

SB 92-FN - AS AMENDED BY THE SENATE

03/18/2021 0755s

2021 SESSION

21-0908

04/11

SENATE BILL **92-FN**

AN ACT relative to increasing the penalty for criminal mischief, the release of a defendant pending trial, and requiring law enforcement candidate background checks.

SPONSORS: Sen. Bradley, Dist 3; Sen. Avard, Dist 12; Sen. Carson, Dist 14; Sen. Hennessey, Dist 1; Sen. D'Allesandro, Dist 20; Sen. Ricciardi, Dist 9; Sen. Giuda, Dist 2; Sen. Cavanaugh, Dist 16

COMMITTEE: Judiciary

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ANALYSIS

This bill increases the penalty for criminal mischief involving vandalizing public property; amends the statute governing bail and pre-trial release to include provisions for pre-trial detention for commission of certain offenses that would create a presumption that the defendant is a danger to the public; and requires an employer to release information upon request by a law enforcement agency conducting a background check on a candidate for a position as a law enforcement officer.

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Explanation: Matter added to current law appears in ***bold italics***.  
Matter removed from current law appears [~~in brackets and struckthrough.~~]  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Twenty One*

AN ACT relative to increasing the penalty for criminal mischief, the release of a defendant pending trial, and requiring law enforcement candidate background checks.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1 1 Criminal Mischief; Penalty Amended. Amend RSA 634:2, VI to read as follows:

2 VI. Any person who is found guilty of criminal mischief under paragraph III of this section  
3 because he or she has vandalized, defaced, destroyed, tampered with, or made any other  
4 unauthorized alteration, whether permanent or temporary, on public property, shall be guilty of a  
5 ~~[violation]~~ **class A misdemeanor if the damage is \$1,000 or more, a violation if the damage is**  
6 **less than \$1,000**, and shall also make restitution for any damage he or she has caused.

7 2 Bail and Recognizances; Release of a Defendant Pending Trial. Amend RSA 597:2 to read as  
8 follows:

9 597:2 Release of a Defendant Pending Trial.

10 I. Except as provided in paragraph **III or** VI, upon the appearance before the court of a  
11 person charged with an offense, the court shall issue an order that, pending arraignment or trial, the  
12 person be:

13 (a) Released on his or her personal recognizance or upon execution of an unsecured  
14 appearance bond, pursuant to the provisions of paragraph III;

15 (b) Released on a condition or combination of conditions pursuant to the provisions of  
16 paragraph III;

17 (c) Detained; or

18 (d) Temporarily detained to permit revocation of conditional release pursuant to the  
19 provisions of paragraph VIII.

20 II. Except as provided in RSA 597:1-d, a person charged with a probation violation shall be  
21 entitled to a bail hearing. The court shall issue an order that, pending a probation violation hearing,  
22 the person be:

23 (a) Released on his or her personal recognizance or upon execution of an unsecured  
24 appearance bond, pursuant to the provisions of paragraph III;

25 (b) Released on a condition or combination of conditions pursuant to the provisions of  
26 paragraph III; or

27 (c) Detained.

28 III. When considering whether to release or detain a person, the court **and a bail**  
29 **commissioner** shall consider the following issues:

30 (a) Safety of the public or the defendant.

1           (1) *A person who is charged with homicide under RSA 630:1; first degree*  
2 *assault under RSA 631:1; second degree assault under RSA 631:2; domestic violence under*  
3 *RSA 631:2-b; aggravated felonious sexual assault under RSA 632-A:2; felonious sexual*  
4 *assault under RSA 632-A:3; kidnapping under RSA 633:1; stalking under RSA 633:3-a;*  
5 *trafficking in persons under RSA 633:7; robbery under RSA 636:1, III; possession,*  
6 *manufacture, or distribution of child sexual abuse images under RSA 649-A; computer*  
7 *pornography and child exploitation under RSA 649-B; or felonious use of firearms under*  
8 *RSA 650-A:1, shall, upon arrest, be detained for a period of not more than 72 hours from the*  
9 *time of his or her arrest, excluding Saturdays, Sundays, and holidays, based upon the*  
10 *rebuttable presumption the person charged is a danger to the public.*

11           (2) If a person is charged with any *other* criminal offense, an offense listed in RSA  
12 173-B:1, I, or a violation of a protective order under RSA 458:16, III, or after arraignment, is charged  
13 with a violation of a protective order issued under RSA 173-B, the court may order preventive  
14 detention without bail, or, in the alternative, may order restrictive conditions including but not  
15 limited to electronic monitoring and supervision, only if the court determines by clear and convincing  
16 evidence that release will endanger the safety of that person or the public. In determining whether  
17 release will endanger the safety of that person or the public, the court may consider all relevant  
18 factors presented pursuant to paragraph IV.

19           (b) Assuring the court appearance of charged persons.

20           (1) The court shall order the pre-arraignment or pretrial release of the person on his  
21 or her personal recognizance, or upon execution of an unsecured appearance bond in an amount  
22 specified by the court, or cash or corporate surety bail, subject to the condition that the person not  
23 commit a crime during the period of his or her release, and subject to such further condition or  
24 combination of conditions that the court may require unless the court determines by a  
25 preponderance of the evidence that such release will not reasonably assure the appearance of the  
26 person as required.

27           (2) If the court determines by a preponderance of the evidence that a person has  
28 failed to appear on any previous matter charged as a felony, class A misdemeanor, or driving or  
29 operating while impaired, or a reasonably equivalent offense in an out-of-state jurisdiction, 3 or more  
30 times within the past [5] 3 years, or twice on the present case, there shall be a rebuttable  
31 presumption that release will not reasonably assure the appearance of the person as required **and**  
32 ***the person shall be detained in pre-trial detention.***

33           (3) In determining the amount of the unsecured appearance bond or cash or  
34 corporate surety bail, the court may consider all relevant factors bearing upon a person's ability to  
35 post bail.

36           (4) The court shall not impose a financial condition that will result in the pretrial  
37 detention of a person solely as a result of that financial condition unless the court determines by

1 clear and convincing evidence that the nature of the allegations presents a substantial risk that the  
2 person will not appear and that no reasonable alternative will assure the person's appearance. The  
3 defendant shall be afforded the opportunity to be heard.

4 (c) Failure of a person to abide by previous bail conditions. If there is probable cause to  
5 believe that, while on release pending resolution of a previous offense, the person committed a  
6 felony, class A misdemeanor, or driving or operating while impaired, **was released on bail, and**  
7 **thereafter was arrested for a third felony, class A misdemeanor, or driving or operating**  
8 **while impaired**, there shall be a rebuttable presumption that the person will not abide by a  
9 condition that the person not commit a new offense **and the person shall be detained in pre-trial**  
10 **detention.** ~~[The court shall not impose a financial condition that will result in the pretrial detention~~  
11 ~~of the person solely as a result of that financial condition unless the court determines by clear and~~  
12 ~~convincing evidence after a hearing that no reasonable alternative or combination of conditions will~~  
13 ~~assure that the person will not commit a new offense.]~~ The court may consider any relevant factors  
14 in making its determination.

15 IV.(a) Evidence in support of preventive detention shall be made by offer of proof at the  
16 initial appearance before the court. At that time, the defendant may request a subsequent bail  
17 hearing where live testimony is presented to the court **to rebut the presumption that the**  
18 **defendant is a danger to the public or is at-risk of re-offending while on bail.**

19 (b) At any subsequent hearing, such testimony may be presented via video conferencing,  
20 unless the court determines that witness testimony in court is necessary. A request by the  
21 defendant for in-court testimony shall be made by oral motion at the initial hearing or by written  
22 motion prior to any subsequent hearing. Any order granting the defendant's request shall be  
23 distributed to the parties at least 48 hours prior to any subsequent hearing.

24 (c) There shall be a rebuttable presumption that an alleged victim of the crime shall not  
25 be required to testify at the bail hearing. Nothing in this section shall preclude an alleged victim  
26 from voluntarily testifying at such hearing. The state may present evidence of statements made in  
27 the course of an investigation through a law enforcement officer.

28 V. A no-contact provision contained in any bail order shall not be construed to:

29 (a) Prevent counsel for the defendant from having contact with counsel for any of the  
30 individuals protected by such provision; or

31 (b) Prevent the parties, if the defendant and one of the protected individuals are parties  
32 in a domestic violence or marital matter, from attending court hearings scheduled in such matters or  
33 exchanging copies of legal pleadings filed in court in such matters.

34 VI. If a person is charged with violation of a protective order issued under RSA 173-B or  
35 RSA 633:3-a, the person shall be detained without bail pending arraignment pursuant to RSA 173-  
36 B:9, I(a).

1 VII. In a release order issued pursuant to this section, the court shall include a written  
2 statement that sets forth:

3 (a) All of the conditions to which the release is subject, in a manner sufficiently clear  
4 and specific to serve as a guide for the person's conduct; and

5 (b) The provisions of RSA 641:5, relative to tampering with witnesses and informants.

6 VIII. A person charged with an offense who is, or was at the time the offense was committed,  
7 on release pending trial for a felony or misdemeanor under federal or state law, release pending  
8 imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for  
9 any offense under federal or state law; or probation or parole for any offense under federal or state  
10 law, except as provided in RSA 597:1-d, III, ~~[may]~~ **shall** be detained for a period of not more than 72  
11 hours from the time of his or her arrest, excluding Saturdays, Sundays and holidays. The law  
12 enforcement agency making the arrest shall notify the appropriate court, probation or parole official,  
13 or federal, state, or local law enforcement official. Upon such notice, the court shall direct the clerk  
14 to notify by telephone the department of corrections, division of field services, of the pending bail  
15 hearing. ~~[If the department fails or declines to take the person into custody during that period, the  
16 person shall be treated in accordance with the provisions of law governing release pending trial.]~~  
17 Probationers and parolees who are arrested and fail to advise their supervisory probation officer or  
18 parole officer in accordance with the conditions of probations and parole ~~[may]~~ **shall** be subject to  
19 arrest and detention as probation and parole violators.

20 IX. Upon the appearance of a person charged with a class B misdemeanor, the court shall  
21 issue an order that, pending arraignment, the person be released on his or her personal  
22 recognizance, unless the court determines pursuant to paragraph III that such release will endanger  
23 the safety of the person or the public. The court shall appoint an attorney to represent any indigent  
24 person charged with a class B misdemeanor denied release for the purpose of representing such  
25 person at any detention hearing.

26 X. A person detained by a circuit court has the right to:

27 (a) In the first instance, a hearing in circuit court within 36 hours after the filing of the  
28 motion, excluding weekends and holidays on a motion to reconsider the original detention order; and

29 (b) A decision upon a de novo appeal, pursuant to RSA 597:6-e, II, to the superior court  
30 within 36 hours of the filing of the appeal, excluding weekends and holidays.

31 3 New Section; Police Standards and Training Council; Law Enforcement Candidate Background  
32 Checks. Amend RSA 106-L by inserting after section 16 the following new section:

33 106-L:17 Law Enforcement Candidate Background Check.

34 I. For purposes of performing a background check for a candidate to be employed as a peace  
35 officer or in the case of a candidate for a position other than a sworn peace officer within a law  
36 enforcement agency, the candidate's previous employer shall disclose employment information

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1 relating to the candidate, upon request of a law enforcement agency, if all of the following conditions  
2 are met:

3 (a) The request is made in writing.

4 (b) The request is accompanied by a notarized authorization by the candidate releasing  
5 the employer of liability.

6 (c) The request and the authorization are presented to the employer by a sworn officer or  
7 other authorized representative of the requesting law enforcement agency.

8 II. In the absence of fraud or malice, an employer shall not be subject to any civil liability for  
9 any relevant cause of action for releasing employment information required pursuant to this section.  
10 This section shall not abrogate the existing common law or statutory privileges and immunities of an  
11 employer.

12 III. For purposes of this section, "employment information" includes written information in  
13 connection with job applications, performance evaluations, attendance records, disciplinary actions,  
14 eligibility for rehire, and other information relevant to the performance of a peace officer or other  
15 law enforcement agency candidate, except information prohibited from disclosure by any other state  
16 or federal law or regulation.

17 IV. An employer's refusal to disclose information to a law enforcement agency in accordance  
18 with this section shall constitute grounds for a civil action for injunctive relief requiring disclosure  
19 on the part of an employer.

20 V. Employment information disclosed by an employer to an initial requesting law  
21 enforcement agency shall be deemed confidential. However, the initial requesting law enforcement  
22 agency may disclose this information to another authorized law enforcement agency that is also  
23 conducting a background check into a peace officer or other law enforcement agency candidate. If  
24 the information is disclosed to another law enforcement agency, that agency shall utilize the  
25 information for investigative leads only and the information shall be independently verified by that  
26 agency in order to be used in determining the suitability of a peace officer or other law enforcement  
27 agency candidate.

28 VI. An employer may charge a reasonable fee to cover the actual cost incurred in copying  
29 and furnishing documents to a law enforcement agency as required by this section.

30 4 Effective Date.

31 I. Section 1 of this act shall take effect January 1, 2022.

32 II. The remainder of this act shall take effect 60 days after its passage.

**SB 92-FN- FISCAL NOTE**  
AS AMENDED BY THE SENATE (AMENDMENT #2021-0755s)

AN ACT relative to increasing the penalty for criminal mischief, the release of a defendant pending trial, and requiring law enforcement candidate background checks.

**FISCAL IMPACT:**     State             County             Local             None

STATE:	Estimated Increase / (Decrease)			
	FY 2021	FY 2022	FY 2023	FY 2024
<b>Appropriation</b>	\$0	\$0	\$0	\$0
<b>Revenue</b>	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
<b>Expenditures</b>	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
<b>Funding Source:</b>	<input checked="" type="checkbox"/> General Penalty Assessments	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input checked="" type="checkbox"/> Other -

**COUNTY:**

<b>Revenue</b>	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	Indeterminable	Indeterminable	Indeterminable

**METHODOLOGY:**

This bill increases the penalty for criminal mischief involving vandalizing public property; amends the statute governing bail and pre-trial release to include provisions for pre-trial detention for commission of certain offenses that would create a presumption that the defendant is a danger to the public; and requires an employer to release information upon request by a law enforcement agency conducting a background check on a candidate for a position as a law enforcement officer.

The Judicial Branch reports in previous years, there were an average of 162 convictions per year under RSA 634:2, III (ranging from 70 – 237). The Branch is unable to determine how many of those were charged “because he or she has vandalized, defaced, destroyed, tampered with, or made any other unauthorized alteration, whether permanent or temporary, on public property.” Concerning the change from a violation to a Class A Misdemeanor, the Judicial Branch is unable to estimate how many cases would be affected or the amount of additional fines that may be imposed. By changing the penalty to a Class A misdemeanor, any findings of guilty can be appealed de novo to the superior court, which would result in a second trial. While this will result in additional cases and trials in superior court, the Judicial Branch is unable to predict how many cases will be appealed for a new trial in superior court. The bill would also expand

the use of pretrial detention. This would likely result in additional expenditures to the Judicial Branch for transporting the defendant to and from jail and hearings.

The New Hampshire Association of Counties indicates this bill may have an interminable impact on county expenditures.

The Police Standards and Training Council indicates this bill would have no fiscal impact on the Council.

**AGENCIES CONTACTED:**

Judicial Branch, New Hampshire Association of Counties and New Hampshire Police Standards and Training Council