

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Strafford, ss.

March Term, 2023

STATE OF NEW HAMPSHIRE

v.

Timothy Verrill

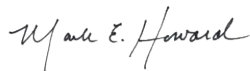
#219-2017-CR-072

MOTION FOR REMEDIES

NOW COMES the accused, Timothy Verrill, by and through counsel, Meredith Lugo and Julia Nye, Public Defenders, and respectfully requests that this Honorable Court order the following remedies and sanctions against the State for the discovery of violations under the New Hampshire Rules of Criminal Procedure, this Court's discovery orders, the Fifth and Fourteenth Amendments to the U.S. Constitution and Part I, Articles 15 and 16 of the N. H. Constitution:

- a. Reimbursement for the defense's expense for additional investigation and subpoenas in Florida.
- b. Prohibit the State from using inculpatory information contained within discovery withheld in its case in chief.
- c. Apply the same rulings and agreements on motions in limine and hearsay evidence from prior trial.
- d. Provide a jury instruction allowing the jury to draw an adverse inference against the State for its failure to provide significant discovery to the defense in a timely matter.
- e. Provide a jury instruction allowing the jury to draw an adverse inference against the State for its decision to hand the drug investigation to the federal authorities,

[See narrative order on motion dated July 26, 2023.](#)



Honorable Mark E. Howard  
July 26, 2023

Clerk's Notice of Decision  
Document Sent to Parties  
on 07/26/2023

thereby preventing the defense access to the government's investigation of material witnesses in this case.

- f. Order that the State is prohibited from using transcripts of trial testimony to impeach, to refresh recollection of witness or to use in lieu of an unavailable witness.
- g. Order that the State must try the same theory for its case.

In support of this Motion, the following is stated.

### **Introduction**

The State agrees to the remedies outlined in a, b and c. The remedies and sanctions for the Court to consider are d, e, f and g. The issue is not whether the State violated the discovery rules. Nor should the issue be the extent of the violations. The State conceded, even during the hearing on the defendant's first motion to dismiss that the violations were egregious and unprecedented. Judge Houran, the sitting trial judge, agreed and made a finding that the discovery violations were "egregious". Two disclosures after that finding only increases the depths of the violations. As stated by the author to the opinion affirming the denial of the motion to dismiss during the oral arguments on the appeal of the denial of the second motion to dismiss before the New Hampshire Supreme Court, the violations were "reprehensible". The sanctions and remedies should be fashioned to address violations described "egregious" and "reprehensible" in mind. The defendant's proposed remedies and sanctions fit the criteria.

### **Procedural Background and Request for Findings of Fact**

1. On October 25, 2019, at the close of the hearing on the defendant's first motion to dismiss, the parties argued about the appropriate remedies. The defense argued as alternatives to

a dismissal, among other things, that each of the investigator sign affidavits that he or she turned over all material relating to the homicide case against Timothy Verrill.

2. The prosecutor for the State argued that such affidavits were unnecessary because he was confident that all discovery had been turned over; nonetheless, the State agreed to this remedy. Members of the investigation team from the Major Crime Unit were present during the arguments. They did not correct the prosecutor's bold assertions. Nor did they inform the prosecutors that MCU had already planned to do an audit of the investigation.<sup>1</sup>

3. On Monday, October 28, 2019, Judge Houran informed the parties that he would be issuing an order denying the defendant's motion to dismiss and imposing alternative remedies and sanctions.

4. The defense chose not to ask for a mistrial and decided to proceed with trial with the late discovery that had been disclosed on October 23 and 24, 2019, including the following:

- Monique Cote's emails with Detective McAuley which were discovered after Ms. Cote's father contacted the defense counsel earlier in the trial. That disclosure led to the late disclosure of everything else the State disclosed after October 23, 2019. Thereafter, a recording of Ms. Cote was provided.
- Recording of an interview with Jessica Rodriguez which contained exculpatory information.
- Recording of interview with Chris Cortez, which contained information which the defense could have used in its cross-examination of the State's key witness, Joshua Colwell.
- Recorded interview of Erin Feeley, which showed that the investigation was so disorganized that the lead detectives did not know the other interviewed Ms. Feeley.

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<sup>1</sup> According to Lt. Sonia, he sent emails to all the participants in the investigation upon learning about discovery not being turned over. Tr. Vol. I, p.32.

- A report that another person of interest, Michael Ditroia, submitted to a polygraph about the deaths of the two women whom Mr. Verrill is accused of killing.

5. The other remedies ordered by Judge Houran after the finding of the egregious violation by the State and after noting there had been repeated litigation pretrial regarding the State's lack of timeliness with handing over discovery included:

- The introduction of the recording of Jessica Rodriguez should she be unavailable.
- Prohibition against State from eliciting inculpatory information from Ms. Feeley's second disclosed interview.
- Prohibition of using inculpatory information from Alan Johnson.
- Prohibition against the State from using inculpatory information from the polygraph of Michael Ditroia.
- An adverse jury instruction on State's failure to meet discovery obligations.
- Allowing the defense to re-open and to recall Stephen Clough and Joshua Coldwell.

6. Subsequently, while the defense team was working on revising their case in line with the Court's order on the remedies, on October 30, 2019, the prosecutors informed the defense team of even more discovery to be turned over, including:

- A recording of the pre-polygraph interview of Stephen Clough, which was conducted the same week as Mr. Ditroia's by the same detective.
- A Cell phone extraction of Tanner Crowley's phone
- Surveillance footage from Holy Rosary Credit Union, which displayed a sequence different from the one testified to by Joshua Colwell;
- A recorded call between Jeff Sullivan and Dean Smoronk.

7. During the evening of October 30, 2019, the defense team reviewed the new evidence to the extent they could and mulled about the next course of action. On the morning of October 31, 2019, before the defense team had made any final decision on the course of action because of the materials turned over the day before, the State informed the defense team, that yet again, there were additional materials to be turned over and that these materials were “significant.” That afternoon, at the request of the defense after consultation with the State, the Court granted the defense’s request for a mistrial. Although the Court entertained a two-week continuance the defense was concerned about the volume of materials the State represented were yet to be turned over and that the two weeks would put the time frame beyond the window promised to the jury to be a realistic end date. The additional materials turned over after October 31, 2019, included:

- Search Warrant affidavit, warrant and return in connection with search of 979 Meaderboro RD in July 2017.
- Arrest paperwork for James Morin.
- Arrest paperwork and other outstanding warrants for Dean Smoronk in December 2018/early 2019.
- Written notes by Det. Strong.
- Recording of 46-minute call between Det. Strong and Ms. Guevara.
- Recording of call with Dana and Suzi Caldwell;
- Bobby O’Neill jail calls.
- Duplicates of many items of discovery already provided.

8. During the hearing on the motion to dismiss before this Court, the State agreed that

it made egregious discovery violations and caused prejudice to the defense.<sup>2</sup>

9. This Court denied the motion to dismiss. The defendant filed a motion for findings of fact, which the Court denied.

10. The Supreme Court affirmed the trial court's decision denying the motion to dismiss; however, the Court vacated the decision on the motion for additional findings.

11. With respect to additional findings, the defense requests that this Court find the following:

a. That Det. Sloper, an experienced officer who had worked as a lead investigator, made egregious discovery violations by not turning over all the notes and recordings associated with his polygraphs and interviews of Steven Clough and Mike Ditroia after they were completed.

b. That the State denied that there were any institutional patterns of misconduct with respect to the MCU's system of keeping track of discovery materials that had been in existence for decades.

c. That the delayed discovery disclosure included the names of several potential witnesses whom the defendant would have interviewed prior to trial.

d. That the failure to disclose potential witnesses, such as James Morin, Monique Cote, Christopher Cortez, and Mouse (who by the time of trial was deceased), prevented the defendant from having information which would have assisted in his trial strategy before the first trial.

e. That while Judge Houran found that the fault for the initially discovered violation laid primarily with the lead investigator; the magnitude of the entirety of the violations was caused by more than the incompetence of one officer.

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<sup>2</sup> "What happened here is worthy of harsh criticism, it's worthy of severe sanction by this Court... ." Tr. Vol III, p. 390.

f. That, according to the lead investigator, the Attorney General's Office decided early in the investigation of the homicides to hand over the drug investigation to the DEA and as a result both the MCU and the Attorney General's Office were unable to obtain reports from the DEA's investigation. Tr. Vol. II, p. 311

g. That the lead investigator had no experience with working with the DEA and the division of investigations, and the division, in part, caused confusion as to whether to provide information, such as interviews with Tanner Crowley and Dominic Mango, both of whom had contact with Dean Smoronk on the date of the homicides, to the defense.

### **Legal Argument**

12. The issue before the Court is what additional sanctions/remedies the Court should impose after the Court previously ordered remedies for "egregious" discovery violations. The original violations were inexcusable, the second and third batch only heighten the extent of the State's nonfeasance.

13. Ordinarily, a continuance is the standard remedy for late disclosure if the defense counsel cannot incorporate the new materials during the first trial. State v Cotell, 143 N.H. 275, 280 (1998)

14. In some jurisdictions, where a late disclosure is a result of bad faith, the remedy would include preclusion or in extreme circumstances, a dismissal. State v Brooks, 149 Wash. App. 373, 406 (2009).

15. The decision on the appropriate remedy is one of fairness to the defense, deterrence to the prosecutor, and the integrity of the court. U.S. v. Wicker, 848 U.S. F.2d 1059, 1061 (1988).

16. Imposing the appropriate remedies is not just about making sure that such unprecedented

discovery violations never occur again; it is also about making sure that the State does not benefit from its own nonfeasance. “A defendant normally has the right to complete a trial before a “particular tribunal”: either the same chosen jury, in a jury trial; or the same judge, in a bench trial. State v Solomon, 157 N.H. 47, 50 (2008). “Such a right exists because the 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.” Id. (Internal citation and quotations omitted).

17. The blame for the necessity for a second trial falls squarely on the State. The prosecutor noted that if the defense had not requested a mistrial, then a mistrial by “manifest necessity” would have been the appropriate alternative. The defense could have asked for a mistrial after the first disclosure on October 23, 2019. They chose not to because it had been over two years since Mr. Verrill’s arrest and because the State’s case was substantially completed. They also chose to go forward because the trial, from the defense perspective, was going well for Mr. Verrill. The defense went forward with the representation from the lead prosecutor of his full confidence that all discovery had been turned over. When the defense finally did ask for a mistrial, they did so only after the State had broken that representation not once, but twice. Not in a small amount, but in significant amounts. Even if the “ultimate” negligence was committed by the lead investigator, the prosecutors never brought any kind of oversight to the discovery despite the defense pleas for such oversight pre-trial. Ultimately, it was not the prosecutors who oversaw the discovery rule compliance, but rather, it was the head of the MCU who initiated the review.

18. The remedies and sanctions proposed by the defense assures that the defense is not in a

worse position because of the State's lack of due diligence with the investigation in the case *and* the State does not benefit from the mistrial with the existence of transcripts from a previous trial that they caused to end.

19. The remedies proposed by the defense also address the appearance of disregard for the Court's integrity and need to maintain a schedule.

### **Proposed Remedies/Sanctions**

20. Adverse Inference Jury Instruction for Discovery Violation. Judge Houran's order already provides this remedy, but the wording of such instruction is at issue. The defendant's proposal is as follows:

*In violation of its obligations under the State and Federal Constitution, the prosecutors and the Major Crimes Unit failed to disclose a significant amount of information and only provided such information towards the end of the first trial. Some of the information was favorable to the defense. Although this failure to disclose does not necessarily bear on the guilt or innocence of the defendant, you may, if you think it appropriate in light of all the evidence, take into account the possible harm to the defense caused by this delay when evaluating whether the government has proven the defendant's guilt beyond a reasonable doubt.*

The State's anticipated objection to the proposed instruction is the characterization of the discovery of "favorable". It was. The Public Defender Program is known for its thoroughness with investigation when a case warrants it. This case warranted such thoroughness. Had the defense had names like Monique Cote, Jessica Rodriguez, Christopher Cortez and Mouse, there is no doubt that the potential witnesses would have been interviewed and the information provided by the witnesses would have assisted in developing the trial strategy.

21. Adverse Inference Jury Instruction for State's decision to hand over drug investigation to the

Federal Authority. One cannot help but wonder if the fiasco of losing track of the investigations happened in part because of the State's decision to separate the homicide from the drug investigation. The supervisor of the lead investigator noted from the beginning that the case was "complex". Tr. Vol I, p. 31. Neither the lead investigator nor the prosecutor appeared to understand that they would not have available to them the reports from the DEA. <sup>3</sup>

22. Prohibition against the State from using the trial transcripts. If the State is allowed to use the transcripts to refresh the memory, to impeach a witness, or to use the transcript in lieu of an unavailable witness, then the State will have benefitted in its own misconduct. The State will have a benefit just by using the transcripts to prepare the exact same case. The defense, on the other hand, will have to find out if their witnesses are even available, as some did not testify.

23. The State must commit to the same theory of the case. In other words, if the State suffers from the absence of a witness, they should not be able to change the theory of the case to adapt to the various changes in witnesses' availability or testimony. Similar to the last remedy, the State should not be able to change the case because of changes caused by delays of their own making.

WHEREFORE, Mr. Verrill, through counsel, respectfully requests that this Honorable Court adopt the proposed findings and order the requested remedies and sanctions.

Dated this 8<sup>th</sup> day of March, 2023.

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<sup>3</sup> According to Lt. Strong, the Attorney General's Office was trying to work with the legal department to get the

Respectfully submitted,

/s/ Julia M. Nye

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 8th day of March, 2023 to Peter Hinckley, Esq., of the NH Attorney General's Office.

/s/ Julia M. Nye

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Julia M. Nye