State of New Hampshire
Supreme Court

NO. 2005-0754

2006 TERM

MARCH SESSION

STATE OF NEW HAMPSHIRE

v.

RICHARD CLOUTIER

RULE 7 APPEAL OF FINAL DECISION OF COOS COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT, RICHARD CLOUTIER

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Did the court err in finding that Saphire M., the complaining witness, was incompetent to testify when she was unable to narrate sufficiently for meaningful cross-examination?
   Preserved: 1 *Trn.* at 119-21, 184-85.

2. Were Mr. Cloutier's federal and state rights to confrontation, due process, and compulsory process violated in light of Saphire's inability or unwillingness to be subject to meaningful cross-examination?
   Preserved: 149-50, 184, 189.

3. Did the court err in not allowing Mr. Cloutier access to exculpatory information that probably contained evidence of inconsistent statements?
   Preserved: Defendant's *Motion to Compel Discovery* (June 13, 2005).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Richard Cloutier was convicted for felonious sexual assault upon the allegations of Saphire M., an 11-year old retarded girl.

I. Saphire's Situation

Saphire was 11 years old at the time of the allegation and 12 at the time of trial in 2005. 1 *Trn.* at 63, 104. She is mentally retarded, has difficulty with reading and math, and cannot understand time. 1 *Trn.* at 65. Although she was nominally in seventh grade at the time of trial, her intellectual functioning was at a first- or second-grade level. 1 *Trn.* at 64-65. Saphire's condition is caused by DiGeorges Syndrome, 1 *Trn.* at 64, which refers to a missing chromosome and the symptoms of which are cardiac disease, immunity disorders, facial abnormalities, and other problems. *See* STEDMAN'S MEDICAL DICTIONARY 1752 (27th ed. 2000). It may have been exacerbated by her having had open-heart surgery as an infant. *Id.*

Richard Cloutier, the defendant here, is related to Saphire in that he has been living with Saphire's maternal grandmother for nearly 20 years, 1 *Trn.* at 67, 86, he is Saphire's godfather, 1 *Trn.* at 109, and they have spent lots of time together. 1 *Trn.* at 70. Saphire's extended family described Mr. Cloutier's relationship with Saphire as good, doting, "special," and without prior complaint. 1 *Trn.* at 70, 109, 110, 111. He treated Saphire as a granddaughter, 1 *Trn.* at 70, and she called him "Pa Père." 1 *Trn.* at 67-68.

II. Saphire Gave Differing Versions of Story

During trial Saphire testified to a number of versions of her story. When she visited Mr. Cloutier's house Saphire regularly spent her nights on the couch in the livingroom. 1 *Trn*. at 117, 135. On the morning of the alleged incident she was sleeping, and woke up on the couch. 1 *Trn.*

at 118. She variously told the jury that she awoke by herself, 1 *Trn.* at 161, or that Richard woke her up. 1 *Trn.* at 139. When cross-examined was attempted on the different answers, no amount of questioning rendered a comment. 1 *Trn.* at 161.

Whatever awoke her, Saphire told the jury that Mr. Cloutier was on the couch in the livingroom, 1 *Trn.* at 126, 135, but told investigators that he was in the kitchen. 1 *Trn.* at 156, 162. When asked about the different stories, Saphire would not answer. 1 *Trn.* at 162. She also told her mother that the entire incident occurred in the cellar, 1 *Trn.* at 93, 156. Saphire refused comment on the differing versions. 1 *Trn.* at 180-81.

Saphire testified that after she was awake, Richard was on the couch next to her. 1 *Trn.* at 124, 135. During trial she said she was laying on the couch, 1 *Trn.* at 165, 183, but she had told investigators that she was sitting. 1 *Trn.* at 166. The defendant was unable to have Saphire reconcile the two versions. 1 *Trn.* at 163-65.

Equally unclear is what Saphire was wearing. In interviews she told investigators she was wearing clothes, 1 *Trn.* at 158, specifically pants and a shirt. 1 *Trn.* at 159. At trial she told the jury she was wearing pajamas. 1 *Trn.* at 136. The defense tried to pin this down, but Saphire refused. 1 *Trn.* at 160, 170. On re-direct the State ameliorated this inconsistency somewhat by having the witness admit that pajama bottoms can be called "pants" and the top can be called a "shirt." 1 *Trn.* at 183. But Saphire clearly distinguished "pajamas" from "clothes." 1 *Trn.* at 170. Regardless, she refused to reconcile her differing statements about what she was wearing.

Saphire reported the incident itself in several varieties. She had told a DCYF worker during its investigation, her mother, and a Berlin city police officer that she was wearing clothes and that Richard had taken them off her. 1 *Trn.* at 27, 103, 158. In cross-examination at trial she

said her clothes remained on the entire time. 1 *Trn*. at 173-74. As with virtually all other details, Saphire would not account for the differing stories. 1 *Trn*. at 174.

Similarly, Saphire told her mother that the incident did not involve any touching, but only seeing. 1 *Trn.* at 93, 110, 157. Her grandmother understood it consisted of Mr. Cloutier in the basement with his pants down, masturbating, and he asked Saphire if she wanted to touch his penis. 1 *Trn.* at 98. At trial Saphire said it consisted of him guiding her hand to his penis. 1 *Trn.* at 69, 138-41. She told the police a fourth version, that Mr. Cloutier made her touch his privates with her hand and then he took her clothes off but did not touch her. 1 *Trn*. at 26. Saphire would not answer questions to resolve these stories despite their enormous difference in legal significance. 1 *Trn.* at 168-169.

III. Cannot Establish Timing of Allegations

Although the State is not obligated to specify exactly when the alleged incident occurred, the evidence suggests that there was no possible time it could have happened. Saphire testified that only she, Mr. Cloutier, and the dog were home when the alleged incident occurred, 1 *Trn.* at 126. Her grandmother was at work. 1 *Trn.* at 125. The maternal grandmother, Linda Riff, testified that although Saphire spent many nights at her house, there were just two times during the summer of 2004 in which Mr. Cloutier was alone there with Saphire. 1 *Trn.* at 32.

One was the first of July. 1 *Trn.* at 83, 88. Saphire had specified that on the date of the incident Ms. Riff went to work; she said Mr. Cloutier went to his room. 1 *Trn.* at 141-42. On that day, however, Mr. Cloutier worked, and would have left the house about the same time as Ms. Riff for his job at Berlin City Ford. 1 *Trn.* at 83, 90-91. Thus July 1 can be ruled out.

The second possibility was in late August, either the 24th or 25th. 1 *Trn.* at 32

(investigating officer); 1 *Trn.* 94 (grandmother). Linda Riff testified, however, that toward the end of July – medical bills showed it was the 31st – Mr. Cloutier's hand was severely injured. "He was walking up to his mother's with the dog and four dogs attacked our dog, and he got bit. . . . His fingers were cut and broken and torn off. He had to have emergency surgery in Hanover." 1 *Trn.* at 91-92. He couldn't work into the fall because the injuries were painful and the bandages were clumsy. 1 *Trn.* at 92, 94. In any event, in late August the bandages were large and obvious. 1 *Trn.* at 92-93.

The State made no effort to investigate these facts to either corroborate Saphire's story or to establish the date of the alleged crime. 1 *Trn.* at 33, 49. Although she was interviewed numerous times, and the investigating officer agreed in testimony that it would have been a good idea, 1 *Trn.* at 42, no authority ever asked Saphire about Mr. Cloutier's hands. 1 *Trn.* at 33.

At trial the defense tried. At first she wouldn't answer, 1 *Trn.* at 122, 166, but then conceded that on the date of the alleged act there was nothing unusual about Mr. Cloutier's hands. 1 *Trn.* at 167. Thus, the evidence rules out late August as well.

Her mother testified Saphire has an inability to understand time. 1 *Trn.* at 65. While she was able to recite "Monday, Tuesday, Wednesday . . . ," Saphire doesn't know how many days there are in a week. 1 *Trn.* at 154-55. Thus, though the evidence rules out the only two possible days the allegations could have occurred, Saphire was unable to lend any temporal credence to her story.

IV. Inconsistencies in Other Matters

Saphire was inconsistent about other matters as well. Her paternal grandmother, Cindy Mortenson, testified that she had had a "good touch - bad touch" conversation with Saphire. 1

Trn. at 110. When asked about the conversation Saphire said both that it happened and it didn't happen. 1 *Trn.* at 172-73. Saphire would not answer questions about whether she understood the nature of the truth, 1 *Trn.* at 153, 155, or understood what remembering means. 1 *Trn.* at 169. Saphire admitted that she had lied on a prior occasion when she made false accusations to her teachers regarding her mother allegedly hitting her on the head. 1 *Trn.* at 76-78, 107-08.

V. Saphire Unable or Unwilling to Answer Questions

There is a long list of questions at trial that Saphire simply would not answer, whether because she was unable or unwilling. They include:

- whether she awoke by herself or by someone else 1 *Trn.* at 161;
- what she was wearing, 1 *Trn.* at 136, 160, 170;
- what Mr. Cloutier was wearing, 1 *Trn.* at124-25, 136;
- where Mr. Cloutier was when she woke up, 1 *Trn.* at156, 162;
- whether she told her mother that the incident occurred in the cellar, 1 *Trn.* at 156;
- whether she was sitting or laying on the couch, 1 *Trn.* at 164-65;
- whether she told the prosecutor whether she was sitting or laying, 1 *Trn.* at 164;
- whether she told the DCYF investigator whether she was sitting or laying, 1 *Trn.* at 166;
- whether she told DCYF that the incident did not involve any physical contact, 1 *Trn.* at 168-69;
- whether she told her mother or grandmother that the incident did not involve any physical contact, 1 *Trn.* at 157;
- whether she told her grandmother anything about the event, 1 *Trn.* at 157;
- whether she told the prosecutor that her clothes remained on during the incident, 1 *Trn.* at 174;

- whether Saphire told various people differing versions of the event, 1 *Trn.* at 180-81;
- whether she had a good-touch-bad-touch conversation with her grandmother, 1 *Trn.* at 172-73;
- whether there was anything unusual about Mr. Cloutier's hands at the time of the alleged incident, 1 *Trn.* at 122, 166;
- what Saphire watched on television after the alleged event and differing stories she told to various people about that, 1 *Trn.* at 168;
- where Saphire learned the word penis, 1 *Trn.* at 170-72;
- what it means to remember, 1 *Trn.* at 169; and
- what it means to tell the truth, 1 *Trn.* at 153, 155.

After Mr. Cloutier's attorney complained to the court that he was unable to get answers to any questions and was therefore unable to conduct a meaningful cross-examination, 1 *Trn.* at 178, he appears to have given up. 1 *Trn.* at 181.

Not only did most of the defendant's questions produce no answers, Saphire's testimony is riddled with extraordinarily long delays. Repeatedly Mr. Cloutier's attorney waited and waited for answers, in one instance over a minute. 1 *Trn.* at 174. In most cases he was unable to out-wait Saphire and just went on to another question. While her testimony occupies only 70 pages of the transcript, the long silences make it nearly two hours on the tape. An appreciation of the inhibiting nature of the silences cannot be fully gleaned from the written record. Thus the parties have submitted a revised portion of the transcript with the delays noted, and the tape of Saphire's testimony has been made a part of the record on appeal. Adequate review of Mr. Cloutier's case should include this Court listening to, at the least, Saphire's cross-examination.

Saphire's non-answers affected the State as well as the defendant. Virtually all of the prosecutor's *direct* examination of Saphire had to be conducted with leading questions, to which Mr. Cloutier objected. 1 ***Trn.*** at 118. Saphire was lead by the prosecutor into her in-court identification of the defendant. 1 ***Trn.*** at 145. Toward the end of her direct testimony, Saphire had not yet related the facts of the alleged incident. Several times the prosecutor had to reassure, cajole, and nearly threaten Saphire to tell. 1 ***Trn.*** at 137-38.

Mr. Cloutier has adamantly maintained his innocence from the first moment he heard of the allegations. 1 ***Trn.*** at 25, 31. A jury sitting in the Coos County Superior Court (***Timothy J. Vaughan***, J.) nonetheless convicted him, and he was sentenced to 3½ to 7 years, committed. This appeal followed.

SUMMARY OF ARGUMENT

Mr. Cloutier first shows that Saphire M., the complaining witness, was unable to narrate sufficiently for meaningful cross-examination. He therefore argues that the witness was incompetent to testify.

He then argues that these same circumstances – Saphire's inability or unwillingness to be cross-examined – violated his federal and state rights to confrontation, due process, and compulsory process.

Finally, Mr. Cloutier points out that he was denied access to exculpatory material. Some of the records were provided to the court which reviewed them *in camera*, but Mr. Cloutier continues to believe they contain exculpatory information. Other records were never disclosed. He thus argues that his right to discovery was violated.

ARGUMENT

I. Complaining Witness Lacked Capacity to Testify

Because of Saphire's mental incapacity, she was unable to provide coherent testimony and the trial court should have found her incompetent as a witness.

A. Record Shows Saphire Could Not Narrate

Competence to testify in New Hampshire courts requires that a witness must possess several basic capacities:

- moral capacity of sincerity, *i.e.*, understanding of the moral duty to tell the truth;
- mental capacity to understand the nature and consequences of the oath to tell the truth;
- mental capacity to observe;
- mental capacity to remember; and
- mental capacity to relate or narrate that which was observed and remembered.

Imwinkelried, *et al.*, 1 COURTROOM CRIMINAL EVIDENCE § 203 at 58 (3rd ed. 1998); N.H. R. Ev. 601(b) ("A person is not competent to testify as a witness if the court finds that the witness lacks sufficient capacity to observe, remember and narrate as well as understand the duty to tell the truth."). Physical incapacities do not disqualify a witness, as courts generally work around them by the use of devices or interpreters.

Here Mr. Cloutier does not dispute the first four criteria. *See e.g.*, *State v. Keyes*, 114 N.H. 487 (1974) (witness felt no moral compulsion to tell truth); *State v. Dixon*, 144 N.H. 273 (1999) (ability to understand difference between truth and falsehood); *State v. Mills*, 136 N.H. 46 (1992) (ability to understand obligation to tell truth); *State v. Hungerford*, 142 N.H. 110 (1997) (mental capacity to remember).

Rather he suggests that Saphire did not possess the mental capacity to narrate. Throughout her testimony, Saphire was unable to relate the most basic facts surrounding the alleged crime. *C.f., State v. Dixon*, 144 N.H. at 279 (child witness unable to recite collateral information "such as street addresses").

The list of evidentiary items Saphire could not relate included virtually every detail making up the circumstances of the allegations, *e.g.*, what she was wearing and if she were wearing anything, what Mr. Cloutier was wearing, whether the alleged act consisted of physical contact or not, in what room or on what storey of the house it occurred, whether she was sitting or laying when the alleged incident occurred, or if Mr. Cloutier had an impossible-to-miss bandage on his hand. She was unable to narrate what happened later, *e.g.*, who she told about the alleged incident, whether she told different stories to various people, whether she had a good-touch-bad-touch conversation with the grandmother. Saphire also could not testify about what it means to remember or what it means to tell the truth. *See e.g.*, *State v. Brown*, 138 N.H. at 651 (child witness volunteered that truth would mean it was cloudy today and lie would be it was sunny).

B. Saphire Was Competent on Direct Testimony Only Because She Was Rehearsed for it and Coerced into Telling the State's Story

To extent Saphire was able to narrate enough on direct examination to get the core allegations on the record , her testimony was either coerced or rehearsed. For example:

Q: And what happens after he comes onto the couch?

32 second delay, no answer

Q: You don't really like to talk about it, do you, Saphire? No? Okay. You have to say yes or no for me.

A: No.

Q: Okay. But you know it's important that you talk about it today, right?

A: Yes.

Q: You know the people over there that want to hear what you have to say, okay? I know it's--I know it's scary. I don't like it either. But--but you have to--you have to try to tell them, okay?

no answer

Q: Do you want to try to tell them?

3 second delay

A: Yes.

Q: Okay. So why don't you tell them what happens after Richard comes onto the couch with you? Okay. What happens next?

19 second delay, no answer

Q: Do you remember what happens?

A: Yes.

Q: Okay. You just--you're having some trouble saying it? Okay. I understand. Would you--would you feel better if your mother was in the courtroom?

A: Yes.

1 *Trn.* at 127-28. Another example which finally produced got Saphire to make the allegations:

Q: Let me just ask you generally, okay, Saphire, does something happen then?

A: Yes.

Q: Okay. And you remember what that something is?

A: Yes.

Q: Okay. You just havin' a hard time tellin' us what it is?

no answer

Q: Okay. All right. You know you have to tell us, right?

A: Yes.

Q: Okay. And that you're--you know you're safe over there, do you know that?

no answer

Q: Okay. Your mother's here. We have a bailiff. Nothing's gonna happen to you, okay?

no answer

Q: Okay. But--but we all need to know, okay, Saphire? Okay. So you have Richard sitting next to you on the couch. Then what happens?

43 second delay, no answer

Q: Okay. Saphire, you told us you know what happens?

A: Yes.

Q: Right, you remember what happened?

A: Yes.

Q: Okay. And--and you want to tell us, right?

A: Yes.

Q: Okay. So now's the time, okay? You really have to tell us now, okay, or otherwise it's gonna be too late, okay, and you don't want that, okay. So you're on the couch. Your mother's--sorry. Your Ma Mère has gone to work. It's just you, Richard, and [the dog]?

A: Yeah.

Q: Okay. In the house. And Richard's on the couch with you. Then you have to tell us now what happened.

A: Okay.

32 second delay, no answer

Q: Do you think you're gonna be able to tell us, Saphire?

A: Yes.

Q: Okay. You really have to do it right now, okay? Okay. This is--this is probably the last time I can ask you. If you don't answer, it's gonna be too late, okay? All right. Now, you're on the couch. Richard's on the couch with you. It's just the two of you in the house. What happens then?

A: Uhm.

1 *Trn*. 137-38.

Saphire admitted she practiced the answers to her questions with State authorities during a pre-trial visit to the courtroom apparently set up for that purpose. 1 *Trn.* at 161-62. In her testimony she used the word "penis" although her mother specified they did not talk about sex in their home, 1 *Trn.* at 68, and she did not learn it from her friends. Thus there is the implication that she learned the word during her practice sessions with the State. The defense was unable to learn, however, what was the source of her education. 1 *Trn.* at 171-72.

The investigation in this case also became part of the rehearsal for Saphire's direct testimony. *State v. Sargent*, 144 N.H. 103 (1999) (use of poor investigation techniques may result in coercing child witnesses in sex abuse cases); *see also, State v. LaPorte*, 134 N.H. 73, 77 (1991) and *State v. Heath*, 129 N.H. 102, 110 (1986) ("the legislature could reasonably have found that repetitive subjection to interrogation without judicial supervision is so disturbing to young victims and witnesses as to threaten effective prosecution").

Saphire endured as many as nine investigative interviews. 2 *Trn.* at 212. Her smooth marking of male and female anatomical charts during trial, 1 *Trn.* at 140, may have been a result of the improper use of anatomically-correct dolls during at least one of those interviews. 1 *Trn.* at 43-35, 54 (Berlin police officer, who was ignorant of sex abuse investigation protocols, RSA 169-C:38-a, violated protocols regarding doll during interview).

Thus during her direct testimony Saphire was able to competently narrate. But only to the extent necessary for the State to present the core facts of its allegation, and only after she had been thoroughly prepared and practiced. Saphire was completely unable, however, to narrate for the purposes of testing those allegations during cross-examination.

Where a witness is unable to narrate, she is incompetent to testify in open court. *Government of Virgin Islands v. Riley*, 750 F.Supp. 727, 728 (D.V.I. 1990), *aff'd*, 973 F.2d 224 (3d Cir. 1992) (child witness found incompetent to testify because "refusal or inability to respond verbally to questions"). Young or mentally challenged witnesses are competent where the record shows they [are] able to "articulate[] answers, . . . which reflect[] [their] personal observations." *State v. Dixon*, 144 N.H. 273, 279 (1999); *State v. Briere*, 138 N.H. 617, 620 (1994) (witness deemed competent upon finding that when witness "was not sure of the answer to certain questions, she was able to say so and to say that she could not remember"); *State v. Brown*, 138 N.H. 649 (1994) (testimony included in opinion demonstrates child could narrate coherently); *State v. St. John*, 120 N.H. 61 (1980) (witness able to narrate).

Even given this Court's generous standard of review in these matters, *State v. Mills*, 136 at 49-50, competency is still a matter of *law*, and the record shows Saphire did not understand questions, or was either unwilling or unable to narrate answers them, even those reflecting her personal observations.

Accordingly, Saphire's did not have the capacity to narrate and the court should have found she was incompetent to testify.

C. Court Erred in Not Allowing Mr. Cloutier to Clarify Whether Saphire Understood Questions

It is apparent from the record that both the prosecuting and defending attorneys were mystified as to why Saphire would not answer questions, and that both repeatedly tried varying tactics in an attempt to get answers. *See e.g.* 1 *Trn.* at 128 (State suggests mother be allowed in courtroom).

During cross-examination, Mr. Cloutier's attorney attempted to clarify whether Saphire understood the questions she was being asked.

> Q: All right. Do they ever talk about the truth in school?
>
> 3 second delay, no answer
>
> Q: Do they ever talk about what it means--what it means to be--tell the truth or promise to tell the truth? Do you ever talk about that?
>
> 8 second delay, no answer
>
> Q: Do you understand my question?
>
> 18 second delay, no answer
>
> Q: Do you understand what I'm asking?
>
> A: Yes.
>
> Q: Okay. Can you ask me back the question I just asked to make sure you understand me, okay? What did I just ask you?

1 *Trn.* at 149.

Rather than allowing Saphire to say repeat the question, the court told the defense attorney that although it was clear he was "attempting to question her competency," "that's not an appropriate line of questioning." 1 *Trn.* at 149-50. As there was no objection from the State, and the court did not specify, it is unknown on what basis the question was disallowed.

This Court has suggested that any method of getting facts regarding competence on the

record will be accepted unless it prejudices the defendant. *State v. Brown*, 138 N.H. 649 (1994) (not violate defendant's rights when only prosecutor examined child witness as to competency when prosecutor asked routine questions directed at capacity to observe, remember, narrate, and understanding of duty to tell truth); *State v. Aikens*, 135 N.H. 569 (1992) (similar).

But nothing in the record appears to be directed toward determining whether Saphire actually understood all the questions she was either unable or unwilling to answer. Because understanding is a component of competency, the determination competence may turn on whether questions were properly understood. Thus it was error to not allow Mr. Cloutier's attorney to explore Saphire's understanding of his questions.

II. Saphire's Inability or Unwillingness to Answer Mr. Cloutier's Questions Violated his Rights, and Her Testimony Should Have Been Struck

A. Saphire's Recalcitrance Violated Mr. Cloutier's Rights to Confrontation, Compulsory Process, and to Present Favorable Proofs

The right to cross-examine adverse witnesses – to confront – in criminal cases is fundamental. *Smith v. Illinois*, 390 US 129 (1968); *State v. Dugas*, 147 N.H. 62 (2001). *State v. Ramos*, 121 N.H. 863 (1981) ("Cross-examination is necessary to ensure that the defendant 'shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and be fully heard in his defense.'"). N.H. CONST. pt. I, art. 15; U.S. CONST. amd VI. A defendant's right to compulsory process and to present favorable proofs are likewise fundamental to a fair trial. *Crane v. Kentucky*, 476 U.S. 683 (1986); *State v. Laurie*, 139 N.H. 325 (1995). Witnesses are required to answer all questions put to them. N.H. R. EVID. 501.

The purpose of confrontation is to ensure the accuracy of the fact-finding and truth-detection process. *Ohio v. Roberts*, 448 U.S. 56 (1980); *Duton v. Evans*, 400 U.S. 74 (1970). In sexual abuse cases this is doubly important because "false allegations of abuse are disturbingly common." *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants*, 26 HARV. C.R.-C.L. L.REV. 185, 185-86 n.4 (1991) (citing studies showing prevalence of false reports and suggesting reasons). Cross-examination ensures the reliability of evidence, *Maryland v. Craig*, 497 U.S. 836 (1990), and provides the right to develop relevant information. *State v. Higgins*, 149 N.H. 290 (2003) (rape-shield statute set aside when accuser's prior sexual activity is relevant to defense); *State v. Glodgett*, 148 N.H. 577 (2002) (same). Cross-examination provides the ability to question the credibility of an accuser, *State v. Flynn*, 151 N.H. 378 (2004); *State v. Newman*, 148 N.H. 287

(2002), and to expose bias. *State v. Blackstock*, 147 N.H. 791 (2002).

Contemporary confrontation law as it applies to witnesses who present cross-examination difficulties begins with *United States v. Owens*, 484 U.S. 554 (1988). In *Owens* the witness, who had been beaten on the head in a prison fight, had recalled the attack on him at one point long before trial during a police interview while he was recovering in the hospital, but did not recall it at the time of trial. The Supreme Court held that his severe memory problems and his inability to describe the crime or identify his attacker during cross-examination did not violate the defendant's confrontation rights. The Court wrote: "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Owens*, 484 U.S. at 559 (quotations omitted). *See also California v. Green*, 399 U.S. 149, 157 (1970) ("As long as the declarant is testifying as a witness and subject to full and effective cross-examination, the Confrontation Clause is not violated."); *State v. Etienne*, 146 N.H. 115 (2001) (although court may limit cross-examination, defendant may not be denied opportunity to make threshold level of inquiry).

The other significant development in the law was *Crawford v. Washington*, 541 U.S. 36 (2004). There the defendant's wife had made an out-of-court statement the State sought to use at trial. The statement was not given in a forum subject to cross-examination, and her testimony was barred by the marital privilege. The Court held that because there was no opportunity for cross-examination, and the statement was inadmissible.

The witness in *Owens* was forgetful, and in *Crawford* was privileged. Saphire is neither, but abstracting from *Owens* and *Crawford* renders a rule: as long as the witness is present and able to answer the defendant's questions, confrontation is satisfied. *See e.g.*, *State v. Pierre*, 890

A.2d 474, 502 (Conn. 2006) (confrontation clause satisfied "so long as the witness appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination"); *Fowler v. State*, 829 N.E.2d 459, 466 (Ind. 2005) ("a witness who is present and responds willingly to questions is 'available for cross-examination' as that term is used in *Crawford"*).

What constitutes being available for cross-examination does not mean merely that the person is physical present on the witness stand. *Davis v. Alaska*, 415 U.S. 308, 315 (1974) ("Confrontation means more than being allowed to confront the witness physically."); *State v. Peters*, 133 N.H. 791, 793 (1991) ("We presume . . . that unavailability . . . does not refer to physical absence. Instead, it may relate to a circumstance such as emotional trauma caused by testifying in the courtroom.").

Unavailability occurs when a child is "simply too young and too frightened to be subjected to a thorough direct or cross-examination." *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991). Unavailability may be caused by a privilege. *State v. Donnelly*, 145 N.H. 562 (2000) (self-incrimination); *Crawford*, 541 U.S. at 36 (marital); *State v. Higgins*, 149 N.H. 290 (2003) (rape-shield); *State v. Farrow*, 116 N.H. 731 (1976) (doctor-patient); *Opinion of the Justices*, 117 N.H. 386 (1977) (newspaper reporter); *State v. Gell*, 524 S.E.2d 332 (N.C. 2000) (attorney-client).

Unavailability may also be caused by mere recalcitrance of a witness. *Carlos v. Wyrick*, 753 F.2d 691 (8th Cir. 1985); *United States v. Pope*, 739 F.2d 289 (7th Cir. 1984) (confrontation rights not violated when witness eventually answered questions). Mental illness, so long as the witness was able to answer questions, does not necessarily cause unavailability. *Frank v.*

Brookhart, 877 F.2d 671 (8th Cir. 1989).

Stated generally, "Confrontation Clause questions will arise [when] restrictions may 'effectively . . . emasculate the right of cross-examination itself.'" *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985) (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)).

If the subject on which the defendant wishes to cross-examine the witness is collateral, confrontation rights are not implicated. *See e.g., State v. Newman*, 148 N.H. 287 (2002) (barring questions about unrelated sexual assault). But confrontation is violated when the witness "refus[es] to answer questions bearing directly on the circumstances surrounding" the allegations, *Carlos v. Wyrick*, 753 F.2d 691, 693 (8th Cir. 1985), or bearing on the witness's credibility. *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

When the cause of a witness's recalcitrance is a self-incrimination privilege, the remedy is to immunize the witness from prosecution based on the testimony. RSA 516:34. When the cause is not related to such a privilege, and the witness's refusal to answer "denies a party a thorough and sifting cross-examination of the specifics of the witness's testimony on direct," the remedy is to strike the direct testimony of the witness. *Cody v. State*, 609 S.E.2d 320 (Ga. 2004).

In Mr. Cloutier's case, Saphire would not answer questions regarding nearly every significant detail surrounding the crime she alleged, nor would she answer questions regarding conflicting stories she told her family and the authorities. Mr. Cloutier's cross-examination of her was emasculated by her inability or unwillingness to answer his questions, resulting in a violation of his right to confrontation, of compulsory process, and to present favorable proofs. Accordingly, Saphire's testimony should have been struck. Likewise, evidence of her out-of-

court statements should be struck as well.[1] *State v. Young*, 87 P.3d 308 (Kan. 2004) (where state's witness refuses to testify, prior statements are not admissible).

B. Saphire's Recalcitrance Violated Mr. Cloutier's Due Process Rights

Saphire's inability or unwillingness to answer Mr. Cloutier's questions also violates his due process rights. *See State v. Spaulding*, 147 N.H. 583, 589 (2002) (due process addresses availability of testimony in sexual assault cases); N.H. CONST. pt. I, art. 15; U.S. CONST. amd XIV.

Due process involves a three-part test balancing private and public rights, and the value of additional process.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also In re Baby K.*, 143 N.H. 201, 205 (1998).

The State has the obvious interests of doing justice and prosecuting criminals. Mr. Cloutier likewise has an interest in justice, and of not being incarcerated. The American criminal justice system is built around these competing and roughly balanced principles. *See Anders v. California*, 386 U.S. 738 (1967). The risk of erroneous fact-finding here, however, is enormous.

While it is unlikely that Saphire is capable of maintaining a sustained lie, because she

---

[1]Mr. Cloutier's attorney several times complained about Saphire's testimony and his inability to get answers to questions. 1 *Trn*. at 149-50, 184, 189. To extent that the attorney did not sufficiently ask for Saphire's testimony to be struck, that is plain error. N.H. SUP. CT. R. 16-A.

refused to answer questions there was no way for Mr. Cloutier to subject her story to "testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. at 61. He could not, for example, determine whether the alleged incident actually happened, or whether it might be the product of the fantasy of a puberty-age girl, or whether the suggestiveness of multiple interviews by State authorities may have hardened such fantasies into belief by a person of limited intellect.

Such suggestions are not themselves fantasy. Saphire's mother testified, for instance, that her family does not discuss sex. 1 *Trn.* at 68. Saphire herself admitted she did not learn the word "penis" from her friends or from her dog, but no amount of questioning overcame Saphire's refusal to answer where she learned the word "penis" or whether she learned it from the prosecutor or the victim-witness coordinator. 1 *Trn.* at 171-72. Most probably she learned it from investigators or the prosecutor, but it was impossible for Mr. Cloutier to discover when or from whom.

Because Mr. Cloutier's due process rights were not protected by allowing the jury to hear Saphire testify without meaningful cross-examination, her entire testimony should have been struck. Because the jury erroneously heard her testimony, Mr. Cloutier's conviction should be reversed.

III. Mr. Cloutier was Denied His Right to Exculpatory Materials

A. Materials Sought, Reviewed, and Denied

Mr. Cloutier requested to discover a number of records. Over the course of several pleadings and hearings, he narrowed down his request to four items, which the court eventually agreed to review *in camera*. *See* July 29, 2005 *Trn*. and COURT ORDER (Aug. 2, 2005).

- Records of Saphire's pediatrician, Dr. Beals, of Coos County Family Health (January through December, 2004);
- Records of Dartmouth Hitchcock (March and April 2005), where it is believed Saphire was interviewed by a sexual assault professional;
- School records, including those of the nurse, and counselor.

Ultimately the court conducted a review of *some* of these records.

The court found no exculpatory information in the pediatrician's records, although no review was conducted of records for December 2004, which given the time-frame of her conversations with others, is the period during which Saphire most likely discussed matters relevant to this case. COURT ORDER (Aug. 16, 2005); COURT ORDER (Aug. 25, 2005).

The court found no exculpatory information in Dartmouth Hitchcock's records. COURT ORDER (Aug. 9, 2005). But there are two problems. First, records of March 2005 were not reviewed by the court. Second, it appears that the court was not provided any records from the sexual assault counselor with whom it is believed Saphire spoke.

The court also found no exculpatory information in Saphire's school records. COURT ORDER (Aug. 26, 2005); COURT ORDER (Sept. 6, 2005). The court was provided records, however, only with regard to Saphire's special education plan, health plan, and grade reports, none of which are of particular concern to Mr. Cloutier. But the court apparently was not

provided with records with which Mr. Cloutier is far more interested – those from the school nurse and school counselor with whom Mr. Cloutier believes Saphire spoke.

Thus, although Mr. Cloutier was successful in having the court conduct an *in camera* review of some of the records he requested, the court never reviewed the most important information he sought. Of that which the court did review, Mr. Cloutier continues to believe they contain exculpatory material, and that the trial court erred in its assessment.

B. Mr. Cloutier Has a Right to Discover Exculpatory Evidence

Criminal defendants have a right to discover exculpatory evidence. U.S. CONST. amd. XIV; N.H. CONST. pt. I, art. 15; *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Heath*, 129 N.H. 102 (1986); *State v. Dukette*, 113 N.H. 472 (1973). When there are privacy concerns with materials sought to be discovered, the trial court conducts an *in camera* review. *State v. Gagne*, 136 N.H. 101 (1992); *State v. Amirault*, 149 N.H. 541 (2003).

> The threshold showing necessary to trigger an *in camera* review is not unduly high. The defendant must meaningfully articulate how the information sought is relevant and material to his defense. To do so, he must present a plausible theory of relevance and materiality sufficient to justify review of the protected documents.

State v. Graham, 142 N.H. 357, 363 (1997).

In camera review does not consist of just the judge. Here both the prosecutor and the defense counsel should have reviewed the material to advise the court whether the records might contain exculpatory material. *State v. Lacourse*, 127 N.H. 737 (1986) (after court refuse to review diary, this Court "remand[ed]. . . to the trial court with instructions that the trial judge, prosecution and defense counsel examine the diary in camera to determine if it contains any exculpatory evidence, or could lead to the discovery of any exculpatory evidence, or could be

reasonably used to test the credibility of the complainant.); *but see State v. Hilton*, 144 N.H. 470 (1999).

Regarding consultation with a sexual abuse counselor, the defendant can discover "those statements of the victim which relate to the alleged crime being prosecuted." RSA 173-C:5, II. That the complaining witness might have made inconsistent statements to an RSA 173-C counselor is sufficient grounds on which to discover the records. *State v. Hoag*, 145 N.H. 47 (2000).

Evidence which is useful to the defendant for the impeachment of credibility is deemed exculpatory. *United States v. Bagley*, 473 U.S. 667 (1985); *State v. Lacourse*, 127 N.H. 737 (1986). Mr. Cloutier here is not requesting immaterial items such answers to hypothetical questions, *State v. Graf*, 143 N.H. 294 (1999), or allegations of minor infractions, *State v. Ellsworth*, 142 N.H. 710 (1998).

Exculpatory materials includes all includes material DCYF records as well. *Lavallee v. Coplan*, 239 F.Supp.2d 140 (D.N.H. 2003).

Here, Saphire talked to as many as nine different people about her allegations. Mr. Cloutier thus believes it is probable that their records contain statements which may bear on her credibility, which may contain statements inconsistent with her trial testimony, or which may contain statements inconsistent with what she said to others. Given that Saphire consistently told at least two, and as many as four, different versions to just her family and investigating authorities, Mr. Cloutier believes it is highly unlikely that she somehow told only the prosecution's story to those whose additional records he seeks. Mr. Cloutier also believes that given the professions of some of the people to whom he believes she made statements – guidance counselor, school nurse,

sexual assault counselor – that it is unlikely there is nothing exculpatory in their records. Finally, Mr. Cloutier believes Saphire's statements contain information that would have furthered his efforts to show Saphire was incompetent to testify.

Mr. Cloutier has been prejudiced by his inability to fully confront Saphire on her inconsistent statements, and was hampered in his efforts to show that Saphire was incompetent. *State v. Arthur*, 118 N.H. 561 (1978) (prejudice includes inability to confront witness).

Because Mr. Cloutier was unable to use the exculpatory information he believes is contained in both the material reviewed by the trial court and the material never provided to the court, Saphire's testimony should have been excluded. *See State v. Belton*, 150 N.H. 741 (2004) Accordingly his conviction should be reversed. *See State v. Smalley*, 148 N.H. 66 (2002).

CONCLUSION

For the foregoing reasons, Mr. Cloutier requests that his conviction be reversed.

Respectfully submitted,

Richard Cloutier
By his Attorney,

Law Office of Joshua L. Gordon

Dated: March 25, 2006

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Richard Cloutier requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on March 25, 2006, copies of the foregoing will be forwarded to Stephen Fuller, Senior Assistant Attorney General.

Dated: March 25, 2006

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225