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## PREFACE

I am pleased to present New Hampshire's law enforcement officers with this updated Law Enforcement Manual. The Attorney General's Office first recognized the need to provide law enforcement with a comprehensive manual of the State's criminal law in 1959. The manual was revised in 1979, 1984, and 1993. This edition of the manual will initially be issued in a paper version for Chief Law Enforcement Officers and public officials. It will then be made available in electronic form to all New Hampshire law enforcement officers. Finally, the electronic version will be available through the New Hampshire Police Standards & Training Council's law enforcement web site. As changes to New Hampshire's statutes and court decisions create a need to update the manual, changes will be made to the on-line version of the manual available through the web site. Replacement or supplemental pages will be available on-line for those who prefer to maintain a paper version of the manual. Through this process we will endeavor to keep the manual current.

The Law Enforcement Manual is designed to directly benefit law enforcement officers as they carry out their patrol and investigatory duties. The Manual is not intended to be a prosecutor's trial manual or an advanced text for investigators. The Manual does discuss legal issues in the areas of search and seizure, confessions, and other investigatory techniques, providing basic guidance on the conduct of investigations.

This extensive revision and electronic distribution of the Law Enforcement Manual is the result of contributions and assistance from a number of individuals and organizations, who I would like to thank: Assistant Commissioner of Safety Earl Sweeney, Police Standards & Training Council Director Donald Vittum and his staff, with particular thanks to Captain Benjamin Jean who is managing the web site version of the manual, and Assistant Attorney General Esther Piszczek, who served as technical editor for the manual. I would like to single out and acknowledge the extraordinary contribution of Associate Attorney General Ann Rice, without whose expertise, tireless efforts, and dedication this 2008 major revision of the Manual would not have occurred.

It is my hope that this Law Enforcement Manual will be a valuable resource for the dedicated men and women of law enforcement and will aid them in successfully detecting, apprehending, and assisting in the prosecution of those who violate our laws. The people of New Hampshire should be proud of the professionalism, dedication, and courage of New Hampshire's law enforcement officers. It is my privilege, through my service as Attorney General, to lead these devoted public servants and to provide them with this Law Enforcement Manual to assist them in carrying out their duties.

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Kelly A. Ayotte  
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# **I. 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 stop or an investigative stop.

## **B. Initial Encounter**

The constitutional protections against unreasonable seizures do not come into play until a person is "seized" in the constitutional sense. "Not all interactions between the police and citizens involve a seizure of the person."<sup>1</sup> 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."<sup>2</sup> The officer may request to examine an individual's identification or may ask for consent to search the individual or his or her 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. “So long as the reasonable person would feel free to disregard the police and go about his business,” no seizure has occurred.<sup>3</sup>

## **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.

A seizure occurs for constitutional purposes when a reasonable person, facing the same circumstances, would not feel free to ignore the law enforcement officer’s questions and leave.<sup>4</sup> This happens when an officer, by means of show of authority or the use of physical force, in some way restrains the liberty of a person.<sup>5</sup>

### **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 was 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;
- the character and tone of the conversation between the person and the officers;
- the time of day when the stop occurred;
- whether other people were in the area; and
- the duration of the stop.

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 of 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, or physical restraint of the person, if the words used by an officer convey the message that the person is not free to leave.<sup>6</sup> For instance, the N.H. Supreme Court found that a man had been seized by the police, and thus was entitled to some 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.<sup>7</sup>

## **2. Submission Is Not Necessary For A Seizure To Occur**

Unlike the United States Supreme Court<sup>8</sup> 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.<sup>9</sup> If the officer’s action would lead a reasonable person to believe he or she was not free



to leave, a seizure has occurred, regardless of whether or not 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 he 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.<sup>10</sup>

### **1. An Investigative Stop Must Be Supported By Reasonable Suspicion**

In order to make a lawful investigative stop, an officer must have reasonable suspicion that the person being stopped has been, is, or is about to be engaged in illegal activity.<sup>11</sup> It is not enough that an officer has a general sense or a hunch that someone is doing something wrong.<sup>12</sup> 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. It is not necessary, however, that the information rise to the level of probable cause.<sup>13</sup> Nor is it necessary that the officer rule out all innocent explanations for the suspicious conduct before making the stop because the purpose of an investigative stop is to confirm or dispel the officer's suspicion.<sup>14</sup>

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.<sup>15</sup> Therefore, police officers

should be careful to document in their police 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 or not 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.<sup>16</sup>

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 are 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.<sup>17</sup>

### **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. Officer's Personal Knowledge And Observations**

An officer's personal observations and knowledge can serve as the basis for reasonable suspicion. For example, an officer who observed the fresh smell of burnt marijuana coming from a vehicle during a traffic stop and noted that the driver appeared nervous and his eyes were bloodshot had reasonable suspicion to temporarily detain the driver for further investigation.<sup>18</sup> Note, however, that personal observations can be relied on only if the officer was lawfully in the place from which the observations could be made.<sup>19</sup>

#### **b. 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 criminal activity in a particular area of town, an officer who sees a vehicle drive behind a commercial building in the early morning hours in that area of town could consider that information to infer that the vehicle's presence raised concern.

**c. Information Other Than Personal Knowledge Or Observations**

Police officers are not required to have personal knowledge of all the information upon which they based an investigative stop. They are permitted to rely on information received from other sources, provided the information is reliable.

**i. Information Obtained From Other Law Enforcement Personnel**

“Effective 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.”<sup>20</sup> For that reason, police officers are permitted “to rely on information from a fellow officer,”<sup>21</sup> or a police “flyer or bulletin.”<sup>22</sup> “An officer receiving a dispatched message may take it at face value and act upon it forthwith.”<sup>23</sup> The officer need not have independent grounds for suspecting criminal activity but may rely on the information given 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.”<sup>24</sup>

## **ii. Information Obtained Through Eyewitnesses**

Police officers can “reasonably rely on information provided by an eyewitness.”<sup>25</sup> “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’s credibility.”<sup>26</sup> If an eyewitness to a crime presents herself to police to report face-to-face what she has seen, police need not actually learn the identity of the eyewitness in order act upon the information, because the eyewitness is considered “identifiable.”<sup>27</sup>

## **iii. Information Obtained Through Confidential Informants And Anonymous Tips**

It is permissible for law enforcement to rely on information provided by confidential informants and anonymous tipsters as the basis for investigative stops. The reasonableness of the officer’s action will depend, in large part, on 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 provided proves false, such an informant is viewed as more credible than an anonymous tipster. Nonetheless, if an officer relies on information from a named 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.”<sup>28</sup> For that reason, before officers conduct an investigative stop based on 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. 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 on-going event;
- whether the tip included a level of intimate detail that reasonably implied firsthand knowledge;
- if the anonymous tipster was predicting future events that suggest he or she was privy to the target's private affairs;<sup>29</sup>
- whether the tip provided “an explicit and detailed description of alleged wrongdoing, [which] is entitled to greater weight than a general assertion of criminal activity”;<sup>30</sup>
- 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 criminal conduct.<sup>31</sup>

#### **iv. Information Obtained Through Anonymous Reports Of DWI Or Reckless Operation**

Officers are frequently called upon to act on 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:<sup>32</sup>

- whether there was sufficient information such as the vehicle's make, model, license plate number, location and direction to ensure that the vehicle stopped was the one identified by the tipster;
- the time interval between the police receiving the tip and the suspect vehicle being located;
- whether the tip was based upon contemporaneous eyewitness observations;
- whether the tip was sufficiently detailed to permit the reasonable inference that the tipster has actually witnessed an ongoing motor vehicle offense; and
- if, and to what extent, the information of erratic operation was corroborated by an officer's personal observations.

#### **v. 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 on 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.<sup>33</sup>

## **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. If the officer exceeds the permissible scope of an investigative stop, any evidence obtained as a result will be suppressed at trial. Thus, it is important for officers to understand what is permitted as part of an investigative stop.

### **1. Pat-Down Search**

An officer can conduct a pat-down search or "frisk" of a person's outer garments for weapons if there is a reasonable risk of danger to the officer while the officer conducts an initial limited investigation.<sup>34</sup> 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.<sup>35</sup> The search cannot extend beyond what is minimally necessary to discover the presence of a weapon.<sup>36</sup> If it extends beyond that, it is no longer valid and any evidence obtained as a result will be suppressed.<sup>37</sup>

Police 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 he or she is in danger.

## **2. Questioning The Person**

Officers are permitted to ask a detainee a “moderate” number of questions in order to determine the detainee’s identity and to confirm or dispel the officer’s initial suspicions.”<sup>38</sup> 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. 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.

Officer questioning should be guided by the following:

- is the question you are asking reasonably related to the initial justification for the stop;
- if the answer is no, do you have a reasonable, articulable suspicion that would justify the question; and
- in light of all the circumstances, will the question impermissibly prolong the detention or change its fundamental nature?<sup>39</sup>

## **3. Searching The Interior Of A Motor Vehicle**

Unlike most states, New Hampshire does not recognize an automobile exception to the search warrant requirement.<sup>40</sup> As a result, there is no authority for a police officer to search the passenger compartment of a car simply because the driver

was pulled over. Rather, the officer must be able to articulate a further reasonable suspicion that the vehicle occupants might be armed and pose a danger to the officer.

It is not uncommon for officers to request consent to search a car 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.<sup>41</sup> In other words, the fact that a driver gives consent to search his or her car will not protect evidence from suppression if the officer requesting consent did not have a reasonable cause to support the request. Thus, it is important for officers to document in their police reports any information they developed in the course of a stop that justified 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.<sup>42</sup> Similarly, if during the course of a lawful frisk of a suspect, a law enforcement officer feels an object and immediately, without manipulating it, recognizes it as contraband, the office may seize it.<sup>43</sup>

For further discussion, please refer to the section on the plain view exception to the search warrant requirement, [Chapter IV, C\(2\)](#), pages 69-72.

#### **5. Requesting Identification**

During a Terry stop, an officer may ask the person to provide his or her name and address, destination, and business.<sup>44</sup> However, in situations other than motor vehicle stops, the person has no obligation to respond.<sup>45</sup> Automobile drivers must

provide law enforcement officers with their driver's license,<sup>46</sup> name, address, date of birth, and name and address of the owner of the vehicle, if requested.<sup>47</sup> Failure to comply with such a request is grounds for arrest.<sup>48</sup>

## **6. Use Of Force**

An officer may use reasonable and necessary non-deadly force when detaining a suspect.<sup>49</sup> Keep in mind, however, that 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.<sup>50</sup>

## **7. Miranda Warnings**

Because a person is not, by definition, in police "custody" during an investigative stop, an officer has no obligation to inform the person of the Miranda rights.<sup>51</sup> However, because investigative stops can "metamorphose into an overly prolonged or intrusive detention (and, thus, become unlawful)",<sup>52</sup> 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 evolved into a custodial arrest. 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 Miranda rights.

## **8. Asking Occupants To Exit The Vehicle During A Traffic Stop**

Police officers are permitted to ask the driver of a motor vehicle to step out of the vehicle following an investigative stop.<sup>53</sup> Although the New Hampshire Supreme Court has not addressed the issue, the United States Supreme Court has held that it is

also permissible for an officer to request the passengers of a vehicle to exit the vehicle, as a matter of officer safety.<sup>54</sup>

## **9. Canine Sniffs**

Unlike under the Federal Constitution, a canine sniff is considered a search under the New Hampshire Constitution. However, because it is less intrusive than the 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. Rather, it is permissible if the following conditions are met:

- 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.<sup>55</sup>

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. When An Investigative Stop Evolves Into An Unlawful Detention**

The purpose of investigative stops is to allow police officers to confirm or dispel their suspicions of criminal activity. The scope of the officer's investigation must be limited to that purpose and a stop cannot last any longer than is necessary to achieve that purpose.<sup>56</sup> If the officer is able to determine that the initial suspicion justifying a stop was unfounded, the stop must end at that point.<sup>57</sup> 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.<sup>58</sup>

If an investigative stop exceeds its permissible scope, it becomes an illegal detention. Any evidence obtained as a result may be suppressed unless the State can prove that there was probable cause to support the person's arrest. For that reason, officers should make every effort to minimize the length of investigative stops and carefully focus their inquiries on their specific suspicions.

In determining whether and at what point an investigative stop has evolved into a full-blown detention, courts will scrutinize the facts of the stop and consider such factors as:

- whether the defendant was physically restrained;
- whether the officer(s) was diligent in addressing the purpose of the stop;
- whether the stop was short in duration;
- whether the defendant was told he or she was free to leave and/or not under arrest;
- whether any officer present displayed a weapon;
- whether the defendant was frisked; and
- the number of officers that were in the defendant's immediate vicinity.<sup>59</sup>

## **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. Specifically, the courts have held that properly conducted roadway checkpoints for the purposes of combating drunk driving and intercepting

illegal aliens are constitutional.<sup>60</sup> The United States Supreme Court 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<sup>61</sup> and has suggested that a checkpoint to thwart an imminent terrorist threat or to apprehend a dangerous criminal may also be constitutionally permissible.<sup>62</sup> However, a checkpoint program whose primary purpose was to detect evidence of general criminal conduct—interdiction of illegal drugs—did not pass constitutional scrutiny.<sup>63</sup>

The test for determining the reasonableness of a checkpoint program requires looking at 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. 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 pages 374-83. 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 county attorney or attorney general's office.

## **II. THE LAW OF ARREST**

### **A. Introduction**

RSA 594:1 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.” 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 provides a general overview of the legal requirements of an arrest, including post-arrest procedures and special considerations that arise with the arrest of a juvenile or non-US citizen. That discussion is followed by a general overview of protective custody, which is similar to arrest but involves significantly different procedures, which are defined by statute. Finally, the chapter addresses the law relating to warrantless arrests and arrests pursuant to a warrant.

### **B. What Constitutes An Arrest?**

An arrest has been defined as “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.”<sup>64</sup> It is a more

intrusive type of seizure than an investigative stop because, unlike a Terry stop that 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 are necessary for an arrest to occur.<sup>65</sup> Whether or not an arrest has occurred will depend upon the objective facts and circumstances of a particular case. The officer’s subjective belief about the person’s legal status is not determinative, although it may have some relevance.<sup>66</sup> 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 he or she was restrained to the degree commonly associated with an arrest.

Unlike a Terry stop, 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 a person to stop and speak with them, the police may have “seized” the person.<sup>67</sup> However, it is unlikely that a court would find, under the same circumstances, that a person was under arrest because the police had not gained actual control over the person. In one case, for example, 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 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.<sup>68</sup>

### **C. Factors Considered In Determining If And When An Arrest Has Taken Place**

In the absence of a formal arrest, courts will consider all of 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 he or she was 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 his or her Miranda rights.

It is possible that an encounter that began as an investigative stop could evolve into a custodial situation simply based on changing circumstances. For example, if the tone of police questioning changed from conversational to directly confrontational and

accusatory, or questioning continues for hours with changing teams of investigators, a court might find that at some point the suspect had effectively been taken into custody.

## **D. The Probable Cause Requirement**

To be lawful, an arrest must be supported by probable cause to believe that:

- a crime was committed, *and*
- the person being arrested committed the crime.

An arrest made without probable cause violates the state and federal constitutional rights of the arrestee,<sup>69</sup> and any evidence obtained as a consequence of the arrest will be suppressed.<sup>70</sup>

“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.”<sup>71</sup> Where there is lawful cause to arrest, the arrest will be valid even if the arresting officer incorrectly identified the offense that was committed.<sup>72</sup>

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.<sup>73</sup>

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 arrest even if at the time

of arrest there is insufficient evidence that the defendant “knowingly” possessed the item.<sup>74</sup>

## **E. Permissible Sources Of Information To Support Probable Cause**

As with reasonable suspicion for an investigative stop, officers can rely on information from a variety of sources to form probable cause to arrest. Please refer to the discussion on the factors that form the basis for [reasonable suspicion justifying a Terry stop in Chapter I](#), pages 6-10.

## **F. Executing An Arrest**

### **1. Use Of Force**

Every person has a legal duty to submit to an arrest and refrain from using force or a weapon to resist, regardless of whether there is a legal basis for the arrest.<sup>75</sup> Despite this duty, it is not uncommon for individuals to resist an officer’s effort to arrest someone. 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. More specifically, officers are legally 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; or
- to defend themselves or other people from the imminent use of non-deadly force in the course of effecting an arrest or detention.

The degree of force used in executing an arrest must be reasonable and should not exceed that necessary to safely gain control of the person being arrested.<sup>76</sup>

Whenever an officer uses force in the course of an arrest, the officer should explain in a detailed report the degree of force used and the reason such force was necessary.

For a detailed discussion on the law of the use of force, see [Chapter VII](#), pages 137-52.

## **2. Requesting Assistance From Civilians**

If in the course of making any arrest, an officer needs assistance, 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.<sup>77</sup>

## **3. Conducting 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. 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 a residence other than his or her own, the police must obtain both an arrest warrant and a search warrant.<sup>78</sup> 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. The only exceptions to this rule are if the police obtain voluntary consent to enter the residence or if there are exigent circumstances justifying immediate police action, as discussed in the section on the [exigent circumstances exception to the search warrant requirement](#), pages 72-73.

#### **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.<sup>79</sup> For a detailed discussion of the knock and announce rule, refer to the section on execution of search warrants, see [Chapter V, G](#), pages 102-109.

#### **5. Issuing A Summons In Lieu Of Placing Someone Under Arrest**

In any situation when an officer has grounds to conduct a warrantless arrest for a misdemeanor or violation level offense, the officer has the authority to instead issue a summons to the person.<sup>80</sup>

### **G. Procedure After Arrest**

#### **1. Notification To Family/Friend/Attorney Of Arrestee**

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 and immediately notify that person of the arrest.<sup>81</sup> Failure to make the required notification is a misdemeanor.<sup>82</sup> 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 Miranda was not valid.<sup>83</sup> If the police are not able to make the required

notification, they should document their notification efforts in a report, so that their actions can be defended in the future if necessary.

## **2. Consultation With Attorney And/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 DWI is not entitled to consult with counsel before deciding whether to submit to a blood–alcohol test or breath–alcohol test.<sup>84</sup> Police departments and jails are required to establish regular visiting hours during which a person in custody is allowed to consult relatives and family members.<sup>85</sup>

## **3. Bail**

Except in certain circumstances outlined in RSA 597:1-c and 1-d, RSA 597:2, and RSA 173-B:9, an arrested person is entitled to be released on bail pending trial.<sup>86</sup> A bail commissioner, appointed by the district court, can set and accept bail. The bail commissioner can release a person on personal recognizance, cash, an unsecured bond, a secured bond, or any combination of conditions. Conditions of bail should always include a condition that the person not commit a crime while on release and may also include conditions to ensure the safety of others (for example, prohibiting the defendant from having any contact with the victim) and the defendant’s appearance at trial (for example, requiring the defendant to report to the local probation/parole office on a weekly basis).<sup>87</sup>

In cases involving domestic violence, stalking, or sexual assault, officers should consider asking the bail commissioner or court to use the bail form entitled “Criminal Order of Protection Including Orders and Conditions of Bail.” For

additional information on this type of bail order, please refer to [Chapter IX, section F](#), pages 166-67.

In certain domestic violence or stalking cases, however, a person will not be entitled to bail. RSA 173-B:9 requires that a person must be detained pending a court arraignment if he or she is charged with a violation of (a) a domestic violence protective order issued under RSA 173-B; (b) a stalking order issued under RSA 633:3-a; or (c) an out-of-state order that is enforceable under RSA 173-B. A bail commissioner is not permitted to set bail under those circumstances. For further discussion on protective orders, see the Model Protocol for Police Response to Domestic Violence Cases, available at [http://doj.nh.gov/victim/docs/law\\_enforcement\\_2002.pdf](http://doj.nh.gov/victim/docs/law_enforcement_2002.pdf).

If the person is unable to make bail, or has been charged with an offense for which bail cannot be set, he or she must be taken before the district court within 24 hours, Saturdays, Sundays, and holidays excluded, for arraignment.<sup>88</sup> 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 Non-US Citizens**

If the arrested person is a foreign national (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 him or her appropriate consular assistance. Foreign nationals must be advised of their right to contact their native country's consulate. Depending on the person's nationality, he or she may have additional rights under the VCCR. The United States Department of State has developed detailed guidelines for law enforcement agencies on how to comply with the VCCR, available at [http://travel.state.gov/law/consular/consular\\_753.html](http://travel.state.gov/law/consular/consular_753.html).

## **I. Detaining Juveniles**

When a juvenile is taken into custody, the police may release the juvenile to a parent, guardian, or custodian pending arraignment.<sup>89</sup> If the minor cannot be picked up within a reasonable period of time, an officer is permitted, with court approval, to release the minor to an alternative to secure detention, pending the arrival of the parent, guardian, or custodian.<sup>90</sup>

If the juvenile's release is not appropriate due to the nature of the offense or other circumstances, the police should notify the court and request that the juvenile be placed under supervision or be detained.<sup>91</sup>

Under all circumstances, if the juvenile is not released to a parent, guardian, or custodian within four hours of arrest, the police must notify the court, which must then determine placement. The court has the option to order the juvenile released to the parent or other responsible adult, released under the supervision of a friend or relative, placed in a foster home or other residential placement, or detained.<sup>92</sup>



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 the same as those discussed above.<sup>93</sup> However, a child detained as a CHINS cannot be detained in a facility that has locked doors and physical features designed to restrict movement.<sup>94</sup>

## **J. Protective Custody**

Taking a person into protective custody is a legally distinct action 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**

A person may be taken into protective custody if an officer observes the person engaging in behavior that gives the officer: (a) reason to suspect that the person may be suffering from a mental illness; and (b) 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.<sup>95</sup>

A person taken into protective custody under those circumstances must be transported promptly to a hospital emergency room or other site designated by the community mental health program. There, mental health professionals will determine whether to seek the person's involuntary emergency admission to the hospital.<sup>96</sup>

## **2. Intoxicated And Incapacitated Individuals**

An officer who encounters a person that appears either intoxicated or incapacitated due to alcohol may take that person into protective custody under RSA 172-B:3. Intoxication is defined as “a condition in which the mental or physical functioning of an individual is substantially impaired as a result of the presence of alcohol in his system.”<sup>97</sup> A person is incapacitated if, as a result of alcohol, the person is intoxicated or mentally confused due to withdrawal, such that the person needs medical or professional care to assure his or her safety, or the person presents a direct threat to the safety of others.<sup>98</sup>

When taking a person into protective custody for either condition, officers may use reasonable and necessary force to protect themselves, the person, or others. If force is used, officers should document in a report the type of force used and the reason it was warranted. 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.<sup>99</sup> However, if the person’s identity has already been determined, a search for evidence of identification would not be permissible.<sup>100</sup>

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 be held in an area separate from where any adults or any minors charged with juvenile delinquency are detained.<sup>101</sup>

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 there be no family notification, the request must be honored.<sup>102</sup>

**a. Intoxicated Individuals**

If the person appears intoxicated, the officer can take whichever of the following actions appears most appropriate under the circumstances:

- help the person home, if the person consents;
- take the person to an approved alcohol 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.<sup>103</sup>

**b. Incapacitated Individuals**

The options available to officers are broader if the person appears to be in the more serious state of incapacitation. The office may:

- take the person to an approved alcohol treatment program with detoxification capabilities;
- take the person to a hospital emergency room;
- release the person to an approved alcohol 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 no longer incapacitated, or until an approved alcohol counselor has arranged transportation for the person to an approved alcohol treatment program or hospital emergency room; or
- release the person at any point that the person no longer appears incapacitated.<sup>104</sup>

### **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;
- immediate action is required; and
- there is insufficient time to file a petition for a court order.<sup>105</sup>

The 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 district court, which can authorize continued protective custody pending a hearing.<sup>106</sup> 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 a place other than that of the parent or legal custodian, the police must also make every reasonable effort to notify the parent or legal custodian of the child's whereabouts.<sup>107</sup>

### **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 warrantless entry into a home, without consent, to conduct a warrantless arrest unless the situation falls within a narrow set of circumstances.

## **1. Misdemeanor/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 that:<sup>108</sup>

- 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 videotape, the officer must have actually seen the offense occur;<sup>109</sup>
- 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;<sup>110</sup>
- 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 provisions under RSA 633:3-a; or
- The person to be arrested committed a misdemeanor or violation, and, if not immediately arrested, the person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property.

## **2. Felony-Level Offenses**

A law enforcement officer is authorized to make a warrantless arrest for a felony offense whenever:<sup>111</sup>

- A felony has actually been committed by the person, 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.

### **3. Arrests Within A Dwelling**

An officer may enter a dwelling to make a warrantless arrest only when “exigent circumstances” exist, or when the officer is in “hot pursuit” of the suspect.<sup>112</sup>

#### **a. Exigent Circumstances**

Officers are permitted to make a warrantless arrest 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.”<sup>113</sup>

Officers should consider the following factors when determining whether exigent circumstances exist to justify a warrantless entry to effect an arrest:<sup>114</sup>

- 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?
- 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?

It is not necessary that each of these factors be met before an exigency exists.

Rather the issue is whether the potential harm of waiting to secure a warrant outweighs the privacy interests of those in the dwelling. However, exigent circumstances can never justify a warrantless entry into a residence to make an arrest for a non-jailable offense.<sup>115</sup>

## **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.<sup>116</sup> For this exception to apply, however, the pursuit must have been immediate and continuous,<sup>117</sup> and law enforcement must have begun pursuit while the suspect was outside of the dwelling.<sup>118</sup> The exception does not apply when the underlying offense is a violation-level offense.<sup>119</sup>

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 answers the door.<sup>120</sup>

## **L. Cross-Border Warrantless Arrests**

Maine,<sup>121</sup> Massachusetts,<sup>122</sup> and Vermont<sup>123</sup> have all enacted statutes permitting New Hampshire police officers to enter into their respective states to make an arrest under the following circumstances:

- The officer is in fresh pursuit of the suspect; and
- The officer believes that the suspect committed a felony.

Under Maine and Vermont law, 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, or Maine have similar authority to cross into New Hampshire in fresh pursuit to arrest a suspect believed to have committed a felony. Officers from Vermont and Maine also have authority to do so if the suspect is believed to be driving while intoxicated.<sup>124</sup>

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 district court without unnecessary delay.<sup>125</sup> If the court determines that the arrest was lawful, the court can either detain the person pending issuance of an extradition warrant by the governor of the state in which the crime was committed, or can order the person released on bail.<sup>126</sup>

## **M. 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. The reason for that preference is that with a warrant the determination of probable cause is made by an impartial judicial officer, rather than a police officer who is involved in the case.<sup>127</sup> If an arrest is later challenged, a court is more likely to uphold its validity if it was made



pursuant to a warrant. 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.”<sup>128</sup>

## **1. Authority To Issue A Warrant**

An arrest warrant can be issued by any justice of the peace, or any judge of the district, superior or supreme courts of New Hampshire, provided he or she is neutral and detached.<sup>129</sup> 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.<sup>130</sup> By statute, the warrant is directed to the “sheriff of any county, any deputy sheriff, constable, or police officer of any town in the state,” and has statewide effect. Although not expressly included in the language of the warrant, state troopers, conservation officers, special agents of the New Hampshire Liquor Commission and similar other officers are *ex officio* constables and thus are also authorized to execute New Hampshire 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. Before issuing a warrant, the judge must determine, based on the information provided by the officer, whether there is probable cause to believe that

- a crime was committed; and
- the person named in the warrant committed the crime.

An officer can provide information in support of the warrant either through oral testimony, a written affidavit, or both. The preferable course is, and some judges may require, 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. For a detailed discussion on how to write an affidavit, please refer to the section on writing affidavits, [Chapter V, F](#), pages 91-102.

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 make sure that the judge documents the information in writing and attaches the notes to the application.<sup>131</sup> 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 applicant to specify the crime(s) for which there is probable cause to arrest. Thus, an officer must consider the available information and determine which specific offense(s) is 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 provided the information set forth in the affidavit established probable cause to believe that a crime had been committed.<sup>132</sup>

### **3. Execution Of The Warrant**

Once an arrest warrant has been issued, it can be executed anywhere within the state.<sup>133</sup> 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 is practicable.<sup>134</sup>

By statute, law enforcement officers have the authority to execute arrest warrants beyond the jurisdiction of their particular department or agency.<sup>135</sup> However, as a matter of professional courtesy and officer safety, prior to taking any action, officers planning to execute a warrant in a town or city other than their own should contact the police department in that jurisdiction and seek its assistance.

### **III. THE LAW OF INTERROGATION**

#### **A. Introduction**

Both the state and federal constitutions provide protection for suspects in criminal investigations when they are being interviewed by law enforcement officers.

Those constitutional protections play out in three ways:

1. Statements made by a suspect are admissible as evidence against that person only if the statements were made voluntarily, regardless of whether the person was in custody at the time.
2. Statements made by a suspect during custodial interrogation will be admissible as evidence against the person only if he or she:
  - a. was advised of the Miranda rights, and
  - b. knowingly, intelligently and voluntarily waived those rights.
3. If statements made by a suspect are admitted as evidence against that person at a criminal trial, the jurors may be instructed that unless they find that the statement was made voluntarily, they should not consider it.

A statement obtained from a suspect can often be extremely valuable evidence in a later criminal prosecution. In order to ensure that such evidence will be admissible at trial, a law enforcement officer needs to understand: (1) the concept of “voluntariness” as it relates to a suspect’s statements; (2) when a person must be advised of Miranda; and (3) what constitutes a valid waiver of Miranda. This chapter discusses each of those topics in turn.

#### **B. Voluntariness Of A Suspect’s Statement**

A suspect’s statements can be used as evidence against that person only if they were given voluntarily.<sup>136</sup> This is true regardless of whether the suspect was in

custody at the time the statements were made. While related, the question of whether a statement was given voluntarily is distinct from the question of whether the suspect validly waived Miranda before speaking to the police. Although a Miranda advisement and waiver are important factors in determining whether a suspect's statements were legally voluntary,<sup>137</sup> they are not necessarily the deciding factors.

As discussed below, if a suspect voluntarily makes a statement in response to police questioning, the statement will be admissible even if the suspect has not been advised of his or her Miranda rights, so long as the suspect was not in custody. Conversely, a court could find that a suspect's statement, made while the person was not in custody, was not made voluntarily. If this happened, the statement would be inadmissible even though the suspect had been advised of and waived his or her Miranda rights.<sup>138</sup>

While there is no single definition of voluntariness, the determining factor is whether the suspect's actions were "the product of an essentially free and unconstrained choice or . . . the product of a will overborne by police tactics."<sup>139</sup> 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.<sup>140</sup>

There is no hard and fast rule that can be applied under all circumstances to determine whether a suspect was coerced into making a statement. Rather, courts will examine the totality of the surrounding circumstances, including both the characteristics of the suspect and the details of the interrogation.<sup>141</sup> Because the State will ultimately carry the burden of proving the voluntariness of a statement or confession, law enforcement officers should be aware of the factors that the court is

likely to consider in determining voluntariness and, when appropriate, document in police reports any facts that may be relevant to that determination.

### **1. Characteristics Of The Suspect**

A variety of factors bear on the issue of whether a suspect voluntarily gave a statement. Some of the factors that courts have considered include the person's:

- age;
- intelligence; and
- physical and emotional condition, including intoxication.

### **2. Character Of The Interview**

Courts will 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:

- the tone of the interview;
- the tenor of the questions;
- whether the suspect was properly advised of his or her Miranda rights;
- whether the suspect expressly agreed to the questioning;
- the length of the interview;
- whether the suspect was offered food, water, and/or bathroom breaks;
- whether the suspect was afforded an opportunity to smoke; and
- whether the suspect was sufficiently in control of the interrogation to be able to refuse to answer questions or to offer an exculpatory story.<sup>142</sup>

### **3. Express Or Implied Promises**

A significant factor in determining whether a suspect's statement was given voluntarily is whether the police made any promises to the suspect. If they did, the

court must determine whether in doing so, the police exerted a level of influence that overbore the suspect's will.<sup>143</sup>

A promise of confidentiality or immunity is *per se* unduly influential and will render a confession made in reliance on that promise involuntary.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup> "General encouragement to cooperate is far different from specific promises of leniency."<sup>147</sup>

### **C. When Miranda Warnings Are Required**

In Miranda v. Arizona,<sup>148</sup> the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination prohibits the admission of statements at trial that were given by suspects during "custodial interrogation," unless the suspects were advised first of their rights.<sup>149</sup> 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 suspected of a crime is in custody and subject to interrogation by the police.<sup>150</sup> Thus, the two key questions that law enforcement officers must consider when determining if they are required to advise suspects of their Miranda rights are:

1. Is the suspect in “custody?”
2. Am I legally “interrogating” the suspect?

## **1. Definition Of 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.<sup>151</sup> Whether there is custody in the absence of a formal arrest is determined by evaluating the facts and circumstances from the suspect’s standpoint—whether a reasonable person in the suspect’s position would understand that he or she was under arrest.<sup>152</sup>

An investigative stop does not constitute custody for purposes of Miranda. Thus, an officer is not obliged to give Miranda warnings during a Terry stop. 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 non-custodial encounter between a person and law enforcement officers can evolve into custody.<sup>153</sup> For example, a traffic stop that is initially 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.<sup>154</sup> Similarly, a voluntary interview situation could 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.



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 will scrutinize the specific facts of each detention to determine whether there was a point at which the purpose of the original detention was exceeded or the character of the encounter became more akin to arrest.<sup>155</sup> Courts will consider factors such as the following:<sup>156</sup>

- the degree of physical restraint used;<sup>157</sup>
- the suspect's familiarity with the surroundings;
- the number of officers present;
- the duration of the stop or interview;
- the nature and tone of questioning;
- whether there was a show of authority;
- whether the officers were diligent in addressing the purpose of the stop;
- whether the police told the suspect 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.<sup>158</sup> A person who is confined to a hospital bed while being questioned by police would not be considered in custody simply because he or she could not walk away.<sup>159</sup> Nor would a voluntary encounter between the police and an incarcerated individual be custodial as a result of restrictions imposed by the jail.<sup>160</sup> In either situation, there must be an additional degree of interference with the suspect's freedom imposed by the police for custody to arise.<sup>161</sup>

## **2. Definition Of Interrogation**

The Miranda safeguards come into play when a person in custody is subject to interrogation.<sup>162</sup> 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.”<sup>163</sup>

There is no hard and fast 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.<sup>164</sup>
- 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 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.”<sup>165</sup> 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.”<sup>166</sup>
- An officer engaged in the functional equivalent of interrogation when, after a murder 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 down stairs 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.<sup>167</sup>
- 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.<sup>168</sup>

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.”<sup>169</sup> Courts have held that the following did not constitute interrogation, even though in each case it led to the defendant making an incriminating statement:

- Statements to a defendant that agents had seized approximately 600 pounds of cocaine and that the defendant “was in serious trouble” were attendant to arrest and custody and were not the functional equivalent of interrogation.<sup>170</sup>
- An officer’s picking up and examining evidence in front of a defendant after he refused to talk was not the functional equivalent of interrogation.<sup>171</sup>
- 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 requested him to cooperate, was not the functional equivalent of interrogation.<sup>172</sup>
- Statement to a defendant that he was facing two additional charges was not reasonably calculated to elicit an incriminating response.<sup>173</sup>

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 they 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.”<sup>174</sup> When an officer’s actions or statements do not seek or require a response, the officer “surely cannot be held accountable for the unforeseeable results of [his] words or actions.”<sup>175</sup>

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.<sup>176</sup> Law enforcement officers are entitled to ask standard biographical questions to complete the booking and pretrial process, including the following:<sup>177</sup>

- 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.<sup>178</sup> In Quarles, a police officer took a rape suspect into custody in a supermarket. When the officer frisked him and found an empty shoulder holster, he asked where the gun was, without giving the suspect the Miranda warnings. The defendant answered, “the gun is over there.”<sup>179</sup> 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.<sup>180</sup>

The New Hampshire Supreme Court has not had an opportunity to address if or when the public safety exception would apply under the New Hampshire Constitution. Police officers should be cautious in relying on 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 safety or the safety of the public. When such a danger exists, officers must restrict their questions solely to those necessary to secure the safety of the officers and the public.<sup>181</sup>

#### **4. The Application Of Miranda In DWI Stops**

The right against self-incrimination, which is one of the Miranda rights, does not extend to the production of incriminating physical evidence. For that reason, police officers are under no constitutional obligation to provide Miranda warnings before asking a DWI suspect to perform field sobriety tests.<sup>182</sup> “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.”<sup>183</sup> Similarly, Miranda warnings are not required before any implied consent questioning. Those types of questions are, like booking questions, considered “normally attendant to arrest” and do not constitute interrogation. Any admissions or comments offered by a defendant in response to such questioning are admissible, provided they were made voluntarily.<sup>184</sup>

### **D. Miranda Advisements**

A person in custody is entitled to be informed of the following before being interrogated:

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; and
5. If you decide to answer questions now without an attorney present, you still have the right to stop answering at any time.<sup>185</sup>

It is recommended that officers 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.<sup>186</sup> So long as the rights are reasonably conveyed to the person being questioned, the officer will have complied with his or her constitutional obligation.<sup>187</sup>

Miranda warnings should be given prior to the commencement of custodial interrogation, and should be repeated: (1) at regular intervals during a lengthy interrogation; (2) if the interrogation is interrupted for more than a short period of time; (3) if there is a significant amount of time between advising a suspect of his Miranda rights and questioning (2 hours has been held to be too long);<sup>188</sup> or, (4) 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.<sup>189</sup>

## **E. 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 the Miranda rights.<sup>190</sup> For that reason, it is strongly recommended that officers use a Miranda waiver form and obtain a signed waiver from a suspect whenever practicable. A recommended form for advising suspects of these rights can be found here: [Miranda Waiver Form](#), see page 384.

Although preferable, an express waiver of Miranda is not required in order to make the waiver valid. A suspect can 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.<sup>191</sup> If police officers rely on an implied waiver from a suspect, it is important that the officers document, all of the circumstances of that waiver in a report.

When police are unsure whether a defendant is invoking rights—that is, if the defendant's statement or gesture is somewhat unclear or ambiguous—it is good practice to ask clarifying questions.<sup>192</sup> Clarifying questions will minimize the chance that any statements might later be suppressed.<sup>193</sup> Police should not, however, ask why the suspect either wants to be silent or wants to speak to an attorney.<sup>194</sup> Like implied waivers, ambiguous statements and clarifying questions should also be documented in a report.

## 1. “Knowing And Intelligent” Waivers

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.<sup>195</sup> 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 the English language;
- being under the influence of alcohol or drugs;
- diminished mental capacity; or
- mental illness.

If any of these factors are present, officers should take extra care to make certain that the suspect understood the warnings. For example, after reading each right, an officer might 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 juvenile waiver form. An officer could obtain a Miranda waiver form written in the suspect’s native language. Any efforts that officers take to ensure a suspect’s understanding of Miranda 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; or
- 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.”<sup>196</sup> 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.<sup>197</sup>

The right to counsel is a fundamental one, and law enforcement officers should not discourage a suspect from exercising that right.<sup>198</sup> 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.<sup>199</sup> 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.”<sup>200</sup>

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 police contact was initiated solely by the suspect, without any prompting by the police;
- the police re-advised the suspect of the Miranda rights; and
- the suspect waived those rights.<sup>201</sup>

Because the suspect has earlier invoked the right to counsel, it is important that the suspect's subsequent waiver of that right be express; that is, the suspect must specifically indicate a willingness to waive the right to counsel, or answer a question that refers specifically to that right.<sup>202</sup> For example, after a suspect invoked his right to counsel, police could speak to him if the suspect later volunteered that he wished to talk to the police without his lawyer present.<sup>203</sup>

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 contact with the suspect during interrogation.<sup>204</sup> 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.

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 obliged to terminate the questioning because the attorney requests or orders them to do so. Nor are they required to relay a message from the attorney to

the suspect directing the suspect not to speak with the police.<sup>205</sup> 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. 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. The police may reinitiate questioning at later time, provided that the suspect's initial invocation was "scrupulously honored."<sup>206</sup> 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);<sup>207</sup>
- 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.<sup>208</sup>

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.<sup>209</sup>

## **H. Recording Of Custodial Interrogation**

There is no rule or standard procedure concerning the tape recording of 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, the Supreme Court has adopted a rule regarding the admissibility of tape-recorded statements obtained during custodial interrogation. In order for the State to admit the actual recording of the statement at trial, the police must have recorded everything that transpired after the suspect waived the Miranda rights.<sup>210</sup> If only a portion of the post-Miranda questioning was recorded, the partial recording will be 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.<sup>211</sup>

## **I. Interrogation Of Juveniles**

“[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”<sup>212</sup> 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](#), see pages 385-87, commonly

called the Benoit form, that police officers are required to use. In addition to requiring the use of the more detailed form, the Court has adopted a comprehensive fifteen-factor test for evaluating the validity of a juvenile's Miranda waiver. To be valid, a minor's waiver must have been given voluntarily, intelligently, and with full knowledge of the consequences.<sup>213</sup> In deciding whether a particular Miranda waiver meets those criteria, a court must consider each of the following factors:<sup>214</sup>

- the chronological age of the juvenile;
- the apparent mental age of the juvenile;
- the educational level of the juvenile;
- the juvenile's physical condition;
- the juvenile's previous dealings with the police or court appearances;
- the extent of the explanation of rights;
- the language of the warnings given;
- 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 offense charged;
- whether the juvenile was warned of possible transfer to adult court; and
- whether the juvenile later repudiated the statement.

With respect to providing a juvenile an opportunity to consult with an adult, police officers are required to do several things. First, the police department must comply with RSA 594:15. That statute requires that whenever a person is taken into custody, the officer in charge “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.”<sup>215</sup> In addition, “when a parent or guardian arrives at a police station or other site of custodial detention and requests to see a child in custody, the police must: (1) immediately cease interrogating the juvenile; (2) notify [the juvenile] that his [or her] parent or guardian is present at the station; and (3) immediately allow the parent or guardian into the interrogation room.”<sup>216</sup> While a failure to fulfill any of these obligations will not necessarily lead a court to conclude that a juvenile’s Miranda waiver was invalid, it will weigh heavily against a finding of a valid waiver.

## IV. 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, “if there is time to get a warrant, it is the only safe way to proceed.”<sup>217</sup>

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.<sup>218</sup> Warrantless searches, on the other hand, are *per se* unreasonable unless they fall within one of the recognized exceptions to the warrant requirement.<sup>219</sup> When a defendant challenges the legality of a warrantless search, the State carries the burden of proving that the search was constitutionally permissible.<sup>220</sup>

Nevertheless, when appropriate, warrantless searches can be an invaluable tool for law enforcement. 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 on 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.

## **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.

Unfortunately, there is no concise definition of a search. Under both the State and Federal Constitutions, a search occurs when a government official intrudes upon a person’s reasonable expectation of privacy.<sup>221</sup> That expectation of privacy can attach to a person’s body;<sup>222</sup> a place, such as one’s home or car;<sup>223</sup> an item, such as a wallet or suitcase;<sup>224</sup> or an activity, such as a private conversation.<sup>225</sup>

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.<sup>226</sup>

A person does not have a reasonable expectation of privacy in things that he or she exposes to public view. For instance, there is no reasonable expectation in the privacy of a conversation held on the street, if it can be overheard by the naked ear. Similarly, there is no reasonable expectation of privacy in 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.

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

There is no hard and fast rule as to when a person has a reasonable expectation of privacy. Rather, in determining whether police conduct in a particular instance 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 in business or commercial premises.

The New Hampshire courts have recognized that people have a heightened expectation of privacy in their homes, and will carefully scrutinize police entries into private dwellings.<sup>227</sup> 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.”<sup>228</sup>

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.<sup>229</sup>

New Hampshire is one of a small minority of jurisdictions that presently holds that individuals have a reasonable expectation of privacy in their trash.<sup>230</sup> New Hampshire also follows the minority position that a canine search of the exterior of an automobile is a search for constitutional purposes.<sup>231</sup>

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 by a passenger with a claim ticket at an airport for three hours;
- Private conversations in an apartment overheard from a basement crawl space 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 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 defendant's seat and likely to be moved, but not firmly squeezed, by other bus passengers.<sup>232</sup>

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

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 merely by posting the property with no trespassing signs.<sup>233</sup>

There is no reasonable expectation of privacy in the phone numbers dialed to make outgoing telephone calls.<sup>234</sup> Therefore, the use of a “pen register” is not legally considered to be a search,<sup>235</sup> although it must be authorized by the superior court.<sup>236</sup> Similarly, defendants have no expectation of privacy in the billing records maintained by telephone companies, and these records may therefore be obtained without a search warrant.<sup>237</sup>

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 apartment;
- A person who stays past checkout time in a hotel regardless of whether he is present in the room at time of search;<sup>238</sup>
- A bedroom that defendant stayed in but did not rent, where others had access to room and where defendant had abandoned the premises;
- Naked-eye observations of a greenhouse from a helicopter within navigable air space;<sup>239</sup>
- 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 a lock, accessible from a common hallway, and turning the key to see whether it fits; and
- Telephone calls of state prison inmates.

## **C. Exceptions To The Search Warrant Requirement**

### **1. Consent Searches**

When a person validly consents to a search of his or her person, home or belongings, it serves as a waiver of the person's right to insist that the police obtain a warrant and establish probable cause to search.<sup>240</sup> 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 that the search was legal.<sup>241</sup> In evaluating such a claim, a court must 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 officers who 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 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 and 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.

**a. Voluntariness Of Consent**

To be valid, the person's consent must be given freely, knowingly and voluntarily.<sup>242</sup> 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.<sup>243</sup> Police officers are not obligated 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 consent.<sup>244</sup> That a person was informed of the right to refuse before giving consent would be an important factor in favor of a finding of voluntariness.<sup>245</sup>

The fact that a person is in custody does not make that person incapable of giving voluntary consent.<sup>246</sup> 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.<sup>247</sup>

## **b. Express Or Implied Consent**

Consent to search can be either express or implied. Express consent means consent that is explicitly stated either verbally or in writing. Implied consent means that by conduct, gestures, or other indicators, a person indicates that he or she consents to a search. Implied consent can be found in a variety of different actions, such as the person opening a door to 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 police to search there.<sup>248</sup> Whatever the person's actions, they must "unambiguously manifest consent to enter."<sup>249</sup> A person's standing aside or failure to object or protest when an officer entered his or her home, as an example, is not sufficient to establish consent. There must be some indication that the person was affirmatively agreeing to the officer's action, rather than simply giving in.

Because the State has the burden of proving that a person gave valid consent to a search, officers should always try to get express consent rather than rely on 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 389;
- [Customer Consent And Authorization For Disclosure Of Financial Or Credit Records Form](#); page 390;
- [Consent To Search Computer](#), pages 391-92.

If the police rely on a person's implied consent to conduct a search, it is imperative that the circumstances surrounding the consent are documented in a report. A court will carefully scrutinize the conduct that 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.<sup>250</sup>

### **c. 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.<sup>251</sup> When a third party has equal rights to, and control of, the targeted property as the suspect, then that third party may validly consent to a search.<sup>252</sup> However, if co-occupants control property, both are present, and one occupant consents to a police search while the other refuses, the police may not rely on the authority of the consenting co-occupant to enter.<sup>253</sup> In other words, if co-occupants disagree as to whether the police may enter to conduct a search, the police may not rely on consent to gain entry.

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 authority to consent to a search of that portion of the building not exclusively leased to the tenant-defendant, i.e. common stairways, halls, garages, basement, furnace room, attic, or any other portion of the building not leased to the tenant-defendant;<sup>254</sup>
- A landlord cannot consent to the search of a tenant’s apartment;

- A tenant can validly give consent to a search of his or her apartment, even if the search is for the purpose of gathering evidence against a landlord-defendant;
- An employer may have 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;
- 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 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;
- A person to whom the owner lends a vehicle without restrictions as to use may be able to give consent to permit a search that will be valid against the owner;
- A parent may consent to a search on behalf of a child, except to any area over which the child has exclusive control; and
- University officials cannot consent to a police search of a student's dormitory room or personal property. See section on school searches, [Chapter IV, C\(10\)](#), pages 82-84.

#### **d. 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.”<sup>255</sup> 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 defendant/driver’s consent to search his vehicle extended to a purse in the back seat of a car, where the only female occupant of the car was the passenger.<sup>256</sup> On the other hand, if the container in the back seat was of the type used to hold compact discs 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.

**e. The Scope Of A Search Based On Consent**

“When the police rely on consent as a basis for their warrantless search, they have no more authority than they have been given by the consent.”<sup>257</sup> 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.”<sup>258</sup>

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.<sup>259</sup> On the other hand, where a defendant signed a consent 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.<sup>260</sup>

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

## **2. Plain View Searches**

### **a. Introduction**

In certain limited circumstances, law enforcement officers may seize evidence in plain view without a search warrant. Three conditions must first be met:

- The officer must observe the item from a place where he or she is 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, many courts have recognized that the same analysis applies when determining whether officers may seize objects that they have found by “plain feel,” “plain smell,” etc.<sup>261</sup>

**b. An Officer Must View The Item From A Place Where He Or She Is Lawfully Entitled To Be**

If a police officer is not lawfully in a location when he or she observes evidence, the officer cannot rely on the plain view exception to seize the evidence. For example, an officer who legally enters a residence to do a sweep for potential gunshot victims could rely on the exception if, during the sweep, the officer observes 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 those circumstances, the officer could not rely on the plain view exception to seize evidence.<sup>262</sup>

In Arizona v. Hicks,<sup>263</sup> the United States Supreme Court held that although 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. The serial number revealed that the television set had been stolen. 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, would not transform the viewing into a search.<sup>264</sup>

**c. The Discovery Of Incriminating Evidence Must Be Inadvertent**

Although 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.<sup>265</sup> “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.”<sup>266</sup> Thus, even if officers may have had a suspicion 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, the police discover evidence in plain view, such as drugs, which in combination with other information available to the police would be sufficient to establish probable cause to search for additional drugs, it would be advisable for the officers to temporarily stop the search and secure a supplemental warrant, rather than rely on the plain view exception to seize any other drugs that may be found.

**d. The Incriminating Nature Of The Evidence Must Be Immediately Apparent**

Before an item in plain view may be seized, it must immediately be apparent to the officer that the item is contraband or incriminating evidence.<sup>267</sup> 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.”<sup>268</sup> As with other probable cause determinations, officers are entitled to rely on their expertise and draw reasonable inferences from the facts available to them to decide whether an object is contraband or incriminating.<sup>269</sup> For example, an officer who is trained in the

identification and packaging of controlled drugs could look at a small baggie of white powder and determine that there was a reasonable probability it was contraband.<sup>270</sup>

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 would not justify seizure of the item under plain view.<sup>271</sup>

### **3. 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. 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.”<sup>272</sup> 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.”<sup>273</sup>

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

- a warrantless blood draw to obtain a blood sample from the defendant, who was under arrest for DWI following a late-night car accident, where the delay caused by obtaining a warrant might deprive the State of reliable evidence of the defendant’s conviction;<sup>274</sup>
- 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 that apartment;<sup>275</sup>

- a warrantless seizure and search 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;<sup>276</sup>
- a warrantless inspection of the hidden VIN on the defendant's car where there was probable cause to believe that the car, which was being driven, was stolen;<sup>277</sup> and
- a warrantless entry into a home to apprehend an armed fleeing felon.<sup>278</sup>

The exigent circumstances exception to the warrant requirement is applicable only when the exigency was unforeseeable. The police may not intentionally create or wait for exigent circumstances to develop and then rely on the exigent circumstances exception to justify acting without a warrant. It would be impermissible, for instance, for police 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.<sup>279</sup>

The scope of a warrantless entry and/or search based on exigent circumstances must be narrowly tailored to the exigency. In other words, if the police 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 on probable cause, 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.

#### **4. The “Community Caretaking” Or “Emergency Aid” Exception**

Although often referred to as a type of “exigent circumstances” exception, the “emergency aid” exception is a separate and distinct exception to the warrant

requirement.<sup>280</sup> The “emergency aid” exception 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.”<sup>281</sup> 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,<sup>282</sup> or to enter a person’s property to respond to a reported emergency situation.<sup>283</sup> Provided that such conduct was not a subterfuge for a criminal investigation, it would fall with the emergency aid exception to the warrant requirement.

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

- The police had objectively reasonable grounds to believe that there was an emergency at hand and an immediate need for their assistance for the protection of life or property;<sup>284</sup>
- There was an objectively reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched; and
- The search was not primarily motivated by an intent to arrest and seize evidence.<sup>285</sup>

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.<sup>286</sup> In that case, after assisting in moving a stalled car off the highway, a trooper asked the driver for his license and registration. She discovered that the driver’s license had been suspended and subsequently arrested

him for operating after certification as a habitual offender. The driver sought to suppress 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 expressed doubt that asking for the documents constituted a seizure but assumed nonetheless that it did. It held that the officer's action were part of her community caretaking function and thus fell within an exception to the warrant requirement. The trooper made the request in order 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 basis for undertaking it, and it was not simply a pretext for engaging in criminal investigation.<sup>287</sup> For example, if while investigating a criminal mischief complaint, the police see a briefcase lying on the street and there was no basis to believe it was connected to their investigation, they could seize it for the purpose of safeguarding it and identifying its owner under the emergency aid exception.

## **5. Automobiles**

Unlike the federal courts, the New Hampshire Supreme Court has declined to adopt a motor vehicle exception to the search warrant requirement.<sup>288</sup> In order to conduct a warrantless search of a non-impounded motor vehicle in New Hampshire, both probable cause and exigent circumstances must be present. (For a discussion of



permissible inventory searches of vehicles, see the [section on inventory searches](#), pages 79-81. 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 in a motor vehicle without obtaining a warrant. For example, if the police have probable cause to believe that a person is transporting drugs in his car, and there is reason to believe that he 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.<sup>289</sup> 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 can be secured while a search warrant is obtained.

Generally, when 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.<sup>290</sup>

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.<sup>291</sup>

## **6. 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.<sup>292</sup> A complete discussion of the law of arrest is contained in [Chapter II](#), pages 18-38.

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.<sup>293</sup> The types of situations in which pre-arrest searches are acceptable usually involve additional exigent circumstances, such as a suspect engaging in furtive movements or the officer observing a weapon protruding from a dangerous suspect’s waistband. Under such circumstances, 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 technically occurred.

The justification for the exception is three-fold: to prevent harm to the arresting officer; to prevent the arrestee from destroying evidence; and to ensure that

the arrestee does not have, or cannot gain, any means to escape.<sup>294</sup> 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 his or her 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.

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, he or she 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.<sup>295</sup>

When reviewing the legality of searches based on 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,<sup>296</sup> the Court held that a warrantless search of the passenger compartment of the defendant’s car was not justified under the search-incident 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 she could gain access to any evidence, weapons, or elements of escape

that might have been present in the car. Similarly, in State v. Murray,<sup>297</sup> the Court held that a search of the defendant's purse, conducted after she was in the custody of ambulance attendants, was not justified under the search-incident exception.

“Because whatever was in her purse could not at that 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.”<sup>298</sup>

## **7. Inventory Searches**

### **a. Post-Arrest Detention Search**

The police may conduct a warrantless search of an arrested person, and his or her personal effects, as part of a routine administrative procedure incident to booking and detention.<sup>299</sup> Such a search serves four valid purposes:

- to protect the arrestee's property while he or she 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.<sup>300</sup>

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 arrestee,<sup>301</sup> and to read the hidden contents of a notebook that had been seized incident to an arrest.<sup>302</sup>

**b. Inventory Searches Of Persons Detained In Protective Custody**

While 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 his or her personal effects can be searched solely for the limited purposes of identifying the detainee and reducing the likelihood of injury to the detainee and others.<sup>303</sup> Thus, if the person has been identified, the police would not be justified in searching the contents of his or her wallet.<sup>304</sup> 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.

**c. 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 the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger.”<sup>305</sup>

To be valid as an inventory search, however, the search must be done pursuant to established department policy.<sup>306</sup> Unless the department has a policy that expressly permits it, an officer may not open closed containers that are found in a vehicle during an inventory search.<sup>307</sup> The reason for these rules is to ensure that inventory searches are used for their proper purpose and not as pretext for looking for evidence of criminal activity. 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

law enforcement 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, 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 it exceeded its permissible scope.

## **8. 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;<sup>308</sup> the Division of Motor Vehicles may inspect vehicles and certain car lots, dealers, etc.; the Division of Public Health may inspect businesses for compliance with health requirements;<sup>309</sup> the Pari-Mutuel Commission may inspect all charitable organization records;<sup>310</sup> the Fire Marshal or local fire chief may inspect buildings for code compliance;<sup>311</sup> the Division of Human Services may visit aid recipients to ensure conformity with use requirements;<sup>312</sup> and local ordinances may authorize police officers to check pawn shops for stolen merchandise.<sup>313</sup>

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.<sup>314</sup>

## **9. Field Sobriety Checkpoints**

The law of field sobriety checkpoints is discussed in the driving while intoxicated section of the manual, [Chapter II, G](#), pages 16-17.

## **10. School Searches**

### **a. Searches Of Students And School Facilities**

Searches of students and school premises by law enforcement officials 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 search warrant requirement. However, a school official (as opposed to 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 related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.<sup>315</sup> The rationale for the exception to the warrant requirement in these circumstances is the special need for a speedy response to behavior that threatens the safety of school children and teachers or the educational process itself.

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.<sup>316</sup> 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.<sup>317</sup>

In State v. Heirtzler,<sup>318</sup> the New Hampshire Supreme Court suppressed evidence obtained as a result of an interrogation and warrantless search conducted by a school official, finding that his actions had been induced by law enforcement. The school official searched the student based on 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.

#### **b. 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, in order 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.<sup>319</sup> However, as



discussed above, if a school official conducts a search “in conjunction with or at the behest of law enforcement agencies”<sup>320</sup> or as an agent of the police, the warrant requirement would apply.<sup>321</sup>

## V. PREPARATION AND EXECUTION OF SEARCH WARRANT

### A. Introduction

Absent an [exception to the warrant requirement](#), see pages 63-84, police officers may not conduct a search<sup>322</sup> 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, courts are required to be highly deferential to the probable cause determination made by the issuing judge.<sup>323</sup> They are not required to extend the same level of deference to police officers when reviewing the legality of a warrantless search. It is therefore 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 that 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.<sup>324</sup> 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.

The judge makes a probable cause determination based upon the information set forth in the search warrant application and supporting affidavit. The mere fact of that a person has been indicted for a crime, standing alone, is insufficient to establish probable cause for the issuance of a search warrant.<sup>325</sup>

## **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.<sup>326</sup>

## **D. Applying For Search Warrants**

### **1. Overview**

A search warrant can be issued by any neutral and detached New Hampshire district or superior court judge.<sup>327</sup> It may be issued, upon application, to any sheriff, deputy sheriff, state police officer, or municipal police officer in New Hampshire.<sup>328</sup> 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 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](#), see pages 111-16, 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.<sup>329</sup>

## **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.<sup>330</sup>

Moreover, in addition to all sorts of “conventional” evidence such as drugs and paraphernalia, child pornography, financial records, photographs of private locations, etc., a search warrant can be used to obtain blood, saliva, and hair from a person.<sup>331</sup>

## **4. Application Process In Detail**

The application process 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.<sup>332</sup>

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.<sup>333</sup>

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.<sup>334</sup> This is critical because when a court reviews a search warrant in response to a motion to suppress, the court can 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.<sup>335</sup>

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 the warrant.

If the warrant application documents were submitted by fax or electronic transmission, the requesting agency must forward the original documents to issuing judge by the next business day.<sup>336</sup> 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.<sup>337</sup> 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 is dispelled. If necessary, officers are also authorized to bar a homeowner from entering his or her residence pending the

arrival of a warrant. Officers should make sure to document the circumstances in their report.

## **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.

You can access [standard application, warrant, and return forms](#), all of which are used by law enforcement agencies throughout the state, see pages 392-95. The forms can be completed and printed from your computer. For guidance on how to fill out the forms, place the cursor over the applicable section and a text box will appear, or click on “view” and then “comment,” which will reveal the directions at the bottom of the screen.

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 format. See [Affidavit Form](#), page 397.

## **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 be found at the targeted location or in the possession of the targeted individual.

In making that determination, the court must consider the source(s) of the information, the credibility of the source(s) and the reliability of the information, all of which must be addressed in the affidavit.

### **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 other 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 to 45 North State.



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 a reliable source of information. Similarly, the victim of a crime and any eye-witnesses to a crime are generally considered a reliable source 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.”<sup>338</sup>

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 on 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 this 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 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.<sup>339</sup> 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.<sup>340</sup>
- **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.<sup>341</sup> Even corroboration of "innocent detail[s]" provided by the informant can be important to bolster the credibility of the informant.<sup>342</sup>
- **Existence of Cooperation Agreement:** whenever an informant is providing information under a cooperation agreement, that information must be included in the affidavit.

#### **4. Establish Why There Is Reason To Believe Evidence Will Be Found At 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 (1) evidence related to the crime exists and (2) 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.<sup>343</sup> Similarly, an officer trained in the investigation of sexual/physical assaults can attest, based on 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.<sup>344</sup> 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 home.<sup>345</sup> 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.

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 did not establish a substantial likelihood that the evidence sought will be at the place described in the warrant *when the search warrant is executed*.<sup>346</sup>

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.<sup>347</sup> 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,<sup>348</sup> child pornography, which tends to be "hoarded" by collectors,<sup>349</sup> guns,<sup>350</sup> 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 on 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.<sup>351</sup>
- Information that a defendant committed a stabbing on a particular night would likely support probable cause to believe that trace evidence of the crime, e.g. blood and fiber evidence, would be found on his 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, he 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.<sup>352</sup>
- 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.<sup>353</sup>

## **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 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, 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, e.g., an apartment building or office building, the application must identify the specific unit(s) for which there is probable cause to search. The unit should be described by unit number, physical location, and any other identifying features. For example:
  - Apartment 1-A of multi-unit apartment building located at 3 Spring St. in Concord, 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, Manchester. The business is in the third unit from the left, looking at the mall from the parking lot, with a sign 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.

## **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.<sup>354</sup> 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.<sup>355</sup> 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 be fatal to the validity of the warrant.<sup>356</sup>

The level of specificity required in a warrant depends on the type of evidence that is sought.<sup>357</sup> 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” or “automatic weapons” would likely be sufficient because all items fitting any of those descriptions would be illegal.<sup>358</sup>

**b. Property That Has Been Stolen, Embezzled, Or Fraudulently Obtained**

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, 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.<sup>359</sup>

### **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.<sup>360</sup>

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.”<sup>361</sup> 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 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, 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.”

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.<sup>362</sup>
- U.S. Currency.<sup>363</sup>

#### **d. Description Of Images Of Child Pornography**

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 pornography unless the court either views some of the allegedly pornographic images, or makes an assessment based on a detailed, factual description of the images.<sup>364</sup> However, if a suspect admits that he possesses child pornography, 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 pornography.<sup>365</sup>

One of the most common means by which police develop probable cause to believe that child pornography will be found in a given location is by the inadvertent discovery of what appears to be child pornography 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 language such as "obscene images," "pornography," or "sexually explicit." A good description of an image of child pornography 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 the age of 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, e.g., a child molester who photographs or videotapes his or her victims, the police may wish to search for undeveloped rolls of film or view the videotapes. Because the law in this area is unclear, it is good practice in such cases to err on the side of

caution and specifically request in the warrant permission to develop the film or view the videotapes, using language similar to the following:

- Photographs 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,<sup>366</sup> 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.<sup>367</sup>

While state police officers are “constables throughout the state,”<sup>368</sup> as a general rule, they have no jurisdiction to act in cities and towns with a population in excess of 3,000.<sup>369</sup> Although the matter is unsettled, this restriction likely also applies to the execution of search warrants. 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;<sup>370</sup>
- when an official of a local law enforcement agency requests the officer’s assistance;<sup>371</sup> or
- when ordered to do so by the governor.<sup>372</sup>

Law enforcement officers authorized to execute search warrants “may take with [them] suitable assistants and suffer no others to be with [them].”<sup>373</sup> 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.<sup>374</sup> 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.<sup>375</sup> Therefore, during searches, property owners should not be permitted to “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.<sup>376</sup> Nonetheless, whenever practicable, it is sound practice to show the warrant to the subject(s) of a search before commencing to search. Doing so has two important benefits: (1) 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 (2) it avoids subsequent claims that the manner of execution of the search warrant was unreasonable and therefore unconstitutional.

**a. 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.<sup>377</sup> 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.<sup>378</sup> The knock and announce rule should not, however, be confused with a “knock and ask permission to search” rule; if police are denied admission after announcing their presence and purpose, they may use reasonable force to gain admission.<sup>379</sup>

There are several exceptions to the knock and announce rule. Law enforcement officers need not comply with the rule if:

- knocking and announcing would be a “useless gesture” because the occupant of the premises would clearly be unable to hear them knock;
- announcing their purpose would be a useless gesture because the occupant already knows the officer’s purpose;<sup>380</sup>
- announcing their presence would put them or others at physical risk;
- exigent circumstances are present; or
- doing so would result in the flight of suspects or destruction of evidence.<sup>381</sup>

There may be occasions when facts and circumstances justifying a “no knock” entry are apparent well in advance of the police arriving on the scene. If these facts are known when the officer applies for the warrant, it is good practice to request the issuing magistrate to authorize a “no knock” entry when issuing the search warrant. However, because there is no statutory requirement that judges provide prior judicial

approval for “no knock” entries, some judges are reluctant to authorize “no knock” entries in advance.

The United States Supreme Court has recently held that violations of the knock and announce rule under the federal constitution will not lead to suppression of evidence in federal courts.<sup>382</sup> In an older case, however, the New Hampshire Supreme Court has suggested that suppression of otherwise lawfully seized evidence could be a remedy for a flagrant violation of the “knock and announce rule.”<sup>383</sup> Although the tension between these two cases has not yet been resolved, police should nonetheless consider themselves bound by the knock and announce rule regardless of whether evidence will be suppressed as a result of police failure to properly knock and announce themselves.<sup>384</sup>

### **3. 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 a magistrate issues a warrant with the word “night” or the entire parenthetical phrase crossed out, the warrant authorizes a daytime search only. Otherwise, a warrant may be executed at any time.<sup>385</sup> If a search is begun under a daytime warrant but is not completed by nightfall, it is not necessary to terminate the search.

### **4. 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 only for 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.<sup>386</sup>

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.<sup>387</sup> 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 compartment 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. 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 owner/tenant of the premises claims ownership. The only exception to this rule is if the person is wearing or in actual physical possession of the container and that person is not named in the warrant.<sup>388</sup> 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.<sup>389</sup>

## **5. 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 on 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.

## **6. 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.<sup>390</sup>

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.<sup>391</sup> 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 seven 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.<sup>392</sup> A sample 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. For guidance on how to fill out the form, please place your cursor over the applicable box and a small instruction box will appear, or click on “view” and “comments” to reveal and highlight the instructions. See the [standard application, warrant, and return forms](#), pages 393-96.

One section of the return form is the inventory, which is a listing of all property taken pursuant to the warrant.<sup>393</sup> 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 person as the officer who applied for the warrant.<sup>394</sup>

## **7. 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.<sup>395</sup>

## **H. Motions 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.<sup>396</sup> 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 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.<sup>397</sup> See a sample [motion to seal](#), pages 398-99.

## **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.”<sup>398</sup> The affidavit in support of an anticipatory warrant must establish “(1) that it 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.”<sup>399</sup>

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.<sup>400</sup> 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.<sup>401</sup>

Recently, 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.<sup>402</sup> 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 computers have become pervasive in our society, searching them has become an increasingly frequent task for police officers. As part of the “Cybercrime Initiative,” the Attorney General’s Office, in conjunction with numerous partners, has developed a comprehensive system for forensically searching electronic evidence. Due to the many technical issues 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. Links to useful resources may be found here:

<http://www.cybercrime.gov./index.html>

<http://www.cybercrime.gov/s&smanual2002.htm>

Information—including sample language for search warrants—relating to the use of search warrants to obtain cellular telephone information may be found here. See Law Enforcement Memorandum, pages 400-404, regarding obtaining cellular telephone information.

## **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 new practical issues.

## **2. Preparation Of An 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 or electronic storage device such as a CD ROM, flash drive, etc., or the records maintained by an internet service 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 pornography was 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 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. It is not necessary to get two warrants in every instance of a computer search. 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 pornography 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 images of child pornography 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 images of child pornography. 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 a computer seized for evidence of one crime, police often develop probable cause to believe that the computer 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 evidence 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, sixteen floppy discs, and two CD ROMS marked ‘Kiddie Porn,’” would be sufficiently particular to comply with the relevant statute.<sup>403</sup> 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.<sup>404</sup> Law enforcement officers must conduct a forensic analysis of the evidence within a constitutionally permissible “reasonable” time, which in the context of searches of electronic evidence, will generally greatly exceed seven days.<sup>405</sup> Accordingly, law enforcement officers need not seek prior permission to complete the analysis of electronic evidence more than seven days after its seizure.

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

The USA Patriot Act<sup>406</sup> provides 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 should carefully adhere to the procedure described in the



applicable federal statutes.<sup>407</sup> Moreover, law enforcement officers should be aware of the notice requirements contained in 18 U.S.C. § 2705.

## **VI. DRIVING WHILE INTOXICATED**

### **A. Introduction**

One of the most common, yet potentially most deadly, crimes that law enforcement officers are likely to encounter in their day-to-day duties is driving while intoxicated (“DWI”). Therefore, understanding the legal principles that apply to the investigation and apprehension of intoxicated drivers is extremely important. This chapter will focus on the legal standard for stopping suspected impaired drivers, the legal issues relating to the administration and results of the various physical and chemical tests used to determine a person’s level of impairment, mandatory blood draws pursuant to RSA 265-A:16, and field sobriety checkpoints.

In addition to this chapter’s discussion of specific issues that arise in the investigation of impaired drivers, this manual contains an extensive discussion of the law regarding on-the-street encounters and investigative detentions, arrest, warrantless searches, and search warrant practice and procedure. The legal principles discussed in those chapters are fully applicable to the investigation of impaired drivers.

All New Hampshire law enforcement officers receive training through the Police Standards and Training Academy on field sobriety tests (“FST”), the preliminary breath test devices (“PBT”) and the Intoxilyzer 5000. Officers are encouraged to refer to those training materials. Finally, extensive published literature is available discussing the legal issues related to the investigation and prosecution of cases involving driving while intoxicated in New Hampshire.<sup>408</sup>

## **B. Legal Standard For Stopping Suspected Intoxicated Drivers**

Law enforcement officers are permitted to detain a motor vehicle temporarily to investigate whether the driver is ill, injured, or driving while impaired. Such a threshold inquiry, or investigative stop, is governed by the same principles that govern all other Terry stops.<sup>409</sup> The stop must be supported by reasonable suspicion, and the scope of the investigation must be narrowly tailored to confirm or dispel the officer's suspicions. For an extensive discussion of the law on investigative stops, see [Chapter I](#), pages 1-17.

The legal justification to conduct a DWI traffic stop typically arises either from an officer's personal observations, information provided by a concerned citizen, or both. Officers' observations of one or more of the following have been found sufficient to justify a temporary stop to investigate for possible DWI:

- weaving or improper lane control;
- inappropriate or fluctuating speed;
- failure to obey traffic signals;
- attempts to avoid observation by law enforcement officers;
- unsafe lane changes and other traffic violations;
- reckless or unsafe operation of a motor vehicle;
- improper use of headlights;
- repeatedly crossing "fog lines" or center lines; and
- inexplicable behavior on the part of the driver consistent with mental impairment, such as the extended use of windshield wipers on a dry day.

Any obvious violation of the Motor Vehicle Code, RSA Title XXI, will constitute reasonable suspicion to conduct a traffic stop.<sup>410</sup> However, absent some

indication that the driver is impaired, it will not justify extending the stop to include FST.

Information from an informant may also give rise to reasonable suspicion to conduct a motor vehicle stop for DWI. However, before acting on such information, officers need to assess, based on all the circumstances, whether the information is sufficiently reliable to create reasonable suspicion that the driver of the vehicle is impaired.<sup>411</sup> The preliminary question in that assessment is whether or not the informant is identifiable. If so, then absent some indication that the person might not be telling the truth, the police can accept the information as reliable and act on it as appropriate.<sup>412</sup>

An informant is identifiable if the facts and circumstances surrounding the making of the tip provide the police enough information that they could identify the person if necessary. For example, in State v. Gowen,<sup>413</sup> a woman driving a pickup truck stopped alongside a police car, pointed to another car and said she believed the driver was intoxicated. The driver was ultimately convicted of DWI. On appeal, the driver claimed that the woman's tip, which he characterized as an anonymous tip, was not sufficient to justify the stop. The New Hampshire Supreme Court rejected the defendant's characterization of the tip as anonymous, even though the woman had not identified herself to the police. The Court found that the facts and circumstances provided the police with sufficient information-such as the make, model and license plate of the woman's car- for the police to have identified her if need be.

If the police have received an anonymous tip about an impaired driver, they must assess the totality of the circumstances to determine whether the information is

sufficiently reliable to give rise to reasonable suspicion that the driver of the targeted vehicle is impaired. The New Hampshire Supreme Court has identified the following as factors to consider in making that assessment:<sup>414</sup>

- whether the tipster provided a “sufficient quantity of information” about the motor vehicle that the officer can be certain that the vehicle stopped is the one that the tipster identified. Such information might include, but not be limited to:
  - the vehicle’s make, model, color, or other characteristics;
  - the vehicle’s license plate number;
  - the vehicle’s location; and
  - the vehicle’s direction of travel;
- the length of time that elapsed between the time the police received the tip and the time that the suspect vehicle was located.
- whether the tip was based upon tipster’s personal observations or the tipster merely learned about the alleged impaired operation from some other source; and
- whether the tip provided sufficient detail for an officer to reasonably conclude that the tipster had actually witnessed an ongoing motor vehicle offense.<sup>415</sup>

### **C. Stops Based On Motor Vehicle Infractions**

It is common for a police officer in the course of a traffic stop for a motor vehicle violation to develop a suspicion that the driver is impaired. Once that reasonable suspicion is created, an officer is authorized to expand the scope of the stop to investigate whether or not the driver is, in fact, impaired. It does not matter that the basis for the stop was unrelated to impaired driving. Nor does it matter that, prior to the stop, the officer might have had a hunch that the driver was impaired. As long as the officer did, in fact, observe the person commit a motor vehicle violation,

the officer had justification to conduct the traffic stop, and the officer can pursue any reasonable suspicion that develops from that point.<sup>416</sup>

## **D. The Administration Of Physical And Chemical Tests To Assess A Driver's Impairment**

Police officers have at their disposal a number of different physical and chemical tests that can be used to determine whether and to what degree a person is impaired by drugs or alcohol. Whether a driver can be required to submit to testing, and the consequences of refusing to submit, will depend on the type of test and whether the test is to be administered pre- or post-arrest.

### **1. Pre-Arrest**

When an officer has reasonable suspicion that a person has been driving while impaired, the officer may conduct physical tests to confirm or dispel that suspicion. Such tests include FST, PBT, and horizontal gaze nystagmus ("HGN"). Because none of these tests are considered a search for constitutional purposes, there is no requirement that they be supported by probable cause. Nor is there any requirement that a person be advised of the Miranda rights, or that the person be provided an opportunity to consult with an attorney before deciding whether to submit to the requested test(s).<sup>417</sup>

A driver may refuse to submit to any pre-arrest tests. By itself, a person's refusal is not sufficient evidence to support an arrest for DWI. It is, however, a factor that officers can rely on when determining whether there is probable cause to make such an arrest. Depending on the test being requested by the officer, evidence of the person's refusal may also be admissible in a subsequent criminal proceeding.<sup>418</sup>

### **a. Preliminary Breath Tests**

A PBT is conducted with a hand-held device that can test the alcohol concentration in a person's breath. Before administering a PBT, the following conditions must be met:

- The officer must have been certified by the Police Standards and Training Council to conduct the test;
- The PBT device being used must be of a make and model approved by the Department of Safety; and
- The officer must verbally inform the person that taking the test or failing to take the test will neither prevent nor require a subsequent test under RSA 265:84 (the implied consent law).<sup>419</sup>

Following completion of a PBT, the officer must immediately inform the person of the test results and, if requested, provide the results in writing.<sup>420</sup> Provided all of these conditions have been satisfied, the results of the PBT should be admissible in court for any relevant purpose.<sup>421</sup>

A person has an absolute right to refuse to submit to a PBT. Evidence of the person's refusal will not be admissible in court except for the purpose of determining whether an officer had probable cause to arrest.<sup>422</sup>

Neither the person's consent to submit, nor a person's refusal to submit to a PBT will affect whether additional tests can be conducted in the event the person is arrested.<sup>423</sup>

### **b. Field Sobriety Tests**

FST are balance and coordination tests that are designed to determine whether a person is under the influence of alcohol. The National Highway Transportation Safety Administration ("NHTSA") has scientifically studied, documented, and

promoted a battery of three FST to be used by officers during pre-arrest screening. They are the HGN, the walk and turn test, and the one-leg stand test. NHTSA considers these tests to be the most effective procedures for testing drivers at the roadside to determine impairment.

Other FST include the finger-to-nose test and the coin pick-up. When properly administered and interpreted, these field tests are reliable tools for evaluating whether a person is impaired.<sup>424</sup>

Because FST require specialized training to administer and to evaluate the subject's performance, officers should not attempt to perform the tests unless they have received the necessary training.

Provided there is reasonable suspicion to believe that a person has been driving while impaired, an officer may ask the person to perform any one or more of the FST. To ensure the reliability of the test results, the officer should begin the testing process by doing the following:

- Ask the person whether he or she suffers from any illness or physical disability that affects his or her balance and coordination;
- Make sure that there are no road conditions or other environmental conditions that might affect the person's ability to perform the tests; and
- Explain and demonstrating each test, and asking the person whether he or she has any questions.

In the event that the person is ultimately arrested, the officer should document each of these steps in a report, that includes a detailed description of the person's performance on each test, any comments the person may have made, and any other



significant observations the officer made about the person, such as swaying, slurred speech, disheveled clothing, or an odor of alcohol, etc.

In certain circumstances, such as when dealing with a physically disabled driver who cannot perform balance and coordination tests, it may be necessary for an officer to administer an improvised test such as having the subject recite the alphabet backwards or count from 3 to 33 by threes.

**c. Horizontal Gaze Nystagmus**

The HGN test tracks the movement of a person's eye, as the eye focuses on an item that is moving across the person's field of vision. Only those officers who have received specialized training should administer the test. The results of an HGN test will not be admissible in any future court proceeding unless the prosecution can demonstrate that the test was administered by a properly qualified officer, in accordance with NHTSA protocols.<sup>425</sup>

The results of an HGN test may be admitted as evidence of a person's impairment. However it is not sufficient, standing alone, to prove that a person was intoxicated. Nor is it admissible to prove that the person had a certain blood alcohol concentration level.<sup>426</sup>

**d. Blood And Urine Test; Intoxilyzer**

An officer is free to ask a person, as part of an investigative DWI stop, whether he or she would be willing to consent to a blood test, urine test, or an Intoxilyzer test. However, because the person is not under arrest, and thus not subject to the implied consent law discussed below, there is no legal obligation for the person

to consent. In the event a person agrees to submit to a test, the officer should attempt to obtain the person's consent in writing.

## **2. Implied Consent**

Under the implied consent law in New Hampshire, any person who drives on the ways of this state is presumed to have consented to physical tests and examinations to determine whether the person is under the influence of alcohol or drugs. The implied consent also extends to tests of the person's blood, urine or breath, for the purpose of determining the alcohol concentration.

The implied consent law is triggered when a person has been arrested for DWI or for any "offense arising out of acts alleged to have been committed while [DWI]."

<sup>427</sup> It does not apply pre-arrest. The choice of test(s) to be administered is up to the law enforcement officer.<sup>428</sup>

Police officers should not conduct any physical tests or breath tests under the implied consent law unless they have been trained to do so, either by a law enforcement agency or through a Police Standards and Training Council-approved training course. Test results obtained by officers who have not been properly trained in the administration of the test will likely be excluded as evidence in any court or administrative proceeding.<sup>429</sup>

Officers need not give a Miranda warning before they conduct implied consent testing, nor are they required to allow the person to consult with an attorney before making a decision whether or not to submit to a test.<sup>430</sup> However, as a prerequisite to any testing, officers must advise the arrested person of his or her rights under the

implied consent law. If the arrest was for a violation or misdemeanor-level DWI-related offense, the officers must:

- inform the arrested person of the right to have a similar test or tests made by a person of the arrestee's own choosing;
- afford the arrested person an opportunity to request an additional test; and
- inform the arrested person that if he or she refuses to submit to a test at the direction of the law enforcement officer, his or her driver's license or operating privileges will be suspended, and evidence of the refusal may be admissible in court.<sup>431</sup>

There is a standard "Implied Consent Rights" form, used throughout the state, which goes through each of these points in more detail. [See Implied Consent Rights Form, Violation/Misdemeanor](#), page 405.

If the driver has been arrested for a felony-level DWI-related offense—one involving death or serious bodily injury—the driver has no right to refuse to submit to a test.<sup>432</sup> Therefore, an officer need not explain the consequences of a refusal. There is a standard "Felony Administrative License Suspension Rights" form, which should be used in those situations. [See Felony Administrative License Suspension Rights Form](#), page 406.

After reviewing the rights form with an arrestee, officers should have the person sign the form, indicating that he or she has been informed of the implied consent rights. If the person refuses to sign, there is an area on the form where the officer should document that refusal.

If the person agrees to submit to the officer's request for an Intoxilyzer test, the officer must immediately provide the results of the test to the person, in

writing.<sup>433</sup> If the person submits to a blood or urine test, the police department must furnish the person a copy of the report of the test results, by certified mail, within 48 hours after the report is received.<sup>434</sup> Failure to do so could lead to a court ruling that the test results are inadmissible.<sup>435</sup>

As stated on the implied consent rights forms, the arrestee has a right to have a similar test conducted by a person of his or her own choosing. To ensure that this opportunity is available, police officers are required to get a second breath sample whenever they conduct an Intoxilyzer test, and to turn that sample over to the arrested person.<sup>436</sup> Similarly, if a blood sample is drawn at the direction of a police officer, the sample must be of sufficient quantity to allow for two tests. The testing laboratory is required to retain the sample for 30 days following completion of the test, so that the arrested driver may have an opportunity to retrieve the sample and have it tested.<sup>437</sup>

If the police choose to use a breath test, but the arrested person wants to obtain an independent blood test, the police are obligated to afford him or her a meaningful opportunity to request one. As a general rule, it is sufficient to provide access to a telephone so that the person can make the necessary arrangements.<sup>438</sup> The police are not obligated to release the person from custody or to transport the person to a particular location for the purpose of obtaining an independent test.<sup>439</sup>

#### **a. Incapacity To Give Consent**

When an officer is confronted with a driver “who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusing” a blood or breath test, that driver is deemed, by law, to have given consent to tests.<sup>440</sup> However,

once the person regains consciousness and is able to give consent, the officer should make every attempt to notify the driver of his or her right to a preserved sample for independent testing.

**b. Refusal To Submit To Post-Arrest Testing In Non-Felony  
DWI-Related Arrests**

Although, under the implied consent law, drivers are presumed to have consented to tests of their blood, breath, or urine after arrest for the purposes of determining impairment, a driver can withdraw that consent and refuse to submit to any testing.<sup>441</sup> The right to refuse, however, extends only to people under arrest for violation and misdemeanor-level offenses. It does not apply to felony-level offenses.<sup>442</sup>

Drivers who refuse testing may face a variety of consequences. Evidence of the driver's oral or written refusal to submit to tests will be admissible at trial as evidence of consciousness of guilt.<sup>443</sup> Further, the refusal will lead to the following administrative sanctions:

- A six-month suspension of the person's driving privileges, if it is the person's first refusal under the implied consent law and he or she has no prior DWI or Aggravated DWI convictions; or<sup>444</sup>
- A two-year loss of license, if the person was previously convicted of DWI or Aggravated DWI, or if the person previously refused to submit to a test under the implied consent law, regardless of whether he or she was then convicted of DWI.<sup>445</sup>

These mandatory license suspensions apply regardless of whether the driver is ultimately convicted for the underlying crime.<sup>446</sup> If he or she is convicted, any license suspension that is ordered as a result of the suspect's conviction will be

imposed in addition to the administrative loss of license, and will run consecutive to the administrative suspension.<sup>447</sup>

It is not necessary that a driver expressly refuse to consent, either in words or writing. A person can be deemed to have refused by conduct as well. For example, a person's repeated voluntary belching, which prevents accurate testing, can constitute refusal.<sup>448</sup> However, a person's refusal to complete the ALS rights form, by itself, should not be construed as a refusal to submit to testing. The person must be given the opportunity to orally consent.<sup>449</sup>

It is not uncommon for a driver who initially refused consent to later change his or her mind and request that the officer administer the tests. If there has been any significant delay in submitting to the test, officers may refuse to allow the person to take a test, since such delay may have "serve[d] to deprive the State of an accurate indication of the driver's condition" at the time of operating the vehicle.<sup>450</sup>

### **c. Administrative License Suspension (ALS) Proceedings**

If an arrested person refuses to submit to a post-arrest FST, breath, or chemical test of the officer's choosing, or if the person submits and the test reveals an alcohol concentration of .08 or more (or .02, if the person was under the age of 21), the ALS process is triggered. The officer who requested the test must submit a sworn report to the Department of Safety, certifying the following:

- a test was requested pursuant to the implied consent law, RSA 265-A:4; and
- the person refused to submit to testing, or that the test revealed an alcohol concentration of .08, or .02 in the case of someone under age 21.

In addition, if the event triggering the ALS process was either a refusal or a breath test result of .02 or .08, the following must occur:

- the officer must serve immediate notice on the arrested person that his or her driver's license is suspended, effective in 30 days;
- if the person has a valid New Hampshire driver's license, the officer must take the license from the person and issue a temporary license, valid for the 30-day notice period; and
- the officer must send the license to the Department of Safety along with the sworn report.<sup>451</sup>

If the person submitted to a chemical test and the tests results are not immediately available, the Department of Safety is responsible for providing notice of the license suspension, which becomes effective 30 days after the date of service of the notice.<sup>452</sup>

Within 30 days of receiving notice of the license suspension, the person has the right to request either an administrative review or a hearing by the Department of Safety. An administrative review involves a review of the officer's report and any information that the person chooses to provide to the Department in writing. There is no role for the arresting officer in that process. On the other hand, if the person opts for a hearing, he or she may request that the officer be present at the hearing. In that event, the officer would be called to testify concerning the circumstances surrounding the arrest and the request to submit to the implied consent tests. If an officer fails to appear at a hearing without good cause, the case will be dismissed and the license suspension order will be rescinded.<sup>453</sup>

The scope of the review hearing is limited to the following:

- whether the officer had reasonable grounds to believe the arrested person was driving, attempting to drive, or was in actual physical control of a vehicle upon the ways of this state or operating or attempting to operate a boat on the waters of this state or was driving, operating, attempting to operate, or in actual physical control of an OHRV while under the influence of intoxicating liquor, narcotics, or drugs;
- the facts upon which the reasonable grounds to believe such are based;
- whether the person had been arrested;
- whether the person refused to submit to the test upon the request of the law enforcement officer or whether a properly administered test or tests disclosed an alcohol concentration of 0.08 or more, or, in the case of a person under 21 years of age, 0.02 or more;
- whether the officer informed the arrested person of his or her 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 would result in suspension of his or her license or driving privilege and that testing above the alcohol concentration level specified in RSA 265-A:2 or RSA 265-A:3 would also result in suspension.<sup>454</sup>

At the beginning of the hearing, the Department of Safety hearings examiner will ask the officer whether he or she swore to the report in front of a notary or justice of the peace. The examiner may also ask what formalities were observed during the swearing, such as whether the officer raised his or her hand. Because the statute requires that the hearing be based on a sworn report, a hearings examiner will not proceed on an improperly sworn or unsworn report. This has been, and can be a pitfall for the unwary officer.



## **E. Mandatory Blood Draws Pursuant to RSA 265-A:16**

New Hampshire law requires that whenever there is motor vehicle collision or boating accident that results in death or serious bodily injury to any person, a blood sample shall be drawn from all involved drivers, whether living or deceased, and all deceased vehicle occupants and pedestrians involved. However, in the case of an involved driver who is living, blood cannot be drawn unless there is probable cause to believe that the driver caused the collision.

Any blood sample drawn pursuant to RSA 265-A:16 must be tested for evidence of alcohol or controlled drugs.<sup>455</sup> The test results are to be kept on file by the medical examiner and may be made available to:

- any highway safety agency for use in compiling statistics to evaluate the effectiveness of its program; and
- any person . . . who is or may be involved in a civil, criminal, or administrative action or proceeding arising out of an accident in connection with which the test was performed.

It is well established that the taking of a blood sample from a person constitutes a search under the state and federal constitutions. Like any other type of warrantless search, a warrantless blood draw is unconstitutional unless it falls within one of the exceptions to the warrant requirement. Because alcohol is quickly metabolized in the body, and any delay in obtaining a blood sample may destroy relevant evidence of impairment, courts have recognized that a warrantless blood draw may be constitutional when there is probable cause to believe a person has been driving while impaired and circumstances would make it difficult to obtain a search warrant on a timely basis. For example, in State v. Wong,<sup>456</sup> the New Hampshire

Supreme Court upheld a warrantless blood draw from a driver who was arrested after a fatal accident at approximately 11:30 p.m. The Court noted that the late hour, which made it difficult to obtain a search warrant, and the rapid rate at which alcohol is metabolized, combined to create exigent circumstances. In combination with the officer's probable cause to believe the driver had been driving while impaired, those circumstances justified the warrantless search.

More recently, the New Hampshire Supreme Court recognized that drugs are metabolized at an equally rapid rate as alcohol, and similar circumstances would support a warrantless blood draw to determine whether a driver was impaired by drugs.<sup>457</sup>

Because RSA 265-A:16 requires the police to conduct blood draws under specified circumstances, but does not require a warrant or probable cause to believe the person was driving while impaired, there is some question whether the statute is constitutional and, more specifically, whether the results of a test conducted pursuant to that statute can be used as evidence against a driver in a criminal trial.

The Attorney General's Office has issued a law enforcement memorandum opining that the mandatory blood draw pursuant to RSA 265-A:16 (formerly RSA 265:93) is constitutional, even without the existence of probable cause to believe that evidence of a crime will be found in the person's blood, because the search falls within the recognized "special needs" exception to the search warrant requirement. See [Law Enforcement Memorandum On Mandatory Blood Draws](#), pages 407-12.

However, while the results of a blood test conducted pursuant to RSA 265-A:16 may be used for administrative purposes such as maintaining accurate statistics of serious

alcohol-related accidents, they cannot be routinely used as evidence against drivers in criminal prosecutions. In light of that, the Attorney General advised police officers as follows:

In the event of a collision involving a fatality or serious bodily injury, the requirements of RSA 265:93 [now RSA 265-A:16] must be fulfilled, including the requirement that blood be drawn from any surviving driver, so long as there is probable cause to believe that the driver caused the collision. However, officers are advised not to rely exclusively on that statute to obtain blood test evidence of the presence of intoxicants. Whenever possible, officers should document any facts supporting a finding of probable cause to believe that the driver is impaired, and any exigent circumstances<sup>458</sup> that would justify conducting a warrantless search. This would provide the State with an alternative argument to support the admissibility of the test results at a subsequent trial.

In the event that test results taken pursuant to RSA [265-A:16] reveal the presence of intoxicants in a case where there was either no probable cause to believe that the driver was intoxicated, or the evidence in support of such a finding was weak, the case should be brought to the attention of the county attorney before charges are instituted. The county attorney, in consultation with this office, will evaluate whether there is sufficient evidence to defend the admissibility of the test results at trial.

## **F. Obtaining The Results Of Blood Draws Independently Conducted By Hospitals**

Often in DWI cases involving injury and hospitalization of the driver, the hospital will draw a blood sample and test it for, among other things, the presence of alcohol or drugs. Although the results of such testing would normally be confidential and protected from disclosure under the physician/patient privilege, RSA 329:26 provides an exception to that privilege as it pertains to individuals who are under investigation for DWI.<sup>459</sup> Under that exception, the person's blood sample and the results of laboratory tests for blood alcohol content may be released. There is no

requirement that the person consent to the release, and the police may rely on this exception even if the driver has refused to submit to a test under the implied consent law.<sup>460</sup> The released information can only be used in an official criminal trial.

There may be other types of DWI-related investigations in which the laboratory tests of an individual may be important evidence. If the circumstance does not fall within the exception described above, it may still be possible to obtain the records by other means, such as a grand jury subpoena.<sup>461</sup> However, officers should consult with their county attorney before attempting to do so.

## **G. Field Sobriety Checkpoints**

In 1985, the New Hampshire Supreme Court ruled unconstitutional a system of sobriety checkpoints employed by the Concord Police Department.<sup>462</sup> Following that decision, a bill was introduced in the Legislature that was designed to address the constitutional concerns raised by the Supreme Court relating to the use of field sobriety checkpoints.<sup>463</sup> Although the New Hampshire Supreme Court issued an opinion declaring the bill facially constitutional,<sup>464</sup> the bill was ultimately never acted upon. In 2007, the Court issued an opinion upholding the constitutionality of such checkpoints and specifically addressed the issue of pre-checkpoint publicity.<sup>465</sup>

Following the guidance provided by the New Hampshire Supreme Court in their opinions, as well as procedures that have been found constitutional in other states, the New Hampshire Attorney General's Office has developed guidelines for law enforcement agencies on planning and conducting sobriety checkpoints. See [Sobriety Checkpoint Guidelines](#), pages 375-84.

Sobriety checkpoints present a variety of complex legal issues and any legal challenge will ultimately fall to the responsibility of the Attorney General's Office. For those reasons, it is important that personnel from the Attorney General's Office be closely involved in the planning and implementation of any sobriety checkpoint program. Inquiries should be directed to the Chief of the Criminal Justice Bureau at 271-3671.

## VII. THE USE OF PHYSICAL FORCE

### A. Introduction

The law specifically defines when it is permissible to use physical force in self-defense, 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 not authorized under the law, that person could be subject to criminal liability. A police officer could also face civil liability for wrongful use of force. On the other hand, if a person uses force against another under circumstances allowed by law, that person has not committed a crime and should not be charged with a criminal offense. 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](#),<sup>466</sup> see pages 412-14. In general, the law concerning the use of force against another is divided into two categories: (1) the use of physical force by civilians; (2) and 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 laws governing the use of force differentiate between the use of deadly force and 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.<sup>467</sup> It specifically includes the act of purposely firing a firearm

in the direction of another person or vehicle that the shooter believes is occupied, provided the firearm is one that is capable of causing death or serious bodily injury.<sup>468</sup> The term “non-deadly force” covers any type of force that does not rise to the level of deadly force. It covers a wide range of conduct, including grabbing a person’s wrist, handcuffing a person, using OC spray to subdue someone, and using a taser gun.

The use of force against another is only justified under the law if it is supported by a reasonable belief that the force was necessary under the circumstances. In practical terms, that means that if a law enforcement officer uses force against another in the course of his or her 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.

The following is an overview of the use-of-force law as it applies to the general population and as it relates to law enforcement officers. Whether the use of force against another person is justified in a particular situation is highly dependent upon the specific circumstances. For example, the reasonableness of force used 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 physical location of the altercation, and whether the person using force had any viable alternatives. For that reason, it is not possible to establish any bright line rules about when to use and not to use force. The examples that follow are very generic, and do not address the multitude of factual variations that an officer may be

presented with. The examples are offered solely for the purpose of illustrating the various legal principles. They should be used as definitive guidelines as to when force may be used.

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

### **1. Use Of Non-Deadly Force**

#### **a. 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 third persons from what they reasonably believe to be the imminent use of unlawful non-deadly force.<sup>469</sup>

**Example 1:** *Ann holds up her fist and is about to punch Karen. Karen may use reasonable non-deadly force to protect herself from Ann.*

**Example 2:** *Ann holds up her fist to punch Karen. Sue may use reasonable non-deadly force to protect Karen from Ann.*

The threat of force being defended against must be imminent. In other words, the person acting in self-defense must reasonably believe that the other person is actually about to use force.

**Example:** *Bob tells Jimmy before school that he is going to meet Jimmy after school and punch him in the nose. Jimmy may not reply by immediately punching Bob, because Bob's use of force against Jimmy is not imminent.*

The degree of force used should not be any greater than that reasonably necessary to fend off the threatened or actual force.

**Example:** *Mike tells Herb that he is going to push him aside if Herb refuses to move. Herb may not defend against Mike's threatened use of force by breaking Mike's ribs and fracturing his jaw, because it would*



*be unreasonable to believe that this level of force would be necessary to defend against being pushed aside.*

Civilians are also justified in using non-deadly force against another when they reasonably believe the force is necessary to arrest another person or prevent another person from escaping from custody. However, the use of force must be supported by the civilian's reasonable belief that the person being arrested or prevented from escaping committed a felony, and the person had, in fact committed a felony. Finally, the actor should only use the degree of force necessary to accomplish that objective.<sup>470</sup>

**Example 1:** *Bob sees Jim escaping from Officer Johnson's custody. Bob reasonably believes that Jim was under arrest for the commission of a felony. Jim had, in fact, committed a felony and been placed under arrest for that felony. Bob may use reasonable non-deadly force to apprehend Jim.*

**Example 2:** *Bob sees Jim shoot another person in the back, causing that person to fall to the ground. Jim starts to run away. Bob reasonably believes that Jim committed a felony, which Jim had actually done. Bob may use reasonable non-deadly force to arrest Jim.*

**Example 3:** *Bob sees Jim escaping from Officer Johnson's custody. Bob reasonably believes that Jim was under arrest for the commission of a felony. However, Jim had not, in fact, committed a felony. Bob may not use non-deadly force to apprehend Jim.*

#### **b. Non-Deadly Force In Defense Of Premises**

The law permits a person to use non-deadly force against another, to the extent he or she reasonably believes it is necessary, to prevent or terminate a criminal trespass upon a premises. 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.

**Example:** *Susan, the manager of Super Sundaes, tells John he must leave the restaurant because he is causing a commotion. John refuses to leave. Susan may use non-deadly force to terminate his criminal trespass on the premises.*

### **c. Non-Deadly Force In Defense Of Property**

Civilians may use non-deadly force against another when the civilian reasonably believes it is necessary to prevent an unlawful taking of his or her property, to retake his/her property immediately after its taking, or to prevent criminal mischief. The force used must be reasonable under the circumstances.<sup>471</sup>

**Example:** *James observes a young boy spray painting the window of his shoe store. James may use non-deadly force to stop the boy from engaging in criminal mischief.*

### **d. 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 an act of shoplifting or willful concealment. The manner of detention must be reasonable, and the person can be detained only so long as it is necessary to turn him/her over to the police.<sup>472</sup>

**Example 1:** *Michael, the manager of Rite-Aid, sees Danny concealing a bottle of cough syrup under his coat. Michael physically moves Danny into the store office, calls the police, and detains Danny until the police arrive. Michael was justified in detaining Danny.*

**Example 2:** *Michael, the manager of Rite-Aid, observes Al walking out of the store with several items, which were not paid for. Michael grabs Al in the parking lots and brings him back into the store, locks him in the men's room and leaves him there for an hour, until he has time to call the police. Michael was not justified in holding Al for that length of time.*

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, on the owner's premises. The manner of detention must be reasonable, and the person cannot be held longer than is necessary to surrender him/her to the police.<sup>473</sup>

**Example:** *Jessica, the owner of the Imperial Movie Theater, observed a customer using a video camera to record the movie as it was playing in the theater. When the customer refused to get out of his seat, she grabbed his arm and physically led him to the lobby where she held him until the police arrived. Jessica was authorized in using non-deadly force.*

**e. Non-Deadly Force By County Fair Security Guards**

A county fair security guard is authorized to detain any person that he/she 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. This provision does not apply unless the security guard has completed the part-time officer training.<sup>474</sup>

**Example:** *A security guard at the Hopkinton Fair Grounds observes a man stealing a woman's purse. The guard may use reasonable force to detain the man until he can surrender the man to the police.*

**f. Physical 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 or guardian responsible for the care and welfare of a child is permitted to use force to the extent he/she reasonably believes it is necessary to prevent or punish that

child's misconduct.<sup>475</sup> A teacher is permitted to use necessary force against a minor when the minor is creating a disturbance or refuses to leave the premises.<sup>476</sup> A person who is authorized by law to maintain safety in a vessel, airplane, or train, may use reasonable force to when necessary to achieve that objective.<sup>477</sup> Any person who believes that another individual is about to commit suicide or inflict serious bodily injury on himself/herself may use reasonably necessary force to thwart that individual's effort.<sup>478</sup> Certain health professionals are authorized to use force to administer treatment when it is reasonably believed that the treatment will promote the physical or mental health of the patient.<sup>479</sup>

## **2. Limitations On The Right To Use Non-Deadly Force**

The use of non-deadly force against another is not justified under the law if:

(a) 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 he or she could respond with force and cause physical harm.<sup>480</sup>

**Example:** *In front of a group of friends, Mike repeatedly calls Bill derogatory names and makes fun of Bill's ethnic background, hoping to start a fight. If Bill responds by pushing or punching Mike, Mike cannot lawfully use non-deadly force in self-defense since he provoked Bill with the purpose of starting the fight.*

(b) The actor was the initial aggressor.<sup>481</sup>

**Example:** *To settle an old argument, John sneaks up on Bob and purposely shoves him down to the ground. If Bob gets up and punches John in retaliation, John is not entitled to use force in self-defense because he was the initial aggressor.*

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.<sup>482</sup>

**Example:** *To settle an old argument, John sneaks up on Bob and purposely shoves him down to the ground. Seeing Bob on the ground, John feels terrible about what he has done, apologizes, backs away, and tells Bob that it will never happen again. Since John has completely withdrawn from the encounter and communicated his withdrawal to Bob, Bob is not entitled to use force against John in self-defense. However, if Bob responds with non-deadly force, or threatens to use it in the immediate future, then John may use force in self-defense.*

(c) The force involved was the product of combat by agreement not authorized by law. (Combat “authorized by law” appears to refer to collegiate wrestling, sanctioned professional boxing, and other legitimate forms of physical combat.)<sup>483</sup>

**Example:** *Chuck and Dave decide to settle their differences outside of the bar where they are drinking. Chuck walks up to Dave and punches him in the nose. Dave responds by punching Dave in the eye. Neither person can claim he acted in self-defense because their fight was by agreement and not authorized by law.*

### **3. Use Of Deadly Force**

Civilians are entitled to use deadly force against another person when they reasonably believe that the other person:

(a) Is about to use unlawful, deadly force against the actor or a third person.<sup>484</sup>

**Example 1:** *During the course of robbing a bank, Chip holds a gun up to the bank teller’s head and appears ready to pull the trigger. The teller may lawfully use deadly force against Chip to protect himself, since Chip appears to be about to use unlawful, deadly force against the teller.*

**Example 2:** *During the course of the robbing a bank, Chip holds a gun up to the bank teller’s head and appears to be ready to pull the trigger.*

*The bank manager may lawfully use deadly force against Chip to protect the teller, since Chip appears to be about to use unlawful, deadly force against the teller.*

(b) Is likely to use any unlawful force against a person present while committing or attempting to commit a burglary.<sup>485</sup>

**Example:** *One night, Peter breaks into Tom's house to steal a computer. Tom wakes up and finds Peter in his living room. Peter moves toward Tom and starts to throw a punch. Tom would be justified in using deadly force in self-defense, since Peter was using force against Tom while committing a burglary.*

(c) Is committing or about to commit kidnapping or a forcible sex offense.<sup>486</sup>

**Example:** *Bob drags Lori into an alleyway and starts to rape her. Lori may lawfully use deadly force against Bob in self-defense, since Bob was committing a forcible sex offense against her.*

(d) Is likely to use any unlawful force in the commission of a felony against the actor within such actor's dwelling or its curtilage.<sup>487</sup> 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.<sup>488</sup>

**Example 1:** *John breaks into Steve's house, intending to steal some of Steve's possessions. When Steve comes upon John, John punches him. Steve may use deadly force in self-defense because John used force against him in his house while John was committing a felony against him.*

**Example 2:** *David and Steve are roommates. They get into an argument and David punches Steve in the face, breaking his nose. Steve would not be justified in using deadly force against David.*

#### 4. Limitations On The Right To Use Deadly Force

The use of deadly force in self-defense or in defense of a third person would not be justified if the actor knows that he or she and any third person can retreat from the encounter with complete safety.<sup>489</sup>

**Example:** *When Laura encounters Kathy during a walk in the park, Laura points a handgun at Kathy and warns her to leave the area or she will shoot. Kathy knows that she can retreat from the encounter with complete safety. Accordingly, Kathy is not entitled to use deadly force in self-defense.*

There is no duty to retreat, however, if the actor is within his or her dwelling or its curtilage and was not the initial aggressor.<sup>490</sup>

**Example:** *Dave is sitting in his living room when Simon kicks down his door, runs into the living room, pulls out a knife, and threatens to stab Dave for insulting him the day before. Dave may use deadly force in self-defense, even if he could retreat in complete safety, because Simon was in Dave's dwelling and he reasonably believed that Simon was about to use deadly force upon him.*

The duty to retreat is also inapplicable if the actor is a law enforcement officer or a private person assisting a law enforcement officer, at the officer's direction.<sup>491</sup>

**Example:** *While Officer Smith is standing in the middle of the street directing traffic, Jim points a loaded handgun at her and threatens to pull the trigger unless Officer Smith leaves the area. Officer Smith knows that if she retreats, she will be able to do so with complete safety. Nonetheless, Officer Smith may use deadly force against Jim if legally necessary to protect herself or third persons, since she is under no duty to retreat.*

The use of deadly force is also not justified if 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.<sup>492</sup>

**Example:** *For no apparent reason, Rebecca points a shotgun at Cheryl and threatens to kill her. Cheryl responds by pulling a revolver and pointing it at her. Rebecca would not be justified in shooting Cheryl in self-defense because she provoked Cheryl to use the revolver.*

## C. The Use Of Physical Force By Law Enforcement Officers

### 1. Use Of Non-Deadly Force

There are some circumstances when a law enforcement officer would be justified in using physical force against another, but a civilian would not be.

Specifically, a law enforcement officer is justified in using non-deadly force against other persons when and to the extent that the officer reasonably believes it necessary to do the following:

- (a) To effect an arrest or detention.<sup>493</sup>

**Example:** *Officer Smith chases and apprehends Mr. Johnson. He attempts to handcuff Johnson, but Johnson refuses to comply. Officer Smith may use reasonable and necessary non-deadly force to effect the arrest.*

- (b) To prevent an arrested or detained person from escaping custody.

**Example:** *After being arrested, Mr. Johnson attempts to escape from Officer Smith. Officer Smith may use reasonable and necessary non-deadly force to prevent Johnson's escape.*

However, if the officer knows that the person is arrested or detained illegally, the officer is not permitted to use force to prevent the person's escape.<sup>494</sup>

**Example:** *Officer Nero has arrested Mr. Jordan for the sole purpose of harassing him into leaving the neighborhood. Officer Nero knows that the arrest is illegal. Mr. Jordan attempts to break free. Officer Nero may not use force to prevent Jordan's escape.*

(c) To defend against what the officer reasonably believes to be the imminent use of non-deadly force during an attempt to effect an arrest or detention, or during an escape from arrest or detention.



**Example 1:** *Officer Erving attempts to arrest Mr. Smith. During the course of attempting to arrest Smith, Smith starts to punch him. Officer Erving may use reasonable non-deadly force to protect himself.*

**Example 2:** *Officer Erving attempts to arrest Mr. Smith. During the course of attempting to arrest Smith, Smith starts to punch fellow Officer Johnson, who is providing back-up. Officer Erving may use reasonable non-deadly force to protect Johnson.*

## **2. Use Of Deadly Force**

A law enforcement officer is justified in using deadly force against another only when the officer reasonably believes such force is necessary to:

(a) Defend himself or a third person from what he or she reasonably believes is the imminent use of deadly force.<sup>495</sup>

**Example 1:** *Officer Smith sees Mr. Johnson pointing a loaded rifle out of his car window toward him. Officer Smith may use deadly force against Johnson, because he reasonably believes that doing so is necessary to protect himself from Johnson's imminent use of deadly force.*

**Example 2:** *Officer Smith sees Mr. Johnson pointing a loaded rifle out of his car window toward a crowd of people at a bus stop. Officer Smith may use deadly force against Johnson, because he reasonably believes that doing so is necessary to protect against Johnson's imminent use of deadly force.*

(b) Effect an arrest, 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;<sup>496</sup>
- is using a deadly weapon in attempting to escape; *or*
- otherwise indicates that he is likely to seriously endanger human life or inflict serious bodily injury unless apprehended without delay.

Before the officer uses deadly force, 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.<sup>497</sup>

**Example:** *Officer Smith sees Mr. Jones walking in a park about an hour after the police were called to Jones' residence and found his wife bleeding from stab wounds, which she said Jones inflicted. Based on the investigation, Jones is wanted for first degree assault, using a deadly weapon. Officer Smith identifies himself, tells Jones he is under arrest and orders Jones to stop and place his hands in the air. Jones refuses and continues walking away. Officer Smith is entitled to use deadly force because he has advised Jones that he is a law enforcement officer and Officer Smith reasonably believes that Jones committed a felony involving force.*

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.”<sup>498</sup> 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.<sup>499</sup> Accordingly, officers should not rely on 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.

## **D. 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. 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 it is necessary to carry out the officer's directions.<sup>500</sup>

**Example:** *Officer Smith is attempting to arrest a drunken man outside of a bar one evening. The drunken man is strong and appears to be likely to overwhelm Officer Smith. Officer Smith calls out to the nearby bouncer to help him. The bouncer holds the drunken man's arms behind his back. The bouncer is entitled to do so, because he reasonably believes such to be necessary to carry out the officer's direction.*

However, the use of force is not permissible if the civilian believes the arrest is illegal.

### **2. 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 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.<sup>501</sup>

**Example:** *After responding to a reported bank robbery, Officer Smith sees a masked man running out of the bank carrying an assault rifle. Officer Smith directs the bank's security guard to fire his weapon at the suspect while Officer Smith calls for backup. The security guard may comply with Officer Smith's request, because Officer Smith directed him to do so, and the security guard believes that Officer Smith is authorized to use deadly force under the circumstances.*

## **E. 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 he or she 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.<sup>502</sup>

**Example 1:** *Bob sees Jim escaping from Officer Johnson's custody. Bob reasonably believes that Jim was under arrest for the commission of a felony. Jim had, in fact, committed a felony and been placed under arrest for that felony. Bob may use reasonable non-deadly force to apprehend Jim.*

**Example 2:** *Bob sees Jim escaping from Officer Johnson's custody. Bob reasonably believes that Jim was under arrest for the commission of a felony. Jim had not, however, committed a felony. Bob would not be justified in using non-deadly force to apprehend Jim.*

## **F. 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. 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 his or her duties and a person is injured, even if the subject of the deadly force does not die. 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 [Deadly Force Protocol](#), pages 416-30.

## **VIII. PRE-TRIAL IDENTIFICATION PROCEDURES**

### **A. Introduction**

A common investigative tool is a pre-trial identification procedure, in which the police show an eyewitness or victim of a crime one or more individuals, either in person or by photograph, for possible identification of the perpetrator. An identification obtained through one of these processes can be valuable evidence in a criminal trial. However, unless the identification process complies with a suspect's constitutional rights to due process and right to counsel, any resulting identification may be suppressed. This chapter discusses the right to counsel and the right to due process as they pertain to pre-trial identification procedures.

### **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 an 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.<sup>503</sup> The right to counsel does not apply to photo identifications,<sup>504</sup> thus a photo 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 and conducive to irreparable mistaken identification."<sup>505</sup> 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."<sup>506</sup>

A defendant who challenges the fairness of a pre-trial identification procedure has the burden to prove that the process used was unnecessarily suggestive. 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 on factors that were uninfluenced by the police.<sup>507</sup> There are five factors that courts will consider in making that determination:<sup>508</sup>

- The witness's opportunity to view the suspect.
- What was the lighting like at the time of the viewing?
- How close was the witness to the perpetrator at the time?
- Was there anything blocking or interfering with the witness's view?
- How long was the witness able to look at the suspect?
- The witness's degree of attention.
- Why was the witness looking at the suspect?
- Was there a reason that 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.
- The lapse in time between the crime and the identification.

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.

## **1. Show-Ups**

A show-up consists of presenting a single suspect to an eyewitness for possible identification. Show-ups are "widely condemned" because they are inherently suggestive.<sup>509</sup> They should be employed, if ever, in the most limited types of circumstances. Courts have recognized that there are times when a show-up may be necessary and, if done properly, will still satisfy due process by not being unnecessarily suggestive. Before using a show-up in any investigation, officers should consult with their county attorney or the attorney general's office.

The New Hampshire Supreme Court has decided only one case involving a show-up, State v. Fecteau,<sup>510</sup> and found the procedure was not unnecessarily subjective. In that case, the police took the victim of a sexual assault into the district court when they knew the suspect would be present for an arraignment. They chose a day when they knew the courtroom would be crowded and other non-uniformed males would be present. The Court found that under those circumstances, the police had taken all the necessary steps to avoid the process being unnecessarily suggestive.<sup>511</sup>

Fecteau also involved an unintentional show-up, which the Court upheld. The police were standing outside the courtroom with the two victims when the defendant



arrived at the courthouse and went inside. Despite the officer's attempt to divert the victim's attention, one of the women saw the defendant and spontaneously identified him as her attacker. The New Hampshire Supreme Court held that the identification was not unnecessarily suggestive because it was an accidental process.<sup>512</sup>

Other courts have upheld the use of a show-up procedure against a challenge of unnecessary suggestiveness in the following circumstances:

- A one-person show-up within hours of the crime, in order for the police to determine whether their investigation was “on the right track”,<sup>513</sup> and
- A one-person show-up to the victim who was in serious condition in the hospital, where it was not known how long she would live, and she could not be transported to the jail to attempt to identify her assailant.<sup>514</sup>

## **2. Photo Arrays**

A photo array involves showing a witness a series of photos, 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 photo array is developed based on a witness's description of a suspect. It should consist of a photograph of the suspect and at least seven other “filler” photographs of other individuals who resemble the suspect. The photos are shown to the witness either as a group or in sequence, and the witness is instructed to view the photos and determine whether any of the individuals is the person he or she observed.

To eliminate possible suggestiveness in a photo array, there are a number of guidelines that officers should follow in constructing and conducting an array.

**a. Constructing The Array**

The photo array should consist of a minimum of eight photos, including that of the suspect. When available, the photo 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 photo array should contain only one suspect's photograph. If there are multiple suspects in an investigation, a separate photo array should be constructed for each.

Officers should attempt to use all black and white or all color photographs. To the extent possible, the photos 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.

**b. Presenting The Array**

It is preferable that the officer who presents the photo 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 photo. 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 photo array must exercise caution to refrain from saying anything 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 photos 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 photo 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.

### **3. Line-Ups**

A line-up involves an in-person viewing of a suspect and at least five "filler" individuals by a witness or victim of a crime. As with a photo array, law enforcement must exercise caution in organizing and conducting a line-up, so as to avoid any unnecessary suggestiveness.

#### **a. Composing A Line-Up**

One of the most difficult challenges with a line-up is selecting fillers. As with a photo array, fillers in a line-up should resemble the suspect in significant features such as race, age, height, weight, and particularly those features that the witness may have described. No person with whom the witness may be acquainted should be included in the line-up.

Officers should permit the suspect to take any place in the line-up that he or she chooses. 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 lineup.

Once the composition of the lineup is established, an officer should photograph the lineup in the order the witness will see it, as well as document the names of the individuals involved and their positions in the lineup.

**b. Conducting A Line-Up**

As with the photo array, it is preferable that the officer who conducts a line-up has no knowledge of the suspect's identity or position in the line-up. However, for staffing reasons, such a "blind presentation" may not be feasible. If it is not, the officer presenting the line-up must exercise caution to refrain from saying anything that points out or suggests a particular individual to the witness.

Prior to conducting the line-up, the witness should be told the following:

- the individuals are placed in random order;
- the person who committed the crime may or may not be included in the line-up, 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 is present, 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, the officer should ask the witness to explain how he or she knows the person and the level of certainty about the identification. The witness's identification, or lack thereof, and any comments should be documented. Regardless of whether the witness makes an identification, the

officer should not provide any feedback to the witness about his or her selection or non-selection.

During a line-up, a suspect can be required to exhibit him or herself without violating the right against self-incrimination. For example, it is permissible to ask a suspect, as well as the fillers, to do such things as wear a specific article of clothing, say a specific word or phrase, or make a certain gesture.<sup>515</sup>

At the completion of the line-up, the officer should write a report that covers all of the relevant information about the line-up, including the names of the individuals involved, the process by which they were selected, the instructions given to the witness, any comments made by the witness, and whom the witness identified, if anybody.

## **IX. DOMESTIC VIOLENCE SITUATIONS**

### **A. Introduction**

Situations involving domestic violence are some of the most challenging for law enforcement officers. The Governor's Commission on Domestic and Sexual Violence has developed a protocol for law enforcement on responding to domestic violence situations. The protocol can be found at the following web site:

[http://doj.nh.gov/victim/docs/law\\_enforcement\\_2002.pdf](http://doj.nh.gov/victim/docs/law_enforcement_2002.pdf). This section highlights the most important aspects of the protocol, as well as the mandatory law enforcement provisions of the domestic violence law, RSA 173-B.

### **B. Officer Safety**

Responding to a domestic violence call can be one of the most dangerous activities that an officer engages in. Parties to a domestic disturbance are commonly experiencing anger, frustration, and pent-up emotion. The responding officer can 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 prior to arriving at the scene and should notify the dispatcher upon arrival. Use of emergency lights and sirens should be avoided when in close proximity to the scene of the domestic disturbance, unless there is 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. If responding alone, an officer should refrain from entering the premises until back-up has arrived or is at least en route. When approaching the premises, keep in mind that threats to officer safety may be waiting outside.

Absent exigent circumstances, such as an ongoing assault, that require a forced entry, officers should knock, identify themselves, and request to be admitted to the premises. Officers need not do so, however, if they believe that knocking will place them in danger.

If entry is refused, or if there is no response, it may be necessary for the officers to enter for the purpose of assessing the well being of anyone present in the home. In deciding whether to force an entry, officers should evaluate the degree of urgency and likely time it will take to obtain a search warrant, the possibility of danger to others, including any officers left to guard the site, 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:

- separate the parties;
- remove the parties from areas of the home that pose a significant threat, such as the kitchen, where knives and other weapons are readily accessible;
- take physical control of any weapons;
- establish the location of any other people in the home;
- assess the condition of any children present in the home; and



- assess injuries, administering first aid, and requesting medical services, as needed.

## **C. On-Scene Investigation**

In conducting an investigation, officers should refer to the domestic violence investigation checklist. See [Domestic Violence Investigation Checklist](#), pages 431-32.

Officers should interview the victim and the assailant as fully as the circumstances allow and, if possible, obtain a written statement from the victim. Whenever possible, the victim should be interviewed outside the presence of other people. Any children who are present should be interviewed as potential victims or witnesses.

Officers should take photographs of any injuries suffered by the victim, and should collect and preserve all physical evidence reasonably necessary to support a prosecution, such as weapons, torn clothing, and photographs of physical damage to the premises.

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.<sup>516</sup> Ask the victim he or she has a copy of the order. Officers are entitled to rely on the victim's statement that the order remains in effect as written.<sup>517</sup>

## **D. 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 to press charges.<sup>518</sup> This mandatory arrest provision applies to a violation of any of the following types of protective orders: (a) domestic violence protective orders, (b) stalking protective orders, (c) protective orders contained in a divorce decree; and (d) protective orders issued by another state, territorial, or tribal court.

If the assailant has fled but is apprehended within 12 hours of the incident, the police may execute an arrest without a warrant.<sup>519</sup> 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. See section on conducting an arrest in a third party's home, [Chapter II, F\(3\)](#), pages 23-24.

## **E. 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. If the assailant has fled and there is probable cause to believe that he or she has committed an offense of abuse, officers should promptly initiate procedures to pursue and apprehend the assailant. If the assailant is apprehended within 12 hours of the incident, the police may arrest the person without a warrant.<sup>520</sup> If the 12-hour time period has expired, the police must obtain an arrest warrant.

*NOTE:* As in 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. See section on conducting an arrest in a third party's home, [Chapter II, F\(3\)](#), pages 23-24.

If the parties have committed mutual abuse against one another, officers need not arrest both people, but should arrest the person whom they believe was the predominant physical aggressor. In determining who is the predominant physical aggressor, officers should consider: the relative degree of injury or fear inflicted on the people involved; the strength and size of the persons involved; who initiated the call to the police; and any prior history of domestic violence between the persons.<sup>521</sup>

If the officers decide not to make an arrest, they must provide a detailed explanation for that decision in the incident report. However, as discussed above, if a protective order has been violated, officers must arrest the violator.

## **F. Bail / Criminal Orders Of Protections**

In general, an arrested person is entitled to be released on bail pending trial.<sup>522</sup> However, bail is not permitted if a person has been charged with a violation of a domestic violence restraining order issued under RSA 173-B, a stalking order issued under RSA 633:3-a, or an out-of-state protective order that is enforceable under RSA 173-B. In those circumstances, the person must be detained pending a court arraignment.<sup>523</sup>

In arrests involving domestic violence, for which bail is permitted, officers should request that the bail commissioner or court use the bail form entitled [“Criminal Order of Protection Including Orders and Conditions of Bail” \(COP\)](#), pages

433-37, instead of the standard bail form. In addition to the standard bail conditions, the COP form contains conditions similar to those available under a domestic violence protective order, such as restricting personal contact and prohibiting the possession of firearms and weapons. Unlike the standard bail form, the COP form can be entered into both the state protective order registry and NCIC, thus ensuring that the information will be available to law enforcement officers statewide, as well as in other states.

Because a COP is issued as a bail order, it should not be considered a substitute for domestic violence protective order under RSA 173-B. For instance, a COP 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.

Whenever a bail commissioner issues a COP, the law enforcement officer should fax a copy to the State Police for entry into the state registry. A copy of the COP form should also be filed in the district court along with the criminal complaint.

In general, a COP must be enforced as a bail order, not a domestic violence protective order. If a person violates a condition of a COP, officers should seek modification or revocation of the bail order. However, under certain circumstances, a defendant who is subject to a COP and who violates a condition of that order by engaging in an act under RSA 633:3, II(a) may be charged with stalking under RSA 633:3-a, I(c).

## **G. 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.<sup>524</sup>

*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 domestic abuse, the police are required under RSA 173-B:10 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, local family member or friend;
- transporting the victim to the hospital, police station, or other place of safety;
- assisting the victim in removing personal hygiene items, clothing, medication, business equipment, and other items ordered by the court;
- giving immediate, written notice of the rights, remedies, and services available to victims of domestic violence, a list of which is available here: [http://doj.nh.gov/victim/docs/victim\\_notification\\_form.pdf](http://doj.nh.gov/victim/docs/victim_notification_form.pdf).

The police must also immediately inform victims of abuse of their right to seek a protective order and to seek a private criminal complaint.<sup>525</sup>

## **I. Remaining At The Scene**

If no crime has been committed or there is no probable cause to make an arrest, officers should try to mediate the dispute, refer the parties to a counseling service, or suggest a temporary separation or cooling off period.

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 them to the police station or the local crisis center, and obtaining an emergency telephonic protective order.

## **J. Emergency Telephonic Orders Of Protection**

If a person has been threatened with harm and there is no probable cause to arrest, or the perpetrator has left the scene, officers should follow the procedure described below to seek an emergency telephonic protective order for the victim.<sup>526</sup> 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.

- The victim must complete and sign the “allegation of abuse” section of the [Emergency Order of Protection and Affidavit of Service Form](#), page 438, 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 a district court judge, 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 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.
- Provide the victim a copy of the order and explain that it will remain in effect only until the close of the next regular court business day.
- Inform the victim of the hours and location of the court and how to obtain a new petition and order.
- Immediately fax a copy of the protective order to the Department of Safety at 271-1153.
- Promptly serve the order, or have it served, on the defendant.
- File the return of service at the court of jurisdiction for the victim’s residence. The return should be filed at the opening of business the following day.

## **K. 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 prior to making service. The court issuing the order should have a “Temporary Restraining Order

Information Form” 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.

*NOTE:* Under no circumstances should the plaintiff’s location or address be revealed to the defendant.

## **L. Civil Standbys**

A protective order may prohibit a person from entering the premises or curtilage of the home where the abused person is living, except when accompanied by a police officer for the sole purpose of retrieving personal property or other items specified by a court. Entry can only be made with the consent of the abused person, upon reasonable notice.<sup>527</sup> If requested to accompany the restrained person to the premises, an officer should contact the abused person and arrange for a convenient time to go to the residence. While at the premises, the officer should remain in the presence of the defendant at all times.

Under some circumstances, the person subject to the protective order is living in the residence and the victim has left. If the victim has a court order or permission of the restrained person to enter the premises to retrieve personal property, an officer shall accompany the victim to obtain the property, for the purpose of protecting the victim’s safety.<sup>528</sup> If the restrained person is present, the officer should ask that



person to remain in a specific location where the officer can maintain visual contact of him or her at all times.

## **M. 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, 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.<sup>529</sup>

Firearms, ammunition and/or 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 release and specifying to whom they may be released. If guns are being stored at 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.<sup>530</sup>

## **X. RESPONDING TO REPORTS OF MISSING PERSONS**

### **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. The following policy is a modification of model policies developed by the National Center for Missing Adults and the National Center for Missing and Exploited Children. It has been modified to incorporate the requirements of New Hampshire law, and to take into account the wide variations in resources available to law enforcement agencies throughout the state. Individual agencies are encouraged to modify the policy to fit within their existing department policies. However, in doing so, it is imperative that each agency's policy incorporate the following fundamental aspects of this 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, descriptive information, and the circumstances of the disappearance shall be broadcast to all surrounding police departments. The information shall be entered into NCIC no later than 72 hours after receipt of the initial report.
- For any missing person who falls with the categories of Missing/At Risk or Missing/Unusual Circumstances, 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 state police.
- If a missing person is located, and that person is an adult, his or her whereabouts should not be disclosed without the person's consent.
- If a missing person is returned or located, the law enforcement agency shall take steps to cancel the NCIC entry related to that person and, if dental records were provided to state police, notify the state police that the person has been located.

## **B. Policy On Responding To Reports Of Missing Persons**

Policy: There is no waiting period for filing a missing person report. A police department should accept every report of a missing person. Where a threat or risk exists, the department should conduct a prompt and thorough investigation.

Jurisdictional conflicts are to 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.

### **1. Definitions**

#### **a. Missing Adult**

Any person, 18 years of age or older, whose whereabouts are unknown, who is either missing under circumstances not conforming to their ordinary routine or habits or may be in need of assistance or intervention.

**b. Missing Child**

Any person younger than 18 years old whose whereabouts are unknown to his or her parent, guardian, or responsible party.

**c. 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;
- The circumstances indicate that the person's physical safety may be in danger;
- 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.

**d. Missing/Unusual Circumstances**

A person will be considered missing under unusual circumstances if one or more of the following factors exist:

- The person is a child 13 years of age or younger;
- The person is out of the zone of safety for his/ her developmental state, physical or mental condition;
- The person has diminished mental capacity;
- 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 his/her welfare; or

- There is no explanation for the person's absence.

**e. Missing/Not At Risk**

A missing adult will not be considered at risk if any of the following criteria are met:

- An adult who has left a note (other than a suicide note) and/or told a credible person that he or she is leaving;
- An adult who simply has not been in touch with the reported party for an extended period of time, unless extenuating circumstances exist;
- Fugitives from justice, included AWOL service personnel; or
- An adult who is being sought for business or social purposes such as debt collections or school reunions.

## **2. Procedure**

**a. Initial Response**

All calls for missing persons should be responded to promptly. The initial call-taker or other person so 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. Upon receiving the information, the chief, shift supervisor, or other designated superior shall be notified.

If the information indicates that the circumstances meet any of the criteria set forth in the category of Missing/Not at Risk, no officer needs to be dispatched. In all other circumstances, an officer should be dispatched immediately.

Depending on the risk assessment, and if appropriate, the missing person's name, identifying and descriptive information shall be broadcast to other patrol

officers and to police departments in the surrounding jurisdictions. If the information indicates the probability of foul play or a crime in progress, as in the case of abduction, the broadcast should include all available information, including a description of the suspect, vehicle and direction or travel. In the case of a missing child under the age of 17, consideration should be given to activating a Child Abduction Emergency Alert (commonly known as an AMBER alert). See Child Abduction Emergency Alert Section, [Chapter XI](#), pages 189-92.

**b. Initial Investigation**

(1) Conduct a search of the immediate area to verify that the person is in fact missing.

(2) 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;
- Whether there is information to indicate that the person may be the victim of foul play;
- Whether the person has a history of being a victim of domestic or other abuse, or has mentioned being followed or stalked;
- 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 was the last person known to have seen or spoken to the missing person;
- What activity was the person engaged in when last seen and with whom?
- What is the potential for and mode of the person's mobility (i.e.; car, bus, plane, bicycle, 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 his or her normal behavior;
- Whether the person left a note or any form of communication indicating his or her intentions or whereabouts;
- Whether any of the person's personal belongings are missing, or money is missing;
- Whether anyone might gain financially by the person's disappearance;
- Whether the person has a criminal record, is on probation, parole, or possibly incarcerated; or
- Whether the person is possibly hospitalized.

(3) Based upon the information gathered, determine, in consultation with the supervisor, the appropriate level of response as follows:

(a) **Endangered/Foul Play Suspected:** this includes 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, such as a threatened suicide. The department response should, to the extent feasible, follow the protocols under the column labeled "Endangered/Foul Play" in the Investigative Protocols Chart, [Chapter X, C](#), pages 181-88.

(b) **Disability/Medical Condition:** the missing person suffers from diminished mental capacity, Alzheimer's, dementia, or a medical condition that could be life threatening if the he or she is not located. The department response should, to the extent feasible, follow the protocols under the column

labeled “Disability/Medical Condition” in the Investigative Protocols Chart, [Chapter X, C](#), pages 181-88.

(c) **Unknown/Voluntary:** the reason for the disappearance cannot be easily determined and/or 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 department response should, to the extent feasible, follow the protocols under the column labeled “Unknown/Voluntary” in the Investigative Protocols Chart, [Chapter X, C](#), pages 181-88.

**c. Reporting**

(1) If the missing person falls within the category of Missing/At Risk, his/her name, 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 in excess of 72 hours following receipt of the report.

(2) If the missing person is a child but does not fall within the category of Missing/At Risk, his or her name should be entered in the juvenile category of NCIC.

(3) A copy of the NCIC entry, or similar report, must be disseminated to other officers in the department through the normal channels of communication between shifts.

**d. Follow-Up**

(1) The assigned case agent shall periodically check with the reporting person to ensure that new information is followed up on.



(2) If the missing person has not been located within 30 days, the case agent shall request of the missing person's family or next of kin written consent to obtain the person's dental records from his or her dentist. The records shall be forwarded to the division of the state police, on a form supplied by the division for that purpose.

**e. Recovery and/or Return of Missing Adults**

(1) The assigned officer shall verify that the located person is, in fact, the reported missing person.

(2) Upon making that verification, the officer shall notify NCIC to remove the person's record from the missing persons database. If dental records had been forwarded to the division of state police, the officer shall also provide notice to the division.

(3) The assigned officer shall interview the missing person concerning the circumstances surrounding his or her disappearance and evaluate the potential for any criminal charges or further police action.

(4) The person who initiated the missing person report should be notified of the well being of the missing person. 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 from him or her. All communication with the reporting party should be done by the originating agency/investigator.

**f. Resources**

The following resources are available to aid police departments in dealing with missing person cases:

National Center for Missing Adults  
2432 Peoria Avenue, Suite 1286

Phoenix, AZ 85029  
(602) 944-1786

National Center for Missing and Exploited Children  
699 Prince Street  
Alexandria, VA 22314-3175  
Phone: 703-274-3900

Alzheimer's Association  
255 North Michigan Avenue, Suite 1700  
Chicago, IL 60601  
(312) 335-5814

## **C. Investigative Protocols Chart**

*NOTE:* During the course of a missing adult investigation, it may be determined that the missing person is voluntarily absent and chose to anonymously relocate. Law enforcement must treat the complaint as though foul play is involved until the person's status of being voluntarily absent is verified. If possible, verification should be made through a face-to-face interview by law enforcement with the missing person. Even when the person is located and his/her status as being voluntarily absent is verified, law enforcement is under no obligation to disseminate the location of the person against his/her wishes.

## Initial Investigation Protocol

<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 case of missing child, evaluate whether Amber Alert should be activated.	X		
<p>Interview the person who initiated the MP report, focusing on the following types of information:</p> <ul style="list-style-type: none"> <li>• full physical description of the MP, including clothing, height, weight, eye and hair color, skin tone, scars, tattoos;</li> <li>• description of MP’s mental and physical condition, including list of medications;</li> <li>• exact location where MP was last seen and activity MP was engaged in;</li> <li>• who was MP last seen with;</li> <li>• MP’s place(s) of employment and work schedule(s);</li> <li>• daily routine of MP and his/her family prior to and on day MP went missing;</li> <li>• names of friends, roommates, co-workers, other family members;</li> <li>• whether MP has a history of wandering and, if so, where had MP wandered in the past;</li> <li>• whether MP has access to, and ability to use transportation;</li> <li>• the time frame between when MP was last seen and when MP was discovered missing. (It is crucial to establish this “window of opportunity.” Be aware that persons responsible for MP may attempt to reduce the window of opportunity.);</li> </ul>	X	X	X

<b><u>Initial Investigative Steps</u></b>	<b><u>Endangered/ Foul Play</u></b>	<b><u>Disability/ Medical Condition</u></b>	<b><u>Unknown/ Voluntary</u></b>
<p>Interview the person who initiated the MP report, focusing on the following types of information (con't):</p> <ul style="list-style-type: none"> <li>• steps already taken to locate MP; and</li> <li>• whether the person has specific areas of places of comfort, such as a former residence.</li> </ul>	<b>X</b>	<b>X</b>	<b>X</b>
<p>Conduct a search of immediate area to verify the disappearance, if appropriate. Record the name of all persons involved in this preliminary search. Don't rely entirely on a complainant's or other's provided information regarding possible whereabouts of MP. All searches should be comprehensive. Consult with the county attorney, as necessary, on the need for a search warrant.</p>	<b>X</b>	<b>X</b>	<b>X</b>
<p>Consider using a K-9 or available aerial resources to assist in search, if applicable</p>	<b>X</b>	<b>X</b>	<b>X</b>
<p>Obtain a recent photograph of MP, preferably from shoulders up with an uncluttered background. (Such a photo may be available from DMV). Distribute copies to responding officers and create a missing person flyer.</p>	<b>X</b>	<b>X</b>	<b>X</b>
<p>Identify and secure the location where the person was last seen.</p>	<b>X</b>		

<u>Initial Investigative Steps</u>	<u>Endangered/ Foul Play</u>	<u>Disability/ Medical Condition</u>	<u>Unknown/ Voluntary</u>
<p>If the information gathered to date indicates that the MP was abducted or is the victim of foul play, follow the protocol for Endangered/Foul Play.</p> <p>If the information gathered to date indicated that the MP suffers a dementia or Alzheimer's disease, or a life-threatening medical condition, follow the protocol for Disability/Medical Condition.</p> <p>If the investigation does not reveal sufficient information to make a determination that either of those circumstances exist, the supervisory staff shall determine the appropriate level of response based on existing agency policies.</p>			<b>X</b>
<p>Identify and interview everyone at the scene, focusing on the following:</p> <ul style="list-style-type: none"> <li>• name and contact information;</li> <li>• relationship to MP;</li> <li>• when and where he/she last saw MP;</li> <li>• any information person has about the MP's disappearance;</li> <li>• names of other people who may have information about MP's disappearance;</li> <li>• what the person thinks may have happened to MP, or where the MP might have gone;</li> <li>• names and contact information of MP's friends, associates, caregivers, and friends of the family; and</li> <li>• the identity of any other witnesses who are no longer at the scene.</li> </ul>	<b>X</b>	<b>X</b>	
<p>Broadcast updated information as appropriate to patrol officers and police departments in surrounding jurisdictions.</p>	<b>X</b>	<b>X</b>	

## Extended Investigation Protocol

<u>Extended Investigative Steps</u>	<u>Endangered/ Foul Play</u>	<u>Disability/ Medical Condition</u>	<u>Unknown/ Voluntary</u>
Request assistance as needed from other local, county, or state law enforcement agencies that may be able to provide additional staff or resources.	X	X	
Designate a case agent to coordinate all phases of the investigation.	X	X	
Establish an area to serve as a central point for processing, review, and assignment of all investigative information.	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 abductor(s), and vehicle(s) 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 or the National Center for Missing Adults at (602) 944-1786.	X		
Consider steps to involve the public in locating the MP, including publishing the description and/or photograph of the MP in the media.		X	
Identify the MP's "comfort zones", including his or her house (if different from the scene), as potential crime scenes or sources of evidence, and secure them as necessary. Personal items such as hairbrush/comb, diary, photographs, and items with the person's fingerprints, footprints, teeth impressions, or other sources of DNA may be used to assist in the extended investigation. Determine if any of the MP's personal belongings are missing.	X		

<u>Extended Investigative Steps</u>	<u>Endangered/ Foul Play</u>	<u>Disability/ Medical Condition</u>	<u>Unknown/ Voluntary</u>
Broadcast any pertinent updates to all patrols and area law enforcement agencies, including information on any suspected abductor.	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	
Contact the Alzheimer's Association at (312) 335-5814, as appropriate, for assistance in locating the MP.		X	
Obtain access to records used by the MP, such as: <ul style="list-style-type: none"> <li>• electronic door access;</li> <li>• personal and employment computers, including internet, intranet, and e-mail;</li> <li>• credit card / ATM activity; and</li> <li>• phone records, including cell phones and pagers.</li> </ul>	X		
Obtain driver's license and vehicle information. Check records on recent parking violations and moving motor vehicle violations.	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 vehicle is not located, enter vehicle information in NCIC.	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		

<b><u>Extended Investigative Steps</u></b>	<b><u>Endangered/ Foul Play</u></b>	<b><u>Disability/ Medical Condition</u></b>	<b><u>Unknown/ Voluntary</u></b>
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 neighborhood or area. Consider, in consultation with the county attorney or attorney general, establishing informational roadblocks to locate possible witnesses.	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		
Identify a family liaison to serve as the contact person for the MP's family with the police department.	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		
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 incoming phone calls into the family's residence and cell phone(s), as well as to monitor all activity of cell phones and pagers used by the family and MP.	X		



<b><u>Extended Investigative Steps</u></b>	<b><u>Endangered/ Foul Play</u></b>	<b><u>Disability/ Medical Condition</u></b>	<b><u>Unknown/ Voluntary</u></b>
<p>Identify and periodically check all pertinent sources of information about the MP for any activity. Records to be checked include:</p> <ul style="list-style-type: none"> <li>• birth records;</li> <li>• medical records;</li> <li>• education records;</li> <li>• union or other organizational records;</li> <li>• DMV records;</li> <li>• social security records;</li> <li>• financial records, such as bank accounts, ATM transactions, retirement plans, stock and financial portfolios, credit bureaus;</li> <li>• mail forwarding information;</li> <li>• e-mail addresses; and</li> <li>• phone, cell phone, and pager records.</li> </ul>	<b>X</b>		
<p>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), and fingerprint classification.</p>	<b>X</b>		
<p>Search the NCIC Unidentified Person File. Periodically use the NCIC off-line 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.</p>	<b>X</b>		
<p>Review the sexual offender registry, as well as the local probation/parole office, in order to identify possible suspects.</p>	<b>X</b>		

## **XI. CHILD ABDUCTION EMERGENCY ALERT (“AMBER ALERT”)**

The New Hampshire Child Abduction Emergency Alert, commonly referred to as Amber Alert, is a program that enables law enforcement to quickly notify the public in cases of child 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 (NHDOT). It enables radio and TV stations to quickly broadcast information on suspected child abductions, including suspect and victim descriptions. The information also gets posted on the NHDOT variable message boards, which are posted at various locations along the interstates.

Broadcasters send out an alert through the state’s emergency activation system, which is used to broadcast severe storm warnings. 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, if available.

The alert system is not intended for use in every missing child incident, runaway, or child custody situation. It can only be activated when all of the following criteria can be satisfied:

1. a child 17 years of age or younger has been abducted;
2. the child is in danger of serious bodily harm, injury, or death;
3. there is enough descriptive information available about the child, the suspect, or/or the suspect's vehicle to believe that an alert may help locate the child; and
4. law enforcement believes the child and/or the abductor 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 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.

## **A. Initiating An Emergency Alert**

Once it is determined the above-described criteria for activation are 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](#), page 439.
- Telephone 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 OIC 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 over 17, the system cannot be activated)
- What is the evidence that the child has been abducted? (if not abducted, 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 OIC has confirmed that the criteria have been satisfied, he or she 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 24/7 and is capable of handling multiple incoming lines.

## **B. Cancelling 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 advising that the alert has been cancelled. It will also distribute a cancellation notice through the NHAOB. Normally, a cancellation alert will only be broadcast once. Any further news coverage of the case is at the discretion of the media outlet.

## **XII. 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 be anxiety producing, but becoming familiar with the process and being well prepared should help. This chapter will familiarize officers with depositions and court hearings, courtroom layout, the basic structure of criminal trials, and discuss how to present as effective and credible witnesses.

### **B. Types Of Court Proceedings**

#### **1. Depositions**

A deposition is a formal judicial proceeding, conducted outside the courtroom 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 allow depositions in criminal cases. 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.<sup>531</sup> 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 frequently request 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 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 prior to 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 he or she deviates from the testimony given during the deposition. Therefore, it is critical that the officer provide clear and accurate testimony at the deposition and 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 on 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 an opportunity for cross-examination. 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 his or her trial testimony deviates from that 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.

## **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 trial. The most important rule is that law enforcement officers 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, he or she 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 lingo, particularly when testifying in front of a jury;
- If 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. (Ex: If defense counsel says “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 refrain from saying anything until the trial judge has made a ruling. The judge may either “sustain” or allow the objection, or “overrule” or 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 had been asked. If the witness cannot remember the question, he or she should ask to have it repeated.

## **D. The Courtroom Layout**

A typical [Courtroom Diagram](#) can be found on page 440. As the diagram indicates, the witness stand is typically located between the jury box and the judge’s bench. It is situated so as to maximize the jury’s ability to observe witnesses as they

testify. When a witness is called to the stand, the witness should remain standing until being sworn in by the judge or attorney.

## **E. 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 and summarize their testimony, to explain the elements of the charge(s) and how the State 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 holes and weaknesses in the State's evidence and alert the jury to any defenses the defendant may be relying 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 district 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 may only testify 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 on 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 do 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 of its witnesses and introduces all of its evidence, the State will announce to the court that it rests. Before resting, the State must have presented evidence to prove not only 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 the 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.<sup>532</sup> 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.

#### **4. 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 or expert witnesses in the same manner as the State, and the State has the opportunity to cross-examine each witness. An 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, since the State can generally rely on cross-examination to draw out inconsistencies and weaknesses in the defense 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 district court bench trials (before a judge rather than a jury), the court may choose to give the parties an opportunity to make a closing argument, but it is not required to do so.

## **XIII. DEALING WITH THE MEDIA**

### **A. Introduction**

A criminal defendant has a constitutional right to be tried by a jury that has not been tainted by information in the 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 public out-of-court statements that are likely to materially prejudice the fairness of a criminal trial.<sup>533</sup>

On the other hand, the public has a right to know about the operation of the criminal justice system and the press has a free speech interest in reporting that information. In addition, the law enforcement community has a strong interest in educating the public about crimes that are being solved, alerting the community to potential dangers, and soliciting community cooperation in appropriate cases.

Balancing these competing interests can be difficult for a law enforcement officer who has been approached by a media representative and asked to comment on a particular investigation or criminal case. This chapter provides some guidelines for officers in dealing with the 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 situations, situations where a plea bargain has already been formally accepted by a court, and situations where criminal charges have already been formally declined.

## **B. Criminal Investigations**

### **1. Prejudicial Pre-Trial Publicity**

Both the state and federal constitution forbid prosecutors, law enforcement officers and other persons connected with a criminal case from making statements to the news media that will “materially prejudice” a trial. The purpose of that rule is to protect the integrity of trials by making it possible for jurors to decide the case based on what they see and hear in the courtroom rather than what they might learn through the media.

### **2. Presumptively Prohibited Disclosures**

It is impossible to provide a complete list of the types of information that are considered materially prejudicial. However, the Rules of Professional Conduct list several types of 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 and credibility of a defendant or witness;
- Providing information about the defendant’s or witness’ criminal history;
- Commenting on the expected testimony of a defendant or a witness;
- 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 suspect’s or defendant’s statement or confession, or commenting on the fact that the 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 the defendant's guilt/innocence; and
- Providing any information to the news media that will be inadmissible at trial.

### **3. Permissible Disclosures**

There are a number of types of disclosures that are considered permissible.

For simplicity, they will be discussed in relation to the pre-arrest and post-arrest stages of an investigation.

#### **a. Pre-Arrest**

The following kinds of information generally can be shared with the public during the investigative phase of a case:

- The fact that a crime has occurred;
- The name, address, occupation, and marital status of the victim;
- General information about the investigation;
  - the existence of an investigation;
  - the name of the agency(ies) involved in the investigation;
  - the identity of investigators;
  - the offense, claim or defense involved; and
  - length of investigation.
- If a suspect has not been apprehended, information necessary to aid in his or her apprehension;
- Requests for witnesses to come forward; and
- Limited autopsy information, usually including the medical examiner's rulings as to the cause and manner of death.

*NOTE:* For a variety of reasons it is helpful to avoid using the word suspect when dealing with the press. If a "suspect" is charged he may later claim that he was prejudiced by the disclosure of information. If the "suspect" is not charged there may

be a chorus of questions about the reasons that no charges were brought. Referring to following up “all available leads” and interviewing “persons with information” or “persons of interest” about the crime is not prejudicial and allows officers to share information about the progress of the investigation.

Limiting the disclosure of information obtained during the investigation aids the investigation by allowing officers to better determine who has first hand 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 or no control over the actions of victims, their family and bystanders, all of whom are likely to be approached by news reporters and many of whom may disclose information that would help the investigation or would otherwise be prejudicial if it were released by law enforcement officials. Sometimes these persons 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.

**b. Post-Arrest**

Additional information may responsibly be shared with the public when a decision has been made to make an arrest. That information includes:

- Basic information about the defendant, provided he or she is an adult, including:
  - Name;
  - Address; and
  - marriage and family status.
- If the defendant is a juvenile, the fact that a juvenile has been arrested;
- Whether the defendant was arrested pursuant to a warrant;
- The amount of bail set and whether the defendant has been released;



- If the defendant is at large, information necessary to aid in his or her apprehension or to warn the public of any danger the defendant presents;
- Information about the investigation, including:
  - identity of investigators;
  - identity of arresting officers;
  - length of investigation;
  - resources devoted to the investigation; and
  - 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 proceeding, or the result of a court hearing; and
- Information in the public record such as:
  - the content of pleadings, motions and memoranda of law, provided they have not been sealed by the court; and
  - statements made by counsel, witnesses and the judge at public hearings.

*NOTE:* Before releasing any information during the litigation phase of the case, officers 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, because it is a critical time to avoid any allegation that their comments were meant to prejudice the jury.

## **C. Fires, Accidents, And Mass Casualty Events**

Generally speaking, the considerations outlined above apply with greatest force to criminal prosecutions. It is permissible to release more information in situations where no prosecution is expected or where there is an emergency that requires prompt public notice to prevent injury or death.

## **D. Homicides And Use Of Force Review**

In homicide cases and cases involving the investigation of use-of-force by a law enforcement officer, 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 responsibility for providing appropriate information to the press in a timely fashion. In such cases officers should assume that they should not share any information about the crime or the investigation unless specifically instructed to do so by the Attorney General's Office.

## **XIV. REPORT WRITING**

Report writing is a critical part of every law enforcement officer's job. A report is the way that an officer communicates information about his or her activities to others, and preserves information for future use.

Because law enforcement officers come into contact with so many people during any given day, there is little likelihood that he or she 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 his or her activities, observations, conversations, and the statements of others. These notes will be the raw material from which the officer can write a detailed report.

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. An inconsistent practice can 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.

The body of the report should include a narrative description of the officer's actions and observations, the information obtained, and the source of that information. If possible, the source 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 try to include facts explaining "who, what, when, where, and why." The narrative should include all significant or relevant information, including information that might be viewed as favorable to a suspect or inconsistent with the officer's theory of what occurred. A report should be a factual account of an event. It should not include the officer's opinions about, or theories of, the case. An officer should not, for example, state in report that he or she thinks that a particular witness is withholding information or lying. Instead, report what the witness said and any observations about the witness's behavior, such as that 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 is describing the activities of three males and there is reference 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.

Other tips for effective report writing include:

- Use short, concise sentences;
- Do not use big words when small ones will suffice;
- Avoid using police jargon or slang;
- Include all relevant information, even it appears to contradict or be inconsistent with other information obtained; and
- Be precise. It is better to include too many details than not enough.

## **XV. FORFEITURE OF DRUG TRAFFICKING-RELATED PROPERTY AND OTHER ASSETS**

### **A. Introduction**

NH RSA 318-B:17-a through 17-c set forth a process by which the State can forfeit property and other assets used or obtained in connection with felonious drug trafficking offenses. If a law enforcement agency seizes property, cash, or other assets of an individual in connection with that individual's arrest for a felony level drug trafficking offense, the law enforcement agency may seek to have the person's interest in those assets forfeited. Upon the person's conviction and the successful completion of the forfeiture proceedings, 45% of the proceeds of any forfeited assets will be returned to the law enforcement agency(ies) involved in the seizure for use in drug enforcement related activities. In some instances, the seizing law enforcement agency may opt to use the forfeited property, such as a car, for official law enforcement purposes.

All drug forfeitures actions must be handled by the New Hampshire Attorney General's Office. The Attorney General has issued drug forfeiture guidelines to assist law enforcement agencies in understanding the process and complying with the mandatory timeframes established under the law.

A general overview of the forfeiture process follows. Law enforcement agencies are encouraged to call the Drug Prosecution Unit at 271-3671 to obtain a copy of the Asset Forfeiture Guidelines or for more detailed information.

## **B. Types Of Property Subject To Forfeiture**

Virtually any type of property used or intended for use in the “procurement, manufacture, compounding, processing, concealing, trafficking, delivery or distribution of a controlled drug in felonious violation of” the Controlled Drug Act (RSA 318-B) can be subject to forfeiture.<sup>534</sup> Some of the more common types of property for which forfeiture petitions have been filed include currency, cars, and equipment used to manufacture and package controlled drugs.

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 minimum values for property that it will consider for forfeiture:

- **Cash:** minimum of \$1,000;
- **Vehicles:** minimum of \$3,000 of equity, less than five years old; and
- **Houses:** minimum of \$50,000 of equity.

## **C. 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, either pursuant to a search warrant or under an exception to the warrant requirement. However, there is a specific procedure set out in the statute for seizing property that may be subject to forfeiture but is not evidence in an underlying criminal case,<sup>535</sup> such as a car or real estate that was purchased with proceeds from drug trafficking. Before a law enforcement officer initiates a seizure of real estate or other assets that are proceeds of drug trafficking, he

or she must consult with personnel 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.

## **D. Procedural Requirements And Time Limitation**

The drug forfeiture statutes impose mandatory time limits for providing notice to those interested in the property subject to forfeiture, as well as time limits for the filing of forfeiture petitions. In order to comply with the statutory requirements, law enforcement agencies are required to do the following:

(1) **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.

(2) **Notice to Persons with an Interest in the Property Subject to Forfeiture:** Within seven days of the seizure, the law enforcement agency must “inventory the items or 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].”<sup>536</sup> Notice may be accomplished by personal service on the individual or by certified mail, return receipt requested. The agency should document all steps it takes to provide notice. A sample form for a 7-day notice letter can found be on page 31 of the Asset Forfeiture Guidelines.

(3) **Furnishing Police Reports:** Within 20 days of the seizure, the law enforcement agency must provide the Drug Prosecution Unit copies of all police reports concerning the seizure of the property and the underlying criminal



investigation, including evidence transmittal sheets. Reports of laboratory analysis of any evidence submitted for testing should also be forwarded to the Unit as soon as the reports are received from the lab.

Before a law enforcement agency's request for forfeiture is accepted, an attorney will review the police reports to determine the following:

- Was the property seized pursuant to a search warrant supported by probable cause and, if not, did the seizure fall within a recognized exception to the search warrant requirement?
- Has the law enforcement agency sent out the required 7-day notice letters to all identified interested parties? If not, is there still sufficient time to provide notice within the statutory deadline?
- Is there 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?
- What is the value of the property seized?
- Has the seizing agency investigated the claims of innocent spouses, owners, or dependents, to the extent the agency has been notified of such claims?

For a more detailed discussion of these factors, refer to pages 4-6 of the Asset Forfeiture Guidelines.

## **E. The Forfeiture Proceedings**

The Attorney General's Office must file a forfeiture petition within 60 days of the seizure of the asset. It can opt to proceed in one of two ways:

### **1. Administrative Forfeiture**

RSA 318-B:17-d authorizes the Attorney General to administratively forfeit property that was used or intended for use in the commission of felony offenses under the Controlled Drug Act. Under this process, money, cars and other vessels, firearms,

and equipment with a value of less than \$75,000 can be forfeited without court involvement, through an administrative process within the Attorney General's Office.

Before deciding whether the property should be forfeited, the Attorney General is required to provide notice of the forfeiture action to all parties with an interest in the property. Notice is accomplished by certified mail to the known interest holders and to the public in a newspaper of general circulation in the area where the seizure occurred.

A person claiming an interest in the property to be forfeited has an option as to how to proceed. He or she may (a) file a petition in mitigation or remission, asking the Attorney General to return all or a portion of the seized asset(s); or (b) file a request to transfer the proceeding to the court. If option (a) is chosen, the Attorney General will investigate the claim and make a determination whether any or all of the requested relief should be granted. If option (b) is chosen, the Attorney General will initiate a judicial proceeding, provided the interest holder files a cost bond. The Attorney General can waive the bond requirement in cases of indigency. If neither option is taken, the property will be forfeited without further action.

## **2. Judicial Forfeiture Proceedings**

A judicial forfeiture proceeding is initiated by the filing of a petition in the superior court that would have jurisdiction over any criminal case that might arise out of the forfeiture. A forfeiture action is considered civil in nature, even though it may be related to a criminal case.

The court will hold a hearing on the petition, during which the State must prove by a preponderance of the evidence that the property was used or intended to be

used for a felony violation of the Controlled Drug Act, or that it was proceeds of felony drug trafficking. A person claiming interest in the property can defend against the forfeiture action by demonstrating that he or she had an interest in the property and was neither a consenting party or knowing party to the illegal use of the property.

If the person claiming ownership or an interest in the property has also been charged with the drug-related crime and is acquitted, the forfeiture action against that person's interest in the property must be dismissed.

## **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, service of process, and witness expenses, 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 location, and will be liable for any storage fees and costs. It will also be liable for any loss or damage to the property while in storage.

RSA 318-B:17-b, IX, permits the State to retain forfeited property for "official use by law enforcement or other public agencies." If the seizing department is

intending to use the forfeited property for that purpose, it should inform the Attorney General's Office in writing.

### **3. Liens**

RSA 318-B:17-b, IV, requires that all outstanding recorded liens on property seized be paid in full from the proceeds of any sale or public auction of the forfeited item(s). If a police department 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**

RSA 318-B:17-c provides that the balance of the proceeds of the sale of any forfeited items, after payment of all the expenses, shall be distributed by the Attorney General's Office as follows:

(1) 45% shall be returned to the fiscal officer of the municipal, county, state or federal government with which the law enforcement agency responsible for the seizure is affiliated. The money must be deposited in a special account and used primarily for expenses incurred in connection with drug-related investigations.

(2) 10% shall be deposited into a special account for the office of alcohol and drug abuse prevention; and

(3) 45% shall be deposited in a revolving drug forfeiture fund, administered by the Attorney General's Office. The funds can be made available to law enforcement agencies to defray the extraordinary costs of drug investigations and to purchase equipment. 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.

## **XVI. 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 be able to look at the statutory definition of an offense, understand and identify the required mental state and other elements that must be proven in order to establish a violation of the specific statute at issue. Identifying the appropriate criminal statute that corresponds to the suspect's behavior and properly drafting a complaint will not only avoid legal issues for the prosecutor later in the case, it will 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.

The section on drafting complaints that follows contains sample complaint language for the crimes most commonly encountered by law enforcement officials. There is no one "right" way to draft a complaint. The language for the sample complaints is intended as a guide, and may need to be modified given the facts of a particular case.

The sample complaint language is based on the statutes in effect at the time this manual was distributed. However, criminal statutes are frequently amended by the legislature. Therefore, it is imperative that officers read the actual statute before drafting a complaint to see if there have been any recent amendments to the law.

Officers should also review the annotations listed after the statute to see if the New Hampshire Supreme Court has issued any recent opinions relating to that crime.

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. Definitions have not been included in the sample complaint section. Before drafting a complaint, it is imperative that officers review the applicable statute to see if any of the relevant terms have been defined in that statute or in another.

## **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.<sup>537</sup> There are three types of offenses. From least to most serious, they are violations, misdemeanors, and felonies. The degree of any particular offense is typically defined in the statute. Unlike felonies and misdemeanors, violations are not considered crimes.<sup>538</sup>

### **1. Felonies**

Felonies committed by individuals are designated as either class A or class B. Felonies include murder, any crime so designated by statute, and any crime defined outside the Criminal Code for which the maximum penalty is greater than one year of incarceration (or \$200 fine if imposed on a corporation or unincorporated association).<sup>539</sup> Felonies committed by corporations and unincorporated associations

are unclassified. The maximum penalties and fines associated with each are as follows:<sup>540</sup>

<u>Designation</u>	<u>Term of Incarceration</u>	<u>Fine</u>	<u>Probation</u>
Class A	7 1/2 - 15 years	\$4000	5 years
Class B	3 1/2 - 7 years	\$4000	5 years
Unclassified	None	\$100,000	None

There are some felonies committed by individuals, such as drug offenses and sexual assaults, for which the statutes provide a longer term of incarceration than those listed above.<sup>541</sup> 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 when certain conditions apply.<sup>542</sup> Additionally, crimes involving the felonious use of firearms may trigger minimum mandatory sentences and enhanced maximum sentences.<sup>543</sup>

## **2. Misdemeanors**

Misdemeanors committed by individuals are classified either as class A or class B misdemeanors. A class A misdemeanor is any crime so defined by statute or any crime that is simply defined as a misdemeanor with no class designation.<sup>544</sup> A class B misdemeanor is specifically designated as such. Misdemeanors committed by corporations or unincorporated associations are unclassified. The maximum penalties for each are as follows:<sup>545</sup>



<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	2 year

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 will be recorded as a class B misdemeanor.<sup>546</sup>

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;<sup>547</sup> and
- the offense does not constitute a violation of RSA Chapter 173-B, the domestic violence statutes.<sup>548</sup>

The State can downgrade 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, in its discretion:

- prior to, or at the time of arraignment; or
- within 20 days of the entry of an appeal in the superior court.<sup>549</sup>

A prosecutor also has the authority to downgrade 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 his or her 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.<sup>550</sup>

### **3. Violations**

Violations are offenses so designated by law or any offense for which there is no penalty provided by law other than a fine, forfeiture or other civil penalty.<sup>551</sup> A person who is convicted of a violation is not legally considered to have been convicted of a crime.<sup>552</sup>

## **C. Elements Of An Offense**

Every misdemeanor or felony offense is made up of several different components or “elements,” which are defined by statute.<sup>553</sup> At a minimum, the elements of the offense include the prohibited conduct (e.g., causing bodily injury; selling tobacco to a minor) and the required mental state (e.g, knowingly or recklessly). The definition of an offense may also include other elements that more specifically define the nature and severity of the crime (e.g., property damage in excess of \$1000, committed with a deadly weapon) as well as other “attendant circumstances,” such as the age of the victim. A criminal complaint charging a person with a specific offense must allege all of the elements of that offense. The section containing sample complaint language identifies all the necessary elements of each listed crime.

## D. Culpable Mental States

Every crime has, as one of its elements, a culpable mental state. The State must prove beyond a reasonable doubt that the defendant acted with this 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 as follows: (1) purposely, (2) knowingly, (3) recklessly, and (4) negligently. 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 to engage 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). The mental states are defined by statute as follows:

*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.”<sup>554</sup> If the definition of an offense requires that the defendant acted “intentionally,” it is the same as a requirement that the defendant acted purposely.<sup>555</sup>

*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.”<sup>556</sup> 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.<sup>557</sup>

*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 the situation. However, when the actor creates a risk but is unaware of the risk solely because of engaging voluntarily in intoxication or hypnosis, his acts are reckless with respect thereto.”<sup>558</sup>

*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 a material element of the offense 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 of a reasonable person.”<sup>559</sup>

Each lesser culpable mental state is, by definition, included within the greater culpable mental state. In practical terms, that means that if a prosecutor proves that a defendant acted purposely, he or she 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.

*NEGLIGENTLY*: Acting with criminal negligence could be considered as one step above engaging in thoughtless or stupid behavior that leads to an undesired result. Criminal negligence requires not only that the person fails to become aware of the risk created by his or her conduct, but also that the nature of that risk is such that

failing to become aware of it constitutes a *gross deviation* from the conduct that a *reasonable person* would observe in that situation.<sup>560</sup> The risk must be a serious one that a reasonable person would try to avoid. For example, it might be considered 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 would refrain from doing it. By contrast, tossing a bottle out of the third-story window of a farmhouse that is surrounded by fields would not create a significant risk of causing bodily injury to another person.

**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* consciously disregard it. Thus, a person who simply engaged in conduct without even thinking about the possible consequences could not be considered to have acted recklessly. In addition, for recklessness, the question of whether the risk created by the person's conduct was substantial and unjustifiable must be considered 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 would create a substantial and unjustifiable risk of an explosion. However, if the person throwing the match believed that the container was full of water rather than gas, then under the circumstances known to that person, his actions would not have created such a risk.

*KNOWINGLY*: The mental state of *knowingly* is more restrictive than *recklessly*. To act *knowingly*, a person must not have simply disregarded a risk; the person must have been aware that his or her conduct would cause the prohibited result (e.g., bodily injury) or the prohibited circumstances (e.g. 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 does not necessarily *know* that an injury will result but that person is creating a substantial risk that someone will get injured. In contrast, if the 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.

*PURPOSELY*: To have acted *purposely*, a person must not only have been aware of that his or her conduct will cause a particular result or circumstance, the person must have acted with the purpose or the intent to cause the result or circumstance that is prohibited under the statute. For example, a person might be aware, as he or she threw a lit firecracker into a crowd, that the conduct would cause someone bodily injury, but that does not necessarily mean that the person's purpose in doing so was to cause that result. It may have been simply to scare someone.

Many criminal offenses may be charged under more than one applicable mental state. For example, under the simple assault statute, RSA 631:2, a person can be charged with either knowingly or recklessly causing serious bodily injury to another. A law enforcement officer or prosecutor can choose whether to allege in the complaint that the defendant acted knowingly or recklessly. As a practical matter, when there is more than one mental state that can be charged, it is common to charge the lesser mental state because it is easier to prove at trial. Nonetheless, in both the

investigation of and prosecution of any crime, it is good practice to try to prove the highest level of culpability possible regardless how the crime was charged.

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 issue.<sup>561</sup> In some instances, however, the New Hampshire Supreme Court has issued an opinion defining the appropriate mental state for a particular crime. Those court decisions are listed in the annotations section of the statute.

In the sample complaint section that follows, for those offenses where the mental state has not been defined by statute or case law, this Manual lists the mental state that would most likely be required. However, it is not the intention of the authors of this Manual to prescribe one particular culpable mental state for an offense where none has been specifically provided by the Legislature or by the Supreme Court.

## **E. The Complaint Form**

The complaint is the document that 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.<sup>562</sup> A complaint is legally sufficient if “it sets forth the offense fully, plainly, substantially and formally.”<sup>563</sup> In preparing a complaint, an officer should track the language of the statute. The essential elements

of the crime must be alleged, as well as sufficient additional facts included to inform the defendant when, where, and how the offense was committed.

The following sections discuss the specific sections of the complaint form.

## **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 is not necessarily a fatal error, but can be embarrassing.

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. The use of an incorrect name or incorrect spelling does *not* void the complaint or make it defective as long as a witness can testify that the man or woman who is in court is the one who committed the crime and that the name used in the complaint is the one by which you know him or her.

If the defendant is a corporation, the corporate name should be used. If a business is using a trade name, insert the name of the person who owns the business and the trade name (e.g., 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.

## **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 will not void the complaint or make it defective.<sup>564</sup> Allegations that the crime occurred “on or about” the date alleged in the complaint will usually be sufficient.<sup>565</sup> The complaint may also properly allege that the crime occurred sometime within a specific period, for example: “between May, 1, 1996 and February, 28, 1997.”<sup>566</sup> Sometimes, a defendant will file a motion for bill of particulars, requesting that the State provide a more specific date and time for the crime. If the court concludes that such a 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 bill of particulars.<sup>567</sup>

### **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 act with which he or she is charged and to protect the defendant from being tried twice for the same act. Generally, the town where the offense occurred should be sufficient, e.g. “Smithville.” Additional information concerning the location may also be included, for example “Route 111 in Smithville.”

### **4. The Description Of The Crime**

The large blank area on the complaint—which is preceded by the language “and 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 allege

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.

There is no one correct way to write a complaint. The sample complaint section at the end of the chapter provides examples of how to draft complaints for specific offenses. Obviously, officers will need to modify the language of any sample to fit the specifics of the crime being charged.

## **F. Amending a Complaint**

A complaint can be amended at any time, to correct an error or to change the wording of the charge, provided the amendment is non-substantive –meaning an amendment that does not change the charged offense, or add a new offense.<sup>568</sup> If an amendment is necessary, it can be done 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.”<sup>569</sup>

Once jeopardy attaches - meaning once the jury has been sworn in or, in a bench trial, once the court begins taking evidence - a complaint cannot be amended in substance.<sup>570</sup> If a prosecutor *nol prosses* a complaint after jeopardy has attached because he or she believes it was defective as to substance (as opposed to the complaint being dismissed by the court as insufficient), the State will be barred by double jeopardy from a subsequent prosecution.<sup>571</sup>

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 prior to jeopardy attaching, the

prosecutor should request a recess or a continuance in order to prepare a corrected complaint. Such a procedure does not constitute double jeopardy and is perfectly proper. Similarly, if a motion to quash or dismiss has been 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 might raise an objection to certain words in the complaint, or move to dismiss based on a State's failure to prove specific facts alleged in a complaint. Provided that the words or facts were not necessary to charge the offense, but were included to provide information to the defendant, the court may ignore the unnecessary words as "surplusage."<sup>572</sup> Or, the prosecutor may make an oral or written motion to strike the words as surplusage. For example, in a case in which the defendant was charged with theft of a television set with a specific serial number, but there was no evidence concerning the serial number presented 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."<sup>573</sup>

## **G. Guilty Pleas Constitute A Waiver Of Defects In Complaints**

The entry of a plea of guilty to a complaint constitutes a waiver of any defects apparent on the face of the complaint, and the defendant cannot later challenge the defect.<sup>574</sup>

## **XVII. SAMPLE COMPLAINTS**

### **A. Introduction**

The following chapter provides sample complaint language for a variety of criminal offenses, which are commonly dealt with by law enforcement officers. It is intended to serve as a guide for officers when drafting criminal complaints, to be used in combination with the actual statutes. The statutory language for each criminal offense is set out, with certain phrases bracketed and highlighted in yellow. The non-bracketed phrases indicate elements or words that generally should be included in the complaint. The bracketed phrases indicate elements for which the officer should provide some factual detail. For instance, the offense of felon in possession, RSA 159:3, I, which is the first offense dealt with below, requires a knowing mental state. Thus, the word “knowing” is non-bracketed. The second element of the offense can be satisfied in one of several ways, by either owning, possessing, or having under one’s control. Thus, those words are bracketed and highlighted, indicating the officer must decide which to allege. The third element is the weapon. There are a number of different types of weapons that would satisfy that element; they are included in the next bracketed phrase. Finally, the fourth element is a conviction for a certain type of offense. The language in the fourth bracketed phrase describes the permissible types of convictions.

In certain instances, a word or phrase is bracketed to indicate that the officer must provide factual detail. For example, under the offense of False Information, RSA 159:11, there is the following bracketed phrase, “gave false information or

offered false evidence of his identity.” The officer drafting a complaint should include a factual description of the defendant’s conduct, such as “presented a driver’s license belonging to another person as evidence of his identity” or “falsely stated that he resided in New Hampshire.”

The statutory language is followed by one or more sample complaints that provide guidance in how to word the actual complaint. There is no single correct way to draft a complaint. The samples are simply examples of one way to do so.

It is critical that officers do not use this sample complaint section as an alternative to looking at the actual statute. Many statutes include terms that have a specific meaning under the statute. For example, the term “serious bodily injury” is defined in RSA 625:11 and the term “occupied structure” is specifically defined in the arson statute, RSA 634:1. Those definitions have not been included below, so officers must refer to the statute itself to determine the meaning of certain terms.

It is equally important that officers refer to the statute to determine whether there have been any recent changes to the statute or significant court decisions involving the statute. Criminal statutes are frequently amended by the legislature. Any changes would be reflected in the pocket part of the hard-bound statute books. Similarly, any relevant New Hampshire Supreme Court opinions dealing with a particular statute will be listed in the annotations. Such opinions could impact a decision whether or not to charge a person with a particular offense.

Officers are encouraged to contact their local prosecutor or county attorney with questions concerning charging decisions and the drafting of complaints.

## **B. RSA Chapter 159, Pistols and Revolvers**

### **1. RSA 159:3, Convicted Felons (Felon in Possession)**

#### **a. RSA 159:3, I, class B felony**

knowingly [owned, had in his/her possession, or had under his/her control] [a pistol, revolver, or other firearm, or sling-shot, metallic knuckles, billies, stiletto, switchblade knife, sword cane, pistol cane, blackjack, dagger, dirk-knife, or other deadly weapon as defined by RSA 625:11, V] after being convicted in [any state or federal court in any state, territory or possession of the United States, of a felony against the person or property of another OR a felony under RSA 318-B, OR a felony violation of any state, territory or possession of the United States relating to controlled drugs as defined in RSA 318-B.]

Sample Complaint: *knowingly possessed a stiletto after having been previously convicted in 2003, in the Hillsborough County Superior Court, New Hampshire, of second degree assault, a class B felony.*

Sample Complaint: *knowingly had in his possession, a .38 caliber Smith and Wesson revolver (Serial No. 192506) after being convicted in Suffolk County Superior Court, Massachusetts, of a felony offense of possession of a controlled drug.*

Sample Complaint: *knowingly had under his control a zip gun, a deadly weapon as defined in RSA 625:11, V, which he stored in a trailer owned by his father, John Smith Sr., after being convicted in Merrimack County Superior Court, New Hampshire for burglary, a felony offense.*

#### **b. RSA 159:3, I-a, class B felony**

knowingly [completed and signed an application for the purchase of a firearm], after having previously been convicted in [any state or federal court in any state, territory or possession of the United States, of a felony against the person or property of another, a felony under RSA

318-B, or a felony violation of any state, territory or possession of the United States relating to controlled drugs as defined in RSA 318-B.]

Sample Complaint: *knowingly completed and signed an application to purchase a 9 millimeter Glock semi-automatic pistol, a firearm, after having been previously convicted in 1986 in York County Superior Court, Maine, for the felony offense of theft by deception.*

## **2. RSA 159:3-a, Armed Career Criminals**

### **a. RSA 159:3-a, class A felony**

having been convicted of [any combination of three or more felonies in this state or any other state under homicide, assault, sexual assault, arson, burglary, robbery, extortion, child pornography or controlled drug laws], he/she knowingly [owned, had in his/her possession, or had under his/her control] a [pistol, revolver, rifle, shotgun, or other firearm].

Sample Complaint: *after having been convicted of the following three felony offenses in New Hampshire: first degree assault (Hillsborough County – Northern District, 3/5/94); burglary (Merrimack County Superior Court, 11/18/02) and possession of controlled drugs (Merrimack County, 7/3/06), he knowingly had a rifle in his possession.*

## **3. RSA 159:4, Carrying Without License**

### **a. RSA 159:4, misdemeanor**

knowingly carried [a loaded pistol or revolver, to include any pistol or revolver with a magazine, cylinder, chamber, or clip in which there are loaded cartridges] [in his/her vehicle or concealed on his/her person] without a valid license.

Sample Complaint: knowingly carrying a concealed loaded .38 caliber Smith and Wesson Revolver on his person without a valid license.

**b. RSA 159:4, class B felony**

knowingly carried [a loaded pistol or revolver, to include any pistol or revolver with a magazine, cylinder, chamber, or clip in which there are loaded cartridges] [in any vehicle or concealed on his/her person] without a valid license, after having been previously convicted for violating RSA 159:4 on [insert date, which must be within 7 years of the date alleged in the current indictment or complaint.]

Sample Complaint: knowingly carrying a loaded .38 caliber Smith and Wesson Revolver in his motor vehicle without a valid license, after having been previously convicted for violating RSA 159:4 on July 7, 2006 in the Strafford County Superior Court.

**4. RSA 159:7, Sale To Felons**

**a. RSA 159:7, class B felony**

knowingly [sold, delivered, or otherwise transferred] a [pistol/revolver or any other firearm] to [a person who has been previously convicted of a felony].

Sample Complaint: knowingly sold a 9 millimeter Glock semi-automatic pistol to Jack Swift, who was previously convicted of a burglary, a felony, on September 23, 2004, in Grafton County Superior Court.



## 5. RSA 159:11, False Information

### a. RSA 159:11, misdemeanor

[while purchasing or securing the delivery of a pistol, a revolver, or other firearm] he/she [purposely or knowingly] [gave false information or offered false evidence of his identity].

Sample Complaint: *while purchasing a Benelli shotgun at Warren's Gun Shop, he knowingly gave false information that he had never been convicted of a felony.*

### b. RSA 159:11, class B felony

after having been previously convicted of the crime of false information under RSA 159:11, he/she [purposely or knowingly] [gave false information or offered false evidence of his identity] [while purchasing or otherwise securing delivery of a pistol, revolver, or other firearm].

Sample Complaint: *after having been previously convicted of the crime of false information on May 7, 2005 in the Hooksett District Court, he knowingly gave false information relating to his identity when purchasing a .22 caliber pistol.*

## 6. RSA 159:12, Sale To Minors

### a. RSA 159:12, misdemeanor

knowingly [sold, bartered, hired, lent, or gave] [a pistol or revolver] to [any minor]. The defendant was not (a) the parent, grandparent, guardian of the minor who gave the pistol or revolver to the minor; (b) the administrator or executor of any estate who gave the pistol or revolver to the minor as an heir; (c) an instructor in a

supervised firearms training program, training the minor in the safe use of firearms, with his/her parent's or guardian's permission; (d) a licensed hunter accompanying the minor while lawfully taking wildlife; or (e) an individual supervising the minor using a firearm during a lawful shooting event or activity.

Sample Complaint: *knowingly gave a Smith and Wesson .38 caliber revolver to 13-year old Samuel D., (DOB 9/26/95). The defendant did not fall within any of the exceptions set out in RSA 159:12.*

## **7. RSA 159:13, Changing Marks**

### **a. RSA 159:13, misdemeanor**

knowingly [changed, altered, removed, or obliterated] [the name of the maker, model, manufacturer's number or other mark of identification] on [any pistol or revolver].

Sample Complaint: *knowingly removed the manufacturer's number from a .38 caliber Smith and Wesson revolver.*

## **8. RSA 159:15, Possession Of Dangerous Weapon While Committing A Violent Crime**

### **a. RSA 159:15, class A misdemeanor**

knowingly [used or employed] a [slung shot, metallic knuckles, billies, or other deadly weapon as defined in RSA 625:11,V] during the [commission of, or attempted commission of] of [a violent crime as defined by RSA 651:5, XIII].

Sample Complaint: *knowingly used metallic knuckles during the commission of a robbery, a violent crime as defined by RSA 651:5, XIII.*

**9. RSA 159:16, Carrying Or Selling Weapons**

**a. RSA 159:16, misdemeanor**

knowingly [had in his/her possession with the intent to sell or carried on his/her person] a [stiletto, switch knife, blackjack, dagger, dirk-knife, slung-shot, or metallic knuckles].

Sample Complaint: *knowingly had in his possession a switch knife.*

**10. RSA 159:21, Possession Of Self Defense Weapons By Felons Prohibited**

**a. RSA 159:21, class B felony**

after having been convicted of [a felony] he/she knowingly possessed [an electronic weapon] [while away from his/her residence].

Sample Complaint: *after having been convicted of the felony offense of second degree assault in the Merrimack County Superior Court on October 14, 2003, he knowingly possessed a taser, an electronic defense weapon, while walking down Main Street.*

**11. RSA 159:23, Criminal Use Of Electronic Defense Or Aerosol Self-Defense Spray Weapons**

**a. RSA 159:23, misdemeanor**

knowingly used [an electronic defense weapon or an aerosol self-defense spray weapon] on [a law enforcement officer or another person] with the intent to commit [a crime punishable as a misdemeanor].

Sample Complaint: *knowingly used an electronic defense weapon on Neal Jones with the intent to commit the misdemeanor offense of simple assault on Jones.*

**b. RSA 159:23, class B felony**

knowingly used [an electronic defense weapon or an aerosol self-defense spray weapon], on [a law enforcement officer or another person], with the intent to commit [a crime punishable as a felony].

Sample Complaint: *knowingly used an aerosol self-defense spray weapon on Sarah Hood, with the intent to commit the crime of Aggravated Felonious Sexual Assault, a felony offense.*

**12. RSA 159:24, Sale Of Martial Arts Weapons**

**a. RSA 159:24, misdemeanor**

knowingly [sold, delivered, or otherwise transferred] [a martial arts weapon] to [a person under the age of 18], without first obtaining the written consent of the person's parent or guardian. The defendant was not (a) the parent, grandparent, guardian of the minor who gave the martial arts weapons; (b) the administrator or executor of any estate who gave the martial arts weapons to the minor as an heir; or (c) an instructor in a supervised martial arts training program, training the minor in the safe use of martial arts weapons, with his/her parent's or guardian's permission.

Sample Complaint: *knowingly sold a martial arts weapon, to wit: a throwing star, to June M. (D.O.B. 11/22/90), who was 16 years old, without first obtaining the written consent of June M's parent or guardian. The defendant did not fall within any of the exceptions for this offense under RSA 159:24.*

## C. RSA 173-B, Protection From Domestic Violence

### 1. RSA 173-B:9, Violation Of A Protective Order

#### a. RSA 173-B:9, III, class A misdemeanor

knowingly violated a protective order issued pursuant to [RSA 173-B; RSA 458:16; or any foreign protective order enforceable under the laws of this state] by [insert facts, including: the issuing court; the date the order was issued; the date service was made on the defendant; the person protected by the order; and a description of how the order was violated].

Sample Complaint: *knowingly appeared at Susan Smith's place of employment in violation of a restraining order issued by the Nashua District Court pursuant to RSA 173-B, on June 15, 2006, which was served on the defendant on June 16, 2006.*

*NOTE:* Any person with a prior conviction under this statute or a conviction in another jurisdiction for violating a protective order enforceable under the laws of this state who, within 6 years of the conviction or the completion of the sentence imposed, whichever is later, subsequently commits and is convicted of one or more offenses involving abuse may be charged with an enhanced penalty for each subsequent offense as follows:

- A class B felony may be charged as a class A;
- A class A misdemeanor may be charged as a class B felony;
- A class B misdemeanor may be charged as a class A misdemeanor; and
- A violation may be charged as a class B misdemeanor.

See RSA 173-B: 9, IV.<sup>575</sup> When relying on this provision to charge an enhanced offense, the complaint or indictment must allege the prior conviction, using language

such as the following: “did commit a crime involving abuse within 6 years of being convicted of violating an order of protection, in that the defendant (describe the acts of abuse being charged), after having been convicted in Nashua District Court in December 2006, of violating a protective order.”

## **D. RSA 179, Alcoholic Beverages**

### **1. RSA 179:5, Prohibited Sales**

#### **a. RSA 179:5, I, misdemeanor if natural person, otherwise a felony**

being a [licensee, salesperson, direct shipper, common carrier, delivery agent or any other person], he/she negligently [sold, gave away, caused or allowed to be procured, sold, delivered or given away] [any liquor or beverage] to a [person under the age of 21 or to an intoxicated individual].

*Sample Complaint: while working as a salesperson at the South Bay Market, he negligently sold a twelve-pack of Budweiser to Sam Snell (D.O.B. 8/15/90), a person under the age of 21.*

*Sample Complaint: while working as a delivery person for Merrimack Distributors, he negligently gave away a case of Miller Light Beer to Nancy Nolan, when Ms. Nolan was intoxicated.*

#### **b. RSA 179:5, II, misdemeanor if natural person, otherwise a felony**

as [a licensee, manager, or person in charge of] [a licensed premise], he/she negligently [allowed or permitted] [an individual under 21] to [to possess or consume] [liquor or beverage] on the licensed premises.

Sample Complaint: *while working as the manager of the Pub and Grub in Salem, a licensed premise, he negligently allowed or permitted Susan Smith (D.O.B. 11/22/87), a person under the age of 21, to consume liquor on the premises.*

## **2. RSA 179:9, Person Misrepresenting Age**

### **a. RSA 179:9, I, misdemeanor**

[falsely represented his/her age] [for the purpose of procuring liquor or beverage] and [did procure the liquor or beverage].

Sample Complaint: *falsely represented to the clerk at the Mini-Mart that he was 22 years old, for the purpose of buying a six-pack of Miller Lite, and did purchase the beer.*

### **b. RSA 179:9, II, misdemeanor**

knowingly [possessed, used, displayed] a false [identification card, document, license, or other document which represents an individual's age] for the purpose of purchasing [liquor, beverages, or beer as defined by RSA 175:1, by the bottle, can, glass, container, or drink].

Sample Complaint: *knowingly displayed a false driver's ID to the cashier at the Market Basket, for the purpose of purchasing a six-pack of beer.*

## **3. RSA 179:10, Unlawful Possession And Intoxication**

### **a. RSA 179:10, Unlawful Possession, violation**

[being under the age of 21], he/she had [liquor or alcoholic beverage] in his/her possession.

Sample Complaint: *had in his possession a six-pack of beer, when he was 17 years old (DOB 11/26/90).*

**b. RSA 179:10, Unlawful Intoxication, violation**

[being a person under the age of 21], he/she was intoxicated by the consumption of an alcoholic beverage.

*Sample Complaint: being a person under the age of 21 (DOB 3/3/90), was intoxicated after consuming an alcoholic beverage.*

**4. RSA 179:10-a, Attempt To Purchase Alcohol**

**a. RSA 179:10-a, violation**

being a person under the age of 21, he/she possessed [beverage or liquor] with the intent to purchase, and [did or omitted to do anything] which under the circumstances as he/she believed them to be, was an [act or omission constituting a substantial step toward the purchase of an alcoholic beverage].

*Sample Complaint: while under the age of 21, (DOB 4/9/89), he possessed a six-pack of beer with the intent to purchase it and carried the beer to the checkout counter of the X-tra Convenient Store, an act, which under the circumstances as he believed them to be, constituted a substantial step toward the purchase of an alcoholic beverage.*

**E. RSA 318-B, Controlled Drug Act**

**1. RSA 318-B:2, Acts Prohibited**

*NOTE:* The penalties for offenses under RSA 318-B:2, I and I(a) depend on the type and quantity of the controlled drug involved. Thus, a complaint charging an offense under either of those statutes must allege the type of controlled drug and the quantity. Most of the offenses have an enhanced penalty if the defendant has been



previously convicted of a drug offense. The prior conviction(s) must be alleged in the complaint in order for the defendant to be subject to the enhanced penalty.

The following charts summarize the penalties for offenses under RSA 318-B:2, I and I(a).

**a. Cocaine, Except For Crack**

**i. Sale / Possession With Intent To Sell Or Dispense**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
5 ounces or more	15 - 30 years, \$500,000	up to life, \$500,000
1/2 oz. to 5 oz.	10 - 20 years, \$300,000	20 - 40 years, \$500,000
less than 1/2 oz.	3 1/2 - 7 years, \$100,000	7 1/2 - 15 years, \$200,000

**ii. Cocaine, Except For Crack, Possession**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
none specified	3 1/2 - 7 years, \$25,000	7 1/2 - 15 years, \$50,000

**b. Marijuana**

**i. Manufacture / Sale / Possession With Intent To Sell Or Dispense**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
5 lbs. Or more	10 - 20 years, \$300,000	20 - 40 years, \$500,000
1 oz. to less than 5 lbs.	3 1/2 - 7 years, \$100,000	7 1/2 - 15 years, \$200,000
less than 1 oz.	1 1/2 - 3 years, \$25,000	3 - 6 years, \$50,000

**ii. Marijuana Possession**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
no quantity specified	1 year, \$2000	same

**c. LSD**

**i. Manufacture / Sale / Possession With Intent To Sell Or Dispense**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
100 mgs. or more	15 - 30 years, \$500,000	up to life, \$500,000
less than 100 mgs.	10 - 20 years, \$300,000	20 - 40 years, \$500,000

**ii. LSD Possession**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
no quantity specified	3 1/2 - 7 years, \$25,000	7 1/2 - 15 years, \$50,000

**d. Hashish**

**i. Manufacture / Sale / Possession With Intent To Sell Or Dispense**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
1 lb. Or more	10 - 20 years, \$300,000	20 - 40 years, \$500,000
more than 5 gms., less than 1 lb.	3 1/2 - 7 years, \$100,000	7 1/2 - 15 years, \$200,000
less than 5 gms.	1 1/2 - 3 years, \$25,000	3 - 6 years, \$50,000

**ii. Hashish Possession**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
more than 5 gms.	one year, \$5,000	same
5 gms. or less	1 year, \$2,000	same

**e. Heroin / Crack Cocaine**

**i. Manufacture / Sale / Possession With Intent To Sell Or Dispense**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
5 gms. or more	15 - 30 years, \$500,000	up to life, \$500,000
1 gm. or more, but less than 5 gms.	10 - 20 years, \$300,000	20 - 40 years, \$500,000
less than 1 gm.	3 1/2 - 7 years, \$100,000	7 1/2 - 15 years, \$200,000

**ii. Heroin / Crack Cocaine Possession**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
no quantity specified	3 1/2 - 7 years, \$25,000	7 1/2 - 15 years, \$50,000

**f. PCP**

**i. Manufacture / Sale / Possession With Intent To Sell Or Dispense**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
10 gms. or more	15 - 30 years, \$500,000	up to life, \$500,000
less than 10 gms.	10 - 20 years, \$300,000	20 - 40 years, \$500,000

**ii. PCP Possession**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
no quantity specified	3 1/2 - 7 years, \$25,000	7 1/2 - 15 years, \$50,000

**g. Methamphetamine**

**i. Sale / Possession With Intent To Sell Or Dispense**

(see RSA 318-D:2 for manufacturing methamphetamine)

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
1 oz. or more	10 - 20, \$300,000	20 - 40 years, \$500,000
less than 1 oz.	3 1/2 - 7 years, \$100,000	7 1/2 - 15 years, \$500,000

**ii. Methamphetamine Possession**

QUANTITY	FIRST OFFENSE	SUBSEQUENT OFFENSE
no quantity specified	3 1/2 - 7 years, \$25,000	7 1/2 - 15 years, \$50,000

**2. 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: *knowingly possessed less than one-half ounce of cocaine with intent to sell.*

Sample Complaint—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 of a drug offense under RSA 318-B.*

**3. RSA 318-B:2, I-a**

knowingly [manufactured, sold, purchase, transported or possessed with intent to sell, dispensed, compounded, packaged, or repackaged] [any substance that he/she represented to be a controlled drug or controlled drug analog, OR any preparation containing a substance that he/she represented to be a controlled drug or controlled drug analog].

Sample Complaint: *knowingly sold to Warren Police Officer O'Reilly a substance he represented to be the controlled drug cocaine, in a quantity of 0.75 oz.*

**4. RSA 318-B:2, V, class B felony (RSA 318-B:26, XI)**

knowingly [obtain or attempt to obtain] [a controlled drug] by [(a) fraud, deceit, misrepresentation; (b) the forgery or alteration of a prescription or of any written order; (c) by concealment of a material fact; or (d) use of a false name or the giving of a false address].

Sample Complaint: *knowingly attempted to obtain Vicodin, a controlled drug, by forgery, in that he presented a forged prescription for 30 Vicodin to the CSB Pharmacy to be filled. The prescription purported to be one written and signed by Dr. Alice Schmidt, but was not issued by Dr. Schmidt.*

Sample Complaint: *knowingly obtained a quantity of Valium, a controlled drug, by presenting a prescription for Valium issued to Jane Miller to the Rite Aid pharmacy, and falsely represented that she was Jane Miller.*

**5. RSA 318-B:2, VIII, class B felony (RSA 318-B:26, XI)**

knowingly [made or uttered] a [false or forged prescription or false or forged written order].

Sample Complaint: *knowingly uttered a forged prescription in that she presented a prescription for 40 valium to the CVS pharmacy clerk. The prescription, which was issued by Dr. Russell Preston, had been written for ten valium, but the number “10” had been altered to read “40.”*

**6. RSA 318-B:2, XII-a, class B felony (RSA 318-B:26, XI)**

knowingly [acquired, obtains possession of, or attempted to acquire or obtain possession of] [a controlled drug] by [misrepresentation, fraud, forgery, deception, or subterfuge].

Sample Complaint: *knowingly attempted to acquire possession of the controlled drug Dilaudid (hydromorphone hydrochloride) by misrepresentation, in that she independently consulted Dr. Andrew Mears and Dr. Sylvia Cooper for treatment of an alleged back ailment and did so solely for the purpose of obtaining additional quantities of Dilaudid, which she could not otherwise have legally obtained from one doctor.*

**F. RSA 318-D, Methamphetamine-Related Offenses**

**1. RSA 318-D:2, Manufacture Of Methamphetamine**

*NOTE:* The offenses under this section are unclassified felonies. The penalty for an offense is up to 15-30 years of imprisonment and a fine of up to \$500,000, or both. The penalty for a subsequent offense is a mandatory minimum of 5 years and a maximum of not more than life, a fine of up to \$500,000, or both.

**a. RSA 318-D:2, I**

knowingly [manufactured] methamphetamine.

Sample Complaint: *knowingly manufactured methamphetamine in his home at 23 Manor Road.*

**b. RSA 318-D:2, I(a)**

with a purpose that the offense of manufacturing methamphetamine be committed, he/she [engaged in any conduct] that under the circumstances as he/she believed them to be, constituted a substantial step toward the commission of the crime.

Sample Complaint: *with a purpose that the offense of manufacturing methamphetamine be committed, he purchased five packages of Sudafed from Rite Aid and five packages of Sudafed from CVS, which, under the circumstances that he believed them to be, constituted a substantial step toward the commission of that offense.*

**c. RSA 318-D:2, I(b)**

possessed [one or more of the substances, or their salts or isomers, listed in RSA 318-D:2, I(b)] with the intent to manufacture methamphetamine.

Sample Complaint: *knowingly possessed ammonium nitrate and, sulfuric acid, and mercuric chloride with the intent to manufacture methamphetamine.*

**d. RSA 318-D:2, I(c)**

possessed [one of more of the organic solvents listed in RSA 318-D:2, I(c)] with the intent to manufacture methamphetamine.

Sample Complaint: *possessed acetone, ethanol, and methyl isobutyl ketone, with the intent to manufacture methamphetamine.*

## G. RSA 629, Inchoate Crimes

*NOTE:* The penalty for the following offenses is the same as that authorized for the crime that was intended to be committed, except for murder.

### 1. RSA 629:1, Attempt

with a purpose that [a crime] be committed, he/she [did or omitted to do anything] which [act or omission], under the circumstances as he/she believed them to be, constituted a substantial step toward the commission of said crime.

Sample Complaint: *with a purpose that the crime of first degree assault be committed, he fired a gun in the direction of Jane Smith, which, under the circumstances as he believed them to be, constituted a substantial step toward the commission of that crime.*

### 2. RSA 629:2, Criminal Solicitation

with a purpose that [another person] engage in conduct constituting [a crime], he/she [commanded, solicited, or requested] [the other person] to [engage in such conduct].

Sample Complaint: *with a purpose that Joe Jones engage in conduct constituting the crime of first degree assault, he requested Jones to hit Victor Flynn in the head with a baseball bat.*

### 3. RSA 629:3, Conspiracy

with a purpose that [a crime defined by statute] be committed, he/she agreed with [one or more persons] to [commit or cause the commission of that crime], and [an overt act was committed by one of the conspirators in furtherance of the conspiracy].



Sample Complaint: *with a purpose that the crime of sale of controlled drugs, as defined in RSA 318-B:2, be committed, he agreed with Jane Smith, Joe Jones, and others unknown, to cause the commission of that crime, and one or more of the following overt acts was committed in furtherance of the conspiracy: John Smith transported cocaine from Nashua to Manchester; Joe Jones called David Rainey and told Rainey to meet Smith at the McDonald's on Elm Street in Manchester; [add other acts if presented by facts].*

## **H. RSA 630, Homicide**

### **1. RSA 630:3, Negligent Homicide**

#### **a. RSA 630:3, I, class B felony**

negligently caused the death of [another] by [insert facts].

Sample Complaint: *negligently caused the death of Tom Tread by driving his 1998 Ford pick-up truck on Route 202 in Henniker, at a speed greater than was reasonable and prudent for the condition at the time and driving across the double yellow center line, thereafter colliding with Tread's car and causing Tread's death.*

#### **b. RSA 630:3, II, class A felony**

caused the death of [another] as a consequence of being under the influence of [intoxicating liquor or a controlled drug or any combination of intoxicating liquor and controlled drug] while operating [a propelled vehicle as defined in RSA 637:9, III, or a boat as defined in RSA 270:48, II].

Sample Complaint: *drove his 1998 Ford pick-up truck on Route 202 in Henniker while being under the influence of intoxicating liquor and a controlled drug, cocaine, and struck Mary Smith, who was riding her bicycle along the shoulder of the road, thereby causing Smith's death.*

## **I. RSA 631, Assaults And Related Offenses**

### **1. RSA 631:1, First Degree Assault, class A felony**

#### **a. RSA 631:1, I(a)**

purposely caused [serious bodily injury] to [another].

Sample Complaint: *purposely caused serious bodily injury to Dan Carter by repeatedly striking Carter's head against the ground, causing Carter to suffer a concussion.*

#### **b. RSA 631:1, I(b)**

[purposely or knowingly] caused [bodily injury] to [another] [by means of a deadly weapon].

Sample Complaint: *knowingly caused bodily injury to Susan Deitel by means of a deadly weapon, a knife, by stabbing Ms. Deitel in the shoulder.*

#### **c. RSA 631:1, I(c)**

[purposely or knowingly] caused [injury] to [another] resulting in [miscarriage or stillbirth].

Sample Complaint: *knowingly caused injury to Melinda Strong by kicking her in the stomach, causing internal hemorrhaging, which resulted in Ms. Strong having a miscarriage.*

#### **d. RSA 631:1, I(d)**

[knowingly or recklessly] caused [serious bodily injury] [to a person under 13 years of age].

Sample Complaint: *recklessly caused serious bodily injury to David B. (DOB - 2/12/04), who was under 13 years of age, by placing the child into a bathtub containing scalding water, resulting in severe burns to the child's body.*

**2. RSA 631:2, Second Degree Assault, class B felony**

**a. RSA 631:2, I(a)**

[knowingly or recklessly] caused [serious bodily injury] to [another].

Sample Complaint: *recklessly caused serious bodily injury to Bob Rein by punching him in the face, resulting in a fractured nose and fractured cheekbone.*

**b. RSA 631:2, I(b)**

recklessly caused [bodily injury] to [another] [by means of a deadly weapon].

Sample Complaint: *recklessly caused bodily injury to Rachel Eldredege by striking her in the head and shoulders with a baseball bat, a deadly weapon, which resulted in bruising and soreness.*

**c. RSA 631:2, I(c)**

recklessly caused [bodily injury] to [another] under circumstances manifesting extreme indifference to the value of human life.

Sample Complaint: *recklessly caused bodily injury to Victor Small, under circumstances manifesting extreme indifference to the value of human life, by pushing Small backward through a second story glass window, causing lacerations and bruising to Small's body.*

**d. RSA 631:2, I(d)**

[purposely or knowingly] caused [bodily injury] to [a child under 13 years of age].

Sample Complaint: *he knowingly caused bodily injury to S.C. (DOB - 10/28/03) by kicking the child in the groin and stomach, causing bruising and swelling of the testicles.*

**e. RSA 631:2, I(e)**

[recklessly or negligently] caused [injury] to [another] resulting in [miscarriage or stillbirth].

Sample Complaint: *negligently caused injury to Barbara Brown, resulting in a miscarriage. Smith drove his car on Route 4 in Northwood at a speed greater than was reasonable and prudent for the condition at the time, veered off the road and struck a utility pole. Brown, who was a passenger in Smith's car, had a miscarriage as a result of the injuries she suffered in the collision.*

### **3. RSA 631:2-a, Simple Assault**

*NOTE:* Simple assault is a misdemeanor unless committed in a fight entered into by mutual consent, in which case it is a violation. To charge a violation, follow the language of the sample complaints and add the language “while engaged in a fight entered into by mutual agreement.”

**a. RSA 631:2-a, I(a)**

[purposely or knowingly] caused [bodily injury or unprivileged physical contact] to [another].

Sample Complaint—misdemeanor: *knowingly caused unprivileged physical contact to Tom Smith by punching him in the face.*

Sample Complaint—violation: *knowingly caused unprivileged physical contact to Tom Smith by punching him in the face during a fight that he and Smith entered into by mutual agreement.*

**b. RSA 631:2-a, I(b)**

[recklessly] caused [bodily injury] to [another].

Sample Complaint: *recklessly caused bodily injury to Jim Sweet by pushing him backwards, causing him to fall over a table and strike his head on the floor, resulting in bruising to his head.*

**c. RSA 631:2-a, I(c)**

negligently caused [bodily injury] to [another] by means of [a deadly weapon].

Sample Complaint: *negligently caused bodily injury to Sam Brown by means of a deadly weapon. He held the sharp edge of a knife to Brown's cheek, causing a laceration.*

**4. RSA 631:3, Reckless Conduct**

**a. RSA 631:3, class B felony**

recklessly [engaged in conduct] using [a deadly weapon] which [placed or may have placed] [another] in danger of serious bodily injury.

Sample Complaint: *while standing next to Sheila Mueller, he waved a .357 Magnum revolver, a deadly weapon, around and fired several shots into the air near her head, placing her in danger of serious bodily injury.*

**b. RSA 631:3, misdemeanor**

recklessly [engaged in conduct] which [placed or may have placed] [another] in danger of serious bodily injury.

Sample Complaint: *recklessly engaged in conduct that placed Roger Callo in danger of serious bodily injury. He drove his car toward Callo, who was standing in the street, at a high rate of speed and stopped suddenly, just several yards away from Callo.*

**5. RSA 631:3-a, Conduct Involving Laser Pointing Devices**

**a. RSA 631:3-a, I, violation**

knowingly shone the beam of a laser pointing device at [an occupied motor vehicle, window, or person].

Sample Complaint: *knowingly shone the beam of a laser-pointing device at the front window of a 2004 Toyota Corolla parked at a rest area on Route 4, in which Sally Vinz and Bob Wein were sitting.*

**b. RSA 631:3-a, II, class A misdemeanor**

knowingly shone the beam of a laser pointing device at a [law enforcement officer or law enforcement vehicle].

Sample Complaint: *knowingly shone the beam of a laser pointing device at a law enforcement officer, State Police Trooper Joe Jones, during a traffic stop of the car in which she was a passenger.*

**6. RSA 631:6, Failure To Report Injuries**

*NOTE:* The obligation to report under this statute does not apply if the person seeking treatment or assistance was a victim of sexual abuse or domestic abuse, was older than 17, objected to the release of information to

law enforcement, and was not being treated for a gunshot wound or other serious bodily injury.

**a. RSA 631:6, misdemeanor**

having knowingly [treated or assisted] [another] for a [gunshot wound or for any other injury] which he/she believed to have been caused by a criminal act, he/she failed immediately to notify a law enforcement official of all the information he possessed concerning the injury. [include facts that demonstrate the exceptions to the reporting obligation are not applicable, such as the person seeking treatment was a minor, or the injury was a gunshot wound, or include a statement that “the exceptions to the reporting obligation, as set forth in RSA 631:6, II, were not applicable.”]

*Sample Complaint: knowingly treated Jake Diamond for a gunshot wound to the arm, which she believed to have been caused by a criminal act, and she failed immediately to notify a law enforcement official of all the information she possessed concerning the injury.*

*Sample Complaint: knowingly treated a minor female (d.o.b. 5/15/98) for injuries, including lacerations and bruising to the genitals, which Smith believed to have been caused by a criminal act, and Smith failed immediately to notify a law enforcement official of all the information she possessed concerning the injuries.*

**7. RSA 631:7, Student Hazing**

*NOTE:* refer to the statute for relevant definitions such as “student hazing” and “educational institution.”

**a. RSA 631:7, II(a)(1), class B misdemeanor**

knowingly [participated] [as an actor] in [student hazing].

Sample Complaint: knowingly participated as an actor in a student hazing, by directing Wesley Thompson, a pledge at the Tappa Keg fraternity chapter at UNH, to drink a quart of grain alcohol, as part of a mandatory initiation rite for fraternity pledges.

**b. RSA 631:7, II(a)(2), class B misdemeanor**

being a student at [an educational institution], he/she knowingly [submitted to] [student hazing] and failed to report such hazing to law enforcement or educational institution authorities.

Sample Complaint: being a student at Dartmouth College, he knowingly submitted to hazing and failed to report such hazing to law enforcement or educational institution authorities. At the direction of Joe Jones, the pledge director at the Tappa Keg fraternity chapter at Dartmouth College, Smith drank a quart of grain alcohol during a mandatory initiation rite of the fraternity, and failed to report such hazing to law enforcement or educational institution authorities.

**c. RSA 631:7, II(a)(3), class B misdemeanor**

[was present at or otherwise had direct knowledge of] [student hazing] and failed to report such hazing to law enforcement or educational institution authorities.

Sample Complaint: after being present at a student hazing, he failed to report such hazing to law enforcement or educational institution authorities. Smith was present during an initiation rite of the Tappa Keg fraternity chapter, at which the fraternity pledges were blindfolded and made to walk through a group of fraternity members who assaulted them with wooden paddles and poured urine on them. A reasonable person would perceive the student hazing as likely to cause physical or psychological injury to any of the participants.



**d. RSA 631:7, II(b)(1), misdemeanor**

[an educational institution or organization operating at or in conjunction with an education institution] knowingly [permitted or condoned] [student hazing].

Sample Complaint: *The Tappa Keg fraternity, which operated a chapter at Keene State University, did commit the crime of student hazing in that it knowingly permitted student hazing. The officers of the fraternity held a mandatory initiation rite for student pledges, during which the pledges were forced to drink ten shots of whiskey.*

**e. RSA 631:7, II(b)(2), misdemeanor**

[an educational institution or an organization operating at or in conjunction with an educational institution] [knowingly or negligently] failed to take reasonable measures within the scope of its authority to prevent student hazing.

Sample Complaint: *Muncey College negligently failed to take reasonable measures within the scope of its authority to prevent student hazing. After receiving reports of student hazing at the Tappa Keg Fraternity, Joe Smith, the dean of student affairs at Muncey College failed to take any measures to investigate the complaints thereby failing to enforce its policy against hazing.*

**f. RSA 631:7, II(b)(3), misdemeanor**

[Educational institution or an organization operating at or in conjunction with an educational institution] failed to report to law enforcement authorities [any hazing reported to it by others or of which it otherwise has knowledge].

Sample Complaint: *UNH failed to report to law enforcement authorities acts of hazing which had been reported to it. Joe Smith, Dean of Student Affairs, received a report of student hazing at the Tappa Keg fraternity chapter. Smith*

and other members of the university administration, who Smith advised of the report, failed to report such reported hazing to law enforcement authorities.

## **8. RSA 631:8, Criminal Neglect Of Elderly, Disabled, Or Impaired Adults**

### **a. RSA 631:8, II, class A Felony**

[being a caregiver], he/she purposely caused [serious bodily injury] to [an elderly, disabled, or impaired adult] by [neglect].

Sample Complaint: *being a caregiver to his mother, Donna Day, who was paralyzed and bedridden and dependent on him, he purposely caused serious bodily injury to her by withholding water, causing her to become seriously dehydrated and in need of hospitalization.*

### **b. RSA 631:8, III, class B Felony**

[being a caregiver], he/she [knowingly or recklessly] caused [serious bodily injury] to [an elderly, disabled, or impaired adult] by [neglect].

Sample Complaint: *as caregiver of John Pease, age 81, she recklessly caused serious bodily injury to Pease, an elderly adult dependent upon the defendant for his subsistence, medical, custodial, personal or other care, by neglect. The defendant failed to provide or seek in a timely manner the necessary medical assistance for a Decubitus ulcer on Pease's back, which became infected, thereby causing his death.*

## J. RSA 632-A, Sexual Assault And Related Offenses

### 1. RSA 632-A:2, Aggravated Felonious Sexual Assault, class A felony

#### a. RSA 632-A:2, I(a)

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] [through the actual application of physical force, physical violence or superior physical strength].

Sample Complaint: *knowingly engaged in sexual intercourse with J.F. (DOB 11/22/76) through the application of physical force and strength. He physically forced her onto a bed and restrained her there with his body while he engaged in intercourse.*

#### b. RSA 632-A:2, I(b)

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] while [victim's initials] was [physically helpless to resist].

Sample Complaint: *knowingly subjected S.H. (DOB 11/22/76) to cunnilingus while she was physically helpless to resist. S.H. was asleep.*

#### c. RSA 632-A:2, I(c)

knowingly coerced [insert victim's initials and date of birth] to submit to [sexual penetration] by [threatening to use physical violence or superior physical strength], and [victim's initials] believed [the defendant] had the present ability to execute those threats.

Sample Complaint: *knowingly coerced M.M. (DOB 8/30/83) into submitting to an act of fellatio by showing her a handgun and threatening to shoot her if*

she refused, and M.M. believed that the defendant had the present ability to execute his threat.

**d. RSA 632-A:2, I(d)**

knowingly coerced [victim's initials and date of birth] to engage in [sexual penetration] by [threatening to retaliate against the victim or another person] and [the victim] believed [the defendant] had the ability to execute the threat in the future.

Sample Complaint: knowingly coerced L.D. (DOB 11/22/76) to engage in an act of anal intercourse by threatening to retaliate against L.D.'s child. He told L.D. that he knew where her child went to elementary school and threatened to kidnap her child if she refused. L.D. believed that the defendant had the ability to carry out the threat.

**e. RSA 632-A:2, I(e)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth], [under the circumstances involving false imprisonment, kidnapping or extortion].

Sample Complaint: knowingly performed cunnilingus on L.B. (DOB 11/22/76) under circumstances involving kidnapping, in that after taking L.B. from her home at knife point, he held her against her will in his motor vehicle, where he performed the act of cunnilingus.

**f. RSA 632-A:2, I(f)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] under circumstances where [without prior consent of the victim], the defendant [administered or knew of another person administering to the victim any intoxicating substance which mentally incapacitated the victim].

Sample Complaint: *knowingly engaged in sexual penetration with P.R. (DOB 11/22/76) under the following circumstances: without P.R.'s prior consent, he poured grain alcohol in P.R.'s punch, which mentally incapacitated her and he then engaged in sexual intercourse with her.*

**g. RSA 632-A:2, I(g)(1)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] under the following circumstances: he/she [provided therapy, medical treatment or examination of the victim] and [in the course of that therapeutic or treating relationship or within in one year of termination of that therapeutic or treating relationship,] [acted in a manner or for purposes which are not professionally recognized as ethical or acceptable].

Sample Complaint: *knowingly engaged in sexual penetration with S.A. (DOB 11/22/76) under the following circumstances: he provided therapy for S.A. and in the course of that treatment committed acts which are not professionally recognized as ethical or acceptable. He engaged in sexual intercourse with S.A. as part of her therapy.*

**h. RSA 632-A:2, I(g)(2)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] under the following circumstances: the defendant [provided therapy, medical treatment or examination of the victim] and [in the course of that therapeutic or treating relationship or within in one year of termination or that therapeutic or treating relationship] [used this position to coerce the victim to submit].

Sample Complaint: *knowingly engaged in sexual penetration with S.B. (DOB 11/22/76) under the following circumstances: while serving as her parenting therapist, he used his position to coerce her to engage in anal intercourse by telling her he would recommend the children be permanently removed from her home if she refused to submit.*

**i. RSA 632-A:2, I(h)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth], who is not his/her legal spouse and was [mentally defective] and the defendant [knew or had reason to know that the victim was mentally defective].

Sample Complaint: *knowingly engaged in anal intercourse with T.D. (DOB 11/22/76), who is not his legal spouse. T.D. is developmentally disabled, which the defendant knew as the defendant worked as a staff member in the group home where T.D. lived.*

**j. RSA 632-A:2, I(i)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] [through concealment or by the element of surprise] and [before the victim had an adequate chance to flee or resist].

Sample Complaint: *knowingly engaged in sexual penetration with T.L. (DOB 12/13/75) by the element of surprise and before the victim had an adequate chance to flee or resist. The defendant inserted his finger into the T.L.'s vagina while she was asleep on a couch.*

**k. RSA 632-A:2, I(j)(1)**

knowingly engaged in [sexual penetration] with [victim's gender\*\*] who was [13 years of age or older and under 16 years of age] and not his/her legal spouse, [while the defendant was a member of the same household].

\*\* Because the complaint must allege that the victim and the defendant were members of the same household, it is recommended that the victim be identified only by age and gender, to protect his/her identity to the extent possible.

Sample Complaint: *knowingly engaged in sexual intercourse with a 13 year-old female who was not the defendant's legal spouse, while the defendant and the victim were members of the same household.*

**l. RSA 632-A:2, I(j)(2)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth], who was [13 years of age or older and under the age of 16] and not the defendant's legal spouse, and is [related to the defendant by blood or affinity].

Sample Complaint: *knowingly engaged in the sexual intercourse with fourteen-year old C.D. (DOB 3/15/93), who was not the defendant's legal spouse. C.D. is related to the defendant by affinity.*

**m. RSA 632-A:2, I(k)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth], who was [13 years of age or older and under the age of 16] and not the defendant's legal spouse, while the defendant was [in a position of authority over the victim] and [used that authority to coerce the victim to submit].

Sample Complaint: *knowingly engaged in sexual intercourse with 15 year old F.B. (DOB 4/11/92), who was not his legal spouse, while he was in a position of authority over her. The defendant was F.B.'s school detention supervisor and coerced F.B. to submit by convincing her that her detention would extend throughout the school year if she did not submit.*

**n. RSA 632-A:2, I(l)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] [who was less than 13 years of age].

Sample Complaint: *knowingly engaged in an act of fellatio on D.T., a six year old boy whose date of birth is 6/24/2001.*

**o. RSA 632-A:2, I(m)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] when the victim [indicated through speech or conduct that he/ she did not consent to the act].

Sample Complaint: *knowingly engaged in sexual intercourse with T.D. (DOB 01/10/88), although T.D. repeatedly told the defendant "no" and "stop."*

**p. RSA 632-A:2, I(n)(1)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] while the defendant [had direct supervisory or disciplinary authority over the victim due to the victim's incarceration in a correctional institution or secure psychiatric unit or juvenile detention facility where the defendant was employed], and the defendant [used that authority to coerce the victim to submit].

Sample Complaint: *knowingly coerced S.P. (D.O.B. 04/25/68) to perform an act of fellatio on him, while the defendant was in a position of authority over S.P. due to her incarceration in Hunter House of Correction where he was employed as a correctional officer. The defendant coerced her to engage in fellatio by threatening to take away all of her visitation privileges if she did not submit.*



**q. RSA 632-A:2, I(n)(2)**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth] while the defendant [had direct supervisory or disciplinary authority over the victim, as the victim's parole officer, probation officer, or juvenile probation officer], and the defendant [used that authority to coerce the victim to submit].

Sample Complaint: *knowingly engaged in sexual intercourse L.M. (D.O.B. 04/25/68) while the defendant had direct disciplinary authority over L.M. as her probation officer, and he used that authority to coerce L.M. to submit. He threatened to file a probation violation with the court if she refused to have sex with him.*

**r. RSA 632-A:2, II**

[intentionally or purposely] [touched, whether directly, through clothing or otherwise] the genitalia of [insert victim's initials and date of birth], a person under the age of 13, under [circumstances that can be reasonably construed as being for the purpose of sexual arousal or gratification].

Sample Complaint: *purposely touched the genitalia of E.G., a person under the age of thirteen, in that he used his hand to touch and rub the clothing immediately covering her vaginal area for the purpose of sexual arousal or gratification.*

**s. RSA 632-A:2, III**

engaged in a pattern of sexual assault against [victim's initials and date of birth], who was under the age of 16 and not the defendant's legal spouse, in that during [insert time period of two months or more, but within a 5 year time period] the defendant [insert facts of more than

one act under RSA 632-A:2 or RSA 632-A:3, or both upon the same victim].

Sample Complaint: *engaged in a pattern of sexual assault against W.N. (date of birth 02/22/93), who was not his legal spouse, in that the defendant, knowingly engaged in cunnilingus with the victim, who was related to him by blood, on more than one occasion between February 1, 2002 and April 19, 2002.*

## **2. RSA 632-A:3, Felonious Sexual Assault, class B Felony**

### **a. RSA 632-A:3, I**

purposely subjected [victim's initials and date of birth] to [sexual contact] and caused [serious personal injury], [under any of the circumstances named in RSA 632-A:2].

Sample Complaint: *purposely subjected J.S. (D.O.B. 02/18/76) to sexual contact and caused her serious personal injury, under circumstances violating RSA 632-A:2, I (b). After rendering J.S. physically helpless to resist by knocking her unconscious and causing her to sustain a serious head injury, he touched her breasts with his hands.*

### **b. RSA 632-A:3, II**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth], who was not his/her legal spouse and was [13 years of age or older and under 16 years of age], where [the age difference between the victim and the defendant was 3 years of more].

Sample Complaint: *knowingly engaged in digital penetration of the vagina of fourteen-year old G.D. (DOB 8/14/1993), when the defendant was 22 years old.*

**c. RSA 632-A:3, III**

purposely [engaged in sexual contact] with [victim's initials and date of birth], who was not his/her legal spouse and [was under 13 years of age].

*Sample Complaint: purposely engaged in sexual contact with H.P. (date of birth 6/24/96), who was not his legal spouse and was under 13 years of age, in that the defendant touched H.P.'s genitals.*

**d. RSA 632-A:3, IV(a)**

purposely [engaged in sexual contact] with [victim's initials and date of birth] [while in a position of [direct supervisory or disciplinary authority over the victim due to the victim's incarceration in a correctional institution or secure psychiatric unit or juvenile detention facility] where the defendant was employed, and the defendant [used his authority to coerce the victim to submit].

*Sample Complaint: purposely touched the breasts of M.M. (D.O.B. 04/25/68) while in a position of direct supervisory authority over M.M. due to her incarceration at Hunter House of Correction where he was employed as a correctional officer. The defendant used that authority to coerce M.M. to submit by threatening to take away all of her visitation privileges if she did not allow him to touch her breasts.*

**e. RSA 632-A:3, IV(b)**

purposely [engaged in sexual contact] with [victim's initials and date of birth] [while the defendant had direct supervisory or disciplinary authority over the victim, as the victim's parole officer, probation officer, or juvenile probation officer], and the defendant [used that authority to coerce the victim to submit].

Sample Complaint: *purposely engaged in sexual contact with C.P. (D.O.B. 03/18/68) while he had direct supervisory authority over her as her parole officer. The defendant coerced C.P. to touch his penis with her hand by threatening to file a violation with the court if she refused to do so.*

### **3. RSA 632-A:4, Sexual Assault**

#### **a. RSA 632-A:4, I(a), class A misdemeanor**

purposely subjected [victim's initials and date of birth], who was [13 years of age or older] to [sexual contact] under circumstances violating [under any of the circumstances named in RSA 632-A:2].

Sample Complaint: *purposely subjected M.T. (d.o.b. 11/3/90), who was 17 years old, to sexual contact under circumstances violating RSA 632-A:2, I (a), in that he overcame M.T. by superior physical strength by throwing her to the ground and holding her down with his body while he fondled her breasts with his hands.*

#### **b. RSA 632-A:4, I(b), class A misdemeanor**

purposely subjected [victim's initials and date of birth], who was not his/her legal spouse and was [13 years of age or older and under 16 years of age] to [sexual contact], [while the age difference between the two was 5 or more years].

Sample Complaint: *purposely subjected R.T., to sexual contact, when R.T. was fifteen years old, and the defendant was 26. The defendant touched R.T.'s genitals with his hands. R.T. was not the defendant's legal spouse.*

#### **c. RSA 632-A:4,I(c), class A misdemeanor**

knowingly engaged in [sexual penetration] with [victim's initials and date of birth], who was not his/her legal spouse and was [13 years of age or older and under 16 years of age], [while the age difference between the two is 3 years or less].

Sample Complaint: *knowingly engaged in anal intercourse with fifteen-year old B.J., who was not the defendant's legal spouse, when the defendant was 18 years old.*

**d. RSA 632-A:4, III(a), class A misdemeanor**

[purposely engaged in sexual contact OR knowingly engaged in sexual penetration] with [victim's initials and date of birth] [while in a position of direct supervisory or disciplinary authority over the victim due to the victim's incarceration in a correctional institution or secure psychiatric unit or juvenile detention facility where the defendant was employed].

Sample Complaint: *purposely engaged in sexual contact with S.P. (D.O.B. 04/25/68) while in a position of direct supervisory authority over S.P. due to her incarceration at the Strafford County House of Corrections where he was employed as a correctional officer. The defendant purposely touched S.P.'s breasts with his hands.*

**e. RSA 632-A:4, III(b), class A misdemeanor**

[purposely engaged in sexual contact OR knowingly engaged in sexual penetration] with [victim's initials and date of birth] while in [a position of direct supervisory or disciplinary authority over the victim] as the victim's [parole officer, probation officer, or juvenile probation officer].

Sample Complaint: *purposely engaged in sexual contact with G.W. (d.o.b. 4/30/56) while in a position of direct supervisory authority over G.W. as G.W.'s parole officer. The defendant purposely had G.W. touch his penis with her hand.*

**4. RSA 632-A:10, Prohibition From Child Care Services Of Persons Convicted Of Certain Offenses**

**a. RSA 632-A:10, I, class A felony**

after having been convicted of [any felonious offense involving child pornography, or a felonious physical assault on a minor, or of any sexual assault – identify type, date, and location of conviction], he/she knowingly [undertook employment or volunteer service involving the care, instruction or guidance of minor children, including but not limited to: service as a teacher; a coach; or worker of any type in child athletics; a day care worker; a boy or girl scout master or leader or worker; a summer camp counselor or worker of any type; a guidance counselor; or a school administrator of any type].

*Sample Complaint: after having been convicted of Aggravated Felonious Sexual Assault in Hillsborough County Superior Court, Southern District, in January 2004, he knowingly volunteered as a summer camp counselor at Hay Ride Horse Farm.*

**b. RSA 632-A:10, II, class B felony**

after having been convicted of [any felonious offense involving child pornography, or a felonious physical assault on a minor, or of any sexual assault – identify type, date, and location of conviction], he/she knowingly [failed to provide information of such conviction] when [applying or volunteering] for [service or employment of any type involving the care, instruction, or guidance of minor children, including, but not limited to: service as a teacher; a coach; or worker of any type in child athletics; a day care worker; a boy or girl scout master or leader or worker; a summer camp counselor or worker of any type; a guidance counselor; or a school administrator of any type].

Sample Complaint: *after having been convicted of Possession of Child Pornography in Hillsborough County Superior Court, Southern District, in July, 2005, he knowingly failed to provide information about that conviction when he applied for a job as a librarian in the children's section of the Milltown Public Library.*

**c. RSA 632-A:10, III, class B felony**

after having been convicted of [any felonious offense involving child pornography, or a felonious physical assault on a minor, or of any sexual assault – describe type, date, and location of conviction], he/she knowingly [failed to provide information of such conviction] [when making application for initial teacher certification in this state].

Sample Complaint: *after having been convicted of Second Degree Assault on a minor, a felony, in Middlesex Superior Court, Lowell, MA, he knowingly failed to provide information about his conviction when he applied for initial teacher certification in this state.*

## **K. RSA 633, Interference With Freedom**

### **1. RSA 633:1, Kidnapping**

*NOTE:* Kidnapping is a class A felony unless the defendant voluntarily released the victim without serious bodily injury and in a safe place prior to trial, in which case it is a class B felony. In order to charge a class A felony, the complaint must allege that the defendant failed to voluntarily release the victim without serious bodily injury or in a safe place, or both, prior to trial.

See the example below.

**a. RSA 633:1, I(a), II**

knowingly confined [another] under his/her control with a purpose to hold [the other person] [for ransom or as a hostage].

Sample Complaint—class A felony: *knowingly confined Bruce Maher under his control with a purpose to hold him as a hostage. The defendant held Maher at knife point and told the police he would not release Maher until he was allowed to talk to President Bush. The defendant failed to voluntarily release Maher prior to trial. Maher was released only after the police physically overtook the defendant.*

Sample Complaint—class B felony: *knowingly confined Bruce Maher under his control with a purpose to hold him as a hostage. The defendant held Maher at knife point and told the police he would not release Maher until he was allowed to talk to President Bush.*

**b. RSA 633:1, I(b), II, class B felony**

knowingly confined [another] under [his or her] control with a purpose to [avoid apprehension by a law enforcement official].

Sample Complaint: *knowingly confined Lowell Sweeney under her control with a purpose to avoid apprehension by a law enforcement official, in that the defendant held Sweeney at gunpoint and refused to release him unless the police promised to allow her to go free.*

**c. RSA 633:1, I(d), II, class B felony**

knowingly confined [another] under [his or her] control with a purpose to [commit an offense against him or her].

Sample Complaint: *knowingly confined Sue Strutter under his control with a purpose to commit a crime against her. The defendant tied Strutter to a bed for the purpose of sexually assaulting her.*



## 2. RSA 633:2, I, Criminal Restraint

### a. RSA 633:2, I, class B felony

knowingly confined [another] unlawfully [in circumstances exposing the victim to risk of serious bodily injury].

Sample Complaint: *knowingly confined Valerie O'Neil unlawfully in circumstances exposing her to risk of serious bodily injury. The defendant locked O'Neil in an abandoned refrigerator outside on a frigid night, and confined her there for 7 hours, thereby exposing her to the risk of death or serious bodily injury.*

## 3. RSA 633:3, False Imprisonment

### a. RSA 633:3, class A misdemeanor

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.*

## L. RSA 634:2, Criminal Mischief

### 1. RSA 634:2, I, II(a), class B felony

having no right to do so nor any reasonable basis for belief of having such a right, [he or she] [purposely or recklessly] [damaged] [property of another], thereby purposely [causing or attempting to cause] [pecuniary loss in excess of \$1,000].

Sample Complaint: *having no right to do so nor any reasonable basis for belief of having such a right, she purposely damaged property of another by*

*driving her truck over a Dell laptop computer belonging to Victoria Victim, thereby purposely causing pecuniary loss in excess of \$1,000.*

## **2. RSA 634:2, I, II(b), class B felony**

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] [a substantial interruption or impairment] of public [communication, transportation, supply of water, gas or power or other public service].

Sample Complaint: *having no right to do so nor any reasonable basis for belief of having such a right, he purposely damaged property of another by puncturing the tires on nine buses belonging to the city of Manchester, thereby purposely attempting to cause a substantial interruption of public transportation.*

## **3. RSA 634:2, I, II(c), class B felony**

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] by purposely [causing or attempting to cause] [discharge of a firearm] at [an occupied structure as defined in RSA 635:1, III].

Sample Complaint: *having no right to do so nor any reasonable basis for belief of having such a right, he recklessly damaged property of another by purposely discharging a pistol at the home of Sally Roche at 200 Auburn Road in Pelham, an occupied structure as defined in RSA 635:1, III, thereby damaging a wall and ceiling in the house.*

## **4. RSA 634:2, I, II(d), class B felony**

having no right to do so nor any reasonable basis for belief of having such a right, he/she purposely [damaged] [real or personal property of

another], knowing that the property had [historical, cultural, or sentimental value that cannot be restored by repair or replacement].

Sample Complaint: *having no right to do so nor any reasonable basis for belief of having such a right, she purposely damaged personal property of another, an antique Civil War rifle and family heirloom belonging to Martha Cook, knowing that the rifle had historical value that cannot be restored by repair or replacement.*

## **5. RSA 634:2, I, II-a, class A misdemeanor**

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 \$100 and not more than \$1000].

Sample Complaint: *having no right to do so nor any reasonable basis for belief of having such a right, he purposely damaged property of another, a 2003 Toyota Camry belonging to Sam Tuttle, by dragging a sharp metal stake across the painted surface of the car, thereby purposely causing pecuniary loss of \$860.00.*

## **6. RSA 634:2, I, III, class A misdemeanor**

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].

Sample Complaint: *having no right to do so nor any reasonable basis for belief of having such a right, he recklessly damaged property of another, a 2003 Toyota Camry belonging to Sam Searle by dragging a sharp metal stake across the painted surface of the car.*

## **M. RSA 634:3, Unauthorized Use Of Propelled Vehicle Or Animal**

### **1. RSA 634:3, class A misdemeanor**

knowing that he/she did not have the consent of the owner, he/she [took, operated, exercised control over, or otherwise used] [a propelled vehicle or an animal].

Sample Complaint: *knowing that he did not have the consent of the owner, he took a 1998 Harley Davidson motorcycle belonging to David Boxer and drove it from Manchester to Nashua and back.*

*NOTE:* There is a misdemeanor motor vehicle statute, RSA 262:12, that also covers unauthorized use.

## **N. RSA 635, Unauthorized Entries**

### **1. RSA 635:1, Burglary**

#### **a. RSA 635:1, I, II, class A felony**

with the purpose to commit [a crime] therein, and not being licensed or privileged to enter, he/she entered [the dwelling of another] at night, which was not open to the public.

Sample Complaint: *with the purpose to commit the crime of theft therein, and not being licensed or privileged to enter, she entered the home of Steve Gage, at 156 Main Street, Hollis, at night, which was not open to the public.*

#### **b. RSA 635:1, I, II, class A felony**

with the purpose to commit [a crime] therein, he/she entered [a building or occupied structure, or separately secured or occupied section thereof], which he/she was not licensed or privileged to enter

and which was not, at the time, open to the public. During the [commission of the offense, attempted commission, or in flight immediately after attempt or commission], the defendant was armed with [a deadly weapon or explosives].

Sample Complaint: *with the purpose to commit a sexual assault therein, he entered an occupied structure, the apartment of Marie Varney at 1002 State Avenue, #31, Manchester, which he was not licensed or privileged to enter and which was not open to the public. During the commission of the burglary, the defendant was armed with a deadly weapon, a hunting knife.*

**c. RSA 635:1, I, II, class A felony**

with the purpose to commit [a crime] therein, he/she entered [a building or occupied structure, or separately secured or occupied section thereof], which he/she was not licensed or privileged to enter and which was not, at the time, open to the public; further, during the [commission of the offense, attempted commission, or in flight immediately after attempt or commission], the defendant [purposely, knowingly, or recklessly] inflicted [bodily injury] on [another].

Sample Complaint: *with the purpose to commit the crime of theft therein, he entered a building at 259 South Main Street, Nashua, the office of Allstate Insurance, which he was not licensed or privileged to enter and which was not at the time open to the public. During his flight immediately after commission of the offense, the defendant recklessly inflicted bodily injury on George Star by pushing him down a flight of stairs, causing bruising to Star's arms.*

**d. RSA 635:1, I, II, class B felony**

with the purpose to commit [a crime] therein, and not being licensed or privileged to enter, he/she entered a [building or occupied structure or a separately secured or occupied section of a building or occupied structure], which was not at the time open to the public.

Sample Complaint: *with the purpose to commit the crime of theft therein, and not being licensed or privileged to enter, he entered Harry Black's home, an occupied structure, located at 156 Main Street, Colebrook, which was not at the time open to the public.*

**e. RSA 635:1, V, misdemeanor**

knowingly [made, mended, began to make or mend, or had in his/her possession] [an engine, machine, tool, or implement] [adapted and designed for cutting through, forcing open, or breaking open] a [building, room, vault, safe, or other depository], in order to [steal money or other property therefrom, or to commit any other crime], knowing that the [engine, machine, tool, or implement was adapted and designed for that purpose], with intent to [use or employ it, or allow someone else to use or employ it] for such purpose.

Sample Complaint: *knowingly had in his possession tools that were adapted and designed for forcing or breaking into a building in order to steal money or other property therefrom, knowing that the tools were adapted and designed for that purpose, and he had the intent to use them to break into a building. The defendant had in his possession a sledgehammer, metal pry bar, and wire cutters.*

**2. RSA 635:2, Criminal Trespass**

**a. RSA 635:2, I, violation**

knowing that he/she was not licensed or privileged to do so, he/she [entered or remained in] [any place].

Sample Complaint: *knowing that he was not licensed or privileged to do so, he entered a storage facility at White's Park, belonging to the City of Concord.*

**b. RSA 635:2, I & II, class A misdemeanor**

knowing that he/she was not licensed or privileged to do so,  
he/she [entered or remained in] [any place] and [knowingly or  
recklessly] [caused damage in excess of \$1,000 to the value of the  
property of another].

Sample Complaint: *knowing that he was not licensed or privileged to do so, he entered a storage facility at White's Park, belonging to the City of Concord, and recklessly caused damage in excess of \$1,000 to several lawnmowers belonging to the City of Concord that were stored in the shed.*

**c. RSA 635:2, I & II, class B felony**

knowing that he/she was not licensed or privileged to do so,  
he/she [entered or remained in] [any place] and [knowingly or  
recklessly] [caused damage in excess of \$1,000 to the value of the  
property of another], [having previously been convicted of committing  
criminal trespass involving damage in excess of \$1000].

Sample Complaint: *knowing that he was not licensed or privileged to do so, he entered a storage facility at White's Park, belonging to the City of Concord, and recklessly caused damage in excess of \$1,000 to several lawnmowers belonging to the City of Concord that were stored in the shed, having previously been convicted in August 1999 in the Manchester District Court of criminal trespass involving damage in excess of \$1000.*

**d. RSA 635:2, I & III(a), class A misdemeanor**

knowing that he/she was not licensed or privileged to do so,  
he/she [entered or remained in] [an occupied structure].

Sample Complaint: *knowing that he was not licensed or privileged to do so, he entered an occupied structure, a residence at 72 Gilford Road, Laconia, belonging to Elizabeth and Mike Lahey.*

**e. RSA 635:2, I & III(b)(1), class A misdemeanor**

knowing that he/she was not licensed or privileged to do so, he/she knowingly [entered or remained in] [a secured premises, as defined in RSA 635:2, V].

Sample Complaint: *knowing that she was not licensed or privileged to do so, she knowingly entered a secured premises, land on Mountain Road in Concord owned by Mort Gordon, which was posted with “no trespassing signs” in a manner reasonably likely to come to the attention of intruders.*

**f. RSA 635:2, I, & III(b)(2), class A misdemeanor**

knowing that he/she was not licensed or privileged to do so, he/she knowingly [entered or remained in] [any place] in defiance of [an order to leave or not to enter] [which was personally communicated to him/her by the owner or other authorized person].

Sample Complaint: *knowing that she was not licensed or privileged to do so, she knowingly remained on the property of the Seabrook Nuclear Power Station in defiance of an order to leave which was personally communicated to her by Mary Breed, a security officer at the station.*

**g. RSA 635:2, I & III(b)(3), class A misdemeanor**

having been properly notified of [a court order restraining him/her from entering] [any place], and knowing that he/she was not licensed or privileged to do so, he/she knowingly [entered or remained in] [such place] in defiance of the court order.

Sample Complaint: *after having been properly notified by the clerk of the Concord District Court of an order issued by that court restraining him from entering the AABC Beauty Salon at 40 Main Street, and knowing that he was*



*not licensed or privileged to do so, he knowingly entered the salon in defiance of the court order.*

## **O. RSA 636, Robbery**

### **1. RSA 636:1(a), class A felony**

purposely [used physical force] on [another] [during the course of committing a theft] and the victim was aware of such force. At the time of the incident, the defendant [was actually armed with a deadly weapon, OR reasonably appeared to the victim to be armed with a deadly weapon, OR inflicted or attempted to inflict serious injury on another].

Sample Complaint: *he purposely used physical force on Dan Davis by pulling Davis out his car during the course of stealing Davis' car, and Davis was aware of the force. Defendant was armed with a switchblade knife, a deadly weapon, at the time.*

### **2. RSA 636:1(a), class B felony**

purposely [used physical force] on [another] [during the course of committing a theft] and the victim was aware of such force.

Sample Complaint: *purposely used physical force against Sally Smith, by punching her in the face, while attempting to steal Smith's laptop computer, and Smith was aware of being punched.*

### **3. RSA 636:1(b), class A felony**

purposely [threatened another with physical force OR put another in fear of immediate use of physical force] [during the course of committing a theft]. At the time of the incident, the defendant [was actually armed with a

deadly weapon, OR reasonably appeared to the victim to be armed with a deadly weapon, OR inflicted or attempted to inflict serious injury on another].

Sample Complaint: *she purposely threatened to stab Lisa Olson when Olson resisted her efforts to steal Olson's pocketbook. The defendant appeared to be armed with a deadly weapon, a knife, at the time.*

#### **4. RSA 636:1(b), class B felony**

purposely [threatened another with physical force OR purposely put another in fear of immediate use of physical force] [during the course of committing a theft].

Sample Complaint: *during an attempt to steal Ryan Blake's bicycle, he purposely threatened to punch Blake if Blake did not let go of the bicycle.*

*NOTE:* An act is considered "in the course of committing a theft" if it occurs in an attempt to commit a theft, in an effort to retain the stolen property immediately after its taking, or in immediate flight after the attempt or commission. RSA 636:1, II.

### **P. RSA Chapter 637, Theft**

*NOTE:* Theft is a class A felony if:

- The value of the property or services exceeds \$1,000;
- The property stolen is a firearm; or
- The actor is armed with a deadly weapon at the time of the theft.

Theft is a class B felony if:

- The value of the property or services is more than \$500, but not more than \$1,000;

- The actor has been twice before convicted of theft of property or services, as a felony or class A misdemeanor;
- The theft constitutes a violation of RSA 637:5, II(a) or (b); or
- The property or services stolen are from 3 separate business establishments within a 72-hour period.

Theft is a misdemeanor if the value of the property or services does not exceed \$500.

When charging a felony offense, the complaint must allege facts to support the level of felony charged. For example, when identifying the stolen property, include the language “valued in excess of \$1,000,” “valued in excess of \$500 but not more than \$1000,” or include the actual value, if known. Without language that would give notice to the defendant that the charge is a felony, the complaint will be interpreted as charging a misdemeanor. See examples below under RSA 637:3.

RSA 637:2 sets out definitions that apply to all of the theft statutes and may be critical to a charging decision, such as the definition of “property,” “property of another,” and “purpose to deprive.” Be sure to review those definitions before drafting the complaint.

### **1. RSA 637:3, Theft By Unauthorized Taking**

he/she [obtained or exercised unauthorized control over] [the property of another] with a purpose to deprive him/her thereof.

Sample Complaint—class B felony: *obtained unauthorized control of a Sony flat screen television, valued at more than \$500 but less than \$1000, which belonged to Jim Jones, by taking the television from Jones’ home without permission, with a purpose to deprive Jones thereof.*

Sample Complaint—class A felony: *exercised unauthorized control over \$2500.00 in cash from John Smith’s bank account at TD Banknorth, by withdrawing the cash using Smith’s ATM card without Smith’s permission and with a purpose to deprive Smith of the money.*

## **2. RSA 637:4, Theft By Deception**

he/she [obtained or exercised control over] [the property of another] [by deception] and with a purpose to deprive thereof.

Sample Complaint: *obtained control over \$900 belonging to Nancy Miller by deception and with a purpose to deprive her of the money, by creating the false impression that the ring he was giving her in exchange for the money was made of 18 karat gold with a high quality diamond, which he did not believe to be true.*

Sample Complaint: *obtained control over \$1500.00, the property of John Dooley, by deception and with a purpose to deprive Dooley of the money, in that when he sold Dooley a 1990 Honda Civic, he failed to disclose that the car was subject to a \$1200 lien.*

## **3. RSA 637:5, Theft By Extortion**

[obtained or exercised control over] [the property of another], [by extortion] and with a purpose to deprive [name of the owner] thereof.

Sample Complaint: *he obtained \$1600.00 in cash from John Smith by extortion, with a purpose to deprive Smith of the money, by threatening to divulge information about Smith’s extramarital affair, which was information that Smith sought to conceal.*

## **4. RSA 637:6, Theft Of Lost Or Mislaid Property**

obtained [property of another] that he/she knew to have been [lost or mislaid, or delivered under a mistake as to identity of the recipient or the nature or the amount of property] without taking reasonable measures to return the property to the owner and he/she had the purpose to deprive [identify the

owner] of the property [when he/she obtained it or at any time prior to taking measures to return the property].

Sample Complaint: *she obtained a cord of firewood, valued at \$250.00, which belonged to another, knowing that the wood had been intended for someone else and had been delivered to her house by mistake, and she failed to take reasonable measures to return the property to the owner. She acted with a purpose to deprive the owner of the wood.*

## **5. RSA 637:7, Receiving Stolen Property**

knowingly [received or retained or disposed of] [property of another] [knowing that it had been stolen or believing that it had probably been stolen], with a purpose to deprive the owner thereof.

Sample Complaint: *knowingly received a set of silverware belonging to another, which was valued in excess of \$1000.00, believing that the silverware had probably been stolen, with a purpose to deprive the owner thereof.*

## **6. RSA 637:7-a, Possession Of Property Without Serial Number**

### **a. RSA 637:7-a, I, class A misdemeanor**

knowingly [removed, defaced, altered, changed, destroyed, obliterated, mutilated or caused to be removed, defaced, altered, changed, destroyed, obliterated, mutilated] the [identifying number[s] or other identifying mark] on [any property], with the intent to [conceal the identity of the item, defraud a manufacturer, seller or purchaser, or to hinder competition in the area of sales and servicing, or to prevent the detection of a crime].

Sample Complaint: *she knowingly obliterated the serial number on a 37" Sony T.V. with the intent to conceal the identity of the property.*

**b. RSA 637:7-a, II, class A misdemeanor**

knowingly [bought, received, possessed, sold, or disposed of] [any property] knowing that the [identifying number or other identifying mark] on the item had been [removed, defaced, altered, changed, destroyed, obliterated or mutilated] and failed to report the same to the nearest police station.

Sample Complaint: *knowingly bought a Stihl chainsaw from John Jones, knowing that the serial number on the chainsaw had been removed, and did not report that fact to the police.*

**7. RSA 637:8, Theft Of Services**

**a. RSA 637:8, I**

knowingly obtained [services] which he/she knew [were available only for compensation], by [deception, threat, force, or other means designed to avoid the due payment for the services].

Sample Complaint: *obtained cable TV services, valued at more than \$500 but less than \$1000, which she knew were available from the cable company only for a fee, by splicing a cable line onto her neighbor's cable, with the purpose to avoid due payment for the service.*

**b. RSA 637:8, II**

knowingly [diverted] the [services of another] [that he/she had control over], and to which he/she was not entitled, [to his or her own benefit or to the benefit of another who he or she knows is not entitled to it].

Sample Complaint: *knowingly diverted the services of the grounds keeping crew of the Holiday Hotel, over which he had control as their supervisor, to*

*his own benefit, knowing that he was not entitled to the services, by having the crew mow lawns and trim the bushes at his house at 21 Maple Street, Concord, while they were on-duty. The value of the services was more than \$500 but less than \$1000.*

## **8. RSA 637:9, Unauthorized Use Of Propelled Vehicle Or Rental Property**

### **a. RSA 637:9, I(a)**

purposely [used or operated] [a propelled vehicle] for his/her own purpose, without the owner's consent, when he/she [had custody of the vehicle under an agreement with the owner that he/she or another would perform a service for compensation, for the owner, involving the maintenance, repair or use of the vehicle], and [the use or operation of the vehicle constituted a gross deviation from the agreed purpose].

Sample Complaint: *knowingly used a 2000 Honda Shadow motorcycle for his own purpose and without the owner's consent, while he had the motorcycle in his custody pursuant to an agreement with the owner, Susan Miller, that he would perform an oil change on the motorcycle for payment, and the use of the motorcycle constituted a gross deviation from the agreed upon purpose. He rode the motorcycle from Concord to Hanover and back, a distance of approximately 150 miles. The value of the unauthorized use did not exceed \$500.*

### **b. RSA 637:9, I(b)**

had custody of [a propelled vehicle] [pursuant to a rental or lease agreement with the owner of the vehicle, which specified a time and place for the vehicle to be returned], and he/she knowingly [abandoned, neglected to deliver or refused to deliver the vehicle as agreed upon].

Sample Complaint: *had custody of a 2005 Honda Accord pursuant to a rental agreement with Hertz Car Rental, which specified that the car was to be*

*returned to the Hertz Car Rental Center at the Concord airport by 9:00 p.m. on September 25, 2006, and he knowingly failed to deliver the car at the agreed upon time and place. The value of the unauthorized use of the car was \$387.00.*

**c. RSA 637:9, I(c)**

had custody of [property] [pursuant to a rental or lease agreement with the owner, which specified the manner in which the property was to be returned], and he/she purposely [failed to comply with the terms of the agreement concerning the return, in a manner that constituted a gross deviation from the agreement].

*Sample Complaint: had custody of a commercial popcorn machine pursuant to a rental agreement with the owner, Taylor Rental, which agreement specified that the machine must be returned clean and in good working order, and she purposely failed to comply with those terms in a manner that constituted a gross deviation from the agreement. When she returned the machine, it contained a quantity of burnt oil and burnt popcorn, and the heating element no longer functioned. The value of the damage was more than \$500 but less than \$1000.*

**9. RSA 637:10, Theft By Misapplication Of Property**

knowingly obtained [property from another or personal services from an employee], [upon agreement], knowing that he/she was legally obligated to make [a payment or other disposition] to [a third party] and [purposely or recklessly] [failed to make the required payment or disposition] and [dealt with the property obtained or withheld as his/her own].

*Sample Complaint: knowingly obtained \$1200 from Susan Miller as payment on Ms. Miller's car insurance premium, knowing that she was legally obligated to make a payment to the insurance company in the same amount on Ms. Miller's behalf, and purposely failed to make the payment and instead withheld the money as her own.*



**10. RSA 637:10-a, Use Or Possession Of Theft Detection Shielding Devices And Theft Detection Device Removers**

**a. RSA 637:10-a, I(a), class A misdemeanor**

knowingly [manufactured, sold, offered for sale, or distributed] a [laminated or coated bag or device specifically designed, marketed, and intended to be used to shield merchandise from detection by an electronic or magnetic theft alarm sensor].

Sample Complaint: *knowingly offered to sell to an agent of the police a device that was specifically designed, marketed, and intended to be used to shield merchandise from detection by a magnetic theft alarm sensor.*

**b. RSA 637:10-a, I(b), class A misdemeanor**

knowingly possessed a [laminated or coated bag or device specifically designed, marketed, and intended to be used to shield merchandise from detection by an electronic or magnetic theft alarm sensor], with the intent to commit a theft.

Sample Complaint: *knowingly had in his coat pocket a laminated bag that was specifically designed, marketed, and intended to be used to shield merchandise from detection by an electronic or magnetic theft alarm sensor, with the intent to commit a theft of merchandise from Toys, Inc.*

**c. RSA 637:10-a, II, class A misdemeanor**

knowingly possessed [a tool or device] [that was designed to allow the removal of any theft detection device from any merchandise], with the intent [to use such tool to remove the detection device from the merchandise without the permission of the merchant or person owning or holding the merchandise].

Sample Complaint: *knowingly possessed a tool that was designed to remove theft detection devices from merchandise with the intent to use the tool to remove a theft detection device from a leather coat from Leathers Unlimited, without the permission of the store manager.*

## **Q. RSA Chapter 638, Fraud**

### **1. RSA 638:1, Forgery**

#### **a. RSA 638:1, I(a), class B misdemeanor**

knowingly [altered another's writing without authority OR uttered an altered writing] [with the purpose to defraud OR knowing that he or she was facilitating the commission of fraud by another].

Sample Complaint: *knowingly gave the salesperson at WalMart a sales receipt for a Sony T.V., on which the date had been altered, with the purpose to defraud. She presented the sales slip so that she could get a refund on the TV, knowing that she was not entitled to the refund because she had far exceeded the 30-day return period.*

#### **b. RSA 638:1, I(a), class B felony**

knowingly [altered, without authority OR uttered an altered] [an actual or purported security, revenue stamp, or other instrument issued by a government or government agency, OR a check, issue of stocks, bonds, OR any other instrument representing an interest in or a claim against property, or a pecuniary interest in or claim against a person or enterprise] [with the purpose to defraud OR knowing that he or she was facilitating the commission of fraud by another].

Sample Complaint: *knowingly facilitated the commission of a fraud by John Smith by altering the amount on a check issued to John Smith by Susan Jones from \$100.00 to \$700.00, knowing that Smith was going to cash the check.*

**c. RSA 638:1, I(b), class B misdemeanor**

knowingly [made, completed, executed, authenticated, issued, transferred, published or otherwise uttered] [any writing] so that [it purported to be the act of another OR to have been executed at a time or place or in a numbered sequence other than was in fact the case, OR a copy of an original when no such original existed], [with the purpose to defraud OR knowing that he or she was facilitating the commission of fraud by another].

Sample Complaint: *knowingly created a document that purported to be a bill of sale issued to him by Jim Riley, for a 1995 VW Jetta, with the purpose to defraud the New Hampshire Division of Motor Vehicles.*

**d. RSA 638:1, I(b), class B felony**

knowingly [made, completed, executed, authenticated, issued, transferred, published or otherwise uttered] [an actual or purported security, revenue stamp, or other instrument issued by a government or government agency, or a check, issue of stocks, bonds, or any other instrument representing an interest in or a claim against property, or a pecuniary interest in or claim against a person or enterprise] so that [it purported to be the act of another OR to have been executed at a time or place or in a numbered sequence other than was in fact the case, OR a copy of an original when no such original existed], [with the purpose to defraud OR knowing that he/she was facilitating the commission of fraud by another].

Sample Complaint: *knowingly presented a check that purported to be issued to her by Susan Miller, with the purpose to defraud. She presented a check in the amount of \$1100.00 to the teller at National Bank, made payable to herself, which purported to have been issued by Susan Miller, knowing that it was not, with the purpose to defraud the bank.*

e. **RSA 638:1, V, class B misdemeanor**

knowingly possessed [any writing that is a forgery OR a device for making a forged writing], [with the purpose to defraud OR knowing that he/she was facilitating the commission of fraud by another person].

Sample Complaint: *she knowingly possessed two metal dies for the printing of false share certificates in Public Service Company of New Hampshire, with the purpose of defraud another.*

2. **RSA 638:2, Fraudulent Handling Of Recordable Writings**

a. **RSA 638:2, class B felony**

[falsified, destroyed, removed or concealed] a [will, deed, mortgage, security instrument, or other writing for which the law requires public recording] with the purpose to [deceive or injure] anyone.

Sample Complaint: *he concealed the Last Will and Testament of John Smith, a document that must be publicly recorded pursuant to RSA 548:5, with the purpose to injure Mr. Smith's heirs.*

3. **RSA 638:3, Tampering With Public Or Private Records**

a. **RSA 638:3, class A misdemeanor**

knowing that he/she had no privilege to do so, he/she [falsified, destroyed, removed, or concealed] [any writing or record, public or private] with a purpose to [deceive OR to injure anyone OR to conceal any wrongdoing].

Sample Complaint: *knowing that she had no authority to do so, she destroyed a personal loan note dated October 22, 2006, which she had signed, acknowledging that John Smith loaned her \$3500.00, with the purpose to*

*injure John Smith by preventing him from perfecting a legal claim against her property based on the note.*

#### **4. RSA 638:4, Issuing Bad Checks**

*NOTE:* The grade of the offense depends on the amount of the check:

- it is a class A felony if the face amount of the check exceeds \$1000;
- it is a class B felony if the face amount is greater than \$500 but not more than \$1000;
- it is a class A misdemeanor if the face amount is less than \$500 and the person has been convicted of a similar offense within the last 12 months; and
- in all other cases, it is a class B misdemeanor.

Unless the complaint charges a class B misdemeanor, it must allege the amount of the check in the complaint and, in the case of a class A misdemeanor, the previous conviction.

##### **a. RSA 638:4**

[issued or passed] [a check for the payment of money], knowing that the check would not be paid, and payment was refused by the drawee.

*Sample Complaint—class B felony: issued a check payable to the City of Concord, NH for \$525.00, knowing that it would not be paid by the drawee, TD Banknorth, and the drawee refused payment because there were insufficient funds in the account.*

*Sample Complaint—class A misdemeanor: issued a check payable to the City of Concord, NH for \$525.00, knowing that it would not be paid by the drawee, TD Banknorth, and the drawee refused payment because there were insufficient funds in the account. The defendant was previously convicted of an offense under this statute in the Hillsborough District Court on July 21, 2007.*

## 5. RSA 638:5, Fraudulent Use Of Credit Card

*NOTE:* The level of the offense depends on the value of services or property obtained:

- it is a class A felony if the value is in excess of \$1000;
- it is a class B felony if the value is more than \$500, but not more than \$1000;
- in all other cases it is a misdemeanor.

If you are charging a class A or class B felony, you must include in the complaint an allegation of the value of the services or property obtained.

### a. RSA 638:5

used a credit card for the purpose of obtaining [property or services], valued at [state the amount specifically, or in the range that determines the level of the offense] knowing that [the card was stolen OR the card had been revoked or cancelled, OR for any other reason his or her use of the card was unauthorized by either the issuer or the person to whom the card was issued].

Sample Complaint—misdemeanor: *used a Visa credit card #1234 5678 9103 7734, issued to Julie L. Cain, at the Hess Service Station on North Main Street in Concord, for the purpose of purchasing \$65.00 of gas, knowing that the card had been stolen.*

Sample Complaint—class B felony: *used a Visa credit card #1234 5678 9103 7734, issued to Julie L. Cain, to purchase merchandise valued at a total of 836.79 from the Home Depot store in Concord, knowing that he was not authorized by Ms. Cain to use the card.*

**6. RSA 638:5-a, Fraudulent Communications Paraphernalia**

**a. RSA 638:5-a, II, class B felony**

knowingly [created, offered, or transferred] to [another] [any fraudulent communications paraphernalia as defined in RSA 638:5-a, OR information for creating or using such paraphernalia].

Sample Complaint: *purposely offered Jack Jones a device that is intended for use to obtain cable television service from a cable service provider by making an unauthorized connection to the cable delivery instrument, in order to avoid having to pay a lawful charge for the cable service.*

**b. RSA 638:5-a, III, class A misdemeanor**

[knowingly or wilfully] possessed [fraudulent communications paraphernalia, as defined in RSA 638:5-a, OR information for creating or using such paraphernalia].

Sample Complaint: *knowingly possessed a device designed to obtain toll telecommunications services from a provider by making an unauthorized connection to another telephone instrument in such a way that would allow the user to avoid paying a lawful charge for such telecommunications services.*

**c. RSA 638:5-a, IV, class A misdemeanor**

purposely [communicated or caused to be communicated] [the number or code of an existing, canceled, revoked, expired, or nonexistent credit card issued by a company providing telecommunications services OR the numbering or coding system that is employed in the issuance of such credit cards; OR any method, scheme, instruction or information on how to fraudulently avoid payment for telecommunications services] with the intent that [the number, coding system, or information] [be used fraudulently to avoid the payment of lawful charges imposed by the company].

Sample Complaint: *purposely told David Miller the number of an expired credit card issued by Sprint Communications with the intent that the number would be used to fraudulently to obtain phone services and avoid having to pay lawful charges imposed by Sprint.*

## **7. RSA 638:6, Deceptive Business Practices**

### **a. RSA 638:6, I(a), class B misdemeanor**

[knowingly or recklessly] [used or possessed for use] [a false weight, a false measure, or any other device for falsely determining or recording any quality or quantity].

Sample Complaint: *recklessly used a false weight in that he used a meat scale that recorded a weight 4 ounces greater than the actual weight of the meat.*

### **b. RSA 638:6, I(b), class B misdemeanor**

[knowingly or recklessly] [sold, offered or exposed for sale, or delivered] [less than the represented quantity of any commodity or service].

Sample Complaint: *recklessly sold a quantity of wood to David Hoar, which he represented to be a full cord, but which was less than what was represented.*

### **c. RSA 638:6, I(c), class B misdemeanor**

[knowingly or recklessly] [took or attempted to take] [more than the represented quantity of any commodity or service] when, as the buyer, he/she [furnished the weight or measure].



Sample Complaint: *knowingly took thirty 40-pound bags of mulch from Agway, which was more than the twenty-five bags that she told the cashier she was buying.*

**d. RSA 638:6, I(d), class B misdemeanor**

[knowingly or recklessly] [sold, offered or exposed for sale] [commodities that were adulterated or mislabeled commodities, as defined in RSA 638:6 (d)].

Sample Complaint: *recklessly offered for sale mislabeled apples, which were labeled as having been stored in a “controlled atmosphere” but were kept in storage in a room containing in excess of 5% oxygen, which is at variance with the standards set forth in RSA 436:26.*

**e. RSA 638:6, I(e), class B misdemeanor**

[knowingly or recklessly] made a [false or misleading statement] [in any advertisement addressed to the public, or a substantial segment thereof], for the purpose of promoting the [purchase or sale] of [property or services].

Sample Complaint: *she recklessly made a misleading statement in a public advertisement, published in the Manchester Union Leader, for the purpose of promoting the sale of Goodyear Tires. The advertisement stated that “All Goodyear Tires will last 40-50,000 miles.”*

**8. RSA 638:7, Commercial Bribery**

*NOTE:* The level of the offense of commercial bribery depends on the value of the benefit conferred or offered:

- it is a class A felony if the value is in excess of \$1000;
- it is a class B felony if the value is more than \$500, but not more than \$1000;

- in all other cases it is a misdemeanor.

**a. RSA 638:7, I(a)**

[conferred, offered or agreed to confer] [any benefit] upon [an employee, agent, or fiduciary of an employer or principal] with the purpose of [influencing the conduct of the employee, agent or fiduciary in relation to the employer's or principal's affairs], without the consent of and against the best interest of [the employer or the principal].

Sample Complaint: *offered to confer on John Smith, the purchasing manager for Northern Kitchen Supplies, a benefit of \$15,000, with the purpose of influencing Smith to purchase all of the cookware for the store from her company, Pots Inc., without the consent and against the best interests of Northern Kitchen Supplies.*

**b. RSA 638:7, I(b)**

as [an employee, agent, or fiduciary of an employer or principal], he/she [solicited, accepted, or agreed to accept] [any benefit from another] [upon an agreement or understanding that such benefit will influence his or her conduct in relation to his employer's or principal's affairs].

Sample Complaint: *as an agent of Allstate insurance, he agreed to accept a payment of \$2,000 from Alice Downing, with the understanding that, in exchange for the money, he would issue Ms. Downing an Allstate homeowner's insurance policy at a cost of \$400, to which she would not otherwise be eligible.*

**c. RSA 638:7, II**

[purposely or knowingly] held him/herself out to the public as [being engaged in the business of making disinterested appraisals,

selections, or criticism of goods or services] and he/she [solicited, accepted, or agreed to accept] [any benefit to influence his appraisal, selection, or criticism].

Sample Complaint: *purposely held himself out to the public as being engaged in the business of making disinterested appraisals of antique glass, by advertising his business in the Manchester Union Leader, and he agreed to accept a payment of \$500 to appraise a glass vase at significantly more than he believed it was worth.*

## **9. RSA 638:8, Sports Bribery**

*NOTE:* Sports bribery is a class B felony unless one of the following applies and is alleged in the body of the complaint, in which case it is a class A felony:

- the value of the benefit referred to in paragraphs I(a), (b), or (d) is more than \$1000;
- the value of the benefit gained or to be gained from influencing the outcome of a contest referred to in paragraph I(c) is more than \$1000; or
- the injury threatened in subparagraphs I(a) or (b) is a serious bodily injury.

### **a. RSA 638:8, I(a)**

with a purpose to [influence any participant or prospective participant] [not to give his/her best efforts in a publicly exhibited contest], he/she [conferred, offered to confer, or agreed to confer any benefit on OR threatened any injury to] any such participant or prospective participant.

Sample Complaint—class A felony: *he offered Rob Davis a stereo, valued at \$2,500, with the purpose to influence Davis not to put forth his best efforts*

*during the March 3rd, 2006 hockey game between the Manchester Monarchs and the Lowell Lochmonsters, in which Davis was slated to play.*

**b. RSA 638:8, I(b)**

with a purpose to [influence an official in a publicly exhibited contest to perform his duties improperly], he/she [conferred, agreed to confer, or offered to confer any benefit OR threatened any injury] to such official.

Sample Complaint—class B felony: *with a purpose to influence David Gravel to improperly perform his duties as an official referee at New England Soccer championship, played in Manchester on July 8, 2005, he offered to pay Gravel \$750 to ignore fouls committed by the Worcester Waves.*

**c. RSA 638:8, I(c)**

with a purpose to [influence the outcome of a publicly exhibited contest], he/she [tampered with any person, animal or thing] [contrary to the rules and usages purporting to govern such contest].

Sample Complaint: *with a purpose to influence the outcome of a harness horse race at the Lucky J Race Track on June 3, 2007, he tampered with Highland Hero, a racehorse, by administering methamphetamine to the horse, contrary to the Pari 703.02.*

**d. RSA 638:8, I(d)**

knowingly [solicited, accepted, or agreed to accept] [any benefit], [the giving of which would be criminal under RSA 638:8, I (a) or (b)].

Sample Complaint: *knowingly solicited a benefit, a cash payment of \$200, the giving of which would be criminal under RSA 638:8, I(a). She solicited the*

*payment in exchange for an agreement that she would run in, but not complete the marathon held in Manchester on October 13, 2007.*

## **10. RSA 638:11, Misapplication Of Property**

### **a. RSA 638:11, class A misdemeanor**

knowingly dealt with [property entrusted to him as a fiduciary OR property of the government OR property of a financial institution] [in a manner that violated his or her duty], and [which involved a substantial risk of loss to the owner OR to a person for whose benefit the property was entrusted].

Sample Complaint: *knowingly handled \$5,000 that Jack Jones had entrusted to him a fiduciary in a manner that violated his duty as a fiduciary, and which involved a substantial risk of loss to Jack Jones. He invested the money in his brother's start-up uranium metal company, knowing that the company was severely and illegally undercapitalized.*

## **11. RSA 638:12, Fraudulent Execution Of Documents**

### **a. RSA 638:12, class A misdemeanor**

purposely [caused another person], by [threat or deception], to [sign or execute] [any instrument that affected or was likely to affect the pecuniary interest of any person].

Sample Complaint: *purposely caused Diane Miller to sign an instrument that affected her pecuniary interest by deception. She had Miller sign a release of all claims against John Jones arising out of an automobile accident that occurred on April 24, 2006 - by falsely telling Miller that the insurance company required the release before it would pay any bills.*

## 12. RSA 638:13, Use And Possession Of Slugs

### a. RSA 638:13, I(a), violation

[inserted, deposited, or used] a slug in a machine, with the purpose of [defrauding the supplier of property or a service offered or sold by means of a coin machine].

Sample Complaint: *inserted a slug in a candy machine located at the ABC laundromat, with the purpose of defrauding the laundromat by obtaining candy without actually paying for it.*

### b. RSA 638:13, I(b), violation

[made, possessed, or disposed of] a slug with the purpose of [enabling a person to use it fraudulently in a coin machine].

Sample Complaint: *gave Jane Butler a slug, with the purpose of enabling Butler to use it to fraudulently obtain a ticket from the subway ticket vending machine.*

## 13. RSA 638:14, Unlawful Simulation Of Legal Process

### a. RSA 638:14, class A misdemeanor

knowingly [sent, mailed or delivered] to [another person] [a notice or other writing which has no judicial sanction, but which in its format or appearance simulates a summons, complaint, court order or process, including, but not limited to, a lien, indictment, warrant, injunction, writ, notice, pleading, subpoena, OR an insignia, seal or printed form of a federal, state, or local government or an instrumentality thereof OR is otherwise calculated to induce a belief that it does have a judicial or other official sanction] with the purpose of [procuring another's compliance with the defendant's request].

Sample Complaint: *knowingly mailed a document to Darlene Booth, ordering her to pay him \$75.00 for a default judgment allegedly entered against Booth by the Concord District Court on November 3, 2006, with the purpose of getting Booth to comply with his request to pay him \$75.00. The document was not judicially sanctioned but by its format, appeared to be an order issued by the Concord District Court.*

#### **14. RSA 638:17, Computer Related Offenses**

*NOTE:* A computer crime committed before January 1, 2008 is:

- a class A felony if the damage to or the value of the property or computer services exceeds \$1000;
- a class B felony if the damage to or the value of the property or computer services exceeds \$500 but is less than \$1000, or if the person recklessly engaged in conduct that created a risk of serious physical injury to another;
- in all other cases it is a misdemeanor.

The value of the damage must be alleged in the complaint if the offense being charged is either a class A or class B felony. The same penalties apply for a computer crime committed on or after January 1, 2008 except for the following:

- it is a class A felony if the person has been previously convicted of a violation of RSA 638:17, II, IV, or VI, or any other statute prohibiting similar conduct in another jurisdiction;
- it is a class B felony if the person has violated RSA 638:17, II, IV, or VI.

The existence of the prior conviction must be alleged in the complaint in order to charge the class A or class B felony.

##### **a. RSA 638:17, I**

knowingly [accessed or caused to be accessed] [a computer or computer network] without authorization.

Sample Complaint—misdemeanor: *knowingly accessed the computer network at Concord Medical Services, Inc., without authorization.*

**b. RSA 638:17, II**

knowingly [accessed, caused to be accessed, used, or caused to be used] [a computer or computer network] with the purpose of obtaining [unauthorized computer services].

Sample Complaint—misdemeanor: *knowingly accessed the computer network at Structural Designs, Inc. with the purpose of obtaining unauthorized use of the computer-aided design program.*

**c. RSA 638:17, III**

[knowingly or recklessly] [disrupted, degraded, caused the disruption of degradation of computer services, OR denied or caused the denial of computer services to an authorized user of a computer or computer network].

Sample Complaint—class A felony: *recklessly caused the degradation of the computer services available through the computer network of the Swanzey College by sending an e-mail to David Smith, a student at the college, which contained a virus. The cost of replacing the damaged computer services was \$2500.*

**15. RSA 638:22, Criminal Acts Involving Cloned Phone And Telephone Paraphernalia; Possession Or Use**

**a. RSA 638:22, I, class A misdemeanor**

knowingly [possessed or used] a cloned wireless phone.

Sample Complaint: *knowingly possessed a cloned wireless phone. Her wireless phone was programmed with a mobile identification number assigned*



to another Verizon subscriber, George Samuelson, without the consent of Verizon.

**b. RSA 638:22, II, class B felony**

knowingly [possessed telephone cloning paraphernalia OR possessed or used 2 or more unauthorized access devices or defaced access devices].

Sample Complaint: *she knowingly possessed two telephone calling cards, belonging to Wynn Below and Sarah Miller respectively, without the authorization of either subscriber.*

**16. RSA 638:26, Identity Fraud**

**a. RSA 638:26, I(a), class A felony**

[posed as another], with the purpose [to defraud], [in order to obtain money, credit, goods, services, or anything else of value].

Sample Complaint: *posed as Helen Miller with the purpose to defraud Bank of America in order to obtain a credit. The defendant submitted an application for a Bank of America credit card in the name of Helen Miller.*

**b. RSA 638:26, I(b), class A felony**

purposely obtained [personal identifying information] about [another] without that person's express authorization, with the intent [to pose as that person].

Sample Complaint: *obtained a copy of Joan Smith's social security number, without Smith's permission, with the intent of falsely representing herself as Joan Smith.*

**c. RSA 638:26, I(c), class A felony**

purposely [obtained or recorded] [personal identifying information] about [another], without that person's express authorization, with the purpose to [aid another to pose as that person].

*Sample Complaint: purposely recorded John Davis's savings account number at TD Banknorth, without Davis's express permission, with the purpose of aiding Jeff Miller to pose as Davis and access his account.*

**d. RSA 638:26, I(d), class A felony**

purposely [posed as another], without that person's express authorization, with the purpose of [obtaining personal identifying information about the person that is not available to the general public].

*Sample Complaint: purposely posed as Jennifer Hill, without Hill's express authorization, with the purpose of getting Hill's bank account number, which is not available to the general public. The defendant identified herself as Jennifer Hill to a teller at TD Banknorth using a false driver's license, and requested the account number for Hill's savings account.*

**17. RSA 638:29, Use Of Scanning Device Or Reencoder To Defraud**

*NOTE:* This offense is a class B felony if the defendant:

- has one or more prior convictions in New Hampshire or another state for conduct described in this statute; or
- has used a scanning device or reencoder to defraud two or more times in violation of this statute.

Otherwise, the offense is a misdemeanor.

**a. RSA 638:29, I(a)**

knowingly [used a scanning device] to [access, read, obtain, memorize, or store temporarily or permanently] [information encoded on the magnetic strip or stripe of a payment card], without the permission of the owner, with the intent to [defraud the authorized user, the issuer of the authorized user's payment card, or a merchant].

Sample Complaint—class B felony: *knowingly used a scanning device to read the information on a credit card belonging to David Allen, without Mr. Allen's permission, with the intent to defraud a merchant. He scanned the credit card information with the intent to use the information to make on-line purchases. The defendant was previously convicted of conduct prohibited by RSA 632:29, I(a) in the Albany, NY district court on June 30, 2005.*

**b. RSA 638:29, I(b)**

knowingly [used a reencoder] to [place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card], without the permission of [the authorized user of the card from which the information was reencoded], with the intend to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant].

Sample Complaint: *knowingly used a reencoder to place information encoded on the magnetic strip of Visa card number 1234 5674 8945 8876, issued to Deb Sculley, onto the magnetic strip of another credit card, without Ms. Sculley's permission, and with the intend to defraud Ms. Sculley.*

## **R. RSA Chapter 639, Offenses Against The Family**

### **1. RSA 639:2, Incest**

#### **a. RSA 639:2, class B felony**

knowingly [married, had sexual intercourse with, or lived together under the representation of being married with] [a person] he/she knew to be his/her [ancestor, descendant, brother or sister, of the whole or half blood, or an uncle, aunt, nephew or niece].

Sample Complaint: *knowingly married Alice Chase, a person he knew to be his niece.*

### **2. RSA 639:3, Endangering Welfare Of Child Or Incompetent**

#### **a. RSA 639:3, I, misdemeanor**

knowingly endangered the welfare of [a child under 18 years of age or an incompetent] by [purposely violating a duty of care, protection or support he or she owes to such child or competent OR by inducing such child or incompetent to engage in conduct that endangers his health or safety].

Sample Complaint: *knowingly endangered the welfare of her 3 year-old child, T.B., by purposely violating her duty of care to the child. She left T.B. in a locked car, with no windows open, while she was in the Shining Stars nightclub.*

Sample Complaint: *knowingly endangered the welfare of his 12 year-old child, B.L., by inducing B.L. to ingest a quantity of cocaine, which conduct endangered B.L.'s health and safety.*

**b. RSA 639:3, II, misdemeanor**

knowingly endangered the welfare of [a child under the age of 18 years of age] by [tattooing, branding, or causing someone else to tattoo or brand] the child.

Sample Complaint: *knowingly endangered the welfare of her 6 year-old grandson, B. P., by paying an employee at the Black Spider Tattoo Parlor to tattoo B.P.*

**c. RSA 639:3, III, class B felony**

knowingly endangered the welfare of [a child under the age of 16], by [soliciting the child to engage in sexual activity for the purpose of creating a visual representation as defined in RSA 649-A:2, IV, or to engage in sexual penetration as defined in RSA 632-A:1, V].

Sample Complaint: *knowingly endangered the welfare of S.N., a child under the age of 16, by soliciting S.N. to engage in mutual masturbation with Victoria V. for the purpose of creating a photograph.*

**3. RSA 639:5, Concealing The Death Of A Newborn**

**a. RSA 639:5, class B felony**

knowingly [concealed the corpse of a newborn child].

Sample Complaint: *knowingly concealed the corpse of a newborn child. After giving birth, she wrapped the child's body in newspaper and threw it in a dumpster.*

## S. **RSA Chapter 639-A, Methamphetamine Related Crimes**

### 1. **RSA 639-A:2, I, class B felony**

knowingly engaged in [manufacturing or the attempted manufacture of methamphetamine; storing of any chemical substance; storing or disposing of any methamphetamine waste products; or storing or disposing of any methamphetamine paraphernalia] [in the presence of a child or an incapacitated adult OR in the residence of a child or an incapacitated adult OR in a building, structure, conveyance, or outdoor location where a child or incapacitated adult might reasonably be expected to be present OR in a drug-free school zone OR in a room offered to the public for overnight accommodations OR in a multi-unit residential building].

Sample Complaint: *knowingly stored methamphetamine waste products in her residence at 93 South Main Street, apt. #3, which is located in a multi-unit residential building.*

### 2. **RSA 639-A:2, II, class B felony**

knowingly [caused or permitted] [a child or incapacitated adult] to [inhale, be exposed to, have contact with, or ingest] [methamphetamine, a chemical substance, or methamphetamine paraphernalia].

Sample Complaint: *knowingly permitted her nephew, Ryan D., an incapacitated adult, to have contact with methamphetamine paraphernalia, including funnels and storage jars used in the manufacturing of methamphetamine.*

### 3. **RSA 639-A:2, III, class B felony**

with the intent to [manufacture methamphetamine OR store of any chemical substance OR store or dispose of any methamphetamine waste

products OR store or dispose of any methamphetamine paraphernalia], he/she knowingly [caused or permitted] [any child or incapacitated adult] to buy or otherwise obtain methamphetamine paraphernalia].

Sample Complaint: *with the intent to manufacture methamphetamine, she knowingly caused Ryan D., an incapacitated adult to purchase Drano, a substance used in the manufacturing process.*

## **T. RSA Chapter 640, Corrupt Practices**

### **1. RSA 640:2, Bribery In Official And Political Matters**

#### **a. RSA 640:2, I(a), class B felony**

[promised, offered, or gave] [any pecuniary benefit] to [another] with the purpose of [influencing that other person's action, decision, opinion, recommendation, vote, nomination, or other exercise of discretion] as a [public servant, party official or voter].

Sample Complaint: *promised \$100 to Arthur Drake with the purpose of influencing Drake, in his capacity as Selectperson in the Town of Canton, to vote against the proposed cuts to the library budget.*

#### **b. RSA 640:2, I(b), class B felony**

being a [public servant, party official, candidate for electoral office, or voter], he/she knowingly [solicited, accepted, or agreed to accept] [any pecuniary benefit] from [another], [knowing or believing the other's purpose was to influence his/her action, decision, opinion, recommendation, vote, nomination, or other exercise of discretion] as a [public servant, party official, candidate for electoral office, or voter].

Sample Complaint: *being a candidate for the selectboard of Trenton, she knowingly agreed to accept \$125.00 from Trudy Stentson, believing that Ms. Stentson's purpose was to influence her to vote, as a selectperson, in favor of hiring Tom Trainor as the Trenton police chief.*

**c. RSA 640:2, I(b), class B felony**

being a [public servant, party official, candidate for electoral office, or voter], he/she knowingly failed to report to a law enforcement officer that he/she [was offered or promised a pecuniary benefit in violation of RSA 640:2, I(a)].

Sample Complaint: *being a voter, she knowingly failed to report to law enforcement that George Barnett promised to pay her \$50.00 if she would vote against T. Bucker for school board during the November 2007 election in Swensonville, in violation of RSA 640:2, I(a).*

**2. RSA 640:3, Improper Influence**

**a. RSA 640:3, I(a), class B felony**

purposely [threatened harm] to [a public servant, party official, or voter] with the purpose of [influencing that person's action, decision, opinion, recommendation, nomination, vote or other exercise of discretion].

Sample Complaint: *purposely threatened to damage a car belonging to Susan Lake, a member of the Concord Planning Board, with the purpose of influencing Ms. Lake to vote against the pending application to allow the development of a new WalMart store.*

**b. RSA 640:3, I(b), class B felony**

[privately addressed] to [any public servant who had or will have an official discretion in a judicial or administrative proceeding] any [representation, argument or other communication] with the purpose of



[influencing that discretion on the basis of considerations other than those authorized by law].

Sample Complaint: *privately addressed a communication to John Eggle, a hearings examiner for the Department of Safety who was assigned to preside over the Administrative License Suspension hearing to determine whether the defendant's driver's license should be suspended, with the purpose to influence Mr. Eggle's discretion in that matter on the basis of considerations other than those authorized by law. The defendant privately told Mr. Eggle that if his license were suspended he would publicly disclose that Mr. Eggle was having an extramarital affair.*

**c. RSA 640:3, I(c), class B felony**

being a [public servant or party official], he/she knowingly failed to report to a law enforcement officer [conduct designed to influence him/her, in violation of RSA 640:3, I(a) or RSA 640:3, I(b)].

Sample Complaint: *being a member of the New Hampshire Legislature, she failed to report to a law enforcement officer conduct designed to influence her vote in violation of RSA 640:3, I(b). She failed to report that Jonathan Mueller privately told her that he and others would boycott her business if she voted in favor of House Bill 111.*

**3. RSA 640:4, Compensation For Past Action**

**a. RSA 640:4, I, class A misdemeanor**

being [a public servant], he/she [purposely or knowingly] [solicited, accepted or agreed to accept] [any pecuniary benefit] in return for having [given a decision, opinion, recommendation, nomination, vote, OR exercised his or her discretion, OR for having violated his duty].

Sample Complaint: *as a member of the Conway Zoning Board, he knowingly accepted a free round-trip airplane ticket to San Diego, California, in return*

*for having voted in favor of granting a variance to Cell Services, Inc. for the installation of cell phone towers.*

**b. RSA 640:4, II, class A misdemeanor**

[purposely or knowingly] [promised, offered, or gave] [any pecuniary benefit], [acceptance of which would be in violation of RSA 640:4, I].

Sample Complaint: *purposely offered a case of Seagram's Seven Crown liquor to John James, a consultant to the New Hampshire Water Supply and Pollution Control Division, in return for Mr. James recommending approval of the defendant's sub-development plan in Pembroke. Acceptance of the liquor under those circumstances would have been in violation of RSA 640:4, I.*

**4. RSA 640:5, Gifts To Public Servants**

**a. RSA 640:5, I, class A misdemeanor**

being a [public servant], he/she knowingly [solicited, accepts or agreed to accept] [any pecuniary benefit] from [a person who is, or is likely to become subject to or interested in] [any matter or action pending before or contemplated by the public servant or the governmental body with which the public servant affiliated].

Sample Complaint: *as a member of the jury hearing the case of State v. Thomas Dowd, he knowingly solicited \$500 from Thomas Dowd, the defendant in that trial.*

**b. RSA 640:5, II, class A misdemeanor**

knowingly [gave, offered or promised] [any pecuniary benefit prohibited by RSA 640:5, I].

Sample Complaint: *knowingly promised James Connell, a member of the Board of Psychologists, that he would re-roof Connell's house for no charge, knowing that Connell would be a member of the panel of the Board considering disciplinary action against him.*

## **5. RSA 640:6, Compensation For Services**

### **a. RSA 640:6, I, class A misdemeanor**

being [a public servant], he/she knowingly [solicited, accepted, or agreed to accept] [any pecuniary benefit] [in return for advice, or other assistance in preparing or promoting] [a bill, contract, claim, or other transaction or proposal] as to which [the defendant] knew that [he or she had or was likely to have an official discretion to exercise].

Sample Complaint: *as a member of the Dedham City Council, he knowingly accepted two acres of land in Farmington from Tom Aker in return for assisting Aker in preparing a proposal for snow plowing services for the City of Dedham, knowing that he would likely be in a position to vote on the approval of the proposal.*

### **b. RSA 640:6, II, class A misdemeanor**

knowingly [gave, offered, or promised] [any pecuniary benefit prohibited by RSA 640:6, I].

Sample Complaint: *knowingly promised Ellen Gerry, a Sutterly Selectperson, \$500 in return for Ms. Gerry's advice on preparing a contract proposal for accounting services to the town, knowing that Ms. Gerry would have to give official approval of the contract. Such a payment would have violated RSA 640:6, I.*

## **6. RSA 640:7, Purchase Of Public Office**

### **a. RSA 640:7, I, class A misdemeanor**

knowingly [solicited, accepted, or agreed to accept] for [him/herself, another person, or a political party] [money or other pecuniary benefit] [as compensation for his/her/its endorsement, nomination, appointment, approval, or disapproval] of [any person] [for a position as a public servant or for the advance of any public servant].

Sample Complaint: *knowingly accepted \$100 for himself as compensation for his endorsement of Wesley Tiller for speaker of the New Hampshire House of Representatives.*

### **b. RSA 640:7, II, class A misdemeanor**

knowingly [gave, offered, or promised] [any pecuniary benefit prohibited by RSA 640:7, I].

Sample Complaint: *knowingly gave George Moss, former commissioner of the New Hampshire Department of Resources and Economic Development (“DRED”), \$50 as compensation for Moss’s approval of her promotion from deputy commissioner to commissioner of DRED. The compensation was a benefit prohibited by RSA 640:7, I.*

## **U. RSA Chapter 641, Falsification In Official Matters**

### **1. RSA 641:1, Perjury**

#### **a. RSA 641:1(a), class B felony**

during [an official proceeding], he/she knowingly [made a false material statement under oath or affirmation OR swore or affirmed the truth of a material statement previously made] and he/she did not believe the statement to be true.

Sample Complaint: *during a trial in the Concord District Court, he knowingly made a material false statement under oath, which he did not believe to be true. He stated, "I never threatened to hit Doug Jones."*

**b. RSA 641:I(b), class B felony**

knowingly [made inconsistent material statements under oath or affirmation in official proceedings], [both of which were made within the statute of limitations], [one of the statements was false] and he/she did not believe it to be true.

Sample Complaint: *knowingly made inconsistent material statements under oath in an official proceeding, one of which statements was false and she did not believe it was true. During a child abuse and neglect hearing in the Merrimack District Court in July 2004, she testified that she had never seen her husband strike her stepson, John. During that same hearing, she testified that she saw her husband repeatedly strike John with a belt.*

**2. RSA 641:2, False Swearing**

**a. RSA 641:2, I, class A misdemeanor**

knowingly [made a false statement under oath or affirmation OR affirmed the truth of a statement previously made and did not believe the statement was true] and [the falsification occurred in an official proceeding OR was made with a purpose to mislead a public servant in performing his/her official function OR the statement was one that, by law, is required to be sworn before a notary or other person authorized to administer oaths].

Sample Complaint: *knowingly made a false statement under oath during a trial in the Rockingham County Superior Court. He testified that he had never been convicted of a crime when, in fact, he had.*

Sample Complaint: knowingly made a false statement under oath in a document that the law required be sworn before a notary. She stated in her financial affidavit in support of her application for appointed counsel that she had no assets when, in fact, she owned two houses. Administrative Rule Adm 1003.03 requires such a financial affidavit be sworn before a notary.

**b. RSA 641:2, II, class A misdemeanor**

knowingly made [inconsistent statements under oath or affirmation, one of which was false and he/she did not believe it to be true] and [both statements fall within the 1-year statute of limitations].

Sample Complaint: knowingly made inconsistent statements under oath, one of which was false and she did not believe it to be true. On July 3, 2007, she stated on a criminal history release form that her social security number was 001-123-4567; on September 5, 2007, she stated on another criminal history release form that her social security number was 005-40-6758.

**3. RSA 641:3, Unsworn Falsification**

**a. RSA 641:3, I, class A misdemeanor**

knowingly made [a written or electronic false statement] which he/she did not believe to be true, [on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable].

Sample Complaint: knowingly made the false written statement, “I have paid all residences taxes for which I am liable,” which she did not believe to be true, on a motor vehicle driver’s license application form that bore a notification authorized by RSA 260:10 stating “this application is signed under penalty of unsworn falsification pursuant to RSA 641:3.”

**b. RSA 641:3, II(a), class A misdemeanor**

made [a written or electronic false statement] that he/she did not believe to be true, with a purpose to deceive a public servant in the performance of his/her official function].

Sample Complaint: *made a false written statement that he was a resident of New Hampshire, which he did not believe to be true, and made the statement with the purpose to deceive an employee at the Division of Motor Vehicles, in her performance of issuing a driver's license.*

**c. RSA 641:3, II(b), class A misdemeanor**

knowingly [created a false impression in a written application for any pecuniary or other benefit] [by omitting information necessary to prevent statements therein from being misleading], with a purpose to [deceive a public servant in the performance of his/her official function].

Sample Complaint: *knowingly created a false impression in a written application for financial assistance from the City of Concord by omitting information that she had \$2,500 in savings, which was necessary to prevent her statements from being misleading, and she did so with the purpose of deceiving the employee of the City of Concord Welfare department responsible for determining her eligibility for financial assistance.*

**d. RSA 641:3, II(c), class A misdemeanor**

[submitted or invited reliance on] [any writing] knowing that [it was lacking in authenticity], with a purpose to [deceive a public servant in the performance of his or her official function].

Sample Complaint: *submitted a letter to the Springfield Zoning Board purportedly written by her neighbor, Julia Reynolds, in support of her request for a variance, knowing that the letter was not authentic. She did so with a*

*purpose to deceive the members of the zoning board in their decisions on the variance request.*

#### **4. RSA 641:4, False Report To Law Enforcement**

##### **a. RSA 641:4, I, class A misdemeanor**

knowingly [gave or caused to be to be given] [false information] to any law enforcement officer with the purpose of [inducing such officer to believe that another has committed an offense].

Sample Complaint: *knowingly gave John Smith, Hampton County Deputy Sheriff, information that Darryl Jones had assaulted the defendant, knowing the information was false. He did so with the purpose of inducing Smith to believe that Jones had committed an offense.*

*NOTE:* If the false report involved alleged police misconduct, the State must also allege in the complaint and prove that defendant's purpose, or conscious object, in giving the false report was to instigate a criminal investigation of a police officer's conduct. State v. Allard, 148 N.H. 702, 707 (2002).

##### **b. RSA 641:4, II, class A misdemeanor**

knowingly [gave or caused to be given] information to a law enforcement officer [concerning the commission of an offense OR the danger from an explosive or other substance] knowing that [the offense did not occur OR the danger did not exist OR that he/she did not have any information relating to the danger or the offense].

Sample Complaint: *knowingly gave information to Newton Police Officer Jones concerning the danger of an explosion, knowing that the danger did not*



*exist. He telephoned the Newton Police Department and told Officer Jones that there was a bomb at the Newton High School, knowing that no such bomb existed.*

**5. RSA 641:5, Tampering With Witnesses And Informants**

**a. RSA 641:5, I, class B felony**

believing that [an official proceeding as defined in RSA 641:1, II, or an investigation] is [pending or about to be instituted], he/she purposely [attempted to induce or otherwise cause] [a person] to [testify or inform falsely OR withhold any testimony, information, document, or thing OR elude legal process summoning him/her to provide evidence OR absent him/herself from any proceeding or investigation to which he/she had been summoned].

*Sample Complaint: believing that a Rockingham County Grand Jury investigation was pending, he purposely attempted to cause James Johnson to testify falsely before the Grand Jury. He threatened to kill Jones if Jones did not testify before the grand jury that Jones was with the defendant in New York City on February 3, 2007.*

**b. RSA 641:5, II, class B felony**

purposely [committed any unlawful act] [in retaliation for anything done by another in his/her capacity as witness or informant].

*Sample Complaint: purposely committed an assault against Sarah Davies in retaliation for Ms. Davies testifying against her boyfriend, Sam Tucker in the Merrimack County Superior Court, during the trial of State v. Tucker.*

**c. RSA 641:5, III, class B felony**

purposely [solicited, accepted, or agreed to accept] [any benefit] in consideration for [doing any of the things specified in RSA 641:5, I].

Sample Complaint: *purposely solicited \$500 from David Smith in consideration for absenting herself from the criminal trial of State v. David Smith, to which she had been summoned as a witness.*

**6. RSA 641:6, Falsifying Physical Evidence**

**a. RSA 641:6, I, class B felony**

believing that [an official proceeding, as defined in RSA 641:1, II, or an investigation] [is pending or about to be instituted], he/she purposely [altered, destroyed, concealed, or removed] [any thing], with a purpose to [impair its verity or availability in such proceeding or investigation].

Sample Complaint: *believing that the Milltown Police Department was about to institute a gambling investigation at the Sunset Bar, he purposely destroyed betting slips so as to impair their availability in the investigation.*

**b. RSA 641:6, II, class B felony**

believing that [an official proceeding, as defined in RSA 641:1, II, or an investigation] [is pending or about to be instituted], he/she purposely [made, presented, or used] [any thing] which he/she knew to be false, with a purpose to [deceive a public servant who was or might become engaged in such proceeding or investigation].

Sample Complaint: *believing that the Division of Water Supply and Pollution Control was conducting an investigation of the quality of the water from the well serving his restaurant, he purposely presented what he knew to be a false water sample to James Jones, an investigator for the Division engaged in the investigation, with the purpose to deceive Jones.*

**7. RSA 641:7, Tampering With Public Records Or Information**

**a. RSA 641:7, I, class A misdemeanor**

knowingly [made a false entry in OR false alteration of] [any thing] [belonging to, received by, or kept by the government for information OR required by law to be kept for information of the government].

Sample Complaint: *knowingly made a false entry in the books of the Register of Probate for Merrimack County, a book required by law, RSA 548:5, to be kept for information of the government, by understating the amounts of each class of property for the estate of John Smith.*

**b. RSA 641:7, II, class A misdemeanor**

purposely [presented or used] [any thing] knowing it to be false, with a purpose that [it be taken as a genuine part of information or records referred to in RSA 641:7, I].

Sample Complaint: *knowingly presented to the Rockingham County Registry of Deeds a deed to a parcel of land located at 89 Maple Street, Derry, NH, knowing the deed was false, with a purpose that it be taken as a genuine part of the records which are kept by the county government.*

**c. RSA 641:7, III, class A misdemeanor**

purposely and unlawfully [destroyed, concealed, removed, or otherwise impaired the verity or availability of] [any thing] [belonging to, received by, of kept by the government for information OR required by law to be kept for information of the government].

Sample Complaint: *purposely and unlawfully destroyed citizenship affidavits and domicile affidavits preserved from the 2006 elections prior to the expiration of the three-year retention period required by RSA 659:101.*

## V. RSA 642:1, Obstructing Government Administration

### 1. RSA 642:1, I, class A misdemeanor

purposely [used intimidation, actual or threatened force or violence, simulated legal process OR engaged in any other unlawful conduct] with a purpose to [hinder or interfere with a public servant performing or purporting to perform an official function OR retaliate against a public servant for performing or purportedly performing an official function].

Sample Complaint: *purposely threatened to shoot Merrimack County Deputy Sheriff Conway when Conway attempted to serve him with a divorce libel, and did so with the purpose to interfere with Conway's performance of an official function, service of process.*

Sample Complaint: *purposely sent to Department of Safety Hearings Examiner David Miller simulated legal process—a document purporting to be criminal complaint against Miller -- and did so with the purpose of retaliating against Miller for suspending her license after an ALS hearing.*

### 2. RSA 642:2, Resisting Detention Or Arrest

#### a. RSA 642:2, class A misdemeanor

[knowingly or purposely] [physically interfered with] [a person recognized to be a law enforcement officer, including a probation or parole officer] who was [seeking to effect an arrest or detention] of [the accused or another].

Sample Complaint: *knowingly interfered with Salem Police Officer Brown, a person she recognized to be a police officer, by striking Brown as he attempted to arrest her.*

### 3. **RSA 642:3, Hindering Apprehension Of Prosecution**

*NOTE:* The following offenses are misdemeanors unless the actor knows that the underlying crime is murder or a class A felony, in which case the offense is a class B felony. To charge a class B felony offense, be sure to include language in the complaint that the crime is murder or a class A felony.

#### a. **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—misdemeanor: *with a purpose to delay the discovery of David Donnelly, who was being sought in connection with a theft, she concealed Donnelly by telling the Concord police that Donnelly had gone to Manchester when she knew he was in her apartment.*

Sample Complaint—class B felony: *with a purpose to delay the discovery of David Donnelly, who was being sought in connection with a robbery, a Class A felony, she concealed Donnelly by telling the Concord police that Donnelly had gone to Manchester when she knew he was in her apartment.*

#### b. **RSA 642:3, I(b)**

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 [provided the other person a weapon, transportation, disguise, or other means of avoiding discovery or apprehension].

Sample Complaint—misdemeanor: *with a purpose to prevent the apprehension of Sue Slater for committing the crime of simple assault, she gave Slater her car so Slater could leave the city and avoid apprehension.*

**c. RSA 642:3, I(c)**

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 [warned the other person of impending discovery or apprehension].

Sample Complaint—class B felony: *with a purpose to hinder the apprehension of Sam Jones, who was being sought for the theft of a car, a class A felony, she called Sam at his apartment and warned him that the police were on their way to the apartment.*

**d. RSA 642:3, I(d)**

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 [concealed, destroyed, or altered any physical evidence that might aid in the discovery, apprehension, or conviction of the other person].

Sample Complaint—class B felony: *with a purpose to hinder the prosecution of Tom Randolph for the commission of burglary, a class A felony, she concealed a suitcase containing items stolen from the burglarized home, which would have aided in his conviction.*

**e. RSA 642:3, I(e)**

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 [obstructed by force, intimidation or deception anyone from performing an act that might aid in the discovery, apprehension, prosecution, or conviction of the other person].

Sample Complaint—misdemeanor: *purposely intimidated Charlie Dunn into not reporting to the police that Nick Wilson was responsible for the break-in at the Hill Elementary School by threatening to beat Dunn up, and he did so with the purpose to prevent Wilson's prosecution.*

**f. RSA 642:3, I(f)**

with a purpose to [hinder, prevent or delay the discovery, apprehension, prosecution, conviction, or punishment of another for the commission of a crime], and knowing [that an investigator or law enforcement officer has been authorized, or applied for authorization under RSA 570-A, to intercept a telecommunication or oral communication, or under RSA 570-B, to install and use a pen register or trap and trace device] he/she [gave notice of the possible interception or installation and use to any person].

Sample Complaint—misdemeanor: *with a purpose to hinder the apprehension of Ron Bouchet for the commission of a drug-related crime, and knowing that the Nashua police had been authorized to intercept certain oral communications between Bouchet and others pursuant to RSA 570-A, he purposely notified Bouchet of the possible interception.*

**4. RSA 642:3-a, Taking A Firearm From A Law Enforcement Officer**

*NOTE:* An attempt to take a firearm is a class B felony unless the firearm is discharged, and not intentionally by the officer, in which case it is a class A felony. To charge a class A felony attempt, the complaint must allege that the firearm was discharged, but not intentionally by the officer.

**a. RSA 642:3-a**

knowingly [took or attempted to take] a firearm from [the person of a law enforcement officer], against the officer's will, [while the officer was engaged in the performance of official duties].

Sample Complaint—class B felony: *he knowingly took a firearm from Larry Jones, a Concord Police Officer, against Jones' will, while Jones was engaged in the performance of official duties in that Jones was attempting to arrest the defendant for DWI.*

Sample Complaint—class A felony: *knowingly attempted to take Officer Jones' firearm, which Jones was carrying in a holster on his shoulder, against Jones' will, while Jones was engaged in the performance of his official duties in that he was serving the defendant with a protective order. The firearm was discharged during the incident, without Officer Jones' intent.*

**5. RSA 642:4, Aiding Criminal Activity**

**a. RSA 642:2, class A misdemeanor**

purposely [aided another who has committed a crime] [to profit or benefit from the criminal activity].

Sample Complaint: *purposely aided Jack Leeds, who had committed a theft, to profit from that crime by selling some of the stolen items and returning a portion of the proceeds to Leeds.*

**6. RSA 642:5, Compounding**

**a. RSA 642:5, I, class A misdemeanor**

[purposely or knowingly] [solicited, accepted, or agreed to accept] [any benefit] [as consideration for refraining from initiating or aiding in a criminal prosecution].



Sample Complaint: *knowingly solicited \$500 from John James as consideration for refraining from initiating a criminal complaint against James for assaulting her.*

**b. RSA 642:5, II, class A misdemeanor**

[purposely or knowingly] [conferred, offered, agreed to confer, or agreed to offer] [any benefit upon another] [as consideration for the other person refraining from initiating or aiding in a criminal prosecution].

Sample Complaint: *knowingly offered to give Anthony Miller a plasma television in exchange for Miller's promise not to testify in the defendant's upcoming criminal trial on a charge of theft.*

**7. RSA 642:6, Escape**

**a. RSA 642:6, class B felony**

[knowingly or purposely] [escaped from official custody].

Sample Complaint: *knowingly escaped from official custody by breaking away from Officer McMahon as the officer was walking him into the police station after his arrest.*

**b. RSA 642:6, class A felony**

[knowingly or purposely] [escaped from official custody] and [used force against a person or threatened a person with a deadly weapon to effect the escape].

Sample Complaint: *knowingly escaped from the New Hampshire Men's Prison, where he was an inmate, and used force against another to effect the escape. He knowingly struck Correctional Officer Jenkins with a hammer, a deadly weapon.*

## 8. **RSA 642:7, Implements For Escape And Other Contraband**

### a. **RSA 642:7, I, class B felony**

knowingly provided [a person in official custody] with [anything that may facilitate that person's escape OR the possession of which is contrary to law or regulation OR in any other manner facilitates the person's escape].

Sample Complaint: *knowingly provided Daryl Nason, an inmate at the Strafford County House of Corrections with a hacksaw blade, which might facilitate Nason's escape.*

### b. **RSA 642:7, II, class B felony**

being a person [in official custody], he/she knowingly [procured, made, or possessed] [anything that might facilitate an escape].

Sample Complaint: *being an inmate at the Hillsborough County House of Corrections, he knowingly possessed a Buck knife, which could facilitate an escape.*

## 9. **RSA 642:8, Bail Jumping**

*NOTE:* The sentence imposed for bail jumping depends on the level of the offense on which the defendant had been bailed. Thus, the level of the offense should be identified in the complaint. If the bailed offense was:

- punishable by death, life imprisonment, or imprisonment for a maximum term of 15 years or more, then the bail jumping offense is a class A felony;
- punishable by a term of more than 1 year but less than 15 years, then the bail jumping offense is a class B felony;

- a Class A or Class B misdemeanor, then the bail jumping offense is a class A misdemeanor;
- a violation, then the bail jumping offense is a violation

**a. RSA 642:8, I(a)**

[after having been released with or without bail], he/she knowingly [failed to appear before a court as required by the conditions of his/her release].

Sample Complaint: *having been released on personal recognizance on a class B felony charge of second degree assault, a crime punishable by more than one year imprisonment but less than fifteen years, on the condition that he appear for all court proceedings, he knowingly failed to appear for a scheduled hearing at the Sullivan County Superior Court on October 3, 2007.*

**b. RSA 642:8, I(b)**

[after having been released with or without bail], he/she knowingly [failed to surrender for service of sentence pursuant to court order].

Sample Complaint: *after having been released on bail after having been convicted of class A misdemeanor theft and sentenced to a 12 month term of incarceration, he knowingly failed to surrender to the Rockingham County House of Corrections on April 15, 2007, to serve his sentence, as ordered by the Portsmouth District Court on March 20, 2007.*

## **10. RSA 642:9, Assaults By Prisoners**

*NOTE:* The degree of the offense depends on the type of assault committed:

- if the assault was either a first or second degree assault, as defined in RSA 631:1 or RSA 631:2, the offense is a class A felony;

- if the assault was a simple assault, as defined in RSA 631:2-a, not entered into by mutual combat, it is a class B felony; and
- if the assault was a simple assault entered into by mutual combat, the offense is a misdemeanor.

Therefore, the type of assault, and the elements thereof, must be alleged in the complaint.

**a. RSA 642:9, I**

while [being held in official custody], he/she [committed an assault].

Sample Complaint—class B felony: *while an inmate in the Carroll County House of Corrections, he committed a simple assault against John Elkins. He knowingly caused bodily injury to John Elkins by punching Elkins in the face, causing a black eye.*

**b. RSA 642:9, II, class B felony**

with the intent to [harass, threaten, or alarm] a person [whom the inmate knew or reasonably should have known to be an employee of the department of corrections or of any law enforcement agency], he/she purposely [caused or attempted to cause] the employee to [come into contact with blood, seminal fluid, urine, or feces] by [throwing or expelling the fluid or material].

Sample Complaint: *with the intent to harass Dan Collins, whom he knew to be an employee of the Grafton County Department of Corrections where the defendant was an inmate, he purposely caused Collins to come into contact with urine, by throwing urine in Collins' face.*

## 11. RSA 642:10, Obstructing Report Of Crime Or Injury

### a. RSA 642:10, class A misdemeanor

purposely [disconnected, damaged, disabled, removed, or used force or intimidation to block access to] [a telephone, radio, or other communication device] with a purpose to [obstruct, prevent, or interfere with] [ the report of any criminal offense to a law enforcement agency OR the report of any bodily injury or property damage to a law enforcement agency OR a request for ambulance or emergency medical assistance to any government agency, hospital, doctor or other medical services provider].

Sample Complaint: *with the purpose of preventing Dan Smith from calling the Manchester Police Department and reporting that she had just assaulted him, she damaged Smith's cell phone by smashing it with a hammer.*

## W. RSA 643, Abuse Of Office

### 1. RSA 643:1, Official Oppression

#### a. RSA 643:1, class A misdemeanor

being [a public servant], he/she knowingly [committed an unauthorized act which purported to be an act of his/her office OR refrained from performing a duty imposed on him/her by law or clearly inherent in the nature of the office], with the purpose to [benefit him/herself or another OR harm another].

Sample Complaint: *being a Salem Police Officer, he knowingly arrested John Peters without probable cause, with the purpose to harm Peters' reputation.*

Sample Complaint: *being a clerk of the Concord District Court, she knowingly refused to give David Smalley a certified copy of a nol prossed*

*criminal complaint against Mr. Smalley, which he had requested, with the purpose to harm Mr. Smalley.*

**b. RSA 643:2, class A misdemeanor**

being [a public servant] and [knowing that official action is contemplated OR in reliance on information he/she acquired by virtue of the office or from another public servant] he/she knowingly [acquired or divested him/herself of a pecuniary interest any property, transaction, or enterprise that may have been affected by such action or information OR speculated or wagered on the basis of such action or information, OR aided another to do either of the foregoing].

Sample Complaint: *being an official with the NH Department of Transportation, and knowing that the Department officials were contemplating building a new east-west highway in central NH, he knowingly purchased 200 acres of land in Northwood that might be affected by such construction.*

## **X. RSA 644, Breaches Of The Peace And Related Offenses**

### **1. RSA 644:1, Riot**

*NOTE:* The offense of riot is a class A misdemeanor unless any of the following circumstances apply, in which case the offense is a class B felony:

- any person suffered physical injury;
- any person suffered substantial property damage;
- arson occurred;
- the defendant was armed with a deadly weapon; or
- the defendant knowingly threw or caused to be propelled any object or substance of any kind at any uniformed law enforcement officer or uniformed emergency responder, regardless of whether such object or substance struck the officer or responder.

If any of the above-listed circumstances apply, it must be alleged in the complaint, as shown in the sample complaint below.

**a. RSA 644:1, I(a)**

simultaneously [with two or more other persons], [engaged in tumultuous or violent conduct] and thereby [purposely or recklessly] [created a substantial risk of causing public alarm].

Sample Complaint—class B felony: *simultaneously engaged in tumultuous conduct with Terry Thomas, David Curtis, and other unidentified people, by lighting fireworks and throwing them into the crowd of people in the grandstands at Memorial Field, thereby recklessly creating a substantial risk of public alarm. As a result of their conduct, Justin Caleb suffered burns on his arms.*

Sample Complaint—misdemeanor: *along with at least three other individuals, he purposely threw rocks and bricks at the building where City Hall is located and at the people walking in or out of the building, thereby purposely creating a substantial risk of public alarm.*

**b. RSA 644:1, I(b)**

assembled with [two or more persons] with the purpose of engaging soon thereafter [in tumultuous or violent conduct], believing that the two or more other persons in the assembly had the same purpose.

Sample Complaint: *gathered with approximately 20 other individuals outside the State House and prepared to burn tax codes and throw clumps of tea bags at persons entering and leaving the State House, believing the other members of the group had the same purpose.*

**c. RSA 644:1, I(c)**

with the purpose of [committing an offense against another or the property of another] whom he/she supposes to be [guilty of a violation of the law], purposely assembled [with two or more other persons], believing that the two or more other persons in the assembly had the same purpose.

Sample Complaint: *with the purpose of committing arson against the property of Nigel St. Onge, whom he believed had sexually assaulted Kellie Smith, he purposely assembled with Jim, Larry, and Mary Smith at the home of St. Onge, believing that they had the same purpose.*

**d. RSA 644:1, II**

[purposely or knowingly] [refused to comply with a lawful order to withdraw] given to him/her [immediately prior to, during, or immediately following] [a violation of RSA 644:1, I].

Sample Complaint: *immediately after shooting out the windows of the Hudson Town Hall with five other people, a violation of RSA 644:1, I(a), he purposely refused to comply with a lawful order from Hudson Police Officer Jackson to back away from the building and lie on the ground.*

**e. RSA 644:1, III**

while present during [a violation of RSA 644:1, I or RSA 644:1, II], he/she [purposely or knowingly] [refused to render assistance upon the request of a police officer], said request not involving the use of force.

Sample Complaint: *while present during the burning of a television news van by a mob of people, a violation of RSA 644:1, I, he knowingly refused to comply with a request from Derry Police Officer Alto to call the Derry Fire*



*Department on his cell phone. Officer Alto's request did not involve using force.*

## **2. RSA 644:2, Disorderly Conduct**

*NOTE:* Disorderly conduct is a misdemeanor if the offense continues after any person has requested that the conduct desist; otherwise it is a violation.

### **a. 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].

Sample Complaint—misdemeanor: *knowingly created a condition in a public place, Main Street, which was hazardous to another by an action that served no legitimate purpose. He used a bubble machine to create thousands of bubbles thereby creating a hazard to drivers, and continued to create 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 an action that served no legitimate purpose. He used a bubble machine to create thousands of bubbles thereby creating a hazard to drivers.*

### **b. RSA 644:2, II(a)**

[purposely or knowingly] [engaged in fighting or in violent, tumultuous or threatening behavior], in a [public place].

Sample Complaint: *knowingly engaged in a fistfight with Mark Jones in the Concord Public Library.*

**c. RSA 644:2, II(b)**

[purposely or knowingly] directed at [another person] [obscene, derisive, or offensive words which were likely to provoke a violent reaction on the part of an ordinary person], while in [a public place].

Sample Complaint: *knowingly directed offensive words at Laura Brown, which were likely to provoke a violent reaction of the part of an ordinary person, while standing in a crowd of people at the Pumpkin Festival. He told Ms. Brown that her child was so ugly he was going to cover her with one of the pumpkins so everyone at the festival would not go blind at the sight of her.*

**d. RSA 644:2, II(c)**

[purposely or knowingly] [obstructed vehicular or pedestrian traffic] [on any public street OR sidewalk OR entrance to any public building].

Sample Complaint: *knowingly obstructed pedestrian traffic at the entrance to the Green Street Community Building by using his body to physically prevent pedestrians from entering the building.*

**e. RSA 644:2, II(d)**

[purposely or knowingly] [engaged in conduct] [which substantially interfered with a criminal investigation OR a firefighting operation to which RSA 154:17 is applicable OR the provision of emergency medical treatment OR the provision of other emergency services when traffic or pedestrian management is required], while in [a public place].

Sample Complaint: *knowingly refused to move his truck that was blocking a town access road to the public beach, thereby substantially interfering with emergency medical personnel who were attempting to reach the beach in an ambulance to assist individuals injured during the fireworks display.*

**f. RSA 644:2, II(e)**

knowingly [refused to comply with] [a lawful order of a peace officer to move from OR remain away from any public place].

Sample Complaint: *knowingly refused to comply with Nashua Police Officer Gravel's lawful order to move from his location in the middle of the intersection of Main and Pleasant Streets, where he was standing and holding a sign.*

**g. RSA 644:2, III(a)**

purposely caused [a breach of peace, public inconvenience, annoyance or alarm OR recklessly created a risk thereof] by [making loud or unreasonable noises in a public place OR making loud or unreasonable noises in a private place which could be heard in a public place or other private places], which noises would disturb a person of average sensibilities.

Sample Complaint: *purposely caused a breach of peace by making loud noises while standing on a public sidewalk on Chestnut Street, which noises would disturb a person of average sensibilities. He repeatedly blew a hand-held air horn at pedestrians as they walked by.*

**h. RSA 644:2, IV(c)**

without being authorized to do so, he/she knowingly [entered an area closed pursuant to RSA 644:2, IV (a) or (b) OR remained within the area after receiving a lawful order from a peace officer to leave].

Sample Complaint: *without being authorized to do so, he knowingly walked into an area of Main Street that had been cordoned off by the police, pursuant to RSA 644:2, IV (a), because of an on-going hostage situation and the related risk to public safety.*

### 3. RSA 644:3, False Public Alarms

*NOTE:* The offenses listed in RSA 644:3 do not apply to false alarms subject to RSA 644:3-a or RSA 644:3-b, or false reports under RSA 158:38.

#### a. RSA 644:3, I

[purposely or knowingly] [communicated, either directly or indirectly], to [a governmental agency that commonly deals with emergencies involving danger to life or property] a report known to him/her to be false regarding a [fire, explosion, or other catastrophe or emergency].

*NOTE:* This offense is a misdemeanor unless the report concerns the presence of a biological or chemical substance, in which case it is a class B felony.

Sample Complaint—misdemeanor: *knowingly called the Concord Fire Department and reported that there was a bomb in the high school library, knowing that the report was false.*

Sample Complaint—class B felony: *knowingly called the Concord Fire Department and reported that he had mailed an envelope containing anthrax, a biological substance, to the tax collector at Concord City Hall, knowing that the report was false.*

#### b. RSA 644:3, II, class B felony

[purposely or knowingly] [communicated, directly or indirectly], to any school, business, office building, hospital, or similar facility open to the public] a report known to him/her to be false concerning [the presence of a biological or chemical substance].

Sample Complaint: *knowingly sent an e-mail message to Springfield Hospital admissions reporting that several units of blood obtained by the hospital during a recent blood drive had been contaminated with the HIV virus, knowing that the report was false.*

**c. RSA 644:3, III, class B felony**

[purposely or knowingly] [delivered or caused the delivery of] [a substance he/she knew could reasonably be perceived as a biological or chemical substance], with the purpose of [causing fear or terrorism] and with [reckless disregard for the risk that emergency services would be dispatched as a result of such delivery].

Sample Complaint: *knowingly delivered a white powdery substance in an envelope to the Pillsbury Medical Center, knowing that the powder could reasonably be perceived as anthrax. He acted with the purpose of causing fear and with a reckless disregard for the risk that emergency services would be dispatched as a result of such delivery.*

**4. RSA 644:3-a, Report Of A False Alarm Of A Fire**

**a. RSA 644:3-a, misdemeanor**

knowingly [gave, aided or abetted in giving, by any means] [any false alarm of fire].

Sample Complaint: *knowingly called the Hanover Fire Department and falsely reported that there was a fire at the town library.*

**5. RSA 644:3-b, Report Of A False Alarm Of A Fire Resulting In Injury Or Death**

**a. RSA 644:3-b, class B felony**

knowingly [gave, or aided or abetted in giving, by any means], [a false alarm of a fire], and as a result thereof, [any person] [sustained death OR bodily injury].

Sample Complaint: *knowingly gave a false alarm of a fire by screaming words to the effect of “Fire, Run! Call the police!” during the town parade. As a result of his actions, Ann Nichols sustained a broken wrist when she fell trying to run away and got stepped on.*

**6. RSA 644:3-c, Unlawful Interference With Fire Alarm Apparatus**

**a. RSA 644:3-c, class B felony**

knowingly [tampered with OR interfered with OR impaired] [any public fire alarm apparatus OR wire OR associated equipment].

Sample Complaint: *knowingly impaired the fire alarm at the town library, by pulling the alarm box from the wall and cutting the wires.*

**7. RSA 644:4, Harassment**

**a. RSA 644:4, I(a), misdemeanor**

with a purpose to [annoy, abuse, threaten or alarm] [another person], he/she [made a telephone call, whether or not a conversation ensues], [with no legitimate purpose OR without disclosing his or her identity].

Sample Complaint: *with a purpose to alarm Amy O'Brien, he made a telephone call to Ms. O'Brien's residence at approximately 2:00 a.m., without disclosing his identity, and said words to the effect of "I'm watching you."*

**b. RSA 644:4, I(b), misdemeanor**

with a purpose to [annoy or alarm] [another person] he/she [made repeated communications at extremely inconvenient hours or in offensively course language].

Sample Complaint: *with a purpose to annoy or alarm Betsy Brown, he made repeated telephone calls to her house at extremely inconvenient hours. He telephoned her residence six times between 1:30 a.m. and 4:00 a.m.*

**c. RSA 644:4, I(c), misdemeanor**

[purposely or knowingly] [insulted, taunted or challenged] [another person] [in a manner likely to provoke a violent or disorderly response].

Sample Complaint: *knowingly taunted Jack Peterson in a manner likely to provoke a violent or disorderly response. During a town meeting, he repeatedly yelled at Peterson, calling him a thief and a liar and telling him he was going to take his revenge on Peterson's family.*

**d. RSA 644:4, I(d), misdemeanor**

knowingly [communicated] [any matter of a character tending to incite murder, assault, or arson].

Sample Complaint: *knowingly communicated a matter of a character tending to incite assault. While skating at the outdoor public skating rink he told all the parents words to the effect of "keep your kids out of my way or I'll get them out of the way with this bat" and displayed a bat.*

**e. RSA 644:4, I(e), misdemeanor**

with the purpose to [annoy or alarm] [another], he/she [communicated] [any matter containing any threat to kidnap any person OR to commit a violation of RSA 633:4 OR a threat to the life or safety of another].

Sample Complaint: *with the purpose to alarm Nancy Gold, he sent her an e-mail stating that if her company did not hire him, he would kidnap her son, Michael G.*

**f. RSA 644:4, I(f), Declared Unconstitutional**

*NOTE:* This statute has been declared unconstitutional.

**8. RSA 644:5-a, Inhaling Toxic Vapors For Effect**

**a. RSA 644:5-a, violation**

purposely [smelled or inhaled] [the fumes of any substance having the property of releasing toxic vapors] [for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulled senses of the nervous system].

Sample Complaint: *purposely inhaled the fumes from spray paint by spraying paint on a cloth and breathing in the fumes, for the purpose of causing a condition of excitement or exhilaration.*

**b. RSA 644:5-a, violation**

purposely [possessed or bought or sold] [any substance having the property of releasing toxic vapors] [for the purpose of violating or aiding another to violate RSA 644:5-a].



Sample Complaint: *purposely bought two aerosol cans of Cook Clean oven spray so that he and James Good could inhale the fumes for the purpose of dulling their senses.*

## **9. RSA 644:6, Loitering Or Prowling**

### **a. RSA 644:6, I(a), violation**

knowingly appeared [at a place or at a time] [under circumstances that warrant alarm for the safety of persons or property in the vicinity].

*NOTE:* Circumstances that may be considered in determining whether alarm is warranted include, but are not limited to:

- taking flight upon the appearance of, or questioning by, a law enforcement official;
- manifestly endeavoring to conceal him/herself or an object;
- having in his/her possession tools or property that would lead a reasonable person to believe a crime was about to be committed;
- examining entrances to a structure that he/she has no authority or legitimate purpose to enter.

Sample Complaint: *knowingly appeared in front of the Radio Shack store on Main Street at 2:00 a.m, under circumstances that warranted alarm for the safety of property in the vicinity. He ran away when a police cruiser turned onto Main Street and started driving in his direction.*

## **10. RSA 644:8, Cruelty To Animals**

*NOTE:* Any offense listed under RSA 644:8, III is a misdemeanor for a first offense and a class B felony for a second or subsequent offense. To charge a class B felony offense, the prior conviction(s) must be alleged in the complaint, as shown in the sample complaint below.

**a. RSA 644:8, III(a)**

without lawful authority, negligently [deprived or caused to be deprived] [any animal in his/her possession or custody] [necessary care, sustenance or shelter].

Sample Complaint—class B felony: *without lawful authority, he negligently deprived his Akita puppy necessary shelter and sustenance by leaving the puppy outside in a fenced yard without shelter or sufficient food, while he was away on vacation. The defendant was previously convicted of cruelty to animals on June 28, 2005 in the Dover District Court.*

Sample Complaint—misdemeanor: *without lawful authority, he negligently deprived his Akita puppy necessary shelter and sustenance by leaving the puppy outside in a fenced yard without shelter or sufficient food, while he was away on vacation.*

**b. RSA 644:8, III(b)**

negligently [beat, cruelly whipped, tortured, mutilated or in any other manner mistreated or caused to be mistreated] [any animal].

Sample Complaint: *negligently beat a Morgan horse named Shadow by repeatedly hitting the horse with a shovel, while cleaning out the horse's stall.*

**c. RSA 644:8, III(c)**

negligently [overdrove, overworked, drove when overloaded, or otherwise abused or misused] [any animal intended for or used for labor].

Sample Complaint: *negligently misused his sheepdog, Cotton, an animal intended for or used for labor. He made Cotton herd sheep for 18 hours without a break for food or water.*

**d. RSA 644:8, III(d)**

negligently [transported any animal in his/her possession or custody] [in a manner injurious to the health, safety or physical well-being of the animal].

Sample Complaint: *negligently transported his son's dog Scruffy, while in his custody, in a manner injurious to the physical well-being of the animal. He transported Scruffy in an open trailer attached to his car, thereby causing the dog to be tossed around the trailer and ultimately ejected onto the road.*

**e. RSA 644:8, III(e)**

negligently [abandoned] [any animal previously in his/her possession or custody] [by causing such animal to be left without supervision or adequate provision for its care, sustenance, or shelter].

Sample Complaint: *negligently abandoned a brown kitten called Sadie, an animal previously in his possession or custody, by leaving Sadie at the town landfill without any food, water or shelter.*

**f. RSA 644:8, III(f)**

negligently [permitted or caused any animal in his/her possession or custody] to be subjected to [cruelty, inhumane treatment or unnecessary suffering of any kind].

Sample Complaint: *negligently permitted his rabbit, Cotton, to be subjected to inhumane treatment by allowing his friends to throw lit firecrackers into Cotton's cage.*

**g. RSA 644:8, III-a, class B felony**

purposely [permitted or caused any animal in his/her custody or possession] [to be beaten, cruelly whipped, tortured, or mutilated].

Sample Complaint: *purposely permitted his neighbor, Jeremy Smith, to beat his Cocker Spaniel, Jake, an animal in his custody, by hitting Jake repeatedly with the head of a shovel.*

## **11. RSA 644:8-aa, Animals In Motor Vehicles**

### **a. RSA 644:8-aa, misdemeanor**

[purposely, knowingly, negligently or recklessly] [confined an animal in a motor vehicle OR other enclosed space] [in which the temperature is so high or so low as to cause serious harm to the animal].

Sample Complaint: *recklessly confined a cat in his Chevy Blazer with the windows closed, when the outdoor temperature was 93 degrees. The temperature in the truck became so high that it caused the cat to become seriously dehydrated.*

## **12. RSA 644:8-f, Transporting A Dog In The Open Back Of A Pickup Truck**

### **a. RSA 644:8-f, violation**

transported [any dog] [in the back of a vehicle] [on a public way], where [the space was not enclosed, did not have side and tail racks at least 46 inches high, and the dog was not cross-tethered to the vehicle, protected by a secure cage or other container, or otherwise protected in a manner that would prevent the dog from being thrown or from falling or jumping from the vehicle], [the dog was not being used by a farmer or farm employee while actually engaged in farming activities requiring the services of a dog], and [the dog was not a hunting dog being used at a hunting site or between hunting sites by a licensed hunter who was in possession of all applicable licenses and

permits for the species being pursued during the legal season for such activity].

Sample Complaint: *transported a dog in the back of the Ford F-150 pickup truck on Main Street when none of the protective conditions specified in RSA 644:8-f, I, were met and none of the exceptions in RSA 644:8-f, II, applied.*

### **13. RSA 644:9, Violation Of Privacy**

#### **a. RSA 644:9, I(a), class A misdemeanor**

unlawfully [installed or used] [any device] for the purpose of [observing, photographing, recording, amplifying, broadcasting, or in any way transmitting] [images or sounds of the private body parts of a person, including the genitalia, buttocks, of female breasts, or a person's body underneath that person's clothing] [without the consent of the person entitled to privacy].

Sample Complaint: *unlawfully, and without the consent of Lisa J., the person entitled to privacy therein, purposely installed a digital recorder in the soap dispenser of Ms. J's bathroom shower for the purpose of recording images of her private body parts, including her genitalia, buttocks and breasts.*

#### **b. RSA 644:9, I(b), class A misdemeanor**

unlawfully and [without the consent of the person entitled to privacy therein], [purposely or knowingly] [installed or used] in [any private place], [any device] for the purpose of [observing, photographing, recording, amplifying, or broadcasting, or in any way transmitting images or sounds in such place].

Sample Complaint: *knowingly and unlawfully installed and used a concealed motion-activated digital camera in the women's locker room at Jumbo's Gym,*

*without the consent of the women who used the locker room and were entitled to privacy therein, for the purpose of photographing images of the women.*

**c. RSA 644:9, I(c), class A misdemeanor**

[purposely or knowingly] and unlawfully, [installed or used] [any device] [outside a private place] for the purpose of [hearing, recording, amplifying, broadcasting, or in any way transmitting images or sounds originating in the private place, which would not ordinarily be audible or comprehensible outside such place], [without the consent of the person(s) entitled to privacy therein].

Sample Complaint: *purposely and unlawfully installed and used an intercom device outside the women's bathroom at the Royal Cinema Complex for the purpose of hearing sounds and conversations originating in the bathroom, which would not otherwise be audible or comprehensible outside the bathroom, without the consent of the women entitled to privacy therein.*

**d. RSA 644:9, II, class A misdemeanor**

knowingly [disseminated or caused the dissemination of] [any photograph or video recording of him/herself] [engaging in sexual activity with another person] without the express consent of [the other person or persons who appear in the photograph or videotape].

Sample Complaint: *knowingly posted on his website a video recording of himself engaging in sexual activity with Jeanne V., without the express consent of Jeanne V.*

**e. RSA 644:9, IV, misdemeanor**

knowingly entered [any residential curtilage as defined in RSA 627:9, I, or any other private place as defined in RSA 644:9, II] without lawful authority and [looked into the residential structure thereon or other private place] with no legitimate purpose.

Sample Complaint: *knowingly entered the curtilage of the house at 279 East Menard Street, by walking on the lawn and into the bushes surrounding the house, without lawful authority and looked into the residence through the window into the bedroom, with no legitimate purpose.*

#### **14. RSA 644:13, Unauthorized Use Of Firearms And Firecrackers**

##### **a. RSA 644:13, violation**

[fired or discharged] [any cannon, gun, pistol, or other firearm]  
[within the compact part of a town or city], [without written permission of the chief of police or governing body].

Sample Complaint: *fired a pistol at White's Park, which is within the compact part of the City of Concord, without written permission of the chief of police or City Council.*

#### **15. RSA 644:14, Selling Air Rifles Or Paint Ball Guns To Young Persons**

##### **a. RSA 644:14, violation**

[sold, bartered, rented, lent, or gave] [an air rifle or paint ball gun] to [a person under that age of 18] [without the written consent of the parent or guardian].

Sample Complaint: *rented a paint ball gun to Jeremy Jones, who was 17 years old, without the written consent of Jones' parent or guardian.*

## 16. RSA 644:15, Furnishing Arms To Persons Under 16

### a. RSA 644:15, violation

[sold, bartered, hired, lent, or gave to] [a person under the age of 16] [any cartridge or shotshells suitable for discharging in any rifle, pistol, revolver or shotgun]. The defendant was not the child's parent, grandparent, or guardian; instructing the child in the safe use of firearms during a supervised training program; a licensed hunter accompanying the child while lawfully taking wildlife; or supervising the child during a lawful shooting event or activity.

Sample Complaint: *gave 12-year old C.B. (D.O.B. 02/14/93), a box of .22 caliber cartridges, which were suitable for discharging in a .22 caliber rifle. The defendant did not fit within any of the exceptions listed in RSA 644:15, II.*

## 17. RSA 644:17, Willful Concealment And Shoplifting

### a. RSA 644:17, I, misdemeanor

[without authority], [willfully or knowingly], [concealed the goods or merchandise of any store] [while still in the premises of the store].

Sample Complaint: *without authority, while on the premises of the Market Basket, knowingly concealed several cans of tuna and soup in her knapsack.*

### b. RSA 644:17, II(a)

with the purpose of [depriving a merchant of goods or merchandise], he/she knowingly [removed goods or merchandise from the premises of the merchant].



*NOTE:* The level of a shoplifting offense depends on the value of the property, as provided in RSA 637:11.

Sample Complaint—misdemeanor: *with the purpose of depriving Clothes For The Tall Man of merchandise, he knowingly removed a sweater from the store without paying for it. The sweater was priced \$125.00.*

**c. RSA 644:17, II(b)**

with the purpose of [depriving a merchant of goods or merchandise], knowingly [altered, transfered, or removed any price marking affixed to goods or merchandise].

Sample Complaint: *with the purpose of depriving the merchant Costumes for All of goods, he knowingly removed a price tag marked \$75 from the Dracula costume and replaced it with a clearance price tag marked \$25.*

**d. RSA 644:17, II(c)**

with the purpose of [depriving a merchant of goods or merchandise], he/she knowingly [caused the cash register or other sales recording device to reflect less than the merchant's stated or advertised price for the goods or merchandise].

Sample Complaint: *with the purpose of depriving the merchant "Love Is in the Air" of merchandise, knowingly caused the cash register to reflect less than the merchant's advertised price for a vase. He exchanged the bar code of the \$500.00 vase he purchased with that of a \$10.00 charm, a difference of \$490.00*

**e. RSA 644:17, II(d)**

with the purpose of [depriving a merchant of goods or merchandise], he/she knowingly [transferred goods or merchandise

from the container in which such goods or merchandise were intended to be sold to another container].

Sample Complaint: *with the purpose of depriving Books Abound of goods or merchandise, knowingly put a boxed set of maps, valued at \$300.00, into a lunch box marked as a \$10.00 clearance item.*

## **18. RSA 644:18, Facilitating A Drug Or Underage Alcohol Party**

### **a. RSA 644:18, misdemeanor**

[being the owner or the one with control over the occupied structure, dwelling or curtilage where a drug or underage alcohol house party is held], knowingly [committed an overt act in furtherance of the occurrence of the drug or underage alcohol house party], knowing that persons under the age of 21 [possessed or intended to consume alcoholic beverages or use controlled drugs during the party].

Sample Complaint: *being the owner of the residence at 21 Orchard Drive, he knowingly committed an act in furtherance of the occurrence of an underage house alcohol party, knowing that people under the age of 21 intended to consume alcoholic beverages during the party. He gave his 16 year-old son permission to have 20 of his friends over for an underage alcohol party at their home on the last day of school and went away for the evening.*

## **Y. RSA Chapter 645, Public Indecency**

### **1. RSA 645:1, Indecent Exposure And Lewdness**

#### **a. RSA 645:1, I(a), class A misdemeanor**

knowingly [fornicated, exposed his/her genitals, or performed any act of gross lewdness] [under circumstances that he/she should have known would likely cause affront or alarm].

Sample Complaint: *he knowingly exposed his genitals in the girls' locker room at Newton High school when there were girls present, which he should have known would likely cause affront.*

**b. RSA 645:1, I(b), class A misdemeanor**

purposely [performed any act of sexual penetration or sexual contact on him/herself or another] in the presence of [a child who was at least 13 years of age and less than 16].

Sample Complaint: *he purposely engaged in vaginal digital penetration of Lucy D., in the presence of B.W., a 14 year-old child.*

**c. RSA 645:1, II(a), class B felony**

purposely [performed any act of sexual penetration or sexual contact on him/herself or another] in the presence of [a child who was 12 years old or younger].

Sample Complaint: *he purposely engaged in vaginal digital penetration of Lucy D., in the presence of B.W., a 7 year-old child.*

**d. RSA 645:1, II(b), class B felony**

[having been previously convicted of an offense under RSA 645:1, I(b) OR an offense which involves the same conduct in another jurisdiction], he/she purposely [performed any act of sexual penetration or sexual contact on him/herself or another] in the presence of [a child who was at least 13 years of age and less than 16].

Sample Complaint: *he purposely masturbated in the presence of D.C., a 14 year-old child, having been previously convicted of an offense under RSA 645:1(b) in Merrimack County District Court on March 25, 2004.*

**e. RSA 645:1, III, class A felony**

[having been previously convicted of two or more offenses under RSA 645:1, I(b) or RSA 645:1, II(b), or two or more offenses involving the same conduct in another jurisdiction], he/she purposely [performed any act of sexual penetration or sexual contact on him/herself or another] in the presence of [a child who was at least 13 years of age and less than 16].

Sample Complaint: *purposely engaged in fellatio with George P. in the presence of D.S., a 13 year-old child, having been previously convicted of an offense under RSA 645:1, I(b) in the Pelham District Court on July 9, 2004, and an offense under a Vermont statute prohibiting the same conduct in Middlebury, Vermont District Court on September 13, 2006.*

**2. RSA 645:2, Prostitution And Related Offenses**

*NOTE:* This offense is a misdemeanor with the following exceptions: a violation of subparagraph (b), (c), (d) or (e) is a class B felony if:

- the conduct involved a person under the age of 18, or
- the act involved compelling another person by force or intimidation.

If either of these conditions apply, it must be alleged in the complaint.

**a. RSA 645:2, I(a)**

purposely [solicited, agreed to perform, or engaged in sexual contact, as defined in RSA 632-A:1, IV, or sexual penetration as defined in RSA 632-A:1, V] [in return for consideration].

Sample Complaint: *purposely agreed to perform fellatio on John F., in exchange for \$300.*

**b. RSA 645:2, I(b)**

purposely [induced or otherwise caused] [another] to [solicit, agree to perform or engage in sexual contact, as defined in RSA 632-A:1, IV, or sexual penetration as defined in RSA 632-A:1, V] [in return for consideration].

Sample Complaint—misdemeanor: *purposely induced Virginia Dale to engage in an act of sexual intercourse with John Mueller in return for a payment of \$300, by promising to give Dale some heroin if she did so.*

Sample Complaint—class B felony: *purposely induced Virginia Dale, a person under the age of 18, to engage in an act of sexual intercourse with John Mueller in return for a payment of \$300, by threatening to beat her if she refused.*

**c. RSA 645:2, I(c)**

transported [another] [into or within the state] with the purpose of [promoting or facilitating that person to engage in conduct in violation of RSA 645:2, I(a)].

Sample Complaint—misdemeanor: *drove Cindy D. into New Hampshire from Massachusetts with the purpose of having Cindy D. solicit money in return for acts of sexual penetration, in violation of RSA 645:2, I(a).*

Sample Complaint—class B felony: *she forced Cindy D. into her car by holding a knife to her back, and drove Cindy D. into New Hampshire from Massachusetts with the purpose of forcing Cindy D. to solicit money in return for acts of sexual penetration, in violation of RSA 645:2, I(a).*

**d. RSA 645:2, I(d)**

[not being a legal dependent incapable of self-support], he/she was knowingly [supported, in whole or in part, by the proceeds of violations of RSA 645:2, I(a)].

Sample Complaint—misdemeanor: *was knowingly supported, in part, by money that Cynthia D. earned by engaging in acts of sexual penetration in return for payment in violation of RSA 645:2, I(a). The defendant was not Ms. D's legal dependent who was incapable of supporting himself.*

Sample Complaint—misdemeanor: *was knowingly supported, in part, by money that 17 year-old Cynthia D. earned by engaging in acts of sexual penetration in return for payment in violation of RSA 645:2, I(a). The defendant was not legally dependent on Ms. D for support.*

**e. RSA 645:2, I(e)**

knowingly permitted [a place under his/her control] [to be used for a violation of RSA 645:1, I(a)].

Sample Complaint—misdemeanor: *she knowingly permitted Jeffrey D. to use her apartment at 123 Maple Street, #4, to engage in acts of sexual penetration with another in exchange for money.*

Sample Complaint—class B felony: *she knowingly permitted Jeffrey D., who was 17 years old, to use her apartment at 123 Maple Street, #4, to engage in acts of sexual contact with another in exchange for money.*

**f. RSA 645:2, I(f)**

[purposely or knowingly] [paid, agreed to pay, or offered to pay] [another person] to [engage in sexual contact or sexual penetration] [with the payor or with another person].

Sample Complaint: *purposely offered to pay Terry S. \$50.00 to perform cunnilingus on Sylvia P.*

## **Z. RSA 646-A:2, Desecration Of The Flag Prohibited**

### **1. RSA 646-A:2, I, class A misdemeanor**

knowingly [desecrated a flag of the United States] [while it was properly displayed].

Sample Complaint: *knowingly desecrated a United States flag while it was properly displayed on a flag pole outside the New Hampshire Supreme Court, by spray painting the flag.*

### **2. RSA 646-A:2, II, class A misdemeanor**

knowingly [desecrated a flag of the United States] [while it was the property of another].

Sample Complaint: *knowingly burned a United States flag that was the property of another. He removed the flag from where it was hanging on the house located at 24 Concord Street.*

## **AA. RSA 647, Gambling Offenses**

### **1. RSA 647:1, Lotteries**

#### **a. RSA 647:1, I, class A misdemeanor**

knowingly and unlawfully [conducted a lottery OR disposed of property or offered to dispose of property] [in any way whereby the payment for such property is, in whole or in part, induced by the hope of gain by luck or chance].

Sample Complaint: *knowingly and unlawfully offered to sell her house in a way that payment for the house was induced by the hope of gain by luck. She publicized that she would give her house to the person who submitted the most*

*compelling 500-word essay explaining why that person deserved the house, along with a check for \$500.*

**b. RSA 647:1, II, class A misdemeanor**

knowingly and unlawfully [sold OR offered to sell OR possessed for the purpose of selling OR deposited for mailing] [any lottery ticket or other thing which is evidence that the purchaser will be entitled to a share of chance in a lottery OR notice of the drawing of the lottery (this last clause only applies if the person deposited for mailing)].

Sample Complaint: *knowingly and unlawfully sold James Donovan a ticket for \$5, on which was written, “winner entitled to 75% of the ticket sales; drawing to be held on 12/16/07.”*

**c. RSA 647:1, III, class A misdemeanor**

knowingly and unlawfully [published or deposited for mailing] [information as to the location or identity of the person where, or from whom, a ticket or other thing described in RSA 647:1, II, may be obtained].

Sample Complaint: *knowingly and unlawfully published on a website, www.saavylottery.com, his name and contact information, along with a statement that readers could contact him to purchase tickets for a lottery, the sales proceeds for which would be split equally between the winner of the drawing and the local food bank.*

**2. RSA 647:2, Gambling**

**a. RSA 647:2, I, class A misdemeanor**

knowingly and unlawfully [permitted gambling in any place under his/her control OR gambled or loaned money or anything of



value for the purpose of aiding another to gamble; OR possessed a gambling machine].

Sample Complaint: *knowingly and unlawfully permitted gambling at his home. He allowed people to play a gambling machine that was on the premises, which discharged tickets that entitled the winner to additional games or monetary prizes.*

**b. RSA 647:2, I-a(a), class A misdemeanor**

knowingly and unlawfully [permitted gambling] [on the premises of a business which he/she conducted, financed, managed, supervised, directed, or owned, in whole or in part].

Sample Complaint: *being the manager of the Ol' Yankee Pub, he knowing and unlawfully permitted customers to play video games for monetary winnings on the premises of the Pub.*

**c. RSA 647:2, I-a(b), class B felony**

knowingly and unlawfully [conducted, financed, managed, supervised, or directed] [gambling activity] [on the premises of a business that he/she conducted, financed, managed, supervised, directed, or owned, in whole or in part] and the gambling activity [has had gross revenue of \$2000 in any single day OR was or remains in substantially continuous operation for more than 10 days OR accepted wagers on future contingent events exceeding \$5000 in any 30-day period].

Sample Complaint: *knowingly and unlawfully supervised games of craps and poker at the Fun Times Bar, which she managed, and the games were run on a substantially continuous basis during the period between May 3 and May 21, 2006.*

## **BB. RSA 649, Sabotage Prevention**

### **1. RSA 649-A:3, Child Pornography Offenses**

*NOTE:* All of the following offenses are class B felonies, unless the defendant has one or more convictions in this or any other jurisdiction for conduct prohibited under RSA 649-A:3, I, in which case the offense is a class A felony. To charge a class A felony, the complaint must allege the prior conviction.

#### **a. RSA 649-A:3, I(a)**

knowingly [sold, delivered, provided, offered to sell, agreed to sell, offered to deliver, or offered to provide] any [visual representation of a child engaging in sexual activity].

Sample Complaint—class B felony: *she knowingly sold a photograph of a child performing fellatio on an unidentified male.*

Sample Complaint—class A felony: *she knowingly sold a photograph of a child performing fellatio on an unidentified male. The defendant was previously convicted of possessing child pornography in violation of RSA 649-A:3, in the Sullivan County Superior Court on December 18, 2005.*

#### **b. RSA 649-A:3, I(b)**

knowingly [presented, directed, or participated in] [that portion of a visual representation that consists of a child engaging in sexual activity].

Sample Complaint: *knowingly directed a short film, entitled “Johnny’s Birthday” in which a child was shown fondling an older male’s penis.*

**c. RSA 649-A:3, I(c)**

knowingly [published, exhibited, or otherwise made available]  
[any visual representation of a child engaging in sexual activity].

Sample Complaint: *knowingly published a photograph of two children engaging in mutual fondling of the genitals, by mailing it to D. Miller at 33 Cloutier Drive, in Manchester.*

**d. RSA 649-A:3, I(d)**

[purposely or knowingly] possessed [any visual representation of a child engaging in sexual activity] for purposes of [sale or other commercial dissemination].

Sample Complaint: *knowingly possessed a photograph of a child engaged in simulated sexual intercourse with an older woman, with the purpose of selling the photograph.*

**e. RSA 649-A:3, I(e)**

knowingly [bought, procured, possessed, or controlled] [any visual representation of a child engaging in sexual activity].

Sample Complaint: *knowingly bought from Jessie D. a film that showed a male child engaging in sexual acts, including masturbation and fellatio, with several male adults.*

**f. RSA 649-A:3, I(f)**

knowingly [brought or caused to be brought] [any visual representation of a child engaging in sexual activity] into New Hampshire.

Sample Complaint: *knowingly brought a magazine into New Hampshire from Massachusetts, which contained pictures of minors engaged in various sexual acts, such as fellatio and cunnilingus.*

## **2. RSA 649-B, Computer Pornography Prohibited**

### **a. RSA 649-B:3, I(a), class B felony**

knowingly [compiled, entered into, or transmitted by computer] [any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive identifying information] with the purpose of [facilitating, encouraging, offering, or soliciting] [sexual conduct of a child, sexual conduct with a child, or the visual depiction of sexual conduct of a child].

Sample Complaint: *knowingly sent an e-mail to justforfun@yahoo.com stating that he could make available a "Johnny P., a talented 12-year old boy, for fun and pleasure" and did so with the purpose of facilitating sexual conduct between Johnny P. and the e-mail recipient.*

### **b. RSA 649-B:3, I(b), class B felony**

knowingly [made, printed, published, or reproduced by other computerized means] [any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive identifying information] with the purpose of [facilitating, encouraging, offering, or soliciting] [sexual conduct of a child, sexual conduct with a child, or the visual depiction of sexual conduct of a child].

Sample Complaint: *knowingly printed an e-mail that contained the following information: "Dee Dee, female golden retriever, 2 years old", which he knew to be the code for a 12 year old blond female, and did so with the purpose to solicit sexual acts from this child.*

**c. RSA 649-B:3, I(c), class B felony**

knowingly [caused or allowed to be entered into or transmitted by computer] [any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive identifying information] with the purpose of [facilitating, encouraging, offering, or soliciting] [sexual conduct of a child, sexual conduct with a child, or the visual depiction of sexual conduct of a child].

Sample Complaint: *knowingly allowed an advertisement to be transmitted by computer, notifying the recipients of her availability to perform sexual acts with minor children, with the purpose of having that sexual activity photographed. She and Thomas Trenton created the advertisement, which Trenton then disseminated by computer.*

**d. RSA 649-B:3, I(d), class B felony**

knowingly [bought, sold, received, exchanged, or disseminated by means of computer] [any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive identifying information] with the purpose of [facilitating, encouraging, offering, or soliciting] [sexual conduct of a child, sexual conduct with a child, or the visual depiction of sexual conduct of a child].

Sample Complaint: *knowingly e-mailed to "King Charlie" the telephone number and physical description of T.T., a child under the age of 16, with the purpose facilitating a meeting between "King Charlie" and T.T. for the purpose of sexual conduct.*

### 3. **RSA 649-B:4, Certain Uses Of Computer Services Prohibited**

#### a. **RSA 649-B:4, class B felony**

knowingly used [a computer on-line service, internet service, or local bulletin board service] to [seduce, solicit, lure, entice, attempt to seduce, attempt to solicit, attempt to lure, or attempt to entice] [a child or another person he/she believed was a child] to commit [any offense under RSA 632-A, relative to sexual assault and related offenses, OR indecent Exposure of Lewdness under RSA 645: I, II, OR endangering a child, as defined in RSA 639:3].

Sample Complaint: *knowingly used a computer on-line service to attempt to seduce a person he believed to be a child to commit an offense under RSA 632-A. Through a chat-room conversation, he attempted to solicit "Silly Sal" to meet him for the purpose of engaging in sexual conduct.*

## **CC. RSA 650:2, Offenses Involving Obscenity**

*NOTE:* The following offenses are misdemeanors unless:

- it is a second or subsequent offense, in which case the offense is a class B felony; or
- the defendant knew that the obscene material involved a child, in which case it would be a class B felony. However, if the defendant had one or more prior convictions in NH or another jurisdiction for conduct prohibited under the RSA 650:2, the offense would constitute a class A felony.
- The complaint must allege the facts that would make it a felony offense, as illustrated in the examples below.

## 1. RSA 650:2, I(a)

[sold, delivered, provided, or offered or agreed to sell, deliver or provide] [any obscene material] knowing that the content of the material was obscene.

Sample Complaint—misdemeanor: *offered to sell to John Smith a book of photographs entitled “A Man With A Maid,” knowing that the content of the book was obscene.*

Sample Complaint—class B felony, subsequent offense: *offered to sell a book of photographs to John Smith entitled “A Man With A Maid,” knowing that the content was obscene. He was previously convicted of an offense of obscenity, for conduct prohibited under RSA 650:2, in the Utica, NY District Court on July 6, 2004.*

Sample Complaint—class B felony, involving a child: *offered to sell John Smith a book entitled “A Man With A Maid,” knowing that the photographs were obscene and included pictures of children engaged in obscene activities.*

Sample Complaint—class A felony, involving a child: *offered to sell John Smith a book entitled “A Man With A Maid,” knowing that the photographs were obscene and included pictures of children involved in obscene activities. He was previously convicted of an offense under RSA 650:2, I, in the Sullivan County Superior Court on August 14, 2005.*

## 2. RSA 650:2, I(b)

[presented, directed, or participated in that portion that makes it obscene] a [play, dance, or performance], knowing that the content was obscene.

Sample Complaint: *participated in one act of a play called “You’re a Good Man, Sally Brown” at the Abington Play House, which act was obscene, and he knew that it was obscene.*

**3. RSA 650:2, I(c)**

[published, exhibited, or made available] [any obscene material],  
knowing that the content of the material was obscene.

Sample Complaint: *exhibited a series of obscene photographs at his art gallery at 324 Ashley Street, knowing that the photographs were obscene.*

**4. RSA 650:2, I(d)**

possessed [any obscene material] [for purposes of sale or other commercial dissemination], knowing that the content of the material was obscene.

Sample Complaint: *possessed 15 photographs for purposes of sale, knowing that the photographs were obscene. The 15 photographs were described in detail in a sale advertisement, which listed his telephone number as the contact.*

**5. RSA 650:2, I(e)**

[sold, advertised, or commercially disseminated] [any material] by [representing or suggesting] that the material was obscene.

*NOTE:* For purposes of this section, it is not necessary that the material was obscene.

Sample Complaint: *sold a magazine titled “Big Game Hunting” to Jack Reardon, by representing to Reardon that it contained photographs depicting sexual activity between humans and animals.*



## **DD. Other References**

1. [Arrest Warrants Signed By Justices Of The Peace](#), pages 440-41
2. [Collecting Medications In Death Investigations](#), pages 442-45
3. [Desk Top Or Administrative Subpoenas](#), pages 446-48
4. [Drug Destruction Authorization Form](#), pages 449-52
5. [Identification And Disclosure Of Laurie Materials](#), pages 453-69
6. [Plea Bargaining In DWI Cases](#), pages 470-72

## APPENDICES TO LAW ENFORCEMENT MANUAL

1. [Sobriety Checkpoint Guidelines](#), pages 374-83
2. [Miranda Form](#), page 384
3. [Juvenile Rights Form](#), pages 385-87
4. [Consent To Search](#), page 388
5. [Customer Consent To Search Financial Records](#), page 389
6. [Consent To Search Computer](#), pages 390-91
7. [Search Warrant Application, Warrant, And Return](#), pages 392-95
8. [Affidavit Format](#), page 396
9. [Motion To Seal Search Warrant](#), pages 397-98
10. [Memo On Obtaining Cellular Telephone Information](#), pages 399-403
11. [Misdemeanor ALS Form](#), page 404
12. [Felony ALS Form](#), page 405
13. [Law Enforcement Memorandum On Mandatory Blood Draws](#), pages 406-11
14. [New Hampshire RSA 627:4](#), page 412
15. [New Hampshire RSA 627:5](#), pages 413-14
16. [Officer Deadly Force Investigation Protocol](#), pages 415-29
17. [Domestic Violence Investigative Checklist](#), pages 430-31
18. [Criminal Order Of Protection Form](#), pages 432-36
19. [Emergency Protective Order Form](#), page 437
20. [Amber Alert Form](#), page 438
21. [Courtroom Diagram](#), page 439
22. [Arrest Warrants Signed By Justices Of The Peace](#), pages 440-41
23. [Collecting Medications In Death Investigations](#), pages 442-45
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ATTORNEY GENERAL'S  
GUIDELINES FOR SOBRIETY CHECKPOINTS

PURPOSE

The purpose of these guidelines is to provide broad direction to New Hampshire law enforcement agencies on the planning and conduct of sobriety checkpoints to detect, apprehend and deter drug or alcohol-impaired motorists. Studies in New Hampshire and other jurisdictions indicate that sobriety checkpoints, when used as a component of an aggressive DWI-enforcement program, are particularly valuable for their deterrent effect and in detecting the driver who is moderately impaired and thus even more dangerous because he may not be detected through conventional enforcement methods.

These guidelines incorporate factors emphasized in court decisions from the growing number of jurisdictions in which sobriety checkpoint programs have been evaluated and approved. It is recognized that each law enforcement agency will come to its own determination regarding the feasibility of sobriety check-points based upon a variety of local factors. While there will be differences in sobriety checkpoint programs because of considerations such as manpower, equipment and location, adherence to the basic principles contained in these guidelines is of critical importance in ensuring not only that the programs are effective but also that they will withstand judicial scrutiny.

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

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.

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

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

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



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.<sup>1</sup> 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.

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<sup>1</sup> 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.

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.<sup>2</sup>

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<sup>2</sup> Politeness is an essential factor in order to minimize the intrusion to drivers and their passengers.

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.<sup>3</sup>

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<sup>3</sup> 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.

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.

**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. \_\_\_\_\_

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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 \_\_\_\_\_



**CONSENT TO SEARCH AND SEIZE**

I, \_\_\_\_\_, do hereby voluntarily authorize \_\_\_\_\_ and other officers he/she may designate to assist him/her, to search my (person) (residence) (or other real property) located at \_\_\_\_\_, and I further authorize said officers to remove whatever documents, or items of property whatsoever which they deem pertinent to their investigation, with the understanding that said officer will give me a receipt for whatever is removed.

I am giving this written permission to these officers freely and voluntarily, without any threats or promises having been made, and after having been informed by said officers that I have a right to refuse this search and/or seizure.

Signature: \_\_\_\_\_

Witness: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_\_\_ Time: \_\_\_\_\_

**CUSTOMER CONSENT AND AUTHORIZATION FOR  
DISCLOSURE OF FINANCIAL OR CREDIT RECORDS**

I, \_\_\_\_\_, hereby authorize the  
(Name of Customer)

\_\_\_\_\_  
(Name 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, \_\_\_\_\_, hereby authorize \_\_\_\_\_, a law enforcement officer, and any trained personnel he/she designates to assist, to conduct a complete search of my computer, (description) \_\_\_\_\_, with other identifiers, and any electronic storage devices and all removable computer media associated with the above-referenced computer and to make a forensic 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 I have lawful possession and control over it for purposes of this consent to search.

I have been advised by \_\_\_\_\_, and I 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 that are conducted, and I expressly waive any rights I may have to be physically present during any searches that 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 (name of officer and law enforcement agency)

\_\_\_\_\_ 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: \_\_\_\_\_

**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 \_\_\_\_\_ Court  
(county) \_\_\_\_\_  
\_\_\_\_\_  
(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)

(Continue on Next Page if Necessary)

(Use this additional sheet for Item No. 2, if necessary)

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 \_\_\_\_\_  
(identify)

4. The property for which I seek the issuance of a search warrant is the following:  
(here described the property as particularly as possible)

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)

\_\_\_\_\_  
(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 at \_\_\_\_\_  
(specify)

We therefore command you in the daytime (or at any time of the day or night) to make an immediate search  
of \_\_\_\_\_  
(identify premises)

\_\_\_\_\_ and  
(occupied by A.R.)

of the person of \_\_\_\_\_  
(A.R. 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)

\_\_\_\_\_

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_  
(city or town) (Day) (Month / Year)

(court seal) \_\_\_\_\_  
Justice of the \_\_\_\_\_ Court





**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

## SEARCH WARRANTS TO OBTAIN CELL PHONE INFORMATION

The following is offered to provide guidance on drafting a search warrant for the production of records maintained by the cellular provider.<sup>1</sup>

The first step in obtaining records from a cellular service provider is to identify the provider. A cellular phone carrier can be queried directly to ascertain if they provide service to a known number. The North American Numbering Plan Administration also tracks the numbers that have been assigned to service providers. (<http://www.nationalnanpa.com> ) Since a cellular phone number may now be ported (transferred) by a consumer to another cellular service provider, law enforcement should make a number porting check. Law enforcement may sign up for the service at (<http://www.nationalpooling.com/forms/law/index.htm> )

The second step in obtaining records from a cellular service provider is a preservation request to “freeze” stored records and communications pursuant to 18 U.S.C. § 2703(f). Many cellular service providers maintain records for only a short period of time. “Freeze letters” can be used as a directive to third-party providers to preserve records and not disclose the investigation to the suspect. This is an important tool to use to prevent third-party providers from writing over or deleting data you need while you obtain a warrant. Currently there are no laws that govern how long a third-party provider must retain log or other information.

It is also recommended that you contact the cellular service provider to ascertain the type and nature of records kept and any special terms or definitions that the carrier uses to describe those records. Any request for records should be limited to only the records that are needed. Do not request all of the categories of records listed unless it is truly needed for your case. Specific types of cellular phone records can be described in warrants as follows:

A) Subscriber information

Note: This should give you the name, address, phone numbers, and other personal identifying information relating to the subscriber.

B) Account comments

Note: Anytime the provider has contact with the customer or modifies the customer’s account a notation will be made by a service representative on the account.

C) Credit information

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<sup>1</sup> With the exception of minor changes to better reflect New Hampshire law, this section was prepared by Robert M. Morgester, California Deputy Attorney General, Special Crimes Unit, (916) 445-9330, [Robert.Morgester@doj.ca.gov](mailto:Robert.Morgester@doj.ca.gov).

Note: Most providers run a credit report on customer prior to activating the account.

D) Billing records

Note: Do not ask for toll information; that is a landline term for long distance. Specify period desired.

E) Outbound and inbound call detail

Note: This is the real time, current activity that is not yet on the customer's bill. "Inbound" is usually available for only a limited time (45 days) which gives other cellular phones calling the target number.

F) Call origination / termination location

Note: Available for a limited time (45 days) and gives location information on cell sites used, length of call, date, time, numbers dialed. With a GPS enabled phone it gives location of phone.

G) Physical address of cell sites and RF coverage map

Note: Needed to determine where cell site is located when you receive inbound & outbound or call origination & termination location. The RF coverage map models the theoretical radio frequency coverage of the towers in the system. You will want to limit this request to a specified geographical area.

H) Any other cellular telephone numbers that dial the same numbers as (xxx) xxx-xxxx.

Note: If you want to know who calls the same number the target calls (for example a pager or landline number). Available for only a limited time (45 days).

I) Subscriber information on any cellular numbers that (xxx) xxx-xxxx dials

Note: Subscriber information on the carrier's network that is dialing the target.

J) All of the above records whether possessed by cellular service provider [target of warrant] or any other cellular service provider

Note: If you anticipate the suspect may be roaming or if the number is roaming in the provider's market, you may be able to obtain information from other cellular carriers if you include this language in your description of records.

- K) All stored communications or files, including voice mail, email, digital images, buddy lists, and any other files associated with user accounts identified as: account(s) xxxxxx, mobile numbers (xxx) xxx-xxxx, or e-mail account roe1234@sprint.net.

Note: Cellular service providers now offer similar services to an internet service provider (ISP) and maintain the same type of records such as text messaging, e-mail, and file storage for the transfer of data including digital pictures. Limit your request to what you need.

- L) All connection logs and records of user activity for each such account including:

1. Connection dates and times.
2. Disconnect dates and times.
3. Method of connection (e.g., telnet, ftp, http).
4. Data transfer volume.
5. User name associated with the connections.
6. Telephone caller identification records.
7. Any other connection information, such as the Internet Protocol address of the source of the connection.
8. Connection information for the other computer to which the user of the above-referenced accounts connected, by any means, during the connection period, including the destination IP address, connection time and date, disconnect time and date, method of connection to the destination computer, and all other information related to the connection from cellular service provider.

Note: The above is a standard request made to ISP to track connection information. Remember with the type of cellular service offered today the user can send a message from the phone or from the associated account via a computer or other access device.

- M) Any other records or accounts, including archived records related or associated to the above-referenced names, user names, or accounts and any data field name definitions that describe these records.

Note: This is the catch-all to use when you want everything. This request also includes “archived” information. Many companies now “archive” records thus allowing for the preservation of subscriber records for a significant time. Archived records are usually stored in a spreadsheet format

encompassing a variety of data fields. You must request the data field name definitions in order to understand the spreadsheet.

N) PUK for SIM card # \_\_\_\_\_

Subscriber Identity Module (SIM) is a smart card inside of a GSM cellular phone that encrypts voice and data transmissions and stores data about the specific user so that the user can be identified and authenticated to the network supplying the service. The SIM also stores data such as personal phone settings specific to the user and phone numbers. SIM cards can be password protected by the user. Even with this protection SIM cards may still be unlocked with a personal unlock key (PUK) that is available from the service provider. Note that after ten wrong PUK codes, the SIM card locks forever.

A search warrant for the production of records held by a cellular service provider should always include an order for non-disclosure. The cellular service provider will notify the customer of the search warrant unless there is a non-disclosure order. This order will delay notification for 90 days and can be extended for an additional 90 days. A non-disclosure order may be phrased as follows:

### **ORDER FOR NON-DISCLOSURE OF SEARCH WARRANT**

It is further ordered that cellular service provider not to notify any person (including the subscriber or customer to which the materials relate) of the existence of this order for 90 days in that such a disclosure could give the subscriber an opportunity to destroy evidence, notify confederates, or flee or continue his flight from prosecution

Now that we have listed what records we are seeking, probable cause must be shown in the affidavit for each of the listed items. The following is sample language justifying the need for the production of specified records that can be used as a starting point for drafting the search warrant affidavit:

A) Through experience and training, your affiant knows cellular service providers maintain records related to subscriber information, account registration, credit information, billing and airtime records, outbound and inbound call detail, connection time and dates, Internet routing information (Internet Protocol numbers), and message content, that may assist in the identification of person/s accessing and utilizing the account.

B) Through experience and training, your affiant knows that the cellular service provider maintains records that include cell site information and GPS location. Cell site information shows which cell site a particular cellular telephone was within at the time of the cellular phone's usage. Some model cellular phone are GPS enabled which allows the provider and user to determine the exact geographic position of the phone. Further, the cellular service provider maintains cell site maps that show the geographical location of all cell sites within its service area. Using the cell site geographical information or GPS information, officers would be able to determine the physical location of the individual using

the cell phone number (xxx) xxx-xxxx, which according to corroborating sources listed above was/is in use by the suspect. That information is necessary to the investigating officers in order to \_\_\_\_\_

18 U.S.C. § 2703 provides in relevant part that:

A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity:

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure; or

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

Finally, some words of caution: If you use the cellular subscriber records to attempt to determine the physical location of an individual's position there are a couple of questions that must be answered. First question is call overloading. When the maximum call processing capacity of a specified cell tower is reached it may be designed to hand off calls to other cell towers. Thus, a tower that the records reflect handled a call may have off-loaded the call to another cellular tower. The cellular provider will be able to check the cellular traffic on a specified cellular tower to determine whether or not any calls were off loaded.

A related issue is whether the records reflecting the placement of a specified cellular tower's directional antenna are accurate. Occasionally, the cellular provider may make adjustments to the cellular towers directional antenna that are not reflected in the records. Since the physical location of an individual's position will be based upon this directional antenna, its placement should be confirmed prior to trial.





Richard M. Flynn  
Commissioner of Safety  
Virginia C. Beecher  
Director of Motor Vehicles

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF SAFETY  
DIVISION OF MOTOR VEHICLES  
23 Hazen Drive, Concord, NH 03305

299197

Date of Arrest: \_\_\_\_\_  
Date of Service: \_\_\_\_\_  
Date of Birth: \_\_\_\_\_  
License #: \_\_\_\_\_ State \_\_\_\_\_  
Summons #: \_\_\_\_\_

Name: \_\_\_\_\_  
[AND ALIASES]  
Mailing Address: \_\_\_\_\_  
\_\_\_\_\_

**I. ADMINISTRATIVE LICENSE SUSPENSION RIGHTS/VIOLATIONS AND MISDEMEANORS** OHRV: Y N COMM. VEH: Y N COMM. DRIVER: Y N HAZMAT: Y N (circle one)

- 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.
- You are being 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 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 portion of our sample of your breath, blood, or urine for testing at your own expense.
- If you submit to a blood, urine or breath test which 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 or right to drive in this state will be suspended.
- If you refuse to take a test or tests, the refusal can be admissible in court.
- If you refuse to submit to a test requested by the officer, your New Hampshire driver's license/operating privileges or non-resident operating privilege to drive in this state will be suspended.
- I have been informed of these rights.

\_\_\_\_\_  
Defendant  
8.  I agree to the requested testing.  I refuse the requested testing.  
\_\_\_\_\_  
Defendant

Defendant refused to sign (check if applicable)  
\_\_\_\_\_  
Officer/Witness

**II. ORDER OF SUSPENSION**

**THIS IS YOUR OFFICIAL NOTICE OF SUSPENSION**

- FAILURE TO SUBMIT - Because you failed to submit to testing, the Department of Safety hereby suspends your driving privileges, effective thirty (30) days from today.
- ILLEGAL LEVEL - Because the tests which were taken indicated an alcohol concentration of 0.08 percent or more (or 0.02 or more, if you are under 21), the Department of Safety hereby suspends your driving privileges, effective thirty (30) days from today.

Results indicated \_\_\_\_\_ percent alcohol concentration in your system.

**III. SURRENDER OF NEW HAMPSHIRE DRIVER'S LICENSE**

By law, the officer is required to take your NH license. (If license is not included, indicate reason): \_\_\_\_\_

**IV. TEMPORARY DRIVING PERMIT**

- This entire notice is valid as a temporary driving permit. However, it shall become invalid if detached, defaced or a suspension, revocation or expiration takes effect within the period of issue. Valid only through 12:01 am thirty (30) days after date of service (see above).
- No temporary permit issued because operator does not have a valid New Hampshire license or did not surrender his New Hampshire license.

**V. OFFICER'S REPORT**

I, \_\_\_\_\_ (officer's name), of the \_\_\_\_\_ complete mailing address \_\_\_\_\_ Police Department

hereby swear that I requested a test pursuant to RSA 265:84 and that \_\_\_\_\_ Driver's name

- Refused to submit to testing.  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 \_\_\_\_\_

\_\_\_\_\_  
(Notary Public or Justice of the Peace)

DSMN426 (Rev. 09/06)

DEPT. OF SAFETY COPY



John J. Barthelmes  
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)

DSMV437 (Rev.06/07)

**ATTORNEY GENERAL  
STATE OF NEW HAMPSHIRE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

PHILIP T. McLAUGHLIN  
ATTORNEY GENERAL



STEVEN M. HOURAN  
DEPUTY ATTORNEY GENERAL

April 8, 1999

Memo To: All County Attorneys

From: Philip T. McLaughlin, Attorney General *PM*

Subject: Law Enforcement Memo Re: Mandatory blood tests pursuant to RSA 265:93

As you may be aware, Superior Court Judge Fauver and District Court Judge Huot have both ruled that the results of a blood test taken pursuant to RSA 265:93 can not be used as evidence against a defendant in a criminal trial. RSA 265:93 mandates, in relevant part, that in any motor vehicle accident involving a fatality or serious bodily injury, the blood of any surviving driver must be drawn for purposes of testing for the presence of intoxicants, so long as there is probable cause to believe that the driver caused the accident. (The requirements of RSA 265:93 also apply to boating accidents, pursuant to RSA 270:58-b). The basic premise of the two judges' rulings was that RSA 265:93 unconstitutionally permits the warrantless drawing of blood without probable cause to believe the driver was impaired and absent exigent circumstances. As a result of the courts' rulings, law enforcement officers have voiced some confusion over whether they are still expected to comply with the requirements of RSA 265:93.

This office is of the opinion that the search required by RSA 265:93 is constitutional as it falls within the recognized "special needs" exception. There is, however, a significant issue as to whether the results can be used in a criminal prosecution. The attached law enforcement memo speaks to both of those issues.

As you will see, law enforcement officers are advised to adhere to the mandates of RSA 265:93, but not to rely on the statute as the sole basis for using test results as evidence at trial. They are instructed to document any circumstances that would justify the warrantless drawing of blood under exigent circumstances. Such documentation could provide the State an alternative argument in support of the admissibility of the test results.

12-24  
1  
Officers are also advised to consult with your office before bringing charges in any case where there is either no evidence supporting probable cause or exigency, or where the evidence of those factors is weak. This is to ensure that your office has an opportunity to review the merits of a proposed prosecution to determine whether there is a sufficient evidentiary basis to proceed with the case. This office stands ready to assist you in evaluating these cases and in developing an appropriate record for purposes of appeal, should a case be pursued.

ATTORNEY GENERAL  
STATE OF NEW HAMPSHIRE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

PHILIP T. McLAUGHLIN  
ATTORNEY GENERAL



STEVEN M. HOURAN  
DEPUTY ATTORNEY GENERAL

April 8, 1999

Memo To: All Law Enforcement Agencies

From: Philip T. McLaughlin, Attorney General *PM*

Subject: Mandatory blood tests pursuant to RSA 265:93

There have been recent decisions from the superior and district courts that call into question the constitutionality of the provision in RSA 265:93 which mandates the drawing of blood from any surviving driver of a collision resulting in death or bodily injury, when there is probable cause to believe that the driver caused the accident. This memo serves to clarify the position of this office with respect to that statutory provision and to advise law enforcement officers of their responsibilities under that statute.

RSA 265:93 provides, in relevant part:

When a collision results in death or serious bodily injury to any person, all drivers involved, whether living or deceased, and all deceased vehicle occupants and pedestrians involved shall be tested for evidence of alcohol or controlled drugs. *A law enforcement officer shall request a licensed physician, registered nurse, certified physician's assistant, or qualified medical technician or medical technologist to withdraw blood from each driver involved if living and from the body of each deceased driver, deceased occupant or deceased pedestrian, in accordance with RSA 611:6, II, for the purpose of testing for evidence of alcohol content or controlled drugs; provided that in the case of a living driver the officer has probable cause to believe that the driver caused the collision. . . .*

A copy of the report of any such test shall be kept on file by the medical examiner. The filed report is not a public record under RSA 91-A.

However, the report shall be made available to the following:

I. Any highway safety agency for use in compiling statistics to evaluate the effectiveness of its program; and

II. Any person, including his legal representative, who is or may be involved in a civil, criminal, or administrative action or proceeding arising out of an accident in connection with which the test was performed.

Thus, a blood test must be administered on a surviving driver, even in the absence of any indication that the person may have been driving under the influence of intoxicating substances.

It is well established that the compulsory administration of a blood test constitutes a search under the federal and state constitutions. Schmerber v. California, 384 U.S. 757, 767 (1966). Absent a search warrant or the person's consent, such a search is unconstitutional unless it falls within a particularized exception to the warrant requirement. The United States Supreme Court has recognized such an exception when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." Skinner v. Labor Executives' Ass'n, 489 U.S. 602, 612 (1989).

In Skinner, the Court upheld the constitutionality of a federal regulation requiring any railroad employee directly involved in a major train accident (defined as one resulting in a fatality, release of a hazardous substance requiring evacuation, or damage to railroad property in excess of \$500,000) or an accident resulting in the fatality of a railroad employee, to provide blood and urine samples for testing to determine the presence of intoxicating substances. The regulation was enacted in response to a finding that alcohol and drug abuse by railway employee posed a serious threat to the safety of the public and had been a contributing factor in numerous major accidents.

The Court concluded that the need to regulate the conduct of railroad employees, to ensure public safety, presented a "special need" which justified a departure from the usual warrant and probable cause requirements. The Court based its conclusion of several factors: (a) because the circumstances under which a blood or urine test could be required were specifically and narrowly defined, those charged with administering the tests were left with minimal discretion, and there were virtually no facts for a neutral magistrate to evaluate; (b) because alcohol and drugs are constantly being metabolized and eliminated from the system, the purpose behind the search would be frustrated by the time delays attendant to the securing of a search warrant; (c) the required tests were not unduly intrusive, either in restricting a person's movement or invading that person's privacy; (d) the regulation increased the deterrent effect of administrative penalties arising from the use of drugs or alcohol, by increasing the likelihood that such conduct would be discovered; (e) the procedures help railroad companies obtain valuable information about the causes of major accidents and enable them to take steps to safeguard the public; and (f) the testing was required not to assist in the prosecution of employees, but rather to prevent drug and alcohol related casualties. The Court expressly left open the question of "whether routine use in criminal prosecution

obtained pursuant to [these regulations] would give rise to an inference of pretext or otherwise impugn the administrative nature of the [regulations].”

RSA 265:93 is analogous to the regulation at issue in Skinner. Although not expressly stated, it is clear that the statute was enacted in furtherance of the State’s compelling interest in making its roadways safe. Its focus is obtaining information concerning alcohol and drug impairment of those involved in serious collisions. The resulting statistics are provided to highway safety agencies for use in evaluating the effectiveness of their programs. Thus, like the regulation in Skinner, it addresses a special need, beyond the need for normal law enforcement. In addition, the statute narrowly defines both the circumstances under which a living person can be required to submit to a search, and the extent of that search, thereby minimizing the need for the detached scrutiny of a magistrate. The blood extraction itself is minimally intrusive, involving virtually no risk, trauma or pain, and, by statute, must be done by trained medical personnel. Hence, the level of intrusiveness is minimal. Finally, the purpose of the statute would be frustrated by the imposition of a warrant requirement. Because both drugs and alcohol are metabolized and eliminated with relative speed, the delay attendant to obtaining a warrant could result in the destruction of evidence. Moreover, because the statute takes effect upon the occurrence of a collision involving death or serious bodily injury, there would likely be little time or available personnel to secure a warrant.

In summary, because the statute has an administrative, as opposed to an investigatory purpose; furthers a compelling government interest; and involves only a minimal intrusion on a person’s privacy, it would appear to satisfy the requirements of the “special needs” exception to the warrant requirement. That conclusion, however, does not necessarily mean that the test results can be used against the driver in a criminal proceeding.

In Skinner, the Court expressly declined to address that issue, observing that there was no claim that the regulation was designed as a pretext for law enforcement to gather evidence of criminal activity. However, the Court left open the possibility that routine use in a criminal proceeding of evidence gathered pursuant to the regulation could give rise to an inference of pretext or impugn the administrative nature of the regulatory process, and thereby render the search unconstitutional.

A similar concern could be raised about RSA 265:93. While the statute does not expressly provide that the test results may be turned over to law enforcement, it does allow for disclosure to anyone involved in a criminal or civil proceeding relating to the underlying accident. If test results are furnished to law enforcement and routinely used as evidence in a criminal proceeding, courts could draw an inference that the statute provides a pretext for an otherwise unconstitutional search.

In light of the above, law enforcement officers are instructed as follows: In the event of a collision involving a fatality or serious bodily injury, the requirements of RSA 265:93 must be fulfilled, including the requirement that blood be drawn from any surviving driver, so

long as there is probable cause to believe that the driver caused the collision. However, officers are advised not to rely exclusively on that statute to obtain blood test evidence of the presence of intoxicants. Whenever possible, officers should document any facts supporting a finding of probable cause to believe that the driver is impaired, and any exigent circumstances that conducting a warrantless search. This would provide the State with an alternative argument to support the admissibility of the test results at a subsequent trial.

In the event that test results taken pursuant to RSA 265:93 reveal the presence of intoxicants in a case where there was either no probable cause to believe that the driver was intoxicated, or the evidence in support of such a finding was weak, the case should be brought to the attention of the county attorney before charges are instituted. The county attorney, in consultation with this office, will evaluate whether there is sufficient evidence to defend the admissibility of the test results at trial.



**RSA 627:4 Physical Force in Defense of a Person.**

I. A person is justified in using non-deadly force upon another person in order to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful, non-deadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose. However, such force is not justifiable if:

(a) With a purpose to cause physical harm to another person, he provoked the use of unlawful, non-deadly force by such other person; or

(b) He was the initial aggressor, unless after such aggression he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues the use or threat of unlawful, non-deadly force; or

(c) The force involved was the product of a combat by agreement not authorized by law.

II. A person is justified in using deadly force upon another person when he reasonably believes that such other person:

(a) Is about to use unlawful, deadly force against the actor or a third person;

(b) Is likely to use any unlawful force against a person present while committing or attempting to commit a burglary;

(c) Is committing or about to commit kidnapping or a forcible sex offense; or

(d) Is likely to use any unlawful force in the commission of a felony against the actor within such actor's dwelling or its curtilage.

III. A person is not justified in using deadly force on another to defend himself or a third person from deadly force by the other if he knows that he and the third person can, with complete safety:

(a) Retreat from the encounter, except that he is not required to retreat if he is within his dwelling or its curtilage and was not the initial aggressor; or

(b) Surrender property to a person asserting a claim of right thereto; or

(c) Comply with a demand that he abstain from performing an act which he is not obliged to perform; nor is the use of deadly force justifiable when, with the purpose of causing death or serious bodily harm, the actor has provoked the use of force against himself in the same encounter.

(d) If he is a law enforcement officer or a private person assisting him at his direction and was acting pursuant to RSA 627:5, he need not retreat.

## **RSA 627:5 Physical Force in Law Enforcement.**

I. A law enforcement officer is justified in using non-deadly force upon another person when and to the extent that he 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 knows that the arrest or detention is illegal, or to defend himself or a third person from what he 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.

II. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary:

(a) To defend himself or a third person from what he reasonably believes is the imminent use of deadly force; or

(b) To effect an arrest or prevent the escape from custody of a person whom he reasonably believes:

(1) Has committed or is committing a felony involving the use of force or violence, is using a deadly weapon in attempting to escape, or otherwise indicates that he is likely to seriously endanger human life or inflict serious bodily injury unless apprehended without delay; and

(2) He had made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest and has reasonable grounds to believe that the person is aware of these facts.

(c) Nothing in this paragraph constitutes justification for conduct by a law enforcement officer amounting to an offense against innocent persons whom he is not seeking to arrest or retain in custody.

III. A private person who has been directed by a law enforcement officer to assist him in effecting an arrest or preventing an escape from custody is justified in using:

(a) Non-deadly force when and to the extent that he reasonably believes such to be necessary to carry out the officer's direction, unless he believes the arrest is illegal; or

(b) Deadly force only when he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the imminent use of deadly force, or when the law enforcement officer directs him to use deadly force and he believes such officer himself is authorized to use deadly force under the circumstances.

IV. A private person acting on his own is justified in using non-deadly force upon another when and to the extent that he reasonably believes it necessary to arrest or prevent the escape from custody of such other whom he reasonably believes to have committed a felony and who in fact has committed that felony: but he is justified in using deadly force for such purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the imminent use of deadly force.

V. A guard or law enforcement officer in a facility where persons are confined pursuant to an order of the court or as a result of an arrest is justified in using deadly force when he

reasonably believes such force is necessary to prevent the escape of any person who is charged with, or convicted of, a felony, or who is committing the felony of escape from official custody as defined in RSA 642:6. The use of non-deadly force by such guards and officers is justified when and to the extent the person effecting the arrest believes it reasonably necessary to prevent any other escape from the facility.

VI. 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.

VII. Use of force that is not justifiable under this section in effecting an arrest does not render illegal an arrest that is otherwise legal and the use of such unjustifiable force does not render inadmissible anything seized incident to a legal arrest.

VIII. Deadly force shall be deemed reasonably necessary under this section 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.

**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

PETER W. HEED  
ATTORNEY GENERAL



KELLY A. AYOTTE  
DEPUTY ATTORNEY GENERAL

**MEMORANDUM**

TO: All Enforcement Agencies  
FROM: Peter W. Heed, Attorney General  
DATE: February 9, 2004  
RE: Officer Deadly Force Investigation Protocol

A handwritten signature in black ink, appearing to read "P. Heed".

I am pleased to announce that the Office of the Attorney General has finalized its Officer Deadly Force Investigation Protocol (the "Protocol").

Law enforcement officers are granted special authority to use deadly force in the course of their duties to protect the people and property of their communities. With this special authority comes an obligation that officers are accountable for their use deadly force. As chief law enforcement officer for the State of New Hampshire, the Attorney General has a responsibility to ensure that whenever a law enforcement officer uses deadly force, the officer's actions are done in conformity of the law. To that end, for many years the Attorney General's Office has directed the investigation of incidents involving the use of deadly force by law enforcement officers.

Investigation of deadly force incidents invariably involve a difficult and emotional experience for the law enforcement officer who has been called upon to use deadly force in the course of his or her duties. The investigation of the deadly force incident should not contribute to the stress and trauma experienced by a law enforcement officer who has acted in accordance with his or her obligations and consistent with the officer's legal responsibilities. The Attorney General's Office believes that a written policy will eliminate the uncertainty and confusion that an officer who has used deadly force may experience when his or her conduct is under investigation.

This Protocol is the product of careful review and consideration by many different members of the law enforcement community, including the Chiefs of Police, Police Standards and Training, State Police and this Office. While no formal written policy has existed before today, investigations involving the use of deadly force have followed the framework of this Protocol for the last several years. This has enabled the prosecutors and investigators who have conducted the investigations to refine the process to make the investigations run as smooth as possible. With the distribution of this Protocol, law enforcement officers will have a written procedure that will assist them in understanding the process if they are involved in a deadly force incident.

Please read the attached Protocol carefully. It applies to any situation when an officer uses deadly force during the course of his or her duties and a person is injured, even if the subject of the deadly force does not die. It also applies when death results from an officer's use of non-deadly force. In the event that an officer is involved in a deadly force incident, notification to the appropriate agencies must be made pursuant to the law enforcement memorandum outlining notification for homicides.

I trust that this Protocol will contribute to the public's confidence in law enforcement officers throughout the State.

228237

A handwritten signature in black ink, appearing to read "Robert Had". The signature is written in a cursive style with a large initial "R" and "H".

**STATE OF NEW HAMPSHIRE DEPARTMENT  
OF JUSTICE  
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 ethically, and be accountable for its use.
- B. Events involving the use of deadly force by law enforcement officers can result in harsh criticism from family members of killed or injured persons. They are always subjected to intense media scrutiny, and frequently lead to lawsuits against the police and the units of government that employ them, which may include federal as well as State court action. It is in the best interest of the involved officers and police departments and the public that the use of deadly force by officers be followed by an independent, unbiased, professional investigation.
- C. Even when such an investigation rules out the possibility of criminal charges against the officers involved, their employing agency will generally conduct an internal investigation to determine if the actions of the officers were consistent with the agency's policies and procedures 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.

**II. Purpose**

As the State's chief law enforcement officer as provided in RSA 7:6 and the chief prosecutor in homicides, the Attorney General has the responsibility to ensure that whenever deadly force is used by law enforcement officers, it is done in conformity to the law. The purpose of this protocol is to guide the office in its investigation of such incidents, and to inform law enforcement officers and the public of what to expect when the use of force by law enforcement officers results in death or serious bodily injury to any person.

### III. Definitions

As used in this protocol, the following words shall have the meanings ascribed to them in this paragraph:

- A. **Deadly force** means deadly force as defined in RSA 627:5, 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 or against a law enforcement officer or when death results from the application of non-deadly force by or against such officer.
- C. **Deadly force investigation** means an inquiry conducted under authority of the Attorney General in his or her role as chief law enforcement officer pursuant to RSA 7:6.
- D. **Deadly force investigation team** means a group of officers, attorneys, or other persons with specialized training or expertise designated by the Attorney General to conduct an investigation of a deadly force incident. The team may include a senior investigator and a senior attorney from the Attorney General's Office, investigators from other law enforcement agencies, members of the 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(s)** means officers reasonably believed to have employed deadly force or non-deadly force.
- 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 the state or one of its political subdivisions and authorized by law to make arrests and use force, including probationary or W1 certified officers.
- J. **Lead Investigator** means the member of the Deadly Force Investigation Team assigned by order of the Attorney General to take charge of the other investigators and responsible for ensuring that investigative interviews are conducted, the scene of the incident is documented, and all physical evidence related to the incident is properly collected, marked, preserved, stored, and where appropriate, submitted for laboratory analysis, and responsible to 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. **Officer** means a law enforcement officer as defined above.
- N. **Senior Attorney** means the Assistant Attorney General of any rank responding to and designated by the Attorney General, Deputy Attorney General, the Chief of the Criminal Bureau or the Chief of the Homicide Unit to conduct a particular deadly force investigation, and responsible to the Attorney General for such investigation.
- O. **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.
- P. **Subject** means any person killed or who received serious bodily injury as a result of the application of force by a law enforcement officer during or as the result of a deadly force incident, including a person who commits suicide or attempts to commit suicide during the incident.
- Q. **Use of force** means the use of deadly force resulting in death or serious bodily injury to any person, or the use of non-deadly force resulting in the death or serious bodily injury of any person.
- R. **Victim** means any person killed by someone other than a law enforcement officer as the result of a deadly force incident. A subject only becomes a victim if their death or injury resulted from the commission of a crime by an officer.



#### IV. Policy

- A. Notification: Immediately upon learning that a deadly force incident has occurred, the ranking on-duty officer of the involved agency shall immediately cause notification to be made to 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 Chief Medical Examiner's Office (pursuant to RSA 611:4 and the most recent law enforcement memorandum), and the County Sheriff.
1. Involved agencies should not hesitate at their discretion to make notifications to the Attorney General's Office or other appropriate parties before an incident has been concluded, if it appears that the application of deadly force will be necessary.
- B. Actions by the Involved Agency Prior to Arrival of the Investigation Team
1. Although officers involved in deadly force incidents may be injured or suffering from traumatic stress reactions, in many cases they are able to take appropriate follow-up action until backup officers or supervisory personnel arrive. Officers involved should take practicable and appropriate measures to protect their personal safety, the safety of the public including injured subjects or victims, and to establish a preliminary perimeter and preserve evidence essential to the investigation, including the following steps:
    - a. Ensure that there are no further threats to safety.
    - b. Secure and separate suspects.
    - c. Relay to communications and other field units, information on fleeing suspects and attempt to contain them.
    - d. Administer first aid to themselves, then to victims and subjects as necessary, pending the arrival of emergency medical assistance.
    - e. Request a supervisor, additional backup, specialized units if required, and emergency medical assistance if required.

- f. Holster and secure in place any involved police handguns. Secure long guns in place as evidence. Ensure that guns are not opened, loaded, unloaded, shell casings removed, or in any other way tampered with. Any police guns that were dropped or discarded, and any weapons used by subjects should be left in place and guarded. If this is not possible with police weapons, their location and position should be recorded and the weapon returned to the holster as is until it can be turned over to investigators.
- g. Note the time, and survey the area for relevant facts, identify individuals who are present or have departed the scene, witnesses, potential suspects and suspect vehicles.
- h. If time permits and the officers are physically and emotionally capable of doing so, establish an outer perimeter with crime scene tape or otherwise. Limit entry to the area to persons necessary to the investigation or rendering assistance to the injured. 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 persons, weapons, and other relevant objects. Identify witnesses and other persons present at the scene and request that they remain in order to make brief statements, and provide information to arriving supervisors.
- i. 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 involved officers and all persons at the scene, including attending for any needed medical attention.
2. They should then assure that any suspects are *in* custody and guarded, that all potential witnesses have been identified, a secure perimeter established 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 officers and encourage them not to speak about the incident until supervisors arrive.

D. Duties of Arriving Supervisors

1. Arriving supervisors should see to the safety and medical treatment of all persons requiring it.
2. If an officer has been wounded, ensure that an officer accompanies and remains with the officer at the hospital if possible. Ensure that the officer's family is notified on a priority basis (in person rather than by telephone if possible), and the family transported to the hospital or other location where they are needed as soon as possible.
3. Not release the officer's name to the media or unauthorized parties prior to notification of the family.
4. Assign an officer to the family for security, support, control of the media and visitors, establishment of communications and related matters.
5. Ensure that a proper perimeter has been defined and secured, and determine whether the scene is large enough both that 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.
6. Locate and secure in place any firearms discharged or other weapons used by the involved officers and locate and guard any weapons used by subjects or others. Check the firearms of ancillary officers who were present at the scene for discharge and secure them in place if they appear to have been used recently.
7. Determine and note the original position of the directly involved officers and of the suspect at the time of the shooting. Speak with involved officers separately, and avoid any questioning beyond what is absolutely required to secure the scene, identify witnesses and apprehend any suspect who may have escaped. Beyond that, communication with the directly involved officer(s) should be limited to questions or statements intended to assess and assure the officer's well-being, and should not include any interrogation or the functional equivalent of interrogation regarding the incident.
8. Ensure that officers at the scene are cautioned not to discuss the incident among themselves and, if possible, are separated, with an officer who was not involved in the incident assigned to each directly involved officer for emotional support. The assigned support officer's response to the officer should be non-judgmental, assuring them that it is natural for them to have a

strong emotional reaction, and to express empathy for what they have been through. The assigned support officer's response should not include interrogation or the functional equivalent of interrogation. The assigned support officer should also ensure that the involved officer does not tamper with his or her clothing, duty belt, or firearm and leaves them secured in place.

9. Advise the directly involved officers to expect an extended period of sitting, waiting, and being interviewed.
10. Ensure that any short-lived evidence that might be washed or blown away is secured, and that the clothing of officers and other injured persons that was removed during medical treatment at the scene or at a medical facility is collected and properly preserved for evidentiary purposes.
11. Locate any witnesses and request that they be transported to the police station for interviews by the deadly force investigation team. Caution them not to discuss the incident among themselves. If possible, place them in separate rooms at the police station while awaiting an interview. Provide them with pen and paper and ask that they make notes of their recollection. If they refuse to be transported to the station, request that they remain at the scene or, as a last resort, determine how they can be located at a later time.
12. Ensure that all necessary notifications have been made as required in IV-A, above, and that the Police Chaplain, if any, has been notified.
13. Collect information about the subject including name, date of birth, residence, physical description, etc.
14. Be aware of and sensitive to the existence of post-incident trauma in the officers. Follow the agency's policies with regard to dealing with the impact of post-shooting trauma on police personnel and their families. See that involved officers are moved away from the immediate scene.
15. Establish a command post and a staging area for the media if necessary.
16. Appoint a scene recorder to make a chronological record of activities at the scene until the deadly force investigation team arrives. Include persons present and entering or leaving, actions taken by police personnel and the identities of any emergency medical or fire personnel who are required to access the scene.
17. If a still and/or videotape camera is available, carefully and without contaminating the scene, document it, including any bystanders.

E. Responsibilities of the Investigation Team's Lead Investigator and Senior Attorney

1. Upon arrival at the scene, the Lead Investigator of the Investigation Team and the Senior Attorney shall be briefed and given a walkthrough by the on-scene supervisor and the agency head, if present, and invite 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 investigation team.
2. The Lead Investigator shall ensure that the recommended tasks outlined above for the involved officers, first responders and supervisors have been performed appropriately, and take measures to ensure that any deficiencies are immediately remedied.
3. The Lead Investigator shall ensure that photographs and videotapes are taken of the overall scene, any evidentiary items and all persons present. Color photographs of the involved officers as they appear at the scene shall be taken, including photos of any bruises or injuries. If a digital camera is used, take duplicate photos with a Polaroid or conventional film camera, to avoid accusations of tampering.
4. All officers at the scene who took any notes or diagrams shall be interviewed by the team and those notes collected, copied, and copies returned to them. If videotapes or films were taken, the team shall request them, make prints or copies for the person who took them and retain the originals.
5. Ensure that crime scene specialists thoroughly inspect the scene and collect and preserve any relevant evidence, and that the scene is thoroughly diagramed by the team.
6. Ensure that notification has been provided to next of kin of injured or deceased subjects.
7. Locate and identify witnesses and ask permission to conduct tape recorded or videotaped interviews.
8. Conduct interviews with fire department personnel, emergency medical service providers, and any other first responders to the scene.
9. The Lead Investigator, with or without the Senior Attorney present, should conduct a separate, videotaped or tape-recorded interview with the directly involved officers, in a private location. If possible the interview should be conducted within 24 hours of the incident. The Lead Investigator should

introduce any members of the team present, and limit the number of persons there. He or she should advise the officer not to discuss the incident with anyone except a personal or departmental attorney, labor representative, or designee of the agency head until the investigation has been completed and the findings made public.

- a. Be aware of any symptoms of post-traumatic stress, including time and place distortions, confusion, hearing and visual distortion and emotional impairment, or shock. Defer any except cursory questioning if these symptoms are in evidence.
- b. Express appropriate empathy to the officer for what he or she has been through. Be sure they have received any needed medical attention. Make sure he or she has had an opportunity to contact family members and a personal representative. Do not require officers to have a personal representative present, but give them an opportunity to reflect on whether or not to retain representation before being interviewed.
- c. Inform the officer that your inquiry is being conducted in accordance with the normal procedure when a deadly force incident occurs. Tell him or her that the purpose is to determine whether the use of deadly force was justified under RSA 627:5 and to rule out criminal conduct, not to determine compliance with his or her agency's policy or for the purpose of departmental discipline. Emphasize that the inquiry is being conducted according to the Attorney General's protocol. Ask the officer if he or she wishes to have the department liaison present during any interview. If so, instruct the department liaison that he or she is there as an observer and not an interviewer.
- d. Have the department liaison ask any directly involved officer to turn over his or her duty belt and any weapons to you in a discreet manner, and explain that if spare equipment is available, you will request that the department issue it to the officer as soon as practicable. Every effort should be made to test-fire and return weapons within 48 hours unless there is a particular need to retain a specific weapon or weapons.
- e. If it reasonably appears that the directly involved officer's clothing will be of any evidentiary value, arrange through the department liaison to have appropriate clothing brought to the scene. Then, in as dignified and discreet a manner as possible, collect the officer's clothing and secure and adequately preserve it for evidentiary purposes.

- f. Inform the directly involved officer that he or she is not under arrest and the inquiry is not based on any presumption that he or she acted illegally, if no such presumption has been formed at the time. Ensure that the location of the interview, the number and demeanor of the persons present is not such that the officer should feel threatened, coerced or intimidated. Ask the officer to consider making a voluntary, complete statement after having a chance to collect his or her thoughts and consult with personal representative if he/she so chooses. Inform the officer that an additional interview may be requested later on, to ensure that the officer, upon reflection, has not recalled additional details.
- g. If the officer agrees to be interviewed, conduct as complete and thorough an interview as the officer's physical and emotional state will permit. If the interview is conducted at a medical facility, make sure that permission of the treating medical team has been obtained beforehand. If the officer's physical or emotional condition makes it impractical to obtain sufficiently detailed information, conclude the interview by arranging for a future, more detailed interview at a more appropriate time. If at any time the Senior Attorney determines that the officer would be arrested if he or she attempted to leave the presence of the investigators, the *Miranda* warning should be given and a waiver obtained before any further questioning. Because this is not a departmental internal investigation, the *Garrity* warning is not required.
- h. The Lead Investigator shall continue to supervise the investigation, assign all tasks as required, identify leads that need to be pursued, persons to be interviewed, evidence to be collected, evidence to be submitted for forensic analysis, documents such as police records, 911 tapes, radio transmission tapes, NIDI information, law enforcement agency policies, police personnel records, and records of prior contacts with subjects and witnesses that may be required by the investigation team. The Lead Investigator shall keep the Senior Attorney fully informed, and defer to his or her judgment on all legal matters. The Lead Investigator shall request that any forensic tests be performed on a priority basis.
- i. In situations where a firearm has been secured immediately after a deadly force incident and it can be conclusively determined by field test that it has not been fired since it was last cleaned, or that clothing or items of equipment immediately seized have been examined and will yield no useful evidence, the Lead Investigator may release these items to a supervisor from the involved agency after receiving approval from the Senior Attorney.

F. Relationship to Involved Agency Internal Investigation

If the directly involved agency or an insurance representative conducts an internal investigation, the Senior Attorney should ensure that no information, reports or interviews conducted pursuant to *Garrity* are shared with or made available to the Deadly Force Investigation Team.

G. Victim-Witness Services

1. Upon request of an involved officer or their immediate family, or a member of a subject's or victim's immediate family, the Attorney General's Victim/Witness Services Unit may provide services to these families in accordance with present practices in homicide cases.
2. The Senior Attorney shall notify a member of the immediate family of a subject or victim of the availability of these services and how to access them and of his or her willingness to meet with interested family members at an appropriate time and place.
3. The Senior Attorney may share sufficient information with family members to give them a general description of what investigative steps are being taken and a preliminary account of how the incident transpired, but shall not share confidential investigative information. Any information that is about to be released to the public may be released to family members in advance, but non-public investigative information shall be released only sparingly.

H. Disclosure of Information Generally

1. The Senior Attorney, or with his or her permission, the Lead Investigator shall conduct periodic briefings of the head of the involved agency or his or her designees (unless the agency head was a directly involved officer) during the pendency of the investigation, and otherwise upon the agency head's request. These briefings may include the County Attorney. The recipients shall agree to preserve the confidentiality of the information, and if the agreement is breached, no further confidential information shall be shared.
2. In consultation with the head of the involved agency (unless the agency head was the directly involved officer) and the Lead Investigator, the Senior Attorney should develop a statement of preliminary facts for the media, to be delivered by the Senior Attorney in the presence of the Lead Investigator and the head of the involved agency (or, if the agency head was the directly involved officer, a representative of the local hiring authority) or agency



liaison. No persons other than the Senior Attorney should respond to press questions unless so authorized by the Senior Attorney.

3. Periodically during the investigation the Senior Attorney may issue news releases or make members of the Investigation team available for formal or informal 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 invited to sit with the Team at any such briefings. The Senior Attorney in his or her sole discretion shall balance the public's right to know against the need to preserve the integrity of the investigation and the attorney's obligation under Rules 3.6 and 3.8 of the *Rules of Professional Conduct for Attorneys*.
  - a. Initial press briefings and news releases shall ordinarily be limited to the identity of deceased or injured persons after notification of the next of kin, a brief summary of the incident, and whether or not the officers involved have been placed on administrative leave, and if so, a notation that this is the usual procedure in incidents of this type and should not be regarded as indicative of any wrongdoing by the officers. The names or addresses of the officers involved should not be revealed at this point.
  - b. If reliable, trustworthy information is gathered at any stage of the investigation that will enable the Team to make a preliminary determination that the use of force was lawful and appropriate under the totality of the circumstances, the Senior Attorney shall release that preliminary determination to the public after consultation with the Attorney General, the Investigation Team, and the head of the involved agency (unless the agency head was involved in the incident, in which case the Senior Attorney shall consult with the departmental liaison). The purpose shall be to offer as much information in the most expedient manner possible to alleviate any unfounded suspicion of wrongdoing.

I. Further Investigation and Report

1. The Investigation Team shall conduct such additional interviews, examinations and analyses as are appropriate to successfully complete a thorough and accurate Investigation.
2. The Senior Attorney shall collect all documentation on the case, and prepare a report for the Attorney General. The final investigative report shall include sufficient, relevant facts to determine whether the use of

force by the officers was lawful, an analysis of applicable statutes and case law, a determination as to whether any crimes were committed by the officers or criminal prosecution is warranted, and a recommended determination as to whether the use of force or deadly force was legally justified.

3. The Attorney General, prior to reaching a conclusion, may consult with others such as the Director of Police Standards and Training or his or her designee, or experts in the use of force by law enforcement officers, regarding the expected reactions of trained officers to a similar incident.
4. Before releasing the report to the public, a designated member of the Team or the Senior Attorney shall meet with the agency head or member designee (or if the agency head was a directly involved officer, with a designee of the agency head's appointing authority) and the Police Chief of the community where the incident occurred, and upon request the involved officer or his or her legal representative and make a copy available to them. A designated Team Member or the Senior Attorney shall also meet with the subject or the subject's family and any victim or their family and make details of the report available to them. If the entire report is not going to be released to the public, the Senior Attorney shall decide whether to make the entire report or only a synopsis available to the family of a subject or victim.
5. The Attorney General shall determine whether to make the entire report available to the media consistent with RSA 91-A, or to provide them with a detailed synopsis. This shall depend on whether the publication of any particular details would prejudice a prosecution or civil litigation or embarrass or endanger witnesses or other innocent persons. Under no circumstances shall any report released to other than a law enforcement agency, including any report released to the family of a subject or victim, include the street address or family details of the involved officer(s), out of consideration for the safety of officers and their families.

<b>DOMESTIC ABUSE INVESTIGATION CHECKLIST</b>
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\_\_\_\_\_ POLICE DEPARTMENT

**I. VICTIM (Interview separate from suspect)**

- Described the victim's location upon arrival.
- Recorded victim's name, dob, address, home and work phone numbers.
- Noted time dispatched, time arrived.
- Recorded any spontaneous statements made by the victim.
- Described the victim's emotional condition.
- Described the victim's overall physical condition and appearance.
- Documented the victim's injuries in detail (**size, location and coloration**) and if medical treatment sought.
- Noted victim's relationship with suspect.
- Documented evidence of alcohol and/or other drugs consumed by victim relative to the incident.
- Recorded any history of substance/chemical use by victim.
- Noted any restraining/court orders.
- Gave victim written notice of rights and services on safety pamphlet.
- Asked victim about the presence and location of any firearms and ammunition within the dwelling.
- Asked victim about the presence and location of any deadly weapons used or threatened to be used, by the suspect.
- Received written or recorded statement from the victim.

**II. SUSPECT (Interview separate from victim)**

- Described the suspect's location upon arrival.
- Recorded suspect's name, dob, address, home and work phone numbers.
- Recorded any spontaneous statements made by the suspect.
- Described the suspect's emotional condition.
- Described the suspect's overall physical condition and appearance.
- Described the suspect's injuries in detail (**size, location and coloration**) and if medical treatment sought.
- Documented evidence of alcohol and/or other drugs consumed by suspect during incident.
- Asked suspect about the presence, location, type of firearms and ammunition, located within the dwelling.
- Asked suspect about the presence of other deadly weapons located within the dwelling.
- If arrested**, advised Miranda rights, asked suspect if he/she wanted to make a statement, knew of restraining order, and/or understood order.
- Received written or recorded statement from suspect.

### III. CHILDREN

- Every report must note if children live in the home, whether or not they are present, and child's relationship to each person present at scene.
- Listed names, ages, school and teacher for each child present.
- Interviewed each child alone.
- Recorded any spontaneous statements made by the children.
- Described each child's emotional state.
- Described and documented each child's injury, if applicable.
- Notified DCYF of any child's injuries.

### IV. WITNESSES

- Interviewed the reporting party.
- Identified all witnesses and interviewed them separately.
- Recorded all witnesses' addresses and phone numbers.
- Recorded names and addresses of emergency personnel.
- Identified treating physician and hospital.
- Received written statements.

### V. EVIDENCE

- Recorded the "911" number and incident number.
- Obtain recording of "911" call.
- Photographed the victim's injuries - received permission for additional photos in 24-48 hours.
- Photographed the suspect's injuries.

- Impounded and took into evidence all deadly weapons used or threatened to be used.
- Took into evidence any objects thrown or otherwise used in incident.
- Attached related reports, photos and evidence tags.

### VI. OTHER

- Incident was domestic violence abuse and/or violation of a protective order.
- As required by RSA 173-B, removed all firearms and ammunition present in dwelling.

### ABUSE DEFINED:

- a. Assault or reckless conduct (RSA 631:1 through 631:3)
- b. Criminal Threatening (RSA 631:4)
- c. Sexual Assault (RSA 632-A:2 through 632-A:5)
- d. Interference with freedom (RSA 633:1 through 633:3-a)
- e. Destruction of property (RSA 634:1 & 634:2)
- f. Unauthorized entry (RSA 635:1 & 635:2)
- g. Harassment (RSA 644:4)

**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: \_\_\_\_\_  
County: \_\_\_\_\_  
Address: \_\_\_\_\_

- Temporary Ordered by Bail Commissioner  
 Final Ordered by Judge

**State of New Hampshire**

**v.**

<b>DEFENDANT'S NAME</b>			<b>DEFENDANT IDENTIFIERS</b>			
First	Middle	Last	DOB		HEIGHT	
DEFENDANT'S ADDRESS: _____			SEX		WEIGHT	
Police Incident Number: _____			RACE		EYES	
Date of Offense: _____			State/Birth		HAIR	
<b>VICTIM'S NAME</b> DOB _____ <input type="checkbox"/> Male <input type="checkbox"/> Female			<b>DISTINGUISHING FEATURES:</b>			
<b>RELATIONSHIP to VICTIM</b>			SKIN TONE _____			
<input type="checkbox"/> Married	<input type="checkbox"/> Household member		SCARS, MARKS, TATTOOS: Location and description			
<input type="checkbox"/> Separated	<input type="checkbox"/> Other _____		DRIVER'S LICENSE# _____			
<input type="checkbox"/> Divorced			STATE _____ EXP DATE _____			
<input type="checkbox"/> Cohabit / cohabited			<b>VEHICLE INFO:</b>			
<input type="checkbox"/> Child in common			YEAR		STYLE	
<b>CAUTION</b>			MAKE		COLOR	
<input type="checkbox"/> Weapon involved			MODEL			
<input type="checkbox"/> Weapon is ordered to be relinquished pursuant to New Hampshire state law RSA 597			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. section 2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. section 2262). As a result of this order it may be unlawful for you to possess, transport, ship, or receive any firearm or ammunition while this order is in effect. (18 U.S.C. Section 922(g)(8)).

The court /bail commissioner has found as evidenced by this order: That it has jurisdiction over the parties and subject matter, and the defendant has been provided with actual notice and opportunity to be heard.

The above named defendant is restrained from committing acts of abuse or threats of abuse, and is restrained from harassing, stalking or threatening the victim, or engaging in other conduct that would cause reasonable fear of bodily injury.

The above named defendant shall not have any contact with the victim, whether in person or through third persons, including but not limited to contact by telephone, letters, fax, e-mail, the sending or delivery of gifts or any other method unless specifically authorized by the court. The defendant is prohibited from coming within \_\_\_\_\_ feet or \_\_\_\_\_ yards of the victim.

Case Name: \_\_\_\_\_

Case Number: \_\_\_\_\_

**CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL**

It is hereby ordered pending  arraignment  trial  probable cause hearing  appeal  other 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 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 not commit a federal, state or local crime while on release.
  - B. Defendant appear at all court proceedings as ordered.
  - C. Defendant advise the court in writing of all changes of address within 24 hours.
  - D. Defendant comply with all civil domestic violence 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 or any other method unless specifically authorized by the court, and is further ordered not to interfere with this person at their residence, school or place of employment and additionally is ordered to refrain from going within \_\_\_\_\_ feet or \_\_\_\_\_ yards of where that person(s) may be.
- 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.
- 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 release on bail.

Case Name: \_\_\_\_\_

Case Number: \_\_\_\_\_

**CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL**

- L.  Shall not use or attempt to use or threaten to use physical force against the victim, \_\_\_\_\_, 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 victim's family or household members, or victim's 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

\_\_\_\_\_  
Justice / Bail Commissioner Signature

\_\_\_\_\_  
Typed Name of Justice/Bail Commissioner

**Acknowledgment of Receipt**

I hereby acknowledge receipt of the above order and the penalties notification on pages 4 & 5 of this form.

Defendant: \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Surety

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature, Clerk

\_\_\_\_\_  
Printed Name, Clerk

( )

C:

Case Name: \_\_\_\_\_

Case Number: \_\_\_\_\_

**CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL**

**I. PENALTY FOR OFFENSE COMMITTED WHILE ON RELEASE**

A person convicted of an offense while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense, to:

- A. A term of imprisonment of not more than 7 years if the offense is a felony; or
- B. A maximum term of imprisonment of not more than 1 year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment. Neither the penalty provided by this section nor any prosecution under this section shall interfere with or prevent the forfeiture of any bail or the exercise by Court of its power to punish for contempt, but this section shall be construed to provide an additional penalty for failure to appear.

**II. DETENTION AND SANCTIONS FOR DEFAULT OR BREACH OF CONDITIONS**

A. A peace officer may detain an accused until he can be brought before a justice if he has a warrant issued by a justice for default of recognizance or for breach of conditions of release or if he witnesses a breach of conditions of release. The accused shall be brought before a justice for a bail revocation hearing within 48 hours, Saturdays, Sundays and holidays excepted.

B. A person who has been released pursuant to the provisions of RSA 597:2 and who has violated a condition of this release is subject to a revocation of release, and order of detention, and a prosecution for contempt of Court under the provisions of RSA 597:7-a.

C. The State may initiate a proceeding for revocation of an order of release by filing a motion with the Court which ordered the release. The Court may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before the Court for a proceeding in accordance with the section.

**III. RSA 641:5 TAMPERING WITH WITNESSES AND INFORMANTS. A person is guilty of a CLASS B FELONY :**

A. Believing that an official proceeding, as defined in RSA 641:1, II or investigation is pending or about to be instituted, the person attempts to induce or otherwise cause a another person to:

- 1. Testify or inform falsely; or
- 2. Withhold any testimony, information, document or thing; or
- 3. Elude legal process summoning him to provide evidence; or
- 4. Absent himself from proceeding or investigation to which he has been summoned; or

B. The person commits any unlawful act in retaliation for anything done by another person in the capacity as witness or informant; or

C. The person solicits, accepts, or agrees to accept, any benefit in consideration of his or her doing any of the things specified in Paragraph A.



Case Name: \_\_\_\_\_

Case Number: \_\_\_\_\_

**CRIMINAL ORDER OF PROTECTION INCLUDING ORDERS AND CONDITIONS OF BAIL**

**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. sec. 2265 (1994). This Court has jurisdiction of the parties and the subject matter; the defendant is 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 that 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. sec. 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 such intimate partner or child 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. section 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. section 922 (g) (9).

# The State of New Hampshire

JUDICIAL BRANCH  
**EMERGENCY ORDER OF PROTECTION  
 AND  
 AFFIDAVIT OF SERVICE**

PNO \_\_\_\_\_

Pursuant to RSA 173-B (Domestic Violence) and/or RSA 633:3-a (Stalking)

\_\_\_\_\_ County \_\_\_\_\_ Court  
\_\_\_\_\_ Case/Docket No.

**IN THE MATTER OF**

\_\_\_\_\_  
 (Plaintiff) v. \_\_\_\_\_  
(Defendant's Name) (DOB)  
 \_\_\_\_\_  
(Street Address)  
 \_\_\_\_\_  
(City, State, Zip)  
 \_\_\_\_\_  
(SSN)

The Plaintiff, with the understanding that any false statements are punishable by law, alleges that the Defendant did on (date) \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_ / \_\_\_\_\_  
(Signature of Plaintiff)

I, the undersigned officer of the \_\_\_\_\_ Police Department, certify that I have notified Judge \_\_\_\_\_ of the \_\_\_\_\_ Court of the facts stated above. Pursuant to the Court's telephonic instructions, the following findings and temporary orders have been made.

1.  The Plaintiff is in immediate and present danger of abuse by the Defendant.
2.  The Defendant is temporarily restrained from abusing the Plaintiff, Plaintiff's relatives, or members of the Plaintiff's household.
3.  The Defendant is temporarily restrained from having ANY contact with the Plaintiff, whether in person or through third persons, including but not limited to contact by telephone, letters, fax, e-mail, the sending or delivery of gifts or any other method.
4.  The Defendant is temporarily restrained from entering the premises (including curtilage) where the Plaintiff resides; Plaintiff's place of employment; or Plaintiff's school.
5.  The Defendant is restrained from taking, converting or damaging property in which Plaintiff has a legal or equitable interest.
6.  The Defendant shall relinquish to a peace officer all firearms and ammunition in his/her control, ownership or possession, and the Defendant is prohibited from purchasing or obtaining any firearms or ammunition during the pendency of this order.
7.  Plaintiff is awarded temporary custody of the minor children.
8.  Other: \_\_\_\_\_
9.  For purposes of RSA 633:3-a, the Plaintiff has made a credible allegation of Stalking. The Defendant shall not follow the Plaintiff or appear in proximity to the residence, place of employment or school of the Plaintiff, or follow or appear at any other place where the Plaintiff may be.

These orders are effective immediately and remain in effect until the close of the next court business day. They become null and void at \_\_\_\_\_ (time) on \_\_\_\_\_ (date). Any violation of these orders is a crime as well as contempt of court. Violations shall result in arrest and may result in imprisonment.

Date \_\_\_\_\_ Signature of Officer \_\_\_\_\_  
Type/Print Name of Officer \_\_\_\_\_

.....  
**NOTICE TO PLAINTIFF**

IF YOU WANT THESE RESTRAINING ORDERS TO REMAIN IN EFFECT AFTER \_\_\_\_\_ (date) AND \_\_\_\_\_ (time), YOU MUST APPEAR BEFORE THE ABOVE COURT OR ANY OTHER COURT HAVING JURISDICTION BEFORE THAT DATE AND TIME AND APPLY FOR A NEW ORDER.



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)

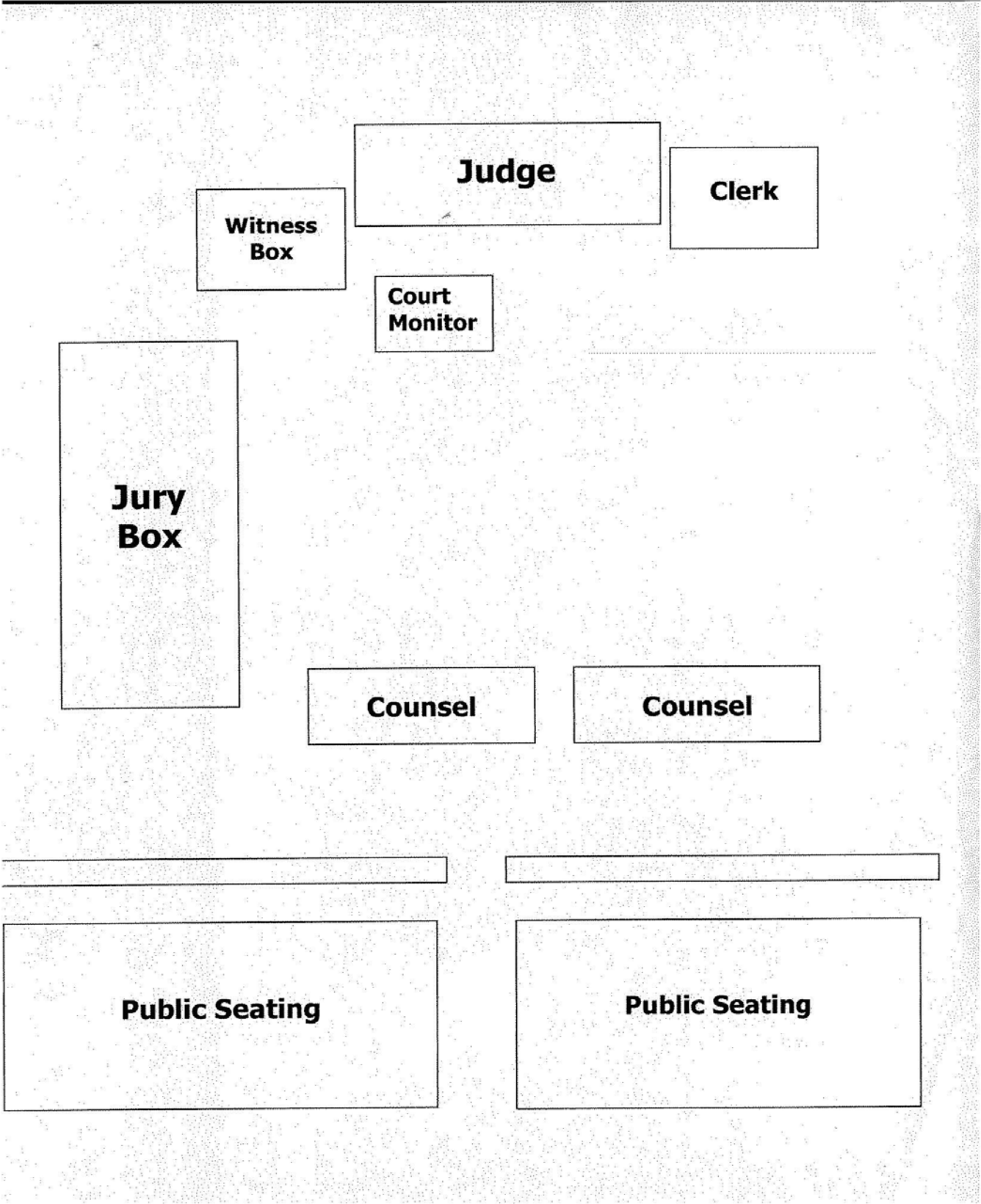
The suspect, \_\_\_\_\_, is a \_\_\_\_\_, approximately \_\_\_\_\_ years old,  
with \_\_\_\_\_ hair, \_\_\_\_\_ eyes, about \_\_\_\_\_ tall, and weighs about \_\_\_\_\_ pounds.  
(Color) (Color) (Height) (Weight)  
(He/She) was wearing \_\_\_\_\_  
(Description of Clothing)  
\_\_\_\_\_  
(Additional 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)



DEPARTMENT OF JUSTICE  
STATE OF NEW HAMPSHIRE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

JEFFREY R. HOWARD  
ATTORNEY GENERAL



STEVEN M. HOURAN  
DEPUTY ATTORNEY GENERAL

May 2, 1996

Memo To: All Law Enforcement Agencies  
From: Jeffrey R. Howard, Attorney General  
Subject: Arrest Warrants Signed by Justices of the Peace/Bail Commissioners

As many of you are aware, it was recently held in a case in Strafford County Superior Court that an arrest warrant was improperly issued because the justice of the peace who signed the warrant was neither "neutral and detached," nor capable of determining probable cause. The justice of the peace was a bail commissioner, and he testified during a suppression hearing that he signed the warrant without any knowledge of the definition of the offense for which he declared he had found probable cause. This memorandum addresses the issues raised in that case.

Justices of the peace are statutorily empowered to issue arrest warrants, RSA 592-A:5, :8; and at least as recently as 1989 could replace municipal or district court judges in certain circumstances, RSA 502:6, 502-A:5. They are regarded as "judicial officer[s] of inferior rank." Opinion of the Justices, 131 N.H. 443, 448 (1989) (citations omitted). Having been so authorized by the legislature, there is no reason to presume that justices of the peace lack the knowledge to make the common sense determination necessary for a finding of probable cause. Indeed, many jurisdictions allow non-lawyers to sign arrest warrants.

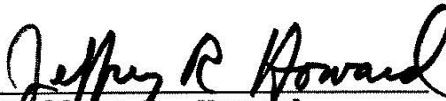
Despite concerns expressed in the order issued in the Strafford County case, the fact a justice of the peace also is a bail commissioner who gets paid on a per case basis for cases in which the commissioner sets bail, does not end the inquiry into whether the commissioner is "neutral and detached." For example, in Commonwealth v. Shea, 545 N.E.2d 1185 (Mass.App.Ct.



1989), a scheme by which arrest warrants were signed by whichever non-attorney court clerk was available because it was his/her turn to stay after hours and set bail when requested (at \$15 per case, the particular clerk claimed he made \$12,000 - \$15,000 per year this way) was upheld. The Massachusetts court found that the clerks were neutral and detached because "various contingencies are involved, among them, whether anyone will be arrested as a consequence of the execution of the warrant, whether an arrested person will claim bail before a judge rather than a bail commissioner, [and] whether the arrestee will apply [for bail] on a date when [that clerk] is scheduled." Id. at 1188.

Similar contingencies are present in cases where justices of the peace who also are bail commissioners sign arrest warrants. Following the issuance of an arrest warrant: the warrant may not be executed; an arrestee may seek bail before a judge rather than a bail commissioner; and the police may contact a different bail commissioner if the arrestee seeks bail prior to arraignment. Generally, cases where issuing "magistrates" are found insufficiently "neutral and detached" do not involve circumstances as innocuous as justices of the peace also being bail commissioners. Rather, those cases include situations where: a prosecuting official signs the warrant, Coolidge v. New Hampshire, 29 L.Ed.2d 564 (1971); or the person receives compensation if he/she issues a warrant, but nothing if he/she fails to sign the warrant, Connally v. Georgia, 50 L.Ed.2d 444 (1977).

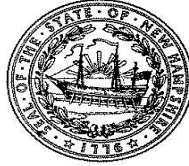
While the Court in the Strafford County case may have ruled correctly under the facts presented in that case, I find no compelling reason to discontinue the practice of having law enforcement agencies present arrest warrants to justices of the peace. Nevertheless, consistent with many agencies' current practices, we recommend the following cautious policy: (1) arrest warrants in major felony cases should be presented to judges, rather than to justices of the peace; and (2) following the sentence that typically appears in an affidavit in support of an arrest warrant, "Based on the foregoing, I have probable cause to arrest [defendant's name] for the crime of [x]," a sentence should be added stating, "The elements of [x] are [a, b, and c]."

  
Jeffrey R. Howard  
Attorney General

**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE  
ATTORNEY GENERAL



DEPUTY ATTORNEY GENERAL

**MEMORANDUM**

TO: All Law Enforcement Agencies

FROM: Attorney General Kelly Ayotte *KAA*

RE: Procedure for Securing and Transporting Medications Seized During a Medico-Legal Death Investigation

DATE: February 9, 2006

Attached is a new protocol for the collection, storage, and delivery of medications that are collected by a Deputy Medical Examiner [DME] or Assistant Deputy Medical Examiner [ADME] in the course of a death investigation. It was developed in consultation with the Colonel of the State Police, members of the Chief Medical Examiner's Office, as well as the Executive Board of the New Hampshire Police Chiefs' Association.

The protocol establishes responsibilities on the part of the DME/ADME and the local law enforcement agency, with the objective of creating a chain of custody for all medications collected. It requires that in all death investigations, when a DME/ADME determines that medications need to be secured for the purpose of furthering the investigation, the local law enforcement agency will provide an officer to witness the collection and documentation of the medications and, if no autopsy is to be performed, to secure the medications until such time as the department delivers them to the State Police Forensic Laboratory. Delivery can be accomplished either in person or by mail, and departments may work cooperatively with other departments to make delivery.

The protocol will take effect immediately. I appreciate your cooperation in working with the DME/ADME's to implement this process. If you have any questions, please contact Chief Forensic Examiner Kim Fallon at 271-1235 or Associate Attorney General Ann Rice at 271-3671.

**PROTOCOL FOR SECURING AND TRANSPORTING MEDICATIONS SEIZED  
DURING A MEDICO-LEGAL DEATH INVESTIGATION**

Whenever it is necessary for a deputy medical examiner (DME) or assistant deputy medical examiner (ADME), in the course of a medicolegal investigation, to collect and preserve medications for further inspection or testing, the following procedure shall be followed:

- a) If the local law enforcement agency has not already responded to the scene, the DME/ADME shall contact the agency and request that an officer respond to assist in the inventory and securing of medications.
- b) In the officer's presence, the DME/ADME shall inventory and voucher any medications being seized, using Form ME-3 "Drug/Medication Inventory Form." The following information shall be included on the form:
  - (1) The name, date of birth, and address of the deceased;
  - (2) The case number;
  - (3) The name, address, and telephone number of the pharmacy;
  - (4) The date the prescription was filled;
  - (5) The name, strength, and dosage of the medication;
  - (6) A description of any markings or imprints on the medication;
  - (7) The instructions;
  - (8) The name of the prescribing health care provider; and
  - (9) The number dispensed.
- c) The officer shall sign off as a witness on the Drug/Medication Inventory Form, verifying that the inventory was done in his or her presence.
- d) The DME/ADME shall seal each container of medication with tamper evident tape provided by the Office of the Chief Medical Examiner (OCME).
- e) The completed form and the sealed medication containers shall be placed in a sealed evidence bag provided by the OCME.
- f) If it has been determined that an autopsy will be performed on the body, the sealed container shall be placed in the body bag, which shall be also be sealed, for transportation to the morgue.



- g) If no autopsy will be performed, the police officer shall take custody of the sealed bag, document it on a DSSP-20 Evidence Examination Request Form, and deliver it to the police department where it shall be maintained in a secure location.
- h) The police department shall be responsible for completing the DSSP-20 form in accordance with State Police Standard Operating Procedure: Evidence Control. The "Check For" column on the form shall include the notation "HOLD FOR OCME."
- i) The police department shall be responsible for delivering the sealed bag(s) to the State Police Forensic Laboratory within a reasonable time not to exceed two weeks. Delivery shall be made either in person or by mail. The police department may arrange for delivery through another law enforcement agency, provided a proper chain of custody is maintained. If delivery is made by mail, the package should be sent using a method that will track the package (e.g., FEDEX, UPS, etc.) for chain of custody purposes. The outer mailing packaging need not be sealed and labeled with all identifying information as long as the inner packaging is properly sealed and labeled. Evidence mailed to the laboratory should be addressed to the attention of "Evidence Technician".
- j) Upon receipt of the evidence, the forensic laboratory shall log it in and store it in accordance with standard operating procedures. The lab shall notify the OCME by telephone that the medication has been received.
- k) If the OCME needs to take possession of the medication for testing or other purposes, it shall be the responsibility of OCME personnel to take custody of the medication at the forensic laboratory and transport it to the office for further processing.
- l) Every six months, the OCME shall prepare a motion to dispose of any medications being held in the lab that are associated with a case that has been disposed of. Upon receipt of a court order granting the disposal, the OCME shall forward a copy of the order to the lab.
- m) The laboratory shall be responsible for disposing of the medications.



STATE OF NEW HAMPSHIRE  
 OFFICE OF THE CHIEF MEDICAL EXAMINER  
 246 Pleasant Street Suite 218 Concord, New Hampshire 03301  
 (603) 271-1235 - FAX (603) 271-6308

DRUG/MEDICATION INVENTORY FORM

*Decedent Information:*  
 NAME:                   DOB:                   AGE:                   DOD:                   CASE #:  
 ADDRESS:

Medication Name/Dosage/Markings	Date Issued	Number Issued	Instructions on Medication	Physician Name	Pharmacy Name/Address/Phone

ADME:                   WITNESS:  
 DATE:                   DATE:

OCME FORM - ME-3   1/13/2006

**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**


33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

PETER W. HEED  
ATTORNEY GENERAL



STEPHEN J. JUDGE  
DEPUTY ATTORNEY GENERAL

MEMORANDUM

TO: All Law Enforcement Agencies  
FROM: Peter W. Heed, Attorney General   
RE: Administrative or "Desk Top" Subpoenas  
DATE: June 24, 2003

This office has recently received a number of inquiries from law enforcement agencies regarding the authority of police officers to issue subpoenas. It is evident from those inquiries that there is much confusion surrounding the matter. This memorandum is being disseminated to offer guidance to law enforcement and to emphasize that a police officer's authority to issue anything akin to a subpoena is extremely narrow.

The authority to issue subpoenas is governed by statute. The laws define who is permitted to issue a subpoena and under what circumstances that authority can be exercised. Judges and justices of the peace have the most extensive subpoena power; they are permitted to subpoena a witness to appear in a case pending before that justice "or any other justice, in any case in any court, in all matters before the general court, or before auditors, referees, arbitrators or commissioners." RSA 516:3 Many administrative agencies and regulatory boards are granted the authority to issue subpoenas as part of their investigative or adjudicative powers.

With two exceptions, the law makes no provision for the issuance of subpoenas by police officers. There is no statutory authority for a law enforcement officer to issue a subpoena in the course of a criminal investigation for the purpose of securing a person's appearance or obtaining documentary evidence. Nor is it permissible for a police officer to obtain a subpoena from a justice of the peace for that purpose. A justice of the peace is only permitted to issue subpoenas for pending official proceedings or depositions. A criminal investigation does not fall within that category.

One exception to this general lack of statutory authority is contained in RSA 359-C, the chapter governing disclosure of bank records. RSA 359-C:11 authorizes a law enforcement officer to obtain certain statutorily defined types of information and documents from a financial institution for the purpose investigating the fraudulent use of drafts, checks or other orders.

Information can be obtained for a period of 30 days prior to and up to 30 days following the date of the alleged illegal act. The officer must certify in writing to the financial institution that "a crime report has been filed which involves the alleged fraudulent use of drafts, checks or other orders drawn upon" the institution. Upon receipt of that certification, the institution must provide the requested information. There is no requirement that the bank customer, whose account is the subject of the request, be provided notice.

The second exception is contained in the federal Electronic Communications Privacy Act. It allows police officers to obtain certain telephone and cellular phone information on an emergency basis without a subpoena, warrant, or court order, where there is an immediate danger of death or serious bodily injury. Officers who are faced with such a situation should contact their county attorney or an assistant attorney general for guidance.

Although the issuance of a subpoena is generally not an option for a police officer conducting a criminal investigation, there are a number of other options available, depending upon the type of information sought. If an officer wants to secure documents or other types of evidence, the officer can apply for a search warrant, provided there is probable cause to believe that evidence will aid in a particular apprehension or conviction and that it will be found in the place to be searched. If there is insufficient evidence to support a search warrant, the officer should consult with his or her county attorney about the possibility of securing a grand jury subpoena for the documents. A similar course may be followed if the desired outcome is to obtain the statement of an uncooperative witness.

In addition, the attorney general and designated assistant attorneys general have statutory authority, pursuant to RSA 7:6-b, to issue an administrative subpoena for certain information from communications common carriers such as internet service providers, and telephone, cellular, and paging service providers.<sup>1</sup> The standard for issuing such a subpoena is less stringent than probable cause; there must be "reasonable grounds for belief that the service furnished to a person or to a location by such communications common carrier has been, is being, or may be used for an unlawful purpose." The types of information that can be obtained pursuant to such a subpoena include:

- (a) The names and addresses of persons to whom stated listed or unlisted telephone numbers are assigned.
- (b) The names and addresses of persons to whom any stated or identified services are provided.
- (c) 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.
- (d) The length of service provided to a subscriber or customer by the communications common carrier.
- (e) The types of services provided to the subscriber or customer by the communications

---

<sup>1</sup> RSA 7:6-b also permits the Attorney General to delegate to county attorneys the authority to issue administrative subpoenas to communication common carriers for evidence relating to suspected violations of the controlled drug statute or the child pornography statute within their respective counties. That delegation has been withheld, however, pending the adoption of administrative rules.

common carrier, and

(f) The telephone number or other subscriber number or identity.

The process for obtaining such a subpoena is not complicated. A police officer should call the criminal bureau of the attorney general's office, 271-3671, and ask to speak to an attorney about a "7:6-b request." With very limited exceptions, the officer will be asked to submit a report, by e-mail if possible, establishing reasonable grounds to issue the subpoena. Upon receipt of that report, the subpoena can be generated and sent out, typically within one day. Any costs associated with the request will be billed to the requesting law enforcement agency.

**ATTORNEY GENERAL  
STATE OF NEW HAMPSHIRE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

PHILIP T. McLAUGHLIN  
ATTORNEY GENERAL



STEPHEN J. JUDGE  
DEPUTY ATTORNEY GENERAL

MEMORANDUM

TO: All Law Enforcement Agencies

FROM: Philip T. McLaughlin, Attorney General *PM*

RE: Revised Forms For Requesting Court Authorization To Destroy  
Controlled Drugs

DATE: December 6, 2002

Attached please find revised forms to be used when requesting superior court authorization to destroy controlled drugs that are in the possession of your agency. These revised forms, which were formally adopted by the superior court on November 15, 2002, reflect the current statutory requirements under RSA 318-B:17 and conform to current practice. They no longer contain provisions requiring approval of the Attorney General; destruction by members of the State Forensic Laboratory; or the presence of two witnesses.

Please begin using these revised forms immediately. You may copy the attached forms or create new ones following the same format. Any questions about the forms should be directed to one of the attorneys in the Drug Prosecution Unit of the Criminal Justice Bureau at 271-3671.

The State of New Hampshire

Superior Court

\_\_\_\_\_ County

PETITION FOR DESTRUCTION OF CONTROLLED DRUGS

NOW COMES the State of New Hampshire, by the subscribing law enforcement agency, and respectfully states as follows:

- 1. The controlled drugs listed on the attached schedule were seized by the \_\_\_\_\_ under the authority of RSA 318-B. (law enforcement agency)
- 2. These drugs were seized either pursuant to valid search warrants, on probable cause without a warrant, or by search consented to by the custodian of the drugs.
- 3. The attached schedule lists the place where the drugs were seized, the kind and quantities of drugs seized, and (if applicable) the defendants' names, the court(s) in which prosecutions were instituted, along with case number(s) and notes of the case(s).
- 4. Lawful possession of the listed drugs has not been established by any person, nor can title to the drugs be ascertained.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court grant the following relief:

- A. Pursuant to RSA 318-B:17, I, Order that the drugs be forfeited and destroyed by the subscribing law enforcement agency; and
- B. Grant such other relief as may be just.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Law Enforcement Officer

The State of New Hampshire  
\_\_\_\_\_  
County

The above petition was subscribed and sworn to, before me, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Justice of the Peace/Notary Public

The State of New Hampshire

Superior Court

\_\_\_\_\_ County

Case No. \_\_\_\_\_

**Return**

I received the attached Order and have executed it as follows:

On \_\_\_\_\_, 19\_\_, at \_\_\_\_\_ a.m./p.m., I destroyed the drugs described in the Order in the following manner:

\_\_\_\_\_

at \_\_\_\_\_

The drugs were destroyed in the presence of:

\_\_\_\_\_

I swear that this Return is a true and detailed account of the destruction of the drugs ordered destroyed in the attached Order.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Law Enforcement Officer

The State of New Hampshire  
\_\_\_\_\_  
County

Subscribed and sworn to and returned, before me, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Justice of the Peace  
Notary Public





**ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397


PETER W. HEED  
ATTORNEY GENERAL



KELLY A. AYOTTE  
DEPUTY ATTORNEY GENERAL

**MEMORANDUM**

**TO:** All County Attorneys  
All Law Enforcement Agencies

**FROM:** Peter W. Heed, Attorney General 

**RE:** Identification and Disclosure of *Laurie* Materials

**DATE:** February 13, 2004

**INTRODUCTION**

In 1995, the New Hampshire Supreme Court issued *State v. Laurie*, 139 N.H. 325 (1995); an opinion which significantly changed the landscape with respect to the constitutionally-mandated disclosure of evidence favorable to a criminal defendant. In prior decisions, the Court had held that when a convicted defendant made a claim that the prosecutor failed to disclose material evidence favorable to the defense, the conviction would stand unless the defendant proved that he or she was prejudiced by the non-disclosure. Under the *Laurie* decision, the burden of proof was shifted to the State. Now, if a defendant makes a threshold showing that the State withheld material favorable evidence, the conviction must be overturned unless the State proves, beyond a reasonable doubt, that the non-disclosure was harmless.

The *Laurie* Court reversed the defendant's murder conviction after finding that the State failed to disclose material evidence about a police officer who participated in the investigation and testified at trial. The non-disclosed information was contained in the officer's confidential personnel file, and could have been used to impeach his credibility.

The impact of the *Laurie* decision has been significant. Police personnel files are now frequently the target of defense discovery requests. Out of an abundance of caution, prosecutors may tend towards disclosure of any information that could possibly be perceived as *Laurie*-type material, often without analyzing whether disclosure is, in fact, required. The police officer's

interest in maintaining the confidentiality of personnel information is often disregarded in the disclosure decision. On the other hand, because police personnel files and internal investigative files are confidential by statute, prosecutors must rely on a police officer or police department to inform them if *Laurie* material exists in a particular officer's file. Due to the lack of case law on the issue of what constitutes *Laurie* material, police departments are free to develop their own definitions, which may or may not comport with the law.

In an effort to assist police and prosecutors, and to develop a standardized method for identifying and dealing with potential *Laurie* material, I am issuing this memorandum, which addresses issues relating to information contained in confidential police personnel files and internal investigations files.

### Identification of Potential *Laurie* Materials

Unfortunately, the term "*Laurie* material" is not subject to easy definition. Whether a court would view any particular piece of information as *Laurie* material would depend, 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 of the information. However, as a general proposition, information that falls within any of the following categories should be considered potential *Laurie* material:

- any sustained instance where an officer deliberately lied during a court case, administrative hearing, other official proceeding, in a police report, or in an internal investigation;
- any sustained instance when an officer falsified records or evidence;
- any sustained instance that an officer committed a theft or fraud;
- any sustained instance that an officer engaged in an 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);
- any sustained complaint of excessive use of force;<sup>1</sup>
- any instance of mental instability that caused the police department to take some affirmative action to suspend the officer for evaluation or treatment, except for a referral for counseling after being involved in a traumatic incident, or for some other reason, for which no disciplinary action was taken.

Material that falls within any of these categories must be retained in the officer's personnel file so that it is available for *in camera* review by a court and possible disclosure to a defendant in a criminal case. However, a report or other document that concerns an incident over ten years old is presumptively non-disclosable and may be removed from the file, provided that the officer has not been the subject of any subsequent disciplinary action.

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<sup>1</sup> 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 *Laurie* 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 *Laurie* material, requiring disclosure.



Police departments are encouraged to develop a policy for identifying *Laurie* materials. A proposed policy is attached.

#### A Prosecutor's Duty to Search for *Laurie* Material

A prosecutor has a constitutional obligation to disclose to a criminal defendant evidence favorable to that defendant. Brady v. Maryland, 373 U.S. 83 (1963); State v. Laurie, 139 N.H. 325 (1995); Prof. R. Cond. 3.8(d). Favorable evidence includes evidence that is exculpatory and information that could be used to impeach the testimony of a prosecution witness. Giglio v. U.S., 405 U.S. 150 (1972). Disclosure is not contingent upon the information being admissible at trial. If the information would be material to the preparation or presentation of the defendant's case, it must be turned over. The disclosure obligation is not limited to materials in the hands of the prosecuting agency. It extends to information "known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995). Thus, a prosecutor has a duty to seek out *Laurie* material in the hands of any involved police agency.

Because police department internal investigations files and personnel files are confidential by statute, a prosecutor cannot conduct a search of those files for *Laurie* material. Rather, the prosecutor must rely on the police department to identify such materials and provide notification of their existence. Some prosecutorial agencies direct a specific *Laurie* inquiry to the police departments for each law enforcement witness in a particular case. However, that may result in a police department being required to respond to the same inquiry regarding a particular officer from multiple prosecutors. On the other hand, for many prosecutors, particularly in the district courts, the process of making specific requests in each case is impractical. Prosecutors must rely, instead, on individual police officers to reveal the existence of *Laurie* materials in their files.

To ensure that all prosecutors are able to meet their constitutional obligations, I am requesting each county attorney to work with the law enforcement agencies within his/her jurisdiction to develop a process whereby the county attorney will be given written notice by a law enforcement agency whenever one of that agency's officers has been found to have engaged in conduct that would fall within one of the categories listed above.<sup>2</sup> Thereafter, notification to the county attorney should occur whenever a determination is made that an officer has engaged in conduct that constitutes *Laurie* material, regardless of whether the officer has already been the subject of an earlier notification. If an officer who has been the subject of such notification leaves the agency for another law enforcement position, the agency should inform the county attorney of the officer's departure and new employer.

There are a number of law enforcement agencies whose officers have statewide jurisdiction, such as the State Police, Marine Patrol, Fish and Game, and Liquor Commission. Because those officers are far more likely to appear as a witness in multiple counties, notification should be made to each of the ten county attorneys, and to the chief of the criminal justice bureau at the attorney general's office.

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<sup>2</sup> At the same time, notice should be given to the agency's prosecutor/court liaison officer.

The written notification should include only the officer's name, department, date of birth, and date of incident that gave rise to the *Laurie* determination. It should not include any information regarding the underlying disciplinary matter, as that information is confidential by statute.<sup>3</sup>

The county attorney will be responsible for compiling a comprehensive list of officers within his/her county who are subject to possible *Laurie* disclosure. The list should be updated as needed to reflect the name of any officer not already on the list who has been the subject of a *Laurie* disciplinary matter. Local prosecutors should be provided a copy of the list, or at least that portion of the list containing information from police departments within their jurisdiction. If only partial lists are provided, local prosecutors should be instructed to check with the county attorney for a *Laurie* notification on any officer with whom they are dealing as a potential witness, if that officer either has statewide jurisdiction or is from outside the prosecutor's prosecutorial region. The county attorney shall make the list, or relevant portions thereof, available to prosecutorial agencies in other counties upon request. The list should otherwise be kept confidential.

Since the concept of *Laurie* materials is rather vague, it is likely that law enforcement agencies will have questions about whether a particular incident would constitute potential *Laurie* materials. The county attorneys should make themselves available to consult with police departments and assist in making that determination. However, because the disciplinary materials are confidential by statute, the consultation should be done on a hypothetical basis, without disclosing the officer's name or any other identifying facts.

This process should ensure that prosecutors have the necessary information to deal with the issue of Brady material in the event that a particular officer is a witness in one of their trials. However, the establishment of this process does not completely relieve a prosecutor of the obligation to seek out potential *Laurie* materials. If a prosecutor has a basis to believe that an officer/witness may have been subject to discipline for conduct that would constitute impeachment information, but the police department has not provided notification of that fact, the prosecutor should direct a specific inquiry to the chief of that department.

#### Disclosure of *Laurie* materials

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<sup>3</sup> I am aware that, with respect to officers who are subject to *Laurie* disclosure, some police departments follow a practice of providing the prosecutor a brief summary of the underlying disciplinary incident, on which the officer has signed off. That summary is provided to defense counsel in cases in which the officer will be a witness, and defense counsel can decide whether to pursue the issue further. Often, the summary is sufficient for defense purposes and no further discovery is requested.

In developing this protocol, it is not my intent to discourage these types of practices. The notification process set out in this memo will ensure that there is a certain minimum level of information available to all prosecutors, which will enable them to fulfill their *Brady/Laurie* obligations. The county attorneys and local law enforcement agencies are free to adapt that process to better reflect local practice, or to adopt additional procedures to further advance that objective.

If the underlying incident involves excessive use of force, which would only be considered *Laurie* material in the context of certain types of cases, the officer may wish to have that fact noted on the notification form. The inclusion of that information would enable a prosecutor to decide whether a request for *in camera* review of the personnel file is necessary, based on the facts of a particular case.



That a police department has designated documents in an officer's personnel file as potential *Laurie* material does not mean that those documents must necessarily be disclosed to a criminal defendant. Rather, it simply informs a prosecutor of the existence of such materials. If a prosecutor intends to call the officer as a witness, the prosecutor should file a motion under seal, advising the court of the material's existence and requesting the court to order the submission of the file for *in camera* review, to determine whether disclosure of any portion of the file is required. The prosecutor should consider requesting, as additional relief, that if the court rules that the file is not subject to disclosure, it issue a further ruling that the file is non-disclosable in any future prosecution. The motion should include a request for a comprehensive protective order to protect against further disclosure of information. The request for a protective order should state that all matters relating to the motion - including the motion, related pleadings, court orders, and similar documents concerning the admissibility of any of the information at issue - be sealed until the court issues an express order to the contrary.

The prosecutor should inform the police officer/witness that such a motion is going to be filed and advise the officer that the prosecutor does not represent the officer's personal interests in the matter; and if the officer desires an advocate to represent his/her interests, the officer should retain private counsel.

If, after conducting an *in camera* review, the court determines that no portion of the file need be disclosed to the defendant, a prosecutor may generally rely on that ruling to support non-disclosure in future cases. The prosecutor should notify the county attorney of the court's decision, so that the county attorney's list can be updated to reflect that ruling. If the court rules that the file need not be disclosed in any future prosecution, the prosecutor should forward a copy of the order to the county attorney. The county attorney, in turn, should remove the officer's name from the list and forward a copy of the court's order to the officer and his or her department. However, nothing herein prevents a prosecutor from seeking *in camera* review of an officer's file in the context of a subsequent case, if the prosecutor deems such a review appropriate in light of the specific facts or the unique role of the officer in the case.

If a court orders disclosure of an officer's file, or portions thereof, copies will be furnished to both parties. Provided that the officer has not accrued additional *Laurie* material in the meantime, in any subsequent case the prosecutor can make an independent assessment of whether disclosure is required, without court involvement. In making that determination, a prosecutor should consider such factors as:

- the nature of the officer's conduct that is the basis of the *Laurie* report (An incident of lying, which involved calling in sick when the officer simply wanted a day off, is less probative of that officer's veracity than an incident of lying that involved providing false information in a police report)
- how recently the incident occurred (The probative value of information diminishes with the passage of time. Any incident more than 10 years in the past should be presumed immaterial, unless it involved particularly egregious conduct that is highly probative on the issue of truthfulness. See N.H. R. Ev. 609)
- the importance of the officer's role in the investigation and/or the officer's testimony at trial

- whether the incident was an isolated one (If there are multiple incidents, the prosecutor must consider the combined impact of those incidents. An incident that would appear relatively minor if viewed in isolation may take on increased importance if it is one of a series of events)

If the *Laurie* documents being evaluated were provided to the prosecutor under a protective order and there is a determination made that disclosure is required, the prosecutor should file a motion seeking court authorization to release the materials, with an accompanying request for a protective order.

It is not uncommon to be faced with a situation where material is arguably *Laurie* material, but in the context of the particular case its probative value is minimal. The prosecutor has three options: (1) file a request for in-camera review of the materials by the court, providing the court with an explanation of why there would be some debate as to whether disclosure is required; (2) disclose the materials and file a pre-trial motion seeking to bar their use at trial (this should only be done where the material has previously been ordered to be disclosed by a court); or (3) withhold the materials. In the latter event, the prosecutor should document the materials in his/her possession and the reason for non-disclosure.

Even if a court orders disclosure of certain materials in a personnel file, that does not necessarily mean that they can be used at trial. Judges typically review documents in-camera prior to trial, when they have little or no knowledge of the facts of the case. Since it is difficult to evaluate the materiality of information in a vacuum, a judge may order disclosure of marginally probative documents, simply to ensure that a defendant's constitutional rights are protected. However, there is nothing to prevent a prosecutor from seeking to limit or bar altogether any reference to the material on the grounds that its probative value is minimal. This can be accomplished by way of a motion in limine or an oral trial motion.

#### Sample Policy for Police Departments

While the above-discussed guidelines are largely directed to prosecutors, there is also a need for police departments to implement standard procedures for the identification and retention of potential *Laurie* materials in police officer personnel files. To address that need, I am attaching a sample policy for consideration by police departments.

#### CONCLUSION

I believe that these guidelines and sample policy strike a fair balance between the need to protect the confidentiality of an officer's police personnel file and the prosecutorial obligation to disclose material favorable evidence to a criminal defendant. While it is not possible to establish definitive standards to deal with all questions surrounding *Laurie* materials, I hope that they will be of assistance in addressing these very important issues.

## **SAMPLE POLICY RETENTION AND DISCOVERY OF PERSONNEL RECORDS**

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### **Policy**

Police personnel and disciplinary records shall be retained subject to the schedules set forth herein, and provided to the courts for discovery purposes as provided herein.

Whenever the department has reason to believe that one of its officers has material in his or her disciplinary file that could affect that officer's credibility as a witness and thus could be used to impeach the officer, the existence of that information shall be disclosed to the prosecutor in every case in which the officer is a potential witness.

An officer's credibility is critical to his or her ability to successfully perform essential job functions, such as testifying at trial or obtaining warrants. If the department determines that the nature of the impeachment material in an officer's file is sufficiently serious so as to hamper the prosecution of criminal cases or limit the usefulness of the officer to the department, that officer will be considered unable to perform one of the essential functions of a police officer. Officers are placed on notice that this constitutes grounds for dismissal from employment.

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### **Purpose**

To ensure compliance with the constitutional mandate that defendants in criminal cases are entitled to disclosure of exculpatory evidence, including adverse information in police personnel or disciplinary files that would adversely impact the credibility of an officer testifying in criminal cases, including violation, misdemeanor and felony cases.

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### **Discussion**

In *State v. Laurie*, 139 N.H.325 (1995) the New Hampshire Supreme Court held that, with respect to any police officer who has been identified as a potential prosecution witness in a criminal case, the State has an obligation to disclose information in the police officer's disciplinary file that could be used by the defense to impeach the character or credibility of that officer. This obligation is not limited to information that the prosecutor has actual knowledge of. It includes information in the hands of any law enforcement agency involved in the investigation.

If the State fails to disclose such information in a particular case, and a court determines that it would have been material to the preparation or presentation of the defendant's case as to credibility and for purposes of cross examination, the conviction will be overturned unless the prosecutor can prove beyond a reasonable doubt that the undisclosed information would not have affected the verdict. *Laurie*



does not require the State to disclose everything that might influence a judge or jury, or that the defendant be permitted complete discovery of all investigatory work or an examination of the State's complete file.

In *Giglio v. United States*, 405 U.S. 150 (1972) the United States Supreme Court has also noted that prosecutors have both a constitutional and an ethical obligation to disclose information that might be used to impeach a State's witness in a criminal trial.

In *Kyles v. Whitley*, 514 U.S. 419 (1995) the United States Supreme Court ruled that a prosecutor's disclosure obligation extends to information known only to police investigators.

In *State v. Gagne*, 136 N.H. 101 (1992) the New Hampshire Supreme Court held that if defense counsel shows that there is a reasonable probability that a particular confidential record or file will contain information that is material and relevant to the defense, the prosecutor must submit the records to the court for an *in camera* review, after which the trial court will disclose any exculpatory materials from the records to both the prosecutor and the defense counsel.

RSA 105:13-b protects the confidentiality of police personnel files from indiscriminate requests by defense counsel to review an officer's file. Before the defense can gain access to the file of any officer who is a potential prosecution witness, a court must make a specific finding that a reasonable probability exists to believe the file contains evidence relevant to that criminal case. The court is then required to review the file *in camera* and determine whether in fact it contains information that is reasonably necessary to permit counsel to adequately cross examine for the purpose of showing unreliability or bias. Only the information that can actually be used for that purpose may be disclosed. All other information must be kept confidential and returned to the police department, *State v. Puzanghera*, 140 N.H. 105 (1995).

Unsubstantiated allegations and misconduct remote in time are examples of information that would probably not be subject to disclosure. Other examples are those where a police officer/witness has been disciplined for actions that would not have an impact on the officer's credibility. Not every disciplinary action against an officer would cause a reasonable person to doubt that officer's credibility.

In the *Laurie* case, there was information in the officer's personnel file and in a pre-employment investigation report from another agency indicating that the officer, who was in charge of the investigation and supervised and witnessed the confession of a murder defendant, was described as a known liar, intimidator and mentally unstable person. This officer's previous employer had received many letters of complaint about his behavior as an extremely volatile person who was prone to being physically and verbally abusive. He had been suspended once for neglect of duty and once for

threatening a civilian with a firearm while off-duty, had failed prior polygraph examinations, had been evaluated by a psychologist who said he should not be entrusted with a gun and a badge, had claimed to have military and educational accomplishments that he was unable to substantiate when questioned about them, had made false claims in order to gain information during an investigation, and was not trusted by his peers. The court found that this information, which was not disclosed to the defendant, would have played a crucial role in the defense strategy and in impeaching the officer's credibility. The conviction was reversed.

In a 1996 law enforcement memo, the NH Attorney General outlined the discussed the obligation of prosecutors to disclose *Laurie* material, and set forth procedures to ensure that obligation was met. Pursuant to the memo, if a prosecutor has probable cause to believe that impeachment or exculpatory evidence exists in the personnel file of any police officer identified as a potential prosecution witness, the prosecutor should file a motion, under seal, advising the court of that fact and requesting that the court order the file to be submitted for *in camera* review. If a prosecutor receives a defense request for disclosure of such a file and determines that defense counsel has demonstrated probable cause that the file will contain relevant evidence, the prosecutor should submit the file to the court for *in camera* review.

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#### **Procedure**

A. The Municipal Records Retention Act, RSA 33-A, and the rules adopted thereunder by the New Hampshire Division of Archives, require that most personnel records be retained for at least seven years after an employee leaves employment. However, the Municipal Records Act does not contemplate disclosures that may be required under the provisions of *State v. Laurie*, 139 N.H. 325 (1995).

B. In order to ensure that courts have access to potential *Laurie* materials to determine whether disclosure is required under *Laurie*, records concerning any of the following shall be retained for the time periods outlined below:

- (1) any substantiated instance when an officer deliberately lied during a court case, administrative hearing, other official proceeding, or internal investigation, or in a police report;
- (2) any substantiated instance when an officer falsified records or evidence;
- (3) any substantiated instance when an officer engaged in an egregious dereliction of duty (for example; using the position of police officer to gain personal benefit such as sexual favors or monetary gain; representing that he or she was engaged in official duties on a particular date/time when, in fact, that was not accurate; or any other conduct that implicates an officer's character for truthfulness);
- (4) any founded complaint of excessive use of force;
- (5) any instance of mental instability that caused the police department to take some affirmative action to suspend the officer for evaluation or treatment,

except for a referral for counseling after being involved in a traumatic incident or for some other reason for which no disciplinary action was taken.

C. Any record that concerns an incident over ten years old is presumptively non-*Laurie* material and may be removed from the officer's disciplinary file, provided that the officer has not been subject to any subsequent disciplinary action. However, to the extent that the officer has been subject to any subsequent disciplinary actions, all *Laurie* material in his or her file shall be retained until the officer would be at least 70 years of age.

D. Any record of disciplinary action that does not constitute potential *Laurie* material, as described in B above, may be deleted from an officer's disciplinary file after two years in the case of an oral or written reprimand or letter of counsel, five years in the case of a suspension for a period not in excess of two days, and ten years in case of a suspension for more than two days but not in excess of five days. All other records of suspension shall be maintained indefinitely. Nothing in this subparagraph or in subparagraphs B or C shall prohibit the department from using prior deleted suspensions to prove that progressive disciplinary measures have been taken.

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 of the behavior described in B above. 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 *Laurie* material. In the event the Chief has questions about that determination, he or she should consult with the county attorney. In consulting with the county attorney, the Chief shall not disclose any personal identifying information about the officer, but simply present a hypothetical situation for the county attorney's consideration.

G. If the Chief concludes that the incident constitutes potential *Laurie* material, 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 potential *Laurie* material. The Chief shall consider such facts and render a final decision in writing.

H. If the Chief's final decision is that the incident in question constitutes potential *Laurie* material, 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 in writing. The notification to the county attorney shall include only the officer's name and date of birth; it shall not include

details of, or documents relating to, the underlying incident, except the date of the incident. The Chief shall instruct the officer in writing that in cases being prosecuted by someone other than the local prosecutor, county attorney, or assistant attorney general, in which the officer will be a witness, the officer shall present a copy of the written notice to the court.

I. If the Chief determines that the incident constitutes potential *Laurie* material, the Chief shall determine if the issue is so likely to affect the 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 involved in an arrest and subsequent court case at any time.

J. Any requests from a prosecutor or defense counsel to produce an officer's personnel or disciplinary 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 and the file has not already been declared subject to a *Laurie* disclosure, the Chief shall notify the requesting party that 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 same. The file shall be accompanied by a letter from the Chief setting forth that the information is being forwarded for purposes of a *Laurie* review, citing RSA 105:13-b and *State v. Puzanghera*, 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.

SAMPLE NOTIFICATION FORM  
(Police Department Letter Head)

TO: [County Attorney; Criminal Bureau Chief, N.H. Attorney General's Office)

Re: *Laurie* Notification

Date:

A determination has been made that the police officer identified below has engaged in conduct that may be subject to disclosure under *State v. Laurie*:

Officer's Name: \_\_\_\_\_

Date of Birth: \_\_\_\_\_

Police Department: \_\_\_\_\_

Date of Incident: \_\_\_\_\_

\_\_\_\_\_  
Chief, \_\_\_\_\_ Police Department



SAMPLE MOTION FOR *IN CAMERA* REVIEW

The State of New Hampshire

[County], SS.

\_\_\_\_\_ Court

[Docket #]

State of New Hampshire

v.

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***FILED UNDER SEAL***

MOTION FOR IN CAMERA REVIEW

NOW COMES, \_\_\_\_\_, and respectfully requests that this Court conduct an *in camera* review of [town, city] Police Officer [name]' personnel file for the purpose of determining whether it contains any *Brady/Giglio* material, which must be disclosed to the defendant. In support of this motion, the State says the following:

1) The State anticipates that Officer \_\_\_\_\_, of the \_\_\_\_\_ Police Department will be a witness in this case.

2) The State has probable cause to believe that exculpatory or impeachment evidence may exist in Officer \_\_\_\_\_'s personnel file. If such evidence exists, it must be disclosed to the defendant under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); State v. Laurie, 139 N.H. 325 (1995).

3) The personnel file is confidential by statute, RSA 105:13-b. Thus, the State is prohibited from gaining access to the file to determine whether it contains Brady/Giglio

material. The State requests that this Court conduct an *in camera* review of the file and make that determination. See State v. Puzanghera 140 N.H. 105, 06-07 (1995).

4) Should the Court find that the file does not contain any Brady/Giglio material, the State requests that the Court further rule that the contents of the file shall not be subject to disclosure in any future litigation.

5) Should the Court determine that the file, or portions thereof, constitute Brady/Giglio material, the State requests that copies of the relevant documents, or portions thereof, be provided to the defendant and the State under a protective order. Such an order should contain provisions: a) barring the parties from further disclosing the information in any form, or using the information for any purpose other than the pending litigation, and b) sealing this motion and all related pleadings and court orders.

WHEREFORE, the State respectfully requests that this Court:

- a) Order the submission of Officer \_\_\_\_\_'s personnel to the Court for *in camera* review;
- b) Conduct an *in camera* review;
- c) In the event the Court determines that the file does not contain any Brady/Giglio material, issue an order to that effect, and
- d) Issue a further order that the file shall not be subject to disclosure in future criminal litigation; or
- e) To the extent that the file contains Brady/Giglio material, disclose those portion of the file to the parties under a protective order consistent with paragraph 5 above; and
- f) Grant such further relief as may be deemed just.

Respectfully submitted,

SAMPLE MOTION SEEKING AUTHORITY TO DISCLOSE CONFIDENTIAL  
MATERIALS

The State of New Hampshire

[County], SS.

\_\_\_\_\_ Court

[Docket #]

State of New Hampshire

v.

\_\_\_\_\_

**Motion for Authorization to Disclose Confidential Information**

NOW COMES \_\_\_\_\_, and respectfully requests that this Court authorize the State to disclose to the defendant certain confidential information. In support of this request, the State says the following:

- 1) The State anticipates that Officer \_\_\_\_\_, of the \_\_\_\_\_ Police Department will be a witness in this case.
- 2) During the course of prior litigation, the court provided the State copies of documents from Officer \_\_\_\_\_'s police personnel file, following a determination the information constituted Brady/Giglio material. The documents were provided under a protective order barring further disclosure.
- 3) The State now seeks authorization from the Court to disclose those documents to the defendant in this case, in accordance with its constitutional obligations under State v. Laurie.
- 4) Due to the confidential nature of the documents, the disclosure should be subject



to a protective order barring the parties from further disclosing the information in any form, or using the information for any purpose other than the pending litigation.

5) The State requests that this motion and any related court orders or pleadings be sealed.

WHEREFORE, the State respectfully requests that this Court:

- a) Authorize the State to provide the defendant copies of the documents from Officer \_\_\_\_\_'s personnel;
- b) Issue a protective order consistent with paragraph 4 above;
- c) Seal this motion and any related court orders or pleadings; and
- d) Grant such further relief as may be deemed just.

SAMPLE SUBMISSION LETTER  
(ON POLICE DEPARTMENT LETTER HEAD)

Clerk of Court  
\_\_\_\_\_ Court  
Street Address  
City, New Hampshire

Re: State v. \_\_\_\_\_, Docket # \_\_\_\_\_

Dear Clerk:

Enclosed please find a copy of the personnel file of [Officer's name], which is being submitted under seal for *in camera* review, in accordance with the Court's order of [date]. This file is protected by statute, RSA 105:13-b, and must be kept confidential. The file is to reviewed for the purpose of determining whether it contains Brady/Giglio material, to which the defendant may be entitled. See State v. Puzanghera. I am providing the file to the court with the understanding that its contents will be disclosed only to the extent required by law, for use only in the context of the above-cited litigation.

If, upon completion of the *in camera* review, the court determines that it needs to retain the file for appeal purposes, I request that it be kept under seal. Otherwise, I am requesting that the file either be returned to the police department or shredded.

If you have any questions, please feel free to contact me.

Sincerely,

Chief, Police Department

ATTORNEY GENERAL  
STATE OF NEW HAMPSHIRE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

PHILIP T. MCLAUGHLIN  
ATTORNEY GENERAL



STEVEN M. HOURAN  
DEPUTY ATTORNEY GENERAL

MEMORANDUM

TO: All Law Enforcement Agencies

RE: RSA 265:82-c

DATE: November 6, 1998

It has come to my attention that there may be some misunderstanding and/or confusion as to the requirements of RSA 265:82-c, Annulment; Plea Bargaining. Paragraph II provides, in relevant part, as follows:

. . . in any case in which a person is arrested for and charged with the offense of driving or attempting to drive a vehicle on any way while under the influence of intoxicating liquor or drugs or while having an alcohol concentration of 0.08 or more and that charge is reduced from a second or subsequent offense to a first offense or in which the original charge is reduced to or in any manner substituted with another charge or a nolle prosequi entered in exchange for an agreement to plead guilty or nolo contendere to another charge, the prosecutor **shall** submit to the attorney general a written report describing such agreement. All such written reports **shall** be submitted to the attorney general on a monthly basis [emphasis added].

It is well settled law that the term "shall" in a statute "requires mandatory enforcement." Town of Nottingham v. Harvey, 120 N.H. 889, 895 (1980); Petition of Michael Mone, No. 98-536, slip op. at 8, N.H., November 4, 1998.

This means that you must notify this office if you do any of the following:

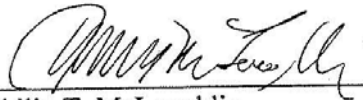
1. Charge an individual with DWI subsequent or Attempted DWI subsequent, and then reduce it to a first offense; or

2. Charge an individual with DWI and then either:
  - a. reduce it to another charge;
  - b. in any way substitute another charge for it; or
  - c. enter a nolle prosequi.

Please note that this statute is **mandatory**, not discretionary. Enclosed is a form which you may use to comply with the requirements of RSA 265:82-c. If you have any questions as to what this statute requires, please call Connie Stratton at 271-3671.

Thank you for your cooperation.

Sincerely,



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Philip T. McLaughlin  
Attorney General

OFFICE OF THE ATTORNEY GENERAL  
 33 CAPITOL STREET  
 CONCORD NH 03301

INSTRUCTIONS: In accordance with N.H. RSA 265:82, all prosecutors are required to report to the Attorney General whenever any case of driving while intoxicated where the plea is negotiated, or the original charge is reduced or nol prossed. You should submit this report at the end of the month for each case reduced, nol prossed, or otherwise negotiated during the reporting period.

DEFENDANT'S NAME:

DATE OF ARREST:

ADDRESS:

ARRESTING DEPARTMENT;

ORIGINAL CHARGE:

DATE OF BIRTH:

REDUCED OR SUBSTITUTED CHARGE:

If charge remains the same, but sentence recommendation is negotiated, describe result of plea negotiations:

PROSECUTOR:

DEFENSE ATTORNEY:

SPECIFIC REASON FOR CHARGE BARGAINING, PLEA BARGAINING, OR NOLLE PROSEQUI (e.g., past record, strength of case, etc.):

OTHER PENDING CHARGES (if any) AFFECTED BY PLEA BARGAIN OR CHARGE BARGAIN AND MANNER IN WHICH AFFECTED:

CHEMICAL TESTS:      Blood               Urine               Breath

DEFENDANT REFUSED TESTS:

BAC:

MONTH/YEAR:

COUNTY:

## ENDNOTES

- <sup>1</sup> State v. Beauchesne, 151 N.H. 803, 809 (2005).
- <sup>2</sup> State v. Riley, 126 N.H. 257, 263 (1985).
- <sup>3</sup> State v. Beauchesne, 151 N.H. 803, 809-10 (2005).
- <sup>4</sup> State v. Beauchesne, 151 N.H. 803, 809 (2005); State v. Riley, 126 N.H. 257, 262 (1985).
- <sup>5</sup> State v. Cote, 129 N.H. 358, 364 (1987).
- <sup>6</sup> State v. Quezada, 141 N.H. 258, 260 (1996).
- <sup>7</sup> State v. Quezada, 141 N.H. 258, 260 (1996).
- <sup>8</sup> United States v. Hodari D., 499 US. 621, 626 (1991) (holding that a seizure does not occur until a suspect yields to police authority).
- <sup>9</sup> State v. Beauchesne, 151 N.H. 803, 813 (2005).
- <sup>10</sup> Terry v. Ohio, 392 U.S. 1, 20-21 (1968); State v. Beauchesne 151 N.H. 803, 809 (2005).
- <sup>11</sup> Terry v. Ohio, 392 U.S. 1, 20-21 (1968); State v. Wiggin, 151 N.H. 305, 308 (2004); State v. Maya, 126 N.H. 590, 595 (1985).
- <sup>12</sup> State v. Wiggin, 151 N.H. 305, 308 (2004) (citing State v. Turmel, 150 N.H. 377, 380 (2003)).
- <sup>13</sup> State v. Galway, 145 N.H. 100, 103 (2000).
- <sup>14</sup> State v. Galway, 145 N.H. 100, 103 (2000).
- <sup>15</sup> State v. Wiggin, 151 N.H. 305, 308 (2004).
- <sup>16</sup> See State v. Roach, 141 N.H. 64, 66 (1996) (suspect's location in Manchester's "combat zone" contributed to reasonable suspicion).
- <sup>17</sup> 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"), cert denied, 691 N.E.2d 582 (Mass. 1998).
- <sup>18</sup> State v. Livingston, 153 N.H. 399, 401 (2006).
- <sup>19</sup> See Texas v. Gonzalez, 388 F.2d 145, 147 (5th Cir. 1968) (arrest invalid when police trespassed onto defendant's property and then observed suspicious conduct through defendant's window).

- <sup>20</sup> Oliver v. Woods, 209 F.3d 1179, 1191 (10<sup>th</sup> Cir. 2000) (quotations, citation, and brackets omitted).
- <sup>21</sup> State v. Carroll, 131 N.H. 179, 189 (1988).
- <sup>22</sup> United States v. Hensley, 469 U.S. 221, 233 (1985).
- <sup>23</sup> United States v. Hensley, 469 U.S. 221, 233 (1985); accord State v. Salato, 47 P.3d 763, 768 (Idaho Ct. App. 2001).
- <sup>24</sup> United States v. Hensley, 469 U.S. 221, 233 (1985) (emphasis in original).
- <sup>25</sup> Welch v. Dir., Dept. of Motor Vehicles, 140 N.H. 6, 8 (1995).
- <sup>26</sup> State v. Corey, 127 N.H. 56, 59 (1985).
- <sup>27</sup> State v. Gowen, 150 N.H. 286, 288 (2003).
- <sup>28</sup> Florida v. J. L., 529 U.S. 266, 270 (2000).
- <sup>29</sup> State v. Christy, 138 N.H. 352, 357 (1994).
- <sup>30</sup> State v. Conant, 139 N.H. 728, 731 (1995).
- <sup>31</sup> State v. Conant, 139 N.H. 728, 731 (1995).
- <sup>32</sup> State v. Sousa, 151 N.H. 297, 303 (2004).
- <sup>33</sup> Draper v. United States, 358 U.S. 307, 313 (1959).
- <sup>34</sup> State v. Roach, 141 N.H. 64, 66-67 (1996); see also RSA 594:3 (“A peace officer may search for a dangerous weapon any person whom he is questioning or about to question as provided in RSA 594:2 whenever he reasonably believes that he might be in danger if such person possessed a dangerous weapon”).
- <sup>35</sup> State v. Roach, 141 N.H. 64, 67 (1996).
- <sup>36</sup> State v. Roach, 141 N.H. 64, 67 (1996).
- <sup>37</sup> Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (citing Sibron v. New York, 392 U.S. 40, 65-66 (1968)).
- <sup>38</sup> State v. Turmel, 150 N.H. 377, 383-84 (2003); see accord RSA 594:2 (stating the questions that should be asked are “name, address, business abroad, and where he is going”).
- <sup>39</sup> State v. McKinnon-Andrews, 151 N.H. 19, 25 (2004).
- <sup>40</sup> State v. Sterndale, 139 N.H. 445, 450 (1995); compare United States v. Ross, 456 U.S. 798, 809 (1982) (recognizing automobile exception to the search warrant requirement of the Fourth Amendment to the United States Constitution).
- <sup>41</sup> State v. McKinnon-Andrews, 151 N.H. 19, 25 (2004).

- <sup>42</sup> Michigan v. Long, 463 U.S. 1032, 1049-50 (1983) (“If, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances”).
- <sup>43</sup> Minnesota v. Dickerson, 508 U.S. 366, 377 (1993).
- <sup>44</sup> RSA 594:10.
- <sup>45</sup> State v. Webber, 141 N.H. 817, 820 (1997).
- <sup>46</sup> RSA 265:4, I(f).
- <sup>47</sup> RSA 265:4, I(a).
- <sup>48</sup> RSA 594:10.
- <sup>49</sup> RSA 594:4.
- <sup>50</sup> United States v. McCarthy, 77 F.3d 522, 530 (1st Cir. 1996), cert denied, 519 U.S. 1093 (1997).
- <sup>51</sup> See Terry v. Ohio, 392 U.S. 1, 20-29 (1968); State v. Turmel, 150 N.H. 377, 383 (2003).
- <sup>52</sup> United States v. Lee, 317 F.3d 26, 31 (1st Cir. 2003), cert denied, 538 U.S. 1048 (2003).
- <sup>53</sup> Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977); State v. Turmel, 150 N.H. 377, 383 (2003) (citing State v. Hamel, 123 N.H. 670, 676 (1983)).
- <sup>54</sup> Maryland v. Wilson, 519 U.S. 408, 414-15 (1997).
- <sup>55</sup> State v. Pellici 133 N.H. 523, 534-35 (1990).
- <sup>56</sup> State v. Pellici 133 N.H. 523, 529 (1990).
- <sup>57</sup> State v. Hight, 146 N.H. 746, 749 (2001).
- <sup>58</sup> State v. Hight, 146 N.H. 746, 748-49 (2001); State v. Noel, 137 N.H. 384, 389-90 (1993).
- <sup>59</sup> State v. Turmel, 150 N.H. 377, 384-85 (2003).
- <sup>60</sup> Michigan Dept. 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).
- <sup>61</sup> Illinois v. Lidster, 540 U.S. 419, 423 (2004).
- <sup>62</sup> Indianapolis v. Edmond, 521 U.S. 32, 44 (2000).
- <sup>63</sup> Indianapolis v. Edmond, 531 U.S. 32, 47 (2000).
- <sup>64</sup> State v. Hutton, 108 N.H. 279, 285 (1967) (citing State v. Murray, 106 N.H. 71, 73 (1964)).
- <sup>65</sup> State v. Schofield, 114 N.H. 454, 456 (1974) (quoting State v. Garceau, 108 N.H. 209, 211 (1967)).



- <sup>66</sup> State v. Riley, 126 N.H. 257, 263 (1985).
- <sup>67</sup> State v. Quezada, 141 N.H. 258, 260 (1996).
- <sup>68</sup> State v. Noel, 137 N.H. 384, 389 (1993).
- <sup>69</sup> State v. Pierce, 126 N.H. 84, 86 (1985).
- <sup>70</sup> State v. White, 119 N.H. 567, 571 (1979) (court held that detention on less than probable cause resulted in confession being inadmissible).
- <sup>71</sup> State v. Jaroma, 137 N.H. 562, 567 (1993) (citations omitted).
- <sup>72</sup> RSA 594:13.
- <sup>73</sup> State v. Hutton, 108 N.H. 279, 287 (1967).
- <sup>74</sup> State v. Jaroma, 137 N.H. 562, 567 (1993); see also United States v. Ruigomez, 702 F.2d 61, 66 (5th Cir. 1983) (probable cause to arrest for possession of handgun existed without firm proof that handgun belonged to defendant when police found gun on passenger side of car where defendant was sitting).
- <sup>75</sup> RSA 594:5.
- <sup>76</sup> RSA 594:4, I.
- <sup>77</sup> RSA 594:6.
- <sup>78</sup> Steagald v. United States, 451 U.S. 204, 212-13 (1981).
- <sup>79</sup> State v. Jones, 127 N.H. 515, 520 (1985).
- <sup>80</sup> RSA 594:14, I.
- <sup>81</sup> RSA 594:15.
- <sup>82</sup> RSA 594:17.
- <sup>83</sup> State v. Farrell, 145 N.H. 733, 738 (2001).
- <sup>84</sup> State v. Greene, 128 N.H. 317, 319 (1986).
- <sup>85</sup> RSA 594:16.
- <sup>86</sup> RSA 597.
- <sup>87</sup> RSA 597:2.
- <sup>88</sup> RSA 594:20.
- <sup>89</sup> RSA 169-B:11.
- <sup>90</sup> RSA 169-B:9-a; “An ‘alternative to secure detention’ means any local program, approved by the court, police, probation, or the department of health and human services, which offers a less

restrictive alternative to secure detention for minors,” such as a crisis home or group home. RSA 169-B:2, II.

<sup>91</sup> RSA 169-B:11.

<sup>92</sup> RSA 169-B:11, III.

<sup>93</sup> RSA 169-D:10.

<sup>94</sup> RSA 169-D:9-b.

<sup>95</sup> RSA 135-C:28, III.

<sup>96</sup> RSA 135-C:28, III.

<sup>97</sup> RSA 172-B:1, X.

<sup>98</sup> RSA 172-B:1, IX.

<sup>99</sup> RSA 172-B:3, VIII.

<sup>100</sup> State v. Harlow, 123 N.H. 547, 552 (1983).

<sup>101</sup> RSA 172-B:3, V.

<sup>102</sup> RSA 172-B:3, VI.

<sup>103</sup> RSA 172-B:3, I.

<sup>104</sup> RSA 172-B:3, II.

<sup>105</sup> RSA 169-C:6, I.

<sup>106</sup> RSA 169-C:6, II.

<sup>107</sup> RSA 169-C:6, II(d).

<sup>108</sup> RSA 594:10.

<sup>109</sup> Forgie-Buccioni v. Hannaford Brothers, Inc., 413 F.3d 175, 180 (1st Cir. 2005).

<sup>110</sup> A person eligible for protection under RSA 173-B:1 includes the actor’s “family or household member or current or former sexual or intimate partner.”

<sup>111</sup> RSA 594:10, II.

<sup>112</sup> McDonald v. United States, 335 U.S. 451, 454-56 (1948) (holding that exceptions to the warrant requirement are only permitted in “exceptional circumstances”).

<sup>113</sup> State v. Stern, 150 N.H. 705, 709 (2004).

<sup>114</sup> 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”).

<sup>115</sup> Welch v. Wisconsin, 466 U.S. 740, 753 (1984).

- <sup>116</sup> United States v. Santana, 427 U.S. 38, 42-43 (1976).
- <sup>117</sup> State v. Ricci, 144 N.H. 241, 245 (1999).
- <sup>118</sup> State v. Morse, 125 N.H. 403, 408 (1984).
- <sup>119</sup> Welch v. Wisconsin, 466 U.S. 740, 754 (1984).
- <sup>120</sup> State v. Morse, 125 N.H. 403, 408 (1984).
- <sup>121</sup> Me. Rev. Stat. Ann. tit. 15 § 154 (2005).
- <sup>122</sup> Mass. Gen. Laws ch. 276, § 10A (2005).
- <sup>123</sup> Vt. Stat. Ann. tit. 13 § 5042 (2005).
- <sup>124</sup> RSA 614:1. The New Hampshire fresh pursuit authority applies to out-of-state law enforcement officials only if the other state grants reciprocal authority. RSA 614:1-a. Because the Massachusetts laws do not include a provision for an out-of-state officer to enter the state in fresh pursuit of someone suspected of DWI, the New Hampshire fresh pursuit law does not apply to Massachusetts officers under those circumstances.
- <sup>125</sup> RSA 614:2.
- <sup>126</sup> RSA 614:2.
- <sup>127</sup> See United States v. Watson, 423 U.S. 411, 417-24 (1976).
- <sup>128</sup> United States v. Watson, 243 U.S. 411, 423 (1976).
- <sup>129</sup> Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (search warrant invalid where it was signed by the attorney general, whose office was overseeing the underlying investigation).
- <sup>130</sup> RSA 490:4; RSA 502:18; RSA 502-A:11, RSA 592-A:5-6.
- <sup>131</sup> RSA 595-A:4.
- <sup>132</sup> RSA 594:13.
- <sup>133</sup> However, that does not include authority to enter a third party's home to arrest the person named in the warrant.
- <sup>134</sup> RSA 594:9.
- <sup>135</sup> RSA 594:7.
- <sup>136</sup> State v. Beland, 138 N.H. 735, 737 (1994); State v. Laurie, 135 N.H. 438, 444 (1992).
- <sup>137</sup> See State v. Monroe, 142 N.H. 857, 865-56 (1998) (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) (“Cases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities

adhered to the dictates of Miranda are rare.”) (brackets ommitted)), cert. denied, 525 U.S. 1073 (1999).

<sup>138</sup> See State v. Portigue, 125 N.H. 352, 362-63 (1984) (in some special circumstances, non-custodial interrogation could possibly so overbear a suspect’s will to resist as to make a confession involuntary and inadmissible).

<sup>139</sup> State v. Rezk, 150 N.H. 483, 487 (2004).

<sup>140</sup> State v. Rezk, 150 N.H. 483, 486 (2004).

<sup>141</sup> State v. Monroe, 142 N.H. 857, 864 (1998).

<sup>142</sup> State v. Rezk, 150 N.H. 483, 489 (2004) (court noted that the defendant was able to refrain from divulging the names of individuals that the police pressed him on for information).

<sup>143</sup> State v. Rezk, 150 N.H. 483, 488 (2004).

<sup>144</sup> State v. Carroll, 138 N.H. 687, 691 (1994).

<sup>145</sup> State v. Rezk, 150 N.H. 483, 490 (2004).

<sup>146</sup> State v. Rezk, 150 N.H. 483, 490 (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).

<sup>147</sup> State v. Rezk, 150 N.H. 483, 489 (2004) (quotation omitted).

<sup>148</sup> Miranda v. Arizona, 384 U.S. 436, 444 (1966).

<sup>149</sup> Miranda v. Arizona, 384 U.S. 436, 444 (1966); see also Illinois v. Perkins, 496 U.S. 292, 296 (1990) (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

<sup>150</sup> State v. Grey, 148 N.H. 666, 670 (2002).

<sup>151</sup> State v. Locke, 149 N.H. 1, 6 (2002), cert. denied, 538 U.S. 1043 (2003).

<sup>152</sup> State v. Turmel, 150 N.H. 377, 383 (2003).

<sup>153</sup> State v. Turmel, 150 N.H. 377, 383 (2003).

<sup>154</sup> State v. Szczerbiak, 148 N.H. 352, 355-56 (2002).

<sup>155</sup> State v. Turmel, 150 N.H. 377, 383 (2003).

<sup>156</sup> See State v. Turmel, 150 N.H. 377, 384-85 (2003).

<sup>157</sup> See State v. Cook, 148 N.H. 735, 740 (2002) (courts will consider the “the degree to which the suspect’s freedom of movement was curtailed”).

<sup>158</sup> State v. Tucker, 131 N.H. 526, 530 (1989).

<sup>159</sup> See State v. Tucker, 131 N.H. 526, 530 (1989).

- <sup>160</sup> State v. Ford, 144 N.H. 57, 63-64 (1999).
- <sup>161</sup> State v. Tucker, 131 N.H. 526, 531 (1989).
- <sup>162</sup> State v. Gravel, 135 N.H. 172, 177 (1991).
- <sup>163</sup> State v. Gravel, 135 N.H. 172, 177 (1991) (brackets omitted) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).
- <sup>164</sup> State v. Dellorfan, 128 N.H. 628, 633-34 (1986).
- <sup>165</sup> Brewer v. Williams, 430 U.S. 387, 392-93, reh'g denied, 431 U.S. 925 (1977).
- <sup>166</sup> Brewer v. Williams, 430 U.S. 387, 399 (1977).
- <sup>167</sup> State v. Plch, 149 N.H. 608, 612, 614-15, cert. denied, 540 U.S. 1009 (2003).
- <sup>168</sup> State v. Torres, 130 N.H. 340, 343 (1988); State v. Lewis, 129 N.H. 787, 795-96 (1987).
- <sup>169</sup> United States v. Payne, 954 F.2d 199, 202 (4<sup>th</sup> Cir.), cert. denied, 503 U.S. 988 (1992).
- <sup>170</sup> United States v. Moreno-Flores, 33 F.3d 1164, 1169 (9<sup>th</sup> Cir. 1994).
- <sup>171</sup> Kennedy v. State, 540 S.E.2d 229, 231 (Ga. Ct. App. 2000).
- <sup>172</sup> United States v. Jackson, 189 F.3d 502, 511 (7<sup>th</sup> Cir.), cert. denied, 528 U.S. 979 (1999).
- <sup>173</sup> State v. Guajardo, 135 N.H. 401, 403-04 (1992).
- <sup>174</sup> United States v. Crisco, 725 F.2d 1228, 1232 (9<sup>th</sup> Cir.), cert. denied, 466 U.S. 977 (1984).
- <sup>175</sup> Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980).
- <sup>176</sup> United States v. Moreno-Flores, 33 F.3d 1164, 1169 (9<sup>th</sup> Cir. 1994) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).
- <sup>177</sup> State v. Chrisicos, 148 N.H. 546, 548-49 (2002) (citing Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990)).
- <sup>178</sup> New York v. Quarles, 467 U.S. 649, 655-56 (1984).
- <sup>179</sup> New York v. Quarles, 467 U.S. 649, 649 (1984).
- <sup>180</sup> New York v. Quarles, 467 U.S. 649, 657 (1984).
- <sup>181</sup> State v. Lopez, 139 N.H. 309, 312 (1994).
- <sup>182</sup> State v. Arsenault, 115 N.H. 109, 113 (1975).
- <sup>183</sup> State v. Goding, 128 N.H. 267, 274 (1986) (quoting South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983)).
- <sup>184</sup> State v. Goding, 128 N.H. 267, 274 (1986).
- <sup>185</sup> Miranda v. Arizona, 384 U.S. 436, 479 (1966).

- <sup>186</sup> California v. Prysock, 453 U.S. 355, 359-61 (1981) (noting that “no talismanic incantation” is required to satisfy Miranda).
- <sup>187</sup> State v. Plch, 149 N.H. 608, 618 (citing Duckworth v. Eagan, 492 U.S. 195, 203 (1989)).
- <sup>188</sup> State v. Torres, 130 N.H. 340, 344 (1988).
- <sup>189</sup> See 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”).
- <sup>190</sup> State v. Tapply, 124 N.H. 318, 322 (1983).
- <sup>191</sup> Miranda v. Arizona, 384 U.S. 436, 475 (1966).
- <sup>192</sup> Davis v. United States, 512 U.S. 452, 461 (1994).
- <sup>193</sup> Davis v. United States, 512 U.S. 452, 461 (1994).
- <sup>194</sup> See Commonwealth v. Contos, 754 N.E.2d 647, 656-58 (Mass. 2001) (statements suppressed when police continued to question why defendant wanted to stop talking, and ignored statement about a lawyer; the “why” questions were not clarifying in nature).
- <sup>195</sup> Edwards v. Arizona, 451 U.S. 477, 482 (1981).
- <sup>196</sup> State v. Tapply, 124 N.H. 318, 325 (1983).
- <sup>197</sup> Minnick v. Mississippi, 498 U.S. 146, 153 (1990); Arizona v. Roberson, 486 U.S. 675, 682-83 (1988).
- <sup>198</sup> State v. Tapply, 124 N.H. 318, 325 (1983).
- <sup>199</sup> State v. Tapply, 124 N.H. 318, 324 (1983).
- <sup>200</sup> State v. Carpentier, 132 N.H. 123, 128 (1989).
- <sup>201</sup> Smith v. Illinois, 469 U.S. 91, 95 (1984); State v. Plch, 149 N.H. 608, 617 (2003).
- <sup>202</sup> State v. Plch, 149 N.H. 608, 617 (2003) (quoting State v. Elbert, 125 N.H. 1, 9 (1984)).
- <sup>203</sup> State v. Plch, 149 N.H. 608, 617 (2003).
- <sup>204</sup> State v. Roache, 148 N.H. 45, 52 (2002).
- <sup>205</sup> State v. Roache, 148 N.H. 45, 52 (2002).
- <sup>206</sup> Michigan v. Mosley, 423 U.S. 96, 104 (1975).
- <sup>207</sup> Michigan v. Mosley, 423 U.S. 96, 102-04 (1975).
- <sup>208</sup> Arizona v. Roberson, 486 U.S. 675, 687-88 (1988).
- <sup>209</sup> State v. Laurie, 135 N.H. 438, 442-43, cert. denied, 506 U.S. 886 (1992).

- <sup>210</sup> State v. Barnett, 147 N.H. 334, 338 (2001); accord State v. Dupont, 149 N.H. 70, 74 (2003) (citing State v. Barnett, 147 N.H. 334, 338 (2001)).
- <sup>211</sup> State v. Barnett, 147 N.H. 334, 338 (2001).
- <sup>212</sup> State v. Benoit, 126 N.H. 6, 18 (1985).
- <sup>213</sup> State v. Benoit, 126 N.H. 6, 18-19 (1985).
- <sup>214</sup> State v. Benoit, 126 N.H. 6, 15 (1985).
- <sup>215</sup> State v. Benoit, 126 N.H. 6, 19 (1985) (quoting RSA 594:15) (emphasis in original).
- <sup>216</sup> State v. Farrell, 145 N.H. 733, 739 (2001).
- <sup>217</sup> See State v. Beede, 119 N.H. 620, 627 (1979), cert denied, 445 U.S. 967, reh'g denied, 446 U.S. 993 (1980).
- <sup>218</sup> State v. Sands, 123 N.H. 570, 604 (1983).
- <sup>219</sup> State v. Theodosopoulos, 119 N.H. 573, 576 (1979), cert denied, 446 U.S. 983 (1980).
- <sup>220</sup> State v. Graca, 142 N.H. 670, 672 (1998).
- <sup>221</sup> State v. Goss, 150 N.H. 46, 48-49 (2003).
- <sup>222</sup> State v. Stern, 150 N.H. 705, 708 (2004) (taking of blood sample is a search).
- <sup>223</sup> State v. Grey, 148 N.H. 666, 668-69 (2002).
- <sup>224</sup> State v. Webber, 141 N.H. 817, 819 (1997).
- <sup>225</sup> Katz v. United States, 389 U.S. 347, 352 (1967) (telephone conversation in a telephone booth).
- <sup>226</sup> State v. Goss, 150 N.H. 46, 49 (2003) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).
- <sup>227</sup> State v. Grey, 148 N.H. 666, 668-69 (2002).
- <sup>228</sup> State v. Pinkham, 141 N.H. 188, 190 (1996) (quoting State v. Hanson, 113 N.H. 689, 690-91 (1973)).
- <sup>229</sup> 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,” 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 whether the guest may have left property in the hotel).
- <sup>230</sup> State v. Goss, 150 N.H. 46, 49 (2003).

- <sup>231</sup> 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.
- <sup>232</sup> Bond v. United States, 529 U.S. 334, 336-39 (2000).
- <sup>233</sup> Oliver v. United States, 466 U.S. 170, 179 (1984).
- <sup>234</sup> State v. Valenzuela, 130 N.H. 175, 189 (1987).
- <sup>235</sup> State v. Valenzuela, 130 N.H. 175, 184 (1987).
- <sup>236</sup> RSA 570-B.
- <sup>237</sup> State v. Gubitosi, 152 N.H. 673, 677 (2005).
- <sup>238</sup> 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).
- <sup>239</sup> Florida v. Riley, 488 U.S. 445, 450-52 (1989).
- <sup>240</sup> State v. Watson, 151 N.H. 537, 540 (2004).
- <sup>241</sup> State v. Johnston, 150 N.H. 448, 453 (2004).
- <sup>242</sup> State v. Pinder, 126 N.H. 220, 223 (1985).
- <sup>243</sup> State v. Patch, 142 N.H. 453, 459 (1997).
- <sup>244</sup> State v. Johnston, 150 N.H. 448, 455 (2004).
- <sup>245</sup> State v. Watson, 151 N.H. 537, 541 (2004).
- <sup>246</sup> State v. Patch, 142 N.H. 453, 459 (1997).
- <sup>247</sup> State v. Patch, 142 N.H. 453, 459 (1997); State v. Prevost, 141 N.H. 647, 651 (1997).
- <sup>248</sup> But see State v. Diaz, 134 N.H. 662, 665 (1991) (“[a]ccepting 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”).
- <sup>249</sup> 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).
- <sup>250</sup> State v. Sawyer, 145 N.H. 704, 707 (2001), cert denied, 537 U.S. 822 (2002); State v. Diaz, 134 N.H. 662, 664 (1991).
- <sup>251</sup> State v. Collins, 133 N.H. 609, 614 (1990).
- <sup>252</sup> State v. Coolidge, 106 N.H. 186, 195 (1965).
- <sup>253</sup> Georgia v. Randolph, 547 U.S. 103, 114-15 (2006).



- <sup>254</sup> United States v. Kelly, 551 F.2d 760 (8th Cir. 1977), cert denied, 433 U.S. 912 (1981).
- <sup>255</sup> State v. Sawyer, 147 N.H. 191, 194 (2001).
- <sup>256</sup> State v. Sawyer, 147 N.H. 191, 195 (2001).
- <sup>257</sup> State v. Pinder, 126 N.H. 220, 224 (1985) (quoting W. LaFave, Search and Seizure § 8.1(c), at 624 (1978)).
- <sup>258</sup> State v. Baroudi, 137 N.H. 62, 66 (1993).
- <sup>259</sup> State v. Baroudi, 137 N.H. 62, 66 (1993).
- <sup>260</sup> State v. Pinder, 126 N.H. 220, 224 (1985).
- <sup>261</sup> 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).
- <sup>262</sup> State v. Slade, 116 N.H. 436, 438 (1976).
- <sup>263</sup> Arizona v. Hicks, 480 U.S. 321, 324-25 (1987).
- <sup>264</sup> United States v. Dunn, 480 U.S. 294, 305 (1987).
- <sup>265</sup> State v. Murray, 134 N.H. 613, 615 (1991).
- <sup>266</sup> State v. Davis, 149 N.H. 698, 701 (2003).
- <sup>267</sup> State v. Ball, 124 N.H. 226, 235 (1983).
- <sup>268</sup> State v. Davis, 149 N.H. 698, 701 (2003).
- <sup>269</sup> State v. Davis, 149 N.H. 698, 701 (2003).
- <sup>270</sup> State v. Murray, 134 N.H. 613, 616 (1991).
- <sup>271</sup> State v. Ball, 124 N.H. 226, 236-37 (1983).
- <sup>272</sup> State v. Stern, 150 N.H. 705, 709 (2004).
- <sup>273</sup> State v. Stern, 150 N.H. 705, 709 (2004).
- <sup>274</sup> State v. Stern, 150 N.H. 705, 710 (2004).
- <sup>275</sup> State v. Theodosopolous, 119 N.H. 573, 579 (1979).
- <sup>276</sup> State v. Gallant, 133 N.H. 138, 145-46 (1990).
- <sup>277</sup> State v. Carmargo, 126 N.H. 766, 770 (1985).
- <sup>278</sup> Welch v. Wisconsin, 466 U.S. 740, 752 (1984).
- <sup>279</sup> See State v. Morse, 125 N.H. 403, 408 (1984) (evidence suppressed when police intentionally created exigent circumstances by knocking on suspect's door).

- <sup>280</sup> State v. Macelman, 149 N.H. 795, 797 (2003).
- <sup>281</sup> State v. Macelman, 149 N.H. 795, 798 (2003) (quotation marks and citations omitted).
- <sup>282</sup> State v. Psomiades, 139 N.H. 480, 481 (1995).
- <sup>283</sup> State v. Macelman, 149 N.H. 795, 798 (2003).
- <sup>284</sup> 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 in 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)).
- <sup>285</sup> State v. Macelman, 149 N.H. 795, 798 (2003).
- <sup>286</sup> State v. Brunelle, 145 N.H. 656, 659 (2000).
- <sup>287</sup> State v. D’Amour, 150 N.H. 122, 126 (2003).
- <sup>288</sup> State v. Sterndale, 139 N.H. 445, 449 (1995).
- <sup>289</sup> State v. Carmargo, 126 N.H. 766, 770 (1985).
- <sup>290</sup> State v. Gallant, 133 N.H. 138, 147 (1990).
- <sup>291</sup> State v. Camargo, 126 N.H. 766, 770 (1985).
- <sup>292</sup> Wong Sun v. United States, 371 U.S. 471, 487 (1963).
- <sup>293</sup> State v. Degrenier, 128 N.H. 547, 548-49 (1986).
- <sup>294</sup> State v. Murray, 135 N.H. 369, 374 (1992).
- <sup>295</sup> Maryland v. Buie, 494 U.S. 325, 335-36 (1990); State v. Smith, 141 N.H. 271, 276 (1996).
- <sup>296</sup> State v. Sterndale, 139 N.H. 445, 448 (1995).
- <sup>297</sup> State v. Murray, 135 N.H. 369, 374 (1992).
- <sup>298</sup> State v. Murray, 135 N.H. 369, 274 (1992).
- <sup>299</sup> Illinois v. Lafayette, 462 U.S. 640, 646 (1983).
- <sup>300</sup> Illinois v. Lafayette, 462 U.S. 640, 646 (1983).
- <sup>301</sup> State v. Maxfield, 121 N.H. 103, 105-06 (1981).
- <sup>302</sup> State v. Cimino, 126 N.H. 570, 574-75 (1985).
- <sup>303</sup> RSA 172-B:3, VII; see also 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).
- <sup>304</sup> State v. Harlow, 123 N.H. 547, 549-52 (1983).

- <sup>305</sup> South Dakota v. Opperman, 428 U.S. 364, 369 (1970) (internal citations omitted).
- <sup>306</sup> State v. Finn, 146 N.H. 59, 62 (2001); State v. Hale, 136 N.H. 42, 45 (1992).
- <sup>307</sup> State v. Finn, 146 N.H. 59, 62 (2001).
- <sup>308</sup> State v. Plante, 134 N.H. 585 (1991), cert denied, 502 U.S. 984 (1991).
- <sup>309</sup> RSA 313-A:19, I.
- <sup>310</sup> RSA 287-E:9, VI.
- <sup>311</sup> RSA 153:4-a.
- <sup>312</sup> RSA 170-E:4, II.
- <sup>313</sup> RSA 398:13.
- <sup>314</sup> State v. Sidebotham, 124 N.H. 682, 689 (1984).
- <sup>315</sup> 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).
- <sup>316</sup> State v. Heirtzler, 147 N.H. 344, 348 (2001).
- <sup>317</sup> State v. Nemser, 148 N.H. 453, 455 (2002).
- <sup>318</sup> State v. Heirtzler, 147 N.H. 344, 348 (2001).
- <sup>319</sup> Commonwealth v. Nielson, 666 N.E.2d 984, 987 (Mass. 1996).
- <sup>320</sup> New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985).
- <sup>321</sup> State v. Nemser, 148 N.H. 453, 457 (2002).
- <sup>322</sup> For a discussion of the legal definition of a search, click [here](#).
- <sup>323</sup> 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).
- <sup>324</sup> N.H. Const. pt. I, art. 19.
- <sup>325</sup> State v. Kellenbeck, 124 N.H. 760, 765-66 (1984).
- <sup>326</sup> State v. Cannuli, 143 N.H. 149, 152 (1998).
- <sup>327</sup> RSA 595-A:5.
- <sup>328</sup> RSA 595-A:3.
- <sup>329</sup> RSA 594-A:2.
- <sup>330</sup> RSA 595-A:1.

- <sup>331</sup> State v. Doe, 115 N.H. 682, 686 (1975).
- <sup>332</sup> RSA 490:27-a.
- <sup>333</sup> RSA 490:27-a.
- <sup>334</sup> RSA 595-A:4; RSA 490:27-a.
- <sup>335</sup> State v. Canelo, 139 N.H. 376, 391 (1995).
- <sup>336</sup> RSA 490:27-a.
- <sup>337</sup> RSA 595-A:4.
- <sup>338</sup> State v. Corey, 127 N.H. 56, 59 (1985); State v. Doe, 115 N.H. 682, 684-85 (1975).
- <sup>339</sup> State v. Davis, 133 N.H. 211, 214 (1990) (“[W]e 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).
- <sup>340</sup> State v. Hazen, 131 N.H. 196, 201 (1988).
- <sup>341</sup> State v. Caicedo, 135 N.H. 122, 125 (1991); State v. Carroll, 131 N.H. 179, 187 (1988).
- <sup>342</sup> State v. Davis, 133 N.H. 211, 213 (1990); State v. Hazen, 131 N.H. 196, 201 (1988).
- <sup>343</sup> State v. McMinn, 144 N.H. 34, 39 (1999); State v. Fish, 142 N.H. 524, 530-31 (1998).
- <sup>344</sup> State v. Maxfield, 121 N.H. 103, 106 (1981).
- <sup>345</sup> State v. Sylvestri, 136 N.H. 522, 527 (1992).
- <sup>346</sup> State v. Valenzuela, 130 N.H. 175, 192 (1987).
- <sup>347</sup> State v. Marcotte, 123 N.H. 245, 248 (1983).
- <sup>348</sup> 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 Indep. Oil Prod., 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)).
- <sup>349</sup> State v. Kirsch, 139 N.H. 647, 650-51 (1995).
- <sup>350</sup> 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).
- <sup>351</sup> State v. Moreau, 113 N.H. 303, 307-08 (1973).
- <sup>352</sup> State v. Cannuli, 143 N.H. 149, 152 (1998).

- <sup>353</sup> 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 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).
- <sup>354</sup> See RSA 595-A:2; Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325 (1979).
- <sup>355</sup> State v. Tucker, 133 N.H. 204, 206 (1990).
- <sup>356</sup> Groh v. Ramirez, 540 U.S. 551, 556-57 (2004).
- <sup>357</sup> State v. Salsman, 112 N.H. 138, 142 (1983).
- <sup>358</sup> State v. Tucker, 133 N.H. 204, 206 (1990).
- <sup>359</sup> State v. Fitanides, 131 N.H. 298, 301 (1988), cert denied, 490 U.S. 1080 (1989).
- <sup>360</sup> State v. Fitanides, 131 N.H. 298, 301-02 (1998).
- <sup>361</sup> State v. Emery, 123 N.H. 630, 632 (1983).
- <sup>362</sup> State v. Kirsch, 139 N.H. 647, 652 (1995).
- <sup>363</sup> State v. Fitanides, 131 N.H. 298, 301 (1988).
- <sup>364</sup> United States v. Brunette, 256 F.3d 14, 18 (1st Cir. 2001).
- <sup>365</sup> State v. Dowman, 151 N.H. 162, 165-66 (2004).
- <sup>366</sup> RSA 106-B:12.
- <sup>367</sup> See State v. Titus, 107 N.H. 215, 218 (1966), cert denied, 385 U.S. 941 (1966).
- <sup>368</sup> RSA 106-B:11.
- <sup>369</sup> RSA 106-B:15.
- <sup>370</sup> RSA 106-B:11.
- <sup>371</sup> RSA 106-B:15.
- <sup>372</sup> RSA 106-B:15.
- <sup>373</sup> RSA 595-A:8.
- <sup>374</sup> 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.”).

- <sup>375</sup> State v. Cavanaugh, 138 N.H. 193, 196-97 (1993).
- <sup>376</sup> State v. Cavanaugh, 138 N.H. 193, 195 (1993).
- <sup>377</sup> Wilson v. Arkansas, 514 U.S. 927, 931-36 (1995); see also State v. Jones, 127 N.H. 515, 518-20 (1985) (the knock and announce rule is a product of New Hampshire common law).
- <sup>378</sup> State v. Jones, 127 N.H. 515, 517-18 (1985).
- <sup>379</sup> State v. Jones, 127 N.H. 515, 518 (1985).
- <sup>380</sup> State v. Jones, 127 N.H. 515, 520 (1985) (quoting Miller v. United States, 357 U.S. 301, 310 (1958)).
- <sup>381</sup> See State v. Thompson, 132 N.H. 730, 733 (1990) (“no knock” entry permissible when drug dealer barricaded doors to apartment and set up elaborate surveillance system); see also State v. Matos, 135 N.H. 410, 412 (1992) (holding that exigent circumstances justify no knock entry where an easily disposable illegal narcotic is being packaged in small quantities and is housed in a residential dwelling with traditional plumbing).
- <sup>382</sup> Hudson v. Michigan, 547 U.S. 586, 591 (2006).
- <sup>383</sup> State v. Jones, 127 N.H. 515, 517-18 (1985).
- <sup>384</sup> Hudson v. Michigan, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) (“The Court’s decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law’s concern”).
- <sup>385</sup> State v. Barron, 137 N.H. 29, 32 (1993).
- <sup>386</sup> State v. Coons, 137 N.H. 365, 367 (1993).
- <sup>387</sup> State v. DeCoteau, 137 N.H. 106, 110 (1993).
- <sup>388</sup> State v. Leiper, 145 N.H. 233, 234 (2000).
- <sup>389</sup> State v. Valenzuela, 130 N.H. 175, 198 (1987) (quoting United States v. Heldt, 668 F.2d 1238, 1269 (D.C. Cir. 1981)).
- <sup>390</sup> RSA 595-A:5.
- <sup>391</sup> 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”).
- <sup>392</sup> RSA 595-A:7.
- <sup>393</sup> RSA 595-A:5 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.”

<sup>394</sup> State v. Sands, 123 N.H. 570, 606 (1983) (citing RSA 595-A:5).

<sup>395</sup> State v. Canelo, 139 N.H. 376, 383 (1995).

<sup>396</sup> In re State (Bowman Search Warrants), 147 N.H. 621, 627 (2001).

<sup>397</sup> See In re State (Bowman Search Warrants), 146 N.H. 621, 629 (2001).

<sup>398</sup> State v. Canelo, 139 N.H. 376, 380 (1995) (quoting United States v. Garcia, 882 F.2d 699, 702 (2d Cir. 1989)).

<sup>399</sup> United States v. Grubbs, 126 S. Ct. 1494, 1500 (2006) (emphasis in original).

<sup>400</sup> If the triggering event does not transpire, the warrant is void. State v. Canelo, 139 N.H. 376, 380 (1995).

<sup>401</sup> State v. Canelo, 139 N.H. 376, 382 (1995).

<sup>402</sup> United States v. Grubbs, 547 U.S. 90, 96 (2006).

<sup>403</sup> RSA 595-A:5.

<sup>404</sup> See, e.g., United States v. Criminal Triumphy Capital Group, Inc. et al., 211 F.R.D. 31, 111 (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 U.S. Dist. Lexis 8977 (Dist. of Mass.) (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. Albert, 195 F. Supp. 2d 267, 278-79 (Dist. of Mass. 2002); United States v. Hernandez, 183 F. Supp. 2d 468, 480 (Dist. of P.R. 2002).

<sup>405</sup> 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. Advoc. 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”).

<sup>406</sup> 18 U.S.C. § 2703(b).

<sup>407</sup> See 18 U.S.C. §§ 2701-2705.

<sup>408</sup> E.g., John A. Stephen, NEW HAMPSHIRE DWI MANUAL, (3d. ed. LEXIS Law Publishing 2004).

<sup>409</sup> State v. Turmel, 150 N.H. 377, 380 (2003); see also State v. Galgay, 145 N.H. 100, 103 (2000) (holding that the facts necessary to conduct an investigative stop of a potentially impaired driver need not arise to the level of probable cause).

<sup>410</sup> State v. McBrearity, 142 N.H. 12, 14 (1997).

<sup>411</sup> State v. Sousa, 151 N.H. 297, 299 (2004).

<sup>412</sup> State v. Gowen, 150 N.H. 286, 288 (2003).

<sup>413</sup> State v. Gowen, 150 N.H. 286, 288 (2003).

<sup>414</sup> State v. Sousa, 151 N.H. 297, 303-04 (2004).

<sup>415</sup> See Welch v. Director, New Hampshire Division of Motor Vehicles, 140 N.H. 6, 9 (1995) (eyewitness provided sufficient information for the officer to form a reasonable suspicion that the driver of the motor vehicle was intoxicated when the witness informed the trooper that the defendant smelled of alcohol and appeared to be intoxicated and pointed out the vehicle that he was in).

<sup>416</sup> State v. McBreairty, 142 N.H. 12, 15 (1997) (the New Hampshire Supreme Court adopted the reasoning of the United States Supreme Court in Whren v. United States, 517 U.S. 806, 814-15 (1996), and held that “[t]he ultimate test of the propriety of an investigatory stop under part I, article 19 is whether, viewing the circumstances objectively, an officer had a specific and articulable basis for concluding that an individual had committed, was committing, or was about to commit a crime” regardless of the officer’s subjective motivations).

<sup>417</sup> Because suspects are generally not in custody when preliminary breath tests are administered, Miranda does not apply even by its own terms. Moreover, regardless whether a suspect has been arrested, as a matter of law, “Miranda warnings need not precede implied consent law questioning, and voluntary admissions, comments, or explanations spoken in response to implied consent law questioning are admissible as evidence in criminal trials.” State v. Goding, 128 N.H. 267, 274 (1986); State v. Arsenault, 115 N.H. 109, 113 (1975).

<sup>418</sup> State v. Frederick, 132 N.H. 349, 350 (1989).

<sup>419</sup> RSA 265:-A:15.

<sup>420</sup> RSA 265:-A:15.



- <sup>421</sup> RSA 265:-A:15.
- <sup>422</sup> RSA 265:-A:15.
- <sup>423</sup> RSA 265:-A:15.
- <sup>424</sup> John A. Stephen, *NEW HAMPSHIRE DWI MANUAL*, (3d. ed. LEXIS Law Publishing 2004).
- <sup>425</sup> State v. Dahood, 148 N.H. 723, 735 (2003).
- <sup>426</sup> State v. Dahood, 148 N.H. 723, 734 (2003).
- <sup>427</sup> RSA 265-A:4; see Saviano v. Director, N.H. Div. of Motor Vehicles, 151 N.H. 315, 319 (2004) (a defendant arrested for disobeying police officer was subject to the implied consent law, where the offense was committed while he was driving under the influence).
- <sup>428</sup> RSA 265-A:4; Hallet v. Johnson, 111 N.H. 152, 153 (1971).
- <sup>429</sup> RSA 265-A:6.
- <sup>430</sup> But see State v. Greene, 128 N.H. 317, 320 (1986) (“[W]e express no opinion as to whether there may be a right to the advice of counsel where the potential DWI violation may result in a more serious loss of liberty for the defendant such as where a death has occurred in connection with the DWI arrest”).
- <sup>431</sup> RSA 265-A:8; State v. Denney; 130 N.H. 217, 221 (1987).
- <sup>432</sup> RSA 265-A:14.
- <sup>433</sup> RSA 265-A:4.
- <sup>434</sup> RSA 265:84.
- <sup>435</sup> State v. Sullivan, 144 N.H. 541, 544-45 (1999).
- <sup>436</sup> RSA 265-A:7.
- <sup>437</sup> RSA 265-A:7.
- <sup>438</sup> State v. Winslow, 140 N.H. 319, 322 (1995).
- <sup>439</sup> RSA 265-A:7.
- <sup>440</sup> RSA 265-A:13.
- <sup>441</sup> RSA 265-A:14 provides that “If a person under arrest [for driving while intoxicated by alcohol or drugs] refuses upon the request of a law enforcement officer . . . to submit to physical tests or [tests of blood, alcohol or urine for alcohol], none shall be given. . . .”
- <sup>442</sup> RSA 265-A:14.
- <sup>443</sup> State v. Parker, 142 N.H. 319, 323 (1997).
- <sup>444</sup> RSA 265-A:14, I(a).

- <sup>445</sup> RSA 265-A:14, I(b).
- <sup>446</sup> RSA 265-A:14, I (a)-(b).
- <sup>447</sup> RSA 265-A:14, II.
- <sup>448</sup> Jordan v. State, 132 N.H. 34, 36-37 (1989).
- <sup>449</sup> Wensley, v. Director, 140 N.H. 560, 562-63 (1995).
- <sup>450</sup> State v. Schneider, 124 N.H. 242, 245 (1983).
- <sup>451</sup> RSA 265-A:30.
- <sup>452</sup> RSA 265-A:30, III.
- <sup>453</sup> RSA 265-A:31.
- <sup>454</sup> RSA 265-A:31,II.
- <sup>455</sup> RSA 265-A:16.
- <sup>456</sup> State v. Wong, 125 N.H. 610, 628-29 (1984).
- <sup>457</sup> State v. Steimel, 155 N.H. 141, 148 (2007).
- <sup>458</sup> Exigent circumstances to conduct tests for alcohol are generally present in cases where there is probable cause to believe that the suspect is under the influence of alcohol because alcohol can be rapidly metabolized by the body. State v. Schneider, 124 N.H. 242, 245 (1983).
- <sup>459</sup> See RSA 329:26 (providing a privilege for medical records but expressly providing that “[t]his section shall also not apply to the release of blood samples and the results of laboratory tests for blood alcohol content taken from a person who is under investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs. The use and disclosure of such information shall be limited to the official criminal proceedings”).
- <sup>460</sup> State v. Nickerson, 147 N.H. 12, 13-14 (2001).
- <sup>461</sup> In re Payne, 150 N.H. 436, 443 (2004).
- <sup>462</sup> State v. Koppel, 127 N.H. 286, 294 (1985).
- <sup>463</sup> HB 196, 1986 Session.
- <sup>464</sup> Opinion of the Justices, 128 N.H. 14, 16-17 (1986).
- <sup>465</sup> State v. Hunt, 155 N.H. 465, 475 (2007).
- <sup>466</sup> In the event of a conflict between the relevant statutes and the summary of the statutes contained in this manual, the statutes will control.
- <sup>467</sup> RSA 627:9, II.

- <sup>468</sup> RSA 627:9, II.
- <sup>469</sup> RSA 627:4, I.
- <sup>470</sup> RSA 627:5, IV.
- <sup>471</sup> RSA 627:8.
- <sup>472</sup> RSA 627:8-a, I.
- <sup>473</sup> RSA 627:8-a, II.
- <sup>474</sup> RSA 627:8-b.
- <sup>475</sup> RSA 627:6, I.
- <sup>476</sup> RSA 627:6, II.
- <sup>477</sup> RSA 627:6, V.
- <sup>478</sup> RSA 627:6, VI.
- <sup>479</sup> RSA 627:6, VII.
- <sup>480</sup> RSA 627:4, I(a).
- <sup>481</sup> RSA 627:4(b).
- <sup>482</sup> RSA 627:4(b).
- <sup>483</sup> RSA 627:4, I(c).
- <sup>484</sup> RSA 627:4, II(a).
- <sup>485</sup> RSA 627:4, II(b).
- <sup>486</sup> RSA 627:4, II(c).
- <sup>487</sup> RSA 627:4, II(d).
- <sup>488</sup> State v. Warren, 147 N.H. 567, 570 (2002).
- <sup>489</sup> RSA 627:4, III(a).
- <sup>490</sup> RSA 627:4, III(a).
- <sup>491</sup> RSA 627:4, III(d).
- <sup>492</sup> RSA 627:4, III(c). RSA 627:4(b) and (c) 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 he or she abstain from performing an act he/she is not obliged to perform.
- <sup>493</sup> RSA 627:5, I.

<sup>494</sup> RSA 627:5, I.

<sup>495</sup> RSA 627:5, II(a).

<sup>496</sup> “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).

<sup>497</sup> RSA 627:5, II(b).

<sup>498</sup> RSA 627:5, VII.

<sup>499</sup> Tennessee v. Garner, 471 U.S. 1, 11 (1985).

<sup>500</sup> RSA 627:5, III(a).

<sup>501</sup> RSA 627:5, III(b).

<sup>502</sup> RSA 627:5, IV.

<sup>503</sup> State v. Fecteau, 133 N.H. 860, 868 (1991).

<sup>504</sup> United States v. Ash, 413 U.S. 300, 321 (1973).

<sup>505</sup> State v. Philbrick, 135 N.H. 729, 730 (1992).

<sup>506</sup> State v. Rezk, 135 N.H. 599, 601 (1992).

<sup>507</sup> State v. Guay, 130 N.H. 413, 417 (1988).

<sup>508</sup> Neil v. Biggers, 409 U.S. 188, 199 (1972); State v. Whittey, 134 N.H. 310, 312, (1991).

<sup>509</sup> Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

<sup>510</sup> State v. Fecteau, 133 N.H. 860, 860-76 (1991).

<sup>511</sup> State v. Fecteau, 133 N.H. 869, 868 (1991).

<sup>512</sup> State v. Fecteau, 133 N.H. 860, 868 (1991).

<sup>513</sup> Simmons v. United States, 390 U.S. 377, 384-85 (1968); United States v. King, 148 F.3d 968, 970 (8th Cir. 1998) (“quick, on-the-scene identification [is] essential to free innocent suspects and to inform the police if further investigation is necessary”).

<sup>514</sup> Stovall v. Denno, 388 U.S. 293, 302 (1967).

<sup>515</sup> Gilbert v. California, 388 U.S. 263, 266-67 (1967); United States v. Wade, 388 U.S. 218, 222-23 (1967); State v. Cormier, 127 N.H. 253, 256 (1985); State v. Arsenault, 115 N.H. 109, 112-13 (1975).

<sup>516</sup> For a discussion of the enforceability of foreign protection orders, see page 40 of the domestic violence protocol, at [http://doj.nh.gov/victim/docs/law\\_enforcement\\_2002.pdf](http://doj.nh.gov/victim/docs/law_enforcement_2002.pdf).

<sup>517</sup> RSA 173-B:13, VI.

<sup>518</sup> RSA 173-B:9, I(a); RSA 633:3-a, V.

<sup>519</sup> RSA 594:10, I(b).

<sup>520</sup> RSA 594:10, I(b).

<sup>521</sup> RSA 173-B:10, II.

<sup>522</sup> RSA 597.

<sup>523</sup> RSA 173-B:9.

<sup>524</sup> RSA 173-B:9, I(b), RSA 173-B:10, I(a).

<sup>525</sup> RSA 173-B:11, I.

<sup>526</sup> RSA 173-B:4, I.

<sup>527</sup> RSA 173-B:5, I(a)(2).

<sup>528</sup> RSA 173-B:10, I(d).

<sup>529</sup> RSA 173-B:5, X (c).

<sup>530</sup> RSA 173-B:5, X (c).

<sup>531</sup> RSA 567:13.

<sup>532</sup> “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 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)).

<sup>533</sup> N.H. Rules of Profession Conduct 3.6 and 3.8.

<sup>534</sup> RSA 318-B:17-b, I.

<sup>535</sup> RSA 318-B:17-b, I-b.

<sup>536</sup> RSA 318-B:17, I(a).

<sup>537</sup> RSA 625:6.

<sup>538</sup> RSA 625:9.

<sup>539</sup> RSA 625:9.

<sup>540</sup> RSA 651:2, IV.

<sup>541</sup> See RSA 318-B:26; RSA 632-A:10-a.

<sup>542</sup> See RSA 651:6.

<sup>543</sup> See RSA 651:2.

<sup>544</sup> RSA 625:9, IV.

<sup>545</sup> RSA 625:9, IV(a); RSA 651:2, IV and V.

<sup>546</sup> RSA 625:9, VIII.

<sup>547</sup> RSA 625:9, VII.

<sup>548</sup> RSA 173-B:9, III.

<sup>549</sup> RSA 625:9, VII.

<sup>550</sup> RSA 625:9, VI.

<sup>551</sup> RSA 625:9, V; RSA 651:2, III, VI-a.

<sup>552</sup> RSA 625:9, II(b).

<sup>553</sup> “‘Element of an offense’ means such conduct, or such attendant circumstances, or such a result of conduct as:

- (a) Is included in the definition of the offense; or
- (b) Establishes the required kind of culpability; or
- (c) Negatives an excuse or justification for such conduct; or
- (d) Negatives a defense under the statute of limitations; or
- (e) Establishes jurisdiction or venue.” RSA 625:11, III.

<sup>554</sup> RSA 626:2, II(a).

<sup>555</sup> State v. Brewer, 127 N.H. 799 (1986).

<sup>556</sup> RSA 626:2, II(b).

<sup>557</sup> RSA 626:2, IV.

<sup>558</sup> RSA 626:2, II(c).

<sup>559</sup> RSA 626:2, II(d); State v. Ebinger, 135 N.H. 264, 265-66 (1992).

<sup>560</sup> State v. Ebinger, 135 N.H. 264, 265-66 (1992).

<sup>561</sup> State v. Bergen, 141 N.H. 61, 62 (1996).

<sup>562</sup> “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).

<sup>563</sup> RSA 601:4.

<sup>564</sup> State v. Thresher, 122 N.H. 563, 568-69 (1982); State v. Spade, 118 N.H. 186, 189 (1978); State v. Skillings, 99 N.H. 427, 429 (1955).

<sup>565</sup> State v. Spade, 118 N.H. 186, 188-89 (1978).

<sup>566</sup> State v. Larkin, 128 N.H. 639, 640 (1986).

<sup>567</sup> State v. Larkin, 128 N.H. 639, 639-40 (1986).

<sup>568</sup> State v. Johnson, 130 N.H. 578-85 (1988).

<sup>569</sup> See State v. Fennelly, 123 N.H. 378, 387 (1983); State v. Thresher, 122 N.H. 63, 68-69 (1983); State v. Blaisdell, 59 N.H. 328, 331 (1869).

<sup>570</sup> State v. Erickson, 129 N.H. 515, 519 (1987); State v. Donovan, 128 N.H. 702, 705 (1986).

<sup>571</sup> State v. Pond, 133 N.H. 738, 741 (1990).

<sup>572</sup> State v. Lurvey, 122 N.H. 190, 192 (1982).

<sup>573</sup> State v. LeClair, 126 N.H. 479, 479 (1985).

<sup>574</sup> State v. M’Gregor, 41 N.H. 407, 411-12 (1860).

<sup>575</sup> See RSA 173-B:9, IV.