

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

AUGUST TERM, 2020

State of New Hampshire

v.

BRANDON CASTIGLIONE

218-2019-CR-01132

**STATE'S MOTION TO RECONSIDER
AND OBJECTION TO MOTION TO COMPEL OUTSTANDING DISCOVERY**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and respectfully requests this Motion to Reconsider the Court's Order made less than 10 days after its pleading and before the State had an opportunity to reply, and with its timely Objection to the Defendant's Motion to Compel Outstanding Discovery, and in support thereof states as follows:

Procedural History

1. The defendant is charged with one count of Second Degree Murder – Reckless, alleging that he recklessly caused the death of Luis Garcia under circumstances manifesting extreme indifference to the value of human life by shooting Mr. Garcia in the head with a firearm on or about October 1, 2019. The complaint was filed on October 2, 2019.

2. The defendant's competency to stand trial was raised by defense counsel on December 2, 2019. Indictment and all pre-trial motions have been stayed pending the determination of competency. On August 12, 2020 the Court (Wageling, J.) issued an order finding the defendant competent to stand trial.

3. The New Hampshire Attorney General's Office, represented by undersigned counsel, is counsel of record for the State in the instant matter. On August 12th, the defendant moved the Court to compel the State to provide "outstanding" discovery in this matter. Specifically, the defendant is requesting all discovery materials from a separate and distinct case, State v. Dale Holloway, docket 226-2019-CR-00814, currently pending in Hillsborough County Superior Court – South. That matter is being prosecuted by the Hillsborough County Attorney's Office, specifically, Assistant Hillsborough County Attorney Catherine Devine.

4. Prior to filing his motion, the defendant requested the materials from the Attorney General's Office. Undersigned counsel did not provide the requested materials as they are not in the State's possession, and the Attorney General's Office is not a party in the Holloway case. The defendant represents that he went to the parties in that case, the Hillsborough County Attorney's Office and Attorney Donna Brown (counsel for Mr. Holloway). Both Attorneys Devine and Brown objected to providing the materials he requested.

5. After the defendant filed the instant motion, Attorney Devine filed an intervenor's motion on behalf of the Hillsborough County Attorney's Office, voicing their objection. In that motion, Attorney Devine also voices Attorney Brown's objection to the motion. The State's deadline to respond to the defendant's August 12th motion is a minimum of ten (10) days to respond to the defendant's filing, which by operation N.H. R. Sup. Ct. 2 falls on Monday August 24, 2020.¹ However, the Court issued its ruling before the State's pleading was timely filed, and without a hearing on the matter.

¹ The availability of E-Filing does not change the computation of the time with regards to the State's deadline to respond. N.H. Supp. R. Sup. Ct. 6(c)(1).

Reconsideration

6. Despite the caption of Attorney Devine's pleading, the Hillsborough County Attorney's Office is an intervenor to the present action rather than a representation of the State's prosecuting authority of record. On August 19th, Assistant County Attorney Devine filed an objection captioned "State's Objection to Defendant's Motion to Compel 'Outstanding' Discovery," indicating the Hillsborough County Attorney's Office objection to sharing discovery from an attempted murder that happened eleven (11) days after the defendant's charged conduct and placement in custody. To the extent that the Court took this as "the State's" response to the defendant's motion, this was in error, as the State is not represented by the Hillsborough County Attorney's Office here. Attorney Devine's objection would more appropriately have been filed as an intervenor in this matter, and undersigned counsel should still have been allowed to file its objection in accordance with the Rules of Criminal Procedure. Similarly, should Attorney Brown wish to file a separate objection based on Mr. Holloway's grounds for keeping discovery in his matter from being shared with the defendant, then Attorney Brown's motion should be treated as a separate intervenor as it is considered by the Court.

7. In ruling on the defendant's motion without allowing a response by the State as represented by the NH Attorney General's Office, the Court overlooked or misapprehended facts of the case, specifically, counsel of record for the State, and the Court should reconsider its decision regarding the defendant's request for discovery materials in light of the State's objection as set forth below. N.H. R. Sup. Ct. 43(a).

State's Objection to Motion to Compel "Outstanding" Discovery

- I. **The State cannot be compelled to provide materials to the defendant that are not within the State's possession or control in the instant case.**

8. Due process requires prosecutors to “disclose evidence favorable to the accused where the evidence is material either to guilt or punishment.” *State v. Lucius*, 140 N.H. 60, 63 (1995). This duty, however, is not unlimited. “[A] prosecutor’s duty to produce exculpatory evidence extends only to evidence in the prosecutor’s possession or in the possession of a law enforcement agency charged with the investigation and presentation of the case.” *State v. Lavallee*, 145 N.H. 424, 427 (2000). Similarly, the New Hampshire Supreme Court has imputed knowledge of evidence to the State only when such evidence is “within the control of the prosecutor or in the possession of a law enforcement agency charged with the investigation and presentation of the case.” *State v. Etienne*, 163 N.H. 57, 90 (2011).

9. In asking the Court to compel the State, here represented by the NH Attorney General’s Office, to provide the discovery materials from a wholly separate case, the defendant argues that possession or control of such materials must be imputed from the Hillsborough County Attorney’s Office to the Attorney General’s Office. The defendant points to RSA 7:6, 7:11 and 7:34 as basis for his argument to assert that the Attorney General in fact has direct control over not only those cases prosecuted by the Attorney General’s Office, but also every case prosecuted by every county attorney across the entire state. This is an absurd interpretation of these statutes, As the defendant cites himself in his motion, these statutes only “give [the Attorney General] the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest.” *Wyman v. Daniels*, 101 N.H. 487, 490 (1958).

10. It simply cannot be said that the Attorney General has assumed such control in State v. Holloway. Since the beginning, that matter has been prosecuted by only one agency, the Hillsborough County Attorney’s Office. Assistant County Attorneys responded on the day of

October 12, 2019, in response to Mr. Holloway's alleged actions, and filed the complaint the next day in Hillsborough County Superior Court. The evidence sought by the defendant, therefore, cannot be said to be "within the control of the prosecutor or in the possession of a law enforcement agency charged with the investigation and presentation of the case," which in the matter at bar is the Office of the Attorney General. *See Etienne*, 163 N.H. at 90. Consequently, it does not fall within the State's duty to disclose such evidence, and the Court should not compel the State to do so.

11. It should also be noted that the discovery sought is not "outstanding" as the defendant asserts in his motion. As explained above, the State has no obligation to provide the materials sought because they are not in the possession of the prosecutor or investigating agency for the instant case. Without such obligation, the discovery sought cannot be deemed "outstanding." The defendant's claim undermines itself. After confirming that the undersigned counsel for the State is not in possession of Mr. Holloway's discovery, and that the Hillsborough County Attorney's Office and Mr. Holloway's attorney both object to providing any, he then alleges that the State is actively withholding evidence which he admits it does not possess. The defendant's own pleading recognizes then that his claim is unsupported.

II. The defendant has failed to demonstrate he is entitled to the materials sought.

12. Should the Court find the materials are in fact within the control of the State for the instant case, and that Mr. Holloway has no right either as a murder victim's son or as a separate defendant to object to giving the man alleged of killing his father with details of his own actions eleven days later, the State should still not be compelled to provide the materials sought as the defendant has failed to establish he is entitled to them.

13. An accused in New Hampshire has “the right to produce all proofs which may be favorable to himself.” N.H. CONST., Pt. 1, Art.15. “Favorable evidence is that which is admissible, likely to lead to the discovery of admissible evidence, or otherwise relevant to the preparation or presentation of the defense.” *State v. Dewitt*, 143 N.H.24, 33 (1998).

14. Beyond a bald assertion that the materials sought are relevant to potential defenses because both the instant case and Holloway “occurred within a two-week period and many of the witnesses are the same...” and both cases involve members or attendees of the New England Pentecostal church, the defendant offers no specific explanation for such relevance. The defendant mentions in his motion the materials may be relevant to motive, but this argument fails given the circumstances of the two cases. While the defendant states these cases occurred within two weeks of each other, this fact is of no consequence. What matters is the timing of the events. The defendant fails to mention that the Holloway case occurred nearly two weeks after the instant case. Any materials collected in the investigation of Holloway, therefore, could not possibly bear on the defendant’s motive in the instant case because the defendant could not possibly know that the events in the Holloway case would occur.

15. In his motion, the defendant seems to imply that the State is failing to disclose evidence not just to deprive him of the materials sought, but that the State is also representing that the materials do not exist and that the State is doing so contrary to its duty to see justice done and by striking a “foul” blow. Def’s Mot. ¶ 39, 40. To be clear, the State is not representing that the materials sought – the discovery in Holloway – do not exist in an effort to force the defendant or defendant might abandon lines of investigation, defenses, or trial strategies. The State simply asserts that compelling the Attorney General’s Office to obtain such materials from a separate agency which is not a party in this case is not the means by which the defendant should pursue

the evidence. The parties of the Holloway case are the only ones in possession of the materials sought, and that case would be the more appropriate venue for pursuing these materials by motion of the Court so both parties may be heard regarding their objections to providing the materials to the defendant. The defendant may also subpoena Mr. Holloway's attorney to provide the records, giving Mr. Holloway an opportunity to file a motion to quash in support of his stated objection. Holding the State accountable for the defendant's failure to avail himself of the proper remedy is not the solution.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) GRANT the State's Motion to Reconsider;
- (B) DENY the defendant's Motion to Compel Outstanding Discovery; or
- (C) Hold a hearing on the issue at which the Hillsborough County Attorney's Office and counsel for Mr. Holloway may be present to state their objections; and
- (D) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

Date: August 23, 2020

/s/ Adam L. Woods

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading was uploaded through the e-filing system which provides service to counsel for the defendant, Eliana Forciniti, Esq. and Sydney Hanson, Esq., of the New Hampshire Public Defender's Office – Stratham, Catherine Devine, Esq. of the Hillsborough County Attorney's Office, and counsel for Dale Holloway, Brian Lee, Esq. and Donna Brown, Esq.

August 23, 2020

/s/ Adam L. Woods _____

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