THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0093

State of New Hampshire

v.

Timothy Verrill

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court

BRIEF FOR THE DEFENDANT

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(Fifteen Minute Oral Argument)

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QUESTION PRESENTED

1. Whether the court erred when it found that the State acted with mere culpable negligence, and that the State did not goad the defense into requesting a mistrial.

Issue preserved by Motion to Dismiss #2, filed May 26, 2020; State's Objection; hearing on Motion to Dismiss #2, held June 22-25, 2020; and court's order, issued February 1, 2021*.

* Citations to the record are as follows:
"T-I" through "T-X" refers to the trial transcript;
"A" refers to the addendum to this brief, which contains the February 1, 2021 order;
"App." refers to the appendix to this brief;
"H1" refers to the transcript of the hearing on the first motion to dismiss;
"H2" refers to the transcript of the hearing on the second motion to dismiss;
"H3" refers to the hearing on November 14, 2020.

STATEMENT OF THE CASE

On January 29, 2017, officers discovered the bodies of Christine Sullivan and Jenna Pellegrini at 979 Meaderboro Road in Farmington, a house shared by Sullivan and Dean Smoronk. App. 42-43. The Major Crimes Unit (MCU) of the New Hampshire State Police (NHSP) conducted the homicide investigation. App. 42-43. Sgt. Brian Strong, a member of the MCU since 2008, was designated lead investigator. App. 43; H2 250.

Timothy Verrill was arrested on February 6, 2017, and later charged with two counts of first-degree murder, two alternative counts of second-degree murder, and five counts of falsification of physical evidence. T-V 980; App. 123. His trial began with jury selection on October 1, 2019. App. 61. Verrill moved to dismiss the charges during trial, on October 24-25, 2019, due to discovery violations. App. 3-16. The court (Houran, J.) denied the motion on October 28, 2019. App. 17-36. After additional undisclosed information surfaced, the defense moved for a mistrial on October 31, 2019. App. 81-82. The State did not object, and the court granted the motion. App. 81-82.

After receiving more information that had not previously been produced, the defense filed a second motion to dismiss on May 26, 2020. App. 37-121. The court (Howard, J.) held an evidentiary hearing on June 22, 24 and 25, 2020. It

denied the motion in a written order dated February 1, 2021, A58-A77, and denied a motion to reconsider on February 11, 2021. App. 370.

STATEMENT OF THE FACTS

A. The Murders.

Dean Smoronk and Christine Sullivan illegally dealt large amounts of controlled drugs, including methamphetamine, cocaine, and pills. T-I 31; T-III 337, 378, 381-82, 517; T-IV 557-58, 566, 609, 617, 624; T-X 1508-10, 1582. They distributed the drugs from a house they shared at 979 Meaderboro Road in Farmington. App. 44; T-III 378, 381-82; T-V 609; T-X 1508-10, 1582-85.

In January of 2017, Sullivan and Smoronk's partnership was dissolving. T-I 16 (Smoronk stated, "I want a new partner.") Smoronk expressed hostility that included threats to kill Sullivan. T-I 17; T-III 366-67, 473; T-V 631; T-IX 1408-10; T-X 1462. Sullivan feared Smoronk, T-X 1460, and told friends that if anything happened to her, Smoronk was to blame. T-III 473; T-X 1578. Sullivan and Jenna Pellegrini, who was staying with Sullivan, were found dead outside at 979 Meaderboro Road on January 29. T-V 753.

Smoronk had left for Florida on January 25 but allegedly returned to New Hampshire on January 28. T-I 13; T-III 538; T-IV 602. He could not get in touch with Sullivan, T-I 14, 19, and those he asked to check on her could not find or contact her. T-I 21. They noted signs of possible violence in the house, including blood on a mattress, but did not see Sullivan or Pellegrini. T-III 400-28; T-IV 596-97; T-VI 994-

1037; T-IX 1383-1391. These people reported their observations to Smoronk but did not call the police. T-III 428, 491; T-IV 601. Many communications were encrypted, so the messages would be unretrievable if the phones were later seized by law enforcement. T-I 98, 140, 142; T-II 271, 301, 311; T-IV 574, 644.

On the evening of January 28, Joshua Colwell picked up Smoronk at Logan Airport. T-IV 602. Colwell was an officer in the Mountain Men, a motorcycle club. T-III 515; T-IV 614. He dealt drugs for Sullivan and Smoronk, helped Smoronk collect a drug debt in Florida, and about week before the murders, introduced Smoronk to members of the Mountain Men as a source of potential buyers of methamphetamine. T-IV 618, 622, 655.

After stopping to pick up his gun, Colwell took Smoronk to the house at Meaderboro Road. T-IV 604; T-VI 1072. The home security cameras were deactivated, T-IV 605, and they saw blood. T-IV 607. Before he called the police, Smoronk had Colwell remove from the house an ounce of cocaine, two pounds of methamphetamine, and one-hundred pills. T-IV 609, 649.

Investigators focused on Verrill. He was viewed as a close associate of Smoronk and Sullivan. T-III 382, 501-02, 507. Verrill allegedly had security codes to the house that others did not. T-IV 555. According to Colwell, Verrill

seemed perturbed that Pellegrini, an outsider, was with Sullivan, and he seemed agitated, paranoid, and "off" or "not normal" before and after the murders. T-IV 556, 568-70. Efforts were allegedly made to clean the house after the murders, and the bodies of Sullivan and Pellegrini were found outside. T-V 767, 778, 783, 785, 793, 839. Verrill allegedly purchased items that could have been used to clean up after the murders. T-IV 670, 673-74; T-V 944-46. In the period after the murders, he seemed mentally unstable and tried to avoid police contact. T-V 882, 886, 890-900, 913, 915, 925. The State argued that Verrill committed the murders, disposed of the bodies, and tried to clean up the crime scene.

B. The First Discovery Violations.

The illegal drug activity in which Smoronk, Sullivan and others engaged was intertwined with the murders. Dating back to 2016, Smoronk and Sullivan were the focus of investigations by the Drug Enforcement Agency (DEA) and the New Hampshire State Police Narcotics Investigation Unit (NIU). App. 44. After the homicides, MCU investigators, at least one member of the prosecution team, DEA agents, and NIU members decided the DEA would investigate the "drug angle" of the murder case. App. 45; H2 304, 306-09. Two DEA agents, Daly and Keefe, participated with MCU investigators in joint interviews of potential homicide case witnesses, including some who resided in Florida and were

involved in Smoronk's illegal activities. H2 306. The MCU gave the DEA all the reports it generated in the homicide investigation but received few reports from the DEA about the drug investigation. H2 301-11. While Strong claimed that neither he nor the Attorney General's Office could get any DEA reports, H2 311, a NIU investigator, Trooper Chris Huse, obtained a report by making a request to an Assistant United States Attorney. H2 104. Despite plea agreements with Smoronk, Colwell, and others, and the DEA's numerous interviews of witnesses connected to their drug trafficking activity, the defense received few DEA reports. H2 248, 311, 318.

Before trial, the defense tried repeatedly to obtain discovery of drug-related information via emails, letters, depositions, and motions. See App. 57, 109, 110-14, 123-125; App. 134-36, 140-42. The prosecution told the defense that it had all the discovery, or that what it was seeking did not exist. See, e.g., App. 57-59 (discussing defense efforts to obtain discovery).

The drug information was critical to the defense. H2 220-28; App. 60-66. Smoronk told anyone who would listen that he wanted Sullivan dead. He had previously hired people to commit murder. Smoronk developed a connection with Colwell and the Mountain Men right before the murders, and he wanted to move his drug enterprise in a direction that

carved out not only Sullivan, but Verrill, who could be careless and unreliable. T-V 517, 524, 632-33. Given the State's repeated assurances, the defense had to go to trial with what it assumed was complete discovery.

That assumption was incorrect.

During the trial, Patrick Cote, an Arizona resident, contacted Executive Director of the New Hampshire Association of Criminal Defense Lawyers. App. 75; H2 139. Cote had read about the trial and wanted to make sure the defense knew about his daughter Monique, whose ex-boyfriend, Steven Clough, was a drug-dealing associate of Smoronk and Sullivan. H2 140-42. The defense had not heard of Monique. H2 142. A defense investigator spoke to her and learned she had been interviewed by and exchanged emails with Stephen McAulay, a MCU investigator. App. 75-76; H2 141-42. Apart from being a significant dealer of methamphetamine for Smoronk and Sullivan, Clough went to Meaderboro Road at Smoronk's behest before the police responded and the women's bodies were discovered. H2 137-38.

The defense asked the prosecutors about Monique on October 23, 2019. App. 76; H2 136, 143. The prosecutors contacted the MCU and learned it had interviewed her in March of 2017. App. 76; H1 33. The prosecutors additionally learned, and revealed to the defense, that the MCU, in 2017-

18, interviewed four other people without ever informing the prosecutors: Erin Feeley, Chris Cortez, Alan Johnson, and Jessica Rodrigue. App. 76-77; H2 148. In addition, the prosecutors learned from the MCU, and disclosed to the defense, that Michael Ditroia, who sold drugs on behalf of Sullivan and Smoronk and was a suspect in the murders, passed a polygraph administered by MCU Detective Steven Sloper on August 24, 2017. App. 77; H2 151-54

C. The First Motion to Dismiss.

The defense filed a motion to dismiss during trial on October 24, 2019. App. 3-16. The court (Houran, J.) held an evidentiary hearing at which Strong and McAulay testified.

Strong testified that the prosecutors had asked him to collect all texts and emails between law enforcement and witnesses, but he did not look at the phones of other investigators and there was no formal system to track or catalog texts with witnesses. H1 4, 8. He kept track of assignments made and completed on a spreadsheet, but none of the recently discovered interviews were included. H1 28-29. Strong characterized this as an "oversight." H1 29. The undisclosed information included assertions that Smoronk was behind the murders and may have flown back to New Hampshire under an alias, Clarence Thompson. H1 20-25. Strong claimed the MCU disproved theories about Smoronk's alleged culpability. H1 26-27.

McAulay testified that he interviewed Monique Cote on March 6, 2017. H1 33. He exchanged emails with her in 2017 and 2018. H1 34. Monique provided drug-related information to the DEA, and she forwarded to McAulay texts she had received from Clough. H1 35-37. McAulay also interviewed Jessica Rodrigue, whose Florida-based ex-boyfriend Smoronk had allegedly hired to kill someone. H1 49. McAulay claimed Rodrigue was more involved with the DEA side of the investigation. H1 50. He failed to do a report of his contact with Rodrigue and never turned over to Strong the disc of his interview. H1 52-53. McAulay testified to the failure of the organizational system intended to track what he had turned over to Strong and what tasks he had completed. H1 55-57.

In opposing the defense motion, the Attorney General's Office represented that everything had now been turned over to the defense. H2 161; App. 78; App. 248-49 (State represents, "I know the State Police and Major Crimes Unit have taken every step available to make sure that everything has been turned over in their possession."). The court denied the motion on October 28, 2019. App. 17-36. Because the prosecution represented that all discovery had been provided, the defense did not move for a mistrial. H2 163. The parties discussed the possibility of alternative relief or sanctions. H2 165; App. 225-26, 242-251. As the trial continued, the State

made an offer for Verrill to enter a naked plea to second degree murder. He rejected the offer. H2 166.

Unbeknownst to the court or the defense at that time, on October 28, 2019, the MCU and the Attorney General undertook an audit of the Verrill discovery broader than the efforts that uncovered the undisclosed information described above. H2 38, 65. The audit gathered every report, interview, text, and email to make sure all assignments had been turned in, all materials were accounted for, and everything was in the possession of the prosecutors. H2 69-79. The details of the audit are described below, in Section G.

D. The Second Discovery Violations.

On October 30, 2019, despite having represented to the court that all discovery had been provided, the prosecutors notified the defense there was more undisclosed material. App. 78; H2 167. It included a pre-polygraph interview of Steven Clough; investigators decided not to subject him to the polygraph after the interview because he was not truthful. App. 78; H2 120, 168. It also included video surveillance outside the Holy Rosary Credit Union, where Verrill had met Sullivan and Pellegrini before the murders, and phone extractions from Smoronk's assistant in Florida, Tanner Crowley. App. 79; H2 168-73.

E. The Third Discovery Violations; The Mistrial.

Court was not in session on October 31. H2 176. The defense exchanged emails with the prosecutors and spoke to them by phone three times. H2 177-183. In a call from one of the prosecutors, the defense learned of an additional discovery issue. H2 178. The defense emailed the prosecutors to see what position the Attorney General would take if the defense moved for a mistrial. H2 179-80. In a second phone call, the prosecutors stated they had authority to agree to a mistrial without prejudice. H2 180. The defense did not move for a mistrial. H2 180.

Shortly thereafter, the defense received a third phone call from prosecutor Geoffrey Ward, who was at the State Police barracks. H2 181. Attorney Ward revealed that they had discovered more material, which he said was gathered from a separate drug investigation. H2 182. When asked by the defense to describe the scope and volume of information, Attorney Ward said it was significant. H2 182-83.

The parties requested to see the court, and the defense moved for mistrial. App. 81-82; H2 185-87, 243-46. After previously representing to the court on October 25 that all discoverable information had been disclosed, the prosecution told the court on October 31 that it had no confidence in the MCU. App. 282 ("[T]he bottom line is we do not, at this time, have confidence when the State Police tells us that they have

provided us with anything. And frankly, neither you nor Defense counsel should have confidence when I tell you that we have provided you with everything."). The State did not object to the motion, and the court granted it. App. 82.

F. The Fourth Discovery Violations; The Second Motion to Dismiss.

After trial, the defense learned that prosecutors and MCU investigators had not examined the discovery before Ward said it contained significant information associated with a separate drug investigation. App. 83-84. Later, the prosecutors stated the information was not significant after all, and any "misunderstanding" with respect to the matter was a product of the prosecutors' "confusion" and "panic." H3 11-12. However, after the mistrial, the prosecution turned over roughly 500 pages of previously undisclosed discovery, and dozens of discs that included other media and extractions from several cell phones. App. 84-87.

The defense filed a second motion to dismiss, asserting two theories. One was that the State provoked the defense into moving for a mistrial when it told the defense that it was missing significant information connected to a drug investigation. App. 88-92. The other focused on the entirety of the State's conduct with respect to discovery, arguing that its disregard of discovery obligations warranted dismissal. App. 92-118.

G. The Hearing on the Second Motion to Dismiss.

The court (Howard, J.) held a hearing on the second motion to dismiss on June 22, 23, and 25, 2020. The defense called seven witnesses, including defense counsel Meredith Lugo. Through Attorney Lugo, the defense explained its decision to request a mistrial and the significance of the discovery that was not turned over before trial. Through the other witnesses, who were from the MCU and NIU, the defense described the discovery management system employed by the MCU, the failure to provide discovery, and the audit.

1. The Failure to Provide Discovery.

Lt. John Sonia assumed command of the MCU in November of 2017. H2 16. The MCU consists of 18-20 investigators. H2 16. It investigates mostly homicides, roughly 20-30 per year, the prosecutions of which are handled by the Attorney General's Office. H2 17, 43. Virtually every case generates thousands of pages of discovery. H2 44. Sonia testified that the lead investigator oversees the management of the case. H2 18. They collect reports and materials, assign tasks, and act as the liaison to the prosecution. H2 18-20. The lead compiles reports in a casebook. H2 21. There is no set procedure on how the lead keeps track of paperwork or how the casebook is assembled.

H2 22. Only the lead investigator has access to the casebook. H2 34.

Sonia learned on October 23-24, 2019, which was during the trial, that there were issues with discovery not having been disclosed. H2 31-32. Because Sonia could not find Strong and had no access to the casebook, he sent an email asking MCU investigators if they had any undisclosed discovery. H2 33-34.

Sonia discovered that the casebook's table of contents was inaccurate, and some information had never been turned over. H2 34-35. He directed Sgt. Justin Rowe to lead an audit of the discovery, which commenced on October 28. H2 38, 49. This involved having Strong hand over everything he had to Rowe. H2 39. The review lasted several weeks. H2 40, 50. Sonia said it was "unprecedented," it involved many prosecutors, and that changes occurred so the "lack of effective record keeping in this case . . . never occurs again." H2 51-52.

Rowe testified that a lead investigator is expected to "take care of their own tasks, and . . . have some basic organizational skill to keep them on track." H2 80. After learning of issues with discovery during trial, Rowe sent out an email with the casebook table of contents attached and asked investigators to check what they had against the table to see if they had materials not listed. H2 64.

On October 29, Rowe met with McAulay for 6-8 hours and reviewed all his materials. H2 71. Rowe found that McAulay had items that were not in the casebook, meaning they had never been turned over to Strong. H2 72. He met with Strong for 12-14 hours on October 30, and organized all his materials, including texts and emails with witnesses, so the prosecutors could review them. H2 73, 76. The information Rowe used to gather documents included requests for discovery that defense counsel had made before trial. H2 78. Rowe did not analyze Strong's spread sheets or determine why the missing material did not end up in the casebook. H2 81-82.

Troopers Mark Hall and Chris Huse work for the NIU. H2 90, 100. Hall also works with the DEA. H2 91. He testified that in April of 2017, he initiated a motor vehicle stop of James Morin, who allegedly had a connection to Smoronk's drug operation. H2 92. Morin possessed a half-ounce of methamphetamine when he was stopped. H2 94. He allegedly cooperated with the DEA. H2 96. Hall gave Strong a copy of his report of the encounter, and Hall logged the report into VALOR, which is the State Police's electronic case management system. H2 93, 97. Though the MCU is part of the State Police, it does not use VALOR or any centralized and computerized case management system. H2 61. Strong never included this report in the casebook. H2 300.

Huse testified that he arrested Michael Ditroia, who possessed a half-ounce of methamphetamine. H2 101. Because of Ditroia's connection to Smoronk, Strong interviewed Ditroia. H2 102. Though Huse provided his report to Strong, it was not in the Verrill casebook. H2 102, 301. In addition, in March of 2019, Huse was present during a proffer of Alex Tsiros conducted by the Bureau of Alcohol, Tobacco and Firearms. H2 103. After the proffer, Huse provided information related to the homicide to Strong, who failed to properly document it. H2 105, 301.

Steven Sloper, a MCU sergeant, received training as a polygraph examiner in January of 2017. H2 108, 110. He conducted an exam of Ditroia in August of 2017, while he was a polygraph intern. H2 111, 113. Sloper concluded that Ditroia passed. H2 114. This was the first exam Sloper had conducted outside his training. H2 113. Strong had requested the exam, which had to be pre-approved by the prosecutors. H2 112, 295. After the mistrial was declared, the defense hired an independent polygraph examiner to review Sloper's work. That examiner concluded Ditroia failed the polygraph. App. 114.

Sloper also conducted a pre-polygraph interview of Clough at Strong's request but did not go forward because Clough was not sufficiently trustworthy. H2 120. Sloper did not produce any report associated with either Ditroia or

Clough until the audit. H2 122-23. According to Sloper, because he was serving as a polygraph examiner, rather than a detective, it did not occur to him to forward this information to Strong. H2 122-23. Because Sloper was not assigned as an investigator in Verrill's case, he could not determine whether any of the information was exculpatory. H2 126.

Strong had been a member of the MCU since 2008, a sergeant since 2013, and had been lead investigator in eleven homicide cases. H2 250-53. He was promoted to head a special investigation unit in 2018 but remained lead investigator in this case. H2 251. Strong testified that if he did not keep track of assignments, work product would not end up in the casebook. H2 254-58. He never received training on how to do this. H2 267.

Strong met at least twice with Jesse O'Neill, one of the prosecutors assigned to the Verrill case, to ensure the discovery was complete. H2 271-73, 279-80. Despite these meetings, numerous items were never entered into the spread sheet or placed in the casebook. These included interviews of Monique Cote, Jonathan Millman, Alan Johnson, Chris Cortez, Jessica Rodrigue, Michael Ditroia, Stephen Clough, James Morin, Alex Tsiros, Angelica Brown, Faith Brown, and Dominic Mango. H2 286-94. Also excluded was a call between Smoronk and Jeff Sullivan, Christine's brother, that was recorded by the DEA. H2 317-18. In some instances,

Strong participated in the interviews, conducted them, or was aware of them because he was travelling with the investigator who conducted the interviews. H2 290-92, 306.

2. The Decision to Request a Mistrial.

Attorney Lugo testified that she and co-counsel, Julia Nye, first learned that the defense was missing evidence on October 23, 2019, when they heard about Monique Cote. H2 136. They did not move for a mistrial until after the third phone call with the prosecutors, on October 31, 2019, in which they learned they did not have significant drug investigation information. H2 182-87.

Attorney Lugo stated the defense did not move for a mistrial on October 25 because the State represented that all discovery had been disclosed. H2 163. In addition, investigators were prepared to sign affidavits swearing that they had disclosed all their information. H2 165. On October 30, they received more information that Attorney Lugo characterized as voluminous, including multiple phone extractions and videos. H2 167-73. Her and Attorney Nye were concerned about their ability to review the information because of its volume and the fact they were simultaneously trying to put on a defense case. H2 174-76.

Court was not in session on October 31. H2 176. However, the defense learned that morning of more discovery that had never been disclosed. H2 178. Attorney Ward

stated that (1) it related to the drug investigation; (2) it was a significant amount of information; and (3) it included items such as a chart and phone records that the defense did not have. App. 81; H2 182-83. Based on the State's representations and the importance of the drug investigation to the defense, and after consultation with colleagues at the Public and Appellate Defender, the defense moved for a mistrial. H2 185-87, 243-48.

SUMMARY OF THE ARGUMENT

1. The court erred when it ruled that the prosecution did not goad the defense into moving for a mistrial. It also erred when it found only Strong committed misconduct, and that he was negligent. These rulings resulted in the court erroneously denying Verrill's motion to dismiss.

If this Court finds dismissal improper, it must reverse the lower court's findings that only Strong was culpable, and the level of culpability was no more than culpable negligence. Those findings are incompatible with the record. If they govern the imposition of sanctions, the sanctions will not hold the State accountable for its misconduct, and thus, will not sufficiently vindicate Verrill's rights upon his retrial.

I. THE COURT ERRED WHEN IT FOUND THAT THE STATE ACTED WITH MERE CULPABLE NEGLIGENCE, AND THAT THE STATE DID NOT GOAD THE DEFENSE INTO REQUESTING A MISTRIAL.

The Attorney General prosecutes homicides, and the MCU investigates most of those cases. Because defendants will spend the rest of their lives in prison if convicted of first-degree murder, or perhaps go free if not, the entities bear a massive amount of responsibility. Society places its trust in them. The defendant trusts the Attorney General to direct an investigation that is calculated to promote rather than subvert justice, and to ensure that the discovery to which he is constitutionally entitled is disclosed sufficiently before trial that he may investigate and prepare his defense.

That trust was misplaced. The proceedings below revealed an intent on the part of the Attorney General's Office and the MCU to structure the investigation so that key drug evidence would be unavailable to the defense. The proceedings revealed an atmosphere of indifference to, and disregard for, discovery obligations, and a pattern of incompetence among the investigators whom the Attorney General supervises. Finally, the proceedings revealed an intent on the part of the Attorney General's Office to provoke the defense into moving for a mistrial it did not otherwise want, given the late stage of the trial. For these reasons, Verrill asks this Court to reverse the lower court's decision

and grant his motion to dismiss. Alternatively, he asks the Court to reverse the lower court's finding on culpability, and remand for consideration of sanctions.

A. The Lower Court's Order.

After reviewing the procedural history and testimony, the court stated, "There is no dispute that the State committed significant discovery violations in this case[.]" A68. The court ruled that the State had no intent to provoke a mistrial, much of the undisclosed evidence was cumulative, and the defense was already considering a mistrial. A70-A71. It also ruled that there was no actual prejudice, and it found the same level of culpability that Judge Houran found in his order of October 28, 2019. A75-A77. Accordingly, the court denied the motion to dismiss.

B. The Motion to Reconsider.

Verrill asked the court to make findings on how many discovery violations occurred, what they were, and what level of culpability attached to the conduct of the perpetrators. App. 356-57. If only Strong was responsible, he was deficient in keeping track of assignments, and no one else was blameworthy, as the order implied, any sanction would be proportionate – and minor. If multiple actors were culpable, including the prosecutors, and that culpability reflected more than mere disorganization or mismanagement, more stringent

sanctions would be appropriate. The court denied the motion. App. 370.

C. The Standard of Review.

"[The Court] defer[s] to the trial court's factual findings unless those findings are clearly erroneous, and consider[s] de novo the court's conclusions of law with respect to those factual findings." State v. Cotell, 143 N.H. 275, 282 (1998); see also State v. Thelusma, 167 N.H. 481, 484 (2015) (Court defers to factual findings unless contrary to the manifest weight of the evidence).

D. The Governing Legal Principles.

"[T]he 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." State v. Duhamel, 128 N.H. 199, 202 (1986). One exception is when the prosecution goads the defense into requesting a mistrial. State v. Zwicker, 151 N.H. 179, 188 (2004). A second exception, grounded in due process, is when the prosecution or its agents engage in deliberate or reckless misconduct. Cf. State v. Cotell, 143 N.H. 275, 279 (1998) (holding dismissal appropriate in extraordinary situations). The court considers prejudice, but the requisite amount depends on the nature of the misconduct. See U.S. v. Osorio, 929 F.2d 753, 762 (1st Cir. 1991) ("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.").

E. The Double Jeopardy Argument.

The Double Jeopardy Clause protects defendants from multiple prosecutions for the same offense. U.S. Const. amend. V; N.H. Const. pt. I, art. 16. "Double jeopardy protections are in place to promote 'the finality of judgments,' minimize the 'harassing exposure to the harrowing experience of a criminal trial,' and safeguard the defendant's 'valued right to continue with the chosen jury.'" State v. Bjorkman, 171 N.H. 531, 538 (2018) (quoting Crist v. Bretz, 437 U.S. 28, 38 (1978)).

Although the defendant typically waives double jeopardy protections when moving for a mistrial, retrial is barred if the prosecutor "intended . . . to provoke the defendant into requesting a mistrial." State v. Murray, 153 N.H. 674, 678–80 (2006); see also Oregon v. Kennedy, 456 U.S. 667, 673-74 (1982) (noting that retrial may be barred if the State "goad[ed] the defendant into requesting a mistrial . . . so as to afford the prosecution a more favorable opportunity to convict the defendant."); State v. Glenn, 160 N.H. 480, 490 (2010) ("Double jeopardy will bar retrial . . . where a prosecutor engages in misconduct with the intention of provoking the defendant into moving for a mistrial and the defendant does so.").

To assess such a claim, the Court considers the prosecution's culpability, intent, and the impact of its actions on the defense's decision to terminate the proceeding. On the first point, the prosecution's conduct must be more than grossly negligent. "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial. . . ." Kennedy, 456 U.S. at 675-76; see also Murray, 153 N.H. at 681 ("[A]n additional showing, beyond prosecutorial gross negligence, is required to bar retrial.") (Citation omitted). The prosecution must intend to create circumstances such that the defendant had virtually no choice but to terminate the proceeding. See United States v. Dinitz, 424 U.S. 600, 609 (1976) (holding that Double Jeopardy Clause affords defendant the right to "retain primary control over the course to be followed in the event of [prosecutorial error]."). As this Court explained in a post-Kennedy decision, "the defendant, by conduct and design of the State, [must have] 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." State v. Montella, 135 N.H. 698, 700 (1986).

Verrill argued that the State acted with a level of culpability higher than "gross negligence," akin to "reckless

disregard." In State v. Marti, 147 N.H. 168, 173 (2001), the Court acknowledged the standard but did not decide whether to adopt it. As noted in Marti, in State v. Rogan, 984 P.2d 1231, 1246-49 (Hawaii 1999), the court held that "reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial." Id. at 1249. The Rogan court derived its rule, in part, from holdings of the Texas and New Mexico Supreme Courts. Id. at 1247 (quoting Bauder v. State, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996) (prosecution barred after declaration of a mistrial at the defendant's request when the State was aware of but consciously disregarded the risk that an objectionable event for which it was responsible would require a mistrial); State v. Breit, 930 P.2d 792, 803 (N.M. 1996) (prosecution barred if the official intended to provoke a mistrial or willfully disregarded the risk of a mistrial). This Court should find that the intent element 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.

The prosecution's intent can be determined from circumstantial evidence. Kennedy, 456 U.S. at 679-80 ("Because 'subjective' intent often may be unknowable, I

emphasize that a court—in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case.") (Powell, J. concurring); United States v. Tafoya, 557 F.3d 1121, 1128 (10th Cir. 2009) ("We recognize that proving intent or lack of [prosecutorial] intent is often circumstantial. . . ."); State v. Handt, 2004 WL 1152831 *2 (Minn. App. 2004) (unpublished decision) ("[W]e cannot ascertain whether the court considered any circumstantial evidence of intent or whether the court simply dismissed any consideration of intent because there was no direct admission of intent by the prosecutor."); cf. State v. Zubhusa, 166 N.H. 125, 130 (2014) (noting that "intent often must be proven by circumstantial evidence"). A defendant can form intent in a short space of time. State v. Place, 126 N.H. 613, 615 (1985). The court can thus infer a prosecutor's intent to provoke a mistrial based on events that developed rapidly.

The Nebraska Supreme Court has set forth factors a court may consider in determining whether the prosecution intended to provoke a mistrial. State v. Muhannad, 837 N.W.2d 792, 802 (Neb. 2013). First, the court cited Justice Powell's concurrence in Kennedy, which suggested considering (1) whether there was a sequence of overreaching prior to the single prejudicial incident; (2) whether the prosecutor resisted or was surprised by the defendant's

motion for a mistrial; and (3) the findings of the trial and appellate courts concerning the intent of the prosecutor. Muhannad, 837 N.W.2d at 802 (citing Kennedy, 456 U.S. at 680) (Powell, J., concurring). Second, the court noted that "[a]t least one court has set forth a four-factor inquiry: (1) whether there was a sequence of overreaching or error prior to the error resulting in the mistrial; (2) whether the prosecutor resisted the motion for a mistrial; (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial; and (4) the timing of the error." Muhannad, 837 N.W.2d at 802 (citations omitted). Third, it stated that "[a]nother court has adopted a three-factor inquiry more focused on motive: (1) whether the record contains any indication that the prosecutor believed the defendant would be acquitted, (2) whether a second trial would be desirable for the government, and (3) whether the prosecutor proffered some plausible justification for its actions." Id. (citation omitted). See also United States v. Archibald, 2003 WL 561096 *5 (E.D. Pa. 2003) (unpublished opinion) (citing similar tests). Of note are the sequence of errors in this case, the timing of the mistrial, and the justifications offered for the actions.

The lower court explained its finding that the State did not intend to provoke the defense into requesting a mistrial at Pages 13-14 of its order. A70-A71. The court stated that

Attorney Ward, in accord with his constitutional obligation, informed the defense that the State found more undisclosed evidence. A70. According to the court, Ward made no misrepresentation. A71. The court supported that finding with the assertion that the undisclosed evidence was cumulative to what the defense had. A71. It found no fault on the part of the prosecution. A71. The court noted that the defense was already considering a mistrial, and that the State's offer not to object was borne of its "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]." A71.

The analysis raises two questions. First, did Attorney Ward's statements about the newly discovered evidence constitute prosecutorial misconduct? Second, did Ward reasonably believe that his statements would cause the defense to move for mistrial?

On the second point, Attorney Ward had to have known that the defense would request a mistrial if informed that the MCU had a significant volume of drug-related investigation material, including reports, charts, and phone records, that had never been disclosed. The drug investigation evidence was critical. Ward knew the defense had been requesting it throughout the case. If it was finally available, as he said, what choice would they have? The defense had moved to

dismiss, been presented with a significant volume of undisclosed evidence that it was struggling to assimilate, was considering a mistrial, having asked the State its position on such a motion.

On the first point, Attorney Ward's statement was either a misrepresentation, or misconduct constituting more than gross negligence. In part, the court found otherwise because the prosecutors later discovered the information was inconsequential; in effect, because there was no harm, there was no foul. This has no bearing on Attorney Ward's conduct at the time it occurred. Had Ward said, "We found something, it seemed at first glance to be significant, but we believe you already have it," as in Dinitz, the defense could have retained the primary choice over what course of action to pursue, whether it be a recess to review the evidence, or a mistrial.

But that is not what Attorney Ward said. He said, "We found something. What we found is significant. There is a lot of it. It is a drug investigation that was kept separate." If the information turned out to be immaterial, that underscores the prosecution's error in its initial characterization. It establishes that the prosecution acted either with reckless disregard for the contents of the undisclosed discovery, or in gross dereliction of its responsibility to deliver accurate and

reliable information to the defense as it decided whether to terminate the trial.

In his after-the-fact explanation, Attorney Ward stated his representations on October 31 likely reflected the prosecution's state of panic and confusion upon seeing the amount of information. H3 11-12. He added that, at the time, they had not gone through the information in any depth. H3 11-12. This is not what he told the defense before it decided to move for a mistrial. If they were in such a state of panic that they did not know whether there was additional exculpatory information in the State's possession, that is what he should have said at that time, not two weeks later. At least that statement would have allowed the defense to consider whether it had any options apart from a mistrial.

Attorney Ward's statements had their predicted effect. The defense believed him. The statements caused the defense to move for a mistrial. Though the defense was considering asking for a mistrial, Attorney Lugo testified that it was not until hearing from Ward that the decision was made. H2 185-87, 243-48. The defense was "painted into a corner," and a mistrial was the "only reasonable means" of escape.

The State's non-opposition to a mistrial was no act of largesse. If the trial continued, any conviction would likely have been tainted by Laurie error or an ineffective assistance of counsel claim. While Verrill may have been convicted of

two counts of first-degree murder, the mistrial afforded the State the advantage of a "do-over" after having seen nearly the entirety of the defense case. See Green v. United States, 355 U.S. 184, 187 (1957) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."). This Court should find that Verrill had no reasonable option but to request a mistrial, that he was put in that position by the State's misconduct, and that the State benefitted from the decision.

The facts here differ from those in cases where courts have rejected the argument that the prosecution provoked the request for a mistrial.

In Murray, the State conceded that the prosecutor committed misconduct by not turning over discovery to the defense. Murray, 153 N.H. at 678. This Court found that the prosecutor had no tactical reason to provoke the defense into moving for a mistrial. Id. at 680. By contrast, here, the defense had no viable option apart from moving for a mistrial. The State repeatedly failed to disclose evidence, while Murray apparently involved only an isolated instance. Finally, here, a

mistrial served the State's interest in getting a conviction that was not potentially going to be overturned on appeal or by a motion for a new trial and allowed it to go to trial again having seen nearly all the defense case.[1]

Federal cases reaching the same result are also distinguishable. For example, in United States v. Aviles-Sierra, 531 F.3d 123, 126 (1st Cir. 2008), the court found that the government did not know about the undisclosed evidence it elicited; thus, it committed no misconduct and could not have intended that the disclosure provoke a mistrial. See also United States v. Strickland, 245 F.3d 368, 384 (6th Cir. 2001) (finding no intent to provoke mistrial because prosecutor did not know about the evidence). Here, apart from having already committed several discovery violations, the prosecution said the MCU had significant information regarding a separate drug investigation in a murder case interwoven with drug investigations. This was more than "prosecutorial blundering," Murray, 153 N.H. at 680, as the prosecutors knew their representations would cause the defense to request a mistrial.

In Creighton v. Hall, 310 F.3d 221, 228-29 (1st Cir. 2002), the court found no double jeopardy violation because

[1] In the other cases in which this Court has considered an argument that the State's conduct provoked the defense to request a mistrial, the prosecutor committed an isolated, mid-trial act of misconduct, and the Court found the act did not carry with it an intent to cause the defense to move for a mistrial. See Zwicker, 151 N.H. at 189; Montella, 135 N.H. at 701; Duhamel, 128 N.H. at 203.

"Creighton had a choice 'over the course to be followed' in his prosecution. He could either have taken his chances with the first trial, the possibility of a reversal on appeal if convicted, and a subsequent retrial, or he could, as he did, have ended the first trial. The choice was his to make." Verrill had already faced late disclosures of discovery and been told that the newest information was voluminous and material. The State's characterization ensured he had no other reasonable choice.

This Court should reverse the lower court's decision and bar the State from reprosecuting Verrill.

F. The Due Process Argument.

Part I, Article 15 of the New Hampshire Constitution provides that "[e]very subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel." As the lower court noted, A72, the state provision is more protective than the Fifth and Fourteenth Amendments to the Federal Constitution, but Supreme Court decisions have shaped New Hampshire jurisprudence.

The lower court acknowledged that because "prosecutors are responsible for information possessed by [] police departments. . .," the police's failure to produce discovery is attributable to the prosecution. A72. The court

found that the MCU made "late disclosures"[2] but Verrill suffered no "actual prejudice." A75. Even if he had, according to the court, dismissal would be inappropriate because Verrill will get a new trial. A76-A77. Finally, the court found that because the MCU did not intentionally withhold evidence, it would not make findings of misconduct additional to those in the order of October 28, 2019. A76-A77.

The court's ruling on the due process argument is another application of the "no harm, no foul" principle it employed to dismiss the double jeopardy claim. There, because the drug information later turned out to be insignificant, in the court's view, it did not matter that the State represented on October 31 that it was extremely significant. Here, because in the court's view, there was no actual prejudice, it did not assess the prosecution's responsibility for producing discovery or the magnitude of its failures. It did not consider whether the failures were attributable to misconduct, intentional or otherwise, on the part of the prosecution or its agents. Having found no harm and no prosecutorial misconduct, the court's conclusion is not surprising.

1. The prosecutor's responsibility.

[2] The conduct in this case was closer to "non-disclosure." But for the chance phone call from Patrick Cote, none of the evidence would have been disclosed.

As recently as the mid-twentieth century, criminal defendants had limited access to pretrial discovery. In State ex rel. Regan v. Superior Court, 102 N.H. 224, 226 (1959), the defense sought to compel the pretrial production of investigations, reports, records, and laboratory results. The Regan Court rejected the request as overbroad and unsupported by legal authority. Id. The defense could conduct depositions, RSA 517:13 (1959), and was entitled to a list of witnesses the prosecution intended to call at trial twenty-four hours in advance. G.S. (1867) c. 243, § 1.

A series of Supreme Court cases changed the landscape. In Brady v. Maryland, 373 U.S. 83, 84 (1963), the prosecution did not disclose in advance of trial a statement that another man admitted the homicide with which Brady was charged. 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; see also Strickler v. Greene, 527 U.S. 263, 288 (1999) ("[U]nder Brady an inadvertent non-disclosure has the same impact on the fairness of the proceedings as deliberate concealment."). In so holding, the Court recognized that the prosecutor is the guarantor of the fairness of the trial process and responsible for the failure of justice where the defendant went to trial without potentially

exculpatory evidence. Brady, 373 U.S. at 87-88. The Court extended the Brady mandate to evidence relevant to witness credibility, Giglio v. United States, 405 U.S. 150, 154-55 (1972), including impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985).

In Giglio, the Court also recognized that "[t]he prosecutor's office is . . . the spokesman for the Government." Giglio, 405 U.S. at 154. The Court elaborated in Kyles v. Whitley, 514 U.S. 419 (1995). Kyles established that the prosecution's disclosure obligation extends to evidence it does not possess. Id. at 437 ("[T]he 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.").

In State v. Laurie, 139 N.H. 325, 331-33 (1995), decided three months before Kyles, the Court granted the defendant a new trial even though the prosecution did not know of the undisclosed evidence at issue, and thus, did not intentionally suppress it. In State v. Lucius, 140 N.H. 60, 63 (1995), decided three months after Kyles (but not citing the case), the Court held that "[a]lthough the misconduct may be attributable to the State Police . . ., 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." The Court reiterated in Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 777 (2015), that "[a]lthough the police may 'sometimes fail to inform the 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.'" (Quoting Kyles, 514 U.S. at 438).

The lower court's order failed to acknowledge the prosecution's responsibility for ensuring the production of discovery. The MCU decided how to staff the case, but the Attorney General's Office directed the investigation. It was obligated to ensure that the MCU had the capacity to manage discovery so it could be catalogued and disclosed. The MCU had no such ability. The prosecutors had no idea how inept the MCU was and did not establish any "procedures or regulations" to ensure the defense received "all relevant information" before trial. The prosecution was also obligated to conduct the investigation in a manner not calculated to make relevant discovery virtually unobtainable – a duty it violated when it delegated to the DEA the investigation of the "drug angle" of the Farmington homicides.

2. The State's misconduct.

The State's concession that "[t]here has been a clear discovery violation," App. 228, is an understatement. "A

discovery violation" suggests an isolated error. It does not fairly describe the institutional failures or disregard of discovery obligations that occurred in this case.

The State pursued four defenses in the face of the non-disclosures. The first was to scapegoat Strong. But Kyles, Laurie and Lucius eliminate that defense. If the State's investigators failed, the prosecutors failed, and the MCU are the State's investigators. Cf. State v. Lavallee, 145 N.H. 424, 427 (2000) (holding prosecutor's duty to disclose evidence does not extend to evidence in possession of DCYF).

The second defense was to declare that the prosecution had addressed and fixed the issues. After the initial series of non-disclosures came to light, the prosecutors, on October 25, stated that all the missing discovery had been turned over to the defense. App. 248-49. This Court recognizes the authority prosecutors wield and the correlative responsibility they shoulder. "Public prosecutors must be held to a high standard of conduct." State v. Arthur, 118 N.H. 561, 563 (1978). When prosecutors say issues have been addressed, everyone believes them. The declaration motivated the court to deny the motion to dismiss, and the defense to absorb the late-disclosed evidence it had received to vindicate Verrill's "'valued right' to have his trial completed by a particular tribunal," State v. Gould, 144 N.H. 415, 416

(1999), especially since he had been held without bail for nearly three years.

This defense also failed. As the court was denying the first motion to dismiss, an audit began that would cause the State to recant its declaration a few days later.

The third defense was to minimize the incompetence associated with the repeated discovery violations. Strong was portrayed as disorganized. He was not well-trained, and he lost track of what was assigned, completed, and outstanding, perhaps because the case was too big, he had too many pages of material to manage, or he did not have enough help. The lower court adopted the characterization of Strong as a bumbling but not ill-intentioned investigator. A76.

However, the order failed to address several truths that render the misconduct in this case far greater. Strong was the lead investigator. He had a serious responsibility. Strong and his associates made errors which, but for a chance phone call, would have gone undiscovered. The leaders of the MCU assigned him to investigate homicides despite his inability to manage the workload; the MCU failed to adopt record-keeping procedures calculated to catalog discovery; and the MCU's leaders and the Attorney General failed to supervise the investigation. That a homicide investigation produces a lot of paperwork is no excuse. In some instances, Strong either directed an investigative initiative or was travelling with an

investigator who conducted an interview, and even those reports never made it into a casebook to which only Strong had access. No one was concerned enough about his failures to determine precisely how and why they occurred, or to ensure that no similar errors marred his previous homicide investigations. Instead, he was promoted to head a special investigation unit. H2 251.

Another minimization technique was to characterize the errors as the product of "nonfeasance" rather than "malfeasance." App. 231. The argument misses the mark because the conduct fits the definition of "malfeasance." See Williams v. City of Dover, 130 N.H. 527, 529 (1988) ("malfeasance" is "wrongful conduct that affects, interrupts or interferes with the performance of official duties.") (Quoting Black's Law Dictionary 862 (5th Ed. 1979)). The MCU and the State were culpable under that definition. It also misses the mark because "malfeasance" is not required. See supra at 30-31. Finally, it misses the mark because "nonfeasance," defined in Black's as "[t]he failure to act when a duty to act exists," understates the magnitude of the series of errors that occurred here.

The fourth defense was to minimize the significance of the late-disclosed material. That issue is addressed in Section (c.) below, "The mistrial as a remedy." However, the State's conduct with respect to the drug investigation is

relevant to the misconduct inquiry. After the State characterized that information as significant, the defense had no choice but to move for a mistrial. The defense took the State at its word, as it did when it had said all discovery had been disclosed. If, indeed, the information was not significant, the prosecution acted without regard for the truth of the statement, and the impact of that representation on the defense.

Finally, the lower court found that no one acted with the intent to suppress discovery. Specific intent is not required. See supra at 30-31; see also Government of the Virgin Islands v. Fahie, 419 F.3d 245, 256 (3d Cir. 2005) ("[A] constitutional violation that results from a reckless disregard for a defendant's constitutional rights constitutes willful misconduct.") However, the finding overlooks a decision by the Attorney General's Office and MCU that rendered unavailable to the defense a swath of potentially relevant and exculpatory discovery material.

In the earliest stages of a homicide investigation which stemmed from drug trafficking, the MCU and Attorney General delegated the investigation of the "drug angle" to federal authorities, thus removing any material the DEA gathered from the realm of the Attorney General's imputed knowledge and obligation to disclose. Cf. State v. Etienne, 163 N.H. 57, 90 (2011) (imputing knowledge among attorneys

in different bureaus of Attorney General's Office); see App. 233 (characterizing discovery generated by DEA as a "separate matter). Despite the federal investigations of Smoronk, Colwell, and others, and the joint nature of the state and federal investigations into the homicide, the decision meant the defense would receive no discovery of what the DEA uncovered. That decision suppressed homicide discovery, and it was intentional.

3. The mistrial as a remedy.

Mistrial cases fall along a continuum. At the benign end, circumstances occasioning the mistrial arose through no fault of any party, and retrial is not barred absent the existence of exceptional prejudice or other contingency. At the serious end, the mistrial resulted from misconduct greater than culpable negligence or gross misconduct. While retrial is rarely barred, a high degree of misconduct renders the remedy cognizable.

The lower court's conclusion that there was either no or minor misconduct is unsupported by the record. Also unsupported is the court's apparent conclusion that the prosecutors were without fault. Verrill has already argued there was misconduct by the MCU attributable to the prosecution, and that it was repeated. The prosecution engaged in misconduct by failing to police its subordinates, creating circumstances where it would not receive reports of

the investigation of the "drug angle" of the homicides, and failing to examine the drug information it found before calling it significant. That misconduct deprived Verrill of his right to complete his trial.

Though this Court has not yet seen fit to dismiss a case due to police or prosecutorial misconduct, the level of indifference toward discovery obligations here is without precedent. No one would have thought that a defendant in a case of this magnitude, having spent nearly three years awaiting trial, would have gone to trial missing so much discovery, or would have had to request a mistrial because a prosecutor, erroneously, told him he was missing much more. Along that continuum, the level of misconduct here is exceptional.

The court also relied on a finding of no prejudice in determining that dismissal was not appropriate. A76-77. With respect to the provocation argument, prejudice is not relevant. It is relevant under the due process analysis, but the amount of prejudice that need be shown depends on the degree of misconduct. Osorio, 929 F.3d at 762; Loud Hawk v. United States, 628 F.2d 1139, 1152 (9th Cir. 1979) ("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.") (Kennedy, J., concurring).

The undisclosed discovery, described in the motion to dismiss, was significant. Much of it related to the defense theory of an alternative perpetrator, and the defense's lack of access to it before trial was undeniably prejudicial. The State and court discounted prejudice because the defense has the discovery now. Even assuming that is so, prejudice remains in at least two respects. First, given the timing of the disclosures, the defense has been fully exposed, and the State has seen several defense witnesses testify. Second, the defense has only a few isolated reports from the DEA's investigation of the "drug angle" of the drug-motivated homicides, meaning information is still suppressed.

4. The remedy apart from dismissal.

If this Court rules that the State did not goad the defense into requesting a mistrial or engage in conduct sufficiently egregious to warrant dismissal, the issue of other remedies remains. The lower court invited defense counsel to propose remedies. A77. However, 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 Judge Houran found in his order of October 2019. If the Court does not dismiss the case, it must establish, as a principle governing the remand, that misconduct greater than

culpable negligence occurred. Having made that finding, this Court must direct the lower court to fashion a remedy that places the parties, as nearly as possible, in the same position as if no misconduct had occurred. The State cannot derive any advantage from the fact it has seen almost the entire defense case, including cross-examinations of all its witnesses, as it prepares for retrial. Nor can the State benefit from its decision to delegate a critical aspect of the investigation to the DEA, a federal agency over which it has no control.

CONCLUSION

WHEREFORE, Mr. Verrill requests that this Court:

a.) Reverse the lower court's order and bar the State from reprosecution; or

b.) Rule that the State's misconduct was, at least, reckless and in gross dereliction of its duties with respect to discovery, and remand for the determination of sanctions.

Undersigned counsel requests fifteen minutes of oral argument.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation set forth in the order on the motion to extend the word limit and contains approximately 9963 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ David M. Rothstein
David M. Rothstein

DATED: September 27, 2021

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

The State of New Hampshire

v.

Timothy Verrill

Docket No. 219-2017-CR-00072

ORDER ON DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

The defendant, Timothy Verrill, is charged by indictment with two counts of first degree murder, two counts of second degree murder, and five counts of falsifying evidence. These charges arise out of the deaths of Christine Sullivan and Jenna Pelligrini on or about January 27, 2017. The court (Houran, J. (ret.), presiding) held a jury trial on this matter in October 2019 which resulted in a mistrial following the mid-trial revelations that the State committed multiple discovery violations. Verrill now moves to dismiss the pending charges with prejudice based on the State's failure to turn over Brady materials which he argues caused him actual prejudice. (Court index #593). Specifically, Verrill contends the untimely-disclosed evidence is "directly relevant to [his] alternative perpetrator defense." (Id.) The State objects, acknowledging the discovery violations but arguing that dismissal with prejudice is not the proper remedy. (Court index #596). The court held an evidentiary hearing on this matter on June 22, 24, and 25, 2020. Based on the parties' arguments, the evidence, and the applicable law, Verrill's motion to dismiss with prejudice is DENIED.

Procedural and Factual Background

To the extent not restated below, the court incorporates by reference the facts set forth in this court's prior order (Houran, J.) on the defendant's first motion to dismiss. (See court index

#498 (prior order on defendant's motion to dismiss with prejudice) (hereinafter the "Order")). By way of additional background as it may be relevant to the present motion, the court provides the following summary[1] of the investigation and the defendant's trial strategy.

On January 27, 2017, Dean Smoronk called 911 to report a double homicide at his home in Farmington, New Hampshire. The two homicide victims were Christine Sullivan, who resided at the house with Smoronk, and Jenna Pelligrini, who was a guest at the house. The investigation of these homicides involved numerous witnesses who were connected to the house, Smoronk himself, and the victims through either the witnesses' presence at the house around the time of the murders or their believed involvement with a drug operation headed by Smoronk and Sullivan.[2] Through interviews with Smoronk and Steven Clough, Verrill—alleged to work for Smoronk and Sullivan in their drug operation—became a prime suspect. Verrill was subsequently indicted on the present charges in November 2017.

At trial, the defendant asserted an alternative perpetrator theory defense. Key witnesses at trial included Clough and Josh Colwell due to their presence at the house around the time of the murders and their involvement in the drug operation. In addition, the defense asserted Smoronk himself was an alternative perpetrator.

The following factual findings related to the jury trial and subsequent mistrial are derived from the extensive witness testimony presented at the hearing.

I. October 23, 2019 and October 30, 2019 Discovery Violations and the Mistrial

During the October 2019 jury trial, Verrill was represented by Attorney Meredith Lugo and Attorney Julia Nye. In the middle of the jury trial and during the State's case-in-chief, on

[1] The court derives this summary from the factual background set forth in the defendant's motion to dismiss. (See court index #593).

[2] Smoronk and Sullivan had been under investigation by both the Drug Enforcement Agency ("DEA") and the New Hampshire Narcotics Investigation Unit ("NIU"), for a few months prior to these homicides.

October 23, 2019, it came to defense counsel's attention that certain discovery in the possession of the New Hampshire State Police Major Crimes Unit ("MCU") had not been turned over to the defense. This information came to light because a Patrick Cote sent an e-mail to the New Hampshire Public Defender's office on October 19, 2019, stating he had information regarding an important trial witness—Steven Clough—which might be relevant to the ongoing trial. Patrick Cote's daughter is Monique Cote who is a former partner of and shares a child with Steven Clough. After defense counsel's investigator, Claire Adams, spoke with Patrick and Monique Cote, Monique forwarded e-mails between herself and Trooper Stephen McAulay exchanged during MCU's investigation of this case. Attorney Lugo reviewed these forwarded e-mails and confirmed this was the first instance that the defense was provided these discovery materials. Thereafter, defense counsel notified the court that undisclosed discovery materials had come to light. The court (Houran, J.) suspended trial and held an evidentiary hearing on October 24 and 25, 2019, on the defendant's motion to dismiss with prejudice, based on the State's failure to disclose discovery. (See court index #503). The trial resumed on October 25, 2019. Ultimately, on October 28, 2019, the court denied the defendant's motion to dismiss, concluding remedies short of dismissal could adequately address any prejudice to Verrill. (See generally Order).

Also on October 23, 2019, Lieutenant John Sonia, head of the MCU, was notified that the MCU possessed and had failed to turn over certain discovery materials generated during the homicide investigation. Lt. Sonia sent an e-mail to all personnel involved in this investigation, directing each of them to check their own files for materials that were not disclosed. Although Lt. Sonia did not have the investigation casebook,[3] then in the possession of the case's lead

[3] The investigation casebook is the record keeping tool utilized by the MCU and is fully explained in the following section. (See infra 8–9).

investigator, Lieutenant Brian Strong, it quickly became apparent that discovery materials in the possession of Trooper McAulay and Sergeant Steven Sloper had not been turned over to the Attorney General's office and, in turn, defense counsel. Accordingly, MCU leadership determined it was necessary to conduct an audit of the investigation and assigned Sergeant Justin Rowe to lead the audit. Sergeant Matthew Minitucci[4] and Troopers Hester and Elsemiller were assigned to assist Sgt. Rowe with the audit. The audit began the following week on October 28, 2019, as the jury trial continued.

Lt. Sonia testified that his role in the audit was to prescribe the structure of the review. He also testified that the purpose of the audit was not only to ensure all discovery was disclosed but also to identify how or why many discovery materials were not timely disclosed in this investigation. With these goals in mind, Sgt. Rowe began this unprecedented review of the MCU's investigation. The audit team utilized a large conference room at the New Hampshire State Police ("NHSP") headquarters to gather and review all materials and conduct interviews. At the outset of the audit, Lt. Sonia determined that all investigators who worked on this investigation should review their own records and any other materials in their possession to identify undisclosed discovery materials. However, early in the audit process, Sgt. Rowe concluded that due to the volume of undisclosed discovery, the audit team would need to conduct an individual review of each investigator's materials and also double check items that were claimed to be previously disclosed.

Sgt. Rowe testified that the audit team interviewed every MCU investigator who was involved in the homicide investigation. During those investigator interviews, the audit team went through the casebook table of contents and compared the enumerated items to the discovery

[4] The court notes that this officer's name is not mentioned in any of the pleadings and the court is unaware of the proper spelling. As such, the court spells his name phonetically.

materials in the conference room. The audit team also identified any discovery materials brought into the conference room that were not recorded in the casebook, including physical and digital discovery materials. The audit team utilized defense counsel's discovery requests as a roadmap to review the discovery materials provided by investigators. The audit team also reviewed the investigators' state-issued laptops and cell-phones. The team ran keyword searches on files, text messages, and e-mails to identify any names and phone numbers connected to the homicide investigation previously not disclosed.

Notably, the audit team conducted the most significant review of materials and interviews with Lt. Strong and Trooper McAulay. Lt. Strong was the lead investigator on the homicide investigation and Trooper McAulay was the primary subordinate investigator. Between October 29, 2019 and October 31, 2019, the audit team interviewed and reviewed discovery materials with Trooper McAulay and Lt. Strong for 6–8 and 12–14 hours respectively. Sgt. Rowe testified that Trooper McAulay and Lt. Strong possessed the most undisclosed discovery materials and the volume of those collective undisclosed marterials was significant.

The audit continued as the trial progressed. Two days later, at the end of the trial day on October 30, 2019, the prosecutors from the Attorney General's office learned from MCU and relayed to defense counsel that "there was more," meaning there was additional undisclosed discovery unearthed by the continuing audit. On October 30, 2019, the State informed defense counsel that the additional discovery consisted of cell phone extractions for Tanner Crowley, a recording of a pre-polygraph interview with Steven Clough, surveillance footage from the Holy Rosary Credit Union in Farmington, and a recorded phone call between Dean Smoronk and Jeff Sullivan, the brother of one of the victims.

Later on October 30, 2019, defense counsel received a portion of the additional discovery

and began reviewing it. That night, Attorneys Lugo and Nye also discussed their options with regard to the trial in light of the additional discovery violations. Specifically, they discussed whether they could effectively incorporate the additional discovery into their case in the middle of trial, whether they should request a mistrial, and how this late discovery disclosure would affect Verrill's defense. They also reached out to their colleagues at the New Hampshire Public Defender's office seeking advice on how to proceed and spoke with Attorneys Rothstein and Smith. Attorneys Lugo and Nye did not make any decisions on October 30, 2019, as to how to proceed because they were expecting to receive the remainder of the undisclosed discovery the following morning.

The next day, October 31, 2019, Attorneys Lugo and Nye had three separate phone calls with the Attorney General's office—specifically Attorneys Hinckley and Ward—regarding the additional undisclosed discovery. First, Attorney Hinckley called to ask if defense counsel agreed it was appropriate to inform the Strafford County Superior Court Clerk's Office and the court (Houran, J.) that there was another discovery issue. Attorney Hinckley indicated during this call that he and Attorney Ward were on their way to NHSP headquarters to review the undisclosed discovery and discern what was going on. Attorney Lugo again discussed defense counsel's options in light of the undisclosed discovery with her colleagues at the public defender's office. Following that discussion, and, still undecided about whether the defense would request a mistrial, Attorney Lugo emailed Attorneys Hinckley and Ward and asked them what the State's position would be if the defendant indeed requested a mistrial. In response, Attorney Ward indicated that he would call back shortly. During that second phone call, Attorney Ward indicated that he was authorized by the Attorney General to assent to a mistrial without prejudice. Finally, during the third phone call, Attorney Ward informed Attorneys Lugo

and Nye that he and Attorney Hinckley were at NHSP headquarters and had realized after their arrival that there were even more undisclosed discovery materials than represented the day before. Specifically, Attorney Lugo testified that Attorney Ward indicated to her that Attorney Hinckley had picked up an envelope from one of the discovery piles and noticed phone numbers and names he did not recognize as associated with the case. Attorney Ward also shared that he and Attorney Hinckley learned upon their arrival that NHSP kept all drug-related discovery separate from the homicide discovery and thus NHSP had not turned over the drug investigation discovery to the Attorney General's office. Attorney Lugo further testified that she asked Attorney Ward what the volume of the undisclosed discovery materials were and Attorney Ward responded it was significant.

Attorney Lugo testified that the information she learned during this phone call with Attorney Ward informed the defense's decision to request a mistrial. She testified that this new information from Attorney Ward was significant in the decision to request a mistrial for two reasons: first, the sheer volume of discovery that was not disclosed and, second, the fact that undisclosed discovery related to the drug investigation which the defense repeatedly requested the production of prior to the trial. As outlined in an email drafted by Attorney Lugo, the defense requested a mistrial and proposed that the parties litigate whether it was with or without prejudice at a later date once the defense had reviewed the entirety of the undisclosed discovery. (See Def. Ex. B). The court (Houran, J.) granted the assented-to mistrial request on October 31, 2019, and dismissed the jury.

In the months following the mistrial, the defense team reviewed the additional undisclosed discovery, amounting to more than 500 written pages and 39 separate discs of media. The undisclosed discovery included information previously unknown to defense counsel

related to the following known witnesses: Brianna ("Dusty")[5] Cousens, Jeff Sullivan, Steven Clough, Dean Smoronk, and Jenna Guavara. Similarly, the undisclosed discovery included information regarding the following persons whose identities or connections to the homicide investigation were previously unknown to defense counsel: Monique Cote, Jessica Rodrigue, Michael Ditroia, Jonathan Millman, James Morin, Suzi Caldwell, Faith Brown, John Plaisted, and Alex Tsiros. A complete list of the substance of those discovery materials is available in the defendant's motion to dismiss. (See Def.'s Mot. Dismiss ¶¶ 128–130). As additional details regarding the specific undisclosed discovery materials become relevant to the court's analysis, it will be incorporated accordingly below.

II. The Major Crimes Unit of the NHSP

At the hearing, the court heard significant testimony about the MCU's staffing structure, responsibilities and course of conduct during investigations, and record keeping practices. The court heard testimony from the following members of the NHSP: Lt. Sonia, Sgt. Rowe, Lieutenant Mark Hall, Sergeant Chris Huse, Sgt. Sloper, and Lt. Strong.

Lt. Sonia is, and has been at all times relevant to this investigation, in charge of the MCU. The MCU is comprised of 18–20 investigators, half of whom are sergeants and half of whom are trooper detectives. The unit's primary task is investigating homicides and other major crimes. Ordinarily, the Attorney General's office is the prosecutor for homicide cases and the MCU works hand-in-hand with the Attorney General's office throughout the investigation. The MCU's investigation generates discovery which includes, but is not limited to, crime scene reports, witness interviews, surveillance footage, and other physical and digital evidence. In addition, the MCU sometimes receives reports from other local, state, and federal law

[5] Although unclear from the defendant's motion, the court presumes that the references to Brianna Cousens and Dusty Cousens refer to the same individual. (See Def.'s Mot. Dismiss ¶¶ 129, 184).

enforcement agencies that become collaterally involved in a particular investigation. Lt. Sonia testified that homicide investigations can generate thousands of pages of written discovery.

When a potential homicide is reported, the head of the MCU designates an investigator as the lead investigator and assigns other investigators to operate under the lead. Generally, as many as 6 to10 investigators will be assigned to a single investigation. Three investigators were assigned primarily to this case: Lt. Strong, as lead, Trooper McAulay, and Sgt. Bright, who was shortly thereafter promoted and became less involved.

The lead investigator is charged with oversight and management of the entire investigation, the collection of evidence, and the disclosure of discovery materials to the prosecuting office. The lead assigns tasks to investigators, coordinates investigation efforts with other law enforcement, compiles and organizes all investigation materials and, sometimes, personally completes assignments such as interviews. The lead is also charged with following up on tasks assigned to other investigators to ensure the investigation's records are accurate and complete.

The casebook method, which MCU utilizes for homicide investigations, is a record keeping system in which all physical discovery, i.e., written reports, items from the crime scene, discs containing interviews or surveillance, etc., are compiled into a physical binder. This binder—the casebook—is later turned over to the prosecuting body (usually the Attorney General's office) or, if no prosecution follows, is filed with the MCU internally. Lt. Strong testified that the only materials not included in the casebook are those not directly related to a particular investigation. Any materials not included in the casebook remain in the lead investigator's possession and there is no set inventory system for such materials.

Sgt. Rowe testified that the casebook is supposed to contain all evidence collected in the

course of an investigation and include a table of contents identifying all evidence contained within. Sgt. Rowe testified that at the time of this investigation, the MCU had no designated procedures for compiling a casebook. In addition, he testified that there was no formal training for a lead investigator as to how to compile a casebook. Rather, lead investigators learned from mentors within the unit and adapted templates or methods to fit their own organizational preferences.

According to Lt. Strong, the MCU still has no centralized records management system in place. That is, all investigators save discovery onto their own computer, and thus a lead investigator has no way to access such files readily to check what tasks are complete. Lt. Strong testified that he personally utilized a spreadsheet to track investigator assignments and other investigative efforts such as interviews. Lt. Strong testified that if a task or other investigative effort was inadvertently excluded from his spreadsheet, he would have no indicator or reminder to follow-up on that assignment's completion. In other words, a failure to record an item into the spreadsheet would likely result in a failure to collect that item. Lt. Strong admitted that his record-keeping practices in this investigation fell short. However, he also testified that none of his identified shortcomings were the result of any intentional effort to prevent information from being disclosed to the Attorney General's office or defense counsel.

As a result of the MCU's record-keeping deficiencies in this case, which were illuminated by the significant non-disclosure of pertinent discovery in this case, the unit has implemented certain changes. Sgt. Rowe testified that the audit performed in this case was unprecedented and has never before been necessary. He also testified that the MCU has since deemed such review and additional oversight necessary. The MCU now engages in redundant overview through a tier system whereby the investigators check in with the lead, who reviews

their assignments and reports, and the lead in turn reports to senior management, which reviews the individual efforts and lead investigator's supervisory efforts, as well as the investigation as a whole. In addition, Sgt. Rowe testified that the MCU has implemented check-in points every thirty days to ensure investigations and accompanying record-keeping practices are up to standards.

Analysis

There is no dispute that the State committed significant discovery violations in this case; however, the parties diverge on the proper remedy. The defendant contends that as a result of the discovery violations, his constitutional rights to due process and against double jeopardy were violated. (See Def.'s Mot. Dismiss 1). The defendant requests the charges against him be dismissed with prejudice. (See id.) The State, while acknowledging its violations, urges that they were not malicious or intentional and did not prejudice the defendant such that dismissal is the proper remedy. (See State's Obj. 1). The State requests the court consider less severe alternative remedies and sanctions. (See id.)

I. Double Jeopardy

The defendant argues double jeopardy should attach and preclude and retrial because the State goaded him into requesting a mistrial when members of the Attorney General's office allegedly misrepresented the substance of the undisclosed discovery materials to his trial attorneys. (See Def.'s Mot. Dismiss ¶¶ 135–141). The State counters that it "accurately informed counsel that additional materials had not been provided, that such materials were significant in amount, and that such materials apparently" related to the drug investigation. (See State's Obj. ¶ 16).

In making his arguments, Verrill relies on Part I, Articles 15 and 16 of the New

Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. (See generally Def.'s Mot. Dismiss). As the state and federal constitutions provide identical double jeopardy protections, the court addresses Verrill's arguments under the State Constitution, referring to federal law for guidance only. See State v. Duhamel, 128 N.H. 199, 202 (1986); see also State v. Murray, 153 N.H. 674, 680–81 (2006).

Generally, when a defendant's request for a mistrial is granted, a retrial on the same charge is not barred by double jeopardy. Murray, 153 N.H. at 680–81. On the other hand, when—by reason of prosecutorial or judicial overreaching that is intended either to provoke the defendant "into requesting a mistrial or to prejudice his prospects for an acquittal," United States v. Dinitz, 424 U.S. 600, 611 (1976)—the defendant requests and obtains a mistrial, the Double Jeopardy Clause prohibits a retrial. State v. Scarlett, 121 N.H. 37, 39 (1981). To establish prosecutorial overreaching, the defendant must show that the government, through gross negligence or intentional misconduct, caused aggravated circumstances to develop that severely prejudiced the defendant. State v. Lake, 125 N.H. 820, 823 (1984). Therefore, a retrial 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 or inadmissible evidence. State v. Montella, 135 N.H. 698, 700 (1992). Whether the prosecution so intended is a matter of fact to be decided by the trial court. Duhamel, 128 N.H. at 203.

As the United States Supreme Court explained in Oregon v. Kennedy, 256 U.S. 667, 675–676 (1921), mere prosecutorial error is insufficient. See United States v. Aviles-Sierra, 531 F.3d 123, 126 (1st Cir. 2008). "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion ... does not bar retrial

absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes 'a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.'" Oregon, 256 U.S. at 675–676 (quoting United States v. Scott, 437 U.S. 82, 93 (1978)). Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." Id. at 676 (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)). Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion. Id.

Upon review, the court finds the State did not intend to goad the defense into requesting a mistrial. The defense contends that the State's representations, through Attorney Ward, 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 members of the Attorney General's office, 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 members of the Attorney General's office 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 Attorney Generals' 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. In the absence of any evidence of goading, double jeopardy does not bar Verrill's retrial.

II. Due Process

The defendant urges that the State's discovery violations caused him actual prejudice because the untimely disclosed materials were directly relevant to his alternative perpetrator defense. (See Def.'s Mot. Dismiss ¶¶ 161–207). Thus, he contends the only adequate remedy is dismissal of the charges against him with prejudice. (See id. ¶¶ 83–84). The State disputes that the defendant has suffered demonstrable actual prejudice and, even if the court finds he has, disputes that the extreme remedy of dismissal with prejudice is warranted. (State's Obj. ¶¶ 52–59, 64–111).

In making his arguments, Verrill relies on Part I, Articles 15 and 16 of the New

Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. (See generally Def.'s Mot. Dismiss). As the State Constitution provides greater protection than the Federal Constitution with regard to the disclosure of potentially exculpatory information, the court addresses Verrill's arguments under the State Constitution, referring to federal law for guidance only. See State v. Etienne, 163 N.H. 57, 95 (2011); Murray, 153 N.H. at 680–81.

Part I, Article 15 of our State Constitution provides that no citizen "shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Etienne, 163 N.H. at 88. The "law of the land" is synonymous with "due process of law." Id. (quoting Bragg v. Director, N.H. Div. of Motor Vehicles, 141 N.H. 677, 678 (1997)). This due process right imposes on the prosecutor the "duty to disclose evidence favorable to the accused where the evidence is material either to guilt or to punishment." Id. (quoting State v. Lucius, 140 N.H. 60, 63 (1995)). This duty is not satisfied merely because the prosecutor assigned to the case is unaware of exculpatory information. Duchesne v. Hillsborough Cty. Att'y, 167 N.H. 774, 777–78 (2015). Rather, prosecutors are responsible for information possessed by certain government agencies, such as police departments, that are involved in the investigation giving rise to the prosecution. Id. Although in this case the misconduct may be attributable to the State Police rather than the Attorney General'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. Lucius, 140 N.H. at 63.

While the defendant has a constitutional right under the state and federal due process clauses "to obtain evidence helpful to his defense," see Petition of State, 169 N.H. 340, 344 (2016), "relief for a Brady violation requires proof that the violation somehow caused [the defendant] prejudice." State v. Colbath, 130 N.H. 316, 320–21 (1988). The defendant must show that he was actually prejudiced by the prosecutor's discovery violation. State v. Stickney, 148 N.H. 232, 236 (2002); State v. Cotell, 143 N.H. 275, 279 (1998). Actual prejudice exists if the defense has been impeded to a significant degree by the nondisclosure. Stickney, 148 N.H. at 236.

The court may impose various sanctions for the prosecution's inexcusable failure to disclose evidence, including, but not limited to, citation for contempt, suspension for a limited time of the right to practice before the court, censure, informing the appropriate disciplinary bodies of the misconduct, or imposition of costs. Cotell, 143 N.H. at 279. However, the most extreme sanction of dismissal with prejudice is reserved for extraordinary circumstances, and should not be wielded, for instance, where a prosecutor fails to act, but has not actually prejudiced the defendant. Id.; State v. Chace, 151 N.H. 310, 314 (2004). In other words, even where a discovery violation results in prejudice, dismissal is not warranted where the prejudice can be remedied through other procedural mechanisms. See Cotell, 143 N.H. at 280–81; see also Chace, 151 N.H. at 314; Stickney, 148 N.H. at 236; State v. Michaud, 146 N.H. 29, 33 (2001); State v. Bain, 145 N.H. 367, 372 (2000).

The defendant identifies numerous discovery materials the late disclosure which he contends caused him actual prejudice because the materials were directly relevant to his alternative perpetrator defense. The court will summarize those identified materials and the related witnesses here. First, Trooper Vincente interviewed Tanner Crowley, a person believed

to be Smoronk's "I.T. guy," in Florida in March 2017 and defense counsel still have not been provided a report or recording of that interview. Second, Lt. Strong conducted an additional phone interview with Jenna Guevara, an individual who was familiar with Smoronk and Sullivan's drug activities, on March 19, 2017, and exchanged one additional text message with her on May 1, 2017. According to Verrill, these items corroborate Fidencio Arellano's claim that Smoronk hired him to kill Edgar Morales and Sullivan.

Third, Lt. Strong exchanged text messages with the following persons: Arnold Bennett, Barry Hildreth, and Steven Clough. Verrill asserts that the text messages with Arnold Bennett—father of Michael Bennett, a witness believed by police to have information about the homicides because of a statement Michael made that more people were involved than Verrill—indicate Arnold may have additional information about witnesses in the case because he knew of Michael Ditroia's relationship with Smoronk and Cousens. The defense asserts text messages with Barry Hildreth disclosed post-mistrial specifically relate to the homicide investigation and witnesses involved, as well as motorcycle clubs generally.[6] Regarding the text messages with Steven Clough disclosed post-mistrial, the defense asserts Clough indicated he had information to provide to the DEA regarding Smoronk and also that Clough might have been paranoid about his own and his family's safety.

Fourth, John Plaisted made an initial statement to a secretary at a local police department who took notes of his statement by hand. According to Verrill, these hand-written notes indicate that Plaisted had obtained knowledge from Jesse Dobson about motive for the murders and knew persons involved, such as one of the victims (Pelligrini) and Smoronk. Verrill contends the handwritten notes contradict Sergeant Koehler's report, prepared after interviewing Plaisted and

[6] The defense did not elicit any testimony at the hearing regarding the undisclosed text messages between Lt. Strong and Barry Hildreth.

Dobson, during which Dobson denied such knowledge. Fifth, video surveillance from the Holy Rosary Credit Union showing Josh Colwell, accompanied by Verrill, meeting the two victims prior to the homicides. Sixth, Sgt. Sloper conducted a pre-polygraph interview with Clough although Clough was never actually given a polygraph examination. Seventh, Jonathan Millman, a friend of Verrill, was interviewed by law enforcement in 2017. Finally, evidence related to the drug investigation involving Smoronk was not turned over notwithstanding that it was a central theme to Verrill's alternative perpetrator theory.

In addition, Verrill contends that the following information, addressed in this court's (Houran, J.) prior order, caused actual prejudice in light of materials disclosed post-mistrial: information related to Jessica Rodrigue, Fidencio Arellano's text messages with Lt. Strong about his ex-girlfriend Jessica Rodrigue, and Smoronk's solicitation of him to kill two individuals, including Sullivan, Michael's Ditroia's polygraph, and the interview of Alan Johnson.

Upon review of the identified materials not already addressed in this court's (Houran, J.) prior order, the court finds that Verrill has not suffered actual prejudice as a result of the State's late disclosure of the materials enumerated above. See Cotell, 143 N.H. at 279. Although the court finds Verrill has identified sources of potential prejudice with respect to the late disclosed materials, this is insufficient to warrant the sanction of dismissal with prejudice. See Colbath, 130 N.H. at 320–21; Stickney, 148 N.H. at 236. Not only are Verrill's assertions of actual prejudice speculative, vague, and lacking articulation of how he would have altered his trial strategy in light of the untimely-disclosed materials, but also the evidence enumerated above is largely cumulative of timely-disclosed discovery materials. Dismissing a case for prosecutorial misconduct or discovery violations where the defendant has suffered no actual prejudice results in the defendant benefitting from a windfall, and the price is paid by the public,

not the prosecutor. Chace, 151 N.H. at 314. Thus, although there is no doubt Verrill was entitled to such materials and they may be germane to the issues at trial, the court finds Verrill did not suffer actual prejudice sufficient to compel a dismissal with prejudice.

Even if the court were to conclude that Verrill suffered actual prejudice, dismissal with prejudice would not be the appropriate remedy. See Cotell, 143 N.H. at 279. Where lesser sanctions and procedural curative measures are sufficient to remedy any potential or actual prejudice, those are preferred to the extreme remedy of dismissal. Id. at 280. Indeed, the weight of the caselaw reflects that even where a defendant has been tried and convicted, the remedy for undisclosed exculpatory materials is not dismissal with prejudice, but rather a new trial. See State v. Laurie, 139 N.H. 325, 327 (1995) (granting new trial due to undisclosed exculpatory evidence); State v. Dedrick, 135 N.H. 502 (1992) (same); Lucius, 140 N.H. at 63 (same as Laurie); Etienne, 163 N.H. at 88 (contemplating and ultimately denying a new trial where exculpatory evidence was withheld); see also State v. Arthur, 118 N.H. 561, 563 (1978) (explaining that delayed disclosure "does not necessarily call for a new trial or the drastic remedy of dismissal of the charges."). Accordingly, the court finds the less extreme sanction of a new trial can sufficiently cure any potential prejudice Verrill suffered.

In addition, the 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 (Order, 17)—reiterated that none of his conduct was the part of any effort to intentionally withhold evidence form 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. (See Order, 16–17).

Finally, Verrill requests that in the event that the court denies his motion to dismiss with prejudice, the court allow him the opportunity to propose alternative remedies. This request is GRANTED and Verrill may propose alternative remedies for the court's consideration.

Conclusion

For the foregoing reasons, Verrill's motion to dismiss with prejudice is DENIED. Verrill is hereby afforded 30 days from the date on the Clerk's Notice of Decision within which to file a supplemental pleading concerning alternative remedies. The State will thereafter have 30 days in which to respond. The court will thereafter issue a separate order on alternative remedies or sanctions, if any.

SO ORDERED.

Date: February 1, 2021

Mark E. Howard
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/02/2021