QUESTIONS PRESENTED

1. Did the trial court err in precluding Kornbrekke from cross-examining the complainant regarding a prior false accusation of sexual assault, and in precluding extrinsic evidence regarding the false accusation?

Issue preserved by Kornbrekke's motion in limine and supporting documentary evidence, App. A3,* the State's objection, App. A19, two hearings, T-ML.; T1. 73-83, and the trial court's ruling. T1. 82-83.

2. Did the trial court err in denying Kornbrekke's motion to dismiss after his first jury trial resulted in a mistrial, because the retrial violated his right against double jeopardy?

Issue preserved by motion to dismiss, App. A34, the State's objection, App. A40, hearing on the motion, T-MD., and the trial court's ruling. App. A47.

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*References to the record are as follows:
"T-MT1.", "T-MT2.", and "T-MT3." refers to the separate transcripts of the first and second days, and the single transcript encompassing the third and fourth days, of the jury trial that resulted in the declaration of a mistrial;
"T1." - "T3." refer to the transcripts of the three-day re-trial;
"T-ML." refers to the December 22, 2005 hearing on Kornbrekke's motion in limine (transcript is incorrectly dated December 22, 2006);
"T-MD." refers to the June 9, 2005 hearing on Kornbrekke's motion to dismiss;
"App." refers to the Appendix to this brief; and

STATEMENT OF THE CASE

A Merrimack County Grand Jury indicted Karl Kornbrekke for two counts of aggravated felonious sexual assault (AFSA). T1. 3. The first indictment alleged that on or about January 15, 2004, at Concord, Kornbrekke engaged in digital penetration of the complainant Mary Hensley, and that Hensley did not consent. NOA 8. The second indictment is identical except that it alleged penile penetration. NOA 10.

Kornbrekke first tried this case to a jury in February, 2006. During deliberations, the trial court (Fitzgerald, J.) declared a mistrial. T-MT3. 330. Subsequently, Kornbrekke filed a motion to dismiss, claiming that retrial would violate his right not to be tried twice for the same offense. App. A34. The court denied his motion to dismiss. App. A47.

Prior to the re-trial, Kornbrekke filed a motion in limine to allow cross-examination, and extrinsic evidence, regarding a prior accusation of sexual assault by the complainant against another man which Kornbrekke alleged was false. App. A3. After hearing, the court (McHugh, J.) denied the motion. T1. 82-83.

After a second trial, the jury found Kornbrekke guilty on both counts. T3. 3. The trial court (McHugh, J.) sentenced Kornbrekke to serve three and one-half to seven years, with a

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"NOA" refers to the Notice of Appeal.

consecutive, suspended sentence of the same duration. NOA 7, 9.

STATEMENT OF THE FACTS

On January 13, 2004, Mary Hensley met Karl Kornbrekke at an A.A. meeting. T1. 117-118. After the meeting, they exchanged phone numbers, and Hensley called Kornbrekke the next day. T1. 119-20. According to Hensley, they planned to meet at a Dunkin' Donuts the following morning, and then go to an A.A. meeting together. T1. 121.

At the time, Kornbrekke lived in room 121 of a Concord hotel, having resided there since September of the previous year. T2. 20-21. Before meeting Hensley, Kornbrekke had expressed his concern to front desk clerk John Doucette that Hensley may be after him for his prescription medication, Ativan. T1. 183, 192. Hensley was a recovering heroin addict on probation, with prior convictions for selling and possessing heroin. T1. 117, 174.

Hensley testified that she met Kornbrekke, they got coffee, she bought cigarettes, and they went to his hotel room. T1. 123. Hensley testified that Kornbrekke began acting "flirtatious," touching her neck and trying to kiss her. T1. 128. According to Hensley, she attempted to rebuff Kornbrekke's advances, T1. 128-30, but Kornbrekke pulled her down onto the bed where he was lying, and they talked for awhile. T1. 129-30.

Hensley testified that Kornbrekke called Hensley "pretty" and made other compliments, then got partially on top of Hensley, began kissing her, and put his hands up her shirt. T1. 131. Hensley testified that she stated from the beginning, "I can't do this," and tried to push Kornbrekke away. T1. 131-32. Kornbrekke started to put his hands down Hensley's pants. T1. 133. According to Hensley, this made her "mortified," and she told Kornbrekke he needed to stop, because she was having her period and was wearing a sanitary napkin. T1. 133.

Hensley testified that subsequently, Kornbrekke put his hands inside her pants, and inserted his fingers into her vagina. T1. 134. Hensley claimed that a struggle ensued, as Kornbrekke held one of her arms over her head and tried to pull her pants down while reaching for a condom. T1. 135. Eventually, Kornbrekke got Hensley's pants down and penetrated her vagina with his penis. T1. 136-37. According to Hensley, she lay underneath him crying, and eventually stopped resisting. T1. 136-37. When Kornbrekke got up, Hensley grabbed her stuff, called her uncle for a ride, and went to the hotel lobby. T1. 139.

Rajesh Patel, the owner and operator of the hotel, testified that he approached Hensley because she was not a guest in the hotel, and Hensley told him she had come there to meet

somebody in room 121. T2. 20-22. Because Hensley seemed "a little upset," Patel asked her if everything was okay. T2. 22. Hensley replied that Kornbrekke "tried to rape her." T2. 23.

According to Hensley, Kornbrekke approached her in the breakfast room, offered her a ride, and said: "I'm sorry. I've never done that." T1. 140. Doucette observed Hensley crying in the breakfast room, saw Kornbrekke approach Hensley and speak briefly, and got the impression that Hensley did not want to speak with Kornbrekke. T1. 186. He also observed that Hensley did not appear disheveled. T1. 189.

At some point, Patel told Kornbrekke that Hensley was going to call the police. T2. 24. Patel observed that Kornbrekke seemed nervous. T2. 25. Subsequently, Patel saw Kornbrekke go to his room, and then out towards the back of the building, in the vicinity of the dumpster. T2. 24, 28.

Hensley's uncle picked her up, and they telephoned the Concord Police, who told her to go to the Concord Hospital for a rape kit. T1. 142. Concord Police Officer Ranee Boyd spoke with Hensley, who requested that the police make no audio or video recording of the interview. T2. 45-46. Hensley provided her sweater, the sleeve of which was stained with blood. T1. 177. The sexual assault examination revealed that Hensley had no physical injuries. T2. 66.

Concord Police Officer Steve Smagula testified that he went to the hotel, and Patel told him that he may want to check the dumpster. T1. 201. Smagula found Kornbrekke outside, and they went to Kornbrekke's room to talk. T1. 202.

There, Kornbrekke told Smagula that he and Hensley watched television, and then engaged in consensual sex on one of the beds. T1. 205. Afterwards, according to Kornbrekke, Hensley looked as if something was wrong. T1. 206. Kornbrekke thought she might have been embarrassed because she was having her period at the time. T1. 206.

Asked whether he had gone over to the dumpster, Kornbrekke said he had, to discard the pants and shirt he wore, because they were stained with Hensley's blood. T1. 207. Smagula and Kornbrekke went to the dumpster, and Kornbrekke retrieved his clothes, which were wrapped in a plastic bag. T1. 208, 214.

Smagula conducted a tape-recorded interview of Kornbrekke. T2. 6; App. A54.** During that interview, Kornbrekke maintained that he and Hensley had consensual sex. App. A58. He also stated that before they met on the morning of the alleged assault, Hensley became aware that he had an unfilled

** A tape of the interview was played for the jury, but not transcribed as part of the formal record. The appendix to this brief includes a copy of a transcript of the interview provided in discovery. See App. A54-A61.

prescription for Ativan, told him that she was taking a similar drug called "Beanies," and repeatedly asked him to fill his prescription. App. A56, A58. Kornbrekke stated that he did not have enough money to do so, and that Hensley made an unsuccessful attempt to call a friend to get the drug. App. A56.

Kornbrekke told the officers that Hensley became upset when she observed her menstrual blood on his jeans and t-shirt. App. A58. When Hensley left the room, Kornbrekke followed, asking her what was wrong. App. A58. Kornbrekke stated that Hensley told him to leave her alone, and that he could not understand why she was so upset. App. A58-A59.

Hensley's Prior Accusation of Sexual Assault against Corey Clark.

The trial court precluded Kornbrekke from cross-examining Hensley regarding a prior accusation of sexual assault and subsequent recantation, after Kornbrekke and the State made offers of proof and submitted documentary exhibits that described the following factual scenario.

On May 31, 1997, Mary Hensley reported that a man she had been dating, Corey Clark, had forcibly raped her by penetrating her, without her consent, while he held her down on a bed. App.

A12. Hensley and Clark had been involved in a relationship for approximately two weeks. App. A26. According to the State, the genesis of the case involved a witness not identified in the record who observed Hensley in a bedroom with Clark, with a "blank look" on her face. App. A21. Subsequently, Hensley tearfully told the witness that Clark raped her. Id.

Sgt. Shepherd of the Boscawen Police prepared an arrest warrant affidavit, indicating that Hensley told him that Clark had "raped" her and that during the rape Clark had "grabbed [her] around the throat...." App. A12. Hensley wrote a statement indicating that at an acquaintance's house, she went into a spare bedroom with Clark at around 1:30-2:00 in the morning, and the following transpired:

> We were laying in bed, my intenchens [sic] were to go to sleep. Cory [sic] started forcen [sic] him self on me. He new [sic] I was not willing I tryed [sic] pulling away from him an [sic] he pulled me towerds [sic] him. He refused to ware [sic] a condom. This was an on going thing from about 2:-2:30 until about 10:-10:30. He was very controling [sic]. He had one hand around my throat an [sic] the other on my hips to hold me close to him. Around 11:00 a.m. I went into andys room across the hall an (sic) talk to amy. I told her what happened. Shortly after Cory left andys house. We went looking for him an (sic) found him at his girlfreinds (sic). Then called the cops.

App. A11. As a result, the police arrested Clark and initiated a prosecution for aggravated felonious sexual assault. App. A4.

A witness, Krista Witham, told the police that Hensley had attempted to extort money and drugs from Clark at the time that she accused him of rape. App. A15. Specifically, Witham told Shepherd that prior to the arrival of the police, Hensley told Witham: "tell [Clark] I'll make a deal with him, run inside and tell him if he gives me $400.00 plus an ounce of weed, I'll drop the charges." App. A15. According to Witham, she relayed this message to Clark, who refused the offer and repeatedly told Witham that he "never raped her." App. A15.

Clark initially reacted to Hensley's accusation by leaving the scene and hiding in a female acquaintance's home, telling the acquaintance that Hensley was his cousin. App. A21. When the police first spoke to Clark, he said that he did not have sexual contact with Hensley. App. A21. After being informed that a DNA test would be performed, he admitted that he did have intercourse with Hensley. App. A21.

On June 17, 1997, Hensley recanted to a public defender investigator. In a written statement witnessed by her mother, App. A4, Hensley said:

> Prior to May 31, 1997, Corey Clark and I had consensual sex. He was respectful toward me during that time.

> On May 31, 1997, Corey had his hand around my throat as part of the sexual movement. I was not expecting this motion, and it caught me off-guard. I didn't feel threatened - Corey did not threaten me at all.
> On May 31, 1997, Corey and I were having sex in a different way than before. But Corey did not rape me.
> I did not intend to press charges of rape or assault against Corey.
> I am not the one who called the Boscawen Police on May 31, 1997. Amy Davis made the phone call. I did not want the police involved. I wanted to handle this in my own way.

App. A13 (emphasis in original). Subsequently, the State nol prossed the charge against Clark. App. A25.

SUMMARY OF THE ARGUMENT

The trial court's denial of Kornbrekke's motion to cross-examine Hensley regarding her prior false accusation of sexual assault cannot be sustained under Rule 608(b) or Rule 403, and it violated Kornbrekke's state and federal constitutional rights to confrontation. This Court recently set forth guidelines regarding the interplay between Rule 608(b) and Rule 403, and also overruled an unduly onerous standard of admissibility that was the governing law at the time of the court's decision. Because the trial court's decision is not sustainable under the new guidelines and standard of admissibility, Kornbrekke's conviction should be reversed.

The trial court erroneously denied Kornbrekke's motion to dismiss following the declaration of a mistrial. Although Kornbrekke assented to a mistrial after the jury announced it was deadlocked and juror misconduct was revealed, the trial court had an independent obligation to determine if the juror should be disqualified so that deliberations could continue untainted by the presence of a juror that could not be impartial. Because it did not do so, retrial was barred under the state constitutional right against double jeopardy.

I. THE TRIAL COURT ERRED IN PRECLUDING KORNBREKKE FROM CROSS-EXAMINING THE COMPLAINANT REGARDING HER PRIOR FALSE ACCUSATION OF SEXUAL ASSAULT, AND IN EXCLUDING EXTRINSIC EVIDENCE REGARDING THE FALSE ACCUSATION.

Kornbrekke filed a motion in limine, seeking to cross-examine Hensley, and to admit extrinsic evidence, regarding her prior accusation of sexual assault against Corey Clark and subsequent recantation. App. A3. Kornbrekke argued that the evidence was admissible under N.H.R. Ev. 608(b), and that it adversely reflected on Hensley's credibility to the degree that precluding the evidence would violate his state and federal constitutional rights to confrontation. App. A8.

The State objected, taking the position that "[a] defendant in a sexual assault case may cross-examine a victim about a prior false allegation of sexual assault under Rule 608(b) only if the defendant makes a threshold showing of probity and similarity, and demonstrates clearly and convincingly that the prior allegations were false." App. A20 (quoting State v. Gordon, 146 N.H. 258, 261 (2001)(quotations omitted), *overruled*, State v. Miller, 154 N.H. __, 921 A.2d 942 (N.H. 2007)). The State argued that Kornbrekke's evidence did not meet either standard. App. A20.

The trial court denied the motion after hearing argument at two pretrial hearings. T-ML. 4-19, T1. 73-81. The court

explained that the episode took place seven years prior to the present accusation, the court did not "see a pattern at all," and allowing the evidence would cause a "trial within a trial." T1. 81-82. The court concluded: "there's enough dissimilarities in my view – time, space and et cetera – which makes me have no difficulty in saying it's way too prejudicial and not probative of anything." T1. 82. The trial court erred, because cross-examination regarding the prior false accusation was admissible under Rule 608(b) and could not be barred by Rule 403. Moreover, the court's ruling violated Kornbrekke's state and federal constitutional rights to confrontation. U.S. CONST., amends. VI, XIV; N.H. CONST., pt. I, art. 15.

A. Under Rule 608(B) and Rule 403, the Trial Court Erred in Precluding Cross-Examination of Hensley Regarding Her Prior False Accusation.

Rule of Evidence 608(b) provides, in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule § 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness....

N.H. R. Ev. 608(b). Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court rejected the evidence under both rules, since the court stated that the evidence was prejudicial and had no probative value. T1. 83.

Ordinarily, this Court applies a sustainable exercise of discretion standard on appeal from a trial court's evidentiary ruling. State v. Bashaw, 147 N.H. 238, 241 (2001); see State v. Lambert, 147 N.H. 295, 296 (2001). Here, however, no deference should be afforded the trial court's ruling, because its ruling was guided by decisions and legal standards that have been abrogated by this Court.

Recently, subsequent to the proceedings below, this Court substantially revised the standards under Rule 608(b) for admissibility of a prior false accusation on cross-examination of the complainant. Miller, 921 A.2d 942; State v. Brum, _ N.H., No. 2006-086, Slip Op. at 4-7 (N.H. May 10, 2007)(discussing and applying Miller). Prior to the trial court's ruling, several of this Court's decisions stated or implied that a criminal defendant must meet a "demonstrably

false" standard in order to cross-examine a complainant regarding a prior false accusation of sexual assault. State v. Abram, 153 N.H. 619, 631-33 (2006); State v. Etienne, 146 N.H. 115, 118-19 (2001); Gordon, 146 N.H. 258.

In Miller, this Court acknowledged that in those three decisions, it had "conflated the issues of when, as a constitutional matter, a trial court must permit a defendant to cross-examine a witness about allegedly false accusations of sexual assault and when, as an evidentiary matter, a court may allow a defendant to do this." 921 A.2d at 947. The Court held the defendant need not meet a demonstrably false standard in order to cross-examine a witness under Rule 608(b). Id. Rather, the trial court has the "discretion to permit the defendant to cross-examine the victim about the prior false allegations, provided that the court found that the allegations were probative of truthfulness and untruthfulness and otherwise admissible." Id.

The Miller Court also set forth new principles to aid trial courts in analyzing the "interplay between Rules 403 and 608...." Id. at 948. With respect to the degree of probative value, this Court set forth nine factors. Id. With respect to the potential prejudicial effect of the evidence, the Court set forth several additional factors. Id. at 948-49. Application

of these factors reveals that the evidence was highly probative of a material issue at trial, Hensley's credibility, and was not substantially more prejudicial than probative.

The first two factors examine whether the evidence involves a "crucial or unimportant" witness, and "the extent to which the evidence is probative of truthfulness or untruthfulness." Id. at 948 (quotations omitted). Both of these factors provide strong support for allowing cross-examination. See, e.g., Miller v. State, 779 P.2d 87, 89 (Nev. 1989)("It is important to recognize in a sexual assault case that the complaining witness' credibility is critical and thus an alleged victim's prior fabricated accusations of sexual abuse or sexual assault are highly probative of a complaining witness' credibility concerning current sexual assault charges."). There was no physical evidence of an assault or non-consensual encounter such as physical injuries or torn clothing, heightening the importance of Hensley's credibility.

The fourth and fifth factors,*** whether Hensley's prior act of untruthfulness is "closely connected" to this case, and "the extent to which the circumstances surrounding the specific instances of conduct are similar to the circumstances

surrounding the giving of the witness's testimony," also support its admissibility. Miller, 921 A.2d at 948 (quotations omitted). As Kornbrekke argued to the trial court, Hensley had recently met both men (14 days for Clark, 2 days for Kornbrekke), App. A26, and in both cases Hensley seemed motivated to obtain drugs from her intimate partner. App. A7-A8, A15, A17, A33. In both cases, Hensley claimed that she was held down on a bed and that sexual intercourse occurred. App. A7, A11. Additionally, Kornbrekke drew a comparison between the non-use of a condom with Clark and the fact that Hensley was menstruating at the time of the charged incident, arguing that both cases constituted "examples of Ms. Hensley becoming angry and accusatory after having sex in a manner which, in retrospect, she regretted." App. A26 (emphasis in original).

At any rate, Kornbrekke contends, ample similarity is established in the simple fact that the prior false accusation is that of sexual assault, because most people would view a false accusation of sexual assault to be an "unusual fabrication." Redmond v. Kingston, 240 F.3d 590, 592 (7th Cir. 2001). The most powerful evidence for overcoming a juror's natural skepticism regarding the likelihood of such an unusual

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[***] The prior false accusation is not probative of other relevant matters, so the third Miller factor has no bearing on

fabrication, would be a prior false accusation that demonstrates the complainant's capacity to make just such a fabrication.

The sixth Miller factor, the "nearness or remoteness in time" of the prior false accusation, does not weigh against its admissibility. 921 A.2d at 948 (quotations omitted). Rule 608(b), in allowing cross-examination regarding prior acts that are probative of dishonesty, performs a closely related function to Rule 609, which allows cross-examination regarding convictions that are probative of dishonesty. The latter rule effectively defines remoteness by making certain convictions that are ten years old or less presumptively admissible, while convictions that are more than ten years old are not admissible unless "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." N.H.R. Ev. 609(b). Accordingly, although the trial court appears to have viewed the prior accusation as remote because it occurred seven years prior to the charged offense, T1. 81, Rule 609, by analogy at least, provides support for the opposite conclusion.

The seventh Miller factor, "the likelihood that the alleged specific-instances ... conduct in fact occurred," 921 A.2d at 948 (quotations omitted), weighs heavily in favor of

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this case. Miller, 921 A.2d at 948.

admissibility because Hensley recanted her accusation of rape and unequivocally stated in writing that she was not raped. Thus, Kornbrekke satisfied even the "demonstrably false" standard applied by this Court prior to the Miller decision. State v. LeClair, 730 P.2d 609, 615 (Ore. App. 1986)("Courts have uniformly stated that, when a complainant has recanted prior accusations or they are otherwise demonstrably false, the trial court must allow the defendant to cross-examine the complaining witness regarding them."); State v. Ellsworth, 136 N.H. 115, 120 (1992)(evidence of falsity weak where former defendant claimed accusation was false, but accuser remained consistent in her statements).

The State argued, however, that "there was significant circumstantial evidence to suggest that the victim's initial report was true." App. A21. Specifically, the State pointed to Hensley's blank stare, her tearful disclosure, Clark's flight from the scene, and Clark's initial false statements to law enforcement officers investigating the case. Id.

However, the State's official response to Hensley's recantation at the time - nol prossing the charges against Clark - is more telling than its present argument that there was "significant" evidence of his guilt. By nol prossing that charge, the State gave Clark no opportunity to establish his

innocence in a public forum after Hensley publicly accused him of rape, and its attempt to now recast Clark as a rapist should be rejected.

In any event, Clark's attempt at flight and reluctance to admit consensual intercourse, in the immediate wake of Hensley's accusation and subsequent attempt to extort him, may reflect his self-preservation instinct, but hardly demonstrate his guilt. Further, neither a blank stare nor a tearful disclosure conflicts with the theory that Hensley falsely accused Clark, as lies and truth alike may arise out of powerful emotions.

The eighth Miller factor, "the extent to which specific-instances evidence is cumulative or unnecessary in light of other evidence already received on credibility," 921 A.2d at 948, does not cut against admissibility. Kornbrekke elicited several criminal convictions which were not crimes of dishonesty and likely had only a marginal impact on Hensley's general credibility. T1. 174. The impeachment value of a prior conviction for operating after certification as an habitual driving offender, or a prior drug conviction, is minuscule compared to a prior false accusation of sexual assault. White v. Coplan, 399 F.3d 18, 24 (1st Cir. 2005)(impeachment by prior false accusation is "considerably more powerful" than other

types of impeachment that constitute "mere[] 'general' credibility evidence.").

With respect to the prejudicial effect of the evidence, the Miller Court also provided guidance, setting forth two factors that come into play when the witness is not the defendant, plus two other "costs and dangers" that may be considered by the trial court. 921 A.2d at 948-49 (quotations omitted). The trial court's order only reflects one of these considerations, the view that cross-examination regarding the prior accusation would lead to a "trial within a trial...." T1. 83; see Miller, 921 A.2d at 949 (court may consider whether evidence will necessitate "time-consuming and distracting minitrials....")(quotations omitted).

First, as this Court noted in State v. Hurlburt, 132 N.H. 674, 675, 676 (1990), this factor is generally "ungrounded" with respect to Rule 608(b) because "[i]t is the prohibited extrinsic evidence that leads to a trial within a trial, not the inquiry on cross-examination." At any rate, because Hensley's statements regarding whether Clark raped her are inconsistent and irreconcilable, the danger of a "trial within a trial" is minimal.

With respect to the other prejudice factors set forth in Miller, the concern that the evidence will cause the jury to be biased against the party that called the witness; Miller, 921 A.2d at 948; should be given no weight in a criminal case, for two reasons. First, jurors are sophisticated enough to understand that a prosecutor, unlike a civil attorney, does not choose her clients and causes, and must take her complaining witnesses as they come. Second, as this Court has recognized, the likelihood that any juror will become biased *against* a prosecutor is exceedingly remote. State v. Bujnowski, 130 N.H. 1, 4 (1987)("[T]he representative of the government approaches the jury with the inevitable asset of tremendous credibility....")(quotations omitted).

Further, cross-examination will not subject Hensley to "harassment" or "undue embarrassment"; Brum, supra, Slip Op. at 5 ("consistent with Rule 611, the court may consider whether admitting the Rule 608(b) evidence will subject the witness to harassment and undue embarrassment")(quotations omitted); because the underlying facts concern no private matter. Rather, these facts have already been publicly aired, through the public prosecution of Clark that occurred as a result of her false accusation. Finally, while a jury may well give tremendous

weight to evidence of a prior false accusation, there is no reason to believe that it will give more weight than the evidence deserves. Id. (Trial court may consider whether jury will give the evidence "too much weight")(quotations omitted); cf. Redmond, 240 F.3d at 592 ("Nor was the evidence of her previous false charge of rape prejudicial to the state, except insofar as its prejudicial effect was a function of its probative weight, which of course is not the relevant meaning of prejudice.").

In conclusion, no trial court could sustainably apply the Miller factors to exclude cross-examination of Hensley regarding her prior false accusation. Because Hensley's credibility was critical, the trial court's error prejudiced Kornbrekke, and this Court must reverse. Hurlburt, 132 N.H. at 676 (reversing because trial court erred in precluding defendant from cross-examining complainant regarding a prior act of misappropriation of $600 from her employer).

B. The Trial Court Denied Kornbrekke's State and Federal Constitutional Rights to Confrontation by Precluding Him from Cross-Examining Hensley Regarding Her Prior False Accusation of Sexual Assault.

Part I, Article 15 of the State Constitution safeguards Kornbrekke's right to impeach Hensley on cross-examination, as

an "incident" of the right to confrontation. Miller, 921 A.2d at 949 (quotations omitted). "Although a trial court has broad discretion to fix the limits of cross-examination, it may not completely deny a defendant the right to cross-examine a witness on a proper matter of inquiry." Miller, 921 A.2d at 949; State v. Etienne, 146 N.H. 115, 118 (2001). Here, Kornbrekke sought to cross-examine Hensley concerning a "proper matter of inquiry" for purposes of the State Constitution's confrontation clause. Miller, 921 A.2d at 949 ("we agree that whether the victim falsely accused her father of physical and emotional abuse was relevant to the defendant's fabrication defense...."). Further, Kornbrekke satisfied the requirement of the State Constitution that the prior allegation be "demonstrably false," Miller, 921 A.2d at 947, through the evidence and arguments that are discussed in part (I)(A) of this brief. See infra pp. 17-18.

The standard of review depends on whether the trial court allowed a "threshold inquiry" into the subject matter at issue. Miller, 921 A.2d at 949 (quotations omitted). If it did not, then it violated the defendant's right to confrontation, and the conviction must be reversed. Id. If the court allowed a threshold inquiry, then any further limits on cross-examination

will be measured against a sustainable exercise of discretion standard. Id.

Here, this Court must reverse because the trial court did not allow even a threshold inquiry into the matter. In both Brum and Miller, the defendants sought to cross-examine the complaining witness in a sexual assault prosecution concerning allegedly false statements made regarding a prior accusation. Brum, Slip Op. at 7; Miller, 921 A.2d at 949. In Brum, this Court defined the matter at issue narrowly, as "the discrepancies between the victim's 1996 and 2005 accounts of the 1996 incident," and concluded that the trial court allowed a threshold inquiry, because the defendant was allowed to cross-examine the complainant regarding several such discrepancies. Slip Op. at 8. In Miller, this Court defined the matter at issue more broadly, as whether the trial court allowed a "threshold inquiry at trial into the victim's character for truthfulness or untruthfulness...." 921 A.2d at 949. The Miller Court concluded that the court allowed a threshold inquiry because "the jury heard from seven witnesses regarding the victim's character for untruthfulness," all of whom

testified that the complainant was not a trustworthy witness.[****] Id. at 949-50.

Whether the subject matter for cross-examination is defined narrowly as in Brum, or broadly as in Miller, the trial court violated Kornbrekke's right to confrontation because it did not allow even a threshold inquiry. Unlike in Brum, the court did not allow any cross-examination questions concerning Hensley's prior accusation against Clark. Unlike in Miller, Kornbrekke had no adverse character witnesses to draw on. The criminal convictions he elicited were not crimes of dishonesty and likely had only a marginal impact on her general credibility. T1. 174.

Even if this Court were to consider the impeachment by prior conviction or other cross-examination topics to constitute a "threshold inquiry" into the matter at issue, it still must reverse. The trial court unsustainably exercised its discretion because the impeaching impact of the prior false accusation

[****] The Miller Court also discussed, in addition to the seven character witnesses, the defendant's cross-examination of the complainant regarding her inconsistent statements about the charged offense. 921 A.2d at 950. Such cross-examination, however, is not an attack on the complainant's "character for truthfulness or untruthfulness," but rather constitutes a direct impeachment of her trial testimony. McCormick on Evidence, § 33 at p. 44 (abridged 4th Ed. 1992)(distinguishing the "five main modes of attack upon the credibility of a witness," which include prior inconsistent statements, and "an attack upon the character of the witness.").

would have been far greater than the questions regarding Hensley's prior convictions, such that the latter could not substitute for the former. E.g., State v. Guenther, 854 A.2d 308, 323 (N.J. 2004)("a prior criminal conviction for criminal mischief or aggravated assault probably has far less bearing on the trustworthiness of a victims testimony than a prior false accusation").

Kornbrekke also advances an independent claim that the trial court violated his federal constitutional right to confrontation by excluding cross-examination regarding Hensley's prior accusation. In a criminal case, restrictions on the defendant's rights "to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" Michigan v. Lucas, 500 U.S. 145, 151 (1991) (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). The federal confrontation right, as interpreted by the First Circuit, may require cross-examination regarding a prior accusation of sexual assault even if the defendant cannot meet a "demonstrably false" standard. White, 399 F.3d at 26.

The trial court's decision to preclude cross-examination regarding the prior accusation in this case based on Rules 608(b) or Rule 403 was disproportionate to the purposes served

by those rules. This calculus requires a "balancing of interests," taking into account the following relevant factors: "the importance of the evidence to an effective defense, the scope of the ban involved, and the strength vel non of state interests weighing against admission of the evidence." White, 399 F.3d at 24 (citations omitted).

Here, Kornbrekke contends that the trial court infringed upon his right to confrontation in its application of Rule 608 to the particular facts of this case. As discussed above, the evidence was critical to an effective defense for Kornbrekke, yet the trial court did not allow any cross-examination at all on the area of inquiry. In so ruling, the trial court undervalued the importance of the evidence, and overstated the strength of the State's interests weighing against admission of the evidence.

First, the trial court set the bar too high regarding the extent of similarity between the past and present accusation necessary to justify cross-examination regarding the past accusation. See T1. 83 (court concludes by stating that there were "enough dissimilarities in [its] view – time, space and et cetera – which makes ... [the evidence] way too prejudicial and not probative of anything."). As discussed above, there were

substantial similarities between Hensley's accusations; certainly, the events were far more similar, than those underlying a case from the Seventh Circuit found to constitute a violation of the right to confrontation. Redmond, 240 F.3d 590.

In Redmond, the complainant accused Redmond, a counselor at an institution for alcohol and drug-abusing minors, of trading cocaine for sex; the prior accusation was a false claim of forcible rape. Id. at 590-91. Despite this difference in context and factual circumstance, the Seventh Circuit held that a complete denial of cross-examination concerning the prior false accusation violated the defendant's right to confrontation. Id. at 593.

Second, although the potential motives for Hensley's present and prior accusations closely align, as discussed in section I(A) above, such alignment in motive is not necessary for the evidence to constitute a protected area of cross-examination under the federal confrontation clause. As stated in White, "[i]f the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character)." 399 F.3d at 24. The Court went on to state: "In our case the nature of the motive may be unknown; but if the prior accusations are similar

enough to the present ones and shown to be false, a motive can be inferred and from it a plausible doubt or disbelief as to the witness' present testimony." White, 399 F.3d at 26.

Third, the trial court overstated the State's interest in avoiding a "trial within a trial," T1. 83, an interest recognized but discounted by the White Court:

> [C]ross-examination and extrinsic proof are two different issues. The ability to ask a witness about discrediting prior events-always assuming a good faith basis for the question-is worth a great deal. Imagine if White had been allowed to question the girls about their prior accusations, establish their similarity, and inquire into supposed recantations. The jury, hearing the questions and listening to the replies, might have gained a great deal even if neither side sought or was permitted to go further.

399 F.3d at 25. In conclusion, when Rule 403 "is applied ... to exclude highly probative, noncumulative, nonconfusing, nonprejudicial evidence tendered by a criminal defendant that is vital to the central issue in the case ([the complainant]'s credibility), the defendant's constitutional right of confrontation has been infringed." Redmond, 240 F.3d at 592.

C. The Trial Court Violated the State and Federal Constitutions by Precluding Kornbrekke from Admitting Extrinsic Evidence of Hensley's Prior Accusation of Sexual Assault.

In State v. Ellsworth, 142 N.H. 710, 719 (1998), this Court held that the right to confrontation under the State Constitution mandates admission of extrinsic evidence of a prior false accusation of sexual assault in limited circumstances. Specifically, the Court held that "extrinsic evidence should be admitted only where the allegations are similar, and the proffered evidence is highly probative of the material issue of the complainant's motives." Id. Applying this standard, the Ellsworth Court held that the defendant "failed to make a threshold showing of probity and similarity" because the other accusations were not allegations of sexual assault, and they occurred subsequent to the charged acts. Id.

For all the reasons stated in section I(A) above, the circumstances of Hensley's statements were sufficiently similar, and sufficiently probative of the material issue of her motives, such that a categorical exclusion of extrinsic evidence violated Kornbrekke's confrontation right. Of course, extrinsic evidence may not have been necessary, since nothing in this record rules out the possibility that Hensley, on cross-examination, may have acknowledged that her prior accusation was false. See App. A9 (Kornbrekke's motion in limine indicated it would seek to introduce extrinsic evidence only if Hensley "denied the

falsity" of her prior accusation). Nevertheless, the trial court erred in ruling out extrinsic evidence, without first allowing cross-examination of Hensley regarding the prior accusation. Following that cross-examination, the court could have determined whether Kornbrekke's confrontation right necessitated allowing extrinsic evidence, which may have been as simple as allowing the introduction of her prior written statements.

II. THE TRIAL COURT ERRED IN DENYING KORNBREKKE'S MOTION TO DISMISS AFTER HIS FIRST JURY TRIAL ENDED IN A MISTRIAL, BECAUSE RETRIAL VIOLATED HIS RIGHT AGAINST DOUBLE JEOPARDY.

During jury deliberations in Kornbrekke's first trial, the jury sent a note to the presiding judge (Fitzgerald, J.) stating that it could not reach a unanimous verdict. T-MT3. 329. The foreperson confirmed that the jury was divided "5, 6 and 1" on the digital penetration charge and "4, 7 and 1" on the penile penetration charge. Id. The note also stated that a juror had disclosed that she was a social worker who worked with "other victims" of sexual assault, and that she had a child who was the victim of a sexual assault. T-MT3. 330. During jury selection, no juror had disclosed these potentially-disqualifying personal circumstances.

In chambers, the trial court discussed the above with defense counsel and stated that the court's inclination was to declare a mistrial. Id. Asked if he had any objection, defense counsel stated he did not. Id. Subsequently, the court declared a mistrial. Id.

Later, Kornbrekke filed a motion to dismiss, claiming that he could not be retried based on this Court's decision in Petition of Mello, 145 N.H. 358 (2000). App. A34, A36. The

State objected, and the trial court denied the motion to dismiss. App. A40, A47.

Kornbrekke contends that the trial court erred in granting the mistrial under the circumstances, and that it should have attempted lesser measures including voir dire of the jury and dismissal, if necessary, of the juror whose impartiality was in question. "Because a defendant is put in jeopardy at the moment a jury is empaneled and sworn, the constitution recognizes the defendant's valued right to have his trial completed by a particular tribunal." State v. Gould, 144 N.H. 415, 416 (1999)(quotations and citations omitted); N.H. CONST., Pt. I, Art. 16; U.S. CONST., Amend. V. Accordingly, this Court has "cautioned trial courts not to terminate trials too quickly, encouraging them to discuss lesser sanctions with counsel and to take time for reflection." Id. The standard of review on appeal is whether the trial court sustainably exercised its discretion in granting a mistrial rather than first pursuing lesser remedies. State v. Bathalon, 146 N.H. 485, 488 (2001); In re Brosseau, 146 N.H. 339, 341 (2001).

First, "[i]t is a fundamental precept of our system of justice that a defendant has the right to be tried by a fair and impartial jury." State v. Weir, 138 N.H. 671, 673

(1994)(quotations omitted). If "a juror's qualifications are called into doubt during trial, the trial judge should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, such juror should be excused." Mello, 145 N.H. at 361 (quotations omitted).

Although the defendant's consent to a mistrial will generally enable retrial absent judicial or prosecutorial impropriety, Mello, 145 N.H. at 360-61, the Mello Court carved out an exception to that rule under remarkably similar circumstances as those of the present case. Just as in this case, Mello's jury reported it was deadlocked, and at the same time, the trial court learned that a juror had revealed a potentially disqualifying life circumstance that she had not disclosed during jury selection. Id. at 359. That same juror "had been overheard outside the jury room to say, 'I don't care what the rest of you people say. I'm not changing my mind.'" Id.

The trial court in Mello then called the jury into the courtroom, telling counsel that it would grant a mistrial if the foreperson confirmed they were still "'hopelessly deadlocked.'"

Id. Subsequently, however, at a bench conference, counsel inquired about proceeding with a depleted panel. Id. The court, however, stated it did not know which juror had made the reported statements, and could not so inquire because that would constitute prohibited interference with jury deliberations. Id. at 359-60. Consequently, the foreperson confirmed that the jury was deadlocked, and the court declared a mistrial, without objection. Id. at 360.

Although Mello himself had moved for the mistrial, this Court held that retrial would violate Mello's state constitutional right to double jeopardy. Id. at 361. This Court reasoned: "Once the trial court became aware that a juror may have failed to reveal information on her juror questionnaire that could have been grounds for her disqualification, the court had an independent obligation to voir dire the jurors individually and determine which, if any, had failed to disclose information that would justify her disqualification." Id. at 361-62 (emphasis added). This Court further determined that if such an inquiry had taken place, and if it had resulted in the disqualification of a juror, then the parties could have stipulated to proceed with a depleted panel, which may have resulted in an unanimous verdict. Id. at 362.

Based on Mello, this Court must reverse, because the trial court here failed to exercise its "independent obligation to voir dire the jurors individually," and determine whether a juror should have been disqualified. Id. at 362. Had it done so, the court could have then obtained the parties' stipulation to a depleted panel, just as in Mello, and the jury could have deliberated free of the taint of a biased juror. Just as in Mello, "[a]lthough we cannot know whether these alternatives would have resolved the deadlock, the trial court had a duty to explore them." Id.

The primary difference between this case and Mello, the fact that there were four or five jurors voting for guilty at the time of the reported deadlock rather than one as in Mello,[*****] does not render that case distinguishable. For example, on the penile penetration indictment, had there originally been four votes for guilty, and had the offending juror been one of those votes, than upon her removal there would be just three votes for guilty. Free of the coercive influence of a biased juror, a jury split 9 to 3 could resolve its differences without great difficulty. To illustrate this point, in the re-trial, the jury

[*****] A comment by the foreperson implied that the number of votes for guilty were five on the former indictment, and four on the latter. T-MT3. 329.

informed the court that it was deadlocked nine to two with one undecided. T3. 6. Subsequently, asked by the court whether they could reach a verdict by the end of the day, the jury returned an hour later - having eaten lunch during that hour - with a unanimous verdict. T3. 7-8.

In conclusion, because the trial court failed to exercise its independent obligation to "explore the[] alternatives" to declaring a mistrial, this Court must conclude that "it would be unfair to subject the defendant to a new trial." Mello, 145 N.H. at 362. Accordingly, this Court must reverse.

CONCLUSION

WHEREFORE, Mr. Kornbrekke requests that this Court reverse. If the Court reverses based on the first issue, but affirms the trial court's decision to deny the motion to dismiss, then this Court should grant a new trial.

Kornbrekke requests fifteen minutes oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 17th day of July, 2007.

_____
Theodore Lothstein

DATED: July 17, 2007