STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss. May Term, 2025

State of New Hampshire No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

REPLY TO STATE'S OBJECTION TO MOTION FOR BILLS OF PARTICULARS

The accused, Justice Anna Barbara Hantz Marconi, respectfully replies to the State's Objection to her Motion for Bills of Particulars, because the State fails to address the core of the accused's motion, makes no effort to defend or explain the remarks of its attorney before this Court, and seeks to withhold evidence in contravention of the established rules and practices of criminal courts in this State. If the State has the evidence summarized to this Court on February 3, 2025, it should be ordered to produce that evidence as discovery and to detail the facts supported by that evidence in Bills of Particulars.

1. The State had a grand jury return indictments against Justice Hantz Marconi. Despite a request by Justice Hantz Marconi, the State did not ask for authorization to record and transcribe the grand jury proceedings. Questions remain as to exactly what was summarized and presented to the grand jury. However, from the discovery produced by the State, which includes no record of grand jury testimony, it is apparent that the State did not present to the grand jury any witnesses who observed or participated in the conversation(s) at issue. The indictments require the State to prove that Justice Hantz Marconi acted with criminal intent. When the defense pointed out that the three percipient witnesses to the events—then-Governor Sununu, Rudy Ogden, and Chairperson Duprey—denied in their recorded interviews witnessing any corrupt intent, or even the implication of an improper intent, the State countered that it could prove such

intent circumstantially, with other, unnamed, undisclosed witnesses or evidence. When pressed to disclose that evidence, the State has refused. This motion followed.

2. It is axiomatic that in this State, "justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." *State v. Cromlish*, 146 N.H. 277, 280 (2001). Our justice system "liberalized" discovery rules "in recognition of the concept that 'the ends of justice are best served by a system which gives both parties the maximum amount of information available, thus reducing the possibility of surprise at trial.'" *State v. Nadeau*, 126 N.H. 120, 124 (quoting R. McNamara, 1 Criminal Practice and Procedure § 511, at 344 (1980)). *See also State v. Reader*, 160 N.H. 664, 668 (2010) (explaining that the purpose of the discovery rules is "to avoid trial by ambush"). Unfortunately, contrary to its obligation to pursue justice, the State appears to be doing exactly the opposite—alluding to witnesses and evidence but refusing to disclose them to the defense so it can prepare a defense. In *State v. Allison*, 134 N.H. 550 (1991) the Supreme Court emphasized that the "purpose of a bill of particulars is…*to enable* [a defendant] *to prepare an intelligent defense*." *Id.* (italics in original).[1]

3. Here, the State represented to this Court that it has "facts and circumstances," "multiple witnesses," and "other individuals" which will allow the jury to "make their inferences

[1] In *Allison*, the defendant was charged with two counts of negligent homicide stemming from a car crash. *Allison*, 134 N.H. at 552. The defendant filed a motion for a bill of particulars requesting detailed information about specific acts, times, and locations that would demonstrate the requisite *mens rea*. *Id.* at 553. The State did not object and the trial court granted the motion, but the State did not file a bill of particulars. *Id.* Instead, "it orally represented that it could not provide more specific information as it was unaware of further details." *Id.* During trial, "[i]n a chambers conference immediately prior to closing arguments, the State indicated for the first time that it planned to argue that 16.5 seconds elapsed" between when one witness saw the defendant's vehicle and when their cars passed. *Id.* The defense objected, but the trial court overruled the objections, and the State made the argument in its closing to the jury. *Id.* at 554. The Supreme Court noted that the State's actions "greatly limited the opportunity of the defendant to attack the accuracy and relevance of the 16.5-second figure." *Id.* at 555. And the error was not harmless because the "figure was important to the State's argument" and the defendant was unable to present evidence to counteract it. *Id.* at 556-57. Notably, while the State makes brief reference to *Allison*, *see St. Obj.* at ¶ 5, it appears to have cited material from the *Allison* dissent. *Compare St. Obj.* at ¶ 6 *with Allison*, 134 N.H. at 570 (Horton, J., dissenting).

about whether [Justice Hantz Marconi] acted with the requisite criminal intent." *D. Mot.* at ¶ 3. Yet, it refuses to disclose the statements of these witnesses. *See* N.H. R. Crim. P. 12(b)(1)(B) (requiring disclosure of witness statements within forty-five days after entry of a not guilty plea). The State should not be allowed to conduct a "trial by ambush," *Reader*, 160 N.H. at 668, and prevent Justice Hantz Marconi from "*prepar*[*ing*] *an intelligent defense*." *Allison*, 134 N.H. at 554 (italics in original).

4. Furthermore, there is no good reason to countenance such a delayed disclosure. "The discovery of truth in criminal proceedings should not suffer by an overly technical application of a scheduling order or the rules of court." *Cromlish*, 146 N.H. at 280. That is because, as noted above, "justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." *Id.* (underline added). Thus, the "trial court has the inherent authority to exercise its sound discretion in matters relating to pre-trial discovery." *State v. DeLong*, 136 N.H. 707, 709 (1993).

This Court's Prior Ruling Regarding a Bill of Particulars Is No Longer Applicable Given that the State Has Introduced "New Facts and Circumstances."

5. In its Objection to this Motion for a Bill of Particulars, the State references an earlier decision of this Court in which it denied a prior motion for a bill of particulars. *See St. Obj.* at ¶ 6. In denying that prior motion, this Court noted that the indictments reference conversations with then-Governor Sununu and Chairperson Duprey and relied on references to those conversations in the indictments in deciding that the indictments provided the Defendant with "enough information to prepare her defense…". *Order on 1A Motion* at 16. But now transcripts of the investigative testimony of those witnesses have shown that this basis for denying a motion for a bill of particulars no longer exists. In fact, the statements of then-Governor Sununu and Chairperson Duprey do not reveal that Justice Hantz Marconi made "these statements in an

attempt to improperly influence, or otherwise unlawfully interfere with an investigation into her husband." *Id*.

6. Due to the transcripts of the investigative testimony of then-Governor Sununu and Chairperson Duprey, and the in-court statements of the prosecutor, it is clear that those witnesses, and the references to those statements in the indictments, do not support the State's effort to prove that the defendant acted with a criminal purpose. In fact, the investigative testimony of then-Governor Sununu and Chairperson Duprey undermine the State's case, because they both unequivocally say that they did not think defendant was doing anything improper. So, how is the State going to prove its case? The defendant has absolutely no idea and therefore needs the State to set out in a bill of particulars how it will prove that Justice Hantz Marconi acted with a criminal purpose, so that she can properly prepare for trial. What are the "facts and circumstances" that Attorney Fincham alluded to at the February 3, 2025 hearing? Who are the "other individuals" that the State expects to call and what will they say? And because the accused does not know what evidence the State has to prove her intent to attempt to improperly influence or interfere, the accused cannot properly prepare any defense, never mind an "intelligent defense." Justice requires that the State stop hiding the ball and provide the names of witnesses referenced by the State at the February 3rd hearing and what the State expects them to say.

<u>The Cases Cited by the State do not Support its Position and in Fact Support the Granting of the Bill of Particulars.</u>

7. The State's excerpts from cases discussing bills of particulars do not change the analysis. In *State v. Chick*, 141 N.H. 503 (1996), the defendant was charged with multiple counts of aggravated felonious sexual assault and "made this motion orally on the morning of trial" to identify the specific sexual act, of multiple, which would form the basis of the State's case and

"to force the prosecution to elect the act upon which it would rely.". *Id.* at 504, 506. Because his defense did not "hinge[] upon knowledge of specific facts" and because, "at the motion hearing, defense counsel indicated that he was primarily interested in policing the trial court's ruling regarding uncharged acts," our Court could not "say that [the trial court's refusal to grant a bill of particulars] was an unreasonable method of dealing with the defendant's concerns." *Id.* at 507. However, *Chick* reiterated that a bill of particulars is required "when 'necessary for the preparation of a defense.'" *Id.* (quoting *State v. Steer*, 128 N.H. 490, 494). Here, a bill of particulars is required to allow Justice Hantz Marconi to prepare an "intelligent defense" based on what the State has referenced as the additional, undisclosed evidence it intends to present at trial to prove the crucial element of its case—that she acted with an improper purpose.

8. The State also cites *State v. Kuchman*, 168 N.H. 779 (2016), wherein the defendant was charged with first degree assault and moved for a bill of particulars because he was charged with acting "in concert with" another and he argued this "implicated numerous theories of liability" and therefore he could not prepare an adequate defense. *Id.* at 783-84. Rejecting his argument, the Court said the indictment contained "enough facts to warn [him] of the specific charges against him." *Id.* at 786 (quoting *State v. Marshall*, 162 N.H. 657, 661-62 (2011)). Because "the defendant hoped to use a bill of particulars to simplify his defense strategy by forcing the State to narrow its theory of liability" and because the defendant had already "set forth several distinct theories of liability that the prosecution could rely upon at trial, demonstrat[ing] that he was able to anticipate those theories, and, thus, prepare an intelligent defense," the Court determined that the trial court "did not unsustainably exercise its discretion." *Id.* Yet, it nevertheless reiterated that "there may be cases in which reasonable trial preparation would require an allegation of the specific conduct[.]" *Id.* (quoting *State v. Doucette*, 146 N.H. 583, 590 (2001)).

9. That is precisely the situation here. The defense is not seeking to narrow the State's theory of liability. Because the State has charged six of the seven crimes as inchoate crimes with lower evidentiary standards that hinge on an accused's mental state, and because the State's own percipient witnesses have said that they did not believe that Justice Hantz Marconi acted with a criminal purpose, the defense must be informed of the evidence cited by the State in order to prepare an intelligent defense.

10. Finally, *State v. Superior Court*, 106 N.H. 228 (1965), long predates the adoption of the Rules of Criminal Procedure, *see State v. Laux*, 167 N.H. 698, 704 (2015), and thus its holding about discovery obligations may no longer be good law. The Supreme Court has not cited to the holding of that case on discovery obligations since 1979. *See State v. Osborne*, 119 N.H. 427, 434 (1979) (citing to *Superior Court* for the "minimum that is required by statute or our constitution"). Additionally, the requested information in *Superior Court* far exceeds the minimal requests of the accused here. *Compare Superior Court*, 106 N.H. at 232 (requesting "facts or information which indicate the time and date of the abduction…the geographical locale…the means of conveyance…the date and time [of the victim's death], and the geographic locale or place [of the murder]") *with D. Mot.* at p. 6 (requesting details of witnesses and evidence referred to by State in motion hearing but not disclosed to defense).

11. The fact that the charges in the indictments hinge upon the State's ability to prove she acted with a criminal purpose only highlights the need for the State to disclose the evidence referenced by Attorney Fincham at the February 3, 2025 motion hearing. The State's suggestion that circumstantial evidence of an accused's mental state is sufficient misstates the applicable case law. *See St. Obj.* at ¶ 2. The State cites to *State v. Carr*, 167 N.H. 264 (2015) and *State v. Tayag*, 159 N.H. 21 (2009), *see St. Obj.* at ¶ 2, but fails to acknowledge these were appeals after trial with different standards of review. In an appeal of the denial of a motion for a directed

verdict, where the court views "the evidence and all reasonable inferences arising therefrom in the manner most favorable to the State," *Carr*, 167 N.H. at 275, the "jury is entitled to infer the requisite intent from the defendant's conduct in light of all the circumstances in the case." *Tayag*, 159 N.H. at 24 (quoting *State v. DiNapoli*, 149 N.H. 514, 516 (2003)). Here, however, no jury has been empaneled, no evidence presented. The issue is the accused's constitutional right to adequately prepare for trial. The issue is the State's refusal to share with the defense the "facts and circumstance" referenced by Attorney Fincham. See, *Tayag*, 159 N.H. at 24.

12. The differences between the cases cited by the State and the situation here could not be clearer. In *Tayag*, the defendant was charged with aggravated felonious sexual assault and argued that the State "failed to submit sufficient evidence of [his] mental state[.]" *Id.* at 23. Although the "State presented only circumstantial evidence of the *mens rea* of knowingly," the victim's testimony that she felt the defendant digitally penetrate her, and therefore "a rational jury could conclude that the defendant acted knowingly" because there was "no evidence that support[ed] any other rational conclusion." *Id.* at 24. Here, by contrast, and discussed at length in other defense motions, Justice Hantz Marconi's alleged conduct, a meeting with the then-Governor and a phone call with Chairperson Duprey, supports many "rational conclusion[s]," most obviously, the exercise of her First Amendment rights and expressing her concerns to the appointing authority about her ability to fulfill her obligations and tenure on the Court in light of the unspecified investigation of her husband. *Id.*

13. In *Carr*, the defendant was convicted of criminal solicitation of accomplice to insurance fraud and witness tampering. *Carr*, 167 N.H. at 266-67. The State had evidence from the defendant's boyfriend and two tenants about the defendant's plan to burn down the building and collect the insurance proceeds, including four recorded phone calls. *Id.* at 267-68. While our Court explained that solicitation "requires no overt act other than the offer itself," *id.* at 270, that

is a far cry from the State refusing to disclose to the defense the witnesses who could speak to the defendant's purposeful *mens rea*. The State's position goes much further than *Carr*. The State does not merely say that it does not have to prove the elements of the solicited or attempted crime; the State argues it need not even disclose to the defense the evidence it represented to this Court it has to prove the purposeful *mens rea* of the inchoate crime. This is not what our case law says.

14. The State's position is contrary to our case law and the interests of justice. The "evidence used to prove the [State's] case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). This "is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Id.* This is why our system is designed "to avoid trial by ambush," *Reader*, 160 N.H. at 668, and "justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information." *Cromlish*, 146 N.H. at 280. The State's actions are contrary to these maxims and should be rejected by this Court.

WHEREFORE, the defense respectfully requests that the Court grant this motion and order the State to provide bills of particulars to the seven indictments that detail what witnesses or evidence the State possesses that will show Justice Hantz Marconi's purposeful state of mind and to provide such evidence to the defendant.

Dated this 8th day of May, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Guerriero, do hereby certify that Senior Assistant Attorney General Dan Jimenez and Assistant Attorney General Joseph Fincham are registered e-filers in the Court's electronic filing system and that when filing this motion, I am electing for them to receive a copy of the document through the electronic filing system's system for electronic service.

/s/ Richard Guerriero