THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-____

State of New Hampshire v. Nicholas Fuchs
Merrimack County Superior Court
(217-2019-CR-00581)

and

State of New Hampshire v. Jacob Johnson
Merrimack County Superior Court
(217-2020-CR-0873)

and

State of New Hampshire v. Jeffrey Hallock-Saucier
Merrimack County Superior Court
(217-2020-CR-00089)

PETITION FOR ORIGINAL JURISDICTION UNDER SUPREME COURT RULE 11

THE STATE OF NEW HAMPSHIRE

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A. DECISION TO BE REVIEWED

The State of New Hampshire ("State") petitions this Court to exercise original jurisdiction pursuant to New Hampshire Supreme Court Rule 11 to review the same series of orders issued in three criminal cases: an order denying an assented to motion for a protective order, denial of a motion to seal, and a narrative order denying motions for reconsideration. The orders involve the same legal issue and same legal reasoning.

Specifically, the State asks this Court to review the narrative order issued in all three criminal cases denying three nearly identical motions for reconsideration. PD 41-51; *see also* PA 10-16, 41-48, 73-81.[1] The State also asks this Court to review the four superior court orders denying assented-to motions for protective orders for discovery materials—potentially exculpatory evidence from police officers' personnel files—in the three cases. PA 5-7, 35-37, 38-40, 57-59. The State further asks this Court to review the denial of several motions to seal. PA 8, 9, 49, 60, 70, 73. Copies of these orders are included in the appendix.

B. PORTIONS OF PETITION FILED UNDER SEAL

The State has redacted the officers' names and departments in the documents provided in the appendix, as addressed in the State's Motion to Redact Officers' Identifying Information being filed herewith.

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[1] Citations to the record are as follows:
"PD __" refers to the addendum to this Petition for Original Jurisdiction and page number.
"PA __" refers to the appendix to this Petition for Original Jurisdiction and page number.

C. QUESTION TO BE REVIEWED

I. Whether the superior court interpreted RSA 105:13-b too narrowly when it concluded that the statute provides no confidentiality for potentially exculpatory evidence taken from a law enforcement officer's personnel file once the police personnel file materials are disclosed to a defendant as required by *Brady/Laurie* and RSA 105:13-b, I.

II. Whether the superior court erred when it concluded that police personnel records are presumptively public records under RSA 91-A:4.

III. Whether the superior court unsustainably exercised its discretion when it *sua sponte* transformed routine, non-adversarial, assented-to criminal discovery motions into RSA 91-A proceedings and delayed three criminal cases. RSA 105:13-b, RSA 91-A:4, and precedent from this Court, provided a clear basis to grant the parties' assented-to motions.

D. PROVISIONS OF CONSTITUTION, STATUTES, RULES, AND REGULATIONS INVOLVED

Statutes:

RSA 105:13-b, Confidentiality of Personnel Files

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. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.

III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

RSA 91-A:4, I, Minutes and Records Available for Public Inspection

Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

RSA 91-A:5, IV, Exemptions

Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from

investigative files on a limited basis to persons whose health or safety may be affected.

New Hampshire Court Rules:

Rule 50, New Hampshire Rule of Criminal Procedure

(a) *Access to Documents.*

(1) *General Rule*. Except as otherwise provided by statute or court rule, all pleadings, attachment to pleadings, exhibits submitted at hearings or trials, and other docket entries (hereinafter referred to collectively as "documents") shall be available for public inspection. This rule shall not apply to confidential or privileged documents submitted to the court for *in camera* review as required by court rule, statute or case law.

(2) *Burden of Proof*. The burden of proving that a document or a portion of a document should be confidential rests with the party or person seeking confidentiality.

(3) The following provisions govern a party's obligations when filing a "confidential document" or documents containing "confidential information" as defined in this rule.

(b) *Filing a Document Which Is Confidential In Its Entirety*.

(1) The following provisions govern a party's obligations when filing a "confidential document" as defined in this rule. A "confidential document" means a document that is confidential in its entirety because it contains confidential information and there is no practicable means of filing a redacted version of the document.

(2) A confidential document shall not be included in a pleading if it is neither required for filing nor material to the proceeding. If the confidential document is required or is material to the proceeding, the party must file the confidential document in the manner prescribed by this rule.

(3) A party filing a confidential document must also file a separate motion to seal pursuant to subdivision (d) of this rule.

(4) A party filing a confidential document shall identify the document in the caption of the pleading so as not to jeopardize the confidentiality of the document but in sufficient detail to allow a party seeking access to the confidential document to file a motion to unseal pursuant to subdivision (f) of this rule.

(c) *Documents Containing Confidential Information.*

(1) The following provisions govern a party's obligations when filing a document containing "confidential information" as defined in this rule. If a document is confidential in its entirety, as defined in subsection (b) of this rule, the party must follow the procedures for filing a confidential document set forth in subdivision (b).

(2) "Confidential Information" means:

(A) Information that is not public pursuant to state or federal statute, administrative or court rule, a prior court order placing the information under seal, or case law; or

(B) Information which, if publicly disclosed, would substantially impair:

(i) the privacy interests of an individual; or

(ii) the business, financial, or commercial interests of an individual or entity; or

(iii) the right to a fair adjudication of the case; or

(C) Information for which a party can establish a specific and substantial interest in maintaining confidentiality that outweighs the strong presumption in favor of public access to court records.

(3) The following is a non-exhaustive list of the type of Information that should ordinarily be treated as "confidential information" under this rule:

(A) information that would compromise the confidentiality of juvenile delinquency, children in need of services, or abuse/neglect, termination of parental rights proceedings, adoption, mental health, grand jury or

other court or administrative proceedings that are not open to the public; or

(B) financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit card numbers or Personal Identification Numbers (PINs) of individuals including parties and non-parties; or

(C) personal identifying information of any person, including but not limited to social security number, date of birth (except a defendant's date of birth in criminal cases), mother's maiden name, a driver's license number, a fingerprint number, the number of other government-issued identification documents or a health insurance identification number.

(4) *Filing Documents Containing Confidential Information*.

(A) When a party files a document the party shall omit or redact confidential information from the filing when the information is not required to be included for filing and is not material to the proceeding. If none of the confidential information is required or material to the proceeding, the party should file only the version of the document from which the omissions or redactions have been made. At the time the document is submitted to the court the party must clearly indicate on the document that the document has been redacted or information has been omitted pursuant to Rule 50(c)(4)(A).

(B) It is the responsibility of the filing party to ensure that confidential information is omitted or redacted from a document before the document is filed. It is not the responsibility of the clerk or court staff to review documents filed by a party to determine whether appropriate omissions or redactions have been made.

(C) If confidential information is required for filing and/or is material to the proceeding and therefore must be included in the document, the filer shall file:

(i) a motion to seal as provided in subdivision (d) of this rule;

(ii) for inclusion in the public file, the document with the confidential information redacted by blocking out the text or using some other method to clearly delineate the redactions; and

(iii) an unredacted version of the document clearly marked as confidential.

(d) *Motions to Seal*.

(1) No confidential document or document containing confidential information shall be filed under seal unless accompanied by a separate motion to seal consistent with this rule. In other words, labeling a document as "confidential" or "under seal" or requesting the court to seal a pleading in the prayers for relief without a separate motion to seal filed pursuant to this rule will result in the document being filed as part of the public record in the case.

(2) A motion to seal a confidential document or a document containing confidential information shall state the authority for the confidentiality, *i.e.*, the statute, case law, administrative order or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. An agreement of the parties that a document is confidential or contains confidential information is not a sufficient basis alone to seal the record.

(3) The motion to seal shall specifically set forth the duration the party requests that the document remain under seal.

(4) Upon filing of the motion to seal with a confidential document or the unredacted version of a document, the confidential document or unredacted document shall be kept confidential pending a ruling on the motion.

(5) The motion to seal shall itself automatically be placed under seal without separate motion in order to facilitate specific arguments about why the party is seeking to maintain the confidentiality of the document or confidential information.

(6) The court shall review the motion to seal and any objection to the motion to seal that may have been filed and determine whether the unredacted version of the document shall be confidential. An order will be issued setting forth the court's ruling on the motion to seal. The order shall include the duration that the confidential document or document containing confidential information shall remain under seal.

(7) A party or person with standing may move to seal or redact confidential documents or confidential information that is contained or disclosed in the party's own filing or the filing of any other party and may request an immediate order to seal the document pending the court's ruling on the motion.

(8) If the court determines that the document is not confidential, any party or person with standing shall have 10 days from the date of the clerk's notice of the decision to file a motion to reconsider or a motion for interlocutory appeal to the supreme court. The document shall remain under seal pending ruling on a timely motion. The court may issue additional orders as necessary to preserve the confidentiality of a document pending a final ruling or appeal of an order to unseal.

(e) *Procedure for Seeking Access to a Document or Information Contained in A Document that has been Determined to be Confidential*

(1) Any person who seeks access to a document or portion of a document that has been determined to be confidential shall file a motion with the court requesting access to the document in question. There shall be no filing fee for such a motion.

(2) The person filing a motion to unseal shall have the burden to establish that notice of the motion to unseal was provided to all parties and other persons with standing in the case. If the person filing the motion to unseal cannot provide actual notice of the motion to all interested parties and persons, then the moving person shall demonstrate that he or she exhausted reasonable efforts to provide such notice. Failure to effect actual notice shall not alone be grounds to deny a motion to

unseal where the moving party has exhausted reasonable efforts to provide notice.

(3) The Court shall examine the document in question together with the motion to unseal and any objections thereto to determine whether there is a basis for nondisclosure and, if necessary, hold a hearing thereon.

(4) An order shall be issued setting forth the court's ruling on the motion, which shall be made public. In the event that the court determines that the document or information contained in the document is confidential, the order shall include findings of fact and rulings of law that support the decision of nondisclosure.

(5) If the court determines that the document or information contained in the document is not confidential, the court shall not make the record public for 10 days from the date of the clerk's notice of the decision in order to give any party or person with standing aggrieved by the decision time to file a motion to reconsider or appeal to the supreme court.

(f) *Sanctions for Disclosure of Confidential Information.*

If a party knowingly publicly files documents that contain or disclose confidential information in violation of these rules, the court may, upon its own motion or that of any other party or affected person, impose sanctions against the filing party.

E. DOCUMENTS

The following documents are included in the appendix to this petition:

State v. Nicholas Fuchs Documents (217-2019-CR-00581)

- Motion For A Protective Order Of Discovery Materials-February 24, 2021 (Margin Order Denial-February 25, 2021)
    - *Proposed Protective Order*

- Motion To Seal State's Motion For A Protective Order Of Discovery- February 24, 2021 (Margin Order Denial-February 25, 2021)
- Motion To Seal Motion For Reconsideration-March 4, 2021 (Margin Denial-March 16, 2021)
- Motion To Reconsider Denial Of Protective Order-March 4, 2021 (Margin Order Denial-March 16, 2021)
    - *Proposed Protective Order*
- Order in *Fuchs, Johnson, and Hallock-Saucier*-March 18, 2021
- State's Emergency Motion To Stay Proceedings And Seal Or Redact Pleadings-March 22, 2021
- Case Summary Report (217-2019-CR-00581)

State v. Jacob Johnson Documents (217-2020-CR-00873)

- Motion for a Protective Order of Discovery Materials (Officer 1)-February 25, 2021 (Margin Order Denial-March 1, 2021)
    - *Proposed Protective Order*
- State Motion for a Protective Order of Discovery Materials (Officer 2)-February 25, 2021 (Margin Order Denial-March 1, 2021)
    - *Proposed Protective Order*
- Motion to Reconsider Denial of Protective Order-March 4, 2021 (Margin Order Denial-March 18, 2021)
    - *Proposed Protective Order (Officer 1)*
    - *Proposed Protective Order (Officer 2)*
- Motion to Seal Motion to Reconsider-March 4, 2021 (Margin Order Denial-March 16, 2021)

- State's Emergency Motion to Stay Proceedings and Seal or Redact Proceedings-March 22, 2021 (Margin Order-April 1, 2021)
- Case Summary Report (217-2020-CR-00873)

State v. Jeffrey Hallock-Saucier Documents (217-2020-CR-00089)

- Motion for a Protective Order of Discovery Materials-March 5, 2021 (Margin Order Denial-March 16, 2021)
    - *Proposed Protective Order*
- Motion to Seal Motion for a Protective Order-March 5, 2021 (Margin Order Denial-March 16, 2021)
- Defendant's Motion *in Limine* #1 Regarding Exculpatory Evidence-March 9, 2021 (Margin Order Delaying Ruling-March 16, 2021)
    - ****Exhibits to motion are omitted****
- Motion to Seal State's Response to Defendant's Motion *in Limine* #1-March 10, 2021 (Margin Order Denial-March 16, 2021)
- State's Response to Defendant's Motion *in Limine* #1-March 10, 2021
- State's Motion to Seal Motion to Reconsider-March 29, 2021
- State Motion to Reconsider Denial of Protective Order-March 29, 2021 (Margin Order Denial-March 29, 2021)
    - *Proposed Protective Order*
- State's Emergency Motion to Stay Proceedings and Seal or Redact Proceedings-March 22, 2021 (Margin Order-March 23, 2021)
- Objection to State's Emergency Motion to Stay-March 23, 2021
- Case Summary Report (217-2020-CR-00089)

- 2017 Memorandum from Attorney General Foster Regarding Exculpatory Evidence Schedule and Protocols

F. STATEMENT OF THE CASE

This petition for original jurisdiction arises out of three Merrimack County Superior Court cases involving three different defendants but the same legal issue.

- *State v. Nicholas Fuchs*, (Docket No.: 217-2019-CR-00581) ("Fuchs")
- *State v. Jacob Johnson,* (Docket No.: 217-2020-CR-00873) ("Johnson")
- *State v. Hallock-Saucier,* (Docket No.: 217-2020-CR-00089) ("Hallock-Saucier")

The following sets forth the relevant facts and issues in each case.

1. Fuchs

In August 2019, Nicholas Fuchs was indicted for a class B felony for violating the Controlled Drug Act, RSA 318-B:2. PA 31. On February 24, 2021, the State filed an assented-to motion for a protective order to maintain confidentiality over potentially exculpatory evidence from the personnel file of a named police officer that the State needed to disclose to defense counsel in order to meet its *Brady*/*Laurie* obligations. PA 5-7. *See Brady v. Maryland,* 373 U.S. 83 (1963), *State v. Laurie*, 139 N.H. 325 (1995); RSA 105:13-b, I; *see also N.H. R. Crim. P*. 50(c)(2)(A) (defining "Confidential information" to include "Information that is not public pursuant to state or federal statute, administrative or court rule . . ., or case law"). The State also filed a motion to seal on the basis that the protective order described the

confidential and statutorily protected materials. *See N.H. R. Crim. P.* 50(d). PA 8. On February 25, 2021, the court (*Schulman*, J.) denied the motions without prejudice on the basis that "[p]olice personnel records and documents related to police internal personnel practices are presumptively public records under RSA 91-A:4, unless for particularized reasons, the public release of the records would result in an invasion of privacy. *See Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 357 (2020)." PA 6. The Court invited the State or the witness to argue "that such particularized privacy concerns are present in this case" and stated that if "the court finds that the records are not public records, then the court will comsoder [sic] issuing a protective order of appropriate scope." PA 6. The Court concluded that "if the records fall within the scope of 91-A:4, meaning that that [sic] any member of the public is entitled to the records upon demand, the court will NOT issue a protective order." PA 6.

On March 4, 2021, the State filed a motion for reconsideration arguing that the court had: (1) erred in analyzing the assented-to request for a protective order under 91-A instead of RSA 105:13-b; (2) misinterpreted RSA 105:13-b; (3) misapprehended RSA 105:13-b and RSA 91-A:5, IV when it ruled that "police personnel records . . . are presumptively public records under RSA 91-A:4"; (4) overlooked the unsettled but related question of law regarding whether the Exculpatory Evidence Schedule ("EES") was subject to disclosure under RSA 91-A:5, IV. PA 10-13. The State also argued that (1) several Freedom of Information Act ("FOIA") exemptions and (2) the law enforcement privilege supported keeping the disclosed documents confidential pre-trial to the broadest extent possible, especially if the documents identified individuals who provided information

to the police with the expectation that their disclosures would be kept confidential. PA 13-15. On March 16, 2021, the trial court denied the motion by margin order that indicated that a narrative order was forthcoming. PA 10.

On March 18, 2021, the court issued its narrative order explaining that because "the court would not ordinarily issue a protective order that gags the parties and counsel from sharing what is otherwise available to the general public upon demand," a protective order "is inappropriate" if the State "provides discovery of documents that are subject to mandatory public disclosure under the Right to Know statute." PD 44. The court reasoned that after the 2020 overrule of *Fenniman*,[2] "the practice of willy-nilly issuing protective orders to gag the defense whenever the State provides exculpatory evidence of police misconduct is no longer tenable" and that "a knee-jerk protective order based on the provenance rather than the substance of the discovery is unwarranted and could amount to a prior restraint of lawful speech." PD 46. According to the court, nothing in RSA 105:13-b—a statute that requires the State to disclose to the defense exculpatory evidence in the personnel file of a police officer witness—"suggests that such exculpatory evidence, once disclosed, must be kept confidential." PD 46. The court asserted that the public has a strong interest in the disclosure of information related to police misconduct and in allowing members of the defense bar to share information that "casts doubt on the credibility of particular police witnesses." PD 48. The court invited the State "to make a fact-specific case that public disclosure of the information would result in an invasion of privacy" but concluded that "the court will not issue gag orders in blank."

[2] *Union Leader Corp. v Fenniman*, 136 N.H. 624 (1993)

PD 48. The court's narrative order also denied the motion to seal on the basis that "the filings at issue do not contain any factual information from a police personnel file." PD 50.

The name and department of the police officer involved became a part of the public record when the trial court denied the motions to seal because the assented-to motion for a protective order and the motion for reconsideration identified the officer. Therefore, on March 22, 2021, the State filed an emergency motion asking the court to reseal the proceedings, redact the names of the officers, and stay the proceedings for thirty days to allow the State to decide whether to pursue an appeal. PA 28-30. On April 1, 2021, the court granted the motion in part, holding that the discovery at issue did not need to be provided pending appeal and setting May 17, 2021 as a status conference. PA 28. The court replaced the pleadings that identified the officer with redacted copies. PA 34.

2. Johnson

In October 2020, Jacob Johnson was charged with two counts of first-degree assault, two counts of criminal threatening with a deadly weapon, and one count of misdemeanor simple assault. PA 53. On February 25, 2021, the State filed two assented-to motions for protective orders to maintain the confidentiality of potentially exculpatory evidence from the personnel file of two named police officers that the State needed to disclose to defense counsel to meet its *Brady/Laurie* obligations. PA 35-37, 38-40. *See Brady*, 373 U.S. at 87; *Laurie*, 139 N.H. at 327; RSA 105:13-b, I; *N.H. R. Crim. P.* 50(c)(2)(A). The State also filed two motions to seal on the basis that the

protective orders described the confidential and statutorily protected materials. PA 55; *see N.H. R. Crim. P.* 50(d).

On February 25, 2021, the court (*Schulman*, J.) issued two margin orders denying the motions without prejudice. PA 35, 38. The court explained:

> Police personnel files may be public records under RSA 91-A:4 and 5 unless there is a particularized concern of invasion of privacy. If the records could be accessed by any member of the public, the court will not issue a protective order. But, the State may renew the motion if it believes the records are not public records under RSA 91-A:4 and 5, as construed by the N.H. Supreme Court in the *Town of Salem* case last year.

PA 35 (*citing* 173 N.H. at 357 (2020); *see also* PA 38.

The State filed a motion for reconsideration on March 4, 2021 raising the identical arguments that it raised in *Fuchs*. PA 41-48. On March 18, 2021, the court denied the motion by a margin order that referenced the same narrative order as issued in *Fuchs*. PA 41; PD 41-51. On March 22, 2021, the State filed an emergency motion seeking a stay pending appeal, and asking the court to reseal pleadings identifying the officers at issue or redact the officer's names. PA 40-42. The court granted the emergency motion on April 1, 2021. PA 50. The court replaced the pleadings that identified the officer with redacted copies. PA 56.

3. Hallock-Saucier

In February 2020, Jeffrey Hallock-Saucier was charged with three class B felonies: one count of criminal threatening, one count of criminal threatening against a person with a deadly weapon, and one count of reckless

conduct with a deadly weapon. PA 91. On March 5, 2021, the State filed an assented-to motion for a protective order to maintain the confidentiality of potentially exculpatory evidence from the personnel file of a named police officer that the State needed to disclose to defense counsel to meet its *Brady/Laurie* obligations. PA 57-59. *See Brady*, 373 U.S. at 87; *Laurie*, 139 N.H. at 325; RSA 105:13-b, I; *N.H. R. Crim. P.* 50(c)(2)(A). The State also filed a motion to seal on the basis that the protective order described the confidential and statutorily protected materials. PA 60. *See N.H. R. Crim. P.* 50(d).

On March 9, 2021, defense counsel filed an unsealed motion *in limine* asking to be allowing to inquire whether the officer named in the State's motion for a protective order "is on the *Laurie* list and how and why [he] got there." PA 68. The State filed a sealed response and asked the court to deny the defendant's motion without prejudice pending his receipt of the potentially exculpatory evidence at issue. PA 70-72. On March 16, 2021, the trial court (*Schulman*, J.) issued a margin order indicating that it would hear defendant's motion prior to jury selection. PA 61. The court noted that the "mere status of being on the so-called *Laurie* list (which (a) is not required by *Laurie* and (b) is not a list) is not something that may be inquired into." PA 61.

On March 16, 2021, the court denied the State's motion for a protective order, the motion to seal that motion, and the motion to seal the State's response to the motion *in limine* by margin orders that referenced the narrative order the court issued in *Fuchs* and *Johnson*. PA 57, 60, 70, PD 41-51.

On March 22, 2021, the State filed an emergency motion seeking a stay pending appeal, and asking the court to reseal pleadings identifying the officers at issue or redact the officer's names. PA 82-84. The defense objected on the basis that jury selection had been scheduled for April 20, 2021, that granting a stay is against the public interest, and that granting a stay would violate the defendant's speedy trial right. PA 85-90. On March 23, 2021, the court issued an order ruling that the State's motion would be granted if the State appealed. PA 84. On March 31, 2021, the court stayed the case pending this appeal. PA 95.

The court also held that the State's motions which named the officer could be sealed if the prosecutor filed versions that redacted the officer's name. PA 84. The prosecutor filed the redacted versions. PA 94. The court denied the State's request to seal or redact the defendant's motion *in limine*, which also included an officer's name. PA 84.

On March 29, 2021, the State filed a motion for reconsideration raising the identical arguments raised in the motions for reconsideration in *Fuchs* and *Johnson*. PA 74. The court denied the motion that same day and stated:

> "The court remains willing to make a fact-based determination of whether a sufficiently compelling privacy interest exists to warrant a protective order. But the court will not issue a protective order in blank, sight unseen, merely because the substance of the information has to do with alleged misconduct on the part of a police officer. A blanket, one-sized fits all approach is unwarranted, unsupported by statute, and likely unconstitutional for the reasons set forth in the court's narrative order."

PA 74.

G. REASONS THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION

1. Standard of Review

"Certiorari is an extraordinary remedy that is not granted as a matter of right, but rather at the court's discretion." *Petition of New Hampshire Div. of State Police*, ___ N.H. at ___, ___ A.3d ___, 2021 WL 1152119 (slip op. at 3) (issued Mar. 26, 2021). This court's review of the trial court's decision on a petition for writ of certiorari "entails examining whether the court acted illegally with respect to jurisdiction, authority or observance of the law, or unsustainably exercised its discretion or acted arbitrarily, unreasonably, or capriciously." *Id.*

The trial court's order gives rise to several special and important reasons for granting this petition. *N.H. Sup. Ct. R.* 11(1). Rule 11 allows this Court to exercise original jurisdiction when: (1) "a trial court or administrative agency has decided a question of substance not theretofore determined by this court"; (2) "has decided it in a way probably not in accord with applicable decisions of this court"; and, (3) "has so far departed from the accepted or usual course of judicial or administrative agency proceedings as to call for an exercise of this court's power of supervision." *Id.* Each of these reasons applies and the Court should grant the petition in this case.

2. First Question Presented

The first question in this Petition concerns statutory interpretation: whether materials taken directly from a police personnel file and disclosed to a defendant as required by *Brady/Laurie* and RSA 105:13-b,

I, remain confidential unless a judge determines that the evidence is admissible at trial. Although this Court "generally review[s] trial court decisions regarding discovery management and related issues deferentially under [the] unsustainable exercise of discretion standard, where, as here, the court's ruling is based on its construction of a statute, [this Court's] review is *de novo*." *Petition of New Hampshire Div. of State Police*, ___ N.H. at ___, 2021 WL 1152119 (slip op. at 7) (quotation omitted).

When this Court interprets statutes, it seeks to determine the intent of the legislature based on the "words of the statute considered as a whole" and "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Petition of Carrier*, 165 N.H. 719, 721 (2013). The Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* The Court seeks to "discern the legislature's intent and to interpret statutory language in light of the police or purpose sought to be advanced by the statutory scheme." *Id.*

RSA 105:13-b, titled "Confidentiality of Personnel Files," is "designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records." *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774, 780 (2015). The statute states that: "Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal trial shall be disclosed to the defendant." RSA 105:13-b, I. Section III of the statute states that: "No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be

opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case." RSA 105:13-b, III. The statute sets forth a process allowing the judge to examine the file in camera if he or she determines probable cause exists. The statute directs that: "[t]he remainder of the file shall be treated as confidential." RSA 105:13-b, III.

While Section I does not explicitly address confidentiality, it provides for only a limited disclosure: potentially exculpatory evidence to a particular criminal defendant in a particular criminal case. RSA 105:13-b, I. The balance of the statute provides for an additional disclosure to particular criminal defendant in a particular criminal case, but only should that defendant meet a high standard—probable cause.[3] Otherwise, the statute confirms, "the file shall be treated as confidential." RSA 105:13-b, III. When read as a whole, therefore, the statutory scheme makes plain that police personnel file disclosures are very limited, in scope and circumstance, and that documents from police personnel files are to be kept confidential to the broadest extent possible. *See Gantert v. City of Rochester*, 168 N.H. 640, 646 (2016) (citing RSA 105:13-b for the proposition that "police personnel files are generally confidential by statute"); *see also In re Petition of State*, 153 N.H. 318, 321 (2006) (citing

[3] Contrast, for example, the liberal civil discovery standard, which allows a party to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action" so long as "the information sought appears reasonable calculated to lead to the discovery of admissible evidence." *Super. Ct. Civ. R.* 21(b).

RSA 105:13-b and repeatedly referring to police personnel files as "confidential personnel files").

The State relied on the statutory promise of confidentiality in the assented-to motions for protective orders in all three cases. The motions urged the trial court to grant the protective order on the basis that:

> Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. *See* RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the law enforcement officer's personnel records while meeting the State's competing interest in providing exculpatory evidence in a criminal matter, enabling the Defendant and his counsel to review complete discovery and prepare for trial. *See generally, State v. Laurie*, 139 N.H. 325 (1995); *N.H. R. Prof Conduct* 3.8(d)."

PA 5-6, 35-36, 38-39, 57-58.

The trial court denied the motions on the basis that "[n]othing in [RSA 105:13-b, I], or the statute as a whole, suggests that such exculpatory evidence, once disclosed, must be kept confidential." PD 46. Rather, according to the trial court, the statute "is nothing more than a statutory command to the prosecutor to provide discovery." PD 46. The trial court's novel statutory interpretation is erroneous because it fails to construe RSA 105:13-b, I, together with the rest of the statute to effectuate the statute's overall purpose. *See Carrier*, 165 N.H. at 721. The trial court's interpretation also renders an absurd and unjust result. *See id.*

This Court explained in *Duchesne* that the Legislature enacted RSA 105:13-b "to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of

officer personnel records." 167 N.H. at 780. Some Legislatures in other states have elected to balance these rights and interests differently. *See* Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743, 762 (2015) (identifying four different approaches state legislatures have taken with regard to *Brady* disclosures and defendant and public access to police personnel files). Indeed, legislatures in some states have passed statutes that make records of police misconduct publicly accessible, thereby eliminating the prosecutor's obligation to discover and disclose exculpatory evidence under *Brady. Id.* (noting that records of police misconduct are publicly accessible in Florida, Texas, Minnesota, Arizona, Kentucky, Louisiana, and South Carolina). The New Hampshire Legislature made a different choice: it enacted a statute on the "Confidentiality of Personnel Files" that makes materials in police personnel files confidential subject to narrow constitutional exceptions. RSA 105:13-b. The trial court therefore erred when it interpreted 105:13-b, I as "nothing more than a statutory command to the prosecutor to provide discovery," PD 46, because this narrow interpretation disregards the context of the statute as a whole.

The trial court's interpretation also renders an absurd and unjust result. The Legislature elected to make police personnel files confidential. Nothing in the statute implies that the Legislature intended to give criminal defendants the power or discretion to undercut that confidentiality. But if a defendant is free to do whatever he or she wants with potentially exculpatory evidence from a police personnel file, the criminal defendant will be free to disclose otherwise confidential materials at will. It would also be absurd and unjust if a criminal defendant were free to reveal otherwise-confidential

information to the public at a time when the trial court has yet to determine that the evidence is even relevant or admissible at trial. A defendant may believe that selective disclosure could assist his case, but these revelations could interfere with the judicial process by tainting the jury pool and interfering with the parties' ability to try the case.

3. Second Question Presented

The superior court erred when it concluded that police personnel records are presumptively public records under RSA 91-A:4 because it misinterpreted the Right-to-Know Law in several ways.

First, the trial court erred when it concluded that police personnel records are presumptively public records because it overlooked the fact that RSA 105:13-b constitutes a statutory exemption to the Right-to-Know Law. RSA 91-A:4, I, states that citizens may inspect governmental records "except as otherwise prohibited by statute . . . ." RSA 105:13-b is just such a statute. *See New Hampshire Ctr. for Pub. Int. Journalism v. New Hampshire Dep't of Just.,* ___ N.H. at ___, ___ A.3d ____, 2020 WL 6372970, (slip op. at 7) (issued Oct. 30, 2020) (assuming without deciding that "RSA 105:13-b constitutes an exception to the Right-to-Know Law and that it applies outside of the context of a specific criminal case in which a police officer is testifying").

RSA 105:13-b prohibits even a criminal defendant from accessing or inspecting police personnel files outside of the narrow constitutional disclosures required by *Brady/Laurie*. Otherwise, materials from police personnel files "shall be treated as confidential." RSA 105:13-b, III.

This statute implicitly establishes that the public has no right to access or inspect police personnel files. Had the Legislature intended for anyone, including a criminal defendant, to be able to review or obtain an entire police personnel file under the Right-to-Know law, it would have so stated. *See New Hampshire Ctr. for Pub. Int. Journalism*, ___N.H. ___, 2020 WL 6372970 (slip op. at 7) ("We will neither consider what the legislature might have said nor add words that it did not see fit to include." (quotation omitted)). Instead, the Legislature plainly placed police personnel files beyond the scope of a RSA 91-A request by enacting a statute that ensured limited disclosure to meet a constitutional requirement to a particular criminal defendant in a particular criminal case while emphasizing that the balance of the file "shall be treated as confidential." RSA 105:13-b, III.

This Court held in *New Hampshire Right to Life*, that the Right-to-Know Law, like FOIA, "should not be used to circumvent civil discovery rules." *New Hampshire Right to Life v. Dir., New Hampshire Charitable Trusts Unit*, 169 N.H. 95, 106 (2016). The trial court, by disregarding the statutory exemption contained in RSA 105:13-b as "nothing more than a statutory command to the prosecutor to provide discovery," PD 46, has done just that. RSA 105:13-b statutorily exempts even criminal defendants from inspecting police personnel files; therefore, the trial court misapprehended the law when it held that police personnel records are "presumptively public records." PA 6; *see* RSA 91-A 4, I.

Second, even if the Legislature had not enacted RSA 105:13-b and statutorily exempted police personnel records from the Right-to-Know law, the Right-to-Know law itself recognizes that personnel records are not—as the trial court claims—"presumptively public records." PA 6.

RSA 91-A:4, I, states that citizens may inspect governmental records "except as otherwise prohibited by . . . RSA 91-A:5." RSA 91-A:5 provides that certain government records are exempt from disclosure, including: "[r]ecords pertaining to internal personnel practices; confidential, . . . personnel, . . . and other files whose disclosure would constitute an invasion of privacy." RSA 91-A:5, IV. In May 2020, this Court affirmed "records documenting the history or performance of a particular employee fall within the exemption for personnel files." *Seacoast Newspapers, Inc.*, 173 N.H. at 340; RSA 91-A:5, IV.

Personnel records, like the other categories of records in RSA 91-A:5, IV are not *per se* exempt from disclosure, but are "sufficiently private" so as to trigger this Court's well-established three-step 91-A analysis. *Reid v. New Hampshire Att'y Gen.,* 169 N.H. 509, 528 (2016); *see also Union Leader Corp.*, 173 N.H. at 357 (*overruling Fenniman* to the extent that it adopted a *per se* rule of exemption for records relating to "internal personnel practices" and holding that the same three-step balancing test the Court uses for other categories of records listed in RSA 91-A:5, IV applies to records relating to "internal personnel practices"). Therefore, even setting aside the statutory protections contained in RSA 105:13-b, police personnel records are not "presumptively public records" because members of the public are not *per se* entitled to these documents on demand.

To the contrary, when evaluating a Right-to-Know request for personnel records, the records are subject to a fact-specific balancing test that assesses and balances an individual's privacy interest and the government's interest in nondisclosure against the public interest in disclosure. *See Reid*, 169 N.H. at 528-29. To the State's knowledge, this Court has never

concluded that the balance requires disclosure of information maintained in a police officer's personnel file. Indeed, it remains an open question of law whether even information that is derived from, but not contained within, a police personnel file is subject to unredacted disclosure under 91-A:5, IV. *See New Hampshire Ctr. for Pub. Interest Journalism*, ___ N.H. ___, 2020 WL 6372970, (slip op. at 2) (holding the EES "is neither confidential under RSA 105:13-b nor exempt from disclosure under the Right-to-Know law as an 'internal personnel practice' or a 'personnel file'" but remanding to the trial court to evaluate under the 91-A three-part balancing test).

Third, federal cases interpreting FOIA provisions that are similar to exemption provisions in the Right-to-Know law also support the State's assertion that police personnel records are also not "presumptively public records." *Seacoast*, 173 N.H. at 338 (noting that this Court "often look[s] to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions"). *See also U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 755-56 (1989) (noting "Exemption 3 applies to documents that are specifically exempted from disclosure by another statute. § 552(b)(3). Exemption 6 protects 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' § 552(b)(6)).

In addition, this Court has adopted the "*Murray* exemption"—a test embodied in exemption 7 of the FOIA at 5 U.S.C. 552 (b)(7)—which exempts "records or information compiled for law enforcement purposes" from disclosure to the extent that the production of such records or information:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . .

Murray v. New Hampshire Div. of State Police, Special Investigation Unit, 154 N.H. 579, 582 (2006); *Montenegro v. City of Dover*, 162 N.H. 641, 645 (2011); *see also* the Freedom of Information Act Guide published by the United States Department of Justice, *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7* (collecting cases).

Finally, courts throughout the country have held that information and documents that would undermine the "confidentiality of sources" or "the privacy of individuals involved in an investigation" are protected by a law enforcement privilege even when they might otherwise be subject to discovery in the context of ongoing litigation. *See, e.g., In re The City of New York*, 607 F.3d 923, 944 (2d Cir. 2010); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 62 (1st Cir. 2007); *In re U.S. Dep't of Homeland*

Sec., 459 F.3d 565, 570 (5th Cir. 2006); *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997); *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996). This Court has not issued an opinion addressing whether it would adopt the law enforcement privilege.

4. Third Question Presented

The superior court unsustainably exercised its discretion when it *sua sponte* transformed routine, non-adversarial, assented-to criminal discovery motions into RSA 91-A proceedings and delayed three criminal cases. RSA 105:13-b, RSA 91-A:4, and precedent from this Court, provided a clear basis to grant the parties' assented-to motions.

The assented-to motions for protective orders and the motions to seal in all three cases cite RSA 105:13-b as the basis for the parties' understanding that the materials from the police officers' personnel files are confidential by statute. PA 5, 35, 38, 57; *see N.H. R. Crim. P.* 50(d)(2) ("A motion to seal a confidential document or a document containing confidential information shall state the authority for the confidentiality, *i.e.*, the statute, case law, administrative order or court rule providing for confidentiality, or the privacy interest or circumstance that requires confidentiality. An agreement of the parties that a document is confidential or contains confidential information is not a sufficient basis alone to seal the record."). The proper and long-standing interpretation of RSA 105:13-b supports the parties' understanding that the documents were confidential by statute and no other statute, court practice, or rule prevented the court from granting the assented-to request.

To the contrary, prosecutors throughout the State have regularly filed assented-to motions asking courts to issue protective orders for discovery

materials using the template motion included in a 2017 memorandum from then Attorney General Foster to law enforcement agencies and county attorneys. PA 99 ("In compliance with RSA 105:13-b, prosecutors will provide potentially exculpatory evidence *directly to the defense* for any law enforcement witnesses in the case. This disclosure should be done in conjunction with a protective order until it is determined that the information is admissible at trial. A sample protective order is attached for guidance."); PA 117-19 (sample protective order). To the State's knowledge, no trial court in the State has denied a comparable assented-to motion for a protective order in a case involving materials from a law enforcement officer's personnel file. Despite this Legislative enactment and unbroken judicial precedent, the trial court denied the State's assented-to motions for protective orders.

In denying the motions, the trial court stated that "the practice of willy-nilly issuing protective orders to gag the defense whenever the State provides exculpatory evidence of police misconduct is no longer tenable" now that "the *Town of Salem* case did away with the categorical approach taken in *Fenniman* and replaced it with a fact-specific balancing test." PD 45-46; *citing Town of Salem*, 173 N.H. at 347; *see also Fenniman*, 136 N.H. at 624.

The court explained, with no citation to legal authority, that:

> While every case is different, and while there are factual exceptions to every rule, there is a strong and compelling public interest in disclosure of information relating to dishonest and assaultive behavior committed by police officers in the course of their official duties. The public has an interest in seeing how its police department investigates and disciplines its own. After all, it is the public, through its representatives that determines who will serve as police chief and how internal

> discipline will be monitored. The public interest is also served by preventing precisely what the State's motions would accomplish, i.e. the inability for the defense bar in a particular locality to share information that casts doubt on the credibility of particular police witnesses.

PD 48. The trial court welcomed the State "to make a fact-specific case that public disclosure of the information will result in an invasion of privacy" but held that it "will not issue gag orders in blank." PD 48.

The trial court also denied the motions to seal on the basis that "pub[l]ic transparency is once [sic] means of keeping the courts, and more generally the government as a whole, accountable to the people." PD 49. The court explained:

> [T]he motions for protective orders in these cases touch on public policy concerns that may be addressed in other fora, such as the Legislature, city councils, town select boards and police commissions. The nation as a whole is presently wrestling with the manner in which police misconduct is redressed and prevented. How can the public do ***its*** job if it does not know how the present system is functioning?

PD 49 (emphasis in the original).

But the legislature, by enacting a specific statute on the issue of the confidentiality of police personnel records, *see* RSA 105:13-b, and including an exemption for personnel and other confidential records in the Right-to-Know law, *see* RSA 91-A:5, IV, made the policy determination that police personnel records are confidential. While the trial court may disagree with that policy determination, or believe that there are overriding policy reasons that favor disclosure in cases involving police misconduct, "matters of public policy are reserved for the legislature." *CaremarkPCS Health, LLC v. New*

Hampshire Dep't of Admin. Servs., 167 N.H. 583, 591 (2015); *see also Dolbeare v. City of Laconia*, 168 N.H. 52, 56-57 (2015) (holding that to the extent to which a plaintiff relied upon public policy to support her statutory construction, the plaintiff made her argument in the wrong forum); *Petition of Kilton,* 156 N.H. 632, 645 (2007). Indeed, the trial court acknowledged the Legislature's role on matters of public policy in its narrative order when it stated, "the motions for protective orders in these cases touch on public policy concerns that may be addressed in other fora, such as the Legislature." PD 49. The legislature remains responsible for enacting statutes that balance policy considerations and it is currently working to do so on the very matters implicated by these cases.[4]

While the trial court may favor public disclosure of the documents at issue, the legislature has determined these documents are confidential. The trial court's disagreement with that legislative choice should not result in the delay of three criminal cases by forcing the parties to litigate an issue that the legislature already decided. As both this Court and the United States Supreme Court have observed, the "'adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges to fashion the questions for review.'" *Hodges v. Johnson*, 170 N.H. 470, 490-91 (2017) *(Bassett*, J., dissenting) (quoting *Central Bank of Denver,*

[4] The most recent update from the Commission of Law Enforcement Accountability, Community and Transparency ("LEACT") makes clear that the New Hampshire Legislature has not been idle on these matters of public policy. *See* LEACT Recommendations- February 2021 Monthly Tracking Dashboard (detailing the current implementation status of each of the forty-eight recommendations from the LEACT commission which includes considerable legislation in progress). Available online at: https://www.governor.nh.gov/sites/g/files/ehbemt336/files/inline-documents/sonh/20210218-dashboard.pdf (last visited April 13, 2021).

N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 195 n.4 (1994) (*Stevens*, J., dissenting) (quotations omitted). The trial court unsustainably exercised its discretion when it denied the State's assented-to requests for protective orders—requests supported by statute and long-standing precedent—and refashioned the matters into complex, fact-specific, civil Right-to-Know proceedings in order to advance the court's public policy preferences. The trial court's unsustainable exercise of discretion has undermined judicial effectiveness and the adversary process, has delayed discovery in all three criminal cases, and has resulted in a stay in a case that was previously set for jury selection on April 20, 2021. *See* PA 95 (trial court stayed the case pending appeal and cancelled jury selection).

H. JURISDICTIONAL BASIS

The New Hampshire Supreme Court has jurisdiction to hear this case pursuant to RSA 490:4 and as further specified in New Hampshire Supreme Court Rule 11.

I. PRESERVATION STATEMENT

These issues were preserved in the assented-to motions for a protective order, the motions to seal, and the motions for reconsideration submitted in each of the three cases. PA 5-16, 35-49, 57-60, 71-78.

J. PARTIES

Petitioner:	Petitioner's Counsel:
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K. TRANSCRIPT STATEMENT

No transcript is necessary to adjudicate the issues raised in this Petition.

L. CONCLUSION

By denying the assented-to motions for protective orders in these cases, the trial court has transformed routine, undisputed criminal discovery requests into 91-A cases and has effectively forced the parties to become unwilling litigants in Right-to-Know requests both brought by, and before, the trial court itself. Therefore, the trial court's orders give rise to several special and important reasons for granting this petition. *N.H. Sup. Ct. R.* 11(1). The trial court, in ruling that materials from police personnel files are "presumptively public records," PA 6, under the Right-to-Know law, has decided a question of substance in a way that is not in accord with statute or prior decisions of this Court. *See N.H. Sup. Ct. R.* 11(1). The court has also vastly departed from the usual course of action in similar cases. *See id.*

This Petition reflects an urgency that requires original jurisdiction now, and not standard appellate review at some point in the future, after discovery and a trial. If this Court declines to accept this Petition, the State will be forced to disclose confidential materials taken from police personnel files to the trial court and make fact specific arguments as to why various portions of various documents may or may not be subject to 91-A disclosure. This process will continue to introduce unnecessary delays into the cases and force the parties to litigate an issue that the trial court, not the litigants, has introduced into the case. It will also undermine the specific and detailed

statutory scheme the legislature has crafted governing confidentiality and limited disclosure obligations with respect to police personnel files. And it may result in the wider publication of information the Legislature deems confidential.

Thus far in these three cases, the trial court has misapprehended the heightened protections that the legislature decided to afford to police personnel documents by enacting RSA 105:13-b and RSA 91-A:5, IV. PD 41-49. The court has also unsealed documents containing the names of the officers which could cause immediate harm to the reputations and privacy of the named individuals. PD 49-51. If the State discloses documents from police personnel files to the trial court, the trial court will apply its flawed interpretation of the applicable statutes, and release additional confidential information to the public—disclosures that would harm the public, the government, the named officers, and other individuals identified in the files. *See Duchesne*, 167 N.H. at 780 (observing that both the police and the public have a "countervailing interest . . . in the confidentiality of officer personnel records"); *see also Reid*, 169 N.H. at 529 (collecting cases and acknowledging that individuals who cooperate with internal investigations have privacy interests at stake, and that the public also has a strong interest in protecting the privacy of those who cooperate in internal investigations).

The State respectfully asks this Court to accept this petition. It will allow this Court to illuminate whether RSA 105:13-b confidentiality continues within constitutional limits once documents have been disclosed to defendants, and whether RSA 105:13-b exempts police personnel file documents from disclosure under 91-A:4. This Petition could also allow this Court to clarify whether courts can or should subject police personnel

documents disclosed during criminal discovery to 91-A balancing when deciding whether to seal motions or grant protective orders. If so, the court could also use this Petition to provide guidance to trial courts regarding the applicability of the *Murray* exemption and the law enforcement privilege

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

April 15, 2021

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 11(5), I hereby certify that a copy of the foregoing petition and accompanying appendix was mailed this day, postage prepaid, to the defendant's counsel, and to the trial court, at the following addresses:

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Courtesy copies of the petition and appendix have been e-mailed to the above-listed counsel of record.

April 15, 2021 */s/Elizabeth C. Velez*
Elizabeth C. Velez

ADDENDUM TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, ss

STATE OF NEW HAMPSHIRE

v.

JEFFREY HALLOCK-SAUCIER

217-2020-CR-0089

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-00873

STATE OF NEW HAMPSHRIE

v.

NICHOLAS FUCHS

217-2019-CR-00581

ORDER

The State's motions for protective orders, motions to seal and motions for reconsideration all DENIED.

I. Background

In these three cases the State has made the determination that it must provide the defense with information from a police officer's personnel file because that information is potentially

exculpatory. See, e.g., State v. Laurie, 139 N.H. 325 (1999); Kyles v. Whitley, 514 U.S. 419, 437 (1994); RSA 105:13-b,I.

The State asks the court for two things: First, the State seeks protective orders that would prohibit defense counsel from sharing the information. Second, the State seeks to seal all reference in the court file to (a) the fact that such discovery is being provided, (b) the issuance of a protective order, and (c) all litigation regarding the matter. Essentially, the State wishes to have the defense gagged and the existence of the gag order kept secret.

Notably, the State has not described the substance of the potentially exculpatory evidence. It say only that (a) the evidence is potentially exculpatory, (b) the evidence must be disclosed to the defendant as a constitutional imperative, (c) because the source of the evidence is a police personnel file it must be kept secret on pain of contempt, and (d) even the request to keep the information secret must itself be kept secret.

In two of the above-captioned cases, State v. Johnson and State v. Fuchs, the motions before the court are (a) motions for reconsideration of the denial (without prejudice) of protective orders and (b) motions to seal. None of these motions describe the substance of potential the exculpatory evidence at issue.

All that the State is willing to say is that the evidence comes from a police personnel file.

In the remaining case, State v. Hallock-Saucier, the motions before the court are (a) a motion for a protective order, (b) a motion to seal that motion and (c) a motion to seal the State's response to a motion in limine.[1] Once again, the State has declined to describe the substance of the potential exculpatory evidence.

II. Protective Orders

The court clearly has the authority to supervise discovery in criminal cases through the issuance of protective orders. N.H.R.Crim.P 12(b)(8); cf State v. Larose, 157 N.H. 28, 39 (2008) ("The trial court has broad discretion in managing the proceedings before it . . . including pre-trial discovery[.]" (internal citation omitted)). Such orders may forbid the recipients of even constitutionally required discovery from re-disclosing what they receive when necessary to, *inter alia*, prevent an invasion of privacy or safeguard a well-grounded expectation of confidentiality. Thus, for example, the court routinely grants protective orders forbidding the publication of

[1]The defendant's motion in limine in Hallock-Saucier seeks permission to cross-examine a police officer about the reasons why he is on the so-called exculpatory evidence schedule, a/k/a the Laurie list. The motion was premature because the defense has not yet learned that reason.

videotaped CAC interviews of child victims of alleged sexual assault. Also, for example, the court often grants protective orders relating to a witness' medical records.

However, the court would not ordinarily issue a protective order that gags the parties and counsel from sharing what is otherwise available to the general public upon demand. Thus, if the State provides discovery of documents that are subject to mandatory public disclosure under the Right To Know statute, RSA 91-A:4, a protective order is inappropriate. Indeed, such an order would be a prior restraint on speech relating to a matter of public record. It would forbid the defendant, defense counsel and the defense team from speech that literally any other member of the public could make as of right.

Until recently, all police department records relating to "internal personnel practices" were *per se* exempt from public disclosure. This was the result of the New Hampshire Supreme Court's decision in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993). Fenniman authoritatively construed the "internal personnel practices" exemption to the general rule that all government records may be accessed by the public. See RSA 91-A:4 (stating the general rule); RSA 91-A:5, IV (establishing the exemption). During Fenniman's long reign, all police department records relating to police officer discipline and misconduct were categorically shielded from public view.

While Fenniman was good law, New Hampshire trial courts routinely granted protective orders restricting the re-disclosure of police department records relating to officer discipline and misconduct. Fenniman did not actually require the issuance of protective orders; it did no more than construe an exemption to the Right To Know statute. No other Supreme Court decision required protective orders. No statute required protective orders. But nonetheless, Fenniman fostered a culture of confidentiality with respect to internal police misconduct and discipline records.

Fenniman was overruled last year by Union Leader Corporation v. Town of Salem, 13 N.H. 345, 357 (2020). In the Town of Salem case, the New Hampshire Supreme Court held that a balancing test must be applied in order to determine whether records relating to "internal personnel practices" and police officer discipline must be made available to the public. This balancing test requires the court to determine whether the release of the records would constitute an invasion of privacy. In making this determination, the court must make a fact-specific inquiry into (a) the extent of the privacy interest at stake and (b) the extent of the public interest in disclosure. In short, the Town of Salem case did away with the categorical approach taken by Fenniman and replaced it with a fact-specific balancing test.

Thus, the practice of willy-nilly issuing protective orders to gag the defense whenever the State provides exculpatory evidence of police misconduct is no longer tenable. It is one thing to ask for a case-specific protective order on the grounds that re-disclosure would result in an invasion of privacy. But a knee-jerk protective order based on the provenance rather than the substance of the discovery is unwarranted and could amount to a prior restraint on lawful speech.

The State reliance on RSA 105:13-b is misplaced. That statute consists of three paragraphs. Paragraph I requires the State to disclose to the defense any exculpatory evidence in a police officer's file if the officer will be a witness:

> 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. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.

Nothing in that paragraph, or the statute as a whole, suggests that such exculpatory evidence, once disclosed, must be kept confidential. The statute makes no provision for a protective order. It does not create a privilege. It is nothing more than a statutory command to the prosecutor to provide discovery.

The records at issue in these cases appear to fall into this category. To be sure, the prosecutor described the records as "potentially exculpatory" rather than "exculpatory."

However, he indicated that they must be provided directly to the defense. Thus, the court presumes that the prosecutor was proceeding under paragraph I.

Paragraphs II and III of RSA 105:13-b require an *in camera* review when either (a) the prosecutor cannot determine whether the material is exculpatory or (b) the material is not exculpatory but is otherwise material to the case. These two paragraphs essentially forbid courts from ordering discovery of those portions of a police officer's personnel file which are neither (a) exculpatory nor (b) otherwise relevant and material. But when the court engages in an *in camera* review for this purpose it is not sitting to decide, in the first instance, whether any portion of the file is exempt from public disclosure.

In any event, the issue in this case is not whether the records are discoverable--the State concedes that they are--but rather whether the court must issue a sight unseen gag order, without first determining whether disclosure of the records would result in an invasion of privacy.

Based on the parties' filings, it would appear that the records in question likely relate to the grounds for placing an officer on the exculpatory evidence schedule. Assuming that the placement was made in accordance with the Attorney General's guidance, there would be a finding, following an investigation,

and possibly following a hearing, that the officer committed either acts of dishonesty or used excessive force. While every case is different, and while there are factual exceptions to every rule, there is a strong and compelling public interest in disclosure of information relating to dishonest and assaultive behavior committed by police officers in the course of their official duties. The public has an interest in seeing how its police department investigates and disciplines its own. After all, it is the public, through its representatives that determines who will serve as police chief and how internal discipline will be monitored. The public interest is also served by preventing precisely what the State's motions would accomplish, i.e. the inability for the defense bar in a particular locality to share information that casts doubt on the credibility of particular police witnesses. Speaking generally, an officer who has been found to have committed such acts has a limited cognizable interest in keeping that fact secret from the public he serves.

All of this is to say that the State is welcome to make a fact-specific case that public disclosure of the information would result in an invasion of privacy, but the court will not issue gag orders in blank.

III. Sealed Filings

A motion to seal court filings implicates Part 1, Articles 8 and 22 of the New Hampshire Constitution. Associated Press v. State, 153 N.H. 120, 127 (2005); In re State (Bowman Search Warrants), 146 N.H. 621, 630 (2001); Petition of Keene Sentinel, 136 N.H. 121, 129-30(1992). The public has a constitutionally grounded to access the records of **its** courts. Pubic transparency is once means of keeping the courts, and more generally the government as a whole, accountable to the people.

For example, the motions for protective orders in these cases touch on public policy concerns that may be addressed in other fora, such as the Legislature, city councils, town select boards and police commissions. The nation as a whole is presently wrestling with the manner in which police misconduct is redressed and prevented. How can the public do **its** job if it does not know how the present system is functioning?

"There is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." Associated Press, 153 N.H. at 129 (quoting Douglas v. Douglas, 146 N.H. 205, 208 (2001)). See also N.H.R.Crim.P. 50(a) placing

the burden of proof on the party seeking to seal a document or portion of a document.

To be sure, the presumption of openness may be rebutted by proof that the information in a filing is confidential by virtue of statute. N.H.R.Crim.P. 50(c)(2)(A). However, as explained above, there is no longer a rule of *per se* confidentiality for police personnel files. More important, the filings at issue do not contain any factual information from a police personnel file. As noted above, the State has assiduously declined to describe the substance of what it refers to as "potentially exculpatory evidence."

The presumption of openness may also be rebutted by proof that the public disclosure of information in a filing would "substantially impair . . . the privacy interests of an individual." N.H.R.Crim.P. 50(c)(2)(B)(i). However, because the present filings do not describe the substance of what is in the police personnel file, they may remain publicly filed without any impairment of the officer's privacy.

IV. Conclusion

The State's motions for reconsideration are DENIED.

The State's motions to seal are DENIED.

The State's motions for protective orders are DENIED.

However, the State may renew its motions for protective order if it can show that the re-disclosure of specific factual information will result in an invasion of privacy.

March 18, 2021

Andrew R. Schulman,
Presiding Justice