

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Strafford, ss.

September Term, 2023

STATE OF NEW HAMPSHIRE

v.

Timothy Verrill

#219-2017-CR-072

DEFENSE OBJECTION TO STATE'S MOTION TO ADMIT FORMER

TESTIMONY OF UNAVAILABLE WITNESS

AND RENEWED MOTION TO DISMISS

NOW COMES the accused, Timothy Verrill, by and through counsel, Meredith Lugo and Julia Nye, Public Defenders, and hereby objects to the State's Motion to admit the testimony offered by Stephen Clough at Mr. Verrill's trial held in October 2019. The defense also renews its Motion to Dismiss based on its inability to cross-examine Clough at Mr. Verrill's upcoming trial. Finally, should the Court deny this Motion, the defense requests alternative relief as detailed below.

This Objection is grounded in Mr. Verrill's rights to due process, a fair trial, effective assistance of counsel, and to confront the witnesses against him. New Hampshire Constitution, Part 1 Article 15; United States Constitution, Fifth, Sixth, and Fourteenth Amendments.

Clough's prior testimony cannot constitutionally be entered into evidence at Mr. Verrill's upcoming trial as the defense did not have, as required by NHRE 804(b)(1)(B), "an opportunity and similar motive" to cross-examine him at the 2019 trial due to the volume and significance of materials related to Clough that the State failed to turn over prior to that trial.

Specifically, the defense was prevented the opportunity and motive to cross-examine Clough about the following:

- a. His claims regarding his contact with police during the investigation and denials that he was concerned he was a suspect;
- b. The central role he played throughout the pendency of the case in the federal drug investigation;
- c. His relationship with Michael Ditroia (aka Spider); and
- d. His mental state leading up to and at trial.

In support of this Motion, the following is stated:

### **Introduction**

1. In October 2019 Mr. Verrill stood trial on the instant charges. After ten days of testimony and during the presentation of the defense case, the Court (Houran, J.) declared a mistrial on October 31 due to newly discovered evidence that had not been provided to the defendant pre-trial. There were three different incidents of discovery violations uncovered during the trial: undisclosed information regarding primarily Monique Cote, Clough's ex-girlfriend and the mother of his daughter on approximately October 23; disclosure that a pre-polygraph video-taped interview with Clough had been conducted in August 2017, at the conclusion of which the examiner determined that it would not be appropriate to conduct a polygraph examination, on October 30 after trial ended for the day; and additional information totaling approximately 500 pages and 39 media discs disclosed after trial.
2. Clough was called as a witness by the State and testified on day 3 of the trial for several hours.
3. On September 12, 2023, the State contacted the defense and advised they had learned that Clough died in a motorcycle accident in late August 2023. The State advised the

- defense of its intention to admit Clough's testimony from the October 2019 trial and its proposed method of doing so, specifically having counsel for the State and a paralegal from the NH Attorney General's Office engage in a back and forth reading of the transcript of his testimony.
4. The State subsequently filed a Motion seeking to admit Clough's testimony pursuant to NHRE 804(a)(4) and 804(b)(1). The defense objects, citing his constitutional rights as well as asserting that the State cannot meet its burden as the proponent of this evidence to demonstrate that it qualifies for admission under the Rules of Evidence.
  5. In the first instance, Mr. Verrill notes that a defendant's right to confront and cross-examine the witnesses against him is enshrined in both the U.S. and N.H. constitutions and is well-established. Specifically, the N.H. Constitution establishes that a defendant "shall have a right ... to meet the witnesses against him face to face." Part I, Article 15. The New Hampshire Supreme Court has noted the precise language used in our state constitution when evaluating confrontation claims, observing that the "language of the New Hampshire Constitution in this regard is the more precise of the two, in that it explicitly provides what the Federal Constitution has been interpreted to mean," namely, face to face confrontation. State v. Peters, 133 N.H. 791, 794 (1991).
  6. With respect to the Rules of Evidence, the defense concedes that it appears Clough is deceased and as such unavailable as defined by NHRE 804(a)(4). The defense does not agree that Clough's prior testimony qualifies for admission under NHRE 804(b)(1). At the outset, the defense notes that as the proponent of the evidence, the

State bears the burden of establishing that the rule is satisfied and cannot meet its burden by simply asserting that it is.

7. The defense argues that Clough's testimony fails for admission under the Rules of Evidence because the defense did not have "an opportunity and similar motive to develop it" on cross-examination at the October 2019 trial due to the State's conceded and established discovery violations.
8. The United States Supreme Court has made it clear that it is an absolute requirement under federal Rule of Evidence 804, which contains language identical to NH's rule, that the party against whom the prior testimony is offered must have had a similar motive to develop and/or challenge that testimony on cross. United States v. Salerno, 505 U.S. 317, 321-322 (1992).
9. Much of the federal case law surrounding Rule 804 and former testimony concerns matters such as new technological advancements that have occurred between the time of the first and second trial. In such instances, courts have concluded that despite the new advances, the defense still had a similar motive at the first trial. See, e.g., United States v. Ausby, 436 F. Supp. 3d 134 (2019).
10. However, these decisions rest at least in part on the lack of culpability of either party with respect to the new advancements. In contrast, the Ninth Circuit has noted that a party's culpability in withholding evidence should be considered by a court when evaluating a Rule 804 argument, noting in a particular case that "there was no suggestion that the defendant's failure to discover the information was the prosecution's fault." United States v. Koon, 34 F.3d 1416 (Ninth Circuit, 1994), *rev'd* on other grounds, 518 U.S. 81 (1996).

11. Here, Verrill argues that his lack of opportunity and similar motive with respect to his cross-examination of Clough at the October 2019 trial was the direct result of the State's discovery violations. This is evidenced in multiple lines of cross that the defense was unable to pursue.

**Clough's Lies regarding his Contact with Police during the Investigation**  
**and his Perception of Himself as a Suspect**

12. At trial, Clough was cross-examined about the number of times during the investigation he spoke with law enforcement and the timing of those interrogations. Defense counsel did not know of the August 2017 pre-polygraph interview and so did not include this in her listing of police contacts and Clough did not volunteer it.

13. Also on cross, Clough conceded that the investigation "made [him] nervous" yet emphasized "But I knew I hadn't done anything, so I had nothing to be nervous about." Trial Transcript, p. 451-452. In reality, Clough had a lot to be nervous about, including at least one investigator telling him he would fail a polygraph.

14. Without knowledge of the pre-polygraph interview, and especially the examiner's conclusion that it would not be appropriate to conduct a polygraph examination of Clough because he would not pass due to "guilty knowledge" that he had not come forward with (Transcript of Pre-Polygraph Interview, Bates, p. 11611), the defense was denied the opportunity to effectively cross-examine Clough's assertions as a direct result of the State's discovery violations.

15. Had the defense been able to fully inform the jury as to both Clough's statements during the polygraph and statements made to him by the examiner Steven Sloper, the jury could have fully assessed Clough's claim that he was not especially nervous.

Instead, the jury did not hear, for example, that Clough repeatedly stated during the pre-polygraph interview that his goal in meeting with Sloper was to “clear myself” (Id. at Bates, p. 11543, 11553, 11615). Sloper agreed that the point in meeting was to clear Clough of suspicion, but also made clear to him that the interview was achieving the opposite, telling him “I know that there’s other facts and other things that you’re not coming forth with about” and that Clough possessed “guilty knowledge there’s something there that you know that you’re not coming forward with.” (Id. at Bates, p. 11611). In response to, Clough expressed anger and frustration, complaining it was “so offensive that people don’t believe what I say” (Id. at Bates, p. 11612) as well as disbelief, stating “I can’t even believe this is going on **again** where I’m being questioned like I’m not believed.” (Id. at Bates, p. 11611) (emphasis added). The latter comment is particularly revealing as showing this was not the first or only time during the investigation that Clough felt law enforcement was not believing him.

16. In addition, the non-disclosed texts between Clough and Strong are consistent with Clough’s presentation at the pre-polygraph interview, as they reveal Clough repeatedly seeking the opportunity to submit to a polygraph in order to clear himself as a suspect.
17. Overall, the defense was denied the opportunity to present a complete picture to the jury, namely that more than six months after the murders and Verrill’s arrest Clough’s name still needed clearing and a lengthy interview held for that purpose failed to do so.

### **Clough's involvement in federal drug investigation**

18. As the defense has asserted in other pleadings, a decision was made at the outset of the investigation into the murders to keep the drug investigation separate from the murder investigation, and to have the drug piece handled by the DEA, a federal agency. Subsequent to the October 2019 trial and as a result of the previously undisclosed discovery, the defense learned that throughout the murder investigation, Clough was simultaneously providing information to Jack Daly of the DEA, with Lt. Strong's knowledge (Strong was lead on the murder investigation). In fact, Clough and Strong were texting about Clough providing information to Daly **during** Verrill's trial (on October 8, 2019).
19. Without this knowledge, the defense was denied the opportunity to engage in multiple lines of cross-examination, such as Clough's motive in cooperating with the DEA, his understanding as to what if any of the information he provided the DEA was shared with state investigators, and whether he believed his cooperation would shield him from scrutiny in the murder investigation. Instead, wholly absent any knowledge of Clough's involvement with the DEA, the defense could do none of the above.

### **Potential Connection between Clough and Spider**

20. Timely disclosed discovery referenced both Clough and Spider but did not highlight any connection between them. Rather, both were merely described as associates of Christine Sullivan and Dean Smoronk. At trial, Clough did not mention Spider in his testimony and unsurprisingly, the defense asked no questions about Spider on cross-examination. It was only through discovery that was initially withheld, and which the defense did not have access to until after Clough testified, that the defense learned

that of all the individuals involved in the investigation, only Clough and Spider were asked to submit to polygraph examinations. Had the defense known of this similarity prior to trial, counsel could have sought out evidence of any other connections between them and learned, for example, that Clough and Spider texted back and forth several times while Clough was at Smoronk's house the Saturday night after the murders. Instead, the defense was denied the opportunity to cross-examine Clough regarding his relationship with Spider and how that relationship could have impacted whether he had a motive for the murders and the actions he took and statements he made during the investigation.

**Clough's mental state at the time of his testimony**

21. Prior to trial, the defense had received some text messages Clough exchanged with lead investigator Lt. Brian Strong. However, the State failed to produce the majority of their text messages until after trial. Not only did this allow Clough to falsely represent that he had only texted with Strong until the summer of 2018 (when in fact they were still actively texting on the eve of and during trial), the defense was denied critical information regarding Clough's mental state.
22. At the time of the October 2019 trial, the defense had been provided no evidence from the State that Clough was suffering from any sort of mental impairment. Had the State timely disclosed the texts Clough exchanged with Strong between April and September 30, 2019, it would have been abundantly clear that something was very wrong with Clough's mental state. Throughout the six month period leading up to the October 2019 trial, Clough repeatedly texted Strong looking for help, asking him to come over to his house and investigate what he claimed were audio and video

recordings of people in distress, often emphasizing that he needed Strong to come over immediately and that he believed his children were in grave danger. He also complained about the authorities not believing him or taking his claims seriously, and adamantly denied that there was anything wrong with him. In contrast, Strong confronted Clough with his beliefs about his deteriorating mental state, texting him on September 29, “I have been to our [*sic*] house and listened to our [*sic*] recordings there is nothing going on, u r the only person hearing the things u r hearing, if it was actually happening others would be hearing what u r hearing.” Strong reiterated his concerns for Clough’s mental state the following day, September 30: “Steve, I am not stopping by. I have talked w your father and brother, u need help. U r the only person who sees and hears things.” Shortly thereafter when Clough texted Strong to ask for assistance in connecting with Jack Daly of the DEA, Strong replied that Daly was not interested in speaking with Clough.

23. Strong has testified that he cannot remember whether he informed the Attorney General’s Office about the text messages or his concerns regarding Clough’s mental state. If he did, it was not information that the State shared with the defense; Attorney O’Neill emailed defense counsel a Zwicker letter on October 13 that contained no reference to any such concerns or evidence of a deteriorating mental state.

24. Had the defense had any of this information pre-trial, the defense could have sought to obtain medical and/or psychiatric records of Clough and/or sought to question Strong and Daly, especially regarding whether Daly was not interested in speaking with Clough because he too was aware of his declining mental state. Instead, the

defense was wholly unaware of these communications taking place nearly simultaneously with the State presenting Clough as one of their star witnesses and asking the jury to accept his testimony as truthful. The defense did not have a similar motive at the October 2019 trial to cross-examine Clough regarding his mental state as counsel had no information regarding any abnormalities in said mental state. The defense was also wholly deprived of the opportunity to cross-examine Clough regarding what appear to be his paranoid delusions and hallucinations and the repeated rejection by law enforcement of his bizarre claims. The defense was also denied the opportunity to argue to the jury both that Clough was unreliable and not credible as a result of his current mental state, but also the opportunity to suggest to the jury that his current symptoms could be connected to the murders of Sullivan and Pellegrini, and Clough having had some involvement in the murders.

25. That this was information critical for the defense to have and be able to utilize cannot seriously be disputed, particularly given Clough's centrality to the State's case. The New Hampshire Supreme Court has made clear that "[i]nformation pertaining to a witness' mental stability may be relevant to credibility, and therefore useful as impeachment evidence at trial." State v. Dewitt, 143 N.H. 24, 34 (1998). See also State v. Shepherd, 159 N.H. 163 (2009). Federal courts agree. See, e.g., United States v. Jimenez, 256 F.3d 330, 343 (Fifth Circuit, 2001) (quotation and citation omitted) ("a defendant has the right to attempt to challenge [a witness's] credibility with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify.").

### **Conclusion re: NHRE 804 Argument**

26. This Court should deny the State's Motion as the defense did not have a similar opportunity or motive to cross-examine Clough at Verrill's October 2019 trial. Indeed, the defense was hamstrung by the State's discovery violations, having been denied exculpatory information it could have used to great effect to impeach Clough and present him to the jury as a potential alternative perpetrator. In contrast, had the defense possessed the undisclosed information detailed in this Motion, it would have been in a very different – and far better – position to cross-examine him. This is especially true with respect to his mental state, which as reflected in the text messages with Strong was significantly deteriorating by the time of trial. The defense was denied the ability to present evidence of Clough's mental state to the jury and/or suggest possible ties between Clough's then-current mental state and his involvement in the murder investigation and trial.

### **Renewal of Motion to Dismiss**

27. In denying the defense's Motion to Dismiss, this Court characterized Clough as a "key witness" at Mr. Verrill's trial. Order, p. 2. The Court denied the Motion despite the volume of undisclosed discovery, finding "the less extreme sanction of a new trial [could] sufficiently cure any potential prejudice Verrill suffered" from the non-disclosure. This of course presumes that the new trial is a fair one at which the defense is on equal footing with the State and afforded a full and fair opportunity to cross-examine witnesses, an opportunity the defense clearly cannot and will not have given Clough's presumed death.

**Request for Alternative Remedies in the event this Motion is denied**

28. In the event this Court denies either the request to dismiss the charges or preclude the State from admitting Clough's prior testimony, then the defense requests that it be permitted to admit through other witnesses the information with which it would have cross-examined Clough at trial had that information been in its possession at the time, regardless of whether the questioning otherwise complies with the Rules of Evidence. For example, the defense proposes that it be permitted to cross-examine Strong and/or Sloper regarding Clough's pre-polygraph interview, his statements during the interview about wanting to clear himself, and the decision not to administer a polygraph, and cross-examine Strong regarding his texts with Strong, among others.
29. The defense does not concede that this is a sufficient replacement for a full and fair cross-examination of Clough. However, simply allowing the State to read Clough's testimony into the record without informing the jury of any of the information discussed in this Objection will mislead the jury and allow the State to present not only an incomplete but also a false picture of Clough, one of its "key witness[es]."
30. Finally, should the State be permitted to admit Clough's testimony, the Court should require that the testimony may be admitted only by playing the recording of Clough actually testifying at the October 2019 trial. The jury will obviously be denied the ability and opportunity to observe Clough's demeanor, body language and facial expressions; they should not also be denied the ability to assess his tone of voice, any hesitation in answering questions, as well as any emphasis or inflection when doing so. Simply put, if this Court is admitting the testimony then the jury should at least get to hear Clough's words in his own voice.

31. In addition, permitting the State to read from a transcript will only serve to exaggerate in the jury's mind Clough's importance as a witness (since no other witness will be presented this way) while also risking them failing to listen as closely as they would to a recording.

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

- A. Deny the State's Motion because as the proponent of the evidence the State has failed to establish that Clough's testimony qualifies for admission under NHRE 804(b)(1); and/or
- B. Dismiss the charges as the potential prejudice caused by the State's discovery violations can no longer be cured; or
- C. Permit the use of the alternative remedies proposed by the defense; and
- D. Should the testimony be admitted, require that an audio recording of Clough's testimony be played for the jury; and
- E. Grant such further relief as is deemed just and proper.

Dated this 21st day of September, 2023.

Respectfully submitted,

/s/ Meredith Lugo

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Witness List has been sent via e-filing this 21st day of September, 2023 to Peter Hinckley, Esq. and Brian Greklek-McKeon of the NH Attorney General's Office.

/s/ Meredith Lugo

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Meredith Lugo