

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

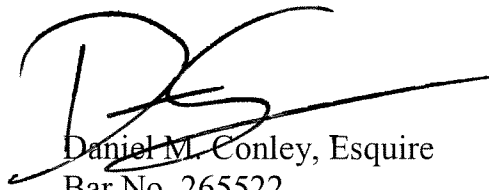
No. 2019-0279

New Hampshire Center for Public Interest Journalism, et al v. New Hampshire
Department of Justice

RULE 7 APPEAL FROM A DECISION OF THE HILLSBOROUGH COUNTY
SUPERIOR COURT SOUTHERN DISTRICT

BRIEF FOR THE NEW HAMPSHIRE ASSOCIATION OF CHIEFS OF POLICE
AS AMICUS CURIAE

New Hampshire Association of Chiefs Of Police

A handwritten signature in black ink, appearing to read 'D. Conley', with a long horizontal flourish extending to the right.

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STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 30(1), the New Hampshire Association of Chiefs of Police (“NHACOP”) respectfully submits this brief. The NHACOP is a nonprofit organization made up of Police Chiefs and other administrators from law enforcement agencies across the State of New Hampshire. The NHACOP advocates for the creation of legislation and administrative rules that promote public safety and professionalism within law enforcement that is consistent with the quality of life in the State of New Hampshire. The NHACOP strives to elevate the standards of police service, advance the highest ethical and professional standards in law enforcement at all levels throughout the State of New Hampshire, and uphold the honor and integrity of the law enforcement profession in its entirety. The members of the NHACOP have a duty to protect the constitutional rights of the citizens in the communities in which they serve as well as a duty to protect the rights of the employees within their agencies. Thus, the NHACOP has a strong interest in this Court’s interpretation of the confidentiality of the Exculpatory Evidence Schedule (“EES”).

SUMMARY OF THE ARGUMENT

The Hillsborough County Superior Court Southern District erroneously denied the New Hampshire Department of Justice's Motion to Dismiss. The legislature has made police personnel files as confidential as constitutionally permissible. Through RSA 105:13-b, I, the legislature has made exculpatory evidence in police personnel files available to the defendant in a criminal proceeding. Decisions as to what parts of the personnel file will be disclosed due to its exculpatory value, are resolved by a judge after an *in camera* review. RSA 105:13-b, II. Further, the legislature has protected the confidentiality of police disciplinary actions by making them inadmissible and not discoverable in civil actions. RSA 516:36. Had the legislature intended for police personnel files to be made public, it would not have enacted statutes which specifically protect police officer personnel files.

To protect the constitutional rights of criminal defendants and the statutory rights to privacy of a police personnel file, the Attorney General has developed the Exculpatory Evidence Schedule ("EES"). The EES is generated with personnel information provided directly to the Attorney General's Office from the Chiefs of Police. App. 1, 1.¹ The EES was compiled to alert prosecutors to initiate an inquiry into a police officer's personnel file for exculpatory evidence.

The EES provides no details of the allegation for which the police officer is on the EES. The EES does not distinguish between minor department policy violations, major department policy violations, and criminal acts. If the names of the officers on the EES

¹Citations to the record are as follows: "App." refers to the appendix attached to this memo followed by the particular page number.

were to be **made** public, it will tarnish a police officer's professional and personal reputation permanently. Even if the officer is later, through due process, removed from the EES, the damage cannot be undone.

Even without the threat of public scrutiny of police personnel files, **the** recruitment and retention of police officers has become a daunting task in our current contentious society. If we are to add to that the public shaming of officers on the EES, it will damage police officers' personal and professional reputations. This impacts not only the individual officer's career but hinders that officer's ability to effectively serve his or her community and intentionally inflicts unnecessary stress in an already difficult career. The current statutes and procedures presently in place protect the rights of the individual officers to privacy, as well as balance the State's obligation to provide exculpatory evidence.

ARGUMENT

THE EXCULPATORY EVIDENCE SCHEDULE BALANCES THE CRIMINAL DEFENDANT'S RIGHT TO EXCULPATORY EVIDENCE WHILE UPHOLDING THE LEGISLATURE'S INTENT TO KEEP POLICE PERSONNEL FILES CONFIDENTIAL.

Police officers have privacy rights that are protected under RSA 105:13-b. Police personnel files are to remain confidential except to the extent that they are exculpatory in a criminal proceeding. RSA 105:13-b. The New Hampshire Supreme Court has stated, "...the legislature has enacted a statute, RSA 105:13-b, which is designed to balance the rights of criminal defendants against the countervailing interest of the police and the public in the confidentiality of officer personnel records." *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774, 780 (2015). Police officers disciplinary actions are not even discoverable or admissible in state civil actions. RSA 516:36.

The United States Supreme Court and the New Hampshire Supreme Court provide criminal defendants any favorable and exculpatory evidence in the possession of the prosecution. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Laurie*, 139 N.H. 325, 329-30 (1995). To comply with these constitutional rights, and assist prosecutors in identifying when there may be exculpatory evidence in a police officers' personnel file, the attorney general developed the "*Laurie* List" (now the EES). *Laurie*, 139 N.H. 325; App. 1. The United States Supreme Court expanded on *Brady* to include disclosure of impeachment evidence, "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government...To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer

who deals with it.” *Giglio v. United States*, 405 U.S. 150, 154 (1972). Under the Attorney General’s direction, the names on **the EES** are to remain confidential and it is the Attorney General’s responsibility to effectively ensure that the prosecution offices across the State uphold *Brady/Giglio* constitutional requirements. Chiefs have disclosed their police officers’ confidential personnel information for the EES, in order to assist prosecutors who do not have access to browse confidential police personnel files at will. App. 1, 3.

Police Chiefs are required to preserve the confidentiality of their police officers’ personnel files. RSA 105:13-b. At the same time, Police Chiefs have an obligation under the Federal and State Constitutions to provide criminal defendants with information that may be exculpatory. Police personnel files are confidentially held in such high regard that RSA 105:13-b has outlined the statutory procedure for disclosing police personnel information to a constitutionally-pertinent criminal defendant while protecting the confidentiality of a **police officer’s personnel file**. The disclosure of relevant **exculpatory evidence from a police personnel file** is **determined** by a judge following an *in camera* review. This information is only disclosed to a particular criminal defendant while the remainder of the personnel file is treated as strictly confidential and returned to the law enforcement agency. RSA 105:13-b, **III**. Law enforcement in New Hampshire has an interest in the statutorily guaranteed confidentiality of police officers’ personnel information, **as well as the constitutional exculpatory evidence obligations**. The current EES balances the confidentiality of police personnel files in compliance **with the state law and the obligation to provide exculpatory evidence**.

A. THE EXCULPATORY EVIDENCE SCHEDULE CONTAINS PERSONNEL FILE MATERIAL.

The New Hampshire Attorney General's Office has procedures which the Chief of Police, High Sheriff, or Colonel must follow in order to be in compliance with the EES. The procedure requires an annual review of the personnel files in their respective departments to certify the accuracy of the EES. Upon review of the files, these high ranking administrators must submit a certification affirmatively stating that they have complied with EES and disclosed all exculpatory material. The EES is a summation of issues directly in an officer's personnel file. This checks and balance provide further protection of the police officers' personnel file while upholding all criminal defendants' constitutional rights. App. 1, 4-5.

The EES is developed solely from a police officer's personnel record and directly given to the Attorney General's Office by the Chief of Police from each department. A police officer is added to the EES after a **chief** has conducted an internal investigation which resulted in a sustained finding of alleged wrongdoing. App. 1, 1. The EES is a list of police officer's internal personnel disciplinary findings contained within their personnel file. App. 1, 1-2. By **making** names on the EES public, **confidential** internal personnel disciplinary findings would be revealed despite the fact that the information has been gathered from **multiple** files and consolidated into a single document. This ultimately, **deprives** police officers the privacy **they** are guaranteed by statute to their personnel records. Thus, the EES is an extension of the personnel file.

B. THE CURRENT EES AFFORDS POLICE OFFICERS THEIR STATUTORY RIGHT TO PRIVACY.

Police officers are employees, and while they are subject to higher standards in a criminal court, they should also be afforded the privacy protections established for them by the legislature. It is not the intent or desire of the Chiefs of Police to protect unethical police officers who should be exposed for their wrongdoing. Rather, it is their intention to protect their employees' statutory rights to privacy and their employees' interest in their reputation. RSA 105:13-b; *Duchesne*, 167 N.H. at 780. This right to privacy is already appropriately balanced with a criminal defendant's right to discoverable materials. The current system, wherein the EES is redacted for the general community, appropriately balances the rights of the community to be aware of any issues in their respective police departments, but also protects individual police officers from public scrutiny and ridicule for infractions which may fall onto a scale of behaviors from misuse of a sick day to purposeful falsifying of evidence. Despite the Attorney General's intentions, being on the EES list creates a stigma. An officer on the EES for a minor lapse in judgment does not deserve a lifetime of this public stigma. Making the EES public will diminish public confidence in the police and debilitate their ability to be effective police officers.

Additionally, police officers have due process rights to remove themselves from the list in accordance with the Attorney General's procedures. App. 1, 5. If the list is public, a police officer may be exposed to public ridicule and then later be removed from the list. Being on the EES has long lasting consequences for a police officer

professionally and personally. Their reputation is at stake. Once on the EES, even if removed at a later time, the harm has already been done to their reputation.

C. THE CURRENT EES PROTECTS THE COMMUNITY, THE RIGHTS OF THE INDIVIDUAL CRIMINAL DEFENDANTS, AND THE INTEGRITY OF THE INTERNAL AFFAIRS PROCESS.

Law enforcement is already struggling to retain and recruit police officers in a contentious society. Making the EES public will create skepticism for people entering into public service knowing they won't be afforded privacy protections that other professions guarantee. It will also make it very difficult for the current certified police officers on the EES to continue to work in their current capacity while maintaining the public's trust. The safety of our towns and cities relies upon fully staffed professional police officers supported by the communities they serve.

Chiefs of Police must consider the ramifications of the EES in all internal affairs investigations. While the EES is currently confidential, chiefs are human and may subconsciously consider the implications and ramifications of their current employee's inclusion on a public list when making a finding in an internal affairs investigation. Chiefs may unintentionally be hesitant to make sustained findings in cases which would ultimately subject their own department and employees to ridicule and scrutiny. In contrast, a chief also has total power to sanction an officer to the EES out of a sustained finding in an internal investigation, diminishing the officer's due process rights. In either case, the implicit bias of a chief may compromise the integrity of the EES list, the police officers' expectation to privacy in personnel matters, and ultimately the rights of the criminal defendant's access to exculpatory material.

CONCLUSION

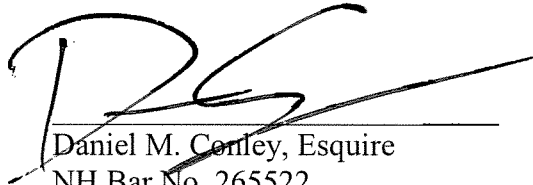
For the foregoing reasons, this Court should hold the EES remain confidential and subject to disclosure consistent only with *Brady/Giglio* obligations, not to the general public. *Brady*, 373 U.S. 83; *Giglio*, 405 U.S. 154.

Respectfully submitted,

THE NEW HAMPSHIRE ASSOCIATION
OF CHIEFS OF POLICE

By its attorney,

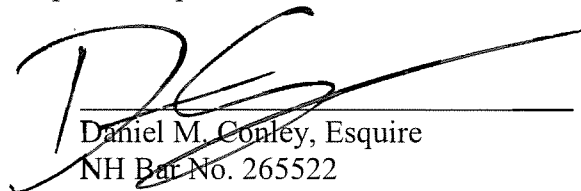
November 13, 2019



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CERTIFICATION OF SERVICE

I hereby certify that this brief has been electronically served on this 13th day of November 2019, to counsel for Appellees, New Hampshire Center for Public Journalism, et al, and counsel for Appellant, New Hampshire Department of Justice.



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APPENDIX 1

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 documents¹, medical and all mental health records², and any other related materials regardless of where the materials are kept or how they are labeled by the employer. While it may be common practice for a variety of legitimate reasons to maintain these records in separate locations, the “personnel file,” as discussed in this protocol and in the case law, includes any potentially exculpatory material maintained by an employer.

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

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

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

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

III. Identification of Potentially Exculpatory Materials

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

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

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

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

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

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

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

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

However, the practical reality is that prosecutors cannot review every officer's personnel file in every criminal case. Thus, it is imperative that the EES is properly updated and maintained. By September 1, 2017, each police chief, high sheriff, colonel or other head of a law enforcement agency (together hereinafter referred to as the "Chief") or their designee, shall complete a review of the personnel files⁴ 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 ongoing litigation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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