

Clerk's Notice of Decision  
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on 11/04/2020

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

NOVEMBER, 2020


ROCKINGHAM, SS.

The motion is GRANTED.  
However, it is granted in order  
for the presiding judge to hear  
this case. That judge has already  
heard arguments related to the  
issue at hand but is  
unavailable for today's hearing.  
Therefore, the matter may  
be rescheduled for a Webex  
hearing at a later date and  
will not be held until in person  
hearings resume.

STATE OF NEW HAMPSHIRE

v.

BRANDON CASTIGLIONE  
218-2019-CR-1132

  
Honorable Daniel I. St. Hilaire

MOTION TO CONTINUE

November 4, 2020  
NOW COMES the Accused,

Brandon Castiglione, through counsel, Eliana Forciniti, and

respectfully moves to continue for a hearing on his substantive motion to compel where the  
prosecutor, defense counsel, the defendant, are all present in court.

This motion is grounded in Mr. Castiglione's rights to due process, to effective assistance  
of counsel, and to be able to consult with counsel as issues may arise during the hearing. N.H.  
Const. pt. I, art. 15; U.S. Const. Amends. V, VI, XIV.

As grounds, Mr. Castiglione states:

1. The State accuses Brandon Castiglione of one count of Second-Degree Murder for the  
death of Luis Garcia.
2. Competency was raised in this case and after a contested hearing on the issue, Mr.  
Castiglione was deemed competent to stand trial.
3. On August 12, 2020, the Defense filed a Motion to Compel Outstanding Discovery.  
Specifically, the Defense was requesting the discovery that the State possessed in an  
accompanying case, State v. Dale Holloway.
4. The Court granted the Defense's motion and ordered that within 30 days, the State  
provide the Defense with any exculpatory or favorable materials contained within the

discovery. (Wageling, J.). Rather, than comply the State filed a motion to reconsider the Court's decision.

5. On September 28, 2020, the Court granted the State's motion to reconsider and ordered a hearing on the motion to compel.
6. Hearing notices were provided to the Defense on September 30, 2020 requiring the Accused's presence in Court. It did not indicate that the hearing would be conducted by video. However, on November 2, 2020, the clerk's office informed the parties that the hearing would be handled via video conference.
7. The Defense requests that the hearing be continued to allow for an in-person hearing. Mr. Castiglione has frequently noted his preference for in-person hearings including in a case status report filed on May 15, 2020.
8. Mr. Castiglione continues to express a strong preference for in-person hearings. He notes that the party's ability to communicate with each other and with the Court during a web hearing is not the same as during a live hearing. Moreover, Mr. Castiglione strongly believes in the importance and existence of non-verbal communications that occur while individuals are in each other's presence. This form of communication is non-existent in remote hearings.
9. Though it is not anticipated that this hearing will be evidentiary in nature, this is a hearing based on a substantive issue which could have substantial effect on Defense's ability to prepare for trial and therefore on the outcome of the case. This issue could also have an impact on future appeals should Mr. Castiglione be found guilty. It is therefore very important that a clear record be made on this issue.

10. The Court has previously granted in-person hearings in this case when requested by the Defense and again when requested by the State.
11. Mr. Castiglione understands that this request will result in a continuation. He is currently held without bail at the Rockingham House of Corrections. Trial in his case has not been set and considering the complexity and number of witnesses required in his case it is not anticipated that Mr. Castiglione's trial will occur soon.
12. The State, through the Attorney General's Office, takes no position on the Defense's request. The State and Defense Attorney in Mr. Holloway's case have been notified of the Defense's request but their position on the request is unknown.

#### Due Process

13. Live hearings have occurred in various courts across the state. Circuit courts have held abuse and neglect, competency, and bail revocation hearings. Superior courts have held evidentiary hearings and plea and sentencing hearings in serious felony cases. The superior court is planning to conduct a jury trial in November and December, a far more complex endeavor than holding an evidentiary hearing. Other Superior Courts in the state have already held jury trials. While health and safety are of paramount concern, there is no reason to believe that with standard precautions, a live hearing in this case will jeopardize anyone's safety any more than would a trip to the grocery store. The quality and appearance of justice afforded by an in-person hearing is not only worth the effort, but necessary to safeguard Mr. Castiglione's rights to due process, to confrontation, and to consult with his attorney. N.H. Const. pt. I, art. 15; U.S. Const. Amends. V, VI, XIV.
14. This is particularly true considering the Governor's relaxation of the stay at home order. People are now able to frequent mini-golf courses, bowling alleys, and sit inside in

restaurants. These activities are no safer than being inside a courtroom and their importance to the foundation of our freedom pale in comparison.

15. Courts have construed the Fifth and Sixth Amendments, applicable to the states via the Fourteenth Amendment, to encompass the due process right to physical presence at all proceedings after arraignment. United States v. Gagnon, 470 U.S. 522, 526 (1985) (“The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, . . . but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.”).
16. In Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934), the Court explained that a defendant has a due process right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.... [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.’”) (Citations omitted). “[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” Kentucky v. Stincer, 482 U.S. 730, 745 (1987); see id. at 750 (“Physical presence of the defendant enhances the reliability of the factfinding process.”) (Marshall, J., dissenting).
17. The right attaches at a hearing on a motion to suppress, see People v. Gaines, 534 N.Y.S.2d 257, 258 (A.D. 1988), and other hearings that involve the development of factual issues. Clark v. Stinson, 214 F.3d 315, 322 (2d Cir. 2000) (“If fact issues are presented, however, as they often will be on a pretrial motion to suppress evidence or on

some motions for new trial, it would seem that defendant has a right to be present.”)

(Quoting 3A Charles Alan Wright, Federal Practice and Procedure §721.1 at 12 (2d Ed. 1982)); accord Robinson v. Commonwealth, 837 N.E.2d 241, 247 (Mass. 2005)

(“Although it is not a settled question of law, a number of appellate courts have concluded that a hearing on a motion to suppress evidence does constitute a critical stage of the proceedings. See, e.g., United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (“suppression hearing is a critical stage of the prosecution which affects substantial rights of an accused person; the outcome of the hearing ... may often determine the eventual outcome of conviction or acquittal”); Olney v. United States, 433 F.2d 161, 163 (9th Cir. 1970) (hearing on motion to suppress is critical stage, “particularly in narcotics cases, where the crucial issue may well be the admissibility of narcotics allegedly found in the possession of the defendant”); People v. Anderson, 16 N.Y.2d 282, 287–288, 266 N.Y.S.2d 110, 213 N.E.2d 445 (1965) (suppression hearing is “crucial step” in criminal prosecution because facts of search are established and its legality determined, which often determines ultimate question of guilt))<sup>1</sup>.

### Confrontation

18. The Sixth Amendment’s Confrontation Clause provides that, “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The Court has explained why a “face to face” encounter between the defendant and witnesses is essential. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (“A witness ‘may feel quite differently when he has to repeat his story looking at the man

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<sup>1</sup> In the only case cited only case cited by Robinson that was not in accord, the court found no violation of constitutional right where the judge participated remotely, but everyone else, including the defendant, was in the courtroom. United States v. Burke, 345 F.3d 416, 425-26 (6th Cir. 2003).

whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.”) (Quoting Z. Chafee, *The Blessings of Liberty* 35 (1956)). See also United States v. Bordeaux, 400 F.3d 548, 554 (8th Cir. 2005) (“The virtual ‘confrontations’ offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect. The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie. ‘It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”) (Quoting Coy, 487 U.S. at 1019).

19. The parallel language of the New Hampshire Constitution, part I, article 15, is even more protective of the defendant’s right to personally confront live witnesses. N.H. Const. pt. I, art. 15 (“Every subject shall have a right . . . to meet the witnesses against him face to face. . . .”); see People v. Fitzgerald, 633 N.E.2d 685, 688 (Ill. 1994) (finding language in Illinois Constitution that accused shall have the right to meet the witness face to face “confers an express and unqualified right to a face-to-face confrontation of witnesses”); Brady v. State, 575 N.E.2d 981, (Ind. 1991) (finding language in Indiana Constitution that accused shall have the right to face-to-face meeting with witness “is something unique and important. . . . While the right to cross-examination may be the primary interest protected by the confrontation right in Article I, Sec. 13 of the Indiana Constitution, the defendant’s right to meet the witnesses face to face cannot simply be read out of our State’s Constitution.”). Thus, even if the federal constitution would permit witnesses to testify by video, with the defendant also on a video feed, the procedure violates the New Hampshire Constitution.

#### Right to Counsel

20. As part of its grounding in the Sixth Amendment and part I, article 15, a defendant's right to be present "is an essential concomitant of a defendant's right to effective assistance of counsel." United States v. Washington, 705 F.2d 489, 497 (D.C. Cir. 1983). As explained in Faretta v. California, 422 U.S. 806, 819-20 (1975), the right to effective assistance is not merely that a defense shall be made for the defendant, but rather that the defendant personally has the right to make his defense: "It is the accused, not counsel, who must be . . . 'confronted with the witnesses against him' . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Further, as observed by the First Circuit in LaChappelle v. Moran, 699 F.2d 560, 564 (1st Cir. 1983), "[m]atters may be asserted before a factfinder which the defendant alone knows how to answer or to correct. Tactical decisions vital to defendant may have to be made on the spot." The interest cannot be vindicated where the defendant is on a remote video link in the jail, and his counsel is on a separate video link or in the courtroom. See Wright v. Van Patten, 552 U.S. 120, 127-28 (2008) ("[T]he correct interpretation of the requirement of 'presence of counsel' in Cronic is presence of counsel in open court . . . by one's side.) (Stevens, J. concurring) (emphasis in original) (internal quotation omitted).

21. The impact of the coronavirus pandemic on the criminal justice system is unprecedented. Likewise, unprecedented in New Hampshire is a court's ruling to permit a hearing on a matter of great significance to occur where the accused cannot have ready access to his advocate. This hearing can safely be held in court, and to vindicate Mr. Castiglione's rights under the State and Federal Constitutions, it must be held in court.

WHEREFORE, Mr. Castiglione requests that the court continue the scheduled evidentiary until the Court is willing to grant the parties a hearing with the parties in the courtroom.

Respectfully submitted,

*/s/Eliana Forciniti#*

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing motion has been forwarded to the Attorney General's Office on this 4<sup>th</sup> day of November , 2020.

*/s/Eliana Forciniti*

Eliana Forciniti