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

REPLY TO STATE'S OBJECTION
TO DEFENSE MOTION TO DISMISS OFFICIAL OPPRESSION CHARGE

The Accused, Supreme Court Justice Anna Barbara Hantz Marconi, respectfully replies to the State's Objection to her Motion to Dismiss Official Oppression Charge, Or, In the Alternative, to Strike References to the Code of Judicial Conduct. The State fails to address the central points of the defense motion, ignores the relevant New Hampshire precedent, and relies on an unbounded interpretation of RSA 643:1 that leads to absurd results. Its objection fails.

The State's Continued Parade of Horribles Is Unfounded.

1. The State is incorrect to say that the defense position would mean that "judges (and only judges) are immune from criminal prosecution under RSA 643:1 for abusing their public office…an absurd result." *St. Obj.* at ¶ 12. All judges, like any other person in this State, are subject to the criminal law. The defense position does nothing more than require the Attorney General to prosecute actual crimes while leaving the regulation of non-criminal judicial conduct where it belongs – before the Judicial Conduct Committee.

2. More importantly, the only "absurd results" would be those deriving from the State's position. If what the State alleges is true, the entirety of N.H. Sup. Ct. R. 38 and every rule and comment of the Code of Judicial Conduct, would be incorporated into the Criminal Code. That truly would lead to absurd and unintended results and would be directly contrary to the

introduction to the Code of Judicial Conduct which explicitly states, "[t]he Code is not designed or intended as a basis for civil or criminal liability." N.H. Sup. Ct. R. 38, Scope [7].[1]

3. Consideration of the logical extension of the State's argument shows that it is wrong. If a judge violates the Code of Judicial Conduct by letting his "personal and extrajudicial activities" take precedence over the "duties of judicial office," N.H. Sup. Ct. R. 38, Rule 2.1, "to benefit himself or another," RSA 643:1, such as benefitting himself by ending court early to attend his child's soccer game, according to the State, the judge has committed Official Oppression. If a judge permitted "family, social, financial, or other interests or relationships to influence the judge's judicial conduct or judgment," N.H. Sup. Ct. R. 38, Rule 2.4(B), say, for example, if the judge's wife was ill and the judge cancelled court "to benefit himself or another" (his wife), RSA 643:1, he would be guilty of Official Oppression. Put simply, incorporating the Code of Judicial Conduct into RSA 643:1 leads to the criminalization of every arguable act of judicial misconduct, no matter how minor, an unintended and "absurd" result. Avoiding such unintended consequences is the obvious reason for the language in the "Scope" provision at the front of the rules.

4. The absurdity of the State's argument is further illustrated by its claim that the "purposeful *mens rea* requirement in RSA 643:1" somehow saves its construction incorporating the judicial canons. *St. Obj.* at ¶ 7. Our Supreme Court has already squarely rejected this argument: "[t]here is no intent requirement in these canons." *In re Snow's Case*, 140 N.H. 618, 624 (1996). "In fact, it is practically impossible to impose a *mens rea* element on the 'appearance of impropriety' standard in Canon 2." *Id.* (citing *Blaisdell v. City of Rochester*, 135 N.H. 589, 593 (1993)). "Accordingly, the subjective intent or motivation of the judge is not a significant

[1] In its prior motion, the defense cited to the "Preamble" of the Code but that language is actually in the "Scope" provision immediately after the Preamble.

factor in assessing the judge's conduct under this standard." *Id.* (cleaned up, quotation and citation omitted). Yet, the State seeks to do precisely that. *See Indictment* (CID 2257292C) (alleging Justice Hantz Marconi violated "New Hampshire Supreme Court Rule 38…specifically…Rule[] 1.2").

5. Ignoring this clear text and then ignoring the on-point precedent the defense cited in its motion, *see D. Mot.* at ¶¶ 6-8, the State instead cites decisions from Washington and Oregon. Those decisions had nothing to do with judges and whether those states' respective codes of judicial conduct could be used as a basis for criminal liability. Instead, those cases concerned police misconduct and vagueness challenges to official misconduct statutes. *See State v. Birge*, 16 Wash. App. 2d 16, 21-22 (2021) (two police officers who encouraged grandmother to beat disabled child with a belt while one of the officers held the child down and were charged as both principals and as accomplices to third degree assault and official misconduct); *State v. Florea*, 296 Ore. 500, 502 (1984) (former police chief convicted of theft and official misconduct). These cases stand for nothing more than the obvious. Were a public official to commit a separate violation of the criminal code, as in *Birge*, third degree assault, or as in *Florea*, theft, then those criminal acts could serve as predicate "unauthorized acts" to support a criminal charge pursuant to the official misconduct statute. Thus, in New Hampshire, if a judge committed some other crime and RSA 643:1 was otherwise satisfied, then, of course, the judge's conduct would be unauthorized and the judge could also be convicted of Official Oppression. Where the State is wrong is in its reliance on the Code of Judicial Conduct for the predicate of an unauthorized act when the Code itself is neither "designed [n]or intended as a basis for…criminal liability." N.H. Sup. Ct. R. 38.

6. The State's incorrect interpretation can be explained by its failure to appreciate the history and interplay of RSA 643:1 and the Code of Judicial Conduct. The Official Oppression

statute came first. The legislature adopted it in 1971. *See* Laws 1971, 518:1 (enacting the Criminal Code containing 643:1). The Supreme Court did not decide *In re Mussman*, 112 N.H. 99 (1972) until the following year, when it held that "this court has the power, upon a proper showing of abuse or misconduct, to order a suspension of a judge from sitting in his court or to assign some other judge in his place." *Id.* at 103. Unsurprisingly, the Court then adopted the original canons of the Code of Judicial Conduct by rule the following year. *See In re Snow's Case*, 140 N.H. 618, 621 (1996). Simultaneously, the citizens of this State "approved part II, article 73-a of the State Constitution," which "has been recognized as vesting discipline of the legal profession in the supreme court." *See Op. of the Justices*, 140 N.H. 297, 299 (1995). The only way the 1971 legislature could have intended violations of the Code of Judicial Conduct to be "unauthorized" acts would be if, when enacting RSA 643:1, the legislature was able to see into the future, predict the adoption of the Code of Judicial Conduct, and intend the statute to incorporate the Code after it was written and adopted.

7. The Court should also consider *In re Judicial Conduct Comm.*, 151 N.H. 123 (2004). The legislature had adopted RSA 494-A, creating a Judicial Conduct Commission, "empowered to impose disciplinary actions" and "to report evidence of criminal conduct to the attorney general." *Id.* at 124-25 (quotation and citation omitted). In finding the legislation unconstitutional, the Court noted that the "court's superintending function…entails more than just the power to impose discipline on justices" as it "includes the authority to determine how best to regulate their conduct." *Id.* at 126.

8. Just as RSA 494-A:1 "specifically interferes with that discretion,…usurps an essential power of the judiciary, and is, therefore, unconstitutional," so too would the State's incorporation of the Code of Judicial Conduct into RSA 643:1. *Id.* at 127. Letting the legislature, or, for that matter, prosecutors for the State, "determine[e] whether [the Code of Judicial Conduct] has been

violated" is "unconstitutional." *Id.* at 129-30. The power to determine and to impose discipline for violations of the Code of Judicial Conduct is solely within the authority of the New Hampshire Supreme Court because the power is an "exclusive, judicial function." *Id.* at 126 (cleaned up, quoting *Opinion of the Justices (Judicial Salary Suspension)*, 140 N.H. 297, 301 (1995)). Holding otherwise violates the separation of powers. *See* N.H. Const. pt. I, art. 37.

9. Additionally, the State ignores the fact that the Code is not static. For example, the 1972 Model Code of Judicial Conduct, upon which the code adopted by the New Hampshire judiciary in 1973 is based, "used 'should' rather than 'shall.'" Charles G. Geyh et al, *Judicial Conduct & Ethics* § 1.04, 10-11 (2020). The language was not changed until the 1990 Model Code, *id.* at 11, which the New Hampshire judiciary later adopted. But if the judiciary can make changes to the Code of Judicial Conduct and thus expand the scope of criminal liability, this would run counter to our Constitution's command that the legislature draft the criminal laws. *See* N.H. Const., pt. II, art. 5; *Dow v. State*, 114 N.H. 714, 718 (1974) ("The constitution assigns to the legislature the power to enact laws defining and to fix the degree, extent, and method for punishment"); McNamara, 1 NH Practice Series: Criminal Practice & Procedure § 1.01 (2025) ("Part 2, Article 5 of the New Hampshire Constitution assigns to the Legislature the power to enact laws defining crimes and to fix the degree, extent, and nature of punishment.").

<u>In Addition to An Absurd and Unconstitutional Interpretation, the State Fails to Address the Precedent from the New Hampshire Supreme Court.</u>

10. Nowhere in the State's objection does it make any reference or response to the defense's discussion of *State v. Decker*, 138 N.H. 432 (1994). In *Decker*, a defendant argued that the attorney general's office violated a Rule of Professional Conduct warranting suppression of his confession. *Id.* at 438. Swiftly rejecting his argument, the Supreme Court held that "suppression of a confession is not warranted absent a violation of the defendant's constitutional

or statutory rights." *Id.* The "Rules of Professional Conduct are aimed at policing the conduct of attorneys, not at creating substantive rights on behalf of third parties." *Id.* (citing the "Scope" section of the Rules, specifically that they "are designed to provide guidance…and to provide a structure for regulating conduct through disciplinary agencies…Violation 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."). Our Court quoted at length from the Michigan Supreme Court's decision in *People v. Green*, 405 Mich. 273, 274 (1979) explaining that the rules are "self-imposed internal regulations prescribing the standards of conduct" and "[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[.]" *Decker*, 138 N.H. at 439 (quoting *Green*, 405 Mich. at 274). *See also Sullivan County Regional Refuse Disposal Dist. v. Town of Acworth*, 141 N.H. 479, 483 (1996) (explaining that "*Decker* reflects our reluctance to allow the Rules to become a wellspring of rights that protect other parties or other interests"); *In re Burling*, 139 N.H. 266, 271 (1994) (explaining that the rules are "self-imposed internal regulations prescribing standards of conduct for members of the bar") (quotation and citation omitted). Similarly, and as emphasized above, the "Scope" section of the analogous Code of Judicial Conduct "is not designed or intended as a basis for civil or criminal liability." N.H. Sup. Ct. R. 38, Scope [7]. The logic of *Decker* controls here.

11. For this very reason, the defense pointed to numerous cases from other jurisdictions noting that codes of judicial conduct are not intended as a basis for criminal or civil liability. *See D. Mot.* at ¶¶ 6-8. Thus, in *United States v. Terry*, No. 1:10CR390, 2011 U.S. Dist. LEXIS 57288 (N.D. Ohio May 26, 2011), the court found "that the judicial code does not have the force of law" and "cannot be used to support the findings of a legal duty under state law[.]" *Id.* at *28-29. Likewise, in *Clayton v. Willis*, 489 So. 2d 813, 815-16 (Fla. Dist. Ct. App. 1986), a Florida

appellate court found that a judge charged with criminal misconduct offenses for alleged violations of the judicial code was entitled to a writ of prohibition because "[s]uch violations are not crimes and, except for impeachment, are within the exclusive jurisdiction" of the judicial branch. As New York's highest court observed almost a half-century ago, it "perceive[d] no intention on the part of the Legislature to cloak the District Attorney with responsibility for compelling conformity with the Code of Judicial Conduct" because to "accept the proposition advanced by [the State] would be to countenance the institution of criminal proceedings for any alleged violation of the provisions of the code." *People v. La Carrubba*, 46 N.Y.2d 658, 664-65 (1979).

12. The State fails to show that any of these authorities should be rejected.

Because the Only "Unauthorized Acts" Alleged in the Indictment Are Predicated on Violations of the Code of Judicial Conduct, the Indictment Fails to State a Crime and Should Be Dismissed.

13. The crime of Official Oppression requires "an unauthorized act which purports to be an act of office" or "knowingly refrain[ing] from a duty imposed on [her] by law or clearly inherent in the nature of [her] office." RSA 643:1. The only reference in the indictment to an allegedly "unauthorized act" or a "duty" is a reference to the "New Hampshire Code of Judicial Conduct." *Indictment* (CID 2257292C). As detailed above, a violation of the Code cannot serve as the predicate "unauthorized act." Therefore, the indictment is defective, and the Court should dismiss this charge. *See, e.g.*, *State v. Mealey*, 100 N.H. 228, 230, 232 (1956) (a "complaint that fails to allege every fact necessary to constitute the offense changed is defective" and is quashed).

Conclusion.

14. The plain text of the Code of Judicial Conduct, analogous New Hampshire Supreme Court precedent, and precedent from other jurisdictions shows that the State is wrong. The Code of Judicial Conduct cannot be a basis for criminal prosecution. Judges, like everyone else in the State, are subject to criminal liability. If the judge commits a separate violation of the criminal code, under color of office, they too would be liable for Official Oppression. But what the State cannot do is use a violation of the judiciary-exclusive, self-imposed, internal regulations as a predicate act for a charge of Official Oppression. It is contrary to the plain language of Code, relevant case law, and would violate the separation of powers. The Court should dismiss the indictment.

WHEREFORE, the Accused respectfully requests that the Court order that the indictment be dismissed.

Dated this 24th 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