

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

THE STATE OF NEW HAMPSHIRE

v.

PAMELA SMART

218-1990-S-1371

ORDER

The matter before the court is Intervenor Vance Lattime, Sr.'s motion for reconsideration (Docket Document 5) of the court's order of December 10, 2015, denying his motion for return of a gun, holster and ammunition seized pursuant to a search warrant. Because the court must follow the law, rather than its own sense of decency, Mr. Lattime's motion is GRANTED.

I.

At common law an instrument that caused a person's death was called a "deodand" and forfeited. Today, items associated with infamous crimes are sold to the highest bidder on eBay. What was once mundane and fungible becomes valuable due to its totemic significance and the blood of the victims. One can, for example, pay to visit the actual wall from the Valentine's Day Massacre. A collector paid over quarter of a million dollars at an auction in Nashua for an old pistol, just because it was strapped

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to Bonnie Parker's (of Bonnie and Clyde) thigh at the time of her death.¹ Which brings us to the gun that was seized in this case.

This gun was used in a premeditated, execution style murder. A wholly innocent man was killed. His family suffers to this day. Their suffering will likely be increased if, as the court fears, the weapon that caused his murder is placed into commerce as a curiosity. The weapon is a .38 caliber Charter Arms revolver. The Intervenor could buy a new one for a few hundred dollars, far less than the amount he likely spent to retain counsel to seek the return of the old one.

The murder was front page news when it occurred in 1990. As the investigation progressed, the victim's wife was interviewed on television, tearfully urging the swift capture of whoever was responsible for the crime. The wife, defendant Pamela Smart, was eventually tried and convicted for the murder and sentenced to life without parole.

Along the way, the case attracted national and international attention. Portions of the trial were televised gavel to gavel. Four years after the trial, a movie based loosely on the case and starring Nicole Kidman, Matt Dillon and Joaquin Phoenix was shown nationwide. A second movie, made for television and starring Helen Hunt, hewed more closely to the actual facts of the case. The Discovery Channel devoted an episode of *Investigation* to the case. The facts of the case formed the basis of a *Law & Order* episode. Several books about the case were published. Defendant Pamela Smart's transfer from one prison to another was covered by the New York Times and, during the

¹See, *Bonnie and Clyde Guns Sell For \$504,000*, NBC News, 9/20/2012, http://usnews.nbcnews.com/_news/2012/09/30/14162079-bonnie-and-clyde-guns-sell-for-504000?lite

trial reports of the testimony were published in newspapers on every continent and in every major language.

The case remains in the public's consciousness despite the intervening quarter century. In 2010, Pamela Smart appeared on *Oprah*. That same year, New Hampshire's largest television station broadcast interviews with members of the victim's family. In 2014, HBO produced and broadcast a documentary based on the case. New Hampshire and national news outlets covered every parole hearing for Smart's codefendants. In 2015, Smart gave a prison interview to New Hampshire's largest television station. To follow up on that interview, in 2015, the same television station spoke with the Governor's office and each of the Executive Councilors in order to broadcast their views on the potential for executive clemency.

The local and national media coverage of the case had a salacious edge. Smart was a young woman who worked in a high school. She had a sexual affair with a student, described in torrid detail both in court and in the media. She conspired with this student and his friends to kill her newlywed husband. Circa the time of the trial, the largest newspaper in the State published front page photographs of Smart in a bathing suit. Some twelve years later, the National Enquirer published pictures of Smart in what appeared to be underwear in a prison cell.

It would take a psychologist, a sociologist or an anthropologist to explain why our society transforms murderers into B-List celebrities. But, if released to the intervenor, the "gun from the Pam Smart" case will itself attain B-List status. To prevent that from happening, if the court could do as it pleased, it would forfeit the gun to the State and order it destroyed.

II.

Intervenor Vance Lattime Sr. had nothing to do with the murder. He is the innocent owner of a gun, holster and ammunition that were seized by the police in 1990 when the murder was investigated. Lattime Sr.'s son, Vance Lattime Jr., was one of four teenagers who conspired with Pamela Smart to commit the murder. To this end, Lattime Jr. took Lattime Sr.'s gun without permission and gave it to another conspirator to murder Smart's husband. Lattime Jr. was convicted for his role in the murder and sentenced to a lengthy term at the State Prison.

Lattime Sr. now seeks the return of his gun, holster and ammunition pursuant to RSA 595-A:6. That statute provides as follows:

If an officer in the execution of a search warrant, or by some other authorized method . . . shall seize and safely keep them under the direction of the court or justice so long as necessary to permit them to be produced or used as evidence in any trial. Upon application by . . . civil claimants, the court, prior to trial or upon an appeal after trial, shall, upon notice to a defendant and hearing, and except for good cause shown, order returned to the rightful owners any stolen, embezzled or fraudulently obtained property, or any other property of evidential value, not constituting contraband. . . . Photographs or other identification or analysis made of the returned property shall be admissible at trial as secondary evidence, in lieu of the originals, for all relevant purposes, including ownership. . . . All other property seized in execution of a search warrant . . . shall be disposed of as the court or justice orders, which may include forfeiture and either sale or destruction as the public interest requires, in the discretion of the court or justice, and in accordance with due process of law. Any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith.

The statute thus requires the return of "property of evidential value" to its "rightful owners" unless (a) the State or the defendant shows "good cause" to retain the property for use in a criminal investigation or proceeding or (b) the property is contraband or otherwise subject to forfeiture, in which case it may be destroyed or forfeited to the

State. See, State v. Kean, 168 N.H. 93, 96 (2015) (The government is permitted to seize evidence for use in investigation and trial, but such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture); State v. Pessetto, 160 N.H. 813, 816 (2010) ("If the item is not contraband, the trial court must return the property unless the State provides good cause to withhold its return."); State v. Gero, 152 N.H. 379, 387 (2005).

The State has agreed to return the holster and ammunition to Lattime Sr. See, State's Partial Objection To Motion For Reconsideration (Docket Document 6), ¶1. However, it objects to returning the gun on the grounds that it may still be needed in a criminal investigation or proceeding. Id., ¶¶3 and 4; See also, State's Objection (Docket Document 4), ¶¶ 4 and 5. More particularly, the State argues that even though Smart was convicted of being an accomplice to first degree murder, sentenced to life without parole, and unsuccessful in her multiple appeals:

No one can predict the future when it comes to potential legal action by a defendant serving a life without parole sentence. However, common sense and counsel's experience reasonably lead to the conclusion that the defendant is likely to continue to contest her conviction and sentence. In fact, history shows this to be the case.

State's Objection (Docket Document 4), ¶4. The State also notes that Smart remains free to seek executive clemency.

All of this is true. However, regardless of what Smart files in the future, the State will not be prejudiced in its ability to respond if it relinquishes possession of the gun. Throughout the lengthy trial, appellate and post-conviction proceedings Smart never challenged the undisputable fact that Lattime Sr.'s gun was the murder weapon. The probability of a future dispute concerning either the cause of death or the murder

weapon is asymptotically close to zero. If it ever becomes necessary to revisit the facts of the case, photographs and videos of the gun will suffice. The State has had a quarter century to test the gun and does not argue any need for further testing.

To understand why the State has no further need to retain the gun, it is necessary to understand both the evidence and the procedural history of Smart's case. The underlying facts supporting the State's case were described by the New Hampshire Supreme Court in Smart's direct appeal as follows:

In the fall of 1989, the twenty-two-year-old married defendant [Smart] was the director of media services for the school district that included Winnacunnet High School in Hampton. She met and befriended William Flynn and Cecelia Pierce, two fifteen-year-old high school students from Seabrook . . . Eventually, in February or March of 1990, the defendant and Flynn became sexually involved.

Shortly after their affair began, the defendant told Flynn that in order for them to continue their relationship they would have to kill her husband, Gregory, a twenty-four-year-old insurance salesman to whom the defendant had been married less than a year. Eventually the defendant and Flynn together planned that Flynn would commit the murder with the help of his friends, and would stage the killing as if committed in the course of a burglary of the defendant's home. According to the plan devised by the defendant, she would leave open the bulkhead door to the basement of her home to provide entry for Flynn and the others before Gregory returned home. The perpetrators were to park their car in a shopping center behind the residence and change into dark clothes before approaching the apartment. The defendant advised Flynn that he and his accomplices should wear gloves to avoid leaving fingerprints and should ransack the apartment, taking away whatever they wanted as compensation. Pursuant to the defendant's plan, her husband was to be killed with a gun upon entering his home as if he had surprised burglars.

Flynn discussed the plan with his friends Pete Randall and Vance Lattime, Jr. [the Intervenor's son], also teenagers from Seabrook. With the aid of another boy, Raymond Fowler, Flynn set out from Hampton to commit the murder one night in April, using the defendant's car. When the two arrived at the defendant's apartment complex, however, they saw her husband's truck and abandoned the plan. After this unsuccessful attempt, Flynn recruited Randall and Lattime to help execute the plan. He told them that the defendant had agreed to pay them five hundred dollars each for

committing the murder. **Lattime provided his father's .38 caliber revolver and his grandmother's car to transport the boys from Seabrook to the defendant's Derry apartment.**

After school ended on May 1, 1990, the defendant drove Flynn, Randall and Lattime to pick up Lattime's grandmother's car in Massachusetts. The defendant discussed with them the various details of the murder plan, seeking advice on how to react when she returned home and discovered her husband murdered. . . .

Flynn, Randall and Lattime picked up Fowler and drove to the defendant's residence. While Lattime and Fowler waited with the car at the shopping center, Flynn and Randall entered the defendant's apartment through the unlocked bulkhead into the basement. After ransacking both the upstairs and downstairs of the apartment, they waited for Gregory to return home, with Flynn carrying the gun and Randall holding a knife he had taken from the kitchen. When Gregory came home, the boys forced him to his knees. While Randall with one hand held Gregory's head down and with the other hand held a knife in front of his face, Flynn shot him once in the head. Taking a pillowcase they had filled with jewelry, the boys fled to meet Fowler and Lattime, and the four drove back to Seabrook. **The next day, Lattime replaced the gun among the rest of his father's collection.**

On June 10, Ralph Welch, a friend of Lattime, told Lattime's parents that Randall and Lattime had admitted to him their participation in the murder. **Lattime's parents took the gun to the Seabrook Police Department, accompanied by Welch, and subsequent ballistics tests confirmed that the gun had been used in the murder.**

Worried because of Welch's intentions to go to the police, Randall and Lattime went to see Flynn and the defendant at the latter's new condominium in Hampton. After discussing the matter, the defendant drove them to Seabrook in an unsuccessful attempt to retrieve the gun. The next night, June 11, Lattime, Randall and Flynn were arrested. Virtually daily before May 1, the defendant spoke with Cecelia Pierce, her student intern, about the plan to have Flynn murder her husband. The night before the boys were arrested, the defendant told Pierce of Welch's intention to report the boys to the police, and said that if Lattime and Randall were smart they would blame Welch and Fowler for the murder.

Pierce was questioned several times about the murder by the Derry police and denied any knowledge of it. On June 14, after hearing rumors of the impending arrest of an unidentified girl alleged to be involved, Pierce again met with the Derry police and told them of the defendant's involvement in the murder. She agreed to a phone tap of a conversation with the defendant and to wearing a recording device, or body wire, to

record face-to-face conversations with the defendant. On July 12 and 13, with Pierce surreptitiously recording their conversation, the defendant warned Pierce that if Pierce told the truth to the police, Pierce would be an accessory to murder, and urged her to continue to lie. The defendant acknowledged that the boys had carried out the murder to look like a burglary as she had planned, and stated that "nothing was going wrong" until the boys told Welch about it. She stated that, if arrested, she would admit to the affair with Flynn but deny any involvement in the murder plot. She expressed concern that Lattime, who merely waited in the car during the murder, would eventually confess and implicate the others. Nevertheless, the defendant told Pierce she was confident that, as between a sixteen-year-old "in the slammer facing the rest of his life" and herself, "with a professional reputation and a course that I teach," her denial would be believed. The defendant reminded Pierce that, by telling the truth, Pierce would be sending the defendant to prison for the rest of her life.

On August 1, 1990, the defendant was arrested in connection with the murder of her husband. In January 1991, Flynn, Randall and Lattime agreed to plead guilty to reduced charges and subsequently testified for the State at the defendant's trial. Another witness, Cindy Butt, a co-worker of Pierce, testified that a month prior to the murder, Pierce told her that she had a "friend named Pam who wanted to find somebody to kill her husband." George Moses, a high school student, testified that he knew the defendant at Winnacunnet High School and met her again while visiting his mother in prison. According to Moses, the defendant asked him to lie for her by claiming that he had overheard Pierce admit to lying to the police about the defendant's involvement.

State v. Smart, 136 N.H. 639, 643-646 (1993) (emphasis added).

Smart testified at trial. She admitted that she had an adulterous affair with her teenage codefendant but denied knowledge of, and involvement in the murder. Smart argued that the teenagers committed the murder on their own and that their testimony was not credible. She did not dispute the ballistics tested that proved that Lattime Sr.'s gun was used to commit the murder. Simply put, the fact that the gun was the murder weapon was part of Smart's theory of defense and not something she challenged at trial.

In her direct appeal, Smart raised issues related to (a) whether her jury was tainted as a result of the extensive pretrial publicity, (b) whether her jury was possibly affected by the trial atmosphere, (c) alleged juror misconduct, (d) jury instructions and (e) the admissibility of taped statements she made to a witness who was cooperating with the State. Id. None of her arguments on direct appeal related to the admissibility or evidentiary importance of the ballistics test or the murder weapon. The New Hampshire Supreme Court affirmed Smart's conviction, Id., and the U.S. Supreme Court denied her petition for review. Smart v. New Hampshire, 510 U.S. 917 (1993).

Smart unsuccessfully sought both state and federal post-conviction relief. Those efforts apparently ended twelve years ago when the U.S. Supreme Court declined to review the denial of federal post-conviction relief. Smart v. Curry, 543 U.S. 1011 (2004). To the best of the court's knowledge, none of Smart's claims for relief in state or federal court had anything to do with the question of whether Lattime Sr.'s gun was the murder weapon. Smart did not allege that her lawyers were ineffective with respect to either (a) allowing the State to present evidence of the ballistics test, (b) failing to present evidence or argument with respect to the possibility that some other gun might have been used or (c) failing to investigate that possibility. Thus, the fact that Lattime Sr.'s gun was the murder weapon was not at issue prior to trial, during trial, on appeal, on post-conviction review in state court, or on post-conviction review in federal court.

At this late date, virtually any future challenge to Smart's conviction will be barred in state court by laches and in federal court by the federal statute of limitations and federal statutory restrictions on successive petitions. See, 28 U.S.C. §2244(b) and (d). Assuming, dubitante, that Smart could clear these procedural hurdles, she would still

have to demonstrate both legal error and sufficient prejudice to undermine confidence in the outcome of her case. The court cannot conceive how the availability of the actual murder weapon could be even marginally relevant to this determination.

Although it is not necessary to go any further down the rabbit hole, the court notes that Smart has not objected to Lattime Sr.'s motion. Lattime Sr. served Smart with a copy of his motion by mail and the State served its objection on Smart's attorney. Smart has thus forfeited any argument she might have had for safekeeping the gun pending further proceedings. Therefore, she will not be heard to complain about any future inability to subject the gun to further forensic testing.

Finally, the court rejects the State's concern that the gun might be probative in an executive clemency proceeding. As the State points out, the Governor and Council are not constrained by any rules of evidence in their consideration of applications for pardons and commutations. They may grant clemency for any reason they see fit and may consider whatever facts they deem relevant. See, N.H. Constitution, Part 2, Article 52. But this does not mean that the State is entitled to retain Lattime Sr.'s property for the entirety of Smart's life, just in case Smart files an application for a pardon or commutation and is granted a hearing.

Notwithstanding the Executive Branch's constitutional prerogatives, there is no rational possibility that the gun will be passed around at a clemency hearing, or inspected by the Governor and Council or tested yet again to confirm that it was the murder weapon. Even if a clemency petition were fueled by so-called residual doubt, there would be no doubt concerning the fact that Lattime Sr.'s gun was used to kill

Smart's husband. If a clemency hearing is ever held, it will no doubt revolve around more rational concerns.

III

The State does not argue that it needs to retain the gun for use in future criminal or clemency proceedings involving Smart's four co-defendants. All four pled guilty, served long prison sentences and are now on parole. Thus, they still have significant constraints on their liberty. That said, the State appears to concede that the likelihood of post-conviction motions or petitions from any of the co-defendants is close to nil. The chance that anything about the gun will be relevant to such a motion or petition is even lower.

IV.

The State does not argue that Lattime Sr.'s gun is contraband or should otherwise be forfeited to the State or destroyed. Therefore, perhaps the court need not reach this issue. However, because the gun was an instrumentality of a crime, some discussion is warranted.

"Derivative contraband includes tools or instrumentalities that a wrongdoer has used in the commission of a crime." State v. Cohen, 154 N.H. 89, 92 (2006) (internal quotation marks omitted). See also, Pessetto, 160 N.H. at 817. In general, derivative contraband may be forfeited to the State or destroyed. Cohen, 154 N.H. at 92. However, the New Hampshire Supreme Court has not yet decided whether the State's interest in forfeiting an otherwise unobjectionable instrumentality of a crime can snuff out an innocent owner's property rights.

Cohen articulated a common law (or at least a non-statutory) basis for the forfeiture or destruction of instrumentalities of crime. There is no general forfeiture statute that applies to instrumentalities of crime. The Legislature has, however, provided for forfeiture of items used as instrumentalities in drug trafficking and human trafficking felonies. See, RSA 318-B:17 and 633:8 and 9. Those statutes provide complete protection for innocent owners by prohibiting forfeiture of a property interest "unless the owner or owners thereof were consenting parties to a felonious violation ... and had knowledge thereof." RSA 318-B:17, III(a); RSA 633:8, XI.

It would be incongruous if forfeiture under Cohen eliminated this statutory protection for innocent owners. Indeed, the absence of an innocent owner exception to forfeiture under Cohen could work serious mischief. If a thief steals my car and uses it to rob a bank, am I then at risk of losing my car to the State because it was an instrumentality of a robbery? If not, and if there is no across-the-board protection for innocent owners, what criteria will courts use to determine which innocent owners are deserving enough to get their property back? Accordingly, the court concludes that there is an innocent owner exception to forfeiture under Cohen.

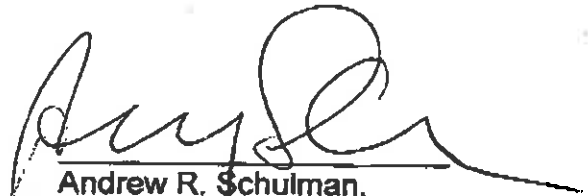
Lattime Sr. is an innocent owner. He did not give his son permission to take his gun. He did not know that his son took his gun. He had no idea that his son was going to use the gun to commit a murder. Therefore, Lattime Sr. has done nothing to forfeit his property interest under Cohen. Further, even if Cohen allowed for the discretionary forfeiture of an innocent owner's property interest, see, Bennis v. Michigan, 516 U.S. 442 (1996), the court would not use that discretion in a case such as this, in which an innocent owner's property was taken by a criminal without permission and then used in

a crime. The fact that the criminal in question was Lattime Sr.'s teenage son does not make a difference.

V.

Lattime Sr. is entitled to the return of his gun, holster and ammunition. He can decide whether he really wants it.

March 8, 2016



Andrew R. Schulman,
Presiding Justice