

STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss.

November Term, 2024

State of New Hampshire

No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

REPLY TO STATE’S OBJECTION  
TO THE DEFENSE MOTION TO DISQUALIFY THE NEW HAMPSHIRE ATTORNEY  
GENERAL’S OFFICE AND TO DISMISS ALL INDICTMENTS

The Accused respectfully replies to the Attorney General’s objection to the defense Motion to Disqualify the New Hampshire Attorney General’s Office and Dismiss All Indictments. As explained below, the Attorney General’s objection fails to address the most important points in the defense motion, misstates the motion, and relies on case law that is inapplicable.

The Motion Is Ripe for a Decision.

1. Preliminarily, the defense agrees with Attorney General Formella on one point – the court may now decide the issue presented as a matter of law. That is not because there are no relevant facts to be considered, but rather because the Attorney General does not (and cannot) deny the relevant facts.

2. The facts are important. *See Preston v. Gillam*, 104 N.H. 279, 282 (1962) (the “decision as to whether a conflict of interest exists is ordinarily factual and depends upon the circumstances of the particular case”); *Marsh v. Hanover*, 113 N.H. 667, 673 (1973); *State v. Collins*, 320 A.3d 47, 53-54 (N.H. 2024); *State v. Addison*, 166 N.H. 115, 124 (2014); *State v. Guaraldi*, 127 N.H. 303, 311 (1985).

3. However, the facts here are undisputed. Formella is and has been Governor Sununu's attorney, as private counsel, as legal counsel to the Governor, and as Attorney General. Formella's progression from each of those positions to the next is directly attributable to his relationship with Sununu. The Attorney General's objection does not contest these facts. Thus, the attorney-client relationship and the personal connection between Formella and Sununu identified in the motion to disqualify should be accepted as true by the court.

4. The court should also accept these facts as true because they are apparent from the record and papers on file in the case. The defense motion provided detailed citations to public sources and records. The factual allegations and their bases are fully identified in the motion. The Attorney General's complaint that the defense motion was not verified by affidavit has no merit. N.H. R. Crim. P. 35(i)(1) provides that no affidavit is needed when the "facts...are apparent from the record or from the papers on file in the case." The Attorney General's failure to question the cited sources or deny the factual allegations shows that they should be accepted as true.

5. For these reasons, the defense agrees that the court can decide the issue "based solely on the undisputed facts." *State v. Zhukovskyy*, 174 N.H. 430, 439 (2021). *See also Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711-712 (2010) ("the trial court held a hearing on the motion to dismiss, accepted the truth of the plaintiff's allegations, and ruled based upon the plaintiff's pleadings").

The Attorney General Fails to Address the Core of the Defense Motion: Attorney General Formella is Conflicted.

6. Attorney General Formella cannot serve as lawyer for Governor Sununu and prosecute this case. His lengthy history of serving as Sununu's personal lawyer and ally creates a conflict of interest because of the significant risk that he will be biased in his assessment and investigation of Justice Hantz Marconi.

7. The Attorney General attempts to avoid addressing this argument by mischaracterizing the defense arguments and by addressing the derivative conflict with the Public Integrity Unit first, without addressing the root of all of the conflict: Formella’s longstanding personal and professional relationship with his client, Sununu, the very public official who Justice Hantz Marconi is charged with attempting to improperly influence and therefore the allegedly aggrieved party.

8. The Attorney General says, starting in the title to his section containing paragraphs 24-29 of the objection, “Defendant’s Motion Does Not Allege that AG Formella Individually Has a Conflict of Interest.” That is simply not true. Paragraphs 3-11 of the defense motion describe the close personal and professional relationship between Formella and Sununu. Paragraphs 38-41 of the defense motion specifically state that Formella has a personal interest which creates a conflict of interest under Rule 1.7(a)(2) regarding conflicts arising from “personal interests.”

9. Sununu was and is Formella’s client and the person to whom he is beholden. Thus, a conflict exists between Formella’s duties to his client—Sununu—and his duty to be an impartial and fair prosecutor in a criminal case where that client is the allegedly aggrieved party and primary witness. *See* Def. M. at ¶¶ 34-35; N.H. Rs. Prof. Conduct 1.7(a)(2), 1.11(d)(1), 3.8. *See also* New Hampshire Bar Association Ethics Committee Advisory Opinion #2022-23/02, *Public Prosecutors and Referral Fees* at 2 (“As a prosecutor, the lawyer has the responsibility of a minister of justice and to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”) (cleaned up, quotation and citation omitted).

10. This conflict should have been addressed by the Attorney General at the outset of any investigation. Formella’s relationship with Sununu is obvious. Formella’s duty to supervise and oversee all the attorneys in his office is a matter of law and is well known. The disqualification

issues were created by the Attorney General’s handling of this matter and could have been avoided. He could have hired outside counsel, instructed them to remain independent, and adopted procedures to screen himself and his attorneys from the prosecution. *See* RSA 7:12, I (“...the attorney general may employ counsel, attorneys...in case of reasonable necessity...”); *State v. Actavis Pharma, Inc.*, 170 N.H. 211, 212 (2012) (describing an instance where the Office of the Attorney General (OAG) retained a private law firm to represent the OAG); *Addison*, 166 N.H. at 123-24 (describing screening procedures); *Collins*, 320 A.3d at 53-54 (same).

The Attorney General Fails to Discuss the Key New Hampshire Supreme Court Case on Point and Misreads the Case Law It Cites.

11. The Attorney General’s objection makes no mention of *Rogowicz v. O’Connell*, 147 N.H. 270 (2001). That case involved a prosecuting attorney in a criminal matter where the complainant was also the attorney’s client in non-criminal civil matters. Although the case was unusual in that a private attorney was allowed to prosecute a criminal case, the Court’s holding plainly applies in any situation where the prosecuting attorney is also counsel for a witness. The Supreme Court explained that “[i]t is the prosecutor’s duty to remain under appropriate restraint and to avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he or she is entitled.” *Id.* at 274 (quotation and citation omitted). It also said, “the prosecutor has a duty to the public to achieve justice and a duty to the defendant to never lose sight of the fact that the defendant is entitled to a full measure of fairness,” *id.* at 274 (cleaned up, quotation and citation omitted), must “vigilantly protect[] a defendant’s right to a fair trial,” *id.*, and, when the “readily apparent” private interests of the prosecutor influence the discharge of his prosecutorial duties, he must be disqualified. *Id.* at 275. Here, Formella chose to remain the supervising prosecutor despite the “readily apparent” conflict and therefore must be disqualified.

12. The *Rogowicz* court did not distinguish between public and private attorneys. The reasoning of the opinion applies in both circumstances and compels the finding of a conflict of interest when a prosecutor represents a key witness. The Supreme Court reaffirmed *Rogowicz* earlier this year and noted that prosecutors, like private attorneys, are subject to Rule 1.7. *Collins*, 320 A.3d at 53. Yet, the Attorney General's objection simply fails to address *Rogowicz*.

Because Formella Is Conflicted, His Whole Office is Conflicted.

13. Attorney General Formella is not like a line attorney in the Department of Justice. He has supervisory authority over his entire office. *See* Def. M. at ¶¶ 12-14. This case does not present a horizontal conflict of interest, but rather a vertical one, where the supervisor at the top has a conflict.

14. The Attorney General's objection incorrectly relies on opinions in cases which involved horizontal conflicts of interest, not the vertical conflict of interest the defense has identified. So, for instance, in *Appeal of Trotzer*, 143 N.H. 64 (1998), the Court found no conflict in a professional licensure hearing where one assistant attorney general acted as prosecutor and another represented the board. *Id.* at 68. As the Court noted (and the AG acknowledges, St. Obj. at ¶ 15), the two assistant attorneys general "were employed in different bureaus of the attorney general's office, with different supervisors and wholly distinct functions." *Trotzer*, 143 N.H. at 68 (underline added). Here, by contrast, the supervising attorney, the Attorney General himself, has a conflict where his primary witness is his current and former client, and where there are no "different bureaus," nor "different supervisors", nor "wholly distinct functions." The entire prosecution is under Formella.

15. Likewise, *In re Huston (N.H. Bd. of Vet. Med.)*, 150 N.H. 410 (2003) is inapplicable. That case involved a proceeding before the Board of Veterinary Medicine. The veterinarian

challenged the suspension of his license because “two members of the attorney general’s office prosecuted the case, while a third served as board counsel.” *Id.* at 412. In other words, the veterinarian did not claim the Attorney General himself, the supervising attorney, had a conflict. Rather, the veterinarian claimed a conflict between attorneys at similar levels within the office – a horizontal conflict. In addition, the veterinarian conceded that “there was no actual bias in [the] case.” *Id.* Here, the defense points to a vertical conflict and has specifically asserted that Formella cannot be impartial.

16. In addition, despite quoting at length from *Huston*, the Attorney General leaves out the Court’s concluding caveat:

By our ruling, we do not intend to imply that the ethical obligations of public and private attorneys are different in all circumstances. We are not called upon in this opinion to discuss the circumstances under which public and private attorneys are subject to the same ethical obligations.

*Id.* at 413. As pointed out in the defense motion, Def. M. at ¶ 32, the instant case does present a situation where public and private attorneys are subject to the same ethical obligations. That is what *Collins* says about Rule 1.7. *See* 320 A.3d at 533. Thus, the *Huston* conflict is not only materially different (horizontal rather than vertical conflict, no evidence of actual bias) but the Court expressly limited its holding to those materially different circumstances. The case says nothing about the present situation.

17. The Attorney General looks to *State v. Addison*, 166 N.H. 115 (2014), but that case undermines, rather than strengthens, the objection. *Addison* requires an inquiry into “the circumstances of a particular case” to determine “whether disqualification of the entire office’ is required.” *Id.* at 121. The court found that disqualification was not required in large part because screening was an available means of addressing the conflict of interest. All five of the attorneys, as well as all other employees of the criminal justice bureau involved in the case, were screened

from the attorney who had the conflict and the information in her files. *Id.* at 123. On that record, the Court “conclude[d] that the State ha[d] demonstrated that it implemented screening procedures that...prevented the disclosure of confidential information” and therefore that “disqualification of the entire attorney general’s office...[was] not warranted.” *Id.* at 124. But the Addison screening solution does not work in this case. It is not possible when the conflicted attorney is the supervisor of all other attorneys in the office.

18. The Attorney General’s discussion of *State v. Klattenhoff*, 71 Haw. 598 (1990) is inapposite. The issue there was whether it was a conflict of interest for attorneys from one division of the Attorney General’s Office to represent an individual in civil litigation while attorneys from another division were prosecuting the same individual criminally. *Id.* at 599-600. The court held that “the AG may represent a state employee in civil matters while investigating and prosecuting him in criminal matters, so long as the staff of the AG can be assigned in such a manner as to afford independent legal counsel and representation in the civil matter, and so long as such representation does not result in prejudice in the criminal matter to the person represented.” *Id.* at 605 (underline added). In other words, *Klattenhoff* involved a situation in which screening was possible and appropriate. *Klattenhoff* did not involve a vertical conflict where the Attorney General himself was the one conflicted.<sup>1</sup>

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<sup>1</sup> The lengthy string citation from *Klattenhoff* does not help the Attorney General’s argument. Only one case involved a criminal prosecution, and no case involved a situation where the Attorney General had a longstanding legal relationship with his primary witness. See *Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197, 1202 (Me. 1989) (addressing the “narrow issue” of whether “[i]f an agency is represented in court by independent private counsel, is it ethically permissible for the Attorney General to seek judicial review of an administrative decision of that agency, even though the agency was counselled by members of his staff during the administrative proceeding”); *Feeney v. Commonwealth*, 373 Mass. 359, 360 (1977) (addressing whether the Attorney General can “prosecute [a civil] appeal to the Supreme Court from a judgment..., contrary to the expressed objections of State officers whom he represented in the District Court proceedings”); *EPA v. Pollution Control Board*, 69 Ill. 2d 394, 398 (1977) (examining “whether a State agency may employ private counsel to represent it and have his or her fees paid by the Attorney General in the absence of appointment of such counsel by the court or the Attorney General”); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 866 (Ky. 1974) (addressing “whether the Attorney General...has standing to initiate and maintain a suit challenging the constitutionality of an Act of the General Assembly, against a state officer, department or agency charged with the administration of the Act”); *Humphrey v.*

19. Of *Klattenhoff's* many citations, only *State ex rel. McLeod v. Snipes*, 266 S.C. 415 (1976) involved a criminal prosecution. In that case, the South Carolina Supreme Court held, over the Attorney General's objection, that a South Carolina law requiring the Attorney General to provide representation to public officials in criminal prosecutions did not conflict with the Attorney General's constitutional duty to supervise criminal prosecutions. *Id.* at 420-21. The court found no conflict because it was "common knowledge that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors [county attorneys] in their respective circuits," because there was "ample latitude to designate an individual or individuals who could *independently* represent the public official" and because "the statute in question simply place[d] upon the Attorney General the duty to see that the public official [was] provided representation." *Id.* (italics in original). The more important point here is that *McLeod* is inapplicable to the circumstances of this case. The question in *McLeod* dealt with the Attorney General designating defense counsel when certain public officials are criminally charged. *Id.* at 418, 421. That situation is a far cry from a situation, as in this case, where the Attorney General himself is the attorney for the prosecution's most important witness and allegedly aggrieved party.

20. The Attorney General is mistaken in not recognizing that a different analysis is needed when the conflict arises from the interest of a supervising attorney, such as the Attorney General. Such situations are predictably uncommon but not unheard of. In *Pascoe v. Wilson*, 416 S.C. 628 (2016), the South Carolina Supreme Court declared that the Attorney General and his

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*McLaren*, 402 N.W.2d 535, 537-41 (Minn. 1987) (holding there is no conflict of interest for the attorney general to civilly sue a former executive director of a state agency for reimbursement); *State ex rel. Allain v. Mississippi Public Service Com.*, 418 So. 2d 779, 782, 784 (Miss. 1982) (holding that attorney general could intervene in a proposed electrical rate increase on behalf of state commission and the public but explaining that the "unique position of the attorney general requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or specially appointed counsel to represent the agency unfettered and uninfluenced by the attorney general's personal opinion") (underline added).

office were recused from an investigation into the conduct of certain state legislators. *Id.* at 630. And in *State v. Breeze*, 873 P.2d 627 (Alaska Ct. App. 1994), the Alaska Court of Appeals held it proper to appoint a special prosecutor where the Attorney General and his department had a conflict of interest. *Id.* at 635. Unprecedented prosecutions sometimes require unconventional solutions.

#### The Attorney General Makes Additional Incorrect Assertions.

21. The Attorney General's objection conjures up disastrous consequences that supposedly would follow from the defense position. According to the Attorney General, granting the defense motion would mean that the Attorney General's attorneys are conflicted out of every case in which "state officials may be percipient witnesses." St. Obj. at ¶ 21. That is not the defense argument at all. The defense argument is that when the Attorney General himself has an attorney-client relationship with the Governor, and when the Attorney General himself has a long personal and professional relationship with the Governor, the Attorney General is disqualified from handling a case in which the Governor is his witness and allegedly aggrieved party. This is a rare if not unique situation.

22. The defense explained in its motion that when attorneys other than the chief attorney in an office have a conflict, the normal solution is to have a screen between the attorney(s), citing *Addison*, 166 N.H. at 121-23; *Collins*, 320 A.3d at 53-54, but that solution does not work when the attorney who has the conflict has statutorily mandated duties of supervision over all of the attorneys in the office. Def. M. at ¶¶ 56-57.

23. The Attorney General also claims that the defense's argument will somehow be moot when Governor Sununu leaves office. *See* St. Obj. at ¶¶ 22, 27. This simply ignores the fact that the conflict existed at the time the State investigated Justice Hantz Marconi, when it presented

the evidence to the grand jury, and when it had the grand jury indict her. No future change in the governorship can remedy the legacy of that conflict.

Conclusion.

24. Finally, the Attorney General suggests that the defense is “misusing” the disqualification motion and that the motion is a form of “gamesmanship.” *See* St. Obj. at ¶ 28. The suggestion is baseless. The defense has detailed the uncontested facts and the law on which the motion is based. The reasons to believe there is a conflict of interest are substantial. Whether the Attorney General who indicted a sitting Supreme Court Justice has a conflict of interest is a very serious issue which must be addressed. At a minimum, the Attorney General should see that.

25. The defense expected the Attorney General to object and the defense does not fault the Attorney General to the extent he raises legitimate legal questions in good faith. However, the suggestion of “gamesmanship” is tantamount to an accusation of bad faith on the part of defense counsel when there is no basis for such an accusation. More importantly, the accusation is a sign of exactly the kind of partiality in litigation which the defense fears. The Attorney General ignores the Supreme Court’s direction that “the prosecutor has a duty to the public to achieve justice and a duty to the defendant to never lose sight of the fact that the defendant is entitled to a full measure of fairness.” *Rogowicz*, 147 N.H. at 274. This is another sign that the Attorney General should not be prosecuting this case.

WHEREFORE, the Accused respectfully requests that the Court:

- (a) Disqualify Attorney General John Formella and all of the attorneys in the Department of Justice from prosecuting the case; and
- (b) Dismiss all of the indictments.

Dated this 22nd day of November, 2024.      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*