

State of New Hampshire  
Supreme Court

NO. 2017-0385

2017 TERM  
DECEMBER SESSION

State of New Hampshire

v.

David Martinko

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

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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<sup>1</sup> charging Mr. Martinko with pattern sexual assault.

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<sup>1</sup>The State has assigned unique character strings to identify the Informations, which are handwritten in the bottom-right margin of each Information. FELONY INFORMATIONS (May 14, 2014), *Addendum* at 18, 20, 22. 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.<sup>2</sup>

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,<sup>3</sup> 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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<sup>2</sup>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 sprung only from Information #57, and not from the others. See ORDER ON DEFENDANT'S MOTION FOR CLARIFICATION (May 26, 2016), *Appx.* at 22.

<sup>3</sup>The court also dismissed the original district 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               | <i>Oct. 31, 2013 (self-reported)</i>   | <i>Oct. 31, 2013</i>  | <i>Touching</i>                  | <i>Once</i>                           | <i>Dover, New Hampshire</i>                       | <i>8-9</i> |
| 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.

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

| 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 |

September 2010 to October 2013 – all within the five-year pattern timeframe mandated by the statute.<sup>4</sup> 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

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<sup>4</sup>RSA 632-A:1, I-c: "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<sup>5</sup>; N.H. CONST. pt. 1, art. 16<sup>6</sup>; *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); *see 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,<sup>7</sup> 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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<sup>5</sup>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.”

<sup>6</sup>N.H. CONST. pt. 1, art. 16: “No subject shall be liable to be tried, after an acquittal, for the same crime or offense.”

<sup>7</sup>RSA 632-A:2: “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); *Fortier*, 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.<sup>8</sup> 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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<sup>8</sup>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. Fortier*, 146 N.H. 784 (2001); see also *State v. Ericson*, 159 N.H. 379 (2009); *State v. Hannon*, 151 N.H. 708 (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.

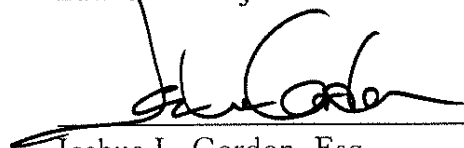
### REQUEST FOR ORAL ARGUMENT

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



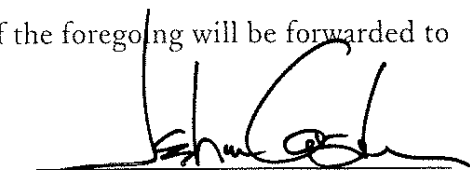
Joshua L. Gordon, Esq.  
Law Office of Joshua L. Gordon  
(603) 226-4225 [www.AppealsLawyer.net](http://www.AppealsLawyer.net)  
75 South Main St. #7  
Concord, NH 03301  
NH Bar ID No. 9046

### 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.

**ADDENDUM**

|    |  |           |
|----|--|-----------|
| 1. | Felony Informations (May 14, 2014).....                                    | <u>18</u> |
| 2. | State Prison Sentences (June 13, 2014). . . . .                            | <u>24</u> |
| 3. | Motion to Vacate Plea & Sentences (Apr. 20, 2017). . . . .                 | <u>30</u> |
| 4. | Order on Motion to Vacate Plea and Sentences (June 7, 2017).. . . . .      | <u>36</u> |
| 5. | Transcript of Plea and Sentencing Hearing (June 13, 2014), pages 8-10..... | <u>48</u> |

D.O.B. October 11, 1974

LOE: B

RSA Ch. 632-A:2, III; 651:6, I(e)  
Aggravated Felonious Sexual  
Assault  
Enhanced Felony  
10-30 years, \$4,000

STATE OF NEW HAMPSHIRE

STRAFFORD, SS.


SUPERIOR COURT

FELONY INFORMATION

At the Superior Court holden at Dover, within and for the County of Strafford aforesaid, in the month of **MAY**, in the year of **TWO THOUSAND AND FOURTEEN**, comes now the Strafford County Attorney, in the name of and on behalf of the State of New Hampshire, upon information, and complains that

**DAVID MARTINKO**  
**LKA: 31 BACK RIVER ROAD**  
**DOVER, NH 03820**

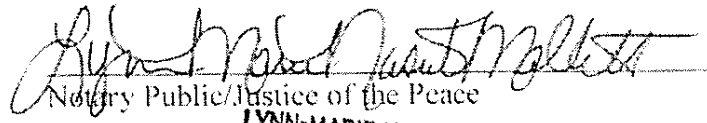
between the **FIRST** day of **SEPTEMBER** in the year **TWO THOUSAND AND TEN** and the **THIRTY-FIRST** day of **AUGUST** in the year **TWO THOUSAND AND ELEVEN**, at **DOVER** in the County of Strafford aforesaid, **did commit the crime of AGGRAVATED FELONIOUS SEXUAL ASSAULT**, in that he **did engage in a pattern of sexual assault with A.G. whose date of birth is August 16, 1998, 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 with A.G., contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.**

  
Kathryn A. Smykowski, NHBA # 19597  
Assistant County Attorney

SSC#219 13 CR 521  
CHG ID# 936555C



Personally appeared the above named County Attorney on the Twentieth day of May, Two Thousand and Fourteen, and made oath that the above information by her subscribed is, to the best of her knowledge and belief, true.

  
Notary Public/Justice of the Peace  
**LYNN-MARIE NASUTI-MALLETT**  
Justice of the Peace New Hampshire  
My Commission Expires September 18, 2018

SSC#219 13 CR 521  
CHG ID# 936555C

D.O.B. October 11, 1974

LOE: B

RSA Ch. 632-A:2, III  
Aggravated Felonious Sexual  
Assault  
Class A Felony  
10-20 years, \$4,000

STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

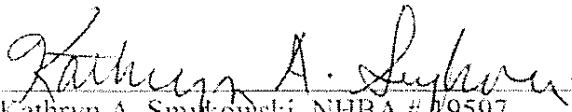
SUPERIOR COURT

FELONY INFORMATION

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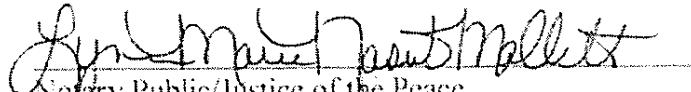
**DAVID MARTINKO**  
**LKA: 31 BACK RIVER ROAD**  
**DOVER, NH 03820**

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**, at **DOVER** in the County of Strafford aforesaid, did commit the crime of **AGGRAVATED FELONIOUS SEXUAL ASSAULT**, in that he did engage in a pattern of sexual assault with **A.G.** whose date of birth is August 16, 1998, 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 with **A.G.**, contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

  
Kathryn A. Smykowski, NHBA # 9597  
Assistant County Attorney

SSC#219 13 CR 521  
CHG ID# 936550C

Personally appeared the above named County Attorney on the Twentieth day of May, Two Thousand and Fourteen, and made oath that the above information by her subscribed is, to the best of her knowledge and belief, true.

  
Notary Public/Justice of the Peace

LYNN-MARIE NASUTI-MALLETT  
Justice of the Peace - New Hampshire  
My Commission Expires September 18, 2018

SSC#219 13 CR 521  
CHG ID# 9305500

D.O.B. October 11, 1974

LOE: B

RSA Ch. 632-A:2, III  
Aggravated Felonious Sexual  
Assault  
Class A Felony  
10-20 years, \$4,000

STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

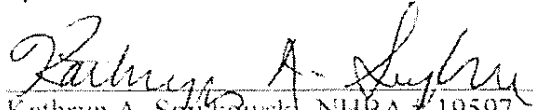
SUPERIOR COURT

FELONY INFORMATION

At the Superior Court holden at Dover, within and for the County of Strafford aforesaid, in the month of **MAY**, in the year of **TWO THOUSAND AND FOURTEEN**, comes now the Strafford County Attorney, in the name of and on behalf of the State of New Hampshire, upon information, and complains that

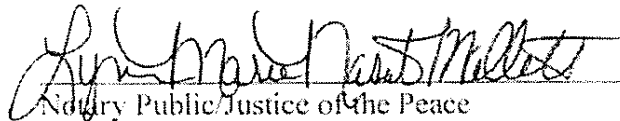
**DAVID MARTINKO**  
**LKA: 31 BACK RIVER ROAD**  
**DOVER, NH 03820**

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**, at **DOVER** in the County of Strafford aforesaid, did commit the crime of **AGGRAVATED FELONIOUS SEXUAL ASSAULT**, in that he did engage in a pattern of sexual assault with A.G. whose date of birth is August 16, 1998, 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 with A.G., contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

  
Kathryn A. Strykowski, NHBA # 19597  
Assistant County Attorney

SSC#219 13 CR 521  
CHG ID# 930557C

Personally appeared the above named County Attorney on the Twentieth day of May, Two Thousand and Fourteen, and made oath that the above information by her subscribed is, to the best of her knowledge and belief, true.

  
Notary Public/Justice of the Peace

**LYNN-MARIE NASUTI-MALLETT**  
Justice of the Peace - New Hampshire  
My Commission Expires September 18, 2018

SSC#219 13 CR 521  
CHG ID# 930557C

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Stafford County Superior Court  
 Case Name: State v. David Martinko  
 Case Number: 214-2013-CR-521 Charge ID Number: 936555C  
(if known)

**STATE PRISON SENTENCE**

|   |  |
|---|--|
| Plea/Verdict: <u>Guilty</u>                 | Clerk: <u>April Cote</u>               |
| Crime: <u>Agg. Felonious Sexual Assault</u> | Date of Crime: <u>9/1/10 - 8/31/11</u> |
| Monitor: <u>Milco Wragge</u>                | Judge: <u>Fauver</u>                   |

A finding of GUILTY/TRUE is entered.

- 1. The defendant is sentenced to the New Hampshire State Prison for not more than 20 year(s) / \_\_\_\_\_ months, nor less than 10 year(s) / \_\_\_\_\_ months. There is 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.
- 2. This sentence is to be served as follows:  Stand committed  Commencing forthwith
- 3. \_\_\_\_\_ of the minimum sentence is suspended  
 \_\_\_\_\_ of the maximum sentence is suspended  
 Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within \_\_\_\_\_ years of  today's date  \_\_\_\_\_.
- 4. \_\_\_\_\_ of the sentence is deferred for a period of \_\_\_\_\_ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of \_\_\_\_\_ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
- 5. \_\_\_\_\_ of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
- 6. The sentence is  consecutive to \_\_\_\_\_  
 concurrent with \_\_\_\_\_
- 7. Pretrial confinement credit: 30 days.
- 8. The Court recommends to the Department of Corrections:
  - A. Drug and alcohol treatment and counseling
  - B. Sexual offender program
  - C. Sentence to be served at the House of Corrections
  - D. \_\_\_\_\_

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider

Case Name: State v. David Martinko  
Case Number: 2013-CR-521

STATE PRISON SENTENCE

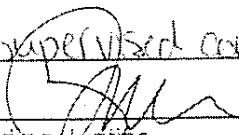
**PROBATION**

- 9. The defendant is placed on probation for a period of \_\_\_\_\_ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.  
Effective:  Forthwith  Upon Release \_\_\_\_\_  
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 10. Subject to the provisions of RSA 504-A:4, III, if the underlying conviction is for a felony, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 11. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

**OTHER CONDITIONS**

- 12. 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.
  - A. The defendant is fined \$ \_\_\_\_\_ plus statutory penalty assessment of \$ \_\_\_\_\_
    - The defendant shall also pay the time payment fee of \$25.00.
    - The fine, penalty assessment and any fees shall be paid:  
 Now  By \_\_\_\_\_  Through the Department of Corrections as directed by the Probation/Parole Officer.
    - \$ \_\_\_\_\_ of the fine is suspended for \_\_\_\_\_ years(s).
    - \$ \_\_\_\_\_ of the penalty assessment is suspended for \_\_\_\_\_ year(s).
  - B. The defendant is ordered to make restitution of \$ \_\_\_\_\_ plus statutory 17% administrative fee
    - Through the Department of Corrections as directed by the Probation/Parole Officer
    - At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
    - Restitution is not ordered because: \_\_\_\_\_
  - C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
  - D. Under the direction of the Probation/Parole Officer, the defendant shall tour the
    - New Hampshire State Prison  House of Corrections
  - E. The defendant shall perform \_\_\_\_\_ hours of community service under the direction of the Probation/Parole Officer.
  - F. The defendant is ordered to have no contact with A.G. or her family except as may be authorized either directly or indirectly, including but not limited to contact in-person, by mail or authorized telephone or by means of any communications, electronic or otherwise. by the fam
  - G. The defendant and the State have waived sentence review in writing or on the record. court to
  - H. The defendant is ordered to be of good behavior and comply with all the terms of this make the sentence. biological adult daug
  - I. Other: The defendant shall have no unsupervised contact with minors.

Date June 13, 2014

  
Presiding Justice Peter H. Fauver  
Presiding Justice



THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

http://www.courts.state.nh.us

Court Name: Stafford County Superior Court  
Case Name: State v. David Martinko  
Case Number: 214-2013-C12-521 Charge ID Number: 930556C  
(if known)

STATE PRISON SENTENCE

|  |  |
|--|--|
| <input checked="" type="radio"/> Plea/Verdict: <u>Guilty</u> | Clerk: <u>April Cote</u>               |
| Crime: <u>Agg. Felonious Sexual Assault</u>                  | Date of Crime: <u>9/1/11 - 8/31/12</u> |
| Monitor: <u>Mike Wragge</u>                                  | Judge: <u>Fauver</u>                   |

A finding of GUILTY/TRUE is entered.

- 1. The defendant is sentenced to the New Hampshire State Prison for not more than 20 (year(s)) / \_\_\_\_\_ months, nor less than 10 (year(s)) / \_\_\_\_\_ months. There is 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.
- 2. This sentence is to be served as follows:  Stand committed  Commencing upon completion of sentence. 10
- 3. \_\_\_\_\_ of the minimum sentence is suspended Charge ID 93055  
\_\_\_\_\_ of the maximum sentence is suspended  
Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within \_\_\_\_\_ years of  today's date  \_\_\_\_\_.
- 4. \_\_\_\_\_ of the sentence is deferred for a period of \_\_\_\_\_ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of \_\_\_\_\_ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
- 5. \_\_\_\_\_ of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
- 6. The sentence is  consecutive to 13-CR-521 (930556C)  
 concurrent with \_\_\_\_\_
- 7. Pretrial confinement credit: \_\_\_\_\_ days.
- 8. The Court recommends to the Department of Corrections:
  - A. Drug and alcohol treatment and counseling
  - B. Sexual offender program
  - C. Sentence to be served at the House of Corrections
  - D. \_\_\_\_\_

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: State v. David Martinko

Case Number: 216-2013-CR-521

**STATE PRISON SENTENCE**

**PROBATION**

9. The defendant is placed on probation for a period of \_\_\_\_\_ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.  
Effective:  Forthwith  Upon Release \_\_\_\_\_  
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
10. Subject to the provisions of RSA 504-A:4, III, if the underlying conviction is for a felony, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
11. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

**OTHER CONDITIONS**

12. 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.
- A. The defendant is fined \$ \_\_\_\_\_ plus statutory penalty assessment of \$ \_\_\_\_\_  
 The defendant shall also pay the time payment fee of \$25.00.  
 The fine, penalty assessment and any fees shall be paid:  
 Now  By \_\_\_\_\_  Through the Department of Corrections as directed by the Probation/Parole Officer.  
 \$ \_\_\_\_\_ of the fine is suspended for \_\_\_\_\_ years(s).  
 \$ \_\_\_\_\_ of the penalty assessment is suspended for \_\_\_\_\_ year(s).
- B. The defendant is ordered to make restitution of \$ \_\_\_\_\_ plus statutory 17% administrative fee  
 Through the Department of Corrections as directed by the Probation/Parole Officer  
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.  
 Restitution is not ordered because: \_\_\_\_\_
- C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- D. Under the direction of the Probation/Parole Officer, the defendant shall tour the  
 New Hampshire State Prison  House of Corrections
- E. The defendant shall perform \_\_\_\_\_ hours of community service under the direction of the Probation/Parole Officer.
- F. The defendant is ordered to have no contact with A.G. or her family except as may be either directly or indirectly, including but not limited to contact in-person, by mail or authorized telephone or by means of any communications, electronic or otherwise. by the family.
- G. The defendant and the State have waived sentence review in writing or on the record. Court to include the biological adult daughter!
- H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- I. Other: The defendant shall have no unsupervised contact with minors.

Date JUNE 13, 2014

[Signature]  
Presiding Justice  
PETER H. FAUVER  
Peter H. Fauver  
Presiding Justice

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Stratford County Superior Court  
 Case Name: State v. David Martinko  
 Case Number: 214-2013-CR-521 Charge ID Number: 9360557C  
 (if known)

**STATE PRISON SENTENCE**

|   |   |
|---|---|
| Plea/Verdict: <u>Guilty</u>                 | Clerk: <u>April Cole</u>                |
| Crime: <u>Agg. Felonious Sexual Assault</u> | Date of Crime: <u>9/1/12 - 10/31/13</u> |
| Monitor: <u>Mike Wrayge</u>                 | Judge: <u>Fauver</u>                    |

A finding of GUILTY/TRUE is entered.

- 1. The defendant is sentenced to the New Hampshire State Prison for not more than 20 year(s) / \_\_\_\_\_ months, nor less than 10 year(s) / \_\_\_\_\_ months. There is 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.
- 2. This sentence is to be served as follows:  Stand committed  Commencing upon completion
- 3. \_\_\_\_\_ of the minimum sentence is suspended BE SENTENCE ON  
 \_\_\_\_\_ of the maximum sentence is suspended 9360557C  
 Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within \_\_\_\_\_ years of  today's date  \_\_\_\_\_.
- 4. \_\_\_\_\_ of the sentence is deferred for a period of \_\_\_\_\_ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of \_\_\_\_\_ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
- 5. All of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
- 6. The sentence is  consecutive to 13-CR-521 (9360557C)  
 concurrent with \_\_\_\_\_
- 7. Pretrial confinement credit: \_\_\_\_\_ days.
- 8. The Court recommends to the Department of Corrections:
  - A. Drug and alcohol treatment and counseling
  - B. Sexual offender program
  - C. Sentence to be served at the House of Corrections
  - D. \_\_\_\_\_

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: State v. David Martinko

Case Number: 214-2013-CR-521

STATE PRISON SENTENCE

**PROBATION**

- 9. The defendant is placed on probation for a period of \_\_\_\_\_ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.  
Effective:  Forthwith  Upon Release \_\_\_\_\_  
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 10. Subject to the provisions of RSA 504-A:4, III, if the underlying conviction is for a felony, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 11. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

**OTHER CONDITIONS**

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  - A. The defendant is fined \$ \_\_\_\_\_ plus statutory penalty assessment of \$ \_\_\_\_\_
    - The defendant shall also pay the time payment fee of \$25.00.
    - The fine, penalty assessment and any fees shall be paid:
      - Now  By \_\_\_\_\_  Through the Department of Corrections as directed by the Probation/Parole Officer.
      - \$ \_\_\_\_\_ of the fine is suspended for \_\_\_\_\_ years(s).
      - \$ \_\_\_\_\_ of the penalty assessment is suspended for \_\_\_\_\_ year(s).
  - B. The defendant is ordered to make restitution of \$ \_\_\_\_\_ plus statutory 17% administrative fee
    - Through the Department of Corrections as directed by the Probation/Parole Officer
    - At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
    - Restitution is not ordered because: \_\_\_\_\_
  - C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
  - D. Under the direction of the Probation/Parole Officer, the defendant shall tour the
    - New Hampshire State Prison  House of Corrections
  - E. The defendant shall perform \_\_\_\_\_ hours of community service under the direction of the Probation/Parole Officer.
  - F. The defendant is ordered to have no contact with A.G. or her family except as may be either directly or indirectly, including but not limited to contact in-person, by mail or authorized telephone or by means of any communications, electronic or otherwise. by the family
  - G. The defendant and the State have waived sentence review in writing or on the record. Court. This includes the
  - H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence. defendants biological
  - I. Other: The defendant shall have no unsupervised contact with minors, all

Date

JUNE 13, 2014

Presiding Justice

PETER H. FAULVER

Peter H. Faulver  
Presiding Justice

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 9365557C 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. Whittaker, 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*, 147 N.H. 340, 341 (2001).
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*, these 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 facts and rulings of law; and
- c. Grant any other relief deemed appropriate and just.

Respectfully submitted,  
David Martinko


Date: April 20, 2017

By:   
\_\_\_\_\_  
Adam Bernstein, Esq.  
NH Bar ID: 13992  
21 Temple St.  
Nashua, NH 03060  
(603) 595-1600

**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

STRAFFORD COUNTY

SUPERIOR COURT

Docket No. 219-2013-CR-521

State of New Hampshire

v.

David Martinko

ORDER ON MOTION TO VACATE PLEA AND SENTENCES

David Martinko has, through counsel, filed a Motion To Vacate Plea And Sentences (court index 29). The State has filed an objection (court index 31).

Mr. Martinko requests a hearing on his motion. The court will schedule a hearing when it determines that a hearing would assist it in determining the pending issues. *See State v. Tsopas*, 166 N.H. 528, 530 (2014) (absent statutory mandate, superior court has discretion to determine whether hearing is necessary (citing to former Criminal Rules 58 and 115)); *cf.* Superior Court Civil Rule 13(b) (in a civil case, unless request for hearing sets forth reasons that hearing will assist court in determining the issues, no hearing will be scheduled). Upon consideration of the parties' pleadings, the record before the court,<sup>1</sup> and the applicable law, the court determines that a hearing would not assist it in determining the issues raised in Mr. Martinko's motion, and his request for a hearing is accordingly denied.

On June 13, 2014, Mr. Martinko pled guilty to three charges of Aggravated Felonious Sexual Assault, each of which alleged patterns of sexual assault. Each pattern charge alleged more than one act of sexual assault over a period of two months or more and within a period of five years during three specified time frames, one between September 1, 2010 and August 31, 2011, one between September 1, 2011 and August 31, 2012, and one between September 1, 2012 and October 31, 2013. Mr. Martinko was sentenced consistent with the parties' negotiated agreement to the New Hampshire State Prison for three consecutive stand committed 10 to 20 year terms, with the additional provision that the third consecutive term

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<sup>1</sup> The record includes a transcript of the June 13, 2014 plea and sentencing hearing in this case, which the court ordered to be prepared to aid its consideration of Mr. Martinko's Motion to Vacate Plea and Sentences.

may be suspended upon successful completion of sexual offender programming while incarcerated.

Mr. Martinko's motion alleges that his defense counsel was ineffective, asserting that Mr. Martinko's defense counsel was required to, but did not, advise him that his guilty pleas to these three charges were in violation of the Double Jeopardy Clauses of the New Hampshire and United States Constitutions. Mr. Martinko asserts that he raised the issue with his defense attorney and was advised that his pleas to these three pattern charges did not violate the New Hampshire or United States Double Jeopardy Clauses; for purposes of this order, the court accepts, without finding, that representation to be true. The State's objection asserts that Mr. Martinko's defense counsel was not ineffective because the three charges did not violate Mr. Martinko's constitutional protections against double jeopardy. For the reasons which follow, Mr. Martinko's motion is denied.

"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." *State v. Brown*, 160 N.H. 408, 412 (2010) (internal quotations and citations omitted).

"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." *Id.* (internal quotation and citation omitted). A reviewing court affords "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. Collins*, 166 N.H. 210, 212-213 (2014). A fair assessment of defense attorney performance requires, among other things, "that every effort be made to eliminate the distorting effects of hindsight." *Id.* at 213.

The second prong of the test for ineffective assistance of counsel, concerning prejudice, requires the defendant to establish that there is a reasonable probability that, but for his attorney's unprofessional errors, the results would have been different. *Brown*, 160 N.H. at 413; see *Strickland v. Washington*, 466 U.S. 668, 694 (1984).



In the present case, Mr. Martinko asserts that if his 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. Accordingly, for purposes of this order the court assumes, without deciding, that the second prong of the ineffective assistance test, concerning whether the result would have been different, has been met.

The first prong of the test for ineffective assistance of counsel requires a showing that defense counsel's representation was constitutionally deficient. *Brown*, 160 N.H. at 412. Mr. Martinko asserts that his attorney's representation was constitutionally deficient because his attorney failed to advise him that his pleas to these three pattern sexual assault charges, alleging three separate sets of the same kinds of acts all within the same five-year time period, violated his constitutional protections against double jeopardy. More specifically, Mr. Martinko asserts that his convictions on these three pattern charges resulted in multiple punishments for the same offense in violation of the New Hampshire and United States Double Jeopardy Clauses. *State v. Richard*, 147 N.H. 340, 341 (2001).

The court determines that because Mr. Martinko's pleas to these three pattern charges were consistent with settled law, e.g. *State v. Richard*, 147 N.H. 340, 343 (2001) and *State v. Jennings*, 155 N.H. 768, 777-779 (2007), Mr. Martinko's attorney's representation in connection with his pleas to these charges was not constitutionally deficient.

The law concerning pattern sexual assault charges and the Double Jeopardy Clauses of the New Hampshire and United States constitutions, at the time of Mr. Martinko's pleas as now, is primarily set out in the statutes proscribing pattern sexual assault, RSA 632-A:2, III, and RSA 632-A:1, 1-c, and *Richard*, 147 N.H. 340, and *Jennings*, 155 N.H. 768.

RSA 632-A:2, III, proscribes patterns of sexual assault against persons under 16 years old (and where the person is not the defendant's legal spouse):

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. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.

"Pattern of sexual assault" as used in RSA 632-A:2, III, is in turn defined by RSA 632-A:1, I-c, as "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," with RSA 632-A:2 referring to aggravated felonious sexual assault and RSA 632-A:3 referring to felonious sexual assault.

In *State v. Richard*, 147 N.H. 340, the defendant challenged, under the Federal Double Jeopardy Clause, his convictions for multiple patterns of sexual assault against two victims. Although in the present case the patterns allege the same kinds of underlying acts in separate time frames while in *Richard* the patterns alleged different kinds of underlying acts in overlapping time frames, 147 N.H. at 341, the Supreme Court's rationale in upholding the convictions in that case is nonetheless instructive. Accordingly, the court sets out that rationale in full:

The Double Jeopardy Clause of the Federal Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V; *see Brown v. Ohio*, 432 U.S. 161, 164, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). It "protects a defendant's rights in three ways: First, it protects against a second prosecution for the same offense after an 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). The defendant asserts a violation of the third category of protections.

In determining whether a defendant is subject to multiple punishments for the same offense, we must determine the unit of prosecution intended by the legislature. *State v. Cobb*, 143 N.H. 638, 647, 732 A.2d 425 (1999) (federal double jeopardy analysis); *Sanabria v. United States*, 437 U.S. 54, 69-70, 98 S. Ct. 2170, 57 L. Ed. 2d 43, (1978). 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. *Cobb*, 143 N.H. at 647; *Bell v. United States*, 349 U.S. 81, 84, 99 L. Ed. 905, 75 S. Ct. 620 (1955). We review the plain language of the pattern statute to discern the legislature's articulated intent.

The pattern statute provides:

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. The mental state applicable to the underlying acts

of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.

RSA 632-A:2, III. "Pattern of sexual assault" is defined as "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." RSA 632-A:1, I-c (Supp. 2000). RSA 632-A:2 (Supp. 2000) and RSA 632-A:3 (Supp. 2000) proscribe different statutory variants for aggravated felonious sexual assault and felonious sexual assault.

The defendant argues that the legislature intended to proscribe as a single pattern crime any and all variants of sexual assault under RSA 632-A:2 and :3 committed against a single victim during a common time frame, regardless of the number or nature of the underlying acts. We disagree.

The legislature broadly defined the proscribed pattern to include the commission of two or more acts under the aggravated felonious sexual assault statute, RSA 632-A:2, *or* two or more acts under the felonious sexual assault statute, RSA 632-A:3, *or* a combination thereof. *Cf. People v. Higgins*, 9 Cal. App. 4th 294, 11 Cal. Rptr. 2d 694, 700 (Ct. App. 1992) (California pattern statute provided express limitation that defendant be charged with only one count per victim). Reading "pattern of sexual assault" as encompassing *all* statutory variants of sexual assault committed against a victim during a common time frame would lead to an absurd result. *Liteky v. United States*, 510 U.S. 540, 550, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994) (presumption that legislature would not enact statute that would lead to absurd result). Such an interpretation would effectively limit the criminal exposure of a perpetrator to a single conviction when a victim is unable to recall discrete assaults due, in part, to their frequency, while defendants whose victims have discrete recall would remain accountable for multiple convictions under the single-act sexual assault provisions, RSA 632-A:2, I-II; RSA 632-A:3, I-IV. To interpret the pattern statute as the defendant suggests would allow a perpetrator to benefit from the fact that his repetitive assaults may have blurred a victim's memory. Such a result is illogical.

We recognize that we have previously held that "the focus of the pattern statute is to criminalize a continuing course of sexual assaults, not isolated instances." *State v. Fortier*, 146 N.H. 784, [791], 780 A.2d 1243, 1250 (2001). This conclusion does not preclude multiple patterns of sexual assault involving a single victim from occurring during a common time frame, as "pattern of sexual assault" was defined by the legislature. When seeking convictions on multiple pattern indictments that charge numerous assaults within a common time frame inflicted on a single victim, however, the pattern indictments cannot rely on the same underlying act or acts to comprise the charged pattern. For example, two indictments charging a common time period cannot charge the same type of sexual assault.

In this case, 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 was not infringed.

When pursuing multiple pattern indictments involving a particular victim, the State should be mindful of its obligation to exercise meaningful prosecutorial discretion. *State v. Krueger*, 146 N.H. 541, [543-544], 776 A.2d 720, 722 (2001) (warning State to be circumspect when exercising discretion in charging); *State v. Rayes*, 142 N.H. 496, 500, 703 A.2d 1381 (1997) (recognizing prosecutorial discretion for bringing multiple charges for single event). Furthermore, a defendant's right to jury unanimity might effectively preclude multiple pattern charges in a particular case depending on the nature of the evidence. *See Fortier*, 146 N.H. at [791], 780 A.2d at 1250-51 (jury must unanimously agree that defendant engaged in more than one act of sexual assault as described in RSA 632-A:2 and :3, but need not agree on the particular underlying acts). Both issues are left for another day.

*Richard*, 147 N.H. at 342-344 (emphasis in original).

In *State v. Jennings*, 155 N.H. 768, the defendant moved to dismiss, under the Federal Double Jeopardy Clause, his three convictions for patterns of sexual assault against the same victim. The trial court granted the motion, but the Supreme Court reversed. Although the three pattern charging documents in *Jennings* alleged that the events occurred in three different towns in the same county, 155 N.H. at 776, the charges in this case otherwise mirror the charges in *Jennings*. As in the present case, the *Jennings* pattern charges allege the same kinds of underlying acts occurring in separate time frames but all occurring within five years, 155 N.H. at 776. Thus, the Supreme Court's rationale in upholding the convictions in that case is directly applicable here. Accordingly, the court sets out the *Jennings* majority's rationale in full:

The defendant was indicted for five counts of aggravated felonious sexual assault. Three of the indictments alleged pattern sexual assaults under RSA 632-A:2, III (2007). Each pattern indictment alleged that the defendant digitally penetrated H.J. on more than one occasion over a period of two months or more and within a period of five years. Indictment No. 05-1067 alleged that assaults occurred between January 2002 and November 2003 in Nashua. Indictment No. 05-877 alleged that assaults occurred between December 2003 and August 2004 at Wellesley Street in Milford. Indictment No. 05-879 alleged that assaults occurred between September 2004 and March 2005 at King Street in Milford.

The defendant filed a motion to dismiss, arguing that the indictments violated his double jeopardy rights under the Fifth and Fourteenth Amendments to the United States Constitution. The trial court agreed, and dismissed indictments Nos. 05-877 and 05-879. Using our decision in *State v. Richard*, 147 N.H. 340, 786 A.2d 876 (2001), as a point of departure, the trial court held that the pattern indictments subjected the defendant to multiple punishments for the same offense because each indictment charged the same variant of sexual assault, and the cumulative time frame of all the indictments was less than five years. On appeal, the State argues that the pattern sexual assault statute allows the charging of multiple patterns involving the same type of sexual assault during a single five-year period, when the indictments each rely upon a different set of acts and each set of acts is alleged to have occurred during a different time frame and at a different location. Therefore, argues the State, the charging of multiple patterns in this case does not run afoul of double jeopardy. We agree, and reverse the trial court's dismissal of the indictments.

The Double Jeopardy Clause of the Federal Constitution serves three primary purposes. "First, it protects against a second prosecution for the same offense after an 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) (quotation omitted). 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, we must determine the unit of prosecution intended by the legislature. *Richard*, 147 N.H. at 342. 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. Cobb*, 143 N.H. 638, 647, 732 A.2d 425 (1995). However, the rule of lenity "is applicable only where statutory ambiguity has been found. Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one." *Bailey*, 127 N.H. at 814 (quotation and citation omitted). We review the plain language of the pattern statute to discern the legislature's intent.

The pattern statute in pertinent part provides: "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." RSA 632-A:2, III. "Pattern of sexual assault" is defined as "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." RSA 632-A:1, 1-c (2007). RSA 632-A:2 (2007) and RSA 632-A:3 (2007) provide different statutory variants for aggravated felonious sexual assault and felonious sexual assault.

The defendant argues that the pattern sexual assault statute is intended to define as a single pattern all sexual assaults of the same variant that occur within a five-year period, and that the pattern indictments subject him to multiple punishments for the same offense because they all allege the same variant of sexual assault against the same complainant within the same five-year period. The pattern statute on its face contains no such limit.

Moreover, to read such a limit into the statute would undermine its very purpose. The purpose of the pattern statute is to address the "legitimate concern that many young victims, who have been subject to repeated, numerous incidents of sexual assault over a period of time by the same assailant, are unable to identify discrete acts of molestation. These young victims may have no practical way of recollecting, reconstructing, distinguishing or identifying by specific incidents or dates all or even any of the acts of sexual assault." *State v. Fortier*, 146 N.H. 784, 790-91, 780 A.2d 1243 (2001) (quotation and citations omitted).

In *State v. Richard*, the defendant made a claim similar to the one being made here, arguing that the pattern statute was intended to define as a single pattern any and all variants of sexual assault under RSA 632-A:2 and :3 committed against a single victim during a common time frame, regardless of the number of underlying acts. *Richard*, 147 N.H. at 342-43. We disagreed, noting:

The legislature broadly defined the proscribed pattern to include the commission of two or more acts under the aggravated felonious sexual assault statute, RSA 632-A:2, or two or more acts under the felonious sexual assault statute, RSA 632-A:3, or a combination thereof. Reading "pattern of sexual assault" as encompassing *all* statutory variants of sexual assault committed against a victim during a common time frame would lead to an absurd result. Such an interpretation would effectively limit the criminal exposure of a perpetrator to a single conviction when a victim is unable to recall discrete assaults due, in part, to their frequency, while defendants whose victims have discrete recall would remain accountable for multiple convictions under the single-act sexual assault provisions, RSA 632-A:2, I-II; RSA 632-A:3, I-IV. To interpret the pattern statute as the defendant suggests would allow a perpetrator to benefit from the fact that his repetitive assaults may have blurred a victim's memory. Such a result is illogical.

*Id.* at 343 (citations omitted).

For similar reasons, reading "pattern of sexual assault" to encompass every assault of a given variant that occurs within five years would lead to an absurd result. *State v. Warren*, 147 N.H. 567, 568, 794 A.2d 790 (2002) (presumption that legislature would not enact statute that would lead to absurd result). The more plausible reading of the statute allows the State to charge more than one pattern of a given sexual assault variant within a five-



year time frame, each as an individual unit of prosecution, when the evidence of discrete patterns so warrants. Because the indictments in this case charge three discrete patterns of sexual assault, as permitted by the statute, and because the prosecution at trial would have to prove that the acts occurred within each of the alleged, discrete periods of time, *State v. Hammon*, 151 N.H. 708, 713-14, 867 A.2d 426 (2005), the defendant is not subject to multiple punishments for the same offense and his federal double jeopardy right is not infringed.

We were careful to note in *Richard* that "[w]hen seeking convictions on multiple pattern indictments that charge numerous assaults within a common time frame inflicted on a single victim . . . the pattern indictments cannot rely on the same underlying act or acts to comprise the charged pattern." *Richard*, 147 N.H. at 343. The same requirement applies here. The requirement is met, however, because the pattern indictments allege three separate sets of acts during three discrete time periods at three different locations.

As in *Richard*, we note 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. Furthermore, a defendant's double jeopardy rights might preclude multiple pattern charges in a particular case depending upon the nature of the evidence. As in *Richard*, these issues are left for another day. *Id.*

*Jennings*, 155 N.H. at 776-779.

Mr. Martinko attempts to distinguish *Jennings* by pointing out that the three pattern charges in that case arose in three separate locations, 155 N.H. at 776, while in his case the charges all arose in the same location. However, while it is factually true that the three *Jennings* patterns each arose in a different location, *id.*, and while it is true that the *Jennings* opinion references this fact in its rationale, explaining that the *Jennings* pattern charges do not rely on the same underlying acts "because the pattern indictments allege three separate sets of acts during three discrete time periods at three different locations," *id.* at 778, that distinction is not decisional, that is, it is not material, to the *Jennings* decision. In *Jennings*, as in the present case, the applicable principle of law may be stated as follows: "Because the indictments in this case charge three discrete patterns of sexual assault, as permitted by the statute, and because the prosecution at trial would have to prove that the acts occurred within each of the alleged, discrete periods of time, the defendant is not subject to multiple

punishments for the same offense and his federal double jeopardy right is not infringed.” *Id.* at 778 (citation omitted).

Mr. Martinko also points out that the majority opinion in *Jennings* was subject to a dissent by Justice Dalianis (now, Chief Justice Dalianis) which would have upheld the trial court’s dismissal of the three pattern sexual assault charges on double jeopardy grounds, *id.* at 779-780. Mr. Martinko correctly asserts that under the rationale of the *Jennings* dissent, his convictions on the three pattern charges in this case would violate the Double Jeopardy Clause of the Federal Constitution, *see id.* at 780. That there was a strong dissent does not, however, mean that a majority opinion, as on point as *Jennings* is to this case, is not settled law.

As in *Richard*, 147 N.H. at 343, and *Jennings*, 155 N.H. at 778, so is it here, that “[w]hen seeking convictions on multiple pattern indictments that charge numerous assaults within a common time frame inflicted on a single victim . . . the pattern indictments cannot rely on the same underlying act or acts to comprise the charged pattern.” *Richard*, 147 N.H. at 343. Further, as in *Richard*, 147 N.H. at 344, and *Jennings*, 155 N.H. at 779, so is it here, that “when pursuing multiple pattern indictments involving a particular victim, the State should be mindful of its obligation to exercise meaningful prosecutorial discretion,” *Jennings*, 155 N.H. at 779, and “a defendant’s double jeopardy rights might preclude multiple pattern charges in a particular case depending upon the nature of the evidence.” *id.*

In Mr. Martinko’s case, the pattern indictments do not rely on the same underlying acts to comprise the charged pattern. To the contrary, the State’s charges allege three separate sets of acts during three discrete time periods, and the State’s offer of proof provided to the court and Mr. Martinko at his June 13, 2014 plea and sentencing hearing demonstrated that the State was prepared to present evidence of those separate sets of acts during those discrete time periods (Tr., June 13, 2014, at 8-10). More particularly, the State was prepared to present evidence that, although the assaults began outside of this jurisdiction, starting in September 2010 in this county, when Mr. Martinko and his family moved their household to Dover, Mr. Martinko put his fingers and his penis inside the vagina of his stepdaughter, who was then 12 years old. (Tr. at 9-10). The State was prepared to present evidence that he did

so every night or every other night until shortly before she turned 14, when she told the defendant it needed to stop, and thereafter continued about once a month or so until the last incident, on October 30, 2013, which involved the defendant rubbing his stepdaughter's vagina, and which the defendant self-reported to police.<sup>2</sup> (Tr. at 8-10.)

*Richard*, 147 N.H. 340, and *Jennings*, 155 N.H. 768, arose under the Federal Double Jeopardy Clause, but the result is no different under the Double Jeopardy Clause of the New Hampshire Constitution. "Part I, Article 16 of the State Constitution protects a defendant from multiple punishments for the same offense." *State v. Krueger*, 146 N.H. 541, 542 (2001) (citation and internal quotation omitted). Multiple punishment cases include so-called "'unit of prosecution' cases in which the problem is not that the same course of conduct is proscribed by more than one statute but that a defendant's continuing course of conduct is fragmented into more than one violation of a single statutory provision." *State v. Lynch*, \_\_\_ N.H. \_\_\_, \_\_\_ (Mar. 10, 2017) (slip op. at 15) (citation and internal quotation omitted). Although the Supreme Court has invited parties in future cases to ask the Court for reconsideration of its double jeopardy jurisprudence under the New Hampshire Constitution, *State v. Locke*, 166 N.H. 344, 351 (2014), the test at the time of Mr. Martinko's plea, as now, is as follows:

Our test, which we have referred to as the 'same evidence' test, provides: Two offenses will be considered the same for double jeopardy purposes unless each requires proof of an element that the other does not. We focus upon whether proof of the elements of the crimes as charged will in actuality require a difference in evidence.

*Lynch*, \_\_\_ N.H. at \_\_\_ (slip op. at 16) (citation and internal quotation omitted).

The State charged Mr. Martinko with committing more than one act of aggravated felonious sexual assault, felonious sexual assault, or both, over a period of two months or more between September 1, 2010 and August 31, 2011, with committing more than one act of aggravated felonious sexual assault, felonious sexual assault, or both, over a period of two months or more between September 1, 2011 and August 31, 2012, and with committing more

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<sup>2</sup> The State also represented that it was prepared to present evidence that the defendant had his stepdaughter touch his penis "on occasion." (Tr. at 9). Because there is no information in the record before the court about whether those occasions were over any period of two months or more or were during one, two, or three of the separate time periods charged, the court ignores that representation for purposes of this order.



than one act of aggravated felonious sexual assault, felonious sexual assault, or both, over a period of two months or more between September 1, 2012 and October 31, 2013. The State was prepared to present evidence of multiple separate acts of aggravated felonious sexual assault, occurring every night or every other night between Labor Day, September 2010 and August 31, 2011, to present evidence of multiple separate acts of aggravated felonious sexual assault, occurring every night or every other night until shortly before his victim's 14<sup>th</sup> birthday and then occurring about once a month or so thereafter between September 1, 2011 and August 31, 2012, and to present evidence of multiple separate acts of aggravated felonious sexual assault and felonious sexual assault, occurring about once a month between September 1, 2012 and October 31, 2013.

On this law, and under these factual circumstances, defense counsel's advice to Mr. Martinko not to challenge the three pattern charges on Double Jeopardy Clause grounds did not fall below any objective standard of reasonableness, *see Brown*, 160 N.H. at 412. The case had been bound over on one charge alleging a single discrete act of aggravated felonious sexual assault, but had not yet been presented to a Grand Jury for consideration for indictments. Mr. Martinko was facing evidence that he had committed discrete acts of aggravated felonious sexual assault and felonious sexual assault on his stepdaughter at least every other night from Labor Day 2010, when she was 12, until shortly before her 14<sup>th</sup> birthday, and then about once a month from then until the end of October 2013, when she was 15. Facing such discrete act evidence, and understanding *Richard*, 147 N.H. at 342-344, and *Jennings*, 155 N.H. at 776-779, advising Mr. Martinko not to challenge whether the prosecutor's exercise of prosecutorial discretion was meaningful or whether the nature of the evidence would support multiple pattern charges was an objectively reasonable decision.

For the foregoing reasons, Mr. Martinko's Motion To Vacate Plea And Sentences is denied.

So ordered.

June 7, 2017



Steven M. Houran  
Presiding Justice

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

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

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

**AMENDED (Cover)**

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

6 THE COURT: Thank you.

7 Is that your understanding of the negotiated  
8 disposition, Counsel?

9 MR. BETANCOURT: Yes, Your Honor.

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

12 THE DEFENDANT: Yes sir, it is.

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

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: Stand up.

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

19 THE DEFENDANT: Yes, sir.

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

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