



National Transportation Safety Board

Washington, D.C. 20594

Office of General Counsel

October 17, 2018

VIA EMAIL

[REDACTED]

Susan J. Mallery, Esq.
Schoharie County District Attorney
P.O. Box 888
Public Safety Facility
Schoharie, NY 12157

Re: Investigation of a 2001 Ford Excursion stretch limousine accident at the intersection of State Route 30 and State Route 30A in Schoharie, New York
Saturday, October 6, 2018
NTSB Accident No. HWY19MH001

Dear District Attorney Mallery:

From our conversations on Sunday, October 14, 2018, as well as from contact that other National Transportation Safety Board (NTSB) staff have had with you and the New York State Police (NYSP), you are aware that the NTSB is concerned about the restrictions you imposed on our timely access to evidence and information related to the fatal limousine accident in Schoharie County on October 6, 2018. You expressed concerns about the involvement of the NTSB in light of your criminal prosecution, which I address more fully in this letter. Thus, I again request your cooperation so that the NTSB may complete a thorough and timely investigation.

As you know, the NTSB Chairman accompanied a multi-disciplinary team of investigators to the crash scene on October 7, 2018. The NTSB is following its mandate to conduct a safety investigation. As we discussed, the NTSB is an independent establishment of the United States, established over 50 years ago, and is responsible for investigating and establishing "the facts, circumstances, and cause or probable cause of" major transportation accidents that occur in the United States. *See* 49 U.S.C. 1131. In the case of highway accidents, our statute grants NTSB jurisdiction to investigate those "highway accident[s] ... the Board selects in cooperation with a State." 49 U.S.C. § 1131(a)(1)(B). The NTSB is not a regulatory agency in the conventional sense -- it does not promulgate operating standards and does not certificate organizations or individuals. NTSB investigations are non-adversarial proceedings and are not conducted for the purpose of determining the rights or liabilities of any person. 49 C.F.R. § 831.4. The goal of our work is to foster safety improvements, through formal and informal safety recommendations, for the traveling public.

As I mentioned to you, the NTSB has been asked by senior leadership of the Federal government to conduct this investigation expeditiously to determine if urgent safety recommendations may be issued related to the limousine industry in hopes of preventing another tragedy like this one.

Throughout the week of October 7, the NTSB investigators were in contact with the NYSP about the progress and planned activities for the NTSB investigation. In fact, because the NYSP is a party to the NTSB investigation, it had participated in the NTSB's planning and progress meetings. Through those contacts, the NTSB understood that the NYSP wished to have a forensic exam of the vehicle. The NTSB agreed that it would wait until the forensic examiner was available and we would join that exam. As the week progressed, the ability of the NTSB to join that exam eroded from full participation to observer, to observer without taking photos or notes, to being barred from the exam. In my discussions with you, you claimed that you do not believe that the NTSB has authority to be on the scene of the investigation in light of the criminal prosecution, you are concerned about the NTSB releasing information about the investigation, and you are concerned that through its work and observations, NTSB staff could be witnesses called in the criminal investigation.

I addressed your concerns during our conversations, and as promised, provide additional information now. Attached is a multi-page statement of the NTSB's authority in highway crashes and its interactions with states. Second, other than the press conferences that occurred last weekend, until the accident investigation is complete, the NTSB's release of information is measured and includes only factual information. Because the NYSP is a party to the investigation, the NTSB will consider its request to review the public statements before they are released, and if desired, I would review the statements with you to contemplate any potential impact on your prosecution.

Similarly, your concern about the NTSB staff being called as witnesses is misplaced. As I mentioned, aside from jurisdictional issues, which the Safety Board does not waive or concede, a subpoena for testimony does not comply with the Board's governing federal regulations. See 49 C.F.R. Parts 835 and 837. If a party attempts to enforce a subpoena, the NTSB will remove the matter to federal court for resolution consistent with our regulations and other governing law. In particular, with regard to testimony in criminal matters, NTSB regulations require attorneys to send requests for such testimony to the NTSB's Office of General Counsel. 49 C.F.R. § 835.10. NTSB employees may testify only as to the factual information they obtained in the course of an investigation. As the General Counsel, I will decline the request that they testify regarding matters beyond the scope of their investigation and shall not authorize any expert or opinion testimony. 49 CFR 835.3(b). With these constraints, it is highly unlikely that an NTSB employee would testify. In the 50 year history of the NTSB, I estimate that employees have testified less than 20 times in criminal matters, and most often, that testimony was voluntarily provided because of the nature of the case.

On Sunday, you then stated that the NTSB could not participate or be present during the vehicle examination because the search warrant issued on October 12, 2018 by Honorable George R. Bartlett III, County Court Judge sitting as a Local Criminal Court Justice, Schoharie County, New York, did not identify the NTSB as a participant. Not only was this search warrant not

dispositive based upon the NTSB's independent authority, but I believe the oversight could have been cured. The NTSB's statutory authority allows it to "...enter property where a transportation accident has occurred or wreckage from the accident is located and do anything necessary to conduct an investigation...." 49 U.S.C. 1134(a)(1). Additionally, because you felt legally bound by the search warrant, it could have been amended. You were concerned about contacting Judge Bartlett on a Sunday, however, recall that the NTSB did not receive the directive that it could not participate in the vehicle examination until late Saturday evening. Thus, we had no opportunity to pursue another remedy during normal business hours. Ultimately, you permitted the NTSB investigators to stand approximately 15 feet away from the vehicle during the forensic exam. There was no interaction with the examiner and the NTSB investigators often could not see the work being done.

Further, you stated that the NTSB would not have access to the vehicle until after the forensic exam, after any other work that the NYSP wished to complete, after review by the defense counsel, and after the exam by the defense counsel's expert. You could provide no timeframe for the completion of these reviews, other than you expected it would be soon. In a letter you sent to the defense counsel dated October 16, 2018, you asked the defense counsel to identify a date near the end of the month when it might review the vehicle. That means at least two weeks will pass with the vehicle sitting idle and valuable safety evidence eroding.

I understand that you do not want to compromise your criminal investigation, and therefore, you have structured your cooperation with the NTSB investigation with only that in mind. However, this resistance to the NTSB investigation of the limousine accident is perplexing in light of our Congressional mandate and the NTSB mission, and it is not a satisfactory situation for NTSB. You are looking for the potential evidence of a crime. The NTSB is concerned with different evidence, or a different look at that evidence, when looking for safety issues to prevent future accidents. Moreover, our inability to garner immediate access to the vehicle permanently impairs our ability to establish the facts and circumstances relevant to safety issues.

Nonetheless, I do believe we may work together to ensure both of our investigations are thorough and accurate. The NTSB asks that you and/or the NYSP provide the following to the NTSB's investigative team:

- Appropriate storage of the vehicle to protect its integrity (especially mitigating the impact of the weather). I understand that, as of yesterday, the NYSP has continued the rental agreement that the NTSB began for the tent. Additionally, the NYSP is searching for an indoor facility.
- Appropriate storage of all parts removed from the vehicle to maintain their integrity. I understand that the parts have been placed in the NYSP evidence system and will be maintained indoors.
- Immediate access to the vehicle, or at a minimum, coordinated access when NYSP and/or the defense team access the vehicle.
 - The NTSB is particularly interested in the occupiable space inside of the vehicle, the structural modifications used to lengthen the vehicle's wheelbase and increase its occupancy, the powertrain components, the steering and brake systems.

- I understand that the NYSP does not object to the NTSB being present when the defense/defense expert examine the vehicle.
- Investigative documentation obtained by the NYSP that has not been shared with the NTSB
 - Thank you for providing copies of the information of the scene collected by the drone(s).
 - NYSP has provided next of kin information.
 - I understand that the New York Department of Transportation reports are under review by the NYDOT Counsel's office, and it will be in contact with the NTSB investigative team about releasing the reports.
- An unredacted copy of Brian F. Chase's report(s) and photographs or video taken during his examination.

The NTSB will continue to cooperate with the NYSP and you throughout this accident investigation. If you believe or learn otherwise, contact me immediately. I look forward to your response and a resolution to our current impasse. I am confident that we may have a productive investigative relationship.

Sincerely,

A black rectangular redaction box covers the signature of Kathleen Silbaugh. There are some faint blue ink marks above the box, possibly remnants of a signature or initials.

Kathleen Silbaugh
General Counsel

Enclosure

Background on NTSB highway authority and criminal investigations

The NTSB commenced operations in 1967 as an independent agency located with the Department of Transportation to investigate accidents in all modes of transportation, to report on their facts, circumstances, and probable cause, and to make remedial safety recommendations to prevent accidents. NTSB investigations are non-adversarial proceedings and are not conducted for the purpose of determining the rights or liabilities of any person. 49 C.F.R. §831.4. The NTSB is not a regulatory agency in the conventional sense - it does not promulgate operating regulations and does not certificate organizations or individuals. The goal of our work is to foster safety improvements, through formal and informal safety recommendation for the traveling public. Pub. L. 89-67; 80 Stat. 935. In 1975, Congress made NTSB a completely independent establishment of government, and its duties, particularly in the surface mode of transportation, were considerably expanded. Pub. L. 93-633; 88 Stat. 2156.

In order to fulfill its responsibilities, Congress granted the NTSB extraordinary powers and repeatedly enlarged and strengthened the NTSB's authority. For example, NTSB has statutory authority to enter any property where an accident has occurred or wreckage is located and "do anything necessary to conduct an investigation," order autopsies of persons who die in transportation accidents, "inspect any record, process, control, or facility related to an accident investigation," and examine or test, among other things any vehicle involved in an accident. 49 U.S.C. §1134.

The NTSB garnered well-earned respect for its investigative abilities, and safety recommendations, and we are experienced with working with other agencies when criminal or other parallel investigations are being conducted. In an opinion authored by the Chief Judge of the D.C. Circuit, the Court characterized the broad powers of the NTSB and its exercise of that authority as follows:

NTSB is a uniquely independent federal agency.... Congress has endowed the NTSB with broad powers to accomplish its missions, because the work of the agency is viewed as extremely important. See S REP. NO. 101-450, at 2 (1990) ("The NTSB's mission ... is critical.") Most importantly, the Board's investigations have "priority over any investigation by another department, agency, or instrumentality of the United States Government." 49 U.S.C. §1131(a)2 (1994). The Board has used these broad powers wisely, achieving notable successes in its work and receiving high praise for the integrity of its investigative processes. See S. REP. NO. 104-324, at (1996) (The Safety Board's reputation for impartiality and thoroughness has enabled it to achieve such success in shaping transportation safety improvements that more than 80 percent of its recommendations have been implemented.").

Chiron Corp. v. National Transp. Safety Board 198 F.3d 935 at 937 (D.C. Cir. 1999).

Moreover, many of our highway investigators are former law enforcement officers, and our investigative staff is experienced in working with other agencies when criminal or other parallel investigations are being conducted and our senior officials are also very sensitive to such needs.

The NTSB has a distinguished record of contributing to highway safety for decades. For example, as a result of the NTSB's investigative work and safety recommendations, automobile airbags for all citizens are safer, child fitting stations are available nationwide, and graduated driver licensing programs for teenagers have been implemented nearly all states. Additional examples of safety improvements inspired by or resulting from investigations or resulting from investigations or recommendations of the NTSB include improvements in the design and construction of school buses, highway barrier improvements, and center high-mounted rear brakes lights on automobiles. Although there is no way to quantify the accidents that did not happen or the lives that were not lost because of the efforts of the NTSB, the tangible safety improvements that can be directly associated with the work of the NTSB have saved countless lives and avoided millions and perhaps billions of dollars in injuries and property damage.

The jurisdictional mandate for NTSB investigations in the highway mode reads: "The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of ... a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State[.]" 49 U.S.C. §1131(a)(1)(B). There is no legislative history on the meaning of "in cooperation with the states," but it has long been interpreted by NTSB to be merely a recognition that NTSB will necessarily have to pick and choose accidents that it thinks have national importance. It cannot, nor should it, investigate the tens of thousands that occur every year; and that because, unlike the other modes NTSB investigates, it is the individual states who are largely responsible for the regulation of operators and enforcement of traffic safety, NTSB will necessarily need to coordinate its exercise of investigative authority with those agencies who would routinely respond to an accident whether or not NTSB was present.

It should be noted that the operative jurisdictional language clearly indicates that *the Board* selects the accidents it investigates. In other words, the jurisdictional phrase "in cooperation with a State" does not grant New York, or any other state, mutual input regarding an NTSB decision about whether to investigate a particular highway accident.¹ This concept – that the phrase "cooperation with" imparts an obligation to make a good faith consultation, but does not create a mutual "veto" over a particular course of action – can also be seen in the statutory language used in our surface testing authority. Our statute requires that such testing "to the maximum extent feasible, preserves evidence related to the accident, consistent with the needs of the investigation and with the cooperation of that owner or operator." See 49 U.S.C. §1134(c)(2). From the legislative history, it is clear that the phrase "with the cooperation of that owner or operator" does not impart upon those parties the power to control NTSB decision-making regarding an accident investigation. The legislative history emphasizes that the owner's interests do not trump NTSB's need and cannot be used to delay the inquiry.

¹ It would also be counterproductive to safety to confer on states veto rights over NTSB's choices of which accidents to pursue. States may be facing potential litigation stemming from their action or inaction or want to avoid adverse publicity from NTSB's conclusions and probable cause determinations. States could thus thwart legitimate inquiries for selfish reasons unrelated to transportation safety.

The provision specifying the cooperation of the owner or operator has been added to the law in an attempt to create an atmosphere of cooperation between the investigating agencies and the owner or operator and to prevent unnecessary litigation of these issues. If, however, arrangements cannot be worked out, the NTSB has the authority to secure an immediate court order as necessary to obtain evidence and conduct examinations or test. Thus, consent of the owner is not a precondition to NTSB conducting examinations or tests consistent with the needs of the investigation.

H.R. REP. NO. 970108, Part II, 97th Cong., 1st Sess. 3 (1981), reprinted in 1981 U.S.C.C.A.N. 1736-37. Presumptively, given Congress's previous use of the exact same language ("cooperation with a State" and "cooperation of that owner or operator"), it did not intend for our highway jurisdiction, and associated statutory authority, to be usurped or compromised by state officials.² The Board does not seek priority over states in highway investigations, but it is at least entitled to parity for needed evidence.

NYSP and the District Attorney's actions (i.e., barring an NTSB investigation and refusing to cooperate to find mutually satisfactory methods to permit NTSB to go forward while providing adequate protection for any potential criminal prosecution that may stem from the accident) are not consistent with Article VI of the United States Constitution, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2; see also Nash v. Florida Industrial Commission, 389 U.S. 235, 239-240 (1967) ("The action of Florida here has a direct tendency to frustrate the purpose of Congress.... Florida should not be permitted to defeat or handicap a valid national objective.")

In fact, the California Attorney General, in response to California Highway Patrol (CHP) questions, issued a formal opinion on this very issue. The 1979 opinion by then-California Attorney General George Deukmejian concluded that CHP cannot by law

² This concept is also similar to the provisions in our statute addressing when investigative priority will be ceded to the Federal Bureau of Investigation. See 49 U.S.C. § 1131(a)(2)(B) ("If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation....") There is an obligation to make a good-faith consultation, but the decision is still that of one agency.'

prevent NTSB from conducting a safety investigation or bar it from the scene: “[a] general principle arising from the supremacy clause is that a state may not impede a federal agent in the fulfillment of his duties imposed by federal law.” A copy of the Opinion is attached.

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

MARCH 30, 1979

IL 79-37

OPINION

of

GEORGE DEUKMEJIAN
Attorney General

VICTOR D. SONENBERG
Deputy Attorney General

Formerly ^{Op} Op. 78/78
No. CV 78/78

THE HONORABLE G. B. CRAIG, COMMISSIONER, CALIFORNIA
HIGHWAY PATROL, has requested an opinion on the following
questions:

1. Can the California Highway Patrol accept or
reject National Transportation Safety Board assistance at
accident scenes for which the California Highway Patrol is
the primary investigating agency?

2. Can the California Highway Patrol refuse to
allow any governmental entity or private organization access
to a traffic collision scene and/or involved vehicles while
securing evidence to support criminal prosecution?

The conclusions are:

1. There is nothing in the law which compels the
highway patrol to accept or reject National Transportation
Safety Board assistance at accident scenes. However, the highway
patrol does not have the power to bar employees of the National
Transportation Safety Board from the scene of accidents which
the Board has selected for investigation.

2. The California Highway Patrol may not exclude
governmental entities with parallel traffic enforcement jurisdic-
tion from a traffic collision scene, and from the involved
vehicles, except on certain areas of state freeways or in
those areas where it has exclusive police jurisdiction. How-
ever, the highway patrol, where required by the necessities
of the accident investigation, may so exclude all other
governmental entities and private organizations.

ANALYSIS

The National Transportation Safety Board (hereafter NTSB) is an independent agency of the federal government (49 U.S.C. § 1902(a)).

Under the Independent Safety Board Act of 1974 (49 U.S.C. §§ 1901 - 1907) the essential functions of the NTSB are to investigate transportation accidents (49 U.S.C. §§ 1902(b)(5), 1903(a)), including highway accidents (49 U.S.C. § 1903(a)(1)(B)), determine their causes (49 U.S.C. § 1903(a)) and make recommendations to federal, state and local authorities for action that will promote the reduction of similar accidents (49 U.S.C. §§ 1903(a)(3), 1904(2)). (See also 49 C.F.R. § 800.3(a).) The NTSB is also directed to initiate special studies and investigations on matters pertaining to transportation safety and avoidance of injuries (49 U.S.C. § 1903(a)(4)), to assess accident investigation methods and publish recommended methods (49 U.S.C. § 1903(a)(5)), and to prepare an annual report to Congress with a detailed appraisal of the accident investigating and prevention activities of federal and state agencies (49 U.S.C. § 1904(3)).

It can thus be seen that the federal government, acting through the NTSB, has a substantial investigatory interest in highway accidents with the significant objective of gathering information to reduce injuries and improve highway safety. Thus to the extent that the present question contemplates the California Highway Patrol's rejection of NTSB participation in an investigation of highway accidents, a consideration of the supremacy clause of the United States Constitution (art. VI, cl. 2) is required. 1/ This clause provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

1. The present question literally asks whether the highway patrol "can accept or reject [NTSB] assistance at accident scenes" We are unaware of any provision of law that either requires or prevents the highway patrol from accepting NTSB assistance in the conduct of its accident investigations. However, the entire context of the opinion request indicates that what is at issue is not the question of accepting or rejecting assistance, but whether the highway patrol has the authority to bar the NTSB from access to an accident scene where the highway patrol is conducting an investigation. Our reply will be directed to this issue.

clause is that a state may not impede a federal agent in the fulfillment of his duties imposed by federal law. (Wash v. Florida Industrial Comm'n (1967) 389 U.S. 235, 239-240; In re Heagle (1990) 135 U.S. 1, 62, 75-76; 57 Ops. Cal. Atty. Gen. 42, 44 (1974); Tribe, American Constitutional Law (1975) p. 393.)

In the present situation the federal statute authorizes NTSB investigators "to enter any property wherein a transportation accident has occurred . . . and do all things therein necessary for a proper investigation" (49 U.S.C. § 1903(b)(2).) If, nonetheless, the NTSB could be excluded at the discretion of a state agency from access to the scene of a highway accident which the NTSB had selected for investigation, the fulfillment of the cardinal public safety objectives of the federal law would clearly be thwarted by such state action. As stated in Wash v. Florida Industrial Comm'n, *supra*, 389 U.S. at p. 240: "a state law cannot stand that either frustrates or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created." Thus it has been held that the State of Arizona could not compel a federal agency to submit plans for a dam it intended to construct to the state engineer for prior approval. (Arizona v. California (1931) 283 U.S. 423, 451-542.) Following the same principle, it was held that the State of Maryland could not compel a post office employee to obtain a state driver's license before driving a post office truck. (Johnson v. Maryland (1920) 254 U.S. 51, 55-57.) Similarly in United States v. City of Chester (1944) 144 F.2d 415, 420, it was held that a federal agency in constructing emergency defense housing could not be required to comply with municipal building ordinances. See also Mayo v. United States (1943) 319 U.S. 441, 447-448.

With respect to the present situation we therefore conclude that by virtue of the Constitution's supremacy clause the California Highway Patrol may not restrict the NTSB from access to the scene of a highway accident.

But in so concluding we note that the federal statute directs that the highway accidents to be investigated are to be selected by the NTSB "in cooperation with the States." (49 U.S.C. § 1903(a)(1)(B).) (See also 49 C.F.R. § 800.3(a).) Thus while an NTSB investigation cannot be precluded by the state, the NTSB is obligated to consult with and consider the pertinent interests of the state in the process of selecting highway accidents for investigation. In this connection we are informed by the highway patrol and the NTSB that a general policy of cooperation between these two agencies is presently operative.

We next consider the question of whether the highway patrol can bar any governmental entity (other than the NTSB) or any private organization from an accident scene while the highway patrol is securing evidence relating to criminal charges.

Considering this question requires, initially, a specification of the statutes delineating the highway patrol's law enforcement jurisdiction.

Vehicle Code section 2400 provides that the Commissioner of the highway patrol "shall enforce all laws regulating the operation of vehicles and the use of the highways . . .", and Vehicle Code section 2401 directs the Commissioner to provide at all times for the "patrol of the highways."

Vehicle Code section 2409 and Penal Code section 830.2 afford to highway patrol officers "the powers of a peace officer" primarily to enforce the laws relating to the operation of vehicles upon the highways.

Vehicle Code section 2412 authorizes all highway patrol officers to investigate accidents and gather evidence for the purposes of criminal prosecution arising out of such accidents.

Thus the jurisdiction of the highway patrol to enforce the laws on highways throughout the state and to conduct investigations in connection with such law enforcement is clearly established. But what is most significant in relation to the present question is that this jurisdiction is not exclusive. It is shared with the other police agencies throughout the state. (See California Traffic Law Administration 12 Stan. L. Rev. 388, 392-394 (1960) commenting upon the broad overlap of jurisdictions of the state's various police agencies in the field of traffic law enforcement.) Thus county sheriffs by virtue of their general law enforcement authority (Gov. Code §§ 26600-26604) have authority, which parallels that of the highway patrol, to investigate Vehicle Code violations. (36 Ops. Cal. Atty. Gen. 198 (1960).) In McCorkle v. City of Los Angeles (1969) 70 Cal.2d 252, 261-263, the Supreme Court recognized the authority of city police officers to investigate traffic accidents, and concluded that such officers, while conducting such investigations, are "traffic officers" as defined by Vehicle Code section 625 and are such within the meaning of Vehicle Code section 2800 which requires obedience to the orders and directions of a "traffic officer." (See also Pen. Code § 830.1 and Gov. Code §§ 41601, 41602 conferring upon city police virtually the same law enforcement authority that is possessed by sheriffs. And note that the

Vehicle Code's definition of "traffic officer" applies not only to members of the highway patrol but also to "any peace officer who is on duty for the exclusive or main purpose of enforcing . . . [the accident and traffic provisions of the Vehicle Code]." Veh. Code § 625 (emphasis added).

However, within this framework of parallel jurisdiction there are, with two limited exceptions, no provisions establishing jurisdictional priorities which would give one police agency authority over another in those situations where more than one agency is responding to the same incident.

The first exception involves the "facilities of travel" of bridge and highway districts. Here Streets and Highways Code section 27177 grants to the highway patrol "exclusive" police jurisdiction. Thus by its terms this provision authorizes the highway patrol to exclude other police agencies from conducting enforcement activities on district travel facilities. (See City of Nevada v. Bastow (1959) 328 S.W.2d 45, 47 which defines the word "exclusive" to mean "possessed to the exclusion of others; . . . debarred from participation or enjoyment; not including, admitting, or pertaining to any other")

The other exception involves state freeways within city limits (other than those within the City of Los Angeles). On such areas of the freeways section 2400 of the Vehicle Code provides that the highway patrol shall have "primary jurisdiction for the administration and enforcement of . . . [traffic] laws, and for the investigation of traffic accidents. . . ." (Emphasis added.) On the other hand, this same section provides that "city police officers while engaged primarily in general law enforcement duties may incidentally enforce state and local traffic laws and ordinances on state freeways." (Emphasis added; Veh. Code § 2400.) This assigning of "primary jurisdiction" to the Highway Patrol and "incidental[]" authority to the city police clearly indicates that the highway patrol is to be the predominant traffic enforcement authority in the specified areas of the state freeways. Vehicle Code section 2400 thus confers upon the highway patrol, in these particular areas, authority to control accident investigations and restrict, where necessary, the access of other police agencies to the accident scene and to the involved vehicles.

However, the fact that the Legislature has expressly specified those instances where the highway patrol is to have superseding authority in traffic law enforcement over police agencies that also have traffic enforcement jurisdiction, requires the conclusion that in all other instances the highway patrol does not have this authority over such police agencies.

As stated by the Supreme Court in Wildlife Alive v. Chickering (1976) 13 Cal.3d 190, 196:

"In the grants [of powers] and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode"

Thus if the highway patrol desires to exclude other police agencies from an accident scene in those situations where its authority to take this action is not specified by statute, such exclusion would have to be based upon cooperative agreements worked out between the highway patrol and the other agencies. (See 15 Ops. Cal. Atty. Gen. 129, 130 (1950).)

There still remains, however, the question of the highway patrols' authority to exclude from the accident scene persons from governmental agencies which do not have parallel enforcement jurisdiction, and persons from private organizations.

Pertinent to the highway patrol officer's authority when conducting an accident investigation is Vehicle Code section 2800 which makes it unlawful "to willfully fail or refuse to comply with any lawful order, signal, or direction of any traffic officer" and Penal Code section 148 which prohibits anyone from "willfully resist[ing], delay[ing] or obstruct[ing] any public officer, in the discharge or attempt to discharge any duty of his office" (See also Pen. Code § 69.)

As already noted, investigating accidents and gathering evidence is one of the duties of the highway patrol expressly designated by statute. (Veh. Code § 2412.) Thus the above specified Vehicle and Penal Code provisions which prohibit obstructing an officer in the performance of his duties, and which require obedience to his directions, would appear to afford the highway patrol ample authority to exclude any persons, whether they represent private organizations or governmental agencies (without parallel enforcement jurisdiction), from access to an accident scene and from access to the involved vehicles, when such exclusion is necessary to prevent obstruction of the investigatory and evidence gathering process. (See In Re William F. (1974) 11 Cal. 3d 249, 251-253; Los Angeles Free Press, Inc. v. City of Los Angeles (1970) 9 Cal. App. 3d 448, 455, 457.)

In so concluding we are aware of Penal Code section 409.5 which authorizes highway patrol and other specified peace officers to close off areas where accidents or other disasters have created a menace to the public

health and safety (see also Veh. Code § 2812), and we note that this section also provides that "[n]othing in this section shall prevent a duly authorized representative of any news service, newspaper, or radio or television station or network from entering the areas closed pursuant to this section." (Pen. Code § 409.5(d).)

This proviso exempting news reporters from the otherwise applicable access restrictions of Penal Code section 409.5 gives rise to the question of whether news reporters constitute an exception to an officer's authority to exclude persons from private organizations from the scene where an investigation is being conducted.

In considering this question we note first that the news reporter's exemption of Penal Code section 409.5 applies when the scene is closed by peace officers "pursuant to this section." (Pen. Code § 409.5(d).) Therefore, by its express terms, the exemption is not applicable when peace officers close an area pursuant to some other section.

Also, the phrase that "nothing in this section shall prevent . . . [a news reporter from entering the closed areas]" is a further indication in the proviso that the reporter's exemption is not to apply to access restrictions which are based on other statutory sections. Thus, for example, if within a restricted disaster area, highway patrol officers, pursuant to their law enforcement and investigative authority under the Vehicle Code (§§ 2400, 2409, 2412), closed off a smaller area to protect the integrity of a criminal investigation, Penal Code section 409.5 would not afford a reporter access to such investigative area because the closure of such area was not based upon that section. See Los Angeles Free Press, Inc. v. City of Los Angeles, supra, 9 Cal.App.3d at 455-457, which, while noting Penal Code section 409.5, recognized the authority of peace officers to place restrictions upon the access of news reporters to the scenes of crimes and disasters.

A similar question concerning the authority of police officers to restrict access to an investigative scene is raised by Penal Code section 402 which provides:

"Every person who goes to the scene of a disaster, or stops at the scene of a disaster, for the purpose of viewing the scene or the activities of policemen, firemen, other emergency personnel, or military personnel coping with the disaster in the course of their duties during the time it is necessary for emergency vehicles or such personnel to be at the scene of the disaster or to be moving to or from the scene of the disaster for the purpose of protecting lives or property, unless it is part of the duties of such person's employment to view such scene or activities, and thereby impedes such policemen, firemen, emergency personnel

or military personnel in the performance of their duties in coping with the disaster, is guilty of a misdemeanor."

"For the purposes of this section, a disaster includes a fire, explosion, an airplane crash, flooding, windstorm damage, a railroad accident, or a traffic accident."
(Emphasis added.)

Thus if a person's employment duties require him to view a disaster scene, the proviso in Penal Code section 402 exempts him from the restrictions of that section. However, it should be noted that Penal Code section 402 is expressly directed to protecting against impediment, the performances of those duties that are related to "coping with . . . disaster[s]". That section is not directed to the protection of the performance of other types of official duties, unlike Penal Code section 148 which, in prohibiting the willful obstruction of a public officer in the discharge of his duties, is not confined in applicability to any particular type of official duty. Thus, because of the express qualification in the terms of Penal Code section 402, if an officer restricts access to a particular area in order to permit the effective conduct of a criminal investigation, as opposed to "coping with [a] . . . disaster," the provisions of Penal Code section 402 would not be applicable. As stated in Hurst v. City and County of San Francisco (1944) 33 Cal.2d 293, 301: "a proviso, that is, an exception . . . should not be construed to limit the general power except to the extent that it clearly does so." See also People ex rel S.F. Bay etc. Cor. v. Town of Emeryville (1968) 69 Cal.2d 533, 543; Johnson v. Board of Supervisors (1929) 208 Cal. 232, 285. There appears to be no basis in the terms of either Penal Code sections 402 or 409.5 for extending the exceptions to the access restrictions contained in these statutes to situations which these statutes do not specify.

Thus we conclude that the exceptions in Penal Code sections 402 and 409.5 do not limit the authority of the highway patrol to restrict the access of persons from private organizations to an accident scene where a criminal investigation is being conducted.



National Transportation Safety Board

Washington, D.C. 20594

Office of General Counsel

December 14, 2018

VIA EMAIL

And VIA UPS Next Day Delivery
Tracking #1Z A4E 715 24 9400 9307

Susan J. Mallery, Esq.
Schoharie County District Attorney
P.O. Box 888
157 Depot Lane
Public Safety Facility
Schoharie, NY 12157

Re: Investigation of a 2001 Ford Excursion stretch limousine crash at the intersection of
State Route 30 and State Route 30A in Schoharie, New York
October 6, 2018
NTSB Accident No. HWY19MH001

Dear District Attorney Mallery:

Last Thursday, December 6, 2018, was the two-month anniversary of the crash of the 2001 Ford Excursion stretch limousine in Schoharie, New York.

As we have discussed with you or the New York State Police (NYSP) throughout October and November 2018, the NTSB is following its Congressional mandate to conduct a safety investigation of this crash. The NTSB is an independent agency of the United States and is responsible for investigating and establishing “the facts, circumstances, and cause or probable cause of” major transportation accidents that occur in the United States. *See* 49 U.S.C. 1131. In the case of highway accidents, our statute grants NTSB jurisdiction to investigate those “highway accident[s] ... the Board selects in cooperation with a State.” 49 U.S.C. § 1131(a)(1)(B). The NTSB is not a regulatory agency in the conventional sense -- it does not promulgate operating standards and does not certificate organizations or individuals. NTSB investigations are non-adversarial proceedings and are not conducted for the purpose of determining the rights or liabilities of any person. 49 C.F.R. § 831.4. The goal of our work is to foster safety improvements for the traveling public, through formal and informal safety recommendations.

Per your demands, the NTSB has modified its traditional investigative procedures to accommodate the needs of your criminal investigation, allowing your team and the defense team

first access to the vehicles and other evidence. The NTSB's Congressionally-mandated safety investigation, however, cannot be hindered any further.

Although the NTSB team has been successful in gathering some secondary information in coordination with your office and the NYSP, (including the scene data collected by the drone(s), the next of kin information, and the New York Department of Transportation reports), the delays you imposed have denied the NTSB access to the primary, essential evidence, resulting in safety-critical evidence being lost.

Specifically, the NTSB team has been denied access to the crash vehicle, the other vehicles operated by the company, and relevant reports and records. On October 17, 2018, I sent you a letter that requested information and access. Listed below are the outstanding items from that letter and subsequent requests, along with the NTSB's annotations with the information known to date. None of these items have been resolved.

- Immediate access to the vehicle. (NTSB agreed to access the vehicle in coordination with the NYSP and/or the defense team to alleviate any concerns about spoliation.)
 - The NTSB is particularly interested in the occupiable space inside of the vehicle, the structural modifications used to lengthen the vehicle's wheelbase and increase its occupancy, the powertrain components, the steering, and brake systems.
- An unredacted copy of [REDACTED] report(s) and photographs and video taken during his examination.
- Immediate access to the other vehicles impounded from the operating company. (NTSB agreed to access these vehicles in coordination with the NYSP and/or the defense team to alleviate any concerns about spoliation.)
- Appropriate storage of the vehicle to protect its integrity (The NTSB has been working with the NYSP to erect a storage facility around the vehicle, at the NTSB's expense.)
- Appropriate storage of all parts removed from the vehicle to maintain their integrity, and access to those parts. (The NTSB has no updates on the location or means of storage of the parts removed from the vehicle.)

Subsequent to my letter, Dr. Rob Molloy, Director, Office of Highway Safety, has contacted you by telephone and emails, dated November 27, 29 and 30, 2018, to provide updates on the investigative process, and to repeatedly request information, and most importantly, access to the crash vehicle. He explained that much of the NTSB's work would be non-destructive. He attached an Inspection Protocol with his November 27, 2018 email, which is attached again for your convenience.

We believe you have been unresponsive to the NTSB's attempts to obtain information via letter, emails and telephone calls. Instead, what we have been told is that your schedule is full and you are too busy to respond.

Although the NTSB appreciates the need to pursue justice for the crash victims and their families, the NTSB and others have made public statements that the safety investigation is progressing. These statements were based upon representations by you that the agency would have reports and access to the vehicle. Recall that you stated that the NTSB investigative team could

inspect the vehicle once the defense team had completed its work. The defense team's inspection of the vehicle was completed in mid-November, yet the agency has received no response from you to our subsequent requests to examine the vehicle. Further, during our conversation on Sunday, October 7, 2018, you told me that the NTSB would receive a copy of the NYSP's forensic examination report as soon as it is complete. Is it not complete? If it is not, the NTSB asks that you provide all information that the forensic examiner provided to the NYSP and provide the complete report when it is available.

Moreover, during this two-month period, key perishable safety investigative information may have been lost because you denied the NTSB the necessary access. Our investigative team may no longer be able to evaluate the corrosion on the vehicle or its parts at the time of the crash (which is critical when examining the brakes), or the status of the vehicle's electrical system at the time of the crash. Similarly, the NTSB may not be able to evaluate the condition of the other vehicles operated by the company at the time of the crash, which is critical to understanding proper vehicle maintenance.

While we understand the important duties that you are fulfilling, we are gravely concerned that your lack of responsiveness to our requests has seriously impeded our abilities to carry out our Congressionally-mandated duties to properly complete this safety investigation and potentially prevent similar accidents in the future.

Therefore, in consideration of your schedule and the time required to provide a written response, we request a telephone conversation with you on December 18 or 19 so we may develop a plan to move forward. Please advise on which of these dates you may have this phone conversation, as well as a time that you will be available.

Sincerely,

A black rectangular redaction box covering the signature of Kathleen Silbaugh.

Kathleen Silbaugh
General Counsel

Attachment



National Transportation Safety Board

Washington, D.C. 20594

INSPECTION PROTOCOL

Schoharie, NY
HWY19MH001

Background:

The National Transportation Safety Board is an independent Federal agency charged by Congress to determine the probable cause of an accident and to issue safety recommendations. The vehicle itself is an important aspect in determining the probable cause of this accident. This examination will help to determine the effect of the stretch modification, the structural integrity and road worthiness of the vehicle.

Our vehicle inspection process involves an in depth examination of all vehicle components and applicable Federal Motor Vehicle Safety Standards (FMVSS). The examination will also include compliance with the manufacturers specifications for modification.

Often times operational parts and systems can be eliminated as contributory to the crash. There have been occasions where this type of examination has resulted in urgent or emergency recommendations to prevent other accidents from occurring. For instance a recall and removal of operation of a particular amphibious passenger vehicle from service until a recall was addressed, and a brake component in a Freightliner truck that could cause a loss of braking.

Since this crash NTSB investigators have been in contact with limo trade groups, limo companies, vehicle modifiers, vehicle manufacturers, state vehicle inspectors gathering information about limo vehicle. NTSB investigators have inspected stretched limos to develop a knowledge base of designs, modification and components specific to stretched limos.

Exterior Vehicle Inspection:

The accident vehicle was inspected and examined by the NYSP and their retained expert. Although NTSB investigators and defense representatives were present at a distance, several items were removed from the vehicle for further examination, but those items have not been identified to the NTSB. The NTSB understands that the items were removed from the vehicle for further examination. The NTSB did not observe the NYSP or its expert examine in detail the interior of the accident vehicle other than a scan of the accident vehicle. The NTSB did not observe the NYSP or its expert examine in detail the frame or undercarriage.



National Transportation Safety Board

Washington, D.C. 20594

Exterior inspection protocol:

- Examination will be conducted in cooperation with and direction of the Schoharie District Attorney in the presence and assistance by the NYSP
- Examine the undercarriage of the vehicle as it is in storage supported on jack stands. The height should provide adequate room for our examination so there is no need to further raise or lay the vehicle on its side.
- The examination will include photographs, measurements, documentation and additional scanning.
- There is no intention to remove any items or conduct any type of destructive testing.
- There may be a need to use a wire brush to remove some surface rust as the vehicle has not been stored in a climate controlled shelter.
- Frame,
 - Examination to include the general condition and all associated components, welds, body supports, body attachment and corrosion
 - Frame and floor concealment panels (if equipped remove to examine behind them)
- Suspension
 - Springs, shocks, sway bars
- Steering system
- Drive train
 - Drive shafts, carrier bearing
 - Engine oil sample
 - Transmission fluid sample
 - Verify that engine was operating
- Tires and wheels
 - Tires and wheels specified
 - Tires and wheels on the vehicle, size, manufactured date, load rating, speed rating
- Brake system
 - Brake lines, rotors, calipers, brake fluid (analyze for viscosity, contamination)
 - ABS, download of ABS module
- As part of our examination to examine the cause, we have a need to view the parts and information from the NYSP expert.
 - Collectively we may ask for further analysis of some components by the NYSP expert

Interior Vehicle Inspection:

Interior inspection protocol:

- Visual examination, photos, measurements, seat examination, dimensions, attachments, seat belts and seatbelt anchors.



National Transportation Safety Board

Washington, D.C. 20594

- Purpose: Establish mechanism of injury and evaluation of seat integrity, restraint systems and interior deformation
- Vehicle side panels and roof support
 - Examination of welds at structure members and possible weld quality
 - Passenger containment, survivable space
- Vehicle specification plates, stickers

Company Remaining Fleet:

Inspection of Remaining Fleet (3 stretched limos):

- Visual inspection of the remaining fleet in the presence of and assistance of the NYSP and NYDOT
 - Purpose to examine the underframe for corrosion and integrity
 - Safety inspection to examine compliance with applicable Federal and State Regulations
 - Arrangements have been made with a garage with a lift to raise the vehicles in a safe manner inside due to weather considerations
 - Vehicles could be transported under NYSP escort to and from the garage to maintain chain of custody about 7 miles from Troop G



National Transportation Safety Board
Washington, DC 20594

Office of General Counsel

January 7, 2019

By electronic mail to: [REDACTED]

The Honorable George R. Bartlett, III
County Court Judge
Schoharie Supreme and County Court
290 Main Street
Schoharie, NY 12157

Re: Application for supplemental search warrant for white Ford Excursion limousine (NY license plate TOGALUX1; VIN 1FMNU40S51EB10299) and related state and federal investigations into the fatal limousine accident in Schoharie, New York on October 6, 2018

Dear Judge Bartlett,

In a telephone conversation late on the afternoon of January 4, 2019 with F. Christian Spies, Chief Clerk of the Schoharie County Courts, the National Transportation Safety Board (NTSB) was informed for the first time that this Court has asked for the NTSB to comment on the above-referenced application for a supplemental search warrant related to the fatal limousine accident which occurred in Schoharie, New York on October 6, 2018. The supplemental search warrant would authorize only the New York State Police (NYSP) and its expert, [REDACTED], to remove, disassemble and inspect the transmission and torque converter from the crash vehicle. As proposed, the search warrant does not, on its face, allow the NTSB access to the vehicle or to these parts.

The NTSB categorically opposes the supplemental search warrant if such a search, which would necessarily result in altering and/or destroying physical evidence on the crash vehicle, is conducted without NTSB investigators being present and actively participating in the removal, disassembly and inspection of the relevant parts of the vehicle.¹ If the NTSB were excluded

¹ In several communications with the NTSB, District Attorney Mallery has mischaracterized the level of access to the crash vehicle granted to NTSB investigators. Specifically, in a letter dated December 19, 2018, District Attorney Mallery stated "your investigators have been given at least three lengthy opportunities to view the limousine." In a letter dated December 28, 2018, inviting the NTSB to issue a joint press release with her office, District Attorney Mallery stated "NTSB representatives have been present at multiple viewings of the limousine." To be perfectly clear, while NTSB investigators have been in the vicinity of the crash vehicle during inspections by the NYSP and [REDACTED] NTSB investigators have been restricted to viewing the inspection from a minimum of 15 feet away, and have not been permitted to participate in the inspections or to examine parts removed from the crash vehicle. District Attorney Mallery asserted that because the NTSB was not identified on the search warrant, our investigators had to remain beyond the perimeter of the forensic examination.

from such activities, that would be the second time major work was performed on the crash vehicle while federal investigators were denied access.

Your Honor, the NTSB requests that you intervene to facilitate the NTSB gaining immediate access to the crash vehicle, as authorized by federal law, to begin this necessary part of our safety investigation. As explained below, it is critical that the NTSB begin its inspection before the vehicle is altered again. The NTSB will coordinate its work with the NYSP, District Attorney Mallery, and the defense team. Alternatively, if the Court wishes to mediate, the NTSB will inform the Court of its next steps and needs.

Although the NTSB statutory authority does not require our agency's inclusion on a state search warrant, should the Court believe that is appropriate or that it will expedite our access to the crash vehicle, we ask that the Court issue the necessary documentation or Order(s).

Elected representatives, and likely the traveling public, believe that the NTSB has been given necessary access to fully investigate this crash. On January 4, 2019, WTEN in Albany quoted New York State Assemblyman Chris Tague and Rep. Antonio Delgado who both cited the importance of the NTSB's investigation in urging an end to the partial federal government shutdown. While the partial government shutdown does impact NTSB operations, in this instance, District Attorney Mallery's refusal to grant access to the crash vehicle is having the greatest impact on the NTSB investigation.

NTSB Background and Authority

The NTSB "is an independent establishment of the United States Government." 49 U.S.C. § 1111(a); *see Dolan v. U.S. Post. Serv.*, 546 U.S. 481, 484 (2006) (explaining that independent establishments have sovereign immunity). "Congress has endowed NTSB with broad powers to accomplish its missions, because the work of the agency is viewed as extremely important." *See Chiron Corp. & PerSeptive Biosystems v. Nat'l Transp. Safety Bd.*, 198 F.3d 935, 937 (D.C. Cir. 1999). Historically, "[t]he NTSB's function is 'to promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations.'" *See Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1389 (9th Cir. 1986) (quoting 49 U.S.C. § 1901(1) (1982)).

Federal law requires the NTSB to "investigate or have investigated . . . and establish the facts, circumstances, and cause or probable cause" of certain transportation accidents, and to "issue safety recommendations to prevent or mitigate the effects of a similar accident." *See* 49 U.S.C. § 1131(a). Such investigations "are fact-finding proceedings with no adverse parties . . . and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings." 49 C.F.R. § 831.4(c). Instead, the goal of our work is to foster safety improvements, through formal and informal safety recommendations, for the traveling public.

Moreover, federal law authorizes the NTSB to "enter property where a transportation accident has occurred or wreckage from the accident is located and do anything necessary to

conduct an investigation.” 49 U.S.C. § 1134(a)(1). Because our investigations are non-criminal, the NTSB does not need a search warrant to obtain necessary evidence.

The NTSB fully appreciates the needs of state authorities to investigate accidents for potential criminal activity, and to prosecute such crimes as appropriate. We routinely conduct our investigations parallel to and in coordination with state and local authorities. The Board does not seek priority over states in highway investigations, but it is at least entitled to parity for needed evidence.

Background on Investigation and Exclusion of NTSB Investigators

The level of obstruction we have experienced from District Attorney Mallery while trying to conduct our investigation is deeply concerning. In the days following the accident, the NTSB coordinated with NYSP to obtain access to the crash vehicle. That access, however, initially was delayed until the NYSP expert, ██████████ arrived. District Attorney Mallery then determined that the NTSB could not join ██████████ as he conducted his work because the agency was not included on the search warrant. She declined the agency’s request to contact the Court to seek an amendment to the search warrant. As noted above, the NTSB investigators observed both ██████████ activities and the work of the defense expert from at least fifteen feet away. Since October 12, 2018, District Attorney Mallery has refused all NTSB requests for access to the crash vehicle until all NYSP, prosecution and defense work is complete.

NTSB Seeks the Ability to Perform its Congressionally-mandated Safety Investigation

Understanding the sensitivity of criminal investigation, and although only a preliminary document, on November 27, 2018 and December 14, 2018, the NTSB presented an Inspection Protocol to District Attorney Mallery. A copy is attached. For this initial inspection, the Protocol states: “the examination will include photographs, measurements, documentation and additional scanning; there is no intention to remove any items or conduct any type of destructive testing; and there may be a need to use a wire brush to remove some surface rust as the vehicle has not been stored in a climate controlled shelter.” During my conversation with District Attorney Mallery on December 19, 2018, she stated that her expert disagreed that the NTSB’s work could be done without further damaging the vehicle. When we asked how taking measurements and photographs would be destructive, she said she would have to verify the information from her expert. We have not received a further response.

These basic items are critical to the safety investigation. To allow further destruction of the vehicle and removal of parts before the NTSB completes this initial Inspection Protocol will impact our ability to determine the vehicle’s role in the probable cause of the crash and to propose safety recommendations. District Attorney Mallery asserts that she has no authority to grant the NTSB access to the vehicle because the search warrant does not identify the NTSB, and thus, she would be violating the Court’s order by doing so. She also asserts that the search warrant obligates her to maintain the evidentiary integrity of the vehicle, perhaps up to and including trial. See District Attorney Mallery’s letter dated December 19, 2018.

We are seeking the Court's guidance on how to gain access to the vehicle and the timing is critical. To protect the vehicle from the weather and other outdoor elements, the NTSB has contracted to erect a storage structure at NYSP Troop G Headquarters in Latham, where the vehicle currently is housed under a tent. The building is scheduled to begin on Thursday, January 10, 2019. To prevent further harm to the federal investigation, it is critical that the NTSB begin the Inspection Protocol for the crash vehicle before the vehicle is moved into the protective shelter because such movement will likely alter the condition of the vehicle even further. The NTSB will coordinate its work with NYSP, District Attorney Mallery and the defense team.

As stated above, although the NTSB authority does not require our agency's inclusion on a state search warrant, should the Court believe that is appropriate or that it will expedite our access to the crash vehicle, we ask that the Court issue the necessary documentation or Order(s).

You likely are aware that there is a partial federal government shutdown due to a lapse in appropriations. The NTSB is not funded currently and many NTSB employees are furloughed. However, given the perishable nature of the evidence we are seeking from the crash vehicle, the NTSB is authorized to activate those employees who are needed to perform the Inspection Protocol as soon as access is granted.

Interactions with District Attorney Mallery

While not directly related to the question of the supplemental search warrant, the NTSB is concerned about what appears to us to be a lack of candor on the part of District Attorney Mallery. In the conversation with Chief Clerk Spies on January 4, 2019, mentioned above, the NTSB first learned that on December 24, 2018, this Court deferred the application for a supplement search warrant and instructed the District Attorney to notify the NTSB of the application by December 28, 2018, and to offer the NTSB the opportunity to comment on the application by January 7, 2019. None of this information was conveyed to the NTSB by District Attorney Mallery.

District Attorney Mallery did not mention a supplemental search warrant to the NTSB until a brief telephone conversation on December 31, 2018. During that call, no mention was made of the transmission or torque converter on the crash vehicle. Indeed, the NTSB was under the impression that the supplemental search warrant was being sought for the purpose of adding NTSB investigators to the list of persons and entities authorized to examine the crash vehicle. This addition had been sought by the NTSB since early October, when District Attorney Mallery cited the limitations of the original search warrant to justify her refusal to permit NTSB investigators to inspect the vehicle.

The NTSB was first made aware of the true purpose of the supplemental search warrant in a letter received later on December 31, 2018 from District Attorney Mallery, in which she stated that in the earlier telephone conversation "no one objected to the [supplemental search warrant]." Again, the NTSB had not objected to the supplemental search warrant during the telephone call because we were not told about the specific content of the supplemental search warrant. Had we known the true content of the application, we would have objected.

Further, District Attorney Mallery never informed the NTSB that this Court was seeking formal comment from the NTSB on the application, nor that this Court had imposed a deadline to comment. Rather, District Attorney Mallery merely stated “[i]f time permits, kindly send to the [Court] a note by fax or email...stating that you have no opposition to the [supplemental search warrant].” There was no indication that such a note was due by a date certain. A copy of District Attorney Mallery’s letter is enclosed.

Finally, after hours on Friday, January 4, 2019, District Attorney Mallery sent a letter to this Court urging signing of the supplemental search warrant “as soon as possible” and stating that Dr. Robert Molloy of the NTSB had “[given] me his oral consent.” Shortly thereafter, Dr. Molloy replied to District Attorney Mallery, clarifying that the NTSB was still working on its formal response, and reiterating the need for NTSB investigators to have access to the vehicle. Despite this clarification from the NTSB, District Attorney Mallery did not amend her assertions to the Court.

We look forward to the opportunity to talk with you further about this or any related matter. To ensure that you are fully informed of the NTSB’s positions or to receive answers to your questions, please contact me directly. My office telephone number is [REDACTED] and my email address is [REDACTED]

Sincerely,

[REDACTED]
Kathleen Silbaugh
General Counsel

Enclosures



National Transportation Safety Board

Washington, D.C. 20594

INSPECTION PROTOCOL

Schoharie, NY
HWY19MH001

Background:

The National Transportation Safety Board is an independent Federal agency charged by Congress to determine the probable cause of an accident and to issue safety recommendations. The vehicle itself is an important aspect in determining the probable cause of this accident. This examination will help to determine the effect of the stretch modification, the structural integrity and road worthiness of the vehicle.

Our vehicle inspection process involves an in depth examination of all vehicle components and applicable Federal Motor Vehicle Safety Standards (FMVSS). The examination will also include compliance with the manufacturers specifications for modification.

Often times operational parts and systems can be eliminated as contributory to the crash. There have been occasions where this type of examination has resulted in urgent or emergency recommendations to prevent other accidents from occurring. For instance a recall and removal of operation of a particular amphibious passenger vehicle from service until a recall was addressed, and a brake component in a Freightliner truck that could cause a loss of braking.

Since this crash NTSB investigators have been in contact with limo trade groups, limo companies, vehicle modifiers, vehicle manufacturers, state vehicle inspectors gathering information about limo vehicle. NTSB investigators have inspected stretched limos to develop a knowledge base of designs, modification and components specific to stretched limos.

Exterior Vehicle Inspection:

The accident vehicle was inspected and examined by the NYSP and their retained expert. Although NTSB investigators and defense representatives were present at a distance, several items were removed from the vehicle for further examination, but those items have not been identified to the NTSB. The NTSB understands that the items were removed from the vehicle for further examination. The NTSB did not observe the NYSP or its expert examine in detail the interior of the accident vehicle other than a scan of the accident vehicle. The NTSB did not observe the NYSP or its expert examine in detail the frame or undercarriage.



National Transportation Safety Board

Washington, D.C. 20594

Exterior inspection protocol:

- Examination will be conducted in cooperation with and direction of the Schoharie District Attorney in the presence and assistance by the NYSP
- Examine the undercarriage of the vehicle as it is in storage supported on jack stands. The height should provide adequate room for our examination so there is no need to further raise or lay the vehicle on its side.
- The examination will include photographs, measurements, documentation and additional scanning.
- There is no intention to remove any items or conduct any type of destructive testing.
- There may be a need to use a wire brush to remove some surface rust as the vehicle has not been stored in a climate controlled shelter.
- Frame,
 - Examination to include the general condition and all associated components, welds, body supports, body attachment and corrosion
 - Frame and floor concealment panels (if equipped remove to examine behind them)
- Suspension
 - Springs, shocks, sway bars
- Steering system
- Drive train
 - Drive shafts, carrier bearing
 - Engine oil sample
 - Transmission fluid sample
 - Verify that engine was operating
- Tires and wheels
 - Tires and wheels specified
 - Tires and wheels on the vehicle, size, manufactured date, load rating, speed rating
- Brake system
 - Brake lines, rotors, calipers, brake fluid (analyze for viscosity, contamination)
 - ABS, download of ABS module
- As part of our examination to examine the cause, we have a need to view the parts and information from the NYSP expert.
 - Collectively we may ask for further analysis of some components by the NYSP expert

Interior Vehicle Inspection:

Interior inspection protocol:

- Visual examination, photos, measurements, seat examination, dimensions, attachments, seat belts and seatbelt anchors.



National Transportation Safety Board

Washington, D.C. 20594

- Purpose: Establish mechanism of injury and evaluation of seat integrity, restraint systems and interior deformation
- Vehicle side panels and roof support
 - Examination of welds at structure members and possible weld quality
 - Passenger containment, survivable space
- Vehicle specification plates, stickers

Company Remaining Fleet:

Inspection of Remaining Fleet (3 stretched limos):

- Visual inspection of the remaining fleet in the presence of and assistance of the NYSP and NYDOT
 - Purpose to examine the underframe for corrosion and integrity
 - Safety inspection to examine compliance with applicable Federal and State Regulations
 - Arrangements have been made with a garage with a lift to raise the vehicles in a safe manner inside due to weather considerations
 - Vehicles could be transported under NYSP escort to and from the garage to maintain chain of custody about 7 miles from Troop G

**SCHOHARIE COUNTY DISTRICT ATTORNEY
SUSAN J. MALLERY, ESQ.
P.O. Box 888, Public Safety Facility
Schoharie, New York 12167**

MICHAEL L. BREEN, ESQ.
Assistant District Attorney

LORA J. TRYON, ESQ.
Assistant District Attorney

December 19, 2018

Ms. Kathleen Silbaugh
General Counsel
National Transportation Safety Board
490 Lenfant Plaza SW
Washington DC 20594

Re: Investigation regarding fatal crash in Schoharie County

Dear Ms. Silbaugh:

I respond to your December 14, 2018 letter as follows.

Your team of investigators has done a thorough examination of the facts underlying the incident referred to above. Contrary to your letter, I made no demands on your agency, nor have I hindered your investigation. In fact, the court directed the New York State Police, pursuant to a signed search warrant, to secure the evidence in this case. Despite your claims, your investigators have been given at least three lengthy opportunities to view the limousine, and have been in repeated contact with the New York State Police about this matter.

Notwithstanding statements in your letter, our expert, and members of the New York State Police Crash Reconstruction Unit have thoroughly examined the vehicle and are continuing to examine it and to complete their investigations as to the cause and circumstances of the crash. Pursuant to its obligations, the New York State Police continues to strictly maintain the chain of custody of all evidence. Indeed, we anticipate the limousine being inspected by our expert and the defense experts, conceivably up until the date of trial. As a prosecutor, my job, and that of the New York State Police, is to preserve the integrity of the most crucial piece of evidence in this case. I am also obligated to protect the right of the defense to inspect the evidence as well. As you note in your letter, at least some of the inspection you are requesting would alter this evidence. I note that, Under 42 USC Section 1134, concerning Inspections and autopsies of wreckage from an accident, examinations and tests should be conducted in such a way as to avoid unnecessary interference and to preserve evidence.

In any event, as I have previously stated, once the limousine is moved to the storage facility the NTSB is erecting, your investigators may be able to conduct additional inspections, upon consent of the defense and our expert.

Pursuant to our conversation today, we made some progress on some of your requests and I look forward to further advancing our common interest.

Very truly yours,

A solid black rectangular redaction box covering the signature area.

Susan J. Mallery
Schoharie County District Attorney

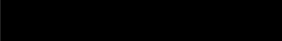
**SCHOHARIE COUNTY DISTRICT ATTORNEY
SUSAN J. MALLERY, ESQ.
P.O. BOX 888, Public Safety Facility
Schoharie, New York 12157**



Michael L. Breen
Assistant District Attorney


Lora J. Tryon
Assistant District Attorney



December 31, 2018


Via Email: 
Robert J. Molloy, Ph.D., Director
Office of Highway Safety
National Transportation Safety Board

Re: Fatal Limousine Crash

Dear Mr. Malloy:

Please be advised, the Schoharie County District Attorney's Office, along with the New York State Police, is requesting that the transmission and torque converter be removed from the limousine and transported to our expert,  for further examination. Pursuant to our telephone conversations today, no one objected to the same.

I enclose a copy of the Supplemental Search Warrant and supporting Affidavit proposed, for your review. If time permits, kindly send to the Hon. George R. Bartlett, III a note by fax or email (Fax 518-453-4315, email: ) stating you have no opposition to the same. It is my understanding we are trying to complete  evaluation prior to January 18, 2019, so that the defense, upon application to Judge Bartlett, may commence its forensic evaluation.

Very truly yours, 



SUSAN J. MALLERY, ESQ.
District Attorney
SJM/ct



Cc: Kathleen Silbaugh, General Counsel, NTSB (w/enc.)
Pete Kotowski, NTSB (w/enc.)
Lee Kindlon, Esq. (w/enc. fax and email)

SCHOHARIE COUNTY DISTRICT ATTORNEY

SUSAN J. MALLERY, ESQ.

P.O. BOX 888, Public Safety Facility

Schoharie, New York 12157



Michael L. Breen
Assistant District Attorney

Lora J. Tryon
Assistant District Attorney

January 4, 2019

Hon. George R. Bartlett, III
Schoharie County Court
P.O. Box 669
Schoharie, New York 12157

RE: Limousine Crash

Dear Judge Bartlett:

I respectfully request that Your Honor sign the search warrant application to remove the transmission and torque converter and transport them to expert [REDACTED] as soon as possible as the New York State Police would like to schedule the limousine's transmission and torque converter removal for Monday, January 7, 2019.

On January 3, 2019, Robert J. Molloy, Ph.D., Director of the NTSB gave me his oral consent. I anticipate Mr. Molloy sending an email.

It is my understanding the defense team wants the transmission and converter reviewed by expert, [REDACTED] as soon as possible as they are hoping to apply to the Court for permission for the defense team to examine the limousine's components the last week of January.

Thank you for your prompt attention to this matter.

Respectfully yours,



SUSAN J. MALLERY, ESQ.
District Attorney

SJM/ct

Cc: Robert J. Molloy, Ph.D., Director, NTSB
Lee Kindlon, Esq.
MarcJ. Kaim, Esq.



State of New York
Unified Court System
Schoharie County Courts
Supreme Court County Court Family Court
Surrogate's Court
The Courthouse PO Box 669
Schoharie, New York 12157

George R. Bartlett, III
County Judge
Acting Justice, Supreme Court

Jamie N. Batcher
Law Clerk

January 9, 2019

Kathleen Silbaugh, General Counsel
National Transportation Safety Board
490 Lenfant Plaza SW
Washington, DC 20594

Re: Investigation for supplemental search warrant for white Ford Excursion limousine (NY license plate TOGALUX1; VIN 1FMNU40S51EB10299) and related state and federal investigations into the fatal limousine accident in Schoharie, New York on October 6, 2018

Dear Ms. Silbaugh:

This will acknowledge receipt of your letter dated January 7, 2019 regarding the Schoharie County District Attorney's request for a supplemental search warrant. As I am uncertain if copies of this letter were sent to the other involved parties, by copy of this letter I forward your letter on to the other parties.

The present application by the People for leave specifically to remove and examine the transmission and the torque converter of the Ford limousine was presented to the court in camera in the afternoon of Monday, December 24, 2018. At that time, the Court deferred issuance of the warrant pending submission of proof of service of the application upon the National Transportation Safety Board ("NTSB") and upon defense attorney Lee Kindlon, service by fax or e-mail was directed to be effected by Friday December 28, 2018, and responses, if any, were due to the Court by Monday, January 7, 2019.

On Friday, January 4, 2019, the NTSB spoke to Chief Clerk, F. Christian Spies, who detailed the instructions given to the District Attorney on December 24, 2018; and, in particular, the notice that was to be given by the District Attorney to the NTSB and defense counsel on or before December 28, 2018.

After business hours on January 4, 2019, the Court received, by fax, a letter from District Attorney Mallery asking the Court to sign the People's supplemental search warrant application "to remove the transmission and torque converter and transport them to expert [REDACTED] as soon as possible as the New York State Police would like to schedule the limousine's transmission and torque converter removal for Monday, January 7, 2019."

This letter went on to indicate that "Robert Malloy, PhD, Director of the NTSB, gave his oral consent [to issuance of the warrant]. I anticipate Mr. Malloy sending an email" (see letter dated January 4, 2019 from the District Attorney to the Court).

The NTSB informed Mr. Spies on January 4, 2019 that it had not received a notice or search warrant application from the District Attorney. As the Court was not in receipt of an affidavit of service, Chief Clerk Spies sent out an email on Saturday, January 5, 2019 indicating that the Court would hold consideration of the supplemental search warrant application in abeyance pending receipt of the affidavit of service and a response from NTSB and defense counsel.

On January 7, 2019, the Court received an affidavit of service from the District Attorney's office, indicating that on December 31, 2018, it served a "Proposed Supplemental Sealed Search Warrant, an application for a Sealed Supplemental Search Warrant, along with cover letter dated December 31, 2018." The cover letter, however, does not state the fact that the Court requested a response on or before January 7, 2019. The letter did represent that the District Attorney had a telephone conversation with Robert J. Molly, Director of the NTSB, in which he did not object to the Court's issuance of the supplemental search warrant as requested.

Thereafter, on January 7, 2019 the Court received the letter referenced above from the NTSB. In that letter the NTSB states that it "categorically opposes the supplemental search warrant . . . without NTSB investigators being present and actively participating in the removal, disassembly and inspection of the relevant parts of the vehicle."

Initially, it was never this Court's intention that any of its issued search warrants be construed so as to deny the NTSB access; and, until the recent kerfuffle, this Court had no reason to believe that the NTSB was not given the access necessary to fulfill its obligations. That being said, the Court now knows otherwise.

The NTSB's letter of January 7, 2019, requests that the Court intervene to facilitate the NTSB gaining immediate access to the crash vehicle. I am reluctant to interject the Court into this matter and agree with the NTSB that its work does not require Court permission on a search warrant. Further, the Court is surprised that coordination of access between law enforcement, defense counsel and the NTSB is an issue in this case as, I assume, coordination between the various entities is tragically not an infrequent necessity that is routinely resolved without Court intervention.

For whatever reason, this coordination is not occurring here and perhaps, Court involvement will be of assistance, particularly where, as here, time is of the essence.

It appears the easiest way to break this impasse is to include the NTSB on the search warrant. This being the case, I request that the NTSB submit suggested language for the Court to insert into the search warrant. Please submit same by January 14, 2019, defense counsel and the District Attorney shall submit any opposition on or before January 16, 2019. Of course, in the interim, I urge the interested parties to use their best efforts to reach an agreement as to the appropriate language that will best accommodate everyone's duties and result in an amicable resolution.

Finally, as it appears the NTSB did not receive the proposed search warrant or redacted application, I request the District Attorney send same to Attorney Silbaugh as soon as possible.¹

Thank you for your anticipated cooperation.

Very truly yours,


GEORGE R. BARTLETT, III

GRB/klm

As requested by the NTSB, the limousine shall not be moved until the issues presented here are resolved.

c: **Hon. Susan J. Mallery, Schoharie County D.A. Fax - 518-295-2273**
Robert J. Molloy, Ph.D., Director - Office of Highway Safety

Lee Kindlon, Esq.

Benjamin Allen, Esq. - NTSB



National Transportation Safety Board
Washington, DC 20594

Office of General Counsel

January 14, 2019

By electronic mail to: [REDACTED]

The Honorable George R. Bartlett, III
County Court Judge
Schoharie Supreme and County Court
290 Main Street
Schoharie, NY 12157

Re: Application for supplemental search warrant for white Ford Excursion limousine (NY license plate TOGALUX1; VIN 1FMNU40S51EB10299) and related state and federal investigations into the fatal limousine crash in Schoharie, New York on October 6, 2018

Dear Judge Bartlett,

Thank you for your letter dated January 9, 2019. For the NTSB, it answered some of the agency's pending questions about the safety investigation of the fatal crash involving a Ford Excursion Limousine working in parallel with the criminal investigation. As you alluded to in your letter, this is a highly unusual situation. The NTSB is routinely granted access to necessary evidence from an accident and has a long history of working cooperatively with state and local authorities to accomplish our parallel missions without judicial intervention.

Parties Interaction Friday, January 11, 2019

In your letter, you urged the parties "to use their best efforts to reach an agreement as to the appropriate language that will best accommodate everyone's duties and result in an amicable resolution." The District Attorney, Assistant District Attorney, defense counsel Mr. Kindlon, the NTSB General Counsel, Assistant General Counsel and Director of the Office of Highway Safety convened via conference call on Friday, January 11 at 7 p.m. This was the first available time for all parties to speak on Friday. From the NTSB's perspective, the call was disappointingly unproductive.

District Attorney Mallery began the call by asking Defense Counsel Kindlon his response to the proposed search warrant for the removal and inspection of the transmission and torque converter, but stated her belief that the NTSB does not have standing in this matter and had

engaged in *ex parte* communications by writing to the Court.¹ Despite your letter, District Attorney Mallery still seems to believe that NTSB access to the vehicle is dependent upon our inclusion on a state search warrant. She stated several times during the call that she has no opposition to including NTSB on the application for the supplemental search warrant, but that such inclusion would only permit us to be present when the vehicle is moved, and to inspect and take photographs “under the supervision of the State Police.” As the NTSB wrote in its follow-up email, the NTSB’s non-destructive work on the crash vehicle is not dependent on New York state law nor the NTSB being named in any NYSP search warrant. Instead, as you stated in your letter, the NTSB’s “work does not require Court permission on a search warrant.”

District Attorney Mallery was not willing to discuss anything more than the pending search warrant application, despite repeated attempts to remind her of the NTSB’s need to inspect the vehicle in its current condition before it is moved or altered again. The Inspection Protocol, which was first provided to District Attorney Mallery on November 27, 2018, identifies the work that the NTSB must conduct without further delay and with the vehicle in its current location. (A copy of the Protocol is attached.) Contrary to District Attorney Mallery’s assertion during the call, conducting the Inspection Protocol is in no way dependent upon the building of the shed or moving the vehicle. Indeed, it must happen before moving the vehicle. Representatives from the State and the defense are welcome during the NTSB’s work.

District Attorney Mallery requested dates when the defense expert and the NTSB are available during the next two weeks. The NTSB replied our investigators could begin as early as today, but District Attorney Mallery said that would not be possible. In our follow-up email, we stated that with one calendar day’s notice, the NTSB investigators will be ready to proceed with the Inspection Protocol. The NTSB’s Inspection Protocol must precede any inspection or removal of the transmission and torque converter and movement of the vehicle into the shed. Once the vehicle is moved, the NTSB investigators will need to be allowed to actively participate in the inspection and removal of the transmission and torque converter. (Copies of the emails are included.) If that process can be more easily accomplished through our inclusion on a supplemental search warrant, we welcome that action.

District Attorney Mallery steadfastly refused to even discuss the NTSB’s independent federal authority to inspect the vehicle or conduct our investigation. When we attempted to broach the topic during the call, she stated that she had “not formulated [her] opinion” on NTSB access, and was not prepared to respond on the call, but would do so “at the appropriate time.” She refused to provide an estimate as to when she would respond, stating only that it had to be coordinated with her experts and the defense.

District Attorney Mallery unexpectedly terminated the call at that point.

In light of the continued impasse with District Attorney Mallery, the NTSB urges the Court to intercede. We understand the Court’s reluctance to interject itself in this matter,

¹ The NTSB agrees that it is not a party to the criminal investigation. However, there is a federal interest in the crash vehicle and actions related to it. Further, the NTSB’s letter responded to your request for NTSB’s input on the application for the supplemental search warrant.

however it is apparent that our interactions directly with District Attorney Mallery are not productive and are unlikely to resolve the impasse.

Suggested Language for Search Warrant

Finally, although the NTSB agrees with you that this step should not be necessary, the agency greatly appreciates the opportunity to submit language to include the NTSB on the pending search warrant. The agency recognizes that this language is a bit awkward because it reflects work that must occur prior to the actions identified on the search warrant, so we welcome your guidance and edits. Perhaps a separate order is needed to address the NTSB's investigative work that must be done before this search warrant is effective.

Our suggested language is: Prior to any action being taken to inspect or remove the transmission and/or torque converter, the NYSP and District Attorney shall grant the NTSB immediate and unfettered access for the work identified in its Inspection Protocol, including access to the parts previously removed from the vehicle. Following completion of the NTSB Inspection Protocol, the NTSB shall actively participate in the removal and inspection of the transmission and torque converter, including the opportunity to photograph the parts and be present during any subsequent work involving the parts.

We reiterate that we look forward to the opportunity to talk with you further about this or any related matter. My office telephone number is [REDACTED] and my email address is [REDACTED]

Sincerely,

[REDACTED]
Kathleen Silbaugh
General Counsel

Enclosures

Cc: Schoharie County District Attorney Susan J. Mallery
by email to [REDACTED]
Lee Kindlon
by email to [REDACTED]



National Transportation Safety Board

Washington, D.C. 20594

INSPECTION PROTOCOL

Schoharie, NY
HWY19MH001

Background:

The National Transportation Safety Board is an independent Federal agency charged by Congress to determine the probable cause of an accident and to issue safety recommendations. The vehicle itself is an important aspect in determining the probable cause of this accident. This examination will help to determine the effect of the stretch modification, the structural integrity and road worthiness of the vehicle.

Our vehicle inspection process involves an in depth examination of all vehicle components and applicable Federal Motor Vehicle Safety Standards (FMVSS). The examination will also include compliance with the manufacturers specifications for modification.

Often times operational parts and systems can be eliminated as contributory to the crash. There have been occasions where this type of examination has resulted in urgent or emergency recommendations to prevent other accidents from occurring. For instance a recall and removal of operation of a particular amphibious passenger vehicle from service until a recall was addressed, and a brake component in a Freightliner truck that could cause a loss of braking.

Since this crash NTSB investigators have been in contact with limo trade groups, limo companies, vehicle modifiers, vehicle manufacturers, state vehicle inspectors gathering information about limo vehicle. NTSB investigators have inspected stretched limos to develop a knowledge base of designs, modification and components specific to stretched limos.

Exterior Vehicle Inspection:

The accident vehicle was inspected and examined by the NYSP and their retained expert. Although NTSB investigators and defense representatives were present at a distance, several items were removed from the vehicle for further examination, but those items have not been identified to the NTSB. The NTSB understands that the items were removed from the vehicle for further examination. The NTSB did not observe the NYSP or its expert examine in detail the interior of the accident vehicle other than a scan of the accident vehicle. The NTSB did not observe the NYSP or its expert examine in detail the frame or undercarriage.



National Transportation Safety Board

Washington, D.C. 20594

Exterior inspection protocol:

- Examination will be conducted in cooperation with and direction of the Schoharie District Attorney in the presence and assistance by the NYSP
- Examine the undercarriage of the vehicle as it is in storage supported on jack stands. The height should provide adequate room for our examination so there is no need to further raise or lay the vehicle on its side.
- The examination will include photographs, measurements, documentation and additional scanning.
- There is no intention to remove any items or conduct any type of destructive testing.
- There may be a need to use a wire brush to remove some surface rust as the vehicle has not been stored in a climate controlled shelter.
- Frame,
 - Examination to include the general condition and all associated components, welds, body supports, body attachment and corrosion
 - Frame and floor concealment panels (if equipped remove to examine behind them)
- Suspension
 - Springs, shocks, sway bars
- Steering system
- Drive train
 - Drive shafts, carrier bearing
 - Engine oil sample
 - Transmission fluid sample
 - Verify that engine was operating
- Tires and wheels
 - Tires and wheels specified
 - Tires and wheels on the vehicle, size, manufactured date, load rating, speed rating
- Brake system
 - Brake lines, rotors, calipers, brake fluid (analyze for viscosity, contamination)
 - ABS, download of ABS module
- As part of our examination to examine the cause, we have a need to view the parts and information from the NYSP expert.
 - Collectively we may ask for further analysis of some components by the NYSP expert

Interior Vehicle Inspection:

Interior inspection protocol:

- Visual examination, photos, measurements, seat examination, dimensions, attachments, seat belts and seatbelt anchors.



National Transportation Safety Board

Washington, D.C. 20594

- Purpose: Establish mechanism of injury and evaluation of seat integrity, restraint systems and interior deformation
- Vehicle side panels and roof support
 - Examination of welds at structure members and possible weld quality
 - Passenger containment, survivable space
- Vehicle specification plates, stickers

Company Remaining Fleet:

Inspection of Remaining Fleet (3 stretched limos):

- Visual inspection of the remaining fleet in the presence of and assistance of the NYSP and NYDOT
 - Purpose to examine the underframe for corrosion and integrity
 - Safety inspection to examine compliance with applicable Federal and State Regulations
 - Arrangements have been made with a garage with a lift to raise the vehicles in a safe manner inside due to weather considerations
 - Vehicles could be transported under NYSP escort to and from the garage to maintain chain of custody about 7 miles from Troop G

Silbaugh Kathleen

From: Silbaugh Kathleen
Sent: Friday, January 11, 2019 8:20 PM
To: 'Susan Mallery'
Cc: 'Lee Kindlon'; Allen, Benjamin; Molloy Robert
Subject: RE: Transmission Search Warrant

As I attempted to explain prior to your terminating the call this evening, the scope of our discussion must be broader than the pending search warrant application for the transmission and torque converter. The NTSB's non-destructive work on the crash vehicle is not dependent on New York state law or the NTSB being named in any NYSP search warrant. Instead, as Judge Bartlett stated, the NTSB's "work does not require Court permission on a search warrant." The Inspection Protocol, which was first provided to you on November 27, 2018, identifies the work that the NTSB must conduct without further delay and with the vehicle in its current location. Contrary to your assertion, conducting the Inspection Protocol is in no way dependent upon the building of the shed or moving the vehicle. Indeed it must happen before moving the vehicle.

With one calendar day's notice, the NTSB investigators will be ready to proceed with the Inspection Protocol. They can be in Schoharie county as early as mid-day on Monday, January 14, 2019. Again, the NTSB's work must precede any inspection or removal of the transmission and torque converter and movement of the vehicle into the shed. Both the State and defense are welcome to observe the NTSB's work. Then, the NTSB investigators look forward to actively participating in the inspection and removal of the transmission and torque converter, pursuant to a supplemental search warrant. In coordination with NTSB leadership, NTSB investigators may be available throughout the next two weeks.

From: Susan Mallery [REDACTED]
Sent: Friday, January 11, 2019 7:28 PM
To: Silbaugh Kathleen [REDACTED]
Cc: 'Lee Kindlon' [REDACTED]
Subject: Transmission Search Warrant

Pursuant to the pending search warrant application before Honorable George R. Bartlett:

To confirm our conversation on January 11, 2019 starting at 7:00 p.m., we have agreed that defense attorney, Lee Kindlon, will send the District Attorney's office several dates that defense experts are available to inspect the limousine. The NTSB was also on the call. The NTSB will also send dates that their investigators are available to inspect the limousine.

Thank you,

Susan Mallery

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Silbaugh Kathleen

From: Silbaugh Kathleen
Sent: Friday, January 11, 2019 4:38 PM
To: 'Carola Tripsas'
Cc: Lee Kindlon; Molloy Robert
Subject: Schoharie Phone Conference

We have confirmed that Mr. Kindlon is available for a call at 7.

For the NTSB, the contact numbers for the call are [REDACTED] and [REDACTED]

Thank you.

From: Carola Tripsas [REDACTED]
Sent: Friday, January 11, 2019 2:07 PM
To: Silbaugh Kathleen [REDACTED]
Cc: Lee Kindlon [REDACTED]
Subject: Phone Conference

Susan Mallery will be available at 7:00 p.m., as long as defense counsel is included in the conference call. Susan Mallery will provide a call-in number.

Carola A. Tripsas
Secretary
Schoharie County District Attorney's Office
157 Depot Lane, P.O. Box 888
Schoharie, New York 12157
[REDACTED]

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Silbaugh Kathleen

From: Silbaugh Kathleen
Sent: Friday, January 11, 2019 1:15 PM
To: Susan Mallery; [REDACTED]
Cc: Molloy Robert
Subject: RE: Ford Excursion limousine -NTSB investigation plan and response to Court

Ok. We are available to speak at 7 p.m. What is the best number to call?

From: Susan Mallery [REDACTED]
Sent: Friday, January 11, 2019 12:26 PM
To: Silbaugh Kathleen [REDACTED]
Cc: Molloy Robert [REDACTED]
Subject: RE: Ford Excursion limousine -NTSB investigation plan and response to Court

The District Attorney has been in meetings from 8:30 a.m. and will be in meetings today until 6:30 p.m.

Carola A. Tripsas
Secretary
Schoharie County District Attorney's Office
157 Depot Lane, P.O. Box 888
Schoharie, New York 12157
[REDACTED]

From: Silbaugh Kathleen [REDACTED]
Sent: Thursday, January 10, 2019 4:38 PM
To: Susan Mallery [REDACTED]
Cc: Silbaugh Kathleen [REDACTED]; Molloy Robert [REDACTED]
Subject: Ford Excursion limousine -NTSB investigation plan and response to Court
Importance: High

Good afternoon,

As follow-up to Judge Bartlett's January 9, 2019 letter, the NTSB proposes that we have a conference call to talk about the NTSB's investigative plan particularly related to the crash vehicle, and the NTSB's response to the Court that is due no later than Monday, January 14.

We suggest either a 10 a.m. call, or a 1 p.m. call. Which is best? The NTSB can send a conference link once the time is set.

Thank you,
Kathy Silbaugh

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Silbaugh Kathleen

From: Silbaugh Kathleen
Sent: Friday, January 11, 2019 10:10 AM
To: 'Susan Mallery'; [REDACTED]
Cc: Molloy Robert
Subject: RE: Ford Excursion limousine -NTSB investigation plan and response to Court

Ms. Tripas-

Thank you for your message. Is DA Mallery available at 1 today? Or between 2:45 – 5?

Kathy

From: Susan Mallery [REDACTED]
Sent: Friday, January 11, 2019 9:47 AM
To: Silbaugh Kathleen [REDACTED]; Susan Mallery [REDACTED]
[REDACTED]
Cc: Molloy Robert [REDACTED]
Subject: RE: Ford Excursion limousine -NTSB investigation plan and response to Court

Good Morning,

The District Attorney is presently at a meeting and will not be returning before 10:00 a.m.

Carola Tripas

Carola A. Tripas
Secretary
Schoharie County District Attorney's Office
157 Depot Lane, P.O. Box 888
Schoharie, New York 12157
[REDACTED]

From: Silbaugh Kathleen [REDACTED]
Sent: Thursday, January 10, 2019 4:38 PM
To: Susan Mallery [REDACTED]
Cc: Silbaugh Kathleen [REDACTED]; Molloy Robert [REDACTED]
Subject: Ford Excursion limousine -NTSB investigation plan and response to Court
Importance: High

Good afternoon,

As follow-up to Judge Bartlett's January 9, 2019 letter, the NTSB proposes that we have a conference call to talk about the NTSB's investigative plan particularly related to the crash vehicle, and the NTSB's response to the Court that is due no later than Monday, January 14.

Silbaugh Kathleen

From: Susan Mallery [REDACTED]
Sent: Friday, January 11, 2019 9:47 AM
To: Silbaugh Kathleen; Susan Mallery; [REDACTED]
Cc: Molloy Robert
Subject: RE: Ford Excursion limousine -NTSB investigation plan and response to Court

Good Morning,

The District Attorney is presently at a meeting and will not be returning before 10:00 a.m.

Carola Tripsas

Carola A. Tripsas
Secretary
Schoharie County District Attorney's Office
157 Depot Lane, P.O. Box 888
Schoharie, New York 12157
[REDACTED]

From: Silbaugh Kathleen [REDACTED]
Sent: Thursday, January 10, 2019 4:38 PM
To: Susan Mallery [REDACTED]
Cc: Silbaugh Kathleen [REDACTED]; Molloy Robert [REDACTED]
Subject: Ford Excursion limousine -NTSB investigation plan and response to Court
Importance: High

Good afternoon,

As follow-up to Judge Bartlett's January 9, 2019 letter, the NTSB proposes that we have a conference call to talk about the NTSB's investigative plan particularly related to the crash vehicle, and the NTSB's response to the Court that is due no later than Monday, January 14.

We suggest either a 10 a.m. call, or a 1 p.m. call. Which is best? The NTSB can send a conference link once the time is set.

Thank you,
Kathy Silbaugh

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Silbaugh Kathleen

From: Lee Kindlon [REDACTED]
Sent: Friday, January 11, 2019 7:40 AM
To: Silbaugh Kathleen
Cc: susan.mallery [REDACTED] Molloy Robert
Subject: Re: Ford Excursion limousine -NTSB investigation plan and response to Court

Importance: High

Good morning,

As I assume you meant a conference today at either of those two times, I am not available — I have a (uncancel-able) meeting at ten and I have to be in the Appellate Division at noon for a Show Cause Order (and I don't know how long it's going to be). Rather than hold anybody up, I will state now that I don't have any objection to the plan and, technically, I don't really think I have standing to object (although I appreciate the professional courtesies extended to me to comment).

Respectfully,

Lee C. Kindlon, Esq.
The Kindlon Law Firm, PLLC
52 James Street
Albany, NY 12207
www.Kindlon.com
[REDACTED]

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On Jan 10, 2019, at 4:37 PM, Silbaugh Kathleen [REDACTED] wrote:

Good afternoon,

As follow-up to Judge Bartlett's January 9, 2019 letter, the NTSB proposes that we have a conference call to talk about the NTSB's investigative plan particularly related to the crash vehicle, and the NTSB's response to the Court that is due no later than Monday, January 14.

We suggest either a 10 a.m. call, or a 1 p.m. call. Which is best? The NTSB can send a conference link once the time is set.

SCHOHARIE COUNTY DISTRICT ATTORNEY
SUSAN J. MALLERY, ESQ.
P.O. BOX 888, Public Safety Facility
Schoharie, New York 12157
[REDACTED]

January 16, 2019

Hon. George R. Bartlett, III
Schoharie County Court Judge
290 Main Street
Schoharie, NY 12157

Re: People v. Nauman Hussain

Dear Judge Bartlett:

I write in response to the Court's January 9, 2019 letter to NTSB General Counsel Kathleen Silbaugh. In that letter, the Court addressed NTSB's January 7, 2019 ex parte claims that it had not received the access it wanted to the limousine at issue in this criminal matter. In its letter, the Court described the People's in camera search warrant application to examine the limousine's transmission and torque converter, made pursuant to CPL Section 690 (the "transmission search warrant"). On its own initiative, the Court directed that a copy of the in camera transmission search warrant application be provided to defense counsel and counsel for NTSB and permitted each of them to respond to the in camera application.

On or about January 7, 2019, the Court received a letter from NTSB counsel, "categorically oppos[ing]" the search warrant unless its non-party, non-police officer investigators "actively participat[ed] in the removal, disassembly and inspection of the relevant parts of the vehicle". The Court, based on the NTSB's letter, and without input from the parties to the criminal action, apparently made a "finding" that the NTSB had not been given necessary access to the limousine and that the "entities" had not coordinated to provide the NTSB with access. The Court indicated its reluctance to intervene, but nonetheless, sua sponte, suggested that the NTSB be "added" to the pending search warrant.

The People now submit this letter in order to correct a few of the legal and factual inaccuracies that have developed thus far and to suggest a lawful solution to the NTSB's complaints. To emphasize what I have said repeatedly throughout this intervention by NTSB: I have absolutely no objection, at the appropriate time, and with the appropriate safeguards, to having the NTSB conduct inspections. However, the claims made by the NTSB that evidence is being destroyed or not tested are not true. Rather, the NTSB objects that the inspections are not being conducted by its investigators, on its time frame. Let me be clear: the necessary inspections and tests are being conducted by qualified experts working for the only parties in this criminal matter. Those inspections will soon be concluded. At the appropriate time, the NTSB, using the investigatory powers it has, which do not include the issuance of a search warrant, may conduct its own inspection. As a prosecutor, my job, and that of the New York State Police, is to preserve the integrity of the crucial pieces of evidence in this case. In addition, I am also obligated to protect the right of the defense to inspect the evidence so as not to create an issue at trial or on appeal.

In camera search warrant applications

On October 7 and October 12, 2018, this Court issued two search warrants permitting an initial search and “vehicle autopsy” of the limousine. Those searches have long been completed.

On December 24, 2018, the People applied for an additional search warrant for the limousine, requesting removal and testing of the limousine’s transmission and torque converter by the NYSP and its expert, [REDACTED]. It is this search warrant that gave rise to the NTSB’s ex parte contacts with the Court, and to what amounted to a press onslaught.¹ To date, the Court has not signed the search warrant, and has delayed necessary inspections.

The NTSB “protocol”

While law enforcement and the defense proceeded to conduct and complete necessary inspections of the limousine, the NTSB unfortunately engaged in an extensive press campaign, seeking to coerce law enforcement to provide virtually unlimited access to the limousine. The access sought included proposed testing, parts removal and alteration of the limousine, before law enforcement or the defense had completed their inspections. The NTSB demanded the implementation of a self-created “protocol”, on its time frame, and with its own investigators. Despite the fact that the NTSB claimed that it had “no intention” to “remove any items or conduct any type of destructive testing”, the protocol apparently seeks just that. It seeks, among many other things, to “remove some surface rust”; “remov[al] of frame and floor concealment panels”; “brake lines, rotors, calipers, brake fluid (analyze for viscosity, contamination)”; and “download ..ABS module”.

NTSB involvement from the day of the crash

It is important to correct the misrepresentations made by NTSB that it has had virtually no access to the limousine. From the very beginning, the NYSP and the NTSB have worked collaboratively. Indeed, the NTSB was invited to, and did, establish an office at the NYSP headquarters in Latham. The NYSP shared much of its investigatory information, including numerous photographs, witness depositions and other evidence. The NTSB provided the NYSP a tent to enclose the limousine after it was removed from the scene. In October 2018, the NTSB offered to purchase a shed to enclose the limousine for the NYSP.

NTSB representatives have inspected the limousine. On October 14 and 15, 2018, with the assistance of its retained expert [REDACTED], the NYSP executed the October 12, 2018 “vehicle autopsy” search warrant, in the presence of NTSB investigators. The NTSB investigators signed in to the Crime Scene Attendance Log sheet, indicating that they were present on that day. On October 30, 2018, representatives of the defense, the District Attorney and NTSB investigators again viewed the limousine while the defense experts conducted a preliminary inspection of the limousine, took pictures and created a 3D image. Again, the NTSB investigators signed in to the Crime Scene Attendance log sheet, indicating that they were

¹ On October 17, 2018, NTSB legal counsel stated in a letter to me that: “[T]he NTSB’s release of information is measured and includes only factual information. Because the NYSP is a party to the investigation, the NTSB will consider its request to review the public statements before they are released, and if desired, I would review the statements with you to contemplate any potential impact on your prosecution.” The NTSB has not done so.

present on that day. The NTSB was not on the search warrant signed by this court and a compromise was reached to allow them to be present and observe.

On November 30, 2018, I sent NTSB Director Robert Molloy an email advising him that I would be preparing for and trying a homicide case and would not be available for two weeks.

Despite the fact that I had notified the NTSB of my other commitments, on December 14, 2018, the NTSB sent me a letter claiming it had not had access to the limousine. The letter was shared with the press.

On December 19, 2018, local media aired Mr. Molloy's "exclusive interview" in which he complained about a lack of communication between the NTSB and my office.

On December 19, 2018, I sent a letter to the NTSB, stating that it could conduct additional inspections, with the consent of the defense and the NYSP expert, once the limousine was moved into the limousine shed the NTSB was allegedly erecting.

On December 21, 2018, I, NYSP Investigator Albro Fancher and NTSB Investigator Peter Kotowski participated in a conference call confirming that the NTSB could take pictures of the limousine prior to it being moved. We also discussed the timing for delivery of the limousine shed and other areas of interest.

On December 28, 2018, I sent Mr. Molloy a letter requesting a joint press conference to correct false information being reported in the press. I urged the NTSB to comply with professional standards and to work together to restore public trust in the investigation. The NTSB declined to do so and did not formally reply to that correspondence.

On December 31, 2018, my assistant and I had a telephone conversation with Mr. Molloy, in which I informed the NTSB that the NYSP was going to further examine the transmission and the torque converter. I told Mr. Molloy that the Court was seeking the NTSB's view on the matter. I also told him that the NYSP had no objection to permitting the NTSB to take photographs and measurements, so long as no evidence was destroyed. Mr. Molloy indicated that he had no objection to the procedure, and would submit a response to the Court, with the assistance of legal counsel. Contrary to the NTSB's assertion, contemporaneous notes indicate that Mr. Molloy was informed about the fact that the People had submitted an application to search the transmission. The notes reflect that Mr. Molloy indicated "no problem with transmission search warrant if they're there". Subsequently, although the law does not permit or require it, at the Court's request, I provided the NTSB and defense counsel with a copy of the in camera search warrant application.

On January 4, 2019, I wrote the Court, requesting that it sign the transmission search warrant, noting my understanding that Mr. Molloy had consented to the procedure. At that time, I also informed the Court that the defense had agreed that Mr. Chase should review the transmission and torque converter as soon as possible, so that the defense expert could seek permission to examine the limousine's components thereafter.

The NTSB's ex parte communications and subsequent events

On January 7, 2019, NTSB legal counsel submitted an ex parte letter to the Court.² In it, counsel stated, without asserting any legal standing to do so under New York law, that the NTSB “categorically opposes the supplemental search warrant if such a search, which would necessarily result in altering and/or destroying physical evidence on the crash vehicle, is conducted without NTSB investigators being present and actively participating in the removal, disassembly and inspection of the relevant parts of the vehicle.”

On January 9, 2019, this Court issued a letter to NTSB counsel. In it, among other things, the Court apparently accepted the assertions of the NTSB, without giving either party to the criminal action the opportunity to respond.

On January 9, 2019, at 6:28 p.m., counsel for the NTSB sent an email to the Court, attempting to explain why counsel believed it was acceptable to violate attorney ethics rules by communicating ex parte with the court: “Confirming that Ben Allen, Robert Molloy and I received Judge Bartlett’s letter. The NTSB did not forward copies of its letter to District Attorney Mallery or the defense team because we understood that we were writing for the benefit of the Court. We will include all parties in any future correspondence.”

On the evening of January 11, 2019, counsel for the NTSB, defense counsel Lee Kindlon and I had a phone conference. During that phone conference, Mr. Kindlon indicated that he understood that he did not have standing to object to any search warrant, and that he appreciated being given the opportunity to inspect the limousine again. I asked both defense counsel and counsel to the NTSB to provide dates when their investigators could be present to inspect the limousine. Rather than merely providing dates, counsel for the NTSB repeatedly attempted to unilaterally dictate terms for the limousine’s inspection. The same evening, I received an email from counsel to the NTSB, indicating that it could have investigators available to inspect the limousine on one calendar day’s notice. Counsel further demanded that the NTSB’s work be done before the execution of the transmission search warrant, and before moving the limousine.

On January 11, 2019, I received an email from F. Christian Spies, indicating that the Court had released the NTSB’s January 7, 2019 letter and the Court’s January 9, 2019 response to the press.

On January 14, 2019, I received the NTSB’s latest letter to the Court. At this time, it seeks “immediate and unfettered access” to the limousine, and asks the Court to issue an ultra vires search warrant on its behalf – without satisfying any of the requirements of New York State law. As noted below, the NTSB has no authority to obtain search warrants. Its discovery authority appears to be limited to the issuance of administrative subpoenas.

Also on January 14, 2019, I received defense counsel’s letter indicating the defense had completed the exterior inspection of the vehicle.

The NTSB’s jurisdiction and statutory authority

² Rule 3.5(a)(2) of the New York Rules of Professional Conduct for Lawyers states in pertinent part: “A lawyer shall not: ...in an adversarial proceeding communicate or cause another person to do so on the lawyer’s behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending... except: ... (ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties”.

The NTSB's job is to review accidents to make safety and design recommendations, at a much later date. Its goal is to "foster safety improvements . . . through formal and informal recommendations". According to its website, these reviews and recommendations can take years to complete.³ Here, the limousine involved is a 17+ year old stretch limousine that had accumulated approximately 200,000 miles without proper care and repairs. A major focus of the State's criminal case is that the limousine was neglected and ill-maintained. The NTSB's focus, on the other hand, must naturally address the design of the vehicle at the time of manufacture, and it may provide potential recommendations for changes in Federal Motor Vehicle Safety Standards ("FMVSS"), which are applicable to vehicles at the time of their manufacture (See 49 CFR 571.1, *et seq.*). Accordingly, the notion that federal mandates regarding the manufacture of the limousine may be in urgent need of amendment is without merit. There is no dire urgency for the NTSB to perform investigative measures beyond visual examination and documentation at this juncture. The limousine is in a tent provided by the NTSB and will hopefully soon be in a shed provided by the NTSB. Further, any components that the NYSP has previously removed for inspection and testing are subject to chain of custody, and are being maintained in a climate-controlled environment.

The governing federal law, and NTSB policy, mandate that criminal trials take precedence over the regulatory agency. In fact, the NTSB is required to work in "cooperation with" a state, not to undermine or dictate to state agencies. 49 U.S.C. Section 1131(a)(1)(B)). The NTSB's purely administrative authority does not entitle it to take over a criminal investigation or place state investigators in a subordinate role. This clear mandate is indeed critical to justice and jurisprudence, as the NTSB neither participates in criminal prosecutions nor in civil litigation.

As the NTSB repeatedly asserts, federal law does permit it to "on display of appropriate credentials and written notice of inspection authority, . . . enter property where a transportation accident has occurred or wreckage from the accident is located and do anything necessary to conduct an investigation." 49 U.S.C. Section 1134(a)(I) (emphasis added). The text of this statute is very clear: it pertains to entry on property where a crash has occurred, after NTSB personnel display their credentials and provide written notice. Indeed, NTSB investigators did enter the property where the crash occurred. This statute says nothing whatsoever about the NTSB's authority to request a search warrant to examine evidence obtained by law enforcement. Indeed, we have located absolutely no statutory authority for the NTSB to do so. The NTSB reluctantly admits as much in its January 7, 2019 *ex parte* letter: "Because our investigations are non-criminal, the NTSB does not need a search warrant to obtain necessary evidence."

49 USC Section 1134, entitled "Avoiding Unnecessary Interference and Preserving Evidence" states in pertinent part that "examinations and tests should be conducted in such a way as to avoid unnecessary interference and to preserve evidence." Pursuant to 49 USC Section 1113, at the appropriate time, the NTSB "may conduct [administrative] hearings" to carry out its duties and "may require, by subpoena or otherwise, necessary witnesses and evidence." 49 USC Section 1131 (a)(2)(C) states in pertinent part that, only if a "Federal law enforcement agency suspects and notifies the Board that an accident being investigated by the Board may have been caused by an intentional criminal act, the Board, in consultation with the law enforcement

³ <https://www.nts.gov/investigations/AccidentReports/Pages/AccidentReports.aspx>

agency, shall take necessary actions to ensure that evidence of the criminal act is preserved.” Here, of course, at this point in time, the defendant has been charged with acts of negligence.

The instant transmission search warrant application

Weeks ago, on December 24, 2018, pursuant to CPL Section 690, the People properly made an in camera search warrant application to this Court for further inspection of additional components of the limousine: the transmission and the torque converter. The law simply does not permit this Court to sua sponte create another search warrant for the benefit of the NTSB. Section 690 permits search warrants to issue solely on the application of either a police officer, district attorney, or other state public servant. There are no other permissible applicants under the law. Further, the law requires that a search warrant be strictly tailored to search appropriate areas, upon a showing of probable cause. The People of the State of New York have not applied for a search warrant for the NTSB to have “unfettered” access to crime scene evidence without any showing of probable cause.

Proposed solution

In order to break the NTSB-created impasse, the People nonetheless propose the following lawful, common-sense solution. The NTSB may, under the supervision of the NYSP, (the appropriate law enforcement entity that applied for the warrant), be allowed to inspect the limousine itself, and to photograph and measure it. No alteration, removal or destruction of the evidence by representatives of the NTSB will be allowed.

Conclusion

The People’s job is to seek justice, and to fairly and effectively conduct a criminal investigation to determine the responsibility for the deaths of 20 innocent people. The families of the 20 deceased young people deserve a fair trial. If the NTSB’s intervention, and the Court’s continuing cooperation with it, result in evidence being tampered with or destroyed by a non-party to the criminal proceeding, the People’s ability to go forward will be impaired significantly. We simply cannot allow evidence to be tainted, altered or destroyed. We will insist that the ultimate trial in this case not be jeopardized. It is concerning that politics are seemingly of much greater concern to some than justice for the victims and grieving families of the tragic limousine crash in Schoharie, New York on October 6, 2018. I would be remiss if I did not aggressively ensure the integrity of the criminal prosecution of this major case.

Sincerely,



Susan J. Mallery, Esq.
Schoharie County District Attorney

cc: Lee Kindlon, Esq.
Kathleen Silbaugh, NTSB



State of New York
Unified Court System
Schoharie County Courts
Supreme Court County Court Family Court
Surrogate's Court
The Courthouse PO Box 669
Schoharie, New York 12157
[REDACTED]

January 18, 2019

George R. Bartlett, III
County Judge
Acting Justice, Supreme Court

Jamie N. Batcher
Law Clerk

Hon. Susan J. Mallery, D.A.
Schoharie County District Attorney
P.O. Box 888
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Kathleen Silbaugh, General Counsel
National Transportation Safety Board
490 Lenfant Plaza SW
Washington, DC 20594

LETTER/ORDER

E-mail: [REDACTED]

Re: Application for supplemental search warrant for white Ford Excursion limousine (NY license plate TOGALUX1; VIN 1FMNU40S51EB10299) and related state and federal investigations into the fatal limousine accident in Schoharie, New York on October 6, 2018

Dear Counselors:

On October 12, 2018, this Court issued a search warrant of the subject vehicle for the purpose of performing a "forensic vehicle autopsy" and authorized the People's expert to participate under the supervision of the New York State Police. Thereafter, by application of December 24, 2018, the State Police applied for a supplemental search warrant to allow the People's expert to "remove, disassemble and inspect the torque converter (which relays power from the engine to the transmission of the Subject Vehicle)" (paragraph 21 of application).

By that date, the Court was aware of media reports about access issues between the Schoharie County District Attorney and the National Transportation

Safety Board (NTSB); and, prior to signing the requested warrant, this Court stated to the applicant that it had read and/or heard reports about this dispute. Accordingly, the Court expressed its wish to have input from the defendant and NTSB before allowing parts to be taken from the vehicle and then disassembled. The Court, thus, directed the District Attorney to put the NTSB and defendant's attorney, Lee Kindlon, Esq., on notice of the application. The Court requested the District Attorney to provide notice on or before December 28, 2018 and in the notice to request the noticed parties to provide any input on or before January 7, 2019.

As detailed in the Court's letter of January 9, 2019 there were issues surrounding service of the notice and its adequacy. The Court, in its letter of January 9, 2019, a copy of which is attached hereto for easy reference, expressed its opinion that the issues between the parties should have been resolved without Court involvement. Nevertheless, in an effort to broker a prompt, amicable resolution of the impasse between the District Attorney and the NTSB, the Court urged the parties to make an effort to reach a resolution that would best serve the public interest. Unfortunately, the parties were unable to agree and their conference call attempting a settlement as represented by the NTSB ended with the District Attorney "unexpectedly terminating the call."

All parties, however, submitted written suggestions to resolve the issue, unfortunately, the suggestions by the District Attorney and NTSB differ.

Contentions raised by District Attorney

In its letter to the Court dated January 16, 2019 the District Attorney sets forth several arguments as to why the NTSB should not be a part of any proceeding in this Court.

1. Search Warrant - Authority of Court

Initially, the District Attorney contends that this Court has no authority to issue a "search warrant" for the benefit of the NTSB. The District Attorney is correct in that the Court may not issue search warrants on the application of the NTSB. However, that is not the situation here.

The limousine was seized pursuant to a search warrant issued in October. The December 24, 2018 application was entitled as an application for a Supplemental Search Warrant, however, the actual vehicle had already been seized pursuant to a search warrant. Accordingly, the Court and People must be mindful of CPL 690.50(5) which provides that “upon seizing property pursuant to a search warrant, a police officer must, without unnecessary delay, return to the Court the warrant and the property . . . (emphasis supplied).

CPL 690.55 then provides that:

1. Upon receiving property seized pursuant to a search warrant, the court must either:

a. Retain it in the custody of the court pending further disposition thereof pursuant to subdivision two or some other provision of law; or

b. Direct that it be held in the custody of the person who applied for the warrant, or of the police officer who executed it, or of the governmental or official agency or department by which either such public servant is employed, upon condition that upon order of such court such property be returned thereto or delivered to another court.

As Professor Preiser states in his Practice Commentaries to CPL 690.55, “property having been seized pursuant to a search warrant and inventoried is then retained in custody under direction of the Court pursuant to the provisions of this section.” (Emphasis supplied).

In this case, after the vehicle was seized, the Court directed that the seized property be held in the custody of the NYS Police who applied for the warrant, but the fact is that the property remains under the direction of the Court.

Thus, contrary to the District Attorney’s position, her office does not have exclusive control over the vehicle. In fact, the District Attorney, by applying for a Supplemental Search Warrant, acknowledges the same.

2. District Attorney's assertion that Federal Law mandates that Criminal proceedings take precedence over NTSB action.

The District Attorney contends in her letter that "the governing federal law, and NTSB policy, mandate that criminal trials take precedence over [NTSB] (p. 5, District Attorney's letter of January 16, 2019). The District Attorney uses this as a launching point to contend that her office must be in control and is the arbiter of how and when the NTSB will be given access to the subject vehicle. The District Attorney states "at the appropriate time, the NTSB, using the investigatory powers it has, which do not include the issuance of a search warrant, may conduct its inspection" (p. 1, letter of January 16, 2019 by District Attorney). The District Attorney seemingly takes the position that her office is the sole arbiter of who gains access to the vehicle and when. This simply is not the case, as CPL Article 690 provides otherwise. The issue of the NTSB's authority is addressed later in this letter/order.

3. Conclusion by District Attorney

The District Attorney in a section of her letter of January 16, 2019, entitled "Conclusion" states as follows:

"The People's job is to seek justice, and to fairly and effectively conduct a criminal investigation to determine the responsibility for the deaths of 20 innocent people. The families of the 20 deceased young people deserve a fair trial. If the NTSB's intervention, and the Court's continuing cooperation with it, result in evidence being tampered with or destroyed by a non-party to the criminal proceeding, the People's ability to go forward will be impaired significantly. We simply cannot allow evidence to be tainted, altered or destroyed. We will insist that the ultimate trial in this case not be jeopardized. It is concerning that politics are seemingly of much greater concern to some than justice for the victims and grieving families of the tragic limousine crash in Schoharie, New York on October 6, 2018. I would be remiss if I did not aggressively ensure the integrity of the criminal prosecution of this major case."

The Court has no doubt that the District Attorney is trying her best to conduct a fair criminal investigation; however, the District Attorney's assertion that the Court is engaged in "continued cooperation with the NTSB" is troubling. There is absolutely no basis for an assertion that the Court is cooperating with the NTSB. Rather, the Court is simply attempting to fulfill its duties as an impartial jurist. The fact that the Court rules against a position a litigant takes should not be viewed as cooperation with the other party.

Next, the District Attorney states that "it is concerning that politics are seemingly of much greater concern to some than justice for the victims . . ." This gratuitous comment, not directed at anyone, has no place here. The comment lacks any context or relevance in any litigation, let alone a case of this magnitude and seriousness; and such comment unnecessarily only serves to undermine faith in our justice system, which system includes the Office of the District Attorney.

Finally, the assertions that the District Attorney must control the access to the subject vehicle and allowing any other entity access to the vehicle may result in evidence being tampered with or destroyed by a non-party, presumably the NTSB, highlights the current problem. The District Attorney, in her zeal to perform her duties, fails to appreciate the important duties of the NTSB and its mandate to investigate this horrendous accident; and that the NTSB may fulfill its investigatory duties simultaneously with the criminal investigation. As the District Attorney and the NTSB were unable to work out details to allow both entities to perform their duties, we are faced with this standoff that requires Court intervention to resolve.

II. NTSB Authority

The function of the NTSB is "to promote safety in transportation." The Board is responsible for the investigation, determination of facts, conditions and circumstances and the cause or probable cause of [inter alia] highway accidents (49 U.S.C.A. §1131). Except in certain situations regarding suspected criminal actions, an investigation conducted under the authority of the NTSB has priority over any investigation conducted by another Federal agency. (49 C.F.R. §831.5). The District Attorney refers to this section in her letter dated January 16, 2018 on page 5, where she states "NTSB policy, mandate that criminal trials take

precedence over the regulatory agency.” The ‘certain situations’ referred to in §831.5 are:

(B) - If the Attorney General, in consultation with the [Board], determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish priority to the *Federal Bureau of Investigation*. (Emphasis added).

(C) - If a Federal law enforcement agency suspects and notifies the Board that an accident being investigated by the Board...may have been caused by an intentional criminal act, the Board, in consultation with the law enforcement agency, shall take necessary actions to ensure that *evidence of the criminal act is preserved*. (Emphasis added; 49 U.S.C.A. §1131).

Accordingly, the District Attorney’s assertion that criminal trials take precedence over NTSB’s investigation is not correct in the situation presented here where the case was not relinquished to the FBI.

NTSB investigations are fact-finding proceedings and should not involve adverse parties. (*see*, 49 C.F.R. §831.4). Under federal law the NTSB is entitled to first right to access wreckage, information and resources as well as enter property where an accident...has occurred. (49 C.F.R. §831.5, §831.9).

In order to fulfill these duties, the NTSB: “on display of appropriate credentials and written notice of inspection authority, may enter property where a transportation accident has occurred or wreckage from the accident is located and do anything necessary to conduct an investigation; and (2) during reasonable hours, may inspect any record, including an electric record, process, control or facility related to an accident investigation” (49 U.S.C.A. §1134[a][a][2]). “In carrying out subdivision (a)(1) of the section, an officer or employee may examine or test any vehicle . . . The examination or test shall be conducted in a way that: (2) to the extent feasible, preserves evidence related to the accident, consistent with the needs of the investigation” (49 U.S.C.A. §1134[c][2]). Contrary to the District Attorney’s position, the NTSB is not required to wait until criminal investigations are complete to commence its mandated investigation. Nothing precludes simultaneous investigations.

In fact, the very regulation cited to by the District Attorney in support of her position contemplates cooperation between the NTSB and local authorities.

Discussion

On October 6, 2018 a tragic limousine accident occurred in Schoharie County where 20 people were killed. This horrific event resulted in a criminal investigation in the context of which this Court issued numerous search warrants and the NTSB commenced an investigation.

These victims, their families, defendant, and the general public deserve better than having investigations and justice delayed by this imbroglio.

Both the District Attorney and the NTSB have separate, but equally important functions. Law enforcement to bring any one criminally responsible to justice and the NTSB to ascertain the cause of the accident, recommend any remedial action so as to, hopefully, prevent future accidents and, thus, protect the public.

As the Court indicated previously, it never intended that the search warrants it issued would be interpreted by the District Attorney to preclude access to the vehicle by the NTSB as both entities need access to further the public interest. This Court cannot comprehend how law enforcement precluding access to the vehicle by the NTSB serves the public interest. Indeed, allowing inspection by all interested parties (law enforcement, the NTSB, and defendant) serves everyone's interests. If there are ever issues in a criminal proceeding, defendant's experts' presence at any inspections would serve to minimize any issues regarding the inspection. Moreover, allowing access to the NTSB would allow it, and law enforcement, to obtain the information they each need to serve their common purpose and duties to the public. In this regard, the District Attorney has not presented any reason for opposing access to the NTSB and the defense;¹ and, absent any substantive argument by the District Attorney justifying precluding

¹The District Attorney argues that NTSB inspections will possibly taint or destroy evidence necessary to a criminal prosecution but the People have not submitted an affidavit by its expert(s) or Investigators detailing how this would happen or if it could be prevented by employment of safeguards.

access to the NTSB, it is obvious that the NTSB should be given access. To repeat, absent any prejudice articulated by the District Attorney, the public interest demands access to the NTSB.²

This standoff must come to an end. A horrible tragedy occurred on October 6, 2018; and any further delay in the investigations, both criminal and for public safety, cannot be countenanced particularly as stated previously since the Schoharie County District Attorney has failed to articulate any prejudice to the criminal investigation should the NTSB conduct a simultaneous investigation. Moreover, defense counsel does not voice any objection to a procedure that allows access by the NTSB so long as its expert is present.

By letter/decision dated January 9, 2019 the Court inter alia urged the District Attorney, defense counsel, and the NTSB to use their best efforts to reach an agreement. The parties held a telephone conference on January 11, 2019; however, this conference, as reported by the NTSB in its letter dated January 14, 2019, did not result in an agreement although both the NTSB and District Attorney have submitted letters to the Court in which they, unfortunately, submit differing settlement suggestions.

Conclusion

The District Attorney takes the position that the criminal investigation trumps the NTSB investigation and any NTSB investigation must be subject to her permission. In this regard the District Attorney objects to the Court taking “ultra vires” actions allowing NTSB access to the subject vehicle. This position ignores Article 690 of the New York State Criminal Procedure Law, which as detailed above, provides that any seized property remains subject to the ultimate control of the Court that issued the search warrant.

²Defendant, by letter of his attorney dated January 14, 2019, does not object to NTSB having access to the vehicle, stating that: “After consultation with our experts, the defense is done with the exterior inspection of the vehicle and would consent to the vehicle being moved into a more permanent structure, as discussed by all parties. We would request that our experts be present for any future examinations by either the NTSB or the People’s investigators, and specifically for the removal of the vehicle’s transmission and torque converter.”

The District Attorney contends that NTSB involvement will potentially harm the criminal investigations. However, in asserting this, the District Attorney provides no detail and does not attach any supporting documentation from the State Police experts or the People's independent expert to substantiate this assertion.

It is hard to understand why the People, the NTSB, and defense through their experts cannot work out a mutually acceptable protocol to allow all to fulfill their duties. There must have been hundreds, if not thousands, of accidents where there has been a criminal investigation occurring cooperatively and simultaneously with an investigation by the NTSB. Moreover, it seems unlikely that the State Police lack personnel with experience in these simultaneous investigations so as to appropriately coordinate the investigations.

What is clear is that this is an untenable situation. Two critically important investigations are being delayed over unsubstantiated concerns by the People that an NTSB investigation will taint their investigation. The Court does not doubt the sincerity of the District Attorney's position; however, the People's position effectively precludes the NTSB from performing its equally important public safety inquiry. This is despite the People's failure to articulate or provide expert opinion as to why the criminal investigation and NTSB investigation cannot be conducted side by side, in a cooperative manner with clearly defined protocols which allow the investigations to proceed forthwith and also protect defendant's rights. The victims, their families, and the public interest deserve nothing less than a complete investigation by both the People and the NTSB.

This being the case, the Court will cancel its calendar for Tuesday, January 29, 2019. It will hold a conference on that day starting at 9:30 a.m. to see if common ground between the access proposed in the NTSB letter of January 14, 2019 and the District Attorney's letter of January 16, 2019 can be worked out. Since the issues are more technical than legal at this juncture, I request that the District Attorney attend with its independent expert or with a representative from the State Police with appropriate expertise. Defense counsel should attend along with his expert. Understanding the distance for an NTSB representative to travel to Schoharie and exigencies created by the Federal Government shutdown, NTSB counsel and its expert may appear by telephone.

It is the Court's hope that such a conference, in which the experts can discuss their needs, will resolve this unnecessary impasse without further delay.

Absent an agreement being reached, the Court will have to make the decision that will allow access to the People, the defense, and the NTSB that will preserve the integrity of the evidence and maintain the chain of custody by which the public interest will be served.

Of course, as stated previously, the Court would welcome the parties and/or their experts talking prior to January 29, 2019 and reaching an agreement without the necessity of further Court involvements.

SO ORDERED.

Very truly yours,

A black rectangular redaction box covering the signature of George R. Bartlett, III.

GEORGE R. BARTLETT, III

GRB/klm
Attachment

SCHOHARIE COUNTY DISTRICT ATTORNEY

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P.O. Box 888, Public Safety Facility
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January 18, 2019

Honorable George R. Bartlett, III
Schoharie County Court
Post Office Box 669
Schoharie, New York 12157

Dear Judge Bartlett,

Pursuant to your request please find the following sites that support our criminal action taking precedence over the regulatory investigation by NTSB.

49 USC § 1113. Administrative

(1) The Board may--
(D) confer with employees and use services, records, and facilities of State and local governmental authorities;

49 CFR § 831.4 Nature of investigation.

(c) NTSB investigations are fact-finding proceedings with no adverse parties.

The regulations the NTSB operates under give them priority only over federal criminal investigations, even though the regulation expressly recognizes that state authorities may conduct investigations.

49 CFR § 831.5 Priority of NTSB investigations.

(a) Relationships with other agencies. (a)

(1)(a)(1) Except as provided in 49 U.S.C. 1131(a)(2)(B) and (C) regarding suspected criminal actions, an investigation conducted under the authority of the NTSB has priority over any investigation conducted by another Federal agency.

(b) Investigations by other Federal agencies.

(2)(b)(2) The NTSB recognizes that state and local agencies may conduct activities related to an accident under investigation by the NTSB. These agencies will not participate in the NTSB's probable cause determination.

Rulemaking hearings. Comments taken during the rulemaking hearings (82 FR 29670, Vol. 82, No. 124, Part III, Thursday, June 29, 2017) concerning the "priority" of NTSB investigations expressly addressed, and denied NTSB's request that other federal agencies would have to seek its permission before interviewing witnesses, gathering records or obtaining other evidence:

In the comments, other government entities generally expressed concern that the NTSB was overstating its authority and had proposed language that could result in interference with investigations conducted by other agencies. ... [A California regulatory agency commented that "although the NTSB's authorizing legislation, provides for investigative priority when other Federal agencies are involved, the language does not include priority over state agencies.

Particularly notable is the comment at pp. 29673-74:

Regarding our relationships with state agencies, we intend to continue working with them in a manner similar to our practices with Federal agencies. We often rely on the local knowledge intrinsic to state agencies following an accident, and usually coordinate with them concerning the timing of certain investigative activities and releases of information to ensure we do not impede a state agency's contemplated enforcement or other activities.

3. Testing

As discussed previously, some commenters questioned the NTSB's authority to determine the manner and method of testing.... Commenters may have interpreted the exclusive testing language to mean the NTSB was asserting a broader exclusive authority to investigate an accident. That was not intended. The NTSB continues to acknowledge that other agencies may be authorized to conduct other investigations.

49 CFR § 831.30 Authority of NTSB in highway investigations.

(a)(a) Scope. The NTSB is responsible for the investigation of selected highway accidents (e.g., collisions, crashes and explosions), including at railroad grade-crossing accidents. Such investigations will be conducted in cooperation with the designated authorities of the state or local jurisdiction in which the accident occurred.

8. The language in NTSB's own website and manuals imply that state criminal actions should take priority:

Website:

In cases of suspected criminal activity, other agencies may participate in the investigation. The Safety Board does not investigate criminal activity; in the past, once it has been established that a transportation tragedy is, in fact, a criminal act, the FBI becomes the lead federal investigative body, with the NTSB providing any requested support.

<https://www.nts.gov/investigations/process/Pages/default.aspx>

Major Investigations Manual:

In any event, the importance of cooperation and communication cannot be overstated. Because the criminal investigation may overlap the Board's investigation, the IIC should explain Board's procedures and the criticality of preserving and documenting certain forms of evidence. If any problems are encountered in this type of accident investigation, the Board's Office of General Counsel should be consulted.

<https://www.nts.gov/investigations/process/Documents/MajorInvestigationsManual.pdf>

Therefore it is our position that the state criminal case should have priority over the NTSB civil investigations for the following reasons:

1. NTSB cases have no time frame; we have constitutional speedy trial concerns
2. NTSB does not have the same strong criminal investigatory powers
 - a. They do not have search warrant power (49 USC 1113 and 49 CFR 831.9 (the right to enter property))
 - b. They do not have criminal contempt power
3. The criminal case should take priority to avoid the possible assertion of double jeopardy, collateral estoppel or res judicata
4. The criminal case should take priority to avoid claims of Fifth and Sixth amendment violations in the criminal case, or even possible immunity issues?
5. The criminal case should take priority to avoid claims of Brady and Rosario violations
6. The criminal case should take priority because the NTSB has a "presumption of openness" in providing information to the public (49 CFR 800.2(b)), which could damage the criminal case by tainting jury pools, discouraging witnesses from public disclosure, etc.
7. NTSB's statutory and regulatory framework requires them to "cooperate" with the state. It does not give them priority over state criminal actions, but only federal actions; state actions are not subject to this priority:

Respectfully Yours,


Susan J. Mallery, Esq.
District Attorney

SJM/lq

Cc: Kathleen Silbaugh, NTSB
Lee Kindlon, Esq.



National Transportation Safety Board

Washington, D.C. 20594

Office of General Counsel

January 24, 2019

By electronic mail to: [REDACTED]

The Honorable George R. Bartlett, III
County Court Judge
Schoharie Supreme and County Court
290 Main Street
Schoharie, NY 12157

Re: Application for supplemental search warrant for white Ford Excursion limousine (NY license plate TOGALUXI; VIN 1FMNU40S51EB10299) and related state and federal investigations into the fatal limousine crash in Schoharie, New York on October 6, 2018

Dear Judge Bartlett,

First, thank you for your letter of January 18, 2019 and for your continued willingness to resolve the issue of the NTSB's access to the crash limousine. In light of the partial federal government shutdown, we also appreciate your offer for the NTSB to participate via telephone in the conference scheduled for January 29, 2019. However, because of the importance of this safety investigation to the NTSB, the agency will attend in person. Specifically, I will attend with the NTSB Investigator-in-charge (IIC), who oversees the safety investigation, as well as the NTSB investigator who, along with the IIC, will perform much of the work identified in the NTSB's Inspection Protocol.

The NTSB investigators will be prepared to begin their work on the crash limousine as early as Wednesday, January 30, 2019. They estimate that it will take between two and four days to complete the Inspection Protocol.

Additionally, the NTSB IIC informed me that NYSP Captain Richard O'Brien and Mike MacIntosh called him on Tuesday, January 22, 2019 to discuss the Inspection Protocol. To the IIC's knowledge, no other parties participated on the call. It is the IIC's understanding that the NYSP had two concerns with the Protocol, both of which they resolved to the satisfaction of the NYSP and the NTSB. The IIC and NYSP did not discuss when the NTSB's work would begin, any preliminary procedures that must be completed prior to the NTSB beginning its work, and who from the NYSP would attend.

Because no counsel nor the defense's expert(s) participated on the call, we look forward to discussing any outstanding concerns with all parties during the conference on Tuesday. We also will be prepared to commit to dates and times for the NTSB work to begin.

If you require any additional information prior to Tuesday, my direct workday telephone number is [REDACTED]

Sincerely,

[REDACTED]

Kathleen Silbaugh
General Counsel

Cc: Schoharie County District Attorney Susan J. Mallery
by email to [REDACTED]
Lee Kindlon
by email to [REDACTED]