THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0146

Petition of the State of New Hampshire

APPEAL PURSUANT TO RULE 11 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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DISCUSSION

The parties have extensively briefed whether materials in police personnel files remain confidential once disclosed to a defendant under RSA 105:13-b, but before they are introduced at trial. As set forth in the State's brief, the answer to this question is yes. The statutory language and structure compel this conclusion, as do this Court's past characterizations of RSA 105:13-b and, until now, the apparently unbroken practice of trial courts permitting disclosures under RSA 105:13-b subject to protective orders. The respondents improperly read the statutory language in isolation, elevating form over substance and leading to absurd and untenable results. In adopting a version of those arguments *sua sponte*, the trial court erred as a matter of law, and this Court should reverse.

This reply addresses two related, but separate issues. First, it bears emphasizing that even if one assumes *dubitante* that information disclosed to a defendant under RSA 105:13-b is no longer *per se* confidential, this does not mean that the defendant may disseminate that information unconditionally. In arguing otherwise, the respondents urge this Court to adopt a policy-driven view of RSA 105:13-b that finds no support in the statutory text or precedent. Alternatively, they ask the Court to endorse the trial court's attempt to inject fact-intensive right-to-know balancing into these criminal cases. The Court should do neither.

Second, the Court should reject the respondents' attempt to raise substantive First Amendment and Part I, Article 22 theories for the first time in their opposing brief. These theories were never preserved below. Moreover, the respondents waived any First Amendment claims by

assenting to the protective orders in question. They cannot avoid these waivers by asserting the purported rights of others. And in any event, the remedy for the type of First Amendment violation the respondents assert here would merely be to require that the parties provide "good cause" for the protective orders, not inject right-to-know balancing into a criminal case. The respondents' speech-based arguments are accordingly misplaced.

I. The respondents' dissemination arguments fail as a matter of law.

The respondents argue in their opposing brief that any disclosure of exculpatory information under RSA 105:13-b is necessarily unconditional. *See, e.g.*, DB 12–13, 18–23.[1] In making this argument, the respondents notably overlook the purposes the disclosure requirements under RSA 105:13-b, *Brady v. Maryland*, and *State v. Laurie* are designed to serve. Despite what the respondents' brief might be read to suggest, disclosures of exculpatory evidence are not mandated under the First Amendment or Part I, Article 22. Rather, the U.S. Supreme Court held in *Brady* "that the suppression by the prosecution of evidence favorable to an accused . . . violates *due process* where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963) (emphasis added). In *Laurie*, this Court held that "the New Hampshire constitutional right *to present all favorable proofs* affords

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[1] Citations to the record are as follows:
"SB __" refers to the State's opening brief.
"DB __" refers to the respondents' opposing brief.
"P __" refers to the State's Rule 11 petition and addendum.
"DM __" refers to the respondents' motion for summary dismissal or affirmance.
"SD __" refers to the addendum to the State's opening brief.
"SA __" refers to the appendix to the State's opening brief.

greater protection to a criminal defendant" than does the federal standard. 139 N.H. 325, 330 (1995) (emphasis added). Thus, *Brady* and *Laurie* concerned a defendant's due-process right to mount a defense in a criminal proceeding. Neither case speaks to whether a defendant (or anyone else) has a separate right to obtain or disseminate information outside of the criminal proceeding.

It is therefore unsurprising that RSA 105:13-b only contemplates the disclosure of exculpatory information in a police personnel file "to the *defendant*." RSA 105:13-b, I (emphasis added). The respondents point to nothing in the text or structure of RSA 105:13-b that confers upon the defendant a categorical right to then disseminate the disclosed information "without conditions." DB 19. Indeed, the respondents' confidentiality arguments are premised on the notion that RSA 105:13-b applies only in the context of a specific criminal proceeding. DM 18–19 n.8. While the respondents' confidentiality arguments are incorrect, they reflect that, at a minimum, there is no plausible way to read RSA 105:13-b as affirmatively *authorizing* unconditional dissemination outside of the context of the criminal case in question.

The respondents likewise do not argue *Brady* and *Laurie* mandate unconditional dissemination of potentially exculpatory information in order to prepare a constitutionally sufficient defense. This, too, is no surprise, given that the respondents' own defense attorneys assented to the protective orders in question.[2] The respondents instead contend that the abstract

[2] Respondent Johnson has filed a motion below seeking to withdraw his assent, SA 23–24, which the State has moved to strike, SA 25–29. Both motions remain pending.

interests various third parties might have in accessing information involving police misconduct justifies dissemination without conditions. This contention is little more than the type transparent policy argument that the respondents have rhetorically suggested the State is making in this case.

The respondents position is further undermined by their acknowledgement that if their confidentiality argument is right, any member of the public (the respondents included) *already could* seek access to information in police personnel files under RSA chapter 91-A. *See generally* DB 17–29. The respondents recognize that such a request would trigger fact-intensive balancing under this Court's three-part public-interest framework. *See* DB 23–30. They offer no principled reason for why members of the public should be permitted to avoid the right-to-know process whenever they seek information that has been disclosed in a criminal case. The Court should not endorse such a loophole.

Perhaps sensing the weakness of their categorical argument, the respondents alternatively contend that the trial court was correct to inject a fact-intensive right-to-know analysis into their criminal cases.[3] As discussed in the State's opening brief, numerous federal courts have rejected similar attempts to convert criminal cases into FOIA proceedings. *See* SB 26–31. This Court has likewise observed that RSA chapter 91-A "should not be used to circumvent . . . discovery rules." *N.H. Right to Life v. Dir., N.H. Charitable Trust Unit*, 169 N.H. 95, 106 (2016). These

[3] That the respondents devote several pages of their brief to such an analysis, *see* DB 23–30, belies their insistence that they "*are not* arguing that the standard for issuing a protective order is governed by the Right to know law" and that the trial court merely looked to RSA chapter 91-A "by analogy," DB 17 (emphasis in original)

decisions persuasively demonstrate the trial court's error in assessing the protective orders at issue in this case through a right-to-know prism.

Moreover, the ramifications of the trial court's approach are striking. This Court has acknowledged that RSA 105:13-b "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. Atty.*, 167 N.H. 774, 780 (2015). When the right-to-know process is injected into an ongoing criminal proceeding, who represents these countervailing interests? It is by no means clear that criminal prosecutor would be in a position to competently (or even ethically) represent the interests of every officer, cooperating witness, or other person whose reputational and privacy rights might be implicated if information contained in a police personnel file were made public. A court would thus be left to decide between determining the rights of someone who is not party to or represented in the case at bar and delaying a criminal proceeding in order to litigate what is, in essence, a separate civil action. The respondents provide no coherent justification for this unworkable arrangement.

Relatedly, what happens when someone wishes to appeal a right-to-know determination made in the context of an ongoing criminal proceeding? The State has a statutory right to appeal a pretrial order "if, either because of the nature of the order in question or because of the particular circumstances of the case, there is a reasonable likelihood that such order will cause either serious impairment to or termination of the prosecution of any case." RSA 606:10, II(d). It is easy to imagine circumstances in which an order authorizing the public disclosure of

information contained in a police personnel file might satisfy this standard, particularly if the information were deemed inadmissible or no one sought to introduce it at trial. Additionally, this Court has routinely considered mandatory Rule 7 appeals brought by the losing parties in civil proceedings brought under RSA 91-A:8. Does a similar appeal right extend to right-to-know determinations made during criminal proceedings, particularly if an officer intervenes in an action with separate counsel to defend his or her interests? Does such an appeal right extend to persons whose rights are implicated by the court's determination, even if they were not parties to the criminal case? And if an appeal is taken from a right-to-know determination made in a criminal case, what happens to the underlying prosecution? The respondents have not attempted to answer any of these important questions.

Then there is the practical reality that protective orders like the ones at issue in this case actually *promote* a criminal defendant's due-process and speedy-trial rights. As the respondents and the trial court both acknowledge, the State characterized the disclosures subject to the protective orders in these cases as containing "*potentially* exculpatory" evidence. SD 63, 67, 68 (emphasis added). Under RSA 105:13-b, II, "[i]f a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required." This Court has nonetheless emphasized that "[t]he prosecutor bears the responsibility of determining which information must be disclosed to a defendant as exculpatory evidence," *In re Petition of State*, 153 N.H. 318, 321 (2006), while cautioning prosecutors who, "acting out of an abundance of caution, . . . routinely cause the officer's personnel file to be submitted to the court to

determine whether it contains exculpatory information that must be turned over to the defense," *Duchesne*, 167 N.H. at 782.

Protective orders like the ones at issue in this case allow prosecutors to provide *potentially* exculpatory information directly to defendants without requiring that the trial court first review those materials. This safeguards a defendant's due-process rights by incentivizing prosecutors to disclose *more* information than they likely would absent this type of protective order. Because that information is disclosed with minimal court involvement, the protective order similarly promotes the defendant's speedy-trial rights by streamlining criminal discovery. While one might infer from the respondents' brief that they view these interests as subservient to their speech-based concerns, the fact that similar protective orders appear to be commonplace suggests that this is not a view shared by trial-court judges or the defense bar at large.

For several reasons, these benefits evaporate when a protective order governing the dissemination of *potentially* exculpatory information must be justified under the right-to-know standard. First, some of the information provided under the type of protective order at issue in this case may not, in fact, ultimately be exculpatory. Second, as discussed, having to litigate a right-to-know action in the middle of a criminal case would only slow down discovery and delay the entire case. Third, such a process would divert prosecutors from their primary roles and require them to moonlight as right-to-know advocates. This would incentivize busy or cautious prosecutors to err on the side of seeking *in camera* reviews, which would also delay the disclosure of information under RSA 105:13-b and the underlying prosecution, while also unnecessarily burdening trial-court

judges. The respondents make no meaningful attempt to explain how *Brady* and *Laurie* justify these outcomes.

If this Court is unwilling to adopt the State's confidentiality arguments, then it should at the very least avoid such untenable results. In particular, the Court should not read into RSA 105:13-b a categorical right to disseminate information found nowhere in the statutory language or structure and untethered from the constitutional rights the statute is designed to promote. Rather, the Court should conclude that RSA 105:13-b means what it says: that exculpatory information "shall be disclosed *to the defendant*." RSA 105:13-b, I (emphasis added). To the extent the respondents, their counsel, or anyone else would prefer more widespread disclosure, then there is an established process available under the right-to-know law. In shoehorning that process into these criminal cases, the trial court erred.

II. The Court should reject the respondents' First Amendment and Part I, Article 22 arguments.

The respondents contend that the protective orders at issue in these cases violate the First Amendment and Part I, Article 22. The Court should reject this argument for several reasons. For one, neither the State nor the respondents raised or litigated this argument below. Nor did the State—the appealing party in this case—raise this issue in its petition or opening brief. *See State v. Batista-Salva*, 171 N.H. 818, 822 (2019) (noting that the appealing party bears the burden of demonstrating preservation). The respondents did not file a cross-appeal raising the issue. And while the trial court touched upon First Amendment concerns in its narrative order, it did so *sua sponte*, without the benefit an adversarial proceeding and not in a

manner that could be fairly construed as a "ruling." *See id.* ("Generally, we do not consider issues on appeal that were not presented to the trial court. This preservation requirement . . . reflects the general policy that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court." (internal citations omitted)). The respondents' First Amendment and Part I, Article 22 arguments are therefore not preserved for review.

But even if they were, the arguments are waived. All three respondents assented to the protective orders at issue in this case. SD 51–52, 62–68, 75–77. "[A] party may, by consenting to a protective order or otherwise, waive [his First Amendment] rights." *Nat'l Polymer Prod., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981). "A waiver of First Amendment rights may only be made by 'clear and compelling' relinquishment of them." *See id.* (citations omitted). The proposed protective orders unambiguously limited the respondents' ability to disseminate information disclosed by the State under RSA 105:13-b. *See* SD 63, 66, 77. By assenting to those protective orders, the respondents waived any First Amendment or Part I, Article 22 arguments they might have raised.[4]

The respondents cannot avoid this fact by asserting the rights of others. True, an assented-to protective order is not immune from a third-

[4]The respondents assert that their assent was involuntary because a bargaining disparity exists between a criminal defendant and the State. If any of the respondents believed that the State was improperly conditioning *Brady/Laurie* disclosures on the relinquishment of First Amendment rights, then he could have sought relief from the trial court. That this did not occur only further confirms that the respondents' speech-based arguments were not preserved.

party challenge. *See, e.g.*, *United States v. Wecht*, 484 F.3d 194, 203–04 (3d Cir. 2007). But that does not mean that a party who unequivocally waives his own First Amendment rights may nonetheless invoke the rights of a non-party, particularly for the first time on appeal. And in any event, "there is no constitutional or common-law right of public access to discovery materials exchanged by the parties by not filed with the court." *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir.2009). For these reasons, too, the respondents' First Amendment and Part I, Article 22 claims necessarily fail.

Finally, *even if* the respondents' speech-based arguments were viable, the remedy still would not be what the trial court sought to impose here. When a protective order is "entered on a showing of good cause, . . . is limited to the context of pretrial . . . discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).[5] The protective orders here are limited to pretrial discovery and do not restrict dissemination of information gained from some other source. The State believes that the record likewise reflects ample good cause to issue the orders. But even if it did not, "good cause" merely requires "the party seeking protection" to "show[] specific prejudice or harm will result if no protective order is granted." *Phillips ex rel. Ests. of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002). This is a far cry from

[5] While *Seattle Times* specifically referenced "civil discovery," several federal courts of appeals have indicated that the standard equally applies to criminal discovery. *See, e.g.*, *N. Jersey Media Grp. Inc. v. United States*, 836 F.3d 421, 430 (3d Cir. 2016) ("[D]iscovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation." (cleaned up)); *id.* (citing cases).

the fact-intensive inquiry the trial court sought to require. Accordingly, even if this Court does not reverse the trial court's judgment—and it should for all of the reasons stated above and previously—then it should still vacate the trial court's orders and direct the trial court to apply the correct standard.

CONCLUSION

For the foregoing reasons, and those stated in the State's petition and opening brief, this Court should reverse the trial court's judgment.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Samuel Garland, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 2,925 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

September 16, 2021 /s/ *Samuel R. V. Garland*
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CERTIFICATE OF SERVICE

I, Samuel R. V. Garland, hereby certify that a copy of the State's reply brief shall be served on the following parties of record, through the New Hampshire Supreme Court's electronic filing system:

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