

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2020-0322

State of New Hampshire

v.

Justin Gunnip

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
SULLIVAN COUNTY SUPERIOR COURT

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**BRIEF FOR THE STATE OF NEW HAMPSHIRE**

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THE STATE OF NEW HAMPSHIRE

By its Attorneys,

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(15-minute Oral Argument)

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**ISSUE PRESENTED**

Whether the trial court erred when it granted the defendant's motion to set aside the verdict on his conviction for falsifying physical evidence under RSA 641:6.

The issue is preserved by the State's objection to the defendant's motion to set aside the verdict, the court's order on the motion to set aside the verdict, and the State's motion for reconsideration.

### **TEXT OF RELEVANT AUTHORITIES**

#### **RSA 641:5**

A person is guilty of a class B felony if:

- I. Believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:
  - (a) Testify or inform falsely; or
  - (b) Withhold any testimony, information, document or thing; or
  - (c) Elude legal process summoning him to provide evidence; or
  - (d) Absent himself from any proceeding or investigation to which he has been summoned; or
- II. He commits any unlawful act in retaliation for anything done by another in his capacity as witness or informant; or
- III. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in paragraph I.

#### **RSA 641:6**

A person commits a class B felony if, believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he:

- I. Alters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation;

#### **Md. Code Ann., Crim. Law § 9-307 (West)**

- (a) A person may not destroy, alter, conceal, or remove physical evidence that the person believes may be used in a pending or future official proceeding with the intent to impair the verity or availability of the physical evidence in the official proceeding.

**N.J. Stat. Ann. § 2C:28-6 (West)**

A person commits a crime of the fourth degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

- (1) Alters, destroys, conceals or removes any article, object, record, document or other thing of physical substance with purpose to impair its verity or availability in such proceeding or investigation;

**Tenn. Code Ann. § 39-16-503 (West)**

(a) It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress, to:

- (1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding;

**Model Penal Code (“MPC”) § 241.7, Tampering with or Fabricating Physical Evidence**

A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he:

- (1) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation.

### **STATEMENT OF THE CASE**

On September 25, 2019, a Sullivan County Grand Jury indicted Justin Gunnip (“the defendant”) on charges of conspiracy to commit assault by a prisoner (RSA 629:3; RSA 642:9) and falsifying physical evidence (RSA 641:6) related to his involvement in an assault on a fellow inmate at the Sullivan County House of Corrections (“SCHOC”). T<sup>1</sup> 6-7. Following a two-day trial on February 11-12, 2020, a jury convicted the defendant on both charges.

On, February 20, 2020, the defendant filed a motion to set aside both verdicts and the State objected. SA 37-49. On April 16, 2020, the court (*Tucker, J.*) issued an order on the defendant’s motion to aside the verdicts. SA 59-65. The court denied the defendant’s motion on the conspiracy charge, but granted it on the falsifying physical evidence charge. SA 61, 65. On May 11, 2020, the State filed a motion for reconsideration, which the court denied. SA 66-70, 73.

This State’s appeal followed.

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<sup>1</sup> Citations to the record are as follows:

“SA \_\_\_” refers to the addendum appended to the State’s brief, and page number;

“T\_\_\_” refers to the consecutively paginated transcript of the defendant’s two-day jury trial held February 10-11, 2020 and page number.



## STATEMENT OF THE FACTS

The State offered four witnesses to an altercation at the SCHOC on August 17, 2019 between Kyle Perkins (“the victim”), Charles Hall, Cameron Baumhower, and the defendant on August 17, 2019.

The State first called Denis O’Sullivan, a deputy sheriff lieutenant for the Sullivan County Sheriff’s Office. T 32-33. Lieutenant O’Sullivan testified that his primary duties involve performing investigations for the SCHOC and the Sullivan County Nursing Home. T 33.

Lieutenant O’Sullivan testified about the SCHOC’s video surveillance systems. He described how the video cameras record video footage without audio and how that footage saves to a server that Lieutenant O’Sullivan can access to view the recordings. T 34. Prisoners do not have access to the server. T 45. He testified that the footage is saved for six to eight months and recorded phone calls are saved for almost three years. T 34. To access the surveillance footage, Lieutenant O’Sullivan uses an on-site computer terminal that is password-protected. T 34. Lieutenant O’Sullivan further testified that the defendant knew about the video surveillance system from his involvement in a previous investigation. T 38.

Lieutenant O’Sullivan also testified that he reviewed the camera footage captured in the Unit 1 dayroom on August 17, 2019. He explained that the two cameras in the dayroom have fixed views that provide coverage of the entire room. T 48. He further explained how he saved that footage onto two discs. T 39. The State offered these recordings into evidence without objection. T 40-41.

In addition, Lieutenant O'Sullivan testified to the injuries he observed on the victim after the assault. Mr. Perkins had a swollen nose, his eye was swollen shut, and his lip appeared swollen and cut. T 42. Lieutenant O'Sullivan also testified that he observed redness and bruising on the knuckles of Charles Hall's left hand. T 42.

The State next called Sean Coughlin, a correctional officer at the SCHOC. T 50. Officer Coughlin testified that he responded to a report of a medical emergency in the Unit 1 dayroom on August 17, 2019. T 51. Officer Coughlin reviewed the video surveillance footage from the dayroom on the afternoon of the assault and identified the defendant, the victim, Charles Hall, and Cameron Baumhower. T 53-55.

Officer Coughlin testified that the video showed the victim sitting down with his arms on a bench and his feet on the bench in front of him. T 57. Officer Coughlin identified people in several segments of video footage from cameras in the dayroom and in several other rooms in that unit of the SCHOC. T 59-69. Officer Coughlin then identified several individuals, including the defendant, who entered the dayroom where the victim was watching television. T 66-67, 69.

In the video and accompanying still photos, the defendant assumes a position beneath one of the cameras and then holds a newspaper in front of the lens to obstruct the camera's view. T 81, 82, 115; SA 60. When the defendant removes the newspaper, the camera once again captures the scene in the dayroom, including the victim lying on the floor. SA 60.

The State's final two witnesses, Cole Bannister and Brianna DeFillippis testified to the victim's injuries. Cole Bannister, a corporal at the House of corrections, testified that he saw the victim prior to the assault

in the dayroom and did not observe any injuries to his face. T 102-03. Following the assault, Corporal Bannister saw the victim again and observed bruising, swelling, and other injuries to the victim's face. T 103

Brianna DeFilippis is a registered nurse who worked at Valley Regional Hospital at the time of the assault. T 106. She testified that she treated the victim's injuries, including a swollen and bleeding nose, a large bruise on his lower back, and a lump on his right calf. T 106. Ms. DeFilippis testified that the victim had reported to her that he received the injuries when another inmate "had jumped him or attacked him." T 106-07.

### **SUMMARY OF THE ARGUMENT**

RSA 641:6 makes it a crime to "alter, destroy, conceal or remove any thing" with a purpose to impair its verity or availability in an official proceeding or investigation that the person believes is pending or about to be instituted. The trial court erred in its interpretation of RSA 641:6 when it found that there was insufficient evidence that the defendant altered the video surveillance recording in the SCHOC. Both the plain language of the statute, and the broader statutory scheme into which RSA 641:6 fits, support the application of this statute to the defendant's conduct.

## ARGUMENT

### **THE PLAIN LANGUAGE OF THE STATUTE AND THE STATUTORY SCHEME OF RSA 641 SUPPORT THE STATE'S INTERPRETATION OF RSA 641:6.**

#### **A. Standard of Review**

“In matters of statutory interpretation, [this Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole.” *State v. Formella*, 158 N.H. 114, 116 (2008). This Court reviews the trial court’s statutory interpretation *de novo*. *State v. Mayo*, 167 N.H. 443, 450 (2015).

The State argued that, in obscuring the camera, the defendant altered the video feed’s view. SA 46, 57, 69. Following the defendant’s trial and conviction, the trial court found that the State had provided insufficient evidence to support this falsification charge and set aside the defendant’s conviction for falsifying physical evidence. SA 61-64. The court framed the argument as follows:

[The defendant] contends the statute's requirement that a ‘thing’ be ‘altered, destroyed, concealed, or removed,’ implies the preexistence of the ‘thing.’ He says in this case the ‘thing’ was what was on the server in the data room. He argues he could not alter, destroy, or remove the recording as alleged unless he had access to the server, and the evidence established he had none. So, he says there was evidence he acted to prevent the camera from recording the intended area, but not that he altered, destroyed, or removed what it ultimately recorded. The State contends the defendant altered the recording by obstructing the specific view the department intended the camera to record, and that "the defendant, by holding up a piece of paper, altered that view such that the recording did not

capture what it would have otherwise recorded." altered, destroyed, or removed what it ultimately recorded.

SA 61-62.

The court found that “[n]ecessarily, the thing must exist in order for it to be ‘destroyed, concealed, or removed,’ and so it is with its alteration. There was no evidence the recording was altered and, in fact, the State used it as an exhibit to prove Gunnip’s role as a conspirator precisely because accurately portrayed his conduct in connection with the assault.” SA 62. By defining the term ‘any thing’ more narrowly than the legislature did in the statute, and by finding that a thing must exist before it can be altered, the trial court erred.

**B. The plain language of RSA 641:6 is intentionally broad and fully encompasses the defendant’s act of falsification.**

RSA 641:6 reads in relevant part:

641:6 Falsifying Physical Evidence.

A person commits a class B felony if, believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he:

- I. Alters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation[.]

The State’s indictment alleged:

- 1) Purposely;
- 2) “Believing that an official proceeding, as defined in RSA 641:1, II or investigation is pending or about to be instituted, [the defendant]:

- 3) Altered, destroyed, or removes (sic) anything with a purpose to impair its verity or availability in such proceeding or investigation, to wit:
- 4) [The defendant] did hold up a certain newspaper such that a camera's view at the Sullivan County House of Corrections was obstructed preventing it from capturing a certain incident that occurred there so that its recording would not be available in such proceeding or investigation[.]

**1. 'Any thing' is an intentionally broad phrase intended to encompass a wide range of evidence.**

“In matters of statutory interpretation, [this Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole.” *In re State (State v. Johanson)*, 156 N.H. 148, 151 (2007). This Court will first “examine the statutory language, and, where possible, [will] ascribe the plain and ordinary meanings to the words used.” *State v. Kardonsky*, 169 N.H. 150, 153 (2016) (citing *State v. Maxfield*, 167 N.H. 677, 679 (2015)). This Court “interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” *Id.*

The term “any thing” is not defined in the statute. *See* RSA 625:11; RSA 641:1-8. “When a term is not defined in a statute, [this Court] look[s] to its common usage, using the dictionary for guidance.” *Appeal of Silva*, 172 N.H. 183, 188 (2019). *Webster's Third New International Dictionary* defines “thing” variously as:

- 1(a): a matter of concern : affair;
- 2(a): deed, act, or accomplishment;

- 3(a): whatever exists or is conceived to exist as a separate entity or as a distinct and individual quality, fact, or idea: a separable or distinguishable object of thought;
- 4(a): an entity that can be apprehended or known as having existence in space or time as distinguished from what is purely an object of thought;
- 5: an object or entity that cannot or need not be precisely designated;

The definition of thing found in *Black's Law Dictionary* also demonstrates the term's broad legal sweep:

The subject matter of a right, whether it is a material object or not; any subject matter of ownership within the sphere of proprietary or valuable rights. • Things are divided into three categories: (1) things real or immovable, such as land, tenements, and hereditaments, (2) things personal or movable, such as goods and chattels, and (3) things having both real and personal characteristics, such as a title deed and a tenancy for a term. The civil law divided things into corporeal (*tangi possunt*) and incorporeal (*tangi non possunt*).

“Thing,” *Black's Law Dictionary* (11th ed. 2019).

The broad scope of the term “thing” as an entity that may elude precise designation in this statute is made even broader by the modifier “any,” literally meaning to capture every possible kind of thing. *Webster's Third New International Dictionary Unabridged* (2002) (defining “any,” in the first instance, as “one indifferently out of more than two: one or some indiscriminately of whatever kind”). By its plain language and meaning, the phrase “any thing” encompasses virtually any subject that a defendant might try to alter, including, as the State contends, a surveillance camera's intended view and, by extension, the feed from that view.



A broad construction of the term, moreover, comports with this Court's construction of other provisions of RSA 641:6. In *State v. McGurk*, 157 N.H. 765, 770 (2008), this Court, relying on the broad language of RSA 641:6, held that the statute does not require falsified 'evidence' be admissible at trial. *See, also, State v. Dodds*, 159 N.H. 239, 245-46 (2009) (reaffirming the *McGurk* holding); *State v. Daoud*, 158 N.H. 334, 338 (2009) (holding that the terms "alters, destroys, conceals or removes" have independent significance despite overlap in their definitions).

Had the legislature intended to restrict the definition of 'any thing,' it could have narrowed it. It could have omitted "any" and it could have modified "thing" with a limiter. For example, as the *Black's Dictionary* definition shows, "thing" can be divided into the corporeal and incorporeal. Similarly, a comparable New Jersey statute criminalizes one who "[a]lters, destroys, conceals or removes any article, object, record, document or other *thing of physical substance*." N.J. Stat. Ann. § 2C:28-6 (West) (emphasis added). The New Hampshire legislature did not limit the language it chose for RSA 640:6 to the realm of physical things. Instead, through the use of "any", the legislature made clear that all things fall within the statute's reach.

In choosing that language, the legislature deliberately deviated from the Model Penal Code Provision upon which RSA 641:6 is based, further confirming its intent for 'thing' apply as broadly as possible. RSA 641:6 is derived, almost verbatim, from the Model Penal Code ("MPC") § 241.7, Tampering with or Fabricating Physical Evidence. But the MPC provision refers to "any record, document, or thing." Rather than leave 'thing' as a catch-all at the end of a list, The New Hampshire legislature eliminated the

words record and document, and left the broader term “any thing” to stand on its own.

The actions proscribed under RSA 640:6 are intentionally broad. The Commentaries to the MPC note, “[this provision] punishes one who ‘alters, destroys, conceals or removes.’ This expansive statement of the proscribed conduct covers virtually any kind of tampering.” MPC Part II Commentaries, vol. 3, at 179. The legislature’s exclusion of “record” and “document,” leaving only “any thing” demonstrates an intent for even greater breadth.

In a case interpreting a neighboring provision, RSA 641:5, this Court found that where the legislature “excluded the terms ‘witness’ and ‘informant’ used in the Model Penal Code provision on witness tampering, and instead used the broader term ‘person,’ the exclusion evidenced the legislature’s intent to apply the statute more broadly. *State v. Kilgus*, 125 N.H. 739, 742-43 (1984). The legislature’s intent to broaden the scope of RSA 641:6 is, likewise, evident from the drafters’ changes to the MPC provision.

This broad construction is consistent with other courts that have construed the word “thing.” For example, in *TruGreen Ltd. P’ship v. Dep’t of Treasury*, No. 344142, 2020 WL 1845580, at \*1 (Mich. Ct. App. Apr. 10, 2020), the Court of Appeals of Michigan recently defined “things of the soil.” That court noted:

the definitions of “thing” in the 1933 [Oxford English Dictionary] runs to over two full pages in a font so small as to be barely readable. . . . Some examples of the definitions. . . include “a being without life or consciousness; an inanimate object,” “a piece of property,” “an event, occurrence, incident,”

“a material substance,” “what is proper,” “that with which one is concerned,” “that which is to be done,” “an entity of any kind,” “a being or entity consisting of matter, or occupying space” and many, many others. Moreover, there is a section for the use of the word “thing” in “phrases, special collocation, and combinations[.]”

*Id.* at n. 6.

The trial court relied, in part, on an unpublished opinion from a Tennessee appellate court, *State v. Callahan*, No. E2002- 926-CCA-R3--CD, 2003 WL 1960267 (Tenn. Crim. App. April 28, 2003), overruled on other grounds, by *State v. Smith*, 436 S.W. 3d 751 (Tenn. 2014). *Callahan* discussed a substantially similar provision of the Tennessee Criminal Code.<sup>2</sup> Similar to the trial court, the *Callahan* court offered, without explanation, an overly narrow construction of “thing” that runs counter to the legislature’s intent in using such broad language as “any thing.” Also similar to the trial court, the *Callahan* court focused its analysis on the recording and on the fact that the tape was not altered after it was created.

The Tennessee Supreme Court, however, has since confirmed that *Callahan*’s construction is too narrow, and that the statute does not require the State or the trial court to identify the “thing” that the defendant altered. With respect to Tennessee’s comparable statutory language, the Supreme

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<sup>2</sup> Tenn. Code Ann. § 39-16-503 (West) reads in relevant part:

- (a) It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress, to:
  - (1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding;

Court of Tennessee has held, subsequent to *Callahan*, that the precise identification of the “thing” is not an element of the crime.

In *State v. Majors*, 318 S.W.3d 850, 858 (2010), that court considered the same statutory provision that the lower court analyzed in *Callahan*, which closely resembles New Hampshire’s language. The *Majors* court first noted that “thing” is “a term for an object or entity not precisely designated and perhaps not even capable of being designated.” The *Majors* Court then held that the State did not need to identify the “thing” at issue:

Based on the language of the statute and our comparative analysis of other criminal code sections, we hold that, in order to obtain a conviction for tampering with a “thing” of evidence, the State is not required to identify the specific object or entity that the defendant altered, destroyed, or concealed with the intent to impair its verity, legibility, or availability as evidence in an investigation or official proceeding. Instead, the statute only requires that the State establish beyond a reasonable doubt that the defendant altered, destroyed, or concealed some evidentiary “thing,” even if it is not capable of precise identification.

*Id.* This construction, a clear departure from the lower court’s holding in *Callahan*, applies with equal force to the nearly identical language of RSA 640:6. By identifying the specific “thing” that it felt was at issue, the trial court substantially deviated from the statutory language of RSA 641:6.

In finding for the defendant, the court determined that the ‘thing’ at issue must be the recording on the server. SA 62-64. In light of the broad language used throughout RSA 641:6, the trial court’s narrow definition of “any thing,” is not persuasive. The State has consistently maintained that the “thing” the defendant altered was not the recording on the server, but

the camera's intended view. SA 46, 57, 69. By first choosing to re-identify the "any thing" at issue and then requiring the State to prove that the defendant altered that specific thing, the trial court erred. This Court should find that the defendant's actions did alter "any thing" within the meaning of the statute when he altered the camera's view, and the trial court erred when it ruled to the contrary.

**2. The trial court's finding that a thing must first exist before it can be altered redefines the elements of the statute in a manner that the legislature did not intend.**

In ruling for the defendant, the trial court further concluded that a thing must exist before it can be altered. Specifically, the court held that the defendant could not have altered the recording because the recording did not exist until after the defendant obstructed the camera's view with the newspaper. Not only did the court err in reducing the scope of "any thing," but it also erred in removing the feed from the realm of "any thing" in the brief period before it reached the server.

"It is the province of the legislature to enact laws defining crimes and to fix the degree, extent and method for punishment." *State v. Rix*, 150 N.H. 131, 134 (2003). "By adding an extra element which is not included within the statutory definition of the crime[], [a court] improperly intrude[s] upon the legislature's prerogative to define criminal conduct." *State v. Quintero*, 162 N.H. 526, 551 (2011).

A thing can be created and falsified contemporaneously. The statutory language of RSA 641:6, I does not specify where or when a defendant's intervention in the process of evidence generation constitutes

falsification. Indeed, nothing in the statute limits the crime to conduct committed after the creation of the “thing” at issue. By ruling to the contrary, the trial court improperly injected a temporal limitation that the legislature did not see fit to include in the statute and impermissibly redefined the criminal conduct prohibited under RSA 641:6.

By holding up a newspaper to the lens and blocking the camera from recording its intended view in the natural course of events, the defendant altered that video feed’s view—a thing—in real time, as the SCHOC was creating it, and before it ever reached the server. By concluding that the State must show the recording pre-existed the defendant’s alteration, the trial court improperly added an additional element for the state to prove beyond what the statute requires. For this reason, this Court should find that RSA 641:6 does address the defendant’s brazen act of evidence tampering.

**3. The statutory scheme of RSA 641 criminalizes a broad range of actions intended to impair the availability of evidence and obstruct the administration of justice.**

In its decision, the trial court pointed to the statute’s heading, “641:6 Falsifying Physical Evidence,” and reasoned that the recording became ‘physical evidence’ when it was recorded to the server. SA 62-64. But “the title of a statute is not conclusive of its interpretation, and where the statutory language is clear and unambiguous this court will not consider the title in determining the meaning of the statute.” *In re Vernon E.*, 121 N.H. 836, 841 (1981). As the previous sections have outlined, the plain language

of the statute clearly and unambiguously supports the defendant's conviction for tampering with physical evidence, defined as "any thing."

However, "[w]hile the title of a statute is not conclusive of its interpretation, it provides significant indication of the legislature's intent in enacting the statute." *State v. Gubitosi*, 157 N.H. 720, 725 (2008).

Therefore, if this Court does consider the section title, the State maintains that the trial court's reasoning on this point is not persuasive because the definitions of 'physical evidence' are nearly as broad and varied as the definitions of 'thing.'

This Court has previously endorsed a broad reading of the term 'evidence' in the title of this statute. The *McGurk* Court relied on the broad language of RSA 641:6, to hold that the statute does not require the falsified 'evidence' be evidence admissible at trial. Any piece of evidence useful to an investigation, whether admissible or not, is included in this statute's purview. If the definition of the 'evidence' in 'physical evidence' is broad, then the canon of *noscitur a sociis* suggests a similar breadth for the term 'physical.' See, e.g., *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 231 (2008) (explaining that "[t]he general rule is that the meaning of a word, and, consequently, the intention of the legislature, should be "ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter.")

Just as this Court determined that the word evidence is broadly construed in this statute, so, too, is the word physical. The statutory scheme of RSA 641 divides evidence in to two broad categories: testimony and

physical evidence. ‘Physical’ evidence, therefore, is a broad category that constitutes any evidence that is not testimony.

At least one other court has addressed this distinction in a similar statutory context. In *Pinheiro v. State*, 244 Md. App. 703, 712 *cert. denied*, 468 Md. 555, 228 A.3d 169 (2020), a case analyzing Maryland’s “Impairment of verity or availability of physical evidence” statute, Md. Code Ann., Crim. Law § 9-307 (West), the Maryland Court of Special Appeals considered what constitutes ‘physical evidence.’ The court addressed this question in its analysis of whether police body camera footage constituted physical evidence. After extensively analyzing various definitions of the terms ‘physical’ and ‘physical evidence,’ that court held that both the plain language of the statute and the overall statutory scheme supported the conclusion that “physical evidence encompasses evidence not testimonial in nature.” *Id.* at 715.

As the *Pinheiro* court correctly determined, physical evidence constitutes any evidence, however constituted, that is not testimony. It does not matter that the evidence is not yet recorded to a physically identifiable medium. The camera footage that the defendant altered was as much ‘physical evidence’ when the camera generated it as it was ‘physical evidence’ when it reached the server.

The trial court also considered the titles of neighboring statutory provisions. This Court “interpret[s] statutes in the context of the overall statutory scheme and not in isolation. In so doing, [it is] better able to discern the legislature's intent, and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme.” *Ford v. New Hampshire Dep’t of Transp.*, 163 N.H. 284,



291 (2012). But contrary to the trial court’s findings, the overall statutory scheme of RSA chapter 641 supports the defendant’s conviction. Chapter 641, entitled “Falsification in Official Matters,” covers a broad range of falsification offenses including: perjury (RSA 641:1), false swearing (RSA 641:2), unsworn falsification (RSA 641:3), false reports to law enforcement (RSA 641:4), witness tampering (RSA 641:5), tampering with public records or information (RSA 641:7), and false filing with the director of charitable trusts (RSA 641:8).

These provisions closely track Section 241 of the Model Penal Code. “Article 241 defines perjury and a series of related offenses dealing with falsification in official matters. A considerable range of conduct is included.” Model Penal Code § 241 Commentary, Explanatory Note for Sections 241.0-241.9. As the commentaries further explain, Article 241 includes three tampering offenses and includes “a wide range of impermissible conduct.” *Id.*

Both RSA 641 and its MPC source material identify broad areas of illegality related to falsification. These provisions distinguish ‘physical’ evidence from testimonial evidence, but do not further limit it, as the trial court has done. The overall statutory scheme of RSA 641 seeks to prevent the kind of obstruction of justice in which the defendant engaged. By overly limiting the definition of “any thing” and finding that the footage only became “any thing” or “physical evidence” once it reached the server, the trial court has not interpreted the statute in a manner that advances the overall policy goals of RSA 641. For these reasons, this Court should find that the court misinterpreted RSA 641:6 and reinstate the jury’s verdict against the defendant.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Honorable Court vacate the judgment below and remand the case for further proceedings consistent with that order.

The State certifies that the appealed decision is in writing and is appended to this brief.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

THE OFFICE OF THE NEW  
HAMPSHIRE ATTORNEY GENERAL

April 9, 2021

/s/Zachary L. Higham

Zachary Higham

N.H. Bar No. 270237

Assistant Attorney General

New Hampshire Department of Justice

33 Capitol Street

Concord, NH 03301-6397

(603) 271-3671

**CERTIFICATE OF COMPLIANCE**

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,611 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 9, 2021

/s/Zachary L. Higham  
Zachary Higham

**CERTIFICATE OF SERVICE**

I, Zachary L. Higham, hereby certify that a copy of the State's brief shall be served on the Office of the Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

April 9, 2021

*/s/Zachary L. Higham*  
Zachary Higham

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Count 1: State v. Justin Gunnip  
RSA 629:3; 642:9 – Conspiracy to Commit Assault by Prisoner  
Class B Felony Offense  
(information only)

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS

NO. 220-2019 CR 00180  
CID 1664974C

At the Sullivan County Superior Court held at Newport, within and for the County of Sullivan,  
ON THE 25<sup>th</sup> of September, IN THE YEAR 2019,

25-SEP-19 09:14

The Grand Jurors for the State of New Hampshire, Upon Their Oath, Present That:

Justin Gunnip  
DOB: 12/1/1987

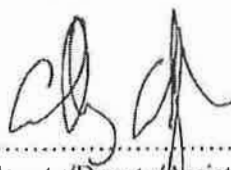
Of or formerly of 103 County Farm Rd., Unity NH on or about August 17, 2019 at Unity, in the  
County of SULLIVAN, did:

- 1) Purposely;
- 2) With the purpose that the crime of Assault by Prisoner be committed;
- 3) Agreed with one or more persons, to wit: Charles Hall and more persons, to cause the commission of such crime; and
- 4) One or more overt acts were committed in furtherance of the conspiracy, to wit:
- 5) Charles Hall did strike Kyle Perkins with his hands while both were inmates at the Sullivan County House of Corrections

Contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Foreperson



County/Deputy/Assistant County Attorney  
This is a true bill.

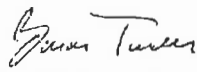
INFORMATION ONLY:  
(Not a part of the Indictment)

Penalty: 3 ½ to 7 years NHSP  
\$4,000

**DISMISSED. At hearing held today, State elected to proceed to trial on CID 1711275C.**

Gender – Male  
Height – White  
Weight – 6'00  
Race – 190  
Hair - Brown  
Eyes – Brown

Clerk's Notice of Decision  
Document Sent to Parties  
on 02/04/2020

  
Honorable Brian T. Tucker  
February 3, 2020

Count 2: State v. Justin Gunnip  
RSA 641:6 – Falsifying Physical Evidence  
Class B Felony Offense  
(information only)

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS

NO. 2019 CR 00180  
CID 1664997C

At the Sullivan County Superior Court held at Newport, within and for the County of Sullivan, ON THE 25<sup>th</sup> of September, IN THE YEAR 2019.

25-SEP-19 10:14


The Grand Jurors for the State of New Hampshire, Upon Their Oath, Present That:

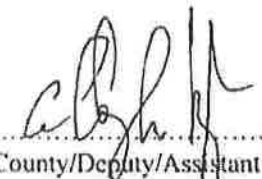
Justin Gunnip  
DOB: 12/1/1987

Of or formerly of 103 County Farm Rd., Unity NH on or about August 17, 2019 at Unity, in the County of SULLIVAN, did:

- 1) Purposely;
- 2) Believing that an official proceeding, as defined in RSA 641:1, II or investigation is pending or about to be instituted, he:
- 3) Altered, destroyed, or removes anything with a purpose to impair its verity or availability in such proceeding or investigation, to wit:
- 4) Justin Gunnip did hold up a certain newspaper such that a camera's view at the Sullivan County House of Corrections was obstructed preventing it from capturing a certain incident that occurred there so that its recording would not be available in such proceeding or investigation;

Contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

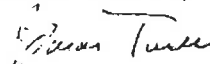
  
Foreperson

  
County/Deputy/Assistant County Attorney  
This is a true bill.

INFORMATION ONLY:  
(Not a part of the Indictment)

Penalty: 3 1/2 to 7 years NHSP  
\$4,000

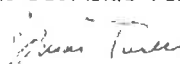
Verdict: Guilty  
Entered February 11, 2020



Honorable Brian T. Tucker

Gender – Male  
Height – White  
Weight – 6'00  
Race – 190  
Hair – Brown  
Eyes – Brown

GUILTY VERDICT VACATED.  
See Order on Motion to Set Aside Verdicts.

  
Honorable Brian T. Tucker  
April 16, 2020

Clerk's Notice of Decision  
Document Sent to Parties  
on 04/16/2020

Clerk's Notice of Decision  
Document Sent to Parties  
on 04/16/2020

8

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Sullivan Superior Court  
22 Main St.  
Newport NH 03773

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**RETURN FROM SUPERIOR COURT**

Case Name: **State v. Justin Gunnip**  
Case Number: **220-2019-CR-00180**

Name: **Justin Gunnip**, Sullivan County House of Correction 103 County Farm Rd Unity NH 03743

DOB: December 01, 1987

Charging document: Indictment

<b>Offense:</b>	<b>GOC:</b>	<b>Charge ID:</b>	<b>RSA:</b>	<b>Date of Offense:</b>
Assault by Prisoner Assault by Inmate		1664974C	642:9	August 17, 2019

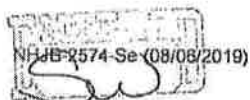
Disposition: Dismissed/Quashed

Date: February 03, 2020

Action taken: by Hon. Brian T. Tucker

J-ONE:  State Police  DMV

C:  Dept. of Corrections  Offender Records  Sheriff  Office of Cost Containment  
 Prosecutor Geoffrey M. Gallagher, ESQ  Defendant  Defense Attorney Constantine Hutchins, III, ESQ  
 Other \_\_\_\_\_  \_\_\_\_\_ Dist Div. \_\_\_\_\_





Count 4: State v. Justin Gunnip  
RSA 629:3; 642:9 – Conspiracy to Commit Assault by Prisoner  
Class B Felony Offense  
(information only)

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS

NO. 220.2019 CR 00180  
CID 1711275C

At the Sullivan County Superior Court held at Newport, within and for the County of Sullivan,  
ON THE 22<sup>nd</sup> of JANUARY, IN THE YEAR 2020.


The Grand Jurors for the State of New Hampshire, Upon Their Oath, Present That:


**Justin Gunnip**  
DOB: 12/1/1987

Of or formerly of 103 County Farm Rd., Unity NH on or about August 17, 2019 at Unity in the  
County of SULLIVAN, did:

- 1) Purposely;
- 2) With the purpose that the crime of Assault by Prisoner be committed;
- 3) Agreed with one or more persons, to wit: Charles Hall and more persons, to cause the commission of such crime; and
- 4) One or more overt acts were committed in furtherance of the conspiracy, to wit:
  - a) Justin Gunnip standing on a table under a certain camera; and/or
  - b) Justin Gunnip moving a certain piece of paper towards a certain camera while Charles Hall talked with Kyle Perkins but not covering said camera; and/or
  - c) Charles Hall removing a certain cast from his arm/hand; and/or
  - d) Justin Gunnip standing on a certain table under a certain camera; and/or
  - e) Justin Gunnip handing another individual a newspaper while that person stands under a certain camera; and/or
  - f) Justin Gunnip nodding his head; and/or
  - g) Justin Gunnip holding a piece of paper over a certain camera; and/or
  - h) Charles Hall did strike Kyle Perkins with his hands while both were inmates at the Sullivan County House of Corrections

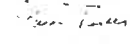
Contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

  
Foreperson

  
County/Deputy/Assistant County Attorney  
This is a true bill.

INFORMATION ONLY:  
(Not a part of the Indictment)  
Penalty: 3 ½ to 7 years NHSP  
\$4,000

Gender – Male  
Height – White  
Weight – 6'00  
Race – 190  
Hair - Brown  
Eyes – Brown

Verdict: Guilty  
Entered February 11, 2020  
  
Honorable Brian T. Tucker

Plea of Not Guilty  
Entered February 3, 2020

  
Clerk of Court

22 JAN 20 PM 08:00

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Sullivan Superior Court  
22 Main St.  
Newport NH 03773

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE**

Case Name: **State v. Justin Gunnip**  
Case Number: **220-2019-CR-00180**

Name: **Justin Gunnip, Sullivan County House of Correction 103 County Farm Rd Unity NH 03743**

DOB: **December 01, 1987**

Charging document: **Indictment**

<b>Offense:</b>	<b>GOC:</b>	<b>Charge ID:</b>	<b>RSA:</b>	<b>Date of Offense:</b>
Assault by Prisoner Assault by inmate		1711275C	642:9	August 17, 2019

Disposition: **Guilty/Chargeable By: Plea**

**A finding of GUILTY/CHARGEABLE is entered.**

Conviction: **Felony**

Sentence: see attached

April 16, 2020  
Date

Hon. Brian T. Tucker  
Presiding Justice

Daniel J. Swegart  
Clerk of Court

**MITTIMUS**

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.



Attest:   
Clerk of Court

**SHERIFF'S RETURN**

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Sheriff

J-ONE:  State Police  DMV

C:  Dept. of Corrections  Offender Records  Sheriff  Office of Cost Containment  
 Prosecutor Geoffrey M. Gallagher, ESQ  Defendant  Defense Attorney Constantine Hutchins, III, ESQ  
 Sentence Review Board  Sex Offender Registry  Other \_\_\_\_\_  Dist Div. \_\_\_\_\_

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH**  
http://www.courts.state.nh.us

Court Name: Sullivan Superior Court  
Case Name: State v. Justin Gunnip  
Case Number: 220-2019-CR-0180 Charge ID Number: 1711275C  
(if known)

**STATE PRISON SENTENCE**

Plea/Verdict: Guilty	Clerk: Swegart
Crime: <b>Consp. to Commit Assault by Prisoner</b>	Date of Crime: 08/17/2019
Monitor:	Judge: Hon. J. Tucker

A finding of GUILTY/TRUE is entered.

**CONVICTION AND CONFINEMENT**

- A. The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.
- B. The defendant is sentenced to the New Hampshire State Prison for not more than 5 X years, nor less than 2 years and 1/2 years.  
There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.  
Pretrial confinement credit: 221 days.
- C. This sentence is to be served as follows:  
 Stand committed  Commencing 04/16/2020  
 \_\_\_\_\_ of the minimum sentence and \_\_\_\_\_ of the maximum sentence is suspended.  
Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends \_\_\_\_\_ years from  today or  release on \_\_\_\_\_  
 \_\_\_\_\_ of the sentence is deferred for a period of \_\_\_\_\_ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of \_\_\_\_\_ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
- D. The sentence is  consecutive to case number and charge ID \_\_\_\_\_  
 concurrent with case number and charge ID \_\_\_\_\_
- E. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.
- F. See Addendum to State Prison Sentence Substance Use Disorder Assessment and Treatment.
- G. The Court recommends to the Department of Corrections:  
 Screen and/or assess for drug and alcohol treatment needs.  
 Sentence to be served at House of Corrections  
 \_\_\_\_\_

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Name: State v. Justin Gunnip

Case Number: 220-2019-CR-0180

STATE PRISON SENTENCE

**PROBATION**

A. The defendant is placed on probation for a period of \_\_\_\_\_ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective:  Forthwith  Upon release from \_\_\_\_\_

The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

B. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

**Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

**FINANCIAL OBLIGATIONS**

A. **Fines and Fees:**

Fine of \$ \_\_\_\_\_, plus a statutory penalty assessment of \$ 0.00 to be paid:

Today

By \_\_\_\_\_

Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed by DOC for the collection of fines and fees, other than supervision fees.

\$ \_\_\_\_\_ of the fine and \$ \_\_\_\_\_ of the penalty assessment is suspended for \_\_\_\_\_ year(s).

**A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.**

B. **Restitution:** **in an amount not to exceed**

The defendant shall pay restitution of \$ 4,007.86 to Sullivan Co. DOC

Restitution shall be paid through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because: a hearing shall be held to determine the amount of **OTHER CONDITIONS** restitution, if any.

A. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

B. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

C. Under the direction of the Probation/Parole Officer, the defendant shall tour the  New Hampshire State Prison  House of Corrections

D. The defendant shall perform \_\_\_\_\_ hours of community service and provide proof to \_\_\_\_\_ within \_\_\_\_\_ of today's date.

E. The defendant is ordered to have no contact with \_\_\_\_\_ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

F. Law enforcement agencies may  destroy the evidence  return evidence to its rightful owner.

G. The defendant and the State have waived sentence review in writing or on the record.

H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

I. Other:

**Clerk's Notice of Decision**

Date April 16, 2020

**Document Sent to Parties**

Presiding Justice

NHJB-2115-Se (08/06/2019)

on 04/16/2020

Page 2 of 2

*Brian T. Tucker*  
Honorable Brian T. Tucker



Filed  
File Date: 2/20/2020 3:54 PM  
Sullivan Superior Court  
E-Filed Document

STATE OF NEW HAMPSHIRE

Sullivan County Superior Court

Sullivan, ss.

February Term, 2020

State of New Hampshire

# 220-19-CR-180

v.

Justin Gunnip

MOTION TO SET ASIDE VERDICT

NOW COMES the accused, by and through Tony Hutchins, public defender, and respectfully requests this Court to set aside the verdicts of guilty returned by the jury in the above-captioned matters. This motion is pursuant to NH Rule of Criminal Procedure 25(e).

In support of this motion it is stated as follows:

1. The defendant was convicted after trial of one count of Falsifying Physical Evidence and one count of Conspiracy.
2. The defendant moved to dismiss both of these charges after the State rested on the basis that the State had presented insufficient evidence to support the charges. The Court denied these motions and, at the end of the trial, the jury returned verdicts of guilty to both charges.
3. Defendant now requests the Court to set aside the guilty verdicts.

FALSIFYING PHYSICAL EVIDENCE

4. RSA 641:6 prohibits Falsifying Physical Evidence.
5. The Statute prohibits both the fabrication or presentation of false evidence with the purpose to deceive a public servant under RSA 641:6, II and it prohibits a person who believes that an



FEB 20 2020

E

official proceeding or investigation is pending or about to be instituted from altering, destroying, concealing or removing any thing with a purpose to impair its verity or availability in such proceeding or investigation or investigation. RSA 641:6, I.

6. The State alleged that the defendant "altered, destroyed ... or removed any thing" by obstructing a camera in the jail "day-room" with a newspaper.
7. While the State presented no witness who could testify as to what occurred contemporaneously with the alleged event, a video of the incident was presented at trial. The video showed the defendant placing a newspaper in front of a camera lens.
8. To determine whether the State presented sufficient evidence to support a conviction for Falsifying Physical Evidence requires the Court to engage in statutory interpretation. The evidence must be sufficient to support a conviction for a charge under RSA 641:6, I.
9. Courts must "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning."
10. Where the language used in the statute are not ambiguous, the Court need look no further than the language itself and "construe the language according to its plain and ordinary meaning." State v. Kousounadis, 159 N.H. 413, 423 (2009); see also State v. Folley, \_\_\_ N.H. \_\_\_ (decided January 20, 2020). The Court should also "interpret a statute in the context of the overall statutory scheme and not in isolation." Kousounadis, 159 N.H. at 423.
11. The language of RSA 641:6, I is not technical and ordinary dictionary definitions suffice. State v. Jennings, 159 N.H. 1, 8 (2009). The phrase "alters, destroys ... or removes any thing" The term 'thing,' while not anywhere defined in the statute, clearly denotes something physical. The words associated with the term "thing" assist in defining it. A "thing" must exist as a physical object if it can be altered, destroyed, concealed or destroyed. Ipso facto,

one cannot alter, destroy, conceal or remove a physical object until that object exists, and in this case the physical object -a video- recording- did not exist at the time the defendant was alleged to have obstructed a day-room camera at the jail. Furthermore, the recording accurately recorded what it recorded and was still intact at the time of trial and was used during the course of the trial as an accurate depiction of what was recorded.

12. This interpretation is consistent with the section heading: Falsifying Physical Evidence (emphasis added).

13. The use of "thing" to denote a physical object is further borne out by the New Hampshire Criminal Code's Comments to the 1969 Report, which state:

This section is a counterpart to other sections in this chapter. Here, instead of protecting the verity of testimony, the offense is designed to deter falsification or concealment of physical evidence or the fraudulent use of such evidence. (emphasis added). The terminology is based on the Model Penal Code, S 241.7.

14. Model Penal Code S 241.7 uses the expression "record, document or thing" instead of merely "thing" but the word "thing" still denotes something physical in the Model Penal Code, as explained in the Model Penal Code, Part II Commentaries, vol. 3, at 179 (American Law Institute 1980)

Unlike some older statutes, [footnote omitted] the offense defined by this section is not limited to conduct that prejudices the integrity or availability of a written instrument but applies to any physical object.

(emphasis added).

15. The accompanying words bear out that a "thing" is a physical object (in contrast to a "view" as argued by the State) that one is prohibited from altering, destroying, concealing or removing.

16. An exhaustive search has revealed only one case, previously cited to the Court, dealing with the issue of whether obstructing a camera lens constituted Tampering With of Falsifying Physical

Evidence. See State v. Callahan, 2003 Tenn. Crim. App. LEXIS 372. While that case is not binding on this Court, there is no other case cited by either party deciding this same issue on the same material facts under a substantially similar statute, and its reasoning is persuasive. Had the defendant altered, destroyed concealed (though this variant was not charged) or removed the video recording itself once it was recorded, the State would have been able to present a supportable case.

17. All New Hampshire's reported cases concerning Falsifying Physical Evidence concern the physical manipulation of physical existing things; no new Hampshire case supports the novel interpretation urged by the State. Such an interpretation would open the door to Falsifying Physical Evidence charges regarding a burglar using gloves because the fingerprints he would otherwise leave behind would not be created. Likewise, a bank robber who wears a mask would obstruct a bank camera's view of his face. Or, of a person steals at Walmart wearing a hooded sweatshirt to obscure his face. The potential examples are endless and would stretch the statute beyond what it covers.

18. The Statute is not ambiguous and it does not reach the conduct in this case. However, if the Court determines that the statute does reach the conduct in this case, then the Court is necessarily finding that it is ambiguous or has imprecise delineation, and the doctrine of lenity applies. State v. Dansereau, 157 N.H. 596, 602-3 (2008). Where neither the legislature nor the New Hampshire Supreme Court has defined the word "thing", any imprecision or ambiguity must be resolved in favor of the defendant. Id. at 603.

#### CONSPIRACY TO COMMIT ASSAULT BY PRISONER.

19. This case presented a evidence consisting of soundless video recordings of an occurrence at



the Sullivan County House of Corrections. The State alleged that this evidence proved a prior conspiracy to commit assault on a prisoner.

20. Testimony concerning the alleged assault itself was never presented. More importantly, no testimony was presented detailing what, if any, conspiracy existed and what its goal was.

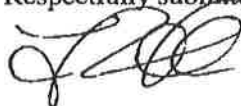
21. Therefore, nothing presented supported that the defendant entered into an agreement whose specific goal was to assault the alleged victim. Without this evidence, the State's case was insufficient to support the charged conduct and the jury was left to speculate as to what the goal of any agreement was.

22. Because the State failed to present testimony supporting what the terms or goal of the conspiracy were, this charge too must be dismissed.

WHEREFORE, the accused prays this Court grant the within motion and dismiss both the Falsifying Physical Evidence charge as well s the Conspiracy to Commit Assault By Prisoner charge..

Dated this 20th day of February, 2020.

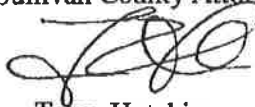
Respectfully submitted,



Tony Hutchins  
NH Bar ID#7904  
Public Defender  
27 John Stark Highway, PO Box 26  
Newport, New Hampshire 03773  
(603) 865-1460

CERTIFICATE OF SERVICE

I, Tony Hutchins, do hereby certify that a copy of the foregoing Motion has been forwarded this 20th day of February, 2020, to the Sullivan County Attorney's Office.



Tony Hutchins

THE STATE OF NEW HAMPSHIRE  
SULLIVAN COUNTY SUPERIOR COURT  
THE STATE OF NEW HAMPSHIRE  
v.  
Justin Gunnip

Docket No.: 220-2019-CR-180

State's Objection to Defendant's Motion to Set Aside Verdict

NOW COMES, the State of New Hampshire, by and through its attorneys, the Sullivan County Attorney's Office, and respectfully objects to the defendant's Motion to Set Aside Verdict and offers the following in support thereof:

1. On February 11, 2020, the Sullivan County Superior Court, by *petit jury*, convicted the defendant of falsifying physical evidence and conspiracy to commit assault by prisoner.
2. The defendant moved to dismiss those charges at trial and now moves that the Court set aside the jury's verdicts. While the defendant characterizes his motion as being based on the sufficiency of the evidence, he repeats his prior argument regarding the statute not capturing his conduct.
3. The Court denied the defendant's motion to dismiss at trial. The defendant's trial motion to dismiss was made on nearly identical grounds to his instant Motion and the State does not see a new point of law or fact justifying why the Court should set aside the jury's verdict.



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I. The Court should deny the defendant's Motion to Set Aside the Verdict of the Falsifying Physical Evidence count.

4. The defendant argues that the State did not present sufficient evidence to support his conviction. He repeats his prior argument that the charged conduct does not fall within the conduct captured by the RSA.641:6.
5. The defendant's argument centers on the insistence that "thing" within the meaning of RSA 641:6 must be a physical thing.
6. He argues that his actions did not alter "any thing," meaning any physical thing, and as a consequence cannot be captured by the statute.
7. The defendant says that the recording happened and that his actions did not alter that recording.
8. The defendant tries to support his position by pointing to the language of the Model Penal Code, however this argument is unavailing.
9. The New Hampshire Statute does not use the same phrase, "record, document or thing" used in the Model Penal Code.
10. The difference between the language of the Model Penal Code and the enacted language of RSA 641:6 reinforces the Court's interpretation of the statute.
11. The Model Penal Code uses a list which ends with the catchall provision of "thing," similar to the Tennessee statute that the defendant has previously referenced.
12. Such language would suggest that "thing" is constrained to categories similar to those preceding it in the list. But, the New Hampshire statute is

significantly different both in the preceding first clause and the second clause as discussed in the State's Response Memorandum.

13. The Court should construe falsifying physical evidence "according to the fair import of its terms and to promote justice." In re Justin D., 144 N.H. 450, 452-53 (1999).
14. The Court "appl[ies] statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme." State v. Lathrop, 164 N.H. 468, 469 (2012).
15. The Court looks to "the language of the statute itself, and if possible, construe[s] the language according to its plain and ordinary meaning." State v. Allain, 171 N.H. 286, 288 (2018).
16. The defendant's interpretation of the statute reads constraints onto "any thing" that are not supported by the statute's language.
17. As the State has previously argued to the Court, the legislature used "any thing" rather than the list language. This is broader language than either of the statutes relied upon by the defendant.
18. This difference must be accorded meaning.
19. The New Hampshire statute captures the defendant's conduct. The New Hampshire Supreme Court has rejected a narrow view of RSA 641:6. See State v. Daoud, 158 N.H. 334 (2009) (rejecting an argument "that the legislature did not intend... a broad reading" of RSA 641:6).

20. When properly evaluating the defendant's motion, he "must prove that no rational trier of fact, viewing all of the evidence in a light most favorable to the State, could find guilt beyond a reasonable doubt." State v. Hill, 163 N.H. 394, 395 (2012).
21. In this case, the jury heard and saw evidence that camera 11 records a very specific view. The defendant, by holding up a piece of paper, altered that view such that the recording did not capture what it would have otherwise recorded.
22. Such conduct is captured by the statute and there was sufficient evidence for the jury to find the defendant guilty of the indictment.
23. The defendant's hypotheticals are immaterial to the conduct supporting his conviction. He did not just prevent the recording from depicting his face or the face of co-conspirators. He did not just prevent the transference of fingerprints onto surfaces. He altered a camera's view so that its recording did not record what it otherwise would have recorded.
24. The jury heard sufficient evidence for a reasonable juror to find the defendant guilty of falsifying physical evidence and the conduct is captured by the statute.
25. At a fundamental and practical level, but for the defendant's act of holding a newspaper and blocking camera 11's view, it would have recorded Charles Hall's assault of Kyle Perkins. The defendant's actions altered that recording. There is no other reason for the defendant to have engaged in such conduct but to have intended that the recording not be available at the subsequent

proceeding or investigation. Such conduct is the type of conduct that the statute is intended to deter.

26. The Court should deny the defendant's motion to vacate the falsifying physical evidence count.

II. The Court should deny the defendant's Motion to Set Aside the Verdict of the Conspiracy to Commit Assault by Prisoner count.

27. The defendant asks the Court to set aside the jury's verdict because he claims that the State presented no evidence that "supported that the defendant entered into an agreement whose specific goal was to assault" Kyle Perkins.

28. When properly evaluating the defendant's motion, he "must prove that no rational trier of fact, viewing all of the evidence in a light most favorable to the State, could find guilt beyond a reasonable doubt." State v. Hill, 163 N.H. 394, 395 (2012).

29. A criminal conviction can be based on circumstantial evidence, where "all of the factors and circumstances" in evidence are sufficient for a reasonable juror, properly instructed, to find guilt beyond a reasonable doubt. State v. Greely, 115, N.H. 461, 468 (1975).

30. "To establish a *prima facie* case of conspiracy, the State is not required to demonstrate an explicit agreement among the conspirators." State v. Gilbert, 115 N.H. 665, 667 (1975).

31. "A tacit understanding between the parties to cooperate in an illegal course of conduct will warrant a conviction for conspiracy." Id.

32. Here the State presented ample evidence of the conspiracy and the defendant's purposeful agreement and participation in that conspiracy.
33. The jury saw evidence of the defendant demonstrating to a co-conspirator how to cover up the cameras.
34. The jury saw ample evidence to conclude that there was a plan to assault Kyle Perkins: Charles Hall unwrapping his cast, repeatedly approaching Kyle Perkins, multiple individuals placing themselves around the dayroom before the assault occurred, and Justin Gunnip giving the signal for the cameras to be covered and the assault begin by nodding his head.
35. Further, the jury saw what Kyle Perkins did or, rather, did not do. They saw Mr. Perkins remain seated despite Mr. Hall's advancing on him. They saw that Mr. Perkins was still seating as the camera was covered. They saw sufficient evidence to conclude that the contact was unprivileged and not permitted by law.
36. The jury saw Mr. Perkin's injuries.
37. They saw the lack of injuries on Mr. Hall.
38. The State does not need to present the specific "terms or goal" of the conspiracy in order for the jury to properly convict the defendant.
39. A conspiracy conviction may be supported by circumstantial evidence and here the State presented both direct evidence and circumstantial evidence of that conspiracy. Gilbert, 115 N.H. at 667 (1975).



40. Accordingly, the Court should deny the defendant's motion to set aside the verdict related to the conspiracy count.

WHEREFORE, the State of New Hampshire respectfully requests that the Court:

- A. DENY the defendant's Motion to Set Aside the Verdict as to the Falsifying Physical Evidence conviction;
- B. DENY the defendant's Motion to Set Aside the Verdict as to the Conspiracy to Commit Assault By Prisoner conviction; and
- C. GRANT such other relief as justice may require.

THE STATE OF NEW HAMPSHIRE

Sullivan County Attorney Office

Dated: 2/27/2020

/s/ Geoffrey Gallagher  
 Geoffrey M. Gallagher (Bar #20771)  
 Assistant County Attorney  
 Sullivan County Attorney Office  
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 Newport, NH 03773  
 Phone: (603) 863-7950  
 Fax: (603) 863-0015  
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was mailed to Tony Hutchins, Esq., counsel for the defendant on the above date.

/s/ Geoffrey Gallagher  
 Geoffrey M. Gallagher (Bar #20771)

STATE OF NEW HAMPSHIRE

Sullivan County Superior Court

Sullivan, ss.

February Term, 2020

State of New Hampshire

# 220-19-CR-180

v.

Justin Gunnip

MEMORANDUM SUPPORTING DEFENDANT'S MOTION TO DISMISS - FALSIFYING  
PHYSICAL EVIDENCE

NOW COMES the accused, by and through Tony Hutchins, public defender, and respectfully requests this Court to grant defendant's motion to dismiss made orally after the State rested.

1. The defendant was charged, inter alia, with Falsifying Physical Evidence. The State alleged in it's indictment that the defendant committed this offense by "altering, destroying or removing anything...." by holding a newspaper over a camera's view to prevent a recording of an event at the Sullivan County House of Corrections. The defendant's position is that there was no evidence presented to the jury that he altered, destroyed or removed any thing.

Thus he did not falsify any evidence.

2. There is no binding case law in the State of New Hampshire addressing this specific issue.

3. However, defense counsel did find a case from Tennessee. In State v. Callahan, 2003 Tenn. Crim. App. LEXIS 372, (overruled on other grounds in State v. Smith, 436 S.W.3d 751 (2014) the court of Criminal Appeal of Tennessee, At Knoxville dismissed a charge



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of Evidence Tampering that alleged that the defendant did "alter, destroy, or conceal any record, document or thing with the intent to impair its verity, legibility or availability in an investigation or proceeding." Callahan at 10. The evidence adduced at trial involved a robbery where a cardboard container for beer cans was placed over a security camera. Id. at 5. The purpose for blocking the security camera was to obscure the defendant's complicity in a theft from the cash register at a truck stop where the defendant worked. Id. at 4 - 5.

4. In determining that the State had presented insufficient evidence to support the Evidence Tampering charge, the court reasoned:

At the outset, an important distinction, we believe, is that this case does not involve a "doctored" tape. The tape, for example, was not edited to insert the defendant's likeness and show her being robbed by two males. Nor was the tape edited to remove footage of actual events that were captured. Indeed, the tape itself was never altered. The defendant made the same point to the trial court; she used as examples a bank robber who wears a mask to conceal his identity or one who uses a gun to shoot out the bank security cameras. Another example that occurs to us is a robber who extinguishes the lights and/or power in the building to thwart security cameras from recording the actual robbery. Such offenders are neither creating false evidence nor tampering with pre-existing evidence. We find these examples persuasive, and we hold that the statute does not reach the defendant's actions in obstructing the view of the security camera.

Id. at 12 - 13.

5. The case at bar is factually indistinguishable from the Callahan case and its reasoning should be adopted by this court in dismissing Falsifying Physical Evidence charge against the defendant.

WHEREFORE, the accused prays this Court dismiss the Falsifying Physical Evidence charge dignified against the defendant as the State has presented insufficient evidence to support it..

Dated this 10th day of February, 2020.

Respectfully submitted,

*/s/Tony Hutchins*

Tony Hutchins  
NH Bar ID#7904  
Public Defender  
27 John Stark Highway, PO Box 26  
Newport, New Hampshire 03773  
(603) 865-1460

CERTIFICATE OF SERVICE

I, Tony Hutchins, do hereby certify that a copy of the foregoing Motion has been forwarded this 10th day of February, 2020, to the Sullivan County Attorney's Office.

*/s/Tony Hutchins*

Tony Hutchins

THE STATE OF NEW HAMPSHIRE  
SULLIVAN COUNTY SUPERIOR COURT  
THE STATE OF NEW HAMPSHIRE

v.

Justin Gunnip

Docket No.: 220-2019-CR-180

State's Response to Defendant's Memorandum of Law

NOW COMES, the State of New Hampshire, by and through its attorneys, the Sullivan County Attorney's Office, and respectfully submits this response to the defendant's Memorandum of Law:

1. The defendant points to an out of state, overturned, intermediary appeals court decision as an authority upon which the Court should rely upon to grant his request to dismiss the pending falsifying physical evidence charge. This Court should deny the defendant's motion for the following reasons.
2. As a preliminary matter, the case, cited by the defendant, is not binding on this Court. Additionally, a close reading of the case, the relevant statutes, and the subsequent authorities interpreting that case do not support the defendant's interpretation.
3. First, the appeals court concluded that the evidence did not support a finding that an investigation "was pending or in progress." State v. Callahan, 2003 Tenn. Crim. App. LEXIS 372, \*10, 2003 WL 1960267.
4. The Tennessee statute, at issue in State v. Callahan, 2003 Tenn. Crim. App. LEXIS 372, \*10, 2003 WL 1960267, uses different language to describe the so-called pending investigation requirement.



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5. Tenn. Code Ann §39-16-503 states: “knowing that an investigation or official proceeding is pending or in progress.”
6. This language is significantly different from the language of RSA 641:6 which states “believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted.”
7. The Tennessee statute differs in another significant way which must be accorded meaning.
8. The Tennessee statute uses a list: “document, record” and uses “thing” as the final term in the list. “Thing” in this case would be reasonably limited to categories such as “document[s]” and “record[s].” Such a reading is consistent with ejusdem generis, one of the canons of statutory construction.
9. But, the New Hampshire statute is different and the Court must look to that language, and should not rely upon an overturned, out-of-state, and non-binding authority when interpreting New Hampshire statutes, particularly when the language of the two contemplated statutes is different.
10. The New Hampshire statute uses “any thing” which is far more expansive term than the language of the Tennessee statute. “Thing” is not limited by any proceeding usage such as in the Tennessee statute. Quite to the contrary, the New Hampshire statute, uses “any” to modify “thing.” “Any” is the opposite of a limiting term and suggests that the General Court intended for the crime to be broad by using such expansive language. See State v. Daoud, 158 N.H. 334 (2009) (rejecting an argument “that the legislature did not intend... a broad reading” of RSA 641:6).

11. Further, it is worth looking at the case that overruled Callahan. That case, State v. Smith, 436 S.W.3d 751 (Tenn. 2014), summarized Callahan's holding. It stated:

"In Callahan, the defendant, a truck stop employee, called the store manager and reported that she had been robbed. The defendant then covered the store's security camera, took money from the cash register, and called the police. A jury convicted the defendant of tampering with or fabricating evidence. A panel of the Court of Criminal Appeals reversed Callahan's conviction, concluding that an investigation was not pending or underway at the time the camera lens was covered. Applying this holding to Mr. Smith's case, the trial court concluded that no investigation was "pending" when the acts were committed by Mr. Smith because the police had not yet been notified of Mrs. Smith's disappearance."

State v. Smith, 436 S.W.3d 751, 761, 2014 Tenn. LEXIS 466, \*15-16, 2014 WL 2766674.

12. The defendant wishes the Court to rely upon an overturned decision, from an intermediary appeals court, that interpreted a statute that substantially differs from the New Hampshire statute's language in multiple ways, and where that state's Supreme Court described Callahan's holding in a substantially different way than the defendant.

13. The Court should not follow such an authority.

14. As the State has consistently alleged and argued, the defendant held up "a certain newspaper such that a camera's view at the Sullivan County House of Corrections was obstructed, preventing it from capturing a certain incident that occurred there, so that its recording would not be available in such a proceeding or investigation."



15. Under the New Hampshire statute, a “view” falls within “any thing” as it is capable of being altered and the defendant’s alteration of it quite literally prevented evidence from being collected that would have otherwise been collected but for the defendant’s action. That evidence, evidence that would have been recorded but for the defendant’s actions, was not available for the investigation.

16. Lastly, the Court should look at how the New Hampshire Supreme Court examined RSA 641:6. State v. Dodds, 159 N.H. 239, 247 (2009). In Dodds, the State alleged that Dodd committed the crime of falsifying physical evidence in that he

“(a) went from the west bank of the river to safety, (b) soaked his feet in cold water while he was in a warm room and then (c) surreptitiously re-inserted himself in a place in the woods where no one would be looking for him.”

Id.

17. The Court concluded that the State only needed to prove “that the defendant altered the appearance of his feet to make them appear consistent with his statement of events with a purpose to impair their verity or availability in a proceeding or investigation.” Id.

18. Here the defendant is alleged to have altered a camera view so that that view would not be available in the subsequent proceeding or investigation.

19. Such conduct is certainly captured by the statute and intended to be addressed by it.

20. Accordingly, the Court should deny the defendant’s Motion.

WHEREFORE, the State of New Hampshire respectfully requests that the Court:

A. DENY the defendant’s Motion to Dismiss; and

B. GRANT such other relief as justice may require.

Respectfully Submitted  
 THE STATE OF NEW HAMPSHIRE  
 Sullivan County Attorney Office

Dated: 02/10/2020

/s Geoffrey Gallagher \_\_\_\_\_  
 Geoffrey M. Gallagher (Bar #20771)  
 Assistant County Attorney  
 Sullivan County Attorney Office 14  
 N. Main St.  
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 Newport, NH 03773  
 Phone: (603) 863-7950  
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 Email: ggallagher@sullivancountynh.gov

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent to Tony Hutchins, Esq., counsel for the defendant, on the above date.

\_\_\_\_/s Geoffrey Gallagher \_\_\_\_\_

Geoffrey M. Gallagher (Bar #20771)

# The State of New Hampshire

SULLIVAN, SS.

SUPERIOR COURT

No. 220-2019-CR-180

STATE OF NEW HAMPSHIRE

v.

JUSTIN GUNNIP

## ORDER

*Re: Defendant's Motion to Set Aside the Verdicts*  
(doc. no. 45)

A jury found Justin Gunnip guilty of two crimes — Conspiracy to Commit Assault by a Prisoner and Falsifying Physical Evidence. I denied the defendant's motion to dismiss the charges at the conclusion of the State's case. Now pending is his motion to set aside both verdicts. "To succeed on his motion . . . the defendant has the burden of establishing that the evidence, viewed in its entirety and with all reasonable inferences drawn in favor of the State, was insufficient to prove beyond a reasonable doubt that he was guilty of the crime charged." *State v. Fandozzi*, 159 N.H. 773, 782 (2010) (quotation omitted). The motion is granted in part and denied in part.

**A. Conspiracy**

The indictment for this charge alleged the defendant agreed with Charles Hall and others to cause an assault on Kyle Perkins. There was undisputed evidence that Gunnip, Hall, and Perkins were inmates at the Sullivan County House of Corrections at the time of

the offense. The State's proof of conspiracy was circumstantial, as it relied on a video recording from a corrections department security camera. There was no audio, but the video showed the movements of Gunnip, Hall, Perkins, and other inmates.

Perkins was sitting on a bench watching television. The video showed that when the assault was imminent, Gunnip held a paper in front of the camera to block its view of where Perkins was sitting. Once Gunnip removed the paper and video surveillance of the area beyond the paper resumed, it was reasonable to infer that Perkins was injured as the result of an assault. Witness testimony supplemented the recording and with the video provided sufficient circumstantial evidence of a purposeful agreement by Gunnip that the crime of assault on a prisoner would be committed, and of an overt act in furtherance of that agreement.

Gunnip argues the conviction should not stand because there was no direct evidence of the conspiracy, such as witness testimony about an agreement to commit an assault or a witness account of the assault itself. But

a verdict will not be reversed merely because the evidence supporting it was circumstantial. Especially is this so when the crime alleged is conspiracy. The very essence (of conspiracy) is secrecy and concealment. Since direct evidence of a conspiracy is often difficult to obtain, the existence of a conspiracy frequently must be proved, if at all, by attendant circumstances.

*State v. Theodore*, 118 N.H. 548, 551 (1978) (citations and quotations omitted). The circumstantial evidence, and the video recording in particular, was sufficient to establish the defendant's guilt beyond a reasonable doubt.

The motion to set aside the conviction for conspiracy is DENIED.

**B. *Falsifying Physical Evidence***

In order to convict the defendant of Falsifying Physical Evidence, the State had to prove he (1) altered, destroyed, concealed, or removed any thing, (2) with a purpose of impairing its verity or availability for an official proceeding or investigation, (3) believing that an official proceeding or investigation is pending or about to be instituted. *See State v. Dodds*, 159 N.H. 239, 245 (2009); RSA 641:6, I. The State alleged the defendant “altered, destroyed, or removed anything,” by holding a newspaper in front of a video camera at the House of Corrections in order that a recording of the assault would be unavailable to those who would investigate it. A corrections officer testified that whatever the camera recorded was on a server in the department’s data room, to which inmates have no access.

Gunnip contends the statute’s requirement that a “thing” be “altered, destroyed, concealed, or removed,” implies the preexistence of the “thing.” He says in this case the “thing” was what was on the server in the data room. He argues he could not alter, destroy, or remove the recording as alleged unless he had access to the server, and the evidence established he had none. So, he says there was evidence he acted to prevent the camera from recording the intended area, but not that he altered, destroyed, or removed what it ultimately recorded. The State contends the defendant altered the recording by obstructing the specific view the department intended the camera to record, and that “the defendant, by

holding up a piece of paper, altered that view such that the recording did not capture what it would have otherwise recorded." State's Obj. to Motion, ¶ 21.

The motion requires interpretation of the statute. The starting point is its text and the "plain and ordinary meaning" of its words. *State v. Bobola*, 168 N.H. 771, 773 (2016) (quotation omitted). The statute is considered "in the context of the entire statutory scheme," with the goal of applying it as the legislature contemplated "and in light of the policy sought to be advanced by the entire statutory scheme." *Bobola*, 168 N.H. at 773 (quotations omitted).

The relevant portion of the statute makes it a crime to "*alter, destroy, conceal or remove any thing*" with a purpose to impair its verity or availability in an official proceeding or investigation that the person believes is pending or about to be instituted. RSA 641:6, I. The indictment alleges Gunnip committed three of the four actions – "altered, destroyed, or removed."

The canon of *noscitur a sociis* suggests the item must exist in order to be altered. Liability requires that the person "alter, destroy, conceal, or remove" the thing. Necessarily, the thing must exist in order for it to be "destroyed, concealed, or removed," and so it is with its alteration. There was no evidence the recording was altered and, in fact, the State used it as an exhibit to prove Gunnip's role as a conspirator precisely because it accurately portrayed his conduct in connection with the assault.

The “policy sought to be advanced by the entire statutory scheme” is consistent with this analysis. The statute was derived from the Model Penal Code and “is a counterpart to other sections in this chapter.” “Here, instead of protecting the verity of testimony, the offense is designed to deter falsification or concealment of physical evidence or the fraudulent use of such evidence.” COMMISSION TO RECOMMEND CODIFICATION OF CRIMINAL LAWS, § 586:6, comments (1969); MODEL PENAL CODE, § 241.7, Explanatory Note (the sanctions adopted by the section are “for tampering with or fabricating physical evidence.”)

The title of Chapter 641 is “Falsification in Official Matters,” and falsification is the central element of the chapter’s crimes. Perjury (RSA 641:1) requires material statements that are false. The falsification element in the offenses for False Swearing (RSA 641:2), Unsworn Falsification (RSA 641:3), and False Reports to Law Enforcement (RSA 641:4) is self-evident. And, consistent with a legislative history that describes the altered item as one of “physical evidence,” the section at issue is titled, “Falsifying Physical Evidence.”

“Although the title of a statute is not conclusive of its interpretation, a title is significant when considered in connection with the legislative history of the act, and ambiguities inherent in its language.” *State v. Rosario*, 148 N.H. 488, 491 (2002) (quotation omitted).

Whatever the result of the defendant’s actions in this case, the video depicted the actual view from the surveillance camera and not a falsified or altered one.

In the only case the parties and the court have been able to find that discusses a similar issue, the Court of Criminal Appeals of Tennessee concluded on similar facts that

the absence of proof of falsification foreclosed conviction. In *State v. Callahan*, No. E2002-926-CCA-R3-CD, 2003 WL 1960267 (Tenn. Crim. App. April 28, 2003), *overruled on other grounds*, *State v. Smith*, 436 S.W. 3d 751 (Tenn. 2014), the defendant covered a store surveillance camera with cardboard while her confederates robbed the store. The trial court “concluded that by causing something to be left out of the video tape, the defendant falsified what actually happened.” *Id.* at \*4. The appeals court disagreed, finding it “an important distinction” that the tape itself was not “doctored.”

Indeed, the tape itself was never altered. The defendant made the same point to the trial court; she used as examples a bank robber who wears a mask to conceal his identity or one who uses a gun to shoot out the bank security cameras. Another example that occurs to us is a robber who extinguishes the lights and/or power in the building to thwart security cameras from recording the actual robbery. Such offenders are neither creating false evidence nor tampering with pre-existing evidence.

On this point, its unpublished opinion concluded, “the statute does not reach the defendant’s actions in obstructing the view of the security camera.” *Id.*

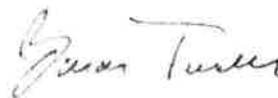
The State had to prove that physical evidence — here, the recording maintained on the server in the facility’s data room — was falsified. The evidence established the recording was intact, and it was used as evidence precisely because it showed what the surveillance camera recorded. Since the State’s proof did not establish the physical evidence was altered, destroyed, or removed, it does not support the conviction for Falsifying



Physical Evidence. The motion to set aside the verdict on the charge is GRANTED.

**SO ORDERED.**

**DATE: APRIL 16, 2020**



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**BRIAN T. TUCKER**  
**PRESIDING JUSTICE**

THE STATE OF NEW HAMPSHIRE  
SULLIVAN COUNTY SUPERIOR COURT  
THE STATE OF NEW HAMPSHIRE

v.

Justin Gunnip

Docket No.: 220-2019-CR-180

STATE'S MOTION FOR RECONSIDERATION

NOW COMES, the State of New Hampshire, by and through its attorneys, the Sullivan County Attorney's Office, and respectfully requests that the Court reconsider and reverse its decision to vacate the defendant's conviction for falsifying physical evidence and offers the following in support thereof:

1. In the Court's order vacating the defendant's conviction and reversing its earlier construction of the statute, the Court correctly begins by examining the plain language of the Statute.
2. NH RSA 641:6 states:

A person commits a class B felony if, believing that an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he:  
I. Alters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation; or  
II. Makes, presents or uses any thing which he knows to be false with a purpose to deceive a public servant who is or may be engaged in such proceeding or investigation.
3. Here, the State alleged that the defendant violated the statute by altering, destroying or removing any thing with a purpose to impair its verity or availability in an investigation at the house of corrections.



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4. The Court applied the canon of *noscitur a sociis* to the other terms within the statute, “destroys, conceals or removes,” and concluded that they suggest the item must exist in order to be altered.
5. The State disagrees and has attached three recordings to this pleading which it believes reinforce that “altering” is more esoteric concept than the Court credits. See Exhibit 1; Exhibit 2; Exhibit 3.
6. The State’s construction of the statute is driven by the statute’s intent and language.
7. First, the statute’s intent can be drawn from the statute’s very language. Its intent is to protect and preserve the “verity or availability [of any thing] in such proceeding or investigation...”
8. The court concluded that “any thing” must be physical evidence. But, this construction constrains “any thing” in a way that is unsupported by the statute’s actual language.
9. First, “thing” is not limited to mere objects with physicality. A song is a “thing” and it lacks physicality. A color is a “thing” that has no physicality.
10. Further, the Court can look at the language used in RSA 641:5 to see that the usage of “any thing” in RSA 641:6 is not so limited.
11. In RSA 641:5, the legislature used “testimony, information, document, or thing.” In this case, it is clear that when the General Court wishes to constrain “thing” to a particular class of things, it can. Further, there is a suggestion in

this class, that “thing” is not limited to items with physicality as neither information or testimony are physical.

12. This contrasts with the use of “any” to modify “thing” in RSA 641:6. “Any thing” must be broader than “thing” as used in RSA 641:5. By putting these broad terms together, it is difficult to imagine that the legislature did not intend to protect and preserve the verity or availability of all evidence as evidence is certainly “any thing.”
13. The Court relied upon an out-of-state decision which concluded that the relevant “statute does not reach the defendant’s actions in obstructing the view of the security camera.” State v. Callahan, No. E2002-926-CCA-R3-CR, 2003 WL 1960267 (Tenn. Crim. App. April 28, 2003) *overruled on other grounds*, State v. Smith, 436 S.W. 3d 751 (Tenn. 2014).
14. But, this case merely reinforces the State’s construction. As the State has previously argued, the Tennessee statute uses a different clause, “any record, document,” to modify “thing.” Tennessee Code Annotated §39-16-503.
15. These modifiers clearly limit “thing” to physical things. “Any thing” cannot hold the same meaning as “any record, document, or thing.”
16. The New Hampshire statute uses “any” to modify “thing.” If evidence is a category included with the meaning of “thing,” which is reasonable given both the intent and language of the statute, than if a defendant altered, destroyed, or removed “any evidence” than the statute is satisfied.

17. The Court applied its definition of “any thing” in this case to mean the defendant had to alter a recording maintained on a server in the house of correction’s data room.

18. As the State has demonstrated, a recording can be altered as it is created. Here that is what the defendant did. The evidence shows that the defendant altered the evidence so it would not depict the assault. The jury understood this conduct to be captured by the statute as did the Court initially.

19. Lastly, the Court stated that “the State used [the recording] as an exhibit to prove Gunnip’s role as a conspirator precisely because it accurately portrayed his conduct in connection with the assault.”

20. The Court ignores that the video did not contain everything that happened that day in Unit 1 at the Sullivan County House of Corrections. It omitted the assault and that omission is directly attributable to the defendant and his actions.

21. The defendant’s inability to alter the entire recording does not preclude that he did alter a portion of it.

22. The Court should reconsider its decision to vacate the defendant’s conviction of falsifying physical evidence because its construction improperly limits “any thing” to only physical evidence.

WHEREFORE, the State of New Hampshire respectfully requests that the Court:

A. HOLD a hearing on this matter;

- B. GRANT this motion for reconsideration and reimpose the defendant's conviction for falsifying physical evidence; and
- C. GRANT such other relief as justice may require.

WHEREFORE, the State of New Hampshire respectfully requests that the Court:

- A. HOLD a hearing on the defendant's Motion;
- B. DENY the defendant's Motion; and
- C. GRANT such other relief as justice may require.

Respectfully submitted  
 THE STATE OF NEW HAMPSHIRE  
 Sullivan County Attorney Office

Dated: 5/11/20

/s/ Geoffrey Gallagher  
 Geoffrey M. Gallagher (Bar #20771)  
 Assistant County Attorney  
 Sullivan County Attorney Office  
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 Newport, NH 03773  
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent to Tony Hutchins, Esq., counsel for the defendant, on the above date.

/s/ Geoffrey Gallagher  
 Geoffrey M. Gallagher (Bar #20771)



STATE OF NEW HAMPSHIRE

Sullivan County Superior Court

Sullivan, ss.

May Term, 2020

State of New Hampshire

# 220-19-CR-180

v.

Justin Gunnip

OBJECTION TO STATE'S MOTION TO RECONSIDER ORDER -RE:  
FALSIFYING PHYSICAL EVIDENCE.

NOW COMES the accused, by and through Tony Hutchins, public defender, and hereby objects to the State's Motion asking the Court to reconsider granting defendant's Motion to Set Aside the Verdict of Guilty to Falsifying Physical Evidence.

1. The State has filed a Motion for this Court to reconsider its order granting defendant's motion to set aside the verdict on the Falsifying Physical Evidence charge.
2. Motions for reconsideration are permitted where the Court has overlooked or misapprehended points of law or fact. See N.H. Rule of Criminal Procedure 43.
3. In this case, the Court has done neither. The Court declined the State's invitation to stretch the meaning of "thing" used in the Falsifying Physical Evidence statute beyond the physical and into the non-physical domain.
4. The Court addressed those issues within its order, and correctly so. While the word "thing" could be used, as the State suggests, to signify non-physical things, such as songs or colors, or even concepts or imaginings, the statute was not crafted to encompass things that are not physical.

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5. For the reasons in the Court's order of April 16, 2020, the State's Motion to Reconsider should be denied.

WHEREFORE, the accused prays this Court deny the State's Motion to Reconsider.

Dated this 12th day of May, 2020.

Respectfully submitted,

/s/ Tony Hutchins

Tony Hutchins  
NH Bar ID#7904  
Public Defender  
27 John Stark Highway, PO Box 26  
Newport, New Hampshire 03773  
(603) 865-1460

CERTIFICATE OF SERVICE

I, Tony Hutchins, do hereby certify that a copy of the foregoing Motion has been forwarded this 12th day of May, 2020, to the Sullivan County Attorney's Office.

/s/ Tony Hutchins

Tony Hutchins



THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT

Sullivan County

Sullivan Superior Court

State v. Justin Gunnip

220-2019-CR-00180

ORDER

Re: State's Motion to Reconsider Order of Dismissal  
(doc. no. 58)

Ruling: Denied.

The motion is for reconsideration of the order setting aside the guilty verdict for Falsifying Physical Evidence. I adhere to my finding that the evidence did not show the defendant falsified the video recording within the meaning of the statute.

SO ORDERED.

June 8, 2020

Judge Brian T. Tucker

Clerk's Notice of Decision  
Document Sent to Parties  
on 06/10/2020



NHJB-3054-5e (08/06/2019)