STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss. July Term, 2025

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

v.

Anna Barbara Hantz Marconi

REDACTED

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

The defense replies as follows to the State's Objection to the Defense Renewed and Supplemented Motion to Disqualify the Attorney General's Office and Dismiss the Indictments.

THE STATE'S PROCEDURAL OBJECTIONS ARE PATENTLY MERITLESS

1. The State devotes much of its objection to a spurious claim that the Renewed Motion should be dismissed as untimely under N.H. R. Crim. P. 15(b)(1). *See St. Obj.* at ¶¶ 1-9. The State's heavy reliance on a baseless procedural objection serves only to underscore the validity of the defense motion. There is no new motion to disqualify that was filed after any deadline. To the contrary, the defense made the motion to disqualify long ago as the very first motion in this case, even before the arraignment, and has now renewed it months before trial. To say that the defense has not timely asserted that Attorney General Formella should be disqualified is patently wrong. Moreover, the Renewed Motion was filed soon after the State had slowly and finally produced evidence not only showing Formella's additional conflicts, but also how the conflicts of interest have affected the investigation and prosecution of this case. The defense followed the suggestion of the court in its first order to renew the motion to disqualify when there was evidence that Formella would be a witness and evidence of the prejudice arising from Formella's various conflicts of interest.

2. As this court is aware, the defense raised the issue of Formella's conflicts of interest on October 31, 2024, approximately two weeks after the indictments were announced and more than a month prior to arraignment.[1] *See First Mot. Disqualify*. The defense had requested pre-indictment discovery and then discovery by rule on October 24, 2024, but the State did not produce the first 715 pages (of what is now a total of 2522 pages) of discovery until December 23, 2024. On that date the defense learned about Attorney General Formella's interviews of then-Governor Sununu and Legal Counsel Rudy Ogden. Then, the prejudice resulting from the sum of Formella's conflicts of interest was gradually revealed as the State produced additional discovery on January 29, 2025 (ten audio and video files), February 14, 2025 (62 pages), February 27, 2025 (152 pages), March 10, 2025 (11 pages), April 9, 2025 (12 pages), May 27, 2025 (1,560 pages), May 29, 2025 (8 pages), and June 3, 2025 (2 pages).[2] [redacted] It is erroneous for the State to claim that the defense had the relevant and necessary discovery in the seven-day window it alleges was the appropriate time to re-raise the conflict of interest. *See St. Obj.* at ¶ 3.

3. The State's assertion that the defense first raised the objection that Formella may be a trial witness in the Renewed Motion is flatly contradicted by the record. The defense specifically

[1] [redacted]

[2] In at least one instance, the State only decided to share certain discovery after the issue emerged at the May 20, 2025, hearing on other motions. *See* Transcript of Motion Hearing (May 20, 2025) at pp. 23-24.

[3] That discovery was relied upon in the Renewed Motion. *See Renewed Mot.* at ¶ 69. Likewise, discovery that was not provided until February 27, 2025 was also used. *See Renewed Mot.* at ¶ 73.

raised the objection that Formella may be a trial witness in the first defense motion to disqualify filed in October. *See First Mot. Disqualify* at ¶¶ 46-49.

4. More importantly, in the court's December 18, 2024 Order on the first motion to disqualify, the court recognized that the defense had raised the potential for a conflict of interest with Formella as a witness, but the court declined to disqualify him "at this stage and upon the information provided[.]" *First Order* at 14. Nevertheless, the court itself said that "[s]hould the Defendant later find that she has suffered harm from an actual, not speculative conflict, she may challenge AG Formella'[s] involvement with adequate supporting documentation." *Id.* at 15.[4] The court put no deadline on such a challenge. *Id.* And the court emphasized the importance of showing prejudice arising from the conflicts.

5. Significantly, at the time of the ruling on December 18th on the first motion to disqualify, neither the defense nor the court knew of Formella's role as the first law enforcement agent to interview Sununu or Ogden, or the full extent of how that conflict had prejudiced Justice Hantz Marconi throughout the investigation of this case. The only reason that the court and the defense did not have that information is that the State did not produce it at the time.

6. The State cannot now fairly claim that the defense somehow waived the very objection that it raised on October 31, 2024, even though it was the State that withheld information critical

[4] The State misstates this court's order from December 2024. The State claims that this "Court further noted that even such a scenario would not make AG Formella a necessary witness or create a conflict of interest." *St. Obj.* at ¶ 11. This is not what the court said. The court was concerned about 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." *First Order* at 14. (underline added). The court did not "understand how such a hypothetical situation differs from the normal course." *Id.* Yet even the State concedes that Formella and his office are not the same. *See St. Obj.* at ¶ 18. And it is certainly not the normal course for the Attorney General himself to take the first witness statements from the percipient witnesses, without anyone else on the call or at the meeting, and without following his own procedures regarding these investigations.

to the objection and the court's consideration of the objection. As our Supreme Court has repeatedly admonished, a fundamentally unfair procedure is one that, for example, "'gives a party a significant advantage or places a party in a position of prejudice or allows a party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading advantage.'" *State v. Winslow*, 140 N.H. 319, 321 (1995) (quoting *State v. Symonds*, 131 N.H. 532, 534 (1989)). The New Hampshire Supreme Court has never held or even suggested that a conflict of interest can be tacitly waived by the Rule 15(b)(1) motion deadline. Rather, its holdings suggest the opposite. Disqualification is a "flexible, case-by-case approach" looking at "the circumstances of a particular case." *State v. Addison*, 166 N.H. 115, 121 (2014) (quotation and citation omitted). So, for instance, in *State v. Mountjoy*, 142 N.H. 648 (1998), it held that if a court is even made aware of the potential for a defense conflict of interest, it is required to act. *Id.* at 651. In *State v. Cyrs*, 129 N.H. 497 (1987), where the defendant did not raise the conflict issue until the day of trial, *id.* at 499, the Court adopted "a *per se* rule of reversal in cases where the State has actual knowledge" that defense counsel had a conflict of interest. *Id.* at 502. And in *State v. Gonzalez*, 170 N.H. 398 (2017), it explained that the trial court has an "'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" *Id.* at 404 (quoting *Gonzalez-Lopez*, 548 U.S. at 152). Because the partiality of the prosecution goes to the heart of the fairness, and appearance of fairness, of the proceeding, and because the defense raised the issue immediately, it is not waived.

7. The State would like to manipulate the proceedings so that no matter when the defense asserts Formella's conflicts of interest, there will always be a procedural bar. The State withheld discovery relevant to the conflict issue during the litigation of the first motion. Then the State produced some discovery before the pretrial motion deadline followed by substantial additional

discovery after the deadline. This structure allowed the State to withhold discovery relevant to the conflict when the defense first raised it, so that the court found the defense arguments speculative. And then by staggering and withholding discovery, the State was able to engineer a complaint that the defense motion which was originally speculative is now too late. It is a Goldilocks theory of timing that cannot be reconciled with our Supreme Court's admonition that on a motion to disqualify, the "court should examine the purpose of the advocate-witness rule" to determine if a particular situation requires disqualification, with the particular concerns of protecting "the legal system from the appearance of impropriety and the avoidance of jury confusion." *McElroy v. Gaffney*, 129 N.H. 382, 389 (1987).

8. In the words of Judge Learned Hand, "Justice is not a game[.]" *United States v. Paglia*, 190 F.2d 445, 447 (2d Cir. 1951). In New Hampshire, "we make every effort to reach a judgment on the merits, to achieve the ends of justice unobstructed by imaginary barriers of form." *Roberts v. General Motors Corp.*, 140 N.H. 723, 729 (1996).

9. Moreover, in criminal cases, prosecutors have "a duty to the defendant never to lose sight of the fact that the defendant is entitled to a full measure of fairness." *State v. Collins*, 2024 N.H. 7 at ¶ 15 (quotation omitted). As the United States Supreme Court explained nearly three decades ago, an interested prosecutor is an error "so fundamental and pervasive" that it "require[s] reversal without regard to the facts or circumstances of the case" because "it undermines confidence in the integrity of the criminal proceeding." *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 809-10 (1987) (quotations and citations omitted). "It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters." *Id.* at 810. Thus, as with racial discrimination in the selection of the grand jury or a judicial officer faced with a conflict of interest, the Supreme Court rejected harmless error analysis

because it is "not sensitive to [the] underlying concern" that an "interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Id.* at 811-14. Accordingly, the Court "establish[ed] a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment." *Id.* at 814.

10. The United States Supreme Court considers errors that "defy analysis by 'harmless-error' standards" to be "structural errors" because "they affect the framework within which the trial proceeds and are not simply an error in the trial process itself." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (cleaned up, quotations and citations omitted). Likewise, the New Hampshire Supreme Court recognizes that "certain constitutional errors necessarily render a trial fundamentally unfair" because the error "infects the entire conduct of the trial from beginning to end and therefore constitutes an irreparable injustice[.]" *State v. Ayer*, 150 N.H. 14, 24 (2003) (quotations and citations omitted). "[S]tructural errors require automatic reversal of a defendant's conviction." *State v. Brooks*, 2025 N.H. 12 at ¶ 12. Such structural or fundamental error exists here where the Attorney General, a necessary witness in the case, oversees and directs the prosecution and where the State fails to disclose that conflict despite timely notice by the defense.

FORMELLA'S TESTIMONY IS ADMISSIBLE.

11. The defense offered three non-exhaustive reasons why Attorney General Formella's testimony would be admissible. *See Renewed Mot.* at ¶¶ 17-30 (for the origins of the investigation), ¶¶ 31-34 (as potential impeachment), ¶¶ 35-38 (for evidence of then-existing state of mind). The State responds to some of these, but, as in the past, mischaracterizes the defense position then purports to refute that wrongly described position.

Formella's Testimony Is Admissible Regarding the Origins of the State's Investigation.

12. Regarding the first basis for questioning Formella at trial and the State's failure to follow its own procedure for public integrity investigations, the State ignores the defense's right to inquire into the origins of the investigation and how, when both percipient witnesses denied seeing anything illegal, it ignored its "**general policy**" and "receive[d]" unnamed, undisclosed evidence that led unnamed officials in the Department of Justice to "exercise[] [their] discretion" and investigated when the head of the Department of Justice, and the superior to those unnamed officials, was the first person in the office to become aware of the meeting in question. *St. Obj.* at ¶ 16 (bolding and underline in original). None of the State's vague explanations trump the defense's constitutional right to challenge the reliability of the investigation. *See Renewed Mot.* at ¶ 19 (citing *Kyles v. Whitley*, 514 U.S. 419 (1995)).

13. Furthermore, the State works hard but fails to distinguish *State v. Roman*, 176 N.H. 367 (2023), in any meaningful way. In *Roman*, both the trial court and the Supreme Court said that the police's investigative steps were relevant and could be considered by the jury. Id. at 372, 374. The discussion of the opening the door doctrine does not change the analysis of the relevance of the evidence. Beyond *Roman*, the State's objection ignores the other authorities cited by the defense. *See Renewed Motion* at ¶ 18. And the defense could cite other authority as well. *See e.g.*, *Carter v. Douma*, 796 F.3d 726, 730 (7th Cir. 2015) ("When the reasons for the police's actions are relevant, a witness can testify about what information prompted those actions. That is, when such a statement is offered only to show the effect it had on the police, it is used for a purpose other than the truth of its contents."). In short, the State cannot credibly deny that an accused person has the right to produce evidence about the origins of an investigation as part of a challenge to the reliability of the investigation which led to criminal charges.

Formella's Testimony Is Admissible to Show the Declarant's Then-Existing State of Mind.

14. The State argues that "AG Formella's testimony about the substance of [the] conversations [he had with Formella and Ogden] would be inadmissible hearsay." *St. Obj.* at ¶ 14. But the State is responding to an argument the defense never made. As the defense made clear in its Renewed Motion, Formella's testimony is admissible under the "well-established" exception to the hearsay rule for statements which show the relevant state of mind of a witness (here, then-Governor Sununu and Legal Counsel Oden). *See Renewed Mot.* at ¶¶ 35-38; *Clooney v. Clooney*, 118 N.H. 754, 754 (1978); *State v. Sulloway*, 166 N.H. 155, 162 (2013). As this court knows, Justice Hantz Marconi made no asks, threats, bribes, or anything of the like in her meeting with Sununu and Ogden. Instead, the State plans to rely on "circumstantial evidence to show her criminal intent." Transcript of Motion Hearing (May 20, 2025) at 29. To reiterate the obvious, "Formella's testimony would show Sununu's and Ogden's state of mind at the time they were interviewed by Formella, which included no perception that Justice Hantz Marconi was improperly influencing or attempting to improperly influence them." *Renewed Mot.* at ¶ 38 (cleaned up, quotation and citation omitted). The reactions of Sununu and Ogden as related to Formella are no less circumstantial evidence than whatever circumstantial evidence the State claims it will offer at trial. Yet, the State's objection never once mentions, let alone refutes, this theory of admissibility.

Formella's Testimony Is Admissible as Potential Impeachment Evidence.

15. The State's argument about using Formella's testimony to impeach Sununu or Ogden is wrong on the facts and wrong on the law. Factually, the State is simply incorrect to claim that "AG Formella's notes of his conversations with Sununu and Ogden are consistent with Sununu and Ogden's recorded and transcribed interviews." *St. Obj.* at ¶ 15. For one, Formella's notes of the Ogden interview describe how "Goc [sic] said he mentioned it to Gordon [MacDonald]

beforehand and he didn't know." D712. That flatly contradicts Sununu's recorded interviews where he claimed he only spoke to Chief Justice MacDonald afterwards. *See* D135 (Sununu first denial); D172 (Sununu second denial); D250 (Ogden denial). Likewise, Formella's notes of his interview with Sununu indicate that Sununu told him that "Gordon asked if Gov is hearing anything." D715. Yet, Sununu made no mention of that in either of his recorded interviews and it goes directly to the propriety of judicial officials speaking with the governor about pressing issues, that is, the very heart of this case.

APPOINTMENT OF THE DEPUTY ATTORNEY GENERAL DOES NOTHING TO CURE THE CONFLICT OF INTEREST.

16. Recognizing the untenability of its position, the State, for the first time, claims that the "appropriate remedy is…the application of RSA 7:3" and the appointment of the deputy attorney general. *St. Obj.* at ¶ 18.[5] The State's proposal is untenable. First, the State's claim is contradicted by its own representations to this court at the December 2, 2024 hearing. *See* Audio of Motion Hearing (Dec. 2, 2024) at ~2:48:05 pm ("All prosecutorial authority is derivative of the Attorney General. No one has standing to prosecute any crime punishable by jail time or prison absent the, under the auspices of the Attorney General") (underline added); *id.* at ~2:49:05 pm ("He is the state's lawyer. He is the state's prosecutor. He has the ultimate responsibility to seek the prosecution of all crimes before the courts. And no one else can exercise that authority independent of him.") (underline added). Second, appointment of the deputy attorney general would do nothing to address the preexisting conflict of interest, Formella's indisputable role supervising his subordinates, including the deputy, in this case, and his public commentary about the alleged propriety of the investigation. *See Renewed Mot.* at ¶ 51; Press Release, N.H. Dep't

[5] The State is blind to the irony of asserting this argument for the first time while claiming that the argument the defense has been making since October 2024 is untimely.

of Justice, State of New Hampshire v. Anna Barbara Hantz Marconi (Oct. 16, 2024).[6] Third, in not one of the on-point cases the defense cited did passing the buck to the deputy solve the issue. *See Renewed Mot.* at ¶¶ 48-53.[7] Likewise, the State has identified no case law or historical examples of its novel claim that the deputy attorney general can replace the attorney general. In short, such a proposed remedy would do nothing to address the "broad concern that the administration of justice not only be fair, but also appear fair" that has permeated this case from the get-go. *McElroy*, 129 N.H. at 389 (quotation and citation omitted).

CONCLUSION.

WHEREFORE, the defense respectfully requests that this court disqualify Attorney General Formella and his entire office, and dismiss the indictments.

Dated this 21st day of July, 2025.

Respectfully submitted,

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[6] Available at https://www.doj.nh.gov/news-and-media/state-new-hampshire-v-anna-barbara-hantz-marconi.

[7] Notably, the State failed to address any of these decisions in its objection.

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