August 13, 2020

LEACT Testimony – Laurie List

Dear Commission Members,

I thank the members of this Commission for the opportunity to testify today. I am here representing the New Hampshire Association of Criminal Defense Lawyers, a group of approximately 300 Granite State criminal defense attorneys. On behalf of our members, I come before you today to urge you to recommend publication of the exculpatory evidence list, also known as the "Laurie List". The existing system for maintaining and disclosing potentially exculpatory evidence in an officer's personnel file threatens and, in many cases violates, the Constitutional rights guaranteed all criminal defendants and contributes to mistrust of law enforcement.

Police serve a very unique function in our communities. They are present to protect us, but are also empowered to stop, detain, arrest us and even potentially take a life. This authority and power begs for transparency as to whom that authority is given and in how that authority is exercised.

<u>My First Experience with the Laurie List</u>

Despite the fact that ours is an adversarial system, criminal defense lawyers do not defend crime – we defend people charged with crimes. Most of us, myself included, have great respect for law enforcement. We need police officers and respect that going to work involves putting their lives at risk every day to protect the communities they serve. They have an often difficult and thankless job. The vast majority of officers do it exceptionally well and with honor. We all know, though, that there are some who violate their oath and use the authority given by the badge to bully, or even abuse, those they swore to protect. Such officers do not deserve to wear a badge. That we have a system that shields such officers from public scrutiny and accountability is a disservice to the State, to individual defendants, to victims, and to their fellow officers.

I first learned of what was then called the "Laurie List" as a relatively new public defender. I had been assigned a case in which a man was accused of badly assaulting his wife. The plea offer that would have avoided trial called for my client to serve 18 months in jail, in part because this was not his first domestic case and in part because the victim was terrified and had suffered injury. Negotiations stalled and my client declined that offer. On the afternoon we were to start the bench trial in the circuit court, the prosecutor approached and asked if my client would take a no time deal, meaning the prosecutor was willing to let my client go with a sentence hanging over his head but no time to serve up front. I was confused, but advised my client of the offer. He declined, saying he was ready and wanted a trial.

While we waited for the judge to come onto the bench to begin the trial, the visibly angry and flustered prosecutor pulled me into the hallway to tell me he was dropping the case completely because they did not want to release Laurie materials. To be clear, the prosecutor believed my client should serve at least 18 months in jail for assaulting his wife. The victim was prepared to

testify and did not want the case dropped. The case was dropped to protect the officer's personnel file.

In cases like this one, my clients are beneficiaries of bureaucratic failure. I have no information about the specifics that lead to the prosecutor dropping the case. It could be that the prosecutor knew the Laurie materials existed from early on, but if so why did he not provide them in the six months before the trial as required by the court rules? If he did not know before that day, why not and how did he learn? And why did he still try to get my client to plead guilty when he knew that Laurie materials had not been disclosed to me or my client? Was the prosecutor aware all along that this information existed and, rather than telling me, chose to engage me and my client in a game of chicken about his constitutional rights? It certainly did not appear that way, but that doesn't mean it hasn't happened in other cases. Who made the call to drop the case rather than disclose? His supervisor? The police chief? And perhaps most confounding of all was this question: If the officer had something this damning in his file, so damning that they would let my client walk away, why was he still wearing a badge and carrying a gun?

I don't know the answer to any of these questions. That was not the last time a prosecutor dropped a case in response to the involvement of an officer on the Laurie List. When I returned to the office after that case and explained what happened to my colleagues, I learned that this type of outcome was not uncommon. Indeed, it has happened multiple times since then. I personally have also had prosecutors negotiate to avoid disclosures, stating plainly that if they have to "burn" their officer, by providing evidence that could damage an officer's reputation for truthfulness, the plea offer is off the table and future offers will come with harsher penalties. In the aftermath of the very public Darren Murphy and Aaron Brown revelations, prosecutors made Constitutionally required disclosures for all cases these officers had been part of but in many, still opted to vacate convictions rather than risk public disclosure of the full file.

It is often said that no one dislikes a bad cop more than a good cop. This could not have been clearer to me than on that day, as the subject officer walked out of the courthouse behind a sobbing victim with his personnel file intact. The remaining officers' faces made their opinion perfectly clear.

The outcome of that case is not what the Laurie Court envisioned or demanded. It was unjust and unfair.

We want you to understand that our call to make the Laurie List public is not borne out of a desire to expose dirt, to ruin someone's career, or to have a good cop lose their job. Our job as defense attorneys is to protect not just the rights of each individual client, but to protect the rights of those not yet charged and those who will never be charged. The United States and New Hampshire Supreme Courts have made it clear that one of those rights is the right to potentially exculpatory evidence, which can include information contained in an officer's personnel file.

Police officers have an awesome responsibility and awesome power. They are uniquely empowered to stop, detain, arrest, and even in certain circumstances to kill an individual. Their testimony can singlehandedly lock a defendant up for months, years, even for life. Convictions can have significant collateral consequences including the loss of the right to vote or possess

firearms. In many cases, police officers are the only witnesses, particularly in cases seen as "lower level" such as motor vehicle violations, resisting arrest, or disorderly conduct charges. These "lower level" charges can still be devastating for our clients. Motor vehicle charges can result in loss of a driver's license and fines, which can set a defendant up for years without a license in a state with a dearth of public transportation. This impacts the livelihood of families.

The badge brings with it inherent credibility that any factfinder, whether judge or jury, will consider in reaching a criminal verdict. Police officers are professional witnesses. The presumption is that a police officer will be honest and follow the rules, which is why the Courts have made it clear that when there is information that may challenge an officer's credibility, a defendant is entitled to it. When the system for gathering and tracking this information is ad hoc and secret, rather than centralized, consistent, and transparent, the risk of Constitutional violation is significant, as is the impact on a community's trust in law enforcement.

When the stakes are this high for those involved in the criminal justice system, we must zealously guard the Constitutional rights guaranteed every criminal defendant. Those rights are for the innocent as much as they are for the guilty. These disclosures must be made and we must have confidence they are being made so we can trust the system. Dismissing cases to protect an officer's disciplinary issues made public is unacceptable. Simply put, if an officer cannot see a case through by being a witness at trial, if he cannot be trusted to do his job because of something in his personnel file, he should not be wearing a badge and making the arrest in the first place. If the community cannot trust an officer, he should not be on their streets with a gun. The current process exists solely to extend protection to officers' personnel files. The List, which was created solely to help prosecutors comply with their constitutional obligations while shielding the contents of officer's file, is fundamentally flawed and must be abandoned.

THE LIST

The process by which the List is compiled and maintained is haphazard and ripe for failures and abuses. Each individual agency is responsible for determining which of their officers must be added. We respect that officers are entitled to due process as it relates to employment procedures bargained for by their respective union. In the time that I have been part of this conversation I have heard of officers placed on the list who had no idea they had been so placed. I have also heard concerns about the decision to place officers on the list being motivated by animus or personal disagreements with superior officers. To the extent that these things are happening, they should not be. These issues demonstrate additional flaws in the existing system and reason to reform it.

First and foremost, we believe there should be no List. The List itself has created a catch 22. The argument is that the files cannot be reviewed so a more generic document should be created. Then the existence of the List creates an issue of employability for the officer – if they are on the List they are unemployable as an officer. I understand these concerns. But the List was created as a tool to ensure prosecutors are able to meet their obligation to provide defendants potentially exculpatory evidence contained in an officer's personnel file. These is a Constitutional obligation. The maneuvers to avoid disclosure threaten this right. The only way to assure that

these rights are protected is to make the list public so defendants and their counsel can access information.

Presuming the List continues to exist, any process for determining what information must be provided to defendants must be fair, transparent and independent. We believe a process can be created that will both allow the State to meet its Constitutional obligations and afford officers due process. I and other attorneys have been provided disclosures best described as trivial and hardly indicative of an officer's dishonesty. In other cases, I have been provided evidence of falsified reports, failure to follow protocol for drug analysis and other violations for officers still employed and policing our communities. This speaks to a lack of consistency about what is deemed potentially exculpatory and raises the question of what is not being reported.

There is no one body that makes the decision of what officers are placed on the list. Every individual agency is required to provide names of those added to the List and certify or attest that they have complied with the AG's requirement to report this information. However, there is no consequence for failing to comply with these reporting requirements. This means agencies may or may not be reporting the names of officers who have engaged in conduct that would place them on the list – and the public has no idea either way.

The latest document I have been able to access is from January of 2020. It shows that only 17 percent of agencies required to certify compliance with reporting requirements have done so. This means one of two things. It could mean that the remaining 83 percent of departments have complied but have not certified, or it could mean that the remaining 83 percent have <u>not</u> complied. In either case, the List is useless as a tool for helping prosecutors meet their constitutional obligations.

If a prosecutor relies on an inaccurate list to determine whether there is potentially exculpatory evidence that they are required to produce to a defendant, especially when the compliance rate is only 17 percent, there is a significant risk that a defendant will not get information to which they are Constitutionally entitled. Yet the defendant may never know because the prosecutor does not know. And that leads to constitutionally unsound convictions. Unsound convictions (indeed the mere risk of unsound convictions) is bad for the citizens, bad for individual defendants, and bad for victims. It also calls into question the credibility of our criminal justice system at large and challenges public confidence.

I am often challenged to give an example of when this process did not work– for an example of when a defense attorney did not get information the prosecutor was constitutionally obligated to produce. I cannot. But do not mistake that for affirmation that there have not been such instances. This system is such that the defendants are the last to know if they ever know at all. As a defense attorney, I have zero way of knowing if a prosecutor does not disclose exculpatory evidence whether that means there was no such evidence or whether it means there is evidence but it is being withheld from me. The prosecutors themselves may not know they have failed to meet their obligation. Everything, from the conduct at issue to the decision by a judge to order or not order disclosure, is shielded from the defense. And while I deeply respect the courts,

judges are not able to assess whether information in an officer's file could be potentially exculpatory to a particular case. That is the specific job of defense attorneys.

CURRENT DISCLOSURE PROCESS

If everything works as it should, a prosecutor will learn of potentially exculpatory evidence in an officer's file. They then file an *ex parte* motion with the Court giving the Judge the information from the file and asking the Judge to decide if they have to disclose the information to the Defense. Because this is *ex parte*, the Defense is not aware that this is even happening. The Judge reviewing the request is not privy to defense strategy and typically does not have the full police reports so knows only the facts available to them when they are making their determination about whether information should be disclosed to the defense.

If the Judge rules the information does not been to be disclosed, the Defense never learns it exists. If the Judge rules that the information is potentially exculpatory and must be disclosed, only then is it provided to the Defense. But before this information is provided the Defense attorney and their client are asked to sign a protective order that prohibits disclosure of the materials to anyone, including partners or colleagues in their law firm. On occasion the protective order requires that the defendant themselves cannot see the information, only counsel. Once this protective order is signed and approved, the defendant receives (sometimes redacted) information. If the Defense then wishes to use that information in a public hearing or trial, they have to ask the Court's permission to do so. Those requests are sometimes granted and sometimes denied.

RECOMMENDATIONS

I believe the bad cops make it harder for all the good cops to do their job. The secrecy around police officer files harms individual defendants but also harms the public trust in law enforcement and our justice system. As the Commission has already discussed, legislation passed in our last session to require officers to report the misconduct of other officers. This accountability must go further. If an officer has engaged in conduct that means they cannot do their job, they should not be shielded.

NHACDL has many concerns about accuracy of the Laurie List and the reliability of disclosures made or not made. We have no doubt that defendants' rights are being violated by the current Laurie protocol. These failures must be viewed in their full Constitutional magnitude. The fear is that there are other cases like Laurie in which information existed but was not disclosed. Prosecutors at both the circuit court and superior court level have expressed their own belief that the List is inaccurate and that they are not being given information they are constitutionally required to disclose. The criminal defense bar has no faith in the accuracy of this list. Nor should you. We must do better.

The Constitutional implications for individual criminal defendants is significant. Beyond the accuracy of the List, the secrecy of this list creates and contributes to distrust of the police and the criminal justice system. When an officer is sworn in and given a badge, and a gun and told to police our communities, we are encouraged to trust them to do what is right. The age-old adage

that trust is earned applies to policing. Law enforcement must earn the trust of the communities they police. Creating secret documents about the officers in their neighborhoods does not engender trust – it erodes it.

We offer the following specific recommendations for your consideration:

1. Eliminate the List, making police disciplinary files available to the defense in any criminal prosecution.
2. To the extent the List continues to exist, we are asking that the Commission make the following specific recommendations:
    - That a single entity be created and tasked with determining when an officer should be placed on the list.
        - That a single protocol be created for making this determination.
        - We support an officer's right to due process in this determination.
    - If the List remains as it is, with individual agencies responsible for determining when an officer is placed on this list, enforcement mechanisms for compliance with procedures must be created.
        - It is suggested that these enforcement mechanism should penalize departments for failing to certify compliance with the reporting requirements; and
    - That a more streamlined protocol be created so prosecutors at all levels have direct access to the information (not just the List) so they can meet their obligation to disclose information to defendants.

Respectfully submitted,

Robin D. Melone

NHACDL President