NORTH CAROLINA

GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 97CRS-39580

STATE OF NORTH CAROLINA)
)
VS.)
)
RONNIE LEE KIMBLE,)
DEFENDANT.)

MOTION IN LIMINE
RE JANET SMITH

NOW COMES the defendant, above-named, through counsel, and moves the court pursuant to Article I, Sections 19, 23, and 24 and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the General Statutes of North Carolina to bar evidence concerning the fact that Ronnie Kimble has been charged with conspiracy to commit a sex act by a custodian under 14-27.7 and to bar any evidence of any events surrounding alleged incidents between the defendant and former jailor Janet Smith, including statements that Ronnie Kimble made in letters or notes to Janet Smith. Any such evidence has no relevance to the determination of the defendant's guilt in the murder of Patricia Kimble and, assuming *arguendo* that if the relevance threshold were met, such evidence would fail a Rule 403 balancing test. In support of this motion the defendant shows the court the following:

1. In the fall of 1997 while incarcerated in the Guilford County Jail, the defendant and a female jailor, Janet Smith, who had custodial responsibility over the defendant began to talk to each other and pass notes and letters.

2. The letters progressed to the point where they contained graphic sexual descriptions of fantasies as to what they would do had they been free to do what they wished without fear of adverse consequences. The letters, though quite sexually explicit, never refer to anything of a sexual nature in the past tense, only in the future tense. In short, they make reference to sexual acts in terms of fantasy as opposed to actual events which have happened. In point of fact, the only physical contact between the defendant and Janet Smith was an embrace and a kiss.

2. Despite this lack of evidence, Assistant District Attorney Dick Panosh and Detective J. D. Church, (the lead investigator in the defendant's murder case) indicted the Defendant for conspiracy to commit sexual activity by a custodian under N.C.G.S. 14-27.7 with Janet Smith. The statute reads as follows:

> If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, **having custody of a victim of any age engages in vaginal**

> **intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony.** Consent is not a defense to a charge under this section.

N.C.G.S. 14-27.7 (emphasis added). The lack of evidence aside, this is the legal equivalent to indicting a 16-year-old girl under the statute for having sex with her stepfather; or for that matter for indicting a 12-year-old girl for statutory rape for having consensual sex with her 18-year-old boyfriend. The statute quite simply speaks for itself: if the person having custody of the victim "engages in vaginal intercourse or a sexual act with **such victim, the defendant** is guilty of a Class E felony. N.C.G.S. 14-27.7 (emphasis added). If the legislature had wanted to criminalize the conduct of the person in custody, it would have said both the defendant and victim are guilty of a class E felony and it surely would not have used the term victim to refer to the person in custody.

3. Undersigned counsel has done an exhaustive computerized search of caselaw in an attempt to find a case in which a named victim under this statute has been prosecuted. There are none.

4. Nor does it make a difference that the state has indicted the defendant for conspiracy to violate the statute rather than for a substantive offense. If the defendant falls into a class of legislatively protected persons, as here, he can not be charged with conspiracy. The leading case enunciating this principle comes from the United States

Supreme Court in *Gebardi v. United States,* 287 U.S. 112, 53 S.Ct. 35, 77 L.Ed. 206 (1932). There a man and a woman were both convicted of conspiracy to violate the Mann Act (transporting a girl or woman across state lines for immoral purposes). The Supreme Court reversed and held that where the legislative intent was to leave even the voluntary acquiescence unpunished by the woman, and hence not guilty of the substantive crime, then the woman could not be found guilty of conspiracy. This is precisely the situation with our statute except that it is even more clear since our legislature used the term "victim." *See also* LaFave and Scott, Substantive Criminal Law, Section 6.5 p. 119. In addition, charging the participants with conspiracy based upon a crime which requires two participants such as bigamy, adultery, incest or solicitation violates Wharton's Rule. *Ibid.* It is not clear whether North Carolina has formally adopted Wharton's rule. *State v. Larrimore,* 340 N.C. 119 (1995).

5. In anticipation of the prosecution's argument that it will not seek to introduce evidence of the fact the defendant has been charged, but only so much of the facts as are necessary to bring out the fact that the defendant wrote Janet Smith a letter in which he urged her to deny to authorities that anything had been going on between them and pledged that he would do the same, such evidence could only be considered for admissibility if the defendant's

credibility became an issue. Even then, stating that he would deny to authorities that any kind of a relationship existed between himself and Janet Smith is only marginally relevant to credibility concerning testimony under oath in a court of law. However, the potential for unfair prejudice is rampant. The real reason the prosecution wants to get into this matter, is to bring out that the "relationship" with Janet Smith was outside the defendant's marriage. Such evidence is in fact, merely bad character evidence masquerading as credibility impeachment. As such it will never pass muster under a Rule 403 analysis; the unfair prejudice it generates far outweighs any probative value it might have.

6. Finally, to allow the State to delve into such extraneous matters in the event the defendant were to take the witness stand in his own behalf, has a profoundly chilling effect on his decision to testify. It presents the defendant with a Hobson's choice: he can either present his defense from his own lips and be smeared by irrelevant character assassination, or he can forego his right to put forth a defense at all. The law can not be party to such duplicity.

WHEREFORE, the defendant prays the court not allow any evidence of this alleged incident to be presented in the trial of this matter.

This the 14 day of July, 1998.

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