STATE OF NEW HAMPSHIRE 029170

MERRIMACK, S.S. SUPERIOR COURT

STATE OF NEW HAMPSHIRE SUPERIOR COURT

V.

2016 APR 5 PM 3 48

OWEN LABRIE

CASE NO.: 217-2014-CR-00617

DEFENDANT'S MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANT'S REQUEST FOR NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL

NOW COMES the Defendant, Owen Labrie, by and through counsel, and requests this Honorable Court grant him a new trial based upon violations of his constitutional right to have effective representation of counsel at his trial.

In support of his Motion for New Trial Based upon Ineffective Assistance of Counsel, Mr. Labrie submits the following Memorandum and states as follows:

FACTS AND PROCEDURAL HISTORY

1. Mr. Labrie was indicted for aggravated felonious sexual assault, certain uses of computer services prohibited, misdemeanor sexual assault, simple assault and endangering the welfare of a child. Mr. Labrie was represented at trial by J.W. Carney, Esq. and Sam Zaganjori, Esq. (hereafter collectively referred to as "trial counsel"). Undersigned counsel, Jaye Rancourt, Esq., served as local counsel. Prior to trial, trial counsel moved to have Attorney Rancourt's presence waived at trial. The Court granted this request over Attorney Rancourt' s expressed concerns that she could not fulfill her obligations to Mr. Labrie and the Court should she be excused from trial.

2. Mr. Labrie's trial commenced on August 17, 2015. The evidence lasted for six days and ultimately came down to the conflicting accounts of C.P., the complaining witness, and Mr. Labrie. C.P., the complaining witness, accused Mr. Labrie of non-consensual, sexual assault. Mr. Labrie testified that he met with C.P. and there was heavy petting, fondling and "dry humping" but no sexual penetration of any sort. In addition to the testimony by C.P. and Mr. Labrie, evidence was introduced from many of Mr. Labrie' s former friends and classmates, many of whom testified that Mr. Labrie told them he had sexual intercourse with C.P. The State also presented forensic evidence that Mr. Labrie's DNA was found on C.P.'s underwear and that sperm/semen was located in C.P.'s underwear; there was no evidence, however, that sperm/semen was Mr. Labrie's.[1] There was conflicting testimony regarding whether any sexual penetration had occurred and whether any sexual intercourse which may have occurred was consensual.

3. One charge of endangering the welfare of a child was dismissed by the Court after the State's case was presented. After jury deliberation, the jury returned verdicts of not guilty on the counts of aggravated felonious sexual assault and simple assault. The jury returned verdicts of guilty on the counts of misdemeanor sexual assault, the remaining charge of endangering the welfare of a child, and the felony charge of certain uses of computer services prohibited.

LEGAL ARGUMENT

4. Mr. Labrie was denied his constitutional right to effective assistance of counsel pursuant to Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the Federal Constitution. "The State and Federal Constitutions 'guarantee a

[1] There was evidence that a stain was noted on C.P.'s underwear. At least a portion of the stain was semen. A DNA analysis indicated the presence of Mr. Labrie's DNA, however, the DNA sample attributable to semen/sperm could not be said to have included Mr. Labrie because the DNA of three or more individuals was noted. TT. Day 5, pp. 809-810.

criminal defendant reasonably competent assistance of counsel.'" State v. Thompson, 161 N.H. 507, 528 (2011); (citing State v. Brown, 160 N.H. 408, 412 (2010)); see also Strickland v. Washington, 466 U.S. 668, 684 (1984). "To prevail upon such a claim, a defendant must show, 'first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case.'" Id. (citing Brown, 160 N.H. at 412). "To meet the first prong of this test, the defendant 'must show that counsel's representation fell below an objective standard of reasonableness.'" Id. (citing Strickland, 466 U.S. at 688). "To meet the second prong, the defendant 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (citing Strickland, 466 U.S. at 694).

5. The New Hampshire Supreme Court has held that if the defendant can show that trial counsel "failed to subject the prosecution's case to meaningful adversarial testing," the Court will presume prejudice. State v. Paulsen, 143 N.H. 447, 455 (1999); see also State v. Anaya, 134 N.H. 346 (1991).

FAILURE TO CHALLENGE FELONY- CERTAIN USES OF COMPUTER SERVICES PROHIBITED

6. Trial counsel failed to subject the State's case on the felony charge of certain uses of computer services prohibited to any meaningful adversarial testing. This failure resulted in trial counsel providing ineffective assistance of counsel and a violation of Mr. Labrie's constitutional rights afforded by the New Hampshire and the Federal Constitutions.

7. Mr. Labrie was indicted on August 14, 2014 and charged with the crime of certain uses of computer services prohibited (hereinafter referred to as "Computer Offense"). Under this indictment, the State alleged the following:

1. Owen Labrie did utilize a computer on-line service and/or internet service to seduce, solicit, lure or entice a child under the age of 16 (female juvenile D.O.B. 10/24/98), in order to commit an offense under RSA 632-A against her, relative to sexual assault and/or related offenses;
2. Owen Labrie committed said act utilizing St. Paul's School e-mail and/or Facebook; and
3. Owen Labrie committed this offense knowingly.

Mr. Labrie had always stood accused of this very serious offense, a Class B Felony, that carried the possibility of a prison sentence and would subject Mr. Labrie to life-time registration as a sexual offender if convicted. Despite these very serious consequences, trial counsel for Mr. Labrie failed to address and/or challenge this Computer Offense through either pre-trial litigation, by confrontation of the evidence at trial, by making a motion to dismiss this charge, and by failing to challenge the jury instruction and/or application of this charge to the facts of this case. Prejudice to Mr. Labrie is to be presumed based upon these facts. See Paulsen, 143 N.H. at 455; Anaya, 134 N.H. at 346.

8. Trial counsel has admitted that they failed to subject the Computer Offense to any meaningful adversarial testing, arguing that the "dilemma did not present itself" until the verdict was rendered. See Defendant's Reply to State's Objection to Motion to Set Aside Verdict, ¶6. Trial counsel essentially argued that they did not believe the Computer Offense could stand if Mr. Labrie was found not guilty on the aggravated felonious sexual assault charges. Presumably, the trial strategy was to challenge the aggravated felonious sexual assault charges, assuming that the Computer Offense would thereby be defeated. This was objectively unreasonable. This

rationale and understanding was fundamentally flawed and trial counsel's failure to challenge the Computer Offense resulted in a miscarriage of justice for Mr. Labrie.

1. Failure to Challenge Application of the Computer Offense Pre-Trial

9. It is undisputed that trial counsel failed to challenge the Computer Offense pre-trial. No constitutional challenges were made prior to trial. Trial counsel did not challenge the statute facially or as applied to the facts of this case on First Amendment grounds; nor did it challenge the statute on dormant commerce clause or due process grounds.

10. Only after trial and after conviction did trial counsel attempt to challenge the Computer Offense, arguing that the application of the Computer Offense to the facts of this case was inconsistent with the overall purpose of the criminal code and arguing that the punishment was violative of the Eighth Amendment. Pre-trial, no motions were filed to challenge the Computer Offense based upon legislative intent, which was argued by trial counsel only after Mr. Labrie' s conviction. In ruling upon trial counsel's challenge to this offense, post-conviction, the trial court ruled the challenge to be untimely. See Order dated October 20, 2015.

2. Failure to Request Appropriate Jury Instructions.

11. Trial counsel further rendered ineffective assistance by failing to request a jury instruction concerning the proper construction of the Computer Offense. First, trial counsel should have requested an instruction that, to establish a violation of RSA 649-B:4, the state must prove that the defendant made use of the special characteristics of on-line services – for example, the ability to communicate with strangers while concealing one's identity – in order to initiate and sustain communication with a child for purposes of inveigling the child to commit a sex crime. Second, at a minimum, trial counsel should have requested an instruction informing the

jury that, if it were to acquit Mr. Labrie of the aggravated felonious sexual assault charges, it then must also acquit Mr. Labrie of the Computer Offense charge.

12. The Computer Offense statute, RSA 649-B:4, prohibits individuals from "knowingly utiliz[ing] a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child . . . to commit" one of an enumerated set of sexual offenses. The language and structure of the statute make clear that, for the statute to apply, the state must prove that the defendant took advantage of – that is, "utilized" – the special characteristics of internet services to "seduce, solicit, lure, or entice" a child.

13. The internet and other electronic communications services are distinct from other, more conventional communication medium – such as telephonic or face-to-face communications – in that they provide users with the ability to initiate and sustain communications with a large number of strangers, all while concealing one's identity under the cloak of anonymity. In enacting RSA 649-B:4, the legislature acknowledged the unique and potentially dangerous characteristics of such communications; the legislative history of RSA 649-B:4 confirms that the purpose of the statute was thus to prohibit those predatory and exploitative uses of the internet and other anonymous electronic communications services. See HB1651-FN, Committee Notes, Oral Statement of Rep. Cardin (discussing application of statute to pedophiles who use the internet to reach minors). Accordingly, it is not the use of the internet and other electronic communications services – standing alone – that implicates the concern animating the statute. Instead, the legislature intended to target the use of such communications services to the extent such uses take advantage of or otherwise capitalize upon the special characteristics that distinguish a computer-based communication from more traditional modes.

14. For this reason, simply using the internet to communicate with an individual with whom one already has a relationship, without concealing one's true identity, does not implicate the purpose of the statute because it does not "utilize" the special and uniquely dangerous characteristics of communications sent through anonymous electronic communications services. For example, when a high school student sends a message to a fellow student with whom he is already acquainted using Facebook or the school's e-mail service, that communication may be more convenient than passing handwritten notes or leaving telephone messages, but the computer does not meaningfully enable the first student to "entice" the second student in a way that is different from other means of communication. This type of internet-based communication between known acquaintances thus has none of the hallmarks of the types of anonymous and deceptive internet-based communications at which the statute is directed – namely, the targeting of vulnerable strangers through misrepresentations concerning one's identity. Thus, although the first student may be said to have used internet-based communication as a means to contact the second student, it cannot fairly be said that the first student utilized, or took advantage of, any of the distinct and potentially dangerous characteristics of internet-based communications.

15. By contrast, when a defendant takes advantage of the ability to communicate with strangers over the internet to make contact with an unknown child, or when an adult takes advantage of the anonymity of the internet to pose as a teenager, that defendant has availed him or herself of the special characteristics of internet-based communications. In such circumstances, the ability to utilize these unique characteristics serves as the but-for factor in "luring" a child to enable the defendant to commit a crime – the ability to communicate via

computer services permits the defendant to seduce, solicit, lure, or entice a child in a way that would not be possible using another, more conventional mode of communication.

16. Properly construing the statute in this manner, it is evident that, in order to sustain a conviction under RSA 649-B:4, the state must prove that the defendant made use of one of the special characteristics of internet-based communications in order to initiate and sustain communication with a child – in a manner not achievable through use of a conventional communication medium – for the purposes of committing a sexual offense. Trial counsel rendered ineffective assistance by failing to hold the state to this burden. Specifically, trial counsel never requested that the jury be instructed concerning the meaning of "utilizing" internet-based communications – that is, availing oneself of the unique characteristics of communications made using computer on-line or internet services. Instead, the jury was simply instructed that the state must prove "the Defendant utilized a computer online service, and/or internet service to seduce, solicit, lure, or entice another person to engage in an act of sexual penetration with her." TT. Day 7, p. 1109.

17. Had the jury been properly instructed, it could not have convicted Mr. Labrie of the Computer Offense because it is evident that Mr. Labrie did not avail himself of the use of a computer to entice C.P. in a way that would not be possible using other conventional medium. For example, Mr. Labrie could not have availed himself of the anonymity characteristic of internet-based communications utilized to "lure" and "entice" a child because Mr. Labrie was known as an acquaintance to C.P. before he initiated the internet-based communications at issue. See *e.g.*, TT. Day 1, p. 75 (testimony of C.P. indicating that she was "familiar with [Mr. Labrie] before [she] received [his] senior salute," and that she considered him a friend "by association"); TT. Day 4, p. 488 (testimony of C.P.'s friend, Owen M., stating that Mr. Labrie and C.P. "knew of each other and were friendly with each other"); TT. Day 6, p. 866-67 (testimony of Mr. Labrie

indicating that he met C.P. in August before his senior year at St. Paul's, and that he and C.P. had a "friendly" and "increasingly . . . flirty" relationship throughout that school year). In addition, the evidence showed that the correspondence between Mr. Labrie and C.P. leading up to the sexual encounter at issue was not limited to internet-based communications. See *e.g.*, TT. Day 6, p. 867-69 (testimony of Mr. Labrie stating that he and C.P. would "chat each other up" when they saw each other on campus, danced together at school dances, and took pictures with each other at parties and social events); TT. Day 2, p. 101-02 (testimony of C.P. indicating that Mr. Labrie had enlisted his friend, Owen M., to have an in-person conversation with C.P. encouraging her to accept Mr. Labrie's senior salute). This evidence establishes that the use of a computer was merely incidental to, and not the but-for factor in, soliciting, seducing, luring, or enticing C.P. to engage in sexual conduct.

18. Additionally, and at a minimum, trial counsel should have requested an instruction informing the jury that, if it were to acquit Mr. Labrie of the aggravated felonious sexual assault charges, it then must also acquit Mr. Labrie of the Computer Offense charge.

19. The State indicted Mr. Labrie for two sexual offenses involving non-consensual sex: (1) aggravated felonious assault under RSA 632-A:2 I (m) (relating to unconsented-to sexual penetration) and (2) aggravated felonious assault under RSA 632-A:2 I (i) (relating to sexual penetration accomplished by the element of surprise). None of the State's remaining charges against Mr. Labrie — all misdemeanors — required the State to prove that any sexual contact that occurred between Mr. Labrie and C.P. was non-consensual. Thus, a jury verdict finding Mr. Labrie guilty on any or all of the misdemeanor charges, but not guilty on the aggravated felonious assault charges, necessarily would have carried with it the finding that Mr. Labrie engaged in mutually voluntarily sexual intercourse with C.P. Because RSA 649-B:4

cannot properly be construed to reach computer use that is merely incidental to the commission of a sexual offense, such as when computer services are used to arrange consensual sexual encounters between known acquaintances, the jury should not have been permitted to find Mr. Labrie both not guilty of aggravated felonious assault and guilty of the Computer Offense.

20. The jury was not so charged. Instead, the jury was instructed only as to the elements of the Computer Offense charge, and not as to its proper construction or its interrelation with the other charges brought against Mr. Labrie. See TT. Day 7, pp. 1108-1110. Trial counsel's failure to request such a charge resulted in prejudice to Mr. Labrie. The jury ultimately determined that Mr. Labrie was not guilty of the aggravated felonious assault charges, thus indicating its finding that Mr. Labrie and C.P. engaged in mutually voluntary sexual intercourse. Nevertheless, the jury also returned a verdict of guilty as to the Computer Offense. Had the jury been properly instructed, such a result would not have been permitted.

3. Bill of Particulars

21. Trial counsel failed to request a bill of particulars in order to establish the act upon which the State was relying to establish the Computer Offense.

22. Under the State's theory of the Computer Offense and the jury instruction, the prosecution should have been required to prove that, at the time Mr. Labrie sent either e-mail and/or Facebook communication to C.P., his intent was to commit an offense under RSA 632-A against her. To contest the intent element effectively, trial counsel needed to understand upon which specific communication the State was relying to establish the required mental state and thereby the criminal offense. In its Objection to the Motion to Set Aside Verdict, the State reiterates certain evidence from the trial which includes Mr. Labrie's first e-mail communication to C.P., as well C.P.'s responses via e-mail. See State's Objection, p.5. The State then goes on

to refer to communication between Mr. Labrie and C.P. by means of Facebook. Id. at p.6. The State then refers to e-mail and/or Facebook communication between Mr. Labrie and other individuals related to, but not copied to, C.P. Id. at p.7. In communication with Malcolm Salovaara, Mr. Labrie indicates that he is slaying C.P., not having sexual intercourse. The State has never indicated which specific message and/or messages would support a conviction for the Computer Offense. A bill of particulars filed prior to trial would have confirmed upon which communications the State intended to rely to prove this charge.

23. Trial counsel failed to request a bill of particulars prior to trial. The State was thus able to rely upon all e-mail and/or Facebook communications in argument to the jury that the Computer Offense had occurred. This effectively relieved the State of its burden to establish Mr. Labrie's mental state at the time the relevant communication was sent.

24. The State's burden was to prove, beyond a reasonable doubt, that Mr. Labrie knowingly utilized a computer and/or internet service to seduce, solicit, lure or entice a child under the age of 16, with the intent to commit an offense under RSA 632-A. In order to sustain its burden, the State was required to prove that at the time a specific communication was sent, Mr. Labrie's intent was to seduce, solicit, lure or entice C.P. to engage in sexual penetration. See Jury Instruction, TT. Day 7, pp. 1109–10. Intent to seduce, solicit, lure or entice C.P. for the purposes of kissing, groping, and other activities not specifically made unlawful in RSA 632-A would have been insufficient. By failing to request a bill of particulars that would define the specific communication or communications at issue, trial counsel alleviated the State of its burden.

25. "The purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense *and to enable him to prepare an intelligent defense*." State v. Allison, 134 N.H. 550, 554, 595 (1991) (citing State v. Superior Court, 106 N.H. 228, 232 (1965)) (emphasis added). "[A] bill of particulars strictly limits the prosecution to proof within the area of the bill." Id. (citing United States v. Armco Steel Corp., 255 F. Supp. 841, 846 (S.D. Cal. 1966)); see State v. Boire, 124 N.H. 622, 624 (1984).

26. Because trial counsel failed to request a bill of particulars, there is no way to know whether the jury convicted Mr. Labrie based upon his first e-mail communication to C.P. or subsequent e-mail or Facebook communication. This is important for many reasons. First, the initial e-mail invitation sent by Mr. Labrie was rebuffed and/or refused by C.P. See Exhibit A (Trial Exhibit, 1). C.P. in fact reinitiated communication via e-mail whereby she accepted a subsequent invitation delivered to her in person by Owen M. Subsequent Facebook communication was made in response to C.P. reinitiating correspondence. Therefore, there are important factual distinctions to be drawn between the e-mail and Facebook communication, including questions regarding who initiated the communication (as it goes to the proof of soliciting, luring, and enticing) and the mental state at the time of the communication. None of these distinctions were drawn for the jury at the trial as no meaningful challenge was mounted against this charge.

4. Failure to Challenge Application of the Computer Offense During Trial

27. The State has argued, in objecting to Defendant's Motion to Set Aside Verdict as to the charge of Certain Uses of Computer Services Prohibited, that the Computer Offense occurred when Mr. Labrie communicated with C.P. via St. Paul's e-mail and/or Facebook. Trial counsel made no argument to the jury regarding this offense either in the opening statement,

closing argument, or through cross-examination of witnesses. Trial counsel did not challenge the sufficiency of the evidence and did not argue to the jury that the application of this Computer Offense, under these circumstances, should not apply (essentially a jury nullification argument).

a. Sufficiency of the Evidence

28. Trial counsel failed to challenge the sufficiency of the evidence as it related to the Computer Offense.

29. Assuming *arguendo* that the State was attempting to prove that the initial e-mail correspondence from Mr. Labrie formed the basis for the Computer Offense, there was insufficient evidence introduced to establish Mr. Labrie's intent at the time the e-mail was sent. For example, there was evidence that at the time the initial e-mail was sent by Mr. Labrie (e-mail commonly referred to as the "senior salute" by the State) his intention was to "hook-up" with C.P., not necessarily to have sexual intercourse. Evidence was produced at trial that a "senior salute" could mean anything from kissing to sexual activity (penetration). See TT. Day 4, p. 488-89; TT. Day 4, p. 577; TT. Day 4, p. 583. Mr. Labrie did communicate with Malcolm Salovaara at or near the time of the e-mail exchange with C.P. However, in that communication, Mr. Labrie states that he is "slaying" C.P. Numerous individuals testified that slaying could again mean anything from kissing to sexual intercourse. T. Day 4, pp. 489; 518-19. In interviews with the police, Owen M., who testified at trial, had repeatedly stated that he did not believe that Mr. Labrie intended to have sexual intercourse (*i.e.* commit an offense under RSA 632-A) at the time he sent the first e-mail to C.P. See Exhibit B. Specifically, Owen M. had stated to police that, "it had never been said to him that Owen was planning on having sex with [C.P.]." Id. In the transcript of Owen M.'s interview with the Concord Police Department he stated the following:

Owen M.: ...I don't think he, before they started making out, he had any intention of doing it, he just ended up siding on the spot, that that was...
DeAngelis: siding on the spot?
Owen M.: Like, oh, like I'll have sex with her.

Exhibit B. (bate stamped pages 566-67). While Owen M. may not have been permitted to testify regarding his beliefs, he certainly could have testified that there had been no previous conversations during which Mr. Labrie expressed his desire to have sexual intercourse with C.P.

30. Trial counsel did not ask Owen M. about these statements during cross-examination. This information would have provided a defense to the Computer Offense. If the jury believed the testimony of Owen M., and the State was relying upon the first e-mail sent by Mr. Labrie to establish the Computer Offense, this evidence could have established that Mr. Labrie did not possess the requisite intent at the time the e-mail was sent and therefore was not guilty of the Computer Offense. The State was relying upon a statement made five months prior to the e-mail being sent to establish intent. TT. Day 7, p. 1079. This position, as attenuated as it was, went unchallenged.

31. Henry Kremer testified to the following:

Q. It's fair to say that he never told you that he planned or expected to have sexual intercourse with her?
A. Correct.

TT. Day 4, p. 573. Although trial counsel asked Mr. Kremer the question, they never followed up on this line of questioning. They never relied upon that statement to argue to the jury that Mr. Labrie did not possess the requisite intent to commit the Computer Offense at the time any e-mail and/or Facebook communication had occurred.

32. Trial counsel never made any argument to the jury regarding this Computer Offense. They never argued in their opening statement, never cross-examined one witness regarding intent at the time e-mails or Facebook messages were sent, and never argued in the closing argument regarding application of the Computer Offense. Failure to challenge the sufficiency of the State's evidence was ineffective assistance of counsel.

33. Failure to challenge the sufficiency of the evidence at trial is ineffective assistance of counsel. See Testerman v. State, 907 A.2d 294 (Md. App. 2006). In Testerman, the Court of Special Appeals of Maryland held that the failure of the defendant's trial counsel to "point out that switching seats does not satisfy the legal definition of 'eluding' a police officer and thereby failing to preserve this issue for appellate review constituted ineffective assistance of counsel." Id. at 304. The Court of Special Appeals looked to trial counsel's failure to preserve the claim that the evidence did not support a conviction as grounds for so holding. Id. at 305. The Court stated:

> At the end of the State's case, appellant's counsel simply stated, without elaboration, 'Your Honor, I would make a motion as to all the charges and I would submit.' Nor did he seek to remedy the error, at the conclusion of his defense, when the court directly asked, 'Did you make your final motion yesterday?' His only response was: 'I would make the [same] motion at this time.' Because switching seats did not constitute 'eluding' a uniformed police officer by any other means, appellant's counsel should have moved with particularity for a judgment of acquittal on that charge. In not doing so, his actions 'fell below an objective standard of reasonableness' and fail the first Strickland prong.

Id. at 305. In this case, trial counsel made no arguments to dismiss to the Court, either at the conclusion of the State's case nor at the conclusion of the defendant's case. Further, trial counsel failed to argue the facts to the jury in any manner. Trial counsel's failure to subject the State's case to any meaningful adversarial testing was ineffective assistance of counsel. Failure to subject the State's case to meaningful adversarial testing is prejudicial.

34. Trial counsel failed to confront the State's case and subject it to meaningful adversarial testing based upon a flawed understanding of the law. A trial strategy based upon a fundamentally flawed understanding of the law is necessarily unreasonable.

b. Jury Nullification / Selective Prosecution

35. In the State of New Hampshire, a criminal defendant is entitled to present all proofs favorable at their trial and to argue jury nullification. See New Hampshire Constitution, Part I, Article 15; see also State v. Wentworth, 118 N.H. 832, 838-39 (1978). Ample evidence was available to trial counsel prior to trial that numerous other individuals, over the age of 18, had communicated with individuals under the age of 16, inviting them to intimate encounters, by means of the St. Paul's e-mail system and/or Facebook. The communication was similar to that relied upon to convict Mr. Labrie. In fact, individuals who the State put on the witness stand to testify in this matter had sent e-mails similar to that sent by Mr. Labrie to individuals under the age of 16, including C.P. Not only should trial counsel have introduced these e-mails to impeach the witnesses (as will be discussed later in this Memorandum), trial counsel should have introduced these e-mails to either challenge the State's theory on the applications of the Computer Offense under these circumstances or to set forth of a case of selective prosecution and thereby argue jury nullification to the jury. Trial counsel did neither.

36. Evidence produced to trial counsel prior to trial indicates that Andrew Thomson and Tucker Marchese both sent solicitations via e-mail and/or Facebook to C.P. See Exhibit C. Andrew Thomson and Tucker Marchese, both witnesses who testified against Mr. Labrie, had sent "senior salute" e-mails to underage girls inviting them to some type of encounter. Charges were not pursued against either of these individuals. This is not to say that the State had evidence that sexual encounters did occur (with the exception of an instance discussed in the

sealed Addendum), however such proof is not necessary based upon the theory of the State's case. The State has argued that the offense is committed at the time the communication is sent. Should the State argue lack of proof of intent for these other instances it is only due to the complete lack of investigation into these numerous other "senior salutes." There is no indication that the police pursued interviews with the parties involved to establish **if** any sexual activity had occurred. In fact, the police had information that not only the witnesses that testified against Mr. Labrie, but other boys at the St. Paul's School, had solicited both C.P. and other underage girls. See Exhibit D. The State's investigation into these activities was woefully lacking and at times, nonexistent. While the State interviewed every girl with whom there was the slightest rumor of sexual contact between them and Mr. Labrie, they did not pursue investigation of any other individuals with the same vigor.

37. The fact that the State did not pursue criminal charges and/or investigate any of the other boys other than Mr. Labrie may not have made out a case for selective prosecution, however, it did make out a case for jury nullification. In order to prove selective prosecution, Mr. Labrie would have had to establish that not only had similarly-situated individuals not been prosecuted (which was evident from the discovery), but also that Mr. Labrie was prosecuted based upon some clearly impermissible discriminatory grounds such as race, religion, etc. See State v. Monahan, 125 N.H. 17, 26 (1984). However, Mr. Labrie could have established that the State had grounds to investigate other individuals, many of whom testified against him, and chose not to do so. This would have been permissible under his Constitutional right to produce all proofs favorable and his right to argue jury nullification pursuant to NH RSA 519:23-a. Further, Mr. Labrie would have been permitted to question the witnesses against him on the basis of bias and motive to lie in exchange for the State's agreement not to pursue criminal charges

against them. See N.H. Const., Part I, Article 15; see also State v. Mayo, 125 N.H. 200, 203 (1984); State v. Wentworth, 118 N.H. 832, 838-39 (1978).

38. Further, the State's failure to pursue charges against the other boys or even to investigate further into their interactions with underage girls creates the impression that the State's theory on the application of the Computer Offense via e-mail and/or Facebook is inapplicable to communication between teenagers. If the State's theory on application of the Computer Offense is correct, then they should have, at the very least, investigated as to whether any violation of RSA 632-A had occurred as a result of any of the "senior salutes" sent to underage girls by eighteen year old boys at the St. Paul's School. The jury could have found that the State's failure to apply the statute to other teenage communication demonstrates its inapplicability under the circumstances presented to them. Failure to pursue this line of defense was prejudicial to Mr. Labrie.

FAILURE TO IMPEACH TRIAL WITNESSES

39. As stated in the introductory paragraphs, much of the evidence in this case came down to the jury making a credibility determination between Mr. Labrie and C.P. The State relied upon the testimony of other individuals to provide corroborating evidence. In so doing, the State called four of Mr. Labrie's former friends and classmates.

40. Andrew Thomson testified that he was Mr. Labrie' s roommate for three years while they attended St. Paul's School. TT. Day 4, p. 538. During his testimony, which at times was very damaging to Mr. Labrie, Mr. Thomson testified as follows:

> Q. And what was your relationship with [C.P.]?
> A. We know each other around campus. We would say hi to each other. She was good friends with my younger sister. They played volleyball together, so they had a –they had a solid relationship. So I—we didn't know each other really well, but we did know of each other and were friendly.

TT. Day 4, p. 541. Trial counsel did not challenge Mr. Thomson about his prior interactions with C.P. Due to the sensitive nature of these exchanges and the involvement of the juvenile C.P., argument related to this topic will be addressed in a sealed Addendum filed herewith.

41. Later in his direct examination, Andrew Thomson testified as follows:

Q. Did you have a conversation with Owen Labrie about him meeting up with [C.P.]?
A. Did I have---yeah, we did have a conversation the night right before he was going to see [C.P.].
Q. Okay. Where were you when you had this conversation?
A. We were in our room, and it was right after we had had a graduation dinner with friends of ours and their families.
Q. So who was in the room at this point?
A. It was just me and Owen.
Q. And what was the conversation you had with him?
A. I basically—he told me he was going to see [C.P.]. I was on my way—I believe I was on my way to my sister's trumpet concert and he was on his way to spend time with [C.P.], and I told him that it probably wasn't a great idea, and I warned him that she was a lot younger than us.

TT. Day 4, pp. 547-48. Trial counsel did attempt to impeach Andrew Thomson's testimony by asking questions regarding a juvenile [E.W.]. TT. Day 4, p. 561. Thereafter a bench conference was held, which bench conference has been sealed by Court Order. TT. Day 4, pp. 561-65. Upon information and belief a separate discussion was held in chambers. This chambers conference was either not recorded and/or not transcribed and the subject matter of the conference has also been sealed. As such, discussion of this line of inquiry will be addressed in a sealed Addendum filed herewith.

42. Tucker Marchese testified against Mr. Labrie at his trial. Trial counsel did not impeach Mr. Marchese during his trial testimony. Mr. Marchese testified as follows:

Q. Who is [C.P.]?
A. She was a student at St. Paul's. A freshman when Owen and I were seniors.
Q. What was your relationship like with her?
A. Minimal. I exchanged very few words with her in my time there.

TT. Day 4, pp. 582-83. In fact, Mr. Marchese had sent a senior salute to C.P. See Exhibit C-2. The State was aware of this senior salute as was trial counsel. It was provided in discovery materials. Mr. Marchese's testimony was not challenged on this point by trial counsel.

43. Andrew Thomson, Henry Kremer and Tucker Marchese spoke with law enforcement prior to trial. At one some point prior to trial, all three individuals were represented by counsel. Counsel for each of these individuals had conversations with the State regarding an understanding that their clients were not being investigated for any criminal wrongdoing. With this understanding, these three individuals spoke with law enforcement and testified against Mr. Labrie. Trial counsel never asked any of these three individuals about their previous meetings with law enforcement and/or their understanding between them and either the Merrimack County Attorney's Office or the Concord Police Department. This line of cross-examination would have highlighted the motive of each of these individuals to provide information against Owen Labrie in order to protect themselves against criminal investigation and/or prosecution.

44. In light of these individuals' own actions related to sending "senior salute" solicitations, their efforts to be cooperative with the State would have questioned their credibility.

FAILURE TO INVESTIGATE INTO COMPLAINING WITNESS' SOCIAL MEDIA ACCOUNTS

45. Mr. Labrie had requested that his trial counsel obtain information from the Facebook account of C.P. around the time of May 31, 2014. Trial counsel indicated to Mr. Labrie that they would request these records. No such request was ever made.

46. There was evidence provided in discovery, and alluded to at trial, that an incident regarding a post on Facebook caused C.P. to become upset and caused her to call her mother claiming to have been sexually assaulted by Mr. Labrie. TT. Day 2, pp. 230-31. Also provided in discovery was a portion of a text message exchange between Owen M. and C.P.'s friend, Claudia L. Claudia and Owen M. had exchanged messages via text message on June 2, 2014. These exchanges tended to indicate that Claudia, who testified at trial, acknowledged an understanding that C.P. had consented to what had occurred between her and Mr. Labrie. Exhibit E. This exchange indicates that the Facebook post had "pushed her over the edge." Exhibit E. At one point in the text exchange, Claudia writes "and she [C.P.] wouldn't have cared if all the shit after didn't happen." Exhibit E. These text exchanges indicate that C.P. was concerned about her reputation based upon the Facebook exchange, which prompted her to become upset, and ultimately prompted a call to her mother and an allegation of sexual assault.

47. There was ample evidence produced at trial to demonstrate that students at St. Paul's School communicated with each other frequently via the messaging function of Facebook. It was likely that these messages would have been instrumental in impeaching C.P. An investigator working for trial counsel communicated with an individual who spoke with C.P. and communicated with her via Facebook immediately after she was allegedly raped by Mr. Labrie. He would have testified that C.P. appeared "calm, collected, and relaxed." See Exhibit F. Further, he would have testified that C.P. seemed "very much in control of the situation." See Exhibit F. Evidence produced at trial indicated that C.P. used the Facebook messenger function to communicate with Mr. Labrie and others about her encounter with him shortly thereafter. This demonstrates that evidence available via Facebook records would have been helpful in impeaching C.P.

48. In light of the frequency and contemporaneousness of C.P.'s communications on Facebook, it was likely that C.P.'s Facebook exchanges would have contained information which may have been used to challenge her credibility regarding her allegations of a forcible rape occurring. Mr. Labrie requested that his trial counsel obtain these records. Trial counsel informed Mr. Labrie they would request them. Trial counsel never requested these records.

49. While Mr. Labrie was ultimately found not guilty of the aggravated felonious sexual assault charges, information attacking the credibility of C.P. could have undermined her entire testimony, including her claims that Mr. Labrie and she had sexual intercourse. Failure to fully investigate and request discovery materials which may have been used to impeach the credibility of C.P. was ineffective assistance of counsel.

50. Failure to fully investigate the complaining witness is ineffective assistance of counsel. See Gibbs v. State, 652 S.E.2d 591 (Ga. App. 2007). See also State v. Thiel, 665 N.W.2d 305, 310 (Wis. 2003).

FAILURE TO IMPEACH COMPLAINING WITNESS

51. The following exchange occurred during cross-examination of C.P., which indicates that trial counsel was not aware of the discovery in his possession at the time of trial which failure allowed C.P. to testify falsely. The exchange follows:

Q. [C.P.], let me put the question to you again, please. Prior to receiving the senior salute from Owen, you had received senior salutes from other people, other boys, at St. Paul's School; isn't that true?
A. Yes, that is true.
Q. And it's fair to say that you did not respond affirmatively to any of them?
A. No, I did not. I did not know those boys at all, really, not even in passing, so I knew to just take a step away from that.
Q. You did not even respond to those; did you?
A. No, I did not.

TT. Day 2, p. 239. In fact, C.P. had received at least three senior salutes and had responded to two, possibly accepting one. C.P. had received a senior salute from a senior boy on May 30, 2014. Exhibit D-2. It does not appear she responded. C.P. received a senior salute from another senior boy on May 29, 2014. Exhibit D-1. She responded to that e-mail on May 30, 2014. The boy responded back via e-mail, "I might be able to make room for you tonight", on May 30, 2014. Exhibit D-1. This is the same night she met with Mr. Labrie. C.P. received a senior salute from Tucker Marchese on May 12, 2014. She responded later that day declining the invitation, indicating it was "tempting". Exhibit C-2. Evidence in trial counsel's possession at the time indicates that C.P. received at least three senior salutes, had responded to two and possibly accepted one invitation. Her testimony regarding previous "senior salutes" was not true. Trial counsel appears not to have been aware of this information contained in discovery material.

52. C.P. testified that following her encounter with Mr. Labrie she was very sore. She testified that it was "difficult to walk, walk fast, especially." TT. Day 2, p. 154. She stated, "sitting down on the floor was very much very painful." TT. Day 2, p. 165. She further stated, "sitting down there was a lot of pain between my legs and in between the vaginal area and the anus, in between there was really, really painful." TT. Day 2, p. 201. Trial counsel had in their possession photos of C.P. taken the day after this alleged incident. In those photos C.P. was jumping on a trampoline, doing splits in the air on a trampoline and smiling. See Sealed Exhibit G. The photos certainly do not support her contention that she was in pain, so much pain that she could barely walk down stairs. Failure to impeach C.P. with these photos was ineffective assistance of counsel.

53. Failure to impeach the complaining witness is ineffective assistance of counsel. Everage v. State, 893 S.W.2d 219 (Tex. App. – Houston 1st Dist. 1995); Catalan v. Cockrell, 315 F.3d 491 (5th Cir. 2002); People v. Riley, 101 A.D.2d 710 (1984); See also Thiel, 665 N.W.2d 305.

54. C.P. testified that she told her sister, Lucy P., about her meeting with Mr. Labrie. TT. Day 2, pp. 213-14. Trial counsel objected to introducing any of the statements between C.P. and her sister. Id. Ultimately, none of the statements between the siblings were introduced, however, it was apparent from the testimony that Lucy P. was upset. Later in the testimony, C.P. indicated, and Mr. Labrie stated via Facebook message that Lucy P. punched him in the face. TT. Day 2, pp. 219-20. This could very well have left a misleading impression for the jury which would be that C.P. had told Lucy P. she was raped by Mr. Labrie, causing Lucy P. to retaliate and punch him in the face.

55. In actuality, trial counsel was aware of two witnesses, friends of Lucy P., who would testify that C.P. was gloating about her senior salute with Mr. Labrie. See Exhibit F. She was teasing Lucy about it. She was jumping around, jumping on Lucy's back and then making comments such as...my breasts are sore because of last night with Owen. The witness would have testified that it was this behavior by C.P. that made Lucy angry, causing her to lash out at Mr. Labrie. See Exhibit F. Trial counsel, not only allowed a misleading impression to be put forth to the jury about C.P.'s interaction with her sister, they failed to call witnesses that would have countered the testimony of C.P. (that she was upset about her interaction with Mr. Labrie and that she was in so much pain she could barely sit down).

56. Failure to present witnesses who would have countered C.P.'s testimony that she was forcibly sexually assaulted by the defendant was ineffective assistance of counsel. See Yarbrough v. State, 871 So. 2d 1026 (Fla. App. 2004); Adams v. Bertrand, 453 F.3d 428 (7th Cir. 2006); Bryant v. Commissioner of Correction, 964 A.2d 1186 (Conn. 2009). While Mr. Labrie was ultimately not convicted of the aggravated felonious sexual assault charges, this case came down to who did the jury believe, Mr. Labrie or C.P.? By failing to challenge the credibility of C.P. on all inconsistent statements, trial counsel failed to provide effective assistance of counsel which resulted in Mr. Labrie being convicted of the lesser offenses of misdemeanor sexual assault. Failure to investigate and/or present evidence bearing upon credibility (when credibility is the sole issue in a case) is not objectively reasonable. See Williams v. Washington, 59 F.3d 673, 681 (7th Cir. 1995).

FAILURE TO OBJECT TO MISSTATEMENTS MADE BY THE PROSECUTION IN CLOSING ARGUMENT

57. In his closing argument, the prosecutor stated the following:

> Kevin McMann [sic] told you, the first thing he did with the underwear when he got it was examine it with an alternate light source. He examined it in search for semen with a florescent light. It wasn't on the outside of the underwear, it was only in one place, the interior crotch panel. There is no logical way to explain how semen got in the interior crotch panel of her underwear unless it involves a penis in her underwear or semen in her vagina.

TT. Day 7, p. 1081. Trial counsel did not object to this statement. This statement that "it wasn't on the outside of the underwear, it was only in one place, the interior crotch panel" is a misstatement of evidence. The testimony of Kevin McMahon indicates that he saw "a slight deposit in the crotch panel area of the underpants." TT. Day 5, p. 777. He indicated that this could be from semen or other bodily fluids. TT. Day 5, pp. 777-78. It could have also been a combination of bodily fluids. He then testified that he took a cutting from the "stained area of

the underpants" specifically "[He] actually cut a little square of the fabric out...." TT. Day 4, p. 778. Never does Kevin McMahon indicate that the stain he observed was only on the inside of the panel and not soaked through from the outside. Never once does he indicate that the stain which ultimately resulted in testing positive for PSA, indicating the presence of semen, was not on the outside of the underwear. TT. Day 4, pp. 764-89.

58. The prosecutor misstated the evidence attempting to counter Mr. Labrie's argument that any semen noted by the serologist could seeped through from the outside of the underwear and was not necessarily deposited on the inside crotch panel. This was an important point at it related to Mr. Labrie's testimony that he and C.P. were "dry humping" while her underwear remained in place over her vagina. Further, this evidence could have confirmed Mr. Labrie's account of pre-ejaculation.

59. The New Hampshire Supreme Court has stated, "it is well settled that counsel may not argue facts that have not been introduced into evidence." State v. Lake, 125 N.H. 820, 822 (1984) (citing State v. Sands, 123 N.H. 570, 597-98 (1983)). As stated by the Court in Lake, when the case depends upon the jury's determination of the credibility of witnesses, "[i]t would be virtually impossible to determine the degree to which the jury may have been influenced by the prosecutor's comment." Id. at 824 (citing State v. LaBranche, 118 N.H. 176, 179 (1978)).

60. In failing to object to this erroneous comment made by the prosecution, trial counsel permitted a misstatement, bearing directly upon the credibility of Mr. Labrie' s testimony, to go unchallenged. In the case of State v. King, 248 P.3d 984 (Utah Ct. App. 2010), the Court of Appeals of Utah found that failure of trial counsel to object to inaccurate statements made by the prosecutor during closing arguments resulted in defense counsel performance which "was deficient because it fell below an objective standard of reasonableness." Id. at 994.

CUMULATIVE EFFECT OF COUNSEL'S DEFICIENCIES

61. While the Court may find that any one of these failures by trial counsel standing alone does not amount to ineffective assistance of counsel, and/or that they failed to substantiate prejudice, viewing the cumulative effect of these errors creates a pattern of deficiencies that, considered in their totality, amount to Mr. Labrie being provided ineffective assistance of counsel, which prejudiced Mr. Labrie.

62. It is an "unreasonable application of Strickland" for the Court to "weigh each error individually when the cumulative effect of the errors required reversal. Rather than evaluating each error in isolation...the pattern of counsel's deficiencies must be considered in their totality." Goodman v. Bertrand, 467 F.3d 1022, 1030 (6th Cir. 2006); See also Richards v. Quarterman, 566 F.3d 553, 571 (5th Cir. 2009); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988). In State v. Gondor, 860 N.E.2d 77 (Ohio 2006), the Supreme Court of Ohio held that the trial court "properly considered the cumulative effect of trial counsel's errors." Id. at 90. In so holding the Court stated, "Strickland directs us to look at the 'totality of the evidence before the judge or jury; keeping in mind that some errors will have had a persuasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture'." Id. (citing Strickland, 406 U.S. at 696). In Thiel, 665 N.W. 2d 305, the Supreme Court of Wisconsin found that it was the consensus of several United States Courts of Appeal "that when a court finds numerous deficiencies in counsel's performance, it need not rely on the prejudicial effect of a single deficiency if taken together, the deficiencies establish cumulative prejudice." Id. at 321 (citing Washington v. Smith, 219 F.3d 620, 634-35 (7th Cir. 2000)).

63. In King, 248 P.3d 984, the Court of Appeals for Utah reversed the conviction for the defendant charged with aggravated sexual abuse of a child based upon the cumulative error doctrine. Id. at 995. The Court of Appeals found that the prosecutor's mischaracterizations of evidence coupled with defense counsel's failure to object or request any curative instruction and defense counsel's affirmative acceptance of one of the misstatements, combined to undermine the Court's confidence that the defendant received a fair trial. Id. at 996.

WHEREFORE, Defendant Owen Labrie respectfully requests that this Honorable Court:

A. Grant this Motion and order a new trial for Mr. Labrie;

B. Schedule an evidentiary hearing; and

C. For such other relief as may be just and equitable.

Respectfully submitted,
Owen Labrie, Defendant
By and Through His Attorneys,
BRENNAN LENEHAN IACOPINO & HICKEY

Date: April 5, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Defendant's Motion and Memorandum In Support Of Defendant's Request for New Trial Based Upon Ineffective Assistance of Counsel" has been forwarded, even date herewith, postage prepaid, to Assistant County Attorney Catherine J. Ruffle.

Jaye L. Rancourt, Esq.