

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

HILLSBOROUGH, SS.  
Northern District

FEBRUARY TERM 2024

State of New Hampshire

v.

Adam Montgomery

Case No. 216-2022-CR-00020  
216-2022-CR-02372

**STATE'S OBJECTION TO DEFENDANT'S MOTION FOR RECONSIDERATION**  
**FILED ON FEBRUARY 18, 2024**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, with the strongest objection to the Defendant's Motion to for Relief filed yesterday, Sunday, February 19, 2024. He defendant's motion is fantastically mistitled, as it is actually a motion for reconsideration pursuant to Superior Court Rule 43 of the Court's previously decided, well-reasoned ruling finding that there was no violation of the Court's sequestration order under Superior Court Rule 615. On top of ignoring the reasoning behind the Court's ruling, and the plain language of the Rule itself, the defendant accuses the State of attempting to influence Kayla Montgomery's trial testimony by misconstruing the witness's counsel's representations, alleging improper conduct without support, and asks for unprecedented relief. The defendant fails to take into account the plain language Rule 615, the fact that Kayla Montgomery is a recognized victim of at least one of the defendant's crimes and was entitled to have attended each and every day of trial if she so chose, that retained counsel has an obligation to speak with his/her client in the course of preparing for their

client for testimony in any setting, and the fact that no exculpatory evidence was withheld from the defendant, nor does he have basis to so allege. In support of this Objection to the defendant's Motion for Reconsideration, the State sets forth as follows in a manner expedient to the Court's disposition of this matter so trial may continue:

1. The defendant is charged with assaulting his 5yr old daughter, and then separately, murdering her, abusing her corpse, falsifying physical evidence of the murder, and tampering with a witness to his deeds, Ms. Kayla Montgomery, to ensure she did not testify or inform his activities to police. Harmony Montgomery is the victim of the defendant's charged assault, murder, abuse of her corpse, and falsifying physical evidence about her death. Kayla Montgomery is the victim of the defendant's witness tampering.

2. During its opening statement on February 8, 2024, the defense argued that Kayla Montgomery was left alone with Harmony and that Harmony died while the defendant was elsewhere. The defendant's motion for reconsideration is partially correct; in that while the discovery known to the State does not support the defense's assertions that Ms. Montgomery was left alone with the children when Harmony died, the idea that the defendant would say that Ms. Montgomery killed Harmony and not the defendant is neither novel nor unanticipated. The State has always considered that the defendant may try to allege that Ms. Montgomery killed Harmony, so that the defendant's choice to pursue this defense at trial was not unanticipated. The defense is correct in that the State asked defense counsel where it thought there was a basis to make that allegation in opening, to "prove up" what good faith it had that such evidence would be provided at trial, and the defense is correct in saying that it

anticipated that information sufficient to make those inferences somehow coming from Ms. Montgomery.

3. The defendant's allegations in paragraph 4 of his motion are in error. The State did not direct Attorney Garrity to speak to his client. Rather, the state provided Attorney Garrity with information to adequately represent his client, of which Attorney Garrity informed the Court he was then already aware of the defendant's arguments at opening after having been so informed by another person not affiliated with the State. At the hearing on this issue, Attorney Garrity made it clear to the Court that he would not discuss what he spoke to his client about. Nevertheless, before that hearing the defendant elicited and the Court allowed over Attorney Garrity's objection to answer that she heard about the defendant's claim that she had killed Harmony from her attorney.

4. The defendant's allegations in paragraph 5 of his motion are in error. The State did not ask Attorney Garrity to deliver any specific message to Ms. Montgomery, let alone to "warn" her of the anticipated cross-examination on the defendant's claim that she was the murderer. As discussed, *infra*, the State is under a continuing obligation to provide the defendant with any new information learned from pretrial meetings with any witness, not provide a summary of what was discussed, general principles of testifying, or what questions that witness may be asked on direct or cross-examination. The State has no obligation to tell the defendant that in witness preparation in the weeks leading up to trial that it had previously discussed the possibility that the defendant may allege Ms. Montgomery killed Harmony, or admit to some of the charged acts while denying the murder and others.

5. The defendant's final allegation in paragraph 6 is without support. The fact that Ms. Montgomery was prepared to be accused of murdering Harmony was something discussed in

witness preparation before the jury was selected or the defendant gave his opening argument. The idea that Ms. Montgomery learned this and changed her testimony, let alone that the State conducted an action to create a “dividing line” between Ms. Montgomery’s testimony assumes a great deal more of Ms. Montgomery than was she displayed during the whole of her testimony at trial. Despite this, the fact that Ms. Montgomery knew before trial that the defendant may accuse her of murdering Harmony makes irrelevant whether Ms. Montgomery knew the defendant’s opening argument or not.

6. The defendant’s allegations in paragraph 7 are partially correct. The State was as surprised as the defendant’s counsel when Ms. Montgomery stated she was aware that the defendant was arguing she had killed Harmony the early morning hours of December 7, 2019. Upon information and belief, the State was under the impression from the NH State Prison for Women that the block where Ms. Montgomery resided at the New Hampshire State Prison for Women was prevented by correctional authorities from receiving information about the trial under her testimony was complete. Following the defendant’s question on re-cross examination eliciting Ms. Montgomery’s communications with her attorney, the State did ask to conduct a colloquy at the bench.

7. The defendant’s “summary” of what occurred during the colloquy with the Court at the bench in paragraphs 10-13 is woefully incomplete. While the State has been unable to listen to the entire 1 hour of recording of the colloquy with the Court, the defendant’s summary does not reflect the conversation of the parties with the Court, nor does it reflect Attorneys Attorney Garrity stated he had outside information irrespective of the State about the defendant’s allegations put forth in his opening arguments.

8. Again, the defendant's allegations in paragraph 14 of his motion for reconsideration are in error. The fact that Ms. Montgomery was prepared to be accused of murdering Harmony was something discussed in witness preparation before the jury was selected or the defendant gave his opening argument. The idea that Ms. Montgomery learned this and somehow changed her testimony is without support; it does not also mean that the State acted in error, and more importantly, it does not mean that the sequestration order was violated in any way.

9. The defendant's allegations in paragraphs 20 and 21 of his motion are in error, hyperbole without support, and do not accurately reflect the whole of the testimony elicited from Ms. Montgomery. The State's conduct was in now way in error of the Court's sequestration order, nor afoul of the State's obligation to provide exculpatory information to the defendant pursuant to its obligation under the United States and New Hampshire constitutions.

10. New Hampshire Rule of Criminal Procedure 43 provides as follows:

“A Motion for Reconsideration or other post-decision relief shall be filed within ten days of the date on the Clerk's written notice of the Order or Decision, which shall be mailed by the Clerk on the date of the Notice. The Motion shall state with particular clarity, points of law or fact that the Court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present; but the motion shall not exceed ten (10) pages. A hearing on the motion shall not be permitted except by order of the Court...”

This is what the defendant has filed as opposed to the title the defendant applied to his motion.

**Defendant's Misunderstanding and Misstatements of the Court's  
Correct Application of the Law to the Facts at Bar**

- I. The Court did not misconstrue Rule of Criminal Procedure Rule 615 when it correctly interpreted the plain language of the Rule to apply to witness testimony.

11. The Court has neither overlooked nor misapprehended the points of law and fact regarding the points brought forward by the defendant on whether a violation of the sequestration order took place. This is likely why he elected to not cite the entirety of the Rule in his pleading and ignore the portions that remove merit from his claim that a violation took place. The language of the Rule of Criminal Procedure 615 is clear as crystal and plain on its face:

- a) At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
- (1) a party who is a natural person;
  - (2) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
  - (3) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
  - (4) a person authorized by statute to be present.
- (b) A sequestration order issued under subsection (a) of this rule prohibits a sequestered witness:
- (1) from being present in the courtroom until after the witness has testified and is not subject to recall by any party; and
  - (2) from discussing the testimony he or she has given in the proceeding with any other witness who is subject to sequestration and who has not yet testified.

A sequestration order shall not be construed to impose additional restrictions unless the order clearly describes such restrictions.

Rule of Criminal Procedure 615.

12. The Court did not misconstrue the application of the Rule in its previously ruling to not have applied to the defendant's claims here. The Court's order followed the Rule, expressly ordering "witnesses excluded so that **they cannot hear other witness' testimony.**" The rule restricts the hearing of other witness testimony by witnesses; not arguments. The defendant also failed to cite to the Court the very last sentence of Rule 615, expressly stating that "a sequestration order **shall not be construed to impose additional restrictions unless the order clearly describes such restrictions.**" Here, the Court ordered no additional restrictions other than testimony, the defendant requested no additional restrictions other than testimony, and the Rule forbids construing the order as imposing any additional restrictions other than hearing other witnesses' testimony. The Court's previous ruling that no violation of the sequestration order took place was based upon a reading of the whole of Rule 615, and not the selected portions cited by the defendant.

13. The defendant's citation to his understanding of years of practice in New Hampshire courts does not provide any basis to ignore the express language of Rule 615 that the order "shall not be construed" as imposing a restriction over hearing arguments unless the "clearly describe[d]" in the order issued. The Court may not ignore the express language of the applicable rules to this matter any more than a party could ignore the Rules of Evidence. Rule 615 cannot be construed as the defendant requests it to be in his motion to reconsider as to do so would be to ignore the plain language of the Rule.

II. Assuming the Court was allowed to ignore the plain language of Rule 615, the Court did not misconstrue that the Rule was not violated as Ms. Montgomery would not be statutorily excluded by the Rule as the listed victim of one of the charged offenses.

14. In another portion of Rule 615 uncited by the defendant, the Rule expressly does not apply to individuals who have a statutory authorization to be present in the courtroom. Ms. Montgomery has this statutory authorization as a victim of the defendant's crime of Tampering with Witnesses or Informants.

15. The defendant is charged the Class B felony of Tampering with Witnesses or Informants for purposely attempting to induce or otherwise cause Ms. Montgomery to testify or inform falsely when he believed an official investigation was pending or about to be instituted. The victim of this crime is the person tampered with, Ms. Montgomery. As such, she is the victim of the defendant's alleged offense. At trial facts have been elicited by both parties that show Ms. Montgomery was threatened, harassed, and beaten to ensure she did not tell police about the defendant's crimes towards Harmony Montgomery, and that if questioned she would testify or inform falsely to the story the defendant concocted: that he had dropped Harmony off at her biological mother's house in Massachusetts around Thanksgiving Day 2019 when the family was evicted.

16. Her status as a victim is created by statute, as is her authority to attend all proceedings of the defendant's trial on the charge where she was the victim of his crime. A victim is "entitled to the following rights" under RSA 21-M:8-k, II, expressly including "the right on the same basis as the accused **to attend trial and all other court proceedings**, including post-conviction proceedings." RSA 21-M:8-k, II(e). Ms. Montgomery holds this right as a victim of the defendant's crime of Tampering with Witnesses or Informants as she is defined as a victim as the "person who suffered direct or threatened physical, emotion, psychological or financial harm as a result of the commission or attempted commission of a crime," under RSA 21-M:k-8, I(a). Independently, she also holds this right as a victim of the

defendant's crimes of 2<sup>nd</sup> Degree Murder as Harmony Montgomery's step-mother in Harmony's immediate family at the time of Harmony's death, as expressly included by the statute for all "immediate family of a homicide victim." Id.

17. Assuming *arguendo* that the Court could ignore the plain language of Rule 615 as the defendant supposes without support, Ms. Montgomery was authorized by statute RSA 21-M:K-8, II(e) to be present at the opening arguments, and her qualification for this authorization was both as a direct victim of one of the defendant's crimes, and as an immediately family member of a homicide victim whom she resided with at time Harmony was murdered.

18. The New Hampshire Supreme Court has long recognized this statutory authority of victims to be present at all court proceedings when it was still a function of court rules prior to it being authorized by codified by the legislature in statute, and interpreting otherwise would be error. See State v. Johnson, 132 N.H. 279, 280 (1989), *citations omitted* ("Assuming that a sequestration order did purport to exclude the victim from the courtroom, however, it was error. In contrast to the common law rule that sequestration of witnesses in a criminal case was discretionary with the court, New Hampshire Rule of Evidence 615 now mandates sequestration at the request of either side in a criminal case, subject to exceptions, *inter alia*, for a victim of the crime, as to whom this rule does not authorize exclusion. Any order purporting to sequester the victim was error, and the refusal to persist in error can hardly be said to constitute an abuse of discretion." (decided under prior Rule 615 predating RSA 21-M:8-k in 1991). The defendant's proposed application based upon counsel's understanding of counsel's "years of practice" would expressly override the last 35 years of New Hampshire Court rules of procedure and express statutory authority. Moreso,

as the Supreme Court in Johnson put forward, this Court now denying, as it should, every one of the defendant's proposed forms of relief, could "hardly be said to constitute an abuse of discretion." Id.

19. As such, the plain language of the law as well as the last 35 years of New Hampshire jurisprudence shows that Ms. Montgomery would have been expressly exempt from the sequestration order even if it were construed as the defendant now suggests, which to do so would be plain error.

III. Assuming the Court was allowed to ignore the plain language of Rule 615, and invalidated the statutory mandates of RSA 21-M:8-k, II., this Court's prior ruling was still not in error as the New Hampshire Supreme Court has ruled there is no violation of sequestration order occurs when a witness discusses his/her own testimony prior to testifying.

20. The defendant's argument is that the victim learned that the defendant would blame her for Harmony's murder from his statements in opening argument and discussed her testimony with her attorney. Even if the sequestration order expressly applied to opening statements, the New Hampshire Supreme Court has found no violation of the sequestration order occurs when witnesses discussed their own testimony prior to testifying. Ms. Montgomery discussions with her counsel, who is duty bound to represent her, is not a violation of that order.

21. In State v. Giordano, 138 N.H. 90 (1993), that court entered a sequestration order which applied during the testimony of all other witnesses and went further by ordering that witnesses also "be so sequestered during opening statements by both sides." State v. Giordano, 138 N.H. 90, 93 (1993). After the order was entered and before trial began, several police officers scheduled to testify at trial discussed the facts of the case. Id. at 92. Similar to the defendant at bar, the defendant in Giordano argued that the proper relief was a mistrial, strike the witnesses testimony, or dismissal of the case, arguing that the officers had violated the order by their discussion. Id. The trial court found that its order had not been violated and denied the motion to strike the witnesses testimony and dismiss the indictment. Id. at 93.

22. The New Hampshire Supreme Court affirmed the trial court's order and rejection of the same relief the defendant now asks for, holding that, "The question presented to the trial court involved only whether the express terms of the sequestration order were violated." It did not find that the sequestration order carried itself to discussions of the witnesses' testimony prior to trial, and prior to any of them testifying. Accordingly, it found "no abuse of discretion by the trial court in denying the motion to dismiss." Id.

23. Similarly, here the allegation put forward by the defendant is that the Court order prevented Ms. Montgomery from knowing the allegations put forward by the defendant in his opening; that he would claim she killed Harmony. Unlike the Court order in Giordano, the Court's order in this case, as proposed and requested by the defendant, did not expressly prevent witnesses from anything other than another witness' testimony. Even then, a witnesses' discussion about their own testimony is not a violation of that order. This is doubly true with a witnesses' discussion with her own counsel about her testimony. Even if the Court's order had expressly limited the witnesses in the case at bar from hearing opening arguments, a witnesses' discussion of what her testimony would be with her own counsel would not be precluded.

IV. The defendant's additional prayers of relief must be denied when the defendant's allegations about the State's actions are inaccurate, the State did not fail to produce any potentially exculpatory evidence to the defendant, and allegedly unshared evidence was not material to the defendant's attack on the witness, nor his anticipated defense at trial.

24. For the purposes of this quick response to the defendant's motion mid-trial, the defendant is claiming that a Brady violation has occurred specifically because "The State filed to inform the defense and the Court of its conversation with Attorney Garrity." Defendant's Motion, ¶19. The defense's claim is misplaced for several reasons.

25. First, the prosecution did not violate Brady because speaking with a victim's attorney about what occurred in court is not a violation of the Court's sequestration order. As explained above, *supra*, for several independent reasons, there was no sequestration applying to witnesses and opening arguments, if there were it would have been plain error for Attorney Garrity's client to be subject to that order due to her statutory exemption on two separate grounds, and even if she had been, discussing her testimony prior to trial with her counsel would not be a violation of said order.

26. Second, once the defendant was allowed to inquire and learned that Ms. Montgomery had spoken with her attorney about opening arguments, the *Brady* obligation to the extent that it existed would have been removed as counsel then had adequate opportunity to cross-examine Ms. Montgomery on cross-examination, even being allowed by the Court to pierce attorney-client privilege and inquire into the extent of her conversations with her counsel in private on the matter of his representation of her.

27. Third, in the context of this trial the defendant fails to establish that Ms. Montgomery knowing he would accuse her of committing the murder prejudiced his defense when such strategy was already well known to the State, Ms. Montgomery, and Ms. Montgomery's counsel before trial began.

28. Fourth, the issue of whether the State violation is unsettled when Attorney Garrity informed the Court that he knew about the content of the defendant's opening from an outside source independent of the State.

29. Fifth, even if this Court were to determine that the State was under an obligation to discuss its conversation with Ms. Montgomery's counsel about a matter previously discussed with Ms. Montgomery before trial began, the State's non-disclosure of the content of its call to Attorney Garrity would be immaterial because if the defendant cannot show that it had an effect on the witnesses' testimony to an extent as to affect any eventual verdict, whatever that may be.

30. Part I, Article 15 of the New Hampshire Constitution provides that no citizen "shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." N.H. Const. pt. I, art. 15. The "law of the land" is synonymous with "due process of law." Bragg v. Director, N.H. Div. of Motor Vehicles, 141 N.H. 677, 678 (1997) (quotations omitted). This due process right imposes on the prosecution the "duty to disclose evidence favorable to the accused where the evidence is material either to guilt or to punishment." State v. Lucius, 140 N.H. 60, 63 (1995). See generally Brady, 373 U.S. 83.

31. To allege a violation or seek such bold relief as requested by the defendant at bar, “a defendant must prove that the prosecution withheld evidence that is favorable and material.” See State v. Dewitt, 143 N.H. 24, 33 (1998). If, however, the defendant establishes that the prosecution knowingly withheld favorable evidence, “the burden shifts to the State to prove beyond a reasonable doubt that the omitted evidence would not have affected the verdict.” Id. Thus, the defendant has the initial burden to show that the evidence withheld by the State was favorable. State v. Shepherd, 159 N.H. 163, 170 (2009). Favorable evidence includes “that which is admissible, likely to lead to the discovery of admissible evidence, or otherwise relevant to the preparation or presentation of the defense.” Dewitt, 143 N.H. at 33.

32. If the defendant proves that the evidence is favorable, the next consideration is whether the State knowingly withheld the evidence. See Lucius, 140 N.H. at 63-64. If the defendant carries this burden, the burden shifts to the State to prove, beyond a reasonable doubt, that the undisclosed evidence would not have affected the verdict. See Id.; United States v. Bagley, 473 U.S. 667, 682 (1985); see also Dewitt, 143 N.H. at 33; Shepherd, 159 N.H. at 170-71

33. For example, when applied to the State’s second point on this issue, as soon as the alleged exculpatory statement was delivered to the defendant during trial, there was no longer a continuing Brady violation, and hence he has no right to any relief sought. See generally State v. Colbath, 130 N.H. 316, 320-21 (1988). As the New Hampshire Supreme Court articulated “Although the defendant seems to think that the delay in disclosing the statement should have entitled him to some relief, he forgets that relief for a Brady violation requires proof that the violation somehow caused him prejudice. The defendant had no right to relief, beyond production of the evidence itself, unless he could demonstrate that the delay

in producing it ultimately harmed him in some way.” State v. Colbath, 130 N.H. at 321. Here, the defendant was allowed to further inquire of Ms. Montgomery about her knowledge of the defendant’s opening argument, something she was entitled to have attended should she wished to. The defendant was even allowed to pierce attorney-client privilege and inquire into the extent of her conversations with her counsel in private on this part of his representation on this matter for her. The delay in an alleged non-disclosure of a non-applicable sequestration order did not prejudice the defendant as he was not foreclosed from going to great extents to question Ms. Montgomery on the alleged sequestration violation. Beyond this, he also cross-examined her for what the State estimates to be nearly 6 hours on her testimony, and the validity of her statements. He asked her repeatedly whether she killed Harmony, and whether Harmony died alone with her in the middle of the night while the defendant was not present. Her denials of this are not unforeseen by the defendant, because her adoption would have been unprecedented and undisclosed to the State or any investigating agency or body that previously questioned/examined her.

34. Pursuant to Brady, the prosecutor does not need to “disclose everything that might influence a jury, or that the defendant be permitted a complete discovery of all investigatory work or an examination of the State’s complete file.” State v. Laurie, 139 N.H. 325, 330 (1995). In other words, “Brady does not vest a defendant with broad discovery powers; nor does it create a general constitutional right to discovery in a criminal case.” Cohen v. Crosser, 935 F.2d 269, 1991 WL 93185 (6th Cir. 1991) (table) (citing United States v. Todd, 920 F.2d 399, 405 (6th Cir.1990)). Rather, “Brady protects the fairness of the proceedings,” and “no Brady violation results from nondisclosure of certain documents if the information embodied in such documents is available from alternate sources and [the] defendant has

knowledge of and access to such sources.” Id. The allegations of the defendant’s that the State spoke with Attorney Garrity, combined with his failure to remind the Court that Attorney Garrity stated he was also informed about the opening arguments from an outside source, fail to constitute a violation of the State’s Brady obligations, and did not jeopardize the fairness of the proceedings.

35. In addition, the defendant has not met his burden to prove that the undisclosed information is favorable to the defendant to the extent that the Court should even entertain the extreme remedies proposed. Whether the defendant likes the language of Rule 615 is irrelevant: **there has been no violation of the sequestration order** for the State’s conduct to have constituted an exchange of sequestered information, no finding that the State made a knowing material misrepresentation to the Court, and no basis to conclude that the State then committed a failure to disclose exculpatory information that so prejudiced the defendant of information. This is true to the extent that, even if the State had *ordered* Attorney Garrity to inform his client, this would not have amount to a violation of any Court order. The “inquiry in this due process analysis is not whether the evidence is admissible, but instead whether it is favorable—i.e., whether it would have helped the defense in the preparation or presentation of its case.” Id. The defendant knowing the witness was aware of its claim that she killed Harmony when she was alone with her would not have helped in its preparation of their planned cross examination of her. This is especially true when such an attack on her was easily foreseeable. In the context of this trial, the defendant has not established that knowledge of Ms. Montgomery’s knowledge of its opening argument was favorable in its cross-examination, nor in its recross examination, when her knowledge was explored by the defendant in detail.

36. In the interests of time as the defendant raises this issue midtrial on a Sunday, the State reserves the right to supplement this pleading should the Court find that there has been a violation of the Court's sequestration order, should the Court entertain any of the defendant's prayers of relief on a basis that the State has somehow withheld exculpatory evidence, and should the Court seriously entertain making a finding that the State has attempted to influence Kayla Montgomery's testimony or engaged in any improper conduct.. WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Deny the defendant's Motion to Reconsider; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: February 20, 2024

/s/ Benjamin J. Agati  
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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 and via electronic mail to Carrie Smith, Esq. and Jamie Brooks, Esq. counsel of record in this matter.

/s/ Benjamin J. Agati  
Benjamin J. Agati, Bar # 16161