STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. 10th CIRCUIT CANDIA DIVISION
Case No. 422-2020-CR-0057

THE STATE OF NEW HAMPSHIRE

v.

JEAN XXX

JEAN XXX'S MOTION TO SUPPRESS EVIDENCE

NOW COMES the Defendant, Jean XXX by and through her attorney, David J. Bobrow, with the following Motion to Suppress stating as follows:

STATEMENT OF UNCONTESTED FACTS

1) Ms. XXX is charged with one count of Aggravated Driving While Intoxicated. See *Complaint*.
2) The Defendant is a 56-year old female with no criminal history. *Report of Patrolman Michael McNeil* (hereafter '*McNeil Report*.')
3) On or about October 20, 2019, she was involved in a single-car motor vehicle accident. *Id*.
4) Patrolman McNeil responded to the accident and observed an injured female in the vehicle's passenger seat being treated for injury. *Id*.
5) The officer attempted communication with Ms. XXX but she was non-responsive as she

drifted in and out of consciousness. *Id*.

6) No one else observed the accident. *Id*.

7) The officer located the purse of the operator and went through her belongings to obtain her identification. *Id*.

8) Ms. XXX was removed from the vehicle and taken to the hospital. *Id*.

9) The officer examined the scene and took pictures. *Id*.

10) There was no evidence of any substance use at the scene or the vehicle. *Id*.

11) There was no evidence of any fault by the operator at the scene or the vehicle. *Id*.

12) The officer made contact with Paul XXX, husband of Ms. XXX, who advised that she was on the way to meet him for dinner when the accident occurred. *Id*.

13) The officer sent a blood preservation fax to the hospital. *Id*.

14) The following day, the officer contacted Mr. XXX for an update on Ms. XXX's condition. *Id*.

15) On October 25, 2019, the officer spoke to Mr. XXX and the son of the parties to obtain further information regarding Ms. XXX's condition. He inquired about alcohol use and both denied knowledge of any use at the time of the accident. *Id*.

16) On October 28, 2019, the officer spoke to a Sarah XXX who reported she was Ms. XXX's daughter-in-law. She stated that she 'heard' Ms. XXX had been drinking before the accident. There is no further information on where this information was obtained and nothing that suggests anything reported was verified. *Id*.

17) On November 1, 2019, the officer met with Ms. XXX. The conversation was purportedly recorded but has not been provided in discovery. During that conversation, Ms. XXX denied using alcohol or drugs. *Id*.

18) On November 8, 2019, 19 days after the accident, the officer retrieved the blood sample from Exeter Hospital. No warrant was ever attempted or obtained. *Id*.

19) On November 18, 2019, the blood sample was presented to the State Lab for testing. There is no explanation for the delay.(1) *Id*.

20) On December 6, 2019, the lab analyzed the results. See *Lab Report*.

21) The date of the lab report is December 16, 2019. *Id*.

22) On December 25, 2019, the lab results were returned to the officer. *McNeil Report*.

MEMORANDUM OF LAW

I. THE SEIZURE OF THE BLOOD OF MS. XXX ABSENT A WARRANT WAS ILLEGAL AND THEREFORE ALL EVIDENCE OBTAINED AFTER THE SEIZURE SHOULD BE SUPPRESSED

N.H. CONST. pt 1, art.19. [Searches and Seizures Regulated.] provides that:

> "Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases and with the formalities, prescribed by law."

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1 The officer is to submit the secured container to the forensic laboratory in accordance with RSA 265-A:5, II, as soon as feasible. See Saf-C 6402.07(b) Sample Handling and Transport. Failing to do so creates a split sample issue. See Saf-C 6402.15 Availability of Sample of Sufficient Quantity for Similar Testin ((a) A blood or urine sample taken pursuant to RSA 265-A:4 shall be held for a period of 30 days following completion of testing, pursuant to RSA 265-A:7). Ms. XXX seeks preservation of this issue in this Motion, at oral argument and/or in a Motion *in Limine*.

In 2010, the New Hampshire Supreme Court decided *State v. Davis*, 161 N.H. 292, 12 A.3d 1271 (2010). In that matter, the Court held that when determining "whether a warrantless search may give rise to a violation of the State Constitution, we apply an expectation of privacy analysis." A warrantless search implicates Part I, Article 19 only if the defendant has exhibited an actual (subjective) expectation of privacy and that expectation is one that society is prepared to recognize as "reasonable." Without an invasion of the defendant's reasonable expectation of privacy, there has been no violation of the defendant's rights under Part I, Article 19. Id. at 1271. It should be noted in that matter that the officer had responded to a report about an intoxicated student at the Kearsarge Regional High School and when there, obtained information that the defendant was taken by ambulance to New London Hospital, that the defendant had driven a teacher's automobile and that while driving he had backed into a tree. The officer also learned that the student who was with him had been so concerned about his apparent intoxication that he had refused to allow the defendant to continue driving. *Id*. at 1271-73.

Since that decision, there have been two major legal changes. In 2013, the United States Supreme Court decided *McNeely v. Missouri* and in 2018, New Hampshire amended its Constitution to add Art. 2-b. Right of Privacy, which states "{a}n individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." Therefore, based on the fact that there was no probable cause to search or invade Ms. XXX's right to privacy, and the subsequent decision by the United States Supreme Court as well as the amendment to the New Hampshire, the obtaining of the blood from the hospital was a violation of Ms. XXX's rights of a Constitutional dimension, therefore should be suppressed as the proper remedy for wrongfully obtained evidence. *State v. Hammond*, 144 N.H. 401, 404

(1999).

A. There is a Reasonable Expectation in Privacy to One's Medical Information Requiring a Warrant Before a Search

In 2018, the New Hampshire voters overwhelming approved of a Constitutional amendment that codified a right to privacy. *N.H. Const. Art. 2-b. Right of Privacy*. There is no doubt that this right to privacy is meant to include medical procedures and information. See *Missouri v. McNeely*, 133 S.Ct. 1552, 569 U.S. 141, 185 L.Ed.2d 696, 81 U.S.L.W. 4250, 24 Fla.L.Weekly Fed. S 150, (2013)("{w}e have never retreated, however, from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.") As an Ohio Court noted subsequent to the McNeely decision, "the method adopted by New Hampshire and advanced by the State in this case would allow for a warrantless search of the medical records without the requirement that the person is first arrested." As such, unlike in the implied consent cases, these situations would not even require probable cause prior to performing the search. Such a low threshold for a warrantless search goes beyond the recognized exceptions to the warrant requirement.

The United States Supreme Court has routinely upheld that blood tests, and the act of taking the blood test, are subject to a heightened level of privacy. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2164 (2016); *Missouri v. McNeely*, 569 U.S. 141, 143 (2013). In Birchfield the court distinguished blood tests, as tests that "implicate privacy interests because they are much more physically invasive—they require the piercing of the skin – and they produce a sample that can be preserved and used to obtain further information beyond the subjects blood alcohol level

at the time of the test." *Birchfield* at 2164. But such a restriction would be illogical if the police could simply direct another to take blood and use those results. Since New Hampshire has voted to pass a privacy amendment which gives an individual the right to "live free from government intrusion," the admissibility of blood tests that are issued by police officers are held to heightened scrutiny due to privacy concerns.

Montana and California, like New Hampshire, have adopted amendments to their State Constitution which expand the right to privacy beyond what is recognized under the Federal Constitution. *Cutter v. Brownbridge*, 183 Cal.App.3d 836, 228 Cal.Rptr. 545, 549 (1986) ("the right to control circulation of personal information is fundamental. This right reaches beyond the interests protected by the common law right of privacy and may be protected from infringement by either the state or by any individual. The "zones of privacy" created by article 1, section 1, extend to the details of one's medical history. And, an "individual's right to privacy encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones."); *State v. Nelson*, 941 P.2d 441, 448 (Mont. 1997)("{w}e hold further that, if the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records. In contrast to telephone company billing records, for which there is no reasonable expectation of privacy, *Hastetter v. Behan* (1982), 196 Mont. 280, 283, 639 P.2d 510, 511, medical records fall within the zone of privacy protected by Article II, Section 10 of the Montana Constitution.") In a case, strikingly similar to here, whether Blood Alcohol Concentration results were admissible, *Nelson* held that an individual's medical information in the hands of a healthcare provider is subject to protection under the right to privacy provision of Montana's Constitution, and can be obtained via an investigative subpoena only upon a showing of a compelling state interest. *Id*. at 449. The burden of showing such a

compelling state interest is met only when the State demonstrates probable cause exists that an offense has been committed, thus warranting the intrusion into the privacy of a defendant through the production of medical records. *Id*.

Other states that have expanded the Right to Privacy have ruled Blood Alcohol Concentrations inadmissible because it would infringe upon the citizens privacy rights. See *Nelson* (generally, discussed *supra*); *Blank v. State*, 3 P.3d 359, 368 (Alaska App. 2000), rev'd, 90 P.3d 156 (Alaska 2004)(officer's alleged good-faith compliance with unconstitutional statute authorizing tests of driver's breath and blood for alcohol content if driver was involved in an accident that killed or injured another person, even without an individualized suspicion of impairment, did not permit admission of test results in prosecution arising from fatal automobile-pedestrian accident); *People v. Watson*, 825 N.E.2d 257, 261–62 (Ill. 2005) (compelled taking of a defendant's blood and its subsequent testing is an intrusion upon the defendant's privacy interests, protected, coextensively, by both the Fourth Amendment and the equivalent provision of the state constitution); *State v. Martines*, 331 P.3d 105, 109 (Wash. App. Div. 1 2014), rev'd, 355 P.3d 1111 (Wash. 2015)(State could not conduct tests on a lawfully procured blood sample from defendant without first obtaining a warrant. When the government disturbs those privacy interests that citizens of the state should be entitled to hold safe from governmental trespass absent a warrant, the state constitutional right of protection against unreasonable searches and seizures is implicated).

States that have added a separate provision which expands the right to privacy do not admit warrantless searches into evidence. New Hampshire has added a separate provision which expands the right to privacy. The medical evidence is protected under the right to privacy.

B. The Officer Had the Ability to Obtain a Warrant

All searches and seizures in New Hampshire are *per se* unreasonable unless they conform to the narrow confines of a judicially recognized exception. *State v. Cora*, 170 N.H. 186, 190-91 (2017). Further, Part I, Article 19 of the New Hampshire Constitution "manifests a preference for privacy over the level of law enforcement efficiency which would be achieved if police were permitted to search without probable cause or judicial authorization." *State v. Canelo*, 139 N.H. 376, 386 (1995). The warrantless search of a driver's body for evidence of intoxication in situations where the driver is arrested for DWI has been justified only when there is an exigency is a risk of losing evidence because of the diminishing alcohol concentration level in the driver's blood." *State v. Clark*, 23 N.E.3d 218, 2014-Ohio-4873, (Ohio App. 3 Dist. 2014) citing *Schmerber v. California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). No such exigency exists in circumstances whereas here, the tests have already been performed and their results are safely stored by the hospital. *Id*.

Blood was drawn from Ms. XXX on October 20, 2019. *Statement of Uncontested Facts* (hereafter '*Facts*') #13. The blood was not retrieved until November 8, 2019 and not tested until December 6, 2019. *Id*. #18. There simply was no reason for departing from the warrant requirement as there were clearly no exigent circumstances that made securing a warrant impractical in this particular case. *McNeely*, 133 S.Ct. 1552 (2013); see also *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948) ("we cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative.") The acquired blood

is not admissible because there was time for the officer to obtain a warrant as there was no risk of losing evidence. See *State v. Camargo*, 498 A.2d 292, 296 (N.H. 1985). In that matter, the Court found the police could have obtained a search warrant before towing the automobile from defendant's parking lot and could have avoided incurring the risk of the vehicle being moved by assigning an officer to observe the lot while they obtained a warrant. *Id*. In this case the officer had 19 days to obtain a warrant before seizing Ms. XXX's blood sample, while the blood remained safely at the hospital. *Facts* #18. There was no risk that search, or seizure would fail, in that the requested blood would be lost, if the officer did not act swiftly. Like *Camargo*, there was simply no justification for a warrantless seizure and subsequent search because no exigent circumstances existed.

C. There was No Probable Cause for a Search in this Matter

In matters that have been presented to the Court in cases of blood draw, there has been uniformity in that there was actual probable cause for the blood draw or obtaining blood, or that the blood draw and obtaining the blood or test was allowed by statute. See *Davis* (*generally*, discussed *supra*); *State v. Bazinet*, 184 A.3d 448 (2018)(death on scene and officer examination of the vehicle noticed that neither the passenger nor the driver had been wearing a seatbelt at the time of the crash. Officer also discovered a thermos-type cup in the passenger side of the center console containing liquid that smelled like alcohol); *State v. Dilboy*, 160 N.H. 135 (2010)(members of the Dover Police and Fire Departments arrived on the scene within minutes. They found the defendant standing beside the truck. He told the paramedics several times that he

was addicted to heroin and suffering from withdrawal. He stated that he had taken three Klonopin tablets at 9:00 that morning, explaining that although he did not have a prescription for it, he was taking it to help with symptoms of heroin withdrawal).

There was no probable cause in this matter. The officer at the scene examined the vehicle and found no evidence of alcohol, did not smell alcohol, and through his subsequent conversations with immediate family members, did not obtain any evidence of alcohol use. See *Facts* #4-15. It was one week after the accident when a person who identified herself as the daughter-in-law of Ms. XXX stated she 'heard' that Ms. XXX had been drinking. *Id*. #16. If such a tip was provided to the police, it absolutely would not be enough to initiate a police stop of the vehicle as even when an informant is identified, "the tip [must] contain[ ] sufficient indicia of reliability to justify the stop." *State v. Riefenstahl*, 172 Vt. 597, 779 A.2d 675, 677 (2001); *see* also *State v. Sousa*, 151 N.H. 297, 855 A.2d 1284, (2004)("{i}n light of these cases, we hold the following factors, viewed in light of the totality of the circumstances, are important when evaluating whether an anonymous tip gives rise to reasonable suspicion. First, whether there is a "sufficient quantity of information" such as the vehicle's make, model, license plate number, location and bearing, and "similar innocent details" so that the officer may be certain that the vehicle stopped is the one the tipster identified. *Wheat*, 278 F.3d at 731. Second, the time interval between the police receiving the tip and the police locating the suspect vehicle. *Id*. Third, whether the tip is based upon contemporaneous eyewitness observations. *Id*. at 734; see *Blake*, 146 N.H. at 4, 766 A.2d 725. Fourth, whether the tip is sufficiently detailed to permit the reasonable inference that the tipster has actually witnessed an ongoing motor vehicle offense.") If the information provided by the alleged daughter-in-law would not be enough to justify a stop, it absolutely is not enough to support probable cause to search. Since the officer had no other

information suggesting that Ms. XXX was intoxicated, there was not probable cause for a search in this matter.

WHEREFORE the Defendant moves that this Honorable Court suppress all evidence obtained in the matter after the illegal search which allowed the police to obtain the blood together with any and all other relief that this Court deems fit and just.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

I certify that on this date I mailed, postage paid, a copy of Defendant's Motion to Suppress Evidence to Nottingham Police Prosecutor William Hart Jr. Esq.

Date:_____ _____
David J. Bobrow, Esq.