STATE OF NEW HAMPSHIRE
SUPREME COURT

NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM, ET AL

V.

NEW HAMPSHIRE DEPARTMENT OF JUSTICE

CASE NO. 2019-0279

**MEMORANDUM OF LAW OF AMICUS CURIAE – NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE APPELLEES/PETITIONERS; NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, ET AL.**

NOW COMES, amicus curiae, New Hampshire Association of Criminal Defense Lawyers ("NHACDL"), and provides the following Legal Memorandum in Support of the Appellees/Petitioners, New Hampshire Center for Public Interest Journalism, The American Civil Liberties Union of New Hampshire, et al.

## INTEREST OF THE AMICUS CURIAE

The New Hampshire Association of Criminal Defense Lawyers is the voluntary, professional organization of the criminal defense bar in New Hampshire. It has over 300 members, including almost half of all practicing public defenders and virtually all members of the private bar who do any significant criminal defense work in New Hampshire. Collectively, the membership practices in all ten counties, all eleven superior courts, all fourteen district division courthouses, this court, and the federal courts.

NHACDL's mission is to safeguard and promote the effective assistance of counsel in criminal cases, support the lawyers who practice criminal defense, to represent the interests of criminal defendants and to preserve the fairness and integrity of the criminal justice system.

NHACDL sponsors Continuing Legal Education and training programs, provides mentors to new lawyers, operates a listserv and maintains an electronic resource library. NHACDL also takes public policy positions on issues of importance to the criminal justice system. Thus, when proposed legislation or judicial decision is likely to impact the procedural fairness of criminal adjudications for years to come, NHACDL will take a stand.

The issues in this case are of direct concern to NHACDL, its members and its present and future clients. NHACDL members and the present and future clients of its members are directly impacted by having the EES list made public in order to ensure that clients are being provided all exculpatory discovery materials to which they are constitutionally entitled.

## STATEMENT OF THE CASE AND THE FACTS

Since 2004 there has been a secret list of police officers who have engaged in sustained misconduct which reflects negatively on their credibility or trustworthiness. This list is currently called the Exculpatory Evidence Schedule ("EES list"). This list was previously identified as the "Laurie List." Beginning in 2004 this list was maintained by the county attorney's in each of the 11 counties of New Hampshire. In March of 2017, the Department of Justice centralized the process and began to maintain the EES on a statewide basis. As of January 2020 there are 275 officers on the EES list.

The EES list, in its current form contains five columns: (1) officer's name; (2) employing department; (3) date of incident; (4) date of notification; and (5) category or type of behavior that resulted in the officer being placed on the EES. See, Order, State's App. pp 1-2. The Appellees/Petitioners (The New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Union Leader Corp., Newspapers of New England, Inc., Seacoast Newspapers, Inc., Keene Publishing Corporation, and the American Civil Liberties Union of New Hampshire) each

filed NH RSA 91-A requests seeking the New Hampshire Department of Justice to disclose the most recent EES. The DOJ provided a list, redacting all personal identifying information of the officer's on the list. Unredacted lists were then requested. The DOJ refused to provide unredacted lists arguing that they contained "personnel" information, which resulted in this litigation.

The Department of Justice filed a Motion to Dismiss the 91-A petitions. The trial court (J. Temple) denied that DOJ's Motion to Dismiss. A final stipulated judgment was entered, and this appeal followed.

## SUMMARY OF ARGUMENT

The New Hampshire Association of Criminal Defense Lawyers supports the positions set forth by the Appellees/Petitioners. The Attorney General is attempting to shield police officers who have been found to be untrustworthy and/or lacking in credibility. This attempt to shield untrustworthy police officers must fail because the information contained on the EES are not "personnel" records and because the public has a strong interest in disclosure of this exculpatory information which impacts the effective administration of justice. Public disclosure of the misconduct of police officers is of particular importance given the great deal of power that is bestowed upon these public servants. Society grants police officers power over other citizens which includes the ability to stop their motor vehicles, enter into their homes, and take them into custody. It is difficult to comprehend a stronger public interest than ensuring that those police officers that abuse this awesome power are being appropriately disciplined for their misconduct.

## ARGUMENT

### I. If the EES list does reflect an "Internal Personnel Practice" under NH RSA 91-A:5, IV, the Public's Interest in Disclosure Weighs Heavily Against any Minimal Privacy Interest of Non-Disclosure

In examining the invasion of privacy exemption in RSA 91-A:5, IV and its corresponding public interest balancing analysis, the public's interest in disclosure of the identity of untrustworthy and/or incredible police officers drastically outweighs any minimal privacy interest of the offending law enforcement officers. See, *Reid v. New Hampshire Attorney General,* 169 N.H. 509, 528 (2016). As has been stated by Appellees/Petitioners, the purpose of NH RSA 91-A:1 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." NH RSA 91-A:1.

It bears reiterating why and how the EES list, formerly the Laurie list, came to be. The initial iteration of the list was created in response to this Court's ruling in *State of New Hampshire vs. Carl Laurie*, 139 N.H. 325 (1995). Mr. Laurie stood accused of murder. He was tried and convicted without the benefit of having access to, or being alerted to the existence of, exculpatory evidence that if known would have called into question the credibility of the lead investigating officer on his case. *Id.* at 327. That officer was Steven Laro. This Court found that the State of New Hampshire violated Mr. Laurie's constitutional rights when the prosecutors failed to disclose the exculpatory evidence related to Laro. *Id.* at 333. This evidence of misconduct was known to prosecutors and withheld from Mr. Laurie.

In particular, the information kept from Mr. Laurie included numerous instances of misconduct that reflected negatively on Laro's character and credibility. *Id.* at 330. The information of misconduct included that, Steven Laro had "amassed a personnel file more than three inches thick, consisting primarily of letters of complaint." *Id.* Those complaints demonstrated "that Laro was an extremely volatile person". *Id.* "The letters, often [seven] or [eight] pages in length, stated [that] Laro would come on strong, often verbally abusive, and if questioned about his demeanor, [he] would manhandle the subject, often choking the person or

threatening him with physical harm.'" *Id.* According to the personnel file from his previous employer, when submitted to polygraph examination regarding his conduct it was "determined that he was not being truthful and this, in turn, resulted in court cases being tainted." *Id.* at 331. When asked about his personnel file from his previous employer, Steven Laro was untruthful stating that he was "never disciplined". *Id.* Laro's personnel file at his employment during the time of the Laurie investigation and his previous employment included incidents of misrepresentation and inappropriate use of firearms. *Id.* This Court ultimately concluded that "[t]he prosecution's failure to disclose the evidence violated the New Hampshire constitutional right to present all favorable proofs." *Id.* at 333.

Often times, police officers are the only witnesses against our clients in criminal cases. Challenging their credibility can be the only avenue of defense for many criminal defendants. To deny criminal defendants the ability to verify that all exculpatory information has been provided is to deny them the ability to ensure that the New Hampshire Constitution is being upheld. As stated by the Supreme Court of Vermont, "[t]he public interest in knowing what the government is doing 'is particularly acute in the area of law enforcement.'" *Rutland Herald v. City of Rutland*, 48 A.3d 568, 578 (Vt. 2012), *citing*, *Caledonian-Record Publishing Co. v. Walton*, 573 A.2d 296, 299 (Vt. 1990).

Here, the public interest in disclosure is great given the fact that the current system for the EES list provides defendants with no ability to verify that they have received all the information to which they are constitutionally entitled. Because the system works in secret, defendants simply have to trust that the system has worked. As the Petitioners discuss in their Petition, for this system to work as intended, multiple events must occur: (1) the police chief needs to become aware of a credibility/exculpatory issue concerning an officer; (2) the police chief needs to determine that the

issue warrants placement on the EES list and then place the officer on the list; (3) the police chief needs to inform the county attorney or Department of Justice of the decision to place the officer on the EES list; (4) the assistant county attorney needs to consult the list in every criminal case to see if any testifying officers may have potentially exculpatory information in their personnel file; and (5) the assistant county attorney needs to make a disclosure to the defendant if the officer is on the list (or, if the assistant county attorney is unsure whether the information is potentially exculpatory, seek in camera review from the criminal court under RSA 105:13-b and the Attorney General's March 21, 2017 memorandum). If any of these steps is not followed, the system breaks down and the defendants may not receive information to which they are Constitutionally entitled. And if the system does break down, defendants will never know because the EES list is viewed by the State as a secret document.

One need look no further than recent news reports to understand that disclosures do not occur as required, and often police misconduct goes unreported and uninvestigated. A criminal investigation by the Department of Justice regarding the Salem, New Hampshire police department has been ongoing for over one year without any final resolution. As part of this investigation, Salem Sergeant Michael Verrocchi was recently arrested and charged with reckless conduct and disobeying a police officer for allegedly, while off-duty, fleeing the police and engaging in a high-speed chase on November 10, 2012. This incident was only uncovered with the release of an audit report in November 2018. It is unclear whether the Department's investigation has led to the placement of Salem officers on the list. However, it was recently disclosed that the Department referred the incident concerning Sergeant Verrocchi, along with another incident in the audit report where an officer was accused of causing a motor vehicle accident while driving under the influence of alcohol and leaving the scene of a crash, to the Salem police department for consideration of

whether the officers would be placed on the EES list.[1] Of these two incidents, the Salem police department has only disclosed that one of the officers in these two incidents was later placed on the EES list.[2] In any event, with respect to the incident concerning Sergeant Verrochi, it appears that, since 2012, this officer has been handling cases and testifying in court after he was engaged in an incident of reckless conduct with a deadly weapon and disobeying a police officer. Potentially six years have gone by without appropriate disclosures to defendants. Convictions of countless citizens may have rested upon the testimony of this officer.

Incidents such as these not only tarnish the reputation of the police officer and the department, it taints the reputation of the criminal justice system. It undermines the public's trust in the criminal justice system. Trust comes from transparency, not hiding the ball and protecting those who have committed misconduct. The ultimate goal is to protect the integrity of the criminal justice system, not to protect individual law enforcement officers who have been found to have committed acts of misconduct.

Amici, particularly the New Hampshire Police Association, argue that disclosure of the list will undermine trust in law enforcement. The opposite is true. "Transparency fosters trust and legitimacy in the government and encourages compliance with authorities." Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L & Pol'y Rev. 109, 119-120 (2017). When New York was looking to change the law which shielded police misconduct records from public disclosure the

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[1]*See* Ryan Lessard, "Salem PD Reviewing Two Old Internal Affairs Investigations at AG Request," Union Leader (Mar. 19, 2019), https://www.unionleader.com/news/safety/salem-pd-reviewing-two-old-internal-affairs-investigations-at-ag/article_a267a95f-ffc2-592c-a974-c97024d854c3.html.

[2]*See* Ryan Lessard, "Salem Police Sergeant Arrested for 2012 High-Speed Chase," *Union Leader* (Jan. 15, 2020), https://www.unionleader.com/news/courts/salem-police-sergeant-arrested-for-high-speed-chase/article_25d72d6c-71ef-5d89-a68e-4cbc7f87303a.html

Commissioner of NYPD stated "making information about disciplinary proceedings public will help us build trust with the community." See, https://brooklyneagle.com/articles/2019/04/23/50-a-explained/. Research has demonstrated that when police are perceived by the public as untrustworthy or illegitimate, "both police and prosecutors will be less effective at serving their community." Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct,* 28 Stan. L & Pol'y Rev. at 120. The public simply does not know if the officer with whom they interact may or may not be on the list. This fosters a lack of trust. If the public has access to the list and determines that the officers with whom they interact are either not on the list, or listed for a minor transgression, this builds trust and confidence. "[W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective." Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees,* 51 Wake Forest L.Rev. 793, 802 (2016); *See also*, Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information From the Public*, 22 CUNY L. Rev. 148 (2019).

Recent admissions by the Attorney General's office that 93 officers were added to the EES between June of 2018 and January of 2019 coupled with admissions that some of these were added for conduct occurring some time ago further undermines the public's trust in the judicial process and law enforcement. Every convicted individual in the State of New Hampshire may rightfully wonder if their constitutional rights have been violated. Convicted persons have no way of verifying if the officer involved in their case should have been on the EES list and if the exculpatory evidence related to that officers misconduct should have been disclosed. This breeds distrust in law enforcement and distrust in the judicial system. Further, if years later it is

discovered that one of the necessary EES steps broke down and potentially exculpatory information was not shared with a criminal defendant, or potentially numerous criminal defendants, years of costly litigation may occur in order to right the wrongs and correct the mistakes.

The public interest in records of police misconduct is so great that many states require the disclosure of police misconduct records under their freedom of information legislation or similar statutes. Police disciplinary records are generally available to the public in Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Maine, Minnesota, North Dakota, Ohio, Texas, Utah, Vermont and Wisconsin.[3] Police disciplinary records are disclosed to the public under certain circumstances in Arkansas, Colorado, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Missouri, Montana, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee and West Virginia.[4]

The State's argument that the public interest in disclosure is minimal or non-existence as the interest relates primarily to criminal defendants is misplaced. First, it is important to note that the State tends to characterize criminal defendants in the context of criminal defendants charged with felonies and/or those represented by counsel. Defense attorneys, we presume, are aware of

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[3] See, Code of Ala. §36-12-40, ARS §§39-121 – 39-128 and §38-1109, Cal Pen Code §§ 832.7 and 838.8, Florida Statute 119, O.C.G.A. §50-18-72(a)(8), KRS §61.878(1)(a), *City of Baton Rouge v. Capital City Press*, 7 So.3d 21 (La.App. 1 Cir. 2009), 30-A MRSA § 2702(1)(B)(5), and 7070(2)(E), Minn. Stat. §13.43, N.D. Cent. Code §44-04-18, ORC Ann. §149.43, Utah Code Ann. §63G-2-301(3)(o), *Rutland Herald v. City of Rutland*, 48 A.3d 568, 578 (Vt. 2012), Wis. Stat. §19.36(10)(b).

[4] See, A.C.A. §25-19-105(c)(1), Conn. Gen. Stat. §1.210, HRS §92-F-14, *Kalven v. City of Chicago*, 7 N.E.3d 741 (Ill. App. Ct. (First District, First Division) 2014), Indiana Code §5-14-3, *Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester*, 787 N.E.2d 602 (Mass. App. Ct. 2003), MCLS § 15.243.1(s), §610.021 R.S.Mo., Montana Code §2-6-102, *Cox v. New Mexico Dept. of Public Safety*, 242 P.3d 501 (N.M. Ct. App. 2010), N.C. Gen. Stat. §§153A-98 and 160-A-168, 51 Okl. St. §24A.7, Rhode Island General Law §38-2-24(4)(A)(I)(b), *Burton v. York Sheriff's Department*, 594 S.E.2d 888 (Ct. App. 2004) , *Charleston Gazette v. Smithers*, 752 S.E.2d 603 (W.Va. 2013).

the EES list. However, thousands of New Hampshire citizens come into contact with the criminal justice system by way of traffic violations and class B misdemeanor offenses every day. These individuals frequently are unrepresented, as they are not constitutionally entitled to court-appointed counsel. Certainly the State would not argue that these citizens are not entitled to know if the officer with whom they interacted is on the EES list. These citizens have absolutely no way of knowing of the EES list or if the officer involved in their case is on this list. As unsophisticated litigants, they are unlikely to ever ask. In fact, most of these citizens are not even provided discovery materials prior to making important decisions about whether to enter a plea or proceed to trial as an offer is made to them at the time of arraignment before any discovery has been provided. Public disclosure of the EES list helps to protect those citizens accused of low level offenses as well as those accused of serious criminal offenses.

Further, the argument that the police officers who have been found to have engaged in misconduct maintain a privacy interest greater than that of the public, whom they serve, is simply wrong. Several courts have found that public officials, including police officers, have no right to privacy with regard to their official duties. *See*, *Rutland Herald v. City of Rutland*, 48 A.3d at 572 (Vt. 2012); *Rinsley v. Brandt*, 446 F.Supp. 850, 857-58 (D.Kan. 1977); *Cowles Publi'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988). As stated by the Supreme Court of Montana, "[t]he conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know." *Great Falls Tribune Co. v. Cascade County Sheriff*, 775 P.2d 1267 (Mo. 1989).

## II. NH RSA 105:13-b Does Not Create a Categorical Exemption for the EES List as the EES List Contains Exculpatory Evidence.

Both the Department of Justice and Amici, New Hampshire Police Association, argue that the EES list is exempt from disclosure pursuant to NH RSA 105:13-b. For the reasons explained

in Petitioners' brief, this argument fails as the EES list is not a police "personnel file" document pursuant to NH RSA 105:13-b. However, even if the EES list constitutes "personnel file" information under NH RSA 105:13-b, this statute specifically creates an exception to confidentiality with respect to exculpatory evidence in a police officer's personnel file, which would include exculpatory information that exists on the EES list.

The relevant portion of RSA 105:13-b states:

> ***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.

NH RSA 105:13-b(I) (*emphasis added*). As this language makes clear, exculpatory evidence in an officer's personnel file "shall be disclosed to the defendant" and is therefore not confidential. Indeed, only the non-exculpatory "remainder of the file shall be treated as confidential." RSA 105:13-b, III.

It is important to note that NH RSA 105:13-b was amended in 2012 to make it easier for criminal defendants to obtain these records. Prior to the 2012 amendment, NH RSA 105:13-b stated:

> No personnel file on a police officer who is serving as a witness...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 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.

*See*, NH RSA 105:13-b (2001); *see also*; *State v. Ainsworth*, 151 N.H. 691, 694 (2005). The above cited provision of the statute remains in the amended NH RSA 105:13-b with the following

proviso: "No personnel file of a police officer who is serving as a witness...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." NH RSA 105:13-b(II) (*emphasis added*). With this change, the legislature made clear that it only intended to deem confidential "non-exculpatory" information in a police officer's personnel file, the "exculpatory" information given to defendants is not deemed confidential by the plain language of the statute.

By and through these amendments the legislature has made a clear statement that exculpatory evidence, even if contained in a personnel file, is not confidential and is not protected from disclosure. While the State is correct that NH RSA 105:13-b dictates that the evidence is to be provided to the defendant in a pending litigation, nothing indicates that the exculpatory evidence produced must be held as confidential or otherwise protected from further disclosure or dissemination. The plain language of RSA 105:13-b states that the exculpatory evidence contained within the actual personnel file, the file maintained by the employer, is not subject to confidentiality. Indeed, not only does RSA 105:13-b not apply to the exculpatory information on the EES list, but also the Department of Justice's current procedure requiring that exculpatory portions of an officer's file only be disclosed to defendants under a protective order is plainly wrong. Indeed, the Department's protective order policy 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. App.1 204, 209, 216-217 (Joseph A. Foster Mar. 21, 2017 Memo.) (stating that exculpatory information to defense attorneys "should be done in conjunction with a protective order until it is determined that the information is admissible at trial"; also including a sample motion for a protective order). It should go without saying that compliance

with *Brady/Laurie* obligations should not be conditioned on defense attorneys agreeing to a "gag" order, let alone a "gag" order that is inconsistent with the terms of RSA 105:13-b.

Therefore, the argument put forth by the Department of Justice that NH RSA 105:13-b makes police personnel files strictly confidential and thereby provides a shield for a request under NH RSA 91-A is not accurate. Given that the exculpatory evidence contained within the personnel file is not confidential, NH RSA 105:13-b is not the blanket shield of police personnel files as argued by the State. *See*, DOJ's Brief p. 19.

Likewise, the State and Amici's arguments that the EES list is a "personnel file" because the information contained on the EES list may also reside in an actual personnel file must fail. This argument is not only erroneous as pointed out by the Petitioners in their brief, but this argument invites a slippery slope as it applies to all professions over which any governing licensing body has oversight. For example, the New Hampshire Attorney Discipline Office may institute an investigation into an attorney who is also under investigation by his or her law firm or employer. While this information may reside simultaneously in two locations, one of which is a personnel file, does not render the attorney discipline record private.[5] Likewise, if the electrician's board institutes an investigation into alleged misconduct by a licensed electrician, the information located in the board's file are not confidential just because the same information may be contained in the electrician's personnel file. Essentially, the New Hampshire Police Association is arguing to this Court that police officers should be treated differently than other employees in the State of New Hampshire.

[5] As pointed out by Petitioners, New Hampshire law makes available to the public disposed-of complaints concerning lawyers and judges (including those that are unfounded). *See* N.H. Sup. Ct. R. 37(20)(b)(1); N.H. Sup. Ct. R. 40(3)(b); *see also* N.H. Attorney Discipline System, *available at* http://www.nhattyreg.org/search.php.

There should be no greater transparency than when it comes to law enforcement officers who have engaged in sustained misconduct. Those who yield great power and have been found to have violated the trust placed on them by society deserve no such blanket protection.

## CONCLUSION

This Court should affirm the Superior Court's April 23, 2019 Order.

Respectfully submitted,
The New Hampshire Association
Of Criminal Defense Lawyers
By its attorney,

Dated: January 29, 2020

/s/Jaye L. Rancourt
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## STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this Memorandum of Law complies with New Hampshire Supreme Court Rules. Further, this Memorandum of Law with New Hampshire Supreme Court Rule 16(4)(b) which states that no other Memorandum of Law shall exceed 4,000 words.

/s/ Jaye L. Rancourt
Jaye L. Rancourt, Esquire

## CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing NHACDL's Memorandum of Law of Amicus Curiae was served this 29th day of January, 2020 through the electronic-filing system on counsel for the Defendant/Appellant (Daniel Will, Esquire.) and the State/Appellee (Gilles Bissonnette, Esquire).

*/s/ Jaye L. Rancourt*
Jaye L. Rancourt, Esquire