

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ANNA BARBARA HANTZ MARCONI

217-2024-CR-1167

****Redacted Pursuant to N.H. R. Crim. P. 50(c)****

**STATE'S OBJECTION TO DEFENDANT'S RENEWED AND SUPPLEMENTED
MOTION TO DISQUALIFY THE ATTORNEY GENERAL'S OFFICE
AND TO DISMISS THE INDICTMENTS**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and objects to Defendant's Renewed and Supplemented Motion to Disqualify the Attorney General's Office and to Dismiss the Indictments ("Renewed Motion"). In support of this Objection, the State represents as follows:

Renewed Motion Should Be Dismissed as Untimely under Rule 15(b)(1)

1. On October 31, 2024, Defendant filed her Motion to Disqualify the New Hampshire Attorney General's Office and Motion to Dismiss All Indictments ("First Motion"). On November 11, 2024, the State filed its Objection to the First Motion. On November 13, 2024, Defendant filed her Notice of Intent to File Reply, and Defendant filed her Reply on November 22, 2024. On December 18, 2024, this Court issued its Order on the Defendant's Motion to Disqualify the Attorney General's Office and Dismiss All Indictments ("Order on the First Motion"), denying the First Motion. In the interest of judicial economy, the State incorporates by reference its previous arguments related to the First Motion without repetition herein.

2. On December 23, 2024, the State provided Defendant with virtually all discovery in this matter related to and relied upon in the Renewed Motion related to Defendant's assertion that AG Formella has a conflict of interest, including AG Formella's notes, materials related to the 2013 complaint against Sununu, and audio recordings and transcripts of interviews with Sununu, Ogden, and Duprey. The State's records indicate that counsel for Defendant downloaded these materials on this same date.

3. On December 30, 2024, Defendant filed her Motion to Reconsider Order Denying Motion to Disqualify the New Hampshire Attorney General's Office and to Dismiss All Indictments. None of the arguments therein raised or relied upon the discovery provided and received on December 23, 2024, and Defendant did not request assent for an extension of the deadline to file a motion to reconsider until after this discovery could be reviewed. This Court denied the Motion to Reconsider the First Motion on January 17, 2025. *See* Order on the Defendant's Motion to Reconsider Disqualification of the Attorney General's Office and Dismissal of All Indictments.

4. On March 20, 2025, the parties appeared before the Court for a dispositional conference. "At that time, the defense notified the Court that the defense anticipated filing additional pretrial motions . . ." Assented-To Motion to Extend Deadline (filed April 2, 2025) at ¶ 1. Defendant acknowledged that under N.H. R. Crim. P. 15(b)(1), "all pretrial motions for both the defense and the State [were] due April 4, 2025." Id. at ¶ 2. However, with the State's assent, this deadline was extended by two weeks to April 18, 2025, to allow Defendant to file all motions she wished to present to the Court that would be covered by Rule 15(b)(1) – including motions to dismiss. Id. at ¶ 3, *2.

5. On April 14, 2025, Defendant filed five (5) motions to dismiss that explicitly relied upon the discovery provided on December 23, 2024, not only to support her new arguments, but also as the basis to reraise claims that had already been raised and adjudicated in previous motions. See Motion to Dismiss Charges of Official Oppression and Criminal Solicitation of Official Oppression at n.1 (reraising vagueness and overbreadth because discovery provided), ¶¶ 9, 38 (citing Sununu and Ogden transcripts); Motion to Dismiss Charge of Attempt to Commit Improper Influence at n.1 (reraising vagueness and overbreadth because discovery provided), ¶¶ 56-57 (quoting Sununu and Ogden transcripts); Motion to Dismiss Charge of Criminal Solicitation of Improper Influence at n.1 (reraising vagueness and overbreadth because discovery provided), ¶¶ 56-58 (citing and quoting Sununu and Ogden transcripts); Motion to Dismiss Charge of Obstructing Government Administration at n.1 (reraising vagueness and overbreadth because discovery provided), ¶¶ 4-5, 33-34 (quoting Sununu and Ogden transcripts); Motion to Dismiss Charges of Criminal Solicitation of Misuse of Position at n.1 (reraising vagueness and overbreadth because discovery provided), ¶¶ 30-35 (quoting Sununu, Ogden, and Duprey transcripts).

6. The Renewed Motion was filed on July 1, 2025 – over two months after the deadline set by Rule 15(b)(1) and just two months before trial. The Renewed Motion argues from the premise that AG Formella’s notes, the Sununu interviews, and the Ogden interviews give rise to Defendant’s argument that AG Formella is a necessary witness and thus has a conflict of interest. See Renewed Motion at *1, ¶¶ 4-6, 9-38. However, this argument is based upon discovery provided on December 23, 2024 – the same discovery relied upon in Defendant’s five (5) motions to dismiss filed on April 14, 2024, in accordance with the deadline set by Rule 15(b)(1) and extended by agreement of the parties to April 18, 2024.

7. Defendant’s arguments related to prejudice are also based upon discovery materials provided and received on December 23, 2024. Id. at ¶ 66 (“And, at the time [of the First Motion], the defense could not do more than speculate because it did not have discovery to back up its concerns.”), ¶¶ 54-68 (various arguments related to prejudice based on discovery materials provided and received on December 23, 2024).

[REDACTED]

[REDACTED]

[REDACTED]

9. Pursuant to Rule 15(b)(1), the deadline for Defendant’s Renewed Motion was originally April 4, 2024, until extended by the parties to April 18, 2024. Unlike other subsections of Rule 15(b), the language of Rule 15(b)(1) makes clear that this deadline is mandatory. *Compare* N.H. R. Crim. P. 15(b)(2) (**Except for good cause shown**, motions to suppress shall be heard in advance of trial.”) (emphasis added), Rule 15(b)(4)(A) (“**Except in exceptional circumstances**,”) (emphasis added); *with* N.H. R. Crim. P. 15(b)(1) (“The deadline **shall be**”) (emphasis added). Accordingly, the Renewed Motion should be dismissed as untimely.

AG Formella Is Not a Necessary Witness; Does Not Have a Conflict of Interest

10. Defendant’s argument of a conflict of interest on the part of AG Formella is derivative of her assertion that AG Formella is a necessary witness in this case because of AG Formella’s conversations with Sununu and Ogden. *See* Renewed Motion at ¶ 30 (“Considering these circumstances, the defense is entitled to question [AG] Formella about the origins of this case, his interviews of Sununu and Ogden, and his office’s [alleged] failure to follow [Public Integrity Investigation] policy”), ¶ 34 (“Thus, if the State offers arguments or evidence to suggest that either Sununu or Ogden is not telling the truth when denying [Chief Justice MacDonald’s hearsay], then [AG] Formella is a witness to Sununu’s and Ogden’s prior consistent statements.”), ¶ 45 (“In short, [AG Formella’s] testimony is ‘relevant, material, and unobtainable elsewhere.’ *Van Dyck*, 149 N.H. at 606.”).

11. This Court has already considered and rejected this argument in its Order on the First Motion. *See* Order on the First Motion at *14. As this Court noted in denying the First Motion, the unique status of the attorney general, serving as civil counsel to the executive branch

(including the governor) and the State's chief prosecutor (*see, e.g., id.* at *4), does not create a conflict of interest. *Id.* at *10. Accordingly, AG Formella speaking to Sununu and Ogden in his role as civil counsel and hearing information that is relevant to his duties as a prosecutor is not a reason to disqualify AG Formella and/or the New Hampshire Department of Justice. *Id.* at * 3-10 (discussing the dual roles of the attorney general and finding no conflict of interest generally or in this case). While the Court found Defendant's allegations to be "speculative" that AG Formella or other AAGs could hypothetically become witnesses "if the Governor approached them with information regarding his conversation with Defendant," the Court further noted that even such a scenario would not make AG Formella a necessary witness or create a conflict of interest:

In addition, the Court does not understand how such a hypothetical situation [of the Governor approaching AG Formella with information about his conversation with Defendant] differs from the normal course. To disqualify the AG's office in such a situation would seem to require its disqualification any time the AG's office receives a tip regarding criminal activity, chooses to investigate, and ultimately finds probable cause to indict and prosecute. The Court does not understand how this process differs from the statutory duty of the AG's office to conduct criminal investigations and prosecutions. See RSA 21-M:2.

Id.

12. Regarding the "origins of this case" aspect, Defendant quotes *State v. Roman*, 176 N.H. 367, 373 (2023) for the proposition that "the investigative steps the police take in a case are relevant evidence for the jury to evaluate." Renewed Motion at ¶ 18. However, *Roman* concerned whether the State had "opened the door because it created a prejudicial and misleading impression that the detective relied upon medical records as support for the defendant's arrest." *Roman*, 176 N.H. at 372. The State had asked the investigating officer whether he had collected any medical records as part of the investigation, and the officer stated that he received medical records from a CAPP examination. *Id.* The defendant argued that he was entitled to cross-examine the detective about the CAPP examination findings to counter prejudice and a misleading impression. *Id.* The

trial court denied the request, finding that “the State did not ‘inject otherwise inadmissible evidence’ [(i.e., the results of the CAPP examination)] because ‘the investigative steps the police take in a case [are] relevant evidence for the jury to evaluate’” *Id.* The trial court gave a curative instruction for the jury not to speculate about what the results of the CAPP examination were, and the Supreme Court ruled that the curative instruction and the officer’s limited testimony that a CAPP examination was performed and medical records were generated “without more detail, did not give rise to a ‘misleading advantage’ that required rebuttal.” *Id.* at 373 (quotation omitted).

13. Applying the logic of *Roman* to this case, AG Formella would only be allowed to state that he had a conversation with Sununu and a conversation with Ogden before Sununu and Ogden were interviewed by investigators. AG Formella would not be allowed to relay Sununu and/or Ogden’s hearsay statements any more than the officer in *Roman* could add “more detail” about the CAPP examination that would “give rise to a ‘misleading advantage’ that required rebuttal.” *Id.* (quotation omitted). Further, AG Formella is not the only source of information regarding these limited areas identified by the *Roman* court. The Renewed Motion cites Sununu and Ogden’s transcripts to establish that AG Formella spoke with both Sununu and Ogden before being interviewed by investigators. See Renewed Motion at ¶¶ 11-13 (Sununu), 15 (Ogden). Accordingly, AG Formella is not the only source of evidence that is “relevant, material, and unavailable elsewhere” regarding the existence and timing of his conversations with Sununu and Ogden, and as such AG Formella is not a necessary witness in this case. *State v. Van Dyck*, 149 N.H. 604, 606 (2003) (stating that “[a] lawyer is a ‘necessary’ witness if ‘his or her testimony is relevant, material and unobtainable elsewhere.’”) (quotation omitted).

14. Regarding the substance of the conversations AG Formella had with Sununu and Ogden, AG Formella’s testimony about the substance of these conversations would be

inadmissible hearsay. However, Defendant's conversations with Sununu and Ogden are admissible because: (1) they are not offered for the truth of the matters asserted, but rather are offered as the means of her alleged criminal conduct and for the effect on the listeners; and (2) even if they were offered for the truth of the matters asserted, they are admissions by a party opponent. *See N.H. R. Evid.* 801(c)(2), (d)(2). Sununu and Ogden can testify to these statements by Defendant because they were present when these statements were uttered by Defendant. However, AG Formella and Chief Justice MacDonald were not present when Defendant uttered these statements. Accordingly, they could only relay what Sununu and/or Ogden told them about what Defendant uttered, which would be inadmissible hearsay. That is, AG Formella and/or Chief Justice MacDonald would be offering Sununu and/or Ogden's statements (not Defendant's) for the truth of the matters asserted by Sununu and/or Ogden (*i.e.*, that Defendant said these things), which is inadmissible hearsay. *See id.* at 801(c)(2).

15. Defendant's argument about AG Formella testimony being relevant to impeach or rehabilitate Sununu and/or Ogden rest upon a misunderstanding of the admissibility of portions of Chief Justice MacDonald's potential testimony. AG Formella's notes of his conversations with Sununu and Ogden are consistent with Sununu and Ogden's recorded and transcribed interviews. *See, e.g., Renewed Motion* at ¶ 32 ("Thus, Formella's testimony at trial would support Sununu's and Ogden's statements [to investigators] and contradict MacDonald's [inadmissible hearsay]."). Accordingly, there is no prior inconsistent statement by Sununu and/or Ogden that makes AG Formella a necessary witness to admit Sununu and/or Ogden's prior statements to AG Formella. Rather, Defendant cites a divergence between Sununu and Ogden's statements to AG Formella and investigators, on the one hand, and Chief Justice MacDonald's recollection of what Sununu told him about the conversation, on the other hand. As stated *supra*, Chief Justice MacDonald's

statement about what Sununu told him about Sununu's conversation with Defendant would be inadmissible hearsay. Given the agreement between Sununu and Ogden's statements to AG Formella and their statement to investigators, AG Formella's testimony about the contents of his conversations with Sununu and Ogden are not "relevant, material, and unavailable elsewhere." *Van Dyck*, 149 N.H. at 606. Accordingly, AG Formella is not a necessary witness with regard to the contents of his conversations with Sununu and/or Ogden, as he has no information that is relevant and unavailable elsewhere.

16. Regarding the New Hampshire Department of Justice's policy concerning public integrity investigations, Defendant misstates the policy in question. Section II.A. of the policy makes it clear that, in general, complaints *should* be in writing. Renewed Motion at Exhibit B ("Complaints **should be submitted** in writing"; "Complaints **may also be submitted** via email"; ". . . it shall be the **general policy** of the AGO not to commence an investigation or other action except upon a written complaint.") (emphasis added). *See also* Section IV. ("The purpose of this statement is to facilitate the effective handling of public integrity matters by the AGO, and to provide general guidance to the public and to governmental agencies in dealing with the AGO. This statement is subject to change, and is not intended to confer any rights, privileges, or benefits upon any person or entity."). Thus, the policy makes clear that, *generally speaking*, complaints *should be* submitted to the New Hampshire Department of Justice in writing. However, nothing in the policy states or implies that the New Hampshire Department of Justice has limited itself to never acting on any complaint which has not been reduced in writing. In this case, when prosecutors within the New Hampshire Department of Justice were already engaging in a criminal investigation of another individual, and then receive evidence that Defendant was trying to illegally interfere with this investigation, the New Hampshire Department of Justice exercised its

discretion in how to investigate this matter by interviewing Sununu and Ogden without the delay of a formal, written statement in order “to facilitate the effective handling of public integrity matters” – both that involving Defendant and the investigation with which she sought to interfere.

17. AG Formella has no evidence to offer that is “relevant, material, and unavailable elsewhere.” *Van Dyck*, 149 N.H. at 606. He is therefore not a necessary witness in this case, and thus has no conflict of interest. Accordingly, Defendant’s Renewed Motion should be denied on its merits.

If AG Formella Has a Conflict of Interest, RSA 7:3 Controls

18. If this Court were to find that AG Formella is a necessary witness in this case with a conflict of interest, the appropriate remedy is not the novel remedy proposed by Defendant in the disqualification of the entire New Hampshire Department of Justice, but rather the application of RSA 7:3. “The deputy attorney general shall act as attorney general whenever the latter is absent or unable to act **from any cause**, or whenever there is a vacancy in the office, provided he shall not so act when the governor and council have appointed an acting attorney general in accordance with the provisions of RSA 7:15.” RSA 7:3 (emphasis added). The inability to act on a case due to a conflict of interest would qualify as being “unable to act from any cause.” Thus, the Legislature has made clear that whenever a particular attorney general is unable to fulfill the duties of his office, generally or on a specific case, the proper procedure is for the deputy attorney general to assume the responsibilities of the *office* of the attorney general. In this way, the unique constitutional and statutory obligations of the *office* of the attorney general may be fulfilled regardless of whether any particular attorney general is able to act.

19. As this Court previously stated, “To disqualify the AG’s office” in a situation that does not differ “from the normal course,” where the “statutory duty of the AG’s office to conduct

criminal investigations and prosecutions” when “the AG’s office receives a tip regarding criminal activity, chooses to investigate, and ultimately finds probable cause to indict and prosecute” would defy not only common sense, but the will and judgment of the Legislature regarding the appropriate course of conduct in such a situation. Order on the First Motion at *14.

20. Accordingly, if this Court were to find that AG Formella is a necessary witness in this case and has a conflict of interest such that he is “unable to act” in his capacity as attorney general in this case, then the appropriate remedy is for the deputy attorney general to act as attorney general in this case.

WHEREFORE, the State respectfully requests that this Honorable Court:

- (A) Deny the Renewed Motion as untimely under Rule 15(b)(1);
- (B) Alternatively, deny the Renewed Motion because AG Formella is not a necessary witness in this case and therefore does not have a conflict of interest;
- (C) Alternatively, deny the Renewed Motion in part to allow the deputy attorney general to act as attorney general in this case under RSA 7:3; and
- (D) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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Date: July 11, 2025

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's e-filing system to counsel of record.

/s/ Joe M. Fincham II
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