

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

ANNA BARBARA HANTZ MARCONI

217-2024-CR-01167

STATE'S OBJECTION TO MOTION TO DISQUALIFY AND MOTION TO DISMISS

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 Disqualify the New Hampshire Department of Justice ("DOJ") and to Dismiss All Indictments. The Defendant's requested remedies in effect amount to immunity from prosecution and are unsupported by applicable law relating to the role of the Attorney General. In support, the State represents as follows:

Defendant's Motion Only Presents Questions of Law

1. Defendant's Motion generally alleges that undersigned counsel have a conflict of interest individually, that Attorney General John Formella ("AG Formella") and/or the Attorney General as a public office ("the Attorney General") has a conflict of interest that extends to the entire DOJ, and that these conflicts of interest require the extraordinary remedy of dismissal of the indictments in this case.

2. The issue of whether a conflict of interest exists is a question of law. *State v. Labonville*, 126 N.H. 451, 455-56 (1985). Accordingly, whether the appropriate remedy for such a purported conflict would be dismissal of the indictments is also a question of law.

3. In her prayer for relief, Defendant requests that this Court "[h]old an evidentiary hearing on this motion if the prosecution disputes any factual assertions in the foregoing

motion.” Motion at p. 23. However, “[this] Court will not hear any motion grounded upon facts, unless such facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed to and stated in writing signed by the parties or their attorneys” N.H. R. Crim. P. 35(i)(1). No such affidavit by Defendant, papers in this case (aside from the charging documents), or agreement by the parties exists to support any factual allegations in Defendant’s Motion. Accordingly, there are no grounds for this Court to hold a hearing on this motion regarding factual disputes. Id.

4. Further, where the issues to be determined by the trial court are purely questions of law, defendants cannot merely assert a theory of defense in a pretrial pleading to force the State to choose between either accepting the theory of defense or engaging in a mini-trial to test the validity of the theory of defense alleged when the Court can otherwise rule on the matter as a question of law. *See State v. Zhukovskyy*, 174 N.H. 430, 439-40 (2021); *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711-12 (2010).

5. Defendant’s Motion presents solely questions of law, the facts alleged by Defendant are irrelevant to the disposition of Defendant’s Motion and, as noted above, are unaccompanied by an affidavit. This Court should rule on the issues presented purely as questions of law.

Undersigned Counsel Do Not Have Conflicts of Interest Individually

6. Defendant alleges that undersigned counsel have a conflict of interest individually based upon a pecuniary interest (*i.e.*, continued employment). Motion at ¶ 45. Defendant asserts that because Governor Sununu directed then-Attorney General MacDonald to create the Public Integrity Unit (“PIU”) by executive order, the Governor has the power to unilaterally disband the PIU and terminate undersigned counsel’s employment, which creates a personal interest for

undersigned counsel in the prosecution of this case. Motion at ¶¶ 42-45. Defendant argues that this “personal interest” also violates the New Hampshire Rules of Professional Conduct. Motion at ¶ 42 (citing N.H. R. Prof. Conduct 1.7(a)(2), defining a “concurrent conflict of interest” to include where a lawyer’s representation “will be materially limited by . . . a personal interest of the lawyer”).

7. Undersigned counsel are commissioned Assistant Attorneys General. “Assistant Attorneys General are appointed by the Attorney General, with the approval of the Governor and Council, for five-year terms.” McNamara, New Hampshire Practice Vol. 1 (5th ed. 2010) at § 2.01 (citing RSA 7:16; RSA 21-M:3, III). These commissions “serve[] to ensure that shifting political winds do not affect criminal law enforcement in New Hampshire.” *Id.*

8. Undersigned counsel “may be removed only as provided under RSA 4:1.” RSA 7:16, I. RSA 4:1 provides for the removal of public officials that requires the appointing authority to petition removal, a majority by the Executive Council to accept the petition, hold a public hearing, and then a majority vote to remove the public official. *See* RSA 4:1, I-VI.

9. As undersigned counsel’s commissions cannot be “abolish[ed],” unilaterally by anyone, undersigned counsel do not have “‘personal interests’ that might affect [their] impartiality” relating to a potentiality of “abolish[ment]” of undersigned counsel’s jobs. Motion at ¶ 45.

10. Furthermore, the rescission of an executive order by gubernatorial action cannot unilaterally eradicate a prosecutorial function. That is, the existence of a distinct PIU within the DOJ—as a statutorily-created component or instituted by administrative action—does not change the Attorney General’s obligation to enforce the laws of this State and prosecute criminal conduct. Whether it is through the general criminal jurisdiction held by the Attorney General or

exercised through a particular component of the office, the DOJ is authorized and tasked with investigating and prosecuting criminal conduct.

The Attorney General (as an Institution) Does Not Have a Conflict of Interest

11. Defendant claims that because the Attorney General in one capacity represents the Governor, and because Governor Sununu is likely to be a fact witness in a trial in this matter, the Attorney General has an irreconcilable conflict of interest under N.H. R. Prof. Conduct 1.7. Motion at ¶¶ 29-37. However, Defendant identifies no interest of Gov. Sununu, either in his official capacity as Governor or in his private capacity as a fact witness, that would be in opposition to the Attorney General's duty to enforce the criminal laws of the State of New Hampshire. *See* RSA 640:1, I(c) (Governor has a duty, under pains of criminal penalty, to report attempts to improperly influence him to law enforcement); N.H. CONST. pt. II, art. 41 (Governor also has responsibility "for the faithful execution of laws").

12. "The attorney general is a member of the executive branch, and is a constitutional officer, appointed by the Governor and Council pursuant to Part II, Article 46 of the New Hampshire Constitution." *Opinion of the Justices (Requiring Att'y Gen. To Join Lawsuit)*, 162 N.H. 160, 171 (2011) "The New Hampshire Attorney General occupies a pivotal and unique role in the state's criminal justice system. He is the chief law enforcement officer in the state. The Attorney General is specifically charged with enforcement of the criminal laws of the state and has been given **ultimate responsibility** for criminal law enforcement by the legislature. The Attorney General also has broad common-law powers" McNamara at § 2.01 (citations omitted) (emphasis added).

13. "The attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state and, with the aid of the county

attorneys, the attorney general shall enforce the criminal laws of the state.” RSA 7:6. The DOJ, “through its officials, shall have all the powers and duties enumerated by statute and implied from the common law,” including the “general functions” of “[a]dvising and representing the state and its executive branch agencies in all civil legal matters” and “[s]upervising and conducting criminal investigations and prosecutions.” RSA 21-M:2.

The powers of the Attorney General are broad and numerous. Some grow out of the common law, and many are specified by statute. He is specifically charged with enforcement of the criminal laws of the state, and with supervision of criminal causes pending before the Supreme and Superior Courts. His authority to enter a *nolle prosequi* in pending actions is not doubtful. He is charged with representing the State in all causes in this court in which the state is interested. These specific statutory duties in no way detract from his powers and duties at common law.

State v. Swift, 101 N.H. 340, 342-43 (1958).

14. Broadly, the DOJ has two functions: criminal law enforcement and civil representation of state actors and interests.¹

The office of the Attorney General was restructured in 1985 as the department of justice, under the executive direction of the Attorney General. The department consists of two divisions. The division of legal counsel is comprised of a bureau of civil law and a bureau of transportation and construction. The division of public protection consists of the environmental protection bureau, consumer protection and antitrust bureau, and criminal justice bureau.

McNamara at § 2.01 (citing RSA 21-M:6, 7; RSA 7:8-a, 8-b).

15. Assistant attorneys general within these respective divisions can (and often do) represent differing state interests, sometimes even in the same proceeding. In *Appeal of Trotzer*, 143 N.H. 64, 68-69 (1998), the New Hampshire Supreme Court held “that it is permissible for one assistant attorney general to represent [a state board] in its quasi-judicial capacity and

¹ The DOJ also consists of the Office of the Solicitor General. See RSA 21-M:12-a. Similarly, the Solicitor General’s duties consist of “[r]epresenting the state in all criminal appeals to the New Hampshire supreme court or federal court” and “[r]epresenting executive branch officials and executive branch agencies, boards, and commissions in all appeals to the New Hampshire supreme court. RSA 21-M:12-a (II) (a)-(b).

another assistant attorney general to prosecute the case before the board, provided no actual bias exists.” In *Trotzer*, the Court reasoned that because attorneys “were employed in different bureaus of the attorney general’s office, with different supervisors and wholly distinct functions . . . , allegations of collusion between the assistant attorneys general [were] unfounded and [did] not support a claim of actual bias.”

16. In *In re Huston (N.H. Bd. of Vet. Med.)*, 150 N.H. 410, 412-13 (2003), the New Hampshire Supreme Court was faced with the same issue as in *Trotzer* (one assistant attorney general representing the board and another prosecuting the action) and declined to overrule *Trotzer*. Specifically, the Court reasoned:

The petitioner’s argument [of the existence of a conflict of interest] rests upon a false premise. He assumes that the ethical obligations of private and public attorneys are identical in all circumstances. They are not. “Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers” differ from those of private attorneys. *N.H. R. Prof. Conduct* Scope. Accordingly, public and private attorneys have different ethical obligations in some circumstances. *See id.* Lawyers under the supervision of the attorney general, for instance, “may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.” *Id.* **The rules of professional conduct do not abrogate this authority.** *Id.*

Huston, 150 N.H. at 413 (emphasis added).

17. In *State v. Addison*, 166 N.H. 115 (2014), the New Hampshire Supreme Court affirmed the trial court’s denial of a motion seeking to recuse the entire DOJ because counsel for defendant joined the DOJ during the pendency of criminal litigation. The Court recognized, but did not address, separation of powers issues with a court being asked to disqualify the entire DOJ from prosecution, which would also be present in Defendant’s Motion, as recusing the entire DOJ would intrude upon the common-law, constitutional, and statutory powers of the Attorney General. *Id.* at 119. The Court also declined to adopt a *per se* rule of disqualification “solely

upon an appearance of impropriety” because such an approach “fails to recognize any distinction between lawyers engaged in private practice and prosecutors engaged in constitutionally- and statutorily-mandated duties on behalf of the public.” *Id.* at 120. The Court also noted that DOJ’s structure and screening procedures rebut any presumption “that confidences will be shared or that an appearance of impropriety has been shown.” *Id.* at 122-24.

18. The only instances in which the two broad categories of the Attorney General’s powers and duties – to prosecute criminal cases and to represent a state agency or actor – have been held to be in conflict is where the DOJ would act on both sides of a criminal case (*i.e.*, as both prosecutor and counsel for defendant). *Compare Swift*, 101 N.H. at 342-43 (Attorney General may appear to defend a charged state official because the Attorney General would thus “represent one of two conflicting public interests”), *with State ex rel. Brown v. Knowlton*, 102 N.H. 221, 223 (1959) (distinguishing *Swift* because, in this case, “the Attorney General elected to assume the role of prosecutor and defense counsel simultaneously”). *See also Connecticut Com. on Special Revenue v. Connecticut Freedom of Information Com.*, 174 Conn. 308 (1978) (analyzing, and collecting cases regarding, the role of the Attorney General in representing competing state interests on behalf of different state agencies in civil litigation).

19. The Supreme Court of Hawai’i was presented with an allegation by a criminal defendant that there was a conflict of interest where the Attorney General was prosecuting a case against a state official who was concurrently being represented by the Attorney General in two unrelated civil suits. *State v. Klattenhoff*, 71 Haw. 598, 599 (1990). In finding no conflict of interest, the *Klattenhoff* Court stated:

A majority of states have similarly permitted the AG to concurrently represent conflicting interests when the AG can ensure independent representation for the competing parties. *Superintendent of Ins. V. Attorney Gen.*, 558 A.2d 1197, 1202-03 (Me. 1989) (citing *Connecticut Comm’n on Special Revenue v. Connecticut*

Freedom of Information Comm'n, 174 Conn. 308, 319, 387 A.2d 533, 537 (1978); *Feeney v. Commonwealth*, 373 Mass. 359, 365-66, 366 N.E.2d 1262, 1266 (1977); *see also E.P.A. v. pollution Control Bd.*, 69 Ill. 2d 394, 14 Ill. Dec. 245, 372 N.E.2d 50 (1977); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. 1974); *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535 (Minn. 1987); *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n*, 418 So.2d 779 (Miss. 1982); *see also State ex rel. McLeod v. Snipes*, 266 S.C. 415, 421-22, 223 S.E.2d 853, 855-56 (1976).

We recognize, as do the majority of states, that due to the multiple duties statutorily imposed upon the AG's office, the ethical rules for private law firms are not necessarily applicable, in all cases, to the AG's office.

The practical reality is that every employee, appointee or elected official in state government who may be advised by the AG, or receive some legal service from the AG is a potential client of the AG. Thus, there is a potential conflict whenever the AG exercises his statutory duty to investigate and prosecute violations of state law committed by people in state service. **Carried to its logical end, appellant's argument would mean that every time a state employee, appointee or elected official became the subject of a criminal investigation, that party could disqualify the AG from prosecuting based upon an alleged conflict-of-interest. Thus, the AG would constantly be prevented from performing his duties as the State's chief law enforcement officer.**

Klattenhoff, 71 Haw. at 604 (emphasis added).

20. In New Hampshire, the logical end of Defendant's Motion is even more absurd than the one contemplated in *Klattenhoff*. All prosecutors in the State of New Hampshire operate under the supervisory direction and control of the Attorney General, and their power to prosecute criminal cases is derivative of the authority of the Attorney General to oversee the prosecution of all criminal cases. *See* McNamara at § 2.01 (citing RSA 7:6; RSA 21-M:8, II). This includes county attorneys and their deputies, who "are considered deputies of the Attorney General," with the Attorney General being "the paramount authority" in all criminal prosecutions. *Id.* at § 2.02 (citing *Fletcher v. Merrimack County*, 71 N.H. 96 (1901)). Accordingly, carried to its logical conclusion, Defendant asserts that no state official and no other individual where a state official was a witness could ever be prosecuted in the State of New Hampshire because of DOJ's civil

representation of a state entity or state official.² In essence, Defendant argues that she should be immune from criminal prosecution because the Governor and other state officials witnessed her alleged crimes.

21. Although Defendant argues that “this case presents a rare, if not unique, situation,” it is not unique (or even rare) for the DOJ to prosecute crimes where state officials may be percipient witnesses. Motion at ¶ 67. For example, many homicide prosecutions are investigated by New Hampshire State Police, who are also a civil client of DOJ.³ The DOJ is prosecuting criminal cases related to the Youth Development Center while also representing the State in related civil litigation.⁴ The PIU prosecutes cases of on-duty misconduct, including excessive force up to and including homicides, by law enforcement officers – including state officials who may have been, and work for agencies who are, civil clients of the DOJ.⁵

22. Also, relevant to the perceived conflict claimed by Defendant, the point will soon be moot. As of the beginning of January 2025 when he leaves office Governor Sununu will cease being the governor of the State of New Hampshire but will still be the same fact witness he is now.

² Private prosecutions for class B misdemeanors and violations could theoretically be prosecuted by private individuals. *See State v. Martineau*, 148 N.H. 259 (2002).

³ *See, e.g., State v. Joshua Lancaster* (454-2024-CR-00375, 215-2024-CR-00550); *State v. Hassan Sapry* (211-2019-CR-00254); *State v. Nicholas Murphy* (211-2020-CR-00184); *State v. Connor MacLeod* (212-2024-CR-00078); *State v. William Kelly* (212-2023-CR-00337); *State v. Armando Barron* (213-2020-CR-00308); *State v. Keegan Duhaime*, 213-2022-CR-00154; *State v. Dustin Duren* (214-2024-CR-00028); *State v. Robert Lavoie* (214-2023-CR-00417); *State v. Lance Goodrich* (215-2021-CR-00619); *State v. Robert Tulloch* (215-2001-CR-00199, 00200); *State v. Theodore Luckey* (216-2021-CR-01532); *State v. Thomas Humphrey* (216-2023-CR-02745); *State v. Grant DeGiacomo* (226-2023-CR-00723); *State v. Denielle Dauphinais* (226-2021-CR-00944); *State v. Jesse Sullivan* (217-2024-CR-00154); *State v. James Coe* (218-2023-CR-01259); *State v. John Kratz* (218-2023-CR-00739); *State v. Brian Roberge* (219-2023-CR-00737); *State v. Timothy Verrill* (219-2017-CR-00072); *State v. James Robarge* (220-2013-CR-00120); *State v. David Carrier, Sr.* (220-2012-CR-00055).

⁴ *See, e.g., State v. Victor Malavet* (217-2021-CR-00507); *State v. Lucien Poulette* (216-2021-CR-00749); *State v. Bradley Asbury* (216-2021-CR-00746); *State v. Stephen Murphy* (216-2021-CR-00677 thru 00679, 01309); *State v. James Woodlock* (216-2021-CR-00747, 00748, 01340); *State v. Jonathan Brand* (216-2021-CR-00782; 216-2024-CR-00035); *State v. Stanley Watson* (216-2021-CR-00864); *State v. Jeffrey Buskey* (216-2021-CR-00665).

⁵ *See, e.g., State v. Matthew Millar* (217-2024-CR-00071); *State v. Theophilus Osabutey* (429-2024-CR-00281); *In re Jean Paul Sainme* (non-prosecution agreement with corrections officer; referral to Police Standards & Training); *State v. Andrew Monaco* (459-2016-CR-03378) (later annulled).

23. According to Defendant's argument, all criminal defendants in each of these cases (and any other case where a state official is a percipient witness) should be dismissed (or convictions set aside) with no prosecutor able to vindicate the State's interest in seeing that its criminal laws are enforced. Such an absurd result is contrary to the common-law, constitutional, and statutory powers and duties of the Attorney General (and common sense).

Defendant's Motion Does Not Allege AG Formella Individually Has a Conflict of Interest

24. Defendant alleges that because of AG Formella's personal, professional, and political associations with Gov. Sununu prior to AG Formella becoming Attorney General, AG Formella has a conflict of interest. Motion at ¶¶ 1-6, 38-41.

25. As with undersigned counsel, AG Formella was appointed by the Governor and Council for a four-year term "to ensure that shifting political winds do not affect criminal law enforcement in New Hampshire." McNamara at § 2.01 (citing RSA 7:1; RSA 21-M:3, I).

26. Defendant cites no authority for the proposition that a personal, professional, and/or political connection between a Governor and an Attorney General disqualifies the Attorney General from ethically discharging the duties of the Attorney General. Rather, under New Hampshire law, to the extent AG Formella has personal, professional, and/or political connections with Gov. Sununu, this is insufficient to establish that AG Formella has a conflict of interest or that his prosecutorial decisions are motivated by any personal interest. *See State v. Addison*, 165 N.H. 381, 641-53 (2013) (quoting and citing, *inter alia*, *People v. Vasquez*, 137 P.3d 199, 209 (Cal. 2006) (Prosecutors, "as people, inevitably hold individual personal values and allegiances" and "may also have political ambitions or apprehensions. But that a public prosecutor might feel unusually strongly about a particular prosecution or, inversely, might

hesitate to commit to a prosecution for personal or political reasons does not inevitably indicate an actual conflict of interest, much less a constitutional bar to prosecution.”)).

27. Furthermore, the sole authority for the proposition that AG Formella has a personal conflict of interest offered by Defendant is decidedly unpersuasive and easily distinguishable. *Clauson’s Case*, 164 N.H. 183 (2012) concerns a private attorney who was initially hired by the husband in a domestic violence case for his criminal defense, then simultaneously retained by the husband’s wife for the purposes of a joint representation to lift a no-contact condition in a bail order (in the underlying criminal case). Suffice it to say, the professional conundrum the private attorney brought upon himself in *Clauson’s* in no way reflects the realities in the case at bar—the chief law enforcement officer of the State prosecuting a case where a fact witness also happened to be (at least at the time) the Governor. The prosecution of Defendant by AG Formella, with anticipated trial testimony by (then former) Governor Sununu, in no way forecloses alternatives that would otherwise be available to Mr. Sununu. As such, N.H. R. Prof. Conduct 1.7 does not apply in these circumstances and there is no conflict of interest. Consistent with that conclusion, *Clausen’s Case* demonstrates an actual Rule 1.7 conflict, and in doing so highlights exactly how distant it is from the matter before the Court in this prosecution of Defendant.

28. The requested remedies of disqualifying the entire DOJ and resultantly granting Defendant what amounts to immunity from prosecution are extreme remedies for allegations of a conflict of interest that are unsupported by applicable law relating to the role of the Attorney General. “The disqualification of the government’s counsel is a drastic measure and the court should hesitate to do so unless it is absolutely necessary.” *United States v. Santiago-Rodriguez*, 993 F.Supp. 31, 38 (D.P.R. 1998). “Additionally, because misuse of disqualification motions for

gamesmanship is costly to both clients and the judicial system, such motions ‘should be subjected to particularly strict judicial scrutiny.’” *United States v. Worman*, 2024 U.S. Dist. LEXIS 123360, *3 (D. Ida. July 12, 2024) (citing *Optyl Eyewear Fashion Int’l Corp. v. Style Co.*, 760 F.2d 1045, 1050 (9th Cir. 1985)).

29. Defendant’s argument that undersigned counsel has a conflict of interest is based on a misunderstanding of the law concerning assistant attorneys general. Defendant’s argument that the Attorney General (as an institution) has a conflict of interest mistakenly asserts that the usual application of Rule 1.7 applies to the Attorney General and the DOJ and ignores the unique role of (and law surrounding) the Attorney General and the DOJ. Defendant’s argument that the Attorney General (as an institution) has a conflict of interest under Rule 1.7 misapprehends the rule generally and ignores the reality that the Attorney General and the Governor’s interests are not adverse in this matter. Defendant’s argument that AG Formella has a conflict of interest based on personal, professional, statute bound, and/or political connection to Gov. Sununu is in contraposition to applicable New Hampshire law.

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

- (A) Deny Defendant’s Motion to Disqualify the DOJ and to Dismiss All Indictments;
- 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: November 12, 2024

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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/ Dan A. Jimenez
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