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January 3, 2017

Clerk Tracy Uhrin
Merrimack County Superior Court
163 North Main Street
PO Box 2880
Concord, NH 03302

RE: State v. Foad Afshar, 217-2015-CR-00588

Dear Clerk Uhrin:

Please find enclosed the following:

- Motion for New Trial.
- Motion to Stay Convictions and Sentences and Set Bail
- A disc containing all transcripts that our office has obtained in regards to Mr. Afshar's case.

In a previous letter, dated August 15, 2016, we sent the Court a disk containing the transcripts we had received as of that point in time. Since that time, we have obtained additional transcripts. The enclosed disk contains all transcripts that we have received since being retained in this case.

Please note that the prayer in this motion asks that the Court schedule an evidentiary hearing to address the merits of the motion, but it also asks that the Court schedule a pre-hearing conference in the first instance.

Please do not hesitate to call if you have any questions or concerns.

Sincerely,

Theodore Lothstein
N.H. Bar # 10562

TML/mh
ENCLOSURES
cc: Kristin Vartanian, Prosecutor, Merrimack County Attorney's Office
Joseph Cherniske, Prosecutor, Merrimack County Attorney's Office
Foad Afshar

THE STATE OF NEW HAMPSHIRE

Merrimack County Superior Court

The State of New Hampshire v. Foad Afshar	217-2015-CR-00588

MOTION FOR NEW TRIAL

"It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." -- Part I, Article 35 of the State Constitution.

Dr. Foad Afshar, through counsel, Theodore Lothstein, Esq., respectfully requests that this Court grant this motion for a new trial. This Court must grant a new trial, because the jury that convicted Dr. Afshar included at least two jurors who were childhood victims of sexual abuse. These jurors never disclosed their experiences with childhood sexual abuse to this Court during jury selection. However, they did choose to disclose their status as childhood victims of sexual abuse with the entire jury during deliberations. The presence of these two jurors on Dr. Afshar's jury, and the fact that they infected the entire jury by their disclosures during deliberations, violated Dr. Afshar's fundamental right to a fair and impartial jury, and to due process of law, as protected by Part I, Articles 15, 17, and 35 of the State Constitution, and the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution.

Further, as a separate and independent ground for relief, this Court must grant a new trial because former defense counsel's substandard and

deficient performance during trial deprived Dr. Afshar of the fundamental right to the effective assistance of counsel under Part I, Article 15 of the State Constitution, and under the Sixth and Fourteenth Amendments to the United States Constitution. As further detailed in Section IV below, defense counsel's representation was ineffective because he failed to ensure that people who had been the victim of childhood sexual abuse would not be seated on this jury, did not elicit critical testimony regarding the initial disclosure to school counselors, did not move to sever the charges, did not call an independent expert to the stand but rather relied on a criminal defendant to be his own expert witness, did not adequately prepare his client to testify, and made other errors that, taken together, cumulatively denied the defendant his right to the effective assistance of counsel.

In support, it is stated:

I. Procedural Background

1. Foad Afshar is presently serving a three to six year state prison sentence, imposed by this Court (Nicolosi, J.) on August 26, 2016. This sentence arises out of June 17, 2016 verdicts of guilty for aggravated felonious sexual assault, sexual assault, and two counts of unlawful mental health practice, following a nine-day jury trial. Afshar now brings this Motion for New Trial.

2. The charges and convictions in this case arise out of a brief period of time where Dr. Foad Afshar, Psy.D. was E.R.'s therapist. Dr. Afshar saw E.R. for five counseling sessions on the following dates: December 2, 2014,

December 10, 2014, December 17, 2014, December 23, 2014, and January 6, 2015. T3. 493-94.[1]

3. During that same time period, Dr. Afshar neglected to send paperwork to the Board of Mental Health Practice to renew his license, so it lapsed between the third and fourth sessions. T4. 803-804.

4. Around January 13, 2015, shortly before what would have been the sixth session with Dr. Afshar, E.R. made a series of disclosures regarding alleged inappropriate physical contact by Afshar that are discussed in detail in Section II, below. In brief, when he made a statement to a school guidance counselor, Lindsay Herbert, on January 14, 2015, she reported the matter to the authorities.

5. In July, 2015, the Merrimack County Grand Jury indicted Dr. Afshar for aggravated felonious sexual assault, and the State filed an Information accusing him of misdemeanor simple assault, both alleged to have occurred on January 6, 2015. Charge ID#s 1107420C and 421C. The State also filed two Information charges for unlawful mental health practice, based on the two

[1] References to the record are as follows:
"T-J" refers to the transcript of jury selection.
"T-Opening." refers to the transcript of opening statements.
"T1." refers to the transcript of the first day of the jury trial, June 2, 2016;
"T2." refers to the transcript of the second day of the trial, June 3, 2016;
"T3." refers to the transcript of the third day of the trial, June 6, 2016;
"T4." refers to the transcript of the fourth day of the trial, June 7, 2016;
"T5." refers to the transcript of the fifth day of the trial, June 8, 2016;
"T6." refers to the transcript of the sixth day of the trial, June 14, 2016;
"T7." refers to the transcript of the seventh day of the trial, June 15, 2016;
"T-JVD" refers to the transcript of the June 15, 2016 jury voir dire and jury instruction;
"T-C." refers to the transcript of the closing arguments;
"T-V." refers to the transcript of the verdict;
"T-S." refers to the transcript of the sentencing hearing;
"Depo." refers to the deposition of Dr. Ryan Hall.
"D[#] refers to the discovery provided by the State, which has Bates numbering.

sessions that Afshar saw E.R. after his license lapsed. Charge ID#s 1107422C and 23C.

6. On or about July 7, 2015 Dr. Afshar retained Tony Soltani, Esq. ("defense counsel") to represent him. On August 12, 2015, Attorney Soltani filed his Appearance in this case. Doc. Index #3.

7. On May 23, 2016, the parties conducted jury selection in this matter. Details of the jury selection are further discussed in Section III, below.

8. On June 17, 2016, the jury convicted Dr. Afshar on all counts. T-V. 3-5.

9. On August 26, 2016, this Court (Nicolosi, J.) sentenced Dr. Afshar to serve no less than three years, and no more than six years in the State Prison, stand committed. The Court did not sentence Afshar on the sexual assault misdemeanor, because it was an alternative charge. On the two counts of unlawful mental health practice, the court imposed fines of $100 plus $24 penalty assessment, all suspended for one year.

10. On or about September 20, 2016, undersigned counsel filed Dr. Afshar's Notice of Appeal with the New Hampshire Supreme Court. The Court accepted the appeal and set a briefing deadline for December 20, 2016. *State v. Afshar*, Case # 2016-0509.

11. On December 14, 2016, the New Hampshire Supreme Court granted Dr. Afshar's Assented-to Motion to Stay the Appeal and Remand, so that Dr. Afshar could return to the trial court to file and litigate this Motion for New Trial.

12. Dr. Afshar now files this Motion for New Trial, asserting that this Court must grant him a new trial because of the violation of his right to a fair and impartial jury, and because of the violation of his right to the effective assistance of counsel.

II. The Jury Trial

13. On May 23, 2016, the trial court conducted jury selection. Further details about the jury selection relevant to this motion are discussed in detail in Section III below.

14. The State called E.R. as its first witness. A 14-year-old 8th grader at the time of trial, he testified that he lived with his father William and his sister Caitlyn R. T1. 40. He also spent time at his mother Heidi's house, who lived nearby, on an informal basis. T1. 40.

15. In the fall of 2014, when E.R. was a 12-year-old 7th grader, the household also included William's then-girlfriend Julie Morris, who E.R. did not care for. T1. 54, 60. E.R. testified that he got in trouble in late summer or early fall of 2014 for shoplifting a cigarette lighter and condoms, for smoking marijuana, and for getting caught with marijuana at school. T1. 57-58.

16. E.R. testified that he decided to seek counseling to address his ongoing challenges: getting in trouble, difficulties with Morris, and being "stressed out in school…." T1. 65. Morris was the one who suggested that E.R. see Afshar, as she also received counseling from him. T3. 474. E.R. testified that his parents told him that it would be "fine" if he chose not to go. T1. 65, 67.

17. E.R. testified that his father brought him to see Dr. Afshar weekly, at a 6:00 p.m. weeknight appointment, for a total of five sessions. T1. 81. E.R. testified that during the "first few sessions," things went well. T1. 85.

18. The prosecutor asked E.R. what E.R. told Dr. Afshar at the outset of therapy in terms of what he "hop[ed] counseling could do for [him]...." T1. 84. E.R. responded that he told Dr. Afshar that he was nervous about two big tests that were coming up at the end of the semester, his "home life was a cesspool," and he was "nervous" about submitting to a physical exam by a doctor because he didn't like it when doctors "put their hand down your pants or anything like that...." T1. 84-85.

19. E.R. testified that he also discussed with Afshar the anxiety he had about submitting to a physical exam that included examination of his genitals, and that Afshar suggested that he have the physician examine him "above the clothes." T1. 88. E.R. testified that following that session, he went for his physical exam, and he had his doctor do the exam "over the pants." T1. 90.

20. E.R. testified that in subsequent sessions with Dr. Afshar, they engaged in relaxation exercises, including breathing exercises. T1. 91-93. On the fourth session, Dr. Afshar introduced a sound and light stimulation "Proteus" device, which E.R. described as "[s]unglasses with lights on them," and "headphones that make a buzzing sound." T1. 93; T2. 239. He would use the device while lying on a couch. T1. 96. He testified that while wearing the device, he could not see, except for the lights, and could not hear, except for the buzzing sound. T1. 98. Asked if Dr. Afshar explained the purpose of the

machine, E.R. responded: "I don't think so...." T1. 96. He testified that he was "[c]onfused" about "how it was supposed to help with the stress." T1. 96.

21. E.R. testified that during that fourth session, while using the Proteus machine, Dr. Afshar did not touch any part of his body. T1. 98; T2. 242.

22. E.R. testified that during the fifth session, while using the Proteus machine, Dr. Afshar ran his fingernails or back of his hand along E.R.'s back, arms, chest and stomach. T1. 98-100. E.R. testified that Afshar touched these parts of the body under the clothing, telling E.R. to roll over so that different areas could be reached. T1. 101-102.

23. E.R. testified that during this session, after he rolled over onto his back for a second time, Dr. Afshar put his hand underneath E.R.'s pants and underwear. T1. 103-104. According to E.R., Afshar rubbed E.R.'s genitals with his hand for approximately fifteen seconds. T1. 103-104; T2. 261, 275. In a prior interview, E.R. had said that Afshar did this with both hands, but he testified at trial that he meant to say "hand," not "hands." T2. 275. E.R. testified that he knew it was Afshar and "not a different person" because Afshar's hands felt "cold" when touching other parts of his body, and were the same "temperature" when touching his genitals. T1. 106.

24. E.R. testified that Afshar said nothing to him while engaging in this conduct, except when having him roll over, at which point Afshar would pause the Proteus device and tell E.R. to roll over. T1. 107-108.

25. E.R. testified that the assault ended because the session ended. T1. 109; T2. 262. E.R. further testified that Afshar did not ask him to refrain from telling others about the physical contact. T2. 263.

26. E.R. testified that he let it happen because he was "in shock," "nervous," and "scared" of what would happen if he told his father. T1. 106, 111. E.R. testified that his father was in the waiting room when the assault occurred. T1. 106. E.R. went home with his father and didn't say anything about it. T1. 110.

27. E.R. testified that a week later, when it was time to go to the next session, he made a disclosure to his sister. T1. 111-12. According to E.R., his sister didn't believe him, but she told their father, and he cancelled the session. T1. 111-12; T2. 278.

28. After cross-examination of E.R., the State played the 50-minute long video of Bethany Cottrell's January 15, 2015 Child Advocacy Center interview of E.R., subject to a limiting instruction. T3. 413, 415-16. Later, the jury viewed the video of a second, 25-minute-long interview of E.R., subject to a limiting instruction. T3. 432, 453.

29. E.R.'s father William R. testified that at the time that E.R. saw Afshar, the household consisted of father, E.R., E.R.'s older sister Caitlyn, and his girlfriend Julie Morris. T3. 466, 472. William, who was no longer with Morris, described her as a person who "did not care for either of [his] kids," and E.R. did not like her. T3. 472. As a result, during the summer before E.R. saw Afshar, E.R. was spending more and more time nearby at his mother's residence. T3. 472.

30. According to William, E.R. lacked supervision at his mother's, because she worked third shift and slept during the day. T3. 470, 473, 503. Thus, as William described it, in the late summer and fall of 2014, E.R. had

become “a little bit lost” -- shoplifting from two different stores, smoking marijuana, using a spray can as a “blowtorch,” and getting suspended after getting caught with marijuana at school. T3. 470, 503, 506.

31. As a result of this downward slide, E.R. began counseling with Dr. Afshar. T3. 474. William testified that at the first session, he told Afshar that the purpose in seeing him was to address the behavioral issues. T3. 477. William also told Afshar about E.R.’s anxiety surrounding a genital examination and unwillingness to submit to one. T3. 477-78. He testified, however, that he did not have an expectation that counseling would address that issue. T3. 478.

32. William testified that Afshar never discussed the use of physical touch or a “systematic desensitization” technique with E.R. T3. 484.

33. On January 13, 2015, ten minutes before what would have been the sixth session, while at home with E.R. and Caitlyn, E.R. said he didn’t want to go. T3. 485. Asked why, E.R. seemed embarrassed and stated “it’s too physical.” *Id.* Caitlyn then said: “Oh, you finally told him what happened,” and then Caitlyn proceeded to tell William “what happened.” T3. 485.

34. William canceled the appointment via mobile text message to Afshar, apologizing for the late notice without providing an explanation. T3. 486. William did not tell Heidi, or anyone else, about E.R.’s disclosure that evening. T3. 486-87.

35. At 6:18 a.m. on January 14, 2015,[2] William received a long email from Afshar. T3. 487-89. The email referred to a text message Afshar had received from Julie Morris, and asked for a meeting with E.R., accompanied by at least one parent. T3. 487-89. The email explained that Afshar was concerned about the reasons for terminating treatment, but emphasized that he was not insisting that E.R. continue treatment. T3. 489. The email continued:

> I think it's important that we have one session where issues get raised in person, addressed and clarified, so they don't spin in the wrong direction or fester in anyone's mind. The integrity and dignity of my patients and my practice, as well as my own reputation, which I've cultivated over three decades as being an excellent and highly-trusted therapist, is very important to me.

T3. 489.

36. William responded by asking if Afshar could see Heidi and himself the following Thursday, and Afshar confirmed that appointment. T3. 487. The follow-up meeting with Afshar never occurred because detectives told William not to go. T3. 543.

37. On the morning of January 14, 2015, after receiving the email from Afshar, William told Heidi what Caitlyn and E.R. had disclosed. T3. 487, 490. He did not report the matter to the police, but the police contacted him later that day or the next day. T3. 494.

38. Heidi R., E.R.'s mother, testified that because of E.R.'s behavioral issues and difficult relationship with Morris, E.R. initiated counseling with Afshar. T3. 555, 557. At the time, E.R. was also receiving counseling from his

[2] At trial, William testified that the email was dated January 15, 2015, but also testified that he received it the morning after January 13, 2015. T3. 487. The email was actually dated January 14, 2015. D79.

school guidance counselor Lindsay Herbert, and drug and alcohol counselor Erika Miller, at Rundlett Middle School. T3. 558. After the first session with Afshar, E.R told Heidi that he thought Afshar was "great," and that he "felt a connection" with him. T3. 561. Further, E.R. told Heidi that Afshar was helping him do a better job managing his stress and anxiety. T3. 577.

39. Heidi never met or communicated with Afshar. T3. 557, 573. She testified that she tried to call him once, but a phone number listed on his website was disconnected. T3. 573.

40. Heidi further testified that on January 14, 2015, while she was driving E.R. and Caitlyn to school, she asked E.R. about his counseling with Afshar, and E.R. responded that he was "never going back there again." T3. 561, 563. Heidi proceeded to receive "information" from E.R. and Caitlyn which "shocked" Heidi, and also upset that William had not made her aware of what he had learned the evening before. T3. 564.

41. Heidi dropped E.R. off at school, telephoned William to talk about it, and then called the school guidance counselor. T3. 564. She asked the counselor, Lindsay Herbert, to talk to E.R. and "get a little bit more of an understanding." T3. 564, 590. The next day, January 15, 2015, she brought E.R. to the Child Advocacy Center interview. T3. 565. E.R. seemed "riddled with anxiety," "extremely upset and uncertain," and "really didn't want to participate." T3. 566.

42. Heidi also testified that she was present for a doctor's appointment with pediatrician Kimberly McDonald, which occurred on December 4, 2014, where E.R. expressed concern about having a genital exam, and none was

performed. T3. 561; T4. 717. McDonald told her that it was acceptable for a boy that age to not want the examination to occur, and that it would be deferred to when he was older. T3. 561. Heidi further testified that McDonald did not perform a genital examination "over the pants" with E.R. T3. 580.

43. Caitlyn R., 15 years old at the time of trial, described her family circumstances as they existed back in January of 2015: She and E.R., who she felt "very close" to, lived with their father and his ex-girlfriend Morris. T4. 608-610. They had an informal arrangement where they could go to their mother's house whenever they wanted to see her; she lived "two minutes" away. T4. 608. Caitlyn described Morris as being "not a good person," who "hated" E.R., "thought he was a horrible kid," and "wanted nothing to do with him." T4. 610-11.

44. Caitlyn recalled E.R. having behavioral problems in the fall of 2014, and initiating counseling with Afshar. T4. 611-12. After a couple of sessions, E.R. told Caitlyn that he felt comfortable with Afshar, it was "fun," and he "liked it...." T4. 612, 621.

45. Caitlyn testified that prior to a scheduled session with Afshar, E.R. provided some important information to her, with a "very serious" and "stern" demeanor, which they discussed for an hour. T4. 613. Caitlyn testified that she "didn't know if [she] believed him at first, but after a while it sunk in" and she did believe him. T4. 612, 613, 622.

46. Caitlyn testified that when their father came home, which she believed occurred on the same day as a scheduled session, E.R. told his father; he seemed "scared to say it." T4. 613-14. Caitlyn said that William had "pretty

much the same" reaction she had, "very surprised and shocked," and he cancelled the session. T4. 614. E.R. seemed "relieved," "[l]ike happy that he didn't have to go." *Id.*

47. Caitlyn initially testified that E.R. gave her this information on the same day that they told her father, T4. 612-13, which would be January 13, 2015, T3. 485, but shown her January 15, 2015 statement to the police, also testified that she was "pretty sure" that E.R. had disclosed to her a week prior to that interview. T4. 628. Caitlyn also agreed that she told the police that during that week or so, E.R. had told her two different versions of the story. T4. 630. However, at trial she testified that E.R. did not tell her two different versions, but only one version, which was that Afshar put his hands under E.R.'s waistband, under his underwear, and rubbed his genitals. T4. 670-71.

48. Caitlyn testified the morning after she and E.R. told William, Heidi gave them a ride to school, E.R. told Caitlyn to tell his mother the story on the way to school, and Caitlyn did. T4. 614, 619, 668.

49. Caitlyn had told the police in two separate interviews that E.R. had told the story to her a full week before it was disclosed to his father, not the very same day. T4. 626, 627. Caitlyn had further told the police that she did not believe E.R.'s story when she first heard it, and that is why she kept it to herself. T4. 630-31. However, at trial, Caitlyn maintained that E.R. first told her the story on the same day that it was disclosed to his father. T4. 632, 668.

50. Without objection, and prior to cross-examination, the prosecutor elicited from Caitlyn that she was able to tell when her brother was lying, and when he was telling the truth, and that she believed E.R. was telling the truth.

T4. 610. On cross-examination, defense counsel reinforced this point, having Caitlyn again testify that she could tell when E.R. was telling the truth. T4. 618.

51. By agreement of the parties, excerpts of a deposition of pediatrician Kimberly McDonald were read into the record. T4. 712. Heidi brought E.R. in on December 4, 2014 for a regular check-up, including physical examination. T4. 717-18. Heidi told her about E.R.'s recent behavioral difficulties, told McDonald that Afshar was hired to provide counseling for E.R. regarding those issues, and stated that even after just one session with Afshar, E.R. was "making great strides...." T4. 719-21.

52. McDonald testified that her notes showed that E.R. declined a genital examination, so they deferred the exam. T4. 723. She testified that it was not uncommon for children that age to defer the examination, and that she was not aware of any time pressure to get that examination done. T4. 724-25.

53. Detective Julie Curtin, with the Concord Police Youth Services Unit, testified that school guidance counselor Lindsay Herbert initially reported the matter to DCYF, and DCYF contacted the Concord Police. T4. 675-76. Curtin spoke to E.R.'s parents, and then arranged for the Child Advocacy Center interview. T4. 677.

54. Subsequently, on January 15, 2015 at 4:30 p.m., Curtin and Detective Chris DeAngelis approached Afshar at his office to attempt to interview him. T4. 679-80. Their visit interrupted a session with a client. T4. 682. Afshar submitted to the interview, after they provided E.R.'s release of information. T4. 683, 685.

55. According to Curtin, at the outset of the unrecorded interview, Afshar said he had no idea why the police were there and asked if he was being investigated. T4. 683-84. After the detectives asked him if any client had recently terminated with him, he acknowledged that this had occurred, and after further discussion, he stated that "he knew where [E.R.]'s misunderstanding was coming from." T4. 685-86.

56. Afshar then told them that E.R. had been "worried about a genital exam at the doctor's," and Afshar had felt that this "was one of the most tangible things to work on with [E.R.]." T4. 686. Afshar told the detectives that he had used several therapeutic techniques for addressing the genital exam issue and alleviating anxiety with E.R., including "systematic desensitization," breathing exercises, counting backwards, "transferring control," "anchoring," and "imagery." T4. 686-88, 690.

57. According to Curtin, Afshar gave the example of "transferring control" by having E.R. touch his own arm and putting his hand on top of E.R.'s hand. T4. 687. He demonstrated the anchoring technique by having detective DeAngelis touch his own leg, and then put his hand over DeAngelis's hand "while saying something." T4. 688. He also referred to the concept of "time crunching," helping E.R. get to the point where he could schedule a genital exam and then see if progress had been made. T4. 691-92.

58. The detectives asked if there were other instances of touching during therapy. T4. 689. Afshar said that he had E.R. touch his own upper belly area under his shirt, "because the belly was the closest you could get to the genitals without crossing that boundary," and instruct E.R. to imagine that it was

Afshar's hand. T4. 689, 691. Afshar denied that any other touching occurred. T4. 689.

59. Afshar said they had spent the sessions up to that date focusing on the genital exam anxiety issue, but they intended to address more important things in the future, including "[k]nives found in Ethan's pillow case, smoking, and a shoplifting incident, and stress anxiety." T4. 708.

60. When the detectives told Afshar what he was being accused of, Afshar responded that "it didn't happen, and that it wouldn't ever happen." T4. 707. Afshar also told the detectives that he had not seen E.R. touch his own penis, and he would not have allowed it. T4. 708.

61. When asked if they he had employed any devices, Afshar showed them the "Proteus advanced light sound stimulation system," which consisted of dark glasses that emitted flashing lights, and headphones that played white noise. T4. 690. Afshar said they used it for 5 to 7 minutes at the end of a session, and that no touching occurred while using the device, as it would not be "relevant." T4. 691.

62. Curtin also testified that they asked Afshar to describe what the most recent session "looked like," and then described Afshar's response:

> [He] didn't answer the question, he just stated: He had just said that there was no overt sign, symptom, or indication that -- like, [E.R.] hadn't said no. He hadn't grimaced, he hadn't pulled his hand away. That was how he answered my question about what the last session looked like.

T4. 688-89. When asked how the most recent session ended, Afshar said that E.R. gave him a hug, he patted E.R. on the head, and he told E.R. that he had done a good job and "learned a lot today." T4. 692.

Dr. Afshar denied that any touching, including accidental touching, of E.R.'s genitals had occurred, and maintained that touching genitals could never be a part of therapy. T4. 690-91, 694-95, 707.

63. Curtin and DeAngelis asked for a copy of Afshar's treatment notes. T4. 688. According to Curtin, Afshar told them that he had taken no notes in five weeks. *Id.* The police obtained billing records relating to E.R., but no session notes. T4. 727.

64. Curtin testified that Afshar brought up his reputation several times, saying:

> [H]e had been in business for about 30 years... that 80 percent of the patients he saw were juveniles, that nothing like this had ever come up before, and he made statements like this is why there are so few practitioners in this field because of an allegation. An allegation made by a child can essentially end your career.

T4. 695.

65. Curtin testified that about an hour and twenty minutes into the interview, Afshar stated that he would not answer any further questions without an attorney present. T4. 694.

66. Jamie Stevens, from the Board of Mental Health Practice, testified that Afshar's license expired December 21, 2014, because he had not sent in a timely renewal form, despite reminder letters sent out by the Board two months and two weeks prior to that date. T4. 804-807. She further testified that prior to that renewal period, Afshar had been continually licensed as a mental health

counselor since 2002,[3] having regularly renewed his license every two years as required by the Board. T4. 803-804.

67. Stevens further testified that a letter was sent to Afshar notifying him that his licensed had lapsed. T4. 807-809. In response, the Board received a renewal form and payment in the mail from Afshar, along with a letter explaining what happened that caused him to miss the deadline. T4. 809-10, 813. The Board, however, sent him an email advising that he had sent the wrong paperwork, and needed to send in a reinstatement form with supporting documentation. T4. 816-18. Afshar then sent in an application for reinstatement, containing everything he would need to be eligible for reinstatement, which the Board received on January 20, 2015. T4. 819-20, 826.

68. The State's expert witness, psychologist Dr. Michael Vanaskie, testified that the generally accepted view, held by "almost all therapists," is that only "[v]ery minimal" physical touching may occur during therapy because of the need to maintain boundaries. T5. 870. Vanaskie gave examples of acceptable touching of a minor during therapy: a pat on the back, a high five, a fist bump, touching of the arm to comfort a patient or triggering a hypnotic trance. T5. 871, 873.

69. Vanaskie testified that systematic desensitization is a generally-accepted "behavior therapy that involves systematically helping a person

[3] In his own testimony, Dr. Afshar explained that he had been practicing as a counselor in various settings since 1980 in Massachusetts, and since 1992 in New Hampshire at a time when our State had a certification requirement with certain exceptions grandfathered in, not a licensing process. T5. 1030-31; T6. 1217-18.

overcome anxiety for a particular phobia or a particular situation." T5. 863. Vanaskie testified, however, that he was not aware of any generally accepted therapy that combines "touch therapy" and "systematic desensitization."[4] T5. 874.

70. Vanaskie testified that it would be "not acceptable" for a therapist to touch his patient's bare stomach, and that touching a patient's bare back would be "right at the limit of acceptability," "not acceptable by most therapists' standards." T5. 874. Vanaskie testified that it could be acceptable to have a patient touch his own stomach. T5. 875, 913.

71. Vanaskie testified that systematic desensitization could be a generally accepted means of treating a patient for anxiety relating to genital examinations, but only in the scenario where it is "absolutely necessary for the exam to occur." T5. 876. Vanaskie further testified that "guided imagery" could be used to address the issue, "but there would be no touching... there's no need for it." *Id.*

72. Vanaskie testified that before these treatment methods could be employed, there would have to be a "full history," a determination of whether there had been any "history of abuse," and whether the child had experienced any trauma relating to physicians. T5. 877. Without these safeguards, Vanaskie testified, "systematic desensitization that's narrowly focused like that... could cause more harm basically." T5. 877.

[4] Detective Curtin had not claimed that during the interrogation, Afshar ever used the phrase "touch therapy" to describe the techniques he used with E.R. However, after the prosecutor and Vanaskie introduced that phrase into the vocabulary of the trial, T5. 874, 1012, defense counsel and Dr. Afshar himself during his own testimony adopted and frequently used that phrase. T5. 1018; T7. 1267, 1274, 1277, 1324.

73. Vanaskie further testified that there would have to be informed consent from the minor's parent, where the therapist explains the treatment method to be used, and the risks and benefits of the treatment. T5. 877.

74. The defense called six character witnesses: Sheryl Cheney, Charles Ehrlich, Scott Hopkins, Robin LaCouture, Andrew Saffian, Kim Saffian, and Dr. Roger Wicksman. T5. 950, 959, 980, 987, 996, 1005; T6. 1155. With the exception of Dr. Wicksman, a local osteopathic physician who referred patients to Afshar, T6. 1157, each of these witnesses had either been a patient of Afshar's, or had one or more children that had been treated by Afshar, or both. T5. 951, 969, 974, 981, 989, 998, 1009. These witnesses generally provided opinion testimony to the effect that Afshar was a caring and compassionate professional who made himself very available to his clients. T5. 956, 970, 983, 991, 999, 1010; T6. 1158.

75. Dr. Afshar provided very lengthy testimony, spread out over parts of three different trial days. In brief: He cataloged in great detail his extensive educational background, work history, and professional credentials, T5. 1025-28, 1029-1040, 1047-54; T6. 1069-71, 1183-84; educated the jury regarding multiple topics in the field of psychology and the science of the brain, T5. 1028-29, 1032-34, 1040-41,1042-43; implicitly criticized Vanaskie's testimony and Vanaskie's treatment methods, T5. 1038-39, 1041-44; vouched for the appropriateness and efficacy of his own treatment methods, T5. 1043-45; described his debilitating medical condition, degenerative arthritis of the wrists, claiming it played a role in him not keeping contemporaneous session notes, T6. 1072-77, 1180, 1206; described his treatment of E.R., T6. 1077-

1107, 1115-1142, 1160-1183; provided his own account of the interrogation by Detectives Curtin and DeAngelis at his office, T6. 1201-1209, and explained the sequence of events that caused him to fail to renew his license in a timely manner. T6. 1218-28. He denied touching E.R.'s bare back, stomach, T6. 1178, and denied putting his hands in E.R.'s pants. T6. 1179. His testimony is explored in further detail in Section IV(D), below.

III. This Court Must Grant a New Trial Because The Seating of Two Victims of Sexual Assault as Jurors Violated Dr. Afshar's Right to a Fair and Impartial Jury.

76. First, this Court must grant a new trial, because of a flawed jury selection that allowed at least two jurors to be seated who were childhood victims of sexual abuse, and who disclosed their status as childhood victims of sexual abuse to the entire jury during deliberations.

77. After the statutory waiting period had passed, undersigned counsel retained a licensed investigator to interview jurors. The investigator, Rebecca Dixon, interviewed juror L.J., who disclosed the following:

> [L.J.] confided that when she was a young girl she had experienced a similar but different incident where two of her neighbors had touched her inappropriately. She explained that the two neighbors were brother and sister. [L.J.] told her parents and then hid in her room. She believes her parents reported the incident, but was not certain.

78. Juror L.J. also told Dixon:

> She was determined to be a good juror and wanted to be as impartial as possible. When she heard the defendant was charged with sexually molesting a young boy she thought to herself, "God must have put me in this position to help someone else in life".

79. This juror further told the investigator that during deliberations, there were "a few" jurors who expressed that "they were not convinced that Afshar was guilty…."[5]

80. This would mean, of course, that an unknown number of jurors, after hearing nine days of evidence, were not convinced that the State had proven guilt beyond a reasonable doubt.

81. L.J. then "shared that something similar had happened to her when she was a young girl" with the other deliberating jurors.

82. L.J. told the investigator that in response to L.J.'s disclosure to the deliberating jurors, juror *C.L., who was the jury foreperson*, "disclosed that he had experienced a situation that had occurred within the Catholic Church." L.J. "felt C.L. had spoken up so that she would not feel alone." L.J. told the investigator that neither shared details of their personal childhood trauma.

83. Subsequent to these disclosures, however, the jurors who had not been convinced of Afshar's guilt came over to juror L.J.'s side and switched their votes to guilty.

84. As far as one can tell from the record, not one of the 12 jurors came forward to advise the court that two different jurors had disclosed their status as victims of childhood sexual abuse during deliberations.

85. On November 25, 2016, juror C.L., the foreperson juror who comforted L.J. during deliberations by saying he had an experience within the Catholic Church, refused to speak with Dixon.

[5] Investigator Rebecca Dixon's report of the interview of juror L.J., along with report of the attempt to interview juror C.L., was provided to the State at the time of filing of this Motion.

86. One thing that is clear from the transcript of jury selection, is that the trial judge firmly believed that jurors who had been childhood victims of sexual abuse should not be seated on the jury. This is apparent from the record, because when a juror voluntarily disclosed that the juror or someone close to the juror had been the victim of childhood sexual abuse, this court immediately excused the juror, without any further effort to "rehabilitate" the juror.

87. Thus when juror "P." came up to the bench and simply stated, "I was sexually abused as a child," this Court immediately excused him, without asking any follow-up questions and without asking the parties if they wished to question juror P. or be heard on whether he should be dismissed for cause. T-JS. 59.

88. When juror K.L. disclosed that she was the victim of "child molestation," this court excused her. T-JS. 17-19.

89. When juror W.V. disclosed that she works at New Hampshire Hospital and reviews records of children who have been sexually abused on a daily basis, this court excused her. T-JS. 23.

90. When juror J.H. told the court she would have a "hard time" with a case of this type because her boyfriend had been a "victim of this type of crime," this court excused her. T-JS. 67-68.

91. Nevertheless, two jurors who had been childhood victims of sexual abuse got seated on this jury. The following is a description of what happened during jury selection that caused this unfortunate outcome.

92. During the jury voir dire, defense counsel did not insure that the trial court ask what is typically a "standard" question in an aggravated felonious sexual abuse trial: "Have you, or a member of your family or someone close to you ever been the victim of sexual abuse?" See T-JS. 5-15.

93. The trial court did ask a more "generic" question, asking jurors whether the jurors or those close to them had ever been the victim of a crime, whether or not prosecuted,[6] T-JS. 13, but did not ask the more direct and on-point question, whether the jurors or someone close to them had been the victim of sexual abuse.

94. Further, defense counsel's failure to insure that the specific question about prior sexual abuse was asked, may have led some jurors to misinterpret another voir dire instruction given by the trial court:

> I know every time I read a case where there is something like a sexual assault charged, I say this to juries; that *sometimes jurors come up to me and they say I feel really strongly about aggravated felonious sexual assault of children, particularly with children.* And I hope that there's nobody in this courtroom who would endorse or think that would be okay to do. So that's not what you decide in this case. What you're going to decide is whether or not the State has met its burden of proving that the defendant committed such an act. And the defendant sits here, he's innocent and you can't presume by anything that I've read in the charges or anything that you have heard or read about that the defendant is anything but innocent unless and until the State convinces you beyond a reasonable doubt if you're selected as a juror that he committed that offense.
> And these kind of cases, the difficult cases, are why we have juries in this country. *And so the fact that it may be a difficult case, if it is for you, should not have you come up to me and say it's too hard and that's why I don't want to serve.*

[6] This Court propounded this question during voir dire:
"Have you or a close member of your family or a close friend ever been a victim of a crime? And when I ask that question, I don't mean whether somebody has been prosecuted or identified or charged, I just mean have you ever been victimized." T-JS. 13.

> Having said that, if you truly feel that you can't be fair and impartial because of the nature of the offense, you should tell me that because we don't want anyone on the jury who can't be neutral and can't hear the evidence and render a fair and a just verdict for both the State and the defendant. Okay?

T-JS. 6-7 (*Emphasis added*).

95. After providing a series of *voir dire* questions to the jury venire that did not include the standard question regarding prior experiences with sexual abuse, this Court gave the parties an opportunity to object or request further questions. T-JS. 16. Inexplicably, when given this opportunity, defense counsel did not object or request the standard question, even though he had filed a written pleading prior to trial that requested that very question.[7]

96. Subsequently, when the names of jurors C.L. and L.J. were selected, both told the court that they had no affirmative answers to the *voir dire* questions this Court had propounded. T-JS. 59, 72. Thus, they did not disclose the information that juror C.L. says both disclosed to the deliberating jurors. Accordingly, they were ruled qualified. *Id.*

97. Subsequently, after drawing 22 jurors, the trial court gave each counsel an opportunity to conduct attorney-conducted individual *voir dire* for about 10 minutes. T-JS. 16. This additional procedure provides counsel an opportunity to "examine, by oral and direct questioning, any of the prospective

[7] Prior to trial, on May 23, 2016, defense counsel filed a pleading entitled "Defendant's Proposed Voir Dire Questions" which did request that the 'standard' question be asked of the jury venire, as follows:
"Have you, any member of your family, or anyone near and dear to you, ever been the victim of sexual assault? Is there anything regarding that experience that could, in any way, possibly affect your ability to be fair and impartial to Dr. Afshar and the State?" *Defendant's Proposed Voir Dire Questions*, Doc. Index #47, at pg. 1.

jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause.'" RSA 500-A:12-a, III.

98. Defense counsel personally addressed the 22 jurors on a variety of topics, but did not ask them the most important question in a trial of this type: whether any of the jurors, or someone close to them, had been the victim of sexual abuse. T-JS. 82-94. Prosecuting attorney Cherniske also did not address that issue during panel voir dire. T-JS. 73-82.

99. As a result of this procedure, jurors L.J. and C.L were seated on Dr. Afshar's jury. And during deliberations, at a point in time when some jurors did not believe that Afshar was guilty, jurors L.J. and C.L. made the prejudicial disclosures discussed above.

100. "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." RSA 526:1. The "petition may be presented to the superior court in the county where the judgment was rendered." RSA 526:2.

101. "[I]t is a fundamental precept of our system of justice that a defendant has the right to be tried by a fair and impartial jury." *State v. Tabaldi*, 165 N.H. 306, 312 (2013)(quotations omitted).

102. Part I, Article 35 of the State Constitution provides: "It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." This provision for judicial impartiality also applies to jurors. *State v. Town*, 163 N.H. 790, 793 (2012). The Sixth Amendment, applicable to the states through the Fourteenth Amendment, similarly provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

an impartial jury ….” RSA 500-A:12 endeavors to enforce these constitutional rights, providing: “If it appears that any juror is not indifferent, he shall be set aside on that trial.”

103. Under the State and Federal Constitutions, “*[v]oir dire* examination serves to protect the defendant's right to an impartial jury by exposing possible biases, both known and unknown, of jurors.” *State v. VandeBogart*, 136 N.H. 107, 110 (1992)(quotations omitted).

104. In order for *voir dire* examination to identify potential biases of jurors, the trial judge and attorneys for the parties must ask the right questions, in a probing but respectful manner. And, of course, the “necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.” *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, __, 104 S. Ct. 845, 849 (1984).

105. In this trial, however, the jury selection process failed to empanel jurors who could reasonably be described as fair and impartial. To the contrary, the process empaneled two jurors who, objectively speaking, would be the *least* likely to be fair and impartial in an aggravated felonious sexual assault trial.

106. In *McDonough*, the Court observed that “[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.” *Id.* at 850. This case implicates the very core of the concerns that gave rise to jury selection *voir dire* procedures in the first place – identifying jurors who have suffered a profound, life-impacting experience, that would provide a natural tendency for those

jurors to be biased in favor of one of the parties, and/or biased against the other party. Thus, Dr. Afshar's convictions appear to have been the result of a proceeding that was fundamentally unfair.

107. In order to obtain a new trial based on a juror's non-disclosure during *voir dire*, the defendant "must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 850. The *McDonough* standard applies in cases where a juror deliberately conceals information, as well as in cases of "mistaken but honest" responses to *voir dire* questions. *Id.* at 849-50.

108. The New Hampshire Supreme Court has recognized that the specific scenario here, the selection of a juror in a child sexual abuse trial who was the victim of child sexual abuse, may result in the denial of the defendant's right to a fair and impartial jury. *State v. Town*, 163 N.H. 790 (2012).

109. In *Town*, the trial court "asked the prospective jurors whether they or a close friend or relative had ever been the victim of sexual abuse." *Id.* at 791. A juror came forward and disclosed that she had been the victim of sexual assault. *Id.* at 791. As a result, the trial judge in *Town* was able to conduct the issue-focused individual *voir dire* that did not occur in this case. *Id.*

110. During that voir dire, the juror in *Town* committed to the trial judge that she would "try" to be fair and impartial, but then told defense counsel she was "unsure" about her ability to remain fair and impartial. *Id.* at 791-92. The trial judge then asked questions designed to rehabilitate the juror, and in response, the juror again committed to try to "put aside her personal situation"

and "do the best" that she could. *Id.* at 792. The trial judge denied the defendant's for-cause objection, ruled the juror qualified, and the jury convicted the defendant of aggravated felonious sexual assault. *Id.* at 791, 792. The New Hampshire Supreme Court, however, held that Town's right to a fair and impartial juror had been violated by the qualification of that juror, and reversed the defendant's conviction. *Id.* at 791, 795.

111. Here, two jurors were selected who did not disclose they had the same reason to be biased as the juror in *Town*. Under settled New Hampshire law, the trial judge may recall and interrogate jurors "whenever [the judge] is of the opinion that the jury may have made some mistake or been guilty of some improper conduct which produced their verdict." *Bunnell v. Lucas*, 126 N.H. 663, 669 (1985)(quotations omitted). Jurors may be recalled for examination by the trial court "in order to ascertain whether the case has been properly tried; and ... this may be done even though the jurors have separated." *Eichel v. Payeur*, 106 N.H. 484, 486 (1965). Because New Hampshire courts are more permissive than federal courts in allowing *voir dire* of jurors regarding their deliberative processes, our State did not adopt section (B) of Federal Rule of Evidence 606. *See Comment* to N.H. Rule Evid. 606.

112. This Court must schedule an evidentiary hearing, reconvene all of the jurors, and question them individually for the limited purpose of confirming that an injustice occurred because two jurors who should have been excused for cause sat on the jury as a results of errors in the selection process, requiring this Court to grant a new trial.

IV. This Court Must Grant a New Trial, because the Proceedings Violated Dr. Afshar's Right to the Effective Assistance of Counsel.

113. Part I, Article 15 of the State Constitution, and the Sixth Amendment to the United States Constitution, provide the fundamental right to the effective assistance of counsel. *State v. Whittaker*, 158 N.H. 762, 768 (2009); *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052 (1984).

114. The Court has addressed such issues under the State Constitution in the first instance, looking to federal opinions for guidance. *State v. McGurk*, 157 N.H. 765, 769 (2008). Thus, Afshar asks that this Court address the issue under the State Constitution in the first instance, reaching the federal issue only if the court denies relief under the State Constitution.

115. "'To successfully assert a claim for ineffective assistance of counsel, 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.'" *McGurk*, 157 N.H. at 769 (quoting *State v. Sharkey*, 155 N.H. 638, 640–41, 927 A.2d 519 (2007)). This is the prevailing legal standard under both the State and Federal Constitutions. *McGurk*, 157 N.H. at 768.

116. To satisfy the "performance" prong of this constitutional test, the defendant "'must show that counsel's representation fell below an objective standard of reasonableness.'" *Whittaker*, 158 N.H. at 768 (quoting *Strickland*, 466 U.S. at 688). Courts "judge the reasonableness of counsel's conduct based upon the facts and circumstances of that particular case, viewed from the time

of that conduct." *State v. Hall*, 160 N.H. 581, 584 (2010)(quoting *Strickland*, 466 U.S. at 690).

A. By Failing to Identify and Exclude Jurors that were Victims of Childhood Sexual Assault, Despite Multiple Opportunities to do so, Defense Counsel provided Ineffective Assistance of Counsel.

117. First, defense counsel provided ineffective assistance of counsel by failing to object to the trial court's voir dire questions, and failing to inquire, during panel voir dire, whether any jurors had personal experiences with sexual abuse.

118. The most devastating basis for bias in a case of this type, without question, is the juror who has been sexually abused by a child or whose close family members have been victimized by this crime. In practically every sentencing hearing for a case of this type, trial judges, prosecutors, victim advocates, and victims themselves stress that childhood sexual abuse inflicts lifelong and profound emotional trauma, and adversely impacts the victim's relationships with others and ability to trust others in the future.

119. If defense counsel had been allowed to set out only one goal for jury selection, it is inarguable that the goal would be to empanel a group of jurors who had never been subjected to one of the most traumatic and devastating of all forms of crime, sexual abuse, the traumatic experience that E.R. claimed to have experienced in Dr. Afshar's office.

120. However, counsel did not object to the trial court's *voir dire* questions that did not include the most critical question, whether any juror or juror's close family member had been the victim of sexual abuse. By not following up on his pretrial written request for that question, and by not

obtaining a formal ruling on that motion, counsel may have forfeited Afshar's right to appeal that issue except on grounds of plain error. And finally, given an opportunity to *voir dire* the jurors himself, counsel did not ask questions along that line or remind the jurors of their responsibility to come forward if the juror, or a close member of her family, had been the victim of sexual abuse. The outcome of counsel's errors, as explained in Section III above, was a violation of Afshar's right to a fair and impartial jury.

121. Accordingly, by failing to pursue minimally-adequate measures to ensure that either the trial judge, or defense counsel himself, identified and rooted out such jurors, defense counsel provided ineffective assistance of counsel.

B. Defense Counsel Provided Ineffective Assistance of Counsel by Failing to Call Critical Non-Disclosure Witnesses.

122. E.R. accused Afshar of sexually assaulting him in the fifth and final office appointment, which occurred on January 6, 2015. E.R. did not disclose to a parent until January 13, 2015, a week later.

123. During that week, and just two days after the January 6, 2015 appointment, E.R. met with a school counselor, Erika Miller that he had been seeing since November of 2014. D14. He had met with Erika for a longer period of time, and for more sessions, than with Afshar. D14; T3. 498. Although she had been assigned as a drug and alcohol counselor after he got in trouble in school for possession of marijuana, E.R. liked to talk with her more generally about things that were causing him stress and anxiety. T1. 69 (E.R. testifies he talks to Miller about "[l]ike how things are going.... If I'm stressed. Like about

school work coming up, or anything like that."). In fact, he was still seeing Miller as of the time of trial. T1. 68.

124. The police provided a release of information to Miller. D14. She told them that when she saw E.R. on January 8, 2015, he did not report inappropriate or questionable conduct by Afshar, nor had he ever done so before. D14. To the contrary, he told Miller that he liked Afshar. D14.

125. Thus, E.R. had seen a counselor just two days after the session where he later claimed to have been assaulted by Afshar -- a trusted counselor that he felt comfortable being open with about a variety of issues, including the quality of care provided by Afshar – and he did not say anything negative about Afshar.

126. It was not until re-cross, that defense counsel attempted to question E.R. about his January 8, 2015 non-disclosure to Erika Miller. T3. 449. But when defense counsel questioned E.R. about that topic, E.R. incorrectly claimed that he had told Erika Miller about the assault in the session that occurred "two or three days after" his last session with Afshar. T3. 449.

127. Thus, defense counsel had set up an erroneous statement by E.R., for impeachment by Erika Miller. But then, he never called Erika Miller to the stand. The jury never learned that in the January 8, 2015 session, E.R. did not disclose anything to Erika Miller.

128. The result was the worst of all possible worlds – the jury was left with the impression that E.R. made a very contemporaneous disclosure to a trusted school counselor, just two or three days after an assault. This undercut two core defense theories – that the accusation began as a small lie or prank

told to a sister that grew and grew; and that the accusation was made on the brink of an appointment with Afshar, impulsively motivated by E.R.'s desire to discontinue counseling with Afshar.

129. Defense counsel, similarly, failed to establish that when E.R. made a disclosure to guidance counselor Lindsay Herbert on January 14, 2015, Herbert recalled E.R. saying that Afshar "put his hand down his pants" and it made E.R. "uncomfortable," but did not recall E.R. saying that Afshar touched his penis or privates. Herbert's notes concerning this critical session for a mandated reporter indicated: "I asked [E.R.] if he had touched his genital area *and he didn't indicate that he had* (although I forget exactly what he said.)" D80 (Emphasis added).

130. When Detective Curtin asked Herbert to explain this last part of her statement, Curtin described Herbert's response as follows:

> Herbert could not recall exactly what [E.R.] stated to her, however, *she stated that she got the feeling that it was not sexual; she could not explain what she meant by that other that she thought that the counselor had put his hand down [E.R.]'s waistband but did not touch his genitals*. Herbert stated that it was difficult to have this discussion with a 7th grade male.

D134 (*Emphasis added*).

131. Herbert's notes are consistent with a core theory of defense at trial – that E.R. misinterpreted an inadvertent touch, or a touch that was intended to be therapeutic, not sexual, and his story expanded as he was questioned repeatedly and gained much-needed attention from family, school counselors, and supportive investigators. Accordingly, for very compelling reasons, defense counsel put Lindsay Herbert on the Defendant's Witness List. Doc. Index # 13.

132. But then, inexplicably, defense counsel never cross-examined E.R. regarding E.R.'s meeting with Herbert and his "no" answer when asked if Afshar had touched his penis or genitals.

133. And, defense counsel did not serve Herbert with a subpoena, with the result that when the prosecution released her without calling her, defense counsel informed the trial court that he no longer had the ability to call Herbert to the stand without the court's assistance. T4. 798.

134. Nevertheless, later in the trial, defense counsel explained to the court that he intended to call Herbert to establish E.R.'s inconsistent statement to Herbert. T5. 927-28. The prosecutors objected under Rule of Evidence 613, because defense counsel never confronted E.R. with the prior inconsistent statement. T5. 928.

135. The court agreed, and ruled Herbert's testimony inadmissible. T5. 929-30. The court based its ruling, not on counsel's failure to subpoena Herbert, but on his failure to comply with Rule 613 and confront E.R. with the exculpatory statement(s) that he made to Herbert. *Id.*

136. The New Hampshire Supreme Court has stressed the critical importance of impeachment evidence in sexual assault cases:

> The usefulness of impeachment evidence is particularly apparent in this case where only the complaining witness and the defendant have actual knowledge of the circumstances surrounding the alleged assault. As we have noted, 'when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility may violate due process.'

State v. Dewitt, 143 N.H. 24, 34 (1998)(quoting *State v. Dedrick*, 135 N.H. 502, 508 (1992)).

137. Here, defense counsel failed to conduct the proper cross-examinations and call the correct witnesses, so the jury could learn of E.R.'s nondisclosure during his January 8, 2015 meeting with Erika Miller, and his strikingly ambiguous statement to Lindsay Herbert during their January 14, 2015 meeting. Defense counsel's failure to elicit any of this evidence, and his inadvertent elicitation of E.R.'s erroneous claim that he *did* tell Erika Miller what happened in their meeting two days after his last meeting with Afshar, caused the jury to receive an incomplete and misleading account of the origins of E.R.'s story. Indeed, the jury learned only a false inculpatory version of the origins of E.R.'s story, and did not hear the highly exculpatory information possessed by Miller and Herbert. These deficiencies prevented the jury from learning the truth of what actually happened during this investigation, and rendered Afshar's trial unfair.

C. Counsel Provided Ineffective Assistance of Counsel by Not Moving to Sever the Charges.

138. Defense counsel rendered ineffective assistance of counsel by failing to sever the unlawful mental health practice counts, alleged to have occurred on December 23, 2014 and January 6, 2015, from aggravated felonious sexual assault and sexual assault, alleged to have occurred on January 6, 2014.

139. Under New Hampshire Rule Criminal Procedure Rule 20, when charges are "related offenses", "[t]he trial judge shall join the charges for trial unless the trial judge determines that joinder is not in the best interests of justice." Rule 20(a)(2). Joinder of unrelated offenses is allowed only upon

written motion of the defendant, or with the defendant's written consent. Rule 20(a)(3).

140. Rule 20(a)(1) defines "related offenses" as follows:

> *Related Offenses*. Two or more offenses are related if they:
> (A) Are alleged to have occurred during a single criminal episode; or
> (B) Constitute parts of a common scheme or plan; or
> (C) Are alleged to have occurred during separate criminal episodes, but nonetheless, are logically and factually connected in a manner that does not solely demonstrate that the accused has a propensity to engage in criminal conduct.

141. Under these rules, one of the counts of unlawful mental health practice, the one alleged to have occurred on January 6, 2015 (Charge ID 1107422C), is a related offense because it occurred during the same criminal episode as the alleged sexual assault offenses. The other count, alleged to have occurred on December 23, 2014, is not a related offense. It did not occur during the same criminal episode.

142. It would be absurd to call the unlawful mental health practice charges part of a "common scheme or plan," because that would mean that Dr. Afshar's scheme or plan was to make sure that he only committed sexual assault offenses while unlicensed, a ridiculous theory that the prosecution never espoused at trial.

143. And finally, the offenses are not logically or factually connected. There was no logical or factual connection between the fact that Dr. Afshar continued to practice after his license expired on December 20, 2014, and the allegation that he sexually assaulted E.R. Indeed, at the sentencing hearing in this matter, after the State asked for 12 month sentences on the unlawful mental health practice charges, the trial court declared that those offenses

were "*de minimus*," bore no connection to the sexual assault offenses, and sentenced Afshar to a $100 fine on each count, all suspended.[8]

144. Joinder of these charges allowed the State to portray Dr. Afshar throughout the trial as an unlicensed fraud preying upon innocent children. Thus, in opening statement, the prosecutor told the jury that "[t]o the defendant, counseling with E.R.... "*wasn't about treatment*," "*wasn't about helping [E.R.]*", "*wasn't about talking to [E.R.] about his problems*", but rather was "an opportunity to use his position of control to sexually assault a physically and emotionally vulnerable12-year-old patient." T-Opening. 13-14 (Emphasis added).

145. While this may sound like the typical hyperbole in a lawyer's argument, it took on a more sinister aspect when on the very next page of the transcript, the prosecutor stated that documents from the Board of Mental Health Practice "*will show you the defendant didn't have a valid license at the time he treated [E.R.].*" T-Opening. 14 (Emphasis added).

146. This statement was incorrect. Dr. Afshar had a valid license to practice for the majority of sessions that he conducted with E.R. – the same valid license that he had held, uninterrupted and unblemished, for 12 years. T4. 804. The prosecutor corrected the misstatement near the conclusion of his opening statement. T-Opening. 26. But, the damage was done, and it was defense counsel's failure to move to sever the charges that gave the prosecutor the ability and opportunity to inflict that prejudice.

[8] This is based on counsel's recollection of the sentencing hearing. Counsel has ordered a transcript of the sentencing hearing, and will provide a copy to the parties and court when available.

147. The unfair prejudice inflicted by joining these charges was even illustrated during jury selection, when Juror C. described her doubts about her ability to remain fair and impartial, stating to the court: "the idea that someone would impersonate … a medical professional… that's just another whole realm." T-JS. 121. This Court excused Juror C. immediately after she made that statement. *Id.* While there were other reasons to excuse Juror C., her expressed disgust about a defendant 'impersonating a medical professional' shows how the joinder of these charges invited unwarranted assumptions, eroded the presumption of innocence and inflicted prejudice.

D. It was Ineffective Assistance of Counsel to Not Call an Independent Expert Witness in Afshar's Defense.

148. Defense counsel provided ineffective assistance of counsel by not calling an independent expert witness to testify in the defense case. *See State v. Whittaker*, 158 N.H. 762, 775 (2009)(ruling that counsel provided ineffective assistance of counsel by not retaining independent accident reconstruction expert). Counsel had retained and consulted with two experts, provided expert notification for each to the State, and the State took their depositions. However, counsel called neither to the stand, instead using Afshar as his own expert. Because, as further explained in Section IV(E) of this Motion, Dr. Afshar's own testimony did not serve as an adequate substitute for calling an independent expert, defense counsel provided ineffective assistance of counsel. *Cf. State v. Seymour*, 140 N.H. 736, 749 (1996)(counsel was not ineffective in failing to call an expert, where counsel developed the needed information through other witnesses).

149. Of the two experts that were retained on Afshar's behalf, defense counsel should have called Dr. Ryan Hall to the stand. Dr. Hall, a board-certified forensic psychiatrist, had impeccable credentials. Depo. 7-30. Imbued with credibility, his testimony would have effectively rebutted several different key themes in the prosecution case.

150. First, and most importantly, Dr. Hall would have testified, contrary to Vanaskie, that there are accepted therapeutic treatment methods that involve the therapist touching the patient, including therapies for phobias or anxiety, as long as the touching is for the patient's benefit, and is a non-erotic touching. Depo. 65-71, 76-77. Vanaskie did not refer to a single publication or treatise during his testimony, while Hall provided journal abstracts that supported his view that some therapists advocate physical touch as part of their therapeutic model, while many others avoid it. T-Depo. 72-81, 87.

151. Hall also would have validated other aspects of the treatment methods used by Afshar that the prosecution condemned throughout its case. He had heard of therapists having their patients touch parts of their own bodies, including bare skin, and including their stomach, during therapy. Depo. 93. He had heard of therapists doing this while instructing the patient to imagine it was the therapists' hand. Depo. 94.

152. Most critically, Hall would have testified that although he has not used it in his own practice, he has heard of other therapists using sound/light devices like the Proteus used by Afshar during therapy. T-Depo. 95-96. Defense counsel should have recognized from the beginning that demystifying the Proteus was critical to Afshar's defense. After all, common sense suggests that

a weird machine that most people have never even heard of, that obscures two of the patients' primary senses, vision and hearing, could be construed as a sinister method of disorienting the patient for the purpose of facilitating a sexual assault.

153. Dr. Hall, however, characterized the Proteus as a "treatment option," likening it to a "hypnosis wheel" or "relaxation tape." T-Depo. 96. At Afshar's trial, without an independent expert, Afshar was the *only* witness to explain and attempt to justify the use of the Proteus on a 12-year-old patient. T6. 1160.

154. An expert like Dr. Hall would have defused parts of Dr. Vanaskie's testimony that seemed to reflect nothing more than his personal opinion and which instilled substantial prejudice.

155. By painting Afshar's treatment methods as within the acceptable range of treatment options within a diverse therapeutic community, and confirming that each of his methods, including physical touch and the Proteus, are used by other therapists, Hall would have effectively rebutted the prosecution's effort throughout this trial to portray Afshar as a therapist whose methods were so far outside the mainstream, they could only be part of an elaborate scheme to facilitate child abuse.

156. Afshar acknowledges that if counsel's decision to forgo calling an independent expert was a reasonable strategic decision, it cannot be ineffective assistance of counsel. "Broad discretion is afforded trial counsel in determining trial strategy, and the defendant must overcome the presumption that

counsel's trial strategy was reasonably adopted. *State v. Sharkey*, 155 N.H. 638, 641 (2007).

157. In an email to Dr. Hall sent on June 9, 2016, defense counsel represented that he had decided not to call Dr. Hall because "[t]he Government expert just fell apart." Defense counsel also represented that the trial judge had endorsed his decision to not call an expert. Thus, defense counsel, in effect, represented that he had made a strategic decision.

158. However, defense counsel did not make the decision to forgo using an expert at trial, but rather, made the decision to use his criminal-defendant client as his *own* expert. As further explained in the next section, that was not an objectively reasonable decision.

159. Because defense counsel's failure to call an independent expert was not the result of a reasonable strategic decision, because it fell "outside the outside the range of reasonable professional judgment," and because "its prejudicial effect is clear," it constituted ineffective assistance of counsel. *State v. Thompson*, 161 N.H. 507, 526 (2011).

E. Defense Counsel Provided Ineffective Assistance by Not Preparing Afshar for his Unusual Dual Role of Testifying in his Own Defense, and Acting as his Own Expert Witness.

160. In this case, fundamentally, a child-patient's word was pitted against the word of a respected and accomplished psychotherapist. Yet, knowing that the State had made extensive and even extraordinary efforts to prepare its star witness to testify at trial, defense counsel did not undertake even minimally adequate and appropriate measures to prepare Afshar to testify in his own defense. Defense counsel did next to nothing to prepare Afshar to

testify, even though counsel was using Afshar in an unusual and precarious dual role – both as percipient witness, the only other person who really knows what happened behind the closed door of his office, and as expert witness. By not adequately preparing Afshar to testify at trial, defense counsel provided ineffective assistance of counsel.

161. First, the record shows that the State made extensive efforts to prepare E.R. to testify at trial, including many pretrial meetings with prosecutors, witness advocates, or law enforcement investigators. T1. 139, 144.

162. Dr. Afshar describes[9] defense counsel's preparation of him to be a trial witness as follows: Although he was used as both expert witness and lay/percipient witness, counsel did not make any effort to prepare him to testify in his own defense until the middle of the jury trial, 6:00 p.m. *on the evening prior to the day he took the stand.* Counsel never suggested that Afshar should participate in a mock direct examination or mock cross-examination.

163. Further, counsel did not review the pretrial *limine* rulings with Afshar or remind him to conform his testimony to those rulings. Counsel did not review a list of topics to be discussed during the direct and cross-examinations.

164. The transcript of Afshar's testimony reflects a rambling, disjointed witness examination that jumped from topic to topic without any apparent structure. Counsel did not ask simple, introductory questions such as whether Afshar was married, where he lived, whether he had children, until after 21

[9] Dr. Afshar will file a supporting affidavit.

pages of trial transcript. T5. 1046. Counsel, knowing that Afshar's testimony would be interrupted by a lengthy interruption in the proceedings, did not have Afshar assert his innocence to the jury or even address the allegations at all on that first day. *See* T5. 1024-1054. His testimony resumed six days later.

165. The harm done to the effectiveness of Dr. Afshar, both as a lay witness and expert witness, is apparent from the record**.** Counsel's unstructured, unplanned, disjointed approach required the jury to assess the merits of parts of Afshar's *expert* testimony, before they ever heard him address the serious and scandalous accusations brought against him. T5. 2024-54, T6. 1069-71, 1183-84. Indeed, counsel's approach required the jury to wait six days before they heard Afshar address the merits of the case.

166. In another episode demonstrating a lack of preparation, defense counsel asked Afshar to provide the foundation for introduction of his own medical records from Dartmouth Hitchcock Orthopedics, which of course, he could not do, since Afshar is not the keeper of the records at that medical office. T6. 1074. This resulted in one of several awkward moments during Afshar's testimony, as the trial court sustained the prosecutor's objection. *Id.* Defense counsel apparently had not subpoenaed the keeper of the records or complied with N.H.R. Evid. 902(11), so the jury never saw the records that purportedly documented Afshar's wrist injury upon which he had based part of his defense. T6. 1075, 1180, 1206.

167. Ninety-five pages into Afshar's second day of testimony, the trial court allowed defense counsel to call a witness out of order, character witness Roger Wicksman. T6. 1155. As of that point, Afshar still had not denied his

guilt of the charges against him. Thus, after a total of 125 pages of testimony, T5. 1024-54, T6. 1060-1155, and after two significant interruptions, one of which was six days in duration, Afshar had yet to assert his innocence.

168. Finally, after 140 pages of testimony, over the course of two days, Afshar for the first time told the jury that he had touched E.R. only on his arm. T6. 1175.

169. Shortly thereafter, Afshar was rebuked by the trial court, in the presence of the jury, for testifying as to information in his records of treating E.R. that had been excluded in a pretrial ruling. T6. 1203. Prior to trial, the court ruled that expert witnesses could not rely on Julie Morris's suggestion to Afshar that E.R. had been abused by someone else in the past, because it was speculation. Doc. Index #54, Order on Motions in Limine (June 1, 2016). During trial, the court reiterated its ruling. T4. 758.

170. Against that backdrop, defense counsel asked Afshar what he thought was happening, when the police made an urgent visit to his office. T6. 1202. As part of his answer, Afshar began to testify as to his "impression… [that] there had been a suspicion of sexual abuse with [E.R.]," and the State objected. *Id.* at 1203. The State asked to approach, but the trial court stated: "You don't need to approach." *Id.*

171. Subsequently, the trial court directly addressed the jury, stating: "What Dr. Afshar just testified to, I'm sure he was aware he should not have." *Id.* Afshar then stated, also in front of the jury, that he was not aware, and this Court responded, also in front of the jury: "Dr. Afshar, if you're not aware, then your lawyer failed to tell you." *Id.* Thus, after receiving inadequate preparation

by his lawyer, Afshar became the only witness in this trial to be publicly rebuked by the trial judge in the presence of the jury.

172. As another example, counsel clearly did not prepare Afshar as to how to address questions concerning which treatment methods he had used with other patients. The record shows Afshar's lack of preparation, because sometimes, he asserted a privilege and refused to answer, but in another instance, he defended himself by relating an anecdote about a client. *E.g.*,T6. 1326 (Afshar refused to answer whether he had physically touched other patients while using the Proteus machine, claiming therapist-patient confidentiality); T6. 1369 (Afshar tells the story about how a child patient told his parent that Afshar told the child he didn't have to do his homework, and Afshar told the parent he did not say any such thing to his client). Because Afshar had not been prepared to take a consistent position on these issues, his answers and refusals to answer came across as self-serving rather than protective of client confidentiality, to his prejudice.

G. <u>The Totality of the Trial Record Demonstrates that Defense Counsel Committed Ineffective Assistance of Counsel</u>

173. Finally, defense counsel committed ineffective assistance of counsel more generally through a series of mistakes that, viewed as a whole, show that he "made such egregious errors that he failed to function as the counsel the State Constitution guarantees." *State v. Thompson*, 161 N.H. 507, 529 (2011). These include, but are not limited to, the following.

174. Counsel, throughout the trial, asked questions and elicited testimony that did not conform to the Rules of Evidence, or to the trial court's

rulings, or both. This caused multiple delays that had to have alienated the jury, and unnecessarily prolonged the trial. On the sixth day of trial, the prosecutor asked for sanctions against defense counsel. T6. 1211. In response, the trial court made a statement to defense counsel that is well supported by the record: "I am in agreement with the State, almost every ruling I've made, you were skating right around the edge of (indiscernible)..." *Id.*

175. Counsel allowed the prosecutor to bolster E.R.'s credibility and build up the content of his testimony through inappropriate leading questions, without objection. T1. 58, 60, 66, 68, 114. As one of many examples:

> Q Okay. And why did you think a counselor would be able to help you talk more?
> A I don't know.
> Q Were there certain things that you didn't want to talk about with your parents?
> A Yes.
> Q Did you think you would be able to talk about those things with a counselor?
> A Uh-huh. Yes.

T1. 66.

176. Further, defense counsel undermined his client by having E.R. assert, over and over again, that he told the truth during the CAC interviews. T1. 117, 121, 130, 170. This incriminated Afshar, since E.R. accused Afshar of the same sexual assault in those interviews that he accused him of at trial, and since the first CAC interview was very close in time to the initial disclosure. Thus:

> Can we agree that the -- what you told Bethany during the interviews was complete?
> A Yes. It was complete.
> Q Truthful?
> A Truthful.

Q Accurate?
A Yes.

T1. 169.

177. Later in the trial, without objection, the prosecution played the CAC interviews, in which E.R. accused Dr. Afshar of sexual assault, interviews that counsel had now established as being complete, truthful, and accurate. T3. 413, 415-16; 432, 453.

178. On the second day of trial, the Court rebuked defense counsel for bringing home a prosecution exhibit (!), saying "Don't do it again." T2. 192. Counsel replied: "I'm not firing on all cylinders, Judge." *Id.*

179. Defense counsel endeavored to impeach E.R. by questioning his father about a series of statements that E.R. had supposedly made to his father, but counsel had failed to confront E.R. with those statements, so the trial court sustained the prosecutor's objection. T3. 526-27. This was the same error that counsel made in attempting, unsuccessfully, to elicit E.R.'s exculpatory statements to Lindsay Herbert, as discussed in Section IV(B) above.

180. The trial court repeatedly rebuked defense counsel for interspersing his questions with inappropriate commentary before the jury. *E.g.,* T3. 324, 500-01, 502, T4. 768.

181. Repeatedly, defense counsel returned to court later than instructed, delaying the proceedings, such that the court gave him a "final warning" on the fourth day of trial after he returned from lunch 15 minutes after the jury trial was supposed to resume. T4. 948.

182. For no apparent reason, against the rules of evidence, and to the prejudice of his client, defense counsel got *E.R.'s father to agree that E.R.'s father, "to this day," continued to believe that Afshar put his hands down E.R.'s pants*. T3. 536; *see State v. Lopez*, 156 N.H. 416, 424 (2007). Not surprisingly, the prosecutor did not object. The trial court, however, found this question so objectionable, it actually made its own objection:

> Q Okay. Because that -- to this day that's what you believe happened, right?
> THE COURT: Objec --
> THE WITNESS: Right.
> THE COURT: What am I objecting for? You can't ask the witness what he believes happens or didn't happen. You may disregard that. His opinion's not something you should consider.

T3. 536.

183. Defense counsel had difficulty asking questions that complied with the rules of evidence, to the extent that witness examinations were constantly interrupted, and the trial prolonged, by constant objections by the prosecutor, most of which were sustained. For example, during the cross-examination of William R., there are no less than 10 sustained objections. T3. 508, 510, 527, 536, 537, 538, 540, 544, 546, 547.

184. Defense counsel's associate attorney handled the questioning of the first defense character witness so poorly, nearly every question she asked regarding Afshar's character drew an objection and a ruling sustaining the objection. T4. 952, 953, 954, 955, 956, 957 (twice). Defense counsel took over from there, but was repeatedly admonished by the court for eliciting testimony that violated the court's ruling as to the permissible scope of character witness

testimony. T5. 971, 983, 984; T6. 1090 (trial court warns counsel again not to try to introduce previously-excluded evidence).

185. Finally, after the jury announced its verdict of guilty on the charge of aggravated felonious sexual assault, defense counsel asked for bail pending appeal. T-V. 14. As the trial court immediately stated, of course, bail pending appeal is not allowed for this crime, and the trial court proceeded to order Dr. Afshar's incarceration. *Id.*; *see* RSA 597:1-a, I. Dr. Afshar, who must have been bewildered and terrified, then asked if he could give his property to his children, and defense counsel made the same feeble request. T-V. 15.

186. Defense counsel had never prepared Dr. Afshar for this terrible moment. He had not told Dr. Afshar that if convicted, he would be immediately incarcerated without possibility of bail. Defense counsel's lack of preparation, caused unnecessary and unwarranted additional pain for Dr. Afshar and his family. He was taken away to jail for the first time in his life, without warning, without notice, and without opportunity to prepare himself and his family. Counsel's lack of preparation for this particular moment in the trial, while obviously not a factor in the trial's outcome, further demonstrates his lack of preparation to try an aggravated felonious sexual assault trial to a jury.

V. Trial Counsel's Errors Inflicted Prejudice.

187. To satisfy the second prong of the *Strickland* standard, the prejudice prong, the defendant must establish that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Whittaker*, 158 N.H. at 768 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is "a probability sufficient to undermine

confidence in the outcome." *Sharkey*, 155 N.H. at 641. In making this determination, this court must consider "the totality of the evidence presented at trial." *State v. Kepple*, 155 N.H. 267, 270 (2007).

188. The State presented a relatively weak case against Dr. Afshar. There was no physical evidence to corroborate a sexual assault. There were no witnesses other than the accused and the accuser. Although his father was right outside the office in the waiting room, E.R. did not disclose inappropriate conduct to his father during or immediately after the appointment. E.R.'s description of the assault – lasting only about 15 seconds, Afshar saying nothing during the assault, Afshar not asking E.R. to keep a secret, occurring after only five therapeutic sessions - bordered on the implausible. T2. 261, 263.

189. The circumstances of E.R.'s disclosure to his parents about a week later also raise substantial questions of credibility. E.R.'s own sister did not believe E.R.'s story at first. E.R.'s father reacted to what he was told by cancelling an appointment, but did not call the police, take E.R. to the doctor, or even call E.R.'s mother immediately upon receiving a disclosure.

190. The jury deliberated for about a day before reaching a verdict. They were released to have lunch together and then commence deliberations at 12:16 p.m. on June 16, 2016. T-C. 63. They did not reach a verdict until 12:40 p.m. the next day. T-V. 3. The lengthy deliberations evidence that the jury did not find this to be an overwhelming case.

191. With the effective assistance of counsel, the jury would have also learned that E.R. saw a trusted counselor two days after the counseling session where the assault allegedly occurred, and did not tell the counselor, Erika

Miller, that anything inappropriate had occurred in Dr. Afshar's office, although E.R. had praised Dr. Afshar in previous meetings with her.

192. With the effective assistance of counsel, the jury would have learned that when another trusted counselor, Lindsay Herbert, spoke to E.R. on the same day that he made a disclosure to his mother, he answered "no" when asked if Afshar touched his penis or genitals. Although Herbert was not certain what E.R. had said, her impression was that the contact was not sexual in nature.

193. These facts regarding the step-by-step development of E.R.'s evolving story are critical to Afshar's defense because they tend to undermine the greatest strength of the prosecution's case. In counsel's view, the strongest part of the prosecution's case was the lack of significant motive for E.R. to falsely accuse Dr. Afshar. When Miller and Herbert's testimony is taken into account, however, a different narrative reveals itself where E.R. did not intend to falsely accuse Dr. Afshar, but simply reported inadvertent or ill-advised physical contact that made him uncomfortable, a story which grew and grew as he gained much-needed positive attention and support from loved ones and trusted authority figures.

194. With the effective assistance of counsel, Dr. Afshar would not have had to serve as his own expert witness, an awkward and untenable dual role. He would not have left the jury hanging over a six-day break, after extensive testimony where he lauded his own qualifications and lectured the jury regarding arcane principles of psychology, but never addressed whether he was guilty or innocent of the charges.

195. With the effective assistance of counsel, Dr. Afshar would have had the benefit of Dr. Ryan Hall's testimony, to educate the jury about the therapeutic techniques he used when counseling E.R. and more effectively counter some of the points made by Dr. Vanaskie. While Dr. Hall's testimony would not have proven Afshar's innocence, it would have taken the burden off his shoulders to defend his own therapeutic methods and allowed him to focus in on the central issue at trial, whether he exploited and assaulted a vulnerable young patient.

196. Finally, and most importantly of all, with the effective assistance of counsel, Afshar would not have been judged by a jury that, inexcusably, included at least two jurors who had been sexually abused as children. He would not have been judged by a jury where, during deliberations, the jury learned of the victimization of two of their members, the very definition of a miscarriage of justice.

197. For all of these reasons, Afshar has shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Accordingly, this Court must grant a new trial.

WHEREFORE, Dr. Afshar respectfully requests that this Court:

A) Schedule a pre-hearing conference to resolve any discovery and procedural issues, and also to consider the defendant's Motion to Stay Convictions and Sentences, filed this date;

B) Schedule an evidentiary hearing;

C) Order the jurors to appear for examination by the court on the issues raised in this motion;

D) Vacate the convictions and sentences in this matter;

E) Order a new trial on all charges;

F) Grant such further relief as serves justice.

Respectfully submitted,

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Lothstein Guerriero, PLLC
3 N. Spring Street, Suite 101
Concord, NH 03301
TEL: (603) 513-1919

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded by mail this 3rd day of January, 2017 to the prosecutors, Joseph Cherniske, Esq., and Kristin Vartanian, Esq., Merrimack County Attorney's Office, 4 Court Street, Concord, NH 03301, and to Foad Afshar at MCI-Walpole.

Theodore Lothstein

STATE OF NEW HAMPSHIRE
Merrimack County Superior Court

THE STATE OF NEW HAMPSHIRE v. FOAD AFSHAR	217-2015-CR-00588

MOTION FOR STAY OF CONVICTIONS AND SENTENCE AND REQUEST FOR BAIL HEARING

Foad Afshar, through counsel, Theodore Lothstein, Esq., respectfully requests that this Court grant a stay of the convictions and sentence in this matter, schedule a bail hearing, and release Afshar on bail pending final resolution of the Motion for New Trial filed this date.

In support, it is stated:

1. This motion is filed in conjunction with the Motion for New Trial filed this date. That Motion's description of the procedural backdrop of this case is incorporated by reference.
2. Dr. Afshar submits that the issues raised in the Motion for New Trial present a prima facie case that a miscarriage of justice occurred in his jury trial. By this Motion, Dr. Afshar requests that this Court schedule a non-evidentiary hearing to determine whether the likelihood of success on that motion is sufficiently high that in the interests of justice, the convictions and sentences should be stayed so that he can be granted bail pending final hearing and final resolution on the merits.

3. As discussed in paragraph 185 of the Motion for New Trial, no person is entitled to bail following a jury's verdict of guilty on the crime of aggravated felonious sexual assault. This case, however, presents an extraordinary situation where new facts have come to light regarding two of the jurors that undermine an objectively-reasonable person's faith in the reliability of the outcome of this trial. See Section III, paragraphs 76-112 of the Motion for New Trial.
4. Further, the conditions of Afshar's confinement have been both cruel and unusual. For reasons which have not been explained, after Afshar spent several months in the prison's Berlin facility and incurred no disciplinary issues whatsoever, the prison transferred him to MCI Cedar Junction in South Walpole, Massachusetts. An informational website maintained by the Commonwealth of Massachusetts describes this prison as a "maximum security" prison.[1] It is one of the most notorious of Massachusetts' prison facilities, housing hard core and incorrigible criminals.
5. Dr. Afshar is a 56-year-old professional therapist with no prior criminal record whatsoever. When housed at Merrimack County House of Corrections between June 17, 2016 and August 26, 2016, on information and belief, Afshar had no disciplinary issues. When housed in the State Prison in Berlin, on information and belief he had no disciplinary issues.

[1] http://www.mass.gov/eopss/law-enforce-and-cj/prisons/doc-facilities/mci-cedar-junction.html, visited on December 28, 2016.

6. As this Court observed during trial, Dr. Afshar is slight of build and short of stature. He has a wife and children that live in New Hampshire and continue to support him, and as the Court observed at sentencing, literally scores of supporters from the greater community. The placement of this man in a maximum security prison, out of State and far from home, is unconscionable.
7. Undersigned counsel has no idea why the Department of Corrections transferred Afshar to MCI-Walpole. What counsel does know, is that E.R.'s mother is a nurse that works at the New Hampshire State Prison. Prior to the sentencing hearing, she repeatedly contacted the probation officer assigned to write the PSR using her official Department of Corrections email rather than a personal account, inappropriately crossing the line between her role as an employee of the Department of Corrections and her role as the mother of E.R. All of this gives rise to serious questions regarding the true reasons for the exile of Dr. Afshar to one of the most notorious prisons for hard-core, incorrigible offenders in northern New England.
8. Accordingly, under the unique and extreme circumstances of this case, this Court should stay the convictions and sentence and schedule a bail hearing.
9. The State, through prosecuting attorneys Joseph Cherniske and Kristen Vartanian, Esqs, are presumed to object to this motion.

Accordingly, the accused respectfully requests that this Court:

A) Schedule a non-evidentiary hearing, within 14 days of the filing of this motion;

B) Grant a Stay of the convictions and sentences in this case;

C) Set bail, under the same terms and conditions as previously set pending trial, and any further conditions that the Court deems appropriate and necessary under the circumstances;

D) Grant such further relief as serves justice.

Respectfully submitted,

Theodore M. Lothstein
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Lothstein Guerriero, PLLC
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Concord, NH 03301
TEL: (603) 513-1919

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded in hand this 3d day of January, 2017 to Kristin Vartanian, and Joseph Cherniske, Prosecutor, Merrimack County Attorney's Office.

Theodore Lothstein

THE STATE OF NEW HAMPSHIRE

Merrimack County Superior Court

The State of New Hampshire v Foad Afshar	217-2015-CR-00588

AFFIDAVIT OF DEFENSE COUNSEL

I, Theodore Lothstein, hereby swear or affirm under the pains and penalties of perjury that all factual representations made in the accompanying Motion for a New Trial, while generally not based on matters within my own personal knowledge, are made in good faith based on my reading of the discovery, trial transcript and other record materials in this case, and information received from Dr. Afshar.

DATED: 01/03/2017

Theodore Lothstein

On this 3rd day of January, 2017, personally appeared the above-named Theodore Lothstein, known to me, or proven to be the same, and made oath that the foregoing statements are true, to the best of his knowledge and belief, before me.

Justice of the Peace/Notary Public

My Comm. Expires:_____

MELANIE R. HOWARD
Justice of the Peace - New Hampshire
My Commission Expires April 6, 2021