THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Strafford, ss. April Term, 2020

STATE OF NEW HAMPSHIRE

v.

Timothy Verrill #219-2017-CR-072

MOTION TO DISMISS

NOW COMES the accused, Timothy Verrill, by and through counsel, Meredith Lugo and Julia Nye, Public Defenders, and respectfully requests that this Honorable Court dismiss with prejudice the pending charges. The State of New Hampshire acted recklessly and willfully in its failure to turn over significant *Brady* materials prior to trial, severely prejudicing the defense. The State then engaged in conduct intended to provoke the defense into requesting a mistrial. The alleged review procedures the State instituted after the mistrial are inadequate to ensure that Verrill has the essential materials he needs to fully and effectively defend himself at a retrial. The combined effect of the State's conduct has denied Verrill due process and supports dismissal of the charges. This Motion is grounded in Verrill's rights as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Part I, Articles 15 and 16 of the N.H. Constitution.

In support of this Motion, the following is stated.

Introduction

The defense recognizes that dismissal is an extraordinary remedy. However, this case is extraordinary. Exculpatory evidence directly relevant to Verrill's alternative perpetrator defense would have remained suppressed by the State but for the interest of a civilian witness in the fairness of the trial. As a direct result of this witness' outreach to defense counsel, the defense

learned of three witnesses who had not been disclosed by the State, all of whom had provided law enforcement with exculpatory information related to the primary witnesses in the investigation – Dean Smoronk, Josh Colwell, and Steve Clough. This was not new discovery; it was discovery that had been in the possession of the State for at least a year, in some instances for more than two years. The defense notified the State and Court that it would be seeking dismissal and trial was halted to address the discovery violations. But there was more. Immediately before the hearing, the State revealed that witness Michael Ditroia had undergone a polygraph more than two years before, a polygraph attended by the lead investigator, which he claimed cleared this witness. The defense has since learned that Ditroia responded deceptively to the question, "Did you kill those two women in Farmington?"

The motion to dismiss was denied and trial continued. But there was still more. Days later the State informed the defense that additional undisclosed information had been located, including an aborted polygraph of Steve Clough and surveillance footage from a business that contradicted Josh Colwell's testimony. As the defense worked to absorb this material, the State notified them there was still more – a significant amount of undisclosed discovery related to the drug investigation, information the defense had repeatedly requested prior to trial and been told did not exist. As a result of the State's representation that there was material undisclosed drug investigation information, the defense reluctantly moved for a mistrial, to which the State assented.

After the mistrial was granted, material and exculpatory evidence that had been specifically requested by the defense well before trial, requests that were either ignored by the State or met with assurances that either it did not exist or had all been disclosed, was provided. Significant portions of this evidence were directly related to Smoronk, Colwell, and Clough –

and conflicted with their statements to law enforcement or at trial, suggesting greater knowledge of and involvement by each in the murders. Then, when the State represented that all had finally been disclosed, the defense pointed out that still no material from the drug investigation – the significant amount of undisclosed discovery that had prompted the mistrial, discovery which had been continuously requested before trial - had been turned over. The State then advised the Court that it had been incorrect in the representations it made to defense counsel on October 31 – the representations that caused the defense to request the mistrial. It claimed that the significant amount of discovery it referred to on that date had in fact all been provided pre-trial and reverted to its earlier claim that no drug investigation existed. Depositions conducted after the mistrial, however, revealed there was a drug investigation which the State knew from the outset had been handled by the DEA in cooperation with the State Police.

Throughout the pretrial period and continuing through the mistrial declaration up to the present, there has been a systemic problem with the provision of discovery in this case to the defense. The Attorney General's Office repeatedly represented to the Court and defense that all discovery had been provided. The defense repeatedly learned of the existence of additional discovery; each time, the State insisted there was no systemic issue and merely isolated instances of discrete items being overlooked. These representations continued even after a substantial amount of discovery was disclosed during trial, not as the result of any attempt by the State to comply with its constitutional obligations, but as the fortuitous result of a civilian making contact with the defense and the defense making inquiries of the State. In opposing the defense request for a mistrial, the State assured the Court that the State and Police and Attorney General's Office had spent two days ensuring that all discovery had finally been provided. However, the

depositions and amount of discovery provided after the mistrial belie these representations, which were not based on fact.

When the mistrial was declared on October 31, the Attorney General's Office conceded that neither the Court nor defense could have any confidence in the representations made by their office or the State Police that discovery had been provided in full. Yet shortly thereafter, after conducting an incomplete "audit" that did not even attempt to determine how and why significant exculpatory material was not timely provided, the State reverted back to its original position of unfounded assurances that the defense has all discovery. To the contrary, it was the State's October 31 concession that it is accurate – neither the Court nor defense can or should have any confidence that this is the case. This is so because of the way the audit was conducted and because no attempt has been made to obtain information in the hands of the DEA.

Dismissal is warranted because the State has failed to provide the defense with material and exculpatory evidence, acting in bad faith and reckless disregard of its constitutional obligations. The State acted with the same intent in not determining what material had not been provided to the defense on October 31, leading to the defense request for mistrial. For all of these reasons, Timothy Verrill moves for an order dismissing with prejudice the charges of first and second degree murder and falsification of physical evidence.

Facts

General Practice

1. The New Hampshire State Police Major Crimes Unit (MCU) investigates homicides. The unit contains about ten detective sergeants and ten troopers. The unit works alongside prosecutors from the Attorney General's Office (AG). There are no written protocols for the

MCU to follow on handling a homicide investigation; however, there are practices that the MCU follows and the AG is aware of these practices.

2. When a homicide occurs, the Lt. Commander of the unit assigns a lead investigator from the group of detective sergeants. The assignment is based on rotation and availability and not necessarily on experience or skills. The Lt. Commander also assigns other members to assist with the investigation. The lead investigator assigns tasks, such as interviewing witnesses, collecting, examining and testing evidence, and taking photographs to other members of the MCU. When a member of MCU becomes a lead investigator, there is no specific training on how to be a lead, other than "shadowing" another officer acting as lead.

3. After the assignments have been completed, it is the role of the lead investigator to follow up and collect documentation, such as lab reports, investigative reports, discs containing videos and/or audio recordings, and evidence logs and place them into the "casebooks." The casebooks contain the paper discovery and discs of interview recordings that are turned over to the prosecutor.[1]

4. The size and number of casebooks depend on the complexity of the case. The lead investigator reviews the materials and determines whether materials submitted to him are filed in the case book. If they are not, the AG never knows about them, and thus, they are never turned over in discovery. There are no protocols on how a lead investigator organizes the casebooks. The casebooks themselves are not a tracking system for the assignments given and completed.

5. The MCU does not have either a records management system or a centralized method of keeping track of assignments. In other words, there is no document or database that the lead investigator, his supervisor or the AG can review to see if assignments have been completed.

[1] The "casebook" method is also used for drug investigations. The practice began in the 1930's.

Each lead investigator develops his or her own method of keeping track of assignments handed out. If the lead investigator does not put the assignment on a list, he may never follow up on the assignment. Some investigators do not complete assignments unless they are reminded to do so.

6. When there is an overlap in investigations with another unit, such as the Narcotics Investigation Unit (NIU), or a federal investigative agency like the Drug Enforcement Administration (DEA) the MCU does not have a policy on how information is shared or documented. In some cases, there are specific meetings to coordinate a surveillance, arrest or an interrogation. In other cases, a member of a narcotics unit may hand in a written report containing information relevant to the homicide. In other cases, "intel" obtained from a confidential informant or suspect in a drug investigation is simply "relayed" to the lead investigator but not documented.

7. The AG reviews only the materials sent by the lead investigator or by another investigator upon a direct request. There is no practice whereby the prosecutors review the materials in the possession of the lead investigator or other investigators on a case. There is also no practice that the lead investigator reviews the files of each investigator to confirm that all the required assignments have been completed and materials handed in for inclusion in the casebooks.

Summary of Investigation

8. On January 29, 2017, the Farmington Police responded to a 911 call by Dean Smoronk about a double homicide at his home. The Farmington Police found a blood-stained bed but no bodies. The local police called in MCU; Lt. Strong was the first to respond and found the bodies of the two women. One of the victims was Christine Sullivan, who lived there with Smoronk.

The other victim, Jenna Pellegrini, was a guest at the house. Investigators concluded early on that the murders were committed early in the morning on January 27.

9. Lt. Scott Gilbert assigned then-Lt. Brian Strong as the lead investigator. As of January 2017, Lt. Strong had been a member of MCU for approximately nine years and served as lead on eleven prior investigations. Lt. Gilbert also assigned other troopers to assist with crime scene preservation, investigation and conducting interviews. Lt. Sonia prepared the warrant affidavits at the beginning of the case. After the first several weeks, Sgt. Bright and Det. McAulay were the only assigned investigators who remained on the case in addition to Lt. Strong, who remained the lead in the lead-up to trial, despite being transferred out of MCU in April 2018.

10. In addition to interviewing witnesses, the investigators collected numerous phones for extraction and preservation of text messages. The AG issued subpoenas to phone companies to preserve phone records for witnesses who were known to be at the residence during the time the homicides may have happened, including Christine Sullivan, Jenna Pellegrini, Timothy Verrill, Scott Pelletier, Matthew Granger, Steven Clough, Buddy Seymour, Jason Parker, and Nicole Steadman, Josh Colwell, and Ian Bates. Parker went to Smoronk's residence during the day on January 28 at Smoronk's request to check the residence. Clough went to Smoronk's residence during the evening of January 28 at Smoronk's request. Clough invited Seymour and Steadman. Seymour went back to the residence between 11:00 p.m. and midnight with Pelletier and Granger. At this stage on the investigation, police were aware of Josh Colwell going to Smoronk's residence once at a minimum, to drop Smoronk off after picking him up from the airport. The police learned that Colwell and Verrill were friends and that Colwell claimed to have seen Verrill before and after the State alleges that the homicides occurred. The police knew Colwell as a member of the local motorcycle gang known as the Mountain Men. His title was

Sgt. of Arms. Another witness who saw Verrill before and after the State alleges the homicides occurred was Ian Bates, who was close friends with Colwell and stayed at his house Thursday into Friday January 26-27. The police learned that Bates was an active member of the Vigilante Motorcycle Club.

11. The State Crime Lab reviewed and analyzed the home surveillance videos and participated with the crime scene processing of fingerprints and blood samples.

12. As a result of interviews with Smoronk and Colwell, Verrill became a prime suspect. A review of the home surveillance system placed Verrill as the last visitor prior to the homicides. By Feb. 4, 2017, the State Lab matched fingerprints on evidence collected from the scene, such as a Prestone container, with Verrill's prints. The Prestone container was significant because investigators had also located ice melt poured on top of blood on one of the home's decks in an apparent effort to conceal.

13. In addition to the information provided by Smoronk and Colwell pointing to Verrill, the members of MCU learned that Smoronk had made threats to kill Sullivan repeatedly in the past. Members of MCU collected information on Smoronk's activities before and after the homicides by collecting cell phone location records and obtaining airport videos of Smoronk's departure to Florida early on January 25 before the homicides and his arrival back in Boston after the homicides on January 28.

14. As represented and sworn to in contemporaneous warrant affidavits, DEA Agent Timothy Keefe and NIU Det. Michael Belleau told Lts. Strong and Sonia that Smoronk and Sullivan had been under active investigation for drug trafficking since October 2016 by their respective agencies. Although it was clear during the first couple of days of the homicide investigation that the investigation would necessarily include numerous interviews with witnesses who were part

of a network of drug dealing, Lt. Strong, a detective whose primarily experience was in crime scene processing and who had little experience in conducting drug investigations, continued as lead.

15. Early in the homicide investigation, the AG, NHSP commanders, and members of MCU, NIU and DEA met to decide how to divide up the investigation. As a result of the meeting, MCU continued to handle the homicide investigation and the DEA took over any drug-related investigations involving Smoronk and others in his circle. Lt. Strong was present for the meeting, but he did not participate in the decision to divide the investigation because, he testified at deposition, it was "above his pay grade." When witnesses were believed to possess information about both the homicides and Smoronk and Sullivan's drug operation they were sometimes jointly interviewed by members of MCU and the DEA, but sometimes not. The DEA never agreed to share materials on interviews done exclusively by members of the DEA with the NH State Police or the AG. As a result of the separation of the investigation, relevant and potentially exculpatory materials related to the homicide case became beyond the reach of the defense's discovery request.

16. Lt. Strong made at least two copies of all original reports and recordings turned into him by investigators. Because of the DEA's intimate involvement with the homicide investigation, he sent one of the copies to the AG and the other copy to the DEA. The DEA received everything that the AG did.

17. As lead on the case, in addition to coordinating the investigation within MCU and being the contact person for DEA and AG, Lt. Strong also participated in meetings with the State Labs to determine the priorities in evidence examination.

18. During the first two months of investigation, MCU and the Farmington Police department conducted approximately thirty seven interviews; some witnesses were interviewed more than once. Some of the interviews were conducted by phone, primarily of witnesses who lived in Florida, several of whom reached out to NH law enforcement in the immediate aftermath of the homicides. Among those interviewed multiple times were Steven Clough and Michael Ditroia, who was known as "Spider." Clough was a person of interest because he was a known meth dealer with connections to both Smoronk and Sullivan and because he told inconsistent stories about going to Smoronk's house and apparently found the blood-stained mattress in Smoronk's home and failed to tell Smoronk or call the police. Clough was interviewed six times during the first month of the investigation. Clough was also a childhood friend of Strong's and Strong used that connection to try to get Clough to open up about what happened. On February 1, 2017, MCU executed a search warrant at Clough's home.

19. Ditroia was a person of interest because of his longevity in the area, his background as part of the motorcycle club (Mountain Men) and his drug activity. Ditroia was first interviewed on February 6, 2017. The interviewed was recorded. As a result of this interview, the State learned, among other things, that Ditroia had heard from Angelica Brown that she was aware of of Clough and his crew knowing for a month beforehand that Sullivan would be killed and making two trips to the residence that weekend, removing items from the house. Ditroia represented that he had only met Smoronk once prior to the homicides and that he had worked for Sullivan assisting with her side antiquing business for several months until late December 2016. On February 23, 2017, NIU made a motor vehicle stop at Strong's request. Ditroia was one of the occupants along with Smoronk and Dan Wall and he was arrested for possession of meth. He was interviewed separately by Sgt. Huse of NIU and by Strong. He explained that he

was with Smoronk to help him recover "company hard drives" that were stolen from Smoronk's home. Ditroia would tell investigators that, as demonstrated by this incident, he was a close associate of Smoronk's, although he claimed this occurred only after the homicides.

20. Members of the investigation team used text messages and emails to communicate with some of the witnesses. Det. McAulay interviewed Monique Cote at Lt. Strong's request. At the time of the homicide, Ms. Cote was in a custody battle with Steven Clough. Det. McAulay prepared a report in June 2017 on that interview and continued email contact with Ms. Cote until at least the fall of 2018. None of this information was provided to the defense before trial. During this time, Cote provided extensive information regarding Clough, including that she had contacted the DEA and that Clough lied under oath during a custody hearing, violated court custody orders and kidnapped their child. In several of her emails, Cote forwarded McAulay text message exchanges with Clough as well as a text message exchange with Chris Cortez, a witness unknown to the defense prior to trial. According to Cortez, Smoronk secretly flew back to N.H. to be present for the murders, Ditroia and Clough were both involved in the murders, and that there was a witness known as "Mouse" who believed that Smoronk was going to kill him. The information from Cortez was forwarded to Strong who directed McAulay to interview Cortez. McAulay and a DEA agent conducted a recorded interview with Cortez in September 2018. Like the Cote interview and emails, this interview was not provided to the defense until Cote's father contacted defense counsel, leading to the discovery of Monique Cote's emails with McAulay, which ultimately produced this additional material.

21. Bright and Strong exchanged text messages and emails with numerous witnesses. As discussed in detail in the post-trial disclosure section of this Motion, a significant percentage of Strong's communications with witnesses were not provided until after trial. Det. Sgt. Koehler

communicated by email with members of Christine Sullivan's family and her attorney on her South Carolina drug charges. Koehler also interviewed of Ian Bates, Colwell's friend. He texted with Bates' brother and father to arrange the interview. Koehler emailed with a sergeant in the CT State Police about motorcycle gangs and compiled material from the internet on Bates and Colwell, including their involvement with motorcycle gangs. Koehler's emails with Sullivan's family and attorney, research on motorcycle gangs and text messages regarding Bates were not turned over until after the mistrial.

22. On February 16, 2017, Trp. Elsemiller, at Strong's direction, conducted a phone interview with Erin Feeley, who was with Verrill's girlfriend on the evening of Friday January 27. Feeley told Trp. Elsemiller that she saw Verrill come home that night and described his demeanor. The interview was not recorded, but Trp. Elsemiller prepared a report regarding the interview. On April 19, 2018, McAulay conducted a second interview of Feeley at Strong's direction. When McAulay conducted this interview, which was recorded, he had not been advised that Feeley had been interviewed before. Elsemiller's report was turned over pretrial but the recorded interview conducted by McAulay was not. McAulay's text messages with Feeley indicate that after interviewing her he did find the report of the prior interview. These text messages were also not turned over before trial.

23. After the initial round of interviews conducted in February and early March 2017, in mid-March, Strong, Bright and McAulay traveled to Florida with DEA Agents Keefe and Jack Daly and conducted joint interviews. Smoronk owned a second home in Florida and was known to spend most of his time there in 2016. The witnesses interviewed in Florida largely fell into two groups, friends of Sullivan and individuals connected to Smoronk's drug operation. These

interviews were for the most part turned over to the defense, with three significant exceptions discussed below.

24. After trial, the defense learned that a fifth officer, NH State Tpr. Vincente, who was "embedded" with the DEA, accompanied the other investigators on this trip. Vincente, and perhaps others, interviewed Tanner Crowley and Dominic Mango. Crowley was a potentially material witness regarding the homicides because Smoronk used Crowley's computer and internet knowledge and Crowley was involved in Smoronk's drug operation. Strong was aware that Crowley was known as Smoronk's "I.T. guy." Mango was the teenage son of Smoronk's Florida girlfriend Vanessa and friends with Crowley. Strong was aware of the interviews conducted with Crowley and Mango. The defense did not learn of these interviews until after trial and still have yet to receive any further information about them.

25. Among the friends of Sullivan who were interviewed was Jenna Guevara, who knew both Sullivan and Smoronk. Guevara provided information about Smoronk and Sullivan's drug operations as well as Sullivan's fear that Smoronk would kill her and statements about Smoronk's repeated threats to do so and his abuse. Guevara was first interviewed by phone on February 2, 2017 by Tpr. Shackford. She was next interviewed in person at the Cape Coral PD on March 12, 2017. On March 15, 2017, Strong arranged for Guevara to place a one-party call to Smoronk. During the call, notes were exchanged between Guevara and Strong. During this period of time, Guevara also consented to Strong's extraction of her cellphone. Strong interviewed Guevara again on March 19, 2017, by phone. The March 19 interview was recorded. It was not turned over until after the mistrial.

26. After the Florida trip, Strong and Keefe went to California on March 30, 2017 to interview Caroline Robinson, a suspected crystal meth supplier for Sullivan and Smoronk. The

interviews of witnesses in New Hampshire, Florida and California revealed that Smoronk and Sullivan brought drugs into New Hampshire from different locations outside of the state. Smoronk had connections in Florida from whom he could obtain cocaine. Sullivan introduced Smoronk to her connections in California and they started bringing in crystal meth in addition to cocaine, ultimately bringing in kilos of both drugs from Florida and California.

27. Additional and follow-up interviews of witnesses were conducted by Strong, Bright and McAulay between April and August of 2017. On March 27, Strong and Bright interviewed Angelica Brown at MCU headquarters in Concord, NH. Bright and McAulay conducted a second interview of Brown on April 10 in Maine, as well as an interview of her father on that same date. Brown became a witness of interest because of her conversations with people who were at the scene of the crime, particularly Seymour. Specifically, Brown heard Seymour say that he moved the bodies at Smoronk's home. Even though the interviews were completed in the spring of 2017, they were not provided to the defense until June 2018 (first interview) and August 2018 (second interview) after repeated requests from the defense.

28. On May 5, 2017, Bright and McAulay interviewed Jonathan Millman, a witness who saw Verrill on Friday January 27. Investigators learned about Millman from records of the text messages Verrill and Millman exchanged on January 27. The interview was not recorded, but Bright took notes. No report was ever done. The defense did not receive the notes nor any indication that Millman had been interviewed until after the trial.

29. Police executed another search warrant at Smoronk's residence in July 2017. Strong was present for the search. During the search, additional witnesses were interviewed. Faith Brown was interviewed for the first time. The interview was conducted by Tpr. Wardner and DEA agent Daly on Smoronk's property, in a vehicle parked by the house, and was recorded. Brown

was a close friend of Smoronk's, was allegedly involved in his drug operation, and had significant contacts with Smoronk after the homicides. Brown advised Wardner and Daly that Smoronk told her that he saw the bodies and almost vomited as a result; in contrast, Smoronk has consistently maintained to law enforcement that he did not find the bodies. DEA retained the recording of Brown's interview. Wardner took notes but retained them. The State did not turn over the notes or the recording until after trial. The defense did not have any indication from the discovery provided pretrial that Brown had been interviewed or that she had provided information regarding inconsistent statements by Smoronk.

30. On April 24, 2017, Lt. Hall, a member of the NIU's Mobile Enforcement Team, arrested James Morin for possession of meth as the result of a motor vehicle stop and participated in the subsequent debriefing of Morin. Hall prepared a report containing a narrative of the stop and arrest as well as an "intel" report containing the information provided by Morin during his debriefing. Morin pointed to Josh Colwell as his source of drugs and identified Colwell as the vice president of the Mountain Men. Morin told Hall that in January he had attended a party at the Mountain Men's clubhouse, a party which Smoronk also attended. Morin told Hall that Colwell had made statements to him about the homicide and described finding the women's bodies with Smoronk. Hall testified at deposition that he did not provide Strong with the police report but did provide him a copy of the debrief report. Strong did not contest Hall's testimony but did not documented the information in any way or include the debrief report in the homicide discovery nor do any follow-up investigation on Colwell's statements or with Morin. The defense did not receive a copy of the report and had no knowledge of Morin until after the mistrial.

31. In August 2017, McAulay by letter requested surveillance video from Holy Rosary Credit Union for the afternoon of January 26, when Colwell claimed he and Verrill had met up with Sullivan. The Credit Union complied with the request and sent McAulay video for the entire day. The defense did not learn of the request or the existence of the video until October 30, after the Court's denial of the defendant's Motion to Dismiss during the trial.

32. Also in August 2017, Strong arranged for and observed the polygraphs of Steven Clough and Michael Ditroia within the same week. Clough volunteered for a polygraph to "clear" himself as a potential suspect and Ditroia agreed to a polygraph after his arrest on felony drug charges. Strong obtained authorization as required from the AG for the polygraphs. Sgt. Sloper, also a member of MCU, had just received his certification in polygraph examinations in April 2017. Ditroia was his first criminal polygraph. Sloper determined that Ditroia passed his examination. He refused to polygraph Clough because, as he testified at deposition, he believed based on the interview of Clough he conducted prior to what was to have been the polygraph that Clough possessed too much "guilty knowledge" about the homicides. The State did not turn over Ditroia's polygraph until just before the motion to dismiss hearing held during trial and it did not turn over the Clough pre-polygraph interview video recording until a week later on October 30, a day before the mistrial was declared. As a result of the receiving the polygraphs the defense retained a polygraph expert. In contrast to Sloper's finding that Ditroia passed, the defense expert scored the interview by hand and by the computer program and both results scored Ditroia as not truthful in his answer to the question, "did you kill the two women in Farmington."

33. On September 15, 2017, McAulay and Bright interviewed Alan Johnson, who also saw Verrill on or around January 27. Information about Johnson came from the records of text

messages Verrill and Johnson exchanged on January 27. The recording of Johnson's interview was not turned over to the defense until October 23, during the trial. None of the discovery provided pretrial contained any indication that law enforcement had spoken with Johnson.

34. In September 2017, Strong and McAulay, accompanied by Keefe and Daly of the DEA, traveled to Florida to interview Fidencio Arellano. Strong and Keefe interviewed Arellano on September 21 after Guevara assisted in locating him. Arellano provided information during the interview about Smoronk's attempts to solicit him to kill first Edgar Morales and then Sullivan. During and after the interview Arellano indicated that his ex-girlfriend Jessica Rodrigue may possess information corroborating his account, although he was not asked for, and did not provide, her name during his recorded interview. The next day, September 21, McAulay and Daly interviewed Rodrigue at the jail where she was held and she provided information which corroborated Arellano's claims. McAulay interviewed Rodrigue at Strong's direction. Both interviews were recorded. Prior to trial the defense received only Arellano's interview. The defense did not learn of the Rodrigue interview until October 23, when undisclosed information first came to light as a result of Cote's contact with defense counsel.

35. In January 2018, the State Lab and Strong communicated about testing of the broken ring that had been recovered from Sullivan's body. As the investigators were looking to see if DNA belonging to the perpetrator was present on the ring, analysts at the Lab recommended that the ring be sent to an outside lab that specialized in Y-STR testing, the method of testing capable of detecting male DNA on an item believed to contain a primary amount of female DNA, testing that the NH Lab does not conduct. Ultimately, this testing was conducted and male DNA was detected. This male DNA does not belong to Verrill.

36. Fingernail clippings taken from Sullivan and Pellegrini during their autopsies were also sent to the State Lab to be tested and were similarly sent to an outside lab for Y-STR testing. Male DNA was detected under the fingernails of both women; Verrill was determined not to be the source of this male DNA.

37. On April 26, 2018, the DEA recorded a phone call made by Smoronk to Christine Sullivan's brother Jeff Sullivan. At some point, the DEA provided Strong a copy of this recording. Strong testified at deposition that he was told by the DEA that he was not permitted to provide this recording in discovery. He also testified that he was aware of the DEA setting up some type of recording system on Sullivan's phone to record additional calls, including other calls made by Smoronk as well as by other individuals, but that he was not provided with any other recordings. Finally, he testified that he did not know why the DEA provided him with this specific recording but no others. The defense did not receive the recording of the Smoronk-Sullivan call until the morning of October 31, the date the mistrial was declared. The defense has never been provided any other recordings and it is unknown how many exist and/or what information relevant to the homicides they may contain.

38. In September 2018 the State Lab conducted DNA testing on swabs of reddish-brown staining taken from the kitchen ceiling. These swabs had previously tested positive for blood. A DNA profile was obtained from the swabs and the Lab determined the blood contained male DNA. Verrill was excluded as the source of this male DNA.

39. Also in September 2018 McAulay and Keefe conducted a recorded interview of Chris Cortez, as referenced above in ¶ 20. Cortez provided information about statements Colwell had made to him, about the homicides generally but also specifically regarding Smoronk's

knowledge of and involvement in the homicides. This interview was not provided to the defense until October 2019.

40. On March 8, 2019, Sgt. Christopher Huse of the NIU participated in the proffer interview of Alex Tsiros with ATF agents and an Asst. U.S. Attorney. Tsiros provided relevant and material information about both Dean Smoronk, Steve Clough, and Michael Ditroia. Tsiros provided information about local sources of meth, including about an individual who sold meth supplied by Smoronk. Tsiros stated that Clough had told him that he helped move Sullivan and Pellegrini's bodies with Kevin Temple, Matt Granger and Scott Pelletier. Huse testified at deposition that he called Strong the day of the proffer or the very next day to tell him about the information related to the homicides that Tsiros provided. Strong did not make any documentation of this information in the homicide case. He did not request a report, interview Tsiros, or conduct any follow-up investigation as a result. Defense counsel did not receive the report on the proffer interview until December 2019, well after the mistrial had been declared.

Pre-Trial Discovery Disclosure by the AG

41. Between the appointment of the N.H. Public Defender on February 7, 2017 and the eve of trial in October 2019, the State turned over discovery in several formats, including paper, recordings of interviews, phone records and cell site information from phone companies, cell phone extractions, bench notes and raw data from the State Lab, photographs, and surveillance videos. In paper, the defense received nearly 11,000 pages containing investigative and narrative reports, search warrants, arrest warrants, requests for preservation of cell phone records, criminal records of witnesses, lab reports, crime scene investigation reports, evidence examination request forms, death certificates, autopsy reports, transcripts, cell site location data, one party authorizations, photocopies of text messages, and interview notes. The defense also received

over sixty audio or video recordings of witness interviews. The phone records included extractions of multiple phones; each extraction was equivalent to thousands of pages. There were also thousands of photos as well as 1,100 pages of material from the State Lab in addition to the page total referenced above.

42. The general practice of the State's management of discovery as described above was reflected in the manner of the AG's release of discovery to the defense in this case. Materials were turned over to the defense as the AG received them, except that the AG's did not turn over materials that the lead investigator did not document, follow up on, or remember to turn over. Nor did the AG make any agreement with the DEA about getting copies of the drug investigation pertaining to Smoronk and other major State witnesses, such as Clough, Ditroia and Colwell. Finally, the AG did not have a practice of auditing the investigation to ensure that they looked at everything MCU collected (although, when it finally conducted an audit in this case after the mistrial, it still failed to thoroughly review all investigative material in this case.

43. The police arrested Timothy Verrill on February 6, 2017. The Court appointed the Public Defender's Office to represent Verrill on February 7. The Public Defender sent out its standard discovery request on February 8 and filed a Motion to Preserve requesting, among other things, that text messages and emails that law enforcement exchanged with potential witnesses be preserved for the defense's inspection. The Court granted the Motion to Preserve on February 22, 2017.

44. Before indicting Verrill in November 2017 the State filed four motions to extend the indictment and discovery deadlines. The defense assented to the first two motions but objected to the third and requested an evidentiary bail hearing, which was held in August 2017. On

November 17, 2017, the grand jury indicted Verrill including on two counts of first-degree murder.

45. A dispositional conference was held in December 2017, at which time the parties discussed deadlines and scheduling of trial. The defense requested an October 2018 trial date based on the discovery it had received thus far. The State, without articulating what additional materials were left to turn over, stated its position that a March 2019 trial date was more realistic while also maintaining that they did not expect there to be significant additional discovery provided. With respect to the management of discovery, Attorney Ward represented that he had weekly if not daily contact with Strong. When Atty. Davis expressed concern as to what discovery remained outstanding and sought to determine whether the State had provided all discovery thus far in possession of the State Police, Atty. Ward observed that the Atty. General's Office could not provide reports that had not yet been written. The Court scheduled trial for October of 2018.

46. From the outset of the discovery process the defense requested specific items that appeared to have been completed but not turned over. The State's responses, when they responded, reflected the mismanagement, indifference and deception on the part of both the AG's office and MCU regarding their discovery obligations. Specifically, the delayed disclosure of the Angelica Brown interviews reflected disorder and disarray and AG's responses to the defense's repeated requests for drug investigation were deceptive and misleading. They failed to ever inform the defense that no drug investigation would ever be provided because of the decision made at the outset to have the DEA, not the NIU, conduct the drug investigation.

47. In October 2018 the defense deposed Strong in accordance with the parameters the Court had set for his deposition. During deposition, the defense sought to question Strong, within those

parameters, about witnesses interviewed during the course of the investigation as he served as the lead investigator; the State refused to allow Strong to answer questions regarding witnesses he had not personally interviewed.

Angelica Brown interviews

48. In a May 23, 2017 email, Atty. Davis requested multiple items of discovery, including any interviews law enforcement had conducted with Angelica Brown. Atty. Ward responded on May 26: "As far as the remaining discovery, as soon as I receive something it goes out to you. I will talk with State Police about your specific list."

49. No interviews of Angelica Brown were provided during the following few months, nor in the discovery provided in January 2018 pursuant to the scheduling order issued by the Court as a result of the December 2017 dispositional conference.

50. On April 21, 2018, Atty. Davis asking whether the prosecutors had provided discovery pursuant to Rule 12b-1(A-E). Atty. Ward responded that the Atty. General's Office had recently received some police reports that would soon be provided but did not possess any additional discovery; he noted that he expected additional discovery would continue to be generated. Atty. Davis noted in response that the defense's concern was that the ongoing additionally generated discovery concerned information within the State's possession prior to the discovery deadline. aised specific concerns that the State had discovery that was in existence at the time of the discovery deadline and had yet to turn over (such as the interviews of Angelica Brown).

51. The defense filed a discovery motion on May 25, 2018 requesting that the State provide discovery pursuant to NHRCP 12(b), which the Court granted. In the Motion the defense reiterated the concern it expressed in the above email regarding the State having information in its possession that was not being provided to the defense in a timely fashion. This Motion was

followed by a letter dated June 13, 2018, in which Atty. Davis requested a list of discovery items, including reports, notes and recordings of law enforcement contact with Angelica Brown, as the defense had still not been provided any interviews with Brown.

52. On June 29, 2018, the State finally turned over the first interview with Angelica Brown which had been conducted on March 27, 2017. However, the second Brown interview was not turned over at this time.

53. Thereafter, the defense filed a motion for an immediate hearing on discovery and requested depositions of Strong and Sonia. The State objected, stating that had met with the lead investigator to conduct an audit of "the discovery to date," which they maintained addressed the defendant's concerns regarding undisclosed discovery.

54. Despite these assurances, the State still failed to disclose existing discovery. On August 15, 2018 the defense sent another email to the Atty. General's Office noting that it had come to their attention that the police spoke with Angelica Brown twice, one in March 2017 at state police headquarters and then again in April 2017 at her father's home in Maine.

55. On August 17, 2018, the State turned over the second interview with Angelica Brown that had occurred on April 10, 2017. No explanation was provided for the failure to disclose the Angelica Brown interviews in a timely fashion, nor was any explanation provided for how the defense's multiple specific requests targeted towards obtaining information related to Brown did not result in provision of both interviews.

56. As a result of the delayed disclosure of both Brown interviews, the defense filed a further Motion regarding discovery and requested a hearing, citing ongoing concerns regarding the provision of discovery. No hearing was held.

57. Additional specific requests made by the defense will be discussed in the prejudice piece of the legal argument below, as they relate to specific items that were not provided until either during or after trial.

Pre-Trial Litigation

58. Prior to trial, the defense litigated the admissibility of alternative perpetrator evidence with respect to Smoronk. Specifically, the defense sought leave of the Court to introduce the following categories of evidence at Verrill's trial: Smoronk's solicitation of multiple individuals to kill Sullivan; Smoronk's means and ability to hire someone to kill Sullivan and thereby distance himself from the job; Smoronk's view of Sullivan as a threat to his freedom and his drug dealing business, thereby establishing his motivation to kill her; Smoronk's repeatedly expressed desire to kill Sullivan; and Smoronk's verbal, emotional, and physical abuse to Sullivan, as an unsuccessful attempt to terminate the relationship. This Motion was granted by the Court.

59. The defense filed several related motions in limine, seeking admission of statements Sullivan made to various people regarding her fear that Smoronk would kill her; statements Smoronk made to others about his hatred of Sullivan, his desire to kill her and/or end the relationship and his fear that she posed a threat to him due to their pending criminal charges and that he was therefore stuck with her. These motions were largely granted, subject to certain limitations.

60. The defense also filed a motion in limine regarding Josh Colwell. Specifically, the defense sought leave to introduce evidence regarding Colwell's role as an enforcer for Smoronk's drug operation and his facilitating Smoronk's distribution of drugs through the Mountain Men motorcycle club whose leadership he belonged to. The Court permitted the

defense to introduce evidence about the relationship between Smoronk and Colwell as well as about Colwell's role within the Mountain Men, but barred the defense from referring to Colwell as an enforcer.

61. The defense also filed a motion in limine related to John "Buddy" Seymour, who died of a drug overdose in August 2017 and was consequently unavailable as a witness at the time of trial. The defense sought admission of excited utterance statements made by Seymour to Clough and Steadman upon leaving the Smoronk residence on Saturday January 28 about how much blood he and Clough had seen as well as statements Seymour subsequently made to others about what he had done while inside the residence. The Court granted the motion with respect to the excited utterance statements and ruled the defense could introduce statements Seymour made to and in front of Angelica Brown about moving bodies, cleaning up a murder scene, and trying to make it look like a robbery.

October 2019 Trial

62. Trial was held in State v. Verrill in October 2019. Jury selection took place between October 1 and October 7. Individual voir dire began on October 3. The State's voir dire questions largely focused on emphasizing that although the State's burden of proof was beyond a reasonable doubt, the State did not intend to explain, and could not explain, exactly how the murders occurred. The State advised prospective jurors that they would not hear about a confession from Verrill nor hear from anyone who claimed to have been an eyewitness to the murders. Finally, the State warned that at the end of the trial the jurors may believe that there was someone else involved in the murders, perhaps even someone who had put Verrill up to committing them, and sought assurance that had the State met its burden, the juror would still be willing to convict Verrill in that scenario.

63. The defense voir dire focused in part on assessing jurors' attitudes towards law enforcement witnesses and scientific evidence. The defense also prepared jurors to hear evidence of Verrill's involvement with drugs, both using and selling, and asked them to think about the effect this evidence would have on them and whether they believed that Verrill's involvement with drugs made it more likely that Verrill committed murder. Finally, the defense discussed with prospective jurors their understanding of the burden of proof and presumption and innocence as well as any concerns they thought they would have about returning a not guilty verdict.

64. Strafford County Superior Court heard eleven days of testimony between October 15 and November 1.[2] The State presented its case over eight days and called a total of twenty five witnesses, comprised of nine civilian witnesses, eight law enforcement officers, and eight expert witnesses. Dean Smoronk was on both parties' witness lists but was not called by either side. The first few days of testimony featured a mix of civilian and law enforcement witnesses; the last six witnesses called were all experts.

65. As indicated earlier in this Motion, the bodies of Christine Sullivan and Jenna Pellegrini were found on the morning of Sunday, January 29, 2017. At Verrill's trial, the State alleged that he killed the two women on the morning of Friday, January 27.

66. The State in opening described the murders as brutal, passionate and emotional, and both the murders and clean-up efforts as disorganized and hyper. The State told the jury that Sullivan was attacked in the kitchen and likely killed in the three-season porch off the kitchen as she tried

[2] The testimony on November 1 was cross-examination and re-direct examination of Scott Pelletier, a defense witness whose direct examination took place on October 30. Although the mistrial had been declared on the afternoon of October 31, the parties and Court nevertheless decided to complete Mr. Pelletier's testimony because of his serious health issues.

to defend herself and that Pellegrini was killed in the guest bedroom and had likely been either asleep or unconscious at the time she was killed.

67. The State indicated that Sullivan and Smoronk were in an on and off again relationship which was mostly off and together dealt drugs. The State's opening identified Verrill as someone who worked for Smoronk and Sullivan and ran the business for them when they were away. The State emphasized that Smoronk was in Florida from January 25 until the evening of January 28, in contrast to Verrill who the State described as the last person seen on surveillance video inside the Meaderboro Road residence before the system stopped recording. The State further described Verrill as acting oddly and using drugs heavily throughout January 2017.

68. The State's opening signaled the centrality of Josh Colwell to the State's case. Specifically, the State previewed a significant portion of Colwell's anticipated testimony to the jury, explaining they would hear from Colwell that he and Verrill met up with Sullivan on the afternoon of Thursday January 26 in the parking lot of the Holy Rosary Credit Union in Farmington. The State asserted that while there, Colwell met Jenna Pellegrini, who was with Sullivan, but that Verrill did not meet her. The State also focused on Colwell's alleged contact with Verrill late on the evening of January 26/into the early morning hours of January 27 and mid-morning on January 27 and explained that the jury would hear from Colwell that he was concerned by Verrill's demeanor and statements.

69. The State alleged that on Friday, as Smoronk and mutual friends tried without success to reach Sullivan, Verrill purchased items such as ammonia and ice melt and engaged in clean-up efforts at the residence. The State advised jurors that some cleaning supplies had been found at the residence and others found in Verrill's trunk. The State portrayed Verrill as out shopping

with his girlfriend and brother on Saturday, while Smoronk and others grew increasingly concerned for Sullivan's welfare.

70. The State alleged that after communicating with Colwell, Smoronk sent Steve Clough to his residence to check on Sullivan on Saturday evening while making plans to return to New Hampshire. The State described Clough and John "Buddy" Seymour going to Smoronk's residence at his request on Saturday evening. Also on Saturday evening, Verrill left dinner with his girlfriend and mother and sought admission to Wentworth-Douglass Hospital for substance abuse treatment. Continuing its discussion about the events of Saturday evening, the State described Colwell picking up Smoronk in Boston but left out Seymour's second trip to the Smoronk residence on Saturday evening, on which he was accompanied by Scott Pelletier and Matthew Granger. The State advised the jury that police responded to the residence and the bodies were ultimately found after Smoronk called 911 around 3:00 a.m. on Sunday January 29. The State described Verrill leaving his brothers' home on Sunday after receiving a call from the police that they wished to speak with him and asserted that throughout the following week until his arrest, Verrill "acted like someone who'd committed a life-altering act." The State advised jurors that Verrill's prints were located on two trash bags found in the basement of the Meaderboro Road residence and that a hat Verrill was seen wearing was found in a trash can near where the bodies were located.

71. The State warned jurors that they would hear from and about a number of individuals who acted out of their own interest in self-preservation with respect to their involvement in drugs and that this explained why several witnesses did not voluntarily contact the police nor fully cooperate. However, the State emphasized that these witnesses had no interest in, and did not seek to, protect themselves with respect to the murder investigation.

72. Finally, the State cautioned the jury against what it characterized as the defense's attempt to create a bogeyman and claimed the defense would invite the jury to speculate as to the involvement of Smoronk in the murders. In contrast to its questioning during individual voir dire, the State did not attempt to implicate anyone other than Verrill in the murders.

73. The State made extensive use at trial of an exhibit which consisted of a compilation of various witness' text messages. The exhibit included the cellphone numbers for several key individuals, including Smoronk, Clough, Colwell, and Verrill, and displayed text messages exchanged by these individuals and others, in the month of January 2017.

74. The State sought to establish that Smoronk was in Florida from January 25 through the evening of January 28 through testimony from Vanessa Mango, who was in a romantic relationship with him at the time, and cell site location information. Mango testified that she had contact with Smoronk while he was in Florida and the State presented location data regarding Smoronk's cellphone's use of Florida towers during the relevant period.

75. The State sought to establish that the murders occurred on the morning of Friday morning through information obtained from Sullivan and Pellegrini's phones. Their telephone analyst identified 1:46 a.m. on Friday January 27 as the time of the last outgoing call made by Sullivan's cell phone. Their digital forensics expert testified about the last activity on Pellegrini's phone, which consisted of text messages and "selfie" photographs from early Friday morning.

76. The State sought to link Verrill to the murders and to Smoronk's residence on Friday January 27 through the use of surveillance video from the residence and cell site location data regarding his phone from various times on Friday. The State presented testimony from Erin Feeley about her observations of Verrill on the night of January 27 and from Kathy Bradstreet about conversations she claimed to have had with Verrill during that weekend.

77. The State presented evidence of Verrill's activities during Saturday and Sunday January 28 and 29, which included purchasing a new phone and shopping with his brother, as well as about Verrill leaving his brother's home after the police called requesting to speak with him. The State also presented forensic evidence about Verrill's prints found on trash bags in the basement of the residence and a hat found near the bodies which contained DNA from both Verrill and Sullivan.

78. The State presented lengthy testimony from both Steve Clough and Josh Colwell. Both testified pursuant to proffer letters and grants of immunity.

79. Clough discussed his friendship with Sullivan and indicated he knew Smoronk as well and that he purchased drugs from both of them. Clough also knew Pellegrini. He testified that he had contact with Sullivan and Pellegrini late on Wednesday January 25 when he came to the Meaderboro Road residence to assist Sullivan in moving a grandfather clock.

80. The bulk of Clough's testimony concerned his contact with Smoronk on Saturday evening and Sunday morning, as well as his two visits to the Meaderboro Road residence during that same time frame. He testified that he went to Smoronk's residence accompanied by Nicole Steadman and John "Buddy" Seymour on Saturday evening in response to a telephone call he received from Smoronk. Clough explained that he spoke on the phone again with Smoronk as well as texted with him while he was at his residence. Upon arriving, Clough, with Seymour, broke in at Smoronk's direction by using a shovel to pry open the sliding glass door between the three-season porch and kitchen, and both then walked through the house. Clough observed that the safe in the master bedroom was open. He claimed to have removed a small quantity of drugs at Smoronk's request. Clough testified that he observed a large blood stain on a mattress in the guest bedroom where Pellegrini had been staying on Wednesday night. He testified that he did

not call 911 or advise Smoronk about the blood stain. When questioned, Clough claimed that he did not believe it his place to call 911 and that he did not want to worry Smoronk as he believed he was flying back from Florida later that evening.

81. Clough testified that he returned to Smoronk's residence, again at Smoronk's request, during the early morning hours of Sunday January 29. He testified that Smoronk was on the phone with his attorney when Clough arrived and then called 911. Finally, Clough testified about his contact with the police on Sunday as well as his subsequent interviews with law enforcement.

82. Josh Colwell testified regarding his interactions with Verrill and Smoronk, including throughout the month of January 2017. Colwell explained that Verrill introduced him to Smoronk when Smoronk was looking for someone to help him in collecting debts, but claimed he had never actually collected any debts for Smoronk (although agreed that when in Florida with Smoronk they had gone to see someone who owed Smoronk money, but denied doing anything to this person).

83. Colwell offered that Verrill had been acting strangely during the month of January and described him as unreliable and often confused. He claimed that he had been concerned about him and described texts he had sent to Smoronk expressing that concern. Colwell testified about his involvement with drugs but claimed it was separate from his position as sergeant-at-arms with the Mountain Men motorcycle gang. Colwell testified about two distinct drug operations. One, he asserted that he, Smoronk, Sullivan and Verrill were involved in distributing drugs and reviewed text messages he had sent Verrill about a calendar system he was setting up to keep track of these sales. In contrast, Colwell testified about a separate cocaine operation that he said

involved Smoronk and Sullivan, as well as another of Colwell's associates, but in which Verrill was not included.

84. Colwell testified that he and Verrill met up with Sullivan on the afternoon of Thursday January 26 at the Holy Rosary Credit Union in Farmington. Colwell described meeting Pellegrini in the parking lot, initially mistaking her for Sullivan when he got into Sullivan's vehicle. He maintained that he may have told Verrill that Sullivan had someone with her but that Verrill had not met her as he had. Colwell testified that first he hugged Sullivan while simultaneously dropping money into her bag, then Verrill did.

85. Colwell testified that Thursday night he went out with Ian Bates, a fellow motorcycle gang member. He described texting with Verrill and Verrill coming to his residence after leaving Smoronk and Sullivan's. Colwell claimed that during this visit late on Thursday night Verrill seemed off, that he was acting aggressively and talking about Pellegrini being an informant. He testified that Verrill called Smoronk with his concerns and then left, saying that he was headed back to Meaderboro Road to set up cellphone cameras.

86. Colwell testified that he next saw Verrill mid-morning on Friday when Verrill returned to his residence. He stated he believed that Verrill was coming from the direction of Farmington. He described Verrill acting weird, wearing only a t-shirt despite the cold and smelling of body odor. Colwell claimed that Verrill asked for a change of pants and changed in front of him and that he drank a couple of shots and smoked marijuana. Bates had spent Thursday night at Colwell's house and was still there when Verrill stopped by Friday morning. The State elicited testimony from Colwell that he believed that while at his house, Verrill had a conversation with Bates and that as a result Bates was concerned. Ian Bates did not testify.

87. Colwell claimed that he told Verrill that Smoronk would be angry if Verrill had done anything stupid and that Verrill responded "Really?" Colwell testified that Verrill left saying he had to tie up loose ends. He explained that he and Bates later ran errands and while they were out drove by Smoronk's residence to see if Verrill were there; he claimed he observed Verrill's car in the driveway.

88. Colwell testified about reaching out to Smoronk on Friday afternoon and claimed he did so because he was concerned that Sullivan had been hurt or killed. Ultimately, Colwell picked Smoronk up in Boston late Sunday night and drove him to the Meaderboro Road residence. He and Smoronk went through the residence and after observing the bloody mattress, Colwell left with drugs that Smoronk asked him to remove. Colwell claimed that as he was leaving he told Smoronk to call 911.

89. The defense case focused on Smoronk and Sullivan's abusive relationship and Smoronk's motive to eliminate Sullivan, both as a threat to his freedom due to their pending charges and as a partner in the drug operation. The defense in opening countered the State's description of Verrill as integral to the drug operation by advising the jury that Verrill was simply one among several distributors and that it was the developing relationship between Smoronk and Colwell that Smoronk viewed as the way to advance the drug business while simultaneously removing Sullivan, despite her role as primary manager of the New Hampshire aspect of the business. In contrast to the growing relationship between Smoronk and Colwell, the defense pointed out that Smoronk was becoming frustrated with Verrill, complaining about him to Colwell. The defense cited Colwell's repeated trips to Smoronk's house on the evening of Tuesday January 24 and into the early morning hours the following day (due to Smoronk's stated desire to see him before leaving for Florida) and the surveillance footage which seemed to show Smoronk pointing out

one of the cameras to Colwell on his visit, as well as Colwell's removal of a different camera late on Saturday January 28 at Smoronk's direction as evidence of this growing relationship, one that did not involve Verrill. Texts Colwell and Smoronk exchanged revealed their development of a code to communicate about the drug business and Smoronk's frustration with Verrill and dissatisfaction with Sullivan.

90. With respect to Verrill's activities on Thursday January 26 into Friday January 27, the defense pointed to the Alexa recordings made during the early morning hours of Friday in the residence, which reflected Sullivan and Verrill joking and making song requests. The defense emphasized that although the jury would hear of Verrill's prints on trash bags, they would also hear that the analysts were unable to say how or when the prints got there. The defense also highlighted lab findings not included by the State in its opening, such as male blood on the kitchen ceiling from someone other than Verrill and male DNA that was not Verrill's on one of Sullivan's rings, believed to have been broken as she struggled with her killer, and underneath both victims' fingernails.

91. Similar to its opening, the defense cross-examination of the State's witnesses and defense presentation often focused on Smoronk and Colwell as well. The defense elicited testimony from Vanessa Mango and Jenna Guevara that after Smoronk returned to New Hampshire early on Sunday January 29 but before he had called the police, had texted them about a double homicide (despite his claim that he never found the bodies) and spoke on the phone at length for over thirty minutes before contacting 911.

92. The defense demonstrated to the jury that Smoronk repeatedly pointed the finger at Verrill during his contact with the police. In addition to blaming Verrill during his multiple lengthy interviews with law enforcement, Smoronk also spoke at length about his frustrations

regarding his relationship with Sullivan, including his belief that he was stuck with her out of fear that she would retaliate against him in their pending criminal case in South Carolina if he ended the relationship. Smoronk falsely claimed that the surveillance cameras at the house did not work when asked about them by the first officers who responded.

93. Cross-examination of Clough focused on the number of times he was questioned by law enforcement and emphasized that the police searched his house and his person, including taking his fingerprints and a DNA sample. Clough insisted that despite this attention from law enforcement, he had nothing to be nervous about as he knew he had not committed the murders. Clough admitted that he had brought flashlights, knives, and a gun with him when he went to Smoronk's residence on the evening of Saturday January 28. He maintained he did not see blood on the shovel he and Seymour used to break in. Clough agreed that he was surprised that Smoronk called him that Saturday, as the two of them were not close. Finally, Clough spoke about the volatile relationship between Smoronk and Sullivan, including Smoronk's physical abuse of her, and Sullivan's repeated statements that were she to be killed, it would be Smoronk who was responsible.

94. Cross-examination of Colwell focused on his role within the Mountain Men motorcycle club, including his reluctance to speak with law enforcement in this case until he received assurances that he would not be questioned about the club. The defense examined with Colwell his growing ties with Smoronk, such as Smoronk's attendance at a party held at the Mountain Men clubhouse in January 2017 and Colwell's two trips to Florida, where he stayed with Smoronk at his Cape Coral residence. Cross also included review of Colwell and Smoronk's text message exchanges regarding drug operations, including the cocaine plan from which Verrill was excluded, a deal totaling $24,000, as well as Smoronk's complaints about Sullivan. Colwell

testified that he, Smoronk, and Sullivan counted money at the Meaderboro Road residence late on Tuesday January 24, before Smoronk left for Florida. He admitted that he removed a significant quantity of drugs - approximately one ounce of cocaine, two pounds of methamphetamine, and one hundred pills - from the residence at Smoronk's request before Smoronk called 911 on the morning of Sunday January 29 — and that he continued to engage in drug sales with Smoronk for months after the murders.

95. Cross-examination of the officers responsible for evidence processing and the State Lab analysts largely focused on items the State did not highlight. The defense elicited testimony regarding the reddish-brown staining on the kitchen ceiling, which was determined to be blood and contained male DNA which was not Verrill's. The defense also elicited testimony regarding Sullivan's rings and the victims' fingernail clippings, including that the State Lab did not conduct Y-STR testing, the type of testing needed to find male DNA on items which also contained large amounts of female DNA, and that as a result these items were sent to an outside lab for testing.

96. The defense called nine witnesses before the mistrial was declared. The defense witnesses were a mix of individuals who were friends with Sullivan and/or Smoronk and had knowledge about the tumultuous relationship between them and individuals who either were at the Meaderboro Road residence on Saturday January 28 or had contact with people who were.

97. Friends of Sullivan testified that she was increasingly anxious, emotional and fearful throughout 2016 and into 2017. They indicated that in communications in January 2017, Sullivan had said that she was leaving Smoronk. Jenna Guevara was called by the defense and characterized the relationship between Sullivan and Smoronk as toxic. Guevara testified about abusive text messages Smoronk had sent Sullivan as well as those he had sent to Guevara with

complaints and threats regarding Sullivan. Guevara testified that she had met Verrill when he came to Florida and discussed him playing with her autistic son. Finally, Guevara described Sullivan as like a mother to Verrill and characterized Verrill's relationship with Sullivan and Smoronk as like a child caught in the middle between two divorced parents.

98. Dan Wall testified that he had known Smoronk for over fifteen years and had become friendly with Sullivan as a result of her relationship with Smoronk. Wall testified as to his knowledge of their drug operation, which he explained included crystal meth, steroids, and cocaine. He testified that he was aware of them having drugs shipped to them in the mail, including two kilograms of cocaine on one occasion, watching Smoronk conduct sales, and observing cash in the residence, once in the amount of $75,000. Finally, he testified that around the time of the murders, Smoronk had told him that he had a new drug connection, who he said was named Josh. Wall also testified as to his observations and knowledge of the relationship between Smoronk and Sullivan and Smoronk's abuse of Sullivan. Finally, Wall testified about his interactions with Smoronk after the murders. Wall saw Smoronk on Tuesday January 31 and described Smoronk's demeanor on that date as calm and laidback. He testified that Smoronk told him that he did not have to worry about the criminal charges anymore because Sullivan was gone. He was also in contact with Smoronk throughout the month of February and explained that Smoronk seemed normal and was seeing someone else as well as trying to retrieve items he believed had been stolen from him.

99. The defense called Nicole Steadman, who accompanied Clough and Seymour to Smoronk's residence on the evening of Saturday January 28. Steadman described Clough as frantic before getting there, explaining that she insisted on replacing him as driver because he was fiddling through his backpack and pulled out his gun on the way. She explained that once

they arrived, she waited in the car for approximately fifteen to twenty minutes when Clough and Seymour went inside and that she then grew irritated and called Clough repeatedly without a response. She then when into the house and observed Clough in the kitchen on his cellphone. She told them to hurry up and returned to the car, but it took another approximately fifteen to twenty minutes for them to leave the house. She described Clough and Seymour as frazzled, white, and looking like they'd seen a ghost when they got back to the car and said Clough threw up. She recounted hearing Seymour make a comment about he and Clough having seen a lot of blood. Steadman explained that later that night she and Clough wen to Walmart and Clough got new cellphones. Finally, Steadman indicated that she drove Clough back to the Meaderboro Road residence in the early morning hours of Sunday January 29 and they were met by Smoronk, who told them he was calling in a double homicide to the police.

100. The final witness the defense was able to call before the mistrial was Scott Pelletier. Pelletier was close friends with Sullivan and was friends with Pellegrini. Pelletier knew of Smoronk and knew Clough, including that Clough was afraid of Smoronk. Pelletier went to the Meaderboro residence late on Saturday January 28 with Seymour and Matt Granger. Pelletier testified that he was not close with Seymour but that Seymour had called him out of the blue that night and asked for a ride. He described Seymour as acting weird and saying repeatedly to he and Granger that they had done it; when they questioned him, Seymour said that Sullivan and Pellegrini were missing. As a result, Pelletier testified that the three of them went to the Meaderboro residence, although Granger stayed outside. Pelletier explained that he and Seymour first went into the tool room off the basement, which was open, where Seymour told him that the box where Pelletier knew drugs to have been kept was empty. They proceeded upstairs and Pelletier saw the bloody mattress. He described returning to the kitchen after that

and then seeing Seymour enter the porch from the deck by the hot tub. Pelletier explained that he had planned to go down to the basement but Seymour left the house and so he followed as he did not want to go down by himself. He described returning to the car and Granger turning gray and seeming stunned, as he indicated that he had seen someone in the basement.

101. Pelletier also spoke about his knowledge of Smoronk and Sullivan's drug business. He described regularly seeing large quantities of drugs at the residence, such as two to three kilograms of cocaine and three to five pounds of methamphetamine. He explained that drugs were typically stored in the box in the tool room and safe in the master bedroom. He also testified that he had seen between $5000 and $30,000 cash at the residence. Finally, Pelletier testified about Smoronk and Sullivan's relationship and like other witnesses, characterized the relationship as rocky.

Mid-trial disclosures and first motion to dismiss

102. The events that occurred during trial which ultimately led to the mistrial declaration were set in motion on October 19. On that Saturday, a gentleman named Patrick Cote sent an email to Katherine Cooper, executive secretary of the New Hampshire Association of Criminal Defense Attorneys. Cote asked for Cooper's assistance in reaching Verrill's counsel, indicating he possessed relevant information about Clough.

103. Cooper forwarded the email to Verrill's counsel who requested that their investigator, Claire Adams, make contact with Cote. Adams did so and Patrick Cote explained that his daughter Monique, who had previously dated Clough and shared a daughter with him, also had relevant information about Clough. Adams subsequently interviewed Monique Cote and Cote then emailed Adams. Adams sent those emails to defense counsel on the morning of October 23,

before court began. Counsel reviewed the emails and realized that Cote had forwarded to Adams emails that she had exchanged with Trooper McAulay during the investigation of this case.

104. Counsel made the State and Court aware of the situation before trial resumed that morning. The defense expressed concern that they had not received any discovery regarding Monique Cote or any information she may have provided. Prior to receipt of the emails from Cote, the defense was wholly unaware of her being interviewed in connection with the investigation. Finally, the defense observed that they had specifically requested all emails and text messages that investigators had exchanged with witnesses yet had not previously been provided with these emails.

105. The State indicated its intention to contact McAulay and request that he review his computer to provide the State and defense any emails he had exchanged with Cote. Trial testimony continued throughout the day.

106. At the end of the day, the State asked to address the Court. At this time, Atty. Hinckley indicated that the Attorney General's Office had learned that the material McAulay had withheld consisted of far more than just emails with Monique Cote. Ultimately, the defense received five recorded interviews of which it had previously been unaware, with Monique Cote, Chris Cortez, Jessica Rodrigue, Alan Johnson, and Erin Feeley, totaling approximately four hours. Like Cote, Cortez and Rodrigue were completely unknown to the defense. The defense was aware of Alan Johnson but had not previously received any indication that he had been interviewed by law enforcement. Prior to trial, the defense had been aware of a phone interview conducted by a member of Major Crimes with Feeley. As recounted above, Feeley was called by the State at Verrill's trial; at the time her second, lengthier recorded interview was revealed, she had already testified.

107. The State also provided a number of emails that Monique Cote and McAulay exchanged in March, April and August 2017 as well as September 2018. All of these emails related to Clough, Smoronk, or Sullivan. Many of them included Cote forwarding to McAulay screenshots of exchanges she and Clough had had via text message. Cote attached to an email she sent in April 2017 a court order from the custody case she was involved in with Clough that referenced Clough's numerous acts in defiance of the court's orders and attempts to evade law enforcement and prevent Cote from having contact with their child. The September 2018 emails included screenshots of Cote's text messaging with Chris Cortez and prompted the State Police to interview Cortez, who in turn provided information about statements Josh Colwell made to him regarding the homicides and Smoronk's involvement.

108. On October 24, the State also disclosed approximately 100 pages of emails Scott Goodyear sent to McAulay in April and May of 2017. The State Police conducted an interview of Goodyear in Florida in March 2017, which the defense was provided in discovery; however, the defense had no information prior to trial regarding McAulay's communications with Goodyear after his interview.

109. Defense counsel spent the evening of October 23 into the morning of October 24 reviewing the newly disclosed information. The defense filed a Motion to Dismiss and requested an evidentiary hearing on the motion for the afternoon of October 24. Just prior to the hearing, the defense learned for the first time that as part of the investigation in this case, the State Police had arranged for a polygraph interview of Michael Ditroia.

110. Strong and McAulay testified about the items not turned over (those that had then been discovered) and the investigation on the afternoon of October 24 and the Court heard argument on the defense motion on the morning of October 25. The State argued that the discovery

violations were not a product of bad faith nor willful or intentional. They disputed that the undisclosed material was material and exculpatory or that there had been a pattern of misconduct. The State emphasized that the case was unique in the scope and volume of discovery and that the undisclosed material was a fraction of the total. In contrast to Atty. Ward's statement at the December 2017 status hearing that he was in weekly if not daily communication with Strong and the State's representations in pre-trial litigation that it was on top of discovery, the State now accused Strong of sloth and criticized him for failing to properly supervise the investigation. The State also declared it "noteworthy" that Strong was no longer a lead investigator. (Depositions later made clear that Strong was no longer a lead investigator because he had received a promotion and was now the sergeant in charge of the Special Investigations Unit.)

111. The State insisted that the failure to provide this material was not the result of anything systematic and assured the Court that during the previous two days both the State Police and the Attorney General's Office had taken every step possible to ensure that all discovery had now been provided for the defense.

112. Trial testimony continued on the afternoon of October 25 and throughout the day October 28, with the Court denying the defense motion on the record at the close of testimony on October 28. Trial continued for the next two days.

Mistrial decision

113. After testimony ended for the day on October 30, the State approached the defense counsel to alert them additional undisclosed evidence had been located, specifically what was characterized as a polygraph interview of Steven Clough. The Attorney General's Office also advised defense counsel that McAulay had been found to be in possession of a cellphone

extraction of a phone belonging to Tanner Crowley and that video recordings from the Holy Rosary Credit Union (where Colwell testified he and Verrill met up with Sullivan and Pellegrini on the afternoon of January 26) had also been located. They indicated that a copy of the Clough polygraph was then en route to the courthouse and that the State Police had been instructed to deliver the other materials to defense counsel first thing the next morning. When counsel questioned how and when the State Police had had access to Crowley's phone, given that no interview of Crowley or information regarding contact between the police and Crowley was included in pre-trial discovery, the Attorney General's Office indicated that they were seeking to determine that. (The explanation provided at the time was that McAulay accompanied the DEA to the Florida PD investigating Crowley's murder; the DEA sought to download the phone in the custody of that PD and McAulay provided them use of his equipment).

114. Defense counsel endeavored to watch the three hour recording of Clough's pre-polygraph interview on the evening of October 30 and attempted to determine how they could make use of the information contained therein given that Clough had already testified.

115. On the morning of October 31, in addition to the single cellphone extraction and surveillance footage counsel were expecting, a member of Major Crimes dropped off a total of five cellphone extractions (which initially caused counsel confusion as the discs were labelled "Clough") and a disc containing a recorded telephone call placed by Smoronk to Christine Sullivan's brother Jeff dated April 26, 2018. The disc of the call included no information regarding how it was recorded or how it came into the possession of law enforcement. There were eight discs of Credit Union surveillance footage.

116. Throughout the morning, defense counsel attempted to review the material on the newly received discs as well as consult with other attorneys in their office regarding Verrill's options

and communicate with the Attorney General's Office. Counsel recall multiple communications with the State. First, the parties agreed that it was appropriate to notify the court and request a status hearing that afternoon regarding the additional discovery violations. Defense counsel also informed the Attorney General's Office that materials in addition to those they'd been told to expect had been delivered, although counsel had not yet been able to determine the content on all of the discs. The prosecutors indicated that they were unaware of what the defense had been provided, as they had instructed State Police to deliver the materials to the defense and were themselves going to State Police headquarters to review the materials.

117. As the morning progressed, one of the options defense counsel began discussing with colleagues was requesting a mistrial. Counsel had started thinking about the prospect of a mistrial the previous evening when reviewing the lengthy Clough recording; the newly disclosed material heightened their concern as to the difficult of proceeding with trial at this point. They reached out to the Attorney General's Office to determine what position the State would take should the defense request a mistrial. Attorney Ward called defense counsel and indicated that their office was authorized to agree to a mistrial without prejudice. Defense counsel explained that they had not yet made a determination whether to seek a mistrial, but that in any event they would not be conceding that if they did it should be without prejudice; rather, the defense anticipated taking the position that the issue of prejudice be determined at a later date by the Court after further litigation (and sufficient opportunity for the defense to review the additional materials).

118. As defense counsel continued to review the new material and engage in legal research and consultation with colleagues, the prosecutors called with further news. Attys. Ward and Hinckley indicated that they had arrived at headquarters and seen materials that they had not

previously seen and did not believe had been provided in discovery. They indicated that they had not yet reviewed the material but that it included cell phone records and that although they recognized some of the numbers from the cellphone chart that had been utilized during the trial, there were others that they did not recognize. They made reference to the material they viewed being related to the drug investigation, which they indicated they had just learned the State Police had kept separate and not provided. When defense counsel asked for some indication as to how much material the State believed had not been disclosed, Atty. Ward indicated that it was significant.

119. As a result of this phone call, and more specifically the State's observation that not only was there more discovery that had not been provided, but that that material was significant and involved the drug investigation, defense counsel determined that they had no choice but to request a mistrial. Defense counsel had made numerous attempts before trial to obtain information related to the investigation into Smoronk and Sullivan's drug business. Information was sought not just via the Attorney General's Office and motions filed in this case, but also via multiple letters to the U.S. Attorney's Office and DEA counsel. All such attempts failed to produce any results, despite the obvious centrality of the drug operation to both the defense and State cases as presented at trial.

120. Verrill reluctantly agreed to counsel's advice regarding requesting a mistrial, despite having then been held for over two and a half years pretrial, based on counsel's advice that the drug evidence, both apart from and in addition to the other late disclosed material, was too important to ignore.

121. The parties appeared in Court on the afternoon of October 31, for first a bench conference and then a hearing in open court. The defense requested a mistrial and the State assented to the

defense's request. The defense specifically noted that the State had represented that the material viewed by the prosecutors at headquarters that morning was related to the drug investigation. The State did not dispute that characterization and Atty. Hinckley referred to viewing a "multitude of materials" some of which he and Atty. Ward had not previously seen and at least some of which had not been provided to the defense, noting that the prosecutors had not yet reviewed the material at length.

122. The State advised the Court that a discovery audit would begin the following day, which would consist of one of the prosecutors being present at headquarters and reviewing all materials in the possession of the State Police Major Crimes Unit. The attorneys would determine whether the material was duplicative of what was provided in discovery and if not set it aside for production to the defense. The Attorney General's Office assured the Court that this process would continue until all items had been accounted for. The Court scheduled a status hearing for November 14.

Post-trial disclosures

123. Throughout the next two weeks, new material continued to be produced to the defense. This material will be detailed below. At the November 14 status hearing, the State explained that the prosecutors had met individually with each investigator involved in the case and reviewed their materials with them to ensure that all had been provided. They advised the Court that the audit process had been completed and that the defense had been provided all additional material they had located.

124. Finally, the State for the first time informed the Court and defense about a New Hampshire State Police trooper, Tpr. Vincente, who was "embedded" with the DEA and travelled with members of the DEA and the Major Crimes Unit to Florida and interviewed two

witnesses associated with this case, Tanner Crowley and Dominic Mango. Crowley has been referenced previously in this motion; he was an associate of Smoronk's reportedly involved in his drug business and known to do work on computers and other electronic devices for Smoronk. Dominic Mango was friends with Crowley and the son of Smoronk's Florida girlfriend. Both Crowley and Dominic Mango allegedly spent time with Smoronk in Florida between January 25 and January 28. The State advised that Vincente was considered a DEA employee and that they were therefore required to seek the materials related to those interviews from the U.S. Attorney's Office; they advised they hoped to have an answer on them by early the next week. Notably, as of the filing of this Motion more than six months later, the defense has yet to receive any further information about either interview. Each time the defense has asked about the interviews, the State has advised that they are still awaiting a response from the U.S. Attorney's Office.

125. At the November status hearing, the defense advised the Court that of primary concern was the drug investigation, because they still had not received material related to that investigation and neither the State's pleading nor the representations it made at the hearing indicated that any audit had been conducted of the Narcotics Investigation Unit. This was particularly noteworthy given that it was the drug investigation that prompted the mistrial.

126. In response, the State for the first time disputed the defense's characterization of what had occurred on the morning of October 31. Atty. Ward responded that he did not recall referring to the drug investigation when speaking with defense counsel; he stated that he did recall the State Police telling him and Atty. Hinckley that they believed there was DEA material in the possession of the State Police that they had not provided to the Attorney General's Office. Subsequently, the prosecutors had reviewed the material and determined that it had been

provided. Atty. Ward cited panic and confusion as responsible for the State's representations to the defense on October 31 regarding significant additional discovery that had not been provided.

127. The defense requested, and the Court ordered, that the State conduct an audit of the State Police Narcotics Investigation Unit similar to what had been done with the Major Crimes Unit.

128. The evidence disclosed on or after October 23 and as a result of the post-trial discovery audit totals 39 discs and 511 pages.

129. The discs consist of the following:

- The five previously undisclosed recorded interviews found in McAulay's possession;
- The recorded call between Dean Smoronk and Jeff Sullivan;
- Recording of the polygraph of Michael Ditroia conducted on August 25, 2017 (as explained above the defense was unaware prior to its disclosure that any such polygraph had taken place);
- Recording of the pre-polygraph interview of Stephen Clough conducted on August 30, 2017 (the defense was unaware of the existence of this interview prior to its disclosure);
- Two discs containing a total of one hundred and fifty seven jail calls of Dean Smoronk (the majority of which had not previously been provided to the defense);
- One disc of nineteen jail calls of Dusty Cousens (the defense had not previously received anything indicating that jail calls of Cousens had been obtained by investigators);
- One disc of fifty two calls of Robert O'Neill (like Cousens, the defense had no prior knowledge of investigators obtaining O'Neill jail calls);
- One disc containing one hundred and seventy two jail calls of Verrill, spanning a one year timeframe (four months of which had been previously undisclosed);
- A previously undisclosed recorded interview of Jenna Guevara conducted by Sgt. Strong over the telephone on March 19, 2017;
- A recorded audio interview of a previously unknown witness Suzi Caldwell (conducted by telephone by Sgt. Embrey of the Farmington PD on an unknown date);
- A recorded interview of Faith Brown conducted by John Daly of the DEA and Tpr. Wardner of the NH State Police Major Crimes Unit on July 19, 2017 (the defense had heard of Faith Brown as an associate of Smoronk; however, prior to disclosure did not know that she had been interviewed by law enforcement in connection with this investigation);
- Three video recordings of interviews the defense had prior to trial received audio recordings of, two with a confidential informant and one with Stephen Clough;
- Eight discs of surveillance footage from the Holy Rosary Credit Union in Farmington recorded on Thursday January 26;
- Five discs consisting of cellphone extractions of phones associated with Tanner Crowley;
- Disc containing emails exchanged between Monique Cote and McAulay;

- Disc containing emails exchanged between Scott Goodyear and McAulay;
- Disc containing email sent by someone referenced as "John the Mover", found in McAulay's inbox;
- Three discs containing Strong's previously undisclosed contact with witnesses, two containing text messages and one containing emails (more specifics of which are detailed below)
- One disc consisting of material obtained via an extraction performed of Sgt. Koehler's cellphone, consisting of texts with witnesses and multiple Quicktime movie files, of Verrill and his residence;

130. The 511 pages of new discovery consists of the following:

- Transcripts including:
    - 32 page Jessica Rodrigue interview conducted September 21, 2017 by McAulay and Jack Daly of the DEA (a previously undisclosed witness);
    - 8 page Suzi Caldwell interview (a previously undisclosed witness);
    - 21 page recorded phone call between Smoronk and Jeff Sullivan;
    - 98 page transcript Clough pre-polygraph interview;
    - 231 page Ditroia polygraph;
    - 157 page Faith Brown interview;
    - 156 pages of transcripts and errata sheets for some of the post-mistrial depositions conducted by the defense of members of the State Police;

- 28 pages of material, including pre-test and scoring sheets, related to Ditroia's polygraph and Clough's pre-polygraph meeting;

- 107 pages of police reports including
    - Four reports of McAulay, including one regarding the Monique Cote interview the defense did not receive until mid-trial;
    - A four page report regarding the Faith Brown interview which the defense was unaware of until after trial;
    - A four page report regarding a federal proffer with Alex Tsiros, attended by NHSP Sgt. Huse conducted in March 2019 but not disclosed to the defense until December 2019 (Tsiros provided information about Clough and Ditroia, including regarding Clough's involvement with Smoronk and the homicides);
    - A 14 page report regarding Smoronk's arrest in December 2018 on federal drug charges;
    - 17 pages, consisting of both an intel and a police report, regarding Sgt. Hall's arrest of James Morin in April 2017 during which Morin provided information about Josh Colwell's involvement in drug sales and statements made by Colwell about the homicides, including an admission that he and Smoronk had seen the bodies (information Hall testified he had provided to Strong shortly after receiving it) (the existence of James Morin as a potential witness, the content of his statements, and the these materials were all wholly unknown to the defense prior to trial);

    - 9 pages from Tpr. Elsemiller regarding her post-mistrial search of Strong's computer and cellphones for emails and texts exchanged with witnesses

- 26 pages of handwritten notes including
    - 3 pages related to the Ditroia polygraph and Clough pre-polygraph interviews;
    - 2 pages related to the Faith Brown interview;
    - 1 page related to a June 2017 interview of Jonathan Millman, of which the defense was unaware until after the mistrial;
    - 1 page related to information provided by John Plaisted, of which the defense was unaware until after the mistrial;
    - 5 pages of notes authored by Strong, which include references to both Monique Cote and Jonathan Millman;
    - 1 page list of various phone numbers attributed to Smoronk, found in Strong's possession;

- Various records including
    - 32 pages of housing records for the Carroll County House of Corrections concerning Verrill and Connor McGlone, an inmate interviewed in August 2017 who claimed Verrill made statements to him about his case (found in McAulay's possession);
    - 30 pages of records regarding a storage unit rented by Clough (found in Strong's possession);
    - 54 pages of Cape Coral Florida PD records regarding Smoronk (found in Strong's possession);
    - 6 pages of cellphone records for Peter Mathieu, referenced in discovery as Smoronk's friend and lawyer (found in the possession of either McAulay or Strong);
    - 6 page "DEA Frequency Report" for a phone number belonging to Guevara (found in McAulay's possession);
    - 5 page chart containing text messages exchanged between Verrill and Jonathan Millman (found in McAulay's possession);

- 22 pages consisting of the MCU Casebook Tables of Contents;

- 14 pages consisting of Strong's spreadsheets, the "system" he testified using to keep track of material in the case;

- 54 pages of material in the possession of Sgt. Koehler, including emails he exchanged with Sullivan's brother, sister-in-law, and criminal defense attorney in South Carolina; emails he exchanged with the South Carolina prosecutor and paperwork that prosecutor provided him; and emails he exchanged with the Connecticut State Police about motorcycle clubs in general, as well as material retrieved online regarding Colwell and Ian Bates;

- A cellphone consent search form signed by Dusty Cousens in February 2017 (the defense was previously aware that Cousens had been interviewed, but not that police had sought to search her phone; in addition to learning this information after the mistrial, the defense was also told that no search was conducted because the phone had been wiped).

131. The defense requested, and the Court authorized, depositions of multiple personnel associated with the State Police in connection with the failure to provide complete and timely discovery in this case. because of the length of the investigation, the fact that interviews were conducted in multiple states and his personal involvement in so many witness interviews.

132. Strong further testified that when the discovery audit was being conducted after the mistrial, his role was limited to providing all materials in his possession related to the case to the other investigators conducting the audit. He testified that he was not asked how or why specific items were not turned over, and that even as of the date of his deposition, in late April 2020, he had not been given a list of items that the defense did not receive until after the mistrial.

133. As detailed above, the amount of discovery not turned over until during and after the trial is significant. However, beyond just the scope of the undisclosed materials is the particular relevance of specific items to the alternative perpetrator defense that the State was well aware the defense would be pursuing. Other items related directly to the defense theme that many more people had knowledge of and/or involvement in the murders and/or the clean-up than the State presented to the jury. These items will be reviewed below in the prejudice section of the legal argument that follows.

Legal Argument

Overview

134. "There has been a clear discovery violation… and we don't dispute that." (Attorney Hinckley, Trial transcript, Day 8, p. 39 lines 22-23). The issue before this Court, therefore, is not

whether a discovery violation occurred, but rather, what kind of violation or violations occurred, and the attendant sanction. The conduct displayed by the State before and during trial amounted to an unjustifiable disregard of its constitutional discovery obligations. The State willfully disregarded its discovery obligations as set forth in Brady etc. and the court rules before the trial started. As a result of the State's misconduct, violations to two of Verrill's constitutional rights, Double Jeopardy and Due Process and Double Jeopardy, occurred. The State's failure to address the discovery problems and the representations the State made on October 31 goaded the defense into asking for a mistrial and resulted in prejudice that cannot simply be fixed by a re-trial. The only proper remedy to address these violations is dismissal of the charges against Mr. Verrill.

Double Jeopardy

135. The defense moves for dismissal with prejudice based upon the double jeopardy protections of the Fifth Amendment to the U.S. Constitution and Part I, Article 16 of the N.H. Constitution. The U.S. Supreme Court has explained that the Double Jeopardy Clause provides a defendant with the "valued right to have his trial completed by a particular tribunal." Oregon v. Kennedy, 456 U.S. 667, 671-672 (1982) (internal quotation and citation omitted). The Court has recognized a narrow exception to the general rule that a defendant who elects a mistrial cannot subsequently argue that double jeopardy bars his retrial. Id. at 673. The exception applies when the State has acted "in order to goad the defendant into requesting a mistrial … so as to afford the prosecution a more favorable opportunity to convict the defendant." Id. at 673-674 (internal quotations and citations omitted).

136. The New Hampshire Supreme Court has found the state constitutional guarantee against double jeopardy to be identical to that of the federal Constitution and has expressly adopted the

exception created by the U.S. Supreme Court in Oregon v. Kennedy as the standard that applies under the state constitution. State v. Duhamel, 128 N.H. 199, 202 (1986). The Court further delineated the standard in State v. Montella, 135 N.H. 698 (1986), explaining that retrial is not barred "unless the defendant, **by conduct and design of the State**, has been painted into a corner so as to require a successful motion for mistrial as the only reasonable means of extrication to avoid becoming a victim of unlawful trial tactics or inadmissible evidence." Id. at 700 (emphasis added).

137. In this matter, Verrill alleges that several of the State's actions combined to provoke him into requesting a mistrial. The State engaged in a pattern of deliberate disregard for its constitutional obligations with respect to the provision of discovery. Defense requests for specific items, especially with respect to the drug investigation, were often met with obfuscation or denials that the information existed. The defense received significant exculpatory discovery – five interviews, numerous emails, and the Ditroia polygraph – during trial, after six full days of witness testimony. The trial was briefly halted for a day and a half but then continued unabated as the defense attempted to recover. When the Clough pre-polygraph interview and Holy Rosary Credit Union video footage were finally provided a week later, trial was nearly complete; the State had rested and the defense had only a couple more witnesses to call. Upon receipt of this material, Verrill and counsel were still determined to persevere and figure out a way to incorporate the new material as best they could.

138. However, upon the State's representation that a significant amount of additional material had been located that had not been disclosed – particularly the representation that this material was related to the drug investigation – the defense decided it had no choice but to request a mistrial. This decision was made based primarily upon the number of requests made pretrial for

the drug investigation, none of which resulted in production of the evidence, the centrality of drugs to the homicide case, and the defense belief that the undisclosed material was almost certainly relevant and highly exculpatory. Having been told that what they had been requesting for all these months existed and was capable of being utilized in Verrill's defense, there was no choice but to move for mistrial.

139. The defense filed motions for the drug investigation and specifically requested material from both the state and federal agencies that had investigated Smoronk and Sullivan's drug operation. The State advised the defense before trial that it did not object to providing information in the possession of NIU and claimed that all reports had been provided by the NIU to Major Crimes. However, the State knew when making these representations that NIU had no reports to provide, as from the outset it was determined that the DEA, not the NIU, would handle the drug investigation. When the defense requested DEA material, the State claimed it had no greater ability to obtain the information than did the defense, despite federal regulations expressly authorizing the DEA to share information with state and local prosecutors and contrary to what had in fact happened throughout this case – namely, communication between the federal agents and state investigators in which the investigators were provided information by the federal agents and about the federal investigation that was not memorialized in the homicide case or shared with the defense. The defense made multiple attempts to obtain information related to the DEA investigation directly from the U.S. Attorney's Office but was unsuccessful and this Court denied the exculpatory evidence motion the defense filed shortly before trial in a final effort to obtain the material.

140. It is against this backdrop that the representations the State made on the morning of October 31 must be viewed. The Attorney General's Office advised defense counsel that there

was a "significant" amount of undisclosed discovery – in addition to all of the other additional discovery the defense had already received during the trial. However, beyond characterizing the volume of the still-undisclosed discovery as "significant," the State also specifically referred to it as drug investigation. In subsequent status hearings, the State then retreated from this description and blamed its initial response on panic and confusion.

141. There are two possible interpretations of what occurred on October 31, either of which supports the defense's conclusion that the State in making these representations acted with the intent to provoke the defense into requesting a mistrial. One interpretation is that members of the Attorney General's Office made no effort to review the material they were shown or determine the content of that material. It seems evident that had they done so they would have realized it was material that had already been provided. The deliberate choice not to do so, in order to be able to make the representation that a significant amount of discovery remained undisclosed, was conduct intended to provoke the defense into requesting a mistrial. The other interpretation is that the State was acting in bad faith when it represented that the material that remained outstanding was related to the drug investigation, as the State was well aware that piece of the investigation had been handled by the DEA and not by state investigators.

142. The State may argue that it had no interest in a mistrial being declared, as it did not believe there was a risk of Verrill being acquitted. The State's intent is a factual determination to be made by this Court. See State v. Murray, 153 N.H. 674, 679 (2006). In determining intent, the Court is not limited to considering the possibility of acquittal. Rather, the Court should also consider whether the State acted out of concern that any conviction that may have resulted would have been struck down on appeal, given the significant discovery violations exposed during trial. It is also relevant for this Court to take into account the State's assent to the request for a mistrial

in determining whether the State acted with the intent of provoking the defense into requesting a mistrial. Id.

Due Process

143. "The remedies applied by a court in cases of discovery violations will vary in proportion to the seriousness of the violation and the amount of prejudice suffered by the defendant in each case." U.S. v Osorio 929 F.2d 753, 762 (1st Cir. 1991). Essentially, the determination of the appropriate sanction depends on the needs of the court: deterrence against further misconduct and redress for the prejudice.

144. To understand the depth to which the State should have known its constitutional discovery obligation it is helpful to review the historical context of the development of the obligation. At one time, the defendant did not have the right to pretrial discovery. At common law, there was "[i]n criminal cases, no 'right' to inspection of objects or writings in advance of trial. . . ." State v. Laux, 167 N.H. 698, 703-04 (2015) (quoting State ex rel. Regan v. Superior Court, 102 N.H. 224, 226-27 (1959)). The defendant was limited to taking depositions. Under a prior version of the deposition statute, the defendant in a criminal case had the right to take pretrial depositions. Compare RSA 517:13 (1959) ("The respondent in a criminal case may take the deposition of any person in his defense, upon giving the same notice of the caption thereof to the solicitor of the county that is required to be given to the adverse party in a civil case. . . .") with RSA 517:13, II (eff. Jan. 1, 2004) (except for expert witnesses, criminal defendant must show deposition is necessary to preserve testimony, avoid surprise, or ensure a fair trial).

145. In Regan, the defense sought to compel in a criminal prosecution the pretrial production of investigations, reports, records, and laboratory reports. Regan, 102 N.H. at 226. The trial court granted the motion. Id. Citing the "tremendous breadth" of the order and the lack of

authority supporting it, the State appealed. Id. The Court held that the defense had no right to receive the pretrial discovery it requested. Id. at 230. "[A] respondent 'indicted for an offense the punishment of which may be death' [is] entitled 'to a list of the witnesses to be used . . . on the trial . . . to be delivered to him twenty-four hours before trial. . . .'" (Quoting G.S. (1867) c. 243, § 1)). While the trial court had discretion to order the State to turn over additional information, id. at 229, no statute, rule, or constitutional provision required it.

146. "'There is no general constitutional right to discovery in a criminal case.'" State v. Heath, 129 N.H. 102, 109 (1986) (quoting Weatherford v. Bursey, 429 U.S. 545, 559 (1977)); see also State v. Booton, 114 N.H. 750, 753 (1974) ("[U]nlimited discovery has never been ensconced as a constitutional right."). Court rules mandate the pretrial disclosure of information beyond the scope of what the Regan Court envisioned. Rule of Criminal Procedure 12(b), formerly Superior Court Rule 98, enumerates information the State must disclose to the defense before trial. Those items include statements of the defendant, police reports, witness statements, reports associated with testing, expert disclosures, the defendant's criminal record, any documents, photographs, or physical evidence, and evidence sought to be admitted under Rule of Evidence 404(b). R. Crim. Proc. 12(b)(1)(A)-(D), (F).

147. Under Rule of Criminal Procedure 12(b)(1)(E), the State must also provide, at least forty-five days before trial, "[a]ll exculpatory materials required to be disclosed pursuant to the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, including State v. Laurie, 139 N.H. 325 (1995)." In Brady, the defendant was convicted after trial of capital murder. Brady, 373 U.S. at 84. He had claimed that another man committed the killing. Id. Before trial, Brady asked for and was shown statements made by the other man, "but one . . . in which [the man] admitted the actual homicide, was withheld by the prosecution and did not come to

[Brady's] notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed." Id. Brady sought a new trial. Id. The Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87.

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile' . . . .

Id. at 87-88 (citation omitted).

148. In Giglio v. United States, 405 U.S. 150 (1972), the Court extended Brady to the disclosure of evidence relevant to witness credibility. Giglio was convicted of passing forged money orders. Giglio, 405 U.S. at 150. At trial, a key government witness testified that he received no promise of leniency in exchange for his testimony. Id. at 151-52. After trial, Giglio learned that the witness had been promised he would not be prosecuted if he cooperated with the government, and Giglio moved for a new trial. Id. at 150-51.

149. On appeal of the denial of the motion, the Court cited Brady's holding that suppression of material evidence justifies a new trial 'irrespective of the good faith or the bad faith of the prosecution.'" Id. at 153 (quoting Brady, 373 U.S. at 87). As applied here, the witness's credibility was a critical trial issue, and the undisclosed agreement was relevant to an assessment of his credibility. Id. at 154-55. It did not matter whether the failure to disclose the information "was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's

office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." Id. at 154 (citing Restatement (Second) of Agency § 272)).

150. Employing the same reasoning, the Court in United States v. Bagley, 473 U.S. 667, 676-77 (1985), held that the duty to disclose exculpatory evidence extends to impeachment evidence. Two government witnesses had been paid for their testimony. Id. at 671. The prosecution failed to disclose the agreements with the witnesses, the defendant was convicted, and he filed a motion for a new trial. Id. at 671-72. "Impeachment evidence, . . ., as well as exculpatory evidence, falls within the Brady rule. . . . Such evidence is evidence favorable to an accused, . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Id. at 676 (quotations and citations omitted). While Brady involved the complete suppression of favorable evidence, the Bagley Court cited the equally pernicious effect of incomplete or misleading responses to discovery requests. Id. at 682 ("[A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.").

151. In Kyles v. Whitley, 514 U.S. 419 (1995), another case in which the government failed to disclose impeachment evidence, the Court stressed two points emblematic of the prosecution's duty. First, the Court stated that the right to obtain the evidence exists irrespective of whether there was a specific request that it be disclosed. Kyles, 514 U.S. at 433. Second, the Court made it clear that the prosecution's obligation of disclosure extends to evidence it may not have actually possess. Id. at 437 ("[T]he prosecution, which alone can know what is undisclosed,

must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

152. From a review of these cases, three points are clear. First, the accused is supposed to have the evidence specified in Rule 12, including Brady evidence, sufficiently in advance of trial so his attorneys may be well-prepared to defend him. While Brady, Giglio, Bagley and Kyles involved post-trial motions, the Court intended to change pre-trial practice. Second, the scope of evidence which the State must disclose pursuant to Brady is broad. Third, the prosecutors bear responsibility for the conduct (or malfeasance) of their agents with respect to identifying, locating, and providing discovery to the defense. Even though there was evidence that the Kyles prosecutors did not have the information at the time of the trial, that was no defense to the Brady violation. Kyles, 514 U.S. at 438.

153. "The Brady rule is based on the requirement of due process." Bagley, 473 U.S. at 675. The New Hampshire Supreme Court considered the rule in State v. Dukette, 113 N.H. 472 (1973). In Dukette, the defendant was convicted of statutory rape. Id. at 473. After trial, counsel learned that the prosecution had, but did not turn over, a statement by the alleged victim that was potentially exculpatory. Id. at 475-76. Relying on Brady, the Court ruled that the non-disclosure was constitutionally significant. First, the Court held that the application of the Brady rule did not depend on whether the defense had requested the evidence. Id. at 476 ("We are of the opinion that [e]ssential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose.") (quotation and citations omitted). Second, the Court held that the defendant was entitled to relief because the evidence reasonable bore on the

alleged victim's credibility. Id. at 477 ("When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful.") (Quotation omitted).

154. Laurie, like Brady, is incorporated into Rule of Criminal Procedure 12(b)(1)(E). In Laurie, the defendant was convicted of first-degree murder. Laurie, 139 N.H. at 327. After he was convicted, he learned that the lead detective had engaged in work-related behavior that reflected negatively on his credibility, and he argued that the State's failure to disclose the information entitled him to a new trial. Id. The Court reviewed and adopted the federal constitutional principles in Brady and Bagley but held that "that the New Hampshire constitutional right to present all favorable proofs affords greater protection to a criminal defendant." Laurie, 139 N.H. at 330. Applying the heightened standard, the Court held that the undisclosed material in the detective's personnel file was sufficiently exculpatory and material to warrant a new trial. Id. at 331-33. As in Kyles, which had not yet been decided, the defendant was entitled to relief even though the prosecutor did not have the detective's personnel file, and thus, did not intentionally suppress it.

155. In that vein, months after Laurie, the Court held in State v. Lucius, 140 N.H. 60 (1995), that the Brady obligation attached even though the misconduct or malfeasance concerning the lack of disclosure was committed by the police agents working for the prosecution. Id. at 63 ("Although the misconduct may be attributable to the State Police rather than the county attorney's office, failure of the police to disclose exculpatory evidence to the prosecutor, who in turn could have turned it over to the defense, is treated no differently than if the prosecutor failed to turn it over to the defense." (Citing and quoting State v. Colbath, 130 N.H. 316, 320-21 (1988)

(noting that the "State would be well advised to remind its police investigators of the rule in Brady").

The Nature of the Discovery Violations

156. If the decisions of Brady, Giglio, Bagely, Kyles, along with Dukette, Laurie, Lucius, and Duchesne, were intended to change the pre-trial practice from having the defense to seek out information to requiring the prosecutors to turn over information, the pre-trial practice observed by the AG and MCU constructed a culture where the State ignored and evaded the Courts' intent.

157. "Practice" means a customary or habitual procedure. The method the AG and the lead detective used in this case was a method that was passed down to the respective prosecutors and lead investigator by word of mouth from their predecessors. Even when the flaws were apparent during the pre-trial discovery disclosures, the State failed to address seriously what those flaws were, treating each apparent misstep as just that. The discovery failures were not isolated incidents; rather, they were the results of a culture which developed and encouraged a willingness to disregard discovery obligations.

158. The definition of willful misconduct does not just mean having a purpose; it also includes a pattern of constitutional violations that shows recklessness, failing to act with deliberate indifference, or a reckless disregard of the defendant's constitutional rights. "Thus, reckless misconduct, if prejudicial, may sometimes warrant dismissal. Otherwise, a prosecutor who sustains an erroneous view of her Brady obligations over time will be inadequately motivated to conform her understanding to the law." Government of Virgin Islands v. Fahie, 419 F.3d 249, 256 (3d Cir. 2005). The N.H. Supreme Court has described culpable negligence as less than gross negligence but more than ordinary negligence. State v. Reynolds, 131 N.H. 291, 294 (1988). See also State v. Giordano, 138 N.H. 90, 95 (1993) (holding that "[c]ulpable negligence

is something more than ordinary negligence, mere neglect, or the failure to use ordinary care - it is negligence that is censorious, faulty or blamable.")

159. In this case, the following practices shows an atmosphere, or a pattern, of reckless disregard for the defendant's due process rights under Brady:

a. Each investigator determines what to submit to the lead investigator without a review by either the lead or the AG. For example, Det. Sgt. Koehler decided not to turn over incriminating materials about two witnesses' involvement with motorcycle gangs because he believed it was "research." Sgt. Sloper recorded an interview of a key State witness and kept it in his file because he did not do a polygraph or report.

b. Each lead investigator decided his own system of tracking assignments in the case. Over a year before the trial began, the defense pointed out the flaws with Lt. Strong's tracking system not once, but twice *with the same witness,* Angelica Brown, who happened to be a key defense witness to describe inculpable statements being made by other witnesses as to how the women died. The State may point to the "audit" that occurred in July 28, 2018. That audit did not disclose the second interview with Brown. The second witness was only found after the defense pointed out that there were two interviews. The State never reviewed the auditing system again until after the mistrial.

c. The AG purposely does not review what the investigators have collected, abdicating the responsibility of determining what is Brady material to the investigators.

d. It is a practice where the lead investigator decides on his or her own method of keeping track of assignments, resulting in evasions of turning over exculpatory interviews that he knew about, such as of Rodrigue, Cote and Cortez, all of whom had exculpatory information. By failing to have a system that included documentation of each assignment, Strong was able to exclude interviews of witnesses which were not helpful to the State's theory, but contained exculpatory information for the defense. It is a system that also results in lapses of documentation when favorable information is provided by other agencies, such as when Hall and Huse provided Strong with information from their respective drug investigations, statements made by Morin and Tsiros.

e. The State adopts a "we will turn over the discovery as it becomes available" approach, which forces the defense to ask for materials *already in the possession of the investigators* creating the expectation on the part of the investigators that if it is not requested, then it doesn't need to be turned over, the very practice that Kyles was seeking to end.

f. The fact that the investigators failed to turn over text messages despite requests from the prosecutor reveals the investigators' disrespect and deliberate indifference toward the defendant's constitutional right to due process.

160. A defendant's constitutional right to exculpatory evidence has been the law of the land since 1963. The scope of the constitutional right expanded to the prosecutor's duty to know what exculpatory evidence the investing agencies has in its possession since 1995. Yet, the New Hampshire Supreme Court continues to issue opinions, one as recently as 2015, to explain what Brady means to remind the prosecutors of its principles.

> The duty of disclosure falls on the prosecution, Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Petition of State of N.H. (State v. Theodosopoulos), 153 N.H. 318, 320, 893 A.2d 712 (2006); see also N.H. R. Prof. Conduct 3.8(d) and is not satisfied merely because the particular prosecutor assigned to a case is unaware of the existence of the exculpatory information. On the contrary, we impute knowledge among prosecutors in the same office, State v. Etienne, 163 N.H. 57, 90-91, 35 A.3d 523 (2011), and we also hold prosecutors responsible for at least the information possessed by certain government agencies, such as police departments or other regulatory authorities, that are involved in the matter that gives rise to the prosecution, see Theodosopoulos, 153 N.H. at 320. "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Although police may "sometimes fail to inform a prosecutor of all they know," prosecutors are not relieved of their duty as "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Id. at 438 (quotation omitted).

Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 777 (2015). The State's indifference to these principles warrants dismissal.

Prejudice

161. The next step is determining what sanctions are appropriate. When there has been a showing of willful conduct which resulted in prejudice to the defense that cannot be remedied with lesser sanctions, then dismissal is warranted. Fahie, 419 F.3d at 254-255.

162. The following is a compilation of prejudice caused to Mr. Verrill:

Tanner Crowley

163. The defense was notified by the State on November 14 that Tanner Crowley was interviewed by Tpr. Vincente when he traveled to Florida with other investigators from both Major Crimes and the DEA to conduct interviews related to this case. Crowley was an individual who the defense believed likely possessed information relevant to both Smoronk and Sullivan's drug operation and the homicides. He is referenced in various places in discovery as selling drugs for Smoronk, assisting Smoronk with computers and other electronic devices, and allegedly seeing Smoronk between January 25 and 28. However, none of the discovery provided pre-trial contained any statements made by Crowley or information provided by him, nor any police reports regarding meetings with Crowley. Crowley was murdered in June 2017. The defense was therefore particularly interested in any information Crowley had provided to law enforcement, as he was not available to be interviewed by the defense.

164. In addition to the above, which suggested Crowley would be someone law enforcement was likely to have spoken with, the defense had noted a further indication that Crowley had in fact been interviewed. Specifically, among the discovery provided in January 2018 was a one-party call NH investigators had Jenna Guevara place to Smoronk on March 19, 2017. The defense received both an audio and video recording of the call. The video recording was generated by the Cape Coral PD recording system; the audio was captured on Strong's handheld recorder. The video begins before Strong turns on his recorder and includes conversation that Strong and the other investigator (who the defense believes was either Daly or Keefe of the DEA) had with Guevara prior to beginning attempting the call. Guevara expressed concern about Smoronk learning that NH investigators were in Florida and that she had spoken with

them. In response, the DEA officer, while sitting next to Strong, said "I'm sure Tanner was on the phone with him [Dean] two minutes after we talked to him."

165. Atty. Davis emailed Attys. Young and Ward on March 23, 2018, noting this "reference to a meeting between law enforcement and Tanner" on the video, and requesting that a report or audio be provided of the meeting. Although the State responded to other requests related to Guevara made in the email chain (as will be detailed below), they completely ignored the request related to Tanner Crowley.

166. Strong was questioned at deposition about Vincente's involvement in the Florida trip that investigators made. He testified that he believed Vincente was involved in the briefing that was held prior to the trip and was aware of the information investigators were seeking from witnesses, including Crowley. He acknowledged speaking with Vincente after the interview and agreed that Vincente had provided him information about how the interview went and what information he obtained, although maintained he believed Crowley may not have provided much information.

167. To date, the defense has no idea the amount or content of information Crowley provided, as it still has not received either a report or recording of Vincente's interview with Crowley.

Jenna Guevara

168. Included among the items of discovery which were not disclosed until after the mistrial were multiple items concerning Jenna Guevara. Prior to trial, the defense had received recordings of interviews conducted with Guevara by telephone on February 2, 2017 and in person at the Cape Coral PD on March 12, 2017. As referenced above, the defense had also received the recording of a one-party call placed by Guevara to Smoronk on March 15, 2017. The State has also provided some text messages exchanged between Strong and Guevara.

However, after trial the defense learned of another recorded interview, conducted by telephone by Strong on March 19, 2017. The defense also received at least one additional text message exchanged between Strong and Guevara, dated May 1, 2017.

169. The undisclosed material is particularly significant for a couple of reasons. One, the disclosed and undisclosed discovery were generated quite close in time to each other – yet some of the material was provided and some was not. Two, the defense had made multiple specific requests of the State for material related to Strong's dealings with Guevara, via email and during questioning at his first deposition, which took place in October 2018. Three, the undisclosed material is particularly exculpatory, as it corroborates Fidencio Arellano's claim that Smoronk attempted to hire him to kill Edgar Morales and Sullivan – information that is absent from the discovery provided pre-trial regarding Jenna Guevara.

170. The defense made multiple requests by email for information related to Jenna Guevara, particularly law enforcement's contacts with her during the course of the investigation. The first email Atty. Davis sent concerning one of Guevara's interviews was dated March 23, 2018 and included the request for information regarding Crowley's interview referenced above. She sent further emails on May 10 and May 24. In her May 10 email, she stated that she believed there was information contained in other discovery referencing information provided by Guevara during the March 15 meeting with law enforcement and asked whether "a more detailed report of this event" would be provided. In her May 24 email, she indicated that she did find reference to the additional information she had asked about in the May 10 email, but noted the defense was "still looking for a more detailed report of the interactions with Ms. Guevara during the course of the investigation in this case."

171. On the same date, Atty. Ward responded for the State requesting that Atty. Davis be more specific, stating he was not sure what she meant or was requesting. Atty. Davis responded five minutes later: "There is no report from Sgt. Strong documenting the entirety of the contact with Ms. Guevara during the meeting on 3/14, the meeting on 3/15, or any other contact with her, other than the recent phone call on 2/27/18. The reports we have document the recorded conversations, but nothing else."

172. Atty. Ward responded six days later pointing Atty. Davis to the two reports that had been provided, regarding the March 12 interview and March 15 one-party. (The report regarding the March 12 interview simply noted that an interview had been conducted before transitioning into the transcript of that interview. The report regarding March 15 merely recounted the occurrence of the one-party and noted that Smoronk was very difficult to hear on the recording.)

173. Atty. Davis responded later that day as follows: "I'm not sure I would characterize these reports as "detailing" interactions. We've been provided some information about the 3/12 meeting, a one-party authorization starting 3/13 through 3/15, and some information about the one party on 3/15. I guess I'm looking for you to ask Sgt. Strong for any notes or reports he has for any meetings or conversations with Ms. Guevara from 3/12-3/15, as well as any other contact he has had with her that's not already been provided."

174. Atty. Ward responded that he was asking Strong for any notes or reports he had regarding communications with Guevara between 3/12 and 3/15 as well as any other contact that had not been provided.

175. None of these emails, or whatever communication Atty. Ward had with Strong, resulted in production of either the March 19 recording or May 1 email.

176. Atty. Davis attempted during deposition to ask Strong about his contact with Guevara and in particular about any information Guevara had provided about Arellano. Strong testified that he did not recall what information Guevara had provided about Arellano or when she had provided it, how many times he communicated with Guevara about Arellano, or whether there was any contact with Guevara after law enforcement met with Arellano (Guevara accompanied him) and if so what that contact involved. When asked if any of his non-recorded contact with Guevara would be reflected in text messages, Strong indicated that it could be and that those texts had been provided to the State.

177. However, the primary text in which Guevara discussed Arellano and his allegations regarding Smoronk soliciting him to commit two murders, was not provided to the defense until after the mistrial. Strong provided only screenshots of his text messages with Guevara prior to trial and failed to photograph the most significant information. In the undisclosed text, Guevara confronted Smoronk, stating she had learned that he had asked her friend (Arellano) to put a hit on two people, the second of whom she was particularly horrified to learn about. She also referred to Smoronk's concern about retrieving his key from Arellano. This information is particularly compelling because it corroborates specific claims made by Arellano – that Smoronk had first solicited him to kill Morales and then Sullivan, and that Smoronk had given Arellano two keys along with paperwork regarding Morales and Morales' picture). Had the defense received this information pre-trial, as they were constitutionally entitled to, Guevara could have been questioned about her knowledge of Smoronk's solicitation of Arellano and potentially offered trial testimony in corroboration of Arellano. However, prior to trial the defense had at best only a supposition, unsupported with specific evidence, that Guevara had made statements

demonstrating knowledge of Smoronk's solicitation and therefore was denied the opportunity to obtain this corroboration.

Jessica Rodrigue

178. The discovery violation related to Jenna Guevara is all the more egregious given the State's failure to provide to the defense the other corroboration of Arellano that the State Police obtained, specifically, statements of Jessica Rodrigue. Rodrigue was interviewed in September 2017 but the existence of this interview was not disclosed to the defense until October 2019. Rodrigue told law enforcement that after Arellano moved out she had found that he had left behind paperwork, including mugshots of someone named Edgar. During the interview, the investigators showed her a booking photograph of Edgar Morales, which she immediately identified as the same photograph she had seen in her house as having been in Arellano's possession. This is significant because Arellano had told police that Smoronk had provided him a photograph of Edgar Morales when Smoronk solicited him to kill Morales.

179. In addition, Rodrigue stated that a woman named Jenna had come to her home, with Smoronk, looking for paperwork Arellano had. She also indicated that Jenna had asked her questions about a key that Arellano supposedly had. The State's suppression of both the Rodrigue interview and the Guevara text regarding Arellano prevented the defense from seeking out Rodrigue and from questioning Guevara regarding Arellano's solicitation claims.

Strong's texts and emails with witnesses

180. Prior to trial, the defense was provided text messages that Strong had exchanged with the following witnesses: Jenna Guevara, Michael Ditroia, Randy and Leah Stevens, Pam Dillon, Barry Hildreth and Steve Clough. All were provided in photograph format – Strong took photographs of his cell phone displaying the messages. The texts with Jenna Guevara were

provided in July 2018. On November 8, 2018, the defense specifically requested that the State provide all communications via text and email that investigators had had with witnesses. Atty. Hinckley emailed Strong this request; Strong initially replied by asking what texts he had provided, noting that he recalled having already provided texts from Jenna Guevara (with the exception of the May 1 text discussed above). Atty. Hinckley responded that the only other witness he had seen texts from was Karen Kalvin. Over the next several weeks, Atty. Hinckley sent a number of emails to the defense which included a representation that the Attorney General's Office had checked with investigators and there were still no texts or emails to provide. Strong eventually responded on February 13, 2019 to the November 2018 request and provided text messages with the above-referenced individuals to the prosecutors; the prosecutors in turn provided the texts to the defense in discovery received on March 19, 2019. No explanation was provided at that time as to why the response took over four months.

181. However, despite taking four months to respond to the request, Strong failed to provide the majority of text and email communication with witnesses. He also failed to supplement his disclosure with any subsequent text messages he went on to exchange with witnesses. In addition to the six individuals listed above, after the mistrial the defense was provided text and email communications between Strong and twelve other people – Fidencio Arellano, Arnold Bennett, Michael Clough, Erin Feeley, William McKay, Jason Parker, Scott Pelletier, Elizabeth Pendy, Caroline Robinson, Kassandra Russell, Dean Smoronk, and Dan Wall – as well as additional previously undisclosed communications with Jenna Guevara (as described above), Steve Clough, and Barry Hildreth. A few of these communications involved scheduling interviews that the defense was aware of or trial preparation sessions. However, in addition to

the exculpatory undisclosed Jenna Guevara text discussed above, other communications were also significant.

182. Disclosed after trial was a text message Strong sent to Fidencio Arellano on the morning of September 21, 2017. Although the communication with Arellano consisted of a single text, it is a crucial one – as Strong was asking Arellano if he remembered the name of his ex-girlfriend who was in jail. Arellano was interviewed on September 20 and had referenced his ex-girlfriend as having information about Smoronk's solicitation of him. He also indicated that after they split up, she had advised him that Smoronk had come to the house looking for him. Finally, Arellano noted that he believed she had spoken with Guevara about Smoronk. Strong clearly obtained Jessica Rodrigue's name as a result of this text, as she was interviewed later that day by McAulay and Daly. Had the defense received this text before trial, it could have led them to seek further information from the State to determine whether Arellano had provided the name – which may have led to Rodrigue's interview being disclosed. This text is also evidence of Strong's knowledge of the Rodrigue interview – which makes its nondisclosure all the more problematic.

183. Prior to trial, discovery had been provided regarding Arnold and Jen Bennett's contact with law enforcement. The Bennetts had reached out to the police stating that they believed their son Michael had information about the homicides, as he had made a statement about more people being involved than Verrill. They also indicated that Michael said he had received photos related to the homicides and viewed a partial video of the homicides. Discovery included an interview with Michael Bennett and information regarding law enforcement attempts to search his phone.

184. After the mistrial, the defense received texts and emails that Strong had exchanged with Arnold Bennett. Some involved communication about locating Michael and about the search of

the phone. However, others indicate that Arnold Bennett seems to have had additional information about witnesses in the case – specifically, he texts Strong about speaking with someone (who appears to be named Hayes) discussing Ditroia's relationship with Smoronk as well as a Brianna Cousens, who was associated with both Smoronk and Clough. The information provided does not include whether Arnold Bennett was ever spoken to about this additional information. Based on what the defense received pretrial, they did not contact Bennett, as he appeared to have no significant information to provide; had the texts discussing Ditroia, Smoronk, and Cousens been provided, the defense would have sought to interview him about those individuals and his connection to them.

185. The State did provide some of Strong's texts with witness Barry Hildreth prior to trial. Hildreth was a former member of a motorcycle club with many connections in that world; he was also friends with Josh Colwell. The majority of Strong and Hildreth's communication was not provided until after the mistrial – including the most significant information. It also appears likely that there is additional information Hildreth provided that remains undisclosed – the text messages seem to reference phone calls between Strong and Hildreth in October and December 2017 and meeting and calls between May and June 2019 of which the defense was previously unaware (and about which no information has been provided). The information Hildreth provided in the undisclosed texts and emails related specifically to the murder investigation and witnesses in that investigation as well as more generally to motorcycle clubs.

186. In September 2017, Hildreth advised Strong via text that he had spoken with Smoronk. Strong asked if Hildreth had been able to record the conversation; Hildreth responded that he had recorded two conversations with Smoronk, one of which lasts 21 minutes. To date, the defense has never received these recordings nor any information about what they contain. Also in

September 2017, Hildreth texted Strong about the hat found at the crime scene, noting that if the hat had drawing on it, then it was Verrill's; if not, it was Smoronk's. (As recounted above in the section regarding the trial, one of the pieces of evidence the State claimed demonstrated Verrill's guilt was a baseball cap found near the bodies which contained DNA from both Verrill and Sullivan.) In October 2018 Hildreth texted Strong about someone's recent arrest (the defense believes this was about Colwell) and communications Hildreth had had with Chris Cortez (one of the witnesses the defense did not learn about until October 2019 during trial).

187. Similar to Hildreth, the defense learned only after the mistrial that Strong's texting with Steve Clough was far more extensive than was represented in the discovery provided pretrial. In June 2017 Clough texted Strong about having information for "Jack" and requested his phone number; Strong indicated he would pass the message along and have Jack call Clough. Clough again texted Strong about wanting to privude information to "Jack" in October, 2019 – on the eve of trial. Strong confirmed at deposition that the "Jack" referenced in these texts was Jack Daly, one of the DEA agents who participated in this investigation. He further confirmed that Clough was working providing information to the DEA throughout the investigation, specifically information about Smoronk's drug connection. Depo p. 211. Clough's role as a DEA informant, especially one providing information about Smoronk, constitutes material and exculpatory evidence that was not provided to the defense.

188. Finally, the material provided post-mistrial demonstrates that Clough and Strong remained in regular contact throughout 2019, including just before Clough testified at Verrill's trial. However, it is not just the mere fact of that communication that is significant, it is the contents. Between April and September 2019, Clough repeatedly texted Strong expressing concern for his safety and that of his children and pleading for Strong's help. He sent Strong

pictures as well as audio and video files that he claimed showed intruders in his home. Strong responded first by telling Clough to call the local PD but as Clough continued texting, Strong explained that he had spoken with Clough's brother and father, that everyone knew that something was wrong with Clough, and advised him to get help. These undisclosed text messages demonstrate that a key state's witness was exhibiting significant mental instability in the months leading up to trial – and that the lead investigator on the case was aware of this. Strong testified at deposition that he did not consider Clough rational and characterized him as "not believable." He maintained that he was "pretty confident" he had expressed these concerns to the Attorney General's Office. The defense was not provided with any of this information.

Notes regarding John Plaisted

189. Prior to trial, in one of the first batches of discovery provided by the State, the defense had received two one-page police reports by Sgt. Koehler regarding his contact by phone with Jesse Dobson and Jonnie Plaisted on February 1, 2017. Koehler noted in the report that Dobson's father, Jonnie Plaisted, indicated that Dobson had made statements about the homicides (which, as recounted in Koehler's report, were inaccurate) and claimed to have gotten his information from Facebook. Koehler stated that when he spoke with Dobson, he denied knowing Pellegrini, Sullivan, or Smoronk and claimed that all he knew about the case was what he had viewed on Facebook.

190. After trial, the defense received one page of handwritten notes regarding initial statements provided by Plaisted. Some of the information contained in the notes was similar to what had been contained in Koehler's reports. However, other information was different and/or new. One, the report initially received in discovery stated that Plaisted had alleged Dobson said the victims' fingers were cut off; the notes indicate that he said Dobson said Pellegrini's fingers

were broken (neither victims' fingers were cut off, but Sullivan suffered a broken finger). Two, the notes indicated that the murders occurred because "Jenna and another woman planned a robbery at Dean's house." This information was not contained in either police report, nor does either report contain any indication that Koehler asked either Plaisted or Dobson anything about a robbery or a motive for the murders. This information – both the purported knowledge about a motive and its references to Pellegrini as "Jenna" and Smoronk as "Dean" – seems to contradict Dobson's claim that he did not know anyone involved and had merely seen information on Facebook.

191. Koehler testified at deposition that he had received the notes, which he was told had been written down by a secretary at a local police department, and was assigned to conduct a follow-up interview with Plaisted. He testified that he did not recall whether he asked either of them about the information contained in the notes regarding a planned robbery or a motive for the murders. He also testified that he did not recall questioning Dobson as to where on Facebook he claimed to have viewed information about the case nor checking Facebook himself for such information.

192. Based on the reports provided in discovery, the defense did not attempt to reach out to either Plaisted or Dobson, as there was no reason to think either had any actual information. The defense may well have made a different decision had the notes been provided in a timely fashion; instead they were provided nearly three years after they were written.

<u>Holy Rosary Credit Union video footage</u>

193. Josh Colwell testified at trial about meeting up with Sullivan and Pellegrini in the credit union's bank on the afternoon of January 26. Colwell maintained that he met Pellegrini when they were there but stated he did not know whether Verrill saw her. He also testified that first he

and then Verrill had given Sullivan a hug in the parking lot and while doing so dropped money in her purse. The defense learned of the existence of the video footage on October 30. What the video shows is that the two vehicles were parked right next to each other for more than five minutes. During this period of time, Verrill was either in the driver's seat of his vehicle or standing in front of his vehicle or between the two vehicles. Pellegrini was in the passenger's seat of Sullivan's vehicle. The two were merely feet apart; any suggestion that Verrill wasn't aware of Pellegrini's presence – when Sullivan was inside the bank for more than five minutes and Pellegrini was inside her car which was running and had the headlights on – is far-fetched. Further, although it is unclear on the video whether Colwell gave Sullivan money, it is clear that only Verrill gave her a hug. Due to the State's discovery violation, Verrill was denied from impeaching Colwell with this compelling visual evidence.

Jonathan Millman and Alan Johnson interviews

194. Millman and Johnson were friends of Verrill; he communicated with and visited both of them on Friday January 27, the day the State alleges the murders occurred. Both were interviewed by law enforcement in 2017; neither interview was provided or disclosed to the defense prior to trial. Although the State claimed in argument regarding the motion to dismiss that was litigated during trial that Johnson provided information which inculpated rather than exculpated Verrill, both in fact provided information unhelpful to the State's theory of the case. Verrill engaging in his typical behavior on January 27 - visiting friends and selling them drugs - is inconsistent with the State's depiction of Verrill as frantic, aggressive, and concerned that Pellegrini was an informant as well as the State's allegation that on that date he was committing and cleaning up after two brutal murders.

Polygraphs

195. The defense was not provided information about the polygraph of Ditroia or the planned polygraph of Clough, both of which occurred in August 2017, until October 2019. Both were exculpatory. Although Sloper, who administered Ditroia's exam, opined that he was truthful, the expert retained by the defense concluded that Ditroia was untruthful on the key issue, whether he had killed Sullivan and Pellegrini. Neither the defense nor the State called Mike Ditroia as a witness. If the polygraph had been disclosed in a timely manner so that the defense could have had an expert review it and determine that Ditroia in fact failed the test, Ditroia would have been called by the defense. Ditroia always maintained that he did not know Smoronk well until after the homicides, which led to defense's decision not to call him. However, Ditroia was well connected with the drug scene and he familiar with Smoronk's house because he worked for Sullivan. Given Ditroia's knowledge of the home, his falling out with Sullivan, and his subsequent relationship with Smoronk, the defense could have reasonably argued that he may have killed the women at Smoronk's request.

196. Clough testified at trial as one of the state's main witnesses. The State portrayed him as someone who was in constant contact with Smoronk during the weekend of the homicides and therefore helped the State eliminate Smoronk as a suspect. Had the defense been aware of the August 2017 recorded pre-polygraph interview, and known that Clough was still a suspect at that late date and had been advised that the State Police would not administer a polygraph because they believed he would fail, the defense would have had the opportunity to cross-examine him on several points. During trial, Clough maintained that he was never worried that he was a suspect. However, the reason for the polygraph meeting was because was bothered that he was a focus of the investigation.

197. Clough also made statements to Sloper that he had not made to other investigators, statements the defense would have utilized at trial. For example, Clough told Sloper that Smoronk was calm when he was speaking with him on the phone while he was doing a walk-through of his house. Clough also told Sloper that he saw Seymour look out the window that overlooked where the bodies were found and that Seymour had had no reaction when he did so. As discussed above Seymour was deceased by the time of trial but the defense presented evidence regarding statements Seymour had made about moving the bodies. Finally, Clough told Sloper that he had looked into Sullivan's bedroom window, which would have required going around the hot tub. During trial, Clough claimed that he did not knock on windows around that side of the house. The importance of the contradictory claim made to Sloper, and the reason the defense would have impeached Clough with it, is that there is no way one could exit the door from the porch to the hot tub without stepping on a blood-soaked rug which only partially covered a pile of ice melt that had been poured on top of a pool of blood.

198. The polygraph interviews are also important because to date the State still has not provided a consistent explanation as to either how they were not disclosed in a timely fashion or how they were found. The defense was made aware of the Ditroia polygraph on October 24, 2019 but did not learn about the Clough aborted polygraph until October 30. Strong testified at deposition in April 2020 that he did not remember how Ditroia's polygraph was ultimately located, but that when it was, he spoke with Sloper and Sloper advised him at that time that he had a recording of the pre-polygraph interview he had conducted with Clough. He maintained he was "dumbfounded" that neither recording had been submitted to him, although admitted neither was included in his spreadsheet either. In contrast, Sloper testified at deposition that Strong reached out to him looking for the Ditroia polygraph in October 2019 as the result of either an

email or court order directing that all case-related materials be collected. He testified that he and Strong did not discuss the pre-polygraph Clough meeting. Sloper testified that when he learned of the request from the Atty. General's Office that anyone who had been involved in the case doublecheck their materials, he remembered Clough and notified Strong about the recording.

Drug Investigation

199. On January 19, 2018, when the State turned over discovery pursuant to the scheduling order from the December 2017 dispositional conference, it did not advise the defense that they agreed to let the DEA take over the related drug investigation. (The defense was aware of DEA involvement because of the several witness interviews which were conducted jointly by members of the DEA and Major Crimes. The defense was **not** aware prior to Strong's April 2020 deposition that it was determined early on that the DEA, not the State Police, would handle the drug-related portion of the investigation.)

200. On April 27, 2018, Attorney Davis emailed the State inquiring whether the State was going to be turning over the DEA investigation. The State did not respond.

201. On May 25, 2018, the defendant filed a motion to compel discovery of the State and federal drug investigations relating to Smoronk and Sullivan. The State contacted the defense on June 5 requesting an extension in which to file its response to the defense motion. Atty. Ward emailed that he was "discussing with DEA and their lawyer whether there are any reports that they can provide us with." He maintained that the DEA had not provided the Attorney General's Office or State Police with any reports but indicated that "what we are discussing is an agreement that some information, relevant to your client, be provided." The defense assented to the State's requested extension.

202. However, no material was provided and the State responded to the motion noting that the DEA had not agreed to provide any reports. The State also claimed in its response that it "had provided extensive discovery concerning the drug investigation that is ongoing and concerns the defendant as well as Christine Sullivan, Dean Smoronk, and others." The State never represented that it had made the decision to allow the DEA to take over the drug investigation relating to Smoronk and Sullivan. The State attached to its response correspondence from counsel for the DEA office suggesting that the process for obtaining discovery from the federal agency was the same for the State as it was for the defense. The Court relied on the State's representations denied the motion with respect to the federal investigation without holding a hearing.

203. On June 25, 2018, Davis followed up on the order by email to the prosecutors noting that the State had not referenced the state drug investigation in its response and confirming that the State did not object to providing State drug investigations relating to Smoronk and Sullivan. Again, the State did not clarify that there was not a State drug investigation relating Smoronk and Sullivan because the decision had been made more than a year earlier to hand that portion of the investigation over to the DEA. Instead, the State per Atty. Ward responded, "We will provide materials generated by State investigators. I have inquired of Lt. Strong as to whether any units within State Police, such as NIU, have any other reports concerning Smoronk, et al. I have been told that all the reports were with MCU and have been provided. I have asked him to double-check that." Nor did the State clarify at this time that NIU never "opened a case" on the investigation into Smoronk and Sullivan, as would later be claimed.

204. As of July 9, 2018, the defense notified the Court and State via motion that Mr. Verrill was seeking to argue at trial that Smoronk either committed the murders or arranged for someone

else to kill Sullivan and Pellegrini. The defense theory included the importance of Smoronk's drug enterprise and of his relationship with motorcycle gangs.

205. The parties appeared for a status conference on August 9, 2018. The State was represented by Deputy Atty. General Jane Young. Atty. Young expressed concern about the scheduled trial date, asserting that if the defense's motion were granted the State's case would be lengthened. In discussing scheduling, Judge Houran brought up the motion for discovery related to the drug investigation. Atty. Davis noted that the defense still had not been provided any information from NIU, despite a pre-existing months-long drug investigation into Smoronk and Sullivan being referenced in warrant affidavits and noted that this lack of information was hampering the defense's ability to submit Touhy requests to the U.S. Attorney's Office for federal material. Rather than stating that there was no NIU investigation or clarifying that the DEA had been in charge of the drug investigation since shortly after the homicides, Atty. Young stated that she could not tell the Court or defense the status of the drug investigation, as it was "not a piece that [she had]."

206. On January 30, 2019, the Court granted the defendant's alternative perpetrator motion. Between June and September of 2019 the defense sent multiple Touhy requests to the U.S. Attorney's Office. After extensive back and forth, the USAO turned over Federal Express documents and two related DEA reports that the defense was able to establish had been provided to the N.H. State Police based on statements made in search warrant affidavits. The defense did not know to ask for reports related to James Morin or Alex Tsiros because the State had not yet provided the defense any information about either individual.

207. The prejudice to the defense caused by the State's refusal to provide the drug investigation cannot be overstated. The defense's theory rested on Smoronk's motive to remove

Sullivan from the drug operation and replace her managerial skills with Josh Colwell's motorcycle club ties. It also relied on presenting Verrill as one of several distributors rather than central to the Smoronk and Sullivan drug operation as the State claimed. The State's refusal denied the defense evidence on these points, evidence that the defense has a good faith basis for believing exists, given affidavits filed in federal court referring to a drug operation involving Smoronk and Colwell. Since the mistrial, the defense has also learned that Clough, during the investigation of this case, was providing drug information, including information related to Smoronk, to the DEA. The defense was also entitled this material and exculpatory evidence, especially given the importance of Clough to the State's case.

Dismissal as the Appropriate Sanction

The adoption of dismissal as a sanction is a recognition that there are no other sanctions or combination thereof that would deter the misconduct found in this case and redress the prejudices caused to Mr. Verrill's defense. "In a rare case, government action may be so culpable that deterrence of future violations and protection of judicial integrity become the principal concern, and then only a plausible suggestion of prejudice or none at all would be required for suppression of evidence or the imposition of other sanctions, such as dismissal of the charges." United States v. Loud Hawk 628 F. 2d 1139, 1152 1979) (concurring opinion).

This is not misconduct that was found in one police department among a few officers. This is not misconduct found in a particular area of the case. This is a misconduct that permeated through every aspect of the case because of the custom and culture of the agency tasked with investigating the most serious crimes in the State. Again and again, pieces of discovery fell through the cracks. Angelica Brown's interviews served as a red flag for the prosecutors to look at everything that the investigators had. The lack of response for three months to a prosecutor's

request for text messages served as a red flag for the prosecutors to look what the investigators had, but they did not. The inability to locate a phone extraction performed by the lead investigator without the defense pointing out the documentation of such extraction served as a red flag. The defense responded to the continued lapses with respect to discovery as best it could by filing repeated motions to express its alarm to the Court regarding the State's repeated lack of due diligence with respect to constitutional obligations regarding the provision of material and exculpatory information. When the State represented after the mistrial that it had conducted an audit to ensure that finally everything had been turned over, it still failed to look at everything that the investigators had to make its own determination of what should be turned over.

The evidence disclosed mid-trial and after the trial is more like suppressed evidence or non-disclosed evidence than delayed disclosure. It is evidence that never would have been disclosed but for a civilian's interest in the trial. The prejudice to Mr. Verrill is not just his more than three years of pretrial incarceration (which will likely extend to four years before a second trial takes place in the event the request for dismissal is denied) and the deprivation of his ability to complete trial with the first jury. Prejudice also results from the requirement that he lay out all the ways he will address and utilize the new evidence, through the types of cross-examination of witnesses, the new strategy regarding the importance of Ditroia in the homicides, and the role of Colwell in the homicides. The connections between the DEA investigations and the deliberate decision to separate the drug investigation from the homicide investigation prevents the defense from ever being assured that Verrill is getting the Brady material and other discovery to which he is constitutionally entitled. The circumstances of this case are extraordinary. The remedy should be exceptional. It should be a dismissal.

WHEREFORE, Mr. Verrill, through counsel, respectfully requests that this Honorable Court

grant this Motion and dismiss all pending charges with prejudice, as well as grant such further relief as is deemed just and proper. In the event this Motion is denied, the defense reserves the right to propose alternative remedies to the Court to address the prejudice Mr. Verrill has suffered.

Dated this 26th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 26th day of May, 2020 to Peter Hinckley, Esq., Jesse O'Neill, Esq., and Geoffrey Ward, Esq., of the NH Attorney General's Office.

Meredith Lugo

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