

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

NOVEMBER TERM, 2001

SUPERIOR COURT

No. 00-S-888 – 00-S-896

No. 00-S-934 – 00-S-935

The State of New Hampshire

v.

Chad Evans

**STATE'S MOTION FOR RECIPROCAL DISCOVERY**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and requests that the defendant in the above-captioned matter be ordered to provide the following discovery materials to the State:

- A. Statements of all witnesses, including, but not limited to, statements of individuals identified as witnesses by the State, and of any witnesses that the defendant intends to call at trial;
- B. All books, papers, documents, photographs, tangible objects, etc. which are intended for use by the defendant as evidence at trial; and
- C. All results or reports or other statements prepared or conducted by experts which the defendant anticipates calling as a witness at trial, as well as a summary of each such expert's qualifications.

In support of this Motion, the State asserts as follows.

1. On November 16, 2001, the defendant was arrested on a manslaughter charge for causing the death of 21-month-old Cassidy Bortner. On December 14, 2001, the Strafford County Grand Jury handed up several indictments against the defendant. The defendant was charged with Second Degree Murder, two counts of First Degree Assault, and six counts of Second Degree Assault. He was also charged by information with endangering

the welfare of a child and simple assault for causing unprivileged physical contact with Amanda Bortner.

2. To date, the State has produced nearly 3000 pages of written discovery.

3. Superior Court Rule 98(C)(2) provides:

Not later than the final pretrial conference or ten (10) calendar days before jury selection, whichever occurs first . . . the defendant shall provide the state with a list of the names of the witnesses the defendant anticipates calling at the trial . . . . 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. Notwithstanding the preceding sentence, this rule does not require the defendant to provide the state with copies of or access to statements of the defendant.

4. In addition, Superior Court Rule 98(E) permits either party to seek additional discovery.

5. “Broad and liberal discovery ... has long been practiced in New Hampshire.” State v. Miskell, 122 N.H. 842, 847 (1982). Superior Court Rule 98 incorporates the discovery procedures mandated by Superior Court Rule 99, which established a “general rule of reciprocal discovery.” State v. Chagnon, 139 N.H. 671, 677 (1995).

6. The duty to produce relevant discovery is not triggered by a showing of “substantial need” and “undue hardship.” Id. Rather, the determination of whether to order discovery is a matter within the trial court's discretion. See State v. Heath, 129 N.H. 102, 109 (1986). Applying these principals, the New Hampshire Supreme Court has held that it is proper to require the defense to produce statements obtained from prospective State’s witnesses. Chagnon, 139 N.H. at 677.

7. Moreover, numerous New Hampshire Superior Courts have held that Rule 98 requires the disclosure of statements obtained by the defense from individuals whom the

State intends to call as witnesses at trial. E.g., State v. James Martin, No. 99-S-1439, 5/26/00 Order (Sullivan, J.) Granting State's Motion For Reciprocal Discovery; State v. Paul Baran, No. 00-S-0747-48, 10/16/00 Order (Lynn, J.) Granting State's Motion For Reciprocal Discovery; State v. James Hall, No. 99-S-1207, 4/27/00 Order (Smith, J.) Granting State's Motion For Reciprocal Discovery; State v. Leslie Noonan, No. 98-S-533, 12/21/98 Order (Manias, J.) Granting State's Motion For Reciprocal Discovery (orders attached as Exhibit A).

8. These decisions are fully consistent with the long-standing rule of reciprocal discovery in New Hampshire. In addition, they are justified in order to prevent the defense from withholding relevant discovery in order to ambush State's witnesses on cross-examination. The entire purpose of the liberal discovery procedures in New Hampshire is to promote fairness and to prevent such "trial by surprise."

9. The State has been unable to reach defense counsel to determine the defense's position on this motion.

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

- (A) Grant the State's Motion for Reciprocal Discovery; and
- (B) Grant such further relief as may be just and proper.

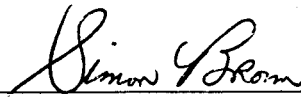
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys  
PHILIP T. MCLAUGHLIN  
ATTORNEY GENERAL



N. William Delker  
Bureau Chief



Simon R. Brown  
Assistant Attorney General  
Homicide Unit  
Criminal Justice Bureau  
Office of the Attorney General  
33 Capitol Street  
Concord, New Hampshire 03301-6397  
(603) 271-3658

November 5, 2001

I certify that a copy of the foregoing motion was delivered, in hand, this day to Alan Cronheim, Esq., and Mark Sisti, Esq., counsel of record for the defendant.



N. William Delker

**EXHIBIT A**

**EXHIBIT A**

THE STATE OF NEW HAMPSHIRE

EXHIBIT 1

HILLSBOROUGH, SS  
NORTHERN DISTRICT

SUPERIOR COURT  
2000

No. 99-S-1439

STATE OF NEW HAMPSHIRE

v.

JAMES MARTIN

ORDER ON STATE'S MOTION FOR RECIPROCAL DISCOVERY [17]

The State has filed a motion for reciprocal discovery in this case. The parties have agreed on all items, except for one. The defense argues that it does not have to provide statements its investigator took of State's witnesses that the defense has no intention of calling as a witness at trial. In support of its position that such statements are not discoverable by the State under temporary Rule 98, the defense cites a portion of section C(2) which states the defendant shall also provide the State with all statements of witnesses the defendant anticipates calling at trial or hearing. Based upon this language the defense argues that it does not have to provide statements of any witnesses the defense does not intend to call at trial, e.g. any witnesses that are clearly going to be State's witnesses in this case and are not going to be called by the defense.

The court agrees with the defendant's position regarding the automatic mandatory disclosure requirements set forth in temporary Rule 98. However, the second paragraph of Section E Motions Seeking Additional Discovery provides that "this rule

does not preclude any party from filing motions to obtain additional discovery."

The court finds that this issue has already been addressed in State v. Chagnon, 139 NH 671 (1995). In that case acting under Rule 99, currently suspended by temporary Rule 98, the supreme court ruled that the trial court had discretion to order the defense to provide a copy of the statement of the victim, clearly under the facts of Chagnon a witness that the State intended to call, not the defendant. Chagnon involved a charge of attempted murder.

The court finds that temporary Rule 98 did not modify Chagnon, and that this court still has the discretion to grant the State's motion requiring the defense to produce statements by any potential witness, not just witnesses the defense intends to call at trial. The court finds that temporary Rule 98 has not modified the general rule of reciprocal discovery established under old Rule 99 and affirmed in Chagnon. Id. at 677.

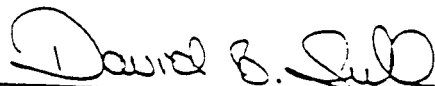
The court finds that the general practice in criminal cases in this state is still for reciprocal discovery of all statements of potential witnesses, not just witnesses that a party intends to call. The defense has raised no issue or specific facts why the court should not depart from the general rule in this case regarding any of the witness statements being sought by the State.

The State's motion is GRANTED. The defense is ordered to produce within 10 days of receipt of this order copies of all

witness statements.

Based on the supreme court's limitation in Chagnon and State v. Drewry, 139 NH 678, 681 (1995) of discovery to "purely factual information," the defense may redact from the statements information concerning the mental impressions, theories, legal conclusions, or trial strategy of defense counsel, or information that is not pertinent to the anticipated testimony of each witness. Upon receiving the statements, if they are partially redacted, the State may ask the court to review the unredacted version in camera to verify that the omitted portions are protected by the work product doctrine.

Dated: May 26, 2000



DAVID B. SULLIVAN  
PRESIDING JUSTICE

STATE OF NEW HAMPSHIRE  
HILLSBOROUGH-NORTH, SS

EXHIBIT ONE  
SUPERIOR COURT

NOTICE OF DECISION

Michael A. Delaney, Esq.  
State of NH-Criminal Justice Bureau  
33 Capitol Street  
Concord, NH 03301

State v. Paul Baran

Docket #'s:  
00-S-0747; 0748

Please be advised that on 10/16/2000 Judge Lynn made the following order relative to:

Motion for Auth. to Obtain Service ; Approved  
604-A: DNA Analyst

Motion for Services ; Granted  
other than counsel; DNA Analyst

Other ; Granted  
Motion for Reciprocal Discovery

10/17/2000

John M. Safford, Clerk  
300 Chestnut Street, Room 127  
Manchester, NH 03101-2490  
603-669-7410

Christopher H.M. Carter, Esq.  
Barbara R Keshen, Esq.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JAMES J. HALL

Docket No. 99-S-1207

ORDER ON PENDING MOTIONS

The defendant, James J. Hall, is charged with first degree murder in the death of his mother. The following motions are pending before the Court: (1) Defendant's Motion for Disclosure of Evidence Related to Motive; (2) Defendant's Motion for Disclosure of 404(b) Material; and (3) State's Motion for Reciprocal Discovery. After hearing this day, the Court rules on these motions as discussed below.

(1) Defendant's Motion for Disclosure of Evidence Related to Motive

Defense counsel represents that they are satisfied with the State's disclosure of evidence related to motive and the issue has been resolved. Accordingly, the defendant's motion is MOOT.

(2) Defendant's Motion for Disclosure of 404(b) Material

The defendant moves the Court to order the State to disclose any evidence that the State seeks to admit under New Hampshire Rule of Evidence 404(b). Specifically, defense counsel is concerned that they will have to sift through approximately 1200 pages of "open file" discovery provided by the State in order to ascertain what evidence of the defendant's "prior bad acts" the State might introduce at trial.

The State contends that it will not offer any evidence of

prior criminal convictions at trial because the defendant does not have a criminal record, but represents that it will present evidence of events surrounding the alleged homicide, including evidence that the defendant forged his mother's signature on a check and used her ATM card to withdraw money from her bank account. The State argues that Rule 404(b) is inapplicable because this conduct does not constitute "prior bad acts." Instead, the State avers the evidence is a material part of the course of conduct leading up to, and following, the alleged murder, and constitutes evidence of plan and preparation.

The Court notes the curious nature of the defendant's motion. In essence, the defendant wants the State to disclose any evidence of "prior bad acts" committed by the defendant that it intends to introduce at trial. While the defendant cites appropriate authority regarding the test for the admissibility of "prior bad acts," he does not cite any support for his contention that the State must identify any evidence provided to the defendant in discovery that it would offer against the defendant under New Hampshire Rule of Evidence 404(b).

Given the nature of the defendant's request, the Court directs the State to file a brief on this question within ten days of this order. The defendant may file a reply brief within ten days of receiving the State's brief.

(3) State's Motion for Reciprocal Discovery

Pursuant to Superior Court Temporary Rule 98, the State moves the Court to order the defendant to provide statements of the

State's witnesses taken by an investigator for the defense. The defendant objects to disclosing statements of State witnesses in the possession of the defense.


This precise issue has been addressed by the New Hampshire Supreme Court in State v. Chagnon, 139 N.H. 671 (1995), and subsequently by this Court in State v. Noonan (Merrimack Co. Docket No. 98-S-533). In Chagnon, the New Hampshire Supreme Court found that purely factual information contained in witness statements is not privileged, even if part of a defense investigator's report, and is discoverable. See 139 N.H. at 678.

Therefore, the Court orders the defendant to provide the State with copies of all statements of State witnesses in the possession of the defense which pertain solely to each witness' testimonial content. See id. at 676. Based on the supreme court's limitation in Chagnon to "purely factual information," the defendant may redact from the statements information concerning the mental impressions, theories, legal conclusions, or trial strategy of defense counsel, or information that is not pertinent to the anticipated testimony of each witness.

Accordingly, the State's Motion for Reciprocal Discovery is GRANTED.

So Ordered.

DATED: April 27, 2000

  
PETER W. SMITH,  
Presiding Justice

THE STATE OF NEW HAMPSHIRE

EXHIBIT 1

MERRIMACK, SS

SUPERIOR COURT

State of New Hampshire

v.

Leslie Noonan

Docket No. 98-S-533

ORDER

Presently before the Court are (1) Defendant's Motion for Discovery, (2) State's Motion to Reschedule Trial to an Earlier Date, and (3) State's Motion for Reciprocal Discovery. The Court heard these matters on December 18, 1998.

I. Defendant's Motion for Discovery

At the hearing, the parties represented that the matters contained in the defendant's motion have been resolved. The parties shall file their stipulation as to these discovery matters forthwith. To that extent, the defendant's motion is GRANTED without objection.

II. State's Motion to Reschedule Trial to an Earlier Date

The State seeks to reschedule the trial date so that the defendant may be available to testify in the trial of Kenneth Munson, the defendant's alleged accomplice.

Even if the trial date is rescheduled, the defendant may not be available to testify in the Munson trial. Moreover, the State has other means at its disposal to guarantee the defendant's availability to testify. For these reasons, and for the reasons stated in the defendant's objection, particularly defense counsel's

preexisting trial commitments, the Court DENIES the State's motion.

### III. State's Motion for Reciprocal Discovery

The defendant shall comply with his reciprocal discovery obligations under Superior Court Rule 98. These obligations include disclosure of the following materials requested by the State: (1) all statements of witnesses that the defendant intends to call at trial ten calendar days before jury selection, see Super Ct. R. 98(C)(2); and (2) all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by experts which the defendant anticipates calling as a witness at trial not less than thirty calendar days prior to jury selection, see Super Ct. R. 98(B)(3).

The defendant objects to disclosing statements of State witnesses in the possession of the defense. In State v. Chagnon, the New Hampshire Supreme Court considered the reciprocal discovery obligations of the defendant with regard to statements of State witnesses. See 139 N.H. 671, 672-73 (1995). The Court found that purely factual information contained in witness statements is not privileged, even if part of a defense investigator's report. See id. at 678. The Court made no distinction between defense witness statements and State witness statements, and compelled the defendant to disclose the redacted portion of a victim's statement taken by a defense investigator. See id.

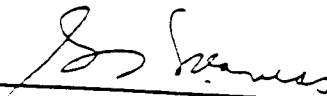
Accordingly, the defendant is ordered to provide the State with copies of all statements of State witnesses in the possession

of the defense which pertain solely to the witnesses' testimonial content. See Chagnon, 139 N.H. at 676. To protect information concerning the mental impressions, theories, legal conclusions, or trial strategy of defense counsel, or information that is not pertinent to the anticipated testimony of the witness, the defendant may provide redacted copies of such information to the State, deleting the information which the defendant contends is privileged and should not be disclosed.

The defendant shall also submit to the Court for in camera review a complete copy of any statement at issue as well as the redacted version, along with a memorandum of law detailing the grounds for nondisclosure. See Chagnon, 139 N.H. at 676-77. The redacted version must be provided to the State and to the Court at or before the time other witness statements are required to be disclosed.

So Ordered.

DATED: 12/21/98

  
George L. Manias  
Presiding Justice