No.

IN THE
SUPREME COURT OF THE UNITED STATES

****

Kevin Thurlow - Petitioner

vs.

Warden N.H. State Prison - Respondent(s)

****

APPENDIX TO

Petitioner's Petition For Writ Of Certiorari

****

CONTENTS:

United States Court of Appeals
For the First Circuit

No. 19-1891

KEVIN THURLOW,

Petitioner - Appellant,

v.

MICHAEL ZENK, Warden, NH State Prison,

Respondent - Appellee.

Before

Howard, Chief Judge,
Lynch and Kayatta, Circuit Judges.

JUDGMENT

Entered: November 12, 2020

Petitioner-Appellant Kevin Thurlow seeks a certificate of appealability ("COA") to appeal from the denial and dismissal of his § 2254 petition in the district court. After careful review of petitioner's submissions and of the record below, we conclude that that the district court's rejection of Thurlow's claims was neither debatable nor wrong, and that petitioner has therefore failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, Thurlow's application for a certificate of appealability is DENIED.

Thurlow's motion for appointment of counsel on appeal is ALLOWED.

The appeal is hereby terminated.

By the Court:

Maria R. Hamilton, Clerk

cc:
Kevin Thurlow, John P. Newman, Elizabeth Christian Woodcock

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Kevin Thurlow

v. Case No. 16-cv-512-SM

NH State Prison, Warden

ORDER

After due consideration of the objection filed, I herewith approve the Report and Recommendation of Magistrate Judge Andrea K. Johnstone dated August 13, 2019. Additionally, finding that the petitioner has failed to make substantial showing of the denial of a constitutional right, the court declines to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2); Rule 11, Rules Governing Habeas Corpus Cases Under Section 2254; First Cir. LR 22.0.

Steven J. McAuliffe
United States District Judge

Date: August 28, 2019

cc: John P. Newman, Esq.
Elizabeth C. Woodcock, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Kevin Thurlow

v. Civil No. 16-cv-512-SM

Warden, New Hampshire State Prison

REPORT AND RECOMMENDATION

Petitioner Kevin Thurlow, a prisoner in the custody of the New Hampshire Department of Corrections, has filed a petition for a writ of habeas corpus (Doc. No. 1) pursuant to 28 U.S.C. § 2254. Before the undersigned magistrate judge for a report and recommendation are the parties' cross-motions for summary judgment (Doc. Nos. 24, 26). See Apr. 2, 2019 Notice; LR 72.1. Both motions are duly opposed. See Doc. Nos. 25, 27.

Background

Thurlow is currently serving a 43-86-year prison sentence, pursuant to his convictions for six felony sexual assault offenses and three manufacturing child pornography offenses. See Nov. 28, 2012 Mittimuses, State v. Thurlow, No. 281-2010-CR-1686 (N.H. Super. Ct., Rockingham Cty.) ("State Criminal Case"); Def.'s Brief, State v. Thurlow, No. 2012-0935 (N.H. May 28, 2013), at 10-30. Thurlow's convictions were for offenses he

committed in 2004 against his (then) stepdaughter, L.G. See State v. Thurlow, No. 2012-0935, ("Criminal Appeal"), 2014 N.H. LEXIS 32, at *2, 2014 WL 11621685, at *1 (N.H. Feb. 26, 2014). The record in this case reveals the following facts.

Thurlow married L.G.'s mother, Linda Daigle, in 2001, when L.G. was five years old. At the time, Daigle had two children, L.G. and an eight-year-old son, A.G. When Thurlow engaged in the conduct for which he was convicted, he lived in Epping, New Hampshire with Daigle, A.G., L.G., and Thurlow's two sons, one from a previous relationship, and one born to Daigle. Until 2008, when Thurlow's offenses came to light, A.G. and L.G. spent the school year with Daigle and Thurlow in Epping, and spent summers in Vermont with their father.

Thurlow sexually assaulted L.G. at their house, on more than one occasion, before and while L.G. was in the second, third, and fourth grade. When L.G. was 11 or 12 years old, Thurlow told her that he wanted to take pictures of her in a bathing suit. She agreed, and posed for Thurlow, wearing a bathing suit. After taking a number of photographs, Thurlow directed L.G. to move her bathing suit to the side to expose her genitals and breasts. She did so, and Thurlow took photographs in which L.G.'s genitals and breasts were exposed.

In July 2008, after L.G. and her brother had left Epping to spend the summer with their father in Vermont, Daigle searched

Thurlow's computer and discovered twenty-four of the above-described photographs of L.G. in a blue bathing suit. Daigle went to the police with the photographs she had found, and officers went to the Thurlow/Daigle residence to investigate. The police arrested Thurlow on unrelated charges, and confiscated Thurlow's computer.

Later that month, in response to the discovery of the blue bathing suit photographs of L.G. on Thurlow's computer, L.G. was interviewed at the Child Advocacy Center ("CAC"). When asked whether Thurlow had ever touched her in a sexual way, she said that she did not know, or could not remember.[1] After her CAC interview, L.G. began seeing a counselor, who kept records of her sessions with L.G. In April 2010, L.G. gave a second interview at the CAC in which she disclosed sexual contact with Thurlow. As a result of what L.G. said in her CAC interviews, the State charged Thurlow with felony sexual assault and manufacturing child sexual abuse images.

With respect to the manufacturing child sexual abuse image charges, the indictments specified that "Thurlow took pictures of L.G. . . . in a blue bathing suit while there was a lewd exhibition of L.G.'s genitals." May 28, 2013 Def.'s Br., at 7-

[1]While the record is not entirely clear on this point, it appears that L.G. told the CAC interviewer that Thurlow had taken the photographs of her in a blue bathing suit that were found on his computer.

9, Criminal Appeal. Thurlow was also indicted on four counts of manufacturing child sexual abuse images of L.G. while she was wearing a black bathing suit, but the State later nol prossed those charges. See Trial Tr., vol. I, 44:21-22, State Criminal Case.

In the meantime, on February 22, 2012, Thurlow was indicted in this court on federal child pornography charges. See Feb. 22, 2012 Indictment, United States v. Thurlow, No. 1:12-cr-027-PB-1 (D.N.H.) ("Federal Criminal Case") (ECF No. 1). In his federal case, he was represented by Attorney Jonathan Saxe. See Feb. 24, 2012 Order, Federal Criminal Case (ECF No. 5). On occasion, Attorney Saxe provided information and made suggestions to the Attorney Deanna Campbell, who represented Thurlow in the state criminal proceedings.

In June 2010, during the course of his state-court prosecution, Thurlow moved the trial court to remove and replace Attorney Campbell. The trial court never ruled on Thurlow's motion. Thurlow was tried in state court in September 2012, with Attorney Campbell serving as his counsel. Thurlow was convicted on all of the charges on which he was tried. See Sept. 19, 2012 Order, State Criminal Case. The New Hampshire Supreme Court ("NHSC") affirmed his convictions. See Criminal Appeal, 2014 N.H. LEXIS 32, at *2, 2014 WL 11621685, at *1 (N.H. Feb. 26, 2014).

On June 23, 2014, Thurlow filed a pro se motion for a new trial in the Superior Court, arguing that: (1) his trial counsel made two errors that deprived him of his right to the effective assistance of counsel; and (2) the trial court erred by ignoring his request to fire Attorney Campbell. See June 23, 2014 Mot. for New Trial, State Criminal Case (Doc. No. 1-1, at 2). The Superior Court denied both Thurlow's motion for a new trial, see July 6, 2016 Order, id. ("MNT Order") at 27 (Doc. No. 1-1, at 38), and a motion for reconsideration that was filed by counsel appointed to represent Thurlow in his post-conviction proceedings. See July 27, 2016 Order, id. (Doc. No. 1-1, at 47) (denying July 15, 2016 Def.'s Mot. for Recons., id. (Doc. No. 1-1, at 39)). The NHSC declined Thurlow's notice of discretionary appeal. See State v. Thurlow, No. 2016-0460 (N.H. Sept. 28, 2016) (Doc. No. 1-1, at 61).

28 U.S.C. § 2254 Standard

A federal court may grant a petition for a writ of habeas corpus "only on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). When a prisoner brings a claim in federal court that "was adjudicated on the merits in State court proceedings," under 28 U.S.C. § 2254(d),

> [f]ederal habeas relief may not be granted . . . unless it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of this Court; or that it "involved an unreasonable application of" such law; or that it "was based on an unreasonable determination of the facts" in light of the record before the state court.

Harrington v. Richter, 562 U.S. 86, 100 (2011) (citations omitted). As to the distinction between decisions that are contrary to federal law and those that involve an unreasonable application of such law, the Supreme Court has explained:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

Discussion

Thurlow asserts three claims for relief under the Sixth Amendment to the United States Constitution. Thurlow claims that he was denied the effective assistance of trial counsel in two ways and that the trial court violated his Sixth Amendment rights by failing to rule on his request to fire Attorney Campbell.

I. Ineffective Assistance of Counsel Claims

A. Legal Standard

The Sixth Amendment, which is made applicable to the states by the Fourteenth Amendment,[2] guarantees a criminal defendant "the right to the effective assistance of counsel." United States v. Miller, 911 F.3d 638, 641 (1st Cir. 2018) (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). To assert an ineffective assistance of counsel claim, "[f]irst, the defendant must show that counsel's performance was deficient," and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687.

To satisfy the first part of the inquiry, the so-called performance prong, Thurlow must show that Attorney Campbell's representation was "outside the wide range of professionally competent assistance." Id. at 690. To satisfy the prejudice prong, Thurlow must show "that 'there is a reasonable probability that, but for [Attorney Campbell]'s unprofessional errors, the result of the proceeding would have been different.'" Rivera v. Thompson, 879 F.3d 7, 12 (1st Cir. 2018) (quoting Strickland, 466 U.S. at 688).

---

[2]See Walker v. Medeiros, 911 F.3d 629, 631 n.1 (1st Cir. 2018).

When reviewing an ineffective assistance claim asserted in a § 2254 petition, the court must apply a "doubly deferential" standard of review, which requires the petitioner "to show that counsel's performance was objectively unreasonable and that no reasonable jurist could come to the . . . conclusion the state court drew [that counsel's performance was reasonable]." Lucien v. Spencer, 871 F.3d 117, 131 (1st Cir. 2017) (emphasis in the original) (citing Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)); see also Rivera, 879 F.3d at 12. This "'doubly deferential standard of review [which] gives both the state court and the defense attorney the benefit of the doubt . . . is an extremely difficult standard to meet.'" Jaynes v. Mitchell, 824 F.3d 187, 196 (1st Cir. 2016) (citation omitted).

B. Claim 1 - Testimony of Damon Carroll

In Claim 1, Thurlow asserts that he is being incarcerated in violation of his right to the effective assistance of counsel because Attorney Campbell "failed to interview, or call at trial, a witness, Damon Carroll, who [she] knew to possess exculpatory evidence to which Carroll would testify at trial." Feb. 1, 2017 Order (Doc. No. 3), at 1. Here, as in his motion for new trial filed in the trial court, Thurlow asserts that Attorney Saxe told Attorney Campbell that a witness, Damon Carroll, could testify that "[Carroll] had accidentally walked

in on L.G.'s brother [A.G.] taking pictures of [L.G.] in a bathing suit." Oct. 21, 2016 Mot. for New Trial, at 2, State Criminal Case (Doc. No. 1-1, at 3). The Superior Court held an evidentiary hearing on Thurlow's motion for a new trial, at which Attorney Saxe testified as follows:

> [T]he Defendant and Mr. Carroll had been out for a motorcycle ride. They returned to the [Thurlow/Daigle] residence and they saw kind of a sketchy situation involving the two children where the male child had a camera and the female child was in, I think, a black bathing suit. There was a couple different suits. I can't remember which one.

Apr. 26, 2016 Mot. Hr'g Tr. 18:12-17, State Criminal Case. In Thurlow's view, "Mr. Carroll's information would have assisted the defense in establishing that someone other than [Thurlow] may have taken the pictures found on the home computer." Oct. 21, 2016 Mot. for New Trial, at 2, State Criminal Case (Doc. No. 1-1, at 3. Thurlow argues that, had Carroll so testified, his testimony would have been compelling evidence that Thurlow did not take any pictures of L.G. in a bathing suit. Therefore, Thurlow further reasons, his trial counsel would have been able to make a stronger argument that Thurlow was not guilty of sexually assaulting L.G. On that basis, Thurlow claims that Attorney Campbell should have done more to ensure Mr. Carroll's appearance and testimony at Thurlow's trial.

Attorney Campbell Attorney Campbell gave a deposition in which she explained that she did not take additional action to

ensures Mr. Carroll's appearance and testimony. Attorney Campbell stated at her deposition that: (1) she spoke with Carroll once by telephone; (2) she attempted to follow up with him repeatedly, but he did not return any of her subsequent telephone calls; and (3) she did not take more aggressive steps to contact Carroll because she believed he did want to talk with her.

In its order denying Thurlow's motion for a new trial, the Superior Court ruled that Thurlow had failed to satisfy the performance prong of his ineffective assistance claim concerning Attorney Campbell's failure to call Carroll as a witness at Thurlow's trial, and that, even if Thurlow had established deficient performance, he had not satisfied the prejudice prong. Because the NHSC declined to review the Superior Court's order denying Thurlow's motion for a new trial, the Superior Court order was "'the last reasoned decision' issued by the [state courts]," and thus this court "'look[s] through to'" that decision in determining whether Thurlow has satisfied the § 2254 standard as to the question of whether Attorney Campbell's failure to call Carroll as a witness amounted to the ineffective assistance of counsel. Moore v. Dickhaut, 842 F.3d 97, 100 (1st Cir. 2016) (citation omitted). Therefore, the question before this court is whether the Superior Court's "'application of the Strickland standard was unreasonable,'" in its order denying

Thurlow's motion for a new trial. Hensley v. Roden, 755 F.3d 724, 736 (1st Cir. 2014) (quoting Harrington, 562 U.S. at 101). Judge Wageling did not unreasonably apply either the performance prong or the prejudice prong of the Strickland standard.

A. Performance

Thurlow claims that the Superior Court unreasonably applied the performance prong of the Strickland standard by ruling that Attorney Campbell did not step "outside the wide range of professionally competent assistance," Miller, 911 F. 3d at 641, in deciding not to put Carroll on the witness stand at Thurlow's trial. With regard to calling witnesses at trial, "'[t]he decision whether to call a particular witness is almost always strategic.'" Hensley, 755 F.3d at 737 (citation omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

In evaluating the performance prong of the Strickland analysis here, the Superior Court noted the wide latitude that attorneys have when making strategic decisions, and then stated that "Attorney Campbell's decision not to aggressively pursue a reluctant potential witness is exactly the type of strategic decision that must be 'afford[ed] a high degree of deference.'" MNT Order at 8 (Doc. No. 1-1, at 19) (citation omitted). The

Superior Court further found that "a reasonable attorney would be concerned that Carroll's refusal to return messages meant that he was not interested in providing favorable testimony to the defense." Id. at 8-9 (Doc. No. 1-1, at 19-20). Furthermore, Attorney. Campbell provided an explanation for her decisions concerning Carroll which the Superior Court accepted, and that easily survive the doubly deferential standard that this court must apply when reviewing that court's application of Strickland's performance prong to Attorney Campbell's strategic decisions. The court finds there is no basis for rejecting the Superior Court's determination that Thurlow failed to establish that Attorney Campbell's performance was deficient, and Thurlow's claim so stating may be denied on that basis.

B. Prejudice

Even if the Superior Court had erred in its application of the Strickland performance prong as to Claim 1, however, Thurlow has not shown that that court unreasonably applied the prejudice prong.

> To succeed on the prejudice prong, it is not enough for [a defendant] to show that the errors had some conceivable effect on the outcome, but he is also not required to prove that the errors were more likely than not to have affected the verdict. Instead, [a] reasonable probability is one sufficient to undermine confidence in the outcome. In essence, the prejudice inquiry is focused on the fundamental fairness of the proceeding.

Rivera, 879 F.3d at 12 (internal quotation marks and citations omitted).

In deciding that Thurlow had not established the prejudice prong of the Strickland standard, the Superior Court stated:

> Even if the Court assumes [that Attorney Campbell found Carroll, that Carroll cooperated with the defense, and credibly testified consistently with Attorney Saxe's representations, Thurlow] still cannot prevail on his ineffective assistance claim because Carroll's testimony would not have changed the outcome of the trial. On the contrary, it may have increased Defendant's likelihood of conviction by opening the door to otherwise inadmissible propensity evidence.

MNT Order at 9 (Doc. No. 1-1, at 20).

As for the unhelpfulness of Carroll's testimony, the Superior Court explained that while Carroll would have testified that he saw A.G. take pictures of L.G. in a black bathing suit, Thurlow was convicted of taking lewd photographs of L.G. while she was wearing a blue bathing suit. Evidence that someone other than Thurlow took pictures of L.G. in a black bathing suit does little if anything to exculpate Thurlow from charges that he took photographs of her in a blue one.

As for the potentially damaging effects of Carroll's testimony, the Superior Court noted that: (1) Carroll testified to seeing A.G. take pictures of L.G. in a black bathing suit; (2) the State nol prossed the four indictments charging Thurlow with taking photographs of L.G. in a black bathing suit; and (3)

Attorney Campbell successfully moved to keep the jury from seeing the photographs of L.G. in a black bathing suit which were found on Thurlow's computer.

> Carroll's testimony relates solely to charges which the State nolle prossed before trial and which Attorney Campbell successfully kept the jury from learning about. Had Carroll testified at trial, his testimony would have introduced this otherwise inadmissible evidence to the jury. In effect, the jury would have learned that Defendant had two sets of inappropriate pictures of the victim on his computer, only one of which could potentially be explained by Carroll's testimony, if the jury found him credible. In sum, Carroll's testimony would have hurt, not helped, Defendant, and thus he cannot demonstrate any prejudice resulting from Attorney Campbell's failure to pursue Campbell as a defense witness.

MNT Order at 10 (Doc. No. 1-1, at 21). In other words, the Superior Court found that Carroll's testimony concerning the photographs of L.G. in a black bathing suit would have been, at best, a double-edged sword, and that Attorney Campbell was appropriately concerned with mitigating the potential for such testimony to prejudice Thurlow's defense.

Thurlow asserts that: (1) the rationale the Superior Court relied on "was never articulated or advanced by trial counsel in her deposition or at any point in the proceedings," Mar. 14, 2019 Pet'r's Mem. of Law (Doc. No. 25-1, at 8); and (2) that the Superior Court's "ruling was 'based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," id. (quoting Teti v. Bender, 507

F.3d 50, 56 (1st Cir. 2007); citing 28 U.S.C. § 2254(d)(2)). Thurlow identifies no authority, however, and the court is aware of none, for the proposition that when assessing the degree of prejudice that resulted from Attorney Campbell's litigation strategy, the Superior Court was limited to theories that Attorney Campbell advanced in her deposition, or that the Superior Court was limited to Attorney Campbell's testimony in determining the facts upon which to rest its decision.

Lastly, Thurlow claims that the absence of Carroll's testimony was a serious enough evidentiary defect to undermine confidence in the jury's verdict. First, evidence that A.G. took pictures of L.G. in a black bathing suit is weak evidence that Thurlow did not take photographs of her in a blue bathing suit, or that Thurlow did not sexually assault L.G. Next, as explained above, it is not the province of this court to make its own finding as to whether Attorney Campbell's representation was ineffective under the Strickland standard. The question before this court is whether the Superior Court rendered a decision that was contrary to or an unreasonable application of Strickland when that court ruled that Attorney Campbell did not provide ineffective assistance of counsel to Thurlow. As already explained, the Superior Court did not unreasonably apply the Strickland standard in making the ruling Thurlow challenges here through Claim 1.

II. Claim 2 - L.G.'s Mental Health Records

Beginning in July 2008, L.G. saw a counselor for about a year and a half. At some point, Attorney Saxe saw some of L.G.'s counseling records, told Attorney Campbell that he had seen them, and suggested to Attorney Campbell that those records might be useful to her defense of Thurlow in state court. Attorney Campbell, however, did not try to obtain or examine L.G.'s counseling records. Thurlow's second ineffective assistance claim is based on Attorney Campbell's purported "fail[ure] to investigate or obtain exculpatory mental health records of [L.G.], which [Attorney Campbell] knew to exist and to be exculpatory." Feb. 1, 2017 Order (Doc. No. 3, at 1-2).

In its order denying Thurlow's motion for a new trial, the Superior Court considered Thurlow's claims that L.G.'s counseling records would have provided Attorney Campbell with evidence concerning: (1) L.G.'s motive to fabricate a story that Thurlow had abused her; (2) Thurlow's lack of opportunity to engage in the conduct underlying his criminal charges; and (3) the possibility that L.G. had based her fabricated charges against Thurlow on pieces of internet fiction referred to as "lemons." See MNT Order at 14, 16, 18-19 (Doc. No. 1-1, at 25, 27, 29-30).

The Superior Court, in the MNT Order, ruled that Thurlow's right to the effective assistance of counsel was not violated by Attorney Campbell's decision not to obtain and review L.G.'s counseling records. In so ruling, the court bypassed the performance prong of the Strickland standard and determined that Thurlow had failed to establish that he had been prejudiced by Attorney Campbell's failure to get the counseling records, addressing each of Thurlow's arguments.

A. Motive to Lie

In its order denying Thurlow's motion for new trial, the Superior Court described the first part of Claim 2 as follows:

> [Thurlow] contends that reviewing counseling records would have revealed that, during a therapy session involving the victim's mother, the victim learned that [Thurlow] had moved back in with her mother. [Thurlow] asserts that this session occurred shortly before the second CAC interview in April 2010, during which the victim first disclosed [Thurlow]'s sexual abuse to law enforcement. According to [Thurlow], the counseling records would have shown that the victim had a motive to lie in reporting the abuse; specifically, she wanted to move back to New Hampshire with her mother and she was upset that [Thurlow] was living with her mother again.

MNT Order at 14 (Doc. No. 1-1, at 25).

As to L.G.'s motive to lie, the Superior Court ruled that Thurlow was not prejudiced by his attorney's failure to obtain L.G.'s counseling records because those records show that L.G. disclosed Thurlow's conduct to her counselor in June 2009, two

months before L.G. learned anything about Thurlow moving back in with Daigle, the knowledge Thurlow claims gave L.G. a motive to fabricate sexual abuse allegations against him. Thurlow's instant petition fails to demonstrate why the Superior Court's factual findings are unreasonable in light of the record of this case.

The Superior Court found that, in light of those facts, Thurlow was not prejudiced by Attorney Campbell's failure to obtain L.G.'s counseling records to the extent they revealed the date that L.G. discovered that Thurlow and Daigle were living together. Thurlow fails to demonstrate how the Superior Court's determination regarding prejudice was an unreasonable application of Strickland. Accordingly, Thurlow's Claim 2 fails, to the extent it relies on L.G.'s counseling records containing a motive to lie.

B. Lack of Opportunity

In the second part of Claim 2, Thurlow alleges that because Attorney Campbell did not obtain L.G.'s counseling record, he was denied the use of a letter written by Daigle, contained within those records, which Thurlow claims demonstrated Daigle's near-constant presence in the house where and when L.G. alleged the sexual assaults took place. Accordingly, Thurlow argues

that he was denied evidence that he lacked the opportunity to engage in the conduct underlying his sexual assault charges.

At trial, on direct examination, Daigle offered the following testimony about how much time she spent at home:

> I was home and I tried to be home all the time, as much as I could.
>
> . . . .
>
> I think I was home. I tried. The work I did was around the kids' schedules, so I did try to be home when the little kids or the big kids were off the bus. There were days I worked late. There were times I ran a kid, play dates, and picked up, dropped off, after-school program I had to pick up once in a while. But most of the time, I was home because I liked being home.

Trial Tr. vol. II, 248:23-249:11. In addition, the following exchange took place between the prosecutor and Daigle:

> [Prosecutor:] And would you go out to see various friends or any friends? Any time you could be out of the house visiting friends?
>
> [Daigle:] No. The most I went out usually was to go to the grocery store or go to church. And most of the time, the kids would come with me for church or at the Wednesday night youth group stuff.

Id. at 250:5-11. On cross-examination, Attorney Campbell elicited further testimony in a similar vein. See id. at 303:20-307:11.

In its order denying Thurlow's motion for a new trial, the Superior Court states that Thurlow "argued that the trial testimony of the victim's mother was different from what she

said in the letter about [Thurlow]'s lack of opportunity, and thus the letter would have assisted in impeaching her testimony." MNT Order at 16 (Doc. No. 1-1, at 27). The Superior Court found, however, that "obtaining the letter in the counseling records would not have changed the outcome of the trial because (1) Attorney Campbell knew this information anyway and (2) the victim's mother testified to the same information contained in the letter." Id. at 18 (Doc. No. 1-1, at 29).

Thurlow does not say, and the court cannot discern, what specific testimony Thurlow sought to impeach with the letter, or how the testimony could have been impeached by that letter, as Daigle's testimony was both favorable to Thurlow's lack-of-opportunity defense and was not inconsistent with what Daigle wrote in the letter. Thurlow has therefore failed to demonstrate that the Superior Court either unreasonably determined the facts in the record, or unreasonably applied the Strickland standard to find that no prejudice arose from Attorney Campbell's failure to obtain Daigle's letter from L.G.'s counseling records.

C. "Lemons"

In the MNT Order, the Superior Court described the third part of Claim 2 as follows:

> [Thurlow] argues that information contained in the counseling records would have allowed the defense to "extensive[ly]" cross-examine the victim about her interest in sexually explicit fictional stories called "lemons." According to [Thurlow], these lemons "are clearly relevant to establish [L.G.'s] knowledge and capacity for graphic sexual description, and also suggest a curiosity about sexual transgression . . .." [Thurlow] also asserts that he could have used the "lemon" theme, in conjunction with some of the counseling records, to argue to the jury that the victim had romantic feelings for him and came up with a "lemon" expressing those fantasies, which spun out of control and resulted in the sexual abuse charges.

MNT Order at 18-19 (Doc. No. 1-1, at 29-30) (citation to the record omitted). The Superior Court ruled that Thurlow was not prejudiced by his counsel's failure to obtain L.G.'s counseling records because "Attorney Campbell used the 'lemon' theory to explain the victim's basis of knowledge, just as [Thurlow] suggests she should have done [and] [n]othing in [L.G.]'s counseling records would have assisted trial counsel in further developing this strategy or using it to greater effect." Id. at 20 (Doc. No. 1-1, at 31).

The court has reviewed all of L.G.'s counseling records. There is nothing in those records that Attorney Campbell could have used to make a more persuasive argument than she did using the lemon theme. Thurlow has therefore failed to demonstrate that the Superior Court either unreasonably determined the facts in the record or unreasonably applied the Strickland standard to those facts to find that no prejudice accrued to Thurlow from

Attorney Campbell's failure to obtain the counseling records to obtain further information about "lemons."

IV. Claim 3

In Claim 3, Thurlow asserts that his Sixth Amendment rights were violated "when the trial court abused its discretion by failing to inquire into [his] timely request to fire his counsel due to irreconcilable differences." Mar. 22, 2017 Mot. to Amend Pet. (Doc. No. 6), at 3. Respondent argues that he is entitled to summary judgment on Claim 3 because it has been procedurally defaulted. Thurlow does not address respondent's procedural default argument.

"[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule," Davila v. Davis, 137 S. Ct. 2058, 2064 (2017), if that state procedural rule "is both firmly established and regularly followed." Logan v. Gelb, 790 F.3d 65, 72 (1st Cir. 2015)). "A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show 'cause' to excuse his failure to comply with the state procedural rule and 'actual prejudice resulting from the alleged constitutional violation.'" Davila, 137 S. Ct. at 2064-65 (quoting Wainwright v. Sykes, 433 U.S. 72, 84 (1977)).

Here, it is undisputed that: (1) in June 2010, Thurlow filed a motion in which he asked the trial "court to remove and replace [his] court appointed attorney," MNT Order at 21 (Doc. No. 1-1, at 32); and (2) the trial court never ruled on that motion. However, Thurlow did not raise that issue in his direct appeal to the NHSC. He did raise it in his motion for a new trial, but, in reliance on State v. Kinne, 161 N.H. 41, 44-46, 7 A.3d 1205, 1208-09 (2010), and Avery v. Cunningham, 131 N.H. 138, 143, 551 A.2d 952, 954-55 (1988), the Superior Court ruled that Thurlow was barred from raising that issue in his motion for a new trial because he had not raised it in his direct appeal. See MNT Order, at 22-23 (Doc. No. 1-1, at 33-34). The rule in Avery that bars collateral review of most issues not raised on direct appeal "is 'firmly established' and 'regularly followed' in New Hampshire." Kepple v. Unknown Warden, N. N.H. Corr. Facility, No. 10-cv-331-LM, 2011 U.S. Dist. LEXIS 110447, at *33, 2011 WL 4452673, at *12 (D.N.H. Sept. 26, 2011) (citation omitted).[3] Thurlow has not addressed the respondent's procedural-default argument, and therefore has not established cause and prejudice for his procedural default. Accordingly,

[3]The NHSC has identified certain exceptions to the Avery rule, but none of them apply here. See Kinne, 161 N.H. at 45-46 (noting that Avery does not bar collateral attacks asserting ineffective assistance of counsel or collateral attacks on purportedly illegal sentences).

Claim 3 has been procedurally defaulted, which entitles the respondent to judgment as a matter of law on that claim.

V. Certificate of Appealability

The Rules Governing Section 2254 Proceedings ("§ 2254 Rules") require the court to "issue or deny a certificate of appealability ["COA"] when it enters a final order adverse to the party" in a § 2254 action. § 2254 Rule 11(a). For the reasons set forth above, the district judge should find that Thurlow has not made a substantial showing of the denial of a constitutional right, and decline to issue a certificate of appealability. See 28 U.S.C. § 2253(c); § 2254 Rule 11(a).

Conclusion

For the reasons described above, the district judge should grant respondent's motion for summary judgment (Doc. No. 24), deny petitioner's motion for summary judgment (Doc. No. 26), and decline to issue a certificate of appealability.[4] Any objection to this Report and Recommendation must be filed within 14 days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). The

[4]Should the district judge accept this recommendation and decline to issue a certificate of appealability, Thurlow may seek such a certificate from the court of appeals under Federal Rule of Appellate Procedure 22(b). See Rule § 2254 Rule 11; 18 U.S.C. § 2253(c).

14-day period may be extended upon motion. Failure to file a specific written objection to the Report and Recommendation within the specified time waives the right to appeal the district court's order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016).

Andrea K. Johnstone
United States Magistrate Judge

August 13, 2019

cc: John P. Newman, Esq.
Elizabeth C. Woodcock, Esq.

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

STATE OF NEW HAMPSHIRE

v.

KEVIN THURLOW

Docket No. 218-2010-CR-01686

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

Defendant Kevin Thurlow was convicted of six counts of aggravated felonious sexual assault and three counts of manufacturing child sexual abuse images on September 19, 2012, after a two-day jury trial before this Court. The New Hampshire Supreme Court subsequently affirmed these convictions by 3JX panel. See State of New Hampshire v. Kevin Thurlow, No. 2012-0935 (N.H. Feb. 26, 2014) (Doc. 55). Defendant now moves for a new trial based on ineffective assistance of counsel. The State objects. On April 26, 2016, the Court held a hearing on Defendant's motion. For the following reasons, Defendant's motion is **DENIED**.

Background

I. Facts

The following facts were presented to the jury or are otherwise supported by the record. Defendant married the victim's mother when the victim was in kindergarten. See Trial Tr. Vol II, 146:6–8, Sept. 18, 2012. Over the next few years, Defendant engaged in grooming behavior and then began sexually abusing the victim. See Thurlow, No. 2012-0935 (3JX op. at 1–2). The Supreme Court summarized the sexual assaults thusly:

> By the time the victim was in the second or third grade, she testified, the defendant would have her rub his penis with him wearing nothing but a sock over it. At the time, the victim believed she was simply "rubbing or scratching another part of him." By the time she was in the fourth grade, the victim testified, the defendant would have her rub his bare penis. Eventually, the victim testified, she would "give [the defendant] hand jobs regularly," and the defendant would have her remove her clothing so that he could touch her breasts and genitalia with his hands, mouth, and penis.

Id. at 2. Defendant also took pictures of the victim posing in different bathing suits with her genitalia exposed, which usually led to sexual contact. See Trial Tr. Vol. I, 35:4–17, Sept. 17, 2012; see also Trial Tr. Vol II, 192:7–194:12.

The abuse first came to light in the summer of 2008, when the victim's mother discovered explicit pictures of her daughter in hidden files on Defendant's computer. See Trial Tr. Vol. II, 260:15–265:14. In these pictures, the victim was wearing a blue bathing suit while exposing her genitals to the camera. See Trial Tr. Vol. I, 36:2–6. The victim's mother reported the pictures to the police, who executed a search warrant at Defendant's house the next day. Id. at 49:8–16. During the course of that search, the police uncovered a marijuana growing operation, and Defendant was arrested on drug charges.[1] See id. at 49:1–19.

At the time the photographs were discovered, the victim was staying with her biological father in Vermont for the summer. See Trial Tr. Vol. II, 144:1–25, 171:2–8. On July 22, 2008, the victim was brought to the Child Advocacy Center (CAC) under the guise that she was going to be interviewed about the drug investigation. See id. at 175:13–176:21. When asked if Defendant had ever touched her inappropriately, she responded at various points with "I don't know," "I don't remember," and "no." Id. at 178:6. The victim testified at trial that she did not disclose the abuse during this

[1] The jury was not privy to information about Defendant's drug arrest.

interview because she did not want to get Defendant in trouble. Id. at 178:7–8.

After the July 2008 interview, the victim did not return to her mother's house and instead began living full-time with her father in Vermont. See id. at 181:2–13. She also began seeing a therapist. In April 2010, the victim was interviewed again at the CAC, id. at 181:12, at which time she disclosed Defendant's sexual abuse to law enforcement, id. at 186:19–187:8.

II. Procedural History

Defendant was arrested in May 2010 based on the victim's disclosures at the second CAC interview. Attorney Deanna Campbell of the New Hampshire Public Defender (NHPD) was appointed to represent Defendant in July 2010. See Appearance (Doc. 3). Defendant was indicted shortly thereafter on several counts of aggravated felonious sexual assault and manufacturing child sexual abuse images.

Defendant did not go to trial on these charges until more than two years later. This delay was mostly attributable to the parallel federal investigation that arose from the victim's disclosures. For example, in January 2011, the parties agreed to continue trial because the State planned to refer the manufacturing charges to the United States Attorney's Office for prosecution. See Agreement (Doc. 12). Trial was continued again in May 2011 because the federal investigation was still ongoing. See Assented to Mot. Continue ¶¶ 3–4 (Doc. 14). Attorney Jonathan Saxe of the Federal Defender's Office was appointed to represent Defendant in October 2011. See Saxe Aff. ¶ 2, Mar. 4, 2015.[2] By May 2012, Defendant had been indicted on federal manufacturing charges. See Mot. Continue Trial ¶ 2 (Doc. 20). Despite the Court granting two additional continuances to facilitate the resolution of the federal charges first, see id.; Agreement

[2] Attorney Saxe's affidavit is attached to Defendant's Motion for Discovery/In Camera Review (Doc. 68).

(Doc. 15), the federal trial was ultimately continued, and Defendant's trial on the state charges took place in September 2012, see Mot. in Limine: 404(b) Evid. ¶ 1 (Doc. 27).

Both the victim and her mother testified for the prosecution at trial, as did the police officer who executed the search warrant and collected evidence. Defendant was convicted of all charges on September 19, 2012. The Court (Wageling, J.) sentenced him to an aggregate prison term of 43 to 86 years, to be served stand committed, with additional suspended time. See generally Docs. 38–49. The federal charges were later dismissed because Defendant had been convicted in state court.

After the New Hampshire Supreme Court affirmed his convictions, Defendant filed a pro se motion for new trial in October 2014. See Mot. New Trial (Doc. 59). The Court subsequently appointed Attorney Kelly Dowd to represent Defendant because his motion alleged ineffective assistance of counsel by Attorney Campbell, a member of the NHPD. See Order Appointment Counsel (Doc. 63); Notification Eligibility (Doc. 64); cf. State v. Veale, 154 N.H. 730, 734–35 (2007) (holding NHPD is automatically disqualified from representing defendant in appeal involving claim of ineffective assistance of counsel where said counsel was a public defender). Attorney Dowd did not file a supplemental motion for new trial and instead relied on the arguments contained in Defendant's pro se motion. See Order on Status Conference (Doc. 67).

The Court partially granted Attorney Dowd's motion for discovery of the victim's counseling records by ordering that certain records be produced for in camera review. See Order Def.'s Mot. Disc./In Camera Review 3 (Doc. 68). The Court then disclosed a portion of these records, subject to a protective order, after finding that they contained "potentially relevant and/or potentially exculpatory information." See Protective Order

(Under Seal) (Apr. 9, 2015) (Doc. 73); Protective Order (Under Seal) (Feb. 26, 2016) (Doc. 91).

Standard of Review

Generally, a motion for new trial may be granted "when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." RSA 526:1. "The State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel." State v. Eschenbrenner, 164 N.H. 532, 539 (2013); accord N.H. CONST. pt. I, art. 15; U.S. CONST. amend. VI. When a defendant seeks a new trial based on ineffective assistance of counsel, he bears the burden of proving "that his trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Eschenbrenner, 164 N.H. at 539 (quoting State v. Fecteau, 140 N.H. 498, 500 (1995)). "Because the standard for determining whether a defendant has received ineffective assistance of counsel is the same under both constitutions," the Court evaluates Defendant's claim under the State Constitution, citing to federal cases for guidance only. State v. Whittaker, 158 N.H. 762, 768 (2009).

"To assert a successful claim for ineffective assistance of counsel under the State Constitution, 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." Eschenbrenner, 164 N.H. at 539. "To meet the first prong of this test, the defendant 'must show that counsel's representation fell below an objective standard of reasonableness.'" Whittaker, 158 N.H. at 768 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). In evaluating whether counsel's

performance was reasonable, the Court "afford[s] a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." State v. Kepple, 155 N.H. 267, 270 (2007). "'[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" Whittaker, 158 N.H. at 769 (quoting Strickland, 466 U.S. at 689).

To meet the second prong of the ineffective assistance of counsel test, "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case." Eschenbrenner, 164 N.H. at 539–40 (quotation omitted). "The prejudice analysis considers the totality of the evidence presented at trial." Kepple, 155 N.H. at 270. Finally, if the defendant fails to meet either prong of the test, the Court need not address the other prong. Id.

Analysis

Defendant argues trial counsel provided ineffective assistance by failing to pursue two avenues of investigation: a potential defense witness named Damon Carroll and the victim's counseling records. Defendant also argues that the trial court erred by failing to rule on his pro se motion for new counsel, which he filed while the charges were pending on December 10, 2010. The Court addresses each argument in turn.

I. Investigation of Potential Defense Witness

Defendant first argues that Attorney Campbell provided ineffective assistance of counsel by failing to secure the testimony of an exculpatory witness, Damon Carroll.

According to Defendant, Carroll "was willing to testify that he had accidentally walked in on [the victim]'s brother taking pictures of her in a bathing suit . . . ."[3] Mot. New Trial ¶ 5. Defendant explains that this "information would have assisted the defense in establishing that someone other than [him] may have taken the pictures found on the home computer." Id. Defendant offered testimony from Attorney Saxe at the April 2016 hearing, who explained that he had spoken with Carroll in preparing for the federal trial. According to Attorney Saxe, Carroll claimed that after returning from a motorcycle ride to Defendant's house, he observed a male child holding a camera and a female child wearing a black bathing suit, both of whom "scurr[ied] around" when the two men entered the residence. Attorney Saxe's affidavit similarly recounts that "Carroll noted one occasion [during which] he had observed [the victim] in a black bathing suit apparently posing for pictures for her brother.[4]" Saxe Aff. ¶ 7.

At the April 26, 2016 evidentiary hearing, the parties agreed to submit a transcript of Attorney Campbell's deposition in lieu of her live testimony. In that deposition, Attorney Campbell explained her reasoning for not pursuing Carroll more aggressively: based on his failure to return any of her telephone messages, "it seemed pretty obvious that he wanted no part of this." Campbell Dep. 28:5–7, July 13, 2015. Attorney Campbell noted that she knew she had the correct phone number for Carroll because he had answered her call initially, yet he did not get in touch with her despite repeated requests to do so. See id. at 10:15–11:1. Attorney Campbell took this to mean that Carroll "did not want to have contact or speak with [her] or [her] office." Id. at 24:7–8.

Defendant argues that Attorney Campbell should have been more aggressive in

[3] The Court notes that Defendant did not testify at the April 26, 2016 hearing and his motion does not contain a sworn to affidavit.
[4] It is unclear from the record if these events are one in the same or different.

making contact with Carroll by, for example, assigning an investigator to track down his whereabouts. This suggestion overlooks the fact that Carroll would only be helpful to the defense if he was willing to cooperate and confirm Defendant's story. Carroll's conduct would give a reasonable attorney pause about both his reliability as a witness and his likelihood of cooperating if a defense investigator was sent to knock on doors looking for him. In short, while Attorney Campbell could have done more to physically locate Damon Carroll, her decision must be evaluated in light of the recognition that the tactics most likely to locate Carroll might also be the ones most likely to alienate him and to ensure that he was unwilling to cooperate with the defense. Accordingly, the Court declines Defendant's invitation to second-guess this decision.

Furthermore, in the context of ineffective assistance of counsel claims, "complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative." United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983). Here, a large amount of speculation is required because Defendant has failed to submit an affidavit from Carroll himself regarding what he would have testified to had he been called as a defense witness at trial. Furthermore, Attorney Campbell's decision to not aggressively pursue a reluctant potential witness is exactly the type of strategic decision that must be "afford[ed] a high degree of deference." Kepple, 155 N.H. at 270. "An attorney is not obligated to pursue weak options when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial." State v. Moussa, 164 N.H. 108, 117 (2012).

Here, a reasonable attorney would be concerned that Carroll's refusal to return

messages meant that he was not interested in providing favorable testimony to the defense. Indeed, there are several possible reasons why Carroll may have been unwilling to contact Attorney Campbell, none of which would have been particularly helpful to Defendant's case. Accordingly, Attorney Campbell acted reasonably in deciding to pursue other defense strategies.

Notwithstanding the foregoing conclusions, the Court assumes, in the alternative, that Defendant has met the deficient performance prong of the ineffective assistance test. That is, the Court assumes that the defense found Carroll, he eventually cooperated with the defense, and credibly testified consistent with Defendant's and Attorney Saxe's representations. Even if the Court assumes all of these things, Defendant still cannot prevail on his ineffective assistance claim because Carroll's testimony would not have changed the outcome of the trial. On the contrary, it may have increased Defendant's likelihood of conviction by opening the door to otherwise inadmissible propensity evidence.

Defendant was originally indicted on seven counts of manufacturing child sexual abuse images. See Charge ID Nos. 361401C through 361407C. Three of the counts pertained to images in which the victim was wearing a blue bathing suit, see Charge ID Nos. 361404C, 361405C, & 361406C, while the other four counts pertained to images in which the victim was wearing a black bathing suit, see Charge ID Nos. 361401C, 361402C, 361403C, & 361407C. On the day of jury selection, the State nolle prossed the four counts relating to the black bathing suit images after determining that they did not meet the statutory definition of sexually explicit conduct under RSA 649-A:3-b. See Mot. in Limine Exclude Evid. Other Crimes, Wrongs or Acts for Images Involving Black

Bathing Suit ¶ 2 [hereinafter Mot. in Limine Black Bathing Suit] (Doc. 31); see also Trial Tr. Vol. I, 43:19–20, 44:18–22. Attorney Campbell then successfully sought to preclude the State from mentioning the black bathing suit images at trial on the basis that these uncharged bad acts would unfairly prejudice Defendant. See Mot. in Limine Black Bathing Suit ¶¶ 2–4; Trial Tr. Vol. I, 62:12–18 (Court granting motion to exclude this evidence); see also Trial Tr. Vol. II, 81:12–17 (defense objecting to State's renewed motion to introduce existence of black bathing suit photos because this evidence would be "extremely prejudicial"); id. at 85:4–86:7 (Court denying renewed motion and declining to allow State to discuss black bathing suit images).

Carroll's proposed testimony relates to a single incident in which the victim's brother allegedly took photographs of her wearing a black bathing suit. Although this testimony could potentially explain the black bathing suit images found on Defendant's computer, it would not explain the blue bathing suit photographs displaying the victim's genitalia that were also found on this computer. Moreover, Carroll's testimony relates solely to charges which the State nolle prossed before trial and which Attorney Campbell successfully kept the jury from learning about. Had Carroll testified at trial, his testimony would have introduced this otherwise inadmissible evidence to the jury. In effect, the jury would have learned that Defendant had two sets of inappropriate pictures of the victim on his computer, only one of which could potentially be explained by Carroll's testimony, if the jury found him credible. In sum, Carroll's testimony would have hurt, not helped, Defendant, and thus he cannot demonstrate any prejudice resulting from Attorney Campbell's failure to pursue Carroll as a defense witness.

Lastly, the Court notes that Attorney Campbell essentially made the same

suggestion to the jury—that the victim's brother took the bathing suit photographs—without calling Carroll as a witness. See Trial Tr. Vol. III, 317:4–18, Sept. 19, 2012 (suggesting victim's brother used Defendant's computer); id. at 378:19–23 (closing argument) ("If [the brother] suspected something, I would think he would be here. If [he] saw something, don't you think he would be there? But if [he] did something, he would not be here. Kevin Thurlow is not guilty."). In other words, Attorney Campbell employed this defense strategy without exposing the jury to prejudicial information about the black bathing suit photographs on Defendant's computer, which would have come out through Carroll's testimony. Therefore, to the extent Defendant argues that Attorney Campbell's failure to investigate Carroll foreclosed his suggested strategy, the Court rejects this argument.

II. The Victim's Counseling Records

Defendant argues that Attorney Campbell provided ineffective assistance of counsel by failing to obtain the victim's counseling records from her therapist in Vermont, whom she saw between the first CAC interview in July 2008 and the second CAC interview in April 2010. According to Defendant, these records contain information that would have assisted the defense in impeaching the victim and the victim's mother, the State's two main witnesses. See Mot. New Trial ¶¶ 6–7, 10. Defendant argues that Attorney Campbell's decision not to seek these records was not a reasonable trial strategy and that he was prejudiced thereby. See id. ¶¶ 12–13.

After he was appointed to represent Defendant on the federal charges, Attorney Saxe was permitted to review the victim's counseling records, which were in the possession of the U.S. Attorney's Office at that time. See Saxe Aff. ¶ 3. Attorney Saxe

made an agreement with federal prosecutors that he would not disclose the contents of the records unless or until the federal district court reviewed them in camera and issued a protective order. Sometime thereafter, Attorney Saxe advised Attorney Campbell about the existence of the victim's counseling records, see Campbell Dep. 14:16–15:5, and suggested that she "ought to take a look at th[em]," id. at 35:22–23. Ultimately, Attorney Campbell decided not to request the records and explained this decision to Defendant. Id. at 17:4–9.

The parties offered slightly differing testimony concerning what Attorney Saxe told Attorney Campbell about the counseling records. At the April 26, 2016 evidentiary hearing, Attorney Saxe testified that although he could not remember exactly what he told Attorney Campbell, he tried to convey to her that he had reviewed the records and that he believed they contained useful information, without disclosing the nature of that information. According to Attorney Campbell's deposition testimony, Attorney Saxe told her that the counseling records contained "some interesting disclosures" from the victim. Campbell Dep. 15:8. Attorney Campbell took this to mean that "there were some inconsistencies." Id. at 36:22–37:1. She also learned that the victim had not disclosed the sexual abuse to her therapist right away. See id. at 15:12–16:6.

Attorney Campbell also recalled Attorney Saxe advising her that the counseling records contained a letter from the victim's mother, id. at 15:9–10, who was not "immediately receptive or responsive to [the victim]'s disclosures," id. at 16:8–9. For his part, Attorney Saxe's recollection of this letter was that it "indicat[ed] that [the victim's mother] did not understand how the allegations would have been possible due to her presence in the home and [Defendant]'s busy work schedule." Saxe Aff. ¶ 5. Attorney

Saxe explained at the hearing that the victim's mother had also relayed this specific concern during an interview with himself and his investigator, and that he would have shared information from that interview with Attorney Campbell. He was unsure, however, whether he had mentioned the existence of the letter to Attorney Campbell.

At the April 2016 hearing, Attorney Saxe made further representations to the Court about his memory of the contents of the victim's counseling records, and of his investigation of Defendant's case more generally. For example, he learned through the victim's mother that she had attended a counseling session with the victim towards the end of the year-and-a-half period during which the victim was in counseling in Vermont before the second CAC interview. According to Attorney Saxe, the victim learned during that session that her mother had moved back in with Defendant, which upset both the victim and her father. Attorney Saxe believed that this discovery occurred close in time to the victim's second CAC interview, during which she disclosed extensive sexual abuse committed against her by Defendant. See Saxe Aff. ¶ 4. Attorney Saxe clarified, however, that the victim had disclosed this abuse to her therapist at least several months prior to this CAC interview. He conceded that this timeline weakened any argument that the victim's anger at Defendant's renewed cohabitation with her mother prompted her to fabricate allegations of sexual abuse against Defendant in the second CAC interview.

Defendant appears to argue that much if not all of the above information is contained in the victim's counseling records, see Mot. Disc./In Camera Review ¶¶ 7, 9, and that Attorney Campbell would have learned this important information if she had tried to review these records, see Mot. New Trial ¶ 10. Because the Court disposes of

Defendant's argument under the prejudice prong of the ineffective assistance test, it need not analyze the reasonableness of Attorney Campbell's decision not to obtain the records, and thus it does not summarize the reasons for her decision here. See generally Campbell Dep. 17:4–18:17, 35:8–15, 39:10–11, 40:20–41:9, 42:12–13 (explaining reasons). Instead, the Court finds that nothing in the counseling records would have contributed to a different outcome at trial, even if those records had been requested by and disclosed to Attorney Campbell.

A. Timing of Disclosure

Defendant contends that reviewing the counseling records would have revealed that, during a therapy session involving the victim's mother, the victim learned that Defendant had moved back in with her mother. Defendant asserts that this session occurred shortly before the second CAC interview in April 2010, during which the victim first disclosed Defendant's sexual abuse to law enforcement. According to Defendant, the counseling records would have shown that the victim had a motive to lie in reporting the abuse; specifically, she wanted to move back to New Hampshire with her mother and she was upset that Defendant was living with her mother again.

The Court reviewed the counseling records in their entirety again in light of the arguments Defendant articulated at the hearing. During this review, the Court found additional entries responsive to Defendant's argument regarding the timing of disclosure, which it discusses below. In conjunction with the present order, the Court will issue another protective order disclosing these additional documents to the parties.

Although the victim did not disclose Defendant's sexual abuse to law enforcement until her second CAC interview in April 2010, she disclosed it to her

therapist in June 2009. See Apr. 26, 2016 Hr'g, Def.'s Ex. A (under seal) (copy of counseling records disclosed as of hearing date). A previously undisclosed entry in the counseling records indicates that the victim became aware in August 2009 that her mother was having contact with Defendant. On February 15, 2010, the victim's mother attended a counseling session with the victim and her therapist, during which the victim learned that Defendant had moved back into her mother's residence. While Defendant argues this provided the victim with a motive to lie, the victim's disclosure of the sexual abuse to her therapist predated any knowledge of Defendant moving back in with her mother. Accordingly, the counseling records do not support Defendant's argument concerning the victim's motive to fabricate the abuse allegations.

Even if Defendant contends that this argument still should have been made at trial, his position overlooks the damage this argument would have done to his defense. Arguing that the victim gained a motive to lie about the abuse in February 2010—or even in August 2009—would have allowed the State to introduce the victim's 2009 disclosures to her therapist as prior consistent statements. See State v. Young, 144 N.H. 477, 482 (1999) (noting that a witness's prior consistent statement is admissible as substantive evidence, under New Hampshire Rule of Evidence 801(d)(1)(B), "if it predates the motive to fabricate that it is purported to rebut"). Attorney Campbell understood, and the counseling records confirm, that the victim disclosed Defendant's sexual abuse to her therapist in 2009, several months before the joint counseling session with her mother, when the motive to lie purportedly arose. See Campbell Dep. 16:5–6. Attorney Campbell was careful to tailor her defense strategy so as not to open the door to testimony about the victim's prior disclosures. See Trial Tr. Vol II, 129:2–12.

In sum, the counseling records do not contain the information Defendant contends would have changed the outcome of his trial as they do not support his theory about the victim's motive to lie in reporting the abuse. Accordingly, he is unable to demonstrate prejudice in this respect.

B. Letter from the Victim's Mother

Defendant also argues that the letter from the victim's mother contained in the counseling records, if disclosed to the defense before trial, would have been used to show that Defendant lacked opportunity to commit the pattern of sexual abuse alleged by the victim. At the hearing, Defendant argued that the trial testimony of the victim's mother was different from what she said in the letter about Defendant's lack of opportunity, and thus the letter would have assisted in impeaching her testimony.

While their memories differ on whether Attorney Saxe told Attorney Campbell about the existence of the letter, Attorney Saxe testified that he learned the same information contained in the letter by interviewing the victim's mother directly, and that he would have shared this information with Attorney Campbell. Accordingly, based on the evidence presented to the Court at the April 26, 2016 hearing, Attorney Campbell received the same information about Defendant's lack of opportunity to commit the charged crimes without requesting the counseling records. In other words, the counseling records would not have added anything new. Compare Whittaker, 158 N.H. at 774 (holding that defense counsel's decision not to consult with accident reconstruction expert prevented defendant from learning about availability of unavoidable accident defense).

Moreover, the Court disagrees with Defendant's reading of the trial transcript on

this issue. On direct examination, the victim's mother testified that "most of the time, [she] was home" with the children. Trial Tr. Vol. II, 249:10–12. When asked by the prosecutor if she ever left the house to visit friends, the victim's mother responded: "No. The most I went out usually was to go to the grocery store or go to church. And most of the time, the kids would come with me for church or at the Wednesday night youth group stuff." Id. at 250:8–11. Contrary to Defendant's contention, this testimony is consistent with, not contrary to, the contents of the letter. See Apr. 26, 2016 Hr'g, Def.'s Ex. A, at 1 (under seal) (letter) ("I was home all the time. . . . I rarely went out, and if I did, it was to a church Bible study or ladies church something. I couldn't figure out when he had opportunity.").[5] Accordingly, Attorney Campbell did not need to impeach the victim's mother on this point because the witness provided favorable testimony regarding Defendant's lack of opportunity on direct examination.

Furthermore, on cross-examination, Attorney Campbell elicited several additional statements from the victim's mother that supported Defendant's lack of opportunity to sexually abuse the victim, especially on a weekly basis as the victim described. For example, the victim's mother agreed that she structured her work schedule so that she was the parent home with the children after school. See Trial Tr. Vol. II, 303:20–305:22; see also id. at 307:9–11 ("[F]or the . . . most part, I think I was home."). The victim's mother also agreed that Defendant worked "a lot," meaning five or six days a week, at the job he held when the victim was ages seven through nine. See id. at 306:18–307:25. She also testified that Defendant went into the office "every day" after they

[5] The Court clarifies that, when read in context, the letter does not appear to be doubting the victim's allegations, contrary to Attorney Campbell's understanding. Indeed, the very next line of the letter emphasizes: "That's not at all to say I don't believe and support [the victim] 100% . . . ." See Apr. 26, 2016 Hr'g, Def.'s Ex. A, at 1 (under seal) (letter) (emphasis in original). Rather, the victim's mother appears to be trying to come to terms with how she did not detect the abuse for several years.

bought a business when the victim was eleven, whereas she only worked "Mother's hours." See Trial Tr. Vol. III, 313:15–315:7. Attorney Campbell focused on this lack of opportunity in both her opening statement and her closing argument. See Trial Tr. Vol. II, 138:2–139:9 (discussing, in opening statement, how Defendant worked a lot while victim's mother stayed home with the children); id. at 139:3–5 ("So when the State asks you how could this have happened, the answer, ladies and gentlemen, is quite simple, it didn't happen. It didn't happen."); see Trial Tr. Vol. III, 364:16–365:22 (noting, in closing argument, the number of people living in the house and the parents' work schedules during the time period when the victim claimed Defendant would chase her "all around the house" after taking her underwear).

In sum, obtaining the letter in the counseling records would not have changed the outcome of the trial because (1) Attorney Campbell knew this information anyway and (2) the victim's mother testified to the same information contained in the letter. Therefore, Defendant has failed to demonstrate prejudice in this respect as well.

C. Information About "Lemons"

Defendant argues that information contained in the counseling records would have allowed the defense to "extensive[ly]" cross-examine the victim about her interest in sexually explicit fictional stories called "lemons." According to Defendant, these lemons "are clearly relevant to establish [her] knowledge and capacity for graphic sexual description, and also suggest a curiosity about sexual transgression . . . ." Mot. Disc./In Camera Review ¶ 14. Defendant also asserts that he could have used the "lemon" theme, in conjunction with some of the counseling records, to argue to the jury that the victim had romantic feelings for him and came up with a "lemon" expressing

those fantasies, which spun out of control and resulted in the sexual abuse charges.

At trial, Attorney Campbell asked the victim about "lemons," which the victim described as "racy" stories on the internet written by fans of shows who "insert[] themselves into sexually explicit stories" about those shows and post them online. Trial Tr. Vol. II, 216:5–217:6. Although the victim admitted reading "lemons" on her computer, she denied ever writing any. Id. at 217:9–218:1.

In his motion for discovery and at the hearing, Defendant asserted that "lemons" "often contain[] themes of incest and rape." Mot. Disc./In Camera Review ¶ 14. The Court is unsure of the basis for this assertion, as Defendant has not offered any evidence or relevant authority to support his contention about the thematic content of "lemons." Nor is there any suggestion that the victim read "lemons" involving rape or incest. Notwithstanding these issues, the Court assumes, for the sake of argument, that Defendant's assertion about "lemons" is correct and that the Court may properly consider this assertion in the context of the present motion.

The victim's counseling records do not contain any reference to "lemons." While Defendant argues the records show the victim fantasized about him, the Court disagrees. With respect to the June 23, 2009 counseling entry, the reference to the victim's private sexual behavior does not give rise to an implication that she sexually fantasized about Defendant; if anything, it gives rise to the opposite conclusion. Additionally, the fact that the victim wondered about Defendant's well-being in January 2009—after the pictures were found but before any disclosures were made— hardly gives rise to the inference that she had sexual fantasies about him and created a fictional story to express those fantasies. In short, the counseling records do not

provide additional evidence relevant to the "lemon" theory, and thus trial counsel's failure to obtain these records did not foreclose this theory of defense.

Indeed, "lemons" were a significant theme in Attorney Campbell's closing argument. She argued, for example, that the victim's descriptions of sexual activity came from "lemons" she read online. See Trial Tr. Vol. III, 366:1–4 ("Where would she come up with these allegations? How would a 15-year-old know what to say? Well, I think most of us learned a little something here yesterday about lemons."); see also id. at 377:25–378:1 ("[W]here else would she find out about masturbation with a sock, lemons perhaps?"). Attorney Campbell further argued that when the victim was brought back to the CAC for the second interview, she needed to explain the explicit pictures the police found, "[s]o she create[d] a lemon. And Kevin [Thurlow] became the scapegoat." Id. at 371:20–372:2; see also id. at 375:1–2 ("Or is it possible that this is [her] lemon and that she had to create a story since pictures were found?"). Later in her closing argument, Attorney Campbell returned to this theme, asserting that the victim "needed a way out and she needed a lemon." Id. at 376:5–6.

As the preceding paragraph illustrates, Attorney Campbell used the "lemon" theory to explain the victim's basis of knowledge, just as Defendant suggests she should have done. Nothing in the victim's counseling records would have assisted trial counsel in further developing this strategy or using it to greater effect. Accordingly, Defendant cannot meet the prejudice prong, and thus he has failed to demonstrate that he received ineffective assistance of counsel.

III. Defendant's *Pro Se* Motion for New Counsel

Defendant's final argument is that the trial court erred by failing to rule on his

motion for new counsel, which he filed a few months after he was indicted. See Def.'s Mot. to Be Appointed New Councel [sic] [hereinafter Mot. New Counsel] (Doc. 9). Defendant argues that this was an error by the trial court, as opposed to an error by trial counsel, see Mot. New Trial 4, and thus his claim is not one for ineffective assistance. Instead, he argues that the trial court abused its discretion by failing to inquire as to the basis for Defendant's request for new counsel. See id.

The procedural context for Defendant's motion is as follows. In late August 2010, the Court held a structuring conference and trial was initially scheduled for January 2011. The next event in the Court's file occurred on December 10, 2010, when Defendant filed a handwritten motion "to be appointed a new councel [sic]." Mot. New Counsel. The motion stated in full: "In the past months councel [sic] has not made any attempts to contact me regarding my case nor has [she] returned my phone calls and messages I left. I would like this court to remove and replace my court appointed attorney." Id.

The file does not contain a written ruling on Defendant's motion. The Court has also reviewed the audio recordings of the hearings held in the case during the relevant time period, and the motion for new counsel is not mentioned on the record. The next two filings are the State's motion to admit 404(b) evidence and its prospective witness list. See Docs. 10–11. Then, on January 4, 2011, the date of the final pretrial hearing, the parties filed an agreement to continue trial because "the manufacturing charges [we]re being referred for federal prosecution." Agreement 1 (Doc. 12). Defendant also waived speedy trial. Id. at 2. He continued to be represented by Attorney Campbell,

without incident, for the next two years.[6] Indeed, Defendant's motion for new counsel was never referenced again until his October 24, 2014 motion for new trial.

Defendant's request for appointment of new counsel in December 2010 was based on his assertion that Attorney Campbell was not returning his phone calls or otherwise contacting him about the case. Given Attorney Campbell's active involvement in the case thereafter, as evidenced by the Court's file, the Court reasonably infers that any communication issue was resolved by Defendant and Attorney Campbell to the satisfaction of both individuals. This conclusion is further supported by Defendant's failure to object to proceeding with his current representation after December 2010, or to otherwise raise the issue at any time before or even during trial. Defendant cannot now "comb the record on a treasure hunt for issues never properly brought before the trial judge," State v. McCabe, 145 N.H. 686, 690 (2001) (quotation omitted), after remaining silent on the issue since December 2010. Accord State v. Cass, 121 N.H. 81, 83 (1981) ("Errors discovered by combing the record after trial and never properly presented to the trial judge should not be utilized to set aside a verdict.")

Moreover, Defendant failed to raise the trial court's failure to rule on this motion in his direct appeal. Accordingly, Defendant is procedurally barred from raising this issue now. See State v. Kinne, 161 N.H. 41, 44–46 (2010) (noting ineffective assistance of counsel and legality of sentence claims are among limited exceptions to rule that errors not raised on direct appeal are procedurally barred from collateral attack); see also Avery v. Cunningham, 131 N.H. 138, 143 (1988) ("[S]ince the

[6] Although Defendant claims he subsequently attempted to refile this motion, see Mot. New Trial ¶ 15, the Court declines to consider his unsworn statement to this effect, as he chose not testify at the April 26, 2016 evidentiary hearing, nor does the record provide independent support for this assertion.

petitioner had both knowledge of the issue and an opportunity to raise it properly before this court on direct appeal, but failed to do so, he has procedurally waived the issue for collateral review.").

Even assuming, without deciding, that Defendant is not procedurally barred from raising this issue, the Court finds that it does not fall within the statutory bases for granting a motion for new trial. RSA 526:1 provides that a motion for new trial may be granted "when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." Here, Defendant has not raised, for example, a claim of newly discovered evidence. See State v. Etienne, 163 N.H. 57, 96 (2011) (recognizing that newly discovered evidence claim fails with RSA 526:1). Instead, Defendant points to the trial court's failure to issue a ruling on a motion to appoint new counsel that was filed in December 2010, approximately five months after he was first indicted and nearly two years before he ultimately went to trial. In short, the only thing "new" about this claim is that Defendant failed to bring it up again until nearly four years after he filed the motion. Because this is not the type of claim encompassed by RSA 526:1, the Court declines to grant Defendant's motion for new trial on this basis.

The Court's conclusion is strengthened by the fact that Defendant makes no substantive argument that he was prejudiced by the trial court's failure to rule on his motion, instead focusing on the trial court's failure to inquire as a basis for "automatic" reversal. Mot. New Trial ¶ 18 (quotation omitted). Defendant does not argue, for example, that there was a significant breakdown in his relationship with Attorney Campbell such that further inquiry by the Court would have led to the substitution of counsel. Indeed, Defendant's failure to raise the issue again until four years later

suggests that any disagreements he may have had with Attorney Campbell were not "so great that [they] resulted in a total lack of communication preventing an adequate defense." Moussa, 164 N.H. at 116 (quoting United States v. Woodard, 291 F.3d 95, 107 (1st Cir. 2002)). Instead, the more likely explanation, as Attorney Campbell noted in her deposition, is that Defendant was frustrated at the lack of movement in his case resulting from the parallel state and federal investigations. See Campbell Dep. 22:11–17. Were frustration at institutional inertia enough to require substitution of counsel, the criminal justice system, known for its slow-turning wheels, would be reduced to an endlessly revolving door for defense attorneys.

The Court disagrees that State v. Sweeney, 151 N.H. 666 (2005), requires a different result. Sweeney is distinguishable for several reasons, the first of which is that the case dealt with the constitutional right to self-representation. Sweeney, 151 N.H. at 670–71. Defendant's motion for new counsel cannot reasonably be construed as an attempt to invoke the right to represent himself, and thus the trial court's failure to rule on this motion did not deprive him of the ability to exercise said right.

As Defendant pointed out at the hearing, Sweeney does discuss the issue of substitution of counsel in conjunction with its discussion of the right to self-representation. See id. at 671–72. This is because there was some ambiguity in that case as to whether the defendant was attempting to proceed pro se or to substitute counsel when he asked whether he could "fire" his attorney. See id. at 669, 671. Here, there was no such ambiguity. Nevertheless, assuming Sweeney applies to a non-ambiguous request to appoint new counsel, this case involves key factual differences such that the trial court's failure to inquire does not require reversal here.

"Once a court appoints an attorney to represent an accused, . . . there must be good cause for rescinding the original appointment and interposing a new one." United States v. Myers, 294 F.3d 203, 206 (1st Cir. 2002). "Good cause depends on objective reasonableness." Id. It "cannot be determined solely according to the subjective standard of what the defendant perceives." Woodard, 291 F.3d at 108 (quotation omitted). Furthermore, "not every bump in the road entitles a criminal defendant to have his lawyer cashiered and a new one appointed." Myers, 294 F.3d at 206.

In Sweeney, the Supreme Court reversed because the trial court's failure to inquire left the appellate court with no basis to determine whether there was good cause to grant a motion to substitute counsel. Id. at 672. While the Sweeney court "ha[d] no information as to the nature and extent of any conflict between the defendant and his attorney," id. at 671, here, Defendant told the Court, via his motion for new counsel, that his dissatisfaction was the result of Attorney Campbell's failure to return his messages or to otherwise contact him about his case, see Mot. New Counsel. Because the record establishes "the source of the defendant's dissatisfaction," Sweeney, at 151 N.H. at 671, the trial court's failure to inquire further does not leave this Court guessing as to the true reason for Defendant's request to appoint new counsel, see id. at 672.

Based on this record, the Court concludes that Defendant's complaint did not provide good cause to appoint new counsel, as it did not suggest "a total breakdown in communication" that would "preclud[e] [Attorney Campbell] from effectively litigating the issues remaining in the case." Myers, 294 F.3d at 208. Nor is there any evidence to suggest that these purported communication issues persisted or deteriorated during Attorney Campbell's representation of Defendant after December 2010. Indeed, the

Court's file and Attorney Campbell's deposition demonstrate that there was active consultation between herself and Defendant during the pendency of these charges. See Campbell Dep. 12:16–14:15, 18:4–19:17, 20:11–21:22. Defendant's failure to raise further complaints about his representation supports this conclusion. Because Defendant was never "told that he had no right to fire his attorney" by the trial court, the Court need not interpret his silence as an "assum[ption] that he had no choice but to continue with appointed counsel." Sweeney, 151 N.H. at 672. Instead, the Court may and does find this silence relevant, although not dispositive, in concluding that there was no irretrievable breakdown in communication between attorney and client and thus Defendant suffered no prejudice from the trial court's failure to rule on his motion to appoint new counsel. Denial of Defendant's motion, therefore, would not have been an abuse of the trial court's discretion. Because the trial court failed to rule on the motion, this had the same effect as denying the motion, and the same standard of review applies.

Lastly, the Court addresses Defendant's suggestion that his four-year silence on this issue—that is, his failure to raise it in any form after filing the December 2010 motion—should have no bearing on the Court's analysis at this stage. Defendant argues that his December 2010 motion requested relief in the form of the appointment of new counsel, and that he was not obligated to renew this request; rather, it was the trial court's obligation to rule on this request. While the Court agrees that a defendant need not refile his motion in order to convey that he "really meant" his request for relief, it disagrees that Defendant's silence here should be deemed irrelevant.

The defendant bears the burden of raising errors made by the trial court on direct

appeal. See State v. Martin, 145 N.H. 313, 315 (2000) (discussing defendant's burden with respect to raising appellate issues). Accordingly, it was Defendant's obligation to raise the trial court's failure to rule on his motion when he appealed his convictions to the Supreme Court. Because he remained silent on this issue, he is procedurally barred from raising it in a collateral attack now.[7] See Avery, 131 N.H. at 144 ("[Defendant cannot] use a collateral proceeding alleging ineffective assistance of counsel as a means of circumventing the court's procedural requirements.").

Conclusion

For the reasons discussed above, Defendant's motion for new trial is **DENIED**.

So Ordered.

July 6, 2016
Date

Marguerite L. Wageling
Presiding Justice

[7] Defendant does not claim that the failure to raise this issue constituted ineffective assistance of counsel.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

KELLY E. DOWD, ESQ
THE LAW OFFICES OF KELLY E DOWD PLLC
29 CENTER STREET SUITE 12
PO BOX 188
KEENE NH 03431

Case Name: **State v. Kevin Thurlow**
Case Number: **218-2010-CR-01686**

Please be advised that on July 27, 2016 Judge Wageling made the following order relative to:

Motion for Reconsideration - "Denied."

July 28, 2016

Maureen F. O'Neil
Clerk of Court

(273)

C: Karen H. Springer, ESQ

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2016-0460, State of New Hampshire v. Kevin Thurlow, the court on September 28, 2016, issued the following order:

Notice of appeal is declined. See Rule 7(1)(B).

Under Supreme Court Rule 7(1)(B), the supreme court may decline to accept a notice of discretionary appeal from the superior or circuit court. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who considered this matter believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Dalianis, C.J., and Hicks, Conboy, Lynn, and Bassett, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
Rockingham County Superior Court, 218-2010-CR-01686
Honorable Marguerite L. Wageling
Kelly E. Dowd, Esq.
Attorney General
Appellate Defender
File