THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2021-0146

Petition of State of New Hampshire

MOTION FOR RECONSIDERATION OR REHEARING

NOW COME Respondents Jeffrey Hallock-Saucier and Jacob Johnson and hereby move for reconsideration or rehearing pursuant to Supreme Court Rule 22. In support of their motion, Respondents state as follows:

On February 4, 2022, this Court issued an opinion in this case reversing and remanding the trial court's determination that RSA 105:13-b did not require it to issue a protective order for exculpatory evidence in a police officer's personnel file. Though below-listed attorneys from ACLU-NH rarely file motions for reconsideration, this Court's decision significantly overlooked or misapprehended the text of the statute and well-accepted canons of statutory construction. *See* N.H. Sup. Ct. R. 22(2) ("The motion shall state with particularity the points of law or fact that in the professional judgment of the movant the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present …."). In so doing, this Court's decision compels defendants to treat as secret information obtained in criminal cases concerning police officers who are paid by taxpayer dollars and work for us. In other words, the Court's misapprehension of the text of the statute provides police with special, categorical secrecy protections in the context of criminal cases that no other witness blanketly receives.

I. INTRODUCTION

Typically, this Court begins its statutory interpretation analysis by examining the plain text of a statute, ascribing the words their ordinary meaning. If a statute is ambiguous, the Court may look to legislative history for guidance, and the Court may look at the legislature's intent by examining the title of a statute. *See State v. Brouillette*, 166 N.H. 487, 490, (2014) ("We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent.") (internal quotations omitted). The Court's analysis in this case flips this procedure on its head by beginning with the statute's title and interpreting the text of the statute second.

In its opinion, the Court erred by beginning with the statute's title and assuming incorrectly that it created a general presumption of confidentiality for police personnel files. The Court then turned to the actual text of the statute and rendered surplusage the only time the word "confidential" appears in the text of the statute. It also, based upon this incorrect presumption of general confidentiality, read words requiring confidentiality into the statute that are not there. Moreover, the Court erred in considering the dicta in *Duschesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016) that police personnel files are presumptively confidential because in those cases the Court did not have the opportunity to consider the statutory interpretation arguments advanced here. Finally, the Court erred by considering a California case that interpreted a statute with different language.

II. ANALYSIS

First, the Court erred by reading the statute's title as providing evidence of the legislature's intent that generally police personnel files are to be treated confidentially.

The title of the statute is "Confidentiality of Personnel Files," and it merely reflects the general subject matter of the statute. Yet this Court divines too much from those four words. Indeed, the title does not *require* confidentiality for police personnel files in criminal cases—instead, it just as plausibly suggests that the statute will generally discuss the confidentiality of police personnel files in criminal cases (including exceptions). In other words, the legislature did not title the statute "Personnel Files *To Be Confidential*," and the Court should not divine the legislative purpose as if the General Court had done so. Indeed, the United States Supreme Court has cautioned against precisely this type of overreliance on a statute's title because titles are short and cannot fully convey all the nuances of the text of the statute:

> That heading is but a short-hand reference to the general subject matter involved . . . [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general matter.

Bhd. Of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528-29 (1947). This Court's February 4, 2022 opinion casts aside this well-settled rule that statute titles generally indicate no more than a statute's "general subject matter."

This Court's decision also casts aside the well-settled rule that titles, at most, can be insightful if a statute is ambiguous. *See State v. Surrell*, 171 N.H. 82, 85 (2018) ("Additionally, we do not consider legislative history to construe a statute that is clear on its face"); *accord United States v. Godin*, 534 F.3d 51, 59 (1st Cir. 2008) ("We may also look to the title of a statute

to resolve ambiguity in the text."). Here, this Court seemed to conclude that the statute was unambiguous, but did so by first (and improperly) using the statute's title to inform this conclusion.

Here, there is no ambiguity in the text—RSA 105:13-b requires a prosecutor to turn over exculpatory evidence without any reference to confidentiality. *See* RSA 105:13-b, I ("Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant."). And, if there is any doubt as to this interpretation, it is eliminated by Attorney General Foster's 2017 memorandum to law enforcement in which he noted that RSA 105:13-b—following amendments made in 2012—"makes an exception to the otherwise confidential nature of police personnel files for direct disclosure to the defense of exculpatory information in a criminal case." *See* State App. 204.

But even if there were ambiguity—which there is not—the Court erred by first turning to the title of the statute instead of the legislative history. *See State v. Folds*, 172 N.H. 513, 526 (2019) ("Where legislative history plainly supports a particular construction of the statute, we will adopt that construction, since our task in interpreting the statutes is to determine legislative intent.") (citation and quotation omitted). The legislative history makes clear that the purpose of the statute was to *generally discuss* the confidentially of police personnel files in criminal cases, rather than to make such files generally confidential.

As initially drafted in 1992, the title of HB 1359, which became RSA 103:15-b, read "AN ACT *requiring* confidentiality of personnel files of local police officers except in certain criminal cases." Resp. Add. 105-06 (emphasis added). However, the bill was amended in the House, including to remove language stating that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a

public record pursuant to RSA 91-A." As part of that amendment, its title was changed to "AN ACT *relative* to the confidentiality of police personnel files in criminal cases." Resp. Add. 117, 128 (emphasis added). This change in the legislative history demonstrates that it was the intention of the legislature that first enacted RSA 105:13-b in 1992 that the statute does not *mandate* confidentiality of police personnel files in criminal cases, but rather *discusses* it and when it applies in the context of a criminal case.

Second, the Court compounded its error by rendering the last sentence of RSA 105:13-b, III surplusage. The plain text of the statute reads that, after a court makes a determination on the relevance of evidence in an officer's file and orders the relevant part of the file disclosed, "[t]he remainder of the file shall be treated as confidential and returned to the police department employing the officer." RSA 105:13-5, III. In other words, the only portion of the statute's text that even addressed confidentiality is the portion dealing with "the remainder of [the] officer's file" that was not deemed exculpatory or relevant. However, in its opinion, the Court wrote: "Read in context, this sentence merely states that material not required to be disclosed to the defendant retains its general confidentiality and is to be returned to the employing police department." *Opinion*, p. 6. But this reading renders meaningless the phrase "shall be treated as confidential" for the "remainder of the [officer's] file." This is because the Court's interpretation provides blanket confidentiality in criminal cases for the ***entire*** file—both exculpatory and non-exculpatory alike—thereby casting aside (and rendering inconsequential) this more specific language governing the confidentiality of the non-exculpatory "remainder of the file." *See In the Matter of Kelly & Fernandes-Prabhu*, 170 N.H. 42, 49 (2017) ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect. We also presume that the legislature does not enact

unnecessary and duplicative provisions."). This is especially incongruous because the phrase rendered superfluous is the only time the word "confidential" appears anywhere in the text of the statute. Instead a more plausible reading of the statute governing confidentiality of personnel files would be one that gives the word "confidential" meaning—*i.e.* that it is only the non-exculpatory remainder of the file (after a court has conducted its review) that is confidential and returned to the police department.

Third, after this Court incorrectly interpreted from the title of the statute that "police personnel files . . . start with a presumption of general confidentiality," Opinion, p. 6, the Court incorrectly read legislative silence on further dissemination to require the protective order. But legislative inaction says little, as the legislature could just have easily believed that action was unnecessary because it agreed with defendants' statutory interpretation that the 2012 amendment to RSA 105:13-b required disclosure to defendants without confidentiality conditions.[1] Indeed, as the Court observed, RSA 105:13-b requires exculpatory evidence in a personnel file of a police officer who is serving as a witness in a criminal case to be disclosed to the defendant. The statute neither explicitly permits nor prohibits a defendant from further sharing that information, but the Court erred by concluding from this silence that "[n]o further dissemination is . . . permitted"—rather than the (more plausible) "no further dissemination is prohibited." Counsel from ACLU-NH, who have litigated many governmental transparency cases in New Hampshire, are unaware of any other contexts in which legislative silence on an issue of dissemination has been interpreted as a prohibition on speech or disclosure. By contrast,

[1] It is "'impossible to assert with any degree of assurance that [a legislative] failure to act represents' affirmative [legislative] approval of" one of this Court's decisions. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n. 1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting)).

the legislature in other contexts has explicitly made publication or dissemination of documents prohibited, demonstrating that the legislature knows how to create confidentiality when it wants. *See*, *e.g.*, RSA 169-B:36 ("It shall be unlawful for any person to disclose court records…"); RSA 132:34, II(b) ("Proceedings under this section shall be held in closed court, shall be confidential and shall ensure the anonymity of the minor."); RSA 458:15-b, I-a ("Except as provided in paragraph II, all financial affidavits filed under this chapter shall be confidential…"). Indeed, the legislature in enacting RSA 105:13-b in 1992 explicitly rejected categorical secrecy for police personnel files under RSA ch. 91-A when it amended the statute to remove such secrecy. Resp. Add. 105-106, 126-127 (prior version), 117-118, 128-129 (amended version).

The plain text of RSA 105:13-b, I does not explicitly mandate confidentiality of records, as the legislature has chosen to require in other areas of law. By reading such confidentiality into the statute, this Court erred and rewrote the statute. *See Correia v. Town of Alton*, 157 N.H. 716, 718 (2008) ("We will neither consider what the legislature might have said nor add words that it did not see fit to include.").

Fourth, this Court erred in considering *Duschesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016) for the proposition that RSA 105:13-b makes police personnel files generally confidential. Both of these cases were brought by officers seeking removal from the then-*Laurie* lists (now the Exculpatory Evidence Schedule) and were not about the confidentiality of their personnel files. As explained in Respondents' brief, any discussion of the meaning of RSA 105:13-b was dicta. Moreover, this Court's reliance on that dicta is especially dubious because the proper construction of RSA 105:13-b's confidentiality provisions was not in contention. Undersigned counsel has reviewed the briefs filed by the parties in those cases, and in

neither did any party advance the statutory interpretation Respondents advance here: namely, that only the non-exculpatory, non-relevant portions of police personnel files are confidential. Accordingly, the construction of the statute was not in dispute, and the Court did not have the benefit of principled argument in that case against the proposition that such files are presumptively confidential in all cases.

Fifth, this Court erred in adopting the reasoning of a California case, *Alford v. Superior Ct.*, 107 Cal. Rptr. 245, (Ct. App. 2001). *Alford* was interpreting California Evidence Code Section 1045(e) which *explicitly required a court to issue a protective order*, with language that is not present in RSA 105:13-d. §1045(e) ("The court *shall*, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law.") (emphasis added). *Alford*—which was reversed on appeal on other grounds—simply interpreted a statute that has an explicit requirement of confidentiality not present in the New Hampshire statute, and so simply does not apply. In other words, this Court rewrote RSA 105:13-b to impose on defendants a mandate of confidentiality that does not exist, even for exculpatory information that they are required to receive under the due process provisions of the United States and New Hampshire Constitutions.

WHEREFORE Respondents Jeffrey Hallock-Saucier and Jacob Johnson respectfully pray that this Honorable Court:

A. Grant this motion;

B. Reconsider its February 4, 2022 Opinion or rehear this case;

C. Affirm the trial court's orders; and

D. Grant such other relief as is just and proper

Respectfully Submitted,

JEFFREY HALLOCK-SAUCIER

By and through his attorneys,

/s/ Henry R. Klementowicz

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on counsel for the State through the court's electronic filing system on today's date: Samuel Garland, Esq.

Dated: February 14, 2022 */s/ Henry R. Klementowicz*
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