

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CARROLL, SS.

JULY TERM, 2025

MOOT.

State of New Hampshire

v.

Clerk's Notice of Decision
Document Sent to Parties
on 08/26/2025



Honorable Mark D. Attorri

August 26, 2025

William Kelly
212-2023-CR-0337

**STATE'S OBJECTION, REQUEST FOR WRITTEN ORDER WITH
ASSOCIATED FACTUAL AND LEGAL BASES, AND REQUEST FOR PROCEDURES:
COURT-ORDERED MEDIATION/SETTLEMENT CONFERENCE**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General ("the State"), and respectfully objects to the Court's decision requiring the parties to engage in mediation/a settlement conference in this case. The Court's decision is not supported by statute, rule of court, or known court administrative order; contravenes existing Supreme Court rules on mediation; and likely violates the separation of powers doctrine. Moreover, at this point the State is unaware of the procedures to be employed at the ordered procedure, and cannot effectively fulfill its obligations under the Victim's Bill of Rights. For these reasons, the State respectfully objects, seeks a written Order from the Court setting for its legal and factual underpinnings for its directive, and seeks clarity on the procedures to be employed at the ordered procedure. In support of this objection, the State submits the following.

1. The defendant is charged with two counts of reckless second-degree murder, arising out of the beating death of his girlfriend Christine Falzone and the resulting death of her unborn child on about December 17, 2023, in Ossipee, New Hampshire. Trial is scheduled to commence with jury selection on November 3, 2025.

2. On July 21, 2025, the Court held a brief hearing on motions in limine. At that time, the Court informed the parties of the Court's inclination to schedule the case for a settlement conference/mediation. Neither the State nor the defense had requested either a settlement conference or mediation. Neither did the State or the defense consent to the Court's proposal. Lastly, the State did not have any opportunity to discuss the possibility of a settlement conference/mediation with any of the victims in this case. See RSA 21-M:8-k, 1(a) (noting that "victim" also includes "immediate family of a homicide victim.")

3. The court subsequently issued a notice of hearing for a "settlement conference," currently scheduled for September 12, 2025.

4. Initially, despite characterized as a "settlement conference," the procedure ordered by the Court is not an authorized settlement conference. The applicable guidelines for a settlement conference are set forth in the Felony Settlement Conference Policies and Procedures, N.H. Superior Court (December, 2015). As is set forth expressly in those policies and procedures, "Both the prosecutor and defense counsel must agree to participate in the settlement conference . . ." Here, neither party agreed to participate in any settlement conference.

5. The State is unaware of any statutory basis for the Court-ordered settlement conference/mediation. Nor is authority found in any applicable court rule. The New Hampshire Rules of Criminal Procedure sets forth broad judicial discretion at a dispositional conference, see Rule of Criminal Proc. Rule 12(b)(3), but the ordered settlement conference/mediation is a different proceeding. And, although mediation is provided for in Supreme Court Rule 12-A, that process not only is predicated "upon the agreement of all parties," but also expressly excludes "[c]riminal cases."

6. Lastly, the State is aware of a previously-issued judicial statement on criminal mediation. Copy attached. Initially here, the discussion of that process makes reference to “the pandemic”—Covid—and it is thus unclear whether the process still has efficacy today. Indeed, the State does not know exactly what the attached statement entails—it is not an administrative rule or other published rule of court. Regardless, mediation is inapplicable in this case, as the mediation discussed in that statement is expressly intended “for cases that both sides expect will not need a trial, but for some reason has not resolved yet.” Here, not only is a trial expected, it is scheduled. Moreover, although agreement of both parties is not required, as it is for a settlement conference, mediation must be requested by either the prosecution or defense. Here, neither side has ever requested mediation. Finally—and perhaps most importantly—to the extent that the attached statement constitutes an actual existent judicial “rule” or “policy,” administrative or otherwise, it directly contravenes Supreme Court Rule 12-A, supra.

7. Thus, there appears to be no legal basis for a court-ordered settlement conference/mediation. Moreover, such a requirement likely violates the separation of powers doctrine:

The separation of powers doctrine mandates that the legislative, executive, and judicial branches of government remain separate from and independent of each other. N.H. Const. pt. I, art. 37. This requirement of the constitution is violated by an improper imposition upon one branch of constitutional duties belonging to another or an encroachment by one branch upon a constitutional function of another.

State v. Shackford, 127 N.H. 695, 700-01 (1986) (internal quotation marks and citation omitted).

Here, plea negotiation—including whether to enter into any discussions, and to what extent—is an executive function, not a judicial function. See State v. Smith, 173 N.H. 115, 119 (2020)

(“When presented with evidence of criminal offenses punishable by imprisonment, prosecutors possess the sole authority to decide whether and whom to charge, the classification of the offense

charged, and whether to offer a plea bargain.”). Requiring the State to engage in mediation/settlement conference intrudes on its prosecutorial function and discretion.¹

8. Here, a recent decision by the Colorado Supreme Court is instructive. In In re Plaintiff: the People of Colo. V. Justice, 524 P.3d 1178 (Colo. 2023), the Colorado Supreme Court succinctly framed the issue before it, and its answer:

No two ways about it—mediation is one of the most effective tools for conflict resolution in American jurisprudence. But may a state trial court in Colorado properly order mediation in a criminal case? In a word, no.

Id. at 1180.

9. The matter came before the Colorado Supreme Court by way of petition by the prosecution, which was ordered to engage in mediation in a criminal case over its objection. In ultimately agreeing with the prosecution that court-ordered mediation was unauthorized, the Colorado Supreme Court conducted a review of pertinent statutory provisions, concluding that none authorized compelled mediation and that such a process was in contravention of those provisions that invest the prosecution with authority to engage in plea discussions. See id. at 1183-84. The Supreme Court also rejected the argument that compelled mediation fell within the inherent authority of trial courts to carry out their duties. See id. at 1184-85. Ultimately, the Supreme Court concluded:

In sum, compulsory mediation is a square peg, and squeeze it as a trial court might, it does not fit in the round hole of criminal litigation. The district court, though well-intentioned, erred in ordering mediation in this criminal case.

Id. at 1186; see also, e.g., United States v. Ridley’s Fam. Markets, Inc., 525 F. Supp. 3d 1355, 1358 (D. Utah 2021) (“courts are precluded by rule and the doctrine of Separation of Powers

¹ The State also notes that requiring a criminal defendant to engage in mediation/settlement conference, absent consent, may impermissibly intrude upon a defendant’s constitutional right to trial by jury. But it is not for the State to advocate for the defendant here or in any other case.

from ordering the United States and a criminal defendant to engage in plea negotiations to settle a pending prosecution.”); State v. Delancy, 360 So.3d 815, 817 (Fla. App. Ct. 3d Dist. 2023) (“compelling the State to participate in a plea-bargaining process against its stated objections constitutes an improper intrusion into the executive branch.”).

10. The Supreme Court in Justice addressed and ultimately decided the issue before it on statutory grounds. But the underlying principles dealt with solely prosecutorial powers and discretion, which were potentially affected by compelled mediation. Here, those concerns are also present, and implicate separation of powers. As noted, the State did not request a settlement conference/mediation; nor has the State consented to the court-ordered procedure here. For these reasons, the State objects to the ordered and scheduled “settlement conference,” whatever that procedure actually may be—a settlement conference whose parameters and procedures are set forth in published rules, see supra, or mediation whose parameters and procedures are as yet unknown.²

11. Next, the State requests from the Court written guidelines as to how the ordered mediation/settlement conference is expected to proceed. This case involves victims who must be properly notified and advised, in accordance with the Victims’ Bill of Rights. RSA 21-M:8-k. At this point, the State does not know the guidelines and parameters for the procedure ordered by the Court. Absent such information, the State cannot fulfill its important statutory obligations. Compare Felony Settlement Conference Policies and Procedures, N.H. Superior Court

² Alternatively to objection, the State asks the Court to reconsider its order and scheduling of an unagreed-upon settlement conference. See N.H. R. Crim. Proc. 43. The points of fact that the Court has overlooked or misapprehended is the State’s lack of consent to the ordered procedure, and the points of law overlooked are Supreme Court Rule of Evidence 12-A and the separation of powers doctrine.

(December, 2015) (setting forth in detail procedure to be followed in agreed-upon settlement conference, including recording of procedure and input from and participation by victims).

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

- A. Issue a written Order setting forth the legal and factual grounds for the Court's ruling on mediation/settlement conference; and
- B. Set forth the procedures to be employed at the ordered mediation/settlement conference; and
- C. Grant such further relief as may be just and proper.


Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

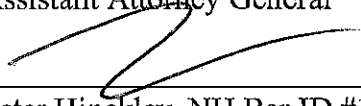
By its attorneys,

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CERTIFICATE OF SERVICE

I certify that on this day a copy of this pleading has been provided to Brett W. Newkirk, Esq., and Katherine Canny, Esq., counsel for the defendant, via the electronic case filing system.



Peter Hinckley

CRIMINAL MEDIATION

Background

Resolving cases during the pandemic has been challenging for many reasons, including the difficulty isolation creates in meeting with clients, and the inherent disconnect that occurs when attorneys do not regularly cross paths in court. In an effort to provide several avenues to resolve cases, the Superior Court has conducted status conferences in every county to ensure the attorneys have a scheduled court event that prompts them to review their cases and make plea offers and counter offers. Generally that process has helped resolve straight forward cases.

The Superior Court also uses the “Felony Settlement Conference”¹ process to help resolve more complicated cases that often involve victims and challenging emotional barriers. In order for a settlement conference to occur, both sides must agree to submit a case to a retired judge for mediation. The settlement conference protocols are extensive and can be found on the judicial branch website.²

Criminal Mediation

Criminal Mediation is a third option that will provide another opportunity for case resolution. Either the prosecutor or the defender, or both, can request a criminal mediation with a retired judge or with a sitting judge who will not preside over the case. There is not a need for an agreement as there is for Felony Settlement Conferences. The purpose of criminal mediation is to help resolve a case that the requesting party believes should be resolved but for various reasons has not yet resolved, and a status conference with the presiding judge has not produced a negotiated resolution. The retired (or sitting but not presiding) mediating judge will be able to become more involved in working with the parties to resolve the case than the presiding judge,

¹ [Felony Settlement Conferences | New Hampshire Judicial Branch \(nh.gov\)](#) (last accessed December 23, 2021).

² [felony-settlement-conference-policies-and-procedures.pdf \(nh.gov\)](#) (last accessed December 23, 2021).

and will have specifically scheduled time to conduct a more thorough review of the case through mediation. This process is not intended to be a substitute for cases that should otherwise resolve quickly or through the Early Case Resolution process, nor for cases more appropriate for a Felony Settlement Conference. Criminal Mediation will be available for cases that both sides expect will not need a trial, but for some reason has not resolved yet.

Process

Mediation sessions will be scheduled for several days a month in each county. Retired mediating judges who are under 70 and sitting mediating judges who will not otherwise be involved in the case can take pleas at the time of the mediation. For those retired mediating judges over 70, who are ineligible to take pleas, a schedule of sitting judges will be created so they can immediately take pleas that result from the mediation sessions.

The Superior Court administrator will create a simple form for either party to complete requesting criminal mediation, or either party may request mediation at the time of a dispositional or status conference. Mediations will generally be scheduled for one hour. The mediation sessions can occur by WebEx or in person at the discretion of the mediating judge. The defendant will be required to be present for the mediation session.

If there is a victim involved in the case, the victim is not required to be present, though may do so if s/he wishes. In cases involving a victim, if the victim is not present, the judge conducting the mediation shall confirm with the prosecutor or the victim witness advocate that the victim has been specifically informed of the mediation, has been notified of the right to be present, and has been consulted about the potential disposition of the case through mediation. If the State believes it may need further victim consultation prior to a revised offer during mediation, the

prosecutor or victim witness advocate shall make best efforts to have the victim available by phone.

There will generally not be a record kept of the mediation session. If the defendant or victim wishes to speak to the court, however, a record will be required. Notification that a record will be required because either the defendant or the victim wishes to be heard must be provided to the Clerk at least one week in advance of the scheduled mediation.

Criminal case mediations are confidential. The confidentiality provisions applicable to Felony Settlement Conferences, set out at Attachment B to the Felony Settlement Policy and Procedures document,³ are applicable to criminal mediations as well.⁴

At the conclusion of the mediation session, the mediating judge will file a report indicating:

Case settled, plea and sentence completed;

Case settled, negotiated plea and sentence to be scheduled;

Case settled, capped plea and sentence to be scheduled for ____ hour(s);

Case did not settle, parties continuing to engage in meaningful negotiations;

or Case did not settle, proceeding to trial.

³ Felony Settlement Conferences | New Hampshire Judicial Branch (nh.gov), Attachment B (last accessed December 23, 2021).

⁴ Paragraph 1.8 of the Felony Settlement Conference confidentiality policy, which concerns the record of the proceeding, applies to criminal mediations only if the mediation is conducted with a record.