

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ANNA BARBARA HANTZ MARCONI

**STATE'S OBJECTION TO MOTION TO DISMISS INDICTMENTS ALLEGING
ATTEMPT OR CRIMINAL SOLICITATION OF IMPROPER INFLUENCE**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and objects to Defendant's Motion to Dismiss Indictments Alleging Attempt or Criminal Solicitation of Improper Influence ("Motion"). In support of this Objection, the State represents as follows:

1. Defendant was indicted by the Merrimack County Grand Jury for, *inter alia*, Attempt to Commit Improper Influence (Charge ID 2257290C) and Criminal Solicitation of Improper Influence (Charge ID 2257291C).

2. The Motion argues that the indictments should be dismissed because: (1) the statutes require the State to prove that Defendant "had a purpose to privately address then-Governor Sununu;" (2) the indictments do not allege this purported element of the offenses; and (3) the State is unable to prove this purported element of the offenses. Motion at 6-14.

Collateral Estoppel and Res Judicata Preclude Motion

3. The Motion argues that the indictments fail to allege essential elements. In her prior motion to dismiss indictments on First Amendment and judicial immunity grounds, Defendant moved for a bill of particulars on the basis that the indictments were insufficient to place Defendant on notice. *See* Defendant's Motion to Dismiss All Indictments at ¶¶ 60-63. In

denying Defendant's motion for a bill of particulars, this Court found that the indictments "meet [the] standard" for sufficiency set forth in *State v. Carr*, 167 N.H. 264, 269 (2015). Order on Defendant's Motion to Dismiss All Indictments at *15-16. This Court specifically found that "[t]he indictments **recite the elements of the offenses** and provide enough facts to notify the defendant of the charges." Id. at *16 (emphasis added).

4. "In its most basic formulation, the doctrine of collateral estoppel bars a party to a prior action . . . from relitigating any issue or fact actually litigated and determined in the prior action. Res judicata, or 'claim preclusion,' is a broader remedy and bars the relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation." *Gray v. Kelly*, 161 N.H. 160, 164 (2010) (quotation omitted).

5. "For collateral estoppel to apply, three basic conditions must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so." *Stewart v. Bader*, 154 N.H. 75, 80-81 (2006).

6. There are three elements for *res judicata* to apply: "(1) the parties in both actions are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment of the merits." *Riverbend Condo Ass'n v. Groundhog Landscaping & Prop. Maint.*, 173 N.H. 372, 375 (2020).

7. In this case, the parties have already litigated, and this Court has already ruled on, the issue of the sufficiency of the indictments, and this Court has already found that "[t]he indictments **recite the elements of the offenses** and provide enough facts to notify the defendant of the charges." Order on Defendant's Motion to Dismiss All Indictments at *16 (emphasis

added). Relitigating the sufficiency of the indictments through collateral attacks on this Court's ruling wastes the resources of the parties and the Court. Accordingly, under the doctrines of collateral estoppel and *res judicata*, the Motion should be denied.

Defendant's Argument is Inapplicable to Criminal Solicitation Charge

8. Assuming *in arguendo* Defendant's position in the Motion, such an argument is inapplicable to Charge ID 2257291C (Criminal Solicitation of Improper Influence). The Motion argues that in the context of the Criminal Solicitation charge, "the State must prove that it was [Defendant's] purpose to 'privately address' then-Governor Sununu" Motion at 7. However, the indictment in Charge ID 2257291C alleges that Defendant committed Criminal Solicitation "by soliciting [then-]Governor Christopher Sununu to improperly influence a member and/or members of the New Hampshire Department of Justice" That is, it is not Defendant, but then-Governor Sununu, who would be required to have the "purpose to privately address" under the Defendant's theory advanced in the Motion. Defendant's argument is analogous to saying that if Defendant solicits Perpetrator to commit Criminal Threatening under RSA 631:4, I(a) against Victim, then Defendant must place Perpetrator "in fear of imminent bodily injury or physical contact." The element of the crime solicited is not imported to the interaction between Defendant and Perpetrator – it is only relevant to the inchoate interaction between Perpetrator and Victim. Accordingly, Defendant's argument is inapplicable to the charge of Criminal Solicitation (Charge ID 2257291C), and Defendant's motion to dismiss this charge should be denied on this ground.

There is No Element of "Privately Address" Under Crimes Charged

9. The Motion concerns two inchoate crimes – Attempt and Criminal Solicitation. Both of these offenses are substantive crimes distinct and separate from the crime attempted or

solicited. *State v. Harper*, 126 N.H. 815, 818 (1985) (“An attempt is a substantive crime in and of itself”); *State v. Carr*, 167 N.H. 264, 269-270 (2015) (discussing Criminal Solicitation as an offense distinct from the crime solicited). While “privately address” is an element of the crime of Improper Influence, it is not an element of either Attempt or Criminal Solicitation. Compare RSA 640:3, I(b) with RSA 629:1, I, RSA 629:2, I.

10. “An indictment charging an attempt must allege both an intent to commit a crime and an overt act in furtherance of the crime. The attempt statute requires the State to identify the intended offense but **does not require the State to plead and prove the elements of the intended offense**. Since an attempted crime is by definition a crime not completed, **the State could not plead, factually identify, and prove the elements of the intended offense as if it had been carried out.**” *State v. Perry*, 166 N.H. 716, 724 (2014) (quotations omitted) (emphasis added). For example, “all that [is] required [t]o charge [a] defendant with attempted armed robbery, class A felony, [is for] the indictment . . . to allege that the defendant (1) with a purpose to commit *armed robbery*, (2) committed acts constituting a substantial step toward the commission of *that crime*.” *Id.* at 724-25 (quotation and citation omitted) (emphasis in original). See also *State v. Casanova*, 164 N.H. 563, 566 (2013) (holding that because statutory variants of an underlying crime are not elements of an attempt to commit the underlying crime, “jurors [are] not required to unanimously find which specific [statutory variant] the defendant intended to commit; it [is] sufficient that they unanimously conclude[] that the defendant intended to commit [any of the applicable statutory] variant[s]”).

11. Similarly, “[c]ontrary to the defendant’s assertions, the criminal solicitation statute does not require the State to plead and prove the elements of the solicited crime” *Carr*, 167 N.H. at 270. “The mens rea of solicitation is a specific intent to have someone commit

a completed crime.” *Id.* at 269 (quotation omitted). “However, unlike conspiracy and attempt, it requires no overt act other than the offer [(i.e., the solicitation)] itself.” *Id.* at 270 (citation omitted). “Thus, solicitation can be viewed as an attempt to conspire.” *Id.* (quotation omitted). “Because solicitation is an attempt to conspire, and because attempt is by definition a crime not completed, **the State could not have pleaded, factually identified, and proved all of the elements of the [crime solicited].**” *Id.* (quotation omitted) (emphasis added). “Requiring the State to prove the elements of [the crime solicited] **would force the State to prove more than is required by the criminal solicitation statute.**” *Id.* (citation omitted) (emphasis added).

12. Charge ID 2257290C alleges the two elements of Attempt: (1) an intent to commit a crime (“with a purpose that the crime of Improper Influence be committed”); and (2) an overt act in furtherance of the crime (“did or omitted to do anything which, under the circumstances as she believed them to be, was an act or omission constituting a substantial step toward the commission of said crime”). *Perry*, 166 N.H. at 724-25. Charge ID 2257291C alleges the two elements of Criminal Solicitation: (1) a specific intent to have someone commit a completed crime (“with the purpose that another engage in conduct constituting the crime of Improper Influence”); and (2) a solicitation (“commanded, solicited, or requested another to engage in such conduct”). *Carr*, 167 N.H. at 269-70.

13. Thus, “[t]he indictments [at issue] recite the elements of the offenses” Order on Defendant’s Motion to Dismiss All Indictments at *15-16. The Motion is nothing more than an attempt by Defendant to “force the State to prove more than is required by the [attempt and] criminal solicitation statute[s],” requiring to State to plead, identify, and prove an “element[] of [the underlying crimes attempted and solicited].” *Carr*, 167 N.H. at 270. Accordingly, the Motion should be denied.

There Is Still No Summary Judgment in Criminal Cases.

14. Again in the litigation of this case, despite Defendant's awareness that "there 'is no summary judgment procedure in criminal cases' nor 'a pre-trial determination of sufficiency of the evidence . . .,'" (Defendant's Motion to Dismiss All Indictments at ¶ 58 (quoting *State v. Bisbee*, 165 N.H. 61, 65-66 (2013)), Defendant nevertheless again seeks summary judgment through a pre-trial determination of sufficiency of the evidence. *See* Motion at ¶¶ 11-14. That is, despite the fact that the New Hampshire Supreme Court has refused to import elements of crimes attempted or solicited into Attempt and Criminal Solicitation, partially because these charges presuppose that some element of the crime cannot be proven (*Perry*, 166 N.H. at 724; *Carr*, 167 N.H. at 270), Defendant argues that not only should this Court import such an element, but should then engage in the type of review prohibited under *Bisbee*, find that the State cannot prove such element, and dismiss the indictments. Motion at ¶ 14.

15. However, "[t]he indictments [at issue] recite the elements of the offenses," and "[t]he fact that indictments were issued in this case demonstrate that the grand jury found, based on the totality of the evidence that was presented to them, that there was probable cause to believe that the Defendant [committed the acts alleged] with the necessary mental state." Order on Defendant's Motion to Dismiss All Indictments at *15-17. Under *Bisbee*, this ends this Court's pre-trial inquiry into the sufficiency of the evidence.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Deny Defendant's Motion to Dismiss Charge IDs 2257290C and 2257291C; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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Date: April 14, 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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