

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**No. 2009-0324**

**State of New Hampshire**

**v.**

**Francis Karuru a/k/a Francis Ngugi**

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**Appeal Pursuant to Rule 7 from Judgment  
of the Hillsborough County Superior Court / South**

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**BRIEF FOR THE DEFENDANT**

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(5 Minutes 3JX Panel Oral Argument)**

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QUESTION PRESENTED

1. Whether the court erred in admitting evidence of Karuru's presence at the January 4, 2008 drug sale and his statement about a drug dealer and drugs.

Issue preserved by Motion, A 4-5\*; State's Objection, A6-7; objections made prior to trial and trial court's ruling, TI 3-12.

2. Whether the trial court erred in allowing the State's principal witness to testify while wearing a mask.

Issue raised as plain error pursuant to Supreme Court Rule 16-A.

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\*Citations to the record are as follows:  
"A" refers to the Appendix to Defendant's Brief;  
"TI" refers to Trial Transcript, December 2, 2008;  
"TII" refers to Trial Transcript, February 27, 2009.

STATEMENT OF THE CASE

Francis Karuru was charged in the Hillsborough County Superior Court-Southern District with two counts of sale of a narcotic drug. A 1-2; TII 8-9. The purported sales occurred on January 7 and 9, 2008. A 1-2; TII 8-9. The January 9 charge alleged that Karuru acted as an accomplice. A 2; TII 8-9.

The trial commenced on December 2, 2008 but ended in a mistrial. TI 28-29. Another trial was held on February 27, 2009. TII. Following a one day jury trial, Karuru was found guilty on both counts. TII 166-67. The court (Groff, J.) sentenced Karuru to concurrent sentences of 2-4 years, stand committed. A 12-13.

STATEMENT OF FACTS

On January 4, 2008, Detective Keith Dillon of the Nashua Police Department went to 49½ Bowers Street to purchase crack cocaine. TII 23. Dillon was working undercover and acting on information obtained from an informant. TII 22-23. The informant accompanied Dillon to the Bowers Street residence. TII 23.

When they arrived, the informant introduced Dillon to the target of the investigation, Robert Ngari. Dillon also met Karuru and his brother, Timothy Kamane Waiganjo, who happened to be at the residence. TII 23-24. Dillon talked with Ngari about buying crack cocaine and Ngari made a telephone call to his supplier. TII 25.

According to Dillon, while they waited for Ngari's supplier, they talked about the quality of the crack cocaine. TII 25. Dillon said that Karuru told him that "they'd been dealing with this particular subject for approximately a year, and that it was good stuff." TII 25. They waited about twenty-five to thirty-five minutes, and then Ngari left the apartment and returned with crack cocaine that he gave to Dillon. TII 26-28.

As Dillon prepared to leave, he asked Ngari if he could "come back." TII 27. Dillon testified that Karuru gave Dillon a cell phone number and said "if I needed anything to call him." TII 27, 58. Dillon agreed that Karuru was not involved with

Ngari in selling Dillon crack cocaine on January 4, 2008. TII 58.

Waiganjo testified as a defense witness. He said that, during this first meeting, Dillon told the men that he was a contractor and he had a contract to shovel snow off roofs. TII 106-7. According to Waiganjo, Karuru asked Dillon for a job and Dillon indicated he could get Karuru a job. TII 107. Waiganjo testified that there was "no talk about drugs" between Karuru and Dillon on January 4, 2008. TII 107, 109. At some point, Waiganjo heard Karuru and Dillon exchange phone numbers. TII 109. The court sustained the State's objection to questioning related to why Karuru might have sold drugs to Dillon, and no further testimony on that issue was elicited from Waiganjo. TII 110.

On January 7, 2008, Dillon called Karuru using the cell phone number Karuru had given him. TII 28, 59. Dillon asked Karuru for a "hundred," referring to \$100 worth of crack cocaine. TII 25, 28. Karuru told Dillon to pick him up at the Bowers Street address. TII 28-29, 59.

Dillon testified that when he picked up Karuru, Karuru told him to drive to 13 East Pearl Street. TII 29, 60. Dillon testified that the police already were familiar with 13 East Pearl Street as "an active crack house." TII 46, 73. When they arrived, Dillon gave Karuru money and Karuru went into the

residence. TII 29. When Karuru returned, he gave Dillon a small baggie containing crack cocaine. TII 29.

Dillon called Karuru again on January 9, 2008 and they met at the Bowers Street address. TII 32, 60. When Dillon arrived, Karuru got into the car and they waited for Karuru's supplier. TII 32, 61. While they waited, Dillon said Karuru told him that "this particular dealer's method was to give small portions of crack cocaine at a very high potency for addiction, and by the method of doing smaller portion would require you to return more often." TII 33.

After some period of time, Karuru got out of Dillon's car and waited on the porch of 49½ Bowers Street, where he spoke with Ngari. TII 34, 62. When Karuru and Ngari returned to Dillon's car, Karuru indicated that his supplier was not going to meet them, and Karuru and Ngari directed Dillon to 13 East Pearl Street. TII 35, 62. There, Dillon gave Ngari \$100 and Ngari went into the East Pearl Street residence. TII 36. 63. When he returned, Ngari gave Dillon \$90 worth of crack cocaine and \$10 in change. TII 36, 63.

Detective Michael Carignan was part of the surveillance team watching Dillon on January 7 and 9, 2008. TII 66-67, 69. On January 7, he saw Dillon arrive at the Bowers Street residence and Karuru come out and get into the car. TII 67. Carignan then

went to 13 East Pearl Street anticipating that Dillon and Karuru would go there. TII 67-68.

At the East Pearl Street address, Carignan saw Dillon and Karuru arrive and Karuru get out and go into the residence. TII 67. When Karuru exited the East Pearl Street address he returned to Dillon's car. TII 68-69. Although he monitored what was being said in Dillon's car, Carignan could not recall what Karuru and Dillon had talked about. TII 72.

On January 9, Carignan saw Karuru and Ngari get into Dillon's car at the Bowers Street address. He saw them go to the East Pearl Street address but did not see what occurred there. TII 69-70. The only conversation Carignan heard from Dillon's car was Karuru and Ngari arguing about a wallet. TII 72-73.

Karuru's testimony was consistent with his brother's, Waiganjo. He first met Dillon when Dillon and a friend visited Ngari's apartment. TII 116. Karuru said Dillon told him he owned a construction company and that he was working clearing snow. TII 117-18. He asked Dillon if Dillon had work for him. TII 118. Karuru gave his telephone number to Dillon so he could contact him about work. TII 118. He said that Dillon told him that he would call him later in the week. TII 119.

Karuru testified that Dillon called him only once, a few days after their first meeting. TII 120-21. He said that Dillon wanted to meet with him and that he was looking for Ngari. TII

121. Dillon said he would come pick up Karuru, which he did shortly thereafter. TII 121.

After he picked up Karuru, Dillon drove to Ngari's apartment on Bowers Street. TII 122. Karuru testified that they talked about a construction job. TII 122. After they got to the Bowers Street residence, Dillon and Ngari talked and then Ngari told Dillon to take them 13 East Pearl Street. TII 123. When they arrived, Ngari got out of the car and, at some point, returned and Dillon took them back to Bowers Street. TII 123-24.

When Dillon testified he wore a mask to conceal his identity. TII 113. The only explanation for the mask was given by the prosecutor in her opening statement. TII 10. She said that the mask was necessary to protect his "ongoing investigations." TII 10.

## SUMMARY OF THE ARGUMENT

The trial court erred when it denied Karuru's motion to exclude evidence that, on January 4, 2008, he was present at Ngari's drug sale and that he told Dillon that he had dealt with a "particular subject for approximately a year and that it was good stuff," referring to the quality of crack cocaine. To the extent it was predisposition evidence given the entrapment defense that was then pending, predisposition evidence is not admissible until sufficient evidence of entrapment has been presented in defense. In other words, the evidence is only admissible in rebuttal, not in the State's case-in-chief. In any event, the disputed evidence was not relevant because it did not make it more or less likely that Karuru would sell drugs, and it was not part of the drugs sales charged in the indictments. Further, the minimal probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Karuru.

The trial court also committed plain error in allowing Dillon, the State's principal witness, to testify while wearing a mask that concealing his identity. Allowing Dillon to testify in a mask violated Karuru's right to confrontation under the state and federal constitutions and constituted plain error.

I. THE COURT ERRED IN ADMITTING EVIDENCE OF KARURU'S PRESENCE AT THE JANUARY 4, 2008 DRUG SALE AND HIS STATEMENT ABOUT A DRUG DEALER AND DRUGS.

Before trial, Karuru moved to exclude the admission of "prior bad act" evidence. A 4-5. Specifically, he sought to exclude his statement to Dillon that he had dealt with a "particular subject for approximately a year and that it was good stuff," referring to the quality of crack cocaine. A 4-5; TI 3-10. Karuru also sought to exclude evidence that he was present on January 4, 2008 when Ngari sold crack cocaine to Dillon. A4-5; TI 11-12.\*\* He argued that while this evidence, and particularly his statement, indicated that he may have purchased or used drugs in the past, it was not relevant to whether he sold drugs to Dillon, or for any proper purpose under Rule 404(b). A 4-5; TI 11-12.

When the trial court considered the admissibility of this evidence, Karuru's notice of entrapment defense was pending. A 3. Although the State had moved to strike the defense prior to trial, the court deferred ruling on that motion. TI 8-9. Regarding the admissibility of Karuru's statement, the State argued that it was relevant to show predisposition in light of

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\*\* At the motion hearing, Karuru's counsel initially stated, "if the State wants to present the fact that Frank [Karuru] was there, I guess we wouldn't object to that." TI 3. Later during the hearing, however, Karuru argued that he did not have anything to do with the Ngari drug sale and therefore it was not relevant. TI 12.

Karuru's entrapment defense, and that it was relevant because it was made to facilitate the subsequent sales. A \_\_; TI 5-10. Recognizing the prejudicial nature of the evidence about Karuru's presence at the January 4 drug sale, the State stated that it did not need to admit that evidence. TI 9-10.

After hearing arguments, reviewing Dillon's report of the January 4, 2008 encounter, and a defense investigator's report regarding the anticipated defense testimony of "Timothy Kimani"\*\*\*, the trial court ruled that Karuru's statement was admissible. TI 9. When the State sought to clarify that the evidence about Karuru's presence at the January 4 sale was excluded, a further discussion ensued during which the court asked defense counsel:

Let me ask you this. Let me ask you this.  
If somebody says entrapment defense, do you  
think they can introduce evidence that -  
doesn't it have to do with his state of mind  
to introduce evidence that he made sales  
before? I mean isn't that -.

TI 11. The defense responded by arguing that if the evidence related to Karuru having sold drugs, "it would go directly to the entrapment defense," TI 11, but Karuru was not involved in any sale of drugs on January 4. TI 11-12. Eventually, the court ruled,

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\*\*\* It appears that the investigator's report related to the expected testimony of Timothy Kamane Waiganjo, who testified at trial. TII 96-9110.

Well, I mean, when he says in combination with some testimony I expect you're going to hear about, well, I guess even Mr. Cammani's [sic] statements here about actually - actually getting or facilitating drugs for the other person. And I think all of this is very relevant. I'm going to allow it. It's that simple. Your motion is overruled. It call [sic] comes in.

TI 12.

The trial court's rulings appear to rest primarily on the entrapment defense and, particularly on the then-anticipated testimony of Waiganjo. The defense investigator's report that the court reviewed prior to making its ruling indicated that Waiganjo would testify that Karuru had purchased drugs for Dillon and that he did so because Dillon was going to give him a construction job. A 9-10. However, the report was not admitted into evidence at trial. Moreover, although Waiganjo testified at trial, none of this information was elicited from him. TII 96-110. On the contrary, the court sustained the State's objection to questioning about why Karuru may have "helped the detective to buy drugs." TII 110. As a result, Waiganjo's testimony was primarily related to Karuru's encounter with Dillon on January 4, 2008 and that, during that encounter, they talked about a job, not drugs. TII 96-110.

Following the close of the evidence, the State renewed its motion to strike the entrapment defense. TII 139-141. After some discussion, Karuru withdrew the defense. TII 141-42.

The trial court erred in admitting evidence that Karuru was present when Ngari sold crack cocaine to Dillon on January 4, 2008. The court also erred in admitting evidence that Karuru allegedly told Dillon that "they'd been dealing with this particular subject for approximately a year, and that it was good stuff," referring to the crack cocaine Ngari was getting for Dillon. The court erred for three reasons. First, predisposition evidence is not admissible until sufficient evidence of entrapment is admitted. Second, the evidence was not relevant to show predisposition and was not relevant as part of the drug sales charged in the indictments. Third, any minimal probative value the evidence may have had was substantially outweighed by the danger of unfair prejudice to Karuru.

This Court reviews a trial court's evidentiary rulings pursuant to the unsustainable exercise of discretion standard. State v. Connor, 156 N.H. 544, 546 (2007); State v. Yates, 152 N.H. 245, 249 (2005). "To demonstrate that the trial court exercised unsustainable discretion, the defendant must show that the ruling was clearly untenable or unreasonable to the prejudice of his case." Yates, 152 N.H. at 249. See also, Connor, 156 N.H. at 546; State v. McGlew, 139 N.H. 505, 507 (1995).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." N.H. R. Evid. 401. Evidence that is not relevant is not admissible. N.H. R. Evid. 402.

Regarding admissibility of "other bad act" evidence under Rule 404(b), "[t]he evidence must be relevant for a purpose other than proving the defendant's character or predisposition; there must be clear proof that the defendant committed the act; and the probative value of the evidence must not be substantially outweighed by its prejudice to the defendant." McGlew, 139 N.H. at 507 (citing State v. Whittaker, 138 N.H. 524, 526 (1994)). Not only should the proponent of the evidence avoid "the mechanical recitation" of a permissible basis for admission under Rule 404(b), but trial courts should "make specific findings to support [their] evidentiary rulings . . ." to assist with this Court's review. Id. (quoting State v. Simonds, 135 N.H. 203, 207 (1991)). "Whether the court adopts the State's theory, a variation, or an alternative, the court must explain precisely how the evidence relates to the disputed issue, without invoking propensity." Id. at 510. "The record shall also reflect the considerations underlying a trial court's balancing of the other bad act evidence's probative value against its prejudice to the defendant." Id. (citations omitted). In this respect, Rule 404(b) incorporates the balancing test of Evidence Rule 403. Id.; State v. Marti, 140 N.H. 692, 694 (1996).

A. It Was Error To Admit The Evidence In The State's Case-In-Chief.

Evidence of predisposition or propensity to commit a crime is only relevant and admissible after a defendant has presented sufficient evidence at trial of entrapment. In other words, the evidence is only admissible in rebuttal, not in the State's case-in-chief. See generally Gorin v. United States, 313 F.2d 641, 653(1<sup>st</sup> Cir. 1963) (discussing entrapment in terms of "the primary issue of inducement and the rebuttal issue of predisposition"); State v. Little, 121 N.H. 765 (1981) (discussing the entrapment defense and noting that the State was permitted to admit predisposition evidence in rebuttal and after the presentation of the defense's case).

Here, notwithstanding the State's pending motion to strike the entrapment defense at the outset of the trial, this evidence was admitted in the State's case-in-chief and before Karuru had presented any defense to the jury. After the close of the evidence, the State again argued that Karuru had failed to present sufficient evidence of entrapment. After some discussion, Karuru subsequently withdrew the defense. By this juncture in the case, however, the State had already been allowed to admit the highly prejudicial evidence to rebut the anticipated, but abandoned, defense.

B. The Evidence Was Not Relevant To Show Predisposition And Was Not Part Of The Charged Conduct.

Karuru's presence on January 4, 2008 and his statement to Dillon bear no relationship to his predisposition to sell drugs. Karuru was not part of the January 4 sale. TII 58. Ngari, not Karuru, was the target of Dillon's investigation based on the information he had learned from the informant. TII 22-23. The most this evidence established is that Karuru knew someone who sold drugs. Regarding Karuru's statement, while it suggests he may have used drugs, it did not relate to him selling drugs. That Karuru knew someone who sold drugs or Karuru may have used drugs does not make it more or less likely that he would sell drugs.

The evidence also was not relevant as part of the charged conduct. Contrary to the State's argument below, Karuru did not make the statement at issue when he gave Dillon his phone number. On the contrary, according to Dillon, Karuru made the statement well before and not in connection with giving Dillon his phone number. TII 25-27. When he gave his number to Dillon, Karuru made no mention of any drug dealer, the quality of any drugs, or selling drugs. TII 27, 58. There also was no link between Karuru's presence on January 4 and the alleged sales on January 7 and 9. Indeed, not only did the State not argue the contrary, it suggested to the trial court that it could admit evidence of how

Karuru and Dillon met without eliciting testimony that the Ngari drug sale occurred at the same time. TII 9-10.

C. Any Minimal Probative Value Of The Evidence Was Substantially Outweighed By The Danger Of Unfair Prejudice To Karuru.

Even if this evidence had some probative value for a permitted purpose, that value was substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." State v. Pelkey, 145 N.H. 133, 136 (2000) (quotations and citations omitted). The evidence here had minimal probative value to the disputed issues. It did though pose a legitimate danger of unfair prejudice from the possibility that the jurors may have concluded that Karuru had been associating with drug dealers for at least a year and was familiar with the quality of drugs they sold. The jury may have treated Karuru unfairly as a consequence.

In this respect, the evidence was markedly more prejudicial than Karuru's purported statement to Dillon on January 9, 2008. On that day, according to Dillon, Karuru was unable to obtain any drugs and, instead, relied on Ngari. While they waited, Dillon claimed Karuru said that this particular dealer's method was to

give small portions of "high potent crack cocaine", information that Karuru arguably could have heard from Ngari or someone else as opposed to having personal experience with the dealer or the drugs he sold.

Evidence of Karuru's presence at Ngari's on January 4, 2008 drug sale and his statement to Dillon that date was not relevant to show a predisposition to sell drugs. Even if it was marginally probative of predisposition, such evidence was not relevant in the State's case-in-chief and, in any event, its marginal probative value was substantially outweighed by the danger of unfair prejudice.

II. TRIAL COURT ERRED IN ALLOWING THE STATE'S PRINCIPAL WITNESS TO TESTIFY WHILE WEARING A MASK.

Dillon wore a mask to conceal his identity when he testified. TI 12; TII 10. Prior to the first trial, the court asked defense counsel if there was any objection to proceeding in this manner. TI 12. Defense counsel told the court there was no objection. TI 12. When the court indicated it could close the courtroom or have him in the mask, defense counsel again said "no." TI 12. This issue was neither revisited by the court or counsel after the mistrial, nor prior to the new trial two and a half months later. TII 3-10. The court did not give the jury any instructions about the mask, but the State explained in its opening statement that Dillon would be wearing the mask to protect his identity due to ongoing investigations. TII 3-10; 151-62.

Dillon was the State's principal witness against Karuru. Although Carignan watched Dillon and Karuru on January 7 and 9, 2008, Dillon was the only person to testify that Karuru sold him crack cocaine. His testimony regarding why Karuru gave him his phone number on January 4, 2008, what Karuru said to him on January 4, and what happened when he met him was contradicted by Waiganjo and Karuru. Allowing Dillon to testify in a mask concealing his identity violated Karuru's right to confrontation under the state and federal constitutions and constituted plain error. This Court should reverse.

A. Karuru Had A Constitutional Right To Face The Witnesses Against Him Unimpeded By A Mask.

A criminal defendant's right to physically face the witnesses against him is a clearly established right under the state and federal constitutions. U.S. Const., Amend. VI and XIV; N.H. Const., Pt. 1, Art. 15. See State v. Peters, 133 N.H. 791, 794 (1991) (quotations omitted) (citing Maryland v. Craig, 110 S.Ct. 3157, 3163 (1990); Coy v. Iowa, 487 U.S. 1012, 1017 (1988)). This encompasses "the right to conduct cross-examination, . . . , as well as ensur[e] that the witness will give his statements under oath . . . [and before the jury so it may] observe the demeanor of the witness in making his statement. . . ." Peters, 133 N.H. at 794 (1991) (quotations omitted) (citing Craig, 110 S.Ct. at 3163; Coy, 487 U.S. at 1017). While this right is not absolute and "'must occasionally give way to considerations of public policy and the necessities of the case,'" Peters, 133 N.H. at 794 (citing Craig, 110 S.Ct. at 3165) (emphasis supplied by Peters Court), any exception requires an "individualized finding that a witness in a particular case is unavailable to testify at trial." Id. (citing Coy, 487 U.S. at 1021); see also, Morales v. Artuz, 281 F.3d 55, 58 (2d Cir. 2002) ("[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability

of the testimony is otherwise assured.'") (quoting Craig, 110 S.Ct. at 3157).

The right to confrontation is fundamental and clearly established, and numerous courts outside this jurisdiction have considered the circumstances in which a witness may testify while wearing a mask.\*\*\*\* The courts in those cases have considered several factors: whether there was a compelling necessity for the disguise; whether the disguise interfered with a reasonable opportunity to fairly assess the witness's demeanor and credibility; and whether alternatives were available to lessen the impact on the defendant's right to confrontation. See Morales, 281 F.3d at 60 (dark glasses only minimally impaired jurors' ability to assess witness's credibility as they were able to see her facial expression and body language and hear the delivery of her testimony); Ayala v. Speckard, 131 F.3d 62, 71 (2d Cir. 1997) (disguising a witness as opposed to closing the courtroom "risks lessening the jury's opportunity to observe the witness's demeanor and assess credibility . . . ."); People v. Brandon, 145 Cal. App. 4th 1002, 1024-25 (2006) (witness-victim was in an "extreme traumatic condition" while testifying and scarf and sunglasses did not interfere with observation of her facial expressions and body language); Romero v. State, 173

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\*\*\*\* This issue was raised in State v. Hernandez, No. 2008-0883. This Court heard oral argument in that case on October 8, 2009 but has not yet issued its decision.

S.W.3d 502 (Tex. Crim. App. 2005) (defendant's right to confrontation violated where disguise obscured nearly all of witness's face and there was no manifest necessity to disguise witness); Commonwealth v. Lynch, 789 N.E.2d 1052, 1060-61 (Mass. 2003) (no confrontation problem when a witness wears dark glasses that does not prevent the exposure of with his face); People v. Sammons, 478 N.W.2d 901, 906-07 (Mich. App. 1991) (assuming safety of witness was sufficient basis for some protections, full face mask was not narrowly tailored to "preserve the essence of effective confrontation").

Here, when the issue was first raised, the State did not offer and the trial court did not assess whether there was a compelling need for Dillon to wear a mask. TI 12. Assuming such a need existed when the issue was raised before the first trial, the court did not consider whether the necessity still existed after the case ended in a mistrial and before the second trial commenced nearly two and a half months later. TII 3-9. The only reason given for the disguise is in the prosecutor's opening statement when she said that Dillon would be in a mask to avoid jeopardizing his ongoing undercover work. TII 10.

There is no description in the record about the mask that Dillon wore and the extent to which it obscured his face and body. It is described only as a "mask." TI 12; TII 10. Karuru testified that he could not recognize Dillon through the mask.

TII 113. The prosecutor's remarks about the mask also suggest that, at a minimum, it covered Dillon's face sufficiently to conceal his identity. TII 10. Such a mask, as with the masks in Ramero and Sammons, would have interfered with a jury's reasonable opportunity to observe Dillon's facial expressions and demeanor while testifying, which is essential to fairly assess his credibility.

Assuming there was a need to conceal Dillon's identity, there was no consideration of alternatives that might have lessened the impact to the essential function of Karuru's right to confrontation. Although the court raised one possible alternative - closing the courtroom - at the outset of the first trial, there was no consideration of other possible alternatives that did not infringe on Karuru's other constitutional rights, and there was no consideration of any alternatives two and a half months later before the new trial began. TI 12; TII 3-5.

The record here does not support the conclusion that the State's interest was strong enough to justify the remedy permitted, where that remedy shielded the face of the State's principal witness. Under these circumstances, it was error to permit Dillon to testify in the mask.

B. It Was Plain Error To Allow Dillon To Testify In A Mask.

Because trial counsel did not object to Dillon testifying in a mask, this issue is raised pursuant to the Court's plain error

rule. Sup. Ct. R. 16-A. Under the plain error rule, this Court considers the following elements: "(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." State v. MacInnes, 151 N.H. 732, 737 (2005) (citation omitted). Here, there was error that was plain and that error affected Karuru's substantial rights and seriously impeded the fairness of his trial.

First, the error was plain. The right to confrontation is fundamental and well-established. It includes the right of a defendant to cross-examine and observe the demeanor of the witness. See Peters, 133 N.H. 791; Craig, 110 S.Ct. 3157; Coy, 487 U.S. 1012. The mask unquestionably interfered with this right. Moreover, it was plain error to allow the mask without assessing the State's interest in using it and whether that interest was strong enough to justify shielding the face of the State's principal witness.

Second, it is equally clear that the error affected a substantial right that undermined the fairness of the trial. The error violated Karuru's substantial right to confrontation as it impeded the jury's ability to fully and fairly assess Dillon's credibility. This was particularly prejudicial because the State's case rested primarily on Dillon's credibility.

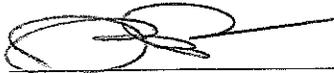
Notwithstanding Carignan's limited surveillance from a distance, Dillon was the only witness to testify that Karuru sold him drugs on January 7 and 9, and the defense witnesses contradicted most of his testimony. Such an error created a grave risk that the outcome of the trial was tainted by the inability to fairly assess the credibility of Dillon's testimony.

CONCLUSION

WHEREFORE, Karuru respectfully requests that this Court vacate his convictions.

Undersigned counsel requests five minutes of argument before the 3JX Panel.

Respectfully submitted,



\_\_\_\_\_  
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Appellate Defender Program  
Franklin Pierce Law Center  
2 White Street  
Concord, NH 03301  
603-228-9218

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were sent by first-class mail to the N.H. Attorney General's Office, 33 Capitol Street, Concord, NH 03301.



\_\_\_\_\_  
Pamela E. Phelan

Dated: November 12, 2009

# APPENDIX

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D.O.B. 02/26/76  
NPD # 08-4-IV

RSA Ch 318-B:2  
Sale Of Narcotic Drug  
Class B Felony  
3 1/2 - 7 Years N.H.S.P.  
Up To \$4,000 Fine

**STATE OF NEW HAMPSHIRE**  
HILLSBOROUGH, SS. SUPERIOR COURT

**INDICTMENT**

At the Superior Court, holden at Nashua, within and for the County of Hillsborough aforesaid, in the month of **June**, in the year **two thousand and eight**,  
the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE**, on their oath, present that

V55

**FRANCIS KARURU A/K/A FRANCIS NGUGI**

49 1/2 Bowers Street  
Nashua, NH

08-5-999

on or about the 7<sup>th</sup> day of January  
in the year 2008, at Nashua  
in the County of Hillsborough aforesaid, did commit the crime of Sale Of Narcotic Drug, in  
that FRANCIS KARURU a/k/a FRANCIS NGUGI, did knowingly sell a quantity of the  
narcotic drug crack cocaine to another for One Hundred Five Dollars (\$105.00) in United  
States currency without being authorized to do so,  
contrary to the form of the Statute, in such case made and provided, and against the peace and  
dignity of the State.

This is a true bill.

Date 6/18/08

*Cynthia Harrington*  
Foreperson

February 27, 2009  
Jury Verdict: Guilty

Marguerite L. Wageling  
Hillsborough County Attorney

8th JUN 18 2008

*Catherine M. Devine*  
Catherine M. Devine, Assistant County Attorney

HILLSBOROUGH COUNTY  
SUPERIOR COURT

D.O.B. 02/26/76  
NPD # 08-4-IV

RSA Ch 318-B:2  
Sale Of Narcotic Drug  
Class B Felony  
3 1/2 - 7 Years N.H.S.P.  
Up To \$4,000 Fine

HILLSBOROUGH, SS. **STATE OF NEW HAMPSHIRE** SUPERIOR COURT

**INDICTMENT**

At the Superior Court, holden at Nashua, within and for the County of Hillsborough aforesaid, in the month of **June**, in the year **two thousand and eight**, the **GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE**, on their oath, present that

VST

**FRANCIS KARURU A/K/A FRANCIS NGUGI**

49 1/2 Bowers Street  
Nashua, NH

08-5-1000

on or about the 9<sup>th</sup> day of January in the year 2008, at Nashua in the County of Hillsborough aforesaid, did commit the crime of Sale Of Narcotic Drug, in that FRANCIS KARURU a/k/a FRANCIS NGUGI, while acting in concert with Robert Ngari, did knowingly sell a quantity of the narcotic drug crack cocaine to another for Ninety Dollars (\$90.00) in United States currency without being authorized to do so, contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Date 6/18/08

*Cynthia Harrington*  
Foreperson

January 27, 2009  
by Verdict: Guilty

Marguerite L. Wageling  
Hillsborough County Attorney

by: *[Signature]*  
Catherine M. Devine, Assistant County Attorney

7. PROPERTY  
a. Do you own a house or...

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
08-S-999

SUPERIOR COURT  
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

V.

FRANCIS KARURU

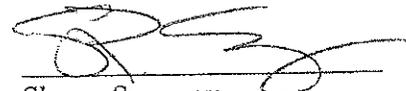
NOTICE OF DEFENSE - ENTRAPMENT

NOW COMES Francis Karuru, by and through his attorney Shawn Sweeney, with this notice of defense and in support thereof sets forth the following:

At a trial in the above entitled matter, Mr. Karuru may present the defense of Entrapment in that he was induced or encouraged into the alleged transaction by a law enforcement official for the purpose of obtaining evidence against him and the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it.

DATED: September 1, 2008

I hereby certify that a copy of this notice has this day been forwarded to the Hillsborough County Attorney's Office.

  
Shawn Sweeney

HILLSBOROUGH COUNTY  
2008 SEP -4 A 9:24

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
SOUTHERN DISTRICT

SUPERIOR COURT  
08-S-999 & 1000

STATE OF NEW HAMPSHIRE

v.

FRANCIS KARURU

NOW COMES Francis Karuru, by and through his attorney Shawn Sweeney, with this motion to exclude and in support thereof states the following facts taken from discovery provided by the prosecution and applicable law:

1. Francis Karuru is accused of sale of a controlled drug on January 7, 2008 and criminal liability to sale of a controlled drug on January 9, 2008.
2. According to police reports, Mr. Karuru was present on another occasion when Detective Dillon was purchasing cocaine from someone else. On that occasion Detective Dillon reports that Mr. Karuru made admissions to having purchased crack cocaine in the past.
3. Admissions or statements regarding Mr. Karuru's prior drug use do not make the existence of any fact that is of consequence to the determination of any element of the offense more or less probable and therefore not relevant. N.H. R. Evid. 401. "Evidence which is not relevant is not admissible." N.H. R. Evid. 402. Even if the Court were to decide that such admissions or statements were relevant to some element of the offense charged, their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and could be misleading to the jury. N.H. R. Evid. 403.
4. To the extent that Mr. Karuru's admissions or statements of other witnesses regarding prior drug use bears on the State's case, it is merely evidence of Mr. Karuru's character or propensity for committing such an offense and that he acted in conformity with that propensity and committed the charged offenses. N.H. R. Evid. 404(a). Evidence of Mr. Karuru's other crimes or bad acts are not admissible to prove his character or to show that he acted in conformity therewith.

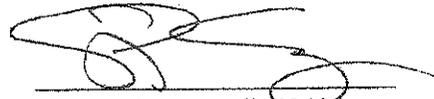
N.H. R. Evid. 404(b). There is no indication from discovery or by state's motion that any exception to Rule 404(b) is applicable in this case.

WHEREFORE, Francis Karuru respectfully requests that this Honorable Court:

1. Exclude evidence of prior bad acts, and
2. Grant such other and further relief as may be just and proper.

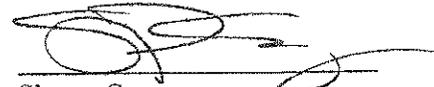
DATED: November 26, 2008

Respectfully Submitted,  
Francis Karuru  
By his attorney,

  
Shawn Sweeney #14940

**CERTIFICATION**

I hereby certify that a copy of this motion has this day been forwarded to the Hillsborough County Attorney's Office.

  
Shawn Sweeney

HILLSBOROUGH, SS.  
ST. NO. 08-999, 1000

SUPERIOR COURT, SOUTH

THE STATE OF NEW HAMPSHIRE  
V.  
FRANCIS KARURU A/K/A FRANCIS NGUGI

STATE'S OBJECTION TO DEFENDANT'S UNCAPTIONED MOTION TO EXCLUDE

NOW COMES the State of New Hampshire by and through the Office of the Hillsborough County Attorney with an Objection to the Defendant's Motion to Exclude. In support thereof the State says as follows:

1. Open file discovery has been provided to the defendant;
2. Trial in this matter was originally scheduled for October 6, 2008 and continued to December 1, 2008;
3. The defendant filed a Notice of Entrapment defense on September 1, 2008 and will apparently try to support this defense with the testimony of one Timothy Kimani (see attached);
4. Despite the fact that the trial management conference was held on Thursday, November 20, 2008 defense counsel has waited until the very last minute to file this motion (which the State received via FAX on November 26, 2008 at 12:23 p.m.);
5. Presumably defense counsel has failed to caption this motion because it is actually either a Motion to Suppress or a Motion to Exclude 404(b) Evidence which should have in either case been filed 45 days prior to jury selection on October 17, 2008. It is clear that this motion is unconscionably late and should be denied without hearing;
6. Further, it is the State's position that the defendant has completely mischaracterized the statements made to the detective prior to his sales to the detective (see attached);
7. As a review of the attached police report clearly shows, during an alleged sale made in defendant's presence by his co-defendant Robert Ngari three days before he himself allegedly made a sale to the same detective, he took that opportunity to provide the detective with his phone number which the detective actually used to set up the subsequent purchases. Accordingly, these statements were made to facilitate the crime charged and are part of the same criminal episode;
8. Additionally, in light of the defendant's entrapment defense, the State cannot be

precluded from meeting that defense with the defendant's own statements admitting his prior involvement in the drug trade and giving the detective his number to facilitate a sale.

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

- A. Deny the motion without a hearing as it is untimely filed;
- B. In the alternative, deny the motion because it is without merit based on the foregoing;
- C. Grant such other and further relief as may be just and proper.

DATED: November 26, 2008 at 3:35 p.m.

Respectfully submitted,



Catherine M. Devine, ACA

I hereby certify that a copy of the within Objection has been forwarded to Shawn Sweeney, Esquire.



Catherine M. Devine, ACA

On 01-04-08 at approximately 1545 hours, I drove with IT to 49 1/2 Bowers Street. IT directed me to the hallway door where we went to the third floor and knocked on apartment #5. A black male whom IT called "Rob" opened the door. IT asked "Rob" if he could get a 100 for IT, referring to \$100.00 worth of crack cocaine. "Rob" said he had to make a phone call and used my cell phone. "Rob" walked into a back room where I could see him talking to someone on the phone. "Rob" exited the room and said it would be 20 minutes. "Rob" also stated that it would cost \$120.00.

Detective Sergeant Carignan, Detectives Rourke, Page and Bergeron conducted surveillance during the operation.

Also inside the residence were two black males, "Frankie" and "Tim", both of whom I had never met. During the conversation with "Frankie" he stated that he was "Rob's" cousin. While seated on the couch "Rob" and "Frankie" were asking me questions about who I was and what I did for work. I asked "Frankie" if the product was good, referring to the crack cocaine and "Frankie" stated that he has been dealing with this particular dealer for about a year it is good.

At approximately 1605 hours, "Rob" made another phone call and stated that his "dealer" would be here in 5 minutes. At approximately 1620 hours, there was a knock at the door, I handed "Rob" \$120.00 in pre recorded United States currency and "Rob" opened the door and went into the hallway. "Rob" returned shortly after and handed me a small plastic bag containing a white rock like substance purported to be crack cocaine.

IT and I left the residence immediately after and I advised "Rob", before leaving, that I would be back for more. "Frankie" gave me his cell phone number (978-996-2834) and stated that when I need more to call him. We left the residence and I transported IT to a predetermined location. As we left the residence I observed the mailbox to apartment #5 to have the name "Ngari" on it.

I returned to the Nashua Police Department and field tested the suspect substance which yielded a positive reaction to presence of a narcotic drug, cocaine. I tagged the suspect substance into evidence and completed a NH State Lab report.

A check of records located a Robert Ngari, Date of Birth 10-5-84, 5'8" and 145lbs and black hair. I was able to identify Ngari through a booking photo as "Rob", the same subject I recently purchased the crack cocaine from. I also located a booking photo of "Frankie" and was able to identify him as Francis Karuru, Date of Birth 2-27-76, last known address at 20 Paxton Terrace. The investigation is ongoing.

Detective Dillon D-45



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E-mail: [mcgrath274@yahoo.com](mailto:mcgrath274@yahoo.com)

New Hampshire License 51734

[www.mcgrathinvestigativeservices.com](http://www.mcgrathinvestigativeservices.com)

Date: September 8, 2008

Statement: Timothy Kimani

Investigator: David McGrath

On Thursday September 4<sup>th</sup> 2008 I spoke with:

Timothy Kimani  
14-A Riverside Ave,  
Hudson, NH  
603-886-5475

Mr. Kimani stated that Mr. Karuru and the under cover Nashua detective had become good friends. The Nashua detective would call Francis Karuru all of the time from one of his two cell phones.

Over time, the detective would ask Francis to do him some favors. Mr. Kimani said that Francis was "excited to meet this guy, because he seemed to have money".

Kimani also stated that the detective told Francis that he owned a construction company in Litchfield NH and that the detective promised Karuru good paying jobs.

Mr. Kimani said the detective would come over and drink beers with Francis and some other friends. From time to time the detective would ask Francis Karuru to get him some crack cocaine. Francis would go down to an area known as "the portch" where crack cocaine could be purchased by approaching anyone on the portch.

Mr. Kimani said that "Francis would do anything to help this guy out, because he had money and could hook Francis up with a job".

Mr. Kimani said that Francis was not a drug dealer, but he did know where to buy the crack. Kimani said that "everyone knows where to get it around here". He helped the Nashua detective obtain the drugs because he was hoping to find a good job shoveling roofs during the winter months. Francis also believed that the detective was in the construction business and if he became friendly with him, he may find other employment in the construction business after the winter months.

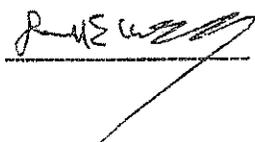
Mr. Kimani said that the Nashua Detective was like a big brother in that he appeared as if he was trying to help you out. He said "he seemed like a genuine guy, and he was the kind of guy you wanted to do something for".

Mr. Kimani stated that Mr. Karuru was not a drug user and to his knowledge never sold any illegal narcotics.

I asked Mr. Kimani if he had anything to add and he said that "Francis was just trying to better himself".

The interview was ended as Mr. Kimani had nothing further to offer to this statement.

David McGrath

A handwritten signature in black ink, appearing to read "D. McGrath", written over a horizontal line.

A10

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
ST. NO. 08-S-999, 1000

SUPERIOR COURT, SOUTH

THE STATE OF NEW HAMPSHIRE

V.

FRANCIS KARURU A/K/A FRANCIS NGUGI

STATE'S MOTION IN LIMINE/TO EXCLUDE WITNESS TESTIMONY

NOW COMES the State of New Hampshire by and through the Hillsborough County Attorneys Office with a Motion In Limine. In support thereof the State says as follows:

1. On September 1, 2008 defendant filed a Notice of Defense-Entrapment. Apparently in support of this Notice, the defendant has provided the State with a narrative report from a private investigator containing statements attributed to one Timothy Kimani.

2. From the statement provided, it appears that Mr. Kimani's testimony would be inadmissible hearsay in its entirety.

3. In the alternative, the witness may expose himself to criminal liability should he testify regarding his knowledge of the defendant's drug activities as it is not clear from the report whether Mr. Kimani was present as an eyewitness, participant or whether he was told this by the defendant.

4. Given these facts the State cannot adequately prepare to cross-examine this witness and the Court cannot properly determine whether the witness needs counsel for a potential Richards hearing.

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

- A. Exclude all testimony from Mr. Kimani;
- B. In the alternative, order the defendant to provide an offer of proof regarding the issues raised by this motion;
- C. Grant such other and further relief as may be just and proper.

DATED: November 20, 2008

Respectfully submitted,



Catherine M. Devine, ACA

I hereby certify that a copy of the within Motion has been delivered to Shawn Sweeney, Esquire.



Catherine M. Devine, ACA

# The State of New Hampshire

HILLSBOROUGH COUNTY SOUTHERN DISTRICT

SUPERIOR COURT

MITTIMUS/RETURN FROM SUPERIOR COURT - STATE PRISON SENTENCE

Docket No. 08-S-999

DOB: 2/26/76

Name: Francis Karuru aka Francis Ngugi

Indictment     Waiver     Information     Complaint

Offense: Sale of a narcotic drug

RSA: 318-B:2

Date: 1/7/08

Disposition: Guilty By:

Plea     Jury     Court

TN:

A finding of guilty is entered  
Conviction:

Felony     Misdemeanor     Violation of Probation

1.  The defendant is sentenced to the New Hampshire State Prison for not more than 4 YEAR(S), nor less than 2 YEAR(S) There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
2.  This sentence is to be served as follows:  
 Stand Committed     Commencing forthwith.
7.  Pretrial confinement credit: 281 days.
8.  The Court recommends to the Department of Corrections:  
A.  Drug and alcohol treatment and counseling.  
Pursuant to RSA 499:10-a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

### OTHER CONDITIONS

11.  The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence.  
B.  The defendant is ordered to make restitution of \$ 105.00 plus statutory 17% administrative fee.  
 Through the Dept. of Corrections on the following terms: Payable to the Nashua Police Dept.  
C.  The defendant is ordered participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.  
G.  The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

4/1/09  
Date

Hon. William J. Groff  
Presiding Justice

Marshall A. Buttrick  
Clerk

### MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

April 1, 2009  
Date

Attest: Marshall A. Buttrick  
Clerk

### SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

\_\_\_\_\_  
Sheriff

- cc:
- |   |  |   |
|---|--|---|
| <input checked="" type="checkbox"/> State Police                    | <input type="checkbox"/> DMV                             | <input checked="" type="checkbox"/> Dept. of Corr.      |
| <input checked="" type="checkbox"/> Pros. Atty. Cassie Devine, Esq. | <input checked="" type="checkbox"/> Offender Recs        | <input checked="" type="checkbox"/> Shawn Sweeney, Esq. |
| <input type="checkbox"/> Sex Off. Reg. - K. Cliver                  | <input checked="" type="checkbox"/> Defendant            | <input checked="" type="checkbox"/> Nashua PD           |
| <input checked="" type="checkbox"/> HOC: Hills. Cty                 | <input checked="" type="checkbox"/> Office of Cost Cont. | <input type="checkbox"/> GAL                            |
| <input type="checkbox"/> Nashua Dist. Ct. (RE: )                    | <input checked="" type="checkbox"/> SRB                  | <input checked="" type="checkbox"/> Sheriff             |

# The State of New Hampshire

HILLSBOROUGH COUNTY SOUTHERN DISTRICT

SUPERIOR COURT

MITTIMUS/RETURN FROM SUPERIOR COURT - STATE PRISON SENTENCE

Docket No. 08-S-1000

DOB: 2/26/76

Name: Francis Karuru aka Francis Ngugi

Indictment     Waiver     Information     Complaint

Offense: Sale of a narcotic drug

RSA: 318-B:2

Date: 1/9/08

Disposition: Guilty By:

Plea     Jury     Court

TN:

A finding of guilty is entered

Conviction:

Felony

Misdemeanor

Violation of Probation

1.  The defendant is sentenced to the New Hampshire State Prison for not more than 4 YEAR(S), nor less than 2 YEAR(S) There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
2.  This sentence is to be served as follows:
  - Stand Committed     Commencing forthwith.
6.  The sentence is  concurrent with 08-S-999
7.  Pretrial confinement credit: 281 days.
8.  The Court recommends to the Department of Corrections:
  - A.  Drug and alcohol treatment and counseling.
 Pursuant to RSA 499:10-a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

### OTHER CONDITIONS

11.  The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence.
  - B.  The defendant is ordered to make restitution of \$ 90.00 plus statutory 17% administrative fee.
    - Through the Dept. of Corrections on the following terms: Payable to the Nashua Police Dept.; Joint & several with co-defendant Robert Ngari
  - C.  The defendant is ordered participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
  - G.  The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

4/1/09  
Date

Hon. William J. Groff  
Presiding Justice

Marshall A. Buttrick  
Clerk

### MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

April 1, 2009  
Date

Attest: Marshall A. Buttrick  
Clerk

### SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

cc:

- State Police
- Pros. Atty. Cassie Devine, Esq.
- Sex Off. Reg. - K. Cliver
- HOC: Hills. Cty
- Nashua Dist. Ct. (RE: )

- DMV
- Offender Recs
- Defendant
- Office of Cost Cont.
- SRB

- Dept. of Corr.
- Shawn Sweeney, Esq.
- Nashua PD
- GAL
- Sheriff

A13