CONFIDENTIAL

LEGISLATIVE BILL REVIEW FORM: 2015

Bill Number: H.279 **Name of Bill:** An act relating to recording of criminal and civil offenses by law enforcement officers

Agency/Dept: Dept. of Public Safety-State Police **Author of Bill Review:** Sgt. Eric Albright

Date of Bill Review: 02/26/15 **Related Bills and Key Players:**

Status of Bill: (check one)

XX **Upon Introduction** ____ **As passed by 1st body** ____ **As passed by both bodies**

Recommended Position:

____ **Support** ____ **Oppose** XX **Remain Neutral** ____ **Support with modifications identified in # 8 below**

Analysis of Bill

1. **Summary of bill and issue it addresses.** The stated purpose of this bill is: This bill proposes to require law enforcement agencies to ensure that law enforcement officers engaged in law enforcement activities are equipped with a video recording device on the officer's person or vehicle. The bill also proposes to require a law enforcement officer to record on video any interaction with a person who the officer has reasonable suspicion to believe is committing a crime or civil violation. Video recording is not required under exigent circumstances or if video equipment is unavailable or malfunctioning. The bill proposes to require a law enforcement officer operating a vehicle containing a video recording device to turn the device on whenever the vehicle's blue lights are in operation.

2. **Is there a need for this bill?** No. From a DPS-State Police standpoint this is not a necessary bill. DPS has had Video/Audio recorders in vehicles since 1999-2000. All patrol units currently have "Watchguard" DVD Audio/Video recording systems. All DPS Troopers assigned patrol units with these systems are subject to follow

department policy which mandates recording as outlined by this bill for the most part. The system also automatically initiates recording when the front facing blue lights, siren or PA system are utilized by the operator. This can-not be overridden. See attachment-VSP-DIR-417. Currently, DPS-VSP has approximately 200 in car systems in the field.

3. **What are likely to be the fiscal and programmatic implications of this bill for this Department?** The real fiscal issue with this bill regardless of it being law is the cost of software and storage of data as well as the initial systems themselves-current units in use by DPS-VSP are approximately $4795 per unit and there are approximately 200 units in use. DPS-VSP is currently looking to update all units when the warranty expires-estimated cost is $959,000, for all the new units. Cost of maintaining the units after the warranty runs out is estimated to be $2000 per month for all total units in use. Digital data storage is $2000 per year per terabyte of data. Current estimates for storage requirements by DPS-VSP would be 1,052 terabytes over the next four years (current retention policy on data/video is 4 years), totaling $2,304,000 per year once the 4 year retention is reached. There is also cost associated with the need for specialized personnel required to manage the data, system maintenance, public records requests, legal discovery requirements with criminal cases and training for these systems. This is not an issue for DPS in relation to the real existing value of the use of these systems as a tool to enhance law enforcement application as it relates to documentation and prosecution of law violations as well as investigating allegations of misconduct by members. There are several programmatic implications. One is the existing Vermont Supreme Court decision from 2002, State of Vermont vs.GERAW. This relates to video/audio recording in private places-specifically private residences. This bill if passed into law would be in conflict with this ruling in certain instances. See attachment-State vs. Geraw. Further issues raised is the requirement of this bill that Law Enforcement record essentially everything relating a criminal or civil law violation, would jeopardize some sensitive investigations: undercover narcotics units (who record the lion share of what they do as a matter of practice), juvenile victim interviews for sexual assaults etc. It also seems unnecessary to mandate by law that any interview, issuing of Miranda Warnings etc. need to be recorded and that the subject be advised they are being recorded in such instances. This is already a "best practices" and recommended way to conduct investigations. This bill if passed, requires all Law Enforcement to be equipped with a system of some sort. This would require DPS-VSP to outfit its approximate remaining 100 positions with systems (include BCI etc).

4. **What might be the fiscal and programmatic implications of this bill for other departments in state government, and what is likely to be their perspective on it?** There are no known fiscal or programmatic implications for other departments in state

government-with the exception of other state law enforcement entities such as the Department of Motor Vehicles Enforcement Division, the Department of Fish and Wildlife and the Department of Liquor Control, who are all law enforcement agencies who engage in law enforcement activities. These three departments if subjected to this bill becoming law, would face the same fiscal implications as DPS and require budgetary changes and or funding by the legislature. As written the bill specifies DPS, municipal police agencies, and sheriff's departments. DMV, DLC and Fish and Wildlife all have Law Enforcement sections and do not fall under any of these law enforcement groups.

5. **What might be the fiscal and programmatic implications of this bill for others, and what is likely to be their perspective on it?** (f*or example, public, municipalities, organizations, business, regulated entities, etc)* The fiscal and programmatic implication would be the same as outlined above being especially hard on small municipalities and many sheriff's departments relative to the overall cost. Many of these agencies are likely to have a negative perspective towards passage of this bill as a result. In speaking with Rep. Troiano about his bill, he states he is trying to make sure contacts with the police are "memorialized" for future needs. He has a private investigator back-round, doing work for defense attorneys in Vermont. He sees the video as a useful tool in convincing clients to forgo lengthy court processes and expenses to all involved when the video clearly demonstrates guilt. He also sees it as a useful tool to make sure that police work is done properly. Troiano stated that he felt the recording warning was a good way for everyone to be on notice and aware of the gravity of the situation but acknowledged that in this day and age everyone has come to expect anything and everything be recorded in the public. When asked about funding this bill should it become law, Troiano told me that he expected federal money to be available for this and his research showed that the body cameras are only $300 per unit. I pointed out this may be for a poor quality system with limited storage capacity. Troiano gave no indication this would be funded legislatively if passed into law. This program will be very expensive for not only State Law Enforcement but also Sheriffs and Municipal Departments. Conceptually, this is a good idea fiscally, the timing could not be worse

6. **Other Stakeholders:**

6.1 Who else is likely to support the proposal and why? Any law enforcement agency in Vermont looking to attain video capabilities to enhance their efforts regarding prosecution of criminal and civil cases as well as safeguard their officers from liability and or complaints-should the units be funded federally or legislatively.

6.2 Who else is likely to oppose the proposal and why? All Law Enforcement agencies not having video systems in place and within their budgets, who would be required to conform if this bill was passed into law. This is based mostly on the

financial aspect of storage requirements (see attached LEAB report-"storage capacity can be prohibitively expensive, particularly if agencies are required to store recordings for long periods of time").

7. **Rationale for recommendation:** *Justify recommendation stated above.* The rationale for these recommendations revolves around funding. It is not realistic to pass this bill into law without proper funding sources and hard numbers on that funding. Budgets are tight and it is not feasible to expect that compliance by law enforcement agencies be absorbed by municipalities and counties across the state. More research is required as to how many agencies already utilize systems and have funding in place and how many do not.

8. **Specific modifications that would be needed to recommend support of this bill***: Not meant to rewrite bill, but rather, an opportunity to identify simple modifications that would change recommended position.*

9. Gubernatorial appointments to board or commission?

Secretary/Commissioner has reviewed this document  **Date: 3/12/15**

Attachment 1

VSP-DIR-417

Mobile Video/Audio Recording Equipment (MVR)/Mobile Vision System and Watch Guard Digital Video

1. 1.0 PURPOSE
    1. 1.1 To provide uniform and proper use of mobile video/audio recording equipment (MVR) by Vermont State Police members.
2. 2.0 POLICY
    1. 2.1 All members using MVR equipment shall be appropriately trained in the operation, and be familiar with this policy.
    2. 2.2 All video/digital/audio tapes are the property of the Department of Public Safety. No DVDs or tapes shall be destroyed or reused without authorization from a station commander.
    3. 2.3 All digital recordings are property of the Department of Public Safety and shall not be released or disseminated without the approval of the Director or designee.
    4. 2.4 The MVRs are capable of recording video in different "Quality Modes". This setting is to be kept at the six (6) hour setting.
3. 3.0 PROCEDURE
    1. 3.1 Members assigned to patrol vehicles equipped with MVR digital recording equipment shall ensure that each system is tested at the beginning of the member's tour of duty and any problems shall immediately be brought to the attention of the shift supervisor or Senior Trooper In Charge (STIC). A Help Desk ticket shall be submitted to the Office of Technology Services (OTS) immediately.
    2. 3.2 Members using MVR / digital recording equipment shall record both video and audio in the following situations/scenes including but not limited to the following:
        1. (A) All citizen contacts of a law enforcement nature.
        2. (B) Major motor vehicle and criminal enforcement stops
        3. (C) Police pursuits
        4. (D) In progress motor vehicle or criminal statute violations
        5. (E) Traffic collisions involving department vehicles, and, or collisions resulting in injury or death.
        6. (F) Any situations where the member, because of experience or training, determines that the incident should be documented.
        7. (G) All searches
    3. 3.3 If after a member has begun an audio/video recording and the member then determines either the audio and or videorecording must be paused, stopped, or the reason for which the recording was started is concluded, the member shall record the reason for the termination

or suspension of the audio and or video on the DVD/tape prior to stopping it. (i.e., when documentation is no longer necessary at the scene of a crash).

4. 3.4 MVR Tape/DVD Storage
    1. (A) Each station shall maintain both a DVD deposit box and a DVD cabinet in a secure location.
    2. (B) Both the DVD deposit box and cabinet shall remain locked and accessible to supervisory personnel or their designee only.
    3. (C) When a DVD is full it shall be placed in the locked DVD deposit box and logged using form - MVR1.
    4. (D) Recorded MVR DVDs shall be logged into the MVR data tracker, and placed into the MVR cabinet. The MVR data tracker shall be updated each time a DVD is removed and returned to the cabinet. During the mandatory retention period, all DVDs shall be returned to the cabinet following their removal for review or duplication for court or other authorized reason.
    5. (E) A copy of the DVD shall be made and labeled in the same manner as the original. This copy will be made on a Sony DVD-RW ®, Maxell DVD- RW ® or other DVD-RW approved by WatchGuard Mobile systems which will be provided by OTS or your local barracks supplier. The copies shall be forwarded to Headquarters at least every two weeks.
    6. (F) Each DVD shall be identified, labeled and burned **into the metadata** as follows:
        1. (1) In the Officer Name Field: The members VIBRS user name (i.e., in the case of Merritt Edson, medson) will be listed.
        2. (2) In the Vehicle Name Field: the letters EQ will be followed by one space and the EQ number. i.e. EQ 424
        3. (3) In the Department Name Field: only the letters VSP will be listed.
    7. (G) The member will record with permanent marker, the following **information on the label** of the DVD and DVD envelope prior to submitting it for storage:
        1. (1) Date and times included on the entire DVD
        2. (2) Any applicable Spillman law incident numbers
        3. (3) Officer's VIBRS name
    8. (H) If a member is using another member's assigned cruiser equipped with a digital system, a new DVD will be placed in the MVR unit, the field (officer name) shall be changed to the current member using the officer drop down list.
    9. (I) Each DVD shall be placed into a protective DVD envelope immediately upon removal from the MVR recorder to protect it from damage.
    10. (J) When an arrest has been made the DVD shall be removed after the recording of that incident has completed and a new DVD inserted into the MVR.
    11. (K) All DVDs shall be retained at the station level for a minimum of four (4) years. DVDs will be destroyed at the end of the four (4) year period. Authorization for destruction will be at the discretion of the Station Commander, or designee. At the end of the four year retention period, DVD's shall be destroyed utilizing a DVD shredder

or other approved destruction method. Refer to the retention period for criminal cases and apply to each DVD which contains any case information on these cases. Example, sexual assaults, homicide, arson, aggravated assault, etc.

12. (L) DVDs containing incident numbers shall be retained at the station level for not less than four (4) years. Should there be pending court action for driving under the influence of alcohol or drugs or other crime that exceeds the four-year limit, then the original DVD will not be destroyed until 90 days following adjudication.
13. (M) The metadata on the processing room DVD or video shall be labeled in the following manner.
    1. (1) Date and time fields will remain on.
    2. (2) VSP will be placed in the department name field.
    3. (3) Station name in vehicle field. (i.e. Brattleboro.)
    4. (4) There will be a drop down list of officers VIBRS names in the officer field. Officers will choose theirofficer name.
14. (N) The "cabin" and wireless microphone in the processing / interview room will be put in "mute" mode when defendants are consulting with their attorney either on the phone or in person.
15. (O) Officers will use the unique 12 digit bar code number on the original DVD when referring to their DVDs in incident, crash reports or other documents.

5. 3.5 Duplication of Tapes/DVDs
    1. (A) Duplicate DVDs shall ONLY be made onto DVD-R, DVDs.
    2. (B) A duplication fee may be assessed as provided for in Title 20 VSA §1815. No fee shall be charged to a defendant whom the court has determined is unable to pay. The Department will provide the blank DVD.
    3. (C) The duplicate DVD will contain only scenes from a specifically requested incident.
    4. (D) The duplicate DVD shall be labeled with a Vermont State Police label containing the date of the duplication, the unique 12 digit bar code number that is on the original and a statement prohibiting further duplication or distribution of the DVD without the express written consent of the Director or his/her designee. (Downloadable Forms - MVR Label Form)

4. 4.0 OPERATION
    1. 4.1 Responsibilities of Operators
        1. (A) Members shall be responsible for operation, care and maintenance of assigned MVR equipment. Maintenance shall be performed in accordance with manufacturer's recommendations.
        2. (B) Prior to each shift, members shall determine that MVR equipment is working satisfactorily and complete a standard pre-operational system check. The completion of the pre-operational check shall be recorded by the member on the DVD at the start of the shift, and as necessary during the course of the shift (i.e., if maintenance is required, completion of such maintenance should be noted). This pre-operational test will have the "TEST OFSYSTEM" event tag applied.

3. (C) A shift supervisor will be notified, as soon as possible, if any problems are discovered with operation of the MVR equipment. A follow up ticket to the Help Desk will be submitted immediately.
4. (D) Members shall only use video equipment and DVD's issued or authorized by the Department.
5. (E) The audio microphone will be activated during all video recordings.
6. (F) Members shall not erase, nor alter any DVD or the hard drive.
7. (G) At the conclusion of each incident, the member will be asked to answer five (5) sets of questions. These are:
    1. **(1) Event Category (choose one)**
        1. 1. MV STOP
        2. 2. TEST OF SYSTEM
        3. 3. CRASH PD 3200
        4. 4. CRASH PI 3100
        5. 5. CRASH F 3000
        6. 6. DUI
        7. 7. ARREST
        8. 8. DRUG INVOLVMENT
        9. 9. MAST OR THAZ
        10. 10. DOMV OR FAMILY DIST
        11. 11. CASE FOLLOW UP
        12. 12. 911 CALL
        13. 13. ALARM
        14. 14. OTHER
    2. **(2) Search**
        1. 1. NO
        2. 2. YES
    3. **(3) Use of Force**
        1. 1. NO
        2. 2. YES
    4. **(4) Pursuit**
        1. 1. NO
        2. 2. YES
    5. **(5) Case Number** - A case number shall be entered when an arrest is made; there is a use of force, there is a pursuit or a motor vehicle search is conducted.

2. **NOTE**: The MVR will not stop recording until the above questions are answered.
    1. (H) The use of MVR equipment shall be noted in the appropriate incident report. For digital recordings, the member shall report the DVD number and the appropriate title(s) in the appropriate incident report and all associated discovery reports/requests.

2. (I) A new DVD will be inserted when 10 percent of available digital recording time remains on the counter or any other time that the member feels that the replacement of the DVD should be made (i.e. prior to setting up for a DUI Checkpoint).
3. (J) Should a member become involved in an incident where the DVD becomes full prior to inserting a new DVD and the message appears on the system that the DVD is full, the member shall follow the procedures for putting in a new DVD and record the remaining time involved in the incident on the next DVD.
4. (K) At the completion of an incident / recording, members shall follow the prompts on the screen of the digital DVD system and answer all questions that follow. Event tags are required.
5. (L) Access to the MVR hard drive for video that is not normally recorded to a DVD will be at the direction of the Director or his/her designee.
6. (M) Please refer to the Electronic Monitoring- Body Wires section of the Vermont State Police Search and Seizure Manual for lawful use of the recording device in a residence.
7. (N) Changes to the MVR configurations are not permitted without the approval of the Commander of OTS.

3. 4.2 Responsibilities of Supervisors
    1. (A) Supervisors shall ensure that Troopers who utilize MVR equipment comply with established policies, procedures and guidelines.
    2. (B) Supervisors will randomly review DVDs produced by Troopers (recommended at least quarterly review) for the purpose of ensuring compliance with established policies, and to identify material that would be appropriate for training.
    3. (C) The Station Commander, or designee, shall be responsible for the maintenance of the local station DVD file, the submission of tapes to General Services when necessary, and the maintenance of appropriate transfer records.

5. Effective October 15, 1999
   Revised January 1, 2001
   Revised May 25, 2010

Attachment 2

C

Supreme Court of Vermont.
STATE of Vermont
v.
John E. GERAW.

No. 00–459.
March 15, 2002.

Defendant, who was charged with sexual assault of a minor, moved to suppress audio recording of police interview that took place in his home. The District Court, Unit No. 2, Chittenden Circuit, Linda Levitt, Michael S. Kupersmith, JJ., granted motion to suppress, as well as defendant's motion for permission to appeal. The Supreme Court, Johnson, J., held that the warrantless and surreptitious electronic recording by the officer violated defendant's right to privacy under the state constitution.

Affirmed.

Skoglund, J., dissented and filed opinion, in which Amestoy, C.J., joined.

West Headnotes

[1] Searches and Seizures 349 104

349 Searches and Seizures
349II Warrants
349k103 Authority to Issue
349k104 k. Impartial Magistrate Requirement. Most Cited Cases

The warrant requirement in the Vermont constitution reflects a deeply-rooted historical judgment that the decision to invade the privacy of an individual's home or possessions should

normally be made by a neutral magistrate, not by the agent of the search itself. Const. C. 1, Art. 11.

[2] Constitutional Law 92 2540

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2540 k. In General. Most Cited Cases
(Formerly 92k72)

Judicial review operates as a potent and immutable check on the power of the executive branch, immune from the shifting political pressures or perceived exigencies of the time.

[3] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

A person cannot rely on state constitutional right to be free from search or seizure without a warrant to protect areas or activities that have been willingly exposed to the public. Const. C. 1, Art. 11.

[4] Searches and Seizures 349 26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases

The core value that gave life to the right to be free from search or seizure without a warrant, pursuant to the state constitution, is the freedom from unreasonable government intrusions into the privacy of Vermont citizens, a value that finds its purest expression in the warrant requirement;

although criminal defendants may seek court review of searches and seizures, these after-the-fact challenges do not serve the purpose of the constitutional provision in protecting the rights of everyone—law-abiding as well as criminal—by involving judicial oversight before would-be invasions of privacy. Const. C. 1, Art. 11.

[5] Searches and Seizures 349 53.1

349 Searches and Seizures
349I In General
349k53 Scope, Conduct, and Duration of Warrantless Search
349k53.1 k. In General. Most Cited Cases

Warrantless and surreptitious electronic recording of a face to face conversation by a known police officer in defendant's home violated defendant's right to privacy under the state constitution; such monitoring and recording would undermine the confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. Const. C. 1, Art. 11.

[6] Telecommunications 372 1468

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(B) Authorization by Courts or Public Officers
372k1464 Application or Affidavit
372k1468 k. Necessity; Inadequacy of Other Procedures. Most Cited Cases
(Formerly 372k516)

The burden of guarding privacy in a free society should not be on its citizens; it is the government that must justify its need to electronically eavesdrop. Const. C. 1, Art. 11.

****1220*351** Lauren Bowerman, Chittenden County State's Attorney, and Pamela Hall Johnson, Deputy State's Attorney, Burlington, for Plaintiff–Appellant.

E.M. Allen of Stetler Allen & Kampmann, Burlington, for Defendant–Appellee.

Present: AMESTOY, C.J., DOOLEY, MORSE, JOHNSON and SKOGLUND, JJ.

JOHNSON, J.

The question presented is whether Vermont citizens must accept the risk that police interviews in the privacy of their home are being secretly recorded without the protection of a judicially authorized warrant. We conclude that Chapter 1, Article 11 of the Vermont Constitution prohibits such secret recording. Accordingly, we affirm the order of the Chittenden District Court granting defendant's motion to suppress.

The material facts are few and undisputed. On April 17, 2000, two police detectives interviewed defendant at his residence in Essex Junction. The detectives were investigating an allegation that defendant had engaged in sexual acts with a foster child. The officers identified themselves, and defendant invited them into his residence. They sat down at defendant's kitchen table, where the officers interviewed defendant about his relationship with the minor. Unbeknownst to defendant, the officers secretly tape recorded the conversation.

****1221** Defendant was later charged with one count of sexual assault of a minor, in violation of 13 V.S.A. § 3252(b)(1). He moved to suppress the audio recording of the interview, alleging that it was unlawfully obtained without a warrant, in violation of Chapter I, Article 11 of the Vermont Constitution.[FN1] Following a hearing, the trial court issued a written decision and order, granting the motion. The court concluded that defendant enjoyed a reasonable expectation that a conversation in the privacy of his home would not be secretly recorded, and therefore that the recording violated his fundamental right to privacy ***352** under Article 11 and must be suppressed. The trial court subsequently granted, and this Court accepted, the State's request for an interlocutory appeal.

> FN1. That provision states: "That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted."

[1][2] In reviewing the trial court's ruling, we benefit from a series of decisions over the last two decades dealing with the requisite standards and permissible scope of searches and seizures under Article 11. We begin with the fundamental proposition that, as stated in *State v. Jewett*, 148 Vt. 324, 328, 532 A.2d 958, 960 (1986), "[t]he circumstances under which warrantless searches or

seizures are permitted ... must be jealously and carefully drawn." (internal quotation marks omitted). The warrant requirement in our Constitution reflects a deeply-rooted historical judgment that the decision to invade the privacy of an individual's home or possessions should normally be made by a neutral magistrate, not by the agent of the search itself. See *State v. Savva,* 159 Vt. 75, 86, 616 A.2d 774, 780–81 (1991). Judicial review operates as a potent and immutable check on the power of the executive branch, immune from the shifting political pressures or perceived exigencies of the time. *Id.* at 87, 616 A.2d at 780–81.

[3] That said, we have also consistently held that Article 11 protects only those areas or activities that a reasonable person would conclude are intended to be private. See *State v. Costin,* 168 Vt. 175, 177, 720 A.2d 866, 868 (1998); *State v. Kirchoff,* 156 Vt. 1, 10, 587 A.2d 988, 994 (1991); *State v. Blow,* 157 Vt. 513, 517, 602 A.2d 552, 555 (1991). "[A] person cannot rely on Article 11 to protect areas or activities that have been willingly exposed to the public." *Kirchoff,* 156 Vt. at 7, 587 A.2d at 994. Thus, we have held that the State must have a warrant to enter open fields where indicia, such as fences and signs, would lead a reasonable person to conclude that the area is private, see *id.,* but that Article 11 does not protect such areas when the owner or occupant has not taken sufficient steps to exclude the public. See *State v. Chester,* 156 Vt. 638, 638, 587 A.2d 1008, 1009 (1991) (mem.). This distinction was reaffirmed in *Costin,* where a majority of the Court held that Article 11 does not prohibit the use of a warrantless video surveillance camera located in a field where an in-person police stake-out would not otherwise be excluded. 168 Vt. at 180–82, 720 A.2d at 868–71.

Two additional decisions— *Blow,* 157 Vt. 513, 602 A.2d 552, and *State v. Brooks,* 157 Vt. 490, 601 A.2d 963 (1991)—are especially significant for our purposes here, as both underscore the significance ***353** of the home as a repository of heightened privacy expectations. In *Blow,* we held that Article 11 prohibited the police from monitoring****1222** and recording a conversation with a confidential informant in the defendant's home without a warrant, noting that such activity "conducted in a home offends the core values of Article 11." 157 Vt. at 519, 602 A.2d at 556. On the same day, we held in *Brooks* that the warrantless transmittal and recording of a conversation with a confidential police agent in a parking lot did not offend Article 11 because the defendant did not have the same expectation of privacy in words uttered to the informant outside his home. 157 Vt. at 493–94, 601 A.2d at 965; see also *State v. Bruyette,* 158 Vt. 21, 37, 604 A.2d 1270, 1278 (1992) (Dooley, J., concurring) (suggesting that secret monitoring of conversation between defendant and his girlfriend in parked car were outside protection of Article 11).[FN2]

FN2. As we acknowledged in *Brooks* and *Blow,* the Fourth Amendment to the United

States Constitution—as interpreted by the high court in *United States v. White,* 401 U.S. 745, 751, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971)—does not prohibit the warrantless use of informants equipped with concealed devices to record conversations with unknowing suspects. Many state courts have followed *White.* See *Brooks,* 157 Vt. at 492 n. 2, 601 A.2d at 964 n. 2 (listing states that have followed *White*). Several others, however, have declined to follow *White*, including two which we cited in our earlier decisions, *State v. Glass,* 583 P.2d 872, 880 (Alaska 1978), and *Commonwealth v. Blood,* 400 Mass. 61, 507 N.E.2d 1029, 1031–39 (1987). More recently, Pennsylvania's high court also construed its state constitution to prohibit the police from using a confidential informant to surreptitiously record conversations in a defendant's home without a warrant. See *Commonwealth v. Brion,* 539 Pa. 256, 652 A.2d 287, 289 (1994); see generally C. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping,* 47 DePaul L.Rev. 837, 871–78 (1998) (collecting state constitutional decisions dealing with surreptitious police monitoring and recording); M. Dubis, *The Consensual Electronic Surveillance Experiment: State Courts React to United States v. White,* 47 Vand. L.Rev. 857, 858–87 (1994) (collecting and analyzing state court decisions after *White*).

We have, to be sure, disagreed at times about the degree of emphasis to be placed on the location of the search and seizure, to the exclusion of other considerations, such as advanced technologies that may alter or intensify the nature of the intrusion. See, e.g., *Brooks,* 157 Vt. at 494, 601 A.2d at 965 (Morse, J., dissenting) (arguing that intrusive "nature of the surveillance" as much as the location may trigger Article 11 protection); *Costin,* 168 Vt. at 188–90, 720 A.2d at 874 (Johnson, J., dissenting) (arguing that even unposted open field may warrant Article 11 protection from intensive round-the-clock surveillance by hidden video camera); see generally Note, *The Lack of Privacy in Vermont,* 24 Vt. L.Rev. 199, 218–25 (1999) (noting tensions between geographic and balancing approaches in the ***354** Court's Article 11 jurisprudence). We have consistently agreed, however, that the home represents a unique historical category with "special expectations of privacy" warranting the strongest constitutional protection from warrantless searches and seizures. *State v. Morris,* 165 Vt. 111, 133, 680 A.2d 90, 105 (1996) (Dooley, J., dissenting).

As noted, *Blow* is especially significant in this regard, since the only real distinction here is that the secret recording was accomplished in defendant's home by a known police officer rather than by a confidential police informant.[FN3] A careful reading of *Blow* and the cases discussed above, however, renders this a distinction devoid of any meaningful difference; for the heart ****1223** of our holding in *Blow* was a recognition of the "deeply-rooted legal and societal principle that the

coveted privacy of the home should be especially protected." *Blow*, 157 Vt. at 518, 602 A.2d at 555. This heightened expectation of privacy rendered it objectively reasonable to expect that conversations in the privacy of one's home would not be surreptitiously invaded by warrantless transmission or recording. "[W]arrantless electronic participant monitoring conducted in a home," we held, "offends the core values of Article 11." *Id.* at 519, 602 A.2d at 555.

> FN3. The State does not assign, nor do we discern, any significance in the fact that the secret tape recording in *Blow* was accomplished by means of a hidden wire that transmitted the conversation to a third police agent who recorded the conversation, while here it was accomplished by means of a secret tape recorder in the possession of the detectives.

While our holding would not appear to admit of any exceptions based on the particular identity of the secret recorder, properly understood it is not the breadth of our holding in *Blow* but rather its underlying reasoning that dissolves any constitutionally significant distinction between that case and this. This is readily discerned from two of the principal cases on which we relied, *Commonwealth v. Blood*, 400 Mass. 61, 507 N.E.2d 1029 (1987), and *State v. Glass*, 583 P.2d 872 (Alaska 1978). In both cases, the high courts of Massachusetts and Alaska held, respectively, that the electronic recording of a conversation by a confidential informant in the defendant's home violated the defendant's right to privacy under the state constitution. See *Blood*, 507 N.E.2d at 1034 (holding that it was "objectively reasonable to expect that conversational interchange in a private home will not be invaded surreptitiously by warrantless electronic transmission or recording"); *Glass*, 583 P.2d at 880 (construing state ***355** constitution to hold that "the expectation that one's conversations will not be secretly recorded or broadcast should be recognized as reasonable"); see also *Commonwealth v. Brion*, 539 Pa. 256, 652 A.2d 287, 289 (1994) (holding "that an individual can reasonably expect that his right to privacy will not be violated in his home through the use of any electronic surveillance").

Both cases recognized the risk that confidences disclosed to another person in the privacy and security of one's home may be repeated to others, or even later disclosed in court. Yet both fundamentally rejected the proposition that there was no difference between talking to another person who later repeats what is said, and talking to someone who electronically records one's every word and phrase. As eloquently summarized in *Blood:*

> We think it a constitutional imperative to recognize that "the differences between talking to a person enswathed in electronic equipment and one who is not are very real, and they cannot be reduced to insignificance by verbal legerdemain. All of us discuss topics and use expressions

with one person that we would not undertake with another and that we would never broadcast to a crowd. Few of us would ever speak freely if we knew that all our words were being captured by machines for later release before an unknown and potentially hostile audience. No one talks to a recorder as he talks to a person."

507 N.E.2d at 1036 (quoting *Holmes v. Burr,* 486 F.2d 55, 72 (9th Cir.1973) (Hufstedler, J., dissenting)); see also *Glass,* 583 P.2d at 878 (noting that invasive impact of secret recording in the home presents an "additional risk of an entirely different character" than the possibility of mere participant disclosure, which is mediated by such attendant circumstances as credibility, memory, and selectivity).

The Massachusetts court also relied on Justice Harlan's compelling dissent in *United States v. White,* 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (the decision we declined to follow in *Blow*), in which he eviscerated the argument "that it is irrelevant whether secrets are revealed by the mere tattle tale or the transistor." ****1224** *Id.* at 787, 91 S.Ct. 1122 (Harlan, J., dissenting). Justice Harlan reasoned that the scope of constitutional protection must reflect "the impact of a practice on the *sense of security* that is the true concern of the ... protection of privacy." *Id.* at 788 n. 24, 91 S.Ct. 1122 (emphasis added). Analyzed in this light, warrantless monitoring and ***356** recording "undermine[s] that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society." *Id.* at 787, 91 S.Ct. 1122. While interposing a warrant requirement between law enforcement officers engaged in such practices and the general public does not lessen the intrusion, it does—at least—ensure that the surveillance has been found to be reasonably necessary by a "prior independent determination of a neutral magistrate." *Id.* at 783, 91 S.Ct. 1122.[FN4]

FN4. The dissent relies on *Lopez v. United States,* 373 U.S. 427, 439, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963), for the proposition that admitting a secretly recorded conversation with the police represents nothing more than "the most reliable evidence" of the conversation. The dissent fails to note that Justice Harlan, who authored *Lopez,* expressly disavowed this aspect of its reasoning in *White.* While acknowledging that there might be some difference between third-party eavesdropping, as occurred in *White,* and participant tape-recording, as in *Lopez,* Justice Harlan nevertheless observed:

> While the continuing vitality of *Lopez* is not drawn directly into question by this case, candor compels me to acknowledge that the views expressed in this opinion [*White*] may impinge upon that part of the reasoning in *Lopez* which suggested that a suspect has no

> right to anticipate unreliable testimony. I am now persuaded that such an approach misconceives the basic issue, focusing, as it does, on the interests of a particular individual rather than evaluating the impact of a practice on the *sense of security that is the true concern of the Fourth Amendment's protection of privacy.*
>
> *White,* 401 U.S. at 788 n. 24, 91 S.Ct. 1122 (Harlan, J., dissenting) (emphasis added).

Thus understood, our holding in *Blow* cannot be reconciled with the State's argument that Article 11 permits a known police officer to secretly record a conversation in an individual's home without judicial authorization because the "expectation of privacy" is different. From the standpoint of the citizen secure in the privacy of his or her home, nothing changes merely because the party spoken to is a police officer rather than the officer's secret alter ego. Any Vermonter who sits around the kitchen table conversing—as defendant did here—has a reasonable right to expect that he or she is not being secretly monitored or **recorded**. Our "sense of security" in face-to-face conversations **inside** our homes extends at least this far.

Of course, most people will be more wary when speaking with a police officer than a friend, and should reasonably expect that the conversation will be carefully noted and subsequently repeated. This is a far different expectation, however, from knowingly exposing every word and phrase one speaks, every inflection or laugh or aside ***357** one utters, to the scrutiny of the world at large. Clearly the detectives who interviewed defendant well understood that his expectations and, hence, his very words might be different if he knew that he was being recorded. Otherwise, they would have not have acted surreptitiously.

[4] The dissenting opinion makes much of the "values" underlying Article 11, suggesting that it was designed to protect "the exchange of thoughts and ideas [and] personal trust between individuals." 173 Vt. at ——, 795 A.2d at 1230. The dissent fails to mention what we have characterized as the "core value that gave life to Article 11," the freedom from unreasonable****1225** *government* intrusions into the privacy of Vermont citizens. *Kirchoff,* 156 Vt. at 6, 587 A.2d at 992. That value finds its purest expression in the warrant requirement. "Although criminal defendants may seek court review of searches and seizures, these after-the-fact challenges do not serve Article 11's purpose of protecting the rights of everyone—law-abiding as well as criminal—by involving judicial oversight before would-be invasions of privacy." *Savva,* 159 Vt. at 86, 616 A.2d at 780.

The dissent would excuse the underhanded method the police utilized in this case to record the

conversation with defendant, insisting that it was not "trickery." With respect, if it was not trickery to hide a tape recorder to secretly record a conversation with an unsuspecting citizen, what was it? Indeed, this case offers vivid testimony to our warning in *Savva* that "the social costs of eliminating the warrant requirement are simply too high. Without it, police behavior would be subjected to judicial scrutiny only in rare cases, while '[d]ay by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene.' " *Id.* at 87, 616 A.2d at 780 (quoting *Harris v. United States*, 331 U.S. 145, 173, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947)).

[5][6] We thus categorically reject the State's claim "that one who shares his personal confidences with a police officer known to him as such does not have a legitimate expectation that his words will not be electronically seized." On the contrary, as Justice Harlan observed, "the burden of guarding privacy in a free society should not be on its citizens; it is *the Government* that must justify its need to electronically eavesdrop." *White*, 401 U.S. at 793, 91 S.Ct. 1122 (Harlan, J., dissenting) (emphasis added). Having failed to do so in this case by establishing a reasonable justification for the recording before a ***358** neutral magistrate, we conclude that the tape was properly suppressed.

Consistent with our earlier decisions in *Brooks* and *Blow*, our holding is necessarily limited to the facts before us involving a police interview in the privacy of the home, where our "sense of security," in Justice Harlan's words, is highest. *White*, 401 U.S. at 788 n. 24, 91 S.Ct. 1122; see also *Brion*, 652 A.2d at 289 (**inside** the home "a person may legitimately expect the highest degree or privacy known to our society"). The four out-of-state cases on which the State relies are thus fundamentally distinguishable, as all involved police interviews in other, more public settings that do not enjoy the same historical protection. In *City & Borough of Juneau v. Quinto*, 684 P.2d 127, 128–29 (Alaska 1984), the Alaska Supreme Court—distinguishing its earlier decision in *Glass*—upheld the warrantless recording of a suspect's conversation with a police officer on a public highway during the course of the defendant's apprehension and arrest for drunk driving. The court rejected the argument that the defendant enjoyed a reasonable expectation of privacy in such circumstances, where one "is aware, or reasonably should be aware, that he or she is speaking to a police officer who is in the process of executing either a lawful arrest or a lawful investigative stop." *Id.* at 129. The decision in *Quinto* is consistent with our holding in *Brooks* and many others holding that defendants do not enjoy a reasonable expectation of privacy when speaking with police officers in such public settings. It does not, however, justify a warrantless recording in the privacy of the home.

The State also relies on *In re A.W.*, 982 P.2d 842, 847 (Colo.1999), which held that a defendant

does not have a reasonable expectation of privacy precluding the warrantless recording of an interview in a police stationhouse. Although the court ****1226** noted that defendant was "speaking in the actual presence of a police officer," the court's holding cannot be separated from the fact that the defendant was not conversing in the privacy of his home, but **inside** the interview room of a municipal police department. *Id.* at 847. Similarly distinguishable is *Commonwealth v. Thorpe*, 384 Mass. 271, 424 N.E.2d 250 (1981). There the defendant, a former police officer, contacted another officer with an offer to sell a copy of a police sergeant's promotional examination. The officer who was contacted secretly recorded eight telephone conversations and two face-to-face conversations with the defendant, one in a restaurant and another in a doughnut shop. The court upheld ***359** the warrantless recording, broadly rejecting the proposition that "free speech and privacy values are unduly threatened by the risk that when one speaks to a known police officer he may be recording the conversation." *Id.* at 258. *Thorpe* did not, however, involve a police interview in the defendant's home and did not—despite its broad language—hold that a defendant speaking in the privacy of his or her home waives the right to be free from warrantless electronic surveillance and **recording**.

Nor, finally, does *Commonwealth v. Eason*, 427 Mass. 595, 694 N.E.2d 1264 (1998), support the State's position. That case concerned the surreptitious monitoring and **recording** of a telephone conversation between the defendant and a confidential informant using an extension phone in the informant's home. The Massachusetts court distinguished its holding in *Blood*, observing that although the defendant was speaking from **inside** his home, he had no knowledge or control over "the conditions at the other end of [the] telephone conversation." *Id.* at 1268. Accordingly, the court concluded that the defendant did not enjoy the same expectation of privacy that inheres in face-to-face conversations occurring exclusively in a private home, *id.* at 1267, the situation we confront here.

Half a century ago, Justice Jackson explained that the warrant requirement forms the core of our privacy protections—not as a means to interfere with legitimate law enforcement efforts, but rather as a process to ensure that those efforts are properly balanced against the interests of "a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). We have determined as a society that judging "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.* When all is said and done, that is the principle which we reaffirm today.

Affirmed.

SKOGLUND, J., dissenting.

I do not dispute the significance of the home as a place of heightened privacy expectations, but disagree with the majority's conclusion that the actions of the police in this case violated Article 11 of the Vermont Constitution. This Court has consistently held that the core value protected by Article 11 is freedom from unreasonable governmental intrusion into legitimate ***360** expectations of privacy. *State v. Morris,* 165 Vt. 111, 115, 680 A.2d 90, 93 (1996); *State v. Savva,* 159 Vt. 75, 87, 616 A.2d 774, 780–81 (1991); *State v. Blow,* 157 Vt. 513, 517, 602 A.2d 552, 555 (1991); *State v. Brooks,* 157 Vt. 490, 493, 601 A.2d 963, 964 (1991); *State v. Kirchoff,* 156 Vt. 1, 5–6, 587 A.2d 988, 991 (1991). I suggest that there can be no legitimate or reasonable expectation that a conversational interchange between a suspect and police detectives investigating a crime will be ****1227** private, regardless of where that conversation takes place.

A very brief review of the law of search and seizure under the Fourth Amendment to the United States Constitution is offered as an aid to understanding the error I see in the majority's approach. Before the 1967 case of *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), neither wiretapping nor electronic eavesdropping violated a defendant's Fourth Amendment rights unless there had been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure. See *Olmstead v. United States,* 277 U.S. 438, 466, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (evidence obtained from telephone calls intercepted without warrant was admissible as there was no entry into defendants' houses or offices); *Goldman v. United States,* 316 U.S. 129, 134–35, 62 S.Ct. 993, 86 L.Ed. 1322 (1942) (use of a "detectaphone" held against the wall of adjoining office to overhear conversation of defendant was not violation of the Fourth Amendment, as "what was heard ... was not made illegal by trespass or unlawful entry."). But where "eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied" by the defendant, although falling short of a "technical trespass under the local property law," the Fourth Amendment was violated and any evidence of what was seen and heard, as well as tangible objects seized, was considered the inadmissible fruit of an unlawful invasion. *Silverman v. United States,* 365 U.S. 505, 509, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) (eavesdropping accomplished by means of "spike mike" inserted through wall of adjoining house made contact with heating duct in defendant's house, which then acted as a "giant microphone," held to violate Fourth Amendment rights.).

In *Katz,* the Supreme Court heard a challenge to evidence of petitioner's side of a phone conversation, overheard by FBI agents who had attached an electronic listening and recording

device to the outside of the public telephone booth from which petitioner had ***361** placed his calls. See 389 U.S. at 348, 88 S.Ct. 507. The petitioner had framed the issue as whether a public telephone booth is a constitutionally protected area so that a right to privacy attached. The Government maintained that it was not. The Court rejected this formulation of the issue: "In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' " *Id.* at 350, 88 S.Ct. 507. It wrote:

> this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection....But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
>
> *Id.* at 351–52, 88 S.Ct. 507 .

The Court held that the FBI should have obtained a warrant prior to the use of the electronic surveillance involved in the case. The import of the case is the Court's focus on the privacy expectations of the individual and not on the locus or extent of the government intrusion. "One who occupies [the phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352. *Katz* overruled ****1228** *Olmstead* and *Goldman* and "swept away doctrines that electronic eavesdropping is permissible under the Fourth Amendment unless physical invasion of a constitutionally protected area produced the challenged evidence." *United States v. White*, 401 U.S. 745, 748, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971).

After *Katz*, the concept of "constitutionally protected areas" no longer served as a "talismanic solution to every Fourth Amendment problem." 1 W. LaFave, Search and Seizure § 2.4(a), at 524 (3rd ed.1996). Justice Harlan, in his concurrence in *Katz*, summarized the appropriate analysis as follows: "that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not ***362** 'protected' because no intention to keep them to himself has been exhibited." *Katz*, 389 U.S. at 361, 88 S.Ct. 507.

We have adopted the United States Supreme Court's rationale in *Katz* and opined that Article

11 of the Vermont Constitution, "like the Fourth Amendment, protects people, not places." *State v. Zaccaro*, 154 Vt. 83, 90–91, 574 A.2d 1256, 1261 (1990) (citing *Katz*, 389 U.S. at 351, 88 S.Ct. 507). In those cases where we have interpreted Article 11 as providing broader protection than the Fourth Amendment of the United States Constitution, we have consistently, until today, used the "reasonable expectation of privacy" analysis that is the cornerstone of Fourth Amendment jurisprudence. For example in *State v. Kirchoff*, 156 Vt. at 10, 587 A.2d at 994, we held that under Article 11 a lawful possessor has a "reasonable expectation of privacy" in affairs conducted in open fields where indicia, such as fences and "no trespassing" signs, would lead a reasonable person to conclude the area is private. We emphasized in *Kirchoff* that a person cannot rely on Article 11 to protect areas or activities that have been willingly exposed to the public. *Id.* at 7, 587 A.2d at 992–93.[FN1]

> FN1. In keeping with this approach, a few days after our decision in *Kirchoff* we decided *State v. Chester*, 156 Vt. 638, 587 A.2d 1008 (1991) (mem.), and found that the police did not violate Article 11 when they walked on land that lacked barriers or signs prohibiting entry.

Again in *Savva*, 159 Vt. at 91–92, 616 A.2d at 783, we found a more expansive protection under Article 11 than under the Fourth Amendment for containers located in automobiles. We grounded our analysis on defendant's expectation of privacy in the packages contained in the hatchback of his vehicle and again noted that Article 11 does not protect areas willingly exposed to the public. *Id.* at 89, 616 A.2d at 782.

It is true that, throughout Fourth Amendment and Article 11 jurisprudence, the home has enjoyed heightened privacy expectations. In emphasizing this principle, the majority finds support in two of our decisions. Both, I suggest, were decided on a reasonable expectation standard. In *State v. Blow*, 157 Vt. at 515, 602 A.2d at 553, a police informant was wired with electronic transmitter and sent to the defendant's house where he purchased marijuana. Defendant moved to suppress the tape recordings of the transactions and the officer's testimony about them. The judge allowed the detective to testify about the conversations between the informant and the defendant at the time of the sale. The recordings themselves ***363** were not introduced. In deciding the case, we acknowledged that the "assumption of the risk" rationale set out in *White*, 401 U.S. at 751–52, 91 S.Ct. 1122, would preclude any finding****1229** of a violation of the federal constitution. [FN2] However, we then analyzed the defendant's claim under Article 11 using the "expectation of privacy" principles derived from *Katz:* (1) whether the defendant had "an actual (subjective) expectation of privacy" concerning his conversations in his home with an undercover police

informant, and (2) whether the expectation is one that society is prepared to recognize as "reasonable." *Blow*, 157 Vt. at 517, 602 A.2d at 555 (quoting *Katz*, 389 U.S. at 361, 88 S.Ct. 507). We found that warrantless electronic participant monitoring conducted in a home offended defendant's expectation of privacy and the core values of Article 11 and suppressed the evidence. However, in emphasizing the importance of the home as a focus of Article 11 analysis in *Blow*, we did not signal "a return to the formalism of *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), under which the privacy right was invaded *only* by a trespass to property. On the contrary, the privacy value should be protected wherever it is unreasonably threatened ...." *Blow*, 157 Vt. at 520, 602 A.2d at 556. It was the invasion of privacy that concerned us, not a mere trespass into the home.

> FN2. In *White*, the United States Supreme Court held that the government use of informants equipped with concealed devices to record conversations with unknowing suspects did not violate the Fourth Amendment. 401 U.S. at 751, 91 S.Ct. 1122. The federal constitutionality of warrantless electronic surveillance with the consent of one party to a conversation was upheld on the ground that when one speaks one voluntarily assumes not only the risk that one's listener may repeat what one says to others, but also the risk that the listener may be recording or monitoring the conversation for broadcast to others.

A different result was obtained in *State v. Brooks*, 157 Vt. at 491–94, 601 A.2d at 963–65, where we considered a challenge to participant electronic monitoring where the wired informant and the defendant were in two adjacent vehicles in a parking lot. Applying the same "reasonable expectation of privacy analysis," we held that such monitoring was not regulated by Article 11: "[W]e find that defendant, regardless of what he actually expected, did not enjoy a reasonable expectation of privacy in a public parking lot." *Id.* at 493, 601 A.2d at 964.

Of course we hold a deeply rooted, subjective expectation of privacy in our homes. The right to retreat into our personal sanctuary—be it an apartment, a rented room, a hut or a mansion—and to be free from unreasonable governmental intrusion is at the heart of Article 11. The problem with the majority's approach to this ***364** case is its near total reliance on the fact that the recorded conversation took place in defendant's home. It neglects to analyze whether the conversation was a private one, one in which an individual would retain a subjective expectation of privacy, and whether society is prepared to recognize that expectation as "reasonable."

"Article 11 protects the people from governmental intrusion into their private affairs; to the extent their affairs are willingly made public, the provision has no application." *Kirchoff*, 156 Vt.

at 7, 587 A.2d at 993. "In determining whether persons have a privacy interest in any given area or activity, we examine both private subjective expectations and general social norms." *State v. Morris*, 165 Vt. at 115, 680 A.2d at 94 (citing *Blow*, 157 Vt. at 517–18, 602 A.2d at 555).

First, let us not forget, defendant invited the officers into his home and agreed to talk with them about allegations that he had engaged in sexual acts with a foster child. By speaking freely with officers, whom he understood were investigating his possible involvement in a serious crime, ****1230** defendant could not have had a reasonable expectation that the questioning was private or would be kept private. The same conclusion is reached even viewing the facts of this case with a mind towards the heightened privacy expectation generally associated with one's home. This is not a conversation over a kitchen table between friends. He knew who he was talking to, and the purpose of the officers' visit. Would society think he had a legitimate or reasonable expectation that this exchange with police would be private? I think not.

As in *Blow*, the majority finds support in *Commonwealth v. Blood*, 400 Mass. 61, 507 N.E.2d 1029 (1987), and in *State v. Glass*, 583 P.2d 872 (Alaska 1978). However, in these cases the conversations the courts held to enjoy an expectation of privacy were captured by *confidential informants* in the defendants' homes. In neither case did the defendants have reason to suspect that their conversation partners were working with the government. And, in both cases the courts anchored their analysis in whether the expectation of privacy was one society was willing to embrace. "When we confront the question whether police activities amount to a search or seizure within the meaning of art. 14 [of the Massachusetts Declaration of Rights], we ask, 'whether the defendants' expectation of privacy [in the circumstances] is one which society could recognize as reasonable.' " *Blood*, 507 N.E.2d at 1033 (citing ***365***Commonwealth v. Podgurski*, 386 Mass. 385, 436 N.E.2d 150, 152 (1982)). "[O]ne communicating private matters to another exhibits an actual (subjective) expectation of privacy whether or not the listener is equipped with electronic devices. The key question is whether that expectation of privacy is one that society is prepared to recognize as reasonable." *Glass*, 583 P.2d at 880.

Another Massachusetts case, *Commonwealth v. Thorpe*, 384 Mass. 271, 424 N.E.2d 250 (1981), provides a succinct summation of why privacy is protected and whether warrantless, secret recordings of conversations between known police officers and suspects undermine this protection. In *Thorpe*, defendant moved to suppress certain tape recordings of conversations between himself and a police officer to whom he offered to sell a copy of a police sergeant's promotional examination. Wearing a tape recording device, the officer had several conversations with Thorpe. On appeal, Thorpe argued that the warrantless recordings violated his right to be free from

unreasonable searches and seizures as guaranteed by art. 14 of the Massachusetts Declaration of Rights because he had an expectation of privacy in not having his conversation with the officer recorded. The court rejected this argument and held:

> We do not think that free speech and privacy values are unduly threatened by the risk that when one speaks to a *known* police officer he may be recording the conversation. This is not the type of warrantless surveillance condemned by the courts and commentators ..., whose impact on privacy is "such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society."

Thorpe, 424 N.E.2d at 258 (citing *White,* 401 U.S. at 787, 91 S.Ct. 1122 (Harlan, J., dissenting)) (emphasis added).

Analysis of privacy expectations in situations such as that present in *Thorpe,* where defendant is aware that he is talking to police, requires an evaluation of the values intended to be protected by Article 11, such as the exchange of thoughts and ideas, personal trust between individuals, free expression and individuality, or as stated by the court in *Thorpe,* the "confidence****1231** and sense of security in dealing with one another." 424 N.E.2d at 258. While it is certainly true that surreptitious recording of conversations between citizens can have a chilling effect of such forms of freedom, this effect is ***366** rendered de minimis "when one is aware, or reasonably should be aware, that he or she is speaking to a police officer." *City & Borough of Juneau v. Quinto,* 684 P.2d 127, 129 (Alaska 1984) (tape recording of defendant's conversation with police officer was properly admitted into evidence at trial, when defendant knew, or reasonably should have known, that he was speaking to police officer); *People v. Suite,* 101 Cal.App.3d 680, 161 Cal.Rptr. 825, 829 (1980) (holding that defendant's reliance on cases decided on a "reasonable expectation of privacy" standard was "sorely misplaced" when he sought to suppress recordings of telephoned bomb threats to police, observing that it was "ludicrous" for defendant to argue that his calls to police were confidential communications); *In re A.W.,* 982 P.2d 842, 847 (Colo.1999) ("[O]ne who is speaking in the actual presence of a police officer or detective has neither a subjectively nor an objectively reasonable expectation of privacy."); *State v. Bonilla,* 23 Wash.App. 869, 598 P.2d 783, 784–86 (1979) (where defendant called police dispatcher and confessed to murdering his wife, while other officer listened in on extension lines, "[i]t would strain reason for [defendant] to claim he expected his conversations with the police dispatcher to remain purely between the two of them.").

I return again to the fact that defendant invited the officers into his home and agreed to answer

questions surrounding their investigation. There is no dispute that his consent was voluntary. When consent is given to a search or seizure, there is usually no violation of Article 11. See *State v. Sheehan,* 171 Vt. 642, 643, 768 A.2d 1275, 1278 (2000) (mem.); *Zaccaro,* 154 Vt. at 90, 574 A.2d at 1261; *State v. White,* 129 Vt. 220, 224, 274 A.2d 690, 692 (1971).

For example, in *Sheehan,* the defendant argued that his **consent** was not voluntary, contending that police deceived him because their request to enter the home to talk with him was a pretext to gain entry to arrest him. In finding that his **consent** was indeed voluntary, we relied on the fact that the uniformed police identified themselves, asked defendant's **consent** to enter the **residence** so that they could talk to him, and that the scope of the conversation was not limited or defined. "Once **inside**, the police acted within the scope of their broad invitation and did precisely what they said they would, talk to defendant. Nothing about the police officers' behavior suggests that they engaged in trickery or misrepresented their purpose in order to gain entry into defendant's home." *Sheehan,* 171 Vt. at 643, 768 A.2d at 1278. Like the officers in *Sheehan,* the officers in the case before ***367** us did not misrepresent their purpose or engage in trickery in order to gain entry into defendant's home, or to induce him to speak with them. And, in fact, they specifically told him what topic they wanted to talk about—the allegations brought against him by a foster child.

Ah, but was it a trick to secretly record the conversation that ensued?

In *State v. Costin,* 168 Vt. 175, 181, 720 A.2d 866, 870 (1998), we analyzed the situation where law enforcement had placed video surveillance cameras on a suspected marijuana field. We dismissed the claim that the video surveillance alone created an Article 11 search. "We do not see how Article 11 protects against the use of a technological device that accomplishes the same result as a lawful in-person stake-out, and nothing more." *Id.* Here, we have a lawful, consented to conversation with investigating officers. The fact that ****1232** they captured the defendant's voluntary statements using a technologically superior means to the note-taking and memories of the officers does not " 'transmogrify a constitutionally innocent act into a constitutionally forbidden one.' " *Id.* (quoting *Vega–Rodriguez v. Puerto Rico Tel. Co.,* 110 F.3d 174, 181 (1st. Cir.1997)).

In *Lopez v. United States,* 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963), the Supreme Court upheld the use of a wire recording of a conversation between the defendant and an Internal Revenue Service agent that occurred in defendant's office during which the defendant offered the agent a bribe. The IRS agent had recorded the conversation on a small recording device carried in

his pocket. While the decision in *Lopez* was based, not on consideration of the defendant's expectations of privacy, but on outmoded considerations that "no trespass was committed," [FN3] the reasoning quoted below does not suffer from the difference in approach and is strikingly similar to the reasoning we utilized in *Costin.* The Court wrote:

> FN3. The decision in *Lopez* predated the Court's change in approach set forth in *Katz.* At the time of *Lopez,* it was "insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." *Lopez,* 373 U.S. at 438–39, 83 S.Ct. 1381.

> Once it is plain that [the agent] could properly testify about his conversation with Lopez, the constitutional claim relating to the recording of that conversation emerges in proper perspective.... Indeed this case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, ***368** the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose.... [The device] was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.
>
> *Lopez,* 373 U.S. at 438–39, 83 S.Ct. 1381.

In a criticism of the majority's approach in *Costin,* the dissent suggested the Court was "resurrect[ing] an outdated, formalistic analysis that rigidly focuses on mapping out property worthy of constitutional protection while ignoring modern search-and-seizure law, which examines expectations of privacy and societal interests." 168 Vt. at 184, 720 A.2d at 872. This, I suggest, is what is happening here. Whether we are dealing with open fields as in *Costin* and *Kirchoff,* or garbage left on the curb as in *State v. Morris,* 165 Vt. at 115–16, 680 A.2d at 93–94, or events that transpire in the home as in *Blow,* the core principle that triggers Article 11 protection is the individual's expectation of privacy and not the location of the government activity challenged.

Because Article 11 protects people, not places, in this case, the location of the conversation is constitutionally immaterial. I would hold that the recording of defendant's conversations with the police officers under these circumstances was not a violation of any right guaranteed to him by Article 11 of the Constitution of the State of Vermont and that the court erred in suppressing evidence of that tape recording on the grounds stated. As stated in *Lopez:*

> Stripped to its essentials, [respondent's] argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.****1233** For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.
>
> 373 U.S. at 439, 83 S.Ct. 1381.

I hesitate to speak for society as a whole, but respectfully suggest that Vermonters would not find reasonable a suspect's expectations that his responses to police questions about possible involvement in a crime are private. I am authorized to state that Chief Justice Amestoy joins in this dissent.

Vt.,2002.
State v. Geraw
173 Vt. 350, 795 A.2d 1219

END OF DOCUMENT

VERMONT DEPARTMENT OF PUBLIC SAFETY
LAW ENFORCEMENT ADVISORY BOARD

SUMMARY REPORT

2014

The Law Enforcement Advisory Board advises the commissioner of public safety, the governor, and the general assembly on issues involving the cooperation and coordination of all agencies and constables that exercise law enforcement responsibilities.

Prepared by: DPS Law Enforcement Advisory Board

Date: January 15, 2015

Table of Contents

INTRODUCTION

In 2004, the Vermont General Assembly created a Law Enforcement Advisory Board (LEAB) of the Department of Public Safety with authorizing language contained in T.24 V.S.A. § 1939. The purpose of the Board is to advise the Commissioner of Public Safety, the Governor, and the General Assembly on issues involving the cooperation and coordination of all agencies that exercise law enforcement responsibilities. Membership of the Board is set by statute. The current members are listed on Page 4.

In 2014, the Vermont legislature tasked the LEAB with the following:

- Creating a model Conducted Electrical Weapon (CEW) Policy;
- Drafting a CEW Use Report Form;
- Making recommendations for the implementation of Sec. 4 of Act 193, regarding the electronic recording of custodial interrogations;
- Providing a model Eyewitness Identification Policy for agencies to adopt on January 1, 2015;
- Making a recommendation regarding officers certified to use CEW's wear body cameras;
- Ensuring that CEW's are measured and calibrated as required by the CEW Model Policy.

As always, LEAB members would welcome an opportunity to offer testimony and answer any questions regarding any subject in this report.

Respectfully submitted,

Richard B. Gauthier
Executive Director, VT Criminal Justice Training Council
2014 Chair, LEAB

LEAB Members

2014

Chair: Richard Gauthier, Executive Director, Vermont Criminal Justice Training Council

Vice-Chair: Paco Aumand, Director, Criminal Justice Services Division

Commissioner Keith Flynn, Commissioner of the Department of Public Safety

Colonel Thomas L'Esperance, Director of the Vermont State Police

Chief Jennifer Morrison, Vermont Association of Chiefs of Police

Sheriff Roger Marcoux, Lamoille County Sheriff, Vermont Sheriffs' Association

Karen Horn, Vermont League of Cities and Towns

John Treadwell, Attorney General's Office

Executive Director, State's Attorney & Sheriff's Office

James Leene, U. S. Attorney's Office

Matthew Valerio, Defender General's Office

Michael O'Neil, Vermont Troopers Association Representative

Constable Nelson Tift, Vice-President, Vermont Constable Association

CEW Model Policy

Act 180, **An Act Relating to Statewide Policy On The Use Of and Training Requirements For Electronic Control Devices**, Sec. 1. 20 VSA 2367(b), required the Law Enforcement Advisory Board to establish a statewide policy on the use of and training requirements for electronic control devices (ECD), also referred to as conducted electrical weapons (CEW). The Act also specified some provisions that were to be included in the model policy.

The LEAB had previously drafted a proposed model policy that met with some resistance and criticism, and conducted a number of public hearings intended to get citizen input on law enforcement use of CEW's in Vermont. Using the results of these hearings, testimony presented to both House and Senate Committees on Government Operations, and the provisions contained in the Act, the LEAB worked with representatives from the American Civil Liberties Union (ACLU) and Disability Rights-Vermont (DR-V) to create the CEW Model Policy referenced in this report (see Appendix A).

The policy as written complies with the criteria specified in the Act, and the LEAB will review the policy annually to ensure that it remains up-to-date with any developments involving CEW use.

CEW Report Form

Act 180, **An Act Relating to Statewide Policy On The Use Of and Training Requirements For Electronic Control Devices**, Sec. 1. 20 VSA 2367(f) requires that "*Every State, local, county, and municipal law enforcement agency and every constable who is not employed by a law enforcement agency shall report all incidents involving the use of an electronic control device to the Criminal Justice Training Council in a form to be determined by the Council*." Though not reflected in the Act, the LEAB received a verbal request from Senate Government Operations to work with the ACLU and DR-V in creating the form and contents. Given that the current LEAB Chair is also the VCJTC Executive Director, having the LEAB work on the form would comply with both legislation and the SGO request.

The LEAB created a small working group consisting of the chair and representatives from the ACLU and DR-V to draft a CEW report form to submit for review to the entire board. The initial draft went through several revisions before being finalized by the board (see Appendix B).

The VCJTC will accept CEW use reports from agencies and host them on a separate page, accessible to the public, on the VCJTC website. Agencies will be required to provide CEW Use Reports quarterly of all incidents that are approved and ready to be released within that quarter. All deployments for a calendar year will be due no later than January 15 of the following year.

The Council will not be hosting the entire law enforcement report on an incident, and individuals seeking more specific detail than that included in the CEW Use Report Form will be directed to the agency submitting the form.

Electronic Recording of a Custodial Interrogation

No. 193. **An act relating to law enforcement policies on eyewitness identification and bias-free policing and on recording of custodial interrogations in homicide and sexual assault cases,** requires that the LEAB develop a plan for the implementation of Sec. 4 of this Act (electronic recording of a custodial interrogation) assess the scope and location of current recording inventory in Vermont, develop recommendations on how to adequately equip agencies with recording devices, and provide recommendations on the expansion of recordings for any felony offense.

The Act also required the LEAB to submit a written report to House and Senate Committees on Judiciary with its recommendations for implementation of Sec. 4, 13 VSA 5581, by October 1, 2014. This report (see Appendix C) was completed and submitted by the due date. The survey was also completed and the results attached to this report.

Recommendation

The LEAB determined that recording equipment is inexpensive and should be considered essential equipment that is built into an agency's budget. Given that the Act allows for audio recording alone if "…law enforcement does not have the current capacity to create a visual recording…", an agency should, at a minimum, be audio recording custodial interrogations while building the capacity to add video recording.

The LEAB further recommends that a best practice would be for an agency to record all custodial interrogations regardless of offense.

Model Policy for Eyewitness Identification

No. 193. **An act relating to law enforcement policies on eyewitness identification and bias-free policing and on recording of custodial interrogations in homicide and sexual assault cases,** requires that by January 1, 2015, law enforcement agencies shall adopt an eyewitness identification policy and that the policy will contain the essential elements as identified by the LEAB and specified in the Act.

The LEAB, working with the Innocence Project (IP), developed a model policy two years ago. The existing policy (see Appendix D) was reviewed in September 2014 by the IP Director of State Policy, who affirmed that it was up to date and in compliance with the provisions in the Act.

Agencies and constables will be notified of the requirements of the Act and provided with a link to the model policy.

Body Camera Recommendation

The LEAB recognizes the valuable role that body cameras could play and is convinced that the recordings produced by the cameras would exonerate officers far more than implicate them in wrongdoing, but would suggest a more comprehensive study before requiring that officers wear them. Though the LEAB was tasked only with developing a recommendation regarding officers certified to use a CEW also being required to wear a body camera, it became evident during Board discussions that a more universal recommendation be developed, with agencies then deciding which officers, if any, should wear them.

Issues that would warrant more consideration are as follows:

Financial: The actual acquisition of the cameras would be the least expensive step in the process. The price per unit has dropped significantly at the same time that recording quality has improved. But the need for and cost of storage capacity can be prohibitively expensive, particularly if agencies are required to store recordings for long periods of time.

Policy: Questions concerning camera usage need to be resolved and best practices identified.

Legal: There are concerns regarding camera usage and privacy, notification to individuals that they're being recorded and their ability to refuse, how long the videos have to be stored, how they're treated from a public records perspective, etc.

Recommendation

Given that these issues are interconnected and each will affect the other, the LEAB recommends that we be given additional time to explore them in depth during 2015 with identified stakeholders, with the goal of making a more comprehensive and informed presentation to the legislature and to Vermont law enforcement in the 2015 report.

CEW Measurement and Calibration

The section of the CEW Model Policy that addresses measurement and calibration reads as follows:

5 Measurement and Calibration

. *5.1 CEWs shall be calibrated at the _____ to ensure the electrical output of the device is within manufacturer's specifications under the following circumstances:*

. *5.1.1 Upon receipt by a law enforcement agency and prior to use in the field, only if measurement and calibration equipment is available in the state;*

. *5.1.2 Annually, only if measurement and calibration equipment is available in the state; and,*

. *5.1.3 After a critical incident, regardless of whether there is measurement and calibration equipment available in the state or the unit needs to be sent back to the manufacturer for testing..*

. *5.2 Exception – CEWs that are self-calibrating are not subject to these provisions unless a law enforcement agency requires calibration pursuant to its own policies and procedures or there are reasonable grounds to believe that the self-calibration is not functional.*

. *5.3 If a CEW's electrical output is determined to be outside of manufacturer's specifications it shall not be used in the field until it has been found to have output within manufacturer's specifications.*

At the time this section of the policy was written, the VCJTC was planning on purchasing a testing station for approximately $17,000, and the station would have been made available for use either at the Academy or in the field by VT law enforcement agencies, as needed, free of charge. Given that this was not a budgeted expenditure, the VCJTC was planning on using carryover money to fund the purchase. Unfortunately, that opportunity was lost due to the VCJTC rescission spending cuts.

Without in-state testing availability, CEW measurement and calibration will prove to be difficult and expensive for Vermont law enforcement agencies. Currently, Taser (the predominant CEW brand used by VT law enforcement) charges $500 per unit to test, and the unit has to be shipped to the company.

It should be noted that it is unknown how many current CEW models issued to law enforcement officers have the self-calibration feature, though they should still be subject to independent testing after a critical incident.

Recommendation

Continuing efforts are being made to develop an in-state testing option. Until that becomes available, sending units away for annual testing will prove to be too much of a financial and logistical hardship for agencies. CEW's are tested before being shipped from the factory and it's the recommendation of the LEAB that agencies only be required to rely on this until/unless testing equipment is readily available in-state, at which time agencies should adhere to provisions 5.1.1 and 5.1.2, above.

Appendix A

CEW Model Policy

LEAB's Proposed Policy

Use of Conducted Electrical Weapons

INTRODUCTION AND PURPOSE

The purpose of this policy is to effectuate 20 V.S.A. § 2367 and establish statewide training and policies governing law enforcement agencies' use of Conducted Electrical Weapons ("CEWs").

When properly used, CEWs can be an effective and efficient law enforcement tool that can reduce injuries to suspects, bystanders, and law enforcement officers. However, a recent review of existing CEW policies from around Vermont indicates that law enforcement agencies have different policies regulating when and how CEWs may be used. In addition, the frequency with which law enforcement agencies must work together and community concern over the potential dangers of CEWs support the need for a consistent and safe approach to the use of CEWs as less-lethal law enforcement tools.

This policy sets forth recommended minimum standards for training officers on using CEWs, the circumstances under which officers should use CEWs, and the procedures officers should follow after using CEWs. Although this policy contains provisions and principles that may apply to several different types of force, it focuses on CEWs and does not specifically address all other lawful types of force law enforcement officers may use in a given situation. This CEW policy is designed to supplement rather than replace any existing use of force policies. It is expected that law enforcement agencies incorporate the provisions of this policy into their existing use of force policies.

Finally, because this policy attempts to apply universally to all law enforcement agencies regardless of their size, it is not possible to fully detail the level of supervisory review of use of force reports completed after CEW deployment. Agencies should refine these provisions of this policy according to their size, existing policies, and the needs of the communities they serve.

POLICY

1. Definitions.

    1.1. Conducted Electrical Weapon ("CEW"): A less-lethal law enforcement device that delivers an electrical pulse to the body of a subject in either a "drive stun" or "probe" mode. When used in "probe mode" the device discharges two probes that remain connected to the CEW via wire and which upon impact deliver an electrical pulse designed to temporarily incapacitate that subject. When used in "drive stun" mode, the device makes direct contact with and delivers an electrical pulse to the body of a subject, but does not result in the same temporary incapacitation of a subject as when used in "probe" mode. CEWs include "Electronic control devices" which are defined at 20 V.S.A. § 2367(a)(1) as "device[s] primarily designed to disrupt an individual's central nervous system by means of deploying electrical energy sufficient to cause

uncontrolled muscle contractions and override an individual's voluntary motor responses."

1.2. Special populations: Members of special populations include subjects an officer has reason to believe are:

1.2.1. Cognitively impaired such that they are unable to comply with an officer's instructions.

1.2.2. Experiencing an emotional crisis that may interfere with the ability to understand the consequences of their actions of follow directions.

1.2.3. Persons with disabilities whose disability may impact their ability to communicate with an officer, or respond to an officer's directions.

1.2.4. Under 18 years of age.

1.2.5. Pregnant.

1.2.6. Over 65 years of age.

1.2.7. Physically infirm, subject to or diagnosed with a heart condition, or epilepsy, or a seizure disorder.

1.3. Special circumstances: Special circumstances include situations where an officer has reason to believe the subject is:

1.3.1. Operating a motor vehicle.

1.3.2. Standing in an elevated area, near water, or near flammable materials (including but not limited to alcohol-based chemical sprays).

1.3.3. Restrained.

1.4. Special consideration: A consideration of: (i) the potential additional risk of harm posed by deploying a CEW against a member of a special population or a subject in special circumstances; and (ii) whether other types of force are reasonably available to effectuate custody of or facilitate control over a member of a special population or a subject in special circumstances while still preserving the safety of that person, third parties, and the responding officer(s).

1.5. Active Resistance: A subject using physical activity to resist or takes an affirmative action to defeat an officer's ability to take him/her into custody or to seize him/her, but the subject's actions would not lead a reasonable officer to perceive a risk of physical injury to him/herself, the subject, or a third person. Examples of active resistance include pulling away, escaping or fleeing, struggling and not complying on physical contact, or other energy enhanced physical or mechanical defiance. Refusing to move upon verbal direction or chaining oneself to an object does not constitute active resistance.

1.6. Active Aggression: Behavior that creates an imminent risk of physical injury to the subject, officer, or third party, but would not lead a reasonable officer to perceive a

risk of death or serious bodily injury. Examples include an attack on an officer, strikes, wrestling, undirected strikes with injury potential, kicking, shoving, punching, and other words or behavior indicating that such actions are imminent.

1.7. Critical Incident: A deployment of a CEW that results in serious bodily injury or death of the subject.

2. CEW Use and Deployment Procedures.

2.1 Only officers who complete training on the use of CEWs containing the minimum elements set forth in Section 4 of this policy, as approved by the Vermont Criminal Justice Training Council, shall be authorized to carry CEWs.

2.2 Prior to the start of each shift, an officer authorized to carry a CEW shall conduct a spark test of the CEW to ensure that it is properly functioning. Only properly functioning CEWs shall be carried for use. CEWs that are not properly functioning shall be taken out of service and sent for repair.

2.3 When it is safe to do so, law enforcement should display and provide a warning prior to deploying a CEW.

2.4 Officers may only deploy CEWs in the following circumstances:

2.4.1 In response to either:

2.4.1.1 A subject exhibiting active aggression.

2.4.1.2 A subject actively resisting in a manner that, in the officer's judgment, is likely to result in injury to the subject, the officer, or third persons.

2.4.2 If, without further action or intervention by the officer, injuries to the subject, the officer, or others will likely occur.

2.4.3 To deter vicious or aggressive animals that threaten the safety of the officer or others.

2.5 Neither an officer, a subject, nor a third party has to actually suffer an injury before use of a CEW may be justified.

2.6 An officer should attempt to avoid deployment to a suspect's head, neck, chest, genitals, female breast, and stomach of a pregnant woman.

2.6.1 When targeting a subject from the front, the preferred target area is a horizontal line approximately 2 inches lower than the sternum and below. An ideal probe deployment from the front will "split the hemispheres" having one probe strike a subject above the belt line and the other probe striking the subject in the thigh or leg thereby activating the hip flexor.

2.6.2 When targeting a subject from the back, the preferred target area is below a horizontal line drawn even with the shoulders across the neck and below.

2.7 Officers should use the minimum number of cycles necessary to take a suspect into custody or mitigate their assaultive behavior.

2.8 CEWs shall not be used in a punitive or coercive manner and shall not be used to awaken, escort, or gain compliance from passively resistant subjects. The act of fleeing or destroying evidence, in and of itself, does not justify the use of a CEW.

2.9 When it is safe to do so, officers should attempt to deescalate situations. However, officers are not required to use alternatives to a CEW that increases the danger to the officer, another person or the public.

2.10 Officers should avoid deploying more than one CEW on a single subject at the same time unless circumstances exist such as an ineffective probe spread on the first CEW or the first CEW fails to achieve immobilization of the subject and a second deployment is independently justified. Before deploying a second CEW, officers should consider the feasibility and safety of attempting to control the subject with a lesser type of force.

2.11 Officers having reason to believe they are dealing with a member of a special population or are dealing with special circumstances shall give special consideration to deploying an CEW. Officers having reason to believe they are dealing with an individual with a psychiatric disability shall consider consulting with the area designated mental health agency.

3 Post Deployment Procedure.

3.1 Following CEW use, officers should only use restraint techniques designed to minimize the risk of impairing a suspect's respiration. Once restrained, the subject should be moved into a recovery position that facilitates breathing.

3.2 As soon as practicable after CEW deployment, the CEW probes shall be removed from the subject. The probes shall be treated as a biohazard. In the following cases, officers should wait for EMS to remove the probes:

3.2.1 The probes embedded in a sensitive area such as the face, neck, throat, groin, female breast, or stomach of a pregnant woman.

3.2.2 The officer encounters problems when attempting to remove the probe.

3.3 Medical attention at a medical facility shall be offered to all individuals subjected to a CEW deployment.

3.4 Emergency medical services shall be contacted if a subject:

3.4.1 Suffers an obvious injury.

3.4.2 Does not appear to recover properly and promptly after deployment.

3.4.4 Is a member of a special population.

3.4.4 Has been subjected to three or more CEW deployments or a continuous deployment exceeding 15 seconds.

3.4.5 Has been subjected to a deployment to his or her chest.

3.4.6 Exhibits signs of extreme uncontrolled agitation or hyperactivity prior to the CEW exposure or the subject was involved in a lengthy struggle or fight prior to the CEW exposure.

3.5 If a subject refuses additional medical attention, that refusal should be documented.

3.6 When an officer has reason to believe (s)he is responding to a situation that may necessitate emergency medical services, (s)he shall make reasonable efforts to summon such services in advance.

. 3.7 With the exception of the required spark test and accidental discharges that do not connect with any living being, each time a CEW is deployed and/or displayed it shall be documented in a use of force report within 24 hours of the deployment unless otherwise authorized by a supervisor. This use of force report shall contain the following, at a minimum:

3.7.1 The date, time, and location of the incident.

3.7.2 The officer(s) involved in the incident, identifying which officer(s) used CEWs.

3.7.3 The type of CEW deployment, i.e., display, drive stun, or probe mode.

3.7.4 Identifying and descriptive information for the subject, including any information indicating if the subject was a member of a special population or encountered during an incident involving special circumstances. If law enforcement consulted with any mental health agencies that fact should be noted.

3.7.5 A list of other known witnesses.

3.7.6 The number of CEW cycles used, the duration of each cycle, and the duration between cycles.

3.7.7 The level and description of resistance encountered.

3.7.8 Whether CEW use was effective.

3.7.9 The type of crime/incident the suspect was involved in.

3.7.10 The approximate range at which the CEW was used.

3.7.11 The point of impact.

3.7.12 Whether law enforcement used or attempted to use any other types of force.

3.7.13 The medical care provided to the subject, including any refusal of additional medical attention after initial screening by EMS.

3.7.14 The type of injuries, if any, sustained by any of the involved persons including

the officer(s).

3.7.15 When possible, photographs of the CEW probe entry sites.

3.8 The department shall also collect the download data, cartridges, probes, and wires from the CEW that was deployed and shall maintain them pursuant to its evidence policies. The download shall occur as soon as reasonably practical after the CEW is deployed.

3.9 When possible, in instances in which more than one CEW has been deployed, a sampling of the AFID tags should also be collected and maintained pursuant to the department's evidence policies.

3.10 Accidental discharges that do not connect with any living thing shall be documented in a departmental memorandum explaining in detail how the discharge occurred within 48 hours of the alleged accidental discharge unless otherwise authorized by a supervisor.

3.11 All use of force reports and departmental memorandum required under this policy shall be reviewed by the officer's supervisor. The department shall conduct a use of force review in the following situations:

3.11.1 The department receives a complaint of excessive use of force.

3.11.2 The supervisor recommends conducting a use of force review.

3.11.3 The encounter resulted in death or serious bodily injury.

3.11.4 The individual exposed to the CEW is a member of a special population.

3.11.5 An individual was exposed to three or more CEW cycles or a cycle that lasted longer than 15 seconds.

3.12 Upon request, a suspect subjected to a CEW deployment, or his/her next of kin, shall be kept informed of the procedural status and final result of the review.

3.13 Annually each law enforcement agency shall report to the Vermont Criminal Justice Training Council all incidents involving the use of a CEW in a form to be determined by the Council. The Council shall make this information available on its website.

4 Training Requirements.

4.1 Training for officers authorized to carry CEWs shall be conducted annually.

4.2 Training shall not be restricted solely to training conducted by the manufacturer of the CEW. However, training shall include the recommendation by manufacturers for the reduction of risk of injury to subjects, including situations where a subject's physical susceptibilities are known.

4.3 Training shall emphasize that CEWs may be less-lethal, but are not non or less-than lethal.

4.4 Training shall also incorporate, at a minimum:

4.4.1 Instruction on the use of force continuum.

4.4.2 Techniques to avoid or deescalate confrontations.

4.4.3 The underlying technology and operation of CEWs.

4.4.4 The physiological effects upon an individual against whom such a CEW is deployed.

4.4.5 The proper use of the weapon, including both the proper mechanical use of the weapon and the circumstances under which it is appropriate to use the weapon.

4.4.6 Scenario-based training.

4.4.7 Proper removal of CEW probes.

4.4.8 The potential medical needs of a subject who has been subjected to a CEW deployment.

4.4.9 The post-deployment reporting requirements.

4.4.10 Instruction on interacting with individuals experiencing a mental health crisis, emotional crisis or other type of crisis, as recommended by the Vermont Criminal Justice Training Council.

4.5 Departments should also evaluate the value of requiring or allowing officers to feel the effects of a CEW as part of training. If an officer decides to feel these effects, the training shall include an explanation of the potential differences between that officer's experience and the experience of a subject in the field. Departments requiring or allowing its officers to undergo a CEW deployment shall, beforehand, provide a thorough explanation of the potential injuries an officer could incur as a result of the deployment even within a controlled training environment.

5 Measurement and Calibration

5.1 CEWs shall be calibrated at the _____ to ensure the electrical output of the device is within manufacturer's specifications under the following circumstances:

5.1.1 Upon receipt by a law enforcement agency and prior to use in the field, only if measurement and calibration equipment is available in the state;

5.1.2 Annually, only if measurement and calibration equipment is available in the state; and,

5.1.3 After a critical incident, regardless of whether there is measurement and calibration equipment available in the state or the unit needs to be sent back to the manufacturer for testing.

5.2 Exception – CEWs that are self-calibrating are not subject to these provisions unless a

law enforcement agency requires calibration pursuant to its own policies and procedures or there are reasonable grounds to believe that the self-calibration is not functional.

5.3 If a CEW's electrical output is determined to be outside of manufacturer's specifications it shall not be used in the field until it has been found to have output within manufacturer's specifications.

6 Review

6.1 Vermont's Law Enforcement Advisory Board shall review this policy annually.

Appendix B

CEW Incident Reporting Form

To be completed by any Vermont Law Enforcement Officer after the display or deployment of a Conducted Electrical Weapon

1. Case number:_____
2. Use of CEW (check all that apply):
   - ☐ display
   - ☐ probes shot. Where did probes hit subject?_____
   - ☐ drive stun mode. How many cycles:_____ Where was CEW held against subject's body

     _____
3. Date and time of display or deployment: ___/___/___ at _____.
4. Location of display or deployment (city, town or village):_____
5. Was the subject human or animal? (circle one). If animal, complete only questions 13 – 20.
6. Sex of subject: ☐ male ☐ female
7. Perceived race of subject:
   - ☐ White
   - ☐ Black or African-American
   - ☐ Asian
   - ☐ Hispanic or Latino
   - ☐ American Indian or Alaska Native

6. Age of subject (if unknown, give an approximate guess): _____

7. Before deployment, did you have reason to believe the subject was a member of a special population? If so, check all that apply. If none apply, complete only questions 12-20):
   - ☐ pregnant
   - ☐ elderly (over 55)
   - ☐ child (under 16)
   - ☐ low body-mass index (thin)
   - ☐ disability
   - ☐ mental health condition
   - ☐ developmental/intellectual disability
   - ☐ traumatic brain injury
   - ☐ emotional crisis to extent subject may have had difficulty understanding requests or orders
   - ☐ epilepsy/seizure disorder
   - ☐ heart condition
   - ☐ deaf/hard of hearing
   - ☐ low vision/blind

8. If any box was checked in question 7, how did you obtain information leading to your belief the subject was a member of a special population? Check all that apply:
   - ☐ subject notified officer
   - ☐ civilian witness notified officer
   - ☐ professional witness notified officer
   - ☐ dispatch notified officer
   - ☐ personal perception of subject

9. Were mental health care or developmental disabilities professionals contacted for assistance with the subject? □ No (If no, go to question 11) □ Yes, contacted by □ Officer or □ someone else (list whom):
_____
If yes, when?
□ Prior to the display or deployment
□ During the display or deployment
□ After the display or deployment
Other comments:_____

10. If you answered "yes" to question 9, what was the outcome of that attempt to contact mental health care or developmental disability professionals? Check all that apply:
□ Professional assisted to resolve situation more promptly or with less coercion than without contact;
□ Professional did not result in any positive or helpful impact on the situation;
□ Professional provided limited positive or helpful impact on the situation;
□ Contact was attempted but no one could be reached;
□ Professional helped reduce the time officers had to be at the scene;
□ Intervention helped avoid involuntary placement in detention or emergency department;
□ Intervention helped provide appropriate follow-up and service provision;
□ Intervention was ineffective.

11. Was the training "Interacting with People Experiencing a Mental Health Crisis" (also known as Act 80 training) useful in dealing with this incident? □ Yes □ No □ N/A

12. To the best of your knowledge, was the person under the influence of alcohol or other drugs at the time of the event?
□ Yes □ No □ Unknown

13. Decision to use CEW was based on:
□ active aggression of subject;
□ active resistance of subject, with injuries to others or subject likely to occur;
□ anticipated injuries to subject, officer, or others at scene.

14. What was the subject's response to the use of the CEW?
□ Subject was compliant directly after use of CEW;
□ Subject was not compliant directly after use of CEW, requiring additional force;
□ CEW failed; subject had to be handled through other means. State reason for failure if known:_____

15. Was any other force used in addition to the CEW? Check all that apply:
□ OC or other chemical □ firearm
□ physical force □ baton
□ other (describe): _____
Was this additional use of force before or after use of the CEW? □ Before □ After

16. Was medical assistance provided to the subject following the use of the CEW? □ Yes □ No
If yes, by whom? □ Officer □ Paramedics □ Other emergency or health care professionals

17. Check any box below relating to noteworthy details not already described:
□ Incident occurred on an elevated location such as a roof, stairs, or bridge;
□ Subject was near or in water at time of incident;
□ Subject was wearing heavy clothes;
□ Subject was more than 25 feet away when CEW probe shot;
□ Subject was fleeing when CEW probe shot.

18. Was a recording device running at the time of the incident? □ Yes □ No
If yes, was it a □ body cam □ dashboard cam □ other (describe):_____

19. CEW model and serial number: _____

20. Was the subject charged? □ Yes □ No
If yes, what charge(s)?_____

Please return this bill review as a Microsoft Word or PDF document to laura.gray@state.vt.us and Jessica.mishaan@state.vt.us

Return this completed form to Gail Williams at gail.williams@state.vt.us

Vermont Criminal Justice Training Council
Vermont Police Academy
317 Academy Road, Pittsford, VT 05763
Tel: (802) 483-6228 Fax: (802) 483-2343
www.vcjtc.vermont.gov

Please return this bill review as a Microsoft Word or PDF document to laura.gray@state.vt.us and Jessica.mishaan@state.vt.us

Appendix C

Law Enforcement Advisory Board
Report to the Senate and House Committees on Judiciary
Implementation Plan for Act No. 193, Sec. 4, 13 VSA 5581
(Electronic Recording of a Custodial Interrogation)

October, 2014

Act No. 193 requires the Vermont Law Enforcement Advisory Board (LEAB) to develop an implementation plan on the following:

§ 5581. ELECTRONIC RECORDING OF A CUSTODIAL INTERROGATION

(a) As used in this section: (1) "Custodial interrogation" means any interrogation:

(A) involving questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject; and (B) in which a reasonable person in the subject's position would consider himself or herself to be in custody, starting from the moment a person should have been advised of his or her Miranda rights and ending when the questioning has concluded.

(2) "Electronic recording" or "electronically recorded" means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation, or if law enforcement does not have the current capacity to create a visual recording, an audio recording of the interrogation

(3) "Place of detention" means a building or a police station that is a place of operation for the State police, a municipal police department, county sheriff department, or other law enforcement agency that is owned or operated by a law enforcement agency at which persons are or may be questioned in connection with criminal offenses or detained temporarily in connection with criminal charges pending a potential arrest or citation.

(4) "Statement" means an oral, written, sign language, or nonverbal communication.

(b)(1) A custodial interrogation that occurs in a place of detention concerning the investigation of a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title shall be electronically recorded in its entirety.

(2) In consideration of best practices, law enforcement shall strive to record simultaneously both the interrogator and the person being interrogated.

(c)(1) The following are exceptions to the recording requirement in subsection (b) of this section:

(A) exigent circumstances;

(B) a person's refusal to be electronically recorded;

(C) interrogations conducted by other jurisdictions;

(D) a reasonable belief that the person being interrogated did not commit a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title and, therefore, an electronic recording of the interrogation;

(E) the safety of a person or protection of his or her identity; and

(F) equipment malfunction.

(2) If law enforcement does not make an electronic recording of a custodial interrogation as required by this section, the prosecution shall prove by a preponderance of the evidence that one of the exceptions identified in subdivision (1) of this subsection applies. If the prosecution does not meet the burden of proof, the evidence is still admissible, but the Court shall provide cautionary instructions to the jury regarding the failure to record the interrogation.

Implementation Plan

It's been a long-standing practice of the LEAB to develop and recommend statewide model policies for law enforcement agencies on various topics, as well as identify essential components that an agency's policy should contain. This practice allows agencies to either adopt the LEAB policy or modify existing policies to ensure they contain the essential components. With regards to Act. 193, the LEAB will follow the same process.

1.) 13 VSA 5581 contains very specific requirements for law enforcement agencies regarding the recording of custodial interrogations, as noted above. Though some agencies in VT are already recording interviews and have policies addressing this, there is no one model policy available to agencies that either don't currently record interviews but will in the near future, or that contains the essential components as laid out in statute.

2.) The LEAB has partnered with Project Innocence to review policies from around the state and those supplied by Project Innocence in order to identify best practices and incorporate the language in 13 VSA 5581, and then create a statewide model policy that agencies can adopt or use to compare to the language and procedures in their own policies.

3.) The LEAB goal is to have this model policy available for agencies by January 1, 2015, the same date that agencies have to adopt an eyewitness identification policy.

4.) The LEAB has conducted a survey of current recording equipment possessed and used by VT law enforcement agencies, and will develop recommendations on how to assist law enforcement agencies seeking to equip their facilities.

Respectfully submitted,

Richard B. Gauthier, Chair
Vermont Law Enforcement Advisory Board

Survey Results

Agency	Equipment in Station			Equipment in Cruisers			Policy	Media type			Comments
[redacted]	*Audio*	*Video*	*Both*	*Audio*	*Video*	*Both*		*Digital*	*Analog*	*both*	
BarreTown PD			x				no	x			
Bennington PD			x			x		x			
Dover Police Dept			x	x			no	x			
Hardwick Police			x			x	yes	x			
Milton Police Department			x			x-	yes	x			not enough for every officer
Orange County Sheriff's Office						x- victims only					Main office equipment died
Richmond Police Department			x			x	no	x			
Rutland City Police Dept.			X			X	YES	X			
Vergennes Police Department			x			x	yes			x	
Vermont State Police (All barracks)			x			x					
Washington Co. Sheriff's Office			x								DUI processing room only
Winooski Police Department			x			x	yes	x			

Appendix D

Model Policy for Eyewitness Identification

EYEWITNESS IDENTIFICATION
Sample Model Policy

BACKGROUND:

The identification of a suspect by an eyewitness can be an important component of a criminal investigation, but can be equally significant in clearing an innocent suspect. Many people who have been convicted of serious crimes, only to later be exonerated by scientific evidence, were originally convicted based in large part on mistaken identification by a witness. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in over 75% of convictions overturned through DNA testing. The [INSERT] Police Department recognizes that it is as much the responsibility of the police to protect the innocent from conviction as it is to assist in the conviction of the guilty.

The identification of criminal offenders must be approached with extreme caution as the court may exclude eyewitness evidence if it determines that police methods were unnecessarily suggestive.

POLICY:
It is the policy of the _____ Police Department that:

1. Eyewitnesses will be given specific instructions prior to being shown a suspect;

2. Photo arrays and line-ups will be conducted using sequential rather than simultaneous presentation; and

3. Photos arrays, line-ups and voice identifications will be conducted using blind administration.

DEFINITIONS:
Show-up: The presentation of one suspect to an eyewitness shortly after the commission of a crime.

Field View: The exposure of an eyewitness to a group of people in a public place on the theory that the subject may be among the group. A field view differs from a show-up in that it may be conducted well after the commission of the crime, and may be conducted with or without a suspect in the group.

Photo Array: The showing of photographs of several individuals to an eyewitness for the purpose of obtaining an identification.

Sequential Presentation: The showing of photographs one at a time.

Simultaneous Presentation: The showing of a group of photographs at the same time.

Line-up: The live presentation of a number of people to an eyewitness for the purpose of obtaining an identification. A line-up differs from a field view in that it is conducted in a controlled setting, such as a police station, a known suspect is in the mix, and the participants are aware that an identification procedure is being conducted.

Voice Line-up: A procedure whereby a witness is permitted to hear the voices of several people for the purpose of obtaining an identification of a suspect's voice.

PROCEDURES:

Right to Counsel During Identification Procedure
No right to counsel attaches for non-corporeal identification procedures, such as those involving photographs or composite drawings, whether conducted before or after the initiation of adversarial criminal proceedings.

The right to counsel attaches to in-person identification procedures after the suspect has been arraigned or indicted.

General Considerations
Due process requires that identifications be conducted in a fair, objective, and non-suggestive manner. Due process is violated when identification procedures arranged and/or conducted by the police are unnecessarily suggestive and conducive to irreparable mistaken identification.

Prior to conducting an identification procedure, officers should take a full description of the suspect from the witness and document said description.

If practicable, the officer should record the procedure and the witness' statement of certainty. If not, the officer should jot down the witness' exact words and incorporate them into his/her report. The witness should be asked to initial and date the front of the photograph selected.

Police officers should avoid any words or actions that suggest to the witness that a positive identification is expected, who they expect the witness to identify, or congratulating the witness on a 'correct' identification.

A report of every show-up, photo array, line-up or voice identification procedure, whether an identification is made or not, shall be submitted. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer (this should be accomplished by submitting the appropriate witness instruction form), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure.

Witness Instructions
Whenever practicable, an officer conducting an identification procedure will read the witness a set of instructions from a departmental form (show-up card, or photo array or line-up instruction form). Those instructions should include the following:

□□The person who committed the crime may or may not be (the person, or in the set of photographs) you are about to view.

□□You should remember that it is just as important to clear innocent persons from suspicion as to identify guilty parties.

□□The individuals you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. (Not for use during show-ups or voice identifications.)

□□Regardless of whether or not you select someone, the police department will continue to investigate the incident.

□□The procedure requires the officer to ask you to state, in your own words and without using a numerical scale, how certain you are of any identification.

□□If you do select someone, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.

□□Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.

Show-ups

1. Show-up identification procedures should only be used soon after a crime has been committed, typically within two hours, or under exigent circumstances, such as the near death of the only available witness. Show-ups should be conducted live whenever possible and not photographically. Officers should not attempt to obtain identifications using DMV, or other photos, unless a dire emergency exists.

2. When a show-up is arranged in an emergency situation, where either a witness or a victim is in imminent danger of death or in critical condition in a hospital, and the circumstances are such that an immediate confrontation is imperative, the emergency identification procedure shall be conducted in a non-suggestive manner.

3. Every show-up must be as fair and non-suggestive as possible. Specifically, if the suspect is handcuffed, he/she should be positioned so that the handcuffs are not visible to the witness. Unless necessary for the safety of the officers or others, the suspect should not be viewed when he/she is inside a police vehicle, in a cell, or in jail clothing.

4. Detaining a person who fits the description of a suspect in order to arrange a show-up is lawful where the officer has reasonable suspicion that the suspect has committed a crime, even if probable cause to arrest has not yet developed.

5. If the witness fails to make a positive identification and sufficient other evidence has not developed to provide probable cause to make an arrest, the suspect must be permitted to leave. His/her identity should be recorded and included in the officer's report.

6. If a suspect is stopped within a short time after the commission of the crime, he/she may be taken to a location where he/she can be viewed by a witness for possible identification; or, he/she may be detained at the site of the stop and the witness taken there to view him/her. Transporting the witness to the site of the stop is preferred if circumstances permit.

7. Suspects should not be brought into a crime scene as contamination may result. For the same reason, clothing articles found at the crime scene should not be placed on or in contact with a suspect. A suspect should not be brought back to the home of a victim or witness unless that was the scene of the crime.

8. Police officers must not do or say anything that might convey to the witnesses that they have evidence of the suspect's guilt. Officers should turn down their radios so that the witness they are transporting does not pick up information about the stop of the suspect.

9. The suspect should be viewed by one witness at a time and out of the presence or hearing of other witnesses. Witnesses who have viewed the suspect should not be permitted to communicate with those who have not.

10. Where multiple witnesses are available to identify the subject, officers should permit the subject to be identified by only one or two. Once one or two witnesses have identified the subject during a show-up, further identifications should be attempted by means of a photo array or line-up.

11. Officers may transport victims or witnesses in police vehicles to cruise the area where a crime has just occurred in order for them to attempt to point out the perpetrator. While checking the area, officers must be careful not to make any statements or comments to the witnesses which could be considered suggestive.

12. Officers should make written notes of any identifications and any statements made by witnesses at the time of confrontation with the suspect. Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain he/she is of the identification. Officers should ask the witness not to use a numerical scale, but rather to indicate certainty in his/her own words. All statements by the witnesses should be incorporated into the officers' report.

Preparing a Photo Array

1. Photo arrays should be shown to witnesses as soon as possible after the commission of a crime.

2. Include one suspect and seven fillers (non-suspects) in each array. Mark the back of each photo with numbers one through eight.

3. Try to use photographs of the same size and basic composition. Do not include more than one photograph of the same person.

4. Use a photo of the suspect that closely depicts his/her current appearance.

5. Select fillers who generally fit the witness' description of the offender. Avoid fillers who so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the filler.

6. Ensure that photos bear no markings indicating previous arrests.

7. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature such as facial scars or severe injuries by adding or covering the feature.

8. Once the array has been assembled, examine it to ensure that nothing about the suspect's photo makes him/her stand out.

9. Consider changing the order of photos from one witness to the next, or when a witness asks to see the array a second time.

10. When showing a witness an array containing a new suspect, avoid using fillers from a previous array.

Showing a Photo Array

1. The procedure must me conducted in a manner that promotes reliability, fairness and objectivity.

2. Allow each witness to view the photographs independently, out of the presence and hearing of the other witnesses.

3. Never make suggestive statements that may influence the judgment or perception of the witness.

4. A second officer who is unaware of which photograph depicts the suspect should actually show the photographs. This technique, called blind administration, has been recommended by the National Institute for Justice, and is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect. The technique also allows the prosecution to demonstrate to the judge or jury at trial that it was impossible for the officer showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph he/she should select.

5. The investigating officer or the second officer (the administrator) should carefully instruct the witness by reading from a departmental Photo Array Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The investigating officer and the administrator should also sign and date the form.

6. For the reasons above, the officers should explain to the witness that the officer showing the array does not know the identity of the people in the photographs. The investigating officer should leave the room while the array is being shown by the administrator.

7. The officer should show the photographs to a witness one at a time and ask the witness whether or not he/she recognizes the person.

8. When the witness signals for the next photograph, the officer should move the first photograph so that it is out of sight and ask the witness whether he/she recognizes the next photograph.

9. The procedure should be repeated until the witness has viewed each photograph. If the witness identifies a subject before all the photographs have been viewed, the officer should remind the witness that he/she is required to show the rest of the photographs.

10. If the witness fails to make an identification, but asks to view the array a second time, the officer administering the identification should ask the witness if he/she was able to make an identification from the original viewing. If the witness is unable to make an identification, but feels that it would be helpful to repeat the procedure, then it is permissible to show the entire array a second time. The order of the photographs should be shuffled before the array is shown for the second time. An array should not be shown more than twice.

11. If the witness identifies the suspect, the officer should ask the witness how certain he/she is of the identification. Officers should ask the witness not to use a numerical scale, but rather his/her own words.

12. The photo array should be preserved as evidence in the same configuration as when the identification was made.

13. If more than one witness is to view an array and a witness has already marked one of the photos, a separate unmarked array shall be used for each subsequent witness.

Line-ups

1. Line-ups shall be conducted under the direction of a detective supervisor, or in his/her absence the [agency head or designee] and, when feasible, after consultation with the State's Attorney's Office.

2. A suspect cannot be detained and compelled to participate in a line-up without probable cause to arrest. If a suspect refuses to participate in a line-up, the State's Attorney's Office may be asked to apply for a court order to compel the suspect to cooperate.

3. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a line-up or other live identification procedure, he/she must be informed of his/her right to have an attorney present at the line-up and of his/her right to be provided with an attorney without cost if he/she is unable to afford such legal counsel. Unless a valid waiver is voluntarily and knowingly made, in writing if possible, no such identification may proceed without the presence of the suspect's attorney.

4. Select a group of at least five fillers who fit the description of the subject as provided by the witness(es). Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers selected should not be known to the officer administering the line-up. In selecting line-up fillers, abide by the guidelines for photo array fillers as described above.

5. All persons in the line-up should carry cards that identify them only by number and should be referred to only by their number. As with photo arrays, each witness must view the line-up independently, out of the presence and hearing of the other witnesses.

6. The investigating officer should explain to the witness that a second officer (the line-up administrator) will be conducting the line-up, and that he/she does not know the identity of the people in the photographs.

7. The investigating officer should carefully instruct the witness by reading from a departmental Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form.

8. The investigating officer should leave the room while the line-up administrator conducts the line-up.

9. The line-up should be conducted so that the suspect and fillers do not actually line up, but rather so that they are displayed to the witness one at a time. This can be accomplished either by having them stand with their back to the witness and then face the witness one at a time, or by having them enter the room individually and leave before the next one enters.

10. The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo arrays. If practicable, the officer should record the procedure.

11. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the line-up and the manner in which it is to be conducted. Any suggestions made by the suspect's attorney should be included as part of the line-up report.

12. Allow counsel representing the accused sufficient time to confer with his/her client prior to the line-up. Once the line-up is commenced, attorneys should function primarily as observers and he/she should not be permitted to converse with the line-up participants, or with the witnesses, while the line-up is underway. The concept of blind administration requires that no one be present who knows the identity of the suspect. For this reason, the attorney should leave the room before the line-up begins.

13. The suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a line-up if the suspect has not yet been arraigned or indicted. If an attorney in such a situation insists on having information about line-up witnesses, advise him/her to direct his/her request to the State's Attorney's Office.

14. During a line-up, each participant may be directed to wear certain clothing, to put on or take off certain clothing, to take certain positions or to walk or move in a certain way. If officers are to ask the participants to wear an article of clothing, they must guard against circumstances where the article only fits the suspect. All line-up participants shall be asked to perform the same actions.

15. Line-up participants must not speak during the line-up. If identification of the suspect's voice is desired, a separate procedure must be conducted. (See section on voice identification below.)

16. After a person has been arrested, he/she may be required to participate in a line-up regarding the crime for which he/she was arrested. After arrest, a suspect may lawfully refuse to participate in a line-up only if he/she has a right to have counsel present (post arraignment/indictment) and the counsel is absent through no fault of the suspect or his/her attorney.

Voice Identification

1. Although considerably less common than visual identifications, voice identifications may be helpful to criminal investigations where the victim or other witness was blind, the crime took place in the dark, the subject was masked, the witness' eyes were covered by the perpetrator, or they were never in the same room with the perpetrator but heard his/her voice. If officers wish to conduct a voice identification procedure with a witness who also saw the subject, they must first consult with the a detective supervisor, or in his/her absence the [agency head or designee] and, when feasible, the State's Attorney's Office.

2. As with any in-person identification or confrontation, if the suspect has been arraigned or indicted, he/she has a right to the presence of counsel at the voice identification procedure.

3. Where a voice identification is attempted, the following procedures should be employed to the extent possible:

a. As in a line-up, there should be at least six persons whose voices will be listened to by the witness; one-on-one confrontations should be avoided. Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers should not be known to the officer administering the procedure, and officers should abide by the guidelines for photo array and line-up fillers as described above;

b. The suspect and other participants shall not be visible to the witness; this can be done by using a partition, or by similar means;

c. All participants, including the suspect, shall be instructed to speak the same words in the same order;

d. The words recited by the participants shall not be the ones spoken by the offender during the crime; the line-up participants should speak neutral words in a normal tone of voice;

e. When both a visual and voice line-up are conducted, the witness should be informed that the line-up participants will be called in a different order and by different numbers;

f. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.

4. The investigating officer should carefully instruct the witness by reading from a departmental Voice Identification Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form. If practicable, the officer should record the procedure.

5. Adhere to the principles of blind administration as described above. As is the case with photo arrays and line-ups, the investigating officer should leave the room while the administrator conducts the procedure.

Courtroom Identification

Prior to conducting any courtroom identification procedure, officers should consult the State's Attorney's Office. The same right to an attorney and the same due process considerations that apply to all other identification procedures also apply to station house and courtroom identifications.

1. If the suspect has been arraigned or indicted, he/she has a right to have counsel present at any in-person identification/confrontation.

2. Live confrontations and informal viewings of the suspect by witnesses must be conducted in such a manner as to minimize any undue suggestiveness.

3. Officers shall not state or suggest that the suspect has been arrested or booked or that he/she has made any confession or incriminating statement or that any incriminating evidence has been uncovered. The witness' identification, particularly if it takes place in a police station or courtroom, must be a result of his/her recollection of the appearance of the perpetrator and must not be unduly influenced by information or suggestions originating from the police.

Drawings and Identi-Kit Composites

An artist's sketch, computerized drawing, composite, or other depiction can sometimes aid an investigation, but are most effective when a witness has a good recollection of the offender's facial features. However, research has shown that a person selected based on resemblance to composite is more likely to be mistakenly identified. Additionally, building a composite has been shown to lower a witness' accuracy for identifying the original face.

Prior to attempting a sketch or composite, officers should take from the witness and document a full description of the offender.

1. A sketch prepared by a trained artist is preferred over a composite.

2. Sketches and composites should not be attempted prior to the showing of a photo array or line-up.

3. Once the sketch or composite has been completed, the witness should be asked to state in his/her own words how accurately the composite reflects how the suspect appeared during the crime and a report should be prepared regarding the sketch or composite procedure.

4. The fact that a suspect resembles a sketch or composite is not, without more, probable cause to believe that the suspect is the offender.

Mug Shots

When an investigation has failed to identify a suspect, it may be advisable to have eyewitnesses come to the police station to look through photographic files.

However, officers should not resort to this procedure until other investigative avenues have been exhausted.

1. Remove or hide any information on the photographs that might in any way influence the witness;

2. Ensure that the files contain only one photograph of each individual and that the photographs are reasonably current;

3. Do not refer to the photographs as "mug shots";

4. If photographs of various formats are used, ensure that several of each format are used;

5. Permit the witness to look at a number of photographs before making his/her selection;

6. Do not call to the attention of the witness any particular photograph;

7. A report shall be filed following the procedure, regardless of whether an identification is made. The report should describe the photographs viewed by the witness(s).

8. Officers should be extremely cautious before charging a subject based on this type of identification alone.

Hypnotically Aided Identification

Hypnotically aided testimony is not admissible at trial. Memory recalled prior to hypnosis which was the subject of a hypnotic session may be excluded as hypnotically aided. In light of the serious consequences which could result from asking or permitting a witness to undergo a hypnotic session, such a procedure shall not be undertaken until the entire matter has been reviewed by the [agency head], the State's Attorney's Office, and appropriate hypnosis experts.

Instruction Card for Show-up Identification Attempt

1. You are going to be asked to view someone.

2. The person who committed the crime may or may not be the person you are about to view.

3. You should remember that it is just as important to clear innocent persons from suspicion as it is to identify the guilty.

4. Regardless of whether or not you identify the person, we will continue to investigate the incident.

5. When we are done, our procedures require me to ask you to state, in your own words, how certain you are of any identification.

6. If you do select someone, please do not ask us questions about the person you have selected, as no information can be shared with you at this stage of the investigation.

7. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.

8. Do you have any questions before we begin?

If identification is made, ask "Without using a numeric scale, how certain are you?"

Voice Identification Line-up Instruction Form

1. You are being asked to listen to several people speak.

a. You will be hearing them one at a time.
b. Please listen to all of them.
c. They are in random order.
d. Please make a decision about each person before moving on to the next one.

2. The person who committed the crime may or may not be one of the people you are about to hear.

3. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.

4. The officer administering this procedure does not know whether any of the people were involved in the crime.

5. Please pay no attention to the content of the words spoken. They have been chosen at random.

6. Regardless of whether or not you select a person, the police department will continue to investigate the incident.

7. The procedure requires the officer to ask you to state, in your own words, how certain you are of any identification.

8. If you do select someone, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.

9. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.

10. Do you have any questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:
Without using a numeric scale, tell me how certain you are.

Photo Array Instruction Form

1. You are being asked to view a set of photographs.

a. You will be viewing the photographs one at a time.
b. Please look at all of them. I am required to show you the entire series.
c. They are in random order.
d. Please make a decision about each photograph before moving on to the next one.

2. The person who committed the crime may or may not be in the set of photographs you are about to view.

3. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.

4. The officer showing the photographs does not know whether any of the people were involved in the crime.

5. The individuals in the photographs you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

6. Regardless of whether or not you select a photograph, the police department will continue to investigate the incident.

7. The procedure requires the officer to ask you to state, in your own words, how certain you are of any identification.

8. If you do select a photograph(s), please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.

9. Regardless of whether you select a photograph(s), please do not discuss the procedure with any other witnesses in the case.

10. Do you have any questions before we begin?

Witness Signature _____ Date _____
Officer Signature _____ Date _____
Administrator Signature _____ Date _____

If identification is made:

Without using a numeric scale, tell me how certain you are

Line-up

Witness #:

Witness:

Notes:

Did anyone look familiar?

(If identification is made) Without using a numerical scale, tell me how certain you are.

Officer's signature:

Please return this bill review as a Microsoft Word or PDF document to laura.gray@state.vt.us and Jessica.mishaan@state.vt.us

Please return this bill review as a Microsoft Word or PDF document to laura.gray@state.vt.us and Jessica.mishaan@state.vt.us