

HILLSBOROUGH, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JEFFREY H.

DOCKET NO. 07-S-557

**MOTION FOR DISCOVERY OF
PRIOR ALLEGATIONS OF SEXUAL ABUSE**

NOW COMES, Defendant in the above captioned matter, through his counsel, and respectfully requests that this Honorable Court grant his request for an in-camera review and discovery with respect to any and all allegations made by the complaining witness, Adriana P., regarding prior sexual abuse by third parties.

IN SUPPORT OF THIS MOTION, Defendant states the following:

1. The Defendant is charged with aggravated felonious sexual assault against Adriana P. The Defendant has filed, pursuant to RSA 626:6, notice that he may rely upon the defense of consent.
2. The indictment alleges that the charge of sexual assault arose from the Defendant's conduct on or between August 26, 2006 and August 27, 2006 in Hollis, New Hampshire.
3. The allegations were first made by the complainant on September 19, 2006 to Detective Richard R. Mello of the Hollis Police Department who conducted a recorded interview of the complainant that same day.

4. Based upon reports received in discovery, the complainant is the sole witness available to the State with first hand knowledge of the allegation of sexual assault.

5. During the course of said interview with the Hollis Police Department, Adriana P. stated that she “does not know how to say no” because she was raped before when she was five years old. Interview Transcript, 9/19/06, p 19. Additionally, in an e-mail sent by the complainant to the Defendant subsequent to the date of the alleged assault, the complainant indicated that she had been raped four (4) times previously. Facebook.com E-mail to Jeffrey H., 8/29/06, 4:21 PM.

6. The Defendant seeks discovery of any and all records pertaining to any and all allegations made by complaining witness regarding prior sexual abuse as referenced above.

7. RSA 632-A:6 and N.H.R.E. 412, commonly referred to as the “rape shield doctrine”, provide that prior consensual sexual activity between the victim and any person other than the [defendant] shall not be admitted into evidence in any prosecution under RSA 632-A. RSA 632-A:6; N.H.R.E. 412. The protection from undue harassment afforded to the complainant by RSA 632-A:6, however, must yield to the Defendant's right to confront the evidence against him under certain circumstances. State v. LeClair, 121 N.H. 743, 746 (1981); *see also* State v. Goulet, 129 N.H. 348,351 (1987)(A defendant's right to due process and to confront witnesses limits the probative sweep of the rape shield law when the probative value of that evidence outweighs the prejudicial effect of its introduction).

8. NHRE 412 specifically provides for pre-trial discovery of evidence of prior consensual sexual activity if there is a “reasonable possibility that the information sought in a

pretrial discovery proceeding, which would otherwise be excluded...will produce the type of evidence that due process will require to be admitted at trial.” NHRE 412.

9. The Defendant in the instant matter, however, requests information with respect to prior allegations of sexual abuse, not consensual sexual activity. “The rape shield doctrine does not apply, however, when prior *non* -consensual conduct is at issue.” State v. Frost, 141 N.H. 493, 501 (1996). *See also* State v. Cox, 133 N.H. 261, 265 (1990). “Logically, evidence ruled admissible by a trial court as a consequence of a Howard hearing must be of a *consensual* sexual behavior. State v. Cox, 133 N.H. 261, 264-265(1990) (emphasis in original).

10. During the course of the complainant’s statement to the Hollis Police Department, she told Detective Mello that she was raped before when she was five years old, however, in an e-mail sent to the Defendant subsequent to the date of the alleged assault, the complainant indicated that she had been raped four (4) times previously. Thus, disclosure of any and all allegations of prior sexual assault is relevant and admissible with respect to the credibility of the complainant, as the conflicting statements reflect inconsistencies which affect her credibility.

11. “When the reliability of a given witness may well be determinative of guilt or innocence, non disclosure of evidence affecting credibility may violate due process.” Id. *Citing* State v. Detrick, 135 N.H. 502, 508 (1992).

12. In the light of the above referenced facts, the materials requested by Defendant are likely to lead to admissible evidence. The materials requested relate directly to the complaining witnesses credibility, which is especially important in the instant matter, as only the complainant and the Defendant have actual knowledge of the events which led to the allegations of assault

13. As the Defendant asserts that he had consensual sexual intercourse with Adriana P., his defense will, thus, rely, in part, upon undermining the credibility of the complainant.

14. A memorandum of law accompanies the filing of this motion and the arguments set forth therein are hereby incorporated as if fully set forth herein.

15. Undersigned counsel has attempted to contact the prosecutor to determine the State's position on this motion but the prosecutor has been unavailable to accept counsel's call.

WHEREFORE, the Defendant respectfully moves this Court grant the following relief:

- A. GRANT this motion and order the production of the aforementioned discovery materials to the defense for use in the defense of this case;
- B. GRANT this motion and allow the defense to inquire at deposition of the complainant as to claims of prior sexual assault; and,
- C. Grant such further relief as is just.

Respectfully submitted,
Jeffrey H., Defendant
By his Attorneys,
BRENNAN CARON LENEHAN & IACOPINO

Date: November 7, 2007

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been forwarded, even date herewith, postage prepaid, to Assistant County Attorney Kent Smith.

Michael J. Iacopino, Esq.

