

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2009-0110

The State Of New Hampshire

v.

Joel Verenbec

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
MERRIMACK COUNTY SUPERIOR COURT

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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(5 Minutes 3JX Panel Oral Argument)

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**ISSUE PRESENTED**

Whether the lower court correctly denied the defendant's motion for new trial based on an allegation that a witness was dishonest and withheld her "nude modeling" activities, requiring a new trial, where the defendant had knowledge concerning the modeling prior to trial, evidence of the nude modeling was introduced at trial and further evidence, if introduced, would be immaterial and cumulative, and not of such character to lead to a different result at trial or require further evidentiary hearings.

**STATEMENT OF THE CASE**

On April 30, 2008, the defendant, Joel Verenbec, was convicted after a jury trial in Merrimack County Superior Court (*Mangones, J.*) on two counts of aggravated felonious sexual assault (AFSA). T 444.\* *See* RSA 632-A:2, III (2007). The defendant was convicted of intentionally touching J.P.'s genitalia with his hand on more than one occasion over a period of two months or more and within a period of five years, when J.P. was under the age of thirteen. T 444. The defendant was also convicted of touching J.P.'s genitalia with his mouth on more than one occasion over a period of two months or more and within a period of five years, when J.P. was under the age of thirteen. T 444. The trial court dismissed one count of felonious sexual assault at the conclusion of the State's case. T 324.

Prior to sentencing, the defendant filed a motion for new trial alleging newly discovered evidence. APP 1-9. After a hearing, the trial court denied the defendant's motion. NOA 19. The defendant was sentenced to the New Hampshire State Prison for a total of five to ten years, stand committed. NOA 2. This appeal followed.

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\*The transcript of the trial shall be referenced as T \_\_\_\_.

The excerpted transcript of Lena Martin's trial testimony shall be referenced as TM \_\_\_\_.

The transcript of the motion for new trial hearing shall be referenced as H \_\_\_\_.

The defendant's appendix shall be referenced as APP \_\_\_\_.

The Notice of Appeal shall be referenced as NOA \_\_\_\_.

The child witnesses are identified by their first and last initials of their name (CB and CY); The victim is identified by the first and last name (J.P.).

**STATEMENT OF FACTS**

**A. Evidence at Trial**

Michelle Paille was in a relationship with the defendant from the spring of 2003 to November 2004. T 168, 169, 172, 335. The defendant moved into Paille's apartment in Boscawen after a few months of being together. T 172. Paille was pregnant with her son CB when the relationship with the defendant began. T 168-169. CB was born in October 2003. T 174. Paille had two other children: J.P., who was six years old, and CY, who was two years younger. T 55, 139, 174.

Paille had been a licensed nurse assistant for approximately seven years and was employed at the Pleasant View Nursing Home. T 138, 140. She was required to work every other weekend, Saturday and Sunday, from 7:00 in the morning until 3:00 in the afternoon. T 141, 173. The defendant watched the children when Paille was working. *Id.* Paille's parents or her friend Helen watched the children prior to the relationship with the defendant. *Id.*

The problems in the relationship started after CB was born. T 176. Paille would sleep on the couch because CB would cry. *Id.* In November 2004, Paille went to her father's house. T 177. Paille returned home to find all of the defendant's things gone. *Id.* The defendant felt he was being ignored in the relationship. T 335. The defendant felt Paille was pushing him away because of

his HIV status. T 334, 364. Paille told her children that the defendant was gone and would not be living with them. T 178. Paille did not badmouth or speak poorly of the defendant. *Id.*

In the summer of 2006, J.P. and her brother CY went to Paille's sister's home in West Virginia. T 184-185. Lena Martin was J.P.'s aunt and Michelle Paille's younger sister. TM 3, 6. Martin, who had previously lived in New Hampshire, relocated to West Virginia in 2005. TM 5-6. The move occurred after Daniel Martin, Lena's husband, a geo-spatial engineer, got a position with Earth Data International. TM 3, 5-6. Martin was a stay-at-home mother and tended to the "hobby farm." TM 3.

Martin had also worked outside the home. Martin had been a model since she was eighteen. TM 5. She was a "spokes model" and modeled lingerie and swimwear. *Id.* She also modeled for Playboy. *Id.* Martin had been a Playboy Model of the Year. TM 26. She modeled for Playboy when they needed her. *Id.* Martin did other nude modeling on the Internet. TM 28. Martin modeled for herself, Ultimate Swimwear, Becky Lebow, Perfect 10, and Video Bliss. *Id.*

During the visit in the summer of 2006, Daniel and Lena Martin had some concerns regarding CY. TM 14. According to Lena, CY was exhibiting sexualized behavior, which included CY rubbing Daniel's leg. TM 35. CY called Daniel "honey," talked about a secret place, and also discussed dreams of kissing men. TM 36. J.P. was very upset during Martin's conversation with CY. TM 14.

J.P. told Lena that she needed to talk with her. *Id.* J.P. disclosed to Lena that the defendant had sexually assaulted her. T 84. It was a period of time after the sexual assaults took place. T 83. J.P. was very close with Lena and saw Lena as one of her best friends. T 45. J.P. felt better after telling Lena about what the defendant had done to her. T 89. Lena informed her husband, her mother, DCYF, and J.P.'s mother. TM 19.

J.P. did not like when the defendant would watch her on weekends while her mother worked. T 61. The defendant would do "inappropriate things." *Id.* The assaults would occur a lot. T 62. They occurred in the living room. T 62. CB and CY were behind the closed door of the bedroom. T 63. The defendant would tell J.P. to put her toys away and turn off the television. T 72. The defendant would tell her to take her clothes off. *Id.* The defendant only wore a T-shirt. T 74-75.

J.P. was seven and eight years old at the time of the sexual assaults. The defendant would touch J.P. with both his hands and mouth. T 31, 64. The defendant would touch J.P.'s face, neck, and genitalia. *Id.* At trial, J.P. described in detail how the defendant held her down and held her legs open while he used his tongue and hands on her genitalia. T 64, 66-71. The defendant specifically used two fingers to touch the inside and outside of J.P.'s genitalia. T 69. The defendant's assaults occurred more than once. T 65, 68-69. The defendant would not say anything while he did this to J.P. T 70.

The defendant also told J.P. “to touch him where he goes to the bathroom in the front.” T 75. The defendant would pull J.P.’s arm to do this. T 76. J.P. was scared. *Id.* J.P. thought that she was forced to touch the defendant’s private part on one occasion. *Id.* The specific event was blurry. T 77. J.P. could not recall what the defendant’s private part looked like. *Id.*

When J.P. was being assaulted, she told the defendant to get off her and he did not listen. T 78. She was both mad and scared. *Id.* After the defendant was done assaulting J.P., he would put his clothes back on. *Id.* J.P. did the same. *Id.* J.P. described the assaults as occurring every weekend while her mother was at work. T 80. It started soon after the defendant moved in. T 81. J.P. was happy when the defendant moved out because the assaults ended. *Id.* The defendant told J.P. that if she told anyone, he would keep doing it. T 82. That made J.P. scared, so she did not tell anyone while it was happening. *Id.*

The defendant testified on the final day of trial. The defendant denied using his mouth or hands on J.P.’s genitalia or having J.P. touch his penis. T 347, 348. The defendant claimed to know of no reason why J.P. would be making the allegations against him. T 348. The defendant stated that he would watch Paille’s children while she worked every other weekend. T 340, 360. The defendant did not think J.P. was crazy or delusional. T 352. The defendant felt J.P. was a nice kid and intelligent. T 362-363. The defendant agreed that there was nothing in his

relationship with Paille that would have caused J.P. to dislike him or make up the assaults. T 366.

**B. Relevant Events Before and After Trial**

Lena Martin was deposed prior to trial on April 7, 2008. APP 11. Martin testified that she modeled for a living. APP 13. Martin stated she modeled “all kinds of stuff”, including swimwear and lingerie. *Id.* She said she did this once in a while as an independent contractor. *Id.* The defendant’s counsel asked no further questions concerning Martin’s occupation. *Id.*

At the final pre-trial conference, the defendant’s counsel informed the State that he had heard rumors from the defendant’s family that Lena Martin was a pornography star. H 6. According to the defendant’s counsel, he did a quick Internet search, but was unable to find anything out. *Id.* Other than the deposition, the defendant’s counsel had no contact with Martin. Specifically, defense counsel did not seek to interview Martin prior to trial. The State was not asked to inquire from Martin about her type of modeling. H 19. The defendant’s counsel did not make a formal request to the State to act concerning the rumor. H 24.

Prior to the start of trial, the State informed the defendant’s counsel that Martin worked for Playboy. H 7, 12. The State met with Martin the weekend prior to trial and she stated she modeled for Playboy and had been a Playmate of the Year. H 27. It was also the State’s recollection that the defendant’s counsel

was informed of Video Bliss. *Id.* The defendant's counsel conceded that he knew about Video Bliss prior to trial. APP 2.

The defendant's counsel did not ask that the trial be continued. The jury was selected and the trial took place. Martin was called as a witness on April 29, 2008, the second day of trial. TM 3. As presented above, Martin testified concerning her modeling. While the jury knew Martin did nude modeling and made videos, the defendant's counsel did not specifically ask her if she considered herself to be a pornography star. H9. The defendant's counsel did not ask that a hearing be held outside the presence of the jury to further inquire. The defendant's counsel did not attempt to recall Martin or ask that trial be continued.

According to the defendant's motion for new trial, defense counsel learned after trial that Martin used a professional or screen name and was a pornography star. H 8, 15-16. The defendant's motion for new trial was denied after a hearing. NOA 13-19. The trial court's order was issued on October 9, 2008. NOA 19.

In denying the defendant's motion, the court held that the defendant's counsel was on notice of a potential area of evidence concerning Martin screen name and activities in the adult entertainment industry. NOA 17. Further, there was no evidence that Martin fabricated the allegations against the defendant. NOA 18. The court also held that Martin's adult modeling was conveyed to the jury. *Id.* The court was not persuaded that it would have allowed the defendant's counsel to cross-examine Martin in greater detail concerning her activities. *Id.*

The information would have been cumulative considering the evidence of Martin's nude adult-type modeling was already presented to the jury. NOA 18-19. The court was not persuaded that a different result would occur at another trial, given the fact that Martin's testimony related to the issues of the victim's disclosure.

NOA 19. The victim testified to the sexual assaults. *Id.*

### SUMMARY OF THE ARGUMENT

The trial court properly denied the defendant's motion for a new trial. The defendant has failed to meet the criteria to warrant a new trial based on newly discovered evidence. RSA 526:1 provides that "[a] new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." The defendant has not established "(1) that he was not at fault for not discovering the evidence at the former trial; (2) that the evidence is admissible, material to the merits, and not cumulative; and (3) that the evidence is of such character that a different result will probably be reached upon another trial." *State v. Steed*, 140 N.H. 153, 157 (1995).

Martin never deliberately concealed evidence from the defendant's counsel. Martin answered all questions posed to her. There is absolutely no evidence that Martin attempted to lie or testify falsely about her modeling. In fact, the defendant's counsel was aware prior to trial concerning Martin's modeling. APP 13. The defendant's counsel not only deposed Martin, but also heard a rumor that she was a pornography star. H 6. Further, the defendant's counsel knew Martin posed in Playboy and had worked with Video Bliss. H 7, 12, 27; APP 2.

The evidence of Martin's modeling was sufficiently conveyed to the jury. Martin testified that she was a Playboy Model of the Year and had done other nude modeling on the Internet. TM 26, 28. The jury was made well aware of

Martin's activities and any further evidence, even if admissible, would have been cumulative.

J.P. testified before the jury to the sexual assaults that she endured from the defendant. J.P. was not confused about who assaulted her or what was done to her. There is no evidence that J.P. viewed any of Martin's nude modeling. Further, there is no evidence that nude modeling videos or photos were the basis for J.P.'s testimony concerning the sexual assaults. The basis of Martin's testimony dealt specifically with the disclosure of J.P., not the merits of J.P.'s allegations. Evidence that Martin used a professional name and engaged in nude modeling would not lead to a new result at trial. The defendant is trying to impeach and discredit Martin to cast a shadow on J.P.'s testimony concerning the sexual assaults.

The defendant's inability to meet the criteria of a new trial should preclude both a new trial and a remand to the trial court for further evidentiary hearings.

**ARGUMENT**

**I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR NEW TRIAL BECAUSE THE DEFENDANT FAILED TO MEET ANY OF THE CRITERIA FOR A NEW TRIAL.**

The crux of the defendant's motion for new trial is that newly discovered evidence, allegedly unknown to defense counsel prior to trial, was admissible, was material, and was not cumulative. As such, a new trial or further evidentiary hearing would be required.

RSA 526:1 (2007) provides that "[a] new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." To warrant a new trial, the defendant must prove "(1) that he was not at fault for not discovering the evidence at the former trial; (2) that the evidence is admissible, material to the merits, and not cumulative; and (3) that the evidence is of such character that a different result will probably be reached upon another trial." *State v. Steed*, 140 N.H. 153, 157 (1995). The defendant has failed to meet any of the criteria to warrant a new trial based on the newly discovered evidence.

It is a question of fact for the trial court to determine if newly discovered evidence requires a new trial. *State v. Davis*, 143 N.H. 8, 11 (1998). The Court will review the trial court's denial of the defendant's motion for a new trial for an unsustainable exercise of discretion. *State v. Lambert*, 147 N.H. 295, 296 (2001)

*Id.* at 8, 11. Since the trial court's decision was reasonable in light of the facts presented at trial, the decision should be affirmed.

**A. Verenbec Was At Fault For Not Discovering The Evidence.**

The defendant is unable to meet the burden of proving that he was not at fault for failing to discover the information at the former trial. The evidence that the defendant claimed was newly discovered included Martin's screen name and pornographic images. APP 3. Much of this information was known before or during trial. This information could have been discovered prior to trial. The newly discovered information was not the type that did not exist. The information existed, but was explored by the defendant.

The defendant's counsel had the opportunity to ask Martin about the extent of her modeling when she was deposed on April 7, 2008. APP 11. Martin testified that she modeled for a living. APP 13. When asked if she modeled clothing, Martin stated she modeled "all kinds of stuff," including swimwear and lingerie. *Id.* The defendant's counsel did not ask any further questions concerning Martin's occupation. *Id.* The defendant's counsel only asked four questions about Martin's modeling. *Id.* Martin was never asked if she did nude modeling. *Id.*

The defendant's counsel knew prior to the final pretrial conference about the rumor that Martin was a pornography star. H 6. The defendant's counsel even searched the Internet, but was unable to find anything out. *Id.* The State was not

asked to inquire about Martin's type of modeling. H 19, 25. The defendant's counsel did not ask Martin himself.

The defendant's counsel knew prior to trial that Martin had engaged in nude modeling. It was not a surprise when it was discussed during trial. The defendant's counsel knew that Martin had worked for Playboy. H 7, 12. The State met with Martin the weekend prior to trial and she said she modeled for Playboy and had been a Playmate. H 27. The defendant's counsel also knew about Martin posing for Video Bliss. APP 2.

There is no indication that the defendant's counsel had any further contact with Martin after the deposition. There was no contact ask about a professional name or her modeling activities, did not seek to interview Martin prior to trial, did not meet with Martin for trial preparation, did not ask for a further deposition, and did not ask that the trial be continued. H 38.

The record does not support the defendant's argument that Martin attempted to conceal or lie about her modeling activities. Martin answered all questions asked of her. Martin was not asked any question during the deposition or at any other time prior to trial regarding any other activities. Martin told the State prior to trial that she had posed for Playboy and Video Bliss. This information was conveyed to defense counsel. During trial, Martin discussed her modeling. TM 5. She testified to modeling for Playboy. *Id.* Martin also testified to doing other nude modeling on the Internet. TM 28. Martin testified to

modeling for herself, Ultimate Swimwear, Becky Lebow, Perfect 10, and Video Bliss. *Id.* Martin provided answers to all questions presented to her and did not attempt to cover up her nude modeling.

The defendant's reliance on *Rollins v. Rollins*, 122 N.H. 6 (1982), is not persuasive. *Rollins* dealt with a divorce decree that was being contested because of property division. *Id.* at 8-9. This Court remanded the matter to allow a limited hearing for the defendant to supplement her offers of proof and offer any relevant testimony. *Id.* at 9. The new evidence was not available prior to the final decree and suggested the existence of fraud and deception. *Id.* The master was "[n]ot compelled to alter the existing decree if he concluded that it was fair and equitable under the circumstances." *Id.*

*Rollins* was not a criminal matter. It dealt with property division in a divorce. *Id.* at 8-9. Unlike the participants in *Rollins*, Martin is not a party to this matter. The record is clear that Martin did not attempt to commit any fraud or deception. Most importantly, the trial court was given all of the new information at the hearing in the motion for new trial. APP 1-65. The trial court had the opportunity to hear the relevant testimony, and denied the defendant's motion based on all of the information. NOA 13-19.

This matter is more akin to *Steed*. In *Steed*, the defendant was convicted after trial of criminal trespass for violating a domestic restraining order. *Steed*, 140 N.H. at 153. One month after trial, Steed filed a motion for a new trial based

on newly discovered evidence, a videotaped recording between the defendant and police. *Id.* at 154-55. Steed's counsel admitted to possessing the videotape prior to trial, but had not reviewed it in detail until after the trial. *Id.* The trial court denied the defendant's motion for new trial *Id.* at 157-158. This Court agreed with the trial court and held that "[S]teed should not be held blameless for failing to 'critically review[]' such a recording prior to trial." *Id.* at 157.

As in *Steed*, the defendant's counsel was aware of Martin's activities prior to trial. The defendant's counsel did not seek to adequately explore the information concerning Martin's modeling. The defendant's counsel cannot be considered blameless in his failure to seek out further information regarding Martin's nude modeling and possible use of a screen name. Since the defendant's counsel was at fault for failing to discover the evidence, the defendant fails to meet the first prong of the test.

**B. The Evidence Concerning Ms. Martin's Involvement In The Adult Modeling Industry Was Not Admissible, Was Not material, And Was Cumulative.**

Further testimony concerning Martin's involvement in the adult modeling industry would have been inadmissible at trial because it was not relevant. *See N.H. R. Ev.* 401. Even if the evidence were relevant, it would still be inadmissible. *See N.H. R. Ev.* 403. The evidence would unfairly prejudice the jury against Martin and ultimately confuse the issues. Martin's trial testimony was essentially limited to the disclosure by the victim, J.P. Martin was not asked to discuss the

mertis of J.P.'s allegations. Martin's career would have no bearing on what happened to J.P.

Testimony about Martin's career would not be material to the charges against the defendant. The defendant's argument concerning materiality hinges on a faulty premise. There is no evidence that J.P. viewed any of her aunt's adult modeling photos or videos. This is all speculative. There is no evidence Martin shot her own pornography at her home or had pornography at her home. Further, any pornography was shown to her young niece and nephew during a summer vacation.

The defendant's motion references the acts performed by Martin as evidence the information would be admissible and material. J.P. testimony is qualitatively different from the types of sexual acts Martin engaged in. Martin was either alone or with a woman. APP 15-65. There were no men involved in any of the pictures. There were no male genitalia displayed. J.P. testified that the defendant told her, "To touch him where he goes to the bathroom in the front." T 75. The defendant would pull J.P.'s arm to do this. T 76. J.P. also testified in detail how the defendant held her down and held her legs open while he would use his tongue and hands on her genitalia. T 64, 66-71. The appendix does not include any photos showing Martin engaging in cunnilingus. The lack of both male genitalia and cunnilingus refutes the photos' materiality.

Further testimony concerning Martin's career would be cumulative.

"Cumulative evidence is defined as additional evidence of the same kind to the same point. Evidence which goes to a point upon which no evidence was adduced at the former trial is not cumulative." *Davis*, 143 N.H. at 12 (citing *State v. Abbott*, 127 N.H. 444, 450, 503 (1985)). The trial testimony from Martin included numerous references to her career. Martin testified to modeling lingerie and swimwear. TM 5. Martin testified to being one of Playboy's Models of the Year. TM 26. Martin testified to nude modeling that was on the Internet. TM 28. Martin testified to modeling for herself, Ultimate Swimwear, Becky Lebow, Perfect 10, and Video Bliss. *Id.* The jury was under no illusion about what Martin's career entailed. As the trial court noted, it was communicated to the jury. NOA 18.

The fact that there was no alternative source of J.P.'s sexual knowledge does not make the evidence less cumulative, material, or admissible. J.P. and the defendant were the only witnesses to the sexual assaults. J.P. was clear on how she was sexually assaulted. J.P. was also clear on who sexually assaulted her. There is no alternative source of sexual knowledge because the source was based on the defendant's repeated sexual assaults on J.P. J.P.'s sexual knowledge was formulated by the repeated sexual assaults. J.P.'s testimony at trial was enough for the jury to conclude the defendant was guilty.

**C. The Newly Discovered Evidence Is Not Of Such Character That A Different Result Will Probably Be Reached Upon Another Trial.**

The defendant has failed to show how the result of trial would be different. More evidence and testimony concerning Martin's activities in the adult modeling industry would not produce a different result at trial. As provided above, the jury was aware of Martin's career. More evidence of it is simply more of the same. The jury already knew of a possible alternative source. The jury had made their minds up concerning the credibility of witnesses. As in many sexual assault cases, the only two parties are the defendant and the victim. Further corroboration of the J.P.'s testimony is unnecessary. It would not change the victim's testimony. J.P. was clear on what she endured, who did it, and how long it occurred. It would also not change the defendant's testimony. The defendant denied using his mouth or hands on J.P.'s genitalia or having J.P. touch his penis. T 347-348. J.P.'s delayed disclosure would preclude the finding of physical evidence. The jury knew of all of this information and found the defendant guilty.

The defense is essentially attempting to retry the case to impeach and discredit Martin because of her adult modeling activities. The defendant would use the impeachment of Martin to infer lack of credibility of J.P. This Court and other courts have held that "[w]hen the testimony of a newly discovered witness is relevant to only collateral issue[s], or would serve only to impeach or discredit a witness, an order directing a new trial is not justified." *State v. Boisvert*, 119 N.H.

174, 177 (1979); accord *State v. Nelson*, 105 N.H. 184, 193 (1963), *cert. denied*, 377 U.S. 1001 (1964); *State v. Danforth*, 73 N.H. 215, 220 (1905); see also, e.g., *Commonwealth v. Lo*, 428 Mass. 45, 53, 696 N.E.2d 935, 941 (1998) (“It is well established that newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial” (brackets, quotation, and citation omitted)); *People v. Pineda*, 207 A.D.2d 915, 916, 616 N.Y.S.2d 660, 661 (1994) (In order to constitute newly discovered evidence warranting a new trial, the evidence “must do more than merely impeach or contradict the former evidence”), *appeal denied*, 86 N.Y.2d 845, 658 N.E.2d 233 (1995); *Terry v. State*, 56 P.3d 636, 642 (Wyo. 2002) (“a motion for new trial on the grounds of newly discovered evidence shall not be granted where the evidence is solely to impeach a witness”).

Further, as this Court and other courts have long recognized, there is a fundamental difference between reversing a conviction and granting a post-trial motion for a new trial. “[A] motion for a new trial on the ground of newly discovered evidence is not favored by the courts and is viewed with great caution.” *Terry*, 56 P.3d at 639. Therefore, “courts have found it necessary to apply somewhat stringent rules, to prevent the almost endless mischief which a different course would produce.” *State v. Carr*, 21 N.H. 166, 171 (1850). “Careless preparation, tampering with witnesses, repeated and fruitless trial, and immense

expense in litigation, would be a few of the many evils attendant upon a loose practice in this respect.” *Id.*

The defendant has failed to show how the result of trial would be different if Martin’s career had been further explored. The defendant is seeking to retry the case to attempt to elicit further testimony about Martin’s nude modeling to infer that J.P. testimony was fabricated, dishonest, or incorrect. The jury was made well aware of Martin’s career. The jury already knew of potential alternative sources of J.P.’s sexual knowledge. They were not persuasive arguments. The jury also knew of the delayed disclosure and lack of physical evidence. The testimony of the witnesses, including J.P. and the defendant, was enough for the jury to convict.

**D. No Remand Is Required.**

If the Court is not inclined to grant a new trial, the defendant seeks to have this matter remanded for further proceedings in the trial court. The goal of the defendant would be to ask the victim, J.P., and Martin about Martin’s career. The basis for this request is predicated on Martin committing a fraud. Martin did not attempt to perpetuate a fraud upon the court as the defense alleges. The facts do not tell that story. Martin did not testify dishonestly or deliberately withhold evidence. The record shows that Martin answered the questions posed to her. Further, there is no evidence that J.P. was around or saw any pornography. If she did, it still would not account for her description of the events, which are unlike the information provided in the appendix. APP 15-65. This matter should not be

remanded to the trial court for a further evidentiary hearing because there is no legal or factual basis to do so.

CONCLUSION

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

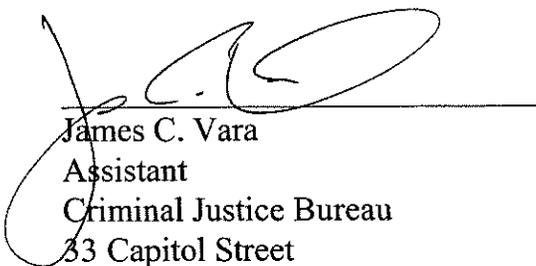
The State requests 5 minutes oral argument before a 3JX panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Michael A. Delaney  
Attorney General

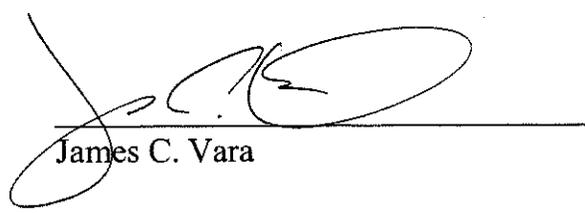


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January 19, 2010

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Lisa L. Wolford, Assistant Appellate Defender, counsel of record.



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