No. 18-7961

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID MARTINKO,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

On Petition for a Writ of Certiorari
to the New Hampshire Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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Dated: April 18, 2019

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COUNTER-STATEMENT OF THE CASE

A. The Facts

The petitioner sexually assaulted his stepdaughter, A.G, for a decade—from the time she was four or five years old until she was fifteen years old. T. 9-10.[1] The petitioner and A.G. lived in Michigan, Massachusetts, and New Hampshire during this time. *Id.* The petitioner began "touching" A.G., but quickly escalated the assaults to putting his penis and fingers inside the vagina of his four- or five-year-old victim. T. 9. By the time A.G. was twelve years old, the petitioner was abusing her "every night or every other night," either by requiring her to touch his penis or by engaging in sexual intercourse.[2] T. 10. While the assaults temporarily ceased around A.G.'s fourteenth birthday, they resumed shortly thereafter when the petitioner began having intercourse with A.G. "once a month or so." *Id.*

On October 31, 2013, the petitioner confessed to the Dover Police that he had sexually assaulted A.G. on just one occasion. T. 8-9. The petitioner recounted that on October 30, 2013, he went into A.G.'s room, climbed into her bed, and rubbed her vagina over and under her clothes before pressing his penis against her vagina. T. 8-9.

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[1] This brief will refer to items in the record as follows:
"Pet." refers to the petition for writ of certiorari.
"A." refers to the appendix to the petition for writ of certiorari.
"T." refers to the trial transcript of the plea-and-sentencing hearing on June 13, 2014.
"SA" refers to the State's supplemental appendix.

[2] The defendant asserts in his petition that he engaged in one variant of sexual assault. The State of New Hampshire disputes this statement of fact. As discussed herein, the defendant admitted to at least two variants of sexual assault—sexual penetration and sexual contact as defined in N.H. Rev. Stat. Ann. § 632-A:1, IV, V.

The police spoke to A.G., then fifteen, the following day. T. 9. A.G. confirmed the incident on October 30, 2013, but disclosed the full extent of the sexual abuse that the petitioner had inflicted upon her since she was a four- or five-year-old child. T. 9, 10.

B. Procedural background

The State charged the petitioner with three counts of aggravated felonious sexual assault based upon patterns of sexual assault that he perpetrated against A.G. from September 1, 2010, to August 31, 2011; September 1, 2011, to August 31, 2012; and September 1, 2012, to October 31, 2013. *See* N.H. Rev. Stat. Ann. § 632-A:2, III (2016); N.H. Rev. Stat. Ann. § 632-A:1, I-c (2016) (defining a pattern of sexual assault); A1-A6. Each charge alleged that the petitioner:

> Did commit the crime of aggravated felonious sexual assault, in that he did engage in a pattern of sexual assault with … a young girl under the age of sixteen and not his legal spouse by committing more than one act of aggravated felonious sexual assault or felonious sexual assault or both over a period of two months or more and within a period of five years by knowingly engaging in sexual penetration or purposely engaging in sexual contact.

A1–A6.

On June 13, 2014, the trial court held a plea-and-sentencing hearing, at which the petitioner waived indictment on each of the three felony informations. A7-A12; T. 2-3. Before the hearing, the State and the petitioner entered into a negotiated plea agreement pursuant to which the petitioner agreed to plead guilty to each of the charged counts and to serve three consecutive ten-to-twenty-year sentences, though the third sentence would be suspended upon completion of sexual-offender programing. T. 8-9; A7-A12. At the hearing, the State presented the terms of the negotiated plea and the facts upon which the

charges were based. T. 8-10. The petitioner then pleaded guilty to each charge, admitting that he committed the underlying acts. T. 9-10, 12 (Q: "Do you admit you committed the acts charged you intended to do so? A: "Yes, sir."). The trial court accepted the petitioner's pleas and imposed the negotiated sentences. T. 17-18.

On June 14, 2016, the petitioner filed a motion to vacate his plea and sentences, arguing that he had received ineffective assistance of counsel. SA 1-6. The petitioner contended that the statutory definition of "pattern of sexual assault," *see* N.H. Rev. Stat. Ann. § 632-A:1, I-c, mandated that all assaults of the same sexual variant perpetrated against the same victim by the same defendant within a certain period be charged as one single offense. *See* SA 4-5. The petitioner therefore contended that his abuse of A.G. from September 1, 2010, to October 30, 2013, constituted a single offense, not the three separate offenses to which he had pleaded. SA 1-6. He argued that his plea to three—rather than one—pattern of sexual assault violated the double-jeopardy clauses of the state and federal constitutions. SA 5. The petitioner further argued that his prior counsel was ineffective because he failed to advise the petitioner of these double-jeopardy concerns. SA 2-3. The trial court (*Houran*, J.) denied the motion by order dated June 7, 2017. A20-A31.

On appeal to the New Hampshire Supreme Court, the petitioner raised two issues:

I. Did the superior court err in ruling that the felony Informations to which Mr. Martinko pleaded guilty conformed to state and federal constitutional protections against double jeopardy; and

II. Did the superior court err in its ruling that Mr. Martinko's trial counsel provided effective assistance, where counsel failed to advise Mr. Martinko that the Felony Informations to which he

> pleaded violated state and federal constitutional protections against double jeopardy.

SA 11; *State v. Martinko*, 194 A.3d 69, 72 (N.H. 2018). The parties agreed that the petitioner's appeal first required the court to determine the applicable unit of prosecution under the pattern-sexual-assault statute. *Martinko*, 194 A.3d at 72-73.

The New Hampshire Supreme Court first examined the petitioner's double-jeopardy argument under the New Hampshire Constitution. "To determine whether charged offenses violate the double jeopardy protections of … [the] State Constitution in unit of prosecution cases, [the court] examine[s] whether proof of the elements of the crimes as charged will require a difference in evidence. *Id.* at 73. Citing its own precedent, the court noted that it previously "rejected the petitioner's argument that the pattern sexual assault statute is intended to define as a single pattern all sexual assaults of the same variant committed against a single victim that occur within the same five-year period," and again declined to impose such a limitation in the current case. *Id.* at 74 (internal quotations omitted). Instead, the court held that because each charge required the State to prove different evidence, the State "was permitted to seek separate convictions on the charged informations, without violating the petitioner's protection against double jeopardy" under the state and federal constitutions. *Id.*

The New Hampshire Supreme Court reached the same conclusion with regard to the federal constitution. *Id.* at 74. The Court stated, "[t]o determine whether a defendant is subject to multiple punishments for the same offense, in violation of the protection provided by the Federal Constitution, [the court] must determine the unit of prosecution intended by the legislature." *Id.* (quotation omitted). "Because the substantive power to

prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." *Id.* at 74-75 (quoting *Ohio v. Johnson*, 467 U.S. 493, 499 (1984)). In this context, the court reiterated that to construe the pattern-sexual-assault statute to define all assaults of the same variant committed against the same victim within a five-year period as a single pattern would undermine its very purpose. *Id.* at 75. The court therefore concluded that under the federal constitution, the State was permitted to seek separate convictions on the charged informations. *Id.*

Because the petitioner's charges and sentences did not violate either the state or federal constitution, the court affirmed the denial of the petitioner's motion to vacate his plea and sentences. *Id.*

SUMMARY OF THE ARGUMENT

1. The petitioner presents three questions in his petition for writ of certiorari. The petitioner first contends that this Court should limit state courts' use of the absurdity doctrine to "modern textualism," subject to three limitations. Pet. 27. He then contends that the "same-evidence" test is not the proper test to use for double-jeopardy challenges under the New Hampshire Constitution. Pet. 32. This Court should decline certiorari as to these questions because they were neither raised in, nor decided by, the state court.

Further, these questions relate to how a state high court may interpret the state's own law and constitution. This Court too should not grant certiorari to address such questions as it is "bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976).

2. The petitioner next contends that the State violated his rights under the state and federal double-jeopardy clauses when it charged him with three pattern-of-sexual-assault crimes for what he contends was one continuous pattern of sexual assault, and therefore, one crime. At the heart of the petitioner's remaining question presented is the assertion that N.H. Rev. Stat. Ann. § 632-A:1, I-c requires the State to charge as a single crime all assaults of the same sexual variant perpetrated against the same victim by the same defendant within five years. The petitioner argues that because the State did not follow this alleged mandate and instead charged him with three crimes, he was improperly punished multiple times for one criminal offense. However, the New Hampshire Supreme Court has twice held that N.H. Rev. Stat. Ann. § 632-A:1, I-c

contains no such mandate. And while framing the issue on appeal as one of double jeopardy, the petitioner's real challenge is to this holding. Again, this Court should not grant certiorari to second-guess a state high court's interpretation of its own state law.

Moreover, resolving this question presented in favor of the petitioner does not change the outcome of this case. Even under the petitioner's proposed construction of the statute, his pleas and sentences are still constitutionally sound because the underlying charges were based upon three separate patterns of sexual assault and therefore, he was properly charged with and punished for three crimes.

REASONS FOR DENYING THE WRIT OF CERTIORARI

This Court should deny the petition for writ of certiorari. The petitioner has not preserved many of the issues he raises. Moreover, there is no reason or precedent for this Court to insert itself into a decision of a state court interpreting and applying the state's own law.

1. The questions presented by the petitioner regarding the absurdity doctrine and the proper test to use for state double-jeopardy challenges were neither raised in, nor decided by, the state court.

The petitioner contends that this Court should limit state courts' use of the absurdity doctrine to "modern textualism," subject to three limitations. Pet. 27. He also contends that the "same-evidence" test is not the proper test to use for double-jeopardy challenges under the New Hampshire Constitution involving numerous charges under the same state statute. Pet. 32.

The petitioner did not address, nor did a court pass upon, either of these arguments at any point during the state court proceeding. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below."); *United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule … precludes a grant of certiorari only when the question presented was not pressed or passed upon below."). Therefore, this Court should deny certiorari as to those questions presented on this ground alone.

Notably, with regard to the petitioner's challenge to the use of the same-evidence test, the New Hampshire Supreme Court has acknowledged that while it has articulated the same-evidence test in state double-jeopardy cases, it has not consistently applied it.

Martinko, 194 A.3d at 73. Therefore, the court has invited litigants to suggest a formulation of the double-jeopardy test to be applied under the state constitution. *Id.* (citing *State v. Locke*, 96 A.3d 962 (N.H. 2014)). However, "Neither party … accepted … [the] invitation in this case." *Id.*

Against this backdrop, even on appeal to this Court, the petitioner fails to advocate for a formulation of the double-jeopardy test to apply to the New Hampshire Constitution. Instead, he asks this Court for "guidance" because it is a "superior court" to the New Hampshire Supreme Court. Pet. 33. That is not the function of this Court.

2. This Court cannot second-guess a state high court's interpretation of its state law.

The petitioner next asserts that the State violated his rights under the state and federal double-jeopardy clauses when it charged him with three counts of pattern-of-sexual-assault for what he contends was one continuous pattern of sexual assault, and therefore, one crime. However, the New Hampshire Supreme Court has twice held that N.H. Rev. Stat. Ann. § 632-A:1, I-c does not require that all assaults of the same sexual variant, perpetrated against the same victim by the same actor within a certain period, be charged as one pattern-of-sexual-assault aggravated felonious sexual assault. In light of this, the petitioner argues that this Court can overrule this state court precedent because it is a "superior court," and the New Hampshire court misinterpreted the language of the New Hampshire statute. Pet. 30-32. This Court should decline the petitioner's invitation to supplant a state high court's interpretation of a state statute with its own interpretation of the same.

It is hornbook law that this Court cannot review decisions of state courts construing state law. This Court is "bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976). The Double Jeopardy Clause provides no exception to this rule, and no basis for this Court to second-guess the legitimacy of state high courts' interpretations of their own state law. Neither this Court nor any federal court suggests otherwise. The New Hampshire Supreme Court has held that N.H. Rev. Stat. Ann. § 632-A:1, I-c does not require that all assaults of the same sexual variant perpetrated against the same victim within the statutorily defined time period as one pattern-of-sexual-assault aggravated felonious sexual assault. *Martinko*, 194 A.3d at 75; *State v. Jennings*, 929 A.2d 982, 991 (N.H. 2007). Instead, "to construe the pattern sexual assault statute to define all assaults of the same variant committed against the same victim within a five-year period as a single pattern would undermine its very purpose." *Martinko*, 194 A.3d at 75; *see Jennings*, 929 A.2d at 991 ("[R]eading 'pattern of sexual assault' to encompass every assault of a given variant that occurs within five years would lead to an absurd result."). This determination is conclusive and unreviewable.

Moreover, the petitioner's proposed construction of N.H. Rev. Stat. Ann. § 632-A:1, I-c is not sound. Contrary to the plain language of the statute, the petitioner's interpretation requires the addition and removal of statutory language to give it force. To conform to the petitioner's interpretation, one would have to revise the statute to read: a "'pattern of sexual assault" means "*all assaults of the same sexual variant* commit[ted] … under RSA 632-A:2 [or] RSA 632-A:3~~, or both,~~ upon the same victim over a period of

2 months or more and within a period of 5 years." This is not what the statute provides, and as the New Hampshire Supreme Court has made clear, it will not add language to a statute that the legislature did not see fit to include. *State v. Pessetto*, 8 A.3d 75, 79 (N.H. 2010).

Because N.H. Rev. Stat. Ann. § 632-A:1, I-c permitted the State to charge the petitioner with three separate crimes, the charges will not violate the state or federal double-jeopardy clause unless the multiple charged patterns of sexual assault comprised the same individual acts of sexual assault. They do not, and the petitioner does not claim to the contrary. Therefore, the state court's determination that the charging and sentencing in this case did not violate the federal Double Jeopardy Clause does not conflict with this Court's precedent.

3. There are alternative grounds to support the result in this case.

Finally, this Court should deny the petition because there are alternative grounds to affirm that New Hampshire Supreme Court's decision. Even under the petitioner's proposed construction of the statute—that is, that N.H. Rev. Stat. Ann. § 632-A:1, I-c requires the State to charge all assaults of the same variant committed against the same victim within a five-year period as a single pattern of sexual assault—he still committed three pattern-of-sexual-assault crimes for which the State could (and did) charge him separately. Therefore, the petitioner did not receive multiple punishments for the same conduct; he received three punishments for three crimes.

The petitioner argues that contrary to his interpretation of the statute, the State arbitrarily divided by time period one continuous pattern of sexual assault into three such

patterns, and therefore, unconstitutionally charged three aggravated felonious sexual assaults. Pet. 26. However, for this argument to prevail one of the following would need to be true: first, that the petitioner engaged in only one variant of sexual assault, or second, that the State intended to charge a multi-variant pattern as one aggravated felonious sexual assault. Neither is true.

First, the petitioner admitted that he engaged in two variants of sexual assault—sexual penetration and sexual contact. *See* N.H. Rev. Stat. Ann. § 632-A:1, IV, V (2016); T. 9-10 (the petitioner made A.G. touch his penis "on occasion" and engaged in sexual intercourse with A.G. when she was 12 and 13 years old). Thus, even under his suggested construction, the petitioner did not engage in a pattern of single-variant assaults that the State would need to charge as a single pattern.

Second, the State did not charge the multi-variant assaults as one pattern. Rather, each information provided as follows:

> DAVID MARTINKO … did commit the crime of aggravated felonious sexual assault, in that he did engage in a pattern of sexual assault with … a young girl under the age of sixteen and not his legal spouse by committing more than one act of aggravated felonious sexual assault *or* felonious sexual assault or both over a period of two months or more and within a period of five years by knowingly engaging in sexual penetration or purposely engaging in sexual contact.

A1-A7 (emphasis added). The italicized "or" is fatal to the petitioner's argument because it demonstrates that the State contemplated that the charged patterns may comprise one or more acts of sexual penetration *or* sexual contact, but not both.

Instead, the evidence and the informations support three distinct patterns of abuse. The petitioner admitted that he made A.G. touch his penis "on occasion" from September

1, 2010, to August 31, 2011, when she was 12. T. 9-10. This is consistent with the first information. A1-A2. Consistent with the second information, the State proffered and the petitioner admitted that he had sexual intercourse with A.G. "every night or every other night" from September 1, 2011, to August 31, 2012, when she was 13 years old. T. 10; A3-A4. Third, after the petitioner stopped abusing A.G around her fourteenth birthday, the State proffered and the petitioner admitted that he resumed having sexual intercourse with A.G., but "once a month or so," from September 1, 2012, to October 31, 2013. T. 10; A5-A6. This cessation coupled with the change in frequency in abuse constitutes a third pattern of sexual assault, consistent with the third information. *See State v. Krueger*, 776 A.2d 720, 722 (N.H. 2001) (the evidence supported finding two separate assaults where a video showed that there was time for reflection between the acts).

Because the evidence to which the petitioner admitted supported three distinct patterns of sexual assault that are not based upon any overlapping conduct, the petitioner was not punished multiple times for the same offense, even under his own construction of the statute. Thus, neither the petitioner's plea nor sentence would conflict with the Double Jeopardy Clause of the federal constitution even under his construction of the state statute.

CONCLUSION

The petition should be denied.

RESPECTFULLY SUBMITTED,

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Dated: April 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent this day via first class mail to Petitioner.

_____
Elizabeth A. Lahey

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

STRAFFORD, SS.

219-2013-CR-521,
Charge ID's 936555C -
936557C

In the Matter of: State of New Hampshire v. David Martinko

DEFENDANT'S MOTION TO VACATE PLEA AND SENTENCES

NOW COMES the defendant, David Martinko, by and through his Attorney, Adam H. Bernstein and requests that this Court vacate his guilty pleas which were entered before this Court on June 16, 2014.

In support of this Motion, Mr. Martinko states the following:

FACTS

1. Mr. Martinko entered pleas of guilty to three counts of Aggravated Felonious Sexual Assault alleging a pattern of sexual assault with A.G. whose date of birth is August 16, 1998.

2. Charge ID 936555C alleges that Mr. Martinko "...engaged in a pattern of sexual assault with A.G. (DOB August 16, 1998) between September 1, 2010 and August 31, 2011 in Dover, New Hampshire. Specifically, Mr. Martinko is alleged to have committed more than one act of Aggravated Felonious Sexual Assault or Felonious Sexual Assault or both over a period of two months or more and within a period of five years by knowingly engaging in sexual penetration or purposely engaging in sexual contact with A.G.

3. Charge ID 936556C alleges the exact same conduct except the allegation occurred between September 1, 2011 and August 31, 2012 in Dover.

4. Charge ID 936557C alleges identical contact except the allegations occurred between September 1, 2012 and October 31, 2013 in Dover.

5. Mr. Martinko was represented by David Betancourt of the New Hampshire Public Defender.

6. Mr. Martinko entered pleas of guilty to all three indictments.

7. On Charge ID 936555C, the Court sentenced Mr. Martinko to the New Hampshire State Prison for ten to twenty years stand committed commencing on June 16, 2014. The Court awarded Mr. Martinko 222 pretrial confinement credit and recommended to the Department of Corrections that Mr. Martinko complete the sexual offender program. Other conditions of Mr. Martinko's sentence is that he is to have no contact with A.G. or her family except as may be authorized by the Family Court the defendant shall have no unsupervised contact with minors.

8. On Charge ID 936556C, Mr. Martinko was given an identical consecutive sentence to Charge ID 936555C.

9. On Charge ID 936557C, Mr. Martinko was given an identical sentence but all of the minimum sentence may be suspended by the Court on application of the defendant provided that the defendant demonstrates meaningful participation in a sexual offender program while incarcerated. In the event that the sentence is suspended, it is consecutive to the stand committed sentence in Charge ID 936556C.

10. According to Mr. Martinko, he raised the issue of Double Jeopardy with Attorney Betancourt prior to entering into the plea agreement with the State. Mr. Martinko indicates that Attorney Betancourt advised Mr. Martinko that the Double Jeopardy cause of both the New Hampshire Constitution and the United States Constitution were inapplicable to the plea agreement in which he entered his pleas of guilty.

LEGAL ARGUMENT

a. Attorney Betancourt was ineffective when he failed to advise Mr. Martinko that his pleas of guilty to the three pattern indictments were in violation of the Double Jeopardy Clauses of the New Hampshire Constitution and the United States Constitution

11. Attorney Betancourt was ineffective in allowing Mr. Martinko to go forward with the plea agreement outlined above as it is in violation of Part 1, Article 16 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

12. There is a two prong analysis that the Court must undertake to determine whether counsel provided ineffective assistance. See State v. Winttaker, 158 N.H. 762, 768 (2009). "... To prevail upon a claim for ineffective assistance of counsel, a defendant must show, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." Id.

13. In this case, the first prong in *Whittaker* is met. Mr. Martinko was not advised by Attorney Betancourt that his pleas of guilty to the above indictments were in violation of the Double Jeopardy Clauses of both the New Hampshire Constitution and the United States Constitution.

14. Here, the second prong outlined in *Whittaker* has also been met. Had Mr. Martinko been properly advised that his pleas of guilty were in violation of the Double Jeopardy Clauses of the New Hampshire Constitution and the United States Constitution, he would not have entered pleas. The fact that he entered such pleas, prejudiced Mr. Martinko as he received essentially 30 years stand committed in the New Hampshire State Prison based on the three pleas of guilty.

15. A guilty plea must be knowing, voluntary, and intelligently made. *See State v. Arsenault*, 153 N.H. 413, 416 (2006). Based on the above, Mr. Martinko submits to this Court that he did not enter such a plea.

    a. Mr. Martinko's pleas of guilty and subsequent sentencing on the three indictments are in direct violation of the Double Jeopardy clauses as enumerated under Part 1, Article 16 in the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

16. Each indictment alleges identical allegations except for the time period in which the allegations occurred.

> "The Double Jeopardy Clause of the Federal Constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. Amend. V; *See Brown v. Ohio*, 432 U.S. 161, 164, 97 S. Ct. 221, 53 L. Ed. 2d 187 (1977). It "protects a defendant's right in three ways: First, it protects against a second prosecution for the same offense after acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense." *State v. Bailey*, 127 N.H. 811, 814, 508 A.2d 1066 (1986). See *State v. Richard*, 142 N.H. 340, 341 (1997).

17. In this case, the sentence imposed on Mr. Martinko is in violation of the third prong of the Double Jeopardy Clause in that these convictions subject him to multiple punishments for the same offense.

18. In *Richard* the Court held that "...While the pattern indictments charged overlapping time frames, each charged a particular variant of sexual assault different from the type charged in the other patterns. Because each pattern indictment did not rely upon any act charged in another pattern indictment, the same pattern was never charged twice. Accordingly, we conclude that the defendant was not subjected to multiple punishments for the same offense as defined by the legislature, and his Federal Double Jeopardy right does not infringe." Id at page 343.

19. The Court in *Richard* was clear that "...When pursuing multiple pattern indictments involving a particular victim, the State should be mindful of its obligation to exercise meaningful prosecutorial discretion." Id at 344 (Citing *State v. Krueger*, 146 N.H. 541 (2001); *State v. Rayes*, 142 N.H. 496, 500 (1997). In this case, all of the variants of sexual assault charged in each indictment are identical. This case is distinguishable from *Richard*.

20. In *Richard* the Court made clear that "...Two indictments charging a common time period cannot charge the same type of sexual assault." Id at page 343.

21. The Court in *State v. Jennings*, 155 N.H. 768 (2007) relied on *Richard's*, *Supra* that "...[W] hen seeking convictions on multiple pattern indictments that charged numerous assaults within a common timeframe inflicted on a single victim... the pattern indictments cannot rely on the same underlying act or acts to comprise a charged pattern." Citing *Richard*, 147 N.H. at 343, *Supra*. The Court held in *Jennings* that the same requirement is applicable.

22. In *Jennings*, the Court held that Double Jeopardy was not infringed because "...The pattern indictments allege three separate sets of acts during three discrete time periods at three different locations." Id at 779.

23. In this case, the circumstances are distinguishable from both *Richard* and *Jennings*. The indictments alleged against Mr. Martinko involve three separate sets of acts during overlapping time periods, alleging identical variants of sexual behavior that occurred at the same location.

24. In *Jennings*, the Court again made note of the cautionary warning that was in *Richard*, "...When pursuing multiple pattern indictments involving a particular victim, the State should be mindful of its obligation to exercise meaningful prosecutorial discretion. Furthermore, the defendant's Double Jeopardy rights might preclude multiple pattern charges in a particular case depending upon the nature of the evidence. As in *Richard*, those issues are left for another day." Id at 779.

25. In this case, this very issue is in direct contradiction to the holdings of *Richard* and *Jennings*. Each indictment alleges an overlapping time period to which the defendant committed the same variant of inappropriate sexual behavior at the same location in Dover, New Hampshire. It is Mr. Martinko's position that these indictments are in violation of the Double Jeopardy protections afforded by both the United States Constitution and the New Hampshire Constitution.

26. The dissent by Justice Dalianis is on point.

27. Justice Dalianis indicates in her dissent that "Each indictment alleges the same prohibited act against the same victim during the same five year period. Here, there are not "Multiple patterns of sexual assault involving a single victim...during a common timeframe, but only one pattern." Id at 779 (Citing *Richard,* 147 N.H. at 343.)

28. Justice Dalianis further notes that "... The majority contends that the patterns alleged are different because they comprise "three separate sets of acts during three discrete time periods at three different locations." I disagree. While in *Richard,* the indictments "Each charged a particular variant of sexual assault different from the type charged in the other patterns, here, each indictment charged the same variant of sexual assault." Id.

29. This case is consistent with Justice Dalianis' dissenting opinion in that these indictments allege three separate sets of acts which include the same variant at the same location.

30. Arguably, the majority in *Jennings* would find that this case is the type of situation where a defendant's Double Jeopardy rights would likely preclude multiple pattern charges.

WHEREFORE, the defendant requests that this Court vacate his pleas of guilty in the above matter as they are in violation of the Double Jeopardy Clause of the New Hampshire Constitution as guaranteed under Part 1 Article 16 and the United States Constitution as guaranteed under the Fifth and Fourteenth Amendments or

a. Grant a hearing;
b. Provide findings of fact and rulings of law; and
c. Grant any other relief deemed appropriate and just.

Respectfully submitted,
David Martinko

Date: April 20, 2017

By: _____
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CERTIFICATE OF SERVICE

I certify that a copy of same has been sent this date to Kathryn Smykowski of the Strafford County Attorney's Office.

Date: April 20, 2017

_____
Adam Bernstein, Esq.

State of New Hampshire
Supreme Court

NO. 2017-0385

2017 TERM

DECEMBER SESSION

State of New Hampshire

v.

David Martinko

RULE 7 APPEAL OF FINAL DECISION OF THE
STRAFFORD COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT, DAVID MARTINKO

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QUESTIONS PRESENTED

I. Did the superior court err in ruling that the felony Informations to which Mr. Martinko pleaded guilty conformed to state and federal constitutional protections against double jeopardy?
Preserved: Motion to Vacate Plea & Sentences (Apr. 20, 2017), *Addendum* at 30.

II. Did the superior court err in its ruling that Mr. Martinko's trial counsel provided effective assistance, where counsel failed to advise Mr. Martinko that the Felony Informations to which he pleaded guilty violated state and federal constitutional protections against double jeopardy?
Preserved: Motion to Vacate Plea & Sentences (Apr. 20, 2017), *Addendum* at 30.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On Halloween 2013, David Martinko, who had no prior criminal record, walked into the Dover, New Hampshire Police Department, and reported that on the previous evening he had sexual contact with his step-daughter, who was then 15. *Plea-Sent.Hrg.* at 8, 17. The next day the police interviewed the young woman. She discussed the previous evening, and also revealed there were additional times when Mr. Martinko had sexual contact with her. *Plea-Sent.Hrg.* at 8-9.

The police issued a criminal complaint that day, alleging one count of aggravated felonious sexual assault. Mr. Martinko was appointed a public defender, got arraigned in the Dover District Court, posted $10,000 cash bail, and was released on condition of no contact with the victim and anyone else under age 18. COMPLAINT (Nov. 1, 2013), *Appx.* at 1; CONDITIONS OF BAIL (Nov. 13, 2013), *Appx.* at 1; APPOINTMENT OF COUNSEL (Nov. 5, 2013 & May 22, 2014), *Appx.* at 11; APPEARANCE (of Attorney David J. Betancourt) (Nov. 7, 2013), *Appx.* at 3. The following week, after he lost his job, Mr. Martinko voluntarily relinquished bail, and subjected himself to incarceration, where he remains. MOTION TO VOLUNTARILY RELINQUISH BAIL (Nov. 7, 2013), *Appx.* at 4; BOND IN CRIMINAL CASE (Nov. 7, 2013), *Appx.* at 6; BAIL ORDER (Nov. 14, 2013) (victim's name redacted), *Appx.* at 6.

After the case was transferred to the superior court, NOTICE OF BOUNDOVER (Nov. 22, 2013), *Appx.* at 8, the State issued three felony Informations[1] charging Mr. Martinko with pattern sexual assault.

[1] The State has assigned unique short text strings to identify the Informations, which are handwritten in the bottom right margin of each Information. FELONY INDICTMENTS (May 14, 2014), *Addendum* at 12, 15, 20. For convenience, these numbers have been truncated, so that each Information identification is referenced here as a two-digit number: "#55," "#56," and "#57."

All three Informations are identical except for their dates, which are precisely successive:

- Information #55: "between the first day of September in the year two thousand and ten and the thirty-first day of August in the year two thousand and eleven...";

Information	Pattern Start Date	Pattern End Date
55	September 1, 2010	August 31, 2011
56	September 1, 2011	August 31, 2012
57	September 1, 2012	October 31, 2013

- Information #56: "between the first day of September in the year two thousand and eleven and the thirty-first day of August in the year two thousand and twelve...";

- Information #57: "between the first day of September in the year two thousand and twelve and the thirty-first day of October in the year two thousand and thirteen...."

FELONY INFORMATIONS #55, #56 & #57 (May 14, 2014), *Addendum* at 18, 20, 22 (capitalization altered). All three Informations identically alleged that Mr. Martinko, between those dates:

> at Dover, in the County of Strafford ... did commit the crime of aggravated felonious sexual assault, in that he did engage in a pattern of sexual assault with ... a young girl under the age of sixteen and not his legal spouse by committing more than one act of aggravated felonious sexual assault or felonious sexual assault or both over a period of two months or more and within a period of five years by knowingly engaging in sexual penetration or purposely engaging in sexual contact....

Id. (capitalization altered).

Mr. Martinko then filed an intent to plead guilty – indicating the terms of a negotiated plea – waived his right to a grand jury indictment (thus allowing the allegations to go forward on informations rather than indictments), and waived his right to trial. NOTICE OF INTENT TO ENTER PLEA OF GUILTY (May 13, 2014), *Appx.* at 9; WAIVER OF INDICTMENT (June 10, 2014), *Appx.* at 14; ACKNOWLEDGMENT & WAIVER OF RIGHTS (June 10, 2014), *Appx.* at 12.

The negotiated plea was:

- Information #55: 10 to 20 years stand committed, commencing forthwith;
- Information #56: 10 to 20 years stand committed, consecutive to #55;
- Information #57: 10 to 20 years stand committed, consecutive to #56, suspended on conditions.[2]

NOTICE OF INTENT TO ENTER PLEA OF GUILTY (May 13, 2014), *Appx.* at 9; *Plea-Sent.Hrg.* at 4-7, 16. At his plea-and-sentencing hearing, in allocution Mr. Martinko explained his self-report, relinquishment of bail, and pleas of guilt:

> I am sorry for what I have done and I know I cannot make up for what has been done, but I wish to go to heaven and that is my primary goal behind turning myself in and making amends and trying to make things right with God and allow the courts to settle their punishments as well.

Plea-Sent.Hrg. at 17. The court accepted Mr. Martinko's pleas, imposed sentences as negotiated,[3] and required sex offender registration. *Plea-Sent.Hrg.* at 18. STATE PRISON SENTENCES (June 13, 2014), *Addendum* at 24-29; NOTICE OF REQUIREMENT TO REGISTER (June 13, 2014), *Appx.* at 16.

Two years later, Mr. Martinko, first *pro se* and then through a private attorney, filed a request to vacate his pleas and sentences. His grounds were that his lawyer who conducted his plea and sentencing was ineffective for not advising him that the three Informations were multiplicitous in that they arbitrarily charged a single crime in three separate Informations, thus subjecting Mr. Martinko to double jeopardy, in violation of both the Federal and New

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[2]Conditions were: completion of the sex offender program, no contact with the victim and her family, no contact with Mr. Martinko's biological adult daughters, and no unsupervised contact with minors. A year after sentencing, the court clarified that the no-contact orders sprang only from Information #57, and not from the others. *See* ORDER ON DEFENDANT'S MOTION FOR CLARIFICATION (May 26, 2016), *Appx.* at 22.

[3]The court also dismissed the original Porter court complaint. RETURN FROM SUPERIOR COURT (June 13, 2014) (omitted from appendix).

Hampshire constitutions. MOTION TO VACATE PLEA & SENTENCES (Apr. 20, 2017), *Addendum* at 30; APPEARANCE OF ATTORNEY BERNSTEIN (Apr. 20, 2017), *Appx.* at 23; *see also* MOTION TO APPOINT COUNSEL (Nov. 27, 2015), *Appx.* at 18. The State objected. OBJECTION TO MOTION TO VACATE PLEA & SENTENCES (May 2, 2017), *Appx.* at 24.

The court ordered preparation of a transcript of the 2014 plea-and-sentencing hearing, but denied appointment of a lawyer. ORDER (May 17, 2017), *Appx.* at 27; ORDER (Jan. 29, 2017), *Appx.* at 21. In June 2017, the Strafford County Superior Court (*Steven M. Houran*, P.J.) issued an order denying Mr. Martinko's request to vacate, on the grounds that there was no double-jeopardy violation, and thus no ineffective assistance of counsel. ORDER ON MOTION TO VACATE PLEA AND SENTENCES (June 7, 2017), *Addendum* at 36.

SUMMARY OF ARGUMENT

Mr. Martinko first explains the evidence presented against him at his plea and sentencing hearing, and analyzes the dates of the alleged pattern conduct.

In the law of double jeopardy, pattern charges against a defendant must be reflective of the defendant's alleged pattern conduct. Mr. Martinko argues that he was charged arbitrarily, however, because the pattern charges do not relate to the evidence. It appears that the State randomly chose start and end dates for its allegations, unrelated to the evidence; it alleged successive periods, thereby creating multiple charges, where there was, at most, a single pattern of conduct. Accordingly Mr. Martinko requests this court dismiss the multiplicitous allegations.

Because his attorney at sentencing did not apprise Mr. Martinko of the double jeopardy issue, he pleaded guilty to three charges rather than one, and was commensurately sentenced to three consecutive prison sentences.

ARGUMENT

The date ranges of the three pattern Informations are precisely successive: the second Information begins on the very next day after the first Information ends, and the third Information begins on the very next day after the second ends.

There is no evidence in the record, however, that three distinct patterns began and ended on those dates. As such, the periods are arbitrary, and therefore the Informations are multiplicitous, in violation of federal and state constitutional bars against double jeopardy.

I. The Pattern Evidence Against David Martinko

The only evidence appearing in the record regarding Mr. Martinko's conduct was recited by the prosecutor during the plea and sentencing hearing, in response to the court's question: "What ... facts can the State prove beyond [a] reasonable doubt in the event these cases should go to trial?" *Plea-Sent.Hrg.* at 8. The prosecutor noted that all the facts were from Mr. Martinko's self-report and from the interview with the young woman the next day. *Plea-Sent.Hrg.* at 8-10. The prosecutor's recitation of the evidence was:

> After speaking about [the October 31, 2013] incident [the victim] told the forensic interviewer that the touching began when she was four or five when she lived in Michigan and that shortly after he began putting his penis and his fingers inside of her vagina.
>
> He also had [the victim] touch his penis on occasion. She said that this behavior continued when the family moved from Michigan to Massachusetts and when they moved from Massachusetts to Dover, which was Labor Day weekend of 2010 when she was 12.
>
> She said that the touching and the sexual intercourse stopped for awhile shortly before her 14th birthday when she told the defendant it needed to stop. She said up until that point the abuse was happening every night or every other night and after she told him it needed to stop, it happened about once a month or so.

Plea-Sent.Hrg. at 9-10.

After this recitation, the prosecutor concluded: "Those were the facts the State would rely on should this matter have gone to trial." *Plea-Sent.Hrg.* at 10.

Broken down into its smallest constituent parts, the evidence can be thus summarized:

Incident number	When, in record	When, more exactly	Act	Frequency	Location	Trn. cite
1	*Oct. 31, 2013 (self-reported)*	*Oct. 31, 2013*	*Touching*	*Once*	*Dover, New Hampshire*	*8-9*
2	"[W]hen she was four or five."	Calculated: between Aug. 16, 2002 and Aug. 15, 2004.	Touching	unknown	Michigan	9
3	"[S]hortly after" incident number 2.	unknown	Digital Penetration, Intercourse	unknown	Michigan	9
4	"[W]hen the family moved from Michigan to Massachusetts and when they moved from Massachusetts to Dover"	Nothing in record to date this event, presumably between 2004 and 2010.	Touch penis, intercourse	"[O]n occasion."	Michigan & Massachusetts, or Dover, New Hampshire	9-10
5	"[W]hen they moved from Massachusetts to Dover, which was Labor Day weekend of 2010 when she was 12."	Sept. 1, 2010 and Sept. 2, 2010.	Touch penis, intercourse	"[E]very night or every other night."	Massachusetts or Dover, New Hampshire	10
6	"[S]topped for awhile [until] shortly before her 14th birthday."					10
7	"[A]fter" 14th birthday.	Calculated: sometime after August 16, 2012	Intercourse	"[O]nce a month or so."	Dover, New Hampshire	10

The dates alleged in the Informations, as shown in the chart repeated here from above, do not reflect any differences in the pattern conduct shown by the evidence.

Information	Pattern Start Date	Pattern End Date
55	September 1, 2010	August 31, 2011
56	September 1, 2011	August 31, 2012
57	September 1, 2012	October 31, 2013

The evidence suggests there was a pattern of sexual contact for a period of about three years, from

September 2010 to October 2013 – all within the five-year pattern timeframe mandated by the statute.[4] Because there is nothing in the evidence to distinguish the three Informations, the assaults were part of one cumulative three-year pattern, and not three separate one-year patterns.

Under the most conviction-generous reading of the evidence regarding the successive dates of Informations #55 and #56, there was conduct for somewhat less than two years, beginning in September 2010 (incident #5), and continuing to some time after the victim's fourteenth birthday in September 2012 (incident #6). While cumulatively those dates are roughly encapsulated within Informations #55 and #56, there is nothing in the record to suggest a distinction between acts occurring from September 1, 2010 to August 31, 2011 and those occurring from September 1, 2011 to August 31, 2012; that is, there is nothing in the record to suggest the artificial breakpoint the State created between August 31 and September 1, in 2011. The prosecutor's recitation of the evidence does not even mention 2011, and there is no evidence of any change in victim, location, sexual variant, or any other pattern-breaking conduct. Informations #55 and #56 together are therefore a single pattern.

Also giving the most conviction-generous reading to the evidence regarding the successive dates of Informations #56 and #57, at most there was a short gap in conduct, but then a resumption with no change in conduct, making that break also artificial. Informations #56 and #57 together are also part of a single pattern, comprised of the conduct set forth in the three Informations.

Overall, Mr. Martinko's conduct was one continuous pattern spanning three years. The purpose of the pattern statute is to allow the State to prosecute where a victim cannot recall

[4] RSA 632-A:1 I-a: "'Pattern of sexual assault' means committing more than one act under RSA 632-A:2 or RSA 632-A:3, or both, upon the same victim over a period of 2 months or more and within a period of 5 years."

incidents and dates with exactitude, not to give an overzealous prosecutor leave to break one pattern into many, merely to increase punishment. *See State v. Krueger*, 146 N.H. 541, 543-44 (cautioning prosecutors against overzealously charging multiple offenses for a single event); John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015) ("When the government wants to impose exceptionally harsh punishment on a criminal defendant, one of the ways it accomplishes this goal is to divide the defendant's single course of conduct into multiple offenses that give rise to multiple punishments.").

II. A Single Crime Was Arbitrarily Charged as Three Separate Informations and Therefore the Informations Were Multiplicitous

The double jeopardy provisions of the federal and state constitutions present several related, but distinct, issues. U.S. CONST., amd. 5[5]; N.H. CONST. pt. 1, art. 16[6]; *State v. Hannon*, 151 N.H. 708, 713 (2005).

> The Double Jeopardy Clause ... serves three primary purposes.... Third, it protects against multiple punishments for the same offense. This case involves an alleged violation of the third category of protection. In determining whether a defendant is subject to multiple punishments for the same offense, [this court] must determine the unit of prosecution intended by the legislature. When a statutory provision is ambiguous, the rule of lenity demands that all doubt be resolved against turning a single transaction into multiple offenses and thereby expanding the statutory penalty.

State v. Jennings, 155 N.H. 768, 776-77 (2007) (quotations and citations omitted, paragraphing altered); *seel also State v. Bailey*, 127 N.H. 811, 814 (1986); *Valentine v. Konteh*, 395 F.3d 626, 634 (6th Cir. 2005) (States "do not have the power to prosecute one for a pattern of abuse through simply charging a defendant with the same basic offense many times over."). Based on its reading of the pattern sexual assault statute,[7] this court has determined that the "unit of prosecution" for pattern sexual assault allegations is the pattern itself. *State v. Richard*, 147 N.H. 340, 342 (2001); *State v. Fortier*, 146 N.H. 784, 791 (2001) (legislature intended pattern statute to "criminalize a continuing course of sexual assaults, not isolated instances.").

The law regarding how to determine whether the prosecutor's chosen unit of prosecution

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[5]U.S. CONST., amd. 5: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[6]N.H. CONST. pt. 1, art. 16: "No subject shall be liable to be tried, after an acquittal, for the same crime or offense."

[7]RSA 632-A:8: "A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age."

unduly subjects a defendant to double jeopardy is probably not susceptible of ready harmonization, *State v. Locke*, 166 N.H. 344, 353 (2014) ("We invite parties in future cases to ask us to reconsider our double jeopardy jurisprudence consistent with the principles of *stare decisis*, and to suggest a formulation of the double jeopardy test to be applied under our State Constitution."); *State v. Lynch*, 169 N.H. 689, 707 (2017) (same), though some have tried. *See* George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1 (1985) (analysis of United States Supreme Court cases demonstrating difficulty of determining unit of prosecution, and proposing five part test); Jeffrey M. Chemerinsky, *Counting Offenses*, 58 DUKE L.J. 709 (2009) (noting four possible analyses; suggesting application of lenity, incorporation of Eighth Amendment principles, and caution regarding habitual offender statutes); John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015) (observing historical trend toward weak double jeopardy jurisprudence, suggesting ameliorating ambiguities by application of traditional Eighth Amendment principles, a rejuvenated lenity jurisprudence, and strict construction of penal statutes); Jack Balderson, Jr., *Temporal Units of Prosecution and Continuous Acts: Judicial and Constitutional Limitations*, 36 SAN DIEGO L. REV. 195 (1999) (suggesting reversal of current presumptions, and creation of presumption against multiple prosecutions unless there is clear legislative intent to the contrary); Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965) (identifying evidentiary test and behavioral test); Michelle A. Leslie, *State v. Grayson: Clouding the Already Murky Waters of Unit of Prosecution Analysis in Wisconsin*, 1993 WIS. L. REV. 811 (1993) (suggesting legislative intent should control).

Easily discernable from the jurisprudence, however, is that multiple patterns alleged against a defendant must reflect actual distinct patterns found in the evidence. *Jennings*, 155 N.H. at 768 (multiple pattern indictments reflecting multiple variants of sexual assault); *Forcier*, 146

N.H. at 784 (two pattern indictments reflecting two victims); *Krueger*, 146 N.H. at 541 (multiple indictments reflecting multiple acts appearing in video); *State v. DeCosta*, 146 N.H. 405 (2001) (multiple pattern indictments reflecting escalating conduct); *State v. Castine*, 141 NH 300, 305 (1996) (multiple pattern indictments reflecting escalating conduct); *State v. Wilbur*, N.H. Sup.Ct. No. 2011-0627 (Dec. 14, 2012) (unreported) (multiple pattern indictments reflecting patterns of conduct occurring in multiple locations); *State v. Spinner*, N.H. Sup.Ct. No. 2005-0692 (Jan. 31, 2008) (unreported) (multiple pattern indictments where "each indictment involved different acts of sexual assault").

While this court has allowed small differences to constitute separate patterns, it has nonetheless demanded that there be some material differences in the acts to justify separate pattern allegations.[8] In *Richard*, 147 N.H. at 343, this court allowed ten pattern counts regarding a single victim because "each charged a particular variant of sexual assault different from that charged in the other pattern indictments." In *Jennings*, 155 N.H. at 776, this court specified that one group of assaults occurred in 2002 and 2003 in Nashua, another occurred in 2003 and 2004 at Wellesley Street in Milford, and the third occurred in 2004 and 2005 at King Street in Milford. This court then allowed the three pattern counts regarding the single victim because "the pattern indictments allege[d] three separate sets of acts during three discrete time periods at three different locations." *Jennings*, 155 N.H. at 778.

The superior court in Mr. Martinko's case distinguished *Jennings* on the basis that the differing locations was not a decisional characteristic. ORDER ON MOTION TO VACATE PLEA

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[8] Because the purpose of the pattern statute is to allow for inexactitude by young or inarticulate victims, this court has approved pattern prosecutions where the alleged dates are inexact. *State v. Lakin*, 128 N.H. 639 (1986) and where there is overlap between the alleged pattern and alleged discrete acts. *State v. Farrin*, 146 N.H. 784 (2001); see also *State v. Pelkey*, 159 N.H. 379 (2009); *State v. Hebert*, 151 N.H. 705 (2005).

AND SENTENCES at 9 (June 7, 2017), *Addendum* at 36 (location "distinction is not decisional, that is, it is not material"), and therefore found no double jeopardy violation here.

First, in *Jennings*, location was indeed decisional. Second, the point, which the superior court appears to have missed, is that there was *some* non-arbitrary difference among the *Jennings* indictments, such that multiple patterns could be distinguished, and that the differing patterns alleged in the indictments reflected the differing patterns appearing in the evidence.

In Mr. Martinko's case, the State alleged three pattern Informations. Cumulatively, the alleged patterns began on September 1, 2010, and ended on October 31, 2013. The dates the State chose to begin and end each pattern between the cumulative start and end dates, however, do not appear to reflect any pattern-centered difference in the evidence. The three identical Informations alleged the same act of sexual assault, against the same victim, in the same location. The only difference among them was the start and end dates, but nothing in the record evidence suggests those start and end dates were at the start or end of any distinct patterns.

To be constitutionally valid, the charged patterns cannot be arbitrarily disconnected from the evidence. Because the distinctions in this case are arbitrary, the patterns alleged against Mr. Martinko violated his State and Federal Constitutional protections against double jeopardy.

Moreover, this court should consider adopting the dissent's position in *Jennings*, which would hue closer to the legislative language, and require any pattern that occurs within the five-year statutory timeframe to be charged as a single pattern. *Jennings*, 155 N.H. at 779 (Dalianis, J., dissenting). Because Mr. Martinko's conduct was contained within a three-year period, he should not have been charged for more than a single pattern.

III. Ineffective Assistance of Counsel

Because Mr. Martinko's constitutional rights were violated, his plea-and-sentencing counsel was ineffective.

> 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. A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective. To satisfy the first prong of the test, the performance prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness.... To satisfy the second prong, the prejudice prong, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. Brown, 160 N.H. 408, 412-13 (2010) (quotations and citations omitted).

The superior court assumed that if Mr. Martinko's "defense attorney had advised him that his pleas were in violation of the Double Jeopardy Clauses of the New Hampshire and United States constitutions, he would not have entered pleas of guilty," and that thus "the second prong of the ineffective assistance test, concerning whether the result would have been different, has been met." ORDER ON MOTION TO VACATE PLEA AND SENTENCES at 3 (June 7, 2017), *Addendum* at 36. That Mr. Martinko's three sentences are to be served consecutively, moreover, makes the prejudice manifest. *See Krueger*, 146 N.H. at 544 (prejudice mitigated where multiple convictions consolidated for sentencing).

Regarding the first prong, however, the superior court held that because, in its view, Mr. Martinko's pleas did not violate double jeopardy, there was no ineffective assistance. It therefore dismissed Mr. Martinko's motion to vacate his pleas. ORDER (June 7, 2017).

Given that the superior court's finding regarding double jeopardy was in error, however, it misjudged the ineffective assistance claim, and this court should reverse.

CONCLUSION

For the foregoing reasons, this court should hold that Mr. Martinko's pleas violated his State and Federal protections against double jeopardy, and that his trial counsel therefore provided ineffective assistance. This court should thus reverse two of the three convictions, and remand for re-sentencing on the remaining Information.

REQUEST FOR ORAL ARGUMENT

Although this matter is controlled by *Jennings*, there may be residual ambiguity regarding the specificity with which criminal pattern allegations must be reflective of the patterns in the evidence. Accordingly, oral argument will be informative.

Respectfully submitted,

David Martinko
By his Attorney,
Law Office of Joshua L. Gordon

Dated: December 8, 2017

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on December 8, 2017, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: December 8, 2017

Joshua L. Gordon, Esq.

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE, Complainant, vs. DAVID MARTINKO, Defendant.	)	Superior Court Case No. 219-2013-CR-00521 Dover, New Hampshire June 13, 2014 11:55 a.m.

PLEA AND SENTENCING
BEFORE THE HONORABLE PETER H. FAUVER
JUDGE OF THE SUPERIOR COURT

AMENDED (Cover)

APPEARANCES:

For the State:	Kathryn Smykowski, Esq. STAFFORD COUNTY ATTORNEY'S OFFICE 259 County Farm Road Dover, NH 03820
For the Defendant:	David Betancourt, Esq. NEW HAMPSHIRE PUBLIC DEFENDER'S OFFICE 10 Ferry Street Suite 202 Concord, NH 03301
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Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

(Proceedings commence at 11:55 a.m.)

MS. SMYKOWSKI: For the record, Your Honor, this is State v David Martinko, it will be a plea and sentencing hearing, aggravated felonious sexual assault (indiscernible).

THE COURT: All right. It's my understanding that there are three charged offenses, 956557C, 936556C and 555C. And are there going to be -- are we going ahead on those or are there going to be new information and a waiver of indictment?

MS. SMYKOWSKI: Waiver of indictment on those charges, Your Honor.

MR. BETANCOURT: And the waiver has been submitted, Your Honor.

THE COURT: Okay.

MS. SMYKOWSKI: The ones that you just read.

THE COURT: All right. So those charges are going to be nolle prossed and then the waive -- there's going to be new charges entered; is that correct?

MS. SMYKOWSKI: No, Your Honor, those are the new charges. Those are the felony informations. There was one charge that was bound over that the State -- it's a (indiscernible) that the State has nolle prossed.

MR. BETANCOURT: It was -- he was never indicted, Your Honor, it was all this case pre-indictment. So it's just the informations are the only charges.

THE COURT: All right. Bear with me a moment.

Okay. So there's going to be a waiver of indictment on 936557C, 556C, 555C and I have that in front of me now and do you know what this waiver of indictment means, sir?

THE DEFENDANT: Yes, I do.

THE COURT: Why don't you tell me what it means?

THE DEFENDANT: The waiver indictment essentially means that I am waiving my rights to a grand jury to review the evidence to see whether or not I'm guilty of these charges, that I would be bound over for trial.

THE COURT: Well, that's not quite what it means. What it means -- go ahead Counsel.

MR. BETANCOURT: Yeah. The grand jury is whether there's probable cause to charge you.

THE DEFENDANT: Right, okay.

THE COURT: It's not whether you're guilty. There's a jury over there, that after indictment, would hear the case and decide whether the State has met its burden of proving you guilty beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes. Yes, I do.

THE COURT: The grand jury has a preliminary determination as to whether or not the charges should go to that jury.

THE DEFENDANT: Uh-huh.

THE COURT: Understand that?

THE DEFENDANT: Yes, sir.

THE COURT: They're not deciding your guilt or innocence.

THE DEFENDANT: Yes.

THE COURT: Okay. And did you go over that process with your counsel? Did he explain it to you?

THE DEFENDANT: Yes, he did.

THE COURT: And I have found your waiver of indictment form which lists all those charges, which appears to be your signature. Did you go over this with your counsel?

THE DEFENDANT: Yes, I did.

THE COURT: And he explained it.

Counsel, did you go over that with him?

MR. BETANCOURT: Yes, Your Honor.

THE COURT: You satisfied he understands what this waiver means?

MR. BETANCOURT: Yes, Your Honor.

THE COURT: Okay. All right. It's my understanding this is a negotiated plea. You can be seated.

MS. SMYKOWSKI: That's correct, Your Honor.

THE COURT: Would the State please set forth the please set forth the terms and the negotiated disposition?

MS. SMYKOWSKI: Yes, Your Honor.

All the charge ID numbers are on docket 2013-CR-521. Beginning with Charge ID number 936555C. The defendant is sentenced to the New Hampshire State Prison for not more than

20 years nor less than 10 years. There's added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence to be prorated for any part of the year. The sentence is to be served as follows: stand committed commencing forthwith. The defendant has pre-trial confinement credit of 222 days. The sexual offender program is recommended to the Department of Corrections.

The following conditions of this sentence are applicable whether incarceration is suspended, deferred, or imposed or whether there's no incarceration ordered at all.

Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The Defendant is to participate meaningfully and complete any counseling, treatment, and educational programs as directed by the correctional or authority or parole officer.

The defendant is ordered to have no contact with A.G. or her family except as may be authorized by the family court. And this no contact is to include the defendant's biological adult daughters. The defendant and the State have waived sentence review in writing or on the record. The defendant is ordered to be of good behavior and comply with all terms of this sentence. And the defendant shall have no unsupervised contact with minors.

On Charge ID 936[illegible]C, the defendant is sentenced to

the New Hampshire Prison for not more than 20 years nor less than 10 years. There's added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the Defendant's sentence to be prorated for any part of the year. The sentence is to be served as follows: stand committed commencing upon completion of the sentence on Charge ID number 936555C and again, this sentence is consecutive to that charge ID number.

Again, the final conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all.

Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is to participate meaningfully and complete any counseling, treatment, and educational programs as directed by the correctional authority or parole officer.

The defendant is ordered to have no contact with A.G. or her family except as may be authorized by the family court. The no contact is to include his adult biological daughters. The defendant and the State have waived sentence review in writing or on the record. The defendant is ordered to be of good behavior and comply with all terms of this sentence. And the defendant shall have no unsupervised contact with minors.

And again, the sexually offender program will be recommended to the Department of Corrections.

On Charge ID 936557C, the defendant is sentenced to the New Hampshire State Prison for not more than 20 years nor less than 10 years.

There's added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence to be prorated for any part of the year. The sentence is to be served as follows: stand committed commencing upon completion of the sentence on Charge ID number 936556C. All of the minimum sentence may be suspended by the Court on application of the defendant, provided the defendant demonstrates meaningful participation in the sexual offender program while incarcerated. Again, this sentence is consecutive to Charge ID 936556C and the sexual offender program is recommended to the Department of Corrections.

The following conditions of this sentence are applicable whether incarceration is suspended, deferred, or imposed or whether there is no incarceration ordered at all.

Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence. The defendant is to participate meaningfully and complete any counseling, treatment, and educational programs as directed by the correctional authority or parole officer.

The defendant is ordered to have no contact with A.G. or her family except as may be authorized by the family court. And that no contact includes the defendant's adult biological

children. The defendant and the State have waived sentence review in writing or on the record. The defendant is ordered to be of good behavior and comply with all terms of this sentence. And the defendant shall have no unsupervised contact with minors.

THE COURT: Thank you.

Is that your understanding of the negotiated disposition, Counsel?

MR. BETANCOURT: Yes, Your Honor.

THE COURT: Sir, is that your understanding of the negotiated disposition?

THE DEFENDANT: Yes sir, it is.

THE COURT: Okay. All right. You can be seated again. What's -- facts can the State prove beyond reasonable doubt in the event these cases should go to trial?

MS. SMYKOWSKI: On October 31st, 2013, the defendant arrived at the Dover Police Department and wished to speak to a detective so that he could confess to a sexual assault. Detective Nato (phonetic) was on duty and spoke with the defendant who said that he had made a mistake last night and he was looking for help.

During the interview the defendant explained that he went into his daughter's room and that he climbed into his 15 year old stepdaughter's bed, he identified her as A.G. He said that he began rubbing her arms and legs and then began to rub

her vagina over the clothes. He said that she rolled onto her back and he continued to rub her vagina. He then pulled down her pants and, again, continued to rub her vagina. He said that he removed his penis and pressed it against her vagina and at this point A.G. turned away and pulled her pants back up and the defendant left the room.

On November 1st, 2013, A.G. participated in a forensic interview with the child advocacy center. She stated that she was there because her father -- her stepfather had sexually assaulted her two nights prior and it was not the only time he had sexually assaulted her.

She first talked about the defendant coming into her bedroom on October 30th and getting into her bed. She reported that the defendant began touching her private area on the outside, he then pulled down her shorts and underwear and continued to rub her private part.

She said that she turned onto her side and the defendant stopped and she pulled her shorts and underwear up and the defendant left the room.

After speaking about that incident she told the forensic interviewer that the touching began when she was four or five when she lived in Michigan and that shortly after he began putting his penis and his fingers inside of her vagina.

He also had A.G. touch his penis on occasion. She said that this behavior continued when the family moved from

Michigan to Massachusetts and when they moved from Massachusetts to Dover, which was Labor Day weekend of 2010 when she was 12.

She said that the touching and the sexual intercourse stopped for awhile shortly before her 14th birthday when she told the defendant it needed to stop. She said up until that point the abuse was happening every night or every other night and after she told him it needed to stop, it happened about once a month or so.

Those were the facts the State would rely on should this matter have gone to trial.

THE COURT: Stand up.

All right. I have in front of me a form, sir, entitled acknowledgement of waiver of rights. And before I go through this with you, why don't you raise your hand or at least -- you don't have to. You swear that the facts that you have read this acknowledgment of rights and the representation as to reading that are true and accurate?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I'm going to go over these rights with you again.

I want to advise you, personally, that you have a constitutional right to a speedy and public trial by jury, to see and hear the evidence and cross-examine witnesses against you, to the process of this Court to compel the attendance of

witnesses in your favor, the assistance of counsel at all stages of these proceedings; do you understand that?

THE DEFENDANT: I do, sir.

THE COURT: In other words, you're not required to prove your innocence, but it's the duty and burden of the State to prove by competent evidence you're guilty beyond a reasonable doubt; do you understand that?

THE DEFENDANT: I do, sir.

THE COURT: In a trial of this matter, you cannot be called as a witness against yourself or otherwise be required to incriminate yourself; do you understand that?

THE DEFENDANT: I do, sir.

THE COURT: By pleading guilty, you're giving up your right to a trial and to all 12 jurors who must unanimously agree on your guilt or innocence; do you understand that?

THE DEFENDANT: I do, sir.

THE COURT: By pleading guilty you're giving up your right to appeal in this matter, this is your day in court; do you understand that?

THE DEFENDANT: I do, sir.

THE COURT: Also, you'll be giving up your right to have a sentence reviewed and I'll go through that with you in a few more minutes; do you understand that?

THE DEFENDANT: I do, sir.

THE COURT: Each of these rights are -- excuse

me -- give up those rights by pleading guilty rather than go to trial in these cases. I'll go through that again.

With each of these rights in mind, is it your desire to waive those rights by pleading guilty rather than go to trial in these cases?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty to these charges because you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Do you admit you committed the acts charged you intended to do so?

THE DEFENDANT: Yes, sir.

THE COURT: Have you been advised on maximum penalties provided by law for these offenses? What's the most I could sentence anybody to for these offenses?

THE DEFENDANT: According to our plea offer here it's 10 to 20 for each counts -- 10 to 30 -- 10 to 30 with the first count with a $4,000 fine.

THE COURT: Each of these is 10 to 20, correct?

MR. BETANCOURT: The first count it's 10 to 30 and then --

THE COURT: Right.

MR. BETANCOURT: -- and then it's 10 to 20, Your Honor.

THE COURT: Right. The 5550 is 10 to 30?

THE DEFENDANT: Yes, sir.

THE COURT: And the other two are 10 to 20.

THE DEFENDANT: 10 to 20, yes.

THE COURT: With fines of $4,000 on each.

THE DEFENDANT: Yes.

THE COURT: Is that your understanding of it?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Are you doing this voluntarily or has anybody made threats against you to make you do this?

THE DEFENDANT: Voluntarily, sir.

THE COURT: Okay. You've gone over all of this with your attorney?

THE DEFENDANT: I have.

THE COURT: And he's explained it to you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know any reason why the Court should not accept the pleas of guilty from you? Do you know any reason why I shouldn't?

THE DEFENDANT: No, sir.

THE COURT: Are you under a doctor's care? Are you taking any medications or drugs which might affect your ability to understand --

THE DEFENDANT: No, sir.

THE COURT: -- what I'm talking about or what your attorney is talking to you about?