



**New Hampshire Commission of Law Enforcement
Accountability, Community, and Transparency**
Remote Commission Meeting via Teleconference
Monday, August 17, 2020 at 9:30 a.m.

Commission Members Present: Deputy Attorney General Jane Young, *Chair*; Robert Quinn, *Commissioner of the Department of Safety*; Ahni Malachi, *Executive Director, New Hampshire Commission for Human Rights*; John Scippa, *Director, Police Standards and Training*; Rogers Johnson, *Chair of the Governor's Advisory Council on Diversity and Inclusion*; James McKim, *President of the Manchester NH NAACP*; Sawako Gardner, *Justice of the New Hampshire Circuit Court*; Mark Morrison, *New Hampshire Police Association*; Charlie Dennis, *President, New Hampshire Association of Chiefs of Police*; Ken Norton, *Executive Director, National Alliance on Mental Illness - New Hampshire*; Gilles Bissonnette, *Legal Director, ACLU of New Hampshire*; Julian Jefferson, *Attorney, New Hampshire Public Defender*; Eddie Edwards, *Public Member*; and Ronelle Tshiela, *Public Member*.

Also Present: Maria Eklund, *Operations Program Assistant II, State of New Hampshire, Homeland Security & Emergency Management*; Kim Schmidt, *Legal Research Assistant, New Hampshire Department of Justice*; Annie Gagne, *Paralegal, New Hampshire Attorney General's Office*; Nicole Clay, *Assistant Attorney General, New Hampshire Department of Justice*; Albert Scherr, *Professor, UNH Franklin Pierce School of Law*; and Matt Broadhead, *Senior Assistant Attorney General, New Hampshire Attorney General's Office*.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you, Maria. Good morning, everyone. Just to remind everybody that this meeting is being recorded. I am Deputy Attorney General Jane Young. And pursuant to Executive Order 2020-11, I am serving as the Attorney General's Designee.

I think that most of you saw the email. Joseph will not be joining us today, tomorrow, or Wednesday. In his place will be Gilles Bissonnette, who is the ACLU New Hampshire's Legal Director. I think that he may be having some issues. Gilles, are you on the line?

DIRECTOR BISSONNETTE: Yes, Deputy Young. This is Gilles Bissonnette with the ACLU. I am online through audio, having some video issues. But I am here. Thank you.

DEPUTY ATTORNEY GENERAL YOUNG: Okay. And so, (inaudible) going forward, we're going to get you on the Attendee List, change you to a Panelist, Gilles. So we will get you that tomorrow. Maria, his email is G-I-L-L-E-S@ACLU-NH.org. So, Gilles, hopefully we will get you through a little easier tomorrow. Okay?

DIRECTOR BISSONNETTE: Thank you.

DEPUTY ATTORNEY GENERAL YOUNG: So, first order of business, as always, is the call to order. This meeting of the Commission on Law Enforcement Accountability, Community and Transparency is

called to order. The meeting is taking place pursuant to Emergency Order Number 12 and is being conducted remotely.

I'm going to ask each Commission Member to identify themselves by their name, where they are currently located, and who, if anyone, is with them. I am Jane Young. I am at the Department of Justice in Concord. With me are Kim Schmidt, Anne Gagne, and Nicole Clay. Good morning, Commissioner Quinn. Happy Monday. How are you?

COMMISSIONER QUINN: Good morning, Deputy Young and fellow Commission Members. Robert Quinn, Department of Safety, I'm at my office located 33 Hazen Drive in Concord. And I am alone.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Good morning, Director Malachi. How are you?

DIRECTOR MALACHI: Good morning. Doing well, Deputy Young and fellow Commissioners. My name is Ahni Malachi. I am in my residence in Penacook. And I am alone in my room.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Director Scippa, good morning.

DIRECTOR SCIPPA: Good morning, Deputy Young. Good morning, Commission Members. John Scippa, Police Standards and Training, I am at my home in Exeter, New Hampshire. There's one adult in the house with me, but she's in another room.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. Good morning, Commissioner Johnson. How are you?

MR. JOHNSON: I'm well, thank you, Deputy Commissioner Young. I am Rogers Johnson. I am representing the Governor's Diversity and Inclusion Council. I am in my home office in Stratham, New Hampshire. And I am alone.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. Good morning, President McKim.

MR. MCKIM: Good morning, Deputy Young, and good morning, Commissioners. My name is James McKim. I am in my home office in Goffstown, New Hampshire. And I am alone.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Good morning, Judge Gardner. How are you?

JUDGE GARDNER: Good morning, Deputy General Young and fellow Commission Members. I am (inaudible) Gardner. I am dialing in from my home in Rye, New Hampshire. There are other members in the home, but they're not in the room with me.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Good morning, Lieutenant Morrison.

LIEUTENANT MORRISON: Good morning, everyone. Mark Morrison, I am here on behalf of the New Hampshire Police Association. I am located at the Londonderry Police Department. And I am alone in my conference room.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Morning, Chief Dennis.

CHIEF DENNIS: Good morning, Deputy General Young and fellow Commission Members. Charlie Dennis, I'm in my office at the Hanover Police Department at 46 Lyme Road in Hanover. And I am alone.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Good morning, Director Norton.

DIRECTOR NORTON: Good morning, Deputy Young and fellow Commission Members. I'm Ken Norton from NAMI New Hampshire, the National Alliance on Mental Illness. I'm on Great Cranberry Island, Maine. There are family members and friends in the home, but not in the room with me. And welcome, Gilles. We will miss Joseph, but good to have you here.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. Good morning, Gilles. You are next.

DIRECTOR BISSONNETTE: Good morning, Deputy Young. Thank you, everyone. Gilles Bissonnette, Legal Director for the ACLU of New Hampshire (inaudible) the next few days for Joseph. Thanks again for having me. I'm in my office in Concord, 18 Low Avenue. And I am alone.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. Good morning, Attorney Jefferson.

ATTORNEY JEFFERSON: Morning, Deputy Young and fellow Commission Members. I am in my office in Manchester and I am alone.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Chief Edwards, good morning.

CHIEF EDWARDS: Good morning, Deputy Young and fellow Commission Members. I am in Boothbay Harbor, Maine at the Tug Boat Restaurant. Believe that I'm the only person in this restaurant. They were gracious enough to shut down today for me. No, I'm joking. They're just closed on Mondays.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Is that water in back of you?

CHIEF EDWARDS: Yes, it's a very nice view. Yes.

DEPUTY ATTORNEY GENERAL YOUNG: It looked very picturesque. Good morning, Commissioner Tshiela. How are you?

MS. TSHIELA: Good morning, I'm good. I'm in Exeter, New Hampshire this morning and there are a few people in the home with me. But they're not in the room with me.

DEPUTY ATTORNEY GENERAL YOUNG: Okay. Thank you very much. I think that that is everyone. We do not have the Minutes. Ahni, you had asked Robin to go over. She had recommendations at the back of her written materials. But I think that when she said them, she probably laid them out a little differently. So we were going to go back and capture those. So when that is done, we will get the Minutes out. So tomorrow we will likely have the Minutes from Friday and today.

So, as I indicated, today we are having two witnesses testify. The first is Professor Albert Scherr from the UNH School of Law. And then, second we will call Senior Assistant Attorney General Matt Broadhead. Professor Scherr, are you on the line?

PROFESSOR SCHERR: (No audible response).

DEPUTY ATTORNEY GENERAL YOUNG: Yeah, there you are. Good morning. Oh, maybe not. Professor, you're, yeah, on mute. And you should be there now. Can you hear me?

PROFESSOR SCHERR: I can hear you.

DEPUTY ATTORNEY GENERAL YOUNG: Good morning.

PROFESSOR SCHERR: Good morning. A pleasure to be in front of the Commission, thank you for having me.

DEPUTY ATTORNEY GENERAL YOUNG: So, Professor, we have your written testimony, which is five pages. I trust that all Commission Members have read it. So the operating procedure here is that you have three minutes to summarize your testimony. And then, the Commissioners get to ask you questions.

I will tell you, having done a number of these, I think sort of the fruitful information comes out during the question-and-answer period. So we will put a clock up. You have three minutes to summarize your testimony. And then, it's open for questions. So, good morning, welcome, and thank you for being here.

PROFESSOR SCHERR: And thank you for having me, Deputy General Young. And hello to all the Commissioners, some of whom I know and some of whom I've gotten to know by listening to much of the Commission's hearings over the last several weeks. I'm at my home in Portsmouth, New Hampshire, in my home office. My teenage daughter is sleeping upstairs, and clearly will not wake up anytime soon.

I'm going to focus on something different that hasn't really been focused on at all in this hearing. As my testimony indicates, I want to focus on the role of Prosecutors in the Criminal Justice System and the unique power they have to stem the possibility of Police misconduct and to deal with systematic racism -- or systemic racism, excuse me, in the Criminal Justice System in New Hampshire.

I have six recommendations, to get right to the point. Number 1, I think, to no surprise, every Prosecutor in the State of New Hampshire should regular annual (inaudible) renewed and refreshed every year.

(Inaudible) should receive (inaudible) and understand the importance of racial profiling, many decisions that they make. This training should be done in collaboration with an outside Agency outside of any prosecutorial authority in the State of New Hampshire to make sure it brings a difficult by really important perspective, prosecutors' decisions. There are, I understand, Agencies, nonprofits around the country who do that.

Number 3, I think Prosecutors should be added to the list of people who must report Police misconduct to the appropriate (inaudible). That list is captured in the recent legislation passed by the Legislature. I think Prosecutors have a unique perspective and window on possible Police misconduct and should be added to that.

Four, I recommend -- the Commission should recommend that the New Hampshire Supreme Court pass a Rule of Professional Conduct for Prosecutors that requires (inaudible) authorities. Five, Prosecutors must develop specific plans for increasing diversity in their offices.

And six, no surprise, there needs to be, at the level of prosecutorial decision-making and its various forms, there needs to be comprehensive data collection and release of racial and -- race and ethnic data. And that needs to be made public on a regular basis. As a Law Professor, I could go on forever. But taking Deputy General Young at her word, I will stop ahead of time and welcome questions from Members of the Commission.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. I will open it up to questions from the Commission Members. So if you just raise your hand, we will keep a running list. And we will get everyone. Attorney Jefferson?

ATTORNEY JEFFERSON: Thank you, Madame Chair. And good morning, Buzz. How are you doing?

PROFESSOR SCHERR: Great; good to see you.

ATTORNEY JEFFERSON: Same here.

PROFESSOR SCHERR: Or at least hear you.

ATTORNEY JEFFERSON: So, I was intrigued about one of your recommendations to add Prosecutors to have a specific rule or legislation passed that they also report Police misconduct. Can you tell me a little bit more about why you -- your rationale behind that recommendation, and why you think it's useful?

PROFESSOR SCHERR: Yeah, I think Prosecutors -- I mean, Prosecutors are very powerful. (Inaudible). Judges may disagree. But Prosecutors, I think, are the most powerful people in (inaudible), whether they pursue cases or not pursue cases. They essentially run the Grand Jury. They make sentence recommendations. They negotiate plea bargains.

And they have very close relationships with the Police Departments they work with. And so, they have a unique window, what they see in cases and what they see in the Police Officers they deal with, and the Police Departments they deal with. And I think they, more than anyone, have both the knowledge and

independence to be able to identify what may be Police misconduct of a variety of sorts. And when I talk about Police misconduct, it's something more than simply Laurie List issues.

ATTORNEY JEFFERSON: And can you give me an example of something that wouldn't be sort of a Laurie List issue that you think a Prosecutor could (inaudible) this unique position to have access to the information that sort of supports us giving them this specific role?

PROFESSOR SCHERR: Well, I think it was you who mentioned early in the hearings how many times Criminal Defense Lawyers around the State have cases where they see pictures of -- or they see their Client with bruising or some kind of injury and are charged with misdemeanor, most often. And it's clear from what they say, and from the history of particular Officers, that there has been, to put it euphemistically, some roughing up in the arresting process. It's happened. It always happens. It's only a few Police Officers. But it happens. And Prosecutors can see that. They can know that.

They can also (inaudible) who have not been accurate in their Police Reports. Police Officers who change their testimony on the witness stand, all of this happens. And it's dealt with in, at best, an informal way. And I think Prosecutors need to have the authority and the power, and the independence to call this out.

ATTORNEY JEFFERSON: And as a sort of related question to that, do you think that because there is this relationship between Prosecutors' Offices and Police Departments, that there is some conflict there, because they work together so often, hand-in-hand? Does that create a danger of too much coziness?

PROFESSOR SCHERR: Can; it can very much create that sense. I mean, the relationships between -- I'm thinking in particular of County Attorneys' Offices with the various Police Departments within their county. Some of them are very positive. And some of them are very fraught that Police Departments feel that they should have the final say on a plea bargain. They should have the final say on a sentence recommendation. That a Prosecutor is not doing their job if they don't agree with the Police. Prosecutor is not doing their job if they express concerns about the possibility of an illegal search, or an illegal seizure.

So, it's very difficult for a Prosecutor to say -- and I've talked with many Prosecutors about this, many of them former students. It's very difficult for them to say to a Police Department, no, we're not going to do that, or, no, what you did is not right. What you did is wrong. What you did is racial profiling.

A good example of that is the State v. Jones case -- State v. Ernest Jones case, which I think the Commission has heard about. But just very briefly, the Police got a call for a suspicious vehicle in the parking lot of an apartment building.

They went there. There was a pickup truck, a black male driver and a white woman in the passenger's seat. They approached the car and asked what was going on. And the white woman said, oh, I live in this apartment building. I'm just having a conversation with my friend. They, then, detained those two in that car for 20 more minutes while they ran a License and record check on both of them, particularly the black male in the car.

The only -- and essentially the New Hampshire Supreme Court found that there was no reason, beyond once they found out that their -- the vehicle was not suspicious. There was a good reason for them to be there, and the people to be in the vehicle and in that parking lot. There was no reasonable suspicion

to hold (inaudible) for 20 more minutes. And I think it's very difficult to view that as anything other than the Police felt the car was still suspicious because of the black male in the car.

I think a good Prosecutor in that case doesn't litigate it. A Motion to Suppress was filed in that case saying it was an illegal detention. I think a good Prosecutor would recognize. A good Prosecutor who's aware of the issues of racial profiling and implicit bias would recognize that that is a case of racial profiling.

And the most important thing to do in that case is not to win the case and do everything they can to win that case, no matter what. It is to say to the Police, you all can't be doing this. You can't be detaining people for made-up reasons just to run a License check. That is racial profiling. And they need to help Police Departments that have this problem understand that, rather than just doing the easier thing which is trying to win the case and trying to survive it.

And to be blunt, that was also true of the Appellate (inaudible). They lost at the Trial Court level. The Defense lost at that Trial Court level and it was appealed to the New Hampshire Supreme Court. The Appellate Prosecutors in this case should have also recognized the problem in this case and been able to say, no, we're not going to go forward with this case. This is a case of racial profiling. And have a conversation, not an angry conversation but a educational conversation with the Police in that case in that Department explaining what was wrong with what happened.

A perfect example of how powerful and unique the role of a Prosecutor is and how difficult it is for a young Prosecutor, in particular, to stand up to an experienced Police Officer and say, no, you can't do this; they need the power to do that. They need the power, by virtue of being required to report misconduct, being required to call out racial profiling.

ATTORNEY JEFFERSON: And kind of that point, in my experience there are Prosecutors who do exactly what you are advocating for. In my experience, I've had Prosecutors who I would file a Motion to Suppress and they would email me back and they'd say, you know what? Yeah, you're right. I'm withdrawing this charge. I've had Prosecutors particularly in the District Court who would say, let's have this suppression hearing so that you can cross-examine this Officer, so that I can help educate the Officer on why these issues are important.

So it seems like we heard from Lieutenant -- I think it was -- Noyes from the State Police that he said rules are good, but culture is even more important. So if we have rules that sort of foster a culture of saying that the Prosecutor's Office has its own independent role from the Police Department, and part of that role is to exercise this supervisory power once they inherit the prosecution, do you think rules would help foster that culture? And do you think that's a good culture that clearly defines that a Prosecutor's role is distinct and very unique from a Police Officer's role? And part of that role is to do these things that you're advocating for.

PROFESSOR SCHERR: (Inaudible) with what you say, I think that it's -- the culture in the Prosecutor's Office, as a general matter, is very difficult. They're very busy. They have a lot of cases. Things move very fast. They're dealing with a lot of different prosecute -- a lot of different Defense Attorneys, a lot of different Defendants, some pro se. And it's hard to foster that culture. One of the things in my recommendations that helps foster that culture -- put aside the kinds of trainings I recommend -- is I think all the...

DEPUTY ATTORNEY GENERAL YOUNG: Professor, I think you are frozen. So we've lost a lot of what you've said there, if you just want to start again?

PROFESSOR SCHERR: (No audible response).

DEPUTY ATTORNEY GENERAL YOUNG: Professor, can you hear me?

PROFESSOR SCHERR: (No audible response).

(Pause)

DEPUTY ATTORNEY GENERAL YOUNG: Professor, can you hear me?

PROFESSOR SCHERR: (No audible response).

DEPUTY ATTORNEY GENERAL YOUNG: The rest of (inaudible) try to get this fixed, so we can get his testimony.

PROFESSOR SCHERR: (Inaudible) in the State of New Hampshire. That (inaudible) is not a natural (inaudible). Hello? Hello?

ATTORNEY JEFFERSON: Professor, can you hear me?

PROFESSOR SCHERR: Hello? Can you hear me? Yeah. No. I'll try and call in.

DEPUTY ATTORNEY GENERAL YOUNG: Okay.

ATTORNEY JEFFERSON: Okay.

DEPUTY ATTORNEY GENERAL YOUNG: Because we didn't get any of that, Professor, and I think it's important. So, Julian, you may have to re-ask the question.

ATTORNEY JEFFERSON: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you.

PROFESSOR SCHERR: I can. Okay. By the way, it was a brilliant answer to myself only.

ATTORNEY JEFFERSON: So, are you going to call in, Professor?

PROFESSOR SCHERR: I can, if that's better. I can hear you on that. Do you want to keep trying it this way? Or I can try calling in.

ATTORNEY JEFFERSON: It's good now, Deputy. Do you want to just try to continue with this format?

DEPUTY ATTORNEY GENERAL YOUNG: Yeah, he looks pretty good right now. So, yeah.

ATTORNEY JEFFERSON: All right. So, Professor, we didn't really get any of that answer. So, my brief kind of question was, is sort of building this culture that clearly defines the two different roles of a Prosecutor's Office and a Police Agency, and how the Prosecutor's Office can help foster that supervisory piece, if you can just sort of summarize your answer, because we didn't hear it?

PROFESSOR SCHERR: Yeah, culture is very important. And culture is developed in a number of ways. It's developed by rules that the Prosecutors are aware that they need to report misconduct. And the Police Departments are aware that they have that responsibility.

It's fostered by the kind of training I've recommended. It's fostered by having more diversity in offices. There are only two people of color in any County Attorney's Office in the entire State of New Hampshire. And Prosecutors need to have a culture where diversity is before them, and in their office and the people they work with, not just a part of those who they are prosecuting.

ATTORNEY JEFFERSON: And one final question for you, so one big thing we're talking about is this whole Laurie List that started, as you know, by State v. Laurie. And I understand you were Trial Counsel or somehow involved in the case. So I think it would be really important if we could hear from you about your take on the Laurie List and what you think this Commission should do about it, in terms of recommendations for reform.

PROFESSOR SCHERR: Probably if nothing else, a sign of how old I am that I was Trial Counsel in State v. Laurie; what actually happened in that case, it's a first-degree murder case and the -- coming out of Franklin, New Hampshire. And the (inaudible) case organized the investigation before the Major Crimes Unit of the State Police became involved. And he also heard what he believed was a spontaneous confession on the part of our Client, Carl Laurie.

We litigated the case. We litigated that confession, whether our Client actually said those things. He was a key witness in the case. Carl Laurie was convicted of first-degree murder and got a life-without-parole sentence.

A few months -- a month-or-two after that case, that conviction, and that sentencing, my Co-Counsel on the case, a Lawyer named Jim Moyer, a well-known Lawyer in Concord -- a now-well-known Lawyer in Concord was talking with a Prosecutor in a Prosecutor's Offices who said, hey, did you hear about Steve -- the individual in that case and about his background? And Jim was not aware of that.

We investigated further. It turned out that the Prosecutors in the case from the Attorney General's Office were aware of and failed to disclose to us a huge amount of negative information about the Lead Detective in the case. He had been let go from a Massachusetts Police Department that had a file 3-inches thick about his misdeeds and misconduct. He would claim to have gone to training and not gone to training. He was suspended three different times, a multitude of lies while he was in that Department. I mean, it was not a subtle case file. And the Prosecutors made the decision in the case not to turn that over to us, as part of discovery.

We filed a Motion for a New Trial, based on that evidence and lost at the trial level. And that's what gave rise to the State v. Laurie Opinion. I submitted it to the Commission, along with my testimony. I would recommend everybody on the Commission read it.

There's no subtlety at all to the voluminous nature of the information. At one point, an Assistant Attorney General told Franklin, once he became aware of that information, at some point in this process, I think after the conviction, if there's another homicide in Franklin, don't assign this guy to that homicide.

So, for me, what I -- I've been living that case for, wow, close to 30 years now. And that case was tried in 1989/1990, if I'm not mistaken, somewhere around there. The message there is it's really difficult to vest exclusive and let's call it secret, or undercover, authority to one entity in deciding what the Defense should need. What counts as exculpatory evidence and what doesn't count as exculpatory evidence?

A stark reality of the Criminal Justice System, for better in ways and for worse in many ways, is that it's -- as between Counsel in the case, the Prosecutors and Defense Lawyers, there's this feeling -- very competitive feeling. There's this athletic contest feel to it, winning and losing. And that, as much as we all fight it, in the interest of our Client, or in the interest, as a Prosecutor, of doing justice -- and I think we all try and fight it -- it's really hard not to say, when confronted with information that may hurt your case, the Prosecutor, God, I don't want to (inaudible). It's going to hurt my case.

Always been the risk of having just one person make the decision; and I (inaudible). I am very supportive (inaudible) be better if people aren't making decisions in-camera. There's litigation about it in court. I think the idea of a statewide Commission or Committee, or entity that decides (inaudible) conduct is important.

(Inaudible), what counts for Laurie List purposes as Police misconduct, which is (inaudible) of all Police misconduct. What counts for Laurie List purposes as Police misconduct, as I think Deputy General Young had said last week, it really depends on (inaudible) the case...

ATTORNEY JEFFERSON: So, Buzz, if you can hear us, you're going in-and-out again. I think it might be better -- and I'll defer to Deputy Young -- to have you call in.

DEPUTY ATTORNEY GENERAL YOUNG: Maria, can you work that out with him, please? Yeah, Professor, we're going to have -- you come in-and-out. So we're going to have Maria reach out to you to get you on. It's probably better via phone. Thank you, Maria.

ATTORNEY JEFFERSON: And thank you, Deputy Young. I'm all set.

DEPUTY ATTORNEY GENERAL YOUNG: Okay, thank you. We will just get him back on the line.

(Pause)

DEPUTY ATTORNEY GENERAL YOUNG: We should have the Professor back on the line within a minute. So, thank you for your patience, Commission Members. And just so you know the lineup, it's President McKim, Gilles, Lieutenant Morrison, and Ken Norton. Thank you. Professor, if you're on the line, can you hit *3? We have a number of callers on and we can't identify you. So *3, please. Okay, Maria. So his hand is up, and you should be able to unmute him.

MS. EKLUND: I just unmuted. He should be good to go.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Professor, can you hear me?

PROFESSOR SCHERR: I can.

DEPUTY ATTORNEY GENERAL YOUNG: Okay. This is good. So I think that Attorney Jefferson had concluded his questioning. If I'm wrong, we can loop back to him again. So, next is President McKim, questions or comments for Professor Scherr.

MR. MCKIM: Thank you, Deputy Young, and thank you so much, Professor Scherr, for your testimony. I am so appreciative of your raising this issue. I wholeheartedly agree that Prosecutors are an extremely if not the most powerful player in the Criminal Justice System. And this, for me, was borne out really and introduced to me in reading Michelle Alexander's *The New Jim Crow*, where she says that most Prosecutors' Offices lack any manual or guidebook advising Prosecutors how to make discretionary decisions. Even the American Bar Association Standards of Practice for Prosecutors are purely aspirational. No Prosecutor's required to follow the Standards or even consider them.

So I really appreciate your recommendations as to how we can improve for everyone how Prosecutors deal with cases. So, I wonder if you might share a few things and clarify a few things for me at least. What kind of training do Prosecutors go through now?

PROFESSOR SCHERR: I think it's very dependent. Historically, it's been very dependent on -- let's start. There's three types of prosecutorial entities in New Hampshire, speaking very broadly. There's the Attorney General's Office, which is -- the Attorney General's the Chief Law Enforcement Officer in the State. They, generally speaking, prosecute all homicide cases. They were the Prosecutors in the Carl Laurie case. And they represent the State in all criminal appeals. And they also have other responsibilities, like the Public Integrity Unit. They represent the State in civil matters. And they handle criminal cases out of County Attorney's Offices that have -- there may be a conflict of interest or something else going on. So that's entity number 1.

Entity number 2 is the County Attorneys' Offices. They are county-by-county. They're funded by the County. The Attorney General's Office, Department of Justice, is funded by the State. The County Attorneys' Offices are funded county-by-county. And their salaries vary. And the number of Assistants in the office vary, depending on the volume of cases.

And then, there are the local and municipal Prosecutors, which are a -- I put them all in one category. But they're a varied group of individuals. Some of them are Police Prosecutors. Some of them are hired by the City -- are Members of the City Attorney's Office in that city, like the City of Concord or in Manchester. And they primarily prosecute cases in District Court, Circuit Courts. Some of them are regional Prosecutors. They handle cases from a group of towns who've gotten together so they can afford to have a Lawyer as a Prosecutor.

The County Attorneys' Offices handle felonies, primarily, and misdemeanor appeals. And they do the major trials. So that's the broad structure of prosecution in the State, somewhat simplified but gives you a feel for it.

The County Attorneys' Offices, they do their training on -- each County Attorney's Office in the first instance does their own training. And it varies widely around the State. Most of the time, it's working under the supervision of a more senior person in the office, from what I have understood in talking with former students who have gone into Prosecutors' Offices.

My understanding is the Attorney General's Office is working harder to have more regular training for County Attorneys and Prosecutors in the State. But I think that Deputy General Young can probably be way more informative than I am. I think that's a developing process.

And to be painfully blunt, I think a lot of the training comes from the education they have in law school. And I think the way we train people, I teach major -- the major course in -- called Criminal Procedure. And that's the intersection of Police, Defendants, their -- the Police investigation, and the Constitution. And I think I need to do a better job at educating students on issues surrounding racial profiling, systemic racism, Police misconduct. And I've worked hard at it, but I think I need to do a much better job.

But there's very little training at the municipal and local level, other than the bigger offices, like in Manchester and Concord, where you have Attorneys who've been there for a long time and can offer that training. So it's kind of a patchwork quilt of training. There's no formal, organized training that includes all Prosecutors in the State.

MR. MCKIM: Thank you. So, would it be beneficial to have some kind of guidelines created and maybe a training regimen, and maybe even a certification for Prosecutors?

PROFESSOR SCHERR: I think some version of that would be very, very good. A formalized training program would be an excellent idea. I know the Public Defender Program in New Hampshire, which is the largest law firm in the State with, I think, about 130 Lawyers, they have a six- to eight-week training program at the frontend, before Lawyers start going to court, that the great advantage they have, it's a centralized organization. And they all work for the same organization.

There are, as one might imagine, really difficult funding issues, when we're talking about a statewide training program for Prosecutors, given the County pays for County Attorneys. The municipalities pay for their Prosecutors. The State pays for the Attorney General's Office. So I don't want to diminish the messiness of funding.

MR. MCKIM: Thank you for that. That's helpful. My next question...

PROFESSOR SCHERR: If I could add one more thing, just in terms of your reference to *The New Jim Crow*, there's a very interesting book written by a woman named Emily Bazelon, B-A-Z-E-L-O-N, called *Charged*. It's about prosecution in 21st century American, makes some recommendations for changes. Again, it's Emily and Bazelon, B-A-Z-E-L-O-N. And the name of the book is *Charged*. I think it adds an additional perspective, particularly focused on prosecution -- Prosecutors and their offices. I'm sorry to interrupt.

MR. MCKIM: No, that's great. It's always helpful to have new books to have to read and to add on the reading list. I'm wondering next, in your testimony you mentioned that Prosecutors need to be able to call out Police Officers for racial profiling. And you alluded to this in your verbal testimony.

The way that was phrased sounds as if they're not able to, as if there's no procedure for it, or there's some other barrier preventing them from reporting that. And I wonder if you might explain that a little bit. Am I interpreting that incorrectly, or if that's correct?

PROFESSOR SCHERR: No.

MR. MCKIM: How do we change that?

PROFESSOR SCHERR: You interpret it correctly in that there's no formal process that I know of for that happening. It -- it's an individual Prosecutor having a -- could be an individual Prosecutor having a conversation with the Police Officer involved in the case, explaining what was wrong with it and explaining that that is not an approach that should be taken.

It may be a Prosecutor having a conversation with their Supervisor, the County Attorney, themselves, or their immediate Supervisor, saying this is what I see. This is what happened in this case. Or this is what I see coming out of that Department, and strategizing as to what to do about that.

But there is no formal process. I think it is a -- and that all occurs within a culture that there is a lot -- there can be, depending on the Prosecutor's Office and depending on the Police Department, there can be a lot of friction between those two offices. And calling out a Police Officer, or a Police Department, can cause problems.

We've seen recently in Hillsborough County a fight between the Manchester Police Department and the Hillsborough County Attorney's Office. And that's a difficult and sad example of the kind of fraught relationships you can be had -- you can have, when the Police Department perceives that they weren't listened to, and that they then go to the media. And I'm not picking on that particular Department. It's just one example.

I don't have a nice, neat, and tidy way to solve the problem. I think, as Julian was suggesting, a lot of this is about culture change. And culture change occurs at a number of levels. But, I think Prosecutors need to be armed with the responsibility to report problems in a way that they aren't currently armed with. That's, I guess, the best way to put it.

MR. MCKIM: Great, thank you. So, what that says to me is, it's one thing to say that it's required that they report it. But it's another to have a formal process that they can actually use to actually fulfill that requirement?

PROFESSOR SCHERR: Agreed.

MR. MCKIM: Right; so that actually leads me to my next question, which Attorney Jefferson touched on. I'm a big fan of Peter Drucker. And he coined the phrase, "Culture eats Policy for breakfast." So, I'm very appreciative of the recommendations you're giving around -- and the discussion we're having around culture.

Just being a student of organizational operations and performance, I'm very cognizant of culture, separate from Rules and Policies. So I'm curious to hear your thoughts on what we might do around changing the culture of the prosecutorial office, not just the Rules. And I'm especially intrigued and interested in, you mentioned the larger Departments, like Manchester, which has one set of circumstances,

but also about the smaller towns and areas and how that culture -- what might we do, or recommend, to change the culture in both those kinds of scenarios?

PROFESSOR SCHERR: A very difficult question; culture change is the hardest change and can take a generation-or-more, to say the least. So, I say that in the context of that broad difficulty with culture change.

I think I would recommend that every -- I'm speaking -- let me speak about County Attorneys' Offices, because they're the most discrete entities, and handle, by far, the large majority of serious cases. I would recommend that every County Attorney Office develop a Policy on how to deal with racial profiling, how to deal with perceived Police misconduct. Identify very clearly what counts as Police misconduct.

And again, I don't think this should focus purely on the type of misconduct that comes up in the Laurie List discussion. I think that's one type of misconduct. But there's other Police misconduct that has been alluded to. The Defendants who have a lot of -- continually have a lot of bruising when arrested by certain Officers, or the kind of conduct that -- racial profiling is not Laurie List misconduct.

And I think the Police misconduct, I also -- I want to make clear. Police misconduct I'm talking about is not just that which gives rise to possible criminal prosecution of a Police Officer. I think the Attorney General's Public Integrity Office is working very hard at dealing with that.

But I think County Attorneys' Offices need to know when somebody has filed a complaint against a Police Officer for certain kinds of conduct. They need to know about that, not just for Laurie List purposes, put aside whether we're going to continue to have a Laurie List or not. But they need to know about what's going on in their Police Departments. And they need to have an established Policy of when an individual County Attorney sees something happen that is part of the Policy in the office. Here's the steps that that person takes, be it I'm not an organizational expert, but I'm sure it's elementary organizational practice to have a process for dealing with these kind of complaints, and the working it up the chain, and deciding what to do about it.

And the County Attorney or the Supervising Attorney having a Liaison in the Police Department to discuss these issues; and I don't know that that -- I think that occurs here-and-there. Oddly enough, it may occur with the smaller Departments more frequently than the bigger Departments, simply because the relationships tend to be more personal in smaller Departments with the Prosecutors.

So, I think I guess the first thing I would say to try and sum this up is there -- every County Attorney's Office needs to have an established Policy, what to do when they observe Police misconduct. What is reportable Police misconduct, if Prosecutors are included in the new legislation requiring Police Officers to report? What is Police misconduct? And what is racial profiling?

Again, the backdrop to all of this is Prosecutors' Offices getting implicit bias training, Prosecutors' Offices getting racial profiling training. Prosecutor's Office having more diversity in their office so that it's not just a them-type of thing, the other people, the people of color. Those are the people in the office. They're not just people they're prosecuting. So, again, I apologize for going on. It's my weakness as a Law Professor. But, also, culture change is a very, very big, difficult, sprawling topic.

MR. MCKIM: All right, thank you. And I certainly appreciate that. And just one last question -- and thank you to the Commissioners for indulging me here -- you've also mentioned in your written testimony that -- about the pressure to turn around cases quickly. I wonder if you could expound on that a little bit,

and help us to understand what those pressures are. And should we look at ways of releasing some of that pressure, reducing some of that pressure, or just curious to hear your thoughts on that?

PROFESSOR SCHERR: Again, a complicated issue, but let me give you just a couple thoughts. One, the pressure comes from probably what I would call, from my perspective, and the data I've seen, overcharging, that too many cases are charged that can be resolved in other ways.

I was in front of a legislative body who was assessing how many cases in which Court-appointed Counsel is appointed, result in complete dismissal of all the charges or complete not guilty Findings. And the quasi-scientific data that was developed suggested that somewhere between 25% and 30% of the cases that came into the system that -- the Criminal Justice System that resulted in a Court-appointed Counsel that is on a Class A misdemeanor or on a felony, 25% to 30% of them roughly were either completely dismissed, all -- that case being any number of charges resulting from an incident. Either the case was completely dismissed, or there was a Finding of not guilty on all of the charges.

To me, that suggests a -- there needs to be a serious examination of the issue of overcharging. If -- can we screen out a good number of those 25% to 30% cases before the person gets charged, or before Counsel gets appointed? Or are they only getting dismissed because of Counsel being appointed? There seems to be some systemic inefficiency there, if that many cases are getting dismissed. So, I think there's a responsibility on the part of Prosecutors' Offices to think that issue through.

Broadly, another part of the problem is certainly in County Attorneys' Offices, and my guess is in municipalities and localities, there's -- and I know in the Attorney General's Office, there's the enduring funding issue. County Attorneys' Offices are subject to county budgets. And that is always a struggle for every county. So I think that's something that -- funding is not a statewide issue at a Prosecutor's level. So that's an issue. On the other hand, my fear is that the more Prosecutors you have, the more time they will have to charge more people. There's not a simple little answer to this. So, those are some of my first thoughts.

MR. MCKIM: Thank you. And it's interesting in organizations. Behavior is driven quite regularly by metrics and measurements. So, I'm eager to learn a bit more about how Prosecutors are measured to see if they're measured on the number of cases versus some other metric. But that's probably for a different time. So...

PROFESSOR SCHERR: Another big question.

MR. MCKIM: Another big question; so, that is the end of my questioning, Deputy. I'm -- I yield the rest of my time.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. Gilles, you're up next. Questions or comments? And Eddie, I saw your hand raised.

DIRECTOR BISSONNETTE: Thank you.

DEPUTY ATTORNEY GENERAL YOUNG: So you're on the roll.

DIRECTOR BISSONNETTE: Thank you, Attorney Young. As I'm new to this, can everyone hear me?

DEPUTY ATTORNEY GENERAL YOUNG: We can.

DIRECTOR BISSONNETTE: Oh, wow. Great, great. Thank you, Professor. I know that one of your recommendations is requiring Prosecutors to report Police misconduct to the Department Chief and Police Standards and Training. You've talked a little bit about it, particularly in response to Attorney Jefferson's questions about what you mean concerning Police conduct. I was just wondering if you could just flesh that out in as much detail as possible as to what you mean, when you're referring to Police misconduct that a Prosecutor would be able to identify as he or she is prosecuting the case.

PROFESSOR SCHERR: I'm more than willing to. I think the important thing to understand, as I think I keep repeating, is this isn't just about Laurie List misconduct. The kind of conduct that might give rise to concerns about the credibility of an Officer is certainly really important, as it plays out in the Laurie context. And I think it's important to develop processes to deal with that.

But there's also other kinds of misconduct. I've talked about the -- I'll call it the roughing-up conduct that you see an Officer who's got problems. You can tell, as a Prosecutor, that this Officer is a problem Officer. There just seems to be too many assault of a Police Officer charges and disorderly conduct charges, or resisting arrest charges coming from this Officer. I mean, those are very -- you see those in the system. And very often, it's somebody who is not very anxious to be arrested and is resisting. And it takes more force to effectuate the arrest. And that's completely understandable.

But very often -- not very often, you see in my practice as a Public Defender, and in my conversations I have with both the Defense Lawyers and Prosecutors to today, there are just cases where you can identify an Officer who's a problem Officer. And there's -- as I was discussing with President McKim -- there's really not a process for what to do about that. It's very informal. And that's a subtler issue.

There's the kind that is reportable to the Public Integrity Office of the Attorney General's Department -- the Attorney General's Office that might give rise to criminal conduct. Then, there's the kind of what -- misconduct that it seems like a part of the conduct. And I'll give you an example -- a category of examples.

I can't tell you the number of Criminal Defense Lawyers who've called me that I've talked to who said, I got this Police Report where it's like a DWI case. And the Police Report has a -- the Report refers to the wrong -- in the report section -- the Narrative section of the Report, it refers to the wrong individual. The rest of the Report has the right individual. It's clearly what happened is the Officer is cut-and-pasting his Report -- his Narrative from another Report into that Report. That's not -- that's just not appropriate and it happens. It's a function of probably laziness and, all right, this is just another DWI. We will put that in there. It doesn't happen all the time, but it happens.

And then, every Prosecutor in this State has had the circumstance where they've been surprised by what a Police Officer says on the witness stand. They never heard that before. Or it's different than what they said to them. And it's a very, very difficult situation for a Prosecutor to deal with.

So, there's this host of conduct that is misconduct. It's not the TV news-type of misconduct. But it occurs in the system and the system, the culture lets it happen, because there's no way to deal with it. And there's no real percentage for particularly a young Prosecutor calling out the Officer.

DIRECTOR BISSONNETTE: Thank you, Professor. Just to follow up on that and to follow up on -- a little bit on your written testimony where you talk about how Prosecutors need to be able to call out Police Officers for racial profiling, do you think there'd be any utility to legislation banning racial profiling? And what issues would you see with something like that, if it's something that you think would have some utility?

PROFESSOR SCHERR: I think, yes, in theory, there would be -- it would be valuable to have legislation banning racial profiling. I've talked to a number of people about this. The difficulty is in writing that legislation. And you can't engage in racial profiling, if that's what they -- you must not engage in racial profiling.

Proving that what occurred is racial profiling versus something else, proving that I pulled this guy over because the license plate light on his back license plate was out, that's reasonable suspicion to pull him over for a traffic violation. But the real reason that that's occurring is to the person is a person of color and they want to see what's going on, and see if they can get the person to agree to have their car searched.

I mean, that's the classic racial profiling, stopping someone for a reason other than the real reason to stop them, the reason you're -- it's called a pretextual stop. It's the extension of the stop beyond telling the person, your license plate light is out. Get it fixed, and giving them a ticket. You were going 75 in a 65 or a 60. Here's the ticket. And asking questions like, so, where are you headed? Do you live up there? What are you going to be doing up there, if you don't live there? Who are you going to be visiting?

That kind of extension of a stop to -- and this happens in -- anecdotally, it happens in cases where people of color are involved. That's racial profiling. And so, probably the best legislation -- so it's already banned by the Constitution, not you can't extend a detention beyond the purpose of the detention. But that kind of conversation happens all the time and needs to -- we need to figure out ways to limit that.

The only way we can really figure this out in a serious way is to get data. Again, I've made a recommendation for data collection in Prosecutors' Offices. But I think there's already been talk about broader data collection. And the data collection needs to be not just race data collection. It needs to be race/ethnicity data collection.

My understanding is the CALEA standard is collect race data. And Hispanic individuals, that's identified -- being a Hispanic is identified as an ethnicity not as a race. So frequently you get data that says X percent white, Y percent black, and then you'd get some trivial numbers, at least in New Hampshire, in terms of Pacific Islanders and indigenous people. It needs to be race/ethnicity data collection, not just race collection. And that will begin to help us understand what's actually going on out there.

DIRECTOR BISSONNETTE: Totally agreed, Professor, thank you. Just one last question, and this is relevant to your recommendation concerning how Prosecutors' Offices must develop specific plans for increasing the diversity among the Prosecutors in their office. Could you just again flesh that out a little bit for me? You referenced it very briefly. Just why do you think that's so important, based on your experience?

PROFESSOR SCHERR: Let me go back to the conversation I was having with President McKim. I think it's a culture issue. It is hard to think about this at a -- psychologically at an important-enough level to have it affect your decision-making, unless members of your office are people of color and you can

appreciate that this isn't just people different than us. This is about all of us. It's not just about people different than us.

As we all know, New Hampshire is a very white State. And we often think there's no systemic racism in New Hampshire, when it's just we don't know. We don't hear from people who are in our office, or in our workplace, who are suffering these daily indignities, and are racially profiled in the subtlest of ways. And that that cultural power of having people of color in the office you work in is as important for a culture change as is a set of rules, because rules are administered by people.

DIRECTOR BISSONNETTE: Thank you. Deputy Young, I'm done with my questions. Thank you.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you so much. Lieutenant Morrison, you are up next, followed by Ken Norton, Ahni, and then Eddie.

LIEUTENANT MORRISON: Thank you very much. Good morning, Attorney Scherr. Thank you very much for being here. Good to see you again. And I just...

PROFESSOR SCHERR: Good to see you.

LIEUTENANT MORRISON: I want to start off by saying I do have a very fond appreciation for your knowledge and experience, despite disagreeing with you very often. So, thank you for what you're doing. Is it fair to say that there are no formal barriers limiting prosecutorial discretion?

PROFESSOR SCHERR: Yes, perhaps at the extremes. I mean, the most obvious informal barrier is if a Prosecutor, the people in his office screw up too much. He or she's not going to get reelected again. But Prosecutors have tremendous discretion in everything they do. They have an even greater immunity than do Police Officers, in terms of getting sued for wrongful conduct. They're not subjected to the ineffective assistance of Counsel requirement of the Sixth Amendment that is imposed on Defense Lawyers. And there's really no specific-enough professional -- Rule of Professional Conduct, except at the very extremes, in terms of lying to the Court, that limits their prosecutorial discretion on a daily basis. So, that's the longwinded Law Professor answer. The short answer is yes, there are no formal essentially barriers on prosecutorial discretion.

LIEUTENANT MORRISON: Okay, because it's been my experience that Prosecutors do exercise that discretion. And I think it's important for people to sort of remember that some of these cases, especially involving search and seizure, are based on decisions that Officers are making in very, very short amount of time. They are not attorneys. And their decisions get to be scrutinized heavily with zero restriction on time, zero restriction on resources. And some of our biggest cases, I think, can be ruled on by a Supreme Court and, say the U.S. Supreme Court in a 5-4 Decision. And that tells me that five of the smartest people in the land thought one day and four thought a different way.

So I think it's important. And correct me if I'm wrong. But would you not agree that it is not necessarily misconduct? It is not necessarily nefarious. It is not necessarily anything negative when an Officer conducts a search or a seizure and it's later deemed to be an illegal seizure.

That word "illegal" simply means it's not admissible in court and it can't go through. But it doesn't mean that the Officer's doing something nefarious. And it could be a very fine issue of law. Is that fair to say?

PROFESSOR SCHERR: Yeah, I mean, my answer to you, as any good Law Professor would give to that question, is yes and no. Yeah, there's plenty of illegal -- searches that turn out to be illegal. The Prosecutor says, I'm not prosecuting that case, because it's illegal. You made the wrong decision in the spur of the moment. And here's why it was the wrong decision, as a matter of law. That's the function of a Prosecutor's Office. In that sense, it's to be a screening device for cases Police bring. It's not the Police's job to prosecute the case and take the case all the way through. It's the Police job to start the case, investigate it, make an arrest, etc. So, Prosecutors have this screening function. So that's yes, I agree.

No, I think there are certain numbers of cases, like the Jones case, where a Prosecutor in that case needs to say to the Officer, I'm not going through with the case because this -- you -- the only reason you extended this search is because the person driving the car was black, and that made him suspicious. There's no other logic to what happened in the Jones case than that. And I think Prosecutors who understand what implicit bias is and what racial profiling is, they need to call out those kinds of circumstances.

So, it depends on the case. But, yeah, many decisions are found to be illegal just because the Officer didn't work well in the spur of the moment, in terms of his understanding, or her understanding, of the law. But there's some cases where a Department or a Police Officer needs to be called out, like the Jones case.

LIEUTENANT MORRISON: Thank you for that. Now, turning to the Jones case, I don't get that reading from the case that this was a discriminatory case. It seems more as though the Court is allowing for that to be a factor, whether people feel free to leave. And again, correct me if I'm wrong. Attorney Bissonnette may be able to chime in. I think this was a case he worked on. But was not one of the bigger problems in the case the Officer wasn't available to testify?

PROFESSOR SCHERR: Yeah, that was the choice of the Prosecutor, my understanding of that case. But here's why, as we frequently do, Mark, here's why I disagree with you. So people understand what's going on here, Mark and I were on both of the Bail Commissions that came out of the Bail Reform Act around two, three years ago. So, we've gotten to know each other and our disagreements are good-humored, if disagreeable.

The problem in the Jones case is I think the Court recognized that there was no -- if Jones perceived that he was being detained, that he was not free to leave during the 20 minutes that they were running the check, if he perceived that he was being detained and was not free to leave, then it was an illegal detention, because they had no reason, once they cleared up the reason that the vehicle wasn't suspicious, which was the reason for the call from whoever the anonymous call. Once they cleared that up, they had no reason to detain him.

And what the Court said is, in deciding whether he felt detained, you need to think about it from the perspective of a black person interacting with the Police and how that may actually be quite different from how I might feel in that circumstance. And it's important for any Court to take that into consideration. But, it's clear, from the Jones Opinion, that the Police had no reason to detain him for that 20 minutes. It's hard not to read that as they couldn't get rid of their suspicion, because it was a black man.

LIEUTENANT MORRISON: Okay. I think the case is a lot more simple than that, in that they identified the driver and the passenger. The driver had a Bench Warrant. And search incident to arrest revealed fentanyl. Is that your recollection of the particular stop?

PROFESSOR SCHERR: Yeah, generally. But the step that you missed there is they found out he had a Bench Warrant. It took them that 20 minutes to find out he had a Bench Warrant. They detained him for 20 minutes before they found out he had a Bench Warrant. And that 20-minute detention for no reason is the problem in the case.

LIEUTENANT MORRISON: Okay. Well, the wording in the case is less than 20 minutes. I know that's splitting hairs. But, there are times where a Law Enforcement Officer will have to wait for the available radio time, call it into a Dispatcher, and the Dispatcher, however long it takes them to enter that into the computer. And then, depending on what type of Warrant, you have to verify it. So, that timeframe was not deemed unreasonable in this case, was it?

PROFESSOR SCHERR: I think that's where we're going to agree to disagree.

LIEUTENANT MORRISON: Okay. I just don't see any wording to that effect. And as far as I'm just looking at the verbiage of the case. And it quoted the Seventh Circuit that race is not irrelevant to the question of whether a seizure occurred. But it is not dispositive, either, citing U.S. v. Mendenhall.

I think those are good points and good training points. But I just disagree with the characterization that this was anything other than two Police Officers trying to determine the suspicious nature of this vehicle.

One person had a Bench Warrant, which obviously means he did not go to a court hearing, did not comply with possibly his conditions of bail, proverbial (inaudible). And I just -- I don't think this case speaks to the issue that you're painting with it, which is why I respectfully disagree. And lastly, and then I'll reserve any further questions for later, so other people can chime in here, but the conversations about pretextual stops, you're not suggesting that a motor vehicle stop based on a legal equipment violation or something is an illegal stop, correct?

PROFESSOR SCHERR: No, depending -- the stop, itself, is not illegal, depending -- although you read some of the Federal Court Decisions in this regard about what's been going on, on I-95. One Federal District Court Judge had a extreme difficulty with the way the stop occur -- why the stop occurred. But let's put that aside.

Very often, for a motor vehicle violation, the Police can pull somebody over. My big concern is they -- we all know there are cases where it's not why the person is being stopped. They want to do some rattling of the cage, so to speak, or they want to see what they can find out. And they engage in conversation that has nothing to do with processing the motor vehicle violation.

LIEUTENANT MORRISON: Okay. And so far, your opinion is not backed up with the Constitutional Rulings of some of these cases. These stops are permissible, regardless of what subjective, I guess, thought process behind it. It's a legal stop and the Officer has the ability to do that. That has been found

constitutional, as well as proper expansion of a stop, based on the facts and circumstances the Officer finds when they make contact with that operator. Is that correct?

PROFESSOR SCHERR: The U.S. Supreme Court has said that, in and of themselves, pretextual stops are not unconstitutional. They are constitutional.

LIEUTENANT MORRISON: Okay.

PROFESSOR SCHERR: That said, if you read the Hernandez case that I think is part of the ever-increasing file that the Commission has that I believe Attorney Brown submitted several weeks ago, that's a perfect example of a Federal District Court Judge saying that an I-95 stop was quickly expanded into an illegal detention.

And it's a textbook example of an Officer putting together facts like the person was nervous. The person he'd never met before was nervous. That the Officer had followed closely behind the car for several miles; that the person had glanced at him, when driving by him; and that the person had had his hands on the steering wheel in a 10-2 posture, which is what is recommended. In that case, the Prosecution offered that up as reasons for a continued extension of the stop. And the Federal District Court Judge did not accept that.

So, it just depends. If you stop me because my rear license plate taillight is out and you come up to me, and we have no conversations about my rear -- other than you saying, your rear taillight is out. And then, you ask me, where am I going? What are you doing there? Where are you coming from, all of that? That's a stop that is intend -- you are now engaging in conversation and investigation that has nothing to do with the purpose of the stop. And my concern is, in the examples that Attorney Brown gave, on I-95, these are frequently happening with people of color. And that's the concern.

LIEUTENANT MORRISON: Okay. Well, Attorney Scherr, thank you, as always, for your contributions and entertaining my questions. I look forward to being able to do it again sometime soon.

PROFESSOR SCHERR: I look forward to it, too, Mark.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Thank you. Ken Norton, you are up next?

DIRECTOR NORTON: Hi, thanks, Professor. And in the interest of transparency for everyone, my bride is a retired career Prosecutor who worked at the District Court level as County Attorney and in the Department of Justice, but not in the Criminal Division. So, my first question is: are you aware of how many, if any, Police Officers in New Hampshire have been charged with a crime regarding their conduct during an arrest or a detention?

PROFESSOR SCHERR: I'm not aware of any specific numbers. I don't know if anyone keeps those actual numbers. I think there's, again, anecdotal information. There's an incident that occurred in Seabrook where an Officer was particularly aggressive and throwing an individual on the floor. There's a video of that. If one searches the internet, you can see that.

There was a long chase that occurred in another case, where the Officers that took the person out of the car engaged for -- the individual was not resisting, even though he engaged in a long change. But once the car stopped and he got out, he was assaulted. And two of those Officers -- one, I believe, a New Hampshire State Police Officer -- was charged in that circumstance. So, it happens. But I don't know if there's any source of how frequently that happens.

DIRECTOR NORTON: And then, one of the things that we've heard from prior testimony is the challenge regarding accountability for misconduct. And heard from Director Scippa last week that Police Standards and Training can only deal with that which they've been made aware of. And it seems like this gets at the heart of a lot of what the challenge is, relative to culture.

And you've talked about the County Attorney Offices should be informed regarding misconduct at a local Police Department. How would that occur? And are you aware of any other counties or District Attorneys' Offices in other States that have these types of reporting mechanisms?

PROFESSOR SCHERR: I think it would occur. I think it's a part of the disparate system for accounting for the varieties of what I'm calling broadly Police misconduct. There is a -- County Attorneys are made -- the Prosecutors in County Attorneys' Offices, in the instance of Laurie-type material, are, to some extent, made aware of it, as a part of the Laurie List. So there's that.

I believe Director Scippa referred to they receive complaints. There's a complaint form. And they can receive complaints from everyone or anyone. I think the Public Integrity Unit at the Attorney General's Office is open to receiving complaints.

But what isn't there is an organized system where every Police Department has a complaint form on their website, or in their building, in the lobby. Every court has a complaint form. The complaint form -- every County Attorney's Office has a complaint form available and transparent. And I think it needs to be -- that reporting system needs to be organized in a way that information flows through to everyone.

So, the reason I chose to speak before the Commission about this issue is that Prosecutors have a unique window on misconduct of a variety of kinds: low-grade misconduct, high-grade misconduct, however you want to characterize it. And they need to be put in a better position to deal with it. And it -- processes need to be developed. They need to have Policies within the office, because more than any other entity outside a Police Department in New Hampshire, other than criminal Defendants and to some extent Defense Lawyers, but even more so than Defense Lawyers, they have the best window on this.

And much of this can be taken care of with a County Attorney's Office having a process where a young Prosecutor reports to their Supervisor. This makes me nervous. And there's a process that unfolds that the Supervisor or the County Attorney, themselves, can talk to the Police Department to nip this in the bud and to identify this at the frontend, rather than it building and building over time. And the part of the core of that is having a system for reporting amongst all the Agencies we're talking about that is organized, where information flows freely amongst those.

DIRECTOR NORTON: Yeah, thanks for that answer. And I'm still struggling with this, because I think part of what we've heard of is that when those reports are made at the local level, that they don't necessarily end up being made ultimately at the Police Standards level. So, depending on the Chief or depending on the Department, they may feel like -- or even the Prosecutor in this instance -- that they've

had a conversation, that the Chief was receptive. The Chief said whatever he or she said. Yeah, I'll deal with it, or we've spoken with this Officer about this.

But we don't see the cumulative impact, perhaps, if there is a cumulative one. Or there's no overall reporting mechanism around this. And I think one of the questions that I'm struggling with, and I think perhaps the Commission is struggling with, regarding misconduct, is how do we get to that? How do we get to that point? And what accountability or enforceability do we have as a State over municipal Police Departments?

PROFESSOR SCHERR: Um-hmm [yes]; you're correct in perceiving that as at the core of what the Commission is working on. I mean, I think that is really important. The State has the authority, through Police Standards and Training, to decertify a Police Officer. And I think, so, at that level, there is that process in place.

I think Director Scippa has said that work needs to be done, based on the Audit. Work needs to be done on that process. And I hope that this Commission does everything they can to encourage that process and the recommendations of the Audit to happen as quickly as possible.

But there needs to be organizationally -- to go back to what President McKim was talking about, the process needs to be coordinated. If there is a problem reported to a Police Chief, perhaps he needs to at least notify Police Standards and Training there was a problem. Here's the brief nature of it. We're going to manage this for the -- in this way at this level. And it's all documented. And so, it's -- there's no penalty. But somebody is -- other than the Police Chief, who's got his own, or her own, issues, in terms of managing the Police Department, there is independent documentation and potentially accountability over time.

DIRECTOR NORTON: Thanks, Professor. And I agree. And I'm not trying to beat this, but I'm struggling to understand. And absolutely the PSTC has the ability to decertify an individual Officer. But, if there are systematic problems within a particular Department, let's say, and they've been identified via audits -- and I think we clearly need to increase the ability of Police Standards and Training and their capacity to do these audits. But it doesn't sound like even if there had been systemic problems identified that Police Standards has any authority to hold a Department accountable.

PROFESSOR SCHERR: I agree with you at this point. I think the premise -- the condition for beginning to sort that problem out is data collection. Comprehensive, statewide data collection, be it in terms of the potential determining whether there is systemic racism or not.

But putting that aside, comprehensive data collection about issues within individual Police Departments, and perhaps the Legislature needs to empower Police Standards and Training more. But at least I -- I'm very hesitant to over-formalize the issue beyond data collection until we understand what the nature of the problem is, be it in terms of consistent problems within a Department, put aside racial profiling or racism issues. But consistent other kinds of problems within a Department, I think we need to -- we don't have data on that. And we don't know that. And that's a concern for the State, not just the municipality.

And that's a data collection issue in the frontend so then we can figure out, we're seeing this problem too many places. What do we do with it? Do we need to pass legislation to organize ourselves in a better way and have standards in a better way?

DIRECTOR NORTON: Thanks. Do you think that Police Standards and Training, as it's currently constituted, in terms of its makeup, let's say, maybe not its reach, is the proper authority -- I don't know what word I'm looking for. I mean, are they the mechanism that the State should be empowering as currently formulated to move forward with these accountability measures and data collection measures?

PROFESSOR SCHERR: I think they have a role that they have not been able to fully transact their role. And I think I have great hope with Director Scippa in place that they're going to do that better. I am uncertain whether mixing -- let me -- I don't think they should be doing everything. I think it's better to have a statewide Agency that's dealing with broader issues of Police misconduct, and that it has citizen -- it's a statewide Citizen Review Board.

Citizen Review Boards are very common around the country. Some of them are statewide. Some of them are municipality-wide. Some of them are regional. I think that's a mechanism that handles a good portion of certain types of complaints about Police misconduct. I don't think that replaces Police Standards and Training. But I think it would be a mistake to empower Police Standards and Training to do everything. It's too much. And it -- they've got enough to do.

DIRECTOR NORTON: Don't you think on some level that Police Standards and Training, as it's currently consists, I mean, it does have public members and representatives? I mean, isn't it, in some way, that makeup of Law Enforcement, Judges, public members, that type of oversight body?

PROFESSOR SCHERR: Yeah, I think it is too much to ask them to do. They are -- I think they -- they're over -- they're -- the Committee performs a valuable function in giving some perspective on certification of Police Officers. But it's hard enough doing the training they do to -- and all the certification that they do.

I just think it gives them too much to do different than what they're already doing. It forces them to be more of an investigative body. It forces them to be making the kind of judgments that I think are better made by other constituted bodies with their own independent sets of standards.

DIRECTOR NORTON: Okay. I mean, I clearly -- my opinion is that they're very under-resourced. But maybe I guess we will sort out sort of where things go from here. Last question, sort of different note, we've heard testimony that -- or recommendations that all Civil Court proceedings regarding misconduct resulting in payment, either as a result of a Court Decision or a Settlement Agreement, should be made public. Do you -- are you with that? What are your thoughts about that?

PROFESSOR SCHERR: I am a very strong advocate of transparency. And I think it need -- the public needs to be clear what it is costing them to have this behavior in their Police Department. So, in that sense, I'm a very strong advocate of getting rid of NDAs, Non-Disclosure Agreements, because I think it's valuable that the public know. They are the ones who, in the end, provide the money. And so, that's valuable. I'll leave it at that.

DIRECTOR NORTON: Great, thanks so much. And thank you to my Commission Members for indulging my questions.

DEPUTY ATTORNEY GENERAL YOUNG: Ken, to your question about, have Officers been charged, I can at least shed some -- I can shed some light on at least two of them. So the case that the Professor referenced, it was in Seabrook. There was a video that went viral. We learned of the video, I think, just like the public did, of a young man who was intoxicated, was being led down, went into the wall, and then was pepper-sprayed.

We looked at that case. In fact, we prosecuted it. We have a Press Release that's on our website. The Officer who used the OC spray, the Grand Jury returned a No True Bill on that case. The other Officer went to trial and that was a hung jury, after a multiday trial. And then, that ended up pleading (ph). So he ended up pleading guilty.

Then, there was another case a number of years ago that a man led Mass. State Police and New Hampshire Police Officers on a -- on an hour's long chase through Massachusetts, ended up in New Hampshire. Again, that was captured on video by numerous media outlets.

The State Police Officer came in pretty quickly, pled guilty, and agreed to be decertified as a Police Officer, was out of law enforcement. The Police Officer from Massachusetts exercised his right to go to trial, and a jury acquitted him. So those are just a couple of the cases that we looked at.

I will tell you from looking at a number of Officer cases in this office, prosecuting a number of the cases, that they're not easy cases to prosecute. We always say that. I mean, some of the cases, it seems like that this is a pretty straightforward case with strong evidence. I think that juries are reluctant to find Police Officers guilty, for whatever reason. I mean, we don't sort of go that deep down into the rabbit hole. But I would just tell you that, that those are the actual facts that I'm aware of, not anecdotal information.

DIRECTOR NORTON: Thank you, Deputy Young.

DEPUTY ATTORNEY GENERAL YOUNG: You're welcome, Ken. Chief Edwards, you're up next, followed by Ahni, Chief Dennis. And then, I will give you guys a break before we go to Attorney Broadhead. Thank you.

CHIEF EDWARDS: Thank you, Deputy. And thank you, Professor, for your testimony this morning. It's been very enlightening. I just have a couple questions for you. You started your testimony today. Early in your testimony, you talked about systemic racism in New Hampshire. And we've had a number of witnesses come before the Commission and discuss this same issue. So I'll ask you as I've asked them. Do you believe there's systemic racism in New Hampshire? And do you believe there's systemic racism in New Hampshire's Law Enforcement community?

PROFESSOR SCHERR: Yes, I believe there is, based on my conversations with Prosecutors, Defense Lawyers, Clients, students, people of color whom I know in the State. It's very present, generally speaking.

Number 2, I think it occurs at the law enforcement level, too, just based on all of the conversations I've had that I referred to. I think the difficult thing that none of us can really do is there's no way to measure it. And the only thing I can say, the only measurement there is, which is only a piece of the measurement is the number of people of color in the State Prison is disproportioned to the number of people of color in New Hampshire.

CHIEF EDWARDS: Well, okay. I mean, we could talk about that for a long time. And we don't have that kind of time today. But there's a number of factors by which someone ends up in Prison. But, I do want to kind of press you a little bit on this issue, because by your definition, what you just described, that would make you a participant in structural -- I mean, systemic racism in New Hampshire.

PROFESSOR SCHERR: Yeah.

CHIEF EDWARDS: So, you believe...

PROFESSOR SCHERR: I think I said I -- if you read the end of my testimony, I was trying to be very blunt about the inadequacy of what I've done as a Law Professor teaching law students, be it those who are going into the Criminal Justice System or who are going into practicing as Lawyers, generally. I haven't done as good a job as I want to do and hope to do better in the future, in identifying those issues and having conversations with students about those issues, and alerting them to that.

But, I've practice in -- I've been in New Hampshire for 38 years. And by being part of the system, whatever efforts I made as a Public Defender to fight it, whatever efforts I've made in the Legislature, in terms of criminal justice reform, I'm a part of that system.

CHIEF EDWARDS: So, if you feel that way, what efforts or what reforms do you think we should make to Defense Attorneys to address their implicit bias or their participation in systematic racism?

PROFESSOR SCHERR: I think the Public Defenders Office needs to do a better job at diversifying the Attorneys in the office. I think it does only a slightly better job than the Prosecutors' Offices. And I think they need -- it's a very difficult issue. But I think they need to do a much better job.

I think they need to have regular implicit bias training on an annual basis. And I think they need to have an ability to listen to people from communities of color in New Hampshire independent of those people they are representing, in figuring out ways for them to deal with it. And so, I think they have that responsibility, too.

CHIEF EDWARDS: So, you believe if the system hired more people of color that many of the issues would be addressed?

PROFESSOR SCHERR: No, I think it would start the culture change. It would be a piece of the culture change. I don't think it fixes the problem. But it makes it more possible that the problem will be addressed more explicitly if Prosecutors and Defense Lawyers, the culture is improved. I think this is a huge problem. It's not fixed by some hiring practices.

CHIEF EDWARDS: Well, I would agree with you on that. And let me just say very briefly I grew up in a very violent area of this country, Atlanta, Georgia. And my brother is a career violent criminal. He's spent eight years in Prison for attempted murder. He mounted to murder someone. So, when I hear folks say that, like in the case that you referred to, there are also victims. My brother had victims.

PROFESSOR SCHERR: Yeah.

CHIEF EDWARDS: And victims in our State lean on Law Enforcement and Prosecutors to make sure they do a good job investigating crimes, make sure they do a good job of following up on those crimes and seeing those crimes through. So, what message would you have to victims of crimes when Police Officers would be accused of doing sloppy policework by not really vetting someone who they believe has a Warrant?

PROFESSOR SCHERR: I think the message for victims is we need to get better policework so that doesn't happen, number 1. I mean, more broadly, I think you would be -- maybe not you. I was going to say you would be surprised. But I think people would be surprised at the number of people who are in the State Prison who, themselves, are victims in some way of a bad system, a system that doesn't give them a good education, a system that doesn't deal with opioid abuse well. I think the -- there are a lot of people in the State Prison who are victims, also. And I think the example of the opioid crisis is a perfect one of -- I feel very strongly that victims in this State need a voice.

And I think the Coalition Against Domestic and Sexual Violence has done a strong job at doing that. But, I think they need to demand better -- they need to demand prosecution and policework that they're entitled to, as victims.

CHIEF EDWARDS: Well, that's where I'm curious, because earlier in your statement, when you were talking about Prosecutors being overworked and not having proper resources, you also said you wouldn't be supportive of more Prosecutors, because they would just have time to prosecute more people.

PROFESSOR SCHERR: Well, I tried to be a little more nuanced about it than that. I think the risk of just throwing more money in Prosecutors' Office is they just -- they got more people so they can charge more people. And I think that's the risk there.

I think the first thing that needs to be done is Prosecutors understanding whether they are overcharging people or not. That comes before throwing more money at them. I think there's some evidence out there, based on what I've heard, that there's a lot of overcharging going on. And it's costing the system money. It's costing the system money for the Public Defender Program. It's costing the system money for Prosecutors' Offices. It's costing the system money for all sorts of things. So I don't think the first answer is throw money at Prosecutors' Offices, because I think without understanding in-depth the issue of overcharging and the misuse of prosecutorial discretion, I think throwing money at a Prosecutor's Office would be a mistake.

CHIEF EDWARDS: Okay. And I think you would agree with me. What you've just kind of outlined, there's no evidence of it, right? I mean, you're relevant...

PROFESSOR SCHERR: No, there is.

CHIEF EDWARDS: If I could just -- you're really kind of speculating based upon conversations you've had with individuals, right? We haven't collected any data, or we have no evidence collected that we can review that says that Prosecutors are overcharging and they're abusing their prosecutorial discretion.

PROFESSOR SCHERR: There is data. When I was before the Committee who was -- it was a Legislative Committee that was investigating whether removing -- this is going to get a little technical. And I apologize for this.

CHIEF EDWARDS: (Inaudible).

PROFESSOR SCHERR: Not forcing people who have had all their charges dismissed, or all their charges -- have been found not guilty of all their charges, not requiring that they pay back the State for the cost of their Counsel, that was what the Committee was looking at. How much money would that take out of the system, the Office of Cost Containment?

And the data that was presented, imperfect but certainly very serious data, by among others the Court System and the Public Defenders Office, was that between 25% and 35% of cases that there was appointed Counsel on, the -- all the charges were dismissed or the person was found not guilty. So that is a data-based perception on my part.

CHIEF EDWARDS: Right; and that's what I said. I mean, you're drawing that conclusion. But no one has definitively said this is the issue. You're drawing those conclusions. And I think that's what's concerning, at least for me, that when -- like when you point to racial profiling in car stops, or approaching people of color on car stops, it's because of my personal background and my professional background, I am really curious to know what evidence are you leaning on when you suspect that? It sounds to me like some of your testimony, it sounds to me that if you stop a person of color, that, in and of itself, could be reasons for you and some others to believe that the person was stopped simply because they were black.

PROFESSOR SCHERR: I guess I'd go back to an issue that this Commission has been dealing with in many ways. Part of the reason for this Commission is to find out what is going on. And I think data collection -- comprehensive statewide data collection of race and ethnicity data in interactions with the Police and with Prosecutors' Offices gets to a better answer of whether this is happening.

Yes, my information is anecdotal. But I think there are many in the Criminal Justice System who share that same opinion. But I am an advocate not of making decisions based on my opinion, or my sense of people's opinions. I think the data needs to be collected and in an honest and thorough way, and looked at very carefully.

CHIEF EDWARDS: I appreciate that answer, because one of the things that's very concerning for me, as well, is the classroom-to-Prison pipeline. And it all -- that started in academia, where Professors were saying that there was going to be a coming of super predators. And they were mainly talking about young and black young people.

PROFESSOR SCHERR: Yeah.

CHIEF EDWARDS: And that never emerged. So we relied on academia and other people to make public statements, and, with all due respect, sir, much like you're making today. And people drew conclusions from that and passed legislation on that.

And now, the black and brown communities have suffered for well-over 20 years from that type of -- this type of panel discussion. So, I want us to make sure that when we're talking, we're very clear of someone's opinion versus evidence of something. And so, I think those things lead to more harmful outcomes than helpful. So, thank you so much for your testimony today. And thank you, Attorney Young. I'm finished.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you, Chief. Director Malachi, questions or comments for the Professor?

DIRECTOR MALACHI: So, actually, in rare Commission form, between Lieutenant Morrison and Chief Edwards, my questions have been asked. One thing that I did want to mention, and maybe Lieutenant -- I'm sorry, Chief Dennis -- sorry, Chief. Maybe Chief Dennis will get into the legal definition of racial profiling. We've talked about a lot of different things. I don't want to belabor us anymore. And I would like to give Chief Dennis an opportunity to ask his questions.

One last thing, I know we've talked about State v. John Hernandez. And I believe the Finding on that was that it was not an impermissible stop. So, my concern, I guess, as we go forward with other testimony from other witnesses, that we really stay true to apples with apples and not apples with pineapples, because when we don't put the entire set of facts out there, then it's easy to skew it any which way you'd like. And so, if we're going to mention a piece of a case, I think it's important that we discuss or at least have the bullet points in totality of what happened. So, I just want to put that out there. I appreciate the Professor's lengthy testimony. I appreciate his wisdom in teaching students. And I thank him for recognizing that he has work to do, as we all do. So, thank you for that.

PROFESSOR SCHERR: You're welcome.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Chief Dennis?

CHIEF DENNIS: And thank you, Deputy. And thank you, Professor, for your testimony this morning. As the Deputy said at the very beginning, the opening statement is usually the short part. Your testimony is everyone asked questions.

But, to answer Ahni's question just quickly about racial profiling, that would basically be Law Enforcement using race or ethnicity as the only grounds of stopping someone and suspecting them of committing some sort of offense. So it's where you're using that as the only reason you're stopping someone, or interacting with them, is because of their race or ethnicity.

So, Professor, I've had a little bit of time to type, as other people asked. And I just know, at least from my experiences, Prosecutors do reach out to Law Enforcement Executives about issues that they see as being problematic with cases which include maybe the actions or inactions of witness Officers. During your testimony, are you just trying to say that this type of prosecutorial interactions with Law Enforcement Executives is just not occurring as often as they should be?

PROFESSOR SCHERR: Yes, I think that's true. I think it varies from Prosecutor's Office to Prosecutor's Office. I think it varies with the training that occurs within a Prosecutor's Office. I think it varies with the experience of the particular Prosecutor. It varies with the Police Department.

I mean, I've seen -- to be honest with you, I'll give you a perfect example. When I was practicing oh so many years ago, even before the Carl Laurie case, in a -- and managing a local Public Defenders Office, there was one Police Department in that jurisdiction that was in a fight with the County Attorney's Office. They just didn't get along.

I mean, you may have seen this in sort of -- they just didn't get along with them. And I would often call up an Officer, or talk to an Officer, in court. And I would get more information about the case out of the Officer than the Prosecutor on the case would, because I had a better relationship with the Officer.

The nature of the relationship between Police Departments and Prosecutors' Offices is challenging. And done well, it can be a really productive one where Prosecutors can educate a Police Department and Officers, and improve their policing. And Police Officers can educate Prosecutors about the realities of what's going on, on the streets, so to speak. That's a very creative and positive relationship.

But too many Prosecutors' Offices don't have systems in place to manage that. So, as often is the case in New Hampshire, when there's good people involved, good things tend to happen. But when there's people who are lazy, or just mailing it in, or whatever, are not venal or mean-spirited people, but aren't doing their hard job as well as it could be done. Without systems in place, those people get entrenched in the system. And you have abuses. And I've -- I'll leave it at that.

CHIEF DENNIS: Well, thank you for that, Professor. And certainly we've heard people talk about culture. We've discussed it in our Commission. And not only is it extremely important within Law Enforcement Agencies, you're correct also, in prosecutorial, or County Attorney's Office, it's just as important there, too.

You'd mentioned the State v. Ernest Jones case. And I just want to talk. I kind of want to use that as an example and kind of ask you a question. So, here I kind of go. To sum this up quickly, you said that the Police had no reason to keep Jones detained for approximately 20 minutes. So it had to be racial profiling, or was because of his race. Is that accurate?

PROFESSOR SCHERR: I suspect that the reason they detained him for 20 more minutes to do the record check, which eventually turned up the Bench Warrant, they retained suspicion of that vehicle being there, and that there was something suspicious about it. And I'm hard-pressed to figure out another reason, other than -- not a conscious bias -- other than this implicit bias that, wow, this is weird. This is suspicious. And that's the insidiousness of implicit bias.

I do not think that either of those Officers was saying out loud, this is a black guy, to themselves or to each other. This is a black guy. We're going to hold onto this guy for a lot longer and run a License check and a record check. I think it's an example of implicit bias. I don't think there's really any other explanation for that.

CHIEF DENNIS: Okay. And certainly we know, as from testimony we've had before our Commission, that there is a disproportionate number involving people of color being incarcerated in our State. And we know from testimony in the Commission that better data needs to be collected regarding traffic stops and different things like that. And you've certainly spoken to data collection. But with that said, the majority of people stopped and arrested within the State of New Hampshire are not people of color. Would that be an accurate statement?

PROFESSOR SCHERR: Yes. Just on what data I've seen.

CHIEF DENNIS: Okay. Well, I would imagine if you look at the numbers within the State, I mean certainly most of the people that are going to be stopped is going to match the number of -- that higher number within the State.

But I'm finally getting to my question here. Using the elements of the Jones case, could this following scenario occur? You have a white male and a white female in a vehicle that is called in as suspicious. A white Officer responded to that call. And after the Officer determined that the female was a resident, that they could have been detained for approximately 20 minutes, and the Police really had no reason. Has cases like that occurred before?

PROFESSOR SCHERR: Sure.

CHIEF DENNIS: Okay. So my question to you is, what is that called?

PROFESSOR SCHERR: Well, I don't think it happens anywhere near with the frequency. It happens occasionally, yeah.

CHIEF DENNIS: Okay.

PROFESSOR SCHERR: But I don't think it happens nearly with that frequency for this reason. I would wager. Again, I don't want to make the world of the Jones case. But the -- probably the original reason for the suspicious vaccine was called in was because the caller was suspicious of a black male driving a pickup truck. So, I think that call gets made far more frequently when it's a black person and a white person in a parking lot, than when there's two white people in the parking lot.

CHIEF DENNIS: Okay. So basically you're saying there could be part of the person calling in could be part of the original problem to why it was called in, in the first place?

PROFESSOR SCHERR: Yeah.

CHIEF DENNIS: Okay.

PROFESSOR SCHERR: Yeah, the issue of the implicit bias is not exclusive to Police Departments by any stretch, or Prosecutors' Offices, or Lawyers' Offices, or Professors' Offices.

CHIEF DENNIS: Right, but certainly Law Enforcement is the one that gets tagged with the -- I guess the tag of racial profiling, which we know does occur and has occurred, and continues to occur. I think that's what we're trying to figure as to what extent it does occur.

But, anyway, it was just something as I kind of thought and processed that case, because, as a Chief and other Chiefs around the State, we handle complaints from any and every person. I've had complaints from white people saying they were detained for no apparent reason. So we deal with the full gamut of

people making those comments. So I just appreciate your time answering the questions for me. And thank you.

PROFESSOR SCHERR: If I could just follow up very briefly, Chief?

CHIEF DENNIS: Sure.

PROFESSOR SCHERR: And I appreciate your comments. This is going to grossly oversimplify it. But if every Officer asked themselves when they approach a car, having stopped it, and sees that it's a person of color, asks themselves, what I'm doing next depend on the race or ethnicity of this person, or what I know objectively. I think that's a culture change for some Officers in New Hampshire.

To go back to Director Malachi said, yes, in the Hernandez case, the Court found it was not an illegal stop. But it did find that the behavior that followed that by the Officer was illegal. And that's -- I want Officers and Prosecutors to ask that explicit question of themselves. Train themselves to think it through, because it's such a hard problem for everybody in the country. Ask that question. Why am I doing this? And really force yourself -- oneself to answer that question honestly. That's what I think the culture we need to develop.

CHIEF DENNIS: Great. Hey, thank you so much, Professor.

DEPUTY ATTORNEY GENERAL YOUNG: Gilles, you have a question or comment?

DIRECTOR BISSONNETTE: Yeah, I had one final question. And it had to do just with pretextual stops, Professor Scherr. So, I know that Officer Morrison talked about how pretextual stops have been permitted. And that's the Wren Decision, which I know that you're familiar with, right, Professor Scherr?

PROFESSOR SCHERR: Yes.

DIRECTOR BISSONNETTE: So, I guess my quest...

PROFESSOR SCHERR: Yes, I'm very familiar with it.

DIRECTOR BISSONNETTE: Yes, so I guess my question is this. So, Wren allows for pretextual stops under the Fourth Amendment. But would you agree with me that that's only essentially a floor and that there's nothing that would prohibit this Commission to recommend that we bar pretextual stops, because of concerns that we may have with them, despite the fact that Wren concluded they were constitutional? Is that something that you would agree with me, especially in light of a lot of the criticism that's been given to pretextual stops in the Wren Decision?

PROFESSOR SCHERR: Yes, I would agree completely with what you say. I think there is room for this Commission to make recommendations to the Legislature about how to deal with pretextual stops. It's a difficult issue to prohibit.

But I think there are shifts in presumptions that can be -- again, not to get too technical. There are ways that it can be done that will shift the balance a bit, without making it a useless exercise, that I think would be very, very constructive. And I'm certainly willing to participate in that process going forward.

DIRECTOR BISSONNETTE: Thank you, Deputy Young, for indulging that question. I'm done. And I know that we're approaching a break.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. So, I will sort of conclude. I've heard a number of questions and I thought that I would make my comments at the end. I have had the honor and the privilege of being a career Prosecutor. I started off at a County Attorney's Office and came to the Attorney General's Office.

This starts and ends with leadership. You have to have somebody in that office who understands the process. And you have to have somebody that can tell you right from wrong. And if there is a metric on how many cases that you have won and you have lost, it is time to find another career.

Prosecutors are here to do justice. And there have been cases where you find out information and you think, oh, boy, there goes my case. And you should be able to go to a Supervisor that will tell you exactly that. Turn that over to the Defense and call the Chief. And you have to be taught at a very early age that you have to be able to stand up and tell the Police when they have done something right, and tell them when they have done something wrong.

I can give you an example of I tried a case where two individuals came out of Massachusetts and they were selling a kilo of cocaine. Prosecuted the first case, jury found the Defendant guilty. Getting ready for the second case and because I had strong professional relationships with the Police Officers, somebody said to me, yeah, you may not want to call this one Officer again. I think he has some problems.

I didn't take him off my witness list. I called the Chief and said, what's going on? Turn that file over. And instead of doing as I directed, the Chief called my boss and said, what is she doing? That file went to the Court. That witness was not called. And I turned around and gave that information to the first case that I had tried and where the jury convicted the individual.

Didn't do anything to that case, because I could make an argument. But anywhere along the way, if there was a Supervisor that just said, no, don't upset the Police, that's how you forge relationships. You have to communicate. And that communicates -- that starts at the top-down.

So, I don't mean to get on a soapbox. But if we are going to look at that honestly, you need to have leaders that understand the process that can teach and that can change to tell the Prosecutors what needs to be done, that could withstand the heat when it comes, whether it's from a Police Chief or from a Defense Attorney, or from the Supreme Court. That's what we need, leadership across the board. Leadership that can engage their people in their office and leadership that can engage with the Police Chiefs, with the Public Defenders, and the Defense Attorneys.

So, those are my comments to some of the questions that have been answered through here. But, again, the win-or-loss is not a Prosecutor's job. It's to do justice, because when you -- when somebody is found guilty, you want to ensure that they're found guilty based on the strongest admissible evidence, both for the system, but, as Chief Edwards said, the Defendant. But you also in most of these cases have victims and victims' families. That's the only way this system is going to work. And with that, I will give you a eight-minute break until noontime. And then, Matt Broadhead is on. Hey, Maria, you can pause until noon, okay?

MS. EKLUND: Okay. I'm pausing now.

(Off the record at 11:52 a.m.)

(On the record at 12:00 p.m.)

MS. EKLUND: We're now recording.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you, Maria. Good afternoon, Commission Members. We are back on the record after an eight- or nine-minute break. Joining us next is Senior Assistant Attorney General Matthew Broadhead.

Attorney Broadhead, I saw that you were on the line for the first presentation. So you have three minutes. Yesterday, your slides were shared with Members of the Commission. I know that you probably want to go over those slides. But you also are to know that everybody, I trust, has reviewed them.

So, with that being said, Attorney Broadhead, you are up and you have three minutes, which will then be followed by questioning by whichever Commission Members would like to ask you questions and make comments. Thank you, Attorney Broadhead. The floor's yours.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Thank you, Deputy. Good afternoon, everybody. My name, as the Deputy said, is Matthew Broadhead. I'm a Senior Assistant Attorney General. And I'm the Bureau Chief for the Transportation and Construction Bureau.

In that role, I serve as the Chief Legal Counsel to the Department of Safety, including the Division of State Police. And I've had the opportunity to litigate a number of cases involving qualified immunity and alleged misconduct in State Court, Federal Court, as well as the First Circuit Court of Appeals. And this is something that I've grown familiarity with and happy to cover as much as I can within three minutes.

Prior to joining the Attorney General's Office, I did maintain a civil litigation practice in Dover in the area of Civil Rights and Employment Law. And I represented victims of racial and sexual harassment discrimination in lawsuits against Government Units and Employers, as well. So I do bring that as my background.

I'm going to share my slide here. I'm going to at least attempt to. So, in order to bring a lawsuit against a Law Enforcement Officer, you need to first file a complaint that sets forth sufficient facts to establish a Claim against the Officer.

There are generally two vehicles by which a person can bring a Claim. One is under Federal Law. That's 42 U.S.C. § 1983. It's commonly referred to as a § 1983 Claim. And you can bring an Officer -- a lawsuit against an Officer under State Law. And Claims against State Police Officers -- although all State Employees, actually, are covered under RSA 541-B, it's not specific to Law Enforcement. And then, the Municipal Officers are subjected to liability potentially under RSA 507-B. There's some overlap between the State Claims. But it's not -- doesn't 100% sync up between 541-B and 507-B.

Under Federal Law, the § 1983 Claim, you are -- it's an alleged violation of a constitutional right. That's the first element that you need to meet is that there's some sort of right that's under the U.S. Federal Constitution that has been violated. And that's the vehicle to bring that Claim. So a common example is Fourth Amendment, where somebody alleges either an unlawful seizure, unlawful arrest, or excessive force. The State Law Claims are generally for what are called intentional torts, so assault, battery, or malicious prosecution all included under that RSA 541-B.

In terms of after a Claim is brought, the Law Enforcement Officer may assert certain types of immunities, depending on the type of Claim. Immunities are not a mere defense. It's important to distinguish between what a defense is, in terms of a Claim. That's something that is raised at the trial stage. And immunity is an immunity from the suit, itself. So it's determined at the earlier possible stage of litigation, to the extent that it can be determined.

What you need in order to assert immunity under Federal Law is that there is a Qualified Immunity Doctrine that provides that if there's no disputed facts as to the conduct -- and that's a key distinction, that there's no dispute, in terms of how the arrest was made, or how the force was used or applied. There's no dispute over that. Then, the Plaintiff has to show, in order to bring their Claim, that there was, one, a constitutional violation that occurred; and two, that the right was not clearly established at the time of the alleged conduct.

There doesn't need to be an identical case. That's a common misconception in the qualified immunity context. There does not need to be a preexisting case that puts the conduct at-issue that squarely decided whether or not something is or is not constitutional. Rather, it needs to be kind of a robust consensus that would be sufficient to put an Officer on notice.

And this is judged from an objective standard. It doesn't matter what the individual Officer's motivations were in using the force or in seeking the arrest, or the seizure. It's judged from a reasonable person standard.

Immunity under State Law, there are three general ones that typically could apply to Law Enforcement Officers. One is official immunity that is raised, under RSA 99-D. There are a couple cases on this that govern Municipal Officers, as well as State Officers, acting within the scope of their duties. And the -- what official immunity is, it's a little different than qualified immunity. And again, this just applies to State Law Claims. If an Officer is immune from liability if they act within the scope of their duties, they took some sort of discretionary act, and that it's not made in a wanton or reckless manner. So there's a reasonableness approach to this, as well.

But it does -- under 541-B, the same standard applies. However, you look to the Officer's subjective intent, meaning did they believe that their actions were actually lawful. And so, that's the immunity from tort liability under 541-B.

Discretionary function immunity really comes into play for all State Agencies. This is an immunity that exists when there is decision-making that's occurring at a high level. A good example of this is DOT, when they are planning to replace an intersection, or a light at an intersection, they look at the State resources and where they need to deploy one Emergency Crew versus in a different location. And those kind of high-level decision-making can't lead to liability. And where this applies in the context of Law Enforcement would be deciding whether or not to conduct training or how to deploy certain resources.

And then, the final question, this doesn't necessarily apply to immunity, but just so that you know, so that the Commission kind of is aware of what RSA 99-D also provides, it provides that the State defends and indemnifies. That means we pay for their Counsel, anybody that is sued. And we pay for any sort of judgment, or settlement, that would result from any of the alleged Claims against the Employee, provided that the person acted within the scope of his or her official duty and that the acts were not wanton or reckless. So, that is my presentation in a nutshell. I covered a lot of ground. It is a privilege to be able to present in front of you, Commission Members. And I look forward to your questions. Thank you.

DEPUTY ATTORNEY GENERAL YOUNG: President McKim, your hand is up. This is just for you, this presentation. So, here you go.

MR. MCKIM: Thank you very much, Deputy. And thank you, Assistant Attorney General for your testimony. And this is certainly helpful to me, and hopefully to other Commissioners, as well. I'm -- we're here and we've talked quite a bit about implicit bias. And we've talked quite a bit about this implicit bias being unconscious.

And my observations and experience have shown that, when people are faced with situations where their implicit bias is manifest, they sometimes act in ways that indicate that they are fearing for their lives. And so, I'm really curious about your -- the slide when you talked about the Federal Claim and the reasonable Officer, what a reasonable Officer would do.

I'm grappling with how an act driven by unconscious implicit bias is rated as reasonable for another Officer or not reasonable. And I'm fumbling through this, because I'm really, really struggling with it. So I wonder if you can shed any light, or share your thoughts, on how this unconscious implicit bias and whether someone is reasonable versus unreasonable, and Officers fearing for their lives and taking action based on that. Help me, please.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: It's a good question. And there's a lot to unpack there. All I can say is that in cases where I've litigated some of the fearing for either the lives and safety of the Officer, or for others, in that matter, I've seen it come up in a couple cases, not in the context of implicit bias or race-based fear. And so, I haven't seen that specific and how a Court would address it.

But the case that I'm thinking about right now is there was an Officer-involved shooting where the Officer was positioned in front of a vehicle, where there was a woman -- a white woman who was driving in the car. And he had his firearm drawn and was approaching the vehicle. And he did subjectively believe -- and I think there was no doubt in anybody's mind that he subjectively believed that he was in fear of the car being driven at him.

The Court has to, under qualified immunity, disregard that fear. They need to look at the objective facts of how much time was transpiring between the Officer approaching the vehicle. How much time he -- whether he had other means of evading the car; whether -- the distance between the Officer and the car; the data that was in the dashboard, the black box, so to speak, in the car that showed the rate of acceleration. So these are all objective.

I'm not sure that I'm going to be great at answering your question. But the Court will look at it from an objective perspective, based on the facts. The Officer cannot just explain their way out of a situation by saying, I was in fear of my life. And so, qualified immunity, at least under Federal Law, instructs the Courts to disregard that fear. Does that answer your question?

MR. MCKIM: I don't know. I'm still processing it. And it's interesting. Because we're talking about unconscious implicit bias, I'm not sure that an Officer would know that they had it and would even state it. So, how do we get at that motive for an action?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Yeah, so I do think that, in cases -- now, this is typically what you'll see where a organization such as the ACLU, or some other entity, have in the

past brought lawsuits against municipal -- and I'm thinking of one case. There was a Chicago case where there was an allegation of widespread racial profiling.

And all I can say is that it would be something like that turns to the data more so than the subjective or lack of subjective unconscious bias. The cases that I've seen haven't focused on that as a predicate to liability. It's more data-driven is what I would say.

MR. MCKIM: Okay. Still processing; so I guess I'll just cut someone to the quick here. We are tasked with making recommendations to the Governor, in the wake of the various murders that have happened over the last few months. And since we've talked a lot about the need for implicit bias training and the fact that it's not quite as prevalent as we would like, are there any recommendations you think we should make in the meantime around qualified immunity, or any other laws that we have for that matter. But, we're here specifically about qualified immunity, but that can help us to address the situation on unconscious implicit bias, until we get the training there, or even afterwards. I'm sure we'd want it. But just curious to your thoughts as to what we might do to address the situation.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Sure, and I'm going to give an unsatisfying answer. And I apologize in advance for it. But our job, at least in my role in representing the State Police, is to not engage in policy and just simply apply the law, as it exists.

I will say that for there to be a change in qualified immunity, because it is a Federal Doctrine, State privileges or immunities don't apply in Federal Court. So that would need an act of Congress to remove qualified immunity.

And with respect to the State Policies, I can at least explain what the Courts -- why they apply this immunity. And I could read from a case from Massachusetts where the Doctrine is intended to balance two important interests.

One is the need to hold the Public Officials accountable when they exercise power irresponsibly. In the murder of George Floyd, there is no way that an Officer in that situation will be afforded the protections of immunity. The way that the Doctrine is intended to provide, it provides safe harbor for those Officials who maybe make a bad guess. But they're protected from liability from harassment or distraction, or things of that nature, when they end up making a bad guess in a gray area.

And I think Chief Dennis had -- or maybe it was the Lieutenant who had said, well, these are judged by the Judge in cool chambers, 20/20 hindsight. But these Officers do have to make split-second decisions. And that is kind of where the qualified immunity, the immunities, that's the policy reason why Courts have adopted that layer of immunity.

But outside of that, I express no opinion as to whether or not the immunities should be changed or whether the laws should be expanded to permit more suits, or less suits. I think I'd defer to the Legislature and to this Commission to make those types of recommendations.

MR. MCKIM: Thank you. And I understand the reasoning for the qualified immunity and I certainly support it, as I think it's an important -- what's the word? I know it's tool, but an important law to protect those who are on our frontlines and making those split decisions which none of us -- or many of us would not want to be in the position to make.

So I certainly don't want to come across as wanting to get rid of it. I'm just looking for that middle ground to address the situation we're in. So I thank you for your testimony. And I appreciate the position you're in, as well, not able to make policy recommendations.

So, I guess I would, though, ask one last question for you, and perhaps this is for the Deputy Attorney General, as well. Where could we go to get some guidance on what recommendations we might make in this regard?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: That's a good question. Jane, did you want to -- oh, okay. So, I'd defer to the Officers, themselves. They are -- they offer a unique perspective on what it is like.

If I could share just a brief description of a case -- of a recent case involving qualified immunity, it involved a gun -- a threat to a school system. And somebody posted a -- a student posted a message on Facebook saying essentially that he was going to harm everyone in the school and all of the bullies that had been bullying him for years. But he didn't make a specific reference to what type of method he was going to use, whether it was a gun or a bomb. It was a generalized threat.

And the Officers, acting very quickly, responded and arrested the individual. Ultimately the charges were dropped, because the element of the offense requires a specific reference or an inference as to what method the person was going to do -- or to use.

I think we don't want Police Officers thinking in the back of their head, when taking this type of action, whether or not they could be subjected to liability, because if they chose to not take action and something happened to the school, I think that public perception of the inaction could outweigh it. So, in that case, Officers were granted qualified immunity in that case, because they don't need to be legal savants in order to bring a Claim. And so, that's just kind of one of the examples of we do want to -- I'd defer to Police Officers who are making those decisions on making those types of recommendations to tweaking our immunities, because it affects them more so than it would affect me.

MR. MCKIM: Thank you for that. I think that's very well-said and very important to hear from those who would be impacted. And I think we have a number of them also on this Commission who could speak to that. I think Chief Edwards was raising his hand. And I would love to hear his thoughts.

DEPUTY ATTORNEY GENERAL YOUNG: So, Chief, if you want to respond to that question, go ahead. And then, Gilles has his hand up, as does Rogers. So, I will call you in that order. But, Eddie, if your comment is to this topic, the floor is yours.

CHIEF EDWARDS: Well, my comment is to this topic, because I just want to get a clarifying issue with Commissioner McKim. The NAACP, I think it was Mr. Cofield, testified before the Commission. And in his recommendation, that was supported by you and other Members of the New Hampshire NAACP, called for Statutes to eliminate qualified immunity.

So, today you said you support it, which I'm happy to hear. But I just want to -- so that we're clear on the record, there was a document produced that said that the NAACP wants to eliminate it. And you're supportive of it.

MR. MCKIM: Yeah, so the document from Mr. Cofield did indicate the NAACP National's position of eliminating qualified immunity. As President of the Manchester branch and from what I have seen, I -- from a national perspective, I have to support what National says.

But I personally believe that there is a reason. There is a valid reason for having a Qualified Immunity Statute. I am hopeful that there is a way to modify that Statute to address some of the issues that have been surfaced around it.

And I don't know whether there is a way to do that. If there isn't a way to do that, then perhaps we should eliminate it. But I don't have enough evidence right now, myself, as I serve on this Commission, to say that I wholeheartedly, without any reservations, support totally eliminating qualified immunity.

CHIEF EDWARDS: Okay, thank you.

DEPUTY ATTORNEY GENERAL YOUNG: Gilles, Rogers has his hand up. So I don't know if he wants to weigh-in on this topic. So I'll come back to you last. So, Rogers, the floor is yours.

MR. JOHNSON: Thank you, Jane. Speaking on behalf of the NAACP for the Seacoast, in talking with our membership and other individuals, we have looked at both National and NEAC's position on qualified immunity. And the one thing that I can say for sure is that their approach was referenced really toward major municipality areas, such as Boston, Worcester, Springfield, and national issues. And they're not totally reflective of New Hampshire.

Speaking on the part of being a New Hampshire resident, I honestly believe and wholeheartedly support qualified immunity, because it is a (inaudible) in New Hampshire. So I am at odds with National. And if they'd like to call me about it, I will let them know. I will tell you that this would not be the first time that both National and NEAC have been at odds with the Seacoast branch. And I will fully stand up and support that.

But I had a secondary question to Counselor Broadhead. If I had the opportunity to ask you this question, this is something that I've been trying to get at the better part of, I'd say, three weeks. Counselor, first of all, thank you for your testimony. I want to ask you this question. And I don't know if you have an answer for this, because it may be somewhat hypothetical.

But we have heard testimony that there is an effort afoot to replace Police Officers with other individuals to respond on urgent situations all across the State. They are called the Community Response Team.

The question is: should this Community Response Team respond to a situation and something untoward happen, are they protected by qualified immunity? Or are they subject to civil or criminal penalties, in a situation where a Law Enforcement Officer should have been called in the first place? What happens here?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: It's a good question. My -- and one that I had not researched previously, so my off-the-cuff answer is qualified in a, I would need to do some more research to give a definitive answer.

But, the -- what the § 1983, specifically with respect to qualified immunity, it applies to all persons acting under color of law. So, the definition of person is a natural person, or a Municipal Department. It does not include States.

So my first answer is, as long as there's a Statute that authorizes somebody to take action, under State Law, that they would be a person acting under law and would be entitled to immunity. That's simply, well, to the application of qualified immunity in the right instance. So, my first kind of shooting off the side of my hip, I think that they would be covered.

Under State Law, it probably is a little bit more unclear. Yeah. I would make a recommendation that it's always better when something is spelled out in law, rather than trying to read between the lines. So if there were to be some sort of statutory authorization, I think addressing immunity there would go a long way, whether or not it does or does not apply to those individuals.

MR. JOHNSON: Well, then, to follow up, I am going to make the suggestion. I hope you would concur that it would be a recommendation of this Committee to make sure that that language is made clear so that those individuals of these Crisis Response Teams, or the like, either are afforded immunity, one way or another, because if we now make the suggestion to remove qualified immunity from the Police Departments, they're going to be subject, as well, meaning who in their right mind on a Crisis Response Team would then respond in a situation where they could be liable if something bad were to happen?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Right; and I'm going back to my Tort Law days. But there is such a thing as -- there's generally that bystanders don't owe a duty of care under negligence to other bystanders.

But there is a -- I'm going to call it a Doctrine that's called the Botched Rescue Doctrine, because that does trigger liability, potentially, if you do engage in conduct where you are trying to take steps to help somebody and then botch it, and make the situation worse. You can be subject to liability under Civil Tort Law. That's a gross oversimplification (ph). So I would have concerns that if immunity wasn't addressed in the Statute that somebody could be subjecting themselves to liability, correct.

MR. JOHNSON: Thank you, Counselor. I appreciate your response. And I'm finished, Attorney General Young.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. Gilles?

DIRECTOR BISSONNETTE: Thank you so much, Attorney Broadhead. And it's good to see you again. I know we see a lot of each other the past few weeks.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Yeah, good to see you.

DIRECTOR BISSONNETTE: Good to see you. So just to be transparent, I, along with the ACLU, are very concerned about qualified immunity. We've issued Briefs condemning the Doctrine and its applicability, even in egregious cases. And I only say that not to give a speech but just to be transparent about where I stand on the Doctrine and where the ACLU stands on the Doctrine.

So, just to start off, would you agree with me that qualified immunity, it's not enshrined in Federal Statute, but rather it's a Doctrine that the Courts came up with in the late-'60s, and it was expanded upon in the 1980s, with respect to its clearly established element? Is that something that you'd agree with? Do I have my history right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: That is my understanding. They do tie it back to the Statute. And (inaudible) by any means, but it is a Doctrine that has been developed in Federal Court.

DIRECTOR BISSONNETTE: Yeah, for Federal Constitutional Claims. Yeah. No, I got you. So it's -- and just to be clear, too, qualified immunity is not limited. Its usage is not limited in situations where a Police Officer is making split-second decisions, right? I understand that may be the rationale. But it's not limited to those situations, right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: It is not. It applies to...

DEPUTY ATTORNEY GENERAL YOUNG: Gilles, we're having a hard time hearing. So if you're not speaking, can you turn your mic off? So, Matt, we haven't gotten any of that. Gilles, can you shut your mic off...

DIRECTOR BISSONNETTE: Oh, I'm sorry. I'm sorry about that.

DEPUTY ATTORNEY GENERAL YOUNG: It's okay. It's all right.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Thank you. Yeah, it was a little distracted there. So it can apply to Officers obtaining Grand Jury Indictments, if they misstate or misrepresent facts. It can apply to Due Process Claims. It can apply to -- yeah, it can be applied in certain circumstances where there are not split-second decisions. That's correct.

DIRECTOR BISSONNETTE: Yeah, I'm not trying to ask a gotcha question. I'm just trying to essentially make the point that I understand the rationale for the Doctrine. It's designed. The Courts have framed it as being necessary to help immunize Officers who make split-second decisions. It is used in situations that go far beyond the split-second decision-making of Police. So I just wanted to make that point. I'm not trying to be difficult about that. But I just think that's an important thing to highlight.

And so, my next question is: qualified immunity, it's a -- I'll use the term. I'm not putting words in your mouth -- a Federal construct for Claims arising out of the Federal Constitution. But there would be, to be clear, nothing barring this Commission from recommending a State cause of action, or damages arising out of the New Hampshire Constitution, which would be like § 1993 [sic], but where a qualified immunity would not be a defense, which would be unlike the Federal System we have in Federal Court. There'd be nothing that would bar the New Hampshire Legislature from putting forward a law like that, right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: The Legislature can do what it wants. And I've always taken that position. And our job is to just uphold whatever laws the Legislature puts in place.

DIRECTOR BISSONNETTE: (Inaudible), just so everyone knows, most recently after the murder of George Floyd created a State cause of action where qualified immunity isn't a defense. And I'm previewing a little bit what I'm going to testify about tomorrow. But I just want to make clear that even though

qualified immunity is a Federal Doctrine, there are still things we could do, I think, in New Hampshire, if we wanted to go this route to create a right of action in State Court where qualified immunity was not on the table.

So, just some questions about just the clearly established law prong, because this is just the piece that has always concerned me, and it concerns me when I read the cases. I think you're right that you don't necessarily need an identical case. But it seems to me, reading cases particularly out of the last 5 to 10 years, you have to find a case that may not be identical but is like really, really, really -- I'll say really five more times -- really, really close. And if you can't find it, the Officer is immunized.

And Judge Reeves out of Mississippi just wrote a written Decision where he -- I'm getting to my question -- where he explained the clearly established prong this way. An Officer cannot be held liable under this prong, unless every reasonable Officer would understand that what he's doing violates the law. It doesn't matter as the Fifth Circuit -- that's for Mississippi -- explained. It doesn't matter that we're morally outraged or the fact that our collective conscious is shocked by the alleged conduct, because it doesn't necessarily mean that the Officials should have realized that the conduct violated a constitutional right. And he documents a lot of cases where really offensive conduct was immunized.

And so, I guess what I'm trying to get at is, I mean, wouldn't you agree with me, maybe I don't need to find an identical case, but that I need to find basically a case that is very, very similar to defeat qualified immunity? And that's a pretty high bar to holding an Officer liable, even where the Officer's conduct could be troubling or in bad faith.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: So, that's not the law in the First Circuit. So I don't know the case that you're talking about. But some of that language that you're citing I don't think would fly in the First Circuit.

I litigated this exact issue on what level of generality is needed in order to find that something was clearly established. And I commend to everybody's reading. It's a case -- it's my case. But it's *Belsito Communications v. Decker*. And it's a First Circuit case where this is discussed at-length.

And really what the First Circuit looks to is two aspects. And actually, I can quote from that *Belsito* case. They say that the -- well, the Plaintiff does not need to show that the complained-about conduct is the spitting image of conduct previously deemed unlawful. He must show that the conduct's lawfulness was apparent.

So, the First Circuit looks at whether or not the conduct is debatable. If it's within the gray area of that it was debatably constitutional, then the overlay is that immunity would apply. And that is because to fulfill the purpose of if it's in a gray area, the Officer should be protected, whereas the controlling authority does not need to be an identical case. It just needs to provide a consensus of pervasive authority sufficient to put an Officer on notice that his conduct violated the constitutional norm. And then, the second part of that is whether the reasonable Officer would have known that the conduct violated the law. So I think it's a little nuanced there. But I would disagree with that Fifth Circuit case that I don't think that's the state of the law in the First Circuit.

DIRECTOR BISSONNETTE: Thanks. No, I'm looking at that case right and robust consensus, right? I mean, did the State argue qualified immunity in this case?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: We did. Yeah.

DIRECTOR BISSONNETTE: So that is kind of the point I'm making, right, is that this is a very vibrant defense that even if ultimately unsuccessful in court -- and it often is successful in court -- is a tool that could be used by the State quite frequently to resist liability. Just unqualified immunity, itself -- if qualified immunity doesn't exist, that doesn't mean that the Officer can't make his or her case at trial that he or she shouldn't be held liable, right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: No, you're correct. They would be able to assert just the normal affirmative defenses at trial. I think what immunity is designed to do for Officers is every time there is a pending charge related to a potential crime, that the Officer shouldn't be subjected to a counter lawsuit in an effort to protect the -- to basically increase the pressure on the Officer to either drop the charges or not. It's to protect them from harassment in all of those cases, except for the most egregious. That is the Policy that the Judges continually point to on those types of cases.

DIRECTOR BISSONNETTE: Yeah, regular citizens, you and me, don't get that protection, right? Well, you may, as a Prosecutor, but I'm not. I don't get that protection as a regular citizen, right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: The persons must be under color of State Law. So it was intended to protect Government Officials who are engaged in conduct that might touch upon a constitutional right. So, it's not just Law Enforcement Officers. But certainly they are a big component.

DIRECTOR BISSONNETTE: Last question, because I've been going on, and I'm sorry to be grilling you like this. It's only some -- it's a Doctrine that's complicated. But it's just really been something that obviously we're thinking a lot about these days, in light of recent events.

So even if when an Officer is sued and even if that Officer invokes qualified immunity or ultimately qualified immunity doesn't apply, they're indemnified, as you said, right, unless the actions of the Officer were -- it's wanton and reckless. I can't remember the exact phrase, right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: That's correct.

DIRECTOR BISSONNETTE: So if we didn't have qualified immunity, an Officer would still be indemnified, unless his or her actions were wanton and reckless. So no one's taking the Officer's house, is what I'm saying, unless that wanton-and-reckless standard is satisfied, according to the municipality or the State, right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: That's correct. Practically speaking how this works is that, at least for State Employees, an initial decision is made by the Attorney General as to whether or not somebody will be defended and indemnified. If that comes down as, no, we are not going to defend and indemnify, they have the right. The Employee has the right to appeal to the Governor and Council to overturn that decision.

In one of the cases that was referenced in the morning testimony, there was an Officer, a State Trooper, who had engaged in conduct that was deemed to be wanton and reckless. And there is a civil lawsuit pending from that matter. And we are not defending and indemnifying that particular Officer.

So, it does happen. But in my experience, it is pretty rare to not defend -- to not extend defense and indemnification to the Trooper.

DIRECTOR BISSONNETTE: Last question, I promise. Are there -- is qualified immunity, is it raised in every case, in your experience, by the State?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: That's a good question. I struggle to think of one where we have not. So, I think we've raised it in most cases. But, again, that's mostly because if the Officer didn't act wanton and reckless, there's usually a basis to -- because we are defending and indemnifying, there is a basis to believe that the act was constitutional.

DIRECTOR BISSONNETTE: But, under qualified immunity, an Officer can be immunized even where he or she acted in unconstitutional way, right?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: That is correct. The Doctrine provides that if it's in the gray area that there's no case beyond -- on point -- and that Belsito case is a good case on this, because it was with respect to a seizure of a mobile phone of a -- sorry, a digital camera device. And at the time of that case, there was no robust consensus. There was no even consensus on how to treat seizing digital equipment without a Warrant.

As you know, there has been caselaw that has intervened since that case. And so, there is now more guidance on it. And so, as new technology develops, the law is not always clear as to what Officers can and cannot do. And so, it's designed to protect those Officers who are making those types of decision. And in that case, it was -- the seizure was to prevent the deletion of data, which could have been used to support the elements of the crime.

DIRECTOR BISSONNETTE: Thank you, Attorney Broadhead. I appreciate you taking these questions very much. Thank you.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Of course, Gilles. And I do note for the Commission that there was a House Session where we worked with the ACLU to draft some suggested language on creating a cause of action under the New Hampshire Constitution. And Gilles, I hope you still have that draft. But I do appreciate for the times that we can work together, we do work together.

DIRECTOR BISSONNETTE: Yeah, we do. And I think, to be honest, my thinking with respect to the immunities portion of that has maybe changed, in light of recent events. But you're spot-on and it was a good collaboration. And I appreciate it.

DEPUTY ATTORNEY GENERAL YOUNG: Hey, Matt, I want to ask a follow-up question to Gilles' question. If there is a State Officer who is charged with a crime, or convicted with a crime, would that defense be raised?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Meaning would the -- would it -- does that mean that we would not defend and indemnify them, based on the conviction? Is that...

DEPUTY ATTORNEY GENERAL YOUNG: Correct.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Yeah, so that obviously, if our office is prosecuting, we usually have made the decision that this is criminal conduct. And that would be deemed wanton and reckless. So that would sever -- there still is an investigation -- an independent civil investigation that's done just to ensure, to confirm the defense and indemnification decision. But that is a strong indicator that if somebody is charged by our office, they will not be defended and indemnified.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. So the lineup is Ahni, Ronelle, Mark, John Scippa, and Chief Edwards. So, with that, Ahni, the floor is yours.

DIRECTOR MALACHI: Thank you, Deputy Young. It -- a lot of questions have taken place. And I appreciate Attorney Bissonnette's line of questioning. However for the patient observer, it just felt like he was working on legislation and his testimony for tomorrow more so is for today, so a little perplexed by that. But, moving on.

Thank you, Attorney Broadhead. So, I guess my first question -- and maybe it's the last. Who knows? My initial question would be, if the DOJ is representing a Law Enforcement Officer and if I'm correct in assuming a State Employee, as well, could be covered by qualified immunity. And if that's correct, then lump those people in with this question, as well.

Wouldn't -- would it be logical that using qualified immunity would be one of the tools to defend someone? I mean, it's like if I go somewhere and I have an issue with someone. I may decide -- or maybe it feels like it's based on my ethnicity, or my gender, or my religion, based on how I sit in these things. And would certainly, if I'm taking to someone to court, I would certainly put those things into my charge. I mean, it only makes sense to look at everything available to either charge someone or to defend someone. Am I correct in assuming that?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: You are. As Attorneys, we have an ethical obligation to defend our Clients. That similarly applies -- and to robustly defend our Clients. And so, if we were to leave a Doctrine like qualified immunity on the table, we would be doing a disservice ethically to our Client in failing to pursue it.

So we most certainly have that in the back of our minds, as Government Attorneys. We still have Clients. And most of these Troopers are sued in their individual capacity under Federal Law. And so, that does -- we represent the individual, not the office. And we do robustly defend them.

DIRECTOR MALACHI: Thank you for that. And so, it would be safe to assume that, given this is an opportunity -- well, let me move on past that. If the Law Enforcement Officer, or State Employee, had done something criminal and the DOJ was representing them, would qualified immunity still be something you would put as a defense? And if so, if it's a criminal case, then it -- I mean, it would be something that easily wouldn't apply. So the person would still move forward in the criminal charges. Do I have that understanding correct?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Yes, so if there was a criminal charge against an Officer, then more likely than not our office would not be even defending or indemnifying that Officer. And so, we probably would not be raising that immunity issue.

Could the Officer do it in their individual capacities, when they get their own Counsel? I believe they can. But in the Doctrine of -- in the world of qualified immunity, if somebody's been convicted of conducted, you can't then collaterally attack it through the civil process. So that Officer would have a very hard time making out an immunity case in light of a jury conviction, or a plea deal, where somebody agreed to be convicted to conduct. So that would be a uphill battle for that Officer to make an immunity argument.

DIRECTOR MALACHI: Understood; so then -- and for me, understanding that you follow whatever laws Legislators make, I get that. My Agency, the same thing. Would an Officer and/or State Employee be still able to be well-represented if there were no qualified immunity? Does this help? Or does it hinder, in your understanding? And not saying that you would decide that the law -- that it should go away. But is it helpful to have that as a defense?

I mean, to expound on that, it sounds like if a Law Enforcement Officer or a State Employee does something that's criminal, then it's not -- you're not able to use that as a defense. And so, Attorney Bissonette was specifically speaking of, I would imagine, George Floyd. So -- and I think our understanding here is that qualified immunity would not attach for the Police Officer. So that, in and of itself, would be the answer to the question of whether or not qualified immunity is helpful or not in a criminal case. So, with my expert ramblings, what is your thought on that?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: So, on a personal -- I can kind of answer with anecdotal, just kind of having represented Law Enforcement Officers in cases, where -- that have resolved in any number of ways. It's a very hurtful thing to be named in a lawsuit. And I've walked through Officers who just believed in their heart of hearts that they did everything right and would do it the same way again, just because they made a bad guess, either whether it's a split-second or otherwise. It affects them. It affects their family. It affects -- Civil Findings can lead to EES -- being placed on EES. And so, they're fearful of their job. They're fearful of how they're perceived.

And so, qualified immunity, I do think, has been an ability for Officers to feel somewhat justified in how they have treated a certain situation. So, I do think that there is that from a personal level that I've experienced with the Troopers. I'm not sure that that answers your question. But if I didn't answer your question, let me know.

DIRECTOR MALACHI: No, I think that gets us there. Thank you very much. And I did have sort of a follow-up for actually two of the Commissioners. Commissioner McKim and Commissioner Johnson, I know, Commissioner McKim, you're more representing the NAACP than Rogers is. But I did have a question.

When Mr. Cofield gave his testimony, and stated that the document -- the NEAC document which is representative of the talking points from the NAACP at-large, and then also for the New England region, when I asked him about specific ones for New Hampshire, I thought those were forthcoming. But, those have not -- or was he to submit those? Were you all to submit those?

And specifically we're talking about qualified immunity, which was one of the things in the document that the NAACP would like to have it gone or moved in a different way, I understand the

positioning of you, Commissioner McKim, and you, as well, Commissioner Johnson. But it would be helpful if we had more clarity on the New Hampshire-specific topics, so that, as we digest this in totality, we're clear on what is reasonable for New Hampshire. Maybe it's what you guys think is relative or not. I don't know the best way to handle that. I mean, we can speak specifically with qualified immunity or generally to the entire document.

DEPUTY ATTORNEY GENERAL YOUNG: Commissioner Johnson?

DIRECTOR MALACHI: Pick one.

DEPUTY ATTORNEY GENERAL YOUNG: Oh, is that a -- Commissioner Johnson, did you have a comment? Or that was just a...

MR. JOHNSON: No, I was always giving my newly-appointed colleague an opportunity to respond. If you'd like me to respond first, I'd be more than happy to.

DEPUTY ATTORNEY GENERAL YOUNG: Sure; and then we will go to President McKim. But I just wanted, for timing purposes, we have about 30 minutes. And we have six people who want to speak or ask questions. So we just...

MR. JOHNSON: Ooh, boy, I'm excited. To answer your question, Commissioner Malachi, my opinion -- and I won't speak for Mr. McKim. But my opinion is that the NEAC document probably should be supplanted with a document from our point of view in New Hampshire.

So, I will succinctly say that the document that was created by NEAC was a effort by the various Presidents of the several branches across New England, none of which is what I agreed to significantly, most of which is what I pretty much opposed. The testimony that Mr. Cofield gave, I was not going to be a person in the meeting during the testimony to negate what he was going to say, because it's the better art of valor, meaning I'm not going to go against an individual.

But now, being put to the point, there's no way that I approve of most of that. And so, I'm going to flat-out say it, because, quite frankly, this is what I believe. So, in that light, Mr. McKim can agree or disagree. But that's my point.

MR. MCKIM: From my perspective, I had actually initiated conversations with Mr. Cofield to create a New Hampshire-based version of that document. There is a draft, which we've been trying to get the New Hampshire Presidents -- branch Presidents -- Rogers, myself, and Gloria Timmons from Nashua -- together to review that draft and to have Mr. Cofield submit it to the Commission, as that was his task to do with our assistance.

So, I'm hopeful that we will be able to do that in the next week, given the timing for this Commission. But, that notwithstanding, I am in agreement with Commissioner Johnson that much of that is really focused at large cities, at large municipalities, and needs to be modified for us here in New Hampshire.

DIRECTOR MALACHI: Thank you, both. I appreciate that. It's good to have a more clear understanding. And with the research that I did, just the revelatory information in 2017, I think the NAACP moved more to a political group.

It's important, I think, to make sure that the political policies that the NAACP is putting forth, whatever those may be, are relative to New Hampshire to make sure that those are things that fit, but also that we're all clear that it's political policy. And we can move forward accordingly just as a transparent conversation, nothing more than that. So, I appreciate the answers from Attorney Broadhead and from Commissioners McKim and Commissioner Johnson. Thank you, both. Thank you, all three, very much.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you very much. Commissioner Tshiela, you are up next.

MS. TSHIELA: I have two comment -- can you guys hear me okay? I was just having connection issues.

DEPUTY ATTORNEY GENERAL YOUNG: Yeah. No, you're fine. You're very clear.

MS. TSHIELA: Okay. Yeah, sorry. I have two comments that I'd like to make. The first is earlier, Attorney Broadhead said it's hurtful to be named in a lawsuit. And earlier we talked about how important the victims are in these situations. So I think that needs to be brought back up that we need to also think about the victims. That's my first thing.

My second thing is this. Obviously, a conversation right now is being had around qualified immunity. And I represent an organization with a lot of individuals who believe that, in a lot of cases, it can be the enemy to accountability.

That being said, I've had multiple conversations with Members of Law Enforcement on qualified immunity, itself, not reform. That's important, because a question was asked earlier as to -- it was said that this is a Federal Doctrine and this needs to be handled when it comes to -- this needs to be handled at the congressional level. Cool, fine.

However, it was also said that there are things that could be done here in New Hampshire. And so, when asked what can we do here in New Hampshire, but where can we go to find answers as to what types of recommendations we can make around things here in New Hampshire, and who we can ask, the answer was given that we should ask Police Officers, because they are the most affected by this.

So, you're basically suggesting that we ask Police Officers about reform when it comes to a protection for Police Officers. That response, to me, was very -- I was very disappointed by that response. And I believe it was far from substantive.

And I understand if you don't have the answer to that question today. That being said, I would appreciate it if you, or someone else, was able to provide that answer for us, because I'd like the answer to that question, because I'd like to see what we can do here in New Hampshire. And with that, I'm going to yield the rest of my time. Thank you.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Thank you. It's a good thought. When I asked that question, I had not thought about who might be able to give a definitive response to that. But certainly victims of Police misconduct should certainly have input and a seat at the table in terms of

determining Policy. I didn't mean to suggest that that was the only -- that Officers are the only people to get input from. So, thank you for the comment.

MS. TSHIELA: No, and that's not what I was trying to direct that towards, as well. I believe that it's just important for us to remember the victims, because that was a conversation that was had earlier. And you did mention how hurtful it can be for Police to be named in a lawsuit. That was my first thing.

And for the second thing it was not really even having a seat at the table when it comes to reform, but I was just asking, where can we get this information? Point us in the right direction. And the answer was given: Police Officers. And like I said, I believe that I was very disappointed by that response. And I believe it was far from substantive. But thank you again for your slides earlier. I believe it was really helpful in understanding some other things. So, thank you.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: You're very welcome.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you, Commissioner Tshiela. Lieutenant Morrison?

LIEUTENANT MORRISON: Thank you. Very quickly, Attorney Broadhead, just because an Officer is immuned (ph)-- or immune, does that mean that a victim or somebody who has been affected negatively has nobody to sue?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Can you give me kind of more information? Do you mean if somebody is making a Claim for an unlawful arrest, for instance? Their recourse would be to sue the Officer. That's correct. Would there be anybody else? Is that what you're asking?

LIEUTENANT MORRISON: Correct, would they be able to still sue the municipality, even though the Officer may be personally immune?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Under Federal Law, there is -- there's a Doctrine called Respondeat Superior. And whether or not it applies in a particular instance would be whether or not the -- if the question is whether or not the Department was aware of specific conduct that would have led to some sort of intervention or should have led to some sort of intervention, if that is the case, then the -- even if the Officer is immune, the Police Department would not be. So that is correct.

Under State Law, you can bring a Claim against the Department, as opposed to the Officer in certain circumstances. And so, that -- and immunity really doesn't -- qualified immunity does not apply to those State Claims. We'd be looking at whether or not there was some sort of high-level decision or discretionary function that was exercised by the Department.

LIEUTENANT MORRISON: Thank you. Would you also agree that Law Enforcement Officers, specifically, are not regular people in the sense of the situations that they're put in and the decisions that they are forced to make?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Law Enforcement Officers are in a unique position. I do agree in the sense that they are authorized to take custody. I'm not aware of any other Employee, other than a Law Enforcement Officer, that has the same awesome responsibility of physically taking custody of people. So does that answer your question?

LIEUTENANT MORRISON: Yes; and that question was more geared toward the line of suggestion of regular people don't enjoy those types of things. Well, of course not, because they're not being asked to do those types of things.

So, I would not be in favor of doing anything with qualified immunity, other than strengthening it. But, aside from that, I'm just trying to write down some notes here. And I'd like to try to bring a few things together.

It's overwhelmingly clear, I think, from the testimony that we've heard and the experiences that we've all shared that Law Enforcement is very often under-resourced, understaffed, at times undertrained, and are still asked to do things that nobody else is asked to do. Is that sort of a fair assessment?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Yeah, outside of Corrections Officers, now that I think about it, but, yes, I'd agree with that.

LIEUTENANT MORRISON: Thank you. And to -- and I believe it was Mr. McKim's request, I'll try and pull a few things together. So, as Law Enforcement Officers, we look evil in the face and move forward, not backwards. We are oftentimes outnumbered in strange situations, strange locations, with people who we've never met and may never meet again. Have our own personal fear that we deal with; weather, lighting; the knowledge that at every single call there's at least one firearm, and that's ours. There's a lot to process all at once, and which is why I think the qualified immunity is so appropriate.

Nobody is asked to make the decisions that Law Enforcement Officers make in the timeframe and under the conditions in which they make them. And to take one of the examples brought up at the beginning of this section, Officers were faced with two losing scenarios to pick from. You either allow a school shooter or some sort of a threat to a school, or you conduct an investigation that may have, in this case, involved a seizure that wasn't supported by probable cause or something, and therefore the case was thrown out.

Nobody else is asked to do that. Nobody else carries that burden of making those decisions. And I feel comfortable speaking on behalf of Law Enforcement everywhere when I say that. And I think to forget that, or to try to diminish that, does a disservice to this entire profession.

And I also feel comfortable saying that should qualified immunity change, putting Officers financially at-risk outside of the conditions as they exist now, you would see an exodus in this profession like you've never seen and the already overwhelming understaffing of Departments that you see around the State would be exacerbated to a level that nobody wants to see.

So, I appreciate very much Mr. McKim and Mr. Rogers [sic], in their at least honesty that they're saying this might not be a good fit for New Hampshire. And I appreciate that very much. And I agree with them that I don't think that these changes are a good fit for New Hampshire. And I just -- I guess I'll stop there and thank you for your informative testimony.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you, Lieutenant. John Scippa?

DIRECTOR SCIPPA: Thank you, Madame Chair. Attorney Broadhead, thank you very much for being here today and giving us your insight. Very quickly -- and I thought you were going to kind of speak to it more directly, but early on in your testimony you came close -- with regard to qualified immunity, can you give other examples for the Commission and for the public those other types of positions that are allowed qualified immunity?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: So, there is a version of qualified immunity for Corrections Officers. There are -- I'm so embedded in representing State Troopers in connection with law enforcement, I have not done a dive into what other types of positions might be entitled to it.

So, off the top of my head, I could think of Law Enforcement, Corrections Officers. There's Immigration Customs Enforcement cases out there. And I'm hard-pressed to think of others right at this point.

DIRECTOR SCIPPA: Do Public School Teachers enjoy qualified immunity, if they're acting under the color of law?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Actually, so that is a good point. I don't know the answer to that. I've seen a case where there was a § 1983 case alleged against either a Teacher or a Principal for making the decision to not publish an image in a yearbook that involved a gun. It was a student who was a skeet shooter and a champion, I guess, at that. And he wanted his senior photo to be a picture of him posing with the firearm. And the school was sued, I believe, under § 1983. I don't know if immunity applied in that circumstance.

DIRECTOR SCIPPA: Thank you very much. And would a Department of Transportation Officer or a Hearings Officer at DOT, under acting color of law, are they entitled to that?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: I don't know. I believe they would, if they're acting under color of law. It would have to be an alleged constitutional violation. So part of it is that Law Enforcement Officers by nature of their position impact those constitutional rights more so than I think other Employees do. So, I think that that's really where the rub is, is what other Officers, or people acting under color of law, do impact constitutional rights?

DIRECTOR SCIPPA: Thank you very much.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: You're welcome.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. I would just remind the Commissioners that we have about 12 minutes left. Chief Edwards?

CHIEF EDWARDS: Thank you, Deputy. And I will be very, very brief because I just want to make a statement. Attorney Boarshead (ph), thank you so much for your testimony today. And I'd just like to echo briefly Lieutenant Morrison's statement, because I think it's important to remember that.

Law Enforcement Officers go through a vetting process unlike anyone else for employment, anyone. We've heard from Deputy Young about the Public Integrity Office and how the Attorney General's Office actually prosecutes Police Officers who misbehave. We've heard from Law Enforcement Leaders throughout this Commission that no one is more concerned or disgusted by bad Police Officers acting in bad faith.

So, I think, as we've also heard today, which I think is very important, from members who represent the community, in terms of the NAACP, that people here in New Hampshire understand that we need to make changes and we need some system changes. But we do not need to follow the model that's being pushed nationally.

And I think the document that was submitted to this Commission by Mr. Cofield was a national model. I think in some regards, some of the things that we've heard from the ACLU may be national models. We're much more interested in making sure that New Hampshire has put together a system of accountability, and we make improvements in those systems. So, thank you very much for the time.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you, Chief. Director Norton?

DIRECTOR NORTON: Yes, thank you, Attorney Broadhead, for your testimony. And I will admit I'm a little bit confused still. And so, I'm uncertain when qualified immunity comes into play. Is it in determining if charges are brought forward? Is it by the Court in initially determining the validity of any Claim? Or is it used in making a final Decision by the Court, or all of the above?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: That's a great question. So the qualified immunity can be asserted at any point after a Complaint has been filed. So a lawsuit must first be initiated. And the Officer can raise it on a couple of stages during the litigation. And it's typically in advance of trial.

If there are no disputed facts, meaning the Parties really agree on what happened, the question is only one of whether it was unlawful or unreasonable, then the most appropriate stage for that is going to be at a stage called Summary Judgment. And the Defense would file -- the Officer, himself or herself, would file a Motion for Summary Judgment, which would ask the Court to dismiss the case on the basis of qualified immunity.

If there are disputed facts, then that Summary Judgment process typically isn't appropriate as a way to resolve it. What would happen is the Defense, or the Plaintiff, would request an evidentiary hearing, where the Officer's testimony, the testimony of other witnesses, would be brought. And the Judge would hear the facts and assess credibility, and then could make a determination before it gets to a jury, as to whether or not immunity would apply.

And then, there is also at least one case that evidentiary hearing was not held. And the -- it went forward with the jury trial. And the jury actually returned a verdict. But the Court -- in favor of the Plaintiff -- but the Court, in looking at the facts, as they came in during the trial, applied the Doctrine of Qualified Immunity, after there was a jury verdict. And that went up to the Supreme Court.

And the Supreme Court admonished the Trial Court and said that immunity is immunity from suit. And therefore, it needs to be resolved at an -- as early as you can, because the Defendant has basically lost the immunity, by proceeding with a trial. You basically didn't -- it was -- the immunity was worthless,

because they ended up going to a jury trial anyways. But then the Court did uphold the application of immunity in that case. That was the Conrad case that the New Hampshire Supreme Court case had held.

DIRECTOR NORTON: Thanks, that's helpful then. So, I would assume, then, a Prosecutor, thinking about bringing criminal charges, has to consider qualified immunity as part of that decision-making process in New Hampshire. It's not just limited to civil actions.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: I don't believe that qualified immunity would immunize a criminal Defendant. The qualified immunity is a civil immunity that arises under Civil Claims. So I'm not aware of any Doctrine that would prohibit a Prosecutor from bringing a case under Federal Law. And so, the qualified immunity is an outgrowth of really civil liability.

DIRECTOR NORTON: Okay. And then, my next question -- and I don't know if I'm also confusing things. But how does it come into play regarding use of deadly force? I know that different States have different standards about reasonable or justified, or necessary, or last resort. Does qualified immunity supersede those standards?

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Well, that's -- I guess there's two components. In a criminal case -- and I'd defer to the Prosecutors who might know this law better. But, in a criminal case, there is a defense that somebody could bring in, for instance, a Officer-involved shooting. There is a Justification Statute that applies to all citizens. If you are justified in using deadly force, that can be a defense to a criminal prosecution.

That's separate and distinct from the body of law governing qualified immunity. Qualified immunity would take a look at the Officer's use of force. And the cases that I've seen on the topic, it follows the same sort of standard, whether or not there's a robust consensus of cases that would apply to immunize the Defendant. So, for instance, Officer-involved shootings are a special offshoot of the law. And we'd look to those cases to determine whether or not immunity would apply in that situation.

DIRECTOR NORTON: Okay, thanks. And then, just comment to Commissioner Johnson's questions, again I'm not an Attorney, but I have been involved in two previous malpractice suits and with both State Officials meaning those from the State Hospital, and nonprofit individuals, myself, included, representing community mental health centers have been sued. And it seemed to me subjectively that those State people had a higher level of protection or immunity than we did. So I appreciate Commissioner Johnson's questions and desire to pursue that further. Thanks.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Thank you.

DEPUTY ATTORNEY GENERAL YOUNG: So, Commissioner Norton, on the criminal side, so typically when these matters will come in, they will be reviewed criminally first. I can tell you we don't look at a criminal case and say, geez, if we charge this State Trooper and he's found guilty, this is going to cause the civil side of the house problems. We look at it independently and separately.

So we have to look at the defenses that are available under the Criminal Code to determine if we can prove our case beyond a reasonable doubt, or, where applicable, can we disprove the offense -- the defense beyond a reasonable doubt? So there are two separate entities that look at them and they don't mix.

And I can tell you, from running the Criminal Bureau and from approving some of these initial prosecutions, we never think, boy, if we go forward with this, it's going to cause liability. That's not how we do it.

So there are defenses that are available in the criminal realm. And then, if and when a suit is brought in the civil realm, there is another set of defenses that are available there, as well. And we erect walls in this office so one side doesn't contaminate the other side. So, judgments are made independently and based on the case in front of the Attorney in the office. Does that help a little bit?

DIRECTOR NORTON: I'm certainly aware of that. I was just confused whether qualified immunity applied for criminal cases, or whether it was a civil standard. So, yeah, it's been very helpful, got that now. But, thank you.

DEPUTY ATTORNEY GENERAL YOUNG: Okay. You are welcome. Three minutes, not to put any pressure on you, Chief Dennis or Judge Gardner.

CHIEF DENNIS: No pressure taken, I'll be as brief as I can. I think, as a Commission, we've worked well together. We have a diverse group of different organizations coming together, community members, and things like that, looking at how we can transform the policing profession.

And I think in many areas, we have agreement in a lot of areas. We've talked about Use of Force Policies, training, education standards. We've talked about early warning systems, disciplinary procedures. We're talking about reporting Police misconduct now.

But I think qualified immunity is an essential part of policing. I think, as Representative of the Chiefs Association, it allows Officers to respond to incident without pause, making those split-second decisions. I think Lieutenant Morrison did an excellent job in laying out exactly simply what it is we deal with when we show up on scenes. And it's difficult.

I think the loss of this protection would have a chilling effect on Police Officers and limit their ability and their willingness, when they respond to calls for service, those critical incidents where you're making those split-seconds decisions. I think calls to reduce or eliminate qualified immunity is not a constructive path for it. And I'll stop at that. Thank you.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you, Chief. Judge Gardner, you can have the last word on this topic.

JUDGE GARDNER: Okay. Well, thank you. I have a question. And I do appreciate Lieutenant Morrison's highlighting the reasons for this Qualified Immunity Doctrine to be applied for Law Enforcement.

But, Attorney Broadhead, thank you for your testimony. You did mention the Conrad case. So I was just going to ask you about that, because I think that also emphasizes, sir, the broad -- the breadth of the application and varied application of qualified immunity. So, could you just kind of touch upon that, please? Thank you.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: Sure, thank you, Your Honor. So, the Conrad case was a unique case where there was an Officer who was, by some observations, behaving erratic in reference to a domestic situation involving his wife. And the Officers detained the Trooper. And to just try to get a sense of what was going on, he seemed unstable. And they were trying to find a way to take his firearm off of his person, based on some of the statements that he had made.

And the -- and he resigned on the spot. And at that point, they didn't know whether to let him go or to invoke certain protections for Union Employees that require a compelled statements that could not later be used for -- in a criminal charge, but could be used and compelled in the employment setting.

And in that case, the Plaintiff brought a false arrest -- or a False Imprisonment Claim against the Troopers, as well as some constitutional unlawful seizure arguments under § 1983. As I said before, that did go to a jury trial and it resulted in a pretty sizeable jury verdict. I think it was a \$2 million jury verdict on the side of the Plaintiff.

But the Courts determined that the Officers acted reasonably, given the situation, and applied immunity. And the Supreme Court's guidance was, from that lesson -- the New Hampshire Supreme Court's guidance was we should be ruling on immunity at the earliest possible stage, so that we're not wasting judicial resources down the line, if immunity did apply. That's the case in a nutshell. I might have missed certain details. It's been a while since I've reread it. But that's generally what happened in that case.

DEPUTY ATTORNEY GENERAL YOUNG: Oh, Judge, I think your mic is off. Do you have a follow-up?

JUDGE GARDNER: No, I just said thank you.

SENIOR ASSISTANT ATTORNEY GENERAL BROADHEAD: You're welcome.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. So we see no further questions or comments. So just tomorrow Attorney Michigean (ph) from the Supreme Court Attorney Discipline System will be testifying. He is somebody that Attorney Jefferson recommended.

Attorney Bissonnette will be testifying tomorrow. I think we all sort of got a trailer of what his testimony is going to be today. And we also have Attorney Krupski. He will be the last, given his timing. Attorney Krupski represents a number of Attorneys in the State. So I think he's going to talk about process. Excuse me. He represents a number of Police Officers. I think that he will discuss process.

So, on -- and then on Wednesday, it will be the Attorney General's Office talking about the Exculpatory Evidence Schedule, the procedure for Officer-involved incidents of use of force, as well as Public Integrity. So we will be hearing public testimony on Thursday.

Any members of the public who want to speak should notify the Commission in advance by sending an email to following web address: LEACT, LEACT@doj.nh.gov. And one more time, LEACT@doj.nh.gov. As always, written testimony is strongly encouraged and should be submitted prior to Thursday. We will post it on the website. They can post -- excuse me. They can go to the Commission's website, which is www.governor.nh.gov/accountability. Any other questions or comments before we adjourn? Commissioner Malachi?

DIRECTOR MALACHI: Yes, quick question. For the three people testifying tomorrow, will we receive the written testimony ahead of time?

DEPUTY ATTORNEY GENERAL YOUNG: Yes, to the extent we get it, we will. We've been trying to do that. So we will have today to do it. But, Gilles, will you be submitting written testimony?

DIRECTOR BISSONNETTE: Yeah, we're finalizing it right now. If I send it to the LEACT email address, that doesn't just go to all Commission Members, does it, or does that just go to Kim?

DEPUTY ATTORNEY GENERAL YOUNG: Yeah, it comes to Kim and we will get it posted.

DIRECTOR BISSONNETTE: Okay. We're trying to get it by the end of today. We're finalizing it up now.

DEPUTY ATTORNEY GENERAL YOUNG: Okay. And for those of you who know, Kim doesn't sleep. So it gets posted at 8:00, 9:00, or 10:00.

DIRECTOR BISSONNETTE: I've noticed that. I've noticed that.

DIRECTOR MALACHI: Thank you, both.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Any other questions or comments? Seems like we don't know what to do without Joseph. Does anybody want to make a Motion? President McKim, what would your Motion be? Oh, no, you got to put your speaker on.

MR. MCKIM: Sorry, I thought I did. I hereby move that we adjourn for the day and enjoy the rest of whatever the day has to offer.

DEPUTY ATTORNEY GENERAL YOUNG: And Director Norton was the second on that before Mark Morrison could get in. So I will vote yes, we adjourn. Commissioner Quinn?

COMMISSIONER QUINN: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Commissioner Tshiela?

MS. TSHIELA: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you. Chief Edwards?

CHIEF EDWARDS: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Attorney Jefferson?

ATTORNEY JEFFERSON: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Attorney Bissonnette?

DIRECTOR BISSONNETTE: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Chief Dennis?

CHIEF DENNIS: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Lieutenant Morrison?

LIEUTENANT MORRISON: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Judge Gardner?

JUDGE GARDNER: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Commissioner Johnson?

MR. JOHNSON: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Director Scippa?

DIRECTOR SCIPPA: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: And Commissioner Malachi?

DIRECTOR MALACHI: Yes.

DEPUTY ATTORNEY GENERAL YOUNG: Thank you for joining us, Gilles. To those who are on vacation, thank you for your diligence. I'll see you tomorrow morning. Bye, guys.

(Meeting adjourned.)