THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT** **NOVEMBER 2012 TERM**

DOCKET NOS.
217-2012-CV-0279

GORDON MACRAE
v.
RICHARD M. GERRY, WARDEN,
NEW HAMPSHIRE STATE PRISON

STATE'S MEMORANDUM OF LAW FOR DENIAL AND DISMISSAL OF PETITION

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NOW COMES the respondent, Richard M. Gerry, Warden, by and through the Office of the Merrimack County Attorney, submits argument and authority for denial and dismissal of the Petition for Writ of Habeas Corpus, and says that:

I. PROCEDURAL BACKGROUND

Indictments

In April 1993, defendant was indicted in Cheshire County for sexual assaults involving two brothers, TG and JG. The following month, the defendant was indicted in Rockingham County for additional sexual assaults against JG. In August, additional charges were brought in Rockingham County for sexual assaults against a third victim, LC. These charges were initially consolidated and remained so during much of the pre-trial litigation. In May 1994, defendant was indicted in Cheshire County for sexual assault of a fourth victim, AB.[1]

[1] All indictments are included at the beginning of the State's Document Supplement [Doc. Supp.] 1-38.

The TG charges arose from allegations that in 1983, while the victim was under 16, the defendant performed fellatio on him on five separate occasions at St. Bernard's Church in Keene, where the defendant was serving as a priest. Four of the assaults occurred during pastoral counseling sessions and were charged as class A felonies pursuant to RSA 632-A:2, X (1986) (sexual penetration when the actor is in a position of authority over the victim).[2] These same assaults were charged in the alternative as class B felonies pursuant to RSA 632-A:3 (sexual penetration of victim 13 to 15 years old).[3] The fifth assault occurred in the defendant's living quarters at the rectory and was charged as a class B felony under RSA 632-A:3.[4]

The Cheshire County charge involving JG arose from reports that the defendant performed fellatio on JG at the St. Bernard's rectory in Keene during the summer of 1983, when JG was under 16.[5] The three Rockingham charges involving JG arose from reports that in 1983, defendant took JG for a weekend at the Our Lady of the Miraculous Medal rectory in Hampton. The first night, he got JG drunk and performed fellatio on him; the next night he again served JG alcohol and attempted to sodomize him.[6]

The four Rockingham charges involving LC arose from complaints that,

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[2] Cheshire County indictments 93-S-224 through -227, Doc. Supp. 1-8.

[3] Cheshire County 93-S-218 through -221, Doc. Supp. 11-18.

[4] Cheshire County 93-S-223, Doc. Supp. 9-10.

[5] Cheshire County 93-S-228, Doc. Supp. 21-22.

[6] Rockingham County 93-S-1076 through -1078 (93-S-1078 was an alternative to 93-S-1076), Doc. Supp. 23-28.

while defendant was serving as a priest at Our Lady of the Miraculous Medal, he fondled LC on multiple occasions during 1982 and the first half of 1983, while the boy was 12-13 years of age.[7]

The AB charge arose from reports that, during the spring of 1987, the defendant performed fellatio on AB at the St. Bernard's rectory when the boy was under 16.[8]

Throughout pre-trial and trial, defendant was represented by lead counsel Ron Koch of Albuquerque, New Mexico, pro hac vice, and local counsel J.R. Davis of Keene. The presiding judge was Brennan, J.

Pre-Trial Litigation

Discovery Issues: Defense counsel sought privileged records regarding TG and the other victims, including their psychological and substance abuse treatment records. Following a hearing on March 9, 1994, the discovery motions were granted in large part.[9] Defense counsel filed a second motion for discovery which was granted by the court on April 4, 1994.[10] A month before trial, defense counsel filed a Motion to Compel Discovery of TG's treatment records at Derby Lodge which had been previously ordered but counsel had not received, and for access to Deborah Collett, a therapist who

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[7] Rockingham County 93-S-1554 through -1557, Doc. Supp. 29-36.

[8] Cheshire County 94-S-219, Doc. Supp. 37-38.

[9] Doc. Supp. 39-54.

[10] Doc. Supp. 55-61.

treated TG at Derby Lodge. Following a hearing,[11] the court granted those requests in written orders dated August 17, 1994.[12]

With defendant's consent, Attorney Koch also provided the State with reciprocal discovery, including the defendant's efforts at rebutting, point by point, the victims' allegations appearing in police reports. The defense also provided the results of questionnaires sent out by Attorney Koch to potential alibi witnesses identified by the defendant. See Letter from Ron Koch to ACA Bruce Reynolds, February 18, 1994.[13]. Koch explained the reciprocal discovery to the court during a motion hearing: "I did just last week provide Attorney Reynolds with a very extensive packet of discovery based upon the work that we've been doing to try to ferret out [sic] of the merits of some of these claims." TMH March 9, 1994 at 7.

404(b) Issues: The State moved to admit 404(b) evidence in its case in chief regarding each of the four victims. In addition to evidence of charged and uncharged crimes from each of the four victims, the State sought to admit evidence regarding three additional victims:

- **JP** alleged that, when he was 14 years old, defendant solicited him to engage in homosexual prostitution on five occasions. JP also alleged that in or around 1988, the defendant took pornographic photographs of him. In 1988, defendant pled guilty to a charge of endangering the welfare of JP, arising from the allegations of solicitation.[14]

[11] TMH August 17, 1994.
[12] Doc. Supp. 62-72.
[13] Doc. Supp. 73-74.
[14] Doc. Supp. 87-88.

- In 1989, defendant violated the terms of probation in connection with the endangering conviction by having unsupervised contact with a minor (AB), discussed in a chambers conference at T1:7-8.[14] (AB was also the victim in one of the indictments.) There was also evidence that defendant had photographed AB nude, and evidence that he had attempted to initiate sexual contact with another youth, **JG#2**.[15]

- **DG** (another brother to TG and JG) alleged that, commencing in 1979, the defendant became close to him by giving him presents and taking him on outings, and then in or around 1983 began to initiate physical contact verging on sexual contact. On overnight visits, defendant provided him beer and DG would awaken in the morning feeling drugged and suffering from anal pain and discomfort. DG was around 13 at the time. Three years later, defendant took DG to a church rectory in Hudson where two other individuals sodomized him in turn.[14]

The State argued that all of its 404(b) evidence was admissible to prove motive, intent, and plan or scheme. However, the State never presented the court with an item-by-item analysis showing the particular relevance of each proferred bad act as it related to each individual victim.

Defendant's opposition to the 404(b) evidence was primarily concerned with evidence of crimes against <u>other victims</u> and relied upon the then-recently decided case of <u>State v. Whittaker</u>, 138 N.H. 524 (1994), in which the Supreme Court reversed a conviction because evidence of an assault on a <u>different</u> victim was improperly admitted under Rule 404(b). Koch argued, "A five year old sexual assault committed in a somewhat similar manner on another person does not constitute evidence of a plan to commit an assault

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[14] Trial transcript are referred to as T Vol#:pg ; motion hearings, TMH date:pg; sentencing hearings, S Vol#:pg.

[15] Summarized in TMH July 8, 1994:8.

[14] Doc. Supp. 78-79.

on the victim here." See TMH July 8, 1994:25-32.

On July 28, 1994, the court ordered that all the 404(b) evidence be excluded. In that order, the court also faulted the State for not precisely identifying the proferred 404(b) evidence.[14]

Severance of trials: Although the charges involving the victims TG, LC, and JG had been consolidated by agreement earlier, in November 1993 defendant moved for reconsideration of the consolidation order. Following a hearing on July 8, 1994, the court granted the motion to sever and ordered separate trials as to each victim (by this time, AB had been added, so there were four victims), starting with TG in September 1994. TMH July 8, 1994:49.

Trial

The trial commenced on September 12, 1994 and lasted for 10 days.

In a chambers conference the morning of trial, ACA Gainor asked the court whether the 404(b) order precluded him from referring in his opening statement to admissions by defendant to Detective McLaughlin while he was on probation after the 1988 conviction for endangering the welfare of a minor. Koch objected that this would necessarily bring in much of the 404(b) information regarding other victims. T1:6-9. The conference continued as follows:

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[14] Doc. Supp. 111, 119.

> THE COURT: Well the way I see it, my rulings on the 404-B question keep out the evidence that you've just discussed. That is McLaughlin's talk about whether he is a pedophile or hebephile. That's out. It doesn't come in. Now as we all know, the whole ballgame here is credibility. And as you well know, if the door opens, the whole world may come in.
>
> MR. KOCH: I understand that.
>
> THE COURT: Now the moment the defendant takes the stand his credibility is an issue. I think the--just to let you know at this point, for instance I think the violation of probation will come in and the whole thing will come in. The whole story on the violation will come in. Whether anything else will, will depend on the terrain and the situation and that we can't know until the defendant takes the stand and if he takes the stand. Of course you know the tremendous risk.
>
> MR. KOCH: I know the risk if he does and if he doesn't because I listened to some of those jurors on questioning.
>
> THE COURT: But the State's opening--the State's case is going--is extremely limited by my rulings on 404-B. But that whole situation certainly can change on the other end of this trial.
>
> MR. KOCH: The Court isn't ruling right now that if Gordon takes the stand that automatically we've opened Pandora's box?
>
> THE COURT: Now, what I am saying, just to put everybody on notice that if he takes the stand, then his credibility is at issue. As far as I'm concerned, credibility at this point from what I know is going to make or break this case for both sides.

T1:9-11.

In his opening statement, Attorney Koch argued that TG had fabricated the allegations as part of a scheme to obtain a financial settlement from the Roman Catholic Diocese of Manchester and the defendant. T1:46, 58. He portrayed TG as a chronic abuser of alcohol and drugs from an early

age, a problem teenager who was in and out of counseling, a person who was aggressive, hostile, abusive physically and verbally, even as a young man, to the point where his family could not deal with him. T1:52-53.

In light of this evidence, Koch continued, the account of the first incident of fellatio, as given in the State's opening statement, was improbable:

> Now ladies and gentlemen, [TG] has made an allegation that almost the first time he comes in here he walks into Gordon MacRae's office to be counseled. He is upset and Gordon MacRae walks over, out of the clear blue, unzips his pants and fellates him. With no other explanation or description or anything else.

T1:59.

After the openings were concluded, the State argued that by characterizing the defendant's conduct as coming "out of the blue," counsel had opened the door to previously excluded evidence that the defendant fondled TG in 1979 in the Sacred Heart church rectory at Marlborough, and twice more on car trips in 1981 and 1982. T1:61-62. Defense counsel countered that his "out of the blue" statement was simply a fair comment on the likelihood of an assault occurring in the rather abrupt manner described by the State. T1:63.

The trial court agreed with the State:

> If the jury in this case finds the evidence of the earlier molestations credible, then it appears that the events of the counselling session leading to the

> indictment were not "out of the blue." The court therefore finds that Attorney Koch's "clear blue" comment, in conjunction with his characterization of the alleged victim, placed in dispute Gordon MacRae's opportunity or "chance" to commit the charged act. The Court further finds that these comments gave the defendant a misleading advantage because the Court's bad acts order crippled the State's ability to rebut the allegations. Indeed, since credibility and opportunity are currently the two most important factors in this case, to prevent the State from introducing the prior acts would be an injustice.
>
> In light of the foregoing and for the following reasons, the Court finds that the history of sexual abuse between the defendant and alleged victim is admissible . . . . Before the State introduces the prior acts, the Court will issue a limiting instruction to the jury.

Order dated September 13, 1994 at 2-3.[15]

The State's first witness, TG, was on the stand for five days, more than two-thirds of it on cross-examination. The testimony can be found in volumes II through VI.[16]

Consistent with his opening statement, Koch elicited evidence that TG was in the process of suing defendant and the Diocese of Manchester for money damages, T5:56, that his trial testimony differed from what he told Detective McLaughlin, T4:14-15, and challenged the genuineness of TG's emotions on display during direct and his testimony regarding the need

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[15] Doc. Supp. 121.

[16] TG's direct is in the transcript at T2:19-56 and T3:3-43. Cross-examination, T3:44-126, T4:9-43, 50-118,and T5:3-59. Redirect T5:120-139, T6:3-16. Recross T6:19-41.

for medication to get through the trial, T3:88, T4:9, T6:6, 14, 19-20. On cross-examination, TG admitted that, while in treatment at Farnum Center, T4:39, in response to a personal assessment form, he had described himself as having one of the worst tempers growing up, T4:41, that it took him many years to learn self-control, T4:42, that when confronted, he would get angry and walk out or turn and run away, T4:55-56, that in the past he had lied to either get what he wanted or out of fear, T4:62, that he lied and then fabricated alibis to convince others because he had lost their trust, T4:63, and that he had made excuses to deflect attention from his underlying problems, T4:63.

Koch asked him why returned for counseling sessions after being berated then sexually assaulted in the first one. Koch challenged TG's account that he became sexually aroused and had an erection while he was crying and broken down. T5:12-14.

Koch also repeatedly challenged TG's credibility through other witnesses. For example, TG's mother Patricia Grover agreed that she had not abandoned him in 1983, T6:106, and that she did not coerce him into attending counseling with defendant, T6:112. This contradicted TG's testimony on both points. Patricia Grover agreed that in 1980 she sent TG to a Dr. Raasoch. She agreed that she would not have been surprised if one of the issues the doctor was dealing with was TG's not being honest and not

telling the truth, T6:111.

Deborah Collett testified on day two, during a break in TG's testimony.[17] Collett was a licensed therapist who treated TG in 1986 at the Derby House, a residential substance-abuse treatment facility. Collett's testimony appears in a separate volume dated September 13, 1994, referred to herein as T [Collett].

During cross-examination by Koch, Collett testified that TG disclosed to her that he had been abused by "a clergy person." T [Collett]:13, but that he did not identify the person. Id. 14. (TG testified that he had identified defendant to Collett as his abuser.) Koch also went through TG's extensive treatment records with Collett, eliciting testimony about TG's severe substance abuse and its consequences: " . . . consumes alcohol at a rate of 12 to 18 beers a day, has a history of shakes, sweats and hallucinations while drinking. He reported numerous mind and mood altering drug use, marijuana, excessive use of alcohol and drugs, including mind and mood altering drugs . . . ." Id. 19.

During Koch's cross-examination, Collett said that she had the impression from TG that the sex abuse occurred when he was a small child.

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[17] Defendant states that Collett did not testify before the jury, Dft.'s Supporting Mem. Law 14. This is not correct. As the transcript reveals, on day two of trial, due to an issue as to Collett's mental status and her ability or willingness to appear and testify, Justice Brennan ordered that Collett would be required to testify before the jury after all spectators had been cleared from the courtroom, T2:77-80. T [Collett]:2-49.

Id. 29-30. (TG testified that the charged offenses occurred in 1983 when he was 15.)

Keene Police Detective James McLaughlin testified about his investigation of the TG assaults. He interviewed TG on March 23 and April 1, 1993. He recounted TG's allegations regarding the uncharged assaults (1979 in the Sacred Heart church rectory, 1981 and first half of 1982 during car trips with defendant). McLaughlin then recounted TG's description of the charged assaults in the St. Bernard's rectory offices and defendant's apartment.

Koch questioned Detective McLaughlin closely regarding the level of detail TG provided during the police interviews as compared with his trial testimony. Koch pointed out that TG did not provide certain details during the interviews regarding one of the assaults occurring in a southwest office, T7:111-12. McLaughlin agreed that TG never mentioned that in 1983 he was playing chess with defendant just prior to one of the charged assaults, T7:130. Koch's cross-examination of McLaughlin is discussed further in the ineffective assistance of counsel section below.

The State's last witness was Dr. Fleischer, whose testimony is summarized in State v. MacRae, 141 N.H. 106, 108-11 (1996).

The defense called nine witnesses. The first two, Robert Biron and Fred Laffond, were associated with St. Bernard's church at or around the

time of the charged offenses. They contradicted TG's testimony about the door to the southeast office and if it could be locked. T3:23 (TG), T5:29 (TG), T8:11 (Biron), T8:30-31 (Laffond). Their testimony challenged TG's account that he occasionally earned money working for the rectory. T5:29 (TG), T8:16-17 (Biron), T8:37-38 (Laffond). Biron's testimony made it seem unlikely that fellatio could be performed in the rectory offices without being discovered, T8:13-14 (Biron). He said there was no couch in the southeast rectory, contradicting TG. T3:23 (TG), T8:13 (Biron).

Dennis Horan, the pastor at Sacred Heart in Marlborough where defendant was an intern in 1979, challenged TG's account of a 1979 incident in which TG said that Horan invited him into the rectory alone for doughnuts. T8:50.

The defendant's sister Deborah Karonis and brother-in-law John Karonis also testified. They contradicted TG's statements that defendant played rock music, T4:71 (TG), T8:59 (Deborah), 62 (John); that TG met defendant's family multiple times, T4:66 (TG), T8:60 (Deborah); that defendant had a marble chess set in 1983, T3:18-19 (TG), T8:64-65 (John); and that defendant's apartment was on the third floor T3:24 (TG), T5:40 (TG), T8:62-64 (John).

Father Maurice Rochefort also testified for the defense. Father Rochefort was the pastor at the St. Francis Xavier Church in Groveton, where defendant had been assigned as a deacon. He cast doubt upon Patricia

Grover's statements that defendant had the opportunity to visit TG's family often while serving in Groveton, T6:115 (Patricia Grover), T8:69 (Maurice Rochefort). And he claimed that defendant did not have a marble chess set in 1983 (T8:71).

The defense then rested.

In his closing argument, Koch reïterated the themes introduced in the opening and challenged TG's credibility. For example, he argued that TG and his mother Patricia Grover had taken the defendant's kindness and turned it into a perversion, T9:11-12. He claimed that TG resented defendant for exerting such influence on his family, T9:14. He suggested that TG was motivated by a desire for financial gain, consulting a civil lawyer at the same time that he came forward to police, T9:14, 15.

Koch then identified inconsistencies in the State's evidence, T9:15-41. Koch told the jury that "when you're making manufactured memories, you make things up," T9:24. Continuing, he contended that TG's mother contradicted his allegation that she made him attend counseling sessions, T9:30, adding that if the first incident happened as described, TG would not have gone back two, three, four times and sleep there, T9:32. With regard to TG's allegations of the prior, uncharged acts, Koch took the same approach--highlighting contradictions and questioning plausibility. T9:34-35 (Sacred Heart rectory), T7:40 (car trip to Keene), T9:37. Koch argued that TG's

testimony of the incidents of fellatio in the rectory offices was inherently incredible and questioned how TG could maintain an erection and submit to fellatio after being berated, beaten down, and, particularly, while sobbing uncontrollably, T9:42-43.

In its closing, the State questioned the importance of the alleged inconsistencies in TG's testimony. While no one else witnessed the assaults, the State argued that there was corroboration. The State appealed to the jury's common sense in understanding why TG would respond as he did to the defendant's assaults and reminded them of Dr. Fleischer's testimony regarding patterns of disclosure and other behaviors of adult victims of childhood sexual assaults.

At the defendant's request, the court did not repeat the 404(b) instruction highlighting the limited relevance of the 404(b) evidence that was admitted, as part of its final charge to the jury. T9:111.

The jury returned a verdict of guilty on all charges after five and a half hours' deliberation, T10:3.

On October 6, 1994, before he was sentenced for the TG assaults, the defendant pled guilty to three of the charges involving AB, JG, and LC. The negotiated plea provided for a sentence of 1 to 2 years on each of the three charges. These sentences were to be concurrent with one another and concurrent with the sentences yet to be ordered in the TG convictions.

After a three-day sentencing hearing on the TG convictions, the court sentenced the defendant to one term of 3½ to 7 years for the act of fellatio against TG committed in the defendant's apartment at the rectory, to be followed by four consecutive terms of 7½ to 15 years for the acts of fellatio against TG committed during counseling sessions. Consistent with the terms of the negotiated pleas, defendant received sentences of 1 to 2 years on each of the three charges involving AB, JG, and LC, concurrent with one another and with the TG sentences. All remaining charges were nol prossed or dismissed as lesser included offenses.

The New Hampshire Supreme Court affirmed the convictions. State v. MacRae, 141 N.H. 106.

Post-Conviction Events

Lead defense counsel Ron Koch died in 2000.[18] In 2002, lead prosecutor ACA Reynolds became inactive and moved out of state. In 2007, Justice Brennan retired from service as a superior court justice. In 2009, ACA Robert Gainor, who assisted ACA Reynolds at trial, died.

In 2003, defendant requested that J.R. Davis' law firm turn over his defense file to attorney Eileen Nevins. Attorney Nevins received the complete file on or about October 1, 2003. At the defendant's request, Davis's law firm did not retain a copy of the file. See Davis response to

[18] "In Memoriam," New Mexico Bar Journal, Spring 2001, Doc. Supp. 124, 125.

habeas petition, dated Sept. 25, 2012.[19]

In December 2011, having filed no post-conviction challenges since the N.H. Supreme Court upheld his conviction in 1996, the defendant filed a Motion for New Trial in Cheshire County Superior Court. In it, he alleged as grounds ineffective assistance of counsel and newly discovered evidence. The State objected to the motion for new trial as untimely under RSA 526:4 (2007) and State v. Looney, 154 N.H. 801 (2007). Defendant subsequently entered a voluntary non-suit in that proceeding, filing the instant petition in May 2012.

The State prepared informal interrogatories so that Attorney Davis could respond to the claims of ineffective assistance of counsel. Davis reviewed his files from the defendant's trial at the offices of Cathy Green. He then prepared a written response to the IAC claims.[20] In that response, Davis identified a number of documents from the 1994 defense file which he also provided to the parties to the instant proceeding. However, Davis also noted that some material was missing:

> I know that the file I reviewed at [sic] Kathy's office did not contain my entire file. I do not know what all is missing. I am confident that numerous pages of hand written notes are missing from hearings as well as telephonic and/or in person conferences with Ron and/or Gordon. I did not find the bulk of my billing records. Normally at my former firm, we kept

[19] Doc. Supp. 130, 132.

[20] Doc. Supp. 131.

> one set of the invoices with the file and one with the bookkeeper. I have no reason to believe that we did anything differently with Gordon's file. I mention the billing records because I employed what I called "full format" billing. Under such a format, I would typically (but not always) provide an extended narrative of activities, conferences, and telephone calls which would often identify the subject and contents of such activities.

Davis response to habeas petition at 2.[21] In particular, Davis remembered two working lists he used during the pretrial interview with TG. He was unable to find these in the file.[22]

II. INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) CLAIMS

The defendant claims that defense counsel was ineffective for the following reasons: (1) defense counsel's opening statement led to the admission of previously excluded 404(b) evidence; (2) during discovery, defense counsel provided defendant's theories and strategies to the State; (3) defense counsel failed to object to the admission of expert testimony through a lay witness; and (4) defense counsel failed to conduct discovery.

Legal Standard

A defendant who challenges his conviction based on allegations of ineffective assistance of counsel has the burden of establishing (1) that his counsel's performance was deficient and (2) a reasonable likelihood

[21] Doc. Supp. 132.

[22] Doc. Supp. 137.

that, had counsel not acted as he did, the defendant would have been acquitted. Strickland v. Washington, 466 U.S. 668 (1984); State v. Faragi, 127 N.H. 1 (1985).

> The constitutional standard by which we measure the performance of a lawyer representing his client in a criminal case is reasonable competence. A claim of ineffective assistance of counsel cannot succeed without a showing that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The defendant must accordingly demonstrate both that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

State v. Allison, 127 N.H. 829, 830-31 (1986) (emphasis added, internal quotation marks and citations omitted).

The seminal decision on ineffective assistance of counsel claims is Strickland v. Washington. There the United State Supreme Court noted:

> 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.

Strickland v. Washington, 466 U.S. 668 at 689 (emphasis added, internal quotation marks and citation omitted).

The right to counsel does not guarantee either perfection in trial tactics or success by the defendant. State v. Labonville, 126 N.H. 451 (1985). If the defendant's counsel, aware of all the circumstances, made a rational, tactical decision at trial, the defendant is not denied the effective assistance of counsel, even if decision made by counsel could be challenged in retrospect. 1 R. McNamara, Criminal Practice and Procedure §18.18 at 408-09) (4th ed. 2003).

The New Hampshire Supreme Court described the first IAC prong as follows:

> To meet the first prong of the test, a defendant must show that counsel made such egregious errors that he or she failed to function as the counsel that the State Constitution guarantees.

State v. Kepple, 155 N.H. 267, 270 (2007).

The second, "actual prejudice," prong is satisfied as follows:

> [A]ctual prejudice must rise to such a level that there is a reasonable probability that . . . the result of the proceeding would have been different. If the defendant is unable to demonstrate such prejudice, we need not even decide whether counsel's performance was deficient. In cases where a defendant can demonstrate a reasonable probability that the result of the proceeding would have been different, the United States Supreme Court has recently refined the prejudice inquiry in the federal test to include a focus on whether counsel's . . . performance renders the result of the

trial unreliable or the proceeding fundamentally unfair.

State v. Sanchez, 140 N.H. 162, 163-64 (1995) (internal punctuation and citations omitted).

The defendant can meet neither prong.

Opening the door

Defendant's first IAC claim is that Koch opened the door to the previously excluded evidence of the three prior uncharged assaults against TG. Contrary to defendant's characterization of Koch's "catastrophic" error which "wrecked the defense," trial counsel simply took a calculated risk and the tactic was part of a reasonable overall strategy. Moreover, trial counsel was already prepared to attack TG's allegations of prior assaults and to incorporate that attack into his overall strategy--witness, Koch's assault on TG's credibility, spanning five days.

The tactic was part of a reasonable overall strategy.

Attorney Koch wrote a letter to co-counsel Davis shortly before trial:

> We're going to be playing a "cat and mouse" game at trial in order to avoid opening the door to 404(b) evidence. I've had to re-think my strategy, primarily due to the judge's surprise ruling on consolidation and exclusion of 404(b) evidence. We may be in a position where we can't call Gordon. I'm also trying to figure out now to keep out alleged admissions Gordon made to Det. McLaughlin regarding his being a "hebephile" (which can't be corroborated because the tapes are gone. Gordon obviously denies any such admission to McLaughlin). I'm also trying to figure out how to keep out probation records, treatment records, etc. I'd appreciate your thought on these matters. Trial tactics are going to be extremely important. I originally thought all evidence would probably be admitted and the best way to try the case would be to wield a

> broad sword. I am now of the opinion that we to have the precision of a laser surgeon in order to effectively represent Gordon.

Koch letter to Davis dated August 18, 1994.[23]

In short, Koch was fully aware of the risk of opening the door to 404(b) evidence and had prepared a strategy designed to avoid doing so, to the extent reasonably consistent with a viable defense characterized by extensive cross-examination.

Koch's opening attacked TG's credibility. That tactic carried with it the risk that the three prior incidents involving TG might become relevant to explain the victim's reactions to the defendant's behavior during the 1983 assaults. However, Koch scrupulously avoided any statements that might open the door to the much more extensive and damaging 404(b) evidence of assaults of <u>other victims</u>, and he successfully avoided doing so throughout the trial.

One particular incident during the trial highlighted the challenge facing Koch with regard to keeping out evidence of assaults on other victims. At one point in TG's cross-examination, Koch pursued questions to support his theory that TG had fabricated the claims to obtain money from the Diocese of Manchester. TG contradicted his earlier testimony that he went to Detective McLaughlin <u>before</u> consulting with an attorney regarding a

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[23] Doc. Supp. 140, 141, provided by Davis to the State in this proceeding pursuant to a limited waiver of the attorney-client privilege.

civil lawsuit. TG became flustered and indicated that he could not fully explain the contradiction. T3:56-67.

The court became concerned that TG's inability to answer was the result of the 404(b) order and felt that the jury have been misled. The State argued that Koch had opened the door to evidence regarding all the other victims, to give context to the civil lawsuit. T5:61-64. The court ordered a voir dire of TG. During the voir dire, TG stated that he had been unable to explain his contradiction because it would have required him to refer to his brother JG's allegations against MacRae, which were also the subject of a criminal investigation at the time and contemplated civil litigation--but he knew this information was excluded from evidence by the 404(b) ruling. After this voir dire, the court declined to allow the State to admit further 404(b) evidence, but instead instructed the jury to disregard TG's statements as to whom he talked to first, McLaughlin or a civil attorney.[24]

A central theme of the defense was that the charged assaults were highly improbable. The defense argument was that TG would not submit to sexual abuse in a distraught state and that he would not return for repeated abuse after he had been reduced to tears, nor would he submit to fellatio after being berated and reduced to tears. In making that argument, the defense ran the risk of opening the door to evidence of the prior assaults

[24] Voir dire, argument of counsel, and the court's instruction to the jury, are at T5:94-121.

on TG. The tactic, however, was a reasonable one.

Before trial, the court had informed counsel that, if the defendant took the stand, previously excluded 404(b) evidence involving a probation violation and two other victims, JP and AB[25] would be admissible on the issue of credibility:

> THE COURT: Now the moment the defendant takes the stand his credibility is an issue. I think the -- just to let you know at this point, for instance I think the violation of probation will come in and the whole thing will come in. The whole story on the violation will come in.

T1:10. Although it was not a final ruling, counsel was clearly on notice that if the defendant testified, it would likely result in the jury hearing evidence of a probation violation and two other victims. Attacking TG's credibility, therefore, was a reasonable alternative.

And Koch did have a substantial body of evidence with which to attack TG's credibility. This included TG's counseling records and the police reports containing TG's statements to McLaughlin. It was, therefore, a reasonable tactical decision to attack TG's version of how the assaults occurred and his character.

Attorney Davis recalled that "Ron was surprised that we did as well as we did with the pre-trial 404(b) order. Ron had been working on the assumption that a lot of it--<u>at least regarding [TG]</u>--would come in

[25] Described at T1:7-8.

during trial." Davis response to habeas petition at 4 (emphasis added).[26] Attorney Davis also recalled "discussing State v. Fecteau, 133 N.H. 890 (1991) with Ron . . . . [and] discussing [the State's] proficiency in getting 404(b) evidence in despite pre-trial orders excluding same." Id.

Moreover, according to Davis, defendant was aware of and approved of the plan to aggressively attack TG's credibility: "Based upon the strategy that Ron and Gordon were proposing to employ, Ron and Gordon decided to do everything possible to portray [TG] in as negative a light as possible with [TG]'s motive for concocting such falsehoods being purely a desire for financial gain." Id. Compare Lobosco v. Thomas, 928 F.2d 1054, 1057 (11th Cir.1991) (where defendant concurred in the strategy, it was not ineffective assistance for defense counsel to use his closing argument at the guilt stage of the trial to concede the defendant's guilt and begin building a case for mercy based on his contrition); United States v. Weaver, 882 F.2d 1128, 1140 (7th Cir.1989) ("Where a defendant, fully informed of the reasonable options before him, agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel [under Strickland]."); United States v. Williams, 631 F.2d 198, 204 (3d Cir.1980) (no ineffective assistance existed because the defendant ultimately concurred in his trial counsel's tactical decision).

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[26] Doc. Supp. 134.

Koch's calculated risk did not wreck the defense.

The downside of Koch's calculated risk was not the catastrophe that the defendant now claims. Just as with the charged assaults, Koch challenged the believability of TG's accounts of the prior uncharged ones, attempting to show that TG's descriptions were improbable.

Koch elicited testimony from TG that the pastor of Sacred Heart, Father Horan, often invited him into the rectory for doughnuts (as he alleged defendant did on the day of the assault in 1979). T3:112-14. The defense contradicted TG on this point with testimony that the priests at Sacred Heart did not invite individual children as individuals to come into the rectory for doughnuts. T8:50 (Father Horan). Koch also elicited evidence that TG changed his story regarding exactly what the defendant did to him that day. TG testified that defendant fondled him over his clothes, T2:30, but had told Detective McLaughlin that defendant unzipped his pants and fondled his penis. T7:40. Koch used this contradiction in his closing, arguing that TG's allegations were fabricated. T9:35.

Further, TG testified that, during a June 1981 car trip, defendant took him for visit with defendant's sister in Lynn. TG said that he had been in that house on multiple occasions ("not a one-time thing," T4:66) and that during this visit they watched a movie and stayed two hours. T2:36-37, T4:66 70. In the defense case, Koch presented evidence that defendant took

TG to his sister's house in Lynn only once, for a visit before dinner that lasted 40-50 minutes. T8:60, 66.

TG testified that, even though defendant was not assigned to the Sacred Heart parish in Marlborough in 1982, "he was still in constant contact with [TG's] family coming over on more than a couple of occasions, making long trips just to come over and see us." T2:40. Defense counsel presented evidence that, in the first half of 1982, the defendant was serving as a deacon at a parish in Groveton, some distance from TG's family's house in Marlborough. T8:69-70 (Maurice Rochefort). Koch also showed that, after defendant was ordained a priest in May 1982 and prior to his assignment to St. Bernard's in Keene, he had fewer opportunities for personal contact. T6:115 (Patricia Grover), T8:70 (Rochefort).

Moreover, the 404(b) evidence involved the same victim, TG, and its relevance depended entirely upon the jury's assessment of his credibility. There was no additional, direct evidence other than the victim's testimony. See State v. Haley, 141 N.H. 541, 549 (1997) (404(b) evidence was "neither surprising nor unduly prejudicial" where there were already multiple charges involving the same victim and the uncharged acts came in solely through the testimony of that victim).

Finally, the court strictly and preëmptively limited the jury's use of the 404(b) evidence, minimizing any potential for undue harm to the

defense. T2:28-29. Compare, State v. Perron, 122 N.H. 941, 949-50 (1982) (counsel was not ineffective for making tactical decision to present character evidence in favor of the defendant which opened the door to State's presentation of evidence of defendant's bad character, especially when the limiting instruction mitigated any potential prejudice).

In summary, trial counsel's choice of this particular tactic for challenging the key witness's credibility was "a calculated risk falling within the limits of reasonable practice," State v. Fecteau, 140 N.H. 498, 502 (1995).

The defendant cannot demonstrate prejudice.

The defendant cannot satisfy the prejudice prong of Strickland because he cannot show that the outcome of his trial would have been different but for the alleged errors. Strickland, 466 U.S. at 693.

If Koch had not attacked TG's character and the plausibility of his descriptions of the charged assaults, there would have been little left of his defense. An alibi defense would have been difficult in light of wide time frame during which the assaults were alleged to have occurred. Having the defendant testify was also not a viable option based on the court's warning of probable consequences if defendant placed his own credibility in issue. See infra at 24. Had Koch abandoned his pointed attacks on TG's credibility, the defense would have been weaker, not stronger. Koch

would have been left with the claims of delayed reporting, inconsistencies between the police statements and trial testimony, and the lawsuit against the Church. But Dr. Fleischer's testimony tended to reduce the impact of TG's delayed reporting and the inconsistencies. And standing alone, the defendant's circumstantial evidence of a financial motive was not particularly strong--in fact, it would be surprising if a victim of sexual assault by a priest did not pursue financial compensation from the priest and his Church.

Thus defendant cannot demonstrate a reasonable probability that, if not for defense counsel's "out of the blue" comment and other remarks questioning TG's character in the opening statement, he would have been acquitted.

Giving away the defense theory and strategy

Defendant next claims that trial counsel's representation was constitutionally deficient because he provided the State with defendant's own responses to the allegations in the State's discovery as well as materials obtained from potential witnesses. Dft.'s Supporting Mem. Law 46.

The disclosure of these materials, described infra at 4, was a strategy personally approved by the defendant. This is evident from Koch's letter to ACA Bruce Reynolds describing the accompanying the work product as follows:

> A summary of Gordon MacRae's response to the [TG], [JG] and [LC] allegations. As a technical matter this

> is work-product and not discoverable, however, since we are after a search for the truth in this situation I have decided to send you the information because I have the impression that you and Mr. Gainor are truly committed to understanding both sides of the allegations, i.e., you want to know the truth. In one sense, these documents expose our defense and remove the element of surprise, however, I spoke about releasing these documents to you and Mr. MacRae indicated that he had no objection to your viewing the materials because he believes the more information you receive, the more likely you will see that the allegations are false.
>
> The document is structured as a page by page rebuttal of the discovery material we have received.

Koch letter to ACA Reynolds dated February 18, 1994 (emphasis added).[27]

In his response to the State's informal interrogatories in this proceeding, Attorney Davis provided additional insight into the tactical reasons for the disclosure:

> I remember that this [disclosure] was associated with the [sic] a variety of issues including (but not limited to) formulating and substantiating an alibi defense, setting things up for a bill of particulars from the State, and arguing that it was fundamentally unfair to force a defense for unknown dates going back some 10 years earlier.
>
> In addition, I remember that Gordon questioned whether [TG] would actually assist the state and/or testify when push cam to shove. Gordon believed that the more he could demonstrate that [TG]'s statements contained numerous, important errors, impossibilities, and/or outright lies, then the more likely either 1) Bruce would question [TG]'s truthfulness and/or reliability and possible reduce or dismiss charges; and/or 2) [TG] would either clam up or not assist the state--including the possibility of skipping out.

[27] Doc. Supp. 73.

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I do not remember the details of my conversations with Ron in any significant manner other than I told him that it was unusual; not sure I would do it (although I do not believe that I even had the entire proposed disclosure--at least at that point so that I could provide comments on what (if anything) ought not be included); and that Ron needed to make sure that Gordon was still on board with the disclosure--particularly depending upon what exactly Gordon had noted on the work product or what was contained in the witness statements. I do not remember the exact dates; however, I know that my last conversation with Ron regarding the disclosure was in early 1994.

For your information, at that point in time and well before then, Gordon was actively involved in reviewing the file including reviewing discovery material (both from the State and defense generated--including at least one private investigator that Ron or Gordon had hired). I understood that Gordon was actually assisting Ron in New Mexico; although I am not certain of whether this was at Ron's office in Albuquerque or at Gordon's then residence in Jemez Springs, New Mexico. I do know that when Ron, Gordon, and I were preparing for jury selection and during trial, Gordon was intimately familiar with Ron's file contents and the organization of same. I remember Ron telling me that Gordon was still on board with the disclosure; however, I do not have any real detailed memory of the conversation beyond what I mentioned above.

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In discussing the disclosure above, I have emphasized that Ron was to make sure that Gordon was "still" on board with the disclosure. I used this phraseology intentionally, because I remember Gordon talking to me about the work that he was doing in preparing an earlier version of same. Gordon was preparing information both for Ron's use as well as for potential disclosure to Bruce. In fact, at one point Gordon provided me part of the material (10/07/1993). Gordon and I actually talked about the disclosure (and other matters) on or after 10/07/1993. At that point, I remember Gordon letting

> me know that he had talked to Ron about the disclosure, that Gordon was onboard with it, and that it would not contain any damaging information.

Davis response to habeas petition, dated September 25, 2012 (emphasis added).[28]

The defendant does not cite any authority supporting his assertion that the disclosures in this case render "assessments of reasonableness . . . all but irrelevant," Dft.'s Supporting Mem. Law 46. Both of the above-cited letters show that the tactic was both reasonable and approved by defendant. See Lobosco, Weaver, and Williams, all supra (no ineffective assistance existed because the defendant ultimately concurred in his trial counsel's tactical decision).

Moreover, far from "neutraliz[ing] the defense and guarantee[ing] the conviction," Dft.'s Supporting Mem. Law 16, the disclosures actually benefited the defense.

During the direct testimony of Detective McLaughlin, the State sought to admit a series of letters between defendant and McLaughlin posing as JG. The letters contained what looked like admissions of misconduct by defendant, and the State argued that they showed defendant's consciousness of guilt. Defense counsel objected, arguing that the State was misreading the letters and they did not show consciousness of guilt at all. To

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[28] Doc. Supp. 135-36.

make his point, Koch read to the court the defendant's own hand-written, self-serving explanations--the very work product which defendant now claims neutralized his defense. T7:79-89. The potentially damaging letters were ruled inadmissible. T7:91-93.

The disclosure of defendant's work product also helped further the defendant's claim that TG was fabricating. In an interview with Detective McLaughlin, TG had said the assaults took place in the southeast office. At trial he said the first assault happened in the southwest office. Under cross-examination, McLaughlin agreed that TG did not mention the southwest office during the police interviews. Koch then elicited from the detective that, prior to trial, police learned from defendant's "work product" that he did not use the southwest office until after Father Dupuis left in August 1993. T7:110-13. The State objected to Koch using his own client's out-of-court statements, but the court allowed it, for its relevance to TG's state of mind, T7:116. This evidence supported one of the themes of the defense, that TG was changing his story to fit the facts. Again, the disclosures of defendant's self-serving work product allowed defendant to tell his story without having to testify.

Also, Attorney Davis explained that much of the work product disclosure was intended to provide fodder for the argument that the defendant was unfairly prejudiced by the passage of time prior to indictment and by the

lack of specificity in the indictments themselves (although this effort did not bear fruit due to superseding case law from the New Hampshire Supreme Court). See Davis' response to habeas petition at 5, third full paragraph.[29]

Defendant has offered no specifics that call into question Attorney Davis' recollection that the disclosure did not contain any information that could have helped the State or any information that the State could not have easily anticipated. To put defendant's calculated disclosures of work product in context, Koch's letter to Davis dated August 18, 1994,[30] exemplifies the kind of defense work product that, if disclosed, could in fact have prejudiced the defense; however, that letter was of course not disclosed until the defendant waived the privilege in the context of this proceeding.

The defendant cannot show that the disclosure of work product was an egregious error or that, had he not made the disclosure, defendant would likely have been acquitted.

Failure to conduct discovery

Defendant's next claim is based on the interview of TG conducted on September 2, 1994 by co-counsel J.R. Davis. The interview was transcribed

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[29] Doc. Supp. 135.

[30] Doc. Supp. 140.

and the transcript is 170 pages long.[31] The defendant offers only speculation and second-guessing in his attempt to show that the interview was tantamount to a failure to conduct discovery.

First, the choice of an informal interview (as opposed to a sworn deposition) is a decision within the sound discretion of trial counsel. Additionally, defendants are not entitled to depose their alleged victims as a matter of right, but only upon a showing of necessity. State v. Fernandez, 152 N.H. 233, 236 (2005); RSA 517:13 (2007). In this case, the court granted the defendant's request to question TG on the condition that it would be an informal interview and not a deposition. TMH March 9, 1994:36-39.

As noted by defendant's present counsel, Koch already had a number of statements given by TG which contained their own contradictions and imprecisions. Dft.'s Supporting Mem. Law 48 ("frequent supplements and alterations to his stories"). If, shortly before trial, TG had given sworn testimony providing missing details or resolving contradictions, Koch could be reasonably sure the State would then offer the deposition testimony at trial as a prior statement consistent with TG's expected testimony. Koch's decision preserved his ability to challenge TG's inconsistencies at trial and deprived the State of the use of a deposition as a source of prior

[31] A copy of the transcribed interview, referred to as Tr. TG Interview Sept. 2, 1994, has been provided to the Court.

consistent statements.

Koch properly used Davis to conduct the interview because he did not want to give TG a preview of his cross-examination. As he noted in a letter to Davis dated August 18, 1994: "I also want to take my statement from [TG]. I may utilize an attorney or investigator, other than myself to do the interview as I don't want [TG] to become acquainted with me and my style. I don't want him to feel that I'm a familiar figure when we go to court." Koch letter to Davis (emphasis added).[32]

The interview helped the defense determine if TG was up to the task of testifying at all. As Attorney Davis noted in his response to the habeas petition, the defendant "questioned whether [TG] would actually assist the state and/or testify when push came to shove." Davis response to habeas petition at 5.[33] Davis remembered that "the State was having issues reaching [TG] and getting him to commit for the interview." Id. at 7.

Contrary to defendant's assertion that Koch "sent an unprepared lawyer" to do the interview, Attorney Davis recalled receiving detailed written instructions before conducting the interview. Koch followed up with a telephone discussion. Davis also recalled that he reviewed the discovery carefully in preparation:

> When Ron asked me to do [TG]'s interview, I remember

[32] Doc. Supp. 141.

[33] Doc. Supp. 135.

telling him that I needed to go through the discovery in detail (I had not been retained to review or digest the discovery) and that he needed to give me the details of what he wanted to know (and not know) from [TG]. Although Ron sent me the letter dated 08/22/1994, I did not think that it gave sufficient details--particularly in light of my lack of detailed knowledge of and familiarity with the discovery--especially from the State. After receiving his letter, Ron and I talked and he told me what he most wanted. I do not remember what all he wanted me to cover. I do remember that I had two working lists (one of events and issues and the other regarding [TG]'s reactions) and checked off the items as I questioned [TG]. I thought that I checked off all the boxes. I may not have. It has been too long ago for me to remember. I do not have the lists at this point. I do not remember seeing them in the file that I reviewed at Kathy's office.

I do remember that Ron particularly wanted me to see 1) how [TG] would "come off" as a witness, on the one hand; and 2) on the other hand, if [TG] would make either additional claims or contradict the ever moving "details" of his previous disclosures Ron being of the belief (with my concurrence) that it was good either to get more contradictions or more outlandish statements.

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In preparation for the interview, I reviewed the discovery extensively. I cannot state for how long at this point in time; however, I remember going through binders for an extended period of time--several hours. I talked to someone (I think Gordon, but I am not absolutely certain) regarding parts of the discovery, certain areas to be most familiar with, and events from [TG] and his history. However, given the complexity of the discovery and the convoluted nature (and changing nature) of [TG]'s claims, I readily admit that I did not feel adequately prepared to conduct the interview (at least going into the interview). I shared this concern with Ron and Gordon before actually doing the interview. Neither Ron nor Gordon shared my concern. After the interview was completed, I do not remember having as great a concern as I had going into it; however, I would

> have preferred to have been more prepared.

J.R. Davis response to habeas petition.[34]

Attorney Davis accomplished the first objective, which was to assess TG as a witness. Attorney Davis was also able to elicit from TG new allegations that the defendant had threatened him with a gun in 1987 during a chase around a cemetery. TG had previously reported the incident to Detective McLaughlin, but McLaughlin's reports made no mention of a gun. See Sentencing volume 2 page 47 (hereinafter S2:47) (cross-examining TG during sentencing hearing). Also, Koch arranged for Ira Cook, a private investigator, to attend the interview. See Koch letter to Davis, August 18, 1994 at 3;[35] Tr. TG Interview Sept. 2, 1994:2.

The defendant has not identified any specific information not elicited during the interview that would have led to an acquittal. Moreover, Attorney Davis was not surprised by any of TG's testimony:

> I do not remember all the trial events in sufficient detail to state currently whether, in my opinion, a more thorough interview of [TG] would have made any difference whatsoever in the jury verdict. I can state that I do not remember having any concerns during the trial itself that anything came out in evidence that either 1) was a surprise; and/or 2) anything that Ron and Gordon had not already thought through how to address --particularly relative to Ron's cross examination of [TG].

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[34] Doc. Supp. 137.

[35] Doc. Supp. 142.

Davis response to habeas petition at 7.[36]

The record also shows that Koch made use of the TG interview in cross-examining TG regarding his lawsuit for money damages from defendant and the Church. T5:57-58.

In light of this record, defendant cannot show that defense counsel's handling of the TG interview amounted to egregious error, or that had the interview been conducted as a deposition and handled differently, the defendant would have been acquitted. Strickland, 466 U.S. at 693.

Failure to object to expert testimony by a lay witness

Defendant next claims that Koch was ineffective when he did not object to Detective McLaughlin's testimony on the basis that he was not qualified as an expert. Dft.'s Supporting Mem. Law 46.

Koch's decision not to object was not ineffective assistance. Given the case law in 1994, it is not clear an objection would have been sustained. See Strickland v. Washington, 466 U.S. at 689 (In reviewing IAC claim, court must make every effort 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); United States v. Wright, 573 F.2d 681, 684 (1st Cir.), cert. denied, 436 U.S. 949 (1978) ("Counsel is not required to waste the court's time with futile or

[36] Doc. Supp. 137.

frivolous motions").

Moreover, even if Koch had successfully objected, there is no reasonable likelihood that defendant would have been acquitted, because the State was prepared to, and did, offer expert testimony through Dr. Fleisher which thoroughly covered the subject of disclosure by victims of sexual assault, a matter which McLaughlin's testimony touched on only briefly.

To place the claim in context, the testimony at issue is as follows:

> Q: Where we left off, I was asking you about the disclosure of sexual abuse being a process rather than an event. Do you recall that?
> A: Yes.
> Q: Can you elaborate on that concept?
> A: Most of the victims of--. Most of the adult victims who are victimized as children sexually, when they finally come to terms and are able to disclose that information, especially to an authority, will basically give you a rough outline of what happened to them, what occurred over a length of time. And then on subsequent interviews, they will come up with additional,facts about their victimization.
> Q: Is there a term "confabulation" that you're familiar with?
> A: Confabulation is sometimes the mind will take incidents of abuse that occurred years ago, and let's say three incidents happen during a given day. Their mind may believe that those occurred on three separate days, or vice versa, that three separate day's events happened all in one day, and that can happen.
> Q: So if I understand, your disclosure sometimes comes in pieces rather than in its totality?
> A: Yes, typically.
> ***
> [Testimony about interviews with TG]
> ***
> Q: Now, before the lunch break I was talking to you

> about the number of child victims of sexual abuse that you've spoken to. Do you remember that?
>
> A: Yes.
>
> Q: In fact, what I wanted "to ask you was how many victims of child sexual abuse have you talked to? Do you understand the difference between those two questions?
>
> A: You're talking about adults who were disclosing sexual abuse versus actual children that I've spoken to?
>
> Q: Yes.
>
> A: I've spoken probably to about a hundred adult survivors of child sexual abuse.
>
> [Testimony about interviews with TG]

T7:97-99.

The defendant relies upon State v. Gonzalez for the proposition that a lay witness cannot testify regarding the general characteristics of disclosures by victims of childhood sex abuse. However, the reference to Gonzalez is unavailing. That opinion was issued in 2003 and the defendant's trial occurred in 1994. At the time of defendant's trial, our Supreme Court had not announced the rule upon which the defendant relies. Indeed, Gonzalez relied on State v. Martin, 142 N.H. 63 (1997), State v. MacRae, 141 N.H. 106 (1996), and State v. Cressey, 137 N.H. 402 (1993). Of those three, only Cressey was decided prior to defendant's trial.

However, Cressey did not establish the boundary between lay and expert testimony regarding sexual assault victims; rather, that case held that an expert in the area of psychology and child sexual abuse could not testify that a particular child was or was not abused or that the child exhibited

symptoms consistent with a child who had been abused. Id. at 407-11. Cressey went on to hold that "the State may offer expert testimony explaining the behavioral characteristics commonly found in child abuse victims to preempt or rebut any inference that a child victim witness is lying." Id. at 412. The court made clear it was referring specifically to testimony regarding the "child sexual abuse accommodation syndrome," id. at 411. In short, Cressey did not directly address the issue decided in Gonzales, whether a police officer's observations limited to his personal experiences interviewing other sexual assault victims required him to be qualified as an expert.

In that respect, the trial court ruled that McLaughlin could not offer an opinion regarding TG's credibility or whether TG had been abused: "Detective McLaughlin cannot give an opinion as to whether or not this victim, this alleged victim, is in fact a victim." T7:53-54. The detective's experience, however, could be admitted. T7:96. Given the state of the case law in 1994, it was not an error for Koch to agree with the judge on this point.

Moreover, even had Koch objected, the jury would still have heard the much more extensive testimony of Dr. Fleischer on the subject, testifying as an expert. See T7:168-200.[37] Thus the defendant cannot establish prejudice

[37] Dr. Fleischer's testimony is summarized in State v. MacRae, 141 N.H. 106, 108-11 (1996).

as a result of McLaughlin's testimony.

By way of comparison, Koch did object to Dr. Fleischer's testimony that between 70 and 80 percent of males treated for substance abuse problems at Beech Hill Hospital between 1989 and 1990 had been sexually abused. On appeal, the Supreme Court agreed that the testimony was inadmissible. However, the court found the error harmless beyond a reasonable doubt because the testimony was cumulative. Similar statistical evidence was presented to the jury by defense counsel during cross-examination of the victim, in an effort to show that earlier disclosures by the victim were the result of peer pressure in group counseling sessions. State v. MacRae, 141 N.H. at 110-111. The defense would have fared no better with respect to McLaughlin's cumulative testimony about sex-abuse victim behavior, had they appealed it.

Defendant also suggests Koch should have objected to McLaughlin's testimony regarding his education, training, and years of practical experience, arguing that, without special instruction from the court, the jury may have formed the impression McLaughlin was not "just a police man, [but] an expert." Dft.'s Supporting Mem. Law 48. This claim is unavailing.

McLaughlin was the lead investigator on the case. His credentials were relevant to assist the jury in evaluating the soundness of his investigation. Defendant has cited no authority supporting the proposition

that a lead investigator may not give his credentials and experience as background information for the jury without special instruction from the court that the witness was not testifying as an expert.

Moreover, defendant is mistaken when he states that no expert testimony instructions were given to the jury." Dft.'s Supporting Mem. Law 48. In his final charge, the trial court gave two instructions pertaining to experts, and the instructions made it clear that the only expert in the case was Dr. Fleischer. T9:81, 89-90.

Given the thoroughness and authoritativeness of Dr. Fleischer's expert testimony on the processes of disclosure by adult victims of child abuse, there is no reasonable possibility that the jury's verdict would have been different without Detective McLaughlin's limited testimony on that subject.

III. NEWLY DISCOVERED EVIDENCE CLAIMS

The defendant claims that, since his trial, he has found "newly discovered evidence" and that this evidence merits habeas corpus relief. The 'evidence" consists of statements made by "friends and relatives" of TG challenging TG's credibility. These statements are neither new nor evidence.

Legal standard

"In order to prevail on a motion for a new trial on the ground of newly discovered evidence, the defendant must show that: 1) he was not at fault for not discovering the evidence at the former trial; 2) the evidence is admissible, material to the merits and not cumulative; and 3) the evidence is of such a character that a different result will probably be reached upon another trial." State v. Bader, 148 N.H. 265, 282 (2002).

"For newly discovered evidence to warrant a retrial in a criminal case, the existence of the required probability of reversal must be gauged by an objectively reasonable appraisal of the record as a whole, not on the basis of wishful thinking, rank conjecture, or unsupportable surmise." Id. at 284 (internal quotations marks omitted).

TG's "Friends and relatives"

Defendant introduces his newly discovered evidence as follows:

> In the years since MacRae's trial, [TG]'s friends and relatives have come forward with evidence that [TG]'s stories were lies, and his trial testimony was rank perjury--a calculated effort to extract a large payment from the church . . . . These new witnesses have nothing to gain from their statements now. Indeed, statements provided to MacRae's counsel now might be contrary to the interests of the people who provided them. There is no reason to suspect from them anything but truth.

Dft.'s Supporting Mem. Law 50 (emphasis added). Defendant's characterization of his newly discovered evidence does not withstand scrutiny.

Chief among these "friends and relatives" of [TG] are:

- Trina Ghedoni, TG's ex-wife and a convicted felon;
- Ghedoni's son Charles Glenn, a convicted murderer;
- Ghedoni's daughters Tineesha and Shalina, who were 10 and 12 years old, respectively, in 1994;
- Steven Wollschlager, a convicted felon who described TG and his brothers as "a pack of scumbags" and said that the defendant "turned [Wollschlager's] life around" in prison;
- Debra Collett, a therapist who treated TG and testified at defendant's trial in a manner consistent with her 2008 statements being offered now;
- Leo and Penny Demers, longtime friends of defendant; Leo testified at trial; and
- Pam Wagner, a Catholic nun and longtime friend of defendant.

These individuals can hardly be described as TG's friends and relatives from whom there is no reason to expect anything but the truth. None of them qualifies as a relative (divorce having severed the relationship to wife and step-children). And each of them has a demonstrable bias against TG or in favor of the defendant.

Finally, rather than "coming forward," it appears that contact with each witness was initiated by the defendant's investigator, James Abbott, who, not surprisingly, had his own bias in favor of his client. Compare, State v. Lemire, 115 N.H. 526, 530 (1975) (upholding denial of new trial, where defendant proferred the testimony of rape victim's sister which was

taken by defense counsel and was given in response to questions which were leading and suggestive of the answers).

Trina Ghedoni

Trina Ghedoni (born: 1959) is the centerpiece of the newly discovered evidence claim. Ghedoni is not "newly discovered." Indeed, she was engaged to TG at the time of trial and they were married shortly thereafter. As discussed further, her proferred testimony would have been of dubious admissibility. The proferred testimony, therefore, is not truly evidence. Rather, it is an assault on TG's character, an avenue fully explored at trial, and is likely the product of her failed marriage with TG.

Defendant's submission includes six reports by James Abbott of interviews of Ghedoni and one handwritten statement. Ghedoni's handwritten statement (Dft.'s Exh. A, Sept. 23, 2008) typifies the legal insufficiency of all Ghedoni's evidence. Abbott's reports of his interviews with Ghedoni suffer from comparable defects.

Ghedoni's description of TG's "personality flaws" --compulsive liar, manipulator--clearly fall within the realm of ordinary impeachment evidence which is unavailing in a motion for a new trial based on newly discovered evidence. State v. Boisvert, 119 N.H. 174, 177 (1979) ("When the testimony of a newly discovered witness . . . would serve only to impeach or discredit a witness, an order directing a new trial is not justified."). Her

characterization of TG as a "drama queen ruled by sex and jealousy" would not even be admissible for impeachment.

Ghedoni wrote that TG never told her he was abused and that he led her to believe he would be testifying about other people who were abused. Both assertions would be entirely consistent with, and thus cumulative to, the testimony at trial. TG testified that he never disclosed to anyone other than Deborah Collett during counseling and then to Detective McLaughlin. TG's mother Patricia testified that TG kept things to himself, T6:59, and that, when he finally disclosed to her, he gave her little detail. T6:101-02. TG's non-disclosure to his fiancée was consistent with Dr. Fleischer's testimony regarding the behavior of adult victims of sex abuse, particularly males. T7:174. Thus this evidence (repeated in Abbott's March 14, 2008 report, Dft.'s Exh. E), is at best cumulative and not of a character likely to change the verdict. Bader, 148 N.H. at 83 (trial court properly discounted defendant's proferred evidence that was consistent with the evidence presented at trial).

Ghedoni's statements regarding TG "getting even" with the Catholic Church (repeated in Abbott's 4-23-2008 reports) are cumulative as well: TG's financial motive was a centerpiece at trial. Moreover, even if such testimony were allowed and believed by the jury, it would not be likely to change the verdict, because it is not unexpected for a victim of repeated

sexual abuse by a priest to seek damages from the Church.

Ghedoni's statement that defendant was "not an abuser" in TG's life was inadmissible as an opinion on an ultimate issue. Also, had she been permitted to so testify on defendant's behalf, placing defendant's character in issue, it would open the door to much if not all of the 404(b) evidence of other victims, improving the chances of conviction.

Ghedoni's allegation that TG was jealous of his brothers' relationships with the defendant to the point of anger was already argued at trial on the basis of testimony of TG's mother Patricia. The testimony, therefore, would have been cumulative. This testimony--placing in issue the nature of defendant's relationships with TG's brothers--could have opened the door to evidence of defendant's assaults on JG and DG.

The bare allegation that TG lied about a sexual encounter at Diddler's Park is plainly inadmissible: TG did not testify about any such matter at trial. Impeachment by specific instances of conduct is generally not allowed. Rule 609(b). Justice Brennan had refused to allow Dean Clay to testify that TG described an insurance scheme he had going on in Keene in 1989 or 1980. T8:92-95. There is no reason to believe that the trial court would have allowed testimony regarding this specific incident of alleged dishonesty.

Ghedoni's allegations that the chess set in the rectory was not

purchased until years later is cumulative to trial testimony; moreover, from her, it is pure hearsay, as is her allegation about "the lie he told at Derby Lodge."

Ghedoni's statement regarding TG's use of medication at trial, and her more elaborate statements in Abbott's reports, Dft.'s Exh. G and X, add nothing to the evidence presented at trial on the same subject during Koch's cross-examination of TG and are therefore cumulative.

Ghedoni's statement that her marriage to TG was postponed, "because of gaps in testimony and many lies," until TG "cleared up some issues" is clearly not admissible and is collateral to issues in defendant's trial. It also raises a question about Ghedoni's veracity, given that she and TG obtained a marriage license on October 17, 1994--and were married on November 18, 1994, four days after defendant went to prison.[38]

Ghedoni's statement regarding what TG told Deborah Collett, apart from being hearsay, is also irrelevant: There was no testimony at trial that TG told Collett his step-father had abused him. T [Collett]:6-7 (TG referred to a clergy person and a foster-father).

Ghedoni's allegations of what TG did with the settlement money from the lawsuit (and the more detailed allegations included in Abbott's reports, Dft.'s Exh. E, G, and N) have no relevance to the merits of the case.

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[38] Marriage certificate, Doc. Supp. 143.

According to Ghedoni, TG received the civil award in March 1997. How he spent the money has no bearing on the issues at trial. This is not "newly discovered evidence." State v. Nelson, 105 N.H. 184, 193 (1963) ("To warrant a new trial on newly discovered evidence it must be established to the satisfaction of the Trial Court that such evidence goes to the merits of the case and not merely has a tendency to impeach or discredit a witness and must be of such a character that it is at least probable that a different result will be reached upon another trial.").

Moreover, evidence at trial established that TG had longstanding problems with drugs and alcohol, emotional problems, and was not used to having money to spend. It is not surprising that, presented with a substantial sum of money, TG acted exactly in the manner Ghedoni described. As Attorney Davis noted in his response to the petition, "[TG] (in my opinion) came off as a broken individual who had been deeply injured and traumatized--by someone or something." Davis response to habeas petition at 8.[39] Additionally, the proferred evidence does not directly rebut TG's testimony regarding what the defendant did to him; it goes to a collateral matter, which makes it unavailing in a newly discovered evidence claim, Boisvert, 119 N.H. at 177.

Ghedoni's claimed that TG fabricated his allegations against defendant.

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[39] Doc. Supp. 138.

But Ghedoni would not have been a competent witness because she was not present when the abuse took place. With respect to the statements that TG allegedly made to her, Ghedoni is glaringly inconsistent. For instance, in the April 23, 2008 report, Dft.'s Exh. N, Ghedoni is quoted as stating that both she and TG told her son Charles (then a child) that TG was not abused by defendant "to shelter Charles from the truth." (Emphasis added.) By her comments on this issue to Abbott, Ghedoni seemingly impeaches both Charles and herself in their attempts to now make TG out as a liar.

In the same report, Ghedoni stated that she did not believe that TG was assaulted by defendant "as a child" but believed that "they had a relationship when [TG] was older." Ghedoni neither specified a relevant age for TG to support the suggestion of a consensual, adult sexual relationship with defendant, nor did she explain how she arrived at this conclusion.

Moreover, the record does not support the conclusion that, at the time of trial, Ghedoni believed TG was lying. To the contrary, the sentencing transcript reflects that Ghedoni believed and supported TG. Attorney Davis asked TG about the recovery process:

> Q [by Attorney Reynolds]: Irrespective of the problems--let me make it clear, [TG], I am not trying to minimize it but irrespective of the problems you have had in your life, nonetheless you are engaged to be married now?
> A: [by TG]: Yes.
> Q: And your fiancée stood by you and with you throughout the trial?

> A Yes.
> Q: By the way, let me make it clear, we don't need to talk about her name.
> A: Well I mean she suffered just like everybody else has suffered to stand by me. It wasn't the easiest thing to do for them to have to go through. They saw the pain, the suffering. They had to put up with my behavior and that is all a direct result of this and a direct result of Mr. MacRae.
> Q: And she is standing by you still, your fiancee?
> A: That's correct.

S2:59-60.

After the trial, Ghedoni, now married to TG, wrote to the lead prosecutor, Bruce Reynolds:

> Bruce,
> Words cannot say how much I appreciate the time, effort, and amount of sensitivity you showed toward all the victims and families . . . . I'll never forget your role in this whole process.
> Many Thanks,
> Mr. & Mrs. [TG]

Letter to ACA Reynolds.[40] The handwriting on the card appears to be the same cursive handwriting in Ghedoni's statement dated Sept.23, 2008, Dft.'s Exh. A. It also appears to be the same handwriting as her signatures on the 1994 marriage certificate and the 1997 petition for divorce.[41]

Abbott's August 5, 2009 report, Dft.'s Exh. X, provides numerous reasons to discount Ghedoni's proferred testimony as the product of bias: Ghedoni claimed that TG broke her nose by slamming her head in their

[40] Doc. Supp. 144.

[41] Doc. Supp. 143, 149.

refrigerator door in Manchester; she resented the fact that he wasted the settlement money on drugs, pornography, motels and gambling while they were married and living in Arizona; and she was angry that he surreptitiously depleted the funds from their jointly owned annuity account. Moreover, after she found TG in bed with another woman, she divorced him and left the state.[42]

Ghedoni was so angry that she cut TG's image out of the photographs which showed him, with her children, flashing some of the cash he received as settlement compensation from the Church, Dft.'s Exh. E, 1-30-2009.

If the defendant were granted a new trial, and if Ghedoni were allowed to testify, she could be impeached not just for her bias. Ghedoni is a convicted felon who was sentenced to prison in 2008. The crime for which she was convicted involved dishonesty: she lied to police and concealed the whereabouts of her son, Charles Glenn, who was wanted for murder.[43]

In short, Ghedoni's proferred testimony is no basis to grant habeas corpus relief in this case.

Charles Glenn

Charles Glenn (born: 1981) is Ghedoni's son. His statement appears in Dft.'s Exh. B. The statement appears to have been prepared by James Abbott and signed by Glenn on May 21, 2008. Abbott visited Glenn on April 22,

[42] Divorce decree, Doc. Supp. 145.

[43] Doc. Supp. 150-53.

2008[44] at the Rhode Island State Prison in Cranston.

In the typed statement, Glenn claimed that, while he was in YDC from 1993 to 1997, TG visited him there with Ghedoni, and that he occasionally received weekend furloughs and visited Ghedoni and TG in Manchester. He claimed that, before the trial, TG told him he was going to set up MacRae and the Church to gain money for sexual abuse, and that, after the trial and the settlements, he stated that he had succeeded in his plot. Glenn said that, on several occasions, TG told him he had never been molested by MacRae, but that "[t]here were other allegations made by other people against MacRae and TG jumped on and piggybacked onto these allegations for the money." Glenn repeated Ghedoni's allegations that TG went to counseling and therapy on his attorneys' advice to gain jury appeal.

Glenn's statements, if they had been admitted at trial, would have added nothing new. TG's motives were thoroughly explored on cross-examination and his lawsuit against the Diocese was a centerpiece of the defendant's case. Additionally, Glenn's proferred testimony that TG said he "piggybacked onto" other people's allegations against defendant would likely have opened the door to evidence regarding those allegations of "other people"--including TG's two brothers DG and JG--to allow TG to explain why he came forward to police when he did.

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[44] Dft.'s Exh. N.

Glenn has some significant impeachment problems of his own. Glenn, who was born in 1981, has a lengthy criminal history dating back to 1997, when he was certified as an adult and convicted of criminal mischief. He was convicted of felony criminal threatening in 1998 and sentenced to state prison for 1 to 4 years. His criminal history culminated in 2012 with a conviction at trial for second degree murder for shooting Leonard Gosselin in the back on August 30, 2005. In the same trial, he was convicted of five additional felonies: criminal threatening for pointing a gun at Chad Diaz, attempted armed robbery, falsifying physical evidence x2, and felon in possession of a deadly weapon.[45]

"To warrant a new trial on newly discovered evidence it must be established to the satisfaction of the Trial Court that such evidence goes to the merits of the case and not merely has a tendency to impeach or discredit a witness and must be of such a character that it is at least probable that a different result will be reached upon another trial." State v. Nelson, 105 N.H. at 193 (upholding trial court's finding that affidavits of three convicted felons who claimed that a State's witness told them he lied at trial were insufficient to warrant a new trial).

Glenn's criminal history is not the only reason to treat his statement as highly suspect. An insidiously close relationship with Ghedoni is

[45] Doc. Supp. 154-66.

evident from the fact that she helped him avoid apprehension after he murdered Leonard Gosselin in 2005. From her own comments, it is obvious that Ghedoni's personal bias against TG is deep-seated and longstanding. It stands to reason that she has imparted this bias to her son, whom she sought to protect from the law.

The defendant has not demonstrated a ground for habeas corpus relief on the basis of Glenn's statements.

Tineesha and Shalina Glenn

On March 14, 2008, Abbott interviewed Ghedoni's daughters Tineesha (born 1984) and Shalina (born: 1982). According to Dft.'s Exh. G, Ghedoni, who was in Goffstown Women's Prison at the time, told Abbott to contact her daughters to enlist their assistance in obtaining an interview with Glenn.

According to Abbott's report, Dft.'s Exh. Z, Tineesha first learned of TG's allegations against defendant during the trial, when she was 10 or 11 years old. Beyond that, she offered no opinion or evidence as to whether defendant assaulted TG. She described TG as a "creep" and a "pervert," who one time fondled her breast and another time stared at her and Shalina while they were sleeping. Tineesha said that she and Shalina were afraid of TG. She also stated that her mother had argued with TG.

Tineesha was convicted of shoplifting 2002 and arrested for the same offense in 2004 but that second charge was nol prossed.

Shalina, according to Abbott's report, Dft.'s Exh. AA, visited her brother Charles in prison about once a month and agreed to asked him to speak with Abbott. She called a woman named "Lynn" and asked Lynn to also speak to Charles. She then handed Abbott the phone. Lynn asked Abbott to give her an address so that Glenn could write to him.

According to Abbott's report, Shalina said her mother divorced TG because of his drinking, drug abuse, and infidelity. She described TG as a sick individual obsessed with sex and teenage girls. She said she was nervous in his presence and happy that his mother divorced him. She was 12 at the time of the trial and remembered no details. She offered no opinion or evidence as to whether defendant assaulted TG.

Shalina was arrested on 12-13-2009 for simple assault. Three months later she was convicted of resisting arrest and a charge of hindering apprehension was nol prossed.

None of the statements attributed to Shalina and Tineesha would have been admissible at trial, nor would they be admissible at a new trial. Their allegations regarding TG's behavior have no bearing on credibility and would have been excluded under 404(b) as inadmissible character evidence. Both statements only confirm and explain Ghedoni's animus against TG. In short, these statements are not newly discovered evidence and the defendant has not satisfied his burden that he is entitled to habeas corpus relief.

Steven Wollschlager

Abbott interviewed Wollschlager (born: 1973) three times in 2008: August 28, September 24, and October 27. Dft.'s Exh. K.

Dft.'s Exh. T consists of a two-page report of the first interview and a one-page questionnaire apparently completed by Wollschlager. One of the last questions on the form asked Wollschlager for his opinion about TG and his brothers. Beside that question, Wollschlager wrote, "pack of scumbags." Abbott also reported that "Wollschlager described the [G] kids as 'a pack of scumbags' including the girls in the family." There is no reference to Wollschlager describing TG as a friend.

According to Abbott's report, Wollschlager met defendant in 1988 when Wollschlager was in drug rehabilitation. Defendant helped him get needed counseling.

Wollschlager also alleged that in the 80's or early 90's, police approached him and him and "kept trying to get me to say things I didn't do." He said he remembered being approached by an officer who tried to get him to state that he was sexually abused by defendant. Wollschlager said that he believed the officer was Detective McLaughlin. He also stated that he was subpoenaed to testify at defendant's trial but was not allowed to testify. Wollschlager said that he would have testified that defendant never made a single sexual advance or overture towards him. In addition,

Wollschlager said he remembered the [G] kids bragging about setting up and getting money from the Church.

Wollschlager told Abbott that he later reconnected with the defendant in prison while he was serving a sentence for armed robbery. Defendant counseled him and "turned his life around." At the end of the interview, Wollschlager asked Abbott to give his address to the defendant so that they could communicate with each other.

Wollschlager provided a handwritten statement, Dft.'s Exh. S, in which he said that the defendant had helped him with his substance abuse and alcohol problems. He said that defendant never engaged in any inappropriate talk of sex,or sex for money. He said he was interviewed in 1988 by Detective McLaughlin about whether anything inappropriate ever happened with him and he told the detective no.

He said in 1994 that he was aware of defendant's trial "knowing full well that it was bogus" and that he also knew "the reputations of those making accusations." He said he again met with Detective McLaughlin, who described the lawsuits and money, and left him with the impression that "if I would go along with the story I could reap the rewards as well." He said he was given $50 and was tempted to go along and accuse defendant, but later changed his mind and did not want to lie or make up stories. When he came to court under subpoena, he informed an unnamed official that he would not

testify that defendant abused him, the official became upset and told him he could leave.

Dft.'s Exh. R is Abbott's report of the third Wollschlager interview. Accompanying the report is a copy of a Keene Police Department report by Detective McLaughlin of an interview with Wollschlager. The police report bears a number of handwritten comments apparently made by Wollschlager.

In his report, Abbott says that Wollschlager went through the police report line by line and contradicted many of Detective McLaughlin's assertions. According to Abbott, Wollschlager confirmed what he had said in the two previous interviews and elaborated on some allegations regarding McLaughlin tempting him with the promise of money, and ending the interview by giving him "'a large sum of money' in agreement that Wollschlager would testify against MacRae."

He also clarified that it was the "District Attorney's" [sic] office that released him from the subpoena after he told a secretary there, "I don't know what this is about and I don't want to be a part of it."

In short, Wollschlager's statements are not newly discovered evidence. Defendant and his lawyers were aware of Wollschlager's existence prior to trial. The defense was given the Keene Police reports in discovery.[46] From his work product disclosed to the State, it appears that defendant

[46] State's Discovery E172-174, E238.

went through the discovery line by line and annotated it. Wollschlager's name was also brought up during the pretrial hearing on 404(b) evidence. TMH July 8, 1994:25. Ira Cook, the defendant's investigator, could have interviewed Wollschlager prior to or during trial. Thus the Wollschlager material does not meet the first requirement for newly discovered evidence--that the defendant must was not at fault for not discovering the evidence at the former trial.

Nor is the evidence "of such a character that it is at least probable that a different result will be reached upon another trial." The testimony that the defendant did not molest Wollschlager proves nothing. Wollschlager was not present when TG was abused and could only have testified that the defendant's pedophilia did not extend to him. Compare, State v. Boisvert, 119 N.H. at 177 (upholding trial court's denial of new trial where defendant proffered a witness to testify that rape victim lied concerning her own drinking habits).

Abbott described Steven Wollschlager as TG's friend. Dft.'s Exh. K ¶8. However, there is nothing in any of the underlying reports or in Wollschlager's written statements to support that characterization. On the contrary, Wollschlager appeared to dislike TG and his family, referring to them as "scumbags" during all three interviews.

In addition to disliking TG and his family, Wollschlager clearly

owed defendant a debt of gratitude for helping him as a troubled teenager and again, for "turning his life" around when he was a fellow inmate with defendant at New Hampshire State Prison, where Wollschlager was serving a sentence for armed robbery.

Wollschlager's extensive criminal history includes a 1995 conviction for armed robbery with a prison sentence of 5 to 10 years, a parole violation in 2001, and a 2001 conviction for possession of cocaine with a prison sentence of 2 to 7 years.[47]

Wollschlager said that he was aware during the 1994 trial that the charges against defendant were "bogus" and that TG and his brothers were bragging about a scheme to make money from the church. But he did not offer to testify. Instead, he simply told the prosecutor that he did not know what it was all about and did not want to be a part of it. It was not until 2008, after being approached by defendant's investigator, that made allegations that TG was lying and the detective essentially attempted to bribe him to procure his testimony.

If the defense were now allowed to introduce Wollschlager's claims, the door would be opened to the all the 404(b) evidence involving multiple victims, to explain the reason for Detective McLaughlin's interest in defendant and his approach to Wollschlager. McLaughlin's discovered the

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[47] Doc. Supp. 167-173.

defendant's other victims, four of whom testified at defendant's sentencing in the TG case. McLaughlin first articulated defendant's modus operandi in seducing boys for sex, a modus operandi reviewed in detail by Dr. Anna Salter in her testimony during sentencing. Dr. Salter testified that the defendant sought male victims, whom he patiently groomed for sexual encounters, always targeting children that he knew were in distress. S2:129.

In short, the defendant has not shown that Wollschlager's proferred testimony is newly discovered evidence. He knew of Wollschlager's existence at the time of trial and did not pursue the discovery provided by the State. He has demonstrated no basis for habeas corpus relief.

Deborah Collett

Deborah Collett's trial testimony is discussed earlier at 11-12. Abbott interviewed her on August 27, 2009. Dft.'s Exh. D. Defendant's submission also includes her handwritten statement dated May 20, 2008. Dft.'s Exh. C.

The information in Ms. Collett's statement and Abbott's report is duplicative of her trial testimony. She testified that "[TG] was challenged by the other people in treatment due to his lack of honesty in the program"; TG "allude[d] to the fact that it was a clergy person but then it was other people too"; that her conversation with Detective Clarke was recorded "and I remember him promising me a copy of that and never receiving [it]."

T [Collett]:7-8.

Collett's description to Abbott[48] of what Father Rochefort told her after the trial concerning defendant's chess set, apart from being inadmissible hearsay, is also cumulative, because Father Rochefort and John Karonis testified at trial on the subject. T8:65 (Karonis); T8:71 (Rochefort).

To the extent that Collett has provided additional details or clarification, that does not satisfy the second prong of the newly discovered evidence standard. "Cumulative evidence is defined as additional evidence of the same kind to the same point." State v. Bader 148 N.H. at 282-83. Defendant's submissions from Collett fall into this category. Moreover, trial counsel had a full opportunity to explore the details of Collett's knowledge during trial. If counsel believed that the judge prevented him from doing so, he could have objected, and, if over-ruled, appealed the issue. Additionally, defendant has not identified any particular "new" revelations from Collett that would likely have changed the verdict.

[48] Dft.'s Exh. D.

Leo and Penny Demers

Abbott interviewed Leo and Penny Demers on May 12, 2008. His report of that interview is in Dft.'s Exh. W, along with an affidavit from Leo Demers dated February 13, 2008. Leo Demers testified for the defense at trial. As a result, their proferred testimony is not newly discovered.

According to the report and affidavit, Leo and Penny were and remain friends of defendant and are convinced of his innocence. In his affidavit, Leo said that in 2000, Bishop McCormack stated that he believed defendant was not guilty and his accusers likely lied. None of this would be admissible (hearsay, irrelevant character evidence, unhelpful opinions on ultimate issue).

Additionally, Leo claimed that during TG's testimony, TG's therapist Pauline Goupil, sitting on the last row in the courtroom, used hand signals to direct TG to cry at certain points in his testimony. "Penny related the activity to Koch and the judge then cleared the courtroom of all spectators."

If in fact Ms. Demers related this information to Koch, there is no indication in the record that Koch relayed it to the court. Accepting the report at face value, it is not newly discovered, because it was brought to Koch's attention.

Koch was an experienced defense attorney. He repeatedly challenged the

authenticity of TG's emotional displays during his direct testimony and the contrast with his responses on cross-examination. T3:88, T4:9, T6:6, 14, 19-20. As ACA Reynolds observed at one point, while raising an objection:

> He is an able lawyer doing this far longer than I have, as far as I can tell, and I am sure this is not the first priest he has represented and I am sure it's not the first victim of child abuse that he has ever cross-examined as an adult. He is an able lawyer and playing it to the hilt, and what he is doing now is he is crossing the line.

T4:30. ACA Reynolds' opinion of Koch's expertise is corroborated by news and court reports from Albuquerque, N.M.[49]

Koch was aware of Goupil's presence in the courtroom (but not "in the last row of seats on the right side of the court" as alleged by Demers):

> Q: Well, sir, throughout this trial, hasn't Pauline Goupil on a couple of days been sitting in a chair right here behind the swinging door?
> A: That's possible.
> Q: That's the therapist that Mr. Upton sent you to, isn't that correct?
> A: If she was sitting there. Pauline Goupil is the therapist which I'm going to, yes, sir.
> Q: And Pauline Goupil is the one, sir, who I believe is basically taking you through a process of relating back what has gone on in your life and helping you identify that that is connected in some respects to the actions of Gordon MacRae?

T5:54.

Assuming Demers passed the allegation regarding Goupil on to Koch, it

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[49] Doc. Supp. 124.

is impossible to believe that Koch, an experienced attorney, would have missed the opportunity to convey it to the court or confront TG with the "coaching" when TG was on the stand. Also, it is apparent from the record of the ten-day trial that the trial court was very attentive and it is equally hard to believe that, from the bench, the court would not have seen the behavior of spectators in front of him.

Moreover, the court never cleared the courtroom because of Goupil. The trial record reflects that the judge cleared the courtroom on day two of trial for Deborah Collett's testimony, to accommodate her fragile emotional state. See T2:77.

Pam Wagner

Pam Wagner is a Catholic nun and longtime friend of the defendant. Her name was included in a list of alibi witnesses defendant filed with the court along with his notice of alibi. Father Maurice Rochefort also mentioned her during his testimony. As such, her proferred testimony is not newly discovered. Rochefort testified that Sister Wagner, along with two other nuns, were visiting the defendant and himself in 1986 in Bar Harbor, Maine, during the time when defendant bought a marble chess set. T8:74-75.

The defendant has included an email dated August 25, 2009 from Wagner in his submission to the court. It was sent to an unidentified party (probably James Abbott) and then forwarded to the defendant. Dft.'s Exh. L.

The body of the email was addressed to "Gordon" and recounts Wagner's recollection of defendant buying a beautiful chess set. However, Wagner did not seem to recall the year.

This information cannot qualify as newly discovered evidence because the defendant clearly was aware of it at trial. Additionally, it is entirely cumulative to the testimony of Rochefort and John Karonis regarding the chess set.

James Abbott

The affidavit of defendant's investigator James Abbott concludes with the following self-serving statement:

> During the entirety of my three-year investigation of this matter, I discovered no evidence of MacRae having committed the crimes charged, or any other crimes. Indeed, the only thing pointing to any improper behavior by MacRae were [TG]'s stories--that were undermined by the people who surrounded him at the time he made his accusations and the trial.

Dft.'s Exh. K at 7.

There is no indication in defendant's submission that Abbott, in his search for evidence, ever contacted TG's actual friends and relatives--many of whom testified at trial: brothers JG and DG, Patricia Grover, Kathy Hall; and no evidence that he contacted any of other trial witnesses or the victims who testified at sentencing.

This fact, combined with his misleading characterization of

Wollschlager and the other proferred witnesses as "friends and relatives" of TG, suggests that the reason Abbott found no evidence that defendant committed the crimes charged is that he was not looking for such evidence. In any event, Abbott's investigation provides no basis for habeas corpus relief.

IV. CONCLUSION

The record in this case clearly establishes that the defendant received effective assistance of counsel at trial. Defendant's arguments to the contrary are insufficient to show otherwise.

"[W]hen a petition for habeas corpus asserts that the petitioner was denied effective assistance of counsel, the court need not hold a hearing if the existing record of the case clearly indicates that the petitioner is not entitled to the relief requested on the grounds alleged." Grote v. Powell, 132 N.H. 96, 99 (1989).

Moreover, none of the proferred witness statements meets the legal standard for newly discovered evidence. "To warrant a new trial on newly discovered evidence it must be established to the satisfaction of the Trial Court that such evidence goes to the merits of the case and not merely has a tendency to impeach or discredit a witness and must be of such a character that it is at least probable that a different result will be reached upon

another trial." State v. Nelson, 105 N.H. at 193 (upholding trial court's finding that affidavits of three convicted felons, claiming that a State's witness told them he lied at trial, were insufficient to warrant a new trial). Taken together or piece by piece, the newly proferred evidence is not of such a character that it is at least likely that a different result will be reached upon another trial.

The rule of Grote regarding dismissal of meritless habeas petitions is not limited to ineffective assistance of counsel claims, see, e.g., State v. Diamontopoulos, 140 N.H. 182, 184 (1995) (statute controlling habeas corpus proceedings envisions occasions where a hearing would not be required); RSA 534:5 (2007). That rule should be applied to the defendant's claim of newly discovered evidence as well as to his IAC claim.

WHEREFORE Richard M. Gerry, Warden requests that this honorable Court:

A. Deny and dismiss the petition based on the record and pleadings before the Court; and

B. Grant such other and further relief as the Court deems just.

Respectfully submitted,

RICHARD M. GERRY, WARDEN
NEW HAMPSHIRE STATE PRISON

DATED: November 19, 2012

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CERTIFICATION

I hereby certify that a copy of the foregoing State's Memorandum of Law for Denial and Dismissal of Petition was this day forwarded to local defense counsel, Cathy J. Green, Esq., 764 Chestnut St., Manchester, NH 03104 and pro hac vice defense counsel, Robert Rosenthal, Esq., 523 E. 14th St., Ste. 8D, New York, NY 10009.

DATED: November 19, 2012

George A. Stewart