LEGISLATIVE COMMITTEE MINUTES

SB493

Bill as Introduced

SB 493 - AS INTRODUCED

2018 SESSION

18-3008
04/03

SENATE BILL ***493***

AN ACT establishing a committee to study the codification of the exculpatory evidence schedule and related law enforcement protocols.

SPONSORS: Sen. Carson, Dist 14; Sen. Gannon, Dist 23; Sen. Soucy, Dist 18; Sen. French, Dist 7; Sen. Bradley, Dist 3; Rep. Hopper, Hills. 2; Rep. M. McCarthy, Hills. 29; Rep. Wall, Straf. 6; Rep. Hinch, Hills. 21

COMMITTEE: Judiciary

ANALYSIS

This bill establishes a committee to study whether or not to codify in statute the exculpatory evidence schedule (EES), formerly known as the "Laurie list," and the related law enforcement protocols established by the attorney general in a law enforcement memorandum dated March 21, 2017, in light of the evolution of the law since the New Hampshire supreme court decision in State v. Laurie, 139 N.H. 325 (1995).

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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 493 - AS INTRODUCED

18-3008
04/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eighteen

AN ACT establishing a committee to study the codification of the exculpatory evidence schedule and related law enforcement protocols.

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

1 Committee Established. There is established a committee to study the codification of the exculpatory evidence schedule and related law enforcement protocols.

2 Membership and Compensation.

I. The members of the committee shall be as follows:

(a) One member of the senate, appointed by the president of the senate.

(b) Two members of the house of representatives, one of whom shall be from the judiciary committee and one of whom shall be from the criminal justice and public safety committee, appointed by the speaker of the house of representatives.

II. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

3 Duties. The committee shall study the whether or not to codify in statute the exculpatory evidence schedule (EES), formerly known as the "Laurie list," and the related law enforcement protocols established by the attorney general in a law enforcement memorandum dated March 21, 2017, in light of the evolution of the law since the New Hampshire supreme court decision in *State v. Laurie*, 139 N.H. 325 (1995). The committee shall also study the provisions of RSA 105:13-b regarding the confidentiality of police personnel files to determine if the statute should be amended to incorporate, in whole or in part, the EES and the related law enforcement protocols.

4 Chairperson; Quorum. The members of the study committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the senate member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Two members of the committee shall constitute a quorum.

5 Report. The committee shall report its findings and any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before November 1, 2018.

6 Effective Date. This act shall take effect upon its passage.

Committee Minutes

Senate Judiciary Committee

Jennifer Horgan 271-3092

SB 493, establishing a committee to study the codification of the exculpatory evidence schedule and related law enforcement protocols.

Hearing Date: January 30, 2018

Time Opened: 9:15 a.m. **Time Closed**: 9:24 a.m.

Members of the Committee Present: Senators Carson, French and Hennessey

Members of the Committee Absent : Senators Lasky and Gannon

Bill Analysis: This bill establishes a committee to study whether or not to codify in statute the exculpatory evidence schedule (EES), formerly known as the "Laurie list," and the related law enforcement protocols established by the attorney general in a law enforcement memorandum dated March 21, 2017, in light of the evolution of the law since the New Hampshire supreme court decision in State v. Laurie, 139 N.H. 325 (1995).

Sponsors:

Sen. Carson	Sen. Gannon	Sen. Soucy
Sen. French	Sen. Bradley	Rep. Hopper
Rep. M. McCarthy	Rep. Wall	Rep. Hinch

Who supports the bill: Senator Carson; Bob Blaisdell, NH Police Association/NH Troopers Association; Lieutenant Patrick Cheetnam, NH Police Association

Who opposes the bill: No one

Summary of testimony presented in support:
Senator Carson (provided written testimony)

- This bill revolves around the Laurie List.
- Has tried to address this issue multiple times, but it has gotten stuck in the House.
- Would like to put together a study committee to look at the elements of the Laurie List to make sure everyone is aware of what puts someone on the list and how the list is maintained.
- This will ensure that there is due process for officers.
- Provided two memos that show two different Attorney Generals interpreting the Laurie List in two different ways.
- Senator French asked if the Laurie List is a list of officers that the police chiefs create of officers who have lied in court or falsified evidence.
    - That is true in part. Officers can find themselves on the list for a variety of reasons, but people look at the list and think it is a reason to challenge an officer's truthfulness. Currently, if an officer wants to challenge their inclusion on the list they have to go to superior court and hire an attorney.
- Senator French asked if this is a statewide list.
    - That is not defined. Is unsure as to where it is even held.

- Senator French asked if this study committee could look at the guidelines for the list and it's process.
    - Yes. Being on this list can ruin an officer's career. There has been a commission on this previously; it passed the Senate, but failed in the House. This will bring the House and the Senate together in hopes of getting everyone on the same page.

Lieutenant Patrick Cheetnam (NH Police Association)

- Providing officers due process is one of the most important issues officers are facing today.
- Has worked on this with Senator Carson for a number of years.
- The codification of this process is necessary.
- There was a case of four officers being placed on the list due to a situation. Those officers were cleared of any wrong doing and the Chief asked to remove them from the list, but the County Attorney said no. That case went all of the way to the Supreme Court. The Supreme Court ruled in the officer's favor and recommended that the Legislature address this issue.
- Senator French asked if the list is kept somewhere.
    - It is kept regionally by the county attorneys under the Attorney General. Has never seen the list
- Senator French asked how many people are on the list.
    - Does not know.

Summary of testimony presented in opposition:
None

Future Action: Pending

jch
Date Hearing Report completed: January 31, 2018

Speakers

Senate Judiciary Committee
SIGN-IN SHEET

Date: 01/30/2018 Time: 9:15 a.m.

SB 493 AN ACT establishing a committee to study the codification of the exculpatory evidence schedule and related law enforcement protocols.

Name/Representing *(please print neatly)*

Name/Representing	Support	Oppose	Speaking?	Yes	No
Senator Sharon Carson SD#14	☒	☐	Speaking?	☒	☐
Bob Blaisdell NH Police Association NH Troopers Association	☒	☐	Speaking?	☐	☒
Patrick Cheetham NH Police Assoc.	☒	☐	Speaking?	☒	☐
	☐	☐	Speaking?	☐	☐
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	☐	☐	Speaking?	☐	☐

Testimony

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

Laurie List

LAW ENFORCEMENT MEMORANDUM

TO: **All New Hampshire Law Enforcement Agencies**
All County Attorneys

FROM: **Joseph A. Foster, Attorney General**

RE: **The Exculpatory Evidence Protocol and Schedule**[1]

DATE: **March 21, 2017**

INTRODUCTION

Over fifty years ago, in a landmark case establishing the obligation of a prosecutor to provide potentially exculpatory evidence to the defense, the United States Supreme Court noted:

> Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Brady v. Maryland, 373 U.S. 83, 87 (1963). This bedrock principle of the criminal justice system forms the basis of a prosecutor's obligation to inform criminal defendants of any exculpatory and/or impeachment evidence which relates to their case. Exculpatory evidence is evidence that is favorable to the accused. This includes evidence that is material to the guilt, innocence, or punishment of the accused or that may impact the credibility of a government witness, including a police officer. It is paramount that this obligation is scrupulously complied with in order to maintain the public's confidence in the criminal justice system.

Case law also makes clear that the existence of exculpatory evidence known to law enforcement is imputed to the prosecutor. Together, the obligation to produce and the imputation of knowledge creates tension between the right to confidentiality in a

[1] This protocol is intended to replace the 2004 Heed Laurie Memorandum. The Exculpatory Evidence Schedule ("EES") replaces the *Laurie* list.

government witness's personnel file and the prosecutor's need to know whether the records contain potentially exculpatory evidence. It is my hope that this new protocol will strike a more comfortable balance between these two competing interests, while ensuring that all criminal defendants in New Hampshire are treated fairly.

In 2004, Attorney General Peter Heed issued a New Hampshire Department of Justice memorandum entitled "Identification and Disclosure of *Laurie* Materials." The Heed Memorandum was produced to update law enforcement on the developments in the law since *State v. Laurie*, 139 N.H. 325 (1995), and the 1996 Memorandum issued by Attorney General Jeffery Howard. The Heed Memorandum established standardized guidelines and policies that are followed throughout the State today by prosecutors and police departments to identify, manage, and disclose exculpatory evidence contained in police personnel files.

Since 2004, the case law related to the disclosure of *Laurie* material has evolved and RSA 105:13-b, the statute governing the confidentiality of police personnel files has been extensively rewritten and reenacted. The statute now makes an exception to the otherwise confidential nature of police personnel files for direct disclosure to the defense of exculpatory evidence in a criminal case. It also provides that, "the duty to disclose exculpatory evidence that should have been disclosed prior to trial ... is an ongoing duty that extends beyond a finding of guilt."

In 2015, the New Hampshire Supreme Court decided *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015). In *Duchesne*, the Court was critical of a number of procedures set forth in the Heed Memorandum. Specifically, the Court criticized the procedure of automatic disclosure *in camera* to trial courts of personnel files as had been mandated under the prior language of the statute and the Heed Memorandum. The Court encouraged an independent review of the potentially exculpatory materials by the prosecutor, emphasizing that it is the prosecutor's duty to make these assessments and that the revisions to RSA 105:13-b provided a mechanism for this review and disclosure. *Id.* at 781.

In 2016, the New Hampshire Supreme Court determined that an officer was provided with adequate due process prior to his name being placed on the *Laurie* list, after his internal investigation file was reviewed by a superior officer and the chief of police, and he was then given the opportunity to meet with the chief and later the opportunity to meet with the Police Commission. *Gantert v. City of Rochester*, 168 N.H. 640, 650 (2016).

In light of these changes and the evolution of the law, the *Laurie* protocol has been updated. This new protocol has been reviewed by the each of the state's County Attorneys, many chiefs of police, and the Director of the New Hampshire State Police.[2]

[2] On January 3, 2017, I issued a Law Enforcement Memorandum that raised concerns with some members of the law enforcement community. Those concerns have been considered and this Memorandum amends and replaces the January 3 Memorandum.

The new protocol retains the list requirement. However, the list will now be called the Exculpatory Evidence Schedule ('EES"). The EES will include designations to distinguish between officers with credibility issues and officers with other potentially exculpatory evidence in their personnel files. The schedule must be maintained for two primary reasons: first, without the assistance of a list prosecutors cannot meet their daily obligation to disclose exculpatory information imputed to them but maintained in protected personnel files; and second, maintenance of the list is precisely the type of procedure contemplated by the United States Supreme Court to ensure that this prosecutorial duty is effectively discharged. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

It is important to recognize that inclusion on the EES does not mean that an officer is necessarily untrustworthy or dishonest—and in many cases the designation on the EES will make clear there is no question of dishonesty. Nor does it mean that information contained in an officer's personnel file will be used at trial or otherwise become public. It simply means that there is information in the file that must be disclosed to a criminal defendant if the facts of the case warrant that disclosure. Whether that material will be used at trial to cross-examine the officer will be the subject of pre-trial litigation.

The 2017 protocol mandates several important changes to existing guidelines and sample policy. (Please see the attached protocol for the details related to these changes). The most significant changes are as follows:

- The *Laurie* list will now be known as the Exculpatory Evidence Schedule ("EES"). The EES will include designations to inform prosecutors whether the personnel-file conduct at issue is related to credibility, excessive force, failure to comply with legal procedures, and mental illness or instability will only be based upon acts or events first occurring after the individual became a law enforcement officer.

- By September 1, 2017, each police chief, high sheriff, colonel or other head of a law enforcement agency (together hereinafter referred to as the "Chief") shall have completed a review of the personnel files[3] of all officers in their agency to ensure the accuracy of the new EES. Chiefs will provide an updated EES to the County Attorney for their jurisdiction and to the Attorney General or designee by September 1, 2017, and then at least annually by July 1st of each year and more often as necessary. On or before, September 1, 2017, the Chief shall certify as to the accuracy and completeness of his or her review of the files, using the form attached. If there is a question regarding whether the conduct documented in the file is

[3] "Personnel files" include all materials related to an officer's employment as defined in N.H. Admin. Rules, Lab 802.08, to include internal investigation materials, background and hiring documents, medical and mental health documents and any other related materials regardless of where the materials are kept or how they are labeled by the employer. For purposes of Exculpatory Evidence Schedule, the Chief shall only disclose matters first arising after an individual becomes a law enforcement officer.

potentially exculpatory, the Chief should consult with the County Attorney.

- The Attorney General's Office will provide a training for Chiefs and other law enforcement officials this Spring and periodically thereafter to provide Chiefs guidance as to what exculpatory evidence must be disclosed.

- All officers placed on the EES will be notified by the Chief and/or the County Attorney.

- At all times prosecutors retain the constitutionally based and ethical obligation to determine whether the personnel file of any officer who is a potential witness in a criminal case contains potentially exculpatory evidence. Because the EES is limited to events that first arise during the officer's employment in law enforcement, it is possible it will not include all potentially relevant exculpatory evidence. The prosecutor's obligation may be met by the prosecutor personally reviewing the personnel file of an officer who is expected to be a witness in a pending case and by inquiry of the officer.

- In compliance with RSA 105:13-b, prosecutors will provide potentially exculpatory evidence directly to the defense for any law enforcement witnesses in the case. This disclosure should be done in conjunction with a protective order until it is determined that the information is admissible at trial. A sample protective order is attached for guidance.

- If the prosecutor is unable to determine whether the information is potentially exculpatory in a particular case, the documentation from the personnel file will be submitted *in camera* for the court's review and its determination of whether the evidence is exculpatory in that case.

- All complaints of lack of credibility, excessive force, failure to comply with legal procedures, and mental illness or instability[4] must remain in an officer's personnel file, until a determination is made that the complaint is unfounded, exonerated, not sustained or sustained.[5] Any complaints, determined to be sustained (meaning the evidence proved the allegations true) or not sustained (meaning the evidence is insufficient to determine

[4] Only instances of mental illness or mental instability that caused the law enforcement agency to take some affirmative action to suspend the officer as a disciplinary matter should be considered exculpatory. Any incident for which no disciplinary action was taken, shall not be considered exculpatory evidence. For example, a directive by a Chief to an officer to seek mental health treatment following a traumatic incident or event (on or off the job) does not result in the officer being included on the EES. Mental health treatment should not be stigmatized but where appropriate, encouraged.

[5] "Unfounded" means any allegation that was investigated and found devoid of fact or false. "Exonerated" is a finding that the allegation is true, but that act was lawful and consistent with policy. "Not sustained" is any allegation for which the evidence was insufficient to either prove or disprove. "Sustained" is any allegation for which the evidence was sufficient to prove the act occurred.

whether the allegation is true or false) must be preserved in the officer's personnel file throughout the officer's career and retirement, unless the finding is later overturned.

- The new protocol eliminates the ten-year rule for maintaining an officer's name on the EES.[6]

- If an allegation is determined to be unfounded, or if the officer is exonerated after challenging the disciplinary action, the officer's name will be taken off the EES after consultation with the Attorney General or designee.

- An officer may **not** avoid inclusion on the EES by resigning his position. If an officer does resign, the disciplinary investigation must be preserved in the officer's personnel file and the complaint will be treated as a sustained complaint for purposes of the EES.

- All law enforcement officers have a personal obligation to notify the prosecutor in any case in which they may be a witness if they have potentially exculpatory evidence in their personnel file. In the coming months, the Attorney General's office will develop a training for all certified New Hampshire law enforcement officers

- All law enforcement agencies should review and consider adopting the Model Brady Policy developed by the International Association of Chiefs of Police. If your department adopted the sample policy attached to the Heed Memorandum as a standard operating procedure, it should be rescinded and replaced with the Model Policy and with procedures consistent with the new protocol within 60 days with the following exception: all new standard operating procedures should maintain the internal review process set forth in the Heed Memorandum at paragraphs E through J, as revised in the attached protocol, approved in *Gantert v. City of Rochester,* 168 N.H. 640 (2016).

Ultimately, every prosecutor is responsible for determining whether the information in a police officer's personnel file is subject to disclosure based upon the facts and circumstances of a particular case, the officer's role in the investigation, the potential defenses being presented, and a review of the pertinent case law and rules of evidence. If questions remain, they can be directed to the Attorney General or designee.

[6] The Deputy Attorney General, Ann Rice, sent an email notice to all County Attorneys on June 25, 2014, to no longer remove officers from the *Laurie* list after ten years from the date of the conduct in question.

2017 PROTOCOL FOR IDENTIFYING WITNESSES WITH POTENTIALLY EXCULPATORY EVIDENCE IN THEIR PERSONNEL FILES AND MAINTANENCE OF THE EXCULPATORY EVIDENCE SCHEDULE ("EES")

I. The heads of all law enforcement and government agencies retain an on-going obligation to identify and disclose potentially exculpatory materials in their employees' personnel files to the County Attorney in their jurisdiction and to the Attorney General or designee.

Given the protected status of the personnel files of government witnesses, it is imperative that agency heads remain diligent in disclosing to prosecutors any conduct by an employee that is documented in a personnel file that could be potentially exculpatory evidence in a criminal case. What constitutes exculpatory material is quite broad. For guidance in making this determination many of the types of conduct that have been found to be potentially exculpatory in case law are listed in Part III below.

The International Association of Chiefs of Police (IACP) developed a Model Brady Policy for law enforcement agencies which also provides many examples of *Brady* material and is consistent with this new policy. The Model Policy is attached to this memo.

II. Personnel files include all internal investigation files, pre-employment records, and all mental health records.

For purposes of this protocol, a personnel file includes materials from all of the following records: internal investigation materials, background and hiring documents[1], medical and all mental health records[2], and any other related materials regardless of where the materials are kept or how they are labeled by the employer. While it may be common practice for a variety of legitimate reasons to maintain these records in separate locations, the "personnel file," as discussed in this protocol and in the case law, includes any potentially exculpatory material maintained by an employer.

The employer must maintain in personnel files all complaints against an employee that are pending investigation, are found not sustained (meaning the evidence is insufficient to determine whether the allegation is true or false) or are sustained (meaning

[1] While in most instances, background and hiring files document conduct that preceded employment in law enforcement which will not be relevant, courts in unique circumstances have held otherwise where the conduct involved credibility. Therefore, prosecutors in connection with a pending case may question a Chief or the officer and review such information to assess whether any pre-law enforcement conduct took place that warrants disclosure. For purposes of placement on the EES, only matters first arising after an individual became a law enforcement officer are relevant.

[2] Only instances of mental illness or instability that caused the law enforcement agency to take some affirmative action to suspend the officer as a disciplinary matter should be considered exculpatory. Any incident for which no disciplinary action was taken shall not be considered exculpatory evidence. For example, a directive to an officer to seek mental health treatment following a traumatic incident or event (on or off the job) does not result in the officer being included on the EES. Mental health treatment should not be stigmatized but instead, where appropriate, encouraged.

the evidence proved the allegation true). If that finding is later overturned and the complaint is determined to be unfounded or the officer is exonerated, the complaint and related investigatory documents may be removed. If a complaint is determined to be unfounded, or the officer is exonerated, the officer can be taken off the EES with the approval of the Attorney General or designee, and the records removed from the officer's personnel file.

III. Identification of Potentially Exculpatory Materials

The term "potentially exculpatory material" is not easily defined because it is subject to refinement and redefinition on a case by case basis in the state and federal courts. Whether a court would view any particular piece of information as potentially exculpatory evidence depends, to some extent, on the nature of the information in question, the officer's role in the investigation and trial, the nature of the case, and the recency or remoteness of the conduct. However, when making the initial determination to place an officer's name on the EES it will be without the refining lens of the facts of a particular case. Yet, the only guidance available is extracted from case law. Nevertheless, as a general proposition, information that falls within any of the following categories should be considered potentially exculpatory evidence:

- A deliberate lie during a court case, administrative hearing, other official proceeding, in a police report, or in an internal investigation;
- The falsification of records or evidence;
- Any criminal conduct;
- Egregious dereliction of duty (for example, an officer using his/her position as a police officer to gain a private advantage such as sexual favors or monetary gain; an officer misrepresenting that he/she was engaged in official duties on a particular date/time; or any other similar conduct that implicates an officer's character for truthfulness or disregard for constitutional rules and procedures, including *Miranda* procedures);
- Excessive use of force;[3]
- Mental illness or instability that caused the law enforcement agency to take some affirmative action to suspend the officer for evaluation or treatment as a disciplinary matter; a referral for counseling after being involved in a traumatic incident, or for some other reason, for which no disciplinary action was taken shall not result in placement on the EES.

[3] Incidents of excessive use of force generally do not reflect on an officer's credibility, and thus, in the context of most criminal cases, would not be considered exculpatory material. However, in the context of a case in which a defendant raises a claim of aggressive conduct by the officer, such incidents would constitute exculpatory material, requiring disclosure.

IV. In connection with a pending case, prosecutors may review law enforcement officers' personnel files.

The County Attorney or Attorney General, or their designees, may review the entire personnel file of an officer in connection with a pending case in which the officer may be a witness. This change is necessitated by the revisions to RSA 105:13-b, discussed above, and the developing case law.

The current version of RSA 105:13-b exempts exculpatory evidence from the confidential status of police personnel files. While the language of the statute leaves questions as to how to determine whether material is exculpatory if the entire file is not available, the legislature clearly intended prosecutors to have access to the previously confidential files to meet their discovery obligations. The legislative history of the statute reflects that it was revised to address a perception that law enforcement was hiding information in the confidential files and not properly reporting to prosecutors *Laurie* material.

This interpretation of the statute is consistent with the Court's ruling in *Theodosopoulos*, that "RSA 105:13-b cannot limit the defendant's constitutional right to obtain all exculpatory evidence." *State v. Theodosopoulos*, 153 N.H. 318, 321 (2006). The *Theodosopoulos* Court also upheld the trial court's order directing the prosecutor to review the personnel file of the witness and to produce any exculpatory evidence contained in the file directly to the defendant. *Id.* at 322.

More recently, in *Duchesne*, the Court was critical of the Heed protocol's mandate of automatic referral of the officer's personnel file to the trial court rather than the prosecutor reviewing the materials in the first instance. *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 783-84 (2015). The *Duchesne* Court discussed the changes in RSA 105:13-b, and also interpreted the first paragraph of the new statute as a directive that exculpatory evidence be disclosed to the defendant. *Duchesne*, 167 N.H. at 781.

However, the practical reality is that prosecutors cannot review every officer's personnel file in every criminal case. Thus, it is imperative that the EES is properly updated and maintained. By September 1, 2017, each police chief, high sheriff, colonel or other head of a law enforcement agency (together hereinafter referred to as the "Chief") or their designee, shall complete a review of the personnel files[4] of all officers in their agency to ensure the accuracy of the new EES. A notation should be added to the new EES designating the type of exculpatory evidence contained in the file. These categories should include credibility, excessive force, failure to comply with legal procedures, and mental illness or instability. This designation should limit the necessity

[4] "Personnel files" include all materials related to an officer's employment as defined in N.H. Admin. Rules, Lab 802.08, to include internal investigation materials, background and hiring documents, medical and mental health documents and any other related materials regardless of where the materials are kept or how they are labeled by the employer. For purposes of placement on the Exculpatory Evidence Schedule, only matters first arising after an individual became a law enforcement officer are relevant.

for further and repeated reviews of the officer's file by informing prosecutors of the type of material contained in the file. Actions or events that took place prior to an officer's employment in law enforcement will not result in that officer's placement on the EES.[5]

Chiefs must provide the updated EES to the County Attorney in their jurisdiction and to the Attorney General or designee by September 1, 2017, and then at least annually by July 1st of each year and more often as necessary. Using the attached certification form, each Chief will certify as to the accuracy and completeness of the review. If there is a question regarding whether the conduct documented in the file is potentially exculpatory, the Chief should consult with the County Attorney.

The Attorney General's Office will provide a training for Chiefs and other law enforcement officials this Spring, and periodically thereafter to provide Chiefs guidance as to what constitutes potentially exculpatory evidence.

If the EES designation indicates that the material may be exculpatory in a particular case, the prosecutor will have to review the materials. In doing so, the prosecutor should analyze the nature of the conduct in question, and weigh its exculpatory nature in light of the officer's role in the investigation and trial, the nature of the case, the known defenses, and the recency or remoteness of the conduct, before making a final determination of whether the materials are potentially exculpatory in that particular case. What may be exculpatory in one criminal matter may be irrelevant in another.

The prosecutors who have reviewed the contents of an officer's personnel file shall maintain the confidentiality of the material reviewed. The production of the exculpatory materials should be done in conjunction with a protective order, as not all discoverable materials are necessarily admissible at trial. The discovery disclosure should outline the nature of the conduct and the finding of the agency. In certain cases, it may also be necessary to produce the underlying reports regarding the investigation. This should also be done in conjunction with a protective order. A sample protective order is attached.

When a determination is made to add an officer to the EES, the County Attorney and/or the Chief will notify that officer. Along with the notification, the officer will be given the opportunity to submit documentation for inclusion in his or her personnel file to indicate that he or she is challenging the disciplinary finding or the finding that the conduct is exculpatory. A notation will be made on the list if the matter is subject to on-going litigation.

[5] In most instances, actions or events that took place prior to an individual's employment in law enforcement will not constitute relevant exculpatory evidence. However, courts have held in unique circumstances that some pre-law enforcement conduct implicating credibility was exculpatory. Therefore, to fulfill their constitutional and ethical obligations, prosecutors may question Chiefs or officers about such matters and review the officer's personnel file to assure it does not contain relevant exculpatory evidence.

To the extent that institutional knowledge permits, an officer who was taken off the *Laurie* list because the conduct was more than ten years old should be placed back on the EES. Hereafter, no officer will be taken off the EES without the approval of the Attorney General or designee.

V. The EES will be maintained and updated by the Attorney General or designee. The County Attorneys will maintain the information from the EES in their case management software.

The master EES will be maintained by the Attorney General's Office. The EES, and its updates, will be provided to the County Attorneys who will incorporate the information into their case management software, Prosecutor By Karpel (PBK). The County Attorneys will ensure that their PBK software properly notes officers in their county with exculpatory information in their files, and that it will be updated regularly for easy reference by their prosecutors.

Following receipt of the annual updates from the Chiefs, the County Attorneys will provide updates to the EES to the Attorney General's Office at least annually by no later than August 1st, and as needed, to enable the Attorney General's Office to maintain a master schedule. County Attorneys shall contact Chiefs who fail to provide their annual July 1st certification to assure the EES is complete. A process will be developed for local prosecutors to have access to the EES.

The EES is a confidential, attorney work product document, not subject to public disclosure. The EES contains information from personnel files which are protected from disclosure under RSA 91-A.

VI. An officer can only be removed from the EES with the approval of the Attorney General or designee.

Given the breadth of the constitutional and ethical obligations to provide exculpatory evidence and the fact that the failure to comply with this obligation could result in overturning a criminal conviction or dismissal of a case, it should be the practice to err on the side of caution when determining whether an officer's designation on the EES should continue.

If it is determined the information in the personnel file would not be exculpatory in any case, the officer's name shall be removed from the list, but only with the approval of the Attorney General or designee.

VII. The prosecutor must disclose directly to the defense any exculpatory material in a particular case for any potential witness in an upcoming trial.

If an officer is on the EES and is a *potential* witness in an upcoming trial, even if he or she is not testifying, and the prosecutor determines that information in the officer's personnel file is exculpatory, the prosecutor must provide this evidence directly to the

defense in compliance with the deadlines set forth by New Hampshire Rules of Criminal Procedure, or other deadline set by the trial court. As noted above, the disclosure of the materials should be the subject of a protective order limiting the dissemination of the information or materials.

VIII. Judicial Review is reserved for instances in which the prosecutor cannot determine if the material is exculpatory in a particular case.

In camera review of a personnel file, in whole or in part, as deemed necessary in a particular case is only appropriate if there is a question as to whether the information in that portion of the personnel file is exculpatory, after the prosecutor has reviewed the file. These findings are case-specific, and therefore one judge's ruling that the information is not exculpatory nor discoverable, is not binding in any other case.

IX. New procedures should be established by the heads of law enforcement agencies to track cases in which officers testify in the event that there is a post-conviction discovery of exculpatory evidence.

The current statute provides an ongoing duty of disclosure "that extends beyond a finding of guilt." RSA 105:13-b, I. Thus, law enforcement agencies should develop a procedure for tracking cases in which an officer testifies in order to comply with this obligation. It is currently difficult to identify cases in which a particular officer has testified, hampering efforts to make the post-conviction notifications directed by the statute.

X. All law enforcement agencies should review and consider adopting the Model Policy for Brady Disclosure Requirements, adopted by the International Association of Chiefs of Police.

A copy of this policy is available on the International Association of Chiefs of Police website and is also attached. Adoption of this policy will ensure consistent procedures and standards throughout the State and provide guidance to the heads of law enforcement agencies in determining when certain conduct should be designated as potentially exculpatory.

If your department adopted the sample policy attached to the Heed Memorandum as a standard operating procedure, it should be rescinded and replaced with the Model Brady Policy that has been adapted for New Hampshire and which outlines procedures consistent with the new protocol, the court's holding in *Gantert v. City of Rochester,* 168 N.H. 640 (2016), and the revisions to RSA 105:13-b.

XI. Process prior to placing an officer on the EES and production of personnel files pursuant to a court order.

The following paragraphs have been inserted into the Model Brady Policy that is attached to this Protocol. They outline the process departments should follow prior to

placing an officer on the EES and the process of producing personnel files pursuant to a court order.

E. The Deputy Chief (Captain, Lieutenant, Internal Affairs Unit Supervisor, etc.) shall review all internal affairs investigation files including those investigations conducted by an immediate supervisor, to determine if the incident involved any conduct that could be considered potentially exculpatory evidence. If it does, he or she shall send a memo to the Chief outlining the circumstances.

F. The Chief shall review the memo and determine if the incident constitutes potential exculpatory evidence. If the Chief concludes that the incident constitutes potentially exculpatory evidence, he or she shall notify the involved officer. If the officer disagrees with the Chief's finding, he or she may request a meeting with the Chief to present any specific facts or evidence that the officer believes will demonstrate that the incident does not constitute potentially exculpatory evidence. These facts or evidence may also be presented in writing which will be placed in the officer's personnel file. The Chief shall consider such facts and render a final decision in writing. In addition, if the officer is contesting the finding that he or she committed the conduct in question through arbitration or other litigation that should also be noted in the officer's personnel file.

G. In the event the Chief has questions about this determination, he or she should notify the County Attorney. Upon review of the material, the County Attorney shall determine if it is potentially exculpatory evidence and whether the officer's name should be on the EES with that designation.

H. Upon the Chief and/or County Attorney determination that the conduct reflected in the officer's personnel file is potentially exculpatory evidence, the officer shall be notified in writing.[6]

I. If the final decision is that the incident in question constitutes potentially exculpatory evidence, a copy of that decision shall be placed in the officer's disciplinary file, as well as transmitted to the department's prosecutor/court liaison officer. The Chief shall also notify the County Attorney and the Attorney General or designee in writing. The notification shall include the officer's name and date of birth, along with a description of the conduct and a copy of the findings of the internal investigation or other relevant documents substantiating that conduct.

J. The Chief shall instruct the officer in writing that in all criminal cases in which that officer may be a witness, the officer shall present a copy of the written notice that the officer's name is on the EES to the prosecutor.

K. If the Chief determines that the incident constitutes potentially exculpatory evidence, the Chief shall then assess whether the conduct is so likely to affect the

[6] If the department is overseen by a Police Commission, the policy may provide that the officer shall have an opportunity to have his or her placement on the EES also reviewed by the Commission.

officer's ability to continue to perform the essential job functions of a police officer as to warrant dismissal from the department. In making such review, the Chief should consider not only the officer's present duty assignment, but also the officer's obligation to keep the peace and enforce the laws on a 24-hour basis, and the possibility that the officer may become a witness in a criminal case at any time.

L. Any requests from defense counsel to produce an officer's personnel file shall be referred to the office of the Chief of Police. If the request is not made in the context of a specific criminal case, the Chief shall deny the request. If the request relates to a specific pending criminal case in which the officer is a witness, and the officer's conduct reflected in the file has not already been determined to be potentially exculpatory evidence, the Chief shall notify the prosecutor of the request and provide the file for the prosecutor's review. If a determination is made by the prosecutor that the file does not contain any potentially exculpatory evidence, the requesting party will be directed to obtain a court order for the portion of the file they can establish is likely to contain potentially exculpatory evidence.

Upon receipt of a written court order, the file will be made available to the trial judge for an *in camera* review. Upon receipt of such an order, the file shall be copied and the copies personally delivered to the court, and a receipt obtained for the same. The file shall be accompanied by a letter from the Chief setting forth that the information is being forwarded for purposes of a review for potentially exculpatory evidence pursuant to RSA 105:13-b, III, and requesting that the file only be disclosed to the extent required by law, and only in the context of the specific case for which the *in camera* review is being conducted. The letter shall also request that the file be returned to the department or shredded when the court is through with it, or retained under seal in the court file if necessary for appeal purposes.

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

EXCULPATORY EVIDENCE PROTOCOL SCHEDULE- 2017 CERTIFICATE OF COMPLIANCE- DUE SEPTEMBER 1, 2017

NOTE: An annual Exculpatory Evidence Protocol and Schedule certificate of compliance must be submitted in accordance with the Attorney General's Exculpatory Evidence Protocol and Schedule Memorandum on or before July 1 of each calendar year.

I hereby certify that the personnel files of each law enforcement officer who was listed as sworn full or part-time with this law enforcement agency during the past year have been reviewed by the individual listed below for potential exculpatory evidence in compliance with the guidance provided by the Attorney General's Memorandum. The personnel files reviewed included the full employment record of each officer, including but not limited to, internal investigation materials, disciplinary files, background and hiring documents (to include their prior employment file if prior employment was in law enforcement), and their medical and mental health documents.

I have sought advice from the County Attorney and the Attorney General when assessing whether conduct should be considered potentially exculpatory. For any officer who had potentially exculpatory evidence in their personnel file for matters arising after the individual became a law enforcement officer, I have notified both the County Attorney and the Attorney General to place the officer's name on the Exculpatory Evidence Schedule (EES). I have notified every officer whose name was placed on the EES of such placement in writing.

Signature of reviewing Officer	Title of Authority
Signature of Chief Law Enforcement Officer	Title of Authority
Date	Law Enforcement Agency

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

EXCULPATORY EVIDENCE PROTOCOL SCHEDULE-ANNUAL CERTIFICATE OF COMPLIANCE

NOTE: An annual Exculpatory Evidence Protocol and Schedule certificate of compliance must be submitted in accordance with the Attorney General's Exculpatory Evidence Protocol and Schedule Memorandum on or before July 1 of each calendar year.

I hereby certify that the personnel files of each law enforcement officer hired with this law enforcement agency during the past year have been reviewed by the individual listed below for potential exculpatory evidence in compliance with the guidance provided by the Attorney General's Memorandum. The personnel files reviewed included the full employment record of the officer, including but not limited to, internal investigation materials, disciplinary files, background and hiring documents (to include their prior employment file if prior employment was in law enforcement), and their medical and mental health documents. In addition, for any officer with new complaints filed in this calendar year or disciplined by this department in the past year, their file was reviewed in full again in compliance with the guidance provided by the Attorney General's Memorandum.

I have sought advice from the County Attorney and the Attorney General when assessing whether conduct should be considered potentially exculpatory. For any officer who had potentially exculpatory evidence in their personnel file for matters arising after the individual became a law enforcement officer, I have notified both the County Attorney and the Attorney General to place the officer's name on the Exculpatory Evidence Schedule (EES). I have notified every officer whose name was placed on the EES of such placement in writing.

_____ _____
Signature of reviewing Officer Title of Authority

_____ _____
Signature of Chief Law Enforcement Officer Title of Authority

_____ _____
Date Law Enforcement Agency

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

_____, SS. _____TERM, 2017

**** FILED UNDER SEAL ****

State of New Hampshire

v.

_____

MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS

NOW COMES the State of New Hampshire, by and through the Office of the Attorney General and undersigned counsel, and hereby request that the Court issue a Protective Order of Discovery Materials to be provided to defense counsel in the above-captioned matter that include materials from a law enforcement officer's personnel file. In further support of this motion, the State says as follows:

1. Pursuant to the State's obligation to provide exculpatory evidence to the defense, the State has obtained potentially exculpatory evidence from the _____ Police Department consisting of materials from Officer _____'s personnel file. Officer _____ may be called as a witness for the State in this matter.

2. While the State acknowledges that these materials may be potentially exculpatory, the State does not concede that these materials may be used in open court for impeachment of Officer _____. This will be the subject of a later Motion in *Limine* in this matter.

3. In the interim, the State is asking that defense counsel be prohibited from discussing these materials or providing a copy of the materials from Officer _____'s

personnel file that will be produced in discovery, to anyone other than defense counsel and their investigator(s).

4. The Court has the authority to issue this proposed protective order. Indeed, it is well-established that the Court has the inherent authority to exercise its sound discretion in matters concerning pretrial discovery. *See State v. Emery*, 152 N.H. 783, 789 (2005); *State v. Smalley*, 148 N.H. 66, 69 (2002); *State v. Delong*, 136 N.H. 707, 709 (1993). Pursuant to Rule 12 of the new Hampshire Rules of Criminal Procedure, therefore, the Court may at any time restrict or even deny discovery "[u]pon a sufficient showing of good cause." *See* N.H. R. Crim. P. 12(b)(8).

5. Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. *See* RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the officer's personnel records while meeting the State's competing interest in providing potentially exculpatory evidence in a criminal matter, enabling the defendant and his counsel to review complete discovery and prepare for trial. *See generally, State v. Laurie*, 139 N.H. 325 (1995); *N.H.R.Prof.C.* 3.8(d).

6. Counsel for the defendant, attorney _____, ASSENTS/OBJECTS to the proposed protective order attached hereto.

WHEREFORE, the State respectfully asks that the Court:

A. Grant this motion;

B. Approve the attached proposed protective order; and

C. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

DATE _____

Attorney

CERTIFICATE OF SERVICE

I hereby certify that on _____, I sent a true copy of the foregoing motion and all attachments by first-class mail to attorneys _____.

_____

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

_____ SS. TERM, _____

** UNDER SEAL **

State of New Hampshire

v.

_____

[PROPOSED]
PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above-captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105:13-b, the State has reviewed the confidential police personnel file of Officer _____ for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain documents contained in Officer _____'s personnel file may be potentially exculpatory in this matter. The documents will be provided to the defendant's counsel under this protective order.

3. Defense counsel is prohibited from sharing or further disseminating these confidential documents and the confidential information contained therein with anyone other than their client and their staff.

4. If the defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

_____
Presiding Justice

Date

MEMORANDUM

TO: All County Attorneys
All Law Enforcement Agencies

FROM: Peter W. Heed, Attorney General

RE: Identification and Disclosure of *Laurie* Materials

DATE: February 20, 2004

INTRODUCTION

In 1995, the New Hampshire Supreme Court issued *State v. Laurie*, 139 N.H. 325 (1995); an opinion which significantly changed the landscape with respect to the constitutionally-mandated disclosure of evidence favorable to a criminal defendant. In prior decisions, the Court had held that when a convicted defendant made a claim that the prosecutor failed to disclose material evidence favorable to the defense, the conviction would stand unless the defendant proved that he or she was prejudiced by the non-disclosure. Under the *Laurie* decision, the burden of proof was shifted to the State. Now, if a defendant makes a threshold showing that the State withheld material favorable evidence, the conviction must be overturned unless the State proves, beyond a reasonable doubt, that the non-disclosure was harmless.

The *Laurie* Court reversed the defendant's murder conviction after finding that the State failed to disclose material evidence about a police officer who participated in the investigation and testified at trial. The non-disclosed information was contained in the officer's confidential personnel file, and could have been used to impeach his credibility.

The impact of the *Laurie* decision has been significant. Police personnel files are now frequently the target of defense discovery requests. Out of an abundance of caution, prosecutors may tend towards disclosure of any information that could possibly be perceived as *Laurie*-type material, often without analyzing whether disclosure is, in fact, required. The police officer's interest in maintaining the confidentiality of personnel information is often disregarded in the

disclosure decision. On the other hand, because police personnel files and internal investigative files are confidential by statute, prosecutors must rely on a police officer or police department to inform them if *Laurie* material exists in a particular officer's file. Due to the lack of case law on the issue of what constitutes *Laurie* material, police departments are free to develop their own definitions, which may or may not comport with the law.

In an effort to assist police and prosecutors, and to develop a standardized method for identifying and dealing with potential *Laurie* material, I am issuing this memorandum, which addresses issues relating to information contained in confidential police personnel files and internal investigations files.

Identification of Potential *Laurie* Materials

Unfortunately, the term "*Laurie* material" is not subject to easy definition. Whether a court would view any particular piece of information as *Laurie* material would depend, to some extent, on the nature of the information in question, the officer's role in the investigation and trial, the nature of the case, and the recency of the information. However, as a general proposition, information that falls within any of the following categories should be considered potential *Laurie* material:

- any sustained instance where an officer deliberately lied during a court case, administrative hearing, other official proceeding, in a police report, or in an internal investigation;
- any sustained instance when an officer falsified records or evidence;
- any sustained instance that an officer committed a theft or fraud;
- any sustained instance that an officer engaged in an egregious dereliction of duty (for example, an officer using his/her position as a police officer to gain a private advantage such as sexual favors or monetary gain; an officer misrepresenting that he/she was engaged in official duties on a particular date/time; or any other similar conduct that implicates an officer's character for truthfulness);
- any sustained complaint of excessive use of force;[1]
- any instance of mental instability that caused the police department to take some affirmative action to suspend the officer for evaluation or treatment, except for a referral for counseling after being involved in a traumatic incident, or for some other reason, for which no disciplinary action was taken.

Material that falls within any of these categories must be retained in the officer's personnel file so that it is available for *in camera* review by a court and possible disclosure to a defendant in a criminal case. However, a report or other document that concerns an incident over ten years old is presumptively non-disclosable and may be removed from the file, provided that the officer has not been the subject of any subsequent disciplinary action.

Police departments are encouraged to develop a policy for identifying *Laurie* materials. A

[1] Incidents of excessive use of force generally do not reflect on an officer's credibility, and thus, in the context of most criminal cases, would not be considered *Laurie* material. However, in the context of a case in which a defendant raises a claim of aggressive conduct by the officer, such incidents would constitute *Laurie* material, requiring disclosure.

proposed policy is attached.

A Prosecutor's Duty to Search for *Laurie* Material

A prosecutor has a constitutional obligation to disclose to a criminal defendant evidence favorable to that defendant. Brady v. Maryland, 373 U.S. 83 (1963); State v. *Laurie*, 139 N.H. 325 (1995); Prof. R. Cond. 3.8(d). Favorable evidence includes evidence that is exculpatory and information that could be used to impeach the testimony of a prosecution witness. Giglio v. U.S., 405 U.S. 150 (1972). Disclosure is not contingent upon the information being admissible at trial. If the information would be material to the preparation or presentation of the defendant's case, it must be turned over. The disclosure obligation is not limited to materials in the hands of the prosecuting agency. It extends to information "known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995). Thus, a prosecutor has a duty to seek out *Laurie* material in the hands of any involved police agency.

Because police department internal investigations files and personnel files are confidential by statute, a prosecutor cannot conduct a search of those files for *Laurie* material. Rather, the prosecutor must rely on the police department to identify such materials and provide notification of their existence. Some prosecutorial agencies direct a specific *Laurie* inquiry to the police departments for each law enforcement witness in a particular case. However, that may result in a police department being required to respond to the same inquiry regarding a particular officer from multiple prosecutors. On the other hand, for many prosecutors, particularly in the district courts, the process of making specific requests in each case is impractical. Prosecutors must rely, instead, on individual police officers to reveal the existence of *Laurie* materials in their files.

To ensure that all prosecutors are able to meet their constitutional obligations, I am requesting each county attorney to work with the law enforcement agencies within his/her jurisdiction to develop a process whereby the county attorney will be given written notice by a law enforcement agency whenever one of that agency's officers has been found to have engaged in conduct that would fall within one of the categories listed above.[2] Thereafter, notification to the county attorney should occur whenever a determination is made that an officer has engaged in conduct that constitutes *Laurie* material, regardless of whether the officer has already been the subject of an earlier notification. If an officer who has been the subject of such notification leaves the agency for another law enforcement position, the agency should inform the county attorney of the officer's departure and new employer.

There are a number of law enforcement agencies whose officers have statewide jurisdiction, such as the State Police, Marine Patrol, Fish and Game, and Liquor Commission. Because those officers are far more likely to appear as a witness in multiple counties, notification should be made to each of the ten county attorneys, and to the chief of the criminal justice bureau at the attorney general's office.

The written notification should include only the officer's name, department, date of birth,

[2] At the same time, notice should be given to the agency's prosecutor/court liaison officer.

and date of incident that gave rise to the *Laurie* determination: It should not include any information regarding the underlying disciplinary matter, as that information is confidential by statute.[3]

The county attorney will be responsible for compiling a comprehensive list of officers within his/her county who are subject to possible *Laurie* disclosure. The list should be updated as needed to reflect the name of any officer not already on the list who has been the subject of a *Laurie* disciplinary matter. Local prosecutors should be provided a copy of the list, or at least that portion of the list containing information from police departments within their jurisdiction. If only partial lists are provided, local prosecutors should be instructed to check with the county attorney for a *Laurie* notification on any officer with whom they are dealing as a potential witness, if that officer either has statewide jurisdiction or is from outside the prosecutor's prosecutorial region. The county attorney shall make the list, or relevant portions thereof, available to prosecutorial agencies in other counties upon request. The list should otherwise be kept confidential.

Since the concept of *Laurie* materials is rather vague, it is likely that law enforcement agencies will have questions about whether a particular incident would constitute potential *Laurie* materials. The county attorneys should make themselves available to consult with police departments and assist in making that determination. However, because the disciplinary materials are confidential by statute, the consultation should be done on a hypothetical basis, without disclosing the officer's name or any other identifying facts.

This process should ensure that prosecutors have the necessary information to deal with the issue of Brady material in the event that a particular officer is a witness in one of their trials. However, the establishment of this process does not completely relieve a prosecutor of the obligation to seek out potential *Laurie* materials. If a prosecutor has a basis to believe that an officer/witness may have been subject to discipline for conduct that would constitute impeachment information, but the police department has not provided notification of that fact, the prosecutor should direct a specific inquiry to the chief of that department.

Disclosure of *Laurie* materials

That a police department has designated documents in an officer's personnel file as

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[3] I am aware that, with respect to officers who are subject to *Laurie* disclosure, some police departments follow a practice of providing the prosecutor a brief summary of the underlying disciplinary incident, on which the officer has signed off. That summary is provided to defense counsel in cases in which the officer will be a witness, and defense counsel can decide whether to pursue the issue further. Often, the summary is sufficient for defense purposes and no further discovery is requested.

In developing this protocol, it is not my intent to discourage these types of practices. The notification process set out in this memo will ensure that that there is a certain minimum level of information available to all prosecutors, which will enable them to fulfill their *Brady/Laurie* obligations. The county attorneys and local law enforcement agencies are free to adapt that process to better reflect local practice, or to adopt additional procedures to further advance that objective.

If the underlying incident involves excessive use of force, which would only be considered Laurie material in the context of certain types of cases, the officer may wish to have that fact noted on the notification form. The inclusion of that information would enable a prosecutor to decide whether a request for *In camera* review of the personnel file is necessary, based on the facts of a particular case.

potential *Laurie* material does not mean that those documents must necessarily be disclosed to a criminal defendant. Rather, it simply informs a prosecutor of the existence of such materials. If a prosecutor intends to call the officer as a witness, the prosecutor should file a motion under seal, advising the court of the material's existence and requesting the court to order the submission of the file for *in camera* review, to determine whether disclosure of any portion of the file is required. The prosecutor should consider requesting, as additional relief, that if the court rules that the file is not subject to disclosure, it issue a further ruling that the file is non-disclosable in any future prosecution. The motion should include a request for a comprehensive protective order to protect against further disclosure of information. The request for a protective order should state that all matters relating to the motion - including the motion, related pleadings, court orders, and similar documents concerning the admissibility of any of the information at issue - be sealed until the court issues an express order to the contrary.

The prosecutor should inform the police officer/witness that such a motion is going to be filed and advise the officer that the prosecutor does not represent the officer's personal interests in the matter; and if the officer desires an advocate to represent his/her interests, the officer should retain private counsel.

If, after conducting an *in camera* review, the court determines that no portion of the file need be disclosed to the defendant, a prosecutor may generally rely on that ruling to support non-disclosure in future cases. The prosecutor should notify the county attorney of the court's decision, so that the county attorney's list can be updated to reflect that ruling. If the court rules that the file need not be disclosed in any future prosecution, the prosecutor should forward a copy of the order to the county attorney. The county attorney, in turn, should remove the officer's name from the list and forward a copy of the court's order to the officer and his or her department. However, nothing herein prevents a prosecutor from seeking *in camera* review of an officer's file in the context of a subsequent case, if the prosecutor deems such a review appropriate in light of the specific facts or the unique role of the officer in the case.

If a court orders disclosure of an officer's file, or portions thereof, copies will be furnished to both parties. Provided that the officer has not accrued additional *Laurie* material in the meantime, in any subsequent case the prosecutor can make an independent assessment of whether disclosure is required, without court involvement. In making that determination, a prosecutor should consider such factors as:

- the nature of the officer's conduct that is the basis of the *Laurie* report (An incident of lying, which involved calling in sick when the officer simply wanted a day off, is less probative of that officer's veracity than an incident of lying that involved providing false information in a police report)
- how recently the incident occurred (The probative value of information diminishes with the passage of time. Any incident more than 10 years in the past should be presumed immaterial, unless it involved particularly egregious conduct that is highly probative on the issue of truthfulness. See N.H. R. Ev. 609)
- the importance of the officer's role in the investigation and/or the officer's testimony at trial
- whether the incident was an isolated one (If there are multiple incidents, the prosecutor

must consider the combined impact of those incidents. An incident that would appear relatively minor if viewed in isolation may take on increased importance if it is one of a series of events)

If the *Laurie* documents being evaluated were provided to the prosecutor under a protective order and there is a determination made that disclosure is required, the prosecutor should file a motion seeking court authorization to release the materials, with an accompanying request for a protective order.

It is not uncommon to be faced with a situation where material is arguably *Laurie* material, but in the context of the particular case its probative value is minimal. The prosecutor has three options: (1) file a request for in-camera review of the materials by the court, providing the court with an explanation of why there would be some debate as to whether disclosure is required; (2) disclose the materials and file a pre-trial motion seeking to bar their use at trial (this should only be done where the material has previously been ordered to be disclosed by a court); or (3) withhold the materials. In the latter event, the prosecutor should document the materials in his/her possession and the reason for non-disclosure.

Even if a court orders disclosure of certain materials in a personnel file, that does not necessarily mean that they can be used at trial. Judges typically review documents in-camera prior to trial, when they have little or no knowledge of the facts of the case. Since it is difficult to evaluate the materiality of information in a vacuum, a judge may order disclosure of marginally probative documents, simply to ensure that a defendant's constitutional rights are protected. However, there is nothing to prevent a prosecutor from seeking to limit or bar altogether any reference to the material on the grounds that its probative value is minimal. This can be accomplished by way of a motion in limine or an oral trial motion.

Sample Policy for Police Departments

While the above-discussed guidelines are largely directed to prosecutors, there is also a need for police departments to implement standard procedures for the identification and retention of potential *Laurie* materials in police officer personnel files. To address that need, I am attaching a sample policy for consideration by police departments.

CONCLUSION

I believe that these guidelines and sample policy strike a fair balance between the need to protect the confidentiality of an officer's police personnel file and the prosecutorial obligation to disclose material favorable evidence to a criminal defendant. While it is not possible to establish definitive standards to deal with all questions surrounding *Laurie* materials, I hope that they will be of assistance in addressing these very important issues.

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Tuesday, February 13, 2018

THE COMMITTEE ON Judiciary

to which was referred **SB 493**

AN ACT establishing a committee to study the codification of the exculpatory evidence schedule and related law enforcement protocols.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS

BY A VOTE OF: 5-0

Senator Sharon Carson
For the Committee

This bill establishes a committee to study whether or not to codify in statute the Exculpatory Evidence Schedule (EES), formerly known as the "Laurie list," and the related law enforcement protocols established by the Attorney General in a law enforcement memorandum dated March 21, 2017. The establishment of this committee will allow House and Senate members the opportunity to come together and find common ground on this important issue.

Jennifer Horgan 271-3092

FOR THE CONSENT CALENDAR

JUDICIARY

SB 493, establishing a committee to study the codification of the exculpatory evidence schedule and related law enforcement protocols.
Ought to Pass, Vote 5-0.
Senator Sharon Carson for the committee.

This bill establishes a committee to study whether or not to codify in statute the Exculpatory Evidence Schedule (EES), formerly known as the "Laurie list," and the related law enforcement protocols established by the Attorney General in a law enforcement memorandum dated March 21, 2017. The establishment of this committee will allow House and Senate members the opportunity to come together and find common ground on this important issue.