

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, NORTH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-2372

OBJECTION TO MOTION TO UNSEAL

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and Robin Davis, Esq., and respectfully requests this Honorable Court deny the Motion To Unseal Probable Cause Affidavit and remove the arrest warrant and affidavit from the Court file in this docket. The Motion should be denied and the probable cause affidavit stricken from the docket for the following reasons:

- a) The application for the arrest warrant is an *ex parte* proceeding brought by the police prior to the case commencing – it is not a document that NH Rules of Criminal Procedure, Rule 50(a) requires be available for public inspection.;
- b) Unlike an affidavit to be filed when there is no arrest warrant, or no arrest warrant signed by a Judge, there is no rule providing for the filing of the arrest warrant probable cause affidavit upon the docketing of a complaint after arrest; and
- c) The prejudice to the defendant, especially in his upcoming Armed Career Criminal trial, scheduled for Jury Selection May 31, 2023 can not be overstated.

1. The defendant has been indicted on Second Degree Murder and related charges in the death of Harmony Montgomery.

2. On March 31, 2023, David Sakowich, Managing Editor at WMUR-TV filed a Motion to Unseal the Probable Cause Statement, which was filed in this docket on October 25, 2022.

3. Generally, an arrest warrant is sought by police after a matter has been investigated and probable cause is believed to exist that a crime has been committed and that the defendant is the person who committed the crime. Complaints are not filed and a criminal case not opened until

after the arrest is made. There may or may not be a substantial period of time between the approval of the arrest warrant and the actual arrest and docketing of the complaints.

4. This matter was opened on the above docket with the Court on October 25, 2022. Mr. Montgomery was arrested on murder and related charges on October 24, 2022. Thus it is clear that the arrest warrant and accompanying affidavit were approved and executed prior to this docket commencing in Superior Court.

5. Pursuant to New Hampshire Rules of Criminal Procedure, Rule 50(a)(1) the general rule is that “all pleadings, attachment to pleadings, exhibits submitted at hearings or trials, and other docket entries (hereinafter referred to collectively as “documents”) shall be available for public inspection” with an exception for confidential or privileged documents submitted for in camera review. In other words, filings as a part of the adversarial process leading to and including trial are public. The arrest warrant and accompanying affidavit are not pleadings, attachment to pleadings, nor exhibits for a hearing or trial to which the defendant can challenge or present his side. They are not documents required to be available to the public. Rather, they are part of an *ex parte* communication with a judge and police and/or the State, in which the defendant can not participate. A one sided summary of the police investigation presented *ex parte* to a judge in support of an arrest warrant is not a document that implicates the adversarial process but rather tantamount to a Court sanctioned press release.

6. Nor is the public entitled as a matter of right to a summary of the investigation to support probable cause. When a case is brought through direct indictment before a Grand Jury, no Probable Cause Affidavit supporting the arrest is filed with the Court. Grand Jury proceedings are secret. Thus, the information available to the public from the Court is through pleadings, attachments to pleadings and exhibits, hearings and orders, and trial.

7. In this case, Mr. Montgomery could have been arrested through direct indictment without any filing with the Court. Mr. Montgomery was incarcerated and being held on preventative detention on two separate dockets. Trial on one docket, Armed Career Criminal (ACC) and related charges, was scheduled for November, but was continued days after the complaints on the homicide charge filed, and another docket that had not yet been scheduled for trial. The Grand Jury issued the indictments in this docket on January 20, 2023. Nothing prevented the State from proceeding by direct indictment.

8. Affidavits supporting arrest warrants are summaries of the investigation in a manner to support probable cause to arrest a defendant generally prepared and submitted by police. Such an affidavit generally does not contain inconsistencies in the investigation, nor does it address potential defenses. A one-sided recitation of the investigation by the investigators should not be public any more than the State should be able to file its discovery, such as a transcript of a witness or defendant's statement, test results or photographs, unless as an attachment to pleading or an exhibit relevant to the pleading. Here, the affidavit is not only essentially a narrative of the State's case but has the added heightened credibility of a Court document signed by a Judge.

9. In addition, the Rules of Criminal Procedure set forth when and what should be filed regarding arrest and arrest warrants. When a person is arrested pursuant to a warrant, the filings are different than when arrested without a warrant.

10. NH Rules of Criminal Procedure, Rule 3(c) provides that "When a person is arrested with a warrant, the complaint, and the **return form** documenting the arrest shall be filed in a court of competent jurisdiction without unreasonable delay." (emphasis added.) Nothing in this rule suggests that when a person is arrested on a warrant, the **warrant affidavit** become a part of the criminal court docket. Instead, Rule 3(c) provides on for the **return form** to be filed. Compare NH Rules of Crim Pro, Rule 10 (b) (providing that where a person is "arrested without a warrant and is held in custody, or if the defendant was arrested pursuant to a warrant **that was not issued by a judge** and is held in custody, the court shall require the state to demonstrate, by **affidavit or by statement filed under oath** if filed electronically, probable cause for arrest.") (emphasis added.)

11. For the commencement of the case to include not only the charge but an unsolicited narrative of the police investigation is improper and is prejudicial **in this docket** because it is given heightened credibility as a court filing. The prejudicial effect of tainting the jury pool will deny Mr. Montgomery his right to due process and a fair trial guaranteed by the Fifth and Sixth and Fourteenth Amendments to the U.S. Constitution and Part 1, Article 15 of the N.H. Constitution.

12. There is additional and unsurmountable prejudice, however, to public release of the affidavit as it affects Mr. Montgomery's trial on the previously continued Armed Career Criminal (ACC) and related cases (Docket 216-2022-CR-577) which is scheduled for Jury Selection at the end of May, 2023, less than 2 months away. The publicity surrounding the investigation into the whereabouts of Harmony Montgomery already had the great potential of tainting the jury pool and

prejudicing the ACC trial Because of this, the Court has agreed additional measure were needed during jury selection. Publication of a narrative of the State's case will create insurmountable prejudice and pollute the jury pool to such an extent that no fair trial is possible. The facts alleged in the affidavit will not be explained or challenged during the ACC trial. Even if jurors state they can put assigned the information obtained from the media, the allegations will hang out there in the minds of those jurors, unaddressed, unanswered.

Accordingly, undersigned counsel requests that this Honorable Court:

- A. Deny the State's Motion to Unseal; and,
- B. Remove the arrest affidavit from the Court file, or
- C. Hold a hearing on this matter if the Court is not inclined to do so; and
- D. Any further relief in favor of Mr. Montgomery that the Court deems equitable and just.

Respectfully submitted,

/s/ Caroline L. Smith
Caroline L. Smith, Esq.
N.H. Bar #5992
N.H. Public Defender
408 Union Avenue
Laconia, NH 03246
(603) 524-1831

CERTIFICATE OF SERVICE:

I hereby certify that a copy of this OBJECTION TO STATE'S MOTION TO UNSEAL has been forwarded to the Office of the Attorney General on this 3rd day of April, 2023.

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

