QUESTIONS PRESENTED

1. Did the trial court err in overruling Morrill's objection when the prosecutor commented on his right to remain silent during closing argument?

Issue preserved by contemporaneous objection, T3 620-21,* and the trial court's ruling. T3 621.

2. Did the trial court err in admitting hearsay testimony that violated Morrill's right to confrontation?

Issue preserved by hearing on the admissibility of the testimony, T3 522-544, and the trial court's ruling. T3 545, App. A1-A5.

*References to the record are as follows:
"T1" refers to the transcript of the first day of trial, May 10, 2005;
"T2" refers to the second day of trial, May 11, 2005;
"T3" refers to the third day of trial, May 12, 2005;
"NOA" refers to the Notice of Appeal;
"App" refers to the Appendix to this brief.

STATEMENT OF THE CASE

In the Strafford County Superior Court, an indictment charged Donald Morrill with aggravated felonious sexual assault. The indictment alleged that between January 27, 1997, and December 26, 2000, Morrill engaged in a pattern of sexual assault by purposely touching the genitalia of N.N. with the purpose of sexual arousal or gratification. T1 56-57.

At trial, the jury convicted Morrill, and the court (Fauver, J.) sentenced him to serve eight to twenty years in the state prison, with two years of the minimum sentence suspended upon meaningful participation in a sexual offender program. NOA 2.

STATEMENT OF FACTS

In the late fall of 1996, Susan Morrill moved into Donald"Sam" Morrill's home in Middleton, along with her children from previous relationships, Joshua, Tasha and N.N. T1 212, 217, 222-23. The youngest, N.N., then four years old, divided her time between weekends with Susan and Sam (hereinafter, "Morrill"), and weekdays at her father Lee Noyes's trailer in Rochester. T1 212-13, 223-25.

For many years, Noyes battled several illnesses, including liver disease and alcoholism. T1 221, T2 488. When he drank, the liver disease would incapacitate him and make him extremely ill, causing numerous hospitalizations. T1 222. In the fall of 1997, Noyes's sister Gayle Huntress called and told Susan that Noyes had become ill again. T1 224-25. N.N. did not see Noyes for several months. T1 225, T2 299. At some point during the spring of 1998, however, N.N. resumed spending several days at a time with Noyes at his trailer. T1 236-37, T2 300.

Huntress testified that sometime in April of 1998, Noyes asked her to speak with N.N. T2 490, 492. N.N. subsequently told Huntress that Morrill had done something to her and she was afraid Huntress would not believe her, but instead call her a liar like her mother did. T2 495. Noyes told Huntress that he was reluctant to report it because it might "backfire on him" and cause him to lose custody. T2 505. Huntress testified she told Noyes to report the accusation to the authorities to protect N.N., T2 505, and Noyes did so.

Susan testified that in late April, 1998, she left work and went to Noyes's residence at Noyes's request, at which point Noyes told N.N. to "tell your mom what you just told [him]." T1

237-38. N.N. told Susan that Morrill had been touching her on her "pee-pee." T1 238. Susan, who did not then believe N.N., T1 244, confronted Noyes, demanding to know what he had said to "make her say this." T1 238.

Susan further testified that on April 28, 1998, a state trooper and a DCYF investigator went to her residence, while N.N. was still with Noyes, and told Susan that an allegation had been made. T1 242, T2 316. Susan lied, claiming to not know that an accusation had been made. T2 318-19. The next day, N.N. made a disclosure during a videotaped interview at the Strafford County Attorney's Office. T1 552-555. After the interview, according to State Trooper Erin Commerford (then known as Donini), Susan stated that she believed Noyes had made up this story and persuaded N.N. to tell it, and further claimed that Noyes had done similar things in the past due to "monetary disagreements and custodial disagreements." T3 564.

Within one week of the videotaped interview, N.N. recanted. Susan testified that she instructed N.N. to repeat her recantation to her babysitter, Lisa Caplette. T2 248. Commerford testified that on May 6, 1998, she and a DCYF investigator met N.N. at Caplette's home, at which time N.N. repeatedly told them that Noyes had told her to say what she said. T3 572-573.

Events leading up to the second disclosure.

On June 3, 1998, Noyes filed for custody of N.N., citing the investigation of Morrill for sexual abuse. T2 305. He obtained an order for temporary custody, which was served on Susan. T2 306. Susan retained a lawyer and within days had successfully petitioned the court

to overturn its ex parte order, pointing out that the investigation had been closed. T2 306-307. Subsequently, Susan won custody of N.N. T2 307. Noyes was hospitalized again, and died on October 13, 1998. T3 595.

In July of 1999, Morrill began serving eight months of a twelve-month sentence for operating after certification as a habitual offender. T2 319. Susan testified that upon Morrill's return home in May of 2000, N.N. became withdrawn and did not want to be left alone. T1 252-253. Susan further testified that twice during the summer or fall of 2000, she observed Morrill coming out of N.N.'s bedroom at night. T1 256. When she asked what he was doing in there, he would reply that he was closing a window. T1 256. Additionally, an incident occurred which both Susan and Tasha discussed in their testimony.

Tasha, eighteen years old at the time of trial, T2 380, testified that at about 1:30 one morning, in June or July of 2000, she came home from a neighbor's house with a friend. T2 392-93, 409. When she went to use the bathroom, she looked into the bedroom shared by N.N. and Joshua and saw Morrill standing on a toy box and leaning over N.N., who was sleeping in the top bunk. T2 393-95. Tasha testified that it appeared that Morrill, who was wearing only underwear, was kissing N.N.'s stomach. T2 394-95. Tasha testified that she loudly confronted Morrill, who she believed to have been drinking. T2 396-98. Susan testified that the episode woke her up, and that she too confronted Morrill at that time. T1 258.

Joshua Hildreth, seventeen years old at the time of trial, T2 427, testified that around September of 2000, one or two months before Morrill moved out, something happened that made him uncomfortable. T2 441-42. One night, while Susan was at work, Morrill came in the

bedroom several times for four to five minutes at a time. T2 443-444. One of the times, Joshua testified, he saw Morrill sitting on N.N.'s bed with his hand underneath the blanket, near her crotch area. T2 442, 445. Joshua testified that N.N. woke up, asked Morrill what he was doing, and Morrill replied that he was checking on Joshua because he was sick, and then left. T2 446.

After the incident described by Tasha and Susan, Susan began sleeping with N.N. on the couch in the living room. T1 260-61. She testified that this arrangement continued for three to four weeks, after which time she told Morrill to move out and ended their relationship. T1 261.

Susan testified that one night after Morrill left, N.N. asked her if Morrill would return. T1 267. When Susan told her he would not, N.N. then made another disclosure, T1 267, which Susan reported in December of 2000. T1 87-89, 268.

Subsequently, State trooper Maureen Steer arranged a second videotaped interview of N.N., now eight years old, at the Strafford County Attorney's Office. T1 94-95, 268. Susan brought N.N. in for the interview on January 9, 2001. T1 95. Steer testified that no videotaping occurred, however, as N.N. would not talk about the disclosure and "had a hard time answering very basic simple questions like, what is your name...." T1 95.

Over the course of the next several months, Steer had difficulty reaching Susan. T1 97-97, 117-18. In September, 2001, the Morrill family moved to Wakefield and N.N. enrolled in a new school. T1 270-71. In November of 2001, for the second time, the State closed the case. T1 98.

The circumstances surrounding the third disclosure.

In December of 2001, N.N. made another disclosure to her school guidance counselor. T1 100, 269. A third videotaped interview was scheduled for January 25, 2002. T1 101. This time, N.N. gave a statement regarding the allegations. T1 102.

The complainant's testimony.

N.N., thirteen years old at the time of trial, T1 126, testified that not long after they moved to Morrill's Middleton home, Morrill began coming into her room at night and touching her on her vagina under her clothing. T1 139-140, 143-44. She testified that he would come in while she was sleeping, but that she would wake up during the assault. T1 143.

N.N. had little memory of other relevant events or of the general circumstances of her life before and during the charged time frame. She testified that she had little or no memory of her father Lee Noyes, T1 130, no memory of telling Noyes or her aunt (Huntress) about Morrill's conduct, T1 151, no memory of telling her babysitter (Caplette) that Noyes told her to say that Sam touched her, T1 192, and no memory of a videotaped interview. T1 151.

Caplette testified that at some point in 1998, Susan told her that Morrill was being investigated for allegedly touching N.N. T3 580. Subsequently, at her house, N.N. told her that her father had "told her to say the stuff she had said" about Morrill. T3 581. In a written statement Caplette said that she never saw any inappropriate behavior by N.N., and that N.N. seemed to be a normal, healthy child. T3 584.

SUMMARY OF THE ARGUMENT

1. The trial court erred in allowing the prosecutor to comment during closing argument on Morrill's exercise of his constitutional right not to testify. Because the surrounding circumstances demonstrate that the argument was neither isolated nor inadvertent, and because the trial court gave no curative instruction, but instead overruled Morrill's objection, he is entitled to a new trial.

2. The trial court further erred in admitting testimony concerning the reason that Noyes did not immediately report N.N.'s first disclosure to the authorities. This testimony constituted inadmissible hearsay, not within any exception to the hearsay rules, and its admission violated Morrill's right to confrontation. Morrill did not make any argument or introduce any evidence that opened the door to the testimony, and its admission prejudiced his defense.

I. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO COMMENT ON MORRILL'S SILENCE DURING CLOSING ARGUMENT.

Morrill called only one witness, Caplette, and then rested his case without testifying. Thus, the case proceeded quickly from the completion of the State's case to closing arguments. During closing argument, defense counsel emphasized, as her co-counsel had done during opening statement, T1 71-73, certain core principles of criminal procedure. T3 595-97. Based on these principles, defense counsel argued, the jury should acquit because

> To be proof beyond a reasonable doubt, that evidence must be rock solid. It must be strong. It must be sure. And the evidence in this case is none of those things.

T3 597. Defense counsel went on to make various fact-based arguments based on the trial evidence. T3 597-617.

Subsequently, the County Attorney, early in her closing, stated to the jury:

> I want to also pick out a couple of things that were emphasized by the defense in both the opening statement and the closing argument. One thing that Attorney Slamon said to you is the evidence must be rock solid. Rock solid. <u>It must be a great comfort to the defendant to have someone stand up on his behalf and tell you that.</u>

T3 620 (emphasis added). Defense counsel immediately objected, on the basis that the prosecutor had commented on Morrill's exercise of his right not to testify. T3 620-21. The trial court overruled the objection. T3 621.

It is a bedrock principle of constitutional law that "[a] defendant's decision not to testify or present evidence in his own defense can provide no basis for an adverse comment by the prosecutor." <u>State v. Hearns</u>, 151 N.H. 226, 233 (2004) (quotations omitted); <u>State v. Ellsworth</u>,

151 N.H. 152, 155 (2004); Griffin v. California, 380 U.S. 609 (1965). Such arguments are particularly pernicious because, as this State's most frequently-referenced criminal procedure treatise pointedly describes it, a curative instruction regarding the prosecutor's commentary on the defendant's silence

> may only accentuate the defendant's failure to testify in the mind of the jury. For that reason, comment by a prosecutor on a defendant's failure to testify must be considered the most egregious form of improper argument.

2 R. McNamara, N.H. Practice, Criminal Practice and Procedure § 32.36 at 391 (4th Ed. 2003).

The first step is to assess whether the prosecutor's comment improperly commented on the defendant's right not to testify or present evidence. As the First Circuit Court of Appeals has made clear, this determination is not one of form, focusing on the words used, but one of substance, focusing on the message conveyed to the jury. "Even an indirect or inferential comment on a defendant's silence can transgress the Fifth Amendment." United States v. Rodriguez, 215 F.3d 110, 122 (1st Cir. 2000)(quotations omitted), cert. denied, 532 U.S. 996 (2001).

Here, the prosecutor's argument was an "indirect or inferential comment" on Morrill's decision not to testify in his own defense, for several reasons. First, claiming that defense counsel's arguments on Morrill's "behalf" must have been "a great comfort" to Morrill, while simultaneously attacking those arguments, depicted Morrill as a man who relied on his lawyer to serve as his mouthpiece. Second, the argument, by referring to the fact that Morrill chose to have defense counsel "stand up" for him, emphasized Morrill's decision to remain seated at counsel table rather than take the witness stand.

For these reasons, the trial court erred in finding that the jury could not draw a "reasonable inference" that the prosecutor had commented on Morrill's failure to testify. T3 621. "[O]blique comments on a defendant's failure to testify, if sufficiently suggestive, can be as pernicious and as unlawful as direct comments...." United States v. Harbin, 601 F.2d 773, 777 (5th Cir. 1979)(cited in State v. Lovely, 124 N.H. 690, 697 (1984)). Even assuming that the prosecutor's argument was susceptible to two interpretations, only one of them improper, as was the case in State v. Turgeon, 137 N.H. 544, 547 (1993), the trial court engaged in an unsustainable exercise of discretion by overruling the objection and thus allowing the improper interpretation to take hold with the jury. Cf. id. at 548 (trial court gave immediate, strong curative instruction).

The next step in the analysis is to determine, balancing three factors, whether the jury's verdict must be reversed because of the prosecutor's arguments. These factors are

> (1) whether the prosecutor's misconduct was isolated and/or deliberate; (2) whether the trial court gave a strong and explicit cautionary instruction; and (3) whether any prejudice surviving the court's instruction likely could have affected the outcome of the case.

State v. Ellsworth, 151 N.H. at 155 (quotations and citation omitted).

First, the prosecutor made another improper comment which, although not objected-to, constitutes persuasive evidence that her conduct was deliberate, rather than inadvertent. Specifically, after the trial court overruled defense counsel's objection, the prosecutor adversely commented on Morrill's exercise of his right to a jury trial. Although Morrill had not testified, the prosecutor contrasted the victim's credibility with Morrill's credibility, by arguing that the victim testified truthfully, T3 646, and that "it was the defendant who lied.... " T3 646.

The prosecutor explained that Morrill had lied, first to his family members, "[a]nd it was the defendant who lied when he came into this courtroom and pled not guilty to these charges." T3 646.

The "not guilty" plea is not a statement of fact, or in any manner an assertion of factual innocence, but rather, is the legal mechanism by which the defendant exercises the most fundamental of all constitutional rights, the right to a trial. By saying that Morrill "lied to the Court" when he so requested a trial, and thereby negatively contrasting his credibility with that of the victim, the prosecutor adversely commented on Morrill's exercise of his right to a trial. This Court should determine that this latter argument supports Morrill's position that the prosecutor's initial infraction was deliberate, rather than an isolated or inadvertent misstatement. As this Court has recognized,

> prosecutors can and should present their cases zealously. Yet, while a prosecutor may strike hard blows, he is not at liberty to strike foul ones. This maxim is particularly relevant to closing arguments, for such arguments come at an especially delicate point in the trial process and represent the parties' last, best chance to marshal the evidence and persuade the jurors of its import.

Ellsworth, 151 N.H. at 154-55 (internal quotation marks omitted).

As for the second factor, "whether the trial court gave a strong and explicit cautionary instruction," id. at 155, this weighs strongly in favor of reversal, as the trial court issued no curative instruction at all, instead overruling the objection and allowing the jury to consider the argument. A general instruction at the close of arguments regarding the defendant's right to remain silent, as was given here, T3 655, will not undo the damage. Ellsworth, 151 N.H. at 156-57. Indeed, in Ellsworth, the Court held that even a curative statement by the prosecutor

himself upon prodding by the trial court will not suffice. "Unlike a prosecutor's explanation, a trial court's immediate curative instruction bears the weight of judicial disapproval." Id. at 157.

As for the third factor, "whether any prejudice surviving the court's instruction likely could have affected the outcome of the case," id. at 155, this factor too weighs in favor of reversal. Since there was no curative instruction, all of the prejudice inherent in the prosecutor's argument not only survived to taint the jury's deliberations, but in fact was amplified by the prosecutor's subsequent inappropriate adverse comment on Morrill's decision to have a trial at all. There was, of course, no physical evidence presented in this case. Cf. Hearns, 151 N.H. at 234 ("overwhelming evidence" in sexual assault trial included mixture of defendant's and victim's DNA on a sheet in defendant's apartment). Morrill made no incriminating statements.

Further, the corroborative testimony of N.N.'s siblings did not render the evidence overwhelming, for several reasons. Both Tasha's and Joshua's testimony were impeached by inconsistencies in their testimony. T2 408-490, 416, 419, 464-66. Their observations were not memorialized in an official report to law enforcement for many months. T1 103 (Tasha and Joshua did not give statement until January of 2002). T2 467. Both would be expected under the circumstances to align with N.N. and her mother at the time of the third disclosure, not with their estranged stepfather. E.g., T2 467 (Joshua did not tell anyone of his observations until after Morrill moved out, at which time Susan told him about what Tasha had seen, and then asked Joshua if he had seen anything). Finally, as defense counsel argued during closing, their testimony could be framed as "tak[ing] common everyday events and criminaliz[ing] them," T3

602, as neither claimed to actually observe Morrill engage in unambiguously criminal conduct such as touching genitalia, and parents have many innocent reasons to check on -- and even touch -- their sleeping children.

For these reasons, the State's case depended primarily on N.N.'s credibility. The reliability and credibility of N.N.'s testimony were called into question by her recantation, her generally poor memory of that time period of her life, and the State's concession that she was then and continued to be "a little intellectually limited." T3 624. Indeed, the State's theory of prosecution was that N.N. was so susceptible to suggestion and influence that her mother's conduct, and pressure from her siblings, caused her to recant. T3 631-36. Because the evidence was not overwhelming, the prosecutor's improper argument could have affected the outcome of this case, and this Court must reverse.

II. THE TRIAL COURT ERRED IN NOT EXCLUDING INADMISSABLE HEARSAY THAT VIOLATED MORRILL'S RIGHT TO CONFRONTATION.

After Noyes reported N.N.'s allegation of sexual abuse, Officer Commerford met with Noyes and discussed the circumstances of N.N.'s disclosure. T3 556-58. The State sought permission to introduce Commerford's testimony that she asked Noyes why he had waited so long to report N.N.'s disclosure to the authorities, and Noyes "told her that did not know what to do and he did not want to get anyone in trouble." T3 525. The State argued that the testimony came within the "state of mind" exception to the hearsay rule. T3 525. The State further claimed that the defense had opened the door to the testimony. T3 525-26 ("The defense's contention has been and is going to be at the close of the case that [Noyes] was the genesis for all of this, that he planted the idea in [N.N.'s] mind in the first place and he's the one who made it all up.").

Morrill objected, stating that the testimony constituted inadmissible hearsay, and further that no defense testimony or argument had created a false or misleading impression. T3 526-27, 531. Morrill represented to the Court that the defense was not arguing that Noyes had influenced N.N. into making a false accusation. Instead, Morrill articulated his theory of defense as follows: "[I]n the course of conversations with Lee Noyes ... [N.N.] said at one point that [Morrill] was touching her and that [Noyes] then used that in the custody fight." T3 530-31. The defense further argued that the proffered hearsay testimony would violate Morrill's right to confrontation. T3 532-33.

The trial court admitted the testimony, finding that although it did not fall within the N.H. Rule of Evid. 803(3) "state of mind" hearsay exception, it was not offered for the truth of the matter asserted and therefore did not constitute hearsay. App. A2. The court further ruled that Morrill opened the door to the testimony, and its admission did not violate his right to confrontation. App. A3-A5. The court erred.

A. Noyes's out-of-court statements constituted inadmissible hearsay.

Because Noyes's out-of-court statement constituted a description of his past state of mind, regarding his motive for not immediately reporting N.N.'s disclosure, it constituted hearsay and did not fall within the state of mind exception. N.H. R. Evid. 801. 'Hearsay' is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.H. R. Evid. 801(c). The "state of mind" hearsay exception includes:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

N.H. R. Evid. 803(3). This Court will reverse a trial court's ruling on the admissibility of evidence only if the court's ruling "was clearly untenable or unreasonable to the prejudice of [the defendant's] case." State v. Francoeur, 146 N.H. 83, 86 (2001)(quotations omitted).

As the trial court correctly reasoned, App. A2, Commerford's testimony did not fall within Rule 803(3) because Noyes's statement "reflect[ed] his past mental state and is an explanation for past behavior." App. A2 (emphasis in original). Thus, the statement constituted "a

statement of memory or belief to prove the fact remembered or believed." N.H. R. Evid. 803(3). This last clause of the rule formalized the common law doctrine as to this hearsay exception. Ibey v. Ibey, 93 N.H. 434, 437 (1945)("Declarations as to past mental conditions are pure hearsay and are not within the exception.")(quotations omitted).

The trial court erred, however, in its determination that the testimony did not constitute hearsay at all. The court explained its ruling as follows:

> [T]he State is not seeking to prove that Noyes, in fact, did not know what to do or did not want the defendant to get in trouble. Rather, the State is seeking to offer the statement to rebut the defendant's position that Noyes orchestrated the alleged victim's statements to get custody of her and punish her mother. As such, it is not hearsay.

App. A2.

The trial court, however, acknowledged that Noyes's out-of-court statement concerned "[Noyes's] reason for his delay" in reporting N.N.'s disclosure. App. A5. In other words, the testimony served to answer a historical question regarding why, at some point in the past, Noyes did not immediately report N.N.'s allegation of a serious crime committed by a family member, and why he continued to delay disclosure of her allegations. Accordingly, the testimony was offered for the truth of the matter asserted – that Noyes delayed not for an insidious reason such as indoctrinating or coaching N.N., or for a conscientious reason such as good faith doubt that N.N. really had been assaulted, but for an innocent reason, not wanting to get anyone in trouble. It was, therefore, hearsay. State v. Bennett, 144 N.H. 13, 19 (1999)("Narratives of past facts or expressions of one's understanding of what has happened do not show present intention and are incompetent hearsay.")(quotations omitted). Under

Bennett, and other cases decided both before and after the adoption of the rules of evidence, assertions as to past state of mind that are offered to show that the declarant claimed to harbor a particular motivation or belief, constitute inadmissible hearsay. See Simpkins v. Snow, 139 N.H. 735, 738 (1995); Ibey, 93 N.H. at 437.

Furthermore, the testimony prejudiced Morrill, because it impermissibly bolstered N.N.'s credibility on the central issue in the case – whether her initial disclosure, or her subsequent recantation, constituted the truth. Practically speaking, N.N. could not be confronted regarding her feelings, thoughts and motivations during that period of her life, because, as she testified, she had no memory of making the initial disclosure, of making her first videotaped statement, nor of recanting. Noyes could not be confronted, because he was dead. If the jury were to credit the hearsay testimony, however, it could rule out several possible exculpatory theories regarding why Noyes delayed disclosure, including that he may have acted in bad faith, or that he may have delayed because he harbored the same doubts Susan did regarding the truthfulness and/or reliability of N.N.'s story.

B. The admission of Noyes' hearsay statements violated Morrill's right to confrontation.

The admission of Commerford's testimony about Noyes's out-of-court statements also violated Morrill's right to confrontation. Crawford v. Washington, 541 U.S. 36 (2004). In that decision, the Court held that the admission of "testimonial" statements made by an out-of-court declarant violates the right to confrontation unless the State can show both that the declarant is unavailable, and that the defendant had a prior opportunity to cross-examine the declarant. Id.

at 68. Here, Morrill never had opportunity to cross-examine Noyes. Thus, to the extent Noyes's statement constituted "testimonial" evidence, its admission violated the Sixth Amendment.

While the Crawford Court did not precisely delineate the outer perimeter of what types of hearsay statements constitute "testimonial" evidence, Noyes's statements were well within its boundaries for the following reasons. First, his statements were obtained as a direct result of questioning by a police officer regarding a criminal investigation. T3 556-58. The Court stated that "whatever else the term [testimonial] means, it applies at a minimum to ... police interrogations." Id. at 68. The Court further made clear that it used the term "interrogation" in its "colloquial, rather than any technical legal, sense." Id. at 53 n. 4. Thus, Noyes's statements to Commerford fall within the core prohibition of the Crawford ruling.

Second, "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." United States v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005). Noyes made his statements in response to questioning by a police officer regarding a criminal investigation that he had initiated by reporting N.N.'s disclosure. Under these circumstances, a reasonable person would have known that his statements may be used prosecutorially.

Third, the Crawford Court, examining the origins of the confrontation clause and relying primarily on that history to reach its holding, 541 U.S. at 43-56, 67-68, focused on the role of the State in obtaining the statements. "Involvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse - a fact borne out time and again through history with which the Framers were keenly familiar." Id., 56

n. 7. Commerford testified that she obtained Noyes's statement during questioning regarding this criminal investigation, T3 556-58, and thus, intended to elicit evidence for potential use in a criminal prosecution. Accordingly, regardless of whether the proper focus is on the intent of the declarant, the intent of the investigating officer, or the intent of both as one court recently held, Hammon v. State, 829 N.E.2d 444, 446 (Ind. 2005), cert. granted, 126 S. Ct. 552 (2005), Noyes's statements were testimonial.

The trial court, in holding that Noyes's statement was not testimonial, reasoned that the statement, although "highly probative to this case," was "not directly incriminating of the defendant...." App. A5. The court did not cite any authority in support of this rationale. Nothing in the Crawford decision suggested that the confrontation clause only applies to testimonial statements that are "directly incriminating of the defendant." To the contrary, the testimony at issue in the Crawford decision, concerning a statement to police made by Crawford's wife that generally supported her husband's claim of self-defense, 564 U.S. at 38-40, did not directly incriminate Crawford, yet the Court had no hesitation in classifying it as a "testimonial" statement. Id. at 65-67. Because the trial court's reasoning is inconsistent with the holding and underlying analysis in Crawford, its ruling must be reversed.

D. The court erred in ruling that Morrill opened the door to the inadmissible hearsay testimony.

Assuming that Noyes's statements were inadmissible as hearsay, as a confrontation violation, or both, the remaining question is whether, as the trial court found, the defense

opened the door to admission of the statements. This Court has recently framed its opening-the-door doctrine as follows:

> The 'opening the door' doctrine applies when one party introduces evidence that provides a justification beyond mere relevance for an opponent's introduction of evidence that may not otherwise be admissible. The initial evidence must have reasonably created a misimpression or misled the fact-finder in some way. This rule allows the opposing party to place potentially misleading evidence in its proper context.

State v. Rogan, 151 N.H. 629, 631 (2005)(citations omitted). On appeal, the standard of review is whether the trial court's ruling constituted a sustainable exercise of discretion. Madeba v. MPB Corp., 149 N.H. 371, 392 (2003).

First, "[f]or the opening-the-door doctrine to apply, the testimony at issue must have created a misimpression." State v. Weeks, 140 N.H. 463, 468 (1995). Here, the defense made argument, nor introduced any evidence, that created a misleading impression. The court found that "[i]n this case, the defendant has explicitly stated that his theory of the case is that the allegations against him were fabricated at Noyes' prompting to give Noyes an advantage in a custody battle over the alleged victim." App. A3. This finding is, however, unsupported by the record. Defense counsel made no such statement, nor did counsel expressly ask the jury to draw any such inference from the evidence during opening statement. T1 68-84. The court further indicated, "[t]he defendant has also asked questions of witnesses during trial with the intention of producing evidence of this theory." App. A3. While Morrill agrees that correctly describes the intent and effect of some of his cross-examination questions, his questions did not

open any door because they did not mislead, and because he was not the first to elicit the evidence that provided the greatest support for such a theory.

In fact, it was the State that first brought before the jury most of the facts from which a reasonable juror could infer that Noyes had influenced N.N. into accusing Morrill of sexual abuse. The prosecutor told the jury in opening statement that after N.N. disclosed to Noyes, Susan "got angry at [Noyes] and she blamed [Noyes] and she said, why are you telling N.N. to say these things, this is a lie, why don't you want me to be happy with [Morrill]." T1 61. The prosecutor further informed the jury that, following several weeks of tumult in the household, "N.N. took it back. N.N. said, it didn't happen, my daddy told me to say it, it didn't happen." T1 63. The prosecutor then told the jury a "custody battle ... erupted" between Susan and Noyes concerning N.N., T1 64, and that before the custody issue could be resolved Noyes "started drinking again and became sick enough from his liver disease that he died." T1 64.

Undoubtedly, there was a path to acquittal in this case, based on the theory that Noyes influenced the disclosure, and Morrill concedes he presented his defense in a manner that pointed the way down that path. The defense indicated prior to trial its intention to elicit N.N.'s recantation, and that because of her recantation, DCYF closed its 1998 investigation. T1 39-50 (hearing on State's motion in limine). In his opening, defense counsel portrayed pre-existing conflicts over custody of N.N. as the environment within which the disclosure emerged. T1 74-78. This became an issue at trial, which both parties introducing competing evidence as to whether the custody disputes began prior to, or after the disclosure. T2 360 (State, during redirect of Susan, elicits testimony that custody arrangements were amicable prior to the

disclosure, and that no conflict regarding custody occurred until after the disclosure; T3 564 (Defense responds by eliciting testimony that Susan told state trooper contemporaneous to the disclosure that she believed Noyes made up the story and induced N.N. to tell it, as Noyes had done similar things in the past due to "monetary disagreements and custodial disagreements."). Morrill's purpose in contesting this issue was apparent - to leave open the most apparent path to acquittal, by exposing Noyes's potential motives during that time period. Morrill did not mislead the jury, however, as he never expressly argued that Noyes caused N.N. to make up a story, never asked the jury to draw such an inference, and introduced no misleading testimony.

Thus, although the evidence was certainly relevant, the opening-the-door doctrine does not apply because the defense did not mislead, and because the State introduced the facts providing the greatest support for the theory that Noyes influenced the disclosure. See Rogan, 151 N.H. at 631 ("the opening the door doctrine applies when one party introduces evidence that provides a justification beyond mere relevance for an opponent's introduction of evidence")(emphasis added); State v. Crosby, 142 N.H. 134, 138 (1997)("[T]he State may not employ a trial strategy of introducing evidence which itself creates the necessity for admitting bad acts evidence.").

Because Morrill did not expressly argue that Noyes improperly influenced N.N.'s disclosure, and because Morrill introduced no misleading testimony, Rogan is distinguishable. In Rogan, 151 N.H. at 632-33, this Court held that defense counsel's cross-examination of an investigating officer concerning her interview of the victim "placed the integrity of [her] investigation at issue" by suggesting and insinuating that "her investigation was unfair and that

she had coerced the victim to make incriminating statements." Id. at 632. On this basis, the Court held, the defense opened the door for the State to play the entire interview for jury. Id. at 633. This enabled the jury to make its own well-informed determination, based on such considerations as "tone of voice and presentation of questions and pauses," of whether, as defense counsel alleged, the interviewer applied undue influence when interviewing the victim. Id. Rogan is distinguishable not only because defense counsel presented Morrill's case by development of facts rather than insinuation and suggestion, but also on the more fundamental level that while the tape in Rogan provided the jury a reliable source to assess the truth of defense counsel's claims, the unreliable hearsay from a deceased declarant in this case did not.

This case is unusual in that the trial court admitted inherently unreliable evidence under an opening-the-door theory. As such, this case presents an opportunity for the Court to provide additional guidance to trial courts regarding the proper application of the opening-the-door doctrine when a litigant claims the opposing party opened the door to evidence that is generally regarded as unreliable, as opposed to evidence that was previously suppressed for reasons other than reliability. See generally David Estabrook, "Opening the Door: New Hampshire's Treatment of Rebuttal Evidence," N.H. Bar Journal at 30 (Fall 2006)(student-authored article surveys this Court's opening-the-door decisions and suggests that the doctrine provides insufficient guidance to trial courts).

This Court's opening-the-door doctrine, as presently articulated, does not expressly distinguish between situations where a litigant seeks admission of evidence excluded for reasons other than reliability, versus those less frequent situations where a litigant seeks admission of

unreliable evidence, as occurred here. The first category includes A) evidence suppressed because of a constitutional or statutory bar, e.g., State v. Patten, 137 N.H. 627 (1993) (defendant's testimony opened door to inconsistent statements made at bail hearing despite general rule precluding admission of statements at bail hearing); State v. Cannon, 146 N.H. 562, 565 (2001)(victim's testimony opened door to evidence otherwise precluded by rape shield law); and B) evidence excluded because of Rule 404(b). E.g., State v. Carlson, 146 N.H. 52, 56-57 (2001). In these types of cases, there is generally no concern regarding the reliability of the evidence. For example, evidence subject to Rule 404(b) cannot come in absent clear proof in any event. Rather, the evidence is excluded because of some other public policy, such as deterring unconstitutional police conduct, or safeguarding the privacy of sexual assault victims. To the extent reliable evidence may nevertheless undermine the truth-finding process of the jury if used for an improper purpose such as propensity, this Court has appropriately directed trial courts to subject the contested evidence to the Rule 403 balancing test. State v. Fecteau, 133 N.H. 860, 874 (1991). More generally, this Court has instructed trial courts to apply the doctrine cautiously such that it "prevent[s] prejudice and is not ... subverted into a rule for injection of prejudice." State v. Trempe, 140 N.H. 95, 99 (1995)(quotations omitted).

This Court should provide more guidance to trial courts for cases falling in a second category, where a litigant claims that the opposing party has opened the door to unreliable evidence, such as the inadmissable hearsay at issue in this case. The admission of unreliable evidence threatens to impair, rather than enhance, the core truth-finding function of the jury. Indeed, this Court's willingness to reverse a jury's verdict appears to be at its apex when dealing

with cases falling in this category. Thus, in appellant's prior appeal, State v. Morrill, 151 N.H. 331 (2004), this Court reversed where the trial court allowed the State to introduce, on an opening-the-door theory, evidence of a witness's personal opinion as to the veracity of the complaining witness. Id. at 334 (citing State v. MacRae, 141 N.H. 106, 108-109 (1996) and State v. Kulas, 145 N.H. 246, 247 (2000)). Similarly, in State v. Benoit, 126 N.H. 6, 20-21 (1985), this Court reversed where the trial court, on an opening-the-door theory, allowed the State to introduce the results of an identification procedure previously found unnecessarily suggestive and therefore unreliable.

This Court has upheld the admission of unreliable evidence under an opening-the-door theory only in State v. Stetson, 135 N.H. 267 (1992). In that case, the defense first introduced unreliable hearsay evidence, by a declarant who refused to testify. Id. at 268. This Court upheld the trial court's decision to then allow the State to admit unreliable hearsay evidence by the same declarant that specifically contradicted the hearsay testimony elicited by the defense. Id. at 268-69.

While this Court has not expressly articulated such a rule, Morrill, Benoit and Stetson together provide support for a rule that when a litigant seeks to elicit unreliable evidence, the opening-the-door doctrine does not apply to admit the evidence unless it specifically contradicts an argument or specific evidence introduced by the opposing party. This seems to be a more prudent course, and more consistent with this Court's past jurisprudence, than the Bar Journal article's recommendation that the entire doctrine should be "pared back" so that it aligns with the specific contradiction and curative admissibility doctrines. See Estabrook, supra, at 30.

Several United States Supreme Court decisions support this distinction between a broad opening the door doctrine for reliable evidence, and a narrow doctrine for unreliable evidence. Compare Oregon v. Hass, 420 U.S. 714, 722 (1975)(Testifying defendant can be impeached with prior inconsistent statement obtained as result of Miranda violation as long as "the trustworthiness of the evidence satisfies legal standards.") with Mincey v. Arizona, 437 U.S. 385, 397-98, 401 (1978) (Defendant cannot be impeached with prior inconsistent, but involuntary, statement because involuntary statements constitute unreliable evidence).

Regardless of whether this Court deems it appropriate in this or another case to restate or clarify the opening-the-door doctrine, it is significant that this Court has never upheld the admission of inherently unreliable evidence under the doctrine absent a litigant's introduction of evidence that specifically contradicts the otherwise-inadmissible testimony. Here, Morrill did not engage in argument or introduce evidence that specifically contradicted Noyes's hearsay statement, and it should not have been admitted. Accordingly, this Court must reverse.

CONCLUSION

WHEREFORE, Mr. Morrill respectfully requests that this Court reverse his conviction for aggravated felonious sexual assault.

Oral argument is requested.

Respectfully submitted,

By_____

Theodore Lothstein
Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 13th day of February, 2006.

_____

Theodore Lothstein

DATED: February 13, 2006