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SUPREME COURT

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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0346

IN RE: SEARCH WARRANT FOR 1832 CANDIA ROAD, MANCHESTER, NEW HAMPSHIRE

MANDATORY APPEAL FROM
6th CIRCUIT COURT – DISTRICT DIVISION – CONCORD

REPLY BRIEF OF APPELLANT, RICHARD EXLINE

By: Friedrich K. Moeckel, Esquire
NH Bar ID No. 16472
Tarbell & Brodich Professional Association
45 Centre Street
Concord, New Hampshire 03301
603.226.3900

January 16, 2018

15-minute oral argument requested
To be argued by Attorney Moeckel

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ARGUMENT

I. The State misstates the record and conflates legal acts with alleged illegal acts.

The State's brief falsely claims the State's affidavit in support of its search warrant demonstrated probable cause appellant committed a crime. *State's Brief*, p. 7, 9-11, 18. To wit, the State claims appellant:

1. "[U]sed the email addresses of other people without their knowledge and had forwarded a Craigslist post to those people, using their e-mail addresses without their consent. *Id.* at 7.
2. "had to select the 'email a friend' option and provide the e-mail address for the intended recipient, as well as the e-mail address for the sender." *Id.* at 10
3. "clearly had no privilege to use the email addresses and he falsified the information in them because the emails gave the impression that someone else had sent each of them." *Id.* at 11.
4. "Although he acknowledges that he posted the statement and forwarded it to the 54 recipients, he contends the e-mails 'claimed as unlawful demonstrated that they were not from the recipients.'" *Id.* at 18 (emphasis added).
5. "posted the comment on Craigslist, that he had to enter each of the addresses to forward the post, and that the IP address used to make the post was assigned to an account that Comcast serviced in Exline's name. All of these facts were contained in the affidavit in support of the warrant." *Id.* (emphasis added).

In numbers 1-3 and 5, above, the State claims facts exist in the affidavit in support of the State's search warrant when in fact no such facts exist. As to number 4, above, the State altogether represents facts that do not exist and further suggests appellant agrees with those fabricated facts.

As appellant's brief demonstrates, the only facts in the State's affidavit in support of its search warrant application linked to appellant are facts of lawful activity. The original Craigslist post of legal and the State has already conceded that point at the trial court. *Appellant's Brief*, p. 13. Also, there was nothing illegal about the May 31, 2016 e-mail from foryousales07@gmail.com (the e-mail address of Cannon Real Estate Company, Inc., located at Mr. Exline's residence at 1832 Candia, Road) to William Hinkle stating deputy director Joseph should resign. *Id.* at 15. Regarding the quote from appellant's brief, the full quote is

“Furthermore, the trial court overlooked the glaring white elephant in the State’s affidavit: the e-mails claimed as unlawful demonstrated that they were not from the recipients.” *Id.* at 17. In that context appellant pointed out there was no evidence or fact making it probable appellant or Ms. Roy forwarded the Craigslist Post.

As to the facts that appear in the State’s brief as identified above, those facts are not in the affidavit in support of the State’s search warrant. Not to put too fine a point on it, but the affidavit in support of the State’s search warrant does not state:

1. Appellant used the email addresses of other people without their knowledge and had forwarded a Craigslist post to those people, using their e-mail addresses without their consent.
2. Appellant selected the ‘email a friend’ option and provided the e-mail address for the intended recipient, as well as the e-mail address for the sender.
3. Appellant clearly had no privilege to use the email addresses and he falsified the information in them because the emails gave the impression that someone else had sent each of them.
4. Appellant acknowledges that he forwarded it [the Craigslist Post] to the 54 recipients.
5. Appellant had to enter each of the addresses to forward the post.

App., p. 18-45. Indeed, if those facts existed in the State’s search warrant application this may be a different case where the arguments on appeal solely relate to those acts not being crimes.

Irrespective of that speculation, the fact remains the State’s affidavit did not contain any evidence whatsoever that appellant or Ms. Roy engaged in criminal activity under RSA 638:3 or 638:26, or that evidence of criminal activity under RSA 638:3 or 638:26 would be found at appellant’s home.

In total the State’s brief fails to address the fundamental problems with the trial court’s order. Namely:

1. That appellant’s May 31, 2016 e-mail to William Hinkle was legal;
2. That appellant’s Craigslist Post was legal;

3. The individual who created the Craigslist Post was not necessarily the same individual who forwarded that post;
4. There was and is no evidence appellant forwarded the Craigslist Post; and
5. There was and is no evidence appellant used the devices seized to forward the Craigslist Post or otherwise used those devices for criminal activity.

II. The case law on which the State relies is inapposite.

The State cites several cases to support its argument the State's affidavit in support of its search warrant was sufficient for the trial court to grant it. Those cases are inapposite to this case. Here is why. On the facts the *Golb*¹ cases present a glaring and immutable distinction from this case. That is, in those cases there was no dispute Golb sent e-mails impersonating other individuals. He did. In this case there is no evidence appellant forwarded the Craigslist Post. Inasmuch as the Dead Sea Scrolls and the attendant academic debate may be fascinating and generate genetic pride, the facts and relevant statutes are so dissimilar to this case that they are unhelpful. *Golb v. Attorney General of the State of N.Y.*, 870 F.3d 89 (2d Cir. 2017).

Appellant challenged the legitimacy of the search warrant under RSA Chapter 595-A and the New Hampshire Constitution. Accordingly, to the extent the State's citation to, and reliance on, *United States v. McLellan*, 792 F.3d 200 (1st Cir. 2015), *United States v. Grant*, 218 F.3d 72, 73 (1st Cir. 2000), and *United States v. Khounsavanh*, 113 F.3d 279 (1st Cir. 1997) espouse a federal standard, such a standard is inapplicable to this case. *State v. Ball*, 124 N.H. 226 (1983). As to *McLellan*, specifically, unlike the facts of this case, in *McLellan* there was evidence McLellan engaged in criminal activity. 792 F.3d at 205.

Relative to the cases on which the State relies in support of its arguments of statutory interpretation, those arguments are addressed in the following section.

III. Appellant preserved the legislative history argument.

In §III of its brief the State claims “the argument regarding legislative history is waived.” *State’s Brief*, p. 14. The State makes this claim to counter appellant’s argument that the legislative history of RSA 638:26 support the conclusion that that statute does not cover the acts alleged as illegal in the affidavit supporting the state’s search warrant application. *Appellant’s Brief*, p. 16-22. Contrary to the State’s claim appellant did preserve the “legislative history” argument so-called. Here is why:

Supreme Court Rule 16(3)(b) requires the appellant’s brief to contain “the questions presented for review....” The questions presented need not mirror those contained in the appellant’s notice of appeal. *Id.* Furthermore, “[t]he statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.” *Id.*

In this case appellant’s questions presented for review are identical to the questions contained in appellant’s notice of appeal. *Compare Appellant’s Brief*, p. iv, with *Appellant’s Notice of Appeal*, p. 3 of 4. Relevant to the State’s preservation argument, appellant’s brief contains the following questions presented:

11. Whether the affidavit in support of the application for a search warrant set forth factual detail establishing probable cause that appellant had committed violations of the statutes cited in the application for a search warrant?
Preserved: App., p. 4-9.
12. Whether the state’s application for a search warrant and supporting affidavit sufficiently alleged that probable cause existed that a crime had committed?
Preserved: App., p. 4-9.
13. Whether the state’s application for a search warrant and supporting affidavit sufficiently alleged a causal link between any criminal conduct and appellant?
Preserved: App., p. 4-9.
14. Whether the state’s application for a search warrant and supporting affidavit sufficiently alleged probable cause that the crimes specified therein were committed?
Preserved: App., p. 4-9.

¹ *People v. Golb*, 23 N.Y.3d 455 (N.Y. Ct. App. 2014) overruled by *Golb v. Attorney General of the State of N.Y.*, 870 F.3d 89 (2d Cir. 2017)

15. Whether the state's application for a search warrant and supporting affidavit sufficiently alleged probable cause that appellant committed the crimes specified therein?

Preserved: App., p. 4-9.

16. Whether the state's application for a search warrant and supporting affidavit sufficiently alleged probable cause that the equipment the state requested to search and seize will assist in determining whether appellant committed the offenses stated in the state's application for a search warrant and supporting affidavit?

Preserved: App., p. 4-9.

Appellant's Brief, p. *iv*.

Questions presented numbers 11 – 16 address the fundamental argument appellant made before the trial court –the same argument appellant makes on appeal: the trial court failed to analyze the state's affidavit in support of its search warrant against RSA 638:3 and 638:26. *See Lassonde v. Stanton*, 157 N.H. 582, 588 (2008); *In re Juvenile 2003-187*, 151 N.H. 14, 15-16 (2004); *State v. Jimenez*, 137 N.H. 450, 452 (1993); *Hillside Assocs. of Hollis, Inc. v. Maine Bonding & Cas. Co.*, 135 N.H. 325, 330 (1992). In order to effect such an undertaking one must necessarily analyze RSA 638:3 and 638:26 to determine what those two statutes make illegal. *C.f. State v. Fogg*, 16_ N.H. ___, ___ (decided August 1, 2017). This is called statutory interpretation. As appellant points out in his brief, the plain language of RSA 638:25 excludes the term "e-mail." Appellant then cited to *State v. Washington*, 168 N.H. 689, 692-93 (2016), to demonstrate that this court has declined to broadly construe the term "including" in RSA 625:11 in conjunction with 638:26, I(b) to include items not in the RSA 625:11 list. *Appellant's Brief*, p. 19. Thus, the legislative history of RSA 638:26 and 644:4 are relevant to the extent the court concludes RSA 638:25, I, is ambiguous or *Washington, supra*, is inapplicable. *Everett Ashton, Inc. v. City of Concord*, 169 N.H. 40, 44–45 (2016).

IV. This court should hold a full panel oral argument.

On its cover and in its conclusion the State requests 3JX oral argument. On the other hand appellant requests 15-minute oral argument. It is true Supreme Court Rule 12-D(1)(b) permits any party request that a case be set for oral argument before a 3JX panel. It is also true that in deciding whether to assign a case to a 3JX panel this court looks at whether the:

1. appeal involves claims of error in the application of settled law;
2. appeal claims an unsustainable exercise of discretion where the law governing that discretion is settled;
3. appeal claims insufficient evidence or a result against the weight of the evidence.

N.H. Sup. Ct. R. 12-D(5)(a)-(c).²

True, this case involves the application and interpretation of New Hampshire law on probable cause. One could argue that body of law is always developing. Yet, this case is unique in respect to its procedural posture. There is not a reported case addressing the return of property seized under RSA Chapter 595-A based on a lack of probable cause to grant the warrant in the first instance. Second, because the trial court made no factual findings, this court's review is *de novo*. *State v. Fish*, 142 N.H. 524, 528 (1997) (*de novo* when there were no controlling facts determined at the trial court level in the first instance). Additionally, this case is not one that merely argues the evidence was insufficient; rather, this case is about the level of insufficiency falling so low as to be the absence of evidence. In these respects, a full court review, and not a 3JX panel, is proper.

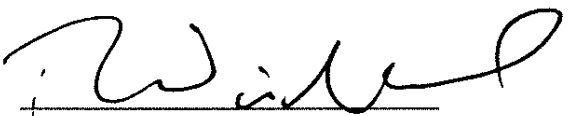
CONCLUSION

For the reasons articulated in this reply brief and in his brief, Richard Exline respectfully requests this Court to reverse and vacate the trial court's decision.

Respectfully submitted,

Richard Exline
By his attorneys,
Tarbell & Brodich Professional Association

Dated: January 16, 2018

By: 
Friedrich K. Moeckel, Esquire
NH Bar ID No. 16472
Tarbell & Brodich Professional Association
45 Centre Street
Concord, New Hampshire 03301
603.226.3900

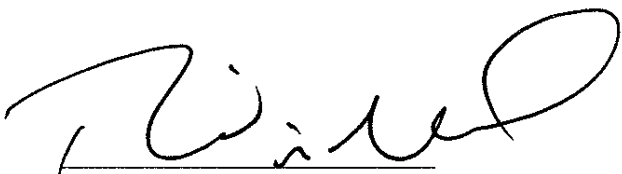
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Richard Exline requests that his attorney Friedrich K. Moeckel be allowed 15 minutes for oral argument.

I hereby certify that on January 16, 2018 two copies of the foregoing Reply Brief were forwarded to counsel for Appellant:

Elizabeth C. Woodcock, Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301

Dated: January 16, 2018


Friedrich K. Moeckel, Esquire
Tarbell & Brodich Professional Association
45 Centre Street
Concord, New Hampshire 03301
603. 226.3900

² Rule 12-D(5) uses no conjunction between 12-D(5)(b) and (c). Thus, it is unknown whether list is conjunctive or disjunctive.