

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

217-2020-CV-00026

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**THIS DOCUMENT PERTAINS ONLY  
TO PLAINTIFF MEEHAN'S INDIVIDUAL CASE**

**THIS DOCUMENT DOES NOT PERTAIN TO CONTRACTOR DEFENDANTS**

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**DHHS'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY  
OF CRIMINAL DEFENDANTS**

Plaintiff David Meehan's witness list contains numerous criminal defendants, including those against whom Mr. Meehan alleges abuse and those against whom Mr. Meehan does not allege abuse.<sup>1</sup> DHHS expects that all the criminal defendants will assert their privilege against self-incrimination pursuant to the Fifth Amendment in response to questions by Mr. Meehan's counsel, who have advised that they will ask the witnesses questions about the case and Mr. Meehan's claims. The Court should exclude these witnesses from appearing before a jury when the jury will not receive any testimony or evidence from them.

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<sup>1</sup> Mr. Meehan's witness list includes Bradley Asbury, Michael LaChance, Lucien Poulette, Jeffrey Buskey, Frank Davis, Steven Murphy, Gordon Thomas Searles, and James Woodlock.

## Argument

### **I. Testimony from criminal defendants against whom Mr. Meehan alleges no abuse is irrelevant.**

Mr. Meehan's witness list includes criminal defendants and potential criminal defendants Michael LaChance and Lucien Poulette. Mr. Meehan does not allege that these individuals abused him, that he reported any abuse to these individuals, that these individuals have any knowledge of his alleged abuse, or that some third party reported his abuse to these individuals. *See David Meehan First Amended Short Form Complaint Supplement to Master Complaint*, dated September 7, 2022 ("FASFC"), at ¶¶ 23-71. Any testimony from (or appearance of) these criminal defendants is, therefore, irrelevant and inadmissible.

### **II. The criminal defendants' invocations of the Fifth Amendment would be inadmissible pursuant to Rule 403.**

First, in the case of non-party witnesses who invoke the protections of the Fifth Amendment, the risk is that "[t]he jury may attach undue weight to the [witness's] assertion of the privilege: The revelation that [the invoker] has claimed the privilege marks him as a criminal who has probably eluded justice. The jury is not likely to realize that the innocent may invoke." *Farace v. Independent Fire Ins. Co.*, 699 F.2d 204, 211 (5th Cir. 1983) (internal quotations omitted).

Second, questions designed to result in invocation of the privilege (and ensuing inferences of criminality) will invite the jury to give undue weight to questions rather than answers. Once Mr. Meehan's counsel determines that every question posed will result in a witness invoking the privilege, he will be free to pose most any question he pleases, free from contradiction by the witness.

Third, DHHS will effectively lose the ability to cross-examine any of the witnesses, because the witnesses will be unable either to explain why they chose to invoke the privilege or to contradict Mr. Meehan's intended inferences. The "purpose of cross-examination is to review testimony given on direct examination in order to determine the veracity, accuracy and depth of knowledge of the witness." *Petition of Grimm*, 138 N.H. 42, 47 (1993). DHHS's inability to cross-examine the criminal defendants not only limits its ability to defend itself, but also limits the jury's ability to determine what alleged facts are true.

Fourth, Mr. Meehan cannot use or rely on the criminal defendants' invocation of the privilege as a substitute for substantive evidence corroborating his claims. He has already testified at his deposition that there is no other independent evidence that corroborates his claims. He testified that no other person, aside from himself and his alleged abusers, observed or had firsthand knowledge of his alleged abuse. (*See, e.g.*, Meehan Depo. Tr. 61:18-62:10; 107:16-22; 189:16-18.) And he does not allege that any other individuals on his witness list have firsthand knowledge of his alleged abuse, and DHHS is not aware of any such witnesses. Therefore, it is unlikely that Mr. Meehan will be able to put on any independent evidence to corroborate his alleged abuse. Absent such evidence, or until *after* he presents any such evidence, Mr. Meehan cannot use or rely on inferences from non-party witnesses' invocation of the Fifth Amendment to try to prove his case:

A plaintiff seeking to rely on a Fifth Amendment inference must *first offer* evidence which at least tends to prove each part of the plaintiff's case. Once that has been done, the Court can then add to the weight of the other evidence by use of the inference. However, the invocation of the Fifth Amendment privilege, standing alone, is not sufficient evidence to constitute probative proof of a plaintiff's case.

*In re Curtis*, 177 B.R. 717, 720 (Bankr. S.D. Ala. Feb. 7, 1995) (emphasis added); *see also LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390 (7th Cir. 1995) ("Silence is a relevant

factor to be considered in light of the proffered evidence, but the direct inference of guilt from silence is forbidden.”); *Kontos v. Kontos*, 968 F. Supp. 400, 408 (S.D. Ind. May 16, 1997) (“*Before* an adverse inference may be drawn from a party’s refusal to testify in a civil case, there must be independent corroborative evidence to support the negative inference beyond the invocation of the privilege.”) (emphasis added).

The risk is that putting forth eight criminal defendants who invoke the Fifth Amendment privilege creates the false impression that there are eight witnesses who corroborate what Mr. Meehan alleges. That may not, however, accurately reflect what each criminal defendant would testify to if they were to answer questions fully and without invoking the privilege, but the jury will not have the benefit of finding that out. Thus, without first presenting any independent evidence corroborating his claims, Mr. Meehan cannot try to prove his case on mere negative (and potentially false) inferences from non-party witnesses’ invocation of the Fifth Amendment.

Lastly, unrestricted questioning of the criminal defendants by Mr. Meehan’s counsel risks jury confusion. *See Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300, 1310 (11th Cir. 2014) (“Because the witness cannot be made to explain why the privilege has been invoked, the reliability of the adverse inference drawn from his silence is limited.”); *MicroTechnologies, LLC v. Autonomy, Inc.*, No. 15-cv-02220-JCS, 2018 WL 5013567, at \*3 (N.D. Cal. Oct. 16, 2018) (holding that the “lack of clarity of exactly what inference might appropriately be drawn from [a] witness’s blanket assertions of the Fifth Amendment . . . [creates] unfair prejudice and jury confusion . . .”).

This risk is even greater if Mr. Meehan’s counsel were to ask questions of the criminal defendants that imply the existence of facts to which a criminal defendant may not have knowledge. For example, Jeffrey Buskey was a low level YDC employee who had either limited

or no knowledge of what occurred at a YDC leadership level. Yet questions posed by Mr. Meehan's counsel may imply that he did, and DHHS will be unable to refute this. Allowing such testimony incentivizes outsized reliance on the criminal defendants by Mr. Meehan's counsel, who will try to use their questions of the criminal defendants as a substitute for any actual substantive evidence supporting Mr. Meehan's claims.

### **III. The *LiButti* line of cases does not support admission of the criminal defendants' invocation of the privilege.**

*LiButti v. United States* is often referenced by courts considering the admissibility of witness testimony, and inferences drawn therefrom, in civil cases when the non-party witness invokes the Fifth Amendment privilege.<sup>2</sup> 107 F.3d 110 (2d Cir. 1997). "The overarching concern is fundamentally whether the adverse inference is trustworthy under all the circumstances and will advance the search for the truth." *Id.* at 123-124. "Although the issue of the admissibility of a non-party's invocation of the Fifth Amendment privilege against self-incrimination in the course of civil litigation and the concomitant drawing of adverse inferences appropriately center on the circumstances of the case," the *Libutti* decision identifies four "non-exclusive factors which should guide the trial court in making these determinations." *Id.* None of those factors support admission of the criminal defendants' invocation of the privilege in this case.

*The Nature of the Relevant Relationship:* With respect to this factor, the Second Circuit instructed, "While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be." *Id.*

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<sup>2</sup> Notably, *Libutti* was a non-jury trial. Here, a group of lay jurors with no familiarity with the privilege will be asked to consider what inference should be drawn against the Defendant because former, renegade employees invoked it. This Court has already excluded from trial the fact that indictments have been brought. Calling witnesses who will only invoke their Fifth Amendment privilege does an end-run around this ruling.

at 123. The Second Circuit further explained, “any factors suggesting that a former employee retains some loyalty to his former employer—such as the fact that the employer is paying for his attorney, would serve the necessary purpose of reducing the chance that the employee will falsely claim to have engaged in criminal conduct for which the defendant employer is liable.” *Id.* at 122 (internal quotation marks and citations omitted); *see also id.* at 123 (“The closer the bond, whether by reason of blood, friendship, or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.”). Here, there is no close bond between the criminal defendants and DHHS, or loyalty from them to DHHS.

The criminal defendants are former employees of DHHS who are being criminally prosecuted for their rogue actions outside the scope of their employment. *United States ex rel. Debra Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 61 n.25 (D. D.C. 2007) (holding witness’s relationship to defendant, particularly at the time he pled the Fifth when he was not defendant’s employee and defendant exercised no control over him, “does not render the inference trustworthy when used against” the defendant); *In re Urethane Antitrust Litig.*, MDL No. 1616, 2013 WL 100250, at \*2 (D. Kan. Jan. 8, 2013) (declining to apply inference partly because “at the time they invoked the Fifth Amendment, these witnesses had no relationship to [defendant], against whom this evidence is offered” and because plaintiffs conceded “[defendant] did not exercise control over the witnesses at the time they invoked” the Fifth). And because DHHS and the criminal defendants are accused of different types of wrongdoing, it is in the criminal defendants’ interests to try to shift blame from themselves to DHHS, which renders their interests adverse to DHHS.

*The Degree of Control of the Party Over the Non-Party Witness:* The Second Circuit gave as an example with respect to this factor “whether the assertion of the privilege should be

viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2), and may accordingly be viewed . . . as a vicarious admission.” *LiButti*, 107 F.3d at 123. That is not the case here: the criminal defendants’ alleged acts were all outside the scope of employment. Thus, they cannot be said to be speaking for DHHS or to be an alter ego of DHHS with respect to the alleged physical and sexual abuse, and DHHS did not exercise control over the unauthorized alleged abuse, which served no purpose of DHHS.<sup>3</sup> Indeed, Mr. Meehan has not alleged that DHHS is vicariously liable for the criminal defendants’ alleged abuse of him. In addition, to the extent the pertinent time of control is the time the privilege is invoked, DHHS has no control now over the former employees. *Miller v. Pilgrim’s Pride Corp.*, No. 5:05CV00064, 2008 WL 178473, at \*8–9, (W.D. Va. Jan. 16, 2008) (finding second *LiButti* factor weighed against application of the inference because witness no longer employed by defendant-employer at the time of her trial testimony).

*The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation:* With respect to this factor, the Second Circuit instructed that a trial court should consider “whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.” *LiButti*, 107 F.3d at 123. Again, under the circumstances of this case, the interests of the criminal defendants and DHHS are not compatible: rather, it is in the criminal defendants’ interests to try to shift blame from themselves

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<sup>3</sup> “Conduct falls within the scope of employment if: (1) it is the kind that [the employee] is employed to perform; (2) it occurs substantially within the authorized time and space limits; and (3) it is actuated, at least in part, by a purpose to serve the employer.” *Porter v. City of Manchester*, 151 N.H. 30, 40 (2004). DHHS did not employ the criminal defendants for the purpose of physically and sexually abusing YDC residents, nor could such acts be actuated by a purpose to serve DHHS. *See Order, Redacted v. Spaulding Youth Center*, No. 216-2015-CV-520, at 15 (N.H. Super. Ct. Mar. 31, 2016) (holding foster parents “could not have been acting in the scope of their employment by abusing” the plaintiff); *see also Rand v. Town of Exeter*, 976 F. Supp. 2d 65, 76 (D. N.H. Oct. 2, 2013) (“[N]o reasonable jury could conclude that [employee], a laborer, was employed by the Town to assault and batter others, or that [the employee] was motivated, even in part, to serve the Town when he allegedly engaged in this activity.”).

to DHHS. Moreover, the criminal defendants can invoke the privilege in this civil litigation to harm DHHS, knowing that the privilege cannot be used against them in their respective criminal cases. *See Emerson v. Wembley USA Inc.*, 433 F. Supp. 2d 1200, 1213 (D. Colo. June 1, 2006) (denying admission of an adverse inference when the nonparty witness was a former employee who did not have a cognizable interest in the outcome of the case); *Abington Emerson Capital, LLC v. Adkins*, No. 2:17-cv-143, 2021 WL 611998, at \*22 (E.D. Ohio Jan. 22, 2021) (excluding nonparty witness testimony and finding the interests of a nonparty witness and a litigant were “more adverse than cohesive” where assertion of the Fifth Amendment privilege prevented the litigant “from learning key facts supporting its theory that [the non-party witness] was a rogue employee . . .”).

*The Role of the Non-Party Witness in the Litigation:* With respect to this factor, the Second Circuit noted, “Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.” *LiButti*, 107 F.3d at 123-24. Here, again, the criminal defendants who were clearly acting outside the scope of their employment cannot be said to have been acting in a controlling role for DHHS. Further, Plaintiff seeks to hold DHHS liable on a theory of negligent hiring, retention, training, or supervision. Thus, the criminal defendants were not decision makers or in control with respect to the actions that form the bases for Plaintiff’s claims against DHHS.

In sum, the overarching concern with the criminal defendants’ testimony is (1) trustworthiness under all the circumstances; and (2) whether the testimony “will advance the search for the truth.” *Id.* at 123. The inferences Mr. Meehan’s counsel seeks are massive in scope: he seeks inferences in Mr. Meehan’s favor on all questions the criminal defendants refuse

to answer. Granting inferences from the criminal defendants' refusal to respond to questions is unfair and prejudicial on many levels for the reasons stated herein.

#### **IV. Inferences From the Criminal Defendants' Testimony Will be Effectively Unreviewable on Appeal.**

While DHHS may be able to object to questions posed by Mr. Meehan's counsel at trial, any claim of error by DHHS on the admission of inferences may be unreviewable on appeal. *See RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3rd Cir. 1986) (noting that because "[the witnesses] asserted the Fifth Amendment in response to questions concerning their employment status with [the litigant] . . . [the court] lack[s] record evidence to determine whether their depositions might come under the penumbra of Rule 801(d)(2)(D)."). This would be particularly important should Meehan's counsel pose questions concerning actions outside the scope of employment including both alleged abuse, as referenced above, and timing of employment. *See Robertson v. Nat'l R.R. Passenger Corp.*, No. CIV.A. 98-1397, 1999 WL 280407, at \*1 (E.D. La. May 3, 1999) ("A statement issued by a former employee after the employment ceases, is inadmissible under Rule 801(d)(2)(D)."). The same risk attaches to DHHS's likely objections to questions seeking hearsay, among other things. In all, allowing questioning by Mr. Meehan's counsel knowing that the criminal defendants will not answer those questions allows him to develop an unduly prejudicial record that an appellate court will have challenges in reviewing. This undercuts DHHS's ability to present a wholesome defense.

#### **Conclusion**

DHHS respectfully requests that this Court either (1) exclude the testimony of the criminal defendants included on Mr. Meehan's witness list; or (2) order Mr. Meehan to produce a list of proposed questions so that the Court may conduct a voir dire examination of the criminal defendants.

Respectfully Submitted,

New Hampshire Department of Health and Human Services; Department of Youth Development Services; Division of Children, Youth, and Families; Division of Juvenile Justice Services; and Sununu Youth Services Center, a/k/a Youth Development Center and Youth Development Services Unit, f/k/a State Industrial School and Adolescent Detention Center

By their attorneys,

JOHN M. FORMELLA  
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Date: April 10, 2024

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record on the date above.

/s/ Brandon F. Chase

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