

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

**DEFENDANT'S OBJECTION TO STATE'S MOTION TO COMPEL
RECIPROCAL DISCOVERY**

2009 OCT -1 P 12:56
ROCKINGHAM
SUPERIOR COURT

Defendant Jesse T. Brooks, by and through counsel, hereby opposes and objects to the State's Motion to Compel Reciprocal Discovery (Sep. 21, 2009). Although the discovery that the State seeks in its motion is well beyond a defendant's discovery obligations under Superior Court Rule 98, the State has provided no specific rationale for requiring its production in this case. Instead, the State seeks essentially to re-write the Rule 98 requirements based on caselaw most of which pre-dates the adoption of that rule.

Mr. Brooks has already produced to the State all of the materials and information that he is required to produce under Rule 98. Moreover, Mr. Brooks has exceeded his Rule 98 obligations and provided additional information regarding expected trial witnesses. The State cites no valid basis for requiring the additional discovery that it now seeks, and therefore the State's motion should be denied.

In further objection to the State's Motion, Mr. Brooks states as follows:

1. A defendant's discovery obligations are governed by Superior Court Rule 98.

Rule 98, which was adopted in 1997, provides that

the defendant shall provide the state with a list of the names of the witnesses the defendant anticipates calling at the trial or hearing. Contemporaneously with the furnishing of such witness list, the defendant shall also provide the state with all statements of *witnesses the defendant anticipates calling at the trial* or hearing.

Rule 98(C)(2) (emphasis added). Under Rule 98, a “statement” of a witness means

- (i) a written statement signed or otherwise adopted or approved by the witness;
- (ii) a stenographic, mechanical, electrical or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement;
- and (iii) the substance of an oral statement made by the witness and memorialized or summarized within any notes, reports or other writings or recordings, *except that, in the case of notes personally prepared by the attorney representing the state or the defendant at trial, such notes do not constitute a “statement” unless they have been adopted or approved by the witness or by a third person who was present when the oral statement memorialized or summarized within the notes was made.*

Rule 98(C)(3) (emphasis added).

2. Mr. Brooks has already significantly exceeded his discovery obligations under Rule 98. Contrary to the State’s suggestion that Mr. Brooks has produced little or no information regarding the expected trial witnesses in this case, see State’s Motion at 1, Defense counsel has provided the State with the identity and relevance of each of the witnesses whom Mr. Brooks intends to call at trial. See Rule 98(C)(2). Defense counsel has provided the State with notes from a defense investigator regarding witnesses on Mr. Brooks’ witness list. See Rule 98(C)(2)(iii). Defense counsel has also provided the State with summaries of the expected testimony of its witnesses, even where such summaries did not constitute “statements” requiring production under Rule 98.

3. In addition, Mr. Brooks has provided the State with information regarding multiple witnesses *on the State’s witness list*. Although, again, not required by Rule 98, this discovery has included notes from a defense investigator regarding his contacts with witnesses whom the State has indicated it intends to call at trial. Contrary to the State’s assertions, Mr. Brooks thus is far from “spring[ing] a surprise defense and witness” on the State or the Court in this case. Cf. State’s Motion at 4 (quoting State v. Drewry, 139 N.H. 678, 686 (1995)).

4. The State now seeks to require production of any “new information” that defense counsel has obtained from any witness *whom the State intends to call* at trial. In other words, the State would require defense counsel to create a summary of information that defense counsel obtained during an interview, by defense counsel, of any witness on the State’s witness list. Cf. Rule 98(C)(2).¹

5. The discovery that the State seeks is well beyond the terms of Rule 98 in at least three ways. First, Rule 98 has no requirement that a defendant produce any information regarding the State’s witnesses. See Rule 98(C)(2). Second, Rule 98 does not require a defendant to produce any information from any “oral statement” made by a witness where that statement is not “memorialized or summarized” in a writing. See Rule 98(C)(3) (iii). Third, Rule 98 carefully excludes from a defendant’s discovery obligations even those writings that memorialize an “oral statement of a witness” but that constitute the notes of an attorney representing the defendant. See id.

6. The State suggests that Rule 98 merely “defines *some of the parameters* of a defendant’s reciprocal discovery obligations.” See State’s Motion at 5 (emphasis added). According to the State, the rule only “constitutes the baseline of a criminal defendant’s pre-trial disclosure obligations.” Id. at 6.²

7. The bulk of the caselaw that the State cites in support of its argument, however, pre-dates the adoption of Rule 98. Indeed, 5 of the 7 New Hampshire Supreme Court cases cited

¹ The fact that the focus of the State’s motion is discovery regarding its own witnesses is easily missed; it is, after all, buried in the State’s motion. See State’s Motion at 3 (referencing this point for the first time in the last sentence of paragraph 6); id. at 8 (discussing this point in paragraph 16—the last paragraph of the motion).

² Ironically, the State thus appears to concede that Mr. Brooks has met his obligations under the terms of Rule 98 while also asserting that Mr. Brooks’ objection to the discovery that the State seeks constitutes “an end-run around rules requiring that he provide reciprocal discovery to the State.” See State’s Motion at 5.

in the State's motion are older than the Rule 98 requirements. See State v. Drewry, 139 N.H. 678 (1995); State v. Chagnon, 139 N.H. 671 (1995); State v. Nadeau, 126 N.H. 120 (1985); State v. Miskell, 122 N.H. 842 (1982); State v. Bloom, 174 N.H. 750 (1974).

8. Chagnon, for example, which the State cites specifically in describing the scope of a defendant's obligations under Rule 98, discussed a defendant's discovery obligations under former Superior Court Rule 99, not Rule 98. See State's Motion at 6; 139 N.H. at 677. Rule 99 (which was suspended in 1999), as discussed in Chagnon, was unlike Rule 98 "a general rule of reciprocal discovery" by which a court had broad discretion to "require the parties to exchange or otherwise to inform each other of, and permit each other to inspect and copy" documents, including "statements of witnesses." 139 N.H. at 677 (quoting Rule 99). Rule 99, unlike Rule 98, thus left "the determination of whether to order discovery to the trial court's discretion." Id.

9. The State is correct in noting that in 2004, in State v. Zwicker, 151 N.H. 179, 190 (2004), the Supreme Court upheld the trial court's order that the defendant provide the State "with a summary of testimony that he expected to elicit from two witnesses." The State omits, however, a crucial fact regarding the witnesses at issue in Zwicker: they were *defense* witnesses.

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 It was in this rather unique circumstance that the supreme court held that 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.

Order on Def.'s Omnibus Motion to Compel Discovery, State v. John A. Brooks, Rockingham Superior Court Nos. 07-S-1028-1031, at 5 (Jan. 22, 2008) (Lynn, C.J.) (emphasis in original).

Zwicker thus comports with the requirements of Rule 98 for a defendant to provide the State with information regarding the defendant's own witnesses.³

10. The Rule 98 limitations on a defendant's discovery obligations are particularly apt in the context of the State's investigation in this case. As the State has noted repeatedly, it has produced substantial volumes of discovery in this case to date, including discovery regarding all of the witnesses on its witness list. The State, through various law enforcement officers and agencies as well as the Attorney General's office, has interviewed these witnesses, in some cases, multiple times. Witnesses also appeared in the grand jury and testified at either or both of the trials of co-defendants John Brooks and Robin Knight. The State, unlike the Defendant, thus has had multiple opportunities to elicit information from its witnesses, including multiple opportunities to elicit such information by subpoena and under oath, and should have no need for any information that defense counsel has elicited in their interviews of those witnesses.

11. Despite this context, the State offers no rationale specific to this case for requiring the discovery it seeks, see State's Motion at 3-4, and fails to explain why its attorneys cannot simply reinterview the witnesses on its own witness list. There is no assertion that the witnesses in question are hostile to the State. Instead, the State primarily cites generic arguments regarding "broad and liberal discovery" that would be applicable to any defendant in any criminal case. See id. at 4.⁴ The State's arguments thus would essentially rewrite and supersede Rule 98's

³ The Supreme Court decision in Zwicker did not address or even reference the trial court's rationale for its order. The only issue in the case was whether the summaries that the court ordered produced constituted work product. See Zwicker, 151 N.H. at 191. In the only other post-Rule 98 case the State cites, State v. Cromlish, 146 N.H. 277 (2001), which is equally irrelevant here, the Supreme Court upheld the trial court's rejection of a defendant's request for funds for an expert made over two months after the deadline for expert disclosures.

⁴ The only circumstances specific to this case that the State cites concern are the State's assertions about the insufficiency of two previous discovery-related filings by Mr. Brooks. See

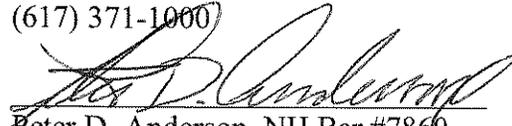
provisions. As noted above, Mr. Brooks has fully complied with and, in fact, exceeded his obligations under Rule 98. Those obligations should not now be rewritten with no appropriate basis articulated by the State for doing so.

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

- A. Deny the State's Motion to Compel Reciprocal Discovery; and
- B. Grant such other relief as is just and appropriate.

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

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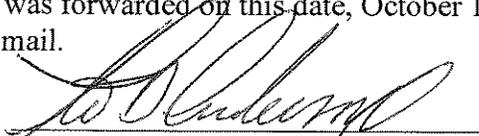


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Certificate of Service

I hereby certify that a copy of the foregoing was forwarded on this date, October 1, 2009, to all counsel of record by electronic mail and U.S. mail.



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State's Motion at 5. As documented in the record, Mr. Brooks disagrees with the State on these points, neither of which bears on the propriety of the discovery that the State now seeks.