

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

GENO JOSEPH MARCONI

Case No. 218-2024-CR-01426

**STATE'S OBJECTION TO MOTION TO DISMISS/QUASH RE CHARGE ID's  
2257802C & 2257803C, OR IN THE ALTERNATIVE, FOR BILL OF PARTICULARS**

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 re Charge ID's 2257802C & 2257803C, or in the Alternative, for Bill of Particulars. In support thereof, the State represents as follows:

1. Defendant is alleged to have deleted a voicemail and/or voicemails from a phone. Defendant is alleged to have done so with a purpose to impair the verity or availability of the voicemail(s) in an official proceeding or investigation that he believed to be pending or about to be instituted, in violation of RSA 641:6, I. Defendant is also alleged to have done so with a purpose to hinder or interfere with a public servant performing or purporting to perform an official function and/or to retaliate for the performance of such a function, in violation of RSA 642:1, I. The numbers and associated contacts of the deleted voicemail(s) at issue have been provided in discovery. *See Bates Stamp #0009189*. Witness statements by these individuals have also been provided in discovery.

2. Defendant argues that in order to violated RSA 641:6, I (and therefore to be “unlawful” for purposes of RSA 642:1, I), the State must allege that the falsified item(s) – in this case, the voicemail(s) – must have “known evidentiary value . . . to some official proceeding or investigation” in order to constitute “physical evidence.” Motion at ¶¶ 13-15. Defendant argues that “[w]ithout such information,” Defendant has not been properly placed on notice as to the acts constituting the crimes charged. Id. at ¶ 15. Defendant also alleges that the term “thing” as used in RSA 641:6, I, is unconstitutionally vague as applied to Defendant for the same reason. Id. at ¶¶ 16-18.

### **Defendant’s Argument Misunderstands Elements of RSA 641:6, I**

3. RSA 641:6, I, provides:

A person commits a class B felony if, believing than an official proceeding, as defined in RSA 641:1, II, or investigation is pending or about to be instituted, he:

I. Alters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation; . . . .

4. The elements for the offense are thus: (1) the defendant believes that an official proceeding or investigation is pending or about to be instituted; (2) the defendant alters, destroys, conceals, or removes any thing in order to impair its verity or availability in such proceeding or investigation. Despite Defendant’s focus on “physical evidence,” which is in the title of RSA 641:6, the term “physical evidence” appears nowhere in the statute.

5. “The defendant’s reasoning is flawed, however, because the language of RSA 641:6 does not make the admissibility of the evidence at trial an element of the offense of falsifying physical evidence.” *State v. McGurk*, 157 N.H. 765, 770 (2008). The statute includes situations in which the defendant, by actions, “clearly impaired the availability of that evidence for any resulting proceeding or investigation irrespective of its admissibility against him at trial.”

*Id.* at 770-71 (quoting *State v. Wagstaff*, 846 P.2d 1311, 1312 (Utah Ct. App.), *cert. denied*, 857 P.2d 948 (Utah 1993)). “This language indicates that, when the legislature enacted the statute, it was concerned with preserving physical evidence for investigatory purposes or for use in subsequent litigation.” *State v. Gunnip*, 174 N.H. 778, 782 (2022).

6. An investigation cannot determine the evidentiary value of an item, and attorneys cannot form opinions about the relevance and admissibility of an item, if that item is not preserved – that is, if a suspect alters, conceals, destroys, or removes it. A requirement that the State allege the evidentiary value of the evidence would serve only to excuse a successful attempt to falsify physical evidence from criminal investigation or prosecution. This lack of “availability” is specifically one of the issues that RSA 641:6, I, was meant to remedy – preventing the absence of evidence from consideration. *Id.* (discussing relevance of item independent of its admissibility at trial).

7. The only further requirement outside the language of the statute that the New Hampshire Supreme Court has imposed is that the item falsified “must have enough evidentiary value such that it is relevant to officials trying to reconstruct what had occurred.” *Id.* (quotation omitted). This would be satisfied in a situation, like this one, where a person conceals, destroys, or removes an item because investigators are denied the opportunity to analyze the potential relevance of the item to the investigation if it is deleted, thus denying them the ability to reconstruct what occurred with regard to the falsified item and its relation to the investigation.

8. The New Hampshire Supreme Court has rejected a similar argument of reading a descriptor from a title into the elements of a portion of the Witness Tampering statute where the words do not appear, RSA 641:5, I. In *State v. Kilgus*, 125 N.H. 739, 742 (1984), the defendant argued that RSA 641:5, I(a) required the “person” tampered with was not a “witness or

informant” – a word that appears in the title of the statute, but not the statute itself. In rejecting that contention, the Court stated:

The meaning of the word “person” is clear and unambiguous. It refers to all people, without limitation as to their status as witnesses or informants. “When the language used in a statute is clear and unambiguous, its meaning is not subject to modification by judicial construction.” *State v. Flynn*, 123 N.H. 457, 462, 464 A.2d 268, 271 (1983); RSA 21:2.

The statute limits the term “person” and establishes a connection between the “person” and the investigation pending by requiring that the defendant believe “that an official proceeding . . . or investigation is pending or about to be instituted,” when he attempts to induce a person to testify or inform falsely. RSA 641:5, I(a). . . . Under the language of the statute it was not necessary that [the person solicited] actually inform or testify so as to become an “informant” or a “witness”; it was only necessary that the defendant believe that [the person] was a potential witness. Witness tampering is a crime based on the attempt to induce false testimony and, therefore, the statute focuses on the defendant’s intent, rather than the actions of the person tampered with, or the outcome of the pending investigation. RSA 641:5, I(a).

The defendant claims that the title of the statute requires that the person tampered with actually become a witness or informant in the pending investigation. Although the title is “Tampering with Witnesses and Informants,” the text of this section does not mention the terms “witness” or “informant.” RSA 641:5, I(a). **The title of a statute is not conclusive of its interpretation, and where the statutory language is clear and unambiguous this court will not consider the title in determining the meaning of the statute.** *In re Vernon E.*, 121 N.H. 836, 841, 435 A.2d 833, 836 (1981).

*Id.* (emphasis added).

9. An indictment must only contain “the elements of the offense and enough facts to warn a defendant of the specific charges against him.” *State v. Bisbee*, 165 N.H. 61, 65-66 (2013) (citation omitted).

10. A bill of particulars is a tool for clarifying “an inadequate indictment or complaint;” it is not “a general discovery device.” *State v. Chick*, 141 N.H. 503, 506 (1996) (quoting *State v. Allison*, 134 N.H. 550, 554 (1991)). “The purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense and to

enable him to prepare an intelligent defense.” *State v. Kuchman*, 168 N.H. 779, 784-85 (2016) (quotation and citations omitted). Accordingly, it is inappropriate to use a bill of particulars to require the state to “specify the means by which the crime was accomplished, or other facts that are not essential elements of the crime,” (*Chick*, 141 N.H. at 506 (citations omitted)) including “us[ing] a bill of particulars to simplify [Defendant’s] defense strategy by forcing the State to narrow its theory of liability” (*Kuchman*, 168 N.H. at 786). “However desirable it might seem to an accused that the State should be compelled to set out in an indictment the details of the evidence on which it relies to sustain the charges made, [Defendant is] not entitled by law to that information.” *State v. Superior Court*, 106 N.H. 228, 231 (1965) (quotation and citations omitted), *overruled in part on other grounds*, *State v. Laux*, 167 N.H. 698, 704-05 (2015). *See also*, *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015 (1980) (citations omitted) (bill of particulars “is not designed to compel the government to detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial”).

11. In this case, it is alleged that Defendant deleted voicemails. These voicemails were from witnesses in the underlying investigation, as identified in discovery. Defendant has been notified of the charges against him such that he can prepare an intelligent defense and not be subjected to a subsequent prosecution for the same conduct. Accordingly, Defendant’s motion to dismiss or quash the indictments, or in the alternative for a bill of particulars, should be denied.

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

(A) Dismiss Defendant’s motion; and

(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: June 17, 2025

/s/ Joe M. Fincham II  
Joe M. Fincham II, Bar #273596  
Assistant Attorney General  
Criminal Justice Bureau  
New Hampshire Department of Justice  
1 Granite Place South  
Concord, NH 03301  
(603) 271-3671  
joe.m.finchamii@doj.nh.gov

/s/ Dan A. Jiménez  
Dan A. Jiménez, Bar #273604  
Senior Assistant Attorney General  
Criminal Justice Bureau  
New Hampshire Department of Justice  
1 Granite Place South  
Concord, NH 03301  
(603) 271-3671  
dan.a.jimenez@doj.nh.gov

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  
Joe M. Fincham II