

HILLSBOROUGH, SS.
Northern District

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

State of New Hampshire

v.

Adam Montgomery

Case No. 216-2022-CR-00577

STATE'S OBJECTION TO DEFENDANT'S MOTION FOR REMEDY

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby objects to the defendant's *Motion for Remedy* ("Def.'s Mot."). As grounds therefore, the State submits as follows:

FACTS

1. The defendant is facing multiple charges of Armed Career Criminal, Felon in Possession, Theft, and Receiving Stolen Property. These charges relate to allegations of the defendant stealing/possessing a rifle and a shotgun in approximately September/October 2019. It is anticipated that at trial multiple individuals will testify that they witnessed the defendant with the two firearms at his residence on Gilford Street in Manchester in approximately October 2019. Jury selection is scheduled for May 31, 2023.

2. On April 17, 2023, Detectives with the Manchester Police Department interviewed Michael Harju, an inmate housed at the Hillsborough County House of Corrections. Mr. Harju reported that the defendant admitted to possessing and selling firearms prior to being arrested. Mr. Harju's interview with law enforcement was sent to the State on April 24, 2023. That same day, his interview was provided to the defendant. On April 24, 2023,

the State submitted *State's Witness List For Trial*, which included Mr. Harju. On May 2, 2023, the State submitted updated criminal history reports for all witnesses including Mr. Harju. Mr. Harju's criminal history report included a multi-state search for charges and/or convictions. It was discovered to the defendant as Bates No. 2100 – 2113.

3. On April 19, 2023, the State received a new report from the State Forensic Laboratory regarding the stolen Stag Arms AR-15 rifle.¹ The report indicated that the lab conducted additional testing that had been requested April 2022. The additional testing included the collection of swabs from the firearm. The State discovered the new lab report to the defendant that same day it was received, on April 19. Following the receipt of the new report, the Manchester Police Department submitted the swabs to DNA Labs International for an expedited analysis. DNA Labs International analyzed the swabs and submitted a report (Bates No. 2223 – 2224). The report was received by the State on May 12, and discovered to the defendant that same day. Notably, the State does not intend to use information related to the DNA analysis in its case-in-chief.

4. On May 18, 2023, law enforcement conducted a proffered interview of Elias Dawley, an inmate housed at the Hillsborough County House of Corrections. During the interview, Mr. Dawley provided information he allegedly learned from the defendant regarding the death, disposal and secreting away of Harmony Montgomery. He also disclosed that the defendant confessed to stealing firearms and bragged about gun sales. On May 20, 2023, the State emailed counsel for the defendant regarding Mr. Dawley's statement. The State informed the defense of the substance of Mr. Dawley's statement and notified them that a copy of the

¹ In his motion, the defendant references new testing of a .380 firearm. *See* Def.'s Mot. ¶ 7. The State believes that this is a scrivener's error.

recording had been requested and would be sent as soon as it was received. On May 22, 2023, the State received the recorded interview and discovered it to the defendant. Notably, the State does not intend to present Mr. Dawley as a witness in its case-in-chief.

5. On May 1, 2023, based on discovery regarding Mr. Harju, the defendant filed his *Motion for View*. Counsel for the State and defense is currently scheduled to visit the Hillsborough County House of Corrections on May 23.

6. On May 10, 2023, detectives with the Manchester Police Department interviewed Corrections Officer Juan Franco with the Hillsborough County House of Corrections. The State received discovery of Officer Franco's interview on May 11, 2022 and sent it to the defendant that same day. That same day, the State filed the *State's Amended Witness List For Trial*, which included Officer Franco's as a potential witness.

7. Finally, at the Final Pretrial Hearing on May 16, 2023, the defendant announced that he remained ready for trial. Since the Final Pretrial Hearing, the only newly discovered information relates to Mr. Dawley whom the State does not plan to call in its case-in-chief.

8. In *DeLong*, the Court upheld the trial court's denial of the defendant's motion to preclude a new witness that the prosecutor learned of the night before trial. *See State v. DeLong*, 136 N.H. 707, 708-709 (1993). The Court reasoned that the new witness did not prejudice the defendant when discovery was provided timely, and the defendant was provided an opportunity to interview the witness. *Id.*

ARGUMENT

9. Rule 12 makes two references to the State's ongoing obligation to disclose discovery to the defendant. Section (b)(7) provides for a continuing obligation to supplement discovery response on a "timely" basis, while section (b)(4)(A) recognizes what could be

characterized as the ultimate deadline to provide witness statements, specifically not less than twenty calendar days prior to the final pretrial conference. Section (b)(7) does not give a definition of the word “timely.”

10. “Timely” is generally defined as “within a specified deadline; in good time; seasonable.” *Black’s Law Dictionary* (11th ed. 2019).

11. To the extent Rule 12 sets an ultimate deadline for the State to provide witness statements to the defendant, the State notes that information related to Mr. Harju, DNA and Dawley was discovered when it was received by the State.² Therefore, the State argues that its provision was timely, and consequently there is no basis to preclude Mr. Harju’s testimony at trial.

12. In the alternative, assuming without conceding that providing Mr. Harju’s interview prior to the Final Pretrial Hearing, was a discovery violation, Rule 12 includes a section on remedies:

If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may take such action as it deems just under the circumstances, including, but not limited to: (A) ordering the party to provide the discovery not previously provided; (B) granting a continuance of the trial or hearing; (C) prohibiting the party from introducing the evidence not disclosed; and (D) assessing costs and attorney’s fees against the party or counsel who has violated the terms of this rule.

Rule 12(b)(9). Of these remedies, the State suggests that the appropriate remedy would be to grant a continuance.

13. As in *DeLong*, discovery regarding Mr. Harju’s statement was provided in a timely manner. The State asserts that Mr. Harju’s interview was not some sort of scheme to

² Notice regarding Dawley’s statement was provided prior to the State receiving the recorded statement.

gain an unfair advantage over the defendant. Instead, the law enforcement received information, conducted an interview, and the State provided the recorded interview to the defendant as soon as it was received and provided notice of its intent to call him as a witness.

14. The State notes that the only prejudice the defendant identifies in his motion with respect to Mr. Harju is that the State has not provided Mr. Harju's criminal history and, as such, he has not been able to prepare the appropriate Rule 609 or Impeachment motion. (*See* Def.'s Mot. ¶ 9.) The State provided Mr. Harju's criminal history report on May 2, 2023, prior to the Final Pretrial Hearing. Any prejudice can be cured by giving the defendant additional time to file his Rule 609 or Impeachment motion, or by allowing time to adapt his trial strategy to the information in Mr. Harju's April interview. *See State v. Stickney*, 148 N.H. 232, 236 (2002) (noting that a discovery violation by the State can be cured by giving the defendant more time to prepare to confront evidence against him). Where additional time will cure the prejudice claimed by the defendant, it is not necessary to extend to the more extreme remedies of Rule 12(b)(9), including the defendant's request to preclude Mr. Harju's testimony at trial.

15. Rule 12(b)(9) calls upon the Court to take a "just" action in the event of a discovery violation. Again assuming without conceding that providing Mr. Harju's interview prior to the Final Pretrial, was a discovery violation, the State argues that where the disclosure was done with the intent, as in *Delong* to provide immediate discovery (and not with the intent to gain an unfair advantage over the defendant), and where the only prejudice claimed by the defendant is that he has not had an opportunity to submit his Rule 609 or Impeachment motion, the just result would be to give the defendant more time to prepare to confront the new evidence.

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

- (A) Deny the defendant's motion to preclude the testimony of Michael Harju;
- (B) Deny the defendant's motion to continue trial until August 2023;
- (C) Grant the defendant additional time to file his Rule 609 or Impeachment motion for Michael Harju; and
- (D) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: May 22, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the State of New Hampshire e-filing system to Carrie Smith, Esq., counsel of record in this matter.

/s/ R. Christopher Knowles
R. Christopher Knowles