

2784020

APPLICATION for SEARCH WARRANT and SUPPORTING AFFIDAVIT

(This application and affidavit to be detached by Justice issuing warrant and filed separately with the court to which the warrant is returnable.)

Instructions: A person seeking a search warrant shall appear personally before any justice, associate justice or special justice of the municipal, district or superior court and shall give an affidavit in substantially the form hereinafter prescribed. The affidavit shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and the affidavit may be supplemented by oral statements under oath for the establishment of probable cause. The person issuing the warrant shall retain the affidavit and shall make notes personally of the substance of any oral statements under oath supplementing the affidavit or arrange for a transcript to be made within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court.

**The State of New Hampshire**

PENGAD-Bayonne, N.J.  
Petitioner 9/10/10  
Exhibit 1  
10-001 OLM

Cheshire County, SS

Keene District Court  
December 14, 2009

I, Joseph R. Fussell, being duly sworn, depose and say:

- I am a Sergeant with the NH Division of Liquor Enforcement, S.L.C., and am currently assigned to supervise the Division's Special Investigations Unit and the Training Unit
- I have been a Police Officer since 2003 and successfully completed the NH Police Standards and Training Academy's 237<sup>th</sup> Part-Time Officer's Academy, and the 136<sup>th</sup> Full-Time Police Academy.
- I am currently an Adjunct Instructor for the New Hampshire Police Standards & Training Academy and instruct several subjects throughout the State, some of which are Advanced Roadside Impaired Driver Enforcement (A.R.I.D.E.), Liquor Law Education, Drugged Impaired Driver Detection, Search and Seizure, and more. As a member of the Division of Liquor Enforcement, I supervise on the Arrest Control Tactics Unit (A.C.T. Unit ~ Use of Force Instructor, Defensive Tactics Instructor, Firearms Instructor, Preliminary Breath Test Instrument Instructor, Expandable Baton Instructor and a Drug Abuse Resistance Education Instructor (D.A.R.E.). In addition, I am a PSTC certified Field Training Officer (F.T.O.). Lastly, I am a certified Drug Recognition Expert (D.R.E.) - Instructor through the National Highway Transportation & Safety Administration

*(N.H.T.S.A.) & the International Association of Chiefs of Police (I.A.C.P.). With this certification I have taught at Drug Recognition Expert Schools in New Hampshire, and Maine. I have educated professionals at the New England Traffic Safety Association (N.E.T.S.E.A.) on the dangers of drugged drivers.*

- I am a nationally certified Horizontal Gaze Nystagmus/Standardized Field Sobriety Test Instructor, and currently teach HGN/SFST at the New Hampshire Police Standards and Training Recruit Academy.*
- I am an advisory panel member on the Nashua Area Prevention Coalition.*

**I** have information based upon the attached affidavit.

*~ See Sworn Affidavit Attached ~*

**B**ased upon the foregoing information (and upon my personal knowledge) there is probable cause to believe that the property hereinafter described is and may be found in, on, and/or around the desks, drawers, cabinets, boxes, closets, computers, hard drives, media storage devices including, but not limited to, floppy disks, CD's, ZIP Drives, mobile media storage devices, etc., of the office area(s), restaurant area(s), kitchen area(s), and/or lounge area(s), and/or office/management areas of the business known as:

**Railroad Tavern**

82 Main Street  
Keene, NH 03431  
License # 1202603

**T**he property and/or information I intend to seize and/or gain as a result of the issuance of a Search Warrant is the following:

- ANY & ALL** video surveillance tape(s)/media storage device(s) used to record the events on December 12<sup>th</sup>, from 9:00 p.m., through December 13<sup>th</sup>, at 12:00 a.m., inside & outside the aforementioned business/licensee.

**A.** Personal computers, and/ or register inventory logging computers, central processing units (CPU), external and internal drives, external and internal storage equipment or media, terminals or video display units, computer disks, disk drives, computer printers, computer scanning equipment, video capture equipment, keyboards, modems, tape drives, disk application programs, data disks, system disk operating systems, floppy disks, tape systems and hard drive and other computer related equipment.

- B. **ANY & ALL** computing or data processing software, or data including, but not limited to: hard disks, floppy disks, cassette tapes, video cassette tapes, magnetic tapes, integral RAM, CD-ROM's, and any other permanent or portable storage devices, e.g. ZIP disks, ZIP drives, Flash/USB Drives.
- C. **ANY & ALL** documents whether contained on paper (handwritten, typed, photocopied or printed form) or stored on the computer, magnetic tape, cassette, disk, diskette, photo-optical device or any other form.
- D. **ANY & ALL** computing or data processing literature, including, but not limited to: printed copy, instruction books, notes, papers or listed computer programs in whole or in part. Indicia of occupancy, including, but not limited to: bills, letters, invoices, personal effects, rental agreement tending to show ownership, occupancy, or control of the premises, or of the above described items "A" through "C".
- E. **ANY & ALL** records and documents whether contained on paper (handwritten, typed, photocopied or printed form) or stored on the cash register, computer, or magnetic tape, cassette, disk, diskette, photo-optical device or any other form. Logs, Log Books, notes, "Post-It" notes, scrap paper, memoranda and/or correspondence relating to the crimes mentioned in the foregoing affidavit. The State would also request invoice(s), delivery receipts/invoices, etc. from beverage/wine/liquor distributors.
- F. The State is aware of the probability/possibility of video surveillance equipment installed in the business. This equipment records those persons entering and leaving the establishment, as well as patrons within the establishment. It is also believed this equipment records sales and actions of patrons of the business as well as employees of the licensee, specifically, Railroad Tavern on 82 Main Street in the City of Keene, NH. Your affiant would request any and all video tape(s)/media storage devices (CD ROM, etc.) indicating the recording of customers and personnel inside and outside of the aforementioned business during the period of time stipulated in the warrant, i.e. specifically, December 12<sup>th</sup>, from 9:00 p.m., through December 13<sup>th</sup>, at 12:00 a.m., 2009.

**NOTE:** Your affiant recognizes that some of the above described property is data that will be contained on cassette tapes, video tapes and/or in electronic and machine readable media which is not readable by your affiant in its present state. By this affidavit your affiant requests authorization for himself and other searching members to seize, listen to, read and maintain the above described property and convert it to human readable form as necessary.

- **ANY & ALL** receipts, invoices, sales slips, credit vouchers, credit card slips, ledgers, bills as described in RSA 179:35 Retention of Invoices and Sale and Delivery Slips.
- **ANY & ALL** memorandums, log books, associated log entries, notes, shift rosters, personnel/employment documentation etc. and/or the like dealing with, referencing, or otherwise involving the incident and/or the personnel involved with, the event(s) described below.

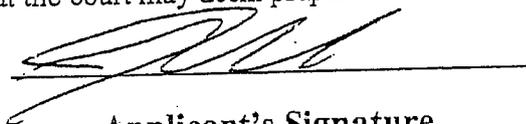
- ANY & ALL liquor/beverage/wine receipts, logs, shipping orders, bills of lading, etc..

Said property being contraband and/or evidence relative to an investigation of:

RSA 179:5 (I) Prohibited Sales [No licensee, salesperson, direct shipper, common carrier, delivery agent, nor any other person, shall sell or give away or cause or allow or procure to be sold, delivered or given away any liquor or beverage to a person under the age of 21 or to an intoxicated individual.]

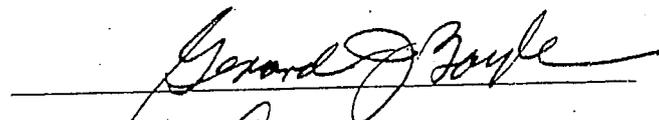
RSA 179:50 Loitering; Intoxication; Unlawful Purpose [No licensee shall allow any person to loiter on his premises who is intoxicated or disorderly or who loiters for any illegal purpose.]

Wherefore, I request that the court issue a warrant and order of seizure, authorizing the search/analysis of the above property, and directing that if such property/information or evidence or any part thereof be found, that it be seized and brought before the court; together with such other and further relief that the court may deem proper.



Applicant's Signature

Then personally appeared the above named Joseph R. Fussell and made oath that the foregoing affidavit by him subscribed is true. Before me this 14 day of December, 2009.



Justice of the Coxsack District Court

(Court Seal)

2784026

# SEARCH WARRANT

The State of New Hampshire

Cheshire County, SS

Keene District Court

To the sheriff, deputy sheriff, state police officer, constable or police officer of any jurisdiction within the State of New Hampshire:

Proof by affidavit (*supplemented by oral statements under oath*) having been made this day before Justice GERALD J. MOYLE by Sergeant Joseph R. Fussell that there is probable cause for: *believing evidence of the crime of, RSA 179:5 (I) Prohibited Sales [sale/service to an intoxicated patron], to which the probable cause upon which this search warrant is issued relates and as such:*

may be found in the following location/business:

**Railroad Tavern**  
82 Main Street  
Keene, NH 03431  
License # 1202603

We therefore command you to make an immediate search of the aforementioned business, and as such the contents and containers therein. Specifically, items stored in the desks, cabinets, boxes, closets, etc., of the office area(s), restaurant area(s), kitchen

area(s), and/or lounge area(s), and/or office (management area(s) of the above-mentioned business,

...between the hours of 6:00 a.m. and 11:00 p.m., for the following property:

- ANY & ALL video surveillance tape(s)/media storage device(s) used to record the events on December 12<sup>th</sup>, from 9:00 p.m., through December 13<sup>th</sup>, at 12:00 a.m. inside the aforementioned business.

- Personal computers, and/ or register inventory logging computers, central processing units (CPU), external and internal drives, external and internal storage equipment or media, terminals or video display units, computer disks, disk drives, computer printers, computer scanning equipment, video capture equipment, keyboards, modems, tape drives, disk application programs, data disks, system disk operating systems, floppy disks, tape systems and hard drive(s) and other computer related equipment.
- ANY & ALL computing or data processing software, or data including, but not limited to: hard disks, floppy disks, cassette tapes, video cassette tapes, magnetic tapes, integral RAM, CD-ROM's, and any other permanent or portable storage devices, e.g. ZIP disks, ZIP drives, Flash/USB Drives
- ANY & ALL documents whether contained on paper (handwritten, typed, photocopied or printed form) or stored on the computer, magnetic tape, cassette, disk, diskette, photo-optical device or any other form.
- ANY & ALL computing or data processing literature, including, but not limited to: printed copy, instruction books, notes, papers or listed computer programs in whole or in part. Indicia of occupancy, including, but not limited to: bills, letters, invoices, personal effects, rental agreement tending to show ownership, occupancy, or control of the premises, or of the above described items "A" through "C".
- ANY & ALL records and documents whether contained on paper (handwritten, typed, photocopied or printed form) or stored on the cash register, computer, or magnetic tape, cassette, disk, diskette, photo-optical device or any other form. Logs, Log Books, notes, "Post-It" notes, scrap paper, memoranda and/or correspondence relating to the crimes mentioned in the foregoing affidavit. The State would request invoice(s), delivery receipts/invoices, etc. from beverage/liquor/wine distributors.
- The State is aware of the probability/possibility of video surveillance equipment installed in the business. This equipment records those persons entering and leaving the establishment. It is also believed this equipment records sales and actions of patrons of the business as well as employees of the licensee, specifically, Railroad Tavern on 82 Main Street in the City of Keene, NH. Your affiant would request any and all video tape(s)/media storage devices (CD ROM, etc.) indicating the recording of customers and personnel inside of the business during the period of time stipulated in the warrant, i.e. specifically, December 12<sup>th</sup>, from 9:00 p.m., through December 13<sup>th</sup>, at 12:00 a.m., 2009.

**NOTE:** Your affiant recognizes that some of the above described property is data that will be contained on cassette tapes, video tapes and/or in electronic and machine readable media which is not readable by your affiant in its present state. By this affidavit your affiant requests authorization for himself and other searching

members to seize, listen to, read and maintain the above described property and convert it to human readable form as necessary.

- ANY & ALL receipts, invoices, sales slips, credit vouchers, credit card slips, ledgers, bills as described in RSA 179:35 Retention of Invoices and Sale and Delivery Slips and required to be retained on the premises and/or readily available to be inspected by the Commission and/or its Liquor Investigators.
- ANY & ALL memorandums, log books, associated log entries, notes, shift rosters, personnel/employment documentation etc. and/or the like dealing with, referencing, or otherwise involving the incident and/or the personnel involved with, the event(s) described below.

If you find any such property and/or information, or any part thereof, you shall bring it and/or the person in whose possession it is found before the

Concord District Court in Concord, NH.

Dated in Concord, NH this 14 day of December, 2009.

Gerard J. Hoyle  
Justice of the Concord District Court

(Court Seal)

# AFFIDAVIT

## IN SUPPORT OF SEARCH WARRANT APPLICATION

Cheshire COUNTY, SS

Keene DISTRICT COURT

December 14, 2009

In support of this application, I, Sergeant Joseph R. Fussell of the NH Division of

Liquor Enforcement, S.L.C., being duly sworn do hereby depose and say:

1. On December 12<sup>th</sup>, 2009, at approximately 11:30 p.m., I was parked on Main Street at the intersection of Railroad Street in Keene, New Hampshire. I parked my cruiser so that I had a clear and unobstructed view from the main entrance to an establishment licensed to sell alcoholic beverages identified as The Railroad Tavern, located at 82 Main Street in Keene, New Hampshire. At approximately 11:43 p.m., I observed a woman to be carried out of the establishment (specifically, another individual had their arm around her and was holding her up as they walked out). The male individual holding her up escorted her to the Railroad Square where they sat down on a bench. At this time, I utilized my personally owned binoculars to enhance my vision. I noted the incapacitated female was smoking a cigarette, and was slumped forward. I watched and noted that she proceeded to rock back and forth as she sat there. As I was watching, I noticed a small group of people (five total including the incapacitated female), that appeared to be regrouping from inside the Railroad Tavern. This group of individuals appeared to be preparing to leave the area with the incapacitated female.
2. At approximately 11:53 p.m., I observed a male individual from the group help the incapacitated female up to her feet. I watched as she was assisted to a vehicle parked directly in front of the licensed establishment identified above. Through these observations, I noted that the female was demonstrating signs of incapacitation, and was clearly unable to care for herself. She appeared to be unable to walk without assistance.
3. I identified the vehicle the above described female was being placed into was a SUV style vehicle, bearing a New Hampshire Registration -MLC-. I watched as the passengers assisted the female into the rear passenger seat, directly behind the female driver.

4. As the above described vehicle proceeded to leave the area, I placed myself directly behind it and followed (the vehicle did not lose my sight from the point the incapacitated female entered the vehicle). I subsequently conducted a motor vehicle stop on this vehicle on Railroad Street to check the welfare of the incapacitated passenger.

6. I approached the vehicle and immediately noted there to be three females in the back seat, a female driver and a male front seat passenger. I noted that the back seat passenger just behind the driver appeared to be passed out. I identified myself to the driver as a Police Officer verbally and by displaying my department issued credentials. I asked her if she would mind speaking with me outside of her vehicle. The driver said that she would speak with me outside of the vehicle, and we relocated to the space between the rear bumper of her vehicle and the front bumper of my cruiser. Once we reached the desired location, I identified her to be:

**Miranda L. Conn**  
**5 Colonial Village Drive #10**  
**Keene, NH 03431**  
**D.O.B. 08/19/1985**  
**348-7298**

I explained to her that I observed the female passenger behind the drivers' seat to be carried out of the Railroad Tavern and assisted into her vehicle. I said that I was concerned about her safety, and asked her if the female was okay. Mrs. Conn said that the female was okay, but she was extremely "drunk". Mrs. Conn said that she does not know the female that well, and the reason she was driving her home was because she feared for her welfare. I asked Mrs. Conn if she knew the female's name, and she said Michelle. Mrs. Conn went on and explained that there was somebody inside the establishment that was making advances towards Michelle, and because she felt Michelle was in danger of going home with this stranger while being so intoxicated that she was not able to care for herself, she decided to do the responsible act of taking her home. I asked Mrs. Conn from one to ten, ten being incapacitated; where did she feel Michelle was at. Mrs. Conn said she thinks Michelle was a 9.5. I asked Mrs. Conn what establishment were they consuming alcoholic beverages at prior to me stopping them, and she said The Railroad Tavern. I asked her if the establishment staff asked them to leave and she stated "God no". I asked if they left the establishment on their own without being asked to leave, and she said "Yes".

7. I walked to the passenger side of the vehicle, and Mrs. Conn opened the window so that I could speak with Michelle. I observed that Michelle was leaning forward, and it appeared that she woke up to speak with me. As I began speaking with her, I observed her eyes to be extremely bloodshot and glassy. I noted that her pupil size appeared to be normal, which indicated the reduced risk of poly drug use. As she spoke with me, she had extremely slurred speech, and demonstrated difficulty answering my questions. Michelle was not able to look into my eyes while she was speaking, more specifically, her eyes were wondering around from up, down, and from side to side (which indicated muscle control loss). I could immediately indicate through my training and experience as

a Drug Recognition Expert Instructor that Michelle was extremely incapacitated, and was not able to care for herself. I asked Michelle for her identifying information, and was ultimately able to determine she was identified (through her New Hampshire drivers license) as:

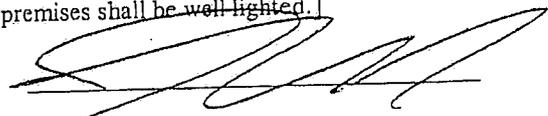
Michelle A. Clark  
572 New Hampshire Route 10  
Marlow, NH  
D.O.B. 09/14/1981

Michelle immediately began telling me "Relationships Suck." She then proceeded to tell me that she was "Fucking Drunk". I asked her out of a scale of one to ten, ten being incapacitated, where did she feel she was at, and she stated that she was "Fucking Drunk". Michelle told me that this was the drunkest she had ever been. I asked Michelle if she was asked to leave the establishment by its staff and she stated "no". I asked her where the last place she consumed alcoholic beverages was and she said The Railroad Tavern. Throughout my conversation with Michelle, she was difficult to understand, and I had to ask her to repeat herself a number of times. In addition, she continued repating "relationships suck" as answers to my questions.

8. I was able to determine that Michelle consumed a small quantity of alcoholic beverages at her residence prior to going out that night. I learned that she consumed one mixed drink at an establishment identified as Vendetta in Keene, New Hampshire. Michelle's friends were answering most of my questions because Michelle was so incoherent. I determined that Michelle arrived at The Railroad Tavern at approximately 9:00 p.m., and was consuming mixed drinks all evening. Michelle was unable to answer me when I asked her how many she consumed, or even what the alcoholic beverage was named. A passenger said that Michelle was drinking "fruity" drinks. One of the back seat female passengers stated that she thinks Michelle had consumed 4-5 alcoholic beverages while at The Railroad Tavern.
9. Throughout my conversation with Michelle, she repeated over and over how much relationships suck. She was emotional, and appeared depressed. I explained to all of the occupants that I was concerned for the safety of Michelle because she was so incapacitated. I noted that all of the other passengers appeared to be sober, and I asked if she was safe to be in their care. All individuals stated that Michelle was safe with them. I asked if they would like medical assistance, and they stated that they did not need medical assistance. Prior to clearing the motor vehicle stop, all occupants thanked me for my concern.

The information I attempt to glean as a result of this Search Warrant is as follows:

- Information relative to possible charges relative to several violations of RSA 179:5 Prohibited Sales on the part of the aforementioned licensee, **Railroad Tavern** on **82 Main Street** in the **City of Keene, New Hampshire**.
- Information relative to the consumption and/or conduct of the female subject inside of the licensee relative to her level of intoxication. Notwithstanding the conduct of the owner, the consumption of those present and their consumption of their alcoholic beverages at the licensee appears, on it's face, to have been excessive. [See *RSA 507-F Alcohol Beverage Licensee Liability*]
- Information on the premises in accordance with RSA 179:35 Retention of Invoices and Sale and Delivery Slips [in accordance with statute, said information should be stored on the premises for 60 days or be readily available to be examined by the Commission or its Liquor Investigators]; as well as additional information relative to identifying the person or persons responsible for allowing the aforementioned subject to become intoxicated contrary to RSA 179:5 Prohibited Sales:
- Information on the premises relative to assisting in identifying those serving alcoholic beverages on the part of the licensee and charged with effectively monitoring the sale and service of alcoholic beverages, specifically the Person in Charge of the licensee in accordance with RSA 179:23(IV) Employment; Employment of Minors; Felon Exception.
- Information relative to the alleged violation of RSA 179:50 Loitering; Intoxication; Unlawful Purpose [No licensee shall allow any person to loiter on his premises who is intoxicated or disorderly or who loiters for any illegal purpose.]
- Information relative to the alleged violation of RSA 179:51 Lighting and Conduct Requirements for On-Premises Licensees [Holders of on-premises licenses shall conduct their premises in an orderly manner at all times, and the premises shall be well lighted.]



Applicant's Signature

Then personally appeared the above named, *Sergeant Joseph R. Fussell, #12*, and made oath that the foregoing affidavit by him subscribed it true.

Sworn to before me by the said, *Sergeant Joseph R. Fussell*,

#12

*Gerard J. Boyle*  
Justice of the CONCORD DISTRICT Court

(Court Seal)

## RETURN

I received the attached search warrant on December 14, 2009 and have executed it as follows:

On December 14 2009 at 7:00 a.m./p.m. I searched the Railroad Tavern located at 82 Main Street,  
in Keene, NH.

and left a copy of the warrant with Randy L. Filiault at the Railroad Tavern, 82 Main St., Keene, together with a receipt for the items seized.

The following is an inventory of the property taken pursuant to the warrant:

- 1- (7) Receipts showing the purchase of liquor.
- 2- (1) Penway Composition note book titled "Log Book"  
- composition book contains various loose yellow notes.
- 3- (8) CDR-Disks containing imagery from the establishment's video recording system.