THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

COÖS, SS. MARCH TERM, 2025

STATE OF NEW HAMPSHIRE

v.

DUSTIN MARK DUREN

214-2024-CR-00028

STATE'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS FOR VIOLATION OF SPEEDY TRIAL RIGHT

By motion dated March 17, 2025, the defendant asks this Court to dismiss indictments charging the defendant with first-degree murder, second-degree murder, reckless conduct, and a related charge of endangering the welfare of a child. He contends that the length of delay in bringing him to trial is presumptively prejudicial. He also contends: (1) that the delay is attributable to the State; (2) that he has repeatedly asserted his speedy trial rights; and (3) that he has suffered actual prejudice due to the delay.

The State objects.

I. RELEVANT FACTS[1]

1. On February 29, 2024, the New Hampshire State Police – Major Crime Unit and the Berlin Police Department began an investigation into the murder of Caitlyn Naffziger. The investigation began when the defendant's father called the Berlin Police Department because of a conversation he had with the defendant. During that conversation, the

[1] The facts are derived from the Probable Cause Affidavit and other discovery materials provided to defense counsel as well as from Court Orders. The facts included are those relevant to the State's Response to the defendant's *instant* motion filing.

defendant told his father that he had shot and killed Ms. Naffziger inside of his apartment at 1063 Main Street in Berlin, New Hampshire.

2. On March 1, 2024, the defendant was taken into custody in Keene, New Hampshire. As the defendant was taken into custody, he directed officers to the gun that he had used to kill Ms. Naffziger which was in the driver's side door of his car. During their encounter with the defendant, members of the New Hampshire State Police and the Keene Police Department took custody of two minor children, E.D. and V.D., who were the children of the defendant and Ms. Naffziger.

3. Once in custody, the defendant was advised of and waived his rights under *Miranda* and agreed to speak with detectives. In the recorded interview that followed, he confessed that he had shot and killed Ms. Naffziger. The defendant described how he picked up and readied his gun before he grabbed E.D. from Ms. Naffziger's lap and immediately shot Ms. Naffziger in the head.

4. E.D. made statements to a Keene Police detective and said that "daddy gave me a boo boo in my ear," that "daddy was bad," and that "daddy's pew pew peeled [sic], mommy." E.D. told the Keene officers that her mommy was holding her when the loud noise happened, and that "her mommy was dead."

5. On June 21, 2024, the defendant was indicted on charges of first-degree murder, second-degree murder, reckless, and reckless conduct with a deadly weapon. A misdemeanor charge of endangering the welfare of a child (E.D.) was also filed. On August 16, 2024, the State obtained a corrected indictment for first-degree murder, and added an indictment for second-degree murder, knowing.

6. On both June 28, 2024, and on August 28, 2024, the defendant waived arraignments and entered not guilty pleas.
7. Following a scheduling conference on September 4, 2024, the Court issued an Order.[2] In that Order, the Court indicated that counsel would file a joint scheduling order, that a two-week trial would be set for July of 2025, and that the defendant was to file a waiver of speedy trial based on the anticipated schedule that was agreed upon by the parties.[3]
8. On October 1, 2024[4], the State provided defense with a proposed scheduling order for their review. On October 2, 2024, counsel for the defendant requested changes to some of the proposed deadlines. Those changes were incorporated, and the State filed the assented-to proposed scheduling order with the Court. The assented-to scheduling order was granted by the Court on October 3, 2024.
9. On January 31, 2025, counsel for the defendant requested additional time to provide the report of an expert witness. The scheduling order provided that such materials were to be disclosed by February 1, 2025. The State assented to the request.
10. On February 3, 2025, the parties appeared at a status hearing in which the Court discussed possible resource issues that could impact the July trial date. At that time, the defendant asserted that he was demanding a speedy trial.
11. On February 5, 2025, counsel for the defendant provided the State with a single expert witness disclosure – a psychiatric report dated November 1, 2024.

[2] The State has requested a copy of the recording of the September 4, 2024, hearing but has not received it as of the time of this filing. The State reserves the right to amend or supplement this filing upon receipt of the recording.
[3] The State notes that the defendant does not appear to have made such a filing and that there has been no request by defense for a status or other hearing to address the issue. The defendant instead remained silent for at least four months, then began raising speedy trial issues on February 3, 2025.
[4] The Court had ordered the parties to provide a structuring proposal by September 25, 2024, as such this filing was late, regardless the dates included in the filing were chosen by all parties, agreed upon, and the filing was assented-to.

12. On February 27, 2025, the State filed a motion to preclude the testimony of the defendant's provided expert witness.
13. On February 28, 2025, the Court cancelled the July jury trial date citing the discussion held during the February 3, 2025, status conference.
14. Following a scheduling conference on March 10, 2025, the Court ordered that trial would take place in October of 2025. On March 14, 2025, the Court issued a structuring order providing that jury selection would take place the week of October 6, 2025, with trial to follow the weeks of October 20th, and 27th, 2025.
15. On March 17, 2025, the defendant filed the *instant* motion to dismiss.

II. STANDARD OF REVIEW AND ARGUMENT

A. Standard of Review

In analyzing claimed violations of both state and federal constitutional rights to a speedy trial, courts apply the test articulated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See also State v. Allen*, 150 N.H. 290, 292 (2003); *United States v. Munoz-Franco*, 487 F.3d 25, 60 (1st Cir. 2007). "This test requires [the court] to balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant caused by the delay." *Allen*, 150 N.H. at 292.

"The period of delay considered for purposes of analyzing a defendant's speedy trial claim begins to run when he is arrested or charged, whichever comes first." *Humphrey v. Cunningham, Warden,* 133 N.H. 727, 734 (1990). In cases involving felonies, pretrial delays of nine months or more are presumptively prejudicial. *See, e.g., State v. Adams*, 133 N.H. 818, 823 (1991); *see also Super. Ct. R. Appx.* (superior court speedy trial policy). However, a defendant's right to a speedy trial "is neither unassailable nor inflexible." *United States v. Bonman*, 2024

U.S. Dist. LEXIS 197552, *6 (D. Mass. Oct. 30, 2024) (unpublished) (referring to the 70-day deadline in the federal Speedy Trial Act).

B. Argument

The defendant was arrested on March 1, 2024. As a result, his trial date, now set in October 2025 – 19 months after his arrest – is presumptively prejudicial. *Adams*, 133 N.H. at 823. That presumption of prejudice only begins the inquiry, however. *See Barker*, 514 U.S. at 530 (noting that the length of the delay is a "triggering mechanism"); *see also Humphrey v. Cunningham*, 133 N.H. 727, 734 (1990) (a court is not required to consider the remaining three factors unless the delay is "presumptively prejudicial.").

At the outset, the delay is partly attributable to the court's resources and calendar. This is significant because the right to a speedy trial also "must be considered with regard to the practical administration of justice." *State v. Varagianis*, 128 N.H. 226, 228 (1986) (quoting *Riendeau v. Milford Municipal Court*, 104 N.H. 33, 34 (1962)). "Delays attributable to the practical administration of justice are not weighed heavily against the State." *State v. Fletcher*, 135 N.H. 605, 608 (1992) (quoting *State v. Zysk*, 123 N.H. 481, 485 (1983)).

But the Court should be aware that the delay is not entirely attributable to the Court and, thereby, the State, or to the State alone. Initially, the defendant agreed to the July 2025 trial date with the Court Order related to the scheduling of that date including an indication that the defendant was filing a waiver of speedy trial. Then, the defendant's counsel assented to the structuring order related to and including the July 2025 trial date. The defendant's agreement to the July 2025 trial date when it was scheduled, in essence, waived his speedy trial rights at least until July 2025. *See, e.g., New York v. Hill*, 528 U.S. 110, 118 (2000) (implicit waiver where counsel agreed to a trial date beyond the time limits set by statute). Therefore, the October 2025

date does not compromise the defendant's speedy trial rights because, having waived them until July 2025, his trial will still be held within the 9-month period prescribed by the court rule.

Further, three days after the Court held the scheduling hearing on February 3, 2025, the defense presented the State with an expert witness disclosure.[5] Notably, the disclosure included a report that had been completed on November 1, 2024, but the defense had elected not to provide it to the State until days after the February 1, 2025, deadline for expert witnesses and after the February 3, 2025, status hearing. Only on March 11, 2025, did the defense provide medical records which were relied upon and discussed in the expert's report. The Court has not ruled on the State's motion to preclude the defendant from calling this witness.[6] If the Court denies the State's motion, the State will have to secure the services of its own expert, a process that will be time-consuming. Depending on the Court's ruling on the State's motion, therefore, the defense may have contributed to the delay by its tardy disclosure of an expert witness. *Cf. State v. Cheatham*, 2021-Ohio-2495, *5-6 (Ohio Ct. App. July 21, 2021) ("When the facts and circumstances of the case show that the underlying source of the delay was attributable to the defendant, it would make a mockery of justice to attribute the delay to the state.").

With respect to the third factor, the State does not contest that the defendant has asserted his speedy trial rights, at least since February 3, 2025.

Finally, although the defendant contends that he has suffered actual prejudice due to the delay, that he has not proved that factor. Considerations in determining prejudice include factors such as incarceration, anxiety, and impairment of the defense, which would occur when, for

[5] The disclosure was ostensibly timely given that the State had assented to defense providing the expert disclosure the week after the established deadline because of indications by counsel that they needed additional time to provide the disclosure. However, it is unclear why additional time was needed to provide a report that had been written months earlier. Further, depending on the Court's ruling, this expert disclosure could be seen as a late notice of a defense.

[6] A hearing is currently scheduled for April 10, 2025, on the State's motion.

example, witnesses are lost. *Allen*, 150 N.H. at 294-95 (lost witnesses); *State v. Colbath*, 130 N.H. 316, 320 (1988) ("cognizable prejudice may take the form of incarceration, anxiety and impairment of defense").

In this case, the defendant is detained and, according to his pleading, his detention has caused him to lose "employment, housing, and the custody of his children." Mot. at ¶ 34. He contends that the location of the Coös County House of Corrections has made communication with counsel more difficult "as it is almost 65 miles from the nearest Public Defender satellite office." Mot. at ¶ 34. And he contends that he has suffered "personal embarrassment." Mot. at ¶ 35.

The argument that he has lost employment and housing would be true of any person who is incarcerated for a length of time, although the State notes that this defendant does not appear to have been employed at the time of his arrest and incarceration. The addition of nine months to the acceptable nine-month delay in bringing a felony to trial does not alter the impact of incarceration.

Significantly, the record shows that while his incarceration may have contributed to his loss of the custody of his children,[7] that loss is also directly related to the charges in this case. The defendant confessedly killed Ms. Naffziger, the children's mother, in front of them and then fled with them. In addition to the charges that he faces for the murder of Ms. Naffziger, the defendant faces two charges directly related to one of those children: he is charged with reckless conduct with a deadly weapon for placing E.D. in danger of serious bodily injury, and with endangering the welfare of E.D. Blaming any loss of custody of the children solely on a delay in bringing him to trial is unpersuasive given the seriousness of the charges – and the impact of the

[7] There appears to have been no official custody agreement related to the children. Further, when the defendant killed Ms. Naffziger, she, not the defendant, had physical custody of V.D.

defendant's actions on the children. Although the defendant is entitled to a trial on these criminal charges and the burden of proof is high, the burden is not as high when removing children from a home which clearly posed a danger to them. To blame the delay in trial and his incarceration for the loss of custody of his children ignores the significant role he played.

The defendant's contention that the Coös County House of Corrections is inconvenient is similarly unpersuasive. The defendant's complaint that his lawyer's office is located 65 miles away seems to argue for more, rather than less, time to prepare for trial. Further, if the defendant is having difficulty communicating with his lawyers, the solution is not to dismiss the charges. It is to draw the difficulties to the attention of this Court and ask the Court for assistance in gaining cooperation from the House of Corrections staff.

The defendant's assertions of prejudice, therefore, are inadequate to warrant dismissal of these charges. *See*, *e.g.*, *United States v. Reyes*, 24 F.4th 1, 56 (1st Cir. 2020) ("[T]he defendant bears the burden of alleging and proving specific ways in which the delay attributable to the [government] unfairly compromised his ability to defend himself.") (citation and internal quotation marks omitted)); *see also United States v. Souza*, 749 F.3d 74, 83 (1st Cir. 2014) ("Though Souza speculates about prejudice, he points to nothing in the eighteen-month period between his arrest and trial that impaired his ability to mount a defense.").

Finally, the defendant's reliance on "personal embarrassment" would be comical were the charges in this case not so serious. It is hardly the fault of the State that this homicide has attracted the attention of the press and the public, or that the defendant's actions in fleeing with the children after he killed Ms. Naffziger caused a nationwide Amber Alert which pulled that attention to this case. The defendant's "personal embarrassment," to the extent that it even qualifies as prejudice, is entirely of his own making.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Deny the defendant's Motion to Dismiss for Violation of Speedy Trial Right; or,

B. Hold a hearing; and/or,

C. Grant such other and further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

March 25, 2025

/s/ Bethany J. Durand
Bethany J. Durand, NH Bar ID # 273943
Assistant Attorney General
New Hampshire Attorney General's Office
1 Granite Place, South
Concord, New Hampshire 03301
(603) 271-3671
Bethany.J.Durand@doj.nh.gov

/s/ Charles O. Bucca
Charles O. Bucca, Bar #275327
Assistant Attorney General
New Hampshire Attorney General's Office
1 Granite Place, South
Concord, New Hampshire 03301
(603) 271-3671
Charles.O.Bucca@doj.nh.gov

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was provided to counsel for the defendant, Hanna Kinne, Esq. and Margaret Kettles, Esq., through the Court's e-filing system.

March 25, 2025

/*s/ Bethany J Durand*
Bethany J. Durand, NH Bar #273943
Assistant Attorney General