IN THE STATE OF NEW HAMPSHIRE

IN THE MERRIMACK SUPERIOR COURT

217-2026-CV-00014
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THE ROCKINGHAM SUPERIOR COURT
AS CASE NOS. 90-1370, 1371, 1372

MERRIMACK SUPERIOR
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PAMELA SMART,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

AND REQUEST FOR HEARING

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NOW COMES, PETITIONER, Pamela Smart, through her attorneys, Matthew Zernhelt (*pro hac vice* admittance pending), Jason Ott (*pro hac vice* admittance pending), and Joseph Prieto, and submits this Petition for Habeas Corpus pursuant to New Hampshire Revised Statute § 534:1, *et seq.*, and all other authority incorporated directly and incidentally herein, and provides:

INTRODUCTION

Pamela Smart's case was subjected to a type of media scrutiny that the world had never seen. News stations sensationalized any purported detail of the case that they could get their hands on. Allegations ran wild. It was a trial by media in the purest form. The snowballing thirst for scandal led to the trial being the first in our country's history that was televised from gavel to gavel. Consequently, Pamela Smart became a caricature, a conceived identity, no longer a person but a story long departed from any possible reality. Such circumstances primed Ms. Smart's trial to challenge the bounds of normal trial practice. In turn, Ms. Smart's trial failed to retain critical constitutional rights and safeguards required to ensure a fair adversarial testing process. In short, Ms. Smart did not receive the fair trial that she was due.

A renewed examination of Ms. Smart's trial has revealed meritorious and unreviewed issues that occurred and that warrant reversal of Ms. Smart's convictions. Specifically, Ms. Smart brings the following allegations of error in this petition:

1) The State's case against Ms. Smart depended on heavily distorted audio tapes of surreptitiously recorded conversations of Ms. Smart. The State provided what the State purported to be transcripts of these conversations to the jury to read along when the jury first listened to the distorted audio tapes. These transcripts deceptively directed the jury to hear Ms. Smart making inculpatory statements not actually present in the audio. A recent 191 participant study has affirmed that an average juror would hear something different than the confessions the State assigned to Ms. Smart if the juror did not have the State's transcripts, or had a different transcript, but a juror will hear the State's assignments if provided the State's transcripts to read along the first time hearing the audio. Therein, the State's

transcripts imposed an insurmountable cognitive bias on the jury against Ms. Smart. This prejudice was substantial as the record expressly reflects that the jury's interpretation of these conversations was the final impetus to convict.

2) Trial Counsel violated Ms. Smart's fundamental constitutional rights by declaring Ms. Smart's guilt to the jury. Trial Counsel's concession of Ms. Smart's guilt without Ms. Smart's consent amounted to structural error and a presumption of prejudice.

3) Ms. Smart was convicted on an inflammatory news media story and not the judicially reviewed evidence produced during trial, as has been admitted by a juror, and this violation of Ms. Smart's constitutional rights denied Ms. Smart a fair trial.

4) Trial Counsel failed to correct and consented to erroneous jury instructions that alleviated the burden required for the State to convict Ms. Smart and this constituted prejudicial error. Namely, jury instructions failed to instruct that Ms. Smart must be found beyond a reasonable doubt to have acted with deliberation and premeditation. Further, the Trial Court did not instruct the jury to only consider evidence presented during trial. Lastly, the Trial Court improperly imposed the influence of the bench in supporting the facts submitted by the State.

5) Ms. Smart was denied due process when the Trial Court imposed a mandatory sentence on a charge that did not carry a mandatory sentence. The State chose to charge Ms. Smart with *accomplice to* first-degree murder and with the substantive crime of first-degree murder. These two counts are statutorily distinct and only the latter carries a mandatory sentence.

Ms. Smart petitions this Court to reverse all findings of guilt and to grant a new trial on all charges, or in the alternative, for a new sentencing hearing.

JURISDICTION

New Hampshire's refined habeas corpus statutory scheme in conjunction with the Interstate Corrections Compact, as statutorily adopted by both New Hampshire and New York, restrict Ms. Smart's ability to file this petition for habeas corpus relief to the county of her detention in New York. Specifically, New Hampshire commands a petition be filed in the county of current imprisonment and the Interstate Corrections Compact provides that New York may be assigned such jurisdiction. Inasmuch, New Hampshire's self-exclusion renders New York the apt forum that can provide Ms. Smart her due relief.

Though uncommon, New Hampshire maintains the right to deputize New York, and New York has every right to assume agency. States are afforded immense freedom in where they place their prisoners and how they administer their correctional systems. *See Meachum v. Fano,* 427 U.S. 215, 225 (1976); *Montanye v. Haymes,* 427 U.S. 236, 242–43 (1976).

Nonetheless, this appears to be an issue of first impression. Therefore, Ms. Smart jointly files this petition in New Hampshire and in New York to involve all interested parties and relevant venues in determining jurisdiction, and ultimately, to abate delay in having this petition considered on its merits.

A. New Hampshire's Revised Statute § 534:3 confers jurisdiction over a petition for habeas corpus strictly onto "the superior court in the county in which the person is imprisoned."

New Hampshire enacted the common law remedy of habeas corpus into the statutory scheme currently found in chapter 534 of the Revised Statutes of the State of New Hampshire. *See* N.H. Rev. Stat. § 534.1 *et. seq.* Therein, New Hampshire's Revised Statute ("N.H. Rev. Stat.") § 534:1 establishes that: "A person imprisoned or otherwise restrained of his personal liberty, by an officer or other person, except in the cases mentioned in the following section, is entitled of right to a writ of habeas corpus according to the provisions of this chapter." The remainder of chapter 534 commands how this right shall be procedurally afforded.

Critical to the case *sub judice* is N.H. Rev. Stat. § 534:3, which provides:

> Application for the writ shall be made to the superior court in the county in which the person is imprisoned, by a person so imprisoned or restrained, or by some person in his behalf.

(underline added). The language of N.H. Rev. Stat. § 534:3 is not happenstance. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001) ("We begin, as always, with the language of the statute."). This statute has been subjected to the microscope and amended into its current iteration. The

statute faced scrutiny during New Hampshire's 1994 legislative session. The modifying bill was titled "CRIMINAL PROCEDURE—HABEAS CORPUS—FILING REQUIREMENTS" and was self-described as "AN ACT requiring a writ of habeas corpus to be filed in the superior court of the county in which the person is incarcerated." CRIMINAL PROCEDURE—HABEAS CORPUS—FILING REQUIREMENTS, 1994 New Hampshire Laws Ch. 56 (H.B. 1176). The bill fulfilled its claimed intent. The language of N.H. Rev. Stat. 534:3 before the change read:

> Application for the writ may be made to the superior court in term time, in any county, or to a justice thereof at any time, by a person so imprisoned or restrained, or by some person in his behalf.

Id.[1] The amendment was approved on May 6, 1994, and became effective on January 1, 1995. *Id.* Henceforth, New Hampshire has inferred contentment with the statute for thirty years, leaving it to read as it currently does with no later alterations. *Id.* New Hampshire, in turn, has restricted where a petition for habeas corpus relief can be filed with an unambiguous *shall* in the former place of an affable *may*.

Notably, New Hampshire had already adopted the Interstate Corrections Compact prior to amending N.H. Rev. Stat. 534:3; New Hampshire had real-time prudence into the jurisdictional imposition it was creating. Ms. Smart had already been transferred by New Hampshire to New York under the Compact's terms before New Hampshire amended N.H. Rev. Stat. 534:3, this was not some conceptual quagmire unforeseeable at the time. Instead, New

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[1] The bill proposed changes pursuant to the following format, where "[a]dditions are indicated by <<+ Text +>>; [and] deletions by <<- Text ->>," the alterations were specifically proposed as:

> 534:3 Application. Application for the writ <<-may->> <<+shall+>> be made to the superior court in <<-term time, in any->> <<+the+>> county<<-, or to a justice thereof at any time->> <<+in which the person is imprisoned+>>, by a person so imprisoned or restrained, or by some person in his behalf.

CRIMINAL PROCEDURE—HABEAS CORPUS—FILING REQUIREMENTS, 1994 New Hampshire Laws Ch. 56 (H.B. 1176).

Hampshire actively conferred jurisdiction over Ms. Smart. Certainly, New Hampshire would not (or could not) limit jurisdiction to deny transferred prisoners access to a habeas filing; due process sirens would promptly subdue such an offense. *See* N.H. Rev. Stat. § 622-B:2 Art. IV(e) ("The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state."); N.H. Rev. Stat. § 622-B:2 Art. IV(h) ("Any inmate confined pursuant to [the ICC] shall have any and all rights to participate in and derive any benefits . . . of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state."). Therefore, New Hampshire had requisite notice, if not awareness, of the full impact of its statutory change. Moreover, conferring jurisdiction is not an incomprehensible notion; New Hampshire has long rationalized the concept of conveyed sovereignty. The Supreme Court of New Hampshire has endorsed New Hampshire's ability to assign sovereignty to partner states through interstate compacts since at least 1964. *See Dresden School District v. Hanover School District*, 105 N.H. 286 (1964) (holding the New Hampshire Constitution allowed for control of some state operations to be conveyed onto a quorum that included out-of-state voters).

To quell any uncertainty, the Supreme Court of New Hampshire has since held the filing constraint ascribed in the statute to be a strict jurisdictional bar. *State v. Jaskolka*, 172 N.H. 468, 473 (2019). In *State v. Jaskolka*, James Jaskolka filed to vacate a conviction and obtain a new trial, which the court interpreted as a petition for habeas corpus relief. *Id.* Fatally, Jaskolka filed the request in the circuit court after the 1994 amendment. The Court explained that prior to the amendment, the statute "stated merely that a petition for a writ of habeas corpus 'may' be made to the superior court" but "the legislature amended the statute to provide that such petitions

'shall' be made to the superior court." *Id.* at 472. "[T]he absence of any statutory authority to consider the extraordinary relief sought by the defendant here deprived the circuit court of jurisdiction to consider the merits of his motion." *Id.* at 473.

The Supreme Court of New Hampshire issued a cautionary admonition in its holding. The parties had not addressed the issue of jurisdiction on appeal. Nonetheless, the Court held that "subject matter jurisdiction may be raised at any time, including on appeal, by the parties, or by this court sua sponte." *Id.* at 471. The Court took such an opportunity sua sponte; Jaskolka's fight for relief was dismissed without regard to the issues raised.

Other states with proximity-based jurisdiction statutes have set a similar standard in denying habeas relief due to improper jurisdiction. For instance, in *Sabisch v. Moyer*, Maryland reviewed how "[u]nder the plain language of [Maryland Code, Courts and Judicial Proceedings] § 3-702(a), to be eligible to petition for a writ of habeas corpus, a person must be 'committed, detained, confined, or restrained from his [or her] lawful liberty within the State[,]' which may involve physical custody or other significant restrictions of a person's lawful liberty within the State." 466 Md. 327, 378 (2019). This obstructed a state court's ability to hear a petition for a writ of habeas corpus filed by a petitioner on unsupervised probation and living in Michigan, as they were "not committed, detained, confined, or restrained in Maryland[.]" *Id.* Thus, the petitioner was "not eligible to seek habeas corpus relief in Maryland." *Id.* at 379.

Similarly, in *Hughes v. State*, Georgia held jurisdictional statutes to strictly apply. 291 Ga. 65 (2012). The petitioner was "serving a 13-year federal sentence at the United States Penitentiary in [Fulton County]. His sentence [was] being enhanced by a State drug-related felony conviction and various misdemeanor convictions that had been previously imposed [] in Cobb County." *Id.* at 65-66. The petitioner "filed in the Superior Court of Cobb County a

petition for habeas corpus relief challenging his Cobb County convictions." *Id.* at 66. The relevant application statute, Georgia Code § 9-14-43, provided, in part, that: "A petition brought under this article must be filed in the superior court of the county in which the petitioner is being detained. The superior courts of such counties shall have exclusive jurisdiction of habeas corpus actions arising under this article." However, "[t]he statute was amended in 2004, and the amendment added the following sentence: If the petitioner is not in custody or *is being detained under the authority of the United States,* any of the several states other than Georgia, or any foreign state, *the petition must be filed in the superior court of the county in which the conviction and sentence which is being challenged was imposed." Hughes*, 291 Ga. at 66 (emphasis supplied by *Hughes*). The trial court initially rejected the petition based on the original language of the law, and disregarding the mandatory language of the amendment, and found that jurisdiction existed instead in the county of incarceration. The Appellate Court reversed, stating that "because Hughes [was] a federal prisoner who [was] attempting to challenge his prior Cobb County convictions, venue for his habeas action was proper in Cobb County and not Fulton County. The trial court therefore erred by concluding that Fulton County was the proper venue for Hughes' habeas action." *Id.*

B. The Interstate Corrections Compact allows New Hampshire to confer jurisdiction and New York to accept jurisdiction.

New Hampshire has contracted Ms. Smart's sentence of life without the possibility of parole to be administered by New York. Ms. Smart was transferred to New York after the first two and a half years of her incarceration. At this point, Ms. Smart has been incarcerated in New York for over thirty years:

> Ms. Smart was relocated to New York pursuant to the Interstate Corrections Compact (the "ICC"). The ICC establishes a framework for the reciprocal use of prison space by states to effect economies in capital expenditures and operational

> expenses. New York and New Hampshire have adopted the ICC. *See* N.H. Rev. Stat. Ann. § 622–B:2 (1997); N.Y. Correct. Law §§ 100–109 (1987). Pursuant to the ICC, these two states have executed a contract authorizing the incarceration of one state's prisoners in the other's prisons.

Smart v. Goord, 21 F. Supp. 2d 309, 313 (S.D.N.Y. 1998).

The ICC establishes the rights and duties of the respective states sending and receiving prisoners. Generally, the receiving state acts as an "agent" for the sending state. N.H. Rev. Stat. § 622–B:2 Art. IV(a); N.Y. Correct. Law § 104(a). The rights of transferred prisoners are also clearly established; transferred prisoners must be given all legal rights they would have received if confined in the sending state. N.H. Rev. Stat. § 622–B:2 Art. IV(e); N.Y. Correct. Law § 104(e). In the event of a conflict of law, the sending state's law governs. *Smart*, 21 F. Supp. 2d at 313.

Jurisdiction is addressed by multiple provisions. The ICC first provides that:

> Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

N.H. Rev. Stat. § 622-B:2 Art. IV(c); N.Y. Correct. Law § 104(c).

The ICC also provides in a separate provision:

> Any hearing or hearings to which an incarcerated individual confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, <u>or of the receiving state if authorized by the sending state</u>. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. <u>In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state</u> and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the

> official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state.

N.H. Rev. Stat. § 622–B:2 Art. IV(f); N.Y. Correct. Law § 104(f).

It is well settled that "'[w]here [a legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 533 U.S. 167, 173 (2001). A distinction between the two provisions discussing jurisdiction is evident. The former provision, clause (c) in the state's respective statutes, speaks specifically to control over placement of an incarcerated individual; in other words, physical control. The sending state maintains decision-making power over whether an incarcerated individual will remain incarcerated in a receiving state, be moved to another receiving state, or be returned to the sending state. The latter provision, clause (f) in the state's respective statutes, speaks more directly to authority over administering hearings. Up front, the clause states that a hearing "may be had before the appropriate authorities of the sending state." This statement presupposes that appropriate authorities exist in the sending state; discord arises when the sending state precluded itself from maintaining appropriate authorities. Providentially, the clause continues that hearings may be heard by the receiving state if authorized by the sending state.

A receiving state conducting a hearing on behalf of a sending state accords a traditional agency relationship where an agent is authorized to act in a principal's capacity to fulfill an accepted duty. *Case v. St. Mary's Bank*, 164 N.H. 649, 657 (2013) (New Hampshire has assigned three elements establishing agency: "(1) authorization from the principal that the agent shall act for him or her; (2) the agent's consent to so act; and (3) the understanding that the principal is to

exert some control over the agent's actions."). In the provision of any such hearing, the states have stipulated that the receiving state shall apply the law of the sending state when conducting a hearing on behalf of the sending state. N.H. Rev. Stat. § 622–B:2 Art. IV(a); N.Y. Correct. Law § 104(a) ("[T]he governing law shall be that of the sending state[.]").

In the instant case, the "the receiving state [has been] authorized by the sending state" to administer a hearing "to which an incarcerated individual confined pursuant to this compact may be entitled by the laws of the sending state[.]" *See* N.H. Rev. Stat. § 622–B:2 Art. IV(f); N.Y. Correct. Law § 104(f). As discussed above, *supra* Section A, New Hampshire's habeas law has restricted an incarcerated individual's right to file a petition for a writ of habeas corpus "to the superior court in the county in which the person is imprisoned[.]" *See* N.H. Rev. Stat. § 534:3. New York enacted the ICC and, therein, recognized its duty to facilitate the rights of the prisoners it accepts, with specific mention of hearings to which a prisoner is entitled by the laws of a sending state. Unambiguously, Ms. Smart is entitled to a hearing on this petition, and New Hampshire authorized the appropriate authorities in the county of her imprisonment in New York to provide it. Statutorily, nowhere other than New York can provide Ms. Smart relief.

C. Federal Habeas Corpus filing requirements similarly restrict jurisdiction to the district of current custody.

Ms. Smart faced a similar query when filing her federal petition for habeas corpus relief in 1997. *Smart,* 21 F. Supp. 2d 309. Ms. Smart initially filed in the District Court for the Southern District of New York due to her being incarcerated in New York. A New York state corrections official who was named as the respondent moved to dismiss the petition for improper

venue or, in the alternative, to transfer venue to New Hampshire. Unfortunately, the case lends little guidance as the filing was empowered by and centered different laws.[2]

While the federal habeas and the state habeas both share a common law origin, they have been statutorily curated by the independent sovereigns. The jurisdictional language empowering the federal habeas is far more flexible. The operative federal language is found in section 2241(a) of Title 28 U.S.C. and provides that "[w]rits of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions." Prior to Ms. Smart's 1997 filing, the Supreme Court of the United States interpreted the phrase "within their respective jurisdictions" as requiring "nothing more than that the court issuing the writ have jurisdiction over the custodian." *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 495 (1973). Therefore, a federal habeas corpus petition could be brought in any court with jurisdiction over the prisoner or their custodian. *Smart*, 21 F. Supp. 2d at 314.

Ultimately, the Court held that "either the appropriate New Hampshire official or the agent-custodian in New York would be a proper respondent[.]" *Id.* at 314. The Court concurrently recognized that in federal civil cases, venue may be changed pursuant to 28 U.S.C. § 1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Habeas corpus cases are civil in nature and are embraced by the term "any civil action." *Id.* at 313 (citing *U.S. ex rel. Meadows v. State of New York,* 426 F.2d 1176, 1183 n. 9 (2d Cir.1970)). Thus, § 1404(a) was applicable to Ms. Smart's habeas corpus proceedings and the Court conducted an analysis of whether "a change of venue would serve the

[2] Even if the laws were the same, "the doctrine of *res judicata* does not apply to *habeas corpus* proceedings." *Fitzgibbons v. Hancock*, 97 N.H. 162, 166 (1951).

interests of convenience and justice." *Id.* at 315. The Court held that a transfer of venues would be in the interest of justice so the Court granted respondent's motion requesting as much. *Id.* at 318.

If Ms. Smart's federal habeas case had any influence on the present matter, *arguendo*, the holding on jurisdiction has since been abrogated by the seminal Supreme Court case of *Rumsfeld v. Padilla*. 542 U.S. 426 (2004); *Trump v. J. G. G.*, 604 U.S. 670, 672 (2025) (Affirming *Rumsfeld v. Padilla*). In that case, Jose Padilla filed a petition for writ of habeas corpus challenging his detention as an enemy combatant pursuant to an order from the President. Padilla was apprehended in Chicago, taken to New York, and then was moved to a Navy brig in Charleston, South Carolina. Padilla filed a federal habeas petition in the District Court for the Southern District of New York and named the President, Secretary of Defense, and the commander of the naval brig as respondents. The Supreme Court was asked to confront jurisdiction under 28 U.S.C. § 2241.

The Court held that the commander of the naval brig where Padilla was detained was the only proper respondent and that the District Court for the Southern District of New York did not have jurisdiction over the commander. *Id.* Padilla could not "name someone else just because Padilla's physical confinement stems from a military order by the President. Identification of the party exercising legal control over the detainee only comes into play when there is no immediate physical custodian." *Id.* at 427. Moreover, after examining *Braden, supra,* the Court held that the language in 28 U.S.C.A. § 2241 "limiting district courts to granting habeas relief 'within their respective jurisdictions' require[d] that the court issuing the writ have jurisdiction over the custodian." *Id.* at 428 (internal citation omitted). "Congress added the 'respective jurisdictions' clause to prevent judges anywhere from issuing the Great Writ on behalf of applicants far

distantly removed." *Id.* The Court therefore upheld the "immediate custodian rule" wherein "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* at 427.

The immediate custodian rule, as imposed by *Padilla*, has repeatedly been recognized in the First and Second Circuits. *See e.g. Marcano v. Newman*, 789 F. Supp. 3d 239 (E.D.N.Y. 2025) (Eastern District of New York was not proper venue for federal inmate's habeas petition where inmate was being held in facility in Western District of Pennsylvania at the time he filed petition); *Cockerham v. Boncher*, 125 F.4th 11, 22 fn6 (1st Cir. 2024) ("Nor does the government appear to contest that a § 2241 petition, if properly brought, must be brought in the district in which a person is confined, regardless of the authority that ordered the confinement."); *In re Joshua Adam Schulte Metro. Det. Ctr. Litig.*, No. 22-CV-5841(EK)(RML), 2024 WL 4043744, at *4 (E.D.N.Y. Sept. 4, 2024) ("[The Eastern District of New York] is the incorrect forum for any claim regarding conditions of confinement in Colorado."); *Thompson v. Barr*, 959 F.3d 476, 491 (1st Cir. 2020) ("Therefore, we construe Thompson's emergency motion for bail as a petition for a writ of habeas corpus and transfer it to the Northern District of Alabama, the district where Thompson remains confined."); *United States v. Eisenberg*, No. 16-CR-00157-LM, 2020 WL 1308194, at *2 (D.N.H. Mar. 19, 2020) (Petitioner's § 2241 petition was improperly filed in the District of New Hampshire when Petitioner was incarcerated in Indiana); *United States v. Lopez*, No. 12-CR-358 (KAM), 2020 WL 2063420, at *2 (E.D.N.Y. Apr. 29, 2020) (Petition was improperly filed in the Eastern District of New York when Petitioner was incarcerated in West Virginia).

Furthermore, jurisdiction has been held to be bound to the date of filing; a subsequent move of a prisoner will not displace that jurisdiction. In other words, if a court had proper jurisdiction at

the time of filing under *Padilla*, and under the immediate custodian rule, that court retains jurisdiction even upon a transfer of the petitioner back to the sending state or to another district. *Cummings v. Fed. Corr. Inst., Berlin*, No. 2024 DNH 023, 2024 WL 1256068, at *4 (D.N.H. Mar. 25, 2024) ("All agree that a district court need not dismiss a section 2241 habeas petition upon the petitioner's transfer, so long as jurisdiction properly attached in the first instance . . ."); *Deras Lopez v. FCI Berlin, Warden*, No. 23-CV-552-LM-TSM, 2024 WL 4217375, at *2 (D.N.H. July 30, 2024), *report and recommendation adopted sub nom. Deras Lopez v. FCI Berlin*, No. 23-CV-552-LM-TSM, 2024 WL 4216599 (D.N.H. Sept. 17, 2024) ("[J]udges in the Districts of New Hampshire [] have found that district courts are not divested of jurisdiction despite a petitioner's transfer to another federal facility [] if jurisdiction properly attached when the inmate filed his § 2241 petition.").

D. Relevant law thus dictates that Ms. Smart's habeas petition be heard in New York applying the laws of New Hampshire.

In summary, the plain language of New Hampshire's Revised Statute § 534:3 unambiguously confers jurisdiction over a petition for habeas corpus strictly onto "the superior court in the county in which the person is imprisoned" which, in the instant case, is the Supreme Court of Westchester County. This interpretation of New Hampshire's statute is supported by the terms of the Interstate Corrections Compact, of which both New Hampshire and New York are signatories, by which "the receiving state"—New York—"[has been] authorized by the sending state"—New Hampshire—to administer a hearing "to which an incarcerated individual confined pursuant to this compact may be entitled by the laws of the sending state"—namely, a hearing on Ms. Smart's habeas petition. *See* N.H. Rev. Stat. § 622–B:2 Art. IV(f); N.Y. Correct. Law § 104(f). Furthermore, this understanding aligns with the "immediate custodian rule" applied in federal courts wherein the proper respondent is "the warden of the facility where the prisoner is

being held." *Padilla*, 542 U.S. at 427. Therefore, Ms. Smart asserts that her habeas petition is properly before the Supreme Court of Westchester County, New York. In the alternative, should this court find such jurisdiction improper, Ms. Smart maintains and exerts her right to seek relief in the Superior Court for Merrimack County, New Hampshire.

PROCEDURAL HISTORY

Ms. Smart was indicted by a Rockingham County Grand Jury on August 14, 1990, on the charges of witness tampering, conspiracy to commit murder, and accomplice to first-degree murder. Ms. Smart was not charged with first-degree murder. Three motions to change venue and a motion to suppress a statement were made prior to trial, all of which were denied. A subsequent motion to reconsider venue and a motion to sequester the jury were likewise denied. Voir dire began on February 19, 1991, and a fourteen-day trial began on March 4, 1991. Ms. Smart renewed her motion to sequester on the first day of jury deliberation but was again denied. The Trial Court, however, belatedly sequestered the jury on the second day of jury deliberation. On March 22, 1991, the jury returned guilty verdicts on all three counts. The Trial Court imposed a three-and-a-half to seven year sentence on the witness tampering count, a seven-and-a-half to fifteen year sentence on the conspiracy to commit murder count, and declared that the Court was mandated to impose a life without the possibility of parole sentence on the accomplice to first-degree murder count.

Ms. Smart filed four post-trial motions for relief in the New Hampshire Superior Court which were heard on August 19, 1991, and August 26, 1991. These four motions were a motion for new trial based on juror misconduct, a motion for new trial based on failure of due process, a motion for individual voir dire of the jurors, and a motion for new trial based on exculpatory evidence. The Superior Court denied all post-trial motions.

Ms. Smart timely pursued a direct appeal of her convictions to the New Hampshire Supreme Court. The New Hampshire Supreme Court affirmed the convictions on February 26, 1993. A motion for reconsideration was denied on April 29, 1993. A petition for certiorari to the Supreme Court of the United States was similarly denied.

Four years later, Ms. Smart filed a petition for habeas corpus before the New Hampshire Superior Court. This filing went before the same judge that oversaw the trial. The Court found no error in its own actions and denied all claims made on June 13, 1997. The New Hampshire Supreme Court summarily affirmed.

Ms. Smart then filed a timely petition for federal habeas relief. The petition was initially filed in the United States District Court for the Southern District of New York, where Ms. Smart was and is currently incarcerated pursuant to an agreement between New Hampshire and New York. The case was transferred to the United States District Court for the District of New Hampshire, as it was held that while Ms. Smart was incarcerated in New York Ms. Smart was still in the custody of New Hampshire. The petition for federal habeas relief was denied on September 20, 2002. A petition for certiorari to the Supreme Court of the United States was denied.

Consequently, Ms. Smart is currently incarcerated at Bedford Hills Correctional Facility, 247 Harris Road, Bedford Hills, New York, 10507, as inmate number 93G0356, serving life without the possibility of parole.

STATEMENT OF FACTS

The facts surrounding this case are quite extensive and a detailed summary is not possible. For purposes of providing the necessary facts for an understanding of the relevant issues, in a neutral manner, Ms. Smart recites the statement of facts as summarized by the

Supreme Court of New Hampshire in Ms. Smart's direct appeal. Ms. Smart accepts this summary, not as a concession, but as the facts to which prejudice is relevant in the instant review. Inasmuch, on appeal, the Court provided:

> The defendant, Pamela Smart, upon entering her Derry home on the night of May 1, 1990, observed the body of her husband, apparently the victim of a homicide. The police arrived on the scene shortly thereafter and immediately commenced a murder investigation, culminating in the defendant's arrest.
>
> After a jury trial in Superior Court (*Gray,* J.), the defendant was convicted of accomplice to first degree murder, conspiracy to commit murder, and tampering with a witness. . . .
>
> Viewing the evidence presented at trial in the light most favorable to the State, the jury was warranted in finding the facts as set forth in this opinion. In the fall of 1989, the twenty-two-year-old married defendant was the director of media services for the school district that included Winnacunnet High School in Hampton. She met and befriended William Flynn and Cecelia Pierce, two fifteen-year-old high school students from Seabrook, and they and other students worked together after school hours to produce an orange juice commercial for a contest. Eventually, in February or March of 1990, the defendant and Flynn became sexually involved.
>
> Shortly after their affair began, the defendant told Flynn that in order for them to continue their relationship they would have to kill her husband, Gregory, a twenty-four-year-old insurance salesman to whom the defendant had been married less than a year. Eventually the defendant and Flynn together planned that Flynn would commit the murder with the help of his friends, and would stage the killing as if committed in the course of a burglary of the defendant's home. According to the plan devised by the defendant, she would leave open the bulkhead door to the basement of her home to provide entry for Flynn and the others before Gregory returned home. The perpetrators were to park their car in a shopping center behind the residence and change into dark clothes before approaching the apartment. The defendant advised Flynn that he and his accomplices should wear gloves to avoid leaving fingerprints and should ransack the apartment, taking away whatever they wanted as compensation. Pursuant to the defendant's plan, her husband was to be killed with a gun upon entering his home as if he had surprised burglars.
>
> Flynn discussed the plan with his friends Pete Randall and Vance Lattime, Jr., also teenagers from Seabrook. With the aid of another boy, Raymond Fowler, Flynn set out from Hampton to commit the murder one night in April, using the defendant's car. When the two arrived at the defendant's apartment complex, however, they saw her husband's truck and abandoned the plan. After this unsuccessful attempt, Flynn recruited Randall and Lattime to help execute the plan. He told them that the defendant had agreed to pay them five hundred dollars each for committing the

murder. Lattime provided his father's .38 caliber revolver and his grandmother's car to transport the boys from Seabrook to the defendant's Derry apartment.

After school ended on May 1, 1990, the defendant drove Flynn, Randall and Lattime to pick up Lattime's grandmother's car in Massachusetts. The defendant discussed with them the various details of the murder plan, seeking advice on how to react when she returned home and discovered her husband murdered. Lattime and Randall returned to Seabrook in Lattime's grandmother's car. The defendant drove Flynn back to Seabrook to meet them and then went to Winnacunnet High School to attend a meeting scheduled for that evening.

Flynn, Randall and Lattime picked up Fowler and drove to the defendant's residence. While Lattime and Fowler waited with the car at the shopping center, Flynn and Randall entered the defendant's apartment through the unlocked bulkhead into the basement. After ransacking both the upstairs and downstairs of the apartment, they waited for Gregory to return home, with Flynn carrying the gun and Randall holding a knife he had taken from the kitchen. When Gregory came home, the boys forced him to his knees. While Randall with one hand held Gregory's head down and with the other hand held a knife in front of his face, Flynn shot him once in the head. Taking a pillowcase they had filled with jewelry, the boys fled to meet Fowler and Lattime, and the four drove back to Seabrook. The next day, Lattime replaced the gun among the rest of his father's collection.

On June 10, Ralph Welch, a friend of Lattime, told Lattime's parents that Randall and Lattime had admitted to him their participation in the murder. Lattime's parents took the gun to the Seabrook Police Department, accompanied by Welch, and subsequent ballistics tests confirmed that the gun had been used in the murder.

Worried because of Welch's intentions to go to the police, Randall and Lattime went to see Flynn and the defendant at the latter's new condominium in Hampton. After discussing the matter, the defendant drove them to Seabrook in an unsuccessful attempt to retrieve the gun. The next night, June 11, Lattime, Randall and Flynn were arrested.

Virtually daily before May 1, the defendant spoke with Cecelia Pierce, her student intern, about the plan to have Flynn murder her husband.
The night before the boys were arrested, the defendant told Pierce of Welch's intention to report the boys to the police, and said that if Lattime and Randall were smart they would blame Welch and Fowler for the murder.

Pierce was questioned several times about the murder by the Derry police and denied any knowledge of it. On June 14, after hearing rumors of the impending arrest of an unidentified girl alleged to be involved, Pierce again met with the Derry police and told them of the defendant's involvement in the murder. She agreed to a phone tap of a conversation with the defendant and to wearing a recording device,

> or body wire, to record face-to-face conversations with the defendant. [3] On July 12 and 13, with Pierce surreptitiously recording their conversation the defendant warned Pierce that if Pierce told the truth to the police, Pierce would be an accessory to murder, and urged her to continue to lie. The defendant acknowledged that the boys had carried out the murder to look like a burglary as she had planned, and stated that "nothing was going wrong" until the boys told Welch about it. She stated that, if arrested, she would admit to the affair with Flynn but deny any involvement in the murder plot. She expressed concern that Lattime, who merely waited in the car during the murder, would eventually confess and implicate the others. Nevertheless, the defendant told Pierce she was confident that, as between a sixteen-year-old "in the slammer facing the rest of his life" and herself, "with a professional reputation and a course that I teach," her denial would be believed. The defendant reminded Pierce that, by telling the truth, Pierce would be sending the defendant to prison for the rest of her life.
>
> On August 1, 1990, the defendant was arrested in connection with the murder of her husband. In January 1991, Flynn, Randall and Lattime agreed to plead guilty to reduced charges and subsequently testified for the State at the defendant's trial. Another witness, Cindy Butt, a co-worker of Pierce, testified that a month prior to the murder, Pierce told her that she had a "friend named Pam who wanted to find somebody to kill her husband." George Moses, a high school student, testified that he knew the defendant at Winnacunnet High School and met her again while visiting his mother in prison. According to Moses, the defendant asked him to lie for her by claiming that he had overheard Pierce admit to lying to the police about the defendant's involvement.
>
> The jury found the defendant guilty of all charges.

State v. Smart, 136 N.H. 639, 643-646 (1993).

Additional facts will be introduced where relevant.

RIGHTS IN FILING A PETITION FOR WRIT OF HABEAS CORPUS

A. Ms. Smart has a right to file a petition for habeas corpus.

"When court action results in the loss of a constitutionally protected liberty interest, it may be collaterally attacked by way of petition for writ of habeas corpus after the time for direct

[3] The Court gives a description of what was said on the body wire recording, however the facts the Court provides were not properly submitted as evidence; the distorted contents of the body wire recordings were never properly affirmed, as discussed *infra*. Nonetheless, the Appellate Court accepted what the State claimed was included on the tapes without proper support.

appeal has expired." *State v. Kinne*, 161 N.H. 41, 44 (2010) (quoting *Sleeper v. Warden, N.H. State Prison,* 155 N.H. 160, 162 (2007)).[4] Thus, a writ of habeas corpus "provides a remedy for constitutional errors . . . without limit of time." *Mallard v. Warden, New Hampshire State Prison*, 175 N.H. 565, 571 (2023) (internal citation omitted). The important principle is that a petitioner "establish a *harmful constitutional error*." *Humphrey v. Cunningham*, 133 N.H. 727, 732 (1990) (emphasis added).

In New Hampshire, a second habeas corpus petition is not procedurally barred if the issues raised in the second petition are different from the issues raised in the first. The matter of subsequent post-conviction filings was reviewed in *Mallard v. Warden, New Hampshire State Prison.* 175 N.H. at 571. Mallard filed a motion for a new trial and then a habeas petition, both asserting ineffective assistance of trial counsel. "[T]he issue in the motion for a new trial was whether Mallard's trial counsel was ineffective for failing to object to a curative instruction and for failing to cross-examine the victim about certain text messages, while the issue in his habeas petition [wa]s whether his trial counsel was ineffective for referring to him as a 'big, menacing black guy.'" *Id.* The Court held, against the State's protestation, that "even if Mallard's motion for a new trial were treated as the equivalent of a petition for a writ of habeas corpus, making this his second habeas petition, the second petition is not procedurally barred as the issues raised in the two pleadings are different." *Id.* The Court allowed Mallard to raise ineffective assistance of counsel in both petitions when the second filing raised a different question.

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[4] The right to file a petition for habeas corpus is statutorily provided as: "A person imprisoned or otherwise restrained of his personal liberty, by an officer or other person, except in the cases mentioned in the following section, is entitled of right to a writ of habeas corpus according to the provisions of this chapter." N.H. Rev. Stat. § 534:1.

The Court in *Mallard v. Warden, New Hampshire State Prison*, relied on the Court's previous holding in *Gobin v. Hancock*, that the doctrine of res judicata does not apply to habeas corpus proceedings. 96 N.H. 450, 451 (1951). The Petitioner in *Gobin* filed three other petitions for a writ of habeas corpus in the same matter. The Court made clear that a "refusal to grant a writ of *habeas corpus* or a dismissal of one is not *res judicata* on a subsequent application for such a writ." *Id.*

Both *Mallard* and *Gobin* referenced *Petition of Moebus*, which stated that "repeated applications for a writ of habeas corpus introducing no new facts material to the issue will ordinarily be summarily disposed of." 74 N.H. 213, 215 (1907). Both *Mallard* and *Gobin* then implemented the supposition that where a writ of habeas corpus does introduce new facts material to the issues in a case, a petition is properly brought before the court.

B. Claims of harmful constitutional error are appropriately brought in a habeas corpus proceeding.

This petition prudently raises facts and issues not previously raised.

i. Ineffective assistance of counsel claims are most appropriately brought in a habeas corpus proceeding.

New Hampshire has held, generally, that "ineffectiveness claims are best brought in a collateral attack." *Kinne*, 161 N.H. at 45. "[A]n allegation of ineffective assistance of counsel need not be raised on direct appeal and may be raised collaterally by filing a petition for a writ of habeas corpus after the time for a direct appeal has expired, if the petitioner can establish harmful constitutional error." *Mallard*, 175 N.H. at 571 (internal quotations omitted); *State v. Thompson*, 161 N.H. 507, 527–28 (2011) ("[U]nder no circumstance shall the failure to bring an ineffectiveness claim on direct appeal result in the procedural default of that claim."); *State v. Pepin,* 159 N.H. 269, 313 (2007) ("[C]laims of ineffective assistance of counsel based upon

alleged trial errors are not procedurally barred by the failure to raise those errors on direct appeal.").

a. A defendant is constitutionally entitled to the effective assistance of counsel.

A criminal defendant is entitled to effective assistance from counsel according to the Sixth Amendment to the United States' Constitution. *Strickland v. Washington,* 466 U.S. 668 (1984). In *Strickland v. Washington*, the Supreme Court of the United States created a two-prong test to resolve claims of ineffective assistance: "First, the defendant must show that counsel's performance was deficient. … Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. For the prejudice prong, unless in a situation where prejudice is presumed, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Holland v. Jackson,* 542 U.S. 649 (2004). Where both prongs of *Strickland* are met, "the Constitution requires that a criminal judgment be overturned." *Id.* at 684. Notably, the Constitutional right to effective assistance of counsel applies even when the proceeding in which counsel assists is statutorily created. *Evitts v. Lucey,* 469 U.S. 387, 401 (1985).

The New Hampshire State Constitution similarly and independently guarantees a criminal defendant reasonably competent assistance of counsel. *State v. Sharkey*, 155 N.H. 638, 640 (2007). Part I, Article 15 of the Constitution of New Hampshire has established a two-part test for determining whether an attorney has provided effective assistance, and this test mirrors the test applicable under the federal Constitution. Alternatively stating the federal test, New Hampshire has stated that a court must determine, using an objective standard, whether trial counsel acted with reasonable competence. *State v. Faragi*, 127 N.H. 1, 4 (1985). For a

defendant to successfully assert a claim that the defendant did not receive effective assistance of counsel, the defendant must show, first, that counsel's representation was constitutionally deficient, and second, that counsel's deficient performance prejudiced the outcome of the case. *Sharkey,* 155 N.H. at 640-41. To meet the second prong, a defendant must demonstrate prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different had competent legal representation been provided. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. *Id.*

b. A subsequent habeas corpus proceeding may raise claims of ineffective assistance by previous habeas counsel.

A conflict of interest may prevent counsel from properly bringing a meritorious ineffective assistance claim. Where trial counsel continues as counsel for a first petition for writ of habeas corpus, such a conflict is inherent: counsel would be forced to claim their own assistance was constitutionally ineffective. New Hampshire recognized such a conflict in *State v. Veale.* 154 N.H. 730 (2007), *abrogated on other grounds by Thompson*, 161 N.H. 507.

In *State v. Veale,* the Court established that the appellate defender and the office of the public defender constituted one firm and continued representation on an ineffective assistance claim caused an inherent issue. *Id.* at 732. "A public defender attempting to represent a client who has charged that public defender with ineffective assistance could, quite obviously, be representing a person with interests adverse to his own. The public defender, instead of advocating fully for the client, might be interested in protecting and preserving his own professional reputation." *Id.* at 734. The Court recognized that the public defender "would likely be hesitant to raise his own trial inadequacies on appeal, or even inform the client of any inadequacies." *Id.* (internal quotation omitted). Inasmuch, "that public defender would be forced to withdraw from any case alleging his ineffectiveness." *Id.* The Court provided, thereafter, that

if "a defendant has raised a claim of ineffective assistance against a public defender and the appellate defender has been appointed as appellate counsel, the appeal will, absent special conditions, be stayed" so that adjudication of the merits of the ineffective assistance claim can occur in the Superior Court, before resuming litigation of other issues brought on appeal. *Id.* at 736.

In extension, when counsel handling a habeas petition fails to bring a meritorious claim, that counsel becomes answerable for ineffective assistance of counsel, as habeas counsel, for not properly bringing a meritorious claim in a first petition. Effectively, these circumstances preserve an ineffective assistance of counsel claim for a second habeas petition when they are not properly raised in a first petition. Therefore, new ineffective assistance of counsel claims can be brought in a second petition if those particular claims of ineffective assistance of counsel were not raised in a prior petition. *See Mallard*, 175 N.H. 565 (Allowing a second habeas petition raising ineffective assistance of counsel claims that were not raised in an initial habeas); *see also Martinez v. Ryan*, 566 U.S. 1, 9 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

Ms. Smart first contends that her prior habeas corpus proceeding should be considered null due to the Superior Court for Rockingham County lacking jurisdiction to hear and rule on the matter. *See* N.H. Rev. Stat. § 534:3 (Providing jurisdiction strictly "to the superior court in the county in which the person is imprisoned."). In the event the hearing is recognized, it was improper for Trial Counsel to remain counsel on Ms. Smart's first petition for habeas corpus

relief due to the inherent conflict of interest.[5] The petition's failure to raise any contention of ineffective assistance of counsel affirms as much. Ms. Smart was specifically provided ineffective assistance of counsel during her prior petition due to the failure to include the available and meritorious claims brought in this petition.

ii. Fundamental fairness may overcome default.

A claim of error is not barred simply because the claim has not been previously raised. New Hampshire and federal courts have identified a multitude of standards that enable review of defaulted claims. Inasmuch, default does not oblige claim preclusion nor is it jurisdictional. *See Massaro v. United States*, 538 U.S. 500, 504 (2003) ("The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments."); *Thomas v. Arn,* 474 U.S. 140, 155 (1985) (The Supreme Court "emphasize[d] that, because the [*Walters*] rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice").

Fundamental fairness operates as the guiding principle in determining whether a claim appropriately should be reviewed. "While [] recogniz[ing] the value of stability in legal rules, [New Hampshire has] also acknowledged that the doctrine of stare decisis is not one to be either rigidly applied or blindly followed. The stability of the law does not require the continuance of recognized error." *State v. Ramos,* 149 N.H. 118, 127–28 (2003) (quotation omitted); *State v.*

[5] Ms. Smart similarly contends the legitimacy of her earlier habeas proceeding on due process grounds. The reasoning relied upon by the Court in *Veale* to disqualify trial counsel from continuing as habeas counsel extends to the trial judge continuing as the judge reviewing a habeas petition. There is an inherent disinclination to reverse one's own decision. In extension, a fresh and neutral review is difficult for a mind that has already resolved the problem on their own terms. However, aside from responding to allegations of default and waiver, Ms. Smart sojourns this point as moot as she is permitted a successive habeas filing.

Miller, 155 N.H. 246, 251 (2007); *see also* NH R CRIM Rule 37 ("When allowed by law and as justice may require, the court may waive the application of any rule.").

New Hampshire has turned towards federal cases for guidance in determining standards for review of defaulted post-conviction claims. *State v. Dukette*, 127 N.H. 540, 545 (1986) (The Court found "federal cases persuasive in deriving standards of materiality and prejudice that should govern post-conviction enforcement of a defendant's State due process right to produce all favorable proofs.").

Ms. Smart relies on the herein discussed protections, individually and jointly, to overcome any allegation of waiver for each claim brought in this petition.

a. A claim may be reviewed where there has been a fundamental miscarriage of justice, such as a substantive infringement of due process rights.

First and foremost, defaulted claims may be heard when a petitioner can "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also McQuiggin v. Perkins*, 569 U.S. 383, 393–94 (2013) ("A federal court may invoke the miscarriage of justice exception to justify consideration of claims defaulted in state court under state timeliness rules.").

The courts' enduring aspiration of fundamental fairness, underlying both the purpose of the habeas remedy and underlying the multitude of due process rights, makes due process claims unremittingly ripe for review in habeas proceedings. In other words, a court undertakes the same inquisition when reviewing whether there has been a "fundamental miscarriage of justice" and whether there has been an unacceptable infringement of due process rights. Where there exists the latter, there exists the former. *See State v. Graf*, 143 N.H. 294, 302 (1999) ("To assess [a] defendant's due process claims under the State Constitution, [the court] look[s] to the principles of fundamental fairness."); *State v. Symonds*, 131 N.H. 532, 534 (1989) ("[W]e look to

fundamental fairness to determine whether the defendant's due process rights were violated."); *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.").

Inasmuch, a superior court may hear due process claims raised in a petition for habeas corpus relief. *See State v. Kinne*, 161 N.H. 41, 46 (2010) (Kinne's argument that his guilty plea was not knowingly, intelligently, and voluntarily made implicate[d] the due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.").

Ultimately, it is "fundamental fairness which the adversary system aims to provide." *See State v. Adams*, 133 N.H. 818, 825 (1991). In the instant case, Ms. Smart's fundamental constitutional rights were violated when the State manufactured inaccurate transcripts which attributed non-existent incriminating statements to Ms. Smart, improperly and irreparably biasing the jury; when Trial Counsel admitted Ms. Smart's guilt to the jury without her knowledge or consent; when Ms. Smart was convicted based on external and inflammatory evidence; when Ms. Smart was convicted under erroneous jury instructions; and when Ms. Smart was unlawfully subjected to a mandatory sentence. The individual and cumulative effect of these errors amounted to a "miscarriage of justice" that demands to be remedied.

b. A claim may be heard where there exists cause and prejudice.

New Hampshire has also recognized a narrow exception to the procedural default rule employed by federal courts under which a habeas petitioner must demonstrate "cause and actual prejudice." *See Kinne*, 161 N.H. at 48 (declining to apply due to failure to argue) (quoting *Bousley v. United States,* 523 U.S. 614, 622 (1998)); *Sleeper v. Warden, New Hampshire State*

Prison, 155 N.H. 160, 163 (2007) (declining to apply due to failure to argue); *see also Coleman*, 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law[.]").

"'[C]ause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him[.]" *Coleman*, 501 U.S. at 753. In other words:

> [C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see or that some interference by officials, made compliance impracticable, would constitute cause under this standard.

Murray v. Carrier, 477 U.S. 478, 488 (1986) (internal citations omitted; cleaned up).

"Then, to establish prejudice, the prisoner must show not merely a substantial federal claim, such that the errors at ... trial created a *possibility* of prejudice, but rather that the constitutional violation worked to his *actual* and substantial disadvantage." *Shinn v. Ramirez*, 596 U.S. 366, 379-80 (2022) (internal citations omitted; cleaned up).

Here, the insidious nature of the State's manufactured evidence served to interfere with detection and the ability to substantively challenge impact. The inaccurate transcripts prompted such an expectation-induced bias that the nature of the error was self-concealing. Ms. Smart brought all relevant claims immediately upon obtaining scientific affirmation.

c. New science revealing inaccurate evidence enables review.

"Science does move on. So should the criminal justice system . . ." Wendy J. Koen & Michael Bowers, *Forensic Science Reform: Protecting the Innocent*, p. 149-50 (2017). The

Supreme Court of the United States has not shied away from the fact that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009). Consequently, "the legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." *Id.* (citing Metzger, Cheating the Constitution, 59 Vand. L.Rev. 475, 491 (2006)).

Due process necessitates some access for relief upon the excusably late discovery of false evidence. Often however, default and waiver render traditional statutory mechanisms unavailable. Accordingly, as default and waiver are excusable and not jurisdictional, courts accept the habeas petition as the most appropriate, if not only, opportunity to correct a conviction that was reached on inaccurate evidence. This relief amalgamates from a protracted line of case law. Ultimately, by the time of *Brady*[6] and *Giglio*[7], the Court underscored that due process requires that a conviction rest on truthful evidence. Allowing a conviction to stand that is based on inaccurate evidence, or undermined by new science, is violative of this standard. Therefore, default and waiver must take a back seat to fundamental fairness when new science undermines a conviction.

For instance, the Third Circuit, in *Lee v. Glunt*, discussed how a conviction based on now-invalidated scientific evidence violates a defendant's due process rights, regardless of whether one could have known at trial that the science was imperfect. 667 F.3d 397 (3d Cir. 2012). "Lee had been charged with first degree murder and arson after his twenty-year-old mentally ill daughter died in a cabin fire at a religious retreat in the Pocono Mountains. He was

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[6] *Brady v. Maryland,* 373 U.S. 83 (1963).
[7] *Giglio v. United States*, 405 U.S. 150 (1972).

convicted on both counts in a jury trial and sentenced to life imprisonment without the possibility of parole." *Id.* at 400. In a federal habeas petition, Lee argued "that newly discovered evidence proves that the fire expert testimony that the Government relied upon to secure his convictions was fundamentally unreliable and that therefore his continued incarceration violate[d] his due process rights." *Id.* "Lee argue[d] that his continued incarceration [was] unconstitutional because his convictions [were] predicated on what new scientific evidence has proven to be fundamentally unreliable expert testimony, in violation of due process." *Id.* at 403. The State responded, arguing that Lee had "merely offered different evidence that could solely be used for impeachment purposes," which did "not, on its own[,] establish a constitutional violation" or enable a claim of actual innocence. *Id.* at 400. The Third Circuit did not limit itself to these questions and instead allowed for a broader review.

Lee was able to establish that the admission of fire expert testimony during his trial "undermined the fundamental fairness of the entire trial," because "the probative value of [the fire expert] evidence, though relevant, [was] greatly outweighed by the prejudice to the accused from its admission." *Id.* at 403. Therein, the Court held that Lee "alleged sufficient facts to demonstrate that discovery [was] essential to the development of his federal claims." *Id.* at 407. Thereafter, the Court held that if "Lee's expert's independent analysis of the fire scene evidence—applying principles from new developments in fire science—shows that the fire expert testimony at Lee's trial was fundamentally unreliable, then Lee will be entitled to federal habeas relief on his due process claim." *Id.* at 407-08. Accordingly, the Circuit Court reversed the District Court, by finding an abuse of discretion, and remanded the case to enable further discovery. *Id.* at 408.

State courts have similarly imputed this due process standard. The Texas Court of Criminal Appeals has granted a new trial stating that regardless of whether the prosecutor was aware of the reliability of evidence, use of now-discredited evidence by the State is a due process violation. *Ex Parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012). Cathy Lee Henderson asserted in a writ of habeas corpus that she had newly available evidence that: (1) showed that she was innocent of capital murder; and (2) but for constitutional errors, she would not have been found guilty. *Id.* at 833. "The single contested issue in the 1995 capital-murder trial was whether [Cathy Lee Henderson] intended to kill [three-and-a-half-month-old] Brandon [Baugh] or whether she recklessly, negligently, or accidentally caused his death. In her statement, [Henderson] contended that Brandon's death was an accident-he accidentally fell from her arms onto a linoleum-covered concrete floor." *Id.* at 838.

In her habeas petition, Henderson "presented the testimony of six expert witnesses. Relying on new developments in the science of biomechanics, these witnesses testified that the type of injuries that Brandon Baugh suffered could have been caused by an accidental short fall onto concrete." *Id.* at 833. Among her experts was the original medical examiner who testified at Henderson's trial. The medical examiner opined at the time of trial that Henderson's claim that the "injuries resulted from an accidental fall was false and impossible," but now "testified at the [habeas] evidentiary hearing that he now believe[d] that there is no way to determine with a reasonable degree of medical certainty whether Brandon's injuries resulted from an intentional act of abuse or an accidental fall." *Id.* at 833-34. The State maintained its trial position and "presented five expert witnesses who testified that, notwithstanding the studies cited by [Henderson's] experts, it was very unlikely that Brandon's injuries were caused by an accidental short fall onto concrete." *Id.* at 834.

The Court determined that the "new scientific evidence [] constitute[d] a material exculpatory fact." *Id.* Henderson had "proven by clear and convincing evidence that no reasonable juror would have convicted her of capital murder in light of her new evidence." *Id.* The Court noted, however, that Henderson's "evidence [fell] short of satisfying the 'Herculean' burden imposed on applicants making a bare claim of actual innocence." *Id.* Nonetheless, the Court was "content to grant [Henderson] a new trial in this case—but on the basis of the inadvertent use of false evidence rather than actual innocence." *Id.* at 834 (Price, J., concurring).

> A bare claim of actual innocence and a claim that false evidence was inadvertently used to obtain a conviction both fall along a continuum of due process violations. At one end of the continuum is a claim that the State has knowingly used false or perjured testimony. Here, due process is primarily concerned with the fairness of the trial. Because of the State's complicity in undermining the integrity of the process, the standard for materiality is comparatively low: a reasonable possibility that the false or perjured testimony contributed to the conviction. At the other end of the continuum is a bare claim of actual innocence. An actual innocence claim does not depend upon a showing of misconduct of any kind on the part of the State. The due process concern is with the accuracy of the result. For that reason, an actual innocence claim will result in habeas corpus relief only upon a showing of extreme materiality: the applicant must be able to show by clear and convincing evidence that, given the newly available evidence of innocence in addition to the inculpatory evidence presented at trial, no reasonable juror would have convicted him. And, as Presiding Judge Keller has advocated, and I agree, "[t]he unknowing use of perjured or false testimony falls [or at least *should* fall] in between these endpoints, with a mid-level standard (or standards) of materiality." Thus, as the particular due process claim moves from the fairness end of the continuum toward the accuracy end, the standard for materiality should rise concomitantly, culminating in the Herculean burden associated with a bare claim of actual innocence.
>
> Though I do not think that the applicant has proven actual innocence in this case, I do believe that she has established that her conviction violated her right to due process. She has proven to my satisfaction that her conviction was based in critical part upon an opinion from the medical examiner that he has now disowned because it has been shown by subsequent scientific developments to be highly questionable.

Id. at 835.

Henderson established "a sufficiently accurate statement of the condition of current scientific/medical knowledge to justify the conclusion that the applicant's trial was rendered unfair—and quite possibly inaccurate[.]" *Id.* at 836. Henderson was not impeded by the fact that a prior petition failed to include a false evidence claim as she could not have known of her opportunity to raise a claim of inadvertent use of false evidence. *Id.*

The American Bar Association ("ABA") has also become current on the matter. The ABA created Rule 3.8(g) and (h) in order to recognize and define a prosecutor's ethical duties with evolving evidence after a conviction. Rule 3.8(g) requires prosecutors to disclose "new, credible, and material" evidence of innocence to "an appropriate court or authority," and if the case is in the prosecutor's jurisdiction, to disclose that evidence to the defendant *and* to investigate whether the defendant was wrongfully convicted. Model Rules of Prof'l Conduct, Rule 3.8(g) (Am. Bar Ass'n 2019). Rule 3.8(h) requires that, if there is clear and convincing evidence of innocence, "the prosecutor *shall* seek to remedy the conviction." *Id.* (emphasis added).

In the instant case, new scientific evidence reveals that the use of the inaccurate State-produced transcripts led to the wrongful conviction of Ms. Smart. As will be discussed further below, updated scientific analysis confirms that a person who listens to a degraded audio clip will be influenced by being given a transcript that purports to accurately document the audio, regardless of the actual accuracy of the transcript. In other words, when compared with listeners who are not given a transcript, listeners given a transcript hear what the transcript tells them they will hear and are more confident in their belief of what they heard. A study conducted in 2025, discussed further *infra* Section I.A, confirmed that this phenomenon likely severely impacted Ms. Smart's case by analyzing some of the most allegedly incriminating clips from the wiretap

tapes used at her trial. The results of this brand-new study directly call into question the reliability of Ms. Smart's conviction.

d. Adequately novel claims may be raised.

The Supreme Court of the United States has also recognized the ability to raise novel claims in a habeas petition, if it is reasonable that trial counsel did not raise a claim due to the claim being too novel at the time of trial, and the failure to raise the claim did not fall below professional norms of practice. Such cause can overcome default. The question becomes, was the claim "sufficiently novel at the time of the appeal from [a] conviction to excuse [an] attorney's failure to raise it at that time." *Reed v. Ross*, 468 U.S. 1, 16 (1984). The Supreme Court of the United States has held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.*

In *Reed v. Ross*, Ross was convicted of first-degree murder and sentenced to life imprisonment. 468 U.S. 1 (1984). He had claimed lack of malice and self-defense, and, in accordance with well-settled North Carolina law, the trial judge instructed the jury that Ross had the burden of proving each of these defenses. Ross did not challenge the constitutionality of this instruction. However, this instruction was later found violative of due process. *Id.* at 1. The Court held that "Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar. Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim." *Id.* at 15. The Supreme Court concluded that "Ross had

cause for failing to raise the issue at that time." *Id.* at 17 (acknowledging a retroactive constitutional principle that had not been previously recognized).

"[I]f we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 15–16.

> If novelty were never cause, counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable.

Id. at 16 (internal citation omitted).

Ms. Smart recognizes a potential inconsistency in both arguing counsel as ineffective for not making an argument that may also be considered adequately novel. In such instance, Ms. Smart first asserts counsel was ineffective. However, if the Court upon review of this petition, determines an identified error to not have been violative of professional norms at the time of trial, Ms. Smart asserts in the alternative that such argument must be viewed as novel.

e. A claim delayed by good faith may be reviewed.

When a defendant does not discover evidence or is not made aware of the materiality of claims in time to raise the claim in an earlier filing, or otherwise does not intentionally delay the filing of a claim for the purpose of prejudice, a defendant lacked the ability to raise the issue in a prior filing. Moreover, where there is a lack of bad faith, and when filing in good faith, and a defendant is serving the severe penalty of life in prison without the possibility of parole, it is in the interest of justice to review any prudently brought and meritorious claims.

This standard was recognized in *Humphrey v. Cunningham*. 133 N.H. 727, 733 (1990). The petitioner argued, in his habeas petition, that his counsel should have filed a motion to dismiss on speedy trial grounds. Petitioner's trial was delayed due to the State's failure to provide a purportedly exculpatory photo array. During habeas proceedings, the State argued that the petitioner could not argue, in his habeas petition, prejudice due to the loss of the photographic array because the "petitioner presented the issue of the loss of the photographic array in the notice of appeal filed during his direct appeal." *Id.* at 732. The Court disagreed with the State's characterization of the issues, specifying that the "issue previously appealed by the petitioner, as stated in the notice of appeal, was whether the Court erred by denying the oral motion to dismiss for failure to preserve potentially exculpatory evidence i.e., the first photographic array." *Id.* (internal citation removed; cleaned up). The Court agreed that such an issue had been waived by not properly briefing it on appeal. *Id.* The Court continued, however, that the prior direct appeal "never addressed the issue of prejudice to [petitioner] caused by the loss of the photographic array. This issue was not, therefore, fully litigated on appeal." *Id.* at 732-33.

The *Humphrey* Court held that petitioner "arguing that he was denied his right to a speedy trial" and that such delay prejudiced his defense did "not appear to be circumventing the appellate process." *Id.* at 733. As there was no indication of "procedural abuse by the petitioner," the Court held it appropriate to consider the issue as part of the petitioner's ineffective assistance of counsel claim. *Id.* (citing IV *Standards for Criminal Justice,* Standard 22–6.1(b) (Supp.1986) (stating that "[u]nless barred because of abuse of process, claims advanced in postconviction applications should be decided on their merits, even though they might have been, but were not, fully and finally litigated in the proceedings leading to judgments of conviction")).

In the instant case, the filing of this petition was delayed for reasons wholly outside of Ms. Smart's control. Specifically, Ms. Smart was unable to previously raise in full the issue of the State's use of misleading and prejudicial transcripts because prior to the 2025 Davidson study, discussed *infra* Section I.A, Ms. Smart lacked the requisite empirical evidence on which to base her claim. Ms. Smart acted without delay in filing this petition as soon as she received the results of the Davidson study and was able to support her claim, filing even before the study has been officially published.

iii. A claim against an illegal sentence is not subject to default.

An illegal sentence may be addressed in a petition for habeas corpus as New Hampshire has unmistakably stated "a petitioner can collaterally challenge an illegal sentence[.]" *Kinne*, 161 N.H. at 45; *Crosby v. Warden, N.H. State Prison,* 152 N.H. 44, 46 (2005) ("[A] defendant's failure to object to a sentence at the time of its imposition does not bar the later filing of an extraordinary writ."). Ms. Smart argues she was given an illegal sentence when the Trial Court imposed a mandatory sentence of life without the possibility for parole to a crime that did not carry a mandatory sentence; failure to exert discretion constitutes an abuse of discretion.

ARGUMENT

I. The State's use of inaccurate and misleading transcripts at Ms. Smart's trial violated Ms. Smart's due process rights and her Counsel's failure to object to the transcripts deprived Ms. Smart of her right to the effective assistance of counsel.

The State manufactured evidence that imposed a cognitive bias against Ms. Smart. Specifically, an unknown member of the Attorney General's Office listened to low-quality audio of body wire conversations of Ms. Smart and then created inaccurate and prejudicial transcripts of what the State wanted the jury to believe was said in those conversations. The State introduced the transcripts to the jury the first time the jury heard the low-quality audio of the

body wire conversations. The jury did not have a chance to listen to the tapes without the transcripts in front of them. This created an expectation-induced bias.

It was error for the State to present these inaccurate transcripts as this amounted to the State arguing facts not in evidence, arguing improper opinion testimony, and ultimately denying the jury's ability to remain impartial. It was also error by Trial Counsel to fail to object to the transcripts as inadmissible and overly prejudicial.

The presentation of the transcripts to the jury, including through deliberations, denied Ms. Smart a fair adversarial testing process and rendered her conviction unreliable. The prejudice to Ms. Smart is not mere speculation. Prejudice is supported by scientific studies, generally, and by a study examining Ms. Smart's case, specifically. Scientific consensus holds that transcription of degraded audio imposes a curse of knowledge in that transcripts cause a person to hear what they are told they will hear. In other words, transcripts are powerful instruments of expectation-induced biases in the interpretation of auditory evidence. Expectation-induced biases resulting from transcripts can also cause insensitivity to the level of degradation in auditory statements, which in turn diminishes the ability to question one's own confidence in accuracy. Not even a court is immune to the curse of knowledge and will become unable to fairly review the truthfulness of a transcript. A research team recently conducted a study to test the actual effect and impact of the transcripts on Ms. Smart's jury, and the creation of an expectation-induced bias was confirmed. Incontrovertibly, transcription is best suited for professional transcribers who lack prior knowledge of the case. No safeguards to protect from bias were implemented for Ms. Smart.

The science affirms prejudice already established by the court record. The record from the trial court makes clear that the jury heavily relied on the alleged content of the tapes and

without this content there is a reasonable probability that Ms. Smart would have been acquitted. A Juror recorded her thoughts at home on a tape recorder each evening of trial and these tape recordings were later played onto and made part of the record. The Juror was adamant that there was no way Ms. Smart could be convicted without the body wire tapes. And, during the trial, it was the transcripts that made the body wire tapes of any use to the jury, as much of the audio from the tapes was uninterpretable without aid from the transcripts. Regrettably, the Juror was struck with the curse of knowledge and heard what the Juror was instructed to hear based on the heavily biased transcripts.

A. The State provided inaccurate transcripts to the jury that created cognitive bias, causing the jury to hear incriminating statements that the audio did not reflect.

Research demonstrates that the use of transcripts accompanying degraded audio produces a cognitive bias in which the listener is influenced to hear what the transcripts tell them they will hear. A recent study applied this principle to excerpts from audio clips used in Ms. Smart's case. The study confirmed that participants who listened to the audio used in Ms. Smart's case were highly influenced by having an accompanying transcript purporting to decipher the audio. In contrast, participants who listened to the audio but were not given any accompanying text rated the audio as less clear and rarely reported hearing the same words as the transcript. These findings were consistent with a growing body of research confirming the prejudicial impact of inaccurate transcripts and highly suggest that the jury in Ms. Smart's case was likewise biased by the State's transcript.

i. Recent scientific review has revealed that the State unduly prejudiced Ms. Smart when the State provided inaccurate transcripts to the jury.

A recent institutional study was able to isolate the impact of the State's transcripts in Ms. Smart's trial. *See* Marion Davidson, Hannah Hinterleiter, Emily Eshleman, Jeff Kukucka, Rachel

S. Rubinstein, Rachael Still, Daja Sawyer, *The Impact of Transcripts on the Interpretation of Audio Evidence*, publication pending (hereinafter "Davidson Study"). Specifically, the study sought to understand how cognitive bias can distort judgment of forensic evidence and evaluate the practice of providing jurors with transcripts of auditory evidence. In so doing, the study rendered an unbiased review of how the transcripts affected people listening to the audio of the body wire conversations.

The study first revealed that the average juror would not have heard the words in the State's transcript if they were not given the State's transcript. However, being given a transcript will lead a listener to "hear" words they are shown. This is not because the transcript is accurate. Listeners in the study were equally likely to hear the words they were shown regardless of whether they were shown the transcript the State presented at trial or an alternative version that substituted out any inculpatory statements. Listeners who were not provided with a transcript, on the other hand, almost never heard the statements contained in either transcript. Furthermore, having either transcript proved to make a listener more confident in the accuracy of their perception. Inasmuch, the transcripts provided a false confidence that a listener's perception was correct. The results of the study indicate that the State was able to manufacture inculpatory statements, that were not otherwise perceivable, and convince the jurors they were accurately hearing these statements.

a. The research process.

The goal of the research study was to determine whether participants' perceptions of degraded audio recordings were altered by reading accompanying transcripts. In order to do so, the study sought participants that would mimic a conventional jury venire. The study restricted participants to U.S. citizens that were eighteen years old or older and had no felony convictions. The study further disallowed individuals with significant hearing issues. This rendered a total of

one-hundred and ninety-one (191) participants. The median age was forty-three years old and was split fifty-seven percent female and forty-three percent male. The participants were sixty-eight percent White, sixteen percent Black, and seven percent Asian.

The researchers randomly assembled the study participants into three groups. All three groups were played the same series of audio clips derived from the body wire tapes presented by the State at Ms. Smart's trial. The study utilized the actual audio recordings from Ms. Smart's trial, as provided by the Attorney General's Office. The study selected eleven excerpts from the audio that the State had transcribed as particularly inculpatory. The excerpts were each between four to ten words to accommodate, and not overburden, participants' working memory load.

Each group was subjected to different conditions while hearing the audio. One group was shown the language from the transcripts used during Ms. Smart's trial. Another group was shown an alternative transcript developed by the research team using non-inculpatory language. The last group was not shown any text at all and served as a control. The chart below compares the language from the original transcript and the alternative transcript provided to the different participant groups.

Text Presented

	Original Transcript	Alternative Transcript
1	I just wish you had never told me **about Greg**	I just wish you had never told me **it felt great**
2	you had your husband **killed**	you had your husband **collect**
3	at least you didn't **pay 'em**	at least you didn't **bail**
4	I'm gonna be **busted**	I'm gonna be **flustered**
5	this would have been the perfect **murder**	this would have been the perfect **lineup**
6	that's when I am going to get **arrested**	that's when I am going to get **elected**

7	I would have just **divorced him I guess**	I would just **avoid someone, yeah?**
8	you **killed** some guy	you **helped** that guy
9	he is going **to turn against them** and he is gonna blame me	he is going **to panic instead** and he is gonna blame me
10	that I **was having an affair** with Bill	that I **went back to the fair** with Bill
11	we can't talk about shit that **should** have happened	we can't talk about shit that **shouldn't** have happened

The participants were asked to write down what they heard, and also to report how many times they played the clip, to report the level of confidence they had in what they wrote, and to rank how clear they felt the audio was. Level of confidence and clarity was ranked on a scale from one to five.

The study adhered to all required and recommended protocols to maintain integrity. The study obtained proper internal review board approval before proceeding with human subjects. The study elected to preregister itself to ensure transparency and credibility, and to reduce potential bias.

b. The results of the study indicate that, compared to a control group who did not receive a transcript, participants who received a transcript were significantly more likely to hear what the transcript told them they would hear, be more confident in the accuracy of their responses, and perceive the audio clip as clearer.

The results of the research study supported three main conclusions. First, the presence of a transcript highly influenced participants' interpretations of all eleven audio clips. Specifically, participants were likely to hear what the transcript told them they would hear, regardless of whether they received the original transcript or the alternative transcript. Second, having either transcript made participants significantly more confident in the accuracy of their perceptions of the audio clips than participants who did not receive a transcript. Participants were equally

confident in having heard the transcript shown to them regardless of what transcript they were shown. Third, participants who received a transcript consistently perceived the audio clips as being clearer than participants who listened without a transcript.

First, the results established that transcript manipulation significantly affected participants' interpretations of all eleven audio clips. For eight of the eleven clips, a majority of participants reported hearing whichever words were suggested by the provided transcript; participants given no transcript rarely or never heard those words.

The following table quantifies what was heard by the participants. The Condition column specifies which text was displayed with the corresponding audio clip—the original transcript, the alternative transcript, or no transcript. Each row, moving left to right, displays what percentage of participants from each group reported that the audio matched either or neither of the transcripts.

For example, the first row of this chart represents what participants from the "original" group—who were given the original transcript used at Ms. Smart's trial—heard when they listened to the first audio clip. For instance, 74.6% of participants from the original group heard the words from the original transcript when given that transcript; "I just wish you had never told me about Greg." Next, 1.5% of participants who received the original transcript reported hearing the words from the alternative transcript; "I just wish you had never told me it felt great." And finally, 23.9% of the participants who were given the original transcript heard neither the original nor the alternate text.

Moving to the second row, the data displays what was heard by participants who were not given any transcript when listening to the first audio clip. None of these participants reported hearing what was written in the original transcript. Next, 6.6% of participants who did not

receive any transcript reported hearing what was written in the alternative transcript. Finally, an overwhelming 93.4% of the group reported hearing something different from both the original and the alternative transcript.

Likewise, the third row demonstrates what was heard by the group who was given the alternative transcript. None of these participants reported hearing what was written in the original transcript. Most, 77.8%, heard what was written in the alternative transcript that they were given. 22.2% reported hearing something different from either transcript.

		Interpretation		
Clip	**Condition**	**Original**	**Neither**	**Alternate**
1	Original	74.6	23.9	1.5
	Neither	-	93.4	6.6
	Alternate	-	22.2	77.8
2	Original	52.2	47.8	-
	Neither	-	100	-
	Alternate	1.6	52.4	46.0
3	Original	89.6	10.4	-
	Neither	1.6	98.4	-
	Alternate	4.8	38.1	57.1
4	Original	82.1	17.9	-
	Neither	3.3	96.7	-
	Alternate	23.8	27.0	49.2
5	Original	59.7	32.8	7.5
	Neither	-	86.9	13.1
	Alternate	-	15.9	84.1
6	Original	94.0	6.0	-
	Neither	34.4	63.9	1.6
	Alternate	14.3	6.3	79.4
7	Original	77.6	22.4	-
	Neither	-	100	-
	Alternate	-	17.5	82.5
	Original	80.6	13.4	6.0

8	Neither	-	78.7	21.3
	Alternate	1.6	4.8	93.7
9	Original	82.1	17.9	-
	Neither	8.2	91.8	-
	Alternate	4.8	27.0	68.3
10	Original	58.2	41.8	-
	Neither	-	100	-
	Alternate	-	42.9	57.1
11	Original	56.7	38.8	4.5
	Neither	4.9	93.4	1.6
	Alternate	17.5	38.1	44.4

Thus, the study found that the provision of a transcript strongly prejudiced jurors' interpretations of the low-quality audio recordings, such that jurors are inclined to "hear" whichever words the transcript implies were said. The study concluded that steps must be taken to maximize the fidelity of transcripts, if transcripts must be used, such as having transcriptions performed by independent experts to protect against adversarial allegiance. Transcribers should also be blind to extraneous information that could taint their judgment, and should document any such exposure along with their confidence in their interpretation.

Second, the presence of the transcripts affected participants' confidence in the accuracy of their perceptions. For all eleven clips, participants who received either the original transcript or the alternative transcript reported higher levels of confidence in their answers than participants who did not receive a transcript. Furthermore, in eight of these clips, participants had the same confidence in their accuracy regardless of whether they received the original transcript or the alternative transcript. These results establish that individuals who receive transcripts are not only more likely to hear what the transcript tells them they will hear, they will also be more confident that their perception is the right one.

The following table provides the average level of confidence that participants expressed they had in what they wrote down. Participants were asked to rate their confidence in their answers on a scale from 1 to 5, with 1 being not very confident and 5 being very confident.

For example, this chart establishes that, regarding the first audio clip, those participants exposed to the original transcript rated their confidence in the accuracy of their answer, on average, at a 3.05 out of 5. The participants shown the alternative text expressed a similar level of confidence, with a rating of 3.02 out of 5. The group that was not shown any text rated their confidence much lower than either group that received a transcript, on average, a 1.64 out of 5.

Confidence Ratings

Clip	Original	Neither	Alternate
1	3.05	1.64	3.02
2	2.34	1.54	2.27
3	3.76	1.67	2.83
4	3.60	1.90	3.10
5	3.12	1.72	3.73
6	4.24	.67	4.02
7	2.85	1.49	2.78
8	3.72	2.26	3.79
9	4.03	2.13	3.68
10	2.18	1.25	2.38
11	2.85	1.71	2.83

Next, participants who received either transcript consistently rated the clips as clearer than did participants not given any transcript. There was no statistical difference between how long any group spent on a particular excerpt.

This last chart demonstrates, on average, how clear participants from each group felt the audio was. Participants were asked to rate how clear they felt the audio was on a scale from 1 to

5, with 1 being not very clear and 5 being very clear. Again, using the first row as an example, when participants were played the first clip and shown the text from Ms. Smart's trial, participants rated the audio, on average, at 2.46 out of 5. When played the audio and shown the alternative text, participants rated the audio, on average, at 2.38 out of 5. Lastly, when played the audio and not shown any text, participants rated the audio, on average, at only 1.53 out of 5.

Clarity Ratings

Clip	Original	Neither	Alternate
1	2.46	1.53	2.38
2	1.88	1.43	1.98
3	3.09	1.46	2.27
4	2.82	1.66	2.29
5	2.66	1.79	3.08
6	3.42	2.41	3.57
7	2.37	1.43	2.21
8	2.79	1.85	2.79
9	3.37	2.15	3.19
10	1.54	1.18	1.65
11	2.16	1.48	2.10

In conclusion, the data establishes, by a statistically significant margin, that listeners are biased by receiving a transcript when deciphering an audio clip. When shown either transcript, participants heard whatever text they were shown. When not shown any text, participants rarely or never heard either of the texts. When shown a text, participants were equally confident that they heard whichever text was presented. Participants' confidence in what they heard dropped significantly when they were not presented with any text. Participants believed the audio to be much clearer when shown either text, no matter what text they were shown. When not shown any text, participants uniformly rated the audio as having lower clarity.

c. **The implications of the results of the study in Ms. Smart's case are outsized.**

In application to Ms. Smart's trial, the results of the research study indicate, with substantial confidence, that the State's manipulation of the conditions impacted how the audio was received by the jury. Specifically, by providing unsubstantiated transcripts for the jury to read as they listened to the audio, the State greatly and unconstitutionally skewed what jury members believed they heard from the audio. In other words, the incriminating assignments made by the transcripts were not founded in any base level of truth. Ultimately, the study revealed that the audio from the tapes is so degraded and of such low quality that what was said cannot be objectively and accurately determined. An ordinary person listening to the audio rarely or never heard the inculpatory statements or any other statements.

But, problematically, the ordinary juror is extremely susceptible to suggestion. When shown a transcript, the ordinary juror will hear that text. And being shown a transcript will make the ordinary juror more confident that they are hearing that text. Remarkably, that text can vary greatly and still have the same impact. Here, the State conjured into existence incriminating text. The State was able to make the jury believe they were hearing statements that did not objectively exist in the audio. Therein, the manipulative power wielded by the State was devastating.

ii. **The results of the Davidson Study are supported by prior research indicating that inaccurate transcripts create cognitive bias.**

The Davidson Study applied real-world facts, those of Ms. Smart's trial, to an already growing body of research. Prior research has found that, when unable to make clear and coherent observations, human beings naturally and subconsciously fill in gaps with context clues, pre-existing beliefs, and expectations. "Such biased (mis)interpretations occurring in living rooms are generally of little consequence, but when living rooms are replaced with courtrooms and purported evidence with actual evidence, the potential for injurious consequences is realized."

Nick D. Lange, Rick P. Thomas, Jason Dana, and Robyn M. Dawes, *Contextual Biases in the Interpretation of Auditory Evidence*, Law Hum. Behav. 178, 179 (2011) (hereinafter the "Lange Study"); Exhibit 1. Scientific studies have put this "gap-filling" phenomenon to the test and examined how "expectation causes the interpretation of speech to be transformed from objectively noisy and non-incriminating to subjectively interpretable and incriminating." *Id.* at 178. In one example, researchers documented this in the 2011 study *Contextual Biases in the Interpretation of Auditory Evidence. Id.*

The Lange Study investigated what types of contextual information are most biasing. The Lange Study conducted two experiments that explored "the ability of two types of contextual information, currently present in the legal system, to bias subjective interpretations of such evidence." *Id.* The experiments demonstrated that (1) "the general context of the legal system" and (2) "the presence of transcripts of the recorded speech are both able to bias interpretations of degraded & benign recordings into interpretable & incriminating." *Id.*

The Lange Study demonstrated "a curse of knowledge whereby people become miscalibrated to the true quality of degraded recordings when provided transcripts." *Id.* Ultimately:

> Degraded recordings of human speech are often difficult to understand. If the degradation is severe enough, people are rarely able to accurately interpret sentences and often cannot accurately interpret a single word. However, if those same people read a written transcript of the speech and then listen to the same clip, they experience "hearing" the content quite clearly. These "top-down" expectancy effects can be powerful; someone who already knows the content of a clip may find it difficult to tell whether it is degraded, even if it is of such poor quality that no one else can understand it.

Id.

> As demonstrated in the present investigations, both the general context of the legal system (Experiment 1) and the presence of transcripts (Experiment 2) can lead to systemic misinterpretations of auditory evidence. These top-down biases are

> powerful and their implications potentially severe as they can transform auditory evidence from objectively noisy, benign, and non-incriminating to subjectively interpretable, dubious, and incriminating. Moreover, people are relatively confident in their expectation-induced misinterpretations and seem unaware of the influence of top-down biases on their interpretation of auditory stimuli.

Id. at 185. "Although the subjective experience fostered by such conditions is an aiding of our perceptual abilities, the potential of having been unwittingly biased looms, as there is no guarantee that the presented text was veridical with the recorded event." *Id.* at 178.

a. Contextual biases will transform noise into incriminating statements.

The first experiment in the Lange Study assessed "the influence of a general legal domain contextual bias on the interpretation of auditory statements." *Id.* at 180. Specifically, the study asked whether "the mere suggestion that [] auditory statements were sampled from criminal suspects' interviews would lead to significantly more inaccurate, dubious misinterpretations of innocuous statements than in control conditions." *Id.*

The study included 145 participants with normal hearing split into three groups; one group was told they would hear audio from a criminal suspect's interview, one group was told they would hear audio from a job candidate's interview, and the third group was not provided context for the audio. *Id.* "The level of degradation of the auditory statements was manipulated at three levels: a highly degraded condition, a less degraded condition, and a control condition presenting the statements in their original undegraded form." *Id.* Each group listened to seventeen statements "of a benign nature" with "no intended coherent narrative running through the individual statements." *Id.* at 180. Each participant listened to each statement four times, writing what they heard after two times and rating their confidence in the completeness and accuracy of their writing after the fourth time. *Id.* at 180-81. The task was self-paced. *Id.* at 181.

In the end, the study found that bias was universally imposed when a statement was given the context of the criminal justice system. "The suspect bias resulted in greater misinterpretation for [almost] every statement." *Id.* at 181. "The results of Experiment 1 clearly demonstrate the ability of contextual information to cause misinterpretations of degraded auditory statements." *Id.* at 182.

The work in the Lange Study was built upon prior, similar research; namely R.M. Warren, *Perceptual restoration of missing speech sounds*, Science, 392 (1970) and A. Samuel, *Phoneme restoration*, Language and Cognitive Processes, 647 (1996). In Warren's demonstration, participants were orally presented sentences with one syllable replaced by either a white noise or a cough:

> When later queried, the participants were generally surprised to learn that the recordings were not complete and unaltered. More impressive, however, is that their interpretations of the missing phonemes were consistent with the context provided at the end of the sentence. For example, when "the **noise**eel was on the *axle*" was presented, participants reported hearing "the *wheel* was on the axle." However, when presented, "the **noise**eel was on the *orange*" they reported hearing "the *peel* was on the orange." Thus, the context supplied at the end of the sentence guided the interpretation of the missing phoneme via a retroactive top-down process. Similarly, the present research demonstrates context driven (mis)interpretations.

Lange Study at 179.

b. Inaccurate transcripts lead to an overestimation of what is audible.

The second experiment in the Lange Study specifically asked whether inaccurate transcripts that were read prior to hearing degraded recordings would lead to significantly greater dubious transcription than when a transcript was accurate or absent. *Id.* at 183.

> Once produced, a transcript purported to be an accurate account of the contents of the auditory evidence may accompany the evidentiary recordings as it navigates its way through the criminal or civil court systems. However, as the results of

> Experiment 1 suggest, there is no guarantee that the transcripts will be accurate as the original transcriber will have been susceptible to the contextual biases accompanying the original recording.

Id. at 183.

In Experiment 2, the researchers tested 79 participants with normal hearing. *Id.* Some participants were told they would listen to audio of a suspect in a criminal investigation and others were not provided any situational context. *Id.* "[H]alf of the participants [received] written transcripts prior to hearing the auditory statements." *Id.* at 184. "Errors in the provided transcripts were manipulated within subject, with half of the transcriptions embedded with suspects' interviews consistent errors and half being accurate innocuous transcriptions. The degradation level of the statements was manipulated with subject using degradation levels of 670, 800, and 1000 Hz. A degradation-absent condition was not included in Experiment 2 because undegraded statements presented with inaccurate transcripts would have made it obvious that some of the transcripts were errorful." *Id.*

Results of Experiment 2 "indicated a significant effect of transcription presence/absence for misinterpretations." *Id.* at 185. Participants with provided transcripts were more likely than participants without provided transcripts to misinterpret the audio across all levels of degradation. *Id.*, Figure 3. "Thus, the results demonstrate that transcripts can be powerful instruments of expectation-induced biases in the interpretation of auditory evidence." *Id.* at 185.

"[E]xpectation-induced biases resulting from transcripts [also] caused insensitivity to the level of degradation in auditory statements." *Id.* "Perhaps even more striking than the inflation of dubious interpretations is the observed miscalibration to the quality of the recorded dialogue caused by the presence of transcripts." *Id.* At each level of degradation, participants that were provided transcripts overestimated the ability of participants without transcripts to correctly

transcribe the audio. *Id.* at 185, Figure 4. For example, participants with transcripts that listened to the audio at 670 Hertz – the highest level of degradation – anticipated that participants without transcripts would be able to transcribe the audio with almost 60% accuracy. *Id.* In reality, participants without transcripts who listened to the audio at 670 Hertz were only able to transcribe the audio with an accuracy rate of approximately 5%. *Id.*

"The immediate implication is that when degraded evidence arises in the legal system, transcripts may cause the poor quality of the evidence to go undetected by those relying on it and cause them to suffer a curse of knowledge." *Id.* The term "curse of knowledge" was used to refer to people believing they hear what they were told they would hear, even if that is not what an audio says and not what they would have heard without first being told someone else's opinion. *See Id.* at 178.

As the researchers summarized:

> The effects of the transcript presence are vividly demonstrated by the present results. The presence of dubious transcripts clearly resulted in a much greater proportion of dubious misinterpretations than occurred under the suspects' interviews bias in isolation. It is important to keep in mind that only half of the transcripts provided to participants contained dubious errors as the other half of correct transcripts should have reinforced correct transcription.

Id.

"Taken together, these results suggest that the presence of an inaccurate transcript is likely a more powerful biasing agent than the general context of the legal system." *Id.* at 185. The researchers added:

> It should again be noted that the manipulation of context information used experimentally is slight in comparison to the amount of biasing information impinging those in the judicial system. Consequently, the operations of top-down bias are likely to be as strong, if not stronger, in the natural ecology of the criminal justice system as those demonstrated in the present experiments.

Id. at 185-86.

The researchers went on to note that while not all transcripts are equally biasing, it is likely insufficient "to rely on a judge's subjective determination of the quality and content of transcripts of auditory evidence as the sole determinant of admissibility" as "no one within the criminal justice system is immune to the cognitive contamination" and "[o]nce exposed to case knowledge, such top-down biases become the inadvertent lens through which subjective interpretation of the evidence is achieved." *Id.* at 186. The researchers propose that transcripts are best suited for admissibility if their transcriber is a "professional" who is "as blind as possible to the case," follows standardized procedure, and is "rigorously evaluated." *Id.* at 186.

The applicability of this research to Ms. Smart's case is damning. No accuracy safeguards were present for the transcription in Ms. Smart's case. All that was conveyed was that the transcripts were prepared by "someone working for the Attorney General's Office." March 14, 1991 – Thursday Morning Session – 9:12 a.m., *Trial Transcript – Bench Conference,* p. 1237. Furthermore, the fact that the transcriber worked for the Attorney General's Office likely introduced an element of bias, as the research on the effects of context on audio perception above indicates.

This contextual bias was compounded when the jury heard the tapes in the context of a criminal trial while reading along to the unreliable transcript prepared by the State. The research indicates that it is highly likely the jury attributed innocuous white noise and filled in gaps in a way that incriminated Ms. Smart. The jury never got the chance to listen to the tapes without the accompanying transcripts and thus never had the opportunity to decide for themselves what the tapes said without being influenced by the transcripts.

B. The State committed compounding transgressions against Ms. Smart that denied Ms. Smart a fair trial and violated Ms. Smart's due process rights.

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, 259 (1997); *Berger v. United States*, 295 U.S. 78, 88 (1935) (A prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"). As such, as the Supreme Court of the United States has affirmed for ninety years, a prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his 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." *Berger*, 295 U.S. at 88; *State v. Addison*, 165 N.H. 381, 548 (2013) ("Although prosecutors may present their cases zealously, this latitude has its limits.").

"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 (citing *State v. Bujnowski*, 130 N.H. 1, 4 (1987)). A "prosecutor appear[s] before the jury as an agent of the government and his statement[s]" are effectively endorsed with "the government's prestige." *State v. Mussey*, 153 N.H. 272, 278 (2006); *Berger*, 295 U.S. at 85 ("[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."). In other words, a prosecutor's endorsement amounts to "a personal assurance of [] credibility." *Id.* It is straightforward then, that "[t]he prosecutor should not 'use arguments calculated to inflame the [] prejudices of the jury'" for the compounding power they carry. *See State v. Preston*, 121 N.H. 147, 151 (1981) (quoting ABA

Standards for Criminal Justice, Standard 3-5.8 (2d ed. 1980)); *Bujnowski*, 130 N.H. at 4-5 ("[T]he representative of the government approaches the jury with the inevitable asset of tremendous credibility—but that personal credibility is one weapon [that] must not [be used].").

As the State wields such power, and potential for abuse, due process protections have been enunciated to prevent and correct prosecutorial misconduct. *Albright v. Oliver*, 510 U.S. 266, 281 (1994) ("The State must, of course, comply with the constitutional requirements of due process before it convicts and sentences a person who has violated state law."). "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin v. California*, 342 U.S. 165, 173 (1952). Due process obliges the courts to determine whether a state action violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions." *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

Due process arises out of varied state and federal sources and can wear many faces. Substantive due process, however, regardless of the source, generally resounds a theme of fundamental fairness. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Part I, Article 15 of New Hampshire's State Constitution provides that no citizen "shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." The "law of the land" has been held to be synonymous with "due process of law." *Bragg v. Director, N.H. Div. of Motor Vehicles*, 141 N.H. 677, 678 (1997). "To assess [a] defendant's due process claims under

the State Constitution, [a court] look[s] to the principles of fundamental fairness." *Graf*, 143 N.H. at 302; *Symonds*, 131 N.H. at 534 ("[W]e look to fundamental fairness to determine whether the defendant's due process rights were violated.").

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Supreme Court of the United States has held this Due Process Clause requires individuals be provided "substantive due process" that prevents the government from engaging in conduct that "shocks the conscience," *Rochin,* 342 U.S. at 172, or interfering with rights "implicit in the concept of ordered liberty" *Palko v. Connecticut,* 302 U.S. 319, 325-26 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). The Supreme Court has imputed the reasoning that empowers the Due Process Clause of the Fifth Amendment to the Compulsory Process Clause of the Sixth Amendment. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982). Therein, "[d]ue process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice.'" *Id.* (quoting *Lisenba*, 314 U.S. at 236). New Hampshire has held that where Part I, Article 15 of the State Constitution provides that "[e]very subject shall have a right to produce all proofs that may be favorable to himself," it is read *in pari materia* to "the compulsory process clause of the sixth amendment and the due process clause of the fifth amendment." *Adams*, 133 N.H. at 826; *State v. Newman*, 148 N.H. 287, 289 (2002) ("[T]he federal Confrontation Clause affords no greater protection than the State Confrontation Clause" negating any need for a "separate federal analysis").

New Hampshire has been clear, that "[a] fundamentally unfair adjudicatory procedure is one, for example, that gives a party a significant advantage or places a party in a position of prejudice or allows a party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading disadvantage." *Graf*, 143 N.H. at 302 (quotation omitted; underline added). It is axiomatic that improper evidence can make a proceeding fundamentally unfair. *State v. Addison*, 160 N.H. 493, 501 (2010) ("Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case."). "Like the Hydra slain by Hercules, prosecutorial misconduct has many heads." *United States v. Williams*, 504 U.S. 36, 60 (1992) (Stevens, J., dissenting).

The State obtaining a conviction based on false evidence is a *prima facie* due process violation. Due process review does not require further categorization. *See Rochin*, 342 U.S. at 173. A conviction that relies on false facts is antithetical to fundamental fairness. Ms. Smart need not establish good or bad intent by the State to warrant a new trial. Nonetheless, the State's incursion parallels numerous cases of prosecutorial conduct that New Hampshire has already condemned. Inasmuch, Ms. Smart demonstrates the State's actions as violative by New Hampshire precedent in the subsections that follow. New Hampshire has been clear that a prosecutor may not argue facts not admitted in evidence, present unfounded opinion testimony, or upset the partiality of a jury. These well-trodden doctrines further demonstrate the need for a new trial.

i. The mandates of due process and fundamental fairness were violated when the State made improper arguments and employed false evidence, regardless of the State's intent.

The Supreme Court of the United States has ambled through many cases contesting convictions due to evidentiary concerns and has consistently upheld that due process requires that, regardless of prosecutorial intent, a conviction be obtained only on truthful evidence. The Court first responded to and condemned bad faith prosecutors obtaining surreptitious guilty verdicts. As early as 1935, the Court made explicit "that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *see also Pyle v. Kansas*, 317 U.S. 213 (1942). The Supreme Court furthered this sentiment, in *Napue v. Illinois,* stating "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. 264, 269 (1959); *see also United States v. Agurs,* 427 U.S. 97, 103 (1976) ("[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have effected the judgment of the jury."); *see also United States v. Bagley,* 473 U.S. 667, 678–80 (1985) ("[D]eliberate deception of the court by the presentation of false evidence is incompatible with rudimentary demands of justice" and a resulting conviction must be set aside "if there is any reasonable likelihood that the false testimony could have effected the jury verdict."); *State v. Yates*, 137 N.H. 495, 498 (1993) (Due process precludes a prosecutor from failing to correct unprompted false evidence).

The Court then enriched the purview of fundamental fairness by applying a more defendant-centered view and disregarding prosecutorial intent. In *Brady v. Maryland*, the Court held that suppression of material evidence justifies a new trial "irrespective of the good faith or

bad faith of the prosecution." 373 U.S. 83, 87 (1963). Then, in *Giglio v. United States*, the Court expounded, that when the "'reliability of a given witness may well be determinative of guilt or innocence,' [the] nondisclosure of evidence affecting credibility falls within this general rule." 405 U.S. 150, 154 (1972) (citing *Napue*, 360 U.S. at 269). The critical fact concerned the nondisclosure, not prosecutorial intent. These cases asked the same root question in determining whether a new trial was required: whether "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" *Id.* (quoting *Napue*, 360 U.S. at 271). Alternatively stated, a conviction must be reversed "if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. If so, the "due process requirements" enunciated by the bad evidence progeny mandates such relief. *Giglio,* 405 U.S. at 155.

The Court's critical theme has been that a conviction obtained through the use of false or manufactured evidence is violative of due process; this principle is irrespective of prosecutorial intent. This sentiment has been expressed throughout our courts, from one coast to the other. As framed by the Ninth Circuit, "a government's assurances that false evidence was presented in good faith are little comfort to a criminal defendant wrongly convicted on the basis of such evidence." *United States v, Young*, 17 F.3d 1201, 1203 (1994); *see also Doggett v. United States*, 505 U.S. 647, 657 (1992) ("[N]egligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, [but] it still falls on the wrong side of the divide between acceptable and unacceptable[.]"). Inasmuch:

> A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial "if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different."

Id. at 1203-04 (citing *Bagley,* 473 U.S. at 678–80) (underline added). Likewise, the Second Circuit has long held that allowing a conviction to stand, that rests on discredited evidence, violates due process. *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) ("[A] state's failure to act to cure a conviction founded on a credible recantation by an important and principal witness, exhibits sufficient state action to constitute a due process violation."). At base, this right operates on the same materiality principle propounded in *Brady* and *Giglio*.

In the instant case, the State denied Ms. Smart a meaningful adversarial testing process when providing the jury with uncertified, inaccurate, and misleading transcripts. In doing so, the State mischaracterized evidence, argued prejudicial facts not admitted in evidence, and presented improper opinion testimony. Ms. Smart need not establish knowing and willful deceit by the State. Ms. Smart was prejudiced just the same no matter whether the act was malpractice or over-exuberant negligence. The State need not check each box of New Hampshire's fundamental fairness assessment to render a trial unfair, but here the State has. The State created "[a] fundamentally unfair adjudicatory procedure" by: (1) giving itself "a significant advantage," (2) placing Ms. Smart "in a position of prejudice," *and* (3) allowing itself "to reap the benefit of [its] own behavior in placing [its] opponent at an unmerited and misleading disadvantage." *Graf*, 143 N.H. at 302. Whether intentional or negligent, Ms. Smart's due process rights were violated and the State denied Ms. Smart a fair trial. Thus, a new trial is warranted.

ii. The State argued prejudicial facts not admitted as evidence and this denied Ms. Smart a meaningful adversarial testing process and violated her due process rights.

Ms. Smart's rights to confrontation and to a fair trial were trampled by the State presenting fictitious transcripts. The State argued its case on confessions that were not supported with evidence and were inaccurate. "It is [] fundamental that a prosecutor should not argue facts

not introduced into evidence. This is because the jury's verdict must be based upon the legally admissible evidence introduced at trial, and the prosecutor's argument is, in effect, unsworn testimony, not subject to cross-examination." *Lake,* 125 N.H. at 824 (underline added). "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). "[A] denial of cross-examination without waiver, [is] constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 (1966).

The Supreme Court of the United States admonished prosecutorial imprudence, that was strikingly similar to that *sub judice,* in the seminal case of *Berger v. United States*. 295 U.S. 78 (1935). The Court characterized the prosecutor's actions as follows:

> That the [] prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner.

Id. at 84.

Specifically, a witness by the name of Goldie Goldstein had been called by the prosecution to identify the petitioner. Goldstein apparently had difficulty in doing so. The prosecuting attorney, in the course of his argument, then said: "Mrs. Goldie Goldstein takes the stand. She says she knows Jones, and you can bet your bottom dollar she knew [the petitioner]." *Id.* at 86. "The jury was thus invited to conclude that the witness Goldstein knew [the petitioner]

well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney." *Id.* at 88. "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Id.* at 85. The Court recognized that the evidence of guilt was not otherwise overwhelming. "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." *Id.* at 89. A new trial was awarded. *Id.*

Similarly, here, the State misstated the facts to the jury. Most egregiously, the State "put[] into the mouths of such witnesses things which they had not said." *See id.* at 84. The State's presentation of unsupported facts in an official-appearing transcript *from the government* suggested knowledge of what was in the audio and the ability to transcribe it. As the Davidson Study proved, large sections of the audio of the body wire tapes were so degraded that no clear meaning could be derived from them. By filling in these gaps for the jury with the unreliable transcript, the State fraudulently represented an "understand[ing] that a witness had said something which [they] had not said[.]" *Id.* Correspondingly, Ms. Smart, too, should be awarded a new trial.

The same principles from *Berger v. United States* were applied half a century later in *State v. Lake.* 125 N.H. 820 (1984). Lake stood trial for driving while intoxicated. "The State's only witness was the arresting officer, who . . . concluded that in his opinion, the defendant was unfit to drive due to intoxication from alcoholic beverages. On cross-examination, the officer revealed that, although he examined the interior of the defendant's vehicle, he could not recall whether there were any alcoholic beverage containers in the vehicle." *Id.* at 821. Defense counsel seized the opportunity provided by the officer's testimony and "argued that when it came to recollecting evidence that might be favorable to the defendant, . . . the officer's memory became

'fuzzy.'" *Id.* "The prosecutor countered defense counsel's argument, in his closing argument, by stating that the officer's recollection of the evidence was 'very precise . . . because he reread his report' before testifying." *Id.* at 821-22. Defense counsel objected to the prosecutor's comment on the ground that no evidence had been introduced during the trial that the officer had ever prepared a report or that he had reread a report prior to testifying. *Id.* at 822. The trial court overruled the objection.

On appeal, the Court determined that "the prosecutor did act improperly in bolstering the credibility of the State's only witness when he argued facts not in evidence." *Id.* at 823. The State did not have overwhelming evidence against the defendant and "the trial below was essentially a trial of one witness's credibility. The prosecutor's improper comment went directly to that credibility. It would be virtually impossible to determine the degree to which the jury may have been influenced by the prosecutor's comment." *Id.* at 824. The *Lake* Court held that "a heightened sensitivity is warranted in cases such as the one before [it] to avoid mere repetition of a boiler plate credibility charge where the jury might be left, through the conduct of the prosecutor, with an unbalanced picture of the credibility of testimony." *Id.* The case warranted reversal on direct appeal.

In *State v. Brinkman,* the defendant relied on *Lake* to support his argument that the prosecutor improperly argued facts not in evidence and that the court erred by overruling his objection. 136 N.H. 716, 720 (1993). The *Brinkman* Court, however, drew a line to direct future cases as to what is and what is not improper. The facts of *Brinkman* did "not support a finding that the prosecutor commented on facts not in evidence." *Id.* at 720. "During cross-examination of the victim, defense counsel attacked the victim's credibility by eliciting that some of her trial testimony was inconsistent with her prior statements. During redirect examination, the

prosecutor elaborated on the same statements to which defense counsel referred by eliciting from the victim that she gave a six-page statement to the police, eighty-one pages of deposition testimony, and 138 pages of other testimony under oath." *Id.* "In response to defense counsel's attack on the victim's credibility, the prosecutor implied in his closing that the defendant found only two inconsistencies in 225 pages of testimony upon which to question the victim. The prosecutor did not make any representations as to the contents of the prior statements, nor did he reveal anything about the prior statements that had not already been revealed at trial by defense counsel." *Id.* The *Brinkman* Court held that the facts before the Court differed from the facts in *Lake*. In *Lake,* the prosecutor attempted to counter an attack on a witness's memory by stating in his closing that the witness's memory regarding the evidence was "very precise . . . because he reread his report" before he testified. *Lake,* 125 N.H. at 822. The trial court erred when overruling the objection to that statement because no report was ever mentioned during trial. *Id.* Therefore, the prosecutor impermissibly testified as to facts not in evidence, and thus it was improper for the prosecutor to draw inferences that a report was reread prior to trial. *Id.*

In the case *sub judice*, the State argued facts not in evidence, akin to the State in *Lake*, but the facts here were far more egregious. Here, the State did not just bolster its witness, the State argued that Ms. Smart, the defendant herself, had made multiple confessions of guilt. These confessions were not just made in passing, like in *Lake*, but were instead provided in writing to read along, put up on posterboards during closing arguments for slow digestion,[8] and sent back with the jury to deliberate with for days. These confessions were not on the tapes and were never entered into evidence.

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[8] Court TV, Pamela Smart Murder Trial: NH V. Smart, https://www.courttv.com/title/25-nh-v-smart-prosecution-closing-argument-jury-instructions/.

Like in *Lake,* the jury was given "an unbalanced picture of the credibility of testimony" due to the conduct of the State. *See Lake*, 125 N.H. at 824. Ms. Smart was prejudiced by this improper argument and bolstering by the State because, without the confessions allegedly made on the tapes, the State lacked any convincing evidence with which to convict Ms. Smart. Ms. Smart's case, like in *Lake,* rested on the issue of witness credibility—here, the State lacked reliable direct evidence other than witness testimony. All of the primary witnesses had issues of credibility as the jury heard the witnesses were receiving extreme benefits from the State in exchange for testifying. *See further, infra* Section I.D.ii. The State unfairly bolstered witness credibility and testimony by creating new facts not in evidence. And, undoubtedly, the conjured concessions were damning.

The State's improper conduct denied Ms. Smart a fair trial and produced a verdict based on inadmissible evidence. The inaccurate and unauthenticated transcripts should never have been presented to the jury. This egregious error, like in *Lake*, warrants reversal.

iii. The State circumventing the rules of evidence and presenting disguised opinion testimony denied Ms. Smart a meaningful adversarial testing process and violated her due process rights.

Even when assuming best intentions on the part of the State, the transcripts amounted to improper opinion testimony on behalf of the State. The transcripts were contrived by an employee in the Attorney General's Office. The transcripts allowed the State to testify to its opinion before the jury without any witness. The State's presentation of the transcripts created prejudice and misled the jury as the transcripts presented inaccurate information backed by the authority of the State. *See Boetti*, 142 N.H. at 259 ("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.'"). "It is

unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *United States v. Young,* 470 U.S. 1, 8 (1984); *Bujnowski*, 130 N.H. at 4 ("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.").

In *State v. Bujnowski*, the Supreme Court of New Hampshire held that "the prosecutor committed prosecutorial overreaching by causing, through gross negligence or intentional misconduct, aggravated circumstances to develop which in turn caused prejudice to the defendant." 130 N.H. at 5. "First, the prosecutor wrongfully informed the jury of his personal opinion as to the credibility of a witness' testimony. After acknowledging his mistake, the prosecutor continued to assert his personal opinion regarding the credibility of the testimony of that witness and of other witnesses." *Id.* On review, the Supreme Court of New Hampshire found abhorrent the "comments made by the prosecutor regarding his personal opinion as to a witness' credibility and the defendant's guilt." *Id.* Such error was determined to be particularly egregious, as it went "far beyond the curable misconduct of stating facts not in evidence." *Id.* The Court held "it unfortunate, indeed deplorable, that the time of the court, jurors, counsel, and court personnel [was] wasted by the unthinking phrasing of a few moments, in utter disregard of our past admonitions." *Id.* at 6 (internal citation omitted).

Here, like in *Bujnowski*, the State improperly offered its own opinion testimony in the form of inaccurate and misleading transcripts. Because large sections of the audio of the tapes were so degraded, it was impossible for an objective understanding of their contents to be created. The State presented its opinion of what the tapes contained through the guise of objective, impartial transcripts. However, this interpretation of the tapes was not impartial

evidence, but instead constituted the subjective opinion of the anonymous person from the Attorney General's Office who created the transcripts. By offering its personal opinion to the jury, the actions of the State, here, constituted in the least "gross negligence" that "aggravated circumstances to develop which in turn caused prejudice to the defendant." *See Bujnowski*, 130 N.H. at 5. Ultimately, the State submitting its personal opinion to the jury disguised as objective fact created a substantial risk that, due to the perceived authority of the State, the jury would give its opinion greater weight. *See Boetti*, 142 N.H. at 259 ("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.'"). These circumstances were aggravated as the unknown person who created the transcripts was not called as a witness in this case and, therefore, the defense was denied its right to cross-examine the witness regarding their interpretation of the tapes.

The Court's holding in *Bujnowski* is an extension of evidentiary safeguards proscribed in New Hampshire's rules of evidence and in confrontation rights more generally. The rules of evidence restrict the ability of a party from introducing opinion testimony to a jury. First, "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." N.H. R. Evid. 701. Therein, New Hampshire has applied a conjunctive test where all elements must be met to allow an opinion from a non-expert. In Ms. Smart's case, the author of the transcript was not a witness during trial at all and offered no testimony for which the transcripts were to aid in understanding. The

transcriber also utilized an applied skill in proclaiming the contents of the transcripts. Therefore, the transcripts were inadmissible without an expert qualification.

"The State, as the party offering [] an expert, had the burden of establishing [the witness's] qualifications." *Newman*, 148 N.H. at 291; *State v. Rodriguez*, 136 N.H. 505, 508 (1992) ("[T]he sixth amendment guarantees criminal defendants the right to be confronted with the witnesses against them."). "A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." N.H. R. Evid. 702. "In evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that: (1) Have been or can be tested; (2) Have been subjected to peer review and publication; (3) Have a known or potential rate of error; and (4) Are generally accepted in the appropriate scientific literature." N.H. Rev. Stat. § 516:29-a(II)(a). Plainly, expert testimony "must be reliable to be admissible." *Newman*, 148 N.H. at 291.

The constitutional and statutory favor for in-person testimony is for obvious reasons. First, "the prospect of confrontation will deter fraudulent analysis." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009). Furthermore, "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* Bias is also a central concern. As Justice Scalia recognized in *Melendez-Diaz v. Massachusetts*, "[f]orensic evidence is not uniquely immune from the risk of manipulation . . . A forensic analyst responding to a

request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." 557 U.S. at 318. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 320.

Here, the State did not offer any expert at all, let alone establish their qualifications or a base level of reliability.

iv. The State's use of the transcripts created a biased jury which was fundamentally unable to render a just verdict.

"[T]he due process requirements of Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant the right to a trial by a fair and impartial jury." *State v. Gribble*, 165 N.H. 1, 17 (2013); *State v. Addison,* 160 N.H. 493, 497 (2010) ("It is a fundamental precept of our system of justice that the defendant has the right to be tried by a fair and impartial jury."); *State v. Laaman,* 114 N.H. 794, 798 (1974) ("It is well established that due process requires that an accused must receive a trial by a fair and impartial jury."); *State v. Smart,* 136 N.H. 639, 646 (1993); *State v. Jackson,* 69 N.H. 511, 512 (1898).

In Ms. Smart's case, the State biased the jury beyond repair by imposing an expectation-induced bias and curse of knowledge regarding what was heard on the tapes. As the scientific research discussed above demonstrates, *see supra* Section I.A., when listening to the audio clips, the jury was improperly influenced to hear what the transcript told them they would hear. This is especially true given that the jurors never had an opportunity to listen to the audio without the accompanying transcript and, therefore, never had the chance to decide for themselves what they were hearing. Moreover, the presence of the transcripts caused the jury to be more confident in the accuracy of their perception of the tapes and the clarity of the audio. The transcripts were

created by a partial employee of the Attorney General's office and fabricated incriminating statements that listeners of the audio who did not receive a transcript consistently did not hear. After reading these transcripts multiple times—both in individual printed packets and, even more egregiously, blown up and put on poster boards presented by the State—there was no chance that the jury could not have been improperly biased. Thus, the State's actions deprived Ms. Smart of her right to an impartial jury and she is entitled to a new trial.

v. The State violated Ms. Smart's right against self-incrimination by fabricating self-incriminatory statements.

The State's transcripts violated Ms. Smart's right against self-incrimination under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Where a defendant is to be free from the compulsion to incriminate themselves, it extends that the State cannot impose fabricated facts of a defendant incriminating themselves; this is a more brazen compulsion.

Part I, Article 15 of the New Hampshire Constitution provides that "[n]o subject shall be . . . compelled to accuse or furnish evidence against himself" and guarantees every citizen due process of law.[9] "The purpose of this right is to prevent the compulsion and subsequent use of the defendant's testimony to establish her guilt in a criminal case." *In re C.O.*, 171 N.H. 748, 761 (2019). "The privilege against self-incrimination extends not only to answers that in themselves would support a conviction, but also to any information sought which would furnish a link in the chain of evidence needed to prosecute." *State v. O'Connell*, 131 N.H. 92, 94 (1988). "Three basic

[9] As the "State Constitution provides greater protection to a criminal defendant with respect to the voluntariness of confessions than the Federal Constitution," parallel review under both the Federal Constitution and the State constitution is generally unnecessary. *State v. Hinkley*, 174 N.H. 414, 418 (2021). Nonetheless, federal cases may be used to aid analysis of the State right. *Id.* Here and throughout this petition, reliance on the State right first does not relinquish invocation of the federal counterpart, and the same intent applies contrariwise.

principles guide the application of the [] privilege against self-incrimination: (1) invocation of the right is construed liberally; (2) invocation of the right does not require any magic words; and (3) the privilege applies to suspects questioned during investigations—it is not limited to persons in custody or charged with a crime." *State v. Remick*, 149 N.H. 745, 746–47 (2003).

"Under the New Hampshire Constitution, the State must prove that a defendant's confession is voluntary beyond a reasonable doubt." *State v. Hinkley*, 174 N.H. 414, 418 (2021). "To be voluntary, a confession must be the product of an essentially free and unconstrained choice and not be extracted by . . . the exertion of any improper influence or coercion. *Id.* at 419. Inherent in this requirement of proof is that the State must prove that a confession was actually made by the defendant to have been voluntary.

Here, the State failed to establish the inculpatory statements in the transcripts were made by Ms. Smart. As discussed above, *supra* Section I.A, the incriminating statements contained in the transcripts were essentially manufactured by a State employee and are not discernable to an unbiased listener. Therefore, the State falsely represented that Ms. Smart incriminated herself.

Moreover, the State's transcripts further induced Ms. Smart to testify as she had to answer for statements she had allegedly made according to the faulty transcripts. Therein, to the extent that her testimony can be viewed as disadvantageous to her defense, the State improperly compelled Ms. Smart to waive her right to remain silent and not testify during trial. *See State v. Hinkley*, 174 N.H. 414 (2021) (recognizing that improper statements made by the police rendered a statement involuntary).

C. Ms. Smart was denied the effective assistance of counsel when both Trial Counsel and Appellate Counsel failed to make adequate objections to the use of inaccurate and prejudicial transcripts.

Trial Counsel committed unprofessional error when Trial Counsel failed to make particularized objections to the use of unauthenticated and inaccurate transcripts. Trial Counsel did not take requisite action to prevent the transcripts from being presented to the jury and subsequently allowed the State to argue facts that were not true and not admitted as evidence. Trial Counsel did argue that the presentation of the words on paper did not accurately portray the cadence of the conversation, but Trial Counsel did not object to the accuracy of those words, contest that those words were said, or object to the transcripts for lacking authentication. Trial Counsel effectively accepted the accuracy of the transcripts and allowed the transcripts to imprint irreversible cognitive bias against Ms. Smart upon the jury. Appellate Counsel raised on direct appeal that the trial court erred in allowing the transcripts to be presented to the jury but, again, failed to properly address the actual issues with the transcripts.

The Supreme Court of New Hampshire summarized the objections made by Counsel at trial as follows:

> At trial, when the tapes were about to be played and the transcripts handed out for the jurors to read along, defense counsel expressed concern that the transcripts were "misleading" because they allegedly failed to account for the "doubling" of voices that occurs when two parties speak at once. No objection was made that the transcripts were not authenticated, and thus none is preserved for review.
>
> The court overruled the defendant's objection to the use of the transcripts, and instructed the jury before the first tape was played as follows:
>
>> "To the extent, if any exists, that the tape itself differs from what you are reading along in the transcript, you will use the tape in your consideration of the evidence in this case and not the transcript."
>
> The court instructed the jury again, after the second tape was played, to "use what you hear and not what you read" if there was any discrepancy, and several times

> during its final charge the court again told the jury that the tapes must govern over any inconsistency that might appear in the transcripts.

136 N.H. at 666 (emphasis added).

On review, the Supreme Court of New Hampshire ultimately held that, "[n]either at trial nor in her brief did the defendant make any particularized showing of inaccuracies in the transcripts relative to the recordings or how she may have been prejudiced thereby. The trial court's instructions to the jury adequately addressed the defendant's objection, and we find no abuse of discretion." *Id.*

This summary reveals three specific errors committed by Trial Counsel and Appellate Counsel. First, Trial Counsel did not object to the transcripts on the basis of authentication. Second, neither Trial Counsel nor Appellate Counsel make a particularized showing of inaccuracies in the transcripts. And third, neither Trial Counsel nor Appellate Counsel demonstrated how the inaccuracies in the transcripts amounted to prejudice.

The jury should not have received the transcripts as the transcripts could not satisfy basic evidentiary safeguards. Trial Counsel did not raise the proper objections to the transcripts *in limine* or during trial to subject the transcripts to these standards. This failure was monumental error. "[T]he failure to object to . . . inadmissible evidence," as clearly established by the record and with no need for further investigation, is "outside the range of reasonable professional judgment and its prejudicial effect is clear." *See Thompson*, 161 N.H. at 526. Such a single and serious error may support a claim of ineffective assistance of counsel. *See Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986). It is outlandish to assume Trial Counsel employed a reasonable trial strategy when allowing the transcripts to be presented to the jury as there would be no possible benefit to Ms. Smart in the jury being able to more explicitly comprehend inculpatory statements. Moreover, the record annuls any place for assumption. Trial Counsel

clearly did not want the transcripts to be introduced as Trial Counsel objected to the entry of the transcripts, just on other, insufficient grounds.

Trial Counsel erred by not properly objecting to each overstep by the State detailed in the immediately preceding subsection. Trial Counsel further erred by failing to object to the transcripts as the original audio was available, the transcripts were hearsay, and the transcripts were not authenticated. Trial Counsel also failed to object to the transcripts as overly prejudicial as the transcripts mischaracterized the evidence. Finally, Trial Counsel failed to object to the transcripts being sent with the jury to deliberate as this allowed for slow and meticulous consumption of the manufactured evidence.

i. The transcripts were moot as the original tapes were available, the transcripts were inadmissible hearsay, and the transcripts were not authenticated, and therefore the transcripts were not admissible.

Trial Counsel allowed the State to usurp all traditional safeguards used to assess the reliability of information before it should be presented to a jury. Trial Counsel failed to object on the basis of the transcripts being irrelevant, being hearsay, and not being authenticated. Trial Counsel's failure to properly object "fell below an objective standard of reasonableness under prevailing professional norms." *See Strickland,* 466 U.S. at 688.

First, "[a]n original writing, recording, or photograph is required in order to prove its content. . ." N.H. R. Evid. 1002. Indirect proof may be allowed to establish the content of a recording if the original is destroyed, unobtainable, not disclosed, or the recording is not closely related to a controlling issue, but these rules are moot when an original is available. *See* N.H. R. Evid. 1004. An analysis into whether any indirect methods to describe the contents of the recordings is not necessary as the original recordings of the body wire were available for Ms. Smart's trial. The original recordings of the body wire required no indirect evidencing. The

transcripts filled no evidentiary hole and were not needed. Any indirect proof to establish content was therefore objectionable.

Second, the transcripts themselves were inadmissible hearsay. Hearsay is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." N.H. R. Evid. 801. New Hampshire's rules against hearsay are a statutory manifestation of New Hampshire's state constitutional rights, as well as an actualization of the federal Confrontation Clause. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980). "[T]he duty to confront a defendant with witnesses falls upon the State." *State v. Coombs*, 149 N.H. 319, 322 (2003); *see also Mullaney v. Wilbur,* 421 U.S. 684, 702-03 & n 31 (1975) (The prosecution may not shift the burden of disproving an element of a crime to the defendant). "[I]n order to sustain an exception to a defendant's confrontation rights there must be an individualized finding that the witness in a particular case is unavailable to testify at trial." *State v. Peters*, 133 N.H. 791, 794 (1991) (internal citations omitted; cleaned up); *Coombs*, 149 N.H. at 322 ("If the State cannot impose unreasonable conditions upon a defendant's right to confront a witness, surely it cannot eliminate the right to confront the witness altogether."). Then, reliability will only be found upon the existence of a "firmly rooted hearsay exception" or the "evidence must be excluded." *State v. Ata,* 158 N.H. 406, 409 (2009). Otherwise, "the trustworthiness of documentary hearsay alone cannot obviate the 'ancient' and 'fundamental' right to confront adverse witnesses." *Coombs,* 149 N.H. at 321; s*ee also White v. Illinois,* 502 U.S. 346, 363 (1992) (Thomas, J., concurring) ("[T]he [Confrontation] Clause makes no distinction based on the reliability of the evidence presented. Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of *ex parte* affidavits found to be reliable.").

The transcripts were a statement, made prior to the trial, purportedly of what was on the tape recordings. The declarant—an unknown employee of the State Attorney's office who created the transcripts—was not made available at trial. No exceptions applied to allow for admission. *See* N.H. R. Evid. 802. The transcripts therefore should have been objected to as hearsay. This violation of the rules resulted in a grave infringement on Ms. Smart's confrontation rights. The transcripts assigned confessions and incriminating statements to Ms. Smart that she simply did not make. Had the creator of the transcripts been called at trial, Ms. Smart would have at least had the opportunity to cross-examine them regarding their credentials and challenge the accuracy of the statements. Instead, Trial Counsel allowed the State to introduce highly inflammatory inadmissible hearsay evidence that ultimately condemned Ms. Smart.

Third, and most egregiously, the transcripts were not authenticated. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." N.H. R. Evid. 901. The transcripts did not fall into any self-authenticating category. *See* N.H. R. Evid. 902. The rules of evidence require, in the least, "[t]estimony that an item is what it is claimed to be." *Id.* Authentication upholds a defendant's basic confrontation rights. "The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.'" *State v. Allison*, 134 N.H. 550, 558 (1991) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 678 (1986); *see also Pointer*, 380 U.S. at 405 ("[T]o deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."). Confrontation "includes the right to expose the possible biases of such witnesses by cross-examination." *Allison*, 134 N.H. at

558. "[T]he defendant may not be denied the opportunity to make at least a threshold level of inquiry." *Id.* at 558.

Here, the transcripts lacked any authentication whatsoever. No foundation was provided by the State as to how the transcripts came into being. It is still a mystery who exactly created the transcripts thirty-four years after the trial has ended. No testimony was given as to the qualifications of the transcriber, if any existed. There is no suggestion that the transcripts were created by a certified transcriber. It is unknown if any type of standard was adhered to. Not a single precaution was identified to prevent bias and protect Ms. Smart's confrontation rights. The transcripts were therefore objectionable as they were not authenticated.

Therefore, Trial Counsel error existed on a multitude of fronts; numerous objections should have been made but were all forfeited. These are not exceedingly technical arguments but rather employ fundamental evidentiary principles. These are legal concepts that a trial attorney reasonably should know. These are most certainly laws that an attorney trying a case of the most serious variety, a murder charge contemplating a sentence of life without the possibility of parole, should know. New Hampshire's Rules of Professional Conduct provide as much and designate a clear standard for reasonable competence. "Legal competence requires at a minimum:"

> (1) specific knowledge about the fields of law in which the lawyer practices;
>
> (2) performance of the techniques of practice with skill;
>
> (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
>
> (4) proper preparation; and
>
> (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

NH R RPC Rule 1.1. Therefore, "[i]n the performance of client service, a lawyer shall at a minimum:"

> (1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;
>
> (2) formulate the material issues raised, determine applicable law and identify alternative legal responses;
>
> (3) develop a strategy, in consultation with the client, for solving the legal problems of the client; and
>
> (4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

Id. Yet, Trial Counsel failed to raise the proper objections to exclude the transcripts.

Similar error was observed and declared as so blatantly prejudicial in *State v. Thompson* that it transcended any need for an evidentiary hearing. 161 N.H. at 526. In *Thompson*, Jerome Thompson was convicted of aggravated felonious sexual assault and claimed that his trial counsel was ineffective for allowing inadmissible hearsay into evidence that provided a foundation for the State's case. 161 N.H. at 529. The Supreme Court of New Hampshire employed the traditional *Strickland*, *supra,* test, as endorsed by state law, asking first "whether counsel's representation was constitutionally deficient" and then whether "counsel's deficient performance actually prejudiced the outcome of the case." *Id.* at 528. In assessing the first prong, the Court reviewed whether "counsel's assistance was reasonable considering all the circumstances." *Id.* at 529. The Court specifically reviewed as error: "counsel's failure to object to the hearsay testimony of the babysitter, mother and Dougherty, all of whom testified regarding out-of-court statements [the child victim] made about the alleged assault." *Id.* Thompson argued "that no strategic reason could motivate defense counsel's failure to object because without the

evidence, the State could not have proven its *prima facie* case." *Id.* The State responded, "that the disputed evidence was admissible under an exception to the hearsay rule," that "trial counsel sought to establish inconsistencies in the statements," and that trial counsel knew the victim had recanted her statements which would "damage her credibility," and that counsel's decision not to object was part of "a reasonably adopted trial strategy." *Id.* at 529-30.

The Court recognized that "experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. Learned counsel therefore use objections in a tactical manner." *Id.* (citation omitted). Nonetheless, the "failure to object to the only substantive evidence of the defendant's guilt" could not "reasonably have been said to have been part of a trial strategy or tactical choice." *Id.* at 530. The Court held that, despite a high degree of deference afforded to defense counsel, the "inconsistent decisions made by the defendant's attorney in this case clearly [fell] below the constitutional bar." *Id.* at 529. Even though trial counsel "did point out some inconsistencies between the babysitter's and mother's testimony, his failure to object allowed a legally insufficient case to go to the jury." *Id.*

Moreover, trial counsel did "successfully object[] to hearsay four times during the testimony," but then allowed harmful testimony when the State continued its questioning. *Id.* at 530. "This pattern of representation can at best be characterized as imprudent, and more accurately, completely irrational. Such conduct can only be attributed to a lack of understanding of the rules of evidence or extreme carelessness." *Id.* "Accordingly, defense counsel's failure to object defie[d] all rational explanation and [was] not protected as trial strategy. Even if the counsel's strategy was to point out inconsistencies between the State's witnesses, as the State suggests, the strategy was manifestly unreasonable." *Id.* (internal citation omitted).

The Supreme Court then held that the "prejudice in this case [was] manifest." *Id.* at 532. "The inaction was so fundamental and flawed that the State was able to prove its case only because of defense counsel's failure, and the defendant was deprived of a fair trial." *Id.*
As noted by the trial court, when "hearsay comes in without objection, then it comes in substantively." *Id.* The Supreme Court recognized that even though "defense counsel [had] never been given the opportunity to explain his decisions, his inconsistent and unexplainable pattern of representation throughout the trial demonstrate[d] that the defendant received constitutionally defective assistance of counsel." *Id.* at 532–33.

Like trial counsel in *Thompson*, Trial Counsel here allowed detrimental and inadmissible hearsay to be presented for the jury's slow consumption. There was no reasonable trial strategy that could exist to account for Trial Counsel's failures, as the incriminating statements contained in the transcripts but not in the audio constituted the most damning evidence the State had against Ms. Smart. Inasmuch, Trial Counsel failed to meet a reasonable standard of competence of a trial attorney. *See Faragi*, 127 N.H. at 4. In other words, Trial Counsel rendered deficient performance. *See Strickland,* 466 U.S. at 687.

ii. The transcripts were overly prejudicial.

Trial Counsel failed to object to the transcripts as overly prejudicial as they changed the nature of the recordings from being mostly indiscernible and largely innocuous to being expressly incriminating. Even if evidence is determined relevant, evidentiary Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." N.H. R. Evid. 403. "Rule 403 is an exclusionary rule that cuts across the rules of evidence." *State v.*

McGill, 153 N.H. 813, 816 (2006) (quotation omitted). "Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision upon something other than the established propositions in the case." *State v. Addison,* 160 N.H. 493, 501 (2010); *State v. Miller*, 155 N.H. 246, 251–52 (2007).

Trial Counsel failing to object to the State changing the nature of the recordings in the case *sub judice* parallels trial counsel error recognized in *State v. Wilbur*. 171 N.H. 445, 456 (2018). In *Wilbur*, Wilbur was charged with two counts of aggravated felonious sexual assault against a child. 171 N.H. at 446. The case relied largely on the child's credibility. Defense counsel's errors impermissibly bolstered that credibility, permitted the State to mischaracterize the defendant's statements, and "permitted the State to convey to the jury that the defendant implicitly admitted to being guilty[.]" *Id.* at 453. "[T]he prosecutor's comments highlighted evidence that was erroneously admitted by virtue of defense counsel's deficient performance, which cut directly to the essential issue at trial — credibility." *Id.* at 456.

During a police interview with a Detective Stevens, Wilbur stated:

> Long, long time ago my dad had a case that was happening but it weren't true. He proved it. It weren't true. I went into the courts with him and doing the same thing I am now. I sat down and told him everything . . .but it got proved . . .[t]hat it didn't happen.

Id. at 451. "The defendant then went on to assert his innocence about a dozen times throughout the rest of the interrogation, and only stated that he would 'fight it' in court in response to Stevens's statement that he 'would likely end up being charged with a crime.' Moreover, the defendant never indicated to Stevens that he was unwilling to answer further questions that the officer desired to ask." *Id.* at 451–52 (internal quotations used to summarize statements on brief).

In its opening statement, the State asserted that when Detective Stevens interviewed the defendant concerning the allegations, the defendant commented that his father had faced similar allegations in the past. Specifically, the prosecutor described the conversation between the defendant and Stevens as follows:

> And the Defendant comes down to the police station, spends a total of four or five minutes before he ends the conversation and moves on. [Stevens is] going to tell you how the Defendant told him, 'Yeah, my father was accused of this but he was found – he was – got away with it, so I'm going to fight it.' That's the end of the conversation.

Id. at 449. The State then elicited the following testimony from Detective Stevens:

[State]:	Okay. Now do you remember – what do you recall the Defendant stating about his father?
[Det. Stevens]:	He told me that his dad had been accused of sexual assault about ten years ago and he beat that.
[State]:	Okay. And as a result of that what did he say he was going to do?
[Det. Stevens]:	That he was going to fight it in court.
[State]:	Altogether, you said it's a relatively short interview, how long did it last?
[Det. Stevens]:	I could estimate five minutes.
[State]:	And did you end the interview or did he end the interview?
[Det. Stevens]:	My recollection is that he did.

Id. at 450. During cross-examination, defense counsel and Stevens had the following exchange:

[State]:	And he denies ever touching her, not once, not twice, but probably four or five times in the course of that interview—
[Det. Stevens]:	Again—
[State]:	—has never touched her?
[Det. Stevens]:	Again, I would say that — I testified that he denied it. I'm not going to sit here and tell you how many times because I don't remember.
[State]:	And in fact, he denies the allegations before ever mentioning anything about his dad?
[Det. Stevens]:	Correct.
[State]:	And it didn't take you too long to realize during the course of this interview that Mr. Wilbur was going to stand on his denial and you weren't going to get any further information? Do you recall—
[Det. Stevens]:	I—

[State]:	—putting that in your—
[Det. Stevens]:	I would—
[State]:	—report?
[Det. Stevens]:	I would agree with that.

Id. "At no point during the cross-examination of Stevens did defense counsel utilize the transcript of the interview, which she had access to during the trial." *Id.* at 451. In its closing, the State argued as follows:

> Defendant, Defense attorney points out to you, he denied it. Yeah, he denied it for about four minutes, ended the interview, and said, "You know what, my father got away with this so I'm going to fight it in court." So here we are. That's not a real denial.
>
> And consider that, if you're accused of this, you're going to do this for three minutes and then leave, or are you going to explain your story? Defense attorney wanted to point out how he denied it. You consider if that's a real denial or that's a go down and, "I'm not saying anything," and going away.

Id. at 451. "Defense counsel did not object to this portion of the State's closing argument even though the State's characterization of the interview varied substantially from the actual contents of the interview." *Id.*

> [Wilbur] advance[d] two arguments in support of his position that his counsel's handling of the description of his interview with Stevens was constitutionally deficient. First, he complain[ed] that counsel did not utilize the transcript during cross-examination to establish, in response to Stevens's testimony, that Stevens did not remember how many times the defendant denied assaulting the child, and that the defendant denied the allegations at least a dozen times. Second, the defendant fault[ed] counsel for not challenging Stevens's testimony, or the State's opening and closing statements, in which the defendant was characterized as having said that his father "beat" or "got away with" a sexual assault and that he intended to do the same — assertions that the prosecutor argued did not amount to a "real denial" of guilt.

Id. at 451.

"In practical effect, defense counsel permitted the State to convey to the jury that the defendant implicitly admitted to being guilty of committing the crimes charged." *Id.* at 453.

Defense counsel did present evidence to rebut the State's mischaracterization, but "the evidence presented in this regard was far too little, given that counsel did not fully elicit the manner of the defendant's denial or the number of times that the defendant denied the charges, and, more importantly, permitted the State to effectively paint these denials as disingenuous." *Id.* at 453. "This failure to rebut the State's mischaracterization was objectively unreasonable. Accordingly, [the Court held] that defense counsel's representation was constitutionally deficient." *Id.* (internal citation omitted).

The Supreme Court of New Hampshire found Wilbur's trial counsel rendered ineffective assistance of counsel in failing to object to or otherwise neutralize a statement that "effectively conveyed to the jury that the defendant was implying his guilt." *Id.* at 452. "[B]y failing to take any corrective course of action, counsel permitted the State to fabricate a misleading narrative to suggest that the defendant implicitly admitted guilt." *Id.* at 452-53. The defendant was entitled to a new trial as a result of counsel's deficient assistance. *Id.* at 457.

Just like in *Wilbur*, the State in Ms. Smart's case mischaracterized the body wire recordings and implied a confession was made by Ms. Smart by presenting unauthenticated and inaccurate transcripts to the effect. In reality, as the Davidson Study demonstrated, *supra* Section I.A., the audio was so degraded that without the aid of accompanying text, listeners did not interpret it to contain the incriminating statements found on the transcript. Trial Counsel committed prejudicial error in failing to properly contest the improper argument in the transcripts, accepting the accuracy of the transcripts, and allowing the jury to receive the transcripts.

iii. The transcripts should not have gone into the deliberation room.

Evidentiary safeguards faced a final affront when the transcripts were allowed to go into the deliberation room with the jury. "It is a fundamental rule that jurors may not receive evidence out of court." *Brigham v. Hudson Motors, Inc.,* 118 N.H. 590, 595–96 (1978) (quotation omitted). "This rule precludes jurors from having access to items not admitted into evidence during deliberations." *State v. Cook*, 148 N.H. 735, 742 (2002).

The case of *State v. Cook* similarly saw an unadmitted transcript accompany jurors into the deliberation room. "Because the transcript was never admitted into evidence, [the Court] agree[d] with the defendant that it was improperly sent with the jury into the deliberation room." *Id.* at 742.[10]

Allowing the transcripts into the jury room facilitated the contemplation of material not admitted as evidence and a conviction based on material not admitted as evidence. The jury being able to read and re-read the transcripts cemented the curse of knowledge. The jury attempting to study the transcripts to compare the transcripts to the tapes would be a counterintuitive and harmful venture due to the transcripts reinforcing bias in such an exercise, as discussed *supra.*

D. Ms. Smart was prejudiced by the State and Counsel's errors.

Ms. Smart was prejudiced by the introduction of the inaccurate and unauthenticated transcripts and there is a substantial probability that, without the transcripts, she would have been

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[10] The Court in *Cook* held that the jurors had already had access to the transcripts during trial and therefore having the transcripts again during deliberations was harmless error. *State v. Cook*, 148 N.H. 735, 743 (2002). Cook did not raise ineffective assistance of counsel for allowing the transcripts to be presented during both trial and deliberations, as Ms. Smart does. Cook further argued that the transcript directed the jury to focus on the tape from which the transcript derived, but the Court was not persuaded this was the case. *Id.* Cook did not raise any issue of content differing between the transcripts and the tapes.

acquitted. The strength of the evidence against Ms. Smart was underwhelming. Deliberation for just three counts took days; even then, late-ordered sequestration to a hotel and away from family likely had a prompting effect. The crux of the State's case rested on the confessions allegedly made by Ms. Smart that were contained in the transcripts but were unintelligible when listening to the tapes. Any other evidence presented by the State was indirect and impeachable. This is confirmed by the contents of tapes recorded by a Juror contemporaneous to trial. These tape recordings were obtained by the Trial Court and played into the court record during a post-trial hearing on August 15, 1991, and the transcript of these audio recordings being played into the record memorializes a juror's perspective on the weight of the State's evidence. August 15, 1991, *In Chambers Meeting Transcript – Juror Tape*. Specifically, these tape recordings describe the impact each piece of evidence had on the Juror, and notably, the substantive impact that the tapes had on the Juror's decision-making. The Juror explores their own thoughts but largely avoids discussing confidential conversations amongst the jury during deliberations. The Juror recordings establish that the faulty transcript of the body wire provided by the State likely convicted Ms. Smart and there is a substantial likelihood that there would have been a different result had the jury not been misled.

i. Standards of review.

a. Harmless error.

New Hampshire cases suggest that a court is to apply the harmless error standard of review to due process claims based on prosecutorial conduct. Under harmless error review, an error is harmless if it can be determined, beyond a reasonable doubt, that the verdict was not affected by the error. *State v. Mason,* 150 N.H. 53, 62 (2003). The State bears the burden of proving that an error is harmless. *Id.* The State cannot establish harmlessness by arguing that

"there was sufficient other evidence to justify a conviction." *State v. LaBranche,* 118 N.H. 176, 179 (1978). Instead, "[a]n error may be harmless beyond a reasonable doubt if the alternative evidence of a defendant's guilt is of an overwhelming nature, quantity or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the strength of the State's evidence of guilt. In making this determination, [a court] consider[s] the alternative evidence presented at trial as well as the character of the inadmissible evidence itself." *State v. Pseudae*, 154 N.H. 196, 202 (2006) (internal citation omitted). Thereafter, to find harmless error the court must find that the jury did not consider the improper evidence or disregarded it. *LaBranche*, 118 N.H. at 179. Such a finding is difficult to make as a court "cannot read the jury's mind nor speculate on the result that would have obtained had not [the] improper evidence been put on the scale against the defendant." *Id.* In effect, harmless error therefore manifests as a presumption of prejudice. *Lake*, 125 N.H. at 824 ("It would be virtually impossible to determine the degree to which the jury may have been influenced by the prosecutor's comment."); *see also Berger*, 295 U.S. 78 ("In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence.").

Harmless error is the traditional test used in direct appeals to assess whether a due process violation warrants reversal. For instance, in *Bujnowski*, the Supreme Court of New Hampshire applied harmless error review when the prosecutor made improper comments bolstering the credibility of a witness. 130 N.H. at 6 ("The burden of establishing that the error was harmless beyond a reasonable doubt rests upon the State. We will order a new trial if the State is not able to show 'beyond a reasonable doubt that the [improper statements] did not affect the verdict.") (internal citation omitted). Likewise, in *Lake*, the Supreme Court applied the

harmless error standard when the State argued facts not introduced into evidence. 125 N.H. at 824.

New Hampshire has repeatedly deployed the harmless error standard in due process challenges to guilty pleas raised in a collateral context. *See State v. Offen*, 156 N.H. 435, 439 (2007) (The Court held the State was unable to establish a constitutionally deficient plea hearing was harmless beyond a reasonable doubt, when challenged in a motion to vacate); *see also State v. Arsenault*, 153 N.H. 413, 419 (2006) (The Court de facto applied the harmless error standard in finding the State failed to establish that a constitutionally deficient plea hearing was harmless beyond a reasonable doubt, when challenged in a motion to vacate); *State v. Jaskolka*, 172 N.H. 468, 472 (2019) (Petitioner's motion to vacate a conviction was viewed as a collateral attack and therefore treated as a petitions for a writ of habeas corpus).

No valid cause exists to incumber a due process claim with a temporal test that relegates a tougher standard of review onto a defendant as time does not soften the harm inflicted by a due process violation. A conviction obtained upon false evidence and improper prosecutorial conduct does not become any less repugnant once decades have been served on the conviction's life sentence. This is particularly true where the State is the cause of the due process violation as the State "should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *See LaBranche*, 118 N.H. at 180.

b. Prejudice sufficient to undermine confidence in the outcome.

Alternatively, if this Court declines to apply harmless error review to the due process violations complained of below, there are a number of other tests that New Hampshire has invoked in habeas proceedings and due process challenges. The difference between them is not

easy to discern. Ultimately, the common thread running through these cases is that a claimant must argue that the complained of error creates a probability of prejudice that is sufficient to undermine confidence in the outcome of the case.

First, the Supreme Court of New Hampshire has declared broadly that "[t]o obtain habeas corpus relief, the petitioner must show harmful constitutional error." *Barnet v. Warden, N.H. State Prison for Women*, 159 N.H. 465, 470 (2009) (citing *Sleeper v. Warden, N.H. State Prison*, 155 N.H. 160, 162 (2007)). In *Barnet*, for example, when analyzing whether petitioner had established a due process violation, the Court asked whether she had demonstrated that the error resulted in prejudice to the defendant's case. *Id.*

New Hampshire has elsewhere implied a materiality standard influenced by the level of state culpability. In *State v. Dukette*, the Supreme Court of New Hampshire probed "the due process significance" of state interference with evidence. 127 N.H. 540, 544-45 (1986). The Court looked towards the "extensive federal case law dealing with post-conviction requests for relief" on due process grounds. *Id.* at 544. Ultimately, the Court held the state acted without apparent negligence, and in good faith, and therefore invoked a materiality test that assessed the "importance or materiality of the evidence as helpful or exculpatory to the defense, and by reference to the prejudice to the defendant resulting from the deprivation." *Id.* at 545. Inasmuch, the court's focus became "the soundness of the verdict as a true reflection of guilt." *Id.* at 546-47. Hence, the *Dukette* Court imposed a standard akin to the materiality standard relied upon in *Brady* and *Giglio*, where a conviction must be reversed "if the evidence is material in the sense

that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678.[11]

Due process contests more generally require a claimant be able to challenge the fundamental fairness of the proceedings, that bedrock principle upon which due process was born. *Graf*, 143 N.H. at 302 ("To assess [a] defendant's due process claims under the State Constitution, [a court] look[s] to the principles of fundamental fairness."); *Symonds*, 131 N.H. at 534 ("[W]e look to fundamental fairness to determine whether the defendant's due process rights were violated."). "A fundamentally unfair adjudicatory procedure is one, for example, that gives a party a significant advantage or places a party in a position of prejudice or allows a party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading disadvantage." *Graf*, 143 N.H. at 302 (quotation omitted).

Conceivably, these standards collide in an inquiry not unlike the second prong of the *Strickland* analysis that is used for claims of ineffective assistance of counsel. Under the second prong of *Strickland*, prejudice occurs when "there is a reasonable probability that, but for [the error], the result of the proceeding would have been different. A reasonable probability is a

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[11] Notably, in determining "whether the State acted in good faith and without culpable negligence," the *Dukette* Court held that the "State should have the burden of persuasion on these issues, at least until [the court has] occasion to determine whether bad faith or negligence should affect the requisite degrees of materiality and prejudice." *Dukette*, 127 N.H. at 545–46 (underline added). The *Dukette* Court did not find bad faith or culpable negligence and therefore did not decide on a correlating standard for when such occurs. However, deduction infers that greater State culpability would reduce the burden on the defendant. Inasmuch, when the government is unable to demonstrate that it acted "without apparent negligence and in good faith, a defendant seeking relief" would *not* be "required to demonstrate a degree of evidentiary materiality and prejudice going beyond a mere possibility that the [State's meddling] could have affected the verdict." *Id.* at 546. A "mere possibility" would then yield much greater buoyancy. *See id.* Where a mere possibility endures, the burden shifts to the State to quench the mere possibility and sufficiently establish that the verdict was not affected by the error. Therefore, higher State culpability would evoke a standard indistinct from harmless error review.

probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. Inasmuch, if Ms. Smart is denied harmless error review, *Strickland's* prejudice prong pragmatically reigns.

Regardless of which standard—harmless error or a reasonable probability of a different result—is applied to the instant case, Ms. Smart can satisfy the Court's appraisal. The false confidence the transcripts imposed on the jury was damning. The deceptive assignments made in the transcripts predisposed the jury to make an unconscious interpretation that was prejudicial to Ms. Smart that could not be overcome.

ii. It is substantially probable that, without the use of the inaccurate transcripts, Ms. Smart would not have been convicted, as was directly confirmed by a juror's contemporaneous record.

The main evidence the State had against Ms. Smart in the instant case was her alleged confession from the body wire tapes. Without the tapes, the State's case rested on the testimony of indisputably incriminated juveniles who received substantial benefits for testifying against Ms. Smart.

a. The importance of the body wire transcripts to the State's case was confirmed by the contemporaneous recordings of a juror.

The crucial role played by the tapes was confirmed by a juror who contemporaneously recorded their thought process each night after trial. The Juror expressed that without the tapes there was no way Ms. Smart would have been convicted; the tapes alone made a conviction a possibility. However, the Juror felt that the tapes were far from a smoking gun, and it was still a difficult decision. Ultimately it was the transcript provided by the State that allowed for a conviction as the tapes would have been impossible to understand without a transcript.

Specifically, the Juror said:

> And so we listened to these tapes, but they were unbelievable poor quality. As a matter of fact, even enhanced – I can't even imagined[sp] what they must have sounded like before they were enhanced, because most of the tape – some of it you

> can understand, but most of the tape, if you didn't have the transcript, which, you know, I don't know how reliable that is, really. I mean, that's debatable, definitely debatable, and I'm sure it will be debated in the deliberation room, **but if you didn't have the transcripts that somebody interpreted the tape and made a transcript of, you wouldn't have known half of what was said**. And so anyway, the tapes, they're contradicting, you know. Some of the tapes she said she didn't do it, and she said to tell – you know, told Celia to just tell the truth. But in some of the tapes it sounded, you know, incriminating, pretty incriminating, and whatever she said – she said -- "Well, I didn't" -- not these exact words but words to this effect, "Well," you know, "I didn't tell" -- you know, "I didn't force them to murder Greg," you know. I – you know, that "they're old enough to make up their own minds. You can't force anybody to do something like that, and I never paid them." And – and what else did she say that I – I thought it was like important? "I didn't force them to do it," and you know, "I can't believe they took me literally," or something. Something to that effect. So I don't know. It was really contradicting. On one hand she sounded like she was (inaudible) everything and was innocent. On the other hand, she sounded like she was guilty as hell. So – but I'm not sure if that's because she was guilty about the affair. It could be – and I know this is going to be debated, hotly debated. It could be – could be that she did have the affair with him, which they already admitted to, and that she complained to Bill about Greg and maybe even said she'd like him dead or something to that effect. It could be that he took her literally and did the whole thing. And the reason why she sounded guilty on the tape was that she felt it was her fault because of the affair and because of her involvement in him, you know, with him. So it's really debatable.
>
> Jesus, you know, the – up to this point – up to this point I would say **without those tapes there would have been no way in hell, not in a million years, that she ever would have been convicted at all, whatsoever**. With these tapes, it's either way. It's anyone's guess. It's anyone's guess.

August 15, 1991, *In Chambers Meeting Transcript – Juror Tape,* p. 83-86 (emphasis added).

Ultimately, it may have been the interpretation of one line of the transcript that convicted Ms. Smart. The Juror specifically noted that the State's case against Ms. Smart was thin and identified one line that led to the conviction:

> That in and of itself would have explained the most damning thing on the tape, you know, that "JR's going to be the first to roll, and when he does, he's going to blame me." There's no possible way that she could have known that had she not been involved, because the kids were in jail. They hadn't spoken to anyone, so she would have had to have known about it for her to say "JR's going to be the first to roll, and when he does, he's going to blame me." **And that is what convicted her.**

Id. at 115 (emphasis added).

Problematically, the Davidson Study, discussed *supra* Section I.A., found that this is not what jurors would have heard had the transcript not been presented. This line is captured in Clip 9 of the study. According to the study, 82.1% of participants who were provided the original transcript of Clip 9 believed they heard what is written in the original transcript. However, 68.3% of participants who were provided the alternative transcript of Clip 9 believed they heard what was written in the alternative transcript. Then, 91.8% of the participants who were not given a transcript of Clip 9 did not hear what is transcribed in either the original transcript or the alternative transcript. This demonstrates that the specific line that the Juror said convicted Ms. Smart was of sufficiently poor quality such that listeners heard whatever is transcribed and, without a transcript suggesting what to hear, participants did not hear anything. Thus, if the State had not been able to put their transcript before the jurors, the jurors would not have believed they heard the suggested incriminating statement on which they convicted Ms. Smart.

The Juror went on to repeat that the tapes were the only evidence that could convince the Juror to find Ms. Smart guilty and it would be "impossible" to convict Ms. Smart without the tapes:

> It's going to be one hell of a tough job. One hell of a tough job. The tapes may make it tough. Definitely it's the only evidence that I can see that's going to make this job tough, because up to – **without the tapes, like I said, it would be impossible to put her in jail. It would be impossible to convict her without those tapes**. Now, with those tapes, it's debatable, so – and it will be debated, hotly, I'm sure. God it's anybody's guess. It's anybody's guess.

Id. at 88 (emphasis added). And again:

> That's the only evidence for – to be disputed, that is as far as I'm concerned. I mean, I don't know what the other Jurors think, but all the testimony up to this point has been by criminals, liars, self-interested people. The only evidence that I could see the contention sticks on those tapes. And by saying what she said on those tapes, it, you know, does definitely give a doubt.

Id. at 104-05.

After Ms. Smart's testimony, the Juror was torn between what Ms. Smart said in court and what the Juror was told was on the tapes:

> I'm not saying everything [Ms. Smart] said today was true, but I'm not saying – I mean, I believe – she was very believable, and I believe that somewhere lies the truth. And we're never going to know, really, what it is. But she created a big doubt today, I think, on every bit of testimony, every bit of evidence.
>
> There's only, actually, that one – the tapes. That's -- there are three tapes that's submitted into evidence. **Those three tapes are the only evidence the State has against her. The rest is all testimony from witnesses that are not credible and completely dismissed in my book.**

Id. at 107 (emphasis added).

After the trial concluded, the Juror reflected and reiterated the paramount importance of the tapes to her decision to find Ms. Smart guilty:

> This is July 1991, and the trial is all over by three or four months, and I'm sitting here thinking, what – if I could say, which is what I'm doing, something to Pam Smart's new attorney, it would be that if you get her a new trial, you know, give her a defense. I – I don't feel like she was given a good defense. The only thing that, you know – I don't know. The whole thing is so weird.
>
> **I believe that Pam is guilty, given the evidence that we were given to consider, which was the tapes, that's all I considered**. I mean, as far as – the only people, as far as witnesses go, that made an impact was Cindy Butt, the girl from Papa Gino's. I believed her testimony, I also believed Brian Washburn, his testimony. I believed both of their's[sp]. That's about it as far as the other – you know. The boys and Celia Pierce, you know, I didn't believe them at all. But in order for those two testimonies to be true, which I believe that they were, someone would have had to have been deceived. And it was either Celia Pierce deceiving this Cindy Butt, you know, couple months in advance, which I don't think she was smart enough to do at all, I think she was an air head, or it was Pam deceiving Brian on the advice of her attorneys, which is what I believe it was to plant some, you know, insurance, so to speak with – with someone.
>
> But, you know, other than that, the tapes were all that counted. And that's all as far as the jury goes that we should possibly, you know, pick, because there was too much dissension on whether or not to believe the boys, which I absolutely would not consider any evidence that they had to say.

Id. at 112-13 (emphasis added).[12]

b. The Juror struggled to reach a guilty verdict even with the transcripts.

Throughout the recordings, the Juror repeatedly expressed doubt over the State's case. At multiple points in the recordings, the Juror expressed disbelief in the State's witnesses and doubt in the State's case against Ms. Smart:

> So to date, it's the beginning of the second week, there hasn't been any single solid thing that was evidence against her, that you could put a woman into jail for, nothing yet.

Id. at 61.

In a recording made on March 18, 1991, the second-to-last day of trial, before closing arguments, the Juror said:

> I think that I couldn't convict her, I don't think, you know. Like I said, we haven't been instructed as to all the law, but right from the beginning the Judge has told us the burden of proof is on the district attorney, is on the State, to prove her guilty beyond a reasonable doubt. Pam created doubt today. I've had doubt all along except for the tapes, and now those were damning, but even in one of the part of the tapes when Pam said, "Yeah, I knew" -- to Celia, "I knew about it before." Celia said, "Bill didn't tell me you knew anything. How come Bill didn't tell me you knew anything?" So I don't know. I'm gonna have to go back over the tapes again. But she – she created doubt and – on the one piece of evidence that would get her. And so if the burden of proof is on the State to prove her guilty beyond a reasonable doubt, and is not on her to prove herself innocent also, she walks. That's a guess, you know.

Id. at 108. The Juror later adds that this doubt persisted in deliberations. The Juror goes so far as to express that she had almost hung the jury, rather than vote guilty:

> I really believe – I can't be sure, of course, but I'm 99 percent sure that I would have hung that jury, because I was damn close to doing it anyway, had I known what this – the sentence was going to be, because I don't believe she deserves that.

[12] At times, the Juror ventures beyond just her own perceptions and into a description of what occurred during deliberations. Ms. Smart relies on the Juror's own perceptions and not on the description of actions taken during deliberations as use of such evidence is restricted pursuant to the 'no impeachment' rule.

Id. at 118-19.

While the Juror did ultimately find Ms. Smart guilty, the Juror's post-verdict recording made clear that she was still not fully convinced by the State's case and that the Juror felt Ms. Smart was not guilty to the level alleged. The Juror provided: ". . . I don't know. . . . I really do believe she is guilty . . . but anyway, even so, I don't believe the extent of her guilt, is what I'm saying, you know. I – I was not the only one who didn't think that – I mean, I don't even think it was – ah, it was her original idea. I really don't." *Id.* at 119.

The fact that this juror struggled to convict Ms. Smart even with the evidence of the State-created transcripts indicates a strong likelihood that, had the jury not received the faulty transcripts, the remaining evidence would not have been sufficient to hold a guilty verdict.

c. The Juror struggled to reach a guilty verdict because the Juror had reasonable doubts and did not believe the State's witnesses.

At numerous points in the recordings, made throughout trial, the Juror expressed a complete lack of belief in the State's witnesses. These witnesses' testimony was the only other substantial piece of evidence against Ms. Smart besides the transcript of the body wire tapes. Therefore, this indicates that, without the inaccurate transcripts, the remaining evidence would have been insufficient to convict Ms. Smart.

Beginning on the second day of trial, the Juror expressed her disbelief in Patrick Randall's testimony:

> So anyway, the cross-examination was quite good. I was impressed. Basically, you know, discredited him, I think, as a believable type of guy. Also one of the main things that was brought out in cross-examination was the fact that all those kids, Vance Lattime, Pete Randall, Bill Flynn and Ramey, all were put in – I think he said ADC, awaiting – ACD – waiting court determination together up in Concord. Meaning it's a juvey hall, juvey detention center, where they were all put in the same – they had plenty of opportunities to concoct a story and get their story straight. Not only did they have plenty of opportunities, the cross-examination

> revealed that they did talk many times even though they were forbidden to talk. They got caught talking four times. And they – he admitted to having talked at least ten times to the other kids involved in this murder. So they're right there. It gives you an idea of – you know, they definitely could have come up with this story. No doubt about it.
>
> Also – what else did he admit. There was something else that was pertinent. Oh, that he was given access by his lawyers to police reports, all the police reports, on what all the other kids testified to, you know.

Id. at 33-34.

The Juror reflected on the testimony of Dr. Roger Fossum, the chief medical examiner for New Hampshire. The Juror stated that the expert testimony on the bullet's pathway further discredited Patrick Randall's story of how the murder took place:

> So that's important because that shoots the shit out of Pete's testimony that Bill was behind Gregory and Pete was in front of Gregory with a knife, and that whole – that whole little scenario. It just shot it, because it didn't ring true. That's just one of the holes that was blown in Pete's story today.

Id. at 42.

The Juror later noted discrepancies between Patrick Randall's story and Vance Lattime's story:

> Several things that stuck out in my mind, in fact, there was a lot that stuck out in my mind, but the fact, that – oh, gosh, there's so many (inaudible) that didn't jive with Pete's story.

Id. at 43. And again:

> I'm not making up my mind, but as far as that testimony shoots the shit out of all this preplanning and all the stuff like that. I mean, he literally – he was honest and it didn't jive, and then he caught himself in his lie, I mean, you know, and continued to lie.

Id. at 48. And again:

> I definitely had a lot of doubts today whether these kids, these Seabrook boys are telling the truth. Definitely, I mean, those two kids, Pete Randall and JR Lattime, did not have the same story on several counts. Not, I wouldn't say, many, but on several. Important, very important. Definitely gave rise to a doubt in my mind, and

I know it did in the other Jurors too, because they were all scratching. They couldn't write fast enough.

Id. at 48-49. And again:

> Basically they discredited him. I mean, he said that he was honest with the State, with the DA, but then he hadn't told him about the rest of his crimes, so how honest is that? Basically, all's he had to say was hearsay stuff. I mean, he did admit to being a burglar, a drug user and wheelman on other jobs, so I don't think what he had to say was very credible.

Id. at 57-58.

The Juror likewise did not believe William Flynn:

> And you know I didn't believe a thing Bill said, nothing. I mean, nothing at all. And I felt nothing for him except disgust. I think he was obsessed with her. I think he still is, and I think he wants to make her pay now for – for whatever reason, I don't really know, and I couldn't even be guessing. I don't believe him. I don't believe anything he said.

Id. at 71.

Looking back on the testimony of Randall, Lattime, and Flynn later in the trial, the Juror affirmed her disbelief of their testimony:

> After thinking about the testimony for the last week and a half now from the three boys, I just want to say what I thought about the three boys. I thought that they perjured themselves on the stand. I thought that they all were telling a lie. Some of the things that they said rang the same as the others, but that doesn't mean that they were true. It only means that they practiced well enough to remember some things the same. That's how I think.

Id. at 76.

The Juror also took issue with Cecelia Pierce's testimony:

> She said she watched the first few days of the testimony on TV, but then she was instructed not to watch, so she said she didn't, which I don't believe. She also had very selective memory.

Id. at 92.

The Juror, further, did not believe George Moses, the son of a woman incarcerated with Ms. Smart in pre-trial detention, who testified that Ms. Smart asked him to say Cecelia Pierce is lying:

> His mother was coming up, I guess, in two months, before the parole board to see if she can get out get her sentence reduced so she could get out. She's in for fraud, welfare fraud, $47,000 worth of welfare fraud. So there's definitely an intent and a reason to lie there.

Id. at 59-60.

In contrast, the Juror expressed belief that Ms. Smart was telling the truth:

> And I thought she was, like, together today, pretty much. I mean, she – she was crying a little bit, but I thought she sounded like she was telling the truth. She said that Celia – no one, you know, after the murder and all that, no one was telling her anything. The police were shutting her out of the investigation. And she said a couple of times – she just said once the thought crossed her mind Bill might have something to do with it. And she asked him, "You didn't have anything to do with this, did you, Bill?" And he said, "What are you crazy? You need a psychiatrist? I can't believe you'd even ask me that." And she said that she thought after the boys were arrested that Celia knew more than she was letting on, and so since she was being totally shut out by the police, and she was calling them everyday[sp], several times a day, they were telling her, "We can't talk to you. We don't want to talk to you. We have nothing to tell you." So she was being totally shut out.

Id. at 100-01. Near the end of the trial, the Juror remarked that Ms. Smart's testimony was "feasible:"

> But I personally thought -- I'm not saying I believe everything that Pam said today, but the things that she did say that I believe would be feasible. I mean, it – I don't know. I mean, I haven't made up my mind of anything, but I'm -- I know I didn't believe any of the boys, because I just didn't. They're liars, they're criminals, and their stories discredited. And they've had time, and opportunity and motive to build a story like that, like they have. It seems that – and I didn't believe Celia. I think she was trying to protect her ass, because she was definitely involved as an accomplice, and she hasn't been charged yet. And so, I mean, it's always – you know, it's always been feasible thing, if you didn't believe any of those things, to – to assume that – well, first of all, you have to assume that she's innocent, but it's always been – for me through this whole thing has been feasible that she very well could be innocent.

Id. at 103-04.

Ultimately, because the remaining evidence against Ms. Smart—namely the witness testimony—was categorically unconvincing, there is a substantial possibility that, without the inaccurate transcript evidence, there would have been a different result.

iii. The Trial Court's instruction was insufficient to dispel any prejudice as the jury was already saddled with the "curse of knowledge" upon reading the State's transcripts.

The Trial Court expressed its awareness of the insufficiency of the transcripts when explaining to the jury that the transcripts were not evidence. Nonetheless, the Trial Court still allowed the transcripts to be presented to the jury and allowed the transcripts to follow the jury into the deliberation room. Ultimately, the transcripts fulfilled the purpose of evidence without the State being required to have the transcripts admitted as evidence. Allowing the State this transgression of the rules of evidence was not neutralized in any way by the Trial Court stating the transcripts were not evidence. The purpose and protections of the rules of evidence were still devastatingly defeated. The transcripts were allowed to argue an unfounded opinion that proved detrimental to Ms. Smart. A jury is presumed to follow a court's instructions, but certain highly incriminating information cannot be instructed away.

The case of *State v. Scarlett* demonstrates the principal that some prejudice from unadmitted evidence is so severe that it cannot be instructed away by a court. *Scarlett* prosecuted a sexual assault of a young child that had been lured away from her playmates. 118 N.H. 904 (1978). "Substantial evidence was presented to the jury linking the defendant to the crime. Most incriminating was the testimony of the victim's young playmates who were with her when she left with her molester. Photographs of the defendant's apartment, the alleged scene of the attack, also served to connect the defendant to the crime." *Id.* at 905. Most damaging to the defendant,

however, was a photograph of an apparently blood-stained bedspread that covered the defendant's bed. *Id.*

"The State, while eliciting testimony from a police officer, displayed to the jury what appeared to be a blood-stained bedspread, marked it for identification, and began an attempt to admit it into evidence." *Id.* "[T]he State was aware that the testimony of the chemist who had tested and analyzed the stains on the bedspread would be necessary in order to prove them to be blood." *Id.* "Nevertheless, the chemist was not present at trial or even scheduled to testify on behalf of the State." *Id.* at 905. "The State overreached when it displayed the bedspread to the jury under these circumstances." *Id.*

"Although the defense counsel's objections to the subsequent testimony concerning the bedspread were properly sustained, and the testimony stricken, the jury had already heard the police officer's testimony that the stains were blood, and that the sheet had been taken from the defendant's bedroom. This highly incriminating information struck a telling blow to the essence of the defendant's defense, that the State could not identify him as the molester." *Id.*

"[The court] attempted to cure the prejudice to the defendant by giving a considered and stern limiting instruction to the jury. The court ordered the jury to 'disregard entirely your observations' and 'disregard any testimony' concerning the bedspread. The court warned the jury that the bedspread 'has no evidentiary or probative value,' and advised it that 'the State was in error in attempting to offer this evidence.'" *Id.* "It was error for the State to have displayed the bedspread knowing that the bedspread could not have been admitted into evidence." *Id.* The level of prejudice warranted a reversal on direct appeal. *Id.* at 907 (holding the State could not show beyond a reasonable doubt that the inadmissible evidence did not affect the verdict).

Prosecutorial conduct need not be as jolting as the bedspread in *Scarlet* to warrant the same principle be applied. The test is simply whether it is possible "for any curative instruction to be effective to cure the taint." *State v. Ayotte*, 146 N.H. 544, 548 (2001). Euphemistically, some inadmissible evidence may be such that "the trial court cannot unring [the] bell once it has been rung." *State v. Kerwin*, 144 N.H. 357, 361 (1999). For example, this can occur when the State impermissibly comments on a defendant declining to testify. *State v. Ellsworth*, 151 N.H. 152, 158 (2004) ("[T]he prejudice created by the prosecutor's comment was not cured by his explanation or the trial court's subsequent instruction."). Or, when the State simply implies during its closing argument that the defendant lied about having only one glass of wine prior to a vehicular assault. *State v. Demond-Surace*, 162 N.H. 17, 25 (2011) ("Here, the evidence against the defendant was not overwhelming, and, indeed, the defendant's alcohol consumption may well have been critical to obtaining a conviction."). Similarly, "incurable prejudice" may arise in testimony revealing "the fact of a defendant's prior criminal offense." *State v. Kerwin*, 144 N.H. 357, 361 (1999). Even the mention of an untried indictment of a similar offense to the one currently on trial may inflict unacceptable prejudice. *LaBranche*, 118 N.H. at 179–80 ("After the second occasion, cautionary or limiting instructions would not have been able to erase the taint of the prejudicial evidence . . . "). In such cases, a trial court focusing on the error may "serve[ ] only to emphasize the prejudice." *State v. LaBranche*, 118 N.H. 176, 179-80 (1978). In any event, Ms. Smart references *Scarlett* for its clear embodiment of the principle that judicial instructions oftentimes are insufficient to cure the prejudice of even unadmitted evidence.

The instant case bears many similarities to *Scarlett.* Here, before the first and second tapes were played, the Trial Court instructed the jury as follows:

> To the extent, if any exists, that the tape itself differs from what you are reading along in the transcript, you will use the tape in your consideration of the evidence in this case and not the transcript.

Smart, 136 N.H. at 666.

Like in *Scarlett*, this jury instruction was insufficient to overcome the substantial prejudice the jury had already suffered by reading the transcripts. As discussed by the scientific research above, *see supra* Section I.A., upon reading the inaccurate transcripts alongside listening to the tapes for the very first time, the jury was subjected to the "curse of knowledge" and was thereafter unable to discern anything different from what the transcripts told them they would hear. The Davidson Study demonstrated this principle using clips from the same audio that was played during Ms. Smart's trial. In effect, the study showed that listeners who read a transcript, regardless of whether it was the transcript prepared by the State in Ms. Smart's case or an alternative transcript with different text, would hear what the transcript told them they would hear. In contrast, participants who listened to the audio clips but did not receive any transcript rarely ever heard the text as presented by either transcript. Furthermore, participants given either transcript were significantly more confident in the accuracy of their interpretations and perceived the audio as clearer than participants who did not receive a transcript. In other words, once the transcripts implanted into the minds of the jury what the jury should be hearing, the transcripts biased the ability of the jury to hear the tapes neutrally.

Therefore, like in *Scarlett*, the Trial Court's instructions that the transcripts were not evidence were moot—the prejudice of the jury having heard the tapes while reading the transcripts was too strong to be cured by an instruction. Because the jury never had the opportunity to listen to the tapes without the accompanying transcript, even if the jury tried to follow the Trial Court's instruction, it would be unable to do so without the transcripts'

prejudicial influence. The Trial Court, the State, and Trial Counsel all furthered the error of the transcripts. The Trial Court should not have allowed the misconduct of the State and should have prevented the transcripts ever being placed in front of the jury.

II. Trial Counsel violated Ms. Smart's fundamental constitutional rights by declaring her guilt to the jury without her consent, which amounted to structural error and a presumption of prejudice.

An attorney surrendering guilt to a jury, against the defendant's will, constitutes prejudicial error. *State v. Anaya*, 134 N.H. 346 (1991). This is what Ms. Smart's Trial Counsel repeatedly and unambiguously did in the case *sub judice*. Such prejudicial error requires reversal and a new trial.

A. An attorney surrendering a client's guilt, without the client's consent, amounts to ineffective assistance of counsel and the denial of a defendant's Sixth Amendment rights.

i. An attorney admitting their client's guilt amounts to ineffective assistance of counsel and prejudice is presumed.

In *State v. Anaya*, Anaya was charged with accomplice to first degree murder and a co-defendant was charged with first degree murder. 134 N.H. 346, 348 (1991). Anaya provided a signed confession in the early stages of a murder investigation, but later recanted. During the subsequent prosecution, Anaya's co-defendant accepted a plea to second degree murder. Anaya's attorneys urged Anaya to similarly take a plea, as the attorneys thought it unlikely that a jury would return a verdict of not guilty, but Anaya unwaveringly stated, "I want to argue this case in court, I want to prove my innocence." *Id.* Ultimately, Anaya's "attorney [made a] plea to the jury, during closing argument, to convict Anaya of being an accomplice to second degree murder, rather than first degree murder." *Id.*

The Court held that counsel committed prejudicial error because counsel effectively admitted the defendant's guilt:

> By effectively admitting Anaya's guilt to this lesser-included offense, over his client's objection, counsel deprived Anaya of his right to have the jury decide his guilt, rendered meaningless his right to take the stand and proclaim his innocence, and eliminated the State's burden to prove Anaya's guilt of this offense beyond a reasonable doubt.

Id. at 354 (emphasis added). It was unnecessary to evaluate the weight of trial counsel asking the jury to convict the defendant on a lesser charge; the simple fact that trial counsel admitted guilt amounted to prejudicial error. *Id.*

The second prong of the ineffectiveness of counsel test generally requires a finding of actual prejudice resulting from an attorney's error, but New Hampshire held this is not necessary when an attorney surrenders their client's guilt:

> On the basis of the particular facts before [the Court], [*Anaya* held] that this requirement need not be met because the error's severity prevented any meaningful adversarial testing of the prosecution's case against Anaya for accomplice to second degree murder.

Id. (citing *United States v. Cronic,* 466 U.S. 648, 659 (1984)). "Thus, prejudice may be presumed, and [] Anaya was denied effective assistance of counsel, in violation of the sixth amendment of the United States Constitution and part I, article 15 of the New Hampshire Constitution." *Id.*

In *State v. Henderson*, "[t]he defendant testified in his own defense. He admitted that he had participated in [a] robbery, but denied that he had caused any of the victim's serious injuries." 141 N.H. 615, 616 (1997). Specifically, the defendant admitted that he swung at the victim but maintained that he only grazed the victim and therefore that he was not the cause of any serious injuries. *Id.* at 619. "[D]efendant's trial counsel submitted 'pattern' jury instructions

to the trial court. These included an instruction that the defendant could be found guilty of class A robbery if he 'inflicted or *attempted to inflict* serious injury on another person.'" *Id.* at 617. "[T]he indictment did not include an allegation that the defendant *attempted* to inflict serious injury, [therefore] it was not necessary for the defendant to present a defense to such an allegation." *Id.* at 620 (*emphasis added*). Trial counsel allowed a jury instruction that expanded the indictment and made it easier for the jury to convict the defendant. *Id.* at 620. In effect, trial counsel conceded that an attempt was enough to convict the defendant, after the defendant took the stand and admitted to an attempt, when this concession was unnecessary. Henderson was found guilty with the expanded instruction. *Id.* at 615.

Upon review, the Supreme Court of New Hampshire held that "the instruction expanded the indictment and allowed the jury to convict him if it found that the defendant 'attempted to' inflict serious injury." *Id.* at 617. The Supreme Court of New Hampshire awarded Henderson a new trial. *Id.* "[T]rial counsel's error in this case affected the fundamental fairness of the trial in such a way as to undermine our confidence in the reliability of the jury verdict. Accordingly, [the Court found] that the defendant met his burden of establishing 'actual prejudice.'" *Id.* at 620. The Supreme Court of New Hampshire awarded Henderson a new trial. *Id.*

The *Henderson* Court compared the case to *Anaya* and held that *Henderson* was "similar in an important way" to *Anaya*. *Id.* at 619-20. "Defense counsel essentially conceded that the defendant had committed a crime-in this case, []without authority from the defendant. As [was] stated in *Anaya*: '[T]he decision to admit such guilt should remain inviolably personal to the defendant.'" *Henderson*, 141 N.H. at 620 (quoting *Anaya*, 134 N.H. at 353) (emphasis added). Counsel's purpose, or lack of purpose, was not relevant in analysis, the simple concession without consent was a fundamental Constitutional violation.

More recently, in *McCoy v. Louisiana*, the Supreme Court of the United States similarly reviewed "whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection." 584 U.S. 414, 420 (2018). The First Circuit summarized the facts of the case as follows:

> In [*Robert Leroy McCoy v. Louisiana*], the Supreme Court considered a case where the defendant, McCoy, on trial for capital murder, instructed his attorney not to concede at trial that he had committed the triple murder he was accused of. 138 S. Ct. at 1506. Predicting that conceding guilt at trial was McCoy's only chance of avoiding the death penalty at the sentencing phase, McCoy's attorney said in his opening statement that there was "no way reasonably possible" that the jury could not conclude, upon hearing the evidence, that McCoy had caused the victims' deaths. *Id.* After being convicted and sentenced to death, McCoy appealed, and the Supreme Court held in a divided opinion that a defendant has a Sixth Amendment right to determine whether his attorney will concede factual guilt at trial. *Id.* at 1512.

Kellogg-Roe v. Gerry, 19 F.4th 21, 26 (1st Cir. 2021) (citing *Mccoy v. Louisiana*, 584 U.S. 414 (2018)).

"[Trial counsel] was placed in a difficult position; he had an unruly client and faced a strong government case. He reasonably thought the objective of his representation should be avoidance of the death penalty. But McCoy insistently maintained: 'I did not murder my family.'" *McCoy*, 584 U.S. at 428. Once McCoy communicated this to the court and trial counsel, "strenuously objecting to [trial counsel's] proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of [trial counsel]'s admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment. Because the error was structural, a new trial [was] the required corrective." *Id.*

The Supreme Court distinguished itself in *McCoy v. Louisiana* from its prior holding in *Florida v. Nixon*. In *Florida v. Nixon,* the Court considered "whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial 'when [the] defendant,

informed by counsel, neither consents nor objects,'" *Id.* at 417 (quoting *Florida v. Nixon*, 543 U.S. 175, 178 (2004).

In *Florida v. Nixon*, Nixon was arrested for a brutal murder. 543 U.S. 175 (2004). Nixon described in graphic detail how he had kidnapped and killed his victim when being questioned by police. *Id.* at 179. Nixon was assigned an assistant public defender as trial counsel. "Negotiations broke down when the prosecutors indicated their unwillingness to recommend a sentence other than death." *Id.* at 181. "[Trial counsel] concluded, given the strength of the evidence, that Nixon's guilt was not subject to any reasonable dispute." *Id.* at 175-76 (internal citation omitted). "[Trial counsel] concluded that the best strategy would be to concede guilt, thereby preserving his credibility in urging leniency during the penalty phase." *Id.* at 181.

Nixon's trial counsel several times attempted to explain this strategy to Nixon, but Nixon remained unresponsive, never verbally approving or protesting the proposed strategy. *Id.* Overall, Nixon gave trial counsel very little, if any, assistance or direction in preparing the case. *Id.* "Nixon stated he had no interest in the trial and threatened to misbehave if forced to attend." *Id.* at 182. When trial began, Nixon followed through in engaging in disruptive behavior and absented himself from most of the proceedings. *Id.* The judge ruled that Nixon had intelligently and voluntarily waived his right to be present at trial. *Id.* "[Trial counsel] acknowledged Nixon's guilt [to the jury] and urged the jury to focus on the penalty phase. . . .The jury found Nixon guilty on all counts. At the penalty phase, [trial counsel] argued to the jury that Nixon was not 'an intact human being' and had committed the murder while afflicted with multiple mental disabilities. . . .and asked the jury to spare Nixon's life. The jury recommended, and the trial court imposed, the death penalty." *Id.* at 175-76. "[T]he court commended [trial counsel]'s performance during the trial." *Id.* at 184. "Every court to consider this case, including the judge

who presided over Nixon's trial, agreed with [trial counsel]'s assessment of the evidence." *Id.* at 176 n.2.

The Supreme Court first affirmed that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Id.* at 187. A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id.* "Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Id.* An attorney is in a difficult position, though, if a client has been informed of the attorney's plan and the client is silent in response. If an attorney moves forward on a plan, the attorney is not operating with a client's expressed consent. Yet, the attorney has responsibly shared the attorney's plan and the attorney is not moving forward over a client's objection. The Supreme Court did not upset the requirement of client consent, but allowed informed silence to constitute consent. *Id.* at 192.

"[Trial counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon." *Id.* at 189. "When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." *Id.* at 192.

New Hampshire has made a parallel distinction, on the state level, to the Supreme Court in *McCoy* and *Nixon*, in *Reid v. Warden, New Hampshire State Prison*. In *Reid*, New Hampshire held that if a court finds that a client knew of counsel's strategy to concede guilt and agreed to it,

the client cannot later claim that they were deprived of their right to decide whether to concede their guilt. 139 N.H. 530, 533 (1995). "The plaintiff in [*Reid*] did not take the stand to profess his innocence, as the defendant did in *Anaya*; in fact, the plaintiff did not take the stand at all and neither protested his innocence nor objected to trial counsel's concession when given an opportunity to speak at the sentencing hearing." *Id.* "More importantly, at the hearing on the petition for writ of habeas corpus, plaintiff's trial counsel testified that the plaintiff was aware of trial counsel's strategy and had agreed to it, and that the plaintiff agreed that it was inadvisable to testify because the State could impeach him with evidence of his prior assaults." *Id.*

Similarly, the First Circuit has made a distinction between an attorney conceding guilt over a client's objection and an attorney putting on an active defense over a client's objection. A defendant is not free to *post hac* argue any instance of not agreeing with trial counsel's actions. Continued parsing has made clear that the protection examines a defendant's decision to concede guilt. In *Kellogg-Roe v. Gerry*, the Court held that "the presentation of an active defense, even over the client's objection, does nothing to subvert the client's desire to maintain his innocence." 19 F.4th 21, 27 (1st Cir. 2021). Under the First Circuit's analysis, "[b]y choosing to go to trial, []Kellogg-Roe availed himself of the presumption of innocence. Counsel did nothing to contradict this presumption. [Kellogg-Roe's] lawyers' actions -- presenting an opening argument, cross-examining the prosecution's witnesses, and putting forward defense witnesses -- were quite the opposite of conceding guilt. Trial counsel in this case made the typical kinds of decisions attorneys are charged with in order to protest their client's innocence." 19 F.4th at 27. *Kellogg-Roe* raises the imperative point of *McCoy*, that a fundamental line is crossed when counsel admits a client's guilt, and therein the adversarial testing process itself.

ii. The Sixth Amendment provides a right to autonomy, and when an attorney violates this right, it constitutes structural error.

"Separately, the Sixth Amendment also guarantees a defendant's autonomy to decide certain aspects of their defense in criminal trials." *Kellogg-Roe,* 19 F.4th at 26 (emphasis added) (citing *McCoy*, 584 U.S. 414). The right to autonomy, as provided by the Sixth Amendment, can overlap broadly with the right to effective assistance of counsel. The right to effective assistance of counsel protects a defendant from trial counsel undermining the adversarial testing process by overstepping and making errors like conceding guilt. *Anaya*, 134 N.H. at 354. The Sixth Amendment right to autonomy, however, is more expansive, and ensures a defendant the ability to make decisions founded upon fundamental constitutional criminal protections. *See Nixon*, 543 U.S. at 187.

One example of an area where a defendant's autonomy is strictly guarded is a guilty plea, which constitutes a most momentous "event of signal significance in a criminal proceeding." *Id.*

> By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. While a guilty plea may be tactically advantageous for the defendant, the plea is not simply a strategic choice; it is "itself a conviction," and the high stakes for the defendant require "the utmost solicitude."

Id. (internal citations omitted) (citing *Boykin v. Alabama,* 395 U.S. 238 (1969)).

The Supreme Court of the United States continued that a criminal defendant has "the ultimate authority" to determine not only "whether to plead guilty, [but whether to] waive a jury, testify in his or her own behalf, or take an appeal." *Id.* (internal citations omitted). "Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Id.* These rights ensure a defendant's own claim to the adversarial testing process.

The Supreme Court assisted in clarifying these rights by better defining attorney and defendant roles in *Robert Leroy McCoy v. Louisiana*:

> The Court reasoned that "[a]utonomy to decide that the objective of the defense is to assert innocence" is protected by the Sixth Amendment because the proper role of the attorney, as assistant, is to make decisions about "trial management." *Id.* at 1508. Strategic or trial management decisions include "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Id.* (quoting *Gonzalez* v. *United States*, 553 U.S. 242, 248 (2008)). Decisions reserved to the client "are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *Id.* [A defendant's] decision not to concede factual guilt might not be the wisest strategy for avoiding the death penalty, the Court reasoned, but he might have other priorities, such as avoiding the "opprobrium that comes with admitting he killed family members" or preserving his chance at exoneration, no matter how small. *Id.* "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her . . . so may she insist on maintaining her innocence at the guilt phase of a capital trial." *Id.*

Kellogg-Roe, 19 F.4th at 26 (citing *Mccoy*, 584 U.S. at 414-15) (cleaned up).

McCoy made clear that a fundamental right has been recognized that ensures a defendant's own claim to the adversarial testing process: "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy*, 584 U.S. at 426. Pivotally, *McCoy* held that when "a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." 584 U.S. at 426 (emphasis added). Instead, "[v]iolations of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural.'" *Id.* at 427. Because the right to autonomy is so fundamental, "'[t]he right is either respected or denied; its deprivation cannot be harmless.'" *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (2984)). When structural error occurs, a defendant "must therefore be accorded a new trial without any need first to show prejudice." *Id.* at 428.

New Hampshire predated the Supreme Court in *McCoy* in determining that an attorney's admittance to a jury of their client's guilt, without their client's consent, violates a defendant's Sixth Amendment right to autonomy. In *State v. Anaya*, Anaya "testified he was completely innocent and at that time told counsel he wanted his innocence argued to the jury. Anaya could, under these facts, expect that counsel would not persist in a different trial strategy." 134 N.H. at 353. Nonetheless, Anaya's attorney argued that the jury convict Anaya of a lesser included offense, not the highest crime charged.

> Although the decision to admit guilt of a lesser-included offense is arguably less serious than the decision to admit guilt of the offense charged, it is undeniably a momentous one. If a jury is able to convict a defendant of a lesser-included crime, the defendant's admission of guilt to that crime puts his or her liberty in immediate, grave jeopardy. Thus, the decision to admit such guilt should remain inviolably personal to the defendant.

Id. (citing *N.H. Rule of Prof. Conduct* 1.2) (emphasis added). "[T]he propriety of counsel's decision, for purposes of the sixth amendment and part I, article 15, should be judged according to whether [a defendant] authorized counsel to make these statements to the jury, particularly where the defendant discussed counsel's proposed argument with him at the close of the evidence." *Id.*

A defendant's right to autonomy is also in accord with New Hampshire's Rules of Professional Conduct, which state "[a] lawyer shall abide by a client's decisions concerning the objectives of representation." *N.H. Rule of Prof. Conduct* 1.2.

B. Trial Counsel conceded to the jury that Ms. Smart was guilty of witness tampering without Ms. Smart's consent.

The State brought a count of witness tampering against Ms. Smart on the basis of conversations Ms. Smart had with Cecelia Pierce. Trial Counsel professed Ms. Smart's guilt of

witness tampering to the jury during closing argument. This was immediately after Ms. Smart had taken the witness stand for two days and adamantly denied involvement in any crime.

As summarized by the State during trial, the State brought the charge of witness tampering:

> For her actions with Cecelia Pierce, the defendant is charged with witness tampering. We will prove that the defendant, knowing that an official proceeding, an investigation into her – to the death of her husband was pending, she purposely attempted to induce Cecelia Pierce to withhold information and provide false evidence to the police.

March 5, 1991 – Tuesday Morning Session – 9:29 a.m., *Trial Transcript – State Opening Statement,* p. 23.

To Ms. Smart's surprise, Trial Counsel conceded Ms. Smart's guilt for this charge during his closing argument. Immediately after Ms. Smart was on the witness stand where she denied guilt in any of the charges brought. Trial Counsel stated to the jury:

> She's clearly engaging in acts that constitute witness tampering, okay, and there's no – the acts she does, she tries to get Cecelia to lie to the police. No doubt about it. Or to withhold information about it. Not a single doubt about it.

March 20, 1991 – Wednesday Afternoon Session – 1:44 p.m., *Trial Transcript – Defense Closing Argument,* p. 1893.[13]

Ms. Smart insistently maintained, and maintains, her innocence of all the charges she faced during trial. Ms. Smart pled not guilty at the beginning of her proceedings and took the witness stand for two days to protest her innocence in front of the jury just before closing

[13] After admitting Ms. Smart's guilt, Trial Counsel attempted to argue, in a roundabout manner, that Ms. Smart's guilt warrants a finding of not guilty. For purposes of this argument, having a reason for admitting guilt does not negate that Trial Counsel did so without Ms. Smart's consent and admitted Ms. Smart's guilt immediately after Ms. Smart had just finished testifying to the complete opposite. Trial Counsel's conduct further fell below professional norms in that he did not request a jury instruction to support his plea for nullification.

arguments. Ms. Smart's "not guilty" plea and Ms. Smart's testimony demonstrate that Ms. Smart did not admit guilt. Ms. Smart was by no means passive in this position.

The record is clear, as laid out below, that Ms. Smart expressed to the jury that her purpose in speaking to Cecelia Pierce was to gather whatever information Ms. Smart could about her husband's killing, not to tamper with a witness. The police had cut Ms. Smart out of the investigation. Ms. Smart was desperate for any information about the killing of her husband. Ms. Smart testified that:

> After the murder, Cecelia – I mean, after the arrest of the kids, Cecelia was calling me on the phone and she was very nervous, very excited and worried and saying that she couldn't believe the kids were arrested. So I was wondering why, what she was so worried about, and she seemed to indicate to me that she knew more than she was saying. So, I mean, obviously, she knew about the affair, but I didn't mean just the affair. I meant more about the murder. And so she kept calling me and she would see me at the office and she was all excited about everything going on. So I thought that she had more information, and once again, like I said, my only source of information was Cecelia Pierce or the news, and I was totally obsessed with finding out who murdered my husband, why, what had happened in that house, and just why no one was telling me anything.

March 18, 1991 – Monday Afternoon Session – 1:00 p.m., *Trial Transcript – Direct Examination of Pamela Smart,* p. 1582-83. Ms. Smart continued:

> Well, I figured that if she knew more about the murder then she would tell me if I acted like I knew more about it. And I told her – well, she'd said to me that she – she'd asked me did I know about the murder beforehand, and initially I had said no. And then she made a statement to me that if I knew more about it, that as long as I told her that she wouldn't tell anyone and that we had to stick together. So in my mind, I thought that I would play a game with her and I would say that I knew more about the murder.

Id. at 1583.

Regarding the July 13 body wire, Ms. Smart stated:

> I don't even remember the whole entire day because I was under a lot of stress, like I said. I was in – on medication and I was – my mind was racing. I was confused. I was scared. I'd heard rumors. I was in a state of hysteria and desperation, and I believe that my voice on tape lends to that.

Id. at 1756. This state of mind was further affirmed on cross examination:

Trial Counsel:	Now, you mentioned in Mr. Maggiotto's – a question or two about it, that you were on medication during the point in time the last two of these tapes were made. Do you recall that?
Ms. Smart:	Yes.
[objection]	
Trial Counsel:	Go ahead, tell the people in the jury what medication you were on.
Ms. Smart:	Prozac.
[]	
Trial Counsel:	On the last page of one of those tapes you talked to Cecelia Pierce about where you're going after you see her.
Ms. Smart:	Right.
Trial Counsel:	Do you recall that?
Ms. Smart:	Yes, I do.
Trial Counsel:	Is what you said to her then correct?
Pam Smart.	Yes.
Trial Counsel:	True?
Ms. Smart:	That I was going to the psychiatrist?
Trial Counsel:	Right.
Ms. Smart:	Yes.

Id. at 1765-67.

As previously discussed, what is missing from Ms. Smart's testimony is any semblance of admitting guilt to witness tampering.

In the three decades since her trial, Ms. Smart has pursued filings ranging from a direct appeal to a mandamus on her denial for a commutation. Ms. Smart has uniformly maintained the same position. Ms. Smart has also been interviewed countless times over the three decades that she has been incarcerated. Not once in that time has Ms. Smart waivered in her position that she

is not guilty of any of the crimes in which she was charged, including the witness tampering charge. Ms. Smart has painfully acknowledged her indirect part in her husband's death; Mr. Flynn's homicidal infatuation arose out of her inappropriate relationship with him. Ms. Smart did not, however, in any way instigate Mr. Flynn with ideas of murder. Correspondingly, Ms. Smart never consented or agreed to what her Trial Counsel conceded.

Ms. Smarts' parents and aunt were intimately involved in trial proceedings and were allowed to be with Ms. Smart during court breaks. Trial Counsel would talk with Ms. Smart and her family during these breaks about the trial. Never once did Trial Counsel propose conceding guilt. Both Ms. Smart and her family were shocked when Trial Counsel admitted Ms. Smart's guilt in front of the jury as this had never been discussed.

C. Trial Counsel conceding Ms. Smart's guilt, without Ms. Smart's consent, amounted to ineffective assistance of counsel and the denial of Ms. Smart's Sixth Amendment right to autonomy.

Ms. Smart has unrelentingly maintained that she is innocent of *all* the charges that she faced during trial. Therein, Trial Counsel's conceding Ms. Smart's guilt to the count of witness tampering amounted to ineffective assistance of counsel that fundamentally affected the fairness of the trial, undermined confidence in the reliability of the verdict, and resulted in presumed prejudice. Trial Counsel's violation of Ms. Smart's right to autonomy was also a violation of Ms. Smart's right to decide whether to plead guilty, and this violation entitles Ms. Smart to a new trial without needing to satisfy the test for ineffective assistance of counsel. Even under a review for prejudice, Trial Counsel's error so undermined Ms. Smart's credibility and integrity that Trial Counsel prevented Ms. Smart from receiving a meaningful adversarial testing of the State's case, and this constitutes prejudicial error.

i. Trial Counsel admitting Ms. Smart's guilt of a charged offense without her consent constituted error and prejudice is presumed.

New Hampshire provides that trial counsel conceding guilt without a defendant's consent is grounds for a new trial. *See Anaya*, 134 N.H. at 354. When counsel surrenders their client's guilt, prejudice is presumed "because the error's severity prevent[s] any meaningful adversarial testing of the prosecution's case[.]" *Id.* Here, Trial Counsel fell below professional norms by explicitly and unambiguously stating to the jury, "She's clearly engaging in acts that constitute witness tampering." March 20, 1991 – Wednesday Afternoon Session – 1:44 p.m., *Trial Transcript – Defense Closing Argument,* p. 1893. When this occurred in *State v. Anaya*, the Supreme Court of New Hampshire held that counsel "rendered meaningless his [client's] right to take the stand and proclaim his innocence, and eliminated the State's burden to prove [his client's] guilt of this offense beyond a reasonable doubt. Thus, prejudice may be presumed, and we hold that Anaya was denied effective assistance of counsel, in violation of the sixth amendment of the United States Constitution and part I, article 15 of the New Hampshire Constitution." *Anaya*, 134 N.H. at 354 (internal citations omitted) (emphasis added). The defendant was granted a new trial. *Id.*

Like in *Henderson*, where trial counsel conceded guilt through a jury instruction, Ms. Smart testified in her own defense. And then, like in *Henderson*, Trial Counsel's error in admitting the defendant's guilt effectively turned that testimony against his client. Henderson's counsel allowed Henderson's words to admit an element of a crime. Ms. Smart's Trial Counsel went even further and *directly* admitted to Ms. Smart committing a crime. Ms. Smart's testimony was immediately contradicted by her own counsel. Ms. Smart's trustworthiness was completely undermined. In line with *Henderson*, Ms. Smart is entitled to the same corrective measure provided to Henderson: a new trial.

ii. Trial Counsel admitting Ms. Smart's guilt of a charged offense without her consent violated Ms. Smart's right to autonomy and constitutes structural error.

Like the defendant in *McCoy*, Ms. Smart had the ultimate right to autonomy. "[Trial Counsel]'s admission of [Ms. Smart]'s guilt despite [Ms. Smart]'s insistent objections was incompatible with the Sixth Amendment." *See McCoy*, 584 U.S. at 428. When a defendant's "autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." *McCoy*, 584 U.S. at 426. Instead, "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural.'" *Id.* at 427. Trial Counsel's violation of Ms. Smart's right to autonomy was a violation of Ms. Smart's right to decide whether to plead guilty, and Trial Counsel's violation of this right entitles Ms. Smart to a new trial. *Id.* at 428.

As established in *Nixon*, Ms. Smart's Trial Counsel was required to "both consult with [Ms. Smart] and obtain consent. . ." *Nixon*, 543 U.S. at 187. The *Nixon* Court held that Nixon's counsel did not commit error because Nixon's trial counsel attempted to explain the proposed trial strategy to Nixon several times and Nixon was unresponsive. "Nixon stated he had no interest in the trial and threatened to misbehave if forced to attend." *Id.* at 182. Nixon was aware of the strategy and the Supreme Court held that this allowed Nixon to at least passively acquiesce. In contrast, here, Ms. Smart's Trial Counsel did not consult with Ms. Smart and did not obtain any sort of passive acquiescence to admit guilt to the jury. Ms. Smart was an active participant in her trial, constantly meeting with counsel, discussing strategy with counsel, and maintaining her innocence. At no time did Trial Counsel discuss the possibility of acquiescing to her guilt—if this had occurred, Ms. Smart would have adamantly rejected the idea, as she has always and continues to maintain her innocence of all charges.

iii. Prejudice can easily be shown even though not required.

Even if precedent did not relieve Ms. Smart of establishing prejudice and entitle Ms. Smart to a new trial without applying ineffective assistance of counsel jurisprudence, Ms. Smart surmounts a showing of prejudicial error.

First and foremost, prejudice is created in the sheer presentation of a confession. It is well-settled that a confession sets the bar as having an incurable prejudicial impact upon a jury. *See State v. Kerwin*, 144 N.H. 357, 360 (1999) ("It is well-settled that an incurable prejudice may result 'when the testimony of a witness conveys to a jury the fact of a defendant's prior criminal offense. The infusion of such evidence into a trial is probably only equalled[sp] by a confession in its prejudicial impact upon a jury.'"); *see also State v. Pierce*, 176 N.H. 487, 490 (2024).

Furthermore, Trial Counsel "prevented any meaningful adversarial testing of the prosecution's case," and undermined Ms. Smart's credibility. *Anaya*, 134 N.H. at 354. Trial Counsel "rendered meaningless [Ms. Smart's] right to take the stand and proclaim [Ms. Smart's] innocence. . . ." *See id.* Ms. Smart's testimony was condemned by her own attorney. Trial Counsel effectively characterized Ms. Smart as a liar. Ms. Smart's right to take the stand as her own witness to the charges she faced was undermined and the authenticity of her testimony defending herself in a murder case was discredited. Trial Counsel denied Ms. Smart effective assistance of counsel and denied Ms. Smart her fundamental right to autonomy. Ms. Smart is entitled to a new trial.

Ms. Smart's credibility was undermined by her own counsel just as was seen in *State v. Wilbur*. 171 N.H. 445. In *Wilbur*, the defendant was charged with two counts of aggravated felonious sexual assault against a child. *Id.* at 446. A transcript of an interrogation of the defendant was introduced to the jury but what was said in the transcript and how the comments

were relayed to the jury by the State were stark. *Id.* at 451. "In practical effect, defense counsel permitted the State to convey to the jury that the defendant implicitly admitted to being guilty of committing the crimes charged." *Id.* at 453. Defense counsel did present evidence, but "the evidence presented in this regard was far too little, given that counsel did not fully elicit the manner of the defendant's denial or the number of times that the defendant denied the charges, and, more importantly, permitted the State to effectively paint these denials as disingenuous." *Id.* "This failure to rebut the State's mischaracterization was objectively unreasonable. Accordingly, [the Court held] that defense counsel's representation was constitutionally deficient." *Id.* (internal citation omitted). The defendant was entitled to a new trial. *Id.* at 457.

Ms. Smart's Trial Counsel did not simply allow the State to "effectively convey[] to the jury that the defendant was implying his guilt" or "permit[] the State to fabricate a misleading narrative to suggest that the defendant implicitly admitted guilt" like trial counsel in *Wilbur. Id.* at 452-53. Even more egregiously, Ms. Smart's Trial Counsel directly admitted the guilt of his own client himself, leaving nothing implicitly communicated to the jury. Ms. Smart's Trial Counsel himself painted Ms. Smart's testimony as disingenuous.

Ms. Smart's Trial Counsel effectively invited the jury to make a decision based on Trial Counsel's characterization of Ms. Smart, and not on the evidence of her guilt or innocence, similar to trial counsel in *Mallard v. Warden.* 175 N.H. 565. Just as in *Mallard*, Ms. Smart's Trial Counsel deprived Ms. Smart of her constitutional right to the effective assistance of counsel, and established grounds for an entirely new trial. Mallard's trial counsel described Mallard as a "'big, menacing black guy' during cross-examination of the victim." *Id.* at 569. "Trial counsel's improper appeal to racial bias in Mallard's criminal case 'effectively invited the jury to make a decision based on a characterization of the defendant and not on the evidence of

his guilt or innocence.'" *Id.* at 574 (quoting *Wallace v. State,* 768 So. 2d 1247, 1250 (Fla. Dist. Ct. App. 2000)).

Ms. Smart's Trial Counsel directly admitted Ms. Smart's guilt of one of the three charges she faced. Trial Counsel characterized Ms. Smart as a liar – specifically, as a person who lied to the jurors when she pled not guilty to all charges and then spent two days telling her side of the story. Like in *Mallard,* this resulted in the jury basing their decision not on the evidence provided, but on Trial Counsel's negative characterization of his client's credibility and admission of guilt. Ms. Smart is entitled to a new trial because Ms. Smart's rights to effective assistance of counsel and autonomy were violated by Trial Counsel's unilateral admission of guilt.

III. Ms. Smart was convicted on an inflammatory news media story and not the judicially reviewed evidence produced during trial, as has been admitted by a juror, and this constitutes a denial of Ms. Smart's constitutional rights.

A. A defendant has the right to a jury that will decide the defendant's case solely on the admissible evidence presented during trial and a jury's failure to do so violates a defendant's due process rights.

The Supreme Court of the United States "has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment." *Ramos v. Louisiana,* 590 U.S. 83, 93 (2020) (quoting *Duncan v. Louisiana,* 391 U.S. 145, 148–50 (1968)); *Groppi v. Wisconsin,* 400 U.S. 505, 509 (1971) ("The due process requirements of the Sixth Amendment to the United States Constitution guarantee a defendant the right to a trial by a fair and impartial jury."). Further, the "Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law." *Peters v. Kiff,* 407 U.S. 493, 501 (1972).

A manifest "touchstone" of this right to a fair and impartial jury is the ability to acquire a "jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554 (1984); *Sheppard v. Maxwell,* 384 U.S. 333, 351 (1966) (A "jury's verdict [must] be based on evidence received in open court, not from outside sources"); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (A juror's "verdict must be based upon the evidence developed at the trial."). In fact, Justice Holmes stated well over a century ago this undeviating rule:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.

Patterson v. State of Colorado ex rel. Attorney General, 205 U.S. 454, 462 (1907); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall[.]").

New Hampshire has mirrored this right, holding that "[i]t is a fundamental precept of our system of justice that a defendant has the right to be tried by a fair and impartial jury." *Addison,* 161 N.H. at 303 (quotation omitted). Part I, Article 15 of the New Hampshire Constitution provides fundamental due process rights, with Part I, Article 35 of the New Hampshire Constitution specifically providing "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." "This provision for judicial impartiality is applicable as well to jurors." *State v. Wellman*, 128 N.H. 340, 348 (1986). A juror is considered impartial "if the juror can lay aside her impression or opinion and render a verdict based on the evidence presented in court." *State v. Weir,* 138 N.H. 671, 676 (1994) (quotation and brackets omitted); *State v. Addison*, 165 N.H. 381, 624 (2013) (quoting *Laaman*, 114 N.H. at 800) ("Under both the

State and Federal Constitutions, a juror is deemed 'impartial' if he or she 'can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court.'")

B. Ms. Smart was convicted on seditious evidence not presented during trial.

Ms. Smart's previous counsel raised concerns around a media story on a motion for new trial and on appeal. Both proceedings dismissed the issue as no direct claim of prejudice could be produced by Ms. Smart. Ultimately, it was not that no prejudice existed, but that Ms. Smart was unaware of the prejudice at the time of the previous filings. Evidence has since become available that establishes a clear showing of prejudice.

On direct appeal, the Supreme Court of New Hampshire recognized the media story at issue, and discussed the media story as follows:

> Several nights before jury selection was to begin, a local television station, WMUR–TV, aired a special program entitled "Anatomy of a Murder," devoted to the defendant's case. Consisting of footage from earlier news broadcasts that included film of pre-arrest interviews with the defendant, of her arrest and that of the teenage boys, along with commentary by a station reporter, the program also mentioned three new indictments against the defendant. One of these indictments charged her with attempting to murder a prospective witness. Suggesting a prejudicial influence on prospective jurors, the defendant points out that the evidence of the new indictments was not introduced at trial. Exposure to inadmissible evidence, however, is not sufficient to presume jury prejudice.

Smart, 136 N.H. at 650.

Around 2005, a reporter, Anna Maria Andriotis, worked for a short-lived publication named Justice Magazine. Ms. Andriotis interviewed a juror that sat on Ms. Smart's jury, named Charlotte Jefts, for an article that was never ultimately published. Ms. Jefts' disclosure of prejudice is jarring. The following reflects the conversation, as transcribed by Andriotis, which itself is supported by an audio recording of the interview:

Jefts: You'd have to be on the jury to know....I just couldn't possibly...when I think of the lives she's ruined..she wants her own way, she doesn't think anything of getting her husband killed.....**she wanted to get that girl killed**...it didn't go through...when she was in jail...she didn't think anything of murdering anyone who gets in her way. I tried very hard three times I voted undecided just to see if whether......there were two others voting undecided

Andriotis: how many times was there a vote?

Jefts: what?

Andriotis: How many times was there a vote, you said you voted undecided three times?

Jefts: Oh, we had several straw votes, I don't know 3, 4, 5 something like that.

Andriotis: ok

Jefts: – and then finally when the last one...it was 12 guilty...there was no way, she was possibly getting out of this 'cause she thought nothing of murdering anybody. She tried to get and **when was in jail awaiting trial she had a friend there whose husband agreed to kill one of the girls who was testifying against her**......

Andriotis: which girl?

Jefts: what?

Andriotis: which girl was she trying to kill?

Jefts: ya, oh, now....I can't think of her name but she went to see her in jail....when Pam was in jail....she....right there she included herself in this she said if you don't do what I tell you to do she mentioned all of them and ME (emphasis)....it included her...that's the first time that she agreed that she had anything to do with it. You understand what I mean?

Andriotis: this was in jail as she was awaiting trial?

Jefts: yes

Andriotis: and she basically....one of the other inmates in there...she approached that inmate's husband and requested or attempted for him to kill....ummm....certain members or the

Jefts: yes, this girl her name was ....uh

Andriotis: from the jury?

Jefts: uh, no,no,no,no,no....it was the girl that she uh was in the class that Pam Smart uh, was teaching

Andriotis: ok, in high school?

Jefts: well it was a part of high school...it was a separate building and Pam was at the head of it

...

Jefts:	Uh, well it was brought up.....uh, in the whole theory, you know, yeah, how that she had got ya, she...when she was in jail awaiting trial, she.... **A friend in there whose husband had agreed to kill, uh, that girl, but then he changed his mind. He did. But, I mean it's awful but she has a mind.....anybody whose in her way she doesn't mind having them killed** and I tried very hard three times on straw votes undecided to see if there was any way that she could....she was a young girl
Andriotis:	right
Jefts:	Any way at all that she could get out of it and there isn't and it's awful to say but she's got a terrible, evil mind ....anybody is in her way and Billy Flynn, he cried, during this whole thing.....when he was on and he kept saying I didn't want to do it, I didn't want to do it, and they said well why did you? And he said because I was in love and I didn't want to lose her so he agreed to kill....uh.....the....uh, you know, the killing.

Exhibit 2 (Transcript of Charlotte Jefts Tape) (emphasis added).

Ms. Jefts reveals her respective misconduct without invading the confidentiality of the deliberations by the jury as a whole.[14] As the transcript reveals, Ms. Jefts stated in no uncertain terms that she knew about evidence that was not produced during trial—namely, accusations against Ms. Smart for allegedly trying to have a prospective witness killed. Ms. Jefts recounted specifics of the alleged attempted killing with no hesitancy that align only with allegations released in the media, that most certainly were not presented during trial. Furthermore, she indicates that she was highly influenced by this improper outside information to convict Ms. Smart. She specifically states that, after a number of undecided votes, she was finally able to reach a verdict of guilty because "[Ms. Smart] thought nothing of murdering anybody" as evidenced by Ms. Smart allegedly trying to have a witness killed. *Id.* Thus, she draws a clear

[14] Ms. Jefts does not divulge the discourse of the jury during deliberations, and as such this interview is not barred by the no-impeachment rule. The interview merely provides insight into Ms. Jefts' own perspective.

cause and effect between her improper knowledge of outside information and her choice to convict Ms. Smart.

The ease in which Ms. Jefts was able to dismiss the necessary blinders of trial and embrace the image of Ms. Smart offered to Ms. Jefts by the media was made easier by the lack of any jury instruction to rely only on evidence produced during trial (this error discussed further *infra* Section IV; this error also nullifies any assumption that the jury followed an instruction not given). There is a very reasonable probability that this understandable human trait infected more than just Ms. Jefts and likely affected the outcome of the trial. Ms. Jefts has since passed away and will not be re-called to disclose any discussion during deliberations. Nonetheless, this interview of Ms. Jefts presents clear evidence that Ms. Jefts not only bested the protections of voir dire, but violated Ms. Smart's fundamental jury rights and due process protections.

C. Ms. Smart being convicted on evidence not presented during trial entitles Ms. Smart to a new trial.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). There is no doubt "[t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 363. "[T]he cure lies in those remedial measures that will prevent the prejudice at its inception." *Id.* However, "reversals are [] palliatives[.]" *Id.* (Finding reversal appropriate because of prejudicial media scrutiny and courtroom disruption).

The Supreme Court of the United States has "repeatedly acknowledged that retrials are the appropriate remedy for violations of [] jury-trial rights." *Smith v. United States*, 599 U.S.

236, 245 (2023) (referencing rights such as a non-unanimous jury, racially biased jury, partial jury, and jury that does not reflect a fair cross-section of the community).

Ms. Smart's trial was infected with prejudicial publicity and Ms. Smart was convicted by a partial jury that was unable to decide the case based only on evidence presented during trial. Seditious, and untrue, allegations from the media invaded deliberations and prejudiced Ms. Smart's verdict, as is concretely demonstrated by Ms. Jefts' interview transcript. The evidence now introduced warrants a reversal. In continuation, the new evidence substantiates arguments raised by Ms. Smart in prior proceedings that were dismissed due to a lack of showing prejudice; Ms. Smart raised meritorious claims in, *inter alia*, Ms. Smart's direct appeal and original state habeas corpus proceeding.

IV. Trial Counsel failed to correct and consented to erroneous jury instructions that alleviated the burden required for the State to convict Ms. Smart and this constituted prejudicial error.

"Jury instructions which inevitably enhance the risk of unwarranted conviction have never been tolerated in our system of jurisprudence." *Dukette v. Perrin*, 564 F. Supp. 1530, 1538 (D.N.H. 1983). For example, it is fundamental that a criminal defendant is entitled to an instruction on the presumption of innocence, *Taylor v. Kentucky,* 436 U.S. 478 (1978), and may not be convicted of a crime except by "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship,* 397 U.S. 358, 365 (1970). In the instant case, Ms. Smart was denied the effective assistance of counsel when Trial Counsel allowed the court to employ jury instructions that lowered the State's burden of proof.

Trial Counsel committed three errors with regard to the jury instructions given in this case. First, Counsel failed to object to the jury instructions on the accomplice to first-degree murder charge that erroneously lowered the State's burden of proof of Ms. Smart's mens rea.

Second, Counsel failed to request that the jury consider only the evidence presented at trial, excluding any external information, when reaching a verdict. Third, Counsel failed to object to overly coercive jury instructions given by the Court. These errors surrendered elements required of the State to prove Ms. Smart guilty, and such concession by Trial Counsel amounts to meaningful prejudice and requires a new trial. *See State v. Guaraldi*, 124 N.H. 93, 97 (1983) (recognizing the claim of ineffective assistance of counsel for failure to file written requests for jury instructions).

In *State v. Henderson*, the Supreme Court of New Hampshire held that the defendant, Henderson, was entitled to a new trial when trial counsel failed to object to jury instructions that alleviated the burden required of the State to convict Henderson. 141 N.H. at 620. In *Henderson*, "[a]t the close of evidence and before submission of the case to the jury, the defendant's trial counsel submitted 'pattern' jury instructions to the trial court." *Id.* at 617. These included an instruction that the defendant could be found guilty of [a] class A robbery if he 'inflicted or attempted to inflict serious injury on another person.'" *Id.* The jury found the defendant guilty of a class A robbery. "Approximately three years after he was convicted, the defendant filed a motion for new trial on the basis of ineffective assistance of counsel. Henderson claimed that his trial counsel's performance in submitting the jury instruction and failing to object to it was deficient because the instruction expanded the indictment and allowed the jury to convict him if it found that the defendant 'attempted to' inflict serious injury." *Id.*

The Court in *Henderson* "conclude[d] that trial counsel's error [] affected the fundamental fairness of the trial in such a way as to undermine confidence in the reliability of the jury verdict." *Id.* at 620. Accordingly, [the Court held] that the defendant met his burden of establishing 'actual prejudice.'" *Id.* at 618. Because "the defendant [] established 'actual

prejudice,' [the Court did not] need [to] decide whether trial counsel's error was so serious that prejudice must be presumed." *Id.* Therefore, Henderson was entitled to a new trial based on ineffective assistance of counsel. *Id.* at 620.

The principle in *Henderson* was repeated in *State v. Stewart.* 155 N.H. 212 (2007). The defendant was convicted on a felony count of issuing a bad check. *Id.* at 213. It was held, on appeal, that the trial court unsustainably exercised its discretion in answering a jury's question and enabling a conviction on a lower burden of proof, therein creating a presumption of prejudice. *Id.* at 217; *See State v. Lambert,* 147 N.H. 295, 296 (2001).

The trial court in *Stewart* "added an element to the crime that does not exist, and in so doing, may have misled the jury. The court stated that the State had to prove that 'at the time [he] issued the check to Mr. Auger, [he] knew there were insufficient funds to cover the check.' [But] that is not an element under RSA 638:4." *Stewart,* 155 N.H. at 217. The actual knowledge element was that the defendant knew "that the bank would not honor the check." *Id.* "[B]y erroneously informing the jury that the defendant's knowledge of an insufficient account balance on the date the check was issued was a necessary element of the crime, the court's answer could have misled the jury into thinking such knowledge was sufficient to meet the mens rea requirement for the crime." *Id.* "[I]n many cases, a jury may find that the mens rea element is satisfied solely by the State's evidence of insufficient funds at the time the check was issued. In a case such as this, however, where there was evidence of an agreement not to deposit the checks immediately, evidence of attempts to obtain financing prior to negotiation of the checks, and evidence that the checks were in fact held for approximately four months, the status of the defendant's account at the time the checks were written may be less relevant, and a rational jury could have found that the mens rea element was not proved." *Id.* "Accordingly, . . . the defendant

was prejudiced by the trial court's erroneous response to the jury's question. The trial court therefore unsustainably exercised its discretion in answering the jury's question." *Id.* (internal citations omitted).

Enabling an easier conviction of one's client constitutes deficient performance and prejudices the outcome of a defendant's case. *See Sharkey,* 155 N.H. at 640–41. Failing to ensure a defendant receives proper jury instructions does not illustrate trial strategy but a prejudicial mistake. *See id.*

A. The jury instructions in the instant case failed to instruct the jury that Ms. Smart must be found beyond a reasonable doubt to have acted with deliberation and premeditation, and this unconstitutionally lowered the burden required by the State to convict Ms. Smart.

Trial Counsel did not submit a jury instruction on accomplice to first-degree murder and did not object to the Trial Court's erroneous instructions to the jury that excluded the mens rea element of accomplice to first-degree murder.

A failure to instruct the jury on all required elements of a crime lowers the burden with which the State is required to obtain a conviction. "[P]art I, article 15 of the New Hampshire Constitution entitles a criminal defendant to a jury determination on all the *factual elements* of the crime charged." *State v. Etienne*, 163 N.H. 57, 80 (2011). A verdict reached without required consideration of all factual elements is inherently unconstitutional. Such an unconstitutional verdict was reached in the instant case.

Such error can also be found as the result of ineffective assistance of counsel. In *State v. Henderson*, the Supreme Court of New Hampshire held that trial counsel's failure to object to jury instructions that alleviated the burden required for the State to convict, constituted error, and prejudice was presumed. 141 N.H. 615, 620 (1997). Surrendering this element of the crime equated to counsel's admission of guilt on that element.

i. New Hampshire's accomplice statute required that the State prove that an accomplice acted with the same mens rea as the principal in a first-degree murder.

The culpability requirement in the accomplice statute directing Ms. Smart's trial necessitated that she act with the same mental state as that required for the underlying offense; in other words, that Ms. Smart act with the same mental state as the principal in a first-degree murder. Relevant to Ms. Smart's case, "to establish accomplice liability, the State must prove that: (1) the accomplice had the purpose to make the crime succeed; (2) the accomplice's acts solicited, aided, or attempted to aid another in committing the offense; and (3) under paragraph IV, the accomplice shared the requisite mental state for the offense." *State v. Papillon*, 173 N.H. 13, 36 (2020) (emphasis added); N.H. Rev. Stat. § 626:8. In the case now before the Court, Ms. Smart places emphasis on this third element. The jury was not instructed that it must find that Ms. Smart acted with the requisite mental state, deliberation and premeditation.

First degree murder has a mens rea unique to itself. New Hampshire statutes use a general mens rea of 'purposely,' but in the application of first degree murder, purposely shall mean that the actor's conscious object is the death of another, and that his act or acts in furtherance of that object were deliberate and premeditated. N.H. Rev. Stat. § 630:1-a.

The mens rea of the substantive offense plays a key role in the application of the accomplice statute. At the time Ms. Smart's case was before the trial court, the accomplice statute stated, in relevant part:

> III. A person is an accomplice of another person in the commission of an offense if:
>
> > (a) With the purpose of promoting or facilitating the commission of the offense, he solicits such other person in committing it, or aids or agrees or attempts to aid such other person in planning or committing it;....
> >
> > ....

> IV. When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

State v. Anthony, 151 N.H. 492, 493 (2004) (citing N.H. Rev. Stat. § 626:8, IV (1996)) (emphasis added).[15]

New Hampshire has determined that the State must prove the elements of both section III and section IV of the accomplice statute. *State v. Duran*, 158 N.H. 146, 151 (2008) (citing *State v. Anthony,* 151 N.H. 492, 493–95 (2004)); *State v. Horne*, 125 N.H. 254, 256 (1984) ("It is apparent [] that section IV is not independent of section III, and that, therefore, the elements set forth in section III must be alleged and proven by the State to establish accomplice liability.")

> Section III contains dual requirements that the defendant act with the purpose of promoting the commission of the offense and that he actually solicit or aid or attempt to aid another in its commission. Thus, to prove accomplice liability, the State must prove that: (1) the accomplice had the purpose to make the crime succeed; (2) the accomplice's acts solicited, aided or attempted to aid another in committing the offense; and (3) under section IV, the accomplice shared the requisite mental state for the offense. *Anthony,* 151 N.H. at 493–95, 861 A.2d 773; *see State v. Burke,* 122 N.H. 565, 570, 448 A.2d 962 (1982); *State v. Goodwin,* 118 N.H. 862, 866, 395 A.2d 1234 (1978).

[15] It should be noted, that in 2001 the legislature amended N.H. Rev. Stat. § 626:8, IV, effectively lowering the mens rea requirement. This change enables a jury to convict a defendant of accomplice liability as long as the result was a "reasonably foreseeable consequence of the conduct" and the accomplice acted "purposely, knowingly, recklessly, or negligently with respect to that result." *Anthony,* 151 N.H at 493-94 (citing N.H. Rev. Stat. § 626:8, IV (Supp.2004)). However, this statutory change was not made until well after Ms. Smart's trial and, therefore, is not applicable to her case. This argument will refer to the statute that was in place at the time of Ms. Smart's trial which required an accomplice to have the same mens rea as the underlying offense. Markedly, Part III did and still does "require[] proof of the accomplice's intent to promote or facilitate another person's *conduct* that constitutes the *actus reus* of the offense." *Id.* at 494 (quotation omitted).

Duran, 158 N.H. at 151 (emphasis added); *Papillon*, 173 N.H. at 35-36; *See State v. Winward*, 161 N.H. 533, 543 (2011).

New Hampshire is "consistent[] with the majority of courts interpreting accomplice liability statutes derived from the Model Penal Code[.]'" *Anthony*, 151 N.H. at 495. The Supreme Court of New Hampshire has provided:

> RSA 626:8, IV, in turn, is derived from, and prior to the 2001 amendment, substantially tracked the language of, Model Penal Code section 206.4. That section of the Model Penal Code "was intended to make clear that an accomplice must nonetheless meet the required mental state for the offense under the statute." *State v. Garnica*, 209 Ariz. 96, 98 P.3d 207, 212 (Ariz. Ct. App. 2004).

Id.

Other states operating off of the Model Penal Code for accomplice have similarly held that "[w]hether a defendant is being prosecuted as a principal or an accomplice, 'the State must prove that he possessed the mental state necessary to commit the offense.'" *State v. Maloney*, 216 N.J. 91, 105 (2013) (quoting *State v. Whitaker*, 200 N.J. 444, 458, (2009). "For both the accomplice and his partner to be guilty, 'it is essential that they shared in the intent which is the crime's basic element.'" *State v. White*, 98 N.J. 122, 129 (1984) (quoting *State v. Fair*, 45 N.J. 77, 95 (1965)). "[A]n accomplice who does not share the same intent or purpose as the principal may be guilty of a lesser or different crime than the principal." *Whitaker*, 200 N.J. at 458.

ii. The requisite mental state of a principal to first-degree murder is not just purposely, but purposely with deliberation and premeditation.

New Hampshire's general definition of "purposefully" is not applicable in the context of first-degree murder, as the first-degree murder statute uses its own definition of "purposefully" which requires premeditation and deliberation:

> As a general rule, acting purposely or with a purpose is defined as acting with the conscious object to cause a given result or to engage in given conduct. RSA 626:2, II(a). When the charge is first degree murder, however, it is insufficient to prove only that the defendant acted with the conscious object to cause the death of another; it is also necessary to prove that he acted with premeditation and deliberation.

State v. Allen, 128 N.H. 390, 393 (1986). Proving deliberation and premeditation is the highest standard imposed on the State. *See id.*

Generally, "[a] person acts purposely with respect to a material element of an offense when [their] conscious object is to cause the result or engage in the conduct that comprises the element." N.H. Rev. Stat. § 626:2, II(a) (2016). New Hampshire has further established that "intentionally" is synonymous with "purposely." *State v. Vincelette*, 172 N.H. 350, 356 (2019).[16]

However, this general definition of "purposefully" is not applicable in the context of first-degree murder. According to the statute establishing first degree murder, "[a] person is guilty of murder in the first degree if he ... [p]urposely causes the death of another ... For the purpose of RSA 630:1-a, I(a), 'purposely' shall mean that the actor's conscious object is the death of another, and that his act or acts in furtherance of that object were deliberate and premeditated." N.H. Rev. Stat. § 630:1-a.[17] This more specific mental state departs from New Hampshire's

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[16] Of note, "knowingly" is a lesser mental state than "purposely." *See State v. McKean,* 147 N.H. 198, 200 (2001). "A person acts knowingly with respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist." N.H. Rev. Stat. § 626:2, II(b). In other words, a defendant acts knowingly when she is "aware that it is practically certain that his conduct will cause a prohibited result." *State v. Ayer,* 136 N.H. 191, 194 (1992). (quotation omitted). "And finally, acting recklessly is defined as acting with an awareness and a conscious disregard of a substantial and unjustifiable risk that material circumstances exist or that a given result will follow from one's acts. RSA 626:2, II(c)." *Allen*, 128 N.H. at 393-94.

[17] The language is presented as follows:

> I. A person is guilty of murder in the first degree if he:
>
> > (a) Purposely causes the death of another;
> >
> > ...

general use of the term "purposely" as a mental state. *See* N.H. Rev. Stat. § 626:2, II(a) (2016). "[M]urder in the first degree is 'purposeful' killing, although it is necessary to prove not only that a defendant caused death with the purposeful state of mind as defined by RSA 626:2, II(a), but that he acted with deliberation and premeditation as well." *Allen*, 128 N.H. at 394 (citing N.H. Rev. Stat. § 630:1–a, II).

"The elements of premeditation and deliberation require proof beyond a reasonable doubt of some reflection and consideration upon the choice to kill or not to kill, and the formation of a definite purpose to kill." *State v. Patten,* 148 N.H. 659, 660–61 (2002) (citation and quotation omitted). "There must be not only intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill." *State v. Place*, 126 N.H. 613, 615-16 (1985) (quoting *State v. Greenleaf*, 71 N.H. 606, 613-14 (1902).

iii. The jury instructions in the instant case failed to instruct the jury that Ms. Smart must be found beyond a reasonable doubt to have acted with deliberation and premeditation.

In the instant case, the only time the Trial Court instructed the jury on the mental state of "purposely" was in the context of conspiracy, never in the context of accomplice to first-degree murder. The definition of purposely in the context of conspiracy is inapplicable and distinct from

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> II. For the purpose of RSA 630:1-a, I(a), "purposely" shall mean that the actor's conscious object is the death of another, and that his act or acts in furtherance of that object were deliberate and premeditated.

N.H. Rev. Stat. § 630:1-a.

the definition of purposely for accomplice to first-degree murder and was inadequate to describe the mens rea of accomplice liability.

In Ms. Smart's trial, the Trial Court instructed the jury on the elements of conspiracy first. The jury was instructed that to convict Ms. Smart of conspiracy, the State must prove that Ms. Smart acted purposely, entered into an agreement to cause the commission of first-degree murder, and that an overt act was committed in furtherance of the conspiracy:

> Under our law a person is guilty of conspiracy if, with a purpose that a crime defined by statute be committed, he or she agrees with one or more persons to commit or cause the commission of such crime and an overt act is committed by one of the conspirators in furtherance of the conspiracy. In this case the State must prove beyond a reasonable doubt three things. First, that the defendant acted purposely. Second, that the defendant agreed with one or more individuals to commit or cause the commission of the crime of first degree murder. And third, that an overt act was committed by one of the conspirators, any one of them, in furtherance of the conspiracy.

March 20, 1991 – Wednesday Afternoon Session – 1:44 p.m., *Trial Transcript - Jury Charge,* p. 1978.

The Trial Court specifically instructed the jury on the mental state of purposely as it is used as an element of conspiracy. "Purposely," as is used as an element of conspiracy, does not require deliberation and premeditation; therefore deliberation and premeditation was not included in the Trial Court's definition of purposely:

> The mental state here is purposely. A person acts purposely with respect to a material element of an offence when her conscious object is to cause the result or engage in the conduct which comprises the element.

March 20, 1991 – Wednesday Afternoon Session – 1:44 p.m., *Trial Transcript - Jury Charge,* p. 1979.

The Trial Court next continued to the charge of accomplice to first degree murder. As the relevant excerpt from the trial transcript below demonstrates, the Trial Court instructed that for

the jury to convict a defendant of accomplice to first-degree murder, the jury must find that a murder occurred with deliberation and premeditation *by a principal actor*. The Trial Court then instructed that the accomplice must have both aided in the commission of the murder but also that the accomplice acted purposely. *Id.* at 1984. However, at no time did the Trial Court instruct the jury that the mental state of "purposely," as applied to an accomplice, was the same as to a principle to first-degree murder; in other words, the Trial Court did not instruct that the accomplice must have acted with deliberation and premeditation. *Id.* at 1984-85.

> The next allegation is accomplice to first degree murder. The defendant is charged with being an accomplice to first degree murder. To prove that the defendant was an accomplice to the crime of first degree murder, the State must prove beyond a reasonable doubt that the crime of first degree murder took place and that the defendant was an accomplice. The State is not required to prove that a particular individual committed the crime of first degree murder, but only that the crime of first degree murder took place and the defendant was an accomplice to the crime. That requires the Court to define for you what is first degree murder. This defendant is not charged with first degree murder, and so in this charge I have used the term "an actor" which means in this case William Flynn. William Flynn, as you know, has not plead guilty to first degree murder, but, rather, to second degree murder. That makes no difference, as I will explain to you later. So the first thing I'm going to do is define for you the crime of first degree murder, with which this defendant is charged.
>
> The definition of the crime of first degree murder has two parts. The State must prove each of the two parts of the definition beyond a reasonable doubt. Because the State, to prove an accomplice, has to first prove a first degree murder was committed, so they have to prove these things to you beyond a reasonable doubt. The State must prove that an individual -- the indictment alleges that individual to have been William Flynn -- caused the death of another person. This means that the death of another person -- the indictment alleges that other person to have been Gregory Smart -- was the direct result of that individual's action, and that that individual acted purposely. First degree murder is causing the death of another person purposely. Purposely mean two things, both of which the State must prove beyond a reasonable doubt. First, that that individual specifically intended to cause the death of another person. It is not enough that the individual knew his actions would cause death. He must have wanted to cause death. Second, the State must prove that the individual's acts in causing death were deliberate and premeditated. The State must prove beyond a reasonable doubt that the individual acted with premeditation and deliberation. Usually there is no direct proof of a person's state of mind at the time he acted, so you must examine all of the facts and circumstances

> to decide this. And I'm going to list a number of factors here for you to consider in deciding whether the individual, whom we shall refer to as the actor henceforth, acted with premeditation and deliberation. You should consider these factors and all of the evidence presented during the trial in deciding this issue.
>
> First, you may examine the actor's conduct before the homicide. You may consider whether the actor planned the homicide; whether he acted secretively, whether he brought a weapon with him to the scene of the homicide, whether he had a motive to kill this particular individual, whether he made any threats or statements showing that he planned the homicide. Second, you may examine the actor's conduct during the homicide. You may consider whether he used a deadly weapon, whether the manner of killing was particularly brutal, whether multiple wounds were inflicted, whether wounds were inflicted on vital organs, whether the homicide was at a place where the actor's acts would not be detected or at a time when others would not be present. Third, you may examine the actor's conduct after the homicide. You may consider whether he attempted to conceal the killing, whether he made any statements after the homicide. In deciding whether the State has proven premeditation and deliberation, ask yourselves the following questions: Was there space and opportunity for reflection? Did the actor think over what he was about to do? Did he cooly form a subtle purpose? Was his mind sedately and considerately made up to take life? The basic question you should ask yourself in deciding whether the actor acted with premeditation is this: Did the actor think about or plan the killing beforehand? A killing that occurs on impulse is not first degree murder. The actor must have weighed the pros and cons and thought about the moral consequences of killing someone. However, there is no particular time required for premeditation and deliberation. The human mind acts with celerity, which means rapidity, speed, and that celerity is sometimes impossible to measure. <u>If the killing results from choice made as a result of thought, however short the time between the intention and the act, it is sufficient to characterize the killing as deliberate and premeditated</u>. The purpose here is to rule out the act of a mind abandoned to impulse and frenzy. There must have been thought, however long or short it may have been. Those are the requirements of the crime of first degree murder which the State must prove beyond a reasonable doubt. . . .

March 20, 1991 – Wednesday Afternoon Session – 1:44 p.m., *Trial Transcript - Jury Charge,* p. 1980-85.

Instead, in the context of the mens rea of the charge of accomplice to first-degree murder, the Trial Court described "purposely" as acting with the purpose of promoting or facilitating the commission of the offense, or acting with a design to help the principal actor succeed. *Id.* The

Trial Court explained that an accomplice must have acted "purposely" as defined in the conspiracy statute, *not* purposely as is used in the first-degree murder statute. *Id.*

> Additionally, the State must prove that this defendant was an accomplice to the crime of first degree murder. To prove the defendant was an accomplice, the State must prove, first, that the defendant helped another person plan or commit the crime of first degree murder. Here the State alleges that the defendant aided William Flynn in the planning or commission of the murder of Gregory Smart by taking certain actions, including advising him to wear black clothes to avoid detection, advising him to wear gloves so as not to leave fingerprints, advising him to rearrange the victim's residence so it appeared to have been burglarized, providing him with directions to the victim's residence, and with information as to what time the victim should be returning home, absenting herself from that residence on both the evening of the murder and on a prior occasion when William Flynn attempted to commit the crime, and providing William Flynn with her car so that he would have transportation to the victim's residence on the prior occasion when William Flynn attempted to commit the murder. And, secondly that the defendant did so with the purpose of promoting or facilitating the commission of the offense. This means that the defendant's acts were designed to help the other person, the actor, commit the offense. In other words, the State must prove that the Defendant had the purpose to make the crime succeed. Now, in this and in the other conspiracy definition that I gave you, I listed certain acts that the State alleges and certain acts in this one that the State alleges. These are allegations by the State. Those come from the indictments, and those indictments are not evidence. They are, and these acts alleged are, what the State charges, what the defendant did. That's what the state says the defendant did. The defendant has said she is not guilty and has pled not guilty and has testified that she is not guilty.
>
> Now, it is not sufficient for the State to prove that the defendant intended to commit a different offense than the principal. Let me say that again. It is not sufficient for the State to prove that the defendant intended to commit a different offense than the principal. The defendant must share the same criminal intent as the principal. Thus, the defendant is only guilty as an accomplice if she committed acts which were designed to commit a crime that both she and the principal, William Flynn, intended to commit.

Id.

As provided, the Trial Court led the jury through questions to ask itself to determine the existence of the deliberate and premeditated mental state for the *principal actor*, but failed to do so with respect to the accomplice's mens rea. In determining whether the principal actor acted with deliberation and premeditation, the Trial Court instructed that: "If the killing results from a

choice made as a result of thought, however short the time between the intention and the act, it is sufficient to characterize the killing as deliberate and premeditated." *Id.* at 1983. Therefore, the Trial Court instructed the jury that intent must precede the formation of deliberation and premeditation. The Trial Court made clear that neither intention nor an action without more would constitute deliberation and premeditation. To prove deliberation and premeditation, the State must prove an actor formed intent, then conscious choice, and then acted. An accomplice sharing a criminal intent with the principal actor does not establish the same mental state as the principal actor, that is deliberation and premeditation, without the accomplice also sharing the conscious choice to act prior to acting.

However, in explaining purposely in the context of the accomplice charge, the Trial Court failed to state that "purposely" for the accomplice charge included deliberateness and premeditation. *Id.* Instead, the Trial Court delivered its explanation of purposely as it had in the conspiracy charge, not including the requirement of deliberation and premeditation. *Id.* Unlike its correct instructions with regard to the principal actor's mens rea, the Trial Court did not instruct the jury that, in order to convict an accomplice, the State was also required to prove that the accomplice had more than a criminal intent, or intended outcome, and a purposeful mental state. The instruction failed to instruct the jury that the State must prove beyond a reasonable doubt that Ms. Smart acted with deliberation and premeditation. This unconstitutionally lowered the burden the State was required to meet to convict Ms. Smart of the accomplice charge.

B. The Trial Court did not instruct the jury to only consider evidence presented during trial.

Trial Counsel did not submit a jury instruction on what the jury was permitted to consider in reaching its verdict and did not object to the Trial Court's failure to instruct the jury that the jury could only reach a verdict based on evidence presented during trial.

The New Hampshire Criminal Jury Instructions at the time of Ms. Smart's trial included a pattern jury instruction on evidence in a case. It provided:

> During your deliberations you should consider only the evidence in the case. The evidence consists of the testimony under oath of the witnesses, exhibits which have been admitted into evidence, the view, facts of which I took judicial notice, and stipulations of certain facts.
>
> During the trial the lawyers made objections. The lawyers are supposed to object when they believe that certain evidence is not admissible. If I sustained an objection or excluded any evidence, you must not guess as to what the answer or evidence would have been. If I ordered that a question and answer be stricken from the record, you must not consider either the question or the answer as evidence.
>
> If you believe that I have expressed or suggested an opinion as to the facts in my rulings, you should ignore such an opinion. It is up to you alone to decide the facts in this case.
>
> In short, you should consider only the legally admissible evidence in deciding this case; that is, the testimony of the witness, the exhibits, the view, stipulations, and facts of which I took judicial notice.

NH Criminal Jury Instruction 1.06 (1985).[18]

The Trial Court's instructions to the jury failed to inform jurors that they may only consider the evidence presented during the case when deliberating:

> During this trial many objections were made by both sides, and there were many bench conferences by both sides. In objecting, a lawyer is simply doing his or her job in representing his or her client. And in my rulings on those objections, I'm simply doing my job to apply the law as I understand it to those objections. Don't count the number of times that I agreed or disagreed with any one lawyer as some indication of how you might think I feel about this case. In this and in any trial, criminal or civil, the Court is completely and absolutely impartial. The job of this case is entirely the responsibility of the jury.

[18] Trial Counsel Mark Sisti was familiar with the New Hampshire Criminal Jury Instructions as a member of the Criminal Jury Instruction Committee.

> I speak the way I speak. If I emphasize or if you think I emphasize the words "guilty" or "not guilty" while I'm speaking to you this afternoon, that is simply the way I talk. I do not intend any emphasis on any words. My vocal tones, my actions are simply the way I speak and the way I am. It is not any indication – if any of you see any untoward or undue vocal tones – any indication of the way you might think I think about this case. Again, the Court is totally and absolutely impartial. And I needn't remind you again that the job of deciding this or any case is on the jury and not on the Court.

March 20, 1991 – Wednesday Afternoon Session – 1:44 P.M., *Trial Transcript – Jury Charge*, p. 1970-71.

When the Trial Court questioned the jury venire about prior exposure to media on this case, the Trial Court framed the relevance of any prior knowledge not in terms of whether potential jurors could disregard the prior exposure in deliberations, but about not having preconceptions of guilt or innocence:

> We need to know right up front how many people in this group can sit on this jury and how many cannot. I would be kidding myself if I said that most of you have not read or heard or seen something about this case in one form of the media or another. I know most of you have, and I would be surprised if anyone in here didn't know anything about this case. The knowledge or prior knowledge of a case is not enough to disqualify you. The fact that you may have heard or seen or read something about this case is insufficient in and of itself to disqualify you as jurors. The question is, have you formed any preconceptions about guilt or innocence in this or any case in front of a court.

February 19, 1991 – Tuesday Morning Session – 9:35 A.M., *Trial Transcript - Jury Venire Instructions*, p. 3-4.

The Trial Court referenced this requirement twice in front of the venire a month prior to the jury instructions at the close of trial. The Court's address included a few sentences out of 52 pages of transcript:

> This case must be decided on what you people will hear, the 12 or 14 of you who – the 12 of you who finally deliberate this case, it must be decided on – only what you hear in this courtroom and nothing else.

February 19, 1991 – Tuesday Morning Session – 9:35 A.M., *Trial Transcript – Jury Venire Instructions*, p. 44.

The Trial Court continued later:

> The question is can you put it aside, whatever you may know about this case, and decide it only on what you hear in the courtroom? That's all we ask of you.

February 19, 1991 – Tuesday Morning Session – 9:35 A.M., *Trial Transcript – Jury Venire Instructions*, p. 80.

The fact that the Trial Court inquired as to jurors' prior knowledge of the case during voir dire does not excuse the later failure to give appropriate instructions just before deliberations and Trial Counsel's failure to request such instructions. This is especially true in a case where additional sensationalized media stories continued to be published during Ms. Smart's lengthy trial.

The Court came closest to instructing the jury to only consider the evidence presented during voir dire with a passing reference to what Mrs. Smart would *want* in a juror, a month prior to the petit jury instructions. Even then, a month apart from when it was needed, this 'desire' of Ms. Smart's was couched as an ability to be open-minded and not given the command of a mandatory right:

> And I guess I'll say again we don't want you on this jury if you've made up your minds for either guilt or innocence. Either way. We can't have you on this jury. We can't have you on this jury unless you can say to yourself, "I would want me on my jury charged with the same offenses that Mrs. Smart is charged with. I would want someone with my open mindedness on a jury trying me." If you can't say that, and I ask you to be honest because this is, as I say, I can't tell you, it's – all jury trial[s] are important. A charge of this nature is obviously very important. <u>Mrs. Smart</u>

> doesn't want you on this jury if you cannot be fair, openminded, and have what we call, I guess, tunnel vision with respect to the facts that you'll hear in this case and are not able to put aside everything you've read and take only the evidence that is produced for you by the State and by the defense, although the defense bears no burden in a criminal case to prove anything.

February 19, 1991 – Tuesday Morning Session – 9:35 A.M., *Trial Transcript – Jury Venire Instructions*, p. 13-14 (emphasis added).

Given the large volume of high-profile, negative publicity about Mrs. Smart before and during the time of her trial, Trial Counsel should have known that it was particularly important for the jury to be instructed, at the close of trial, to render a decision based solely on the evidence presented in court. There was no strategic reason not to request that the jury be admonished of this requirement by the judge immediately prior the jury's deliberations. Doing so could only benefit Mrs. Smart. As provided, *supra* Section III, juror Charlotte Jefts declared that a decisive factor in reaching a verdict of guilty was an inflammatory media story that was released shortly before Ms. Smart's trial. As such, Mrs. Smart was prejudiced by Trial Counsel's failure to request that the judge instruct the jury to render a decision based solely on the evidence. "When reviewing jury instructions, [New Hampshire courts] determine whether the instructions adequately and accurately explain each element of the offense and reverse only if the instructions did not fairly cover the issues of law arising in the case." *Gribble*, 165 N.H. at 29. There is a substantial possibility that the jury considering material outside of the evidence produced during the trial impacted the result of Ms. Smart's case.

C. The Trial Court was overly coercive in its instruction to the jury in how to find Ms. Smart guilty of accomplice to first-degree murder.

A meaningful system of justice requires that a court's instruction not "be of a coercive nature that would improperly sway a jury to reach a unanimous verdict." *State v. Alexander*, 143

N.H. 216, 224 (1998) (quoting *State v. Silva*, 142 N.H. 269, 274 (1997)). The Trial Court deviated from this practice of neutrality in the instant case. The Trial Court commented only on the evidence presented by the State during trial, effectively offering an abbreviated second closing for the State, and disregarding Ms. Smart's defense.

i. It is prejudicial for a trial court to comment on evidence during jury instructions and emphasize the State's case while downplaying or ignoring the defense's case.

In New Hampshire "[i]t is the practice of Superior Court judges not to comment upon the evidence . . . in the charge to the jury." *State v. King*, 136 N.H. 674, 677 (1993) (quoting R. McNamara, 2 *New Hampshire Practice, Criminal Practice and Procedure,* § 994, at 397 (2d ed.1991)); *State v. DiNapoli*, 149 N.H. 514, 521 (2003) ("Trial judges generally do not comment on the evidence in their jury instructions."); *see also Johnston v. Lynch*, 133 N.H. 79, 90 (1990) (". . .accepted modern practice is not to do so.")

"Such practice is prudent given that '[t]he influence of the trial judge on the jury is necessarily and properly of great weight and his slightest word or intimation is received with deference, and may prove controlling.'" *King*, 136 N.H. at 677 (quoting *Quercia v. United States,* 289 U.S. 466, 470 (1933)).

This principle was examined in *State v. King*. "The State introduced as evidence three knives recovered by the police. . . None of these knives [were] positively identified as the alleged weapon. The defendant testified that he did not attack the victim." *King*, 136 N.H. at 675. On the second day of deliberations, the jury indicated that the jury wanted to know what it could consider. *Id.* The trial court reinstructed the jury, on what they should consider, in part:

> The question I got this morning was a very general one. It was to the effect you were wondering what you could consider and what you could not consider when you review this case in particular. Everything that I permitted to go before you is something that you can consider. There are, however, at this stage, since you've

been at it now for, I don't know what, most of the day, let me just, having gone through this before with other juries, indicate that sometimes problems exist because you stay away from what the indictment and what the elements of the offense are and, in terms of what you can consider, that's what you really should be focusing on.

> Now, in this particular case, you know, since I've given the elements in writing at your request, the issue is did the defendant stab the victim with a knife? So, unless you find that the defendant used a knife to cause an injury, bodily injury to the victim, then you must find him not guilty. However, there are conflicts in the testimony in this case as there have been in many other cases that I've been involved in, so that it's difficult for me to know specifically what your areas of disagreement involve.
>
> Now, for example, my recollection of the testimony in terms of how this injury allegedly took place, there were some conflicts. I think one witness said the victim was standing and the defendant burst into the room and there was some contact. I think one witness said that the victim was on the floor, you know, so there is a disagreement as to how this happened. My recollection is one witness said that the defendant's hand was raised like this (indicating) in an upward motion. Another witness said that the injury occurred as a result of a punching motion. These are the kinds of things you're going to get in terms of disagreement. That is not unusual. My recollection is it happened here; it's not unusual for it to happen in these kinds of cases.
>
> The State's burden is not to prove that the injury occurred in a certain fashion. As long as they prove the elements of the case, then that is their obligation and that is their burden.
>
> . . . . .
>
> I'm going to ask you again to reconsider the matter. Recognizing this as a new week-two days have gone by-sometimes that's good when juries cannot agree on what a verdict should be. I'm going to ask you to spend some time in reexamining and reassessing the evidence one more time. I don't think I have to tell you that it's important to have you resolve it. The parties and the Court have put a lot of time and effort in getting this case tried....

Id. at 675-676.

King "argue[d] on appeal that the supplemental charge invaded the province of the jury because[] it prejudicially summarized the State's evidence while making no mention of the defendant's testimony, thereby unfairly emphasizing one side of the case[.]" *Id.* at 677. The

Court, on review, agreed. *Id.* at 674. Prejudice was found even though the trial court pointed out discrepancies in the State's case. *Id.* at 675-76.

The reviewing court analyzed that the trial court "summarized the testimony of several of the State's witnesses but failed to mention the exculpatory testimony of the defendant. In doing so the court improperly focused the jury's attention on whether the victim had been stabbed with a knife and away from the defendant's claim that there had been no assault." *Id.* at 678. "Viewing the effect of the court's comments from the perspective of how a reasonable juror may have understood them, [the court] conclude[d] that [the] references to specific evidence presented at trial by the State were improper and raised the possibility of prejudice to the defendant." *Id.* The error could not be viewed as harmless and the conviction was reversed. *Id.* The court found prejudice in the *King* case, on direct appeal, reasoning that "influence of the trial judge on the jury is necessarily and properly of great weight and his slightest word or intimation is received with deference, and may prove controlling.'" *King*, 136 N.H. at 677.

Ultimately, instructions are reviewed with all the evidence to determine whether a jury charge fairly covers the issues and law of a case or whether they created an unbalanced impression of the law to the jury that was prejudicial to the defendant. *State v. Wright*, 137 N.H. 558, 561 (1993).

ii. The Trial Court presented the State's facts to the jury in a prejudicial manner against Ms. Smart.

When it was time for the Trial Court to instruct the jury on the elements of the charge of accomplice to first degree murder, the Trial Court accompanied the charge with the panoply of allegations brought by the State in how they thought they could prove the charge:

> To prove the defendant was an accomplice, the State must prove, first, that the defendant helped another person plan or commit the crime of first degree murder. Here the State alleges that the defendant aided William Flynn in the planning or

> commission of the murder of Gregory Smart by taking certain actions, including advising him to wear black clothes to avoid detection, advising him to wear gloves so as not to leave fingerprints, advising him to rearrange the victim's residence so it appeared to have been burglarized, providing him with directions to the victim's residence, and with information as to what time the victim should be returning home, absenting herself from that residence on both the evening of the murder and on a prior occasion when William Flynn attempted to commit the crime, and providing William Flynn with her car so that he would have transportation to the victim's residence on the prior occasion when William Flynn attempted to commit the murder. And, secondly that the defendant did so with the purpose of promoting or facilitating the commission of the offense. This means that the defendant's acts were designed to help the other person, the actor, commit the offense. In other words, the State must prove that the Defendant had the purpose to make the crime succeed. Now, in this and in the other conspiracy definition that I gave you, I listed certain acts that the State alleges and certain acts in this one that the State alleges. These are allegations by the State. Those come from the indictments, and those indictments are not evidence. They are, and these acts alleged are, what the State charges, what the defendant did. That's what the state says the defendant did. The defendant has said she is not guilty and has pled not guilty and has testified that she is not guilty.

March 20, 1991 – Wednesday Afternoon Session – 1:44 p.m., *Trial Transcript - Jury Charge,* p. 1984-85.

The Trial Court essentially made a second closing argument for the State. The fact that the Trial Court generically instructed that its recitation of the evidence constituted "allegations" made by the State regarding "what the State charges, what the defendant did" was insufficient to cure this error. Just as in *King*, the Court here barely even alluded to the strong defense Ms. Smart put forth during trial or the facts as presented by the defense, focusing instead only on the facts as alleged by the State. This heavy and one-sided rendition of the facts, from such a heavy and persuasive voice in the courtroom, put a massive thumb on the scale weighing against Ms. Smart.

D. The incorrect jury instructions individually and jointly amounted to prejudicial error.

Trial Counsel failed to properly object to the multiple erroneous jury instructions. First, the State did not make argument as to Ms. Smart meeting the proper mental state. Next, few trials had received the media coverage that this trial received, and this trial required an instruction to the jury to keep out all unvetted content. False and incendiary allegations convicted Ms. Smart in the media well before her actual trial began. This is not mere speculation as there is confirmation that juror Charlotte Jefts convicted Ms. Smart based on claims not presented during trial. Finally, courts have long recognized that the word of a judge carries great weight, and the Trial Court improperly imposed that weight when paraphrasing the facts put forth for the jury to balance. Each of the errors, individually and collectively, prejudiced Ms. Smart. Had the jury been required to consider the correct law and only on the evidence presented at trial, there is a substantial possibility that she would not have been convicted. As discussed above, the majority of the evidence presented against Ms. Smart was in the form of unreliable testimony from Ms. Smart's highly self-interested co-defendants. The juror tapes reveal that this evidence was highly unpersuasive to the jury and that it was incredibly challenging for the jury to reach a unanimous decision. Therefore, even the slightest incorrect jury instruction would likely have had a large impact on the outcome of this case.

V. This case was not subject to a mandatory sentence as the State chose to bring a count of *accomplice to* first-degree murder and not a count of the substantive crime of first-degree murder, which are statutorily distinct.[19]

Life without parole is a possible sentence for a conviction of accomplice to first degree murder, but it is not a mandatory sentence. In the instant case, the Trial Court equated a

[19] "[A] petitioner can collaterally challenge an illegal sentence[.]" *State v. Kinne*, 161 N.H. 41, 45 (2010). Ms. Smart further asserts, *inter alia*, due process, ineffective assistance of counsel, and novelty, as discussed *supra*, overcome any claims of waiver.

conviction of first-degree murder and a conviction of accomplice to first degree murder, and thus erroneously applied a mandatory sentence to Ms. Smart's conviction that did not exist. Thus, Ms. Smart's resulting sentence was illegal.

Ms. Smart was distinctly charged as an accomplice to first-degree murder, and expressly *not* with first-degree murder. The Trial Court in this case could not have made clearer that: "This defendant is not charged with first degree murder. . ." March 20, 1991 – Wednesday Afternoon Session – 1:44 p.m., *Trial Transcript - Jury Charge,* p. 1980. When explaining the elements of accomplice to first degree murder, the Trial Court provided: "So the first thing I'm going to do is define for you the crime of first degree murder, which this defendant isn't charged." *Id.* at 1981.

The State could have charged Ms. Smart with first-degree murder and sought a conviction through an accomplice liability theory, but the State did not choose to charge Ms. Smart with first-degree murder. Inasmuch, Ms. Smart was convicted of accomplice to first-degree murder.

First-degree murder statutorily mandates a sentence of life without parole. No statute, however, mandates that the sentence for *accomplice to* first-degree murder must be life without parole. Consequently, a person convicted of accomplice to first-degree murder is not *mandated* to life without parole.

Nonetheless, the Trial Court stated that it was mandated to sentence Ms. Smart to life without parole when it announced Ms. Smart's sentence to accomplice to first-degree murder. March 22, 1991 – Friday Morning Session – 10:20 a.m., *Sentencing Transcript,* p. 2048. This establishes that the Trial Court did not exercise discretion which amounts to an abuse of discretion that requires resentencing. Trial Counsel failed to correct this error, in kind, providing constitutionally deficient representation.

A. The State may choose whether to charge a defendant with first-degree murder or accomplice to first-degree murder, but these are distinct charges.

In New Hampshire, the charges of first-degree murder and accomplice to first-degree murder are distinct. If a defendant is charged with first-degree murder, they may be convicted of first-degree murder under a theory of accomplice liability. However, the reverse is not true: if a defendant is charged with accomplice to first-degree murder, they may not be convicted of the principal offense of first-degree murder.

New Hampshire allows a conviction of first-degree murder through an accomplice liability theory when a defendant is only charged with first-degree murder. "Under New Hampshire law, [using] 'acting in concert with' [as] language [] in the indictment is ordinarily sufficient to charge a defendant as both a principal and an accomplice." *State v. Doucette*, 146 N.H. 583, 589 (2001). This means, that "an indictment that charges the defendant as a principal puts a defendant on notice to prepare a defense as to both principal and accomplice liability." *State v. Winward*, 161 N.H. 533, 538-39 (2011). This is even true in the instance where "an indictment sufficiently charg[es] a substantive offense as a principal, but contain[s] no express language indicating that accomplice liability is also intended." *State v. Barton*, 142 N.H. 391, 395 (1997). In this situation, the "'distinction between principal and accomplice liability for charging purposes lacks practical significance.'" *Winward*, 161 N.H. at 538 (quoting *Barton,* 142 N.H. at 395). The distinction lacks practical significance at the indictment stage because charging a defendant with first-degree murder enables a conviction no matter whether an indictment identifies a defendant as a principal or accomplice. Yet, for *sentencing* purposes, the distinction does maintain *practical* significance.

In other words, the accomplice liability statute is an enabling statute for a conviction of the substantive charge, when a defendant is charged with the substantive charge. For example, in *State v. Winward*:

> [T]he indictment charged the defendant as both a principal and accomplice and the State had two different options for proving attempted burglary. It could have proven that the defendant himself took a substantial step toward the commission of the burglary, *i.e.,* that the defendant himself removed the screen. However, the State also had the option of proving accomplice liability. Because the indictment clearly alleged both principal and accomplice liability, it provided sufficient notice to the defendant that he was charged with either removing the window screen himself or soliciting, aiding or attempting to aid another in removing the window screen.

161 N.H. at 539 (internal citations omitted).

Reaching a conviction on the substantive charge through an accomplice liability theory does not amend the indictment to include an accomplice charge. An indictment alleging the substantive charge is simply allowed to obtain a conviction on the substantive charge based on an accomplice liability theory. But a conviction is still a conviction of the substantive offense, not on a charge of accomplice to that substantive offense.

Laterally, however, *only* charging a defendant with the *divergent charge* of accomplice does not enable a conviction of the substantive offense. In other words, an indictment that only charged a count of 'accomplice to' an underlying offense, but did not charge the substantive offense itself, may have multiple routes to convict on the accomplice charge, but there is no way to reach a conviction on the substantive offense when only an accomplice charge was included in the indictment. Regarding this situation, the distinction between principal and accomplice liability for charging purposes does have practical significance. And, for *sentencing* purposes, the distinction does maintain practical significance.

This adheres to "Part I, Article 15 of the State Constitution [which] requires that an indictment describe the offense with sufficient specificity to ensure that the defendant can prepare for trial and avoid double jeopardy." *State v. Ericson*, 159 N.H. 379, 384 (2009). "To be constitutional, the indictment must contain the elements of the offense and enough facts to notify the defendant of the specific charges." *Id.*

When charged solely as an accomplice, there is no equivalent to the "in concert with" language that expands the State's ability to reach a conviction on the substantive charge. When only charged as an accomplice, a defendant is not put on notice that they must prepare a defense to acting as a principal or of directly committing the substantive offense. In fact, the opposite occurs. Solely charging a defendant as an accomplice provides notice that the State is *not* advancing a theory that the defendant was a principal to the substantive offense. Consequently, the addition of 'accomplice' may be surplusage when charging a defendant as a principal of a substantive offense, but the inverse is not true. There is practical significance to only charging a defendant as an accomplice.

New Hampshire has recognized bringing solely an accomplice charge requires different review. "In [] cases considering the sufficiency of indictments alleging both principal and accomplice liability, [New Hampshire has] subjected the indictments to a less stringent standard than that imposed upon indictments alleging only accomplice liability." *Barton*, 142 N.H. at 395. Inversely then, indictments alleging only accomplice liability are subjected to a more stringent standard.

The legislature could have, but did not, require the State to merge offenses upon conviction of accomplice. The language of the accomplice statute states: "A person is guilty of <u>an</u> offense if it is committed by his own conduct or by the conduct of another person for which

he is legally accountable..." N.H. Rev. Stat. § 626:8 (emphasis added). The legislature did not institute that a person is guilty of the underlying offense. The legislature left the application distinct.

Similarly, the legislature could have mandated that a substantive offense be charged when someone is alleged to be liable as an accomplice. The legislature, however, gave the State discretion to choose from a plurality of charges. The State can charge a defendant with the principal offense *or* the State can charge a defendant with accomplice to that principal offense.

In the instant case, the State chose to charge Ms. Smart *only* as an accomplice to first-degree murder. Ms. Smart was not charged as a principal to first-degree murder and her indictment did not include the above referenced "in concert with" language. Ms. Smart was never subjected to a charge of first-degree murder.

B. Unlike first-degree murder, accomplice to first-degree murder is not subject to a mandatory sentence of life without parole.

It is true that a conviction of first-degree murder mandates a sentence of life without parole, by statute. *See* N.H. Rev. Stat. § 630:1-a; N.H. Rev. Stat. § 651-A:7. No statute, however, mandates that the crime of *accomplice to* first-degree murder, as expressly and distinctly charged in this case, must be sentenced to life without parole.

The significance of two manners of charging amounting to distinct offenses is enormous as "[a] person convicted of a murder in the first degree shall be sentenced to life imprisonment and shall not be eligible for parole at any time." N.H. Rev. Stat. § 630:1-a. A person convicted of accomplice to murder in the first degree, on the other hand, is not statutorily mandated to any particular sentence.

There is no debate that the accomplice statute provides that "[a] person is legally accountable for the conduct of" a principal and New Hampshire has made clear an accomplice

may be subject to the same penalties of the principal. N.H. Rev. Stat. § 626:8. This principle extends back to the application of the accomplice theory under common law:

> The general common law rule is that one who aids in the commission of a crime *may* be subject to the same punishment as the principal, 'even though no mention is made of him in the state creating the offence.' G. Williams, Criminal Law-The General Part s 121, at 353 (2d ed. 1961); id. s 129, at 386; see 1 F. Wharton, Criminal Law and Procedure s 107, at 233 (R. Anderson ed. 1957); Annot., 131 A.L.R. 1322, 1323 (1941) Note, 25 Va.L.Rev. 844, 848 (1939).

State v. Acton, 115 N.H. 254, 256 (1975) (*emphasis added*).

Critically, since the common law inception, an accomplice *may* be subject to the same punishment as the principal. This discretionary 'may' has not been statutorily relinquished.

Undoubtedly, *may* is monumentally different than an accomplice *shall* be subject to the same punishment. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Technologies, Inc. v. United States,* 579 U.S. 162, 171 (2016).

Moreover, placing the fundamental *may* over *shall* aside, the rule of lenity would fill in any legislative gap or ambiguity. "[T]he rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously." *In re Alex C.*, 161 N.H. 231, 239 (2010) (quotation omitted). "[T]he rule of lenity, [] forbids interpretation of a criminal statute so as to increase the statutory penalty where the legislature's intent is unclear. . ." *State v. Brooks*, 164 N.H. 272, 292 (2012).

A useful comparison may be made between the mandated sentence for first-degree murder and the lack of mandated sentence for the related charge of attempted first-degree murder. "[T]he general rule is that attempts are subject to the same penalties as the completed crimes. . ." *State v. Elbert*, 125 N.H. 1, 15 (1984). This general rule does not apply, however, to

attempted first-degree murder: "the special rule for attempted murder is more lenient than the general rule." *Id.* at 15-16. "[I]n the case of attempt to commit murder the punishment shall be imprisonment for life or such other term as the court shall order." N.H. Rev. Stat. § 629:1. Attempt to commit murder has created a divergent offense in New Hampshire, where it has become distinct of the separate degrees of murder and its mandatory penalty. If the attempt is shown to be first-degree murder if completed, the offense is not mandated to life without parole. The judge is given discretion.

The same applies to the crime of accomplice to first-degree murder. Nonetheless, life without parole has been mandated for the crime of first-degree murder, it has not been mandated for the distinct charge of accomplice to first-degree murder when the State decided to charge as such. Consequently, in the case *sub judice*, the Trial Court erred when mandatorily sentencing Ms. Smart to life without parole and Trial Counsel erred in failing to object to this illegal sentence imposition.

C. A failure to exercise discretion is an abuse of discretion and requires resentencing.

"Although well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all." *Dorszynski v. United States*, 418 U.S. 424, 443 (1974). "[A]s a general rule, the existence of discretion requires its exercise." *United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983). Inasmuch, the lack of use of discretion constitutes an abuse of discretion. *Yates v. United States*, 356 U.S. 363, 366–67 (1958) (finding an abuse of discretion where court failed to exercise discretion and review original sentence on remand). An abuse of discretion in sentencing leaves "no alternative" except "setting aside the sentence." *Id.* (setting aside a federal district court's sentence due to abuse of discretion).

Even where discretion was exhibited, "[a]n unsustainable exercise of discretion will occur if the trial judge fails to consider all the relevant factors necessary to that exercise." *State v. Littlefield*, 152 N.H. 331, 357-58 (2005) (quoting *State v. Stone*, 122 N.H. 987, 989 (1982)). "The [New Hampshire] State Constitution requires the trial court to consider several objective factors before imposing any sentence, including whether the sentence imposed will meet the traditional goals of sentencing — punishment, deterrence and rehabilitation." *State v. Burgess*, 156 N.H. 746, 751 (2008); N.H. Const. pt. I, art. 18.; *see also United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983) ("When dealing with issues as fundamental as a person's freedom or imprisonment, our judicial system can-and must-give every case independent consideration.")

Moreover, "[d]ue process requires that the court inform the defendant at the time of sentencing in plain and certain terms what punishment it is exacting as well as the extent to which the court retains discretion to impose punishment at a later date and under what conditions the sentence may be modified." *State v. Fitzgerald*, 174 N.H. 722, 731 (2022).

The Trial Court abused its discretion when the Trial Court incorrectly announced a mandatory sentence and did not exercise any discretion. Further, sentencing error occurred when the Trial Court did not correctly inform Ms. Smart of the extent to which the court retained discretion to impose punishment at a later date and under what conditions her sentence may be modified. Therefore, Ms. Smart did not receive due process for her life without the possibility of parole sentence and is entitled to re-sentencing.

VI. The cumulative effect of the herein raised errors prejudiced Ms. Smart and rendered her trial unfair.

The cumulative effect of all errors should be considered in determining whether a petitioner was prejudiced. Even when individual errors may not be sufficient to cross the threshold, their cumulative effect may be.

In the instant case, the cumulative effect of the named errors combined to prejudice Ms. Smart and denied Ms. Smart the right to a fair trial. There is a substantial probability that another outcome would have been rendered at trial but for the net effect of each error described above and, therefore, Ms. Smart was prejudiced by these errors.

RELIEF SOUGHT

WHEREFORE, Petitioner, Pamela Smart, respectfully asks this Honorable Court to:

1. Vacate all findings of guilt;
2. Grant a new trial;
3. Grant a resentencing; and,
4. Provide any other relief as law and justice require.

January 4, 2026

Respectfully submitted,

/s/ Matthew Zernhelt

Matthew Zernhelt
Zernhelt Law LLC
100 West Road Suite 204
Towson, MD 21204
(443) 690-0870
mz@zernheltlaw.com

Pro Hac Vice admittance pending

/s/ Jason Ott

Jason Ott, Esq.
OTTLAW, LLC
100 West Road, Suite 204
Towson, MD 21204
(410) 262-4186
jason@ottlaw.com

Pro Hac Vice admittance pending

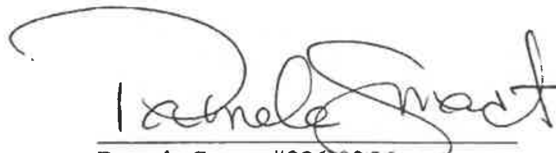
_/s/ *Joseph Prieto*_____
Joseph Prieto, Esq.
(NH Bar no. 15040)
PrietoLaw
68 Sagamore Street
Manchester, NH 03104
(603) 232-2085
joe@prietolaw.com

STATEMENT UNDER OATH

PURSUANT TO NEW HAMPSHIRE REVISED STATUTE §534:4

I present all information included in this petition as true and accurate, and presented in good faith, under the penalty of perjury. I recognize that the penalty for perjury may include a fine or imprisonment or both.

I further affirm that I am currently incarcerated at Bedford Hills Correctional Facility, located at 247 Harris Rd., Bedford Hills, New York, 10607, by order of the Rockingham County Superior Court and the New Hampshire Department of Corrections.



Pamela Smart #93G0356
Fiske-21
Bedford Hills Correctional Facility
P.O. Box 1000
New York, New York 10507
Petitioner

REQUEST FOR A HEARING

Petitioner requests a hearing on all matters raised in this petition.

/s/ *Joseph Prieto*
Joseph Prieto, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 4, 2026, a copy of the foregoing was served to the Office of the Attorney General of New Hampshire via electronic filing.

/s/ *Joseph Prieto*
Joseph Prieto, Esq.

Exhibit 1

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American Psychology-Law Society (AP-LS)

Contextual Biases in the Interpretation of Auditory Evidence
Author(s): Nick D. Lange, Rick P. Thomas, Jason Dana and Robyn M. Dawes
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ORIGINAL ARTICLE

Contextual Biases in the Interpretation of Auditory Evidence

Nick D. Lange · Rick P. Thomas · Jason Dana · Robyn M. Dawes

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Abstract Noisy recordings of dialogue often serve as evidence in criminal proceedings. The present article explores the ability of two types of contextual information, currently present in the legal system, to bias subjective interpretations of such evidence. The present experiments demonstrate that the general context of the legal system and the presence of transcripts of the recorded speech are both able to bias interpretations of degraded & benign recordings into interpretable & incriminating. Furthermore we demonstrate a curse of knowledge whereby people become miscalibrated to the true quality of degraded recordings when provided transcripts. Current methods of dealing with auditory evidence are insufficient to mollify the effects of biasing information within the criminal justice system.

Keywords Top–down bias · Context · Evidence · Misinterpretation

This article investigates a largely unstudied phenomenon in speech perception: How expectation causes the interpretation of speech to be transformed from objectively noisy and non-incriminating to subjectively interpretable and incriminating. Degraded recordings of human speech are often difficult to understand. If the degradation is severe enough, people are rarely able to accurately interpret sentences and often cannot accurately interpret a single word. However, if those same people read a written transcript of the speech and then listen to the same clip, they experience "hearing" the content quite clearly. These "top–down" expectancy effects can be powerful; someone who already knows the content of a clip may find it difficult to tell whether it is degraded, even if it is of such poor quality that no one else can understand it.

Benign instances of such top–down auditory processing are commonplace. Consider how subjective interpretations of song lyrics change following exposure to a new interpretation from a friend. The vocal track often sounds much clearer and future interpretations of the same song will be transformed from what one had *thought* to what one now *knows*. More germane to the present topic, consider a news organization's coverage of a breaking criminal investigation in which recordings of incriminating speech have surfaced. Text is often presented in tandem with the recording to *assist* the viewer in hearing the speech. Although the subjective experience fostered by such conditions is an aiding of our perceptual abilities, the potential of having been unwittingly biased looms, as there is no guarantee that the presented text was veridical with the recorded event. Such biased (mis)interpretations occurring in living rooms are generally of little consequence, but when living rooms are replaced with court rooms and purported evidence with actual evidence, the potential for injurious consequences is realized.

Top–down processing, the ability of context or knowledge to guide the perception or interpretation of lower-level perceptual units (Anderson, 2000), is central to schema-theoretic accounts for how expectations guide perceptions, interpretations, and memories of events (Anderson & Pichert, 1978; Bartlett, 1932; Brewer &

N. D. Lange (✉) · R. P. Thomas
Decision Processes Laboratory, University of Oklahoma, 455 W. Lindsey, DAHT Rm. 740, Norman, OK 73019-2007, USA
e-mail: nlange@psychology.ou.edu

J. Dana
University of Pennsylvania, Philadelphia, PA, USA

R. M. Dawes
Carnegie Mellon University, Pittsburg, PA, USA

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Treyens, 1981; Warren, 1970). One such phenomenon closely aligned with the present experiments is phonemic restoration (Samuel, 1996). In the classic demonstration of phonemic restoration (Warren, 1970), participants were presented sentences aurally with one phoneme replaced by an extraneous sound (i.e., white noise or cough). When later queried, the participants were generally surprised to learn that the recordings were not complete and unaltered. More impressive, however, is that their interpretations of the missing phonemes were consistent with the context provided at the end of the sentence. For example, when "the **noise**eel was on the *axle*" was presented, participants reported hearing "the *wheel* was on the axle." However, when presented, "the **noise**eel was on the *orange*" they reported hearing "the *peel* was on the orange." Thus the context supplied at the end of the sentence guided the interpretation of the missing phoneme via a retroactive top–down process. Similarly, the present research demonstrates context driven (mis)interpretations.

The present research explores how context-driven expectations can cause inaccurate interpretations of auditory evidence and bias people toward hearing falsely incriminating statements in benign recordings. We provided the participants in our experiments with contextual information, such as being told that the audio clips were drawn from interviews with criminal suspects and/or by providing written transcripts, prior to being exposed to innocuous, but degraded, spoken statements. It is our contention that characteristics of the legal setting itself may provide sufficient conditions for dubious misinterpretations of objectively benign audio recordings.

In the legal domain, recordings of spoken statements often serve as critical data upon which judicial actors base their beliefs concerning the guilt or innocence of the accused. Unfortunately, the quality of these recordings is often poor due to various factors (e.g., occluded wiretaps/microphones, low quality recording devices, electronic interference, static, background noise). In such cases a transcript of the recorded evidence may be presented in tandem with the recording as an aid-to-understanding. Consider the case of *Golden v. State* (1983) in which tape recordings of electronically intercepted phone calls between the accused and an alleged hitman served as key evidence. Since the tapes were difficult to understand, the judge ruled that excerpts from the recorded conversation could be presented to the members of the jury on a projection screen as they were played aloud in court. In fact, the judge found it "necessary to allow the transcript to be used during the examination" due to "the background noise and confusion." The transcribed excerpts displayed on the screen presented the most incriminating content purported to be on the tapes.

In the case of *State v. Trask* (2007) where a couple was accused of murdering their infant, a recording of the husband speaking with his wife while detained at the police station was deemed admissible despite the fact that the recording was difficult to understand. In the hearing, each individual jury member was handed a transcript of the purported contents of the recording to aid their interpretation when the recording was played for the court. When the judge asked why the transcript would aid the jury, the prosecutor responded, "At times it's hard to hear what Heather is saying. She says stuff under her breath and it is kind of hard to follow along." The judge went on to ask the prosecutor if the transcript was accurate. Although the prosecutor responded affirmatively, there was no standardized method in place to verify the accuracy of such a transcription. The prosecutor was responding with personal opinion, but presenting it as fact. The present work additionally demonstrates that such opinions have no bearing on the accuracy of transcripts.

Although there is no way to directly ascertain the prevalence of such occurrences, it is reasonable to speculate that such instances are not rare. A police captain with whom we spoke informed us that recordings are part of nearly every criminal case that passes through his department. Additionally, the estimate, averaged over multiple police captains, of auditory evidence being involved in a case at trial was 2.5%. When considering this rate over the total number of cases tried in a year it suggests that the use of auditory recordings as evidence is prevalent.

In addition to these contextual biases, we explore two necessary components for top–down bias of recorded speech: phonological similarity and degradation. These naturally occurring characteristics of auditory evidence are important for the prediction of when top–down misinterpretations are likely to manifest. First, words sharing similar phonemic structures are generally more confusable with one another. It is intuitive that the misinterpretation of *gum* for *gun* is more likely than that of *muddy* for *bloody* based on phonological similarity alone. The statements used in the present experiments contained innocuous words sharing a high degree of phonological similarity with various dubious words. Secondly, the level of degradation of a statement, as naturally exists in many recordings as the result of non-optimal recording methods (e.g., wiretaps, 9-1-1 dispatch recordings, audio track of a camcorder recording), will influence the likelihood of misinterpretation as the degree of degradation in the stimulus will influence the extent to which top–down processes are recruited to guide interpretation. In accordance, the recordings used in the present experiments were degraded to varying degrees.

Although cognitive biases arising from context effects and top–down processing are well respected by researchers of cognition, the area of forensic science on the whole has largely failed to adopt procedural prescriptions to

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safeguard evidence examination (e.g., blind testing). Given the common practice of providing case information alongside evidence as it passes through the criminal justice system, it becomes clear that the top–down biases demonstrated below are free to operate throughout the criminal justice system. For worse or better, no one within the criminal justice system is immune to the cognitive contamination of the evidence at hand. Once exposed to case knowledge, such top–down biases become the inadvertent lens through which subjective interpretation of the evidence is achieved.

Experiment 1: The Legal Context as a Top–Down Bias

Experiment 1 assesses the influence of a general legal domain contextual bias on the interpretation of auditory statements. It is our hypothesis that the mere suggestion that the auditory statements were sampled from criminal suspects' interviews would lead to significantly more inaccurate, dubious misinterpretations of innocuous statements than in control conditions.

Method

Participants. One hundred and forty-five participants with normal hearing from a large midwestern university participated in Experiment 1 for course credit.

Design. A 3(contextual bias) × 3(level of degradation) between-subjects design was used. In the target condition, participants were informed that the to-be heard statements were taken from "criminal suspects' interviews." Two control conditions were used: One in which "job candidates' interviews" was specified as the source of the statements and another in which context information was absent. Participants in this second control condition were simply asked to transcribe the statements without being provided any source information. Save for these small differences in context information, or lack thereof, the instructions were identical in each condition. The level of degradation of the auditory statements was manipulated at three levels: a highly degraded condition, a less degraded condition, and a control condition presenting the statements in their original undegraded form.

Materials. The auditory statements used in Experiments 1 and 2 were spoken by four acting students from the Drama department of a large midwestern university with the aid of a professional voice coach who instructed the students to deliver the statements in a natural manner. The statements were individual sentences ranging from 6 to 14 words in length. The recorded statements used in Experiments 1 and 2 can be found in Appendix A. All statements were of a benign nature ensuring that any dubious transcription produced by the participants represented misinterpretation and there was no intended coherent narrative running through the individual statements. There were a total of 17 statements recorded, ten of which were target statements containing a word sharing a high degree of phonological similarity with a potentially dubious interpretation. The other seven were filler statements in which schema-consistent misinterpretations were not predicted to manifest. The following example was a target statement: "I got scared when I saw what it'd done to him." In this instance we expect the shift to go from "it'd" to "I'd" in the criminal suspects' condition. Note that the interpretation of "it'd" exonerates whereas the misinterpretation of "I'd" incriminates. Each statement was recorded in stereo in a quiet room at a sampling rate of 32,000 Hz at a bit depth of 16 bits. Consistent degradation of the auditory statements was achieved through the use of a low pass filter in an audio editing program that removed high frequencies from each of the statements. This was done at two different levels, 670 and 1000 Hz, where 670 Hz represents the most degraded condition and 1000 Hz represents a less degraded condition. The statements were left unfiltered in the degradation absent condition. The loudness of each statement was controlled through the use of a function in the same editing software that adjusted the average volume of each statement to minus 18 dB. The adjustment was applied to all conditions (670 Hz, 1000 Hz, and degradation absent) to ensure that amplitude differences were not present between conditions or individual recordings. The auditory statements were presented to participants through a pair of Dell A215 speakers played from a Dell OptiPlex desktop computer.

Instructions were presented to the participants on a single sheet of paper. All participant responses were written on individual sheets of paper in answer packets. Each sheet of the packet pertained to an individual auditory statement which accommodated two spaces for separate transcriptions and a rating scale at the bottom for a confidence rating of the second transcription.

Procedure. Participants were seated at a desk that held the speakers from which the statements were played. They then read the instructions for the transcription task. Embedded within the instructions was the top–down contextual bias for the bias present conditions. For instance, in the suspects' interviews condition the instructions informed the participant that the statements they were to hear were taken from criminal suspects' interviews. These instructions were then verbally reinforced by the experimenter to ensure that the participant properly understood the task. This reinforcement only covered the procedural details of the task. The bias (i.e., suspects' interviews), if present, was not verbally reinforced. Each statement was then played a total of four times with the participant transcribing after the statement had been played a

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pair of times. After the statement had been transcribed the second time, participants rated their confidence in the "completeness and accuracy" of their second transcription on a 1–7 Likert scale where 1 referred to being "not confident at all" and 7 referred to being "completely confident." This procedure was carried out for a total of 17 trials. The order of statement presentation and the voice of the actor speaking each statement were fully randomized. The task was self paced with the experimenter presenting the next statement when the participant indicated their readiness to proceed.

Results

The coding scheme for transcription classification, for both Experiments 1 and 2, accommodated four mutually exclusive, exhaustive categories: (1) correct transcriptions, (2) suspect misinterpretations, (3) job interview misinterpretations, and (4) transcriptions errors. Correct transcriptions were transcriptions exactly matching the statement that was presented word for word. Suspect misinterpretations were transcriptions that contained content of a dubious nature and were indicative of the speaker's guilt. Job interview misinterpretations were transcriptions that were consistent with a job interview. Transcription errors accommodated all remaining transcriptions. Although it was possible for a transcription in the job interview context condition to be coded as a suspect misinterpretation, none were observed. Furthermore, no job interview misinterpretations were observed in any condition.[1] Thus, hereafter the use of the term misinterpretation will refer to suspect misinterpretations only. Two blind and independent raters classified the transcriptions into the four transcription categories. Overall inter-rater reliability was assessed by Cohen's Kappa, yielding $\kappa = .957$ after initial coding.

Nominal logistic regression was used for the analyses for all category dependent variables. As displayed in Fig. 1, the interaction effect of contextual bias and degradation on the likelihood of suspect misinterpretations was statistically significant, Likelihood Ratio $\chi^2(4) = 10.24$, $p < .05$, resulting from the greater proportion of misinterpretations occurring for the suspect bias under 1000 Hz level of degradation, Likelihood Ratio $\chi^2(2) = 36.66$, $p < .0001$.[2] Participants under the suspects' interview bias

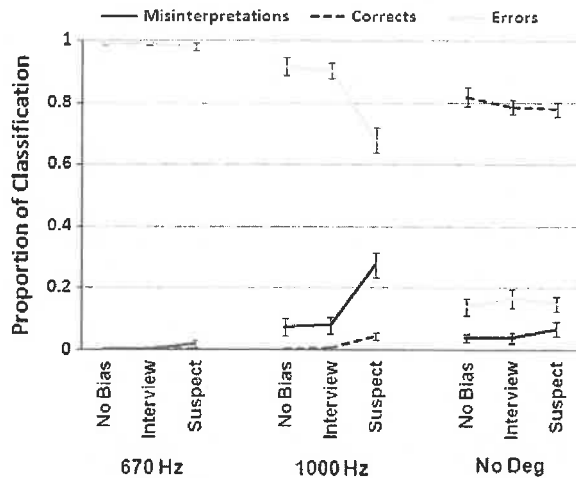

Fig. 1 Experiment 1 Transcription Results: Proportion of three transcription classification categories (misinterpretations, corrects, and errors) plotted by degradation level and bias. Error bars represent standard errors of the means

were 4.56 (95% CI [2.34, 8.89]) times more likely than those in the no bias conditions and 4.15 (95% CI [2.18, 7.90]) times more likely than those in the job interview bias conditions to commit a misinterpretation. There was also a significant effect of degradation, Likelihood Ratio $\chi^2(2) = 56.73$, $p < .0001$, due to participants in the 1000 Hz degradation condition being 5.57 (95% CI [3.63, 8.55]) times more likely to commit misinterpretations compared to those in the control conditions.

For transcription errors there was a significant effect of degradation, Likelihood Ratio $\chi^2(2) = 1809.70$, $p < .0001$, as well as a significant interaction between bias and degradation, Likelihood Ratio $\chi^2(4) = 16.83$, $p < .01$, resulting from fewer errors under suspects' interviews than controls at 1,000 Hz, Likelihood Ratio $\chi^2(2) = 50.43$, $p < .0001$. Correct transcriptions showed a significant effect of degradation, Likelihood Ratio $\chi^2(2) = 1917.59$, $p < .0001$, as more correct transcriptions occurred in the absence of degradation. Table 1, displaying the proportions of each classification (misinterpretation, correct, or error) for each target statement within the crucial degradation condition of 1000 Hz, provides a picture of the relative strength of each statement in eliciting dubious misinterpretations. The suspect bias resulted in greater misinterpretations for every statement (save for statement two in which the proportions of misinterpretation were equal between the suspect bias and control conditions).

[1] It is likely that no job interview misinterpretations were observed due to the fact that none of the sentences were constructed to contain words with high phonemic similarity to words relating to office contexts. Rather the target sentences were constructed with words having high phonemic similarity to dubious words.

[2] It is important to note that there were approximately 2.5 times more correct transcriptions in the suspects' interviews condition than in either control condition under 1000 Hz, Likelihood Ratio $\chi^2(2) = 11.41$, $p < .01$. This rules out the possibility that the greater proportion of misinterpretations observed under the suspects' interviews bias resulted from this condition being generally more error prone.

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Table 1 Proportions of classifications from Experiment 1 (misinterpretations, corrects, and errors) by bias condition and target statement

Proportion of classifications by statement and bias condition at 1000 Hz degradation				
Statement	Bias condition	Misinterpretations	Corrects	Errors
1	Suspect	0.30	0.00	0.70
	No Bias	0.13	0.00	0.87
2	Suspect	0.07	0.14	0.79
	No Bias	0.07	0.00	0.93
3	Suspect	0.61	0.00	0.39
	No Bias	0.17	0.00	0.83
4	Suspect	0.60	0.00	0.40
	No Bias	0.13	0.00	0.87
5	Suspect	0.13	0.05	0.83
	No Bias	0.00	0.00	1.00
6	Suspect	0.10	0.03	0.88
	No Bias	0.07	0.00	0.93
7	Suspect	0.40	0.03	0.58
	No Bias	0.17	0.00	0.83
8	Suspect	0.05	0.05	0.90
	No Bias	0.00	0.00	1.00
9	Suspect	0.23	0.00	0.78
	No Bias	0.00	0.00	1.00
10	Suspect	0.03	0.00	0.98
	No Bias	0.00	0.00	1.00

An ANOVA for the confidence results within the condition of suspects' interviews bias at 1000 Hz (where the significant effect of top–down bias was present for misinterpretations) demonstrated a significant dissociation between transcription accuracy (classification as correct, misinterpretation, or error) and confidence, $F(2,44) = 6.23$, $p < .0042$. As displayed in Fig. 2, post hoc t-tests confirmed a non-significant difference between misinterpretations ($M = 4.08$, $SD = 1.09$) and correct transcriptions ($M = 5.11$, $SD = 1.83$), $t(25) = .64$, $p < .525$, as well as significant differences between transcription errors ($M = 3.7$, $SD = .8$) with misinterpretations, $t(36) = 2.88$, $p < .006$, and correct transcriptions, $t(27) = 2.98$, $p < .005$.[3]

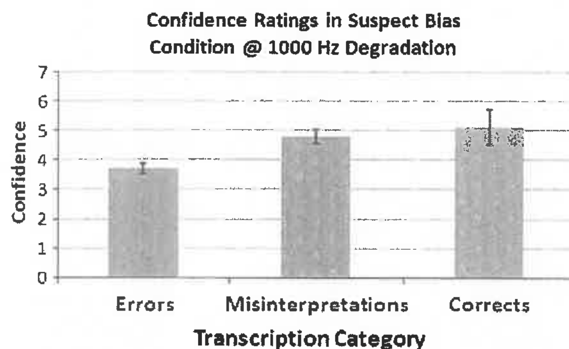

Fig. 2 Experiment 1 Confidence Results: Confidence in transcription accuracy plotted by transcription classification (misinterpretations, corrects, and errors). Error bars represent standard errors of the means

Discussion

The results of Experiment 1 clearly demonstrate the ability of contextual information to cause misinterpretations of degraded auditory statements. However, the lack of dubious misinterpretations under the suspects' interviews bias at 670 Hz, where the proportion of transcript errors was nearly at ceiling across all bias conditions, suggests that general contextual biases are not strong enough to induce misperception in situations that do not foster some general bottom-up interpretation. If the degradation is too great the poor quality of the recording is apparent.

Upon first inspection, the proportion of correct transcriptions across degradation absent conditions may seem somewhat low (hovering near 0.8). However, this finding was likely due to the strict criteria adopted for correct

[3] The confidence results in the focal condition of suspects' interviews bias at 1000 Hz, although compelling, would have been bolstered by comparisons to other conditions thereby demonstrating a distinct pattern of results under the suspects' interviews bias. Unfortunately such comparisons were not feasible as the analytic design was dependent upon observed data falling into each of the transcription classifications. The resulting data provided an insufficient number of data points within each classification for meaningful comparisons to be evaluated in other conditions of interest.

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transcription classification whereby the statements were required to be transcribed veridically. This strict criterion was necessary for the present experiments as these demonstrations in part highlight the drastic implications that such one word differences can have on the interpretations of the statements in question. Recall the example discussed previously, "I got scared when I saw what it'd done to him." Note again that the interpretation of "it'd" exonerates whereas the misinterpretation of "I'd" incriminates, a simple one word difference carrying potentially dramatic implications.

It is important to realize that the type of top–down bias demonstrated in Experiment 1 likely extends to the entire class of judicial actors (i.e., jury members, attorneys, judges, court reporters, police officers, forensic audiologists, etc.). As a result, the situations in which such biases are able to operate over the interpretation of auditory evidence carry throughout the legal system. From the moment a recording is captured, the interpretations of all persons encountering it have the potential to be biased by the information surrounding it. Also, provided that a true legal setting would naturally furnish more potent biasing information than the subtle bias used in Experiment 1, it is reasonable to speculate that such biases are operating with the same, if not greater, force in actual legal settings as in the present empirical demonstration.

The confidence results revealed that participants were nearly as confident in their dubious misinterpretations as in their accurate transcriptions of the innocuous target statements in the crucial condition of suspects' interviews bias at 1000 Hz. This result demonstrates that transcription confidence cannot be used as a reliable surrogate for transcription accuracy. In the two cases mentioned in the introduction the transcripts were authenticated via someone's opinion that the transcripts were accurate reflections of the recording. Given that people's confidence in transcript accuracy does not depend on transcript accuracy it is quite possible for someone to confidently report that the contents of the transcript are accurate when they are not.

The present results demonstrate the ease with which people can be made to generate inaccurate dubious transcripts of innocuous evidence with high confidence when provided subtle contextual information. Given that transcripts, accurate or inaccurate, are likely to accompany degraded auditory evidence as an aid-to-interpretation, Experiment 2 investigates the effects of inaccurate transcripts of auditory evidence on interpretation.

Experiment 2: Transcripts as a Top–Down Bias

Once produced, a transcript purported to be an accurate account of the contents of the auditory evidence may accompany the evidentiary recording as it navigates its way through the criminal or civil court systems. However, as the results of Experiment 1 suggest, there is no guarantee that the transcripts will be accurate as the original transcriber will have been susceptible to the contextual biases accompanying the original recording.[4] In Experiment 2, we predicted that inaccurate transcripts (i.e., dubious transcriptions of innocuous statements), read prior to hearing the degraded recordings, would lead to significantly greater dubious transcriptions than when a transcript was accurate or absent. The manipulation of transcript presence can also be conceptualized as reflecting instances in which someone provided the listener with an expectation of what will be said. Thus, at an applied level, the present manipulation likely captures a wider array of conditions in the criminal justice system than solely those involving a written transcript in the hands of the perceiver.

Our secondary hypothesis was that persons provided transcripts would overestimate the number of words that those without transcripts would accurately transcribe. This result would demonstrate insensitivity to the level of degradation present in the recording due to the expectancy created by the transcript. This prediction stems from research by Loewenstein, Weber, and Moore (2006). Their participants viewed two images that were identical except for one hard to detect difference and predicted how many of their peers would be able to spot the difference. Participants who were shown the answer before making their prediction fared worse, overestimating the number of people that would detect the difference. That is, once they saw the solution, it was harder to imagine not being able to see it. We predicted that transcripts would induce a similar *curse of knowledge*.

Method

Participants. Seventy-nine participants with normal hearing from a large midwestern university participated in Experiment 2 for course credit.

Design. A 2(contextual bias) × 2(transcript presence/absence) × 2(transcription error) × 3(degradation level) mixed design with two between-subject variables and two within-subject variables was used. Contextual bias was manipulated between subjects in the written instructions, using only the suspects' interviews bias and no bias. Based on the results of Experiment 1, which demonstrated the absence of any job interviews transcriptions and null comparisons to the bias absent control condition, the job interviews control condition was excluded from the present

[4] Additionally, inaccurate transcripts may arise as an explicit attempt to deceive (cf. case of Sabrina Aisenberg) and thereby use the effects demonstrated by the present experiment to their advantage.

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design. Transcript presence/absence was manipulated by providing half of the participants with written transcripts prior to hearing the auditory statements. Errors in the provided transcripts were manipulated within subject, with half of the transcriptions embedded with suspects' interviews consistent errors and half being accurate innocuous transcriptions. The degradation level of the statements was manipulated within subject using degradation levels of 670, 800, and 1000 Hz. A degradation-absent condition was not included in Experiment 2 because undegraded statements presented with inaccurate transcripts would have made it obvious that some of the transcripts were errorful.

Materials. The auditory stimuli used in Experiment 2 were the same as those used in Experiment 1 except for the new degradation level of 800 Hz which was achieved using the same process and software outlined for Experiment 1. Additionally, all filler statements were removed from the stimuli and only target statements were used.

Instructions were presented on paper to the participants and were embedded with the top–down contextual bias in the suspects' interviews condition. All participant responses were written on individual sheets of paper in answer packets. Packets provided to the participants in the transcript absent condition were the same as those used in Experiment 1 except that only one transcription was accommodated prior to the Likert scale. Each sheet of the answer packets in the transcript present condition contained the written transcript, a space to accommodate the participant's transcription, and a space at the bottom where they were asked to estimate the number of words that someone not provided a transcript could have correctly transcribed. Additionally, next to the space where the participants were to write their estimate, the total number of words present in the statement they had just heard was provided. For instance the entry space read, "______ out of 10 words" for a 10-word statement. Note again that all statements played to the participants were of a benign nature ensuring that any dubious transcription produced by the participants represented misinterpretation.

Procedure. Participants read the instructions for the transcription task. These instructions were then verbally reinforced by the experimenter. For participants in the transcript absent conditions the procedure of Experiment 2 was identical to that of Experiment 1 with the exception that on each trial participants heard the auditory statement twice and transcribed once. Thus, the transcript absent conditions represented a partial replication of Experiment 1.[5]

Participants in the transcript present conditions were instructed to read each provided statement aloud prior to hearing each auditory statement. Transcript accuracy (correct vs. incorrect) was completely randomized for each subject. After listening to the auditory statement the participants transcribed what they heard. Following transcription, a rating of degradation was taken for each statement. This was done by eliciting judgments of how many words someone not provided a transcript could have accurately transcribed for each statement. Therefore, overestimation of the observed performance in the transcript absent condition by participants provided transcripts would imply that transcripts lead to a lack of sensitivity to the level of degradation in the recordings. The task was self paced in all conditions with the experimenter presenting the next statement when the participant indicated their readiness to proceed.

Results

Two independent raters were used to classify the transcriptions. The raters were blind to condition for each transcript with the exception of transcription presence/absence conditions. Overall inter-rater reliability was assessed by Cohen's Kappa, yielding $\kappa = .894$. As displayed in Fig. 3, a nominal logistic regression indicated a significant effect of transcription presence/absence for misinterpretations, Likelihood Ratio $\chi^2(1) = 64.98$, $p < .0001$, correct transcriptions, Likelihood Ratio $\chi^2(1) = 45.44$, $p < .0001$, and errors, Likelihood Ratio $\chi^2(1) = 128.22$, $p < .0001$. In addition, the results of Experiment 1 partially replicated in the transcript absent condition; although the interaction between bias and degradation was not statistically significant, Likelihood Ratio $\chi^2(2) = 4.01$, $p = .134$, there was a significant effect of bias in the 1000 Hz condition, Likelihood Ratio $\chi^2(1) = 15.38$, $p < .0001$. Participants in the suspect bias condition were 7.23 (95% CI [2.32, 22.53]) times more likely to misinterpret than controls. Thus, the results demonstrate that transcripts can be powerful instruments of expectation-induced biases in the interpretation of auditory evidence.

An omnibus repeated measures ANOVA comparing the estimations (of participants with transcripts) to the actual proportion of words correctly transcribed (by participants without transcripts) demonstrated significant main effects of transcription presence/absence, $F(1,75) = 306.18$, $p < .0001$, and a significant within-subject effect of degradation level, $F(2,150) = 92.95$, $p < .0001$. Post hoc *t*-tests were carried out to assess the robustness of the effect within each

[5] Recall that in Experiment 1 each trial resulted in two successive transcriptions and it was the second transcription that was the basis of the statistical analyses reported. However, there was no significant difference in the rates of transcription classifications between the first and second transcriptions in Experiment 1.

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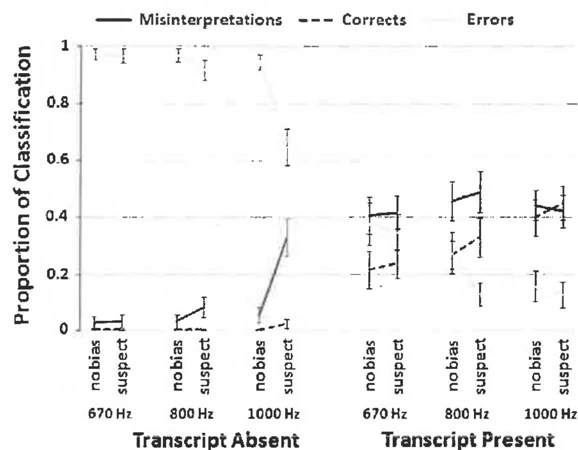

Fig. 3 Experiment 2 Transcription Results: Proportion of three transcription classification categories (misinterpretations, corrects, and errors) plotted by transcript presence/absence, degradation level, and bias. Error bars represent standard errors of the means

degradation level. These tests revealed significant overestimation at every level of degradation, 670 Hz, $t(1,75) = 15.02$, $p < .0001$, 800 Hz, $t(1,75) = 12.9$, $p < .0001$, and 1000 Hz, $t(1,75) = 11.81$, $p < .0001$ (see Fig. 4). The means and standard deviations of the estimated (transcript present) and observed (transcript absent) proportions correct were, respectively, ($M = 0.59$, $SD = 0.28$) & ($M = 0.04$, $SD = 0.12$) at 670 Hz, ($M = 0.79$, $SD = 0.22$) & ($M = 0.22$, $SD = 0.28$) at 800 Hz, and ($M = 0.85$, $SD = 0.19$) & ($M = 0.39$, $SD = 0.31$) at 1000 Hz. Thus, expectation-induced biases resulting from transcripts caused insensitivity to the level of degradation in auditory statements.

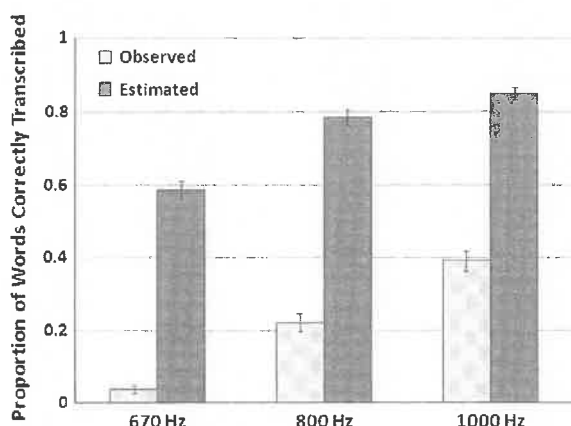

Fig. 4 Experiment 2 Estimation Results: Mean estimations of words correctly transcribed per statement (transcript present condition) vs. actual proportion of words correctly transcribed per statement (transcript absent condition) plotted by degradation level. Error bars represent standard errors of the means

Discussion

Of initial interest, the results of Experiment 1 were replicated in the transcript absent conditions despite the procedural differences of manipulating degradation within subjects and playing the statements only twice. The effects of the transcript presence are vividly demonstrated by the present results. The presence of dubious transcripts clearly resulted in a much greater proportion of dubious misinterpretations than occurred under the suspects' interviews bias in isolation. It is important to keep in mind that only half of the transcripts provided to participants contained dubious errors as the other half of correct transcripts should have reinforced correct transcription. Inspection of Fig. 3 with this in mind reveals that the proportion of dubious misinterpretations observed in the transcript present conditions was near the ceiling of 0.5 across all degradation levels. Taken together, these results suggest that the presence of an inaccurate transcript is likely a more powerful biasing agent than the general context of the legal system.

Perhaps even more striking than the inflation of dubious interpretations is the observed miscalibration to the quality of the recorded dialogue caused by the presence of transcripts. At each level of degradation, participants overestimated the observed proportion of correct transcription of those without transcripts by more than 50%. Alarmingly, for statements presented at 670 Hz the observed proportion of correct transcription was under 5% while the estimations for those with transcripts was well over 50%. The immediate implication is that when degraded evidence arises in the legal system, transcripts may cause the poor quality of the evidence to go undetected by those relying on it and cause them to suffer a curse of knowledge.

General Discussion

As demonstrated in the present investigations, both the general context of the legal system (Experiment 1) and the presence of transcripts (Experiment 2) can lead to systematic misinterpretations of auditory evidence. These top–down biases are powerful and their implications potentially severe as they can transform auditory evidence from objectively noisy, benign, and non-incriminating to subjectively interpretable, dubious, and incriminating. Moreover, people are relatively confident in their expectation-induced misinterpretations and seem unaware of the influence of top–down biases on their interpretation of auditory stimuli.

It should again be noted that the manipulation of context information used experimentally is slight in comparison to the amount of biasing information

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impinging those in the judicial system. Consequently, the operations of top–down bias are likely to be as strong, if not stronger, in the natural ecology of the criminal justice system as those demonstrated in the present experiments. Additionally, the realms within the criminal justice system in which these biases operate are not limited to court rooms. Consequently the leverage exerted by such evidence operates from the time evidence enters a case. Consider the factors that determine if a case makes it to trial. Recordings of the defendant that appear incriminating are likely to exert powerful sway over the defendant's assessment of the prosecution's case.

The present demonstrations illuminate shortcomings with procedures concerning determinations of admissibility regarding auditory evidence and transcripts in court. It is a fact that the trial judge has broad discretion in making this determination for the case at hand (cf. *Addison v. U.S.*, 1963; *State v. Lavers*, 1991; *U.S. v. Avila*, 1971; *U.S. v. Biggins*, 1977; *U.S. v. Harrell*, 1986; *U.S. v. King*, 1978; *U.S. v. Stephens*, 2002). There is no reason to suspect that judges' interpretations of a recording's content are impervious to the biasing effects of case information or specific expectations. A judge we interviewed stated that only accurate transcripts are presented in his trials and anything that is inaudible is correctly labeled as such. He explained that he, the lawyers, and court reporter play the recordings over-and-over so they can decide what can be heard and what cannot. The condition under which a judge decides on the accuracy of a transcript is likely variable from judge-to-judge. Thus, in light of the present demonstrations, it is insufficient, if not neglectful, to rely on a judge's subjective determination of the quality and content of transcripts of auditory evidence as the sole determinant of admissibility.

The implications for the criminal justice system are clear. There presently exist no standards for how auditory evidence may be used prior to trial and the standards by which transcripts are produced for use in court are insufficient to avoid the effects documented by the present work. Objective and standardized practices governing the handling, transcription, and admission of auditory evidence are needed.

Following the procurement of any evidentiary recording it would be sound practice to keep its handlers as blind as possible to the case. One alternative might be a transcription clearing house of sorts, where professionals transcribe snippets of auditory evidence in the absence of biasing information. Standardizing the transcription procedures would allow the reliability of both a particular piece of evidence and individual transcriptionists to be rigorously evaluated. For instance, one could provide precise reliabilities such as "10 out of 45 transcriptionists agreed with the prosecution's interpretation of this auditory utterance." Individual differences in transcription skill could also be rigorously evaluated through objective testing or consensus measures.

Unfortunately, there is reason to suspect that this is likely to be the exception in evidence handling rather than the rule. Several problems of evidence evaluation stemming from top–down expectation effects in other domains of forensic science (i.e., DNA examination, toolmark examination, bitemark identification, handwriting identification, etc.) discussed by Risinger, Saks, Thompson, and Rosenthal (2002) are germane to the present demonstrations and their applied implications. For instance, in discussing the official evidence submission form used by the state of New Jersey, the authors note that there is a box labeled "Brief History of Case" through which any and all information about the case can be supplied directly to the examiner of the evidence at hand. Additionally, Risinger et al. (2002) note that although the latest revision (per 2002) of the standards for the American Society of Crime Laboratory Directors (ASCLD) pays great attention to preventing the physical contamination of evidence, it makes no mention whatsoever that one should avoid the cognitive contamination of evidence examiners with case information. In fact, one of the authors of that paper (Saks) confirmed with an ASCLD-certified laboratory director and an independent ASCLD-certified laboratory supervisor that the practice of passing case information to evidence examiners was virtually universal.

The recently released National Research Council report entitled "Strengthening Forensic Science in the United States: A Path Forward" (2009) discusses the types of cognitive biases presently demonstrated and notes the scarcity of research on cognitive biases in forensic science as well as research aimed at improving forensic science methodologies to minimize the effects of cognitive biases. Research of both types is clearly desirable in addition to a greater appreciation for and adoption of fundamental scientific principals throughout forensic science.

In regards to any particular criminal case, it is important to realize that individual pieces of evidence do not stand alone as judicial actors weigh the guilt of the accused. In considering degraded auditory evidence it is clear that some recordings may not provide overwhelming evidence of guilt on their own, but may nevertheless reverberate with, and further galvanize, the hypothesis of guilt. As each actor in the judicial system, jurors being perhaps the most relevant here, will have individual thresholds of reasonable doubt, it is important that no one be subject to breaching his/her threshold by means of evidence that may well be deemed inadmissible given more justifiable protocols for admission than exist at the present.

While the implications for the criminal justice and legal domains are striking, other domains likely suffer contextual misinterpretations and concomitant overestimation as well. For example, incident review concerning the responsibility

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of persons reliant on noisy auditory communication devices (e.g., 9-1-1 dispatch operators, air traffic controllers, pilots) may fail to account for the objectively poor quality of the auditory communication when post hoc contextual details and/or written transcripts are present. Additionally, interpretations of auditory intelligence (e.g., chatter) procured by government agencies (e.g., FBI, CIA) are likely to be biased in the same manner. Thus, auditory misinterpretation and miscalibration due to top–down processes are likely ubiquitous problems within domains reliant on degraded auditory recordings.

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Appendix A

Recorded Statements used in Experiments 1 & 2
(Target statements in bold, filler statements in non-bold)

(1) **I got scared when I saw what It'd done to him.**
(2) **I left him there all muddy, lyin' on the floor.**
(3) **The gum was on the floor in front of me.**
(4) **Before it was too late, I tried to chill them.**
(5) **I hugged him just for the money.**
(6) **I ripped her after the party.**
(7) **I never meant to charm her.**
(8) **I tucked her in bed last night around midnight.**
(9) **I made sure I wasn't around while they were being filled.**
(10) **I knocked it out, while we were arguing about the burgers.**
(11) The key did not fit the lock to the office door.
(12) I believed it was the wrong thing to say at the time.
(13) It was someplace we didn't belong at that time of night.
(14) I was working in the backyard all day.
(15) My car broke down, so I had to walk several miles in the dark.
(16) It was just too early to leave for the game.
(17) How simple it would have been to get away with it.

References

Addison v. U.S., 317 F.2d 808 (C.A.Tex. 1963).
Anderson, J. R. (2000). *Cognitive psychology and its implications* (5th ed.). New York, NY: Worth Publishers.
Anderson, R. C., & Pichert, J. W. (1978). Recall of previously unrecallable information following a shift in perspective. *Journal of Verbal Learning and Behavior, 17*, 1–12. doi:10.1016/S0022-5371(78)90485-1.
Bartlett, F. C. (1932). *Remembering*. Oxford, England: University Press.
Brewer, W., & Treyens, C. (1981). Role of schemata in memory for places. *Cognitive Psychology, 13*, 207–230. doi:10.1016/0010-0285(81)90008-6.
Golden v. State, 429 So.2d 45 (Fla. App. 1 Dist, 1983).
Loewenstein, G., Moore, D., & Weber, R. W. (2006). Misperceiving the value of information in predicting the performance of others. *Experimental Economics, 9*(3), 281–295. doi:10.1007/s10683-006-9128-y.
National Research Council. (2009). *Strengthening forensic science in the United States: A path forward*. Washington, DC: The National Academies Press.
Risinger, D. M., Saks, M. J., Thompson, W. C., & Rosenthal, R. (2002). The Daubert/Kumho implications of observer effects in forensic science: Hidden problems of expectations and suggestion. *California Law Review, 90*(1), 1–56. doi:10.2139/ssrn.301408.
Samuel, A. (1996). Phoneme restoration. *Language and Cognitive Processes, 11*, 647–653. doi:10.1080/016909696387051.
State v. Lavers, 814 P.2d 333 (Ariz., 1991).
State v. Trask, Case No. CF-2007-184 (Okla. Dist. Ct. 2007–2009).
U.S. v. Avila, 443 F.2d 792 (C.A.Fla. 1971).
U.S. v. Biggins, 551 F.2d 64 (C.A.Fla. 1977).
U.S. v. Harrell, 788 F.2d 1524 (C.A. Fla., 1986).
U.S. v. King, 587 F.2d 956 (C.A.Mont. 1978).
U.S. v. Stephens, 202 F.Supp. 2d 1361 (N.D. Ga., 2002).
Warren, R. M. (1970). Perceptual restoration of missing speech sounds. *Science, 167*, 392–393. doi:10.1126/science.167.3917.392.

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Exhibit 2

JUROR #6

Transcript of Charlotte Jefts tape

Reporter: Anna Maria Andriotis of Justice Magazine

Juror : Charlotte Jefts

Jefts - You'd have to be on the jury to know....I just couldn't possibly...when I think of the lives she's ruined..she wants her own way, she doesn't think anything of getting her husband killed.....she wanted to get that girl killed...it didn't go through...when she was in jail... she didn't think anything of murdering anyone who gets in her way. I tried very hard three times I voted undecided just to see if whether...... there were two others voting undecided

Andriotis – how many times was there a vote?

Jefts – what?

Andriotis – How many times was there a vote, you said you voted undecided three times?

Jefts – Oh, we had several straw votes, I don't know, 3, 4, 5 something like that.

Andriotis – ok

Jefts – and then finally when the last one...it was 12 guilty...there was no way, she was possibly getting out of this 'cause she thought nothing of murdering anybody..she tried to get and when she was in jail awaiting trial she had a friend there whose husband agreed to kill one of the girls who was testifying against her......

Andriotis – which girl?

Jefts – what?

Andriotis - which girl was she trying to kill?

Jefts – ya, oh, now....I can't think of her name but she went to see her in jail.... when Pam was in jail....she....right there she included herself in this she said if you don't do what I tell you to do she mentioned all of them and ME (emphasis)....it included her...that's the first time that she agreed that she had anything to do with it. You understand what I mean?

Andriotis – this was in jail as she was awaiting trial?

Jefts – yes

Andriotis – and she basically….one of the other inmates in there…she approached that inmate's husband and requested or attempted for him to kill….ummm….certain members or

Jefts – yes, this girl her name was….uh

Andriotis – from the jury?

Jefts – uh, no, no, no, no, no…. it was the girl that she uh was in the class that Pam Smart uh, was teaching

Andriotis – ok, in high school?

Jefts – well, it was a part of high school…it was a separate building and Pam was at the head of it

Andriotis – ok

Jefts – ya, and uh, but she went to see her, Pam went to see her when she…..no, the girl went to see her when she was in jail and then she, Pam included herself if you don't do this and that and all the others and ME….she had included herself …..but before she had said it was all Billy Flynn's idea to kill her husband so that he could have her

Andriotis – right

Jefts – it was a sad, weary story

Andriotis – well would you explain how would you describe that experience, that feeling of being on the jury

Jefts – well I had a strange feeling that I would be part of deciding what's gonna happen to this girl …you know…and I tried hard to see is there any way that she could possibly be, you know, released from this but there wasn't. She was so guilty.

Andriotis – what? What made you think that she was guilty?

Jefts – well, the way that she…. that when she was in jail, and then she knew this girl was probably be testifying against her because she went to see her in the jail and she had said, she said if you don't do this that and the other thing, all these and me, she included herself in it, Pam did …but before it was all Billy Flynn's idea about killing her husband.

Andriotis - She basically tried to tell a girl who would have maybe testified-is that what it is - what to say?

Jefts – yeah. And she was…yeah…there was.

Andriotis – How did that get revealed? How did the jury find out about that?

Jefts – No, no, in court the opposition they were wild because we weren't sequestered and ah, usually you are but ah, we weren't and that, oh they screamed so loud, that it wouldn't make any difference at all because we only went about the evidence.

Andriotis – Who screamed so loud?

Jefts – Finally they well they just a shock to us ah, we were sequestered. They took us out to a nice hotel ah, waterfront

Andriotis – Uh-hum.

Jefts – Up in New Hampshire and we had to have twelve rooms and nobody could be together and uh, and then uh, and then the bailiff come in and said you could call your husband and tell that you arrived safely and everything's all right and I did, but I didn't hear everything he said and then the next day we were bused back to the court. The final day have you reached a verdict, yes, what is it? Guilty and so say you all and count every one of us one by one guilty twelve and then the mother of….got up..she started…no, ah, no, the mother of the boy….the mother of the murdered one, got up and started screaming, she said they believed the boys, they believed the boys, and then the father got up, he started, the father of the murdered one got up.

Andriotis – Uh hum.

Jefts – Got up and he said what he thought of her and then she got up and she said I don't have to take this and they went over and they put handcuffs on her and took her away. The whole thing was awful….like a nightmare.

Andriotis – What did the father say?

Jefts – Oh, what he was saying…what he thought of her, how terrible she was….

Andriotis – Um, immediately following that you said that you did not speak with any reporters whatsoever, whether it was newspapers or tv or magazines?

Jefts – Well, ah, somebody called me from Boston and they, the family was trying to go for an appeal and they were, they were talking crazy and I just told them that look it, you weren't there and ah, please don't bother me I don't want to have anything???? ya, but they're trying very hard for an appeal well twice they went for appeal in, you know, where the trial was and that ah, turned down. Then they went to Concord in New Hampshire, the capital, and they were turned down. Then they went to Washington, DC and they refused to take the case….that they were so sure.

Andriotis – Right. OK, so at any point then I just want to be clear with you so you never for example, let's say you never once appeared on a tv show discussing this case?

Jefts – No, but somebody called me and they were telling me that I was talking against her. Now, when we went in, you know when we went in the place was body to body with 1

Jefts – Uh, well it was brought up.....uh, in the whole theory, you know, yeah, how that she had got ya, she...when she was in jail awaiting trial, she.... a friend in there whose husband had agreed to kill, uh, that girl, but then he changed his mind. He did. But, I mean it's awful but she has a mind..... anybody whose in her way she doesn't mind having them killed and I tried very hard three times on straw votes undecided to see if there was any way that she could....she was a young girl

Andriotis – right

Jefts – any way at all that she could get out of it and there isn't and it's awful to say but she's got a terrible, evil mind ....anybody is in her way and Billy Flynn, he cried, during this whole thing.....when he was on and he kept saying I didn't want to do it, I didn't want to do it, and they said well why did you? And he said because I was in love and I didn't want to lose her so he agreed to kill ....uh.....the....uh, you know, the killing.

Andriotis – her husband, right?

Jefts - And I say this is the horrible thing – the whole thing....

Andriotis – Why did you first become?????

Jefts – Well, because here was a young girl....she was 22 at the time....and he was only 15 and I thought is there any way at all that girl could get out and she was a young girl but there was.the evidence against her was so big there was no way at all...no I did vote....

Andriotis – What was the critical piece of evidence sort of like the clincher ....what ~~lead~~ led you to say you know what I think she's guilty and this is why. Was there one particular piece of evidence that did that?

Jefts – Well, yeah, I don't know....course the whole thing....it was a very unusual thing to be in on this jury you know what I mean and to hear this and to hear ...Billy Flynn cry during this whole thing ....his testimony.... and he said I didn't want to do it, I didn't want to do it, he said but she kept bugging me you know and he said and they said, well why did you do it and he said I was in love with her and I didn't want to lose her. The thing was so sad....unbelievable, really. It was a .....I had been on a jury before and I guess that's one reason that they would call on you know somebody who had been on a jury before but ah, it wasn't as devastating as this one, this one was really hard, a terrible thing.

Andriotis – Did you do any kind of media around the time of the trial? Were you interviewed by anybody, um, whether it's a newspaper or?

Jefts - No, I don't understand what you mean.

Andriotis – Media, like did you, were you interviewed at the end of the trial were you interviewed by any newspaper reporters or um, were you on tv at all discussing.

Jefts – No, no, in court the opposition they were wild because we weren't sequestered and ah, usually you are but ah, we weren't and that, oh they screamed so loud, that it wouldn't make any difference at all because we only went about the evidence.

Andriotis – Who screamed so loud?

Jefts – Finally they well they just a shock to us ah, we were sequestered. They took us out to a nice hotel ah, waterfront

Andriotis – Uh-hum.

Jefts – Up in New Hampshire and we had to have twelve rooms and nobody could be together and uh, and then uh, and then the bailiff come in and said you could call your husband and tell that you arrived safely and everything's all right and I did, but I didn't hear everything he said and then the next day we were bused back to the court. The final day have you reached a verdict, yes, what is it? Guilty and so say you all and count every one of us one by one guilty twelve and then the mother of....got up..she started...no, ah, no, the mother of the boy....the mother of the murdered one, got up and started screaming, she said they believed the boys, they believed the boys, and then the father got up, he started, the father of the murdered one got up.

Andriotis – Uh hum.

Jefts – Got up and he said what he thought of her and then she got up and she said I don't have to take this and they went over and they put handcuffs on her and took her away. The whole thing was awful....like a nightmare.

Andriotis – What did the father say?

Jefts – Oh, what he was saying...what he thought of her, how terrible she was....

Andriotis – Um, immediately following that you said that you did not speak with any reporters whatsoever, whether it was newspapers or tv or magazines?

Jefts – Well, ah, somebody called me from Boston and they, the family was trying to go for an appeal and they were, they were talking crazy and I just told them that look it, you weren't there and ah, please don't bother me I don't want to have anything???? ya, but they're trying very hard for an appeal well twice they went for appeal in, you know, where the trial was and that ah, turned down. Then they went to Concord in New Hampshire, the capital, and they were turned down. Then they went to Washington, DC and they refused to take the case....that they were so sure.

Andriotis – Right. OK, so at any point then I just want to be clear with you so you never for example, let's say you never once appeared on a tv show discussing this case?

Jefts – No, but somebody called me and they were telling me that I was talking against

possible ah, people, that were gonna be, you know, called and I sat at a long table at the end and I didn't talk to a soul and NOBODY (emphasis) talked to me 'till they called my name you know, and then I had to go and be interviewed and ah, they said that I, ME (emphasis), that I (emphasis) was talking against her saying what a terrible person she was and all this. I was FURIOUS (emphasis)...I didn't talk to anybody so I called Boston 'cause it came from Boston and I told them, I said this is a big lie because the family was trying to get an appeal.

Andriotis – Was it a tv show that had called you from Boston?

Jefts – What?

Andriotis – Was it a tv show that had called you from Boston?

Jefts – Well, I don't know what it was.

Andriotis – OK.

Jefts – I don't know what it was but somebody called me from Boston. Her family, ah, ah, you know ah, tried to get her released everywhere that she tried, that they tried that they were turned down because they were so sure of her guilt. And we were too. That the jury we were very sure and a lot of them there they kept saying oh look, she's guilty, you know, and they said, the heck with this maybe thing but we went all the way and finally I and two others and myself who had voted undecided a few of the....and finally there was no way we could possibly ah....

Andriotis – Do you know if the people who called you were ah, friends of the Smart or Wojas family or did you know if they were reporters?

Jefts – Well, I think they were....I, I think they were..I don't know for sure but I think they would be connected with the parents – her parents.

Andriotis – OK.

Jefts – Her parents that were trying some way to get her, you know, out of it and then they told us when we were called on the jury they said, if found guilty, absolutely no possible way of her ah, ...release.

Andriotis – Right. Right. So you were saying before about your experience when you were in the juror pool that you sat at the end of a long table, you didn't talk to anybody until, ah, your name was called can you ah, can you give me, can you describe what the atmosphere was like in the juror pool? Were people talking about the case while they were waiting?

Jefts – Well there were people there that were talking about her.

Andriotis – Uh huh.

Jefts – That this was a big long table but I was at the end all by myself. I didn't talk to anybody but they were talking against her, they were.

Andriotis – Do you know what they were saying?

Jefts – Oh, they were saying that she was kind of a racy person and a, oh, you know, but I wasn't really listening but I don't know somehow or other they were pinning it on me.

Andriotis – Right.

Jefts - I didn't talk to a soul.

Andriotis – OK

Jefts – And it wouldn't change the thing at all. At all. Whatever they say because you know you'd have to go through the whole procedure. It wouldn't make any difference what they were saying, I could hear them say well, she was kind of a racy person and this and that but it didn't interest me in any way.

Andriotis – Were people saying that they thought she was guilty?

Jefts – Oh ya, they were saying, ya, knowing her, I wouldn't put it past her, sure, oh ya.

Andriotis – So, do you, basically what I want to confirm with you is that you have – correct me if I'm wrong – have you ever, ah, done any kind of interview with any kind of reporters, tv or newspapers that dealt with this case?

Jefts – That would doubt it?

Andriotis – No, that dealt with this case? In which you were asked to speak about the Pamela Smart case? Have you ever done any interviews about her?

Jefts – No, but I had, after I got home after this was over the telephone was ringing continuously.

Andriotis – Uh huh.

Jefts – About people pro and con and finally I said go take the phone off the hook I'm not taking another call…I told them to take the calls.

Andriotis – Because the reason why I'm asking is because at this point what Linda Wojas is claiming….basically she has sent me this letter where ah, she says that an anonymous writer sent me this letter to the Attorney General's Office stating that, ah, stating that one of the older women on the jury had appeared on a Boston tv show discussing this case.

Jefts – Not me.

Andriotis – Ah, and that's basically what I want to confirm with you – whether you did or didn't do that.

Jefts – I did not.

Andriotis – OK.

Jefts – I didn't know anything about that at all.

Andriotis – OK

Jefts – No.

Andriotis – Alright, that's very, very interesting. Do you know how many people altogether were in the juror pool? Would you say that when you were there were there over a hundred or so? Was everybody who was in the juror pool in the room at the same time?

Jefts – Now wait a minute. Say that again.

Andriotis – Was everybody who was in the juror pool in the room awaiting to be questioned at the same time or were you coming in and out?

Jefts – No, you mean when they ah, I don't know exactly what you mean.

Andriotis – When you were called to ah, jury duty and you arrived at the court were all the individuals called to jury duty for this case in the courtroom at the same time?

Jefts – Oh yes. Yes, we were.

Andriotis – OK.

Jefts – Yes, we were. And we were mixed up. We weren't together at all. I don't know any….the table that I sat at I didn't know anybody and I had sat at the end and I didn't talk to anybody and NOBODY (emphasis) talked to me.

Andriotis – OK.

Jefts – But.

Andriotis – And everybody was in that room?

Jefts – Yes.

Andriotis – OK.

Jefts – Everybody.

Andriotis – OK. Was her....do you know if Pamela Smart's mother was in there?

Jefts – Oh that, I don't know.

Andriotis – OK.

Jefts – But there were so many people that they ran out of seats. They were body to body. There were so many people who were called to duty, you know to be interviewed but I think the reason that I was picked was because I had been on a jury before on you know, another case and I think they, that most of them were familiar with the jury

Andriotis – Right. Did you know much about this case before you were called to jury duty for it?

Jefts – No.

Andriotis – OK. Had you heard about it in the news?

Jefts – Uh...well I think I can't say that I know much about it.

Andriotis – OK.

Jefts – It was all new to me really when I went and they said when they call your name and they called me and they said I see you've been on a jury before and I said yes and they said well I see you've been on for negligent homicide and you've been on, you know, pretty big cases and they said, and I had to describe each one and so now Pam...she had the right to accept or reject anybody and I think that the reason that she accepted me is because... why she accepted me now because they made me describe these other things that I went on and I think now why she picked me .

Andriotis – So she agreed to have you on the jury?

Jefts – Yes, she had the right to accept or deny.

Andriotis – OK.

Jefts – Oh, I know what it was. Because I was on for a robbery ....and uh.....(many pauses noted) getting kind of old and sometimes...

Andriotis – Sure. How old are you?

Jefts – Not guilty because there wasn't one bit of ....and I think she ??? herself in that she didn't know what was going on when she went home and found her husband...that's what I think.

Andriotis – OK. How old are you right now?

Jefts – I'm 89.

Andriotis – And how old were you when you were on this jury?

Jefts – Ah, 75

Andriotis – OK. Well, I want to thank you very much for your time.

Jefts - Well I hope it will help you in some way.

Andriotis – This definitely helps. Thank you and if I have any more questions um, I'll try to put them into one phone call and if anything I would most likely call back today.

Jefts – Well I hope I helped you.

Andriotis - You did, you definitely did.

Jefts – OK

Andriotis – Thank you for your time. Thank you. Bye.

Some pts from Jefts interview

(1) In regards to Jefts' thoughts on a potential pardon for Wojas:

Never...when I think of the lives that she has ruined...

She wants her own way and she doesn't think of her dead husband

It's awful to say but she has a terrible, evil mind

There was no way she could possibly get freed out of this b/c she thought nothing whatsoever of murdering anybody

Miscellaneous

Jefts claims she voted undecided 3 times

Billy Flynn cried through the whole thing
"I didn't want to do but she kept asking me I did it b/c I was in love and I didn't want to lose her"

2 others that voted undecided

when she was in jail awaiting trial she had a friend in there whose husband had agreed to kill that girl

here Jefts claims that Wojas attempted to get an inmate's husband to kill a girl who was going to take the stand @ the trial

she didn't remember any names

I had a strange feeling knowing that I would be a part of deciding what would happen to this girl. I tried hard to see if there was anyway that she could possibly be released from this, but there wasn't, she was so guilty.
She has a mind...anybody who gets in her way she tries to have killed

When the verdict was announced Pam's deceased husband's mother got up and started screaming "they believe the boys!" and the father exclaimed what he thought of her (how terrible she was) and she got up and she said "I don't have to take this" and she was handcuffed

(2) In regards to her interviews with the media (I specified interviews including newspaper, TV, magazine etc.)
NO
Someone called me from Boston and they were telling me that I was talking against her. They were talking crazy and I just told them you weren't there and please don't bother me I don't want to have anything to do with it. I think they were connected to the parents. The family was trying to go for an appeal and everywhere that they tried they turned them down b/c they were so sure of her guilt.

Immediately after the trial:

When I got home after this was over the phone kept ringing (media) I said "this case is closed"

(3) Atmosphere in juror pool:
I sat at a long table at the end and I didn't talk to a soul and nobody talked to me until they called my name
They said that I was talking against her saying what a terrible person she was
I was furious I didn't talk to anyone
A lot of the people in the juror pool were talking about her and were saying "she's guilty," "the heck with this maybe thing"

some were talking against her "racy person" "guilty"

There were so many people [in the juror pool] that they ran out of seats they were body to body

I think the reason that I was picked was b/c I served on juries before (negligent homicide, armed robbery etc.)

she is now 89
she was then 75