# State of New Hampshire
# Supreme Court

NO. 97-164

2000 TERM

AUGUST SESSION

STATE OF NEW HAMPSHIRE

v.

JOHN WANG

RULE 7 APPEAL FROM FINAL DECISION OF DISTRICT COURT

BRIEF OF DEFENDANT/APPELLANT, JOHN WANG

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES . . . . . . *ii*

QUESTIONS PRESENTED . . . . . . *1*

STATEMENT OF THE CASE AND STATEMENT OF FACTS . . . . . . *2*

I. Mr. Wang's Excursions to Sears . . . . . . *2*

II. Facts Regarding Mr. Wang's Problems with Discovery . . . . . . *5*

III. Facts Regarding Mr. Wang's Allegations of an Unfair Trial . . . . . . *7*

A. Facts Regarding Mr. Wang's Allegation that the Court Unlawfully Excluded Relevant Evidence . . . . . . *7*
B. Facts Regarding Mr. Wang's Allegation that the Court Unlawfully Inhibited his Cross Examination . . . . . . *10*
C. Facts Regarding Mr. Wang's Allegation that the Court Demonstrated Bias Against the Defendant . . . . . . *11*
D. Facts Regarding Mr. Wang's Allegation that the Court Unlawfully Testified for Witnesses . . . . . . *14*
E. Facts Regarding Mr. Wang's Allegation that the Court was Unlawfully and Unjustifiably Impatient with the Defendant . . . . . . *18*

SUMMARY OF ARGUMENT . . . . . . *21*

ARGUMENT . . . . . . *22*

I. The Defendant was not Given Discovery Necessary for the Preparation and Presentation of his Defense . . . . . . *22*

II. The Court Repeatedly Prohibited the Defendant from Presenting Relevant Evidence *27*

III. The Defendant was Repeatedly Denied his Right to Cross Examine Witnesses . . . *29*

IV. The Court's Bias Against the Defendant Violated his Right to a Fair Trial . . . . . . *31*

A. The Judge's Violated his Role as Judge . . . . . . *31*
B. The Judge Made Erroneous Rulings in Violation of the Defendant's Rights *32*
C. The Court was Unjustifiably Rude to the Defendant . . . . . . *35*

V. The Court Made a Series of Errors That, Taken Separately or Cumulatively, Are Not Harmless . . . . . . *36*

VI. The State Did Not Prove the Defendant Guilty Beyond a Reasonable Doubt . . . . . *39*

CONCLUSION . . . . . . *41*

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION . . . . . . *41*

APPENDIX . . . . . . *42*

## TABLE OF AUTHORITIES

## QUESTIONS PRESENTED

1. Was the defendant denied the right to a fair trial and the right to present all favorable proofs by the state's failure to provide him with exculpatory evidence he requested?

2. Was the defendant denied the right to a fair trial when during trial the court repeatedly made numerous errors which, taken separately or cumulatively, were not harmless?

3. Was the defendant denied the right to a fair trial, to confront witnesses and to present all favorable proofs when, during trial, the court repeatedly cut off the defendant's examination and cross examination of witnesses?

4. Was the defendant denied his right to a fair trial and right to present all favorable proofs when, during trial, the court deemed as irrelevant substantial evidence tending to prove his defense?

5. Did the state present sufficient evidence for a finding of guilty?

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

The defendant, John Wang, was charged with a misdemeanor B shoplifting on December 16, 1995, having allegedly taken from Sears in the Pheasant Lane Mall in Nashua a remote control for a Sony VCR and a Braun plaque remover (electric toothbrush). He was found guilty (*Larson*, J.) after a May 21, 1996 district court bench trial. This appeal followed.

### I. Mr. Wang's Excursions to Sears

Mr. Wang lives with his elderly mother in Nashua, New Hampshire. His mother had an electric toothbrush, which needed replacing. In early December, Mr. Wang went to Sears in the Pheasant Lane Mall in Nashua, and bought one. After he brought it home, Mr. Wang's mother complained to him that she did not like the new one as much as her old one, and requested that her son return the unit in exchange for another new one that was the same brand as the old worn-out one.

Separately, because he is a video hobbyist, Mr. Wang was interested in buying a VCR that had the capability to "jog and shuttle" (advance and reverse frame by frame) built into the machine's remote controller. Again in early December 1995, Mr. Wang went back to Sears to buy one. The salesperson, later identified as Terry Paletta, recommended a VCR that was supposed to meet his needs, a Sony model SLV 440, which Mr. Wang purchased. When he brought it home, Mr. Wang discovered that while the VCR jogged and shuttled by pressing buttons on the front panel of the machine, the accompanying remote controller did not allow control of the feature remotely. Because a jog and shuttle feature requires a peculiar large dial, he noted this by studying the instructions which came with the machine, and without taking the opaque plastic wrapping off the remote control.

On December 11, 1997, Mr. Wang returned to Sears for the purpose of confronting the store with the fact that his VCR remote did not work as expected. The salesperson, Terry Paletta, apologized for his mistake, and suggested a solution. Mr. Paletta had noted that the remote control from a fancier machine, SLV 920 HF, would control the jog and shuttle function on the less sophisticated machine Mr. Wang had bought. Mr. Wang then put his original remote control, with its plastic wrapping intact, down in the store, and took home the more sophisticated remote control which Terry Paletta had given him. It is important to note that the remote controls on display at Sears do not have any plastic wrapping on them, and are instead tethered to the display shelves so that customers can manipulate but not remove them.

Mr. Wang then tested the fancy remote control with his less fancy VCR at his home. He confirmed that the jog and shuttle function worked remotely, but almost nothing else did.

Understandably unsatisfied, on December 16, Mr. Wang again went to Sears, this time intending to both exchange his mother's electric toothbrush, and to re-exchange his remote control so that he would at least have the original remote that operated his VCR. Though Mr. Wang did not intend any other purchases, he took his mother along to do her Christmas shopping. They went to several stores in the mall, and though his mother walks well, they signed out a wheelchair at the mall information desk for her convenience.

While his mother was shopping in housewares, Mr. Wang took the electric toothbrush and the fancy remote control in hand and went to the sales counter near where the toothbrushes are sold. He explained to a woman there that his mother did not like the one he had, and specified for the saleswoman which brand his mother would prefer. The woman told Mr. Wang that she was unsure whether Sears had the preferred brand in stock, and would need a few

minutes to check. Mr. Wang left the power toothbrush, which he had brought into the store, on the counter, and went to the video section of the store to exchange the remote control. He saw Terry Paletta, who appeared very busy. Mr. Wang approached another salesman, a teenager to Mr. Wang's eyes, and explained. Mr. Wang spotted his original remote wrapped and unopened on the shelf and therefore told the teenager he would like to simply make the switch, but the teenager replied that Mr. Wang would have to talk to Terry Paletta. Mr. Wang then gave the more sophisticated remote that he had brought with him to the clerk. But because Mr. Paletta looked like he would be busy for a while longer, and because he had left his mother longer than he felt was responsible, Mr. Wang returned to her with neither a toothbrush nor a remote control.

Mr. Wang pushed his mother upstairs in the elevator to the clothing department. (The store security cameras first began recording Mr. Wang at this point.) He left her there and alone went back downstairs on an escalator back to the video department. Waiting for Mr. Paletta to be free, Mr. Wang noticed a television antenna he might like to buy. Then Mr. Wang spoke to Terry Paletta and explained the problem with the more sophisticated remote control he had been given on December 11, but Mr. Paletta told Mr. Wang that Mr. Paletta did not know where Mr. Wang's original remote was. Mr. Wang told Mr. Paletta that he, Mr. Wang, believed his original remote was on the shelf, unopened. Mr. Wang handed the more sophisticated remote, which he had brought with him from home that day, to Mr. Paletta. Mr. Paletta offhandedly told Mr. Wang that if he could find his original remote he could take it. Mr. Wang left Mr. Paletta, walked over to where he saw the remote on the shelf, and took it. Feeling uncomfortable with simply pocketing it, he tried to again seek out Mr. Paletta to show him, but was unable to find him. Mr. Wang then went to the housewares section. The woman he had spoken to before told

Mr. Wang that Sears had sold out of the toothbrush brand his mother wanted and returned to him the box containing the toothbrush he had brought with him into the store. Mr. Wang thanked her and walked away. It is important to note that the sales counter where Mr. Wang spoke to the saleswoman and onto which he put the toothbrush is not in view of Sears's security cameras, but is blocked from the camera by a support beam running from floor to ceiling. Because the toothbrush had been sitting unattended on the sales counter for half an hour, Mr. Wang wanted to ensure all the pieces were still there. Thus on his way back up the escalator Mr. Wang opened the box to check. Having decided to buy the antenna he had before noticed, Mr. Wang left the store with the toothbrush in his hand and the exchanged remote in his pocket to go get his wallet, which he had left in his car.

Because the store security camera followed Mr. Wang only on his second trip to the video and toothbrush departments, and had not captured his previous trips there, store security personnel understandably thought that he had stolen both the remote and the electric toothbrush. Mr. Wang was detained as he was leaving the store.

Upon his arrest, Mr. Wang tried to convince the store security people to talk to the woman who helped him with the toothbrush, the teenager, and Mr. Paletta. The security people had also detained Mr. Wang's mother, and had taken from her a number of items which included the sales receipts that would prove his innocence. Mr. Wang tried to convince them to look at the receipts but they refused.

**II. Facts Regarding Mr. Wang's Problems with Discovery**

Mr. Wang intended for the facts as just described to come out at trial. He defense was not that he didn't take things out of Sears – he did – but that the things he took were already his.

He intended to elicit at trial that the electric toothbrush he took was brought in for an exchange. The surveillance tape shows Mr. Wang without a toothbrush, then disappearing behind a support beam, and emerging with a box containing a toothbrush. He intended to rebut this circumstantial evidence by showing that toothbrushes are not displayed in any location behind the support beam, and that the only place he could have taken it from was the sales counter on which he placed it.

Mr. Wang also intended to elicit the facts surrounding the exchange of the remote control, including testimony of the people with whom he dealt. Most important to his defense, he intended to establish that he was found with a wrapped and sealed remote, the model and serial number of which matched the VCR machine which Terry Paletta had earlier sold him. Because it was specified in the complaint, he also needed to establish the value of the remote.

For these purposes, shortly after he was arrested Mr. Wang filed a Motion for Discovery which requested, among other things, a floor plan of the Sears store, the names of the various salespeople with whom he had been in contact, and documents showing the value of the remote control. These requests, though granted by the court, were not complied with by the state.[1] It is not sufficient to say that Mr. Wang could have procured this information himself; on an allegation that he had harassed Sears employees, the court had barred him from any contact with them.[2]

---

[1]The state did not even comply with the relatively simple request that it supply the defendant with a certification that Sears did not have a surveillance tape of the December 11 transaction. Such a certification was ordered by the court. *Motion Hearing, February 26, 1996* at 13.

[2]*Motion Hearing, April 9, 1996.* Despite the defendant's request in his Notice of Appeal, the hearing was not transcribed by the District Court, and the fact cannot be verified. It is believed (continued...)

A month before trial, after a five-month delay, Mr. Wang was finally provided with Mr. Paletta's full name. Mr. Wang immediately set about arranging for a deposition of Mr. Paletta, which took place by court order on May 13, 1996, just a week before his trial. As a result of this deposition, Mr. Wang was able to learn the names of some of the other salespeople. Immediately after deposing Mr. Paletta, Mr. Wang asked the court to allow depositions of the other salespeople. Defendant's "Motion to Depose, Messers Blain, Dawn, Contos," 5/13/96, *Appendix* at 26; Defendant's "Motion to Depose Sears Salespersons," 5/20/96, *Appendix* at 28. These motions were denied.

## III. Facts Regarding Mr. Wang's Allegations of an Unfair Trial

During trial, Mr. Wang suffered numerous violations of his right to a fair trial.

### A. Facts Regarding Mr. Wang's Allegation that the Court Unlawfully Excluded Relevant Evidence

Because Mr. Wang's defense was unusual, had he been represented an experienced attorney probably would have offered an opening argument or even filed a notice of defenses. Even so, at several times during the course of his trial, Mr. Wang's tried to indicate to the court the nature of his defense. *See, e.g.*, *T.Tr.* at 41, 50. The court never took the effort to understand Mr. Wang's defense and thus consistently misunderstood the nature of his questions to witnesses, consistently ruled irrelevant any evidence that was necessary to the defense, and consistently refused to hear any evidence that did not apply to the more common "I didn't do it" defense to shoplifting. The court went so far as to comment:

"The State's case is that you had on your person this particular item, okay? I

---

[2](...continued)
that the District Court misplaced the tape.

> don't care what number it is, what VCR, what it goes with. That's the State's case. And it's all they have to put in evidence. You were apprehended with that on your person, okay, and that is enough to prove a prima facie case for the State of New Hampshire against you. That's enough. Okay."

*T.Tr.* at 80. The court refused to allow evidence about events that occurred on December 11, *T.Tr.* at 105, or about which VCR machine Mr. Wang had bought. *T.Tr.* at 84 - 85.

Instead, the court wanted Mr. Wang's square-peg defense to fit into the court's round-hole idea about the proper way to defend a shoplifting charge. The court admonished Mr. Wang for

> "wasting my time on this particular case if you're not going to . . . at least defend the case in a way that makes sense."

*T.Tr.* at 85; *see also T.Tr.* at 86.

The defendant conceded that the remote produced in court was the one in his pocket, *T.Tr.* at 50. But because the court misunderstood Mr. Wang's defense, it excluded as irrelevant all evidence concerning the identity of the remote with which the defendant was found, which remote he was accused of stealing, or anything that would distinguish between the two remotes.

Mr. Wang was arrested in possession of the original remote that came with his VCR. Thus, establishing its exact identity was crucial to his defense. With that in mind, he attempted to question Sears's loss prevention witness concerning how the store established which remote Mr. Wang was accused of stealing. The court simply would not let him pursue these questions. *T.Tr.* at 38-39, 49, 56-58. The court would not even let the defendant question a witness about how she had been trained to identify the items that alleged shoplifters are accused of stealing. *T.Tr.* at 56.

The defendant repeatedly tried to put in evidence which model of remote he was accused of stealing, and to point out that the model found in his pocket was *not* the one he was accused of

stealing. While the court admitted that it cannot be determined from the surveillance video tape which remote he put in his pocket, *T.Tr.* at 42, the court would not let him ask questions to establish it. *T.Tr.* at 76. The defendant tried to inquire about the stock number of the remote he was found with, but these questions were barred as well. *T.Tr.* at 46. In an attempt to circumvent his thwarted questions, the defendant attempted to establish whether remotes can be acquired separately from the VCR with which they are associated, but was disallowed from asking this too. *T.Tr.* at 47. The court simply would not let the defendant raise any issue concerning the identity of the remote, *T.Tr.* at 78, 83, about the differing features of the remote he was accused of stealing and the one that he returned to the store, *T.Tr.* at 78, or about the "jog and shuttle" feature of the remotes. *T.Tr.* at 84.

The court denied discussion of this matter because it was deemed irrelevant. *T.Tr.* at 84. And in fact if the defendant's defense was what the court thought it was – that the defendant was contesting whether he took an object from the store, *T.Tr.* at 38-39 – the evidence would be properly excluded as irrelevant. But it was clear that the court did not understand the nature of Mr. Wang's defense. *See e.g.*, *T.Tr.* at 40. The court thought that Mr. Wang was contesting whether he took any item at all. *See e.g.*, *T.Tr.* at 41. Despite his many attempts to make the court understand his defense, the court was simply not interested in taking the time to do so, and instead treated Mr. Wang with ridicule. *See e.g.*, *T.Tr.* at 41.

The court took a similar approach to relevance concerning Mr. Wang's defense to the charge concerning the electric toothbrush. Although the defendant established that no witness saw or could have seen him pick up the item from where it was displayed (or from any place), *T.Tr.* at 54-56, the court would not let the state's witness testify in response to Mr. Wang's

question about where the electric toothbrushes were displayed. *T.Tr.* at 52-53.

At one point, the defendant tried to establish that a statement a witness gave to the police was inaccurate, because the inaccuracy corroborated the defendant's own testimony. The court ruled the questioning irrelevant as well. *T.Tr.* at 98:9.

### B. Facts Regarding Mr. Wang's Allegation that the Court Unlawfully Inhibited his Cross Examination

The court repeatedly did not allow Mr. Wang to fully conduct examination. Partly this was based on the court's misunderstanding of his defense. But in other instances, the court's rulings cannot be readily explained.

As mentioned, *supra*, Mr. Wang repeatedly attempted in cross examination to establish which remote he was accused of stealing. The court did not allow cross examination on this crucial issue. But the court prevented cross examination on other matters as well. At one point, for instance, the defendant wanted to show the surveillance videotape to a witness in order to establish the date on which he initially made an exchange of the remote controls. Because Mr. Wang had been denied the names of witnesses for so long, he alleged, their memories were fuzzy. Both Mr. Wang and the witness, Mr. Paletta, agreed that the time they spent together to do the initial exchange was about a half hour. Mr. Paletta testified that the half-hour exchange took place on December 16, whereas Mr. Wang maintained it happened on December 11. Mr. Wang sought to confront Mr. Paletta by showing Mr. Paletta the videotape of December 16, which lasted for only a few minutes. Mr. Wang could thus prove that the half-hour exchange could not have occurred on December 16 but took place earlier, *T.Tr.* at 93-94, 102, and could bolster his defense and corroborate his own testimony. When Mr. Wang asked the court to play

the video, the court responded, "No. It's not going to be shown." *T.Tr.* at 94; *see also T.Tr.* at 102. Without the video, Mr. Wang had no meaningful cross-examination on the matter.

The court also repeatedly prevented the defendant from asking any questions regarding the value of the remote control he was accused of stealing.

In one incident, the court did not allow the defendant to cross examine the state's witness to develop evidence that the state's chain of custody regarding its exhibits was not as strong as the state alleged. *T.Tr.* at T 72-74.

On three occasions, the court dismissed states' witnesses from the stand before the defendant was finished with his cross examination of them. *T.Tr.* at 42; *T.Tr.* at 62, *T.Tr.* at 80-81. In two of the instances, the court allowed the witnesses to stay in the courtroom, despite a standing sequestration order, so that the defendant could not untaintedly re-call them even if he wanted to. *T.Tr.* at 42; *T.Tr.* at 62.

### C. Facts Regarding Mr. Wang's Allegation that the Court Demonstrated Bias Against the Defendant

On several occasions, the court displayed its bias toward the state and against the defendant. In one instance, the defendant asked if a witness had ever met the defendant before December 16, 1995. The witness answered no. Having deposed him and knowing the witness was merely mistaken, Mr. Wang gave the witness another chance: "You had never seen the defendant before December 16, 1995?" Before the witness could answer, in an effort to hurry the trial along, the court interjected: "That's what he said." The witness then corrected himself and the court and testified that he *had* met the defendant earlier. *T.Tr.* at 82.

On another occasion, the defendant objected to the power toothbrush being offered as an

exhibit, because he believed the chain of custody had not been proven. *T.Tr.* at 22.[3] The court responded that the police "obviously are going to have some testimony by some third party, who *hopefully* is in custody or in control of the security locker." *T.Tr.* at 23 (emphasis added). The court thus improperly expressed its hope that an intact chain could be established. More important, the court reminded the state that it had not yet established the chain of custody, thereby helping the state make its case. Later in the trial, the court went beyond a reminder, and actually did the state's work. With a different witness, the state was trying to elicit testimony about the witness's custody of the item, but was fumbling slightly. Without prompting by any party, the court began asking the witness a series of questions, which skillfully brought out the state's facts concerning chain of custody. *T.Tr.* at 66-67.

In a related example, the defendant objected to the state's effort to offer the electric toothbrush into evidence, on the grounds that chain of custody had not been established. *T.Tr.* at 68-69. Rather than take the objection seriously, the court attempted to minimize the importance of taking an item into evidence. The court remarked that the state was

> "[j]ust asking for the admission of these items as their evidence. They were marked for identification before, now they're just admission into evidence."

*T.Tr.* at 69. Because the state probably didn't have a case *without* the exhibit, the court's minimization of its importance was inexcusable. Further, in this vein, the court then went on to say that chain of custody is not grounds for an objection to admission of evidence. *T.Tr.* at 70. The court was plainly in error. The item was admitted into evidence without further questioning.

In yet another example, the defendant was questioning a Sears official about what action

---

[3]Mr. Wang had evidence that the item had been taken away from the location from which the witness claimed it had not been moved. *T.Tr.* at 69.

the store takes regarding employees who do exchanges of merchandise in violation of store policy. The question was obviously relevant to establish what motive the employee in question might have to lie about what he said occurred in the exchange of the defendant's remote controls. While the question was eventually answered during cross examination by the state, *T.Tr*. at 114, the court would not allow the witness to answer it when posed by the defendant. *T.Tr*. at 113.

On several occasions, in a blind blurring of the executive and judicial branches of government, the court played both prosecutor and judge by *sua sponte* objecting and ruling on evidence. In one case, Mr. Wang was questioning whether a witness's bosses at Sears would approve of exchanging remote controls. The question brought no objection from the state. Nonetheless, the court interjected: "That's speculation. That's not permissible." *T.Tr*. at 104. In another instance, the defendant asked his own witness a question. Again without objection by the state, the court interjected: "Leading. Leading." *T.Tr*. at 112. The defendant tried to reformulate the question, but before he could finish it, the court, yet again without objection by the state, interjected: "And besides, it[s] presuming that you're establishing a fact that there was an exchange. That hasn't been proven either." *T.Tr*. at 113. (The court was in error; the exchange had been established.). The defendant tried for a third time to ask the question. Before he could complete it, yet again without objection by the state, the court interjected: "Is that the same question? Exactly the same. I don't think you moved even the preposition in that one. It's leading. You can't ask that." *T.Tr*. at 113. As a matter of law, the court ruling was in error; the defendant was clearly treating his own witness as a hostile witness and could therefore ask leading questions.

The court also prejudged matters not in evidence. After the defendant tried to reformulate

for the fourth time the question referred to, *supra*, the defendant asked his witness, "Would you be upset if you had found out that a sales associates at Sears had exchanged - - -." Yet again without objection from the state, the court interjected, "He already said that's not the custom or the policy. So I assume his answer is going to be yes." *T.Tr*. at 113. While the court was correct that the witness had testified about the store's exchange policy generally, there had been absolutely no testimony concerning how the witness *felt* about it. There was simply no basis for the court to "assume his answer is going to be yes." In another similar instance, the defendant was attempting to establish from his witness on what day the exchange of remotes took place. The court first ruled that the question was irrelevant. The defendant replied to the court that the question was in fact relevant to his defense. The court then explained its view that the question was not relevant "[b]ecause you didn't bring in the old one." *T.Tr*. at 105. This was subsequently directly contradicted by the defendant's own testimony. *T.Tr*. at 115. The court prejudged the evidence before the end of the trial, and displayed its bias against the defendant Moreover, by prejudging this particular piece of evidence, which went to the heart of the Mr. Wang's defense, the court demonstrated its carefree obliviousness toward the presumption of innocence.

### D. Facts Regarding Mr. Wang's Allegation that the Court Unlawfully Testified for Witnesses

On several occasions, the court inexplicably testified on behalf of various witnesses. One witness said she saw the defendant take the electric toothbrush. It is clear, however, that the witness could not *see* the defendant take it, and did not know where the toothbrushes were displayed, but merely surmised such facts from surrounding events. *T.Tr*. at 52. The defendant

attempted to elicit this from the witness – standard fodder of cross examination – but the court prohibited it. In an amazing colloquy between the defendant and the court, the court repeatedly wouldn't simply let the witness acknowledge Mr. Wang's point.

> "Q (by Mr. Wang): And that there's no section [of the surveillance tape] showing the defendant picking up a Braun plaque remover from the display area, is that correct?
>
> A: You were standing right in front of the table that displays them previous to when you walked away from it with the Braun remover.
>
> Q: Where is it?
>
> THE COURT: Well we just saw it. I mean, we're not going to sit here all afternoon and watch TV I hope.
>
> MR. WANG: Well —
>
> THE COURT: What are you trying to establish.
>
> MR. WANG: she's claiming that —
>
> THE COURT: She couldn't see you pick it up?
>
> MR. WANG: She didn't see me.
>
> THE COURT: That's right. Have you ever heard of circumstantial evidence?
>
> MR. WANG: Well, she was making a statement —
>
> THE COURT: You were behind a beam and all of a sudden – or upright support, and you didn't have it before and all of a sudden it's under your arm. So you can testify that a friend of yours passed it to you when you take the stand. But right now, the police have established, as far as this Court is concerned, sufficient probable cause that that box was picked up by you on the way by the table.

MR. WANG:  She said that she saw me take it.   That's not true.

THE COURT:  She said that she saw you take it, that's correct.

MR. WANG:  But there's no way she could have seen it.

THE COURT:  The evidence is that she, through that through that particular camera eye, she couldn't see you pick it up, that's correct.   Saw you go behind the post without it and you come out from behind the post with it. But couldn't see you pick it up, that's correct.

MR. WANG: So it's wrong for her to say that she saw me pick up.

THE COURT: This isn't a moral issue. I mean, she understood her job to mean to watch people for theft in the store and she's doing that.

MR. WANG: I understand that. But she's making a statement that she has no basis for.

THE COURT:  Okay.

MR. WANG: That's all I wanted to find out. And I want her to retract her statement that she saw —

THE COURT: I understand that.

MR. WANG: –  the defendant take —

THE COURT:  You made your point.

MR. WANG:  I never got a chance to get her to say it.

THE COURT: What do you want her to do —

MR. WANG:  I want her to —

THE COURT – genuflect?  She said, obviously had made a statement, she leaped in and the Court understands your point.  Now move on.  Do you have another question?

MR. WANG: Let me ask again: Did you see the defendant —

THE COURT: No, I'm not going to let you ask that. It's already been – the evidence is in. Your point is taken. She's not going to be forced to answer any further questions."

*T.Tr.* at 52-54.

This same sort of thing – the court not allowing a witness to answer a straightforward question and the court answering instead – occurred at several times during the trial. In one case, the defendant asked a witness about the chain of custody: "[W]ere these two items ever out of your custody at any time on December 16th?" *T.Tr.* at 72. The witnessed answered that they were not. The court then interjected with a question, "On December 16th?" *T.Tr.* at 73. The defendant responded, "yes." The Court then added, "Well, it's pretty obvious they were out of his custody at some time during December 16th because that's when you're accused of removing them from the store." The defendant then went on to ask questions about other days. *T.Tr.* at 73. However the point is that the witness was in a far better position than the court to give the rejoinder.

In another instance, the court's answer to a question posed to the witness was inaccurate.

"Q (by Mr. Wang): Are you sure that before the 16th of December, defendant never returned to the store to complain about the remote control unit?

A: Yes.

Q: Are you sure or —

[STATE]: Your Honor, the question was asked and answered.

THE COURT: You're sure it was the 16th?

THE WITNESS: It was the 16th.

THE COURT: Okay. Asked and answered.

Q (by Mr. Wang): No, the question is are you sure or do you simply not recall?

THE COURT: He answered.

THE WITNESS: I recall our conversation regarding the remote control on the 16th. I don't recall seeing you any time prior to that.

Q (by Mr. Wang): But you are not sure that it didn't happen before the 16th, is that correct?

THE COURT: He didn't say that. He said he was sure it was the 16th. But he's already answered the question. He can only answer it so many times and it gets boring. I've heard it. He's sure it's the 16th."

*T.Tr.* at 88-89. The point of this exchange is that the defendant was attempting to determine whether the transaction could have occurred earlier than the witness first testified, and what was the quality of the witness's memory on the matter. The court, rather than simply allowing the witness to testify, answered for the witness. The witness managed to get in a word, but before the question could be fully answered, the court flatly stated "He's sure it's the 16th," without regard to how the witness felt about the quality of his own memory. The question the defendant asked was never allowed to be answered.

**E. Facts Regarding Mr. Wang's Allegation that the Court was Unlawfully and Unjustifiably Impatient with the Defendant**

Mr. Wang's trial lasted just a few hours – the entire trial transcript is just 135 pages long. On many occasions, however, the court displayed an impatience with the defendant – to the point of being rude – that cannot be readily explained. A review of the transcript is necessary to capture the full measure of the court's impoliteness throughout, but attention can be drawn to several passages. *See T.Tr.* at 9, 11, 40, 42, 50, 58, 71, 100, 105.

Related to this, the court was for some reason chagrined that, despite the defendant's passable handling of the trial, he did not have a lawyer to conduct his case. Rather than provide the slight relaxation of formality that most courts allow to *pro se* defendants, this court gave Mr. Wang no slack, and instead told him he "should have used a lawyer in the first place." *T.Tr.* at 72. At one point, faced with an objection, the defendant asked the court how to elicit certain testimony. While there were several possible ways to allowably phrase the defendant's question, rather than instructing the defendant how to do it, the court gave the defendant a gratuitous lecture on subpoenas, and no useful help. *T.Tr.* at 74.

In a similar example, the defendant asked a witness whether he had ever contacted her. He knew he had not, but was trying to establish that he had not harassed Sears employees for purposes of making a record for appeal on some unfavorable rulings concerning discovery. The court incorrectly assumed that the answer might be "yes," and would not allow the witness to answer because, according to the court, the defendant had not been charged with witness tampering. *T.Tr.* at 58-61. The defendant attempted to explain the matter to the court, but the court refused to hear him. The court was apparently unwilling to grant that the defendant had enough intelligence to gauge the strategic issue at hand, and instead the court angrily replied that because he'd "been sitting as a Judge for 16 years" he could make the strategic choices better than the defendant. *T.Tr.* at 60.

In another example, either because the court obviously did not understand his defense and the defendant understandably felt that things ought to be repeated, or just because it is his speaking style, at times throughout the trial Mr. Wang asked innocuous questions twice. This apparently bothered the court, and on one such occasion, the court gratuitously and

disrespectfully lectured the defendant for repeating himself. *T.Tr.* at 110.

Finally, but perhaps most graphically, the court was so frustrated at Mr. Wang's insistence upon raising what the court considered irrelevant, the judge threatened Mr. Wang with a summary finding of guilt and with contempt if he persisted in raising the supposedly irrelevant issues. This came in a colloquy between the defendant and the court in which Mr. Wang was expressing to the court that he felt his right to cross-examine was being curtailed:

"THE COURT:Now, do you have any more questions of this witness?

MR. WANG: Your Honor, I feel that I have not been allowed to cross-examine this witness —

THE COURT: I'm allowing you to ask her questions.

MR. WANG: – without interruption.

THE COURT: You're interrupting me agin. And I'm going to keep my promise.

MR. WANG: I was speaking —

THE COURT: That I will not only terminate this trial, but I will find against you for failure to cooperate. I haven't said contempt.

MR. WANG: Your Honor - - -

THE COURT: But I'm getting close to that. Do you understand what contempt of court is?

MR. WANG: I understand.

THE COURT: Then you better keep that in mind when you're

making your remarks."

*T.Tr*. at 60-61.

## SUMMARY OF ARGUMENT

John Wang was convicted of shoplifting by the Nashua District Court (*Larson*, J.), and fined $400 plus $80 penalty assessment.

The defendant first argues that the inability of the defendant to gain access to several crucial items of discovery he requested and to depose store employees made it impossible to adequately prepare for and present an effective defense.

Second, the defendant argues that the court repeatedly prevented him from presenting evidence relevant to his defense, and that he was therefore unable to present his defense.

Third, the defendant argues that he was repeatedly prevented from cross-examining witnesses.

Fourth, the defendant argues that his right to a fair trial was denied by the court having helped the state present its case, numerous erroneous evidentiary rulings, and by plain rude conduct by the court.

Fifth, the defendant argues that the series of errors made by the court, taken separately or cumulatively, are not harmless error.

Finally, the defendant argues that the state neglected to offer evidence on several elements of the crime charged and that therefore there was insufficient evidence for a finding of guilt.

## ARGUMENT

### I. The Defendant was not Given Discovery Necessary for the Preparation and Presentation of his Defense

Criminal defendants have a due process right to get evidence with which to prepare a defense, *State v. Laurie*, 139 N.H. 325 (1995); *State v. Adams*, 133 N.H. 818 (1991), and an unquestioned right to exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Dukette*, 113 N.H. 472 (1973); *United States v. Agurs*, 427 U.S. 97 (1976); N.H. CONST., Pt. 1, Art. 15; U.S. CONST., Amds. 5, 6 & 14. The state has the burden of defending its decision to withhold when the defendant shows that discovery to which the defendant has a right has been withheld. *State v. Laurie*, 139 N.H. 325 (1995). Even when the discovery is discretionary, evidence that the state failed to comply with a discovery order is relevant to guiding this court's decision. *State v. Paris*, 137 N.H. 322, 330 (1993).

To the extent that the defendant's discovery requests, which were granted by the court, were not fulfilled by the state, the defendant's constitutional rights were violated. Without the items, he could not adequately prepare or present his defense.

The state did not initially object to the defendant's discovery request on grounds that it did not have the items requested by the defendant. The state did, however, suggest that the defendant had harassed store employees. State's "Objection to Defendant's Motion for Partial Discovery," 4/22/96, *Appendix* at 16. The court granted the defendant's requests for, among other things, a floor plan of the store and the names of various salespeople, Defendant's "Motion for Discovery," 1/16/96, *Appendix* at 3; Court's "Further Order," 4/25/95, *Appendix* at 17, but prevented the defendant from having any contact with the store. While the state generally has no

obligation to procure for the defendant items that are outside of its control, *State v. Beckman*, 114 N.H. 18 (1974), when the defendant is prevented from getting the information, the state must fulfill the request. *State v. Cressey*, 137 N.H. 402, 413 (1993).

Material delay in complying with discovery requests is reversible error.

> "Delay in complying with a court order to furnish evidence to the accused, for the purpose of making it less useful to him, cannot be condoned. Such conduct involving evidence favorable to the accused strikes at the very heart of the adversary system, due process, and the guarantee of effective assistance of counsel."

*State v. Arthur*, 118 N.H. 561, 563 (1978). Whether the delay in turning over the names of witnesses amounts to "an unconstitutional suppression of evidence depends upon whether the delay in disclosure substantially prejudiced the defendant in the preparation of his defense." *Id.* To warrant a new trial or dismissal by the trial court, or reversal by this court, "the defendant must at least show that the evidence was favorable to him and that he has been prejudiced" by the delay. *State v. LaRose*, 127 N.H. 146, 152 (1985); *Arthur*, 118 N.H. at 563. Reversible delay is any that prevents the defendant from having sufficient time to use the evidence in his favor. *State v. LaRose*, 127 N.H. at 152.

The defendant wanted to depose the store employee who sold him the VCR and exchanged for him the remote control. Because he had not been provided the witness's name, the defendant moved to depose the only store employee whose first name he knew. Defendant's "Motion for Subpoena," 3/19/96, *Appendix* at 7. In his motion, he mentioned that the witness "is a key eye-witness and essential to the defense." The state did not provide to the defendant the full name or the information necessary to depose Terry Paletta until just two weeks before trial, six months after the incident. Defendant's "Motion for Further Orders by the Court,"

4/29/96, and Court order thereon. The court recognized in part the difficulty the state created in contacting the witness. In an interlocutory order it noted that the defendant had "continuously indicated to the court that Terry's appearance at trail is necessary for a fair trial and is indispensable to his defense." The court also ordered the state to produce the witness for trial and "absolved [the defendant] of any responsibility he has in subpoenaing Terry for trial." Court's "Further Order," 4/24/96, *Appendix* at 17. Upon finally getting permission for the deposition, the defendant immediately deposed him.

The defendant further wanted to depose other store employees who had come in contact with the defendant and who may have had memory of the defendant's transactions with Sears. The defendant moved for discovery of the names soon after being arrested, because he was aware that without any reason to know that the transactions were important the witnesses would soon forget them. The court was consistently made aware, by the defendant's repeated filings, of the state's failure to provide the names. March 10, 1996 Letter from Defendant to the State, *Appendix* at 6; March 20, 1996 Letter from Defendant to the State, *Appendix* at 8; Defendant's "Motion to Dismiss for Failure to Provide Discovery," 4/1/96, *Appendix* at 9; Defendant's "Motion for Reconsideration in Light of New Evidence," 4/12/96; *Appendix* at 11; Defendant's "Motion for Further Discovery," 5/6/96; *Appendix* at 18; Defendant's "Motion for Reconsideration," 5/8/96, *Appendix* at 22; Transcript of Motion Hearing, 5/6/96, *passim*. The state's unexplained delay, in light of the defendant's demonstrated need to know, was a violation of the defendant's state and federal rights of due process rights, to confront witnesses, to have exculpatory evidence, and to present favorable proofs. It is thus reversible error.

Although the state did not ever provide the names of other store employees, the defendant

learned some of them from the deposition of Mr. Paletta. On the same day he learned their names, the defendant sought to depose them. Defendant's "Motion to Depose, Messers Blain, Dawn, Contos," 5/13/96, *Appendix* at 26. In his motion, the defendant noted the information the witnesses could give is "crucial in order that Defendant be properly prepared for trial, and not be prejudiced or surprised at trial," and cited the various relevant constitutional provisions. Without comment, the motion was denied. Several days later, the defendant further filed a "Motion to Depose Sears Salespersons," 5/20/96 *Appendix* at 28. In his motion, the defendant noted that he had been waiting a long time for the information and had requested permission to depose them as soon as he learned their identities, alleged that the witnesses have exculpatory information, and cited the relevant constitutional provisions. That motion, too, was denied. *See also*, Defendant's "Motion for Reconsideration – Denial of Basic Rights to Discovery and to Depose Sears Personnel," 5/21/96, *Appendix* at 30. To get permission to depose witnesses, the defendant need only show "that there is a reasonable possibility that the information sought will produce the type of evidence that due process will require to be admitted at trial." *State v. Miskell*, 122 N.H. 842, 846 (1982) (evidence omitted); *State v. Ellsworth*, 136 N.H. 115, 117 (1992). The court's refusal to grant permission violated the defendant's state and federal rights of due process rights, to confront witnesses, and to present favorable proofs.

There were further names of witnesses the defendant never learned. In his deposition Mr. Paletta testified that he did not know the name of the teenager in the audio-visual department, and also that he did not know the name of the woman who attempted to exchange the power toothbrush. Despite the court order for discovery of this information, it was simply never provided to Mr. Wang.

Beyond the names of witnesses, the defendant also repeatedly asked for the floor plan of the Sears store. Defendant's "Motion for Discovery," 1/16/96, *Appendix* at 3; Defendant's "Motion for Further Discovery," 5/6/96, *Appendix* at 18; Transcript of Motion Hearing, 5/6/96 at 8-9; Defendant's "Motion for Reconsideration," 5/8/96, *Appendix* at 22; Defendant's "Motion for Reconsideration – Denial of Basic Rights to Discovery and to Depose Sears Personnel," 5/21/96. The defendant made clear that the floor plan was necessary to his defense, in that it would 1) enable him to effectively rebut the allegation that he picked up the electric toothbrush from a display hidden to the surveillance camera; 2) show that electric toothbrushes were displayed on a table at the foot of the escalators, nowhere near any place he could have picked one up while out of view of the camera; and 3) corroborate his own testimony that he picked up the item from a check-out counter the location of which he could not prove without the floor plan. The defendant *never* received the plan.

To show that the remote control that was found in Mr. Wang's pocket was the one that came with his VCR, the defendant requested documents upon which the state based its allegation that the value of the remote he allegedly stole was $70. *See*, Complaint, *Appendix* at 1. He was never provided with such information. While the state produced store records showing the value of *a* remote control, it demonstrated the value of an item that was not in any way connected to this case.

The court even denied the defendant's discovery request for a witness list. Defendant's "Motion for Further Discovery," 5/6/96, *Appendix* at 18; Defendant's "Motion for Reconsideration," 5/8/96, *Appendix* at 22. The list was not ever provided to the defendant.

## II. The Court Repeatedly Prohibited the Defendant from Presenting Relevant Evidence

Pursuant to the rules of evidence, any matter is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.H. R. Ev. 401. There is a low bar to relevancy. *State v. Guyette*, 139 N.H. 526 (1995); *State v. Walsh*, 139 N.H. 435 (1995); *State v. Dustin*, 122 N.H. 544 (1982). In criminal cases, a "consequence to the determination of the action" pursuant to Rule 401 is guilt or innocence of the defendant. *State v. Hokanson*, 140 N.H. 719 (1996). When relevancy rulings are made in error, they violate constitutional rights of due process, fair trial, and the right to present favorable proofs, pursuant to the New Hampshire and federal Constitutions. *State v. Woodsum*, 137 N.H. 198 (1993). This court may reverse for an abuse of discretion when relevancy rulings are "clearly untenable or unreasonable to the prejudice of the defendant's case." *State v. Smith*, 135 N.H. 524, 525 (1992) (internal quotes omitted).

In this case, the court denied the defendant's entire theory of defense based on a series of erroneous relevancy rulings. The court simply refused to hear any evidence from the defendant pertaining to the identity of the remote control, the differing functions of the two devices, how the store established which remote the defendant allegedly stole, and any evidence pertaining to the prior exchange of remote controls. Such evidence formed the entire basis of his defense that he merely re-exchanged, rather than stole, the remote which the surveillance tapes showed him putting in his pocket. The court wouldn't even let the defendant explain the nature of his defense.

During the defendant's testimony, he asked the court to match the serial number on the

back of the still-wrapped remote control with the serial number of the VCR he had bought. *T.Tr.* at 123. The defendant knew they were not different. If the trial were a movie, this would be the climactic scene; the defendant offers incontrovertible evidence of his innocence. The court flatly refused to allow the match to be made. Why the court actively chose to ignore evidence that would plainly prove the defendant's innocence is unknown. It is clear, however, that this error alone is sufficient for reversal. *State v. Smith*, 135 N.H. at 525.remote

The record reveals other erroneous relevancy rulings throughout the trial. They completely prevented Mr. Wang from presenting his defense. The court acted without reason, and its rulings had no grounding in any law or fact.[4] As such they were in error, and Mr. Wang's conviction must be reversed.

---

[4]After the defendant's testimony, the trial judge admitted that the identity of the remote control was relevant. *T.Tr.* at 127. However, the court took no action to rectify its late-discovered error, even upon a motion for reconsideration. Defendant's "Motion for Reconsideration of Finding," 8/9/97, *Appendix* at 32.

## III. The Defendant was Repeatedly Denied his Right to Cross Examine Witnesses

A defendant's right to cross examine witnesses is necessary to enforce the defendant's constitutional rights to produce all favorable proofs, to meet witnesses against him face to face, and to be fully heard in his defense. *State v. Ramos*, 121 N.H. 863 (1981). The right to cross examination includes the right to impeach the credibility of witnesses. *State v. Rodriguez*, 136 N.H. 505 (1992), including one's own witness. N.H. R. Ev. 607.

In this case, the defendant was repeatedly prevented from cross examining any witness regarding the identity of the two remote controls, their differing functions, how Sears established which remote the defendant allegedly stole, the prior exchange of remote controls, or the timing of the prior exchange. As these matters went to the heart of the Mr. Wang's defense, his right to cross examine witnesses was materially violated, and his conviction must be reversed.

The court also prevented cross examination to question the state's maintenance of a clean chain of custody of the remote allegedly taken from the defendant. As it is difficult to prove shoplifting without the item allegedly stolen, the chain of custody is crucial, and the court's error demands reversal.

The defendant was also prohibited from asking any questions regarding how the store established the value of the remote Mr. Wang was accused of taking. When the value of an allegedly thieved item is specified in the charging document, the state must prove the value. *State v. Gray*, 127 N.H. 348 (1985). The state charged the defendant, *inter alia*, "with the purpose of depriving Sears of one (1) Sony Remote Control, value, Seventy Dollars, $70.00 . . ." Because the complaint specified the value, the state made it an element of the crime. The defendant's prevention from posing questions on how the store arrived at the value of the object

he allegedly stole violated his right to cross examination and is reversible error.

Finally, the court repeatedly dismissed witnesses before the defendant was finished questioning them, thus preventing full cross examination. It cannot be known on what matters the defendant sought answers, but without a good explanation by the state, *see, e.g. State v. Peters*, 133 N.H. 791 (1991) (witness unavailable), prejudice from resulting from the court's error must be assumed. *See State v. Place*, 128 N.H. 75 (1986) (suppression of evidence required if no opportunity for cross examination). Even if he wanted to, Mr. Wang would not have been allowed to re-call the prematurely dismissed witnesses during the defendant's case. *State v. Smart*, 136 N.H. 639 (1993) (citing SUP. CT. R. 69).

## IV. The Court's Bias Against the Defendant Violated his Right to a Fair Trial

### A. The Judge's Violated his Role as Judge

Criminal defendant's are entitled to a presumption of innocence, which, to convict, the state must overcome by proof beyond a reasonable doubt. *State v. Donovan*, 120 N.H. 603 (1980). All people who come before the court have the right "to be tried by judges as impartial as the lot of humanity will admit." N.H. CONST., Pt. 1, Art. 35. Judges cannot, in any case, constitutionally exercise executive functions. *Opinion of the Justices*, 85 N.H. 562 (1931). When a judge shows great antipathy toward a criminal defendant, the court violates the accused's right to a fair trial, to the presumption of innocence, to the luxury of having the state bear the burden of proof, and to the right of his government to respect its constitutional boundaries.

In this case, the court repeatedly helped the state present its evidence. When the state referred to items not in evidence, the court reminded the state that it had to establish a chain of custody to the evidence which the court assumed the state would introduce; in fact the court expressed its *hope* that the state would establish an adequate chain.

The court also repeatedly *sua sponte* ruled on evidence without any objection by the state (each time ruling against the defendant). The court, of course, never provided such help to Mr. Wang. The rules of evidence require an objection before a court can issue an evidentiary ruling.

> "Error may not be predicated upon a ruling which admits or excludes evidence unless . . . a contemporaneous objection appears of record, stating explicitly the specific ground of objection."

N.H. R. EV. 103(b)(1). By ruling on evidence without an objection, the court did the state's job thereby violating the separation of powers, demonstrated its bias in favor of the state, and denied the defendant his right to a fair trial and the presumption of innocence.

In addition, while a trial judge may interrogate witnesses, the court's role in doing so is to make the evidence clearer, *State v. Davis*, 83 N.H. 435 (1928), not to assist one of the parties. In this case, the judge repeatedly addressed the witnesses, but the court's questions were demonstrably one-sided. For Mr. Wang, the courtroom contained two prosecutors.

Trial judges have a duty to avoid interfering with the presentation of the evidence. *Webb v. Texas*, 409 U.S. 95 (1972) (judge authoritatively warned witness about perjured testimony resulting in witness's refusal to testify; court held warning violated defendant's rights to fair trial and to present defense); *see State v. Whiting*, 117 N.H. 701 (1977). In this case, the court repeatedly made unwarranted and ungrounded assumptions regarding the testimony witnesses were *going* to give, made conclusory remarks regarding witness's statements during the witness's testimony thereby possibly coloring of the testimony, and actually taking over from witnesses the answering of questions posed to the witnesses. For Mr. Wang, the courtroom had a witness both in the box and on the bench.

**B. The Judge Made Erroneous Rulings in Violation of the Defendant's Rights**

The Court ruled that the state's failure to establish a chain of custody was not a valid objection to introduction of evidence. The court was in error. In *Remillard v. New England Tel. Co.*, 115 N.H. 702 (1975), this court held that in absence of evidence that an item offered was the same item that was the subject of the suit, the item was inadmissible. "[B]reaks in the chain of custody may be crucial to the issue of authentication when the evidence is fungible, such as white powder thought to be cocaine." *State v. Woitkowski*, 136 N.H. 134 (1992). Remote controls, insofar as they are ubiquitous in Sears's audio-visual department, are fungible under the circumstances. Questions regarding a break in the chain of custody, therefore, were crucial to the

authentication of the remote control the state sought to introduce. Denial of a defendant's ability to pursue the issue is reversible error.

Perhaps the court recognized its error. But rather than fixing it by allowing testimony concerning the chain of custody, the court gratuitously told the defendant that introduction of an item into evidence was not an important event. Because the state would have a difficult time establishing a theft without identification of the item allegedly stolen, introduction of the item into evidence is of overriding importance. *See*, *State v. Gray*, 127 N.H. 348 (1985). The court's attempt to minimize it is reversible error.

The court also erroneously ruled that the defendant could not challenge a witness's conclusion that the defendant picked up the electric toothbrush from a table, the existence of which was not proven, and if it existed was invisible to her. The court correctly labeled the witness's conclusion circumstantial evidence, but would not allow the defendant to explore the circumstantiality or reliability of it, or whether the conclusion was justified by the observable facts. "[T]o be sufficient to establish guilt beyond a reasonable doubt, circumstantial evidence must exclude all other rational conclusions." N.H. Bar Association, N.H. CRIMINAL JURY INSTRUCTIONS, *citing*, *State v. O'Malley*, 120 N.H. 507 (1980) and *State v. Bird*, 122 N.H. 10 (1982). Instead of allowing the defendant, on cross examination, to suggest other possible conclusions to the witness for her judgment as to their rationality – a standard cross examination technique – the court cut off the defendant's questioning. Thus the court failed to take into account the central problem of circumstantial evidence which *O'Malley* and *Bird* address. As such, it is reversible error.

The court also erroneously prevented the defendant from asking leading questions of his

own witness when it was clear that the defendant was treating him as a hostile witness. A party may impeach his own witness. N.H. R. EV. 607. When a party's own witness is being impeached, or if the witness is identified with the adverse party, the party calling the witness may employ leading questions. N.H. R. EV. 611(c). The defendant called Terry Paletta to the stand and sought to impeach part of his story; Mr. Paletta was a former employee of the store from which the defendant was accused of stealing and was therefore clearly identified with the adverse party. Nonetheless, the court ruled that the defendant's questions were improper because they were "Leading. Leading." *T.Tr.* at 112. The ruling prevented the defendant from establishing the veracity of the witness's testimony, and is reversible error.

The court also erroneously prevented the defendant from asking questions concerning whether the defendant had contacted Sears employees. While the defendant knew that he had not contacted them, the court felt it was its role to prohibit the questions out of its supposed concern for the defendant incriminating himself in as-yet uncharged witness tampering. However, the defendant needed to establish the fact that he had not contacted store employees in order to create a record for appeal of the discovery disputes which are now before this court. To appeal, a party must establish a sufficient record for review. N.H. R. EV. 103. The court's prohibition of questions on this issue took the strategic question of whether to asked the questions away from the defendant, and prevented the defendant from establishing a record for appeal. To the extent that the court jeopardized the defendant's appeal on the discovery issue, the court committed reversible error.

Perhaps most disturbing, the Court threatened Mr. Wang with a summary finding of guilt for a "failure to cooperate." *T.Tr.* at 61. Because guilt must be established by the state beyond a

reasonable doubt, a summary finding of guilt for any reason is simply not in the lexicon of American criminal law. To threaten a citizen with such a sanction for *any reason* is improper. To threaten a person with a summary finding of guilt for exercising such core constitutional rights as presenting his defense and confronting witnesses goes far beyond the bounds of what can be considered a fair trial. *See Powell v. Texas*, 392 U.S. 514 (1967) (to be convicted of a crime, it must be shown that the person did something illegal). The court's threat of holding Mr. Wang in contempt likewise cannot be squared with basic principles of American criminal justice.

**C. The Court was Unjustifiably Rude to the Defendant**

A trial judge has a duty to listen to and understand the testimony and the evidence. *State v. Hause*, 82 N.H. 133, 138 (1925). The court's refusal to take the effort necessary to understand Mr. Wang's defense violated this duty and is reversible error.

Moreover, anger about or comment on the fact that a litigant is unrepresented, although it does not rise to a basis for disqualification, is improper. *Sawtelle v. Sawtelle*, 105 N.H. 177 (1963).

Finally, a trial judge "should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity." SUP. CT. R. 38, *Code of Judicial Conduct*, Canon 3A(3). Rudeness and impatience in the record of this case is pervasive.

## V. The Court Made a Series of Errors That, Taken Separately or Cumulatively, Are Not Harmless

To conclude that an error is harmless, this court must be convinced beyond a reasonable doubt that it did not affect the verdict. *Tsiatsios v. Tsiatsios*, 140 N.H. 173 (1995). The same analysis applies when errors are cumulative. If errors, taken cumulatively, prejudice substantive rights, they are not harmless. *United States v. Rivera*, 900 F.2d 1462 (10th Cir. 1990) (court found none of underlying rulings in error).

The cumulative error doctrine is well established. In *Gordon v. United States*, 344 U.S. 414 (1952), the defendant was convicted on the basis of statements made by a co-defendant who had plead guilty and become a government witness. The trial court ruled that exculpatory statements made prior to the incriminating one were not admissible. The lower court further ruled that a warning given to the cooperating witness by the judge at the witnesses's sentencing, which cautioned the witness to fully cooperate with the government and which tended to show that full cooperation would net the witness a more lenient sentence, was also not admissible. The United States Supreme Court held that while both were errors, the rulings individually may have been harmless. Taken together, however, the court found that they undermined the defendant's ability to cast doubt on the credibility of the witness and therefore were not harmless.

Both federal and state courts recognize the doctrine. *United States v. Lindell*, 881 F.2d 1313 (5th Cir.), *cert. denied*, 493 U.S. 1087 (1989); *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988) ("Although each of the . . . errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted.") (remanding: "The district court should determine the

prejudicial effect, if any, of the errors noted herein both separately and cumulatively."); *United States v. Smith*, 776 F.2d 892, 899 (10th Cir. 1985) (recognizing doctrine, but court found no errors); *United States v. Canales*, 744 F.2d 413, 430 (5th Cir. 1984) ("We recognize that the cumulative effect of several incidents of improper argument or misconduct may require reversal, even though no single one of the incidents, considered alone, would warrant such a result.") (no cumulative error found because some of the errors were trivial, some were not objected to, and others were followed by curative instructions); *Dunn v. Perrin*, 570 F.2d 21, 25 (1st Cir.), *cert. denied*, 437 U.S. 910 (1978) ("The cumulative effect of the three errors was obfuscation of the essentials of due process and fair treatment.") (quotations omitted); *Allett v. Hill*, 422 So. 2d 1047, 1050 (Fla. Ct. App. 1982), *and petition denied*, 434 So. 2d 887 (Fla. 1983) ("While each error standing by itself would be insufficient to require reversal, as this case unfolded before the jury each error had a compounding effect on the one that went before. Thus, the end result was to invidiously infect the verdict. . . . Because we find reversible error in the combined effect of the errors to which allusion has been made, we reverse and remand."); *Brown v. Arco Petroleum Prods. Co.*, 552 N.E.2d 1003, 1009-1010 (Ill. Ct. App. 1989), *and appeal denied*, 561 N.E.2d 687 (Ill. 1990) ("In the present case, we believe the repeated attempts by plaintiff's counsel to elicit improper testimony . . . , the improper admission [of certain evidence], the failure of the trial court to allow defendants to cross-examine [a witness] concerning the basis for his expert opinion, the improper use by plaintiff's counsel of unidentified authority to cross-examine [expert] witnesses, and counsel's improper closing arguments resulted in prejudice to defendants."); *Haynes v. Seiler*, 167 N.W.2d 819, 822-23 (Mich. 1969) ("Although individual errors may not establish prejudice they may, in combination, equal substantial prejudice,

impelling a reversal. . . . The errors committed were not of a kind that shock the judiciary, but in our opinion, their cumulative effect was prejudicial to plaintiffs."); *People v. Johnson*, 452 N.Y.S.2d 53, 54 (1982) ("While perhaps none of the aforementioned possible errors would warrant a reversal, the cumulative effect requires a new trial."); *Katz v. Enzer*, 504 N.E.2d 427 (Ohio Ct. App. 1985) ("Because we are convinced that the cumulative effect of those instances of error resulted in prejudice to [the party] by depriving her of a full and fair hearing of the disputed issues at trial, we must reverse the judgment of the court" below.); *Moss v. Magnetic Peripherals, Inc.*, 744 P.2d 1285 (Okla. Ct. App. 1987) (cumulative error regarding excluding relevant evidence on material issues and incorrectly instructing a jury, taken in combination, require reversal of judgment); *State v. Walker*, 425 S.E.2d 616, 623 (W. Va. 1992) ("Although admission of some of the evidence of which [the defendant] complains might have been harmless standing alone, the cumulative effect of such a multitude of errors taints the entire trial.").

None of the many errors enumerated in this brief are harmless. Each of them is by itself a basis for reversal. If there is any doubt, the errors should be evaluated collectively. Whether viewed individually or cumulatively, Mr. Wang's conviction should be reversed.

## VI. The State Did Not Prove the Defendant Guilty Beyond a Reasonable Doubt

A person is guilty of shoplifting only if he has a "purpose of depriving a merchant of goods or merchandise." RSA 644:17. "'Purpose to deprive'" means to have the conscious object to appropriate the goods or merchandise of a merchant without paying the merchant's stated or advertised price. RSA 644:17, III (b). Thus, the state must prove that the item allegedly stolen belonged to the merchant.

In any theft case, but certainly where the defendant has raised the issue, the state must prove that the item alleged to be stolen was owned by someone not the defendant. *State v. Stanley*, 132 N.H. 571 (1989) (receiving stolen property) (property of another is an element that must be proved by the state); *State v. Gray*, 127 N.H. 348 (1985) (theft) (proof of owner may be required to be proved); *State v. Stauff*, 126 N.H. 186 (1985) (receiving stolen property) (state must prove property belonged to someone else); *see also* RSA 637:2, IV (defining property of another). Use of theft cases for this point is apposite. Shoplifting is a theft charge because it may be a lesser included of theft, *State v. Peck*, 140 N.H. 333 (1995), and because it can be used to elevate a sentence in subsequent theft convictions. *State v. Harper*, 126 N.H. 815 (1985).

The state did not offer proof that the defendant took any item from Sears that did not already belong to the defendant. Regarding the electric toothbrush, the state's evidence was circumstantial. The prosecution alleged that the defendant took it from a table which was invisible to its witness; the witness merely concluded that he took it from the table. Although the defendant was prevented from offering a floor plan to prove the point, the state offered no competent evidence that the invisible table was where Sears displayed the item. The defendant claimed that he picked it up from a sales-counter which, because of a ceiling support beam, was

also invisible to the camera, and that the box he picked up was the same one with which he came into the store.

For guilt beyond a reasonable doubt based on circumstantial evidence, the state must disprove all conclusions rationally derivable from the evidence that are inconsistent with guilt. N.H. Bar Association, N.H. CRIMINAL JURY INSTRUCTIONS, *citing*, *State v. O'Malley*, 120 N.H. 507 (1980); *State v. Bird*, 122 N.H. 10 (1982). The state did not attempt to offer any evidence to disprove the defendant's story, and there was none upon which the court could rule. Thus, this court must reverse.

In any theft case, the state must prove the value of the item allegedly stolen. *State v. Gray*, 127 N.H. 348 (1985). Regarding the remote control, the state offered no evidence of its value. Further, the actual value of the remote control found in the defendant's pocket was $43.95, not $70 as the complaint alleged.

Finally, the state did not prove that the remote control belonged to any one other than the defendant. During Mr. Wang's testimony, he attempted to show the court that the serial number on the back of the remote control, which was still factory-wrapped in opaque plastic, would match the serial number of the VCR he had bought. *T.Tr.* at 123. Had he been allowed to enter this evidence, and all the other evidence he offered regarding the identity of the remote control, he would have shown that the remote in his pocket was the one that matched the VCR he already owned. There is no plausible explanation for the defendant stealing something he already owned, and the state did not attempt to offer one. The *only* reasonable explanation is the one offered by the defendant. As no rational trier of fact could therefore reach a verdict of guilty, this court must reverse. *See, e.g. State v. Martin*, 121 N.H. 1032 (1981).

## CONCLUSION

Based on the forgoing, the defendant requests that this honorable court reverse his conviction.

Respectfully submitted,

John Wang,
By his Attorney,

**Law Office of Joshua L. Gordon**

Dated: August 20, 2000

______________________________
Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

## REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for John Wang requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 20, 2000, a copy of the foregoing will be forwarded to Ann Rice, Esq., Assistant Attorney General.

Dated: August 20, 2000

______________________________
Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

## APPENDIX


1. Complaint . . . . . . . . *1*
2. Defendant's "Motion for Discovery," 1/16/96 . . . . . . . . *3*
3. Letter from Defendant to the State, 3/10/96 . . . . . . . . *6*
4. Defendant's "Motion for Subpoena," 3/19/96 . . . . . . . . *7*
5. Letter from Defendant to the State, 3/20/96 . . . . . . . . *8*
6. Defendant's "Motion to Dismiss for Failure to Provide Discovery," 4/1/96 . . . . . . . . *9*
7. Defendant's "Motion for Reconsideration in Light of New Evidence," 4/12/96 . . . . . . . *11*
8. State's "Objection to Defendant's Motion for Partial Discovery," 4/22/96 . . . . . . . . *16*
9. Court's "Further Order," 4/24/96 . . . . . . . . *17*
10. Defendant's "Motion for Further Discovery," 5/6/96 . . . . . . . . *18*
11. Court "Order," 5/6/96 . . . . . . . . *21*
12. Defendant's "Motion for Reconsideration," 5/8/96 . . . . . . . . *22*
13. Defendant's "Motion to Depose, Messers Blain, Dawn, Contos," 5/13/96 . . . . . . . . *26*
14. Defendant's "Motion to Depose Sears Salespersons," 5/20/96 . . . . . . . . *28*
15. Defendant's "Motion for Reconsideration – Denial of Basic Rights to Discovery and to Depose Sears Personnel, 5/21/96 . . . . . . . . *30*
16. Defendant's "Motion for Reconsideration of Finding," 8/9/97 . . . . . . . . *32*