

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 226-2019-CR-00814

SUPERIOR COURT
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

DALE HOLLOWAY

**STATE'S OBJECTION TO DEFENDANT'S PETITION
FOR WRIT OF HABEAS CORPUS**

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and objects to the Defendant's Petition, stating in support as follows:

1. Defendant has been charged with two counts of Attempted Murder, two counts of First Degree Assault, one count of Second Degree Assault, Simple Assault and Felon in Possession of a Firearm relating to a shooting that occurred at the New England Pentecostal Church in Pelham on October 12, 2019. He is represented by counsel in this matter. He has been held in preventive detention since his arrest.

2. Defendant has also been charged with two counts of First Degree Assault and additional crimes resulting from a serious violent assault on his defense attorney while incarcerated at the Hillsborough County House of Correction. (Docket 216-2019-CR-1856). He is proceeding *pro se* in this matter. The defendant has been held in preventive detention on this case despite multiple opportunities to argue bail since his arraignment on October 22, 2019. Trial is scheduled for early June, 2021.

3. Defendant has petitioned for a writ of habeas corpus on the grounds that his preventive detention in this matter "has changed from regulatory to punitive and based on the length of that incarceration, it has changed from regulatory to punitive and violates the defendant's presumption of innocence and results in improper punishment without trial."

FACTS

4. On October 12, 2019 people were gathered at the New England Pentecostal Church (the church) in Pelham to celebrate the wedding of C. M. and M.C. The wedding was being performed by Bishop Stanley Choate. At the conclusion of the couple's vows defendant approached the altar and shot Bishop Choate in the neck area. C.M. was shot through the arm and M.C. was apparently pistol whipped after defendant's gun jammed. He had placed the weapon in a sock in an attempt to conceal it.

5. M.C.'s son, Brandon Castiglione, allegedly killed defendant's step-father Luis Garcia about a week prior to this incident. Luis Garcia was a pastor at the church and his memorial service was scheduled for noon after the wedding. Defendant identified this fact as his motive for going to the church that day.

6. Pelham Police Department received a report at 10:12 am that an individual had been shot at the church. Upon responding to the scene officers found a number of people inside the church crying, yelling and screaming for help.

7. They observed a male, later identified as the defendant, lying face down with 5 or 6 people on top of him, close to the raised platform that held the altar in the front of the church. Lt. Anne Perriello of Pelham PD immediately obtained the defendant's weapon and secured it. The weapon was a .380 silver and black pistol.

8. Once the scene was secured officers located Bishop Stanley Choate lying on his back with a gunshot wound to his neck area. He was approximately 4 to 6 feet away from defendant. The bishop was transported to Tuft's Medical Center for treatment. He was in critical condition with a bullet lodged in his neck area.

9. C.M. who was identified as the bride, had also been shot in the arm and M.C. who was identified as the groom had a large cut on his head. He reported he had been struck in the head by defendant.

10. Defendant is seen arriving on video at about 10:09 am standing outside the church smoking a cigarette and entering the building a minute later. Guests are seen fleeing the church at 10:13 am. Video captured a BMW SUV enter the church parking lot from the south and the defendant exited from it. Once the guests are fleeing the church the SUV backs up and takes off.

11. Multiple witnesses saw defendant enter the church wearing black clothing and appearing out of place for the ceremony. He briefly sat several pews back from the altar appearing out of place. Towards the end of the ceremony he stood up and rapidly approached the altar raising his right arm, holding something that appeared to be covered, possibly with a sock.

12. He pointed his arm at Bishop Choate and the bishop turned towards him raising one hand and stated, "Son, no, no, no" or words to that effect. Defendant then shot him in the neck and the bishop fell to the ground.

13. He then turned the gun towards C.M. and M.C. and fired two shots striking C.M. in the arm. Several men, including the groom, ran up and tackled defendant to the ground and held him there until police arrived.

14. Defendant admitted he entered the church with the gun in his waistband and admitted pointing the gun at the bishop. He was upset that the wedding, which involved people related to his father's murder, was happening in the church before his father's funeral at the same church.

15. The police also spoke to Rafael Carpio who had given the defendant a ride to the church in the BMW SUV. Defendant claimed he got an Uber and then claimed he paid a "random dude" \$10.00 for a ride to the church. Mr. Carpio confirmed that he had given defendant a ride to the church at defendant's request to attend his father's funeral. Defendant said something to the effect that he would love to get revenge on the kid that murdered his father but he was already in jail.

16. Defendant has a lengthy criminal record of violence and the State has filed notice of extended term.

ARGUMENT

17. Speedy Trial is a nebulous right without fixed deadlines. Although the New Hampshire Supreme Court has created a standard for a presumption of prejudice, State v. Locke, 149 N.H. 1, 8 (2002) (citing State v. Fletcher, 135 N.H. 605, 607 (1992)) (for an incarcerated defendant charged with felonies, “[A] delay of over nine months is presumptively prejudicial.”). Although the New Hampshire Supreme Court created a presumption, the Court ultimately applies the same balancing test as is applied the federal court system to determine if a defendant’s right to Speedy Trial was violated.

18. “In determining whether a defendant’s right to a speedy trial has been violated under the Federal Constitution, we apply [a] four-part test” State v. Lamarche, 157 N.H. 337, 342 (2008); see also Barker v. Wingo, 407 U.S. 514, 530-32 (1972). “The test requires that we balance four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant’s assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay.” Id. (citing Barker, 407 U.S. at 530-32). “We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather they are related factors and must be considered together with such other circumstances as may be relevant.” Barker, 407 U.S. at 533. “[T]hese factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.” Id.

A. The delay is presumptively prejudicial.

19. The length of the relevant delay is a “threshold inquiry.” State v. Allen, 150 N.H. 290, 292 (2003). If the delay is not presumptively prejudicial, the Court can rule without weighing the other three Barker factors. Here, Defendant has been incarcerated for 552 days, over 18

months. Pursuant to Locke and Fletcher, an 18 month delay is presumptively prejudicial to Defendant, and the Court must consider the other three Barker factors to determine if Defendant's Speedy Trial right was violated by the delay.

B. The delay of Defendant's trial is attributable to the COVID pandemic and the Court's scheduling decisions.

20. The second Barker factor requires the Court to "assess why the trial was delayed and how much weight to give the delay." Lamarche, 157 N.H. at 343. "[T]o the extent that valid reasons cause delay, the delay does not count against the state at all." Id. (quoting Rashad v. Walsh, 300 F.3d 27, 34 (1st Cir.2002), cert. denied, 537 U.S. 1236 (2003)). This second factor "seeks to ensure that courts not concentrate on the sheer passage of time without also taking account of the etiology of the delay." Rashad, 300 F.3d at 34. "[T]o the extent that valid reasons cause delay, the delay does not count against the state at all. Id. (citing Barker, 407 U.S. at 531).

21. The instant case was not scheduled for trial because of the Honorable Christopher T. Sununu's Executive Order 2020-04 went into effect taking emergency action in an attempt to mitigate the global COVID pandemic and the somewhat parallel course of defendant's case in the Northern district and dispositional conferences were repeatedly cancelled. The first dispositional conference was held on June 9, 2020 but at that time no trials were being scheduled due to the pandemic.

22. Defendant waived speedy trial in the Northern district and he is also held on that charge in preventive detention. Judge Nicolosi permitted him to withdraw his waiver on July 22, 2020. Because he had waived his speedy trial rights in the North case and was held on preventive detention, the delay in that case up to that point must be assessed to the defendant. He subsequently fired his attorneys and it was determined that he would proceed *pro se*. Jury selection in this case is scheduled for early June, 2021.

23. On November 17, 2020 this Court reluctantly granted defendant's motion for new counsel. Attorney Zaino was appointed to represent defendant and filed an appearance on December 22, 2020. Accordingly, the delay in getting this case to trial is not solely attributable to the global pandemic but also to defendant's actions in firing his attorneys which inevitably caused the delay up to and including December 22, 2020 as this Court made a specific finding that defendant, for good reasons, did not want to proceed *pro se* in this matter.

24. Because the reason for the delay is an unprecedented global pandemic and its impact on the Court's scheduling ability as well as defendant's decision to fire his attorneys is not the fault of the State, defendant's Speedy Trial right has not been violated because of the delay.

C. The State is unaware of any written assertions of Speedy Trial by Defendant.

25. "Under the third factor, we consider the strength of a defendant's assertion of his right to a speedy trial. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determine whether the defendant has been deprived of that right." Lamarche, 157 N.H. at 343 (citation and quotations omitted). In Lamarche, the defendant waited approximately 10 months from indictment to demand a Speedy Trial. Id. The Court noted that "[t]he fact that the defendant waited so long to pursue his right to a speedy trial means that although the factor weighs in his favor, it does not do so heavily." Id.; see also United States v.

White, 443 F.3d 582, 590-91 (7th Cir.), cert. denied, 549 U.S. 929 (2006).

26. In the present case, a review of pleadings and orders filed reflects that Defendant has not made an assertion of his Speedy Trial right in any of his numerous *pro se* motions and it is not raised in defendant's petition. Because defendant has not affirmatively asserted his speedy trial right

as well as the fact that much of the delay is attributable to defendant's firing his attorneys the entirety of the delay should not weigh heavily in his favor.

D. Defendant has not been substantially prejudiced by the delay.

27. "The final factor requires [courts] to determine whether and to what extent the defendant suffered prejudice, including whether the delay resulted in an oppressive pretrial incarceration, anxiety, or an impaired defense." Lamarche, 157 N.H. at 344 (citation omitted).

28. Defendant relies heavily on Judge Delker's order in State v. Samaria, 216-2019-CR-01613. (See attached). It is clear that this order is inapposite on its facts. Defendant is charged with Attempted Murder which carries a penalty of up to life in prison. RSA 597: 1-c provides that

Any person arrested for an offense punishable by up to life in prison , where the proof is evident or the presumption great, shall not be allowed bail.

29. Although the charges for the pending case are the only reasons Defendant is held, cf. Lamarche, 157 N.H. at 344, in the Hillsborough County House of Corrections, Defendant is held because he shot Bishop Choate and C.M. at a wedding ceremony to which he was not invited in front of multiple witnesses. The evidence shows that he planned this assault in a premeditated fashion. In the case pending in the Northern district, defendant viciously assaulted his defense attorney at the jail.

30. The Lamarche court held that the most important consideration when considering whether the delay has prejudiced a defendant is if "the delay impaired his defense in any way." 157 N.H. at 344 (citation omitted). Defendant has made no such claim in any writing or verbal representation to the Court to date.

31. In U.S. v. Zannino, 798 F.2d 544, 547 (1986) the First Circuit articulated several factors to consider in where to draw the arbitrary line when defendants alleged to be a flight risk or danger to the community should be released pending trial. The factors are “the factors relevant in the initial detention decision, such as the seriousness of the charges, the strength of the government’s proof that defendant poses a risk of flight or a danger to the community, and the strength of the government’s case on the merits. Moreover, these judgments should reflect such additional factors as the length of detention that has in fact occurred, the complexity of the case, and whether the strategy of one side or the other has added needlessly to that complexity.”

32. It is clear that defendant’s strategy in firing his attorneys has added needlessly to the complexity of this case which in combination with the global pandemic is the cause for delay in his trial on this matter.

33. For all of the foregoing reasons, defendant’s Speedy Trial right has not been violated by the trial delays.

CONCLUSION

34. The Court has consistently ruled that Defendant is a danger to the community in both the North and South cases and he should be held in preventative detention pending trial. Defendant’s dangerousness has not decreased.

35. Finally, defendant’s Speedy Trial right has not been violated. Although defendant’s period of pre-trial incarceration is presumptively prejudicial under current New Hampshire case law, an examination of the cause of that delay along with the other three Barker factors reflect that defendant’s Speedy Trial right as guaranteed to him by the Sixth Amendment of the U.S. Constitution and by Part I, Article 15 of the New Hampshire Constitution have not

been violated by the delays caused by the COVID pandemic and defendant's own actions in firing his attorneys.

35. Based on the combination of factors referenced above defendant's incarceration has not changed from regulatory to punitive. Accordingly, the Court should deny defendant's Petition for Writ of Habeas Corpus as his speedy trial right has not been violated.

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Deny the Defendant's Petition for Writ of Habeas Corpus;
- B. Schedule a hearing thereon, if necessary; and
- C. Grant the State any such other relief as may be proper and just.

DATED: April 15, 2021

Respectfully Submitted,

/s/ Catherine M. Devine
Catherine M. Devine #629
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Michael J. Zaino, Esq., counsel for the defendant.

/s/ Catherine M. Devine
Catherine M. Devine

The State of New Hampshire

HILLSBOROUGH COUNTY NORTH

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

DANIEL SAMARIA

No. 216-2019-CR-01613

ORDER ON DEFENDANT'S REQUEST TO AMEND BAIL

The defendant, Daniel Samaria, has been charged with manslaughter, negligent homicide, first degree assault, second degree assault, and reckless conduct. See Indictments (Docs. 19–23). All of these alternative charges are premised on the allegation that the defendant caused the death of R.L. on September 13, 2019. The defendant renewed his request for amended bail on December 31, 2020, which the Court took under advisement. At the request of the Court, the parties have filed memoranda of law addressing whether the defendant should be released pretrial due to concerns related to COVID-19, conditions of the Hillsborough County House of Corrections (the “jail”), and the defendant’s health. See Def.’s Mem. of Law (Doc. 90); and State’s Mem. of Law (Doc. 96). The Court held an evidentiary hearing pertaining to these issues on January 5, 2021.

FACTS

The defendant was arraigned on September 16, 2019. At arraignment, the Court (Messer, J.) found the defendant to be a danger to the community and ordered him held in preventative detention. See Bail Order (Docs. 3 and 9). Thereafter, on October 4, 2019, the Court (Messer, J.) held an evidentiary hearing to determine whether the

defendant posed a danger to the community. After review of the evidence, the Court affirmed its original finding that the defendant was dangerous and ordered him held in preventative detention. See November 4, 2020 Court Order (Doc. 14). On November 26, 2019, the defendant was arraigned on new charges, and the Court (Nadeau, C.J.) affirmed the prior decision to hold him in preventative detention. See Bail Order (Doc. 24).

In March of 2020, the defendant filed two motions requesting amendment to his bail. See Mot. Bail Hearing (Docs. 53 and 58). The Court (Delker, J.) affirmed the prior findings of dangerousness and declined to release him as a result of the COVID-19 pandemic. See April 3, 2020 Court Order (Doc. 61). Thereafter, the Court also denied the defendant's December motion to amend bail, which sought release due to the defendant's heart disease. See Margin Order, Mot. Bail Hearing (Doc. 77). At a status conference on December 31, 2020, the Court informed the parties that it would hold an evidentiary hearing regarding the defendant's health and whether he should be released if the trial was unable to go forward in January. The Court asked the parties to submit memoranda fully briefing the issues.

At the evidentiary hearing on January 5, 2021, the defendant called Superintendent Willie Scurry and Health Services Administrator Denise Hartley to testify as to the conditions at the jail as well as policies and procedures related to COVID-19 following an outbreak among inmates and staff. Ms. Hartley primarily testified to the jail's medical response to positive cases of COVID-19. Superintendent Scurry testified to conditions surrounding the outbreak, including: the number of total positive test result among inmates, the number of positive test results among inmates on the block in

which the defendant resides, when and how the jail began conducting COVID-19 tests on the inmates, cleaning policies of the common spaces, how the inmates are housed, isolation policies, mask policies, the process for beginning testing staff for COVID-19, and screening protocols. Notably, Superintendent Scurry testified that inmates who had been exposed to COVID-19 were confined to their cells 22 hours per day and that there were no screening policies in place for staff or visitors to the jail. Superintendent Scurry also could not articulate the cleaning and waste disposal policy for sanitizing visiting attorney rooms.

In addition, the defendant testified that on occasion he was confined to his cell substantially in excess of 22 hours in a 24-hour period as a result of the policies dictating when different groups of inmates would receive recreational time. The defendant also testified that he is functionally illiterate and relies on fellow inmates to help him whenever he needs to engage in written communication. Defense counsel proffered that, as a result of the defendant's inability to read, they cannot simply give him the written discovery and review it with him over the phone. Rather, his attorneys must meet with him at the jail during in-person sessions to review discovery and prepare for trial.

ANALYSIS

The defendant has filed a motion to amend bail. The defendant's motion is premised on a claim that it is fundamentally unfair to continue to incarcerate him without a trial and that the conditions of his confinement endanger his health and welfare. That is, however, not the proper procedural vehicle for his requested relief. New Hampshire's bail statute, RSA ch. 597, does not include either of these considerations

in its rubric. The bail statute begins with the presumption that all defendants are entitled to be released pending trial. RSA 597:1. The Court may order a defendant held on preventative detention or restrictive bail conditions if the State proves by clear and convincing evidence that the defendant's release will endanger the public. RSA 597:2, III(a). In making the decision whether to incarcerate a defendant pretrial, the Court may consider all relevant evidence. *Id.* The evidence, however, must be relevant to the issue of dangerousness. *See id.* ("In determining whether release will endanger the safety of that person or the public, the court may consider all relevant factors") (emphasis added). The defendant here does not argue that the factors he relies on for amending his bail, namely the length of his pretrial incarceration and the conditions of his confinement, make him less dangerous or more likely to abide by restrictive bail conditions. Rather, the defendant argues that his continued detention violates his constitutional right to due process. This is a classic claim for a writ of habeas corpus. *See* RSA 534:1; *Knowles v. Warden, New Hampshire State Prison*, 140 N.H. 387, 389, 666 A.2d 972, 975 (1995) (an inmate seeking a writ of habeas corpus must establish "his present imprisonment is unlawful, alleging a present deprivation of a protected liberty interest.") (quotation omitted).

New Hampshire has a long tradition of considering the substance, rather the form, of the pleading in order to reach the merits of a claim. *See* *Hart v. Warden, New Hampshire State Prison*, 171 N.H. 709, 716 (2019) (treating the defendant's petition for writ of habeas corpus as a request for coram nobis); *State v. Breest*, 167 N.H. 210, 212 (2014) (noting that the trial court considered the defendant's motion for new trial as a petition for writ of habeas corpus); *Roberts v. Gen. Motors Corp.*, 140 N.H. 723, 729,

673 A.2d 779, 783 (1996) (“Since the days of Chief Justice Doe in the late nineteenth century, New Hampshire procedure has focused on what justice requires, not on strict precision in form.”) (quotation and brackets omitted). In the context of the case at bar, the issues have been fully briefed and argued. The defendant, who bears the burden of proof in a habeas proceeding, presented evidence to support his claim that his continued detention was unlawful. While the State correctly recognizes that this claim should have been initiated as a petition for writ of habeas corpus, it cites no grounds to conclude that it would be unfair to consider the defendant’s motion to amend bail as a request for habeas relief. Thus, the Court will consider the defendant’s motion in that context.

One of the most elemental components of our constitutional liberty is the notion that all individuals are presumed innocent until the government proves a criminal charge beyond a reasonable doubt. See Coffin v. United States, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). Indeed, no matter how compelling the evidence of guilt, a defendant has an absolute right to put the government to the test. Id. at 453-56 (citing numerous sources). A person may not be punished until the prosecution has met that burden.

The Due Process Clause of the Fifth Amendment provides, “[n]o person shall . . . be deprived of life, liberty, or property without due process of law. . . .” The Supreme Court has held that the U.S. Constitution protects individuals against “substantive” and “procedural” violations of the Due Process Clause. United States v. Salerno, 481 U.S.

739, 746 (1987). In other words, the Due Process Clause mandates that individuals be protected from government action that interferes "with rights implicit in the concept of ordered liberty," and even when the government properly deprives an individual of life, liberty, or property, it must do so "in a fair manner." Id.

Preventative detention necessarily implicates the defendant's due process liberty interest. However, "the mere fact that person is detained does not inexorably lead to the conclusion that the government has imposed punishment." Id. In determining whether the Bail Reform Act of 1984 was facially unconstitutional based on its provisions allowing for preventative detention, the Supreme Court held:

To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. . . .

Unless Congress expressly intended to impose punitive restrictions the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.

We conclude that the detention imposed by the [Bail Reform] Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. . . . Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. . . . There is no doubt that preventing danger to the community is a legitimate regulatory goal. . . .

Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. . . . The arrestee is entitled to a prompt detention hearing . . . and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.

Salerno, 481 N.H. at 747 (alterations omitted). The Salerno Court's opinion indicates that, while preventative detention is not in and of itself punitive, there are circumstances

in which the continued detention of an individual pretrial could cross an unspecified line at which point the detention would be rendered punitive rather than regulatory. Id. at 747 n.4.

Other courts have considered this question and come to the same conclusion. See United States v. Taylor, 602 Fed. Appx. 713, 717 (10th Cir. 2015) (“[P]retrial detention for a lengthy period of time may implicate due process concerns.”); United States v. Briggs, 697 F.3d 98, 101 (2d Cir. 2012) (“In making such an assessment, we consider the strength of the evidence justifying detention, the government’s responsibility for the delay in proceeding to trial, and the length of the detention itself.”); United States v. Orena, 986 F.2d 628, 630 (2d Cir. 1993) (“[D]ue process does not necessarily set a bright-line limit for the length of pretrial confinement.”); United States v. Gonzales Claudio, 806 F.2d 334, 340 (2d Cir. 1986) (“[T]he due process limit on the duration of preventive detention requires assessment on a case-by-case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement.”) (quotation omitted).

Briggs is particularly instructive in examining how courts have determined whether preventive detention crosses that amorphous line between regulation and punishment. In Briggs, the defendant was indicted as part of a multi-count, multi-defendant drug distribution conspiracy on August 17, 2010. 697 F.3d at 100. On September 1, 2010, a magistrate judge ordered the defendant held without bail pending trial, which the district court reviewed and affirmed. Id. In early 2012, the defendant challenged the preventive detention order, arguing that the ongoing detention of nearly

two years violates due process. Id. The district court rejected the defendant's motion and the appeal followed. The Briggs court held:

Pretrial detention satisfies due process only if its purpose is regulatory rather than punitive. . . . Permissible regulatory purposes include preventing danger to the community . . . and ensuring a defendant's presence at trial. . . . We have consistently held that due process places no bright-line limit on the length of pretrial detention. . . . While length of detention is obviously a central focus of our inquiry. . . the due process limit on the duration of preventive detention requires assessment on a case-by-case basis. . . .

In making such an assessment, we consider the strength of the evidence justifying detention, the government's responsibility for the delay in proceeding to trial, and the length of the detention itself. . . . The longer the detention, and the larger the prosecution's part in prolonging it, the stronger the evidence justifying detention must be if it is to be deemed sufficient to justify the detention's continuance.

Id. at 101 (alterations omitted).

In considering whether the length of the defendant's detention weighed in favor of release, the Briggs court considered prior cases where it had applied such a metric. Id. at 103. It looked in particular at a case that involved a 33-month detention of a defendant accused of "being a key participant in" al Qaeda. Id. (quotation omitted). In that instance, the Briggs court opined that the length of the delay was "extraordinary" and only justified "by the unprecedented scope of violence that the conspiracy of which defendant was allegedly a part inflicted on innocent victims, by the extraordinarily complex and difficult preparation needed to present this case, and more particularly, because the lengthy delay in bringing defendant to trial may not be laid at the government's doorstep." Id. In other words, the Briggs court concluded that that instance was acceptable because the length of the delay was substantially outweighed by other factors.

The Briggs court also examined a case in which the defendants had been held in preventive detention for fourteen months for “participating in the robbery of a Wells Fargo depot by paramilitary Puerto Rican nationalists.” Id. The court in that instance found the delay punitive as the trial was not set for another four months and was anticipated to last in excess of eight months. Id. In short, in juxtaposing these two cases, the Briggs court concluded that the proper framework for determining whether lengthy preventive detention violates the Due Process Clause rests on a consideration of the totality of the circumstances as applied to the metrics detailed above.

The First Circuit has adopted a similar approach for review of substantive due process violations based on preventive detention. In United States v. Zannino, the First Circuit held:

Because due process is a flexible concept, arbitrary lines should not be drawn regarding precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial. Instead, we believe that due process judgments should be made on the facts of individual cases, and should reflect the factors relevant in the initial detention decision, such as the seriousness of the charges, the strength of the government’s proof that defendant poses a risk of flight or a danger to the community, and the strength of the government’s case on the merits. Moreover, these judgments should reflect such additional factors as the length of the detention that has in fact occurred, the complexity of the case, and whether the strategy of one side or the other has added needlessly to that complexity.

798 F.2d 544, 547 (1986) (quoting United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986)).

This Court finds the reasoning of the First and Second Circuits persuasive and adopts and incorporates the test for determining whether the defendant’s pretrial detention is so excessive as to violate his due process rights. The Court will consider: (1) the seriousness of the charge; (2) the strength of the government’s proof that

defendant poses a risk of flight or a danger to the community; (3) the strength of the government's case on the merits; (4) the length of the detention; (5) the complexity of the case; and (6) whether one side or the other has needlessly added to the complexity or delay.

In the case before the Court, the defendant is facing several serious charges, including manslaughter, which carries a sentence of 15-30 years in prison if convicted. RSA 630:2, II. Since the defendant's arraignment, three judges have found clear and convincing evidence he is dangerous based on video surveillance of the incident that resulted in the death of R.L. The defendant has attempted to urge this Court to reconsider these previous findings by re-arguing the strength of the case and the meaning of the defendant's prior criminal record. The defendant, however, has not presented any new evidence suggesting he would not pose a risk to the community if released, and the Court has not made such a finding. Accordingly, the Court finds that the first two factors weigh against the defendant.

That said, regarding the merits of the case, the defendant has asserted self-defense or defense of another. It is the government's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense when he struck R.L. See State v. Etienne, 163 N.H. 57, 81 (2011) (“[S]elf defense and defense of others constitute pure defenses, and, thus, negating such a defense becomes an element of the offense that the State must prove beyond a reasonable doubt.”). This Court found clear and convincing evidence that the defendant's unprovoked attack on R.L. caused his death. Nonetheless, there is a meaningful window between clear and convincing evidence and proof beyond a reasonable doubt. See generally State v. Furgal, 161

N.H. 206, 216 (2010) (adopting clear and convincing evidence and rejecting beyond a reasonable doubt as the burden for preventative detention); see also Hawkins v. Comm'r, N.H. Dep't of Health & Human Servs., No. 99-CV-143-JD, 2010 WL 2039821, at *2 (D.N.H. May 19, 2010) ("Clear and convincing evidence is an intermediate standard between the beyond-a-reasonable-doubt standard and the preponderance standard."), aff'd sub nom. Hawkins v. Dep't of Health & Human Servs. for New Hampshire, Com'r, 665 F.3d 25 (1st Cir. 2012). The surveillance footage viewed by this Court is not so unambiguous to preclude self-defense, defense of another, or even a defense of accident. Indeed, the defendant has presented an expert who has slowed the video to a frame-by-frame view in attempt to demonstrate that the defendant did not punch R.L. prior to his death. As such, the Court concludes that the merits of the State's case are not so compelling as to weigh heavily against the defendant.

In addition, at this point the defendant has been incarcerated since September of 2019, a period in excess of fifteen months. Under ordinary circumstances, New Hampshire's Speedy Trial Policy requires the Court to hold a hearing for the State to show cause why charges should not be dismissed if an incarcerated defendant is not brought to trial within four months. See State v. Skillin, No. 2014-0395, 2015 WL 11182043, at *3 (N.H. July 30, 2015) (non-precedential order citing Speedy Trial Policy). Indeed, the Salerno Court pointed to the "stringent time limitations" in the federal Speedy Trial Act, as one of the bases for concluding that the federal bail statute allowing preventative detention was not facially unconstitutional. Salerno, 481 U.S. at 747. In the case at bar, the trial was originally scheduled to begin on March 23, 2020. In late February, the defendant filed an assented to motion to continue the trial citing the

State's failure to complete discovery. Arguably this continuance could be ascribed to the State, but here it would not be fair to do so. Trial would nonetheless have been continued based on the Emergency Order issued by the New Hampshire Supreme Court suspending all jury trials due to the corona virus pandemic.¹ When jury trials resumed in this county, this case was set to go forward this January 2021. However, in response to growing numbers of COVID-19 cases in Hillsborough County, on January 4, 2021, Chief Justice Nadeau again suspended all jury trials in this court. Although jury trials are scheduled to resume in February, the ongoing public health crisis may result in further suspension of trials. Moreover, there are other cases involving incarcerated defendants that have been scheduled for trial in February. The defendant's trial could go forward in March at the earliest. As such, the defendant's pretrial detention has the potential to continue for two months or more. Such a lengthy delay presumptively exceeds the due process limitations on pretrial confinement. Zannino, 798 F.2d at 548 (“[W]e shall assume that in many, perhaps most, cases, sixteen months [of preventive detention] would be found to exceed the due process limitations on the duration of pretrial confinement.”).

Importantly, in this case the defendant is not incarcerated on a pre-existing conviction and sentence. Nor is he facing trials in multiple separate cases, which would necessarily delay the resolution of his future. There also has not there been extensive pretrial litigation in this matter. All of these considerations may justify a lengthy pretrial detention. Rather the present case is the only basis for the defendant's pretrial incarceration and both parties were ready for trial in January 2021.

¹ <https://www.courts.state.nh.us/supreme/orders/3-16-20-order.pdf>.

Although the reason for the delay is neutral—that is, no one could have predicted the COVID-19 pandemic and the recent rise in cases has made jury trials logistically impossible—the circumstances of incarceration weigh heavily in favor of release. The Court declines to pass judgment on whether the conditions of the jail violate the defendant's Eighth Amendment rights because the defendant has not presented admissible evidence that he has health factors that put him at risk. The Court does find certain conditions at the jail present a particular impact on the defendant in the case at bar. Most notably, the defendant has been locked in his cell 22 hours a day. While all defendants experience some prejudice by reduced access to counsel while incarcerated, the prejudice is particularly salient for this defendant, who is functionally illiterate. The defendant's illiteracy makes it all but impossible for him to meaningfully review discovery on his own in order to aid counsel in preparing his defense. In order to do so, he must meet in person with his attorneys. The jail's lack of screening protocols and apparent lack of sanitization protocols related to the visiting attorney rooms make it is risky for defense counsel to enter the jail in order to prepare their client's defense. While prejudice to the defendant has not traditionally been a factor in the analysis for a violation of due process as a result of prolonged incarceration, the Court would be remiss if it did not weigh the significant prejudice in favor of the defendant given the conditions of the jail and his inability to meaningfully prepare his case for trial as a result.

This brings the Court to the point where it must weigh the various factors and determine whether the defendant's due process rights have been violated. In other words, does the defendant's continued incarceration violate the presumption of

innocence and result in improper punishment without trial or is his imprisonment a necessary regulatory confinement to protect the public? The Constitution is not suspended simply because the State of New Hampshire finds itself in a state of emergency. See Ex parte Sheffield, 611 S.W.3d 630, 635 (Tex. App. 2020), reh'g denied (Oct. 20, 2020) (granting the defendant's petition for writ of habeas corpus to reduce bail to personal recognizance based on a violation of his right to a speedy trial), petition for discretionary review filed (Nov. 20, 2020). In fact, it is in these moments of crisis that the true test of our adherence to core constitutional principles are tested. It is easy to pledge fealty to the lofty goals of the Constitution when there is no cost to adherence to those aspirations. But the rule of law requires more than that. It requires courts to apply the law even when that is difficult or unpopular. Thus, it is not a novel concept in constitutional jurisprudence that sometimes dangerous criminals are allowed to be free in order to protect the liberty of the innocent. In certain cases that outcome is necessary to remedy misconduct by the government. See e.g. State v. Hall, 148 N.H. 394 (2002) (vacating a conviction for second-degree murder, finding that the jury instructions impermissibly shifted the burden of proving intent from the State to the defendant); see also State v. Roache, 148 N.H. 45 (2002) (suppressing statements made by defendant accused of aggravated felonious sexual assault when the police did not inform him that his retained attorney was attempting to contact him). But even when the invasion of constitutional rights is occasioned by innocent administrative error, the New Hampshire Supreme Court has not hesitated to uphold the Constitution and dismiss charges. See e.g. State v. Martin, 145 N.H. 362 (2000) (suppressing firearm in felon-in-possession case finding that the trial court erred when it failed to suppress

evidence obtained pursuant to an arrest warrant that had been vacated by the trial court even though actual notice of the vacated warrant had not been received by police when the defendant was arrested.).

In this case, the length of delay, the prejudice the defendant suffers from continued incarceration, and the gap between the clear and convincing evidence relied on in determining dangerousness and the State's burden of disproving the defendant's claim for self-defense beyond a reasonable doubt all weigh heavily in favor of the defendant. The defendant's continued incarceration violates his presumption of innocence and due process right to be free from punishment prior to conviction.

The Court can ameliorate the danger to the public by imposing restrictive bail conditions. RSA 597:2, III. As such, the Court orders that the defendant be released on personal recognizance bail subject to house arrest. He must live with his brother Keith Dyer. The defendant is ordered to remain under house arrest and may not leave his brother's home except to meet with his attorney and to attend medical appointments. The defendant may not consume drugs or alcohol, cannot possess firearms, dangerous weapons or ammunition, and must file a waiver of extradition. In addition, in light of the defendant's release on due process grounds, the Court concludes that there is no need to hold the record open for the defense to introduce evidence relating to the defendant's health.

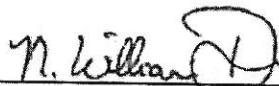
CONCLUSION

For the foregoing reasons, the defendant's petition for habeas corpus, filed as a request to amend bail, is **GRANTED**, and the Court orders that the defendant be

released on personal recognizance subject to the conditions contained in the separate
bail order issued today.

SO ORDERED.

January 11, 2021
Date



Judge N. William Delker

Clerk's Notice of Decision
Document Sent to Parties
on 01/11/2021

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: Hillsborough Superior Court Southern District
Case Name: State v. Dale Holloway
Case Number: 216-2019-CR-1856
(if known)

AGREEMENT

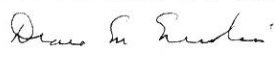
The parties agree as follows:

1. Mr. Holloway has a companion case currently pending in the Hillsborough County Superior Court-Southern District. Parties agree that the Hills-South case will be tried before this case. The Hills-South case currently has a dispositional conference scheduled for March 19. It is expected that trial in that case will be scheduled sometime in November of this year.
2. The parties further agree that this case will be scheduled for jury selection on November 16, with a final pre-trial conference date of November 4. A status hearing will also be scheduled in September, so parties can determine if the Hills-South case will be resolved by November 16, or if a further trial date is necessary.
3. Mr. Holloway agrees to waive speedy trial through December 2020 to accomplish this agreement.

All parties to this Agreement must sign on the next page(s).

FOR COURT USE ONLY

Approved and So Ordered with the understanding that, should the


Honorable Diane M. Nicolosi
March 3, 2020

Hills. So. case be delayed, the Court may require this case to go forward as scheduled with consideration of course of the parties' postitions.

Case Name: State v. Dale Holloway

Case Number: 216-2019-CR-1856

AGREEMENT

Plaintiff/Petitioner

Brian Greklek-McKeon

Attorney for Plaintiff/Petitioner

HCAO

269561

Law Firm , if applicable

Bar ID # of attorney

Signature

/s/ Brian Greklek-McKeon

Signature

Date

03/02/2020

Date

Plaintiff/Petitioner

Signature

Date

Attorney for Plaintiff/Petitioner

Signature

Date

Law Firm , if applicable

Bar ID # of attorney

Defendant/Respondent

Donna Brown

Attorney for Defendant/Respondent

Wadleigh Starr & Peters

387

Law Firm , if applicable

Bar ID # of attorney

Signature

/s/ Donna Brown

Signature

Date

03/02/2020

Date

Defendant/Respondent

Signature

Date

Attorney for Defendant/Respondent

Signature

Date

Law Firm , if applicable

Bar ID # of attorney

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough County

Hillsborough Superior Court Northern District

State v. Dale Holloway

216-2019-CR-01856

ORDER

The Court held a lengthy *ex parte* hearing on the defendant's request for new counsel and alternative request to be allowed to proceed *pro se*. Counsel for the defense were present and indicated that, if Mr. Holloway assisted them, they would be able to provide him effective assistance of counsel and were willing to continue representing him. Their description of the conflict was consistent with Mr. Holloway's. After listening to the complaints raised by Mr. Holloway, the Court concluded that the disputes revolve primarily around counsels' interpretations of the law and their judgment on whether to file motions on Mr. Holloway's behalf, primarily on the issue of pretrial detention, a subject he has raised a number of times at hearings and through *pro se* motions. The Court has previously entertained argument by Mr. Holloway on his firm belief that he should be released and disagreed. Suffice it to say that his assessment of the likelihood of prevailing on a request for release is not realistic. The Court found that the issues, although understand very important to Mr. Holloway, are not central to his defense of the charges. It was clear the defendant is intent on directing his lawyers to file motions that in their view are not in his best interest and do not have any real likelihood of success.

The Court did not appoint new counsel for two reasons primarily: 1. the court was not convinced that new counsel would have any better ability to work with Mr. Holloway than Attorneys Brown and Lee have; and 2. the court did not identify an act or inaction on the part of counsel that would constitute ineffective assistance of counsel. To the extent the lawyers have been unable to meet their professional obligations to defend Mr. Holloway or would in the future, the cause rests with the defendant due to his refusal to assist them and his unrealistic view of the role and obligations of defense counsel. In fact, it appears that the communication between client and lawyers has been robust and fruitful at times.

The defendant after a lengthy colloquy and advice on his constitutional rights and real difficulties and risks with self-representation, particularly in light of his classification status and the seriousness of the charges he faces, opted to proceed *pro se* and declined the assistance of stand-by counsel.

At his request, the trial has been continued to June 7, 2021. He may request reappointment of Attorneys Lee and Brown at any time, if he makes the request with sufficient time for them to be

prepared for trial. He may request appointment of stand-by counsel at any time.

SO ORDERED.

October 28, 2020

Date


Judge Diane M. Nicolosi

Clerk's Notice of Decision
Document Sent to Parties
on 11/02/2020

Name Holloway, Dale DOB 8-6-82
 Location _____ CCN 64251
 Allergies NKDA

Noted By: T.O. Dr. Braga / D Malouf
Albuterol inh. 90mcg 2 puffs BID PRN
 [Redacted]
 Date: _____
 Time: _____
 MD/DDS Signature [Signature] Date/Time: 11/5/19.

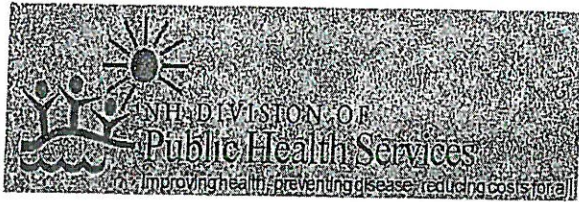
Noted By: [Signature]
 [Redacted]
 Date: _____
 Time: _____
 MD/DDS Signature [Signature] Date/Time: 11/5/19.

Noted By: _____
 Date: _____
 Time: _____
 MD/DDS Signature _____ Date/Time: _____

Noted By: _____
 Date: _____
 Time: _____
 MD/DDS Signature _____ Date/Time: _____

THE ABOVE ORDERS HAVE 11 REFILLS UNLESS OTHERWISE INDICATED.

26



New Hampshire Public Health Laboratories
 Department of Health and Human Services
 29 Hazen Dr., Concord, NH 03301
 Phone (603) 271-4661
 FAX (603) 271-2138

LABORATORY REPORT: FINAL

Report To Laura Morrison
 Hillsborough County Department of
 Corrections
 445 Willow St
 Manchester, NH 03103

Patient HALLOWAY JR, DALE
Date of Birth 8/6/1982
Gender Male
Patient ID HALLOWAY JR, DALE
Address 445 Willow St
 HCHOC
 Manchester, NH 03103

Physician Dr. Christopher Braga

Specimen		Test Request(s)
Lab ID #	2101030098	TaqPath COVID-19 Multiplex
Source/Type	Nasopharyngeal	
Requisition #	642018	
Collected	1/3/2021	
Received	1/3/2021 03:54 PM	
Completed	1/4/2021 03:02 PM	

Test	Result	Method	Completed
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COVID-19 TESTING
 SARS-CoV-2 RNA **Positive** Real Time RT-PCR 01/04/2021

Positive results are indicative of the presence of SARS-CoV-2 RNA. Clinical correlation with patient history and other diagnostic information is necessary to determine patient infection status. Positive results do not rule out bacterial infection or co-infection with other viruses.

The U.S. Food and Drug Administration (FDA) has issued an Emergency Use Authorization (EUA) for the use of the Thermo Fisher TaqPath COVID-19 Combo Kit for the qualitative detection of SARS-CoV-2 RNA. For more information, please see the TaqPath COVID-19 Combo Kit provider and patient fact sheets on the FDA website at <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-use-authorizations#coronavirus2019>

HILLSBOROUGH COUNTY DEPARTMENT OF CORRECTIONS

445 Willow Street
Manchester, New Hampshire 03103-6216
Telephone (603) 627-5620 Facsimile (603) 627-5618
www.hcnh.org

Willie Scurry
Superintendent

Captain Gifford F.J. Hiscoe, CJM
Security

Captain Ryan LeVierge
Operations

To: Commissioner Toni Pappas District 1
Commissioner Michael Soucy District 2
Commissioner Robert Rowe District 3
From: Superintendent Willie Scurry
Date: April 2, 2021
Re: Hillsborough County Department of Corrections updated actions for COVID-19

This report contains updated information regarding the department's actions in response to COVID -19. It supplements the information previously provided to the Board about the steps taken by the department to address the pandemic.

Quarantine Status:

Currently the department has three (3) inmates that are on quarantine status.

- One (1) inmate in quarantine status was a close contact and is housed on 2A.
- One (1) inmate in quarantine status continues to refuse to take a Covid-19 test and is housed on 2A.
- One (1) inmate in quarantine status for refusing to take a TB test and is housed on 2A.

COVID-19 Cases:

- There are currently no active Covid-19 Positive cases in the facility.

Facility wide testing for all staff:

As the Outbreak has been closed, DHHS is no longer conducting weekly facility testing for staff.

Facility wide testing for the inmate population:

As the Outbreak has been closed, DHHS is no longer conducting weekly facility testing for staff. Inmates are continuing to be tested if there are any complaints of Covid-19 symptoms.

Screening staff upon arrival to work:

A Covid-19 self-attestation form is required of any staff, contractors, vendors, attorneys, or anyone authorized prior to entering the facility.

COVID-19 Isolation Units:

As noted previously HCDOC established two separate units (1B) and (2C) for anyone testing positive.

HCDOC Staff Assignment:

Staff assignments continue so that the same staff is assigned as much as possible to the same areas of the facility to reduce the risk of transmission through staff movements.

PPE:

All inmates continue to be issued surgical facemasks on a daily basis and all staff is still required to change their surgical masks daily upon reporting to work.



Release Planning:

DHHS continue to receive email notification for inmates being released into the community who are (1) Covid positive and/or in (2) Quarantine Status for Covid related issues and/or (3) Potential Close Contact. All inmates being released from custody is provided a handout explaining the guidelines to follow if they have tested positive for Covid or have experienced exposure to Covid.

Unit Cleaning Disinfecting / Units Housing Quarantine/Isolation Inmates:

As we continue to deal with the Covid-19 pandemic and the unique challenges it presents to correctional facilities staff (wearing the appropriate PPE) continues all cleaning / disinfecting of all common areas (Dayroom Tables / Phones / Showers, etc.) at the completion of Out of cell time for units housing both Quarantine / Non-Quarantine inmates prior to letting the next group of inmates out.

Screening and Testing Incarcerated Inmates:

The facility will continue with daily screening of inmates on isolation and quarantine status. Inmates will also be tested if they are displaying any signs or complaining of any symptoms for Covid-19.

Vaccination:

The Health Service Administrator and our Medical Provider has submitted all documents to administer Covid-19 vaccination for the inmate population. The NH Department of Health and Human Services Mobile Team came to our facility to provide on-site Covid Vaccinations to our staff and the eligible inmate population.

On-Site Covid Vaccination – N.H Dept. of Health and Human Services 3/31/21 – DOSE 2 Summary:

Thirty One (31) Staff received the Pfizer-BioNTech Vaccine

On-Site Covid Vaccination – N.H Dept. of Health and Human Services 4/2/21 – DOSE 2 Summary:

Twenty Six (29) Staff received the Pfizer-BioNTech Vaccine

Sixteen (16) High Risk Inmates received the Pfizer-BioNTech Vaccine. Two (2) of the eighteen (18) registered eligible inmates refused the second dose.

As of this date the following information is the percentage of Employees Vaccinated.

By April 2, 2021 - Fully Vaccinated Employee Projection: Over 80%

Ongoing Plan as of this date:

Effective 4/2/2021, vaccine eligibility is opening up for all persons. In a continued effort to vaccinate all inmates at the department, the NH Department of Health and Human Services Mobile Team has offered to help coordinate and come to our facility to administer on-site Covid Vaccinations to the remaining inmate population. A date will need to be determined and scheduled with the DHHS Mobile Team.

Effective 4/5/21 – In an effort to balance inmate/attorney needs and continued Covid-19 preventative measures the department will reestablish contact attorney visitations. (See HCNH Website).

Effective 4/5/2021 - In an effort to balance Law Enforcement's needs and continued Covid-19 preventative measures the department will reestablish Law Enforcement visitations.

The department will be coordinating a special inmate visitation schedule from 4/12/2021 to 4/16/2021.

Superintendent Willie Scurry
Hillsborough County Department of Corrections