THE STATE OF NEW HAMPSHIRE

BELKNAP, SS SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

v.

RICHARD E. BERGERON, III

No. 211-2019-CR-163

BRIEF OF *AMICUS CURIAE* ACLU OF NEW HAMPSHIRE IN OPPOSITION TO THE STATE'S MOTION FOR A COURT ORDER PROHIBITING PRE-TRIAL PUBLICITY

NOW COMES the American Civil Liberties Union of New Hampshire Foundation ("ACLU-NH"), and hereby submits this brief as *amicus curiae* in opposition to the State's Motion for a Court Order Prohibiting Pre-Trial Publicity.

I. Introduction

The State urges the Court to issue a sweeping, one-sided gag order which would prohibit Mr. Bergeron (but not the State or its agencies) from "making any additional extrajudicial public statements in the media regarding the above-captioned case," without regard to any prejudice on the parties' ability to have a fair adjudication. For example, this order, if enacted, would prohibit Mr. Bergeron from publicly proclaiming his innocence, even after a local newspaper has already run a story noting his indictment in this case (but not his not guilty plea or presumption of innocence). The State's motion should be denied for at least three independent reasons. First, the basis for the State's request is its apparent assumption that *pro se* criminal defendants are bound by Rule 3.6 of the New Hampshire Rules of Professional Conduct. The State is incorrect. The Rules themselves make clear that Rule 3.6 does <u>not</u> apply to *pro se* criminal defendants. Second, even if Rule 3.6 does apply to *pro se* criminal defendants like Mr. Bergeron (which it does not), the proposed gag order sought far exceeds Rule 3.6's plain terms by (1) including speech that is

not prejudicial because it occurs well before trial, and (2) failing to include the numerous important exceptions that exist in Rule 3.6(c). For example, the State argues that the proposed gag order is needed because of one letter to the editor Mr. Bergeron published in a local newspaper months before a jury is to be empaneled. However, as courts have repeatedly held, such speech occurring well before trial will not "have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" under Rule 3.6. *Third*, if enacted, the proposed gag order would be an unconstitutional infringement on Mr. Bergeron's right to express himself under the United States and New Hampshire constitutions. For these reasons, the State's motion should be summarily denied.

II. Interest of *Amicus Curiae*

Amicus ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). For the past 50 years, ACLU-NH has been dedicated to preserving the individual rights and liberties guaranteed in the Bill of Rights and Constitution in New Hampshire. Part of ACLU-NH's work focuses around advocating for freedom of expression under the First Amendment to the United States Constitution and Part I, Article 22 of the New Hampshire Constitution. To that end, ACLU-NH has recently participated as counsel in *State v. Anderson*, 218-2018-CR-241 (Rock. Cty. Super. Ct. Aug. 31, 2018) (successfully challenging gag order placed on criminal defendant); *Frese v. MacDonald*, 1:18-cv-1180-JL (D.N.H.) (challenging constitutionality of New Hampshire's criminal defamation statute); and *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016) (striking down on constitutional grounds prohibition on "ballot selfies"). ACLU-NH regularly appears as a party or counsel, through direct

representation or as *amicus*¸ in state and federal courts throughout New Hampshire to advocate for the protections afforded by the state and federal constitutions.

III. Facts

Mr. Bergeron was indicted for multiple courts of selling marijuana. On May 20, 2019, an article was published in the *Laconia Daily Sun*, a newspaper of general circulation in Belknap County, announcing Mr. Bergeron's name, street and town, and the fact that he had been indicted for these charges. *See* Exhibit A. The article in question made no mention of the fact that Mr. Bergeron had pleaded not guilty or is presumed innocent. On May 20, 2020, the *Daily Sun* published a letter to the editor from Mr. Bergeron with the headline "Livernois still trying to paint me a public enemy number 1." *See* Exhibit B. While the letter does appear to touch upon some of the facts of the case, the vast majority of the letter: (1) observes the economic impacts of COVID-19; (2) proclaims Mr. Bergeron's innocence; (3) criticizes the Drug Task Force for spending time on marijuana prosecutions; (4) notes the shifting legal landscape for cannabis; and (5) engages in protected political speech by criticizing the County Attorney—an elected official who will face the voters this November—for what Mr. Bergeron implies is a streak of misuse of prosecutorial discretion.[1] That same day, Mr. Bergeron sent an email to the County Attorney saying, "[t]he court of public opinion is in session. You are already losing the case there, and you'll lose it in a courtroom, too." Exhibit B to State's Motion. Two days after the letter was published, the instant motion followed. Trial is scheduled for October 2020, although jury trials have been suspended for months across the State and remain suspended "until further notice." *See* Fourth Renewed and Amended Order Suspending In-Person Court Proceedings Related to New Hampshire Superior Court and Restricting Public Access to Courthouses ¶ 14.

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[1] *Amicus* does not take a position on the relative merits of Mr. Bergeron's critiques.

IV. The Motion for a Gag Order Should Be Denied

The State's motion should be denied for three independent reasons: *first*, the Rules of Professional Conduct do not prohibit Mr. Bergeron from the type of activity complained of; *second*, even if the Rules did apply to him, the proposed gag order far exceeds the Rules' provisions; and *third*, the requested gag-order is an overly broad, viewpoint based restriction on speech and is unconstitutional.

A. The Rules of Professional Conduct do not Prohibit Mr. Bergeron from Speaking Publicly About this Case

The sole basis for the State's motion is New Hampshire Rule of Professional Conduct 3.6, which governs pretrial statements made out of court *by lawyers*. But Mr. Bergeron is not an attorney, and is not bound by the rules in general or by Rule 3.6 in particular. The Statement of Purpose of the rules makes clear: "The Rules of Professional Conduct constitute the disciplinary standard for *New Hampshire lawyers*. Together with law and other regulations governing lawyers, the Rules establish the boundaries of permissible and impermissible lawyer conduct." N.H. R. Prof'l. Cond. Stmt. of Purpose (emphasis added). Rule 8.5(c) governs the applicability of the rules to nonlawyer representatives. It reads: "Rules 1.2, 1.3, 1.4, 1.14, 1.15, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, 4.2, 4.3, 4.4, 8.2(a), and 8.4 of the Rules of Professional Conduct shall apply to persons who, while not lawyers, are permitted to represent other persons before the courts of this jurisdiction pursuant to RSA 311:1. Rule 3.6 is not included in this list. Moreover, the committee on professional conduct shall have jurisdiction to consider grievances alleging violations of these Rules of Professional Conduct by nonlawyer representatives." N.H. R. Prof'l. Cond. 8.5(c).

The plain text of the rule makes clear that Rule 3.6—the basis for the State's motion—is *not* applicable to nonlawyers. The plain text of the rule also makes clear that the enumerated rules apply only to nonlawyers *who are representing other persons*, rather than nonlawyers who are

representing themselves. *See Stack v. Merriewoode Village, Inc.*, No. 2018-0389, 2019 N.H. LEXIS 68 (N.H. Sup. Ct. Mar. 14, 2019)[2] (distinguishing between a nonlawyer representative who is bound by Rules of Professional Conduct listed in Rule 8.5 and self-represented litigants who are instead bound by the same *procedural* rules as litigants represented by counsel); *accord N.H. R. Super. Ct.* 20 (rule governing civil actions requires those who appear on behalf of parties *other than themselves* are governed by the Rules of Professional Conduct as set forth in Rule 8.5). For these reasons, Mr. Bergeron is not bound by Rule 3.6, and violating that rule cannot provide a basis for a gag order.

The State cites two cases in its attempt to extend the applicability of the Rules of Professional Conduct to Mr. Bergeron, but both are easily distinguishable as those cases concerned procedural rules applicable to litigants generally, rather than Rules of Professional Conduct which just govern attorneys. For example, in *State v. Hofland*, 151 N.H. 322, 327 (2004), the Supreme Court upheld a conviction where the self-represented defendant appealed the denial of his request that the trial court recuse itself. Part of the basis for which the defendant sought recusal was the trial court's failure to take judicial notice of several local ordinances. *Id.* The basis for the denial of the request for judicial notice was that the defendant had not supplied copies of the ordinances as required by N.H. R. Evid. 201(d), and the Supreme Court noted in a parenthetical that self-represented litigants are responsible for knowing the court rules applicable to their actions. In *DeButts v. LaRoche*, 142 N.H. 845(1998), the Supreme Court considered a dismissal where an attorney for one of the litigants failed to appear at a structuring conference. The Court found that

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[2] Pursuant to N.H. Sup. Ct. R. 20(2), "An order disposing of any case that has been briefed but in which no opinion is issued, whether or not oral argument has been held, shall have no precedential value, but it may, nevertheless, be cited or referenced in pleadings or rulings in any court in this state, so long as it is identified as a non-precedential order and so long as it was issued in a non-confidential case." *Stack* is such an order.

the attorney had sufficient notice that failure to appear could result in dismissal, but ruled that the trial court abused its discretion in ordering that sanction. *Id.* at 846-47. In discussing whether the attorney was sufficiently informed of the consequences of missing the structuring conference, the Court observed that "Counsel and *pro se* litigants are responsible for knowing the content of the court rules applicable to their actions." *Id.* at 847.

These cases stand for the proposition that, if a court rule is applicable to an action, a self-represented litigant will not be excused from compliance for lack of legal training. The court rules identified in *DeButts* and *Hofland* are by their terms applicable to all proceedings in the state because they bind litigants directly—not just attorneys. *See*, *e.g.*, *N.H. R. Super. Ct.* 1(a)[3] ("These rules govern the procedure in New Hampshire superior court in all suits of a civil nature whether considered cases at law or in equity…"); *N.H. R. Evid.* 101(a) ("These rules apply to proceedings in the State of New Hampshire courts."). By contrast, the Rules of Professional Conduct are promulgated under the Supreme Court's inherent authority to regulate the profession of lawyers—not procedure of individual cases.

In sum, by their very terms, the Rules of Professional Conduct do not prevent Mr. Bergeron from speaking publicly about this case, so they cannot provide a basis for a gag order. As this is the only identified basis in the motion for requesting such an order, the motion must be denied.

B. Even If Rule 3.6 Applied to Mr. Bergeron (Which It Does Not), the Requested Gag Order is Far Broader Than Rule 3.6's Terms.

Even if Rule 3.6 did apply to *pro se* criminal defendants like Mr. Bergeron (which it does not), the proposed gag order, in sweeping fashion, far exceeds Rule 3.6's provisions. For example, the State argues that the proposed gag order is needed because of one letter to the editor Mr.

[3] *DeButts* was decided prior to 2013 when the superior court rules were rewritten. To the best of *amicus*'s recollection, the prior rules of the superior court had a similar provision.

Bergeron published in a local newspaper months before a jury is to be empaneled. Indeed, though trial is scheduled for October, in reality, trial in this case does not appear to be imminent in light of court closures resulting from COVID-19. As courts have repeatedly held, speech occurring well before trial does will not "have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" under Rule 3.6. *See Guerrini v. Statewide Grievance Committee*, No. CV000503192, 2001 Conn. Super. LEXIS 963, 2001 WL 417337 (Conn. Super. Ct. Apr. 3, 2001) ("the state wide grievance committee may have difficulty finding that the plaintiff's statement to the press made several years prior to trial would have a substantial likelihood of materially prejudicing an adjudicative proceeding"); *Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Visser*, 629 N.W. 2d 376 (Iowa 2001) (newspaper article published two years outside of venue not violation). In short, the gag order, in an overly broad fashion, sweeps within its scope speech that is not prejudicial because it occurs far before trial, and therefore does not violate Rule 3.6.

Moreover, the proposed gag order even exceeds the scope of Rule 3.6(c) by ignoring its numerous exceptions. For example, Rule 3.6(c) allows a lawyer in a criminal defense case to state, among other things: "(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; … (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto …." Demonstrating the sheer breadth of the proposed gag order, it would even bar speech that is specifically permitted by a lawyer under Rule 3.6(c), including information contained in public pleadings which is expressly allowed.

C. The Requested Gag Order is Unconstitutional

Both the United States Constitution and the New Hampshire Constitution protect the freedom of expression. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech"); N.H. Const. Pt. I, Art. 22 ("Free speech and Liberty of the press are essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved."). As a threshold matter, any discussion of Mr. Bergeron's case or his views on the County Attorney's job performance are protected, regardless of their merit. *See Doyle v. Comm'r, N.H. Dep't. of Resources & Economic Dev.*, 163 N.H. 215, (2012) ("[W]holly neutral futilities come under the protection of free speech as fully as do Keats' poems or Donne's sermons") (brackets and ellipses omitted) (quoting *United States v. Stevens*, 559 U.S. 460 (2010)). Indeed, the portions of Mr. Bergeron's letter which alleged governmental misconduct are "speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (identifying "the publication of information relating to alleged governmental misconduct" as such speech).

1. The Requested Order is an Unsupportable Prior Restraint on Speech

The requested order would impermissibly act as a prior restraint in violation of the First Amendment and Part I, Article 22 of the New Hampshire Constitution. A prior restraint is a judicial order or administrative system that restricts speech, rather than merely punishing it after the fact. *See Mortgage Specialists v. Implode-Explode Heavy Indus.*, 160 N.H. 227, 240 (2010) (invalidating a court injunction prohibiting republication of a loan chart, as the petitioner's interests in protecting its privacy and reputation did not justify this extraordinary remedy of imposing a prior restraint). As the New Hampshire Supreme Court has held, "[w]hen a prior restraint takes the form of a court-issued injunction, the risk of infringing speech protected under

the First Amendment increases.*"* *Id*. at 241. The danger of a prior restraint is that it has an immediate and irreversible sanction that "freezes" speech at least for the time. For these reasons, any prior restraint on expression comes with a heavy presumption against its constitutional validity. *Id*.

The party seeking the prior restraint has a heavy burden of showing that the imposition of the restraint is justified, as courts can only issue prior restraints in rare and extraordinary circumstances. *See In re Nebraska Press Assn. v. Stewart*, 427 U.S. 539, 558 (1976); *In re N.B*., 169 N.H. 265, 269 (2016) ("Our case law establishes that the burden is on a party seeking closure or nondisclosure of court records."); *Mortgage Specialists*, 160 N.H. at 241 ("prior restraints may be issued only in rare and extraordinary circumstances, such as when necessary to prevent the publication of troop movements during time of war, to prevent the publication of obscene material, and to prevent the overthrow of the government"). The State cannot satisfy this burden here.

Significant media interest neither, by itself, creates prejudice nor demonstrates a likelihood that the persons who are "gagged" by a court order will make prejudicial statements. See *WXIA-TV v. State of Ga*., 811 S.E.2d 378, 387 (Ga. 2018) ("A reasonable likelihood of prejudice sufficient to justify a gag order cannot simply be inferred from the mere fact that there has been significant media interest in a case. After all, 'pretrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial,' and '[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [the right to trial by an impartial jury].'") (*quoting Nebraska Press Assn*., 427 U.S. at 554, 551). The publicity surrounding this case is no greater or sensational than an average event of similar newsworthiness. As the Georgia Supreme Court held, such publicity is not sufficient to justify a prior restraint on the speech of attorneys, trial participants, and news organizations. The State must show more than

a single letter to the editor in order to argue that the right to a fair trial is in jeopardy; they must show that the parties and counsel in this case are likely to make prejudicial statements or disclosures that will place the fairness of the trial at risk. The State has not made—and cannot make—such a showing based solely on a letter to the editor published four months before jury selection and an email from Mr. Bergeron. *See id.*

As the Superior Court has recently observed in *State v. Anderson*, 218-2018-CR-241 (Rock. Cty. Super. Ct. Aug. 31, 2018) (*Schulman*, J.) attached as Exhibit C, "To the extent that the case has, and may in the future, garner significant statewide publicity, it is unlikely to be so pervasive as interfere [sic] with jury selection. Exposure to media coverage can be adequately addressed through routine juror voir dire." It continued: "In the mine run of cases—including very serious cases that attract substantial media interest, the State does not seek, and the court does not impose gag orders." *Id.*; *see also State v. Smart*, 136 N.H. 639, 646-653 (1993) (even in case where "publicity surrounding the defendant's case was enormous and, as claimed by some, unprecedented in this State," an impartial jury was empaneled).

As in *Anderson*, there is simply no basis for finding that there is sufficient media attention caused by this one letter to the editor to support a prior restraint on the speech of Mr. Bergeron. Any media attention there is on the case might equally be due to the article announcing Mr. Bergeron's indictment, can be addressed through the regular process of voir dire, and is likely to dissipate in the at least four months before jury selection.

2. <u>The Proposed Order Is Unconstitutionally Overbroad</u>

Moreover, even if there were a basis to issue the requested order—which there is not—the proposed order is unconstitutionally overbroad. While the practice on commenting on open cases may feel unusual to attorneys and judges in New Hampshire, "the knowledge that every criminal

trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (opinion of *Kennedy*, J.) (ellipsis omitted) (quoting *In re Oliver*, 333 U.S. 257, 270-71 (1948)). "[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about the happenings in the criminal justice system, and, if sufficiently informed about those happening, might wish to make changes in the system." *Id.* at 1070.

"When a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question." *Id.* at 1075. In *Gentile v. State Bar of Nevada*¸ the Court considered the proper constitutional standard to judge restraint on extra-judicial statements by lawyers about pending cases. *See generally id.* The petitioner was an attorney who had been disciplined for out-of-court statements. *Id.* Considering a constitutional challenge to the ethical rules which had provided a basis for the discipline, the Court observed that there was a line of cases which held there must be a "'clear and present danger' that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial." *Id.* at 1070-71; *see also Bridges v. California*, 314 U.S. 252, 270 (1941). The Court also observed, however, "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press," *id.* at 1064, because "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice," *id.* (citation and quotations omitted). Ultimately, the Court held that "'the substantial likelihood of

material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Id.* at 1065; *see also United States v. Scarfo*, 263 F.3d 80, 93-94 (3d Cir. 2001) (applying "substantial likelihood of material prejudice" standard to statements by attorney who previously had represented party in the case); *United States v. Bulger*, 2013 U.S. Dist. LEXIS 91953, *5-17 (D. Mass. July 1, 2013) (in prosecution of high profile boss in organized crime syndicate, analyzing gag order on counsel during trial under "substantial likelihood" standard); *State v. Carruthers*, 35 S.W.3d 516, 563 (Tenn. 2000) (concluding under state and federal constitutions that "substantial likelihood test" strikes a constitutionally permissible balance between the free speech rights of trial participants, the Sixth Amendment right of defendants to a fair trial, and the State's interest in a fair trial."); *Anderson*, 218-2018-CR-241 (Rock. Cty. Super. Ct. Aug. 31, 2018) (applying "substantial likelihood of material prejudice" standard to litigants and their attorneys).

Whatever the standard, the State's request plainly fails to pass constitutional muster because it would have the Court order Mr. Bergeron to refrain from speaking publicly about the case *without any regard to the prejudice to the proceedings*. The Supreme Court has recognized the important constitutional interests implicated by speaking publicly about the judicial and criminal justice system, but the State's motion gives no consideration to ensuring these foundational rights are protected. By way of example, the State's requested order would prohibit Mr. Bergeron from publicly proclaiming his innocence (or even noting that under the Constitution, he is presumed innocent), even as his indictments had already been reported in the *Daily Sun*. *Cf. In re Stone*, 940 F.3d 1332, 1335-36 (D.C. Cir. 2019) (after posting picture to Instagram with crosshairs next to the head of the federal judge overseeing his case, Defendant subject to gag order was nonetheless permitted to solicit funds for his legal defense and maintain his general

innocence). The requested order would prohibit Mr. Bergeron from critiquing the State's decision to spend taxpayer dollars on marijuana investigations and prosecutions, even as the current public health emergency devastates governmental budgets. *See* Mary Williams Walsh, "As Virus Ravages Budgets, States Cut and Borrow for Balance," *New York Times* (May 14, 2020) *available at* https://www.nytimes.com/2020/05/14/business/virus-state-budgets.html. The requested order would prohibit Mr. Bergeron from questioning the County Attorney's use of prosecutorial discretion, even as the voters consider in November whether to give the County Attorney another term. Given the County Attorney's status as an elected position, this is class political speech protected under the First Amendment. *See Rideout v. Gardner*, 838 F.3d 65, 75 (1st Cir. 2016) (noting that political speech "occupies the core of the protection afforded by the First Amendment") (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)). These are just a few examples of the type of speech that are constitutionally protected, would cause no prejudice to the case, but would nonetheless be barred by the State's requested order.

In short, the requested order is sweeping in its effect and not tailored to be the least restrictive means for achieving a significant governmental interest.

V. Conclusion

For the reasons discussed above, the State's motion should be denied.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF
NEW HAMPSHIRE FOUNDATION,

By its attorneys,

_/s/ Henry Klementowicz____________________

Date: June 19, 2020

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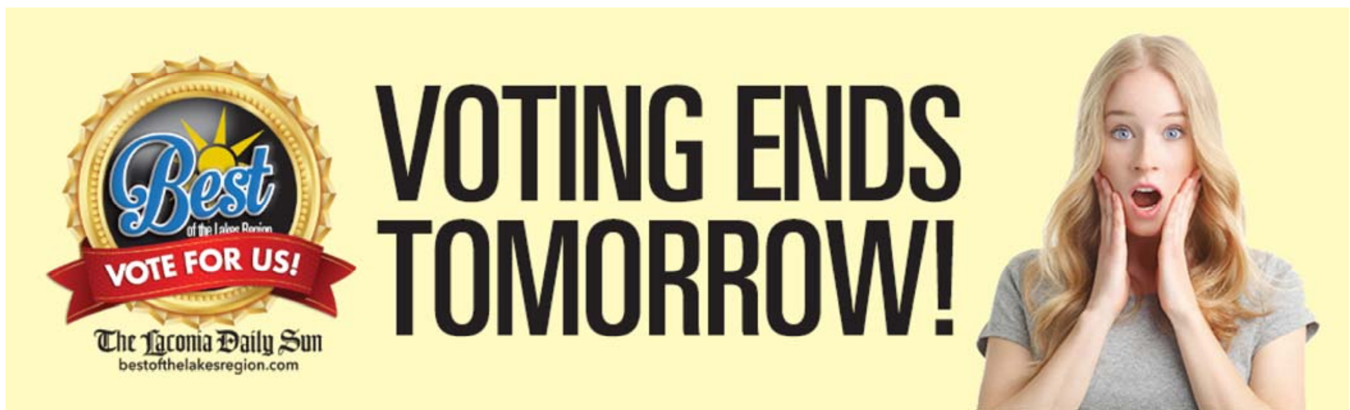
Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record pursuant to the court's e-filing system. A copy was sent to Mr. Bergeron by email per agreement between Mr. Bergeron and *Amicus*.

_/s/ Henry Klementowicz_______________
Henry Klementowicz

Date: June 19, 2020

EXHIBIT A



https://www.laconiadailysun.com/news/courts_cops/woman-who-sold-drugs-to-undercover-cops-indicted/article_caafd6c2-7be9-11e9-81eb-fb42e0af1872.html

Woman who sold drugs to undercover cops indicted

May 21, 2019

LACONIA — A Tilton woman has been indicted on drug trafficking charges.

Terry Gibson, 28, of West Main Street, in Tilton, was indicted on three charges of drug sales, as well as a charge of conspiracy to sell drugs.

Gibson was one of a number of people to be indicted on drug charges by the latest session of the Belknap County grand jury.

Thirty-one of the indictments were for the sale and/or possession of methamphetamine, and 14 for the sale and/or possession of fentanyl.

According to the indictments, Gibson sold methamphetamines, fentanyl, and “heroin of its analog, or a fentanyl class drug, or a combination of both” to undercover detectives on the Tilton Police Department.

Others indicted were:

Richard E. Bergeron III, 41, of Cotton Hill Road, in Belmont, was indicted on six counts of selling less than 1 ounce of marijuana.

David Bates Jr., 26, of Exeter Road, in North Hampton, was indicted on a charge of possession of methamphetamines.

Frank Clement, 45, of Church Street, in Tilton, was indicted on two counts of possession of methamphetamine with intent to sell, and two counts of possession of methamphetamine.

Alexander Bell, 44, of Prospect Street, in Franklin, was arrested for possession of a controlled drug (subsequent charge).

Jessica M. Benwell, 38, of West Bow Street, in Franklin, was indicted for bringing methamphetamine into the Belknap County Corrections facility, and charges of sale of buprenorphine, and possession of methamphetamine.

Dalton Blake, 24, of South Main Street, in Laconia, was indicted on a charge of possession of methamphetamine.

Wayne Boynton, 50, of Hatch Corner Road, in New Hampton, was indicted on a charge of possession of methamphetamine.

Austin Brue, 26, of Lafayette Street, in Laconia, was indicted for possession of methamphetamine.

James A. Burns, 40, no fixed address, was indicted on a charge of possession of

methamphetamine.

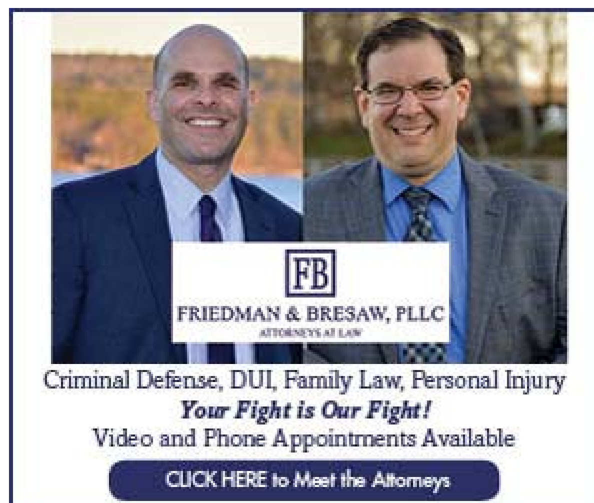
Melissa Chilson, 30, of Summit Street, in Franklin, was indicted on a charge of possession of methamphetamine.

Paige Colby, 30, of School Street, in Loudon, was arrested on a charge of possession of methamphetamine.

Kevin Cram, 32, of Hunkins Pond Road, in Sanbornton, was indicted for possession of fentanyl.

Joseph Crawford, 28, of Dyer Street, in Laconia, was indicted on charges of possession of methamphetamine with intent to sell, and possession of methamphetamine.

Alan Cushing, 37, of New London Drive, in Center Barnstead, was indicted on a charge of possession of methamphetamine.



Emily Danforth, 28, of Gardners Grove Road, in Belmont, was indicted on a charge of possession of fentanyl.

Seth Debois, 26, of Brown Hill Road, in Belmont, was indicted on a charge of possession of fentanyl.

Amanda Dwyer, 33, of East Main Street, in Tilton, was indicted on a charge of possession

of methamphetamine.

Lance Fair, 33, of Route 11, in New Durham, was indicted on charges of possession of methamphetamine, and possession of the prescription pain reliever tramadol.

Ricardo Fonseca, 30, of Endicott Street North, in Laconia, was indicted on a charge of possession of cocaine.

Catherine Gagne, 45, of Merrimack Street, in Concord, was indicted on a charge of possession of fentanyl.

Nathan Greene, 26, of Union Avenue, in Laconia, was indicted on two counts of possession of controlled drugs with intent to distribute — methamphetamine and fentanyl, and separate counts of possession of methamphetamine and fentanyl. According to the indictments, Greene has previously been convicted for drug possession and drug trafficking.

Mark Hebert Jr., 39, of Endicott Street North, in Laconia, was indicted on a charge of possession of methamphetamine.

John Lacourse, 32, of Peverly Road, in Northfield, was indicted on a charge of possession of methamphetamine.

Joshua Latuch, 34, of Main Street, in Laconia, was indicted on a charge of possession of methamphetamine.

Alacia R. Linville, 24, of Court Street, in Laconia, was indicted on a charge of possession of methamphetamine.

Albert Lynch, 47, of Minge Cove Road, in Alton, was indicted on a charge of possession of fentanyl with the intent to distribute, a charge of simple possession of fentanyl, and two counts of driving after having been certified an habitual offender.

Eric Morin, 33, of Hill Road, in Franklin, was indicted on a charge of possession of

fentanyl.

Patrick Nestor, 28, of Palmer Road, in Campton, was indicted on separate charges of possession of methamphetamine, and possession of fentanyl.

Erik J. Parker Sr., 47, of Gusty Road, in Tilton, was indicted on charges of possession of fentanyl with intent to distribute, possession of methamphetamine with intent to distribute, and separate charges of simple possession of methamphetamine and fentanyl. According to the indictments, Parker has previously been convicted for drug possession and drug trafficking.

Tammy Provencal, 39, of Church Street, in Tilton, was indicted on charges of possession of methamphetamine with intent to distribute, and simple possession of methamphetamine.

Jeffrey Tenney, 30, no fixed address, was indicted on a charge of possession of fentanyl. He was also indicted on charges of theft by unauthorized taking, and domestic violence first-degree assault.

Jake Thomas, 21, of Camelot Shore Drive, in Farmington, was indicted on a charge of possession of marijuana with intent to distribute.

Michael Valotta, 36, of Fellow Hill Road, in Northfield, was indicted for possession of methamphetamine.

Kristy Weeks, 33, of Waukewan Street, in Meredith, was indicted on a charge of possession of ecstasy.

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Laconia man charged with attempted murder
The Laconia Daily Sun

Five arrested for drugs in Laconia raid
The Laconia Daily Sun

Chief: suicide in parking lot was 'traumatic' for officers
The Laconia Daily Sun

EXHIBIT B

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Belknap Superior Court
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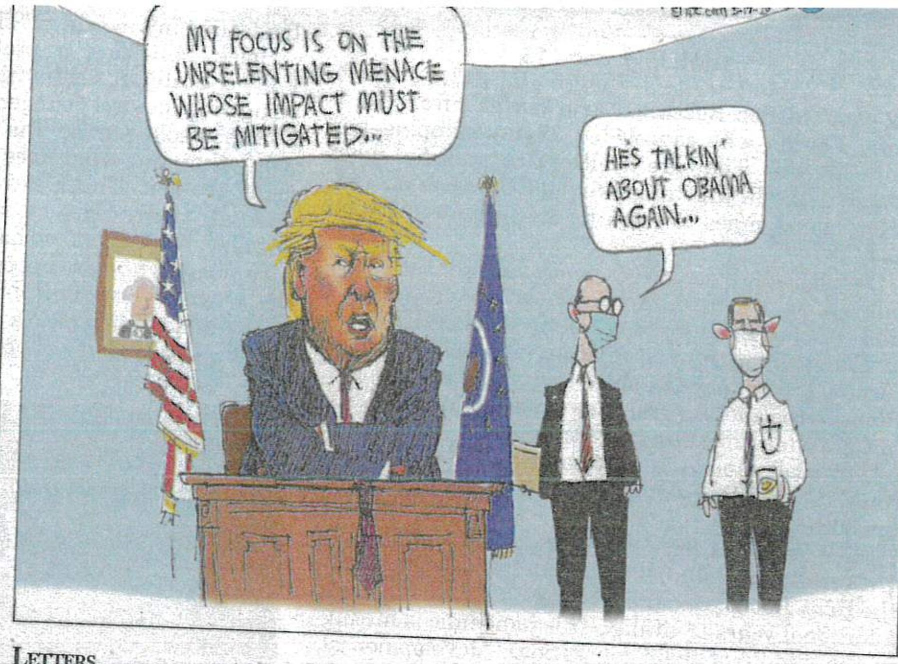


LETTERS

Livernois still trying to paint me a public enemy number 1

To The Daily Sun,

The ongoing pandemic is about to make a very significant impact on our local justice system, which has been shut down for the entire month of April due to "shelter in place" measures to address the spread of Covid-19. Taxpayers of this state simply should not be paying for lost causes being brought to trial by local prosecutors. At this crucial time, county attorneys must shed the dead weight and stop pursuing meaningless cases that will not make any significant impact on crime or community safety.

I wound up entangled in my own case (prosecuted by Belknap County Attorney Andrew Livernois) nearly two full years ago. Right after delivering firewood in a snowstorm in 2018, I slid into a small ditch just off the road. A uniformed officer showed up first. He persisted I get a wrecker while I was trying to call the hotline for roadside assistance from the rental truck company. I refused, knowing I did not have the money to pay for that kind of tow. Eventually the uniformed officer left. Two other people stopped who were later identified as N.H. Attorney General's Drug Task Force detectives. They were dressed as loggers.

These "agents" of the state, paid for by your tax dollars, proceeded to manufacture six serious felonies against me and charge me with offenses that threatened me with 53 years of prison time for trying to help someone out. During a time when resources were sorely needed to combat the ongoing opioid crisis, the state's Drug Task Force decided to invent an intricate case against me after I gave an agent a business card and discussed only firewood with him when he stopped to supposedly help me out.

The Drug Task Force is still actively spending an awful lot of wasteful time on cannabis prosecutions like this one, and it's a lost cause beyond lost causes paid for by your taxes. More states are legalizing recreational marijuana use every year. Every state around New Hampshire is already allowing their citizens to partake in a vast array of available regulated cannabis products. One of the components of Cannabis — CBD oil — is being touted in many circles as a natural miracle cure for pain. Even mainstream drug stores are selling products with CBD oil in them for this purpose.

When does New Hampshire wake up and see the writing on the wall here? Andrew Livernois, your county attorney, gives an NFL football player with a house in Meredith a walk on cocaine charges, but I'm on my way to trial. Please look into your county attorney's history. Google "Andrew Livernois, Drug Task Force" and read all about how I tried to resolve the case. Livernois stonewalled my efforts to expose corruption in law enforcement, and he's still trying to paint me as public enemy number one in my ongoing case. There is even more material on my case and Livernois' link to a civil case against the Drug Task Force at www.nhdrugtaskforce.com.

Rich Bergeron
Belmont

Send letters to: news@laconiadailysun.com

EXHIBIT C

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **State v. Robert S. Andersen**
Case Number: **218-2018-CR-00241**

Enclosed please find a copy of the court's order of August 31, 2018 relative to:

Court Order

September 04, 2018

Maureen F. O'Neil
Clerk of Court

(834)

C: William D. Pate, ESQ; Michael A. Delaney, ESQ; Henry R. Klementowicz, ESQ

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

STATE OF NEW HAMPSHIRE

v.

ROBERT S. ANDERSEN

218-2018-CR-241

ORDER

The matter before the court is the defendant's motion to amend the dispositional conference order (Docket Document 26). The court held a hearing on this motion on August 22, 2018. The defendant's motion is now GRANTED as follows:

> **The dispositional order of May 23, 2018 is VACATED to the extent that it restricts the parties and their attorneys from disclosing information learned from the police reports.**

The court's May 23 order was intended to be an interim, stop-gap order that preserved the status quo. Upon careful consideration, the court finds that this sweeping protective order violates the First Amendment to the United States Constitution and Part 1, Article 22 of the New Hampshire Constitution.

Make no mistake, an order that forbids the parties and counsel in a criminal case from speaking about the facts of the case is a prior restraint on speech. Therefore, such an order implicates the core protections of the First Amendment and Part 1, Article 22. See e.g., Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1304 (1983) ("[E]ven a short-lived "gag" order in a case of widespread concern to the community constitutes a substantial prior restraint and

causes irreparable injury to First Amendment interests as long as it remains in effect."); In re N.B., 169 N.H. 265, 270 (2016).

That said, the court has both the jurisdiction and the obligation to impose carefully tailored constraints on the litigants and their attorneys with respect to extrajudicial statements that (a) reveal privileged information that was disclosed through court mandated discovery (such as, for example, medical records, trade secrets or the identity of confidential government informants), or (b) creates a substantial likelihood of material prejudice to the parties' rights to a fair and impartial trial. See e.g., Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991) (discussing the "substantial likelihood of material prejudice" standard); United States v. Scarfo, 263 F.3d 80, 94, (3d Cir. 2001) (same); United States v. Brown, 218 F.3d 415, 424 (5th Cir. 2000) (same).

Neither of these circumstances is present in this case. Neither party has suggested that the discovery contains privileged or confidential information. Likewise, there has been no claim of a likelihood of material prejudice to the adjudicative process. There is not yet a jury and there is no serious concern that the jury pool will be poisoned by extrajudicial statements. This case is primarily of interest to residents of Salem but the jury pool will be drawn from the entire county, including cities and towns that are outside Salem's orbit (such as Portsmouth, Derry, Raymond, Epping, etc.). To the extent that the case has, and may in the future, garner statewide publicity, it is unlikely to be so pervasive as interfere with jury selection. Exposure to media coverage can be adequately addressed through routine juror voir dire.

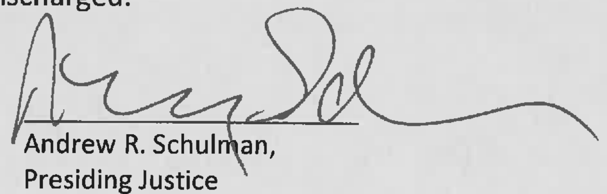
The State's concern appears be, that, if the case is "tried in the media," the resulting news coverage could be unfair due the lack of a complete factual record. No doubt, a criminal

jury trial, conducted under the aegis of an impartial judiciary, subject to the dispassionate application of the rules of evidence, with both sides represented by competent counsel, is likely to lead to a better understanding of the admissible facts than a two-minute interview on the nightly news. Yet, the only material prejudice that the court can consider is material prejudice to the fairness of the adjudication.

In the mine run of cases—including very serious cases that attract substantial media interest, such as first degree murder prosecutions—the State does not seek, and the court does not impose gag orders. Counsel in all cases, remain subject to N. H. R. Prof. R. 3.6, which imposes reasonable and constitutional restraints on extrajudicial statements, as well as a number of safe harbors for certain types of extrajudicial statements to the media. The Rule's restraints kick in only when extrajudicial statements "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 3.6(a). The court has no reason to believe that counsel will discard their obligations under the rule.

The court also notes that the calculus will change once a jury is selected. The court does not anticipate that any party will make any substantive statement to the media between the time the jury is first empaneled and the time it is finally discharged.

August 31, 2018



Andrew R. Schulman,
Presiding Justice