STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JESSE T. BROOKS

09-S-319, 08-S-579, 07-S-2885

ROCKINGHAM SUPERIOR COURT
2009 JUN 15 P 3:11

DEFENDANT'S MOTION FOR DISCOVERY ORDER

Defendant Jesse T. Brooks hereby respectfully moves for an order compelling the State to produce to him, to the extent that it has not already done so, certain discovery necessary for a fair and efficient trial in this matter. In support of this motion, Mr. Brooks states as follows:

1. Mr. Brooks is awaiting trial on one count of conspiracy to commit murder. He is one of five defendants charged in connection with the death of Jack Reid, Sr. in Deerfield on June 27, 2005. Two of Mr. Brooks' co-defendants, Michael Benton and Joseph Vrooman, have entered into plea agreements, are cooperating with the State, and have agreed to testify at trial against Mr. Brooks. A third co-defendant, John "Jay" Brooks—Defendant's father—was the subject of a two-month trial in this Court during the fall of 2008. The trial of fourth co-defendant Robin Knight recently concluded in this Court.

2. The State has been producing discovery to Mr. Brooks on an ongoing basis since approximately July 2007 and has, to date, produced a significant volume of discovery. This discovery has included at least some of the materials that Mr. Brooks seeks by this motion. Mr. Brooks, however, moves for an order of this Court to memorialize the discovery obligations of the State and to ensure access to all discovery to which he is entitled by law and Superior Court rules.

3. As indicated below, nearly all of the discovery that Mr. Brooks seeks herein from the State was previously ordered by this Court to be produced to co-defendant John Brooks. See Order on Defendant's Omnibus Motion to Compel Discovery, State v. John A. Brooks, Nos. 07-S-1028 to 1031, 07-S-2886 (Jan. 22, 2008) ("John Brooks Jan. 22 Order") (attached hereto at Tab A); Order on State's Motion to Clarify and/or Reconsider and Partial Motion to Stay Discovery Order of 1/22/08, John Brooks (Feb. 9, 2008) ("John Brooks Feb. 9 Order") (attached hereto at Tab B); Order on Defendant's First Motion for Supplemental Discovery, John Brooks (May 18, 2008) ("John Brooks May 18 Order") (attached hereto at Tab C). The Court ordered some of these materials produced with the assent of the State. See John Brooks Jan. 22 Order at 2-4.

4. As the Court is aware, this case and the John Brooks case overlap considerably. The cases concern the same alleged events, are products of the same investigation, and involve the same cooperating co-defendants. Defendant Jesse Brooks submits, therefore, that the Court's legal and factual reasons for compelling the State to produce certain discovery in the John Brooks case apply with equal force here to Defendant's effort to ensure access to the same relevant discovery. Moreover, the discovery that Defendant Jesse Brooks is continuing to receive from the State indicates that the State's investigation of this case is ongoing and will continue to generate information that should be subject to discovery obligations set forth below.

5. In light of the foregoing, Defendant Jesse Brooks moves for an order compelling the State specifically to produce, in addition to any other production obligations it has under law or court rules, discovery of the following:

A. Investigation Notes & Reports

Mr. Brooks seeks production of any and all reports and notes of law enforcement officers, criminalists, or forensic experts concerning witness interviews or the collection or examination of evidence in this matter. Production of such notes is required by Superior Court Rule 98. See John Brooks Jan. 22 Order at 2-3, 6-7 (ordering production of same). Moreover, Mr. Brooks seeks an order requiring the State to generate a record of a contact with a witness, and to produce that record, if (1) the State has not previously provided a report of interview of or statement taken from the witness, (2) the witness provides information different from or in addition to that previously disclosed, or (3) the witness provides exculpatory or impeaching information. See id. at 6-7. Mr. Brooks seeks production within 30 days of any such existing discovery not previously produced and production of any such discovery generated hereafter on a monthly basis or on a more regular basis as circumstances may require.

B. Disciplinary Records from Correctional Facilities

Mr. Brooks seeks production of all co-defendants' and other incarcerated cooperating witnesses' disciplinary records from the corrections facilities where they are or have been housed. Mr. Brooks seeks production within 30 days of any existing records not previously produced and production of any such records generated hereafter on a monthly basis or on a more regular basis as circumstances may require. See John Brooks Jan. 22 Order at 3; John Brooks May 18 Order at 1.

C. Criminal Records

Mr. Brooks seeks production of the results of criminal records checks, conducted through the New Hampshire criminal history registry, NCIC and III ("triple I"), for all individuals whom the State expects to call as witnesses at trial. Mr. Brooks submits that the Court order the

production of such discovery at least 45 days prior to trial. See John Brooks Jan. 22 Order at 3; John Brooks May 18 Order at 1.

D. *Laurie* Materials

Mr. Brooks seeks any Brady and Laurie materials pursuant to Superior Court Rule 98(a)(2)(iv). See Brady v. Maryland, 373 U.S. 83 (1963); State v. Laurie, 139 N.H. 325 (1995). Specifically, Mr. Brooks seeks information from the personnel files of any law enforcement officer, in New Hampshire or elsewhere, who will testify as a witness for the State that would adversely effect that officer's (or other witnesses') credibility. Mr. Brooks submits that the Court order the production of such discovery at least 45 days prior to trial. See John Brooks Jan. 22 Order at 3-4.

E. Transcripts

Mr. Brooks seeks transcripts of all audio recordings generated during the course of the investigation in this matter. Mr. Brooks seeks production within 30 days of any existing transcripts not previously produced and production of any such transcript generated hereafter on a monthly basis or on a more regular basis as circumstances may require. See John Brooks Jan. 22 Order at 4.

F. Jail Housing Records

Mr. Brooks seeks any and all records of the correctional facilities where co-defendants Joseph Vrooman and Michael Benton have been or are being housed since their respectve arrests in connection with this matter that show, as to each co-defendant, (1) his entries and exists from the respective facility, (2) his assigned pod at the respective facility, (3) his cell and/or pod mates during his incarceration, and (4) the visitors (including law enforcement agents) that he has had during his incarceration. Mr. Brooks seeks production within 30 days of any existing records not

previously produced and production of any such records generated hereafter on a monthly basis or on a more regular basis as circumstances may require. See John Brooks Jan. 22 Order at 8-10 (regarding Vrooman); John Brooks Feb. 9 Order at 1-2 (reaffirming previous order regarding Vrooman records).

G. Jail Telephone Records

Mr. Brooks seeks an order requiring the State to preserve and produce copies of all recorded telephone conversations that include any co-defendant or other incarcerated cooperating witnesses in this matter recorded during that individual's incarceration. Mr. Brooks seeks production within 30 days of any existing recordings not previously produced and production of any such recording generated hereafter on a monthly basis or on a more regular basis as circumstances may require. See John Brooks Jan. 22 Order at 10-12; John Brooks Feb. 9 Order at 2; John Brooks May 18 Order at 1.

H. Inquiry of Law Enforcement Agencies

Mr. Brooks seeks an order compelling the State, to the extent that it has not already done so, to inquire of every law enforcement agency, both in New Hampshire and elsewhere, involved in any aspect of the investigation of this matter whether the agency has produced all notes, reports, statements or other pertinent records concerning the investigation, and compelling the State to produce promptly to Mr. Brooks any such records received in response to this inquiry. See John Brooks Jan. 22 Order at 12-13.

I. Promises, Inducements or Rewards

Mr. Brooks seeks all evidence of any promises, inducements or rewards, including special accommodations, made to any prospective witness by the State or any law enforcement agency that can be determined by inquiry of (1) any prospective witness and (2) any law

enforcement or prosecutorial agency involved in this matter. See John Brooks Jan. 22 Order at 15-16. Mr. Brooks seeks such information regarding any promises, inducements or rewards previously made or provided or any made or provided hereafter. See id.; see also John Brooks Feb. 9 Order at 3-4 (clarifying scope of earlier order). Mr. Brooks seeks production of any such discovery not previously produced regarding any co-defendant and any prospective witness who has entered into a plea or non-prosecution agreement, or who has received immunity, within 30 days, and production of such discovery regarding any other prospective witness at least 45 days prior to trial. See John Brooks Feb. 9 Order at 3-4.

J. Uncharged Misconduct

Mr. Brooks seeks evidence of any uncharged misconduct of any co-defendant and any other cooperating witnesses as can be determined by (1) inquiry of any law enforcement and/or prosecutorial agency, in New Hampshire or elsewhere, involved in the investigation of this matter; (2) inquiry of any other such agency as to which there is a reasonable good faith basis for believing such information exists, and (3) questioning the witnesses themselves as to whether, within the last ten (10) years, they have been the subject of any criminal, civil or administrative investigation by any local, state or federal agency. See John Brooks Jan. 22 Order at 16-17; John Brooks May 18 Order at 1. Mr. Brooks seeks production of such discovery at least 45 days prior to trial in this matter.

K. Witness Capacity

Mr. Brooks seeks any evidence regarding the capacity of any witness who has entered into a plea or non-prosecution agreement with the State, has received immunity from the State, or is incarcerated and may be called as a witness at trial, to perceive, remember, or relate information that could impact the credibility of his or her testimony, including specifically any

drug or alcohol problems or any physical, medical or psychiatric impairment, such as can be determined by inquiry of such witnesses. Such evidence constitutes potential impeachment evidence subject to the State's disclosure obligation. See John Brooks Jan. 22 Order, at 17-18 (citing State v. Dewitt, 143 N.H. 24, 34 (1998)); see also John Brooks Feb. 9 Order at 4-5 (clarifying scope of previous order); John Brooks May 18 Order at 1. Mr. Brooks seeks production of such discovery at least 45 days prior to trial.

L. Prosecutor Notes

Mr. Brooks seeks production of the notes of any member of the prosecution trial team in this case or in the John Brooks or Robin Knight cases regarding any interviews with Michael Benton or Joseph Vrooman to the extent that such notes (1) were adopted or approved by Benton or Vrooman or a third person not a member of the prosecution trial team who was present at the interview or (2) contain exculpatory information. See John Brooks May 18 Order at 2. Mr. Brooks also seeks production of any such notes regarding Andrew Carter.

Mr. Brooks seeks production within 30 days of any existing notes not previously produced and production of any such notes generated hereafter on a monthly basis or on a more regular basis as circumstances may require.

6. Counsel for Mr. Brooks contacted counsel for the State prior to the filing of this motion. Counsel for the State has advised that he will take no position until he has had the opportunity to review this motion.

WHEREFORE, Defendant Jesse T. Brooks respectfully requests that this Honorable Court:

A. Allow this Motion for Discovery Order;

B. Order the State to preserve and produce all of the discovery sought by this motion; and

C. Grant such other relief as is just and appropriate.

Respectfully submitted,
JESSE T. BROOKS,
By his attorneys,

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Dated: June 15, 2009

Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, June 15, 2009, to all counsel of record in this case by electronic mail and U.S. mail.

TAB A

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT
07-S-1028 to 1031
07-S-2886

State of New Hampshire

v.

John A. Brooks

ORDER ON DEFENDANT'S OMNIBUS MOTION TO COMPEL DISCOVERY

LYNN, C.J.

The defendant, John A. Brooks, stands indicted on two counts of capital murder, one count of first degree murder, and two counts of conspiracy to commit capital murder. Pending before the court is the defendant's Omnibus Motion to Compel Discovery and the State's objection. The court held a hearing on the motion on January 7, 2007. After review of the parties' arguments and the applicable law, the court finds and rules as follows.

I. Background

On May 8, 2007, the defendant was indicted for his alleged involvement in the 2005 murder of Jack Reid. The court initially ordered complete open file discovery pursuant to the Superior Court Rules. The State failed to produce certain discovery within the time required by the rules, and the defendant filed a Motion to Compel. See Super. Ct. R. 98(A)(2). The court (Coffey, J.) denied the defendant's motion, noting the complexity of the case and the fact that the defendant moved to continue the structuring conference, which would have permitted the court and counsel to adjust the standard thirty-day time limit.

Following the structuring conference, the court (Coffey, J.) issued a scheduling order requiring the State to produce all discovery by September 3, 2007. Prior to this deadline, the State moved *ex parte* for a protective order regarding certain discovery. By order issued under seal, the court (Coffey, J.) granted the State's motion and permitted the State to postpone production of the protected discovery until January 2, 2008.[1] The State then timely produced the discovery not covered by the protective order.

After reviewing the discovery produced, both originally and on or about January 2, 2008, the defendant claims it is incomplete. The defendant's motion alleges that the State has failed to produce numerous categories of discovery, and seeks an order from the court compelling the State to provide the requested materials.

II. Agreed Discovery

At the hearing on this matter, the State and the defendant were able to reach agreement with respect to several of the discovery requests. Based on these agreements, the court orders the following:

A. Investigation Notes

The State has agreed to produce, in addition to any report generated, all of the underlying raw investigative or examination notes written by law enforcement officers, criminalists or forensic experts concerning witness interviews or evidence examination. Based on the State's indication that it could produce such raw notes prepared by officers of the Derry and Londonderry Police Departments within two weeks, the State is hereby ordered to provide the defendant with the notes from these police departments

[1] The parties agree that prior to the hearing the State had timely produced the discovery covered by the court's protective order.

within fourteen (14) days of the date of this order. With respect to raw notes taken by officers of the New Hampshire State Police, by all other in-state or out-of-state law enforcement agencies and by criminalists or State forensic experts, the State shall provide the same to the defendant within thirty (30) days of the date of this order.

B. Disciplinary Records from Correctional Facilities

At the hearing, the State agreed to provide the defendant with all of the co-defendants' and other incarcerated cooperating witnesses' existing disciplinary records from the correctional facilities where they are or were housed within fourteen (14) days. The State is hereby ordered to do so. Going forward, the State must provide any such disciplinary records to the defendant within fourteen (14) days from the date the disciplinary action occurs.

C. Criminal Records

At the hearing, the parties agreed that within twenty (20) days the defendant will provide to the State a list of all potential witnesses for whom the defendant desires a criminal record check. Within thirty (30) days after receiving the defendant's list, the State shall produce to the defendant the results of criminal record checks for said individuals conducted through the New Hampshire criminal history registry, NCIC and III ("triple I").

D. Laurie Materials

With regard to Laurie materials, the State has agreed to make appropriate inquiries to all law enforcement agencies, both within New Hampshire and out-of-state, concerning officers who will testify as witnesses for the State, as to whether or not there is any information in said officers' personnel files that would adversely affect their

credibility. If any such information exists, the State shall disclose it to the defendant within sixty (60) days of the date of this order or, at the option of the State, submit it to the court for *in camera* review within that same time.

E. Transcripts

At the hearing, the State agreed to notify the court and the defendant by January 11, 2008, which presently existing statements have not yet been transcribed and the projected date that they will be. By notice filed on January 11, the State indicated that it has 20 audio and/or videotapes that have not yet been transcribed and that it anticipates being able to complete the transcription process for these tapes within sixty (60) days. Given that the State has already furnished the defendant with copies of the tapes themselves (and the defendant therefore is in a position to have his own transcripts prepared), this time frame seems reasonable. However, if the defendant disagrees with the projected deadlines, he may seek further relief from the court.

II. Contested Discovery

The defendant's remaining discovery requests concern the following matters: (A) the State's obligation to document all contacts between any representatives of the State and any co-defendant or potential witness for the State at trial; (B) the dating of all investigative reports; (C) records of movements and contacts of a co-defendant while institutionalized; (D) correctional facilities' telephone recordings; (E) the State's obligation to make inquiry of law enforcement agencies; (F) Rule 404(b) evidence; (G) admissions by silence; (H) exculpatory evidence regarding promises, inducements or rewards to prospective State witnesses, uncharged misconduct of such witnesses, and evidence of witness capacity; (I) defense review of law enforcement files; and (J)

additional discovery not produced by the State. The court addresses each of the defendant's contested requests in turn.

A. Statements

The State does not dispute that it has an obligation to disclose to the defendant all written or recorded statements of witnesses as well as the substance of all oral statements of witnesses that have been memorialized in reports or notes of law enforcement officers or others (but not including notes personally prepared by the State's trial counsel unless the notes were shown to or adopted by the witness or a third person who was present when the oral statements memorialized in the notes were made). See Super.Ct.R. 98(C)(3). It also is clear that the State has an obligation to document and disclose to the defendant any exculpatory or impeaching information that may be provided by a witness during contact with state investigators or prosecutors, including statements made by a witness that contradict or are inconsistent with prior statements of the witness. Relying on State v. Zwicker, 151 N.H. 179 (2004), however, the defendant asserts that the State must go further and reduce to writing the date, persons in attendance and length of any contact its representatives have with any State witness. Thus, according to the defendant, the State must generate a report every time a representative of the State meets with a witness, even if the State has already provided the defendant with statements or reports of prior interviews of the witness and even if the witness provides no new information, exculpatory information, or impeaching information during the later interview. The defendant also asserts that the State is obligated to document and disclose to him all statements made by law enforcement agents to any State witness.

The court finds the defendant's reliance on Zwicker misplaced. From all that appears in the decision, Zwicker involved a situation where, notwithstanding that the defendant's counsel had interviewed two witnesses the defense planned to call at trial, the defense had provided the State with no information at all concerning the factual information the witnesses had provided during the interviews (and which presumably would form the basis for their trial testimony). It was in this rather unique circumstance that the supreme court held the trial court did not err in requiring the defendant's attorney to provide the State with a summary of the testimony he expected to elicit from the witnesses. 151 N.H. at 190-92. Contrary to defendant's argument, this court does not believe that Zwicker stands for the proposition that either the State (except with regard to exculpatory information) or the defendant in a criminal case is generally required to create discovery materials that do not otherwise exist.[2] Nor does the court agree with defendant's implicit suggestion that the mere fact of contact between a witness and a representative of the State itself constitutes exculpatory information.

Here, the State has provided (or has agreed to provide) the defendant with written statements and/or investigative reports that summarize oral statements made by all witnesses. The State, therefore, is not required to produce the specifics of each meeting of a police officer or prosecutor with a witness, such as the date, time, length of meeting, or those present. The State is only required to generate a record of contact if (1) the State has not previously provided a report of interview of or statement taken from the witness, (2) the witness provides information different from or in addition to that previously disclosed, or (3) the witness provides exculpatory or impeaching information.

[2] Aside from Zwicker, which, as noted in the text, is readily distinguishable from this case, the defendant has not cited nor has my research revealed any other authority supporting his expansive view of the State's discovery obligations.

The court notes, however, that if a state representative does make notes during a contact with a witness or generates a report as a result of the contact, then such notes or reports (aside from trial counsel's personal notes) constitute "statements" that must be produced to the defendant.

Similarly, the State does not have to generate and produce a record of statements made by law enforcement agents to potential witnesses unless the law enforcement agent's statement is exculpatory. The defendant has pointed to one or more examples of situations where a police officer may have provided a witness or co-defendant with assistance in remembering certain information, pronouncing the name of a town, etc. This type of information is potentially exculpatory and thus the substance of any such information furnished by a law enforcement officer must be furnished to the defendant.

B. Dating of Reports

The defendant contends it is the State's responsibility to ensure that all investigative reports generated in connection with this case are properly dated. Specifically, the defendant contends all reports should be uniformly dated according to the day that they are written in order to prohibit accidental or intentional misdating. The defendant asserts that there have been a few instances where it appears reports were dated on the date an interview or some other event occurred even though the report was not actually prepared until a later date. The defendant claims his ability to cross examine witnesses will be impaired unless the State confirms that the date of each report is correct.

The State contends it has no independent ability to confirm that a report was written on the date listed on the report. The State alleges the proper avenue for the defense to challenge inaccuracies in the reports is through cross examination and not through discovery requests.

In the absence of any indication of a systematic or deliberate effort to mislead the defense, the court does not believe it would be a proper exercise of judicial authority to attempt to dictate the internal paperwork production routine followed by law enforcement agencies of the executive branch. However, it is not hard to envision circumstances in which a substantial delay between the date when an officer conducted certain activities and the date when the officer documents the activities in a written report would constitute exculpatory evidence, the non-disclosure of which could potentially jeopardize the prosecution of this case. For this reason, among others, it is the court's expectation that in the normal course of business police reports will contain some indication of the date the report was prepared, and not simply the date of the events documented in the report.

C. Jail Records of Co-Defendant Vrooman

The defendant seeks access to records of the house of corrections where co-defendant Joseph Vrooman is housed showing (1) Vrooman's entries and exists from the facility and his assigned pod at the facility, (2) Vrooman's cell or pod mates for the period he has been held at the facility, and (3) the visitors (including law enforcement agents) Vrooman has had while at the facility. Among other reasons, the defendant desires this information as a basis for identifying individuals with whom Vrooman likely has communicated, so that the defense can then interview these individuals about

statements Vrooman may have made to them concerning the death of Reid. The defendant notes that discovery already provided by the State reflects that Vrooman has in fact made statements to other inmates which at least arguably can be regarded as exculpatory.

Because of the State's assertion of security concerns regarding this request, the court gave the State seven days to file a post-hearing memorandum regarding this issue and permitted the defendant seven days thereafter to respond to the State's filing. Having now reviewed the supplemental filings of the parties, the court is not persuaded that there are sufficient grounds to adopt either of the State's proposed alternatives of either denying the discovery outright or permitting disclosure to defendant's attorneys but restricting them from sharing the information with their client. Although some of the information which forms the basis for the State's concerns appears to be ambiguous and subject to varying interpretations, and some of the statements attributed to the defendant may be little more than jail house braggadocio, there is at least one incident involving an assault of another inmate which is quite troubling. However, all of the information relied on by the State predates defendant's recent transfer to the state prison, where he is now held in solitary confinement. This change in defendant's custody status, initiated by the State because of the very concerns which underlie its objection to providing the discovery at issue, surely ameliorate the State's security concerns to a significant degree. Furthermore, because Vrooman also is in custody and thus under the State's control, the State has the ability to address issues regarding his safety in ways other than by restricting the defendant from pursuing legitimate avenues of discovery. The State could, for example, have Vrooman transferred to another facility

or placed in solitary confinement. Finally, while there may be truly exceptional circumstances which would warrant restricting an attorney from disclosing discovery information to his client, the court believes this practice can often place defense counsel in an untenable position and therefore should be utilized only when no other alternative is available. Here, as just noted, there are other reasonable alternatives.

Accordingly, insofar as such records exist,[3] the State is ordered to disclose to the defendant within fourteen (14) days of the date of this order all records maintained by the house of corrections reflecting Vrooman's entry and exit of his pod and/or the institution, his visitors, and his cell or pod mates.

D. Jail Telephone Records

The defendant asserts that he is entitled to copies of the tapes of all recorded telephone conversations made by the defendant or any co-defendant from the state prison or any of the houses or corrections where they are being held (collectively "corrections facilities"). The defendant admits that the State has produced selected recordings of telephone calls made by the defendant and co-defendants from the correctional facilities, but insists that the State cannot selectively choose which jail telephone records are discoverable.

The State responds that it has provided the defendant with copies of the telephone recordings in its possession, but objects to providing more than this, arguing: (1) the defendant's request creates an unreasonable burden because each facility has a different recording procedure; (2) the prisoners have circumvented various recording

[3] As noted elsewhere in this order, the State has no obligation to create records or documents that do not otherwise exist.

systems; and (3) it is not required to produce evidence possessed by other government agencies, such as correctional facilities.

The State's disclosure obligations extend to any evidence "in the prosecutor's possession or in the possession of a law enforcement agency charged with the investigation and presentation of the case." State v. Lavallee, 145 N.H. 424, 427 (2000). "Application of the disclosure rule to law enforcement officials can be justified by the special relationship shared between prosecutors and law enforcement officials in investigating and prosecuting criminal conduct." Id. (citation omitted). This duty, however, does not require the prosecutor to produce evidence in the possession of other government agencies. Id. (finding no justification for imputing to the prosecution the Division for Children, Youth and Families' (DCYF) knowledge that possible exculpatory evidence existed).

Here, the court finds that the relationship between the State and the correctional facilities is such that the State must produce the requested recordings. It is undisputed that, in one fashion or another, all of the corrections facilities record all non-attorney-client calls made by the defendant and the co-defendants. It also seems clear that someone from these facilities or from the prosecution team has been monitoring and/or reviewing these calls and making copies of those calls deemed potentially pertinent to the instant prosecution. That being the case, there is no legitimate reason that the defendant should not also be granted access to the very same tapes so that his defense team may make its own determination of what calls are pertinent.

Accordingly, the State is hereby ordered to direct each of the corrections facilities to preserve (that is, not to tape over) all telephone calls (other than attorney-client calls)

made by or to the defendant or the co-defendants. The State shall provide the defendant with copies of all such recordings as may presently exist within fourteen (14) days of the date of this order, and shall provide the defendant with copies of future calls within ten (10) days of the date such calls occur. This order does not require the corrections facilities to create any recordings that do not or would not otherwise exist under their standard operating procedures, nor (obviously) does it require the facilities to record calls in instances where the defendant or co-defendants have been able to successfully circumvent the institutions' call recording systems.

E. Inquiry of Law Enforcement Agencies

The defendant asserts that the State must make affirmative inquiry of all law enforcement agencies, within and without New Hampshire, which have been involved in the investigation of this case as to whether each such agency has produced all notes and reports regarding its participation in the investigation. Acknowledging its responsibility in this regard, the State responds that it has already made such requests. The State notes, however, that it has no ability to compel authorities outside of New Hampshire to produce materials.

While the State is correct concerning its lack of power to compel compliance by out of state agencies, there is no reason to believe that such agencies would have any reason to be less diligent in cooperating with discovery requests than they were in providing assistance to New Hampshire authorities during the investigation. Accordingly, to the extent it has not already done so, the State is directed to immediately make inquiry of every law enforcement agency that was involved in any aspect of the investigation of this case to insure that each such agency has produced all

notes, reports, statements or other pertinent records concerning the investigation. These agencies include, but are not necessary limited to the following: New Hampshire State Police, Derry Police, Londonderry Police, Massachusetts State Police, Danvers Police, Medford Police, Wakefield Police, Saugus Police, Essex County District Attorney, Las Vegas Police, and appropriate authorities in the State of Tennessee. Insofar as this inquiry results in the production of any materials not previously disclosed, such materials shall be turned over to the defendant within thirty (30) days.

F. Rule 404(b) Evidence

The defendant requests the State to identify any evidence contained within the discovery that it contends falls within the purview of New Hampshire Rule of Evidence 404(b). The State asserts the court's scheduling order does not require the State to designate 404(b) evidence until approximately two months prior to the trial.

The court's scheduling order is somewhat ambiguous on this point. It states that "trial motions (NH Rule of Evidence 404(b), and evidentiary motions is limine)" must be filed by June 2, 2008, and that the State must respond by June 21, 2008. Although the wording of the scheduling order seems to contemplate that only the defendant would file Rule 404(b) motions or motions in limine, in reality both the State and the defendant are likely to file such motions. Because the State represents that it has turned over all discovery containing any arguable 404(b) evidence, the crux of the defendant's position is that the State should be compelled to designate at this time what evidence it will seek to introduce pursuant to Rule 404(b). The court agrees with the State that it would be premature to require such designation at this time. Rather, both the State and the defendant shall be required to file any motions seeking to admit or exclude evidence

pursuant to Rule 404(b) by June 2, 2008, with responses to such motions due by June 21, 2008.

G. Admissions by Silence

The defendant contends that the State should be required to identify any evidence contained within the discovery that it will contend constitute "admissions by silence" of the defendant or any of the co-defendants. The State responds that it satisfies its discovery obligations by providing the defendant with full discovery and that it is not required to go further by characterizing for the defendant what evidence within the discovery may constitute admissions by silence. The court agrees with the State. This case is far less document-intense than most of the cases relied on by the defendant in support of his argument and, consequently, there is no danger here that failure to require a specification of what constitutes admissions by silence will leave the defendant searching for the proverbial needle in the haystack. Through review of the discovery the defendant is in as good a position as the State to determine what evidence may constitute admissions by silence.

H. .Exculpatory Evidence

The defendant asserts he is entitled to the following exculpatory evidence regarding the bias, credibility or motivation of the State's witnesses: (1) all promises, inducements or rewards made to any co-defendant or witness; (2) all evidence of uncharged misconduct by any co-defendant or witness; and (3) any evidence regarding a witness's capacity.

1. Promises, Inducements or Rewards

The defendant contends that the State must produce evidence of any promises, inducements or rewards, including special accommodations, made to any prospective witnesses by the prosecution or by any law enforcement agency. The defendant further argues the State has an affirmative duty to seek out any such information. The State generally agrees that it must produce evidence of this kind, but it is not clear that the State acknowledges the full extent of its obligations in this area.

Due process requires that the State produce all exculpatory information. State v. Laurie, 139 N.H. 325, 327 (1995). This includes impeachment materials. Id. The State is required to produce not only evidence of any formal plea bargains or immunity agreements, but also of any other consideration of any kind offered or given by the prosecution or by any in-state or out-of-state law enforcement or prosecutorial agency to any State witness in return for his cooperation or testimony. Preferential treatment regarding housing, relocation, place of incarceration, other special privileges of any kind, or forbearance to take action regarding civil, criminal or administrative proceedings due to the witness's cooperation must be disclosed. Furthermore, although the court agrees with the State that its obligation to ferret out the existence of such inducements is not unlimited, at the very least the State's obligation of inquiry extends to (1) all law enforcement and prosecutorial agencies, within and without New Hampshire, that are or were involved in the investigation of this case and (2) questioning the witnesses themselves as to whether they have received, been offered or have an expectation of receiving any such consideration.

The State shall make the required inquiries and provide the required disclosures to the defendant within thirty (30) days of the date of this order and shall promptly supplement its disclosures should any witness request, receive or be offered any additional consideration of any kind.

2. *Uncharged Misconduct*

The defendant contends that, in addition to the criminal records of State witnesses, he also is entitled to information concerning instances of misconduct by the witnesses that have not resulted in criminal convictions. The State does not dispute the general proposition that, insofar as it becomes aware of such information and the information has a bearing on credibility, it must be disclosed to the defense; instead, the State takes issue only with the open-ended nature of the duty of inquiry which the defendant seeks to impose upon the prosecution. The court believes the State's concern is well-founded. Brady and its progeny do not require the prosecution to go on a wild goose chase in pursuit of exculpatory evidence the existence of which is purely speculative.

Accordingly, the State shall be required to make inquiry concerning uncharged misconduct of co-defendants and other cooperating State witnesses only (1) with the in-state and out-of-state law enforcement and prosecutorial agencies involved in the investigation of this case, (2) with other agencies as to which there is a reasonable good faith basis for believing such information exists, and (3) by questioning the witnesses themselves as to whether, within the last ten (10) years, they have been the subject of any criminal, civil or administrative investigation by any local, state or federal agency. With respect to category (2) just described, the State shall make inquiry of the law

enforcement agencies specified in defendant's January 14, 2008 submission regarding the two prospective witnesses identified in said submission.

The State shall make the required inquiries and provide the required disclosures to the defendant within thirty (30) days of the date of this order.

3. Witnesses Capacity

The defendant argues that he is entitled to all evidence regarding any witness's capacity to perceive or relate information that could impact the credibility of his or her testimony. Specifically, the defendant asserts the State must disclose any drug or alcohol problems or any physical, medical or psychiatric impairment of the State's witnesses. Citing State v. Dedrick, 135 N.H. 502 (1992), the defendant contends that nondisclosure of evidence affecting witness credibility violates his due process rights when the reliability of the witness may be determinative of his guilt or innocence.

The State contends that the defendant has no right to access its witnesses' confidential medical or psychiatric records without making an adequate showing to warrant review of their contents. Relying on Pennsylvania v. Ritchie, 480 U.S. 39 (1987) and State v. Gagne, 136 N.H. 101 (1992), the State asserts that confidential records of witnesses should be submitted to the trial court for *in camera* review, and that even that step is required only once the defendant has established a reasonable probability that the records contain information that is material and relevant to his defense. The State argues that the defendant has made no such showing in this case and, therefore, his request should be denied.

Evidence regarding a witness's diminished capacity to perceive, remember, narrate or reason may be useful for impeachment purposes at trial. See State v. Dewitt,

143 N.H. 24, 34 (1998) (finding adverse witness's mental health records sufficiently favorable to the defendant to trigger State's obligation to disclose it). Although records regarding physical or mental impairments or drug or alcohol counseling or treatment may be privileged from disclosure pursuant to statute or court rule, such privileges can be waived and there is nothing which prevents the State from at least making inquiry of its witnesses as to whether they have experienced such maladies or been treated for the same and, if an affirmative answer is received, requesting that the witness waive the privilege with respect to relevant records. Furthermore, with respect to those witnesses who have entered into plea or non-prosecution agreements with the State, presumably a condition of such agreements is that the witness provide full and complete information concerning anything pertinent to the case. Since information potentially affecting a witness's credibility is obviously pertinent to the case (indeed the court cannot imagine that the State would not require disclosure of such information for its own purposes), the State would appear to be in a position to compel a privilege waiver from any such witness on pain of being found in violation of the terms of such agreement.

Accordingly, the court hereby orders the State to make inquiry concerning the above matters of any witness who has entered into a plea or non-prosecution agreement with the State in connection with his anticipated testimony in this case. The results of such inquiries shall be disclosed to the defendant within thirty (30) days. Thereafter, the defendant may move for further disclosures if a sufficient showing can be made.

I. Review of Law Enforcement Investigative Files

The defendant requests that defense counsel be permitted to review all law enforcement investigative files to ensure that the defendant has received complete discovery. In the alternative, the defendant asks that, at a minimum, a member of the prosecution trial team be required to review each such file for completeness. The defendant's request is unprecedented in this State and, at bottom, appears to be based on the supposition that the prosecution cannot be trusted to comply with its discovery obligations without a court order prescribing how such compliance must be achieved. The court is not persuaded that such an order is necessary and therefore denies this request.

J. Additional Discovery

In addition to the discovery materials discussed above, the defendant has requested specific items referenced in but missing from the discovery provided by the State to date. See Def.'s Omnibus Mot. to Compel Disc. Ex. A §§ I(1)-(8) & VI(6)(a)-(e). Because the State has not objected to disclosing this information, the court orders the State to do so within fourteen (14) days of the date of this order.

III. Conclusion

For the reasons stated above, the defendant's Omnibus Motion to Compel Discovery is granted in part and denied in part.

So ordered.

January 22, 2008

ROBERT J. LYNN
Chief Justice

TAB B

THE STATE OF NEW HAMPSHIRE

RECEIVED
ROCKINGHAM
SUPERIOR COURT
2008 FEB 12 A 10: 06

ROCKINGHAM, SS.

SUPERIOR COURT

DOCKET NOS. 07-S-1028 – 1031, 2886

STATE OF NEW HAMPSHIRE

V.

JOHN A. BROOKS

ORDER ON STATE'S MOTION TO CLARIFY AND/OR RECONSIDER AND PARTIAL MOTION TO STAY DISCOVERY ORDER OF 1/22/08

After carefully considering the State's Motion to Clarify and/or Reconsider and Partial Motion to Stay Trial Court's Discovery Order of 1/22/08 and the defendant's Response, the court rules as follows on the motion:

1. The court grants the State's request for a stay of its obligation to comply with section II(C) of the court's January 22, 2008 Order on Defendant's Omnibus Motion to Compel Discovery pending ruling on the instant motion for reconsideration. However, since, as discussed in paragraph 2 below, the court denies the States' motion for reconsideration with respect to the section II(C) materials, the State must now provide the section II(C) materials to the defendant forthwith.

2. The court denies reconsideration with respect to the State's request that the jail records of co-defendant Vrooman be subject to a protective order that precludes defense counsel from sharing these records with the defendant. The court is not persuaded that the order issued by the federal court or the possibility that the defendant may be transferred to another facility as a result of the federal court order provides a basis for the protective order the State seeks. Although, as noted in the January 22

order, there is one incident of alleged conduct by the defendant while institutionalized that is a cause for concern, that incident appears to be collateral to the matters at issue in this case. The State simply has not made a sufficiently particularized showing that defendant has engaged in conduct while in custody that demonstrates there would be a risk to Vrooman if the defendant were exposed to information concerning Vrooman's cell or pod mates, visitors, or ingress/egress from place of confinement. As stated previously, the defense has a legitimate need for this information to identify potential witnesses who may have spoken to Vrooman. There is no question that Vrooman and the other co-defendants have been and will continue to be housed in different places of detention. Nothing in the federal court's order prevents this, nor does that order prevent the State or correctional authorities from monitoring the institutional behavior of the defendant, Vrooman, or other inmates with whom they may have contact and from taking appropriate actions to protect the safety of all concerned and prevent threats, harassment or intimidation of any prospective witness. And, of course, this court is always available to grant appropriate relief if an adequate showing can be made.

3. With respect to institutional disciplinary records and jail telephone calls, the court modifies its January 22 order as follows. The State shall collect all calls and disciplinary records at the end of each month and shall produce the same to the defendant within fourteen (14) days of month's end.

4. The State raises three issues with respect to its obligation to disclose information about promises, inducements or rewards received or expected by its witnesses: (1) Does the obligation extend to all witnesses or only to co-defendants and "cooperating witnesses?" (2) If the obligation extends to all witnesses, do all such

witnesses have to be questioned by the State within thirty (30) days as to their receipt or expectancy of receiving consideration in return for their testimony? and (3) Does "consideration" received by a witness mean consideration only with respect to this case or does it mean any consideration ever received by the witness in any case?

Dealing with the last issue first, the State's obligation to disclose to the defense information about inducements received or expected by a witness does not depend on the case in which it is offered by the State or even on whether it is "offered" by the State at all. Rather, the important consideration is whether it involves a situation or circumstance that could provide a witness with reason or incentive to curry favor with the State, even if the State has not offered any "deal" or other formal assistance with respect to the matter. For example, if a State witness was, say, applying for a liquor license or a zoning variance that was contested at the time he spoke with the police or was expected to testify at trial, that fact could well provide the witness an incentive to cooperate with the State in the hopes that doing so would place the witness in a favorable light with the regulatory body responsible for approving the license or variance, even though the prosecution never made any promise or offer to intervene on the witness's behalf with the regulatory body.

With respect to the first and second issues, the State's obligation to disclose inducements extends to all witnesses not just co-defendants or other cooperating witnesses. However, the State's point is well-taken that it would be impractical for the State to have to question all 300 of its prospective witnesses on this score within the next thirty days. It seems quite likely that the vast majority of witnesses who received or have an expectancy of receiving inducements are either co-defendants or individuals

who have some criminal exposure themselves (in this case or other matters) and have been immunized or granted non-prosecution agreements. Accordingly, the State shall question these witnesses and disclose all inducements received or expected within thirty (30) days. With respect to all other witnesses (as to whom the likelihood of inducement evidence seems remote), the State may make the required inquiries and provide the required disclosures as it contacts these witnesses for trial preparation purposes, with the caveat all such information shall be produced to the defense at the latest forty-five (45) days before trial.

5. Lastly, with respect to mental health issues, the State's obligation to make inquiry regarding the existence of such issues extends to all co-defendants and others who have either entered into plea or non-prosecution agreements or been granted formal or informal immunity. However, in making this ruling the court recognizes that, in the case of individuals who are providing information only because they have been compelled to do so via a grant of formal immunity, the State may not have any leverage to force a privilege waiver from such individuals. That the State may not be able to compel a privilege waiver, however, does not prevent the State from asking for one.

So ordered.

February 9, 2008

ROBERT J. LYNN
Chief Justice

TAB C

THE STATE OF NEW HAMPSHIRE

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ROCKINGHAM
SUPERIOR COURT
2009 MAY 20 A 9:48

ROCKINGHAM, SS. SUPERIOR COURT

DOCKET NOS. 08-S-580 – 583; 07-S-1028 – 1031; 07-S-2886

STATE OF NEW HAMPSHIRE

V.

JOHN A. BROOKS

ORDER ON DEFENDANT'S FIRST MOTION
FOR SUPPLEMENTAL DISCOVERY

After careful review of the captioned motion and the State's objection to same, it is hereby ordered as follows:

1. With respect to potential State witnesses Michael Benton, Christopher Bouchard, Heath Chase, Michael Small and any other person who was incarcerated with defendant John Brooks and who may be called by the State as a witness at trial, the State shall produce (in the same manner as previously specified in the court's Order on Defendant's Omnibus Motion to Compel Discovery) the following materials: the witness's criminal record; the witness's disciplinary record while incarcerated[1]; copies of recordings of all recorded calls made by the witness while incarcerated[2]; all promises or inducements of any kind made to the witness; any uncharged misconduct of the witness; and information regarding the witness's capacity to be a witness.

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[1] Although the State now appears to object to providing witness disciplinary records, at the original discovery hearing in this matter the State had agreed to provide this information with respect to "all of the co-defendants and other incarcerated cooperating witnesses . . ." See Order on Defendant's Omnibus Motion to Compel Discovery, § II(B) (Jan. 22, 2008).

[2] The court recognizes that ordering production to the defense of all recorded calls of inmate-witnesses places a burden on the institutions where they are being held. However, as noted in the original discovery order, the calls in question are monitored by institution personnel in any event and the State does not deny that -- regardless of any burden on the institution -- when such monitoring reveals calls that the institution believes the prosecution team should be aware of, the institution provides copies of the recordings to the prosecution. Given this circumstance, the court is not persuaded that the institution is unduly burdened by providing the recorded calls to the defense team.

However, the court denies the defendant's request for discovery of all records regarding each of the above-incarcerated witness's cellmates or pod mates. Unlike the situation with respect to Joseph Vrooman, where the defendant was able to point to specific statements made by Vrooman to other inmates that were at least arguably exculpatory, the defendant has made no similar showing with respect to any of the witnesses identified above. In the absence of such a showing, and given the countervailing considerations of the burdensomeness of the request and the State's legitimate security concerns, the court declines to order disclosure of these records.

2. The State is not required to turn over to the defendant copies of the interview notes of any member of the prosecution's trial team with respect to interviews of Michael Benton or Joseph Vrooman, unless such notes either (1) were adopted or approved by Benton or Vrooman or a third person not a member of the prosecution's trial team who was present at the interview or (2) contain exculpatory information.

3. Although the State had originally indicated the Nashua District Court had no records regarding a 1979 case involving the victim Jack Reid, at the hearing the State indicated that it had received updated information indicating that in fact the district court may have at least some information regarding this case. The State shall disclose to the defendant within ten (10) days any and all information that is available from the district court or from law enforcement agencies regarding the case in question.

So ordered.

May 18, 2008

ROBERT J. LYNN
Chief Justice