

STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss.

April Term, 2025

State of New Hampshire

No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

MOTION TO DISMISS OFFICIAL OPPRESSION CHARGE (CID 2257292C),
OR, IN THE ALTERNATIVE, TO STRIKE REFERENCES TO
THE CODE OF JUDICIAL CONDUCT

The defense moves to dismiss the charge of Official Oppression, or in the alternative, to strike the language from the indictment referencing the New Hampshire Code of Judicial Conduct (Code), for the reasons set forth below:

1. The prosecution charges Justice Hantz Marconi with the crime of Official Oppression, claiming that she

knowingly committed an unauthorized act which purported to be an act of her office or knowingly refrained from performing a duty imposed on her by law or clearly inherent in the nature of her office, to wit: by interfering with, attempting to interfere with, and/or soliciting another to interfere with an investigation into Geno Marconi; and/or violating the New Hampshire Code of Judicial Conduct (New Hampshire Supreme Court Rule 38) (specifically, Rules 1.1, 1.2, 1.3, 2.4, 2.10, 3.1, 3.2, and/or 3.3)

Indictment, CID 2257292C.

2. The Code of Judicial Conduct cannot form the basis for an element of a criminal offense. The Preamble to the Code of Judicial Conduct could not be clearer: “The Code is not designed or intended as a basis for civil or criminal liability.” N.H. Sup. Ct. R. 38, Preamble [7]. The New Hampshire Supreme Court has relied on the Preamble when interpreting the Code. *See In re Coffey’s Case*, 157 N.H. 156, 173 (2008); *Stow v. N.H. Dep’t of Corr.*, 2019 N.H. LEXIS 211 at *7 (unpublished opinion).

3. Moreover, the Supreme Court has emphasized that outside the powers of address and impeachment, judicial discipline is an “exclusive, judicial function.” *In re Judicial Conduct Comm.*, 151 N.H. 123, 126 (2004) (cleaned up). *See also id.* at 128 (“the power to regulate the conduct of judges, including the authority to take disciplinary action short of removal, is a judicial power”). To hold otherwise would violate the principle of separation of powers. *Id.* *See also Op. of the Justices*, 140 N.H. 297 (1995); *In re Mussman*, 112 N.H. 99 (1972); N.H. Const. pt. I, art. 37. Allowing the State to prosecute a justice for violations of the Code of Judicial Conduct would do exactly that: allow the State to encroach on the exclusive power of the New Hampshire Supreme Court to regulate the conduct of the judiciary.

4. The history of the Code bears out this conclusion. The New Hampshire Supreme Court adopted N.H. Sup. Ct. R. 38 which provides for a Code of Judicial Conduct reflecting the state constitutional guarantee of the “right of every citizen to be tried by judges as impartial as the lot of humanity will admit.” *See* N.H. Const. pt. I, art. 35; *State v. Ayer*, 150 N.H. 14, 35 (2003); *State v. Belyea*, 160 N.H. 298, 302-03 (2010). The court adopted the Code in Rule 38 in 1973 to “guide the profession.” *In re Snow’s Case*, 140 N.H. 618, 621 (1996). Crucially, the legislature has never adopted the Code as any part of the general laws of the state. The Code of Judicial Conduct is a purely judicial creation.

5. The court took additional steps to implement the Code. “It was pursuant to our constitutional, statutory, and inherent authority to discipline that we promulgated Supreme Court Rule 39, establishing and describing the JCC [the Judicial Conduct Committee], and Supreme Court Rule 40, outlining the JCC’s procedural rules.” *In re Coffey’s Case*, 157 N.H. 156, 170 (2008) (citing *Snow’s Case*, 140 N.H. at 622) (cleaned up). Again, these procedures are entirely a judicial creation.

6. While the New Hampshire Supreme Court has not had an opportunity to address the part of the preamble which provides that the Code is not intended as a basis for criminal liability, other courts have addressed the issue in their jurisdictions. For example, in *State ex rel. Workman v. Carmichael*, 241 W. Va. 105 (2018), West Virginia’s Supreme Court of Appeals held that a judge’s alleged violations of the West Virginia Code of Judicial Conduct could not form a basis for her impeachment because that “Court had exclusive constitutional jurisdiction over conduct alleged to be in violation of the Code of Judicial Conduct.” *Id.* at 139-40. The court looked to identical language of West Virginia’s Code to conclude that it “is quite clear that [the language] prohibits a Canon violation from being used as the ‘basis’ of a civil or criminal charge...”. *Id.* at 140. That court concluded that to hold otherwise would violate the separation of powers clause of the West Virginia Constitution. *Id.*

7. Cases from other jurisdictions, both state and federal, confirm this conclusion. *See In re Bell*, 962 So. 2d, 537, 543 (Miss. 2007) (holding that “an alleged violation of the [judicial] Canons is not cognizable as a cause of action before our courts” and looking to identical language); *Boehner v. McDermott*, 484 F.3d 573, 580 n.6 (D.C. Cir. 2007) (explaining that the “code of conduct applicable to federal judges is not judicially enforceable” and citing same language); *Spring v. Wick*, 2014-Ohio-2879, ¶ 25 (Ct. App.) (explaining that “alleged violations of the [judicial] code do not, as a rule, create substantive rights in litigants before the courts” and pointing to identical language). *Cf. Roberson v. Minn.*, No. 16-cv-2578 (ADM/HB), 2016 U.S. Dist. LEXIS 182125, at *20 (D. Minn. Dec. 19, 2016) (holding that Minnesota Code of Judicial Conduct does not create civil causes of action); *Hueter v. Kruse*, 576 F. Supp. 3d 743, 775 (D. Haw. 2021) (dismissing civil suit against judge because code does “not provide...any cause of action”); *Church of Scientology Int’l v. Kolts*, 846 F. Supp. 873, 881 (C.D. Cal. 1994) (federal Judicial Code “not created to remedy injured third parties”)

8. Other courts have struck language from indictments that involved a judicial code of conduct. In *United States v. Terry*, No. 1:10CR390, 2011 U.S. Dist. LEXIS 57288 (N.D. Ohio May 26, 2011), a sitting common pleas judge was charged with conspiracy, mail fraud, and honest services mail fraud. *Id.* at *1-2. The defendant challenged the use of the judicial code as the basis for the duty underlying the honest services fraud allegation. *Id.* at *22. In striking the references as surplusage, the court explained that “the code is not legislative, and therefore, does not have the force of law” and so “it cannot support a finding of intent to defraud.” *Id.* Furthermore, the court found that “any references to the judicial code in the Superseding Indictment would be unduly prejudicial to the defendant because they may have the effect of confusing the jurors, and misleading them into thinking that the defendant is on trial for ethical violations.” *Id.* at *29. *See also People v. La Carrubba*, 46 N.Y.2d 658, 665 (1979) (dismissing indictment of judge for official misconduct because judicial code had not been adopted by legislature); *Clayton v. Willis*, 489 So. 2d 813 (Fla. Dist. Ct. App. 1986).

9. In an analogous situation regarding the Rules of Professional Conduct, the New Hampshire Supreme Court has explained that those rules do not “create[e] substantive rights on behalf of third parties” and that “[v]iolation of a Rule should not itself give rise to a cause of action nor should it create any presumption that an independent legal duty has been breached.” *State v. Decker*, 138 N.H. 432, 438 (1994) (quoting the *N.H. R. Prof. Conduct* preamble). In *Decker*, a defendant argued that the Attorney General’s Office violated Rule 4.2 of the Rules of Professional Conduct when it interrogated him outside the presence of his attorney. *Decker*, 138 N.H. 438. Disagreeing, the court held that “the defendant ha[d] no remedy under the Rules of Professional Conduct.” *Id.* at 439. *See also State v. Emanuel*, 139 N.H. 57, 60 (1994) (same); *State v. Leith*, 2018 N.H. LEXIS 157 at *4 (same) (unpublished opinion). The *Decker* court adopted the reasoning from the Michigan Supreme Court’s decision in *People v. Green*, 405

Mich. 273 (1979) that “[a]lthough it is true that the principal purpose of many provisions is the protection of the public, the remedy for a violation has traditionally been internal bar disciplinary actions against the offending attorney” and that the rules “are all self-governing in-house regulations” not “constitutional or statutory rights guaranteed to individual persons.” *Decker*, 138 N.H. at 439 (quoting *Green*, 405 Mich. at 293-294). If the Rules of Professional Conduct do not create substantive rights, then the analogous Code of Judicial Conduct does not either.

10. Because the Code of Judicial Conduct does not create substantive obligations under the criminal laws of this State, the Code cannot form the basis of any allegedly “unauthorized act” that would run afoul of RSA 643:1.

11. The indictment does not allege any other unauthorized act beyond the alleged violations of the Code. Part 1, Article 15 of the New Hampshire Constitution requires that a crime be “fully and plainly, substantially and formally, described” to the Accused. N.H. Const. pt. I, art. 15; *State v. Cheney*, 165 N.H. 677, 679 (2013); *see also* RSA 601:4. The indictment must “describe the offense with sufficient specificity to ensure that the defendant can prepare for trial and avoid double jeopardy.” *State v. Woodard*, 146 N.H. 221, 227 (2001) (quotation and citation omitted). “To this end, the indictment must contain the elements of the offense and enough facts to notify the defendant of the specific charges.” *State v. Sinbandith*, 143 N.H. 579, 584 (1999) (citation omitted); *State v. Bisbee*, 165 N.H. 61, 64 (2013). And it “must describe all of the essential elements of the crime.” *State v. Dennehy*, 127 N.H. 425, 431 (1985) (citing *State v. Bussiere*, 118 N.H. 659, 661 (1978)). An indictment that “fails to allege every fact necessary to constitute the offense charged is defective.” *State v. Mealey*, 100 N.H. 228, 231 (1956) (quotation and citation omitted).

12. Because there “is no summary judgment procedure in criminal cases” nor “a pre-trial determination of sufficiency of the evidence...[t]he sufficiency of a criminal indictment is

determined from its face.” *Bisbee*, 165 N.H. at 65-66 (quoting *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992)). But an indictment must contain “the elements of the offense and enough facts to warn a defendant of the specific charges against him.” *Bisbee*, 165 N.H. at 64 (citing *State v. Marshall*, 162 N.H. 667, 661-62 (2011)). The indictment “must include the elements of the offense with sufficient allegations to identify the offense in fact.” *Marshall*, 162 N.H. at 661. It must meet “the basic requirements of specificity and fair notice.” *See, e.g., State v. Day*, 129 N.H. 378, 380 (1987)/

13. The only reference in the indictment for an allegedly “unauthorized act” or an alleged “duty imposed on her by law or clearly inherent in the nature of her office” is the Code of Judicial Conduct. As discussed above, that allegation cannot form the basis for a criminal charge. Therefore, the indictment is defective and the court should dismiss this charge.

14. References to the Code of Judicial Conduct may have influenced the grand jury’s decision to indict Justice Hantz Marconi. The defense knows from discovery that the State, specifically Attorney Jimenez, elicited testimony regarding purported violations of the judicial canons before the Rockingham County Grand Jury. *See* D595-96 (“Question: Are you familiar with the judicial canons being on the judicial conduct committee? Answer: Yes. Question: Would it be improper for a judge to try to influence an investigation of a close family member? Answer: Yes. Question: Questions from the Grand Jurors? Nothing further.”).

15. Despite a formal request from the defense, the State elected not to transcribe the testimony of the Merrimack County Grand Jury. Thus, the defense cannot confirm exactly what was said by the prosecutors to the Merrimack County Grand Jury. However, considering the wording of the indictment as presented by the prosecutors to the grand jurors, it is plain that grand jurors must have been instructed – improperly – that a violation of the Code of Judicial Conduct may form the basis for a criminal charge.

16. In the alternative, if this court does not dismiss the charge, it should strike the improper language. The plain language of Rule 38's preamble, persuasive precedent from other jurisdictions, and an analogous decision by the New Hampshire Supreme Court all show that the Code of Judicial Conduct cannot form the basis for criminal liability. It is a well-established power of the court to strike words from the indictment. *See State v. Pond*, 132 N.H. 472, 475 (1989).

17. Therefore, if the court does not dismiss the indictments, it should strike all the references to the Code of Judicial Conduct from the indictments. As highlighted in *Terry, supra*, "any references to the judicial code in the Superseding Indictment would be unduly prejudicial to the defendant because they may have the effect of confusing the jurors, and misleading them into thinking that the defendant is on trial for ethical violations."

WHEREFORE, the defense respectfully requests this court dismiss the charge of improper influence (CID 2257292C), or, in the alternative, to strike the references to the Code of Judicial Conduct.

Dated this 4th day of April, 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