THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2021-0146

Petition of State of New Hampshire

REPLY TO RESPONSE TO MOTION FOR SUMMARY DISMISSAL, OR, IN THE ALTERNATIVE, SUMMARY AFFIRMANCE

NOW COME Defendants/Respondents Jeffrey Hallock-Saucier, Nicholas Fuchs, and Jacob Johnson and hereby submit this reply to the State's Response to their Motion for Summary Dismissal, Or, In The Alternative, Summary Affirmance. In reply, Defendants/Respondents state as follows:

Defendants/Respondents write to make three points: 1) the Court should not exercise its discretion to accept this appeal because it would cause significant prejudice to Defendants/Respondents, 2) federal law is instructive and shows why this appeal should not be accepted, and 3) this case warrants summary affirmance on the merits.

First, while the State suggests that this Court should exercise its discretion to accept this appeal even if filed under the wrong rule, this is not a matter of elevating substance over form. The State's failure, under Rule 8, to not first seek leave from the Superior Court to file an interlocutory appeal is not harmless, but rather deeply prejudicial to defendants in this case. Setting aside the fact that the State is obligated to comply with the same procedural rules that all other litigants (including defendants) are required to follow, there is a reason for Rule 8's requirement that a litigant must first seek leave from the trial court before filing an interlocutory appeal—namely, to allow the trial judge to manage its docket, timely resolve disputes, and prevent prejudice to litigants that could be caused by

an interlocutory appeal. The trial court's signature on an interlocutory order is not a mere formality. This is because it is the trial court that is in the best position to balance the equities and harms to the parties if the interlocutory appeal is allowed to proceed. Here, the State's decision to seek an impermissible interlocutory appeal outside Rule 8 is harmful to Defendants because it will needlessly delay Defendants'/Respondents' trials for months, if not longer—all the while they are subjected to significant bail conditions. Defendants/Respondents demonstrate ample prejudice to their speedy trial rights—prejudice the State ignores in its response. Had the State sought trial court approval for this appeal as required, Defendants/Respondents would have had an opportunity to show why these cases, one of which was pending for a year and a half before the State even began the process of disclosing *Laurie* material, should not be extended even longer while the State prosecutes this interlocutory appeal. *See* N.H. R. Crim. Pro. 12(b)(1)(E)(setting deadline to produce exculpatory evidence within 45 days of plea); N.H. R. Prof'l. Cond. 3.8(d) (a prosecutor must make *timely* disclosure to the defense of all exculpatory evidence). In sum, the State in this case is not entitled to special treatment. It should comply with Rule 8, just as defendants in criminal cases are similarly required to apply with its provisions. *See State v. Brouillette*, 166 N.H. 487, 489 (2014) ("*With the trial court's approval*, the defendant then sought interlocutory review of the court's ruling, and we granted her request.").

Second, federal law is instructive on the permissibility of this interlocutory appeal under either Rule 8 or 11, as this appeal falls outside the forms of interlocutory appeals that are permissible under RSA 606:10, II. If this matter was before any federal appeals court, interlocutory review of this issue would not be allowed because it would prejudice the defendant and delay the criminal proceedings. Because of the unique prejudice to defendants, "interlocutory appeals in criminal cases are the exception."

United States v. Kouri-Perez, 187 F.3d 1, 9 (1st Cir. 1999). For example, the *Cohen* (or "collateral order") exception to the rule that an appeal is only allowed after final judgment enables an interlocutory appeal from an otherwise non-"final" order which meets *all* of four conditions. *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541 (1949). The order must (1) concern a collateral issue so conceptually distinct from other issues being litigated in the underlying action that an immediate appeal *would neither disrupt the main action*, nor threaten to deprive the appellate court of useful context which might be derived from subsequent developments in the litigation; (2) completely and conclusively resolve the collateral issue; (3) infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case; and (4) involve an important or unsettled legal issue, rather than merely challenge discretionary trial court rulings. *See United States v. Kane*, 955 F.2d 110, 111 (1st Cir. 1992) (reformulating these same *Cohen* criteria into a three-part test; noting Supreme Court authority restricting *Cohen* appeals in criminal cases to three narrow categories: refusals to dismiss indictments for violations of double jeopardy clause or speech and debate clause or to reduce bail).

Indeed, as the First Circuit explained, were interlocutory appeals routinely allowed in criminal cases, "trial counsel would be diverted from their primary responsibility—their clients' upcoming trials—while pursuing their own interlocutory appeals. Such distractions are even less appropriate in criminal cases than in civil actions." *See Kouri-Perez*, 187 F.3d at 9; *see also Kane*, 955 F.2d at 110 ("As a result of the 'compelling interest in prompt trials,' the requirements of the collateral order doctrine have been interpreted 'with the utmost strictness' in criminal prosecutions.") (citation omitted). Put another way, "[i]n rejecting attempts to expand the narrow class of interlocutory appeals, the First Circuit has stressed the importance of 'promptness in bringing criminal cases to trial' and cautioned,

accordingly, that the policy against piecemeal appeals is strongest in the field of criminal law." *United States v. Larouche Campaign*, 829 F.2d 250, 254 (1st Cir. 1987). Were this Court to employ the *Cohen* "collateral order" exception rule with respect to this issue that falls outside those in which interlocutory review is acceptable under RSA 606:10, II, interlocutory review is especially inappropriate here given that it would "disrupt the main action" and, in so doing, cause significant prejudice to Defendants, especially given their constitutional speedy trial rights which have not been waived

Third, even assuming that this appeal is procedurally appropriate, this is not a close case and warrants summary affirmance on the merits. Out the outset, RSA 105:13-b clearly does not act as an exemption to the Right-to-Know Law, and the State's position, if adopted, would give police officers special RSA ch. 91-a protections that do not exist for other public employees. The State has repeatedly (and correctly) argued in other cases that this statute is limited to criminal cases in which a police officer is a testifying witness—an admission that, by definition, means that this statute does not apply in the RSA ch. 91-A context. In any event, this Court need not even reach this Right-to-Know question because RSA 105:13-b, on its face, does not apply in this case to the records of the officers in question. RSA 105:13-b states that all exculpatory evidence "shall" be produced. It contains no condition that such exculpatory info can only be produced under a protective order, which was further made clear by the 2012 amendments to this statute. This should end the matter. Moreover, the statute only contemplates confidentiality in a criminal case for the "remainder of the file" that is not deemed exculpatory. It is the State, not Defendants/Respondents, that are attempting to rewrite the statute to add provisions that do not exist, in this instance to inexplicably protect police officers at the expense of defendants' speedy trial rights. If the Department

disagrees with RSA 105:13-b and its disclosure obligations, then it is the obligation of the Department to make its case before the legislature rather than unilaterally impose its own policy preference that both protects police officers and is inconsistent with RSA 105:13-b's plain terms.

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*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on counsel for the State through the court's electronic filing system on today's date: Daniel Will, Esq. and Elizabeth Velez, Esq.

Dated: May 27, 2021

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