

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

GENO JOSEPH MARCONI

Case No. 218-2024-CR-01426

*****REDACTED UNDER N.H. R. CRIM. P. 50(c)(2)(A) AND 50(c)(4)(A)*****

STATE'S MOTION REGARDING INTRINSIC EVIDENCE; 404(b)

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and moves to be able to introduce certain evidence at trial as intrinsic evidence of the crimes charged, or, alternatively, as admissible under N.H. R. Evid. 404(b). In support thereof, the State represents as follows:

1. Defendant is charged with two felonies and four misdemeanors. Charge ID 2257801C charges that Defendant “purposefully committed any unlawful act in retaliation for anything done by another in his capacity as witness or informant.” Charge ID 2257802C charges that Defendant Marconi “believe[ed that] an official proceeding or investigation was pending or about to be instituted” and falsified physical evidence “with a purpose to impair its verity or availability in such proceeding or investigation.” Charge IDs 2257803C and 2257805C charge that Defendant “engaged in any unlawful conduct with a purpose to hinder or interfere with a public servant performing or purporting to perform an official function and/or to retaliate for the performance of such a function.” Charge IDs 2257804C and 2257806C are related to Charge IDs 2257801C and 2257805C.

2. Among the means by which the State would be able to prove the status of a person “as witness or informant,” Defendant’s belief that “an official proceeding or investigation was pending or about to be instituted,” and Defendant’s intent “to hinder or interfere with a public servant” are by the existence of and activities in furtherance of the investigation by [REDACTED] [REDACTED] the New Hampshire Department of Justice (“NHDOJ”) into the activities of the Pease Development Authority (“PDA”) and Defendant (“the investigations”).

EVIDENCE AT ISSUE

3. Among the evidence that the State has to prove Defendant’s mental states for the crimes charged are matters inexorably intertwined with the investigations, including:

(1) [REDACTED]

(2) the existence of the State’s subpoena to New Hampshire Fish and Game in connection with the investigations and/or actions of Cheri Patterson (“Patterson”), then of New Hampshire Fish and Game, in response to the subpoena, including but not limiting to calling Defendant immediately after speaking with investigators from NHDOJ regarding the subpoena;

(3) the commercial activities of Greg Bauer (“Bauer”) at Rye Harbor, Bauer’s interactions with investigators from NHDOJ as part of the investigations, and Bauer’s interactions and communications with Defendant regarding the investigations;

(4) the existence and nature of a complaint by PDA Board Member Neil Levesque (“Levesque”) against then-Rye Harbormaster Leo Axtin (“Axtin”), the investigation and conclusion of that complaint, Levesque’s complaints regarding the accuracy of notes of a PDA Ports and Harbors Subcommittee meeting, and the Defendant’s actions in the investigation and in response to these complaint, including Defendant’s text

messages (and messages from recipients as necessary for coherence and context of Defendant's statements) to include (1) text messages regarding Defendant's belief that Levesque was behind the investigations and Defendant's text messages, and (2) emails procuring Levesque's confidential motor-vehicle records from Rye Harbormaster Mandy Huff ("Huff") and providing said records to Brad Cook ("Cook").

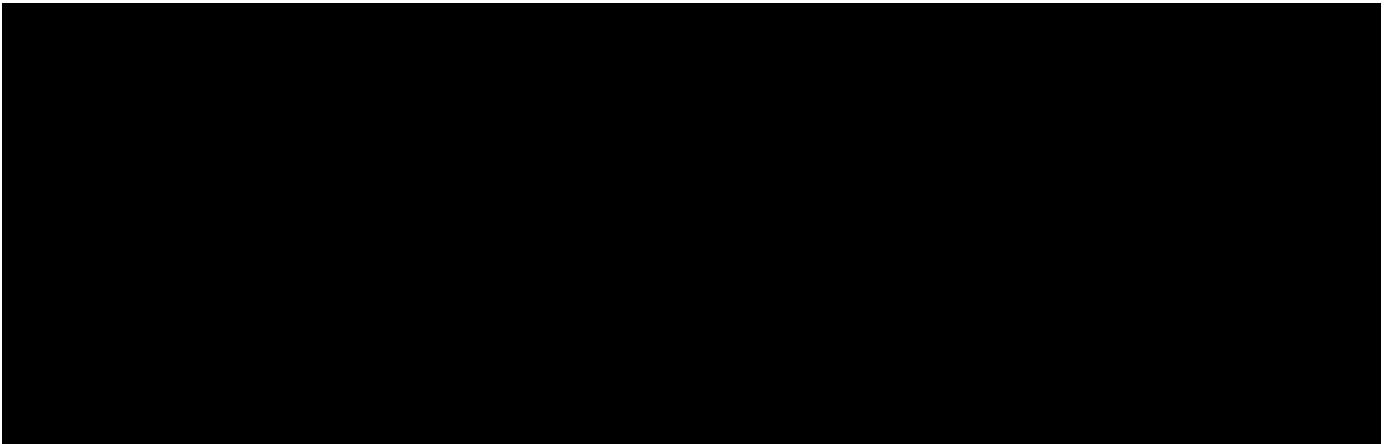
EVIDENCE AT ISSUE IS INTRINSIC EVIDENCE OF DEFENDANT'S CRIMES

4. Evidence deemed "intrinsic" is not subject to a N.H. R. Evid. 404(b) analysis and is admissible so long as it meets the balancing test under Rule 403. *See, e.g., State v. Wells*, 166 N.H. 73, 79 (2014); N.H. R. Evid. 403. "Other act evidence is intrinsic, and therefore not subject to Rule 404(b), when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries of the crime charged." *Wells*, 166 N.H. at 77 (internal quotations omitted). "Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense." *Id.* at 77-78 (internal quotation omitted). "This type of evidence is admissible under the rationale that events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of the charged act so that it may realistically evaluate the evidence." *Id.* at 78 (internal quotation omitted).

5. Even when evidence is intrinsically related to the charged offenses, it is still subject to the balancing test set forth in N.H. R. Evid. 403. *Id.* at 79. Under Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly

presenting cumulative evidence.” N.H. R. Evid. 403. As set forth below, this evidence is highly relevant to and probative of the elements of the charged offenses, including but not limited to proving the requisite *mens rea* of the respective charges against Defendant. Considering the significant overlap between Defendant’s charged conduct and the proffered evidence, there is little unfair prejudice in admitting the evidence, and any prejudice is far outweighed by the probative value of the proffered evidence.

6. Further, counsel for Defendant has stated publicly, in advancing a theory of defense for Defendant, “The indictments contain no allegations of financial impropriety or port mismanagement.” Porter, S. “A sitting New Hampshire Supreme Court justice and her husband were indicted. What now?” Boston Globe (Oct. 18, 2024).¹ These public statements by counsel for Defendant are in conflict with the proffered evidence, and the State is entitled to rebut such a theory of defense with the proffered evidence.



PATTERSON EVIDENCE IS INTRINSIC

8. The State intends to introduce at trial evidence that as part of the investigations, investigators with NHDOJ contacted Patterson regarding CARES Act funds in order to investigate

¹ Available at <https://www.bostonglobe.com/2024/10/18/metro/nh-supreme-court-justice-hantz-marconi-indictment/>

whether there were any improprieties involving said funds by Defendant and/or PDA. A subpoena *duces tecum* was delivered by NHDOJ investigators to New Hampshire Fish and Game addressed to the attention of Patterson. (Defendant had already been placed on administrative leave by PDA weeks by this time.)

9. Shortly after the subpoena was delivered, Patterson contacted Defendant by telephone. Patterson then contacted investigators from NHDOJ regarding the records sought by the subpoena, and Patterson told investigators that they should not seek the subpoenaed records but should seek other records instead. Patterson was later interviewed by investigators with NHDOJ and admitted to communicating with Defendant after Defendant had been placed on administrative leave.

10. Other voicemails (aside from the Patterson and Bauer voicemails) left on Defendant's phone contemporaneously with the Patterson and Bauer voicemails, including some voicemails related to the investigation from potential witnesses, were on the phone and not deleted. This indicates that Defendant intended to delete these voicemails specifically, and that the contents of these voicemails was beyond mere passing reference to the investigation or offers of support after Defendant was placed on administrative leave and placed under criminal investigation.

11. Although this evidence involves uncharged potentially criminal conduct that was under investigation, it was conduct being investigated by the Rockingham County Grand Jury and NHDOJ as part of the investigations. By analogy, if a person is under investigation for a drug offense and successfully destroys evidence of drug activity so as to avoid being charged with a substantive drug offense, at a trial for destroying the evidence of drug activity, evidence that the person was being investigated for the drug offense is intrinsic evidence of Falsifying Physical Evidence and Obstructing Government Administration and not 404(b) evidence. That is, this

evidence is intrinsic to show that Defendant's deletion of a voicemail he received from Patterson was done while Defendant "believe[ed] that an official proceeding or investigation was pending or about to be instituted," "with a purpose to impair its verity or availability in such proceeding or investigation," and "with a purpose to hinder or interfere with a public servant performing or purporting to perform an official function and/or to retaliate for the performance of such a function," all as charged. Accordingly, this evidence is intrinsic evidence of Defendant's charged criminal conduct.

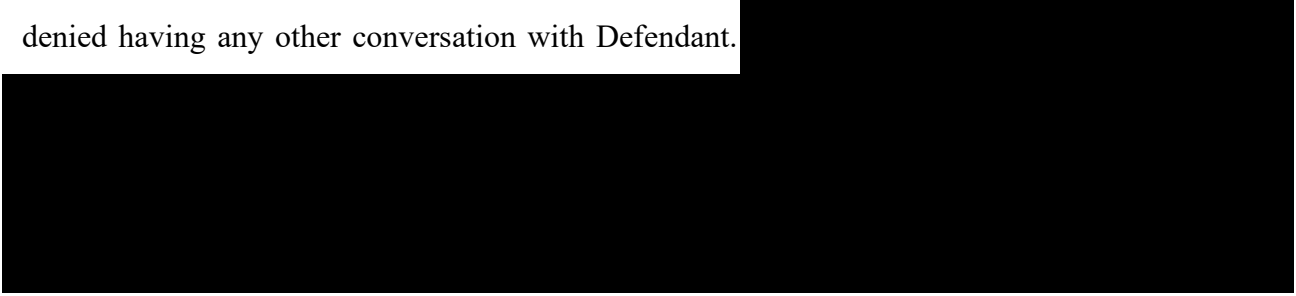
BAUER EVIDENCE IS INTRINSIC

12. The State intends to introduce at trial evidence that as part of the investigations, investigators with NHDOJ sought to interview Bauer regarding his commercial activities at Rye Harbor, specifically his storage of construction items in the parking area of Rye Harbor and any payments or agreements he may have made in order to secure this arrangement.

13. Bauer's older brother is also friends with Defendant, Bauer had performed various work at the harbor by "permission" of Defendant, and Bauer had previously gotten permission from Defendant for the storage of construction items in the past. Bauer has performed work at the harbor for approximately forty (40) years.

14. NHDOJ investigators attempted to contact Bauer at his home and delivered a grand jury subpoena to Bauer for his appearance and testimony before the Rockingham County Grand Jury. Defendant was already on administrative leave at this time. Immediately after receiving the subpoena, Bauer contacted Defendant and discussed the subpoena for Bauer's testimony and the investigation relative thereto. Approximately a week later, Bauer was interviewed by NHDOJ at Bauer's attorney's office pursuant to a proffer agreement. During this interview, despite Bauer being asked in the interview whom Bauer had spoken with about this matter, Bauer initially did

not disclose that he had spoken with Defendant regarding Bauer being contacted by NHDOJ investigators. After a break in the interview during which time Bauer spoke with his counsel, Bauer then admitted to having the above-mentioned telephone call with Defendant, but Bauer denied having any other conversation with Defendant.



15. Other voicemails (aside from the Patterson and Bauer voicemails) left on Defendant's phone contemporaneously with the Patterson and Bauer voicemails, including some voicemails related to the investigation from potential witnesses, were on the phone and not deleted. This indicates that Defendant intended to delete these voicemails specifically, and that the contents of these voicemails was beyond mere passing reference to the investigation or offers of support after Defendant was placed on administrative leave and placed under criminal investigation.

16. As with the Patterson evidence, although this evidence involves uncharged potentially criminal conduct that was under investigation, it was conduct being investigated by the Rockingham County Grand Jury and NHDOJ as part of the investigations. This evidence is intrinsic to show that Defendant's deletion of a voicemail he received from Bauer was done while Defendant "believe[ed] that an official proceeding or investigation was pending or about to be instituted," "with a purpose to impair its verity or availability in such proceeding or investigation," and "with a purpose to hinder or interfere with a public servant performing or purporting to perform an official function and/or to retaliate for the performance of such a function," all as charged. Accordingly, this evidence is intrinsic evidence of Defendant's charged criminal conduct.

LEVESQUE EVIDENCE IS INTRINSIC

17. The State intends to introduce evidence at trial that Levesque made a complaint regarding a conflict of interest regarding Axtin to the PDA. Axtin and Defendant are longtime friends and associates. During the PDA internal investigation of this complaint by an outside attorney, Defendant made accusations against Levesque, alleging that Levesque had a conflict of interest. The internal investigation concluded with no action.

18. In October of 2023, during a PDA Ports and Harbors Subcommittee meeting, Levesque confronted Defendant about several issues involving an employee conflict of interest and preferential treatment by Defendant and others at Rye Harbor. When Levesque reviewed the draft minutes of the Subcommittee meeting, he noticed that there was no record of his interaction with Defendant in the minutes. Levesque reraised these issues with Defendant, and raised the issue of the accuracy of the minutes, at the April 2, 2024, Subcommittee meeting.

19. After this April 2, 2024, confrontation between Levesque and Defendant, on April 3, 2024, Defendant had the following text exchange with Huff:

Defendant: "Has Neil gotten his pier use permit yet?"

Huff: "Yes"

"Would you like a copy?"

"Revoke?"

Defendant: "Yes, please. With a copy of the boat reg and fish and game license and his car reg."

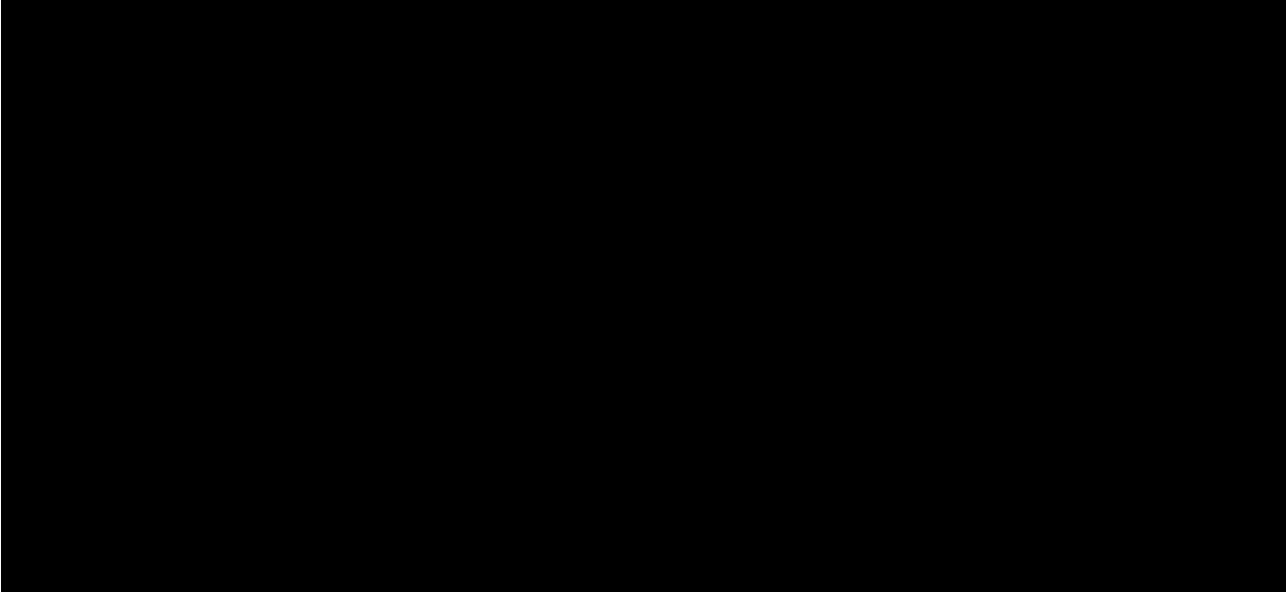
Huff: "Ok"

Defendant: "Covert op."

Huff then emailed Defendant, providing the requested confidential documents.

20. On April 5, 2024, Defendant emailed Brad Cook copies of the documents Defendant requested and received from Huff concerning Neil Levesque. The documents were attached to an email that read, “Captain Cook, As requested. We can discuss later”.

21. Defendant was just weeks later placed on administrative leave and informed by PDA that he was under criminal investigation by NHDOJ. On April 19, 2024, Defendant emailed an individual, “Got suspended pending completion of a criminal investigation. Got a new number since they cut the cord [phone number] Fucking Levesque and [another individual]”. On that same date, Defendant informed another individual by text message that he had been placed on leave because he was under investigation and stated. “It’s all Neil Leveque and [another individual]. . . Neil’s after Leo [Axtin] and I’m in the way.”



23. This evidence concerning Defendant’s ongoing interactions with Levesque and Defendant’s belief that Neil Levesque was the reason Defendant was under criminal investigation is intrinsic to show that Defendant purposefully committed an unlawful act “in retaliation for anything done by [Levesque] in his capacity as a witness or informant,” and that he knowingly disclosed confidential motor vehicle records pertaining to Levesque to Brad Cook and did so “with

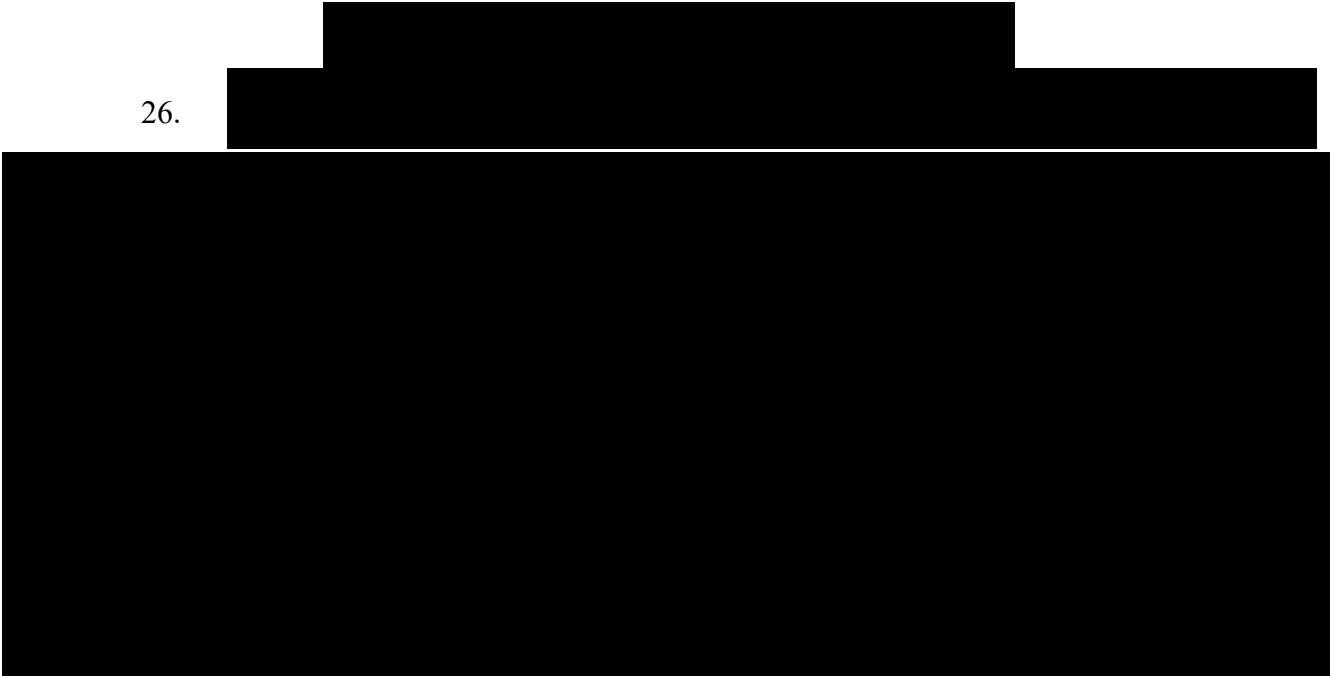
a purpose to hinder or interfere with a public servant performing or purporting to perform an official function and/or to retaliate for the performance of such a function.” Accordingly, such evidence is not subject to Rule 404(b).

EVIDENCE AT ISSUE IS ADMISSIBLE UNDER RULE 404(b)

24. To the extent the Court finds that the above-proffered evidence is not intrinsic to the charged conduct, such evidence is still admissible under N.H. R. Evid. 404(b).

25. Rule 404(b) permits evidence of “other crimes, wrongs, or acts” for purposes other than demonstrating propensity, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” N.H. R. Evid. 404(b). “Other acts” evidence is admissible so long as: (1) it is relevant for a purpose other than proving the person’s character or disposition; (2) there is clear proof; and (3) the probative value is not substantially outweighed by the danger of unfair prejudice. Id.

26.



PATTERSON AND BAUER EVIDENCE

27. The State's proffered evidence regarding Patterson and Bauer satisfies the requirements of Rule 404(b).

28. First, the evidence is relevant to showing Defendant's motive, opportunity, identity, intent, preparation, plan, knowledge, and absence of mistake or accident. This proffered evidence shows Defendant's preparation, plan, and knowledge in speaking with Patterson and Bauer regarding the investigations, including that Defendant knew of the investigations, as well as Patterson and Bauer's status as witnesses or potential witnesses in the investigations. The evidence also shows that Defendant was the one communicating with Patterson and Bauer regarding the investigations (and who deleted the voicemails). The existence of other contemporaneous voicemails on Defendant's phone that were not deleted, combined with the deletion of the Patterson and Bauer voicemails, shows that the deletion of the emails was not a mistake or accident, but rather a deliberate and purposeful attempt to conceal and destroy messages from individuals known by Defendant to be witnesses or potential witnesses in the investigations (and that their voicemails would be potential evidence in the investigations). Further, this evidence shows that Defendant's motive and intent was to communicate with Patterson and Bauer regarding the investigations and to delete the voicemails in order to prevent such voicemails from being discovered (and potentially used against him) during the investigations.

29. Second, there is clear proof of the proffered evidence. This evidence is based upon the examination of data recovered from Defendant's phone, the observations of investigators for NHDOJ who will testify at trial, and the previous statements of Patterson and Bauer (both of whom have been subpoenaed to testify at trial).

30. Third, the probative value of this evidence is not substantially outweighed by any prejudicial effect. Defendant's conduct in communicating with Patterson and Bauer and deleting voicemails from Patterson and Bauer had the effect to blunt any further investigation into the potential wrongdoing by Defendant and/or PDA as part of the investigations. As such, the only evidence of other wrongs with regard to the investigations' interest in Patterson and Bauer will be limited to establishing their relevance as potential witnesses in the investigations and the status of their voicemails as potential evidence in the investigations. The State does not intend to proffer evidence of any discrete acts or further accusations of wrongdoing on the part of Defendant with regard to this evidence other than as outlined above. Accordingly, there is no prejudicial effect that would substantially outweigh the highly probative nature of this evidence.

LEVESQUE EVIDENCE

31. The State's proffered evidence regarding Levesque satisfies the requirements of Rule 404(b).

32. First, the evidence is relevant to showing Defendant's motive, opportunity, identity, intent, preparation, plan, knowledge, and absence of mistake or accident. This proffered evidence shows Defendant's motive was to retaliate against Levesque for their ongoing disagreements and Defendant being placed on administrative leave and under criminal investigation. The evidence shows Defendant's identity in requesting, obtaining, and disclosing Levesque's confidential records, as well as his opportunity, preparation, plan, and absence of mistake or accident in obtaining and disclosing such confidential records. The evidence shows that Defendant was aware of the unlawful nature of these activities, hence the warning to Huff, "Covert op." This statement and others made by Defendant to Huff and others as outlined above shows that Defendant's intent

was to retaliate against Levesque because of Levesque's status as a witness or informant in the investigations.

33. Second, there is clear proof of the proffered evidence. This evidence is based upon the examination of data recovered from Defendant's phone, the observations of investigators for NHDOJ who will testify at trial, and the statements made by Defendant against his interests to persons who are subpoenaed to testify at trial.

34. Third, the probative value of this evidence is not substantially outweighed by any prejudicial effect. As outlined above, the proffered evidence is highly probative of Defendant's state of mind in the various steps Defendant took in retaliating against Levesque because of Levesque's status as a witness or informant in the investigations. The State does not intend to present any evidence with regard to any discrete acts or further accusations of wrongdoing on the part of Defendant with regard to this evidence other than as outlined above, including the validity or invalidity of any complaints by Levesque and Defendant against one another. Accordingly, there is no prejudicial effect that would substantially outweigh the highly probative nature of this evidence.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Grant the State's Motion and find that the proffered evidence is intrinsic evidence that satisfies Rule 403;

(B) Alternatively, to the extent the Court finds the proffered evidence is not intrinsic, hold a hearing on this motion (if necessary) and grant the State's 404(b) motion; and

(C) Grant such further relief as may be deemed just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: October 15, 2025

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to counsel of record by email and by the Court's e-filing system.

/s/ Joe M. Fincham II
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