The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

Pamela Smart

v.

New Hampshire State Prison for Women

No. 217-2026-CV-00014

ORDER ON RESPONDENT'S MOTION TO DISMISS

The Petitioner, Pamela Smart, has filed a petition for a writ of habeas corpus requesting that this Court vacate all findings of guilt from her underlying trial, grant a new trial, and grant a new sentencing. See Doc. 1 (Pet.). The Respondent, the New Hampshire State Prison for Women, moves to dismiss. See Doc. 15 (Mot.); Doc. 17 (Mem. Law). The Petitioner objects. See Doc. 24 (Obj.); Doc. 27 (Reply). The Court held a hearing on the motion to dismiss on July 20, 2026. Upon review of the parties' arguments and the applicable law, for the reasons set forth herein the Respondent's motion to dismiss is **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

The Court notes that the facts surrounding this case are extensive but need not be recited completely here. Like the Petitioner, the Court here adopts the statement of facts summarized by the New Hampshire Supreme Court in its decision on the Petitioner's direct appeal. See Doc. 1 at 16-19 (quoting State v. Smart, 136 N.H. 639, 643-646 (1993)). These facts are taken to be true for purposes of this motion. See Clark v. N.H. Dep't of Emp't Sec., 171 N.H. 639, 645 (2019).

The [Petitioner], Pamela Smart, upon entering her Derry home on the night of May 1, 1990, observed the body of her husband, apparently the victim of a homicide. The police arrived on the scene shortly thereafter and immediately commenced a murder investigation, culminating in the [Petitioner's] arrest. After a jury trial in Superior Court (Gray, J.), the [Petitioner] was convicted of accomplice to first degree murder, conspiracy to commit murder, and tampering with a witness[.]

Viewing the evidence presented at trial in the light most favorable to the State, the jury was warranted in finding the following facts. In the fall of 1989, the twenty-two-year-old married [Petitioner] was the director of media services for the school district that included Winnacunnet High School in Hampton. She met and befriended William Flynn and Cecelia Pierce, two fifteen-year-old high school students from Seabrook, and they and other students worked together after school hours to produce an orange juice commercial for a contest. Eventually, in February or March of 1990, the [Petitioner] and Flynn became sexually involved.

Shortly after their affair began, the [Petitioner] told Flynn that in order for them to continue their relationship they would have to kill her husband, Gregory, a twenty-four-year-old insurance salesman to whom the Petitioner had been married less than a year. Eventually the [Petitioner] and Flynn together planned that Flynn would commit the murder with the help of his friends and would stage the killing as if committed in the course of a burglary of the [Petitioner's] home. According to the plan devised by the [Petitioner], she would leave open the bulkhead door to the basement of her home to provide entry for Flynn and the others before Gregory returned home. The perpetrators were to park their car in a shopping center behind the residence and change into dark clothes before approaching the apartment. The [Petitioner] advised Flynn that he and his accomplices should wear gloves to avoid leaving fingerprints and should ransack the apartment, taking away whatever they wanted as compensation. Pursuant to the [Petitioner's] plan, her husband was to be killed with a gun upon entering his home as if he had surprised burglars.

Flynn discussed the plan with his friends Pete Randall and Vance Lattime, Jr., also teenagers from Seabrook. With the aid of another boy, Raymond Fowler, Flynn set out from Hampton in the [Petitioner's] car to commit the murder one night in April. When the two arrived at the [Petitioner's] apartment complex, however, they saw her husband's truck and abandoned the plan. After this unsuccessful attempt, Flynn recruited Randall and Lattime to help execute the plan. He told them that the [Petitioner] had agreed to pay them five hundred dollars each for committing the murder. Lattime provided his father's .38 caliber revolver and his grandmother's car to transport the boys from Seabrook to the [Petitioner's] Derry apartment.

After school ended on May 1, 1990, the [Petitioner] drove Flynn, Randall and Lattime to pick up Lattime's grandmother's car in Massachusetts. The [Petitioner] discussed with them the various details of the murder plan, seeking advice on how to react when she returned home and discovered her husband murdered. Lattime and Randall returned to Seabrook in Lattime's grandmother's car. The [Petitioner] drove Flynn back to Seabrook to meet them and then went to Winnacunnet High School to attend a meeting scheduled for that evening.

Flynn, Randall and Lattime picked up Fowler and drove to the [Petitioner’s] residence. While Lattime and Fowler waited with the car at the shopping center, Flynn and Randall entered the [Petitioner’s] apartment through the unlocked bulkhead into the basement. After ransacking both the upstairs and downstairs of the apartment, they waited for Gregory to return home, with Flynn carrying the gun and Randall holding a knife he had taken from the kitchen. When Gregory came home, the boys forced him to his knees. While Randall with one hand held Gregory's head down and with the other hand held a knife in front of his face, Flynn shot him once in the head. Taking a pillowcase they had filled with jewelry, the boys fled to meet Fowler and Lattime, and the four drove back to Seabrook. The next day, Lattime replaced the gun among the rest of his father's collection.

On June 10, Ralph Welch, a friend of Lattime, told Lattime's parents that Randall and Lattime had admitted to him their participation in the murder. Lattime's parents took the gun to the Seabrook Police Department, accompanied by Welch, and subsequent ballistics tests confirmed that the gun had been used in the murder.

Worried because of Welch's intentions to go to the police, Randall and Lattime went to see Flynn and the [Petitioner] at the latter's new condominium in Hampton. After discussing the matter, the [Petitioner] drove them to Seabrook in an unsuccessful attempt to retrieve the gun. The next night, June 11, Lattime, Randall and Flynn were arrested.

Virtually daily before May 1, the [Petitioner] spoke with Cecelia Pierce, her student intern, about the plan to have Flynn murder her husband. The night before the boys were arrested, the [Petitioner] told Pierce of Welch's intention to report the boys to the police, and said that if Lattime and Randall were smart they would blame Welch and Fowler for the murder.

Pierce was questioned several times about the murder by the Derry police and denied any knowledge of it. On June 14, after hearing rumors of the impending arrest of an unidentified girl alleged to be involved, Pierce again met with the Derry police and told them of the [Petitioner’s] involvement in the murder. She agreed to a phone tap of a conversation with the [Petitioner] and to wearing a recording device, or body wire, to record face-to-face conversations with the [Petitioner]. On July 12 and 13, with Pierce surreptitiously recording their conversation, the [Petitioner] warned Pierce that if Pierce told the truth to the police, Pierce would be an accessory to murder, and urged her to continue to lie. The defendant acknowledged that the boys had carried out the murder to look like a burglary as she had planned, and stated that “nothing was going wrong” until the boys told Welch about it. She stated that, if arrested, she would

> admit to the affair with Flynn but deny any involvement in the murder plot. She expressed concern that Lattime, who merely waited in the car during the murder, would eventually confess and implicate the others. Nevertheless, the [Petitioner] told Pierce she was confident that, as between a sixteen-year-old "in the slammer facing the rest of his life" and herself, "with a professional reputation and a course that I teach," her denial would be believed. The [Petitioner] reminded Pierce that, by telling the truth, Pierce would be sending the [Petitioner] to prison for the rest of her life.
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> On August 1, 1990, the [Petitioner] was arrested in connection with the murder of her husband. In January 1991, Flynn, Randall and Lattime agreed to plead guilty to reduced charges and subsequently testified for the State at the [Petitioner's] trial. Another witness, Cindy Butt, a co-worker of Pierce, testified that a month prior to the murder, Pierce told her that she had a "friend named Pam who wanted to find somebody to kill her husband." George Moses, a high school student, testified that he knew the [Petitioner] at Winnacunnet High School and met her again while visiting his mother in prison. According to Moses, the [Petitioner] asked him to lie for her by claiming that he had overheard Pierce admit to lying to the police about the [Petitioner's] involvement.
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> The jury found the [Petitioner] guilty of all charges.

Doc. 1 at 17-19 (quoting Smart, 136 N.H. at 643-646).

On March 22, 1991, a Rockingham County jury found the Petitioner guilty of witness tampering, conspiracy to commit murder and accomplice to first-degree murder. Id. at 15. The trial court sentenced the Petitioner to three-and-a-half to seven years on the witness tampering count, seven-and-a-half to fifteen years on the conspiracy to commit murder count, and life without possibility of parole—which the trial court determined to be a mandatory sentence—on the accomplice to first-degree murder count. Id. Following the jury verdict and the trial court's subsequent denial of the Petitioner's post-trial motions, the Petitioner filed a direct appeal of her convictions to the New Hampshire Supreme Court. See id. at 15. On February 26, 1993, the supreme court affirmed the convictions. Id. at 16; see generally Smart, 136 N.H. Subsequently, the Petitioner filed a petition for writ of certiorari to the United States

Supreme Court, which was denied. Doc. 1 at 16; see Smart v. New Hampshire, 519 U.S. 917 (1993) (denying certiorari).

Next, the Petitioner filed a habeas petition in the New Hampshire Superior Court. On June 13, 1997, Judge Gray—the same judge who oversaw the underlying trial—denied the Petition, and the New Hampshire Supreme Court affirmed. Doc. 1 at 16.

The Petitioner—who was then and remains incarcerated in New York pursuant to an agreement between New Hampshire and New York—then sought federal habeas relief in the United States District Court for the Southern District of New York. Id. The case was thereafter transferred to the United States District Court for the District of New Hampshire. Id. On September 30, 2002, the federal habeas petition was denied. Id.; see Smart v. Goord, No. CIV.99-179-M, 2002 WL 31398692 (D.N.H. Sept. 30, 2002) (McAuliiffe, J.). A subsequent petition for certiorari to the United States Supreme Court was likewise denied. Doc. 1 at 16.

The Petitioner is currently incarcerated at Bedford Hills Correctional Facility in Bedford Hills, New York, serving a sentence of life without the possibility of parole. Id.

STANDARD OF REVIEW

When ruling on a motion to dismiss for failure to state a claim, the issue is whether "the [petitioner's] allegations are . . . reasonably susceptible of a construction that would permit recovery." Mentis Scis., Inc. v. Pittsburgh Networks, LLC, 173 N.H. 584, 588 (2020). The Court must analyze the facts contained on the face of the complaint to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). While doing so, the Court assumes the factual allegations in "the [Petitioner's] pleadings to be true and construe[s] all reasonable inferences in the light most favorable to [her]." Mentis, 173 N.H. at 588. To aid its inquiry, the Court may also consider documents attached to the plaintiff's pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the petition. Ojo v. Lorenzo, 164 N.H. 717, 721 (2013) (citing Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010)). Ultimately, the Court must decide "whether the allegations provide a basis for legal relief" under the applicable law. Id. "If they do not," the Court should grant the motion to dismiss. Id.

Under the law of habeas corpus, the government is prohibited from confining persons unlawfully. See RSA 534. "When court action results in the loss of a constitutionally protected liberty interest, it may be collaterally attacked by way of petition for writ of habeas corpus after the time for direct appeal has expired." Petition of Kerry D., 144 N.H. 146, 148 (1999); RSA 534. "To obtain relief, the petitioner must show harmful constitutional error." Sleeper v. Warden, N.H. State Prison, 155 N.H. 160, 162 (2007) (citing Bonser v. Courtney, 124 N.H. 796, 808 (1984)).

The general rule in New Hampshire, however, is that a petition for habeas corpus "is not a substitute for a direct appeal." Mallard v. Warden, New Hampshire State Prison, 175 N.H. 565, 570 (2023). "Therefore, if a habeas petition is based on a claim that could have been brought in a direct appeal, it may be procedurally barred." Id.; see State v. Kinne, 161 N.H. 41, 44 (2010) (holding that "a procedural default may preclude later collateral review"). "However, an exception to the general rule involves claims of ineffective assistance of counsel based upon alleged trial errors." Id. at 570-71 (citing State v. Pepin, 159 N.H. 310, 312 (2009)); see State v. Veale, 154 N.H. 730, 736

(2007) (explaining that ineffective assistance of counsel claims are best brought in a collateral attack). "Under that exception, allegations of ineffective assistance of counsel need not be raised on direct appeal and may be raised collaterally by filing a petition for a writ of habeas corpus after the time for a direct appeal has expired, if the petitioner can establish 'harmful constitutional error.'" Id. (quoting Kinne, 161 N.H. at 45). "To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." State v. Marden, 172 N.H. 258, 262 (2019).

ANALYSIS

The Petitioner first raises a threshold jurisdictional argument, asserting that because she is incarcerated in New York and New Hampshire RSA 534:3 confers jurisdiction over habeas petitions to "the superior court in the county in which the person is imprisoned," the instant petition should be in a New York court under New Hampshire law. See Doc. 1 at 2-14 (citing RSA 534:3 (emphasis added)). The Petitioner then advances five broad substantive claims, most of which involve subclaims: (1) that the State violated her due process rights by allowing the jury to consult transcripts of audio recordings presented at trial, and that she was denied effective assistance of counsel when her counsel failed adequately to object to the use of these transcripts, see id. at 37-105; (2) that her counsel violated her constitutional rights by declaring her guilt to the jury without her consent, see id. at 101-123; (3) that she was convicted on the basis of an inflammatory news media story in violation of her due process rights, see id. at 123-129; (4) that her trial counsel failed to correct and consented to erroneous jury instructions on the accomplice-to-murder charge, see id. at 129-151; and (5) that the trial court improperly concluded that the charge of accomplice to first-degree murder was subject to a mandatory sentence and therefore failed to perform the correct analysis at her sentencing, see id. at 151-159. The Court will address each of these arguments in turn.

I. Jurisdiction

The Court first turns to the threshold question of jurisdiction. The Petition, like all petitions for writs of habeas corpus in New Hampshire, is filed under the procedural auspices of RSA chapter 534. At substantive issue is the effect of the requirement in RSA 534:3 that "[a]pplication for the writ shall be made to the superior court in the county in which the person is imprisoned, by a person so imprisoned or restrained, or by some person in his behalf." (Emphasis added). The Petitioner argues that, here—because the Petitioner is incarcerated in a prison in New York pursuant to an agreement between that state and New Hampshire under the Interstate Corrections Compact ("ICC"), see RSA chapter 622-B—the statute requires that the instant Petition be brought in a New York court applying New Hampshire law. See Doc. 1 at 3-15. The Court disagrees.

In 1979, New Hampshire incorporated the national ICC into state law in RSA chapter 622-B, with the purpose of cooperating with other participating states "to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment, and rehabilitation of various types of offenders[.]" RSA 622-B:2, Art. I. The ICC defines the term "sending state" to mean "a state party to this compact in which conviction or court commitment was had," id., Art. II(b) and defines "receiving state" to mean "a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had," id. Art. II(c). The statute further provides that "[i]nmates confined in an institution pursuant to the terms of [the ICC] shall at all times be subject to the jurisdiction of the sending state," id., Art. IV(c), and "[t]he fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state," id., Art. IV(e). In this instance, New Hampshire is the "sending state" with respect to the ICC and New York is the "receiving state." Therefore, by its plain terms, RSA 622-B:2 asserts New Hampshire's continuing jurisdiction over the Petitioner and preserves the Petitioner's right to pursue habeas relief in New Hampshire. Moreover, no express or implicit provision exists in RSA chapter 622-B conferring habeas jurisdiction on New York.[1]

The Petitioner argues, however—largely on the basis of the legislative history of RSA 534:3 and case law from other jurisdictions, see Doc. 1 at 3-7—that regardless of the language of RSA chapter 622-B, RSA 534:3 mandates that a habeas petition nonetheless must be brought in New York. The Petitioner cites to no New Hampshire law, nor does the Court find any, that supports such an argument. The New Hampshire Supreme Court has not addressed this question, but other jurisdictions which participate in the ICC have done so, and the Court is particularly persuaded by the reasoning of the Arkansas Supreme Court in Hundley v. Hobbs, 456 S.W.3d 755 (Ark. 2015). That case

[1] The Petitioner argues that such a provision might be construed from the language of RSA 622-B:2, Art. IV(f), which allows a receiving state to conduct certain hearings to which an inmate may be entitled, applying the sending state's governing law. See Doc. 1 at 8-10. The Court notes, however, that this provision only allows the receiving state to conduct such hearings "if authorized by the sending state," thus preserving the sending state's overarching jurisdiction over matters pertaining to its prisoners. See RSA 622-B:2, Art. IV(f).

concerned both a factual circumstance and a statutory scheme almost identical to the ones before the Court here: the petitioner in Hundley had been convicted in Arkansas but was incarcerated in New Jersey pursuant to the ICC, and the applicable Arkansas habeas statute required that the "writ shall be directed to the person in whose custody the prisoner is detained," a phrase the Arkansas court construed to mean the "person . . . having physical custody of the prisoner." 456 S.W.3d at 756-57 (citing Ark. Code Ann. § 16-112-105(b)(1) and quoting State Dep't of Pub. Welfare v. Lipe, 521 S.W.2d 526, 528 (Ark. 1975)). In essence, then, the question before the Arkansas court was identical to the question presented in the instant case.

The Arkansas court, interpreting an ICC statute, Ark. Code Ann. § 12-49-102, virtually identical to RSA chapter 622-B, noted that the "ICC provides that the receiving state acts 'solely as an agent for the sending state,'" that inmates confined in a receiving state are "at all times subject to the jurisdiction of the sending state," and that "any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state." Hundley, 456 S.W.3d at 757-58 (citing Ark. Code Ann. § 12-49-102, Art. IV (a), (c), (e), (f))); compare RSA 622-B:2, Art. IV (a), (c), (e), (f). The court concluded that by terms of the ICC the petitioner "remain[ed] under the jurisdiction of Arkansas. . . [, could] be returned to Arkansas for any purpose permitted by Arkansas law. . . [and could] not be deprived of any legal rights that he would have had if confined in Arkansas." Id. at 758; see also Barrtt v. Belleque, 176 P.3d 1272, 1276 (Or. 2008) (inmates transferred under the ICC remain under the jurisdiction of the sending state, can be returned to the sending state, and enjoy all legal rights available in the sending state); Boatwright v. Dir. Dep't of Prisons, 849 P.2d 274, 276 (Nev. 1993) (Nevada prisoner incarcerated in Arizona under the Western Interstate Corrections Compact ("WICC") could file a habeas petition in Nevada while physically incarcerated in Arizona). The Arkansas court concluded that "the terms of the ICC and the Contract supplement our ordinary habeas jurisdictional analysis," and therefore the petitioner's habeas petition was returnable in an Arkansas court. Hundley, 456 S.W.3d at 759.

The Court is persuaded by the Hundley court's reasoning and adopts it here. Accordingly, the Court finds that New Hampshire, as the sending state, retains jurisdiction over the Petitioner while she is incarcerated pursuant to the ICC in New York, the receiving state. The Court therefore properly exercises jurisdiction over the instant Petition.

II. The Transcripts

The Petitioner raises several claims related to the trial court's allowing the jury to consult written transcripts of audio recordings. See Doc. 1 at 37-105. Specifically, the Petitioner argues that the State's presentation of these transcripts to the jury—and the trial court's allowing the jury to consult them in its deliberations—"denied [the Petitioner] a fair adversarial testing process and rendered her conviction unreliable." Id. at 38. The prejudice to the Petitioner, the Petitioner argues, is supported by a "[s]cientific consensus . . . that transcription of degraded audio imposes a curse of knowledge in that transcripts cause a person to hear what they are told they will hear." Id. The Petitioner refers in particular to a recent study "to test the actual effect and impact of the transcripts on [the Petitioner's] jury," which, the Petitioner contends, confirms that an "expectation-induced bias" was create by the transcripts. Id. The Petitioner also argues that she was denied effective assistance of counsel when both her trial and appellate counsel failed to make adequate objections to the introduction and use of these transcripts. Id. at 73-86.

The transcripts at issue documented the audio recordings of the Petitioner's conversations with her student intern, Cecelia Pierce, regarding her plan to have Billy Flynn kill her husband. See Smart, 136 N.H. at 645. Pierce, in cooperation with the Derry Police Department, participated in a lawful "phone tap" conversation with the Petitioner, and also agreed to wear a "wire" to record face-to-face conversations with the Petitioner. Id. Before trial, the Petitioner's counsel filed a motion in limine to exclude all the recordings from evidence. See Doc. 17, Ex. C (Order on Mot. in limine dated Jan. 22, 1991 (Gray, J.)). The trial court listened to all the recordings and granted the motion with respect to one tape only—that of a June 19, 1990, telephone conversation—but denied it otherwise. Id. At trial, when the tapes were played the jury was given transcripts created by the State. See Smart, 136 N.H. at 666. The Petitioner's trial counsel objected to the jury using the transcripts on grounds that they were "misleading" in that they did not "account for the 'doubling' of voices that occurs when two parties speak at once." Id.; see Doc. 17, Ex. D (Trial Transcript) (cited hereinafter as "Tr.") Vol. XV at 1237-38. The trial court overruled the objection. Smart, 136 N.H. at 666; Tr. Vol. XV at 1239. After the first tape was played, the trial court instructed the jury,

> [t]o the extent, if any exists, that the tape itself differs from what you are reading along in the transcript, you will use the tape in your consideration of the evidence in this case and not the transcript. I'm not saying they do or do not differ, but if you find a difference between the transcript and the tape, use the actual words for your consideration.

Tr. Vol. XV at 1241; see Smart, 136 N.H. at 666. Similarly, after the second tape was played, the trial court reiterated the instruction: "Again, I caution you if you do listen to the tapes again, if they differ at all from the transcripts you use what you hear and not what you read." Tr. Vol. XV at 1244; see Smart, 136 N.H. at 666.

The trial court returned to the subject of the transcripts in an in-chambers conference:

> Let me say this. It has been my intention all along that along with the admission of each exhibit—tape, I mean, as an exhibit, came the transcript of that tape. The tapes—the transcripts are not a full exhibit and they won't be a full exhibit because then they are evidence in and of themselves, and they are not evidence and the jury has been cautioned and will be cautioned again that [the transcripts] are only there to assist them, and to the extent that the tape differs from the transcript they are to use the tape. And they will be cautioned about that in the charge itself, but as counsel for the State has said, if we had 50 more headsets everybody in the courtroom could have had one and the press would have made their own notes of what they heard, as they do in any testimony and report it correctly or incorrectly in the press, as they do all the time.

Tr. Vol. XV at 1287. After further discussion with defense counsel regarding the audibility of the tapes, the trial court clarified:

> As I said earlier, we've had a hearing on this earlier. I listened to all those tapes. I found very few, although I'll agree there are some, situations in which words appear on the tape that I, on the first reading, first listening today, couldn't follow.
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> I will say that I previously found these tapes are audible and of assistance to the jury, and with cautionary instructions I don't think the jury will have a problem with them.

Id. at 1289. In its final instructions to the jury, the trial court reiterated its earlier instruction that "the tapes must govern over any inconsistency that might appear in the transcripts." Smart, 136 N.H. at 666.

The Petitioner raised issues related to the jury's use of the transcripts in her direct appeal, claiming that they "were neither accurate nor authenticated." Smart, 136

N.H. at 666. The supreme court noted that no objection was raised at trial as to whether the transcripts were authenticated, so the issue was not preserved for review. Id. The court did take up the question, which was the subject of an objection at trial, of whether the transcripts "were 'misleading' because they allegedly failed to account for the 'doubling' of voices that occurs when two parties speak at once." Id. Noting that evidentiary rulings are within the trial court's discretion and that an appellant claiming a trial court abused discretion has "the burden to demonstrate that the discretionary ruling is clearly untenable or unreasonable to the prejudice of his or her case," the supreme court found that the trial court had not abused its discretion in giving the jury the transcripts. Id. (quoting State v. Cochran, 132 N.H. 670, 672 (1990)). "Neither at trial nor in her brief," the court explained," did the [Petitioner] make any particularized showing of inaccuracies in the transcripts relative to the recordings or how she may have been prejudiced thereby. The trial court's instructions to the jury adequately addressed the [Petitioner's] objection, and we find no abuse of discretion." Id.

The Petitioner now raises a number of arguments to support her claim that the trial court prejudicially erred in allowing the jury to consult the transcripts. Specifically, she argues (1) that her due process rights were violated because the transcripts allowed the State to employ false evidence and make improper arguments, see Doc. 1 at 55-60; (2) that the State argued prejudicial facts not in evidence, thereby "trampl[ing]" the Petitioner's rights to confrontation and a fair trial, see id. at 61-66; (3) that the "inaccurate and misleading transcripts" comprised "improper opinion testimony" admitted in violation of the rules of evidence, see id. at 66-70; (4) that the State's use of the transcripts "created a biased jury which was fundamentally unable to render a just verdict," see id. at 70-71; (5) that her Fifth Amendment right against self-incrimination was violated because the transcripts fabricated self-incriminatory statements for which she was forced to answer, see id. at 71-73; and (6) that the introduction of the transcripts created a "cognitive bias" in the jury that caused jurors to "hear" incriminating statements that the audio did not reflect, see id. at 37-55. The Court will consider the first five of these arguments, which center on substantive issues raised in direct appeal, together, but will consider the novel sixth argument separately.

A. Arguments Related those Brought on Direct Appeal

The Respondent argues, and the Court agrees, that the first five of these arguments are procedurally barred, because all of them, explicitly or implicitly, turn on the claim that the transcripts were "inaccurate" or "misleading" and therefore should not have been submitted to the jury or used at trial. See Doc. 17 at 23-24. As the Respondent notes, see id., the Petitioner raised or could have raised all of these arguments in her direct appeal, where the supreme court expressly addressed the issue of the transcripts' purported inaccuracy and found that the Petitioner failed to "make any particularized showing of inaccuracies in the transcripts relative to the recordings or how she may have been prejudiced thereby." Smart, 136 N.H. at 666.

New Hampshire has long recognized the common law rule that habeas corpus is not a substitute for direct appeal, and therefore a procedural default may preclude later collateral review. See Kinne, 161 N.H. at 44 (citations omitted); see also Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (recognizing procedural default as a bar to relief under federal writs of habeas corpus). The supreme court narrowed the application of this rule after its decision in Humphrey v. Cunningham, where the court declined to apply the procedural default rule to a petitioner who claimed ineffective assistance of counsel, holding that a petitioner "may collaterally attack a proceeding by filing a petition for a writ of habeas corpus after the time for a direct appeal has expired, if he can establish a harmful constitutional error." 133 N.H. 727, 732 (1990). In subsequent rulings, however, the supreme court reconciled its holding in Humphrey with the traditional rule for procedural default by narrowly applying the Humphrey exception to the rule only to "claims of ineffective assistance of counsel based upon alleged trial errors." State v. Pepin, 159 N.H. 310, 313 (2009); see also Kinne, 161 N.H. at 45; Mallard v. Warden, New Hampshire State Prison, 175 N.H. 565, 571 (2023) ("[A]n allegation of ineffective assistance of counsel need not be raised on direct appeal and may be raised collaterally by filing a writ of habeas corpus, . . . if the petitioner can establish harmful constitutional error." (internal quotations and citations omitted)). The Court will not, however, consider an issue raised under the guise of an ineffective assistance of counsel claim that has been previously considered as part of a petitioner's direct appeal. Humphrey, 133 N.H. at 732.[2]

[2] The parties argue at some length over the New Hampshire standard for the waiver of claims in habeas appeals. The Respondent argues that this standard is best articulated in Grote v. Powell, 132 N.H. 96, 100-01 (1989), where the supreme court held that where it had upheld a trial court's ruling on an issue in the petitioner's direct appeal, it would "not now entertain a collateral challenge to that ruling under the guise of an ineffective assistance of counsel claim." See Doc. 17 at 16-17; Doc. 27 at 6. The Petitioner argues that the Respondent "falsely extends" Grote and argues that—both with respect to claims for ineffective assistance of counsel and other claims not expressly raised on direct appeal—"New Hampshire has . . . cabined the principle expounded in Grote to expressly prohibit only the exact issue raised on direct appeal from subsequently being reraised in a collateral attack." Doc. 24 at 9. Citing in particular to Humphrey, the Petitioner claims that New Hampshire law allows a petitioner to raise "the same issue in a habeas petition when that issue was raised but never decided on direct appeal." Doc. 24 at 12-17. In essence, the Petitioner argues that she may raise a collateral attack on any issue, including issues she did or could have raised on direct appeal, if "the Supreme Court of New Hampshire declined to decide [the] issue and thus [the issue] has never been litigated on its merits." Id. at 14. The Court is not persuaded that the Petitioner accurately represents the state of the law, especially as the supreme court has clarified it since Humphrey and finds no support in the law for such a broad exception to the procedural default rule. For the reasons stated above, the Court concludes that New Hampshire adheres to the traditional rule for procedural default but, following Humphrey, allows a narrow exception to that rule specifically for claims of ineffective assistance of counsel. See Pepin, 159 N.H. at 313.

In view of the foregoing, to the extent that the Petitioner now argues harmful constitutional error directly arising from the purportedly "inaccurate" or "misleading" nature of the transcripts, those arguments are barred, since they either were or could have been raised on direct appeal. See id. at 44. Alternatively, however, the Petitioner also argues that she was denied effective assistance of counsel because both her trial counsel and her appellate counsel "failed to make adequate objections" to the use of the transcripts. Specifically, she argues that counsel erred in three ways: (1) by not objecting to the transcripts on the basis of authentication; (2) by failing to make a particularized showing of inaccuracies in the transcripts; and (3) by failing to demonstrate how the inaccuracies in the transcripts prejudiced the Petitioner. Doc. 1 at 74. "The jury" the Petitioner now argues, "should not have received the transcripts as the transcripts could not satisfy basic evidentiary safeguards." Id. Because New Hampshire recognizes an exception to the traditional rule of procedural default with respect to ineffective assistance claims, see Pepin, 159 N.H. at 313, the Court considers this line of argument separately, and for the purposes of this motion the Court will assume that these ineffective assistance claims are not procedurally barred.

"To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." State v. Collins, 166 N.H. 210, 212 (2014) (citations omitted). To satisfy the first prong of the test, the claimant must show "that counsel's representation fell below an objective standard of reasonableness" and that "counsel made such egregious errors that she failed to function as the counsel the State Constitution guarantees." Id. (citing

Strickland v. Washington, 466 U.S. 668, 688 (1984); State v. Thompson, 161 N.H. 507, 529 (2011)). To satisfy the second prong, the claimant must establish a reasonable probability, in view of the totality of the evidence presented at trial, that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Collins, 166 N.H. at 213 (citations and quotations omitted).

To the extent that the Petitioner argues that her counsel was ineffective for their failure to raise evidentiary objections to the admission of the transcripts, such arguments fail to satisfy the first prong of the ineffective assistance test for the simple reason that the transcripts were never offered by the State nor entered into the record as evidence, and the trial court instructed the jury at multiple points that the transcripts were not in evidence and that the audio tape recordings controlled. See Tr. Vol XV at 1241, 1244, 1287, 1289. The supreme court acknowledged these facts in the Petitioner's direct appeal. Smart, 136 N.H. at 666. Thus, to the extent that the Petitioner now argues that her representation was constitutionally deficient because her counsel failed to raise evidentiary objections—e.g., that the transcripts were irrelevant, that they were hearsay, that they were not authenticated, see Doc. 1 at 75-81—such arguments fail to satisfy the performance prong of the ineffective assistance standard. Courts afford a "high degree of deference" to the strategic decisions of trial counsel, and thus, to satisfy the performance prong, the Petitioner "must overcome the presumption that trial counsel reasonably adopted her trial strategy." Collins, 166 N.H. at 212-13. Indeed, "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 213 (quoting Strickland, 466 U.S. at 689). Applying this standard here, the Court cannot conclude—even accepting all the Petitioner's facts as true and drawing all reasonable inferences in her favor—that trial or appellate counsel's failure to raise evidentiary objections to items that were never entered into evidence constitutes an "egregious error[] [such] that [Petitioner's counsel] failed to function as the counsel the State Constitution guarantees." Id. at 212 (citing Thompson, 161 N.H. at 529); see also United States v. Morris, 917 F.3d 818, 823 (4th Cir. 2019) ("A lawyer does not perform deficiently by failing to raise novel arguments that are unsupported by then-existing precedent"); New v. United States, 652 F.3d 949, 952 (8th Cir. 2011) ("A failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment.").[3]

Neither do the Petitioner's arguments related to the purported inaccuracy of the transcripts satisfy the second prong of the ineffective assistance standard, which requires a showing, in view of the totality of the evidence, that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Collins, 166 N.H. at 213 (citations and quotations omitted). The Petitioner argues here that her counsel erred by failing to make a particularized showing of inaccuracies in the transcripts and failing to demonstrate how those inaccuracies prejudiced the Petitioner. Doc. 1 at 74. The Court notes in this context that the supreme court in its ruling on the

[3] The Respondent contends, but the Petitioner disputes, that at the time of the Petitioner's trial it was an established practice in many jurisdictions for trial courts to allow juries to use written transcripts as an aid when listening to recorded evidence. See Doc. 17 at 24-26 (collecting cases); Doc. 24 at 27-34. In light of the Court's analysis above, the Court finds this dispute immaterial and does not reach it.

Petitioner's direct appeal found that the Petitioner failed to "make any particularized showing of inaccuracies in the transcripts relative to the recordings or how she may have been prejudiced thereby." Smart, 136 N.H. at 666. This failure is not rectified in the instant Petition, which likewise fails to allege any specific inaccuracies in the transcripts or any theory—aside from the general theory alleged in her sixth argument, which the Court will consider further below—as to how those inaccuracies prejudiced the Petitioner. Rather, the Petitioner relies on conclusory assertions that the transcripts, by their nature, were per se prejudicial. For instance, the Petitioner claims that

> [t]rial Counsel here allowed detrimental and inadmissible hearsay to be presented for the jury's slow consumption. There was no reasonable trial strategy that could exist to account for Trial Counsel's failures, as the incriminating statements contained in the transcripts but not in the audio constituted the most damning evidence the State had against [the Petitioner].

Doc. 1 at 81. The Petitioner does not, however, identify any specific instances of "incriminating statements" that were contained in the transcripts but not in the audio; nor does the Petitioner advance any theory by which the Court may infer that in any such instance the jury ignored the trial court's repeated instruction—which the jury is presumed to have followed, see State v. Cooper, 168 N.H. 161, 171 (2015) (quotations and citations omitted)—that in any instance in which the transcript and the audio differed, the audio governed. See Tr. Vol. XV at 1241; Smart, 136 N.H. at 666.

The Respondent argues that at the time of the Petitioner's trial it was an established practice in many state and federal courts to use a typed transcript as a visual aid to understand recorded evidence. See Doc. 17 at 25; Arnold v. Commonwealth, 356 S.E.2d 847, 848-49 (Va. Ct. App. 1987) (collecting cases) (holding that whether a jury may use a typed transcript as a visual aid while listening to a recording is a matter within the sound discretion of the trial judge). In United States v. John, for instance, the 8th Circuit Court of Appeals found a trial court did not abuse its discretion by allowing the jury to use such a transcript after the judge (a) reviewed the transcript; (b) found that it accurately reflected the recorded communications and was "prepared with care"; (c) determined that the transcript was necessary to enable the jury to intelligently follow the recorded conversation; (d) before distributing the transcripts, "carefully instructed the jury on their limited use" and emphasized that they were only to be used as aids to listening; (e) instructed the jury to listen to the declarants' manner and emphasis of speech so as to understand what was being said; and (f) allowed the transcripts to be used when the audio was played at trial but not during deliberation. 508 F.2d 1134, 1141 (8th Cir. 1987). "We cannot say," the 8th Circuit held in John, "that this careful and considered use of the typed transcript was an abuse of discretion." Id.; see Arnold, 356 S.E.2d at 849.

The Petitioner cites no law from any jurisdiction, whether current or contemporary with the Court, to support an assertion that a trial court is prohibited from giving a jury a transcript as a visual aid when listening to recorded evidence, or that such a transcript must be moved into evidence in order to be so used. The Court notes that, here, all but one of the six criteria applied by the 8th Circuit in John and adopted by Virginia Appeals Court in Arnold were satisfied in the instant case: in the Petitioner's trial, the trial court judge reviewed both the audio tapes and the transcripts, see Tr. Vol. XV at 1289; found that the transcripts accurately reflected the recorded material, see id.; determined the transcripts would be useful to the jury in following the recorded communications, see id.; and carefully—and repeatedly—instructed the jury as to how the transcripts should be used and that, in the event of a conflict between the transcript and the audio recordings, the audio recordings should govern, see id. at 1241; Smart, 136 N.H. at 666. The instant case differs from John and Arnold in one significant respect—here, the trial court allowed the jury to use the transcripts in their deliberations, see Doc. 24 at 29—but courts applying criteria substantially similar to those outlined in John have found no abuse of discretion even where trial courts have allowed transcripts to be used in deliberations. See e.g., United States v. Carson, 464 F.2d 424, 437 (2d Cir. 1972) (holding the trial court did not abuse discretion in admitting tapes and transcripts into evidence nor in allowing jury to retain transcripts both at trial and in deliberations); People v. Coca, 580 P.2d 1258, 1260 (Colo. App. 1978) (finding no reversible error in trial court's permitting a tape and transcript to be moved into evidence and used in deliberations); see also Doc. 27 at 11-12 (collecting cases). Here, then, the bulk of the John factors weigh toward upholding the trial court's discretion in allowing the jury to use the transcripts as visual aids during trial, and even in its deliberations. More important for the present analysis, however, is that absent a particularized showing of their inaccuracy, the Court cannot find that the use of the transcripts—whether at trial or in deliberations—was per se prejudicial to the Petitioner. Cf. State v. Addison, 160 N.H. 493, 510 (2010) ("Unfair prejudice is not, of course, mere detriment to a defendant from the tendency of the evidence to prove guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial.") (citation omitted). The second prong of the ineffective assistance standard thus remains unsatisfied.

In other words, the Petitioner's first five arguments related to the transcripts—even if the Court finds that those arguments are not procedurally barred because they allege new ineffective assistance of counsel claims—must fail for lack of a showing of prejudice. As noted, even advanced as ineffective assistance claims, all of these arguments turn on a single factual assertion: that the transcripts were "inaccurate and misleading." Doc. 1 at 37. Thirty-three years ago in her direct appeal, the Petitioner raised the virtually identical claim that the transcripts were inaccurate and misleading, and the supreme court held that the Petitioner had failed to "make any particularized showing of inaccuracies in the transcripts relative to the recordings or how she may have been prejudiced thereby." Smart, 136 N.H. at 666. Without such a showing now, it makes no difference whether the Petitioner is allowed to make the same or similar claims on the basis of ineffective assistance of counsel. Even accepting all of the facts in the Petition as true, where those facts cannot establish that inaccuracies in the transcripts caused prejudice to the Petitioner, they must and do fail to merit habeas relief.

B. Cognitive Bias

The Petitioner's sixth argument related to the transcripts addresses the question of prejudice via a novel proposition: the Petitioner now claims the transcripts were prejudicial not due to any purported "inaccuracy," but rather due to a so-called "curse of knowledge" inherent in the transcripts by their nature. See Doc. 1 at 37-55. Briefly, the Petitioner now claims that, because the jury was not able to listen to the audio recordings without transcripts in front of them, the jury was inevitably under the influence of an "expectation-induced bias":

> Scientific consensus holds that transcription of degraded audio imposes a curse of knowledge in that transcripts cause a person to hear what they are told they will hear. In other words, transcripts are powerful instruments of expectation-induced biases in the interpretation of auditory evidence.

> Expectation-induced biases resulting from transcripts can also cause insensitivity to the level of degradation in auditory statements, which in turn diminishes the ability to question one's own confidence in accuracy. Not even a court is immune to the curse of knowledge and will [sic] become unable to fairly review the truthfulness of a transcript.

Id. at 38.

To support this contention, the Petitioner cites a "recent institutional study" (the "Davidson Study")—which is neither published nor appended to the Petition or to any other documents in the record before the Court—which purports to show that being given a transcript to read along with an audio recording "will lead a listener to 'hear' words they are shown" regardless of the transcript's accuracy." Doc. 1 at 40. Therefore, the Petitioner argues, jurors provided with any transcript—whether accurate or inaccurate—to read while listening to audio evidence "provide[s] a false confidence that [their] perception [of the audio] was correct," thereby allowing the "State . . . to manufacture inculpatory statements, that were not otherwise perceivable, and convince the jury they were accurately hearing these statements." Id.

Briefly, in the Davidson Study, as described in the Petition, researchers randomly divided a pool of 191 participants into three groups. Id. at 41. All three groups heard the same series of eleven "clips"—selected to include statements that were "particularly inculpatory"—derived from the audio recordings played for the jury at the Petitioner's trial. One group was also shown the language related to each clip from the transcripts used at trial; a second group was shown portions of an "alternative transcript" created by the researchers using "non-inculpatory language"; a control group was given no text at all. Id. The Petitioner contends that the results of the study support three main conclusions:

> First, the presence of a transcript highly influenced participants' interpretations of all eleven audio clips. Specifically, participants were likely to hear what the transcript told them they would hear, regardless of whether they received the original transcript or the alternative transcript. Second, having either transcript made participants significantly more confident in the accuracy of their perceptions of the audio clips than participants who did not receive a transcript. Participants were equally confident in having heard the transcript shown to them regardless of what transcript they were shown. Third, participants who received a transcript consistently perceived the audio clips as being clearer than participants who listened without a transcript.

Id. at 42-43 (emphasis in original).

The prejudicial implications of the Davidson Study to the Petitioner's case are, the Petitioner asserts, "outsized":

> [T]he results of the [Davidson Study] indicate, with substantial confidence, that the State's manipulation of the conditions impacted how the audio was received by the jury. Specifically, by providing unsubstantiated transcripts for the jury to read as they listened to the audio, the State greatly and unconstitutionally skewed what jury members believed they heard from the audio. In other words, the incriminating assignments made by the transcripts were not founded in any base level of truth. Ultimately, the study revealed that the audio from the tapes is so degraded and of such low quality that what was said cannot be objectively and accurately determined. An ordinary person listening to the audio rarely or never heard the inculpatory statements or any other statements. . . . Here, the State conjured into existence incriminating text. The State was able to make the jury believe they were hearing statements that did not objectively exist in the audio. Therein, the manipulative power wielded by the State was devastating.

Id. at 48. The Petitioner further contends that the "outsized" implications of the Davidson Study are supported by other research suggesting that inaccurate transcripts create cognitive bias in people listening to recorded audio. Id. at 48-54.

The legal relevance of the Davidson Study to the present motion, even taken in context with the earlier studies to which the Petitioner refers, is dubious. As noted, the Davidson Study is not published and is not appended to the Petition, so the Court is constrained to whatever reasonable inferences may be drawn about it from its representation within the four corners of the Petition. But, again, the Davidson Study even as represented fails to identify any inaccuracies in the transcripts. Indeed, while the Petitioner avers that the Davidson Study shows that the audio used at trial was "so degraded and of such low quality that what was said cannot be objectively and accurately determined," id. at 48, the Petition not only fails to show any examples of this purported degradation but also fails to show whether that degradation existed when the tapes were played to the jury or only arose in the thirty-five years since that time. More importantly, the Court cannot determine whether the participants in the Davidson Study received the same instruction as the Petitioner's jury to rectify all discrepancies between the transcripts and the audio by relying on the audio. Nor, in any event, does the Davidson Study show that the jury failed to follow this instruction, as it is presumed to have done. Indeed, nothing in the Petition shows the extent to which the jury consulted the transcripts, nor does the Petitioner explain whether the participants in the Davidson Study, like the jurors, had the capacity to start and stop the audio tapes at will or to listen to them, in part or in their entirety, repeatedly.

Notwithstanding these unresolved questions, the Petitioner asserts that it was "substantially probable" that the Petitioner would not have been convicted without the transcripts, because the "expectation bias" inherent in the transcripts presumptively overwhelmed the will of the jury. The Petitioner points to contemporaneous notes produced by one juror—quoted at length in the Petition and derived from the transcript of a juror-misconduct hearing held some five months after the Petitioner's conviction—in which the juror stated that "without those tapes there would have been no way in hell, not in a million years, that she ever would have been convicted at all, whatsoever," and that "if you didn't have the transcripts that somebody interpreted the tape and made a transcript of, you wouldn't have known half of what was said." Doc. 1 at 93. The same juror averred that "what convicted [the Petitioner]," in his or her view, was a single line from the tape, when the Petitioner stated, "JR's going to be the first to roll, and when he does, he's going to blame me." Id.

The Petitioner argues that the Davidson Study shows that the juror would not have heard this damning statement if he or she had not been provided with transcripts. Id. at 94. Specifically, she contends that this line is captured in "Clip 9" of the Davidson Study, and in the study 82.1% of the participants who were provided the same transcript as the jurors believed they heard "JR's going to be the first to roll," while 68.3% of the participants who were given an alternative transcript believed they heard something else, and 91.8% of the participants who were given no transcript believed they heard something else entirely. Id. "This demonstrates," the Petitioner argues, "that the specific line that the Juror said convicted [the Petitioner] was of sufficiently poor quality such that listeners heard whatever is transcribed and, without a transcript suggesting what to hear, participants did not hear anything." Id. Thus, the Petitioner concludes, if the State had not been able to put the transcript before the jury, "the jurors would not have believed they heard the suggested incriminating statement on which they convicted [the Petitioner]." Id.

The Court is not persuaded by the Petitioner's conclusory argument. First, as noted above, even to the extent that this single juror states that she found the audio tapes to be of "unbelievable poor quality" and that she relied on the transcripts to "know[] half of what was said," nowhere in the portions of the juror's notes included in the Petition does the juror indicate that the transcripts were inaccurate or misleading. More importantly, even crediting the juror's assertion that "what convicted" the Petitioner was a single line from the tapes—"JR's going to be the first to roll"—the juror's notes do not indicate that the juror, nor any juror, relied on the transcript in any way to interpret this line, or that the jury at any time disregarded the trial court's instruction to resolve any conflict between the transcripts and the audio by relying on the audio. Instead, the Petitioner contends that simply by virtue of having the transcripts to consult the juror was infected with the "curse of knowledge" that made it impossible to hear anything in the audio recording that was not in the transcript, and that this "curse of knowledge" was so powerful that no trial court instruction was sufficient to dispel it. See id. at 101-05. In other words, the mere existence of the transcripts so poisoned the jury's deliberations that—regardless of how the jury reviewed the audio recordings or how well the jury adhered to the trial court's instructions—they allowed the State "to manufacture inculpatory statements, that were not otherwise perceivable, and convince the jury they were accurately hearing these statements." Id. at 38 (emphasis added).

The Court is not persuaded. While in the posture of a motion to dismiss the Court is required to assume the truth of the Petitioner's factual allegations and to draw all reasonable inferences therefrom in the Petitioner's favor, see Collectramatic, Inc. v. Kentucky Fried Chicken Corp., 127 N.H. 318, 320 (1985), the Court nevertheless does not "assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law," ERG, Inc. v. Barnes, 137 N.H. 186, 190 (1993). The Petitioner's assertions derived from the

Davidson Study fall squarely into the latter category of conclusions of fact that are not well-pleaded. As the Court has discussed supra, no law supports a blanket conclusion that a jury's consultation of prepared transcripts of audio recordings, in or out of the deliberation room, is per se prejudicial. By this novel theory, the Petitioner attempts to reinscribe this faulty legal conclusion as an assertion of fact putatively arising from a "scientific consensus" reflected in the Davidson Study. Doc. 1 at 38. In resolving a motion to dismiss, however, the Court is required to set aside such "legal conclusions and amorphous accusatory statements." Jay Edwards, Inc. v. Baker, 130 N.H. 41, 48 (1987); see Ronayne v. State, 137 N.H. 281, 285 (1993) (declining to draw an inference in plaintiff's favor where facts alleged in complaint were insufficient to support a causal connection between the defendant's acts and the claimed injuries). Stripped of these conclusory assertions, the Petition is left once again—for all the reasons discussed supra—without factual allegations sufficient to show that the Petitioner was prejudiced by the jury's consultation of the transcripts. Accordingly, the Court's conclusion as to the Petitioner's sixth argument is the same as its conclusion with respect to the first five: absent well-pleaded facts to show that inaccuracies in the transcript caused prejudice to the Petitioner, the argument fails to merit habeas relief even if it is advanced on the basis of ineffective assistance.

Accordingly, consistent with the foregoing, the Respondent's motion to dismiss is **GRANTED** with respect to the Petitioner's claims related to the transcripts.

III. The Witness Tampering Charge

The Petitioner next argues that her trial counsel committed per se prejudicial error by surrendering her guilt to the jury against her will. See Doc. 1 at 105-23.

Specifically, with regard to the charge of witness tampering, the Petitioner claims defense counsel erred by stating in its closing as follows:

> [The Petitioner]'s clearly engaging in acts that constitute witness tampering, okay, and there's no—the acts she does, she tries to get Cecilia to lie to the police. No doubt about it. Or to withhold information about it. Not a single doubt about it.

Doc. 1 at 115; Ex. F (Tr.) Vol. XIX at 1893-94.

The Petitioner maintains that she has "unrelentingly maintained that she is innocent of all the charges that she faced during trial, Doc. 1 at 118, and therefore her trial counsel's "conceding [the Petitioner's] guilt to the count of witness tampering amounted to an ineffective assistance of counsel that fundamentally affected the fairness of the trial, undermined confidence in the reliability of the verdict, and resulted in presumed prejudice." Id.

As a threshold matter, the Respondent argues that this claim, like the rest of the Petitioner's claims, is barred because it could have been brought in the Petitioner's direct appeal. See Doc. 17 at 33. For the reasons discussed above, because the Petitioner advances this claim on grounds of ineffective assistance and it arises from facts that were not addressed by the supreme court in the direct appeal, the Court finds it is not procedurally barred and considers the claim on its merits. See Pepin, 159 N.H. at 313.

New Hampshire law recognizes that a trial counsel's conceding guilt without a defendant's consent constitutes ineffective assistance of counsel and is grounds for a new trial. See State v. Anaya, 134 N.H. 346, 354 (1991). In such a circumstance, prejudice to the defendant is presumed and need not be proven "because the error's severity prevent[s] any meaningful adversarial testing of the prosecution's case." Id.

With prejudice presumed, a defendant's claim for ineffective assistance in this circumstance depends on showing that trial counsel's performance was deficient, overcoming the "strong presumption that counsel's conduct falls within the limits of reasonable practice." Id. (quoting State v. Faragi, 127 N.H. 1, 4-5 (1985)). In plainer terms, to succeed on this claim the Petitioner must demonstrate that that her trial counsel made a statement or statements that were so indistinguishable from an involuntary guilty plea that they "undermined the proper functioning of the adversarial process [such] that the trial cannot be relied on as having produced a just result. Id. (quoting Strickland, 466 U.S. at 686).[4]

The facts alleged in the Petition do not meet this standard. First, the charge at issue was witness tampering. Under the relevant provisions of New Hampshire law, a person is guilty of witness tampering if, believing that an official proceeding or investigation is pending or about to be instituted, he or she attempts to induce or otherwise cause a person to "[t]estify or inform falsely" or "[w]ithhold any testimony, information, document or thing." RSA 641:5, I(a)-(b); see State v. Luikart, 174 N.H. 210, 216 (2021). Like all crimes, witness tampering requires proof of both an actus reus and a culpable mens rea. See RSA 626:2, I ("A person is guilty of murder, a felony, or a misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."). To be guilty of witness tampering, the accused must have acted purposely, see State v. Kilgus, 125

[4] In Anaya, trial counsel made repeated statements in his closing argument pleading for the jury to convict his client of the lesser-included offense of accomplice to second degree murder. 134 N.H. at 350. The defendant argued that these statements were the "functional equivalent of a guilty plea," and also that they violated his right to effective assistance of counsel. Id. at 351. The supreme court did not reach the first argument, that the statements amounted to an involuntary guilty plea, because its decision on the ineffective assistance claim was dispositive of the matter. Id.

N.H. 739, 743 (1984), which means his or her "conscious object is to cause the result or engage in the conduct that comprises the element," RSA 626:2, II(b).

Here, the statement from counsel to which the Petitioner objects does not expressly include any statement that the Petitioner is "guilty" of witness tampering: rather counsel stated only that the Petitioner was "clearly engaging in <u>acts</u> that constitute witness tampering, okay, and there's no—the <u>acts</u> she does, she tries to get Cecilia to lie to the police. . . [o]r to withhold information." Tr. Vol. XIX at 1893-94 (emphasis added). These statements, in and of themselves, do not amount to a concession of the Petitioner's guilt: while her counsel concedes that the Petitioner "engag[ed] in acts that constitute witness tampering," guilt for the charged crime only arises when such acts are combined with a purposeful <u>mens</u> <u>rea</u>. Only minutes later, in a portion of the closing not cited by the Petitioner, her counsel addressed this issue directly with the jury: "I'm telling you <u>two</u> <u>things</u>. I'm telling you the acts are there, and <u>that you shouldn't find her guilty</u> because of the factors and what was going on in her mind. She snapped." Tr. Vol. XIX at 1895.

As discussed <u>supra</u>, it is axiomatic that a person asserting a claim of ineffective counsel must overcome a presumption that "trial counsel reasonably adopted his trial strategy." <u>Thompson</u>, 161 N.H. at 529 (citations omitted). Courts "afford a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." <u>Id</u>. Here, especially given the Petitioner's testimony at trial, counsel's strategic decision—to concede that she engaged in acts constituting witness tampering but was nonetheless not guilty "because of the factors and what was going on in her mind," Tr. Vol. XIX at 1895—

merits the Court's deference. The Petitioner admitted, for instance, that when Cecelia Pierce had told her she was going to the police, she "panicked because [she] did not want her to do that" and her "intention from there on out was to try and talk her out of going to the police." Ex. H (Tr.) Vol. XVII at 1669. She also testified, with respect to another telephone conversation with Pierce, that it "was designed to get Ceclia not to go to the police." Id. at 1740. The Respondent argues that, in view of these and other statements in the Petitioner's testimony, "her bald assertion that her counsel's closing argument was made without her consent rings hollow." Doc. 17 at 37. The Court need not, and does not, reach this question: rather, the Court determines that regardless of what these statements do or do not suggest about the Petitioner's consent, the fact that statements were in the evidentiary record makes her trial counsel's strategy of conceding her actions while challenging the proof of her mental state to raise reasonable doubt all the more reasonable. The Court therefore finds that the allegations in the Petition are insufficient to overcome the presumption that her trial counsel acted reasonably in executing his trial strategy, and therefore must fail to show ineffective assistance of counsel. Accordingly, the Court **GRANTS** the Respondent's motion to dismiss with respect to the purported concession of guilt on the witness tampering charge.

IV. The Effect of Media Coverage

The Petitioner next argues that her conviction was unconstitutionally tainted by an inflammatory news media story in violation of her due process rights under the New Hampshire and United States Constitutions. See Doc. 1 at 123-29. Specifically, the Petitioner points to a broadcast aired on a local television station, WMUR-TV, several nights before jury selection began. Id. at 125. The program, called "Anatomy of a Murder," contained footage from earlier news broadcasts, film of pre-arrest interviews with the Petitioner, and information related to three then-new indictments against the Petitioner, one of which charged her with attempting to murder a prospective witness. Id.

The Petitioner concedes that she raised this issue previously in both her motion for a new trial and her direct appeal, where she argued that the story had a prejudicial influence on prospective jurors because of "its content and proximity to jury selection," noting that evidence of the three indictments mentioned in the story was not introduced at trial. Id.; see Smart, 136 N.H. at 649-52. The supreme court noted that "[e]xposure to inadmissible evidence . . . is not sufficient to presume prejudice." Smart, 136 N.H. at 650 (citation omitted). The supreme court further noted that the bulk of the other publicity the Petitioner raised was "merely factual reporting," most of which appeared "after the jury had been selected and had been continuously instructed by the trial court not to read or watch anything connected to the case." Id. Noting that "our system of justice is premised upon the belief that jurors will follow the court's instructions," id. (quotation and citation omitted), the court concluded that the Petitioner "had show at most that the community from which her jury was drawn was exposed to extensive pretrial publicity that resulted in familiarity with the case. Mere familiarity, however, is not sufficient to presume prejudice," id. (citing Irvin v. Dowd, 366 U.S. 717, 722 (1961) (superseded by statute on other grounds)); State v. Laaman, 114 N.H. 794, 800 (1974)). Upon review, the supreme court concluded that the "trial court adequately protected the [Petitioner's] right to a fair trial." Id. at 653.

The Court notes that, in view of the fact that this issue was raised on direct appeal, for the reasons discussed supra it is likely procedurally barred from habeas review. See Kinne, 161 N.H. at 44. Nonetheless, the Petitioner advances the claim on the basis of putative new evidence. Doc. 1 at 125-128. The Petitioner cites to notes from unpublished 2005 interview with a juror, Charlotte Jefts, now deceased. See id. at 126, 128. The interview was conducted by a reporter for a now-defunct publication called "Justice Magazine," and in the reporter's transcribed notes Ms. Jefts discusses the process of the jurors' deliberations and makes reference to the allegation that the Petitioner was trying to have a prospective witness killed. Id. at 126-127. Neither the unpublished article nor the reporter's complete notes are appended to the Petition, but the Petitioner quotes at some length from the notes, which in relevant part include the following statements from Ms. Jefts:

> You'd have to be on the jury to know . . . . I just couldn't possibly . . . when I think of the lives she's ruined . . she wants her own way, she doesn't think anything of getting her husband killed . . . . . she wants to get that girl killed . . . it didn't go through . . . when she was in jail . . . she didn't think anything of murdering anyone who gets in her way.
> [. . . .]
> [discussing straw votes] . . . there was no way, she was possibly getting out of this 'cause she thought nothing of murdering anybody. She tried to get and when was in jail awaiting trial she had a friend there whose husband agreed to kill one of the girls who was testifying against her . . . . . .
> [. . . .]
> . . . she . . . when she was in jail awaiting trial, she . . . . A friend in there whose husband had agreed to kill, uh, that girl, but then he changed his mind. He did. But I mean it's awful but she has a mind . . . . . anybody whose [sic] in her way she doesn't mind having them killed . . .

Id. (emphasis in original).[5]

[5] The Respondent notes, and the Court agrees, that the presentation of this material in the Petition leaves substantial questions unanswered and unanswerable: for instance, it is not always clear what questions prompt Ms. Jefts' responses, nor is it clear whether the unusual ellipses (ranging from two to six periods in length) indicate pauses in the responses or the reporter's excisions. See Doc. 17 at 40. Except for the

The Petitioner argues that these excerpts show “in no uncertain terms that [Ms. Jefts] knew about evidence that was not produced during the trial—namely, accusations against [the Petitioner] for allegedly trying to have a prospective witness killed,” a detail that “align[s] only with allegations released in the media.” Id. at 127. Ms. Jefts told the reporter that she had voted undecided on three straw votes, but on the final one “it was 12 guilty . . . there was no way, she was possibly getting out of this ‘cause she thought nothing of murdering anybody. She tried to get and when was in jail awaiting trial she had a friend there whose husband agreed to kill one of the girls who was testifying against her.” Id. at 126. “Thus,” the Petitioner argues, Ms. Jefts “draws a clear cause and effect between her improper knowledge of outside information and her choice to convict [the Petitioner].” Id. at 127-128.

The allegations contained within the four corners of the Petition, even construed in the Petitioner’s favor, do not support the Petitioner’s conclusion that Ms. Jefts’s statements show that media coverage and/or juror misconduct tainted the jury’s verdict. First, the interview cited here took place in 2005, some fourteen years after the jury’s deliberation, and even assuming that Ms. Jefts consumed media stories related to the case, nothing in the excerpts quoted in the Petition allows the Court to infer that she consumed them before or while she served on the jury. More importantly, even if Ms. Jefts did view this media coverage in or around the time of trial, the supreme court has already found that the Sixth Amendment “does not require that

> . . . the jurors be totally ignorant of the facts and issues involved [in a case]. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in

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bracketed ellipses here, the Court transcribes the material here with the same punctuation found in the Petition.

> the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

Smart, 136 N.H. at 647 (quoting Irvin, 366 U.S. at 722). In other words, even if Ms. Jefts were shown to have been familiar with the media stories surrounding the trial, "mere familiarity is not sufficient to presume prejudice." Id. (citing Irvin, 366 U.S. at 722). Moreover, the interview excerpts quoted in the Petition do not "draw[] the clear cause and effect" the Petitioner imputes to them: the only express cause-and-effect relationship established in the excerpts is that between the phrase "there was no way, she was possibly getting out of this" and "[because] she thought nothing of murdering anybody." Doc. 1 at 126. That Ms. Jefts, speaking to a reporter in 2005, raised as an example in this context the allegation that the Petitioner tried to have a witness killed—a story that she could have encountered at any time in the fourteen years between the trial and the interview—does not support the conclusion that the story was the reason the Petitioner "thought nothing of murdering anybody." See id. Indeed, assuming that Ms. Jefts was aware of that story prior to becoming a member of the jury, the fact that she voted undecided three times before voting to find the Petitioner guilty supports the opposite conclusion: that her conviction that the Petitioner "thought nothing of murdering anybody" was formed on the basis of trial evidence.

In any event, the allegations contained in the Petition, although they are based on newly revealed materials, are insufficient to raise any new issue. The supreme court considered the question of the effect of pre-trial publicity on the case extensively in the Petitioner's direct appeal, and in their analysis they reviewed the "massive amount" of pretrial media material submitted by the Petitioner, the "enormous" publicity surrounding the case, and the conduct of voir dire. See Smart, 136 N.H. at 649-52. Upon review of all these materials, the supreme court found no evidence that any juror expressing an opinion that the defendant was guilty was selected for the jury, and "the record show[ed] that no one who sat on the defendant's jury possessed a preconceived opinion of her guilt." Id. at 652. Nothing in the instant Petition raises any question that was not already addressed on direct appeal. Accordingly, absent any new issue, the Petitioner's argument as to the effect of media publicity on the trial is procedurally barred from habeas review. See Kinne, 161 N.H. at 44. The Respondent's motion to dismiss is therefore **GRANTED** with respect to the Petitioner's claims relating to media coverage.

At the hearing and in its filings, the Respondent alternatively argues that, because Ms. Jefts is dead there is no way to conduct discovery as to her statements in the interview, this claim is also barred by the doctrine of laches. Because the analysis above is dispositive of this question, the Court does not reach the application of laches here. See Antosz v. Allain, 163 N.H. 298, 302 (2012) (declining to address parties' other arguments where the court's determination on one issue was dispositive).

V. Erroneous Jury Instructions

The Petitioner next argues that she was deprived of effective assistance of counsel in that her trial counsel committed three errors with respect to the jury instructions given at trial: (1) counsel failed to object to the instructions on the accomplice to first-degree murder charge that the Petitioner claims erroneously lowered the State's burden of proof; (2) counsel failed to request a jury instruction that the jury consider only trial evidence in reaching its verdict; and (3) counsel failed to object to what the Petitioner characterizes as "overly coercive jury instructions given by the [trial court]." Doc. 1 at 129-130.

The purpose of a trial court's jury instruction is to explain to the jury in clear and intelligible language the rules of law applicable to a case. State v. Cegelis, 138 N.H. 249, 252 (1994). When reviewing jury instructions, the Court determines "whether the instructions adequately and accurately explain each element of the offense and reverse[s] only if the instructions did not fairly cover the issues of law arising in the case." State v. Gribble, 165 N.H. 1, 29 (2013) (citation omitted). "The scope and wording of jury instructions is generally within the sound discretion of the trial court, and any allegations of error will be evaluated by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." Cegelis, 138 N.H. at 251-52.

The Court takes up the Petitioner's arguments related to jury instructions in turn.

A. Accomplice to First-Degree Murder Instructions

The Petitioner claims trial counsel was constitutionally ineffective in failing to object to the trial court's instruction on the accomplice to first-degree murder charge because the trial court did not instruct the jury that it was required to find her actions as an accomplice to first-degree murder were "deliberate and premeditated." Doc. 1 at 142. Accordingly, the Petitioner argues, the trial court failed to instruct the jury on all the required elements of the charged crime, thereby lowering the burden on the State to obtain a conviction in violation of her rights under Part I, Article 15 of the New Hampshire Constitution. Id. at 132-42.

At issue here is the same two-prong test for ineffective assistance of counsel the Court has recited supra. As a threshold matter, the Petitioner's argument relies largely on State v. Henderson, 141 N.H. 615 (1997) and State v. Stewart, 155 N.H. 212 (1997), from which she draws, inter alia, the principle that where a trial court unsustainably exercises its discretion by enabling a conviction on a lower burden of proof, prejudice—the second prong of the ineffective assistance test—may be presumed. See Doc. 1 at 131. The Respondent contends, and the Court agrees, that the Petitioner misstates the law on this point. See Doc. 17 at 42-44.

Briefly, in Henderson the supreme court considered a case where a defendant was convicted of class A robbery—a charge that requires the State to prove that the defendant actually caused serious injury to the victim—but his trial counsel inadvertently submitted a "pattern" instruction that stated the defendant could be found guilty if he "inflicted or attempted to inflict serious injury on another person. 141 N.H. at 615-17. The defendant in that case contended that he was not required to prove "actual prejudice," because the trial counsel's error was inherently prejudicial. Id. at 617-18. The supreme court, recognizing that "[t]here are limited circumstances in which prejudice is presumed," id. at 618 (citing Anaya, 134 N.H. at 354), concluded that the defendant before it had established "actual prejudice" and therefore the court declined to reach the question of "whether trial counsel's error was so serious that prejudice must be presumed." Id. Similarly, in Stewart, the court considered a defendant charged with a felony count of writing a bad check, where the trial court misstated the mens rea element to the jury: specifically, the trial court responded to a juror question that "the defendant's knowledge of an insufficient account balance on the date the check was issued was a necessary element of the crime," where in fact a rational jury might have found that a defendant lacked sufficient mens rea for the crime—even if he knew his account balance was insufficient to cover the check when he issued it—if the parties had an agreement not to cash the check immediately and the recipient did in fact hold the check pursuant to that agreement. 155 N.H. at 216-17. Accordingly, the supreme court concluded that the defendant "was prejudiced by the trial court's erroneous response to the jury's question. Id. at 217. As relevant here, then, neither Henderson nor Stewart stands for the proposition that prejudice is presumed in ineffective-assistance claims involving erroneous trial instructions. Accordingly, the Court applies both the performance and the prejudice prongs of the ineffective-assistance standard here. See Collins, 166 N.H. at 212.

Here, both prongs of the ineffective-assistance analysis turn on a single factual assertion: that the trial court's instruction on the accomplice to first-degree murder charge was constitutionally deficient because the trial court failed to include the words "premeditated and deliberate" in instructing the jury on the charge. Doc. 1 at 137-142. Upon review of the record, this claim fails. In its instruction on the accomplice to first-degree murder charge, the trial court stated:

> To prove that the [Petitioner] was an accomplice to the crime of first degree murder, the State must prove beyond a reasonable doubt that the crime of first degree murder took place and the defendant was an accomplice. The State is not required to prove that a particular individual committed the crime of first degree murder, but only that the crime of first degree murder took place and the defendant was an accomplice to that crime. That requires the Court to define for you what is first degree murder.

Tr. Vol. XIX at 1980. The trial court then went on to define the crime of first-degree murder:

> The definition of the crime of first degree murder has two parts. The State must prove each of the two parts of the definition beyond a reasonable doubt. Because the State, to prove an accomplice, has to first prove a first degree murder was committed, so they have to prove these things to you beyond a reasonable doubt. The state must prove that an individual—the indictment alleges that individual to have been Willia Flynn—caused the

> death of another person. This means that the death of another person—the indictment alleges that other person to have been Gregory Smart—was the direct result of that individual's action, and that that individual acted purposely. First degree murder is causing the death of another person purposely. <u>Purposely means two things, both of which the State must prove beyond a reasonable doubt. First, that that individual specifically intended to cause the death of another person. It is not enough that the individual knew his actions would cause the death. He must have wanted to cause the death. Second, the State must prove that the individual's acts in causing the death were deliberate and premeditated. The State must prove beyond a reasonable doubt that the individual acted with premeditation and deliberation</u>.

<u>Id</u>. at 1981-82 (emphasis added). The trial court then went on to instruct the jury on the accomplice element:

> Additionally, the State must prove that [the Petitioner] was an accomplice to the crime of first degree murder. To prove the defendant was an accomplice, the State must prove, first, that the [Petitioner] helped another person plan or commit the crime of first degree murder. Here the State alleges that the [Petitioner] aided William Flynn in the planning or commission of the murder of Gregory Smart by taking certain actions, including advising him to wear black clothes to avoid detection, advising him to wear gloves so as not to leave fingerprints, advising him to rearrange the victim's residence so it appeared to have been burglarized, providing him with directions to the victim's residence, and with information as to what time the victim should be returning home, absenting herself from the residence on both the evening of the murder and on a prior occasion when William Flynn attempted to commit the crime, and providing William Flynn with her car so that he would have transportation to the victim's residence on the prior occasion when William Flynn attempted to commit the murder. And, <u>secondly, that the [Petitioner] did so with the purpose of promoting or facilitating the commission of the offense. This means that the [Petitioner's] acts were designed to help the other person, the actor, commit the offense. In other words, the State must prove that the [Petitioner] had the purpose to make the crime succeed.</u>

<u>Id</u>. at 1984-85 (emphasis added). The trial court then re-emphasized the relationship between the requisite mental states of the accomplice and the principal actor:

> Now, it is not sufficient for the State to prove that the [Petitioner] intended to commit a different offense than the principal. Let me say that again. <u>It is not sufficient for the State to prove that the [Petitioner] intended to commit a different offense than the principal. The [Petitioner] must share the same</u>

> criminal intent as the principal. Thus, the [Petitioner] is only guilty as an accomplice if she committed acts which were designed to commit a crime that both she and the principal, William Flynn, intended to commit.

Id. at 1985 (emphasis added).

In brief, the Petitioner's argument is that, because the trial court instructed the jury that the State must prove that the Petitioner, as an accomplice, acted "with the purpose of promoting or facilitating the commission of the offense," id. at 1984—without the incantation of the specific words "premeditated and deliberate"—the trial court thereby erroneously instructed the jury that the mens rea for the accomplice charge was "purposefulness" rather than the more stringent "deliberate and premeditated." See Doc. 1 at 141-42. In view of the trial court's full instructions, however, this is clearly not the case: rather, the trial court, in its instruction on first-degree murder clearly and repeatedly emphasized that the charge required the State to prove the actor acted deliberately and premeditation; in its lengthy instruction on the accomplice element, the trial court correctly linked the accomplice charge to proof of first-degree murder and listed a number of premeditated and deliberate acts alleged by the State to support the accomplice element; and in its final instruction, the trial court clearly—and repeatedly—emphasized that the Petitioner could only be found guilty of the accomplice charge if she and the principal intended to commit the same offense and she "share[d] the same criminal intent as the principal," id. at 1985. The trial court's instructions thus leave no doubt that to be guilty of first-degree murder a person must act deliberately and with premeditation, and to be guilty as an accomplice to first-degree murder a person must act with the same criminal intent.

In view of the clarity of the trial court's instructions, neither prong of the ineffective-assistance standard can be met: the Petitioner's counsel's performance cannot be deemed deficient for a failure to object to a clear jury instruction; nor can the Petitioner show that she was prejudiced thereby. Accordingly, the Petitioner's argument as regards the accomplice to first-degree murder charge fails to merit habeas relief.

B. Trial Evidence Only

The Petitioner next argues that her trial counsel was ineffective in failing to submit a jury instruction on what the jury was permitted to consider in reaching its verdict and its further failure to object to the trial court's failure to instruct the jury that it must reach a verdict based solely on the evidence adduced at trial. Doc. 1 at 142-146. In support of this claim, the Petitioner points to a pattern criminal jury instruction available at the time of the Petitioner's trial that, had it been offered, would have instructed the jury, inter alia, that

> During your deliberations you should only consider the evidence in the case. The evidence consists of the testimony under oath of the witnesses, exhibits which have been admitted into evidence, the view, facts of which [the trial court] took judicial notice, and stipulations of certain facts.
>
> During the trial lawyers made objections. The lawyers are supposed to object when they believe that certain evidence is not admissible. If I sustained an objection or excluded any evidence, you must not guess as to what the answer or evidence ould have been. If I ordered that a question and answer be stricken from the record, you must not consider either the question or the answer as evidence.
>
> . . . . In short, you should consider only the legally admissible evidence in deciding this case; that is, the testimony of the witness[es], the exhibits, the view, stipulations, and facts of which [the trial court] took judicial notice.

Id. at 143 (citing N.H. Crim. Jury Instr. 1.06 (1985). By contrast, the Petitioner offers the trial court's instruction:

> During this trial many objections were made by both sides, and there were many bench conferences by both sides. In objecting, a lawyer is simply doing his or her job in representing his or her client. And in my rulings on those objections, I'm simply doing my job to apply the law as I understand it to those objections. Don't count the number of times that I agreed or disagreed with any one lawyer as some indication of how you might think I feel about this case. In this and in any trial, criminal or civil, the [trial court] is completely and absolutely impartial. The job of deciding this case is entirely the responsibility of the jury.
>
> I speak the way I speak. If I emphasize or if you think I emphasize the words "guilty" or "not guilty" while I'm speaking to you this afternoon, that is simply the way I talk. I do not intend any emphasis on any words. My vocal tones, my actions[,] are simply the way I speak and the way I am. It is not any indication—if any of you see any untoward or undue vocal tones—any indication of the way you might think I think about this case. Again, the [trial court] is totally and absolutely impartial. And I needn't remind you again that the job of deciding this or any case is on the jury and not on the [trial court].

Id. at 143-44 (citing Tr. Vol. XIX at 1970-71). The absence in these instructions of a specific admonition to the jury to consider only evidence adduced at trial, the Petitioner argues, constitutes prejudicial error to which her counsel should have objected.

As a threshold matter, the Petitioner cites no law, nor is the Court aware of any, that requires a trial court to issue a pattern jury instruction on this or any other matter relevant to trial. The Petitioner's argument for prejudice here is essentially the same as that considered supra with respect to the Petitioner's argument regarding the effect of media coverage on the trial. In brief, the Petitioner argues here that

> [g]iven the large volume of high-profile, negative publicity about [the Petitioner] before and during the time of her trial, Trial Counsel should have known that it was particularly important for the jury to be instructed, at the close of trial, to render a decision based solely on the evidence presented in court. There was no strategic reason not to request that the jury be admonished of this requirement [sic] by the judge immediately prior to the jury's deliberations.

Id. at 146. Additionally, the Petitioner reiterates the arguments discussed supra that juror Charlotte Jefts "declared that a decisive factor in reaching a verdict of guilty was an inflammatory media story that was released shortly before [the Petitioner's] trial." Id.

The Court has already concluded, see supra, that the Petitioner's claims regarding Ms. Jefts are unavailing in the context of purported media influence on the jury, and they remain unavailing for the same reasons here. The Petitioner's further argument—that a "large volume of high-profile, negative publicity" infected the jury's deliberations via some unspecified channel, is speculative, and, as such, it does not support the Petitioner's claim that her trial counsel's performance was constitutionally deficient or that she was prejudiced by the trial court's jury instruction.

Indeed, the Petitioner acknowledges, Doc. 1 at 144-46, as does the Respondent, Doc. 17 at 51-53, that the influence of media publicity on the jury was a matter the trial court frequently stressed in its statements to the jury. Early in the trial, the trial court told the jury panel, "We want no one on this jury who cannot decided this case based solely from the evidence that is presented to the jury, without regard to what they may have heard or read or seen in the media." Doc. 22, Ex. K (Tr.) Vol. 1 at 5. During jury selection the trial court stated to the jury venire that "I would be kidding myself if I said that most of you have not read or heard or seen something about this case in one form of the media or another. . . . The knowledge or prior knowledge of a case is not enough to disqualify you. . . . The question is, have you formed any preconception about guilt or innocence in this or any case in front of a court." Id. at 3-4. Later, the trial court addressed the jury panel to say

> [The Petitioner] doesn't want you on this jury if you cannot be fair, openminded, and have what we call, I guess, tunnel vision with respect to

> the facts that you'll hear in this case and are not able to put aside everything that you've read and take only the evidence that is produced for you by the State and by the defense, although the defense bears no burden in a criminal case to prove anything.

Id. at 13-14. The trial court later reiterated these points as the jury panel took shape, telling panel members "this case must be decided on what you people will hear . . . only on what you hear in this courtroom and nothing else." Id. at 44.

The Court analyzes prejudice for purposes of the ineffective-assistance standard, as well as the scope and wording of jury instructions, in view of the totality of the record. Collins, 166 N.H. at 213; Cegelis, 138 N.H. at 251-52 (jury instructions are evaluated "by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, in light of all the evidence in the case"). Here, neither the law nor the totality of the record supports the Petitioner's position: no law mandates now or mandated at the time of Petitioner's trial that a particular pattern jury instruction must be issued by a trial court; no well-pleaded facts, beyond conclusory and speculative assertions, supports a claim that the Petitioner was prejudiced by the jury's considering evidence from outside the trial; and, most importantly, the trial record, including the record from jury selection, is replete with examples of the trial court's reminding the jury that it must decide the case "only on what [it] hear[s] in the courtroom and nothing else." Tr. Vol. I at 44. Accordingly, the Court finds the Petitioner's argument related to the challenged jury instruction insufficient to merit habeas relief.

C. Overly Coercive Instruction

The Petitioner next argues that her trial counsel was constitutionally deficient in not objecting to the trial court's "overly coercive" instruction as to the accomplice to first-degree murder charge.[6] Doc. 1 at 146-150. The instruction in question is the one considered supra in which the trial court instructed the jury as to the relationship between accomplice liability and the underlying crime of first-degree murder:

> Additionally, the State must prove that [the Petitioner] was an accomplice to the crime of first degree murder. To prove the defendant was an accomplice, the State must prove, first, that the [Petitioner] helped another person plan or commit the crime of first degree murder. Here the State alleges that the [Petitioner] aided William Flynn in the planning or commission of the murder of Gregory Smart by taking certain actions, including advising him to wear black clothes to avoid detection, advising him to wear gloves so as not to leave fingerprints, advising him to rearrange the victim's residence so it appeared to have been burglarized, providing him with directions to the victim's residence, and with information as to what time the victim should be returning home, absenting herself from the residence on both the evening of the murder and on a prior occasion when William Flynn attempted to commit the crime, and providing William Flynn with her car so that he would have transportation to the victim's residence on the prior occasion when William Flynn attempted to commit the murder. And, secondly, that the [Petitioner] did so with the purpose of promoting or facilitating the commission of the offense. This means that the [Petitioner's] acts were designed to help the other person, the actor, commit the offense. In other words, the State must prove that the [Petitioner] had the purpose to make the crime succeed.

Id. at 1984-85 (emphasis added).

The Petitioner argues that, because in this instruction the trial court recited specific allegations made by the State—without reference to any evidence produced at trial in the Petitioner's favor—the trial court "essentially made a second closing argument for the State." Doc. 1 at 150. "This heavy and one-sided rendition of the

[6] The Court construes this as an ineffective-assistance argument—despite the fact that the Petition does not frame it as such—because it is a subsection within a larger section alleging various ineffective-assistance claims related to jury instructions. Noting that it might be construed as a separate claim of error, the Respondent argues it should be procedurally barred. Doc. 17 at 54. The Court construes it as an ineffective-assistance claim and thus does not reach the question of whether it is procedurally barred except as consistent with the Court's treatment of other such claims in the Petition.

facts," the Petitioner contents, "from such a heavy and persuasive voice in the courtroom, put a massive thumb on the scale weighing against [the Petitioner]." Id.

To support her argument that this "massive thumb on the scale" constituted a prejudice to which her counsel should have objected, the Petitioner relies on State v. King, 136 N.H. 674, 677 (1993) ("It is the practice of the Superior Court judges not to comment upon the evidence . . . in the charge to the jury."). In King, the supreme court considered the case of a defendant convicted of first-degree assault. 136 N.H at 674. The trial court instructed the jury, which deliberated for approximately two hours and then requested a copy of the elements of the offense, which the trial court gave the jury in the form of a transcription of that portion of its instructions. Id. at 675. The jury was unable to reach a verdict and was sent home for the weekend. Id. On the following Monday, the jury foreperson indicated to the bailiff that "the jury wanted to know what it could consider." Id. In open court, the trial court reinstructed the jury, in relevant part, that it could consider "[e]verything that [the trial court] permitted to go before you." Id. Noting, however, that the jury had been "at it now for, I don't know what, most of the day," the trial court stated that "sometimes problems exist because you stay away from what the indictment and what the elements of the offense are and, in terms of what you can consider, that's what you really should be focusing on." Id. The trial court then went on to identify likely points of difficulty or disagreement in the evidence, including the following:

> Now, for example, my recollection of the testimony in terms of how this injury allegedly took place, there were some conflicts. I think one witness said the victim was standing and the defendant burst into the room and there was some contact. I think one witness said that the victim was on the floor, you know, so there is a disagreement as to how this happened. My recollection is one witness said that the defendant's hand was raised like this (indicating)

> in an upward motion. Another witness said that the injury occurred as a result of a punching motion. These are the kinds of things you're going to get in terms of disagreement. This is not unusual. My recollection is it happened here; it's not unusual for it to happen in these kinds of cases.
>
> The State's burden is not to prove that the injury occurred in a certain fashion. As long as they prove the elements of the case, then that is their obligation.

Id. at 676.

The supreme court, noting that in New Hampshire "[i]t is the practice of Superior Court judges not to comment upon the evidence or the credibility of witnesses in the charge to the jury," id. at 677 (quotation and citation omitted), determined that the trial court here "summarized the testimony of several of the State's witness but failed to mention the exculpatory testimony of the defendant," thereby "improperly focus[ing] the jury's attention on whether the victim had been stabbed with a knife and away from the defendant's claim that there had been no assault," id. Viewing the effect of these comments from the perspective of a reasonable juror, the court concluded that the comments were improper, that they raised the possibility of prejudice, and were not harmless. Id. at 678.

The present case is distinguishable from that in King on several grounds. See Doc. 17 at 54-55; Doc. 24 at 64-65; Doc. 27 at 28-31. First, in that case, the trial court made the challenged comments not in the context of its jury instructions but in direct response to the jury's question about "what it should consider," to which the trial court responded in detail and at length with specific reference to the testimony of individual witnesses. Here, by contrast, the challenged statement is a single sentence from the trial court's general jury instruction in which the trial court instructed the jury that the State must prove the Petitioner acted as an accomplice by proving that she had taken "certain actions," and then went on to list a number of the actions that the State alleged she had taken. See Tr. Vol. XIX at 1984-85. Unlike in King, at no point in these instructions did the trial court make specific reference to any witness or to its "recollection" of any particular trial testimony. Second, in King defense counsel objected to the trial court's statements on the basis, inter alia, that "the court's recollection of the testimony was an invasion of the province of the jury"—but the trial court overruled the objection, despite acknowledging that it was "dangerous for a Court to comment on the evidence" and that it is "something which Courts should not do." Id. at 677. Here, by contrast, no objection was made to the challenged statement—indeed, the lack of such an objection is the gravamen of the Petitioner's putative claim for ineffective assistance of counsel—but the trial court nonetheless went on to contextualize the statements for the jury in its further instructions only moments later:

> Now, in this and in the other conspiracy definition that I gave you, I listed certain acts that the State alleges and certain acts in this one that the State alleges. Those are allegations by the State. Those come from the indictments, and those indictments are not evidence. They are, and these acts alleged are, what the State charges, what the [Petitioner] did. What the State says the [Petitioner] did. The [Petitioner] has said that she is not guilty and has pled not guilty and has testified that she is not guilty.

Tr. Vol. XIX at 1985 (emphasis added).

In sum, then, Court finds that the allegations in the Petition, even taken as true, are insufficient to show that the trial court here "invaded the province of the jury" in a manner analogous to the trial court in King. Unlike the King court, the trial court here did not make reference to any witness testimony (except that of the Petitioner), nor did it characterize its own "recollections" or responses to such testimony. More importantly, here, the trial court clearly emphasized for the jury that the "actions" it had listed were the State's allegations, that these allegations were drawn from the indictment and that the indictment was not evidence. Id. "[J]uries are presumed to follow instructions." State v. Stayman, 138 N.H. 397, 403 (1994). Viewing the trial court's instructions here from the point of view of a reasonable juror and in light of all the evidence in the record, see Cegelis, 138 N.H. at 251-52, the Court concludes that the Petitioner has failed to plead facts sufficient to show that the trial court's instructions were objectionable. Given that determination, to the extent the Petitioner advances this argument as a claim of ineffective assistance of counsel, such a claim is unavailing and habeas relief is unwarranted.

Consistent with the foregoing, the Court **GRANTS** the Respondent's motion to dismiss with respect to the Petitioner's arguments related to the jury instructions.

VI. Mandatory Sentence of Life Without Parole

Finally, the Petitioner argues that the trial court abused its discretion in sentencing the Petitioner to life without the possibility of parole on the accomplice to first-degree murder charge. See Doc.1 at 151-59. The Petitioner argues that the trial court erroneously stated that a life-without-parole sentence was mandatory for accomplice to first-degree murder, and that the trial court therefore abused its discretion by not exercising its discretion to enter another sentence. Id. at 152. Trial counsel's failure to object to this error, the Petitioner argues further, amounted to constitutionally deficient representation. Id.

The crux of the Petitioner's argument is as follows. In New Hampshire, the charges of first-degree murder and accomplice to first-degree murder, the Petitioner argues, "are distinct": a defendant charged with first-degree murder may be convicted under a theory of accomplice liability, but a defendant charged with accomplice to first-degree murder may not be convicted of the principal offense of first-degree murder without a separate charge. Id. at 153. In support, the Petitioner cites to a number of New Hampshire cases concerned primarily with how a defendant is charged. Id. (citing, e.g., State v. Doucette, 146 N.H. 583, 589 (2001) ("Under New Hampshire law, . . . 'acting in concert with' language used in the indictment is ordinarily sufficient to charge a defendant as both a principal and an accomplice"); State v. Winward, 151 N.H. 533, 538-39 (2011) (holding "an indictment that charges the defendant as a principal puts a defendant on notice to prepare a defense as to both principal and accomplice liability"); State v. Barton, 142 N.H. 391, 395 (1997) (holding a defendant charged by an indictment as a principal with "no express language indicating accomplice liability is also intended" is nonetheless on notice to prepare a defense to the substantive offense for principal or accomplice liability)). In all of these cases, the supreme court upholds the principle that an indictment for a substantive offense is sufficient to put a defendant on notice for accomplice liability—by contrast, the Petitioner argues, when the State charges a defendant only with accomplice liability, it "may have multiple routes to convict on the accomplice charge, but . . . no way to reach a conviction on the substantive offense when only an accomplice charge was included in the indictment." Id. at 154. Thus, the Petitioner argues, "for *sentencing* purposes, the distinction . . . maintain[s] a practical significance": specifically, by virtue of the application of common-law accomplice theory, such a defendant only may be subject to the same punishment as the principal. Id. at 154-57 (citing State v. Acton, 115 N.H. 254, 256 (1975) ("[O]ne who aids in the commission of a crime may be subject to the same punishment as the principal even though no mention is made of him in the statute creating the offense." (quotation and citation omitted) (emphasis added))).

The Petitioner's argument fails as a matter of law. By its plain language, RSA 626:8, I provides that "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both." An "accomplice of such other person in the commission of the offense" is "legally accountable" for the other person's conduct. Id. II(c); see State v. Thresher, 122 N.H. 63, 69 (1982) ("'Legally accountable' is defined as including being 'an accomplice of such other person in the commission of the offense.'" (citation omitted)). While the statute does not define the term "accountable," the New Hampshire Supreme Court has held that "[u]nder RSA 626:8, I, II(c), an accomplice to an offense is guilty of the offense itself." State v. Abbis, 125 N.H. 646, 647 (1984) (emphasis added). Accordingly, one found guilty of being an accomplice of first-degree murder is also guilty of the offense of first-degree murder itself. See Thresher, 122 N.H. at 69 ("This court has interpreted RSA 626:8 as eradicating the distinctions between principal and accomplice." (citations omitted) (emphasis added)).

The Petitioner offers no law, nor is the Court aware of any, that contradicts or even complicates the supreme court's holding in Thresher that by the terms of RSA 626:8 the legislature has "eradicate[ed]" the distinction between principal and accomplice for purposes of criminal liability. Therefore, the Petitioner's conviction for accomplice to first-degree murder is a conviction for first-degree murder. The New Hampshire legislature has spoken clearly and unequivocally as to the punishment for a conviction of first-degree murder: "A person convicted of murder in the first degree shall be sentenced to life imprisonment and shall not be eligible for parole at any time." RSA 630:1-a, III (emphasis added). Thus, the trial court did not err in stating that the Petitioner was subject to a mandatory sentence of life without the possibility of parole, and the Petitioner's representation by trial counsel was not constitutionally deficient for their failure to object to that statement.

In view of the foregoing, the Court **GRANTS** the Respondent's motion to dismiss as it regards the Petitioner's arguments concerning her sentence for accomplice to first-degree murder.

CONCLUSION

For the reasons stated herein, the Respondent's motion to dismiss is **GRANTED**.

SO ORDERED.

September 17, 2026
Date

Judge James W. Kennedy

Clerk's Notice of Decision
Document Sent to Parties
on 09/17/2026