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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0416

State of New Hampshire

v.

Nathaniel Smith

RECEIVED
NEW HAMPSHIRE
SUPREME COURT
2019 FEB 15 A 9 47.

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court - North

BRIEF FOR THE DEFENDANT

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(15 Minutes Oral Argument)

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QUESTION PRESENTED

Whether the court erred by denying Smith's motion to enforce a plea agreement.

Issue preserved by Smith's motion and motion to reconsider and the trial court's orders. A1*-A66.

* Citations to the record are as follows:

"A" refers to the appendix to this brief;

"PH" refers to the transcript of the plea hearing held on March 2, 2017;

"H" refers to the transcript of the hearing held on January 31, 2018;

"MH" refers to the transcript of the motion hearing held on May 4, 2018;

"SH1 & 2" refer to the transcripts of the sentencing hearings held on June 18 and 26, 2018.

STATEMENT OF THE CASE AND OF THE FACTS

Nathaniel Smith was charged with three counts related to the November 2015 murder of Michael Pittman. A1. He was also charged with two drug-related counts. Id.

In February 2017, after negotiation between the parties, the State presented Smith with a “Memorandum of Agreement Between the State of New Hampshire and Nathaniel Smith.” A1, A9-A10, A45-A50. The State agreed that, in exchange for his cooperation in the prosecution of his co-defendants in the alleged murder, it would enter a nolle prosequi on his three murder-related charges. A45-A47. It further agreed to “recommend that the court impose the following sentence:”

Conspiracy to Commit the Sale of Controlled Drugs (Waiver of Indictment)(Extended Term): a stand-committed sentence of not more than thirty (30) years, nor less than ten (10) years, with three (3) years of the minimum sentence deferred for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. If the terms of the deferred sentence are met, the deferred portion shall be suspended for

a period of five (5) years upon his good behavior and compliance with the terms of his sentence.

Possession of Controlled Drugs with Intent to Distribute (Waiver of Indictment)(Extended Term): a sentence of not more than thirty (30) years, nor less than ten (10) years, suspended for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. This sentence is consecutive to the stand committed sentence reflected in paragraph I(A)(i) of this document and begins on the date of his release from incarceration on that sentence.

A45. It was further agreed that the “State would recommend to the court and/or the Department of Corrections that Smith serves the incarcerated portion of his sentence at a secure facility separate and apart” from his co-defendants. A45-A46.

The Agreement concluded with the following: “This agreement constitutes the full and complete agreement between the State and Smith, and no other promises or agreement exist between the parties. There shall be no

modification to this agreement unless made in writing and signed by all the parties.” A49. Smith and his lawyers reviewed and signed the agreement. A49-A50.

On March 2, 2017, Smith plead guilty to the two drug-related charges. PH 4-11. The court, having read the agreement, advised Smith that he would be sentenced, “if everything goes right,” to ten to thirty¹ years in prison with three years of the minimum deferred. PH 7-8. It was contemplated that Smith’s sentencing would occur much later, after he had complied with his obligation under the agreement to provide testimony. A46; PH 2, 6-7.

In November 2017, Smith, through new counsel, filed a Motion to Enforce Plea Agreement. A8-A40. That motion argued that the implicit agreement between the parties was that the stand-committed sentence would run concurrently with another, unrelated sentence Smith was then serving. Id. The State responded that Smith should be allowed to withdraw his plea if he so chose but that it had never agreed that the forthcoming sentence would run concurrently with the sentence it knew Smith was then serving. A41-A59. Smith made it clear that he did not intend to withdraw his pleas. H 3-4; MH 2; SH1 2. At a hearing on the motion, Smith’s subsequent counsel argued that, under contract-law

¹ Although the transcript reads “three,” it is clear in context that the judge actually said or meant “thirty.” PH 7.

principles, the court must discern the parties' objective agreement. MH 3-11.

The court held that the presumption that sentences run concurrently, when the sentence is silent on the matter, does not apply to sentences entered at different times, by different judges, in different courts, and prosecuted by different prosecutorial authorities. A4. Because the agreement made no mention of the other sentence and there was no evidence that the State agreed that the current sentence would run concurrently with the other sentence, the court held that the current sentence would run consecutively. Id.

Smith filed a motion to reconsider, to which the State partially agreed. A60-A66. As a result, the court corrected a factual error in its original order but denied Smith's request to reconsider its ruling. A6-A7. Smith was then sentenced in accord with the agreed-upon terms, with the sentences to run consecutively to Smith's sentences in docket numbers 216-2015-CR-1435 and 216-2015-CR-1482. SH1 3-7, 9-11; SH2 2-8.

SUMMARY OF THE ARGUMENT

The agreement between the parties did not indicate an intention that the stand-committed sentence run consecutively to the sentence Smith was then serving. The court erred in its consideration of New Hampshire law on concurrent and consecutive sentences and in considering the State's purported subjective, but unexpressed, intention. Instead, the court should have considered the plain language of the agreement and its legal context and should not have relied on parole evidence to add an essential term. This Court must reverse.

I. THE COURT ERRED IN DENYING SMITH'S MOTION TO ENFORCE THE PLEA AGREEMENT.

Courts interpret plea agreements using basic contract law principles. United States v. Arroyo-Blas, 783 F.3d 361, 365 (1st Cir. 2015). “Because interpretation of a contract is ultimately a question of law for [the Court] to decide, [the Court] review[s] the trial court’s interpretation of that agreement *de novo*.” Town of Pembroke v. Town of Allenstown, 171 N.H. 65, 69 (2018).

“In determining the actual understanding and intent of the parties, the trier of fact should consider the objective meaning of the expressed contract terms.” IBM Corp. v. Khoury, 170 N.H. 492, 501 (2017) (quotation omitted). “The intent of the parties is determined by an objective standard, and not by actual mental assent.” Id. (quotation omitted). “An objective standard places a reasonable person in the position of the parties, and interprets contractual terms according to what a reasonable person would expect them to mean under those circumstances.” Id. (quotation and brackets omitted); see also United States v. Guzman, 318 F.3d 1191, 1195-96 (10th Cir. 2003) (using reasonableness standard to determine defendant’s understanding of a plea agreement).

In applying this objective, “reasonable person” standard, the Court considers the “circumstances and the context in

which the agreement was negotiated.” Pembroke, 171 N.H. at 70 (quotation omitted). “[T]erms which are plainly or necessarily implied in the language of a contract are as much a part of it as those which are expressed.” In the Matter of Patient & Patient, 170 N.H. 252, 254 (2017) (quotation and brackets omitted). “Parol evidence is not ordinarily admissible to supply an essential term that has been omitted from an agreement.” MacThompson Realty v. City of Nashua, 160 N.H. 175, 179 (2010). A final consideration is the “firmly-established” rule, reflecting a “fundamental principle of contract law,” that any ambiguities in the language of a contract are construed against the drafter. Great Am. Dining v. Phila. Indem. Ins. Co., 164 N.H. 612, 624 (2013).

Here, the parties agreed to a stand-committed sentence of at least seven years. The agreement did not specify that that sentence would be consecutive to a sentence all parties knew Smith was then serving. The agreement did make explicit that the suspended sentence would run consecutively to the stand-committed sentence.

The court needed to decide what, objectively, a reasonable defendant would understand about how the agreed-upon stand-committed sentence would relate to his current sentence. In order to find that the objective agreement was that the sentences run consecutively, the court would consider the circumstances and the context of

the entire agreement to determine whether the consecutive nature of the sentences was plainly or necessarily implied by the agreement's expressed terms.

In New Hampshire, it has long been the rule that, when two sentences are silent as to whether they run consecutively or concurrently, they are presumed to run concurrently. State v. Rau, 129 N.H. 126, 130 (1987). "If, in its discretion, a sentencing court intends to impose consecutive sentences, it must specifically state that intention in its order." Id.

While the Rau Court applied the presumption in a case where two sentences were entered on the same day, id. at 127-28, the Court later applied the presumption in a case where two sentences were entered on different days. Crosby v. Warden, N.H. State Prison, 152 N.H. 44, 47 (2005).

In Crosby, the State argued that the Rau presumption of concurrent treatment should not apply when sentences are imposed on different dates and that instead the opposite presumption should apply. Id. at 47 (the State argued that the Court "should adopt a presumption that sentences imposed for different crimes on different dates are to be served consecutively")². This Court saw "no reason to deviate from [the Rau] reasoning in this case." The Court ultimately

² The Court, in dicta, also considered the outcome were it to have adopted the State's proposed presumption and found that the State could not prevail under those circumstances either. Id. ("Even if we were to assume that such a presumption applied, the procedural history of this case is sufficient to overcome any presumption of consecutiveness.").

ruled that, given the record and “the absence of any language indicating that the sentences were to be served consecutively,” that the sentences were concurrent. Id.

Rau and Crosby reflect the context in which the State and Smith reached their plea agreement in this case. The agreement made explicit the “full and complete agreement” between the parties, including the proposed sentence. It did not specify that the sentence was to run consecutively to Smith’s current sentence and no reasonable defendant, given the context of New Hampshire law, would have understood the agreement to be that the sentence would be consecutive to his current incarceration.

In a similar vein, suppose the agreement stated that Smith’s sentence on the possession of controlled drug with intent to distribute charge be suspended for ten years, without specifying the conditions of the suspension. Under New Hampshire law, all suspended sentences have an implicit condition that the defendant remain of good behavior, in the sense that he or she not commit any new crimes. State v. Budgett, 146 N.H. 135, 138 (2001). Thus, the context of New Hampshire law would objectively cause a reasonable defendant to understand that the sentence was suspended on the condition of his good behavior, because that condition would have been plainly or necessarily implied in the plain language of the agreement.

Here, the court erroneously relied on parol evidence to conclude that the State had not actually agreed upon concurrent sentences and thus to find that the sentences were to run consecutively. A4. This contravened the principle that parol evidence cannot be used to “supply an essential term that [had arguably] been omitted from an agreement.” MacThompson Realty, 160 N.H. at 179.

Finally, despite the context of New Hampshire law and the absence of the term “consecutive” from the agreement, the court should have construed against the State any ambiguity in the agreement as to the relationship of the agreed upon sentence to Smith’s current sentence. The State drafted and provided the agreement to Smith and his counsel to review and sign. Nothing in the agreement indicated an intention that the sentences run consecutively. Had that been the State’s intention at the time, it was incumbent upon the State to say so explicitly. The court erred in finding that, based on the agreement, the sentences would run consecutively.

This Court should remand for consideration of a remedy.

When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the

consideration he has furnished, *i.e.*, to withdraw his plea. But rescission is not the only possible remedy; in *Santobello [v. New York]*, 404 U.S. 257 (1971), [the Court] allowed for a resentencing at which the Government would fully comply with the agreement – in effect, specific performance of the contract.

Puckett v. United States, 556 U.S. 129, 137 (2009); see also Allen v. Hadden, 57 F.3d 1529, 1534 (10th Cir. 1995) (“Where the government obtains a guilty plea predicated in any significant degree on a promise of agreement with the prosecuting attorney, such promise must be fulfilled to maintain the integrity of the plea.” (quotation omitted)). Given that Smith has complied with his side of the agreement and that specific performance may only result in Smith being granted a small amount of pretrial credit, specific performance would not be an unduly burdensome remedy for the court or either party. This Court must reverse and remand for consideration of the remedy.

CONCLUSION

WHEREFORE, Nathaniel Smith respectfully requests that this Court vacate and remand for further proceedings.

Undersigned counsel requests oral argument before a full Panel of this Court.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains 2546 words.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief have been mailed, postage prepaid, to:

Criminal Bureau
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Stephanie Hausman

DATED: February 19, 2019

APPENDIX

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STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS
NORTHERN DISTRICT**

SUPERIOR COURT

State of New Hampshire

v.

Nathaniel Smith

Docket No. 216-2017-CR-00913

ORDER

Currently before the Court is defendant's motion to enforce a plea agreement he entered into with the State. Defendant was indicted on charges of first degree murder, second degree murder, conspiracy to commit murder, conspiracy to commit the sale of controlled drugs, and possession of a controlled drug with intent to distribute. The charges stem from the November 2015 murder of Michael Pittman, which defendant is alleged to have been complicit in.

On February 21, 2017, defendant entered into a plea agreement with the State. Under the terms of the agreement, defendant would cooperate in the criminal prosecutions of codefendants Adrien Stillwell, Michael Younge, and Paulson Papillon. In exchange, the State would: (1) *nolle prosequi* the first degree murder, second degree murder, and conspiracy to commit murder charges; (2) recommend he serve ten to thirty years on the conspiracy to commit the sale of controlled drugs charge, with three years of the minimum sentence deferred for ten years upon his cooperation, and with the deferred portion of the sentence suspended for five years upon good behavior; and (3) recommend he serve ten to thirty years on the possession of a controlled drug with

intent to dispense charge, suspended for ten years and to be served consecutively with the sentence to be served on the conspiracy to commit the sale of controlled drugs charge. (Def.'s Ex. E.)

The parties now dispute whether the above plea agreement was meant to run consecutively to, or concurrent with, a federal sentence defendant is currently serving on unrelated drug charges. The agreement itself makes no reference to defendant's federal drug sentence. (See id.) Defendant submits it was his belief the plea agreement in the instant case was to run concurrent with his federal sentence. (Id. Ex. G.) To the contrary, the State contends it never discussed the instant plea agreement being concurrent with any other charges defendant was serving; rather, all internal discussions within the Attorney General's office "always included the fact that any plea agreement that was entered into would call for a sentence that was consecutive to any other sentences the defendant was serving or would have to serve in connection with other charges." (State's Ex. B, ¶ 6.)

Defendant argues that because the plea agreement is silent as to whether the instant sentence is concurrent or consecutive to his existing sentence, there is a presumption that the sentence is concurrent. In support of his argument, defendant relies on State v. Rau, 129 N.H. 126, 130 (1987), and Crosby v. Warden, New Hampshire State Prison, 152 N.H. 44 (2005).¹

¹ Although the State argues Crosby and Rau are inapplicable to the instant matter because those cases address the due process protections that apply to sentencing proceedings generally, the Court is unpersuaded. While it is true defendant has not yet been sentenced on the instant charges, upon entering into the plea agreement and entering a guilty plea pursuant to the terms of the agreement, defendant's fate was essentially sealed. See Mabry v. Johnson, 467 U.S. 504, 507-08 (1984), disapproved of by Puckett v. United States, 556 U.S. 129 (2009) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied by judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.").

The New Hampshire Supreme Court has held that "due process requires a sentencing court to make clear at the time of sentencing in plain and certain terms what punishment it is exacting as well as the extent to which the court retains discretion to impose punishment at a later date and under what conditions the sentence may be modified." Crosby, 152 N.H. at 46. This is because, "[a]t the conclusion of a sentencing proceeding, a defendant and the society which brought him to court must know in plain and certain terms what punishment has been exacted by the court." Id. (citing Rau, 129 N.H. at 126).

In Rau, the Supreme Court held "that when a sentencing order, encompassing multiple counts or multiple indictments, is silent as to whether the sentences imposed on each count or indictment are to run concurrently or consecutively, the presumption is that the sentences run concurrently." 129 N.H. at 130. However, Rau dealt with multiple counts or indictments being sentenced at the same time and is therefore factually distinguishable from the instant issue.

In Crosby, the Supreme Court was tasked with determining whether two sentences, which were imposed on different dates and for different crimes, were to be served concurrently or consecutively. 152 N.H. at 47. The State argued that the Court should "adopt a presumption that sentences imposed for different crimes on different dates are to be served consecutively." Id. The Crosby Court held that even if such a presumption applied, "the procedural history of [the defendant's] case [was] sufficient to overcome any presumption of consecutiveness." Id. In arriving at this conclusion, the Supreme Court relied on the temporal proximity between the two sentences—they occurred less than a week apart—the fact that the trial judge imposing the sentences

was the same, and because "the sentencing order of September 9, 1992, specifically provided that the sentences imposed for the sexual assault charges were to commence at noon on September 14, 1992, the date of sentencing on the burglary charge." Id.

Unlike the sentences in Crosby, the Court finds the procedural history and factual circumstances underlying the two sentences in the instant case fail to establish they were meant to be served concurrently. The two sentences: were not temporally or factually related; were not imposed by the same judge; and were imposed by completely different courts and branches of prosecution. Moreover, there is nothing in the record that would have indicated to the Court at the time of defendant's plea to the current charges that the sentence was meant to be concurrent with his federal sentence. As stated above, the agreement itself makes no mention of the federal sentence, and there is no other evidence demonstrating the State agreed to the instant sentence being concurrent to it. Therefore, the Court finds defendant's current plea agreement will be served consecutively with his federal sentence.

However, given defendant's stated belief that the instant plea agreement was to be served concurrently, rather than consecutively, the Court will allow defendant to withdraw his plea if he so chooses. "[A] defendant who wishes to withdraw a guilty plea before sentencing need only present a 'fair and just' reason." State v. Sarette, 134 N.H. 133, 138 (1991). "The defendant has the burden of proving sufficient grounds for the withdrawal motion, regardless of when it is filed." Id. Here, the Court finds a fair and just reason exists, as the parties entered into the plea agreement with substantially different beliefs and expectations with regard to a materially term of the agreement. See Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 501 (2006) ("There must be a

meeting of the minds on all essential terms in order to form a valid contract."). Therefore, because there was no meeting of the minds as to whether the instant sentence would run concurrent to or consecutive with defendant's federal sentence, he may withdraw his plea and proceed to trial.²

Accordingly, for the foregoing reasons, defendant's motion to enforce his plea agreement is DENIED.

SO ORDERED.

DATE

5/22/18


Kenneth C. Brown
Presiding Justice

² Defendant also argues the plea agreement should be enforced because he "risk[ed] his personal safety by entering into [the] cooperation agreement with the State." (Def.'s Mot. Enforce, ¶ 21 (citing Cooper v. United States, 594 F.2d 12 (4th Cir. 1979), abrogated by Mabry, 467 U.S. at 504.) The Court is unpersuaded. In Cooper, the Fourth Circuit required specific performance of a plea offer made by a subordinate prosecutor which was withdrawn upon the directions of a superior before the defendant, who acted with reasonable promptness, could accept it. 594 F.2d at 18-19. However, unlike the prosecutors in Cooper, here, the State has not withdrawn or attempted to alter the terms of the plea agreement. To the contrary, the State remains willing to fulfill its obligations under the plea agreement as written, and its only disagreement with defendant relates to defendant's federal sentence, which is not expressly addressed in the agreement. Because the Court has found that the facts and circumstances underlying defendant's plea do not establish an intent for the current sentence to run concurrent with defendant's federal sentence and the State remains willing to comply with those terms, the Court finds the Cooper decision does not entitle defendant to any further relief.

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Nathaniel Smith

Docket No. 216-~~2017 CR 00043~~
2016 CR 322

ORDER

Currently before the Court is defendant's motion to reconsider this Court's May 22, 2018 order denying his motion to enforce his plea agreement. Defendant argues the Court overlooked or misapprehended points of fact and law in denying his motion. A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present." N.H. R. Crim. P. 43.


Defendant first correctly points out that the Court mistakenly believed his current sentence was imposed in federal court, when in fact it was imposed in this Court. However, even acknowledging this error, the Court still finds the procedural and factual circumstances underlying the two sentences fail to establish they were meant to be served consecutively. The facts the Court relied on in its May 22, 2018 order remain the same: the sentences were not temporally or factually related, were not imposed by the same judge, and were not imposed by the same branch of prosecution.¹

¹ Defendant's current sentence was prosecuted by the County Attorney's office, where the instant plea deal was agreed to with the Attorney General's office.

Next, defendant argues the Court erred in its interpretation and application of State v. Crosby, 152 N.H. 44 (2005). After review of Crosby, the Court disagrees it erred in applying the law. Accordingly, defendant's motion to reconsider is DENIED.

SO ORDERED.

6/18/18
DATE


Kenneth Crown
Presiding Justice

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS. – Northern Dist.

DECEMBER TERM, 2017

THE STATE OF NEW HAMPSHIRE

V.

NATHANIEL SMITH

216-2016-CR-00322

DEFENDANT'S MOTION TO ENFORCE PLEA AGREEMENT

NOW COMES the defendant, Nathaniel Smith, by and through counsel, Donna J. Brown, and hereby requests this court enforce the plea agreement as understood by Mr. Smith at the time of his plea and to schedule a hearing on this Motion.

1. Nathaniel Smith is charged with one count of first degree murder, one count of second degree murder, one count of conspiracy to commit murder, one count of conspiracy to commit sale of a controlled drug, one count of possession of a controlled drug with intent to distribute.
2. On November 3, 2015, the Manchester Police responded to a call about a shooting at 472 Granite Street. Upon arrival, the police identified the victim of the shooting as Michael Pittman. Pittman subsequently died from these gunshot wounds.
3. After an investigation into this shooting, the Manchester Police made arrests against several individuals including Adrien Stillwell, Paulson Papillion, Michael Younge and Nathaniel Smith.
4. Attorneys Justin Shepherd and Justin Hayes were appointed by the court to represent Nathaniel Smith.
5. There were plea negotiations on behalf of Nathaniel Smith that took place over the course of

several months during the end of 2016 and the beginning of 2017. The back and forth of these negotiations are documented by email exchanges between the defendant's counsel and counsel for the State as well as letters between defense counsel and Nathaniel Smith.

6. There was a meeting scheduled on November 30, 2016 that was described as a "proffer" meeting. The parameters and purpose of this meeting were set forth in a letter from the Office of the Attorney General dated the same day as the meeting. *See Attachment A.*
7. This "proffer" letter stated that:
 - The purpose of the meeting was so that Mr. Smith could "proffer certain information regarding his knowledge of the death of Michael Pittman in Manchester on November 30, 2015."
 - The proffer [was] primarily for the purpose of enabling the State and its law enforcement partners to determine if Smith should be given consideration and the opportunity to cooperate with law enforcement;
 - It [was] understood that after reviewing Smith's proffered information, the State [would] evaluate the information and explore the possibility of Smith's cooperation with the State.
8. On January 3, 2017, John McCormack of the Office of the Attorney General, sent an email to Mr. Smith's attorneys extending a plea offer to counsel for Mr. Smith that stated the following:

We have authority to resolve your client's matter to the terms that Attorney Hayes proposed to Jason. Essentially a guilty plea on the Conspiracy to Commit Murder charge with a sentence of 15-30 years with 5 years deferred for 10 years. The terms of which have been incorporated into the attached cooperation agreement. Please review this agreement and let me us know if we are all on the same page. After which, please execute the agreement as soon as possible with your client and return to us. Once we receive it we will have Smith moved to a safe location and then we can take it from there in terms of setting up the plea. We would like to get this in with the court as soon as possible.

See Attachment B.
9. Letters exchanged between Mr. Smith and his attorneys at the time of these plea negotiations suggest that Mr. Smith rejected the original plea offer made by the State on January 3, 2017.

This fact is established by a letter written by Attorney Shepherd January 24, 2017 to Nathaniel Smith:

Thank you for your most recent letter. Attorney Hayes and I thoroughly review it together. As your defense lawyers we are obligated to bring you timely plea offers as they are received from the Attorney General's Office. As you are aware and as we discussed the Attorney General made the following offer to resolve this matter:

1. The charge of First Degree Murder will be nol prossed;
2. The charge of Second Degree Murder will be nol prossed; and
3. In exchange for a plea of guilty to Conspiracy to Commit Murder the proposed sentence would be 15 to 30 years in prison with 5 years off the minimum deferred. This sentence would run concurrently with the sentence you are currently serving and all parties agreed that you could serve the sentence as we discussed.

We fully understand that you do not wish to resolve this matter by way of a plea. We fully understand that you have rejected the above offer and that you are only willing to resolve the case upon the terms outlined in your letter.

See Attachment C.

10. On February 14, 2017, defense counsel met with Mr. Smith at the jail. On the same date, Mr. Smith sent a letter to his attorneys, as a follow up to these meeting, telling them that he does not agree to the State's "most recent offer." In his letter, Mr. Smith outlined the terms of a plea deal that would be agreeable to him. Among the terms that Mr. Smith set forth in his letter outlining what he wanted as part of a deal in this case, was a condition that any prison sentence that he receive be concurrent to the sentence that he was already serving at the time. *See Attachment D.*
11. On February 21, 2017, Nathaniel Smith and his attorneys signed a document entitled "Memorandum of Agreement Between the State of New Hampshire and Nathaniel Smith." The document set forth the following conditions of the agreement:

- The first-degree, second-degree and conspiracy to commit murder indictments shall be *nolle prossed* at the time of sentencing or upon the conclusion of Smith's cooperation in the criminal prosecutions against Adrien Stillwell, Michael Younge and Paulson Papillion related to the death of Michael Pittman, whichever occurs later;
- The State would make the following plea offer:

- a. Conspiracy to Commit the Sale of Controlled Drugs (Waiver of Indictment)(Extended Term): a stand-committed sentence of not more than thirty (30) years, nor less than ten (10) years, with three (3) years of the minimum sentence deferred for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillion related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. If the terms of the deferred sentence are met, the deferred portion shall be suspended for a period of (5) years upon his good behavior and compliance with the terms of his sentence;
- b. Possession of Controlled Drugs with Intent to Distribute (Waiver of Indictment)(Extended Term): a sentence of not more than thirty (30) years, nor less than ten (10) years, suspended for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillion related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. This sentence is consecutive to the stand committed sentence reflected in paragraph I(A)(i) of this document and begins on the date of his release from incarceration on that sentence;
- c. The State will recommend to the court and/or the Department of Corrections that Smith serves the incarcerated portion of his sentence at a secure facility separate and apart from Paulson Papillion, Adrien Stillwell and Michael Younge, so as best ensure Smith's safety while incarcerated. Smith expressly recognizes that, insofar as the Department of Corrections maintains sole discretion in determining where incarcerated individuals will serve their sentence, this agreement is not void in the event that the Department of Corrections determines that Smith may safely serve his sentence at the New Hampshire State Prison or any other secure facility in New Hampshire;

See Attachment E.

12. On March 2, 2017, Nathaniel Smith plead guilty to Conspiracy to Commit the Sale of Controlled Drugs and Possession of Controlled Drugs with Intent to Distribute. Sentencing was continued indefinitely due to his anticipated cooperation as a witness for the government in both the case of State v. Adrien Stillwell and State v. Paulson Papillion.

13. On March 13, 2017, Mr. Smith wrote a letter to his attorneys where he questioned whether or not the terms of the plea that he had agreed to were consistent with the terms as understood by

the State at the plea hearing. *See Attachment F.*

14. On March 28, 2017, Attorney Shepherd responded to Mr. Smith's letter as follows:

I hope this letter finds you well. I am writing to address the concerns you laid out in your March 13th letter. I spoke with Kim Lacasse and was told that your personal belongings and money are being forwarded to the Sullivan County HOC.

The second deal you signed was better than the first- it was a year less time. The deal was the exact deal you wanted and on the terms you proposed. We were surprised that the Attorney General even entertained the deal. **This sentence runs concurrently with the sentence you are currently serving.**

I don't understand when you say that we have not followed through on your request on "so many different issues". I believe we have followed your requests perfectly on every issue. Let me know if I am mistaken and we will take steps to address it.

See Attachment G.

15. On March 31, 2017, Attorney Justin Shepherd sent an email to Attorney John McCormick of the Attorney General's Office regarding the issue of whether or not the terms of Mr. Smith's sentence were intended to be concurrent with the sentence that Mr. Smith was already serving at the time he was sentenced:

Hi Jay – After speaking w/Atty Hayes we believe the referenced conversation occurred on February 14th with Attorney Strelzin. **It was our understanding based on the conversation that the sentences would run concurrently with the sentence he is currently serving.** We specifically recall this conversation occurring in the parking lot outside the NH State Prison and over a conference call which was on speaker phone. We will cross-check this against our notes but this is our collective recollection and the understanding of Mr. Smith.

With respect to pre-trial confinement credit, Mr. Smith has been held with a no-bail status since his arraignment a year ago. It is our position that he is entitled to receive pre-trial confinement credit given the relevant sentencing statute and his ongoing cooperation.

As always Justin and I look forward to hearing from you. Please pass along the proposed dates for witness preparation that we discussed.

Thanks!

See Attachment H.

16. Attorney Jason Casey of the Office of the Attorney General responded to Attorney Shepherd's email on the issue of whether Mr. Smith's sentence would be concurrent as follows:

To reiterate what we said earlier, we cannot agree to run the sentences concurrent with one another. Based upon Justin Hayes's representations during our call earlier this afternoon, no one from our office (including Jeff Strelzin) ever appears to have expressly agreed to concurrent sentences. Furthermore, we disagree with you that the cooperation agreement's silence on this point renders the sentences concurrent as a matter of law. The principle that you're referring to applies only to sentencing orders that encompass multiple counts or multiple indictments resolved at the same time. *See State v. Rau*, 129 N.H. 126, 130 (1987) ("We hold that when a sentencing order, encompassing multiple counts or multiple indictments, is silent as to whether the sentences imposed on each count or indictment are to run concurrently or consecutively, the presumption is that the sentences run concurrently."). Thus, if the sentencing sheets did not specify, this principle would theoretically apply to the 2 charges that he plead guilty to under the cooperation agreement (possession with intent and conspiracy). However, this principle does not apply to separate sentencing orders stemming from separate indictments that are ordered during separate proceedings, like the two sentencing orders at issue here. It also would not apply where, at sentencing, one party urges the court to order a consecutive sentence. As we've stated, should your client be sentenced under the cooperation agreement, the State will insist on a sentence that is consecutive to the sentence he's currently serving.

See Attachment I.

17. This email demonstrates that it was only after Mr. Smith entered his plea of guilty that the State first told defense counsel that it was their intent that the sentence in the above-captioned matter be consecutive to the sentence that Mr. Smith was already serving at the time of his sentencing.
18. *State v. Rau*, 129 N.H. 126, 130 (1987) held that if a sentencing order is silent as to whether a sentence is consecutive or concurrent, the presumption is for concurrent sentences. Therefore, if a court intends to impose consecutive sentences, it must specify in the order.
19. *Rau* involved two sentences that were imposed at the same time at the same sentencing hearing. In *Crosby v. Warden*, 152 N.H. 44, 47 (2005) the court clarified the issue as to whether *Rau* applied to sentences imposed on two different dates. Mr. Crosby was sentenced on two different dates to two separate house of corrections sentences. The record on the second

sentence did not indicate whether that sentence was concurrent or consecutive to a sentence imposed on an earlier date. The court in Crosby found that where the defendant was sentenced to jail sentences on two different dates on two different sets of charges and where the second sentence was silent as to whether it was to run concurrent or consecutive to the earlier sentence, then the due process principles set forth in State v. Rau apply and the second sentence is to run concurrently to the first sentence.

20. Where the State was aware that Mr. Smith was serving another sentence at the time of his plea on these charges and the written sentencing agreement was silent as to whether or not the sentences would be concurrent or consecutive, this court should impose the sentence agreed to by the parties with the understanding that it be concurrent to the sentence that Mr. Smith is currently serving.

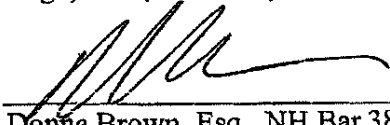
21. Additionally, Mr. Smith asserts that the facts in this case support an argument that he had a plea deal with the State whereby the sentence agreed upon in the plea agreement would be concurrent to the sentence that Mr. Smith was serving at the time of his plea. He therefore requests this court enforce that plea agreement as he has relied on the plea agreement by entering a plea of guilty, by testifying in the matter of State v. Stillwell, and risking his personal safety by entering into a cooperation agreement with the State. *See* Cooper v. United States, 594 F.2d 12 (4th Cir.1979).

WHEREFORE, for the above stated reasons, the defendant respectfully requests this Honorable Court find that the agreement the defendant entered into with State requires that the prison sentence to be imposed be concurrent to the sentence he is already serving.

Respectfully submitted,
Nathaniel Smith


By his attorneys
Wadleigh, Starr, & Peters, PLLC

Dated: December 27, 2017

By: 
Donna Brown, Esq. NH Bar 387
95 Market Street
Manchester, NH 03101
(603)669-4140

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2017 a copy of the foregoing motion was delivered to Attorneys John Harding and Peter Hinckley of the Office of the Attorney General.


Donna Brown, Esq.

A

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

88 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6897

JOSEPH A. FOSTER
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL



November 30, 2016

VIA HAND DELIVERY

Justin Shepherd, Esq.
Shepherd & Osborn, PLLC
351 Main Street
Nashua, NH 03060

Justin Hayes, Esq.
351 Main Street
Nashua, NH 03060

RE: Investigation into the Death of Michael Pittman

Dear Attorneys Hayes and Shepherd:

You have advised me that your client, Nathaniel Smith ("Smith"), wishes to meet with members of the New Hampshire Attorney General's Office ("the State") and the Manchester Police Department to proffer certain information regarding his knowledge of the death of Michael Pittman in Manchester on November 3, 2015.

Before a meeting takes place, it is important that all parties agree as to the nature and purpose of such a meeting. This letter sets forth the full and exclusive terms of the understanding between Smith and the State. There are no other promises, terms or conditions except the following:

1. A meeting will take place at the Hillsborough County Courthouse in Manchester on November 30, 2016. The meeting will be audio recorded.
2. The parties acknowledge that Smith comes to the meeting voluntarily and of his own free will. Smith has not received any promise, suggestion or information of any sort from any law enforcement officer or representative of the State that he will receive any benefit, leniency, consideration, or any form of assistance from the State in exchange for meeting with and speaking to the State's representatives, with the exception of the agreement set forth below. In particular, Smith has not received any promises, explicit or implied, regarding the disposition of any criminal charges that have been or may be brought against him except for those set forth in paragraph three below. Smith will not receive any consideration with respect to any criminal charges that the State could bring or has brought against him merely by participating in a proffer

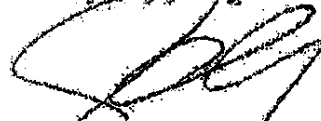
with the State. Rather, the proffer is primarily for the purpose of enabling the State and its law enforcement partners to determine if Smith *should* be given consideration and the opportunity to cooperate with law enforcement.

3. It is understood that after reviewing Smith's proffered information, the State will evaluate the information and explore the possibility of Smith's cooperation with the State. Therefore, the State agrees that it will not use any of Smith's proffered information or statements against him in any pending or future criminal prosecution, except for crimes enumerated in RSA 641:1, 641:2, 641:3, and 641:4 or their equivalents in other jurisdictions, provided the information he provides is truthful. In the event that Smith intentionally lies during the interview, the State may then use any and all of the statements he makes during the interview against him in any criminal case the State has or may initiate. In either event, the State may make derivative use of, and pursue any investigative leads suggested by, the information provided by Smith. The State may use any evidence so developed against Smith and other persons. This provision is necessary in order to eliminate the necessity for a *Kastigar* hearing during which the State would otherwise be required to prove that the evidence it plans to introduce at trial is not derived from information provided by Smith during his proffer.

4. The quality, value, truthfulness and completeness of the information provided and/or cooperation offered by Smith will be subjectively evaluated by the New Hampshire Attorney General's Office. If Smith's information and future cooperation is deemed to be of value to the State, the parties will enter into a separate written agreement containing all of the terms and conditions of his cooperation. Such an agreement may be separate and distinct from a formal Cooperation Agreement, and may include an agreement regarding consideration to be given with respect to pending or future criminal charges. In the event that the parties reach a formal Cooperation Agreement, a copy of that agreement will be provided to Smith after being signed by him and returned to the Attorney General's Office. Otherwise, Smith will receive no benefit or consideration for participating in a preliminary proffer meeting with the State.

5. In the event that Smith is a witness at any official proceeding for any party and offers testimony materially different from any statements made or information provided during the proffer, the attorney for the State may examine him concerning the statements made or information provided during the proffer meeting. This provision is necessary to ensure that Smith does not make materially false statements to a government agency or commit perjury should he testify at any trial or other sworn proceeding.

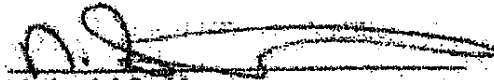
Very truly yours,



Jason A. Casey
Assistant Attorney General
Criminal Justice Bureau

I have read the proffer letter and reviewed the terms with my attorneys, Justin Hayes and Justin Shepherd, and I knowingly, intelligently, and voluntarily agree to its terms.

11-30-16
Date



Nathaniel Smith

I have reviewed the terms of the proffer letter with my client, Nathaniel Smith, and I believe that he understands the terms of the letter and that he knowingly, voluntarily, and intelligently agrees to its term.

11-30-16
Date


Justin Hayes, Esq.
Counsel to Nathaniel Smith

11-30-16
Date


Justin Shepherd, Esq.
Counsel to Nathaniel Smith

B

From: McCormack, John
To: "Justin Shepherd"; "Justin Hayes"
Cc: Casey, Jason
Subject: Nathaniel Smith
Date: Tuesday, January 3, 2017 11:27:02 AM
Attachments: Smith Cooperation Agreement.pdf

Greetings,

We have authority to resolve your client's matter to the terms that Attorney Hayes proposed to Jason. Essentially a guilty plea on the Conspiracy to Commit Murder charge with a sentence of 15-30 years with 5 years deferred for 10 years. The terms of which have been incorporated into the attached cooperation agreement. Please review this agreement and let me us know if we are all on the same page. After which, please execute the agreement as soon as possible with your client and return to us. Once we receive it we will have Smith moved to a safe location and then we can take it from there in terms of setting up the plea. We would like to get this in with the court as soon as possible.

Thanks,


Jay

Jay McCormack
Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-3671
Fax: (603) 223-6256
<mailto:jay.mccormack@doj.nh.gov>

Statement of Confidentiality:

The information contained in this electronic message and any attachments to this message may contain confidential or privileged information and is intended for the exclusive use of the addressee(s). Please notify the Attorney General's Office immediately at (603) 271-3658 or reply to justice@doj.nh.gov if you are not the intended recipient and destroy all copies of this electronic message and any attachments.

C

LAW OFFICE OF
Shepherd & Osborne, PLLC

CRIMINAL DEFENSE

Mark Osborne, Esq.
Justin Shepherd, Esq.*

351 Main Street
Nashua, NH 03080
Office: (603) 895-5525
Fax: (603) 895-5533

January 24, 2017

Nathan Smith, Inmate #92680
C/o NH State Prison
PO Box 14
Concord, NH 03301

Dear Nathan:

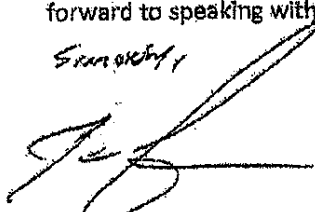
Thank you for your most recent letter. Attorney Hayes and I thoroughly review it together. As your defense lawyers we are obligated to bring you timely plea offers as they are received from the Attorney General's Office. As you are aware and as we discussed the Attorney General made the following offer to resolve this matter:

1. The charge of First Degree Murder will be not pressed;
2. The charge of Second Degree Murder will be not pressed; and
3. In exchange for a plea of guilty to Conspiracy to Commit Murder the proposed sentence would be 15 to 30 years in prison with 5 years off the minimum deferred. This sentence would run concurrently with the sentence you are currently serving and all parties agreed that you could serve the sentence as we discussed.

We fully understand that you do not wish to resolve this matter by way of a plea. We fully understand that you have rejected the above offer and that you are only willing to resolve the case upon the terms outlined in your letter.

In response to your letter we have reviewed the discovery as provided. Additionally, we have filed and drafted and prepared to file a number of motions on your behalf in anticipation of trial. As you are aware we retained an investigator on your behalf at the outset of representation and he has been meeting with you regularly in relation to the case and, more specifically, thoroughly reviewing the discovery. Your defense team is prepared to move forward in the direction you now choose to go. We look forward to speaking with you soon.

Shepherd



* also admitted in Massachusetts

www.ShepherdandOsborne.net

D

2/14/17

Justin,

after speaking to you and Mr Hayes on Thursday 2-14-17. I have changed my mind in as far as considering the most recent offer by the AG. Although he has moved off of the previous offer. It is still not in the range I would feel comfortable with.

This is what I would consider and would like for you to address it with the AG if you continue to proceed in negotiations. I would consider the 15-30 with 7 years off of the bottom number as concurrent with what I'm doing now if I plead guilty to the conspiracy to murder that's it.

They would have to subpoena me if they want me to attend any of my codefendants trials. And even then I would invoke my 5th amendment rights on every question.

If they AG. can take 7 years off of the bottom number as offered they can take 10. And that's where I would feel comfortable in pleading guilty to the conspiracy to murder.

(2)

of this writing before I send a motion to the courts. And relief you of having to do so. Personally I like you, but my life is on the line now faster. And your passive approach to matters of concern is not going to save it.

I'd like for you when you come visit me next, is to one do so at an adequate time so that I may have enough time to digest a good amount of discovery. I'd like to see Distress statements of CO-
defendant statements (stillwell, young, puppillon)

Howard wittes, Amber, Elizabeth Lopez state ments
Every other person can only testify to hearsay. I would also like any and all information they (AG) has in as far as Eye witnesses and video surveillance. I believe these few things are of most importance at this time. And would like to go over them. I'd like for you to put these things together for me and bring them the next time you come up.

And a copy of the motion sent to the courts requesting discovery for me to have.

I don't like you asking me to compromise my rights in order to satisfy the AG. This is why I refuse to speak with them, and would like for you to refrain from asking me from this point forward!

over
←

I would like for you to start building a defense on the states evidence. In which no-one can attest to ~~me~~ saying they seen or heard me say anything about doing anything to anybody at any time. They can assume but the assumption is based on association and/or hearsay and what actually happened.

I hope to see you soon and/or hear from you with the news that you filed the motion to the courts on my behalf requesting I receive discovery. Thank you

Sincerely,

Nathaniel Smith

Dr. F. C. Smith

(4)

At a trial that's less than a 50/50 chance of winning. Basically these statements could potentially hurt me at trial. But it is a chance. I would take it if the state does not accept a resolution that would include, but not limit it to a very low state prison sentence.

To give you a number that I'm comfortable with, would be Ludacris on behalf of myself - My Plan to complete the notice of intent to plead guilty is not to rush into anything. It's a consideration! After reading, reviewing, and discussing the elements of the offense the state must prove. And to eliminate ~~the~~ and honor the courts time by not wasting it. When I believe the results would be the same in trial as in plea. A low state sentence

I honestly believe this is beneficial to the A.G. in the prosecution, or the execution of prosecution, when seeking a conviction in this matter. By NO means does my admission to plead guilty to a charge lesser than Conspiracy to murder (w/ the 1st Degree Murder and 2nd Degree Murder) mean that my co-defendants are the of this crime or any crime unless we can find them guilty with

(5)

the evidence offered. My admission is based or would be based solely on what ~~my~~ the State and myself have concluded to be irreconcilable differences. In trying to resolve Discovery matters in ~~the~~ ^{the} case So please Justin as you proceed take into consideration the following. And maintain my request of trying to get the lowest possible number that should be first priority in the resolution of my case. Talk to you soon!

Sincerely



Nathaniel Smith

P.S. Was just notified conspiracy to murder as well as solicitation to murder carry the same penalty of 15 to 30 and a \$4000 fine. Its a shame my own attorneys would try to talk me into accepting 15 to 30 years with 5 years deferred as a deal. And thats with a proffer (101). Must really think I'm the joke? AS it stands I must. Make a ridiculous counter offer how about a 3 $\frac{1}{2}$ to 7 ran concurrent to what I'm already doing

E

MEMORANDUM OF AGREEMENT BETWEEN
THE STATE OF NEW HAMPSHIRE AND NATHANIEL SMITH

In consideration of Nathaniel Smith's ("Smith") cooperation related to the death of Michael Pittman, including, but not limited to, Smith's cooperation in connection with the criminal prosecutions of Adrien Stillwell, Michael Younge, and Paulson Papillon, and subject to the conditions set forth below, the State of New Hampshire ("the State"), by and through the Office of the Attorney General, hereby enters into the following agreement with Smith:

I. OBLIGATIONS OF THE STATE OF NEW HAMPSHIRE

- A. Incident to Smith's plea(s) of guilty in case number 216-2016-CR-00322 (Hillsborough County – North), at the sentencing hearing, the State will recommend that the court impose the following sentence:
- i. Conspiracy to Commit the Sale of Controlled Drugs (Waiver of Indictment)(Extended Term): a stand-committed sentence of not more than thirty (30) years, nor less than ten (10) years, with three (3) years of the minimum sentence deferred for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. If the terms of the deferred sentence are met, the deferred portion shall be suspended for a period of five (5) years upon his good behavior and compliance with the terms of his sentence.
 - ii. Possession of Controlled Drugs with Intent to Distribute (Waiver of Indictment)(Extended Term): a sentence of not more than thirty (30) years, nor less than ten (10) years, suspended for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. This sentence is consecutive to the stand committed sentence reflected in paragraph I(A)(i) of this document and begins on the date of his release from incarceration on that sentence.
 - iii. The State will recommend to the court and/or the Department of Corrections that Smith serves the incarcerated portion of his sentence at a secure facility separate and apart from Paulson Papillon, Adrien

Stillwell and Michael Younge, so as best ensure Smith's safety while incarcerated. Smith expressly recognizes that, insofar as the Department of Corrections maintains sole discretion in determining where incarcerated individuals will serve their sentence, this agreement is not void in the event that the Department of Corrections determines that Smith may safely serve his sentence at the New Hampshire State Prison or any other secure facility in New Hampshire.

- B. The first-degree, second-degree and conspiracy to commit murder indictments shall be *nolle prossed* at the time of sentencing or upon the conclusion of Smith's cooperation in the criminal prosecutions against Adrien Still, Michael Younge and Paulson Papillon related to the death of Michael Pittman, whichever occurs later; and
- C. The State's obligations set forth in items A and B, above, are expressly contingent upon Smith satisfying the obligations and conditions set forth below in Section II of this agreement.

II. OBLIGATIONS OF NATHANIEL SMITH

- A. Smith will accept full responsibility for his conduct in connection with his actions in committing the crimes of Conspiracy to Commit the Sale of Controlled Drugs and Possession of a Controlled Drug with the Intent to Distribute and by pleading guilty to those charges in Hillsborough County (North) case number 216-2016-CR-00322.
 - i. Smith agrees to waive any right he may have to a speedy sentencing hearing, and further agrees that he may be sentenced after the final disposition of all other criminal charges arising from the death of Michael Pittman, including, but not limited to, all current or future criminal charges brought against Adrien Stillwell, Michael Younge, Paulson Papillon, or any other individual.
 - ii. Smith agrees that, for purposes of sentencing on charge _____ (conspiracy to commit sale of a controlled drug), he shall assent to the sentence recommended by the State and outlined above in Section I.
 - iii. Smith agrees that, for purposes of sentencing on charge _____ (possession of a controlled drug), he shall assent to the sentence recommended by the State and outlined above in Section I.
- B. During any and all events or court proceedings related to the death of Michael Pittman, including, but not limited to, all current and future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon or any

other individual, Smith must comply fully, truthfully, and in a timely manner with all reasonable requests made by the State pursuant to this agreement. This obligation includes, but is not limited to, each of the following:

- i. Smith must at all times act in good faith and provide truthful, accurate and complete information, statements and testimony. Making a material false statement or omission in any context or in any proceeding related to the death of Michael Pittman, including but not limited to, all current or future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon or any other individual, as well as in affidavits, interviews, statements, pretrial meetings, depositions, hearings, trials, retrials, post-trial proceedings or all collateral proceedings, whether in state or federal court, will constitute a breach of this agreement. In the event of such a breach, or any other breach of this agreement by Smith, the State of New Hampshire will be released from all of its obligations under this agreement and may seek the remedies set forth below.
- ii. Smith must cooperate in good faith and employ his best efforts under this agreement. The cooperation required of Smith by this agreement extends to all proceedings related to the death of Michael Pittman, including, but not limited to, all current or future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon or any other individual, irrespective of the number of trials, as well as meetings with prosecutors or the police, while preparing for and testifying during pretrial hearings, depositions, trials, retrials, post-trial hearings and all collateral proceedings, whether in state or federal court. Smith must comply with all reasonable requests made by the State within the scope of this agreement. A failure to so cooperate or provide best efforts will constitute a breach of this agreement. In the event of such a breach, or any other breach of this agreement by Smith, the State of New Hampshire will be released from all of its obligations under this agreement and may seek the remedies set forth below.
- C. Knowingly making a material false statement or omission in any context or in any proceeding related to the death of Michael Pittman including, without limitation, in affidavits, interviews, statements, pretrial meetings, depositions, hearings, trials, retrials, post-trial hearings and all collateral proceedings, whether in state or federal court, will constitute a breach of this agreement. In the event of such a breach, or any other breach of this agreement by Smith, the State of New Hampshire will be released from all of its obligations under this agreement and may seek the remedies set forth below.

III. REMEDIES

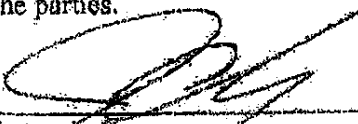
- A. Smith's failure to execute or comply with any of the conditions or obligations set forth in Section II, above, shall constitute a breach of this agreement. In the event of such a breach as determined by a court of competent jurisdiction, the State of New Hampshire may seek the following remedies:
- i. The State may seek to impose any deferred or suspended sentence ordered as the result of the guilty plea(s) referenced above in Section I.
 - ii. Without limitation and for any purpose, the State may make full use of any and all statements or other information or evidence provided by Smith, whether sworn or unsworn, either before or after the date of this agreement.
 - iv. Smith may be prosecuted in any court of competent jurisdiction to the full extent of the law, including, without limitation, by reinitiating any and all previously-dismissed criminal charges (including those listed in Section I, above) that are supported by sufficient evidence.
 - v. Smith may be prosecuted in any court of competent jurisdiction to the full extent of the law for perjury, obstruction of justice or any other appropriate offense in the event that he knowingly makes a material false statement or omission during any events or proceedings related to the death of Michael Pittman, including, but not limited to, all current or future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon and any other individual, during proffer interviews, affidavits, meetings, testimony before a grand jury, depositions, hearings or trials, retrials, post-trial hearings and all collateral proceedings, whether in state or federal court, in the course of fulfilling his obligations under this agreement.
- B. *Waiver of double jeopardy protections:* Smith agrees that any prosecution and sentencing subsequent to a breach of this agreement is not barred by the Double Jeopardy Clause of the United States or New Hampshire Constitutions, or any other constitutional provision or law, and that such double jeopardy rights as he might otherwise have enjoyed under these provisions are hereby waived, except that Smith may raise any other defense or claim that he could have raised prior to entry of this agreement.
- C. *Waiver of speedy trial protections:* Smith agrees that any prosecution and sentencing subsequent to a breach of this agreement is not barred by speedy trial protections afforded by the Due Process Clause of the United States or New Hampshire Constitutions, or any other constitutional provision or law, and that such speedy trial rights as he might otherwise have enjoyed under

these provisions are hereby waived, except that Smith may raise any other defense or claim that he could have raised prior to the date of this agreement.

D. *State of Limitations*: Smith agrees that any prosecution and sentencing subsequent to a breach of this plea agreement is not barred by any applicable the Statute of Limitations.

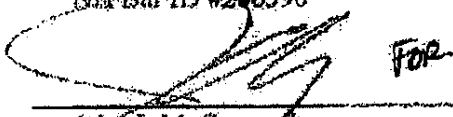
IV. ADDITIONAL TERMS

This agreement constitutes the full and complete agreement between the State and Smith, and no other promises or agreement exist between the parties. There shall be no modification to this agreement unless made in writing and signed by all the parties.



Jason A. Casey
Assistant Attorney General
NH Bar ID #266590

2/21/17
Date

 For

John J. McCormack
Assistant Attorney General
NH Bar ID #19569

2/21/17
Date

I, Nathaniel Smith, have read this Agreement and I have consulted with my attorney regarding its provisions and my rights. I fully understand all of the terms and conditions of the Agreement and my rights thereunder, and freely and voluntarily agree to all of its terms.

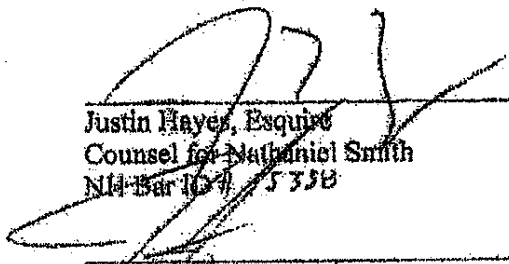


Nathaniel Smith

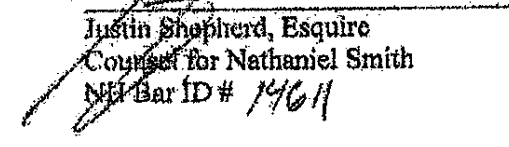
2/21/17
Date

I am counsel for Nathaniel Smith in *State v. Nathaniel Smith*, Hillsborough County (North) case number 216-2016-CR-00322. I have carefully reviewed the entire Agreement. After reviewing the Agreement, I explained to Smith the Agreement and all of its terms, each

of Smith's rights under the Agreement, and the Agreement's impact on all pending and future criminal charges against Smith. I believe that Nathaniel Smith's decision to enter into this Agreement is a knowing, intelligent, and voluntary one.


Justin Hayes, Esquire
Counsel for Nathaniel Smith
NH Bar ID # 5358

2/21/17
Date


Justin Shepherd, Esquire
Counsel for Nathaniel Smith
NH Bar ID # 14611

2/21/17
Date

①

F

3/13/17

Justin,
I'm writing to you out of concern for
several matters pertaining to myself as well as
my case. In case you are not aware, I am
still currently at Sullivan County Correctional
Facility and have been for over a month now.
I need you and Mr. Hayes to pay
special attention to detail in this correspondence
for I have come to a conclusion on several
matters pertaining to myself and my situation,
and will not move off of them until these
matters are addressed.

As I've stated, I'm concerned
with the handling of the details of my
case and the handling of myself. I've
signed a deal while at the prison that was
different than the second deal I signed when
I went to court on the 2nd. I questioned
it, but you overlooked it and expressed how
you felt it was a better deal, without
conversing ^{with} myself as to what I
wanted.

Still the deal was absent of
certain criteria that I requested and was
neither mentioned by you or Mr. Hayes.
The subject matter would be that of
Pg. 4 OF 4

A32 OVER

(2)

1) sentencing to be ran ~~concurrent~~ concurrent to the sentence I'm serving now. 2) that I'm gonna be allotted pre-trial credit of 18 months or at least from the indictment date of the charges March 2016 (1 year to date). Until those two things are properly corrected I will not follow through on my side of the deal.

I have continuously ask you and Justin for your cooperation in following through on my request on so many different issues but have not on any of them.

Again I will not move forward until conditions are met and yes I am taken a stand on this so there is no need for you to question it. I would like for you to retrieve my discovery in full, meaning the material at the prison (4688 pgs), the additional pages and any and or all new material. Plus all the materials I sent to you and Justin (Interviews & Grand Jury interviews).

I need you to contact Kim Hacasse at the prison and retrieve or have her send me all my personal property

Pg 2 of 4

(4)

① To reiterate: 1) Sentencing to be ran concurrent to sentence I'm currently serving. 2) Pre-trial credit of 18 months or from March 2016 indictment.

② I need you to talk to Kim Lacasse and demand all my property and money's from my account esp. (Discovery 4000 pgs.)

③ I need you to please send me any and all discovery in your possession including New as well the pages of discovery I previously sent to you of (interviews and Good Joy interviews) plus notes

④ I would like for you to speak with the A.G. in as far as the concern of my safety in or when transporting to and from court. I was placed in cells with inmate from Concord prison. I'm asking to be moved with a little more concern for my safety

From this point forward I will not allow for you or anyone else to disregard the concerns of myself or my safety.

I will consider and critique every issue in as far as myself and my concern for my safety. Hope to hear from you soon

Sincerely,

Nathaniel Smith

(3)

Those are just some of the things that I would like for you and Justin to address in concern of myself. I've made this whole experience easy for you and Justin and your lack of concern for my interest has caused me to be concerned for myself.

If you don't feel as though anything I've said thus far is of any importance, and decide you want to do anything other than to radicate these issues then please do this for myself, and for you.

I'd like for you to file two motions with the courts. ① To withdraw my plea for the current case and any other part of the plea, and ② a ~~motion~~ motion to withdraw from my case (ineffective counsel) or (conflict of interest).

And Justin I've given plenty of consideration to this. It's my life and it's detrimental to my wellbeing, so I have to place my concerns as a priority, and I hope there are no ill feelings.

I expect to hear from you, but I hope its with regards to the feweral things I've mentioned within this letter.

pg 3 of 4


5

one more thing I expect these things to be done within a timely manner. For trial is to begin soon in Stillwell's case. What ever the course ~~off~~ action is I would like to see progress.

Please DO NOT PUT ~~off~~ these matters as of no concern. For it would be an embarrassment to yourself and myself when the time comes for the courts to, or rather the AG to depend on me to come through and I deny

IF I don't hear from you within a couple weeks of this correspondence I will write the A.G. (Mr McCormick) and explain my dilemma to not want to move forward unless a few minute things are worked out first. I don't see there would be a problem but to cover myself I'll take the initiative

6

LAW OFFICE OF
Shepherd & Osborne, PLLC

CRIMINAL DEFENSE

Mark Osborne, Esq.
Justin Shepherd, Esq.*

351 Main Street
Nashua, NH 03080
Office: (603) 598-5525
Fax: (603) 598-5533

March 28, 2017

Nathaniel Smith, Inmate
C/o Sullivan County HOC
103 County Farm Road
Claremont, NH 03743

Dear Nathan:

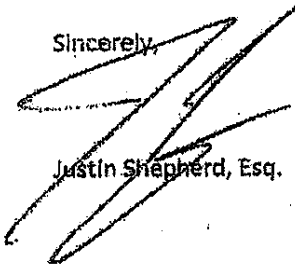
I hope this letter finds you well. I am writing to address the concerns you laid out in your March 13th letter. I spoke with Kim LaCasse and was told that your personal belongings and money are being forwarded to the Sullivan County HOC.

The second deal you signed was better than the first – it was a year less time. The deal was the exact deal you wanted and on the terms you proposed. We were surprised that the Attorney General even entertained the deal. This sentence runs concurrently with the sentence you are currently serving.

I don't understand when you say that we have not followed through on your request on "so many different issues". I believe we have followed your requests perfectly on every issue. Let me know if I am mistaken and we will take steps to address it.

I look forward to hearing from you in the near future.

Sincerely,



Justin Shepherd, Esq.

* also admitted in Massachusetts

H

From: McCormack, John
To: Casey, Jason
Subject: FW: Smith - Concurrent vs. Consecutive
Date: Friday, March 31, 2017 12:46:06 PM

From: Justin Shepherd [mailto:justin@shepherdand Osborne.net]
Sent: Friday, March 31, 2017 12:14 PM
To: McCormack, John
Cc: 'Justin Hayes'
Subject: Smith - Concurrent vs. Consecutive

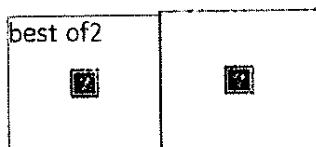
Hi Jay -- After speaking w/Atty Hayes we believe the referenced conversation occurred on February 14th with Attorney Strelzin. It was our understanding based on the conversation that the sentences would run concurrently with the sentence he is currently serving. We specifically recall this conversation occurring in the parking lot outside the NH State Prison and over a conference call which was on speaker phone. We will cross-check this against our notes but this is our collective recollection and the understanding of Mr. Smith.

With respect to pre-trial confinement credit, Mr. Smith has been held with a no-bail status since his arraignment a year ago. It is our position that he is entitled to receive pre-trial confinement credit given the relevant sentencing statute and his ongoing cooperation.

As always Justin and I look forward to hearing from you. Please pass along the proposed dates for witness preparation that we discussed.

Thanks!

Justin Shepherd, Esq.
351 Main Street
Nashua NH 03060
PH- 603-595-5525



Statement of Confidentiality

The information contained in this electronic message and any attachment in this message may contain confidential or privileged information and is intended for the exclusive use of the addressee. Please notify Attorney Justin Shepherd immediately at 603-595-5525 if you are not the intended recipient and destroy all copies of this electronic message and any attachments.

I

From: Casey, Jason
To: "Justin Shepherd"; "Justin Hayes"
Cc: McCormack, John
Subject: Smith

Counsel –

Jay left Justin Hayes a voicemail earlier, but I thought I'd follow up with an email. Your client has been moved to Rockingham County – he's not at the State Prison.

To reiterate what we said earlier, we cannot agree to run the sentences concurrent with one another. Based upon Justin Hayes's representations during our call earlier this afternoon, no one from our office (including Jeff Streizin) ever appears to have expressly agreed to concurrent sentences. Furthermore, we disagree with you that the cooperation agreement's silence on this point renders the sentences concurrent as a matter of law. The principle that you're referring to applies only to sentencing orders that encompass multiple counts or multiple indictments resolved at the same time. *See State v. Rau*, 129 N.H. 126, 130 (1987) ("We hold that when a sentencing order, encompassing multiple counts or multiple indictments, is silent as to whether the sentences imposed on each count or indictment are to run concurrently or consecutively, the presumption is that the sentences run concurrently."). Thus, if the sentencing sheets did not specify, this principle would theoretically apply to the 2 charges that he plead guilty to under the cooperation agreement (possession with intent and conspiracy). However, this principle does not apply to separate sentencing orders stemming from separate indictments that are ordered during separate proceedings, like the two sentencing orders at issue here. It also would not apply where, at sentencing, one party urges the court to order a consecutive sentence. As we've stated, should your client be sentenced under the cooperation agreement, the State will insist on a sentence that is consecutive to the sentence he's currently serving.

Regarding pretrial credit, we will work with you (and him) to ensure that his minimum date on the old drug charge (the one he's currently serving time for) is not affected by the pending homicide charges. At the same time, we cannot allow him to receive the benefit of the same pretrial credit in two separate cases.

Please communicate this to your client at your earliest convenience. If he intends to honor the cooperation agreement, please let us know so that we can meet with him before April 17th. If he does not intend to honor the agreement or testify in Stillwell's trial, please let us know ASAP so that we can pursue other options and re-initiate the homicide prosecution against him. The deal envisioned by the cooperation agreement is fair and equitable, we think. We hope he'll do the right thing and continue to cooperate.

Call Jay or I anytime with questions.

Jason
(857) 225-6033

Assistant Attorney General

Criminal Justice Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-1290

STATEMENT OF CONFIDENTIALITY

The information contained in this electronic message and any attachment to this message may contain confidential or privileged information and are intended for the exclusive use of the addressee(s). Please notify the Attorney General's Office immediately at (603) 271-3658 or reply to justice@doj.state.nh.us if you are not the intended recipient and destroy all copies of this electronic message and any attachments.

JAN 05 2018

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
Northern District

JANUARY TERM, 2018

State of New Hampshire

v.

Nathaniel Smith
216-2016-CR-00322

**STATE'S RESPONSE TO DEFENDANT'S MOTION TO ENFORCE PLEA
AGREEMENT**

NOW COMES the State of New Hampshire by and through its attorneys, the Office of the Attorney General, and responds to the defendant's motion to "enforce the plea agreement as understood by [the defendant] at the time of his plea." The State never agreed that the defendant's sentences in this case would run concurrent with the sentences that he received on unrelated convictions and was serving at the time when he entered into the written plea agreement in this case. Consequently, the defendant has no factual or legal basis to enforce an "agreement" to which one of the parties never actually agreed. The State does note that the Court should permit the defendant to withdraw his guilty pleas in this case, should he seek to do so. That being said, under the terms of the written plea agreement the State will continue in the prosecution of the defendant under the original charges for which he was indicted. In support of the State's response, the State says the following:

1. The defendant was charged by indictment with first-degree murder, second-degree murder, and conspiracy to commit murder, in connection with his role in the murder of Michael Pittman in Manchester, New Hampshire on November 3, 2015.

2. The defendant subsequently entered into a written memorandum of agreement with the State. A full copy of that memorandum of agreement is attached to this response as Exhibit A.

3. Under the terms of the written memorandum of agreement, the defendant was required to plead guilty, through waivers of indictment, to conspiracy to commit the sale of controlled drugs, and possession of controlled drugs with intent to distribute. As to the charges in this case on which the defendant was originally indicted, under the terms of the memorandum of agreement the State would nolle prosequere those charges "at the time of sentencing or upon conclusion of [the defendant's] cooperation in the criminal prosecutions against Adrien Still[well], Michael Younge and Paulson Papillon related to the death of Michael Pittman, whichever occurs later." Neither contingency has occurred, and the original indicted charges against the defendant are still active.

4. On February 21, 2017, the defendant and his attorneys signed the written memorandum of agreement. On March 2, 2017, the defendant pleaded guilty pursuant to the terms of the memorandum of agreement. The defendant has not been sentenced on the charges to which he pleaded guilty under the memorandum of agreement.

5. At the time when the defendant signed the memorandum of agreement, he was serving prison sentences on unrelated felony convictions. The memorandum of agreement does not address whether the agreed-upon sentences in this matter would run concurrent with or consecutive to the sentences on those unrelated felony convictions. In fact, the memorandum of agreement makes no reference at all to those unrelated convictions and sentences.

6. The defendant in his motion has presented to the Court documentary evidence demonstrating his belief that the sentences set forth in the memorandum of agreement would run

concurrent with the sentences on his unrelated felony convictions. The State assumes for purposes of this response that the defendant had such an actual-belief that the sentences would run concurrent. That being said, the defendant has provided no documentary evidence that prosecutors ever stated or agreed to concurrent sentences, except for reference in a post-memorandum email – not a sworn statement – regarding a claimed conversation with “Attorney Strelzin” (the chief of the Attorney General Office’s Homicide Unit) in February, 2017. Defendant’s Motion to Enforce Plea Agreement, dated December 27, 2017, [hereinafter, “Defendant’s Motion”], Attachment H.

7. Prosecutors never stated, told, or suggested to the defendant’s lawyers at the time when the memorandum of agreement was executed that the sentences set forth in the memorandum of agreement would run concurrent with the sentences on the defendant’s unrelated felony convictions. It was the understanding of the prosecutors who entered into that memorandum of agreement, as well as their supervisor, that the sentences set forth in the memorandum of agreement would run consecutive to the sentences on the defendant’s unrelated felony convictions. Moreover, as to the February, 2017, conversation between the defendant’s lawyers at the time and Attorney Strelzin set forth in the unsworn email presented by the defendant in his motion, the State has provided to the Court a sworn affidavit by Attorney Strelzin in which he asserts that he did not agree with counsel that the defendant’s proposed sentences under a memorandum of agreement in this case would run concurrently with his sentences in other cases. See Exhibit B attached to this response.

8. Under these facts and circumstances, the Court should deny the defendant’s request for imposition of current sentences, but should allow him to withdraw his guilty pleas in this case if he wishes to avail himself of this readily-available remedy.

9. As to the relief specifically sought by the defendant, in his motion he argues that “[w]here the State was aware that [the defendant] was serving another sentence [sic] at the time of his plea on these charges and the written sentencing agreement was silent as to whether or not the sentences would be concurrent or consecutive, this court should impose the sentence [sic] agreed to by the parties.” Defendant’s Motion, at ¶ 20. That argument rests, and ultimately falls, on the defendant’s wholly incorrect factual premise that the imposition of concurrent sentences was “the sentence agreed to by the parties.” That was not the agreement. The defendant recognizes that reality in his motion. Id. at p.1 (requesting enforcement of “the plea agreement as understood by [the defendant] at the time of his plea . . .”) (emphasis added). In fact, as demonstrated by the defendant’s unsworn submissions and the State’s sworn submission, there was no agreement at all by the parties as to the issue of whether the sentences in this case would run concurrent with or consecutive to the defendant’s sentences on his unrelated felony convictions.

10. The defendant’s reliance on Crosby v. Warden, 152 N.H. 44 (2005), and State v. Rau, 129 N.H. 126 (1987), is fundamentally misplaced. See Defendant’s Motion, at ¶¶ 18-19. Those cases address presumptions and due process protections that apply generally: (1) when a court (2) imposes a sentence. See Crosby, 152 N.H. at 46-47; Rau, 129 N.H. at 129-30. Those cases, involving judicial orders imposed at the time of sentencing, provide no meaningful guidance for the materially different situation presented here, to wit, differences in intent and understanding between the parties who entered into a memorandum of agreement and terms therein that do not address the disputed matter, before a sentence is imposed. The New Hampshire Supreme Court has never applied the principles discussed in Crosby and Rau either to the plea bargaining process between prosecutors and criminal defendants, or in the context of

memorandum of agreements entered into as part of that process. Although prosecutors owe a due process duty of fair dealing during the plea bargaining process, see infra, the prosecutors here did engage in such fair dealing.

11. The defendant also cites to Cooper v. United States, 594 F.2d 12 (4th Cir. 1979), for the proposition that because he testified in one case – State of New Hampshire v. Adrien Stillwell – and “risk[e]d his personal safety by entering into a cooperation agreement with the State,” the Court should impose the concurrent sentences that he seeks, even though not agreed to in the memorandum of agreement. Defendant’s Motion, at ¶ 21. Cooper does not support the defendant’s requested claim for relief for imposition of sentences to which the State did not agree and that were not expressly provided for in the parties’ formalized written agreement. The appellate court in Cooper held that due process considerations warrant that a criminal defendant’s agreement to plead guilty in accordance with a prosecutor’s initial plea offer under some circumstances may give the defendant a right to specific performance of the terms of the extended offer. 594 F.2d at 16-18. The defendant did receive such fair dealing by prosecutors here. The State neither withdrew its plea offer, changed the terms of the plea agreement in any way after apparent understanding had been reached, or renege[d] on actual agreed-upon terms.¹

12. In fact, Cooper fundamentally undermines the defendant’s argument of what in effect an assertion that he is entitled to a remedy of specific performance. Defendant’s Motion, at ¶ 20 (“this [Court] should impose the sentence [sic] agreed to by the parties with the understanding that it be concurrent to the sentence [sic] that [the defendant] is currently serving.”). The appellate court in Cooper recognized that in determining rights and obligations

¹ Although Cooper is not on point, the State notes that other appellate courts have rejected the analysis employed and the ultimate conclusion reached by the court in Cooper. See, e.g., Government of Virgin Islands v. Scotland, 614 F.2d 360, 363-65 (3rd Cir. 1980).

between prosecutors and criminal defendants under existing agreements, courts generally look to contract law:

[C]ourts have understandably drawn heavily on the ready analogies of substantive and remedial contract law to supply the body of doctrine necessary to order plea bargaining practices and to afford relief to defendants aggrieved in the negotiating process. To the extent therefore that there has evolved any general body of “plea bargain law,” it is heavily freighted with these contract law analogies.

Id. at 15-16; see, e.g., Puckett v. United States, 556 U.S. 129, 137 (2009) (“Although the analogy may not hold in all respects, plea bargains are essentially contracts.”); United States v. Gamble, 917 F.2d 1280, 1282 (10th Cir. 1990) (“In determining the rights of a defendant, or the government, under a plea agreement in a criminal proceeding the courts have frequently looked to contract law analogies.”) (internal quotation marks omitted).

13. Here, applying well-understood and applicable principles of contract law, the defendant’s requested remedy of imposition concurrent sentences must fail. The imposition of concurrent sentences is not a term set forth in the written memorandum of agreement at issue. The defendant makes no argument otherwise. Furthermore, the imposition of concurrent sentences was never agreed to by the State. In order for specific performance – an equitable remedy that a court can employ in its discretion² – there must be an actual agreement between parties. See Shakra v. Benedictine Sisters, 131 N.H. 417, 422 (1989). It is axiomatic that as to agreement, “[a] valid, enforceable contract requires offer, acceptance, and a meeting of the minds on all essential terms. A meeting of the minds is present when the evidence, viewed objectively, indicates that the parties have assented to the same terms.” Glick v. Chocura

² The State notes that, even were there actual agreement by the parties here as to imposition of concurrent sentences, the defendant is not constitutionally entitled to specific performance as a remedy. See Kernan v. Cuero, ___ U.S. ___, 199 L. Ed. 2d 236, 240-42 (2017). Rather, the “ultimate relief to which [the defendant] is entitled must be left to the discretion of the [lower] court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea or, alternatively, that the circumstances require granting . . . opportunity to withdraw his plea of guilty.” Id. at 241 (quoting Santobello v. New York, 404 U.S. 257, 262-63 (1971)).

Forestands Ltd. P'ship, 157 N.H. 240, 252 (2008) (citation omitted and emphasis added); see, e.g., Tsiatsios v. Tsiatsios, 140 N.H. 173, 178 (1995) ("In addition to offer, acceptance, and consideration, a valid contract requires that the parties assent to the same terms; that is, that they have a meeting of the minds.") (emphasis added).³

14. Simply put, there was no agreement between the parties as to the very matter that the defendant seeks relief, to wit, whether the agreed-upon sentences in this matter would run concurrent with or consecutive to the sentences on his unrelated felony convictions. The State accepts as accurate, for the purpose of this response, the defendant's unsworn assertions that he, and apparently his lawyers at the time, believed that the sentences for the crimes to which he pleaded guilty in this matter would run concurrent with the sentences on his unrelated felony convictions. But that was never the understanding or the intent of prosecutors, and they never made such a promise. Given this fundamental absence of a "meeting of the minds" between the only two parties to the memorandum of agreement, there was no "sentence agreed to by the parties." Defendant's Motion, at ¶ 20. Consequently, the defendant is not entitled to imposition of a provision of the memorandum of agreement here that in fact does not exist and that was never agreed upon.

15. That being said, to the extent that the defendant truly believes that he is aggrieved by the memorandum of agreement into which he entered, he has a readily-available avenue of relief. Specifically, the defendant can seek leave to withdraw his guilty pleas in this case. The State agrees that, under the particular circumstances of this case, the Court should allow the defendant to do so. See State v. Sarette, 134 N.H. 133, 138 (1991) (setting forth lenient standard

³ To the extent that the defendant is claiming that prosecutors have breached their obligations under the memorandum of agreement, "[c]onsistent with the contract law-based analysis that governs plea agreement disputes, the party who asserts a breach of a plea agreement has the burden of proving the underlying facts that establish a breach by a preponderance of the evidence." Allen v. Hadden, 57 F.3d 1529, 1534 (10th Cir. 1995).

under which defendant can withdraw guilty plea prior to sentencing). That is the appropriate remedy under contract law, there being no "meeting of the minds" by the defendant. Such a remedy also would be consistent with due process considerations of fair dealing by prosecutors in the negotiation process with a defendant who, for reasons not grounded in any misrepresentation or other bad faith by prosecutors, did not fully understand the terms under which he was pleading guilty. That being said, should the defendant withdraw his guilty pleas then the Court also should allow the State to continue against him on the originally-charged counts of first-degree murder, second-degree murder, and conspiracy to commit murder.

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

- A. Deny the defendant's motion for claimed specific performance of terms of the memorandum of agreement between him and the State not stated in that agreement and to which the State never agreed; and
- B. Grant such other and further relief as may be deemed just and proper.

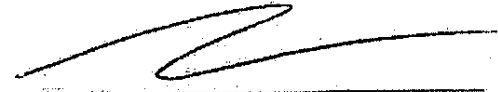
Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

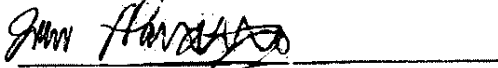
By its attorneys,

Gordon J. MacDonald
Attorney General

January 3, 2018



Peter Hinckley, Bar #18708
Senior Assistant Attorney General

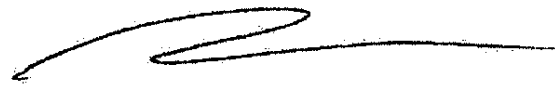


John H. Harding, Bar #4067
Assistant Attorney General
Criminal Justice Bureau
Office of the Attorney General
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF SERVICE

I certify that on this day I sent a true and correct copy of the foregoing by first-class mail to counsel for the defendant, Donna Brown, Esq.

January 3, 2018



Peter Hinckley

MEMORANDUM OF AGREEMENT BETWEEN
THE STATE OF NEW HAMPSHIRE AND NATHANIEL SMITH

In consideration of Nathaniel Smith's ("Smith") cooperation related to the death of Michael Pittman, including, but not limited to, Smith's cooperation in connection with the criminal prosecutions of Adrien Stillwell, Michael Younge, and Paulson Papillon, and subject to the conditions set forth below, the State of New Hampshire ("the State"), by and through the Office of the Attorney General, hereby enters into the following agreement with Smith:

I. **OBLIGATIONS OF THE STATE OF NEW HAMPSHIRE**

- A. Incident to Smith's plea(s) of guilty in case number 216-2016-CR-00322 (Hillsborough County -- North), at the sentencing hearing, the State will recommend that the court impose the following sentence:
- i. Conspiracy to Commit the Sale of Controlled Drugs (Waiver of Indictment)(Extended Term): a stand-committed sentence of not more than thirty (30) years, nor less than ten (10) years, with three (3) years of the minimum sentence deferred for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. If the terms of the deferred sentence are met, the deferred portion shall be suspended for a period of five (5) years upon his good behavior and compliance with the terms of his sentence.
 - ii. Possession of Controlled Drugs with Intent to Distribute (Waiver of Indictment)(Extended Term): a sentence of not more than thirty (30) years, nor less than ten (10) years, suspended for a period of ten (10) years on the conditions of his truthful testimony and full cooperation as to the crimes committed by Adrien Stillwell, Michael Younge and Paulson Papillon related to the death of Michael Pittman, his good behavior and Smith not incurring any major disciplinary infractions while incarcerated and compliance with the terms of his sentence. This sentence is consecutive to the stand committed sentence reflected in paragraph I(A)(i) of this document and begins on the date of his release from incarceration on that sentence.
 - iii. The State will recommend to the court and/or the Department of Corrections that Smith serves the incarcerated portion of his sentence at a secure facility separate and apart from Paulson Papillon, Adrien

Stillwell and Michael Younge, so as best ensure Smith's safety while incarcerated. Smith expressly recognizes that, insofar as the Department of Corrections maintains sole discretion in determining where incarcerated individuals will serve their sentence, this agreement is not void in the event that the Department of Corrections determines that Smith may safely serve his sentence at the New Hampshire State Prison or any other secure facility in New Hampshire.

- B. The first-degree, second-degree and conspiracy to commit murder indictments shall be *nolle prossed* at the time of sentencing or upon the conclusion of Smith's cooperation in the criminal prosecutions against Adrien Still, Michael Younge and Paulson Papillon related to the death of Michael Pittman, whichever occurs later; and
- C. The State's obligations set forth in items A and B, above, are expressly contingent upon Smith satisfying the obligations and conditions set forth below in Section II of this agreement.

II. OBLIGATIONS OF NATHANIEL SMITH

- A. Smith will accept full responsibility for his conduct in connection with his actions in committing the crimes of Conspiracy to Commit the Sale of Controlled Drugs and Possession of a Controlled Drug with the Intent to Distribute and by pleading guilty to those charges in Hillsborough County (North) case number 216-2016-CR-00322.
 - i. Smith agrees to waive any right he may have to a speedy sentencing hearing, and further agrees that he may be sentenced after the final disposition of all other criminal charges arising from the death of Michael Pittman, including, but not limited to, all current or future criminal charges brought against Adrien Stillwell, Michael Younge, Paulson Papillon, or any other individual.
 - ii. Smith agrees that, for purposes of sentencing on charge _____ (conspiracy to commit sale of a controlled drug), he shall assent to the sentence recommended by the State and outlined above in Section I.
 - iii. Smith agrees that, for purposes of sentencing on charge _____ (possession of a controlled drug), he shall assent to the sentence recommended by the State and outlined above in Section I.
- B. During any and all events or court proceedings related to the death of Michael Pittman, including, but not limited to, all current and future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon or any

other individual, Smith must comply fully, truthfully, and in a timely manner with all reasonable requests made by the State pursuant to this agreement. This obligation includes, but is not limited to, each of the following:

- i. Smith must at all times act in good faith and provide truthful, accurate and complete information, statements and testimony. Making a material false statement or omission in any context or in any proceeding related to the death of Michael Pittman, including but not limited to, all current or future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon or any other individual, as well as in affidavits, interviews, statements, pretrial meetings, depositions, hearings, trials, retrials, post-trial proceedings or all collateral proceedings, whether in state or federal court, will constitute a breach of this agreement. In the event of such a breach, or any other breach of this agreement by Smith, the State of New Hampshire will be released from all of its obligations under this agreement and may seek the remedies set forth below.
 - ii. Smith must cooperate in good faith and employ his best efforts under this agreement. The cooperation required of Smith by this agreement extends to all proceedings related to the death of Michael Pittman, including, but not limited to, all current or future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon or any other individual, irrespective of the number of trials, as well as meetings with prosecutors or the police, while preparing for and testifying during pretrial hearings, depositions, trials, retrials, post-trial hearings and all collateral proceedings, whether in state or federal court. Smith must comply with all reasonable requests made by the State within the scope of this agreement. A failure to so cooperate or provide best efforts will constitute a breach of this agreement. In the event of such a breach, or any other breach of this agreement by Smith, the State of New Hampshire will be released from all of its obligations under this agreement and may seek the remedies set forth below.
- C. Knowingly making a material false statement or omission in any context or in any proceeding related to the death of Michael Pittman including, without limitation, in affidavits, interviews, statements, pretrial meetings, depositions, hearings, trials, retrials, post-trial hearings and all collateral proceedings, whether in state or federal court, will constitute a breach of this agreement. In the event of such a breach, or any other breach of this agreement by Smith, the State of New Hampshire will be released from all of its obligations under this agreement and may seek the remedies set forth below.

III. REMEDIES

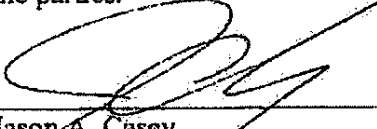
- A. Smith's failure to execute or comply with any of the conditions or obligations set forth in Section II, above, shall constitute a breach of this agreement. In the event of such a breach as determined by a court of competent jurisdiction, the State of New Hampshire may seek the following remedies:
- i. The State may seek to impose any deferred or suspended sentence ordered as the result of the guilty plea(s) referenced above in Section I.
 - ii. Without limitation and for any purpose, the State may make full use of any and all statements or other information or evidence provided by Smith, whether sworn or unsworn, either before or after the date of this agreement.
 - iv. Smith may be prosecuted in any court of competent jurisdiction to the full extent of the law, including, without limitation, by reinitiating any and all previously-dismissed criminal charges (including those listed in Section I, above) that are supported by sufficient evidence.
 - v. Smith may be prosecuted in any court of competent jurisdiction to the full extent of the law for perjury, obstruction of justice or any other appropriate offense in the event that he knowingly makes a material false statement or omission during any events or proceedings related to the death of Michael Pittman, including, but not limited to, all current or future criminal prosecutions of Adrien Stillwell, Michael Younge, Paulson Papillon and any other individual, during proffer interviews, in affidavits, meetings, testimony before a grand jury, depositions, hearings or trials, retrials, post-trial hearings and all collateral proceedings, whether in state or federal court, in the course of fulfilling his obligations under this agreement.
- B. *Waiver of double jeopardy protections:* Smith agrees that any prosecution and sentencing subsequent to a breach of this agreement is not barred by the Double Jeopardy Clause of the United States or New Hampshire Constitutions, or any other constitutional provision or law, and that such double jeopardy rights as he might otherwise have enjoyed under these provisions are hereby waived, except that Smith may raise any other defense or claim that he could have raised prior to entry of this agreement.
- C. *Waiver of speedy trial protections:* Smith agrees that any prosecution and sentencing subsequent to a breach of this agreement is not barred by speedy trial protections afforded by the Due Process Clause of the United States or New Hampshire Constitutions, or any other constitutional provision or law, and that such speedy trial rights as he might otherwise have enjoyed under

these provisions are hereby waived, except that Smith may raise any other defense or claim that he could have raised prior to the date of this agreement.

- D. *State of Limitations*: Smith agrees that any prosecution and sentencing subsequent to a breach of this plea agreement is not barred by any applicable the Statute of Limitations.


IV. ADDITIONAL TERMS

This agreement constitutes the full and complete agreement between the State and Smith, and no other promises or agreement exist between the parties. There shall be no modification to this agreement unless made in writing and signed by all the parties.



Jason A. Casey
Assistant Attorney General
NH Bar ID #266590

2/21/17
Date

 FOR

John J. McCormack
Assistant Attorney General
NH Bar ID #19569

2/21/17
Date

I, Nathaniel Smith, have read this Agreement and I have consulted with my attorney regarding its provisions and my rights. I fully understand all of the terms and conditions of the Agreement and my rights thereunder, and freely and voluntarily agree to all of its terms.

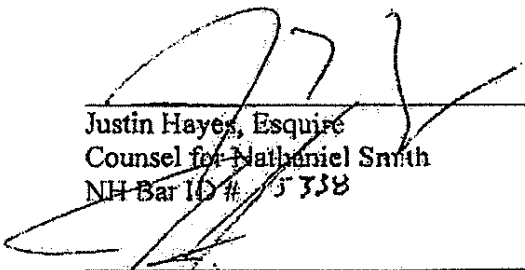


Nathaniel Smith

2/21/17
Date

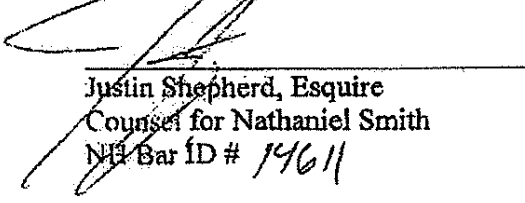
I am counsel for Nathaniel Smith in *State v. Nathaniel Smith*, Hillsborough County (North) case number 216-2016-CR-00322. I have carefully reviewed the entire Agreement. After reviewing the Agreement, I explained to Smith the Agreement and all of its terms, each

of Smith's rights under the Agreement, and the Agreement's impact on all pending and future criminal charges against Smith. I believe that Nathaniel Smith's decision to enter into this Agreement is a knowing, intelligent, and voluntary one.


Justin Hayes, Esquire
Counsel for Nathaniel Smith
NH Bar ID # 5338

Date

2/21/17


Justin Shepherd, Esquire
Counsel for Nathaniel Smith
NH Bar ID # 14611

Date

2/21/17

**THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT**

**HILLSBOROUGH, SS.
Northern District**

JANUARY TERM, 2018

State of New Hampshire

v.

**Nathaniel Smith
216-2016-CR-00322**

**AFFIDAVIT IN SUPPORT OF STATE'S RESPONSE TO DEFENDANT'S MOTION TO
ENFORCE PLEA AGREEMENT**

1. I am a Senior Assistant Attorney General with the New Hampshire Attorney General's Office, and am head of the Criminal Bureau's Homicide Unit. I have held that position for about 13 years. Among my duties and responsibilities as head of the Homicide Unit are discussions with prosecutors in the unit about their active and pending homicide cases.

2. More specifically in that regard, to the extent there may be potential plea discussions with defendants in active and pending cases, the prosecutor(s) assigned to those cases discuss potential plea parameters with me. To the extent that a case may be resolved through a plea, the prosecutor(s) assigned to the case outline for me the details of that plea, including the charge(s) being pleaded to and the proposed sentence(s). In turn, I provide that information to the Attorney General for his/her approval.

3. With respect to potential guilty pleas that arise when the pleading defendant would be pleading guilty and receiving a sentence recommendation from the State in exchange for some form of cooperation on the defendant's part, the approval process is the same for that just discussed with guilty pleas. Namely, the prosecutor(s) assigned to the case outline for me the details of a proposed guilty plea, including the charge(s) being pleaded to and the proposed

sentence(s). In turn, I provide that information to the Attorney General for his/her approval. Additionally with respect to potential guilty pleas connected to cooperation on some part on the part of the pleading defendant, the prosecutor(s) assigned to the case prepare written memorandum of agreements. Those written memorandum of agreements set forth the obligations of the State, the obligations of the pleading defendant, the particular charge(s) to which the defendant will plead, and the recommended sentence(s) on those charges. The written memorandum of agreement is signed by the prosecutor(s) assigned to the case, the defendant, and the defendant's lawyer(s).

4. I am familiar with the above-captioned case of State of New Hampshire v. Nathaniel Smith, whereby the defendant was charged by indictment with first-degree murder and other charges arising out of the murder of Michael Pittman in Manchester, New Hampshire. In the winter of 2016/2017, the case was assigned to Assistant Attorneys General John J. McCormack and Jason A. Casey. Those two prosecutors have since left the Attorney General's Office.

5. More specifically with respect to the above-captioned case of State of New Hampshire v. Nathaniel Smith, I am familiar with the memorandum of agreement entered into between the State and the defendant in the case. I personally spoke with Assistant Attorneys General McCormack and Casey about the case, plea discussions, and potential plea parameters on numerous occasions while they were in discussion with counsel for the defendant at the time, Justin Shepherd and Justin Hayes. I also spoke with Attorneys Shepherd and Hayes about the case and potential plea parameters.

6. During my numerous personal discussions with Assistant Attorneys General McCormack and Casey, neither they nor I ever discussed that the sentences for the charges to

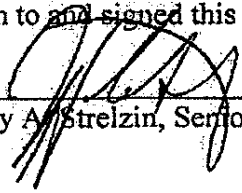
which the defendant would plead guilty in this case would run concurrent with the sentences that he was serving on unrelated felony convictions. On the contrary, the discussions always included the fact that any plea agreement that was entered into would call for a sentence that was consecutive to any other sentences the defendant was serving or would have to serve in connection with other charges.

7. It was always the understanding of Assistant Attorneys General McCormack, Casey, and myself that, under the memorandum of agreement entered into between the State and the defendant in this case, the sentences for the charges to which the defendant would plead guilty in this case would run consecutive to the sentences that he was serving on unrelated felony convictions. Moreover, had the defendant through his lawyers notified us at the time of his guilty plea, or at any time before then, that he understood that the sentences for the charges to which he would plead guilty in this case would run concurrent with the sentences that he was serving on unrelated felony convictions, the State never would have entered into the memorandum of agreement.

8. I have read the exhibit attached to the defendant's Motion to Enforce Plea Agreement, which references a conversation that I had with Attorneys Shepherd and Hayes in February of 2017. At no time did I agree that the defendant's proposed sentences would run concurrently with his sentences in other cases. In fact, it is my recollection that in later discussions with Assistant Attorneys General Casey and McCormack, prior defense counsel Shepherd and Hayes backed-away from the claim that any such agreement had been made during that phone call.


BEFORE ME, the undersigned Notary Public/Justice of the Peace, personally appeared:
JEFFERY A. STRELZIN, SENIOR ASSISTANT ATTORNEY GENERAL, who, after being
sworn by me to tell the truth, did state that he is a Senior Assistant Attorney General representing
the State of New Hampshire in this matter, and that all facts set forth in this Affidavit are based
upon personal knowledge and personal discussions with others with first-hand knowledge of
other facts set forth, and that the statements of fact contained in the Affidavit are true and correct
to the best of his knowledge and belief.

Sworn to and signed this 2nd day of January, 2018, at Concord, New Hampshire.



Jeffery A. Strelzin, Senior Assistant Attorney General

Read, affirmed and signed before me at the time and place described.



Notary Public/Justice of the Peace 38-2022

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, NORTH, SS

MAY TERM, 2018

STATE OF NEW HAMPSHIRE

V.

NATHANIEL SMITH

CASE # 16-CR-913

MOTION TO RECONSIDER

NOW COMES the defendant, Nathaniel Smith, by and through counsel, Wade Harwood, Esq., and respectfully requests this Honorable Court reconsider its order on Mr. Smith's Motion to Enforce Plea Agreement. This request is made pursuant to the NH Constitution, Part I, Article 15 and the Fourteenth Amendment of the United States Constitution.

1. Motions to reconsider are governed by Rule 43 of the New Hampshire Rules of Criminal Procedure. "The motion shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Rule 43 (a).
2. The court misapprehended the facts in this case. Specifically, the court mistakenly believed that the sentence Mr. Smith is currently serving is a federal sentence. It is not. Mr. Smith is currently serving a state sentence in docket 216-2015-CR-1435.
3. The court's mistaken belief that this was a federal sentence, led to court to rely on the following incorrect facts in its analysis: "[t]he two sentences: were not temporally or factually related; were not imposed by the same judge; and were imposed by **completely different courts and branches of prosecution.**" Order at

4 (emphasis added). In fact, both sentences were imposed by the same court, the Hillsborough County Superior Court-Northern District. Additionally, the State of New Hampshire was the branch of prosecution in both matters. The court was correct that different judges were involved as Judge Abramson imposed the sentence in 15-CR-1435.

4. The court also made an error of law. The court in Crosby did not state that those factors were controlling, or even relevant, in whether sentences are concurrent or consecutive. A court has the authority to make sentences consecutive to one another. "If, in its discretion, a sentencing court intends to impose consecutive sentences, it must specifically state that intention in its order." Crosby v. Warden, New Hampshire State Prison, 154 N.H. 44, 46-47 (2005) (quoting State v. Rau, 129 N.H. 126 (1987)). After laying out that rule stated, "[w]e see no reason to deviate from that reasoning in this case." Id. at 47. Thus Crosby affirmed the rule that sentences are presumptively concurrent, even when the sentences are imposed on different dates.
5. In Crosby, the State argued that there should be a presumption of consecutive sentences when the sentences are imposed on a different date. After rejecting that rule by stating that there was no reason to deviate from the rule laid out in State v. Rau, the court went on to explain why the State would lose even if such a presumption existed. It was in this dicta that the court noted that having the same judge impose sentences a week apart would be enough to overcome a presumption of consecutive sentences, if such a presumption existed. Id. Prior to

that point in the opinion, the court had already had already held that the reasoning in Rau applied even when sentences are imposed on separate days.

6. This court misapplied the law by looking to the dicta of Crosby rather than its holding. Further, the court misunderstood the facts and used incorrect facts in applying that dicta. Those two mistakes, in tandem, led the court to make an incorrect ruling.

WHEREFORE, Mr. Smith respectfully requests that this Honorable Court:

- A. Reconsider its ruling and find that the sentencing memorandum as written would lead to concurrent sentences; and
- B. Grant such further relief as justice requires.

May 31, 2018

Respectfully Submitted,

Wade Harwood, Esq.
NH Bar #17703
Sisti Law Offices
387 Dover Road
Chichester, NH 03258
(603) 224-4220

CERTIFICATION

I HEREBY CERTIFY that a copy of the foregoing Motion has been forwarded this 31st day of May, 2018 to John H. Harding, III, Esq. and Peter R. Hinckley, Esq. of the Attorney General's Office.

Wade Harwood, Esq.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

JUN 6 6 2018
done

HILLSBOROUGH, SS.
Northern District

JUNE TERM, 2018

State of New Hampshire

v.

Wade's
COPY

Nathaniel Smith
216-2016-CR-00322

STATE'S OBJECTION TO DEFENDANT'S MOTION TO RECONSIDER

NOW COMES the State of New Hampshire by and through its attorneys, the Office of the Attorney General, and objects to the defendant's motion to reconsider. In support of the State's response, the State says the following:

1. The defendant was charged by indictment with first-degree murder, second-degree murder, and conspiracy to commit murder, in connection with his role in the murder of Michael Pittnan in Manchester, New Hampshire on November 3, 2015.
2. The defendant subsequently entered into a written memorandum of agreement with the State. The terms of that agreement were the subject of recent litigation, as well as a Court order issued on May 22, 2018.
3. The defendant has filed a motion asking the Court to reconsider its May 22 ruling. In support of that motion, filed pursuant to Rule 43 of the New Hampshire Rules of Criminal Procedure, the defendant argues that the Court has misapprehended facts and made an error in law.
4. As to the misapprehension of fact noted by the defendant, the State agrees that the Court mistakenly believed that the sentence that the defendant had been serving

at the time he entered into the subject memorandum of agreement was a federal sentence rather than a state sentence. That mistake, however, has no consequence on the Court's analysis and conclusion.

5. First, whether the unrelated sentence that the defendant was serving when he entered into the subject memorandum of agreement was federal or state, the same factual distinctions that the Court found significant in its analysis still hold true, except that the sentences will both be imposed in the same courthouse – as are thousands every year. That is, “[t]he two sentences: were not temporally or factually related; were not imposed by the same judge; and were imposed by completely different . . . branches of prosecution [to wit, County Attorney and Attorney General’s Office].” Ruling, at p. 4. Notably as well, the one changed circumstance pointed out by the defendant – that the sentences will not be imposed by “completely different courts” – was not a circumstance noted by the Supreme Court in Crosby v. Warden, New Hampshire State Prison, 152 N.H. 44, 47 (2005), the case distinguished by this Court in its challenged ruling

6. Second, the defendant ignores all of the other factual circumstances noted by the Court in its ruling in support of its rejection of the defendant’s argument in support of concurrent sentences. As the Court also found, and relied upon in its analysis:

Moreover, there is nothing in the record that would have indicated to the Court at the time of the defendant’s plea to the current charges that the sentence was meant to be concurrent with his [serving] sentence. [And] the agreement itself makes no mention of the [serving] sentence, and there is no other evidence demonstrating the State agreed to the instant sentence being concurrent to it.

Ruling, at p. 4.

7. As to the defendant’s argument that the Court made an error of law, that argument simply is disagreement with the Court’s legal analysis. A litigant’s subjective

legal interpretation in discord with a Court's ruling does not constitute the requisite misapprehended point of law that may form a basis for reconsideration. The Court made no error in law, and thus there is nothing to reconsider in that respect.

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

- A. Deny the defendant's motion; and
- B. Grant such other and further relief as may be deemed just and proper.

Respectfully submitted,

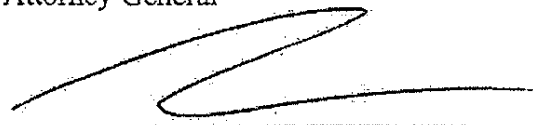
THE STATE OF NEW

HAMPSHIRE

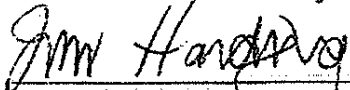
By its attorneys,

Gordon J. MacDonald
Attorney General

June 4, 2018



Peter Hinckley, Bar #18708
Senior Assistant Attorney General

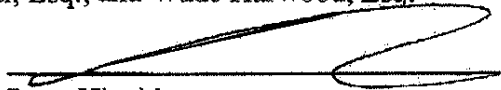


John H. Harding, Bar #4067
Assistant Attorney General
Criminal Justice Bureau
Office of the Attorney General
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF SERVICE

I certify that on this day I sent a true and correct copy of the foregoing by first-class mail to counsel for the defendant, Mark L. Sisti, Esq., and Wade Harwood, Esq.

June 4, 2018



Peter Hinckley