

HILLSBOROUGH, SS.
Northern District

DECEMBER TERM, 2002

In re: Grand Jury Proceedings

No. 02-S-1154

JOINT MOTION TO RELEASE PLEADINGS AND COURT ORDERS

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and, the Diocese of Manchester, by and through its attorneys, Devine, Millimet & Branch, Professional Association, and jointly move this Honorable Court to release pleadings and court orders relating to the Diocese's disclosure of documents in the above-captioned matter. In support of this motion, the parties state as follows:

1. By agreement of the Parties, on April 8, 2002, the Office of the Attorney General sought and obtained a grand jury subpoena duces tecum on behalf of the Grand Jury for Hillsborough County, Northern District, for the Keeper of Records of the Diocese to produce all records relating to criminal sexual abuse by clergy. On June 17, 2002 this Court (Barry, J.) ordered the Diocese to produce unredacted documents to the grand jury on June 20, 2002. The Diocese complied with that order.

2. The unredacted grand jury documents produced by the Diocese on June 20, 2002, provided a basis for further investigation of the Diocese relating to sexual abuse of minors by clergy. The Attorney General convened a task force to investigate the circumstances surrounding the manner in which the Diocese has handled the allegations of sexual abuse by clergy.

3. The term of the grand jury that originally received the documents from the Diocese in June expired at the end of August 2002. A new grand jury was empanelled on September 19, 2002, in Hillsborough County, Northern District. This new grand jury's term expires at the end of December 2002. This Court granted the State's motion to transfer the documents from the first grand jury to the second grand jury.

4. Today, the State and the Diocese have entered into an agreement to end the grand jury investigation without prosecution. That agreement requires the Diocese to conform with a number of conditions. In accordance with the terms of that agreement and in the interest of complete disclosure, the State and the Diocese request this Court to publicly release the pleadings and court orders relating to the litigation of the disclosure of Diocesan documents. Specifically, the Parties request the Court to release the following pleadings and orders:

- Subpoena *Duces Tecum* Issued to the Diocese of Manchester (April 8, 2002);
- The State's Motion To Compel (May 14, 2002);
- The Diocese's Objection to the State's Motion to Compel (May 24, 2002);
- The State's Response to Diocese Objection To Motion to Compel (May 29, 2002);
- This Court's Order Granting the Motion To Compel (May 31, 2002);
- The Diocese's Motion To Reconsider (June 10, 2002);
- The State's Objection to Motion to Reconsider (June 11, 2002);
- The Court's Order on the Motion to Reconsider (June 17, 2002);
- The Court's Order on the Motion to Intervene/Motion to Quash (June 19, 2002) (a redacted copy, which removes the references to the third-party intervenors, is attached hereto);
- Subpoena *Duces Tecum* Issued To The Diocese of Manchester (July 30, 2002);

- The State's *Ex Parte* Motion To Transfer Documents And Evidence Received by Grand Jury Subpoenae (Sept. 16, 2002);
- The Court's Order Granting the State's Motion to Transfer Documents (Sept. 19, 2002);

5. While ordinarily, grand jury proceedings are protected with the utmost secrecy, this rule is not absolute. See State v. Silva, 142 N.H. 269, 272 (1997) ("for most intents and purposes, all [grand jury] proceedings should be legally sealed against divulgence") (quotation omitted) (emphasis added). For example, grand jury secrecy "does not extend to witnesses before the jury." State v. Canatella, 96 N.H. 202, 204 (1950) (citation omitted). In other words, a witness has a constitutional right, protected by the First Amendment to the United States Constitution, to disclose his testimony and other involvement in the grand jury proceedings. Butterworth v. Smith, 494 U.S. 624, 626 (1990) ("We hold that insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution."). "Just as a witness is free to disclose his oral testimony before a grand jury, he is free to disclose what documentary evidence he has been compelled to provide to the grand jury." Halperin v. Berlandi, 114 F.R.D. 8, 15 (D. Mass. 1986).

6. Here the Diocese of Manchester was the target of this investigation. Both the State and the Diocese have joined in this motion to release pleadings and court orders that demonstrate the chronology of the grand jury investigation relating to the release of documents. All of the pleadings and court orders relate directly to a subpoena *duces tecum* served on the Keeper of Records for the Diocese of Manchester. Because the Diocese of Manchester was the witness subpoenaed to produce records, it has a right to disclose its involvement in the grand jury process. See Butterworth, 494 U.S. at 626; Halperin, 114

F.R.D. at 15. Given the significance of this investigation and the need to ensure public confidence in the proceedings, the parties request this Court to release the above-referenced pleadings and court orders.

7. The parties request that the Court order that copies of the above-listed pleadings and court orders shall be obtained from the Office of the Attorney General.

WHEREFORE, the State of New Hampshire and the Diocese of Manchester respectfully request that this Honorable Court:

- (A) Release the above-listed pleadings and court orders;
- (B) Order that the public shall obtain copies of the above-listed pleadings and court orders from the Office of the Attorney General; and
- (C) Grant such other relief as justice may require.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

Philip T. McLaughlin
Attorney General

December 9, 2002



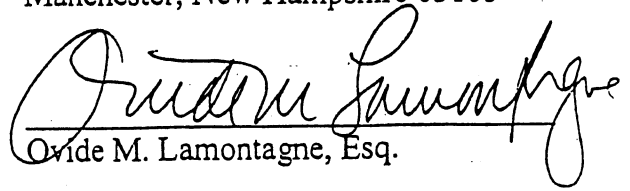
N. William Delker
Senior Assistant Attorney General
Chief, Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

DIOCESE OF MANCHESTER

By its attorneys,

Devine, Millimet & Branch, P.A.
111 Amherst St.
P.O. Box 719

Manchester, New Hampshire 03105


Ovide M. Lamontagne, Esq.

December 9, 2002

HILLSBOROUGH, SS.
Northern District

DECEMBER TERM, 2002

In re: Grand Jury Proceedings

No. 02-S-1154

ORDER ON JOINT MOTION TO RELEASE DOCUMENTS

On today's date, the State of New Hampshire and the Diocese of Manchester have filed a joint motion to release the following pleadings and court orders that were filed in connection with the above-captioned grand jury proceedings:

- Subpoena *Duces Tecum* Issued to the Diocese of Manchester (April 8, 2002);
- The State's Motion To Compel (May 14, 2002);
- The Diocese's Objection to the State's Motion to Compel (May 24, 2002);
- The State's Response to Diocese Objection To Motion to Compel (May 29, 2002);
- This Court's Order Granting the Motion To Compel (May 31, 2002);
- The Diocese's Motion To Reconsider (June 10, 2002);
- The State's Objection to Motion to Reconsider (June 11, 2002);
- The Court's Order on the Motion to Reconsider (June 17, 2002);
- The Court's Order on the Motion to Intervene/Motion to Quash (June 19, 2002) (a redacted copy, which removes the references to the third-party intervenors, is attached hereto);
- Subpoena *Duces Tecum* Issued To The Diocese of Manchester (July 30, 2002);
- The State's *Ex Parte* Motion To Transfer Documents And Evidence Received by Grand Jury Subpoenae (Sept. 16, 2002);
- The Court's Order Granting the State's Motion to Transfer Documents (Sept. 19, 2002);

The Court finds that a witness has a constitutional right, protected by the First Amendment to the United States Constitution, to disclose his testimony and other involvement in the grand jury proceedings. See Butterworth v. Smith, 494 U.S. 624, 626 (1990) ("We hold that insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution."); see also State v. Canatella, 96 N.H. 202, 204 (1950). This right includes the ability of the witness to reveal both the witness' testimony before the grand jury, as well as any documents produced. See Halperin v. Berlandi, 114 F.R.D. 8, 15 (D. Mass. 1986). All of the pleadings and court orders relate directly to a subpoena *duces tecum* served on the Keeper of Records for the Diocese of Manchester. Because the Diocese of Manchester was the witness subpoenaed to produce records, it has a right to disclose its involvement in the grand jury process. See Butterworth, 494 U.S. at 626; Halperin, 114 F.R.D. at 15. Since both the State and the Diocese consent to the release of the pleadings and court orders, and the filings do not reference any other witnesses who appeared before the Grand Jury, the Court orders that the above-listed pleadings and orders shall be released to the public. The Court further orders that the public shall obtain copies of the above-listed pleadings and orders from the Office of the Attorney General.

SO ORDERED:

Presiding Justice

DATED: _____

HILLSBOROUGH-NORTH, SS

SUPERIOR COURT

NOTICE OF DECISION

June 19, 2002

N. William Delker, Esq.
Office of Attorney General
33 Capitol Street
Concord NH 03301-6397

InRe: Grand Jury Subpoena

Docket #:
02-S-1154

Please be advised that on 6/19/2002 Judge Barry made the following order relative to:

Court Order ; Order Made
Re: Motion to Intervene and Motion to quash filed on behalf
of [REDACTED]

Copy of Order Attached Hereto

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

cc: Bradford E Cook, Esq.
Gregory W Swope, Esq.

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

In re GRAND JURY SUBPOENA DUCES TECUM SERVED ON APRIL 8, 2002

Docket No: 02-S-1154

ORDER UNDER SEAL

The Court is in receipt of a motion to intervene and a motion to quash filed by counsel on behalf of [REDACTED]

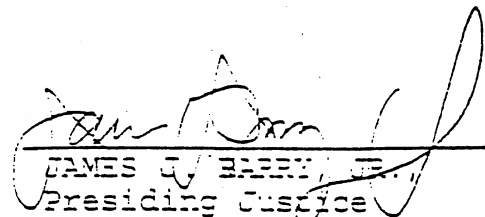
For the reasons stated by the Court in its order of June 17, 2002 the motion to intervene is denied and the motion to quash is denied.

As noted by counsel for the State in its response to [REDACTED] objection to release of records, [REDACTED] has no standing to object to a subpoena seeking records from the Diocese of Manchester and, as the Supreme Court has stated, the law presumes that proceedings before a grand jury are sacrosanct and may not be invaded by the defendant to challenge an indictment or conviction. *State v. Williams*, 142 NH 662, 665 (1998)

The Diocese of Manchester is ordered to produce to the grand jury in Hillsborough County Superior Court, Northern District all records requested in attachment A on or before June 20, 2002 at 9:00 a.m. In the event that the Diocese fails to comply strictly with the terms of the subpoena, counsel for the State may move for the imposition of sanctions.

SO ORDERED.

Dated: June 19, 2002


JAMES J. BARRY, JR.
Presiding Justice

DEVINE, MILLIMET & BRANCH
PROFESSIONAL ASSOCIATION • ATTORNEYS AT LAW

111 Amherst Street
Manchester, NH 03101

Tel: 603-669-1000

Fax: 603-669-3547

December 10, 2002

Ovide M. Lamontagne
omlamontagne@dmb.
603-695-8516

FOR PICK UP

Neals-Erik William Delker, Esq.
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

Re: Roman Catholic Bishop of Manchester/Personnel Matters

Dear Will:

Please find enclosed three original Final Agreements which have been executed by Bishop McCormack and the original Joint Motion which has been executed by me as counsel for the Roman Catholic Bishop of Manchester for filing with the Court this morning.

Please file one original with the Court, return one fully executed original to me in the enclosed self-addressed return envelope, and keep one fully executed original for your files.

Please feel free to contact me should you have any questions or concerns. Thank you for your ongoing assistance and cooperation in this matter.

Very truly yours,



Ovide M. Lamontagne

OML:bg

Enclosures

cc: * Reverend Edward J. Arsenault (w/encls)

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
Northern District

JUNE TERM, 2002

SUPERIOR COURT

In re: Grand Jury Subpoena Duces Tecum Served On April 8, 2002

No. 02-S-1154

UNDER SEALSTATE'S OBJECTION TO MOTION TO RECONSIDER

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and in support of its Objection to the Diocese of Manchester's Motion To Reconsider, says the following:

1) On April 8, 2002, a grand jury subpoena duces tecum was issued on behalf of the Grand Jury for Hillsborough County, Northern District, for the Keeper of Records of the Diocese to produce all records relating to criminal sexual abuse by clergy. The subpoena duces tecum is part of a broad investigation into allegations of child sexual assault lodged against dozens of New Hampshire clergy members. The investigation also is exploring whether the Diocese or any of its members engaged in any criminal conduct by failing to protect children from sexual abuse by priests or by covering up such information. The subpoena called for the Diocese to produce the records by April 19, 2002. On April 12, 2002, the Diocese delivered some of the records covered by the subpoena duces tecum to undersigned counsel. Most of the records that were produced were redacted. On May 14, 2002, the State filed a motion to compel. Subsequently, the Diocese objected and the State

responded to that objection. On May 30, 2002, the Court (Barry, J.) granted the State's Motion to Compel.

2) The Diocese has now moved to reconsider this Court's order requiring the Diocese to produce all records covered by the subpoena duces tecum issued on April 8, 2002. The Diocese also requests a hearing on this matter. The State objects to the motion to reconsider and does not believe, at this juncture, that a hearing is necessary. The Diocese articulated, in detail, its position with respect to the records. There does not appear to be any factual dispute with respect to the records that would necessitate a hearing on this matter. See State v. Roy, 138 N.H. 97 (1993).

3) The Diocese represented in its motion to reconsider that the State anticipated a hearing prior to the Court's order. The State anticipated that that Court would hold a hearing if any third party had sought to intervene to quash the subpoena. However, no individual priest has moved to intervene or quash the subpoena. In the absence of a third party filing a motion to intervene or quash, the State strenuously objects to the participation of any third party in a hearing. Grand jury matters are subject to the utmost secrecy. See State v. Silva, 142 N.H. 269, 272 (1997). The participation of any unauthorized third party in grand jury proceedings is strictly forbidden. See N.H. Sup. Ct. R. 52; State v. VanDerHeyden, 132 N.H. 536, 537 (1989) (indictment dismissed because unauthorized person was present in the grand jury room even though there was no prejudice to the defendant as a result of the breach of secrecy).

3) The grand jury is scheduled to sit on June 20, 2002, to receive the records in this matter. The subpoena duces tecum will have been outstanding for nearing 2 ½ months at

that point. Further delay in the proceedings is unacceptable. See In re Grand Jury Proceedings, 787 F.2d 778, 779 (1st Cir. 1987); see also In re Lopreato, 511 F.2d 1150, 1152 (1st Cir. 1975) (holding that expeditious handling of grand jury proceedings is a major public consideration; and dilatory tactic on the part of witnesses are to be strongly discouraged). The Court should deny the Diocese's motion to reconsider without a hearing.

WHEREFORE, the State respectfully requests this Honorable Court to:

- A) Deny the Diocese Motion to Reconsider without a hearing;
- B) Order the Diocese of Manchester to produce the records to the Hillsborough County Grand Jury no later than June 20, 2002; and
- C) Grant such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

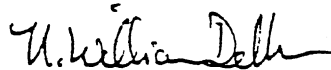
Philip T. McLaughlin
Attorney General



N. William Delker,
Senior Assistant Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

June 11, 2002

I hereby certify that a copy of the foregoing was faxed and mailed this day, postage prepaid, to Bradford E. Cook, Esq., counsel of record for the Diocese of Manchester.



N. William Delker

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
Northern District

MAY TERM, 2002

UNDER SEALIn re: Grand Jury Subpoena *Duces Tecum* Served On April 8, 2002STATE'S RESPONSE TO DIOCESE'S OBJECTION TO MOTION TO COMPEL

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and, in support of its response to the Diocese' objection to the motion to compel, states as follow:

1. On April 8, 2002, a grand jury subpoena duces tecum was issued on behalf of the Grand Jury for Hillsborough County, Northern District, for the Keeper of Records of the Diocese to produce all records relating to criminal sexual abuse by clergy. On May 14, 2002, the State filed a motion to compel production of certain records that the Diocese withheld. On May 24, 2002, the Diocese filed an objection to the motion to compel. In its objection, the Diocese raised several issues that were not addressed by the State in its motion to compel. None of the issues raised by the Diocese provide grounds to avoid compliance with the subpoena.

2. The Diocese first asserts that the documents and information were withheld because the subpoena violated the Fourth Amendment to the United States Constitution. The Diocese asserts that victims of sexual assault have an expectation that their communications with the Diocese will not be disclosed to law enforcement authorities. There are several problems with this position. The Diocese cites no authority for the proposition that privacy

11142
MAY 24 2002
ALHNDOS RES

considerations are a proper inquiry for determining whether a witness must comply with a subpoena duces tecum. In fact, contrary to the Diocese's contention, the Fourth Amendment does not apply to grand jury subpoenas in the same way that it does to search warrants. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Some abstract hope that witnesses or victims may have had the Diocese would not disclose information about criminal conduct is not protected by the Fourth Amendment. The United States Supreme Court has specifically recognized that a person "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443 (1976) (citation omitted).

3. ---The Supreme Court has questioned whether the Fourth Amendment has any bearing on a challenge to a grand jury subpoena duces tecum at all. In Walling, a corporation challenged a subpoena for corporate books and records on the ground that it violated the Fourth Amendment to the United States Constitution. 327 U.S. at 194-95. The Court began by noting that "[t]he short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question of whether order of court for production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer of other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to

orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made.” Id. at 195. The Court went on to note that “the Fourth [Amendment], if applicable, at most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described,’ if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure shall not be unreasonable.” Id. at 208. More recently, the Court has reaffirmed this position, by noting, the Fourth Amendment’s limit on subpoenas for corporate records is only to prevent “unreasonably burdensome” requests for records. See Donovan v. Lone Steer, Inc., 464 U.S. 408, 415 (1984) (quotation omitted).

4. The Diocese cites In re Grand Jury Proceedings Involving Vicars and Hass, 38 F. Supp. 2d 159 (D.N.H. 1998), in support of its argument that the court should consider a multitude of factors in deciding whether to enforce a grand jury subpoena. Vicars and Hass is not applicable to the case at bar. First of all, this case involved a grand jury subpoena to obtain hair, fingerprints, and saliva – a request that is far more intrusive than the subpoena duces tecum for books and records at issue in this case. Moreover, the federal district court for New Hampshire specifically noted that “while the Constitution undoubtedly protects a citizen from an overly broad grand jury subpoena, the subpoena is not subject to the same type or degree of scrutiny under the Fourth Amendment as are search warrant applications.” Id. at 163. “[T]hose challenging such a subpoena have the burden of showing that irregularity exists.” Id. (quoting United States v. R. Enterprises, Inc., 498 U.S. 292, 301 (1991)).

5. In R. Enterprises, the United States Supreme Court addressed the appropriate test to determining how a court determines whether a witness has met his burden of establishing that the subpoena is unreasonable. The Court began by noting that "Our task is to fashion an appropriate standard of reasonableness, one that gives due weight to the difficult position of subpoena recipients but does not impair the strong governmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy. We begin by reiterating that the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. . . . Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." 498 U.S. at 300-01.

6. In order to meet this onerous burden in this case, the Diocese must show that "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Id. at 301. In the alternative, the Diocese must show that the subpoena is "too indefinite" or "compliance would be overly burdensome." Id. It does not appear that the Diocese is alleging that the subpoena is too indefinite or that it covers such a vast number of documents that compliance would be overly burdensome. Nor is there any allegation that the subpoena covers material that is irrelevant. In fact, the subpoena is specifically tailored to a finite group of priests and seeks all records relating to sexual misconduct by these priests.

7. The Diocese does allege that the subpoena should be quashed because it seeks records about offenses that may be beyond the statute of limitations. This is not a ground to quash the subpoena. First of all, the Diocese cannot show that "there is no reasonable

possibility" that the subpoenaed records are irrelevant to the grand jury's investigation. The investigation is two-pronged. On the one hand, the investigation covers individual acts of sexual misconduct by individual priests. On the other hand, the investigation is exploring whether the Diocese engaged in any criminal misconduct by its actions. In particular, if there is evidence that the Diocese covered up criminal conduct, that would be a continuing offense for which the statute of limitations has not yet run. Moreover, if the Diocese engaged in acts that amount to endangering the welfare of a child by exposing the child to a know sexual offender, that crime could also be within the statute of limitations, even if the priest committed sexual offenses against children many years ago. See State v. Portigue, 125 N.H. 352, 360-61 (1984) (the State is not required to "allege a specific time frame in which the knowing endangerment took place in order to satisfy the material elements of the offense"; rather the State may allege "a continuous course of conduct involving continuous acts or omissions"). Finally, a grand jury subpoena duce tecum is not defective because it seeks records that may cover conduct outside the statute of limitations. It is well settled that "[a] grand jury may ask questions about events outside the statute of limitations, or about acts which otherwise would not lead to indictments." United States v. Picketts, 655 F.2d 837, 841 (7th Cir. 1981) (citation omitted); see also United States v. Reed, 647 F.2d 849, 853-54 (8th Cir. 1981) (same) (citing numerous cases).

8. To the extent that the Diocese has raised other issues in its objection to the motion to compel, the State feels that those issues were adequately addressed in its initial motion to compel.

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

(A) Compel the Diocese of Manchester to produce all documents described in the subpoena duces tecum attached hereto as Exhibit A;

(B) Seal this motion and any accompanying order; and

(C) Grant such other relief as justice may require.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

Philip T. McLaughlin
Attorney General



N. William Delker
Senior Assistant Attorney General
Chief, Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671

CERTIFICATE OF SERVICE

May 29, 2002

Bradford Cook, Esq. and Michael Dunn, Esq. attorneys for the Diocese of Manchester have been given notice of the State's Motion to Compel and have been provided with copies of the State's Motion on this date.



N. William Delker