THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2021-0146

Petition of State of New Hampshire

MOTION FOR SUMMARY DISMISSAL, OR, IN THE ALTERNATIVE, SUMMARY AFFIRMANCE

NOW COME Defendants/Respondents Jeffrey Hallock-Saucier, Nicholas Fuchs, and Jacob Johnson and, pursuant to Supreme Court Rule 25(2), move for summary dismissal of this petition, or, in the alternative, summary affirmance of the Superior Court's orders. In support of their motion, Defendants/Respondents state as follows:

I. INTRODUCTION

It is an axiomatic principle of constitutional law that a prosecutor—without conditions—must provide to a criminal defendant all exculpatory evidence in the State's possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Laurie*, 139 N.H. 325 (1995). In each these three cases before this Court, the State seeks to condition the production of constitutionally-required, exculpatory evidence related to the credibility of police officers on the entry of protective orders that would shield the evidence from the public and prohibit defense counsel from discussing the contents of the production with anyone other than counsels' staff and the defendant. In each case, the State filed a motion for a protective order and a motion to seal the motion for protective order. When these motions were denied, the State filed a motion for reconsideration. The Superior Court correctly determined that there was no basis in law for entering such a "gag" order, and in each case denied the State's motion. The Superior Court also correctly noted that there is a presumption that court records are

public documents, and found that the State had not put forward a sufficiently weighty reason to impair the public's right to inspect court documents.

The State now seeks to use the extraordinary remedy of a Rule 11 petition to review the Superior Court's broad discretion to manage discovery and its own docket. In so doing, the State continues to fail to timely produce exculpatory evidence, as well as delay the trials of the three defendants. The State's position is that a trial court ***must*** issue an order gagging defendants and their counsel from discussing exculpatory evidence found in police personnel files, and that the trial court ***must*** allow the State to litigate these orders away from public view. The State's position is wrong, and the Superior Court clearly did not unsustainably exercise its discretion in this case.

This is not a close question. It should go without saying that the State's compliance with *Brady/Laurie* obligations cannot be conditioned on defense attorneys agreeing to a "gag" order. Neither *Brady* nor *Laurie* contain such a condition on the receipt of exculpatory evidence. RSA 105:13-b, itself, also imposes no such condition, instead requiring that "[e]xculpatory 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." (emphasis added). This statute was amended in 2012 to make clear, without exception, that individuals accused of crimes be informed of police personnel file information that could impact a testifying officer's credibility. New Hampshire Rule of Criminal Procedure 12(b)(1)(E) similarly imposes no such condition, instead requiring the State to produce "[a]ll exculpatory evidence required to be disclosed pursuant to the doctrine of" *Brady* and *Laurie* "within forty-five calendar days after the entry of a not guilty plea." Instead of complying with these constitutional obligations, the State has violated these obligations, including RSA 105:13-b, by failing

to provide exculpatory evidence as required, instead opting to (i) not comply with the Superior Court's order, (ii) seek an extraordinary writ of certiorari, and (iii) delay the defendants' respective trials at significant prejudice to their speedy trial rights. This evidence should have been disclosed months ago in compliance with these principles.[1]

The Petition should be summarily dismissed because there are not "special and important reasons" for this Court to exercise its original jurisdiction. The New Hampshire Rules of Criminal Procedure give a Superior Court significant latitude to manage discovery and do not require the issuance of a protective order merely because it is agreed upon. Moreover, if this Court assumes original jurisdiction over these cases, it would considerably prejudice Defendants/Respondents, who would have their constitutional rights to speedy trials jeopardized and who would have to remain subject to bail orders while this appeal proceeds over the course of roughly a year.

---

[1] Setting aside its illegality, the State's practice of conditioning disclosure of exculpatory evidence on the imposition of a protective order is deeply coercive. This practice coerces defendants to relinquish their free speech rights as a condition of obtaining exculpatory evidence to which they are constitutionally entitled. As is obvious, defendants—many of whom are detained pre-trial—will often feel compelled to relinquish their free speech rights in order to timely receive the information to which they are entitled so they can have their day in court. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding it "intolerable that one constitutional right should have to be surrendered in order to assert another"). The State's protective order policy also, as the Superior Court aptly noted, has the effect of insulating officers from scrutiny and prohibiting defense attorneys from engaging in collaborative discussions with their colleagues on the nature of their cases. Indeed, the State's position prevents defense attorneys from coordinating to assess whether disclosures were made, as constitutionally required, in prior cases concerning officers whose information was disclosed in other cases. And because the one-sided proposed protective orders do not prohibit the State from discussing the evidence, this chill on collaborative discussions uniquely and unfairly prejudices the defense.

In the alternative, the Superior Court's denials of the motions for protective orders should be affirmed. As the Superior Court correctly held, RSA 105:13-b requires disclosure of exculpatory evidence without conditions. RSA 105:13-b does not create confidentiality for the portions of an officer's personnel file that are disclosed as exculpatory evidence to the defendant. Furthermore, the State's argument that RSA 105:13-b "constitutes a statutory exemption to the Right-to-Know Law" is incorrect, as this statute only applies in the context of when a police officer is "serving as a witness in any criminal case." Nor is there a basis in law to overcome the strong presumption that court files, including requests for protective orders in these cases, should be available for public inspection.

II. FACTS

A. Mr. Hallock-Saucier's Case

Mr. Hallock-Saucier was arrested on or about February 3, 2020, and was released on personal recognizance bail on February 3. *See* Pet. App. 91.[2] Complaints were filed on February 10, 2020 and the next day he waived arraignment and pleaded not guilty. Pet. App. 92. On March 5, 2021—*over a year after his case had been pending*—the State filed an assented-to Motion for a Protective Order, indicating that it had discovered potentially exculpatory evidence from a police officer's personnel file, and a Motion to Seal Motion for a Protective Order. Pet. App. 57, 60. The State's motion did not explain why the State waited over a year (well past the deadline in the court rules) before seeking the protective order and producing the discovery. The Superior Court denied both motions in a narrative order issued in all three cases on March 18, 2021 ("the Combined

[2] "Pet. __" refers to the State's Rule 11 Petition and Addendum. "Pet. App. __" refers to the Appendix to the State's Rule 11 Petition. "Add.__" refers to the Addendum to this motion.

Order").[3] Pet. 41-51. On March 22, 2021, the State filed an emergency motion for a stay pending appeal, requesting that all proceedings be stayed and that several pleadings be sealed pending appeal. Pet. App. 82-84. Mr. Hallock-Saucier objected and asserted his speedy trial rights. Pet. App. 89 ("the Defendant's rights to a speedy trial are implicated"). The Superior Court granted the motion to stay, on the conditions that (1) the State file an appeal or notify the court that the Attorney General had authorized an appeal, and (2) the State submit substitute pleadings redacting only the names of the officer. *Id.* On March 29, 2021, the State filed a motion for reconsideration, which was subsequently denied. Pet. App. 74-19. The State never sought a Rule 8 Interlocutory Appeal from the Superior Court. Pet. App. 95. On March 31, 2021, jury selection was cancelled due to this appeal. Nearly 15 months after his original arrest, Mr. Hallock-Saucier still has not received the exculpatory evidence to which he is constitutionally entitled.

B. Mr. Fuchs' Case

Mr. Fuchs was charged by complaint on June 18, 2019. Pet. App. 31. On June 20, 2019, he waived his arraignment and pleaded not guilty. Pet. App. 32. He was indicted on August 15, 2019. Pet. App. 31. Trial was twice scheduled and cancelled, in January 2020[4] and April 2020. Pet. App. 33. On February 24, 2021—*over a year and a half after Mr. Fuchs was first charged (and after trial had twice been scheduled and cancelled)*—the State filed an assented-to Motion for a Protective Order of Discovery

[3] Mr. Hallock-Saucier had filed a motion *in limine* for permission to examine an officer about alleged misconduct. Pet. App. 61-69. The State filed a response, and the Superior Court deferred ruling until jury selection. The Combined Order also denied the State's motion to seal the response to the motion *in limine*.

[4] The first trial was cancelled when Mr. Fuchs did not appear for the pretrial conference.

Materials, noting that it had obtained potentially exculpatory evidence in a police officer's personnel file. Pet. App. 5-6. That motion, which did not explain why it was filed after the case had been pending for over a year and a half, was denied without prejudice in a margin order which noted that personnel records are presumptively public records under RSA 91-A:4. *Id.* The State also moved to seal its motion for a protective order, and the motion to seal was denied. Pet. App. 9-10. On March 10, 2021, the State moved to reconsider the denial of its motion for a protective order and moved to seal its motion for reconsideration, and both motions were denied by the Combined Order. Pet. App. 9-15. On March 22, 2021, the State filed an Emergency Motion to Stay Proceedings to Allow State's Appeal of Trial Court Ruling, which was granted in part on April 1. Pet. App. 28-30. Mr. Fuchs remains subject to a bail order requiring he remain of good behavior and abstain from consuming any alcohol. Add. 31. The State never sought a Rule 8 Interlocutory Appeal from the Superior Court. Over 22 months after his original arrest, Mr. Fuchs still has not received the exculpatory evidence to which he is constitutionally entitled.

C. Mr. Johnson's Case

Mr. Johnson was charged with several crimes by complaint on October 15, 2020 and pleaded not guilty and waived arraignment that same day. Pet. App. 54. On February 25, 2021, the State filed two assented-to Motions for a Protective Order of Discovery Materials, noting that it had obtained potentially exculpatory evidence in two police officers' personnel files. Pet. App. 35-36; 38-39. The State also moved to seal these two motions. Pet. App. 55. These four motions were denied. On March 4, 2021, the State filed a motion to reconsider the denial of its motions for protective order, and moved to seal that motion to reconsider. Pet. App. 41-46; 40. Those motions were denied by the Combined Order. On March 22, 2021, the State filed an Emergency Motion to Stay Proceedings and Seal or

Redact Proceedings. Pet. App. 50-52. That motion was granted. On April 19, Mr. Johnson filed a Notice to Clarify Position on Protective Orders and Withdraw Assent (the prosecutor then moved to strike that pleading, and the motion to strike remains pending). Add. 33. The State never sought a Rule 8 Interlocutory Appeal from the Superior Court. Pet. App. 55. Mr. Johnson remains subject to a bail order which includes a "no contact" order, and prohibits Mr. Johnson from travelling outside the state, possessing a firearm, or consuming excessive alcohol. Add. 35. Over six months after he was charged, Mr. Johnson still has not received the exculpatory evidence to which he is constitutionally entitled.

D. The Combined Order

The Combined Order was issued in the three cases below and denied a motion for reconsideration and motions to seal in Mr. Johnson's and Mr. Fuchs' cases, and a motion for protective order, a motion to seal that motion, and a motion to seal a response *in limine* in the third case. Pet. App. 9; 10-15; 41-46; 49; 57-58; 60; 70. The Superior Court observed the following:

> 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 (1) the fact that such discovery is being provided, (b) the issuance of a protective order, and (c) all litigation in the matter. Essentially, the State wishes to have the defense gagged and the existence of the gag order kept secret.

Combined Order, p. 2. The Superior Court further observed that the State did not describe anywhere the substance of the potentially exculpatory evidence. *Id.*

The Superior Court continued that, while it plainly has the authority to issue protective orders, it only does so "to, *inter alia*, prevent an invasion of privacy or safeguard a well-grounded expectation of privacy," but

"would not ordinarily issue a protective order that gags the parties and counsel from sharing what is otherwise available to the general public on demand." *Id.*, pp. 3-4.

The Superior Court next observed that, historically, all police department records of internal personnel practices were categorically exempt from the Right-to-Know law under *Union Leader Corp. v. Fenniman*, 136 N.H. 624. However, following this Court's decisions last year in *Union Leader Corporation v. Town of Salem*, 173 N.H. 345 (2020) and *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020), *Fenniman*'s categorical bar on producing such information was replaced with a public interest balancing test, wherein a court must make a fact-specific inquiry that balances the public interest in disclosure against any privacy interests in nondisclosure. *See* Combined Order, p. 5. In light of that development, the Superior Court held the following: "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." *Id.*, p. 6.

The Superior Court next analyzed the State's arguments under RSA 105:13-b. Examining the text of section I of the statute, the court observed that the statute does not make exculpatory evidence confidential, creates no privilege, and has no provision for protective orders. *Id.* The Superior Court then recounted the strong public interest in seeing how police departments operate and investigate and discipline their own, and held that, "[s]peaking 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." *Id.*, p. 7. The Superior Court then invited the State to present a fact-specific case that public disclosure would result in an invasion of

privacy, but noted that "the court will not issue gag orders in blank." *Id.*, p. 8.

The Superior Court next turned to the State's requests to seal court records. The Superior Court correctly noted the presumption in New Hampshire that court records are public and that a party seeking to seal court records has to demonstrate a sufficiently compelling interest to overcome the public's right of access to the records of its courts. *Id.*, p 9. While acknowledging that the presumption of openness can be overcome, the Superior Court concluded that—because there is no longer a *per se* rule of confidentiality for police personnel files and because the filings do not contain any factual information from a police personnel file—there is no justification to seal the file. *Id.*, p. 10.

III. ANALYSIS

Rather than comply with its bedrock responsibility to produce evidence that tends to exculpate a criminal defendant, the State seeks an end run around this Court's rules governing interlocutory appeals through the extraordinary remedy of original jurisdiction. Because Rule 11 is not an appropriate vehicle for the State to challenge the Superior Court's orders, and because it would unfairly prejudice Defendants/Respondents, this appeal should be summarily dismissed. In the alternative, because the Superior Court's orders were correct, the Court should summarily affirm.

A. The Appeal Should Be Dismissed Because Original Jurisdiction Is Not The Appropriate Vehicle And Because It Would Prejudice Defendants/Respondents in Delaying Their Trials.

1. Rule 11 Is Not Appropriate In This Case.

The State is attempting to invoke this Court's original jurisdiction—available only in extraordinary and unusual circumstances—to re-litigate the Superior Court's thoughtful and well-reasoned order which is well

within its broad authority to manage discovery and its own docket. Moreover, any exercise of jurisdiction would directly undermine this Court's well-settled and preferred method of appellate review of interlocutory orders under Supreme Court Rule 8, including the requirement that relief be sought first from the Superior Court. *See* N.H. Sup. Ct. R. 8(1)(e) (requiring "the signature of the trial court transferring the question"). The State did not seek a certification from the Superior Court under Rule 8 in any of the questions below, and this Court should not reward the State for ignoring this rule by accepting the petition.

"Certiorari is an extraordinary remedy that is not granted as a matter of right, but rather at the discretion of the court." *Petition of State of N.H.*, 162 N.H. 64, 66 (2011). This Court "exercise[s] [its] power to grant the writ sparingly and only where to do otherwise would result in substantial injustice." *Id.* "Certiorari review is limited to whether the trial 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.*

Rule 11(1) lists some of the reasons why this Court will exercise original jurisdiction: "When a trial court or administrative agency has decided a question of substance not theretofore determined by this court; or has decided it in a way probably not in accord with applicable decisions of this court; or 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." None of these circumstances are present here.

As discussed below in Section III.B.1, the Superior Court, in denying the motions for protective orders (and associated motions for reconsideration), conducted a thoughtful and well-reasoned analysis of the applicable statutes and case law, and determined that nothing required it to

issue a protective order that would prohibit counsel or defendants from discussing evidence to which they were constitutionally entitled, and which would likely be public records under RSA ch. 91-A. Moreover, the Superior Court gave the State (and witnesses) the opportunity to present their request again if they could identify specific, particularized privacy concerns. *See* Pet. App. 6; 35; 37 (denying motions without prejudice); Combined Order, p. 8 ("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."). With respect to the motions to seal, the Superior Court correctly recognized that "[t]he public has a constitutionally grounded [interest] to access the records of **its** courts," Combined Order, p. 9 (emphasis in original), and that there is a presumption that court records are public and the burden of proof rests on the party seeking nondisclosure of court records—a burden the State had not met. *Id.*; *Associated Press v. State*, 153 N.H. 120, 129 (2005).

In fact, the State seeks appellate review of a garden-variety discovery issue, where the Superior Court's discretion is at its zenith. "'The trial court has broad discretion in managing the proceedings before it,' including pretrial discovery." *State v. Larose*, 157 N.H. 28 39 (2008) *quoting In the Matter of Connor & Connor*, 156 N.H. 250, 252 (2007). This Court "will disturb decisions about pre-trial discovery . . . only if the [party] demonstrates that the decision was clearly unreasonable to the prejudice of [its] case." *Id.*; *see also State v. Emery*, 152 N.H. 783, (2005) ("Decisions relating to pretrial discovery matters are generally within the sound discretion of the trial court . . . Absent unsustainable exercise of discretion, we will not reverse the trail court's decision with respect to alleged discovery violations."). The relevant court rule codifies this broad discretion. *See* N.H. R. Crim. Pro. 12(b)(8) "Upon a sufficient showing of

good cause, the court *may* at any time order that discovery required hereunder be denied, restricted, or deferred, or make such order as is appropriate." (emphasis added); *cf.* N.H. R. Crim. Pro. 50(d)(2) ("An agreement of the parties that a document is confidential or contains confidential information is not a sufficient basis alone to seal the record.").

In sum, the Superior Court gave the State an opportunity to make a particularized showing as to why a protective order should issue. Instead of doing that, the State is attempting to invoke this Court's original jurisdiction—which is reserved for extraordinary cases—rather than providing the constitutionally mandated discovery, or, failing that, dismissing the instant charges. Because this is not an appropriate use of Rule 11, the Petition should be summarily dismissed so these criminal cases can swiftly proceed to trial.

2. Permitting This Petition Would Prejudice Defendants/Respondents.

If this Court accepts the State's Petition, it would prejudice Defendants/Respondents by subjecting them to prolonged uncertainty, delayed trial, and restrictions in the form of bail conditions for likely an additional year while briefing, argument, and this Court's decision-making process proceed. This delay can be entirely attributed to the State, as Defendants/Respondents did nothing to invite this Rule 11 Petition (and are, by this motion, seeking summary disposition).

Moreover, at least two of these cases are already old enough to be presumptively prejudicial—*Hallock-Saucier* and *Fuchs*—owing in part to the State's late efforts to comply with its discovery obligations. In criminal cases in Superior Court, the State's discovery obligations are set by court rule. Rule 12(b)(2) of the New Hampshire Rules of Criminal Procedure provide: "In addition, within forty-five calendar days after the entry of a not guilty plea by the defendant, the State shall provide the defendant with the

materials specified below . . . (E) All exculpatory materials required to be disclosed pursuant to the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including *State v. Laurie*, 139 N.H. 325 (1995). Mr. Fuchs pleaded not guilty on June 20, 2019, Mr. Johnson pleaded not guilty on October 15, 2020, and Mr. Hallock-Saucier pleaded not guilty on February 11, 2020. Pet. App. 32; 54; 92. Rather than seeking a protective order early to meet its forty-five day deadline to provide Defendants/Respondents with the discovery to which they are constitutionally entitled, the State waited until February and March, 2021 to seek protective orders. Moreover, the State did not explain in its motions for protective orders why it had waited so long. This is a year and a half after Mr. Fuchs's plea,[5] more than a year after Mr. Hallock-Saucier's plea, and over four months after Mr. Johnson's plea. The State is responsible for the delay in this case through its lack of diligence, and now the State, through this appeal, asks to further delay Defendants/Respondents' day in court.

Part I, Article 14 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant a right to a speedy trial. *State v. Langone*, 127 N.H. 49, 51 (1985). "A delay of over nine months in a felony case is considered presumptively prejudicial," requiring a court to consider the speedy-trial analysis under the four-part test articulated in *Barker v. Wingo*¸407 U.S. 514, 530 (1972).[6] *State v. Brooks*, 162 N.H. 570, 581 (2011). Permitting Defendants/Respondents'

[5] While a small portion of the delay in scheduling a trial may be attributable to Mr. Fuchs' failure to appear, he nonetheless should have been provided this constitutionally-mandated discovery much earlier.

[6] One of the factors is a defendant's assertion of his speedy trial rights. Defendants/Respondents consider the instant motion an assertion of their speedy trial rights for the purposes of any motion that may be filed before the superior court.

cases to continue for an additional year—subject to restrictive bail conditions—while this Petition is considered would further jeopardize their speedy trial rights.

B. The Decisions Of The Superior Court Should Be Summarily Affirmed.

If the Court does not summarily dismiss the Petition, it should summarily affirm the Superior Court's orders.

1. The Superior Court Correctly Denied The Motions For Protective Orders.

a. RSA 105:13-b Requires Disclosure of Exculpatory Evidence Without Conditions. RSA 105:13-b Does Not Create Confidentiality for the Portions of the File That Are Disclosed as Exculpatory Evidence to the Defendant.

The State argues that 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. *See* Pet. 20-21. The State is incorrect and ignores the plain language of RSA 105:13-b. Here, the Superior Court was correct in concluding that nothing in RSA 105:13-b "suggests that such exculpatory evidence, once disclosed, must be kept confidential." *See* Pet. App. 22.

This analysis begins and ends with a statute's text, and it is straightforward. *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."). RSA 105:13-b, I clearly states that "[e]xculpatory 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." RSA 105:13-b, I (emphasis added). Similarly, RSA 105:13-b, III states, in part, the following: "…. Only those portions of the file which

the judge determines to be relevant in the case shall be released [to the defendant] 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 105:13-b, III (emphasis added). As this language makes clear, exculpatory evidence in an officer's personnel file that is "relevant in the case" "shall be disclosed to the defendant" and is therefore not confidential. Disclosure is required without conditions. Only the non-exculpatory "remainder of the file shall be treated as confidential." RSA 105:13-b, III.

It is also important to note that RSA 105:13-b was amended in 2012 with the explicit intention of making it easier for criminal defendants to obtain these records, stating that these records "*shall* be disclosed to the defendant." RSA 105:13-b, I (emphasis added). Indeed, the legislator who added the 2012 amendment to RSA 105:13-b—Representative Brandon Giuda—informed the *Union Leader* in a 2012 article that "he made changes to RSA 105:13-b because he passionately believes people accused of crimes should be informed if police personnel records contain information that could hurt an officer's credibility as a witness." He added that, if these disclosures are not made, the State will now "be in violation of state law."[7] Further, prior to the 2012 amendment, RSA 105:13-b stated, in part:

> No personnel file on a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of 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

[7] *See* Nancy West, "Law Intended to Keep Discredited Police From Testifying Draws Fire," *Union Leader* (Nov. 11, 2012), https://www.unionleader.com/news/crime/law-intended-to-keep-discredited-police-from-testifying-draws-re/article_971edcf0-11d0-5430-8a17-55574bb3f21c.html.

> 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 whether it contains evidence relevant to the criminal case ….

RSA 105:13-b (2001); *see also State v. Ainsworth*, 151 N.H. 691, 694 (2005). The above cited provision of the statute generally remains in the amended RSA 105:13-b at Paragraph III, though the first sentence was materially changed in the 2012 amendment as follows: "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 (emphasis added).

By and through this amendment, the legislature made clear that it *only* intended to deem as confidential in the criminal case "non-exculpatory" information in a police officer's personnel file, not the "exculpatory" information given to defendants. Indeed, nothing in the statute indicates that the exculpatory evidence produced to a defendant must be held as confidential or otherwise protected from further disclosure or dissemination. To the contrary, the statute mandates disclosure of exculpatory information without conditions. In its analysis, the State omits the critical word "remainder," which makes clear that the only portions of the officer's personnel file that are confidential in the context of the criminal case are the *remaining* portions of the file that were *not* disclosed to the defendant and that were ultimately returned to the police department. *See* Pet. 22 (ignoring the word "remainder," arguing that the statute confirms that "the file shall be treated as confidential."). Further, the statute's explicit mention of confidentiality as to those "remaining"

portions of the file that are not exculpatory implies that the portions of the file given to the defendant are excluded from such confidentiality. *See Gentry v. Warden, N. N.H. Corr. Facility*, 163 N.H. 280, 282 (2012) ("The familiar doctrine of expressio unius est exclusio alterius ('the mention of one thing excludes another') persuades us that the trial court's interpretation of the statute is correct.").

b. The State's Argument That RSA 105:13-b "Constitutes a Statutory Exemption to the Right-to-Know Law" is Incorrect, as this Statute Only Applies in the Context of When a Police Officer is "Serving as a Witness in Any Criminal Case."

The State's argument that "RSA 105:13-b constitutes a statutory exemption to the Right-to-Know Law," *see* Pet. 20-21, defies the text of RSA 105:13-b, and provides the police with special protections concerning misconduct in their personnel files that do not exist for other government employees. *See N.H. Ctr. for Public Interest Journalist v. N.H. D.O.J.*, 173 N.H. 648, 656 (2020) (assuming but not deciding RSA 105:13-b constitutes an exemption to the Right-to-Know Law).

Under its plain terms, RSA 105:13-b does not constitute a statutory exemption under the Right-to-Know Law. Rather, RSA 105:13-b's plain terms *only* concerns how "police personnel files" are handled when "*a police officer ... is serving as a witness in any criminal case*." *See* RSA 105:13-b, I (emphasis added). This Court seemingly reached this conclusion in *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774 (2015), explaining the following:

> The current version of RSA 105:13-b addresses three situations that may exist *with respect to police officers who appear as witnesses in criminal cases*. First, insofar as the personnel files of such officers contain exculpatory evidence, paragraph I requires that such information *be disclosed to the defendant*. RSA 105:13-b, I. Next, paragraph II covers situations in which there is uncertainty as to

> whether evidence contained within police personnel files is, in fact, exculpatory. RSA 105:13-b, II. It directs that, where such uncertainty exists, the evidence at issue is to be submitted to the court for in camera review. *Id*.

Duchesne, 167 N.H. at 781; *see also State v. Shaw*, 173 N.H. 700, 708 (2020) (same). One federal court has similarly concluded that this statute only concerns the treatment of "personnel files of police officers serving as a witness or prosecutors in a criminal case." *See Hoyt v. Connare*, 202 F.R.D. 71 (D.N.H. 1996) (Muirhead, M.J.) (emphasis added) (in response to position of defendant police officers that the discovery sought should not occur, concluding that RSA 105:13-b "has no application to the discoverability of the files now at issue") (emphasis added). In other words, RSA 105:13-b only creates a procedure concerning the disclosure of exculpatory evidence to defendants, and does not operate in other contexts, including as an exemption when a member of the public seeks police personnel records under the Right-to-Know Law.[8]

---

[8] At least five superior court judges have held that RSA 105:13-b only applies in the context of a criminal case. *See N.H. Ctr. for Public Interest Journalism v. N.H. D.O.J.*, No. 2018-cv-00537, at *3 (Hillsborough Cty. Super. Ct., S. Dist., Apr. 23, 2019) (Temple, J.) (By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file "of a police officer who is serving as a witness in any criminal case."), *affirmed in part, and vacated and remanded on other grounds* in 173 N.H. 648, 656 (2020) ("For the purposes of this appeal, we assume without deciding that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying."), Add. 37; *Officer A.B. v. Grafton Cty. Att'y*, No. 215-2018-cv-00437, at *3, ¶¶ 12-15 (Grafton Cty. Sup. Ct.Oct. 12, 2019) (MacLeod, J.) (granting the Department of Justice's motion to dismiss, which correctly argued that, "[b]y its plain terms, the procedure in RSA 105:13-b only applies when a police officer is 'serving as a witness in any criminal case'"), Add. 49; *Doe v. N.H. Att'y Gen*., No. 217-2020-cv-250, at *4 (Merrimack Cty. Super. Ct. Oct. 20, 2020) (Tucker, J.) (on appeal to Supreme Court at No. 2020-0501) ("Doe's reliance on [RSA 105:13-b] is inapt, however, as it pertains to whether information in an officer's personnel file qualifies as exculpatory or impeachment

In sum, nothing in RSA 105:13-b suggests that this statute applies outside the context of a criminal case or otherwise interferes with other laws, including the public's access to information under RSA ch. 91-A. RSA 105:13-b does not implicate or trump the Right-to-Know Law. Nor does RSA 105:13-b meet the "clear legislative mandate" test to establish a statutory privilege for "police personnel file" information in the context of a public records request. *See Marceau v. Orange Realty*, 97 N.H. 497, 499-500 (1952) (noting that statutory privileges "will be strictly construed"). RSA 105:13-b's plain terms reflect that the legislature never intended this law to alter or interfere with the public's access to information under RSA ch. 91-A—a statute that serves a broader purpose to educate the public about what the government is up to. If the legislature had intended RSA 105:13-b to completely exempt all police personnel files from disclosure under the Right-to-Know Law, it could have done so explicitly.

The State's position in this case is also concerning because, if it is adopted by this Court, it would give the police special, categorical protections for their personnel file information that are not afforded to other public employees under Chapter 91-A. *See Reid v. N.H. AG*, 169 N.H. 509, 528 (2016) (holding that the "personnel file" exemption under RSA 91-A:5,

---

evidence in the context of a specific prosecution."), Add. 62; *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00216, at *8 (Kissinger, J.) (Merrimack Cty., Aug. 27, 2020) (holding that "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case.'") (on appeal to Supreme Court at 2020-448), Add. 77; *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00176, at *7 (Merrimack Cty., Aug. 27, 2020) (Kissinger, J.) (same) (on appeal to Supreme Court at No. 2020-0447), Add. 82; *Provenza v. Town of Canaan*, No. 215-2020-cv-155, at *13-14 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that RSA 105:13-b did not apply to a public records request because "RSA 105:13-b, by its plain language, applies only to situations in which 'a police officer … is serving as a witness in any criminal case.'") (on appeal at Supreme Court at No. 2020-563), Add. 126.

IV implicating public employees is not categorical, but rather is subject to public interest balancing). However, the text of RSA 105:13-b explains that the legislature never intended its provisions to provide such special, *per se* protections to the police under Chapter 91-A.

Indeed, as this Court has held, the personnel files of public employees—including the files of the police—are subject to a public interest balancing test under Chapter 91-A and are not categorically exempt from disclosure. *See Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 341 (2020) (holding that arbitration decision concerning termination of a police officer should be subjected to public interest balancing test under "personnel file" exemption, and thus was not *per se* exempt); *Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 357 (2020) (holding that redactions in an audit concerning police department's internal affairs practices should be subject to public interest balancing analysis). The State's position would effectively carve out police personnel records—and only police personnel records—from the scope of these decisions.

Following this Court's decisions in S*eacoast Newspapers/Town of Salem*, three Superior Courts have concluded that information concerning police conduct should be released. *See Union Leader Corp. v. Town of Salem*, No. 218-2018-cv-01406, at *27-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (on remand, ordering disclosure of most of the redacted information in an audit report concerning how a police department conducted internal affairs investigations), Add. 96; *Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that an internal investigation report concerning an allegation that an officer engaged in excessive force is a public document because the public interest in disclosure trumps any privacy interest the officer may have under RSA 91-A:5, IV; currently on appeal at Supreme Court at No. 2020-563), Add. 126; *Salcetti v. City of*

Keene, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) (on remand, holding: "As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure."), Add. 147.

Consistent with this public interest balancing test, the Superior Court was correct in stating that "[p]olice personnel records and documents related to police internal personnel practices are presumptively public records under RSA 91-A:4, unless … the public release of the records would result in an invasion of privacy." *See* Pet. App. 6. The Superior Court's statement was merely a re-articulation of this balancing test. This balancing test standard explicitly creates a presumption in favor of disclosure that can only be overcome when the entity resisting disclosure meets a heavy burden. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance, declaring the purpose of the Right-to-Know Law in this way: 'Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.'") (quoting RSA 91-A:1); *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 546 (1997) (noting that courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents"); *Murray v. N.H. Div. of State Police*, 154

N.H. 579, 581 (2006) (emphasis added) (noting the "heavy burden to shift the balance towards nondisclosure").[9]

Applying this presumption in favor of transparency is especially applicable here under this balancing test where disclosure implicates the credibility and trustworthiness of New Hampshire law enforcement. As the Superior Court eloquently explained:

> 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 a particular police witness.

See Combined Order, at p. 8. Just as this potentially exculpatory information should be produced to a defendant under RSA 105:13-b without strings attached, a member of the public would be entitled to this

---

[9] The State's reference to the "*Murray* exemption" under FOIA Exemption 7 is inapt, as this exemption only applies to "records or information compiled for law enforcement purposes." *See* State's Pet. at p. 28. This exemption does not include "personnel" records impacting administrative or discretionary decisions. *See Providence Journal Co. v. Pine*, C.A., No. 96-6274, 1998 R.I. Super. LEXIS 86, at *32 (Super. Ct. June 24, 1998) ("In the instant matter, the Attorney General has not shown that gun permit records are compiled specifically for law enforcement purposes. Instead, the evidence shows that the records are compiled in order to facilitate an administrative and discretionary decision concerning the granting of a gun permit to an applicant. Consequently, gun permit records are not law enforcement records for purposes of the exemption contained in R.I.G.L. § 38-2-2(4)(i)(D)."); *Greenpeace USA, Inc. v. EPA*, 735 F. Supp. 13, 14-15 (D.D.C. 1990) (an investigation into whether an employee violated agency regulations was not compiled for law enforcement purposes). Nor has the State provided any evidence that information to be disclosed to defendants implicates "confidentiality of sources" or private citizens or witnesses. *See* Pet. at p. 29-30.

information as well under RSA ch. 91-A's public interest balancing test given the obvious importance of this information.

2. The Superior Court Correctly Denied the Motions to Seal

In the cases below, the State filed several short motions to seal the motions for protective orders or associated motions for reconsideration.[10] Pet. App. 8; 9; 49; 60; 70; 73. The motions to seal were largely of the form: "Accompanying this pleading is a [pleading caption]. The pleading itself describes information which is considered confidential, statutorily protected, and not subject to public disclosure. Pursuant to the New Hampshire Rules of Criminal Procedure Rule 50(d), the State requests that the accompanying pleading be sealed. N.H. R. Crim. P. 50(d)(1-8)." *Id.* In margin orders and in the Combined Order, the Superior Court denied the motions to seal on the basis that the State had not met its burden in demonstrating why the pleadings should be sealed. The Superior Court's decision was correct.

"Under part I, article 8 [of the state constitution], the public has a right of access to court proceedings and to court records which cannot be 'unreasonably restricted.'" *Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992). "[T]here 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." *Id.* In determining whether a court record may be sealed, a

[10] It is unclear whether review of the motions to seal are properly before this Court. While the State indicates that it asks this Court to review the denial of several motions to seal, Pet. 2, none of the questions to be reviewed, Pet. 3, relate to the denial of the motions to seal or the governing standard.

> petitioner's right of access to the sealed records must be weighed and balanced against privacy interests that are articulated *with specificity*. In order for this exacting process to be accomplished, the trial judge must review each document to which access is sought and for which a specific right of privacy is claimed to determine if there is a sufficiently compelling reason that would justify preventing public access to that document, with the burden of proof resting on the party seeking nondisclosure. Before a document is ordered sealed, the trial judge must determine that no reasonable alternative to nondisclosure exists.

Id. at 129-130. Consistent with these constitutional rules, the general rule under the New Hampshire Rules of Criminal Procedure is that "all pleadings, attachments to pleadings, exhibits submitted at hearings or trials, and other docket entries … shall be available for public inspection." *See* N.H. R. Crim. P. 50(a)(1). "The burden of proving that a document or a portion of a document should be confidential rests with the party or person seeking confidentiality." *See* N.H. R. Crim. P. 50(a)(2).

This Court has repeatedly applied this constitutional standard with rigor in protecting the public's right of access to court records and proceedings. *See, e.g., State v. Kibby*, 170 N.H. 255, 258 (2017) (holding that the defendant, who had sent letters to the trial court concerning his representation by counsel, had failed to meet his burden of demonstrating with specificity that the letters contained privileged communications sufficient to justify maintaining them under seal); *Associated Press*, 153 N.H. at 138-39 (holding that RSA 458:15-b, III was unconstitutional, in part, because it (i) placed the burden of proof upon the proponent of disclosure, rather than the proponent of nondisclosure, (ii) abrogated entirely the public right of access to a class of court records, (iii) and was not narrowly tailored to serve the allegedly compelling interest of the State in protecting its citizens from identity theft); *In re N.B.*, 169 N.H. 265, 272-73 (2016) (holding that the portion of the trial court's order which stated

that any future lawsuit or the pleadings therein filed by appellant against DCYF and CASA had to be filed under seal constituted a prior restraint on free speech and limited access to the courts in violation of N.H. Const. pt. I, arts. 8 and 22 in that it was overbroad and did not use the least restrictive means available to achieve its purpose).

While the State, as the party seeking nondisclosure of court records, has a heavy burden to meet, it made no attempt below to explain with any specificity why the pleadings should be sealed beyond the conclusory assertion that the pleadings describe "information which is considered confidential, statutorily protected, and not subject to public disclosure." *See also Petition of Keene Sentinel*, 136 N.H. at 129 ("The Douglases cannot prevail in their claim to keep the records sealed merely by asserting a general privacy interest."). Such a conclusory statement is not enough to meet the State's burden to seal the pleadings. Moreover, as the Superior Court correctly observed, the State's pleadings it sought to seal did not actually include any information from 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.'" Combined Order, p. 10. Indeed, review of the pleadings the State seeks to seal demonstrate that while the pleadings have the name of the officer in whose personnel file exculpatory evidence was found, most of the pleadings contain legal arguments as to why the protective orders should be issued. There is no reason to seal the State's legal arguments from the public view.

Because the pleadings in question do not contain any personnel file information—and at most imply the mere existence of such information—there is no reason to keep any of the pleadings away from public inspection. Moreover, given the requirement that a court ruling on a request to seal

must consider the least restrictive means to protect a privacy interest, there is no reason that the pleadings could not have the officers' names redacted and otherwise remain available for public inspection.

IV. CONCLUSION

For the reasons discussed above, the State's Rule 11 Petition should be summarily *dismissed*. In the alternative, the Superior Court's orders should be summarily *affirmed*.

WHEREFORE Defendants/Respondents Jeffrey Hallock-Saucier, Nicholas Fuchs, and Jacob Johnson respectfully pray that this Honorable Court:

A. Summarily dismiss the State's Petition; or

B. Summarily affirm the decisions below; and

C. Grant such other relief as is just and proper.

Respectfully submitted,

JEFFREY HALLOCK-SAUCIER

By and through his attorneys,

/s/ Henry R. Klementowicz
Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION
18 Low Avenue
Concord, NH 03301
Tel.: 603.333.2201
gilles@aclu-nh.org
henry@aclu-nh.org

R. Peter Decato (N.H. Bar No. 613)
84 Hanover Street
Lebanon, NH 03766
Tel.: 603.678.8000
pdecato@decatolaw.com

Albert E. Scherr (N.H. Bar No. 2268)
2 White Street
Concord, NH 03301
Tel.: 603.828.6515
albert.scherr@law.unh.edu

Robin D. Melone (N.H. Bar No. 16475)
WADLEIGH, STARR & PETERS
95 Market Street
Manchester, NH 03101
Tel.: 603.206.7287
rmelone@wadleighlaw.com

NICOLAS FUCHS

By and through his attorneys,

/s/ Carl D. Olson

Carl D. Olson (N.H. Bar No. 8217)
LAW OFFICE OF CARL D. OLSON
14 Londonderry Road
Londonderry, NH 03053
Tel: 603.425.6555
attyolson@comcast.net

JACOB JOHNSON

By and through his attorneys,

/s/ Alexander J. Vitale

Alexander J. Vitale (N.H. Bar No. 20360)
NEW HAMPSHIRE PUBLIC DEFENDER
10 Ferry Street, Suite 202
Concord, NH 03301
Tel.: 603.224.1236
Fax: 603.226.4299
avitale@nhpd.org

Dated: May 5, 2021

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: Daniel Will, Esq. and Elizabeth Velez, Esq.

Dated: May 5, 2021

/s/ Henry R. Klementowicz
Henry R. Klementowicz