THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0336/2019-0071

State of New Hampshire

v.

Daniel Turcotte

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court – Northern District

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BRIEF FOR THE DEFENDANT

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Issue preserved by Turcotte's motions and the trial court's rulings. T2* 340-46, 347-48, 350-51; T3 614-21.

2. Whether the court erred by denying Turcotte's motion for a new trial.

Issue preserved by Turcotte's motion and the trial court's ruling. A44-A50, A51-A81; see also A82-A93 (State's objection).

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* Citations to the record are as follows:
"A" refers to the appendix to this brief;
"S" refers to the transcript of the sentencing hearing, held on May 18, 2017;
"T1 – T3" refers to the consecutively-paginated transcripts of the three-day trial held on May 8 – 10, 2017.

STATEMENT OF THE CASE

Daniel Turcotte was charged with four counts of aggravated felonious sexual assault ("AFSA") and five counts of felonious sexual assault ("FSA"). T1 177-81. The counts alleged that he:

1) between January 1, 2006 and December 31, 2007, when M.H. was under 13, in Manchester, engaged in sexual contact with M.H.'s breasts and genitals, digital penetration, and cunnilingus (charge ID#1240719c, #1240714c, #1240713c);

2) between January 1, 2009 and December 31, 2010, when M.H. was under 13, engaged in fellatio in Manchester (#1205674c);

3) between January 1, 2009 and December 31, 2010, when M.H. was under 13, engaged in cunnilingus in Hillsborough (#1240712c);

4) between January 1, 2012 and December 31, 2013, when M.H. was between 13 and 16 years old, in Manchester, engaged in fellatio, digital penetration, and sexual intercourse twice (#1240715c, #1240716c, #1240717c, 1240718c).

T1 177-81; T3 633-37.

Before closing arguments began, and unbeknownst to the parties, the trial court had the courtroom locked. A44.

The jury convicted Turcotte on all counts. T3 641-44. At sentencing, after having learned of the courtroom closure, counsel for Turcotte indicated that he may raise that issue at a later time. S 2-6. The court (Kissinger, J.) sentenced Turcotte to consecutive sentences totaling a minimum of fifty years in prison. S 43-47.

This Court stayed Turcotte's direct appeal while he raised the closed courtroom issue. The court (Abramson, J.) denied the motion for a new trial without a hearing. A44-A50. The Court has accepted a discretionary appeal of that issue and joined it with Turcotte's direct appeal.

STATEMENT OF THE FACTS

M.H. was born on June 25, 1999. T1 219. Although her parents divorced in approximately 2004, they continued to live together at times but, when they lived apart, M.H. mostly lived with her father, Derek Homkowicz. T1 219-21. Homkowicz met Daniel Turcotte through work in 2000 or 2001. T1 224-25; T2 385. M.H. lived in many towns from 1999-2012 including Hillsborough and Manchester. T1 220, 222. Turcotte visited them at various locations, sometimes spending the night. T1 220, 222-25, 228-29, 232-33; T2 385-87. Homkowicz and M.H.'s mother, Amy, sometimes left M.H. in Turcotte's care while they went to the store. T1 227-28, 232; T2 395, 400. Homkowicz and M.H. also visited Turcotte at his residences. T1 227; T2 385.

Homkowicz testified that M.H. has a learning disability and a "touch of Asperger's and Autism." T1 221-22. He testified that these issues caused M.H. to learn slowly, to not "know right from wrong," and to be "confused on everything." T1 222; see also T2 298 (school counselor testimony that, developmentally and socially, M.H. appeared "a little bit younger than some of her peers"). When Turcotte spent time with M.H., they would play video games or play with dolls or Star Wars figures, talk, and watch television. T1 227, 233, 250-51; T2 386-87, 395.

In 2013, Homkowicz found on M.H.'s phone naked pictures of her and sexually explicit texts from Turcotte. T1 237; T2 408. M.H. thought she was in trouble and was unable to talk to her parents about it. T1 238. M.H. was interviewed at the CAC but no criminal case was initiated at that time. T1 239-40; T2 325-26, 408, 410-11. M.H. had no further contact with Turcotte and she did not discuss him with her father for approximately two years. T1 240, 245.

In December 2014, M.H. told a counselor at school that she had been sexually assaulted. T2 292-93, 409. The counselor called the police and Homkowicz. T1 244-46; T2 300-01, 410. M.H. was again interviewed at the CAC. T2 322-23, 410-11.

The case was investigated by Gilford Detective Denise Parker and Hillsborough Detective Chris McGillicuddy, who interviewed Turcotte. T2 313-15, 325-27; T3 500-02, 508. Turcotte initially said he did not want to get M.H. in trouble and denied a sexual relationship with her, but he maintained that he loved her. T2 327-28; T3 515-22.

When Parker began questioning Turcotte about his relationship with M.H., he "opened up." T2 328-29; T3 521-22. Parker testified that Turcotte said their relationship was like boyfriend and girlfriend. T2 329-30. Turcotte said that sexual contact began and escalated at M.H.'s instigation. T2 330-33; T3 525, 527-32. Turcotte admitted that he touched

M.H.'s breasts and genitals, that M.H. touched his penis, that they engaged in cunnilingus and fellatio on more than one occasion, and that they had sexual intercourse. T2 330-33; T3 525, 527-30. Turcotte confirmed that he exchanged sexual texts with M.H. T2 334. He said he wanted to talk more but that he wanted to think about what had happened and get his thoughts organized before talking again. T2 335.

Parker and McGillicuddy again interviewed Turcotte and asked him where certain acts had occurred. T2 335-36; T3 533. Turcotte admitted to fellatio in Hillsborough and sexual intercourse in a third-floor apartment in Manchester. T2 336-37, 351-52, 359; T3 531-32, 535-36. He also admitted to digital penetration in Manchester. T3 543.

M.H. testified that Turcotte first started doing things she "didn't like" when she lived with her parents in an apartment in Manchester by a river. T2 388-89. She had testified earlier about living in Manchester when she went to first grade the second time at age 7 and for second grade. T2 373-75. She described two incidents in the "river apartment:" touching of her breasts and genitals and digital penetration of her genitals during the first incident and cunnilingus during the second incident. T2 388-94.

M.H. then described living in Hillsborough for ages 9 and 10. T2 374, 394-95. She testified that Turcotte engaged in cunnilingus with her there. T2 398.

M.H. then described going to visit Turcotte in a green apartment building in Manchester. T2 399-400. Turcotte lived on the third floor. Id. M.H. testified that Turcotte engaged in fellatio with her there. T2 401.

M.H. testified that later, after Turcotte had moved out of the third-floor apartment, her mother moved into the apartment on the second floor of that same building. T2 401-02. M.H. was 12 to 13 years old. Id. She would visit her mother at this apartment and sometimes Turcotte would be visiting at the same time. T2 402-03. M.H. testified that one night, in the unoccupied third-floor apartment, Turcotte engaged in digital penetration, fellatio, and sexual intercourse. T2 403-06. She described another, daytime incident in this apartment when Turcotte engaged in sexual intercourse with her. T2 407.

SUMMARY OF THE ARGUMENT

1. A mistrial is appropriate when the circumstances indicate that justice may not be done if the trial continues. Evidence of similar, uncharged acts carries a high risk of prejudice. In addition, a prosecutor may not suggest that the defendant bears a burden or indicate his or her personal belief. The pervasive, deliberate, and prejudicial errors in this case were not alleviated by the court's curative instructions. Thus, the court erred by denying Turcotte's motions for a mistrial.

2. Criminal defendants have the right to a public trial under the United States and New Hampshire Constitutions. Before the trial court may lawfully abridge that right, the State must advance an overriding interest that would be prejudiced if the courtroom were to remain open, and the court must consider reasonable alternatives to closing the proceedings. The court erred in sua sponte closing the courtroom and without informing the parties so that the court could consider reasonable alternatives. Because this error was structural, Turcotte is entitled to a new trial.

I. THE TRIAL COURT ERRED BY DENYING TURCOTTE'S REQUESTS FOR A MISTRIAL.

During trial, the State sought to admit evidence of acts Turcotte allegedly committed against M.H. in other counties, which the court (Abramson, J.) had previously excluded. T1 200-02, 216; T2 284. The trial court (Kissinger, J.) granted the defense request that the court instruct the State to tell its witnesses that no testimony should be given about the acts alleged in other counties.[1] T1 216-17. The defense made this request to avoid the possibility of a mistrial. T1 216. The court recognized the "sensitivity" of the issue and indicated that if the evidence nonetheless came out at trial, it may feel that "somebody's sort of taking advantage of the circumstance to try to get in something that's not otherwise called for." T1 216-17. The court "caution[ed] both sides to talk to their witnesses about it." T1 217.

During the cross-examination of Detective Parker, the defense sought to elicit that Turcotte never specified that he committed cunnilingus in Hillsborough. T2 338-40. After some back and forth on that topic, during which Parker reviewed her report to refresh her recollection, defense counsel asked, "You don't report that he said he had performed, himself, cunnilingus on her in Hillsborough?" Id. Parker replied, "It was discussed and I believe I'm not

[1] The court ultimately denied the State's request to admit this evidence. T2 284.

supposed to mention other locations? So I don't know – " T2 340.

Defense counsel asked to approach, which request was granted, and then Parker volunteered, "It's kind of hard to address that without saying that." Id. The court instructed her to stop talking. Id.

The defense moved for a mistrial. Id. The court indicated that it wanted to instruct the jury to disregard that testimony, then it would excuse the jury to discuss the motion for a mistrial. Id.

The court told the jury:

> Members of the jury, I'm going to – the last statement by the detective – you're to disregard that last statement. It's to form no part of your deliberations in the case whatsoever. I'm striking it in its entirety; that last statement by the detective and we will take our morning break now; probably about a 10 or 15-minutes break then we'll resume with testimony. Please remember my instruction. You can't talk about the case either among yourselves or with anyone else. Thank you.

Id.

This instruction was nearly identical to other instructions the court had previously given except that it did not identify which statement was struck. See, e.g., T1 183 (striking part of prosecutor's opening statement by identifying

which statement was struck); 186-88 (striking another part of prosecutor's opening statement by identifying which statement was struck); 240-44 (striking part of Homkowicz's testimony by identifying which statement was struck); 246 (striking another part of Homkowicz's testimony by identifying which statement was struck); T2 315 (striking part of Parker's direct by identifying which statement was struck). Thus, the jury may have thought only that Parker's last statement, that it was "kind of hard to address that without saying that," was struck. T2 340. Turcotte had not moved for a mistrial on the five prior occasions when inadmissible statements were made and struck. T1 183, 186-88, 240-44, 246; T2 315.

Turcotte argued that a mistrial was necessary because the jury heard that there were events in other places and "for some reason [Parker is] not allowed to talk about it." T2 342; see also T2 348 (citing Part I, Article 15 of the New Hampshire Constitution). He argued that a curative instruction could not "unring that bell" and that the misstep was hard to understand since Parker was such an experienced law enforcement officer. T2 342; see also T2 313-14 (Parker had recently retired after 22 years in law enforcement).

The court agreed that the statement was improper and that defense counsel's question was appropriate. T2 342-43. However, the court found the situation was hard to navigate, where Turcotte had admitted to acts in multiple places over

many years. T2 342. The court thought that the circumstance "suggest[ed] . . . that the witness was not trying to intentionally avoid the court's order." T2 343. The court denied the motion for a mistrial. T2 343, 348.

The State said that it had instructed Parker not to mention other places and asked the court to further instruct her on that point. T2 344. The court then, outside the presence of the jury, instructed Parker:

> I just want to take a moment to reiterate an instruction that that – I'm sure that the Prosecutors have already talked to you about, but the issue of allegations involving conduct that is alleged to have taken place outside of Hillsborough County, Manchester, Hillsborough, all of those allegations have been excluded by the court by virtue of prior orders of the court and so I'm just going to instruct you, one, not to make any reference to any conduct that is alleged to have taken place outside of Hillsborough County and if you think, for some reason, that a question cannot fairly be answered without reference to that to let the Prosecutor address that with me separately. Don't take it on your own to try to answer the question and I've already said this so I don't mind you hearing this from me. I don't believe that you intentionally did anything improper, but nonetheless given the nature of this case it is absolutely

> essential that I just reiterate that instruction to you.
>
> So, even if you think you can't answer a question fairly without reference to that, don't go there absent me giving you explicit permission to do that. So let the State address that with me; just don't reference any conduct that is alleged to have taken place outside of Hillsborough County unless I give you permission to do that.

T2 350-51.

During the discussion of the motion for a mistrial, the parties and court also discussed Parker's testimony on direct that Turcotte had said cunnilingus occurred in Hillsborough. T2 346-47; see T2 336. When the jury returned, the trial court identified Parker's testimony that Turcotte admitted committing cunnilingus in Hillsborough and instructed them that that testimony was stricken and was "to form no part of your deliberations in this case whatsoever. So just that portion of her testimony." T2 351-52. The court did not further address Parker's statements about other locations.

Then, during closing argument, the defense objected to the prosecutor's argument that, "Attorney Naro [(defense counsel)] has no choice but to say . . . ." T3 614. The court sustained the objection and instructed the jury:

> Members of the jury, I'm going to instruct you to disregard the Statement from the State regarding the Defense

> having no choice. As I talked the principles and I'm going to refer to them again in my instructions, in criminal cases, the Defendant is under no obligation whatsoever, the State has the burden of proof, the charge is beyond a reasonable doubt, the Defendant is under no obligation whatsoever.

T3 615-16.

The prosecutor took his argument back up by saying:

> And, ladies and gentlemen, I don't want in any way to suggest that the Defense has a burden. The evidence has been presented and the Defense has chosen to ask you to address it, right? He is asking you to take a specific interpretation of that evidence and he has to, right? Because –

T3 616.

The defense again objected and the court immediately instructed the jury, "Again, the Defense is under no obligation. I'm going to strike that last comment by the State. It's to form no part of your deliberation." Id.

Later in his closing, the prosecutor stated, "I think [M.H.'s] testimony, while difficult to follow and difficult for her to provide is reliable." T3 619. Turcotte objected, which was sustained. Id. The prosecutor then went back to his argument, apparently in an attempt to "clarif[y]," saying "I

think the evidence shows – " T3 619-20. The court asked the parties to approach. T3 619.

The court indicated it was going to tell the jury to disregard that and it cautioned the prosecutor not to "inject [his] personal opinion." T3 620. The defense moved for a mistrial, arguing that the cumulative effect of the State's improper closing arguments could not be cured by an instruction. Id. The defense noted that the prosecutor was experienced. Id.

The court found that the errors could be fixed by a curative instruction and denied the motion for mistrial. Id. The court instructed the jury:

> Members of the jury, I'm going to strike the last comment by the State regarding what the State – what an individual prosecutor thinks or believes. That's really not relevant, that's not part of any of your consideration in the case and it was improper for the Prosecutor to say that. Please continue.

T3 621. Given the cumulative effect of the improper evidence and argument, the court erred in denying Turcotte's request for a mistrial.

"A mistrial is appropriate when the circumstances indicate that justice may not be done if the trial continues to a verdict." State v. Wells, 166 N.H. 73, 76 (2014). A trial court's denial of a motion for a mistrial is reviewed under the

unsustainable exercise of discretion standard. State v. Gaudet, 166 N.H. 390, 397 (2014).

The introduction of inadmissible evidence should result in a mistrial if it "constitute[s] an irreparable injustice that cannot be cured by jury instructions;" in other words, where "the trial court cannot unring [the] bell." Wells, 166 N.H. at 76-77. On several occasions, this Court has reversed a trial court's denial of a motion for mistrial after evidence of a defendant's prior unrelated crime is unambiguously conveyed to the jury. State v. Ayotte, 146 N.H. 544, 548-49 (2001) (court erred by denying motion for mistrial after State introduced evidence that defendant had committed another arson); State v. Kerwin, 144 N.H. 357, 358-63 (1999) (court erred by denying motion for mistrial after State introduced evidence that defendant committed another sexual assault); State v. Woodbury, 124 N.H. 218, 221 (1983) (court erred by denying motion for mistrial after State introduced evidence that defendant told police, "I've been charged with armed robbery before"); State v. LaBranche, 118 N.H. 176, 178-80 (1978) (court erred by denying motion for mistrial after State introduced evidence that defendant was charged with another attempted sexual assault).

State v. Perry, 166 N.H. 297 (2014), is also analogous. In Perry, the parties agreed that certain statements made by the defendant during his recorded interview should be

redacted at trial. Id. at 299. Due to oversight of both the defendant's lawyer and the prosecutor, however, the State played portions in which the defendant referred to his prior conviction for theft and burglary, to his parole officer, and to prison. Id. at 300. The court granted the State's request for a mistrial and subsequently denied the defendant's motion to dismiss on double jeopardy grounds. Id. at 300-01. On appeal, this Court affirmed the trial court's finding that the inadvertent playing of the portions at issue constituted "urgent circumstances" creating "a high degree of necessity" for declaring a mistrial. Id. at 302.

Here, Parker's testimony clearly conveyed that Turcotte admitted to committing acts of cunnilingus in other locations that were not part of the evidence heard by the jury. Because of the similarity of the other acts, the risk of prejudice was higher. See, e.g., State v. Belonga, 163 N.H. 343, 360 (2012) (the danger of unfair prejudice from evidence of similar, uncharged acts is "very high").

Even if an instruction could cure the prejudice from the admission of such testimony, the instruction here did not. The court told the jury to disregard Parker's last statement. However, Parker had made two inadmissible statements: one that drew the defense objection and a second before the court instructed her to stop talking. The court's instruction referred only to her "last statement" and did not further

clarify that the topic of other locations was inadmissible. T3 340-41. This instruction was less specific, and thus less effective, than the court's prior and subsequent curative instructions and did not meet the challenge posed by the inadmissible testimony. Furthermore, the court's instruction, upon the jury's return, told the jury to disregard Parker's testimony that Turcotte admitted to cunnilingus in Hillsborough and ended with the statement, "So just that portion of her testimony." T2 352. This may have misled the jury into thinking that the court's prior instruction to disregard Parker's "last statement" was no longer in effect.

For these reasons, Parker's inadmissible testimony about other locations constituted an irreparable injustice that could not be cured by jury instructions. The court erred by denying Turcotte's motion for a mistrial.

Despite this incident, the prosecutor continued to prejudice Turcotte's case by making multiple improper arguments in closing. The first step in determining whether a mistrial is appropriate, as a result of a prosecutor's comments to the jury, is to ask whether the comments were improper. Gaudet, 166 N.H. at 399; State v. Addison, 165 N.H. 381, 547 (2013). This requires "balancing a prosecutor's broad license to fashion argument with the need to ensure that a defendant's rights are not compromised in the process." Gaudet, 166 N.H. at 398. The challenged remarks are

considered "in the context of the case." Addison, 165 N.H. at 548. If the challenged remarks were improper, courts then consider "whether the prosecutor's misconduct was isolated and/or deliberate." Id. at 547-48.

Here, despite the prosecutor's broad license to fashion argument, the statements were improper. Shifting the burden of proof onto the defendant is improper argument. See e.g., State v. Hearns, 151 N.H. 226, 233 (2004) ("A defendant's decision not to testify or present evidence in his own defense can provide no basis for an adverse comment by the prosecutor."). In addition, it was clearly error for the prosecutor to state his personal opinion as to the evidence. State v. Bujnowksi, 130 N.H. 1, 4 (1987) ("It is well settled that it is improper for prosecutors to profess to the jury their personal opinions as to the credibility of a witness or the guilt of the accused.").

Here, the improper statements were not isolated. The prosecutor twice – before and immediately after a discussion on the impropriety of an argument suggesting the defendant has a burden – made arguments that defense counsel "had no choice but to say" and "had to" react to the evidence in a certain way. In addition, the prosecutor stated his personal opinion about the veracity of the State's key witness, M.H., and then immediately, after the court sustained an objection to that statement, started to state a personal opinion about

what the evidence would show. This sequence of events strongly suggests deliberate misconduct, or at the very least a dogged resistance to conform one's conduct to the court's rulings.

This Court has also considered a prosecutor's denial of the impropriety of an argument as bearing on whether the argument was deliberate. State v. Ellsworth, 151 N.H. 152, 157 (2004). Here, the prosecutor denied that his comments were improper. T3 614-15, 620-21.

Courts next consider whether the comment was "so prejudicial that it constitutes an irreparable injustice that cannot be cured by jury instructions." Gaudet, 166 N.H. at 399; see also Wells, 166 N.H. at 77 (issue is whether "the trial court cannot unring a bell once it has been rung"); State v. Reid, 161 N.H. 569, 576 (2011) (issue is whether "the misconduct so poisoned the well that the trial's outcome was likely affected"). Evaluating prejudice requires consideration of two factors, "whether the trial court gave a strong and explicit cautionary instruction," and "whether any prejudice surviving the court's instruction likely could have affected the outcome of the case." Addison, 165 N.H. at 548. Even in the absence of prejudice, however, prosecutorial misconduct may still result in reversal if "the breach was so egregious that reversal becomes a desirable sanction to forestall future prosecutorial trespasses." Reid, 161 N.H. at 576.

Here, the tepid instructions did not cure the prejudice of the prosecutor's misconduct. Despite numerous instances of improper comment in opening statement and closing argument, and numerous instances of the admission of inadmissible evidence, the court's instruction remained fairly constant: an admonition that the jury "disregard" the improper statement or evidence and that it was "to form no part of" the jury's deliberation in the case. The court did try to emphasize the constitutional principles in one instruction but failed to effectively communicate the importance of the admonition: "As I talked about the principles and I'm going to refer to them again in my instructions, in criminal cases, the Defendant is under no obligation whatsoever, the state has the burden of proof, the charge is beyond a reasonable doubt, the Defendant is under no obligation whatsoever." T3 615-16. Although the court told the jury the prosecutor's expression of personal belief was "improper," it only said that such a statement was "really not relevant." T3 621.

In contrast, in Bujnowski, the judge told the jury:

> The prosecutor has already said that this was an error when he gave you his personal opinion of what he believed or what witnesses he believed. And he's right. No lawyer should give you his personal opinion of what evidence he believes or of what witnesses he believes. No judge should give a personal opinion. It doesn't matter

> what the lawyers think, or what the judge thinks. The question of who was to be believed and what is to be believed is for the jury. It's for you; so I ask you that you ignore what the prosecutor said was his personal opinion, as he himself has also asked that you ignore.

Bujnowski, 130 N.H. at 3-4 (brackets omitted); see also State v. Dowdle, 148 N.H. 345, 346-48 (2002) (curative instruction "not sufficient to correct" the misconduct).

Here, the combination of improper evidence and argument, and the court's inadequate response, made a mistrial necessary. This Court considers the cumulative effect of improper evidence and argument. In Bujnowski, the Court reversed where the prosecutor stated his personal opinion four times, including three times after a discussion of the propriety of such arguments. Bujnowski, 130 N.H. at 3-6. The prosecutor acknowledged to the jury that he had made a mistake by giving his personal opinion and the court gave an explicit and strong curative instruction at the end of the State's closing. Id. at 3-4. The court found that the prosecutor's "intentional, repetitive misconduct" required reversal. Id. at 6.

Similarly, in Border Brook Terrace Condominium Association v. Gladstone, 137 N.H. 11, 13 (1993), the Court found that repeated misconduct in closing argument,

including referring to facts not in evidence, stating the lawyer's personal belief, and alluding to other conduct which was similar to that alleged in the case and criminal, required reversal. Likewise, in this case, the State improperly admitted evidence that uncharged acts occurred in other locations and improperly argued that the defense had a burden to respond to the evidence and that the prosecutor personally believed the State's key witness. Given the variety and pervasiveness of errors, and the sensitive and important principles they implicated, the prejudice of these errors likely affected the outcome of the case.

At no point did the court ask the jurors to determine whether they could follow the instructions to disregard the varied and influential improper evidence or arguments. See, e.g., State v. Neeper, 160 N.H. 11, 16 (2010) (trial court sought jurors' affirmation that they could follow the instruction to disregard). At some point, it is not within the capacity of the human mind to accurately retain what evidence and argument it can consider, and what it must disregard.

Finally, independent of prejudice, this Court should reverse the conviction to deter future prosecutorial misconduct. See Reid, 161 N.H. at 576 ("A prosecutor's impermissible comment may require a new trial either because the misconduct so poisoned the well that the trial's

outcome was likely affected or the breach was so egregious that reversal becomes a desirable sanction to forestall future prosecutorial trespasses."). A "public prosecutor . . . differs from the usual advocate in that his or her duty is to seek justice, not merely to obtain convictions." State v. Boetti, 142 N.H. 255, 260 (1997). Thus, "it is as much a prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). "Improper argument, while objectionable in any case, is especially troublesome when made by a prosecutor, as the prosecutor is likely to be seen by the jury as an authority figure whose opinion carries considerable weight." Boetti, 142 N.H. at 260 (internal citation and quotation omitted). If appellate courts decline to reverse whenever one can characterize the evidence as "overwhelming," then the incentive to resort to improper argument will remain strong in all but the closest of cases. See Dowdle, 148 N.H. at 348 ("despite the strength of the evidence against the defendant, to uphold her conviction and permit unfettered prosecutorial misconduct would encourage prosecutorial 'piling on' in precisely those cases where a defendant has the most need of scrupulous adherence to the rules," internal quotation omitted). This Court must reverse.

II. THE COURT ERRED BY DENYING TURCOTTE'S MOTION FOR A NEW TRIAL.

Just before closing arguments began, the trial court indicated to a bailiff to lock the doors of the courtroom in order to avoid distractions from people entering or leaving the courtroom during arguments. A44; S 2. The court had not mentioned this plan to counsel for either party. A44. No member of the public who was present at the beginning of closing arguments was made to leave, but one of Turcotte's friends, Christos Karadonis, who had attended all three days of trial, was locked out of the courtroom. A44, A69, A72-A73. After about fifteen or twenty minutes, Karadonis was able to re-enter the courtroom when someone left. A44-A45, A69, A72-A73. However, other people attempted to enter the courtroom and the record does not reflect that they were permitted to. A73, A75, A77. It appears that the courtroom was locked for the duration of closing arguments. A77.

Counsel for Turcotte learned of the courtroom closure after trial. A45. At sentencing, which occurred the week after the verdicts were returned, counsel indicated that he may file a motion for a new trial on that issue. T3 645-46; S 2-6.

Later, Turcotte, represented by different counsel, filed a written motion for a new trial, arguing that the courtroom closure violated his right, under the federal and state constitutions, to a public trial. A51-A81. He argued that the

error was structural and mandated a new trial. Id. Counsel attached statements from Turcotte's trial counsel, a friend of Turcotte's who also attended the trial and who was not locked out of the courtroom, Turcotte's friend who was locked out of the courtroom, a victim-witness employee of the prosecutor's office who was present in the courtroom during closing arguments, a colleague of trial counsel who was locked out of the courtroom, and Turcotte. A57-A81. The State objected. A82-A93.

The court denied the motion without a hearing. A44-A50. The court found that the closure of the courtroom in this case was "too trivial" to amount to a Sixth Amendment violation. A46-A47. It also found significant that the closure was temporary and not complete, in that those present in the courtroom at the time it was locked were not excluded. A48-A49. In so ruling, the court erred.

A criminal defendant has the right to a public trial under Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. Waller v. Georgia, 467 U.S. 39, 44 (1984); Martineau v. Helgemoe, 117 N.H. 841, 842 (1977). In this area, the Federal Constitution provides no greater protection than its New Hampshire counterpart. State v. Cote, 143 N.H. 368, 378 (1999).

A. The Court should apply a *de novo* standard of review.

This Court has previously reviewed decisions to close the courtroom for an abuse of discretion. State v. Guajardo, 135 N.H. 401, 406 (1992).[2] The Court should, instead, review the court's factual findings with deference and its legal findings *de novo*.

In the absence of a genuine dispute of fact, this issue raises a mixed question of law and fact. The Court typically reviews such decisions, even in a constitutional context, *de novo*. DirecTV, Inc. v. Town of New Hampton, 170 N.H. 33, 37 (2017) ("We review a trial court's application of law to facts *de novo*."); see also State v. Bell, 164 N.H. 452, 454 (2012) ("review[ing] *de novo* . . . the ultimate determination of whether . . . reasonable suspicion existed" to justify an investigatory stop); State v. Brooks, 164 N.H. 272, 278 (2012) (reviewing *de novo* whether the defendant's Constitutional confrontation rights were violated); State v. Jennings, 155 N.H. 768, 772 (2007) (reviewing *de novo* whether the

[2] In Guajardo, this Court reviewed whether a closure order violated the Sixth Amendment, and, without citation or discussion, applied an abuse-of-discretion standard. 135 N.H. at 406 (concluding "the closure order was not an abuse of the trial court's discretion."). The Court, in State v. Cote, restated Guajardo's abuse-of-discretion standard without analysis. 143 N.H. 368, 379 (1999) ("the trial court's decision to close a hearing is reviewed for abuse of discretion, see [Guajardo, 135 N.H.] at 406"). The Court has yet to analyze the appropriate standard for reviewing a trial court's decision to close the courtroom. Turcotte asks the Court to do so here.

defendant was in custody for Miranda purposes); State v. Spencer, 149 N.H. 622, 625 (2003) (reviewing *de novo* whether the defendant was interrogated for Miranda purposes).

Appellate courts frequently review a trial court's factual findings with deference and its legal findings *de novo* when evaluating the constitutionality of a trial court's decision to close the courtroom. See United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994) ("The underlying facts concerning the closure as found by the district court will be accepted unless clearly erroneous; however, whether the closure violated the Sixth Amendment is a legal issue which we review *de novo*."); see also United States v. Laureano-Pérez, 797 F.3d 45, 67-68 (1st Cir. 2015) (reviewing an alleged violation of the defendant's "Sixth Amendment right to a public trial . . . *de novo*."); United States v. Osborne, 68 F.3d 94, 98 (5th Cir. 1995); People v. Hassen, 351 P.3d 418, 420 (Colo. 2015); State v. Schultzen, 522 N.W.2d 833, 835-36 (Iowa 1994); State v. Easterling, 137 P.3d 825, 828 (Wash. 2006). But see United States v. Ledee, 762 F.3d 224, 228 (2d Cir. 2014) (applying a three-part, clear error, *de novo*, and "more rigorous than" usual abuse of discretion standard); State ex rel. Newspapers, Inc. v. Cir. Ct. for Milwaukee County, 370 N.W.2d 209, 214 (Wis. 1985) (applying abuse of discretion standard).

Here, the facts are not in dispute: unbeknownst to the parties, the trial court ordered the courtroom locked for closing arguments; the court later indicated its purpose was to avoid distractions, but the record is silent as to whether there was a particular concern about distracting behavior in this case; one of Turcotte's two friends who had attended the entire trial was locked out of the courtroom for some amount of time; others were also precluded from entering during that time. This Court should review that legal question *de novo*.

B. The court erred by closing the courtroom.

The right to a public trial was the "rule in England from time immemorial," and has an "unbroken, uncontradicted history" dating back to the Middle Ages. Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980); see also id. at 565-573 (detailing the historical roots of public trials). Courts have "uniformly recognized" the right to a public trial "as one created for the benefit of the defendant." Waller, 467 U.S. at 44 (citing Gannett Co. v. Depasquale, 443 U.S. 368, 380 (1979)). It ensures "that the public may see [the accused] is fairly dealt with and not unjustly condemned." Waller, 467 U.S. at 44 (citing In Re Oliver, 333 U.S. 257, 270, n. 25 (1948)). The "presence of interested spectators may keep [the jurors] keenly alive to a sense of their responsibility and to the importance of their functions . . ." Id. The right to a

public trial applies broadly to all stages of a criminal proceeding. Waller, 467 U.S. at 48 (applying right to suppression hearing); Presley v. Georgia, 558 U.S. 209, 213 (2010) (*per curiam*) (applying right to jury *voir dire*).

The defendant's right to a public trial is, however, not without limits. The trial court may close the courtroom if:

> (1) the party seeking to close the courtroom advances an overriding interest that is likely to be prejudiced; (2) the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes adequate findings supporting the closure.

Cote, 143 N.H. at 379; see also Waller, 467 U.S. at 48. The trial court must make "findings specific enough that a reviewing court can determine whether the closure order was properly entered." Presley, 558 U.S. at 215 (quotation omitted). In considering the frequency with which this standard would be met, the Supreme Court indicated "[s]uch circumstances will be rare." Waller, 467 U.S. at 45.

Here, no party sought closure of the courtroom during their closing arguments. Rather, the trial court acted *sua sponte*, indicating later that it had done so to limit distractions during closing arguments. However, nothing in the record supported an overriding or particularized concern that this case or this segment of trial would experience

disruptions. Turcotte's friends had attended the entirety of the trial and no mention is made in the record of any disruptions.

Moreover, the court could have achieved its goal without violating Turcotte's right to a public trial, by discussing a proposed limited closure with the parties and thereby ensuring that all interested attendees were in the courtroom before closing arguments began. While Karadonis was not in the courtroom when closing arguments began, there was no indication he would have known that he must return to the courtroom at a specific time or risk being excluded. Instead, his statement indicated that he had left the courtroom occasionally during trial to make phone calls and had always been able to reenter without issue.

C. The court's error was "structural" and requires reversal.

Violations of a defendant's right to a public trial belong to the "very limited class" of fundamental constitutional errors that are not subject to harmless error review. Weaver v. Massachusetts, 137 S.Ct. 1899, 1907-08 (2017); Johnson v. United States, 520 U.S. 461, 468-69 (1997). Such "structural errors" are "so intrinsically harmful" as to trigger "automatic reversal" regardless of the error's actual "effect on the outcome." Neder v. United States, 527 U.S. 1, 7-8 (1999).

As the courtroom was impermissibly closed during a portion of the trial, Turcotte is entitled to a new trial. Waller, 467 U.S. at 50 (granting a new suppression hearing where courtroom was closed during suppression hearing); Cote, 143 N.H. at 380-81 (granting a new hearing on a motion to set aside verdict hearing where courtroom was closed during motion to set aside hearing).

The motion court erred in relying on its findings that the closure was "partial" and "trivial." While the court was correct that the right to a public trial is not absolute, the Supreme Court has consistently reiterated that instances where closure is justified "will be rare." Weaver, 137 S. Ct. at 1909-10 (quotation omitted). The Weaver Court further explained that deprivation of the public-trial right is deemed a structural error not because it results in a fundamentally unfair determination of guilt but "because of the difficulty of assessing the effect of the error" and because the "public-trial right also protects some interests that do not belong to the defendant." Id. at 1910.

Thus, the Supreme Court considers not whether the deprivation of the right was "partial" or "trivial" but whether the trial court made proper factual findings, after considering all reasonable alternatives, prior to closing the courtroom. Id. at 1909; Waller, 467 U.S. at 48. In fact, all of the recent public-trial deprivation cases considered by the Court have

been "partial" or "trivial" in the sense that they involved judicial proceedings not directly conclusive of the defendant's guilt. Weaver, 137 S. Ct. at 1905-06 (jury selection); Presley, 558 U.S. at 213-15 (jury selection); Waller, 467 U.S. at 48 (suppression hearing); see also Cote, 143 N.H. at 380-81 (hearing on motion for a new trial). All confirmed, without reference to the limited nature of the proceeding, that deprivation of the public-trial right was structural. This shows that the Constitution restricts courtroom closures not based on duration or function of the proceeding, but on whether there is a constitutionally sufficient reason for the closure. See, e.g., Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2219-2222 (2014) (cited by Weaver Court at 1909).

Here, the trial court did not have a constitutionally sufficient reason for the closure because the court never told the parties that it was closing the courtroom and thus never solicited or considered reasonable alternatives to its proposed closure. Accordingly, the Court must reverse Turcotte's convictions and grant him a new trial.

CONCLUSION

WHEREFORE, Daniel Turcotte respectfully requests that this Court reverse and remand for a new trial.

Undersigned counsel requests fifteen minutes of oral argument before a full panel of this Court.

The appealed decision for Issue II is in writing and is appended to the brief. The appealed decision for Issue I was not in writing.

This brief complies with the applicable word limitation and contains no more than 7250 words.

Respectfully submitted,

By Stephanie Hausman/CJ

Stephanie Hausman, 15337
Deputy Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief have been mailed, postage prepaid, to:

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301

Stephanie Hausman

Stephanie Hausman

DATED: May 20, 2019

APPENDIX

APPENDIX – TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Daniel Turcotte

Docket No. 216-2016-CR-00465

ORDER

Following a jury trial, defendant was convicted of four counts of aggravated felonious sexual assault and four counts of felonious sexual assault. Defendant now moves for a new trial due to the trial court's closure of the courtroom during closing arguments at trial. The State objects. Upon consideration of the documents submitted, the parties' pleadings, and the applicable law, the Court determines a hearing is not necessary to decide the issues presented. Accordingly, the Court finds and rules as follows.

Defendant had a three-day trial in May 2017. On the final day of trial, the parties made their closing arguments to the jury. Immediately prior to closing arguments, the trial court (Kissinger, J.) closed the courtroom to additional members of the public. Nobody already present in the courtroom was asked to leave, but the doors were locked to any additional viewers. At the time, the trial court did not notify either the State or defendant that it closed the courtroom. A friend of defendant who attended all three-days of the trial was briefly locked out of the courtroom when he tried entering after closing arguments had begun. (Def.'s Ex. C and D.) After approximately 15–20

minutes, he was able to enter mid-way through closing arguments and observe the remainder of the trial. (Def.'s Ex. D.)

Defendant did not learn of the courtroom closure until after trial. (Def.'s Ex. A.) At sentencing, defense counsel raised the issue with the trial court, and requested a stay of sentencing in order to move for a new trial based on the courtroom closure. (Def.'s Ex. B, 2:3–11.) In response, the trial court stated the following on the record:

> [T]here is a lot of case law that gives the Court the authority to how it manages the courtroom. The courtroom was open for the closings provided that people were here at the time that the closing started. At no time, did the Court shut the doors or lock the doors until after the closings had started and were underway. At that point, it is my view that it was critical that the jury – jurors be able to see and watch counsel and their attention be focused on the arguments of counsel.

(Id., 2:13–21.) Defendant now argues that his right to a public trial was violated by the courtroom closure and that the trial court erred by failing to make findings on the record justifying that the closure was necessary. Defendant contends that violation of his right to a public trial constitutes a structural error, which mandates reversal of his convictions and a new trial.

The Sixth Amendment of the Unites States Constitution guarantees that ""[i]n all prosecutions, the accused shall enjoy the right to a speedy and *public* trial[.]" U.S. Const. amend. VI (emphasis added). The right to a public trial ensures that "the public may see [that the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." Waller v. Georgia, 467 U.S. 39, 46 (1984). Part I, Article 15 of the New Hampshire Constitution also guarantees the

right to a public trial. State v. Weber, 137 N.H. 193, 196 (1993) (citing Martineau v. Helgemoe, 117 N.H. 841, 842 (1977)).

A defendant's right to a public trial is not absolute and "must be balanced against other important considerations in the administration of justice." United States v. Acosta-Colón, 741 F.3d 179, 187 (1st Cir. 2013). In order to justify excluding the public from a criminal proceeding, four criteria must be met: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." Waller, 467 U.S. at 48. Deprivation of a defendant's right to public trial is considered a "structural error" that is not subject to a harmless error review. Weaver v. Massachusetts, 137 S.Ct 1899, 1907–1908 (2017).

"It does not necessarily follow, however, that every deprivation in a category considered to be 'structural' constitutes a violation of the Constitution[.]" Gibbons v. Savage, 555 F.3d 112, 120 (2nd Cir. 2009). Indeed, not every courtroom closure during criminal proceedings violates a defendant's right to a public trial under the Sixth Amendment. See United States v. Perry, 479 F.3d 885, 890 (D.C. Cir. 2007) (collecting cases). Nearly all federal appellate courts recognize a distinction between total and partial closures in evaluating whether the public trial right has been violated. United States v. Simmons, 797 F.3d 409, 413 (6th Cir. 2015) (collecting cases). Many of the federal appellate courts further apply a "triviality" exception, which recognizes that some closures are "too trivial to amount to a violation of the [Sixth] Amendment." Peterson v. Williams, 85 F.3d 39, 42 (2nd Cir. 1996); see, e.g., Gibbons v. Savage, 555 F.3d 112,

121 (2nd Cir. 2009) (exclusion of defendant's mother from voir dire was "too trivial to warrant the remedy of nullifying an otherwise properly conducted state court criminal trial."); Perry, 479 F.3d at 890–91 (finding partial closure "trivial" because it did not "implicate the values served by the Sixth Amendment."); United States v. Ivester, 316 F.3d 955, 959–60 (9th Cir. 2003) (temporary exclusion of public to "determine if [the jury was] concerned for their safety was so trivial as to not implicate [defendant's] Sixth Amendment rights."); Braun v. Powell, 227 F.3d 908, 919–920 (7th Cir. 2000) (exclusion of one spectator from trial did not implicate Sixth Amendment right to an open trial).

Upon review, the Court finds the reasoning of the widely-accepted Peterson triviality exception persuasive and concludes that it applies to the circumstances of this case. Under Peterson, in order to determine whether a closure was too trivial to violate the right to public trial, a court may examine whether the closure implicated the core protections of the Sixth Amendment, which are: "(1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward; and (4) to discourage perjury." 85 F.3d at 43.

While defendant relies on several state and federal cases applying the four-part Waller test to evaluate the constitutionality of a courtroom closure, each of those cases involved situations where the public was entirely or substantially excluded from a criminal proceeding. See, e.g., Weaver, 137 S.Ct. at 1906 (total closure of jury selection proceedings); Tinsley v. United States, 868 A.2d 867, 873 (D.C. 2005) (total exclusion of defendant's supporters during trial); State v. Cote, 143 N.H. 368, 379–80 (total exclusion of public during victim's testimony at post-trial motion hearing); Waller,

467 U.S. at 50 (total closure of pretrial suppression hearing).[1] Because this case does not involve a total closure or a substantial exclusion of the public from any portion of the courtroom proceedings, the Court finds these cases inapposite to the present circumstances.

Moreover, contrary to defendant's suggestion, not every temporary closure of a courtroom during criminal proceedings constitutes a violation of the Sixth Amendment. For example, in United States v. Scott, the First Circuit found a trial was not closed to the public in violation of the Sixth Amendment where the trial court briefly closed the courtroom during the charging of the jury. 564 F.3d 34, 37 (1st Cir. 2009). While the trial court barred spectators from entering or leaving the courtroom, it did not ask any members of the public to leave and all those present at the start of the proceeding were allowed to remain. Id. at 38. Under those circumstances, the First Circuit held that "no closure occurred" because "the public was indeed present at the jury charge and with its presence cast the sharp light of public scrutiny on the trial proceedings, thus providing the defendant with the protections anticipated by the public trial provision of the Constitution." Id.

Similarly, here, even though the courtroom was briefly closed during closing arguments, existing spectators were allowed to remain in the courtroom, and nobody already present in the courtroom when closing arguments began was asked to leave. There were members of the public present for the duration of closing arguments. (Def.'s Ex. E.) Defendant also had two supporters present during the entire trial,

[1] Defendant also cited to Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) and Globe Newspaper Co. v. Superior Court, 457 U.S. 589 (1982), which both involve the public's corresponding right of access to criminal proceedings in the context of the First Amendment; for this reason, these cases do not inform the Court's present determination of whether the brief closure of the courtroom during closing arguments of defendant's trial violated his Sixth Amendment right to a public trial.

although one supporter was briefly locked out for 15–20 minutes during closing arguments. (Def.'s Ex. C & D.) He eventually re-gained access to the courtroom and was present for the remainder of trial. (Id.)

Applying the reasoning employed in Scott and the triviality exception outlined above, the Court finds that the brief closure of the courtroom during closing arguments was too trivial to undermine the public nature of defendant's trial. There does not appear to have been any intention by the trial court to purposely exclude the public from defendant's trial, and its reasoning for closing the courtroom was to minimize distraction while counsel for both parties presented their final arguments to the jury. (Def.'s Ex. B, 2:19–21.) Despite the brief closure, members of the public were actually present during closing arguments and the courtroom was otherwise open to the public at every stage of the proceeding. While one of defendant's supporters was briefly excluded from closing arguments, this does not alter the overall public nature of the proceedings as they were actually conducted. Scott, 564 F.3d at 38.

Moreover, the presence of the public during all portions of defendant's trial sufficiently safeguarded the core protections intended by the Sixth Amendment. The trial court's decision to briefly close the courtroom did not vitiate these protections, particularly where the public was indeed present during closing arguments and the trial court was motivated by legitimate concerns to prevent disruption to the jury. See Richmond Newspapers, Inc., 448 U.S. at 581 n.18 ("[A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial."). Where, as here, the closure of the courtroom was temporary in duration and did not involve the exclusion of existing spectators at the start of the proceeding, the Court finds

the closure was sufficiently trivial and did not violate defendant's Sixth Amendment right to a public trial.

For these reasons, defendant's motion for new trial is DENIED.

SO ORDERED.

11/14/18
Date

Gillian L. Abramson
Presiding Justice

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS. – Northern Dist. AUGUST TERM 2018

THE STATE OF NEW HAMPSHIRE

V.

DANIEL TURCOTTE

216-2016-CR-465

MOTION FOR NEW TRIAL

NOW COMES the defendant, Daniel Turcotte, by and through counsel, Donna J. Brown, and respectfully requests this Honorable Court order a new trial in the above-captioned matter pursuant to RSA 526:1. A defendant has a right to a public trial under the United States and New Hampshire Constitutions and before a trial court can lawfully abridge that right, the State must advance an overriding interest that would be prejudiced if the courtroom were to remain open, and the court must consider reasonable alternatives to closing the proceedings. The court erred in closing the courtroom during closing arguments as there was no finding of an overriding interest to close the courtroom and the court did not consider reasonable alternatives to closing the courtroom. Because this error was structural, Mr. Turcotte is entitled to a new trial.

As grounds for this Motion, it is stated:

Factual Background

1. Daniel Turcotte went to trial on four indictments charging Aggravated Felonious Sexual Assault and four indictments charging Felonious Sexual Assault in May of 2017.

2. The parties made their closing arguments to the jury on May 10, 2018. Unbeknownst to Mr. Turcotte and his attorney, the court had locked the doors to the courtroom during the closing arguments of the parties. *See* Exhibit A.[1] The court did not notify counsel that it had ordered the doors to the courtroom closed and therefore counsel for Mr. Turcotte was not given an opportunity to object to the locking of the courtroom. *Id.* Further, the court did not make any finding on the record as to the need for locking the doors to the courtroom prior to limiting access to the courtroom during closing argument. *See* Exhibit B.[2]
3. Mr. Turcotte was convicted of all of these charges on May 10, 2017.
4. A surveillance video of the courtroom shows that the judge motioned for the bailiff to lock the courtroom doors shortly after Attorney Naro began his closing statements. *See* Exhibit B. This surveillance video also shows that Attorney Naro's back was to the judge and the bailiff and it appears that Attorney Naro did not see the bailiff lock the doors to the courtroom.[3]
5. The doors to the courtroom in question are framed by two side window transoms. Through these transoms, the surveillance video shows that numerous people tried to enter the courtroom at various times during closing arguments.
6. The defendant had two friends, John Leppala and Christos Karadanis, who attended his trial and sat behind him during the trial. *See* Exhibit C and D.[4] Before closing arguments, Mr. Karadanis left the courtroom briefly. *Id.* As the court had not notified the parties that it intended to close the courtroom, Mr. Karadanis got locked out of the courtroom and was not

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[1] Affidavit of Attorney Anthony Naro.
[2] Transcript of May 10, 2017 (The defendant has only attached that section of the sentencing transcript where this issue is discussed.)
[3] Counsel has viewed the surveillance video and will present this at a hearing on this motion.
[4] Affidavit of John Leppala and Investigation Report of interview with Christos Karadanis.

able to be present in the courtroom during the closing arguments in his friend's case. *See* Exhibit A at ¶.

7. Attorney Naro learned that the doors to the courtroom were locked during closing arguments after the trial concluded. *See* Exhibit A. Attorney Naro has signed an affidavit stating that had he known that the court was considering locking the courtroom he would have objected to this action. *Id.* Further, Attorney Naro stated that had the court advised counsel that it was considering closing the courtroom, he would have notified the defendant's supporters of this information so that they did not inadvertently get locked out of the courtroom. *Id.*
8. On May 18, 2017, a sentencing hearing was scheduled on this matter. Before the sentencing commenced, counsel for Mr. Turcotte requested the court stay the sentencing hearing as he was going to seek a new trial because he did not know about the courtroom being closed during closing arguments. *See* Exhibit A at 2. During this exchange with the court, the court admitted that the courtroom had been locked and stated the court's reasoning for locking the doors as follows: "...it is my view that it was critical that the jury -- jurors be able to see and watch counsel and their attention be focused on the arguments of counsel." *Id.*
9. The attached memos demonstrate that people encountering a locked door to the courtroom was just as distracting, if not more so, that if the door was unlocked and they public were allowed to come and go as they pleased. *See* Exhibit E and F.
10. The defendant did not consent to the closure of the courtroom and had he been advised that it was going to be closed he would have objected. *See* Exhibit G.
11. On May 18, 2018, this Court appointed undersigned counsel to represent Mr. Turcotte on a motion for a new trial.

Legal Standard for Motion for New Trial

12. "A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." RSA 526:1. A motion for a new trial may be filed within 3 years of the judgment or verdict. RSA 526:4.

13. Justice was not done in this case due to the mistake that the court ordered the doors to the courtroom locked during closing argument without advising counsel and without making the necessary finding that locking the courtroom doors was necessary.

Legal Argument on Closed Courtroom Issue

14. It is firmly established that closing a trial to the public violates the First Amendment. That right was first recognized by the Supreme Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). It is based on the "unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, . . . that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." 448 U.S. at 581.

15. In *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), the Court made clear that the right of public access, a "right . . . of constitutional stature," is nevertheless "not absolute". It can be denied, however, only in "limited" circumstances where the "State's justification in denying access must be a weighty one" and only when the state has shown that closure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606. As the court did not make any findings as the necessity of closing the courtroom, this court did not make the required findings to close the courtroom.

16. "[E]ven partial closure of a criminal proceeding may violate the Sixth Amendment guarantee of a public trial." *Tinsley v. United States,* 868 A.2d867, 873 (D.C. 2005). Although the right

is not absolute, the "fundamental importance of the right to a trial open to the public" requires that "the[] justifications for curtailing that right are not to be invoked lightly; the trial court must find 'the *strict and inescapable necessity* for such a course of action. (Emphasis added. Citation omitted.)" *Id.* at 874. Even a limited closure can be ordered "only under the most exceptional circumstances." Four criteria must be met to justify excluding the public from a criminal proceeding:

> '[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.' (Citation omitted.)

17. The same standard is criteria is applied when evaluating whether or not a partial closure of the courtroom is justified under the New Hampshire Constitution. *State v. Cote*, 143 N.H. 368, 379 (1999).

18. Violations of a defendant's right to a public trial belong to the "very limited class" of fundamental constitutional errors that are not subject to harmless error review. Weaver v. Massachusetts, 137 S.Ct. 1899, 1907-08 (2017); Johnson v. United States, 520 U.S. 461, 468-69 (1997). Such "structural errors" are "so intrinsically harmful" as to trigger "automatic reversal" regardless of the error's actual "effect on the outcome." Neder v. United States, 527 U.S. 1, 7-8 (1999). As the courtroom was closed during trial, Mr. Turcotte is entitled to a new trial. Waller, 467 U.S. at 50 (granting a new suppression hearing where courtroom was closed during suppression hearing); Cote, 143 N.H. at 380-81 (granting a new hearing on a motion to set aside verdict hearing where courtroom was closed during motion to set aside hearing). Accordingly, this Court must reverse Mr. Turcotte's convictions and grant him a new trial.

19. The court's actions violated the defendant's right to a public trial under the First, Sixth and Fourteenth Amendments to the United States Constitution and Part 1, Article 15 of the New Hampshire Constitution and he is therefore entitled to a new trial.

WHEREFORE, for the above-stated reasons, Mr. Turcotte respectfully requests the following:

A. This court schedule a hearing on this motion so that the defendant may present evidence in support of this motion;

B. Grant the defendant's motion for a new trial and vacate the verdicts in this case.

Respectfully submitted,
Daniel Turcotte
By his attorneys,

Wadleigh, Starr & Peters, P.L.L.C.

Dated: August 23, 2018

By: _____
Donna J. Brown,
95 Market Street
Manchester, NH 03101
(603) 669-4140

CERTIFICATION

I, Donna J. Brown, hereby certify that on this 23rd day of August, 2018 a copy of the within Motion was sent to Nicole J. Schultz-Price of the Hillsborough County Attorney's Office.

_____
Donna J. Brown

EXHIBIT A

AUG 10 2018

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS. – Northern Dist. AUGUST TERM 2018

THE STATE OF NEW HAMPSHIRE

V.

DANIEL TURCOTTE

216-2016-CR-465

Affidavit of Attorney Anthony J. Naro

I, Anthony J. Naro, hereby swear and affirm that the following statements are true to the best of my knowledge and belief:

1. I was lead counsel in the matter of State v. Daniel Turcotte, which went to trial before a jury between May 8, 2017 and May 10, 2017 in the Hillsborough County Superior Court – Northern Judicial District.
2. I was the attorney who presented the closing arguments to the jury in this matter.
3. At no time was I ever aware that the court had ordered that the doors to the courtroom be locked to the public. Nor was I aware that the door had actually been locked.
4. At the time of the trial in this case I was familiar with the law as to a criminal defendant's right to an open courtroom and, had I known that the court was considering locking the doors to the courtroom, I would have objected to locking the doors.
5. Further, if the court had informed counsel that it intended to lock the doors to the courtroom during closing arguments, over my objection, I would have informed the

court observers who were attending the trial as supporters of the defendant about these plans so that they would not inadvertently get locked out of the courtroom.

6. It was only after the trial was concluded that I learned that the doors of the courtroom had been locked during closing arguments. I informed the court of my objection to the locking of the courtroom at the next possible event in this case, which was the sentencing hearing on May 18, 2017.

7. This was my twenty-fourth jury trial in nearly ten years. I cannot recall the court ever ordering that the courtroom be locked for closing arguments and if it did happen, it was without my knowledge. Further, I have personally observed numerous closing arguments in jury trials that I was not a party to. On some occasions I have entered the courtroom after closing arguments have already begun. Never I have ever encountered a locked door.

Anthony J. Naro, Esq. Bar. No 18409

Hillsborough, SS.

Subscribed and sworn before me this 8th day of August, 2018.

Notary Public/Justice of the Peace
TINA T. DISHONG, Notary Public
My Commission Expires November 16, 2021

EXHIBIT B

STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT NORTH

STATE OF NEW HAMPSHIRE, Complainant, vs. DANIEL TURCOTTE, Defendant.	Supreme Court Case No. 2017-0336 Superior Court Case No. 216-2016-CR-00465 Manchester, New Hampshire May 18, 2017 2:04 p.m.

HEARING ON SENTENCING
BEFORE THE HONORABLE JOHN C. KISSINGER, JR.
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the State:	Michael Valentine, Esq. Nicole Schultz-Price, Esq. OFFICE OF THE ATTORNEY GENERAL 33 Capitol Street Concord, NH 03301
For the Defendant:	Anthony Naro, Esq. Howard Clayman, Esq. NEW HAMPSHIRE PUBLIC DEFENDER'S OFFICE 10 Ferry Street Suite 202 Concord, NH 03301
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Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

(Proceedings commence at 2:04 p.m.)

(Sidebar begins at 2:04 p.m.)

MR. NARO: So just before we get to sentencing, I've been talking to the State about since actually the day after the verdict. I believe that there are grounds for a motion for new trial. Basically, what I learned after the next day, on Thursday, was that the courtroom was locked during a portion of the closing arguments and neither of us knew about that. There is some federal case law on that in terms of structural error. But I'm still digging through the case law. And I'm not asking for a stay of execution or anything like that.

THE COURT: There's no reason not -- I'm prepared to -- I've addressed this exact issue in the past. And there is a lot of case law that gives the Court the authority to how it manages the courtroom. The courtroom was open for the closings provided that people were here at the time that the closing started. At no time, did the Court shut the doors or lock the doors until after the closings had started and were underway. At that point, it is my view that it was critical that the jury -- jurors be able to see and watch counsel and their attention be focused on the arguments of counsel. And I have -- that is my practice. And I've done it for years. And there is authority supporting my ability to manage how I conduct the trials.

So you can file it, but I have every -- somebody has

raised exactly the argument that you are making and I've ruled against them.

MR. NARO: Okay.

THE COURT: And so --

MR. NARO: Yeah. And I understand.

THE COURT: Yeah. No, no.

MR. NARO: I just want to -- I just want to flag it for the Court. And what I was hoping was that the Court would appoint me to the motion for a new trial. I think I need a separate appointment for that. And that's why I just --

THE COURT: If you do -- absolutely, it does not make sense to have -- go through the process again. I think there's no objection to --

MR. VALENTINE: No.

MR. NARO: Oh, no. Yeah. Because I have to file --

MR. VALENTINE: Mr. Naro told us --

THE COURT: Yeah.

MR. VALENTINE: -- a few days ago that, you know, he was aware of this issue and would be filing something, so.

MR. NARO: Yeah. And so -- because when I filed the direct appeal, it's weird, but I -- you file a request to withdraw and appoint the appellate defender to the case, but then that's why I need this separate appointment I think.

THE COURT: I don't think there's going to be a problem as long as there's a request for it.

MS. SCHULTZ-PRICE: Sometimes they'll wait for the other appeal until this one gets --

MR. NARO: So I've only seen that done in ineffective assistance motions for new trial. And so I think this is kind of sui generis in that respect. So that's why I --

MS. SCHULTZ-PRICE: So that you can go --

MR. NARO: Yeah. It'll get ruled on before the direct appeal is even really dealt with, so.

THE COURT: As soon as you file it, I can go find my order from the other case where somebody objected and made a similar argument.

MR. NARO: Okay.

THE COURT: And so I have -- this is the first that I've encountered that claim.

MR. NARO: Okay.

MR. VALENTINE: Okay.

MR. NARO: Okay. And I'd be happy to look at the order too, just to --

THE COURT: Yeah.

MR. NARO: -- you know, that might help inform my opinions as I'm going through the law and doing this research myself, if that might be helpful to me.

THE COURT: Yeah. I may have to dig it out. It's from Cheshire County case.

MR. VALENTINE: That's what I was going to ask, is it

Cheshire County?

THE COURT: Yeah it is. It's a case, and I think -- I think it may well be Paul Garrity (phonetic) was defense counsel. I'm trying to remember who handed that case for the State and I can't recall who it was.

MR. VALENTINE: Okay.

THE COURT: But you were saying?

MR. VALENTINE: Do you remember if it was a county or an AG case?

THE COURT: It was a county case.

MR. VALENTINE: Okay.

THE COURT: It was a case involving one of the free staters.

MR. VALENTINE: Okay. We had a brief chat with the AG's Office, so they were sort of aware that the issue was going to be raised. If we needed any help since, you know, people are abandoning us, left and right. And so, yeah, we will be -- if you can pull it out and have something for us then I'm sure we'll all --

MR. NARO: And I'll email Paul.

MR. VALENTINE: Yeah.

THE COURT: You know what, if I can find it, I will give it to the clerks and circulate it to both counsels.

MR. VALENTINE: Sure. Okay. Thank you.

MR. NARO: Is he assessable? Because I know he just

left free staters --

THE COURT: No, he does. But no, it was Paul Garrity.

MR. NARO: Okay. I knew it was (indiscernible).

THE COURT: He was on the case -- he as an acquittal. But I think the objection came up, I can't remember at which stage, but --

MR. NARO: Before the verdict, at least.

THE COURT: It was before the verdict, yeah.

MR. NARO: Okay. Okay.

THE COURT: But, yeah, I'll go looking through --

MR. VALENTINE: Okay.

MR. NARO: Okay.

THE COURT: -- and if I can find it --

MR. NARO: I just wanted to put that on your radar. Okay. So awesome.

THE COURT: No, no problem.

MR. NARO: Okay, awesome. All right. Thank you.

MR. VALENTINE: And I can go through it. The gist of it is we're asking for 40; 10 and a 20, and a 20 with 10 suspended, and other things suspended afterwards. I have put them in, sort of, the event order because we are asking for on the -- on every charge after the first AFSA, we are asking for the enhanced 20 to 40 because it's -- then a secondary conviction. So that's why I put them out of order because I'm

going by date as opposed to by number -- numerical.

MR. NARO: And just so we are all clear. I think that people -- if there is an interpretation of ASFA sentencing statute, I don't read it as a mandatory 20 to 40 --

THE COURT: Oh, I know.

MR. NARO: -- it just increases the exposure --

THE COURT: I understand. That's how I read it as well.

MR. VALENTINE: Right, and I'm not arguing it's a mandatory.

MR. NARO: Okay. Great, thank you.

THE COURT: Do you need a few minutes or are you set to go?

MR. VALENTINE: We're set.

THE COURT: Okay.

(Sidebar ends at 2:10 p.m.)

THE COURT: We are here in the sentencing hearing of Daniel Turcotte. If I could just have counsel identify themselves for the record.

MS. SCHULTZ-PRICE: Nicole Schultz-Price for the State.

MR. VALENTINE: Attorney Michael Valentine, for the State.

MR. NARO: Anthony Naro with Attorney Howard Clayman for Mr. Turcotte.

EXHIBIT C

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH - NORTH, SS SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

V.

DANIEL TURCOTTE

216-2016-CR-465

AFFIDAVIT OF JOHN LEPPALA

I, John Leppala, do hereby certify that the facts as set forth below are true and accurate.

1. I attended all three days of Daniel Turcotte's trial.

2. I attended the trial with Christos Karadonis. Christos brought Dan and me to the trial for all three days.

3. Before closing arguments, Christos left the courtroom to make a phone call.

4. When closing arguments were about the start, the court officer locked the door to the courtroom.

5. When Christos tried to come back inside the courtroom, the door was locked. From where I was sitting, I heard Christos trying to open the door.

6. Christos was outside of the courtroom for closing arguments. Christos watched part of the closing arguments through the window. I saw Christos outside of the courtroom through the window.

7. I cannot say at what point Christos came back inside the courtroom during closing arguments. I believe Christos came back in the courtroom about halfway through the closing arguments. Christos came back inside when a female left the courtroom. Christos sat behind me when he re-entered the courtroom.

8. I sat in the courtroom and watched the closing arguments.

John Leppala

Dated: 5-11-17

Personally sworn and subscribed to before me this 11th day of May, 2017.

Justice of the Peace/Notary Public EX 4.23.19

EXHIBIT D

New Hampshire Public Defender
Manchester, New Hampshire

Investigation/Interview Report

State v. Dan Turcotte **File: 216-16-CR-465**
Attorneys: Tony Naro & Howard Clayman
Investigator: Jared Liamos
Person Interviewed: Christos Karadanis (12/16/52)
3 River Place
Lowell, MA 01852
Date/Time/Location of Interview: 5/15/17; Approx. 9:15 A.M.; Telephonic
Date of report: 5/15/17
Follow Up Questions: 5/15/17; Approx. 1:45 P.M.; Telephonic
Addition to report: 5/15/17

On the above date and time, I spoke with Mr. Christos Karadanis over the phone. I identified myself to Christos as an investigator with the NH Public Defender. I told Christos I'm working with the attorneys who represent Mr. Dan Turcotte. I told Christos I wanted to talk about Dan's case. Christos consented to speak with me.

Christos said he attended Dan's trial. Christos explained he attended all three days of the trial. I asked Christos if he was able to watch the closing arguments. Christos replied, "What do you mean?" Christos explained throughout the trial, he walked out of the courtroom a couple times to make phone calls. Christos said he was able to go back inside the courtroom after making his calls.

I asked Christos if the courtroom door was locked at any point when he tried to come back inside. Christos replied, "Only on the last day and the last minute." Christos explained the judge locked the door. Christos said, "The judge didn't like people going in and out all the time."

Christos explained there was a break. Christos said he went outside the use the bathroom before it started. Christos said the door to the courtroom was locked before he could come back inside the courtroom. I asked Christos how long he was outside. Christos said he was outside the courtroom for, "about 15-20 minutes."

I asked Christos if he tried to open the door. Christos said he tried to open the door. Christos explained, "The judge moved his hand no." Christos explained the

judge moved his hand the first time he (Christos) tried to open the door. Christos explained he could hear everything when he was standing outside. Christos said he went back inside after a lawyer left the courtroom.

I asked Christos if anyone else tried going in the courtroom while the door was locked. Christos said, "A couple other lawyers." I asked Christos if he knows how many. Chris replied, "Two or three, I don't know."

I asked Christos if he was at Dan's trial with anyone else. Christos said he was there with Ted. Christos explained he sat next to Ted. Christos said Ted wasn't locked out. I asked Christos if he saw who locked the door. Christos said he didn't see who locked the door. Christos stated he was in the bathroom.

At this time, I had no further questions for Christos. I thanked Christos for his time and our contact ended.

On May 15, 2017 at approximately 1:45pm, I called Christos. I identified myself to Christos as an investigator with the NH Public Defender, working with the attorneys who represent Dan Turcotte. I informed Christos I wanted to ask him some follow up questions. Christos said that would be fine.

I asked Christos if he could describe what he heard while he was outside the courtroom. Christos said he can't remember what was said. Christos said he heard people talking in the courtroom. Christos explained his memory isn't that good.

I asked Christos to describe what he saw when he came back inside the courtroom. Christos explained he saw the judge say that Dan was guilty of all nine counts. Christos stated he saw the judge tell everyone to come back next Thursday.

I thanked Christos for his time and our contact ended.

EXHIBIT E

Hillsborough County Attorney's Office
300 Chestnut Street
Manchester, NH 03101

Memo

To: Michael Valentine

From: Merrill Beauchamp

Date: 5/18/2017

Re: State v. Daniel Turcotte

I was aware the courtroom was locked during closing arguments. I saw the bailiff get up from his seat at the front of the courtroom and walk to the courtroom door to lock it. I do not recall if arguments had already begun when he did this. I observed him look towards the judge at some point before locking the door.

After the door was locked and during closing arguments, I heard the sound of attempts to open the courtroom door.

Merrill Beauchamp

Director, Victim/Witness Program

Hillsborough County Attorney's Office

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EXHIBIT F

Anthony Naro

From: Anthony Naro
Sent: Friday, May 12, 2017 6:51 AM
To: Amanda Steenhuis
Cc: Howard Clayman
Subject: Re: Turcotte Court Closure

Was it the little guy with the beard? Or the little guy with the accent?

Sent from my iPhone

On May 12, 2017, at 5:59 AM, Amanda Steenhuis <asteenhuis@nhpd.org> wrote:

> I got there After your argument started and the doors were closed. I'm not sure how long you had been going. I think I got there around 12:05 give or take.
>
> There was another guy with me in the hallway the whole time. Newman said he thinks he was your client's friend. I'll always remember him because he was so fidgety I had trouble hearing your argument. (Seriously, stop shuffling!). He also asked me who decides the numbers: the judge or the jury. Three other lawyers also came by. Carl Olsen stopped in and left. Two manch public defenders came by looking for an investigator I think and they left also.
>
> The clerk did come out and speak with us to explain that the doors were locked to minimize distractions. I was worried she was going to tell us to leave but she said she had conferred with the judge and it was ok for us to stay there.
>
> Notably, there certainly would have been time for them to let us in without a distraction (during the objection at the bench) but they didn't.
>
> Amanda
>
> Get Outlook for iOS
>
> ---
> From: Anthony Naro <anaro@nhpd.org>
> Sent: Friday, May 12, 2017 12:09 AM
> Subject: Turcotte Court Closure
> To: Amanda Steenhuis <asteenhuis@nhpd.org>
> Cc: Howard Clayman <hclayman@nhpd.org>
>
> Amanda,
>
> Can you tell me if you witnessed anyone else precluded from entering the courtroom during closing arguments?
>
> Do you have any idea when the doors were locked?
>
> Thank you.

Tony Naro
NH Public Defender
44 Franklin Street
2nd Floor
Nashua, NH 03064
(o) 603-598-4986
(f) 603-598-8204
anaro@nhpd.org

EXHIBIT G

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS. – Northern Dist. AUGUST TERM 2018

THE STATE OF NEW HAMPSHIRE

V.

DANIEL TURCOTTE

216-2016-CR-465

Affidavit of Daniel Turcotte

I, Daniel Turcotte, hereby swear and affirm that the following statements are true to the best of my knowledge and belief:

1. I am the defendant in the above-captioned matter.
2. I had two friends who attended most of my jury trial as support of me in this case. Their names are John Leppala + Christos Karadanis
3. One of my supporters was not in the courtroom during closing arguments. I found out after the trial was over my supporter had been locked out of the courtroom during closing arguments when he had gone to the men's room during a break.
4. Further, if the court had consulted with me about locking the doors to the courtroom prior to the closing arguments I would have objected to this action and I would not have waived my constitutional right to a public trial.

x Daniel Turcotte
Daniel Turcotte

Hillsborough, SS.

Subscribed and sworn before me this 21 day of August, 2018.

x _____

~~Notary Public~~/Justice of the Peace

OCT 0 5 2018

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
DOCKET NO. 216-2016-CR-00465

SUPERIOR COURT
NORTHERN DISTRICT

STATE OF NEW HAMPSHIRE

v.

DANIEL TURCOTTE

STATE'S OBJECTION TO DEFENDANT'S MOTION FOR NEW TRIAL

NOW COMES the State of New Hampshire, by and through the Hillsborough County Attorney's Office, and objects to the Defendant's Motion for New Trial, stating in support as follows:

RELEVANT FACTS

1. The defendant was convicted of four felony counts of Aggravated Felonious Sexual Assault and four felony counts of Felonious Sexual Assault on May 10, 2017, following a jury trial.

2. During closing arguments, the presiding justice (*Kissinger*, J.) directed a bailiff to lock the courtroom doors; counsel for the State, counsel for the defendant, and the defendant were unaware this occurred until after closing arguments. Def's. Mot. for New Trial ¶¶ 2, 4; Def's. Ex. A ¶ 3; Def's. Ex. B 2:6-8; Def's. Ex. G. It is on this sole occurrence of the courtroom doors being locked during part of closing arguments that the defendant bases his Motion for a New Trial. See generally, Def's. Mot. for New Trial. The State objects to the defendant's motion in its entirety.

ARGUMENT & AUTHORITY

3. New Hampshire statutory law controlling the granting of new trials is found in

RSA 526:1 *et seq.* Statutorily, for the Court to determine if it should grant a new trial to the defendant, it must consider if because of an "accident, mistake[,] or misfortune justice has not been done and a further hearing would be equitable." RSA 526:1.

4. The defendant claims that the locked courtroom doors violated both the First Amendment and the defendant's right to a public trial pursuant to the Sixth Amendment to the Federal Constitution. Def's. Mot. for New Trial ¶¶ 14, 16.

I. The Defendant's First Amendment Rights Were Not Violated By The Locked Courtroom Doors.

5. The full text of the First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The defendant does not specify with particularity which rights conveyed to him by the First Amendment were violated, but he does cite two freedom-of-the-press cases in support of his argument. Id. at ¶¶ 14-15.

6. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the U.S. Supreme Court reversed a trial court's order closing the courtroom for the entirety of a trial despite obtaining the consent of both the prosecution and defense counsel. As stated by Chief Justice Burger, "The narrow question presented in this case is whether the ***right of the public and press*** to attend criminal trials is guaranteed under the United States Constitution." Id. at 558 (emphasis added). The Court concluded, "[T]hat the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials . . . important aspects of freedom of speech and 'of the press could be eviscerated.'" Id. at 579 (quoting

Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

7. Similar to Richmond Newspapers, Inc., the U.S. Supreme Court in Globe Newspaper Co. v. Super. Ct. of Norfolk Cnty., 475 U.S. 596 (1982), reversed the *sua sponte* order of the Norfolk County Superior Court in Massachusetts to close its courtroom to the public for the ***entirety*** of a criminal trial. Id. at 596-98. The Globe Newspaper Company took issue with the trial court's order and filed suit. Id. at 596. While the Court acknowledged a First Amendment-derived right of the press and public to attend criminal trials, the Court noted in its opinion that courtrooms can be closed on a case-by-case basis for compelling reasons. Id. at 607-08.

8. While the defendant is correct in his overall statement of law that the First Amendment to the Federal Constitution requires, subject to limits, that courtrooms must be open to the public and press during criminal trials, the defendant was neither a member of the press nor the public at trial. The defendant was present in the courtroom with counsel throughout the entirety of closing arguments, including that portion in which the courtroom doors were locked. The defendant was not harmed through an invocation of First Amendment rights belonging to others.

II. The Defendant's Right To A Public Trial Was Not Violated When The Courtroom Doors Were Locked For Part Of Closing Arguments.

9. The defendant's second argument is that locking the courtroom doors for part of closing arguments was a structural violation of his right to a public trial pursuant to the Sixth Amendment of the Federal Constitution. Although a defendant in a criminal trial has "the right to a . . . public trial," U.S. Const. amend. VI, that right is not limitless.

10. The only New Hampshire case cited by the defendant is State v. Cote, 143 N.H.

368 (1999). In Cote, the defendant appealed his conviction alleging four errors. Id. at 369. The only alleged error by Cote that may be relevant here is the trial court's ruling excluding the public from a post-trial motion to set aside the jury's verdict. Id. During trial, the court allowed the State a recess to refresh the minor victim's recollection of a second sexual assault. Id. at 379. During the recess, the trial court heard testimony in chambers and excluded both the public and the defendant from the hearing. Id. Cote conceded on appeal that the trial court's decision to exclude him was supported by factual findings, but the trial court failed to make findings supporting the exclusion of the public. Id. It was on this narrow issue that the case was reversed and remanded in part for the trial court to conduct a hearing to "apply the four-prong test applied in *Guajardo* to the existing record." Id.

11. The four-prong test referenced by the Court in Cote originated out of State v. Guajardo, 135 N.H. 401 (1992). In Guajardo, the New Hampshire Supreme Court held that the trial court did not violate Guajardo's Sixth Amendment right to a public trial by closing the courtroom to the public while a 14-year-old testified regarding a sexual assault by the defendant. Id. To review the trial court's decision to close the courtroom, the New Hampshire Supreme Court adopted the four-prong test created by the U.S. Supreme Court in Waller v. Georgia, 467 U.S. 39 (1984).

12. In Waller, the trial court granted the prosecutor's motion over the defendant's objection to close the courtroom for the entirety of a suppression hearing. Id. at 47. The U.S. Supreme Court held that the trial court's decision violated the defendant's right to a public trial because the trial court did not make the following four findings of fact: "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; [2] the

closure must be no broader than necessary to protect the interest; [3] the trial court must consider reasonable alternatives to closing the proceeding; and [4] it must make findings adequate to support the closure." Id. at 39-40, 48.

13. In support of his motion, the defendant cites Tinsley v. U.S., 868 A.2d 867 (D.C. 2005). Def's. Mot. for New Trial ¶ 16. In Tinsley, the trial court granted the prosecutor's motion over the defendant's objection that certain spectators, family members and friends of the defendant, be excluded from the courtroom because the spectators were intimidating a witness. Id. at 871-72. The effect requiring spectators to leave who were intimidating the witness left two court employees in the gallery. Id. at 872. After observing that even a partial closure of a criminal proceeding may violate a defendant's right to a public trial as cited by the defendant, Def's. Mot. ¶ 16, the Tinsley court wrote, "[T]he right to be tried in open court certainly 'is not trammeled . . . by a trivial, inadvertent courtroom closure . . . .'" Id. at 873 (quoting Bowden v. Keane, 237 F.3d 125, 129 (2d Cir.2001). The Tinsley court upheld the trial court's decision using each of the four prongs in Waller and rejecting Tinsley's request on appeal that trial courts be required to "invent novel alternatives out of thin air, nor to bring up dubious options that the parties themselves have not ventured to propose, only subsequently to reject them." Tinsley, 868 A.2d at 879; see also Waller, 467 U.S. at 48. Although the Tinsley court preferred that a hearing be held before closing the courtroom, sufficient facts existed in the record to negate an allegation of abuse of discretion by the trial court. See Tinsley, 868 A.2d at 876-80. Accordingly, the defendant in this case should not be given a new trial because the courtroom doors being locked for a part of closing arguments is a trivial closure that does not trammel the defendant's right to a public trial.

14. The cases cited by the defendant in support of his motion are fundamentally different from the case at bar. In all except one of those cases, the defendant objected to a motion or action by the State and the trial court overruled the objection. Also, the cases cited by the defendant involve the exclusion of all members of the public from the courtroom during the testimony of a minor victim for a post-trial hearing in Cote, the testimony of a minor victim during trial in Guajardo, and for the entirety of a suppression hearing in Waller. In Tinsley, although only certain members of the public were specifically excluded by the trial judge, it had the effect of barring all members of the public present. While in Cote, the trial court's order was reversed and remanded to make specific findings, the reviewing courts in Guajardo, Waller, and Tinsley all upheld the trial courts' decisions.

15. In this case, Judge Kissinger chose *sua sponte* and without motion or objection from either party to direct the bailiff to lock the courtroom doors ***after*** closing arguments began. The general public, friends of the defendant, and the press were not excluded from being present in the courtroom for closing arguments if they arrived on time. As the presiding judge stated on the record at the defendant's sentencing hearing, the Court was exercising its discretion to manage the courtroom and to limit distractions to the jury of people entering the courtroom while both sides were making closing arguments. Def's. Ex. B 2:12-24. The closing arguments were the last opportunity for attorneys from both parties to address the jury after a lengthy trial where the State had to prove each of the elements for eight felony counts involving the sexual assault of a minor. The Court's intent for locking the doors after closing arguments commenced was for the "jurors [to] be able to see and watch counsel and their attention be focused on the arguments of counsel." Def's Ex. B 2:20-21. The defendant fails to meet his burden of proof to prevail on his

Motion for New Trial. For members of the public who did not arrive late, the courtroom was open to them.

III. A Violation Of The Right To A Public Trial Is Not A Structural Error.

16. In addition to attempting to persuade the Court that his right to a public trial has been violated, the defendant also claims that the alleged violation is a "structural error" that must be reversed regardless of the effect on the outcome of the trial. See Def's. Mot. for New Trial ¶ 18.

17. In support of his motion, the defendant cites three U.S. Supreme Court cases. Id. The first case cited by the defendant supporting his claim of "structural error" is Weaver v. Massachusetts, 137 S.Ct. 1899 (2017). In Weaver, a Massachusetts trial court closed a courtroom to the public during two days of *voir dire* because the courtroom could not accommodate all potential jurors. Id. at 1902. Counsel for the defendant neither objected to the closure of the courtroom nor raised the issue on review. Id. Five years after Weaver was convicted, he filed a motion for a new trial arguing that his attorney provided ineffective assistance of counsel. Id. The trial court denied Weaver's motion and the Massachusetts Supreme Judicial Court affirmed in relevant part, recognizing that the violation of the right to a public trial was a structural error, it rejected Weaver's ineffective-assistance claim because he failed to show prejudice. Id. The U.S. Supreme Court affirmed the judgement of the Massachusetts Supreme Judicial Court, holding, "[W]hile the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." Id. at 1910. In reaching its holding on this issue, the Court declined to hold that a "public-trial violation always leads to a fundamentally unfair trial," Id.

18. In Johnson v. United States, the U.S. Supreme Court upheld the Eleventh Circuit Court of Appeal's holding refusing to find "plain-error" in its review of a trial court judge's error of failing to submit materiality of false statement to the jury because the error did not seriously affect the fairness, the integrity, or the public reputation of the judicial proceedings. 520 U.S. 461 (1997). The pin cite used by the defendant cites the Court's definition of a "structural error" and gives examples of structural errors, including the right to a public trial, citing Waller, 467 U.S. 39 (1984). Id. at 468-69; see also Def's. Mot. ¶ 18. The Court explains, "A 'structural' error . . . is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 468 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). Structural errors are found in only a "very limited class of cases." Id. at 469. Although Johnson discusses structural errors, it does not find one as the Court refused to find that a violation of the Federal Rules of Procedure 52(b) is a structural error. Id. at 461, 468-69.

19. The final case the defendant cites in support of his structural error argument is Neder v. United States, 527, U.S. 1 (1999). In Neder, the defendant requested that the Court find that the omission of an element in a jury instruction was a structural error requiring automatic reversal. Id. After discussing Johnson, 520 U.S. 461 (1997), the Court denied the defendant's request. Id. at 8-10.

20. The defendant cites no case law where the U.S. Supreme Court found a structural error from the facts in the record and the appellant prevailed on that argument. The defendant has failed to prove that the trial court's locking of the courtroom doors was a structural error and has not met his burden of proof to prevail on his Motion for New Trial.

IV. A Presiding Judge Has The Right And Authority To Maintain Order And Decorum In The Courtroom.

21. In State v. LaFrance, 124 N.H. 171 (1983), the New Hampshire Supreme Court reviewed three questions of law referred to it by the Belknap County Superior Court arising from a defendant's motion to prohibit law enforcement officers from wearing firearms in the courtroom during his trial. Id. at 174. Only one of the questions led to a review of law applicable to the case at bar, "2. Does a justice of the New Hampshire court system have the inherent authority to control the wearing of firearms in the courtroom in which he or she is sitting, notwithstanding a statute to the contrary?" Id. The Court held, "[T]rial judges, subject to our review, have authority under the judicial power of the constitution to control the wearing of firearms in the courtroom." Id. at 182. In reaching this holding, the Court wrote, "The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice." Id. at 179-80. The Court incorporated part of an *amicus* brief into its opinion:

> A judge of a court of general jurisdiction (such as the Superior Court) has inherent power to control and order every aspect of any judicial proceeding before him [or her], involving control of the courtroom and all that takes place in it. This inherent power to control the proceedings is a necessary attribute of judicial power in order that the presiding judge may function effectively as a judge. This power is exclusive and indivisible. During a trial there can only be one 'boss,' the presiding justice; otherwise there would be disorder.

Id. at 180 (quoting Brief of Richard Upton at 13-14); See, e.g., In re Petition of Dover Police Dep't., 115 N.H. 378, 378-79 (1975) (the power to control the use of closed circuit television cameras and audio equipment within the courthouse); Kersevich v. Jaffrey Dist. Ct., 114 N.H. 790, 791 (1974) (the power to control the dress or attire of

participants in the trial); Benton v. Dover Dist. Ct., 111 N.H. 64, 65 (1971) (the power to keep order and punish disorderly conduct).

22. In a Florida case, with similar facts to the case at bar, the Florida District Court of Appeals held that a Duval County Circuit Court order "that courtroom doors be locked during proceedings so that there was 'no more traffic coming back and forth' did not violate the defendant's Sixth Amendment right to public trial." McCrae v. State, 908 So.2d 1095 (2005). McCrae argued that the Circuit Court should have held a hearing required by Waller before the courtroom doors were locked. Id. at 1095. Although McRae did not allege and the record does not show that anyone was actually excluded by the courtroom doors being unlocked, that does not seem to be material in the appellate court's decision. Id. Like New Hampshire in LaFrance, Florida gives trial judges "broad authority to manage their courtrooms so that the people's business may be conducted fairly, efficiently, and expeditiously." Id. The Court cited a New York case to support its holding that, "Controlling ingress and egress to the courtroom in the manner the trial court did below is not a 'closure,' but a 'reasonable restriction upon time and manner of public access to the trial,'" Id. (quoting People of Colon, 71 N.Y.S.2d 410, 416-17 (1988)), and surveyed cases from other state courts. Id.; see generally People v. Woodward, 4 Cal.4th 376, 14 Cal.Rptr.2d 434 (1992) (holding right to a public trial is not violated when courtroom doors are locked where members of the public were present) (quotations omitted); Spencer v. Commonwealth, 240 Va. 78 (1990) (holding "there is no constitutional violation where members of the public and the news media are actually in attendance, having entered before" the locking of the doors); Davidson v. State, 591 So.2d 901, 903 (Ala.Crim.App.1991) (holding there is no constitutional violation where court ordered doors locked to prevent noise in

hallway from disrupting the proceedings while people entered and exited the courtroom).

23. When the presiding justice directed the bailiff to lock the courtroom doors after closing arguments began, the trial court was exercising its authority recognized in LaFrance to control its proceedings and the environment of the courtroom to reduce distractions to the jurors while attorneys from both parties made their final arguments before the jury began deliberation. Members of the public were present in the courtroom as reflected in the exhibits attached to the defendant's motion. See Def's. Ex. C, E, G. Therefore, the defendant was not deprived of his Sixth Amendment right to a public trial.

CONCLUSION

24. As the moving party, the defendant has not met his burden by proving both prongs of RSA 526:1, that "justice has not been done and a further hearing would be equitable."

25. The defendant cannot claim harm to himself by invoking the First Amendment rights of others. The First Amendment case law cited by the defendant is not applicable to the case at bar because the courtroom was open to both the public and the press for those who arrived on time and remained in the courtroom during closing arguments.

26. The defendant's rights to a public trial guaranteed by the New Hampshire Constitution and the Federal Constitution were not violated when members of the public were actually in attendance. The four-prong test of Weaver that was adopted by the New Hampshire Supreme Court in Guajardo is not applicable to the case at bar because the public was not excluded from the courtroom. The Court exercised its authority recognized by the New Hampshire Supreme Court in LaFrance to control its environment to reduce the number of distractions to the jurors in the courtroom during closing arguments. For these reasons, the

defendant's Motion for New Trial should be denied in its entirety.

WHEREFORE, the State respectfully requests that this Honorable Court:

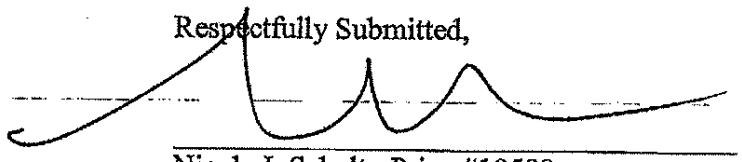
A. Deny the Defendant's Motion for New Trial;

B. Schedule a hearing thereon, if necessary; and

C. Grant the State any such other relief as may be proper and just.

DATED: October 2, 2018

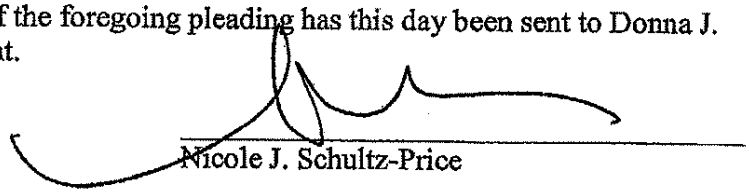
Respectfully Submitted,



Nicole J. Schultz-Price #19588
Assistant County Attorney

CERTIFICATION

I hereby certify that a copy of the foregoing pleading has this day been sent to Donna J. Brown, Esq., counsel for the defendant.



Nicole J. Schultz-Price