

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, NORTH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-2372

216-2022-CR-577

MOTION TO RECONSIDER ORDER ON

WMUR'S MOTION TO UNSEAL

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., Robin Davis, Esq., and Paige Montgomery, Esq., and respectfully requests this Honorable Court reconsider its order on WMUR's Motion to Unseal and support of this, states as follows:

1. The Court's order overlooks or misapprehends the law and facts on prejudice to the defendant caused by release of the affidavit as it affects the trial in docket #216-2022-CR-577. Mr. Montgomery specifically requests that if the affidavit is to become public, the release be delayed until after the trial in Docket #216-2022-CR-577.

2. The Court noted that affidavits are often filed with Motions to Suppress and made available for public inspection. The distinction in such a case is twofold. First, a defendant filing a Motion to Suppress and including the affidavit as part of the pleading has made the calculated determination that the merits and benefit of the Motion to Suppress outweighs any prejudice the public inspection of the affidavit may cause. Second, when the affidavit is part of a pleading, the subject of the affidavit may be addressed, either in the original filing or in an objection to the filing. Here, the affidavit serves no purpose in the file other than a one-sided recitation of the State's investigation into the disappearance and death of Harmony Montgomery. It is not an attachment in support of any argument by the State nor has Mr. Montgomery sought to suppress evidence where the affidavit would be implicated in the argument.

3. In The Court order notes that the information within the probable cause affidavit at issue is graphic in nature as it was in State v. Gribble, 165 N.H. 1 (2013), where the trial and sentencing

of a co-conspirator was only 4 months prior to the defendant's trial. It is the defendant's assertion that there is a fundamental difference and distinction between inflammatory and adverse publicity on facts or assertions on a case going to trial and the avoidable, inflammatory and adverse publicity against a defendant on matters for which he is not on trial.

4. In a trial involving graphic material, a juror will be exposed to not only the graphic details relevant to the trial but also to the potential defense or explanation of those details. In other words, whether pre-trial or during trial, the jurors will be exposed to the details. Keeping not only the State's presentation but also the defendant's defense in mind, the jurors are then in a position to assess and determine the overall relevance of those graphic materials to the charges before them.

5. Here, the trial in #216-2022-CR-577 is unrelated to the homicide charge and is scheduled for jury selection in about 5 weeks. The #216-2022-CR-577 charges revolve around the theft and possession of guns. The graphic details of the murder investigation will not be addressed in the trial, thus the defense to the allegations contained in the affidavit will not be addressed in the trial. Instead, the details of the affidavit will be like a black cloud over the gun trial, with the danger that the details are in jurors' and witnesses' minds without ever being addressed. The danger is that witnesses and jurors will assume the worst about Mr. Montgomery because they have no contrary information to weigh against or balance the information.

6. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. McGlew, 139 N.H. 305 (1995). Publication of the affidavit on the murder charges prior to the trial on the gun case creates all of the danger of unfairly prejudicial evidence without actually being evidence the defendant can address, challenge, rebut, or defend against.

7. Jurors can say that they can put aside information that they have learned regarding the details of the homicide investigation, but it is akin to the improper introduction of unfairly prejudicial NHRE 404(b) evidence, once heard the bell can't be unrung—especially when the allegations of the details of the affidavit are not addressed in the gun cases.

8. In order to establish inherent prejudice, the *nature* of the publicity must be adverse and so inflammatory that it is not possible to select an impartial jury. State v. Addison, 165 N.H. 381, 429 (2013). Here, the nature of the publicity that will be engendered by the premature disclosure

of the affidavit is that it will concern inflammatory information that will not be addressed in #216-2022-CR-577.

Wherefore, Adam Montgomery requests this Honorable Court reconsider its order,

- A. Deny WMUR's Motion to Unseal; or, in the alternative,
- B. Keep the Affidavit under seal until the completion of the trial in #216-2022-CR-577,
- C. Any further relief in favor of Mr. Montgomery that the Court deems equitable and just.

Respectfully submitted,

/s/ Caroline L. Smith
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this MOTION TO RECONSIDER ORDER has been forwarded to the Office of the Attorney General on this 28 day of April, 2023.

/s/ Caroline L. Smith
Caroline L. Smith, Esq.