THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Pamela Smart

v.

State of New Hampshire, et al.

Case No. 217-2026-CV-00014

STATE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The respondents, the State of New Hampshire and the New Hampshire State Prison for Women, hereby file this memorandum of law in support of their motion to dismiss the petitioner's Petition for a Writ of Habeas Corpus.

PRELIMINARY STATEMENT

The petitioner's petition advances five claims, some of which break down into subclaims. Nearly all these claims are procedurally barred because they either were raised on appeal and resolved by the New Hampshire Supreme Court or could have been raised on appeal to the New Hampshire Supreme Court but were not. Because a petition for a writ of habeas corpus is not a substitute for appeal, the vast majority of the petition should be dismissed. The petition also contains ineffective assistance of counsel claims. Those claims all fail because they are not predicated on actual trial errors, do not show how trial counsel's representation was constitutionally deficient, and do not plead facts sufficient to show actual prejudice (nor could they given the underlying record in the petitioner's criminal case).

The petitioner cites federal habeas corpus precedent throughout her petition, but federal procedural law does not apply, let alone control, in this proceeding. Federal habeas corpus for inmates held in state custody is controlled by federal statute, 28 U.S.C. § 2254, and is available only in narrow circumstances. *See Shinn v. Ramirez*, 596 U.S. 366, 377 (2022) ("To ensure that

federal habeas corpus retains its narrow role, [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] imposes several limits on habeas relief, and we have prescribed several more.") (citing *Brown v. Davenport*, 596 U.S. 118, 125 (2022)). Federal habeas corpus relief for federal inmates is similarly controlled by federal statute, 28 U.S.C. § 2255. How the United States Supreme Court and other federal courts have interpreted those congressionally mandated statutory requirements and developed federal habeas corpus law does not govern, and is not informative of, State habeas corpus jurisprudence, including New Hampshire's habeas corpus jurisprudence. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding that errors in applying state law do not provide a basis for federal habeas corpus relief).

Finally, the petitioner contends in her petition that jurisdiction over this matter lies in a New York state court, and that this court does not have jurisdiction to resolve her petition even though she is a New Hampshire inmate serving a New Hampshire state prison sentence pursuant to a New Hampshire state conviction for crimes she committed in New Hampshire, against a victim who lived in New Hampshire, while she was a resident of New Hampshire, and she is presently located in a New York state prison through the Interstate Corrections Compact, RSA chapter 622-B. The State disagrees with that position. The ICC is clear 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," RSA 622-B:2, Art. IV(c); and "[t]he 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," RSA 622-B:2, Art. IV(e). New Hampshire is the "sending state" and the petitioner's confinement in New York, which is the "receiving state," does not deprive her of the right to file a petition for a writ of

habeas corpus in Merrimack County Superior Court, where the New Hampshire Correctional Facility for Women is located.[1]

Accordingly, this court should exercise jurisdiction over the petition and dismiss it for the reasons set forth in further detail herein.

BACKGROUND

The petitioner, Pamela Smart, "was convicted of accomplice to first degree murder, conspiracy to commit murder, and tampering with a witness," after a jury trial in superior court, for the murder of her husband on the night of May 1, 1990. *State v. Smart*, 136 N.H. 639, 643 (1993). She appealed her convictions to the New Hampshire Supreme Court. *See generally id.*

A. Issue Raised On Appeal

In her initial notice of appeal, she raised thirty-four issues, including issues related to the tape recorded evidence against her (Issues 1-7), issues related to how the Grand Jury was instructed on the accomplice to first degree murder charge (Issues 8, 13), issues related to media coverage and its effect on the case (Issues 15-19, 31), an issue related to how the jury was instructed (Issue 29), an issue regarding whether the transcripts of the intercepted phone conversations should have been submitted to the jury because they "were neither complete nor accurate" (Issue 30), and an issue regarding whether imposition of a life without the possibility of parole sentence on an accomplice charge violated the State Constitution (Issue 34). (Exhibit ("Ex.") A at 9-13.)

[1] The Attorney General of New York, joined by the Attorney General of New Hampshire, intends to move to dismiss the petitioner's New York action, *Pamela Smart v. State of New Hampshire, et al*, Index No. 5525/2026 (Supreme Court of the State of New York, County of Westchester).

In her supplemental notice of appeal, filed after she had litigated three motions for a new trial, the petitioner added raised five additional issues in her appeal. These issues related to the effects of media publicity on the pretrial and trial proceedings (Issues 35-36), alleged juror misconduct (Issues 37-38), alleged failure to disclose a promise not to prosecute the mother of a key witness (Issue 39), and the trial court's failure to permit individually sequestered voir dire of the jurors where such voir dire would provide the necessary evidence for her motion for a new trial (Issue 40). (Ex. B at 5-6.)

In resolving her appeal, the New Hampshire Supreme Court recounted the issues before it as follows: "whether the pretrial publicity surrounding her case deprived her of an impartial jury; whether, in view of the publicity, the trial court failed to adequately safeguard the trial proceedings; whether the defendant should have been permitted post-verdict *voir dire* of the jury for alleged juror misconduct; whether the trial court erred in its supplemental instruction to the jury; whether the court erred in denying the defendant's motion to suppress tape recordings of her intercepted conversations; whether the court erred in submitting transcripts of the taped conversations to the jury; and whether the court erred in refusing to allow the defendant to recall two witnesses for renewed cross-examination." *Smart*, 136 N.H. at 643.

B. Factual Record On Appeal

The New Hampshire Supreme Court found that the jury was warranted in finding the following facts. "In the fall of 1989," the petitioner "was the director of media services for the school district that included Winnacunnet High School in Hampton." *Id.* "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." *Id.* "Eventually, in February or March of 1990, the defendant and Flynn became sexually involved." *Id.*

"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." *Id.* at 643-44. "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." *Id.* at 644. "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." *Id.* "The perpetrators were to park their car in a shopping center behind the residence and change into dark clothes before approaching the apartment." *Id.* "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." *Id.* "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." *Id.*

"Flynn discussed the plan with his friends Pete Randall and Vance Lattime, Jr., also teenagers from Seabrook." *Id.* "With the aid of another boy, Raymond Fowler, Flynn set out from Hampton to commit the murder one night in April, using [Ms. Smart's] car." *Id.* "When the two arrived at the defendant's apartment complex, however, they saw her husband's truck and abandoned the plan." *Id.* "After this

unsuccessful attempt, Flynn recruited Randall and Lattime to help execute the plan." *Id.* "He told them that [Ms. Smart] had agreed to pay them five hundred dollars each for committing the murder." *Id.* "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." *Id.*

"After school ended on May 1, 1990," Ms. Smart "drove Flynn, Randall and Lattime to pick up Lattime's grandmother's car in Massachusetts." *Id.* Ms. Smart "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." *Id.* "Lattime and Randall returned to Seabrook in Lattime's grandmother's car." *Id.* Ms. Smart "drove Flynn back to Seabrook to meet them and then went to Winnacunnet High School to attend a meeting scheduled for that evening." *Id.* "Flynn, Randall and Lattime picked up Fowler and drove to [Ms. Smart's] residence." *Id.* "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." *Id.* "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." *Id.* at 644-45. "When Gregory came home, the boys forced him to his knees." *Id.* "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." *Id.* at 645. "Taking a pillowcase they had filled with jewelry, the boys fled to meet Fowler and Lattime, and the four drove

back to Seabrook." *Id.* "The next day, Lattime replaced the gun among the rest of his father's collection." *Id.*

"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." *Id.* "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." *Id.*

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

"Virtually daily before May 1, [Ms. Smart] spoke with Cecelia Pierce, her student intern, about the plan to have Flynn murder her husband." *Id.* "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." *Id.*

"Pierce was questioned several times about the murder by the Derry police and denied any knowledge of it." *Id.* "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 [Ms. Smart's] involvement in the murder." *Id.* "She agreed to a phone tap of a conversation with [Ms. Smart] and to wearing a recording device, or body wire, to record face-to-face conversations with [Ms. Smart]." *Id.* "On July 12 and 13,

with Pierce surreptitiously recording their conversation, [Ms. Smart] 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." *Id.* "[Ms. Smart] 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." *Id.* "She stated that, if arrested, she would admit to the affair with Flynn but deny any involvement in the murder plot." *Id.* "She expressed concern that Lattime, who merely waited in the car during the murder, would eventually confess and implicate the others." *Id.* "Nevertheless, [Ms. Smart] 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." *Id.* at 645-46. Ms. Smart "reminded Pierce that, by telling the truth, Pierce would be sending [her] to prison for the rest of her life." *Id.* at 646.

"On August 1, 1990, [Ms. Smart] was arrested in connection with the murder of her husband." *Id.* "In January 1991, Flynn, Randall and Lattime agreed to plead guilty to reduced charges and subsequently testified for the State at [Ms. Smart's] trial." *Id.* "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.'" *Id.* "George Moses, a high school student, testified that he knew [Ms. Smart] at Winnacunnet High School and met her again while visiting his mother in prison." *Id.* "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." *Id.* "The jury found the defendant guilty of all charges." *Id.*

C. Issues Resolved On Appeal

i. Effect of Pretrial Publicity

The New Hampshire Supreme Court first addressed the effect of pretrial publicity on the petitioner's case and the denial of her motion for a change of venue. *Id.* at 646-53. The New Hampshire Supreme Court addressed the issue under both the Federal and State Constitutions. *Id.* at 646-47. In resolving this issue, the Supreme Court found that "no member of the defendant's jury expressed an opinion on voir dire that [the defendant] was guilty," and found *Irvin v. Dowd*, 366 U.S. 717 (1993), distinguishable because, in that case, two-thirds of the defendant's jury admitted to having formed an opinion about the defendant's guilt before they were seated. *Smart*, 136 N.H. at 648.

The Supreme Court also distinguished *Irvin* and *Rideau v. Louisiana*, 373 U.S. 723 (1963), based on the "kind of publicity involved." The Supreme Court noted that those cases involved publicity of an adverse nature. It reviewed "the massive amount of pretrial media material submitted" to it and remarked that "[s]everal of these items, appearing immediately after the murder, were generated by the defendant herself, who granted extended interviews with the press." *Id.* at 649. The Supreme Court agreed that the publicity surrounding her case was "enormous" and "unprecedented" in New Hampshire but explained that this "avalanche" is not enough. *Id.* The Supreme Court found that, while some of the pieces were hostile or accusatory in content, the overwhelming bulk of the material submitted consisted of straightforward, unemotional factual accounts of events and the progress of investigations. *Id.*

The Supreme Court also noted that most of the media material submitted to it "appeared after the jury had been selected and had been continually instructed by the trial court not to read or watch anything connected the case." *Id.* at 650. In further addressing this issue, the Supreme Court found that the trial court took care in the selecting of the jury, excused the remainder of one's venire after learning a prospective juror had been discussing the media with another prospective juror, and "that no one who sat on the defendant's jury possessed a preconceived opinion of her guilt." *Id.* at 651-52.

In analyzing the venue challenge, the Supreme Court observed that the trial court denied the petitioner's motion to change venue, ruling that she could renew it after *voir dire*, but the petitioner did not renew it. *Id.* at 652. The Supreme Court concluded from this and other circumstances that "at the time of jury selection [the petitioner] believed she had obtained an impartial jury." *Id.* The Supreme Court further observed that the trial court's order denying the petitioner's motion for a new trial found that the jury chosen "was absolutely and completely impartial" and that this view "was, at the time, shared by both the defendant and [trial] counsel. There were no objections to the jury which was selected and each juror was specifically approved by counsel and the defendant individually." *Id.* The petitioner did not challenge this specific finding of fact on appeal. *Id.* The Supreme Court therefore found it was not error to fail to change venue.

In resolving the petitioner's challenge on appeal that the trial court did not *sua sponte* continue the case due to the pretrial publicity, the Supreme Court found that the defendant's insistence on her speedy trial right, the fact that the pretrial publicity was not

so inflammatory as to preclude selection of an impartial jury, and "the evidence that an impartial was in fact selected," did not require the trial court to *sua sponte* grant a continuance. *Id.* at 652-53.

ii. Failure to Safeguard Trial Proceedings

The Supreme Court next addressed the defendant's claim that the trial judge did not adequately safeguard the trial proceedings from what she claimed was a "circuslike atmosphere" created by a "media frenzy." *Id.* at 653. The Supreme Court carefully examined this claim and the arguments the petitioner made in support of it and ultimately found the record evidence did not support it. The Supreme Court found instead that the trial judge exerted and maintained control over the proceedings, *id.* at 655-56, and "had a commanding presence throughout," *id.* at 657. The Supreme Court fund "[t]he defendant's trial took place in a courtroom dominated not by the media but by the presiding judge." *Id.*

The Supreme Court also addressed the trial court's denial of the petitioner's motion to sequester the jury reviewing it for an abuse of discretion. *Id.* The Supreme Court held that, "by handling the media and the jury as he did throughout the trial and by sequestering the jury when a change in circumstances appeared to warrant that actions, the trial judge acted reasonably to protect the defendant's rights." *Id.* at 659. The Supreme Court further held that "[a]bsent a specific showing that the jury had been tainted by exposure to publicity," that "the [trial] court did not abuse its discretion in not ordering sequestration from the outset of the trial." *Id.*

iii. Juror Misconduct

The Supreme Court next addressed the petitioner's claim of juror misconduct that she developed in her motion for a new trial. *Id.* She alleged that "the juror who had created the audiotapes of her trial recollections did so for financial gain" and that "jurors were permitted to consume alcoholic beverages after deliberations while sequestered." *Id.* On appeal, she pressed "her request for individual examination of the jurors only with respect to the alleged consumption of alcohol during deliberations." *Id.* The Supreme Court observed that, during the trial court hearing on the issue, counsel for the petitioner conceded that "he had no evidence, 'none whatsoever,' that the jury deliberated under the influence of alcohol." *Id.* at 660. He further "admitted that the suggestion that the jurors were deliberating in their separate motel rooms on the night they were sequestered, or that they had even had alcoholic beverages that evening, was 'pure speculation.'" *Id.* Because "[u]nsupported speculation does not entitle a defendant to have the trial court interrogate the jurors about alleged impropriety in deliberations," the Supreme Court held that the trial court "did not abuse its discretion in refusing to poll the jury." *Id.*

The petitioner nonetheless argued that the existence of the tape-recorded recollection of a juror was evidence of juror misconduct requiring a new trial. *Id.* Post-conviction counsel, however, did not "call the juror as a witness at the hearing, although the trial court afforded him the opportunity to do so." *Id.* Rather, the evidence supported that the juror made them for her own personal use. *Id.* Because no evidence existed that the juror had formed an intent to sell the tapes while serving as a juror, petitioner's counsel argued the existence of an appearance of impropriety. *Id.* The Supreme Court

held, however, that the petitioner "failed to produce any evidence whatsoever of juror misconduct, and that the trial court properly denied the motion for a new trial on this ground." *Id.*

iv. Answer to Jury Question

The Supreme Court next addressed the petitioner's argument that the trial court's answer to a jury question "was misleading, failed to dispel alleged jury confusion, and erroneously lacked reference to the necessity of proof beyond a reasonable doubt." *Id.* at 660-61. The Supreme Court found none of these arguments preserved for review, but found nonetheless that the matter was without merit. *Id.* at 661.

v. Admissibility of Taped Conversations with Pierce.

The Supreme Court next addressed the admissibility of the taped conversations with Pierce under various constitutional provisions, RSA chapter 570-A, and the New Hampshire Rules of Professional Conduct. *Id.* The Supreme Court rejected all of these issues and the arguments made in support of them. *Id.* at 661-66.

vi. Error By Submitting The Transcripts of Tape-Recorded Conversations To The Jury

The Supreme Court next addressed the petitioner's argument "that the trial court erred in submitting to the jury transcripts of her tape recorded conversations with Pierce, claiming that the transcripts were neither accurate nor authenticated." *Id.* at 666. "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." *Id.* "No objection was made that the transcripts were not authenticated, and thus none [was] preserved for review." *Id.* The trial court overruled the petitioner's objection to the use of the transcripts. *Id.* Instead, it 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.'" *Id.* The trial court further instructed the jury, 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 against told the jury that the tapes must govern over any inconsistency that might appear in the transcripts." *Id.*

The Supreme Court further noted 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." *Id.* The Supreme Court therefore held that "[t]he trial court's instructions to the jury adequately addressed the defendant's objection" and found "no abuse of discretion." *Id.*

vii. Re-opening Cross-examination of Prosecution Witnesses

The Supreme Court then addressed the petitioner's final argument—the trial court's "refusal to allow her to recall Flynn and Lattime for further cross-examination or as witnesses in her case-in-chief." *Id.* at 666-67. She argued that these decisions violated her rights to confrontation under the federal and state constitutions. *Id.* at 667. In rejecting these arguments, the Supreme Court held that "the trial judge acted within his discretion in refusing to allow the witnesses to be recalled for further cross-examination" and that the federal and state constitutions did not grant a right to present cumulative

testimony. *Id.* at 668-69. Finally, the Supreme Court rejected the petitioner's argument that all of her alleged errors, taken together, were sufficiently prejudicial to require a new trial. *Id.* at 669. The Supreme Court rejected this argument because no error existed in the first instance. *Id.*

STANDARD OF REVIEW

A. Motion To Dismiss Standard

"The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Perez v. Pike Inds.*, 153 N.H. 158, 159 (2010). This Court may not "assume the truth or accuracy of any allegations which are not well-pleaded, including the statement or conclusions of fact and principles of law." *ERG, Inc. v. Barnes*, 137 N.H. 186, 190 (1993). Additionally, this Court "need not accept allegations in the writ that are merely conclusions of law." *Konefal v. Hollis/Bookline Coop. School Dist.*, 143 N.H. 256, 258 (1998).

In determining whether a petitioner asserts an actionable claim, this Court may consider "documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the [petition]." *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010).

All of the exhibits submitted in support of the State's motion to dismiss may be considered in resolving this appeal under this standard. They constitute official public records (official court filings, orders, and trial transcripts), and the trial transcripts

themselves are sufficiently referred to in the petition. This is important because, in a habeas corpus matter, where "the record before the trial court indicates that the petitioner would be unable to demonstrate the elements necessary to establish a denial of the right to effective assistance of counsel" or any other right, the superior court may dismiss the petition "without holding a hearing." *Grote v. Powell*, 132 N.H. 96, 102 (1989).

B. Habeas Corpus Standard

"To 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). A writ of habeas corpus is "reserved for those questions which involve fundamental freedoms and occasions of pressing necessity where other remedies are inadequate or ineffective." *Springer v. Hungerford*, 100 N.H. 503, 506 (1957). As such, a writ of habeas corpus is not a substitute for a direct appeal, "and a procedural default may preclude later collateral review." *State v. Kinne*, 161 N.H. 41, 44 (2010). If a petitioner files a direct appeal following a trial and fails to raise an issue he knew or should have known of at the time of his appeal, his failure to raise this issue precludes review of that issue on a collateral attack. *See Sleeper v. Warden, N.H. State Prison*, 155 N.H. 160, 163 (2007) (holding that the petitioner could not collaterally attack his conviction because he failed to raise the issue in his post-verdict motion that the trial court allowed the petitioner to file).

Nearly all of the petitioner's claims fail because she attempting to use a petition for a writ of habeas corpus either as an attempt to re-litigate issues already resolved against her in her direct appeal or to litigate issues that could have, and should have been,

raised in her direct appeal, either expressly or under the guise of ineffective assistance of counsel. *See Grote*, 132 N.H. at 100-01 ("The petitioner challenged this evidentiary ruling in his original appeal. Because we upheld the trial court's ruling, we will not now entertain a collateral challenge to that ruling under the guise of an ineffective assistance of counsel claim.").

C. Ineffective Assistance Of Counsel Standard

"To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." *State v. Marden*, 172 N.H. 258, 262 (2019).

To show deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* This requires errors so "egregious" that counsel "failed to function as the counsel the State Constitution guarantees." *Id.* Review of counsel's performance is highly deferential, and the defendant must overcome the presumption that counsel's actions were a part of a reasonable trial strategy. *Id.* at 262-63. "Accordingly, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 263.

"To satisfy the second prong, the defendant must demonstrate actual 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.* This is a

probability "sufficient to undermine confidence in the outcome" when considering "the totality of the evidence presented at trial." *Id.*; *see also Humphrey v. Cunningham, Warden*, 133 N.H. 727, 733 (1990) ("The key to an ineffective assistance of counsel claim is a showing of actual prejudice."). *Cf. State v. Killam*, 137 N.H. 155, 158 (1993) ("'The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed.'") (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)); *State v. Faragi*, 127 N.H. 1, 5 (1985) ("If the petitioner is unable to demonstrate prejudice, we need not determine whether counsel's performance fell below the objective standard of competence.").

ARGUMENT

I. CLAIM 1: THE TRIAL COURT'S DECISION TO PROVIDE THE JURY WITH TRANSCRIPTS OF AUDIO RECORDINGS PLAYED TO THE JURY IS PROCEDURALLY BARRED AND DOES NOT OTHERWISE WARRANT HABEAS CORPUS RELIEF.

A. Claim 1 - Relevant Background

The petitioner talked to Ceclia Pierce, her student intern, several times about her plan to have Billy Flynn kill her husband. *Smart*, 136 N.H. at 645. The Derry Police Department convinced Pierce to participate in a lawful "phone tap" conversation with the petitioner and to wear a "body wire" to record her face-to-face conversations with the petitioner. *Id.*

Before trial, defense counsel filed a motion in limine to try to keep the tape recordings out of evidence. *See* Ex. C at 1 (trial court's order resolving the motion in limine). In resolving that motion, the trial court listened to the recordings and granted the motion in part and denied it in part. *Id.* The trial court granted the motion with respect to one specific recording, keeping it out of the case, but concluded that the other recordings were audible and could be played for the jury. *Id.*

At trial, when the tapes were about to be played, the jury was given transcripts that the State had created. *Smart*, 136 N.H. at 666. The defendant objected to the jury using the transcripts, contending they were "misleading" because they did not "account for the 'doubling' of voices that occurs when two parties speak at once." *Id.*; (Ex. D, Tr. Vol. XV at 1237-38.) The trial court overruled the objection. *Smart*, 136 N.H. at 666; (Ex. D, Tr. Vol. XV at 1239.) After the first tape was played, the trial court instructed the jury that

"[t]o 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. After the second tape was played, the trial court instructed the jury, in the event of a discrepancy between the transcript and the tapes, to "use what you hear and not what you read[.]" *Id.* In an in-chambers conference regarding the transcripts, the trial court further explained as follows:

> Let me say this. It has been my intention all along that along with the admission of each exhibit – tape, I mean, as an exhibit, came the transcript of that tape. The tapes – the transcripts are not a full exhibit and they won't be a full exhibit because then they are evidence in and of themselves, and they are not evidence and the jury has been cautioned and will be cautioned again that those are only there to assist them, and to the extent that the tape differs from the transcript they are to use the tape. And they will be cautioned about that in the charge itself, but as counsel for the State has said, if we had 50 more headsets everybody in the courtroom could have had one and the press would have made their own notes of what they heard, as they do in any testimony and report correctly or incorrection in the press, as they do all the time.

(Exhibit D, Tr. Vol. XV at 1287).

After further comments from defense counsel, the trial court explained, in part, as follows:

> As I said earlier, we've had a hearing on this earlier. I listened to all those tapes. I found very few, although I'll agree there are some, situations in which words appear on the tape that I, on the first reading, first listening today, couldn't follow.
>
> I will say that I previously found these tapes are audible and of assistance to the jury, and with cautionary instructions I don't think the jury will have a problem with them.

(Ex. D, Tr. Vol. XV at 1289.)

In its final instructions to the jury, the trial court informed it that "the tapes must govern over any inconsistency that might appear in the transcripts." *Smart*, 136 N.H. at 666.

On direct appeal, the petitioner argued that the trial court erred by giving the jury the transcripts because they "were neither accurate nor authenticated." *Id.* The New Hampshire Supreme Court held that the argument that the transcripts should have been authenticated was not preserved for appellate review. *Id.* It also held that the trial court did not abuse its discretion in giving the jury the transcripts. *Id.* It explained 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.*[2]

In her petition, the petitioner argues at length that the use of these transcripts at trial created a "cognitive bias" in jurors that caused them to hear incriminating statements that the recordings did not support. (Pet. at 39-50.) In support of this argument, she cites to an alleged "scientific review" in which participants were divided into three groups. *Id.* at 39-42. One group listened to the recordings while reading along with the transcripts provided at trial. *Id.* at 41. A different group listened to the recordings without a transcript. *Id.* The third group listened to the recordings with an "alternative transcript" created by a research team that contained "non-inculpatory language." *Id.* The petitioner

[2] The tapes themselves were authenticated. Exhibit D, Tr. Vol. XV at 1206, 1225, 1232, 1234-35; Exhibit E, Tr. Vol. XVI at 1368.

contends that this study showed that the provision of a transcript "strongly prejudiced jurors' interpretation of the low-quality recordings" as well as their confidence in the accuracy of their perceptions. *Id.* at 45. In her view,

> [T]he data establishes by a 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.

Id. at 47.

It is unclear from the petition if steps were taken during this study to ensure the recordings the petitioner used had not degraded by the time they were listened to by the participants in this study. Nor is it clear how many times the participants were permitted to listen to the recordings or if the participants were allowed to review any other trial evidence to put these recordings into context including Pierce's testimony. The petitioner does not allege that the participants in the study received the same, repeated trial instructions that the transcripts were not evidence and regarding deferring to the tape recordings if what they heard conflicted or was different than what was written in the transcript. Nevertheless, the petitioner argues that the use of the transcripts created a host of trial errors and claims of ineffective assistance of counsel. The trial errors are procedurally barred. The ineffective assistance of counsel claims based on the use of the

transcripts lack merit. The petitioner cannot empanel a raft of new persons who are not sworn jurors to re-listen to the tape recordings along with the transcripts from the case and other transcripts of her own design outside the context of all of the other trial evidence and jury instructions in an attempt to second-guess the conclusions made by the trial court and the properly chosen and sworn jury that heard and reviewed her case.

B. Most of the Arguments in Section 1 of the Petition Raise Trial Errors that are Procedurally Barred.

In Claim 1, the petitioner argues that the use of the transcripts: (1) violated due process because they amounted to the State making improper arguments and introducing false evidence; (2) were unfairly prejudicial because they admitted facts not in evidence; (3) amounted to "disguised opinion testimony" that was admitted in violation of the rules of evidence; (4) biased the jury "beyond repair" by creating an expectation about what could be heard on the recordings; and (5) violated her Fifth Amendment right against self-incrimination because it "induced" her "to answer for statements she had allegedly made according to faulty transcripts." (Pet. at 55-73.)

The five arguments raised above all relate to trial errors that were raised and resolved on direct appeal. All five arguments are simply other ways of contending that the transcripts were inaccurate or misleading and should not have been used or submitted to the jury. The petitioner pressed that issue on direct appeal to the New Hampshire Supreme Court, and the Supreme Court rejected it. *Smart*, 136 N.H. at 666. The petitioner could have made all of the arguments she makes now to the New Hampshire Supreme Court on direct appeal. The petitioner, however, cannot re-litigate the issue of

the transcripts being inaccurate or misleading through a petition for a writ of habeas corpus. The petitioner is therefore procedurally barred from raising the five arguments identified above. Those claims should be dismissed.

C. The Arguments for Ineffective Assistance of Counsel in Claim 1 Also Lack Merit and Should Be Dismissed.

The petitioner also argues in Claim 1 that her trial counsel provided ineffective assistance by failing to raise "adequate objections" to the use of the transcripts. (Pet. at 73.) She contends that trial counsel should have objected to the transcripts on the grounds that: (1) the transcripts were not relevant because the tapes themselves were available; (2) the transcripts were not authenticated; and (3) the transcripts were inadmissible hearsay. (Pet. at 75-80.) The petitioner also contends that trial counsel and appellate counsel were ineffective for failing to make a "particularized showing of inaccuracies in the transcripts." (Pet. at 74.) Finally, the petitioner alleges that the jury was wrongly permitted to take the transcripts into the jury deliberation room. (Pet. at 86-87.)

i. Trial Counsel Did Not Provide Ineffective Assistance by Failing to Make "Adequate Objections."

The petitioner's argument that trial counsel was ineffective for failing to make adequate evidentiary objections to the transcripts fails out of the gate. As the petitioner admits, (Pet. at 101), the transcripts were not offered or entered into evidence in the petitioner's criminal case, and the trial judge repeatedly instructed the jury that the transcripts were not evidence, and that the tape recordings controlled. The New

Hampshire Supreme Court explained this on direct appeal, *Smart*, 136 N.H. at 666, and the trial transcript makes this clear, (Ex. F, Tr. Vol. XIX at 1988-89, 1996-97).

By the time of the petitioner's trial, it was an established practice in many states and federal circuit courts of appeal that a trial court had the discretion to allow the jury to use a written transcript while listening to recorded evidence. *See, e.g., Arnold v. Commonwealth*, 356 S.E.2d 847, 848-49 (1987) (collecting cases). The Virginia Court of Appeals explained the purpose of this practice:

> The actual tape recording was at times difficult to understand, . . . because of the quality of the recording. The transcript was necessary to enable the jury to intelligently understand and follow the recorded conversation. The use of a transcript was preferable to other available alternatives to facilitate hearing and following the recorded conversation. To simply have played the recording for the jury one time, without the benefit of the transcript, would have rendered some of the conversation ineffective as evidence. Conversely, to have played the tape several times would have prolonged the trial and possibly caused prejudice to the defendant by excessive repetition and undue emphasis of the government's evidence.

Id. at 849. Even when the parties disagree about what was said in the recording, multiple jurisdictions allow this practice when the trial judge instructs the jury that their own interpretation controls in the event it conflicts with the transcript. *See, e.g., United States v. Thompson*, 482 F.3d 781, 788 (5th Cir. 2007); *United States v. McMillan*, 508 F.2d 101, 105 (8th Cir. 1974).

The petitioner has not demonstrated that any jurisdiction prohibits a trial court from giving a jury a transcript as an aid while listening to recorded evidence. She also has not cited a single legal authority, let alone one from New Hampshire, holding that

authentication is necessary before a trial court can permit the jury to use a transcript as an aid while listening to a recording. Trial counsel's decision not to raise a novel argument does not constitute constitutionally deficient performance. *See United States v. Morris*, 917 F.3d 818, 823 (4th Cir. 2019) ("A lawyer does not perform deficiently by failing to raise novel arguments that are unsupported by then-existing precedent"); *New v. United States*, 652 F.3d 949, 952 (8th Cir. 2011) ("A failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment.").

Equally unavailing is the petitioner's argument that trial counsel should have objected on the ground that the transcripts were hearsay. "Hearsay is an out-of-court statement offered *in evidence* to prove the truth of the matter asserted in the statement." *State v. Francoeur*, 146 N.H. 83, 86 (2001) (emphasis added; internal quotations omitted).

As the petitioner admits, the trial court instructed the jury that the transcripts were not evidence, (Pet. at 101.), and jurors are presumed to follow the trial court's instructions, *State v. Cosme*, 157 N.H. 40, 46 (2008). Because the transcripts were never offered "in evidence," they cannot meet the definition of hearsay. Indeed, the Virginia Court of Appeals rejected this exact argument:

> We also reject appellant's contention that use of the transcript amounted to the use of hearsay evidence. Hearsay evidence is defined as a spoken or written out-of-court declaration or nonverbal assertion offered in court to prove the truth of the matter asserted therein. The transcript was not evidence. It was

> merely intended for and used by the jury as an aid to understanding while they listened to the recording.

Arnold, 356 S.E.2d at 850.

"Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *State v. Cable*, 168 N.H. 673, 685 (2016). Thus, trial counsel's decision not to object on hearsay grounds to use of the transcripts also cannot be ineffective assistance of counsel.

ii. Petitioner Has Failed to Allege that Trial or Appellate Counsel Were Ineffective for Missing Any Inaccuracies in the Transcripts.

The petitioner also argues that trial counsel and appellate counsel were ineffective for failing to make a "particularized showing of inaccuracies in the transcripts." (Pet. at 74.) However, trial counsel and appellate counsel being unable to show that any particular part of the transcript was inaccurate does not mean they were ineffective. The petitioner herself does not make any particularized showings that the transcripts were inaccurate. She does not cite any specific portion of the transcripts that she contends was so inaccurate that trial counsel's failure to point it out and object amounted to constitutionally deficient performance. Nor does she explain how such an objection would have caused the trial court to exclude the transcripts entirely or alter its decision to submit the transcripts to the jury with appropriate cautionary instructions.

It is the petitioner's burden to plead facts sufficient to establish an ineffective assistance of counsel claim. In other words, she must plead facts sufficient to show that trial counsel's and appellate counsel's performance was constitutionally deficient in some regard and that the result of her proceeding would have been different because of those

errors. Because the petition does not show that any specific part of the transcripts would have been understood as inaccurate by reasonably competent trial or appellate counsel or explain how such a discovery would have made a difference at trial, particularly in light of the express instructions to the jury about the transcripts, T at 1988-89, 1996-97, the petitioner's conclusory arguments about the lack of "particularized" showings of inaccuracies fails to allege either deficient attorney performance or prejudice.

The petitioner's ineffective assistance of appellate counsel argument on this point is also barred by the doctrine of laches. "Laches is an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights." *Benoit v. Cerasaro*, 169 N.H. 10, 17 (2016). "Laches, unlike limitation, is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced — an inequity founded on some change in the conditions or relations of the parties involved." *Id.* "Because it is an equitable doctrine, laches will constitute a bar to suit only if the delay was unreasonable and prejudicial." *Id.*

"The death of key witnesses is precisely the kind of thing laches is aimed at, particularly where the 'the decedent's knowledge is crucial to a party's defense . . . .'" *State ex rel. Wren v. Richardson*, 936 N.W.2d 587, 598 (Wis. 2019) (quoting 27A Am. Jur. 2d *Equity* § 152); see 27A Am. Jur. 2d *Equity* § 149 ("The doctrine of laches is peculiarly applicable where the difficulty of doing justice arises through the death of the principal participants in transactions complained of . . . .").

The petitioner waited over 30 years to advance this argument even though she could have made it in 1993, after the New Hampshire Supreme Court concluded that

"neither 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." *Smart*, 136 N.H. at 666. No sound reason exists for the delay, and the petitioner's sole appellate counsel, J. Albert Johnson, Esq., died in 2023.[3] *Smart*, 136 N.H. at 639 (listing only J. Albert Johnson on the brief and orally for the petitioner). Consequently, the State cannot depose Attorney Johnson to determine if his representation of the petitioner on appeal was constitutionally deficient. Accordingly, because the delay in raising this issue is unreasonable and actually prejudices the State, the doctrine of laches forecloses this claim.

iii. The Petitioner's Argument That the Transcripts Should Not Have Been Sent Back to the Deliberation Room Was Raised on Direct Appeal and Is Therefore Barred, But Would Nonetheless Be Harmless Error.

Finally, the petitioner's allegation that the transcripts were allowed into the jury deliberation room does not warrant habeas relief. In instructing the jury, the trial court stated the following:

> You will have with you in the jury deliberation room all of the exhibits in this case, including the tapes, which are just one more exhibit for your consideration. I don't single them out for any importance by my mentioning them, but they are going to be submitted to you along with something that is not evidence in this case, and that is the transcript of those tapes. You will be provided with a recording machine so that you can play the tapes if you wish, and you are provided with a transcript so you can follow the tapes if you wish, the vocal portion – audio portion of the tapes. I want to impress

[3] See, e.g., South Florida Sun Sentinel, Obituary, J. Albert Johnson, https://www.sun-sentinel.com/obituaries/memoriam-j-albert-johnson/; Ruth Thompson, *J. Albert Johnson defended the (in)famous: Remembering the Hingham man beyond his clients*, WickedLocal.com, https://www.wickedlocal.com/story/regional/2023/09/13/j-albert-johnson-attorney-hingham-ma-resident-clients-sam-sheppard-patty-hearst/70796063007/?gnt-cfr=1&gca-cat=p&gca-uir=true&gca-epti=z119420v119420d--94--b--94--&gca-ft=190&gca-ds=sophi.

> upon you that the transcripts are not evidence. To the extent that when you listen to the tape the tape differs from the transcript, you are to take the tape as the evidence. If, for example, you see words in the transcript which you don't hear on the tape – I'm not suggesting that you will – but if you do hear words, see words in front of you that you can't hear on the tape, disregard those words. If you cannot hear them while you're reading along with the tapes, then you are to disregard those words. To the extent that the tapes in any way differ from what you're reading along with them in these transcripts, you take what the tapes say, not what the transcript says.

(Ex. F, Tr. Vol. XIX 1988-89.)

Petitioner's counsel requested an additional cautionary instruction about the transcripts be provided to the jury. (Ex. F, Tr. Vol. XIX at 1995-96). The trial court provide the additional instruction:

> Ladies and gentlemen, with respect to the tapes, I told you if you read the words that you don't hear, disregard those words. If you hear what we – you've all heard about a doubling effect. If you can't make sense of it yourselves with a reasoned approach, disregard it. Understand what I'm saying? You got to be able to listen to these tapes and make sense of them. If you can't make sense of them, they're not of aid to you, don't try to – if you can't initially figure out in doubling situation what word came first, if you can't reasonably figure it out, then disregard it.

(Ex. F, Tr. Vol. XIX at 1996-97.)

The petitioner's arguments with respect to the tape transcripts being submitted to the jury are without merit.

First, as a claim of trial error, this issue was raised and briefed on direct appeal. *See Smart*, 136 N.H. at 666 (explaining the petitioner's claim of error that "the trial court erred in submitting to the jury the transcripts"). The New Hampshire Supreme Court reviewed the issue and rejected it, finding that allowing the transcripts to be submitted to the jury was not error. *Id.* This court is precluded from reaching a different conclusion in

this case, through either a direct challenge or an ineffective assistance of counsel claim. *See Grote*, 132 N.H. at 100-101 ("The petitioner challenged this evidentiary ruling in his original appeal. Because we upheld the trial court's ruling, we will not now entertain a collateral challenge to that ruling under the guise of an ineffective assistance of counsel claim.").

Second, the petitioner has failed to plead facts showing that allowing the transcripts to be submitted to the jury was harmful constitutional error, or, for that matter, even trial error, given that the New Hampshire Supreme Court already rejected the petitioner's claim of error on direct appeal that "the trial court erred in submitting to the jury the transcripts" over trial counsel's objection. *Smart*, 136 N.H. at 666. Moreover, given the substantial amount of express instructions given to the jury about the recordings, prejudice cannot be established. *See Cosme*, 157 N.H. at 46 ("Jurors are presumed to follow the court's instructions . . . .").

Third, the New Hampshire Supreme Court has previously held that it is harmless error to permit a transcript not admitted into evidence to accompany a recording into the jury deliberation room. *State v. Cook*, 148 N.H. 735, 742 (2002). The New Hampshire Supreme Court reasoned that:

> The jurors had access to the transcript during trial and were permitted to use it as a guide without objection. Moreover, they had access to the tape during deliberations, which the defendant does not challenge, and could study its content with or without the transcript.

Id. at 742-43.

Although the petitioner objected during her trial, those objections were rejected by the New Hampshire Supreme Court and would not have been meritorious. Accordingly, the petitioner is complaining about a transcript being sent to the deliberation room that the jury was properly permitted to use as a guide during trial. Further, there is no reason to believe that sending the transcripts to the deliberation room prevented the jury from heeding the trial court's instructions that its own interpretation of the audio recordings prevailed over any conflict with the transcripts. There is no meaningful distinction between the petitioner's case and *Cook*. Consequently, the petitioner cannot demonstrate error, let alone an error by trial counsel that rendered their performance constitutionally deficient resulting in prejudice so serious as to bring the outcome of the proceeding into question.

II. CLAIM 2 IS PROCEDURALLY BARRED AND, REGARDLESS, FAILS TO PLEAD SUFFICIENT FACTS TO STATE A VIABLE CLAIM.

In Claim 2, the petitioner contends that her trial counsel was prejudicially defective because he "declar[ed] her guilt to the jury without her consent" on the witness tampering charge against her. (Pet. 105.) Specifically, she claims defense counsel committed *per se* prejudicial error by arguing in closing as follows regarding the tape-recorded conversations with Pierce:

> [The petitioner] clearly engaged in acts that constitute witness tampering, okay, 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.

(Ex. F, Tr. Vol. XIX at 1894.)

Claim 2 fails because it could have been brought on direct appeal but was not. Habeas corpus is not a substitute for direct appeal. Claim 2 therefore fails on this basis alone.

Claim 2 also fails on its face, however, because it does not allege facts that would support petitioner's assertion that her counsel "declar[ed] her guilt[y]" or that trial counsel's argument was made "without her consent." (Pet. 105.); *see Mt. Springs Water Co. v. Mt. Lakes Vill. Dist.*, 126 N.H. 199, 201 (1985) (to avoid dismissal, the petitioner must "plead sufficient facts to form a basis for the cause of action asserted"). In fact, that conclusory assertion is expressly contradicted by the trial court record.

First, by its plain terms, the fragment of her counsel's closing argument that the petitioner quotes does *not* say that the petitioner was guilty of witness tampering. Trial counsel merely stated that the petitioner had engaged in certain *acts*. Under New Hampshire law, a person may not be found guilty of a crime on the basis of acts alone. RSA 626:2, I ("A person is guilty of murder, a felony, or a misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense. He may be guilty of a violation without regard to such culpability."). To be guilty of witness tampering, a defendant must have acted purposefully. *State v. Moscone*, 161 N.H. 355, 359 (2011) (explaining that "we have required a purposeful mental state for witness tampering convictions") (citing *State v. Kilgus*, 125 N.H. 739, 743 (1984)) (cleaned up). The quoted language of petitioner's trial counsel mentions neither guilt nor the *mens rea* required for witness tampering.

Moreover, even cursory examination of the trial transcript shows that the petitioner cherry-picks language from her trial counsel's closing argument and presents it out of context. In the context of the surrounding sentences, far from admitting she was guilty, it is clear that her counsel was arguing she was not guilty of witness tampering because her actions were not done with the requisite purposeful state of mind. *Cf.* RSA 626:2, II(a) ("A person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element."). Following the snippet the petitioner quotes, her counsel argued, "I'm telling you two things. I'm telling you the acts are there, and that you shouldn't find her guilty because of the factors and what was going on in her mind." (Ex. F, Tr. Vol. XIX at 1895.)

Her trial counsel foreshadowed this argument to the jury during his opening statement. There, trial counsel argued:

> We want you to listen to the tapes. Listen to everything, and listen to it all in context. Don't take little bits and pieces and say, 'aha, I've got the kernel of truth.' You've got to take it all now. Take it in context. Take it from whom it comes from and why it's coming from that person. Take it, for instance, in this context of a woman that's been shut out of an investigation, where the police won't even talk to her. Take it in the context—these tapes in the context of a confused woman, an upset woman. Take it in the context of a person that doesn't know what's going on with the police investigation or what they're doing to solve her husband's murder. Take it in the context of an affair, if you want. But take it in context. That's the important thing. If you take it in an isolated sphere in and of itself, then you'll come to the wrong conclusion.

(Ex. G., Tr. Vol. IX at 33-34.)

Second, the petitioner provides no facts supporting her assertion that she did not consent to, and was "surprise[d]" by, her counsel's closing argument regarding witness tampering. (Pet. 115.) While she quotes from the trial transcript at length regarding maintaining her innocence, the same record fatally undercuts any claim that she maintained that her actions – irrespective of their purpose – were not to induce Cecelia Pierce to withhold information from the police. *Cf. State v. Luikart*, 174 N.H. 210, 216 (2021) ("[A] person has committed witness tampering if, '[b]elieving that an official proceeding … or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to … [w]ithhold any testimony, information, document or thing.'") (quoting RSA 641:5, I(b)).

To the contrary, the petitioner specifically testified that she attempted to manipulate Cecelia Pierce into not going to the police to reveal what she knew. For example, she testified as follows:

> Q: Let's—now, on 6-19 you talk to Cecelia Pierce, right?
>
> A: On the telephone, yes.
>
> Q: Yeah, okay. You were talking to Cecelia Pierce –I mean, your plan is to try to get more information, right?
>
> A: Not over the phone, it wasn't.
>
> Q: Well, just in general with Cecelia Pierce, correct?
>
> A: No, not—at June 19th my plan was to try to stop her from going to the police and turning me in.
>
> Q: That's only because it was on the phone?
>
> A: No, that was my plan everywhere. That was my plan during the body wire conversations also.
>
> Q: I see, your plan switches?

A: I told you my plan switched on June 13th when she—

Q: June 13th what's your plan?

A: My plan was originally when the day started to get more information from her and by the time the day was over she'd told me that she was scared and that she was going to go to the police, and she was—

Q: She told you Bill had done it?

[Colloquy omitted]

A: And she had told me that she was going to the police and she was going to the police and she was going to tell that that we, meaning she and I, knew about the murder beforehand, and, of course, I automatically panicked because I didn't want her to do that. So my intention from there on out was to try and talk her out of going to the police.

(Ex. H, Tr. Vol. XVIII at 1667-69.)

She also testified as follows regarding the tape-recorded conversation with Pierce on July 12, 1990:

Q: What were you thinking on July 12th?

A: I was thinking on July 12th that I had to stop Cecelia Pierce from going to the police.

Q: So it's more than just you get information; it was make sure she didn't go to the police, right?

A: I said that earlier today.

A: And you say – and you say you were pretty god at getting her not to go to the police, right?

A: Apparently not, because she'd gone to the police a month before that.

Q: Right, but you were good at making her feel she'd have trouble going to the police?

A: I was trying to make her feel like – that we had to stick together and that she would get arrested.

Q: And this was all a ruse on your part?

A: What?

Q: Your telling Cecelia Perce that the two of you had to stick together because you were both involved in this crime was a ruse on your part?

A: Right.

[Reading of transcript of telephone conversation omitted.]

Q: Now, was this designed to get Cecelia Pierce to talk to you?

A: This was designed to get Cecelia not to go to the police.

(Ex. H, Tr. Vol. XVIII at 1739-40.)

Additionally, the petitioner testified regarding her July 12 conversation with Pierce:

A: Right. So you're scaring Cecelia Pierce that she shouldn't go to the police?

A: Exactly.

Q: And you're scaring her that she's going to be arrested for murder?

A: Exactly.

(Ex. H, Tr. Vol. XVIII at 1744; *see also id.* at 1676, 1677-78, 1723, 1742-43.) The Petitioner further admitted that she had done "everything in . . . [her] power to prevent Cecelia Pierce from going to the police." (Ex. H, Tr. Vol. XVIII at 1754-55.)

In view of the petitioner's clear testimony that she attempted to stop Cecelia Pierce from providing information to the police, her bald assertion that her counsel's closing argument was made without her consent rings hollow. *See Grote*, 132 N.H. at 102 (allowing dismissal of habeas claim without a hearing "because a review of the record

before the trial court indicates that the petitioner would be unable to demonstrate the elements necessary to establish a denial of the right to effective assistance of counsel").

Moreover, petitioner cannot receive habeas corpus relief on her witness tampering charge because she has already completed that sentence. In other words, she is no longer incarcerated, in part, on that charge. She must somehow show that this alleged error

Claim 2, accordingly, should be dismissed.

III. Claim 3 Is Also Procedurally Barred and Otherwise Fails to State a Viable Claim For Habeas Corpus Relief.

In Claim 3, the petitioner argues that her constitutional rights were violated because she was convicted by "an inflammatory news media story." (Pet. at 123-38.) This argument was raised on direct appeal, reviewed and discussed extensively by the New Hampshire Supreme Court, and ultimately rejected. *Smart*, 136 N.H. at 646-59. The Supreme Court examined *voir dire* and "found no evidence to support a claim of presumptive prejudice." *Id.* at 650. It also concluded, after reviewing the record, "including thirty hours of videotape of the trial" that the "trial court here adequately protected the defendant's right to fair trial." *Id.* at 653. It concluded its analysis by stating that:

> Finally with respect to the defendant's claim that her trial was conducted in a circus-like atmosphere, the court has carefully reviewed the videotapes of thirty hours of the trial, recorded by the local television station and furnished as an exhibit. They vividly demonstrate what cannot be captured from the cold transcription of proceedings, namely, that the trial was conducted not in a carnival-like manner, but in the calm, dignified manner to which the defendant was entitled. Witnesses and counsel were plainly audible, no media representatives were inside the bar, and there was no

> commotion. We might add that the videotapes have given us an unusual near-first-hand glimpse of the trial judge at work. His commanding presence throughout, shown by his demeanor with counsel and with the jury, was apparent. The defendant's trial took place in a courtroom dominated not by the media but by the presiding judge.

Id. at 657.

Still, the petitioner cites an unpublished interview for a "short-lived publication" which she contends shows that juror Charlotte Jefts, who is now dead, (Pet. at 128), "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." (Pet. at 127.) She argues that the interview shows that Juror Jefts "was highly influenced by this improper outside information to convict Ms. Smart." (Pet. at 127.) As proof for this allegation, she cites the following transcript of the interview she attached to her petition:

> 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 [interviewer] - 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 . . . . . .

(Pet. Exhibit 2, p. 1.)

The petitioner did not provide a transcript of the complete interview, so it is unclear what question prompted this response. It is also unclear if the ellipses signify omitted speech or verbal or nonverbal pauses. It is also unclear why the ellipses range from having three points to six points. Nevertheless, the transcript itself does not warrant habeas relief.

Even if Juror Jefts's statement could be construed as proof she saw media coverage about the petitioner before trial, which it is not, it still would not show bias. As the New Hampshire Supreme Court stated on direct review, the Sixth Amendment does not require that "the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Smart*, 136 N.H. at 647 (quoting *Irvin*, 366 U.S. at 722). Moreover, the New Hampshire Supreme Court specifically found that "the record shows that no one who sat on the defendant's jury possessed a preconceived opinion of her guilty." *Id.* at 652.

Further, the transcript from Juror Jefts's interview does not show that she shared any knowledge of media coverage she had seen with any other juror. And despite the petitioner's argument, it does not show that media coverage affected her decision. The transcript itself shows that she said "three times I voted undecided[.]" (Pet. Ex. 2, p. 1.) Juror Jefts's alleged statement that the petitioner "thought nothing of murdering anybody," (Pet. Ex. 2, p. 1), is an opinion that easily could have been formed by the trial evidence. No matter how generously the transcript from Juror Jefts's unpublished interviewed is viewed, it does not support a claim that media coverage or juror misconduct affected the verdict.

Moreover, the doctrine of laches, discussed *supra*., bars this claim because Juror Jefts is deceased and there is no way to conduct discovery with respect to this claim and the interview statements Juror Jefts provided.

Claim 3 should be dismissed.

IV. Claim 4 Fails to Allege a Viable Ineffective Assistance of Counsel Claim.

Claim 4 attempts to advance three ineffective assistance of counsel claims, none of which state a viable cause of action. The petitioner claims her trial counsel was constitutionally ineffective for: (1) failing to object to the jury instructions on the accomplice to first-degree murder charge; (2) failing to request a jury instruction that the jury consider only trial evidence in reaching its verdict; and (3) failing to object to alleged "overly coercive jury instructions." (Pet. 129-30.)

These claims fail because the petitioner cannot show constitutionally deficient performance, harmful constitutional error, or prejudice, all of which is required to

maintain a collateral ineffective-assistance challenge. *Mallard v. Warden*, 175 N.H. 565, 570-71 (2023) (holding that ineffective assistance of counsel may be challenged collaterally by a habeas petitioner, but only "if the petitioner can establish 'harmful constitutional error'") (quoting *Kinne*, 161 N.H. at 45); *see also Humphrey*, 133 N.H. at 733 ("The key to an ineffective assistance of counsel claim is a showing of actual prejudice."); *cf. Killam*, 137 N.H. at 158 ("'The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed.'") (quoting *Strickland*, 466 U.S. at 697); *Faragi*, 127 N.H. at 5 ("If the petitioner is unable to demonstrate prejudice, we need not determine whether counsel's performance fell below the objective standard of competence.").

A. Claim 4(a) Fails Because the Jury Was Properly Instructed And, Regardless, the Petitioner Has Failed to Allege Prejudice.

The petitioner claims that her trial counsel was constitutionally ineffective in failing to object the court's jury charge because the trial court did not instruct the jury that it was required to find that her actions as an accomplice to first-degree murder were "deliberate and premeditated," as required for the principal's actions in first-degree murder.

As a threshold matter, the petitioner errs in arguing that this court must presume prejudice regarding her claim. (Pet. 131-32.) She mischaracterizes the two cases on which she relies, *State v. Henderson*, 141 N.H. 615 (1997), and *State v. Steward*, 155 N.H. 212 (1997). In *Henderson*, far from finding that "prejudice was presumed," (Pet.

131), as the petitioner assets, the Court found that "[b]ecause we conclude that the defendant has established 'actual prejudice,' we need not decide whether trial counsel's error was so serious that prejudice must be presumed." 141 N.H. at 618. There, the defendant was charged with class A felony robbery, and "the indictment in this case required the State to prove that the defendant actually caused serious injury to the victim." *Id.* at 619. "Based on the indictment, the defendant presented the defense that he had not actually caused the victim's serious injuries," testifying on his own behalf that he had participated in robbing the victim and tried to punch him "but only 'grazed his head." *Id.* The trial court nonetheless instructed the jury 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 (emphasis in original). The Court found that the trial court's jury instruction prejudiced the defendant under the facts of the case, because "it permitted the defendant to be convicted based on a theory not alleged in the indictment" and "rendered the defendant's trial testimony nothing less than an admission of guilt to class A robbery." *Id.* at 619.

Similarly, in *Steward*, contrary to the petitioner's claim that our Supreme Court concluded there was a "presumption of prejudice," (Pet. 131), our Supreme Court found prejudice based on the facts of the case. There, the defendant, who was charged with a felony count of issuing a bad check, wrote checks to a contractor and asked the contractor not to cash them immediately because he (the defendant) needed to obtain financing to add funds to his bank account before the checks would clear. 155 N.H. at 213-14. The contractor agreed. *Id.* The Court explained that while "defendant's knowledge or belief

as to whether the check will clear at the time it is presented to the bank by the payee that constitutes the mental state of the crime," the trial court erroneously told 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." *Id.* at 216. The Court concluded:

> [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. Accordingly, we conclude that the defendant was prejudiced by the trial court's erroneous response to the jury's question.

Id. at 217.

This case is far different from *Henderson* or *Stewart*. In those cases, actual prejudice arose from jury instructions that affirmatively misstated the law as it applied to the charging documents and trial evidence. Here, the petitioner does not allege the trial court affirmatively mis-instructed the jury in view of the indictment or trial evidence. She alleges merely that the trial court's jury instructions about the elements of accomplice liability for first-degree murder did not include the words "premeditated and deliberate," which it had for the elements of first-degree murder.

Ultimately, this claim fails for two reasons. First, the trial court made clear to the jury that to find the petitioner guilty of accomplice to first-degree murder she had to have the same intent as the principal. After closing arguments, the trial court charged the jury

and permitted them to "have with you in the jury room, my charge which I'm about to read to you now as it defines the elements of these three offenses with which this defendant is charged." T. 1978. In instructing the jury on the accomplice to first degree murder charge, the trial court explained: "To prove that the defendant was an accomplice to 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." T. 1980. The trial court continued: "That requires the Court to define for you what is first degree murder." *Id.*

The trial court then defined first degree murder, in part, as follows:

> 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 alleged that other person to have been Gregory Smart – was the direct result of that individual's action, and that that individual acted purposefully. First degree murder is causing the death of another person purposefully. 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.

(Ex. F, Tr. Vol. XIX at 1981-82 (emphasis added)).

The trial court further explained to the jury: "Additionally, the State must prove that this defendant was an accomplice to the crime of first degree murder."

(Ex. F, Tr. Vol. XIX at 1984.) The trial court instructed on the accomplice element as follows:

> 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 transportation to the victim's residence on the prior occasion when Willima 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 has the purpose to make the crime succeed.

(Ex. F, Tr. Vol. XIX at 1984-85.) This instruction incorporates the instruction on first-degree murder already provided and explains that the defendant must have helped the principal plan or commit the first-degree murder. It also lists the premediated and deliberate acts the State alleged meet this part of the accomplice definition.

The trial court then informed the jury as follows:

> 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 a crime that both she and the principal … intended to commit.

(Ex. F, Tr. Vol. XIX at 1985.) In wrapping up the instruction, the trial court again explained: "That's the definition of an accomplice to first degree murder and includes the definition which the State must prove beyond a reasonable doubt of the crime of first degree murder." *Id.*

In this context, petitioner's argument that trial counsel was ineffective for not objecting on the basis that the jury charge did not specifically use the words premediated and deliberate with respect to the defendant's actions is without merit. The trial court instructed on the accomplice to first degree murder charge in such a way as to leave no doubt that the defendant's actions had to be premediated and deliberate. The trial court's instruction conveyed to the jury that the defendant had to intend to commit the same offense as the principal, William Flynn, that being first degree murder, and that the defendant had to share the same criminal intent as the defendant. T 1985. The trial court also instructed the jury moments earlier that, to convict an individual of first-degree murder, "the State must prove that the individual's acts in causing death were deliberate and premeditated." (Ex. F, Tr. Vol. XIX at 1981-82.) Consequently, there was no error in the instruction given and, absent an error, trial counsel's failure to objection cannot render their representation constitutionally deficient.

Second, when considered in the context of the jury charge and the trial, as a whole, the petitioner cannot demonstrate that this alleged error gave rise to prejudice. In determining whether a petitioner has shown actual prejudice, the court "focus[es] ultimately on the fundamental fairness of the proceeding whose result is being challenged

... [and] [t]he court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Henderson*, 141 N.H. at 618-19 (citations omitted); *see also State v. Kepple*, 155 N.H. 267, 270 (2007) ("The prejudice analysis considers the totality of the evidence presented at trial.") (citation omitted).

As stated earlier, the trial court instructed the jury that an accomplice to first-degree murder must have intended to commit first-degree murder, must have the same intent as the principal, and defined first-degree murder in part to require premeditation and deliberation. (Ex. F, Tr. Vol. XIX at 1981-82, 1985.)

Moreover, in the context of the evidence that was before the jury, by convicting the petitioner, the jury necessarily found that the petitioner acted with premeditation and deliberately, not on impulse.[4] The evidence showed that the petitioner's actions were painstaking, methodical, and persistent. *Smart*, 136 N.H. at 643-47.

Specifically, the evidence showed that prior to the murder, the petitioner had orchestrated two prior attempts to kill her husband before finally succeeding. William Flynn, the principal, testified that the petitioner initially sought to have someone other than himself kill the victim for her. The petitioner asked Flynn, "Could you get anyone to do this? How much would it cost to hire somebody?" (Ex. I, Tr. Vol. XII at 745.) Later, her plan changed to having Flynn kill the victim. *Smart*, 136 N.H. at 643-44. The

[4] "Premeditated and deliberate," "in the natural and ordinary sense of those words," *State v. Greenleaf*, 71 N.H. 606, 610 (1902), mean "with forethought." *See State v. Millette*, 112 N.H. 458, 461 (1972) ("*Mens rea* in murder is more intelligibly expressed as 'malice' without the addition of the word 'aforethought' which adds nothing but confusion in view of the use of the statutory terms 'deliberate and premeditated' in the definition of first-degree murder.").

petitioner told Flynn, "[a]ll right, this is how you could do it." (Ex. I, Tr. Vol. XII at 747). She gave him detailed plans for the killing, including telling Flynn where to park his car, what clothing to wear, how to disguise his appearance, what weapon to use, and where to hide inside the house she shared with the victim to ambush him. (Ex. I, Tr. Vol. XII at 747-48, 832); *Smart*, 136 N.H. at 643-44. As part of the plan, the petitioner told Flynn that she would leave the bulkhead to the house open so Flynn could get inside. (Ex. I, Tr. Vol. XII at 746); *Smart*, 136 N.H. at 644. The petitioner also told Flynn "to ransack the house" so that it would look like a burglary. (Ex. I, Tr. Vol. XII at 746); *Smart*, 136 N.H. at 644. The petitioner said that she would arrange to be at a meeting on the night Flynn went to commit the murder to give herself an alibi. (Ex. I, Tr. Vol. XII at 748.)

"Virtually daily before May 1," the petitioner discussed her plans to murder the victim with Cecelia Pierce, her student intern. *Smart*, 136 N.H. at 645. Pierce testified that the petitioner told her she and Flynn were going "to make it look like a burglary." (Ex. E, Tr. Vol. XVI at 1304, 1320.) Pierce also testified that, during conversations between the petitioner and Flynn at which Pierce was present, the petitioner told Flynn not to hurt her dog and "not to kill [the victim] in front of the dog because it would traumatize the dog." (Ex. E, Tr. Vol. XVI at 1324-25.)

Their first attempt to kill the victim was in March 1990. (Ex. I, Tr. Vol. XII at 754.) Flynn could not go through with it, which made the petitioner "extremely angry." (Ex. I, Tr. Vol. XII at 753, 755.) The next day, however, the petitioner told Flynn, "[d]on't worry about it. I've got another meeting coming up. You can do it then. So everything's all right." (Ex. I, Tr. Vol. XII at 757.)

Their second attempt was in April 1990. (Ex. I, Tr. Vol. XII at 764.) Flynn enlisted two friends to assist him, and the petitioner told him that she would leave the bulkhead door to the house open, as well as the keys in her car. (Ex. I, Tr. Vol. XII at 764.) Flynn's friends picked up the petitioner's car and drove to a store to purchase latex gloves to avoid leaving fingerprints. (Ex. I, Tr. Vol. XII at 769-77.) The petitioner suggested they wear gloves. (Ex. I, Tr. Vol. XII at 770.) Flynn and his friends abandoned the plan, however, because by the time they arrived at the house, the victim was already at home, and the plan was to arrive before the victim returned. (Ex. I, Tr. Vol. XII at 744-76); *Smart*, 136 N.H. at 643-44.

On the day of the murder, May 1, 1990, the petitioner told Cecelia Pierce "[t]hat [Flynn] was going to go up there and he was going to kill [the victim]." (Ex. E, Tr. Vol. XVI at 1336.) The petitioner said to Pierce that she (the petitioner) would be at a meeting that night when the murder occurred so she would have an alibi. (Ex. J, Tr. Vol. XIII at 994-1000, 1015-16; Ex. E, Tr. Vol. XVI at 1336.) Flynn testified that the petitioner told him she had left her house's bulkhead open. (Ex. I, Tr. Vol. XII at 790.) Flynn obtained a gun from a friend who, along with another friend, was going to help him commit the murder. (Ex. I, Tr. Vol. XII at 798, 801.) The petitioner drove Flynn and his two friends to Haverhill, Massachusetts, to pick up a car to use for the murder. (Ex. I, Tr. Vol. XII at 800; Ex. J, Tr. Vol. XIII at 805-06.) During the drive, the petitioner asked to see the gun and Flynn showed it to her. (Ex. J, Tr. Vol. XIII at 807.) Also during the drive, the group went over the plan to kill the victim. (Ex. G, Tr. Vol. IX at 158.) She said to enter the house through the bulkhead and to ransack it and take what they wanted while they

waited for the victim, but not to turn on any lights or hurt her dog. (Ex. G, Tr. Vol. IX at 158.) One of Flynn's friends asked the petitioner about using a knife to kill the victim, and she said that a gun was better since she did not want to "get blood on the sofa." (Ex. G, Tr. Vol. IX at 159.)

After the murder, the petitioner left her meeting and returned home. She went inside, found the victim dead, and then went to a neighbor for help. (Ex. G, Tr. Vol. IX at 49-50; Ex. D, Tr. Vol. XV at 1171-72.) The neighbor called 911 and the police arrived. (Ex. G, Tr. Vol. IX at 51-52, 61.) When the first officer arrived, he entered the home and found the victim dead on the floor. (Ex. G, Tr. Vol. IX at 67.) The home appeared ransacked and there was a small dog in the basement. (Ex. G, Tr. Vol. IX at 73-74.)

In view of this evidence, the error the petitioner alleges – that the trial court did not use the specific words "premediated and deliberate" in one particular portion of its instruction – could not have prejudiced her. The overwhelming evidence establishes only that her conduct was premediated and deliberate, and the instructions read as a whole conveyed to the jury that her actions also had to be premediated and deliberate.

Claim 4(a) therefore fails for want of actual prejudice as well.

B. Claim 4(b) Also Fails Because the Jury Was Told That it May Only Consider the Evidence Presented to it at Trial.

The petitioner claims that her trial counsel was ineffective by failing to object that the trial court neglected to instruct the jury that it must reach its verdict based exclusively on the evidence presented at trial. (Pet. 142-46.)

This claim stumbles right out of the gate. As the petitioner appears to acknowledge, the trial court repeatedly stressed to the jury panel during *voir dire* that jurors must decide this case only on the basis of the evidence presented at trial. For example, the trial court told the jury panel:

> We want no one on this jury who cannot decide this case based solely from the evidence that is presented to the jury, without regard to what they may have heard or read or seen in the media. Those are the types of people who are disqualified from sitting on this jury. There is nothing worse that you could do for the defendant or for the State or our justice system as a whole than to attempt to sit on this jury if you don't think in your heart of hearts that you can be a fair juror.

(Ex. K, Tr. Vol. I at 5.)

Similarly, the trial court instructed the panel that jurors needed to be able to put themselves in the petitioner's position and decide the case "with tunnel vision" based only on the trial evidence. The trial court stated:

> A charge of this nature is obviously very important. [The petitioner] 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.

(Ex. K, Tr. Vol. I at 14.)

Additionally, after winnowing down the panel, the trial court instructed the remaining panel members that:

> [t]his case must be decided on what you people hear ... only on what you hear in this courtroom and nothing else.

(Ex. K, Tr. Vol. I at 44.)

The trial court then reiterated the point, telling the panel members:

> As I've said earlier, I would presume most of you have already heard something about this case. That won't disqualify you, although it might during voir dire. I don't know. The question is can you put that aside, whatever you may know about this case, and decide it only on what you hear in the courtroom?

(Ex. K, Tr. Vol. I at 80.)

The jury instructions themselves emphasized what was evidence and what was not evidence, explained direct and circumstantial evidence, and informed the jury that, "[i]n your consideration of the evidence, you are to consider its quality and not its quantity," (Ex. F, Tr. Vol. XIX at 1968-73.)

Despite these repeated admonitions, (*see* Ex. F, Tr. Vol. XIX at 1976 (trial court reminding jurors of what it had said in *voir dire*)), the petitioner claims that she was nonetheless prejudiced because the trial court did not repeat the admonition in its charge to the jury prior to its deliberations, citing "negative publicity about [her] before and during the time of her trial," and the aforementioned interview with juror Charotte Jefts. (Pet. 145.) However, as noted, jurors do not need to be ignorant of the facts and issues in a case. *Smart*, 136 N.H. at 647. The trial court also took precautions to shield the jurors from media influence during their deliberations, including sequestering the jury and interviewing jurors when concerns about media contacts arose. (Ex. L, Tr. Vol. XX at 2017-19.) Moreover, as also noted, the snippets the petitioner cites of an interview with the late Ms. Jefts – apparently reported in a defunct media outlet a decade and a half after the jury found the petitioner guilty – do not say that the jury reached its verdict on the basis of something other than the evidence presented at trial. The petitioner, accordingly,

has not alleged and cannot otherwise demonstrate that a reasonable probability that the result of her criminal trial would have been different but for the error she now alleges 35 years later.

C. Claim 4(c) Is Procedurally Barred And, In Any Event, Fails Because the Jury Instruction Provided Did Not Improperly Impose the Influence of the Bench on the Jury.

Relying on *State v. King*, 136 N.H. 674 (1993), the petitioner claims that in instructing the jury on the elements of accomplice liability, the trial court "essentially made a second closing argument for the State," by listing certain actions the State alleged she did to aid the planning and commission of the victim's murder. Pet. 149-50 (citing Tr. 1984-85[5]). The petitioner argues this prejudiced her. *Id.* at 146-50. This claim fails for at least two reasons.

First, it is a claim of error that should have been raised in her direct appeal. Because habeas corpus is not a substitute for direct appeal, Claim 4(c) is barred and should be dismissed on that basis.

Second, *King* is inapt. That case concerned the trial court's response to a jury question after the jury had been deliberating for two days. 136 N.H. at 675. Further, in *King*, "[i]mmediately following the trial court's reinstruction defense counsel objected on several grounds, including that the court's recollection of the testimony was an invasion of the province of the jury." *Id.* at 677. The trial court, however, despite recognizing that

[5] These transcript pages appear in Ex. F, Tr. Vol. XIX, attached in support of this memorandum of law.

it might have created a misimpression in the minds of the jurors, overruled the objection. *Id.*

Here, in contrast, the jury was not seeking guidance in deciding an issue about which it had been deliberating. Instead, while initially instructing the jury, the trial court simply recited what "the State alleges." (Ex. F, Tr. Vol. XIX at 1984-85.) Moreover, the trial court expressly instructed the jury that it was not siding with the State by setting forth the actions alleged in the indictment. The trial court explained:

> 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. Those are allegations by the State. Those come from the indictment, and the indictment is 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 she is not guilty.

(Ex. F, Tr. Vol. XIX at 1985.)

"[J]uries are presumed to follow instructions." *State v. Stayman*, 138 N.H. 397, 403 (1994). Given that the trial court instructed the jury that in listing certain actions the State alleged, it was merely stating what the indictment charged, not evidence, and that the petitioner denied she was guilty, there is no reasonable basis for believing the trial court made "a second closing argument for the State," (Pet. 149), or that the petitioner was prejudiced. Consequently, no error or actual prejudice exists on which to predicate an ineffective assistance of counsel claim, even if one were being made with respect to this claim.

Claim 4(c) should also be dismissed.

V. Claim 5 Fails Because an Accomplice to an Offense Is Guilty of the Offense Itself and the Penalty for First-Degree Murder Is a Mandatory Life Sentence Without Parole.

The petitioner argues that under New Hampshire law, a person, such as herself, who was charged and convicted as an accomplice to first-degree murder is not subject to a mandatory sentence of life without parole. She claims that although "[f]irst-degree murder statutorily mandates a sentence of life without parole … [n]o statute … mandates that the sentence for *accomplice to* first-degree murder must be life without parole. Pet. 152 (emphasis in original). In her view, New Hampshire follows the general common-law rule regarding accomplice liability, under which a sentencing court has discretion to impose a sentence of life without parole but is not required to do so. (*See* Pet. 156-57 (quoting *State v. Acton*, 115 N.H. 254, 256 (1975))). She is in error.

The New Hampshire Supreme Court has clearly, directly, and in no uncertain terms held that "[u]nder RSA 626, 8, I, II(c)," the accomplice statute, "an accomplice to an offense is guilty of the offense itself." *State v. Abbis*, 125 N.H. 646, 647 (1984). The petitioner's conviction for accomplice to first-degree murder therefore made her guilty of first-degree murder itself. Upon a conviction for first-degree murder, the person convicted "shall be sentenced to life imprisonment and shall not be eligible for parole at any time." RSA 630:1-a, III. New Hampshire follows its own statute in this regard and not the common law. *See State v. Almodovar*, 158 N.H. 548, 552 (2010) ("A trial court's sentencing authority is statutory.").

A statutory construction analysis confirms this result. RSA 626:8, I provides that "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." A person "is legally accountable for the conduct of another person when: . . . (c) He is an accomplice of such other person in the commission of the offense." RSA 626:8, II(c). RSA 626:8 does not define the term "accountable." Its ordinary meaning, however, as defined by the Oxford English Dictionary, is "responsible" or "liable to be called to account or to answer for responsibilities and conduct."[6] Accordingly, because an accomplice to a crime is legally responsible for the offense of the principal under RSA 626:8, the accomplice is deemed guilty of the principal's offense – here, first-degree murder – and is therefore punished in the same way as the principal. *See, e.g.*, *Abbis*, 125 N.H. at 647 ("Under RSA 626:8, I, II(c), an accomplice to an offense is guilty of the offense itself.") (citations omitted); *State v. Thresher*, 122 N.H. 63, 69 (1982) ("'Legally accountable' is defined as including being 'an accomplice of such other person in the commission of the offense.'") (citation omitted).

RSA 626:8, I & II(c), when read together, thus make clear that a person like the petitioner is guilty of first-degree murder if the first-degree murder is committed by a person for whom she is legally accountable, and legal accountability arises when one is found to be an accomplice of such other person in the commission of the offense. The petitioner was found to be an accomplice to first-degree murder. She was therefore guilty

[6] Accountable, Oxford English Dictionary Online, oed.com/view/Entry/1198?redirectedFrom=accountable#eid

of first-degree murder herself, and RSA 630:1-a, III mandates a penalty of life in prison without the possibility of parole for that offense. *See Almodovar*, 158 N.H. at 552.

The petitioner attempts to make much of New Hampshire Supreme Court cases that distinguish between charging a defendant as a principal and an accomplice, and charging a defendant solely as an accomplice. (*See* Pet. 153-56.) Those cases, however, are inapt. Their focus is on ensuring that the defendant is provided adequate notice in the charging document to be able to prepare a defense, not imposing different types of liability for principals and accomplices. None of those cases holds, or even suggests, that a defendant charged and convicted as an accomplice is not deemed guilty of the principal's offense, much less purports to judicially overturns RSA 626:8.

The petitioner cites *no* case suggesting that a defendant who is deemed guilty of first-degree murder by operation of RSA 626:8, II(c) may be sentenced to anything but life without the possibility of parole. Nor does she cite statutory authority for her position.[7] Further, the State is not aware of any such precedent or statutory authority. To the contrary, the Supreme Court has long "interpreted RSA 626:8 as eradicating the distinctions between principal and accomplice[.]" *Thresher*, 122 N.H. at 69 (citing *Jansen*, 120 N.H. at 618-19, and *State v. Morin*, 111 N.H. 113, 116 (1971)). In view of the eradication of those distinctions, the petitioner's claim that when a defendant is charged

[7] The petitioner cites the distinction in sentencing for murder and attempted murder as a "useful comparison." (Pet. 157.) That comparison fails. The basis for the distinction is the express statutory language of the attempt statute, RSA 629:1 IV. *See, e.g., Abbis*, 125 N.H. at 647 ("An attempt to commit a crime is an act or omission constituting a substantial step toward the commission of the crime and, except for attempted murder, carries the same penalty as the attempted crime.") (citing RSA 629:1). The petitioner cites no analogous statutory exception regarding accomplice liability.

solely as an accomplice to first-degree murder, the defendant is subject to a different sentencing regime than a defendant who is also charged as a principal gets no traction in New Hampshire law.

The law in New Hampshire is clearly and succinctly stated by our Supreme Court in *Abbis*: "[u]nder RSA 626, 8, I, II(c), an accomplice to an offense is guilty of the offense itself." 125 N.H. at 647. First-degree murder carries a mandatory life sentence without the possibility of parole. Claim 5 should therefore be dismissed.

CONCLUSION

None of the claims advanced in petitioner's petition are legally viable. All are procedurally barred, fail to plead or otherwise show error, or fail to state or advance viable claims for relief. Accordingly, this court should dismiss the petitioner's petition.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE &
NEW HAMPSHIRE STATE PRISON FOR WOMEN

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March 23, 2026

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CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that I am emailing a copy of this memorandum of law and supporting exhibits to petitioner's counsel this day consistent with an agreement between the parties for email service of such court filings.

March 23, 2026

/s/ Anthony J. Galdieri
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EXHIBIT A

91-239

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NOTICE OF APPEAL

(Rule 7)

Within thirty days from the date on the clerk's written notice of a decision on the merits, unless otherwise provided by law and except as otherwise provided by Rule 7 in criminal and probate appeals, the moving party shall file (a) 1 copy of this notice of appeal and of the attachments to it with each of the other parties, and with the attorney general in a criminal case; (b) either 2 or 3 copies with the clerk of the lower court depending upon whether a judge, or master and judge, decided the case; and (c) the original and 15 copies with the clerk of the supreme court. The moving party shall pay the filing fee simultaneously with the filing of the notice of appeal.

CASE TITLE (Full Name)

State of New Hampshire

vs.

Pamela Smart

APPEAL FROM ROCKINGHAM CTY. SUP. COURT
(Municipality or county, and name of court)

Date of:
(a) clerk's notice: ____
(b) sentencing (criminal): 3/22/91 & 5/6/91
(c) probate court filing: ____

Trial Judge; Master; Other:
The Honorable Douglas Gray

Which side is the moving party: plaintiff, defendant, or other? Defendant
If other, please specify: ____

Court Reporter or Machine Operator:
William Wojtkowski

Docket No. below: #90-S-1370/1371/1372

If CRIMINAL case, please fill out the following:
Is defendant in jail or prison? Yes
If so, where is the defendant incarcerated?
N.H. State Prison for Women
What is the sentence? Life without parole; 3½ - 7; 7½ - 15 - all concurrent
Was trial counsel court appointed? No
Will the appellate defender be handling the appeal? No

Trial Counsel below:
For Plaintiff or State:
Paul Maggiotto, Esq.
Diane Nicolosi, Esq.
Office of the Atty. General

For Defendant:
Paul Twomey, Esq.
Mark Sisti, Esq.
Twomey & Sisti Law Offices

If party is a corporation or association, give the names and addresses of parent, subsidiaries, and affiliates (to extent known):

	Name	Address	Telephone
MOVING PARTY'S COUNSEL IN SUPREME COURT:	Albert Johnson, Esq.	Johnson, Mee & May 8 Whittier Place Boston, MA 02114	(617) 227-8900
OPPOSING PARTY'S COUNSEL IN SUPREME COURT:	Office of the Attorney General	25 Capitol Street Concord, N.H. 03301	(603) 271-3671

Number of days of trial: 23 + 2 days pre-trial

Dates of hearing and/or trial: Pre-trial hearings: January 17-18, 1991
Trial: February 19 - March 22, 1991
[no court held 3/7/91]

Does the moving party waive oral argument? No

List the exhibits necessary to determine the questions raised on appeal:
All exhibits from pre-trial hearings
All trial exhibits

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:

PLEASE SEE ATTACHMENT #1 -- APPENDED HERETO @ Page #5

STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:

R.S.A. 626:8, R.S.A. 630:1-a, R.S.A. 641:5

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(7). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).

PLEASE SEE ATTACHMENT #2 -- APPENDED HERETO @ Page #9

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

(A) The proper standard of review to be applied by the court to the question, citing relevant authority;

(B) the parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and

(C) the case(s) most relied upon to support the moving party's position:

PLEASE SEE ATTACHMENT #3 -- APPENDED HERETO @ Page #14

If the most extensive transcript designated above were ordered by the court, what is the court reporter's estimate (obtain directly from the trial court clerk) of the number of pages and the cost thereof:

Pages: 3,985 Cost: $14,943.75

A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:

This Appeal involves fundamental questions about the fairness of proceedings which took place in an atmosphere unique in New Hampshire legal history. Many of the issues raised herein involve questions of first impression which will serve to present the opportunity to clarify issues concerning the administration of justice in the State. Many of the questions raised in the Appeal relate to serious questions that affect the public's perception of the fairness of the judicial process in the State of New Hampshire.

The errors complained of within this Appeal operated to deprive the accused of a fair trial and subjected her to the forfeiture of her freedom for the balance of her life -- obviously a substantial and irreparable injury.

TITLE OF CASES WITH SIMILAR OR IDENTICAL ISSUES PENDING, OR EXPECTED TO BE ENTERED, IN THE SUPREME COURT (TO EXTENT KNOWN):

NONE KNOWN

ATTACH TO THIS FORM THE DECISION BELOW AND ONLY SUCH OTHER PLEADINGS AND DOCUMENTS AS THE COURT NEEDS TO EVALUATE THE SPECIFIC QUESTIONS RAISED ON APPEAL. LEGAL MEMORANDA SHALL NOT BE SUBMITTED WITHOUT THE PRIOR APPROVAL OF THE CLERK. INCLUDE A TABLE OF CONTENTS LISTING EACH ATTACHMENT AND REFERRING TO SEQUENTIALLY NUMBERED PAGES. IF THE PARTIES' REQUESTS FOR FINDINGS AND RULINGS ARE ATTACHED, NOTE ON THE RIGHT SIDE OF PAGE WHETHER EACH REQUEST WAS GRANTED, DENIED, OR NOT RULED UPON [RULE 6(5)]. REGARDING THE TEXT OF RELEVANT CONSTITUTIONAL, STATUTORY, AND OTHER DOCUMENTS, SEE RULE 7(6).

CERTIFICATIONS

1. I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

Paul Twomey / Mark L. Sisti

Paul Twomey Counsel Mark L. Sisti

2. I hereby certify that copies of this notice of appeal have been served on all parties to the case and have been filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

Paul Twomey / Mark L. Sisti

Moving Party or Counsel

BRIEF STATEMENT OF THE CASE:

On May 1, 1990, the body of Gregory Smart was found in the foyer of his home in Derry, New Hampshire, by his wife, Pamela, upon her return from school board meeting. Mr. Smart had been shot once in the head. In June, 1990, three juveniles (later certified as adults), William Flynn, Vance Lattime, and Patrick Randall, were charged with the commission of First Degree Murder in the death of Mr. Smart. On several occasions between the date of the arrest of the juveniles and August 1, 1990, a juvenile, who had previously worked as an intern under the direction of Pamela Smart at S.A.U. #21 in Hampton, New Hampshire, engaged in conversations with Pamela Smart at the express direction of the State of New Hampshire. During these conversations, Ms. Pierce was wearing a wire devised for the electronic interception of communications at the behest of the authorities of the State of New Hampshire.

On August 1, 1990, Pamela Smart was arrested and charged with one count of Accomplice to First Degree Murder, one count of Conspiracy to Commit First Degree Murder, and one count of Witness Tampering. During the pre-trial period, the case received an inordinate amount of publicity, which included appearances on several nationally syndicated television shows, by witnesses and persons associated with the case. On December 27, 1990, the defendant filed a Motion for a Change of Venue citing the extraordinary amount of pre-trial publicity. On January 8, 1991, the defendant supplemented this Motion for a Change of Venue. On January 21, 1991, the Court denied defendant's Motion for a Change of Venue stating that the Court was aware of other recent cases having received comparable media coverage without experiencing any real difficulty in selecting a fair and impartial jury. During the jury selection process, the defendant filed a Motion to Reconsider Venue. The Court denied the motion stating that if it was necessary, the motion would be reconsidered sua sponte. Likewise, the defendant's Motion to Sequester the jury was denied by the Court. The Court indicated that it might reconsider the question of sequestration during the period of deliberation. After closing arguments and charge in the case, counsel for the defendant moved that the jury be sequestered during deliberations. The Court declined to order sequestration during the first night of deliberations, but indicated that it would order sequestration for the following nights of deliberations. The jury did not return a verdict on its first two days of deliberations and was sequestered for only the second night.

Prior to trial the Court held a meeting with forty (40) members of the media in order to set up rules and procedures for coverage of the trial. This meeting was held without notice to, or input from, the defendant. During the course

of trial, the trial made numerous decisions concerning press access to information without notice to, or input from, the defendant. The defendant repeatedly objected to such decisions being made without any notice to, or input from, her.

After the defendant's arrest, and prior to empanelment of the Grand Jury on this case; the defendant moved that the Grand Jury be instructed on the specific definition of "purposely" which is contained in R.S.A. 626:2 I(a). The Court denied this request.

Prior to trial the defendant filed four Motions to Quash Indictments and two Motions to Dismiss. All of these motions were denied by the Court. The defendant filed Motions to Quash Indictments #90-S-1370 and #90-S-1372. The Court denied both motions. Both prior to and during trial, the defendant made several requests for exculpatory evidence, including all inducements offered to any witnesses for the State of New Hampshire. When these so-called Brady requests were made to the Court, the Court granted them. When they were made orally to the State of New Hampshire, the State of New Hampshire indicted that they would comply with the requirements of Brady and its progeny.

During the cross-examination of Cecelia Pierce, the defendant learned for the first time that Cecelia Pierce had been told by an agent of the State of New Hampshire that she would not be prosecuted for any offenses she may have committed relating to the death of Gregg Smart. Upon receiving this information, the defendant moved to dismiss based on the failure to disclose this exculpatory material in a timely fashion. This motion was denied.

Prior to trial, the defendant moved that the Court order a co-defendant, Vance Lattime, Jr., to answer certain questions he declined to answer during deposition. The Court denied defendant's motion, notwithstanding the fact that Mr. Lattime's purported agreement with the State required him to answer all questions in a truthful manner.

Prior to trial, the defendant filed a Motion to Suppress any tape recordings made of any conversations of the defendant electronically intercepted. This motion was denied. Prior to trial, the defendant moved to depose Cecelia Pierce. The defendant had originally sought to depose Ms. Pierce in December of 1990. The attorney for the State of New Hampshire requested, for personal reasons, that the deposition not be held until after the New Year. When the defendant sought to depose Ms. Pierce after the New Year, the State objected on the basis that the deposition statute had been amended to preclude depositions of persons who were under the age of sixteen at the time of the offense. The Court denied the defendant's Motion to Depose

Cecelia Pierce.

During trial the State adduced the testimony of one George Moses. The defendant objected to authentication of the voice which Mr. Moses claimed was that of Pamela Smart in telephone conversations. The Court overruled the objection and allowed the testimony. During Mr. Moses cross-examination, the Court refused to allow the defendant to question Mr. Moses concerning his knowledge of sentences being served by his mother in the New Hampshire State Prison for Women.

During the cross-examination of Pamela Smart, the State, over the defendant's objection, was allowed to comment by questioning upon the defendant's Constitutional right to be present throughout the trial.

After the juvenile alleged co-conspirator's in this case had testified, counsel for the defendant received letters written by Flynn and Lattime to a third individual. These letters contained information which tended to contradict both the accuracy of the testimony of the witnesses and the genuineness of the so-called remorse expressed by the witnesses. Furthermore, the letters showed an abiding contempt for the trial process. Immediately upon receipt of these letters, the defendant notified the Court and requested to resume cross-examination of Flynn and Lattime on areas concerned raised in the letters. The Court declined to allow the defendant to resume cross-examination. Later, during the defendant's case, the defendant sought to call Flynn and Lattime in her own case-in-chief. The Court refused to allow the defendant to call these individuals as witnesses.

In regards to the charge of Witness Tampering, the Court refused to instruct the jury on the defense of entrapment. At 10:20 A.M. on the third day of jury deliberations, the jury sent out the following question:

> "I have an allegation, which proven beyond a reasonable doubt, would prove one of the elements of one of the offenses. This allegation is not specifically mentioned in your charge. If this allegation is proved, may I then assume proof of the element?"

The defendant urged the Court to answer the question in the negative. The Court declined and answered the question by asking for a definition of what the jury meant by allegation. At 11:00 A.M. on the third day of deliberations, the jury responded to the Court's question with the following:

"In your charges - Element 1 under accomplice

> states "the State alleges that the Defendant aided William F. in the planning or commission of the murder of Gregory Smart by taking certain actions including ...". Several actions are then listed. Are all other actions excluded?"

The defendant urged the Court to answer the question in the affirmative, stating that otherwise the defendant could be convicted of an offense not even alleged in the indictment. The Court answered the question in the negative, thus allowing the jury to return a verdict of guilt on the charge of first degree murder for acts not even alleged in the indictment.

Shortly after receiving this answer from the Court, the jury returned a verdict of guilty to all three offenses. The defendant was sentenced to life without parole on the Accomplice to First Degree Murder charge, to 7 1/2 to 15 years on the Conspiracy to Commit Murder charge and to 3 1/2 to 7 years on the Witness Tampering charge. All sentences are to run concurrently.

ATTACHMENT #2

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL:

1. Did the Court err by denying the defendant's motion to suppress tape-recorded evidence of incriminating statements where the contact made with the defendant through a state agent occurred after the defendant was represented by counsel and in violation of New Hampshire Rule of Professional Conduct 4.2.?

2. Did the Court err by denying the defendant's motion to suppress tape-recorded evidence of incriminating statements where the interception of defendant's conversation violated defendant's right to a reasonable expectation of privacy, protected by Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution?

3. Did the Court err by denying the defendant's motion to suppress tape recorded evidence of incriminating statements where the interception of defendant's conversation was an unconstitutional search under Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment to the United States Constitution where neither party to the tape-recorded conversation gave valid consent?

4. Did the Court err by denying the defendant's motion to suppress tape-recorded evidence of incriminating statements where the interception of defendant's conversation was authorized and conducted under a statute which fails to adequately separate governmental powers to permit a fair and impartial review of the facts, in violation of the Separation of Powers Clause in the New Hampshire Constitution?

5. Did the Court err by denying the defendant's motion to suppress tape-recorded evidence of incriminating statements where, after asserting her right to counsel, the State directed their agent to interrogate the defendant without benefit of counsel when she was likely to make incriminating statements, thereby denying her right to counsel under the 6th Amendment to the United States Constitution and Part 1, Article 15 of the N.H. Constitution?

6. Did the Court err by denying the defendant's motion to suppress tape-recorded evidence of incriminating statements where the interception of defendant's conversation denied the defendant's right against self-incrimination under Part I, Article 15 of the New Hampshire Constitution and the Fifth amendment of the United States Constitution?

7. Did the Court err in denying the defendant's Motion In

Specific Questions to be Raised on Appeal

Limine, which sought to exclude from evidence any tapes which had been altered or enhanced, in violation of R.S.A. 570-A:8?

8. Did the Court err in denying defendant's Motion for Instruction of the Grand Jury in which the defendant sought to have the Grand Jury instructed upon the definition of purposely as it is used in the First Degree Murder statute?

9. Did the Court err in denying defendant's Motion for Individually Sequestered Voir Dire of Grand Jury?

10. Did the Court err in denying defendant's Motion for a Bill of Particulars on the Witness Tampering charge?

11. Did the Court err in denying the defendant's Motion for a Bill of Particulars on the Conspiracy to Commit Murder indictment?

12. Did the Court err in denying the defendant's Motion to Quash the indictment alleging Witness Tampering for failure to state to allege an offense and for failure to provide the defendant with adequate notice of the charge, in contravention of Part 1, Article 14 and 15 of the New Hampshire Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

13. Did the Court err in denying defendant's Motion to Quash the Conspiracy to Commit First Degree Murder and Accomplice to First Degree Murder indictments, based upon the failure of the Grand Jury to find that the defendant had acted with pre-meditation and deliberation as defined in R.S.A. 630:2(a), in violation of the rights guaranteed the defendant by Part 1 Article 15, R.S.A. 601:1 and the Fifth and Fourteenth Amendments to the United States Constitution?

14. Did the Court err in denying defendant's Motion to Dismiss the Witness Tampering indictment for failure to state an offense under R.S.A. 641:5-I(a) or I(b)?

15. Did the Court err in denying the defendant's motions to change venue and motion to sequester jury in light of potential or actual prejudice to the defendant occasioned by extensive, biased local and national pre-trial media coverage the court denied the defendant's right to due process of law guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Fourteenth amendment to the United States Constitution?

16. Did the Court err in denying the defendant's motions to change venue in light of potential or actual prejudice to the defendant occasioned by extensive, biased local and

Specific Questions to be Raised on Appeal

national pre-trial media coverage the court denied the defendant's right to a fair and impartial jury as guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution?

17. Did the extensive, biased, local and national pre-trial media coverage unjustly condemn the defendant prior to public trial in violation of defendant's right to due process of law as guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution and defendant's right to a fair and impartial jury as guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution?

18. Did the number of media present at trial, and the pervasive international publicity generated by media present at trial prevented the defendant from receiving a fair trial consistent with the due process guarantees of Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution?

19. Did the Court's failure to adopt stricter procedures or to allow defendant to take part in such decisions by which to control the presence of the media, violate the defendant's right to a fair trial under Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution?

20. Was the denial of defendant's motion to compel answers to questions posed by counsel during the deposition of Vance Lattime about whether he previously participated in theft or the sale of stolen property infringe upon the defendant's right to produce all proofs favorable to herself and to be heard in her defense consistent with Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment of the United States Constitution when the statute of limitations may have expired for prosecuting such past crimes and the possibility of self-incrimination would be thereby diminished?

21. Did the denial of defendant's request to resume cross-examination of witnesses Lattime and Flynn when letters written by each witness from the prison to a third party were discovered after defense counsel had concluded cross-examination of the witnesses and where the substance of the letters contradicted prior testimony by the witnesses, infringe upon the defendant's right to produce all proofs favorable to

Specific Questions to be Raised on Appeal

herself and to present a defense consistent with Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment of the United States Constitution?

22. Did the denial of defendant's request to call witnesses Lattime and Flynn in her case-in-chief violate defendant's right to all proofs favorable to herself and to present a defense and to confront the witnesses against her consistent with Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment of the United States Constitution?

23. Did the denial of defendant's attempted cross-examination of adverse witness George Moses' knowledge of the sentence his mother is currently serving in the State Prison for Women, where the defendant is also housed, violate the defendant's right to all proofs favorable to herself and to present a defense and to confront witnesses against her consistent with Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment of the United States Constitution?

24. Did the Court err in denying defendant's motion to depose a key witness for the State when the parties had previously agreed to the taking of the deposition; but upon the request of the State prosecutor who for personal reasons wished to delay the deposition until after the end-of-year holidays agreed to postpone the deposition until after the first of the year, and where the State subsequently failed to honor its prior agreement with defense counsel, and in fact objected to the taking of the deposition on grounds that the reenactment of RSA 517:13, effective January 1, 1991 now prohibits the taking of depositions of minors age 16 and under, and further, where counsel for one of the three juvenile witnesses in the case had already taken the witness' deposition between May 1990 and December 1990?

25. Did the Court err in overruling defendant's objection to the insufficient foundation provided for witness George Moses' identification of defendant's voice on the telephone where the witness had insufficient knowledge of what defendant's voice sounded like as he had only spoken to her once prior to his alleged phone conversation with the defendant, and therefore the jury was not provided with sufficient evidence to support a finding that the witness, because of adequate prior contact with defendant, could recognize the voice on the telephone to be that of the defendant?

26. Was it prosecutorial misconduct for the State prosecutor to

Specific Questions to be Raised on Appeal

comment during cross-examination on the defendant's ability to hear all witness testimony and conform her own testimony accordingly when the defendant has a constitutional right to be present during trial?

27. Did the Court err in denying the Defendant's motion for a mistrial after the prosecutor commented upon her exercise of her right to be present during her trial?

28. Did the Court err in denying those portions of the defendant's Omnibus Motion for Discovery which sought identification of other bad acts alleged by the State, where the questions sent out by the jury indicated that the jury convicted the accused on the basis of an act unknown to the accused and not contained in the indictment?

29. Did the Court err in instructing the jury that they could find the defendant guilty of Accomplice to First Degree murder based upon acts not even alleged in the indictment?

30. Did the Court err in allowing the submission to the jury of what purported to be transcripts of intercepted phone conversations, where the transcripts were neither complete nor accurate?

31. Did the Court err in denying defendant's motion to determine the source of the leaking of sealed indictments in Hillsborough County to members of the media, where the publicity generated by these leaks contributed to the massive publicity of this case?

32. Did any or all of the above cited error singly or in combination operate to deprive the defendant of her right to a fair trial as guaranteed by the due process clauses of the State and Federal Constitutions?

33. Did the Court err in ruling that the State had complied with the mandates of R.S.A. 570:A?

34. Did the imposition of a mandatory sentence of life without parole upon a person charged as an accomplice, operate to deny the defendant her right to proportionality of sentences as guaranteed by Part 1, Article 18 of the New Hampshire Constitution?

ATTACHMENT #2

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

1. A) Matter of law
B) Transcripts of all proceedings in this case are requested.
C) -New Hampshire Rule of Conduct 4.2
-Mussman's Case, 111 N.H. 402 (1971)
-Polycast Technology v. Uniroyal Inc., 129 FRD 621
-(S.D.N.Y. 1990)
-United States v. Hammad, 846 F.2d 854 (2d Cir. 1988)
-United States v. Pinto, 850 F,2d 922 (2d Cir. 1988)
-United States v. Killian, 639 F.2d 206 (5th Cir. 1981)
-United States v. Thomas, 474 F.2d 110 (10th Cir. 1973)
-United States v. Durham, 475 F.2d 110 (10th Cir. 1973)

2. A) Matter of Law
B) Transcripts of all proceedings in this case are requested.
C) -Part 1, Article 19, N.H. Constitution
-4th and 14th Amendments, U.S. Constitution
-State v. Ball, 124 N.H. 186 (1983)
-State v. Phinney, 117 N.H. 145 (1977)
-State v. Pellicci, ___N.H.____(Slip.Op. at 20) (dec'd 8/24/90, Thayer concurring specially)
-Katz v. United States, 88 S.Ct. 507 (1967)
-State v. Valenzuela, 130 N.H. 175 (1987)
-State v. Damiano, 124 N.H. 742 (1984), 412 U.S. 218 (1973)

3. A) Matter of Law
B) Transcripts of all proceedings in this case are requested.
C) -Part 1, Article 19, N.H. Constitution
-4th Amendment, U.S. Constitution
-State v. Benoit, 126 N.H. 6 (1985)
- R.S.A. 21:44

4. A) Matter of Law
B) Transcripts of all proceedings in this case are requested.
C) -Part 1, Article 35 and 37, N.H. Constitution
-Coolidge v. New Hampshire, 403 U.S. 443 (1971)

5. A) Matter of Law
B) Transcripts of all proceedings in this case are requested.
C) -6th Amendment, U.S. Constitution
-Part 1, Article 15, N.H. Constitution

6. A) Matter of Law

B) Transcripts of all proceedings in this case are requested.
C) -Part 1, Article 15, N.H. Constitution
-5th Amendment, U.S. Constitution

7. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -R.S.A. 570-A:8

8. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Articles 14 & 15, N.H. Constitution
-5th, 6th & 14th Amendments, U.S. Constitution

9. A) Whether the trial Court exercised sound discretion.
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Articles 14 & 15, N.H. Constitution
-5th, 6th & 14th Amendments, U.S. Constitution

10. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Articles 14 & 15, N.H. Constitution
-5th, 6th & 14th Amendments, U.S. Constitution

11. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Articles 14 & 15, N.H. Constitution
-5th, 6th & 14th Amendments, U.S. Constitution

12. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Articles 14 & 15, N.H. Constitution
-5th, 6th & 14th Amendments, U.S. Constitution

13. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Articles 14 & 15, N.H. Constitution
-5th, 6th & 14th Amendments, U.S. Constitution
-R.S.A. 630:2(a)
-R.S.A. 601:1

14. A) Matter of Law
B) Transcripts of all proceedings in this case are requested.

C) -Part 1, Articles 14 & 15, N.H. Constitution
-5th, 6th and 14th Amendments, U.S. Constitution
-R.S.A. 641:5-I(a)(b)

15. A) Whether the trial court exercised sound discretion
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

16. A) Whether the trial court exercised sound discretion
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

17. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

18. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

19. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

20. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-6th Amendment, U.S. Constitution

21. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-6th Amendment, U.S. Constitution

22. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-6th Amendment, U.S. Constitution

23. A) Matter of law
B) Transcripts of all proceedings in this case

are requested
C) -Part 1, Article 15, N.H. Constitution
-6th Amendment, U.S. Constitution

24. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution
-R.S.A. 517:13

25. A) Matter of Law
B) Transcripts of all proceedings in this case are requested.
C) New Hampshire Rules of Evidence 602 and 701

26. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

27. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

28. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

29. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

30. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Article 15, N.H. Constitution
-14th Amendment, U.S. Constitution

31. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) -Part 1, Articles 15 & 17, N.H. Constitution

32. A) Matter of Law and/or did the trial Court exercise sound discretion.
B) Transcripts of all proceedings in this case are requested.
C) -Part 1, Articles 14, 15 & 17, N.H. Constitution
-14th Amendment, U.S. Constitution

33. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) Part 1, Article 15, N.H. Constitution

34. A) Matter of Law
B) Transcripts of all proceedings in this case are requested
C) Part 1, Article 18, N.H. Constitution

EXHIBIT B

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

1991 TERM

NOVEMBER SESSION

NO. 91-239

STATE OF NEW HAMPSHIRE

V.

PAMELA SMART

SUPPLEMENTAL NOTICE OF APPEAL

J. Albert Johnson
Thomas J. May
Francis E. Hartig
JOHNSON, MEE & MAY
8 Whittier Place, Suite 1K
Charles River Park
Boston, MA 02114
(617) 227-8900

SUPREME COURT DOCKET NO. 91-239
SUPPLEMENTAL NOTICE OF APPEAL
(Rule 7)

Within thirty days from the date on the clerk's written notice of a decision on the merits, unless otherwise provided by law and except as otherwise provided by Rule 7 in criminal and probate appeals, the moving party shall file (a) 1 copy of this notice of appeal and of the attachments to it with each of the other parties, and with the attorney general in a criminal case; (b) either 2 or 3 copies with the clerk of the lower court depending upon whether a judge, or master and judge, decided the case; and (c) the original and 15 copies with the clerk of the supreme court. The moving party shall pay the filing fee simultaneously with the filing of the notice of appeal.

CASE TITLE (Full Name)

State of New Hampshire

v.

Pamela Smart

APPEAL FROM Rockingham Cty. Sup. COURT
(Municipality or county, and name of court)

Date of:
(a) clerk's notice: _____
(b) sentencing (criminal): 3/22/91 & 5/6/91
(c) probate court filing: _____

Trial Judge; Master; Other:
The Honorable Douglas Gray

Court Reporter or Machine Operator:
William Wojtkowski

Docket No. below: #90-S-1370/1371/1372

Which side is the moving party: plaintiff, defendant, or other? defendant

If other, please specify: _____

If **CRIMINAL** case, please fill out the following:

Is defendant in jail or prison? yes

If so, where is the defendant incarcerated?
N.H. State Prison for Women

What is the sentence? Life without parole; 3½ - 7; 7½ - 15 - all concurrent

Was trial counsel court appointed? No

Will the appellate defender be handling the appeal? No

Mae Ritchie (Post-trial)

Trial Counsel below:

For Plaintiff or State:

Paul Maggiotto, Esq.
Diane Nicolosi, Esq.
Office of the Atty. General

For Defendant:

Paul Twomey, Esq.
Mark Sisti, Esq.
Twomey & Sisti Law Offices

If party is a corporation or association, give the names and addresses of parent, subsidiaries, and affiliates (to extent known):

	Name	Address	Telephone
MOVING PARTY'S COUNSEL IN SUPREME COURT:	J. Albert Johnson Thomas J. May Francis E. Hartig	JOHNSON, MEE & MAY 8 Whittier Place Boston, MA 02114	(617) 227-8900
OPPOSING PARTY'S COUNSEL IN SUPREME COURT:	Office of the Attorney General	25 Capitol Street Concord, NH 03301	(603) 271-3671

Number of days of trial: 23 + 2 days pre-trial
2 days post-trial

Dates of hearing and/or trial: Pre-trial hearings; January 17-18, 1991
TRIAL: February 19 - March 22, 1991
[no court held 3/7/91]
post-trial hearings August 19 & 26 , 1991

Does the moving party waive oral argument? No

List the exhibits necessary to determine the questions raised on appeal:

All exhibits from pre-trial hearings
All trial exhibits
All exhibits from post-trial hearings

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:

On June 5, 1991, the defendant filed a Notice of Appeal to the Supreme Court of New Hampshire. On June 6, 1991, the defendant retained J. Albert Johnson, Esquire; Thomas J. May, Esquire; and Francis E. Hartig to represent her as to pending post-trial motions and for purposes of appeal. Subsequently, on July 30, 1991, J. Albert Johnson, Esquire; Thomas J. May, Esquire; and Francis E. Hartig, Esquire, for the defendant, filed three (3) motions for new trial which were deemed timely by the trial court to be heard along with other post-trial motions previously filed by trial counsel. These motions sought the granting of a new trial on three (3) grounds: (1) Excessive Prejudicial Pretrial and Trial Publicity (Motion for New Trial Failure of Due Process); (2) Juror Misconduct; and (3) Failure by the Attorney General to Provide Exculpatory Evidence. In addition, there was a motion for individual voir dire of the jurors and a motion for unknown person to come forward. All of these motions were heard by the Honorable Douglas Gray on August 19 and 26, 1991. On August 27, 1991, Justice Gray denied the Motions for New Trial based upon Juror Misconduct and Failure to Provide Exculpatory Evidence and the Motion for Individual Voir Dire of the Jurors. Subsequently, on September 11, 1991, Justice Gray denied the Motion for New Trial based on Failure of Due Process.

STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(7). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).

Please see Attachment #1 - Appended hereto at p. #5

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

(A) The proper standard of review to be applied by the court to the question, citing relevant authority;

(B) the parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and

(C) the case(s) most relied upon to support the moving party's position:

Please see Attachment #2 - Appended hereto at p. #7

If the most extensive transcript designated above were ordered by the court, what is the court reporter's estimate (obtain directly from the trial court clerk) of the number of pages and the cost thereof:

1 all proceedings: Pages: 4405 Cost: $16,518.75

A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:

This Appeal involves fundamental questions about the fairness of proceedings which took place in an atmosphere unique in New Hampshire legal history. Many of the issues raised herein involve questions of first impression which will serve to present the opportunity to clarify issues concerning the administration of justice in the State. Many of the questions raised in the Appeal relate to serious questions that affect the public's perception of the fairness of the judicial process in the State of New Hampshire.

The errors complained of within this Appeal operated to deprive the accused of a fair trial and subjected her to the forfeiture of her freedom for the balance of her life -- obviously a substantial and irreparable injury.

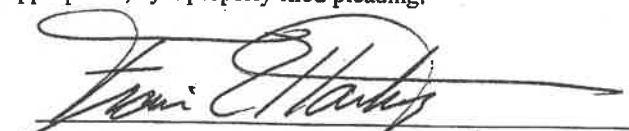
TITLE OF CASES WITH SIMILAR OR IDENTICAL ISSUES PENDING, OR EXPECTED TO BE ENTERED, IN THE SUPREME COURT (TO EXTENT KNOWN):

NONE KNOWN

ATTACH TO THIS FORM THE DECISION BELOW AND ONLY SUCH OTHER PLEADINGS AND DOCUMENTS AS THE COURT NEEDS TO EVALUATE THE SPECIFIC QUESTIONS RAISED ON APPEAL. LEGAL MEMORANDA SHALL NOT BE SUBMITTED WITHOUT THE PRIOR APPROVAL OF THE CLERK. INCLUDE A TABLE OF CONTENTS LISTING EACH ATTACHMENT AND REFERRING TO SEQUENTIALLY NUMBERED PAGES. IF THE PARTIES' REQUESTS FOR FINDINGS AND RULINGS ARE ATTACHED, NOTE ON THE RIGHT SIDE OF PAGE WHETHER EACH REQUEST WAS GRANTED, DENIED, OR NOT RULED UPON [RULE 6(5)]. REGARDING THE TEXT OF RELEVANT CONSTITUTIONAL, STATUTORY, AND OTHER DOCUMENTS, SEE RULE 7(6).

CERTIFICATIONS

1. I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.



Counsel

2. I hereby certify that copies of this notice of appeal have been served on all parties to the case and have been filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

Moving Party or Counsel

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL:

35. DID THE TRIAL COURT ERR BY DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON FAILURE OF DUE PROCESS WHERE THE DEFENDANT, PAMELA SMART, WAS DEPRIVED OF HER RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE UNITED STATES AND THE NEW HAMPSHIRE CONSTITUTIONS BECAUSE OF THE PERVASIVE, NEGATIVE PUBLICITY THAT SURROUNDED THE PRETRIAL AND TRIAL PROCEEDINGS?

36. DID THE TRIAL COURT ERR BY DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON FAILURE OF DUE PROCESS WHERE THE DEFENDANT, PAMELA SMART, WAS DEPRIVED OF HER RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY THE UNITED STATES AND THE NEW HAMPSHIRE CONSTITUTIONS BECAUSE OF THE TRIAL COURT'S FAILURE TO IMPLEMENT JUDICIAL SAFEGUARDS THAT WOULD HAVE PROTECTED THE DEFENDANT FROM THE EFFECTS OF THE PERVASIVE, NEGATIVE PUBLICITY THAT PERMEATED THE PRETRIAL AND TRIAL PROCEEDINGS?

37. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON JUROR MISCONDUCT WHERE A JUROR'S MISCONDUCT, NAMELY TAPE RECORDING HER TRIAL NOTES FOR FINANCIAL GAIN, AS EVIDENCED BY HER OFFER TO SELL THE TAPES TO COUNSEL FOR THE DEFENDANT FOR $25,000.00, DENIED THE DEFENDANT HER CONSTITUTIONAL RIGHT TO A TRIAL BEFORE AN IMPARTIAL JURY AS GUARANTEED HER BY THE NEW HAMPSHIRE AND UNITED STATES CONSTITUTIONS?

38. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL WHERE THE TRIAL COURT'S ACTION OF PERMITTING THE SUQUESTERED "DELIBERATING" JURORS THE OPPORTUNITY TO CONSUME TWO DRINKS CONTAINING INTOXICATING LIQUOR VIOLATED THE NEW HAMPSHIRE'S "PER SE PREJUDICIAL RULE" PROHIBITING "DELIBERATING" JURORS FROM CONSUMING ALCOHOL DENIED THE DEFENDANT HER CONSTITUTIONAL RIGHT TO A TRIAL BEFORE AN IMPARTIAL JURY AS GUARANTEED HER BY THE NEW HAMPSHIRE AND UNITED STATES CONSTITUTIONS?

39. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON FAILURE TO DISCLOSE EXCULPATORY EVIDENCE WHERE THE PROSECUTION'S FAILURE TO DISCLOSE A PROMISE NOT TO PROSECUTE THE MOTHER OF A KEY WITNESS, AFTER THE DEFENSE MADE PRETRIAL DEMANDS FOR ALL EXCULPATORY EVIDENCE, INCLUDING INDUCEMENTS GRANTED TO

WITNESSES, VIOLATED THE DUE PROCESS CLAUSES OF THE UNITED STATES AND NEW HAMPSHIRE CONSTITUTIONS?

40. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION FOR INDIVIDUALLY SEQUESTERED VOIR DIRE OF THE JURORS, WHERE THE INDIVIDUALLY SEQUESTERED VOIR DIRE WOULD PROVIDE THE NECESSARY EVIDENCE TO SUPPORT THE MOTION FOR NEW TRIAL BASED UPON JUROR MISCONDUCT?

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

35. A. WHETHER THE TRIAL COURT EXERCISED SOUND DISCRETION

B. TRANSCRIPTS OF ALL PROCEEDINGS IN THIS CASE ARE REQUESTED

C. - R.S.A. 526:1

- 6TH, 14TH Amendments to the United States Constitution
- Part I, Arts. 15, 17, 21 and 35 of the New Hampshire Constitution
- Sheppard v. Maxwell, 384 U.S. 333 (1966)
- Irvin v. Dowd, 366 U.S. 717 (1961)
- State v. Laaman, 114 N.H. 794, 331 A.2d 354 (1974)

36. A. WHETHER THE TRIAL COURT EXERCISED SOUND DISCRETION.

B. TRANSCRIPTS OF ALL PROCEEDINGS IN THIS CASE ARE REQUESTED.

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C. - R.S.A. 526:1

- R.S.A. 500-A:12, II

- 6TH, 14TH Amendments to the United States Constitution

- Part I, Arts. 15, 17, 21 and 35 of the New Hampshire Constitution

- Remmer v. United States, 347 U.S. 227 (1954)

- Pool v. C. B. & Q. R. Co., 6 F. 844 (D. Iowa 1881)

- State v. Laaman, 114 N.H. 794 331 A.2d 354 (1974)

38. A. WHETHER THE TRIAL COURT EXERCISED SOUND DISCRETION

B. TRANSCRIPTS OF ALL PROCEEDINGS IN THIS CASE ARE REQUESTED

C. - R.S.A. 526:1

- 6TH, 14TH Amendments to the United States Constitution

- Part I, Arts. 15, 17, 21 and 35 of the New Hampshire Constitution

- State v. Bullard, 16 N.H. 139 (1844)

- Leighton v. Sargent, 31 N.H. 119 (1855)

- Remmer v. United States, 347 U.S. 227 (1954)

39. A. WHETHER THE TRIAL COURT EXERCISED SOUND DISCRETION

B. TRANSCRIPTS OF ALL PROCEEDINGS IN THIS CASE ARE REQUESTED

C. - 5th and 14th Amendments to the United States Constitution

- Part I, Art. 15 of the New Hampshire Constitution
- Brady v. Maryland, 373 U.S. 89 (1963)
- Giglio v. United States, 405 U.S. 150 (1972)
- United States v. Perkins, 926 F.2d 1271 (1st Cir. 1991)
- State v. Dery, No. 88-098 (N.H. July 3, 1991) (Westlaw Criminal Justice Directory) 1
- State v. Ramos, 121 N.H. 863 (1981)
- State v. Breest, 118 N.H. 416 (1978)

40. A. MATTER OF LAW

B. TRANSCRIPTS OF ALL PROCEEDINGS IN THIS CASE ARE REQUESTED

C. - R.S.A. 526:1
- 6TH, 14TH Amendments to the United States Constitution
- Part I, Arts. 15, 17, 21 and 35 of the New Hampshire Constitution
- Sheppard v. Maxwell, 384 U.S. 333 (1966)
- Irvin v. Dowd, 366 U.S. 717 (1961)
- State v. Laaman, 114 N.H. 794, 331 A.2d 354 (1974)

EXHIBIT C

The State of New Hampshire

ROCKINGHAM COUNTY SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

VS

PAMELA SMART

90-S-1370, 71, 72

ORDER ON MOTION IN LIMINE RE: ENHANCEMENT OF TAPES

The Court has listened to both the original of all tape recordings of oral intercepts of conversations with the Defendant and has as well listened to enhanced versions of the same tapes. The Court finds no substantial differences between the originals and the enhanced copies, with the exception that the enhanced versions in some instances are clearer. The motion in limine is denied, however, the tape of the third telephone conversation of June, 19, 1990 is, in large part, inaudible with respect to the conversation by the Defendant. Because of that fact, the Court finds that the tape may unfairly present the conversation to the jury and therefore the Court rules that that tape may not be played to the jury unless the Defendant requests it. Whether the other tapes will be admissible will be treated in the Defendant's motion to suppress.

January 22, 1991

Douglas R. Gray, P.J.

A TRUE COPY ATTEST
CLERK

cc: Paul Twomey, Atty
Paul Maggiotto, Atty

EXHIBIT D

ORIGINAL ★ 91-239

VOLUME XV of XXI

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

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THE STATE OF NEW HAMPSHIRE

v.

PAMELA SMART

90-S-1370
90-S-1371
90-S-1372

TRANSCRIPT OF TRIAL PROCEEDINGS

Held before the Honorable Douglas R. Gray, Presiding Justice, and a Jury, at the Rockingham County Superior Court, Exeter, New Hampshire, commencing on March 5, 1991.

APPEARANCES:

For the State: Paul A. Maggiotto
Diane M. Nicolosi
Assistant Attorneys General

For the Defendant: Mark L. Sisti
Paul J. Twomey
Attorneys at Law

* * *

Court Reporter: William N. Wojtkowski, CSR

I N D E X

MARCH 14, 1991 - THURSDAY MORNING SESSION 9:12 A.M.

IN CHAMBERS:

THE COURT: This is a hearing in chambers on March 14th at 9:12 a.m. concerning the letters that were produced by the defense yesterday. It's apparently the defendant's position that the letters -- or the witnesses, specifically Lattime and Flynn, should be recalled for further examination on the contents of these letters. I'll let defense counsel speak for themselves.

MR. SISTI: Thank you. Our position's based primarily on Part 1, Article 15 of the New Hampshire Constitution, production of all proofs favorable for the defendant in such a proceeding, along with the right to confront witnesses effectively in adherence to the Sixth Amentment of the United States Constitution and the Fourteenth Amendment to the United States Constitution. Specifically with regard to the letters that we've obtained, I guess for purposes of this record we should have them marked for identification as a packet at some juncture. The letters allude to, in

general terms -- I can get more specific -- the very reasons that these gentlemen agreed to take the pleas themselves, which vary from the answers that were given on cross-examination and direct examination, already in the record at this particular trial. In fact, there's one specific reference, and I believe it is in Mr. Lattime's letter, one of Mr. Lattime's letters, that they were in a position where it was either Pam or us, and that I think is a direct quotation. There are other allusions to being forced to take the pleas, having to plead because Pam would testify against them, and there's also an allusion to somebody telling them that Pam was prepared to testify against them. I would add for the record that no way, shape or form has any negotiations with regard to Pamela Smart testifying against any of these three co-defendants ever taken place, period. I mean, we've never had even such a formal or informal request on the part of the Attorney General's Office or any law enforcement officer for Pamela Smart to testify against the three juveniles, eventually

certified as adults. That is an absolute fantasy, if not a lie.

Additionally, specific reasons why we should be reopening our cross-examination, there's reference to razors and sulphur in packages or envelopes that would be located within the cell, I believe of the Flynn-Lattime cell, the cell that's shared by both of these individuals. The letter is a fairly recent letter. I believe it is dated either February or March, which raises a concern with regard to whether or not Flynn, Lattime, and even Randall were ingesting cocaine or illicit drugs during the course of their very testimony in the courtroom while they testified during the course of this trial.

I would suggest that, and we can bring in any law enforcement individual to testify, that razor blades and packaging and envelopes generally will lead one to believe that there could be the use of an illicit drug, especially in the context of the letters wherein I believe both Flynn and Lattime suggested that they were frightened that a guard, a correctional officer was about to

discover their particular stash in their cell.

Additionally, at another point during the course of the direct and cross-examination of William Flynn, there was tearful reactions with regard to violence and hurting people, and there was a suggestion on his part that he was remorseful for the terrible, senseless act that he committed. In a letter, I believe dated in early February, it could be just after in fact Flynn took his plea to second degree murder, there's a suggestion and in fact a direct reference to the lack of remorse with regard to violence, hurting people and so forth when there's a direct reference to him wrapping a pipe around another inmate's head. Again, this is an act of violence that I don't believe even Mr. Flynn could maintain was directed by Pamela Smart and would be gone into during the course of cross-examination.

There are numerous references, both in the Lattime and Flynn letters, with regard to a sick obsession with regard to Pamela Smart, and the sick obsession deals with, it appears, six or

seven scrapbooks of photographs or pictures that Flynn has collected, and I would say that these six or seven scrapbooks are probably the result of Flynn, Lattime, and perhaps Randall snipping newspaper articles and photographs from the general media, you know, newspapers or magazines, and keeping them.

Now, there's a problem with that. I think that on opening we attempted to illustrate that this was not some love-starved puppy dog, but a sick, obsessed individual. I think that that would go along with the defendant's theory of the case, and that the obsession of collecting six or seven scrapbooks of photographs and having that kind of contact with this particular case belies Flynn's direct and cross-examination with regard to a legitimate, quote, love for Pam Smart, and also would belie testimony of Randall, Lattime and Flynn perhaps with regard to whether they were closely following the case and whether or not they were rehearsing and trying to alter their testimony with regard to this trial. In other words, were they talking about the case.

I would add yet another specific point, that it seems clear that they were following the case very closely, and that in one of the letters from I believe Flynn to this Tubby at the State Prison, he relates the exact date that the jury was picked or jury selection was completed and makes reference to the entire jury in that particular letter. Again, this is a close following of the case. This is not some we just talked about our feelings about the case type situation.

I would suggest that there was close monitoring of the case and that that began at the very inception of the case, that being jury selection and the completion of jury selection and so forth.

We would ask Mr. Flynn specifically who told him that Pamela was going to plead guilty and testify against him, or whether or not Pam would be able to reduce a charge after a conviction by pleaing against him. Both of those suggestions, by the way, are false. One is legally impossible. The other one never took

place with regard to testimony against any of these individuals.

There is also a suggestion in one of Flynn's letters that they, quote, said Pam would plead guilty now so they, again direct quote from the letter, won't have to make me testify against her. Frankly, I want to know who "they" would be, and if Flynn points the finger at an individual that we then talk to and says that is not true, then that is a legitimate area of cross-examination. In fact, it's a legitimate area of cross-examination to start with because his understanding of the plea agreement had nothing to do with "they" saying Pam would plead guilty so they won't have to make them testify against her. If in fact his plea was induced by a suggestion that Pam was going to plead guilty if he pled guilty, we would suggest that again that would have been a lie. That was never even discussed. Pam was not going to plead guilty. I mean, we never went to the Attorney General's Office and said if you have Flynn plead guilty, we can assure you that Pamela

Smart would plead guilty. In fact, our conversations and the Court's well aware of this have been to the contrary as recently as yesterday morning and the day before that with regard to conversations.

The other thing is that this was a direct question with regard to remorse of Flynn wherein he said he was ashamed, embarrassed, he felt terrible about what he'd done and he felt sorry for the family of Greg Smart. In one of the letters Mr. Flynn would feel so terrible makes a direct reference to a February 4th edition of People Magazine and encourages his friend at the State Prison to get a copy of that. In other words, he's bragging about his role in this particular matter. He's not trying to hide his particular role in this matter. There's no indicia of remorsefulness with regard to this matter when he himself is saying you can generate information about me and what we did if you'll just look at a specific article in a People Magazine, February 4th edition. This belies his position that he's remorseful. It

belies the act that we claim took place on the stand with regard to the tears.

Additionally, in the Lattime letter there's an explanation -- in the Lattime letter there's an explanation of, quote, real -- being a real rat. Lattime explains to his friend Tubs that he would have received a five to ten year sentence if he, quote, testified against everyone. Well, the fact of the matter is Mr. Lattime did not receive a five to ten year sentence, so there must be either one individual or more individuals out there that he's not in agreement to testify against, or when he states that he was in agreement to testify against Randall, Flynn and anyone else that would have been involved in this particular matter, then this was a bold face lie on the stand under oath in front of the jury. If he in fact was prepared to testify against everyone, then he should be receiving his five to ten year sentence because that certainly would have been the negotiated disposition that his attorney would have asked for for the cooperation that

Mr. Lattime is giving. And I think that's it unless --

MR. TWOMEY: I'll add a couple things.

MR. SISTI: Go ahead.

MR. TWOMEY: Just these are about the same sort of things. If you assume that Lattime's telling the truth, it becomes an area of cross-examination because it means he's willing to spend a minimum of 13 years in the State Prison for those two gentlemen, for his friendship, not for his crime, but willing to go from five year minimum to 18 year minimum. That's 13 years of his life for that friendship. I think that's something powerful the jury should know. I think that's a very stark fact.

The photos, I don't recall, quite frankly, if it was five or seven books or five or seven photos. I just don't recall. But I do recall that in reading that it wasn't clear to me. Mark had the impression that these were newspaper photos and he said why that's important. There's something in there that made me think some of these photos may be actual photos Mr.

Flynn somehow secreted. For example, this is one thing that sticks out in my mind, he says at some point he sent a photo to Abrahams and something about we won't have any more, something like that. But why would Mr. Flynn send a newspaper photo to Mr. Abrahams, who is at the State Prison where people could get the same newspapers they can get down here? Pamela Smart's picture is in the paper almost every day of the week and almost every paper in the northeastern United States. The act of sending him a newspaper photo, you just have to have questions.

Now, Bill Flynn still has real photos of Pamela Smart somehow he secreted, and had something get to him. Then he lied on the stand. He also didn't fully cooperate with the State and turn over all the evidence.

Finally, on the jury thing. The remarks made about the jury are troubling in one other respect. That's his competency to be a witness at all. He took an oath and swore to tell the truth and swore to God, and the oath is to tell

the truth to that jury. Clearly, from that letter he has absolutely no respect whatsoever for that jury. Calls them names, and he has absolutely no respect to that jury. A proper question on cross-examination is, "Sir, do you have any respect for that oath you took?" And he may answer self-serving, he may tell the truth, but the question -- we have the right to confront him with his basic competency to give testimony.

THE COURT: State may proceed.

MS. NICOLOSI: Okay, I'm going through the defense points I guess as closely as I can to respond to them. Then I'm going to speak after it about the State's position. As I started out before we went on the record, saying that it was within the discretion of the Court to recall a witness and that implies it has to be something new and additional, something that would be beyond what the defense had an opportunity to cross-examine on when the witness was on the stand when the State presented him. In this case, everything the defense counsel spoke about, all the areas

of cross-examination that they would address, were adequately addressed in their cross-examination of the witness when he testified in court the other day, and that addresses the confrontation issue. They had perfectly free opportunity to ask him any questions about his motives to enter into this deal; whether he was doing it because he was fearful of Pamela Smart testifying against him; whether he was doing it for whatever reasons that they came up with. And Mr. Flynn answered all of those questions adequately, and whatever the jury's impression of that is we'll know at some point. But in any case, those areas were perfectly well addressed.

Likewise, the defense has had all its opportunity to present all proofs favorable. There is nothing new in these letters that hasn't been discussed by both the prosecution and defense when Mr. Flynn was on the stand. Motive and credibility are issues that have been raised. All of those is what cross-examination was all about the day Mr. Flynn

testified.

All right, let me go to the points that were addressed. Reference in the letter to Bill Flynn being forced to take a plea because of what he said in this letter. I just want in the record the language that's in this letter.

He says, "I'll never forget the day she told me that she testified against us if she got convicted. I fucking cried that night."

Well, that line doesn't suggest that Mr. Flynn came into this courtroom and testified as a lie. What it suggests is he felt he was compelled to come in and to plead guilty because there was substantial evidence that could be presented against him in court should she testify against him. And Mr. Flynn is absolutely a hundred percent right. This is a co-defendant, and any co-defendant that would take the stand and testify against the other one would end up offering very substantial incriminating evidence against the other. And I'm sure that all of the lawyers in this case advised their clients that that's one of the risks in this

case if they decided not to plead guilty and go to trial, at any point any one of the co-defendants could have decided to plead guilty or enter into a deal with the State and then offer substantial evidence against him. That's all this line says.

Now, even if that were an untrue statement as the defense has represented, and I don't know what's went on with their negotiations and their advice sessions with their client. I'm not suggesting that they misrepresented what's happening, but even if it was untrue that Pamela Smart ever planned to testify against Bill Flynn, it doesn't make any difference. All that would mean is that maybe his plea was involuntary. It doesn't raise any question about the truthfulness of his testimony whether his plea was involuntary. Doesn't necessarily mean he took the stand and lied. I mean, what this boy is concerned with, and he's absolutely right to be concerned with, is that she would testify and tell the truth against him, which would end up putting him in jail for the rest

of his life. If we read this legally, if Pamela Smart got convicted of first degree murder, she could be subpoenaed by the State of New Hampshire to testify. Whether she would do that or not, who knows? But she would have no Fifth Amendment right at that point. She would have been convicted.

MR. TWOMEY: Aren't there three indictments in Hillsborough County?

MS. NICOLOSI: Yes.

MR. TWOMEY: I thought there were.

MS. NICOLOSI: Anyways, let me move on from that point.

The second thing that was addressed was the reference to cocaine and the use of sulphur and razors in the letters. I'm not going to dispute that. Obviously, that is to do with drugs. There's nothing to suggest that any of these boys took the stand under the influence of drugs. None of them. They were all coherent. Nothing to suggest that. They all admitted that they had some drug use in their past. That somebody might use drugs in no way leads to the conclusion that he came to the stand to testify

under the influence of drugs. None of these people who testified denied that they had used cocaine. If anything, that's an issue perhaps the defense would like to put again before the jury because it becomes a question of whether these are nice boys. There has been no allegation that these three juveniles are nice kids. They steal and they do drugs and admitted that on the stand. There's absolutely nothing in these letters to suggest that Bill Flynn or Vance Lattime had used cocaine before they came in to testify.

The next thing that they address was Mr. Flynn's remorse about violent acts. What he was testifying to was shooting somebody in the head, and he cried during that and it appeared genuine, and the jury will make their call on that. His statement about wrapping a pipe around an inmate in a letter that he wrote to another inmate who is now presently sitting in State Prison doesn't have anything to do with what he testified about. You got to read these letters in context. Here we have a 16-year-old

about to go to State Prison at some point writing a fellow inmate and presenting himself as being pretty tough. If I were in Bill Flynn's shoes, I wouldn't go crying and moaning in my letters to my fellow prisoners in the State Prison. This is obviously some bravado, and doesn't raise any question to what he was testifying about in court.

The sick obsession that defense says they show about Pamela Smart, they already made the point through Flynn. He testified he was in love with her; testified even coming into court he still had feelings for this woman and didn't want to testify against her. He admitted on the stand that he had an obsession with this defendant. Again -- well, I read it as six or seven photos, not scrapbooks. I think it's pretty clear they are talking about photographs from the newspaper. When J.R. talks about sending the photo to his friend in State Prison, he says he's sending it because "you don't appear to have any newspapers up there," for whatever reason Abrahams doesn't have access to the

newspaper. It's one that he says, "I haven't even looked at." It appears that they are sharing with their friend pictures of Pamela Smart. It's not Bill Flynn's obsession. It's Vance Lattime, Doug Abrahams and probably other prisoners in State Prison with this same obsession, all of them, all the people who have been coming to this trial every day and have been calling Channel 9. Obviously, this is a big trial and it is the center of these kids' lives. They admitted on the stand -- when J.R. was asked what's the most important thing, he said, "Probably this case." So of course they've been cutting out pictures of Pamela Smart. This doesn't show anything at all about Bill Flynn's obsession. In fact, at another point in this letter Bill Flynn talks about a letter written to him by another strawberry blonde. Doesn't have anything to do with Pamela Smart.

The other thing, that point that was raised about these pictures is about the boys reading the newspapers. All of them testified that they had read the newspapers. Bill Flynn said that

he read them. He said in fact he had read in the newspaper just the day after he testified about the storage shed being on May 5th. There was no attempt on his part to deny that he read the newspapers. He said that they didn't talk about the substance of the case, and neither does the section that the defense counsel talks about when he was talking about jury selection. He was talking about his feelings. He was again saying he didn't want to testify against Pamela Smart because he has feeling for her. And he talked about the motion being filed by defense counsel to prevent them from testifying. He said, "I hope they don't make me testify." Talking about his feelings, not substance. Nothing there to suggest he lied to the jury and should be called back to be asked about that. Doesn't make any difference.

The next point, they talked about who told them the defendant was going to plead. Doesn't make any difference who told them the defendant would plead, if anybody told them that. The answer doesn't matter. The fact of the matter

is that the defendant had an awful lot of incriminating testimony that she could offer against Bill Flynn, and that was something that he should be and probably was concerned with. I'm not going through -- that same argument I mentioned in the first place applies to that point as well.

And again the section that they talked about, the possibility he would not be made to testify against Pamela Smart if she took the stand was a hope that he expressed, because, as he testified to, he didn't want to testify against this defendant.

Finally, the issue of remorse and People Magazine. These is no question these boys admitted on the stand this case was important to them. It's all they've got left in their lives. Referring People Magazine to Doug Abrahams doesn't suggest any lack of remorse on his part. He's bragging to a fellow inmate. These letters have to be read in context. This is exactly what we would expect him to be doing. Doesn't raise questions of the

credibility of him on the stand. Remorse isn't the issue; truthfulness is.

And the last -- well, Paul Twomey's point about that Lattime is going to spend 13 years in jail for this friendship. Again, none of these boys denied these friendships were powerful. In fact, their testimony was they were willing to go to trial and face life in prison without parole if all of them wouldn't plead together. There's no question about it. That's before the jury, and the defense has adequately presented evidence about that.

And lastly, the comment about the competency of these witnesses because of their oath because of this comment on the jury. Again, this is just bravado. He doesn't talk about anything. I mean, there's no question the defense wants this comment before the jury because it's prejudicial and because what juror wants to be called names, and for that reason might assist them in bringing up issues of Bill Flynn, but it doesn't raise any question of his competency as a witness. And I think it's clear

that the defense doesn't want to go into areas that they haven't covered in cross-examination. They have confronted Bill Flynn about his motives to tell the truth, about his motives to enter into this deal. They had full opportunity to do that when he testified. The reason why they want these letters in front of the jury is because this is a side of Bill Flynn that, of course, didn't come out in front of the jury, and there's no reason for them to see it. This is a boy who is in prison discussing things with another prison inmate, and it doesn't raise any issues of credibility.

MR. MAGGIOTTO: I just want to add one thing. You didn't say that the obsession with Pamela Smart is completely in front of this jury, and that's not only been testified to by Bill Flynn, but even when Patrick Randall and Vance Lattime were on the stand the defense fully explored that possibility, and I don't think I have anything else to add, Your Honor.

The one other thing I want to add, if you read all these letters together it's quite clear

that these boys have been under a lot of strain and pressure because they were testifying; that they've been warned, as I understand it, once they get to State Prison they're going to be fodder for every sort of abuse and attack that goes to people who testify at trials, and also because they're very young.

If you read these letters together you get an understanding that they're trying to explain to the prisoner or a State Prison inmate at the State Prison some reason or justification for their action which will some how lessen the assaults when they get there. And there's nothing in these letters which suggests they were lying, nothing in these letters which suggests anything they would say is untrue. In fact, just the opposite. Why would Bill Flynn be worried about Pam Smart getting convicted if he's the only one who can make up a lie to convict her, which is the theory of the defense. These letters suggest just the opposite; his fear is Pam would get convicted based upon the evidence and testify against him.

So Bill Flynn is doing this big lie and gotten Pete and Vance to go into this lie against her. If none of those boys were ever to testify, she would never ever be convicted. It just doesn't make sense along those lines.

MR. TWOMEY: Couple things.

THE COURT: Briefly.

MR. TWOMEY: Briefly. Very briefly. What the State has done is given you an interpretation, explanation, rationalization for the words in those letters, and I won't go through them. Some of them are farfetched, some are reasonable, rational interpretations. Perhaps those are the ones Bill Flynn will come and tell the jury. Perhaps they are not the ones he'll tell the jury. First of all, it's a nice closing argument, nice way to explain it away, but not the answers to the questions in front of the jury. This is a side of Bill Flynn the jury -- that didn't come in front of. You bet that it's a side that didn't, and that's why we want to let the jury see that side of Bill Flynn. That's what -- the State doesn't want that. It says the jury

impression of Bill Flynn has been formed. Yes, it has, without access to this information. Perhaps the jury will reform it. Perhaps everybody in that courtroom will reform it when they see the other side of Bill Flynn.

State says perhaps his plea was involuntary if one of his statements is true, nothing to do with the testimony. The plea and his testimony are part of a whole. They obtained the plea through him telling them a story the first night. There's two agreements here where he had to come in and be debriefed. He had to tell that story to get the plea. Plea involuntary? Same thing motivated the plea motivates the story. His testimony is a derivative result of the plea. Mincey v. Arizona says evidence cannot be used in court for any purposes whatsoever if the plea is involuntary. It then becomes a question, remove the involuntary plea and see what the individual would say then. Doesn't mean the person can't testify, but you remove the coercion of this and see what they would say. The thing about the girl doesn't have anything to do with

Pam Smart. I don't want to get into the details, but I don't know how anybody can read that other than saying he's talking about a girl who looks like Pam Smart and makes reference to it. If my memory's wrong, first of all, he calls the girl Smart, which is interesting. Right after that -- let me take back what I said. It isn't right after that. I was going to say, 23 years old. I guess that's not Pam Smart. Short. Pam Smart, she must be seven feet tall or something. I mean, these descriptions of this woman is -- he says just my type. I mean, I don't know what to say. That's not something to do with Pam Smart?

MR. MAGGIOTTO: No one disputed that.

MS. NICOLOSI: I didn't say that. I said that this boy is obviously -- I mean, there's no question this kid got on the stand and said he was in love with this woman. He killed for her. What more do you want? I didn't say that. I'm saying he's in prison talking about other women or other girls with other prison inmates. I mean -- go ahead.

MR. TWOMEY: The question about -- the last thing I'm going to say, last thing about the obsession, yes, he admitted at one point he was obsessed with Pam Smart, and, yes, the other boys testified that approximately a year ago he was obsessed with Pam Smart. This evidence shows that right now, today, he is obsessed with Pam Smart. He did not testify to that. He said he still had -- I think the way you put it, he still had feelings for her, right? Still had some feelings. Little bit different than obsession.

MR. MAGGIOTTO: For the record, that's why I think the letters don't support what the defense is trying to say, because if that is true why would he come into court and lie against someone he's obsessed with and in love with? When the letters are read, there's nothing new that the defense hasn't jumped all over.

I think what happens is Bill Flynn walked out of this courtroom and for some reason wasn't dirtied enough in the defense's eyes and they want another crack. I think it's pulling on straws, but I think I've said enough.

THE COURT: The Court has reviewed all of the letters. The Court finds nothing in the letters which could not have been inquired into on cross-examination. The State's motion to recall either Flynn or Lattime or both is denied. Exceptions noted.

MR. MAGGIOTTO: You said the State's motion to recall.

THE COURT: I'm sorry. The defense motion to recall either of these for further cross-examination is denied.

Let's go. We're keeping the jury waiting.

MR. TWOMEY: Could I ask one question about this? Our motion was to recall them for cross-examination. Has the Court at this point ruled -- I didn't understand this was before the Court whether or not we can call them as witnesses in our case in chief?

THE COURT: I never heard of that, but --

MR. TWOMEY: I haven't thought it through.

MR. MAGGIOTTO: Seems to me you're trying to get around the judge's order.

THE COURT: I mean, if that were the case, you could call every other witness, including their tape expert back as part of your case. I've never heard of that being done before. Sometimes it's

done in civil cases when one side calls the other party and, you know, plaintiff calls the defendant, and the defendant's lawyer says, "I reserve the right to call my own client to put in my own case." I don't know of any right to recall every witness the State's called.

MR. TWOMEY: I don't either. I'll look it up.

THE COURT: After a full opportunity to cross-examine.

MR. TWOMEY: I want to say something. I think you should know a witness, whom I'm not going to reveal now, who testified for the State called us yesterday and said, "I have something important you should know and nobody asked me about it." We're going to investigate that and may call another one of the State's witnesses back.

THE COURT: All right.

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[In chambers hearing concluded at 9:47 a.m.]

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IN OPEN COURT BEFORE THE JURY - 9:53 A.M.:

THE COURT: Good morning. State may proceed.

MR. MAGGIOTTO: State calls to the stand Detective Daniel Pelletier.

DANIEL PELLETIER,

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MAGGIOTTO:

Q Detective, maybe you could put the file on the table in front of you to get a better look.

Detective, in a nice clear voice, would you please repeat your name for everyone in the jury, and spell your last name for the reporter.

A My name is Daniel Pelletier. It's P-e-l-l-e-t-i-e-r. I'm a police detective with the Town of Derry, New Hampshire.

Q Detective, I'm going to ask you to sit a little closer to the microphone and speak into the mike, okay? There's water on the table that was put there for you.

Detective, by whom are you employed?

A By the Derry, New Hampshire Police Department.

Q How long have you been employed by the Derry, New Hampshire

Police Department?

A Seven years.

Q And what is your current rank?

A I'm a detective.

Q How long have you been a detective?

A Three-and-a-half years.

Q Before being a detective, what was your position?

A I was a patrolman.

Q Calling your attention to May 1st, 1990, did you have occasion to become involved in the investigation of the murder of Gregory Smart?

A Yes, I did.

Q How did you become so involved?

A I was contacted at my residence at about 10 o'clock at night, 10:15 at night to respond to the Derry Police Department.

Q When you got to the Derry Police Department, what happened after that?

A I met with other Derry police detectives and we went to 4-E Misty Morning Drive.

Q Do you recall about what time you got to 4-E Misty Morning Drive?

A It was somewhere in the area of 11 o'clock.

Q And what happened once you got to 4-E Misty Morning Drive?

A We met with Captain Jackson, the division commander of the Derry Police, and we were assigned different functions. I videotaped the exterior-interior of the crime scene.

Q And besides videotaping the exterior and interior of the crime scene, what else did you do at that time? Anything else?

A At that time I also walked around the outside of the building and looked around and talked to see what other people had already done at the investigation.

Q Did you have occasion on that evening to meet Pamela Smart?

A Yes, I did.

Q Is she in the courtroom?

A Yes, she is.

Q Would you just please identify her.

A The young lady in the pink suit at the defendant's table.

Q What time did you meet the defendant that evening?

A It was 1:22 in the morning.

Q So we're talking about now May 2nd?

A That's right.

Q Where is it that you saw the defendant?

A She was at her in-laws' house, Mr. William Smart's house, and it's the road that's down the street from the condominium.

Q How far was that from the condominium?

A It was about a three minute drive.

Q When you got to Mr. Smart's house, who else was there?

A There were several people there, relatives and friends of the Smarts, and Pamela's mother and father and other friends.

Q What was the purpose of going to see the defendant at this time?

A We were going to get a consent search so we could search the condominium, and also so that we could search Greg Smart's truck parked outside the front of the condominium.

Q What do you mean by a consent search?

A Consent search meaning that the owner of the -- or the renter of the condominium gives us her consent to search the interior of the condominium and the interior of the truck.

Q Where did you talk to the defendant at Mr. Smart's residence?

A We walked in, we went upstairs, and she was sitting in the living room, and she got up out of the living room, came over to us, and we had to sit down in the kitchen where there were less ears, little more quiet.

Q How did she appear at that time?

A When I first saw her, her head was in her hands and she had a sad expression on her face, and she got up out of the

chair, walked over, and she sat down.

Q What, if anything, did she say to you at that time?

A I don't recall specifically what she said. She asked a couple of questions. I don't recall exactly what they were.

Q What was the substance of what she said?

A I don't know. Had to do with what had happened that evening.

Q Did you get the consent form signed?

A Yes, I did.

Q Did you have any hesitation on her part signing the consent form?

A No, she said she wanted to do anything she could to help, and she signed the consent form.

Q After you got the consent forms, what did you do?

A After that I took the two consent forms, one for the truck and one for the condominium, and I brought them back to the crime scene at 4-E Misty Morning Drive.

Q What did you do with those consent forms?

A I handed them over to Captain Jackson and the Attorney General's Office, who were at the crime scene.

Q Now, how long were you at Mr. Smart's residence talking to the defendant when you got the consent forms signed?

A Only 15 minutes or so.

Q And when you brought them back to the crime scene, you said you handed them over to who?

A To Captain Jackson and a member of the Attorney General's Office, Cynthia White.

Q What happened at the crime scene after the consent search forms were signed?

A The State Police conducted the processing of the house -- the condominium.

Q Now, did you partake in that processing of the scene, or was that handled strictly by the State Police?

A That was handled by the Major Crime Division of the State Police.

Q Now, who was handling the investigation -- who would be handling the investigation of the murder after the processing of the crime scene?

A It would be the Derry Police Department.

Q And who in the Derry Police Department was assigned this case?

A I was the lead investigator.

Q What does it mean to be the lead investigator?

A I take care of all the paperwork that comes in and coordinate what happens with my captain, the supervisor.

Q And when you say you coordinate with your captain, that

means Captain Jackson?

A That's right.

Q Did you have occasion to see the defendant again that night?

A Yes, I did.

Q Can you tell us where that was?

A Again, it was May 2nd at 2:30 in the morning or so, I went back to the residence where she was at the in-laws' house, William Smart's house.

Q Who did you go back there with?

A Myself and Detective Barry Charewicz.

Q And you say 2:30 in the morning. This is about an hour after you got the consent forms signed?

A That's right.

Q Why did you go back at that point?

A When we were originally there, several people were in the house, including Pamela's mother and some of her friends, related to myself and Detective Charewicz that she wanted to talk to us, and she was wondering why we wouldn't talk to her right away, and wanted to tell us some things that she thought might help us out.

Q So when you went back there at 2:30, what happened?

A We went back and we met her there. She came down the stairs, and several of her friends also came with her, and

she was willing to talk to us, she wanted to come and talk to us, so we had her --

Q I'm sorry?

A We had her follow us to the Derry Police Department where less people and more controlled environment, where we could talk more quiet.

Q How far is the Derry police station from Mr. Smart's condominium?

A It's only a few miles.

Q So what happens at the police department?

A We got to the police station, and we -- she came inside, sat her down in an interview room, her, myself and Detective Charewicz.

Q Were any of her friends or family members present at this time?

A No, they didn't come into the inverview room with us.

Q And what did you do at that point?

A She started to tell us some things. We got a little bit of background, what happened when she came home, what she saw when she came home.

Q Can you tell the members of the jury what the defendant said she did when she came home that night?

A She said she arrived home, all the lights were off in the

house. She parked her car, walked up to the door, put the key in the door, turned the key. When she pushed the door open, she said she noticed Greg's foot. After turning on the light, she looked at Greg's foot, opened the door a little more, noticed he was laying in the foyer on his stomach with his face facing her. She said she also noticed there was a candlestick, she thought it was by his head. She also noticed what looked like a blue pillow by his head, and she also mentioned that she saw a speaker that was taken off the stand that was in the living room.

Q And after she opened the door and saw this, what did she say she did next?

A She said she immediately -- she knew that she shouldn't touch a dead body because of shows she watched like Rescue 911 and shows of that nature, and she ran out of the building, she started to scream.

Q Now, the defendant say that she thought the body was dead, Greg was dead?

A I don't recall whether she specifically said that. She said she knew she shouldn't touch a body.

Q Then what did she do?

A Turned around and ran out and began to scream for help.

Q Did she say where she went screaming for help?

A Yeah, she ran to a next door neighbor's house, banged on the door, said she got no response from them, so she banged on another door and finally someone came out.

Q Now, after May 2nd, 1990, did you speak to her again?

A Yes.

Q And when was that?

A May 3rd.

Q By the way, after you spoke -- when you were speaking to her on May 2nd, 1990, did you then let her make out a written statement of what happened?

A Yes, I did.

Q Now, after speaking to her on May 2nd, when was the next time you talked to her?

A It was May 3rd.

Q What was the purpose of speaking to her on May 3rd?

A Wanted to get a list of names of people in the residence in the recent past that may have left fingerprints around the house for elimination purposes.

Q What do you mean when you say elimination purposes?

A Anyone, a friend of hers, a relative or someone she knew was in the house, if they touched anything, if they find fingerprints in there, there's a reason why they're there.

Q When you asked for names, did she provide them to you?

A Yes, she did.

Q Tell us what names she provided you with at that time.

A There were nine names. I'd have to refer to the report to tell you all of the names.

Q If that would help you refresh your recollection --

A Yes.

Q -- go right ahead.

A [Witness reading.] Okay, the names which are on page 51 of the police report are --

Q Hang on a second.

MR. TWOMEY: That's fine.

Q Go ahead.

A Thomas and Heidi Perilla, Christopher and Sonia Simone, William and Judy Smart, Yvonne Pellerin, Stephen Payment and Richard Lafaunt.

Q Was the name Cecelia Pierce mentioned at that time in any fashion?

A No, it wasn't.

Q How about the name Bill Flynn?

A No, it was not.

Q Now, How many detectives were working on this case with you?

A From the outset, there were six detectives originally assigned.

Q And can you tell the members of the jury after the first couple of days or right after the homicide, what was the Derry Police Department engaged in, what's the nature of the police work at this point?

A Okay, from here the thing we want to do is find out background information on everyone directly involved and work out from there. They took Pamela Smart, Gregory Smart and started doing background on them. Any names of friends she gave us we started doing background on them.

Q How far did your leads take you?

A We got some tips and leads that brought us to New Jersey, some tips and leads that brought us to Massachusetts, and several in New Hampshire.

Q Now, during the course of your investigation, did you ever speak with one Cecelia Pierce?

A Yes.

Q And when was the first time you spoke with Cecelia Pierce?

A On May 17th, I contacted Cecelia Pierce by telephone.

Q And why were you contacting Cecelia Pierce?

A On May 9th Pam Smart gave us Cecelia Pierce's name as a friend of hers that wasn't a common friend between herself and her husband.

Q Did she contact you or did you contact her on that day, May

9th?

A I don't recall which way it went.

Q What was the purpose of the information that she gave you about Cecelia?

A We asked for friends that weren't common between herself and her husband, friends that weren't friends of Greg's that were specifically and exclusively friends of hers.

Q And she gave you the name Cecelia Pierce?

A Yes. And also the name of Ann Pierce.

Q Did she mention Bill Flynn?

A No, she didn't.

Q So when you called Cecelia Pierce on 5-17 (sic), did you eventually speak with her?

A Yes.

Q Now, calling your attention to June 10th, 1990, were you working that day?

A No, I wasn't.

Q Did you have occasion to take any official police action on that day even though you weren't working?

A Yes, I did. I was home, again got a call at about 4 o'clock in the afternoon, and that was from the dispatcher at the Derry Police Department. That was to respond to the Seabrook Police Department for a lead in this case.

Q Now, when you got to the Seabrook Police Department, were there any other members of the Derry Police Department there?

A Yes, Detective Barry Charewicz, Detective Michael Surrette and Captain Warren Jackson.

Q Now, is this a common occurrence in the Derry Police Department to be called in on a day off if something happens?

A Yes, but not in that number of detectives.

Q So when you got to the Seabrook Police Department on June 10th, 1990, what happened?

A I met with Captain Jackson and Detective Charewicz, and Detective Charewicz had done some interviews of some people from that area that had come into Seabrook Police Department.

Q Do you know who Detective Charewicz had interviewed?

A Yes, he interviewed Vance Lattime, Senior, and interviewed Ralph Welch.

Q Did you have occasion to review those -- that interview of Ralph Welch?

A Yes, did.

Q How did you review it?

A There was a videotape of the interview between Detective Charewicz and Ralph Welch that I watched when I arrived at

the Seabrook police station.

Q Now, after arriving at the police station, what did you do?

A I also -- I watched all the interviews and started to put together some information for furtherance of the investigation.

Q Did you go anywhere?

A Yeah, myself and Detective Lucier, who also showed up at the scene, went to the Smart -- Pamela Smart condominium in Hampton.

Q When you say Pamela Smart's condominium in Hampton, this is different than the condominium in Derry, correct?

A That's right.

Q And you went there with who?

A Myself and Detective Paul Lucier of the Derry Police Department.

Q Do you recall approximately what time it was that you went there?

A I don't recall offhand, no.

Q When you got there, what did you see?

A We saw a vehicle that was parked out front that was registered to Michael Welch.

Q Where was this vehicle parked?

A It was parked in the driveway of Pamela Smart's Landing Road

condominium.

Q Now, besides seeing this car parked in the driveway, did you see the defendant's car?

A No, I didn't.

Q Were you familiar with what kind of car the defendant drove?

A Yes, I was.

Q What kind of car was that?

A It was a Honda CRX.

Q Did you check the garage, see if the car was in there?

A No, I didn't.

Q Why not?

A There was someone in the window. When we drove by Detective Lucier noted there was a female that was looking out the window, looked like the silhouette of a female.

Q Did you then continue on?

A Yes, we drove through.

Q What kind of car were you in?

A We were in an unmarked police car.

Q What does an unmarked detective car look like in Derry? Like an unmarked detective car or --

A This was an undercover car. It wasn't an unmarked LTD.

Q You went where?

A Seabrook police station.

Q When you went back to Seabrook police station, what did you do?

A We got the names of other people who could corroborate the stories that -- the information that we'd learned from Ralph Welch and the other people who were interviewed.

Q And after doing that, what happened next?

A We --

Q What else happened?

A We went and interviewed those people who we learned could corroborate the information.

Q Did you conduct any searches that evening?

A Yes.

Q Can you tell us what searches you conducted?

A Detective Surrette had interviewed Raymond Fowler, and Raymond Fowler had told him that some of the clothing or there was an article that was involved with the case that was thrown on the side of the road in the Town of Seabrook. Myself, Detective Surrette and Raymond Fowler drove along the road and Raymond Fowler was pointing out spots where he thought this item might have been. We never found the item.

Q What else did you do that evening?

A It was the following day that we started to get into other aspects of the investigation.

Q Okay. I'm sorry. So when I assert, you didn't conduct any other search that night, correct?

A That's right.

Q Do you recall who was interviewed on that day and the following day?

A On the following day, Cecelia Pierce was interviewed.

Q Okay. I'll get to that interview in a second.

What other searches did you do then the following day?

A The following day we searched the residence of Vance Lattime, Senior, and the residence of Patrick Randall.

Q What authority did you have to search the residence of Vance Lattime, Senior, and Patrick Randall?

A I obtained a search warrant through the Hampton District Court.

Q Who engaged in the search of Vance Lattime's house?

A It was myself, Captain Jackson and Detective Charewicz, Detective Carlene Thompson -- Detective Carlene Thompson of the Seabrook Police Department, and there were two uniform Seabrook police officers also.

Q When you got to Mr. Lattime's house, what, if anything, did you recover?

A We recovered a set of Kenwood truck speakers with eight inch speakers inside a case.

Q Can you tell the members of the jury where these truck speakers were when you recovered them?

A The truck speakers were in a bedroom identified by Mrs. Lattime as Vance Lattime's or J.R. Lattime's.

Q Were they just sitting in the bedroom hooked up? Can you give us some idea how they were in that bedroom?

A Yeah, the two speakers were on a handmade plywood box. The box had -- a car stereo was hooked into it, too. The speakers were hooked up to that car stereo.

Q What time did this search take place?

A It was in the area of 8 o'clock in the evening on June 11th.

Q June 11th?

A Right.

Q Detective, I'd like to show you what's been marked as State's Exhibit 42-A into evidence, and ask if you recognize this?

A Yes, I do.

Q What do you recognize this to be?

A This is one of the speakers that I recovered from the Lattime residence on June 11th.

Q Showing you 42-B. Do you recognize that?

A Yes, I do.

Q What do you recognize it to be?

A This would be the other speaker that was recovered that day.

Q How is it that you recognize these speakers?

A These tags were placed on the speakers by Detective Charewicz, and my initials are also on there in Magic -- in marker.

Q When you went to the Lattime residence that evening, were you specifically looking for these speakers?

A Yes.

Q Beside searching the Lattime residence, where else did you search?

A There were other officers that searched the Randall residence.

Q Besides searching the house of Mr. Lattime, did you search any other parts of his property?

A Yes.

Q What was that?

A We searched a trailer that was in the back of the residence.

Q And did you recover anything from that trailer?

A No, we didn't.

Q Was anything recovered, to your knowledge, from the Randall residence that evening?

A No, there was nothing -- there was something recovered. There was a knapsack that was recovered from there.

Q Now, was Vance Lattime at the Lattime residence that evening?

A No. J.R.?

Q I'm sorry.

A Vance Lattime, Jr. was not at home.

Q I misspoke. That's what I meant to say, Vance Lattime, Jr.

A No, he was not.

Q Pete Randall?

A No.

Q Was Bill Flynn?

A No.

Q Were you looking for any of those individuals?

A At that point we had arrest warrants for all three of them.

Q Did there come a time on June 11th, 1990 when you saw any of those individuals?

A Yes.

Q When was that?

A We returned to the Seabrook police station after finishing the searches. We were advised that the three of them were at a movie, and someone from Seabrook Police Department had checked out the movie -- I don't know where it is, somewhere in Seabrook -- the movie house to see if they were there. After we went back to Seabrook, the three of them turned themselves in to Seabrook police station.

Q Who were they accompanied by when they came into the Seabrook

police station?

A William Flynn's parents were there. I believe Vance Lattime's were there, and possibly Patrick Randall's parents.

Q Now, that evening that you conducted or searches were conducted of the Randall and Flynn -- I'm sorry -- Lattime and Randall residences, any search conducted of the Flynn residence?

A No.

Q Now, you said earlier that you -- also one of the people you had an opportunity to speak with was Cecelia Pierce?

A That's right.

Q Now, when was this interview of Cecelia Pierce?

A It was somewhere around 4 or 5 p.m. of June 11th.

Q This would have been before the search of the Lattime's and before the arrest, is that correct?

A Yes.

Q This would have been the second or first time that you spoke to Cecelia Pierce?

A I spoke with her once on the phone. Detective Charewicz talked to her once. And this would have been the second time I talked to her.

Q Okay. You spoke to her on the phone I believe you stated May 17th, is that correct?

A That's right.

Q Do you know when Detective Charewicz spoke with her?

A On May 21st.

Q Were you part of that interview?

A No, I wasn't.

Q On June 11th, how was it that Cecelia Pierce was contacted by the Derry Police Department. Did you contact her or did she just happen to walk in?

A We contacted her to talk to her.

Q And where would the interview take place?

A When she arrived, we brought her back to the detective's office at the Seabrook Police Department.

Q When you say "when she arrived," who was with her when she arrived?

A I didn't see her arrive. When I went out to the hallway to meet her after learning that she was out there, I saw Pamela Smart, Cecelia Eaton, who is Cecelia Pierce's mother, and Cecelia Pierce in the hallway.

Q Now, then you saw the defendant, did she say anything to you?

A Yeah, she said, "What's going on?"

Q Did you have any conversation with her?

A I told her I didn't want to talk to her at that point.

Q How did she appear to you?

A Excited, nervous.

Q And when Cecelia Pierce -- I'm sorry. After having that conversation with the defendant, what did you then do?

A When we were finished talking to the defendant?

Q When you were finished talking to the defendant, what did you do is what I mean?

A We brought Cecelia Pierce back to the detective's office at Seabrook Police Department.

Q Who was part of that interview?

A Myself, Captain Jackson and Detective Charewicz.

Q How long did that interview take?

A Approximately 15 or 20 minutes.

Q Fifteen or 20 minutes?

A Right.

Q And who was present for that interview?

A Myself, Detective Charewicz, Captain Jackson, Cecelia Pierce and Cecelia Eaton.

Q Cecelia's mother?

A Right.

Q How did Cecelia Pierce appear during the interview?

A She appeared nervous. Her -- she was looking at the ceiling. She didn't want to look at us when we were talking to her.

I conducted the interview. She sat across from me. As I was talking to her she crossed her arms and legs and sat back and would stare at the ceiling like she had something better to do.

Q At some point did she leave?

A Yes.

Q Did she say why she left or why she had to leave?

A She said she had a driver's ed appointment she had to keep.

Q Now, after talking to Cecelia Pierce on June 11th -- what day of the week was this?

A June 11th was a Monday.

Q After speaking to her on that night, did you ever have occasion -- let me rephrase that.

When was the next time you saw her?

A The next time we saw her was June 14th.

Q How did you see her?

A I was -- I received a phone call at my residence to go to the Derry Police Department to conduct an interview of Cecelia Pierce.

Q Just for background, on June 11th did Cecelia Pierce give you any information or knowledge she had about the murder of Gregory Smart?

A No, she did not.

Q She denied having any?

A Yes, she did.

Q And do you know what her statement was at the police department on May 21st to Detective Charewicz?

A Yeah, she was asked if she knew anything of this, and she said no.

Q So that would be the second time she denied it to you on June 11th, is that correct?

A That's right.

Q How did the Derry Police Department react to that denial by Cecelia Pierce?

A Which denial?

Q On June 11th.

A We told her that we didn't think she was telling the truth and knew she was hiding something.

Q How did she react to that?

A She said she didn't know anything. She continually said that, and she appeared nervous and she didn't want to talk to us anymore, said she had something to do.

Q Was she threatened in any way?

A No, she wasn't.

Q Captain Jackson say anything to her?

A Yeah, he said if she continued her actions that she may be

guilty of harboring or hindering an investigation.

Q How did she react to that?

A She continually said she didn't know anything.

Q Was Mrs. Eaton present during that?

A Yes, she was.

Q At any point did Mrs. Eaton -- I'll withdraw that question.

And this all took place within the interview on June 11th, within the 20 minutes or so?

A That's right.

Q Now, how did you first see Cecelia Pierce on June 14th?

A When I received a phone call to respond to the Derry Police Department. I arrived there at around 11 o'clock in the evening.

Q Where were you at that time?

A I was at home.

Q Is that happening to you a lot in this case?

A Yeah, it is.

- - -

[Laughter.]

- - -

Q So after being called at home at 11 o'clock on June 14th, what happened when you got to Derry Police Department?

A When I got there, I met Sergeant Byron and Captain Jackson

of the Derry Police Department up in the detectives' office. Cecelia Pierce was also up in the detectives' office with her mother, and there was a representative from the Attorney General's Victim-Witness Advocate Office there also.

Q What happened at that time?

A I met with Sergeant Byron. Sergeant Byron said he had talked to her somewhat on what she wanted to tell us, and that she had information linking Pamela Smart to the murder.

Q Did she give a statement at that time?

A Yeah, right after that we did a videotaped interview, and I ran the videotape while Sergeant Byron conducted the interview.

Q So Sergeant Byron conducted the interview and you ran the videotape during the statement of Cecelia Pierce?

A That's right.

Q What time of night did that videotaping process start?

A Somewhere around 11:30.

Q How long did the statement take?

A Approximately -- not more than half an hour.

Q How long did you talk to Cecelia Pierce before taking this statement?

A I personally only talked to her for five minutes or so.

Q So you got called at 11, you got to Derry and went to the

police department at what time?

A It was sometime between 11 and 11:30.

Q And how long after you got there did you do the videotape?

A It was just a short time. I talked to Sergeant Byron, who decided he should do the interview since he'd already talked to her that evening.

Q Now after interviewing Cecelia Pierce on that evening, did you have any further involvement with Cecelia Pierce in this case?

A Yes.

Q Can you tell us what that involvement was.

A After the taped interview, she got something to drink from our Coke machine downstairs, and she was just talking to us. She seemed more relieved than I'd seen her previously on June 11th. She was more relaxed after that.

Q But after that night, my question was actually addressed to after that night, did you see her or have any further involvement with her?

A Yes.

Q When was that?

A On June 19th.

Q Tell us what the purpose of your involvement with Cecelia

was on June 19th.

A On June 19th we conducted a one-party consent telephone tap at Cecelia Eaton's -- Ceceila Pierce's residence in Seabrook.

Q When you say "one-party consent telephone tap," what do you mean.

A That's a telephone conversation that's recorded by the police in which one of the parties in the conversation consents to have that conversation recorded.

Q Who was the person who consented in this case?

A Cecelia Pierce.

Q Did you discuss that with her before doing this one-party consent telephone tap?

A Yes, on June 11th we had talked with her about -- I'm sorry, not June 11th -- on June 14th when she came to the Derry Police Department, after that interview we had talked to her about possibly wearing a body wire or doing something of that nature.

Q When you say June 14th, talking to her, you mean actually the early morning hours of June 15th, correct?

A That's right, yes.

Q What time of day was it that you were at the Pierce residence?

A It was just before 3 o'clock.

Q And who was there with you?

A Myself and Captain Jackson.

Q And besides you and Captain Jackson, who was there with Cecelia?

A Cecelia's mother was there and her father or step-father and her sister were in the house but had left when we conducted the actual telephone tap.

Q And can you give the jury some indication of the type of equipment you were working with at this point?

A Yeah, we brought a telephone with us. We brought two microcassette recorders and tapes to go along with that. The microphone we were using was a suction cup that you can buy anywhere. It plugs in the microcassette recorder. Also earphones to listen as the conversation is being taped.

Q Where does the suction cup go?

A On the receiver of the telephone.

Q Plugs into one of the microcassettes?

A Right.

Q That is for the purposes of picking up the conversation coming over the phone?

A. That's right.

Q What was this earphone you were speaking about?

A The earphone was plugged into the machine also and I had it in my ear so I could listen to what the defendant was also

saying while Cecelia Pierce was talking to her.

Q You said the defendant. Who were you going to have Cecelia Pierce call, the defendant?

A Pam Smart, yes.

Q Where was she going to call the defendant?

A Pamela Smart was at work at that time at the SAU 21 building in Hampton. We had Cecelia Pierce call her there.

Q And prior to having Cecelia Pierce -- you know, I think I asked you this, the earpiece goes to the microcassette so you can hear the conversation, too?

A That's right.

Q Okay. I'm not sure I brought that up.

Prior to placing these phone calls or this phone call to the defendant, did you have any conversation with Cecelia Pierce as to what she should do on the phone?

A Yes, we did.

Q What was that?

A We told her we wanted her to call Pamela Smart and give the impression that the police were on their way over; they had just called from their car phone, they'd be there any minute and she was sick of lying, she didn't know what she should say.

Q So you were feeding these lines to Cecelia Pierce?

A Yes, that's right.

Q And how did you decide to choose these specific topics?

A From the interview that we had done on June 14th, we learned specific information that Cecelia Pierce knew that Pamela Smart had that implicated her.

Q Did you give her any list of questions? Did you write anything down for her?

A On June 19th we didn't write anything to put in front of her before she called. What we did was, we told her verbally what she should say, instructed her what to do, and as she was talking to Pamela on the phone, as I was listening, we were writing things down that she should say as she was talking.

- - -

[Pause - Document shown to defense counsel by Mr. Maggiotto.]

- - -

MR. MAGGIOTTO: Can I have this marked for identification, please.

I think, Your Honor, the parties can agree that there's only one side of this sheet of paper relevant. I believe I have a Xerox copy of the one side. When the jury wishes to look at it,

I can provide that to the jury, if that's in agreement.

THE COURT: All right. Why don't you mark that one side -- one-sided document as the exhibit then, if it's a true copy.

MR. MAGGIOTTO: If I can find it quick enough.

THE COURT: May I see them both.

- - -

[Documents handed to the Court by Mr. Maggiotto.]

- - -

THE COURT: True copy.

- - -

[State's Exhibit 78, being police questions for Cecelia Pierce, marked in evidence.]

- - -

BY MR. MAGGIOTTO:

Q Okay, Detective, showing you what's marked as State's Exhibit Number 78 as a copy of your original note paper, are those the comments that you had provided to Cecelia Pierce?

A Yes, they are.

Q Can you tell the members of the jury what types of things you had written down?

A Yeah, the first line is, "The cops are on their way over. They just called on the car phone."

One of the other things we wrote is, "I don't know what to say when I'm under oath."

One of the other things is, "I'm scared. I don't know what to do. What if they ask about you and Bill and what about when I walked in on you and Bill when you were in bed?"

Also, "Why did you have to have him killed or kill him? You should have just divorced him."

Q And this is stuff you were writing down while she was on the phone?

A That's right.

Q What was Cecelia Pierce's reaction upon your request to do this phone tap?

A On the request on June 19th?

Q Right.

A She wanted to do it. She was willing to cooperate with us.

Q And you discussed that with her mother as well?

A Yes.

Q What time was the first call placed?

A It was 2:55 in the late afternoon.

Q Who dialed the number?

A Cecelia dialed the number.

Q Can you tell us where this was going on in the Pierce residence?

A It was in their kitchen. We were seated around the kitchen table.

Q Who was there?

A Myself, Captain Jackson, Cecelia Pierce and Cecelia Eaton, her mother.

Q Now, before you make this phone call, did you conduct any testing of the equipment?

A Yes.

Q Did you have any problems?

A No, not at that time.

Q What happened after you placed -- she made the call? What happened then?

A We placed the original call, she made contact with her, and we -- we ended the first call.

Q How long did the first call take?

A About seven minutes or so.

Q And were you able to hear this conversation?

A Yes.

Q Were you able to hear it in its entirety?

A Yes, I was.

Q As you were listening to this conversation, how were you

doing that?

A I was listening to the conversation in the earphone that was plugged into the microcassette.

Q Did you recognize the person to whom Cecelia Pierce was speaking with?

A Yes, I did.

Q Who did you recognize that person to be?

A I recognized the voice to be that of Pamela Smart.

Q How did you recognize the voice of Pamela Smart?

A I had talked to her on seven different occasions before.

Q And after this phone conversation with Pamela Smart, what happened next?

A As we were playing back the audio cassette from the first conversation -- Captain Jackson didn't have the benefit of hearing it because he didn't have an earphone that went with it -- he was listening to the first conversation, the telephone rang at around 3:04.

Q What did you do at that time?

A We had a second machine that was set up with a blank tape in it. We switched the microphone with the suction cup from one machine and we plugged into the second machine.

Q And when that person called at that time, who was it?

A It was Pamela Smart calling back Cecelia Pierce.

Q How long after this first phone call was it?

A It was only a -- two minutes or so.

Q So you took out the one machine, you were rewinding the microcassette when the second phone call came in?

A I'm sorry. Repeat that.

Q I was wanting to make sure I understand your testimony.

You were rewinding the first microcassette which had the first conversation, phone call was received at the Pierce residence?

A Yeah, either rewinding or playing it back. The first wasn't ready to record, the second was.

Q Did you have any trouble with the equipment at any point?

A There was a hum on the telephone line and the telephone wasn't of the best quality either. It was a little difficult to pick up.

Q What did you do when you heard this hum?

A We swapped phones. We used an additional phone. Captain Jackson went out between two phone calls and got a telephone from the Seabrook Police Department and brought it back. It didn't seem to help things too much. It did improve the quality somewhat.

Q That was after the second phone call you did that?

A Yes.

Q Were you able to make out and understand the conversation?

A Yes.

Q Okay. So the second call comes in, you plug in the second microcassette, is that right?

A Yes.

Q Do you hear this conversation?

A Yes.

Q Via the same method you hear the first one?

A Yeah, that's correct.

Q Did you recognize the voice on the phone?

A Yes.

Q Whose voice was it?

A Again, it was Pamela Smart.

Q How long did this conversation take?

A This was a short four or five minute conversation.

Q What happened after this?

A After that, the way the conversation was left is that after Cecelia Pierce had finished up with this interview that she was supposed to do with the police, she was supposed to call Pamela Smart back at her home later on in the afternoon.

Q That was part of the subject matter of the first two conversations there was a pending interview with the police?

A That's right.

Q How much time later was Cecelia Pierce supposed to call Pamela Smart?

A She was supposed to call Pam Smart when she arrived at home somewhere around 4 o'clock.

Q Did that phone call happen?

A Yes, it did.

Q Can you tell us what time that was?

A It was just before 4 o'clock. I have 3:55 in this note that I also wrote down the times on.

Q So this is about 50 minutes or so after the second phone call?

A Right.

Q And who called who?

A Cecelia Pierce contacted Pamela Smart at her home.

Q Now, during this period did you have any further discussions with Cecelia Pierce about what to say or how to handle the phone call?

A Yeah, we did the same thing that we had previously. We told her some things that she should say.

Q And how long did that third phone call take?

A About 15 minutes or so.

Q And what microcassette was that third phone call put on?

A After finishing the second phone call, we returned to the

original microcassette recorder we had used in the original tape, so we put the third conversation that we're talking about now on the first tape. So the first and third conversations were on one tape, and the second was on a separate tape.

Q All right. And how long did they talk for at that time?

A Around 15 minutes.

Q What did you do after this third conversation?

A We picked up our equipment and we transported the two tapes back to the Derry Police Department.

Q And did you have occasion to listen to those two tapes?

A Yes.

Q Were they fair and accurate representations of the conversation you heard?

A Yes, they were.

Q Any gaps, deletions on those tapes?

A No, there were not.

Q I'd like to show you what's been marked as State's Exhibit 61 for ID and 62, and ask if you recognize those?

A State's Exhibit 61 is what I labeled as tape number one, and that would include the two outgoing calls that were made by Cecelia Pierce.

Q Now, how do you recognize it as that particular tape?

A I put markings on it myself.

Q What was State's Exhibit Number 62?

A 62 is the microcassette that we used in the second machine. It includes the one incoming call from Pamela Smart to Cecelia Pierce.

Q Did you make similar markings on that cassette as well?

A Yes, I did.

Q Now, did you ever take these microcassettes out of New Hampshire?

A Yes, I did.

Q When was that?

A That was June 21st. I transported these two microcassettes from that conversation on the 19th to Essex, Connecticut.

Q Where were you going in Essex, Connecticut?

A I was going to meet with Bob Halvorson, who was an FBI audio enhancement expert, contracts with the FBI.

Q Why were you trying to get the tapes enhanced?

A To get the best quality we could, to get one hundred percent audio or as close to that as possible.

Q What happened there?

A I met with Mr. Halvorson, gave him the two tapes, asked him to audio enhance them. He took the two tapes, hooked them up to his machinery and he did three sets of -- three copies

of audio enhancements.

Q Were you present during this process?

A Yes.

Q And how long did the process take, if you recall?

A I don't recall specifically. It was -- it took a couple of hours to get everything done.

Q And how many copies did he make?

A Each of the three phone calls, he made three copies of, so there were nine tapes altogether.

Q Why were three copies made?

A There were three separate sets, and they were all sealed. We specifically asked for three separate sets of each phone call. We wanted to preserve one for the trial, wanted to have two working sets.

Q After he enhanced these tapes, what did he do? He gave the copies to you?

A He gave all of the sealed tapes to me and gave me the two originals I had given to him.

Q Did you have occasion to listen to the enhanced copies?

A Yes, I did.

Q Fair and accurate representations of the conversation you heard?

A They are.

Q Are there any deletions?

A No.

Q Additions?

A No.

Q Erasures?

A No.

Q Or changes in any respect except improve the audioability.

A No. The audio was improved and no other changes that I noted, no.

Q I'd like to show you what's marked for identification purposes as 64 for ID. Do you recognize that?

A Yes, I do.

Q What do you recognize it to be?

A This is one of the enhanced copies of the original phone call, of the outgoing phone calls from Cecelia Pierce to Pamela Smart.

Q How do you recognize it to be that?

A The markings on it were made by Mr. Halvorson. It says -- Q1, Part 1 is the -- his markings for the first phone call.

Q I'd like to show you what's been marked 66 for identification purposes. Do you recognize this?

A Yes, I do.

Q What do you recognize it to be?

A This is an enhanced copy of the telephone conversation where Pamela Smart calls Cecelia Pierce back at her residence.

Q And what is State's Exhibit Number 65 for identification purposes?

A This was the third and final telephone call, an enhanced copy of Q1, Part 2, which is the telephone call made to Pamela Smart's residence by Cecelia Pierce.

Q This is one -- only one of the three copies made?

A That's correct.

Q When was the last time you saw these tapes?

A Last time I saw them was when I brought them up here to a suppression hearing.

MR. MAGGIOTTO: Your Honor, at this time I'd like to move these tapes into evidence and mark them as full exhibits.

MR. TWOMEY: May we approach?

THE COURT: All right.

- - -

[Bench conference - no record.]

- - -

NOW AT THE BENCH ON THE RECORD:

MR. TWOMEY: Defendant moves for a mistrial based on the

direct response to a question asked by the prosecutor, which was when was the last time you saw them. He said at the suppression hearing. We move for a mistrial by the State putting that in front of the jury. It's very clear the prejudice that flows out of the jury being informed that the defendant has sought to suppress certain evidence, to keep that evidence from them, and an instruction's not going to cure that. It's like Tolstoy said, tell somebody not to think about a white elephant. You can't do it.

MR. MAGGIOTTO: Just for the record --

THE COURT: I'm trying to understand the objection. I mean, the motion. Why don't you come closer. I couldn't hear what you said.

MR. TWOMEY: We move for a mistrial based on the witness informing the jury that there's a suppression hearing in this case. It was a simple response to a simple question. It was the only truthful response to the question asked of this witness, when was the last time you saw those tapes; answer, at the suppression hearing. The State

asked just a simple question, and the fact the defendant sought to suppress evidence, to keep evidence from the jury, and put that back in front of the jury, that's an inadmissible fact and it's a devastating factor in the jury's deliberations. It's not the kind of thing they can be told to forget about.

THE COURT: All right. What's the State's response?

MR. MAGGIOTTO: Well, the State's response is, first of all, for the record, that wasn't the response that the State intended to be elicited nor the response the State expected the witness to say, that he thought the point up to January 18th so I could say these tapes or one copy have been in proper custody. I don't think that his response has reached the level to the extent it has prejudiced this defendant from getting a fair trial. Certainly something that an easy, curative instruction can handle. If the defense doesn't with to have that instruction, that's up to them, but I don't believe it reached the level of causing a mistrial, an inadvertent slip of the tongue by this witness. I don't think the

defense here is anything along the lines that these tapes are involuntary statements made by the defendant. I think the defense is probably something quite contrary to that, and they're not going to argue that the tapes shouldn't be listened to by the jury. My understanding is these tapes are going to be played and the defense is going to argue what they mean and the State's going to argue they mean something else. No suggestion in putting before this jury purposely the defendant didn't want these tapes in. There's no understanding of the jury what the suppression hearing was about, what it meant, anything of that nature. I think it can be cured by instruction, Judge.

MR. SISTI: Let me add a couple things, okay? One, it can't be cured by instruction. We can't ask this Court to say a suppression hearing was called and there was some challenge to the tapes. I mean, that's a direct -- that is a direct reference to the -- I'd ask the Court to reflect on the State of New Hampshire v. Duhamel which was decided on such a problem

that occurred in that particular murder case. In fact, it would have been about the third from the last question that would have been asked by the prosecution and an unintended answer came from that particular witness that mandated a mistrial in that case.

I mean, if we're going to be frank about it, the reason Mr. Maggiotto didn't expect the answer that he received is because of the obvious prejudicial effect it would have on only one party, and that would be the defense. That is a fact that's out there. It is an inadmissible fact. It's a fact -- might be indirectly put in but it's in. It would be grounds for a mistrial. It's out there and it can't be cured, can't be taken back. We're moving for a mistrial because it can't be cured. It's a mistake. We agree it's a mistake, but it can't be cured.

THE COURT: We'll take the morning recess now.

IN OPEN COURT BEFORE THE JURY:

THE COURT: We'll take the morning recess.

- - -

[Recess at 10:47 a.m.]

- - -

THE COURT: I'll inform counsel before we proceed that when that buzzer rings it is not time to go to the toilet. It means court is back in session.

Ladies and gentlemen, you just heard or you may have heard this witness say something about these tapes at a prior hearing. As in any criminal trial there are many hearings before trial. The subject of that hearing was, among other things, whether or not these tapes were sufficiently audible so that the jury -- so that they would be of aid to the jury. Those tapes have been listened to by the Court, and in fact I ruled one of these tapes at this prior hearing was not sufficiently audible. To that extent, you will not hear one of those three tapes simply because you can't hear it well enough to -- for it to have been of any assistance to you. The other two tapes, the State's motion to admit the other two tapes as full exhibits is granted. The defense motion made at the bench conference is denied. Their exception, of course, is noted.

Mr. Maggiotto, you may proceed.

MR. MAGGIOTTO: Thank you, Your Honor.

THE COURT: With respect to any other purpose of that prior hearing or any other prior hearing, you are to completely disregard that, ladies and gentlemen.

MR. MAGGIOTTO: Just for the record then, Your Honor, your ruling I believe does not admit State's Exhibit Number 62 into evidence because of its audioability, as well as State's Exhibit Number 66, but would allow the admission of 64, 65 and 61 at this time.

THE COURT: Correct.

MR. TWOMEY: Could I approach again, Your Honor?

THE COURT: Yes, you may.

AT THE BENCH:

MR. TWOMEY: I have to again move for a mistrial based on the Court's instruction. Most of the instruction -- quite frankly, I thought the Court had found a skillful way out of the problem. What you said at the end, quite frankly, is very troublesome. I did not make an objection to the introduction of those tapes at the bench. That motion was not denied because I never made it.

I made a motion for mistrial.

THE COURT: I said the motion was denied.

MR. TWOMEY: The Court said to the jury, what I understood the Court to say is the State's motion for --

THE COURT: To admit the tapes as a full exhibit was granted.

MR. TWOMEY: I hadn't heard that motion. Perhaps it was made.

MR. MAGGIOTTO: That's the last thing I did.

THE COURT: Last thing he did.

MR. TWOMEY: I'm sorry. I -- the way the Court said that, I interpreted the Court saying that our motion to object to them was denied. That's what I --

THE COURT: No, no, no, no. I didn't say that at all. I'm going to correct it to the jury, if you want.

MR. TWOMEY: I would ask you to.

MR. MAGGIOTTO: What are you asking to be corrected?

MR. TWOMEY: Was that your interpretation?

MR. SISTI: First of all, I want to make the defendant's record as clear as we can. We don't think there is any curative instruction that could take care of what took place on the stand with regard to a direct reference to a suppression hearing. Not any old pretrial hearing, but a suppression hearing. I want to make that clear,

and we did request specifically on the record that no curative instruction be made. We object to the attempt by the Court to cure an obvious wrong that took place through the testimony of Detective Pelletier. For those reasons we already stated and for the cases we already referred to. So I guess what I'm saying is that that issue -- with regard to that issue we would take the specific exception.

Now, with regard to clarifying what just took place, if it's merely a we did not object to the introduction of the tapes in front of the jury, that would be misleading. We did not object at all. The State, in fact, did move to enter them in a full exhibits. We did not object. That was mischaracterized. We did not object to that, which again leaves us in that position as to why we were here right after Pelletier made reference to a suppression hearing, and again I note that that is the problem that we have to deceive the jury in a effort to cure an obvious wrong, and that's what makes it a manifest necessity to declare a

mistrial at this juncture.

THE COURT: All right, motion's denied. I'll instruct the jury that you did not -- your motion that I denied had nothing to do with admissibility of these tapes.

MR. MAGGIOTTO: I just missed the last part. I thought we were done.

THE COURT: I said the jury will hear the instruction that the motion was denied has to do with a point of law and nothing to do with these tapes.

IN OPEN COURT BEFORE THE JURY:

THE COURT: Ladies and gentlemen of the jury, so the record is clear, the motion which I just said made by the defense which was denied, I said a motion made at the bench conference here was denied. That motion had nothing to do with the admissibility of these tapes. That motion was on another matter of law, which was denied. So the State (sic) has not objected to the admission of these tapes and the motion that I denied had nothing to do with any objection -- the defense, I mean has not objected to the admissibility of these tapes, and the motion I

denied had nothing to do with these tapes at all, and you'll simply disregard the bench conference since it is purely a matter of law.

BY MR. MAGGIOTTO:

Q Now, Detective, after June 19th, did you ever engage in a police -- well, were you ever with Cecelia Pierce again in a similar situation?

A Yes, on July 12th.

Q And what was happening on July 12th?

A On July 12th, myself and other members of the Derry Police Department went to the Seabrook Police Department and met Cecelia Pierce there. In there she was outfitted with a body wire, and again we did a one-party consent on a body wire this time.

Q Why did you decided to do a body wire at this point?

A The original conversation on the telephone, listening to it, it seemed as if Pamela Smart was apprehensive to talk to Cecelia when Cecelia began to talk about the specific things that showed Pamela may have some involvement in the murder.

Q So at this point it was decided to try a face-to-face contact?

A That's right.

Q Now, can you give the members of the jury some indication of what kind of equipment is used for the body wire?

A In this case it's a small box about two by three inches. It's a transmitter and it's housed inside a piece of cloth that's formed like a shoulder holster, and Cecelia Pierce wears it under her arm, and the microphone to it goes along a strap and is placed up by her shoulder, and the antenna from the unit also goes up along another strap so that it transmits over the air to a receiver, the receiver being housed inside a vehicle parked outside in the parking lot nearby, and the receiver has a tape recorder that's attached to it directly that records all the conversation.

Q Now, detective, where did this equipment come from?

A We borrowed it from the Salem, New Hampshire Police Department.

Q Were you familiar with the operation of this equipment?

A Yeah, we had used it before in other operations.

Q Now, prior to doing this operation on July 12th, 1990, did you have any discussions with Cecelia Pierce concerning her willingness to help you in this matter?

A Yes, again she wanted to help us out. The conversation of if she wanted to do it and if she was willing to do it took place that day. Took place before then, too.

Q Now, at the Seabrook Police Department, who outfitted Cecelia Pierce?

A That was Sergeant Carlene Thompson from the Seabrook Police Department.

Q Now, after Cecelia Pierce was -- the body wire was placed on her body, what happened next?

A We had her in the detectives' office, and myself and Sergeant Byron were going over things that -- again that she should say the same basically that she had said on the telephone, trying to keep it simple. Her go in there, and again another imminent interview talking to the police and possibly take a lie detector test.

Q Anything written down at this juncture?

A No, nothing was written down.

Q What time of day was this, about?

A It was around noontime or so that we were at the Seabrook Police Department.

Q What happened next?

A From there, we followed her. Her car and two surveillance vehicles went out to the Winnacunnet High School, School Administrative Unit parking lot.

Q When you say surveillance vehicle, what do you mean?

A Again, another undercover vehicle, not an LTD, not

recognizable as a police car. Also the surveillance van where the operator of the equipment can stay inside and be undetected.

Q When you say an LTD, you mean that's a type of car normally used by Derry Police Department?

A Right.

Q Now, who was in which car?

A Myself and Sergeant Byron were in the undercover car. Detective Michael Raymond and Detective Barry Charewicz were in the surveillance van.

Q Who was operating the equipment in the surveillance van?

A Michael Raymond.

Q And where did these cars park at SAU 21?

A The surveillance van parked directly in front of School Administrative Unit 21 in the parking lot by the front door. The surveillance car that I was in with Sergeant Byron was parked off to the -- parallel to the building off to the side more behind some other cars.

Q How did Cecelia Pierce get there?

A She drove her own car.

Q Anyone with her?

A Yes, on the way over I was in her car, along with her cousin who was visiting from out of state. I -- she stopped

on the way over at a small condo complex before the Winnacunnet High School, dropped me off. Sergeant Byron picked me up. Then we continued following her into the parking lot.

Q As you got to the parking lot, what happened?

A When we got to the parking lot we got into position, and she parked her car, and from where we were, she stayed in her car for a while. From there, one of the secretaries showed up and said Pamela wasn't there yet. Pamela had gone to lunch.

Q How long was there a wait before the defendant showed up?

A It wasn't that long of a wait.

Q Once the defendant showed up, what happened?

A On -- on -- on the 12th she went inside. I may be mistaking the 13th with the 12th now.

Q Let's back up then. When you say Cecelia Pierce was in a car waiting, did that take place on the 12th or the 13th?

A On the 12th, Cecelia Pierce was -- went inside the building because her cousin waited outside in the car, so Pamela Smart had already been at the office on the 12th.

Q Now, was there any requirement or necessity by Cecelia Pierce to turn on this equipment?

A No, we turned it on and taped the button in the on position

so it wouldn't accidentally get shut off.

Q Nothing she had to do but talk?

A That's right.

Q Did you see Cecelia Pierce walk into that building?

A From where I was I saw her get out of the car. I couldn't see her walk into the building, no. I saw her walk along the side and out to the back.

Q At some point did you hear her engage in a conversation with the defendant?

A Yeah, she entered the building, talked to a secretary, then heard her talking to Pamela Smart.

Q Did you recognize Pamela Smart's voice?

A Yes.

Q Now, how was it that you were able to hear Pamela Smart and Cecelia Pierce's conversation when you were in an unmarked car?

A Inside the unmarked car we had a regular police scanner that had the frequency of the body wire, which is a low wattage transmitter, transmit over the wire and we picked it up on the scanner itself.

Q Now, were you doing anything to record this conversation on the 12th?

A Yes, I had a microcassette recorder and I was holding the

microphone of the microcassette speaker up to the speaker of the scanner to record the mike.

Q Essentially, you hold the microphone of the cassette recorder up to the speaker of the scanner?

A That's right.

Q Detective Raymond had an actual lead into a regular cassette, is that correct?

A That's correct, yes.

Q How long did the defendant and Cecelia Pierce speak for at that time?

A It was somewhere around 25 minutes or so.

Q And did you hear the entire conversation?

A Yes.

Q What happened after that?

A After we finished, Cecelia Pierce went back to her car and she went back to the Seabrook Police Department. We -- both of the surveillance vehicles followed her back, met her back at the Seabrook Police Department and recovered our body wire equipment.

Q Did you have occasion at that time or -- or after that time to listen to the cassette that was recorded in the surveillance van?

A Yes.

Q That was a cassette you received from who?

A Michael Raymond.

Q Did you have occasion to listen to the microcassette that you had made from your microcassette recorder up to the scanner?

A Yes.

Q Were they fair and accurate recordings of the conversation you heard on July 12th, 1990?

A Yes, they were.

- - -

[Identification stricken from State's Exhibit

- - -

Q Now, I'd like to show you what's been marked for identification as State's Exhibit Number 68 and ask if you recognize that and how do you recognize it?

A 68 is the microcassette recording of the conversation of July 12th. This is the microcassette that I recorded myself.

MR. MAGGIOTTO: Bear with me one second, Detective. Judge, we're missing one of the pieces of evidence introduced yesterday. Could we have Bill check his office?

THE COURT: What is it?

MR. MAGGIOTTO: We're missing the cassette that was recorded on

July 12th, 1990, this size. You want the exact number?

THE COURT: No, it's not necessary. All right, the reporter can check his office -- check the safe.

MR. MAGGIOTTO: Judge, I could try and continue without it and we'll search for it at an appropriate break or break and look for it now. What would you prefer I do?

THE COURT: You can continue.

MR. MAGGIOTTO: Okay.

BY MR. MAGGIOTTO:

Q All right, Detective, so showing you what's State's Exhibit 68 for identification purposes is a copy of the microcassette you had recorded at that time?

A That's right.

Q And you also received a standard cassette size similar to what I'm holding in my hand right now, which is 69, is that correct?

A Yes, we did. I did.

MR. MAGGIOTTO: I just found what we were looking for, Judge.

- - -

[Laughter.]

- - -

Q Showing you what's State's Exhibit Number 69. Do you recognize that?

A This is the one. This is July 12th, the standard cassette that was recorded by Michael Raymond.

Q How is it that you recognize it?

A My handwriting is on it and Bob Halvorson's markings are on it, also the case number is on it.

Q Detective, what does your handwriting that you placed on here say?

A It says, "Wiretap, Pamela Smart, original master, 7-12-90."

Q And what is the number in the upper left-hand corner 0190001?

A That's our case number.

Q Is that the number you placed on all the tapes that you got in this case?

A Yes, it is.

Q Now, did you have occasion to listen to both of these tapes?

A Yes, I did.

Q Same conversation on each tape?

A It is.

Q Now, after July 12th, 1990, did you engage in any other wiretaps with Cecelia Pierce?

A Yes, the following day, on July 13th.

Q Now, why did you engage in it again on July 13th?

A To get additional incriminating evidence.

Q Now, the conversation that was in the building on July 12th, is there any particular interference on that day?

A There is none that I can recall.

Q Now, on July 13th, how was it set up, arranged?

A On July 13th we again met Cecelia Pierce at the Seabrook Police Department. She was outfitted with a body wire, and again we followed her to the parking lot of Winnacunnet High school, SAU 21.

Q And same equipment that you had used on July 12th?

A Yes.

Q And what car were you in?

A At this time I was in another -- it was a rental car, other than one of our police cars, and two other officers were in the surveillance van.

Q And who were the other officers in the surveillance van?

A Captain Jackson and Detective Michael Surrette were in the surveillance van, and myself and Detective Barry Charewicz were in the rented car.

Q And where were you parked at SAU 21 on this day?

A Again, the surveillance van is parked right in front of the front door of SAU 21 in the parking lot, and myself and

Detective Charewicz were parked more -- closer to Winnacunnet High school itself in the parking lot.

Q And where was Cecelia Pierce?

A Cecelia Pierce was in her own car, and her car was parked on the side of SAU 21.

Q And at the time prior to doing this, did you again have discussions with Cecelia Pierce about her willingness to cooperate in this matter?

A Yes, I did.

Q And did you have any further discussions of what to say?

A We -- we pretty much told her to say the same thing. The additional thing we wanted was a prior attempt -- information on a prior attempt.

Q Again, this is information that had been provided to you by Cecelia Pierce before this?

A That's right.

Q So what happened on the 13th?

A Cecelia Pierce was waiting in her car. This is the date that Pamela Smart hadn't returned from lunch yet. Her secretary came and said Pamela hadn't returned from lunch yet. Shortly after this she did return from lunch, and approached Cecelia Pierce.

Q Did you see the defendant approach Cecelia Pierce?

A Yes, I saw her car pull in the parking lot, recognized her in the car, and I couldn't see after that from where I was.

Q How long after that did Cecelia Pierce and the defendant engage in conversation?

A Less than a minute.

Q And did you hear the conversation between Cecelia Pierce and the defendant at that time?

A Yes, I did.

Q And how were you able to hear it?

A We had the same setup as July 12th. I had a scanner and it was plugged into the car, and I could hear the transmitter on the scanner on the radio frequency.

Q Now, could anybody with a ham radio within any close distance to the transmitter that Cecelia Pierce was wearing have picked up this conversation?

A If they knew the frequency of the body wire, yes.

Q So you were listening on the scanner. Did you attempt to record it in any fashion?

A Yes, I did.

Q And what fashion did you use to record it?

A Again, as I did on July 12th, I had the microcassette recorder with the blank tape and recording from the speaker of the scanner to the microphone of the microcassette

recorder.

Q Besides what you were doing, was there a similar attempt to record the conversations in the surveillance van as there was on July 12th, 1990?

A Yes, the original body wire equipment, which consisted of the receiver and the recorder was again in the surveillance van, being operated by Captain Jackson and Detective Surrette.

Q How long did the defendant and Cecelia Pierce speak at that time?

A This was approximatley 30 minutes or so also.

Q And were you able to hear the conversation over your scanner?

A Yes.

Q Were you able to hear the entire conversation?

A Yes.

Q And was there any part of the conversation that you lost, were unable to hear?

A There were portions that it was difficult to hear because there was machinery that was working in the parking lot, a big payload or a tractor, but I heard the conversation.

Q Were you able to recognize the defendant's voice at that time?

A Yes.

Q Now, after Cecelia Pierce had completed her conversation

with the defendant, what happened next?

A She left the parking lot, and again we followed her back to the Seabrook Police Department where we recovered the equipment from her.

Q And did you have an opportunity to listen to the micro-cassette which you had used to record the conversation of Cecelia Pierce over the scanner?

A Yes.

Q Was it a fair and accurate recording of the conversation that you heard?

A Yes, it is.

Q Did you receive the standard cassette from Michael Surrette?

A Yes, I did.

Q Did you have occasion to listen to the standard cassette?

A Yes.

Q And what was on that cassette?

A The standard cassette didn't end up recording the conversation. There was a malfunction in the equipment and the conversation was not recorded on that standard cassette.

Q Now, were you able to determine why there was a malfunction of the equipment on July 13th, 1990 which was going to be used to record the standard cassette?

A No, I never looked at the equipment to figure out why it

happened.

Q All right. So I'd like to show you what's State's Exhibit Number 73. What is that?

A This is the standard cassette that -- that is an incomplete copy of the conversation.

Q Did anything end up on the standard cassette?

A No, the only thing on the standard cassette is the introduction we do with the date and time and what's going on.

Q State's Exhibit 71, and ask you if you recognize that?

A Yes, this is the microcassette recording that I did on July 13th of the conversation.

Q How do you recognize that?

A Again, my initials are on this and the date and the case number, and it says, "Wiretap, 7-13-90."

Q I'm sorry? 1990?

A Right.

Q Okay. Now, was there ever a time when you took the tapes from July 12th and the tape from July 13th out of New Hampshire?

A Yes.

Q And where'd you take them to?

A I took the tape to again Essex, Connecticut, Bob Halvorson.

Q This is the same gentleman you spoke about before, is that correct?

A That's right.

Q What date did you do that?

A Around January 10th.

Q What happened in Essex, Connecticut?

A I gave the tapes to Mr. Halvorson and Mr. Halvorson again did an audio enhancement of the tapes.

Q Were you present during the enhancement of those tapes?

A Yes, I was.

Q And on July 12th, which tape did he use to enhance, do you know?

A On July 12th he used a standard cassette.

Q So the microcassette wasn't used by him to enhance the conversation, is that right?

A That's right.

Q Now, how long did the process take?

A Again, it was somewhere around two hours or so.

Q You were present during the entire time?

A Yes.

Q By the way, going to July 13th, 1990, how was it if you were in a car the defendant wasn't able to see you?

A We were parked further back in the parking lot on July 13th,

hidden behind other parked cars.

Q That is what, a substantial distance away?

A Right.

Q The surveillance van was where?

A Right in front of SAU 21.

Q Any way to see the surveillance van?

A No.

Q Besides the standard cassette which was enhanced by Robert Halvorson, what else was done at that time?

A He also enhanced the microcassette from July 13th.

Q And how many copies did he make of each of those tapes?

A He made three copies of each tape, for a total of six enhanced copies.

Q Were you present during the enhancement process?

A Yes.

Q Did you have a chance to listen to those enhanced copies?

A Yes, I did.

Q Were they fair and accurate representations of the conversations you heard on July 12th and July 13th?

A They were.

Q I'd like to show you what's State's Exhibit 76 and 75 and ask you if you recognize these?

A 76 is the enhanced copy Q29 of the conversation of July 13th.

Q And what is State's Exhibit 75?

A 75 is an enhanced copy of the conversation of July 12th.

Q Now, these are one of three copies?

A That's right.

Q And these are the copies -- three working copies you made, is that correct?

A This set here is a set that was -- that remained sealed. We had two other sets that were working copies.

Q And these are the same sets you brought to the court at a previous time, right?

A Right.

MR. MAGGIOTTO: I'd like to move these into evidence, the enhanced copies as well as the two originals.

MR. TWOMEY: Can we approach for a moment, Your Honor?

THE COURT: All right.

AT THE BENCH:

THE COURT: All of the defendant's previous objections with respect to the admissibility of these or use of the enhanced tapes are noted and preserved.

MR. TWOMEY: All right. Thank you.

MR. SISTI: Thank you.

IN OPEN COURT BEFORE THE JURY:

BY MR. MAGGIOTTO:

Q Now, Detective, on July 12th and July 13th did the defendant make any reference to her prior phone conversations with Cecelia Pierce?

A Yes, she did.

Q What were those references?

A She said she was afraid her phone was tapped, and one of the things Cecelia Pierce had mentioned before made her upset.

Q What was it that Cecelia Pierce had mentioned that made her upset?

A I don't recall the specific line that she had used when she said that it made her upset.

MR. MAGGIOTTO: At this time, Your Honor, with the Court's permission, I would like to play the enhanced copy of the first conversation of June 19th.

THE COURT: All right.

AT THE BENCH:

MR. TWOMEY: It's my understanding that what has been proposed to be done while these tapes are played is that the jurors will have the earphones, of course, but will be given transcripts that have been prepared by someone, I'm not sure who, I believe someone working for the Attorney General's Office. Yesterday Mr. Halvorson, who

is an expert witness, so qualified by this Court, indicated there are problems on these tapes with what he called doubling, with two people talking over each other. He further indicated that a good and accurate transcription would somehow indicate when words are being said over each other which came first, that that's going on as opposed to these transcript, if my memory of them is correct, go in straight literal fashion. So that, for example, I'll use a different example than what I used yesterday, suppose one person said "innocent" and the other person said "guilty" at the same time. You can have a choice of putting guilty first or innocent first. That becomes a subjective choice, and certain things my client said which, frankly, aren't particularly responsible to Miss Pierce appear after Miss Pierce says things when you put them together in a particular order perhaps look far more incriminating. Because of this, the transcript's misleading.

MR. MAGGIOTTO: My response is twofold. First of all, Mr. Halvorson did not say what Mr. Twomey said he

said as far as the doubling. He said the tapes speak for themselves. That's true in any transcription used in any trial at any time in the world.

Second of all, this Court -- this should be on the record -- had the opportunity to listen to these transcripts. At the same time, the defense had the opportunity to listen to the transcripts, and well over a month ago. In fact, almost two months ago. Now at the moment we're about to give the transcript to the jury they are objecting to them being used. I find it a little incredible, especially since at the hearing I requested to play the tapes and use the transcripts and they -- it was requested by the defense not to do that, we could do that at another time, listen to it and determine whether or not there's any problems. This Court listened to the transcripts --

THE COURT: The jury will be given the transcripts. The defense's motion is overruled.

MR. TWOMEY: Say one more thing --

THE COURT: I'll instruct the jury on the proper use of these

tapes and transcripts.

MR. TWOMEY: I wasn't present when the tapes were listened to.

THE COURT: All right, exceptions are on the record.

IN OPEN COURT BEFORE THE JURY:

MR. MAGGIOTTO: Your Honor, with the Court's permission, I'd like to pass out a transcript to the jury.

THE COURT: Yes, you may. Ladies and gentlemen, you all have headsets there, and you'll noteobviously that they contain no wires and I understand they work by some form of microwave. Hopefully you know more about them than I do.

- - -

[Laughter.]

- - -

THE COURT: Except that I've used these before and I know they work. But there are adjustments on one side of each one of your recorders -- or your receivers. I presume that the State will instruct you as to the use of these.

Counsel, the Court will also have these on and to the extent either Mrs. and Mr. Wojas want them on or Mrs. and Mr. Smart want them on, they are available for them. Because of the

number of receivers, those are all that is available.

I believe the tapes are also audible, am I correct?

MR. MAGGIOTTO: I'm sorry, Your Honor, yes.

THE COURT: To the naked ear in the court, although I'll tell everyone in the courtroom they're probably not -- this won't be like listening to your radio at home because of the size of the room and whatever other problems might exist.

I have previously ruled, ladies and gentlemen, that these tapes are sufficiently audible to be of assistance to the jury. You will also be given a transcript of these tapes. 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. I'm not saying they do or do not differ, but if you find a difference between the transcript and the tape, use the actual words for your consideration.

With that in mind, I believe counsel will

explain to you how to operate these things.

MR. MAGGIOTTO They're very simple. The glass crystal should face the infrared machine, so essentially this should be on your right ear. The two levers on the right earphone are strictly volume, left and right volume, so you want to turn up and hear better what you're listening to, just push it up; too loud, push it down. The only other button you have to touch is the button to turn it on. Push it to the right. The little circle with the dot inside, that means it's on. That's all you have to do, only adjustment you have to do is volume, turning it on and keep the crystal facing the infrared machine.

THE COURT: Counsel, let me suggest there's another button on the top and I guess maybe I'd like to know what that does.

MR. MAGGIOTTO: Your Honor, I think that is just a filtering system. We tested it with a technician and found that the present location of where it is now gives us the best reception and I wouldn't suggest touching it. It's been tested to that.

THE COURT: Mine's to the left.

MR. MAGGIOTTO: Yes, it should be to the number two position.

THE COURT: All right.

- - -

[Tapes played.]

- - -

[Following the playing of the tapes, the luncheon recess was had.]

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MARCH 14, 1991 - THURSDAY AFTERNOON SESSION - 1:16 P.M.

THE COURT: Good afternoon. Go ahead.

MR. MAGGIOTTO: With the Court's permission, I'm going to play the tape of July 12th, 1990.

THE COURT: All right.

MS. NICOLOSI: With the Court's permission, can I hand out the transcripts?

THE COURT: You may.

- - -

[Tape played.]

- - -

[Recess taken.]

- - -

THE COURT: Just before you begin, ladies and gentlemen, with respect to the tapes and the transcripts, as you know, all evidence goes into the jury room with you during deliberations. You'll have the tapes and the transcripts in there. Again, I caution you if you do listen to the tapes again, if they differ at all from the transcripts you use what you hear and not what you read. Thank you. You may proceed.

MR. MAGGIOTTO: Thank you, Your Honor.

DIRECT EXAMINATION BY MR. MAGGIOTTO (Continued):

Q Now, Detective, did there come a time when you arrested Pamela Smart?

A Yes.

Q Would you tell us what day that was?

A August 1st, 1990.

Q Now, after the arrest of Pamela Smart, did you engage in further investigations in this case?

A Yes.

Q Did there come a time when you interviewed a -- one George Moses?

A Yes.

Q Can you tell us the date of that interview?

A That was November 1st, 1990.

MR. MAGGIOTTO: I have no further questions, Your Honor.

THE COURT: All right.

CROSS-EXAMINATION BY MR. TWOMEY:

Q Good afternoon, Detective.

A Good afternoon.

Q First thing I want to ask you, you recall you're still under oath?

A Yes.

Q When that tape was missing, did you think Sisti or I stole

it?

A No, sir.

Q No.

- - -

[Laughter.]

- - -

Q Think Mr. Halvorson walked off with it?

A No, I didn't.

Q I want to take you back a long way, but before I do that let me follow up on what Mr. Maggiotto asked you.

The arrest was on August 2nd. What was the date of that last tape that we just heard?

A July 13th.

Q I said August 2nd. I meant August 1st the arrest was made.

A August 1st.

Q Was there another taping that went on after the one we heard, or another wiring episode?

A There was one additional taping on August 1st.

Q So you sent Cecelia Pierce out again on August 1st?

A That was a telephone recording.

Q Okay. Let me take you back. Let's go back to May. Are you the chief investigator right from the beginning or did you have a different role in the beginning? After the crime

scene was done and the days following.

A I was assigned as the lead.

Q A lot of these evidence pieces have tags on them. Let's look at this particular one. Do you know who took this into custody and when it was taken into custody?

A Yes. I did.

Q When was it taken in?

A It was mid-May. I don't know the exact date.

Q Okay. Mid-May. Now, this -- why don't you describe for the record and the jury what this is that I just showed you?

A That's the candlestick that was left in the interior of the Smart residence, the one that was slightly damaged, so we believe that was the one that was located by Gregory Smart's foot in some of the crime scene photos.

Q Now, this candlestick was located right by his foot -- under his foot but right by the body, correct?

A Yes.

Q It was seen and photographed by the police that evening, correct.

A Yes.

Q This is May 1st, right?

A Correct.

Q And you just told me that it was placed in evidence sometime

around mid-May?

A Right.

Q Could you tell the jury how it happened that in mid-May you got the candlestick?

A Yes. During one of the interviews I did with Pamela Smart, I went over to her residence to talk to her and she pointed out this candlestick that was left behind by the police that processed the crime scene of her condominium. She said she thought it might be important because it was damaged and not before and thought it might have been used in the homicide.

Q You called this slightly damaged a moment ago. Would you agree with me -- first of all, would you hold this and tell me if this is a sturdy, hard object.

A Yes, it is.

Q Okay. You wouldn't want to be hit with that, clearly?

A No, I wouldn't.

Q The base is really very loose at the bottom, correct?

A That's right.

Q You would not use this to hold a candle up; you'd be afraid of it tipping and starting a fire?

A You're probably right, I wouldn't.

Q Okay. Now, that wasn't the only time -- before we go on, don't you think that should have been taken into evidence

that night?

A I didn't do the crime scene.

Q I'm not blaming you or anybody, but if you could go back and look on it, don't you think that should have come into evidence?

A Possibly.

Q Was that the only time that Pamela Smart or the only thing that she told you to try to help you find evidence? Didn't she tell you about some other things at the scene?

A Yes, she did.

Q Do you recall that in that entryway, as you come in the entryway, if I remember right, there's the tile for a number of feet, then by where the tile ends you go upstairs and a rug starts, is that the way it is?

A Stairway's off to the left and carpeted, and tile reaches at the carpeted portion.

Q If you could think about the area, as you come in the door and before you turn to go to the stairs, and the wall right there, right at the corner, do you remember if Pamela Smart pointed out something there?

A Yes.

Q Could you tell the jury what that is?

A She told me there was some plaster chipped off the wall that

she didn't notice chipped off there previously.

Q That was, if you recall, a chip -- maybe not a chip, an indentation I guess is what I want to say, an indentation almost like a crescent shaped indentation about an inch or two long?

A I don't recall the shape of it at this point.

Q Did anybody ever take this to see if someone had swung at Greg Smart with this and hit that wall, if this would have been put in that indentation?

A Not to my knowledge.

Q Okay. Down at the State Forensic Labs they have people to do -- I think it's called tool mark identification. Do those words mean anything to you?

A Yeah, I'm aware of it.

Q That's like if you pry something open or use any kind of object on another object it leaves marks and there are people that can tell you whether it's consistent with that, say, hitting the wall?

A Yes.

Q That was not done?

A No.

Q Would you agree with me if in fact somebody took that candlestick and hit that wall, that would be consistent with

everything you were told by Mr. Randall, Mr. Lattime and Mr. Flynn about what happened there that night?

A Yes.

Q How many times did you meet with Pamela Smart?

A Seven or eight times.

Q At any point in time in the month of May did she come to you and say, "I don't want to talk to you anymore"?

A No, she did not.

Q Was she consistently bringing up things like the two we just talked about?

A Yes.

Q Didn't she or her mother tell you about a towel found with blood on the cellar stairs?

A I don't remember the specifics of that. I remember a towel being mentioned at one point. Both of them were present for that conversation.

Q When you talked to her, and I think you said it was 2:30 in the morning, when you had more of an extended talk?

A That's right.

Q Okay. She told you that she'd been at a school board meeting that night, correct?

A Yes.

Q And she told you that that's something she doesn't

ordinarily do?

A That's right.

Q She didn't try to say like I always go to the school board meetings or anything like that?

A No, she said that was something out of the ordinary.

Q Now, the thing about Cecelia Pierce. How did it come about that you got Cecelia Pierce's name from Pamela Smart? Were you asking her questions about Cecelia Pierce?

A No, I was asking her questions about friends that weren't friends of both her and her husband, that were friends exclusively of hers.

Q You didn't say is Cecelia Pierce one of your friends, you didn't bring up the name Cecelia Pierce, did you?

A No, she did.

Q Right. She volunteered the name Cecelia Pierce for you, correct?

A Yes.

Q And at the same time when she volunteered that, she also volunteered the fact that she was active in a youth group at the school?

A That's right.

Q I think you called it a RISK Program or something like that that had to do with alcohol, drugs and kids?

A Correct.

Q Again, that's something she volunteered; she directed your attention to the fact that that program existed?

A She did, yes.

Q Did you ask her if Greg had insurance?

A Yes.

Q Did she tell you -- what'd she tell you?

A She told me she had insurance but she didn't know the amount of the policy.

Q That's a little bit inconsistent with something at least one of the boys told you, isn't it?

A Yes.

Q One of the boys told you that they knew before May 1st there was $140,000 worth of insurance?

A Yes.

Q And I think that was Mr. Lattime said that?

A I don't recall which one said that.

Q All right. Did you ever try to determine whether or not Pamela Smart could have known the total amount of insurance?

A No. No.

Q Okay. Let me be a little more specific. You had a puzzled look. Did you yourself ever like go to somebody from the insurance company and say were these specific

on these policies and who would have been able to know the amounts?

A I didn't handle that part of it, the investigation.

Q Okay. Let me ask you a question. As a lead investigator, suppose you did do that and were told that one of the policies has a face amount but the other policy is an indeterminate thing, there's a fairly complicated formula to get to and fairly difficult if not impossible for a person to know the amount --

A Right.

Q -- if you had that information, and let's forget everything else about the case, okay, and Mr. Lattime says to you somebody told me the amount of the two policies together, okay, wouldn't you question what Mr. Lattime said?

MR. MAGGIOTTO: Objection as to the form of the question, Judge, as to relevancy and sounds more like an argument than a question to me.

THE COURT: Want to respond to that?

MR. TWOMEY: I'm not -- quite frankly, I don't understand the objection.

THE COURT: Well, I think if you rephrased the question.

Q Let me see, it was a long question. Let me see, I'm not sure I can say it again, so let me see if you follow me,

okay?

I want you to assume just two facts, okay, for the moment. One is that Vance Lattime tells you before May 1st that he has been told by someone the total amount of these two policies, okay?

A Right.

Q All right. Total amount of insurance. That's fact number one. And assume fact number two that an insurance expert from the company told you that one of those policies, it would be very difficult, very difficult, perhaps someone couldn't do it, very hard to know the amount of one of those policies because it's not for a certain amount, you have to go through a formula, okay? Now, are you with me on the two facts?

A Sure.

Q Would you agree with me that the second fact would make you question the first fact?

A Assuming those two facts were true, yes, it would.

Q All right. Did you take these kids to ADC; were you on that ride?

A On one of the rides, yes.

Q The ride when the young men were brought up from court to the detention center?

A Yeah, I transported them on a couple of occasions.

Q Okay. I mean, the first time after they're arrested. If you recall.

A I believe so. I can't be positive right now.

Q Let me -- on any of the times, do you remember the kids laughing and joking on the way to ADC?

MR. MAGGIOTTO: Objection, Your Honor, as to any of the time. What's the relevance. We have to have a point in time if it's going to mean anything to the jury.

THE COURT: Well, I think in view of the Detective's answer, that concerned a number of times that they took them there, I think if he has recall he can certainly answer the question.

Q Do you remember the question?

A Yeah, there was an occasion when they were joking about it, yes.

Q Now, these boys testified, and each one of them said that -- there's some exhibits here that have their deals, quote-unquote. Have you seen those documents for each of the boys?

A I haven't read through them, no. I know that they exist. I know that we have them.

Q Okay. Let's talk about Mr. Randall. Was there an under-

standing between you and the Attorney General's Office, the State and Pete Randall's attorney about whether or not his mother would be charged?

A An understanding as to whether she would be charged?

Q Yeah, for hiding the stuff in the wall.

A I don't know if there was an understanding that she wouldn't be charged. When I went there, I told her that I wanted a written statement, and she wrote out the statement.

Q And on that statement, at the top of it, sort of like a warning form, it says that there have been -- no promises have been made to me, no threats, et cetera, correct?

A Right.

Q Do you remember what Mrs. Randall did before she wrote out her statement?

A No, I don't recall.

Q Didn't she cross out the word "promises"?

MR. MAGGIOTTO: Judge, I object to this question as to relevance. Asking for hearsay. Mrs. Randall's available if they want to call her.

MR. TWOMEY: Your Honor, this man's the witness on the statement. Mr. Randall -- Pete Randall testified there were no other understandings to protect his mother. I have a right to cross-examine the man

about whether there are some.

MR. MAGGIOTTO: This witness doesn't know what Pete Randall knows.

MR. TWOMEY: This witness was right there and --

THE COURT: I guess the question was directed as to whether the witness observed something or not. He can certainly answer that.

BY MR. TWOMEY:

Q Were you the witness for the statement form for Mrs. Randall?

A Yes.

Q Do you recall that she crossed out the word "promises" not only on the statement form but also signed a consent form for search and she crossed it out on both of them?

A Right, I do recall that now.

Q And when that search was going on, when you're looking for the stuff hidden in the wall, you're there, right?

A That's right.

Q Mrs. Randall's there, right?

A Yes.

Q And Lynn Aaby's there, right?

A Correct.

Q I'm sorry?

A Yes, she was.

Q Could you tell the jury who Lynn Aaby is?

A Lynn Aaby is Patrick Randall's attorney.

Q And that search was made -- done as a result of the arrangements that Patrick's attorney had made with the Attorney General's Office; you wrote that on your report, didn't you?

A Right.

Q Now, with all those things going on, was there a promise to Pete, his lawyer or his mother that she wouldn't be charged?

A The promise that I'm aware of that we just said the only thing we're looking for is that bag, to just show us where it is, that's all we want. We weren't going to search her entire house. I didn't make any promise as to specific deals between the Attorney General's Office and her, no.

Q Now, did you talk to -- you yourself interviewed these three boys on some occasion or occasions?

A Yes.

Q Can you tell the jury when that was and how it came about?

A We began the interviews somewhere around January 22nd. Of the three boys they began January 22nd, went into January 23rd, interviewing one of them at a time. From there, the information that they knew was collected and it was decided that the deals would be made after those conversations.

Q Okay. Why don't we take the boys one at a time, and let me ask you about some things they may have said to you, okay?

If you can think about when you talked with J.R., Vance Lattime for a moment. Did Vance Lattime tell you that one month before the murder Cecelia Pierce and Raymond Fowler were looking for a gun to be used in the murder?

MR. MAGGIOTTO: Objection, Your Honor. Could we approach?

THE COURT: All right.

AT THE BENCH:

MR. MAGGIOTTO: The basis of my objection, Your Honor, is that it appears Mr. Twomey wants to go through everything J.R. said to this detective, which is somehow such that Cecelia Pierce would help look for a gun. My objection is that this is not a proper way to examine this witness. If J.R. denied saying something to this witness, this witness can clearly state what J.R. said to impeach J.R.'s prior inconsistent statement, J.R. said this is what he knew of Cecelia. This doesn't mean he can go through all the statements J.R. said, all the statements Pete said and Bill said, just picking out whatever he thinks is helpful to his case. There has been no foundation

laid that J.R. denied saying this. No foundation laid there's any prior inconsistent statement. He's choosing what he wants to go into and bringing out of this witness and say he said it and point out all the inconsistencies between the three stories. The jury's gotten that from the direct examination and cross-examination of the three kids. If they denied making any statement to this detective, he can go into it on cross.

MR. TWOMEY: If I could, briefly. First of all, that's the first one of the statements I've asked about, so I'm not sure. Mr. Maggiotto's coming to the conclusion I'm going through each and everything they said. I have a list of seven that I want to go through each one of those, seven is inconsistent with the testimony those gentlemen gave in court. The one I'm at right now, Mr. Lattime testified that the reason they were looking for the gun was that the gun was to be used to show to somebody. Okay. That type of thing. The statement here that he told him, that's part of his plea was the reason they were

looking for a gun was to be used in the murder. Okay, that's an inconsistency. That's all I want to get out. There's seven of them. Very simple.

THE COURT: I don't see it's going to hurt anything. I'm not rehashing all of the testimony of all of the witness, but he's got a right to do this. It's cross-examination.

MR. MAGGIOTTO: I don't disagree if it's -- my objection, if it's prior inconsistencies, he's drawn a thin line.

MR. TWOMEY: That's my line to draw.

THE COURT: I think it's his line to draw. Objection's overruled.

MR. TWOMEY: Would the Court have the question read back?

THE COURT: Why don't you reask it.

MR. TWOMEY: Okay.

IN OPEN COURT BEFORE THE JURY:

BY MR. TWOMEY:

Q The question I just asked you I can't say word for word, but to the effect of when you're talking to J.R. in January of this year, did he tell you that one month before the murder Cecelia Pierce and Raymond Fowler were looking for a gun to

be used in the murder?

A I'd have to look at the report from --

Q Do you have it there with you?

A Mr. Lattime? Yeah. If you have the page number, I could find it.

Q It's going to take me a moment, too. Why don't you, while you're doing that, take out all three statements and just have them ready.

Why don't we go on to something. I'll have Mr. Sisti look for that. I'll go on to another one.

I have the page, number 4, okay? Did Mr. Lattime talk to you about the events when Ralph Welch found out about what was going on here?

A Yes, he did.

Q Okay. I'm going to ask you about something that's sort of on the bottom of 891, 892. If you want to, we can get there now.

A Okay.

Q Did Mr. Lattime tell you in talking about those events, did he make the statement that it was said that if Fowler's shooting his mouth off then Flynn will want to kill Fowler? I'm on page 892 right at the top. I'm sorry.

A That's what my notes reflect, yes.

Q Do you remember it?

A I don't have a clear recollection without reading what happened and what transpired before that interview, how that fits in the context of the interview.

Q Tell the people in the jury how much care you take in putting your notes together. How do you generate a report like this?

A What we do is have handwritten notes, write down what the person is saying while he's saying it and later generate the police report from the handwritten notes.

Q This particular case, would you agree with me that this is probably the most important case in your life?

A At this point, yes.

Q Okay. So you took a lot of care when you interviewed these kids, I hope.

A Right.

Q All right. If you could go to 878 for a minute. I think Mr. Sisti was able to find it.

MR. MAGGIOTTO: I'm sorry, what page?

MR. TWOMEY: 878, right at the top of the page.

A I don't have page 878 with me.

Q I'm sorry. Actually, I don't know why I'm sorry.

- - -

[Document handed to the witness by Mr. Twomey.]

- - -

Q Okay, you got a chance to read that through. Do you remember the previous question I asked you?

A Right. Yes.

Q Let me state it again so we're all together. I asked you if Lattime had told you that approximately one month before the murder that Cecelia Pierce and Raymond Fowler were trying to find a gun to be used in the murder.

A Right.

Q Did Mr. Lattime say that to you that night?

A Yes, he did. The explanation that he gave for her finding a gun was that she knew the location of one in the glove compartment of a car.

Q I'm sorry, I couldn't hear you. She knew the location. I didn't hear the rest.

A Of a gun, that it was supposedly in a glove compartment of a car, according to Lattime at that time.

Q So Mr. Lattime told you that Cecelia Pierce knew the location of a gun in the glove compartment of a car and that someone went to look for it?

A He didn't tell me that someone went to look for it.

Q He told you that the reason they were trying to buy the gun was to be used in the murder, right?

MR. MAGGIOTTO: Objection, Your Honor.

MR. TWOMEY: I'll withdraw it. I'll withdraw it.

Q Do you remember any of the boys telling you anything about Bill Flynn's reaction after the murder, how he felt?

MR. MAGGIOTTO: Objection as to the form of the question, any of the boys, Your Honor. To be fair to the witness, I think we should specify.

MR. TWOMEY: I'll be more than willing to specify.

Q First of all, do you remember Patrtick Randall telling you anything about that, how Bill Flynn felt about the killing?

A Yes, I do.

Q What can you tell us about that?

A After the murder when Bill Flynn and Patrick Randall were picked up in the car, on the way back to Seabrook Bill, according to Patrick Randall, Bill Flynn made the statement that he can believe he just killed a guy and mentioned something about power, and he said something about the thrill of it all.

Q Thrill of killing?

MR. MAGGIOTTO: Objection as to the form of the question, Your Honor.

Q Was it the thrill of killing that he said?

THE COURT: Well --

A I don't believe he said the thrill of killing. I think he just said the thrill of it.

Q Do you have your report there?

A Yes.

Q I think it's on page 855. I think you're right about that, too. Why don't you tell the jury what -- the things Flynn said. Did he say, "I can't believe I killed this guy"?

MR. MAGGIOTTO: Judge, I object. The reason, I don't --

THE COURT: Just a moment. I think that counsel should put it in context of who said what instead of what someone said. I presume you're saying that someone else said someone said something.

MR. TWOMEY: That's correct. The objection is well taken.

MR. MAGGIOTTO: Judge, further basis of my objection is this is improper impeachment. No prior inconsistency of Pete Randall. He's trying to say Pete Randall said that on the stand.

MR. TWOMEY: That's not what he said.

THE COURT: I'll sustain the State's objection. The jury will take its own recollection.

MR. TWOMEY: Overruled or sustained?

THE COURT: I'm sustaining the State's objection.

MR. TWOMEY: May we approach? I'd like to make a record about

it.

THE COURT: We can make a record of it counsel, and I've sustained an objection and the ruling is going to stand.

MR. TWOMEY: I'm not clear --

THE COURT: I sustained the objection to that question.

MR. TWOMEY: I understand, but there were two objections to the question. I believe the first was that I didn't say who said it, and I agree with that part of the objection. I'm not sure if you're sustaining it on that basis.

THE COURT: Also sustained on the basis it's improper impeachment of a witness not on the stand. Correct, counsel?

MR. MAGGIOTTO: Yes, sir.

MR. TWOMEY: I would like to make a record of -- on my recollection of what Mr. Randall said that he said something about the power, that Bill Flynn said something about the power, but he said he didn't think he said anything about the thrill of it. That's different.

THE COURT: Well, I'll allow him to answer that question from what you've just explained.

Again, ladies and gentlemen of the jury, to the extent that the detective's answer differs at all from what you heard on the stand from Mr. Randall concerning Mr. Flynn's statements, take your own recollection of what you heard from Mr. Randall on the stand.

BY MR. TWOMEY:

Q Detective, I'll try to be very precise about it here. We're now talking about you talking to Pete Randall in January of this year. Okay?

A Right.

Q In your interview did Pete Randall tell you that that night after the killing on the right back that Bill Flynn said -- talked about the thrill of what he did and what a charge he got out of it?

A Yes.

MR. TWOMEY: If I could have just a moment.

- - -

[Pause - Mr. Twomey and Mr. Sisti conferring quietly.]

- - -

MR. TWOMEY: Could we approach for a minute, Your Honor?

THE COURT: Pardon me?

MR. TWOMEY: Could we approach for a minute?

THE COURT: All right.

- - -

[Bench conference - no record.]

- - -

IN OPEN COURT BEFORE THE JURY:

THE COURT: We'll take a short recess, ladies and gentlemen. I'll see counsel in chambers.

- - -

[Recess at 2:55 p.m.]

- - -

BY MR. TWOMEY:

Q Detective, I want to ask you a couple more questions, and the first one's about the scene. You were at the scene, and we talking about the candlestick, right?

A That's right.

Q I'm going to show you Defendant's Exhibit A. Can you take a look at that and see if you've ever seen the things depicted there before.

A I've seen these three items. I haven't seen them in this position before.

Q Where did you first see them?

A I first saw them with -- with Greg Smart. When Greg Smart was laying on the floor inside the foyer, those three items were

underneath him. The wallet was between his legs, and I hadn't seen the keys or the ring.

Q You had not seen the keys or the ring?

A Not when I was at the crime scene, no.

Q Okay. Now, at some point in time did you take part in an investigation concerning the question about whether these three young men should be certified, found to be able to be tried as adults?

A Yes.

Q In the course of that, did you have occasion to talk to a lot of their teachers about their maturity level?

A Yes, I did.

Q And did you ask each one of the teachers to rate these boys on a scale of one to ten, with five being an average kid of average maturity, above being more mature and below five being less mature?

A Yes.

Q Why did you ask about that? What does that have to do with certification?

A It was just one of the questions -- we wanted to get a feel of what these people thought of the boys that we were dealing with.

Q Is that one of the factors that the Court looks at, how

mature they are, in deciding whether or not to treat them as adults?

A I believe so, yes.

Q So if someone wanted these boys to be treated as juveniles, it would be in their interest to say they were immature, correct?

A Yes.

Q Did you ask Pamela Smart whether Lattime and Flynn were on that scale of one to ten? Did she put them below an average degree of maturity?

A No, she didn't.

Q Did she put them above the five point or the average degree or maturity?

A Yes, she did.

MR. TWOMEY: Thank you, sir. No further questions.

REDIRECT EXAMINATION BY MR. MAGGIOTTO:

Q Detective, if someone had said to you, Pamela Smart -- these people said to you these people were one or a two in the maturity level --

MR. TWOMEY: Objection, Your Honor. This is a leading question.

THE COURT: First of all, you can't both talk at once. Bill, did you get what Mr. Twomey said?

COURT REPORTER: Yes, I did.

THE COURT: Now, your objection regarding question, I'll sustain that.

MR. MAGGIOTTO: I'll withdraw that.

MR. TWOMEY: Thank you.

THE COURT: Pardone me? You --

MR. MAGGIOTTO: I'll withdraw the question.

THE COURT: You don't have to. The objection has been sustained.

MR. MAGGIOTTO: I won't rephrase. I'll just drop it. Thank you.

BY MR. MAGGIOTTO:

Q I understand -- I'm sorry, my mind's thinking quicker than my mouth.

Detective, this was given to you in this condition, is that correct?

A Yes, it was.

Q There's a screw on the back of it. Do you see the screw there?

A Yes, I do.

Q Was there a nut that was given to you with it?

A Not that I know of, no.

Q Did you ever try to put a nut on to try to tighten up the base?

A No.

Q Detective, anything that you saw at the scene that indicated that this candlestick was in fact used to strike that wall?

A No.

Q It was just that the defendant had pointed out a chip on the wall to you, is that correct?

A Yes.

Q And she gave you this candlestick?

A Yes.

Q So when the defense attorney said it could have been used to strike the wall and cause that chip, that's just a defense attorney's suggestion, correct?

MR. TWOMEY: Objection, Your Honor. It's all leading, every one of those questions.

THE COURT: They are leading, and the jury will take its own recollection of what defense counsel questioned and the witness answered.

Q Detective could this damage have been caused by just dropping the candlestick to the floor?

A Yes.

Q Now, Pamela Smart showed you that chip by the light, is that correct?

A Yes, she did.

Q That's the light as you walk in on the left?

A Correct.

Q And she pointed it out to you?

A Yes.

Q What day was it?

A It was somewhere around May 9th. I don't recall the exact date.

Q Do you remember when the State Police photographed the crime scene?

A Yes.

Q When was it?

A It was May 1st or May 2nd.

Q I'd like to show you State's Exhibit Number 6 for identification. Do you recognize that?

A Yes, I do.

Q Is that a photograph of the front door with the light switch?

A Yes, it is.

Q See any chip in that photograph?

A I don't see the chip depicted in the photograph, no.

Q Here's State's Exhibit Number 7. Do you recognize this?

A Yes, I do.

Q Okay. Do you see any chip in that photograph?

A I don't see the chip in the photograph. I see several

light flashes from the film.

Q Dust particles?

A Yeah.

Q How about State's Exhibit Number 3, see any chip in that photograph?

A No, I don't.

MR. TWOMEY: May I see those, Mr. Maggiotto.

MR. MAGGIOTTO: I have no further questions, Your Honor.

RECROSS-EXAMINATION BY MR. TWOMEY:

Q Mr. Maggiotto just asked you about dropping that candlestick on the floor, and you said that dropping it on the floor could cause that damage.

A Yeah, it's possible.

Q It's possible. You know there's another candlestick that matches that that's not broken, right?

A Yes.

Q Part of a set. Did you ever take the other candlestick and drop it on a carpeted floor and see if it would do that?

A No, I didn't do any testing list that.

Q To really answer his question, you'd have to know how far it's dropped from, correct?

A Sure.

Q You want to know if someone threw it or just dropped it,

right?

A Right.

Q Did Billy Flynn tell you that he put the candlestick down?

A Yeah, he said that he put it down or dropped it at some point.

Q Didn't Billy say he dropped it and Pete said he didn't -- didn't Pete say he dropped it and Billy said he put it down?

A I don't recall which one told me what.

Q Okay. If you were trying to take a picture of a dent on a wall on the corner there, okay, right where the stairs go up.

A Right.

Q Would this be the angle you'd want to take it from, looking straight down towards the back door? Assuming the dent's somewhere on this side of the wall, okay, facing the hallway.

A Okay.

Q Would you want to take a picture from down here looking at the door or wouldn't you want to go over and take a picture of the dent?

A That wouldn't be the best angle to photograph a specific dent in a wall.

Q The same's really true for all three of these. So you wouldn't stand to take a picture of a dent on the step and

take it, you'd get a direct shot of it?

A These are general views of that wall in the area. They're not specific views of any point in the wall.

MR. TWOMEY: Right. Thank you, sir.

MR. MAGGIOTTO: No further questions, Your Honor.

THE COURT: You may step down.

- - -

[Witness excused.]

- - -

THE COURT: Ladies and gentlemen of the jury, my understanding is from the State that they have one remaining witness, Cecelia Pierce. In order that her testimony not be interrupted by another three quarters of an hour or so, we'll adjourn for the evening. My understanding further is, and I'll hold neither the State nor the defense to this, she'll be finished sometime tomorrow, at which point, at the conclusion of her testimony, we'll adjourn for the weekend. My understanding further is that based on what I've heard from defense counsel, and again I don't hold either the defense or the State to the length of this trial, that the defense

will begin its case on Monday and probably conclude its case on Tuesday. At the conclusion of the defense's case, assuming, which I don't for the moment assume, but if it does conclude sometime Tuesday, whatever time that is, we'll adjourn for that day and arguments and charge will be the following day, and again I don't hold counsel to that by way of examination or the number of their witnesses or any future State's witnesses that we have in addition to what they've told me just now. That's my understanding of where we are in this trial, based on what I've heard from counsel, and again I suggest I'm not limiting counsel in any way at all, but I just wanted you folks to know that.

I caution you again, although I know you're following my cautionary instructions, it is very important you not listen to any radio or television coverage or view any newspaper coverage of this whatsoever. We'll resume tomorrow morning at 9:30. Have a nice evening. I'll see you then. Thank you.

- - -

[Jury excused for the day at 3:27 p.m.]

- - -

IN CHAMBERS - 3:33 P.M.:

THE COURT: Okay, counsel has requested an in camera or in chambers hearing because the Court has released to the members of the media copies of the transcripts of the tapes, and the Court did so on the following basis.

First of all, the Court had previously instructed the jury that they would have the transcripts in the deliberation room with them with cautionary instructions regarding which to take, the transcripts or the tapes, as evidence, if they differed.

Secondly, the media had somehow wired the tape machine so that -- in hopes that the actual tapes would be audible to them and the public, which apparently they were or were not to some degree, and the Court, after long consideration, felt that there was no way that the transcripts could be kept from the media because with the tapes audible, which they may have been to some of the media, the media could take notes regard-

ing that taped testimony as they could have and do frequently regarding live testimony, and that any omissions or deviations from the actual testimony, whether it be on the tapes or live, is a matter for the press's interpretation of testimony. The jury was again cautioned not to read any newspapers, view any coverage, et cetera, as they are every night, and while the Court has no particular leanings towards the press, it was the Court's opinion that the transcripts could not be withheld from the press. Go ahead.

MR. SISTI: Thank you, Your Honor. Understanding the Court's position, I just want to make it clear with regard to the defendant's position.

First of all, none of those transcripts have been introduced as exhibits as of this particular moment. It is somewhere around 3:30 p.m. And they are not exhibits even for the triers of fact in this particular case. The defense contemplated an objection to the introduction of these as full exhibits. That should be known for the record. Should also be known for the record that the State has not

offered these particular transcripts as exhibits. And if I'm wrong on any of these offers of proof, I think that somebody should speak up. We have not even been given a formal procedural opportunity because the offer has not been made to raise our objection with regard to the transcripts being marked as full exhibits for the jury to utilize during deliberations.

I understand the Court's position. I understand the case law position on using transcripts of what has been called cues for the jury or aids for the jury during the course of presentation, but I don't understand, quite frankly, how non-exhibits and non-evidence can be circulated to the media under a First Amendment argument when they are not even facts or evidence in a particular piece of litigation, whether it be this trial or any trial and when they have not even been formally offered to the Court as full exhibits and wherein an opposing party hasn't been given an opportunity once formal offering has been made to argue against it.

The arguments for it would have been made

as follows, and perhaps it would even be more, but they would be made as follows.

One, we don't believe that they are fully accurate, "that" being the transcripts. Two, that there are recognized gaps with regard to the transcripts. Three, that if they are inaudible -- if there's a finding of fact that there are inaudible sections of the tapes, then those sections of the transcript that would correspond with the inaudible parts of the tape should be excised before even being offered to the jury because then the jury would be considering what is on the paper rather than that which is on the tape, and the Court has already instructed the jury that they are to recognize only that which they hear in the tape as being the evidence in the case.

Now, with those things in mind, I guess our objection is that the First Amendment argument with regard to the media will fail; that we haven't been given the opportunity to actually argue about the exhibits themselves as being marked and placed into evidence; that

they aren't marked and placed into evidence at this junction, and that the only evidence, quite frankly, at this juncture the tape, whether audible or inaudible, it doesn't matter and that's the only evidence there and that's the only evidence that should be offered to the jury.

MR. TWOMEY: Perhaps I should wait until after everybody talks. I would like to point one thing out. In listening to those tapes and reading along, to my ears there were clearly portions of it where not just words but sentences just could not be heard, and I think that's what Mark was talking about when he said a finding of fact on inaudible portions. If anyone could tell me they could hear every single word on that tape and understand it in English, please speak up because I'm getting old, my ears are going, but from what I heard, there are portions you can't hear.

If in fact that is true, I guess aside from what we're talking about here, I'd like a finding of fact that that's true. I guess how we could decide it is based on the acuteness of people's

hearing. But I was relying solely on that transcript because portions couldn't be heard.

MR. MAGGIOTTO: First thing, I think we are -- I'd like to separate the issues as I see them. There are portions of the tape which are difficult to hear, and I believe the transcript responds to that because the transcript does say inaudible in lots of different areas. The defense is not pointing out particular areas where they say the transcript has different words in here and the tape is actually inaudible in this portion.

I find this motion strange, coming at the times it's coming only because these transcripts were provided to the defense about a week after January 18th. They listened to all the tapes. They were provided with all the transcripts. They had them for over two and a half months. There was no claim of inadequacies to the point that it shouldn't have gone to the jury. To claim whether or not they should go into the the jury room and have them during deliberation is something the Court may want to re-examine and suggest to the jury listen to the tapes as

opposed to having the transcript, with the transcript as they did in the courtroom. Maybe that's something the Court will want to do instead of giving them the transcripts. I want to make it clear, nothing was done improper letting the jury have these, listening to the audio tapes, especially given the Court's instruction they should listen to the tapes and let that override anything they see in the transcript.

As far as the transcript being given to the press, obviously we had no part in that decision. It doesn't seem like it's prejudicial at all to the defendant. I can't see any way, shape or form it's prejudicial to the defendant. If we had 50 more earphones, we could have provided one to every member in the audience. It seems it was a matter of expedience and convenience rather than hooking it up in such a way that the public could generally hear what was on the tapes, provided transcripts which, I think on a scale of a hundred percent, they are 95, 98 percent accurate, and there's been no

claim otherwise until after the fact.

Based on all that, you know, I don't see any great error that has been caused on any side.

THE COURT: Let me say this. It has been my intention all along that along with the admission of each exhibit -- tape, I mean, as an exhibit, came the transcript of that tape. The tapes -- the transcripts are not a full exhibit and they won't be a full exhibit because then they are evidence in and of themselves, and they are not evidence and the jury has been cautioned and will be cautioned again that those are only there to assist them, and to the extent that the tape differs from the transcript they are to use the tape. And they will be cautioned about that in the charge itself, but as counsel for the State has said, if we had 50 more headsets everybody in the courtroom could have had one and the press would have made their own notes of what they heard, as they do in any testimony and report it correctly or incorrectly in the press, as they do all the time.

MR. SISTI: And I guess -- I'm sorry -- I guess my position is this. Our position is inadmissible evidence has been circulated to the media. Inadmissible, it is not evidence, has been circulated to the media; that in fact the only true evidence is that which can be derived from the tapes. If the media could not understand or if it was inaudible and they could not report because they could not hear what was on the tape, too bad. If they do report now that which is inadmissible, that being evidence or statements from a transcript, and in some way, shape or form that does cause a disability, a prejudicial situation to occur, a juror to be exposed to something that they shouldn't be exposed to, then we have to make this record. That's what this record is for.

THE COURT: I understand. Your objections are noted.

MR. TWOMEY: Could I add one thing, because I'm not sure I spoke correctly when you responded to it. I didn't mean to say they were inaudible portions, but inaudible portions where there's words on the transcript as opposed to where it was

inaudible.

THE COURT: As I said earlier, we've had a hearing on this earlier. I listened to all those tapes. I found very few, although I'll agree there are some, situations in which words appear on the tape that I, on the first reading, first listening today, couldn't follow.

I will say that I previously found these tapes are audible and of assistance to the jury, and with cautionary instructions I don't think the jury will have a problem with them.

As far as the press is concerned, I will be the first to admit that in this trial we've had to deal with the press, as I'm sure the State has and the defense has, in a way that I've never had to deal with the press before. But again, if the press had listened to those tapes, which they could have had there been headsets, they could have drawn their own conclusions and written their own stories, as they do everyday. I read something in the paper everyday about this case that was not said in the courtroom. Every single day. And I've got to believe that the

jury is following instructions and not reading the newspapers. So I don't see that any prejudice has been done to anybody. And thank you very much and we'll see you in the morning.

MR. MAGGIOTTO: Can I clear up something on the record. When I moved the tapes into evidence from Detective Pelletier and Robert Halvorson, I approached the bench just before playing. I may have misspoke and moved in Q1, Part 2 into evidence in place of Q2. Q2 is the tape which is the tape the Court found audible. Q1, Part 2 is the tape the Court found inaudible. I may have moved the wrong one into evidence, and I approached the bench before playing this, and I wanted to make the record clear.

THE COURT: Q1, Part 2, to the extent it's been marked as a full exhibit, will be marked for identification only.

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[In chambers hearing concluded at 3:45 p.m.]

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EXHIBIT E

ORIGINAL *91-239

VOLUME XVI of XXI

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

* * * * * * * * * * * * * * * * * *

THE STATE OF NEW HAMPSHIRE

v.

PAMELA SMART

90-S-1370
90-S-1371
90-S-1372

TRANSCRIPT OF TRIAL PROCEEDINGS

Held before the Honorable Douglas R. Gray, Presiding Justice, and a Jury, at the Rockingham County Superior Court, Exeter, New Hampshire, commencing on March 5, 1991.

APPEARANCES:

For the State: Paul A. Maggiotto
Diane M. Nicolosi
Assistant Attorneys General

For the Defendant: Mark L. Sisti
Paul J. Twomey
Attorneys at Law

* * *

Court Reporter: William N. Wojtkowski, CSR

I N D E X

MARCH 15, 1991 - FRIDAY MORNING SESSION - 9:32 A.M.

THE COURT: Good morning. Go ahead.

MR. MAGGIOTTO: State calls to the stand Cecelia Pierce.

CECELIA PIERCE,

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MAGGIOTTO:

Q In a nice clear voice so that everyone in the jury can hear, would you please repeat your name and spell your last name for the record.

A My name is Cecelia Pierce. P-i-e-r-c-e.

Q Cecelia, I'm going to ask you to try and speak into the microphone so that we'll all be able to hear you, okay?

A Yes.

Q Cecelia, how old are you?

A Sixteen.

Q What's your date of birth?

A May 24th, 1974.

Q Where do you live?

A Folly Mill Road.

Q Who do you live with?

A My mother and stepfather.

Q Do you have any brothers or sisters?

A Yes, I have a sister.

Q Older or younger?

A She's younger.

Q Where do you go to school?

A Winnacunnet High School.

Q What year are you in?

A I'm a junior.

Q Do you know Pamela Smart?

A Yes, I do.

Q Is she in the courtroom?

A Yes, she is.

Q Would you point her out, please.

A She's right there (indicating).

Q How did you first meet Pamela Smart?

A I met her through Project Self-Esteem at the school.

Q When was this?

A October of '89.

Q And what was your involvement in Project Self-Esteem?

A I was a facilitator.

Q What does a facilitator do?

A Facilitator leads a group of freshmen in projects that they do.

Q You're not quite speaking into the microphone. I'm not hearing everything you're saying. Okay?

A Yep.

Q So you were a sophomore facilitator?

A Yes.

Q What was the defendant's role?

A She was a facilitator.

Q How is it that in Project Self-Esteem your paths crossed?

A We got put together to lead the same group. We had to work together.

Q Who else was in that group, do you know?

A There was a teacher from Hampton Academy Junior High and a bunch of students.

Q How often would you see the defendant at that time during Project Self-Esteem?

A At the meetings with facilitators, just about like once a month or a week.

Q I can't hear you.

A About once a month.

Q Besides seeing her in Project Self-Esteem, were you seeing her at any other point during this time period in all of 1989?

A No.

Q What was the nature of your relationship at this time during Project Self-Esteem?

A We were just friends.

Q After Project Self-Esteem, did you become involved with her in any other capacity?

A Yes, I did.

Q What capacity was that?

A I became an intern at her office.

Q What do you mean by an intern at her office?

A I worked with Pam to get credit.

Q How did that come about?

A Pam offered me the internship.

Q When did she offer you the internship?

A During Project Self-Esteem.

Q Winter, spring, summer, fall?

A Fall.

Q Of 1989?

A Yes.

Q What did she tell you about the internship?

A Just that I would be working with her in her office on the computer and learn different stuff.

Q How much credit did you get for it?

A One for each term.

Q I'm sorry?

A One for each term.

Q So at this point, how often -- when you started working as an intern in the Media Center, how often would you see the defendant?

A At least twice a day.

Q When you say "twice a day," explain to the members of the jury how your internship worked.

A Well, I went to Pam's office fifth period, and then I went over again eighth period, and then some days I had to stay after school because you're required to have six hours a week.

Q What kind of work would you do in Pam's office?

A Just work on the computer.

Q What do you mean by "work on the computer"?

A Just type up articles for newsletters and stuff like that.

Q Now, during this time were you spending any time with her outside of school as you were starting as an intern or working as an intern?

A Not at the beginning. But --

Q What do you mean by "but"?

A We started working on the orange juice commercial and we hung around more and more.

Q When did you start working on this orange juice commercial with the defendant?

A Around December.

Q December? And how did that come about?

A Pam got a flier in the mail at her job and she asked if I wanted to do it. I said yes.

Q Who else was working on the orange juice commercial?

A Rachel Emond, Bill Flynn and Traci Collins.

Q Did you know Bill Flynn at this time?

A Yes.

Q How did you know Bill Flynn?

A He was a friend of mine.

Q I'm sorry?

A He was just a friend of mine.

Q At school?

A Yes.

Q What about Rachel Emond?

A She was my best friend.

Q Did you know Traci Collins at this time?

A No.

Q When did the OJ commercial start?

A When did we start working on it?

Q Right.

A Either December of January. I'm not sure.

MR. MAGGIOTTO: Judge, could we have sort of a hiatus on the camera picture taking for a while while the witness is testifying?

THE COURT: Barry. I can turn the speaker up a little bit but there's a hum. But I don't know how many pictures the press needs of one individual within a ten-minute time span.

BY MR. MAGGIOTTO:

Q Now, I'm sorry, I think the last question I asked you is, did you know Traci Collins?

A I do now. I didn't before we started the commercial, no.

Q And how often were you working on the OJ commercial at this time?

A We started working on it every weekend.

Q And did you ever work on it during the week?

A Occasionally.

Q And what kind of things would you do on the weekend?

A We'd work on the video during the day, and when it got nighttime, we'd go out.

Q I'm sorry?

A At night we'd go out.

Q When you say "we'd go out," who are we talking about?

A Pam, Bill and I, and sometimes Traci. Sometimes Rachel.

Q So how much time were you spending with the defendant because of your internship and also because of your work on the OJ video?

A Most of my time.

Q I'm sorry?

A Most of my time.

Q And the OJ video started at what period and lasted till when?

A It lasted until March.

Q When did it begin?

A December of January.

Q Now, in the beginning of the OJ commercial filming, what was the nature of Bill and the -- Bill Flynn's and the defendant's relationship, as you saw it?

A They were just friends at first.

Q I'm sorry?

A They were just friends at first.

Q How long did you know Bill Flynn at this point?

A A couple of years.

Q Is he someone that you hung out with and socialized with or just knew from school?

A I just knew him from school.

Q What about Pete Randall, did you know him?

A Yeah.

Q What was your relationship with him?

A I just knew him from school.

Q What about J.R. Lattime?

A I grew up with J.R. but I really didn't hang around with him.

Q How about Raymond Fowler?

A I just saw him around town. I don't hang around with him.

Q Ralph Welch?

A Same.

Q Now, besides the filming and your internship, were you ever just hanging out at the Media Center?

A I don't think so.

Q When you say fifth and eighth periods you were going over for your internship, can you give the members of the jury what time of day that would be in relationship to your school day?

A It was like 10:40 in the morning and eighth period moves. Sixth, seventh and eighth periods change, so like on Wednesdays fifth and eighth would be -- they'd run concurrent, and we like go out to lunch, and on Monday it would be the very end of the day and would end at 2:15, and on Tuesday it would end at like 1:30.

Q Now, during the times that you would be at the Media Center

in January and December working as an intern, did you ever see Bill Flynn there?

A Yes.

Q And how often was Bill Flynn there?

A Just about every day he came over.

Q Was he there the same time you were there or different time?

A No, he came over different times. There were times when we were both there, yeah.

Q And do you know why he came over different times? Did you have anything to do with his schedule at school?

A Yeah, that's when he had his study hall.

Q What is study hall?

A You're supposed to work -- you just have a teacher and work on your homework. You don't have an assignment from that teacher.

Q Now, did there ever come a time when you noticed a change in the relationship between Bill Flynn and Pamela Smart?

A Yes.

Q When was that?

A Around February.

Q Can you tell us what happened at that time?

A Pam told me that she loved Bill.

Q When Pam told you this, where were you?

A In a room adjoining her office.

Q Can you tell us what happened at that time?

A I laughed.

Q When you -- all right. Before you laughed, were you sitting down, were you standing, was there other people in the room, what was going on?

A She sat me down, told me.

Q I can't hear you, Cecelia.

A She sat me down in a chair.

Q And what'd she say to you?

A She said, "I think I'm in love with Bill."

Q What did you say to that?

A I laughed. It was ridiculous.

Q Why? Why's it ridiculous?

A Because she was married. She was 22.

Q What did she do when you laughed?

A She just kept telling me over and over again, "I'm serious."

Q So what happened after that?

A About a week later she told Bill.

Q Did you have any part in talking to Bill about this?

A I told Bill Pam wanted to see him.

Q And when you say "about a week later she told Bill," how do you know it was a week later?

A I'm not positive. That's when she -- she told me that she told him about a week later.

Q From the time that she told you until the time that she told you she told him, did you have any conversations with the defendant in between those two times?

A Yes.

Q About that? I'm sorry.

A Yes.

Q What were those conversations?

A Just I'd go to work and I'd ask her if she'd told him, and she'd say, "No, not yet."

Q Did she say why she was hesitating?

A She didn't have -- she just was working up her nerve, I guess.

Q Working up what?

A The nerve to tell him.

Q What happened -- well, I'm sorry. You said it was about a week later that she told him?

A Yes.

Q How do you know she told him?

A She told me.

Q I'm sorry?

A She told me.

Q What did she say to you at that time?

A I just went over one day and said, "Did you tell him?" And she said, "Yes." And she said that she had a choice either to kill Greg or get a divorce.

Q Now, is this the first time she ever said anything to you about a choice between killing Greg or divorce?

A Yes.

Q Now, after she told you, what did you say to that?

A I told her to get a divorce.

Q Did she say to you why she couldn't get a divorce?

A Because Greg would take the dog and the furniture, and she wouldn't have any money and she wouldn't have a place to live.

Q And when was the first time you had this conversation?

A About at the time she told Bill.

Q When you say "about the time," are we talking about the same day, couple days after? Do you have any recollection?

A I'm not sure.

Q After she'd told Bill, did you notice any change in their relationship?

A Uh-huh. Bill started coming over more often and they were together more often, and Bill was always smiling.

Q Now, when she said she could either divorce of kill Greg,

did you think she was serious?

A I thought that she was serious but that she wouldn't do it or have it done.

Q And how much -- how often were you having these conversations with the defendant at this time?

A Well, at first it was just like every few days, and then it was every day.

Q And what kind of things would she be talking about?

A What -- what was going on so far, like what they'd discussed last period, her and Bill had discussed, what they'd decided upon, things like to wear, their hair tied back, to wear dark clothes and to make it look like a burglary.

Q Did you ever see anything for yourself or hear anything for yourself which indicated the defendant was unhappy in her marriage?

A Yes.

Q What was that?

A One day when I was going to Pam's office fifth period, I walked in and she was on the phone, apparently arguing with somebody, and I looked at her and I said, "Greg?" and shook her head yes, and she was saying something about getting a divorce, and then they started fighting over who was going to take the dog and the furniture and everything. She said,

"Fine, take the dog," and she hung up, and then she said I was -- I told her that was good, you know, if they were going to get a divorce, and she said, "Well, I don't know what to do. He's going to take the dog and the furniture," and she called Greg's parents because -- I mean, she called Greg back and told him she was sorry because she didn't want him to call his parents because she didn't want anyone to know they were having trouble.

Q Did she say that to you?

A Yes.

Q When -- did she say that to you right then?

A Yes.

Q Now, when you walked in her office, you mean this is her office at the Media Center?

A Yes.

Q Anyone else present for that?

A No, not that I remember.

Q Do you know when this phone call conversation was?

A It was after she told Bill, after she'd mentioned murdering Greg, but I'm not sure exactly when.

Q Was it March, was it April?

A I'd say it was around April.

Q Now, besides seeing -- well, let me ask you this.

Where would you see the defendant and Bill Flynn together before the murder?

A In her office.

Q Anywhere else?

A At Bill's house.

Q And how was it that you were at Bill's house?

A Pam would pick me up and we'd go to Bill's house.

Q Why would you be going to Bill's house?

A Either to pick him up to go out or just to sit around in his room and talk.

Q Was this always connected with filming for the OJ commercial?

A No.

Q So after the OJ commercial stopped, and you said it stopped when?

A March.

Q You were still spending time together with the defendant and Bill Flynn?

A Yes.

Q Besides seeing them at the office and Bill Flynn's house, where would you go out?

A We'd go to Salisbury Beach, just driving around. We'd park behind buildings and just talk. We'd go to the movies. We'd just go out to dance clubs.

Q How often was this going on?

A Every weekend.

Q Did you ever go out drinking with the defendant and Bill Flynn?

A Yes.

Q How many times?

A Just once.

Q Can you tell us about that time?

A Well, I was driving and Pam and Bill were in the passenger's seat.

Q Now, when you say you were driving, did you have a license?

A No.

Q Did you have a learner's permit?

A No, I was in driver's ed.

Q How old were you at this time that you were driving?

A Fifteen.

Q Whose car were you driving?

A Pam's.

Q Which car was this?

A Her Honda CRX.

Q You were driving, and who else was in the car?

A Pam and Bill.

Q Where were they?

A In the passenger's seat.

Q Both of them were in the same seat?

A Yes.

Q How did that work out?

A Pam sat on Bill's lap.

Q Where'd you go?

A Well, first, Pam was driving and Bill was in the middle, and we went to the liquor store and bought Southern Comfort for Bill, and then we got wine coolers for Pam and I, and then I drove and they sat together in the passenger's seat and we went out back of a Spherex or Spharex, I'm not sure.

Q What is Spherex or Spharex?

A It's a company on Walton Road in Seabrook, and we just went out back there and parked and drank.

Q Did you go anywhere else?

A That night?

Q Yeah. Did you see anyone else that night?

A We went to Vance's house.

Q When you say "Vance," who do you mean?

A Vance Lattime.

Q Who'd you see at Vance's house?

A Vance and Pete.

Q What happened when you saw Vance and Pete?

A We were just talking to them, and then Pam went to the store and bought them something to drink. Then we left and went to Salisbury Beach.

Q Now, at Salisbury Beach, what kind of things would you guys do at Salisbury Beach?

A Walk around and go to dance clubs. There's a dance club down there.

Q What's the name of the dance club?

A Sneakers.

Q I'm being informed it's hard to hear you. Maybe you can make sure you're speaking into the microphone and not off to the side. It will be better picked up. Okay?

A Yep.

Q I'm sorry. Now, what was the name of the dance club at Salisbury Beach?

A Sneakers.

Q How often did you go to Sneakers?

A Just once in a while.

Q Besides you, the defendant and Bill Flynn, did anyone else ever go with you to Sneakers?

A Yeah.

Q Who?

A Traci Collins.

Q Anybody else?

A I don't think so.

Q Now, when you were with the defendant Bill Flynn these times, how did they act towards each other?

A They were just -- when Traci was around, they didn't -- they were just friends, acting just like friends.

Q And when Traci wasn't around?

A Well, hugging and kissing. Just being affectionate.

Q Did you ever see any physical contact besides this hugging and kissing between the defendant and Bill Flynn?

A Yes, I did.

Q When was that?

A The week that I stayed at Pam's house.

Q When was the week that you stayed at Pam's house?

A The week before Greg's death.

Q And what nights did you stay there?

A Monday through Thursday.

Q Now, when you were staying there Monday through Thursday, is this a school vacation or was school going on?

A I was in school still.

Q Where was Greg Smart, to your knowledge?

A At school in Rhode Island.

Q And who stayed there with you and Pam, anybody?

A Rachel stayed Monday night and Bill stayed Tuesday night, and then we drove him home. Wednesday and Thursday he came over.

Q I'm sorry, what?

A Came over for a few hours and then we drove him home.

Q Rachel is Rachel Emond?

A Yes.

Q Was Rachel Emond there on Tuesday, Wednesday and Thursday?

A No.

Q She was just there the one night?

A Yes.

Q Was Bill Flynn there Monday night?

A No.

Q How did the defendant and Bill Flynn act in front of Rachel Emond?

A The same as they acted in front of Traci.

Q So what happened on Tuesday night?

A Bill came over and we rented some movies. We rented two movies. We watched Nine and a Half Weeks, and then Bill and Pam went upstairs and I stayed downstairs and watched another movie.

Q And what happened?

A Bill came downstairs to get a cup of ice, and --

Q Did you see anything else?

A Yes.

Q What'd you see?

A I went upstairs and I saw Bill and Pam having sex.

Q When you say "having sex," was this Tuesday night you went upstairs?

A I'm not sure.

Q What do you mean by you're not sure?

A I think it might have been Wednesday night.

Q So this is another night that Bill was there?

A Right.

Q Tell us what you mean when you say you went upstairs. Why did you go upstairs?

A Because they'd been up there for hours. The movie was over. I'd watched parts of another, and I was just getting bored, and so I was walking up the stairs and I yelled, you know, "I hope you guys are done," and then I went upstairs and they weren't.

Q What did you see?

A Pam and Bill naked.

Q And where were they?

A On the floor.

Q In what room?

A In Greg's bedroom.

Q And what kind of position were they in?

A Pam was on top of Bill.

Q And did you say anything to them or they say anything to you?

A No, I just ran back downstairs.

Q Now, did you and the defendant have any other conversations before the murder about her relationship with Bill?

A We -- we talked about her and Bill.

Q What would she say?

A Just that she liked him, and like if they wrote notes back and forth she'd read them to me, and stuff like that.

Q Tell me about these notes. What did the defendant say to you about these notes?

A Well, there was one note that she wrote to Bill, she told me that Sara found it when she was wearing his coat, she found it in the pocket, and I guess she asked Bill who it was from, if it was from Pam, and Bill said yes.

Q Did she ever talk to you about notes from Bill to her?

A Yes.

Q How do you know?

A She read one to me.

Q Where did she read this one to you?

A In her office.

Q And the note from -- and what did she tell you about besides this note from Sara, did she ever talk to you about any other notes she wrote Bill?

A Not really.

Q What else did the defendant say about this note from Sara?

A Just that she didn't know what had happened to it.

Q Was she worried about it?

A And that -- yeah, she was.

Q Why? How do you know?

A She told me, but she wasn't really that worried at first because she didn't sign it. So -- she said she didn't sign it.

Q Uh-huh. I'd like to show you what's been marked State's Exhibit Number 55 in evidence. Ask you to take a look at that. Do you recognize that paper?

A Yes.

Q How do you recognize that paper?

A It's Pam's note paper that --

Q What do you mean by "it's Pam's note paper"?

A It's the pad of paper she has in her top desk drawer.

Q And do you recognize the handwriting on this paper?

A Yes.

Q What handwriting do you recognize it to be?

A Pam's.

Q Had you ever seen this letter before?

A Before right now?

Q No, I mean during the time that Bill and Pam were going out with each other.

A No.

Q I showed this to you prior to your testimony, is that correct?

A Yes.

Q Besides giving letters to Bill, did the defendant give anything else to Bill?

A Yes.

Q What?

A She bought him a magazine subscription for his birthday.

Q What magazine subscription was that?

A Guitar Magazine.

Q How do you know she bought him Guitar Magazine for his birthday?

A Because she gave me the money and I wrote the check for it.

Q Why did she give you the money and why did you write the check for it?

A She gave me the money to deposit into my checking account and I wrote the check because she didn't want to explain to Greg why she'd spend $30.00 on a magazine subscription that

they weren't receiving.

Q And do you know when this was?

A Bill's birthday.

Q When was Bill's birthday, do you recall?

A In March.

Q Do you know of any other time that the defendant tried to cover the relationship between her and Bill?

A I don't -- I don't understand.

Q Any other times where the defendant gave you any indication she didn't want to let it be known she was with Bill.

A Besides not wanting any of her friends to know or anything, no.

Q Okay. Did she ever tell you why Traci couldn't know about the affair?

A Yes.

Q What was that?

A Because Traci was Greg's -- one of his best friend's girlfriend.

Q Who was one of his best friends?

A Brian.

Q I'm sorry?

A I think his name's Brian.

Q And did you spend a lot of time with Traci during this time?

A Not really.

Q Did you ever spend any time with Traci outside the presence of the defendant?

A No.

Q Did you ever have to go to court with Traci?

A Yes.

Q What was that about?

A We got in an accident.

Q Who got into the accident?

A Pam, Bill, Traci and I.

Q When was this accident, do you recall?

A No, I'm not sure.

Q Was it March, was it April?

A I think it was in March.

Q And can you tell us what happened at that accident?

A The car in front of us -- the guy in front of us put his car in reverse and backed into us, and then he took off.

Q So what happened?

A The police caught him, and he was driving without his license and had already been revoked and he was drunk, so we went to court.

Q Did Bill go with you?

A No.

Q Why not?

A Because Pam didn't want anyone to know that Bill was with us.

Q How do you know that?

A Because she told me.

Q What did she say to you?

A She told me that if I was asked on the stand who was with us to say that it was Me, Traci and Pam.

Q When did she tell you this?

A Before we testified.

Q Do you remember when it was that you testified?

A In June.

Q Before or after Bill Flynn's arrest?

A Before.

Q Before his arrest?

A Yes.

Q Now --

A No, I'm sorry. It was after. It was the Wednesday after his arrest.

Q Okay. Now, do you recall when the first time or when it was about the defendant said she wanted to kill Greg Smart?

A Towards the end of February.

Q Now, she said she could either get a divorce or kill Greg. Did she ever indicate to you what her preference would

eventually be?

A Yes.

Q When was that?

A A few weeks after she told me that she had a choice.

Q And during those few weeks' interim, are you talking about it with her?

A Yeah.

Q What kind of things are being said?

A Just that she didn't know what to do, because she liked Bill and she didn't know whether she should get a divorce or have Greg killed.

Q How often was she talking about it?

A Just about every day.

Q What did she eventually tell you?

A That she was going to have somebody kill Greg.

Q Did she say who that somebody was?

A At first they were looking for someone but they couldn't find anyone, so she said Bill was going to do it.

Q When you say "they," who are you talking about?

A Bill and Pam.

Q Now, were you present for any of the discussions between Bill and Pam at this stage?

A No.

Q Why didn't you go to the police?

A Because I didn't think they were serious.

Q Why didn't you think they were serious?

A Because I had known Bill for a couple years and I didn't think that he could kill somebody.

Q Why'd you think that?

A Why'd I think that he couldn't kill someone?

Q Uh-huh.

A Because he didn't seem like the type of person.

Q Now, do you know how long before May 1st when Greg was actually killed that the conversation was that they decided to kill him?

A About a month and a half, two months.

Q What kind of things would Pam tell you during these conversations after they decided to kill him?

A She'd just tell me what had been discussed when Bill was at her office.

Q What kind of things would she tell you?

A She'd tell me that they were looking for a silencer in Haverhill, and that she'd told the boys to make it look like a burglary and to wear black and to pull their hair back and not to leave any fingerprints, to wear gloves.

Q She told this all to you?

A Yes.

Q Now when you say someone was looking for a silencer in Haverhill, what else --

A Raymond was looking for a silencer in Haverhill.

Q I'm sorry?

A Raymond.

Q What else besides a silencer and tying their hair back and making it look like a burglary did they talk about?

A I don't know.

Q Any conversations about a gun?

A Yeah.

MR. SISTI: Your Honor, I got to stop and object at this point. The leading questions are getting out of hand.

THE COURT: Objection sustained.

MR. SISTI: Thank you.

Q What other conversations did they have?

A They had conversations about how to get a gun.

Q Were you ever present for these conversations?

A Yes.

Q Where did these conversations take place?

A In Pam's office.

Q Who was present?

A Me, sometimes Bill, and Pam.

Q And what was said at those times?

A They were just naming off places where he could get a gun.

Q Like where?

A One of Bill's friend's mother had a gun, supposedly.

Q Do you know who the friend was?

A Yeah, Frank.

Q Frank who?

A Frank Daley.

Q Besides Frank Daley's mother, what else?

A Vance's father, and Kenny, the guy that lives upstairs from Bill had a gun collection.

Q Where else?

A I told them my father had a gun.

Q Now, is this the father you live with?

A No.

Q And where did your father that had a gun, where did he live?

A In Hampton.

Q And how long was the last time you'd spoken to that father?

A About three years before.

Q And besides telling that your father had a gun, what else did you say?

A I said that a girl that I worked with at Papa Gino's had a

gun, had said she had a gun.

Q And when you told them this conversation, do you know what time -- month it was?

A No.

Q And after telling them that a person you worked with at Papa Gino's had a gun, what ever became of that?

A I went to work one day and that person was working, and I called Bill and told them they were working and he came over and searched -- he broke into the car and looked through it but he didn't find a gun.

Q How do you know that Bill came over?

A Because he came into Papa Gino's.

Q Did you talk to him?

A Yeah.

Q What'd you tell him at that time?

A I just told him what color car it was.

Q Did you tell him where it was parked?

A Yeah.

Q And did you tell him anywhere else that he might look?

A Just my father's house.

Q Why did you tell them where they could find a gun at Papa Gino's?

A Just to be -- because they asked.

Q Was anyone else present besides you, Bill and Pam at this time?

A I don't remember. I don't think so.

Q I'm sorry, I can't hear you.

A I don't think so.

Q Now, when Bill came to Papa Gino's to look for that gun, who was he with?

A One of the boys. I'm not sure.

Q Why do you say "one of the boys"?

A I think it was either Pete or J.R.

MR. SISTI: Objection. Speculation.

THE COURT: Sustained.

Q You're not sure, don't tell us.

A I don't know.

Q I'm sorry?

A I don't know.

Q Now, who is Haley?

A Pam's dog.

Q Had you ever met Haley?

A Yes.

Q Did she and Bill ever discuss Haley?

A Yeah.

Q What did they discuss about Haley?

A She told Bill not to kill Greg in front of the dog because it would traumatize the dog.

Q What else did she say about Haley?

A Not to hurt the dog.

Q Did they ever discuss in your presence how the killing should take place?

A How?

Q Uh-huh.

A Just that they were going to use a gun, to make it look like a burglary.

Q Were you ever present for any other discussions about the killing with Pam and Bill?

A Yes.

Q Can you tell us about those?

A They would just discuss constantly, you know, how they were going to get a gun; if they get a gun how they'd get a car to go up there.

Q How was Bill going to get there?

A Well, the first -- the first time they couldn't find a car. The second time they were going to use Pam's car.

Q Now, when you say "the first time they couldn't find a car," how do you know that?

A Well, I went to Pam's office and she just said, "Well, they

were going to do it tonight but they couldn't find a car."

Q When you say "they," did she name anyone in particular?

A No, just Bill.

Q Did Bill have a license?

A I don't know. I think. I'm not sure.

Q Do you know if Bill knew the way to Derry?

A Yeah, he should have.

Q Why should he have?

A Because Pam, on the way up and back to Derry, she told him to memorize it, and she wrote out directions for him.

Q When did she write out directions for him?

A When?

Q Yeah.

A Before their last attempt.

Q Where was that?

A In her office.

Q Who was present for that?

A Me, Bill and Pam.

Q Tell us what was going on at that time.

A She wrote directions to her house on a piece of paper and just gave the paper to Bill.

Q And how do you know what was on the piece of paper?

A I saw it.

Q What did she say to Bill?

A She said to memorize them, not to screw up again.

Q When you say "not to screw up again," what did she mean by that?

A Because the second time -- the first time that they went up they took her car and they took a wrong turn, so when they got there Greg was already home.

Q So this was after that attempt that they wrote these directions?

A Yes.

Q And was anybody else present?

A I don't remember.

Q Now, you said there was an attempt when they got lost.

A Yes.

Q What do you know about that attempt?

MR. SISTI: I'm going to have to object just for foundational purposes. I don't know if it's hearsay at this point or not.

THE COURT: All right.

Q Did you ever speak to the defendant about that attempt?

A Yes.

Q Can you tell us what the defendant told you about it? When did you first learn about that attempt?

A The day it was supposed to happen, I went to her office and she told me she had a meeting, was going to let them take her car to Derry to kill Greg.

Q When you say "they," who did she refer to, if anyone?

A Bill and Raymond.

Q Now, she mentioned them by name?

A Yes.

Q Is this the first time Raymond was ever mentioned or had he been mentioned before?

A He'd been mentioned before.

Q Where was this conversation that was taking place with Pam?

A In her office.

Q Anyone else present at that time?

A No.

Q What else did she tell you about?

A Just that they -- they didn't have a gun; that they were going to slit --

Q Before it happened she told you they didn't have a gun?

A No, I think she told me the next day, and they were planning on stabbing him.

Q Let's go one day at a time.

A I'm sorry.

Q When she first tells you they were going up that night, what

did she tell you?

A She told me that when the meeting got over she went to the parking lot but her car wasn't there, so she went to her office and she laid down between the wall and her bookcase -- book shelf, just waited for them to get back, and -- so that if anyone came in the office they wouldn't see her and wonder why her car wasn't there. While she was in there, somebody came in and went through her desk, and I don't -- she didn't know who it was.

Q Did she say why her car wasn't there?

A Because Bill and Raymond had it.

Q How do you know Bill and Raymond had her car?

A She told me.

Q When did she tell you that?

A She told me what happened the next day, but she told me they were going to take her car that day.

Q When you say "she told me they were going to take her car that day," what day are you talking about?

A The day of the attempt.

Q What did she say about taking her car?

A That she was going to leave the keys for Bill and Raymond to take to Derry while she was in a meeting.

Q Did she say what type of meeting it was?

A A school board meeting.

Q Any other conversations with her about it that day?

A No.

Q Okay. Can you tell us, did you ever talk to her about it again?

A The next day.

Q Okay. Where was this conversation?

A In her office.

Q Can you tell us about what time of day that conversation was?

A Around 10:40.

Q Who was present for this converation?

A Pam and I.

Q Can you tell us what she said to you at that time?

A She just said that Bill and Raymond took a wrong turn and that by the time they got to Derry, Greg was already home. So they just turned around and came home.

Q And what else did she say at that time?

A Just she couldn't believe how stupid they were, and that's about it.

Q How did she appear?

A Angry.

Q Why did you think she appeared angry?

MR. SISTI: Objection. Speculation.

THE COURT: Sustained.

Q What did you see in her appearance?

A She would just look mad. She wasn't acting mad. That's it.

Q Now, why didn't you go to the police at this time?

A Because nothing had happened and I didn't think the police would believe me.

Q I'm sorry?

A I didn't think anybody would believe me.

Q Why didn't you think anybody would believe you?

A Because it sounds stupid. The whole thing is just stupid.

Q Why did it seem stupid?

A Because. I didn't -- I didn't think Bill would -- had it in him to kill somebody.

Q Are you upset about testifying today?

A Yes.

Q Why.

A Because. I was friends with Pam.

Q Now, after the defendant told you she'd gone back to her room and laid down between the shelf and the wall, did she ever tell you how she got home?

A The boys came back with her car.

Q When you say "the boys," who do you mean?

A Raymond and Bill.

Q How do you know that?

A Because she told me.

Q Do you have any idea when these conversations with the defendant were?

A No.

Q Any idea what month?

A April.

Q Do you know how long before May 1st they were?

A About two and a half weeks.

Q And do you know night of the week you thought it was?

A I thought it was Tuesday.

Q Why do you think Tuesday?

A Because that's when I thought the meetings were.

Q Now, after this attempt, did you have any other conversations with the defendant about the planning and murder of Gregory Smart?

A Yes.

Q And how often were you talking about it at this time?

A About everyday.

Q And you were still talking about it everyday?

A Yeah, until I told her I didn't want to know anything else and I didn't want to talk about it anymore.

Q When did you tell her that?

A A couple weeks before Greg was killed.

Q Well, you said this attempt was about two and a half weeks before Greg was killed. How long after the attempt did you have that conversation with the defendant?

A Just a couple of days.

Q You okay?

A Yeah.

Q Now, was this attempt that you're telling us about before or after the Papa Gino's incident?

A I don't remember.

Q You don't remember when they were in relationship to each other?

A No.

Q All right. Now, at the time in the week that you stayed at Pam's before the murder of Gregory Smart, were there any discussions during that time?

A The week that I was at Pam's?

Q Were you ever together with Bill Flynn and Pam going to her condominium?

A Yes.

Q The week before when you stayed there?

A Yes.

Q What discussions were held at that time?

A Just we drove through the parking lot of the mall -- of the plaza, and that's about it. She told him to be careful not to leave any fingerprints, and that's about it.

Q What do you mean by you drove through the parking lot of the plaza?

A Just so that they could see, so Bill could see, you know, how he could get to the condominium without being seen.

Q And who drove to Derry that day?

A What day?

Q When you -- the day you're talking about, who was driving the car when you drove through the parking lot at the plaza?

A Probably me.

Q Do you recall?

A No.

Q Now, during this discussion did you have any indication of when the murder of Gregory Smart was to take place?

A I don't think so.

Q When did you first learn?

A That day.

Q What do you mean by "that day"?

A The day that Greg was killed.

Q All right. What did you learn that day?

A Pam just told me that they were going to go up there.

Q And when she said "they," who did she mean? Did she say who she meant?

A I don't remember.

Q And who -- what was your understanding of who was going to go up there?

A My understanding was Bill, Pete, J.R. and possibly Raymond.

Q Did you have any discussions with the defendant about Pete or J.R.?

A Occasionally, she'd mention their names, and I'd just ask if Bill had told them, and she'd just say, "Yeah, I guess so."

Q "Yeah, I guess so"?

A Yeah.

Q When did she say this?

A During our discussions.

Q How long before May 1st was that?

A I'm not sure.

Q Months before, weeks before?

A Weeks.

Q I'm sorry?

A Weeks.

Q Did she actually mention their names at that time?

A On May 1st?

Q Right.

A Mmmm, I don't think so.

Q What did she actually say to you on May 1st?

A That Bill was going to go up there and he was going to kill Greg.

Q And when did she say this to you?

A During eighth period.

Q And where was this conversation taking place?

A In her office.

Q Was anybody else present?

A No.

Q I'm sorry?

A No.

Q What about Greg, did she say anything about Greg?

A Just that he was with clients all day and that he should be home around 8:30.

Q What time did she say?

A 8:30.

Q What would she be doing that night, did she tell you?

A Yeah, she came to work late that day and she was just going to work straight through until the meeting.

Q Did you know what kind of meeting it was?

A No. It had something to do with her course.

Q Now, after this conversation with the defendant, did you ever