THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2019-0072

The State of New Hampshire

v.

Joshua Shaw

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
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I. Whether the trial court properly denied the defendant's request for an *in camera* review of all the officers' disciplinary records and use of force reports, where he conceded they were privileged, but never explained why he believed they existed or where material and relevant to his defense, cited *State v. Laurie*, 139 N.H. 325 (1995), challenged the State's assertion that the records contained no exculpatory information, or challenged the court's findings that RSA 105:13-b, III (2013) applied, and that he had not met his burden under it.

II. Whether the trial court committed an error that was plain when it instructed the jury the State had to prove the defendant "refused to produce his driver's license … for the purpose of examination" to convict him of violating RSA 265:4, I(e) (2014), where this Court has never interpreted the statute, the defendant agreed the court should instruct the jury that "produce means to offer to view, exhibit, or to show," and interpreting "produce" to mean show for a second would lead to absurd and unjust results and undermine the purpose of the statutory scheme.

STATEMENT OF THE CASE

The defendant, Joshua Shaw, was charged with two class A misdemeanor counts of simple assault on a law enforcement officer, *see* RSA 631:2-a, I(a) (2016); RSA 651:6, I(g) (2016), one class A misdemeanor count of attempted simple assault on a law enforcement officer, *see* RSA 629:1 (2016); RSA 631:2-a, I(a); RSA 651:6, I(g); one class A misdemeanor count of resisting arrest, *see* RSA 642:2 (2016); one class A misdemeanor count of disobeying an officer, *see* RSA 265:4, I(e) (2014); and one violation count of driving after suspension, *see* RSA 263:64 (2014). JT 3-6.[1] The defendant filed a notice he might "rely on the defense of justification under the doctrines of physical force in defense of self, defense of others, defense of premises, defense of property, and consent." ASB 43. The Rockingham County Superior Court (*Delker*, J.) held that the doctrines of physical force in defense of self or others applied and were relevant to the assault and attempted assault counts. JT 338-44.

The defendant stood trial on October 2-3, 2019, and on October 4, the jury announced it was unable to reach a verdict on one simple assault count, but found him guilty on the other counts. JT 357-72. On January 4, 2019, the court sentenced the defendant to concurrent stand-committed terms of 12 months on the attempted simple assault, resisting arrest, and disobeying an officer convictions. SH 15-16. On the simple assault

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[1] "ASB" refers to the appendix attached to the State's brief.
"DB" refers to the defendant's brief and addendum.
"EXH A" refers to the thumb drive transferred to this Court. "630," "632," and "634" refer to the video names, and the times cited are those on the Windows Media Player.
"JT" refers to the transcript of the jury trial on October 2-4, 2019.
"SH" refers to the transcript of the sentencing hearing on January 4, 2019.

conviction, the court sentenced the defendant to a consecutive term of one to two years, suspended for three years, and one year of probation, commencing upon his release. On the driving after suspension conviction, the court sentenced the defendant to a fine of $500, suspended for three years. SH 16. The court stayed the sentences pending appeal, and the State entered a *nolle prosequi* on the unresolved simple assault count. SH 18. This appeal followed.

STATEMENT OF FACTS

On May 14, 2018, Officer Andrew Feole was patrolling in Salem when a pickup truck pulling a trailer went past him. The truck's rear license plate was covered by snow, but the trailer's Michigan license plate was visible. Feole ran that plate and learned that the defendant had registered the trailer, his New Hampshire driving privilege had been suspended since 2015 for default of child support, and his description and age matched that of the driver, so he decided to pull him over. JT 39-41. Feole followed the truck onto a narrow road with snowbanks along it and then waited until it "widened up for a safer spot" before he put on his cruiser's blue lights. The truck's driver then pulled it over and stopped. JT 40.

Feole walked up to the driver's side and introduced himself. JT 43. The defendant was driving, his girlfriend, Shannon Whitley, was on the passenger's side, and a large dog was between them. JT 43, 98, 124. The defendant was "immediately hostile" and "argumentative." JT 43. Feole explained that he had stopped them because the truck's rear license plate was covered in snow, which "was a violation of misuse of plates," and that he "suspected [the driver] might be the registered owner … of the trailer, who had a suspended operating privilege in New Hampshire." JT 41. Feole then asked the defendant for his license and registration. JT 41-42. The defendant responded "that [Feole] didn't have any reason to stop him and, therefore, he wasn't going to give [Feole] his license." JT 42.

Feole repeatedly explained why he had stopped the defendant and asked for his license, and the defendant repeatedly refused to produce it. Feole asked the defendant if he owned the trailer, and he said he did, but did not say his name. Feole "needed to actually, positively, identify him,"

so he again asked for his license, and the defendant again said that he had done nothing wrong, so he would not give it to Feole. JT 42. Around that time, Whitley started recording on her cell phone, but kept the camera pointed away from the defendant. EXH A, 630.

Feole told the defendant he might be able to figure everything out if the defendant gave him his license, and the defendant responded, "If I'd done something wrong, I'd say I'd give it to you." EXH A, 630. He then reached toward the visor and said he had a license. Whitley pointed the camera at him, and he then pulled a folded paper out of the visor and said that he had a license, but he was not going to give it to Feole because it was his and he had done nothing wrong. JT 43; EXH A, 632 at 00:12-21.

The defendant cupped the paper in his left hand, twice lifted the top flap for a second with his right hand, and said that he had a license and had just renewed it "a couple weeks ago and, therefore, there was no reason for [Feole] to stop him." JT 43; *see also* EXH A, 632 at 00:21-24. Feole briefly saw "a card that looked like a license" inside the paper, but he could not read the card. JT 42, 46. The defendant then wrapped the paper around the card and put it in the visor. Feole asked, "Are you going to let me see that?" The defendant answered, "No sir." EXH A, 632 at 00:25-29.

Feole told the defendant that not letting him see the license was "a misdemeanor crime called disobeying an officer," and the defendant responded, "OK. Well, let's just get on with the getting arrested then. Let's get right on with it, so I can sue the company, sue the State. It's good to me. I know my shit's all wired tight. I was just up to the, uh, child support. I've done everything I needed to do. You might as well get your supervisor right out here. " Feole responded, "Well if that's the case, you're not going to

have anything to worry about sir." The defendant said, "I know I'm not going to have anything to worry about. You're pulling me over illegally. You're wasting my fucking time. I'm busy. I've got things to do." Feole explained that he was investigating violations, but the defendant was "kicking it up to a misdemeanor by refusing to give him his license." The defendant responded, "I'm not kicking anything up. You're pulling me over for no reason. Zero reason." Feole again explained why he had pulled the defendant over, and the defendant again insisted that Feole had no reason to. EXH A, 632 at 00:29-01:33; *see also* JT 43-44.

Whitley asked Feole how he knew who the defendant was if the plate was covered by snow, and Feole explained that the truck's plate was, but the trailer's plate was not. The defendant said, "You just lied to me." Feole said he had not. The defendant then said, "Why don't you just call your supervisor and get them down here, so I can get this show on the road." Feole responded, "[T]hey're coming down. Don't you worry." While they were speaking, the defendant repeatedly reached toward the gearshift. Whitley asked Feole for his name and badge number. The defendant told her to start recording, and she said she had. Feole then told them his name and badge number. Whitley thanked him and told the defendant she had been recording the whole time. At that point, the defendant put the truck in park, but left it running. EXH A, 632 at 01:33-02:22.

The defendant told Feole, "I haven't broken any law. I don't understand what you're doing here talking to me." Feole responded that he had already explained one law the defendant had broken and another he suspected he had broken. The defendant and Whitley then accused Feole of looking for something. Whitley put her phone down, and the defendant

said, “So, I guess what I’ll do now is invoke my right to remain silent, and I’ll let you prove what,” at which point, the dog tried to climb over him, so he told it Feole was not its friend. EXH A, 632 at 02:23-03:08.

Feole decided to arrest the defendant for disobeying an officer, but did not tell the defendant or attempt to arrest him because Feole weighed only “about 150 pounds,” the defendant weighed “about 300 pounds,” and “based on his hostile manner,” Feole thought “he would either resist arrest, or try to fight, or take off.” JT 45-46. Instead, Feole moved behind the truck and requested backup. JT 46, 95.

Feole’s supervisor, Sergeant Robert Genest, Detective Lieutenant Kevin Fitzgerald, and Officer Matthew MacKenzie arrived at the same time. The defendant told Whitley, “Here come the cops. Roll up your window.” She declined because she was smoking and the dog was happy with it down. Genest and MacKenzie then walked up to Feole, he briefed them, and Whitley picked up her phone and began filming them. EXH A, 632 at 03:15-20; *see also* JT 46-47, 92-95, 130, 168-70, 195-96.

Feole, Genest, and MacKenzie went to the driver’s side window, which was part way down, and Feole said, “All right sir. Can you please step out for me?” The defendant asked, “Step out of the vehicle?” Feole answered, “Yes please.” The defendant asked, “What for?” Feole answered, “You refused to give me your license and I explained to you that that’s a misdemeanor.” The defendant responded, “You never told me I’ve broken a crime. I haven’t broken any laws. I don’t even know why you’re even here arresting me.” Feole said, “I already explained to you that having your rear license plate covered in snow is a motor vehicle violation, and two, that I have reasonable, articulable suspicion that you are the registered owner of

this car[(sic)], and that your license is suspended in New Hampshire." The defendant responded, "Well, you better make sure that's 100% first because if it's not, I'm going to sue you personally." EXH A, 632 at 03:45-04:20; *see also* JT 96, 196-97.

Genest started to open the door, and the defendant slammed it shut, locked it, rolled up the window, and yelled, "Get your fucking hands off the door you. Get the fuck off me." Whitley yelled, "That's assault." The defendant yelled, "What are you guys going to do, fucking assault me?" Whitley repeatedly yelled, "That's assault," and the defendant pulled out his phone and said, "I'm calling the State Police right now." Genest said something, and the defendant responded, "Yeah, because you're assaulting me. I ain't under arrest for nothing. I haven't broken any laws." Genest said, "You're under arrest." The defendant responded, "You're not allowed to do that. I'm going to sue your ass. I'm going to sue you." He then told Whitley to call 9-1-1, and she said that she could not because she was recording, so he gave her his phone and she called 9-1-1. EXH A, 620 at 04:20-05:07; *see also* JT 61-62, 96-97, 125, 170-71, 197.

Genest told the defendant that if he did not get out, they were going to have to smash the window and pull him out because he was under arrest. JT 48, 63, 97-98, 134, 138, 171. The defendant yelled, "Now you're threatening me?" Genest again ordered him to get out, and he responded, "I'm not doing anything. I'm not getting out of the car [(sic)]." Genest said something about a license, and the defendant responded, "I have an ID. My shit's all legal and legit. What are you going to do? Shoot me in the back of the head once I get out there?" Genest answered, "No. We're just going to arrest you." The defendant yelled, "You going to shoot me? Is that what

you're going to do? Beat me up?" Genest said, "Open the door," and the defendant responded, "I'm not opening the door." Genest said something and then used his flashlight to break the window. MacKenzie and Feole reached inside the door and tried to unlock it. The defendant tried to hit them and said, "Get out of here. Get the fuck out." He then leaned back, kicked Genest and MacKenzie, and tried to put the truck in drive. EXH A, 620 at 05:08-52; *see also* JT 48-49, 64, 98-99, 172-73, 175, 182, 197-99.

Whitley told the 9-1-1 operator the officers were assaulting them. EXH A, 620 at 05:51-52. Genest then reached inside the truck and tried to open the door, and the defendant kicked him. MacKenzie pulled out his Taser, said he was going to use it, pointed it at the defendant, and yelled, "Get the fuck out of the car [(sic)] right now. I'm telling you, get the fuck out of the car [(sic)]." Whitely then stopped recording. EXH A, 632 at 05:52-53; *see also* JT 47-48, 99, 200.

Moments later, Whitley started recording again, but kept the camera pointed away from the defendant. The officers again tried to unlock the door, but could not because the defendant kept kicking and taking swings at them. They tried to grab his arms and legs, but he pulled away. He then grabbed keys, put them between his knuckles, swung them at the officers, and yelled, "You're assaulting me." MacKenzie then yelled, "If you hit me again, you're dead. I'm going to knock you out." EXH A, 634 at 00:01-05; *see also* JT 49, 64-65, 72-73, 106, 116-17, 152-53, 173, 183, 197-98, 203, 214-15.

Fitzgerald ran up and said, "He's got his key. Watch his hand." McKenzie said, "If you hit me with that key, you're getting it." Fitzgerald then tried to unlock the door, but could not because the defendant kept

trying to hit him with the keys. The defendant yelled something about "assault" and then yelled, "Get the fuck out of here. These cops are fucking ridiculous." Whitley told the 9-1-1 operator that the officers were there "for no reason" and were "fighting with them." EXH A, 634 at 00:01-15; *see also* JT 142, 153, 173, 182-84, 216, 219.

MacKenzie fired his Taser's prongs into the defendant, who swatted them away, continued kicking and swinging the key at the officers, and yelled, "Fuck you. Stop breaking my shit. Stop breaking my shit." The defendant tried to put the truck in gear, so an officer took the ignition keys. The defendant yelled, "They just took my keys." Whitley told the 9-1-1 operator the officers had pulled them over, taken the keys, and assaulted them for no reason. While she was doing so, the officers repeatedly ordered the defendant to open the door, but he just kept kicking and punching at them, so MacKenzie fired his Taser's second set of prongs into the defendant. The defendant pulled them out and kept fighting, so MacKenzie put the Taser on his leg, gave him a "drive stun," *i.e.*, a direct shock, and then said, "Open the door or I am going to do it again." EXH A, 634 at 00:15-52; *see also* JT 50, 64-66, 69, 72, 99, 102, 174, 197-98, 201-03.

Fitzgerald told MacKenzie to watch out because the defendant still had a key in his fist. The officers repeatedly yelled, "Open the door." The defendant yelled, "You guys. What the fuck is wrong with you?" An officer yelled, "You're under arrest. You're resisting." The defendant yelled, "Under arrest for what?" An officer yelled, "Open the door." The defendant yelled, "Under arrest for what?" The officer yelled, "You're under arrest. You assaulted two police officers." Whitley yelled to the 9-1-1 operator, "No. He did not assault them." Genest pulled out his Taser and yelled,

"Open that door. You'll get it again." Genest then fired his Taser's prongs into the defendant, and he and MacKenzie repeatedly yelled, "Open the door." The defendant yelled, "I can't do anything." He then pulled out the prongs, but did not try to open the door. EXH A, 634 at 00:53-01:20; *see also* JT 104-06, 152-53, 202-03.

MacKenzie and Genest repeatedly yelled, "Open the door." The defendant yelled, "What the fuck is wrong with you guys?" He then said to Whitley, "Tell the police man." The officers kept yelling, "Open the door." Genest then fired his Taser's second set of prongs into the defendant, and the defendant called them "little fuckers." They yelled, "Open the door," and the defendant pulled the prongs out and yelled, "For what?" The officers yelled, "Open the door. Open the door." The defendant responded, "I didn't do anything." An officer said, "You're under arrest." Whitley yelled, "For what?" The defendant yelled, "I didn't do anything." Whitley yelled, "You assaulted us." The defendant yelled, "You busted my fucking window and everything." Whitley told the 9-1-1 operator, "Please. The door's broken." An officer asked, "Will it open?" The defendant responded, "Probably not anymore. You guys just fucked it all up." However, he did not try to open the door. EXH A, 634 at 01:20-55; *see also* JT 50.

It was a "bad situation" because there was traffic coming up behind the officers and the defendant was still fighting with them and preventing them from opening the door. JT 175. Fitzgerald and Genest went to the passenger's side and Genest banged on the door, and said, "Open that door and get out." Whitley said, "No." Genest said, "Open the door and get out. You're under arrest." Whitley said, "No. No." MacKenzie told the defendant, "Open the door. You're under arrest." The defendant yelled,

"Nobody's getting out of this vehicle." He reached over to lock Whitley's door, and MacKenzie said, "Open the door. You're under arrest." He then grabbed the defendant's hand, and the defendant pulled it away. Whitley yelled, "No. My dog cannot get out." She said that her door was locked and then yelled, "My dog. Do not let my dog out." Fitzgerald said, "Open the door. You're under arrest." The defendant responded, "Come on man." Fitzgerald said, "Get out. You're making it a lot harder on yourself." The defendant yelled, "There's nothing I've done wrong. You guys are here for," at which point, MacKenzie gave him another "drive stun." EXH A, 634 at 01:56-02:11; *see also* JT 117, 175, 203-04.

Genest told Whitley to open her door and get out or he was going to smash her window. JT 51, 117, 127, 175-76. She yelled, "No. No. No. My dog." Genest broke the window, and the defendant yelled, "What the fuck?" MacKenzie said, "You're resisting arrest. Get out. You're a fucking idiot." The defendant responded, "Fuck you." Genest again told Whitley to open her door, and she said, "I can't because I got my dog." The defendant said, "So open the fucking door." Genest unlocked Whitley's door, and she yelled, "No. My dog. My dog." The defendant said, "Can you grab the keys?" Fitzgerald said, "Just open the door." An officer said, "It won't open now. I've tried." At that point, Whitley got out of the truck and stopped recording. EXH A, 634 at 02:11-41; *see also* JT 51, 117, 126, 175-76.

Genest got the dog out of the truck, crawled into the passenger side, and he and Feole then tried to pull the defendant out, but he punched at them and held onto the steering wheel. JT 51, 73-74, 117, 154, 176. Genest wrapped his arms around the defendant's head and pulled. JT 117. MacKenzie then hit the defendant's hands and wrists until the defendant

lost his grip. JT 155, 204. Feole, Fitzgerald, and Genest then pulled the defendant from the truck. He landed on his stomach between the passenger's side and the snowbank, his legs slid under the truck, and he tucked his hands under his stomach. JT 51, 118, 156, 176, 177, 186.

By that point, Officers Steven DiChiara and Joseph DeFeudis had arrived. JT 238, 252. Feole, MacKenzie, and DiChiara repeatedly ordered the defendant to take his arms out and put them behind his back, but he refused, so they tried to pull his arms out, but he resisted. JT 51, 156, 187, 205, 238, 252. DiChiara pulled out his Taser and gave the defendant a "drive stun" on the bare back. JT 238-39. Feole again tried to pull the defendant's right arm out, but he resisted. Verbal commands, soft-hand controls, and Taser use had been ineffective and hard-hand controls were next on the force continuum, so Feole punched the defendant in the rib area. JT 51-52, 74, 205. The defendant "released his arm enough so that [Feole] could put it behind his back and put a handcuff on it." JT 52. However, he refused to release his left arm, so DiChiara gave him another "drive stun." The defendant took his arm out and the officers put a handcuff on it. JT 74-76, 84-86, 118-19, 157, 160, 176-77, 205, 239, 255.

DeFeudis told Whitley he needed her phone for evidence, but she refused to turn it over, so he arrested her for hindering apprehension and seized it. JT 124, 256-57. An officer searched the phone pursuant to a warrant and copied the videos. JT 264; EXH A. Genest, MacKenzie, DiChiara, and Feole filed a use of force reports. JT 127-28, 206, 248-49.

The Salem Police Department (SPD) had been using Tasers for only about two years at the time of the defendant's arrest, JT 242, and it was the first time Genest had used one "in ten plus years," JT 107. MacKenzie had

"done the job for 14 years, and [had] never had … any real issues with … anything at all." JT 227-28. DeFeudis and Fitzgerald did not file forms because they had not used Tasers or any hard-hand controls. JT 177-78, 225-26. In fact, Fitzgerald did not carry a Taser, JT 173, and he rarely had to use hands-on control, JT 178.

Genest and MacKenzie used Tasers on the defendant because their presence, verbal commands, and soft-hand controls had been ineffective, his violent reaction had put them, Whitley, and the dog in danger and made it safer to use Tasers, and they could not use pepper spray on him without affecting everyone else. JT 119-20, 200-01, 238-39. None of the officers were disciplined or required to take additional training because they had complied with the SPD's use of force continuum and Taser policy, and the only issue had been with some of their language. JT 85, 161, 177-78. However, the defendant filed a civil lawsuit accusing them of using unlawful and excessive force, and it was still pending at the time of his trial. JT 88, 226-27.

SUMMARY OF THE ARGUMENT

I. This Court should not address the substance of the defendant's arguments challenging the trial court's denial of his motion for an *in camera* review of the officers' personnel files and other internal police files because he did not preserve them in the trial court and has not invoked this Court's plain error rule on appeal. If this Court reviews the arguments under its rule, he cannot meet that strict standard for several reasons. First, the trial court did not err in denying the motion because the information the defendant sought was privileged, but not exculpatory, RSA 105:13-b, III (2013) applied, and he never explained how the information was relevant and material to his defense. Second, any error was not plain because the State said there was no exculpatory evidence in the files. Third, any error did not affect the defendant's substantial rights because his defense applied only to the assault and attempted assault charges, the evidence he sought was inadmissible, and there was overwhelming evidence that he kicked MacKenzie and attempted to hit him with a key before MacKenzie first Tased him.

II. The trial court properly concluded that the phrase "for the purpose of examination" in RSA 265:4, I(e) (2014) modifies both variants of the crime because holding that it did not modify the "[r]efuse, on demand of such officer, to produce his license to drive" variant would lead to absurd and unjust results, render it a virtual nullity, and undermine the purpose of the statutory scheme. Even if the court erred, the error was not plain because the defendant's argument turns upon an interpretation of the statute this Court has never adopted.

ARGUMENT

I. THIS COURT SHOULD NOT CONSIDER THE SUBSTANCE OF THE DEFENDANT'S ARGUMENTS CHALLENGING THE DENIAL OF HIS MOTION FOR AN *IN CAMERA* REVIEW BECAUSE HE DID NOT PRESERVE THEM IN THE TRIAL COURT AND HAS NOT INVOKED THE PLAIN ERROR RULE ON APPEAL, AND EVEN IF THIS COURT REVIEWS THEM FOR PLAIN ERROR, THERE WAS NONE.

On May 14, 2018, the defendant requested that the State provide him "with information concerning any and all matters whereby force was used on an individual" by the officers, and "any and all disciplinary actions regarding [them]." On May 19, the State responded that it "could not provide [it] absent a court order." DB 36. The defendant then filed a motion for an *in-camera* review. DB 35-39. He first stated that he sought review of "materials which [were] subject to a privilege," so he had to: (1) "establish 'a reasonable probability that [they] contain[ed] information that [was] material and relevant to his defense,'" DB 36 (quoting *State v. Gagne*, 136 N.H. 101, 105 (1992)), and (2) "present some specific concern, based on more than mere conjecture, that, in reasonable probability, w[ould] be explained by the information," DB 37 (citing *State v. Graham*, 142 N.H. 357, 363 (1997)). He also noted that this Court has "recognized that 'setting the bar too high' risks violation of the right to due process as guaranteed by Part I[,] Article 15 of the New Hampshire Constitution." DB 37 (citing *Graham*, 142 N.H. at 363).

The defendant then argued that there was "a reasonable probability that the review w[ould] provide evidence that [was] relevant and material to [his] potential defense" because: (1) he "assert[ed] that any force used by

him was justified due to the excessive and unlawful force of the … officers," DB 37; (2) "information concerning disciplinary actions of [them] and any previous use of force employed by [them was] highly relevant to th[at] defense," DB 37; (3) a recent arrest of Bob Anderson also "involved an excessive use of force and … Tasers, and may very well have involved some of the same officers," and (4) it "seem[ed] apparent from the evidence provided that the officers involved [here had] not, at a minimum, follow[ed] proper [Taser] policy." DB 38.

The State objected. DB 40-44. It first noted that RSA 105:13-b (2013): (1) requires "the State to disclose exculpatory evidence in a police personnel file … or seek a determination by the court if the State [is] unsure whether certain evidence is exculpatory," DB 41, n.1, and (2) then "states, '[n]o personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case,'" DB 41 (quoting RSA 105:13-b, III). The State next noted that in *State v. Puzzanghera*, 140 N.H. 105 (1995), this Court held that a defendant must establish probable cause "that the file contains evidence relevant to his case in a manner analogous to the principles set forth in *Gagne* ...." DB 41.

The State then argued that the defendant had failed to meet that burden because: (1) its review of Andersen's file had revealed that none of the officers were involved in the use of force against him, DB 42, and (2) the evidence refuted the defendant's "assertion that the officers [had] not follow[ed] proper procedure when deploying their TASERs," DB 42-43.

The State next said, "If there was exculpatory information contained in the officers' personnel files relating to their credibility, it would be disclosed to the Defendant. That is not the case here, [he] is simply on a fishing expedition to obtain any disciplinary actions taken against [them] …." DB 43. The State then argued that: (1) the defendant had "assert[ed] no basis for the Court to find that any officer's previous use of force [was] relevant to the question" of "whether … the defendant acted in self-defense," and (2) it was not relevant because: (a) it would "not have any tendency to make the existence of any fact that [was] of consequence … more probable," (b) he had "video of nearly the entire encounter," (b) he could challenge the officers' use of force during cross-examination, and (c) the jury could "draw conclusions based on [all] the evidence …." DB 43 (citing *N.H. R. Evid.* 401).

On August 22, 2018, the trial court issued a written order that said, "Denied for the reasons set forth in the State's objection. The defendant has failed to meet its burden to trigger *in camera* review of the police personnel or other internal police files.'" DB 34. The defendant did not move to reconsider the order.

On appeal, the defendant first argues that "[t]he court erred in denying [his] request for an *in camera* review of reports of the officer-witnesses' use of force in other cases, DB 16, because: (1) they "were not likely to be contained in personnel or other internal police files," DB 17; (2) the State was required to disclose exculpatory evidence, DB 17, which needed only to be "material to the preparation of [his] case,'" DB 17 (quoting *State v. Laurie*, 139 N.H. 325, 332 (1995)); (4) he "articulated how reports of … use of force in other cases could be material to his

defense," DB 17, (5) they were because they "may have provided an argument that the officers were motivated to allege that [he] assaulted them in order to hide their own, repeated use of force, which, if repeated, could result in disciplinary action," DB 17; and (5) the "video did not capture the entire interaction," so it "did not obviate the need … to disclose exculpatory evidence," DB 18.

The defendant next argues that: (1) RSA 105:13-b, I (2013), specifies "no mechanism for th[e] required disclosure" of exculpatory evidence, DB 18; (2) a 2004 Attorney General (AG) memorandum requires: (a) police departments to retain potentially exculpatory information in officers' personnel files and notify the county attorney it exists, and (b) county attorneys to compile a *Laurie* list of those officers, DB 19; and (3) "[b]y checking the list, prosecutors know whether there may be exculpatory evidence in an officer's file," but "it is unclear whether the list is complete or accurate," DB 19. The defendant then argues that: (1) "[e]vidence that the officer-witnesses … had used excessive force in other cases or had faced disciplinary actions [would have been] exculpatory," DB 19, even if it "may not have been admissible," DB 20; (2) would have been in their personnel files, DB 20; (3) the State never said that: (a) it looked in the files, (b) it checked the list, or (c) SPD "participated in the [AG's] mechanism," DB 20, and (4) therefore, "the court erred in denying [his] request based on the State's unexplained assertion that exculpatory evidence, if any, would be disclosed," DB 20-21.

The defendant last argues that "[e]ven if the State had tried to satisfy its obligation to provide exculpatory evidence," and the information he sought was all in confidential files, DB 21, "[t]he trial court erred in finding

that [he] had failed to meet his burden to trigger an *in camera* review," DB 21, because: (1) he had "articulated a theory for why the officers' use of force in other situations could be material and relevant in his case," (2) the information "was likely to exist," given that "use of force is a common component of law enforcement," DB 22, and (3) "admissibility [was] not required," DB 22-23.

A. This Court should not address the substance of the defendant's arguments because he did not preserve them in the trial court and has not invoked the plain error rule on appeal.

"It is the burden of the appealing party . . . to provide this [C]ourt with a record sufficient to decide [his] issues on appeal, as well as to demonstrate that [he] raised [his] issues before the trial court." *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004) "The trial court must have had the opportunity to consider any issues asserted by the defendant on appeal; thus, to satisfy this preservation requirement, any issues that could not have been presented to the trial court before its decision must be presented to it in a motion for reconsideration." *State v. Mouser*, 168 N.H. 19, 27 (2015).

The defendant argues that the foregoing issues were "preserved by [his] motion and the court's ruling." DB 5. However, as demonstrated above, he never made any of those arguments in his motion. Therefore, it could not have preserved them.

Furthermore, the court denied his motion "for the reasons set forth in the State's Objection." DB 34. Thus, to the extent the defendant believed that the court erred in doing so, "it was incumbent upon [him] to move for reconsideration." *Mouser*, 168 N.H. at 27. "The record on appeal, however,

does not demonstrate that [he] filed such a motion." *Id.* Therefore, his arguments are not preserved. *Id.*; *see also State v. Eaton*, 162 N.H. 190, 195 (2011) (Eaton's argument "that re-review of the records was necessary so that he could obtain appellate review of the trial court's determination that they contain no discoverable information" was not preserved because he failed to demonstrate "that he ever made [it] to the trial court").

Moreover, the defendant has not invoked this Court's plain-error rule on appeal. Therefore, this Court should decline to address the substance of the foregoing arguments. *See State v. Brum,* 155 N.H. 408, 417 (2007) (declining to consider Brum's argument because he did not preserve it in the trial court or invoke the plain-error rule on appeal).

B. Even if this Court addresses the defendant's arguments under the plain-error rule, it must affirm because the trial court did not err, and even if it did, the error was neither plain nor affected the defendant's substantial rights.

> [This Court will] apply the [plain error] rule sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result. To reverse a trial court decision under the plain error rule: (1) there must be an error; (2) [it] must be plain; (3) [it] must affect substantial rights; and (4) [it] must seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Pennock, 168 N.H. 294, 310 (2015) (quotations omitted). "[T]he defendant bears the burden under the plain error test." *State v. Cooper*, 168 N.H. 161, 168 (2015). He cannot meet that strict standard because there was no error and even if there was, it was not plain, and it did not affect his substantial rights.

i. The trial court did not plainly err in denying the defendant's motion because the information he sought was in personnel or other internal police files, was not exculpatory, and was not relevant.

The defendant's failure to make his appellate arguments in the trial court deprived the State of an opportunity to respond to them. Thus, the facts necessary to rebut his arguments are not in the record. Therefore, if this Court considers the defendant's unpreserved arguments, the State offers the following responses and additional information:

The State contacted the trial court prosecutor and SPD Lieutenant Joel Dolan and determined that the prosecutor and SPD were, and still are, participating in the mechanism first set out in the AG's 2004 memorandum, *see Gantert v. City of Rochester*, 168 N.H. 640, 645 (2016), and then updated in the AG's 2017 memorandum, ASB 48-72, and the AG's 2018 memorandum, ASB 73-78. An officer's use of force reports were, and still are, in confidential, internal police files. Unresolved or proven complaints of excessive force and disciplinary actions, were, and still are, in an officer's personnel file.

When the defendant filed his motion for an *in-camera* review, the prosecutor again checked the *Laurie* list, which is now called the Exculpatory Evidence Schedule (EES), and determined that none of the officers were on it. She also contacted an SPD officer, and he confirmed there was no exculpatory information in the officers' files. She then informed defense counsel she could not provide the information he sought without a court order, DB 36, which is what the AG's mechanism required, ASB 60. It is reasonable to assume the trial court was aware of that

mechanism and the fact that the prosecutor followed it because she routinely appeared in criminal cases in that court.

Furthermore, in her objection to the defendant's motion, the prosecutor said, "If there was exculpatory information contained in the officer[s'] personnel files relating to their credibility, it would be disclosed to the Defendant. *That is not the case* …." DB 43 (emphasis added). Therefore, contrary to the defendant's claim, the prosecutor did not just make an "unexplained assertion that exculpatory evidence, if any, would be disclosed." DB 21 (quotations omitted). Instead, she explicitly stated there was no such evidence, and implied that, if new exculpatory evidence arose, she would provide it to the defendant as required by RSA 105:13-b, I. Thus, the trial court did not err in concluding that the information the defendant sought was both privileged and non-exculpatory, so he had to meet the requirements of RSA 105:13-b, III.

It should also be noted that, contrary to the defendant's claim, this case is not "similar to *In re State* (*Theodosopoulos*), 153 N.H. 318, 319-22 (2006)." DB 22. Theodosopoulos was charged with "failure to yield" after he "was involved in a motor vehicle collision … with a vehicle driven by … an off-duty Hooksett police officer." He then "filed a motion to compel discovery, requesting the State to provide, among other things, all information, documentation or disciplinary memoranda which would serve as *exculpatory evidence* either … relate[d] to [the officer's] credibility or his use of police vehicles," and made the request "pursuant to the *State v. Laurie* decision." *Id.* (emphasis added) (quotations omitted). The trial court ordered the Hooksett Police Department to turn the officer's personnel file over to the State, and the State appealed. *Id.*

This Court held that because Theodosopoulos's "request was limited to *exculpatory evidence*, related either [to the officer's] credibility or his use of police vehicle, pursuant to the *State v. Laurie* decision, … [it was] directly relevant to the central issues in the underlying case and m[ight] be admissible for impeachment purposes." *Id.* (emphasis added). This Court next held "that to the extent [the officer's] confidential personnel file contain[ed] such information, [Theodosopoulos was] entitled to [it] under Part I, Article 15 of the State Constitution and *Laurie*." *Id. at* 321. This Court then held that "[b]ecause [Theodosopoulos was] not requesting generalized information that m[ight] be contained in [the officer's] confidential personnel file, the threshold finding of probable cause and subsequent *in camera* review, as set forth in RSA 105:13-b, [were] not required," so the trial court had not erred. *Id.* at 322.

Here, the defendant did not limit his request to exculpatory information or cite *Laurie*. Instead, he requested all information concerning the officers' use of force against others and disciplinary actions taken against them for any reason, and he never claimed any of it was exculpatory. Therefore, *Theodosopoulos* is nothing like this case and it belies, rather than supports, the defendant's arguments.

In addition, although it is likely that the officers had filed use of force reports in other cases, DB 22, the defendant has not cited, nor could the State find, any authority that supports the proposition that an officer's repeated use of reasonable and necessary force can "result in disciplinary action," DB 17, and any such claim defies common sense. Therefore, the officers' use of force reports in other cases would have been exculpatory only if they had used excessive force, and if they had, the information

would have been included on the EES and put in their personnel files, which the State said contained no exculpatory information, DB 43.

Moreover, the defendant never explained why "information concerning disciplinary acts of the involved officers and any previous use of force employed by [them was] highly relevant to [his] defense." Instead, he merely stated that it was. DB 23. The defendant also never said that he knew or had reason to believe the officers had previously been disciplined or used excessive force. Instead, he merely speculated that they might have used excessive force against Andersen, DB 37, and the State then told the court none of them had, DB 42. Therefore, for all the foregoing reasons, the trial court did not err in holding that "[t]he defendant ha[d] failed to meet its burden to trigger *in camera* review of the police personnel or other internal police files," DB 34, and even if it did, the error was not plain. *See Puzzanghera*, 140 N.H. at 107-08 (holding that Puzzanghera's assertions that he heard "rumors about the officer's participation in a drug rehabilitation program" and used drugs with him were insufficient to demonstrate "there [was] any realistic and substantial likelihood that evidence helpful to his defense would be obtained").

ii. Even if the trial court erred and the error was plain, it did not affect the defendant's substantial rights because the information he sought was inadmissible, and there was overwhelming evidence he assaulted MacKenzie and attempted to assault him and other officers before he was Tased.

"Generally, to satisfy the burden of demonstrating that an error affected substantial rights, the defendant must demonstrate that the error

was prejudicial, *i.e.*, that it affected the outcome of the proceeding." *State v. Charest*, 164 N.H. 252, 256 (2012). The defendant cannot meet that burden.

In the trial court, the defendant argued that the information he sought was relevant and material to his justification defense, DB 36, and the trial court ruled it applied only to the simple assault and attempted simply assault charges, JT 338-44. The jury then convicted the defendant of assaulting MacKenzie "by kicking him in the forearm," JT 4, 357, and attempting to assault MacKenzie, Genest, and/or Feole "by swinging his closed fist with keys protruding from it at [their] faces, JT 4-5, 357. Thus, the question is whether the information he sought—all the officers' use of force reports and disciplinary actions—would have changed the verdicts on those charges. The answer is no.

In *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015), this Court held that a prior incident of excessive use of force by the officers, "without something more (such as evidence that [they] lied or misrepresented the facts) would not be admissible to impeach [their] general credibility because an instance of excessive force is not probative of truthfulness or untruthfulness." *Id.* at 784. This Court also held that "even if a future case were to arise in which a claim of excessive force was made against one of the [officers], the prior incident would not be admissible simply to show [the officer's] propensity to engage in such conduct." *Id.* In addition, in *State v. Furgal*, 164 N.H. 430, 438-39 (2012), this Court held that evidence the victim and his friends had been involved in an altercation at the same location the night before Furgal killed the victim was not relevant to his justification defense because he not aware of the details of

the altercation when he killed the victim. Therefore, it is clear that none of the information the defendant sought would have been admissible.

In any event, Whitley's second video showed Genest reaching into the truck and the defendant trying to hit and kick him. EXH A, 632 at 5:40-46. Whitley did not film the defendant kicking MacKenzie or trying to hit the officers with a key in her third video, but she did record audio of MacKenzie saying, "If you hit me again, I'm going to fucking knock you out," Fitzgerald saying, "He's got his key. Watch his hand," MacKenzie saying, "If you hit me with that key, you're getting it," and a Taser then going off for the first time. EXH A, 634 at 00:01-07. MacKenzie never said the defendant hit him with his hand. Thus, the only reasonable conclusions were: (1) that the defendant kicked MacKenzie, tried to kick him again, armed himself with a key, and tried to hit MacKenzie with it before MacKenzie shot him with the Taser the first time, and (2) that MacKenzie was justified in doing so because he "reasonably believe[d] it [was] necessary to effect [the defendant's] arrest" and "defend himself or a third person from what he reasonably belie[d] to be the imminent use of non-deadly force …." RSA 627:5, I (2016). In other words, there was overwhelming evidence that supported the verdicts. Therefore, the information the defendant sought would not have affected the verdicts, and this Court must affirm them.

II. THE DEFENDANT'S ARGUMENT THAT THE TRIAL COURT MISINTERPRETED THE DISOBEYING AN OFFICER STATUTE IS NOT PRESERVED, AND HIS ARGUMENTS THAT THE COURT DID SO, AND THAT THE ERROR WAS PLAIN AND PREJUDICIAL LACK MERIT.

The disobeying an officer statute, provides, in relevant part: "No person, while driving or in charge of a vehicle, shall … [r]efuse, on demand of such officer, to produce his license to drive such vehicle … or to permit such officer to take the license … in hand for the purpose of examination." RSA 265:4, I(e) (2014). The complaint against the defendant alleged, in relevant part, that he, "while driving or in charge of a vehicle, … knowingly refused on demand of a law enforcement officer … to produce his license to drive such vehicle …." JT 5-6.

During cross-examination, defense counsel repeatedly tried to get Feole to say he did not dispute that the defendant had produced his license, JT 56-57, 89-90, and each time, Feole responded that the defendant had not handed it to him, and that he could not read it, JT 57, 89-90. The last time, Feole also said:

> I guess I'd have to know, is there a legal definition of the word produced? Because that's where … I'm at a stop right now, because he physically had it in his hand. But when I think of the word produce, I think of handing it to or letting me observe it, read it thoroughly so I can actually see the details of it. If that's your definition of produce, I'd say no.

Defense counsel responded, "Right. But if my definition of produce is, hey, I grab my license, and I pull it out, and I show it to you; that's produced?" Feole answered, "Yes." JT 90.

The court later noted that there was a "dispute about what produce the license mean[t]." JT 229-30. The defendant argued that the statute set out "two alternative ways to charge." JT 230. The following day, he argued that failing to produce a license and failing to hand it over were two separate variants, and he had been charged with only the first. JT 269. The State responded that "a general definition of produce [was] to show or provide for consideration, inspection, or use," and "simply, flashing what appeared to be a license" did not meet the definition, JT 270, "or the purpose of the statute," JT 271. The defendant argued that the court should instruct the jury he had "not been charged with failing to hand the license over." JT 271. The State objected. JT 272. The court then said that it would give the defendant's instruction and "a dictionary definition of the word produce, so that [the jurors] could adequately assess whether the circumstances … m[et] that definition." JT 272-73.

The court later said that it had concluded the "phrase 'for the purpose of examination' belong[ed] to both produce and take in hand," so it had added it to the instruction and added that "produce" was defined as "to offer to view, exhibit, or to show." JT 277. The defendant agreed to the addition of the definition, but objected to the addition of the phrase "for the purpose of examination" on the grounds that it substantively amended the complaint and prejudiced him. JT 278-79. The court held that it did not because it "mean[t] the same thing as the term produce," and "the purpose of … produce your license [was] to allow an officer to examine [it]" JT 279. The defendant reiterated his argument. JT 280. The court then held that adding the phrase did not "change[] the substance of the [charge]," but instead "correctly inform[ed] the jury on … the elements," JT 280, that the

cross-examination had made that clarification necessary, and that it did not prejudice the defendant. JT 280-81.

On appeal, the defendant argues that the "court erred in its interpretation of the … statute and … added words that the legislature did not intend to be added to the variant of the crime that was charged." DB 29. He also argues that although his "objection did not focus on whether the court was correctly interpreting the statute," he did object to adding that language, so he has "raised the issue as both preserved and plain error." DB 27. However, none of his statutory interpretation argument is preserved because he never specified at trial that his objection to adding the phrase "for the purpose of examination" was based on statutory interpretation. *See State v. Dodds*, 159 N.H. 239, 243–44 (2009) (holding that because Dodds did not specify at trial that his motion to dismiss was based on statutory interpretation, his statutory interpretation arguments were waived). Therefore, the only questions are whether the trial court erred in interpreting the statute, and whether the error was plain. The answer to both questions is no.

A. The trial court did not err in interpreting the statute because produce means to show for the purpose of examination, and interpreting it to mean only show for a moment would lead to absurd and unjust results and undermine the purpose of the statutory scheme.

This Court has never interpreted RSA 265:4, I(e). Thus, the resolution of the issue of whether the phrase "for the purpose of examination" applies to both variants of the offense requires statutory

interpretation, which is a question of law" that this Court "will review *de novo*." *State v. Lantagne*, 165 N.H. 774, 777 (2013).

> [This Court will] first look to the language of the statute itself, and, if possible, construe [it] according to its plain and ordinary meaning. [This Court will] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [It will also] construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [this Court will] not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables [it] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.

State v. Maxfield, 167 N.H. 677, 679 (2015) (quotations and citations omitted). This Court will "construe the Criminal Code 'according to the fair import of [its] terms and to promote justice.'" *Lantagne*, 165 N.H. at 777 (quoting RSA 625:3 (2016)).

The State does not dispute that the statute includes "two alternative versions of the *actus reus*, 'to produce' and 'to permit such officer to take the license in hand ….'" DB 28 (ellipsis omitted) (quoting RSA 265:4, I(e)). However, the State does dispute that "for the purpose of examination" does not modify both versions, DB 29, because interpreting the statute in that manner would lead to an absurd and unjust result and undermine the purpose of the statutory scheme.

Under the defendant's interpretation of the statute, a driver who permitted an officer to take his license in hand, but then took it back before the officer could examine it would be guilty of violating the statute, but a

driver who flashed his license for a second would not. That is "an absurd and unjust result," so this Court will not interpret the statute in that manner. *State v. Bulcroft*, 166 N.H. 612, 614 (2014).

Furthermore, contrary to the defendant's claim, it does not make "sense that the legislature would require a driver either to produce a license, that is display or show it, or to allow the officer to demand in-hand possession of the license only for the purpose of examining it," DB 29, because producing a license for less time than is necessary for an officer to examine it serves absolutely no purpose. In fact, interpreting the "produce" variant in that manner would render it "a virtual nullity," so this Court will not do so. *Appeal of Wilson*, 161 NH. 659, 664 (2011).

Moreover, it is beyond dispute that the purpose of requiring a driver to have his "license upon his person or in the vehicle in some easily accessible place" and to "display the same on demand of and manually surrender the same into the hands of the demanding officer for the inspection thereof," RSA 263:2 (2014), is to enable the officer to positively identify the driver and determine whether the license is valid. Displaying or producing a license for less time than is necessary for an officer to do so would completely undermine that purpose. Therefore, for all the foregoing reasons, the trial court did not err in interpreting the statute.

i. Even if the trial court erred, the error could not have been plain because the defendant's arguments turn upon an interpretation of the statute that this Court has never adopted.

"When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error.

'Plain' as used in the plain error rule is synonymous with clear or, equivalently, obvious." *Pennock*, 168 N.H. at 310. (quotations, citations, and parentheticals omitted). An error cannot be plain if the defendant's argument "turns upon an interpretation of [a statute] that [this Court] has never adopted." *Depanphilis v. Maravelias*, No. 2017-0139, order at 3 (N.H. July 28, 2017) (non-precedential).

Here, the defendant's arguments turn upon an interpretation of RSA 265:4, I(e) that this Court has never adopted, so any error by the trial court could not have been plain. Therefore, this Court must affirm the conviction.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
Gordon J. MacDonald
Attorney General

April 23, 2020

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CERTIFICATE OF COMPLIANCE

I, Susan P. McGinnis, hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), this brief contains approximately 9,376 words, which is less than the total permitted by the rule. Counsel has relied on the word count of the computer program used to prepare this brief.

April 23, 2020 /s/ *Susan P. McGinnis*

CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that a copy of the State's brief will be served on Stephanie Hausman, Deputy Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

April 23, 2020 /s/ *Susan P. McGinnis*

APPENDIX TABLE OF CONTENTS

THE STATE OF NEW HAMPSHIRE

Rockingham, ss Superior Court

STATE OF NEW HAMPSHIRE

v.

JOSHUA SHAW

Docket No: 218-2018-CR-00365

SUPPLEMENT TO NOTICE OF DEFENSE OF JUSTIFICATION

NOW COMES the Defendant, Joshua Shaw, by and through counsel, and hereby submits this Supplement to Notice of Defense of Justification pursuant to the Court's order dated June 5, 2018.

In support, the following is stated:

1. On May 15, 2018, the Defendant submitted a Notice of Defense of Justification giving notice that he may rely on the defense of justification under the doctrines of physical force in defense of self, defense of others, defense of premises, defense of property, and consent.
2. On May 18, 2018, the State filed an Objection, arguing that the Notice filed was insufficient.
3. The Court, on June 5, 2018, ordered the Defendant to supplement its notice to identify the conduct the defendant engaged in which he asserts forms the basis for each of the defenses. As such, the Defendant provides the following supplementation of facts to support his assertion of justification.

I. Applicable Facts

4. The Defendant and his girlfriend were stopped by a Salem Police Officer who suspected he was operating after suspension due to a default in child support payments.

5. The Defendant refused to hand the officer his license as he had recently cleared up the default and reasonably believed that his license was no longer under suspension. The Defendant then refused to exit the vehicle when told he was under arrest.
6. Multiple Salem Police Officers arrived as backup and the Defendant continued to refuse to exit his vehicle.
7. Officers, without any warning or notice, then smashed the driver's side window of the Defendant's vehicle, attempted to pull him through the broken window, and tased him multiple times. The Defendant held onto his steering wheel and allegedly kicked at the officers. The Defendant also allegedly removed a key, placed it between his fingers, and began swinging at the officers. This formed the basis of the felony charge against the Defendant.
8. Several officers also utilized their tasers, as well as further force to include striking the Defendant's hands and side.
9. A video capturing portions of the incident was taken by the Defendant's girlfriend. The State has copies of said video.

II. Defense of Self & Others

10. The Defendant's potential reliance on defense of self and others pursuant to RSA 627:4 is grounded in the fact that he reasonably believed that the officers were mistaken and that his license was not under suspension.
11. The Defendant reasonably believed it necessary to defend himself and others against the unlawful use of force displayed by the officers.

12. Despite passively refusing to exit his vehicle, the officers, acting as aggressors, broke his window and attempted to forcibly remove him (an individual weighing 280 pounds and standing 6'2 tall) through the broken window.
13. Officers also struck and tased the Defendant multiple times contrary to the department's own use of force procedures.
14. Thus the Defendant was justified in utilizing a reasonable amount of force in defending himself and others from the officer's unreasonable escalation and illegal force.

III. Defense of Premises

15. The State's Objection asserts that defense of premises is unavailable to the Defendant as he was in a vehicle and not at a premises.
16. However, there is no definition of "premises" contained within the justification statute and there is zero indication that a vehicle cannot constitute premises.
17. RSA 627:7 states that "[a] person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using non-deadly force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by such other in or upon such premises."
18. It is assumed, though not stated, that the State is asserting that premises generally means real property. RSA 627:9 provides a definition for "dwelling," which "means any building, structure, vehicle, boat or other place adapted for overnight accommodation of persons, or sections of any place similarly adapted." Presumably, had the legislature meant for premises to be as narrow as the State appears to construe it, it would have used the term dwelling in RSA 627:7.

19. Further, RSA 627:8-a and 627:8-b use the term "premises" when referring to merchants and county fairs. Again, there is nothing limiting "premises" to buildings, structures, or other such real property.

20. RSA 635:2 states that "[a] person is guilty of criminal trespass if, knowing that he *is not* licensed or privileged to do so, he enters or remains in *any place*." (emphasis added).

21. Here the officers were aware that the Defendant did not wish for them to enter his vehicle, a place.

22. As such, the Defendant was justified in using non-deadly force upon officers in their attempt to trespass upon his property.

IV. Defense of Property

23. As stated above, officers purposely broke the window to the Defendant's vehicle. At some later point, they also broke the passenger side window in order to remove the Defendant's girlfriend from the vehicle.

24. The Defendant was justified in reasonably believing that his actions were necessary to prevent further destruction to his property.

V. Consent

25. Under RSA 626:6, "[t]he consent of the victim to conduct constituting an offense is a defense if such consent negatives an element of the offense of precludes the harm sought to be prevented by the law defining the offense."

26. Here the officers consented to any physical contact through their actions, specifically through breaking the window and attempting to remove the Defendant from his vehicle by force.

27. As the Defendant was attempting to defend himself from what he reasonably believed to be unlawful force, the consent of the officers to the contact through their actions negates the required element of recklessly engaging in conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing will be sent to the Melissa Fales, Esq., counsel for the State via USPS on this 18th day of June, 2018.

Joseph Prieto

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JOSEPH A. FOSTER
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

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.

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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

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[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.

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[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.

IACP National Law Enforcement Policy Center
BRADY/LAURIE DISCLOSURE REQUIREMENTS
Model Policy
Amended for New Hampshire 2017

I. PURPOSE

It is the purpose of this policy to provide officers with the information necessary to properly fulfill the reporting and testimonial requirements mandated under United States Supreme Court decisions including *Brady* v. *Maryland* 373 U.S. 83 (1963) and *Giglio* v. *United States*. 405 U.S. 150 (1972), and the New Hampshire Supreme Court decisions including *State v. Laurie*, 139 N.H. 325 (1995), and their progeny.

II. POLICY

The *Brady* and *Laurie* decisions and subsequent rulings have made it a duty of all law enforcement agencies to (1) identify and provide to the prosecution any exculpatory material that would have a reasonable probability of altering the results in a trial, or any material that could reasonably mitigate the sentencing of a defendant and (2) any material relevant to the credibility of government witnesses, including, but not limited to, police officers. It is the policy of this police department to follow *Brady* and *Laurie* disclosure requirements, consistent with the law.

III. DEFINITIONS

Material evidence: Exculpatory evidence is "material" if there is a reasonable probability that disclosing it will change the outcome of a criminal proceeding. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial or sentencing of a criminal case.

Exculpatory evidence/Brady/Laurie *material: Brady/Laurie* violations are, by definition, violations of an individual's 14th Amendment right to due process of law and that due process right under Part I, Article 15 of the New Hampshire Constitution. Exculpatory evidence is evidence that is favorable to the accused; is material to the guilt, innocence, or punishment of the accused; and that may impact the credibility of a government witness, including a police officer. Impeachment material is included in the *Brady/Laurie* disclosure requirements.

Duty to disclose: The affirmative constitutional duty of the police to notify the prosecutor of any *Brady* material.

IV. PROCEDURES

A. General Provisions of Disclosure

A.1. Affirmative Duty to Report

This department shall exercise due diligence to ensure that material of possible *Brad/Laurie* relevance is made available to the County Attorney.

A.2. The defense is not required to request potential *Brady/Laurie* material; it is this department's responsibility to disclose such material as soon as reasonably possible to the County Attorney, or in time for effective use at trial. Responsibility for disclosing such material extends from indictment through the trial, sentencing and post-conviction.

A.3. It is the prosecutor's responsibility to establish whether material disclosed by this department must be provided to the defense.

A.4. Suppression of evidence favorable to an accused violates due process when the evidence is material either to guilt or to punishment, irrespective of good or bad faith. There is no distinction between "impeachment evidence" and "exculpatory evidence" for *Brady/Laurie* disclosure purposes.

A.5. Allegations that are not credible, or have resulted in an individual's exoneration are generally not considered to be potential impeachment information.

B. Examples of *Brady* material

B.1. Examples of *Brady* material that may be subject to disclosure include, but may not be limited to, the following:

B.1.a. Information that would directly negate the defendant's guilt concerning any count in an indictment.

B.1.b. Information that would cast doubt on the admissibility of evidence that the government plans to offer that could be subject to a motion to suppress or exclude.

B.1.c. Any criminal record or criminal case pending against any witness whom the prosecution anticipates calling.

B.1.d. The failure of any proposed witness to make a positive identification of a defendant.

B.1.e. Information that casts doubt on the credibility or accuracy of a witness or evidence.

B.1.f. An inconsistent statement made orally or in writing by any proposed witness.

B.1.g. Statements made orally or in writing by any person that are inconsistent with any statement of a proposed government witness regarding the alleged criminal conduct of the defendant.

B.1.h. Information regarding any mental or physical impairment of any governmental witness that would cast doubt on his or her ability to testify accurately and truthfully at trial.

B.1.i. Information that tends to diminish the degree of the defendant's culpability or the defendant's offense level under state or federal sentencing guidelines.

B.1.j. A finding of misconduct that reflects on the witness's truthfulness, bias, or moral turpitude. This includes employees under suspension.

B.1.k. Evidence that a proposed witness has a racial, religious, or personal bias against a defendant individually or as a member of a group.

B.1.l. An officer's excessive use of force, untruthfulness, dishonesty, bias, or misconduct in conjunction with his or her service as a law enforcement officer.

B.2. Officer personnel files that are related to matters stated above may be provided or open to the prosecution or defense as part of a *Brady/Laurie* disclosure, as is consistent with the law.

C. Duty to Report

Officer adherence to departmental policy and rules in all matters is an imperative of his or her office. Breaches of such rules and policies related specifically to honesty and veracity may have direct bearing on his or her ability to continue serving as a law enforcement officer.

C.1. Officers whose history regarding integrity, honesty, credibility, veracity, and related matters has negative bearing on their professional reputation may be subject to *Brady/Laurie* disclosure requirements.

C.2. It is the obligation of individual officers to inform their superior officer of any elements of their employment as a police officer, information contained in investigative reports, or evidence connected with a criminal indictment or trial that they reasonably believe may be subject to *Brady/Laurie* disclosure.

C.3. Supervisory officers are equally responsible for ensuring that they act with due diligence in identifying any potential *BradyLaurie* material

connected with any criminal proceeding for which they have oversight and for bringing such material to the attention of the prosecutor in a timely manner through established reporting procedures.

D. Departmental Response to Officer Testimonial Impeachment

Officers who are knowingly and intentionally untruthful, are otherwise dishonest in the course of their employment, or use excessive force are subject to impeachment of testimony at trial. Such officers are also subject to disciplinary action up to and including termination of employment.

E. Determination that Disciplinary Conduct is Exculpatory Evidence

E.1. 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.

E.2. 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, the pending litigation should also be noted in the officer's personnel file.

E.3. 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 and with what designation.

E.4. 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.[1]

E.5. Upon a decision 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 to the County Attorney 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.

F. Obligation of Officer on the EES

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.

G. Possible Termination of Employment

If the Chief determines that the incident constitutes potentially exculpatory evidence, the Chief shall determine if the conduct is so likely to affect the 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.

H. Otherwise, police personnel files remain confidential.

Any requests from a prosecutor or 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

[1] 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 reviewed by the Commission.

has not already been determined to be potentially exculpatory, the Chief shall notify the requesting party that 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 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.

I. Training

All sworn law enforcement officers of this department shall receive training in *Brady/Laurie* disclosure requirements.

J. Records Retention

Department executives should discuss with legal counsel requirements for retention of any records of potential *Brady/Laurie* importance and incorporate such guidance in their departmental policy. Such guidance should be based on any state requirements as well as additional measures that may be required to sufficiently conform to due diligence requirements under *Brady* and *Laurie,* and their progeny.

This project was supported by a grant awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice or the IACP.

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.

_____
Date Presiding Justice

LAW ENFORCEMENT MEMORANDUM

To: All New Hampshire Law Enforcement Agencies
All County Attorneys

From: Gordon J. MacDonald, Attorney General

Re: Additional Guidance Concerning the Exculpatory Evidence Schedule

Date: April 30, 2018

The intention of this memorandum is to clarify some of the procedural matters addressed in the New Hampshire Department of Justice March 21, 2017 Exculpatory Evidence Memorandum, Exculpatory Evidence Protocol, and 2017 Training for Law Enforcement PowerPoint presentation (hereinafter, "Memo," "Protocol," and "Training"). Where there is a conflict between this memorandum and the Memo, Protocol, or Training, this memorandum shall control.

Only "Sustained" Findings Shall Entail Placement on the EES

The EES Memo and Protocol contemplate the following basic process with regard to allegations of misconduct against an officer:

- That an investigation will be conducted into the allegations;
- That the investigation will result in a conclusion that the allegation is "sustained," "not sustained," or "unfounded," or that the officer is "exonerated";
- That if the conclusion is that the allegation is "sustained," the head of the law enforcement agency will determine whether the conduct at issue is EES conduct;
- That if the head of the law enforcement agency determines that the conduct at issue is EES conduct, the officer will be notified and afforded the opportunity to present evidence which the officer believes demonstrates the conduct is not EES conduct; and
- That if after considering the evidence presented by the officer, the head of the law enforcement agency's conclusion remains that the sustained allegation of misconduct constitutes EES conduct, he or she shall issue notification causing the officer's name to be placed on the EES.

See Protocol, p. 4, 7.

Only allegations of misconduct which are sustained after an investigation and which constitute EES conduct will result in an officer's name being placed on the EES.[1] "Sustained" means that the evidence obtained during an investigation was sufficient to prove that the act occurred. *See Memo*, p. 4 n.5. **Mere investigation into EES conduct does not warrant either EES notification or inclusion on the EES.** Accordingly, law enforcement agency heads should not cause an officer's name to be "temporarily" placed on the EES while an investigation into the allegations is pending. Further, investigations into allegations of misconduct against officers who resign or otherwise leave employment prior to the completion of the investigation must be completed nonetheless, upon notice to the officer, with or without the officer's cooperation.

There is a caveat to the directive that mere investigation shall not cause EES notification and inclusion: The fact that an officer is under investigation may constitute evidence which is favorable to the defense in a particular case or cases, and thus must be disclosed to the defense in those cases. *See, e.g., United States v. Wilson*, 605 F.3d 985, 1006 (D.C. Cir. 2010) (per curiam) (evidence that the testifying officer was under suspension due to an investigation might show that she was motivated to testify falsely against the defendants in order to curry favor with the government); *United States v. Bowie*, 198 F.3d 905 (D.C. Cir. 1999). **Consistent with the Memo's directives, officers who are under investigation must notify the prosecutor in any case in which they may be a witness that they are under investigation.** *See Memo*, p. 5. The heads of law enforcement agencies should also provide this information to prosecutors in cases in which such officers may be a witness.

Allegations Which Are Determined to be "Not Sustained" Do Not Entail Placement on the EES

As discussed above, the EES Memo and Protocol contemplate that a sustained allegation of EES misconduct against an officer will cause the officer's name to be placed on the EES.

A finding which is not sustained is one for which there is insufficient evidence to enable the conclusion that the alleged conduct actually occurred. *Memo*, p. 4; *Memo*, p. 4 n.5. In essence, an allegation which is not sustained is nothing more than an allegation, which should not be considered exculpatory.

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[1] Written notification concerning sustained allegations which constitute EES conduct must be made to the County Attorney and the Attorney General's Criminal Justice Bureau Chief. *See Protocol*, p. 7. **The notification content shall be limited to the officer's name and date of birth, the name of the law enforcement agency, the date(s) on which the misconduct occurred, and a short description of the type(s) of EES conduct at issue. No other information, and no other records or documents, shall be submitted.** Examples of types of EES conduct include "credibility," "excessive use of force," and "criminal conduct." *See, e.g., Protocol*, p. 2. A sample notification letter is attached to this memorandum.

Thus, allegations which are deemed not sustained after investigation, as with unfounded and exonerated determinations, will not cause an officer's name to be placed on the list. Accordingly, notification is not required regarding allegations which are deemed not sustained.

Mental Health & Exculpatory Evidence

Evidence of mental illness may be exculpatory because it may call into question the witness's reliability and therefore his or her credibility. *See, e.g.*, *State v. Fichera*, 153 N.H. 588, 599-600 (2006) (cross-examination on the issue is permissible if the defendant is able to show that a "mental impairment" affects the witness's perception of events to which she is testifying); *State v. Shepherd*, 159 N.H. 163, 171 (2009) (reversing an AFSA conviction, in part because evidence of the victim's history of depression was "sufficiently favorable to require disclosure"); *see also United States v. Butt*, 955 F.2d 77, 82-83 (1st Cir. 1992) (noting that federal courts have found mental instability relevant to credibility only where the witness suffered from a severe illness that dramatically impaired her ability to perceive and tell the truth); *United States v. Smith*, 77 F.3d 511, 516 (D.C. Cir. 1996) (reversing conviction, in part because the government failed to disclose that a key prosecution witness had been hospitalized for chronic depression for more than a year).

The EES Protocol requires that an officer's name be placed on the EES due to an "instance[] of mental illness or instability that caused [the officer's] law enforcement agency to take some affirmative action *to suspend the officer as a disciplinary matter*." *Protocol*, p. 1 n.2 (emphasis added); *Protocol*, p. 2. The emphasis on the prerequisites of suspension and discipline in the Protocol is consistent with the approach taken by some courts that only severe, protracted mental illness will constitute favorable evidence for constitutional purposes. In other words, if the mental health issue is so significant that it not only compromises an officer's discharge of his or her duties but also results in the officer's suspension as a disciplinary matter, then it ought to be presumptively significant enough to constitute impeachment evidence. The Protocol makes clear that other mental health events, such as "a directive to an officer to seek mental health treatment following a traumatic incident" wherein no affirmative action was taken to suspend the officer as a disciplinary matter, are categorically excluded from the EES. *Protocol*, p. 1 n.2.

The Protocol's requirement of the nexus between "the instance of mental illness or instability" and the "suspen[sion] as disciplinary matter" also means that documentation of such incidents should be found in personnel files other than the officer's medical and mental health files. Assuming that is the case, the Protocol does not require the head of a law enforcement agency to review officers' medical and mental health records to discover such information, since this information will already be known due to other administrative action.

Protocols for Removal from the EES

In *Gantert v. City of Rochester*, 168 N.H. 640 (2016), the New Hampshire Supreme Court observed that "the interest of individual officers in their reputations and careers is such that there must be some *post-placement* mechanism available to an officer to seek removal from the "Laurie List" if the grounds are thereafter found to be lacking in substance...." *Gantert*, 168 N.H. at 650 (emphasis in original). The Court noted that after an officer is placed on an exculpatory evidence list, he or she "may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis." *Id.* (citing *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 784-85 (2015)). Other avenues of post-placement process include grievance procedures identified in employment terms and collective bargaining agreements.

Because sustained findings of conduct warranting inclusion on the EES may be overturned through these processes, the Memo and Protocol permit an officer's name to be removed from the EES "with the approval of the Attorney General or designee." *Protocol*, p. 5. This removal process does not involve a substantive review. NHDOJ is not an adjudicatory body and the protocol described herein is not one which entails reconsideration of the facts underlying the investigation. Instead, the removal protocol requires removal when a sustained finding has been overturned.[2]

The removal protocol is as follows:

1. The Attorney General's designees for the purpose of EES removal are the Director of the Division of Public Protection and the Criminal Justice Bureau Chief. The Attorney General may designate other Senior Assistant Attorneys General for this purpose.

2. The request for removal must be made in writing by the head of the law enforcement agency at which the officer was or is employed, or by the officer or his or her designee. If the request is made by the officer or his or her designee, the Attorney General's Designee shall provide notice thereof to the head of the law enforcement agency at which the officer was or is employed. The request must:

    a. State the allegations against the officer; and

    b. State that an investigation into the allegations was conducted; and

[2] If an officer's name was included on the EES before the investigation into his or her alleged misconduct was completed, the officer's name will be removed by the Attorney General or Designee upon written notification that the outcome of the investigation is that the allegations were unfounded or not sustained, or that the officer was exonerated.

c. State the disciplinary finding which resulted in the officer's placement on the EES, and the fact that the finding has been overturned; and

d. Provide a copy of the order or other determination overturning the disciplinary finding.

3. If a sustained finding was overturned, the Attorney General's Designee shall cause the removal of the officer's name from the EES.

4. The Attorney General's Designee shall notify the head of the law enforcement agency, and the law enforcement officer or his or her designee, in writing regarding the removal decision. A copy of this notification shall be sent to each county attorney.

[Date]

Criminal Justice Bureau Chief
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301

RE: EES NOTIFICATION

Dear Criminal Justice Bureau Chief:

A determination has been made that the law enforcement officer identified below has engaged in conduct that may be subject to disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Laurie*, 139 N.H. 325 (1995):

Officer's name:

Officer's date of birth:

Law enforcement agency:

Date of incident:

Type of EES conduct:

Sincerely,