

## MEMORANDUM

To: The Advisory Committee on Rules  
From: Carolyn Koegler  
Re: # 2016-014. Supreme Court and Trial Court Rules. In Camera Review of Documents.  
Date: November 13, 2017

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I recently received a call from attorney Jeffrey Kaye. Those of you who were members of the Committee at the time may recall that he was very interested in the *in camera* review issue the Committee considered in 2012 and 2013 (docket # 2012-008). He remains interested in the issue and plans to attend the public hearing on December 8 to comment on the proposals included in the public hearing notice.

The issue before the Committee in 2012 and 2013 was whether Supreme Court Rule 57-A, Custody and Return of Documents and Materials Filed in Camera in Trial Courts, should be amended and whether the protocol the Superior Court had proposed for handling *in camera* documents should be adopted as one or more court rules. Attorney Kaye submitted two letters to the Committee in 2013. He submitted a June 6, 2013 letter as a comment when the proposed change to Rule 57-A and the proposed protocol were put out for public hearing in June 2013. Among other things, Attorney Kaye asserted that defense counsel in criminal cases should be involved in *in camera* review of documents. Ultimately, the Committee recommended that the Court adopt the changes to Supreme Court Rule 57-A and approve the proposed Superior Court Protocol.

I thought Committee members might find it helpful to understanding the issues that are before the Committee now to understand the issue that was before the Committee in 2013. Therefore, attached you will find copies of materials contained in the Advisory Committee on Rules file from the June 7, 2013 meeting. As you can see the file contains:

- A proposal to amend Supreme Court Rule 57-A, regarding the custody and return of documents filed in camera in the trial courts;
- A proposed Superior Court Protocol for handling *in camera* documents;
- A proposed Superior Court form order for production of records for *in camera* review;
- A proposed Superior Court form *in camera* protective order;
- A proposed Superior Court form, required in camera certification; and
- A June 6, 2013 letter from attorney Jeffrey Kaye.

Also attached is a copy of attorney Kaye's December 13, 2013 letter to the Committee.

## APPENDIX E

Amend Supreme Court Rule 57-A as follows (new material is in **[bold and in brackets]**; deleted material is in ~~strikethrough~~ format):

### **Rule 57-A. Custody and Return of Documents and Materials Filed In Camera in Trial Courts.**

During the time a case is pending in the trial court, all documents and materials filed in camera with the court shall be maintained by the court.

#### **[1. Civil Cases]**

(a) Upon the final conclusion of a **[civil]** case in the trial court, documents and materials filed in camera will be held at the court until such time as the appeal period has expired. At that time, the clerk shall return the documents and materials filed in camera to the individual or organization that ~~filed~~ **[furnished]** them ~~with the court~~ **[, unless the court orders otherwise].**

(b) If an appeal is filed **[in a civil case]**, the documents and materials filed in camera shall remain in the custody of the trial court pending resolution of the appeal unless the supreme court orders that they be transferred for purposes of the appeal. Upon receipt of the mandate from the supreme court, and if no further proceedings are required, the trial court clerk shall return the documents and materials filed in camera to the individual or organization that ~~filed~~ **[furnished]** them ~~with the court~~ **[, unless the court orders otherwise].**

#### **[2. Criminal Cases]**

(a) Upon the final conclusion of a criminal case in the trial court, documents and materials filed in camera will be held at the court as a part of the official court file for a period of ten (10) years after the appeal period in the case has expired. After ten years, the clerk or designee shall destroy the in camera documents unless a written request has been made prior to that date for the records to be retained for an additional specified period.

(b) If an appeal is filed in a criminal case, the documents and materials filed

**in camera shall remain in the custody of the trial court pending resolution of the appeal unless the supreme court orders that they be transferred for purposes of the appeal. The trial court clerk shall retain the documents as part of the official court file for a period of ten (10) years from the date of the supreme court mandate. After ten years, the clerk or designee shall destroy the in camera documents unless a written request has been made prior to that date for the records to be retained for an additional specified period.]**

## APPENDIX F

The Committee invites comment on the following proposed Superior Court protocol for handling *in camera* documents:

### PROTOCOL FOR HANDLING *IN CAMERA* DOCUMENTS

1. Parties seeking *in camera* review of documents shall file a motion with the Court.
2. The motion for *in camera* review shall be presented to a Judge for ruling in compliance with Superior Court Rules regarding motion practice.
3. If the Judge grants the motion for *in camera* review, the Judge shall issue an Order for Production of Records for *In Camera* Review. The order shall direct the State in criminal cases and the moving party in civil cases to deliver the order to the appropriate provider/agency as well as an *In Camera* Certification Form, which the court shall attach to the order. The Order shall require the provider/agency to complete the *In Camera* Certification form and to deliver the *in camera* documents to the State or moving civil party in a sealed envelope or other sealed container.
4. Upon receipt of the sealed *in camera* documents and *In Camera* Certification Form from the provider/agency, the State or moving party shall deliver the unopened *in camera* documents and *In Camera* Certification form to the Clerk's office in person as soon as practicable and in any event, within two business days of receipt. The delivering party shall be prohibited from opening the sealed *in camera* documents.
5. Upon receipt of the *in camera* documents, the Clerk shall maintain a record of each filing in the specific case in the Clerk's Case Management System (CMS) - Odyssey by recording the documents received in the **Exhibits** tab containing the following information:
  - A. Date of receipt of *in camera* documents
  - B. Name of the provider/agency providing the documents
  - C. Type of *in camera* documents received
  - D. Date of return/destruction of the *in camera* documents
6. *In camera* documents received by the Clerk shall be placed in a sealed envelope or a red or other colored file folder. The outside of this envelope/folder will:
  - A. Be labeled "A"
  - B. Contain the case number, case caption and name of the provider/agency

**C. Be marked "CONFIDENTIAL *In Camera* Materials"**

*In camera* documents can be kept in a location in the Clerk's office separate from the case file or in a red or other colored confidential file attached to the file, as instructed by the Clerk.

7. As soon as practicable after receipt of *in camera* documents, the documents shall be presented to the Judge for review. If the Judge elects to disclose all or any portion of the *in camera* documents, the Judge will issue an order specifying the *in camera* documents to be disclosed along with the *In Camera* Protective Order which specifies limitations on the use or further dissemination of such documents. Unless otherwise ordered, the Clerk or designee will make copies of those *in camera* documents ordered to be disclosed for each lawyer, with one additional set of the copied documents placed in a sealed envelope marked as "B" to be kept as part of the Court's record in the physical case file. A copy of the Court's order relative to such disclosed *in camera* documents shall be attached to envelope "B" and the case number, case caption and the name of the provider/agency will be noted on the outside of envelope "B". The outside of the envelope or file folder should also be marked "CONFIDENTIAL *In Camera* Materials."

8. In civil cases, after the appeal period has expired or, if the case has been appealed, upon receipt of the mandate from the supreme court, the clerk shall return the documents and materials filed *in camera* to the individual or organization that provided them, unless the court orders otherwise.

9. In criminal cases, the clerk shall retain the *in camera* documents as part of the official court file for a period of ten (10) years after the appeal period in the case has expired. After ten years, the clerk or designee shall destroy the *in camera* documents unless a written request has been made prior to that date for the records to be retained for an additional specified period.

**Exhibit Tab step by step process to follow**

**APPENDIX G**

The Committee invites comment on the following form proposed for use in the Superior Court:

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

Court Name: \_\_\_\_\_  
Case Name: \_\_\_\_\_  
Case Number: \_\_\_\_\_

**ORDER FOR PRODUCTION OF RECORDS FOR *IN CAMERA* REVIEW**

**Case Name:** TEST CASE v. TEST CASE  
**Case Number(s):** 218-2012-CR-00000

The above-referenced case is pending in the \_\_\_\_\_ County Superior Court. The Court has granted a request to conduct an *in camera* review of the confidential records of the person listed below. An *in camera* review is one in which the Judge reviews the records and makes a determination based on the contents and the particular facts of the case whether or not the records or any portion thereof will be disclosed to the parties in the case.

The Court is satisfied that there is reason to believe that (Insert name of provider) has records pertaining to the individual identified below.

Accordingly, the keeper of the records of the above-named provider is hereby ORDERED to produce for the following individual \_\_\_\_\_;

- The original or a complete copy of all such records
- The following records \_\_\_\_\_

The keeper of the records shall place these documents in a sealed envelope, or other sealed container, along with the attached completed *In Camera* Certification form. The provider shall deliver the documents to:

(Insert Name and Address of Responsible Party)

**NOTE:** If these records are to be delivered to a location other than the court, the entity at that location shall deliver the documents to the court forthwith, without having unsealed them.

If the provider has any question regarding this order, or its ability to comply in a timely manner, please contact the office listed above. **This Order shall remain under seal.**

SO ORDERED.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Presiding Justice

**APPENDIX H**

The Committee invites comment on the following form proposed for use in the Superior Court:

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

Court Name: \_\_\_\_\_  
Case Name: \_\_\_\_\_  
Case Number: \_\_\_\_\_

***IN CAMERA* PROTECTIVE ORDER (UNDER SEAL)**

The Court conducted an *in camera* review of certain confidential records in this case. Enclosed please find the Court order dated \_\_\_\_\_ identifying which records are to be disclosed to the parties and also setting forth the legal basis for disclosure. The release of the disclosed records is subject to the following restrictions:

1. The State/plaintiff's and defense counsel shall each be entitled to one (1) copy of the records for use only in connection with this case.
2. No party shall make further copies of the records without further order of the Court.
3. Any notes taken by counsel in connection with the review of these records shall be treated as confidential and are subject to the restrictions in this protective order.
4. The records may be disclosed only to parties and their counsel and to investigators, experts, and witness-coordinators directly involved in and reasonably necessary to preparation for trial.
5. Any person to whom disclosure of the records is made shall not further disclose the information therein and shall not use the information therein for any purpose other than this proceeding.
6. Any person to whom disclosure of the records is made in connection with this case shall be advised of the terms of this order.
7. Except as specified in #4 above, the contents of the records shall not be disclosed to any third party without further order of the Court.



8. All *in camera* records in this case shall be maintained under seal by the Clerk and preserved in accordance with the established Superior Court policy for maintaining and preserving *in camera* records.

9. This Order shall remain under seal.

So ordered.

\_\_\_\_\_

Date

\_\_\_\_\_

Presiding Justice

**APPENDIX I**

The Committee invites comment on the following form proposed for use in the Superior Court:

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

Court Name: \_\_\_\_\_

Case Name: \_\_\_\_\_

Case Number: \_\_\_\_\_

**REQUIRED IN CAMERA CERTIFICATION**

TO: Responsible Party

FROM: (Insert Name and Address of Provider/Agency)

\_\_\_\_\_  
\_\_\_\_\_

I \_\_\_\_\_, the undersigned, certify that the enclosed documents/records are complete and true copies of those documents/records the above-named provider/agency has been ordered to provide to you relative to \_\_\_\_\_ (individual's name)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name:  
Title:

Comment on #2012-008

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\* ALSO ADMITTED IN:  
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**JEFFREY M. KAYE**  
**ATTORNEY AT LAW\***  
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June 6, 2013

Via Email to: Rulescomment&Courts.State.NH.US  
Via Fax #603-513-5442

Attn: Caroline Koegler  
NH Supreme Court  
Advisory Committee on Rules  
1 Charles Doe Drive  
Concord, NH 03301

Dear Advisory Committee:

My name is Jeffrey M. Kaye. I have practiced law, especially trial work, for over 40 years in multiple Jurisdictions. I am licensed to practice in New Jersey, California, Massachusetts and New Hampshire. I have actively practiced in New Hampshire since 1977 and admitted to practice in 1987. I have participated in many noteworthy cases in New Hampshire, including representing William Flynn in the State vs. Pamela Smart case in Rockingham County.

Most recently, I am participating in a very topical case, State vs. Cody Eller (Docket No. 226-2011-CR-00429), before Judge Jaclyn Colburn in Hillsborough South Superior Court. This particular case was tried to a Jury over the course of 4 days in November, 2012. The Trial resulted in my client's acquittal on the major Felony A charge, but convictions on 2 Felony B charges. One week after the verdict, I was notified that the Prosecution failed to provide mandatory State vs. Laurie material, pursuant to Rule 98. Laurie material designates that an Officer testifying in the case may have potential credibility issues which the defense must be informed of to properly prepare their case.

From November, 2012 until April 15, 2013, defense counsel filed over 10 Motions to obtain that material. The Court, In Camera, did review the limited material provided by the Police and the County Attorney, revealing to the Court

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only what they deemed to be "exculpatory" evidence and not producing the Officer's entire file to the Court for review on at least three occasions. Judge Colburn in her decision on April 16, 2013, finally set aside the verdict. This case represents the first time a Superior Court Judge has set aside a verdict based on "Laurie" discovery violations in 16 years.

The case is now set down for a retrial and most of the In Camera review and Post Trial Motions have been sealed so I cannot comment on their specific relevancy to your proposed "Protocol For Handling In Camera Documents". However, I will comment generally, in order, as to your proposed Protocol and its weaknesses from a criminal defense posture;

#### Paragraph 1

How can the defense file a Motion seeking In Camera review of documents they do not have knowledge of their existence. If the Prosecution, as sole arbiter, deem documents non-exculpatory, they do not exist. In the Cody Eller case, no documents were produced in Discovery Pre-trial.

#### Paragraph 3

Obviously in criminal cases, the Police, and possibly the County Attorney, will have access to records they intend to produce if they deem those records "possibly" exculpatory, pursuant to R.S.A. Chapter 105:13-b. However, under R.S.A. Chapter 105:13-b, Paragraph II, if they decide they are "non-exculpatory", they need not be submitted for In Camera Review.

#### Query

Where is the State's obligation "to produce all proof that may be favorable to the defendant? (N.H. Constitution P & I, Article 15)

#### Paragraph 7

This paragraph remains very problematic. What is proposed is that in a criminal case, which I will emphasize, the Police, County Attorney, who has access to the "Laurie" List, and the Judge, all make a determination as to what is relevant for disclosure and what is or may not be exculpatory. They also make the determination as to whether the In Camera materials will not lead to further discovery or modify the defense's trial strategy. That is why the Court in "State vs. Eller" set aside the verdict.

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The defendant's Constitutional right to a fair trial should clearly override the privacy of an Officer testifying in a criminal case, as evidenced in my case. The central issue was credibility and whether the jury believed the Officer or Cody Eller. I have recently spent 6 months post trial debating these issues with the Court.

I firmly believe that there must be a new protocol for In Camera documents review, especially in criminal cases. There is no reason that defense counsel cannot review those documents In Camera with the Court and the Prosecution present. These documents would be "Under Seal" and even redacted, if necessary. Clearly, the Prosecution, nor the Judge, does not know the defense's case and their strategy for that defense. The defense is denied by such In Camera review a crucial discovery tool to the detriment of his client.

I apologize for my inability to attend the Hearing, but due to the record being "Under Seal", I cannot discuss my case in detail. I would offer these general observations for your consideration.

If you have any questions, please do not hesitate to call me. Thank you.

Very truly yours,

  
Jeffrey M. Kaye

JMK/bib

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• ALSO ADMITTED IN: NEW HAMPSHIRE,  
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December 13, 2013

Attn: Caroline Koegler NH  
Supreme Court Advisory  
Committee on Rules 1 Charles  
Doe Drive Concord, NH 03301

Dear Justice Lynn, and Members of the Supreme Court Advisory Committee on Rules:

I have previously corresponded with the Committee on June 6, 2013, regarding my preliminary comments and suggestions for Rule Changes regarding Protocol and Rules for "In Camera" review of possible exculpatory materials and impeachment evidence in criminal cases, especially Superior Court Felony cases.

I have been involved in a Criminal Prosecution matter for 2 1/2 long years, a very topical case in Hillsborough County Superior Court, State vs. Cody Eller (Docket No. 226-201 I-CR-00429), that has now been resolved by a Plea Agreement on November 26, 2013. More importantly however, serious Constitutional issues still remain with respect to Disclosure of Exculpatory Materials and Evidence to the Defense in Criminal Prosecutions. It is my observation that the Supreme Court, must address and mandate the protocols and procedures to be followed and adhered to by State-Wide Police Departments, District Court Prosecutors, County Attorneys and even the Attorney General's Office. The Defense is entitled to that Exculpatory Evidence and Impeachment materials under Brady vs. Maryland, 373 U.S. 83 (1963) under Giglio vs. United States, 405 U.S. 150, 1972, under Kyles vs. Whitley, 514 U.S. 419 (1995) and State vs. Laurie, 139 N.H. 325 (1995) and especially pursuant to the N.H. State Constitution, Part 1, Article 15. From November, 2012 until April 15, 2013, this Defense Counsel filed over 10 Motions to obtain Exculpatory Discovery. The Court did review the limited material provided by the Police and the County Attorney's Office, revealing to the Court only what they deemed to be "exculpatory" evidence, but did not produce the Officer's entire file for the Court to review. Judge Jacalyn Colburn in her decision on April 16, 2013, finally Set Aside the Verdict. This case represents the first time a Superior Court Judge has Set Aside a Verdict based on "Laurie" discovery violations in 18 years.

I have been in contact with Attorney Paul Birch, a member of the Committee, who directed me to examine another legal precedent decided by Justice David Souter, who we are fortunate, continues to reside in our backyard or back woods,

should he desire. That case was Kyles vs. Whitley, 115, S. Ct. 1555(decided April 19, 1995)

Justice Souter, wrote that prescient decision 19 years ago, which, even now, was relevant to Cody Eller's defense. I believe the Court needs to formulate new protocols, new procedures, accountability, and responsibility for the Prosecution's Disclosure of exculpatory materials and to the Defense in a Criminal Prosecution.

In Cody Eller's First Trial, the State failed to fulfill their Duty to actively search and seek out Exculpatory Materials, which could be favorable to the Defense. Justice Souter decided this case on April 19, 1995, the day the first shots of the American Revolution were fired at Lexington and Concord, ultimately cementing our Constitutional Rights. Justice Souter opined on pgs. 11 & 12 of that decision as follows:

1. "The prosecution, which alone can know what is undisclosed must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith \*438 or bad faith, see Brady, 373 U.S., at 87, 83 S. Ct., at 1196-1197), the prosecution's responsibility for failing to disclose known, favorable \*\*\*1568 evidence rising to a material level of importance is inescapable."
2. "And it suggested below that it should not be held accountable under Baaley and Brady for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the Brady line of cases. In the State's favor it may be said that no one doubts that police investigation sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubts that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L.Ed.2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the

police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligations to ensure fair trial." (Emphasis Added)

3. "At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality."
  
4. **"Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such and effect on trial's outcome as to destroy confidence in its result."**
  
5. "The prudent prosecutor will resolve doubtful questions in favor of disclosure." This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed 1314 (1935). **\*440** And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. **\*\*1569** See *Rose v. Clark*, 478 U.S. 570, 577-578, 106 S. Ct. 3101, 3105-3106, 92 L.Ed 460 (1986); *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 14 L.Ed2d543(1965); *United States vs. Leon*, 468 U.S. 897, 900-901,104 S.Ct. 3405, 3409, 82 L.Ed.2d 677 (1984) (recognizing general goal of



establishing "procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposed the truth" (quoting *Alderman vs. United States*, 394 U.S. 165, 175, 89 S. Ct. 961, 967, 22 L.Ed.2d 176 (1969)). The prudence of the careful prosecutor should not therefore be discouraged." (Emphasis Added)

Since June, 2013, facing a second trial in State vs. Cody Eller, I was only informed by the Prosecution, 4 months after the fact, that Former Officer Stahl had been suspended, with a recommendation of termination by the Pelham Police Department, and was, in fact, terminated on August 21, 2013. (That Termination Hearing before the Pelham Selectmen was Public, at Former Officer Stahl's specific request and filmed by Comcast.). After Former Officer Stahl's Termination, the Prosecution pressed on with their intent to try Cody Eller on the two remaining Felony "B" charges despite the fact that no "new" Exculpatory Evidence was provided. Since the Superior Court Set Aside Cody Eller's verdicts in April, 2013, the Defense did not receive additional and "new" exculpatory and impeachment materials until September 2013, which resulted in former Officer Stahl's August termination.

On November, 2013 after extensive negotiations, Cody Eller agreed to finally end this 2<sup>nd</sup> Viordeal by pleading guilty to a Misdemeanor, Vehicular Assault and received a sentence of 6 months in the House of Correction, suspended for one year, with no probation, no fine, and 50 hours of Community Service. The Prosecution had overcharged Cody Eller with 1<sup>st</sup> Degree Assault (7 Vi- 15 yrs.) for which he was acquitted during trial, and 2 Felony "B" charges (3 V2- 7 yrs.) which were also dismissed.

The curtain on the case of State vs. Cody Eller has finally come down and is over. However, it is apparent that there are gaping holes in the lack of protocol and procedures for County Attorneys, Prosecutors, as well as the Court to reveal possible exculpatory evidence to the defendant and the Defense in criminal cases, which will undoubtedly result in multiple overturned guilty verdicts. This Counsel has attempted to access, by Subpoena, Former Officer Stahl's prior prosecutions, probably well over 400-500. That Discovery would have revealed that he was on the "Laurie List", and it was his duty and continued duty to reveal that for 6 years. However it appears he continued to bully defendants into confessions, possibly falsifying evidence in Court, not affording Citizens he stopped for minor motor vehicle violations with their Constitutional Rights during their arrest, which occurred within 4-5 minutes.

### Conclusion

Former Attorney General, Peter W. Heed Esq., issued a "Memorandum" to "All County Attorneys and All Law Enforcement Agencies" on February 13, 2004, regarding "Identification and Disclosure of Laurie Materials." The so called "Heed Memo" embraced Justice Souter's decision in Kyles vs. Whitley, supra., stating that

"a prosecutor has a duty to seek out Laurie material in the hands of any involved police agency." (Emphasis Added)

The current issue is no longer about "Laurie Material" or adherence to the "Heed Memo", which seems to focus on the "Laurie List". The real concern for Discovery Disclosure in Criminal prosecutions should be adherence to Federal Constitutional mandates and "Laurie" issues. The new Disclosure Statute, R.S.A., 105:13 -b has been in effect since January, 2013.

I understand that the Attorney General's Office is now considering new protocols for County Attorneys to access possible exculpatory materials in criminal cases. It should be noted that any protocols or procedures established by the Attorney General's Offices is just an instruction, and not mandated by the Courts.

The Attorney General's Office investigated former Officer Stahl in a serious shooting incident in Windham, NH in October 2012. At that time, a young man, with no real criminal record, received a very minor injury from a bullet fired from the rear of his car by former Officer Stahl despite 26 bullets fired into his car. Apparently, the A.G.'s office did not even access the "Laurie List" on which former Officer Stahl was listed, when they cleared him of this incident. I have lived State vs. Cody Eller for over 2 1/2 years and have been "front row" to these complicated "In Camera" review procedures, especially in Criminal cases. I believe this Advisory Committee may examine the following issues:

- A) At what point should the Defense have access to potential, "Exculpatory Materials and Evidence" and Impeachment Materials in Criminal prosecutions.
1. At this juncture, the Defense has a long wait behind the Local Police Departments determining what they want to reveal as "possibly exculpatory evidence", the County Attorney's office, deciding what they deem possibly "exculpatory evidence", and then the Court, "In Camera", deciding what evidence, having been siphoned down to almost nothing, need to be disclosed to the Defense.
- B) The case of State vs. Cody Eller is very illustrative of these Disclosure problems. The "Heed Memo", which all County Attorney's Offices state they embrace, states as follows with regard to what prosecutors should consider:
- "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."

C) In the prosecution of Cody Eller, former Officer **Stahl**, who was the prime witness, had a history, over 12 years, of a "pattern of conduct" of arresting youthful offenders, bullying confessions and violating their civil rights. This is exactly why he was terminated by the Pelham Board of Selectmen, his, Pattern of Conduct. (The Comcast video of that Termination Proceeding can be supplied)

1. Unfortunately, if we took each individual episode of former Officer Stahl's misconduct and isolated them, we would not see the whole picture, that "pattern of misconduct." There remains too many Gatekeepers of Exculpatory and Impeachment Evidence Disclosure, probably at least six levels, in Cody Eller's case. The Defense should be entitled to access subject to a "Confidentiality Agreement" to any possible exculpatory or impeachment materials, which have been produced and submitted by local Police Departments to the "Charging Authority", the County Attorney's Office, local Prosecutors, and the Court, before those materials are totally filtered.

The Prosecution does not know what the Defense Theory may be at Trial. In Cody Eller's case it was former Officer Stahl's pattern of misconduct over 12 years which the Gatekeepers would not know, and ultimately would prove correct, resulting in his termination.

D) The Court may also consider that the Trial Court, in addition to Local Police Authorities, and County Attorney's Offices, that they at least provide a list of what materials have been reviewed, and provided for review. Otherwise, the Defense will have no idea if any materials, possibly indicating any possible exculpatory or impeachment evidence, has any relevance to the Defense.

I thank you very much for your consideration of this important issue. I remain available should the Advisory Committee and Attorney Birch require.

Very truly yours,

  
Jeffrey M. Kaye

JMK/amc  
cc. Attorney Paul Birch