

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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JANE E. YOUNG
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February 12, 2020

VIA ELECTRONIC (jbedrick@nhlawoffice.com)
AND FIRST-CLASS MAIL

Sheriff Scott E. Hilliard
c/o Jared J. Bedrick, Esq.
Douglas, Leonard & Garvey, P.C.
14 South Street
Concord, NH 03301

Dear Sheriff Hilliard:

On Friday, August 9, 2019, you were approached by Tilton police officers after a 911 caller described your erratic operation of your car. The police located you coming out of the 99 Restaurant. Tilton Police Officer Eric Keck placed your take-out bag in your car and saw a glass in the center console. When Officer Keck asked if the drink in your car contained alcohol, you stated, "Ah, no, no, no." 22:22¹ Less than a minute later, when asked by Officer Jeremiah Trott if the drink in your center console was a mixed cocktail, you then responded, "Yes." 22:23 Subsequently, you were asked to perform field sobriety tests by Tilton Police Sgt. Bryan Kydd-Keeler. When Sgt. Kydd-Keeler indicated that you admitted to the other officers that you had been driving, you stated, "I didn't admit that, but." 22:38 Prior to taking a portable breath test, you stated to Sgt. Kydd-Keeler, "This is embarrassing. Listen, listen, I was not driving, so." 22:48 When asked by Sgt. Kydd-Keeler how you got there, you stated, "Somebody drove me here." 22:49 When asked who drove you, you simply shrugged your shoulders. 22:49 Each of these four answers were deliberate lies as evidenced from the video footage.

On Tuesday, January 14, 2020; you were found guilty of one count of aggravated driving while intoxicated, RSA 265-A:3; RSA 265-A:18, a class A misdemeanor offense, in the 9th Circuit—District Division—Nashua Court. This stemmed from your arrest in Tilton on August 9.

Your conviction and your deliberate lies create certain constitutionally and ethically mandated disclosure duties on the part of prosecutors. Specifically, under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995), prosecutors are obliged to inform criminal defendants of any exculpatory evidence and/or impeachment evidence which relates to

¹ Denotes the hour and minute time stamped on the body cameras.

Sheriff Scott E. Hilliard
c/o Jared J. Bedrick, Esq.
February 12, 2020
Page 2 of 3

their case. Exculpatory evidence is evidence that is favorable to the accused. Criminal conduct on the part of a law enforcement officer or a deliberate lie are just some examples of the type of conduct that constitutes exculpatory evidence. Due to the disclosure obligations of prosecutors, this Office tracks and maintains a list of law enforcement officers who have engaged in conduct which may constitute exculpatory evidence. This list is referred to as the Exculpatory Evidence Schedule (EES). The maintenance of the EES is the present procedure in place in New Hampshire to ensure that a prosecutor's duty to disclose exculpatory information is effectively discharged. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

As outlined in the March 21, 2017 Law Enforcement Memorandum issued by Attorney General Joseph A. Foster concerning the EES, typically, before placement on the EES can occur, an internal investigation is conducted into the facts and circumstances of the potentially exculpatory conduct. Pursuant to the Additional Guidance Concerning the Exculpatory Evidence Schedule issued by me and dated April 30, 2018, only "sustained" findings of misconduct warrant placement on the EES.

By letter dated January 24, 2020, I requested the Merrimack County Board of Commissioners to undertake an internal investigation for purposes of determining whether you should be placed on the EES. The Board declined. *See* Letter of Tara Reardon, Chair, Merrimack County Board of Commissioners, dated January 30, 2020. This abdication² raises significant concerns about the protection of the constitutional rights of the criminally accused in Merrimack County and the ability of prosecutors to discharge their ethical and constitutional responsibilities. In light of this extraordinary circumstance, I believe it is incumbent on me, as the chief law enforcement officer in the State of New Hampshire, to determine whether your conduct constitutes exculpatory and/or impeachment evidence.

Here, while no internal investigation has taken place, you were tried before the 9th Circuit Court and found to be guilty of a class A misdemeanor offense. Although the fact of your conviction and your conduct during the investigation is information which may not be

² The Board of Commissioners acts as the executive branch of county government and it has day-to-day responsibility for fiscal and policy matters. Commissioners must fulfill the directives of the legislative branch of county government as well as uphold and enforce the law, including the United States and New Hampshire Constitutions. Moreover, a majority of the Board is expressly authorized to bring a petition to the county convention for removal of a county official for official misconduct subject to notice and an opportunity to be heard with respect to the "allegations supporting the petition." RSA 661:9, IV. It is beyond any reasonable dispute that an allegation such as this must be grounded in fact, after an adequate inquiry or investigation. *See, e.g.,* Super. Ct. R. 7(e) (requiring that filings must be based on "knowledge, information and belief there is good ground to support it"). Your conduct, including your lies to the investigating Tilton police officers, would almost certainly be exculpatory were you to present testimony in your capacity as a law enforcement officer. The Board's failure to invoke its authority and uphold fundamental protections afforded to the people of Merrimack County is inexplicable and necessitates the actions I am taking.

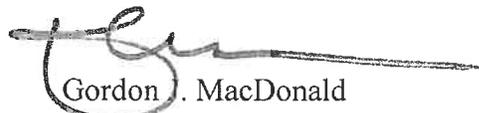
Sheriff Scott E. Hilliard
c/o Jared J. Bedrick, Esq.
February 12, 2020
Page 3 of 3

contained in your personnel file, it is nevertheless public information, knowledge of which would be imputed to prosecutors, and surely constitutes potentially exculpatory information under *Brady* and *Laurie*. As the New Hampshire Supreme Court has made clear, it has “not prescribe[d] any specific procedures that law enforcement or prosecutorial authorities must follow in connection with the use of ‘Laurie Lists.’” *Gantert v. City of Rochester*, 168 N.H. 640, 651 (2016) (citing *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 784-85 (2015)). Nonetheless, an offending officer must be afforded sufficient process before being placed on the EES. In *Gantert*, that process took the form of an internal investigation, which was also reviewed internally, followed by a meeting with the police chief, and a hearing before the police commission. *Gantert*, 168 N.H. at 650. In considering “the government’s strong interest in meeting its constitutional *Brady* obligation, and its interest in not delaying placement of officers on the list” the Court in *Gantert* held that no additional hearing or process was due prior to the officer’s placement on the EES. *Id.*

Certainly, the formalized processes of a criminal investigation followed by a criminal trial where you were represented by counsel, exceeds the process deemed sufficient by the Court in *Gantert* and forestalls the risk of erroneous deprivation of your reputational interest. With respect to your lies to the investigating officers, the video evidence – as described above – is incontrovertible. Therefore, I conclude that you have either been afforded the process you are due or that there is an incontrovertible basis to conclude that a sustained finding of misconduct would result from an internal investigation.

In light of the foregoing, your name will be placed on the EES as of today’s date, February 12, 2020, unless you submit a written objection no later than February 21, 2020. The basis for the placement on the EES will be your conviction and your lies to the investigating law enforcement officers on August 9, 2020.

Sincerely,



Gordon MacDonald
Attorney General

GJM/kas

cc: Merrimack County Attorney Robin A. Davis
Commissioner Tara Reardon
Commissioner Stuart D. Trachy
Commissioner Peter Spaulding
Deputy Attorney General Jane E. Young
Senior Assistant Attorney General Geoffrey W.R. Ward

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