

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

HILLSBOROUGH, SS.  
SOUTHERN DISTRICT

OCTOBER TERM, 2022

STATE OF NEW HAMPSHIRE  
V.  
DANIELLE DAUPHINAIS

226-2021-CR-0944

**STATE'S RESPONSE TO DEFENDANT'S MOTION**  
**FOR IMMEDIATE DISCLOSURE OF DISCOVERY**

NOW COMES the State of New Hampshire, by and through the Office of the Attorney General, and responds as follows:

FACTS

1. The defendant is currently charged with first-degree murder and related charges for killing Elijah Lewis (Age 5) in or around September of 2021 in Merrimack, New Hampshire.
2. On the evening of October 11, 2022, news outlets reported that the defendant had been placed on the witness list in the upcoming trial of *State of New Hampshire v. Adam Montgomery*, which is unrelated to the defendant's criminal charges. On October 12, 2022, counsel for the defendant filed the instant motion. Of note, defense counsel did not contact the undersigned counsel prior to the filing of the instant motion.<sup>1</sup>
3. By way of background, on October 17, 2021, the defendant was arrested on charges of Tampering with a Witness and Endangering the Welfare of a Child. Since that time,

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<sup>1</sup> Rule 12(b)(2)(6) states that "no motion seeking discovery of any of the materials required to be disclosed by paragraph (b)(1), (b)(2) or (b)(4) of this rule shall be accepted for filing by the clerk of court unless said motion contains a specific recitation of (A) the particular discovery materials sought by the motion; **(B) the efforts which the movant has made to obtain said materials from the opposing party without the need for filing a motion;** and (C) the reasons, if any, given by the opposing party for refusing to provide such materials. *N.H. R. Crim. P. 12* (emphasis added).

the defendant has been held at the Hillsborough County House of Corrections. She was arraigned on those charges and appointed counsel.

4. While incarcerated at the Hillsborough County House of Corrections and prior to her indictment for the murder of Elijah Lewis, the defendant was voluntarily interviewed related to an ongoing investigation that is unrelated to the charges against her, namely the investigation into the disappearance of Harmony Montgomery.

5. A review of the materials from that unrelated investigation shows that on April 14, 2022, investigators from the Manchester Police Department<sup>2</sup> conducted a recorded interview with the defendant. At the outset of the interview, the investigator stated:

“So again, we’re here to talk about the Harmony Montgomery case, you’re not in any trouble at all, we’re not here to talk about your case. This is strictly voluntary so if you don’t want to answer any questions, I totally understand. Uh we’re just looking for kind of what you know, what you’ve heard and any information that might help us in the case we have.”

6. During the course of the interview, the defendant did mention the charges against her in the context of explaining her contact with Kayla Montgomery while inside of the Hillsborough County House of Corrections. The defendant was not asked to relate any details about her case and was not questioned about Elijah Lewis. No substantive follow-up questions were asked.

7. On April 15, 2022, the defendant was indicted by a grand jury sitting in Hillsborough County, Southern District on charges of First-Degree Murder, Reckless Second-Degree Murder, and Tampering with Witnesses.

8. On May 3, 2022, investigators in the unrelated investigation conducted a brief, follow-up interview with the defendant. At the onset of that interview, the investigator advised the defendant that they were not there to talk about her case. According to the report related to that interview, the defendant’s case was not mentioned.

9. Information related to the two interviews of the defendant was reported to the team involved in the investigation of that unrelated matter. The related materials were not shared with the undersigned counsel until October 12, 2022, following the filing of the instant motion.

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<sup>2</sup> The investigation into the disappearance or murder of E.L. was primarily conducted by the New Hampshire State Police and the Merrimack Police Department, and not the Manchester Police Department.

10. Upon the filing of the instant motion, the undersigned counsel obtained the reports and audio recording related to the two interviews and prepared to provide them to defense counsel.

11. The State has filed a separate Motion with the Court seeking to disclose the materials related to these interviews to defense counsel, under seal, in light of the potential impact that the disclosure of these materials could have in the unrelated, pending criminal investigation.

12. The State recognizes that the defendant was represented by counsel at the time that these interviews occurred.

### LEGAL ANALYSIS

13. Defense counsel asserts that the defendant's right to counsel under the Sixth Amendment of the United States Constitution and Part 1, Article 15 of the New Hampshire Constitution was violated. However, counsel cites no law to support this assertion.

14. The Sixth Amendment to the United States Constitution guarantees a defendant the right to have the assistance of competent counsel in their defense. Similarly, Part 1, Article 15 of the New Hampshire Constitution provides that every person "held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown."

15. The analysis as to any violation is the same under either the State or the Federal Constitution as the Federal Constitution offers the defendant no greater protection than that of the New Hampshire Constitution.

16. This right to counsel is "designed to give a defendant the benefit of legal advice when making important decisions regarding [her] case." *State v. White*, 163 N.H. 303 (2012) (citing *State v. Jelenewski*, 147 N.H. 462 (2002) and *United States v. Gouveia*, 467 U.S. 180 (1984)).

17. The New Hampshire Supreme Court has found that the right to counsel is offense specific. *Id.* at 308. This means that at the time of the April 14, 2022, interview, the defendant had a right to counsel as to her charges for Tampering with a Witness and Endangering the Welfare of a Child. She did not and does not have a right to counsel as to the disappearance of

Harmony Montgomery, for which she is not a suspect. Arguably, she would not have had a right to counsel even related to the murder of Elijah Lewis if investigators had made efforts to question her about that investigation.

18. In *White*, the defendant was questioned by a government agent related to a shooting while he was pending related drug charges and represented by counsel. The New Hampshire Supreme Court found that that the defendant's right to counsel had attached with respect to the drug charges but held that "because judicial proceedings had not yet commenced ... with respect to the shooting, [the] right to counsel had not attached as to those charges." 163 N.H. at 310. The Court thereby found that the statements concerning the drug charges should be suppressed but allowed the use of the defendant's statements about the shooting at his trial.

19. In *Texas v. Cobb*, the United States Supreme Court indicated that "offense specific" could easily be referred to as "prosecution specific". In making that statement, that Court held that "when the Sixth Amendment right to counsel attaches, it [encompasses] offenses that, even if not formally charged, would be considered the same offense." 532 U.S. 162, 173 (2001). In *Cobb*, the defendant was pending charges related to a burglary when he was questioned about the murders of the occupants of the burglarized home. The Supreme Court found that burglary and murder are not the same offense and ruled that the Sixth Amendment right to counsel did not bar the interrogation of the defendant as to the murders nor impact the admissibility of his confession.

20. Part of the consideration in the *Cobb* decision was that "it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses." *Id.* at 171-172. *See also United States v Coker*, 433 F.3d 39, 43-45 (1st Cir, 2005).

21. Applying this reasoning to the current situation, the defendant is not charged with respect to the disappearance of Harmony Montgomery. She is not a suspect in that investigation and there is no indication that she could ever become a suspect in that investigation. Further, the defendant was not individually selected to be interviewed; efforts were made to speak with anyone on the unit who had information related to that unrelated investigation.

22. The involved investigators were not party to the defendant's case and were not interviewing the defendant in an effort to obtain information about the defendant's case.

23. The defendant participated in a voluntary interview related to her role as potentially having information relevant to an investigation that is wholly unrelated to her charges.

24. The right to counsel does not preclude law enforcement from speaking to a represented person concerning matters outside of the reason for representation. Further, an attorney who represents a person cannot assert a blanket representation that they represent that person on all subjects or matters.

25. To the extent that investigators in the unrelated investigation wittingly or unwittingly obtained statements that mention the defendant's pending charges, those statements were not obtained in violation of any rule, law, or constitutional right because the investigators did not attempt to obtain incriminating statements from the defendant.

26. Although not raised by defense counsel in counsel's filing, there was also no violation of the defendant's Fifth Amendment right to counsel or to her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

27. Although the defendant was incarcerated at the time of these interviews, she was not in custody for the purpose of *Miranda*.

28. The New Hampshire Supreme Court held in *State v. Ford*, 144 N.H. 57 (1999), that when an individual is incarcerated for an offense unrelated to the subject of [her] interrogation, custody for Miranda purposes occurs when there is some act or circumstance that places additional limitations on the prisoner." *Id.* at 63.

29. As shown in the record of the audio recording of the April 22, 2022, the defendant was advised that she was not being interviewed because she was in trouble, that she was not being questioned about her case and that the interview was voluntary. The defendant was relaxed and comfortable even joking with the investigators. She volunteered to seek out information for the investigators and provide anything that she learned to them.

30. There was no violation of the defendant's right to counsel under the Sixth Amendment of the United States Constitution, the Fifth Amendment of the United States Constitution or under Part 1, Article 15 of the New Hampshire Constitution.

31. Defense counsel argues that the disclosure of content of the defendant's statements in the April 14, 2022, and May 3, 2022, interviews was mandated by Rule 12 of the New Hampshire Rules of Criminal Procedure.

32. Rule 12(b)(1)(A) of the New Hampshire Rules of Criminal Procedure requires the State to provide a copy of all statements made by the defendant to any law enforcement officer or agent which are intended for use by the State as evidence at trial or at a pretrial evidentiary hearing.

33. The State does not intend to use the statements from the April 14, 2022, or the May 3, 2022, interviews at any trial of the defendant, in the State's case-in-chief.

34. Regardless, as indicated supra, the State has filed separately for a protective order to allow the disclosure of the reports and audio recording to defense counsel with appropriate protections for integrity of the unrelated, pending criminal investigation.

35. Defense counsel requests unspecified sanctions but does not cite to any rule, statute, or constitutional provision which would support this request.

36. When making its ruling in *White*, the New Hampshire Supreme Court determined that the suppression of statements obtained in violation of a defendant's constitutional rights was "consistent with the 'general rule that remedies should be tailored to the injury suffered.'" 163 N.H. at 311 (citing *United States v. Morrison*, 449 U.S. 3612, 364 (1981)).

37. In *Morrison*, the United States Supreme Court stated that a reviewing court must look to whether "the constitutional infringement has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." *Id.* Further, the Supreme Court stated that "absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding." *Id.*

38. Here, the State asserts that it has no intention to utilize the content of the April 14, 2022, or the May 3, 2022, interviews at any trial of the defendant, in the State's case-in- chief. The State makes this assertion despite the fact that there was no violation of the defendant's right to counsel.

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Issue findings that there was no violation of the defendant's right to counsel and that there was no discovery violation;
- B. Deny the defendant's request for discovery as moot;
- C. Deny the defendant's request for unspecified sanctions; and
- D. Grant such further relief as may be just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney

John M. Formella  
Attorney General

*/s/ Bethany J. Durand*

October 20, 2022

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*/s/ Meghan C. Hagaman*

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**CERTIFICATE OF SERVICE**

I certify that on this day I sent a copy of the foregoing to counsel for the defendant, Jaye Rancourt, Esq., and Benjamin Falkner, Esq., through the Court's e-filing system.

October 20, 2022

*/s/ Bethany J. Durand*

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