THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

v.

GORDON MacRAE

#93-S-0218-0228, 1076-1078, 1229-1231, 1554-1557

MEMORANDUM OF LAW IN SUPPORT OF A MOTION FOR A NEW TRIAL

ROBERT ROSENTHAL
COUNSELOR AT LAW
523 EAST 14TH STREET, SUITE 8D
NEW YORK, NEW YORK 10009
(212) 353-3752

CATHY J. GREEN, ESQ., BAR #995
GREEN & UTTER, P.A.
764 CHESTNUT STREET
MANCHESTER, NH 03104
(603) 669-8446

ATTORNEYS FOR PETITIONER GORDON MACRAE

Table of Contents

Table of Cases and Authorities

Cases

Constitutional Provisions

Other Authorities

Isaac, Rael Jean, "Janet Reno and her Record as a So-Called Champion of Children," Independent Woman's Forum, April 27, 2000 6

Johnson, John, "Kids Don't Lie," Los Angeles Times, August 10, 2003 6

Loftus & Davis, *Recovered Memories*, 2 Annu. Rev. Clin.Psychol. 469, 477 (2006) 3

Maher, Stephen, "Tipping the Scales," Wenatchee World, August 15, 2000l 6

Nathan, Debbie, Almond, Steve, "Reno Reconsidered," Miami New Times, March 3-9, 1993 6

Nathan, Debbie, Snedeker, Michael, "Satan's Silence." Harper Collins (New York: 1995) 4, 6

New Jersey Law Journal, August 16, 1993, Editorial, "Witch Trial II" 6

Rabinowitz, Dorothy, "Not all accounts of sex abuse in the Catholic Church turn out to be true: A Priest's Story." Wall Street Journal, two-part investigative editorial, April 27th and 28th, 2005 6

Rabinowitz, Dorothy, *A Priest's Story,* Wall Street Journal, April 27, 2005 6

Rabinowitz, Dorothy, "No Crueler Tyrannies; Accusations, False Witness and Other Terrors of our Times." Wall Street Journal Books (New York: 2003) 6

Rabinowitz, Dorothy, "The Prosecutors," Wall Street Journal, April 25, 2002 6

Rabinowitz, Dorothy, "Afterward" Wall Street Journal, December 29, 2000 6

Rabinowitz, Dorothy, *The Doctor's Story*, Wall Street Journal, May 24, 2000, p. A26 8

Rabinowitz, Dorothy, "Commentary: Only in Massachusetts," Wall Street Journal, December 29, 1999 6

Rabinowitz, Dorothy, "Reckoning in Wenatchee," Wall Street Journal, September 21, 1999 6

Rabinowitz, Dorothy, "From the Mouths of Babes to a Jail Cell: Child Abuse and the Abuse of Justice – a Case Study," Harpers, May, 1990 6

Rosenthal, R., Suggestibility, Reliability and the Legal Process, *Developmental Review,* September 2002 22

Sauer, Mark, Okerblom, "Trial by Therapy," National Review September 6, 1993 6

Shapiro, Laura, Rosenberg, Debora, Lauerman, John F., Sparkman, Robin, "Rush to Judgment," Newsweek Magazine, April 19, 1993 6

Table of Contents of Appendix

Now comes Defendant-Petitioner, Gordon MacRae, by and through counsel, and hereby states as follows:

Introduction

In the early 1990s, it was well known in and around Keene, New Hampshire that the local Catholic diocese was paying huge sums of money to young men claiming to have been abused by their childhood priests. Tom Grover, a drug addict and alcoholic with neither a job nor prospects, looked to his own payday. Grover accused father Gordon MacRae of having molested him as a teenager, and sued the New Hampshire diocese. He won nearly $200,000 dollars for his efforts and his testimony convicted MacRae of terrible crimes.

There was no evidence to support Grover's claims, other than his testimony. There was not a single witness to the acts alleged in Grover's stories of molestation though they were to have happened in busy, populated places. The convictions – and the money – turned on Grover's performance.

Recently, newly discovered evidence has revealed that before trial, Grover admitted to friends and family that his accusations were lies manufactured for diocese cash, and that he would, and did commit perjury at MacRae's trial. Those people have also reported Grover's conduct after he got his money – conduct that included more admissions of perjury, and that undermines any notion that his stories were anything but lies.

In addition to Grover's overall fraud on the criminal justice system, review of the record in the light and context of the new evidence also reveals a trial marked by actions and inaction of defense counsel that not only undermined the defense, but served the state, and assured the conviction.

The conviction here came during a period of time that has since been widely recognized as

fostering a wave in sexual abuse accusations and convictions – often in cases in which the claimed acts were objectively impossible, but also in cases like this, in which accusations were technically possible, but objectively unlikely. As Grover admitted to his friends and family, his efforts toward MacRae's conviction were based on that wave of false convictions. Thus, as those times largely gone by nourished the prosecution and fostered the conviction, a measured and historically aware review reveals that it was unjust and must be vacated.

Procedural History

On April 30, 1993, Gordon MacRae was indicted in the state of New Hampshire for Felonious Sexual Assault, Class B Felony (2 counts) and Aggravated Felonious Sexual Assault, Class A Felony (4 counts), related to Thomas Grover's allegations. MacRae was tried on all four of the Class A Felony charges, and one Class B charge.

The jury trial was conducted over 10 days, between September 12th and September 23, 1994. (Brennan, A) On September 23, 1994, the jury rendered a verdict of guilt on all counts. On November 14, 1994, MacRae was sentenced to an aggregate prison term of 33½ to 67 years. He remains incarcerated. MacRae continues to maintain his innocence, though doing so undermines any opportunity for parole – as he would be required to claim that he was guilty to satisfy the requirements of the sex offender program, a prerequisite to parole.

On September 25, 1995, an appeal was filed on MacRae's behalf.[1] His conviction was affirmed by the Supreme Court of New Hampshire on June 6, 1996. *State v. MacRae*, 141 N.H. 106 (1996).

This Motion for a New Trial follows.

---

[1]Issues presented: The State Impermissibly Used Dr. Fleischer's Testimony to Prove that Grover's Allegations were True; The Trial Court Erred by Failing to Exercise Any Discretion in Precluding the Defense From Cross-Examining Grover with his Juvenile Convictions; The Trial Court Erred In Instructing the Jury to Disregard Grover's Answers to Defense Questions.

The Facts

The Context In Which Grover Created His Stories

Grover's stories arose in the early 1990s, a time during which not only New Hampshire, but much of the United States was awash in similar claims. It was, the United States Court of Appeals for the Second Circuit recently noted, a period in which "a series of highly questionable child sex abuse prosecutions" were fueled by a "vast moral panic;.... [A] period in which allegations of outrageously bizarre and often ritualistic child abuse spread like wildfire across the country and garnered world-wide media attention." "[T]remendous emotion [was] generated by the public" as a result of which "the criminal process often fail[ed]...."*Friedman v. Rehal*, 618 F.3d 142, 155, 158 (2d Cir. 2010). And those failures were outrageous. Bolstered by frantic prosecutors and a salacious media, incredible – even impossible – claims of molestation corrupted the objectivity – the very essence – of the criminal justice system – from the investigation through the verdict and appeal.

A telling example of a criminal justice system corrupted by passion is found in the statistic that by 1991, twenty five percent of prosecutors reported bringing at least one case involving satanic abuse. Loftus & Davis, *Recovered Memories*, 2 Annu. Rev. Clin.Psychol. 469, 477 (2006). That a quarter of experienced prosecutors in the United States accept the notion that Satan is involved in cases they have prosecuted reveals an alarming perversion of prosecutorial objectivity, or motivation. Yet prosecutors brought those cases to juries, who rendered guilty verdicts.

The number of other equally outlandish and impossible prosecutions, even without Satan's participation is incalculable. Seemingly plausible accusations were championed by investigators and prosecutors motivated perhaps by altruism, but also by compulsive drives for convictions, without a critical assessment of the accuser or the accusations.

The late 1980s through middle 1990s, brought about a series of impossible yet successful

prosecutions. In Manhattan Beach, California, a case of sexual abuse in a preschool included claims about: goats and "goatmen;" holes being drilled into children's underarms; "magic arts" and witches; train rides during the school day on which men in suits hurt a child; staples being shot into a child's ears, nipples and tongue; eyes being stabbed with scissors; animals being chopped up; elephants on the premises; and a baby's head being cut off, the brains burned and children drinking the blood.[2] No evidence of any of this was found. Nevertheless, prosecutors scored convictions. In Maplewood, New Jersey, convictions were won based on stories of knives, forks and other objects being thrust into various orifices of young children, without any injury or noise on the part of the children or the abuser. (f.n. 4, *infra*) In Wenatchee, Washington, a child's stories of having been raped by many adults, night after night, in a church basement garnered convictions for prosecutors. (f.n. 4, *infra*)

Convictions based on such impossible claims underscore how easily and completely investigators, prosecutors and juries have historically abandoned their common sense when the matter before them is child abuse.

Many of the notable convictions from that era have unraveled in the years since – often because of outlandish accusations, overzealous investigators and prosecutors, and other legal errors revealed with the passage of time. For example, in a high-profile 1986 case, North Miami Police Officer Grant Snowden was convicted of a number of child abuse counts and sentenced to several life-sentences. Snowden's case was marked by improbable claims, motives for false accusations, and trial court rulings seemingly motivated by passion rather than intellect. Snowden's conviction was reversed by the United States Circuit Court of Appeals for the 11th Circuit. The state elected not to retry Snowden. *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998).

---

[2]Nathan, D., & Snedeker, M, *Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt,* (Chapter Four, pp. 67-92) Harper Collins, Basic Books (New York: 1995)

Margaret Kelley Michaels was convicted of molesting 21 children in a Maplewood, New Jersey preschool in 1988. A subsequent review of the 33,000-page transcript revealed a prosecution and trial driven possibly by good intentions, but nevertheless poisoned by bias and prejudice. Accusations were influenced by investigators, therapists and parents. Trial court rulings intended as helpful constituted reversible error. The New Jersey Supreme Court reversed the conviction. The state was left without evidence for a retrial. *State v. Michaels*, 625 A.2d 489 (1993).

In 1994 and 1995, nearly 50 residents of Wenatchee, Washington were arrested, pled guilty, or were convicted of thousands of acts of child abuse.[3] Jurors accepted as true the most impossible and implausible claims. Revelations of facts in the years after trial and dispassionate review during post conviction relief proceedings made the injustice clear. Those convictions were reversed and vacated. *See*, "The Power to Harm," fn 3, *infra.*

All of those verdicts seemed reasonable and sound in the years in which they were handed down. Prosecutors presented them with righteousness and passion. Juries accepted these claims, convicting scores on the words of alleged victims. The media applauded the convictions – that they had encouraged. The criminal justice system reflected jobs well done.

Time and perspective, however, eroded the foundations of convictions of that vintage. Lawyers and journalists have looked again at the cases, free of fury and passion of the trials. Deliberate, sober investigation has unearthed accusers trying to please investigators. Liars were revealed too – those accommodating others' demands, and those pursuing personal gain. In the

[3]http://www.historylink.org/index.cfm?DisplayPage=output.cfm&File_Id=7065 (last visited June 22, 2011).

dispassionate light of the present, the cases could not withstand scrutiny, judicial or otherwise.[4] MacRae's case has already provoked journalistic investigation and publication – work that has already undermined any confidence in the conviction.[5]

It is common knowledge that, especially since the 1990's, a huge number of accusations were made against Catholic priests for sexually abusing under-aged parishioners. Even though many accusers had economic motives to make up allegations, there was a sentiment in the air, fanned by the media, that sex abuse was universally rampant in the clergy. It is impossible to know how many claims were true and how many were false. But it is clear that the accumulating allegations and the

---

[4]*See*, *e.g.,* Rabinowitz, Dorothy, "No Crueler Tyrannies; Accusations, False Witness and Other Terrors of our Times." Wall Street Journal Books (New York: 2003); Nathan, Debbie, Snedeker, Michael, "Satan's Silence." Harper Collins (New York: 1995); Johnson, John, "Kids Don't Lie," Los Angeles Times, August 10, 2003); Rabinowitz, Dorothy, "The Prosecutors," Wall Street Journal, April 25, 2002; Maher, Stephen, "Tipping the Scales." Wenatchee World, August 15, 2000l; Rabinowitz, Dorothy, "Afterward." Wall Street Journal, December 29, 2000; Amon, Elizabeth, "Many Injustices Call for Many Lawyers." National Law Journal, December 27, 2000; Editorial "Review and Outlook, New Day for the Accused." Wall Street Journal, March 24, 2000; Isaac, Rael Jean, "Janet Reno and her Record as a So-Called Champion of Children." Independent Woman's Forum, April 27, 2000; Barber, Mike, "Once Wrongly Accused, He's Now a Free Guy." Seattle Post-Intelligencer, April 12, 2000; Rabinowitz, Dorothy*,* "Commentary: Only in Massachusetts," Wall Street Journal, December 29, 1999; Rabinowitz, Dorothy, "Reckoning in Wenatchee," Wall Street Journal, September 21, 1999; Armbrister, Trevor, "I'm not Guilty," Reader's Digest, May 1999; Barber, Mike, Schneider, Andrew, "The Power to Harm" 5-Part Expose, Reporting, and Analysis Series (and additional articles), Seattle Post-Intelligencer, February 1998 through March 1999; Editorial, "Wenatchee Cases Crumbling in Court," Tacoma News Tribune, December 11, 1997; Nathan, Debbie, Almond, Steve, "Reno Reconsidered," Miami New Times, March 3-9, 1993; Shapiro, Laura, Rosenberg, Debora, Lauerman, John F., Sparkman, Robin, "Rush to Judgment," Newsweek Magazine, April 19, 1993; Editorial, "Witch Trial II," New Jersey Law Journal, August 16, 1993; Sauer, Mark, Okerblom, "Trial by Therapy," National Review September 6, 1993; Rabinowitz, Dorothy, "From the Mouths of Babes to a Jail Cell: Child Abuse and the Abuse of Justice – a Case Study," Harpers, May, 1990; Readers Digest, May, 1994; Television Documentaries, including PBS Frontline, "The Child Terror," 10/27/98; other programs, including 48 Hours, May 5, 1993; 20/20, October 22, 1993.

[5]*See*, Rabinowitz, Dorothy, "Not all accounts of sex abuse in the Catholic Church turn out to be true: A Priest's Story." Wall Street Journal, two-part investigative editorial (April 27th and 28th, 2005).

poisoned atmosphere did lead to panic, overwhelming in many instances the affected diocese and the Church itself.[6] This in turn often put pressure on the Church to settle financial claims by accusers, in order to try (without great success, as it turns out) to limit the political and financial damage. Amidst the political crisis, the accused priest frequently did not have the support of the Diocese that he would have expected.

Allegations of sexual abuse against priests present the same problems as similar allegations against teachers, doctors, daycare workers, or anyone else. Frequently, of course, allegations of sexual abuse involving innocent defendants are not fantastical but may have some plausibility, and facts undermining the complainants' credibility may be slow to emerge or simply never become available. Sexual abuse cases are typically a credibility battle between the only two people – here, the priest and the alleged victim – who knew what happened, or what didn't. Though the Second Circuit's decision in *Friedman* involved rather fantastical allegations, the opinion makes clear that the risk of false convictions in sexual abuse cases in general is a matter of concern. In fact, a Pulitzer Prize winning journalist, whose body of work on this topic was cited by the Second Circuit in *Friedman* (618 F.3d at 155), has expressed a harshly skeptical view of the evidence against MacRae in this very case. *See*, Rabinowitz, Dorothy, *A Priest's Story,* Wall Street Journal, April 27, 2005. As the Second Circuit commented in *Friedman*, allegations of sexual abuse can be particularly dangerous to innocent defendants. Prosecutors and investigators can become overzealous, getting "swept up" by "entirely human" "emotions like fear, outrage, anger and disgust" – and normally good judgment can be distorted. Juries, of course, can have the same reaction.

On occasion, when the record happens to be strong enough to reflect the gross unfairness of

---

[6]The Catholic Church has paid to accusers some $2.5 billion since 1994 – $23 million of that coming from the New Hampshire Diocese. Rabinowitz, *supra*, April 27th and 28th, 2005.

the trial (and the accuser's lack of credibility), lightning strikes and the defendant is vindicated. *E.g.*, *People v. Griffin*, 671 NYS2d 34 (1st Dept. 1998)(gastroenterologist improperly convicted for allegedly performing oral sex on a sedated patient during a colonoscopy, on grounds of prosecutorial misconduct and limitations on cross-examining the accuser; defendant acquitted on retrial). *See*, Rabinowitz, Dorothy, *The Doctor's Story*, Wall Street Journal, May 24, 2000, p. A26. *See, similarly*, *People v. Jovanovic*, 700 NYS2d 156 (1st Dept. 1999).

More recently, there have been cases where ruinous sexual allegations were made against defendants, the media engaged in sensationalistic reporting, accepting the allegations as true, and because of the accuser's recklessness the cases began to unravel even before the trial. By prominent example, three lacrosse players at Duke University were falsely accused of rape, and forced to endure protracted public obloquy even with mounting evidence of innocence. *See*, Taylor, Stuart, Jr., & Johnson, K.C., *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case*, 432 pp. (Thomas Dunne 2007); Charlotte Allen, *Duke's Tenured Vigilantes*, The Weekly Standard, Jan. 29, 2007, vol 12, No. 19. The charges now were proven false and dismissed. There is no way for us to know the (presumably) far larger number of cases in which innocent people have been convicted and incarcerated because their accusers maintained a veneer of credibility through the time of the guilty verdict.

MacRae's case came in the middle of the moral panic that infected law enforcement, the public, media, judicial system, and verdicts. The newly discovered evidence presented here casts new light on the investigation, prosecution, trial, and conviction – from the invention of Grover's stories, through defense counsel's role in the conviction. Dispassionate review – not possible until now – makes apparent the injustice of allowing MacRae's conviction to stand.

The Accuser: Tom Grover – Liar, Addict and Thief

Grover the Liar

Grover was a confessed liar long before accusing MacRae. In 1989, while attending one of many drug and alcohol treatment programs, Grover conceded:

> I lied a lot to get what I wanted.... I lied and then would make alibis to convince others because I had lost their trust.

(T. 4/62-63) His friends and relatives concur with those admissions.

Scheming and lying are hallmarks of Grover's character. His former wife, Trina Ghedoni, and step-son Charles Glenn knew Grover as a "compulsive liar," "manipulator, [] drama queen," and "hustler," who "molded stories to fit his needs... lied to get what he wanted," and "who can tell a lie and stick to it 'till his end." Ghedoni explained that when Grover was confronted with his lies, he "would lose his temper and sign into the [psychiatric] unit in Elliott Hospital." (**Exh. A[7]; **Exh. B; **Exh. G; **Exh. N)

Grover's "dishonesty, misrepresentation and unwillingness to be honest about his problems" was a noted feature of his drug and alcohol treatment experiences. (**Exh. C) In 1987, Grover was checked into Derby Lodge – one of the several rehabilitation programs he failed. There, he claimed that as a small child he had been molested by: his foster father, a clergyman, and baby sitters, "among others." Indeed, in "disjointed" accusations, he claimed to have been molested "by so many disparate people that his credibility was seriously in doubt," leaving staff to wonder whether "he was

[7]"T" citations refer to the trial transcript volume number and page (T. vol/page). Some trial transcripts have no volume number; those are cited (T. page, date). "**Exh." citations refer to newly discovered evidence contained in the appendix to this document. "Exh." citations refer to the exhibits submitted herewith. "Exh. K" is the affidavit of private investigator James Abbot, who conducted the investigation in this case. There, Abbott attests to the veracity of his reports from which some of the witnesses' statements presented here are collected.

going for some kind of sexual abuse victim world record." (**Exh. D; T. Collett, 10, 15, 30, 45)

As he developed his accusations against MacRae, recent investigation has revealed, Grover confessed to several people that they were lies. He told one acquaintance about a planned "insurance scheme... in the Keene area." (T. 8/79, 82-87) He "often" confessed to his step son, Glenn, that his accusations were lies and that he would "set MacRae and the church up to gain money for sexual abuse." (**Exh. B)

Grover bragged to Ghedoni and Glenn that he was going to set up MacRae and "get even with the church." (**Exh. A; **Exh. B) Recently, Glenn recalled:

> Grover would laugh and joke about this scheme and after the criminal trial and civil cash award he would again state how he had succeeded in this plot to get cash from the church. On several occasions, Grover told me that he had never been molested by MacRae... [and] stated to me that there were other allegations, made by other people against MacRae and [he] jumped on and piggy-backed onto these allegations for the money.

(**Exh. B)

In 1994, Grover asked Ghedoni to marry him "because it would look better and, more importantly, he needed the security of a wife for the trial." (**Exh. G) During the entire time he and Ghedoni were together, "[Grover] never stated one word of abuse by [MacRae]" (**Exh. G) Grover told Glenn that "he had never been molested by MacRae," and "never changed his statements that he set up Gordon MacRae and the church." (**Exh. B)

Grover the Addict and Manipulator

Grover and his 12 biological siblings were removed from their parents' care "due to abuse and neglect associated with the parents' alcohol abuse."(T. 34-35, 9/13/94) He was adopted by Elmer and Patricia Grover, and became one of eight adopted siblings.

Ms. Grover had "always been worried for the potential [of Grover's alcoholism] because I knew that... both [birth] parents were alcoholics..." (T. 6/82) She should have been concerned also about the effects of her other sons on Grover. They started Grover drinking as early as 1979, when

he was 11 years old. (T. 3/4; T. 4/25). Even that early in his alcoholic life, his mother was aware of and worried about his drinking. (T. 2/52)

In 1982, Grover told his mother that his father was having an affair. Mr. Grover moved out of the house, and the Grovers divorced a year later. The disintegration of the marriage was hard on everyone, Ms. Grover recalled, but particularly for Grover, who believed it was his fault. (T. 2/48)

At trial, Grover blamed his increasing alcohol intake on his parents' marital problems:

> [E]very opportunity, [I] would just go out with [my brothers] and drink... (T. 2/52)
>
> ... it got worse when the separation was going on and I really started drinking.... (T. 2/53)
>
> ... at any available moment that I could get it, I would drink; and that's how it went; and that's how it went.... It was a fairly steady pattern....I went looking for the opportunity to drink and it took a lot of the pain away. (T. 3/6)

By the time of the divorce, Grover had been drinking for four years. He was a 15-year-old alcoholic.

Ms. Grover knew that she was unequipped to deal with such severe addictions. She had known MacRae as a priest for several years and was impressed with him and his relationship with the entire Grover family. She thought he could help her son. (T. 6/44-45, 64-71, 83-84)

MacRae tried, but eventually recognized that he was no more equipped than Ms. Grover to address such extraordinary illness. But if MacRae was of no spiritual or constructive assistance, Grover found other uses for him – at first to bail him out of legal trouble, and finally as a means to fortune.

In 1985, Grover was arrested for burglary and forgery. He ran to MacRae for help, confessing that he was an alcoholic and drug addict. Moved, and with hope for Grover's success, MacRae intervened for Grover, urging the court and prosecutor to forego prosecution in favor of admitting Grover to the Beech Hill residential rehabilitation hospital. MacRae had helped to get other

parishioners into the same types of programs. (**Exh. S) MacRae arranged Grover's admission. (T. 3/29; T. 6/169-171; T. 7/14) Grover used his Beech Hill admission to get clear of the felony charges, and then left the program without completing it. (T. 3/29) Still trying to help this needy and troubled teenager, MacRae helped to place Grover into a number of other drug and alcohol treatment programs.

When Grover was admitted to a program at Derby Lodge in 1987, he confessed to drinking 12 to 18 beers a day and regular use of mood and mind altering drugs, including marijuana, hashish, cocaine, opium, amphetamines and other hallucinogens. He reported there that he "became intoxicated with his first consumption," was a "black out drinker" every time he drank, and had a history of shakes and sweats while drinking. (T. 19, 9/13/94 Collett trial transcript) Grover failed the Derby Lodge program when he was caught smuggling drugs 19 days into the 28-day course. (T. 3/29-30; **Exh. H)

MacRae helped place Grover in at least six other programs. He lasted through some, but none made a difference. (T. 3/28-32, T. 19, 9/13/94; Exh. I, p. 19; Exh. U, p. 12-17, 50, 57, 71, 121) His substance abuse ran unabated. He became such a destructive force that his mother threw him out of the house – telling him not to come back. (T. 6/97; T. 116-117, Grover 9/2/94, pretrial deposition)

Grover the Criminal and Predator

Alcohol and drug abuse were not Grover's only problems. He had numerous experiences with the criminal justice system. In addition to his 1985 burglary and forgery arrests, Grover's rap sheet included two thefts, two forgeries, theft by deception, and another burglary. (T. 6/163) In 1990, he pled guilty to yet another burglary. (T. 3/30-31) While she and Grover lived together in the early 1990's, Grover was arrested for resisting arrest and assault on an officer after breaking Ghedoni's nose. (**Exh. J)

Grover also established credentials as a sexual predator. Ghedoni had two daughters when she met Grover. He frightened them from the start. They recognized him as a "sick individual who was obsessed with sex and teenage girls," a "creep," and "pervert," who was "constantly eying" and groping them. They were particularly frightened when they woke in the middle of the night to find Grover in their room, between their beds, staring at them. (**Exh. Z; **Exh. AA)

Grover accepted no responsibility for any of it. Through sobs and tears at trial, he blamed it all on MacRae.

Grover's addictions continued to rage after trial, and his rap sheets continue to grow with charges of all sorts of things, from traffic infractions, to violent crimes in at least three states and Native American jurisdictions. (**Exh. BB Rap Sheet)

Grover the Fortune Hunter

In the early 1990s, the New Hampshire Catholic Diocese paid millions of dollars to men alleging molestation by their priests. Steven Wollschlager, a local teenager at the time, recalls the diocese's reputation as an easy mark:

> In the early 1990s, all the kids in Keene, New Hampshire bragged about how easy it was to set the priests and the church up for money over sexual abuse charges. All the kids were aware that the church was giving out large sums of money to keep the accusations from becoming public and this fed the imagination of the local kids to join in these allegations.

(**Exh. T)

Grover applied himself to the pursuit of money for claims, as did his brothers. Ultimately, the brothers Grover collected more than a half-a-million dollars in diocese cash. (**Exh. H, Exh. Y)

Grover went to see civil attorney William Cleary. (T. 3/57)

When asked at trial about his meeting with that lawyer, Grover first denied that they talked about anything having to do with "possibly bringing a suit for damages against Gordon MacRae."

They talked, he said, "not about specific things." Or, "just to talk about options." Or, "options" for suing MacRae and the diocese were discussed. Finally, Grover confessed, "the possibility of a cause of action" against MacRae and the diocese was discussed. (T. 3/57, 58) Cleary referred Grover to Keene Police Department Detective James McLaughlin. (T. 3/65-67) Grover was also directed to Attorney Robert Upton, who served him as his lawyer through his diocese payment.

A criminal conviction would assure a victory in a civil lawsuit. Indeed, with a conviction, the only substantive issue in a civil case would be how much money Grover would walk away with. Grover remained close to his civil attorneys throughout the criminal process. He periodically called them "for money or cash advances on his expected cash award," and received "cash advances." (**Exh. B) Detective McLaughlin also seems to have worked with Grover's civil attorneys. Indeed, he conducted at least part of his investigation from Upton's office. (Exh. U, p. 63)

Grover claimed that his lawsuit was not for personal gain, but rather for the "safety of all the other people." He would rather send MacRae to prison than have a "million dollars," Grover said. (T. 3/37, 46) Of course, he was pursuing diocese money at the very moment that he made that statement to the jury.

Grover told the jury that he only wanted money for therapy necessary to deal with problems caused by MacRae: "shame and guilt...[and] hurt inside," "feeling suicidal.... not knowing how to deal with life," not trusting people, "feel[ing] things in my heart the way I used to," and "do[ing] something to deal with all the things that just rip at my heart every night and every day," including crying himself to sleep, and "tak[ing] four or five showers a day trying – to feel – to try to feel clean again." (T. 2/41, 42, 47; 3/36, 39, 40, 47) He had been attending therapy for two years, he said, but could not afford to continue without the lawsuit money. (T. 3/36)

Grover's civil attorney had "a business relationship with the head person," at the New Life

Center, and "asked if he would provide counseling for [Grover]." (T. 6/150) Therapist Pauline Goupil charged Grover just twenty-dollars for each fifteen-minute session. (T. 5/52-53) Grover attended very few sessions – though he claimed at trial to have been in treatment with Goupil for "two years to talk about [abuse]."

Grover's therapy schedule: "When I want to go, then I just go." (Exh. U, p. 19) That wasn't often. At trial, when he claimed "two years" of therapy, he had seen Goupil 19 times or fewer over the course of those years – fewer than 15 hours. After the criminal trial, but before he received his diocese payment, he saw Goupil only 9 times more. She never saw him again, once he received his check. (**Exh. I, pp. 7-8, 85; **Exh. Q)

Worse, when the trial court reviewed Goupil's files concerning Grover, it found "nothing about Mr. MacRae in those records." (T. 3/43) That is consistent with Grover's statements to Ghedoni and Glenn – that his visits with Goupil were for nothing but "to gain jury appeal," and to convince the jury "that his problems were a result of the molestation by MacRae." He also told Glenn that his civil attorneys wanted him to "act crazy, as this would be helpful in the trial." (**Exh. B; **Exh. N)

Grover's Behavior After Receiving Payment For His Accusations

Grover abandoned his "victim" role as soon as he received his diocese payment. For his accusations, in March 1997, the diocese handed over a check for $195,000 (**Exh. Y) He photographed himself with $30,000 in cash and took the money around to show friends and relatives, and photograph them with it. Glenn recalls that Grover came to visit with a bag of money, "fanned it out to take pictures of it, all the while, bragging about 'putting it over on the church.'" (**Exh. A; **Exh. B; **Exh. E)

In August of 1997, Grover took the money and Ghedoni to Arizona, where he blew it all on

alcohol, drugs, cars, gambling, pornography, and motel rooms in which to indulge his vices. He lost about $70,000 in one three-day gambling spree, and a Nevada casino was pursuing him for $50,000 more. Ghedoni left Grover in March of 1998, when she found him in bed with his biological sister. In a year, he threw away everything. (**Exh. G; **Exh. B; **Exh. Q)

The Rectory

Grover claimed the alleged assaults occurred in the St. Bernard's church rectory. The rectory was a busy place.

Four priests lived and worked in the rectory in the summer of 1983: Father Dupuis, Father Bombardier, Father Houle, and MacRae.[8] Caretaker Fred Lafond lived there too, and at times shared an office with MacRae. (T. 3/81-82, 86, 87) One of two church secretaries lived in the rectory. A bookkeeper and a cook worked there as well. (T. 3/80-81)

The rectory kitchen is on the main floor, as are a bathroom, and living room with a television, used for meetings, four business offices, and the dining room. Two stairways open into that floor and there are three doorways to the outside.

Also on the main floor is a large reception area, in which two secretaries worked – sometimes six days a week. (T. 8/13, 20; T. 3/78, 81). Grover conceded that the reception area is:

> one of the main avenues in the house, that entry office, people just walked in and out and there were people in there at all times of the day.
>
> [It was a] central area where most of the activity [took] place...
>
> it was the most populated place in the rectory that was like the center point of the rectory.... it was just people coming in and out; whoever might have been there, the priests were there....

The reception area was also used for "other purposes" and "a lot of stuff," including as a mail

[8]Father Daniel Dupuis was at St. Bernard's from June, 1981 through July, 1983. Father Bombadier lived there during that time. Father Houle was away during July, 1983. (T. 7/24-25)

room, and at random times and unannounced, people came and went through there. (T. 3/78-79; T. 5/7-8, 27) That area "never slows down," even in the summer, Father Biron explained. (T. 8/13)

Grover claimed that the alleged abuse occurred in two of the priests' offices on the first floor. The doorways to both offices open into the reception area. One of the office doors has a glass window – that might have had a "sheer" piece of fabric over it at one point, but never anything obscuring the view through it while MacRae was stationed there. (T. 8/36, 46) Numerous outside windows also looked into the offices from Main Street, the church, the driveway, and the parking lot. (T. 3/19-21)

Grover conceded that sound could be heard through the office doors. Indeed, through the doors, he had on occasion heard parishioners crying during meetings with priests. (T. 5/130) The door locks did not function and were painted over by the time MacRae arrived at the rectory. No one who lived or worked there ever locked a door, asked for, or had even seen a key. (T. 7/33; 8/11-12, 26, 31; T. 8/40)

On the second floor is another living room, one bedrooms for a priest, two guest rooms and the bookkeeper's office. Two staircases opened into the second floor. MacRae lived on that floor from June through August, 1983.

There are two bedrooms with adjacent studies and baths, and a guest room. One stairway opened into the third floor. (Exh. H)

The Detective

Grover's first civil lawyer referred him to Detective James McLaughlin, who led the effort to produce the case against MacRae. (T. 3/65-67) His methods raise significant questions about the investigation and its fairness.

McLaughlin was a self-proclaimed specialist in child sexual abuse, who claimed to have

substantiated "over a thousand" sexual abuse victims in the 750 cases on which he had worked. (T. 7/36-37, 47) To a neutral observer, these numbers suggest a considerable bias in favor of proving a hypothesis of guilt (an *a priori* belief that accusations are true), rather than critically investigating accusations – as is foremost in an investigator's job description.

Examples of questionable McLaughlin tactics are revealed in the newly discovered evidence. These include badgering and coercing witnesses, misrepresenting witnesses' statements, making inaccurate entries in his reports, and even collaborating with Grover's civil lawyer.

One prosecution problem was that Grover did not accuse MacRae until his civil statute of limitations was near expiration – suggesting that his accusations were made only to support his civil claims. To overcome that problem, Grover claimed that in 1987, he reported abuse to Grover's Derby Lodge drug treatment counselor, Debbie Collett – and thus his accusations were not new-found. (T. 3/33) To corroborate that claim, McLaughlin and Detective Brian Clark went to Collett.

Collett could not give them what they wanted. Grover never made such an accusation. (T. 7/103) Collett's records reveal that during one Derby Lodge group session, other patients were challenging Grover for lying to them, after which Grover came to Collett. Grover then offered Collett "disjointed" claims of molestation when he was a small child, by a foster father, Mr. Grover, and a clergy person, "among others." (T. 15, 29-30, 9/13/94, Collett trial transcript)

McLaughlin and Clark refused to accept Collett's report. The two detectives pressed her to corroborate Grover's claim, as they wanted her to tell them that Grover had named MacRae as he now claimed he had done. They bullied and badgered her. Collett described McLaughlin and Clark pursuing the statement they wanted from her:

> Neither [detective] presented as an investigator looking for what information I had to contribute, but rather presented as each having made up their mind and sought to substantiate their belief in Gordon MacRae's guilt.... I was uncomfortable with [Clark's] repeated

> stopping and starting of his tape recorder when he did not agree with my answer to his questions and his repeated statements that he wanted to put [MacRae] where he belonged behind bars, that a priest of all people should be punished. I confronted Detective Clark about his statements and his stopping and starting the recording of my statement, his attitude and his treatment of me which seemed to me to include coercion, intimidation, veiled and more forward threats as well as being disrespectful. At that point and in later dealings, I was overtly threatened concerning my reluctance to continue to subject myself to their tactics, with threats of arrest....
>
> My overall experience personally in interacting with the detectives was one of being bullied, there being an attitude of verbalized animosity, anger and preconception of guilt regarding Gordon MacRae. They presented as argumentative, manipulative and threatening via use of police power in an attempt to get me to say what they wanted to hear.

(**Exh. C)

McLaughlin later prepared a document that he claimed was a transcript of the meeting. It did not, however, reflect what Collett told the detectives. (T. 7-16, 9/13/94 Collett) Collett's repeated requests for a copy of the tape were ignored and denied. Nor was the defense ever provided with a copy of the tape. (T. 11, 9/13/94 Collett; **Exh. D)

In 1994, McLaughlin similarly pursued Grover-contemporary, Steven Wollschlager, for accusations against MacRae. Wollschlager was another of MacRae's parishioners who was counseled by him in 1988. After being assured by McLaughlin that he would be "reimbursed" for his time, Wollschlager met with the detective. "The lawsuits and money were of greatest discussion," Wollschlager recalls,

> and I was left feeling that if I would go along with the story, I could reap the rewards as well.... McLaughlin had me believing that all I had to do is make up a story about [MacRae] and I too could receive a large sum of money as others already had. McLaughlin reminded me of [my] young child and girlfriend and ... that life would be easier for us with a large amount of money.... It seemed as though it would be easy money if I would [] accuse [MacRae] of wrong doing.

(**Exh. S) At first, Wollschlager refused. He had never been molested.

Eventually, lured by "easy money," Wollschlager made up some claims for McLaughlin.

(**Exh. S) But even that was not enough for the detective – who enhanced what statements he managed to elicit. (**Exh. T) Recently, Wollschlager reviewed McLaughlin's report of his statements, and found it to contain fiction. For example, McLaughlin's version had Wollschlager attending high school in the wrong town, making late night collect phone calls to MacRae (though they lived in the same town), and sleeping in the rectory. McLaughlin's report attributes to Wollschlager a comment that MacRae did not molest him because Wollschlager wasn't attractive enough. Wollschlager never said any of that. Nor is any of it true. (Exh. R; Exh. T) As with Collett, no tape of McLaughlin's contact with Wollschlager has ever been produced.

Ultimately, Wollschlager did not support McLaughlin. "I could not bring myself to give perjured testimony against [MacRae], who had only tried to help me." Wollschlager told the county attorney, "I know what this is about and I don't want to be part of it." Without comment or question, he was told he was not needed. (**Exh. R; **Exh. S)

Another example of McLaughlin's preference to confirm his preconception of guilt and blind belief in Grover's claims, without even the most basic factual investigation, is found in the claim that Grover made that MacRae locked the office doors when inside with Grover. The locks were painted over and non-functioning during MacRae's entire time in the rectory. McLaughlin would have known that (and that Grover lied) if he had bothered to look at the locks and talk to caretaker Laffond. He did not. (T. 7/131)

McLaughlin also spent time with Grover's civil attorney, Robert Upton. On April 1, 1994, for example, Grover, McLaughlin, and Upton met in Upton's office, from which the three set up a telephone call to MacRae for Grover to make accusations, in the hope of eliciting an incriminating statement. According to Grover: "me and Jim [McLaughlin] were sitting in [Upton's] conference room talking, and he asked me if I minded trying to contact Gordon MacRae at that time." (Exh. U,

p. 63) Why McLaughlin and Upton were working together is not clear. McLaughlin's reports include nothing of a joint investigation, operations or phone calls from the civil lawyer's office in Concord, 50 miles from Keene.

The Therapist – Pauline Goupil

Goupil testified only in a *voir dire* examination, out of the presence of the jury. She was not a trial witness.

The actual role that Goupil played in the development and presentation of accusations is unclear. Her official contemporaneous records conflict with the claims in her testimony. Either, consistent with her records, she and Grover never discussed MacRae – in which case her testimony about such discussions was inaccurate – or they did discuss MacRae, in which case her official records do not reflect reality. The following is based on the record and newly discovered evidence.

- Grover was referred to Goupil through his civil attorney who had a "business relationship" with the head of the organization for which she worked. (T. 6/150)
- Grover admitted to Ghedoni and Glenn that he was sent to her not for treatment, but "to gain jury appeal" and persuade the jury that "problems were a result of the molestation by MacRae." (**Exh. B; **Exh. N)
- Grover met with Goupil for fewer than three hours, by the time of trial – 11 sessions of 15 minutes (just enough to appear as some kind of relationship). (Exh. I, p. 85, 7/15/96)
- Goupil's contemporaneous records of her Grover-sessions contain "nothing about MacRae," the trial court found upon *in camera* review. (T. 3/43)
- Contradicting her contemporaneous records, Goupil testified that Grover spoke about "memories of sexual abuse." (T. 7/8)
- Also contradicting her records, Goupil conceded that she validated Grover's claims by using

methods to "help[] him remember certain events that had occurred...." all of which produced more stories. (T. 7/8)

- Contradicting Goupil's records too, Grover conceded that Goupil helped him remember stories of abuse, "walked [him] through accusations, and "validat[ed]" and "honor[ed]" the stories as truth. (T. 6/8-10; 7/8 - 10)

- Goupil conceded that addictions like Grover's can in fact be the result of genetics. Evidencing a bias in favor of Grover's accusations however, Goupil concluded that only MacRae could have caused Grover's addictions. (**Exh. I, p. 85) She offered no scientific support for her claim. Nor did she describe any type of clinical evaluation that she might have conducted to reach it – let alone one that would allow her to reach it in less than three hours.

- Goupil also conceded that a therapist might "enhanc[e]" a patient's "memory process," resulting in inaccurate reports, but said she would never do such a thing. (T. 7/8, 9) She did not address the substantial amount of uncontroverted scientific literature documenting that inadvertent, unknowing, and nearly unavoidable presence of even subtle forms of influence is capable of corrupting reports.[9]

- From the courtroom gallery at trial, Goupil coached Grover, at one point directing him to cry. (**Exh. W)

Father Gordon MacRae

[9] *See*, Rosenthal, R., Suggestibility, Reliability and the Legal Process, *Developmental Review,* September 2002 (explaining relevant scientific research literature, and its application to legal and constitutional principles).

MacRae first arrived in the Keene area as a seminary student in the summer of 1979. Performance evaluations by parishioners were very favorable. Ms. Grover, for example, commended his engagement in parish life and with "young people...families and the elderly." She concluded she would "love" for him to become a pastor in the parish. "As I have said, we like him and respect him. We think he will be an excellent priest." (Exh. O) Parishioner Helen Wilson was similarly impressed by MacRae's efforts, "with the young people preparing for confirmation," "visiting the elderly and the sick," and "taking part in parish liturgies." "MacRae has become a friend to me, my husband and my children.... We will miss him." (Exh. P)

The following two summers, MacRae was assigned to churches in nearby parishes. (T. 6/69-70) The Grovers maintained contact with MacRae who, from time to time, would call or stop at the Grover house, and stayed in the Grover home once during the winter of 1980. (T. 6/116; Exh. H)

In 1983 – now a priest – MacRae moved to the St. Bernard's rectory in Keene. (T. 3/7) He quickly entered parish life, making himself available to all every day, at any hour. He was dedicated to the daily needs of his parish, and spent considerable time driving parishioners from place to place, feeding them, providing clothing, assisting to find counseling and rehabilitation programs, as well as providing spiritual guidance.

MacRae, a Devoted, But Naive Priest, Was No Match for Grover

The Grovers were parishioners and friends. MacRae and Ms. Grover were close, and she encouraged his relationship with the children. When Ms. Grover could not handle Grover's addictions and behavior, she sent him to MacRae, hoping for salvation. (T. 6/82-85) She overestimated his abilities. As with every parishioner, MacRae did what he could. But, he was not up to the task.

MacRae's utter failure with Grover, and Grover's total manipulation of him, evidences a

clumsy naivete that undermines any notion of a stealth, sophisticated planner and schemer who could have committed the alleged acts, many in public places, without being discovered.

- That MacRae allowed himself even to be alone – worse, behind closed doors – with a manipulative, criminal, alcoholic, drug-addict, teenager reveals clouded judgment, at best.

- Nighttime car rides create an even greater, and more obvious vulnerability to accusations like Grover's. Yet, MacRae was unaware.

- MacRae was far more than naive when McLaughlin confronted him with Grover's claims. Rather than simply deny McLaughlin's accusation that he was a pedophile, MacRae corrected the detective's terminology, instructing him that given Grover's age at the time abuse was alleged to have occurred, the proper term would have been "phebephile," not "pedophile." (**Exh. H) The state never provided a tape recording of MacRae's comment to McLaughlin. Thus, McLaughlin was free to report it as an admission, claiming that MacRae confessed:

> I prefer not to think of myself in those terms. I prefer to think of myself in terms of what they call a hebephile because a hebephile is someone attracted to adolescents and not to what we would call children.

(T. 1/9)

Certainly, MacRae's comment was not a confession. He denied the accusations when he first heard them, and continues to deny them today. But his blind need to be heard resulted in that ill-advised conversation with the detective – going so far as to argue semantics and furnish the state with what might easily be inferred as an admission.

- A key defense argument was that Grover made up his claims in pursuit of his windfall. (T. 5/56; T. 6/141-149) MacRae undermined that defense, however, when, in December, 1993, he filed a lawsuit against Grover, the entire Grover family, Grover's civil attorney, McLaughlin and the

prosecutor, alleging meritless causes of action based on the criminal prosecution.[10] (T. 6/141) The only result of his acts was the appearance of an attempt to quash the criminal accusations by threat of civil damages. MacRae's lawsuit served the state too by casting Grover's civil suit as a response to MacRae's lawsuit – rather than a grab for diocese money.[11] Worse, MacRae continued to press his civil case as the criminal trial approached; an example of his naivete that played into the hands of the police and prosecutor. (T. 6/141-144)

MacRae's naivete and vulnerability is exhibited also in his actions following the conviction and before sentencing. MacRae, destitute and demoralized, having been left by his lead criminal defense lawyer, and unable to face the prospect of another trial, caved under pressure and pled guilty to claims made by three other of Keene's young men in pursuit of a diocese payday. *Friedman*,618 F.3d at 149-150 (discussing influence to plead guilty in sexual abuse case).

MacRae's conduct is hardly the work of someone capable of maintaining a pattern of clandestine molestation over a period of years – particularly when considered in light of the state's claim that he maintained similar secret assaults on a number of other boys during that time.

The Trial

During the 10-day trial, the state presented 12 witnesses in its direct case,[12] and three rebuttal

---

[10]MacRae's complaint alleged: Conspiracy, Libel, Slander, Malicious Prosecution, Intentional Infliction of Emotional Distress, Abuse of Civil Process, Negligence, Negligent Prosecution, and Soliciting Perjury of a Witness.

[11]Grover's lawsuit was not filed until six months after MacRae sued Grover. (T. 6/141)

[12]Grover (T. 2/19), Deborah Warner, Ph.D. (T. 2/63), Patricia Grover (T. 6/42), Robert Upton (T. 6/139), Lucille Gorges (T. 6/153), Bishop Francis Christian (T. 6/172), Arthur Walker (T. 7/13), Jon Grover (T. 7/17), Father Daniel Dupuis (T. 7/21), Detective McLauglin (T. 7/35), Leonard Fleisher, Ed.D. (T. 7/138), and Pauline Goupil (T. 7/5)(*voir dire* only, out of the presence of the jury).

witnesses.[13] None witnessed any alleged acts, nor did the state offer any objective evidence of the charged crimes. The prosecution turned on Grover's credibility – bolstered with bits of ersatz psychology from state witnesses, who vouched for the truth of the accusations. The defense presented seven witnesses.[14] Collett and Goupil testified outside the presence of the jury.

Pretrial Publicity

The church convicted MacRae in the press before the trial began. As early as a year before the trial, the New Hampshire Diocese issued a press release, picked up by several newspapers, proclaiming MacRae's guilt:

> The Bishop and the Church are saddened by and grieve with the victims of the alleged actions of Gordon MacRae.... the church is a victim of the actions of Gordon MacRae as well as [the victims]....

(Exh. F)

Thus, from early on, the church allied itself with Grover – a confessed liar, drug addict and thief – going so far as to claim a common bond as victims. The purpose of the statement might have been to protect the church from corporate liability, but the effect was that before the jurors took their seats, the church had condemned MacRae.

MacRae's Counsel

MacRae's counsel did nearly as much to convict him as did the state. More than ineffective, counsel served the state – all but guaranteeing a conviction.

New Mexico attorney Ron Koch was the lead counsel. New Hampshire, attorney J.R. Davis

---

[13]David Grover (T. 8/99), Jonathan Grover (T. 8/104), Patricia Grover (T. 8/108)

[14]Father Robert Biron (T. 8/5), Frederick Laffond (T8/28), Father Dennis Horan (T. 8/56), Deborah Karonis (T. 8/66), John Karonis, (T. 8/61), Father Maurice Rochefort (T. 8/66), and Dean Clay (T. 8/81)(*voir dire* only, out of the presence of the jury).

was to be "local counsel only," "...for the purposes of assisting in filing paperwork and advising [Koch] regarding our rather quaint local practices and procedures." Davis was not to review discovery, and his fee was based on his limited role. (Exh. V)

Prior to trial, the court suppressed dramatic Grover-stories of uncharged acts of alleged molestation that were to have occurred before the acts for which MacRae was on trial. (T. 1/9-10) *Infra*, p. 41-46. The suppression order was critical to the defense. The admission of Grover's uncharged acts stories would increase by more than half the number of accusations that MacRae would have to defend. Nevertheless, during his opening statement, Koch opened the door for them all. (T. 1/52, 59; T. 2/4-5) The state took full advantage, presenting that dramatic material through Grover, his mother, brother, and McLaughlin. The weight of so much uncharged acts evidence crushed the defense – before even the first witness took the stand – and completely undermined the credibility of defense counsel, and, in turn, MacRae.

During discovery, the state provided a considerable amount of material, including witnesses' statements and other documents concerning the accusations. MacRae reviewed those documents, annotating them with comments, analyses, impressions, explanations, and strategies for confronting the accusations at trial. Those annotations were a working document for the defense; the outline of the defense theory and strategy. Nevertheless, attorney Koch sent all of that annotated material back to the prosecutor. (Exh. M)

Also, because MacRae did not testify, the state had few of his statements to use against him. MacRae's annotations, however, provided the state with statements and materials from which it could undermine his credibility and even create inferences of admissions. The state could have done none of that had the defense strategy not been provided to it. (T. 7/99-104)

Moving to introduce MacRae's statements included in that material, the prosecutor explained to the court:

> [T]he defendant, a rather unusual occurrence in a criminal case, provided the state with work product, basically Gordon MacRae's response, detailed response to each and every paragraph of the state's voluminous discovery.

(T. 7/67)

In addition, during his investigation of the case, defense counsel sent questionnaires to several potential defense witnesses concerning their interactions with MacRae and any information they might have that would be helpful to the defense. The purpose of those was to assess the pool of witnesses from which MacRae might draw as he built a defense case. Counsel then sent the completed questionnaires to the prosecutor – thus, identifying potential defense witnesses and disclosing their testimony well before trial.

Providing the defense strategy, defendant's statements, and identification of potential witnesses and their statements, to the state before trial, once again armed the state and left MacRae defenseless.

Defense counsel was given an opportunity to conduct a pretrial interview of Grover. Although attorney Davis' retainer agreement was clear in that he would not read or be familiar with the discovery or substance of the case, Koch sent Davis to the interview, alone. (Exh. U)

The pretrial deposition was critical to pin down particulars of the alleged acts, none of which were listed in the indictment, and force Grover to choose a single story. Unprepared, Davis was unable to explore Grover's claims in any detail. Questions about abuse by MacRae are found on five transcript pages. (Exh. U, pp. 141-145) And there, Davis merely let Grover briefly describe two alleged uncharged acts accusations – in vague terms. Davis did not follow up on or explore the claims. The rest of the 170 page interview was devoted to inessential information such as Grover's

addresses and job history, some questions about treatment programs, criminal history, and the like; all of which the defense should have already become aware during the discovery period.

The deposition would also have served also as a rehearsal of Grover's cross-examination – providing counsel with the opportunity to assess Grover's characteristics and find effective methods to question and impeach him. All of that was lost when rather than travel to New Hampshire, Koch sent Davis to the deposition.

In all, counsel did for the state what it could not have done for itself – ushered in inadmissible evidence, gave the defense strategy to the state and failed to conduct critical discovery. A conviction was certain before the first witness took the stand.

Grover's Testimony

Grover's testimony was fantastic, nonsensical, and contradictory – even about the simplest things. For example:

- As he testified, Grover described himself as not nervous and "very nervous," not apprehensive and had "a lot of anxiety." (T. 2/42; 3/44, 47; 4/9)
- Grover remembered details for the state during direct examination, but not on cross-examination, because recalling the acts alleged "overloads my mind and.... leaves me more or less in shock for days after...." (T. 6/10,11)
- Grover claimed that he had not reported abuse during the decade between its alleged occurrence and his meeting with the civil lawyer because: a) he had repressed the alleged abuse (T. 6/10); b) it was "difficult to talk [about it] in front of people (T. 2/42); and c) he did talk about it with a drug and alcohol abuse counselor. (T. 3/33) It is not clear whether Grover was unaware of having been abused, at the same time that he could not talk about it – and talked about it.
- Grover might have forgotten each act immediately after it occurred. Or, at the time of each

act, he might have forgotten that the earlier acts occurred. Or he might have remembered. At trial, he couldn't remember. (T. 5/38-41)

- Grover claimed to have been so traumatized during molestation that to describe him as "emotionally upset" and "crying," would be "a mild statement." Rather, he "los[t] control," but silently (T. 3/103):

> [is] not a vocal thing... I'll shake and just freeze up... I'm not vocal. I don't cry out loud.... If I was crying hysterically or out of control.... if I was sitting here, it wouldn't be like you could hear me on the other side of the door.

(T. 3/103-104)

- Grover claimed to have been in a trance every time he was molested; motionless, crying noiselessly, while neither he nor MacRae spoke a word or made a sound, though Grover cried. (T. 2/31; T. 3/15, 26) On the other hand, at several points in his testimony, Grover's sobs and crying were dramatic enough that recesses were necessary for him to recover. (*i.e.*, T. 2/41; T. 3/22)

- Grover conceded that his accusations increased and changed as therapist Goupil, prompted him to "walk through certain stages – a little bit at a time and as [Goupil] walked through it with me, it came to the surface even more." (T. 6/9-10; Exh. I)

- Grover claimed that experiences with MacRae made it impossible to have a close relationship with a woman. On the other hand, he conceded that he had a years-long, "quite close," "extremely close," "deep seeded," and loving relationship with girlfriend Katherine Hall during the time the abuse was to have occurred. He was also in a close relationship with his wife, Ghedoni, for 5 years. (T. 5/84; **Exh. A, p. 1)

- Grover testified that his drinking problem in 1983 was so great that he drank at "every opportunity," and also that his drinking at the time was "just sporadic," not serious. (T. 2/52-53; T. 5/13)

- Grover's appearance on the witness stand was influenced by Goupil, who coached him from the gallery. (**Exh. X) On at least one occasion, Grover watched Goupil as she "place[d] her finger on her right cheek just at the eye level and slowly move[d] her finger down her cheek with a distinct sorrowful frown on her face. Grover observed this and began to cry on the stand and wept for a good part of his testimony." That performance was in "stark contrast to Grover's behavior after his testimony, in the hall outside the court, where Grover was jumping up and down and laughing and joking with some of his supporters." (**Exh. W; **Exh. X)

- Grover was on prescription drugs while he testified, but didn't know what he was taking. (T. 3/47; 4/9)

- Grover, a grown man, claimed that when he saw MacRae in the courthouse hallway, "I just ran back down the stairs because I was so afraid." (T. 3/39)

Particularly in light of the new evidence that Grover actually viewed his testimony as a joke that he enjoyed laughing and bragging about, his entire performance during the trial has now been shown to be an extensive fraud, not just on MacRae, but on the court itself.

Grover's Accusations

McLaughlin questioned Grover several times as he developed the case, and documented Grover's claims in police reports. The contrast between those reports and Grover's testimony reveals the fluidity of his stories. For example, time and again at trial, Grover claimed that each act of molestation was preluded by MacRae "belittling" and "degrading" him. He never mentioned that to McLaughlin. Grover's claims of out-of-body experiences, blacking out, and floating above himself during the alleged acts were also new for trial, never mentioned to McLaughlin – as was his claim of a chess match immediately before an alleged act. (T. 7/122 - 127, 130)

A particularly bizarre story that Grover added after the McLaughlin interviews, but jettisoned

before trial, concerned a car chase. Grover claimed that in 1987, MacRae, in a car and brandishing a pistol, chased Grover – unarmed and on a bicycle – through the streets of Keene, into a cemetery, and then out of town. (Exh. U, pp. 51, 59-60, 100-109) Grover said that he reported that to McLaughlin – whose reports contain no such thing. (Exh. U, pp. 60, 64, 9/2/94)

The Charged Acts

At trial, Grover claimed that MacRae molested him in the rectory five times, between June 6th and just after Labor Day (September 5th), 1983.

Before trial, he claimed to have been molested four times in the Southwest office on the first floor, and once on the third floor. As the trial approached, it became clear that another priest was assigned to the Southwest office. Grover changed his story, moving two acts to the Southeast office; unencumbered by the presence of another priest. Thus, the concern of the lack of opportunity was evaded. (T. 3/11, 15, 18, 21; T. 7/111)

The reason Grover and MacRae even went into the offices on the occasions in Grover's stories was, Grover conceded, because "people just walked in and out [of the reception area] and there were people in there at all times of the day.... There were always people coming in and out...." They went into the offices, Grover said, because there were people just outside the doors. (T. 5/8, 26-27, 32-33) Yet, no one ever saw or heard anything inappropriate.

As for particular accusations, Grover testified that while talking to MacRae on two occasions in the Southwest office, MacRae "became critical," "degrading," "belittling," and "berating," walked across the room, unzipped Grover's pants, "and started performing oral sex on me..." for 15 minutes, as Grover cried. (T. 3/14-18; T. 4/118; T. 5/9-10, 14, 19).

Grover said that while talking to MacRae on two occasions in the Southeast office, MacRae "became really critical," "degrade[d]," "belittle[d]," and "berat[ed]" him, walked across the room,

unzipped Grover's pants, "and started performing oral sex on me..." for 15 minutes, as Grover cried. (T. 3/21-24)

Grover's claims of "critical," "degrading," "belittling," and "berating," were all new for trial. (T. 7/122-124)

Grover offered some ambient details to enhance his stories. These were lies. Indeed, he admitted several to Ghedoni.

- Grover claimed that the first Southeast office incident "started out as just a friendly game of chess," played on a marble set, across from the couch. (T. 3/19-21)

In fact, Grover added the chess set for the jury. He never mentioned it to McLaughlin. (T. 7/130-131)

In fact, there was no chess set in 1983. MacRae bought it in 1986, while on vacation in Bar Harbor, Maine with Father Maurice Rochefort and two nuns – Pam Wagner and Fran Listen. (T. 8/71-74; **Exh. L)

In fact, Grover confessed the lie of the chess set to Ghedoni. He told her, "[t]hat's what they [McLaughlin] wanted.... It fits." (**Exh. A)

In fact, there was never a couch in the southeast office. (T. 8/13, 33)

- Grover claimed that MacRae "went and... locked the door," and he "would usually lock the door of the office." (T. 3/23; T. 5/29-30; T. 7/131)

In fact, the doors did not lock. Caretaker, Fred Laffond, worked in the church and rectory for 24 years. He had never known an office door to lock, never seen a key, never been asked to repair a lock. Moreover, the locks had been painted over years before. (T. 8/31-33) Confronted with the fact of doors that did not lock, Grover changed his claim: "[MacRae] went over and like he was locking

the door..."[15] (T. 5/29-30)

- Prior to trial, Grover claimed that during one alleged act, MacRae stopped when they heard a noise outside the door. (T. 7/125) Faced with the fact that sound travels through doors in both directions, Grover changed his claim. It wasn't a noise that they heard. Rather, it was a wooden floorboard that "could make a noise.... [and] might creak on the other side of the door." (T. 3/106) In addition to the changed story, the floors were not wood. (T. 8/30)

- Grover claimed that he told his Derby Lodge counselor about abuse by MacRae, and that she did not believe him. (T. 34-36) That never happened. After reviewing her contemporaneous treatment notes, counselor Collett reported that Grover came to her with accusations of abuse against a number of people, but not MacRae. (**Exh. D; T. Collett, 10, 15, 30, 45)

- "At different times I remember different things," Grover testified. Thus, MacRae did – and did not – unzip Grover's fly, and did – and did not – fondle his penis. Grover might – or might not – have told McLaughlin about his opened (or closed) fly. Grover might – or might not – have been fondled on one occasion. (T. 4/15-16)

Other than to say that the alleged third floor of the rectory event was not the first, Grover did not know when it occurred – even in relation to the other claims. (T. 4/112-113)

Uncharged Prior Acts Testimony

But for defense counsel's opening argument blunder, the jury would never have heard three

[15]In his summation, the prosecutor recalled the jury's visit to the rectory: "you were in that rectory and I walked around ... and I'm sure some or all of you saw me turn locks. There are locks with keys in that rectory and some of those locks work." (T. 9/51) The impropriety of the prosecutor's conduct is obvious. That he used that conduct to make himself a witness and announce that the locks worked without any evidence to that effect (and some 11 years after the alleged incidents) strains credulity, if not ethical standards. Defense counsel's failure to object is consistent with ineptitude in every phase of this case.

more of Grover's stories of uncharged acts. All had been excluded pursuant to defense counsel's pretrial motion.

In the first uncharged act story, Grover said that as he and MacRae walked through the rectory main hallway, MacRae forced him up against the wall, strangled him, "grabbed my crotch area and was grinding his body up against my side." (T. 2/30)

The two other prior acts stories are about car rides in which MacRae, while driving, fondled Grover, in the seat next to him. (T. 2/37-41; T. 4/66-76)

Would-Be "Expert Testimony" Unsupported, Unsupportable, and Inappropriate

Two state witnesses were permitted to offer seemingly expert testimony, though without scientific support.

McLaughlin

The state moved to qualify McLaughlin as an expert on "the process in which victims disclose the sexual abuse," and that inconsistencies in reports are "more times than not" seen in true reports. (T. 7/53, 96) The state needed that testimony to overcome Grover's varying and fortuitously-timed claims. The state argued that McLaughlin should be qualified as an expert because that testimony was "not within the understanding of the average juror" and "not within the province of a normal reasonable juror to know about inconsistencies between recollections of sexual abuse... It is not within the normal province of the jury." (T. 7/59, 94-95)

The court denied the motion. McLaughlin would not testify as an expert. However, impressed with McLaughlin's claim of having interviewed more than 1,000 "victims of sexual abuse" in 750 cases and some educational credentials, the court permitted McLaughlin to present the

same testimony – but as a lay witness.[16] (T. 7/37, 47. 96) Defense counsel did not object.

McLaughlin's testimony had the distinct flavor of objective science. But it was rank vouching, bolstering and justification for Grover's shape-shifting stories. He went so far as to tell the jury that Grover's inconsistencies are expected of true claims. As if speaking from empirical research, he instructed the jury:

> Most of the adult victims... will basically give you a rough outline of what happened to them.... And then on subsequent interviews, they will come up with additional facts about their victimization.

(T. 7/97-98) McLaughlin testified also that "typically" "disclosure" comes in pieces rather than in one report. In other words, McLaughlin told the jury that Grover's piecemeal, inconsistent and varying claims are typical, if not indicia of truth. (T. 7/98) Defense counsel did not object to that testimony.

Leonard Fleischer

Psychologist Leonard Fleisher, Ed.D. augmented McLaughlin's vouching claims. Fleischer was qualified as "an expert to testify about the characteristics of adults who are victims of child sexual abuse," "in particular, the phenomenon of delayed disclosure." (T. 7/164-165, 172) In reaching that decision, the court noted:

> I'll tell you, any time I hear anything like Child Sexual Abuse Accommodation Syndrome, all my lights go out because I don't understand what you're talking about....

(T. 7/164)

Fleischer's testimony was not based on empirical science. Yet, he was permitted to instruct

---

[16]The court seemed unconcerned that McLaughlin never offered a basis for his conclusion that those 1,000 had been abused. The sheer number of people McLaughlin deemed "victims" (more than the number of cases on which he worked) suggests a bias in favor of corroborating preconceptions of abuse, rather than unbiased analysis and investigation. (T. 7/37, 47)

the jury:

- It is the norm, it is the average situation that this [abuse] is not reported for long periods of time.... It is the exception that child sexual abuse is reported immediately after the actual assault. (T. 7/173)

- It would be rare and "not in [Fleischer's] experience" for a victim to provide a complete description in a first report. Rather, "details tend to come out over a period of time." (T/ 7/185)

- Fleischer concluded:

  to basically underline the point that we've been talking about that not disclosing is normal. Disclosing right away is abnormal, is unusual.... (T. 7/193)

Though he did not say Grover's name, the jury could understand from Fleischer's testimony that Grover's accusations – "not reported for long periods of time," with "details tend[ing] to come out over a period of time" – bear the characteristics of true accusations. A complete initial disclosure, on the other hand, would be suspect for truth.[17] While there have been observations that some abused children delay in reporting sexual abuse, there is none holding that prompt and complete reports are suspect. Defense counsel did not object to so much bolstering and vouching testimony.

The Verdict

The jury could not have known of Grover's admissions that his accusations were lies, his testimony perjured and the whole production a get-rich-quick scheme. Nor could the court have known that, or the prosecutor. Even McLaughlin might have been fooled by Grover. Certainly, the defense had no evidence of any of that. The evidence of Grover's confessions were not discovered

---

[17]In a *voir dire* questionnaire, the jury evidenced its understanding that some abused children do not immediately report abuse, and some reasons for that. (T. 7/157-158) Indeed, Fleischer agreed that answers were "lay terminology for the very kinds of things that [he is] talking about." (T. 7/158) Thus, Fleischer's testimony served no purpose but to vouch for the truthfulness of the accusations, and thus prejudice MacRae. Nevertheless, the trial court let him testify anyway. (T. 7/64)

until recently. So, the jury was overwhelmed by uncontradicted stories of charged and uncharged acts. It is no wonder that the jury bought it all. After fewer than six hours of deliberation, the jury convicted MacRae on all five charged counts. (T. 10/ 12-13)

LEGAL ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL: DEFENSE COUNSEL INTRODUCED POWERFUL, OTHERWISE SUPPRESSED, "UNCHARGED ACTS" EVIDENCE, LITERALLY PROVIDED THE STATE WITH THE DEFENSE CASE, FAILED TO OBJECT TO POWERFUL "EXPERT" TESTIMONY AND, REFUSED TO CONDUCT CRITICAL DISCOVERY

A. Introduction

Defense counsel's conduct played a major role in MacRae's conviction. In his opening argument, counsel triggered the admission of dramatic and powerful stories of uncharged acts that had been previously suppressed. Before trial, MacRae and counsel provided to the state the entire defense strategy. And, counsel failed to conduct meaningful discovery. In the most critical respects, defense counsel served the state, not MacRae.

As demonstrated below, in section B, the new evidence, such as Grover's own admissions against interest to friends and family, directly put the lie to his entire story at trial, when he shamelessly painted himself, by testimony, body language, noise effects and dramatic acting as the severely traumatized victim of sexual abuse, rather than what he really was – a clever, shameless con artist out to make a score and to entertain himself along the way. The new evidence therefore underscores the enormity of the injustice done here to MacRae and highlights the prejudice that befell him, as an innocent man, when his trial counsel failed to protect him. MacRae's now apparent innocence, viewed in light of the new evidence, shows that this was, at worse for him, a close case of two competing stories of what happened, with the truth on MacRae's side. Thus, given the new evidence, any dereliction by defense counsel in representing MacRae is more likely to have been

prejudicial.

B. Ineffective Assistance of Counsel: The Law

The New Hampshire and federal Constitutions guarantee every criminal defendant the right to counsel. United States Const. Amend. 6; New Hampshire Const. Pt 1, Art. 15. The right to counsel encompasses the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). Counsel may deprive a defendant of his right to counsel by failing to render adequate legal assistance. *Strickland*, *supra* at 686. Both the federal and the state constitutions guarantee a criminal defendant reasonably competent assistance of counsel. *State v. Kepple*, 155 N.H. 267, 269 (2007)

In *Strickland*, the United States Supreme Court established a two-pronged test for determining whether counsel is ineffective pursuant to the Sixth Amendment to the United States Constitution. New Hampshire applies the same test. *State v. Kepple*, 155 N.H. at 270. A defendant has been deprived of the right to effective assistance of counsel when: 1) counsel's performance falls "below an objective standard of reasonableness" – when, in light of all the circumstances of the case, counsel's "acts or omissions were outside the range of professionally competent assistance"; and 2) counsel's deficient performance prejudices the defense, by creating a "reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Strickland,* 466 U.S. at 690, 694; *State v. Sharkey*, 155 N.H. 638 (2007). Consideration of counsel's errors must be "collective[], not item-by-item." *See, Kyles v. Whitley,* 514 U.S. 419, 436 (1995) (identical prejudice standard for ineffective assistance as withholding exculpatory evidence); *United States v. Bagley,* 473 U.S. 667, 682 (1985)(same). Similarly, the prejudice inquiry must consider the

totality of the evidence before the jury. *State v. Croft*, 145 N.H. 90, 92 (2000)[18]

C. Defense Counsel's Representation was Constitutionally Deficient

1. Defense Counsel Brought Into the Trial Highly Prejudicial "Uncharged Acts" Evidence That Supported the State's Case

a. Introduction

Pre-trial, the court excluded Grover-stories of three uncharged acts. (T. 1/9-10) The exclusion was a boon to the defense. These stories would have increased by more than half the number of accusations to defend against. And, they were more dramatic and sympathy-evoking than the charged acts – portraying a much smaller, younger, and vulnerable Grover than the confirmed criminal, substance-abusing, adult in the courtroom. Also, it would be harder to defend against the uncharged acts allegations, as they were to have occurred so much farther in the past – making it all but impossible for MacRae to locate documents, witnesses, and other materials necessary to present a defense.

Nevertheless, in his opening statement, defense counsel opened the door for those uncharged acts stories. Counsel told the jury that Grover's first allegation of abuse was unbelievable because in 1983 (when it was to have occurred), Grover was a "big," "aggressive, violent and hostile," "strong young man." Thus, it was impossible that "MacRae... out of the clear blue, unzips his pants and fellates him, [w]ith no other explanation or description or anything else." (T. 1/ 52, 59)

But, as counsel knew, the first charged act was not the first act that Grover had ever alleged occurred. Rather, the charged acts were a sequel to stories of the earlier uncharged acts that had been

---

[18]This claim is brought in the context of the instant petition because the New Hampshire Supreme Court has articulated its preference for raising ineffective assistance of counsel in a collateral attack, rather than direct appeal. *State v. Kinne*, 161 N.H. 41 (2010); *State v. Pepin*, 159 N.H. 310 (2009); *State v. Veale,* 154 N.H. 730, 736 (2007). *See also*, *Massaro v. United States*, 538 U.S. 500, fn. 9 (2003)(listing jurisdictions holding same preference).

suppressed prior to trial. The charged allegations were not "out of the clear blue." Counsel's misrepresentation was catastrophic and the error obvious. It is hard to imagine that any attorney would not understand its magnitude. Without question, counsel should have known better – particularly having persuaded the court to exclude the uncharged acts testimony in the first place. Counsel's false characterization had to be corrected. The only way to do that was to permit the state to introduce all of the uncharged acts stories – claims of MacRae molesting an 11-year-old newspaper boy. (T. 1/61-1/65; T. 2/3-6)

In addition to opening a floodgate for uncharged acts stories, defense counsel's mischaracterization may well have appeared to be an attempt to mislead the jury. Thus, in the first moments of the trial, counsel also undermined his relationship and credibility with the jury – something critical in any case.

The defense was wrecked. Testimony of uncharged acts was presented throughout the trial, from the first witness to the last. Grover told his uncharged acts stories. (T. 2/28-41) They were repeated by McLaughlin, (T. 7/39-43) reinforced by Ms. Grover, (T. 6/60-62), and told again by brother Jon Grover. (T. 7/20-21)

b. The Uncharged Acts Stories

The first uncharged act story was of a day in 1979 when Grover was 11 years old, delivering a newspaper to the rectory. Grover told the jury:

> ...I went inside and had, uhm, a donut and something to drink and went into the other front room of the rectory... as we were walking down the hallway, MacRae was behind me at first and came and slowly pushed me towards – not pushed me but moved his body so I went towards the wall and just before we got to the door he put – pushed me up against the wall. I had my paper bag in front of me and he pushed his weight up against me and put his arm up under my throat.
>
> He grabbed – took his hand and grabbed my crotch area and was grinding his body up against my side.... I tried to move away and he pushed his weight up against me and was grinding his lower half against my body....

> He was a lot bigger than I was at the time. So it was easy for him to put his weight and pin me and the way he had his arm against my – across my throat area, I moved – I couldn't move backwards and I couldn't move... he pushed – pushed me to the side like that and I turned like this and he came up and I slid on the wall a little bit and before he fully caught his arm against my throat area.

(T. 2/28-2/32)

> Grover's second uncharged act story was about a 1981 car ride.
>
> It was night time and late and I fell asleep in the front of the car and when I woke up, uhm, Gordon MacRae had his hand on my pants and was fondling me... I just woke up real quick and pulled back as close to the door as I could. I stayed away the rest of the way and didn't say anything to him.

(T. 2/36-39)

> The third story was another car ride that year.
>
> I went with him to get some food in Keene and on the way there he again pinned me – he fondled me through my pants....
>
> He just took his arm and pushed like that and then grabbed at my crotch area with his hand and was feeling through my pants....

(T. 2/40)

c. Causing Admission of the Other Acts Evidence Was Not Competent Assistance By Any Standard

It is universal. The defense objective is to limit the admission of harmful evidence and confront that which is admitted. It is never within any "objective standard of reasonableness" for defense counsel to introduce harmful evidence against the defendant. That would be so far from even the broadest "range of professionally competent assistance" that it would raise questions of rationality and competence, not reasonableness.

Counsel's actions here augmented the state's case by more than half, with dramatic, violent, and sympathetic stories of child molestation so long before trial that they were impossible to defend against.

Tripping the admission of the uncharged acts stories was not a strategy. In fact, counsel never understood what he did wrong. When his opening statement comment was brought to his attention, he argued that he had not opened the door to the uncharged acts because opening arguments are not evidence, and then because he only repeated the prosecutor's opening statement – which he did not. (T. 1/62-63) Neither justified his actions or even suggests a strategy. Really, counsel just blathered his way into introducing the uncharged acts stories and ultimately, helping to secure the conviction – without plan, rhyme, or reason. Witless behavior is not strategic. Opening the door to damaging and inadmissible evidence constitutes deficient performance of counsel. *White v. Thaler*, 620 F.3d 890, 900 (5th Cir. 2010); *Commonwealth v. Grissett*, 848 N.E.2d 441 (Mass.App.Ct. 2006)

In *State v. Fecteau*, 140 N.H. 498 (1995), the New Hampshire Supreme Court was faced with similar circumstances. Defendant claimed that counsel's opening statement opened the door to suppressed evidence and constituted ineffective assistance of counsel. The Supreme Court found that defense counsel's comments were part of a strategic "calculated risk" designed to "take full advantage of the court's pretrial rulings...." This was demonstrated in the opening statement, which was "rife" with misrepresentations that were made possible only by trial court's prior ruling suppressing evidence. Thus, and because the trial court admitted "only enough evidence" to correct counsel's misstatements, the reversal of the suppression order and admission of the excluded evidence was deemed proper. *Fecteau*, 140 N.H. at 502.

MacRae's case is entirely different. His counsel's statement was nothing like *Fecteau*'s "calculated risk." Counsel's comment was singular, unknowing, and unintentional. (T. 1/62-63) Counsel calculated nothing. He did not even understand what happened.

Further, prejudice is far greater here than in *Fecteau*. The uncharged act presentation there was minimal; "only enough evidence" to correct counsel's comments." A single witness noted an arrest in another case. In MacRae's case, defense counsel unleashed several witnesses, bringing dramatic stories of molestation against a young boy; enough material to warrant a trial of its own.

Courts finding that counsel's performance was *not* deficient do so based on the particular circumstances of each case. *E.g.*, *Harewood v. Conway*, 2010 WL 5072696 (WDNY 2010) (defendant's own testimony opened the door); *Ruezga v. Yates*, 330 Fed.App. 656 (9th Cir. 2009), affirming Dist Court, 2008 WL 282377(counsel's remarks were decision to strengthen justification argument); *Saunders v. State*, 2010 WL 1796232, Tex.App 2010 (counsel recognized possibility of opening door to new evidence); *Commonwealth v. Henley*, 63 Mass.App.Ct.1, 822 N.E.2d 313 (2005)(same); *Commonwealth v. Henley*, *supra* (same); *Commonwealth v. Carol*, 774 N.E.2d 685 (Mass.App.Ct. 2002)(same). The circumstances here are unacceptable, by any standard.

MacRae's case is not like those in which defense counsel affirmatively chose to sacrifice a prior suppression in favor of a particular strategy. Nor is it a case in which the harm of counsel's actions was minimal. By comparison, *Fecteau* and those cases only illuminate the horror of counsel's conduct here.

d. The Prejudice Is Enormous and Obvious

The prejudice of introducing critical and dramatic prosecution evidence that the state could not obtain for itself is obvious. Here, counsel converted a significant defense advantage (suppression of the uncharged acts stories) to a powerful state weapon (admission of the suppressed uncharged acts stories). Counsel also created the impression that the defense had been hiding evidence, or not being truthful with the jury.

When a defense attorney does not subject the state's case to meaningful and adversarial

testing, prejudice is presumed. *State v. Anaya*, 134 N.H. 346, 352 (1995), *United States v. Cronic*, 466 U.S. 648, 659 (1984). Counsel did not test the state's case. He enhanced it. By assisting the state so ably, counsel's conduct undermined the adversarial process to the point "that the trial cannot be relied on as having produced a just result." *State v. Fecteau*, 140 N.H. 498, 500 (1995).

Particular prejudice here includes, but is by no means limited to:

1) The sheer weight of the uncharged acts stories crushed the defense. The uncharged acts stories were a feature of the trial, pressed on the jury time and again from the first state witness to the last.

2) The indictment, without notice of times, dates, weeks, or months in which each charged act was to have occurred made it difficult enough for MacRae to collect material necessary to confront the evidence against him or mount a defense.

The degree of difficulty was increased unbearably by uncharged acts alleged to have occurred so much farther into the past that they were all but impossible to defend against.

Worse, defense counsel did not trigger the uncharged acts stories until the trial was underway. There was no time to even think about challenging them.

3) With the uncharged acts stories, defense counsel rehabilitated important flaws in Grover's stories.

4) By mischaracterizing the evidence at the very beginning of trial, defense counsel undermined his own trustworthiness, making it that much more difficult to have the jury view the defense as credible.

In this light, Macrae's conviction was a certainty.

2. Pretrial, Defense Counsel gave Away to the State the Defense Theory and Strategies

Before trial, MacRae annotated with his impressions, strategic notes and personal statements

the considerable number of documents and statements against him that the state provided to the defense during discovery. Defense counsel then delivered all of that to the state. (Exh. M) Counsel handed to the state the entire defense strategy – making the state aware of every move the defense would make. (T. 7/99-103) Counsel also gave to the state not only a list of potential defense witnesses, but also counsel's preliminary interviews of those witnesses – in the form of defense questionnaires that had been completed by the potential witnesses and returned to the defense. (Exh. M) There was seemingly little left of the defense that had not been provided to the state prior to trial.

Disclosing the defense case to the state is so far outside any "standard of reasonableness" or "range of professionally competent assistance," that again, assessments of reasonableness or strategy are all but irrelevant. As for prejudice, the constitutional guarantee of adversarial testing is, necessarily, obliterated once the defense hands its strategy to the state before trial. With the defense strategy in hand, the state was then equipped to present its own case to avoid whatever plans of "adversarial testing" defense counsel might have had. Simply, defense counsel neutralized the defense and guaranteed the conviction.

3. Failure to Object to the Admission of Expert Testimony Through a Lay Witness

The court denied the state's motion to have McLaughlin qualified as an expert witness, but permitted him to testify about "the process in which victims disclose sexual abuse," that inconsistencies are found in true accusations "more times than not," and that "a victim just doesn't come out in an interview and tell everything, that this is more a process rather than an event." (T. 7/53) Defense counsel did not object to that testimony. Instead, counsel acquiesced to its admission, agreeing with the state that: "I think [McLaughlin] can testify as a lay person for the very things that [the state] wants him to testify to." (T. 7/95) Counsel was wrong.

a. Though McLaughlin's Was Not Qualified as an Expert Witness, He Was

Permitted to Present Expert Testimony

"Expert testimony involves matters of scientific, mechanical, professional or other like nature, which requires special standing, experience or observation, not within the common knowledge of the general public." *State v. Gonzalez*, 150 N.H. 74, 77 (2003) (*quoting State v. Martin*, 142 N.H. 63, 65 (1997)(testimony about delayed recantations is expert testimony). "Lay testimony," on the other hand, "must be confined to personal observations that any lay person would be capable of making." *Gonzalez*, *supra*.

The state's proffer of McLaughlin's testimony fell squarely within the Supreme Court's definition of "expert testimony." (T. 7/59, 94, 95) McLaughlin's testimony, the prosecutor argued was "not within the understanding of the average juror," "not within the province of a normal reasonable juror," and "not within the normal province of the jury." (T. 7/59, 94-96) Simply, it is expert testimony. *See*, *e.g.*, *State v. Tierney*, 150 N.H. 339, 348 (2003) (officer's testimony regarding sexual assault case was expert testimony, and erroneously admitted as lay testimony). *State v. Gonzalez*, *supra*. Defense counsel did not object , and expressly agreed to its admission through McLaughlin as a lay witness.

b. Counsel's failure to object was not strategy

No defense strategy favors acquiescing to the admission of damning expert testimony. That is particularly true when the testimony was to instruct that proven accusations have the same characteristics as those against MacRae.

c. The prejudice of McLaughlin's testimony was considerable

This case was a close one. It was a credibility contest. There were no witnesses or physical proof of Grover's stories. Thus, the only seemingly objective evidence was "expert" testimony with the appearance of unbiased science. McLaughlin created that appearance. (T. 7/96) He testified about

a degree in psychology, continuing education, publications that he read, articles he had written and years of practical experience. An expert would have made the same claims. The court did not instruct the jury that McLaughlin was just a policeman, not an expert. Nor was any expert testimony instruction given to the jury. The illusion was complete. Thus, the jury was left to assume that McLaughlin's claims were somehow scientific or objective.

As seemingly science, McLaughlin's testimony vouching for the accusations – that true claims look just like Grover's – could be nothing but a critical factor in the verdict. There is a reasonable probability that without McLaughlin's expert testimony, the outcome would have been different. But, counsel failed to object to it; instead going so far as to facilitate its admission against MacRae.

Defense counsel's failure to object constitutes ineffective assistance of counsel.

4. Failure to Conduct Discovery

Before trial, MacRae had the opportunity to depose Grover, whose frequent supplements and alterations to his stories made a pretrial deposition critical. The deposition would be the only opportunity to pin down Grover and force him to commit to a particular version. Every detail locked-in would be one out of which Grover could not squirm at trial. Counsel would have ferreted out critical cross-examination material and prior statements with which to impeach Grover at trial. The deposition would also be critical to mounting a defense – serving to elicit details that would direct MacRae to documents and witnesses necessary to confront the state's case and document alibis. It would also have provided cross-examination rehearsal. Grover's appearance, conduct, presentation, manner of avoiding questions, weaknesses, and other important information were all available for defense counsel to study as he prepared to cross-examine Grover.

None of that happened, however. Koch secured only a pretrial interview – and sent the

unprepared Davis to ask questions. (Exh. U) What was lost is incalculable. What was gained was negligible – a list of addresses, jobs, psychologists, conversations with attorneys, and the like. The discussion of accusations against MacRae were limited to approximately five pages. Worse, Grover generally described only two uncharged alleged acts. Davis did not ask for details. (Exh. U, pp. 139-142, 144-145)

Koch might not have wanted to travel from New Mexico for the deposition. (**Exh. V) Whatever was his reason not to interview Grover, it was not based on consideration of the merits of the case. It is patently unreasonable to send an unprepared lawyer to do anything, let alone conduct the most important bit of defense preparation, with a client's life in the balance. Koch did not provide any assistance (let alone competent). Rather, he abandoned MacRae – something that once again goes far beyond any standard of reasonableness.

The prejudice of not having prepared counsel interview Grover is apparent in the product; nothing relevant to the charges and nothing that the defense should not have had otherwise from the discovery process. Davis' inability to ask key questions left Grover free to evade questions and change stories, and deprived the defense of material critical to adversarial testing and confronting the state's case. (T. 2/16)

D. Conclusion

Defense counsel ushered in extremely powerful evidence against MacRae. Counsel gave the defense strategy to the state. Counsel threw away a key opportunity to gather information and prepare for trial and undermine Grover's credibility. Each of those things constitutes ineffective assistance of counsel sufficient to require a new trial. Cumulatively, as they must be considered, counsel's failures – indeed his mighty contribution to the state's efforts – make the necessity of a new trial all the more inescapable.

II. NEWLY DISCOVERED EVIDENCE REVEALS THAT GROVER'S STORIES WERE LIES

A. Introduction

In the years since MacRae's trial, Grover's friends and relatives have come forward with evidence that Grover's stories were lies, and his trial testimony was rank perjury – a calculated effort to extract a large payment from the church. The new evidence also documents Grover's conduct after he received his $195,000 church payment – conduct that further undermines his stories. It is also internally consistent and corroborated by other facts and circumstances.

These new witnesses have nothing to gain from their statements now. Indeed, statements provided to MacRae's counsel now might be contrary to the interests of the people who provided them. There is no reason to suspect from them anything but truth.

B. The Newly Discovered Evidence

The statement of facts, above, is replete with examples of the new witnesses' testimony.

The newly discovered evidence is of several general types: a) Grover had a reputation - at least among the community of family and friends – as a schemer and liar; b) Grover bragged about his intention to extract money from the diocese by accusing MacRae, admitted that his stories were lies, and that his testimony was perjurous; and c) once he got his money, Grover cast off his "victim" guise to set off on a course of reckless and vile conduct, wholly irreconcilable with his stories of abuse.

C. Newly Discovered Evidence: The Law

A defendant will prevail on a motion for a new trial on the ground of newly discovered evidence, when he can show that: 1) he was not at fault for not discovering the evidence at the

former trial; 2) the evidence is admissible, material to the merits and not cumulative; and 3) the evidence is of such a character that a different result will probably be reached upon another trial. *State v. Mills,* 136 N.H. 46, 51 (1992).

D. The New Evidence Meets the Legal Definition of Newly Discovered

The newly discovered evidence here satisfies that criteria.

First, the new evidence was unavailable and undiscoverable at trial. The new witnesses are, or were, Grover's relatives and friends. He confided in them, shared his plans and admitted his lies and perjury – statements against his penal interest – precisely because they were with him then. He celebrated his payday with them, showing off his diocese cash and taking pictures with it. (**Exh. E) Some of these people likely expected to reap benefits from Grover's ill-gotten gains. The new witnesses were Grover's supporters at trial. They had nothing for MacRae – let alone assistance.

Only after many years had passed – when the witnesses who provided the main new evidence against Grover were no longer as close to him as before or had become estranged for various reasons or were more forthcoming because of the lapse of time – was it possible for the defense to interview them successfully, and then only with the help of a skillful investigator (formerly an agent for the Federal Bureau of Investigation).

Second, the evidence is admissible. Much of the evidence goes to Grover's reputation for dishonesty, as reported by his friends and family. N.H. R. Ev. 608(a). The evidence also contains Grover's statements against interest – admissions of numerous acts of perjury and fraud. N.H. R. Ev. 804(b)(3). And, it undermines the integrity of the investigation and prosecution, revealing, in addition to Grover's motivation and lies, pressure on Grover by police and his civil attorney to accuse MacRae – as well as McLaughlin's heavy handed efforts to extract from other people

accusations and statements to support the prosecution.

This case – and MacRae's conviction – turned entirely on Grover's testimony and credibility. Grover's admissions of perjury, as well as his reputation as a liar, and the state's influence on Grover's accusations, go to the heart of the case, MacRae's guilt or innocence.

Nor is the evidence cumulative. Evidence that "goes to a point upon which no evidence was adduced at the former trial" is not cumulative. *State v. Abbott*, 127 N.H. 444, 450 (1985)(testimony of newly discovered witness was identical to that of two trial witnesses and was thus cumulative). Here, there was no evidence at trial of Grover's reputation as a liar. Indeed, the trial prosecutor raised the absence of that evidence. (T. 4/18) The new witnesses held their evidence. Nor was there evidence going to the integrity of the investigation. The first evidence of that came with the new witnesses' reports that Grover lied to satisfy McLaughlin. The new evidence provides all of that. It is different in character and content from anything presented – or that was available to present – at trial.

Third, the verdict turned on Grover's credibility. The newly discovered evidence – composed of confessions of perjury and lies – undermines that entirely. Indeed, nearly all of the comments about Grover set out in this brief are based on the new witnesses' statements. With the newly discovered evidence, every aspect of the state's case would have collapsed. Cross-examination, for example, would have left Grover with nothing. Instead it was a tedious search for scraps – four days of defense counsel tracing back and forth over the same material, hoping for variations.

Grover's stories were so inconsistent and impossible, that the jury could have convicted only if it believed he was a truthful person who merely confused some details – during an era when

allegations of sexual abuse were believed without questions. Now, seen in a different time and light, the newly discovered evidence makes clear that Grover was not just confused. Indeed, the opposite is true. He is a liar who invented details, and couldn't even remain consistent about those. With the newly discovered evidence, a new trial will probably end with a different result. Indeed, presented with a realistic characterization of Grover, a new jury couldn't possibly reward Grover with a verdict of guilt.

CONCLUSION

Viewed in its proper historical context, MacRae's case is an example of a justice system blinded by passion. As the Second Circuit recognized in *Friedman*:

> Emotions like fear, outrage, anger and disgust, in situations like these, are entirely human. The question is what the legal system can do to correct for the excesses to which they lead. The crux of the moral panic dynamic is that the legal system, in such cases, does not correct for them. It gets swept up in them instead.

Friedman, 618 F.3d at 158.

MacRae was swept up in the fraud perpetrated by Grover on the entire justice system, from the investigators through the jury. His lies, implausible as they were could only have been accepted in a culture steeped in fear, outrage, anger and disgust – all cultivated by the hundreds of previous cases occurring in high profile across the country. All of those involved here might have had the best intentions. Even if so, they were duped by Grover. The newly discovered evidence, particularly viewed in these more rational times exposes Grover's crimes of perjury in support of his craven intent. Indeed, his trial performance, as we now see, was an extended assault on the integrity of the criminal justice system and should not be tolerated by this Court. When all of the evidence

concerning Grover is considered – including the newly discovered evidence – the conviction cannot stand.

Dated: December , 2011

Respectfully submitted,

Gordon MacRae
By His Attorneys

_____
Robert Rosenthal
Counselor at Law
523 East 14th Street, Suite 8D
New York, New York 10009
(212) 353-3752
Pro Hac Vice

_____
Cathy J. Green, Esq., Bar #995
Green & Utter, P.A.
764 Chestnut Street
Manchester, NH 03104
(603) 669-8446

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by first class mail, postage prepaid, to the Cheshire County Attorney's Office on the day of December, 2011.

_____
Cathy J. Green