

THE STATE OF NEW HAMPSHIRE
1st CIRCUIT COURT—DISTRICT DIVISION—LANCASTER

COOS, SS

AUGUST TERM, 2018

Docket No: 451-2018-CR-00297

State of New Hampshire

v.

Jeffrey Woodburn

**STATE'S OBJECTION TO BERLIN SUN'S MOTION TO UNSEAL AFFIDAVIT AND
ARREST WARRANT**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, with this objection to the Berlin Sun's motion to unseal the affidavit and arrest warrant in the above-captioned matter. In support of its motion, the State submits the following:

1. The defendant stands charged with four counts of simple assault, two counts of domestic violence, two counts of criminal mischief, and one count of criminal trespass. The defendant was arrested on these charges on August 2, 2018. The arrest warrant and the affidavit in support of the arrest warrant application were sealed by the Court (*Spath, J.*).

2. The Office of the Attorney General continues to actively investigate the circumstances surrounding the charges against the defendant, which occurred over a time period of approximately 10 months. As this Court undoubtedly is aware, the mere fact of arrest does not halt the important function of further investigation and gathering of additional evidence. Based upon further information gathered and leads developed from this investigation, additional interviews and re-interviews will occur. If the sealed filings are unsealed, such can chill and thwart these investigative leads.

3. Moreover, there is a substantial chance that potential witnesses' testimony may be tainted by the disclosure of information contained within the paperwork that is presently sealed. Only by having such details sealed has the State been able to prevent public dissemination, and the concomitant chance of witness taint.

4. Accordingly, the State objects to the petition to unseal the paperwork filed in connection with this case. Release of this information would undoubtedly compromise the ongoing investigation, because the affidavit in particular reveals the nature, scope and direction of the State's investigation of this criminal case. These documents reveal facts that are truly known to only a few individuals, and release of this information to the general public prior to the completion of the investigation would present a situation where potential witnesses could modify their own testimony or otherwise negatively impact the investigative process.

5. If witnesses to whom investigators have not spoken learn of the substances of statements made by other witnesses in the case, the witnesses may tailor their stories to the information available to law enforcement, or may deny to police that they possess certain knowledge or information altogether.

6. "In *Petition of Keene Sentinel*[, 136 N.H. 121 (1992)] [the Court] recognized that the New Hampshire Constitution creates a public right of access to court records. This right of access of not, however, absolute; and may be overcome when a sufficiently compelling interest for nondisclosure is identified." *Petition of State of New Hampshire (Bowman Search Warrants)*, 146 N.H. 621, 625 (2001) (internal citations omitted). Here, the State has met its burden to demonstrate that the ongoing nature of this criminal investigation constitutes a sufficiently compelling interest for nondisclosure.

7. Indeed, sensitive to the investigative concerns in the context of an ongoing investigation, the New Hampshire Supreme Court has held that the existence of an ongoing pre-indictment criminal investigation is a sufficient basis for maintaining search warrant documents.

Specifically, the Court has stated:

We hold that in most pre-indictment criminal investigation, the existence of an investigation itself will provide the ‘overriding consideration or special circumstance, that is, a sufficiently compelling interest, that would justify preventing public access to the records’ ... [t]his presumption for ongoing, pre-indictment criminal investigations fits snugly within the framework set out in Petition of Keene Sentinel, 136 N.H. 121, and squarely within New Hampshire, and federal, jurisprudence.

See Bowman, 146 N.H. at 629. While the Court in *Bowman* referenced pre-indictment investigations, its rationale remains applicable to ongoing criminal investigations where misdemeanor offenses have been charged. In reaching its holding, the Court distinguished civil cases from pre-indictment criminal investigations, noted that there is no historical tradition of open search warrant proceedings and materials, and found that the procedures for obtaining a search warrant require secrecy. The Court also recognized the following risks present in releasing information contained in a search warrant affidavit: prospective witnesses would be hesitant to come forward; grand jury witnesses will be less likely to testify fully and frankly because they may fear retribution or may be exposed to inducements; other witnesses named in the search warrant documents may fear retaliation and refuse to cooperate with law enforcement; the targets of the search may flee; evidence may be destroyed; and individuals involved in criminal activity would be given an opportunity to craft stories to fit the current state of the investigation or coordinate stories with others who, in fact, participated.

8. Accordingly, the State respectfully requests that the Court deny the petitioner’s motion to unseal.

9. In the event that the State has not made an adequately specific showing of a compelling interest to maintain secrecy, the State requests the court to permit it to present specific information about the scope of the on-going investigation and to explain specifically how release of information in the sealed documents would impact the investigation. The State requests that this information be presented to the Court *ex parte*, either orally or in writing.

10. *Ex parte* presentation of information to the court is a well-accepted practice where one party is required to make a specific showing but must maintain secrecy. The practice is particularly well-developed in the context of grand jury proceedings. In *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 79 (1st Cir. 1999), the government called a witness before the grand jury who invoked the psychotherapist-patient privilege. The government argued that the privilege was breached because of the crime-fraud exception. It submitted information to the court *ex parte*, under seal in order to establish the existence of the privilege. *Id.* at 73. The district court refused to grant the target of the grand jury access to the information in order to rebut the government's case. *Id.* The target appealed, arguing that his due process rights were violated by the *ex parte* submission.

11. The First Circuit Court of Appeals held “[t]he law seems well-settled that, in the context of grand jury proceedings, the government may proffer *ex parte* the evidence on which it bases its claim that a particular privilege does not apply, and that the court may weigh that evidence, gauge its adequacy, and rule on the claim without affording the putative privilege-holder a right to see the evidence proffered or an opportunity to rebut it.” *Id.* at 79 (citing *In re Grand Jury Subpoenas*, 144 F.3d 653, 662-63 (10th Cir. 1998); *In re Grand Jury Proceedings*, 33 F.3d 342, 352-53 (4th Cir. 1994); *In re Antitrust Grand Jury*, 805 F.2d 155, 167-68 (6th Cir. 1986)).

12. This practice of submitting sensitive information *ex parte* is also recognized in New Hampshire. In *State v. Cobb*, 143 N.H. 638, 656 (1999), the Supreme Court observed that the defendant was permitted to submit an *ex parte* proffer to the superior court to support his motion to sever charges that had been filed against him. In his *ex parte* proffer, the defendant explained why it was important that he be allowed to testify concerning one charge but be allowed to maintain his right against self-incrimination with respect to the other charge. *Id.* The necessity of the *ex parte* process is obvious. If the defendant were required to disclose the facts in public he would be jeopardizing his right against self-incrimination. On the other hand, if the defendant could not present the factual basis for his motion, he would have no hope of succeeding on the motion to sever. The same Catch-22 applies here, if the Court requires the State to support its request for closure with greater specificity.

13. To the extent the Court deems a proffer warranted, the process of *ex parte* proffers recognized by the federal courts in the context of the grand jury proceedings is particular appropriate in this case. As the Third Circuit Court of Appeals has recognized:

Ex parte in camera hearings have been held proper in order to preserve the ongoing interest in grand jury secrecy. The secrecy of the grand jury proceedings in the present matter might have been compromised by divulging the specific questions that the government intended to ask during the [witness'] testimony. Judicial supervision and interference with grand jury proceedings should always be kept to a minimum. We hold that the district court did not abuse its discretion in hearing the government's proffer *in camera* and *ex parte*.

In re Grand Jury Empaneling of Special Grand Jury, 171 F.3d 826, 836 (3d Cir. 1999)

(quotation and ellipsis omitted). Accordingly, in the event that this Court concludes that the State did not make a sufficient showing to maintain the documents under seal, the Court must permit the State to present that information *ex parte* and *in camera*.

14. In addition, should the Court order that the documents will not be maintained under seal, the State respectfully requests that the Court provide the State with notice of its decision five days prior to making the documents publicly available so that the State may fulfill its obligations under the victim's bill of rights to notify the victim of the Court's decision. *See* RSA 21-M:8-k. The State also respectfully requests that the Court redact the victim's personal identifying information from any documents made publicly available.

15. Finally, the State has contacted counsel for the defendant, Donna Brown, Esquire, who is in agreement with the State's objection.

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

- (A) Deny the petitioner's motion to unseal the arrest warrant and affidavit; and
- (B) Grant such further relief as may be deemed just and proper.

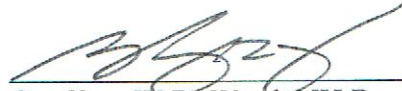
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

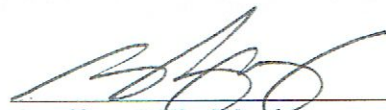
Date: August 28, 2018



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to Barbara Tetreault, Managing Editor, Berlin Sun, and Donna J. Brown, Esquire, counsel of record for the defendant.



Geoffrey W.R. Ward