

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

State of New Hampshire

v.

Anna Barbara Hantz Marconi

No. 217-2024-CR-01167

MOTION TO CLARIFY SUBPOENAS

NOW COMES, the New Hampshire Judicial Branch, by and through its counsel, and respectfully requests to that this Court grant this Motion to Clarify Subpoenas for the four sitting justices of the New Hampshire Supreme Court and a justice of the Superior Court, and states the following as grounds:

1. The undersigned is the General Counsel for the New Hampshire Judicial Branch, an organizational attorney representing the institution of the state's judiciary. In this capacity, the undersigned frequently appears with employees of the Judicial Branch when they are called upon to give evidence at a hearing or trial, or agree to sit for voluntary investigative interviews. The duties of the General Counsel can include filing motions to quash subpoenas, motions to continue proceedings based on the unavailability of Judicial Branch witnesses, and other appropriate pleadings. The undersigned attorney's duties also include discouraging the pursuit of testimony of Judicial Branch employees, including judicial officers, when doing so would raise ethical issues for the witness, or even be contrary to law. The undersigned receives and responds to requests for evidence from the Judicial Branch beyond testimony as well.

2. In the course of completing the duties described above, the undersigned has become aware that both the prosecution and the defendant in this case seek the testimony of judicial officers, namely, all four sitting Justices of the New Hampshire Supreme Court and Superior Court Justice Rudolph W. Ogden, III. Specifically, on July 16, 2025, attorneys from the Department of Justice contacted the undersigned to inform her that they would be issuing subpoenas for the Chief Justice of the Supreme Court and Judge Ogden. On the same day, the undersigned informed the Department and counsel for the defendant that she would file a motion for clarification and circulated a draft of the current motion for the parties' positions. Subsequently, counsel for Justice Hantz Marconi informed the undersigned that if the State subpoenaed the Chief Justice, the defense would likely subpoena the remaining justices of the Supreme Court. On July 23, 2025, the Department served subpoenas for the Chief Justice and Judge Ogden. On July 24, 2025, the defense served subpoenas for Justices Bassett, Countway, and Donovan, as well as Judge Ogden. All subpoenas were served in the manner agreed by counsel and service is not contested.

3. Beginning over a year ago, undersigned counsel has attempted to comply in a fair and even-handed manner with the reasonable requests of both the Department of Justice and counsel for Justice Hantz Marconi to obtain evidence relating to her criminal case. The operative facts of Justice Hantz Marconi's case involve allegations of a meeting arranged by her with the Governor and a phone call conducted by her to a person outside the Judicial Branch. Therefore neither Judicial Branch records nor witnesses comprise the primary evidence in the case. However the Chief Justice submitted on August 2, 2024 to a brief and limited voluntary interview with investigators during the State's investigation of Justice Hantz Marconi, to

determine if he possessed unique and vital evidence related to the case based on representations by the Department that they believed he did possess such evidence.

4. The undersigned has advised both parties generally on the legal limitations on evidence and testimony that the Judicial Branch can provide one year ago. Because both parties are understandably primarily interested in the success of their position in the case, and both may believe judicial testimony could be helpful to them, there may be no party who would be sufficiently interested in the legal and institutional concerns to raise those limitations with the court. Therefore, the undersigned respectfully requests to offer argument solely to brief to the court on her understanding of the law and obtain the court's guidance on whether and when a judge may be called as a witness in this case.

5. The New Hampshire Constitution provides: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." Part I, Article 35. This provision mandates that there be an independent judiciary so that the adjudication of individual controversies is fair and remains uninfluenced by outside forces. *See Petition of Mone*, 143 N.H. 128, 137 (1998) *citing State v. LaFrance*, 124 N.H. 171, 177–78 (1983). This includes the perception of partiality. *In re Petition of Jud. Conduct Comm.*, 151 N.H. 123, 126 (2004) (it is the Supreme Court's responsibility to "foster public confidence in the judiciary"). It is the Supreme Court's responsibility "to oversee the operations of the judicial branch for the purposes of maintaining public confidence in the administration of justice." *Opinion of the Justices (Judicial Salary Suspension)*, 140 N.H. 297, 299 (1995).

6. Specific laws limit the ability of judges to step off the bench and participate in cases as witnesses for either side. Unique to New Hampshire, for over a hundred years, beginning with *Hale v. Wyatt*, 78 N.H. 214, 215–16 (1916), the New Hampshire Supreme Court has held that a judge may be a competent witness to prove all that occurred before him or her, but that he or she may not be compelled to testify. *See Gelinis v. Metropolitan Prop. & Liability Ins. Co.*, 131 N.H. 154, 168–69 (1988); *In re C.M.*, 166 N.H. 764, 778 (2014). The decision as to whether to testify is personal. *Hale*, 78 N.H. at 215. The judge may waive this personal privilege, but it is a matter entirely for the judge to decide. *See Gelinis*, 131 N.H. at 168–69; *In re C.M.*, 166 N.H. 764, 778 (2014); *see also Phelan v. Thompson*, 161 F.R.D. 7, 7–8 (D.N.H. 1994) (recognizing the existence of a state privilege for a judge not to testify and applying the privilege in a federal case where a New Hampshire state judge declined to be deposed by either party).

7. Further, no judge may be examined in this state as to his or her mental processes or the reasoning by which their decision is made. *Merriam v. Salem*, 112 N.H. 267, 268 (1972) (Individuals “acting in a judicial capacity ... may not be required to answer inquiries into the mental processes by which their decisions were reached.”). *See also Baldi v. Broderick*, No. CIV. 04-CV-466-PB, 2006 WL 1134922, at *2 (D.N.H. Apr. 27, 2006) (“The decision-making or mental processes of judges is not subject to discovery. That is true under federal law. ... It is equally true under New Hampshire law.”).

8. The same rationale has protected judicial communications and other deliberative materials in other jurisdictions where they have been sought. *See, e.g., In re Enforcement of a Subpoena*, 463 Mass. 162, 174 (2012) (not only mental processes are protected from disclosure, but also “confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes”—an absolute privilege); *Butler v. Prince*

George's Cnty., Maryland, No. CV 22-1768 PJM, 2024 WL 1376347, at *10 (D. Md. Mar. 29, 2024) (precluding “any effort to require a state-court Judge to testify about his or her mental processes, whether individually or as a matter of collective policy”); *Kosiorek v. Smigelski*, 54 A.3d 564, 578 n. 19 (Conn. App. Ct. 2012) (noting that the lack of authority regarding the sanctity of the judicial deliberative process is “undoubtedly because its existence and validity has been so universally recognized”); *United States v. Nixon*, 418 U.S. 683, 708 (1974) (“the claim of confidentiality of judicial deliberations, for example, has all the values to which accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in ... decisionmaking.”); *Thomas v. Page*, 361 Ill. App. 3d 484, 492 (2005) (“We believe that the benefits which [i]nure to the judicial decision-making process through the interchange of ideas between a judge and all of the members of the court’s staff would be diminished unless these communications remained confidential, including communications between a judge and another judge’s clerk.”).

9. New Hampshire law also provides that it is inappropriate to call a judge as a witness when there is any other person or record available to provide the evidence. *State ex rel Childs v. Hayward*, 109 N.H. 228, 230 (1968) (No judicial officer should “be subjected to interrogation with respect to the evidence presented before him when there is an existing record thereof.”); *In re C.M.*, 166 N.H. at 778 (the testimony sought from the judge could be fully established by official records).

10. Perhaps because of the robustness of New Hampshire law prohibiting judicial testimony under different circumstances, the state has rarely had to confront limitations on the propriety and general admissibility of judicial officer testimony. The practice of other

jurisdictions who have confronted this question is consistent. Where a judge may be called upon to give evidence for things observed in the course of their official duties and there is no other operative legal bar to the testimony, most jurisdictions have impressed that judicial testimony should be rare, and have adopted a three-part test that is often given as:

A judge should only be required to testify if he or she possesses factual knowledge; the knowledge is highly pertinent to the jury's task; and the judge is the only possible source of the testimony on the relevant factual information.

State v. Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc., 291

Kan. 322, 364 (2010); *see, e.g., all in accord United States v. Frankenthal*, 582 F.2d 1102, 1108 (7th Cir. 1978); *United States v. Roth*, 332 F. Supp. 2d 565, 568–70 (S.D.N.Y. 2004) (rejecting the request of a criminal defendant for judicial testimony under the application of this test), *aff'd sub nom. United States v. St. John*, 267 F. App'x 17 (2d Cir. 2008); *People v. Knisley*, 2022 CO 59, ¶ 26–¶ 28 (rejecting the request of a criminal defendant for the judicial testimony under the application of this test); *State v. Sims*, 272 Neb. 811, 827–28 (2006); *Hatcher v. McBride*, 221 W. Va. 5, 14, (2006). The test excludes evidence which is opinion or legal, merely supporting, or available from another source.

11. A test of this kind is scarcely unusual in New Hampshire. A similar one is employed to determine whether reporters may testify. *State v. Gibson*, 170 N.H. 316, 320 (2017). Under that test, in a criminal case, either a defendant or the prosecution must show: (1) that they attempted unsuccessfully to obtain the information by all reasonable alternatives; (2) that the information would not be irrelevant to their case; and (3) that, by a balance of the probabilities, there is a reasonable possibility that the information sought as evidence would affect the verdict in the case. *See id.* (test applies equally to defense and prosecution requests). A similar test is employed when a party to a criminal case requests the privileged treatment records of a victim.

State v. Zarella, No. 2024-0066, 2025 WL 1256011, at *7 (N.H. May 1, 2025) (“To establish an ‘essential need’ for an individual's privileged records, the defendant must establish that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure.”).

12. While a judge is never permitted to give legal testimony under the three-part test for judicial testimony given above, the New Hampshire Constitution also prohibits judges from providing an advisory opinion on legal matters outside the procedures given in Part II, article 74. *Carrigan v. New Hampshire Dep't of Health & Hum. Servs.*, 174 N.H. 362, 366 (2021) (“Thus, while the respective branches of the legislature, the governor, and the executive council may request our advisory opinion on important questions of law, other parties may not.”).

13. A judge who has been requested to testify as a witness in a case may be required to “discourage the party from requiring him or her to testify.” *Hatcher v. McBride*, 221 W. Va. 5, 14 (2006); *see also* New Hampshire Code of Judicial Conduct Rule 3.3, Comment 1 (“A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. [...] Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.”). The judge can then only testify only if the trial court approves, and subject to appropriate limitations.

14. In other states, the trial court may require a pre-trial hearing to determine (a) the testimony expected from the judge by the requesting party; (b) explain why the judge’s testimony is relevant and necessary to the party’s case; and (c) describe the efforts made to obtain the same evidence from alternate sources. The party must then show “that the testimony it seeks to introduce is material and favorable to its case, that the testimony is the only possible

source of testimony on the relevant information, and, if the case is being tried before a jury, that the testimony is highly pertinent to the jury's task.” *Hatcher v. McBride*, 221 W. Va. 5, 14 (2006), citing *People v. Willis*, 349 Ill. App. 3d 1 (2004); *see also* a similar procedure prescribed for obtaining privileged records in *State v. Zarella*, No. 2024-0066, 2025 WL 1256011, at *7 (N.H. May 1, 2025) (A party must show “targeted information is unavailable from another source and that there is a compelling justification for its disclosure ... In determining whether a reasonable alternative source is available such that the defendant can prepare a defense without access to the individual's privileged records, the court must consider: (1) whether the alternative evidence is admissible at trial; (2) whether the alternative evidence is sufficient to overcome a motion for directed verdict; and (3) whether the defense has made adequate efforts to investigate alternative sources.”).

15. Calling a judicial officer outside of the three-part test imposed above may be highly prejudicial and improper under New Hampshire Rule of Evidence 403. *See Hatcher v. McBride*, 221 W. Va. 5, 14 (2006). While the New Hampshire Constitution provides a criminal defendant with favorable proofs, the “right does not entitle the defendant to introduce evidence in violation of the rules of evidence.” *State v. Graf*, 143 N.H. 294, 296–97 (1999) (citation omitted); *see also United States v. Roth*, 332 F. Supp. 2d 565, 570 (S.D.N.Y. 2004), *aff'd sub nom. United States v. St. John*, 267 F. App'x 17 (2d Cir. 2008); and subjects the defense to the same requirements as the prosecution in obtaining disfavored forms of evidence. *See State v. Gibson*, 170 N.H. 316, 320 (2017) (“at a minimum the same balancing of interests applies where the State seeks to pierce the privilege, given the societal interest in all citizens giving relevant testimony about criminal conduct”).

16. It is understandable that a party may wish to invoke the prestige of a judicial officer, particularly the highest judicial officers in the state, to aid their case. But that is precisely the abuse of the prestige of the judicial office, and its potential to overbear a jury's consideration of the facts at issue, that a trial court may guard against. *State v. Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc.*, 291 Kan. 322, 364 (2010) ("Absent a showing of extraordinary need, a judge may not be compelled to testify about matters observed as the consequence of the performance of his or her official duties. [...] This rule [...] prevents juries from being unduly influenced by judges' robes.") (internal citations omitted); *Joachim v. Chambers*, 815 S.W.2d 234, 238 (Tex. 1991) ("The appearance of a judge as a witness threatens, rather than promotes, public confidence in the integrity and impartiality of the judiciary.") (internal quotation omitted).

17. While the three-part test given above applies to all instances in which judges testify relating to matters observed in the course of performing official duties, it does not apply to personal matters and matters not observed in the course of performing official duties:

Clearly, courts will face situations where people, who happen to be judges, witness events that are material to a given case. A judge might be driving to work and witness a car wreck or be involved in one himself. A judge might find it necessary to sue her contractor over inadequate repairs to her house. In such cases, these should be considered "acts that simply happen to have been done by judges."

State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 671 (2000); see also federal judiciary's subpoena regulations, Guide to Judiciary Policy, Vol. 20: Administrative Claims and Litigation, Ch. 8: Testimony and Production of Records, § 810.10(b) (available at: U.S. Courts, Subpoena Regulations, <https://www.uscourts.gov/rules-policies/judiciary-policies/subpoena-regulations>), which specifically state that they do not govern "Legal proceedings in which federal judicial personnel are to testify while in leave or off-duty status as to matters that do not arise out of the

performance of official duties.” *But also see* the same, heavily limiting subpoenas for judges and staff:

The purpose of these regulations is, among other things, to:

- (1) conserve the time of federal judicial personnel for conducting official business;
- (2) minimize the involvement of the federal judiciary in issues unrelated to its mission;
- (3) maintain the impartiality of the federal judiciary in disputes between private litigants;
- (4) avoid spending the time and money of the United States for private purposes; and
- (5) protect confidential and sensitive information and the deliberative processes of the federal judiciary.

Considerations include:

- (9) Whether the testimony or production of records would violate a statute, regulation, or ethical rule. [...]
- (12) Whether the testimony or production of records reasonably could be expected to result in the appearance of the federal judiciary favoring one litigant over another, or endorsing or supporting a position advocated by a litigant.
- (13) Whether the request seeks testimony, records or documents available from other sources.

18. The undersigned submits that a ruling from this court is necessary to determine whether (1) the court agrees that the law above governs whether any subpoenaed judge may testify as a matter of law, (2) whether any testimony sought by either party would satisfy this test.

19. Although the unsigned attorney can summarize the testimony she understands the parties will seek at the court’s request, the parties are in the best position to articulate to the court the testimony they wish to introduce, either in pleadings or in a hearing. However, the undersigned will provide the following information to assist the court in understanding why the motion is being raised. At the time the Chief Justice provided a brief voluntary interview with the Department of Justice a year ago, he was informed they sought information on three limited areas: (1) his conversation with the Governor after the Governor met with Justice Hantz Marconi—which is permissible to gather in an investigatory stage, but hearsay at trial, (2) the

impact of Justice Hantz Marconi's recusals on the work of the Supreme Court, and (3) a conversation the Chief Justice had with Justice Hantz Marconi around May 2024 where she confirmed she had awareness that a grand jury was investigating her husband. After speaking with attorneys for the Department, the undersigned understands that they do not intend to seek information about the first item at trial. They do however intend to seek testimony from the Chief Justice about a fourth area, how he felt in response to his call with the Governor—an opinion which is not factual and not highly pertinent to the jury's task, if it is even relevant and sufficiently probative of anything to outweigh its prejudice. *State v. Addison*, 165 N.H. 381, 464 (2013) (evidence is unduly prejudicial if it “would have a great emotional impact upon a jury” or great “potential for appealing to a juror's sense of resentment or outrage”; “the extent to which the issue upon which it is offered is established by other evidence, stipulation, or inference”; and “whether the evidence is relevant to prove an issue that is actually in serious dispute.”). If the court were to rule the Chief Justice's opinion or how he felt about evidence to be admissible evidence, measures may be appropriate to ensure that the prestige of his office is not abused, including providing information by stipulation and/or without allusion to his judicial office.

20. To the extent the prosecution seeks information about Justice Hantz Marconi's recusals and their impact on the court, it appears they seek the Chief Justice's opinion on whether these recusals were burdensome, not any objective facts related to her recusal. That Justice Hantz Marconi was recused from a substantial percentage of cases does not appear to be a fact in dispute. Opinion evidence is generally not permitted under the three-part test, nor does a difference of opinion (if there is one) appear to be testimony that would be highly pertinent to the jury's task.

21. Attorneys for the Department also stated they may ask about anything in the transcript of the Chief Justice's voluntary interview. Though the undersigned attempted to get further specificity, the Department declined to provide it. However, as the Department exceeded allowable questioning under the three-part test in that interview, about which they were briefed beforehand by the undersigned, this may include impermissible testimony. Moreover, as the Department indicated when counsel agreed to the interview, what is relevant at an investigatory stage and what is relevant and admissible at trial are different.

22. As far as the undersigned knows, the only possibly permissible testimony the Chief Justice may be able to offer at trial is information suggesting Justice Hantz Marconi was aware there was a grand jury investigation of her husband in May of 2024. However, the prosecution must establish that the information is highly pertinent to the jury's task and irreplaceable by other means—including showing that they have done adequate investigation of alternative sources, as they have been aware they made need to do since being briefed on this body of law a year ago. Since May falls after the dates of some of the indicted conduct, it is likely there is other evidence establishing Justice Hantz Marconi's knowledge of an investigation, perhaps including evidence of her own statements that are alleged to be part of the commission of the offenses.

23. The undersigned is not aware of any particular need for factual testimony from the three remaining sitting justices. There is some reason to believe that the testimony is intended to enlarge on opinion or other non-factual testimony the prosecution may seek to elicit from the Chief Justice. The expansion of subpoenas for other justices shows the danger of allowing judges to testify outside the confines of the three-part test and other law in the first instance. If the Chief Justice is required to give what the court could find to be irrelevant and prejudicial testimony

about his opinion of certain evidence, the defendant may argue this opens the door to more inappropriate testimony by other judicial officers. *But see State v. Kelly*, 160 N.H. 190, 202 (2010) (parties to a criminal case are not permitted to introduce evidence that would lead to “confusion of the issues” and “time consuming and distracting minitrials” on matters which are “not the point at issue” in the case).

24. The undersigned generally understands that Judge Ogden may be able testify to matters which he observed when he was not a judicial officer, particularly if there is no other witness available to speak to an important fact. However it may be appropriate for the court to impose certain limitations, such as limiting any reference to his current judicial position, and ensuring that no questioning to him seeks an advisory opinion from a judicial officer. If Judge Ogden’s testimony is duplicative of another witness, such as former Governor Sununu, it may simply not be necessary to place a judicial officer in this posture and work around the potential restrictions on his testimony at all.

25. A motion to quash is the typical vehicle for a nonparty witness to bring to the court’s attention the legal rights and restrictions which adhere to them. *See, e.g., State v. Gibson*, 170 N.H. 316, 320 (2017) (a reporter raising legal questions as to the ability to testify); *State v. Zarella*, No. 2024-0066, 2025 WL 1256011, at *1 (N.H. May 1, 2025) (a victim raising the privileged nature of her treatment records). The New Hampshire Rules of Criminal Procedure provide that a motion to quash may rest on “improper service, hardship, or otherwise as provided by law.” Rule 17(f).¹ Service is not contested in this case. Nor is the Judicial Branch seeking

¹ The undersigned understands that N.H. R. Cr. P. 17 (typically applying to non-parties) controls this pleading, rather than N.H. R. Cr. P. 35(i)(1) (typically applying to parties). However, the undersigned is happy to verify all statements in this pleading should the court determine this is necessary. *See Town of Bedford v. Brooks*, 121 N.H. 262, 265 (1981) (“the practice of submitting motions on statements of counsel is well established in this State...” and courts “have upheld a trial court’s disposition of a motion based upon fact even in the absence of affidavits where neither party objects to the procedure, or when there is no attempt to offer evidence, no claim that the court was not fully informed of the facts, or no claim that material facts are in dispute”) (internal quotations omitted).

quashal if the court determines that there is some factual evidence which either party seeks from a judicial witness, which is highly pertinent to the jury's task and cannot be obtained by other means, so long as the testimony is not violative of the law or the judges' ethical restrictions. Therefore the motion has been styled as one for clarification, or order to be clear that quashal may not be required, should a party be able to satisfy this test. However, the motion may alternatively be construed as one for quashal under Rule 17(f) at the court's discretion.

26. While nonparties have rights and duties that are appropriate to raise with the court in an advance motion, such as a motion to quash or this motion for clarification, the ability of the judicial witnesses to raise these issues mid-trial will be extremely limited. The Branch is a nonparty to the case and it would be challenging for the undersigned attorney (and probably others in the trial process) if she were to offer contemporaneous objection and argument in instances where questioning proceeds on legally impermissible grounds. Therefore the Judicial Branch respectfully asks this court to resolve these matters before trial so that the witnesses may comport themselves with the requirements of law and their ethical duties as judges.

27. The positions of the parties to the case on this motion were solicited and are given as follows. The prosecution declined to assent or object to the motion and asked for the following verbiage to be included: "The State's position is that Chief Justice Gordon J. MacDonald and Justice Rudolph W. Ogden, III, are unique and necessary fact witnesses, but the State takes no position as to the other three justices. We reserve the right to respond to the Court's motion and/or the Defendant's response to the Court's motion." The defendant's position is to object to the motion, insofar as the position must be characterized as assenting or objecting, until such time as the defense may submit a responsive pleading. The defendant requested the following verbiage be included in this motion: "The defense indicated that it would submit a

written response setting forth the constitutional rights of the accused, including the rights to compulsory process and due process.”

WHEREFORE, for the foregoing reasons, the Judicial Branch respectfully requests that this Honorable Court:

- A. Grant this Motion to Clarify the judicial subpoenas and ask the parties to submit information and/or argument on any testimony they will be seeking from any judicial officer;
- B. Upon hearing that information or argument, make a determination as to whether and about what any judicial officer may testify as a matter of law, or whether the subpoenas must be quashed as a matter of law; and
- C. Grant any further relief as justice requires.

Respectfully submitted,

New Hampshire Judicial Branch

By and through its counsel

July 31, 2025

/s/ Erin Creegan
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CERTIFICATION

I hereby certify that on this day the above motion was served via electronic filing to the parties.

/s/ Erin Creegan
Erin Creegan