THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0093

State of New Hampshire

v.

Timothy Verrill

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15-minute Oral Argument Requested)

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ISSUES PRESENTED

Whether the trial court's post-trial factual findings that prosecutors did not intend to goad defense counsel into requesting a mistrial, and that the State was culpably negligent with respect to admitted discovery violations, are clearly erroneous.

STATEMENT OF THE CASE

A Strafford County grand jury indicted the defendant on two counts of first-degree murder, two alternative counts of second-degree murder, and five counts of falsifying physical evidence. *See* RSA 630:1-a, I(a); 630:1-b, I(b); 641:6, I. These charges arose out of the murder of two women in Farmington, New Hampshire, and subsequent efforts to cover up those crimes.

The defendant's trial began with jury selection on October 1, 2019. Towards the end of the presentation of evidence, discovery violations came to light that resulted in the defense moving to dismiss the charges with prejudice. After pausing the trial and conducting an evidentiary hearing on the discovery matter, the trial court (*Houran, J.*), denied the motion to dismiss, and the trial resumed. After the State rested and during the defense case, additional discovery was found. The defense requested a mistrial, without objection and with the understanding that a renewed motion to dismiss would follow once the undisclosed discovery at issue was reviewed and assessed. The court granted the defense mistrial motion.

The defense filed its anticipated second motion to dismiss, and after conducting an evidentiary hearing, the superior court (*Howard, J.*)[1] denied the motion in a written decision. DM58-77.[2] This appeal followed.

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[1] After the mistrial and before the post-trial evidentiary hearing occurred, Judge Houran retired.

[2] Record citations are as follows:
"T__" refers to the trial transcript and page number.
"DB__" refers to the defendant's brief.

STATEMENT OF FACTS

A. Investigation into the murders and discovery production

Investigation into the murders of Christine Sullivan and Jenna Pellegrini began on January 29, 2017, after police discovered their bodies at the Farmington house where Sullivan lived with her boyfriend, Dean Smoronk. T101-02. The New Hampshire State Police Major Crime Unit [hereinafter, "MCU"] assumed the role of primary investigative agency for the homicides, and Brian Strong was the lead investigator. T102; H(2)252.

Among Strong's duties was the collection, documentation, and dissemination to prosecutors of reports and other investigative materials. H(2)253-54. Strong maintained casebooks containing investigative materials, and also compiled spreadsheets in which he documented investigator assignments and materials received and in turn provided to prosecutors. H(2)74-75, 267.

During the course of the investigation, MCU uncovered evidence that Smoronk had a motive to kill Sullivan and had threatened her. H(2)348-49. Strong turned these materials over to prosecutors, who in turn provided them to the defense in discovery. H(2)349. The defense utilized timely disclosed information in support of several motions *in limine* seeking to admit evidence in

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"DA__" refers to the appendix of the defendant's brief.
"SA__" refers to the appendix of the State's brief.
"DM__" refers to the addendum to the defendant's brief.
"H(1)__" refers to the transcript of the hearing on the defendant's in-trial motion to dismiss.
"H(2)__" refers to the transcript of the hearing on the defendant's post-trial motion to dismiss.

furtherance of an alternative perpetrator defense. H(2)221-28. The defense also at trial affirmatively utilized information obtained through discovery to establish Smoronk's animus towards and motive to harm Sullivan, and to advance its alternative perpetrator claim. *E.g.*, T1382-92, 1406-15, 1481-92.

As a result of poor recordkeeping on Strong's part, he failed to memorialize his collection of numerous materials and some assignments given to other investigators. H(2)52, 75, 273, 281-82, 340. That oversight was not due to any intent by Strong to deny access to materials to either prosecutors or defense counsel. H(2)341, 349.

B. Trial progression and the in-trial motion to dismiss

Prior to the start of trial, prosecutors provided the defense with about eleven thousand pages of paginated discovery, and about three hundred separate media-based discovery materials. DA128-32; SA91, 105. Trial evidence began on October 15, 2019. T1. Over the following six days of trial, the State called eighteen witnesses. T2, 152, 333, 552, 743, 983. Later on the sixth day of evidence, October 23, the defense informed the State of previously undisclosed materials possessed by MCU investigator Stephen McAulay that the defense obtained through a third party. H(2)139, 144-45. Prosecutors immediately contacted McAulay to ascertain what materials had not been received by either prosecutors or defense counsel. H(2)145.

As a result of those inquiries, prosecutors provided defense counsel—Meredith Lugo and Julia Nye—with investigative materials produced through

McAulay. H(2)145. Although several of those materials turned out to be duplicative of discovery that the defense already had received prior to trial, some had not been provided to prosecutors or the defense before. H(2)145-46. Those materials consisted of numerous emails between McAulay and a former intimate partner of Stephen Clough—one of the witnesses called by the State in its case-in-chief—and recordings of five previously undisclosed witness interviews. H(2)146-47. The new information included inculpatory observations of, and statements made by, the defendant of which prosecutors had been unaware during the presentation of their case. D234-35. In addition to the McAulay materials, prosecutors also gave the defense a report provided to them by Strong, regarding a polygraph examination taken by Michael Ditroia, a person already known to the parties through previously-provided discovery. H(2)151-54.[3]

Based upon the newly-disclosed information, the defense moved to dismiss the case with prejudice. DA3. On October 24, the trial court conducted an evidentiary hearing, in which McAulay and Strong both testified. McAulay explained that he inadvertently had moved the undisclosed recordings at issue to a "completed" file without providing copies to Strong, and that he mistakenly believed emails were supposed to be preserved rather than produced. H(1)55-57,

[3] The defendant asserts that Ditroia "was a suspect in the murders," apparently suggesting that the undisclosed polygraph information pertaining to him had particular prejudice to the defense. DB15. But according to Attorney Lugo's hearing testimony, Ditroia "was a bit of an enigma to us. We sort of couldn't really figure out what role he had played in the case." H(2)155; *see* H(2)205 (noting that Ditroia was "something of an enigma in the case."). And, for the reasons discussed by the State *infra*, late disclosure did not cause actual prejudice to the defense. DA169-72.

60-66. Strong acknowledged receiving numerous admonishments by prosecutors to provide them with all discovery, and recounted a pretrial meeting conducted to review all the materials in his possession to ensure that all discovery had been provided. H(1)8-9, 28-29. However, Strong explained that he had neglected to record McAulay's assignments and the polygraph examination in his task spreadsheets, which resulted in his failure to give prosecutors those materials. H(1)11-19, 27-29.

The trial court denied the motion to dismiss. DA17-36. In a written decision, the court found that McAulay's failure to turn over materials was negligent, and that Strong was culpably negligent in his faulty documentation and disclosure of discovery. DA32-34. The court also found that the failures occurred "notwithstanding the efforts of the prosecutor's office to avoid them," and that the evidence did not support any allegation of bad faith. DA33-34. The court reviewed the late-disclosed materials at issue and determined that whatever prejudice to the defense effectively could be addressed by the numerous sanctions and remedies it ordered. DA26-31, 35-36.[4]

C. Resumption of the trial and the defense request for mistrial

The trial resumed on October 28. T1306. On that day, the State rested after calling its last witness, and the defense began its case. T1367. Over that day and the next two days, the defense called nine witnesses. T1367, 1381, 1452.

[4] On appeal, the defendant has not challenged any of the factual findings or legal determinations made in the ruling on his in-trial motion to dismiss.

At about the time when the trial resumed, MCU initiated a discovery audit. All investigators who had participated in the murder investigation were directed to review materials in their possession and to verify Strong's receipt thereof for disclosure to prosecutors and the defense. H(2)34-37; DA279. As a result of that review, MCU determined that more materials had not been provided in discovery. H(2)34. At the end of the trial day on October 30, prosecutors were notified that additional discovery existed, and they in turn immediately told defense counsel and worked to send undisclosed materials directly to them. H(2)167-68; DA91-92. That evening, defense counsel received a recording of a previously undisclosed interview of Clough and were informed that more materials existed. H(2)167-69. That same evening, counsel began to discuss whether they could continue with the trial, conversations that actively resumed the next morning:

> So we started talking about [receipt of new discovery] the night . . . of October 30th, and then more the morning of October 31st, essentially trying to figure out can we incorporate this and keep going? Do we recall—in particular, at that point, most of the discussion the night of the 30th was about [] Clough because that's whose recording [] we had just received. I remember speaking with [a senior colleague], and I think having, essentially, a phone call with her on speakerphone with Attorney Nye and I trying to sort of brainstorm do we recall him, do we not, how do we use this?

H(2)174 (testimony of Attorney Lugo).

The next morning, among the new material received by the defense were cellphone data downloads, which counsel subsequently characterized as "huge . . . [r]eally, we look to see that they were phone extractions, and that was all we could do, essentially at the moment." H(2)168, 172. Also that morning, defense counsel

continued their internal discussions as to how to proceed: to request a mistrial or to ask for a brief recess and then resume the trial. H(2)229 (options discussed were to request mistrial or "[t]o potentially take a break of a couple of days and use that time to regroup and then reconvene and finish the presentation of the [d]efense case, so essentially, press on with the trial."); H(2)245 ("[W]e were still trying to figure out how we could incorporate the new material and use it to best defend [the defendant].").[5]

That same morning, prosecutors sought to notify the court that discovery issues had not been resolved despite the earlier assurance to the contrary. DA 91-92, 94-95. Before meeting with the court and defense counsel, two of the trial prosecutors visited MCU offices to attempt to assess the extent of the newly-determined discovery violation. DA282. Also prior to meeting with the court, those same two prosecutors spoke with defense counsel over the phone on three separate occasions. H(2)177-82. The first telephone conversation was to notify counsel of the State's intent to inform the court that additional discovery issues existed. H(2)177-78. In the second call, responsive to an email sent by counsel requesting the State's position were the defense to ask for a mistrial, prosecutors relayed that they would agree to a mistrial without prejudice. H(2)179-80.

[5] *But see* DA105-06 (statement of Attorney Nye at conference with court on October 31: "Your Honor, so yesterday, we did receive [Clough's] interview . . . . Attorney Lugo and I reviewed the interview last night. We also reviewed [additional just-disclosed discovery]. I can say that based on that information alone, we would have asked for a mistrial.").

As to the third and last conversation between prosecutors and defense counsel before meeting with the court, as later attested to by Attorney Lugo:

> As defense counsel continued to review the new material and engage in legal research and consultation with colleagues, the prosecutors called with further news. [Prosecutors] 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.*

SA46-47 (emphasis added).[6] Her testimony on this same event was substantively similar:

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[6] The defendant's appendix contains neither the signed post-trial motion to dismiss, nor the accompanying affidavit from Attorney Lugo attesting to the factual representations set forth therein, including the above. DA121.

Although the defendant's brief attributes the following quoted representations to a prosecutor, there is no accompanying record citation:

> [The prosecutor] said, "We found something. What we found is significant. There is a lot of it. It is a drug investigation that was kept separate."

DB37. Similarly lacking in record support is the defendant's assertion that prosecutors informed defense counsel that "MCU had a significant volume of drug-related investigation material, including reports, charts, and phone records, that had never been disclosed." DB36. Attorney Lugo, who testified on this very matter, never so represented:

> So in that third phone call, I do recall Attorney Ward making reference to seeing phone records, and he referred to at trial one of the exhibits, perhaps one of the frequently used exhibits, was this—I'll call it a chart, like a phone chart that the State had created, and it was several pages of text messages. But the first page of the phone chart was essentially a list of people involved in the case, and then next to each of them their phone number, and Attorney Ward made reference to their

> [Attorney Ward] said that he and Attorney Hinckley had gotten to State Police headquarters, that they had learned that there was more, that they had walked in, that they had learned that the State Police—and again, I'm paraphrasing—but that the State Police had kept separate and not provided drug investigation and that they had walked in and seen materials that they didn't recognize that we didn't have. I remember asking *if they could give us some sense of what type of volume of material they were talking about, and I remember Attorney Ward saying significant*.

H(2)181-82 (emphasis added). Attorney Lugo also discussed how that conversation impacted her thinking with respect to how to proceed:

> So it was significant in two ways. I—*part of the reason I asked the volume question was to try to get some idea of what we are dealing with of—because again, at that point, we were still trying to figure out what to do. Do we continue going forward, or do we request a mistrial? So my volume question was to try to get a handle on just, basically, how much more is there, and how quickly are we going to be able to go through it and regroup*. So that was part of it.
>
> The other part of it that was significant was the drug investigation part of it because my impression from the phone call was that what they were seeing was related to the drug investigation. They didn't have it. We didn't have it. And just knowing the centrality of drugs to the case in general, it heightened how important I thought that evidence would be—or knew that it would be.

H(2)183-84 (emphasis added).

Later that same day, the parties met with the court. Prosecutors informed the court that additional materials were found that had not been disclosed in discovery:

> [We] went to New Hampshire State Police to see what they're doing, and to speak with the supervisors who—frankly, the supervisors have

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> phone records. Some of the numbers we recognized from that chart, and some we don't.

H(2)247.

> been involved in this from last week, including the captain of the investigations bureau, as well as the colonel of the State Police.
>
> There are additional materials that we had not seen before [in addition to materials provided to the defense on October 30 and 31].
>
> . . . .
>
> And frankly, some of that stuff may be along the lines of last week, when I initially reported that there are 14 interviews, and it turned out to be 5. There very well may be some duplicative stuff, but there are clearly notes and cell phone records that it appears that we have not received.
>
> And we notified [d]efense counsel of this as well.

DA282.[7] Attorney Lugo then addressed the matter of mistrial: "I mean, given that—we were talking [mistrial] even before finding out the additional material was coming over. *So just because of our inability to incorporate and review . . . .*" DA283 (emphasis added).

When the defense then requested a mistrial, the State did not object, and also argued that a mistrial was required even absent the defense request. DA293-95. Specifically, the State argued that manifest necessity existed given that a continuance was not a viable option. That was because of "the late discovery [] of

[7] *See also* DA292 ("[We] went to the State Police this morning to discuss the matter with the supervisors, and see where they were in this [review] process. We saw a multitude of materials, some of which we had seen for the first time. Frankly, in large part, it might be similar to last week where we has knee-jerk reaction of providing everything to the [d]efense, and it turns out a majority had already been provided or is in discovery. But the simple matter is that there's still some materials that have not been disclosed to the [d]efense.").

potentially exculpatory evidence, including impeaching evidence, including from witnesses from both sides who have already testified," and because of the trial's late stage and the time needed for defense counsel to review newly-disclosed and yet-to-be disclosed materials. *Id*. Prosecutors also expressed their expectation that the defense would renew a request for dismissal with prejudice upon receipt and full review of all undisclosed materials. DA 295-96. The court then granted the defense request for mistrial. DA297.

D. Post-trial motion to dismiss

After the trial ended, MCU continued and expanded upon its search for undisclosed discovery, initiating in effect a *de novo* review of the entire case. H(2)37, 49-50, 65. That review involved four investigators specifically and solely assigned to it, and occurred over the span of several weeks. H(2)37-40, 65-66. As part of that review, every investigator who had worked on the case turned over all materials, even if believed to have been previously provided, and that mass of collected material was cross-checked to all known provided discovery. H(2)49, 65. The collection and cross-checking of materials was not limited to MCU, but also extended to members of the State Police Narcotics Investigations Unit. DA336-37. Also as part of the process, prosecutors met with individual investigators and examined their entire investigative files. H(2)50-51, 59-70, 79.

The purpose of that unprecedented and exhaustive review was both to ensure that all discoverable materials were located and provided, and to ascertain what had caused the discovery lapses in the first place. H(2)51-52, 55. The latter

turned out to be a lack of efficient recordkeeping by the lead investigator, specific to this case. H(2)52. As to the conclusion that the identified deficiency was limited to the case at hand, every active MCU investigation underwent a similar extensive review process, which revealed no comparable discovery issues. DA339-40. As a result of the discovery errors that occurred, MCU instituted a number of unit-wide protocols designed to ensure multiple levels of oversight on discovery collection and documentation. H(2)53-55; DA340.

The weeks-long *de novo* discovery audit resulted in prosecutors receiving and providing to the defense further new discovery, beyond that produced towards the end of the trial. H(2)188. Specifically, the defense received about an additional five hundred pages of printed-out discovery, as well as about thirty separate discovery media that included witness interviews and cellphone data downloads. *Id.*; DA84-87, 128-32. Although some items were duplicative of materials already in discovery, *see, e.g.*, SA48, 91, 95, 107, others had never been previously disclosed. H(2)188. According to Attorney Lugo, the amount of discovery received after trial was "significant," and included information that the defense considered to be material and exculpatory. H(2)233-34.

After defense counsel received all the new discovery, they reviewed it and conducted an assessment as to prejudice. H(2)195-96, 233-35. Defense counsel could not articulate prejudice in support of their post-trial motion to dismiss without first reviewing all the undisclosed discovery at issue. H(2)235-36.

The defense ultimately filed its post-trial motion to dismiss on May 26, 2020, and the court conducted an evidentiary hearing on it over the course of several days the following month. H(2)1, 191, 353; DA121. The defense called seven witnesses, including Strong and Attorney Lugo. H(2)2, 192. The State submitted several affidavits from people who participated in and oversaw MCU's discovery audit. DA322-41.

The discovery issues that arose in this case were unprecedented, for both the investigators and the attorneys involved. H(2)51-52, 395-96. According to Attorney Lugo, who had practiced criminal defense for about eighteen years, she never before had experienced a similar situation of receiving so much untimely discovery. H(2)175-76. Attorney Lugo estimated that, at the time when notified during the trial of additional undisclosed materials, the defense anticipated resting its case "[p]robably within a week." H(2)133. Upon notification of the additional violations, she consulted with co-counsel and other attorneys in her office as to how to proceed. H(2)229.

At that time, only two options were discussed: requesting a mistrial or continuing with the trial. *Id.* As to the latter, discussion was whether "[t]o potentially take a break *of a couple of days* and use that time to regroup and then reconvene and finish the presentation of the [d]efense case, so essentially, press on with the trial." *Id.* (emphasis added). According to Attorney Lugo, resuming the trial without reviewing what information had yet to be disclosed was not a viable option. H(2)232-33. Specifically, Attorney Lugo agreed that the defense would

not have been prepared to resume trial without reviewing the undisclosed materials, and that she and co-counsel could not effectively represent the defendant without undertaking that review. H(2)235-36.

At the conclusion of the evidentiary hearing on the post-trial motion to dismiss, the prosecutors directly addressed the thought process behind notifying defense counsel of additional undisclosed discovery in the third October 31 telephone call. H(2)395-96. The prosecutors expressly disavowed any intent to goad a defense mistrial request, and explained that notification was given because it was necessary to do so. *Id.*

In a 20-page written decision, the court denied the defendant's post-trial motion to dismiss. DM58-77. The court first discussed the pertinent factual and procedural background, as well as the applicable law. DM58-70. From there, the court separately analyzed the defendant's Double Jeopardy and Due Process claims. DM70-77. In each analysis, the court made factual findings challenged by the defendant in this appeal.

As to Double Jeopardy, the court, upon review of evidence on the matter, expressly found that the prosecutors did not intend to goad defense counsel into declaring a mistrial. DM70-71. The court then analyzed the defendant's Due Process claim. DM71-77. As part of that analysis, the court found that the culpability finding made in the ruling on the in-trial motion to dismiss—to wit, culpable negligence at the individual rather than institutional level, *see* DA32-34—still applied. DM76-77. The court also reviewed the various late-disclosed

materials that the defendant claimed caused him irremediable prejudice and determined that "although there is no doubt [he] was entitled to such materials and they may be germane to the issues at trial, the court finds [he] did not suffer actual prejudice sufficient to compel a dismissal with prejudice." DM76.

The court deferred applying remedies and sanctions and asked defense counsel to submit proposals, as they had done with their first motion for mistrial. DM77. Instead, counsel filed a motion to reconsider, and, upon denial of that motion, filed the instant appeal.

SUMMARY OF THE ARGUMENT

As to the Double Jeopardy challenge, the trial court correctly found that prosecutors did not intend to goad the defense into asking for a mistrial. As to the Due Process challenge, the trial court correctly found that the pertinent level of culpability for the conceded discovery violation was culpable negligence by the lead investigator. With respect to both challenged factual findings, the defendant has offered this Court a great deal of conjecture as to malicious motivations by prosecutors, but has identified no error sufficient to overturn the express findings made. This Court should therefore affirm based on the trial court's detailed record-based findings. Further, the defendant did not preserve his request that this Court add a "reckless" component to prosecutorial scienter in a Double Jeopardy analysis, because the request was never made at any point below.

ARGUMENT

I. THE CHALLENGED FACTUAL FINDINGS ARE NOT CLEARLY ERRONEOUS.

The trial court issued a detailed written decision denying the defendant's post-trial motion to dismiss, after conducting a full evidentiary hearing on the matter, reviewing documents, and receiving arguments from the parties. On appeal, the defendant attacks explicit factual findings made by the court below: that prosecutors did not intend to goad the defense into requesting a mistrial, and that the level of misconduct in connection with the admitted discovery violations was culpable negligence by the lead investigator. DB27. The defendant also asks this Court to create and apply a new, broader, legal standard regarding prosecutorial culpability for an imputed Double Jeopardy violation. The defendant's request to change the controlling law is unpreserved, and the challenged findings are firmly supported by the record.

A. DOUBLE JEOPARDY

At the outset, with respect to the defendant's Double Jeopardy challenge, he asks that "[t]his Court . . . find that the intent element [*see infra*] can be satisfied by specific intent to cause a mistrial *or awareness plus conscious disregard of the risk that the conduct would cause a mistrial*." DB33 (emphasis added). The applicable prosecutorial scienter is intent. *See infra* (discussing legal standard). The defendant proposes alteration of that standard to one of *either* intent *or* recklessness. *See* RSA 626:2, II(c) ("A person acts recklessly . . . when

he is aware of and consciously disregards a substantial and unjustifiable risk that [certain conduct] will result from his conduct.").

But in the defendant's post-trial motion to dismiss addressing this very matter, he never argued for a deviation from settled law. *E.g.*, DA91 ("[T]he State . . . *acted with the intent* to provoke the defense into requesting a mistrial.") (emphasis added). Moreover, in the defendant's motion to reconsider, he agreed that "[i]n its order, the court cited the relevant legal standard for determining when dismissal is the appropriate remedy." DA354. Accordingly, the defendant's newly-raised appellate claim is unpreserved. *See State v. Plantamuro*, 171 N.H. 253, 258-59 (2018) ("The defendant, as the appealing party, bears the burden of demonstrating that he specifically raised the arguments articulated in his appellate brief before the trial court.").[8]

As to the well-settled standards governing the defendant's Double Jeopardy claim, "the general rule is that where a defendant requests a mistrial which is granted, a retrial on the same charge is not barred by double jeopardy. An exception to the rule obtains where the prosecution *intended* to provoke the defendant into moving for a mistrial. . . ." *State v. Duhamel*, 128 N.H. 199, 202

[8] *State v. Marti*, 147 N.H. 168 (2001), is inapposite. DB33. The issue before the Court in *Marti* was under what circumstances Double Jeopardy affords protection against retrial when a conviction is reversed for prosecutorial misconduct. *Id.* at 171.

(1986) (internal citations omitted and emphasis added). "[R]etrial is permitted unless the defendant, *by conduct and design of the State*, has been painted into a corner leaving a motion for mistrial as the only reasonable means of avoiding *becoming a victim of unlawful tactics* . . . ." *State v. Zwicker*, 151 N.H. 179, 188 (2004) (emphasis added). As one court has explained as to the required intent for a Double Jeopardy violation:

> The law has never looked upon the declaration of a mistrial . . . as [a] mild slap[ ] upon the wrist. A mistrial is a rigorous means for redressing even grossly negligent and deliberate misconduct. When the prosecution suffers a mistrial, it suffers a stern rebuke in terms of lost days, lost dollars, lost resources of many varieties and the lost opportunity to make the conviction stick. It is only in the Machiavellian situation where the prosecutor deliberately courts a mistrial that the normal sanctions are self-evidently inadequate. A scheming prosecutor cannot be rewarded by being handed the very thing toward which he connived.

State v. Muhannad, 837 N.W.2d 792, 801 (Neb. 2013) (internal quotation marks and citations omitted).

"Whether the prosecution [] intended [to provoke the defense to request a mistrial] is a matter of fact to be decided by the trial court." *Zwicker*, 151 N.H. at 188; *see State v. Glenn*, 160 N.H. 480, 489-90 (2010) (same). The issue on appeal is whether the finding made was clearly erroneous, *see Duhamel*, 128 N.H. at 203, which occurs only when the finding is "unsupported by the evidence." *Fleet-Bank—N.H. v. Chain Constr. Corp.*, 138 N.H. 136, 139 (1998); *see State v. Murray*, 153 N.H. 674, 679 (2006).

Here, the trial court's express factual finding that prosecutors did not intend to provoke the defense mistrial request is not clearly erroneous. The court firmly grounded that finding upon particular facts and circumstances, and rejected proffered defense arguments that sought inferentially to establish a contrary finding. Specifically, as the court discussed:

> The defense contends that the State's representations . . . during the third phone call between counsel on October 31, 2019, goaded the defense into requesting a mistrial and these efforts were intentional. During that phone call, Attorney Ward informed defense counsel that [prosecutors], including himself, had arrived at NHSP headquarters and determined there was a "significant" amount of undisclosed discovery materials and some materials related to the drug investigation, which [prosecutors] just then learned were kept separate by the NSHP. Despite the defendant's suggestions to the contrary, the court is unpersuaded that these representations were anything more than the State communicating its realization that it was again in violation of its discovery and potential *Brady* obligations due to the NSHP's non-disclosure of pertinent discovery materials and its expedient attempt to notify defense counsel of that material. The hearing testimony does not support the defendant's assertion that Attorney Ward made misrepresentations about the substance of the undisclosed materials—because, according to the defendant, much of the materials disclosed on October 31, 2019 were cumulative of materials already disclosed—to goad the defense into requesting a mistrial. Attorney Lugo's testimony reflects that defense counsel was already contemplating requesting a mistrial prior to October 31, 2019, dependent on the substance of the materials to be turned over on October 31, 2019. Finally, the [prosecutors'] representation that they would not oppose a mistrial if the defense opted to make such a request, while potentially some evidence of goading if made with the intent to induce a mistrial, is not itself goading. Thus, the court finds as a matter of fact that Attorney Ward was not attempting improperly to induce a mistrial. Instead, the court concludes that the offer not to oppose a mistrial if requested was born out of a genuine recognition that if the defense needed a cessation of the trial to digest the new discovery, the State was simply not in a position to oppose any such request.

DM70-71. The court's thorough factual analysis, as well as its use of evidence to support the ultimate finding made, constitutes the very type of reasoned consideration that refutes any notion that the court clearly erred. *See Glenn*, 160 N.H. at 169 ("Because there is evidence in the record to support the trial court's finding that the State did not intentionally engage in misconduct, we uphold it."); *see also*, *e.g.*, *Murray*, 153 N.H. at 679-80 (reviewing trial court's evidentiary basis for finding made and concluding that court did not err); *State v. Montella*, 135 N.H. 698, 700-01 (1992) (same).

The defendant's attempts to infer malicious scienter from the circumstances ignores the direct evidence on this very matter. To be sure, the trial court had before it Attorney Lugo's sworn testimony, which mirrored in material respects attested-to representations that she made in the post-trial motion to dismiss. There was and is no dispute as to Attorney Lugo's recollection of the substance of the third telephone call with prosecutors that informed defense counsel's decision to request a mistrial. But her account of what prosecutors said failed directly to answer the very different question of their subjective intent when information was conveyed.

As to that central issue, the trial court had direct evidence in the form of on-the-record representations from one of the prosecutors involved. At the hearing on the motion to dismiss, that prosecutor expressly and candidly disavowed any intent to provoke a defense request for mistrial:

> It was made clear in our objection, to which I signed an affidavit, there was no intent to goad or provoke a certain course of conduct from counsel [when we] informed them that additional discovery materials existed. Frankly, it has and does sicken me what happened.
>
> It sickened me that a mistrial was declared in a case going so well for the State into which so much time had been placed and resources had been placed by everyone in the case, by the [d]efense attorneys, by the Court, by the [p]rosecutors, and by the jurors who were selected to serve on this case. It sickened me that the victims' families had to be informed and reinformed about the issues that arose that should never have arose. It sickened and embarrassed me to have to knock on [c]ounsel's door and tell them that more materials had not been timely disclosed. It sickened and embarrassed me to tell Judge Houran about the continued discovery issues in this case, despite my representation [to the contrary].
>
> That was me who spoke on the record that counsel was referring to—just a week prior—that the issues had been resolved. I have been a prosecutor since 1997. I have worked in New Hampshire in the Attorney General's Office for 13 years as a homicide prosecutor. I have prosecuted hundreds of cases. I can correctly [be called] a lot of things, correctly, argumentative, litigious, sarcastic—never have I had such a discovery issue arise before in a case.
>
> [We] did not attempt to deceive or manipulate [d]efense counsel. There was no design to provoke a defense request for a mistrial. The design was to suck it up, even though embarrassing and painful on many personal and professional levels, inform [d]efense [c]ounsel and the Court immediately that the discovery issue, thought to be resolved, represented by me to be resolved, in fact, was not resolved, which is what we did, knowing one way or another, that a successful, for us, and lengthy trial in a double homicide was going to be torpedoed. We were being as transparent as we could under the circumstances. And unfortunately, we were correct. A significant amount of discovery was provided on the eve of the trial's end.

H(2)395-96.

The trial court was entitled to rely on this direct evidence of intent—or more precisely, lack thereof—in making its finding that prosecutors did not intend

to goad the defense into requesting a mistrial. *See*, *e.g.*, *Murray*, 153 N.H. at 679-80 (trial court's finding, based in part on representations made by prosecutor on matter, not clearly erroneous); *Duhamel*, 128 N.H. at 203 (same). This on-the-record representation was wholly consistent with the evidence adduced at the hearing held on the motion to dismiss, including Attorney Lugo's testimony. Given such direct evidence, the trial court's finding is fully supported by the evidence.

Aside from this existing direct evidence, the trial court was entitled to "[i]nfer[] the . . . nonexistence of intent from objective facts and circumstances." *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982). Here, the many facts and circumstances identified by the court provided ample support for its finding.

First, as to the notification made by prosecutors on October 31 by phone, the trial court correctly was "unpersuaded that [it was] anything more than the State communicating its realization that it was again in violation of its discovery and potential *Brady* obligations due to [MCU]'s non-disclosure of pertinent discovery materials and its expedient attempt to notify defense counsel of that material." DM71. As for record support, the court here had, in addition to the consistent representations of the attorneys for both sides on the matter, evidence of the post-trial discovery provided to the defense. A day after prosecutors informed defense counsel during the presentation of the defense case of yet more undisclosed materials—and a day after counsel began contemplating whether to request a mistrial based upon an inability to effectively incorporate newly

discovered information in the defense—prosecutors told counsel that a significant amount of additional discovery existed, although its exact nature and extent was unknown.

On appeal, the defendant suggests that prosecutors actually knew what that additional undisclosed discovery entailed. DB19. But before the defense request for mistrial, prosecutors indicated that they were unsure what the undisclosed discovery encompassed. DA282, 285, 292. Defense counsel knew this full well. As Attorney Lugo unambiguously represented to the trial court: "[Prosecutors] indicated that they *had not yet reviewed the material*." SA47 (emphasis added). Apart from these express representations, the parties and the trial court all were well-aware of the obvious: what the undisclosed discovery actually was would not be known until the completion of the *de novo* review being undertaken by MCU produced those as-yet unprovided materials. DA285, 293-94, 297-99.

The information relayed to defense counsel by prosecutors—that there appeared to be a significant amount of undisclosed discovery, including "drug investigation" materials—was neither deceitful nor designed to prompt a defense mistrial request, which was the very course of conduct that defense counsel already had been actively contemplating unbeknownst to the prosecutors. As to the former representation, trial counsel has acknowledged, without reservation, that the discovery ultimately provided post-trial was significant in its quantity. *E.g.*, H(2)233.

In arguing that inferences support his claim of Machiavellian design by prosecutors, the defendant relies heavily on his factual assertion that they informed defense counsel that unspecified "drug investigation" information was significant, both in quantity and nature. *See*, *e.g.*, DB40 ("[T]he prosecution said that MCU had significant information regarding a separate drug investigation . . ."), 42 ("[T]he State represented on October 31 that [the 'drug investigation' information] was extremely significant."). But the trial court reasonably found that the characterization of the undisclosed discovery as significant referred to its quantity rather than its nature. DM70. That finding is wholly in accord with Attorney Lugo's own recollection of the conversation at issue. H(2)181-82; SA46-47.

Objectively viewed, the discovery provided to the defense after trial was significant in quantity, *see* SA91-110 (cataloguing late discovery), and the defendant makes no claim to the contrary. So, too, did that new discovery include "drug investigation" information. *E.g.*, DA84-86; SA92, 97-98, 103-05. Moreover, the merits of such argument aside, the defendant has steadfastly maintained that untimely disclosures caused him prejudice. *E.g.*, H(2)234-35; DA101-16. That the discovery ultimately received after trial apparently did not exceed the defendant's hopes of exculpatory windfall does not alter this reality, or suggest a disingenuous prosecutorial intent. To the contrary, the record provided the trial court with ample basis "[to] find[] as a matter of fact that [prosecutors were] not attempting improperly to induce a mistrial." DM71. In other words, prosecutors' disclosure to defense counsel, and to the trial court, that additional

and undetermined discovery still remained unproduced was not made in order to hoodwink counsel into requesting a mistrial. Rather, prosecutors made that disclosure so that counsel and the court would know that error still existed, and to fulfill their legal and ethical obligations to so disclose as promptly as possible.

Further supporting the trial court's finding is the absence of any true tactical reason by prosecutors to compel a mistrial. Prosecutors reasonably believed that their case-in-chief established the defendant's guilt. H(2)395-96. They had no reason to torpedo the case at its near conclusion, or at any time for that matter. Although the defendant posits a stratagem behind prosecutors' actions, DB39-40, had that actually been so then they would have attempted to avoid a mistrial, in order to "see[] . . . all the defense case," DB40, as well as to preserve conviction from inevitable subsequent challenge by arguing that late discovery was not truly exculpatory or prejudicial.

Moreover, the notification at issue, both in its context and its timing, was the culmination of a plainly linear series of events that began with disclosure by the defense, to the trial court and prosecutors, towards the end of trial that there existed materials not provided in discovery. That revelation spurred an unprecedented internal review process by MCU that uncovered additional undisclosed discovery about which prosecutors were obligated immediately to notify the defense. None of these circumstances was part of any grand scheme by prosecutors to derail a lengthy and successful trial. Similarly, the notion that

prosecutors withheld discovery to spring on defense counsel in the trial's waning days is neither reasonable nor supported by evidence.

Last, the State's assent to a mistrial was not direct or inferential evidence of nefarious prosecutorial intent. DM71. Although the absence of objection under some circumstances may evince intent, *see*, *e.g.*, *Murray*. 153 N.H. at 679, the situation at issue here is not analogous. This was not a typical case, in which a prosecutor at trial elicited previously precluded or otherwise prejudicial evidence. Nor was this a situation in which a prosecutor had a good-faith argument that the error at issue could effectively be redressed short of a mistrial, such as striking the offending evidence or issuing curative instructions. *See*, *e.g.*, *Montella*, 135 N.H. at 700-01; *Duhamel*, 128 N.H. at 203. The fundamentally different error here was not providing discovery to which the defense was entitled as the trial reached its near conclusion. Significantly as well, when the error was discovered, its full nature and extent was unknown, and would not be for quite a while.

Under these circumstances, when the motion for a mistrial was made, prosecutors, defense counsel, and the trial court all understood that counsel first had to have the actual nondisclosed discovery at issue and then take the necessary time to assess it in order to make reasoned judgments as to whether, and how, to use it. *See*, *e.g.*, DA297. Those important substantive decisions involving trial strategies and tactics simply could not be made in the trial's twilight stages, or during a continuance of a reasonably viable length. Indeed, in the midst of the defense case counsel already were "struggling to assimilate" the "significant

volume of undisclosed evidence" that they had received before requesting a mistrial. DB37. And, as Attorney Lugo frankly acknowledged, she and co-counsel could not effectively represent their client without knowing what the other undisclosed materials were. H(2)235-36.

Subsequent events bore out those obvious barriers to the only remedy other than mistrial posited by defense counsel, to wit, a continuance. By the defendant's own characterization, the amount of new material disclosed to counsel *in the midst* of the defense case was "voluminous." DB25. That new discovery was supplemented after trial by hundreds of pages of written discovery and dozens of media-based materials. It took investigators weeks after the trial's cessation to identify and provide the defense with that discovery. The defense then rightly took additional months to review and analyze that newly-disclosed information, and to articulate alleged prejudice for its late disclosure. The ensuing litigation occurred over several more months and included an evidentiary hearing that itself lasted several days.

Viewed objectively and realistically, prosecutors understood that they could not make a valid objection to a defense mistrial request. A continuance was not a valid option, and the defendant has not even attempted to argue otherwise on appeal. Proceeding without the undisclosed discovery similarly was not viable. Such reality was evinced by the State's articulated position that a mistrial was a matter of manifest necessity even if not requested by the defense. DA294-95. *See*, *e.g.*, *United States v. Chapman*, 524 F.3d 1073, 1082-84 (9th Cir. 2008)

(manifest necessity resulting from late discovery disclosure); *Cruz v. Commonwealth*, 963 N.E.2d 1172, 1178-80 (Mass. 2012) (same). For these reasons, the court below rightly found that the lack of opposition to mistrial constituted nothing more than "genuine recognition that if the defense needed a cessation of the trial to digest the new discovery, the State was simply not in a position to oppose it." DM71.

Prosecutors promptly informed defense counsel and the trial court that the defense still had not received the discovery to which it was entitled, not to bait a certain response, but because the disclosure had to be made. The trial court's express finding on this matter was not clearly erroneous.

B. DUE PROCESS

The defendant fares no better in his Due Process challenge to the culpability finding with respect to acknowledged discovery violations. DB52-53. The starting point here is the written ruling on this very matter:

> [T]he court finds that no evidence presented at the hearing necessitates any alternative or further findings with regard to individual or institutional culpability as a result of the discovery violations. Lt. Strong—the only individual previously found to have engaged in culpable negligence—reiterated that none of his conduct was the part of any effort to intentionally withhold evidence [from] the Attorney General's office and, in turn, the defendant. The court finds his testimony credible and reliable on this point. Likewise, no other testimony provided at the hearing illustrates any intentional withholding of evidence from the defendant or to encourage a certain trial result. Accordingly, the findings on culpability set forth in this court's (*Houran*, J.) prior order are incorporated by reference [culpable negligence by Strong, and negligence by McAulay].

DA76-77 (citations omitted).

This express culpability finding is directly supported by evidence adduced at the hearing conducted on the defendant's mistrial motion. Specifically, the lead investigator, Strong, admitted to poor recordkeeping and denied any intentional or nefarious purpose behind such. *E.g.*, H(2)338-41, 349-50. The court credited that testimony, *see*, *e.g.*, *State v. Kousanadis*, 159 N.H. 413, 419 (2009) (noting trial court's "broad discretion" in making credibility determinations), and the defendant has not challenged it on appeal. In light of such direct evidence as to culpability, there was no error at all, let alone error that was clear.

There also was record support for the challenged culpability finding aside from Strong's on-the-record avowals. Although a significant amount of additional discovery was uncovered after trial, the core cause for untimely production—deficient recordkeeping by the lead investigator—remained unchanged from that found in the first mistrial motion. Notably, that same investigator had been responsible for the timely production of a wealth of material that was utilized by the defense before and during the trial in support of its alternative perpetrator claim. *E.g.*, H(2)220-28, 348-49. And, upon review, the trial court determined that the defense was not prejudiced by the particular late disclosures that it had identified in support of its second mistrial motion. DA73-76. Finally, the unprecedented review of discovery practices in this and other cases by MCU determined that the errors here were anomalous rather than systemic. H(2)53-55; DA339-40.

These circumstances provided ample basis for the trial court's express finding that there was no conscious design by the State to withhold discovery: "no other testimony provided at the hearing illustrates any intentional withholding of evidence from the defendant or to encourage a certain trial result." DA76-77. The defendant's assertion that the court "did not consider whether the [discovery] failures were attributable to misconduct, intentional or otherwise, on the part of the prosecution or its agents," DB42, simply ignores this and other pertinent findings actually made.[9]

The defendant contends that prosecutors directed the federal Drug Enforcement Administration to investigate the narcotics activities of people named in the homicide investigation, and did so with a purpose to avoid providing discovery to the defense. *E.g.*, DB28 ("The proceedings below revealed an intent on the part of [prosecutors] and the MCU to structure the investigation so that key drug evidence would be unavailable to the defense."), DB49 ("In the earliest stages of a homicide investigation which stemmed from drug trafficking, the MCU and [prosecutors] delegated the investigation of the 'drug angle' to federal authorities, thus removing any material the DEA gathered from the realm of

[9] Although it is a complaint that has no bearing on the challenge made to the trial court's culpability finding, the defendant fails to explain why "an appropriate remedy cannot be fixed based on an order that found no misconduct on the part of the prosecution, and no more misconduct than [was found in the order on the first mistrial motion]." DB52. In point of fact, the trial court can craft any number of additional remedies and sanctions in connection with the post-trial discovery. As just one example, the court can bar prosecutors from directly or indirectly utilizing late disclosed information, and can allow its introduction by the defense at trial though otherwise hearsay if its source is unavailable.

[prosecutors'] imputed knowledge and obligations to disclose."), DB50-51 ("The prosecution . . . creat[ed] circumstances where it would not receive reports of the investigation of the 'drug angle' of the homicides. . ."). This assertion is without support in the record.

To begin, the claim that the State intentionally withheld discovery is at odds with express findings made by the court that heard evidence on that very matter. DB49 ("[T]he lower court found that no one acted with the intent to suppress evidence."). The claim also truly is unsupported by evidence. As factual basis for his allegation of intentional misconduct, the defendant points to snippets of Strong's hearing testimony. DB12. But in the cited testimony, Strong just briefly recounted discussions held between state and federal investigators in which it had been decided, by those unknown to him, that "DEA would be working the case with [state investigators], and primarily focusing on drugs." H(2)304. Strong was not even sure whether prosecutors were present during these vague discussions. H(2)304-09.

Even if such testimony established prosecutorial presence during discourse into the division of investigative responsibilities, the defendant points to no evidence, testimonial or otherwise, that prosecutors delegated any particular investigatory role to a federal agency. Further, nothing in the testimony cited by the defendant reasonably suggests that the patently unethical, *see* N.H. R. Prof. Conduct 3.4(a), purpose of such an unestablished delegation was intentionally to withhold discovery. Indeed, to imply that prosecutors by conscious design sought

to prevent defense access to discovery is neither reasonable nor supported by evidence. A far more rational inference from the limited actual evidence on the matter—and one tied directly to evidence adduced by the defense—was that a federal agency undertook a primary role in drug-related investigation because of the suspected large quantities of narcotics involved and the interstate nature of their distribution. H(2)94, 97-98. The defendant's unfounded supposition of a nefarious purpose also ignores that federal authorities had been investigating narcotics targets well before the homicide investigation began. H(2)303.

For these reasons, the defendant's factual Due Process attack fails. Further, although not an articulated issue in the defendant's brief, *see* DB27, to the extent his passing arguments as to prejudice constitute a separate Due Process challenge to the trial court's ruling, they fall far short. First, the court expressly ruled on the issue: "the court finds that [the defendant] has not suffered actual prejudice as a result of the State's late disclosure . . . ." DA75. That determination is supported by the court's analysis of the various claimed grounds for prejudice articulated below. *See* DA73-76. Thus, even were the issue of prejudice not factual, the court's ruling was a sustainable exercise of discretion. *See State v. Dodds*, 159 N.H. 239, 248 (2009) (trial court's decision with respect to discovery violations reviewed under sustainable exercise of discretion standard).

The defendant asserts that "[m]uch of [the undisclosed discovery] related to the defense theory of an alternative perpetrator, and the defense's lack of access to it before trial was undeniably prejudicial." DB52. But what little information

actually identified by the defendant on appeal does not support any legitimate claim of prejudice. For example, his claim that "undisclosed information included assertions that Smoronk was behind the murders and may have flown back to New Hampshire under an alias," DB15, fails to point out that the information at issue constituted rumors—patently inadmissible at trial—that follow-up investigation debunked. H(1)20-25, 45-47.

The defendant also lists information favorable to his defense that he suggests was unavailable to him at trial because he did not receive unexplained "drug information." DB13. Putting aside the disconnect between unknown drug information and the defense of alternative perpetrator of murder, at trial the defendant elicited threats and statements of animus made by Smoronk against one of the murder victims, as well as Smoronk's connection to a motorcycle gang. *E.g.*, DB10. So too did the defendant have available at trial information that Smoronk hired people to commit murder. *E.g.*, DB11. Notably, the defendant has not identified any post-trial discovery that constituted admissible evidence that would have added to discovery timely provided by the State, used by the defense, and introduced at trial suggesting Smoronk's involvement in the charged murders.

Similarly unconvincing to the defendant's claim of actual prejudice is his assertion that according to late discovery "investigators decided not to subject [a State's witness] to [a] polygraph . . . because he was not truthful." DB17. The appendix citation provided by the defendant is simply to a statement in his motion to dismiss that the witness's interview was among undisclosed materials. DA78.

The transcript reference was merely an investigator's testimony that the polygraph examination did not occur because, after speaking with the witness, "[w]e realized . . . we shouldn't trust him." H(2)120. As the defense knew full well from a deposition conducted of that same investigator, his reference to "trust" was not the witness's credibility, but the accuracy of polygraph results given the witness's previous exposure to information—whether factual or rumor—about the case. *See* DA172-73.

It is undeniable that the defendant did not receive discovery in a timely manner. But the trial court correctly found that the failure to provide discovery was negligent, not intentional, and that the defendant suffered no actual prejudice from the late disclosures made. Although negligence is hardly laudable, there was no Due Process violation that may warrant the extreme sanction of dismissal with prejudice.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the challenged order.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Peter Hinckley, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,091 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

March 3, 2022 *<u>/s/Peter Hinckley</u>*
Peter Hinckley

CERTIFICATE OF SERVICE

I, Peter Hinckley, hereby certify that a copy of the State's brief shall be served on David M. Rothstein, Esquire, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

March 3, 2022 *<u>/s/Peter Hinckley</u>*
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