STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss. May Term, 2025

State of New Hampshire No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

REPLY TO STATE'S OBJECTION TO THE DEFENSE MOTION
TO DISMISS CHARGE OF ATTEMPT TO COMMIT IMPROPER INFLUENCE

The defense replies to the State's Objection to the defense Motion to Dismiss Charge of Attempt to Commit Improper Influence.

Points in Reply Which Apply to Multiple Motions

1. With respect to this motion and other currently pending motions, the State repeats many of the same erroneous arguments. To avoid wasting the Court's or anyone else's time, the defense addresses those common errors here and references them in the replies to the other objections.[1]

2. The common theme in the State's errors is an attempt to avoid the substantive issues. Rather, the State mischaracterizes the record and raises invalid procedural objections that deflect analysis of the substantive issues raised by the defense.

The State Mischaracterizes the Record.

3. First, the State incorrectly describes the record by claiming that the defense has already presented vagueness and overbreadth challenges to each indictment and that the Court has ruled on such challenges. The record shows exactly the opposite. The defense noted in its motion to

[1] The specific State's objections to which these reply arguments are applicable are the Objections to the Motion to Dismiss the Charge of Criminal Solicitation of Improper Influence, the Motion to Dismiss the Charges of Official Oppression and Criminal Solicitation of Official Oppression, the Motion to Dismiss the Charge of Obstructing Government Administration, and the Motion to Dismiss Charges of Criminal Solicitation of Misuse of Position.

dismiss all the indictments as violative of the First Amendment (filed on Nov. 8, 2024) that the discussion of the doctrines of vagueness and overbreadth in that motion was necessary to the First Amendment analysis there, but that the defense would make challenges to specific indictments on the grounds of vagueness and overbreadth in subsequent motions. *See Def. Mot. to Dismiss All Indictments Because the Alleged Conduct Is Protected by the First Amendment, the Constitutional Right of Redress, and Judicial Immunity* at p. 11, n. 1 ("The defense will make additional overbreadth and vagueness arguments in subsequent motions"). The defense further explained at the hearing on that motion that vagueness and overbreadth were "really not the point of our motion. But we will get there." Transcript of February 3, 2025 Motion Hearing, p. 26 (underline added). Most significantly and not surprisingly, therefore, the Court noted in its order, "[i]n her memorandum supporting her motion to dismiss, the Defendant stated that she will provide further arguments on overbreadth and vagueness in subsequent motions" and therefore the "Court reserves detailed analysis on these issues until they are fully briefed." *Order on 1A Motion* at p. 11, n. 3. The State can hardly claim that these issues were raised and decided when the Court itself reserved detailed analysis of the issues pending the further motions which the defense has now filed.

4. The State also misstates the record by repeatedly asserting that the subsequent motions raising vagueness and overbreadth challenges are "identical" to the issues raised in the November motion to dismiss. The subsequently filed and currently pending motions speak for themselves on this point. Each involves detailed overbreadth and vagueness analyses relying on judicial decisions, legislative histories, and the Model Penal Code Commentary.

The State's Procedural Objections Are Without Merit.

5. The State's *res judicata*, collateral estoppel, and waiver arguments are without merit. The State begins each of its objections with an identical section. *See, e.g., St. Obj. Mot. Dismiss*

Charge Attempt Commit Improper Influence, ¶¶ 1-7, each time inappropriately citing to alleged precedent from a context, such as civil or appellate procedure, not applicable here. *See id.* at ¶¶ 4-6.

6. In arguing that issues have been waived, the State wrongly transplants the preservation and waiver requirements for appellate litigation into this case. The State cites to *State v. Plantamuro*, 171 N.H. 253, 259 (2018), claiming that the defense was required to file a motion to reconsider in order to preserve her vagueness and overbreadth issues. *See St. Obj.* at ¶ 2. But as *Plantamuro* clearly explains, because the appellant failed to make his argument on appeal before the trial court, the "argument is not preserved for our review." *Plantamuro*, 171 N.H. at 259 (underline added). As our Court has explained elsewhere, the appellate preservation rule requires that parties raise the issues at the trial court because "[t]his requirement is designed to discourage parties unhappy with the trial result to comb the record, endeavoring to find some alleged error never addressed by the trial judge that could be used to set aside the verdict." *LaMontagne Builders, Inc. v. Bowman Brook Purchase Group*, 150 N.H. 270, 274 (2003) (quotation and citation omitted). Or more succinctly, "preservation is a limitation on the parties to an appeal[.]" *In re Guardarramos-Cepeda*, 154 N.H. 7, 9 (2006) (underline added). It has no application here.

7. The State also wrongly raises collateral estoppel. "In the criminal context, collateral estoppel means that when an issue of ultimate fact has been determined by a valid and final judgment, such as an acquittal, that issue cannot again be litigated between the same parties in any future prosecution." *State v. Crate*, 141 N.H. 489, 493 (1996) (citing *State v. Cassady*, 140 N.H. 46, 48 (1995)) (underline added). *See also State v. Hastings*, 121 N.H. 465, 467 (1981) ("Collateral estoppel means that when an issue of fact has been tried once and determined, the same issue cannot be relitigated between the same parties in a future lawsuit") (citing *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam)); *State v. Fielders*, 124 N.H. 310, 312 (1983)

("Collateral estoppel….'means simply that when an issue of *ultimate* fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit'") (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)) (italics in original). Put another way, the "question is whether the issue…was actually determined in the first action; not whether it was or could have been litigated." *State v. Kowal*, 116 N.H. 699, 700 (1976). The factors which would give rise to collateral estoppel are not present here. No issue of ultimate fact has been decided. There has been no valid and final judgment. And this is not a subsequent or "future" prosecution. The only requirement that has been met is that the litigation involves the same parties.

8. In addition, and importantly, our Supreme Court has said that "the doctrine [of collateral estoppel] may be applied in the criminal setting, but the instances where this court has actually barred a criminal defendant, by virtue of collateral estoppel, from contesting an issue resolved by a prior trial are extremely limited." *State v. Johnson*, 134 N.H. 498, 501 (1991) (underline added). Because of "the inherent difficulty involved in applying a tool which originated in the civil law to the criminal setting…'collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.'" *Johnson*, 134 N.H. at 501-02 (quoting *Ashe*, 397 U.S. at 444). The "question of whether collateral estoppel applies in criminal cases is determined by weighing competing policy considerations" which "generally weigh in the defendant's favor" because typically, the "'public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy.'" *Johnson*, 134 N.H. at 503 (quoting *Standefer v. United States*, 447 U.S. 10, 25 (1980)). Thus, for example, a district court's order on suppression is not collaterally estopped from relitigation at the superior court. *See State v. Stevens*, 121 N.H. 287 (1981).

9. The State's reliance on the doctrine of *res judicata* is equally misplaced. "Under *res judicata*, a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action." *Blevens v. Town of Bow*, 146 N.H. 67, 73 (2001) (quoting *Marston v. U.S. Fidelity & Guaranty Co.*, 135 N.H. 706, 710 (1992)). Here, there has been no final judgment and no subsequent litigation, so, like the doctrine of collateral estoppel, the doctrine of *res judicata* is irrelevant. Moreover, the "trial court's discretionary powers are continuous" and "[t]hey may be exercised, and prior exercise may be corrected, as sound discretion may require, at any time prior to final judgment." *State v. MacMillan*, 152 N.H. 67, 70 (2005) (quoting *State v. Haycock*, 139 N.H. 610, 611 (1995)). "Because the superior court retains jurisdiction over a matter until its final judgment, interlocutory rulings may be reconsidered at the discretion of the same or another judge of the superior court." *MacMillan*, 152 N.H. at 70 (citing *State v. Wilkinson*, 136 N.H. 170, 177 (1992)). The State is wrong not only because the defense has not previously raised the overbreadth and vagueness issues—as this Court has already noted—but it is also wrong because even if the defense had, *res judicata* and collateral estoppel would not bar this Court from reconsidering the issues.

The State Misunderstands the Doctrines of Overbreadth and Vagueness.

10. The State also fundamentally misunderstands the doctrines of vagueness and overbreadth. So, for instance, the State says the "Defendant cites no authority for the proposition that she can challenge the language of a statute for being vague as applied to her." *St. Obj.* at ¶ 11. This is wrong both as to the defense motion and to the law generally. The defense motion pointed to numerous cases with as-applied vagueness challenges. *See, e.g.*, *State v. Wilson*, 169 N.H. 755 (2017); *State v. Hynes*, 159 N.H. 187 (2009); *State v. Porelle*, 149 N.H. 420 (2003); *State v. Pratte*, 158 N.H. 45 (2008); *State v. MacElman*, 154 N.H. 304 (2006). The State's claim

to the contrary is false. Even more concerning, the State itself cites to cases explicitly involving as-applied vagueness challenges. *See St. Obj.* at ¶ 12 (citing *Wilson*, *Hynes*, and *MacElman*).

11. Likewise, the State makes the unsubstantiated claim that "vagueness relates only to the adequacy of the language of the statute itself, whereas overbreadth relates to infringements on constitutional rights (regardless of the language [sic] the statute)." *St. Obj.* at ¶ 10. This is wrong for multiple reasons. First, a vague statute infringes on constitutional rights because the "vagueness doctrine, originally a due process doctrine, applies when the statutory language is unclear, and is concerned with notice to the potential wrongdoer and prevention of arbitrary or discriminatory enforcement." *Montenegro v. N.H. DMV*, 166 N.H. 215, 221 (2014). *See also United States v. Williams*, 553 U.S. 285, 304 (2008) (explaining how the "[v]agueness doctrine is an outgrowth…of the Due Process Clause of the Fifth Amendment"). Contrary to the State's claim, it is fundamentally about constitutional due process rights. Second, "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms," as the defense has consistently argued, "it operates to inhibit the exercise of those [constitutional] freedoms." *Id.* at 222 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Third, the State contradicts its own erroneous vagueness doctrine when, but two paragraphs later, it quotes from *State v. Hynes*, 159 N.H. 187, (2009) that "It is well established that the specificity required to uphold a statute need not be contained in the statute itself, but rather, in the context of related statutes, prior decisions, or generally accepted usage." *St. Obj.* at ¶ 12. The State's claim that "vagueness relates only to the adequacy of the language of the statute itself" is contracted by the State's own quotation.

12. Repeatedly, the State cites to vagueness and overbreadth cases that do not say what the State claims. *See, e.g.*, *St. Obj.* at ¶ 10 (erroneously claiming that *Hynes* differentiates between overbreadth and vagueness in terms of "clarity and precision"); *id.* at ¶ 11 (same); *id.* at

19 (erroneously alleging that *State v. Briggs*, 147 N.H. 431 (2002) discusses "substantial overbreadth" and "strong medicine").

13. The State also argues that the accused cannot make an as-applied overbreadth challenge "based on her version of the facts without stipulating to the allegations – including the *mens rea* as charged in each Indictment." *St. Obj.* at ¶ 22. The State is simply wrong. *See, e.g.*, *Attorney General v. Hood*, 2025 N.H. 3 (affirming trial court's dismissal of complaints due to unconstitutional overbreadth where defendants did not stipulate to any facts); *State v. Zidel*, 156 N.H. 684 (2008) (finding that trial court erred in denying defendant's motions to dismiss and looking only at defendant's alleged conduct, not his mental state).

14. Likewise, *State v. Grant-Chase*, 01-S-1141, 2002 N.H. Super. LEXIS 10 (Hillsborough-North Superior Court, Feb. 8, 2002) says nothing about a defendant stipulating to certain facts in order to raise an as-applied overbreadth challenge. Rather, what the decision says is that "[a]t oral argument, the State represented that its proof would show" certain facts, and "[a]ssuming the State is able to prove these facts," then there would be "no possible way that such conduct…would be protected by the free speech guarantees of the state or federal constitutions." *Id.* at *8-9 (underline added).

15. The State makes an illogical argument that, if the accused "did act with the requisite *mens rea*, then the issue of whether such conduct would be protected conduct would also be moot, as [the] Defendant has no constitutional right to engage in criminal conduct." *St. Obj.* at ¶ 24. This has the analysis backwards. The State cannot pass an unconstitutional criminal law, convict a defendant, and then argue that the defendant cannot challenge his conviction because he "has no constitutional right to engage in criminal conduct." *Id.* The Constitution restricts the State; the State does not restrict the Constitution. The purpose of the overbreadth and vagueness

doctrines is so that people, including criminal defendants, can challenge validly passed laws, including criminal statutes.

16. Similarly, the State claims that the accused is asking this Court to "usurp the role of the jury" by pointing out the unconstitutionality of the State's prosecution. *St. Obj.* at ¶ 25. It is axiomatic that the "constitutionality of a statute is a matter of law[.]" *Contoocook Valley Sch. Dist. v. State*, 174 N.H. 154, 161 (2021). *See also Akins v. Sec'y of State*, 154 N.H. 67, 70 (2006) ("Whether or not a statute is constitutional is a question of law"); *State v. Parr*, 175 N.H. 52 (2022); *Pierce v. State*, 13 N.H. 536 (1843). It is equally axiomatic that "questions of law" are "within the province of the trial court judge," *N.H. Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 432 (2009), "it is not for the jury to decide[.]" *State v. Barnett*, 147 N.H. 334, 339 (2001)

17. The State says that the "arguments about the lack of an explicit *quid pro quo* are irrelevant." *St. Obj.* at ¶ 26. The State is wrong for two independent reasons. First, the defense never argued there was no *quid pro quo*. It argued there was never even a "quid," an ask, a request, or the like. *See, e.g. D. Mot. Dismiss Charge Attempt Commit Improper Influence* at ¶ 38. What the State asks this Court to permit is a conviction even if the State does not prove either a *quid* or a *quo*. That is to say, that the jury can not only infer the requisite intent, but also the "asks."

<u>Points Which Apply to Both the Motion to Dismiss Charge of Attempt to Commit Improper Influence and the Motion to Dismiss Charge of Solicitation of Improper Influence.</u>

Contrary to the State's Claim, the Texas Case of Isassi v. State Does Not Apply Here.

18. The State claims that *Isassi v. State*, 330 S.W.3d 633 (Tex. Crim. App. 2010) is the "most thorough exposition of RSA 640:3 (Improper Influence)." *St. Obj.* at ¶ 18.[2] That statement

[2] Of further note, improper influence is a misdemeanor in Texas, it is a felony in New Hampshire. *See Isassi*, 330 S.W.3d at 635.

makes it sound like other cases discuss the statute when, in fact, *Isassi* is the only discussion of the relevant prong of the statute. *See Isassi*, 330 S.W.3d at 640 ("The use of the improper influence statute in the manner that it was used here is, as far as we can tell, truly a matter of first impression in state courts."). More importantly, the case is not on point here. *Isassi* did not involve a constitutional challenge to the statute, but rather a sufficiency of the evidence challenge. *Id.* at 635, 638. Notably, on the defendant's motion for rehearing of the appeal, the court's presiding justice wrote a dissent explaining that the "opinion's failure to [adequately articulate the guidelines for determining what communications are criminal] renders the law unconstitutionally vague as applied[.]" *State v. Isassi*, 330 S.W.3d 633, 647-48 (Tex. Crim. App. 2010) (Keller, P.J., dissenting).

19. *Isassi* was also not an analysis of all elements of the improper influence statute, "[o]nly the intent element is at issue here." *Isassi*, 330 S.W.3d at 638. In fact, the court in *Isassi* recognized some of the very claims the accused raises here as it noted "the phrase—an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law—is not further defined in the penal code or in our case law." *Id.* And because *Isassi* involved a prosecution for the substantive crime, rather than the inchoate crime of criminal solicitation (or attempt), the evidence required to prove the offense is completely different (a point the State repeatedly emphasizes in its other pleadings). Here, the vagueness and overbreadth concerns are magnified because, when an inchoate crime is charged, the State does not have to prove the substantive elements, just a solicitation or request and a guilty mind. *See* RSA 629:2, I.

20. Contrary to the State's erroneous claim, the facts of *Isassi* are quite different from this case. The defendant in *Isassi*, a prosecutor, not a judge, told a pre-trial bond coordinator that his aunt did not need to report to the bondswoman's office, that the arresting officer was under

investigation and his aunt's case "was going to get rejected," lied to the coordinator that the District Attorney's office was going to reject the case, never disclosed his familial relationship, called the prosecutor and again lied about the case not being prosecuted, tried to arrange a meeting between his aunt and the prosecutor, and then called another pretrial services officer and again lied about the prosecution. *Isassi*, 330 S.W.3d at 635-37. As such, the appellate court found that the "jury was…entitled to conclude, based upon all of the evidence and reasonable inferences from that evidence, that appellant's intent in making all of these telephone calls was to influence other public officials to dismiss the criminal case against Anna Linda Gonzalez because she was his aunt." *Id.* at 645. Lying repeatedly to government officials about a prosecution is not "stating that there would be no merit in the case against his aunt" and is fundamentally different from expressing one's opinion and concerns to an elected official. The State's description of *Isassi* is misleading.

21. Similarly, the State's passing reference to *State v. Lopez*, 162 N.H. 153 (2011) that the "meaning of words in an interaction forming [sic] basis of [sic] charge of criminal solicitation may be reinforced by other words or actions by the defendant" is another instance of the State's failure to distinguish constitutional overbreadth and vagueness from sufficiency of the evidence challenges. *St. Obj.* at ¶ 18. *Lopez* was not a constitutional challenge, it was a sufficiency of the evidence case. *Lopez*, 162 N.H. at 154. Thus, our Court "conclude[d] that the jury was entitled to consider all of the surrounding circumstances to determine the meaning of the defendant's" action. *Id.* at 159. *Lopez* is not relevant to the accused's pending constitutional challenges which rest on the unconstitutionally vague and overly broad interpretation of the conduct criminalized.

The State's Selective Quotes Distort What the Model Penal Code Commentaries Actually Say.

22. The State makes passing reference to the Model Penal Code Commentary, *see St. Obj.* at ¶ 16, but ignores the rest of the defense's analysis, particularly the even more relevant *Report of the Commission to Recommend Codification of [New Hampshire's] Criminal Laws*. *See D. Mot.* at ¶¶ 18-24. The State then claims that, because the improper influence statute uses the phrase "public servant" which has a broad definition in RSA 640:2, II(a)), therefore the New Hampshire Legislature intended to expand the scope of the improper influence statute beyond what the *Report* and *Commentary* intended. *See St. Obj.* at ¶ 28. The State's argument ignores the express language in RSA 640:3,I(b) that limits that part of the statute to a subset of public servants, specifically, any "public servant who has or will have an official discretion in a judicial or administrative proceeding." This limiting language in subpart I(b) is entirely consistent with the commentary from the *Report* that the "prohibition in paragraph II is limited to judicial and administrative proceedings because legislative and executive officers are traditionally subject to such a variety of special pleas for the exercise of their discretion that there are no prevailing norms, short of penalties for threats or outright bribery, that prohibit communications to them for favor" and thus, "the law ought not to create the condemnation on its own." Commission to Recommend Codification of Criminal Laws, *Report of Commission to Recommend Codificaiton of Criminal Laws* § 585:2, cmts at 84-85 (1969) (underline added). Likewise, the Model Penal Code Commentary uses the term "public servant" in its improper influence statute, *Model Penal Code and Commentaries,* pt. II, vol. 3 § 240.2 at 48, but nevertheless says the relevant prong of the improper influence statute "does not reach attempts to influence legislators or ordinary executive officials in their exercise of discretion or performance of duties." *Id.* at cmt 3, p. 56. The accused is charged with soliciting a violation of RSA 640:3, I(b), not RSA 640:2, II. RSA 640:3, I(b) which prohibits any person from seeking to privately address a public servant with official discretion in an administrative or judicial proceeding. Thus, the applicable part of the

statute is limited to those public servants with official discretion in administrative or judicial proceedings.

WHEREFORE, the accused respectfully requests this Court dismiss the indictment alleging Attempt to Commit Improper Influence.

Dated this 15th day of May, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Guerriero, do hereby certify that Senior Assistant Attorney General Dan Jimenez and Assistant Attorney General Joseph Fincham are registered e-filers in the Court's electronic filing system and that when filing this motion, I am electing for them to receive a copy of the document through the electronic filing system's system for electronic service.

/s/ Richard Guerriero