THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0385

The State of New Hampshire

v.

David Martinko

RULE 7 APPEAL FROM A JUDGMENT OF THE
STRAFFORD COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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ISSUE PRESENTED

The defendant moved to vacate his plea and sentence because he claimed that his trial counsel was ineffective for failing to advise him that his guilty pleas and sentences may have violated the double-jeopardy clauses of the state and federal constitutions. Did the trial court correctly deny the defendant's motion and find that the defendant's trial counsel was effective, even though trial counsel may not have advised the defendant of claimed double-jeopardy concerns?

STATEMENT OF THE CASE

The State charged the defendant, David Martinko, with three counts of aggravated felonious sexual assault based upon patterns of sexual assault that he perpetrated against his stepdaughter ("A.G.") from September 1, 2010, to August 31, 2011; September 1, 2011, to August 31, 2012; and September 1, 2012, to October 31, 2013. RSA 632-A:2, III (2016); Add. 18–23. [1] Each charge alleged that the defendant:

> 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.

Add. 18–23.

On June 13, 2014, the trial court held a plea-and-sentencing hearing, at which the defendant waived indictment on each of the three felony informations. T. 2. Prior to the hearing, the State and the defendant entered into a negotiated plea agreement pursuant to which the defendant agreed to plead guilty to each of the charged counts and to serve three consecutive ten-to-twenty-year sentences, though the third sentence would be suspended upon completion of sexual-offender programing. T. 8–9; App. 13. At the hearing, the State presented the terms of the negotiated plea and the facts upon which the charges were based. T. 8–10. The defendant then pleaded guilty to each charge, admitting

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[1] This brief will refer to items in the record as follows:
"Add." refers to the addendum to the defendant's brief.
"T." refers to the trial transcript of the plea-and-sentencing hearing on June 13, 2014.
"B." refers to the defendant's brief.

that he committed the underlying acts. T. 12. The trial court accepted the defendant's pleas and imposed the negotiated sentences. T. 17–18.

On June 14, 2016, the defendant filed a motion to vacate his plea and sentences. Add. 30. The defendant argued that his pervasive abuse of A.G. from September 1, 2010, until October 30, 2013, constituted a single offense for which he had been subject to multiple punishments, thus violating the double-jeopardy clauses of the state and federal constitutions. Add. 32–35. The defendant further argued that his prior counsel was ineffective because he failed to advise the defendant of these double-jeopardy concerns. Add. 30–32. The trial court (Houran, J.) denied the motion by order dated June 7, 2017.

This appeal followed.

STATEMENT OF FACTS

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

On October 31, 2013, the defendant confessed to the Dover Police that he had sexually assaulted A.G. on just one occasion. T. 8–9. The defendant recounted that on October 30, 2013, he went into A.G.'s room, climbed into her bed, and rubbed her vagina over and under her clothes before pressing his penis against her vagina. T. 8. However, the police spoke to A.G., then fifteen, the following day. T. 9. A.G. confirmed the incident on October 30, 2013, but disclosed the full extent of the sexual abuse that the defendant had inflicted upon her since she was a four- or five-year-old child. T. 9, 10.

SUMMARY OF THE ARGUMENT

The trial court correctly denied the defendant's motion to vacate his plea and sentence because the defendant's trial counsel was effective, regardless of whether he advised the defendant of any double-jeopardy concerns related to his plea and sentence.

First, the defendant's plea and sentence do not violate double jeopardy because the State did not charge and sentence defendant three times for a single crime. Instead, RSA 632-A:1, I-c defines a unit of prosecution for a "pattern of sexual assault" as two or more particular types of criminal acts committing within 2 months to 5 years. It does not require the State to charge all assaults of the same sexual variant perpetrated against the same victim by the defendant within five years as one aggravated felonious sexual assault. Thus, the State properly charged the defendant and the defendant constitutionally pleaded to three counts of aggravated felonious sexual assault based upon different assaults that occurred during three distinct periods.

Second, even under his own construction of the statute, the defendant's plea and sentences did not violate double jeopardy because the informations, supported by the proffered evidence, charged the defendant with three counts of aggravated felonious sexual assault based upon three different patterns of sexual assault.

Third, even if the defendant's plea and sentence violated double jeopardy, his ineffective-assistance claim still fails because at the time that the defendant's trial counsel allegedly[2] failed to give the proper legal advice, the double-jeopardy and statutory-interpretation issues now before the Court were at best unresolved. Thus, the trial

[2] The trial court did not find that the defendant's trial counsel failed to advise the defendant regarding double jeopardy; rather, it accepted this fact "without finding." Add. 37.

counsel's failure to advise on undecided points of law did not fall outside of the "wide range of reasonable professional assistance."

Finally, even if the defendant prevailed on his ineffective-assistance claim, he is not entitled to the relief he seeks. Rather, this Court should vacate his pleas—and thus return the defendant to his pre-plea position—and remand case to the trial court for further proceeding.

ARGUMENT

THE DEFENDANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE THE DEFENDANT'S PLEA AND SENTENCE DID NOT VIOLATE DOUBLE JEOPARDY.

Both the state and federal constitutions guarantee a criminal defendant reasonably competent assistance of counsel. *State v. Cable*, 168 N.H. 673, 680 (2016) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Thompson*, 161 N.H. 507, 528 (2011)). To prevail on a claim of ineffective assistance, 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." *Id.*

Here, the defendant pleaded guilty to three counts of aggravated felonious sexual assault, RSA 632-A:2, III, based upon patterns of sexual assaults that he perpetrated against A.G. from September 1, 2010, to August 31, 2011; September 1, 2011, to August 31, 2012; and September 1, 2012, to October 31, 2013, Add. 18–23.

Under New Hampshire law, "[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 (emphasis added). To establish that a defendant engaged in a "pattern of sexual assault," the State must prove beyond a reasonable doubt that the defendant committed "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.

The defendant argues that his trial counsel's representation was constitutionally deficient because trial counsel permitted the defendant to plead guilty to three aggravated felonious sexual assaults without advising him that "the three Informations were multiplicitous in that they arbitrarily charged a single crime in three separate informations, thus subjecting … [him] to double jeopardy, in violation of both the Federal and New Hampshire constitutions." B. 4–5. In doing so, the defendant really advances a unit-of-prosecution argument and contends that RSA 632-A:1, I-c requires the State to charge as a single aggravated felonious sexual assault all assaults against the same victim through the same sexual variant within a five-year period.

Regardless, the defendant's ineffective-assistance claim fails for three reasons. First, trial counsel's representation of the defendant was not constitutionally deficient because the defendant did not receive three sentences for a single crime. Instead, RSA 632-A:1, I-c defines a "pattern of sexual assault" as two or more particular types of criminal acts committed within 2 months to 5 years. It does not require that the State to charge all patterns of sexual assault of the same sexual variant perpetrated against the same victim by the defendant within five years as one aggravated felonious sexual assault. Thus, the State properly charged the defendant and the defendant constitutionally pleaded to three counts of aggravated felonious sexual assault based upon assaults that occurred during three distinct periods of time.

Second, regardless of the proper interpretation of the statute, trial counsel's representation was nonetheless reasonable because the informations to which the defendant pleaded guilty, supported by the proffered evidence, charged the defendant

with three counts of aggravated felonious sexual assault based upon three different patterns of sexual assault.

Third, even if the defendant's plea and sentence violated double jeopardy, trial counsel's representation was still not constitutionally deficient because the double-jeopardy and statutory-interpretation issues now before the Court were at best unresolved at the time trial counsel allegedly[3] failed to give the proper legal advice. The trial counsel's failure to advise on undecided points of law did not fall outside of the "wide range of reasonable professional assistance."

Moreover, even if the defendant prevailed on his ineffective-assistance claim, he is not entitled to the relief he seeks; rather, this Court should vacate his pleas—and thus return the defendant to his pre-plea position—and remand case to the trial court for further proceeding.

A. RSA 632-A:1, I-c defines a unit of prosecution for a "pattern of sexual assault" as "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."

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. Relevant here, it protects defendants against multiple punishments for the same offense. *State v. Bailey*, 127 N.H. 811, 814 (1986). Part I, Article 16 of the State Constitution similarly "protects an accused against multiple prosecutions and multiple punishments for the same offense." *State v. Nickles*, 144 N.H. 673, 676 (2000). "Double

[3] The trial court did not find that the defendant's trial counsel failed to advise the defendant regarding double jeopardy; rather, it accepted this fact "without finding." Add. 37.

jeopardy precludes the State from pursuing multiple charges in a single prosecution when the charges comprise the same offense and the State seeks multiple convictions and thus multiple punishments." *Id.* Questions of double jeopardy are constitutional questions.

However, while framed as a double-jeopardy question, the defendant's argument on appeal really raises a unit-of-prosecution question—namely, what constitutes a pattern-of-sexual-abuse aggravated felonious sexual assault under RSA 632-A:1, I-c. *State v. Wilson* 169 N.H. 755, 773 (2017); *State v. Jennings*, 155 N.H. 768, 777 (2007). The interpretation of a statute is a question of law, which this Court considers *de novo*. *State v. Lathrop*, 164 N.H. 468, 469 (2012). "In matters of statutory interpretation, [this Court is] the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *Id.* The goal of this Court's review "is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme." *Id.* The Court "construe[s] provisions of the Criminal Code according to the fair import of their terms and to promote justice." *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 740 (2007).

This Court "first examine[s] the language of the statute, and, when possible, ascribe[s] the plain and ordinary meanings to the words used." *Id.* The Court "will neither consider what the legislature might have said nor add words that it did not see fit to include." State v. Pessetto, 160 N.H. 813, 816 (2010). Nor will the Court "interpret statutory language in a literal manner when such a reading would lead to an absurd result." *Appeal of Geekie*, 157 N.H. 195, 202 (2008) (citation omitted).

"Where more than one reasonable interpretation of the statutory language exists, [this Court] review[s] legislative history to aid [its] analysis." *Lathrop*, 164 N.H. at 469 (citation omitted). The Court construes statutes "to address the evil or mischief that the legislature intended to correct or remedy." *Id.*

For the following reasons, RSA 632-A:1, I-c defines the unit of prosecution for pattern-of-sexual-assault aggravated felonious sexual assaults as two or more particular types of criminal acts committed within two months to five years.

First, the plain meaning of RSA 632-A:1, I-c supports the construction urged here. The statute does not require the State to charge all assaults of the same sexual variant perpetrated against the same victim by the defendant within five years as one aggravated felonious sexual assault. Instead, the unit of prosecution under RSA 632-A:1, I-c is simple and straightforward—"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."

The State's interpretation is consistent with this Court's precedent. *Jennings*, 155 N.H. at 777. In *Jennings*, the State indicted the defendant on pattern-of-sexual assault aggravated felonious sexual assaults that he argued subjected him to multiple punishments for the same offense "because they all alleged the same variant of sexual assault against the same complainant within the same five-year period." *Id.* Like the defendant here, Jennings argued 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." *Id.* However, this Court flatly rejected this proposition, stating "[t]he pattern statute on its face contains no such limitation." *Id.*

Moreover, the defendant's construction requires the addition and removal of language to give it force. To conform to the defendant's interpretation, one would have to revise the statute to read: a "'pattern of sexual assault" means "*all assaults of the same sexual variant* commit[ted]. . . under RSA 632-A:2 [or] RSA 632-A:3~~, or both,~~ upon the same victim over a period of 2 months or more and within a period of 5 years." But this is not what the statute provides, and as this court has made clear, it will not add language to a statute that the legislature did not see fit to include. *State v. Pessetto*, 160 N.H. 813, 816 (2010).

The defendant's construction is also inconsistent with the "or both" clause in RSA 632-A:1, I-c, as well as this Court's holding in *State v. Richard*, 147 N.H. 340, 343 (2001). This Court held in *Richard* that the State may seek multiple convictions against a defendant based on abuse of different sexual variants against the same victim within a common timeframe. *Id.* at 343. Read as the defendant's urges, *Richard* cannot stand because the "or both" language would require all acts committed under RSA 632-A:2 or RSA 632-A:3, or both, to be charged as one pattern. Without omitting or rendering meaningless the words "or both" from the statute, one cannot read the statute to define a "pattern of sexual assault" as including all acts of the same sexual variant, but not acts of any and all sexual variants. *See State v. Duran*, 158 N.H. 146, 155 (2008) ("[A]n interpretation that renders statutory language superfluous and irrelevant is not a proper interpretation.").

Second, as this Court recognized in *Richard* and *Jennings*, interpreting "pattern of sexual assault" to include all acts of the same sexual variant within a five-year period would undermine the very purpose of the pattern-of-sexual-assault statute. *Jennings*, 155 N.H. at 777; *Richard*, 147 N.H. at 343. 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.

Jennings, 155 N.H. at 777; *see Richard*, 147 N.H. at 343. The defendant's 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." *Richard*, 147 N.H. at 343. Against this backdrop, to interpret the pattern statute as the defendant urges "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.*

Third, for the same reasons, the defendant's construction would also lead to an absurd result. *Richard*, 147 N.H. at 343. Interpreted as the defendant would have it, the pattern-of-sexual-assault statute would permit—and perhaps encourage—perpetrators to engage in prolonged patterns of sexual assault against a particular victim without fear of additional punishment. *Id.* For example, if a person engages in two acts of sexual intercourse with a three-year-old within a two-month period, he has engaged in a chargeable pattern-of-abuse aggravated felonious sexual assault. However, unless the

three-year-old can sufficiently remember the time, place, and manner of any subsequent act of abuse, which would permit the State to charge the conduct without the pattern statute, the perpetrator could continue to have sexual intercourse with that same child for as long as four years and ten months without committing a second act of aggravated felonious sexual assault. It is inconceivable that the legislature intended such a result. *Id.*

Finally, as this Court has noted, limitations on prosecutors' broad discretion are the proper way to protect defendants from overzealous or improper charging, including arbitrarily charging one crime as multiple crimes.[4] *Jennings*, 155 N.H. at 779; *Richard*, 147 N.H. at 344; *see State v. Krueger*, 146 N.H. 541, 543 (2001). However, the defendant does not alleged prosecutorial misconduct in this case (nor is there any evidence to support such a claim). Thus, there is no basis upon which to vacate the defendant's pleas and sentence.

Based on the forgoing, RSA 632-A:1, I-c permits the State to charge multiple aggravated felonious sexual assaults where the defendant inflicted the same variant of sexual assault against the same victim two or more times between two months and five years, so long as none of the patterns of assault are based upon the same underlying conduct.

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[4] This Court has also noted that the right to jury unanimity provides similar protection, though this case does not implicate that right because the defendant pleaded guilty to the charged offenses. *Richard*, 147 N.H. at 344.

B. Even under the defendant's construction of the statute, the defendant's plea and sentence do not violate double jeopardy because the defendant pleaded guilty to three crimes based upon three distinct patterns of sexual assault.

The defendant implicitly contends that if his construction of RSA 632-A:1, I-c prevails, his plea and sentence violated his constitutional right against double jeopardy. That is incorrect. Instead, even if the statute requires the State to charge all assaults of the same sexual variant perpetrated against the same victim by the defendant within five years as one aggravated felonious sexual assault, the defendant's pleas and sentences are still constitutionally sound because the underlying charges were based upon three separate patterns of sexual assault. Therefore, the defendant did not receive multiple punishments for the same conduct.

The defendant argues that contrary to his interpretation of the statute, the State arbitrarily divided by time period one pattern of sexual assault into three such patterns, and therefore, unconstitutionally charged three aggravated felonious sexual assaults. B. 7. However, for this argument to prevail one of the following would need to be true—first, that the defendant engaged in only one variant of sexual assault; or second, that the State intended to charge a multi-variant pattern as one aggravated felonious sexual assault. Neither is true.

First, the defendant admitted that he engaged in two variants of sexual assault—sexual penetration and sexual contact. RSA 632-A:1, IV, V; T. 9–10 (the defendant made A.G. touch his penis "on occasion" and engaged in sexual intercourse with A.G. when she was 12 and 13 years old). Thus, under *Richard*, the State can charge two patterns of

sexual assault, even where the assaults took place during a common time period. *Richard*, 147 N.H. at 343.

Second, the language of the information demonstrates that the State did not plainly intend to charge the multi-variant assaults as one pattern, and thereby, one aggravated felonious sexual assault. Rather, the informations provided as follows:

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

Add. 18–23 (emphasis added). The italicized "or" is fatal to the defendant's argument because it demonstrates that the State contemplated that the charged patterns may be comprised of one or more acts of sexual penetration *or* sexual contact, but not necessarily both.

Although the informations are not as specific as they could be, notably, the defendant never challenged the sufficiency of the informations. Moreover, the proffered evidence supports the State's reading of the informations. The State proffered, and the defendant admitted, that he made A.G. touch his penis "on occasion" from September 1, 2010, to August 31, 2011, when she was she was 12. T. 9–10. This is consistent with the first information. Add. 18. Consistent with the second information, the State proffered and the defendant admitted that he had sexual intercourse with A.G. "every night or every other night" from September 1, 2011, to August 31, 2012, when she was 13 years old. T. 10; Add. 20. Third, after the defendant stopped abusing A.G around her fourteenth

birthday, the State proffered and the defendant admitted that he resumed having sexual intercourse with A.G., but "once a month or so," from September 1, 2012, to October 31, 2013. T. 10; Add. 22. This cessation coupled with the change in frequency in abuse constitutes a third pattern of sexual assault, consistent with the third information. *See Krueger*, 146 N.H. at 543 (evidence support two separate assaults where video showed time for reflection between acts).

Because the defendant was charged with, pleaded to, and was sentenced for three distinct patterns of sexual assault that are not based upon any overlapping conduct, the defendant was not punished multiple times for the same offense. Thus, even under his interpretation of RSA 632-A:1, I-c, neither the defendant's plea or sentence conflicts with the double-jeopardy clause of the state and federal constitutions.

C. The defendant cannot demonstrate that trial counsel fell below an objective standard of reasonableness by failing to advise him of an at best unresolved question of constitutional law.

To prevail upon his ineffective-assistance claim, 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." *Cable*, 168 N.H. at 680 (citing *Strickland*, 466 U.S. at 686; *Thompson*, 161 N.H. at 528).

Relevant here, "[t]o meet the first prong of this test, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* This Court "judge[s] the reasonableness of counsel's conduct based upon the facts and circumstances of that particular case, *viewed from the time of that conduct*." *Id.* (emphasis

added) (quoting *State v. Hall*, 160 N.H. 581, 584 (2010)) (citing *Strickland*, 466 U.S. at 690). Moreover,

> [j]udicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. "The strong presumption that counsel's conduct is objectively reasonable has particular force in this case because, without an evidentiary hearing on the defendant's ineffective assistance claim, we have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." *Id.* (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)) (internal quotations omitted). Because "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms[,] [t]o establish that his trial attorney's performance fell below this standard, the defendant has to show that no competent lawyer" would have engaged in the conduct of which he accuses his trial counsel. *Id.* at 680–81 (quoting *State v. Whittaker*, 158 N.H. 762, 768–69 (2009)).

Additionally, "[t]o meet the second prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 681. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Both the performance and prejudice prongs of the ineffectiveness inquiry are mixed questions of

law and fact." *Hall*, 160 N.H. at 585. "Therefore, we will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and we review the ultimate determination of whether each prong is met *de novo*." *Id.* "On appeal, when we determine that a defendant has failed to meet either prong of the test, we need not consider the other one." *State v. Kepple*, 155 N.H. 267, 270 (2007).

Here, the defendant cannot satisfy the first prong of this analysis because the trial counsel's alleged failure to advise the defendant of any double-jeopardy concerns was consistent with this Court's precedent in *Jennings*. Therefore, his alleged lack of advice was consistent with the law, and therefore, squarely within the range of reasonableness.

Moreover, the standard set out in *Strickland v. Washington*, which this Court has adopted, "does not require counsel to be clever or inventive, or to advocate a claim not yet announced in the law." *Baez-Gil v. United States*, 2013 U.S. Dist. LEXIS 78310, at *4 (D.N.H. June 4, 2013); *see also Cable*, 168 N.H. at 680 (applying *Strickland*). "Indeed, both the United States Supreme Court and the [United States] Court of Appeals [for the First Circuit] have held that defense attorneys who fail to detect and raise a novel argument have not rendered ineffective assistance." *Baez-Gil*, 2013 U.S. Dist. LEXIS 78310, at *11 (citing *Engle v. Isaac*, 456 U.S. 107, 131–34 (1982); *Choudry v. United States*, 960 F.2d 143 (1st Cir. 1992) (unpublished); *United States v. Fusaro*, 708 F.2d 17, 26–27 (1st Cir. 1983)).

Thus, to the extent *Jennings* does not squarely address and reject the defendant's double-jeopardy argument, it at best leaves open the mere possibility that some future

pattern-of-abuse case may raise double-jeopardy concerns. *Jennings* 155 N.H. at 779. *Jennings* provides, "a defendant's double jeopardy rights might preclude multiple pattern charges in a particular case depending on the nature of the evidence[,] ... these issues are left for another day." *Id.* The trial counsel's alleged failure to provide advice based on an underdeveloped point of law is not outside the scope of reasonableness. *See, e.g., Brown v. United States*, 311 F.3d 875, 878 (8th Cir. 2002) (trial and appellate counsel's failure to raise a novel issue does not constitute deficient performance); *Fusaro*, 708 F.2d at 26 (defense counsel's "failure to spot" a novel claim did "not render counsel's assistance below the range of competence of attorneys"); *People v. Reed*, 556 N.W.2d 858, 863 (Mich. 1996) ("[D]efense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument."); *State v. Ross*, 296 N.W.2d 209, 215 (Neb. 2017) ("counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance."). Thus, even under the most generous reading of *Jennings*, the defendant still cannot satisfy the first prong of the double-jeopardy analysis and his claim therefore fails.

D. If all of the above arguments fail, this Court should vacate each of the defendant's pleas and remand this case for further proceedings before the trial court.

Even if this Court finds the defendants plea and sentence were constitutionally deficient, this Court should remand the case for further proceeding before the trial court.

First, the trial court did not engage in the necessary fact-finding to determine the nature and scope of trial counsel's advice to the defendant. Instead, when addressing the

defendant's ineffective-assistance claim, the trial court "accept[ed], without finding" the defendant's representation that his counsel advised him that his plea and sentence did not violate double jeopardy. Add. 37. Thus, there is not a proper basis upon which for this Court to affirm the trial court's order regarding the claim for ineffective assistance of counsel. The proper course would instead be to remand this case for an evidentiary hearing on this, and other points.

Second, the trial court similarly did not address the second part of the test under *Strickland v. Washington*, stating, "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." Add. 38. Again, there is not a proper basis upon which for this Court to affirm the trial court's order regarding the claim for ineffective assistance of counsel.

Finally, even if the proper facts were before this Court and this Court reversed the trial court's denial of the defendant's motion to vacate, the proper remedy would be to return the defendant to his pre-plea position, not to vacate portions of his negotiated plea. The defendant accepted a plea deal for three separate crimes that encompassed the three years of abuse that he perpetrated against A.G., and agreed to serve three consecutive 10-to-20-year sentences. Now, the defendant cannot parse his plea and sentence, keeping some parts and vacating others. Instead, this Court should vacate the defendant's entire guilty plea—which is the relief the defendant sought before the trial court—and remand this case to the trial court for further proceedings, including possibly re-indicting admitted-to crimes (*e.g.*, the October 20, 2013 assault) and trial.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth A. Lahey, hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Joshua L. Gordon, by first-class mail postage prepaid, at the following addresses:

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