

The Five Things You Should Know about the Laurie List

1. What is the Laurie List?”

The Laurie List is a response to an obligation placed upon the State by State v. Laurie. The Laurie court held that favorable exculpatory evidence included impeachment materials and that “[u]pon a showing by the defendant that favorable, exculpatory evidence has been knowingly withheld by the prosecution, the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict. State v. Laurie, 139 N.H. 325, 330 (1995).

The failure to disclose such evidence required the State to demonstrate beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict. If such a violation occurred and the State failed to meet its burden, a defendant had been denied his trial right to present all favorable proofs and was entitled to a new trial. Laurie, 139 N.H. at 333.

Under Laurie, a prosecutor has the duty to learn of favorable evidence known to other’s acting on the government’s behalf, including the police. Although police may “sometimes fail to inform a prosecutor of all they know, prosecutors are not relieved of their duty as procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant information on each case to every lawyer who deals with it.” Duchesne v. Hillsborough Cty. Attorney, 167 N.H. 774, 778, (2015) (internal citation and quotations omitted). This obligation created practical problems for the State as the Court “impute[s] knowledge among prosecutors in the same office...[and] hold[s] prosecutors responsible for at least the information possessed by certain government agencies,

such as police departments or other regulatory authorities, that are involved in the matter that gives rise to the prosecution...” Id. (internal citations omitted).

In order to address these problems, the New Hampshire Attorney General’s Office issued a Memorandum dated February 20, 2004 (“Memorandum”) directing county attorneys to develop a process with local law enforcement agencies whereby the county attorney will be given written notice by a law enforcement agency whenever one of that agency’s officers has engaged in certain types of conduct. The written notification should include only the officer’s name, department, date of birth, and the date of the incident that gave rise to the potential Laurie information. The county attorney is responsible for maintaining this list and seeing that it is updated as needed.

2. What is Laurie information?

The Memorandum also helped provide guidance to agencies impacted by Laurie in understanding what conduct qualifies. There is no easy definition and one judge’s determination may differ from another’s. To help address this issue, the New Hampshire Attorney General’s Office suggested that information that falls within the following categories should be considered potential Laurie conduct:

- Any sustained instance where an officer deliberately lied during a court case, administrative hearing, other official proceeding, in a police report, or in an internal investigations;
- Any sustained instance when an officer falsified records or evidence;
- Any sustained instance that an officer committed theft or fraud;
- Any sustained instance that an officer engaged in an egregious dereliction of duty (for example, an officer using his/her position as a police officer to

gain a private advantage such as sexual favors or monetary gain; an officer misrepresenting that he/was was engaged in official duties on a particular date/time; or any other similar conduct that implicates an officer's character for truthfulness);

- Any sustained complaint of excessive use of force;
- Any instance of mental instability that caused the police department to take some affirmative action to suspend the officer for evaluation or treatment, except for referral for counseling after being involved in a traumatic incident, or for some other reason, for which no disciplinary action was taken;

3. How is Laurie information disclosed?

Laurie information is most commonly found in police personnel files. RSA 105:13-b and the Memorandum guides the handling of this information. If a prosecutor has been informed that an officer has potential Laurie information in her police personnel file, the prosecutor should file a motion under seal advising the Court of the material's existence. The prosecutor should request that the Court order the submission of the file for in camera review to determine whether disclosure of any portion of the file is required. The Memorandum suggests prosecutors notify the impacted officer before filing the motion. Additionally, the prosecutor should inform the officer that the prosecutor does not represent the officer's personal interests and advise the office to consider retaining private counsel.

If a defendant believes that there is potential Laurie information in a police personnel file, they must demonstrate that there is "probable cause to believe that the file contains evidence relevant to that criminal case." RSA 105:13-b. The defendant must establish "probable cause to believe the police personnel file

contains evidence relevant to his case in a manner analogous to the principles set forth in [State v. Gagne, 136 N.H. (1992)] and [State v. Taylor, 139 N.H. 96, 1994]. State v. Puzzanghera, 140 N.H. 105, 107 (1995).

To establish the requisite probable cause, the defendant must present a plausible theory of relevance and materiality sufficient to justify review of otherwise protected materials. State v. Ainsworth, 151 N.H. 691, 695 (2005). This theory must establish that there is a “realistic and substantial likelihood that evidence helpful to his defense would be obtained from the officer’s personnel file.” Id.

The Memorandum suggests that a prosecutor may generally rely upon a Court’s ruling regarding the disclosure obligation of a police personnel file. Prosecutors should inform the county attorney of any Court rulings on Laurie information so that the county’s Laurie List may be updated to reflect that ruling. Additionally, once a Court has made a Laurie determination, the prosecutor may make an independent assessment of whether disclosure is required in a subsequent case involving that officer without court involvement. In making such a determination, the prosecutor should consider:

- The nature of the officer’s conduct that is the basis of the Laurie report (An incident of lying, which involved calling in sick when the officer simply wanted a day off, is less probative of that officer’s veracity than an incident of lying that involved providing false information in a police report);
- How recently the incident occurred (the probative value of information diminishes with the passage of time. Any incident reported more than 10 years in the past should be presumed immaterial, unless it involved particularly egregious conduct that is highly probative on the issue of truthfulness. See N.H. R. Evid. 609);

- The importance of the officer’s role in the investigation and/or the officer’s testimony at trial;
- Whether incident was an isolated one (if there are multiple incidents, the prosecutor must consider the combined impact of those incidents. An incident that would appear relatively minor if viewed in isolation may take on increased importance if it is one of a series of events).

4. What does being placed on the Laurie List mean for officers?

As a practical matter, being placed on the Laurie List effectively terminates an officer’s career. While that officer may not be outright terminated, the officer is likely to be assigned to limited tasks and, as a result, unlikely to be promoted or advance. While “Laurie, as a practical matter, may influence a police department’s internal hiring and disciplinary policies, it does not express a strong and dominant public policy” that bars the reinstatement of police department employees. In re Town of Pelham, 154 N.H. 125, 131 (2006). This leaves officers and departments in a difficult place regarding an officer placed on the Laurie List.

5. What rights does an officer have regarding placement on the Laurie List?

An individual can hold a property interest in their reputation such that it warrants due process protections. State v. Veale, 158 N.H. 632, 639 (2009). For officers, this means that when state action, such as being placed on the Laurie List, negatively impacts their reputational interest, they must be afforded certain due process protections. Gantert v. City of Rochester, 168 N.H. 640, 648 (2016). There are two stages subject to protection: (1) before the officer is placed on the Laurie List; and (2) after the officer is placed on the Laurie List.

The New Hampshire Supreme Court held that where there was an “internal investigation—which the plaintiff does not allege was unfairly or improperly conducted—two layers of review within the department, an opportunity to meet with the chief, and a hearing before the police commission,” there is no need for a more formal hearing or additional process before an officer is placed on the Laurie List. Id. at 650. There must be a “post-placement mechanism available to an officer to seek removal from the ‘Laurie List’ if the grounds for placement on the list are thereafter shown to be lacking in substance.” Id. But, the New Hampshire Supreme Court indicated that “the legislature, rather than this court, is the proper body to regulate the use of ‘Laurie Lists,’ including the development of procedures for the placement of police officers on, and their removal from, such lists.” Id.

What now?

In 2015, the New Hampshire General Court created a commission to study the use of police personnel files as they related to the Laurie List. N.H. Law 150:1. This commission issued its report on October 29, 2015. A copy of that report is in the materials. It had a number of findings that suggested that

“...there is no clear procedure for dealing with the personnel file of an officer who is on the Laurie List when that officer will be called to testify. Some prosecutors examine the file and make their own determinations as to whether the file contains exculpatory evidence, while others simply pass the sealed file on to a judge for review. The term “mysterious” was used to describe, not only how the process actually works, but how it is even supposed to work.

There is no uniformity in the decisions across jurisdictions. Sometimes the same material is being reviewed by different judges and prosecutors with

differing conclusions as to whether it is exculpatory. More clarity in the criteria for making such determinations might be helpful in building in consistency across jurisdictions.”

Since the commission submitted its report, no new legislation has been passed. There has also been a recent decision (October 13, 2016) out of Rockingham Superior Court addressing the due process requirements implicated by an officer being placed on the Laurie List. It is included in the materials.