THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2009-0474

State of New Hampshire

v.

Dennis Peters

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough County Superior Court / South

BRIEF FOR THE DEFENDANT

Stephanie Hausman
Assistant Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
NH Bar #15337
(603) 228-9218
(15 Minutes Oral Argument)

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QUESTION PRESENTED

Whether the court erred in failing to grant Peters' request for a mistrial and in giving a coercive deadlocked-jury instruction.

Issue preserved by defense motion and objection. T 239-40.**

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*Citations to the record are as follows:
"App." designates the Appendix to this brief;
"T" designates the consecutively-paginated transcript of the three day jury trial held on April 7-9, 2009.

STATEMENT OF THE CASE

Dennis Peters was charged with two counts of aggravated felonious sexual assault, three misdemeanor sexual assault charges, and six simple assault charges that were alleged to have occurred on May 31, 2008. T 11-16. After a jury trial in the Hillsborough County Superior Court - South, the jury returned guilty verdicts on one aggravated felonious sexual assault charge (08-S-1399) and one sexual assault charge (08-S-1401). T 241-46. Peters was acquitted of the remaining charges. Id. The court (Barry, J.) sentenced Peters to ten to twenty years in the state prison and a concurrent twelve month sentence. App. A1-2.

STATEMENT OF THE FACTS

Samantha Kulingoski testified that she took a walk through downtown Nashua on the evening of Saturday, May 31, 2008. T 30-31; 151-52. As she walked on Main Street, a man, later identified as Dennis Peters, said "hi" to her. T 31; 56. Kulingoski stopped, said "hi," and then continued walking. T 31-32. Peters started walking with Kulingoski and talked to her about "how the city has different sounds" and "poetry." T 32; 34. Kulingoski responded to Peters in order to be polite. T 34. There were numerous people out that evening. T 68; 151-52.

As they waited for a traffic light to change, Peters put his arm around Kulingoski but then removed it. T 35-36. Kulingoski became alarmed about Peters' behavior and decided to go to her grandmother's house, even though her own home was closer. T 36; 69. The quickest way to her grandmother's house involved crossing a footbridge. T 37. As she cut through a parking lot to get to the footbridge, Peters again put his arm around Kulingoski. Id. At the beginning of the footbridge, Peters got in front of Kulingoski and kissed her. T 37-38. Kulingoski testified that she did not say anything to Peters about the kiss and they continued over the footbridge, still conversing. T 38-39; but see, T 61 (Kulingoski later testified that she told Peters to stop kissing her and that he did so).

At the end of the footbridge, Peters "nudged" Kulingoski over to the right and, pressing down on her shoulders, sat her on

a rock. 39-40; see also, T 72 (Kulingoski's statement to police that Peters "gently pulled me down."). Peters removed Kulingoski's glasses. T 41. Peters began kissing her again, he lifted her shirt and bra and kissed her breasts, and he lowered her pants and underwear to her ankles, digitally penetrated her, and kissed her vagina. T 41-43; 45. Kulingoski testified that she did not express any objection to these acts, but she did tell Peters that she was menstruating. T 40-41; 43; 45. She also moved Peters' hand "a little." T 45

Peters then carried Kulingoski "like a baby" up a hill and through a hole in a fence. T 45; 47. Her pants were still at her ankles and her shirt and bra were still raised up over her breasts. T 45. At a spot up the hill, Peters continued to touch her sexually. This area was close to a "huge" senior center with a large parking lot that was lit that evening. T 95-96. Kulingoski estimated that Peters digitally penetrated her for "about a half an hour," during which time she did not call for help. T 48; 73. Kulingoski testified that at some point she said "stop, enough" and moved Peters' hand away. T 64.

Finally, Kulingoski got up, rearranged her clothes, and told Peters she had to get her glasses. T 48. She walked back down the hill, retrieved her glasses at the rock, and then crossed back over the footbridge. Id. Back on the street, she flagged down an officer, to whom she revealed she had been "molested." T 48-49; 87.

Kulingoski described Peters and another officer located him near another entrance to the path. T 49; 88; 103. Peters denied that he had been on any other portion of the path, including the area near the scene of the incident. T 105. The police brought Kulingoski to Peters' location in a cruiser and she identified him as her assailant. T 51-52

Peters agreed to go to the police station for questioning. T 108; 149. He was polite, agreeable and cooperative. T 112; 149; 158. Peters described his encounter with Kulingoski as consensual. T 134; 179-80. Peters told the police that he was approached by Kulingoski. T 159. He was excited by their meeting because she looked like "Goddess Tatiana," a Thai woman Peters saw in his fantasies. T 159; 177. Peters described Kulingoski as "magical" and "near-perfect" and indicated that they had been able to communicate without words. T 177-78. He wanted to take her to a "perfect place," "where the water rushed and the trees ... had leaves on them green as emeralds." T 159.

Once they crossed the footbridge, Peters carried her up the hill "as a groom would carry his bride across the threshold on their wedding night." T 160. Peters described the same sexual contact that Kulingoski had described and also similarly described the end of their encounter. T 160-61. Peters said that he waited for her to return but then left the area. T 161.

The trial occurred on April 7 and 8, 2009. T 1; 141. The evidentiary phase of trial, including a view, arguments of

counsel, and the instructions, took approximately six and one half hours over those two days. See, T 3-11 (jury present in courtroom shortly after 9:50 a.m. on April 7); T 20-22 (jury not in courtroom from shortly before 10:15 a.m. until 11:18 a.m. while on view); T 61-63 (lunch break over one hour); T 134-40 (evidence concluded shortly before 3:25 p.m. on April 7); T 143-45 (evidence resumed shortly after 11:19 a.m. on April 8); T 183-89 (evidence concluded shortly before 12:14 p.m.); T 196-288 (closing arguments and jury instructions occurred from 1:52 to 2:47 p.m. on April 8). The jury then deliberated for approximately six and one half hours. See T 228-29 (jury excused to begin deliberations shortly before 2:47 p.m. on April 8),** T 235-36 (jury returned for deliberations at approximately 9:00 a.m. on April 9); App. A3 (jury note at 2:25 p.m. on April 9); T 237 (jury returned to courtroom at 2:48 p.m. on April 9). After thus spending as long in deliberation as they had spent on the rest of the case, the jury indicated that it was unable to come to an agreement on docket numbers 08-S-1399, 1401-03, 1405, and 1407. App. A3 ("We cannot come to an agreement on these, what do we do.").

After re-convening the jury in the courtroom, the court asked the foreperson if she felt "at this point that [the jury

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**The record does not reflect how long the jury deliberated on April 8, though it was likely at least until the court closed at 4 p.m. See, e.g., http://www.courts.state.nh.us/courtlocations/hillsupedir.htm#Hillsborough%20County%20Superior%20Court%20South (Hillsborough South Superior Court open until 4 p.m.).

was] hopelessly deadlocked, or [does she] feel that [the jury] might be able to reach a unanimous agreement with further deliberation?" T 237. The foreperson replied, "Your Honor, I feel like we're at a deadlock." Id. The court responded:

> Pardon me? Well, before we make any final determination, I want to instruct you, as I indicated earlier,*** your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto, and your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view towards reaching an agreement if you can do so without violence to individual judgment.
>
> Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender [your honest] conviction as to the weight or affect [sic] of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

***The Court had not given Model Jury Instruction 1.29 during its general jury instructions. See, App. A6 (Model Jury Instruction 1.29). The Court had addressed these issues in its general jury instructions in this way:

> Your verdict must be unanimous. All 12 jurors must agree in your verdict. Any verdict you reach must be the verdict of each of you individually and all of you collectively.... I suggest to you that deliberation is a three-stage process. Each juror must first think for himself or herself about the evidence and about the law. Each juror should listen carefully to what your fellow jurors have to say about the evidence and about the law, and then each juror should speak up and let your fellow jurors know what your opinions and your views and your positions are on the evidence and the law.

T 224-25.

> Please remember that you are not partisans. You are judges, the judges of the facts, and your sole interest is to ascertain the truth from the evidence in the case. And you should also understand that in the event you are unable to render a unanimous verdict, the Court will declare a mistrial, which will involve the case being retried at a later date before a different jury panel. There is no reason to believe that a new jury after a retrial will have any evidence different from that which has been presented to you, or that a new jury will in any manner be able to better decide the case than you.
>
> Therefore, I'm going to ask you to continue your deliberations. You must use your best efforts to determine whether the State has met its burden to prove the elements of the crimes with which the defendant stands charged beyond a reasonable doubt, and keep in mind that the burden of proof rests solely with the State.
>
> And with that, I'd ask you to return to the deliberation room if you can, and if you can't reach a unanimous verdict within a short period of time, let the bailiff know. Thank you.

T 237-39.

Defense counsel moved for a mistrial and objected to any deadlocked-jury instruction prior to the court's interaction with the jury. T 239. This motion and objection were put on the record after the jury was excused to continue deliberating. Id. Peters moved for a mistrial based on the jury's representation that it was deadlocked. Id. He argued that a deadlocked-jury instruction was coercive, violated his right to due process, and, if given at all, should include a reaffirmation of the presumption of innocence. T 240. The court, based on the instruction it gave, T 237-39, implicitly denied the motion for

a mistrial and overruled Peters' objection to the deadlocked-jury charge.

The jury deliberated for approximately one and a half more hours. T 239-40 (jury excused shortly before 2:54 p.m. and returned at 4:37 p.m.). It announced verdicts of not guilty on the five charges upon which it had not previously been deadlocked. App. A3; T 241-46. The jury found Peters guilty of two of the charges upon which it had previously been deadlocked and acquitted him of the remaining four charges. T 241-46; App. A3.

SUMMARY OF THE ARGUMENT

The trial court erred in refusing to grant a mistrial when the jury indicated that it was hopelessly deadlocked and that no further deliberation could produce an agreement. Any instruction at that point coerced the jury into reaching a unanimous verdict. Furthermore, the instruction given exerted coercive pressure on the jury in violation of Peters' due process rights.

I. THE TRIAL COURT ERRED IN DENYING PETERS' MOTION FOR A MISTRIAL AND IN GIVING A COERCIVE DEADLOCKED-JURY INSTRUCTION.

When a jury indicates to the court that it is having trouble reaching a verdict, the court must decide whether to declare a mistrial or encourage continued deliberation. The trial court "enjoys broad discretion" in deciding which path to choose. State v. Alexander, 143 N.H. 216, 224 (1998) (citation omitted). In exercising that discretion, a court must take care, "lest undue judicial reluctance to discharge a hung jury force the jurors into deliberating so long that their verdict would more likely reflect pressures inherent in the situation than honest unanimity in finding the facts." State v. Hartford, 132 N.H. 580, 584 (1989) (quotation and citation omitted).

A. The court erred in failing to grant a mistrial.

A court should consider several factors in deciding whether to declare a mistrial or give a deadlock instruction:

> (1) a timely objection by the defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which the judge has had with the jury, and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict.

Arnold v. McCarthy, 566 F.2d 1377, 1386-87 (9th Cir. 1978) (citations omitted) (cited in Hartford, 132 N.H. at 585).

"The most critical factor is the jury's own statement that it was unable to reach a verdict.... Upon receiving a communication from the jury stating that it cannot agree, the trial court must question the jury to determine independently whether further deliberations might overcome the deadlock." Arnold, 566 F.2d at 1387 (citations omitted). A mistrial is appropriate if the court has "satisfied [itself] that the foreman's report of a deadlock was accurate, by questioning him in open court and in the presence of the other jurors, none of whom indicated disagreement with the foreman's statement." Hartford, 132 N.H. at 585.

If an instruction is given after the jury has indicated that it cannot reach an agreement, "the trial court act[s] improperly in proceeding to influence the jury to come to a verdict." State v. Flint, 114 Idaho 806, 810 (1988). An instruction that "persuade[s] [the jury] to continue deliberating when they otherwise would not" exerts coercive pressure on the jury. State v. Chapman, 149 N.H. 753, 757 (2003). This is so because such an instruction "may induce jurors to accommodate a verdict which they would not otherwise support." Arnold, 566 F.2d at 1387.

If a jury indicates only the possibility that it may be deadlocked or seeks further guidance from the court, a mistrial is not required. This Court has approved a deadlock charge after the jury has indicated, "[w]e appear to be deadlocked," Alexander, 143 N.H. at 223, and when the jury has indicated it

was deadlocked but requested further guidance from the court. State v. Silva, 142 N.H. 269, 273 (1997). However, this Court has long recognized the hazard in providing supplemental instructions to the jury when it has not requested such guidance. Ahearn v. Mann, 60 N.H. 472, 474-75 (1881) (new trial warranted when supplemental instructions were not in response to the jury's "application for direction upon any matter of law" and "[t]he instructions were a new charge, and without the request of the jury.").

Here, the jury informed the court that it was deadlocked. App. A3. This conclusion was reiterated by the foreperson in open court in the presence of the rest of the jurors. T 237. The foreperson did not indicate that further deliberation or other guidance from the court would help it reach a verdict. Id. Having informed the court of its impasse, the court's instruction to continue deliberations communicated to the jury that a failure to reach a verdict was unacceptable. The court improperly coerced the jury into returning a verdict that reflected this pressure and did not reflect honest unanimity.

When considering the length of deliberations, if "the length of deliberation [is] approaching the length of the trial," a mistrial may be warranted. Hartford, 132 N.H. at 585. Here, the jury had been deliberating as long as the trial had lasted. The jury had already sought the court's guidance on the law. App. A4 (earlier jury question). Clearly, the jury was taking its

obligation to deliberate seriously. However, this effort had not produced a verdict. Peters timely moved for a mistrial. The court erred in failing at that point to grant that request.

B. The court erred in giving a coercive deadlock instruction.

Even when the court may give a deadlocked-jury charge, such an instruction "cannot be of a coercive nature that would improperly sway a jury to reach a unanimous verdict." Alexander, 143 N.H. at 224 (quotation and citation omitted). Rather, the instruction "must accurately state the law, and [this Court reviews] a challenged jury instruction in the context of the court's entire charge." Id. (quotation and citation omitted). A coercive instruction violates a defendant's right to due process and to a fair and impartial trial because it interferes with the jury's deliberations. See, e.g., Flint, 114 Idaho at 810.

The Court has adopted a four-part test to determine whether an instruction is coercive. Alexander, 143 N.H. at 225. The Court will review:

> (1) the content of the instruction; (2) the length of deliberations after the challenged charge; (3) the total length of deliberations; and (4) any indicia in the record of coercion or pressure upon the jury.... The last factor encompasses, *inter alia*: whether the judge knows the numerical division of the jurors' split before giving the instruction; the time the jury has deliberated without a break; the frustration level of the jury for failing to reach a verdict; and the jury's general physical condition.

Id. (citations omitted).

This Court has endorsed Standard 15-4 of the American Bar Association Standards for Criminal Justice, *Trial by Jury*. Hartford, 132 N.H. at 582; State v. Jordan, 130 N.H. 48, 50 (1987). This standard suggests that the deliberation instruction be given *before deliberation begins*. See, e.g., State v. Pollick, 448 Mich. 376, 381-82 (1995). Giving the instruction before deliberations begin may forestall a perceived deadlock and avoids any coercion of a jury that communicates it is deadlocked. Id. at 385.

Some courts have held that any instruction after a jury has indicated it is deadlocked "is not consistent with the orderly administration of criminal justice." Flint, 114 Idaho at 812; see also, State v. Thomas, 86 Ariz. 161, 166 (1959) ("We are convinced that the evils [of a deadlocked-jury instruction] far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court."). Instead of seeing a hung jury as a judicial failure, these courts recognize that such a result indicates that the justice system is working.

> Some cases will inevitably present close factual questions on which twelve people cannot agree. Where such is the case the unanimous verdict requirement and the ultimate acceptance of the jury's failure to reach accord protect the accused from conviction on the basis of evidence so close as to permit real and reasonable differences of opinion. In our system this is a desirable result. Despite the fact that each trial which ends in a hung jury may appear to be an exercise in futility and may create understandable judicial frustration, it should be remembered that a hung jury is only

> undesirable where the hanging jurors simply refuse to join in conscientious collective deliberation in an honest effort to reach a verdict. There simply is no evidence that any significant number of American jurors approach their task in such a manner. What evidence there is all points the other way.

Flint, 114 Idaho at 812-13 (quotation and citation omitted).

Other courts have confronted the problem of deadlocked juries by requiring that all instructions, including the instruction on deliberations, be reread to the jury after an indication of deadlock. Bailey v. State, 669 N.E.2d 972, 975 (Ind. 1996). "Instructions given to the jury should be considered and construed as an entirety." Id. In the absence of information about the source of the jury's disagreement, the deliberation instruction is "no more or less important to the jury than the matters set forth in the other final instructions." Id. "Without knowing the source of the infection, rereading all the instructions provides a broad spectrum antibiotic for whatever has caused the deadlock. We consider it time well spent." Id.

Even courts that allow use of a specific deadlock instruction when the jury has indicated an impasse recognize such an instruction must be carefully crafted. "After the jury is deadlocked, it is particularly vulnerable to suggestions as to how it should proceed. The evidence, law and arguments have already failed to convince the jurors what the verdict should be." State v. Campbell, 294 N.W.2d

803, 813 (Iowa 1980); see also, Pollick, 448 Mich. at 385 ("It requires no special insight to see that there is a greater coercive potential when an instruction is given to a jury that already believes itself deadlocked.").

This Court has recommended that trial courts give a uniform instruction when "advert[ing] to the possibility of unnecessary deadlock." Jordan, 130 N.H. at 49. The recommended instruction, id. at 50, is nearly identical to Model Jury Instruction 1.29. App. A6. The instruction given here contained the recommended instruction but also contained additional language that has not been recommended, including instructing the jury that a hung jury will result in a retrial. T 237-39; see also App. A5-7 (reproducing the Jordan recommended jury instruction, Model Jury Instruction 1.29, and the instruction given here). This Court has cautioned trial courts "to exercise [their] broad discretion carefully in fashioning a response to a jury's indication of deadlock, especially when crafting its own language independent of the model established in Jordan." Alexander, 143 N.H. at 227. Even if the trial court has given the recommended instruction as part of its general jury instructions, coercion may result from an improperly worded instruction given after an indication of jury deadlock. Id. at 226.

Many courts have considered the effect of language similar to that given here - that a hung jury will necessarily result in retrial. This Court has long held that "[t]he consequences of

verdicts or disagreements are not proper subjects to be weighed by the jury in reaching conclusions." Ahearn, 60 N.H. at 475. This Court considered similar language in Silva and reaffirmed that trial courts should only give the instruction approved in Jordan. 142 N.H. at 274. However, in Silva, the Court found that, under the circumstances of that case, the language was not of such a coercive nature as to improperly sway a jury to reach a unanimous verdict. Id.

Other courts have found it improper to instruct the jury that a retrial is a necessary result of a hung jury, because such a statement is inaccurate. "Confronted with a mistrial, the [State] retain[s] the authority to request dismissal of the action.... Moreover, this option is frequently exercised.... Thus the inconclusive judgment of a hung jury may well stand as the final word on the issue of a defendant's guilt." People v. Gainer, 19 Cal. 3d 835, 852 (1977). See also, Burchette v. State, 278 Ga. 1, 3 (2004); State v. Fajardo, 67 Haw. 593, 600 (1985); Flint, 114 Idaho at 812; Campbell, 294 N.W.2d at 810 (Iowa); State v. Turner, 34 Kan. App. 2d 131 135 (2005); State v. Nicholson, 315 So. 2d 639, 642 (La. 1975); Commonwealth v. Rodriguez, 364 Mass. 87, 99 (1973); State v. Quint, 448 A.2d 1353, 1356 (Me. 1982); State v. Martin, 297 Minn. 359, 366-69 (1973); State v. Lamb, 44 N.C. App. 251, 260 (1979); U.S. v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971).

This case is distinguishable from Silva. Not only did the court instruct the jury that a hung jury would necessarily result in a retrial, but the other circumstances reveal that the court's instruction was coercive. Here, the court gave the jury an instruction that had not been part of its original charge. The court did not reiterate all of the instructions, even though it did not know the source of the jury's disagreement. The court failed to reiterate the presumption of innocence, an important consideration when the jury is sent back to reconcile its differences in opinion on Peters' guilt, as Peters had requested. T 240.

While the instruction did include the recommended language, the court went further and added other language. The court told the jury that if they were unable to reach a verdict, the case:

> will ... [be] retried at a later date before a different jury panel. There is no reason to believe that a new jury after a retrial will have any evidence different from that which has been presented to you, or that a new jury will in any manner be able to better decide the case than you.

T 238. This instruction was an erroneous statement of fact and was not a proper topic for the jury's consideration. The court's instruction evidences a concern over the waste of time and resources attendant on a retrial. The jury's own concern about the waste inherent in a retrial or about the court's preference that no retrial take place may have coerced the jury into a

verdict that represented a bargain or surrender rather than a true consensus.

The timing of the instruction also indicates that the verdict was coerced. This Court has found that a total length of deliberations of twelve hours after a three and one-half day trial revealed a lack of coercion. Alexander, 143 N.H. at 226-27. The Court also found that continued deliberations of five and one-half hours after a deadlock charge indicates that the instruction did not coerce the single guilty verdict. Id. at 226. In addition, further questioning from the jury "reinforce[d] the impression that the jury continued serious deliberations well after the allegedly coercive supplemental charge at issue." Id.

Here, the jury had already deliberated for as long as the trial had lasted, six and one-half hours. The jury had previously sent out a question about the law. After the deadlocked-jury charge, the jury returned with a verdict in under two hours, with no further questions for the court. This was a short amount of time to resolve the remaining six charges. That the jury came back with a split verdict indicates that it acted quickly to come to a bargain rather than a consensus. This quick action, after six and one-half hours had failed to produce a verdict, indicates that the verdict was coerced by the court's actions.

The split verdict also indicates that the verdict may have been the result of coercion. A split verdict may suggest a "compromise induced by the so-called 'dynamite charge.'" Martin, 297 Minn. at 363. At the time it announced its deadlock, the jury had already decided to acquit Peters of five of the eleven charges. Being forced to return to deliberations after reaching an impasse, the jury may have reached a verdict through compromise rather than through an honest unanimity.

C. Conclusion

All of the factors indicate that the jury was coerced into reaching a verdict. The jury deliberated earnestly, reaching an agreement on half of the charges. However, a lengthy deliberation and guidance from the court was unable to produce a verdict on the remaining charges. The jury plainly communicated that it was unable to reach a verdict and that no further time or guidance would produce a verdict. The judge not only required the jury to continue their deliberations, but it gave an instruction that a failure to reach a verdict would result in a retrial, which the court implied was a waste of time and resources. The instruction did not conform to the recommendations of this Court and did not reiterate other points of law that may have been the source of the jury's disagreement, such as the presumption of innocence, as requested by Peters. After the instruction, the jury quickly returned a split verdict.

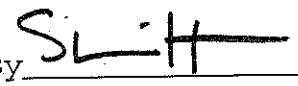
The court erred in failing to grant a mistrial and in giving this deadlocked-jury charge. This Court must reverse.

CONCLUSION

WHEREFORE, Mr. Peters respectfully requests that this Court vacate his conviction.

Undersigned counsel requests fifteen minutes of oral argument before a full panel of this Court.

Respectfully submitted,



By_____

Stephanie Hausman #15337
Assistant Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, this 15th day of December, 2009 to:

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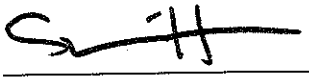

Stephanie Hausman

DATED: December 15, 2009