

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 MOTION TO DISMISS IMPROPER INFLUENCE INDICTMENTS

The Accused, New Hampshire Supreme Court Justice Anna Barbara Hantz Marconi, respectfully replies to the State’s Objection to her Motion to Dismiss Indictments Alleging Attempt or Criminal Solicitation of Improper Influence. In short, neither indictment states a crime because neither indictment alleges that it was Justice Hantz Marconi’s purpose to “privately address” then-Governor Sununu. Moreover, now that discovery has been produced, it is evident that the State could not make such an allegation. The indictments should be dismissed. The State’s Arguments Regarding Collateral Estoppel and Res Judicata Are Meritless.

1. The State’s claims that the defense’s argument are foreclosed by collateral estoppel and *res judicata* are wrong for two independent reasons. *See St. Obj. to M. to Dismiss Indictments Alleging Attempt or Crim. Solicitation of Improper Influence* at ¶¶ 3-7 [hereafter *St. Obj.*].

2. First, the State’s argument that the defense already made this motion, *see id.* at ¶¶ 3, 7, is simply not true. In November, just a few weeks after the indictments were filed, the defense filed a motion to dismiss all of the indictments because “all of the conduct alleged by the Attorney General in its indictments is either protected by the First Amendment or by judicial immunity.” *See D. Mot. to Dismiss All Indictments Because the Alleged Conduct is Protected by*

*the First Amendment, the Constitutional Right of Redress, and Judicial Immunity* (underline added) at 1 (“moves to dismiss all indictments”); *id.* at 2 (“The court should dismiss all of the indictments”); *id.* at 26 (“Order that all the indictments in this case be dismissed”). That motion did not address the Improper Influence indictments specifically and did not discuss the failure of the indictments to allege an attempt or solicitation involving private addresses. The defense did not have discovery when it filed that November motion. Finally, the defense specifically put the State and the Court on notice that further motions directed at particular indictments and their particular defects would be forthcoming. *See id.* at 11, n. 1.

3. The motion at issue here, filed in March, concerns two of the indictments, both involving inchoate crimes and the substantive crime of Improper Influence. The legal basis of the March 2025 motion regarding the two Improper Influence indictments is entirely distinct and different from the legal basis for the November motion to dismiss all indictments. Thus, the State’s claim that this Court has already ruled on this motion is simply wrong.

4. Second, contrary to the State’s claims, even if the State’s mischaracterization of the motions was correct, the doctrines of collateral estoppel and *res judicata* are no bar. In *State v. Wilkinson*, 136 N.H. 170 (1992), a defendant argued that the superior court “was precluded from reconsidering its decision on the defendant’s motion *in limine* because of principles of *res judicata* and law of the case.” *Id.* at 177. Rejecting that argument, the Supreme Court explained that “New Hampshire law has long granted the superior court jurisdiction over a matter until its final judgment.” *Id.* (citing *Redlon Co. v. Corporation*, 91 N.H. 502, 503 (1941)). “Thus,” our Court concluded, “interlocutory rulings may be reconsidered at the discretion of the same or another judge of the superior court.” *Wilkinson*, 136 N.H. at 177.

5. Likewise, in *N. E. Redlon Co. v. Franklin Square Corp.*, 91 N.H. 502 (1941), upon which the *Wilkinson* Court relied, our Supreme Court explained that “[d]iscretionary or

interlocutory orders of the Superior Court do not result in an adjudication of the rights of the parties until the case goes to final judgment.” *Redlon*, 91 N.H. at 503 (citing *Russell v. Dyer*, 39 N.H. 528, 531 (1859)). “By the weight of common-law authority and upon the better reasoning, the Superior Court’s discretionary powers are continuous” and “[t]hey may be exercised, and prior exercise may be corrected, as sound discretion may require, at any time prior to final judgment.” *Redlon*, 91 N.H. at 505 (citations omitted). *See also State v. Poirier*, 136 N.H. 477, 479-80 (1992) (quoting both *Redlon* and *Wilkinson*). *Cf. McNamara 2 N.H. Practice Series: Criminal Practice & Procedure* § 25.19 (2025) (“The principles of *res judicata* never preclude a trial court from reconsidering its decision on a motion *in limine*. New Hampshire law has long granted the Superior Court jurisdiction over a matter until its final judgment. Thus, interlocutory rulings may be reconsidered at the discretion of the same or another judge of the Superior Court.”).

The State’s Interpretation of Inchoate Crimes and RSA 640:3, Improper Influence, Unmoor That Statute from Its Plain Language.

6. The “State must prove that it was Justice Hantz Marconi’s purpose to ‘privately address’ then-Governor Sununu.” *D. Mot.* at ¶ 6. “[S]ince the State has not alleged the necessary mental state—that Justice Hantz Marconi had a purpose to privately address then-Governor Sununu—the State has not alleged the crime it purports to charge.” *Id.* The State responds that in the Criminal Solicitation context, “it is not [the] Defendant, but then-Governor Sununu, who would have been required to have the ‘purpose to privately address’ under the Defendant’s theory advanced in the Motion.” *St. Obj.* at ¶ 8. In the context of both Attempt and Criminal Solicitation, the State adds, “‘privately address’ is an element of the crime of Improper Influence, it is not an element of either Attempt or Criminal Solicitation.” *Id.* at 9.

7. The pitfalls of the State’s interpretation are legion. It is undisputed that in both the inchoate crimes of Attempt and Criminal Solicitation, the State must prove a purposeful *mens rea*. See *State v. Johnson*, 144 N.H. 175, 178 (1999) (Attempt); *State v. Carr*, 167 N.H. 260, 269-70 (2015) (Criminal Solicitation). But “[a]s is true generally of anticipatory offenses, a clear understanding of the requisite mental state in a particular case necessitates an analysis of the elements of the crime to which the anticipatory offense relates” because these crimes do “not exist in the abstract, but rather exist[] only in relation to other offenses.” Wayne LaFave, 2 Subst. Crim. L. § 11.3(a) (3d ed. Oct. 2024). Thus, the State must prove either that it was Justice Hantz Marconi’s purpose to commit Improper Influence when she allegedly attempted to commit Improper Influence, *Indictment* (CID 2257290C), or it was her purpose that another engage in Improper Influence when she allegedly solicited Improper Influence, *Indictment* (CID 2257291C).

8. As to the former, attempting Improper Influence, that requires the State to prove that Justice Hantz Marconi had the purpose to “privately address” then-Governor Sununu. But as the defense motion explained, that is not alleged in the indictment as is required by our Constitution and applicable precedent. See *D. Mot.* at ¶¶ 4-5, 8-11.

9. As to the latter, criminal solicitation of Improper Influence, whether or not the solicitor or the solicitee must be the person who is “privately addressing” the public servant, it still must be the solicitor’s intent for a private address to occur. The indictment makes no such representation. See *Indictment* (CID 2257291C). Nor could it because there is absolutely no evidence that Justice Hantz Marconi asked then-Governor Sununu to do anything, let alone that she had a purpose to privately address him or ask him to privately address someone. See *D. Mot.* at ¶ 11.

10. The breadth of the State’s interpretation bears explication. By the State’s logic, any conversation with any public servant is arguably a Criminal Solicitation of Improper Influence because that public servant could possibly “privately address” someone else, thereby making the original speaker liable, regardless of whether the original speaker asked or intended the public servant to do anything. If a citizen told the Governor that they had concerns about certain books in a school, and the Governor then called the Commissioner of Education, the citizen would have criminally solicited Improper Influence. If a citizen told her Representative that a certain State action was baseless, and the Representative then called the Governor, the citizen criminally solicited Improper Influence.

The State’s Reliance on the Grand Jury’s Determination Is Unfounded.

11. The State argues that because the grand jury returned indictments at the State’s direction, “this ends [the] Court’s pre-trial inquiry into the sufficiency of the evidence.” *St. Obj.* at ¶ 15. It does not. Grand juries are secret, one-sided affairs, where exculpatory evidence is not presented and where grand jurors are bound by the prosecutor’s interpretation of the law. *See generally* McNamara, 1 NH Practice Series: Criminal Practice & Procedure §§ 20.13, 20.18 (2025). If grand jury indictments were unassailable, even based on their failure to allege a crime, there would be no need for the protections our Court has designed regarding the sufficiency of indictments (and bills of particular). *See D. Mot.* at ¶ 8. If grand jury determinations could not be challenged, then the defendant in *State v. Shannon*, 125 N.H. 663 (1984) could not have had her convictions reversed because the indictments failed to include the necessary elements. *Id.* at 666-67. The same is true here.

Conclusion.

12. For all of these reasons, the Attempt and Criminal Solicitation of Improper Influence indictments (CIDs 2257290C, 2257291C) should be dismissed.

WHEREFORE, the Accused respectfully requests that the Court order the two indictments in this case be dismissed.

Dated this 24th day of April, 2025.

Respectfully submitted,

*/s/ Richard Guerriero*

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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*