be extracted by using such tools and the investigator(s) should be prepared to retrieve the data manually, if necessary. Investigators should also communicate with their prosecutors regarding what evidence will be required for these types of technology-related cases.

Law enforcement officers may call their local crisis center to inquire about availability of phones to replace those confiscated from victims for evidence.

Preservation requests must be used to preserve relevant data and information and followed up with the appropriate legal process, such as a RSA 7:6-b subpoena, grand jury subpoena, or search warrant to capture data and content. *See* Search Warrant Tip Sheet, page 486; Sample Preservation Letters, page 488. Important pieces of evidence may include subscriber information, IP addresses, call logs, text/e-mail content, usernames, passwords, and cell tower and location data.

NOTE: Be aware that some Electronic Service Providers (ESPs) and Internet Service Providers (ISPs) notify the subscriber that legal process has been sent to them, unless the subpoena or search warrant is accompanied by a non-disclosure order. Also, it is possible these same companies may notify their subscriber when they have received a preservation request, so it is important to double check with the company about its policies prior to serving legal process to preserve the information.

G. Sexual Assault Evidence Collection Kits

1. Anonymous Report Option

Some adult sexual assault victims who present themselves to the emergency department for medical/forensic treatment may be undecided over whether to report the crime to law enforcement. The anonymous reporting procedure ensures that such victims can have evidence collected and preserved that would otherwise be destroyed through normal activity.

The evidence is collected in the normal process, in accordance with the New Hampshire Sexual Assault: An Acute Care Protocol for Medical/Forensic Evaluations, except that the identity of the patient is not documented on any of the specimens or paperwork provided in the Sexual Assault Evidence Collection Kit. A unique serial number is provided on the end of each Evidence Collection Kit box and this serial number is used in place of the victim's name on all specimens and paperwork.

- Once the examination is complete, and the victim is discharged, the examiner will give the anonymous kit to the law enforcement agency in the jurisdiction where the crime occurred, if the crime occurred in New Hampshire.
- If the crime occurred outside of New Hampshire or the local law enforcement agency in the jurisdiction where the crime occurred cannot pick up the kit, the examiner will give the anonymous kit to the New Hampshire State Police.
- Best practice calls for law enforcement to respond to the hospital as quickly as possible following a call to retrieve a kit. Most hospitals do not have secure refrigerators to hold this evidence. Therefore, the examiner must maintain possession of the kit for chain of custody purposes until it can be given to law enforcement.
- Urine samples should be placed on ice or in the freezer immediately until transportation to the forensic laboratory. Winter weather temperatures do not constitute adequate evidence storage conditions.
- All kits, including anonymous kits, should be transported to the State Police Forensic Laboratory as soon as possible and should not be kept at the police department or in a vehicle.

A victim who chooses to remain anonymous will receive the kit serial number from the medical record upon hospital discharge. If he or she chooses to report the crime to law enforcement, he or she will then provide that number to the police so that the collected evidence may be associated with him or her and an investigation of the crime may begin. If the victim cannot recall the kit serial number, he or she can obtain it from the hospital. It is law enforcement's responsibility to notify the lab that the victim has come forward and this is no longer an anonymous kit.

The anonymous kit is kept at the State Police Forensic Laboratory for 60 days from the date of the medical/forensic examination. If the laboratory is not notified that the victim has reported the crime to law enforcement during this time, the evidence will be returned to the submitting law enforcement agency for continued storage. It is strongly recommended that the returned kits be stored in evidence at the law enforcement agency until the statute of limitations for the offense has run out.

2. Kit Preservation And Storage Considerations

a. Reported Cases

Reported cases are cases where the victim has gone to a hospital following a sexual assault, has had a medical forensic examination with evidence collected, and chooses to report the incident to law enforcement. Best practice regarding this evidence would include:

- Transfer of the kit and any other evidence, *i.e.*, a urine sample on ice separate from the kit box, clothing, etc., collected by the SANE or medical provider to law enforcement.
- Law enforcement properly securing the evidence, *i.e.*, refrigerate the kit if it contains a blood sample and keep urine on ice or frozen, until transport to the Forensic Laboratory.
- Law enforcement transfer of the kit and all other evidence for analysis to the Forensic Laboratory as soon as possible.

- Upon return of the kit and any other evidence in the case from the Forensic Laboratory, law enforcement will properly secure the items at their agency.
 - If the kit has been analyzed, it may be stored at room temperature.
 - If there is a blood sample or urine sample returned with the kit (they will be separate items, not inside the kit), blood should be refrigerated and urine frozen if evidence storage allows.

b. Anonymous Cases

See section above for best practice recommendations.

3. Destruction Or Disposal Of Kits

Before the State destroys or disposes of a sexual assault evidence collection kit, it should consider the maximum applicable statute of limitations and whether any circumstances exist that tolled the limitations period. Pursuant to RSA 21-M:18, I(b)(3)(c), a sexual assault survivor has the right to, *upon written request*, receive written notification from the prosecutor or appropriate State official if the State intends to destroy or dispose of the survivor's sexual assault evidence collection kit or its probative contents before the expiration of the applicable statute of limitations.⁹²⁴ Such notification must be provided to the survivor at least 60 days before the date of intended destruction or disposal. If, in response to this notification, the survivor notifies the State of his or her objection to the destruction or disposal of the kit or its probative contents, the survivor must be granted further preservation of the kit or its probative contents by the possessing agency in.

⁹²⁴ This right does not apply to survivors who opted into the anonymous report option in New Hampshire.

XX. CHILD SEXUAL ABUSE

A. Introduction

Child sexual abuse can include crimes under the sexual assault statute, RSA chapter 632-A; as well as child sexual abuse images, RSA 649-A:3. The Attorney General's Office has developed a protocol for law enforcement on responding to child abuse cases which can be found at:

<https://www.doj.nh.gov/criminal/victim-assistance/protocols.htm>.

This chapter highlights some of the most important aspects of that protocol. It is strongly encouraged that officers refer to the protocol for more detailed guidance in handling child sexual abuse cases.

Generally, the investigative approach to a child sexual abuse case incorporates aspects of the response to other child abuse cases, as well as sexual assault investigations. This chapter will highlight specific considerations for child sexual abuse cases. Officers are encouraged to also review the Child Sexual Abuse chapter, *see* Chapter XX, as well as the Adult Sexual Assault chapter, *see* Chapter XIX, for a more comprehensive overview.

B. The Role Of Law Enforcement In Child Sexual Abuse Cases

The role of law enforcement in cases of child sexual abuse is to ensure the immediate safety and security of the victim, to arrange for urgent medical treatment if needed, to obtain information, and to preserve evidence.

In many, if not most, sexual assaults there are no eyewitnesses and no physical evidence. This does not mean the case cannot be proved beyond a reasonable doubt. In fact, New Hampshire law states a victim's testimony need not be corroborated.⁹²⁵

Notwithstanding this law, it is important for investigators to look for evidence to support the victim's report in the form of:

⁹²⁵ RSA 632-A:6, I (Supp. 2019).

- Medical evidence;
- Physical evidence;
- Witnesses who may have seen or heard something around the time of the incident;
- Witnesses whom the victim and/or suspect may have talked to after the assault;
- Photographic and/or video documentation of the scene(s);
- Information about the suspect's behavior, including efforts to groom or isolate the victim prior to the assault; and
- Evidence of grooming or the existence of power dynamics in the relationship.

C. Investigation

1. Initial Statement

When the reporter of the sexual assault is not the victim, law enforcement should conduct an in-depth interview with the person to whom the child first disclosed. The investigator should obtain as much information as possible about the perpetrator and the crime itself.

When the initial reporter is the victim, a minimal facts interview should be conducted. This “minimal facts interview” is not a comprehensive interview. Rather, it is used to assess safety and health needs, ascertain jurisdiction, identify and preserve sources of evidence, and determine next steps. Law enforcement should try to obtain the following basic information during a minimal facts interview:

- What happened;
- Where it happened (to determine jurisdiction);
- When it happened (first time, last time, and frequency);
- Who the perpetrator is and what is the perpetrator's relationship to the child. There may be more than one perpetrator; and
- Whether there are other victims.

After collecting the initial statement or conducting the minimal facts interview, the case should be referred to a Child Advocacy Center (CAC) to conduct the comprehensive in-depth, forensic interview.

Based on the information gathered from the reporter, law enforcement should gather evidence as appropriate; they do not need to wait until after the forensic interview at a CAC. In fact, additional evidence gathered may be helpful to the forensic interviewer.

2. Forensic Interview at the Child Advocacy Center (CAC)

The purpose of the CAC multi-disciplinary team is to review case investigations and develop two action plans: one related to investigation and prosecution; the second related to making recommendations for the protection, safety, and future well-being of the person being interviewed.

Referrals to a CAC can be made by either law enforcement or the Division for Children, Youth and Families (DCYF). Based on the safety of the child and the underlying circumstances, the forensic interview will be scheduled at the most appropriate time. Law enforcement should be present for the forensic interview and it is critical that they come prepared with relevant information such as initial disclosure, family history and dynamics, suspect information, and any other information gathered.

The forensic interview is only one piece of the investigation. For a variety of reasons, it is common for a child to not initially disclose abuse. Disclosure is a process not an event. *If a full disclosure does not happen during a forensic interview, law enforcement should still conduct a thorough investigation.* One reason for continuing the investigation is that by doing so, potentially relevant evidence or information can be obtained which may help to determine if a crime has been committed. Additionally, in the event a subsequent disclosure takes place, potentially relevant evidence or information will not be lost.

3. Other Investigative Considerations

In addition to the forensic interview, law enforcement should concentrate efforts to develop a thorough and complete investigation by focusing on:

- Thorough documentation of the scene(s) by sketch, photographs, and/or video;
- Use of proper evidence collection and preservation techniques;
- Ensuring follow-up documentation/photography of any injuries to the victim from the assault after 24, 48, or 72 hours, including bruises, scratches, bite marks, or signs of strangulation;
- Whenever possible, and if any of these injuries are in intimate areas of the victim's body (as may be reported by the victim), a sexual assault nurse examiner (SANE) or medical provider should take these follow-up photographs;
- The investigator and an advocate could accompany the victim to the medical facility if the victim wishes;
- Identifying all potential witnesses to conduct interviews, including a neighborhood canvas, when appropriate;
- Identifying any surveillance cameras in the vicinity of the crime scene and collecting video footage for the relevant time;
- Determining when it is appropriate in the investigative process to conduct an interview with the suspect;
- If appropriate under the case circumstances, consultation with a prosecutor on the course of action involving the suspect, *i.e.*, evidence collection, use of a one-party intercept, interview, arrest, detention, grand jury, etc.;
- Obtaining any corroborating information/evidence mentioned during interviews with the victim, witnesses, and/or suspect;
- Obtaining written consent or search warrants when appropriate;
- Obtaining any appropriate electronic evidence;
- Submitting preservation requests to appropriate technology providers;
- Writing thorough police reports; and
- Ensuring compliance with RSA 21-M:18, the Crime Victim Bill of Rights.

Unlike in adult sexual assault cases, child sexual abuse cases are often conducted jointly with DCYF. Ongoing communication between law enforcement and DCYF is critical to ensure that both agencies are aware of investigation timeframes, as well as the mandates to share investigative information.

4. Child Sexual Abuse Material

Both the manufacture and distribution of child sexual abuse images and/or videos are felony level offenses. While some perpetrators commit sexual offenses directly against children and others commit offenses with images and/or videos, many perpetrators do both. Because each image and/or video is a child who was sexually victimized, law enforcement should always explore whether child sexual assault victims are also victims of child sexual abuse material (images and/or videos). In some instances, the abuse a child was subjected to may have been recorded. In other instances, a child may have been forced to view such images and/or videos to groom them. Exploring the potential of crossover between these offenses could lead to additional charges and to the identification of other victims. Child sexual abuse material (CSAM) investigations can be highly complicated, and require trained forensic examiners and forensic resources. Law enforcement should contact the New Hampshire Internet Crimes Against Children Task Force (NH ICAC) unit at **603-629-2758** for assistance with these cases.

D. Medical Evaluation

When sexual assault is suspected, a comprehensive medical evaluation is an essential part of the multidisciplinary response. When a child with suspected abuse or neglect is referred to a Child Advocacy Center (CAC), he or she will be offered a medical evaluation. However, the following situations are considered urgent and the child should be referred for *immediate medical care*:

- A child who appears acutely ill (bleeding, injured, not responsive, etc.);
- A child recently exposed to drugs or other toxic substances;
- Any infant under 6 months of age who may have been injured;
- A child who has been sexually abused within the preceding 72 hours;
- A child who has been the victim of a possible drug-facilitated sexual assault within the preceding 120 hours;
- A pubertal (sexually developed) girl who has been sexually abused involving vaginal/penile penetration within the preceding 120 hours; and
- A child and/or family that has experienced a crisis and may require immediate mental health assessment (*i.e.*, is suicidal, homicidal, or a flight risk).

An officer uncertain about a child's medical status should consult with the local emergency department or the on-call provider for the Child Advocacy and Protection Program of Children's Hospital at Dartmouth, who is reachable through the Dartmouth-Hitchcock page operator at **603-650-5000**.

Depending on the circumstances, a New Hampshire Sexual Assault Evidence Collection Kit may be conducted as part of the medical evaluation. Unlike in cases of adult sexual assault, a sexual assault kit of a child victim cannot be anonymous. Separately, there still may be valuable information gathered and law enforcement should obtain signed releases of information for all medical records. Most medical facilities will require the use of their own release of information form, not one provided by law enforcement. It is important to be specific that all information is requested, including any recordings, images, and SANE records (which are often stored separately from routine medical records).

1. Kit Preservation And Storage Considerations

If, during the medical evaluation a New Hampshire Sexual Assault Evidence Collection Kit is obtained, law enforcement should:

- Properly secure the evidence, *i.e.*, refrigerate the kit if it contains a blood sample and keep urine on ice or frozen, until transport to the New Hampshire State Police Crime Laboratory;
- Transport the kit and all other evidence to the New Hampshire State Police Crime Laboratory for analysis as soon as possible. Under no circumstances should untested kits be left at the police department. All kits, regardless of whether the case is moving forward or not, must be transported to the state lab.

Upon return of the kit and any other evidence in the case from the Forensic Laboratory, law enforcement will properly secure the items at their agency.

- If the kit has been analyzed, it may be stored at room temperature.
- If there is a blood sample or urine sample returned with the kit (they will be separate items, not inside the kit), blood should be refrigerated and urine frozen if evidence storage allows.

2. Destruction Or Disposal Of Kits

Before the State destroys or disposes of a sexual assault evidence collection kit, it should consider the maximum applicable statute of limitations and whether any circumstances exist that tolled the limitations period. Pursuant to RSA 21-M:18, I(b)(3)(c), a sexual assault survivor has the right to, *upon written request*, receive written notification from the prosecutor or appropriate State official if the State intends to destroy or dispose of the survivor's sexual assault evidence collection kit or its probative contents before the expiration of the applicable statute of limitations. Such notification must be provided to the survivor at least 60 days before the date of intended destruction or disposal. If, in response to this notice the survivor notifies the State of his or her objection to the destruction or disposal of the kit or its probative contents, the survivor must be granted further preservation of the kit or its probative contents by the possessing agency.

XXI. STRANGULATION

A. Introduction

Strangulation is a tactic often used to control another person and is found often in domestic violence, sexual assault, and child abuse cases. Strangulation, commonly referred to as “choking,” is a life-threatening traumatic event that can result in death hours, or even days, after the initial assault. The injuries caused by strangulation are often not visible externally, even in fatal cases. Only minimal pressure applied to the neck is needed to cause potentially serious injury. Because the more common term for strangulation is choking, first responders, including law enforcement, should ask a victim if he or she was “choked,” as opposed to “strangled” during the incident.

B. The Law

“Strangulation” is defined by statute as “the application of pressure to another person’s throat or neck, or the blocking of the person’s nose or mouth,” that results in *one* of the following three conditions:⁹²⁶

- **Impeded breathing:**

The victim feels as though he or she cannot breathe or take in air because of a physical obstruction applied by the suspect, or the victim’s lips or fingers turn blue.

- **Impeded blood circulation:**

The victim feels dizzy and light-headed, passes out, has visual disturbances, has ringing in the ears, or feels increasing pressure or pain in the head during the application of pressure to the neck. A headache after the assault is also commonly reported and is consistent with a brain injury due to impeded blood circulation.

⁹²⁶ RSA 631:2, II(c) (Supp. 2019).

- **Change in voice:**

This may not be noticeable to the victim. Even if the victim says no, law enforcement should ask a family member or friend if the victim's voice sounds different. Law enforcement should also obtain a recording of the victim's voice, such as a 911 call or a recorded statement.

C. Law Enforcement Response And Investigation

Strangulation resulting in impeded breathing or blood circulation can occur in numerous ways other than someone's hand(s) around the victim's throat or neck, *i.e.*, it could involve a cloth being stuffed into the victim's mouth, a pillow put over the victim's face, masking tape put over the victim's mouth and/or nose, or the perpetrator sitting on the victim's torso.

Officers should look for and photograph injuries on the victim including:

- Behind the ears;
- All around the neck;
- Under the chin and jaw;
- Eyelids; and
- Shoulders and upper chest, as appropriate.

Officers should photograph the lack of injury and anywhere the victim feels pain. Officers should also photograph any object used and described by the victim and seize the object as evidence.

Importantly, the absence of marks on the victim's neck or throat *does not* mean the victim was not strangled. The lack of external signs of injury often causes victims, law enforcement, and members of the medical community to overlook the potential lethality of an incident of strangulation. It is highly recommended that officers request emergency medical services (EMS) response to all strangulation assaults. It is also recommended that law enforcement agencies adopt a policy of automatic EMS dispatch in strangulation cases.

Victims of strangulation often experience new or changing symptoms in the hours and days following the assault. Therefore, law enforcement should obtain a medical records release from the victim even if the victim declines EMS transport to the hospital or says

that they will not be seeking medical attention. As a result of evolving symptoms victims will often seek medical care later, and these medical records will be an important component of the case. The medical release should specifically request records of treatment and follow up care related to the incident under investigation. EMS run sheets can be extremely useful medical documentation. A medical records release from the victim is required to obtain this documentation for inclusion in the investigative file. The run sheets are generated if the EMS crew has patient contact regardless of whether or not the patient is transported.

Officers should contact victims of strangulation, in person, 24 to 48 hours after the assault to check on the victim's welfare, to ascertain if signs or symptoms have changed, worsened, or improved, and to obtain follow-up photographs of changing or resolving injuries.

In conducting a strangulation investigation, officers should refer to the Strangulation Quick Reference Guide, *see* page 490.

XXII. STALKING

A. Introduction

Stalking cases present a unique and ongoing threat to the victim, the seriousness of which is difficult to predict and may involve ongoing behavior by a suspect that could span just a few days or continue for many years. It may involve a mix of patently criminal acts such as vandalism and kidnapping, or behaviors that, in another context, would be considered benign and non-criminal, such as sending letters, delivering unwanted gifts, or texting or calling the victim.

The Attorney General's Office has developed a protocol for law enforcement on responding to stalking situations, which can be found at:

<https://www.doj.nh.gov/criminal/victim-assistance/protocols.htm>.

This chapter highlights the most important aspects of that protocol, as well as the mandatory law enforcement provisions relative to stalking. It is strongly encouraged that officers refer to the protocol for more detailed guidance in handling these types of cases.

B. The Statute

Pursuant to RSA 633:3-a, the crime of stalking includes:

- Purposely, knowingly, or recklessly engaging in a course of conduct that targets a specific person that would cause a reasonable person to fear for his or her personal safety or the safety of a member of that person's immediate family, *and* the person was placed in such fear;⁹²⁷ or
- Purposely or knowingly engaging in a course of conduct that targets a specific person, and that the actor knows will place that person in fear for his or her personal safety or the safety of a member of that person's immediate family;⁹²⁸ or

⁹²⁷ RSA 633:3-a, I(a) (Supp. 2019).

⁹²⁸ RSA 633:3-a, I(b) (Supp. 2019).

- Engaging in a single act that violates a protective order issued under RSA chapter 173-B, RSA 458:16, or RSA 633:3-a, or violates conditions of bail and is listed in RSA 633:3-a, II(a).⁹²⁹

A course of conduct “means 2 or more acts over a period of time, however short, which evidences a continuity of purpose.”⁹³⁰

C. Mandatory Arrests

If the police have probable cause to believe that the assailant has violated either a temporary or permanent protective order, the police *must* arrest that person, even if the victim does not want the assailant arrested.⁹³¹ This mandatory arrest provision applies to a violation of any of the following types of protective orders:

- Domestic violence protective orders granted under RSA chapter 173-B;
- Stalking protective orders granted under RSA 633:3-a;
- Protective orders contained in a divorce decree under RSA 458:16; and
- Protective orders issued by another state, territorial, or tribal court.⁹³²

If a protective order issued under RSA chapter 173-B, RSA 458:16, RSA 633:3-a, or an order pursuant to RSA 597:2 was violated, and the committed act is listed in RSA 633:3-a, II(a), the assailant can be charged with stalking.⁹³³ If the assailant has fled, but is apprehended within 12 hours of the incident, the police may execute an arrest without a warrant.⁹³⁴ Upon expiration of the 12-hour period, officers must obtain an arrest warrant.

NOTE: If the assailant is located in a third party’s home, the police cannot enter the home to make an arrest, unless they obtain the homeowner’s consent or secure a search warrant, even if it is within 12 hours of the incident.

⁹²⁹ RSA 633:3-a, I(c) (Supp. 2019).

⁹³⁰ RSA 633:3-a, II(a) (Supp. 2019).

⁹³¹ RSA 173-B:9, I(a) (2014); RSA 633:3-a, V (Supp. 2019).

⁹³² RSA 173-B:9, I(a) (2014); 18 U.S.C. § 2265 (2018).

⁹³³ RSA 633:3-a, I(c) (Supp. 2019).

⁹³⁴ RSA 633:3-a, V (Supp. 2019).

NOTE: Violations of protective orders issued under the Child Protection Act,⁹³⁵ also qualify for a mandatory arrest and may be made without a warrant if the violation occurred within 6 hours.

D. Discretionary Arrests

Unless there are compelling reasons not to do so, officers should make an arrest if there is probable cause to believe that one of the parties committed an offense as defined in RSA 633:3-a, regardless if the offense occurred in the presence of the officer. If the assailant is apprehended within 12 hours of the incident, the police may arrest the person without a warrant.⁹³⁶

NOTE: As with mandatory-arrest situations, if the assailant is located in a third party's home, the police cannot enter the home to make an arrest, unless they obtain the homeowner's consent or secure a search warrant, even if it is within 12 hours of the incident.

E. Protective Orders

Unlike a domestic violence protective order, a stalking victim is not required to prove a prior relationship in order to petition for a protective order under RSA 633:3-a. However, if the victim and the stalker are members of the same family or household, or are intimate partners, the victim should be encouraged to seek a domestic violence protective order under RSA chapter 173-B.

Protective orders issued under RSA 633:3-a are enforceable everywhere in New Hampshire, and the types of relief granted, the procedures and burdens of proof, the methods of notice and of service, and the enforcement of such orders, as well as the penalties for violations, are the same as those under RSA chapter 173-B.⁹³⁷

⁹³⁵ See RSA 169-C:7-a (Supp. 2019); RSA 169-C:16 (2014); RSA 169-C:19 (2014).

⁹³⁶ RSA 633-3-a, V (Supp. 2019).

⁹³⁷ RSA 633:3-a, III-a (Supp. 2019).

F. Bail And Criminal Orders Of Protection

In general, an arrested person is entitled to be released on bail pending trial.⁹³⁸ However, because stalking orders are subject to the same procedures and processes as those issued under RSA chapter 173-B, defendants are not entitled to bail and should be detained pending arraignment for violation of a protective order.⁹³⁹

In arrests involving stalking, for which bail is permitted, and if the relationship of the parties qualifies, officers should request that the bail commissioner or court use the bail form entitled “Domestic Violence/Stalking Criminal Order of Protection Including Orders and Conditions of Bail” (CBPO) instead of the standard bail form. *See* CBPO, page 472. In addition to the standard bail conditions, the CBPO form contains conditions similar to those available under a protective order, such as restricting personal contact and prohibiting the possession of firearms and weapons. Unlike the standard bail form, the CBPO form can be entered into both the state protective order registry and National Crime Information Center (NCIC), thus, ensuring that the information will be available to law enforcement officers statewide, as well as in other states.

Because a CBPO is issued as a bail order, it should not be considered a substitute for a civil domestic violence protective order under RSA chapter 173-B or a stalking protective order under RSA 633:3-a. For instance, a CBPO will not contain conditions providing for child support, visitation, or possession of the family home. Officers should still advise victims of their option to apply for a protective order under RSA 633:3-a.

Whenever a bail commissioner issues a CBPO, the law enforcement officer should fax a copy to the State Police for entry into the state registry. A copy of the CBPO form should also be filed in the circuit court along with the criminal complaint.

In general, a CBPO must be enforced as a bail order, not a protective order. If a person violates a condition of a CBPO, officers should seek modification or revocation of

⁹³⁸ N.H. Const. pt. I, art. 33; RSA 597:1 (2001); RSA 597:2 (Supp. 2019).

⁹³⁹ RSA 173-B:9, I(a) (2014); RSA 633:3-a, III-a (Supp. 2019); RSA 597:2, VI (Supp. 2019).

the bail order. However, under certain circumstances, a defendant who is subject to a CBPO and who violates a condition of that order by engaging in an act under RSA 633:3-a, II(a) may also be charged with stalking.⁹⁴⁰

NOTE: The phrase “intimate partners” for the purposes of a CBPO is defined under federal law,⁹⁴¹ which is more narrow than the definition under RSA chapter 173-B or RSA 631:2-b.

G. Seizure Of Firearms, Ammunition, And Deadly Weapons

Law enforcement must seize any firearms and ammunition that are in the control, ownership, or possession of the defendant and any deadly weapons that have been used or threatened to be used if law enforcement has probable cause to believe that a person has been the victim of domestic abuse as defined in RSA 173-B:1. In this context, domestic

⁹⁴⁰ RSA 633:3-a, I(c) (Supp. 2019).

⁹⁴¹ Under federal law, the term “spouse or intimate partner” includes:

(C) for purposes of—

(iii) sections other than 2261A—

(III) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or

(IV) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship; and

(iv) section 2261A—

(III) a spouse or former spouse of the target of the stalking, a person who shares a child in common with the target of the stalking, and a person who cohabits or has cohabited as a spouse with the target of the stalking; or

(IV) a person who is or has been in a social relationship of a romantic or intimate nature with the target of the stalking, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship.

(D) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides.

18 U.S.C. § 2266(7) (2018).

abuse includes the crime of stalking, if the relationship between the parties is either as a family or household member or by a current or former sexual or intimate partner,⁹⁴² or if there was a violation of a protective order.⁹⁴³

NOTE: Absent exigent circumstances or consent, officers may not conduct a search of the premises for weapons, unless a search warrant is obtained. However, if the officers are lawfully present in the home, they may seize any weapons in plain view.

H. Obligations To The Abused Party

Whenever there is probable cause to believe that a person has been the victim of abuse as defined in RSA 173-B, 1, which includes the crime of stalking, and if the relationship between the parties is either as a family or household member or current or former sexual or intimate partner, law enforcement is required to use all reasonable means to prevent further abuse, including, but not limited to, the following:

- Confiscating any deadly weapons used or threatened to be used in the abuse;
- Confiscating any firearms or ammunition in the defendant's control, ownership, or possession;
- Transporting or obtaining transportation for the victim and any child to a designated place to meet a counselor, a local family member, or a friend;
- Assisting the victim in removing personal hygiene items, clothing, medication, business equipment, and other items ordered by the court; and
- Giving immediate and written notice of the rights, remedies, and services available to victims of domestic violence, a copy of which can be accessed here:

<https://www.doj.nh.gov/criminal/victim-assistance/publications.htm>.

⁹⁴² RSA 173-B:10, I(a) (2014).

⁹⁴³ RSA 173-B:9, I(b) (2014).

I. Emergency Telephonic Orders Of Protection

If a victim of stalking has been threatened with harm, a civil stalking protective order may provide the victim with essential protections. Officers should follow the procedure described below to seek an emergency telephonic protective order for the victim.⁹⁴⁴ This procedure should ordinarily be used only during hours when court is not in session. It should not be used as a substitute for arrest, or for asking a court or bail commissioner to detain a defendant pending arraignment or for the issuance of a criminal protective order.

- The victim must complete and sign the “allegation of abuse” section of the Emergency Order of Protection and Affidavit of Service form, detailing specific dates, times, and events. Officers shall not make the determination whether or not an affidavit qualifies for a protective order. That decision is for the judge.
- The officer must contact the after-hours judge for the court where the matter would be heard, identify himself or herself, and read the victim’s allegations of abuse. If possible, the victim should be present with the officer to answer any questions the court may have.
- If the judge determines that there is a credible threat to the petitioner’s safety, the judge will indicate which blocks on the form need to be checked. The officer must check those blocks and sign the form where indicated.
- The officer must provide the victim with a copy of the order, and explain that the defendant will also receive a copy of the order.
- The officer must explain to the victim that the order remains in effect only until the close of the next court business day, and inform the victim of the hours and location of the court to obtain a new petition and order.
- The officer must immediately fax a copy of the protective order to the Department of Safety at **603-271-1153**.
- The officer must promptly serve the order, or have it served, upon the defendant.

⁹⁴⁴ RSA 173-B:4, I (Supp. 2019).

- The officer must file the return of service at the court of jurisdiction for the victim's residence. The return should be promptly filed the next time the court is open for business.

J. Serving Protective Orders

Emergency and temporary protective orders must be served on the defendant promptly. Because service of such orders involves the potential for violence, officers should obtain as much information about the defendant as possible prior to making service. The court issuing the order should have a "Defendant Information Sheet" that contains information about the defendant, which the officer should review.

Prior to making service, the officer should review the protective order to determine whether it includes a requirement that the defendant relinquish all firearms and ammunition. If it does not, the officer shall not attempt to remove weapons or ammunition.

If the order requires the defendant to relinquish all firearms and the defendant refuses to do so, and if the officer has probable cause to believe that the defendant is in possession of firearms, the officer should secure the premises and obtain a search warrant.

NOTE: Under no circumstances should the victim's location or address be revealed to the defendant.

K. Civil Standbys

When an officer has probable cause to believe a victim has been abused as defined in RSA 173-B:1, which includes the crime of stalking, he or she is required to assist "the victim in removing toiletries, medication, clothing, business equipment, and any other items determined by the court."⁹⁴⁵ If the victim has left the residence, this statute does not require notification to, or permission from, the defendant to remove the items specified. Nor does it require that the defendant be present.

⁹⁴⁵ RSA 173-B:10, I(c) (2014).

When a protective order is in place, RSA 173-B:4, I(a)(2), restrains the defendant from entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer and is allowed entry by the plaintiff for the sole purpose of retrieving personal property specified by the court.

In this instance, the defendant must make arrangements through the local law enforcement agency to retrieve any property specified by the court. The law enforcement agency should contact the victim and arrange for a convenient time for the defendant and the law enforcement officer to proceed to the residence to retrieve only the items designated.

L. Firearms Storage And Return

When a defendant is required to relinquish firearms and ammunition as part of a stalking protective order, the firearms provisions of RSA chapter 173-B are in effect and relinquishment must be to a police officer. A defendant can request a court order authorizing storage of the firearms at a federally licensed firearms dealer, at the defendant's expense. If the defendant obtains such an order and provides it to the police department, the department shall transfer the firearms to the designated firearms dealer. The defendant is not permitted to turn the firearms over to the dealer directly.⁹⁴⁶

Firearms, ammunition, or other weapons seized in a stalking case shall not be released, unless the law enforcement agency receives a court order authorizing release and specifying to whom they may be released. If guns are being stored by a firearms dealer, the law enforcement agency must retrieve them and, in turn, release them in accordance with the court order. A defendant is not permitted to retrieve guns from the firearms dealer directly.⁹⁴⁷

⁹⁴⁶ RSA 173-B:5, X(c) (Supp. 2019).

⁹⁴⁷ RSA 173-B:5, X(c) (Supp. 2019).

XXIII. CHILD ABUSE AND NEGLECT

A. Introduction

Child abuse and neglect can have long lasting consequences for children. The Attorney General’s Office has developed a protocol for the response to child abuse and neglect cases, which can be found at:

<https://www.doj.nh.gov/criminal/victim-assistance/protocols.htm>.

This chapter highlights the most important aspects of that protocol, but it is strongly encouraged that officers refer to the protocol for more detailed guidance in handling child abuse and neglect cases.

B. Reporting To The Division For Children, Youth And Families

Any law enforcement officer who has reason to suspect that a child has been abused or neglected *must* report it immediately to the Division for Children, Youth and Families (“DCYF”) Central Intake by calling **1-800-894-5533**, which is available 24 hours a day.⁹⁴⁸ This must be followed by a report, in writing, within 48 hours, which can be submitted by:

Fax: 603-271-6565

or

E-mail: Intake@dhhs.state.nh.us

The report to DCYF must include, if known:

- The name and address of the child suspected of being neglected or abused;
- The person responsible for the child’s welfare;
- The specific information indicating neglect, or the nature and extent of the child’s injuries, including any evidence of previous injuries;
- The identity of anyone suspected of being responsible for such neglect or abuse; and

⁹⁴⁸ RSA 169-C:29 (2014).

- Any other information that might be helpful in establishing neglect or abuse.⁹⁴⁹

C. Joint Investigative Response

When both DCYF and law enforcement are required to assess and investigate the same incident, then a joint, collaborative approach best serves the needs of all agencies and individuals, particularly the child and the family.

DCYF may request and shall receive from any agency of the State or any of its political subdivisions, or any schools, such assistance and information as will enable it to fulfill its responsibilities.⁹⁵⁰ It is important that law enforcement understands the obligations and timelines that dictate DCYF's practice and how that practice intersects with a criminal investigation.

DCYF may also share information from its case records to the extent permitted by law with the partnering law enforcement agency in order to assist them with an investigation and an evaluation of a report of abuse or neglect.⁹⁵¹

If a child's parents refuse to allow a social worker or state employee on their premises as part of a DCYF investigation, and DCYF has probable cause to believe that the child has been abused or neglected, DCYF is required to seek a court order to enter the premises.⁹⁵² If the court believes that the child has been abused or neglected, the court will issue an order permitting the social worker to enter the premises to further DCYF's investigation and to assess the child's immediate safety and well-being. Any juvenile probation and parole officer or child protection service worker who serves or executes a motion to enter *shall* be accompanied by a police officer.⁹⁵³

⁹⁴⁹ RSA 169-C:30 (2014).

⁹⁵⁰ RSA 169-C:34, III (Supp. 2019).

⁹⁵¹ RSA 169-C:38, II (2014).

⁹⁵² RSA 169-C:34, VII (Supp. 2019).

⁹⁵³ RSA 169-C:34, VII (Supp. 2019).

Cooperation between law enforcement and DCYF is essential to ensure the safety of the abused or neglected child. For additional information, please refer to the Joint Guidelines for DCYF/Law Enforcement on Mandatory Notifications, Record Sharing and Investigations issued by the Attorney General's Office and the Department of Health and Human Services in April 2016, *see* page 491.

D. Investigation

When the reporter of abuse and/or neglect is not the victim, the investigator should conduct an in-depth interview with the person to whom the child first disclosed. The investigator should obtain as much information as possible about the perpetrator and the crime itself.

When the initial reporter is the victim, a minimal facts interview should be conducted, and the case should be referred to a Child Advocacy Center (CAC). Officers should try to obtain the following basic information during a minimal facts interview:

- What happened;
- Where it happened, to determine jurisdiction;
- When it happened: first time, last time, and frequency;
- Who the offender is and what the offender's relationship to the child is. There may be more than one offender; and
- Whether there are other victims.

Law enforcement officers or DCYF caseworkers may interview a child in a public place, including schools and childcare agencies, with or without the consent or notification of the parent if there is a belief that the child is a victim of a crime or has been sexually abused, intentionally physically injured, abandoned, or neglected.⁹⁵⁴ For any interview conducted as such, the interview with the child must be recorded on video, if possible. If the interview is video recorded, it shall be recorded in its entirety. If the interview cannot

⁹⁵⁴ RSA 169-C:38, IV (2014).

be video recorded in its entirety, an audio recording of the entire interview shall be made.⁹⁵⁵

Officers who wear body-worn cameras should refer to their agency's standard operating procedures (SOPs) or the county attorney for guidance regarding whether or not a minimal facts interview should be recorded utilizing a body-worn camera. If law enforcement is conducting an interview of a child in a public place pursuant to RSA 169-C:38 when wearing a body-worn camera, then the interview shall be recorded. If there needs to be a comprehensive interview in a private place and a CAC is not an option, then law enforcement needs to get parental consent to record the interview. If consent is not given, then the interview should not be recorded. Body-worn cameras should not be utilized during multidisciplinary meetings and CAC interviews of children. Additionally, when an officer responds to a healthcare facility, the body-worn camera should be turned off due to patient privacy rights,⁹⁵⁶ *unless the officer is responding to a 911 call at that facility.*

Officers should gather information to determine if a non-offending parent/ caregiver has additional information regarding the disclosure. Any other children in the household or otherwise having contact with the perpetrator should be referred to a CAC for a forensic interview.

In cases in which law enforcement is pursuing criminal charges, the investigator will proceed in the most effective manner possible to obtain critical information during the interview with the perpetrator. Before that interview takes place, officers should determine whether DCYF will be involved in the interview. Regardless, DCYF caseworkers will interview the perpetrator during DCYF's assessment.

The identification, collection, and preservation of evidence must be accurately documented. All physical evidence gathered in cases involving physical or sexual abuse or neglect should be collected exclusively by law enforcement officers or medical personnel. Law enforcement should collect any physical evidence as soon as possible either with the consent of a non-offending parent/caregiver or by obtaining a search warrant, if necessary.

⁹⁵⁵ RSA 169-C:38, V (2014).

⁹⁵⁶ Pub. L. 104-191.

To further their investigation, law enforcement officers can obtain a court order to compel either DCYF or a medical provider to disclose a child's medical records.⁹⁵⁷

The necessity of taking photographs should be determined case by case. When there is suspected sexual abuse, if any photographs of the genitalia, with or without injury, are to be taken, they should be taken *only* by the medical provider during the medical evaluation.

E. Removal Of A Child

If law enforcement officers feel that a child should be removed from the home, they must report to DCYF and share the details of the case. If DCYF determines that it will take immediate action, a Child Protection Social Worker (CPSW) will make an assessment, obtain the required court order, and arrange for the removal of the children, as necessary.

Law enforcement, however, has the authority to remove a child from parental custody without a court order when “the child is in such circumstances or surroundings as would present an imminent danger to the child’s health or life unless immediate action is taken and there is not enough time to petition for a court order.”⁹⁵⁸ In this context, the term “imminent danger” “means circumstances or surroundings causing immediate peril or risk to a child’s health or life.”⁹⁵⁹

If officers do so, however, they must immediately inform the court so that the court can immediately decide whether to allow continued custody pending a hearing.⁹⁶⁰ Furthermore, if the child was taken from someone who was not the child’s parent or legal guardian, officers must “make every reasonable effort to inform both parents or other persons legally responsible for the child’s care where the child has been taken.”⁹⁶¹

⁹⁵⁷ RSA 169-C:25-a (Supp. 2019).

⁹⁵⁸ RSA 169-C:6, I (Supp. 2019).

⁹⁵⁹ RSA 169-C:3, XV (Supp. 2019).

⁹⁶⁰ RSA 169-C:6, II(a) (Supp. 2019).

⁹⁶¹ RSA 169-C:6, II(d) (Supp. 2019).

F. Juvenile Abuse/Neglect Orders Of Protection Pursuant To RSA 169-C:16 Or RSA 169-C:19

Orders issued under RSA 169-C:16 or RSA 169-C:19, II(a), may be issued at the request of DCYF, CASA, or another party to the case. If the person against whom the order is issued is present at the abuse and neglect proceeding, the order will be served at that time. If the person is not present, the order *shall be served by law enforcement*.

G. Juvenile Abuse Order Of Protection Pursuant To RSA 169-C:7-a (“Jake’s Law”)

Orders issued under RSA 169-C:7-a may be filed by a parent or guardian on behalf of a minor child. There are no emergency or telephonic protective orders available for RSA 169-C:7-a orders. If a temporary order is granted, the court will schedule a hearing for 30 days, however, the respondent may request a hearing within 5 days. *These orders should be served by law enforcement*.

H. Enforcement Of RSA 169-C Orders Of Protection

For these types of orders, if an officer has probable cause to believe a person has violated an order an arrest *shall* be made. The arrest may be made without a warrant if there is probable cause to believe the violation occurred within 6 hours of the arrest.⁹⁶²

The provisions of RSA chapter 169-C do not authorize the court to order the seizure of weapons or firearms when the protective order is issued. However, subsequent to an arrest for the violation of a RSA chapter 169-C Order of Protection, officers *shall seize* any firearms and ammunition in the control, ownership, or possession of the defendant. Officers shall also seize any other deadly weapons in the control, ownership, or possession of the defendant that may have been used, or were threatened to be used, during the violation of the protective order.⁹⁶³

⁹⁶² RSA 169-C:21-a (2014).

⁹⁶³ RSA 169-C:21-a (2014).

An individual arrested for a violation of a RSA chapter 169-C Order must be detained until arraignment and cannot be released on bail. Any criminal complaint brought for a violation of a RSA chapter 169-C Order must be filed as a class A misdemeanor; it cannot be reduced to a lesser charge.⁹⁶⁴

I. Reporting To The Division For Children, Youth And Families

When law enforcement makes an arrest for violation of a Juvenile Abuse/Neglect Orders of Protection Pursuant to RSA 169-C:16 or 169-C:19, they must immediately notify the Division For Children, Youth And Families Central Intake by telephone at **1-800-894-5533**, which is available 24 hours a day. This report should contain:

- The parties involved;
- The nature of the violation, *i.e.*, threats via text, showing up at the child's school);
- When and where the violation occurred;
- Who was present;
- What other charges the defendant may be charged with; and
- Whether firearms, ammunition or deadly weapons seized.

Central Intake may ask additional questions and request that law enforcement submit a written report as follow-up.

⁹⁶⁴ RSA 169-C:21-a (2014).

XXIV. ELDER NEGLECT AND ABUSE

A. Introduction

The elderly are a vulnerable population and responding to and investigating crimes against the elderly often requires special considerations. As such, the Attorney General's Office provides a manual for law enforcement's response to reports of elder abuse, neglect, and financial exploitation, which can be found at:

<https://www.doj.nh.gov/criminal/victim-assistance/documents/elder-abuse-guide-manual.pdf>

This chapter highlights the best practices when investigating a report of a crime involving an elderly victim. This chapter also discusses the New Hampshire criminal statutes that apply specifically to elderly victims. However, it is strongly encouraged that officers refer to the manual for more detailed guidance in handling elder abuse cases.

Financial crimes committed against the elderly are often considered to be civil and as a result, are not thoroughly investigated. However, financial exploitation of an elder adult is a crime in New Hampshire.⁹⁶⁵ Other conduct, such as abuse or neglect, is also considered criminal. Accordingly, law enforcement should never immediately assume that a matter is purely civil without first performing a thorough investigation.

B. Mandatory Reporting

Any person, including law enforcement officers, who suspects or believes in good faith that a vulnerable adult has been subject to abuse, neglect, self-neglect, exploitation, or is living in hazardous conditions, is required by law to make an immediate report to the Bureau of Elder and Adult Services (BEAS).⁹⁶⁶ A "vulnerable" adult is anyone over the age of 18 whose physical, mental, or emotional abilities render them incapable of managing

⁹⁶⁵ RSA 631:9 (Supp. 2019)

⁹⁶⁶ RSA 161-F:46 (Supp. 2019)

his or her personal, home, or financial affairs in his or her own best interest.⁹⁶⁷ Accordingly, most elderly victims will be considered “vulnerable” adults. Failure to make a report to BEAS is a misdemeanor.⁹⁶⁸

Reports can be made by calling the Adult Protective Services central intake line at the number below. The intake line is open from Monday through Friday, from 8:00 a.m. to 4:30 p.m. Officers calling the intake line will need to leave a voice message that includes their full name, job title, and phone number. An intake worker will then return the call and take an official report. Officers can also make a report by fax at the number below if they prefer.

Adult Protective Services Reporting:

Telephone: 603-271-7014

Fax: 603-271-4743

C. Criminal Neglect Of An Elderly, Disabled, Or Impaired Adult

Under certain circumstances, a caregiver can be held criminally responsible for failing to provide care to an elderly, disabled, or impaired adult. It is important to note that all elements of the offense must be met in order to charge someone under this section.

The elements of criminal neglect of an elderly, disabled, or impaired adult are:

- The defendant was a caregiver;
- The defendant acted purposely, knowingly, or recklessly;
- The defendant neglected the victim;
- The defendant’s neglect caused serious bodily injury to the victim; and
- The victim was an elderly, disabled, or impaired adult.⁹⁶⁹

⁹⁶⁷ RSA 161-F:43, VII (Supp. 2019).

⁹⁶⁸ RSA 161-F:50 (2014).

⁹⁶⁹ RSA 631:8, II, III (Supp. 2019).

The criminal neglect statute applies only to those individuals who are “caregivers,” defined as “any person who has been entrusted with, or has assumed the responsibility voluntarily, by contract, or by order of the court, for frequent and regular care of or services to an elderly, disabled, or impaired adult, including subsistence, medical, custodial, personal or other care, on a temporary or permanent basis.”⁹⁷⁰

However, “[a] caregiver shall not include an uncompensated volunteer, unless such person has agreed to provide care and is aware that the person receiving the care is dependent upon the care provided.”⁹⁷¹

If the evidence establishes that a suspect is a caregiver, the investigating officer will then have to establish that the suspect neglected the victim. “Neglect” is defined as:

the failure or omission on the part of the caregiver to provide the care, supervision, and services which he or she has voluntarily, or by contract, or by order of the court agreed to provide and which are necessary to maintain the health of an elderly, disabled, or impaired adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, that a prudent person would consider necessary for the well-being of an elderly, disabled, or impaired adult.⁹⁷²

“‘Neglect’ may be repeated conduct or a single incident.”⁹⁷³

The investigating officer will also need to prove that the caregiver’s neglect caused serious bodily injury. This can be a difficult element to establish because the elderly are often fragile and easily injured. For example, if the elderly victim is covered in bed sores, the officer should not assume that the sores were caused by neglect, even if the elderly person was clearly neglected.

Law enforcement officers should identify and interview all medical professionals who were involved in the victim’s care because medical professionals are in the best position to offer an opinion on the causation of injuries.

⁹⁷⁰ RSA 631:8, I(b) (Supp. 2019).

⁹⁷¹ RSA 631:8, I(b) (Supp. 2019).

⁹⁷² RSA 631:8, I(f) (Supp. 2019).

⁹⁷³ RSA 631:8, I(f) (Supp. 2019).

Finally, it is important to note that to prove criminal neglect, it is necessary to prove that the victim’s injuries amounted to serious bodily injury. Simple bruises or bed sores are unlikely to be sufficient. Investigating officers will need to establish that the victim’s injuries amounted to a “severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body.”⁹⁷⁴

D. Financial Exploitation Of An Elderly, Disabled, Or Impaired Adult

On January 1, 2015, financial exploitation of an elderly, disabled, or impaired adult became a crime in New Hampshire.⁹⁷⁵ It is important to note that RSA 631:9 does not apply to criminal conduct that was completed before 2015.

RSA 631:9 applies differently depending on whether or not the suspect holds a fiduciary obligation to the victim.

1. RSA 631:9, I(a): When The Suspect Holds A Fiduciary Obligation To The Victim

In this context, the fiduciary obligation must be recognized by New Hampshire law. Some examples of qualifying fiduciary obligations are:

- Agent under a durable power of attorney (DPOA);
- Trustee of a trust;
- Conservator of a conservatorship; and
- Legal guardian.

If the suspect holds any of these fiduciary relationships and has breached his or her obligations as a fiduciary, there may be a chargeable crime. If you have any questions regarding whether a qualifying fiduciary relationship exists in your case, you should contact the Elder Abuse and Financial Exploitation Unit at the Attorney General’s Office.

⁹⁷⁴ RSA 625:11, VI (2016).

⁹⁷⁵ RSA 631:9 (Supp. 2019); 2014 N.H. Laws 151:4, :5.

The elements required to charge a suspect under RSA 631:9, I(a), are:

- The defendant held a fiduciary obligation for the benefit of the victim;
- The victim was elderly (at least 60 years old);⁹⁷⁶
- The defendant either failed to use the property of the elderly adult as required or deprived, used, managed, or took the property for the benefit of someone other than the elderly adult;
- The defendant's conduct was not authorized by the document that established the fiduciary obligation; and
- The defendant acted knowingly or recklessly.

The key to determining whether the defendant committed criminal financial exploitation under RSA 631:9, I(a), is to review the document that established the fiduciary obligation.

- **Example:**

The Police Department receives a report that Marie, 80, is being financially exploited by her son, Bill. The responding officer obtains a copy of Bill's DPOA, which authorizes him to spend Marie's money for her benefit. The document does not authorize Bill to make gifts to himself. The officer reviews Marie's bank records and determines that Bill is regularly writing checks to himself from Marie's account.

In the above example, Bill could be charged with financial exploitation of an elderly adult under RSA 631:9, I(a), because spending Marie's money on himself constituted a violation of his fiduciary obligation to Marie. If the DPOA contained language that said, "My agent is authorized to make gifts to himself," Bill could not be charged with financial exploitation because his conduct is authorized.

- **Example:**

James walks into his local police department to report that his brother, Bill, has been taking money from their elderly mother, Marie. James reports that Bill is Marie's durable power of attorney and has been exploiting his position by taking Marie's money and spending it on himself.

⁹⁷⁶ RSA 631:8, I(d) (Supp. 2019).

Even though the alleged suspect holds a DPOA that authorizes him to spend Marie's money without first obtaining her permission, the intake officer should not immediately conclude that the matter is civil and not criminal. Rather, the officer should attempt to interview James, Marie, and Bill, obtain bank records, and review a copy of the DPOA. Conclusions about whether a matter is civil or criminal should only be made after a full investigation has been completed.

2. RSA 631:9, I(b): When The Suspect Does Not Hold A Fiduciary Obligation To The Victim

In these cases, the focus shifts to the defendant's conduct and the victim's mental capacity. The elements required to charge a suspect under RSA 631:9, I(b), are:

- The defendant acted without legal authority authorizing his conduct; and
- The defendant used undue influence, harassment, duress, force, compulsion, or coercion; *or* used any tactic under circumstances where he or she knew the victim lacked the capacity to consent or consciously disregarded a substantial and unjustifiable risk that the victim lacked the capacity to consent; and
- The defendant committed any of the following actions:
 - Acquired possession or control of an interest in real or personal property or other financial resources of the victim; or
 - Induced the victim against his or her will to perform services for the profit or advantage of another; or
 - Established a relationship with a fiduciary obligation to the victim that gave the defendant control of an interest in the victim's real or personal property or other financial resources; and
- The defendant acted knowingly or recklessly.

The State must prove either that a specific unfair tactic was used to convince a competent victim to voluntarily give away his or her property, or that the defendant knew or should have known that the victim objectively lacked the capacity to consent to any such transaction.

When the State charges a defendant with obtaining the victim's property by using an unfair tactic, the State must prove that the defendant used undue influence, harassment, duress, force, compulsion, or coercion. Each of these tactics involves the use of unfair pressure to convince the elderly adult to agree to the transaction at issue.

When the State charges a defendant with obtaining the elderly adult's property when the defendant should have known that the victim lacked the capacity to consent, the State is required to prove that the victim's lack of capacity either was personally known to the defendant, or was so objectively clear that the defendant's conduct amounted to a disregard of a substantial and unjustifiable risk that the victim lacked the capacity.

When determining whether an alleged victim lacked the capacity to consent, officers should take the following investigative steps:

- Interview the victim and determine whether the victim has the capacity to engage in conversation and provide reasonable responses to questions. Officers should also determine whether the victim appears to understand his or her surroundings and the consequences of any decisions.
- Interview friends and family members who regularly interact with the victim. Officers should ask them about their observations of the victim's ability to make meaningful decisions and to understand his or her surroundings.
- Interview any medical professionals who have treated the victim. Officers should determine if the victim has been diagnosed with any condition that would impair the capacity to consent.

E. Joint Bank Accounts

Many reports of theft from the elderly involve a suspect who is taking money from a joint bank account that the suspect shares with an elderly adult. Typically, the elderly victim will add the suspect to a bank account that is completely funded with the elderly victim's money. Often, the account is funded by the elderly victim's monthly social security and pension payments. Usually, the suspect does not contribute any money to the account, but begins spending down the account for the suspect's own benefit after being added as a joint owner.

Taking money from a joint bank account is a crime under certain circumstances. The key question is whether the suspect was privileged to appropriate the funds. To determine this, law enforcement must look to the privilege established by the arrangement leading to the joint account's creation.⁹⁷⁷ In short, why did the victim add the suspect to the account?

- **Example:**

Marie has a bank account at ABC Bank. The account is completely funded by money belonging to Marie. As Marie begins to age, she adds her son, Bill, to the account so he can assist her with paying bills. Bill never contributes any money to the account. A month after Bill is added as a joint owner, he withdraws \$100,000 from the joint account and uses it to pay off his student loans.

Bill could be charged with theft by unauthorized taking⁹⁷⁸ because his privilege to spend the money was limited to paying Marie's bills. If Marie had added Bill to the account and had told him that she wanted him to use the money for whatever he wants, Bill would have been privileged to take money from the joint account to pay off his student loans.

F. Extended Term Of Imprisonment

Under certain circumstances where a suspect has been stealing from an elderly adult, the suspect's conduct may qualify for an extended term of imprisonment.⁹⁷⁹ The enhanced penalty applies only to qualifying crimes listed in RSA chapter 637 (Theft) and RSA chapter 638 (Fraud). It is important to note that the extended term of imprisonment does not apply if a defendant is charged with financial exploitation of an elderly adult under RSA 631:9.

The enhanced penalty applies in cases where the defendant has committed a qualifying crime against a victim who is 65 years old or older, or who has a physical or mental disability. In order to seek enhanced penalties, the State must prove that in

⁹⁷⁷ *State v. Gagne*, 165 N.H. 363, 372 (2013).

⁹⁷⁸ RSA 637:3 (2016).

⁹⁷⁹ RSA 651:6, I(l) (Supp. 2019).

perpetrating the crime, the defendant intended to take advantage of the victim's age or physical or mental disability, that impaired the victim's ability to manage his or her property or financial resources, or to protect his or her own rights or interests.⁹⁸⁰

G. Interviewing Elderly Victims-Issues And Concerns

1. Capacity

At the beginning of an investigation, it is important to assess the capacity of the elderly victim and the amount of undue influence that is being exerted upon them. The investigator must assess whether the victim has the mental capacity to give consent and to understand the consequences of his or her actions.

In instances of financial exploitation, capacity becomes important if the suspect argues that the victim knew what was taking place and gave consent. Incapacity is "a legal, not a medical, disability and shall be measured by functional limitations."⁹⁸¹ A person is "incapacitated" when the person has "suffered, is suffering or is likely to suffer substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care or safety or an inability to manage his or her property or financial affairs."⁹⁸² The person's "[i]nability to provide for personal needs or to manage property shall be evidenced by acts or occurrences, or statements which strongly indicate imminent acts or occurrences."⁹⁸³

Even though "incapacity" is a legal definition, medical records, a medical evaluation, and observations of people who have regular contact with the older person can be helpful in determining capacity. As such, a victim's medical records should be obtained as soon as possible after an incident has occurred when questions of capacity are raised. Medical records may be obtained from a legal guardian, through a grand jury subpoena or

⁹⁸⁰ RSA 651:6, I(l) (Supp. 2019).

⁹⁸¹ RSA 464-A:2, XI (2018).

⁹⁸² RSA 464-A:2, XI (2018).

⁹⁸³ RSA 464-A:2, XI (2018).

search warrant, or from the BEAS, if it has obtained the records as part of its investigation. Investigators should also conduct interviews with persons who are close to the victim.

In cases of financial exploitation, suspects will often state that the elderly person gave them the money or property as a gift or a loan. If the person had the capacity to manage his or her property or legal affairs, and there is an absence of undue influence or coercion, a crime may not have occurred. If however, it is unclear whether the elderly person had the capacity to manage his or her property or legal affairs during the time that the alleged “gifts” or “loans” were made, then a criminal investigation may be warranted.

A diagnosis of Alzheimer’s Disease does not mean that the person lacked capacity. In the early stages, the person may still have the capacity to manage his or her affairs. Records will again be important in determining an inability to make everyday life decisions.

2. Unfair Tactics (Undue Influence, Harassment, Duress, Force, Compulsion, And Coercion)

Unfair tactics can cause the substitution of one person’s will for the true desires of another. It is often compared to brainwashing. It may occur over a period of time, during which the elderly person’s willpower is worn down by the exploiter to the extent that the exploiter’s desires are substituted for that of the elder. The exploiter gains psychological control over the decision-making capabilities of the elder with the goal of convincing the elder to give consent to sign over money, property, or other valuables to the exploiter.

The term “unfair tactics” does not refer to a crime itself, but provides a theory for the way in which a fraud, theft, or other form of financial exploitation was committed against a person. The focus becomes whether the perpetrator engaged in tactics that had the effect of stripping away or overpowering the elder’s free will. If this exists, the elder’s freedom to choose has been compromised and criminal charges should be considered.

Fear and coercion may not be readily apparent, so investigators should focus on whether the perpetrator engaged in tactics that stripped away or overpowered the elderly

victim's free will, and consult with their prosecutors to determine if criminal charges are appropriate.

3. Interviewing Victims With Cognitive Impairments

The responding officer's first priority should be to determine the victim's mental state.⁹⁸⁴ Whether the victim possessed the capacity to consent to financial transactions, and whether the victim will be a competent witness at a hearing or a trial, are typical issues in elder abuse cases.

The initial evaluation of the victim's capacity or competency should be made at an interview—the sooner the better—and the interview should be memorialized, preferably on video. A victim's capacity can be tested by mental status questions about the date, the day of the week, the name of the president, personal living arrangements, relevant events, and assets. Asking such questions will help determine if the victim understands and can communicate information.

After interviewing the victim, an officer should be able to determine whether a victim's mental state is an issue. If it is, it is incumbent upon the officer to make these concerns known to the prosecutor in order to obtain a mental health assessment. In New Hampshire, these are conducted by a geriatric psychiatrist and with careful evaluation, an expert may discover deficits in areas such as communication, interpersonal skills, isolating behaviors, basic problem solving, insight, awareness, and judgment.

4. Recording The Interview

The interview of a victim with cognitive impairment should be recorded whenever possible. Recording is especially important where the victim is elderly or very ill. By the time the jury trial occurs, the victim may not be available and viewing the recording may

⁹⁸⁴ Large parts of this subsection are taken from an article written by Dennis J. Morris, a former assistant district attorney in San Francisco, California. He gave permission for the use of the article in the New Hampshire Department of Justice publication: "Responding to the Needs of the Elderly, Law Enforcement Field Guide and Resource Manual on Elder Abuse, Neglect and Financial Exploitation."

be the only way the jury can see the victim.

A video recorded interview may show the victim's level of functioning. The video may corroborate testimony from an expert or other witness, or form the basis for an expert opinion.

5. Conducting The Interview

Officers should conduct the interview in a place that is familiar to the victim. A non-public place with minimal distractions is preferable. It is also imperative that the victim not be within earshot or eyeshot of the suspect during the interview. Officers should also schedule the interview at a time when the victim is at his or her best. Often, this is mid-morning.

Officers should address the victim by last name, unless they are given permission to use some other name. Officers should explain to the victim why they are there and who they are. Be sure the victim knows that the interview is confidential up until a certain point where the information will need to be disclosed. Make sure the victim feels safe and as free from threats as possible. Make sure the victim knows that they are not in trouble.

Officers should ensure that the victim can hear and focus on them. Eliminate or reduce background noise. It is not unusual for an elderly person to have vision problems, so conduct the interview in an area that is sufficiently lighted, but free of glare. Try to have the victim face away from possible glare, such as a bright window. If the victim uses glasses or hearing aids, make sure he or she has them on. During the interview, face the victim at eye level. Being face to face is preferable. Make sure the victim can see your face and lips. Officers should not stand over the victim, and should be aware of where their guns are relative to the victim.

Officers should speak slowly and clearly, but should not shout. Keep questions short and avoid complex or compound questions. Select simple words and phrases and keep the pace relaxed. Do not rush through the interview. Give the victim time to process the

question and formulate the answer. Ask only one question at a time and wait for it to be answered before asking follow-up questions.

During the interview, officers should assess the victim's language skills. This is especially important for discussion about body parts, sexual abuse, and financial transactions. As appropriate for your case, find out how the victim refers to body parts, sexual acts, loans, and property transfers. If sexual abuse is a potential issue, determine if you need an interpreter to explain what a victim calls something. Once you learn the victim's terms, use them during the interview. Do not try to get the victim to use common terms and phrases that the victim may not fully comprehend.

If the victim is non-verbal, use diagrams, dolls, or photographs. Officers should be careful to avoid any suggestiveness. Avoid making any personal judgments in the presence of the victim. Avoid communicating disgust, discomfort, shock, disapproval, or embarrassment. When using or reviewing exhibits with the victim, show the exhibits one at a time and describe for the record exactly which item you are discussing.

Begin the interview with general and non-threatening topics and then move to the more specific and uncomfortable topics. It is wise to then return to general topics and conclude with a friendly ending.

6. What To Discuss During The Interview

During the interview, officers should determine the victim's attitude toward the suspect and the relationship between the victim and suspect. Questions to ask include:

- What was the suspect authorized to do?
- What were the suspect's duties?
- Was the suspect a caregiver?
- Did the suspect receive a salary?
 - If so, how much?
- Does the elderly person understand what has happened and what is suspected?
 - If so, when and why did the victim become suspicious?

Officers should attempt to learn about the people with key roles in the victim's life, and obtain contact information for these people. They should also obtain the name and contact information of the victim's physician. Officers should learn about the victim's family, close friends, and neighbors, and determine who are the victim's banker, financial advisor, and broker. Determine if the victim's affairs are being handled by a lawyer, guardian, or conservator.

Officers should ask the victim about any medical conditions and history. When doing so, consider the following:

- Is the victim being forthright?
- Has the suspect told the victim something different about the victim's medical condition?
- If the victim takes prescription medication, determine:
 - The dosage of the victim's prescription medications;
 - Whether the prescribing physician is the victim's general physician;
 - Who dispenses the medication to the victim and when; and
 - Whether the victim knows what pharmacy the medication originates from and the date the prescription was filled.

Officers should also ask the victim about the allegations or events at issue, and determine what the victim thinks the suspect will say about any of the allegations presented. Also, ask the victim more everyday-type questions about the period before and after the events in issue. Determine how the events changed the lives of the victim and the suspect, and how the victim's life degraded while the suspect's life was enhanced at the expense of the victim.

When interviewing a victim of financial exploitation, focus on the inevitable consent defense. Discover whether the victim actually said any words giving consent. For example, a suspect's claim that the victim said a house was the suspect's does not prove the victim actually said the words. If a victim did complete a transaction, it is important to determine whether the victim understood what he or she was consenting to, and whether he or she understood the legal significance of the transaction and entered into it voluntarily.

Officers should ask the victim about his or her assets, bank accounts, CDs and other bank instruments, stocks, bonds, investment accounts, home furnishings, collections, antiques, art, furs, jewelry, vehicles, boats, real estate, credit cards, wills, trusts, safety deposit boxes, and insurance policies. They should determine the whereabouts of these assets as well as who controls them and additional legal mechanisms that may be in place. The additional legal mechanisms may be powers of attorney, guardianships, or contracts.

Officers should attempt to determine whether the victim understands the effects of the above documents. For example, if there is a questionable deed involved, ask the victim if he or she signed the deed, or whether the signature on the deed is his or hers. Ask if the victim understands what a deed is, and what the significance of the suspect's name on the deed is. Determine if the caregiver can evict the victim now that the victim signed the deed, and where the victim would live if he or she was evicted.

Determine what the victim's spending pattern was before he or she became involved with the suspect and after. Often, the victim was very frugal before the suspect came into his or her life, and then the spending dramatically increased in a manner that was very inconsistent with prior spending habits, particularly for someone who is cognitively impaired.

H. Special Considerations

The interview of a cognitively impaired victim, especially an elder, can be a goldmine of information both for the personal benefit of the victim and the benefit of the criminal investigation. As such, officers must take full advantage of the opportunity to interview a victim and to do so in a thoughtful and caring fashion that will aid both the victim and the prosecution. It is important to keep in mind that the interview of a cognitively impaired victim is to be used to investigate and gather evidence of crimes, and to reinforce that investigation and eventual prosecution with evidence of cognitive impairment that would clearly illustrate the lack of ability to consent to any transactions, thus, overcoming possible defenses.

NOTE: An interview of a cognitively impaired victim is an opportunity to assess the victim's level of functioning, confusion, understanding, forgetfulness, communication skill, and self-help skills. The victim's well-being should be the priority. As such, take into consideration the victim's special needs and impairments for which the victim will require assistance.

I. Sample Complaints

- **Criminal Neglect Of An Elderly, Disabled, Or Impaired Adult**

Defendant recklessly caused serious bodily injury to Victim (age 80), an elderly adult, specifically, a stage five decubitus ulcer, by neglect, in that Defendant allowed Victim to lie on the floor of their shared home for multiple days in his/her own feces and urine without calling for help, at a time when Defendant was Victim's caregiver pursuant to RSA 631:8.

- **RSA 631:9, I(b): When The Defendant Does Not Hold A Fiduciary Obligation To The Victim**

Defendant, in the absence of legal authority, recklessly, through the use of undue influence, acquired possession or control of an interest in the financial resources of Victim (age 70), when Defendant knew or reasonably should have known that Victim was an elderly adult, and the aggregate amount of the money involved in the exploitation exceeded \$1,500.00.

or

Defendant, in the absence of legal authority, recklessly, acquired possession or control of an interest in the financial resources of Victim (aged 70), when Defendant knew or reasonably should have known that Victim was an elderly adult, and consciously disregarded a substantial and unjustifiable risk that Victim lacked the capacity to consent to the transaction, and the aggregate amount of the money involved in the exploitation exceeded \$1,500.00.

XXV. HUMAN TRAFFICKING

A. Introduction

Human trafficking is a broad term encompassing various crimes prohibited by both state and federal law in New Hampshire. Generally, human trafficking involves compelling or coercing another person to perform labor, services, or commercial sex acts. Trafficking incidents are frequently associated with other types of offenses or criminal activity, such as domestic violence incidents, prostitution-related offenses, drug offenses, and even labor complaints, that may serve as an initial clue a trafficking incident has occurred. Criminal justice professionals will be able to more readily identify human trafficking when they can identify these underlying offenses and understand how they may be linked to human trafficking. Human trafficking cases are, at the most basic level, extensions of the types of cases with which criminal justice professionals are already familiar.

Victims in these cases may not present initially as “typical” victims. They may be uncooperative and belligerent toward law enforcement and may be involved in criminal activity themselves. Victims of human trafficking are often wholly dependent on, or intensely connected to, the perpetrator. Victims of human trafficking, regardless of decisions they have made at any point during their trafficking, are not active participants in the criminal activity; *they are victims*.

B. New Hampshire Human Trafficking Law

Generally, human trafficking involves compelling or coercing another person to perform labor, services, or commercial sex acts. The laws prohibit a range of conduct related to trafficking, from recruiting or transporting a person into a trafficking offense, to benefitting financially from the offense, to conspiring or attempting to commit a trafficking offense.

In New Hampshire, it is a class A felony to:

- I.(a) Knowingly compel a person against his or her will to perform a service or labor, including a commercial sex act or a sexually-explicit performance, for the benefit of another, where the compulsion is accomplished by any of the following means:
 - Causing or threatening to cause serious harm to any person.
 - Confining the person unlawfully as defined in RSA 633:2, II, or threatening to so confine the person.
 - Abusing or threatening abuse of law or legal process.
 - Destroying, concealing, removing, confiscating, or otherwise making unavailable to that person any actual or purported passport or other immigration document, or any other actual or purported government identification document.
 - Threatening to commit a crime against the person.
 - Making false promise relating to the terms and conditions of employment, education, marriage, or financial support.
 - Threatening to reveal any information sought to be kept concealed by the person which relates to the person's legal status or which would expose the person to criminal liability.
 - Facilitating or controlling the person's access to an addictive controlled substance.
 - Engaging in any scheme, plan, or pattern, whether overt or subtle, intended to cause the person to believe that, if he or she did not perform such labor, services, commercial sex acts, or sexually explicit performances, that such person or any person would suffer serious harm or physical restraint.
 - Withholding or threatening to withhold food or medication that the actor has an obligation or has promised to provide to the person.
 - Coercing a person to engage in any of the foregoing acts by requiring such in satisfaction of a debt owed to the actor.⁹⁸⁵

⁹⁸⁵ RSA 633:7, I(a)(1)-(11) (Supp. 2019).

- I.(c) A person performs a service or labor against his or her will if the person is coerced, or if he or she willingly begins, but later attempts to withdraw from performance and is compelled to continue performing. The payment of a wage or salary shall not be determinative on the question of whether or not a person was compelled to perform against his or her will.⁹⁸⁶
- II. Maintain or make available an individual under 18 years of age for the purpose of engaging the individual in a commercial sex act or sexually-explicit performance for the benefit of another.
- III. Recruit, entice, harbor, transport, provide, obtain, or otherwise make available a person, knowing or believing it likely that the person will be subjected to trafficking as defined in paragraph I or II.⁹⁸⁷

In New Hampshire, it is a class B felony to:

- Pay, agree to pay or offer to pay to engage in sexual contact, as defined in RSA 632-A:1, or sexual penetration, as defined in RSA 632-A:1,V, with a person under the age of 18, or to observe a sexually-explicit performance involving a person under the age of 18. Neither the actor's lack of knowledge of the other person's age nor consent of the other person shall constitute a defense to a charge under this chapter.⁹⁸⁸

C. Penalties

The following penalties apply to convictions under the human trafficking statute:

- Where the victim is under 18 years of age and engaged in a commercial sex act or sexually explicit performance: 7 to 30 years and up to a \$4,000 fine.⁹⁸⁹
- Class A felony: up to 15 years in prison and up to a \$4,000 fine.⁹⁹⁰
- Class B felony: up to 7 years in prison and up to a \$4,000 fine.⁹⁹¹

⁹⁸⁶ RSA 633:7, I(c) (Supp. 2019).

⁹⁸⁷ RSA 633:7, III (Supp. 2019).

⁹⁸⁸ RSA 633:7, III-a (Supp. 2019).

⁹⁸⁹ RSA 633:7, II, III (Supp. 2019).

⁹⁹⁰ RSA 651:2, II(a), IV(a) (Supp. 2019).

⁹⁹¹ RSA 651:2, II(b), IV(a) (Supp. 2019).

D. Additional Provisions

Unlike many other violent crimes, human trafficking usually involves prolonged and repeated trauma. Additionally, the stigma attached to trafficked victims has been shown to have a significant and ongoing impact on their lives. This includes, not only the trauma experienced by the individual victim, but the possibility of rejection by family and/or community. Because of the unique characteristics of human trafficking, the following provisions offer some protections to victims under the human trafficking statute:

- **Evidence restrictions:**

Limits the ability to use a victim's personal sexual history, history of commercial sexual activity, or reputation or opinion evidence regarding the victim's past sexual behavior as evidence at trial.⁹⁹²

- **Protection of a victim's identity:**

Provides protection for the identity of the victim and the victim's family, including images of the victim and the victim's family.⁹⁹³

- **Protection for minors:**

Provides protection from criminal prosecution or juvenile delinquency proceedings for children involved in prostitution, indecent exposure, or lewdness committed as a direct result of being trafficked.⁹⁹⁴

- **Vacating convictions:**

Allows victims convicted of indecent exposure, lewdness, or prostitution as a direct result of being a victim of human trafficking to vacate the conviction by petitioning the court.⁹⁹⁵

⁹⁹² RSA 633:7, IV (Supp. 2019).

⁹⁹³ RSA 633:7, V (Supp. 2019).

⁹⁹⁴ RSA 633:7, VI(a) (Supp. 2019).

⁹⁹⁵ RSA 633:7, VI(b) (Supp. 2019).

- **Restitution:**

Allows for court-ordered restitution for all losses suffered by the victim, including, but not limited to, economic losses, the value of the victim's labor, costs of medical and psychological treatment, transportation, temporary housing, child care, relocation expenses or other losses suffered by the victim.⁹⁹⁶

- **Civil Remedy:**

Allows victims to bring a civil suit against the trafficker for damages, injunctive relief, or other appropriate relief within 10 years of when they exited the trafficking situation or 10 years after they turned 18 years of age, whichever occurs later.⁹⁹⁷

E. Collaboration With Other Agencies

Many human trafficking cases involve a federal aspect, making them ideal candidates for federal prosecution. Sex and labor trafficking cases may also involve foreign nationals, necessitating the involvement of federal immigration agencies and/or immigration resources for victims. Therefore, it is encouraged to reach out to federal partners when appropriate.

⁹⁹⁶ RSA 633:10 (2016).

⁹⁹⁷ RSA 633:11, I, III (2016).

XXVI. INSTRUCTIONS IN THE HANDLING OF MISSING CHILDREN AND MISSING ADULT CASES

A. Introduction

RSA 7:10-b requires the Attorney General to establish uniform procedures for law enforcement agencies to follow upon receiving a report of a missing person. Missing persons include missing adults, missing vulnerable adults, and missing children. RSA chapter 106-J sets forth the Missing Adult Program and Missing Vulnerable Adult Alert Program (Silver Alert).⁹⁹⁸ The Attorney General has created a model policy for law enforcement's response to reports of missing persons, along with an Investigative Protocol Chart (IPC), which provides a step-by-step guide to handling these cases.

The following policy is a modification of the model policy and procedures developed by the National Center for Missing and Exploited Children (NCMEC) for the reporting of missing and abducted children.⁹⁹⁹ Law enforcement agencies are encouraged to modify their policies on missing persons to fit their existing departmental policies. However, in doing so, it is imperative that each agency's policy incorporate the following fundamental aspects of the Attorney General's uniform policy:

- Police departments shall not impose a waiting period for the filing of a missing person report. A report must be accepted, regardless of the length of time that the person has been missing, if the missing person was a resident of, or last seen in, the department's jurisdiction.
- The department shall immediately begin a preliminary investigation to determine the nature of the disappearance and the level of response necessary.
- If the preliminary investigation reveals that the person falls within the category of Missing-At Risk, as described below, the person's name and descriptive information and the circumstances of the disappearance shall be broadcast to all surrounding police departments. The information shall be entered into National Crime Information Center (NCIC) no more than

⁹⁹⁸ The Child Abduction Emergency Alert (Amber Alert) procedure is discussed below, *see* pages 345-48.

⁹⁹⁹ The 2011 Model Law Enforcement Policy and Procedures for Reports of Missing and Abducted Children created by NCMEC can be found in the Appendices, *see* page 503.

- 48 hours after receipt of the initial report for an adult and no more than 2 hours after receipt of the initial report for a child.
- For any missing person who falls within the category of Missing-At Risk, as described below, the agency shall conduct a prompt and thorough investigation.
 - If the person is not located within 30 days, the police shall, with the consent of the person's family or next of kin, obtain the person's dental records and forward them to the New Hampshire State Police.
 - If the person is not located within 30 days, the police shall determine if there is a sample of the missing person's DNA that can be placed into Combined DNA Index System (CODIS) for missing persons. If this is not available, the police should determine if a family member is willing to provide a DNA sample that can be placed into CODIS for missing persons. DNA collected for missing persons is used only for identifying missing persons and not for criminal investigations.
 - If a missing person is located, and that person is an adult, the person's whereabouts should not be disclosed without the person's consent.
 - If a missing child is located, the law enforcement agency shall verify that the located child is, in fact, the reported missing child, and arrange for the child to return to the child's legal guardian or to an appropriate facility. The child should be assessed for needed services before being returned.
 - If a missing person is returned or located, the law enforcement agency shall take steps to cancel the NCIC entry related to that person. If dental records were provided to the State Police, the agency shall notify the State Police that the person has been located.

Jurisdictional conflicts must be avoided when a person is reported missing. If the person either resides in, or was last seen in, the department's jurisdiction, the department shall accept the call and initiate the reporting and investigative process. If the person resides within the department's jurisdiction, but was last seen elsewhere, the department should work to engage and obtain the cooperation of the department covering the area where the person was last seen.

B. Definitions

1. Missing Adult

A “missing adult” is any person:¹⁰⁰⁰

- Who is 18 years of age or older;
- Whose residence is in New Hampshire or is believed to be in New Hampshire;
- Who has been reported to a law enforcement agency as missing; and
- Who falls within one of the following categories:
 - The person is under proven physical or mental disability, thereby subjecting himself or herself or others to personal and immediate danger;
 - The circumstances indicate that the person’s physical safety may be in danger;
 - The circumstances indicate that the person’s disappearance may not have been voluntary; or
 - The person is missing after a catastrophe.

¹⁰⁰⁰ RSA 106-J:1 (Supp. 2019).

2. Missing Vulnerable Adult

A “missing vulnerable adult” includes, but is not limited to, a missing adult who:

- Is 18 years of age or older;
 - Whose whereabouts are unknown;
 - Whose last known whereabouts at the time he or she is reported missing is in New Hampshire; and
 - Whose disappearance poses a credible threat to the safety and health of the person, as determined by a local law enforcement agency; and
- Who has a mental or cognitive disability, such as dementia;
 - Who has an intellectual or developmental disability;
 - Who has a brain injury; or
 - Who has another physical, mental, or emotional disability.¹⁰⁰¹

3. Missing Children

A “missing child” is any person younger than 18 years old whose whereabouts are unknown to the child’s parent, guardian, or responsible party. Until proven otherwise, all missing children are presumed to be at risk.

¹⁰⁰¹ RSA 106-J:3, III (Supp. 2019).

4. Missing-At-Risk

A missing person will be considered “at risk” if any of the following criteria are met:

- The person has a physical or mental disability or is senile, which may subject that person or another to personal and immediate danger. For instance, the person has diminished mental capacity;
- The circumstances indicate that the person’s physical safety may be in danger. For instance:
 - The person is under 18 years of age;
 - The person is out of the zone of safety for the person’s developmental state, or physical or mental condition;
 - The person has a history of self-destructive behavior or has threatened suicide;
 - The person is drug-dependent;
 - The person is a potential victim of foul play or sexual exploitation;
 - The person was absent from home for an extended period of time before being reported as missing;
 - The person is believed to be with people who could endanger the person’s welfare;
 - The person is believed to be in a life-threatening situation; or
 - The person is involved in a situation causing a reasonable person to conclude the person should be considered at risk;
- The person is missing after a catastrophe, but has not been confirmed deceased; or
- The circumstances indicate that the person’s disappearance may not have been voluntary. For instance:
 - The person is absent in a way inconsistent with established patterns of behavior and the deviation cannot be readily explained; or
 - There is no explanation for the person’s absence.

5. Missing-Not At Risk

A missing adult will not be considered at risk if any of the following criteria are met:

- An adult has left a note (other than a suicide note) or told a credible person that they are leaving;
- An adult simply has not been in touch with the reported party for an extended period of time, unless extenuating circumstances exist;
- The adult is a fugitive from justice or an AWOL member of the military; or
- An adult is being sought for business or social purposes such as debt collections or school reunions.

C. Investigative Procedure

1. Initial Response

Law enforcement agencies must respond promptly to all calls regarding missing persons. The initial call-taker—or other person designated by the department—shall immediately conduct an initial risk assessment by obtaining as much information as possible from the reporting party concerning the circumstances surrounding the person’s disappearance, using the Investigation Protocol Chart (IPC) below. Upon receiving the information, the chief, shift supervisor, or other designated superior shall be notified.

If the circumstances meet any of the criteria set forth in the category of “Missing-Not at Risk” as set forth above, no officer needs to be dispatched. In all other circumstances, an officer must be dispatched immediately.

If the missing person is determined to be at risk, the person’s name and descriptive information shall be broadcast to other patrol officers and to police departments in the surrounding jurisdictions. If the information suggests the probability of foul play or a crime in progress—as in the case of an abduction—the broadcast should include all available information related to the suspect, vehicle, and direction-of-travel. In the case of a missing

child, considerations should be given to activating a Child Abduction Emergency Alert (“Amber Alert”). *See* Child Abduction Emergency Alert, page 521.

In the case of a missing vulnerable adult, the program established for notice to the Department of Safety and for a Silver Alert shall be followed.

2. Initial Investigation

The law enforcement agency should complete, at a minimum, the following steps in the initial investigation of a missing person:¹⁰⁰²

- Search agency records for related information regarding the missing person’s family, the place where the person was last seen, and the person’s residence;
- Conduct a search of the immediate area of the missing person’s last known location and residence to verify that the person is in fact missing; and
- Conduct an interview of the reporting party. In addition to obtaining descriptive and other basic investigative information, the officer should focus on gathering the following types of information:
 - In the case of a missing child, whether there is any dispute over the child’s custody and verification of the child’s custody status;
 - Whether the missing person has access to the Internet, a cell phone, or any other communication devices, and search those devices that are available;
 - A detailed description of the missing person, including photos and videos, and descriptions of the person’s clothing and noteworthy features;
 - Whether the person may be the victim of foul play;
 - Whether the person has a history of being the victim of domestic or other abuse, or has mentioned being followed or stalked;

¹⁰⁰² See also the Investigative Checklist for First Responders in the Appendices, page 522.

- Whether the person experienced recent emotional trauma, such as the death of a loved one, an arrest, marital or financial difficulties, or difficulties at work or school;
- Who the last person who saw or spoke to the missing person was;
- What activity the person was engaged in when the person was last seen, and who the person was with;
- Any potential for, and mode of, the person's mobility, *i.e.*, car, bus, plane, bicycle, or on foot;
- Whether the person has access to and familiarity with weapons, and whether any weapons are missing;
- Whether the person has a history of disappearing or of suicidal attempts or tendencies;
- Whether the person has a serious physical or mental illness or any serious condition requiring frequent medication or treatment;
- Whether the person is missing under circumstances inconsistent with the person's normal behavior;
- Whether the person left a note or any form of communication indicating the person's intentions or whereabouts;
- Whether any of the person's money or personal belongings are missing;
- Whether anyone might gain financially by the person's disappearance;
- Whether the person has a criminal record, is on probation or parole, or is possibly incarcerated;
- Whether the person is possibly hospitalized;
- Who would be an appropriate liaison for the missing person's family; and
- Whether there is a need for additional resources and specialized services.

3. Levels Of Response

Based upon the gathered information, the officers shall determine, in consultation with their supervisor, the appropriate level of response as follows:

a. Endangered Or Foul Play Suspected

This includes all missing children and adults who may be the victim of criminal conduct, including known or suspected abductions or circumstances where there is reason to believe the missing person may be in imminent danger of death or serious bodily injury. The department response should, to the extent feasible, follow the protocols under the column labeled “Endangered/Foul Play” in the IPC.

b. Disability Or Medical Condition

In this scenario, the missing person is a vulnerable adult or a child who suffers from diminished mental capacity, Alzheimer’s disease, dementia, or other medical condition that could be life-threatening if the person is not located. The department response should, to the extent feasible, follow the protocols under the column labeled “Disability/Medical Condition” in the IPC.

c. Unknown Or Voluntary

In these cases, the reason for the disappearance cannot be easily determined or the information from the reporting party is limited. A person missing under these circumstances should be considered at risk until significant information to the contrary has been confirmed. The law enforcement response should, to the extent feasible, follow the protocols under the column labeled “Unknown/Voluntary” in the IPC.

4. Reporting

If the missing person is a child or an at-risk adult, the person's name and identifying and descriptive information must be entered into the appropriate NCIC category as quickly as possible, but in no event shall the information be entered later than 48 hours in the case of an adult, and not later than 2 hours in the case of a child, following receipt of the report.^{1003, 1004} A copy of the NCIC entry, or a similar report, must be disseminated to other officers in the department through the normal channels of communication between shifts.

5. Follow-Up

The assigned case agent shall periodically check with the reporting person to determine whether new information is available to be investigated.

If the missing person has not been located within 30 days, the case agent shall ask the person's family or next of kin for written consent to obtain the person's dental records. The records shall be forwarded to the New Hampshire State Police on a form supplied by the State Police for that purpose.

If the missing person has not been located within 30 days, the police shall also ask the person's family or next of kin for a sample of the person's DNA. If this is not available, the police shall ask a member of the person's family for a sample of their DNA. DNA collected for this purpose is used only for identifying missing persons, and not for criminal investigations.

¹⁰⁰³ RSA 106-J:2, I (Supp. 2019).

¹⁰⁰⁴ The Adam Walsh Child Protection and Safety Act mandates that law enforcement enter the information in NCIC within two hours of the *initial receipt* of a report of a missing or abducted child. 34 U.S.C. § 41308(3) (2018).

If the missing person has not been located within 30 days and there is reason to believe the person was the victim of foul play, the case should be entered into the Violent Criminal Apprehension Program (ViCAP) through the Department of Safety's ViCAP coordinator.¹⁰⁰⁵

And finally, “[t]he department of safety, under the direction of the attorney general, shall prepare a periodic information bulletin concerning missing children who may be present in this state, from information contained in the national crime information center computer.”¹⁰⁰⁶

D. Recovery Or Return Of Missing Persons

The assigned officer shall verify that the located person is, in fact, the reported missing person and secure intervention services, as needed. Upon making that verification, in the case of a child, the officer shall arrange for the return of the child to the child's legal guardian, or shall turn the child over to the appropriate state agency or facility.

Upon making that verification, the initial investigating agency shall also notify NCIC to remove the person's record from the missing persons database.¹⁰⁰⁷ If dental records were sent to the State Police, the officer shall also provide notice to the State Police. If the missing person is a vulnerable adult, “the alert shall be canceled upon notification to the Department of Safety that the vulnerable adult has been found.”¹⁰⁰⁸

The assigned officer shall interview the missing person concerning the circumstances surrounding the person's disappearance and evaluate the potential for any criminal charges or further investigation.

¹⁰⁰⁵ ViCAP “maintains the largest investigative repository of major violent crimes cases in the U.S. It is designed to collect and analyze information about homicides, sexual assaults, missing persons, and other violent crimes involving unidentified human remains.” See <https://www.fbi.gov/wanted/vicap/homicides-and-sexual-assaults> (last visited July 15, 2020).

¹⁰⁰⁶ RSA 7:10-a, I (2013).

¹⁰⁰⁷ RSA 106-J:2, II (Supp. 2019).

¹⁰⁰⁸ RSA 106-J:4, IV (Supp. 2019).

The person who initiated the missing person report should be notified of the well-being of the missing person. However, if the missing person is an adult, the officer should not disclose that person's whereabouts to the reporting party, unless the officer has obtained permission to do so. All communication with the reporting party should be done by the originating agency or investigator.

E. Child Abduction Emergency Alert (“Amber Alert”)

1. Introduction

The Amber Alert enables law enforcement to quickly notify the public in cases of a child's abduction, where the child's life is in imminent danger of serious bodily harm or death. The system involves a cooperative effort between state, county, and local law enforcement, the New Hampshire Association of Broadcasters, and the New Hampshire Department of Transportation. It enables radio and television stations to quickly broadcast information on suspected child abductions, including descriptions of the suspect and the victim. The information is also posted on the Department of Transportation's variable message boards, which are posted at various locations along the interstate highways.

Broadcasters transmit an alert through the State's emergency activation system. The stations broadcast an alert tone that breaks in on regular programming, followed by a broadcast of the message. The message may be rebroadcast a number of times to ensure maximum exposure to the listening and viewing public. Television stations will also run a “crawl” along the screen, including a picture of the missing child.

The alert system is not intended for use in every missing child, runaway, or child custody situation. It should be activated only when all the following criteria are satisfied:

- A child (under 18) has been abducted;
- The child is in danger of serious bodily harm, injury, or death. In most stranger abduction cases, the threat of serious injury or death can be assumed, unless there is compelling evidence otherwise;
- There is enough descriptive information available about the child, the suspect, or the suspect's vehicle to believe that an alert may help locate the child; and
- Law enforcement believes the child, the abductor, or both are likely to still be in the area.

In determining whether a case involving a child custody dispute would meet these criteria, an officer should consider whether there is compelling evidence that the child is in imminent danger of serious injury or death by being in the company of the suspected abductor. The following factors should be considered:

- Whether the child has been abused physically or sexually by the suspected abductor;
- Whether the suspected abductor has threatened the child with bodily harm or death;
- Whether the abductor abuses alcohol or drugs; and
- Whether the abductor was under the influence of either alcohol or drugs when the child was taken.

2. Initiating An Emergency Alert

Once the criteria for activation have been met, the commanding officer or officer in charge at the investigating law enforcement agency should:

- Complete the New Hampshire Child Abduction Emergency Alert Activation form;
- Call the New Hampshire State Police Communications Bureau and alert the Bureau that the form will be arriving;
- Fax the completed form to the officer in charge at the New Hampshire State Police Communications Bureau; and
- Notify the police chief or department head that an emergency alert activation has been requested.

In those departments without a 24-hour dispatch or an officer in charge on a particular shift, the investigating officer may need to obtain the assistance of the State Police in completing the form, faxing the form, and notifying the chief or department head.

The officer in charge at the State Police Communications Bureau is required to confirm that the criteria for activating the alert system have been met. The department requesting the activation should be prepared to answer the following questions:

- What is the child's age? (If the person is over 17, the system cannot be activated.)
- What is the evidence that the child has been abducted? (If there has been no abduction, the system cannot be activated.)
- What is the relationship of the child to the abductor? (If the abductor is a family member, additional criteria must be met.)
- What is the evidence that the child is in danger of serious injury or death? (In most stranger abduction cases, the threat of serious injury or death can be assumed, unless there is compelling evidence otherwise.)

Once the officer in charge has confirmed that the criteria have been satisfied, the officer will activate the alert and make an NCIC entry.

A law enforcement agency that initiates an emergency child abduction alert must be prepared to handle a large volume of incoming telephone calls for at least the first 24 hours after the alert has been broadcast. The telephone number given to the public should be a number that is staffed 24 hours a day, 7 days a week, and is capable of handling multiple incoming lines.

3. Canceling An Alert

Once a child is located or the case is closed, the initiating law enforcement agency must notify the State Police Communications Bureau. The Bureau will send out a statewide police broadcast stating that the alert has been canceled. It will also distribute a cancellation notice through the New Hampshire Association of Broadcasters. Normally, a cancellation alert will only be broadcast once. Any further news coverage of the case is at the discretion of the media outlet.

F. Silver Alert

Upon determining that a vulnerable adult is missing, the local law enforcement agency shall notify the Department of Safety.¹⁰⁰⁹ Upon receipt of this notice, the Department of Safety will issue an immediate alert to designated media outlets in New Hampshire. Those outlets may then broadcast the alert at designated intervals.¹⁰¹⁰ The local law enforcement agency must notify the Department of Safety upon locating the missing vulnerable adult.¹⁰¹¹

¹⁰⁰⁹ RSA 106-J:4, II (Supp. 2019).

¹⁰¹⁰ RSA 106-J:4, III (Supp. 2019).

¹⁰¹¹ RSA 106-J:4, IV (Supp. 2019).

G. Resources

The following resources are available to aid police departments in responding to and investigating cases of missing persons:

National Center for Missing and Unidentified Persons (NamUs)
UNT Health Science Center
3500 Camp Bowie Boulevard
Fort Worth, TX 76107

Phone: 855-626-7600

NamUs@unthsc.edu

National Center for Missing and Exploited Children (NCMEC)
333 John Carlyle Street, Suite 125
Alexandria, VA 22314

Phone: 703-224-2150

24-Hour Call Center: 1-800-843-5678 (1-800-THE-LOST)

Alzheimer's Association
255 North Michigan Avenue, Suite 1700
Chicago, IL 60601

Phone: 312-335-5814

H. Investigative Protocol Chart¹⁰¹²

<u>Initial Investigative Steps</u>	<u>Endangered/ Foul Play</u>	<u>Disability/ Medical Condition</u>	<u>Unknown/ Voluntary</u>
Broadcast descriptive information about the missing person (MP) to officers and surrounding jurisdictions.	X	X	X
In the case of a missing child, evaluate whether an Amber Alert should be activated. In the case of a missing at-risk adult, evaluate whether a Silver Alert should be activated.	X	X	
Interview the person who initiated the MP report, focusing on the following types of information: <ul style="list-style-type: none"> • Full physical description of the MP, including clothing, height, weight, eye and hair color, skin tone, scars, tattoos, or other distinguishing marks; • Description of the MP's mental and physical condition, including list of medications; • Exact location where the MP was last seen and activity the MP was engaged in; • Who was the MP last seen with; • The MP's places of employment and work schedules; • Daily routine of the MP and the MP's family prior to, and on the day, the MP went missing; • Names of friends, roommates, co-workers, other family members; • Establish a point of contact for the MP's family; 	X	X	X

¹⁰¹² NCMEC also has a detailed manual for the investigation of missing children on its website.

<ul style="list-style-type: none"> • Whether the MP has a history of wandering and, if so, where had the MP wandered in the past; • Whether the MP has access to, and ability to use, transportation; • Whether the MP has access to, and ability to use, the Internet and electronic devices; • Whether the MP has any social media accounts; • The time frame between when the MP was last seen and when the MP was discovered missing. (It is crucial to establish this “window of opportunity.” Be aware that persons responsible for the MP may attempt to reduce the window of opportunity); • Steps already taken to locate the MP; and • Whether the person has specific areas or places of comfort, such as a former residence. 			
<p>Conduct a search of immediate area and the MP’s residence to verify the disappearance, if appropriate. Record the name of all persons involved in this preliminary search. Do not rely entirely on provided information regarding the possible whereabouts of the MP. All searches should be comprehensive.</p> <p>Conduct a search of all the MP’s Internet services, electronic devices, and social media accounts.</p> <p>Consult with the county attorney, as necessary, on the need for a search warrant. (<i>See State v. Beede</i>, 119 N.H. 620, 626–27 (1979), for the authority to obtain a search warrant in a missing persons investigation.)</p> <p><i>See Sample Affidavit for Missing Person Case</i>, page 524.</p>	X	X	X

Consider using a K-9 or available aerial resources to assist in the search, if applicable.	X	X	X
Obtain recent photographs of the MP, preferably from shoulders up with an uncluttered background. (Such a photo may be available from the Department of Motor Vehicles (DMV)). Videos of the MP can also be helpful. Distribute copies of the photographs to officers and create a missing person flyer.	X	X	X
If information indicates that the MP was abducted or is the victim of foul play, follow the protocol for Endangered/ Foul Play. If information indicates that the MP has dementia, Alzheimer's disease, or a life-threatening medical condition, follow the protocol for Disability/ Medical Condition. If the investigation does not reveal sufficient information to make a determination that either of those circumstances exists, the supervisory staff shall determine the appropriate level of response.	X	X	X
Identify and secure the location where the MP was last seen.	X	X	X
Identify and interview everyone at the scene, focusing on the following: <ul style="list-style-type: none"> • Name and contact information; • Relationship to the MP; • When and where they last saw the MP; • Any information they have about the MP's disappearance; • Names of other people who may have information about the MP's disappearance; • What they think may have happened to the MP, or where the MP might have gone; 	X	X	X

<ul style="list-style-type: none"> Names and contact information of the MP's friends, associates, caregivers, and family friends; and The identity of any other witnesses who are no longer at the scene. 			
Broadcast updated information as appropriate to patrol officers and police departments in surrounding jurisdictions.	X	X	X

<u>Extended Investigation</u>	<u>Endangered/ Foul Play</u>	<u>Disability/ Medical Condition</u>	<u>Unknown/ Voluntary</u>
Request assistance as needed from other local, county, state, or federal law enforcement agencies that may be able to provide additional staff or resources.	X	X	X
Designate a case agent to coordinate all phases of the investigation.	X	X	X
Establish an area to serve as a central point for processing, review, and assignment of all investigative information.	X	X	X
Consider steps to involve the public in locating the MP. Time is of the essence in abduction cases. Publishing the description of the MP, suspected abductors, and vehicles may lead to assistance from the public to successfully recover the MP and identify the perpetrator. Publishing this information can be accomplished through the news media, NaMUS, NCMEC, or NCIC.	X	X	X
Consider steps to involve the public in locating the MP, including publishing the description and photo of the MP in the media.	X	X	X
Identify the MP's "comfort zones," including the MP's house (if different from the scene), as potential crime scenes or sources of evidence, and secure them as necessary. Personal items such as hairbrushes, combs, diaries, photographs, and items with the	X	X	X

MP's fingerprints, footprints, tooth impressions, or sources of DNA may be used to assist in the extended investigation. Determine if any of the MP's personal belongings are missing.			
Broadcast any pertinent updates to all patrols and area law enforcement agencies, including information on any suspected abductor.	X	X	X
Conduct a canvas of the neighborhood or area of disappearance. Consider, in consultation with the county attorney or Attorney General, establishing an information roadblock to locate possible witnesses	X	X	X
Contact the Alzheimer's Association at: 312-335-5814 , as appropriate, for assistance in locating the MP.		X	
Obtain complete electronic access to records used by the MP, such as: <ul style="list-style-type: none"> • Electronic door access; • Personal and employment computer system, including Internet, intranet, and e-mail; • Credit card and ATM activity; and • Phone records, including cell phones and pagers. 	X		X
Obtain driver's license and vehicle information. Check records on recent parking violations and moving motor vehicle violations.	X	X	X
Attempt to locate the MP's vehicle, if applicable. Check with adjacent municipalities for recent contact with the vehicle, as well as parking areas for bus and train stations, airports, taxi companies, and other public transportation entities. If the vehicle is not located, enter the vehicle information in NCIC.	X	X	X

Interview delivery, utility, and contractor employees engaged in legitimate business in the area of the MP's home and the place the MP was last seen. If possible, determine whether those people had prior contact or transactions with the MP.	X	X	X
Obtain complete financial records and business transactions of the MP, the MP's family, and close associates. Consult with the county attorney or Attorney General to ensure that the necessary legal requirements for obtaining such records are satisfied.	X		
Conduct a canvass of the surrounding area or neighborhood. Consider, in consultation with the county attorney or Attorney General, establishing informational roadblocks to locate possible witnesses.	X	X	
Assign one person to issue press releases and handle press contacts, in coordination with the family and case agent, to protect sensitive information.	X	X	X
Identify a family liaison to serve as the contact person for the MP's family with the police department.	X	X	X
Ensure that an officer and a family member remain at the MP's residence, in case the MP returns home. Ensure that an officer remains at the site where the MP was last seen, if other than the residence, in case the MP returns to the scene.	X	X	X
Ensure that a family member remains at the residence to answer all incoming calls. Consult with the county attorney or Attorney General's Office to obtain the necessary legal authority to trap and record all phone calls coming into the family's residence and cell phones, as well as to monitor all activity of cell phones and pagers used by the family and the MP.	X	X	X
Identify and periodically check all pertinent sources of information about the MP for any activity. Records to be checked include:	X	X	X

<ul style="list-style-type: none"> • Birth records; • Medical records; • Education records; • Union or other organizational records; • DMV records; • Social security records; • Financial records, such as bank accounts, ATM transactions, retirement plans, stock and financial portfolios, and credit bureaus; • Mail forwarding information; • E-mail addresses; and • Phone, cell phone, and pager records. 			
Update the initial NCIC entry by fully loading all identifying information into the NCIC Missing Person File, including available dental and medical information (including x-rays), fingerprint classification, and the MP's DNA or familial DNA.	X	X	X
Search the NCIC Unidentified Person File. Periodically use the NCIC offline search capabilities to determine if the MP or suspected perpetrator has had any contact with law enforcement agencies. Ensure that the MP and suspected perpetrator information are cross-referenced.	X	X	X
Review the sexual offender registry, as well as the local probation-parole office, in order to identify possible suspects.	X		
Report case details to State Police ViCap designee.	X		

Note: Law enforcement must always treat the initial report as though foul play is involved, even though officers may later discover that the person is absent voluntarily. If possible, verification that the absence was voluntary should be made through a face-to-face interview by law enforcement with the missing person. In cases where the voluntariness of an absence is verified, law enforcement is under no obligation to report the person's location against the person's wishes.

XXVII. CHARGING DECISIONS AND WRITING CRIMINAL COMPLAINTS

A. Introduction

Law enforcement officers regularly have to decide whether to charge a person with an offense and, if so, which offense. In order to make those decisions, officers need to look at the statutory definition of an offense, and understand and identify the required mental state and other elements that must be proven in order to establish a violation of the specific statute. Identifying the appropriate criminal statute that corresponds with the suspect's behavior and properly drafting a complaint will not only avoid legal issues for the prosecutor later in the case, but will also guide the officer in the investigation and preparation of the criminal case for trial. Often, there may be more than one statute that could apply to the situation at hand. Officers should not hesitate to contact their local prosecutor or county attorney with questions on charging decisions.

This chapter will provide guidance in drafting complaints. Officers should also review the annotations listed after the statute to determine whether the New Hampshire Supreme Court has issued any recent opinions relating to that crime. In some instances, the annotations will detail an additional element of an offense the legislature has yet to add to the statute.¹⁰¹³ If this is the case, the added element should be included on the face of the complaint because the State will be required to prove it at trial.

Many statutory provisions include definitions of particular words or phrases. For example, the terms "serious bodily injury" and "deadly weapon" are specifically defined in RSA 625:11. Before drafting a complaint, it is imperative that officers review the applicable statute to see if any of the terms have been defined in that statute or in another. If a term is defined by statute, the facts necessary to establish that the term meets the statutory definition should be included in the complaint. Failure to include sufficient

¹⁰¹³ See RSA 263:64 (2014); *State v. Kardonsky*, 169 N.H. 150 (2016). In *Kardonsky*, the Court determined the State must prove the mental state "knowingly" in order to prevail on a charge of Driving After Revocation or Suspension, even as a violation. As of the writing of this manual, the legislature has yet to amend the statute to include the *mens rea* of "knowingly."

information in the complaint could result in a dismissal of the case before it even gets to trial.¹⁰¹⁴

B. Types Of Offenses

All offenses are defined by statute. No act or failure to act can constitute an offense, unless it is defined as a crime or violation under the Criminal Code or under another statute.¹⁰¹⁵ Offenses are divided into three levels: violations, misdemeanors, and felonies. Felonies are the most serious; violations are the least. The degree of any particular offense is typically defined in the statute. Unlike felonies and misdemeanors, violations are not considered crimes.¹⁰¹⁶

1. Felonies

Felonies are designated as class A felonies, class B felonies, or special felonies. Felonies include:

- crimes designated as felonies by statute; and
- any other crime for which the maximum penalty exceeds one year of incarceration or, in the case of a corporation or unincorporated association, a fine of more than \$20,000.

The maximum penalties and fines associated with each type of felony are as follows:¹⁰¹⁷

<u>Designation</u>	<u>Term of Incarceration</u>	<u>Fine</u>	<u>Probation</u>
Class A	7 ½ -15 years	\$4,000	5 years
Class B	3 ½ - 7 years	\$4,000	5 years
Unclassified	None	\$10,000	None

¹⁰¹⁴ *State v. Bussiere*, 118 N.H. 659 (1978).

¹⁰¹⁵ RSA 625:6 (2016).

¹⁰¹⁶ RSA 625:9, II (Supp. 2019).

¹⁰¹⁷ RSA 651:2, IV(a) (Supp. 2019).

For felonies such as murder, manslaughter, sexual assaults, and drug offenses, the statutes provide a longer term of incarceration than those listed above.¹⁰¹⁸ These offenses are sometimes referred to as “special felonies,” because they do not meet the definition of either a class A or class B felony. Unless otherwise specified by the statute, the fines and probationary terms for these “special felonies,” are the same as those listed above.

The Criminal Code also provides for an enhancement of the maximum term of incarceration when certain conditions apply.¹⁰¹⁹ Additionally, crimes involving the felonious use of firearms may trigger minimum mandatory sentences and enhanced maximum sentences.¹⁰²⁰

2. Misdemeanors

Misdemeanors are classified either as class A or class B misdemeanors. Any misdemeanors not specifically designated as class A or B are presumed to be class B misdemeanors.¹⁰²¹ For example, the offense of false fire alarms is defined simply as a misdemeanor.¹⁰²² Because the class is not designated, it is presumed to be a class B misdemeanor.

¹⁰¹⁸ See RSA 318-B:26 (Supp. 2019); RSA 632-A:10-a (2016).

¹⁰¹⁹ See RSA 651:6 (Supp. 2019).

¹⁰²⁰ See RSA 651:2, II-b, II-g (Supp. 2019).

¹⁰²¹ RSA 625:9, IV(c) (Supp. 2019).

¹⁰²² RSA 644:3-a (2016).

There are two exceptions to this presumption:

- If an element of the offense involves either an “act of violence” or “threat of violence,” an undesignated misdemeanor is presumed to be a class A.^{1023, 1024}
- If the State files a notice of intent to seek class A misdemeanor penalties *on or before the date of arraignment*, the charge will be considered a class A misdemeanor.¹⁰²⁵ See Notice of Intent to Seek Class A Misdemeanor Penalties, page 528.

Misdemeanors committed by corporations or unincorporated associations are unclassified. The maximum penalties for misdemeanors are as follows:¹⁰²⁶

<u>Designation</u>	<u>Term of Incarceration</u>	<u>Fine</u>	<u>Probation</u>
Class A	Not to exceed 1 year	\$2,000	2 years
Class B	None	\$1,200	None
Unclassified	None	\$20,000	None

If a person is charged and convicted of a class A misdemeanor, but the sentence does not include any period of actual incarceration, suspended, or deferred time, and the fine does not exceed \$1,200, the conviction is recorded as a class B misdemeanor.¹⁰²⁷

¹⁰²³ RSA 625:9, IV(c)(1) (Supp. 2019).

¹⁰²⁴ The term “act of violence” “means attempting to cause or purposely or recklessly causing bodily injury with or without a deadly weapon.” The term “threat of violence” “means placing or attempting to place another in fear of imminent bodily injury either by physical menace or by threats to commit a crime against the person of the other.” See RSA 625:9, VII (Supp. 2019).

¹⁰²⁵ RSA 625:9, IV(c)(2) (Supp. 2019).

¹⁰²⁶ RSA 625:9, IV(a) (Supp. 2019); RSA 651:2, II, IV and V (Supp. 2019).

¹⁰²⁷ RSA 625:9, VIII (Supp. 2019).

A prosecutor has the authority and discretion to charge what is otherwise a class A misdemeanor as a class B misdemeanor, provided that:

- No element of the offense involves an act of violence or threat of violence;
- The lesser charge is in the interest of public safety;
- The lesser charge is not inconsistent with the goals of deterring future criminal activity and preventing recidivism;¹⁰²⁸ and
- The offense does not constitute a violation of RSA Chapter 173-B or RSA 631:2-b, the domestic violence statutes.¹⁰²⁹

The State may reduce a class A misdemeanor charge to a class B charge at any point in the proceeding, if the defendant agrees. Otherwise, the statute permits the State to make such a change, only if it is made:

- Prior to, or at the time of arraignment; or
- Within 20 days of the entry of an appeal in the superior court.¹⁰³⁰

A prosecutor also has the authority to reduce a misdemeanor charge to a violation level offense prior to or at the time of arraignment. The prosecutor must inform the court at the arraignment of the State's intent to proceed on the lesser charge. This option is not available if the offense is one for which the statute prescribes an enhanced penalty for a second offense, such as a misdemeanor offense of criminal trespass under RSA 635:2, I.¹⁰³¹

¹⁰²⁸ RSA 625:9, VII (Supp. 2019).

¹⁰²⁹ RSA 173-B:9, III (2014); 631:2-b (Supp. 2019).

¹⁰³⁰ RSA 625:9, VII (Supp. 2019).

¹⁰³¹ RSA 625:9, VI (Supp. 2019).

3. Violations

Violations are offenses for which there is no penalty provided by law other than a fine, forfeiture, or other civil penalty.¹⁰³² A person convicted of a violation has not legally been convicted of a crime.¹⁰³³

C. Elements Of An Offense

Every misdemeanor or felony offense is made up of several different components or “elements,” which are defined by statute as follows:

- “Element of an offense” means such conduct, or such attendant circumstances, or such a result of conduct as:
 - Is included in the definition of the offense; or
 - Establishes the required kind of culpability; or
 - Negatives an excuse or justification for such conduct; or
 - Negatives a defense under the statute of limitations; or
 - Establishes jurisdiction or venue.¹⁰³⁴

At a minimum, the elements of the offense include the prohibited conduct (*i.e.*, causing bodily injury; selling tobacco to a minor) and the required mental state (*i.e.*, knowingly or recklessly). The definition of an offense may also include other elements that more specifically define the nature and severity of the crime (*i.e.*, property damage in excess of \$1,000, committed with a deadly weapon), as well as other “attendant circumstances,” such as the age of the victim. A criminal complaint must allege all of the elements of the offense charged.

¹⁰³² RSA 625:9, V (Supp. 2019); RSA 651:2, III-a (Supp. 2019).

¹⁰³³ RSA 625:9, II(b) (Supp. 2019).

¹⁰³⁴ RSA 625:11, III (2016).

D. Culpable Mental States

With few exceptions, a culpable mental state is an element of every crime. The State must prove beyond a reasonable doubt that the defendant acted with the applicable mental state. In deciding what charge to bring against a person, it is important to consider whether the evidence that has been obtained will be sufficient to prove that the defendant acted with the required mental state.

There are four mental states defined in the statutes. Arranged from the highest to the lowest degree of criminal consciousness required of the actor, the mental states are:

- **Purposely:**

“A person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element.”¹⁰³⁵

If the definition of an offense requires that the defendant acted “intentionally,” it is the same as a requirement that the defendant acted purposely.¹⁰³⁶

- **Knowingly:**

“A person acts knowingly with respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist.”¹⁰³⁷

If the definition of an offense includes a requirement that the defendant act willfully, it is satisfied by proof that he acted knowingly, unless a further requirement is imposed.¹⁰³⁸

- **Recklessly:**

“A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard constitutes a gross deviation from the conduct that a law-abiding person would observe in

¹⁰³⁵ RSA 626:2, II(a) (2016).

¹⁰³⁶ *State v. Brewer*, 127 N.H. 799 (1986).

¹⁰³⁷ RSA 626:2, II(b) (2016).

¹⁰³⁸ RSA 626:2, IV (2016).

the situation. A person who creates such a risk but is unaware thereof solely by reason of having voluntarily engaged in intoxication or hypnosis also acts reckless with respect thereto.”¹⁰³⁹

- **Negligently:**

“A person acts negligently with respect to a material element of an offense when he fails to become aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that his failure to become aware of it constitutes a gross deviation from the conduct that a reasonable person would observe in the situation.”¹⁰⁴⁰

The highest ranked (purposely) is also the most difficult to prove, while the lowest ranked (negligently) is the easiest to prove. It is much more difficult to show that someone acted with a purpose to cause a specific result or engaged in the prohibited conduct (purposely), than it is to show that the person merely failed to become aware of a substantial and unjustifiable risk that a material element of the offense existed or would result from his conduct (negligently).

Each lesser culpable mental state is, by definition, included within the greater culpable mental state.¹⁰⁴¹ In practical terms, that means that if a prosecutor proves that a defendant acted purposely, the prosecutor has necessarily proven that the defendant acted knowingly, recklessly, and negligently. Likewise, proof of a knowing mental state also proves that the person acted recklessly and negligently; proof of reckless mental state also proves the person acted negligently. The opposite is not true; proof that a defendant acted negligently does not prove that he or she acted recklessly.

The definitions of the four mental states are not always easy to apply because there are not any clear-cut distinctions between them. However, the following discussion highlights some of the practical distinctions.

¹⁰³⁹ RSA 626:2, II(c) (2016).

¹⁰⁴⁰ RSA 626:2, II(d) (2016); *State v. Ebinger*, 135 N.H. 264, 265-66 (1992).

¹⁰⁴¹ RSA 626:2, III (2016).

1. Purposely

To act *purposely*, a person must not only be aware that the conduct will cause a particular result or circumstance, but the person must also act with the purpose or the intent to cause the prohibited result or circumstance. For example, a person who throws a lit firecracker into a crowd, might be aware that the conduct could cause bodily injury, but that does not necessarily mean that the intent in doing so is to hurt someone. The intent may be simply to scare someone.

2. Knowingly

The mental state of *knowingly* is more restrictive than *recklessly*. To act *knowingly*, a person does not simply disregard a risk; the person must be aware that his or her conduct will cause the prohibited result (*i.e.*, bodily injury) or the prohibited circumstances (*i.e.*, entering a place where he or she had no privilege or license to be). For example, a person who swings a baseball bat around in the middle of a crowd may create a substantial risk of injury, but he does not necessarily *know* that an injury will result. In contrast, if that person swings a baseball bat directly at the head of another person standing a foot away, he or she knows that some injury will result.

3. Recklessly

While negligence and recklessness both involve a substantial and unjustifiable risk, there are two major distinctions between the two mental states. Unlike negligence, to act *recklessly*, a person must do more than fail to become aware of the risk – the person must be aware of the risk *and must* consciously disregard it. A person who engages in risky conduct, but is unaware of the possible consequences, does not act recklessly. In addition, to prove recklessness, the substantial and unjustifiable risk created by the conduct is assessed in light of circumstances that the person knew of at the time. For example, there is no question that throwing a lit match into a container of gasoline creates a substantial and unjustifiable risk of an explosion. However, if the person throwing the match believed

the container was full of water, then, under the circumstances known to that person, the risk is not substantial and unjustifiable.

4. Negligently

Acting with criminal negligence is one step above acting thoughtlessly or stupidly. Criminal negligence requires proof that the person failed to become aware of the risk created by his or her conduct, and that the nature of that risk was such that failing to become aware of it constituted *gross deviation* from the conduct that a *reasonable person* would have observed in that situation.¹⁰⁴² The risk must be serious and one that a reasonable person would try to avoid. For example, it might be criminally negligent to throw a glass bottle out of a third-story window onto a busy pedestrian walkway, as a reasonable person would recognize that there would be a substantial and unjustifiable risk that a pedestrian might be injured and, therefore, would not do it. By contrast, tossing a bottle out of the third-story window of a farmhouse surrounded by fields would be unlikely to pose a significant risk of causing bodily injury to another person.

Many criminal offenses may be charged under more than one applicable mental state. For example, under the simple assault statute, RSA 631:2-a, a person may be charged with either purposely or knowingly or recklessly causing bodily injury to another. A law enforcement officer or prosecutor can choose which mental state to allege in the complaint. As a practical matter, when there is more than one mental state that may be charged, it is common to charge the lesser mental state because it is easier to prove at trial. Nonetheless, in the investigation and prosecution of any crime, it is good practice to charge the highest level of culpability that is supported by the evidence.

Some criminal statutes do not specify the required mental state. In that case, the general rule is that the offense requires proof of the mental state that is appropriate in light of the nature of the offense and the policy considerations for punishing the conduct at

¹⁰⁴² *State v. Ebinger*, 135 N.H. 264, 265-66 (1992) (emphasis added).

issue.¹⁰⁴³ In some instances, however, the New Hampshire Supreme Court defined the appropriate mental state. Those court decisions are listed in the annotations section of the statute.

E. The Complaint Form

The complaint informs a defendant of the nature of the charge to allow him or her to prepare a defense and to protect against being charged a second time for the same offense.¹⁰⁴⁴ A complaint is legally sufficient if “it sets forth the offense fully, plainly, substantially and formally.”¹⁰⁴⁵ A complaint should track the language of the statute. The complaint should allege the essential elements of the crime, as well as sufficient additional facts to inform the defendant when, where, and how the offense was committed. It need not recite every fact or circumstance on which the State may rely on to prove the elements of the offense at trial.¹⁰⁴⁶ However, it must contain “the elements of the offense and enough facts to warn the defendant of the specific charges against him.”¹⁰⁴⁷

The following sections discuss the specific sections of the complaint form. *See* Superior Court Complaint, page 529; and Circuit Court Complaint, page 530.

1. Name And Address Of Defendant

The defendant’s name and address must be included as part of the information on the complaint. A mistake in the name may not be a fatal error, but it should be avoided, when possible.

¹⁰⁴³ *State v. Bergen*, 141 N.H. 61, 62 (1996).

¹⁰⁴⁴ “The law could not be more clear. . . a complaint is adequate if it informs the defendant of the offense charged with enough specificity to enable him or her to prepare adequately for trial and to guard against double jeopardy.” *State v. Homo*, 132 N.H. 514, 519 (1989).

¹⁰⁴⁵ RSA 601:4 (2001).

¹⁰⁴⁶ *State v. MacElman*, 154 N.H. 304, 313 (2006); *State v. French*, 146 N.H. 97, 104 (2001).

¹⁰⁴⁷ *State v. French*, 146 N.H. 97, 104 (2001).

If a defendant is known by more than one name, or is known to use an alias, follow the name with “AKA” (“also known as”) and insert the additional name or names. An incorrect name or incorrect spelling does not void the complaint or make it defective if the witness testifies that the defendant is the one who committed the crime and, the witness knows the defendant by the name used in the complaint.

If the defendant is a corporation, use the corporate name. If a business uses a trade name, insert the name of the person who owns the business and the trade name (*i.e.*, John Smith d/b/a (“doing business as”) Smith’s Restaurant).

If the defendant does not have an address, insert the town or city where he or she was living at the time the offense was committed.

2. Date And Time Of The Offense

The date and time of the offense should be alleged as accurately as reasonably possible to fully apprise the defendant of the specific offense with which he or she has been charged and to protect the defendant from being charged twice for the same crime. However, unless time is an *element* of the crime charged, which is rare, proof that the crime occurred on a different day or time from that alleged in the complaint does not void the complaint or make it defective.¹⁰⁴⁸ Allegations that the crime occurred “on or about” the date alleged in the complaint are usually sufficient.¹⁰⁴⁹ The complaint may also properly allege that the crime occurred sometime within a timespan, for example: “between May, 1, 1996, and February, 28, 1997.”¹⁰⁵⁰

¹⁰⁴⁸ *State v. Thresher*, 122 N.H. 63, 68-69 (1982); *State v. Spade*, 118 N.H. 186, 189 (1978); *State v. Skillings*, 99 N.H. 427, 429 (1955).

¹⁰⁴⁹ *State v. Spade*, 118 N.H. 186, 190 (1978); *State v. Skillings*, 99 N.H. 427, 429 (1955).

¹⁰⁵⁰ *State v. Larkin*, 128 N.H. 639 (1986).

Sometimes, a defendant will file a motion for bill of particulars, requesting the State to provide a more specific date and time for the crime. If the court concludes that the bill of particulars is necessary for the defendant to prepare a defense, then the State is bound to prove the allegations in its response to the motion for a bill of particulars.¹⁰⁵¹

3. Location Of The Offense

The physical location or “address” where the illegal act occurred is not an element of an offense. Nonetheless, it is good practice to include the location of the offense in order to fully apprise the defendant of the charges and to protect the defendant from being tried twice for the same offense. Including the location of the offense on the complaint also establishes jurisdiction.¹⁰⁵² Generally, alleging the town where the offense occurred should be sufficient, *i.e.*, “Smithville.” Additional information concerning the location, for example “Route 111 in Smithville” may also be included.

4. The Description Of The Crime

The large blank area on the complaint – which is preceded by the language “[A]nd the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did” – is where the specifics of the charged crime are set forth. The description of the crime should track the language of the statute. Each of the elements of the crime must be alleged. In addition, the complaint should contain sufficient detail to inform the defendant of the crime with which he or she is being charged and to protect the defendant from being charged again for the same crime.

¹⁰⁵¹ *State v. Allison*, 134 N.H. 550, 556 (1991).

¹⁰⁵² RSA 625:4 (2016).

F. Amending A Complaint

A complaint may be amended at any time, to correct an error or to change the wording of the charge, provided the amendment is non-substantive. A non-substantive amendment does not change the charged offense or add a new offense.¹⁰⁵³ A motion to amend may be made by oral or written motion by the State. A statement such as the following would be sufficient: “Your Honor, I move to amend the complaint in this case by inserting the date July 18, 1983, as the date of the offense, instead of June 18, 1983.”¹⁰⁵⁴

A complaint cannot be amended in substance once jeopardy attaches. Jeopardy attaches once the jury is sworn in, or, in a bench trial, once the court begins taking evidence.¹⁰⁵⁵ If a prosecutor *nol prosses* a complaint after jeopardy has attached because it is defective as to substance (as opposed to the complaint being dismissed by the court as insufficient), a second prosecution is barred by double jeopardy.¹⁰⁵⁶

If there is a defect in the substance of the complaint and it appears that the judge is going to grant a motion to quash or to dismiss before jeopardy has attached, the prosecutor should request a recess or a continuance in order to prepare a corrected complaint. Amending the complaint under these circumstances will not constitute double jeopardy. Similarly, if a motion to quash or dismiss was granted prior to trial due to errors in drafting the complaint, police prosecutors may bring a new complaint that corrects the error that led the court to dismiss the previous complaint.

At times, a defendant may object to certain words in the complaint, or move to dismiss based on a State’s failure to prove specific facts alleged in a complaint. If the words or facts were not necessary to charge the offense, but were included to provide information

¹⁰⁵³ *State v. Johnson*, 130 N.H. 578, 585 (1988).

¹⁰⁵⁴ *See State v. Fennelly*, 123 N.H. 378, 387-88 (1983); *State v. Thresher*, 122 N.H. 63, 68 (1982); *State v. Blaisdell*, 49 N.H. 81 (1869).

¹⁰⁵⁵ *State v. Courtemarche*, 142 N.H. 772, 773-74 (1998); *State v. Erickson*, 129 N.H. 515, 519, 533 A.2d 23, 25 (1987); *State v. Donovan*, 128 N.H. 702, 705 (1986).

¹⁰⁵⁶ *State v. Pond*, 133 N.H. 738, 741 (1990).

to the defendant, the court may ignore the unnecessary words as “surplusage.”¹⁰⁵⁷ The prosecutor may make an oral or written motion to strike the words as surplusage. For example, if the defendant is charged with theft of a television set with a specific serial number, but no evidence concerning the serial number was admitted at trial, the prosecution could make a motion such as the following: “Your Honor, I move that the serial number of the stolen television identified in the complaint be disregarded as surplusage or in the alternative stricken from the complaint as surplusage.”¹⁰⁵⁸

G. Guilty Pleas Constitute A Waiver Of Defects In Complaints

The entry of a guilty plea to a complaint constitutes a waiver of most defects apparent on the face of the complaint, and the defendant cannot later challenge the defect.¹⁰⁵⁹

H. Sample Complaints

This section provides sample complaint language for several criminal offenses. This section is intended to serve as a guide to aid officers in their understanding of how to use the language of a statute to a draft criminal complaint. The samples are simply examples to provide guidance. When drafting complaints, officers must look at the actual criminal statute to determine the proper language to use and include in their complaints, as well as to determine whether there have been any recent changes to the statute or significant court decisions involving the statute. Officers are encouraged to contact their local prosecutor or county attorney with questions concerning charging decisions and the drafting of complaints.

¹⁰⁵⁷ *State v. LeClair*, 126 N.H. 479 (1985).

¹⁰⁵⁸ *State v. LeClair*, 126 N.H. 479 (1985).

¹⁰⁵⁹ *State v. M'Gregor*, 41 N.H. 407, 411-12 (1860).

1. Acts Prohibited (Drugs), RSA 318-B:2, I

Knowingly manufactured, possessed, had under his/her control, sold, purchased, prescribed, administered, transported, or possessed with intent to sell, dispensed, or compounded, any controlled drug or controlled drug analog, or any preparation containing a controlled drug.

- **Sample Complaint 1:**

Knowingly possessed less than one-half ounce of cocaine with intent to sell.

- **Sample Complaint 2 (subsequent offense):**

Knowingly sold a quantity of marijuana weighing more than one ounce, but less than five pounds to an agent of the police, having been previously convicted in the Rockingham County Superior Court on Docket No. XXXX on [Date] of a qualifying drug offense pursuant to RSA 318-B:27.

2. First Degree Assault, RSA 631:1, I(a)

Purposely caused serious bodily injury to another.

- **Sample Complaint:**

Purposely caused serious bodily injury to Daniel Clark by repeatedly striking Clark's head against the ground, causing Clark to suffer a fractured skull.

3. Aggravated Felonious Sexual Assault, RSA 632-A:2, I(a)

Knowingly engaged in sexual penetration with victim through the actual application of physical force, physical violence, or superior physical strength.

- **Sample Complaint:**

Knowingly engaged in sexual intercourse with J.F. (DOB: 11/22/1976) through the application of physical force and strength. He/she physically forced J.F. onto a bed and restrained J.F. there with his/her body while he/she engaged in intercourse.

4. False Imprisonment, RSA 633:3

Knowingly confined another unlawfully so as to interfere substantially with his/her physical movement.

- **Sample Complaint:**

Knowingly confined Victoria Walley unlawfully so as to interfere substantially with her physical movement. The defendant handcuffed Walley to a chair for two hours.

5. Criminal Mischief, RSA 634:2, I-II(a)

Having no right to do so nor any reasonable basis for belief of having such a right, he/she purposely or recklessly damaged property of another, thereby purposely causing or attempting to cause pecuniary loss in excess of \$1,500.

- **Sample Complaint:**

Having no right to do so nor any reasonable basis for belief of having such a right, he/she purposely damaged property of another by driving his/her truck over a Dell laptop computer belonging to Samuel Mendez, thereby purposely causing pecuniary loss in excess of \$1,500.

6. Resisting Detention Or Arrest, RSA 642:2

Knowingly or purposely physically interfered with a person recognized to be a law enforcement official, including a probation or parole officer who was seeking to effect an arrest or detention of the person or another regardless of whether there is a legal basis for the arrest.

- **Sample Complaint:**

Knowingly interfered with Smithville Police Officer Kelly Monroe, a person he/she recognized to be a police officer seeking to effect his/her arrest, by hitting Officer Monroe as Officer Monroe attempted to arrest him/her.

7. Hindering Apprehension Of Prosecution, RSA 642:3, I(a)

With a purpose to hinder, prevent, or delay the discovery, apprehension, prosecution, conviction, or punishment of another for the commission of a crime he/she harbored or concealed the other person.

- **Sample Complaint:**

With a purpose to hinder, prevent, or delay the discovery of David Donnelly, whom the police were seeking to arrest for theft, he/she concealed Donnelly by telling Smithville police that Donnelly had gone to Clarksville when he/she knew Donnelly was in his/her apartment.

8. Disorderly Conduct, RSA 644:2, I

Knowingly or purposely created a condition which was hazardous to him/herself or another by any action which served no legitimate purpose in a public place.

NOTE - Disorderly conduct is a misdemeanor if the offense continues after any person has requested that the conduct desist; otherwise it is a violation.

- **Sample Complaint (misdemeanor):**

Knowingly created a condition in a public place, Main Street, which was hazardous to another, by using a bubble machine to disperse bubbles over the roadway for no legitimate purpose, thereby creating a hazard to drivers, and continued to disperse bubbles despite a request from a pedestrian to desist.

- **Sample Complaint (violation):**

Knowingly created a condition in a public place, Main Street, which was hazardous to another, by using a bubble machine to disperse bubbles over the roadway for no legitimate purpose, thereby creating a hazard to drivers.

XXVIII. TESTIFYING AND COURTROOM PROCEDURE

A. Introduction

Police officers are often called upon to appear as witnesses at depositions, pre-trial hearings, and trials. The prospect of testifying can cause some anxiety, but becoming familiar with the process and being well prepared should help. This chapter will familiarize officers with depositions and court hearings, and the basic structure of criminal trials, and will discuss how to present as effective and knowledgeable witnesses.

B. Types Of Court Proceedings

1. Depositions

A deposition is a formal judicial proceeding, typically conducted outside the courtroom and without a judge present. It is an opportunity for an attorney to question a potential trial witness under oath. The purpose of a deposition is to discover, and in some circumstances to pin down, what a witness is going to say at trial.

New Hampshire is one of a very few states that allows depositions in criminal cases for discovery purposes.¹⁰⁶⁰ Unless done by agreement of the parties, a person can be deposed only by order of the court. The party seeking to depose a witness must file a motion with the court and demonstrate that a deposition is necessary.¹⁰⁶¹ The one exception to that rule is when the defense or the prosecution is planning to call an expert witness. In that situation, the opposing party is allowed to depose the witness as a matter of right.

Defense attorneys occasionally ask to depose law enforcement officers in criminal cases. If such a request is granted, the prosecutor will be present during the deposition to protect the interests of the State.

In the typical deposition of a police officer in a criminal case, the defense attorney will question the officer first, after placing the officer under oath. The prosecutor then has

¹⁰⁶⁰ RSA 517:13 (2007).

¹⁰⁶¹ RSA 517:13 (2007).

an opportunity to pose questions, but will often choose not to ask any. During the questioning, either attorney may raise an objection to a question. Because no judge is present to rule on the objection, the officer is still required to answer the question, unless the prosecutor specifically instructs otherwise.

The deposition testimony is recorded and a transcript is typically prepared. The officer will be asked to review the transcript and make any corrections before trial. The officer will also be required to swear to the accuracy of the transcript in writing. The transcript can be used to challenge the officer's testimony at trial if the officer deviates from the deposition testimony. Therefore, it is critical that the officer provide clear and accurate testimony at the deposition, and to carefully review the accuracy of the deposition transcript and make corrections, if necessary.

2. Pre-Trial Hearings

Pre-trial hearings are formal in-court proceedings before a judge. No jury is present.

Law enforcement officers are frequently called as witnesses at pre-trial hearings to testify when, for example, a criminal defendant is seeking to suppress evidence based upon an allegedly illegal search. In a typical pre-trial hearing in a criminal case, the prosecutor will question the officer under oath, after which defense counsel will have the opportunity to cross-examine the officer. Pre-trial proceedings are recorded. A defense attorney may choose to have a transcript of the officer's testimony prepared, to use to impeach the officer if the officer's trial testimony deviates from the testimony at the pre-trial hearing.

3. Trial

Trial proceedings are essentially the same as pre-trial hearings, except that there may be a jury present. Under our system of justice, no defendant may be convicted, unless the State can prove the defendant guilty beyond a reasonable doubt with respect to each element of the charged offense. The proof-beyond-a-reasonable-doubt standard is the highest standard of proof in judicial proceedings.

C. The Law Enforcement Officer As A Witness

1. Rules For Presenting Effective Testimony

The same basic rules apply to testifying at depositions, pre-trial hearings, and trials. The most important rule is that law enforcement officers must tell the truth. They also must be thoroughly prepared. Officers should talk to the prosecutor in advance of the proceeding to discuss what the likely areas of questioning will be. They should re-read and become thoroughly familiar with their reports. If an officer is likely to be questioned about physical evidence, the officer should re-examine the evidence. Other important rules for testifying are:

- Speak slowly and clearly;
- Speak in layperson's terms. Try to avoid using police jargon, particularly when testifying in front of a jury;
- When testifying before a jury, look at the jury when answering the question;
- Listen to the question being asked, and answer only that question;
- Make every effort to completely and honestly answer all questions that are asked;
- Ask for clarification if the question is not clear;
- If you do not know the answer to a question, say so;
- If you have forgotten the answer to a question, say so;
- If a question assumes something that is inaccurate, correct the inaccuracy. (For example, if defense counsel starts a question by saying, "After you ordered the defendant out of the car, you . . .," and you had not ordered the defendant to do anything, say so.);
- Do not argue with defense counsel;
- Do not allow defense counsel to goad you into losing your temper on the witness stand; and
- If re-reading your police report or any other document would help you to remember something or more accurately answer a question, say so.

2. Responding To Objections

During a witness's testimony, it is not uncommon for an attorney to object to either the question being asked or the witness's anticipated answer. If an objection is raised, the witness must not say anything until the judge has made a ruling. The judge may either "sustain" (allow) the objection, or "overrule" (not allow) the objection. If the objection is sustained, the witness should wait for the attorney to ask another question. If the objection is overruled, the witness should continue and answer the question that was asked. If the witness cannot remember the question, he or she should ask to have it repeated.

D. The Structure Of Criminal Trials

Trials generally proceed in the following order:

1. Opening Statements

The opening statement is an opportunity for the prosecution to outline its case for the jury, to identify the witnesses, to summarize their testimony, and to explain the elements of the charges and how it will prove them.

A defendant has the choice of presenting an opening statement immediately after the prosecution, after the prosecution has rested, or not at all. Typically a defendant's opening statement will highlight the perceived gaps and weaknesses in the State's evidence, and alert the jury to any defenses the defendant may rely on. It is not uncommon for defense attorneys simply to urge the jury to listen carefully to the evidence and to remind the jury of the State's burden to prove its case beyond a reasonable doubt.

In the circuit court, where cases are tried before a judge rather than a jury, opening statements typically are not made.

2. The State's Case-In-Chief

After opening statements, the prosecution presents its substantive case or “case-in-chief.” It does so by calling witnesses to present testimony. The State may present both “lay” witnesses, who will testify only to their actual, personal observations, and knowledge, and “expert” witnesses, who have specialized knowledge that the jury may find helpful. Expert witnesses, unlike lay witnesses, may answer hypothetical questions and may offer their conclusions, rather than merely their personal observations. For example, a lay witness might be permitted to testify that he observed a pile of green vegetative matter that smelled like marijuana. A properly qualified chemist, on the other hand, would be able to testify that the vegetative matter not only smelled like marijuana, but that based upon the expert’s analysis, observations, tests, training, and experience, it is his or her opinion that the substance actually is marijuana.

The questioning of a State’s witness by the prosecutor is called the direct examination. After each direct examination, the defense attorney has an opportunity to cross-examine the witness. The State then has an opportunity to conduct a “re-direct” examination, to clarify points that were covered on cross-examination. The judge may permit an additional series of questions under some circumstances.

3. The State Rests

After the State presents all its witnesses and introduces all its evidence, the State will announce to the court that it rests. Before resting, the State must have presented evidence to prove not only all the elements of the crime, but also that the defendant was the perpetrator. If, upon resting its case, the State has failed to present sufficient evidence to convince a judge or jury of the defendant’s guilt beyond a reasonable doubt on any particular charge, the court may dismiss the charge. Therefore, after the State rests, the defense will typically make an oral motion to dismiss for insufficient evidence.¹⁰⁶²

¹⁰⁶² “To prevail on his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to

If the court denies the motion, the defense then has the opportunity to present its case. If the court grants the defendant's motion and dismisses a charge, the trial is over with respect to that charge. The State has no right to appeal the court's decision. If there are multiple charges and the court does not dismiss them all, the trial will continue with respect to the remaining charges.

4. The Defendant's Case

After the State has rested, the defense may make an opening statement if it did not do so earlier. Then, the defendant may present lay and expert witnesses in the same manner as the State, and the State will have the opportunity to cross-examine each witness. Additional series of back and forth questions may be permitted under some circumstances.

5. Rebuttal

After the defense has presented its case, the State may respond to evidence introduced by the defendant by introducing "rebuttal" evidence, which is evidence that contradicts or explains evidence presented by the defendant. Rebuttal evidence is somewhat rare, however, because the State can generally rely on cross-examination to draw out inconsistencies and weaknesses in the defendant's case.

6. Closing Arguments

In a jury trial, both the prosecution and the defense get an opportunity at the end of the trial to make an argument to the jury as to why the evidence does or does not prove the defendant's guilt beyond a reasonable doubt. Because the State carries the burden of proof, the prosecutor always argues last.

In circuit court bench trials (trials before a judge, not a jury), the court may allow to give the parties an opportunity to make a closing argument, but it is not required to do so.

the State, could have found guilt beyond a reasonable doubt." *State v. Evans*, 150 N.H. 416, 424 (2003) (citing *State v. Hull*, 149 N.H. 706, 712 (2003); *State v. Chapman*, 149 N.H. 753, 758 (2003)).

XXIX. FORFEITURE OF DRUG TRAFFICKING-RELATED PROPERTY AND OTHER ASSETS

A. Introduction

RSA 318-B:17-b and RSA 617:1-a set forth the processes by which the State can forfeit property and other assets used or obtained in connection with felony drug trafficking offenses. If law enforcement officers seize a suspect's property, cash, or other assets in connection with the suspect's arrest for a felony drug trafficking offense, law enforcement may seek to forfeit the assets. After the defendant's conviction and the successful completion of the forfeiture proceeding, the agencies involved in the seizure will receive 45 percent of the proceeds of the forfeited property.

In some instances, the seizing law enforcement agency may opt to use the forfeited property, such as a car, for official law enforcement purposes. The Attorney General's Office has issued drug forfeiture guidelines to assist law enforcement agencies in understanding the process and complying with the mandatory timeframes established in RSA 318-B:17-b. All drug-related forfeitures must be handled by the Attorney General's Office. Police officers cannot have items forfeited to police departments. Law enforcement agencies should contact the Drug Prosecution Unit at **603-271-3671** to obtain more detailed information. Additionally, a copy of the Asset Forfeiture Guidelines can be found at:

<https://www.doj.nh.gov/criminal/documents/drug-asset-forfeiture-guidelines.pdf>.

B. Types Of Property Subject To Forfeiture

Virtually any type of property that was "used or intended for use in procurement, manufacture, compounding, processing, concealing, trafficking, delivery or distribution of a controlled drug in felonious violation of [the Controlled Drug Act]" is subject to forfeiture.¹⁰⁶³

¹⁰⁶³ RSA 318-B:17-b, I (2017).

Property that may be forfeited includes:

- “All materials, products and equipment of any kind, including, but not limited to, firearms, scales, packaging equipment, surveillance equipment and grow lights”¹⁰⁶⁴
- Means of transportation, “including but not limited to aircraft, vehicles, or vessels”¹⁰⁶⁵
- Money, including cash, negotiable instruments, and securities.¹⁰⁶⁶ There is a statutory presumption that “[a]ll moneys, coin, currency, negotiable instruments, securities and other investments found in proximity to controlled substances are . . . forfeitable”¹⁰⁶⁷
- “Any books, records, ledgers and research material”¹⁰⁶⁸
- Title or other interests in real property.¹⁰⁶⁹

As with any legal action, there are costs associated with the processing of a forfeiture action. To avoid expending time and effort on forfeitures where the costs involved will exceed the amount subject to recovery, the Attorney General’s Office has set a minimum value for property that it will consider for forfeiture:

- **Cash:** minimum of \$1,000.
- **Vehicles:** minimum of \$3,000 of equity, and less than five years old.
- **Houses:** minimum of \$50,000 of equity.

¹⁰⁶⁴ RSA 318-B:17-b, I(a) (2017).

¹⁰⁶⁵ RSA 318-B:17-b, I(b) (2017).

¹⁰⁶⁶ RSA 318-B:17-b, I(c) (2017).

¹⁰⁶⁷ RSA 318-B:17-b, I(c) (2017).

¹⁰⁶⁸ RSA 318-B:17-b, I(d) (2017).

¹⁰⁶⁹ RSA 318-B:17-b, I(e) (2017).

C. Initiating Forfeiture Proceedings

RSA 318-B:17-b (2017) imposes mandatory time limits for providing notice to those with an interest in the property subject to forfeiture, as well as time limits for the filing of forfeiture petitions. In order to initiate forfeiture proceedings, the Attorney General’s Office must file a forfeiture petition in the superior court *within 60 days of the seizure* of the property.¹⁰⁷⁰ This 60-day deadline is mandatory. “If no such petition is filed within 60 days, the items or property interest seized *shall be released or returned* to the owners.”¹⁰⁷¹ Therefore, it is very important that law enforcement agencies take the following steps within the following time limits:

- **Notice To The Attorney General:**

A law enforcement agency should notify the Drug Prosecution Unit *within five days* after it has seized any property that is subject to forfeiture.

- **Notice To Persons With An Interest In The Property:**

Within 7 days of the seizure, the law enforcement agency must “inventory the items of property interest and issue a copy of the resulting report to any person or persons having a recorded interest or claiming a legal interest in the item[s].”¹⁰⁷² Notice may be accomplished by in-hand service on the individual or by certified mail, return receipt requested.

If mailing notice, it is important to double check the address. If notice is sent to the wrong address and the fault or mistake is with the law enforcement agency, notice will not be effective. The law enforcement agency should document all of the steps it takes to provide notice.

The 7 days begins running from the time the property is seized. Thus, if a vehicle is seized on August 20th, but the search warrant is not executed, and the currency not found, until August 25th, the 7-day letter *must* be served by August 27th.

A sample form for a seven-day notice letter can be found on page 31 of the Asset Forfeiture Guidelines. The law enforcement agency should aim to be inclusive in providing notice. For example, if a target’s drug

¹⁰⁷⁰ RSA 318-B:17-b, II(e) (2017).

¹⁰⁷¹ RSA 318-B:17-b, II(e) (2017) (emphasis added).

¹⁰⁷² RSA 318-B:17-b, II(a) (2017).

proceeds money is being kept in the property of another (*i.e.*, in the spouse's wallet), notice should be given to both the target and the spouse.

- **Furnishing Police Reports To The Attorney General:**

Within 20 days of the seizure, the law enforcement agency must provide the Drug Prosecution Unit with copies of *all* police reports concerning the seizure of the property and the underlying criminal investigation, including evidence transmittal sheets.

Reports of laboratory analyses of any evidence submitted for testing should also be forwarded to the Unit as soon as the reports are received from the lab.

Before the Attorney General's Office will move forward with forfeiture proceedings, an attorney will review the police reports to determine whether:

- The property was seized pursuant to a search warrant supported by probable cause, and, if not, whether the seizure fell within a recognized exception to the search warrant requirement;
- The law enforcement agency sent the required seven-day notice letters to all identified interested parties, and, if not, whether there was still sufficient time to provide notice within the statutory deadline;
- There was evidence to support a conclusion that the asset was used or intended to be used to facilitate a felony drug offense or was the proceeds of a felony drug offense;
- The property had sufficient value; and
- The seizing agency investigated the claims of innocent spouses, owners, or dependents, to the extent the agency was notified of such claims.

For a more detailed discussion of these factors, refer to pages 4–6 of the Asset Forfeiture Guidelines.

D. Seizure Of Property To Be Forfeited

In a typical forfeiture case, a law enforcement agency will have seized property in the course of a criminal investigation, under either a search warrant or an exception to the warrant requirement. However, there is a specific procedure for seizing property that is not evidence in an underlying criminal case, but which is nonetheless subject to forfeiture, such as a car or real estate purchased with proceeds from drug trafficking.¹⁰⁷³ Before initiating a seizure of real estate or other assets that are proceeds of drug trafficking, law enforcement officers are advised to consult with an attorney from the Drug Prosecution Unit, as there are a number of complex legal issues that can arise when seizing and litigating forfeitures of these types of assets.

E. Initiating Forfeiture Proceedings

Filing a forfeiture petition in the Superior Court with jurisdiction over the related criminal case will start the forfeiture proceeding.¹⁰⁷⁴ A forfeiture action is a separate action, however, and is considered civil in nature, even though it may be related to the criminal case.¹⁰⁷⁵

The Court will then hold a hearing on the petition. During the hearing, the State must prove by a preponderance of evidence:¹⁰⁷⁶

- That the property was used, or intended to be used, in connection with a felony violation of the Controlled Drug Act; or
- That the property constitutes proceeds of felony drug trafficking.¹⁰⁷⁷

¹⁰⁷³ RSA 318-B:17-b, I-b (2017).

¹⁰⁷⁴ RSA 318-B:17-b, IV(a) (2017).

¹⁰⁷⁵ RSA 318-B:17-b, IV(b) (2017).

¹⁰⁷⁶ RSA 318-B:17-b, IV(b) (2017).

¹⁰⁷⁷ RSA 318-B:17-b, I (2017).

A person with an interest in the property may defend against the forfeiture action by proving:

- That the person was not a consenting party to a drug felony or had no knowledge thereof; or
- The items were not “involved in an offense which may be charged as a felony.”¹⁰⁷⁸

If the person claiming ownership or an interest in the property has also been charged with the drug-related crime and is found not guilty, the forfeiture action against that person’s interest in the property must be dismissed.¹⁰⁷⁹

F. Costs

1. Legal Costs

At the conclusion of the forfeiture proceeding, the Attorney General’s Office will seek reimbursement for the expenses of bringing the petition. These costs vary, depending on the specific case. The costs associated with the forfeiture action stem from the publication of legal notices and service of process, and typically range from \$20 to \$450.

2. Costs Of Storing And Maintaining Seized Property

The law enforcement agency seizing the property is responsible for maintaining and storing the property in a secure location¹⁰⁸⁰ and is liable for any storage fees and costs. It will also be liable for any loss or damage to the property while in storage.

The State may retain forfeited items “for official use by law enforcement or other public agencies or sale at public auction.”¹⁰⁸¹ If the seizing department intends to use the

¹⁰⁷⁸ RSA 318-B:17-b, III(a), IV(b) (2017).

¹⁰⁷⁹ RSA 318-B:17-b, IV(d) (2017).

¹⁰⁸⁰ RSA 318-B:17-b, II-a (2017).

¹⁰⁸¹ RSA 318-B:17-b, V (2017).

forfeited property for that purpose, it should inform the Attorney General’s Office in writing.

3. Liens

All outstanding recorded liens on seized property must be paid in full from the proceeds of any sale or public auction of the forfeited property.¹⁰⁸² If a law enforcement agency wishes to retain a vehicle for official law enforcement use, and that vehicle is subject to a lien, the department must pay off the lien.

G. Distribution Of Proceeds

The balance of the proceeds of the sale of any forfeited item, after payment of all the expenses, shall be distributed by the Attorney General’s Office as follows:

- 45 percent “shall be returned to the fiscal officer or officers of the municipal, county, state, or federal government which provided the law enforcement agency or agencies responsible for the seizure.” The money must be deposited in a special account and used primarily for expenses incurred in connection with drug-related investigations.¹⁰⁸³
- 10 percent shall be deposited into a special account for the Department of Health and Human Services.¹⁰⁸⁴
- 45 percent “shall be deposited in a revolving drug forfeiture fund, administered by the department of justice.”¹⁰⁸⁵

Ten percent of any funds exceeding \$500,000 is deposited into the special account for the Department of Health and Human Services, and the rest is deposited into the revolving drug forfeiture fund, until certain statutory caps are reached, after which the excess will be credited to the general fund.¹⁰⁸⁶

¹⁰⁸² RSA 318-B:17-b, V (2017).

¹⁰⁸³ RSA 318-B:17-b, V(a)(1) (2017).

¹⁰⁸⁴ RSA 318-B:17-b, V(a)(2) (2017).

¹⁰⁸⁵ RSA 318-B:17-b, V(a)(3) (2017).

¹⁰⁸⁶ RSA 318-B:17-b, V(b) (2017).

By application submitted to the Attorney General’s Office, funds in the revolving drug forfeiture fund can be made available to law enforcement agencies to defray the extraordinary costs of drug investigations and to purchase equipment.¹⁰⁸⁷ Most of the funds in this account are currently used to support the participation of local law enforcement officers in the Attorney General’s Drug Task Force.

H. Post-Conviction Forfeiture

RSA 617:1-a (Supp. 2019) went into effect on January 1, 2017.¹⁰⁸⁸ This statute allows for the forfeiture of property “derived from the commission of the crime,” “[p]roperty directly traceable to property derived from the commission of the crime,” and instrumentalities “used in the commission of the crime.”¹⁰⁸⁹

RSA 617:1-a applies where:

- There has been a criminal conviction under a statute that authorizes forfeiture (which includes RSA 318-B:17-b);¹⁰⁹⁰ and
- The State “establishes that the property is forfeitable by clear and convincing evidence.”¹⁰⁹¹

RSA 617:1-a also authorizes the court to stay civil forfeiture proceedings at the request of either party.¹⁰⁹²

Forfeitures under RSA 617:1-a may be handled by the prosecuting county, while all forfeitures under RSA 318-B:17-b must be pursued by the Attorney General’s Office. It is the opinion of the Attorney General’s Office that seeking forfeiture under RSA 318-B:17-b is the best practice. RSA 318-B:17-b, II(e) makes it clear that for property covered by RSA 318-B:17-b, if no petition is filed within 60 days of the seizure, the property must “be

¹⁰⁸⁷ RSA 318-B:17-c, I, II (2017).

¹⁰⁸⁸ 2016 N.H. Laws 329:10, I.

¹⁰⁸⁹ RSA 617:1-a, I(a)-(c) (Supp. 2019).

¹⁰⁹⁰ RSA 617:1-a, I (Supp. 2019).

¹⁰⁹¹ RSA 617:1-a, III (Supp. 2019).

¹⁰⁹² RSA 617:1-a, V (Supp. 2019).

released or returned to the owners.” Therefore, by not complying with RSA 318-B:17-b, the opportunity for forfeiture may be lost.

XXX. CONSUMER FRAUD

A. Introduction

When an individual or business commits unfair or deceptive acts or uses any unfair method of competition in the conduct of trade or commerce in this State, the conduct may amount to a violation of RSA chapter 358-A, New Hampshire’s Consumer Protection Act (the “CPA”). Common examples of CPA violations include false representations by used car dealers, and misapplication of money or failure to perform prepaid work by contractors. The CPA allows the State to pursue civil and criminal penalties for CPA violations.¹⁰⁹³ Only the New Hampshire Attorney General’s Consumer Protection and Antitrust Bureau (the “CPAB”) can investigate and prosecute violations of the CPA on behalf of the State.¹⁰⁹⁴ Any county attorney or law enforcement officer receiving notice of an alleged violation of the CPA shall immediately provide written notice and any relevant information to the CPAB.¹⁰⁹⁵

This chapter provides a brief overview of consumer protection laws in New Hampshire in order to allow law enforcement officers to recognize cases that should be referred to the CPAB for investigation and prosecution. To report a violation of the CPA, contact the CPAB:

Phone: 603-271-3641

E-mail: DOJ-CPB@doj.nh.gov

B. Conduct That Constitutes A Consumer Protection Act Violation

The CPA makes it “unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within

¹⁰⁹³ RSA 358-A:4, :6-:7 (2009).

¹⁰⁹⁴ RSA 358-A:4, I (2009).

¹⁰⁹⁵ RSA 358-A:4, IV (2009).

this state.”¹⁰⁹⁶ The CPA prohibits unfair and deceptive trade practices in general, and also provides a list of specific types of conduct that violate the statute.¹⁰⁹⁷ For example, failure to disclose the legal name, address, or telephone number, of a business is a defined unfair or deceptive act or practice.¹⁰⁹⁸ Similarly, failing to deliver home heating fuel in accordance with a prepaid contract¹⁰⁹⁹ or selling gift certificates with a face value of \$250 or less with an expiration date are also listed as conduct that expressly violates the CPA. Most of the conduct listed in the statute involves the use of confusing, misleading, or false statements in the sale or advertisement of goods or services.

For a complete list of the conduct that expressly violates the CPA, consult RSA 358-A:2, I-XVII.

In order for conduct that is not specifically listed in the CPA to fall within the general prohibition of unfair or deceptive acts or practices, the State must be able to satisfy two key elements: rascality, and trade or commerce.

1. Rascality Test

Not all bad conduct committed in trade or commerce will rise to the level of a CPA violation. For example, an ordinary breach of contract is insufficient to establish a violation of the statute. The New Hampshire Supreme Court has held that to violate the CPA the conduct must reach a level of dishonesty or mischievousness that would “raise the eyebrow of someone inured to the rough and tumble world of commerce.”¹¹⁰⁰ This is known as the rascality test. Simply put, the conduct must be bad enough that it would objectively be considered wrong by other members of the industry. If the conduct is not sufficiently serious to rise to the level of a CPA violation (like a breach of contract), the State does not

¹⁰⁹⁶ RSA 358-A:2 (Supp. 2019).

¹⁰⁹⁷ RSA 358-A:2, I-XVII (Supp. 2019).

¹⁰⁹⁸ RSA 358-A:2, X-a (Supp. 2019).

¹⁰⁹⁹ RSA 358-A:2, XVI (Supp. 2019).

¹¹⁰⁰ *Milford Lumber Co. v. RCB Realty*, 147 N.H. 15, 17 (2001).

have authority to take enforcement action under the CPA and the victims should be directed to seek private, civil remedies to recover financial losses, such as filing an action in small claims court. The decision as to whether any particular act rises to the level of a CPA violation should be left to the CPAB. Thus, even if an officer does not believe the conduct rises to the level of a CPA violation, he or she should nevertheless provide notice of the conduct to the CPAB.

2. Committed In Trade Or Commerce

The CPA does not apply to all deals and transactions. The State only has enforcement authority under the CPA for deals that were committed in trade or commerce. On a basic level, the question is whether the transaction was in the regular course of business, as opposed to a private transaction by someone not regularly engaged in that business. If a transaction is strictly personal in nature, and is not undertaken in the ordinary course of trade or commerce, remedies under the CPA are not available. The following example illustrates the difference:

- **Example:**

John posts on social media that he is selling his 10-year-old car for \$5,000. The post says “vehicle has been extremely well maintained over the years and has been thoroughly inspected. No major mechanical problems. This car runs like new.” Joe sees the post and buys the vehicle based on the representation that it has been well maintained, inspected, and runs like new. On the drive home from John’s house, the engine starts to smoke and the car starts to shake. A mechanic inspects the vehicle and informs Joe that the vehicle has not been well maintained, and he will have to spend \$10,000 in order to get the vehicle to pass a State inspection. When Joe confronts John, he admits that he had not inspected or maintained the vehicle, but assumed there were no issues because he drove the car the other day and there were not any problems at that time.

In the above example, John has unquestionably engaged in an unfair and deceptive trade practice by misrepresenting that the car was well maintained, inspected, and had no mechanical problems. However, John was not a licensed car dealer and does not sell cars for a living. The transaction occurred at John’s house and not at a dealership. John makes

his living as a plumber and has never sold a vehicle before. Because this was a personal sale, Joe could potentially bring a private, civil action against John, but the State could not charge John with violating the CPA.

If John was actively engaged in the business of selling used cars then his conduct would fall within the CPA statutory definition of trade or commerce. In order to make that determination, law enforcement should analyze the activity involved, the nature of the transaction, and the parties involved. If it appears that the unfair or deceptive conduct was committed in trade or commerce, law enforcement should refer the case to the CPAB for review.

C. Penalties and Remedies

The CPA provides for several penalties and remedies for violations of the statute.

1. Criminal Enforcement

The CPAB may choose to bring criminal charges against an offender if it can prove the defendant purposely engaged in unfair or deceptive acts or practices in the conduct of trade or commerce in New Hampshire.¹¹⁰¹ Any person convicted of violating the CPA shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.¹¹⁰²

2. Civil Enforcement

The CPAB may also file a civil complaint against a person or business when it has reason to believe that trade or commerce declared unlawful by the CPA has been, is being, or is about to be conducted by any person. By bringing a civil enforcement action, the CPAB can seek a temporary or permanent injunction restraining the use of illegal trade or

¹¹⁰¹ *State v. Mandatory Poster Agency, Inc.*, 168 N.H. 287, 294 (2015).

¹¹⁰² Under the CPA, “person” is defined to include “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.” RSA 358-A:1, I (Supp. 2019).

commerce, civil penalties of up to \$10,000 per violation,¹¹⁰³ and can seek restitution of money or property for any person or group victimized by the illegal conduct.¹¹⁰⁴

D. Additional Consumer Protection Statutes

The penalties and remedies discussed above are also available for the violation of several other New Hampshire consumer protection statutes. A violation of any of the statutes listed below is considered an unfair or deceptive act or practice subject to the same remedies as set out by the CPA:

- Regulation of Manufactured Housing Parks (RSA 205-A:2);
- Requirements for Prepaid Contracts for Home Heating Fuel (RSA 339:79);
- Promoting or Offering Chain Distributor Schemes (Commonly Called Pyramid Schemes) (RSA chapter 358-B);
- Unfair, Deceptive or Unreasonable Debt Collection Practices (RSA chapter 358-C);
- Regulation of Motor Vehicle Repair Facilities (RSA chapter 358-D);
- Distributorship Disclosure Act (RSA chapter 358-E);
- Sale of Unsafe Used Motor Vehicles (RSA chapter 358-F);
- Auctions (RSA chapter 358-G);
- Regulation of Rental Referral Agencies (RSA chapter 358-H);
- Buying Clubs (RSA chapter 358-J);
- Deceptive Statements Regarding Prizes and Gifts (RSA chapter 358-O);
- Rent to Own (RSA chapter 358-P);
- Use of Automatic Telephone Dialing Systems and Caller Identification Services (RSA chapter 359-E);
- Home Solicitation Sales (RSA chapter 361-B);
- Regulation of Health Clubs (RSA chapter 358-I);

¹¹⁰³ RSA 358-A:4, III(b) (2009).

¹¹⁰⁴ RSA 358-A:4, III(a) (2009).

- Regulation of Martial Arts Schools (RSA chapter 358-S);
- Security Deposits Under Residential Leases (RSA chapter 540-A); and
- Security Deposits-Prohibited Practices (RSA chapter 540-A).

The following are common examples of conduct that is made unlawful by the above statutes and is punishable under the CPA:

1. Regulation Of Motor Vehicle Repair Facilities (RSA chapter 358-D)

RSA chapter 358-D regulates certain conduct by any person who performs services or repair work on any motor vehicle. A violation of any provision of this statute is an unfair or deceptive act or practice within the meaning of the CPA. The following are examples of conduct prohibited by the statute. For a complete list of prohibited conduct, please consult the statute.

- **Written Estimates:**

Upon request, all motor vehicle repair facilities must provide a written estimate prior to performing any service or repair work.¹¹⁰⁵

- **Authorization:**

A motor vehicle repair facility may not perform any service or repair work, unless it receives the permission of the customer to proceed.¹¹⁰⁶

- **Exceeding An Estimate:**

A motor vehicle repair facility shall not charge the customer any amount which exceeds the estimate by 10% without written consent.¹¹⁰⁷

¹¹⁰⁵ RSA 358-D:2 (2009).

¹¹⁰⁶ RSA 358-D:3 (2009).

¹¹⁰⁷ RSA 358-D:4 (2009).

2. **Sale Of Unsafe Used Motor Vehicles (RSA chapter 358-F)**

RSA chapter 358-F outlines the requirements for any person engaged in the business of selling used motor vehicles at retail. Failure by any dealer of used motor vehicles to comply with the terms of this statute constitutes an unfair or deceptive act or practice within the meaning of the CPA. For a complete list of prohibited conduct, please consult the statute.

- **Inspection:**

Before selling a used motor vehicle which is unsafe for driving upon the ways of this State, all dealers must, at the request of the customer, conduct or have conducted a safety inspection of the vehicle. If the vehicle is determined to be unsafe, the dealer may only sell the vehicle to the customer without fixing the defects if he/she provides the customer with written notice that:

- The vehicle will not pass a New Hampshire safety inspection; and
- Lists all defects that must be corrected before an inspection sticker will be issued.

3. **Martial Arts Studios (RSA chapter 358-I) and Health Clubs (RSA chapter 358-S)**

RSA chapter 358-I and RSA chapter 358-S provide regulations for anyone operating a martial arts studio or health club in New Hampshire. Failure by the owner of a martial arts studio or health club to comply with the statutory requirements constitutes an unfair or deceptive act or practice within the meaning of the CPA. Below are examples of the most common consumer protection violations by studios and clubs. For a complete list of regulations, please consult the statutes.

- **Registration:**

Any person or entity operating a martial arts studio or health club in New Hampshire must file an annual registration statement with the CPAB and pay an annual registration fee. The registration statements must disclose, among other things, the total amount received for prepaid membership services that year. This figure is called “membership refund liability” and

represents the amount of prepaid money the club or studio would owe to consumers in the event that it abruptly closed.¹¹⁰⁸

- **Bonding Requirement:**

Any club or studio that has more than \$5,000 in membership refund liability is required to post a surety bond in the amount of \$50,000 with the CPAB. The CPAB may reduce the amount of the bond if a club or studio's membership refund liability merits doing so.¹¹⁰⁹

- **Length of Membership/Automatic Renewal:**

No term contract for health club services shall be for a term of more than one year or contain an automatic renewal clause for a period greater than one month.¹¹¹⁰ Martial arts studios are permitted to offer term contracts for periods of up to three years provided the student has been enrolled in the school for at least one year.¹¹¹¹ Martial arts studios and health clubs are both required to offer a month-to-month membership option in addition to any term contract they elect to offer.¹¹¹²

4. Telemarketing (RSA chapter 359-E)

RSA chapter 359-E outlines the requirements for telemarketers using an automatic telephone dialing system. Failure by any person using an automatic telephone dialing system for solicitation to comply with the terms of this statute constitutes an unfair or deceptive act or practice within the meaning of the CPA.

- **Registration:**

Any person intending to use an automatic telephone dialing system for solicitation in New Hampshire must register with the CPAB at least 10 days before using the system and pay an annual registration fee.¹¹¹³

¹¹⁰⁸ RSA 358-I:2 (2009); RSA 358-S:2 (2009).

¹¹⁰⁹ RSA 358-I:2, III (2009); RSA 358-S:2, III (2009).

¹¹¹⁰ RSA 358-I:5, I (2009).

¹¹¹¹ RSA 358-S:5, I-II (2009).

¹¹¹² RSA 358-I:5, II (2009); RSA 358-S:5, II (2009).

¹¹¹³ RSA 359-E:2, I (2009).

- **Identification:**

Any solicitation message made through an automatic telephone dialing system must immediately disclose the name of the person, company, or organization making the call, as well as the purpose of the call and the goods or services being offered.¹¹¹⁴

- **Caller ID:**

Anyone using an automatic telephone dialing system for solicitation is prohibited from using any method of blocking that prevents caller identification information from being received by the called party. The caller identification must contain a valid telephone number and shall not contain any misleading or deceptive information.¹¹¹⁵

¹¹¹⁴ RSA 359-E:5 (Supp. 2019).

¹¹¹⁵ RSA 359-E:5-a (Supp. 2019).

XXXI. THE NEWS MEDIA

A. Introduction

A criminal defendant has a constitutional right to be tried by jurors who have not been tainted by printed information or broadcast by the news media. To protect that right, prosecutors have an obligation under the Rules of Professional Conduct to exercise reasonable care to prevent investigators and other law enforcement personnel from making out-of-court public statements that are likely to materially prejudice the fairness of a criminal trial.¹¹¹⁶

However, this obligation must be balanced against the public's right to know about the operation of the criminal justice system, and the press's right to report. In addition, law enforcement has a strong interest in educating the public about solving crimes, alerting the community to potential dangers, and soliciting community cooperation in appropriate cases. Providing timely, accurate, and pointed information is of the utmost importance because the details released early in an investigation will provide the foundation for news stories that most citizens will rely upon.

Balancing these competing interests can be difficult for a law enforcement officer when asked to comment on a particular investigation or criminal case by a member of the news media. The guidelines set out in this chapter apply to situations where a trial is a likely outcome. They are less applicable to mass casualty events, cases where a plea bargain has already been formally accepted by a court, and situations where criminal charges have been formally declined.

¹¹¹⁶ See *N.H. R. Prof. Conduct* 3.6.

B. Presumptively Prohibited Disclosures

It is impossible to provide a complete list of the types of disclosures that are considered materially prejudicial, and, therefore, prohibited. However, the Rules of Professional Conduct, which govern the conduct of attorneys, list several types of extra judicial disclosures that are presumed to fall in that category and must be avoided. They include:

- Giving out the names of suspects and witnesses prematurely;
- Commenting on the reputation, character, expected testimony, and credibility of a defendant or witness;
- Providing information about a defendant's or a witness's criminal history;
- In a case involving the potential for incarceration, commenting on the possibility of a plea;
- In a case involving the potential for incarceration, commenting on the existence or contents of a person's statement or confession, or commenting on the fact that a person refused to speak to the police;
- Commenting on the identity or credibility of prospective witnesses;
- Identifying or describing physical evidence;
- Commenting on the results of forensic tests;
- Stating an opinion of a defendant's guilt or innocence; and
- Providing any information to the news media that will not be admissible at trial.¹¹¹⁷

¹¹¹⁷ See *N.H. R. Prof. Conduct* 3.6(b).

C. Permissible Disclosures

1. Pre-Arrest

The following kinds of information can generally be shared with the public during the investigative phase of a case:

- The fact that a crime has occurred;
- The name of the victim—except in domestic violence or sexual assault cases—but only if the next-of-kin has already been notified;
 - Officers must take care not to reveal the identity of sexual assault victims either directly or indirectly. For example, do not indicate the victim’s relationship to the defendant; and use “male/female, age XX,” in documents that will become available to the public;
- General information about the investigation:
 - The existence of an investigation;
 - The names of the law enforcement agencies involved in the investigation;
 - The identities of investigators;
 - The offenses, claims, or defenses involved; and
 - The length of the investigation;
- Information necessary to help apprehend someone or to warn the public of any danger the person presents;
- Requests for witnesses to come forward; and
- Limited autopsy information, usually including the medical examiner’s conclusions on the cause and manner of death.

In general, law enforcement should not refer to an individual as a “suspect,” unless the person has been charged with a crime. Until the investigation reaches the point when the State can bring a charge, it could create unfair prejudice to refer to someone as a “suspect” in the press. Rather, law enforcement may report on the progress of an investigation by saying, for example, that they are following up on all available leads, or that they are continuing to interview potential witnesses.

Limiting the disclosure of information obtained during the investigation aids the investigation by allowing officers to determine who has firsthand information about the crime and who is merely repeating information that was published in the press. At the same time, officers and prosecutors may have little control over the actions of victims, their families, and bystanders, all of whom may be approached by reporters, and many of whom may disclose information that would help the investigation or would otherwise be prejudicial if released by law enforcement. Sometimes these individuals can be persuaded to assist the investigation by limiting their statements about the crime, the circumstances leading up to the crime, and its immediate aftermath.

2. Post-Arrest

In cases where the arrested suspect is over 18 years old, additional information may be shared with the public when a decision has been made to make an arrest. That information includes:

- Basic information about the arrested person, including:
 - Name;
 - Address; and
 - Marriage and family status;
- Whether the person was arrested pursuant to a warrant;
- The amount of bail, and whether the person has been released;
- Information about the investigation, including:
 - The identity of the investigators;
 - The identity of the arresting officers;
 - The length of the investigation;
 - The resources devoted to the investigation; and
 - The participating agencies;
- Basic information about the nature of the State's case, including:
 - The charge; and
 - The elements of the charge;

- The scheduling of any court proceedings, and the result of a court hearing;
- Information in the public record, such as:
 - The contents of pleadings, motions, and memorandums of law, provided they have not been sealed by the court; and
 - Statements made by counsel, witnesses, and the judge at public hearings.

In cases where the arrested person is under 18 years old, the only information that is permitted to be disclosed is that a juvenile has been arrested. Records in juvenile cases are confidential,¹¹¹⁸ and the knowing disclosure of information in those records is generally punishable as a misdemeanor.¹¹¹⁹ If information needs to be disclosed because a juvenile has escaped or is at large, the decision to disclose must be made by the county attorney or the Attorney General.¹¹²⁰

After an arrest, officers should refrain from providing any further comments to the media, and should consult with the prosecutor assigned to the case. Often, officers will not know precisely what investigative information has become public and what remains privileged. In addition, many prosecutors and officers have a blanket policy to make no comments to any representative of the news media during the trial. During the trial itself, officers and prosecutors must be especially careful about making comments to the press. A trial is a critical time to avoid any allegation that comments to the press were intended to prejudice the jury.

¹¹¹⁸ RSA 169-B:35 (Supp. 2019).

¹¹¹⁹ RSA 169-B:36 (2014).

¹¹²⁰ RSA 169-B:37 (2014).

D. Fires, Accidents, And Mass Casualty Events

More information may be released in situations where no prosecution is expected and where there is an emergency requiring a rapid response. In these situations, enough information should be released to provide the greatest level of protection to the public. Every effort should be made to coordinate with all responding agencies to ensure the release of consistent and timely information.

E. Homicides And Use Of Force Review

In homicide cases and investigations into the use of deadly force by a law enforcement officer—cases in which members of the Attorney General’s Office direct many aspects of the investigation in cooperation with other agencies—the Attorney General’s Office will assume sole responsibility for providing information to the press in a timely manner. In such cases, officers should not share any information about the crime or the investigation, unless they are specifically instructed to do so by the Attorney General’s Office.

XXXII. THE EXCULPATORY EVIDENCE SCHEDULE

A. The Obligation To Disclose Exculpatory Evidence: The *Brady* Rule

The federal and state constitutions guarantee a criminal defendant the due process right to obtain exculpatory evidence from the State.¹¹²¹ This is commonly referred to as the *Brady* rule, after the United States Supreme Court decision *Brady v. Maryland*.¹¹²² The *Brady* rule requires the State to produce exculpatory evidence to the defense—and to do so even if the defense does not ask for it.¹¹²³ The evidence that falls under this rule is commonly called “*Brady* material.”

The failure to provide exculpatory evidence to the defense is a constitutional error that can result in the reversal of a criminal conviction. It does not matter whether the prosecutor acted in good faith when he or she failed to produce the evidence.¹¹²⁴

Prosecutors must be scrupulous about producing exculpatory evidence in every criminal case. When unsure about the exculpatory nature of certain evidence, a diligent prosecutor will disclose the evidence.¹¹²⁵

B. What “Exculpatory” Means

The definition of “exculpatory evidence” is far broader than the word suggests. “Exculpatory” means evidence that is “favorable” to the accused.¹¹²⁶ “Favorable” evidence is evidence that is “admissible, likely to lead to the discovery of admissible evidence, *or otherwise relevant to the preparation or presentation of the defense.*”¹¹²⁷

¹¹²¹ See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Dukette*, 113 N.H. 472 (1973); *State v. Laurie*, 139 N.H. 325 (1995).

¹¹²² *Brady v. Maryland*, 373 U.S. 83 (1963).

¹¹²³ See *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985).

¹¹²⁴ *Brady v. Maryland*, 373 U.S. 87 (1963).

¹¹²⁵ *Kyles v. Whitley*, 514 U.S. 438-39 (1995).

¹¹²⁶ *Brady v. Maryland*, 373 U.S. 87 (1963).

¹¹²⁷ *State v. Etienne*, 163 N.H. 57, 90–91 (2011) (emphasis added).

“Exculpatory evidence” includes impeachment evidence—that is, evidence affecting the credibility of a witness who might testify for the prosecution.¹¹²⁸ It also includes evidence that is material to the defendant’s sentence.¹¹²⁹ Thus, the duty to produce exculpatory evidence extends well beyond an obligation to provide evidence which directly and obviously exculpates the defendant.

C. The Imputed-Knowledge Doctrine

Both the New Hampshire and United States Supreme Courts have made it clear that for the purposes of the *Brady* rule, prosecutors are responsible for disclosing to the defense not only the evidence they possess, but also the evidence possessed by the law enforcement agency involved in the investigation of the case.¹¹³⁰ This is so even if the law enforcement agency fails to turn the evidence over to the prosecutor. Courts refer to this as “imputed” knowledge—that is, as a matter of law, what the police officer knows is deemed known to the prosecutor, even if the officer never actually shares that information with the prosecutor.¹¹³¹ The result is that, when an officer possesses exculpatory evidence that the officer, for whatever reason, has not given to the prosecutor, it is no excuse to a *Brady*-rule violation to say that the prosecutor never actually possessed that evidence.¹¹³² If the evidence was in the hands of, or known to, the investigating law enforcement agency, a prosecutor can violate the *Brady* rule by failing to turn over evidence the prosecutor knew nothing about.

¹¹²⁸ *Giglio v. United States*, 405 U.S. 150, 155 (1972).

¹¹²⁹ *Brady v. Maryland*, 373 U.S. 87 (1963).

¹¹³⁰ See *State v. Etienne*, 163 N.H. 57 (2011); *State v. Lavallee*, 145 N.H. 424 (2000).

¹¹³¹ See *State v. Lucius*, 140 N.H. 60, 63 (1995).

¹¹³² See *State v. Lucius*, 140 N.H. 60, 63 (1995).

D. The Exculpatory Evidence Schedule (“EES”)

1. Establishment Of The Exculpatory Evidence Schedule

The Exculpatory Evidence Schedule—formerly known as the *Laurie* list—came about as a result of the intersection of the *Brady* rule and the imputed-knowledge doctrine. Because exculpatory evidence includes impeachment evidence, prosecutors must turn over evidence that could reflect poorly on the State’s witnesses. Because police officers are usually witnesses for the State, and what they know is imputed to the State, certain evidence that reflects poorly on police officers must be disclosed to the defense.¹¹³³

This means that if a police officer has been found to have engaged in certain types of misconduct, a prosecutor in a case in which the officer has been involved must be aware of that conduct, so the prosecutor can disclose it to the defense. The failure to disclose this information to the defense could jeopardize the integrity of a later conviction.

Because officer misconduct is documented in police personnel files, those files are an obvious source of information for potentially exculpatory information. By statute, “[e]xculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant.”¹¹³⁴

The difficulty for prosecutors is that RSA 105:13-b has long been interpreted to make police personnel records confidential. Thus, a prosecutor may not know that there is exculpatory evidence in those files. However, under the imputed-knowledge rule, the law presumes that the prosecutor will know about exculpatory records of officer misconduct despite the general confidentiality of personnel records.

To resolve the tension between police-personnel-record confidentiality, the *Brady* rule, and the imputed-knowledge doctrine, New Hampshire, like most other states, has created a system of tracking and maintaining evidence of potentially exculpatory officer misconduct. In March 2017, the Attorney General’s Office issued the Exculpatory

¹¹³³ See, e.g., *State v. Laurie*, 139 N.H. 325, 332-33 (1995).

¹¹³⁴ RSA 105:13-b, I (2013).

Evidence Memorandum and Protocol to assist prosecutors and law enforcement officers in discharging their constitutional discovery obligations. *See* The Memorandum and Protocol (March 21, 2017) that established the Exculpatory Evidence Schedule, or EES, page 531.

2. The Exculpatory Evidence Schedule Procedure

- When an officer is the subject of an allegation of misconduct, the chief or head of the officer's law enforcement agency will initiate an internal investigation.
- The officer will be given notice of the investigation and the opportunity to provide a statement or other evidence in defense.
- If the chief determines that the allegations are founded, the chief must also determine whether the misconduct could be exculpatory in any criminal case in which the officer has been, is, or will be involved.¹¹³⁵
 - *Misconduct involving dishonesty*—for example, lying or otherwise making material misstatements about facts, including false information in an incident report, or excluding significant information from an incident report—is *always exculpatory*, but other types of misconduct also qualify.
- If the chief concludes that the misconduct is potentially exculpatory, the chief must notify the officer of that determination and allow the officer the opportunity to establish otherwise.
- If the chief's final decision is that the misconduct is exculpatory, the chief must provide written notification of that fact to the Attorney General's Office and the relevant county attorneys.

¹¹³⁵ The Exculpatory Evidence Schedule Memorandum and Protocol provide guidelines for this determination.

E. The Exculpatory Evidence Schedule And Criminal Prosecutions

In the course of a criminal prosecution, a prosecutor will:

- Check the EES lists maintained by the County Attorney's Office and the Attorney General's Office to determine whether any of the law enforcement officers who worked on the case are on the EES.
- Inform defense counsel that an officer is on the EES.
- Ask the officer's law enforcement agency for the opportunity to review the EES material in the officer's personnel file.
- Seek a protective order from the court to prohibit the defense from disseminating any EES material after it is disclosed.

The fact that an officer's name is on the EES and the defense has been provided with EES material does not necessarily mean that that evidence will be used at trial. Depending on what the EES conduct was, a prosecutor may be able to argue that the evidence is inadmissible. For example, the conduct might be many years old, or it might involve conduct that is not relevant to the particular case. An officer whose name is on the EES and who testifies at trial or a hearing cannot be questioned about evidence that the court rules as inadmissible.

If the EES evidence is deemed admissible, then the officer should expect to be cross-examined about it in court. The officer should ask the prosecutor in advance of the hearing what kinds of questions to expect, and how to provide complete and truthful answers.

Although cross-examination questions typically seek only "yes" or "no" answers, judges often allow witnesses to explain those answers. If that does not happen, the prosecutor can ask the officer for explanations, if necessary, on redirect examination. As a matter of strategy, a prosecutor might decide to question the officer about the EES issue on direct examination to mitigate the effect of the impeachment.

If the prosecutor cannot determine whether a record contains exculpatory evidence in a given case, that record must be submitted to the court for an *in camera* review.¹¹³⁶

¹¹³⁶ RSA 105:13-b, II (2013).

F. An Officer's Exculpatory Evidence Schedule-Related Obligations

With regard to EES-related evidence and criminal prosecutions, law enforcement officers have a personal obligation to inform the prosecutor in any case in which they are a potential witness if:

- They are on the EES or they have potentially exculpatory evidence in their personnel files.
- They are the subject of an ongoing investigation into an allegation of misconduct.

Because the fact of an unresolved investigation is not reflected on the EES, it is especially important that this information be conveyed to prosecutors. Heads of law enforcement agencies share the obligation to report this information to prosecutors.

G. Removal From The Exculpatory Evidence Schedule

In April 2018, the Attorney General's Office issued a memorandum clarifying some aspects of the March 2017 EES Memorandum and Protocol, and setting out the procedure by which officers can cause their names to be removed from the EES. *See* April 2018 EES Memorandum and Protocol, page 550. Only the Attorney General's Office can remove an officer's name from the EES, and only if there is proof that a sustained finding of EES misconduct has been formally reversed, or that the officer has been otherwise exonerated. In considering a request to remove a name from the EES, the Attorney General's Office will not review the evidence that led to the EES determination, and will not evaluate the adequacy of the procedures in the underlying investigation.

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**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

415


33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

LAW ENFORCEMENT MEMORANDUM

TO: All New Hampshire Law Enforcement Agencies
FROM: Gordon J. MacDonald, Attorney General 
DATE: September 8, 2020
RE: Law Enforcement Officer Deadly Force Investigation Protocol

State law entrusts law enforcement officers with special authority. This includes the authority to use deadly force under specified conditions. When an officer uses deadly force, it is imperative that there be an independent, unbiased and professional investigation and that it be conducted in a manner that is as transparent as possible.

As the chief law enforcement officer and the chief prosecutor in homicide cases, the Attorney General has the responsibility to ensure that whenever deadly force is used by a law enforcement officer, that use conforms to the law. At the suggestion of this Office, the Legislature has recently augmented the Attorney General's resources to respond to and investigate the use of deadly force by law enforcement. There is now within the Office a position dedicated to the investigation of the use of force by law enforcement and, earlier this year, that position was filled by a veteran investigator.

The Attorney General's investigation of law enforcement officer deadly force incidents has been guided by a Protocol issued in 2004. The new position within this Office, as well as other considerations, necessitated a complete revision of the 2004 Protocol.

Therefore, today I am issuing a completely revised *Law Enforcement Officer Deadly Force Investigation Protocol* ("2020 Protocol"). The 2020 Protocol replaces and supersedes the 2004 Protocol.

The 2020 Protocol applies to any situation involving a law enforcement officer's use of force which results in death or serious bodily injury to any person. In the event that an officer is involved in a use-of-force incident resulting in death or serious bodily injury, notification to the appropriate agencies must be made pursuant to an *Updated Procedure for Reporting of and First Response to Homicides, Suspicious Deaths, Deaths of Persons*

in Official Custody and Officer-Involved Incidents, dated September 8, 2020, which accompanies this Law Enforcement Memorandum.

It is my sincere belief that this Protocol will help foster the public's confidence that deadly force investigations will be conducted in an independent, transparent, and objective process.

[2825748]

**NEW HAMPSHIRE DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT OFFICER DEADLY FORCE INVESTIGATION PROTOCOL**

I. DISCUSSION

- A. Law enforcement officers are given extensive authority under State statutes to enforce the law and protect persons and property, including the authority pursuant to RSA 627:5 to use force when reasonable and necessary. This includes the authority to use deadly force under certain specified conditions. These laws reflect the special confidence that New Hampshire's Legislature and citizens bestow on police officers, and impose an obligation on the police to use it legally, and be accountable for its use.
- B. After an incident involving the use of deadly force by a law enforcement officer, it is paramount that an independent, unbiased, and professional body conduct an investigation. For this reason, all such investigations will be conducted by the Attorney General's Office (AGO). If the evidence demonstrates that criminal charges are warranted against the involved officer, the AGO will seek an arrest warrant and/or will present the matter to a grand jury. If the evidence demonstrates that the use of force was legally justified under the applicable law, the AGO will issue a detailed report summarizing the scope of the investigation, the facts, the applicable law, and the basis for its conclusion. If the release of a report would prejudice an ongoing or contemplated prosecution related to the incident, then an abbreviated report may be issued consistent with RSA Chapter 91-A and Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.
- C. Regardless of the outcome of the AGO's deadly force investigation, the involved officer's employing agency will generally conduct an internal investigation to determine if the actions of the officer was consistent with the agency's policies, procedures, or best practices and whether any changes in such policies and procedures or in the agency's training programs are advisable. This may include an investigation by the employing agency's liability insurance carrier or legal counsel in order to respond to possible civil litigation.
- D. In addition to its own personnel, the AGO will routinely utilize the services of the New Hampshire State Police Major Crime Unit to assist in the investigation of deadly force incidents. This is because the State Police is the only around-the-clock statewide law enforcement agency in New Hampshire. Additionally, at the discretion of the Attorney General, law enforcement officers from a city or town where the incident occurred that regularly investigate their own homicide cases with the AGO, may also be requested to assist the AGO with the deadly force investigation. The role of the State Police and any

other supporting law enforcement agency is limited to providing assistance with fact-finding; the State Police and other law enforcement agencies make no recommendations or reach any determinations regarding the legality of the use of deadly force. That is a decision solely for the Attorney General.

II. PURPOSE

- A. As the State's chief law enforcement officer, as provided in RSA 7:6, and the chief prosecutor in homicide cases, the Attorney General has the responsibility to ensure that whenever deadly force is used by a law enforcement officer, that use conforms to the law. The purpose of this Protocol is to guide the AGO in its investigation of such incidents, and to inform the public and law enforcement officers of what will occur when the use of force by a law enforcement officer results in death or serious bodily injury to any person.¹
- B. While this Protocol cannot anticipate every possible circumstance that might occur, its goal is to create an independent, transparent, and objective process for the public and the law enforcement officers who serve the public.

III. DEFINITIONS

As used in this Protocol, the following words shall have the meanings ascribed to them in this section:

- A. **Deadly force** means deadly force as defined in RSA 627:9, II, including any force capable of causing death or serious bodily injury to a person.
- B. **Deadly force incident** means an incident in which death or serious bodily injury results to any person from the application of deadly force by a law enforcement officer, or when death results from the application of non-deadly force by such officer.
- C. **Deadly force investigation** means an inquiry conducted under the authority of the Attorney General in his or her role as chief law enforcement officer pursuant to RSA 7:6. The Attorney General does not investigate or opine on the particular procedures or tactics used by a law enforcement officer. Instead, the review of an officer-involved use of deadly force incident consists of a criminal investigation, which is limited to determining whether the officer complied with the applicable law and whether charges are warranted.
- D. **Deadly force investigation team** means a group of officers, attorneys, or other persons with specialized training or expertise who are designated by the Attorney General to

¹ The term "officer" is used throughout this Protocol. However, there may be instances where more than one officer is involved in the incident.

- conduct an investigation of a deadly force incident. The team may include an investigator and a senior attorney from the AGO, investigators from other law enforcement agencies, members of the New Hampshire State Police Major Crime Unit, and other persons expressly assigned by order of the Attorney General to assist in the investigation.
- E. **Directly involved officer** means an officer reasonably believed to have employed deadly force as defined above.
- F. **Handgun** means any firearm such as a pistol or revolver with a grip or short stock designed and capable of being fired and used by use of a single hand, rather than a shoulder weapon.
- G. **Investigators** means law enforcement officers assigned or attached to the Attorney General's Deadly Force Investigation Team and charged with investigating a specific deadly force incident.
- H. **Involved agency** means any agency of the state or one of its political subdivisions that employs one or more officers who are involved in a deadly force incident.
- I. **Law enforcement officer** means a person employed by a state, local, county, or federal law enforcement agency who is authorized by law to make arrests and use force, including probationary or uncertified officers.
- J. **Lead investigator** means the member of the Deadly Force Investigation Team assigned by the Attorney General to lead the other investigators, and whose responsibilities include ensuring that investigative interviews are conducted, the scene of the incident is secured and documented, and all physical evidence related to the incident is properly collected, marked, preserved, stored, and where appropriate, submitted for laboratory analysis. The lead investigator will be under the direction of the senior attorney.
- K. **Liaison representative** means a person designated by the head of the involved agency and approved by the Attorney General to provide logistical assistance to the Deadly Force Investigation Team and to update, as appropriate, the head of the involved agency on the status of the investigation.
- L. **Long gun** means any firearm that is not a handgun.
- M. **Senior attorney** means the Assistant Attorney General responding to and designated by the Attorney General, or his or her designee, to conduct a particular deadly force investigation, and responsible to the Attorney General for such investigation.

- N. **Serious bodily injury** means serious bodily injury as defined in RSA 625:11, VI, including serious, permanent, or protracted injury to the body or any part thereof.
- O. **Use of deadly force** means the use of deadly force as defined above resulting in death or serious bodily injury to any person.
- P. **Victim** in a deadly force incident means any person killed or who sustained serious bodily injury as a result of a deadly force incident. For purposes of this Protocol, the term “victim” does not necessarily mean that the death or injuries were the result of a crime.

IV. POLICY

A. Notification

1. Upon learning that a use of deadly force incident has occurred, the ranking on-duty officer of the involved agency shall immediately notify the head of the involved agency, the chief of police of the community where the incident occurred, the Attorney General’s Office (using as a guideline the Attorney General’s most recent law enforcement memorandum regarding notifications of homicides and suspicious deaths), the New Hampshire State Police Communications Center, the County Attorney, the County Sheriff, and in the event of a fatality, the Chief Medical Examiner’s Office (pursuant to RSA 611:4 and the most recent law enforcement memorandum).

B. Actions by the Involved Agency Prior to Arrival of the Investigation Team

1. Although an officer involved in a use of deadly force incident may be injured or suffering from traumatic stress reactions, in many cases he or she is able to take appropriate follow-up action until backup officers or supervisory personnel arrive. An officer involved should take practicable and appropriate measures to protect the safety of the public including injured victims, and to protect his or her own safety. The officer should also establish a preliminary perimeter at the scene in order to preserve evidence essential to the investigation. In addition, the officer should take the following steps when appropriate:
 - a. Administer first aid to themselves and all other injured people, as necessary, pending the arrival of emergency medical assistance.
 - b. Ensure that there are no further threats to the safety of the public, the officer, and any injured victim at the scene.

- c. Request emergency medical assistance, if necessary, a supervisor, additional backup, and any specialized units, if required.
- d. Holster and secure in place any involved police firearms, ammunition magazines, or other weapons. Ensure that firearms are not opened, loaded, or unloaded, and live ammunition and discharged cartridge casings are not removed, or in any other way altered. Any police officer's or victim's firearms or weapons that were dropped or discarded should be left in place and guarded. If this is not possible, their location and position should be recorded and the firearm or weapon should be secured as is until it can be turned over to investigators.
- e. Establish an outer perimeter with crime scene tape or otherwise. Limit entry to the area to people necessary to the investigation or rendering assistance to any injured people. Protect possible evidence from loss, destruction, or damage that might result before assistance arrives. Ensure that items of evidence are not moved or if moved, note their original location and the position of people, firearms, weapons, and other relevant objects.
- f. Identify people who are present or have departed the scene including witnesses and vehicles. Ask people present at the scene for their cooperation and to remain in order to provide information to arriving supervisors. Separate witnesses to the extent possible.
- g. Even if persons at the scene claim to have seen or heard nothing, they should be identified and asked to remain until supervisors arrive.

C. Duties of First Arriving Backup Officers

1. Arriving officers should first ensure the safety of all people at the scene, including arranging for any needed medical attention.
2. To the extent that anyone has been arrested or placed in custody, ensure that they are appropriately secured. Confirm that all potential witnesses have been identified, a secure perimeter established, a log begun to document entry and exit into the scene, and critical evidence safeguarded to await the arrival of supervisors and the investigative team. To the extent possible, they should refrain from questioning the

directly involved officer, victim, or witnesses. Formal interviews will be conducted at a later time by the Deadly Force Investigation Team.

D. Duties of Arriving Supervisors

1. Arriving supervisors should first ensure the safety of all people at the scene, including arranging for any needed medical attention.
2. If anyone has been injured or wounded and is transported to a hospital, ensure that an officer accompanies and remains with him or her at the hospital if possible.
3. Ensure that a proper perimeter has been defined and secured, and determine whether the scene is large enough that both an inner and outer perimeter are required, or in the event of an incident that took place in more than one location, that multiple perimeters are established.
4. Locate and secure in place any discharged firearms or other weapons used by anyone involved in the incident, which are no longer in their possession. These firearms or weapons must be left in place unless a supervisor determines that the firearms or weapons present a danger that could be ameliorated by removing and securing that firearm or weapon. In such case, the firearm may be removed after receiving permission from the lead investigator or senior attorney. Firearms or weapons still in the possession of the involved officer must be secured by a supervisor. Visually inspect and check the firearms or weapons still in the possession of ancillary officers who were present at the scene for discharge or use and secure them if they appear to have been discharged or used during the incident.
5. Determine and note the original position of the directly involved officer and of the victim at the time of the shooting. Speak with the involved officer separately, and avoid any questioning beyond what is absolutely required to secure the scene and identify witnesses. Beyond that, communication with the directly involved officer should be limited to questions or statements intended to assess and assure the officer's well-being, and should not include any substantive questions regarding the incident. Formal interviews will be conducted at a later time by the Deadly Force Investigation Team.
6. Ensure that the involved officer is separated at the scene and cautioned not to discuss the incident with others until formal interviews have been completed with the Deadly Force Investigation Team.

7. Ensure that any short-lived evidence that might be altered or destroyed by the elements or actions at the scene is secured, and that the clothing of the directly involved officer and any injured person that was removed during medical treatment at the scene, by first responders, or at a medical facility, is collected and properly preserved for evidentiary purposes.
8. Ensure that witnesses at the scene have been identified and ask for their cooperation. Obtain their contact information and request that they go to the local police department to meet with a member of the Deadly Force Investigation Team. Advise them that a formal interview may be requested at a later time by the Deadly Force Investigation Team.
9. Inform the Investigation Team's lead investigator or senior attorney if a witness captured any video or audio of the event using a cellphone or other handheld electronic device, or if a witness knows of someone who did.
10. Appoint an officer to make a chronological record of activities at the scene until the Deadly Force Investigation Team arrives. Include person's present and entering or leaving the incident scene, actions taken by police personnel, and the identities of any emergency medical or fire personnel who are required to access the scene.
11. If a still and/or video camera is available, carefully and without contaminating the scene, document the scene, including any bystanders.

E. Responsibilities of the Deadly Force Investigation Team's Senior Attorney and Lead Investigator

1. Upon arrival at the scene, the senior attorney and the lead investigator of the Deadly Force Investigation Team shall be briefed on the facts known at the time and depending on the circumstances, may view the scene.
2. The senior attorney may request the agency head (unless the agency head was the involved officer) to designate a member of his or her staff as a liaison to the Deadly Force Investigation Team.
3. The lead investigator shall ensure that the recommended tasks outlined above in section IV, B-D, for the involved officer, backup officers, and supervisors have been performed appropriately, and shall ensure that any needed tasks are completed.

4. The lead investigator shall ensure that photographs and videos are taken of the overall scene, including any evidentiary items. Photographs of the involved officer and victim as they appear at the scene shall be taken, including photos of any bruises or injuries.
5. Any officer at the scene who took any notes or diagrams may be interviewed by members of the Deadly Force Investigation Team and those notes collected, copied, and copies returned to them. The Deadly Force Investigation Team shall ask about, view, and secure any photos, video or audio recording of the incident captured by the officer using a cellphone or other electronic device. The Deadly Force Investigation Team shall make prints or copies for the officer who took them and retain the originals. Formal interviews may be conducted at a later time by the Deadly Force Investigation Team.
6. Ensure that crime scene specialists thoroughly inspect the scene and collect and preserve any relevant evidence, and ensure that the scene is thoroughly documented by the team. This may include inspecting and collecting the clothing of any involved person.
7. Ensure that notification has been provided to next of kin of injured or deceased victims.
8. Identify witnesses and ask permission to conduct an interview in a timely manner. The interviews are to be conducted separately and are to be audio recorded and when possible video recorded.
 - a. Ensure that the witness understands that he or she is not under arrest (if that is the case) and that he or she is voluntarily participating in the interview.
 - b. Ascertain if the witness took any photos or recordings of the incident. View and secure any photos, video or audio recordings of the incident captured by the witness using a cellphone or other electronic device with consent or other lawful process. The Deadly Force Investigation Team shall make prints or copies for the witness who took them and retain the originals.
 - c. Conduct as complete and thorough an interview as possible. If the interview is conducted at a medical facility, consider whether it is necessary to consult with the witness's treating medical team before starting the witness's interview. If the witness's physical or emotional condition makes it impractical to obtain sufficiently detailed information, conclude the

- interview and arrange for a future, more detailed interview at a more appropriate time.
- d. Any custodial interview must be done according to the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966) (Miranda).
 - e. At the conclusion of the interview, the witness should be advised not to discuss the incident with any other witness, including all involved the officers, until all witnesses have completed their formal interviews with the Deadly Force Investigation Team.
9. Ask the victim for permission to conduct a recorded interview in a timely fashion. The interview shall be audio recorded and, when possible, video recorded.
- a. Ensure that the victim understands that he or she is not under arrest (if that is the case) and that he or she is voluntarily participating in the interview.
 - b. Ask the victim about, view, and secure any video or audio recording of the incident captured by the victim using a cellphone or other electronic device with consent or other lawful process.
 - c. Conduct as complete and thorough an interview as possible. If the interview is conducted at a medical facility, consider whether it is necessary to consult with the victim's treating medical team before starting the victim's interview. If the victim's physical or emotional condition makes it impractical to obtain sufficiently detailed information, conclude the interview and arrange for a future, more detailed interview at a more appropriate time.
 - d. Any custodial interview must be done according to the requirements of *Miranda*.
 - e. At the conclusion of the interview, the victim should be advised not to discuss the incident with any other witness, including all involved the officers, until all witnesses have completed their formal interviews with the Deadly Force Investigation Team.
10. Consider whether formal interviews with fire department personnel, emergency medical service providers, and any other first responders to the scene are necessary.

11. Be aware of and consider the existence of post-incident trauma when dealing with the involved officer, victim, and witnesses.
12. Secure any agency-captured audio and video footage of the incident, including police body camera footage, cruiser camera footage, radio traffic, 911 calls, and all dispatch records related to the use of deadly force incident.
13. The involved officer, victim, and eyewitnesses should be advised not to review or view any video or audio recordings of the incident from any device such as body cameras, cruiser cameras, surveillance video, or cellphone cameras and avoid viewing any such recordings on the news, the internet, social media, or otherwise, until after their formal interviews have been completed.
14. At the direction of the senior attorney, an interview with the directly involved officer should be conducted in a timely manner. The interview is to be conducted separately, audio recorded, and when possible video recorded.
 - a. Prior to or during the interview, the officer or his or her representative should be informed that a criminal investigation is being conducted according to this Protocol. The officer or his or her representative should be informed that the purpose of the investigation is to determine whether the use of deadly force was justified under RSA 627:5, not to determine compliance with the officer's agency's use of force policy or for the purpose of departmental discipline.
 - b. Ensure that the officer understands that he or she is not under arrest and that he or she is voluntarily participating in the interview.
 - c. Conduct as complete and thorough an interview as possible. If the interview is conducted at a medical facility, consider whether it is necessary to consult with the officer's treating medical team before starting the officer's interview. If the officer's physical or emotional condition makes it impractical to obtain sufficiently detailed information, conclude the interview and arrange for a future, more detailed interview at a more appropriate time.
 - d. Any custodial interview must be done according to the requirements of *Miranda*.
 - e. Because this is not a departmental internal investigation, *Garrity* warnings do not apply and will not be provided.

- f. At the conclusion of the interview, the officer should be advised not to discuss the incident with any other directly involved officers or witnesses until all directly involved officers and witnesses have completed their formal interviews with the Deadly Force Investigation Team.
 - g. The senior attorney shall follow the latest AGO Exculpatory Evidence Protocol and determine whether any involved officer has potentially exculpatory evidence in their personnel file that should be considered during the investigation.
15. Any necessary forensic examinations or testing, including testing of an involved officer's firearm or weapon should be done as soon as possible.
 16. In situations where a firearm has been secured immediately after a deadly force incident and it can be conclusively determined that it has not been fired during the incident, the lead investigator may release that firearm to a supervisor from the involved agency after receiving approval from the senior attorney. Other items seized, such as clothing or personal property, which yield no useful evidence, may be released to their owner after receiving approval from the senior attorney.
 17. The senior attorney and the lead investigator shall continue to supervise the investigation, identify leads that need to be pursued, collect relevant evidence, and assign all tasks. The lead investigator shall keep the senior attorney fully informed of all significant aspects of the investigation, and defer to the senior attorney's judgment on all legal matters.

F. Relationship to Involved Agency Internal Investigation

1. If the directly involved agency conducts an internal investigation of the use of deadly force incident, the senior attorney should ensure that no information, reports, or interviews conducted after *Garrity* warnings have been provided are shared with or made available to the Deadly Force Investigation Team. This is to conform to the requirements of the *Garrity* decision.

G. Advocate Services

1. To the greatest extent possible, and consistent with maintaining the integrity of the investigation, the officer who used deadly force, the victim, or if the victim is deceased or incapacitated, his or her family, shall be kept informed about the

progress of the investigation and informed about available resources and services. The AGO may assign an advocate to assist.

2. If the evidence demonstrates that criminal charges should be brought against the officer who used deadly force, an AGO advocate will assume the duties in accordance with present practices in criminal cases with respect to victims.

H. Disclosure of Information Generally

1. An officer's use of deadly force is a matter of great public interest. The public has a right to know of all facts and circumstances leading to the use of deadly force, the evidence developed during the investigation, and the legal conclusions reached by the Attorney General. However, the AGO must balance the public's right to know with the need to preserve the integrity of the investigation, the rights of the involved individuals, and the attorney's obligations under Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.
 - a. Prior to completion of the investigation and issuance of a report, press briefings and news releases shall ordinarily be limited to the identity of deceased or injured victim after notification of the next of kin, a brief summary of the incident, whether the officer involved suffered any physical injuries, and whether or not the officer involved has been placed on administrative leave, and if so, whether that is the usual procedure in incidents of this type. The name of the officer involved should not be released until after he or she has been formally interviewed as part of the investigation. This is done to maintain the integrity of the investigation.
 - b. No persons other than the senior attorney are to make public statements about the investigation or respond to press questions, unless so authorized by the Attorney General.
2. Periodically during the investigation the Attorney General may direct the senior attorney to issue news releases or hold press briefings. The head of the involved agency (unless he or she was a directly involved officer) and the chief of police of the community where the incident occurred shall be notified in advance of any such release or briefing.
3. The senior attorney, or at his or her direction, the lead investigator or other designated person may provide periodic briefings to the head of the involved agency or his or her designee (unless the agency head was a directly involved officer) during the pendency of the investigation. All recipients shall agree to

preserve the confidentiality of the information, and if the agreement is breached, no further confidential information will be shared.

4. The senior attorney, or at his or her direction, the lead investigator or other designated person may provide periodic briefings to the victim, or if deceased or otherwise incapacitated, his or her family during the pendency of the investigation. All recipients shall agree to preserve the confidentiality of the information, and if the agreement is breached, no further confidential information will be shared.

I. Investigation and Report

1. The Attorney General's review is limited to whether the officer's use of deadly force conformed to the applicable law. Therefore, it is a criminal investigation.
2. In furtherance of the AGO's directive, the Deadly Force Investigation Team shall conduct interviews, examinations, and analyses as are appropriate to successfully complete a thorough and accurate criminal investigation. Experts may be retained and consulted as needed. The senior attorney shall collect relevant documentation on the case, and prepare a report for the Attorney General. The investigative report shall include sufficient, relevant facts to determine whether the use of deadly force by the officer was lawful, an analysis of applicable statutes and case law, a determination as to whether any crimes were committed by the officer or whether criminal prosecution is warranted, and a recommended determination as to whether the use of deadly force was legally justified.
3. In accordance with the Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*, the AGO will not release a report to the public in cases where criminal charges are brought against the involved officer in connection with the deadly force incident. Instead, upon completion of the criminal prosecution the entire investigative file will be made available upon request to the public and the news media consistent with RSA Chapter 91-A.
4. A report will be released where no criminal charges are brought against an involved officer in connection with the deadly force incident. Before releasing the report to the public, a designated member of the deadly force investigation team or the senior attorney shall notify the agency head or his or her designee (or if the agency head was a directly involved officer, with a designee of the agency head's appointing authority), the police chief of the community where the incident occurred, and the involved officer or his or her legal representative, of the report's conclusion and if appropriate under the circumstances, also provide a copy of the report. A designated

team member shall also notify the victim, or if the victim is deceased or otherwise incapacitated, his or her family, before releasing a report to the public and if appropriate make the report available to them.

5. In cases where criminal charges are brought against someone other than the involved officer, the release of a full report may be delayed depending on whether the publication of any particular details would prejudice that ongoing or contemplated prosecution. In that event, an abbreviated report may be issued consistent with RSA Chapter 91-A, and Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.
6. Prior to the release of a report of a deadly force incident involving a fatality, the Attorney General may hold a press briefing to summarize the investigation and the findings and conclusions in the report.
7. Upon completion of the investigation and the report, the entire investigative file will be made available upon request to the public and the news media consistent with RSA Chapter 91-A and Rules 3.6 and 3.8 of the *New Hampshire Rules of Professional Conduct*.

APPLICATION FOR SEARCH WARRANT and SUPPORTING AFFIDAVIT

(This application and affidavit to be detached by Justice issuing warrant and filed separately with the court to which the warrant is returnable.)

Instructions: A person seeking a search warrant shall appear personally before any justice, associate justice or special justice of the municipal, district or superior court and shall give an affidavit in substantially the form hereinafter prescribed. The affidavit shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and the affidavit may be supplemented by oral statements under oath for the establishment of probable cause. The person issuing the warrant shall retain the affidavit and shall make notes personally of the substance of any oral statements under oath supplementing the affidavit or arrange for a transcript to be made of such oral statements. The person issuing the search warrant shall deliver the affidavit and the notes or transcript within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court of record.

THE STATE OF NEW HAMPSHIRE

_____, SS
(county)

_____ Court

(Month / Day) (Year)

I, _____ Being duly sworn, depose and say:
(Name of applicant)

1. I am _____
(describe position, assignment, office, etc.)

2. I have information, based upon:
(describe source, facts indicating reliability and credibility of source and nature of information: if based on personal knowledge, so state)

[Large empty rectangular box for providing details of information source and facts.]

(Use this additional sheet for Item No. 2, if necessary)

[Empty rectangular box for additional information]

3. Based upon the foregoing information (and upon my personal knowledge) there is probable cause to believe that the
(strike out if not applicable)

Property hereinafter described _____
(has been stolen, etc.)

And may be found _____
(in the possession of A.B. or any other person)

At premises _____

4. The property for which I seek the issuance of a search warrant is the following:

(here described the property as particularly as possible)

[Empty rectangular box for property description]

Wherefore, I request that the court issue a warrant and order of seizure, authorizing the search of _____

(identify premises and the persons to be searched)

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court;
together with such other and further relief that the court may deem proper.

(Name)

Then personally appeared the above named _____
and made oath that the foregoing affidavit by him subscribed is true.

Before me this _____ Day of _____
(Day) (Month / Year)

Justice of the _____ Court

(Court seal)

WARRANT
The State of New Hampshire

_____, SS _____ Court
To the Sheriffs of our several counties, or their deputies, any State Police Officer, or any Constable or Police Officer of any city or town, within our State.

Proof by affidavit (supplemented by oral statements under oath) having been made this day before

_____ by
(name of person authorized to issue warrant)

_____ that there is
(names of person or persons whose affidavits have been taken)

probable cause for believing that:

(certain property which has been stolen, embezzled, or fraudulently obtained; OR is intended for use or has been used as the means of committing a crime; OR is contraband; OR is evidence of the crime to which the probable cause upon which this search warrant is issued relates.)

may be found in the possession of _____
(identify)

at premises located _____

We therefore command you in the daytime (or at any time of the day or night) to make an immediate search of

_____ and
(occupied by A.B.)

of the person of _____
(A.B. and any other identifiable individuals with respect to whom probable cause has been established by the affidavit

_____ for the
or supplementary testimony.)

following property: (describe property)

and if you find any such property or any part thereof to bring it and the person in whose possession it is found

before _____ at
(court having jurisdiction)

(location)

Dated at _____ this _____ day of _____
(city or town) (Day) (Month / Year)

(court seal)

Justice of the _____ Court

RETURN

I received the attached search warrant on _____ and have
(Month / Day) (Year)
executed it as follows:

On _____ at _____ o'clock _____ M, I
(Month / Day) (Year)
searched _____ described in the warrant and I
(the persons and the premises searched)

left a copy of the warrant with _____
(names of persons searched and occupant if not a person searched; describe the premises searched if occupant

not present.)

at _____ together with a receipt for the items seized.
(the premises searched)

The following is an inventory of property taken pursuant to the warrant:

[Empty rectangular box for inventory list]

This inventory was made in the presence of _____
and _____

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

(Signature)

Subscribed and sworn to and returned before me this _____ day
(Day)
of _____
(Month / Year)

Justice of the Peace

AFFIDAVIT

I, _____, do hereby depose and say the following:

- (1) (Describe current position and any relevant law enforcement background or training).

- (2) (Describe the information that establishes probable cause to believe that a crime has been committed and evidence of that crime will be found in a particular location. Be sure to include the source of all information. Use as many numbered paragraphs as are necessary).

- (3) (Identify the person, place, or property for which authority to search is being requested).

- (4) (Describe, with particularity, the types of evidence being sought).

Dated: _____

Signature of Affiant

_____, SS.

Then personally appeared before me the above named

_____ and made oath that the foregoing affidavit is true.

Dated: _____

Justice / Justice of the Peace

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SMITHVILLE DISTRICT COURT

In Re Application for Search Warrant

**STATE'S MOTION TO SEAL APPLICATION FOR SEARCH
WARRANT, AFFIDAVIT IN SUPPORT OF APPLICATION,
RETURN AND ANY RESULTING SEARCH WARRANT**

NOW COMES the State of New Hampshire, by and through Sergeant John Doe of the Milltown Police Department, who respectfully requests that this Honorable Court seal the accompanying Application for Search Warrant, the Affidavit in Support of the Application, the Return, and any Search Warrant that may issue in this case. In support of its request, the State says as follows:

1. The Milltown Police Department is conducting a criminal investigation into the sexual assault of a female person in Milltown.
2. Premature disclosure of the information contained in the application, the accompanying affidavit, the return, and any warrant that may issue in this case could compromise the integrity of the ongoing investigation by revealing the identities of witnesses and investigative information known only to the authorities.
3. This Court has the authority to grant the State's request and order the relief requested. See RSA 595-A:4; *Petition of State of New Hampshire (Bowman Search Warrants)*, 146 N.H. 641 (2001) ("we hold that in most pre-indictment criminal investigations, the existence of an investigation itself will provide the overriding consideration or special circumstance, that is, a

sufficiently compelling interest, that would justify preventing public access to the records.”).

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Grant the State’s Motion and seal the accompanying Application For Search Warrant, the Affidavit in Support of the Application, the Return, and any Warrant that may issue in this case; and
- B. Order such other and further relief as may be just and proper.

Respectfully submitted,

Sgt. John Doe
Milltown Police Department
Milltown, New Hampshire

February 1, 2008

WRITTEN CONSENT TO SEARCH

I, _____ having been informed of my constitutional right not to have a search made of my property/premises, hereinafter mentioned, without a search warrant and of my right to refuse to consent to such a search hereby voluntarily authorize _____ and/or _____, Investigators with the [insert law enforcement agency name] to conduct a complete search of my (person) (car) (residence) (or other real property) described as follows:

These Investigators are authorized by me to take from my (person) (car) (residence) (or other real property) any letters, papers, materials or other property, which they may desire. This written permission is being given by me to the above mentioned Investigators voluntarily and without threats or promises of any kind.

_____/_____/_____
Signature Date Time

Witness:

_____/_____
Signature Date

CUSTOMER CONSENT AND AUTHORIZATION FOR DISCLOSURE OF FINANCIAL OR CREDIT RECORDS

I, _____, hereby authorize the
(Name of Customer)

_____ (N
ame and Address of Financial Institution or Credit Reporting Agency)

to disclose these financial or credit records:

(Describe with Particularity)

to _____
(Name of Law Enforcement Agency to which records are to be disclosed).

for the following statutory purpose (s): _____

This authorization is effective from: _____ until _____
(date) (date)

I understand that I have the right at any time to revoke this authorization, except where the authorization is required by statute.

(Date)

(Signature of customer)

(Address of customer)

CONSENT TO SEIZE AND SEARCH COMPUTER(S)/ELECTRONIC MEDIA

I, _____ at _____, New Hampshire hereby authorize _____, an Investigator with the [insert law enforcement agency name] and any trained personnel designated to assist, to conduct a complete search of my

_____, with other identifiers, and any electronic storage devices and all removable computer media associated with the above-referenced computer and to make a bit stream copy of any and all electronic storage devices and removable computer media associated with the above-described computer and peripherals for purposes of further analysis and a complete search of any and all information obtained or derived from the search. This search is to include all areas of the hard drive and removable media, whether password protected or encrypted, including, but not limited to hidden partitions, directories, and files, erased files, deleted files, files marked for deletion, slack space, and unallocated space on the drive and other electronic storage devices and media.

I further authorize the above member or his/her designee to remove, take with them, retain custody over and search any property in connection with the copying and/or searching of the above-information sought by the Investigator(s), including but not limited to, the above-referenced computer and all electronic storage devices and removable media associated with the above-described computer and peripherals, provided I am subsequently given a receipt for anything that is removed. I also affirmatively represent that I am the lawful owner of the above-described and/or associated property, electronic storage devices, removable media or peripherals and/or I have lawful possession and control over it for purposes of this consent to search.

I have been advised by _____, and I fully understand that I have the right to refuse my consent. I also understand that I have the right to be present at the time of any searches which are conducted, and I expressly waive any rights I may have to be physically present during any searches which are conducted pursuant to this consent to search.

I have been further advised that I may withdraw my consent at anytime; however, the withdrawal of my consent shall not be effective until received by _____ of the [insert law enforcement agency name] and shall not be effective as to those items, material, data, e-mail or content already viewed, seized, analyzed or copied.

Date: _____ Time: _____ A.M/P.M. (please circle)

Signature of Person Providing Consent: _____

Witness: _____ Witness: _____

CONSENT TO SEIZE AND SEARCH CELL PHONE(S)

I _____, hereby authorize the [insert law enforcement agency name] and/or any trained personnel designated to assist, to conduct a complete search of the cell phone or mobile device listed below, which is the property of the Town of [insert], NH.

Cell Phone / Mobile Device

Service Provider: Verizon AT&T Sprint T-Mobile Other: _____

Phone Manufacturer: _____

Cell Phone #: (____) _____

PIN/Password: _____

Model #: _____

Serial #: _____

Home Phone Number: (____) _____

Power Cord collected: Y or N _____ Data Cable collected: Y or N _____

I also authorize the [insert law enforcement agency name] to search any removable electronic storage media, such as SIM and memory cards, associated with my cell phone/mobile device, and permit them to download the contents of my cell phone/mobile device and all associated electronic storage media for purposes of further analysis of any and all information obtained.

This search is to include all areas of the cell phone and removable electronic storage media including, but not limited to incoming and outgoing calls, received and sent messages such as text, images, videos, email, contact list information, drafts of messages, internet history and cables. I also affirmatively represent that I am the lawful owner of the above-described property and/or I have lawful possession and control over it for purposes of this consent to search.

I have been advised by _____, and I fully understand that I have the right to refuse my consent. I also understand that I have the right to be present at the time of any searches which are conducted, and I expressly waive any rights I may have to be physically present during any searches which are conducted pursuant to this consent to search. I further authorize the above member or his/her designee to remove, take with them, retain custody over and search my cell phone/ mobile device at a remote location.

I have been further advised that I may withdraw my consent at anytime; however, the withdrawal of my consent shall not be effective until received by _____ of the [insert law enforcement agency name] and shall not be effective as to that content which has already been viewed, seized, analyzed or copied.

Date: _____ Time: _____ A.M/P.M. (please circle)

Signature of Person Providing Consent: _____

Witness: _____ Witness: _____

CONSENT TO SEARCH
Cloud-Based / Remote-Storage Accounts

I, _____, hereby voluntarily provide consent to investigators of the [insert law enforcement agency name], to conduct a complete search of my cloud-based/remote-storage account(s) listed below, which may include, but is not limited to, email, webmail, social media, online file storage, media storage, remote backups, and location services:

ACCOUNT PROVIDER	USERNAME/LOGIN ID	PASSWORD/PHRASE

I have authority to access and use the above account(s) and all information found in them. By signing this form, I authorize law enforcement officers to access the above account(s) as necessary to seize items that they determine may be relevant to their investigation. I have been advised of my right to refuse consent, and give this consent freely and voluntarily. I have been further advised that I may withdraw my consent at any time; however, the withdrawal of my consent shall not be effective until received by Investigator _____ of the [insert law enforcement agency name] and shall not be effective as to that content which has already been viewed, seized, analyzed or copied.

Date: _____ Time: _____ A.M / P.M. (please circle)

Signature of Person Providing Consent: _____

Witness: _____ Witness: _____

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

VIA FACSIMILE: 888-667-0028

September 1, 2020

CellCo Partnership d/b/a Verizon Wireless
180 Washington Valley Road
Bedminster, NJ 07921

Re: Preservation of Records Request

To Whom It May Concern:

The below listed telephone numbers are part of an ongoing investigation at this agency, and we are requesting that you preserve these records in accordance with United States Code, Title 18, Part I, Chapter 121, § 2703(f). The information that we are requesting to be preserved includes subscriber billing & account information, including account notes, activation information, and device information; incoming and outgoing cell tower records; incoming and outgoing call detail records; SMS records; MMS records; Cell Site Data; cell tower location information; all stored photographic or video images; all stored voice mail messages; and all RTT, PCMD, NELO and other historical GPS Precision Location Information for as far back as possible until today's date, September 1, 2020, to be preserved for 90 days pending the issuance of further court process.

In addition, we are also requesting that you preserve all incoming and outgoing text messages for as far back as possible until today's date, September 1, 2020, to be preserved for 90 days pending the issuance of further court process.

Cellular Telephone Numbers: **603-XXX-XXXX**

If you have any questions concerning this request please contact me at [Insert phone number and email address]. Thank you for your assistance in this matter.

Sincerely,

Sgt. John Doe
Milltown Police Department
Milltown, NH

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OBJECTIVES

The key objectives and features of a valid and successful sobriety checkpoint program are as follows:

- a. Strict compliance with a written plan, adequate supervision, consistency and professional execution.
- b. Accurate identification of impaired motorists.
- c. Minimization of motorist surprise, apprehension and inconvenience.
- d. Safety of motorists and participating law enforcement officers.
- e. Achieving maximum deterrent effect through aggressive public information efforts.

PLANNING AND SITE SELECTION

A common thread running through the numerous court decisions on sobriety checkpoints is that the sobriety checkpoint program must be planned and approved at the highest supervisory echelons of the law enforcement agency. This requirement is designed to eliminate virtually all discretion on the part of the officers executing the sobriety checkpoint as to location, duration, or procedures to be followed.

Two important considerations are involved in site selection. First, sites chosen should ideally be in "problem" areas, so as to maximize the effectiveness and productivity of the sobriety checkpoint. The procedure employed by the Concord Police Department in implementing a sobriety checkpoint program in 1984 provides an excellent example of a site selection process. The study which preceded the site selection decision incorporated motor vehicle accident statistics by location (if

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statistics on alcohol-related motor vehicle accidents are available, these will be particularly useful); incidence of arrests for DWI offenses by street location; and a compilation of data on the locations at which DWI arrestees had been drinking, coupled with BAC results of those drivers who submitted to chemical testing for intoxication.

Through a review of these statistics, the Concord Police Department, for example, was able to focus upon a series of areas of particular concern. Law enforcement agencies planning a sobriety checkpoint program may wish to select several potential sites, and utilize one or two at a time on a rotating basis.

The second important factor in site selection involves the physical characteristics of the site selected. The checkpoint site should be situated to permit the safe, efficient diversion of vehicles from the traffic lanes and afford space for a number of vehicles. Room must be allocated for parking of cruisers and a detention area for motorists who are selected for further investigation. Because an impaired driver should not be permitted to operate his vehicle, arrangements should be made for removal of the vehicle or for safe diversion of traffic around the immobilized vehicle. The site should permit the placement of warning signs and reflectorized panels at appropriate intervals before the checkpoint location. The site should permit safe egress from the checkpoint and reentry into the traffic lanes.

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Beyond site selection, law enforcement supervisors must devise a written plan which sets forth personnel and equipment requirements, checkpoint procedures, and contingency planning in minute detail. The plan should be reviewed periodically and updated as necessary. Each participating officer should be provided a copy of the written plan prior to the execution of sobriety checkpoint operations.

TRAINING

Law enforcement agencies utilizing sobriety checkpoints should devise a training program to acquaint participating officers with sobriety checkpoint principles and operational procedures. A briefing by the officer-in-charge should be held just prior to the set-up of each sobriety checkpoint. Law enforcement agencies may wish to provide supplemental training on identification of impaired motorists and field sobriety testing procedures.

PUBLIC INFORMATION

The chief advantage that sobriety checkpoints enjoy over more conventional DWI enforcement methods lies in their deterrent effect. Although information about a sobriety checkpoint program may be expected, over time, to pass by word of mouth, it is only through an aggressive program of advance publicity that the deterrent potential of a sobriety checkpoint program can be fully realized. Virtually every court which has addressed the sobriety checkpoint issue has suggested that advance publicity is an extremely important factor. Public awareness maximizes the deterrent value of the sobriety

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checkpoint, and minimizes fear and apprehension on the part of the motoring public.

The requirement of advance publicity has been the subject of considerable criticism because it has been misunderstood. Law enforcement agencies need not disclose precise locations at which sobriety checkpoints will be set up. Advance notice must, however, be provided of the city, town, or geographical area in which the checkpoints will be run. "The city of Concord" or "Newfound Lake area" are adequate descriptions of the areas in which sobriety checkpoints will be conducted.

Law enforcement agencies should make full use of the various media resources available. Press conferences, press releases, radio and television coverage, posters and flyers should all be considered as means of increasing public awareness of the existence of sobriety checkpoints. Only through an aggressive public information campaign can the true deterrent value of sobriety checkpoints be realized. Advance notice through media sources, coupled with appropriate warning signs at the individual checkpoint site, substantially reduces apprehension occasioned by the sobriety checkpoint.

OPERATION OF THE SOBRIETY CHECKPOINT

Personnel: Sobriety checkpoint operations should be supervised by an experienced officer. Officers staffing the sobriety checkpoint must have received appropriate training and briefings, and should carry with them a copy of the written plan for the sobriety checkpoint. All personnel should be in

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uniform, and should wear reflectorized vests for safety purposes. The personnel complement required will vary based upon location and traffic volume, but sufficient personnel resources should be allocated to (1) permit the safe diversion/direction of traffic; (2) conduct the basic screening process (greet motorists, check license/registration, observe for signs of intoxication) in an efficient manner; (3) conduct field sobriety testing of selected motorists; (4) allow pursuit of motorists who attempt to evade the checkpoint; (5) transport arrestees to police station/troop station for chemical testing and processing; (6) maintain communications with police headquarters; and (7) permit the officer in charge to perform overall supervision of checkpoints without becoming committed to any specific task.

Physical Arrangement of Sobriety Checkpoint: Signs warning motorists that they are approaching a sobriety checkpoint should be placed a sufficient distance before the checkpoint to limit surprise and apprehension and to enable motorists to decelerate and stop safely. The approach to the sobriety checkpoint should be well-marked with traffic cones and reflectorized panels. Bar lights on cruisers should be activated. Takedown lights and alley lights may be used, along with ambient lighting, to illuminate signs and personnel. A suggested pattern of signs at appropriate locations before the sobriety checkpoint, is as follows:

1. Approaching Sobriety Checkpoint
2. Dim Lights. Reduce Speed to 15 mph
3. Prepare to Stop

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An officer should be positioned slightly before the stopping point to direct the traffic flow. Lanes through which vehicles will pass for basic screening should be marked with reflectorized panels and/or cones. The detention/investigation area should be marked and illuminated. At the far end of the sobriety checkpoint, an officer may be detailed to assist motorists in reentering traffic.

Diversion of Traffic Into The Sobriety Checkpoint: Courts have uniformly held that sobriety checkpoints are acceptable only if traffic is stopped according to some standard pattern; i.e., every vehicle, every fifth vehicle, or every tenth vehicle.¹ Such a standardized procedure divests the participating officers of any discretion, and precludes stops based upon factors such as the appearance of the vehicle, the age of the occupants, etc.

Of course, if officers observe erratic operation or other factors which give rise to articulable grounds to stop a vehicle which would otherwise be waved through the checkpoint, then that vehicle should be stopped for further investigation.

¹ The procedure utilized by the Concord Police Department was to have five (5) vehicles in the screening area at any given time. As a vehicle departed the screening area, the next approaching vehicle was pulled over. This is an acceptable approach.

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Procedures:

- (1) Vehicles diverted into the sobriety checkpoint should be guided into well-marked lanes and brought to a stop.
- (2) Officers assigned to the screening process should courteously greet the driver and fully explain the purpose of the sobriety checkpoint.
- (3) The driver should be asked to produce license and registration while the officer observes the driver for signs of intoxication and observes the interior of the vehicle for controlled drugs, open beverage containers and other evidence of impairment. By engaging the driver in conversation while he or she is producing the license and registration, the officer compels the driver to perform a divided-attention task, which will be substantially more difficult for the impaired motorist.
- (4) Attempt to detain the motorist for no longer than one minute during the initial screening process. During this procedure, law enforcement agencies may want to offer drivers a brochure with information on sobriety checkpoints, New Hampshire DWI laws, "REDDI" numbers and other relevant information.²

² Politeness is an essential factor in order to minimize the intrusion to drivers and their passengers.

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If the screening officer develops articulable grounds to believe that a driver is intoxicated, or if the stop produces evidence of any other offense warranting the driver's arrest or the issuance of a summons, warning or defective equipment tag, the driver should be escorted to the detention and investigation area. For the driver who is believed to be under the influence, officers will follow procedures similar to those associated with a routine DWI stop (field sobriety test, use of preliminary breath testing device if issued, etc.) If possible, the officer who conducts the initial interview should follow through with the field sobriety testing. If the testing officer develops probable cause to believe that the driver is intoxicated, the driver should be placed under arrest and promptly transported to the police station or troop station for further processing.

Contingency Planning: Although the prearranged sobriety checkpoint plan should be followed strictly, the authorizing official should delegate to the officer in charge authority to make limited practical changes. For example, if any traffic congestion develops, the officer in charge should be authorized to wave traffic through the checkpoint area until the congestion is alleviated. Similarly, the officer in charge may be delegated authority to displace the sobriety checkpoint to another predesignated location if circumstances warrant.³

³ Factors such as extremely light traffic or evidence that the precise location of the checkpoint has been widely disclosed may make displacement to another approved location desirable.

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The reasons for any change in the location of the checkpoint must be carefully documented.

Records

Detailed records should be maintained of sobriety checkpoint operations. Records should document, as a minimum, number of vehicles stopped; number of drivers detained for further investigation; number of persons arrested for DWI; number of persons arrested for other offenses; number of summonses, warnings and defective equipment tags issued; and number of manhours expended for the checkpoint operation. Obviously, individual officer reports should carefully document the investigation and processing of DWI arrestees. Anything unusual which occurs should be documented as well.

NEW HAMPSHIRE

Department of Justice

Office of the Attorney General



DRUG OVERDOSE DEATH INVESTIGATIONS

- **PRESERVE** *Call Anytime for Assistance:*
- **INFORM** Legal / State Assistance?
NHDOJ Overdose Deaths - 603-230-0846
- **INTERVIEW** Investigative / Intel Assistance?
DEA Strike Force - - - - - 603-213-0925
- **PROCESS**

Overdose Death Investigations

PRESERVE the Scene After Checking the Victim's Status; Separate Witnesses; Start Crime Scene Log; Document Entries; Use Gloves/Booties
CAUTION WITH HEROIN/FENTANYL
DO NOT TOUCH—USE GLOVES AND MASKS

INFORM Others for Assistance: Uniform/Detectives; ADME; NHDOJ Overdose Deaths; DEA Strike Force

INTERVIEW and Fully ID All Subjects Present (incl. Phone #s); Take At-Scene Statements—Audio/Written if Possible; Formal Interviews Should be A/V Recorded; Mirandize if Custodial

PROCESS Scene & Make Detailed Descriptions; Sketch & Photograph; ID/Document Drugs, Paraphernalia, Scripts, Packaging, Prescription Bottles, and Ledgers/Logs; Initial, Seal, and Label All Items Processed (Biohazards = Paper) (Drugs/Documents = Plastic) (Syringes/Needles = Sharps Containers); PHOTOGRAPH EVERYTHING SEIZED: FAR, MEDIUM, & CLOSE

PHONES Should Be Secured; Document Cell Phone #s and PIN #/Pattern to Access Phone; ID Carrier (Ex. Sprint) and Fax Preservation Letter of Victim/Suspect's Phones to Cell Carriers; Put Phone Into Airplane Mode and Secure; If Possibility of Other Users, Secure Phone and Obtain Search Warrant; Write Down and Screen Shot the Last 10 Calls/Texts Sent/Received, then



John J. Bartholmes
Commissioner of Safety

STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
DIVISION OF MOTOR VEHICLES

23 Hazen Drive, Concord, NH 03305

008579

Virginia C. Beecher
Director of Motor Vehicles

Name: _____
(AND ALIASES)

Mailing Address: _____

Date of Arrest _____

Date of Birth _____

License Number _____

State of License _____

I. FELONY ADMINISTRATIVE LICENSE SUSPENSION RIGHTS

1. You have been arrested for an offense arising out of acts alleged to have been committed while you were driving under the influence of alcohol or drugs.
2. You have been asked to submit to a test or tests, at the discretion of a law enforcement officer, in order to determine the alcohol or drug concentration in your system. You may be asked to perform a breath, blood or urine, or physical test, or any combination of these. You do not have the right to refuse the requested test or tests.
3. You have the right to a similar test or tests of blood, urine or breath taken by a person of your own choosing at your own expense. Upon your request, you will be given the opportunity for such an additional test(s). You also have the right to obtain a sample of your breath, blood, or urine for testing at your own expense.
4. If the test taken at the direction of the law enforcement officer shows an alcohol concentration of 0.08 or more (or if you are under age 21, of 0.02 or more), your New Hampshire driver's license/operating privileges or non-resident operating privilege in this state will be suspended.
5. I have been informed of these rights.

_____ Defendant

_____ Officer / Witness

II. OFFICER'S REPORT

I, _____ (officer's name), of the _____
complete mailing address

Police Department hereby swear that I requested a test pursuant to RSA 265:A:4 and that _____
Driver's name

- Submitted to testing which disclosed an alcohol concentration of _____ percent.
- I received blood/urine test results on _____ date.

_____ Officer's Signature

Personally appeared and sworn to before me this _____ day of _____, year _____

DEPT. OF SAFETY COPY

_____ (Notary Public or Justice of the Peace)

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL



ANN M. RICE
DEPUTY ATTORNEY GENERAL

TO : All Law Enforcement Agencies
County Attorneys
FROM: Joseph A. Foster, Attorney General
DATE : April 3, 2015
RE : Model Procedures for Eyewitness Identification Procedures

Eyewitnesses can play a critical role in the investigation and prosecution of a crime. The information provided by an eyewitness can be key in the identification of a perpetrator or the exoneration of a person of interest. However, scientific research has demonstrated, eyewitness evidence is not infallible. An honest and well-meaning witness can identify the wrong person or fail to identify the perpetrator of a crime. Often, the accuracy of an eyewitness's identification is impacted by the procedure used to obtain the information.

In response to the recognized problems with commonly used procedures to collect eyewitness evidence, model procedures have been developed that are based on scientific research. These model procedures reduce or eliminate factors that can undermine reliability and accuracy, thus producing more reliable eyewitness evidence.

Because eyewitness evidence can be such powerful evidence, it is important that law enforcement take steps to minimize the factors that could render such evidence unreliable. To assist in that process, I am issuing the attached a model protocol for law enforcement in New Hampshire, which incorporates the best practices for the collection and preservation of eyewitness evidence.

I recognize that a law enforcement agency's ability to adhere to the procedures set out in the protocol will depend, to some degree, on the agency's staffing and access to recording equipment. For that reason, the procedures set forth are not mandatory. Rather, they should be considered as the standard to which all law enforcement agencies should strive and, to the extent possible, should implement.

Police Chief William Brooks of Norwood, Massachusetts, a national expert on best practices for eyewitness evidence, has agreed to provide training on the procedures outlined in the protocol. We will be sending out a training notice when the schedule has been finalized. You can also find a variety of training materials, videos, and guides on the Norwood police department's website at <http://www.norwoodpolice.com/chieftrainingmaterials.html>.

I urge you to incorporate the attached protocol into your department's standard operating procedures.

MODEL POLICY ON EYEWITNESS IDENTIFICATION

Preparing a Photo Array

1. When assembling a photo array, officers should endeavor to use a current and accurate photograph of the suspect. Filler photographs should be selected based on their similarity to the witness's description of the suspect, not to the appearance of the suspect. Nothing about the suspect's photo should make him or her stand out.
2. An array should contain seven fillers, but in no event less than five, and only one suspect photograph.
3. If the suspect has a unique or unusual feature, such as facial scars or severe injuries, the officer preparing the array should create a consistent appearance between the suspect and fillers by adding the feature to the fillers or by covering the area on every photograph.
4. Once the array has been assembled, the officer should examine it to ensure that nothing about the suspect's photo makes the suspect unduly stand out.

Showing a Photo Array

1. The showing of a photo array must be conducted in a manner that promotes reliability, fairness and objectivity.
2. Whenever practicable, officers should videotape or audiotape the showing of a photo array.
3. Each witness must view the photographs independently and out of the presence and hearing of the other witnesses.
4. Officers must avoid suggestive statements that may influence the judgment or perception of the witness.
5. It is preferable that a second officer who is unaware of which photograph depicts the suspect, known as a blind administrator, should actually show the photographs to the witness. This technique, called double-blind administration, is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect. It also allows the prosecution to demonstrate to the judge or jury that it was impossible for the officer showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph the witness should select.
6. If it is not practicable to use double-blind administration, a blinded technique such as the folder shuffle should be used. In all cases, officers shall employ techniques that ensure that no officer present for the showing of an array can tell when the witness is viewing a photograph of the suspect.

7. The investigating officer or the second officer (the administrator) should carefully instruct the witness by reading from a departmental Photo Array Instruction Form, and the witness should be asked to sign the form indicating that the witness understands the instructions. The investigating officer and the administrator should also sign and date the form.
8. When the double-blind technique is used, the officer should explain to the witness that the officer showing the array does not know the identity of the people in the photographs.
9. The officer shall show the photographs to the witness one at a time and ask the witness whether or not the witness recognizes the person.
10. When the witness signals for the next photograph, the officer should move the first photograph so that it is out of sight and ask the witness whether they recognize the next photograph. The procedure should be repeated until the witness has viewed each photograph.
11. If the witness identifies a photograph, the officer should ask the witness how certain they are of the identification.
12. If the witness identifies a photograph before all the photographs have been viewed, the officer should remind the witness that the officer is required to show the rest of the photographs.
13. Witnesses who ask to see a photo or line-up participant additional times should be shown the entire array or lineup. The order of the photographs should be shuffled before the array is shown for a subsequent time and before any additional showing.
14. The photo array should be preserved as evidence in the same order as when the identification was made.
15. If more than one witness is to view an array and a witness has already marked one of the photos, a separate unmarked array shall be used for each subsequent witness.
16. When an officer is showing a photographic array or lineup to a subsequent witness in the same investigation, officers should shuffle the order to demonstrate that there could be no collusion between the two witnesses.
17. If there are two or more suspects of a particular crime, officers must present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.

Photo Array Instruction Form (double-blind)

1. You are being asked to view a set of photographs.
2. You will be viewing the photographs one at a time and in random order.
3. Please look at all of them. I am required to show you the entire series.
4. Please make a decision about each photograph before moving on to the next one.
5. The person you saw may or may not be in the set of photographs you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. The officer showing the photographs does not know whether any of the people in the array are the person you saw.
8. If the person you saw is in this line-up, the person may not appear exactly as he/she did on the date of the incident because features such as head and facial hair are subject to change.
9. Regardless of whether or not you select a photograph, the police department will continue to investigate the incident.
10. If you select a photograph, the procedure requires the officer to ask you to state, in your own words, how certain you are.
11. If you do select a photograph, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
12. Regardless of whether you select a photograph, please do not discuss the procedure with any other witnesses in the case or the media.
13. Do you have any questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:

Please tell me how certain you are. _____

Photo Array Instruction Form

1. You are being asked to view a set of photographs.
2. You will be viewing the photographs one at a time and in random order.
3. Please look at all of them. I am required to show you the entire series.
4. Please make a decision about each photograph before moving on to the next one.
5. The person you saw may or may not be in the set of photographs you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. If the person you saw is in this line-up, the person may not appear exactly as he/she did on the date of the incident because features such as head and facial hair are subject to change.
8. Regardless of whether or not you select a photograph, the police department will continue to investigate the incident.
9. If you select a photograph, I am required to ask you to state, in your own words, how certain you are.
10. If you do select a photograph, please do not ask me about the person you have selected, as no information can be shared with you at this stage of the investigation.
11. Regardless of whether you select a photograph, please do not discuss the procedure with any other witnesses in the case or the media.
12. Do you have any questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:

Please tell me how certain you are. _____

In-person Line-ups

1. Line-ups should be conducted under the direction of a supervisor, and when feasible, after consultation with the prosecutor with jurisdiction over the case.
2. Prior to arrest, unless a suspect consents, the suspect cannot be detained and compelled to participate in a line-up without a search warrant. If a suspect has been arrested and refuses to participate in a line-up, the prosecutor may apply for a court order to compel the suspect to cooperate.
3. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a line-up, or other live identification procedure, the suspect must be informed of their right to have an attorney present at the line-up and to be provided with an attorney at no cost if they are unable to afford legal counsel. Unless a valid waiver is voluntarily and knowingly made, in writing if possible, no such identification may proceed without the presence of the suspect's attorney.
4. Officers must select a group of at least five fillers who fit the description of the offender as provided by the witness(es). Because the line-up should be administered by an officer who does not know the identity of the suspect, the fillers selected should not be known to the officer administering the line-up. In selecting line-up fillers, abide by the guidelines for photo array fillers as described above. If counsel for the suspect is present, counsel may offer reasonable suggestions about the composition or arrangement of the individuals in the line-up. Any suggestions offered by counsel, whether or not incorporated into the line-up, should be documented and included in the written report of the line-up.
5. The suspect should be viewed by one witness at a time and out of the presence or hearing of other witnesses. Witnesses who have viewed the suspect should not be permitted to communicate with those who have not, until the identification procedure is completed.
6. All persons in the line-up should carry cards that identify them only by number and should be referred to only by their number. As with photo arrays, each witness must view the line-up independently, out of the presence and hearing of the other witnesses.
7. When the double-blind technique is used, the investigating officer should explain to the witness that a second officer (the line-up administrator) will be conducting the line-up, and that the administrator does not know the identity of the people participating.
8. The investigating officer must carefully instruct the witness by reading from a departmental Line-up Instruction Form, and the witness should be asked to sign the form indicating that they understand the instructions. The officer should also sign and date the form.
9. When the double-blind technique is used, the investigating officer must leave the room while the line-up administrator conducts the line-up.

10. The line-up should be conducted so that the suspect and fillers do not actually line up, but rather so that they are displayed to the witness one at a time. This can be accomplished by having them enter the room individually and leave before the next one enters.
11. The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo arrays. Whenever practicable, the police should videotape or audiotape a line-up.
12. Counsel representing the suspect may be afforded a reasonable amount of time to confer with their client prior to the line-up. Once the line-up has commenced, attorneys should function primarily as observers, and should not be permitted to converse with the line-up participants, or with the witnesses, while the line-up is underway. The concept of blind administration requires that no one be present who knows the identity of the suspect. For this reason, any attorney who knows the suspect should leave the room before the line-up begins. An attorney who does not know the suspect may attend the line-up on behalf of defense counsel or the prosecutor.
13. During a line-up, each participant may be directed to wear certain clothing, to put on or take off certain clothing, to take certain positions, or to walk or move in a certain way. If the participants are asked to wear an article of clothing, the police must guard against circumstances where the article only fits the suspect. All line-up participants shall be asked to perform the same actions.
14. Line-up participants must not speak during the line-up. If identification of the suspect's voice is desired, a separate procedure must be conducted. (See section on Voice Identification below).
15. After a person has been arrested, they may be required to participate in a line-up regarding the crime for which they were arrested. After arrest, a suspect may lawfully refuse to participate in a line-up only if they have a right to have counsel present (post arraignment/indictment) and counsel is absent through no fault of the suspect or their attorney.
16. If there are two or more suspects of a particular crime, officers must present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.

In-Person Line-up Instruction Form (double-blind)

1. You are being asked to view a group of people.
2. You will be viewing them one at a time in random order.
3. Please look at all of them. The officer is required to show you the entire group.
4. Please make a decision about each person before moving onto the next one.
5. The person who you saw may or may not be one of the people you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. The officer who will be administering the line-up does not know whether any of the people in the line-up are the person you saw.
8. If the person you saw is in this line-up, the person may not appear exactly as he/she did on the date of the incident because features such as head and facial hair are subject to change.
9. Regardless of whether or not you select someone, the police department will continue to investigate the incident.
10. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.
11. If you do select someone, please do not ask the officer questions about the person you have selected.
12. Regardless of whether you select someone, please do not discuss the procedure with any other witnesses in the case or the media.
13. Do you have questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:

Please tell me how certain you are. _____

In-Person Line-up Instruction Form

1. You are being asked to view a group of people.
2. You will be viewing them one at a time in random order.
3. Please look at all of them. I am required to show you the entire series.
4. Please make a decision about each person before moving onto the next one.
5. The person who you saw may or may not be one of the people you are about to view.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. If the person you saw is in this line-up, the person may not appear exactly as he/she did on the date of the incident because features such as head and facial hair are subject to change.
8. Regardless of whether or not you select someone, the police department will continue to investigate the incident.
9. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.
10. If you do select someone, please do not ask me about the person you have selected.
11. Regardless of whether you select someone, please do not discuss the procedure with any other witnesses in the case or the media.
12. Do you have questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:

Please tell me how certain you are. _____

In-Person Voice Identification

1. Although considerably less common than visual identifications, voice identifications may be helpful to criminal investigations where the victim or witness was blind, the crime took place in the dark, the subject was masked, the witness's eyes were covered by the perpetrator, or the witness was never in the same room with the perpetrator but heard the perpetrator's voice. If officers wish to conduct a voice identification procedure with a witness who also saw the subject, they should first consult with a supervisor, and when feasible, the prosecutor with jurisdiction over the case.
2. As with any in-person identification or confrontation, if the suspect has been arraigned or indicted, the suspect has a right to have counsel present during the voice identification procedure.
3. Where voice identification is attempted, the following procedures should be employed to the extent possible.
 - a. As in a line-up, there should be at least six people whose voices will be listened to by the witness; one-on-one confrontations should be avoided. Because line-ups should be administered by an officer who does not know the identity of the suspect, the fillers should not be known to the officer administering the procedure;
 - b. The suspect and other participants must not be visible to the witness. This can be done by using a partition, or by similar means;
 - c. All participants, including the suspect, shall be instructed to speak the same words in the same order;
 - d. The line-up participants should speak in a normal tone of voice;
 - e. When both a visual and voice line-up are conducted, the witness should be informed that the line-up participants will be called in a different order and by different numbers;
 - f. If there are two or more suspects of a particular crime, officers must present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.
4. As with any identification procedure, police officers should avoid any words or actions that suggest to the voice witness that a positive identification is expected, or who they expect the witness to identify.
5. The investigating officer should carefully instruct the witness by reading from a departmental Voice Identification Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form. Whenever practicable, officers should videotape or audiotape the procedure.

6. When the double-blind technique is used, officers should adhere to the principles of blind administration as described above. As is the case with photo arrays and line-ups, the investigating officer should leave the room while the administrator conducts the procedure.

In-Person Voice Identification Instruction Form (double-blind)

1. You are being asked to listen to several people speak.
2. You will be hearing them one at a time and in random order.
3. Please listen to all of them. I am required to present you the entire series.
4. Please make a decision about each person before moving on to the next one.
5. The person you heard may or may not be one of the people you are about to hear.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. The officer administering this procedure does not know whether any of the people are the person you heard.
8. Regardless of whether or not you select a person, the police department will continue to investigate the incident.
9. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.
10. If you do select someone, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
11. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.
12. Do you have any questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:

Please tell me how certain you are. _____

Voice Identification Instruction Form

1. You are being asked to listen to several people speak.
2. You will be hearing them one at a time and in random order.
3. Please listen to all of them. I am required to present you the entire series.
4. Please make a decision about each person before moving on to the next one.
5. The person you heard may or may not be one of the people you are about to hear.
6. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
7. Regardless of whether or not you select a person, the police department will continue to investigate the incident.
8. If you select someone, the procedure requires the officer to ask you to state, in your own words, how certain you are.
9. If you do select someone, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
10. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.
11. Do you have any questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:

Please tell me how certain you are. _____

MIRANDA WARNING

Initials

- 1. You have the right to remain silent. _____
- 2. Anything you say can be used against you in court. _____
- 3. You have the right to talk to an attorney for advice before any questioning, and to have the attorney with you during the questioning. _____
- 4. If you cannot afford an attorney and you desire to talk to one, an attorney will be appointed for you before any questioning. _____
- 5. If you decide to answer questions now, without an attorney present, you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to an attorney. _____

I have read and have had explained to me the above statement of my rights, and I fully understand what my rights are. _____

I am willing to waive these rights at this time and make a statement and answer questions. Yes _____ No _____

Signed _____ Witness _____

Date _____ Time _____

Juvenile Rights Form

Name of Child in Custody _____

Place _____

Date _____ Time child taken into custody _____

Time this form was read _____

(The following is to be read and explained by the officer, and the child shall read it before signing.)

Before I am allowed to ask you any questions, you must understand that you have certain rights, or protections, that have been given to you by law. These rights make sure that you will be treated fairly. You will not be punished for deciding to use these rights. I will read your rights and explain them to you. You may ask questions as we go along so that you can fully understand what your rights are.

Do you understand me so far? Yes ____ No ____.

1. You have the right to remain silent. This means that you do not have to say or write anything. You do not have to talk to anyone or answer any questions we ask you. You will not be punished for deciding not to talk to us.

Do you understand this right? Yes ____ No ____.

2. Anything you say can and will be used against you in a court. This means that if you do say or write anything, what you say or write will be used in a court to prove that you may have broken the law.

Do you understand this? Yes ____ No ____.

3. You have the right to talk to a lawyer before any questioning. You have the right to have the lawyer with you while you are being questioned. The lawyer will help you decide what you should do or say. The things you say to the lawyer cannot be used in court to prove that you may have broken the law. If you decide you want a lawyer, we will not question you until you have been allowed to talk to the lawyer.

Do you understand this right? Yes ____ No ____.

4. If you want to talk to a lawyer and you cannot afford one, we will get you a lawyer at no cost to you before any questioning begins. This means that if you want a lawyer and you cannot pay for one, you still may have one.

Do you understand this right? Yes ____ No ____.

5. You can refuse to answer any or all questions at any time. You also can ask to have a lawyer with you at any time. This means that if you decide, at any time during questioning, that you do not want to talk, you may tell us to stop and you cannot be asked any more questions. Also, if you decide you would like to talk to a lawyer at any time during questioning, you will not be asked any more questions until a lawyer is with you.

Do you understand this right? Yes ____ No ____.

6. (In felony cases only) There is a possibility that you may not be brought to juvenile court but instead will be treated as an adult in criminal court. There you could go to a county jail or the State prison. If you are treated as an adult you will have to go through the adult criminal system, just as if you were 18 years old. If that happens, you will not receive the protections of the juvenile justice system.

Do you understand this? Yes ____ No ____.

7. Do you have any questions so far? Yes ____ No ____.

(This portion is now to be read by the child.)

I can read and understand English. Yes ____ No ____.

I have been read and I have read my rights as listed above. I fully understand what my rights are. I do not want to answer any questions at this time and I would like to have a lawyer.

Signature of child _____ Date _____ Time _____

Waiver of Rights

(This portion is to be read by the child.)

I can read and understand English. Yes ____ No ____.

I have been read and I have read my rights as listed above. I fully understand what my rights are. I have been asked if I have any questions and I do not have any. I am willing to give up my right to silence and answer questions. I give up my right to have a lawyer present. I do not wish to speak to a lawyer before I answer any questions. No promises or threats or offers of deals have been made to me to make me give up my rights. I understand that I may change my mind at any time and say that I want my rights if I choose. However, if I change my mind, it will not affect what I have already done or said.

Signature of child _____ Date _____ Time _____

Signature of witness _____ Date _____ Time _____

THE STATE OF NEW HAMPSHIRE JUDICIAL BRANCH

DOMESTIC VIOLENCE/STALKING CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL

Case Number: _____ PNO Number: _____
 Court: _____
 Court ORI: _____
 Address: _____ County: _____
 SU Case Number _____ SU PNO _____ SU ORI _____

State of New Hampshire

v.

ADOPTED BY SU **AMENDED ORDER** **VACATE ORDER** Date _____

DEFENDANT'S NAME: First _____ Middle _____ Last _____	DEFENDANT IDENTIFIERS: DOB _____ HEIGHT _____ SEX <input type="checkbox"/> M <input type="checkbox"/> F WEIGHT _____ RACE _____ EYES _____ State/Birth _____ HAIR _____ ETHNICITY <input type="checkbox"/> Hispanic <input type="checkbox"/> Non-Hispanic <input type="checkbox"/> Refused
DEFENDANT'S PHYSICAL ADDRESS (additional info on Pg 4): _____ _____ _____	
Agency Case Number: _____ Date of Offense: _____	

PROTECTED PARTY #1 NAME: DEFENDANT'S RELATIONSHIP TO PROTECTED PARTY*: <u>Intimate Partner:</u> <input type="checkbox"/> Spouse <input type="checkbox"/> Former spouse <input type="checkbox"/> Parent of defendant's child <input type="checkbox"/> Cohabit/Cohabited (intimate relationship required) * <input type="checkbox"/> Additional protected parties on Pg 2	DOB: _____ <input type="checkbox"/> Male <input type="checkbox"/> Female DISTINGUISHING FEATURES: SKIN TONE: _____ SCARS, MARKS, TATTOOS: _____ Location and description: _____
<input type="checkbox"/> Other: <input type="checkbox"/> Protected Party is Child of Intimate Partner <input type="checkbox"/> Parent	

CAUTION <input type="checkbox"/> Weapon involved <input type="checkbox"/> Weapon is ordered to be relinquished pursuant to New Hampshire state law RSA 597	<table style="width: 100%;"> <tr> <td style="width: 20%;">LICENSE INFO:</td> <td style="width: 20%;">DRIVER'S LICENSE#:</td> <td style="width: 20%;">STATE</td> <td style="width: 20%;">EXP DATE</td> <td style="width: 20%;"></td> </tr> <tr> <td>VEHICLE INFO:</td> <td>YEAR</td> <td>MAKE</td> <td>COLOR</td> <td>STYLE</td> </tr> <tr> <td></td> <td>MODEL</td> <td></td> <td>VIN #</td> <td></td> </tr> </table>	LICENSE INFO:	DRIVER'S LICENSE#:	STATE	EXP DATE		VEHICLE INFO:	YEAR	MAKE	COLOR	STYLE		MODEL		VIN #	
LICENSE INFO:	DRIVER'S LICENSE#:	STATE	EXP DATE													
VEHICLE INFO:	YEAR	MAKE	COLOR	STYLE												
	MODEL		VIN #													

WARNING: The attached order shall be enforced, even without registration, by the courts of any state, the District of Columbia, and any U.S. Territory, and may be enforced on Tribal Lands (18 U.S.C. § 2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. § 2262). As a result of this order it may be unlawful for you to possess or purchase a firearm including a rifle, pistol, or revolver, or ammunition pursuant to federal law under 18 U.S.C. § 922(g)(8) and state law. The defendant is advised that he/she has the further opportunity to be heard before a judge on bail issues within 24/48 hours of the request being made to the court, excluding weekends and holidays (RSA 597:6-e, l).

The above named defendant is restrained from harassing, stalking, or threatening an intimate partner, or child of an intimate partner or of the defendant, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily harm to the intimate partner or child; and

The defendant is prohibited from the use, attempted use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; and/or

The above named defendant represents a credible threat to the physical safety of such intimate partner or child;

Case Name: State of New Hampshire v

Case Number: _____

PNO: _____

CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL

It is hereby ordered pending final disposition of this matter that:

- I. A. The defendant shall be released on personal recognizance and subject to conditions listed in Paragraph II and those conditions indicated in Paragraph III.
- B. The defendant shall be released on \$ _____ cash/surety bond subject to conditions listed in Paragraph II and those conditions indicated in Paragraph III.
- C. The defendant shall be detained to permit revocation of conditional release.
- D. The defendant shall be detained for not more than 72 hours to allow for filing of a probation violation.
- E. A hearing pursuant to RSA 597:2, III shall be conducted before the acceptance of bail.
- F. The Court hereby orders that the defendant be detained without bail pursuant to RSA 597:2, III-a.

- II. Defendant's release is subject to the conditions that:
 - A. **Defendant appear at all court proceedings as ordered, including at this court to answer this charge at _____ AM PM on _____**
 - B. Defendant not commit a federal, state or local crime while on release.
 - C. Defendant advise the court in writing of all changes of address within 24 hours.
 - D. Defendant comply with all civil domestic violence and stalking orders of protection.

- III. The Court hereby determines that defendant's release under Paragraph I (A) or (B):
 - will not reasonably assure the appearance of defendant as required; and/or
 - will endanger the safety of the defendant or of another person or the community.

By reason of such determination, the Court imposes the following additional conditions that defendant:

- A. Shall have no contact with _____ by mail, telephone, fax, e-mail, the sending or delivery of gifts, through a third party or any other method unless specifically authorized by the Court, and is further ordered not to interfere with this person at his/her residence, school or place of employment and additionally is ordered to refrain from going within _____ feet of where such person(s) may be.
 Protected Party #2 name: _____ DOB: _____ M F
 Protected Party #3 name: _____ DOB: _____ M F
 Protected Party #4 name: _____ DOB: _____ M F
- B. Shall live at: _____
- C. Shall not travel outside of: _____
- D. Other travel restrictions: _____
- E. Shall refrain from possessing a firearm, destructive device, dangerous weapon, or ammunition.
- F. Shall refrain from any use of alcohol, and use of a narcotic drug or controlled substance as defined in RSA 318-B.
- G. Shall comply with the following curfew: _____
- H. Is ordered not to drive until defendant's license or privilege is restored by the Director of Motor Vehicles.

Case Name: State of New Hampshire v

Case Number: _____ PNO: _____

CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL

- I. Shall report to arresting law enforcement agency or _____ as required.
 - J. Shall remain in the custody of _____, a responsible adult residing at _____, N.H, who agrees to supervise the defendant and to report any violation of a release condition to the Court. The Court has found that the above named adult has reasonably assured the Court that the defendant will appear as required and will not pose a danger to the safety of any person in the community.
 - K. Sign a waiver of extradition before released on bail.
 - L. Shall not use or attempt to use or threaten to use physical force against the protected party(ies) _____, or the parties' children which would reasonably be expected to cause bodily injury.
 - M. Is restrained from harassing, stalking, abusing or threatening to abuse the protected party(ies) family or household members, or protected party(ies) relatives (regardless of place of residence), or engaging in other conduct which would place a person in reasonable fear of bodily injury to the person or person's household members or relatives.
 - N. Other: _____
- IV. The defendant is hereby advised that in the event the defendant violates any of the above conditions of release the defendant may:
- A. Be subject to immediate arrest and detention;
 - B. Be subject to imprisonment for contempt of court;
 - C. Be subject to immediate revocation of release;
 - D. Be subject to additional imprisonment of one year if the defendant commits a misdemeanor while on release; and
 - E. Be subject to additional imprisonment of seven years if the defendant commits a felony while on release.

So Ordered:

Date
Bail Commissioner Fee \$ _____

Signature of Judge / Bail Commissioner

Printed Name of Judge / Bail Commissioner

Amendments to bail conditions so ordered:

Date

Signature of Judge

Printed Name of Judge

Case Name: State of New Hampshire v

Case Number: _____

PNO: _____

CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL**Acknowledgment of Receipt:**

I hereby acknowledge receipt of the above order and the penalties below and:

 Defendant received a copy of "What You Need to Know."_____
Date_____
Signature of Defendant_____
Defendant Cell Phone Number_____
Defendant Mailing Address_____
Defendant Alternative Phone Number_____
Defendant City/State/Zip Code_____
Defendant Email Address_____
Signature of Surety**NOTICE OF INTERSTATE ENFORCEMENT AND
COMPLIANCE WITH THE VIOLENCE AGAINST WOMEN ACT (VAWA)**

1. This criminal protective order meets all full faith and credit requirements of the Violence Against Women Act, 18 U.S.C. § 2265 (1994). This Court has jurisdiction over the parties and the subject matter; the defendant has been afforded notice and a timely opportunity to be heard as provided by the laws of this jurisdiction. This order is valid and enforceable throughout New Hampshire and all other states, the District of Columbia, all tribal lands and all U.S. Territories, and shall be enforced as if it were an order of any such jurisdiction.
2. Violations of this order are subject to state and federal criminal penalties. If the restrained party (the defendant) travels across state or tribal boundaries, or causes the protected party to travel across state or tribal boundaries, with the intent to violate the protective orders and then violates a protective provision of this order, the defendant may be prosecuted for a federal felony offense under the Violence Against Women Act, 18 U.S.C. § 2262(a)(1) or (2) (1994).
3. It shall be unlawful for any person subject to a qualifying protection order to possess any firearm or ammunition in or affecting commerce; or to ship, transport or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. A qualifying court order is an order that was issued after a hearing of which the defendant received actual notice, and at which the defendant had an opportunity to participate; and includes a finding that such person represents a credible threat to the physical safety of an intimate partner or child of such person or intimate partner or which restrains the person from harassing, stalking, or threatening an intimate partner or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. 18 U.S.C. § 922 (g) (8).
4. It shall be unlawful for any person convicted in any court of a misdemeanor crime of domestic violence to ship, transport in interstate commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922 (g) (9).
5. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**
http://www.courts.state.nh.us

Court Name: _____
 Case Name: _____
 Case Number: _____
 (if known)

DETENTION ASSESSMENT SCREENING INSTRUMENT

Juvenile Name: _____		DOB: _____	Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female
Address: _____		Town/City: _____	Phone: _____
Ethnicity: <input type="checkbox"/> Hispanic <input type="checkbox"/> Non-Hispanic			
Race: <input type="checkbox"/> White/Caucasian <input type="checkbox"/> Black/African American <input type="checkbox"/> Native American <input type="checkbox"/> Asian			
<input type="checkbox"/> Pacific Islander <input type="checkbox"/> Two or More Races			
Parent/Guardian Name: _____			Contacted? <input type="checkbox"/> Yes <input type="checkbox"/> No
Screening date/time: _____		Person completing form: _____	

All forms, whether the youth is detained or not, should be forwarded to the following email address: jdai@courts.state.nh.us. If the youth is detained, a hard copy of the form should be submitted to the Court and Juvenile Probation Parole Officer for use at the RSA 169-B:14 hearing.

I. CURRENT OFFENSE(S)

A. Most serious current offense: _____	Score:	Total:
(Choose only 1 item indicating the most serious charge)		
1. Level IV offenses	15	<input type="checkbox"/>
2. Level III offenses	8	<input type="checkbox"/>
3. Level II offenses	4	<input type="checkbox"/>
4. Level I offenses* (Must complete part B)	2	<input type="checkbox"/>
5. Violations of Conditional Release/FTA/Contempt on a Level II,III or IV offense	1	<input type="checkbox"/>
6. Violations of Cond. Release/FTA/Contempt on a Level I offense* (Must complete part B)	1	<input type="checkbox"/>

B. *Additional criteria for Level I offenses

(To be completed only if the most serious current offense listed above is a Level I offense or a Violation of Conditional Release/FTA/Contempt on a Level I offense, all others proceed to Part C).

1. Has the youth been previously adjudicated for at least 3 offenses, not of common scheme, which would be felonies or class A misdemeanors if committed by an adult? YES NO UNK
2. Was the youth represented by counsel at each stage of the prior proceeding following the Arraignment? YES NO UNK

If the answer to both questions is "YES" you may proceed to Part C.

If the answer to EITHER question is "NO" or "UNK", the youth is NOT ELIGIBLE for detention, pursuant to RSA 169-B:19, I(j). For assistance finding a non-secure placement after normal business hours or on holidays, please call 1-888-230-0606 and ask for the Juvenile Justice Helpline on-call Supervisor/Administrator. During normal business hours you may call your local Juvenile Probation Parole office. Please forward this form to the following email address for data collection: jdai@courts.state.nh.us.

C. Additional current offense(s): _____ (Choose one)

(Identify additional current offenses that are NOT lesser included offenses of the most serious offense identified in Part A).

1. Two or more additional felony level offenses	3	<input type="checkbox"/>
2. One additional felony level offense	2	<input type="checkbox"/>
3. One or more additional misdemeanor level offense	1	<input type="checkbox"/>
4. No additional current offenses	0	<input type="checkbox"/>

II. PETITIONS PENDING ADJUDICATION (Choose one)

("Pending" implies that the youth has been arraigned and is awaiting adjudication or disposition.)

1. One or more petitions pending for felony level offense(s)	8	<input type="checkbox"/>
2. Two or more petitions pending for misdemeanor A level offenses	5	<input type="checkbox"/>
3. One petition pending for misdemeanor level offense	2	<input type="checkbox"/>
4. No pending petitions	0	<input type="checkbox"/>

Case Name: _____

Case Number: _____

DETENTION ASSESSMENT SCREENING INSTRUMENT

III. PRIOR FINDINGS OF DELINQUENCY (Choose one)

- 1. Found delinquent on Felony level offense within the last 90 days 8
- 2. Found delinquent on Misdemeanor level offense within the last 90 days 4
- 3. Two or more prior findings for Felony offenses within the last 12 months 6
- 4. One prior finding for Felony offense within the last 12 months 4
- 5. Two or more prior findings for Misdemeanor offenses within the last 12 months 4
- 6. One prior finding for Misdemeanor A offense within the last 12 months 2
- 7. One or more prior findings on Violations of Conditional Release within last 12 months 2
- 8. No prior findings within the last 12 months 0

IV. RUNAWAY/ABSCONDING HISTORY (within last 12 months) (Choose one)

- 1. Youth is currently absconding from a court-ordered placement 4
- 2. One or more instances of absconding from a court-ordered placement 2
- 3. One or more runaways from home 1
- 4. No incidents of absconding or running away 0

V. FAILURE TO APPEAR HISTORY (within last 12 months) (Choose one)

- 1. One or more Bench Warrants issued for FTA 2
- 2. No Bench Warrants issued for FTA 0

VI. MITIGATING/AGGRAVATING FACTORS (Choose all that apply)

(Each item is worth 1 point. Subtract the Mitigating factors and add the Aggravating factors to your total.)

- 1. Youth is 13 or younger 1
- 2. Youth has had NO law violations within the past 12 months 1
- 3. Youth regularly attends school or is employed 1
- 4. Parent/caregiver is willing and able to provide appropriate supervision 1
- 5. Youth is actively engaged with a medical or counseling professional 1
- 6. Competency is pending or youth has been found incompetent within prior year 1
- 7. No prior placement history 1

Points Subtracted _____

- 8. Youth is currently on conditional release 1
- 9. Youth has been terminated from a non-secure placement 1
- 10. A deadly weapon was involved in alleged current offense 1
- 11. Parent/caregiver unable or unwilling to provide appropriate supervision 1
- 12. Youth is suicidal/homicidal but ineligible for an Involuntary Emergency Admission 1
- 13. Youth is currently under the influence of drugs/alcohol but medically cleared 1
- 14. Other: _____ 1

Points Added _____

VII. TOTAL SCORE

VIII. INDICATED RISK FACTOR DECISION SCALE

(Based on the total score, choose the corresponding point range.)

- Score 0- 6 points Release
- Score 7- 11 points Non-secure alternative option
- Score 12+ points Detention

IX. JUDICIAL DECISION (to be completed by Judge)

- Release** _____ (List adult to whom youth is released)
- Release to non-secure alternative** _____ (Identify non-secure alternative)
- Detention** _____

If the Judicial Decision and the Indicated Risk Factor Decision are NOT the same, please give the reasons here:

 Date

 Signature of Judge

 Name of Judge

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

DETENTION ASSESSMENT SCREENING INSTRUMENT (DASI)
INSTRUCTIONS

When to Fill Out:

Anytime law enforcement and/or Juvenile Justice personnel are seeking a secure, out-of-home placement of a juvenile.

The instrument must be completed prior to seeking judicial approval.

Help Completing the Form:

During normal business hours, contact your local Juvenile Probation Parole office for assistance. After normal business hours, or on holidays, please call 1-888-230-0606 and ask to speak to the Juvenile Justice Helpline on-call Supervisor/Administrator.

I-A Most Serious Current Offense:

Choose the most serious current offense and fill it in on the blank space provided. Determine what level the offense falls into by using the "Offense Ranking" list. Match this to the corresponding score.

If the most serious current offense is a Level I offense or a Violation of Conditional Release/FTA/Contempt with a Level I underlying offense, you must proceed to Part B. If the most serious current offense is a Level II- IV, proceed to Part C.

I- B Additional Criteria for Level I Offense:

This section must be completed if the most serious current offense is a Level I offense. Answer both questions. If both answers are "YES" proceed to Part C. If you answer "NO" or "UNK" to either question, the youth is not eligible for detention. Please see next section for ineligible youth.

Youth Not Eligible for Detention:

If after completing Section I, Part B, it is determined that the youth is not eligible for detention, a non-secure alternative may be an option. For assistance in determining the availability of such an option you can contact your local Juvenile Probation Parole office during normal business hours or call 1-888-230-0606 and ask to speak to the Juvenile Justice Helpline on-call Supervisor/Administrator after normal business hours or on holidays. Forward the DASI to the following email address: jdai@courts.state.nh.us.

- I- C Additional Current Offense(s):** This section allows you to add points if there are multiple charges in the referral for detention. These charges must not be lesser included offenses of the most serious charge listed in Part A. Choose the item that applies and the corresponding score. Proceed to Section II.
- II- Petitions Pending Adjudication:** If the youth is currently pending adjudication on a petition choose the item that applies and the corresponding score. "Pending" implies that the youth has been arraigned on the charge. Proceed to Section III.
- III- Prior Findings of Delinquency:** Choose the item that best applies to the youth. You can only choose 1 item. Proceed to Section IV.
- IV- Runaway/Absconding History:** Choose the item that best applies to the youth. Proceed to Section V.
- V- Failure to Appear History:** Choose the item that best applies to the youth. Proceed to Section VI.
- VI- Mitigating/Aggravating Factors:** Choose ALL that apply to the youth in each category. Subtract mitigating factors from the total and add aggravating factors to the total. Proceed to Section VII.
- VII- Total Score:** Add up the total score from each category and enter the total in the box provided. Proceed to Section VIII.
- VIII- Indicated Risk Factor Decision Scale:** Based on the total score; check the box that corresponds to the correct range of points. This is the indicated decision based on the answers to the Detention Assessment Screening Instrument. This is the final area to be completed by the law enforcement officer or Juvenile Probation/Parole Officer.
- IX- Judicial Decision:** This section is completed by the Judge. The Judge should check the box indicating what is being ordered in this case. If the Judicial decision and the indicated risk factor decision scale are not the same, the Judge is asked to give reasons in the space provided.
- What to do with the Forms:** All DASIs, regardless of decision, should be sent to the following email address: jdai@courts.state.nh.us. If detained, the original should go to the court and a copy given to the Juvenile Probation Parole Officer.

RSA	Offense	Crime level	Level
159:4	Carrying a Pistol or Revolver without a License	Misd/Felony	III
159:10	Sale of Firearms without a License	Felony B	III
159:11	Providing False Information in Purchase of Firearm	Misd/Felony	II
159:12	Sale of Firearms to Minors	Misdemeanor	III
159:13	Changing Marks on a Firearm	Misdemeanor	II
159:15	Possession of Weapons while Committing a Violent Crime	Misdemeanor A	II
159:16	Carrying or Selling Weapons (Blackjack, Slung shot or Metal Knuckles)	Misdemeanor	II
159:18	Special Bullets, Felonious use of	Felony B	III
159:19	Possession of Dangerous Weapon in Courtroom/Courtroom Area	Felony B	III
159:19-a(I)	Criminal use of cane or sword cane	Misdemeanor	II
159:19-a(II)	Criminal use of cane or sword cane	Felony	III
159:23	Criminal Use of Electronic Defense or Aerosol Weapons	Misd/Felony	III
159:24	Sale of Martial Arts Weapons	Misdemeanor	II
173-B:9	Violation of Protective Order	Misdemeanor	II
262:12	Taking Without Owner's Consent	Misdemeanor	I
318-B:2/318-B:26	Sale of any Schedule I- IV drugs	Felony	III
318-B:2/318-B:26	Sale of Marijuana or any Schedule V drugs	Misd/Felony	II
318-B:2/318-B:26	Possession of Schedule I- IV drugs	Misdemeanor	I
318-B:2/318-B:26	Simple Possession of Marijuana or any Schedule V drugs	Misd/Violation	I
318-B:26(VI)	Drug Enterprise Leader	Felony	IV
630:1	Murder	Felony	IV
630:2	Manslaughter	Felony	IV
630:3	Negligent Homicide	Felony A/B	III
630:4	Causing or Aiding Suicide	Misd/Felony	III
631:1(I)(a), (b), (c), (d)	First Degree Assault - Cause Serious Bodily Injury	Felony A	IV
631:2	Second Degree Assault	Felony B	III
631:2-a	Simple Assault	Misdemeanor	II
631:2-b	Domestic Violence	Misdemeanor	II
631:2-b	Domestic Violence	Felony B	III
631:3	Reckless Conduct	Misdemeanor	II
631:3	Reckless Conduct	Felony	III
631:4	Criminal Threatening	Misdemeanor	II
631:4	Criminal Threatening	Felony B	III
632-A:2 sections a-i, m	Aggravated Felonious Sexual Assault	Felony A	IV
632-A:2 sections j-l, n	Aggravated Felonious Sexual Assault	Felony A	III
632-A:3 (I)	Felonious Sexual Assault	Felony B	III
632-A:3 (II- IV)	Felonious Sexual Assault	Felony B	II
632-A:4	Sexual Assault	Misdemeanor A	II
633:1	Kidnapping	Felony A	IV
633:1	Kidnapping	Felony B	III
633:2	Criminal Restraint	Felony B	IV
633:3	False Imprisonment	Misdemeanor	II
633:3-a	Stalking	Misdemeanor	II
633:3-a	Stalking	Felony	III

RSA	Offense	Crime level	Level
633:4	Interference with Custody - ALL	Felony B/ Misd	II
"633:7"	Trafficking in Persons	Felony A	IV
634:4	Arson	Felony A	IV
634:1(III)	Arson	Felony B	III
634:1(IV)	Arson	Misdemeanor A	I
634:2(II)	Criminal Mischief	Felony	II
634:2(III)	Criminal Mischief	Misdemeanor	I
634:3	Unauthorized Use of Propelled Vehicle (Joyriding)	Misdemeanor A	I
635:1	Burglary	Felony A	III
635:1	Burglary	Felony B	II
635:1(V)	Possession of Burglary Tools	Misdemeanor A	I
635:2	Criminal Trespass	Misdemeanor	I
635:2	Criminal Trespass	Felony	II
635:6	Interference with Cemetery or Burial Ground	Misdemeanor	I
636:1	Robbery	Felony A	IV
636:1	Robbery	Felony B	III
637	Theft – ALL	Felony/Misd A/B	I
637:9	Unauthorized Use of Propelled Vehicle or Rented Property	Misd/Felony	I
638:1	Forgery - ALL	Felony/Misd	II
638:2	Fraudulent Handling of Recordable Writings	Felony B	II
638:3	Tampering with records	Misdemeanor	II
638:4	Issuing Bad Checks	Felony A	II
638:4	Issuing Bad Checks	Felony B/Misd	II
638:5	Fraudulent Use of Credit Cards - ALL	Felony/Misd	II
638:17	Computer Related Offenses - ALL	Felony/Misd	II
638:26	Identity Fraud	Felony A	III
639:3	Endangering the Welfare of a Child	Misd/Felony	II
639:4	Non-Support	Misd/Felony	II
639:5	Concealing Death of a Newborn	Felony	II
641:10	Perjury	Felony	II
641:2	False Swearing	Misdemeanor	I
641:3	Unsworn Falsification	Misdemeanor	I
641:4	False Reports to Law Enforcement	Misdemeanor	I
641:5	Tampering with a Witness	Felony	III
641:6	Falsifying Physical Evidence	Felony B	II
641:7	Tampering with public records	Misdemeanor	I
642:1	Obstructing Government Administration	Misdemeanor	II
642:2	Resisting Arrest/Detention	Felony	III
642:2	Resisting Arrest/Detention	Misdemeanor	II
642:3	Hindering Apprehension - ALL	Felony/Misd	II
642:3-a	Taking Firearm from Law Enforcement Officer	Felony A	IV
642:3-a	Taking Firearm from Law Enforcement Officer	Felony B	III
642:4	Aiding Criminal Activity	Misdemeanor	II
642:5	Compounding	Misdemeanor	II

RSA	Offense	Crime level	Level
642:6	Escape	Felony A	IV
642:6	Escape	Felony B	II
642:6	Escape	Misdemeanor	II
642:7	Possession of Implements of Escape	Felony B	II
642:8	Bail Jumping - ALL	Felony/Misd	II
642:9	Assaults by Prisoners	Felony A	IV
642:9	Assaults by Prisoners	Felony B	III
642:9	Assaults by Prisoners	Misdemeanor	II
642:10	Obstructing Report of a Crime or Injury	Misdemeanor A	II
644:1	Riot	Felony	III
644:1	Riot	Misdemeanor	I
644:2	Disorderly Conduct	Misdemeanor	I
644:3	False Public Alarms	Felony	II
644:3-a, c	False Fire Alarms	Misdemeanor	I
644:3-b	False Fire Alarms	Felony	III
644:4	Harassment	Misdemeanor	I
644:8	Cruelty to Animals	Felony	III
644:8	Cruelty to Animals	Misdemeanor	I
644:9	Violation of Privacy	Misdemeanor A	I
644:11	Criminal Defamation	Misdemeanor	I
644:12	Refusing to Yield Telephone in an Emergency	Misdemeanor	I
644:17	Willful Concealment	Misdemeanor	I
644:18	Facilitating a Drug or Underage Alcohol House Party	Misdemeanor	I
645:1	Indecent Exposure	Misd/Felony	II
645:2	Prostitution	Misd/Felony	II
649-A:3	Possession of Child Sexual Abuse Images	Felony	III
649-B:3	Computer Pornography Prohibited	Felony B	II
649-B:4	Certain Uses of Computer Services Prohibited	Felony	II
650-A:1	Felonious use of Firearms	Felony	III

DOMESTIC ABUSE INVESTIGATION CHECKLIST

POLICE DEPARTMENT

I. VICTIM (Interview separate from suspect)

- Describe the victim's location upon arrival.
- Record victim's name, dob, address, home and work phone numbers.
- Note time dispatched, time arrived.
- Record any spontaneous statements (excited utterances) made by the victim.
- Describe the victim's emotional condition.
- Note victim's relationship to suspect (married, boyfriend, family member, etc.)
- Document the victim's injuries in detail (**size, location and coloration**) and if medical treatment sought.
- If victim received or may receive any medical attention, **complete medical records release form and have victim sign it.**
- Document evidence of alcohol and/or other drugs consumed by victim relative to the incident.
- Record any history of substance/chemical use by victim.
- Note any restraining/court orders in effect.
- Advise and provide victim with written notice of rights and services available.
- Ask victim about the presence and location of any firearms and ammunition within the dwelling.
- Ask victim about the presence and location of any deadly weapons that were used or threatened to be used, by the suspect.
- Receive audio, video or written statement from victim. (Audio or video preferred)
- Ask victim if any aspect of crime was facilitated by use of any technological devices (cell phone, computer, instant messaging, text, social networking, etc.)

II. SUSPECT (Interview separate from victim)

- Note suspect's location upon arrival.
- Record suspect's name, dob, address, home and work phone numbers.
- Record any spontaneous statements (excited utterances) made by the suspect.
- Describe the suspect's emotional condition.
- Describe the suspect's overall physical condition and appearance.
- Describe the suspect's injuries in detail (**size, location and coloration**). **Complete medical records release form and have suspect sign it.**
- Document evidence of alcohol and/or other drugs consumed by suspect during incident.
- Ask suspect about the presence, location, type of firearms and ammunition, in suspect's control, ownership or possession.
- Ask suspect about the presence of other deadly weapons that were may have been used or threatened to be used during incident.
- If arrested**, issue Miranda rights, ask suspect if he/she wants to make a statement, knew of restraining order, and/or understood order.
- Receive audio, video or written statement from suspect. (Audio or video preferred)

III. CHILDREN

- Interview each child alone. **Special efforts should be made to minimize the impact on the child even if it includes not taking a statement.**
- Every** report should include if children live in home, whether or not they are present, and child's relationship to each person present at scene.
- List names, ages, and school attended for each child present.
- If possible and necessary, arrange to have the child interviewed at a CAC with a forensic interviewer.
- Describe each child's emotional state.
- Describe and document each child's injury, if applicable.
- Notify DCYF of any child's injuries.

IV. WITNESSES

- Interview the reporting party.
- Identify all witnesses and take an audio, video or written statement. (Audio or video statement preferred)
- Record all witnesses' addresses and phone numbers.
- Record names and addresses of emergency personnel or are present or responded to the call.
- Identify treating physician and hospital.
- Receive audio or written statements from medical personnel. Medical release form required.

V. EVIDENCE

- Record the "911" number and incident number.
- Obtain recording of "911" call.
- Photograph the victim's injuries
- Photograph the suspect's injuries.
- Impound and take into evidence all deadly weapons used or threatened to be used.
- Photograph and take into evidence any objects thrown, broken, or otherwise used in incident
- Obtain copies of any text messages, e-mails, phone messages or other social networking materials.
- Complete preservation of orders and follow up with grand jury subpoena or search warrant if necessary.
- Obtain copies of all medicals records from doctors, hospitals and responding emergency service personnel.
- Obtain copies of any civil protective orders or criminal bail orders in effect.

VI. OTHER

- Incident was domestic violence abuse and/or violation of a protective order.
- If arrest is affected, **as required by RSA 173-B,** remove all firearms and ammunition in the defendant's control, ownership or possession.
- Consider lethality assessment questionnaire and implement LAP protocol if applicable.**

ABUSE DEFINED:

Assault or reckless conduct (RSA 631:1 through 631:3)
 Criminal Threatening (RSA 631:4)
 Sexual Assault (RSA 632-A:2 through 632-A:5)
 Interference with freedom (RSA 633:1 through 633:3-a)
 Destruction of property (RSA 634:1 & 634:2)
 Unauthorized entry (RSA 635:1 & 635:2)
 Harassment (RSA 644:4)

APPENDIX G
SUSPECT EXAM EVIDENCE COLLECTION CONSIDERATIONS

Possible items of evidentiary value to request by consent or list in an affidavit:

1. DNA/Buccal Swabs (collect on every suspect)
2. Oral swabs
3. Clothing (List ALL items to be collected):
 - a. (Example:) Underwear/boxer shorts
 - b. _____
 - c. _____
 - d. _____
4. Fingernail scrapings (list one hand or both):
 - a. Right Hand b. Left Hand c. Both
5. Foreign Materials (List ALL items to be collected. *For example:* Swabs from right side of neck for possible saliva)
 - a. _____
 - b. _____
 - c. _____
6. Penile Swabs
7. Observation & documentation of any discharge or injury in genital area
8. External Genitalia Swabs (female suspect)
9. Vaginal/Cervical Swabs (female suspect)
10. Listing of observable injuries with associated body map diagram
 For example: bruises, scratches, bite marks _____
11. Photographs (List ALL areas to be photographed in search warrant & affidavit or on consent form.
 For example: tattoos, piercings, all observable individual areas of injury, anomalies, head to toe, etc.) _____

12. Other item: Please list _____
13. Other item: Please list _____
14. Other item: Please list _____

APPENDIX J

SEARCH WARRANT TIP SHEET FOR COMMUNICATION DEVICES

This is not a comprehensive list but is a list of suggested information that officers should consider including whenever applying for a search warrant for an electronic communication device.

FOR THE SEARCH WARRANT FACE SHEET:

- The person of (insert name here).
- We therefore command you to make a search of the above-mentioned location, vehicles, and person. The search is authorized to be conducted during the night time, or any time of the day, for the following property:
- Any cell phones or hand held communication devices.
- And to examine the cell phones for subscriber and electronic communication documentation specific to this case, in specifically requesting that the search warrant authorize any appropriate law enforcement agency access to the items referred to in the search warrant, the authority to open these items, view their contents, and copy and reproduce all data contained therein as necessary for the investigation and prosecution of this matter.

FOR THE AFFIDAVIT:

- I know through my training and experience⁴² that cell phones store data to include text messages, call records, photos, received contacts and other data pertinent to an investigation.
- I know from my training and experience that even if the files were deleted by a user, they still may be recoverable by a trained computer forensic examiner.
- I know from training and experience that files related to the exploitation of children found on computers are usually obtained from the Internet using application software which often leaves files, logs or file remnants which would tend to show the exchange, transfer, distribution, possession or origin of the files.
- I know from training and experience that computers used to access the Internet usually contain files, logs or file remnants which would tend to show ownership and use of the computer as well as ownership and use of Internet service accounts used for the Internet access.

FOR THE SEARCH WARRANT APPLICATION:

- Based upon the foregoing information (and upon my personal knowledge) there is probable cause to believe that the property hereinafter described as any cell phones or hand held communication devices is evidence used in the commission of a felony crime (insert crime) as defined by (insert RSA here) and is the property of (insert name here), and may be found in the possession of (insert name here) at the residence of (insert address and town), New Hampshire.
- The property I intend to seize as a result of the issuance of a Search Warrant is the following:
 - Any cell phones or hand held communication devices.

⁴² If you are not relying on your own training and experience, but instead are relying on another officer or expert's training and experience, please identify and articulate the source.

- And to examine the cell phones for subscriber and electronic communication documentation specific to this case, in specifically requesting that the search warrant authorize any appropriate law enforcement agency access to the items referred to in the search warrant, the authority to open these items, view their contents, and copy and reproduce all data contained therein as necessary for the investigation and prosecution of this matter.

APPENDIX K PRESERVATION ORDERS



NEW HAMPSHIRE
OFFICE OF THE ATTORNEY GENERAL

Date:

To: _____, Legal Analyst
Company:
Address:
City/State/Zip:
Fax:

Master Case #

ISP PRESERVATION ORDER

You are hereby requested to preserve, under the provisions of Title 18, United States Code, Section 2703(f)(1), the following records in your custody or control, including records stored on backup media:

- A. All information (not to include email), and other files, associated with the account that was assigned **IP Address** _____ **on (day)** _____, **(date)** _____ **at (time)** _____ **AM/PM Eastern Daylight Time (UTC offset of -4/-5).**
- B. All connection logs and records of user activity for each such account, including:
- (1) name;
 - (2) address;
 - (3) local and long distance telephone connection records, or records of session times and durations;
 - (4) length of service (including start date) and types of service utilized;
 - (5) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
 - (6) means and source of payment for such service (including any credit card or bank account number)
- C. relating to the account assigned **IP Address** _____ **on (day)** _____, **(date)** _____ **at (time)** _____ **AM/PM Eastern Daylight Time (UTC offset of -4/-5).**
- D. Any other records related to the above-referenced names and user names, including, without limitation, correspondence, billing records, records of contact by any person or entity about the above-referenced names and user names, and any other subscriber information.

You are requested to preserve for a period of 90 days the records described above currently in your possession. This request applies only retrospectively; it does not obligate you to capture and preserve new information that arises after the date of this request. **Failure to comply with this request could subject you to liability under 18 U.S.C. § 2707.**

You are also requested not to disclose the existence of this request to the subscriber or any other person, other than as necessary to comply with this request.

Please refer any questions to:

Detective : _____ Telephone Number: _____

Thank you in advance for your cooperation

Address, Town, NH Zip
PHONE:/ FAX:

CELL PHONE RECORD PRESERVATION

AGENCY LETTERHEAD

Custodian of Records

[Check www.Search.org for this information]**Phone Number:**

Fax Number:

Email:**Date:****Case #****PRESERVATION ORDER****90 DAY**

The _____ police Department is investigating an allegation of _____. You are hereby requested to preserve, under the provisions of Title 18, United States Code, Section 2703(f)(1), the following records in your custody or control, including records stored on backup media:

Subscriber telephone number: _____ Time Period: From _____ To _____

1. Subscriber billing and account information-to include account notes;
2. Length of service;
3. Incoming and outgoing cell tower records;
4. Incoming and outgoing call detail records;
5. Cell tower location information;
6. The means and source of payment for such service (including any credit card or bank account number);
7. All stored photographic or video images;
8. All stored voice mail messages;
9. Incoming and outgoing test message **CONTENT**.

You are requested to preserve for a period of 90 days the records described above currently in your possession. This request applies only retrospectively; it does not obligate you to capture and preserve new information that arises after the date of this request.

You are also requested **not to disclose** the existence of this request to the subscriber or any other person, other than as necessary to comply with this request.

Please refer any questions to:

Detective *****

Your agency info here

STRANGULATION QUICK REFERENCE GUIDE

Document All Findings in an Appropriate Report or Chart

Date/Time of Assault: _____ Date/Time of Exam: _____

Face	Eyes & Eyelids	Nose	Ears	Mouth
<input type="checkbox"/> Red/Flushed <input type="checkbox"/> Petechiae <input type="checkbox"/> Scratches	<input type="checkbox"/> Petechiae R/L eye <input type="checkbox"/> Petechiae R/L lid <input type="checkbox"/> Bloody Conjunctiva	<input type="checkbox"/> Nosebleed <input type="checkbox"/> Deformity <input type="checkbox"/> Petechiae (in or on)	<input type="checkbox"/> Petechiae (in or on) <input type="checkbox"/> Bleeding from ear canal	<input type="checkbox"/> Bruising <input type="checkbox"/> Swollen tongue/lips <input type="checkbox"/> Cuts/abrasions
Under Chin	Neck	Shoulders	Chest	Head
<input type="checkbox"/> Redness <input type="checkbox"/> Scratches <input type="checkbox"/> Bruising <input type="checkbox"/> Abrasions	<input type="checkbox"/> Redness <input type="checkbox"/> Scratches <input type="checkbox"/> Bruising <input type="checkbox"/> Abrasions <input type="checkbox"/> Edema (swelling) <input type="checkbox"/> Fingernail impressions <input type="checkbox"/> Ligature marks	<input type="checkbox"/> Redness <input type="checkbox"/> Scratches <input type="checkbox"/> Bruising <input type="checkbox"/> Abrasions	<input type="checkbox"/> Redness <input type="checkbox"/> Scratches <input type="checkbox"/> Bruising <input type="checkbox"/> Abrasions	<input type="checkbox"/> Petechiae <input type="checkbox"/> Missing Hair <input type="checkbox"/> Edema <input type="checkbox"/> Fractures <input type="checkbox"/> Concussion
Breathing Changes	Voice Changes	Swallowing Changes	Behavioral Changes	Other
<input type="checkbox"/> Difficulty Breathing <input type="checkbox"/> Hyperventilation <input type="checkbox"/> Unable to breathe	<input type="checkbox"/> Raspy voice <input type="checkbox"/> Hoarse voice <input type="checkbox"/> Coughing <input type="checkbox"/> Unable to or difficulty speaking	<input type="checkbox"/> Trouble swallowing <input type="checkbox"/> Painful swallowing <input type="checkbox"/> Neck Pain <input type="checkbox"/> Nausea/ Vomiting <input type="checkbox"/> Drooling	<input type="checkbox"/> Agitation <input type="checkbox"/> Amnesia <input type="checkbox"/> PTSD <input type="checkbox"/> Hallucinations <input type="checkbox"/> Combativeness	<input type="checkbox"/> Dizzy <input type="checkbox"/> Headaches <input type="checkbox"/> Fainted <input type="checkbox"/> Urination <input type="checkbox"/> Defecation

Strangulation Quick Reference Guide

- How and where was the victim strangled?
- One Hand (R or L), Two Hands, Forearm (R or L), Knee/Foot, Ligature (describe)
- How long? _____ seconds _____ minutes
- Was the victim smothered?
- From 1 to 10, how hard was the suspect's grip? (low) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)
- From 1 to 10, how painful was it? (low) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 (high)
- Multiple attempts: _____ Multiple methods: _____
- Was the victim shaken simultaneously while being strangled? Straddled?
- Held against wall?
- Was the victim's head being pounded against wall, floor or ground?
- What did the victim think was going to happen?
- What caused the strangulation to stop?
- Any prior incidents of strangulation? Prior domestic violence? Prior threats?

Prepared by Detective Bob Frechette – www.refconsultant.com

MEMORANDUM

April 26, 2016

TO: All County Attorneys
All Law Enforcement Agencies
DCYF District Office Supervisors

FROM: Joseph A. Foster, Attorney General
Jeffrey A. Meyers, DHHS Commissioner

RE: Joint Guidelines for DCYF & Law Enforcement on Mandatory Notification,
Record Sharing, and Investigations

The protection of children from abuse and neglect is a mission shared by the dedicated members of the law enforcement community and the Division of Children, Youth, and Families. To better serve that directive, DCYF, the New Hampshire Department of Justice, and members of state and local law enforcement have partnered to address some of the specific challenges inherent in a system in which members of different agencies must work together.

The result of this collaboration is the attached Joint Guidelines on Notification, Record Sharing, & Investigations. The Guidelines concern some of the contexts in which the missions of DCYF and law enforcement intersect and are intended to aid DCYF and law enforcement in identifying effective ways of fulfilling their statutory mandates under the Child Protection Act.

We expect that DCYF District Offices and law enforcement agency supervisors will review the Guidelines, discuss them both in-house and with each other, and jointly implement the procedures they deem prudent. The Attorney General's Task Force on Child Abuse and Neglect will host trainings around the issues discussed in the Guidelines. We anticipate that DCYF and law enforcement personnel will benefit from attending these trainings.

The Guidelines are meant to complement the 2008 Child Abuse and Neglect Investigation Protocols, which can be found on the Department of Justice website, at <http://doj.nh.gov/criminal/victim-assistance/documents/abuse-investigation-protocol.pdf>. The Protocols continue to be a vital resource and should be consulted during joint investigations. The Attorney General's Task Force on Child Abuse and Neglect will review and revise the protocols this year.

Questions may be directed to Assistant Attorney General Lisa Wolford at the NHDOJ (271-3671), and to DCYF Child Protection and Juvenile Justice Bureau Chief Gail Snow (271-8821).

JOINT GUIDELINES FOR DCYF/LAW ENFORCEMENT ON MANDATORY NOTIFICATION, RECORD SHARING, & INVESTIGATIONS

SUMMARY

- GUIDELINE #1:* DCYF District Offices (DOs) and law enforcement agencies (LEAs) should collaborate to establish procedures pertaining to DCYF's verbal notification to LEAs.
- GUIDELINE #2:* DCYF DOs and LEAs should collaborate to establish procedures pertaining to DCYF's written notification mandate.
- GUIDELINE #3:* DCYF DOs and LEAs must designate supervisors to whom issues concerning RSA 169-C:38 notification procedures may be addressed, and must notify each other of those designations.
- GUIDELINE #4:* DCYF DOs and LEAs must designate supervisors to whom issues concerning RSA 169-C:29 notification procedures may be addressed, and must notify each other of those designations.
- GUIDELINE #5:* DCYF DOs and LEAs should collaborate to establish a procedure by which LEAs obtain DCYF records.
- GUIDELINE #6:* LEAs must ensure that their officers provide DCYF with written reports when requested.
- GUIDELINE #7:* LEAs should designate supervisors with whom DCYF DOs Supervisors may address issues concerning record-sharing procedures, and must notify DCYF DO Supervisor of those designations.
- GUIDELINE #8:* During joint investigations, DCYF and LEAs must communicate plans regarding contact with children, family members, and other witnesses, to ensure that such plans do not impede either the abuse and neglect investigation or the criminal investigation.
- GUIDELINE #9:* DCYF DOs and LEAs must designate supervisors to whom issues concerning joint investigations may be addressed, and must notify each other of those designations.

I. MANDATORY NOTIFICATION: DCYF TO LAW ENFORCEMENT

RSA 169-C:38, I, requires DCYF to “immediately” notify local law enforcement, by “by telephone or in person,” when there is reason to believe that a child has been the victim of a crime.

In addition, DCYF must make a written report of the suspected crime to law enforcement within 48 hours, Saturdays, Sundays, and holidays excluded.

DCYF district offices (DCYF DOs) and local law enforcement agencies (LEAs) must work together to establish RSA 169-C:38 notification procedures that work for the particular DCYF DO and local LEA. The procedures may vary depending on local LEA size, staffing, and dispatch arrangements.



A. IMMEDIATE VERBAL NOTIFICATION BY DCYF

GUIDELINE # 1: DCYF DOs and LEAs should collaborate to establish procedures pertaining to DCYF’s verbal notification to LEAs.

The following are suggested considerations:

- 1. Who at DCYF is responsible for verbally notifying an LEA that there is reason to believe a child has been the victim of a crime?**
 - DCYF has determined that the head DO Supervisor of each DCYF DO will be responsible for ensuring that LEAs are notified when DCYF has reason to believe that a child has been the victim of a crime. DCYF will provide the name and contact information of the head DO Supervisors to local LEAs, and will apprise local LEAs of any change to that information. *See* DCYF District Office list, attached.
- 2. Who should DCYF notify at the LEA?**
 - For some LEAs, the dispatch number may be the best number for DCYF to call to provide verbal notification under RSA 169-C:38. For others, the on-shift police supervisor, or another officer or group of officers, may be the best point of contact.
 - LEAs will identify the name, position, and contact information for the law enforcement officer(s) responsible for receiving verbal notification from DCYF, and will provide that information to the appropriate DCYF DO.

- LEAs will update contact information as necessary and forward it to the appropriate DCYF DO.
- 3. Are there special circumstances which present particular challenges to DCYF's ability to effectively communicate verbal notification to LEAs?**
- DCYF DOs and LEAs must identify the particular challenges, if any, to effective verbal notification under RSA 169-C:38. For example, do law enforcement shift-change times present special challenges to DCYF notification? Is the lack of cellular phone service an issue?
 - If challenges have been identified, determine how to best overcome them.
 - LEAs should determine whether cellular phone numbers or other back-up numbers should be shared with DCYF for the purpose of enabling notification under RSA 169-C:38.
- 4. What information must the DCYF DO Supervisor provide verbally to an LEA?**
- At a minimum, DCYF must provide an LEA with the name of the child victim, the child's current address, the name of the person(s) alleged to have committed a crime against the child, and a summary of the allegations



B. WRITTEN NOTIFICATION BY DCYF

GUIDELINE #2: DCYF DOs and LEAs should collaborate to establish procedures pertaining to DCYF's written notification mandate. In doing so, the following should be kept in mind:

- 1. DCYF provides written notification to LEAs via a "Law Enforcement Letter."** The Letter is computer software-generated and contains information reported to the DCYF Intake Unit. DCYF has updated the format of the Letter to eliminate redundant and unnecessary information such as multiple address listings. DCYF anticipates that the new Letter will be utilized starting in April 2016.

2. To whom should DCYF address the written notification?

- LEAs will designate an officer to whom the Letter should be addressed, and must provide that information to the DCYF DO Supervisor. LEAs must apprise the DCYF DO Supervisor of any changes to that information.
- The DCYF DO Supervisor will ensure that RSA 169-C:38 notification Letters are sent to the officer designated by the LEA.

3. How should DCYF and the LEAs best ensure that a designated law enforcement officer promptly receives the written notification?

- The LEA will determine how the designated officer should receive the Letter, and must notify the DCYF DO Supervisor of this determination. For example, depending on the LEA, receiving the Letter by fax or email may be appropriate. The LEA must provide the DCYF DO Supervisor with fax numbers and/or email addresses as appropriate.
- DCYF has found that the most efficient manner of getting written notification to an LEA is to establish an email group to which the Letter is sent. LEAs should consider whether this method of delivery is desirable, particularly in view of considerations like LEA shift changes, vacations, and other periodic absences.

4. Are there special circumstances which present particular challenges to DCYF's ability to effectively provide written notification to LEAs?

- As with verbal notification, DCYF DOs and LEAs must identify the particular challenges, if any, to effective communication of written notification under RSA 169-C:38, and must determine how to overcome them.
- For example, if an LEA determines that DCYF notification Letters should be sent by fax, can the LEA ensure that the fax machine is checked regularly? If it isn't, is email the better delivery method?
- The LEA must also decide how to manage receipt of the Letter when the designated officer is not on duty, and must communicate that determination to the DCYF DO Supervisor.

5. What content does the Letter include?

- The DCYF Law Enforcement Letter contains the following:
 - Abuse/neglect reporter information, unless the reporter is anonymous.
 - The name of DCYF Supervisor reporting the crime, and the name of the LEA officer to whom the report is being made.
 - Victim information.
 - Parent/guardian information pertaining to the victim and to other children in the home.
 - Alleged perpetrator information.
 - Basic information concerning other household members.
 - The date on and municipality in which the crime was allegedly committed.
 - The details of the alleged abuse or neglect, as documented by the DCYF Intake Unit.
 - An indication, consisting of DCYF Referral numbers, as to whether DCYF has received prior reports of abuse or neglect.

- As noted, the Law Enforcement Letter will indicate whether DCYF has received prior reports of abuse or neglect concerning the child victim(s). If desired, LEAs should request information on prior reports from the DCYF DO which has provided the Law Enforcement Letter.

C. WHICH CRIMES MUST DCYF REPORT?

RSA 169-C:38, I, lists five types of harm to a child which DCYF must report to the local LEA when DCYF reasonably suspects that the child has been subjected to such harm. They are:

- Sexual molestation;
- Sexual exploitation;
- Intentional physical injury causing serious bodily injury;
- Physical injury by other than accidental means causing serious bodily injury; and
- Any circumstance in which the child is “a victim of a crime.”

Crimes in New Hampshire are primarily defined in the Criminal Code, which is found in Title 62 of the New Hampshire statutes.

AGO TASK FORCE ACTIONS:

The Attorney General's Task Force on Child Abuse & Neglect will coordinate training for DCYF DO staff on the intersection of RSA 169-C:38, I, and the criminal code, and the issue of what conduct must be reported to law enforcement under RSA 169-C:38.

D. PROBLEM-SOLVING

GUIDELINE #3: DCYF DOs and LEAs must designate supervisors to whom issues concerning RSA 169-C:38 notification procedures may be addressed, and must notify each other of those designations.

- If issues arise concerning notification, the designated DCYF DO and LEA supervisors must work together to promptly resolve them in a mutually satisfactory manner.

II. MANDATORY NOTIFICATION: LAW ENFORCEMENT TO DCYF



Under RSA 169-C:29, every person who has “reason to suspect that a child has been abused or neglected” is a mandated reporter and must report his or her suspicions to DCYF. Under RSA 169-C:30, the oral report must be made “immediately.” “Abused” and “neglected” are terms that are defined by statute. *See* RSA 169-C:3.

The mandatory reporting statute specifically lists “law enforcement officials” amongst the types professionals who must report child abuse and neglect.

RSA 169-C:30 makes explicit what information must at a minimum be included in the report to DCYF, if that information is known:

- The name and address of the child suspected of being neglected or abused.
- The name and address of the person responsible for the child’s welfare.
- The specific information indicating neglect or the nature and extent of the child’s injuries (including any evidence of previous injuries).
- The identity of the person or persons suspected of being responsible for such neglect or abuse.
- Any other information that might be helpful in establishing neglect or abuse or that may be required by the department.



The statute directs law enforcement officers to provide a written report of the allegations within 48 hours if requested by DCYF.

GUIDELINE #4: DCYF DOs and LEAs must designate supervisors to whom issues concerning RSA 169-C:29 notification procedures may be addressed, and must notify each other of those designations.

- If issues arise concerning notification, the designated DCYF DO and LEA supervisors must work together to promptly resolve them in a mutually satisfactory manner.

AGO TASK FORCE ACTIONS:

The Attorney General’s Task Force on Child Abuse & Neglect will coordinate training for law enforcement officers concerning the definitions of abuse and neglect and law enforcement officers’ obligations under the mandatory reporting statute.

III. RECORD SHARING

A. PROVIDING DCYF RECORDS TO LAW ENFORCEMENT



By statute, DCYF case records are confidential. *See* RSA 169-C:25, III.

Under RSA 169-C:34-a, III, and RSA 169-C:38, II, however, DCYF must share its case records with partnering law enforcement officers.

When investigating child-abuse related crime, law enforcement can and should request relevant records from DCYF. DCYF must provide these records upon request.

GUIDELINE #5: DCYF DOs and LEAs should collaborate to establish a procedure by which LEAs obtain DCYF records, bearing in mind the following:

1. **To whom at DCYF should law enforcement make the request for records?** DCYF has determined that each DO Supervisor is responsible for assuring timely response for DCYF records related to child abuse and neglect investigations. *See* DCYF District Office list, attached.
2. **How should the request be made?** LEAs must request DCYF records in writing, by sending a letter or email request to the local DCYF DO Supervisor.
 - When making the request, law enforcement must identify the reason for the request and the date by which the records are needed.
3. **Which records should law enforcement request?** Requests for specific types of records—versus “the whole file”—may expedite DCYF processing time. Some examples of DCYF records are intake and assessment reports, service or case plans, case logs, termination reports, and a list of persons or entities providing services to the child or family. DO Supervisors should explain the types of DCYF records to LEAs.
4. **How will DCYF process the request for records?**
 - Upon receipt of the written request from the LEA, if the requesting officer has not indicated the specific types of records needed, the DCYF DO Supervisor will contact the officer to help determine which records might be most useful to the criminal investigation.

- The DCYF DO Supervisor will also review DCYF's BRIDGES computer software program to determine whether other DOs have records pertinent to the request. If such records exist, DCYF has determined that the DCYF DO Supervisor shall request those records from the other DO(s).

5. When should LEAs expect to receive the records?

- DCYF will provide records requested by law enforcement within 30 days of receiving the written request, and sooner if possible.
- If the need for records is urgent, law enforcement must communicate the basis for the urgency to DCYF. DCYF will expedite its processing of records in exigent circumstances.

B. PROVIDING LAW ENFORCEMENT RECORDS TO DCYF



Information generated by a criminal investigation into child-abuse related crime is often critical to DCYF efforts to initiate and sustain an abuse and neglect petition or other protective action.

RSA 169-C:34, III mandates law enforcement to provide "such assistance and information as will enable" DCYF to conduct investigations into the safety and well-being of children. Accordingly, law enforcement officers must provide information from a criminal investigation when it is requested by DCYF.

GUIDELINE #6: LEAs must ensure that their officers provide DCYF with written reports when requested.

- For effective presentation of a case in court, DCYF requires investigative reports from law enforcement.
- When due to the status of the criminal investigation it is not possible for an LEA to provide DCYF with investigative reports, the LEA must provide DCYF with a written summary of the facts for use in child protection proceedings.

C. PROBLEM-SOLVING

GUIDELINE #7: LEAs should designate supervisors with whom DCYF DOs Supervisors may address issues concerning record-sharing procedures, and must notify DCYF DO Supervisor of those designations.

- If issues arise concerning record-sharing, DCYF DO Supervisors and LEA supervisors must work together to promptly resolve them in a mutually satisfactory manner.

IV. INVESTIGATION



In most cases, DCYF abuse/neglect proceedings and criminal investigations proceed at very different paces.

For example, other than the statutes of limitations, criminal investigations are not subject to statutory constraints on timing.

By contrast, by statute DCYF must “promptly” investigate reports of abuse and neglect, be prepared for a preliminary hearing within 7 days of filing an abuse and neglect petition in family court, and for an adjudicatory within 30 days of that if the child is in an out-of-home placement. *See* RSA 169-C:8; RSA 169-C:16; RSA 169-C:34.

In addition, the investigation methodologies utilized by DCYF and law enforcement are not the same. These differences in timing and approach can result in unintended conflict.

GUIDELINE #8: During a joint investigation, DCYF and the LEA must communicate plans regarding contact with children, family members, and other witnesses, to ensure that such plans do not impede either the abuse and neglect investigation or the criminal investigation.

GUIDELINE #9: DCYF DOs and LEAs must designate supervisors to whom issues concerning joint investigations may be addressed, and must notify each other of those designations.

AGO TASK FORCE ACTIONS:

The Attorney General’s Task Force on Child Abuse & Neglect will coordinate training for DCYF and law enforcement concerning the differing ways in which DCYF and criminal investigations and prosecutions proceed, including the way in which statutory definitions and standards of proof differ.

The Task Force will also coordinate training for DCYF concerning criminal investigation techniques.

**LAW-ENFORCEMENT
POLICY AND PROCEDURES
FOR REPORTS OF
MISSING AND ABDUCTED CHILDREN**

— A MODEL —

**– Developed by –
The National Center for
Missing & Exploited Children®**

Revised – October 2011

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The National Center for Missing & Exploited Children

Model Law-Enforcement Policy and Procedures for Reports of Missing and Abducted Children

Overview

Reports of missing children can be among the most challenging, and emotionally charged cases a law-enforcement agency will ever experience. The attitude and approach an agency and its officers take in responding to reports of missing children may very well determine whether the child is recovered promptly and safely or remains missing for months or years or, even worse, is never recovered. Each stage of the case, therefore, from initial investigation through successful recovery, forms a critical component of a thorough law-enforcement response.

A law-enforcement agency must provide its officers with the tools enabling them to act decisively when confronted with reports of missing children. The single, most important tool an agency can provide is a clearly worded policy directive containing understandable procedures for officers to follow as a guide through each stage of the investigation.

Policies and procedures are of limited value, however, unless an agency ensures every member receives direct instruction about the policy's intent. Additionally, specific training and awareness about the overall issue of missing children will help each officer understand the critical role he or she plays in this important area of child protection. For example officers should be aware they might encounter several types of missing-child cases, each with their own unique response requirements. They include the types of cases noted below.

- A. **Nonfamily abduction** involves a child who has been wrongfully taken by a nonfamily perpetrator through the use of physical force, persuasion, or threat of bodily harm.
- B. **Family abduction** occurs when, in violation of a court order, a decree, or other legitimate custodial rights, a member of the child's family, or someone acting on behalf of a family member, takes or fails to return a child. This is also referred to as parental kidnapping and custodial interference.
- C. A **Runaway** child, often a teenager, leaves home voluntarily for a variety of reasons. This would include any child 17 years of age or younger.
- D. The **Thrownaway** is a child whose caretaker makes no effort to recover the child after running away, who has been abandoned or deserted, or who has been asked to leave his or her home and not allowed to return. While not necessarily reported to authorities as missing, children in this category frequently come to the attention of law enforcement.
- E. The **Lost, Injured, or Otherwise Missing** child is defined as a child who has disappeared under unknown circumstances. The incident may range from the child wandering away and becoming lost to the child being abducted, wherein no one witnessed the act. These circumstances sometimes involve "foul play," where those reporting the incident are attempting to cover-up a crime involving the child.

It should be noted not all missing-child incidents occurring each year in this country result in a direct law-enforcement response. Some incidents are resolved by parents, relatives, friends, or

neighbors while others are over (*i.e.*, the child escapes or returns home) before law enforcement is notified.

This discussion should point out to the law-enforcement administrator that law enforcement is usually called upon to handle the most demanding missing-child reports — those cases requiring decisive action and a carefully planned response.

When developing policy and procedures regarding missing-children cases, it is essential each response, regardless of what the initial indicators may be, should be governed by an assumption the child is in jeopardy until significant facts to the contrary are confirmed. When officers respond with the missing child's safety as their foremost concern, they will be more likely to collect evidence or information that might otherwise be lost during the critical, early stages of an investigation.

Using the Model Policy

This model policy about missing children has been designed to serve as a general reference and may be modified to fit the specific needs of any agency, regardless of size. It attempts to present the missing-child-response process in a logical progression from case intake through first response and case investigation on to recovery and case closure.

From the basic outline presented in this model, administrators are encouraged to add those topics unique to their agency or region of the country and incorporate actions mandated by statutes at all levels from federal to local. It should also be noted the text found in *italics* is offered as explanation, and its inclusion in an agency's final policy or procedures is optional.

Finally, much of the content of this model policy is based on material found in the National Center for Missing & Exploited Children (NCMEC) publication titled *Missing and Abducted Children: A Law-Enforcement Guide to Case Investigation and Program Management*. That publication contains chapters covering each type of missing-child case and provides individual checklists offering step-by-step recommendations for successful case investigation. A free copy of this publication may be viewed, downloaded, and/or ordered from the "More Publications" section of www.missingkids.com. It may also be ordered by calling toll-free at 1-800-THE-LOST® (1-800-843-5678).

Pre-incident Planning and Resource Development

Along with the creation of a written policy and procedure, pre-incident planning and resource development are equally important to the formation of an effective law-enforcement response to reports of missing children. When these three factors are given equal emphasis, a truly comprehensive response plan will result.

In an effort to more efficiently investigate, manage, and resolve cases of missing children and minimize the emotional stresses associated with these incidents, many communities, led by their law-enforcement agencies, are holding preplanning sessions to assess roles, identify resources, and agree on responsibilities. When implemented, this interagency protocol not only spells out specific responsibilities, but also serves as the basis for ongoing communication and cooperation.

When law enforcement responds to the report of a missing child without a plan, time is lost and opportunities are wasted. By adopting planned strategies, officers will be able to exercise more

control over events, react more effectively to unexpected occurrences, and enhance the likelihood of swift and successful case resolution.

**Comments or questions regarding this Model Policy and Procedure are welcomed.
Please contact NCMEC's Jimmy Ryce Law Enforcement Training Center at
1-800-THE-LOST (1-800-843-5678).**

Model Missing Children's Policy

Directive Type	Effective Date	Directive Number
Subject Missing Children		Issuing Authority
Reference	Amends/Rescinds	
Distribution	Reevaluation Date	No. Pages

I. Policy Purpose

Describe the objective(s) of this policy.

The purpose of this policy is to establish guidelines and responsibilities regarding this agency's response to reports of missing children.

II. Policy Statement

Describe the agency's intent or philosophy regarding this policy.

- A. It shall be the policy of this agency to thoroughly investigate all reports of missing children. Additionally every child reported missing to this agency will be considered **at risk** until significant information to the contrary is confirmed.
- B. Jurisdictional conflicts are to be avoided when a child is reported missing. If a missing child either resides in, or was last seen in this jurisdiction, this agency will immediately initiate the required reporting process. If a child resides in this jurisdiction and was last seen in another jurisdiction, but the law-enforcement agency covering that jurisdiction chooses not to take a missing-child report, this agency will assume reporting and investigative responsibility.
- C. Questions concerning parental custody occasionally arise in relation to missing-child reports. It shall be the policy of this agency to accept the report of a missing child even if custody has not been formally established. Reporting parties shall be encouraged to obtain legal custody as soon as possible; however, since the safety of the missing child(ren) is paramount, members of this agency will open a case when it can be shown the child has been removed, without explanation, from his or her usual place of residence. If custody has not been established by the Court, then the law-enforcement responsibility is to ensure the child is safe only.

III. Definitions

Describe what circumstances control report acceptance.

- A. The term **missing child** refers to a person who is
1. Younger than 18 years of age and
 2. Whose whereabouts are unknown to his or her custodial parent, guardian, or responsible party
- B. A missing child will be considered **at risk** when one or more of the **risk factors** noted in paragraph C are present.
- C. **Risk factors** refer to a missing child who is
1. 13 years of age or younger. *This age was designated because children of this age group have not established independence from parental control and do not have the survival skills necessary to protect themselves from exploitation on the streets or*
 2. Believed or determined to be experiencing one or more of the circumstances noted below.
 - a) Is out of the zone of safety for his or her age and developmental stage. *The zone of safety will vary depending on the age of the child and his or her developmental stage. In the case of an infant, for example, the zone of safety will include the immediate presence of an adult custodian or the crib, stroller, or carriage in which the infant was placed. For a school-aged child the zone of safety might be the immediate neighborhood or route taken between home and school.*
 - b) Has mental or behavioral disabilities. *If the child is developmentally disabled or emotionally/behaviorally challenged, he or she may have difficulty communicating with others about needs, identity, or address. The disability places the child in danger of exploitation or other harm.*
 - c) Is drug dependent, including prescribed medication and/or illegal substances, and the dependency is potentially life-threatening. *Any drug dependency puts the missing child at risk. The diabetic or epileptic child requires regular medication or his or her condition may become critical. The abuser of illegal drugs, on the other hand, may resort to crime or become the victim of exploitation.*

- d) Has been absent from home for more than 24 hours before being reported to law enforcement as missing. *While some parents may incorrectly assume 24 hours must pass before law enforcement will accept a missing-person case, a delay in reporting might also indicate the existence of neglect, abuse, or exploitation within the family.*
- e) Is in a life-threatening situation. *The environment in which the child is missing may be particularly hazardous. Examples of a dangerous environment could be a busy highway for a toddler, an all-night truck stop for a teenager, or an outdoor environment in inclement weather for a child of any age.*
- f) Is in the company of others who could endanger his or her welfare. *A missing child in such circumstances is in danger not only of sexual exploitation, but also of involvement in criminal activity such as burglary, shoplifting, and robbery or other violent crimes.*
- g) Is absent in a way inconsistent with established patterns of behavior and the deviation cannot be readily explained. *Most children have an established and reasonably predictable routine. Significant, unexplained deviations from that routine increase the probability of risk to the child.*
- h) Is involved in a situation causing a reasonable person to conclude the child should be considered at risk. *Significant risk to the child can be assumed if investigation indicates a possible abduction, violence at the scene of an abduction, or signs of sexual exploitation.*

D. Actions upon determination of **risk factors**.

1. If it is determined **risk factors** are involved in the report of a missing child, the child will be considered **at risk**, and an expanded investigation, including the use of all appropriate resources, will immediately commence. *While all missing-child incidents should be thoroughly investigated, those involving risk factors indicate a heightened likelihood of danger to the child and, therefore, require an intensive response.*
2. If appropriate, existing interagency response protocols — including the **AMBER Alert** system and/or other immediate community notification methods, if available — should be considered. While AMBER Alerts are typically for abducted children, there are other tools available such as the Endangered Missing Advisory. *Preplanned strategies for responding to missing-child reports are essential for successful case resolution. By identifying all the services and resources a region has available to search for missing children, multiagency agreements can be reached beforehand and promptly activated when the need arises. See Paragraph 7 of Section IV(A) regarding the role of the telecommunicator and Paragraph 3 of*

Section IV(C) regarding the role of the supervisor for additional AMBER Alert commentary.

IV. Procedures

Describe the responsibilities of agency members who may be involved in a missing-child case.

A. Communications personnel receiving the report of a missing child shall

1. Determine if circumstances of the report meet the definition of a missing child as set forth in Section III. *By questioning the caller about the circumstances of the report, the telecommunicator can make a preliminary assessment about the level of risk to the missing child. This assessment shall also prepare the telecommunicator to promptly activate additional response protocols if needed. The Standard for Public Safety Telecommunicators when Responding to Calls of Missing, Abducted, and Sexually Exploited Children provides good guidance about formulating such questions. Each telecommunicator should be familiar with this guide.*
2. Dispatch, in a prompt manner, an officer to the scene of the report. *The officer who routinely patrols the vicinity of the report is best suited to handle the first response since he or she should be familiar with the area and is likely to have knowledge of unusual activities, suspicious people, known offenders, and other neighborhood dynamics. The handling of certain missing-child reports, such as suspected runaways, over the phone is discouraged since accurate assessments of risk to the child cannot be made. Note: (1) The National Child Search Assistance Act (NCSAA, 42 U.S.C. §§ 5779 and 5780) mandates law enforcement's immediate response to reports of missing children, no establishment or observance of a waiting period before accepting a case, immediate entry of descriptive information about the missing child into the Federal Bureau of Investigation's (FBI) National Crime Information Center (NCIC) Missing Person File, and close liaison with NCMEC in missing-child cases. (2) The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act, Pub. L. No. 108-21) amended the National Child Search Assistance Act to extend the same NCIC reporting responsibility and other benefits to missing young adults 18, 19, and 20 years of age. (3) The Adam Walsh Child Protection and Safety Act (Adam Walsh Act, Pub. L. No. 109-248) mandates NCIC entry must be made by law enforcement within two hours of receipt of a report of a missing or abducted child. This replaces the term "immediately" in the National Child Search Assistance Act. Current Criminal Justice Information Services guidance regarding this time limit is two hours from the moment the minimum amount of information for NCIC entry has been obtained.*

3. Notify a supervisor. *Because of the complexity of some missing-child cases, especially those requiring the immediate mobilization of investigative resources, telecommunicators should verify a supervisor has been notified whenever officers respond to such an assignment.*
4. Transmit the appropriate radio alerts and other notifications. *A critical responsibility of the telecommunicator is to obtain sufficient information from the reporting party to broadcast a radio message alerting other officers, and other agencies if necessary, about the circumstances of the missing episode. Information should include the child's height, weight, hair and eye color, clothing, and the location where the child was last seen as well as any dangers or special considerations unique to this missing child. Most importantly the radio alert should contain any information known about a possible abductor with special emphasis on the description of the suspect and vehicle used as well as direction of travel. Consideration should also be given to the use of highway surveillance or "road-block plans," including those involving surrounding agencies, to apprehend a fleeing abductor.*
5. Search agency records for related information, specifically any records such as those pertaining to the family, the place where the child was last seen, and the child's residence. *It is essential for responding officers to know if the child or family has been the subject of previous reports that might have a bearing on this incident. Records should also be reviewed to learn if any incidents have been reported in the area that might have investigative value in this case. Complaints of or reports about incidents such as attempted abductions, prowlers, public lewdness, loitering, and suspicious people will be of particular interest. Access should also be made to Sex Offender Registries to determine if individuals designated as sex offenders reside, work, or might otherwise be associated with the area. All available background information is critical to responding officers and investigative personnel to help evaluate the incident and interview witnesses or possible suspects.*
6. Safeguard all pertinent records. *The telecommunicator should also ensure records of all communication related to this incident, such as phone conversations with the reporting party and witnesses, including written notes regarding the discussion, radio broadcasts, and all subsequent notifications, are safeguarded for future investigative reference.*
7. Activate established protocols for working with the media — including activation of the **AMBER Alert** system and/or other immediate community-notification methods when appropriate. *In agencies without a public-information officer, the telecommunicator, under direction of a law-enforcement supervisor, may be best situated to provide information to the media designed to elicit public assistance in the search for a missing child. In preparation for such situations, telecommunicators should have available the phone numbers of media contacts. Additionally the telecommunicator should also be prepared to immediately activate the*

appropriate immediate, community notification method if so directed by appropriate law-enforcement personnel.

- B. The **initial officer or first responder** assigned to the report of a missing child shall
1. Respond promptly to the scene of the report activating patrol-vehicle mounted video camera if circumstances warrant. *Even if the assigned officer has been provided with initial information such as the missing child's description and other facts about the incident, it would be inappropriate to delay response to conduct a random search by doing things such as circling through parks, checking playgrounds, or stopping suspicious individuals. Unless in immediate response to the missing child's safety, these activities can be handled by other patrol units.*
 2. Interview the parent(s) or person who made the initial report. *The purpose of this interview is to gain an insight into the circumstances surrounding the missing episode and other information needed to conduct an initial assessment of the case. Note: Using a specifically designed missing-person report form to gather information will enable the first responder to more promptly reach an accurate risk assessment. One such form can be found in NCIC's Missing Person File Information Kit, available through your agency Terminal Control Operator. All details should be thoroughly documented for more in-depth review later by investigative personnel who can compare statements made with investigative facts.*
 3. Obtain a detailed description of the missing child including photo(s) and videos. *The collection of information about the missing child, including race, height, weight, hair and eye color, clothing, and other noteworthy features, should be done promptly and relayed to other officers who may be assisting in the investigation. Several recent photos and/or a video, if available, should be secured. Again, the use of a missing-person report form will expedite the collection of descriptive information. Photos should be the most accurate representation available of the missing child. If no photos are immediately believed to be available, several areas commonly forgotten would include cell phones with cameras as well as photos included on social-networking sites.*
 4. Confirm the child is in fact missing. *First responders should never assume searches conducted by distraught parents or others have been performed in a thorough manner. Another check of the scene should be made and include places where children could be trapped, asleep, or hiding. Special attention should be paid to enclosures such as refrigerators, freezers, and the interior of parked vehicles where limited breathing air may place the child at even greater risk. In the case of older children, first responders should ask if parents have checked with the child's friends or perhaps overlooked or forgotten something the child may have said that would explain the absence. Note: A search of the home should be conducted even if the missing child was last seen elsewhere.*

5. Verify the child's custody status. *First responders should ascertain whether a dispute over the child's custody might have played a role in the missing episode or might constitute a risk factor. Questions regarding whether the reporting party has legal custody, if the noncustodial parent has been contesting custody, or if the missing child expressed a desire to live with the other parent may help an officer gain important insight into the case.*
6. Identify the circumstances of the missing episode. *First responders need to ascertain whether the circumstances are such that a heightened level of response is warranted. If risk factors exist, as defined in Paragraph C of Section III, then the decision to employ additional response methods is clear. In other situations where the circumstances are not clear, officers should keep the missing child's safety in mind and act accordingly.*
7. Determine when, where, and by whom the missing child was last seen. *This information is needed to determine factors such as abduction time frame, windows of opportunity, and verification of previously received information. Interview family members, friends/associates of the child, and friends of the family to determine when each last saw the child, what they think happened to the child, and if the child had complained about being approached by anyone. Comparison of information gathered from the reporting party, witness, and other sources may prove vital to case direction.*
8. Interview the individual(s) who last had contact with the missing child. *Effective questioning of those individuals who last saw or spoke with a missing child is crucial in the case-assessment process. While seeking information about the child's appearance, demeanor, and actions, officers should also be alert to any contradictions made or evasiveness demonstrated by the witness, especially if these statements cannot be readily corroborated. Thorough documentation will allow investigative personnel to later compare those statements with the facts of the case as they are uncovered.*
9. Identify the missing child's zone of safety for his or her age and developmental stage. *Responding officers should attempt to determine how far a missing child could travel from the location where last seen before he or she would most likely be at risk of injury or exploitation. This perimeter should, under many circumstances, define the first search zone.*
10. Make an initial assessment of the type of incident. *By employing all available assessment tools (i.e., completion of standardized forms; interviews with parents, other family members, and friends; statements of witnesses; and search of scene) an officer should be able to reach a preliminary determination regarding the type of case and the need for additional resources. Note: Officers must be cautious in "labeling" or classifying a missing-child case, since the classification process will impact the way in which initial information or evidence is gathered. Even if first indications suggest a "less urgent" incident, officers should consider all possibilities until the case category is clearly determined.*

11. Obtain a description of the suspected abductor(s) and other pertinent information. *Officers need to immediately record witness information, not only for general investigative use but also before witnesses forget or speak to others who may confuse or make suggestions about what was actually observed. If the abduction scene involves a business or other public place, officers may be able to supplement witness information with video from security cameras that might provide crucial information about the suspect, vehicles, and circumstances. In the case of a suspected family abduction, the reporting party may have photos of the abductor or other valuable information.*
12. Determine the correct NCIC Missing Person File category and ensure notification is promptly transmitted. *There are 5 categories within the Missing Person File applying to children. They are disability, endangered, involuntary, juvenile, and catastrophe. Simply because the child is younger than 18 does not require the juvenile category be used. The circumstances should govern category selection.*
13. Provide detailed descriptive information to communications unit for broadcast updates. *As information becomes available regarding the missing child's physical appearance, circumstances of the case, or description of the potential abductor, the initial officer should ensure other officers and agencies are provided with up-to-date facts.*
14. Identify and separately interview everyone at the scene. *The name, address, home and work phone numbers of everyone present at the scene, along with his or her relationship to the missing child, should be recorded. If possible, include them in photos and/or videos of the incident scene. By interviewing each person privately, officers may be able to uncover information instrumental in resolution of the case.*
15. Conduct an immediate, thorough search of the scene. *With the assistance of additional personnel, a systematic, thorough search of the incident scene should be conducted. If appropriate, officers should obtain written permission to search houses, apartments, outbuildings, vehicles, and other property that might hold information about the child's location. Officers are again reminded to conduct a thorough, immediate search of the child's home and property — even if the child was last seen at another location. Evaluate the contents and appearance of the child's room/residence. When possible officers should also search a missing child's school locker.*
16. Seal/protect scene, area of child's home, and areas of interest as potential crime scenes. *First responders must take control of the immediate area where the incident occurred and establish an appropriate perimeter to avoid destruction of vital evidence. Extend search to surrounding areas and vehicles including those that are abandoned and other places of concealment such as abandoned appliances, pools, wells, sheds, or other areas considered "attractive nuisances." In addition to external crime scenes, the missing child's home, and particularly his or her bedroom,*

should be secured and protected until evidence and identification material such as hair, fingerprints, and bite marks are collected.

17. Inquire if the child has access to the Internet, cell phone, and/or other communications device. *Before making an initial decision the child has run away, an officer should determine if the child may have left to meet someone he or she encountered while online. Since some offenders are known to use the Internet to identify vulnerable children, what appears at first to be a runaway case, may, in fact, be a child abducted or enticed to leave by someone the child first met online. Even if a child willingly decides to leave home to join someone first met online, the child should be considered at risk. Additionally, since many children have their own cell phones/other electronic communications devices and may have them while missing, an officer should note these devices during the information-gathering process.*
18. Prepare necessary reports and complete appropriate forms. *Information gathered by the first responding officer(s) may be instrumental in the eventual case resolution. To record this important information, officers should prepare a chronological account of their involvement and actions in the case from time of assignment to the point of dismissal. Reports should include everything, not just events seeming to have a direct bearing on the case.*

C. The **supervisor** assigned to the report of a missing child shall

1. Obtain a briefing and written reports from the first responder(s) and other agency personnel at the scene. *This briefing allows the supervisor to determine the scope and complexity of the case and develop an appropriate response. The briefing should be conducted away from family, friends, or any other individuals who may be present. Doing so will allow officers to speak freely about case circumstances and pass along initial impressions and opinions that might be misconstrued by others.*
2. Determine if additional personnel and resources are needed to assist in the investigation. *Depending on the situation, a supervisor may determine additional personnel, including specialized units, should be called to the scene or otherwise assist in the investigation. Certain cases may also require the supervisor to activate existing interagency response protocols as established by mutual-aid agreements or memorandums of understanding. Confirm all required resources, equipment, and assistance necessary to conduct an efficient investigation have been requested and expedite their availability. Be available to make any decisions or determinations as circumstances develop. Contact NCMEC to enlist their resources.*
3. Consider activation of the **AMBER Alert** system and/or other immediate community notification methods. *If circumstances indicate the chances for the child's safe recovery would be increased by immediate public awareness, a supervisor should promptly activate such efforts.*

4. Establish a command post. *A command post is a field headquarters/office for scene management. It is used as a center for organizing personnel, launching and monitoring search and rescue operations, and directing investigative efforts as well as a focal point for deciding the division of investigative labor on-site, administering on-site change of command, responding to investigative inquires, and gathering intelligence. As a general rule the command post should be close enough to the center of activity to facilitate control and coordination, but sufficiently isolated to allow a free exchange of ideas among responders. Establish a command post away from the child's residence.*
5. Organize and coordinate search efforts. *Systematic searches are common features of missing-child investigations. A supervisor should appoint a search operation coordinator who can oversee the search effort while the supervisor remains available to manage the entire investigation.*
6. Ensure all required notifications have been made. *Because dissemination of information is an integral part of the search for a missing child, the supervisor should ensure all officers, other departments and agencies, and all investigative networks are supplied with accurate details. Prepare a flier/bulletin with the child/abductor's photo and description. Distribute in appropriate geographic regions. Note: NCMEC is able to assist with this step.*
7. Establish a liaison with the victim family. *Families of a missing child will experience extreme stress. Supervisors should establish a liaison with the victim family who can explain what investigative actions are being employed and what they can do to assist in the search. In addition the liaison can help the family work with the media.*
8. Confirm all agency policies and procedures are observed. *In addition to providing the innovative direction required during a missing-child investigation, a supervisor must also ensure adherence to the rules and regulations of their professional law-enforcement organization. Established policies and procedures, especially those related to missing children, should be regularly reviewed to ensure compliance.*
9. Manage media relations. *Many missing-child investigations, especially those involving large-scale search efforts, are likely to draw media attention. Supervisors should manage media presence in a way to complement rather than conflict with the investigation.*

D. The **investigator** assigned to the report of a missing child shall

1. Obtain a briefing from agency personnel at the scene. *This briefing should be conducted prior to interviews with family members of the missing child or witnesses who may have been identified during the initial stage of the case. Its objective is to assist the investigator in formulating an effective interview strategy.*

2. Verify the accuracy of all descriptive information. *The verification process should include all details developed during the preliminary investigation. During the interview process the investigator should be alert to facts or statements in conflict with those gathered by the first responder.*
3. Initiate a neighborhood investigation. *A thorough canvass of the neighborhood should be conducted without delay. The objective is to identify and interview all people within the abduction zone who may be able to provide information related to the incident. According to a key child-homicide study, unknowing witnesses are those who see some aspect of a crime but at the time do not realize they are witnessing part of a crime or potential abduction. It was found there were unknowing witnesses in 32.9% of those cases studied. This indicates a neighborhood or area canvass would be of great importance in generating investigative leads.¹ Investigators should use a standardized set of questions during the canvass to ensure completeness and uniformity of information and facilitate establishment of a database to track leads. A record should also be made of all vehicles parked within the neighborhood and any other conditions that may have future investigative value. Access should also be made to Sex Offender Registries to determine if individuals designated as sex offenders reside, work, or are otherwise associated with the area.*
4. Obtain a brief history of recent family dynamics. *Information about family dynamics, obtained from family members, neighbors, teachers, classmates, employers, coworkers, friends, and witnesses, can offer valuable insights into what may have happened to the missing child and where he or she may be found. Records of family contact maintained by law-enforcement agencies, social-service departments, schools, and other organizations should also be obtained and evaluated.*
5. Explore the basis for any conflicting information. *When preliminary investigative steps have been taken, investigators should “compare notes” with the first responder, fellow investigators, and other agency personnel to identify and work through conflicting information. This collaborative evaluation will provide the investigative staff with a solid foundation upon which to structure future case directions. Correct and investigate the reasons for any conflicting information.*
6. Complete all remaining key investigative and coordination steps. *Key investigative steps include, when applicable, collecting articles of the child’s clothing for scent-tracking purposes; reviewing and evaluating all available information and evidence collected; securing the child’s last medical and dental records; contacting landfill management and requesting delay or segregation of garbage and dumping containers from key investigative areas; developing and executing an investigative plan; conducting a criminal-history background check on all principal suspects, witnesses, and participants in the investigation; establishing a phone*

¹Katherine M. Brown, Robert D. Keppel, Marvin E. Skeen, and Joseph G. Weis. *Investigative Case Management for Missing Children Homicides: Report II*. Olympia, Washington: Office of the Attorney General, State of Washington, and U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention, May 2006, NCJ 218936, page 44.

hotline for receipt of tips and leads; and considering establishment of an e-mail address or other methods of electronically receiving leads. Key coordination steps include ensuring details of the case have been reported to NCMEC and preparing and updating bulletins for local law-enforcement agencies, the missing-children clearinghouse, FBI, and other appropriate agencies.

7. Implement effective case management. *An information-management system is an essential part of the overall investigative process. Depending on the resources available, it is best to utilize a computerized system to record, index, cross-reference, and retrieve the facts amassed during an investigation. Note: NCMEC can provide software designed for effective case management.*
 8. Evaluate the need for additional resources and specialized services. *The complexity of many missing-child incidents may necessitate the use of resources and services both from within the agency and other organizations as well. Investigators should be aware of the input obtainable from resources such as the FBI; NCIC; missing-children clearinghouses; and NCMEC — in particular **Team Adam**, which is a rapid-response team of experienced, retired law-enforcement investigators.*
 9. Update descriptive information. *If it appears the case will not be promptly resolved, investigators should ensure the descriptive record, especially the information entered into the NCIC Missing Person File, is updated to include dental characteristics, scars, marks, tattoos, and fingerprints along with additional articles of clothing, jewelry, or unique possessions.*
 10. Monitor media relations. *While information gained through effective media relations is often of significant value in a missing-child case, investigators should review all notices prior to release to ensure investigative objectives are not unintentionally compromised.*
- E. An officer assigned to the report of an **unidentified person**, whether living or deceased, who appears to be a child, shall
1. Obtain a complete description. *Officers who are assigned to this task should use standardized information-gathering forms such as the NCIC Unidentified Person File Worksheet and data-collection guide. This information should be gathered in cooperation with the medical examiner or coroner. In cases involving skeletal remains, consideration should be given to consulting with a Forensic Anthropologist and Forensic Odontologist to ensure all pertinent and accurate information has been gathered. NCMEC's Forensic Services Unit can provide assistance in this area.*
 2. Enter the unidentified child's description into the NCIC Unidentified Person File. *This file is compared daily with the contents of the NCIC Missing Person File. Entries with common characteristics are flagged and*

both agencies are informed. Agencies should expect to receive this information/response overnight.

3. Use all available resources to aid in identification of the child. *NCMEC's Forensic Services Unit; NamUs (National Missing and Unidentified Persons System); missing-children clearinghouses; and other professionals, such as medical examiners, may be of assistance in the identification.*
 4. Cancel all notifications after identification is confirmed.
- F. An officer assigned to the **recovery or return** of a missing child shall
1. Verify the located child is, in fact, the reported missing child. *An officer should personally verify all returns. The benefits of this practice include assessing the child's safety, gaining intelligence about possible offenders, and helping to prevent future episodes.*
 2. Secure intervention services, if appropriate. *During the verification process, officers should be alert for indications additional services may be needed before the child can be safely reunited with his or her family. These services may include mental and/or physical health examinations and arrangements for family counseling.*
 3. Arrange the return of the child to his or her legal guardian or an appropriate children's shelter in the case of a runaway or missing child from within department jurisdiction who has been located and who is not wanted on a warrant or other law violation.
 4. Place the child in custody and transport him or her to the appropriate facility for admission in the case of a runaway from another jurisdiction or from out-of-state who has been located and for whom a warrant exists or for whom an NCIC missing-person "hit" is verified.
 5. Complete the appropriate supplemental reports and cancel all outstanding notifications. *Along with cancellation of the NCIC Missing Person File entry and other notifications regarding the case, a supplemental report should be completed describing the child's activities while missing and circumstances of the recovery/return.*

Notes:

If appropriate this section might also include a proviso concerning an agency's limited authority regarding 16- and 17-year-old missing children who, when located, may not be detained or required to return home unless certain conditions exist.

Agencies may also wish to consider using this policy as the basis for creating or updating an already-existing agency policy about missing persons who are older than 20.

**Comments or questions regarding this Model Policy and Procedure are welcomed.
Please contact NCMEC's Jimmy Ryce Law Enforcement Training Center at
1-800-THE-LOST (1-800-843-5678).**

Acknowledgment

NCMEC recognizes the valuable assistance provided by the International Association of Chiefs of Police in developing the format and structure of the original version of this document.



State of New Hampshire
Child Abduction Emergency Alert
 Fax Broadcast Form
 NHSP COMMUNICATIONS FAX # 271-1153



***** THIS IS A NEW HAMPSHIRE CHILD ABDUCTION ALERT ~ PLEASE STAND BY FOR IMPORTANT INFORMATION *****

1) Enter all available information. 2) Attach additional narrative as necessary. 3) Complete with updated information when available.

The _____ is activating the
(Name of Agency) Police Dept / Sheriff's Office / State Police
 New Hampshire Child Abduction Alert Program. The _____ is investigating
(Name of Agency) Police Dept / Sheriff's Office / State Police
 a confirmed child abduction which occurred on/at _____, in the (City/Town) of _____
(Street/Specific Location)
 at approximately _____ am/pm, on _____
(Time) (Date)

The child, _____, is a _____ year-old _____, with
(Name - If consent is obtained) (Age) (Race/Gender)
 _____ hair, _____ eyes, about _____ tall, and weighs about _____ pounds.
(Color) (Color) (Height) (Weight)
 (He/She) was wearing _____
(Description of Clothing)

(Additional Descriptors)

The suspect, _____, is a _____, approximately _____ years old,
 with _____ hair, _____ eyes, about _____ tall, and weighs about _____ pounds.
(Color) (Color) (Height) (Weight)
 (He/She) was wearing _____
(Description of Clothing)

(Additional Descriptors)

The vehicle is a _____, _____, _____, _____
(Color) (Year or "late/early model", etc) (Make) (Model / # of doors)
 with _____ license plate number _____, It also has: _____
(State) (Plate #) (Additional Descriptors)

 The (vehicle) (suspect) was last seen traveling in a _____ direction on _____
(Direction) (Street/Road/Route)
 (and may be heading to the _____ area).
(Possible Destination -- If applicable)

Anyone with any information on this abduction is asked to call the _____
(Agency)
 at _____, or dial 911 and report the information. Repeating the number to report
(Phone # Provided by Agency)
 information about this abduction: The _____ at _____, or dial 911.
(Agency) (Phone # Provided by Agency)

Broadcast (initial and note date & time of broadcast):
 Original Activation: _____, Update Activation: _____
(Your Initials) (Date & Time of Broadcast) (Your Initials) (Date & Time of Broadcast)

INVESTIGATIVE CHECKLIST FOR FIRST RESPONDERS



This Checklist is meant to provide a framework of recommended actions, considerations, and activities to perform competent, productive, and thorough missing/abducted-children investigations with the goal of better assisting families, victims, and the community.

First Responder

- Activate body camera or vehicle-mounted camera, if circumstances and policy allow, when approaching the scene to record vehicles, people, and anything else of note for later investigative review.
- Interview parent(s)/guardian(s)/person who made the initial report.
- Confirm the child is in fact missing.
- Identify the circumstances of the missing episode.
- Determine when, where, and by whom the missing child was last seen.
- Interview the individuals who last had contact with the child.
- Identify the child's zone of safety for his or her age and developmental stage.
- Attempt to verify the child's custody status.
- Make an **initial assessment**, based on the available information, of the type of incident whether nonfamily abduction; family abduction; runaway; or lost, injured, or otherwise missing.
- Obtain a **detailed** description of the missing child, abductor, and any vehicles used.
- Secure photos/videos of the missing child/abductor, and don't forget photos that may be available on cell phones.
- Evaluate whether the circumstances meet **AMBER Alert criteria** and/or other immediate community-notification protocol if not already activated. Discuss plan activation with supervisor.
- Evaluate whether the circumstances warrant requesting the National Center for Missing & Exploited Children®'s (NCMEC) Team Adam. If a Child Abduction Response Team (CART) is in the area, does the child's case meet their activation criteria?
- Relay detailed descriptive information to communications unit for broadcast updates.
- Determine need for additional personnel including investigative and supervisory staff.
- Brief and bring up-to-date all additional responding personnel.
- Identify and separately interview everyone at the scene. Make sure their interview and identifying information is properly recorded. To aid in this process, if appropriate, take pictures or record video images of everyone present. Vehicle-mounted or body cameras may be helpful with this task.
 - Note name, address, home/business phone numbers of each person.
 - Determine each person's relationship to the missing child.
 - Note information each person may have about the circumstances surrounding the missing episode.
 - Determine when/where each person last saw the child.
 - Ask each one, "What do you think happened to the child?"
 - Obtain names/addresses/phone numbers of the child's friends/associates and other relatives and friends of the family.
 - Determine if any suspicious activity or people were seen in the area.
 - Determine if any people were seen who seemed unusual, strange, or out-of-place.
- Continue to keep communications unit apprised of all appropriate developing information for broadcast updates.
- Obtain and note permission to search home or building where incident took place **even if the premises have been previously searched by family members or others.**
- Conduct an immediate, thorough search of the missing child's home **even if the child was reported missing from a different location.**
- Seal/protect scene and area of the child's home, including the child's personal articles such as hairbrush, diary, photos, and items with the child's fingerprints/footprints/teeth impressions, so evidence is not destroyed during or after the initial search and to help ensure items that could help in the search for and/or to identify the child are preserved. Determine if any of the child's personal items are missing. If possible, photograph/take videos of these areas.
- Evaluate the contents and appearance of the child's room/residence.
- Inquire if the child has access to the Internet and evaluate its role. Do not overlook activity on social-media accounts or other online apps and platforms.
- Ascertain if the child has a cell phone or other electronic communication device and obtain the most recent records of their use.
- Extend search to surrounding areas and vehicles, including those that are abandoned, and other places of concealment such as abandoned appliances, pools, wells, sheds, or other areas considered "attractive nuisances."
- Treat areas of interest as potential crime scenes including all areas where the child may have been or was going to be located.
- Determine if surveillance or security cameras in the vicinity may have captured relevant information. This information may be used to help locate the child and/or corroborate or refute witness statements.
- Interview other family members, friends/associates of the child, and friends of the family to determine
 - When each last saw the child.
 - What they think happened to the child.
 - If the child had complained about being approached by anyone.

- [] Review sex-offender registries to determine if registered individuals live/work in the area or might otherwise be associated with the case. Call NCMEC toll-free at 1-800-THE-LOST® (1-800-843-5678) to request assistance with this step.
- [] Ensure information regarding the missing child is entered into the National Crime Information Center's (NCIC) Missing Person File no more than two hours after receipt of the report and any information about a suspected abductor is entered into the NCIC Wanted Person File. Carefully review NCIC categories before entering the case, and be sure to use the Child-Abduction flag whenever appropriate.
- [] Prepare flier/bulletin with the child/abductor's photo and descriptive information. Distribute in appropriate geographic regions. Call NCMEC toll-free at 1-800-THE-LOST (1-800-843-5678) for assistance with this step.
- [] Prepare reports/make all required notifications.

Supervisory Officer

- [] Obtain briefing and written reports from the first responding officer and other personnel at the scene.
- [] Decide if circumstances meet the protocol in place for activation of an **AMBER Alert** and/or other immediate community-notification systems if not already activated.
- [] Determine if additional personnel are needed to assist in the investigation.
- [] Establish a command post away from the child's residence.
- [] Determine if additional assistance is necessary from
 - [] State/Territorial Police.
 - [] Missing-Children Clearinghouse.
 - [] Federal Bureau of Investigation (FBI).
 - [] Specialized Units.
 - [] Victim-Witness Services.
 - [] NCMEC's Project ALERT®/Team Adam.
 - [] CARTs.
- [] Confirm all the required resources, equipment, and assistance necessary to conduct an efficient investigation have been requested and expedite their availability.
- [] Ensure coordination/cooperation among all law-enforcement personnel involved in the investigation and search effort.
- [] Verify all required notifications are made.
- [] Ensure all agency policies and procedures are in compliance.
- [] Be available to make any decisions or determinations as they develop.
- [] Use media including print, radio, television, and the Internet/social media to assist in the search throughout the duration of the case.

Investigative Officer

- [] Obtain briefing from the first responding officer and other on-scene personnel.
- [] Verify the accuracy of all descriptive information and other details developed during the preliminary investigation.
- [] Initiate a neighborhood canvass using a standardized questionnaire.
- [] Obtain a brief, recent history of family dynamics.
- [] Correct and investigate the reasons for conflicting information offered by witnesses and other individuals.
- [] Collect article(s) of the child's clothing for scent-tracking purposes.
- [] Review and evaluate all available information and evidence collected.
- [] Secure the child's latest medical and dental records.
- [] Contact landfill management and request they delay or at least segregate garbage and dumping containers from key investigative areas in cases where it is suspected there may be imminent danger to the missing child.
- [] Develop and execute an investigative plan.
- [] Conduct a criminal-history background check on all principal suspects, witnesses, and participants in the investigation.
- [] Determine what additional resources and specialized services are required.
- [] Ensure details of the case have been reported to NCMEC.
- [] Prepare and update bulletins for local law-enforcement agencies, missing-children clearinghouse, FBI, and other appropriate agencies.
- [] Establish a phone hotline for receipt of tips and leads. Consider establishing an e-mail address and other methods of electronically receiving leads as well.
- [] Establish a leads-management system to prioritize leads and help ensure each one is reviewed and followed up on. **Note:** NCMEC has developed software, named the Simple Leads Management System, designed to manage and prioritize leads associated with missing-child investigations. It is available at no cost by calling NCMEC toll-free at 1-800-THE-LOST (1-800-843-5678).

This Checklist is adapted from and to be used as a supplement to *Missing and Abducted Children: A Law-Enforcement Guide to Case Investigation and Program Management*. That guide contains additionally recommended Checklists and materials. To request a free copy or assistance for specific cases, call **NCMEC at 1-800-THE-LOST (1-800-843-5678)**. This project was supported by Grant No. 2017-MC-FX-K001 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. This document is provided for informational purposes only in support of NCMEC's mission to serve as a resource center for law enforcement, families, and the public to help find missing children, reduce child sexual exploitation and prevent future victimization and does not constitute legal advice or professional opinion about specific facts. Information provided in this document may not remain current or accurate, so recipients should use this document only as a starting point for their own independent research and analysis. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The opinions, findings, and conclusions or recommendations expressed in this publication are those of the author and do not necessarily reflect those of the Department of Justice. Copyright © 2004-2017 National Center for Missing & Exploited Children. All rights reserved. National Center for Missing & Exploited Children®, 1-800-THE-LOST®, and Project ALERT® are registered trademarks of the National Center for Missing & Exploited Children. The AMBER Alert logo is a registered trademark of the U.S. Department of Justice. NCMEC Order #88.

AFFIDAVIT

1. That I, John Jones, am employed as a Detective with the Smithville Police Department in Smithville, NH. I am a certified police officer in the State of New Hampshire, having successfully completed the Academy Class at the New Hampshire Police Standards & Training Counsel in 2000. In addition to the trainings at the New Hampshire Police Academy, I have attended and successfully completed training in crime scene collection and preservation. I have also investigated numerous criminal and missing persons cases throughout my career.
2. The Smithville Police Department has received a missing person's report and are investigating the whereabouts of Jane Smith (DOB: [insert]).
3. Jane Smith has been missing almost one weeks. She was last seen on September 1, 2020, and as far as I know has not been seen or heard from since.
4. As explained in the following paragraphs, Smithville Police have determined that a search of Jane Smith's residence (1 Main Street, Smithville, New Hampshire), her vehicle, (NH Registration [insert], 2010 blue, Honda Civic) and access to her telephone records (603-XXX-XXXX) is likely to lead to evidence that will aid in the location of the missing person.
5. In State v. Beede, 119 N.H. 620 (1979), the Supreme Court recognized that police are permitted to search a residence in the course of a missing person's investigation, even in absence of probable cause to believe a crime has been committed. The Court stated:

When the police are not seeking things or evidence relating to a criminal case but instead are seeking to inspect for compliance with governmental regulations...or to see if a person is injured and in need of assistance...
or as in this case to find a missing person who may be in need of assistance, it is not necessary that the officer be in possession of facts that would warrant the belief that what is sought will be found (as is required in a criminal case).
It is only necessary that the facts would warrant the belief that it is appropriate to look to see if there is evidence which would lead to the missing person.

State v. Beede, 119 N.H. 620, 626-27 (internal citations omitted; emphasis added).

6. On September 1, 2020, at about 3:45 p.m., Jane Smith left her residence at 1 Main Street, Smithville, NH. The residence is located on .5 an acre of land and described as a tan, single family, one-level house, approx. 1100 sq. feet, one bedroom, one bathroom, kitchen and living room. There is a tan shed, approx. 100 sq. feet, located about 10 feet

from the left side of the residence. From her residence, she drove her 2010 blue, Honda Civic, NH Registration [insert], to her place of employment, Dunkin Donuts, located at 100 North Street, Smithville, NH. She arrived at work at about 4:00 p.m. Upon arrival, she texted her boyfriend, Fred Samuel, confirming her arrival and that she would see him later that evening at her residence as they had planned.

7. Jane Smith's co-workers confirm that Ms. Smith worked her entire 4:00 p.m. to 8:00 p.m. shift on September 1, 2020. At the end of her shift, her co-worker, Jason Jackson, saw Ms. Smith get into her blue, Honda Civic and drive west on North Street, in the direction of Ms. Smith's residence.
8. Surveillance videos obtained from businesses along North Street, capture a vehicle consistent with Ms. Smith's vehicle traveling west on North Street at around 8:00 p.m. Other than the driver, no other passengers are observed in this vehicle.
9. Surveillance video from Roger's Rentals (a scooter rental shop), located at 35 North Street, shows a red pick-up truck, and a blue, Honda Civic, stopped on the side of North Street at 8:10 p.m. that evening. A male, wearing jeans and a red hooded sweatshirt can be seen standing by the driver's side window of the blue, Hondo Civic. The male is wildly gesturing with his arms, and appears to be yelling. At about 8:13 p.m., the male returns to his pick-up and both the pick-up truck and the blue, Honda Civic, drive west on North Street.
10. Ms. Smith's boyfriend, Fred Samuel, who does not own a pick-up truck, told investigators that Ms. Smith never returned to her home on September 1, 2020. He was at Ms. Smith's residence at 8:00 p.m., as they had plans that evening.
11. On September 2, 2020, Fred Samuel filed a missing person's report with Smithville Police Detective John Jones. Fred Samuel reported that his girlfriend, Jane Smith, had gone missing and neither he nor Smith's relatives know her whereabouts. He was concerned for her well-being.
12. On September 2, 2020, Detective Jones met with Fred Samuel at the Smithville Police Department to discuss the missing person's report. Fred Samuel is the boyfriend of Jane Smith and they have been in a relationship for about two years. They communicate daily by text, phone calls, and see each other in person about three to four nights per week.
13. Fred Samuel reported that he last had contact with Jane Smith on September 1, 2020, at about 4:00 p.m., when Jane Smith texted him that she had just arrived at work and confirmed that she would see him after work at her residence as they had planned.
14. When Jane Smith had not arrived to her residence by 8:30 p.m. on September 1, 2020, Fred Samuel called and sent text messages to Jane Smith's cell phone numerous times,

but received no answer or return messages. Jane Smith cell phone is a black, Apple, iPhone 11, and is associated with phone number 603-XXX-XXXX. Her cellular phone carrier is Verizon.

15. Fred Samuel told investigators that Jane Smith was not acting strange recently, nor did she struggle with mental health issues or substance abuse. He described her as a happy person, and they were talking about future plans, including marriage and moving in together.
16. On September 3, 2020, Detective Jones spoke with Jane Smith's manager at Dunkin Donuts, Shelly Barnes. Shelly Barnes reported that Jane Smith was a good employee who regularly showed up for her shifts without issue.
17. On September 5, 2020, at about 11:30 p.m., Smithville Police Department received a report of a blue, Honda Civic parked in a parking lot of Bears Hiking Trails in Smithville. The parking lot is remote (cannot be seen from the road) and used by hikers. Detective Jones responded to the parking lot and confirmed, based upon registration number and VIN number that the vehicle was Jane Smith's vehicle.
18. On September 6, 2020, members of NH Fish and Game responded to the area of the recovered vehicle and conducted a missing persons search. Jane Smith was not located. The vehicle was secured and towed to Smithville Police Department. A black cell phone was observed resting on the center console of the vehicle.
19. Also, on September 6, 2020, Jane Smith's cell phone number (603-XXX-XXXX) was pinged by law enforcement. Verizon Wireless reported the cell phone was powered off and the last known activity on Jane Smith's phone was on September 1, 2020, at about 4:00 p.m.
20. Based on my training and experience, I am aware that when people are missing, they may sometimes be found in homes and vehicles. I am also aware that people sometimes leave items and documents in their homes and vehicles that contain information about their whereabouts and travel plans. There may also be items and documents in these same places that contain contacts and contact information for the missing person that could aid in locating the missing person directly or indirectly.
21. Based on my training and experience, I am aware that a missing person's cell phone, cell records, computer, tablet or similar electronic device may contain information that could aid in locating a missing person directly or indirectly, including their contacts, call history, messages, photos, and internet search history.
22. Based on the foregoing, I am requesting the issuance of a search warrant pursuant to State v. Beede, directing a search of Jane Smith's property located at 1 Main Street,

Smithville, New Hampshire, to include the home and outbuildings at that location. The search will be for Jane Smith herself and any evidence that could lead to locating Jane Smith including address books, camera or other photograph or video recording devices, cell phones, diaries, documents, items, journals, letters, maps, notes, photographs, receipts, records, writings, storage devices and the contents therein, all relating to Jane Smith's contacts, location or travel plans.

23. Based on the foregoing, I am requesting the issuance of a search warrant pursuant to State v. Beede, directing a search of NH Registration number [insert], a 2010 blue, Honda Civic for any evidence that could lead to locating Jane Smith including address books, camera or other photograph or video recording devices, cell phones, diaries, documents, items, journals, letters, maps, notes, photographs, receipts, records, writings, storage devices and the contents therein, all relating to Jane Smith's contacts, location or travel plans.
24. Based on the foregoing, I am requesting the issuance of a search warrant pursuant to State v. Beede, directing a search of the cell phone records associated with Jane Smith (#603-XXX-XXXX), for information that may lead to locating a missing person, Jane Smith, including contacts, call history, messages, photos, and internet search history.

Date: _____

Affiant

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: _____

Case Name: _____

Case Number: _____
(if known)

NOTICE OF INTENT TO SEEK
CLASS A MISDEMEANOR PENALTIES

Notice is hereby given that the State, pursuant to RSA 625:9, IV(c)(2), intends to seek class A misdemeanor penalties against the above named Defendant upon conviction of the offense(s) listed below:

Penalties requiring the charging offense to be classified as a class A misdemeanor include any of the following:

1. Imprisonment for any period, whether imposed, suspended or deferred;
2. A fine higher than \$1200 for any single offense;
3. Probation; and,
4. Home confinement for any period;

Date

For the State

I certify that on this date I provided a copy of this document to Defendant/Defendant Attorney at or before arraignment by: Hand-delivery OR US Mail OR E-mail (E-mail only by prior agreement of the parties based on Circuit Court Administrative Order).

Date

For the State

The State of New Hampshire SUPERIOR COURT COMPLAINT

Case Number: _____

Charge ID: _____

<input type="checkbox"/> VIOLATION	MISDEMEANOR <input type="checkbox"/> CLASS A <input type="checkbox"/> CLASS B <input type="checkbox"/> UNCLASSIFIED (non-person)
	FELONY <input type="checkbox"/> CLASS A <input type="checkbox"/> CLASS B <input type="checkbox"/> SPECIAL <input type="checkbox"/> UNCLASSIFIED (non-person)

You are to appear at the:
 address:
 in:
 at:
 on:

Under penalty of law to answer to a complaint charging you with the following offense:

THE UNDERSIGNED COMPLAINS THAT:

Last Name	First Name	Middle
Address	City	State Zip
Sex	Race	Height Weight Eye Color Hair Color

DOB	License #:	OP License State
<input type="checkbox"/> COMM. VEH.	<input type="checkbox"/> COMM. DR. LIC.	<input type="checkbox"/> HAZ. MAT. <input type="checkbox"/> 16+ PASSENGER

AT:
 On or about Between _____ in the above county and state, did
 commit the offense of:

RSA Name:
 Contrary to RSA:
 Inchoate:
 Extended Term Reason:

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:

Additional allegations are attached.
 against the peace and dignity of the State.
 Date: _____

Prosecutor's Signature NH Bar ID # Printed Name Prosecuting Attorney's Office

THE STATE OF NEW HAMPSHIRE COMPLAINT

Case Number: _____

Charge ID: _____

<input type="checkbox"/> VIOLATION	MISDEMEANOR	<input type="checkbox"/> CLASS A	<input type="checkbox"/> CLASS B	<input type="checkbox"/> UNCLASSIFIED (non-person)	
	FELONY	<input type="checkbox"/> CLASS A	<input type="checkbox"/> CLASS B	<input type="checkbox"/> SPECIAL	<input type="checkbox"/> UNCLASSIFIED (non-person)

You are to appear at the:

Court,

Address:

County:

Time:

Date:

Under penalty of law to answer to a complaint charging you with the following offense:

THE UNDERSIGNED COMPLAINS THAT: PLEASE PRINT

Last Name	First Name	Middle
-----------	------------	--------

Address	City	State	Zip
---------	------	-------	-----

Sex	Race	Height	Weight	Eye Color	Hair Color
-----	------	--------	--------	-----------	------------

DOB	License #:	OP License State
<input type="checkbox"/> COMM. VEH.	<input type="checkbox"/> COMM. DR. LIC.	<input type="checkbox"/> HAZ. MAT. <input type="checkbox"/> 16+PASSENGER

AT:

On _____ at _____ in _____

RSA Name:

Contrary to RSA:

Inchoate:

(Sentence Enhancer):

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:

against the peace and dignity of the State.

SERVED IN HAND

Complainant Signature	Complainant Printed Name	Complainant Dept.
-----------------------	--------------------------	-------------------

Making a false statement on this complaint may result in criminal prosecution.

Oath below not required for police officers unless complaint charges class A misdemeanor or felony (RSA 592-A:7.I).

Personally appeared the above named complainant and made oath that the above complaint by him/her subscribed is, in his/her belief, true.

Date

Justice of the Peace

Case Number: _____

Charge ID: _____

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL



ANN M. RICE
DEPUTY ATTORNEY GENERAL

LAW ENFORCEMENT MEMORANDUM

TO: All New Hampshire Law Enforcement Agencies
All County Attorneys

FROM: Joseph A. Foster, Attorney General

RE: The Exculpatory Evidence Protocol and Schedule¹

DATE: March 21, 2017

INTRODUCTION

Over fifty years ago, in a landmark case establishing the obligation of a prosecutor to provide potentially exculpatory evidence to the defense, the United States Supreme Court noted:

Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Brady v. Maryland, 373 U.S. 83, 87 (1963). This bedrock principle of the criminal justice system forms the basis of a prosecutor's obligation to inform criminal defendants of any exculpatory and/or impeachment evidence which relates to their case. Exculpatory evidence is evidence that is favorable to the accused. This includes evidence that is material to the guilt, innocence, or punishment of the accused or that may impact the credibility of a government witness, including a police officer. It is paramount that this obligation is scrupulously complied with in order to maintain the public's confidence in the criminal justice system.

Case law also makes clear that the existence of exculpatory evidence known to law enforcement is imputed to the prosecutor. Together, the obligation to produce and the imputation of knowledge creates tension between the right to confidentiality in a

¹ This protocol is intended to replace the 2004 Heed Laurie Memorandum. The Exculpatory Evidence Schedule ("EES") replaces the *Laurie* list.

government witness's personnel file and the prosecutor's need to know whether the records contain potentially exculpatory evidence. It is my hope that this new protocol will strike a more comfortable balance between these two competing interests, while ensuring that all criminal defendants in New Hampshire are treated fairly.

In 2004, Attorney General Peter Heed issued a New Hampshire Department of Justice memorandum entitled "Identification and Disclosure of *Laurie* Materials." The Heed Memorandum was produced to update law enforcement on the developments in the law since *State v. Laurie*, 139 N.H. 325 (1995), and the 1996 Memorandum issued by Attorney General Jeffery Howard. The Heed Memorandum established standardized guidelines and policies that are followed throughout the State today by prosecutors and police departments to identify, manage, and disclose exculpatory evidence contained in police personnel files.

Since 2004, the case law related to the disclosure of *Laurie* material has evolved and RSA 105:13-b, the statute governing the confidentiality of police personnel files has been extensively rewritten and reenacted. The statute now makes an exception to the otherwise confidential nature of police personnel files for direct disclosure to the defense of exculpatory evidence in a criminal case. It also provides that, "the duty to disclose exculpatory evidence that should have been disclosed prior to trial ... is an ongoing duty that extends beyond a finding of guilt."

In 2015, the New Hampshire Supreme Court decided *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015). In *Duchesne*, the Court was critical of a number of procedures set forth in the Heed Memorandum. Specifically, the Court criticized the procedure of automatic disclosure *in camera* to trial courts of personnel files as had been mandated under the prior language of the statute and the Heed Memorandum. The Court encouraged an independent review of the potentially exculpatory materials by the prosecutor, emphasizing that it is the prosecutor's duty to make these assessments and that the revisions to RSA 105:13-b provided a mechanism for this review and disclosure. *Id.* at 781.

In 2016, the New Hampshire Supreme Court determined that an officer was provided with adequate due process prior to his name being placed on the *Laurie* list, after his internal investigation file was reviewed by a superior officer and the chief of police, and he was then given the opportunity to meet with the chief and later the opportunity to meet with the Police Commission. *Gantert v. City of Rochester*, 168 N.H. 640, 650 (2016).

In light of these changes and the evolution of the law, the *Laurie* protocol has been updated. This new protocol has been reviewed by each of the state's County Attorneys, many chiefs of police, and the Director of the New Hampshire State Police.²

² On January 3, 2017, I issued a Law Enforcement Memorandum that raised concerns with some members of the law enforcement community. Those concerns have been considered and this Memorandum amends and replaces the January 3 Memorandum.

The new protocol retains the list requirement. However, the list will now be called the Exculpatory Evidence Schedule (“EES”). The EES will include designations to distinguish between officers with credibility issues and officers with other potentially exculpatory evidence in their personnel files. The schedule must be maintained for two primary reasons: first, without the assistance of a list prosecutors cannot meet their daily obligation to disclose exculpatory information imputed to them but maintained in protected personnel files; and second, maintenance of the list is precisely the type of procedure contemplated by the United States Supreme Court to ensure that this prosecutorial duty is effectively discharged. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

It is important to recognize that inclusion on the EES does not mean that an officer is necessarily untrustworthy or dishonest—and in many cases the designation on the EES will make clear there is no question of dishonesty. Nor does it mean that information contained in an officer’s personnel file will be used at trial or otherwise become public. It simply means that there is information in the file that must be disclosed to a criminal defendant if the facts of the case warrant that disclosure. Whether that material will be used at trial to cross-examine the officer will be the subject of pre-trial litigation.

The 2017 protocol mandates several important changes to existing guidelines and sample policy. (Please see the attached protocol for the details related to these changes). The most significant changes are as follows:

- The *Laurie* list will now be known as the Exculpatory Evidence Schedule (“EES”). The EES will include designations to inform prosecutors whether the personnel-file conduct at issue is related to credibility, excessive force, failure to comply with legal procedures, and mental illness or instability will only be based upon acts or events first occurring after the individual became a law enforcement officer.
- By September 1, 2017, each police chief, high sheriff, colonel or other head of a law enforcement agency (together hereinafter referred to as the “Chief”) shall have completed a review of the personnel files³ of all officers in their agency to ensure the accuracy of the new EES. Chiefs will provide an updated EES to the County Attorney for their jurisdiction and to the Attorney General or designee by September 1, 2017, and then at least annually by July 1st of each year and more often as necessary. On or before, September 1, 2017, the Chief shall certify as to the accuracy and completeness of his or her review of the files, using the form attached. If there is a question regarding whether the conduct documented in the file is

³ “Personnel files” include all materials related to an officer’s employment as defined in N.H. Admin. Rules, Lab 802.08, to include internal investigation materials, background and hiring documents, medical and mental health documents and any other related materials regardless of where the materials are kept or how they are labeled by the employer. For purposes of Exculpatory Evidence Schedule, the Chief shall only disclose matters first arising after an individual becomes a law enforcement officer.

potentially exculpatory, the Chief should consult with the County Attorney.

- The Attorney General's Office will provide a training for Chiefs and other law enforcement officials this Spring and periodically thereafter to provide Chiefs guidance as to what exculpatory evidence must be disclosed.
- All officers placed on the EES will be notified by the Chief and/or the County Attorney.
- At all times prosecutors retain the constitutionally based and ethical obligation to determine whether the personnel file of any officer who is a potential witness in a criminal case contains potentially exculpatory evidence. Because the EES is limited to events that first arise during the officer's employment in law enforcement, it is possible it will not include all potentially relevant exculpatory evidence. The prosecutor's obligation may be met by the prosecutor personally reviewing the personnel file of an officer who is expected to be a witness in a pending case and by inquiry of the officer.
- In compliance with RSA 105:13-b, prosecutors will provide potentially exculpatory evidence directly to the defense for any law enforcement witnesses in the case. This disclosure should be done in conjunction with a protective order until it is determined that the information is admissible at trial. A sample protective order is attached for guidance.
- If the prosecutor is unable to determine whether the information is potentially exculpatory in a particular case, the documentation from the personnel file will be submitted *in camera* for the court's review and its determination of whether the evidence is exculpatory in that case.
- All complaints of lack of credibility, excessive force, failure to comply with legal procedures, and mental illness or instability⁴ must remain in an officer's personnel file, until a determination is made that the complaint is unfounded, exonerated, not sustained or sustained.⁵ Any complaints, determined to be sustained (meaning the evidence proved the allegations true) or not sustained (meaning the evidence is insufficient to determine

⁴ Only instances of mental illness or mental instability that caused the law enforcement agency to take some affirmative action to suspend the officer as a disciplinary matter should be considered exculpatory. Any incident for which no disciplinary action was taken, shall not be considered exculpatory evidence. For example, a directive by a Chief to an officer to seek mental health treatment following a traumatic incident or event (on or off the job) does not result in the officer being included on the EES. Mental health treatment should not be stigmatized but where appropriate, encouraged.

⁵ "Unfounded" means any allegation that was investigated and found devoid of fact or false. "Exonerated" is a finding that the allegation is true, but that act was lawful and consistent with policy. "Not sustained" is any allegation for which the evidence was insufficient to either prove or disprove. "Sustained" is any allegation for which the evidence was sufficient to prove the act occurred.

whether the allegation is true or false) must be preserved in the officer's personnel file throughout the officer's career and retirement, unless the finding is later overturned.

- The new protocol eliminates the ten-year rule for maintaining an officer's name on the EES.⁶
- If an allegation is determined to be unfounded, or if the officer is exonerated after challenging the disciplinary action, the officer's name will be taken off the EES after consultation with the Attorney General or designee.
- An officer may **not** avoid inclusion on the EES by resigning his position. If an officer does resign, the disciplinary investigation must be preserved in the officer's personnel file and the complaint will be treated as a sustained complaint for purposes of the EES.
- All law enforcement officers have a personal obligation to notify the prosecutor in any case in which they may be a witness if they have potentially exculpatory evidence in their personnel file. In the coming months, the Attorney General's office will develop a training for all certified New Hampshire law enforcement officers
- All law enforcement agencies should review and consider adopting the Model Brady Policy developed by the International Association of Chiefs of Police. If your department adopted the sample policy attached to the Heed Memorandum as a standard operating procedure, it should be rescinded and replaced with the Model Policy and with procedures consistent with the new protocol within 60 days with the following exception: all new standard operating procedures should maintain the internal review process set forth in the Heed Memorandum at paragraphs E through J, as revised in the attached protocol, approved in *Gantert v. City of Rochester*, 168 N.H. 640 (2016).

Ultimately, every prosecutor is responsible for determining whether the information in a police officer's personnel file is subject to disclosure based upon the facts and circumstances of a particular case, the officer's role in the investigation, the potential defenses being presented, and a review of the pertinent case law and rules of evidence. If questions remain, they can be directed to the Attorney General or designee.

⁶ The Deputy Attorney General, Ann Rice, sent an email notice to all County Attorneys on June 25, 2014, to no longer remove officers from the *Laurie* list after ten years from the date of the conduct in question.

2017 PROTOCOL FOR IDENTIFYING WITNESSES WITH POTENTIALLY EXCULPATORY EVIDENCE IN THEIR PERSONNEL FILES AND MAINTANENCE OF THE EXCULPATORY EVIDENCE SCHEDULE (“EES”)

I. The heads of all law enforcement and government agencies retain an on-going obligation to identify and disclose potentially exculpatory materials in their employees’ personnel files to the County Attorney in their jurisdiction and to the Attorney General or designee.

Given the protected status of the personnel files of government witnesses, it is imperative that agency heads remain diligent in disclosing to prosecutors any conduct by an employee that is documented in a personnel file that could be potentially exculpatory evidence in a criminal case. What constitutes exculpatory material is quite broad. For guidance in making this determination many of the types of conduct that have been found to be potentially exculpatory in case law are listed in Part III below.

The International Association of Chiefs of Police (IACP) developed a Model Brady Policy for law enforcement agencies which also provides many examples of *Brady* material and is consistent with this new policy. The Model Policy is attached to this memo.

II. Personnel files include all internal investigation files, pre-employment records, and all mental health records.

For purposes of this protocol, a personnel file includes materials from all of the following records: internal investigation materials, background and hiring documents¹, medical and all mental health records², and any other related materials regardless of where the materials are kept or how they are labeled by the employer. While it may be common practice for a variety of legitimate reasons to maintain these records in separate locations, the “personnel file,” as discussed in this protocol and in the case law, includes any potentially exculpatory material maintained by an employer.

The employer must maintain in personnel files all complaints against an employee that are pending investigation, are found not sustained (meaning the evidence is insufficient to determine whether the allegation is true or false) or are sustained (meaning

¹ While in most instances, background and hiring files document conduct that preceded employment in law enforcement which will not be relevant, courts in unique circumstances have held otherwise where the conduct involved credibility. Therefore, prosecutors in connection with a pending case may question a Chief or the officer and review such information to assess whether any pre-law enforcement conduct took place that warrants disclosure. For purposes of placement on the EES, only matters first arising after an individual became a law enforcement officer are relevant.

² Only instances of mental illness or instability that caused the law enforcement agency to take some affirmative action to suspend the officer as a disciplinary matter should be considered exculpatory. Any incident for which no disciplinary action was taken shall not be considered exculpatory evidence. For example, a directive to an officer to seek mental health treatment following a traumatic incident or event (on or off the job) does not result in the officer being included on the EES. Mental health treatment should not be stigmatized but instead, where appropriate, encouraged.

the evidence proved the allegation true). If that finding is later overturned and the complaint is determined to be unfounded or the officer is exonerated, the complaint and related investigatory documents may be removed. If a complaint is determined to be unfounded, or the officer is exonerated, the officer can be taken off the EES with the approval of the Attorney General or designee, and the records removed from the officer's personnel file.

III. Identification of Potentially Exculpatory Materials

The term "potentially exculpatory material" is not easily defined because it is subject to refinement and redefinition on a case by case basis in the state and federal courts. Whether a court would view any particular piece of information as potentially exculpatory evidence depends, to some extent, on the nature of the information in question, the officer's role in the investigation and trial, the nature of the case, and the recency or remoteness of the conduct. However, when making the initial determination to place an officer's name on the EES it will be without the refining lens of the facts of a particular case. Yet, the only guidance available is extracted from case law. Nevertheless, as a general proposition, information that falls within any of the following categories should be considered potentially exculpatory evidence:

- A deliberate lie during a court case, administrative hearing, other official proceeding, in a police report, or in an internal investigation;
- The falsification of records or evidence;
- Any criminal conduct;
- Egregious dereliction of duty (for example, an officer using his/her position as a police officer to gain a private advantage such as sexual favors or monetary gain; an officer misrepresenting that he/she was engaged in official duties on a particular date/time; or any other similar conduct that implicates an officer's character for truthfulness or disregard for constitutional rules and procedures, including *Miranda* procedures);
- Excessive use of force;³
- Mental illness or instability that caused the law enforcement agency to take some affirmative action to suspend the officer for evaluation or treatment as a disciplinary matter; a referral for counseling after being involved in a traumatic incident, or for some other reason, for which no disciplinary action was taken shall not result in placement on the EES.

³ Incidents of excessive use of force generally do not reflect on an officer's credibility, and thus, in the context of most criminal cases, would not be considered exculpatory material. However, in the context of a case in which a defendant raises a claim of aggressive conduct by the officer, such incidents would constitute exculpatory material, requiring disclosure.

IV. In connection with a pending case, prosecutors may review law enforcement officers' personnel files.

The County Attorney or Attorney General, or their designees, may review the entire personnel file of an officer in connection with a pending case in which the officer may be a witness. This change is necessitated by the revisions to RSA 105:13-b, discussed above, and the developing case law.

The current version of RSA 105:13-b exempts exculpatory evidence from the confidential status of police personnel files. While the language of the statute leaves questions as to how to determine whether material is exculpatory if the entire file is not available, the legislature clearly intended prosecutors to have access to the previously confidential files to meet their discovery obligations. The legislative history of the statute reflects that it was revised to address a perception that law enforcement was hiding information in the confidential files and not properly reporting to prosecutors *Laurie* material.

This interpretation of the statute is consistent with the Court's ruling in *Theodosopoulos*, that "RSA 105:13-b cannot limit the defendant's constitutional right to obtain all exculpatory evidence." *State v. Theodosopoulos*, 153 N.H. 318, 321 (2006). The *Theodosopoulos* Court also upheld the trial court's order directing the prosecutor to review the personnel file of the witness and to produce any exculpatory evidence contained in the file directly to the defendant. *Id.* at 322.

More recently, in *Duchesne*, the Court was critical of the Heed protocol's mandate of automatic referral of the officer's personnel file to the trial court rather than the prosecutor reviewing the materials in the first instance. *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 783-84 (2015). The *Duchesne* Court discussed the changes in RSA 105:13-b, and also interpreted the first paragraph of the new statute as a directive that exculpatory evidence be disclosed to the defendant. *Duchesne*, 167 N.H. at 781.

However, the practical reality is that prosecutors cannot review every officer's personnel file in every criminal case. Thus, it is imperative that the EES is properly updated and maintained. By September 1, 2017, each police chief, high sheriff, colonel or other head of a law enforcement agency (together hereinafter referred to as the "Chief") or their designee, shall complete a review of the personnel files⁴ of all officers in their agency to ensure the accuracy of the new EES. A notation should be added to the new EES designating the type of exculpatory evidence contained in the file. These categories should include credibility, excessive force, failure to comply with legal procedures, and mental illness or instability. This designation should limit the necessity

⁴ "Personnel files" include all materials related to an officer's employment as defined in N.H. Admin. Rules, Lab 802.08, to include internal investigation materials, background and hiring documents, medical and mental health documents and any other related materials regardless of where the materials are kept or how they are labeled by the employer. For purposes of placement on the Exculpatory Evidence Schedule, only matters first arising after an individual became a law enforcement officer are relevant.

for further and repeated reviews of the officer's file by informing prosecutors of the type of material contained in the file. Actions or events that took place prior to an officer's employment in law enforcement will not result in that officer's placement on the EES.⁵

Chiefs must provide the updated EES to the County Attorney in their jurisdiction and to the Attorney General or designee by September 1, 2017, and then at least annually by July 1st of each year and more often as necessary. Using the attached certification form, each Chief will certify as to the accuracy and completeness of the review. If there is a question regarding whether the conduct documented in the file is potentially exculpatory, the Chief should consult with the County Attorney.

The Attorney General's Office will provide a training for Chiefs and other law enforcement officials this Spring, and periodically thereafter to provide Chiefs guidance as to what constitutes potentially exculpatory evidence.

If the EES designation indicates that the material may be exculpatory in a particular case, the prosecutor will have to review the materials. In doing so, the prosecutor should analyze the nature of the conduct in question, and weigh its exculpatory nature in light of the officer's role in the investigation and trial, the nature of the case, the known defenses, and the recency or remoteness of the conduct, before making a final determination of whether the materials are potentially exculpatory in that particular case. What may be exculpatory in one criminal matter may be irrelevant in another.

The prosecutors who have reviewed the contents of an officer's personnel file shall maintain the confidentiality of the material reviewed. The production of the exculpatory materials should be done in conjunction with a protective order, as not all discoverable materials are necessarily admissible at trial. The discovery disclosure should outline the nature of the conduct and the finding of the agency. In certain cases, it may also be necessary to produce the underlying reports regarding the investigation. This should also be done in conjunction with a protective order. A sample protective order is attached.

When a determination is made to add an officer to the EES, the County Attorney and/or the Chief will notify that officer. Along with the notification, the officer will be given the opportunity to submit documentation for inclusion in his or her personnel file to indicate that he or she is challenging the disciplinary finding or the finding that the conduct is exculpatory. A notation will be made on the list if the matter is subject to ongoing litigation.

⁵ In most instances, actions or events that took place prior to an individual's employment in law enforcement will not constitute relevant exculpatory evidence. However, courts have held in unique circumstances that some pre-law enforcement conduct implicating credibility was exculpatory. Therefore, to fulfill their constitutional and ethical obligations, prosecutors may question Chiefs or officers about such matters and review the officer's personnel file to assure it does not contain relevant exculpatory evidence.

To the extent that institutional knowledge permits, an officer who was taken off the *Laurie* list because the conduct was more than ten years old should be placed back on the EES. Hereafter, no officer will be taken off the EES without the approval of the Attorney General or designee.

V. The EES will be maintained and updated by the Attorney General or designee. The County Attorneys will maintain the information from the EES in their case management software.

The master EES will be maintained by the Attorney General's Office. The EES, and its updates, will be provided to the County Attorneys who will incorporate the information into their case management software, Prosecutor By Karpel (PBK). The County Attorneys will ensure that their PBK software properly notes officers in their county with exculpatory information in their files, and that it will be updated regularly for easy reference by their prosecutors.

Following receipt of the annual updates from the Chiefs, the County Attorneys will provide updates to the EES to the Attorney General's Office at least annually by no later than August 1st, and as needed, to enable the Attorney General's Office to maintain a master schedule. County Attorneys shall contact Chiefs who fail to provide their annual July 1st certification to assure the EES is complete. A process will be developed for local prosecutors to have access to the EES.

The EES is a confidential, attorney work product document, not subject to public disclosure. The EES contains information from personnel files which are protected from disclosure under RSA 91-A.

VI. An officer can only be removed from the EES with the approval of the Attorney General or designee.

Given the breadth of the constitutional and ethical obligations to provide exculpatory evidence and the fact that the failure to comply with this obligation could result in overturning a criminal conviction or dismissal of a case, it should be the practice to err on the side of caution when determining whether an officer's designation on the EES should continue.

If it is determined the information in the personnel file would not be exculpatory in any case, the officer's name shall be removed from the list, but only with the approval of the Attorney General or designee.

VII. The prosecutor must disclose directly to the defense any exculpatory material in a particular case for any potential witness in an upcoming trial.

If an officer is on the EES and is a *potential* witness in an upcoming trial, even if he or she is not testifying, and the prosecutor determines that information in the officer's personnel file is exculpatory, the prosecutor must provide this evidence directly to the

defense in compliance with the deadlines set forth by New Hampshire Rules of Criminal Procedure, or other deadline set by the trial court. As noted above, the disclosure of the materials should be the subject of a protective order limiting the dissemination of the information or materials.

VIII. Judicial Review is reserved for instances in which the prosecutor cannot determine if the material is exculpatory in a particular case.

In camera review of a personnel file, in whole or in part, as deemed necessary in a particular case is only appropriate if there is a question as to whether the information in that portion of the personnel file is exculpatory, after the prosecutor has reviewed the file. These findings are case-specific, and therefore one judge's ruling that the information is not exculpatory nor discoverable, is not binding in any other case.

IX. New procedures should be established by the heads of law enforcement agencies to track cases in which officers testify in the event that there is a post-conviction discovery of exculpatory evidence.

The current statute provides an ongoing duty of disclosure "that extends beyond a finding of guilt." RSA 105:13-b, I. Thus, law enforcement agencies should develop a procedure for tracking cases in which an officer testifies in order to comply with this obligation. It is currently difficult to identify cases in which a particular officer has testified, hampering efforts to make the post-conviction notifications directed by the statute.

X. All law enforcement agencies should review and consider adopting the Model Policy for Brady Disclosure Requirements, adopted by the International Association of Chiefs of Police.

A copy of this policy is available on the International Association of Chiefs of Police website and is also attached. Adoption of this policy will ensure consistent procedures and standards throughout the State and provide guidance to the heads of law enforcement agencies in determining when certain conduct should be designated as potentially exculpatory.

If your department adopted the sample policy attached to the Heed Memorandum as a standard operating procedure, it should be rescinded and replaced with the Model Brady Policy that has been adapted for New Hampshire and which outlines procedures consistent with the new protocol, the court's holding in *Gantert v. City of Rochester*, 168 N.H. 640 (2016), and the revisions to RSA 105:13-b.

XI. Process prior to placing an officer on the EES and production of personnel files pursuant to a court order.

The following paragraphs have been inserted into the Model Brady Policy that is attached to this Protocol. They outline the process departments should follow prior to

placing an officer on the EES and the process of producing personnel files pursuant to a court order.

E. The Deputy Chief (Captain, Lieutenant, Internal Affairs Unit Supervisor, etc.) shall review all internal affairs investigation files including those investigations conducted by an immediate supervisor, to determine if the incident involved any conduct that could be considered potentially exculpatory evidence. If it does, he or she shall send a memo to the Chief outlining the circumstances.

F. The Chief shall review the memo and determine if the incident constitutes potential exculpatory evidence. If the Chief concludes that the incident constitutes potentially exculpatory evidence, he or she shall notify the involved officer. If the officer disagrees with the Chief's finding, he or she may request a meeting with the Chief to present any specific facts or evidence that the officer believes will demonstrate that the incident does not constitute potentially exculpatory evidence. These facts or evidence may also be presented in writing which will be placed in the officer's personnel file. The Chief shall consider such facts and render a final decision in writing. In addition, if the officer is contesting the finding that he or she committed the conduct in question through arbitration or other litigation that should also be noted in the officer's personnel file.

G. In the event the Chief has questions about this determination, he or she should notify the County Attorney. Upon review of the material, the County Attorney shall determine if it is potentially exculpatory evidence and whether the officer's name should be on the EES with that designation.

H. Upon the Chief and/or County Attorney determination that the conduct reflected in the officer's personnel file is potentially exculpatory evidence, the officer shall be notified in writing.⁶

I. If the final decision is that the incident in question constitutes potentially exculpatory evidence, a copy of that decision shall be placed in the officer's disciplinary file, as well as transmitted to the department's prosecutor/court liaison officer. The Chief shall also notify the County Attorney and the Attorney General or designee in writing. The notification shall include the officer's name and date of birth, along with a description of the conduct and a copy of the findings of the internal investigation or other relevant documents substantiating that conduct.

J. The Chief shall instruct the officer in writing that in all criminal cases in which that officer may be a witness, the officer shall present a copy of the written notice that the officer's name is on the EES to the prosecutor.

K. If the Chief determines that the incident constitutes potentially exculpatory evidence, the Chief shall then assess whether the conduct is so likely to affect the

⁶ If the department is overseen by a Police Commission, the policy may provide that the officer shall have an opportunity to have his or her placement on the EES also reviewed by the Commission.

officer's ability to continue to perform the essential job functions of a police officer as to warrant dismissal from the department. In making such review, the Chief should consider not only the officer's present duty assignment, but also the officer's obligation to keep the peace and enforce the laws on a 24-hour basis, and the possibility that the officer may become a witness in a criminal case at any time.

L. Any requests from defense counsel to produce an officer's personnel file shall be referred to the office of the Chief of Police. If the request is not made in the context of a specific criminal case, the Chief shall deny the request. If the request relates to a specific pending criminal case in which the officer is a witness, and the officer's conduct reflected in the file has not already been determined to be potentially exculpatory evidence, the Chief shall notify the prosecutor of the request and provide the file for the prosecutor's review. If a determination is made by the prosecutor that the file does not contain any potentially exculpatory evidence, the requesting party will be directed to obtain a court order for the portion of the file they can establish is likely to contain potentially exculpatory evidence.

Upon receipt of a written court order, the file will be made available to the trial judge for an *in camera* review. Upon receipt of such an order, the file shall be copied and the copies personally delivered to the court, and a receipt obtained for the same. The file shall be accompanied by a letter from the Chief setting forth that the information is being forwarded for purposes of a review for potentially exculpatory evidence pursuant to RSA 105:13-b, III, and requesting that the file only be disclosed to the extent required by law, and only in the context of the specific case for which the *in camera* review is being conducted. The letter shall also request that the file be returned to the department or shredded when the court is through with it, or retained under seal in the court file if necessary for appeal purposes.

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL



ANN M. RICE
DEPUTY ATTORNEY GENERAL

**EXCULPATORY EVIDENCE PROTOCOL SCHEDULE- 2017 CERTIFICATE
OF COMPLIANCE- DUE SEPTEMBER 1, 2017**

NOTE: An annual Exculpatory Evidence Protocol and Schedule certificate of compliance must be submitted in accordance with the Attorney General's Exculpatory Evidence Protocol and Schedule Memorandum on or before July 1 of each calendar year.

I hereby certify that the personnel files of each law enforcement officer who was listed as sworn full or part-time with this law enforcement agency during the past year have been reviewed by the individual listed below for potential exculpatory evidence in compliance with the guidance provided by the Attorney General's Memorandum. The personnel files reviewed included the full employment record of each officer, including but not limited to, internal investigation materials, disciplinary files, background and hiring documents (to include their prior employment file if prior employment was in law enforcement), and their medical and mental health documents.

I have sought advice from the County Attorney and the Attorney General when assessing whether conduct should be considered potentially exculpatory. For any officer who had potentially exculpatory evidence in their personnel file for matters arising after the individual became a law enforcement officer, I have notified both the County Attorney and the Attorney General to place the officer's name on the Exculpatory Evidence Schedule (EES). I have notified every officer whose name was placed on the EES of such placement in writing.

Signature of reviewing Officer

Title of Authority

Signature of Chief Law Enforcement
Officer

Title of Authority

Date

Law Enforcement Agency

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL



ANN M. RICE
DEPUTY ATTORNEY GENERAL

**EXCULPATORY EVIDENCE PROTOCOL SCHEDULE-ANNUAL
CERTIFICATE OF COMPLIANCE**

NOTE: An annual Exculpatory Evidence Protocol and Schedule certificate of compliance must be submitted in accordance with the Attorney General's Exculpatory Evidence Protocol and Schedule Memorandum on or before July 1 of each calendar year.

I hereby certify that the personnel files of each law enforcement officer hired with this law enforcement agency during the past year have been reviewed by the individual listed below for potential exculpatory evidence in compliance with the guidance provided by the Attorney General's Memorandum. The personnel files reviewed included the full employment record of the officer, including but not limited to, internal investigation materials, disciplinary files, background and hiring documents (to include their prior employment file if prior employment was in law enforcement), and their medical and mental health documents. In addition, for any officer with new complaints filed in this calendar year or disciplined by this department in the past year, their file was reviewed in full again in compliance with the guidance provided by the Attorney General's Memorandum.

I have sought advice from the County Attorney and the Attorney General when assessing whether conduct should be considered potentially exculpatory. For any officer who had potentially exculpatory evidence in their personnel file for matters arising after the individual became a law enforcement officer, I have notified both the County Attorney and the Attorney General to place the officer's name on the Exculpatory Evidence Schedule (EES). I have notified every officer whose name was placed on the EES of such placement in writing.

Signature of reviewing Officer

Title of Authority

Signature of Chief Law Enforcement
Officer

Title of Authority

Date

Law Enforcement Agency

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

_____, SS.

_____ TERM, 2017

**** FILED UNDER SEAL ****

State of New Hampshire

v.

MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS

NOW COMES the State of New Hampshire, by and through the Office of the Attorney General and undersigned counsel, and hereby request that the Court issue a Protective Order of Discovery Materials to be provided to defense counsel in the above-captioned matter that include materials from a law enforcement officer's personnel file. In further support of this motion, the State says as follows:

1. Pursuant to the State's obligation to provide exculpatory evidence to the defense, the State has obtained potentially exculpatory evidence from the _____ Police Department consisting of materials from Officer _____'s personnel file. Officer _____ may be called as a witness for the State in this matter.

2. While the State acknowledges that these materials may be potentially exculpatory, the State does not concede that these materials may be used in open court for impeachment of Officer _____. This will be the subject of a later Motion in *Limine* in this matter.

3. In the interim, the State is asking that defense counsel be prohibited from discussing these materials or providing a copy of the materials from Officer _____'s

personnel file that will be produced in discovery, to anyone other than defense counsel and their investigator(s).

4. The Court has the authority to issue this proposed protective order. Indeed, it is well-established that the Court has the inherent authority to exercise its sound discretion in matters concerning pretrial discovery. *See State v. Emery*, 152 N.H. 783, 789 (2005); *State v. Smalley*, 148 N.H. 66, 69 (2002); *State v. DeLong*, 136 N.H. 707, 709 (1993). Pursuant to Rule 12 of the new Hampshire Rules of Criminal Procedure, therefore, the Court may at any time restrict or even deny discovery “[u]pon a sufficient showing of good cause.” *See* N.H. R. Crim. P. 12(b)(8).

5. Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. *See* RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the officer’s personnel records while meeting the State’s competing interest in providing potentially exculpatory evidence in a criminal matter, enabling the defendant and his counsel to review complete discovery and prepare for trial. *See generally, State v. Laurie*, 139 N.H. 325 (1995); *N.H.R.Prof.C.* 3.8(d).

6. Counsel for the defendant, attorney _____, ASSENTS/OBJECTS to the proposed protective order attached hereto.

WHEREFORE, the State respectfully asks that the Court:

- A. Grant this motion;
- B. Approve the attached proposed protective order; and
- C. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

DATE

Attorney

CERTIFICATE OF SERVICE

I hereby certify that on _____, I sent a true copy of the foregoing motion and all attachments by first-class mail to attorneys _____.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

_____ SS.

_____ TERM,

**** UNDER SEAL ****

State of New Hampshire

v.

[PROPOSED]
PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above-captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105:13-b, the State has reviewed the confidential police personnel file of Officer _____ for relevant and potentially exculpatory evidence in this matter.
2. Following its review, the State has determined that certain documents contained in Officer _____'s personnel file may be potentially exculpatory in this matter. The documents will be provided to the defendant's counsel under this protective order.
3. Defense counsel is prohibited from sharing or further disseminating these confidential documents and the confidential information contained therein with anyone other than their client and their staff.
4. If the defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.


So Ordered.

Date

Presiding Justice

LAW ENFORCEMENT MEMORANDUM

To: All New Hampshire Law Enforcement Agencies
All County Attorneys

From: Gordon J. MacDonald, Attorney General 

Re: Additional Guidance Concerning the Exculpatory Evidence Schedule

Date: April 30, 2018

The intention of this memorandum is to clarify some of the procedural matters addressed in the New Hampshire Department of Justice March 21, 2017 Exculpatory Evidence Memorandum, Exculpatory Evidence Protocol, and 2017 Training for Law Enforcement PowerPoint presentation (hereinafter, "Memo," "Protocol," and "Training"). Where there is a conflict between this memorandum and the Memo, Protocol, or Training, this memorandum shall control.

Only "Sustained" Findings Shall Entail Placement on the EES

The EES Memo and Protocol contemplate the following basic process with regard to allegations of misconduct against an officer:

- That an investigation will be conducted into the allegations;
- That the investigation will result in a conclusion that the allegation is "sustained," "not sustained," or "unfounded," or that the officer is "exonerated";
- That if the conclusion is that the allegation is "sustained," the head of the law enforcement agency will determine whether the conduct at issue is EES conduct;
- That if the head of the law enforcement agency determines that the conduct at issue is EES conduct, the officer will be notified and afforded the opportunity to present evidence which the officer believes demonstrates the conduct is not EES conduct; and
- That if after considering the evidence presented by the officer, the head of the law enforcement agency's conclusion remains that the sustained allegation of misconduct constitutes EES conduct, he or she shall issue notification causing the officer's name to be placed on the EES.

See Protocol, p. 4, 7.

Only allegations of misconduct which are sustained after an investigation and which constitute EES conduct will result in an officer's name being placed on the EES.¹

"Sustained" means that the evidence obtained during an investigation was sufficient to prove that the act occurred. *See Memo*, p. 4 n.5. **Mere investigation into EES conduct does not warrant either EES notification or inclusion on the EES.** Accordingly, law enforcement agency heads should not cause an officer's name to be "temporarily" placed on the EES while an investigation into the allegations is pending. Further, investigations into allegations of misconduct against officers who resign or otherwise leave employment prior to the completion of the investigation must be completed nonetheless, upon notice to the officer, with or without the officer's cooperation.

There is a caveat to the directive that mere investigation shall not cause EES notification and inclusion: The fact that an officer is under investigation may constitute evidence which is favorable to the defense in a particular case or cases, and thus must be disclosed to the defense in those cases. *See, e.g., United States v. Wilson*, 605 F.3d 985, 1006 (D.C. Cir. 2010) (per curiam) (evidence that the testifying officer was under suspension due to an investigation might show that she was motivated to testify falsely against the defendants in order to curry favor with the government); *United States v. Bowie*, 198 F.3d 905 (D.C. Cir. 1999). **Consistent with the Memo's directives, officers who are under investigation must notify the prosecutor in any case in which they may be a witness that they are under investigation.** *See Memo*, p. 5. The heads of law enforcement agencies should also provide this information to prosecutors in cases in which such officers may be a witness.

Allegations Which Are Determined to be "Not Sustained"
Do Not Entail Placement on the EES

As discussed above, the EES Memo and Protocol contemplate that a sustained allegation of EES misconduct against an officer will cause the officer's name to be placed on the EES.

A finding which is not sustained is one for which there is insufficient evidence to enable the conclusion that the alleged conduct actually occurred. *Memo*, p. 4; *Memo*, p. 4 n.5. In essence, an allegation which is not sustained is nothing more than an allegation, which should not be considered exculpatory.

¹ Written notification concerning sustained allegations which constitute EES conduct must be made to the County Attorney and the Attorney General's Criminal Justice Bureau Chief. *See Protocol*, p. 7. The notification content shall be limited to the officer's name and date of birth, the name of the law enforcement agency, the date(s) on which the misconduct occurred, and a short description of the type(s) of EES conduct at issue. No other information, and no other records or documents, shall be submitted. Examples of types of EES conduct include "credibility," "excessive use of force," and "criminal conduct." *See, e.g., Protocol*, p. 2. A sample notification letter is attached to this memorandum.

Thus, allegations which are deemed not sustained after investigation, as with unfounded and exonerated determinations, will not cause an officer's name to be placed on the list. Accordingly, notification is not required regarding allegations which are deemed not sustained.

Mental Health & Exculpatory Evidence

Evidence of mental illness may be exculpatory because it may call into question the witness's reliability and therefore his or her credibility. *See, e.g., State v. Fichera*, 153 N.H. 588, 599-600 (2006) (cross-examination on the issue is permissible if the defendant is able to show that a "mental impairment" affects the witness's perception of events to which she is testifying); *State v. Shepherd*, 159 N.H. 163, 171 (2009) (reversing an AFSA conviction, in part because evidence of the victim's history of depression was "sufficiently favorable to require disclosure"); *see also United States v. Butt*, 955 F.2d 77, 82-83 (1st Cir. 1992) (noting that federal courts have found mental instability relevant to credibility only where the witness suffered from a severe illness that dramatically impaired her ability to perceive and tell the truth); *United States v. Smith*, 77 F.3d 511, 516 (D.C. Cir. 1996) (reversing conviction, in part because the government failed to disclose that a key prosecution witness had been hospitalized for chronic depression for more than a year).

The EES Protocol requires that an officer's name be placed on the EES due to an "instance[] of mental illness or instability that caused [the officer's] law enforcement agency to take some affirmative action *to suspend the officer as a disciplinary matter.*" *Protocol*, p. 1 n.2 (emphasis added); *Protocol*, p. 2. The emphasis on the prerequisites of suspension and discipline in the Protocol is consistent with the approach taken by some courts that only severe, protracted mental illness will constitute favorable evidence for constitutional purposes. In other words, if the mental health issue is so significant that it not only compromises an officer's discharge of his or her duties but also results in the officer's suspension as a disciplinary matter, then it ought to be presumptively significant enough to constitute impeachment evidence. The Protocol makes clear that other mental health events, such as "a directive to an officer to seek mental health treatment following a traumatic incident" wherein no affirmative action was taken to suspend the officer as a disciplinary matter, are categorically excluded from the EES. *Protocol*, p. 1 n.2.

The Protocol's requirement of the nexus between "the instance of mental illness or instability" and the "suspen[sion] as disciplinary matter" also means that documentation of such incidents should be found in personnel files other than the officer's medical and mental health files. Assuming that is the case, the Protocol does not require the head of a law enforcement agency to review officers' medical and mental health records to discover such information, since this information will already be known due to other administrative action.

Protocols for Removal from the EES

In *Gantert v. City of Rochester*, 168 N.H. 640 (2016), the New Hampshire Supreme Court observed that “the interest of individual officers in their reputations and careers is such that there must be some *post-placement* mechanism available to an officer to seek removal from the “Laurie List” if the grounds are thereafter found to be lacking in substance....” *Gantert*, 168 N.H. at 650 (emphasis in original). The Court noted that after an officer is placed on an exculpatory evidence list, he or she “may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis.” *Id.* (citing *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 784-85 (2015)). Other avenues of post-placement process include grievance procedures identified in employment terms and collective bargaining agreements.

Because sustained findings of conduct warranting inclusion on the EES may be overturned through these processes, the Memo and Protocol permit an officer’s name to be removed from the EES “with the approval of the Attorney General or designee.” *Protocol*, p. 5. This removal process does not involve a substantive review. NHDOJ is not an adjudicatory body and the protocol described herein is not one which entails reconsideration of the facts underlying the investigation. Instead, the removal protocol requires removal when a sustained finding has been overturned.²

The removal protocol is as follows:

1. The Attorney General’s designees for the purpose of EES removal are the Director of the Division of Public Protection and the Criminal Justice Bureau Chief. The Attorney General may designate other Senior Assistant Attorneys General for this purpose.
2. The request for removal must be made in writing by the head of the law enforcement agency at which the officer was or is employed, or by the officer or his or her designee. If the request is made by the officer or his or her designee, the Attorney General’s Designee shall provide notice thereof to the head of the law enforcement agency at which the officer was or is employed. The request must:
 - a. State the allegations against the officer; and
 - b. State that an investigation into the allegations was conducted; and

² If an officer’s name was included on the EES before the investigation into his or her alleged misconduct was completed, the officer’s name will be removed by the Attorney General or Designee upon written notification that the outcome of the investigation is that the allegations were unfounded or not sustained, or that the officer was exonerated.

- c. State the disciplinary finding which resulted in the officer's placement on the EES, and the fact that the finding has been overturned; and
 - d. Provide a copy of the order or other determination overturning the disciplinary finding.
3. If a sustained finding was overturned, the Attorney General's Designee shall cause the removal of the officer's name from the EES.
4. The Attorney General's Designee shall notify the head of the law enforcement agency, and the law enforcement officer or his or her designee, in writing regarding the removal decision. A copy of this notification shall be sent to each county attorney.

[Date]

Criminal Justice Bureau Chief
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301

RE: EES NOTIFICATION

Dear Criminal Justice Bureau Chief:

A determination has been made that the law enforcement officer identified below has engaged in conduct that may be subject to disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Laurie*, 139 N.H. 325 (1995):

Officer's name:

Officer's date of birth:

Law enforcement agency:

Date of incident:

Type of EES conduct:

Sincerely,