State of New Hampshire
Supreme Court

NO. 2017-0385

2017 TERM

DECEMBER SESSION

State of New Hampshire

v.

David Martinko

RULE 7 APPEAL OF FINAL DECISION OF THE
STRAFFORD COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT, DAVID MARTINKO

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I. Did the superior court err in ruling that the felony Informations to which Mr. Martinko pleaded guilty conformed to state and federal constitutional protections against double jeopardy?
Preserved: Motion to Vacate Plea & Sentences (Apr. 20, 2017), *Addendum* at 30.

II. Did the superior court err in its ruling that Mr. Martinko's trial counsel provided effective assistance, where counsel failed to advise Mr. Martinko that the Felony Informations to which he pleaded guilty violated state and federal constitutional protections against double jeopardy?
Preserved: Motion to Vacate Plea & Sentences (Apr. 20, 2017), *Addendum* at 30.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On Halloween 2013, David Martinko, who had no prior criminal record, walked into the Dover, New Hampshire Police Department, and reported that on the previous evening he had sexual contact with his step-daughter, who was then 15. *Plea-Sent.Hrg*. at 8, 17. The next day the police interviewed the young woman. She discussed the previous evening, and also revealed there were additional times when Mr. Martinko had sexual contact with her. *Plea-Sent.Hrg*. at 8-9.

The police issued a criminal complaint that day, alleging one count of aggravated felonious sexual assault. Mr. Martinko was appointed a public defender, got arraigned in the Dover District Court, posted $10,000 cash bail, and was released on condition of no contact with the victim and anyone else under age 18. COMPLAINT (Nov. 1, 2013), *Appx*. at 1; CONDITIONS OF BAIL (Nov. 13, 2013), *Appx*. at 1; APPOINTMENT OF COUNSEL (Nov. 5, 2013 & May 22, 2014), *Appx*. at 11; APPEARANCE (of Attorney David J. Betancourt) (Nov. 7, 2013), *Appx*. at 3. The following week, after he lost his job, Mr. Martinko voluntarily relinquished bail, and subjected himself to incarceration, where he remains. MOTION TO VOLUNTARILY RELINQUISH BAIL (Nov. 7, 2013), *Appx*. at 4; BOND IN CRIMINAL CASE (Nov. 7, 2013), *Appx*. at 6; BAIL ORDER (Nov. 14, 2013) (victim's name redacted), *Appx*. at 6.

After the case was transferred to the superior court, NOTICE OF BOUNDOVER (Nov. 22, 2013), *Appx*. at 8, the State issued three felony Informations[1] charging Mr. Martinko with pattern sexual assault.

[1]The State has assigned unique character strings to identify the Informations, which are handwritten in the bottom-right margin of each Information. FELONY INFORMATIONS (May 14, 2014), *Addendum* at 18, 20, 22. For convenience, these numbers have been truncated, so that each Information identification is referenced here as a two-digit number: "#55," "#56," and "#57."

All three Informations are identical except for their dates, which are precisely successive:

- Information #55: "between the first day of September in the year two thousand and ten and the thirty-first day of August in the year two thousand and eleven…";

Information	Pattern Start Date	Pattern End Date
55	September 1, 2010	August 31, 2011
56	September 1, 2011	August 31, 2012
57	September 1, 2012	October 31, 2013

- Information #56: "between the first day of September in the year two thousand and eleven and the thirty-first day of August in the year two thousand and twelve…";

- Information #57: "between the first day of September in the year two thousand and twelve and the thirty-first day of October in the year two thousand and thirteen…."

FELONY INFORMATIONS #55, #56 & #57 (May 14, 2014), *Addendum* at 18, 20, 22 (capitalization altered). All three Informations identically alleged that Mr. Martinko, between those dates:

> at Dover, in the County of Strafford … did commit the crime of aggravated felonious sexual assault, in that he did engage in a pattern of sexual assault with … a young girl under the age of sixteen and not his legal spouse by committing more than one act of aggravated felonious sexual assault or felonious sexual assault or both over a period of two months or more and within a period of five years by knowingly engaging in sexual penetration or purposely engaging in sexual contact….

Id. (capitalization altered).

Mr. Martinko then filed an intent to plead guilty – indicating the terms of a negotiated plea – waived his right to a grand jury indictment (thus allowing the allegations to go forward on informations rather than indictments), and waived his right to trial. NOTICE OF INTENT TO ENTER PLEA OF GUILTY (May 13, 2014), *Appx*. at 9; WAIVER OF INDICTMENT (June 10, 2014), *Appx*. at 14; ACKNOWLEDGMENT & WAIVER OF RIGHTS (June 10, 2014), *Appx*. at 12.

The negotiated plea was:

- Information #55: 10 to 20 years stand committed, commencing forthwith;
- Information #56: 10 to 20 years stand committed, consecutive to #55;
- Information #57: 10 to 20 years stand committed, consecutive to #56, suspended on conditions.[2]

NOTICE OF INTENT TO ENTER PLEA OF GUILTY (May 13, 2014), *Appx*. at 9; *Plea-Sent.Hrg*. at 4-7, 16. At his plea-and-sentencing hearing, in allocution Mr. Martinko explained his self-report, relinquishment of bail, and pleas of guilt:

> I am sorry for what I have done and I know I cannot make up for what has been done, but I wish to go to heaven and that is my primary goal behind turning myself in and making amends and trying to make things right with God and allow the courts to settle their punishments as well.

Plea-Sent.Hrg. at 17. The court accepted Mr. Martinko's pleas, imposed sentences as negotiated,[3] and required sex offender registration. *Plea-Sent.Hrg*. at 18. STATE PRISON SENTENCES (June 13, 2014), *Addendum* at 24-29; NOTICE OF REQUIREMENT TO REGISTER (June 13, 2014), *Appx*. at 16.

Two years later, Mr. Martinko, first *pro se* and then through a private attorney, filed a request to vacate his pleas and sentences. His grounds were that his lawyer who conducted his plea and sentencing was ineffective for not advising him that the three Informations were multiplicitous in that they arbitrarily charged a single crime in three separate Informations, thus subjecting Mr. Martinko to double jeopardy, in violation of both the Federal and New

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[2]Conditions were: completion of the sex offender program, no contact with the victim and her family, no contact with Mr. Martinko's biological adult daughters, and no unsupervised contact with minors. A year after sentencing, the court clarified that the no-contact orders sprung only from Information #57, and not from the others. *See* ORDER ON DEFENDANT'S MOTION FOR CLARIFICATION (May 26, 2016), *Appx*. at 22.

[3]The court also dismissed the original district court complaint. RETURN FROM SUPERIOR COURT (June 13, 2014) (omitted from appendix).

Hampshire constitutions. MOTION TO VACATE PLEA & SENTENCES (Apr. 20, 2017), *Addendum* at 30; APPEARANCE OF ATTORNEY BERNSTEIN (Apr. 20, 2017), *Appx*. at 23; *see also* MOTION TO APPOINT COUNSEL (Nov. 27, 2015), *Appx*. at 18. The State objected. OBJECTION TO MOTION TO VACATE PLEA & SENTENCES (May 2, 2017), *Appx*. at 24.

The court ordered preparation of a transcript of the 2014 plea-and-sentencing hearing, but denied appointment of a lawyer. ORDER (May 17, 2017), *Appx*. at 27; ORDER (Jan. 29, 2017), *Appx*. at 21. In June 2017, the Strafford County Superior Court (*Steven M. Houran*, P.J.) issued an order denying Mr. Martinko's request to vacate, on the grounds that there was no double-jeopardy violation, and thus no ineffective assistance of counsel. ORDER ON MOTION TO VACATE PLEA AND SENTENCES (June 7, 2017), *Addendum* at 36.

SUMMARY OF ARGUMENT

Mr. Martinko first explains the evidence presented against him at his plea and sentencing hearing, and analyzes the dates of the alleged pattern conduct.

In the law of double jeopardy, pattern charges against a defendant must be reflective of the defendant's alleged pattern conduct. Mr. Martinko argues that he was charged arbitrarily, however, because the pattern charges do not relate to the evidence. It appears that the State randomly chose start and end dates for its allegations, unrelated to the evidence; it alleged successive periods, thereby creating multiple charges, where there was, at most, a single pattern of conduct. Accordingly Mr. Martinko requests this court dismiss the multiplicitous allegations.

Because his attorney at sentencing did not apprise Mr. Martinko of the double jeopardy issue, he pleaded guilty to three charges rather than one, and was commensurately sentenced to three consecutive prison sentences.

ARGUMENT

The date ranges of the three pattern Informations are precisely successive: the second Information begins on the very next day after the first Information ends, and the third Information begins on the very next day after the second ends.

There is no evidence in the record, however, that three distinct patterns began and ended on those dates. As such, the periods are arbitrary, and therefore the Informations are multiplicitous, in violation of federal and state constitutional bars against double jeopardy.

I. The Pattern Evidence Against David Martinko

The only evidence appearing in the record regarding Mr. Martinko's conduct was recited by the prosecutor during the plea and sentencing hearing, in response to the court's question: "What … facts can the State prove beyond [a] reasonable doubt in the event these cases should go to trial?" *Plea-Sent.Hrg*. at 8. The prosecutor noted that all the facts were from Mr. Martinko's self-report and from the interview with the young woman the next day. *Plea-Sent.Hrg*. at 8-10. The prosecutor's recitation of the evidence was:

> After speaking about [the October 31, 2013] incident [the victim] told the forensic interviewer that the touching began when she was four or five when she lived in Michigan and that shortly after he began putting his penis and his fingers inside of her vagina.
>
> He also had [the victim] touch his penis on occasion. She said that this behavior continued when the family moved from Michigan to Massachusetts and when they moved from Massachusetts to Dover, which was Labor Day weekend of 2010 when she was 12.
>
> She said that the touching and the sexual intercourse stopped for awhile shortly before her 14th birthday when she told the defendant it needed to stop. She said up until that point the abuse was happening every night or every other night and after she told him it needed to stop, it happened about once a month or so.

Plea-Sent.Hrg. at 9-10.

After this recitation, the prosecutor concluded: "Those were the facts the State would rely on should this matter have gone to trial." *Plea-Sent.Hrg*. at 10.

Broken down into its smallest constituent parts, the evidence can be thus summarized:

Incident number	**When, in record**	**When, more exactly**	**Act**	**Frequency**	**Location**	**Trn. cite**
1	*Oct. 31, 2013 (self-reported)*	*Oct. 31, 2013*	*Touching*	*Once*	*Dover, New Hampshire*	*8-9*
2	"[W]hen she was four or five."	Calculated: between Aug. 16, 2002 and Aug. 15, 2004.	Touching	unknown	Michigan	9
3	"[S]hortly after" incident number 2.	unknown	Digital Penetration, Intercourse	unknown	Michigan	9
4	"[W]hen the family moved from Michigan to Massachusetts and when they moved from Massachusetts to Dover"	Nothing in record to date this event, presumably between 2004 and 2010.	Touch penis, intercourse	"[O]n occasion."	Michigan & Massachusetts, or Dover, New Hampshire	9-10
5	"[W]hen they moved from Massachusetts to Dover, which was Labor Day weekend of 2010 when she was 12."	Sept. 1, 2010 and Sept. 2, 2010.	Touch penis, intercourse	"[E]very night or every other night."	Massachusetts or Dover, New Hampshire	10
6	"[S]topped for awhile [until] shortly before her 14th birthday."					10
7	"[A]fter" 14th birthday.	Calculated: sometime after August 16, 2012	Intercourse	"[O]nce a month or so."	Dover, New Hampshire	10

The dates alleged in the Informations, as shown in the chart repeated here from above, do not reflect any differences in the pattern conduct shown by the evidence.

Information	Pattern Start Date	Pattern End Date
55	September 1, 2010	August 31, 2011
56	September 1, 2011	August 31, 2012
57	September 1, 2012	October 31, 2013

The evidence suggests there was a pattern of sexual contact for a period of about three years, from

September 2010 to October 2013 – all within the five-year pattern timeframe mandated by the statute.[4] Because there is nothing in the evidence to distinguish the three Informations, the assaults were part of one cumulative three-year pattern, and not three separate one-year patterns.

Under the most conviction-generous reading of the evidence regarding the successive dates of Informations #55 and #56, there was conduct for somewhat less than two years, beginning in September 2010 (incident #5), and continuing to some time after the victim's fourteenth birthday in September 2012 (incident #6). While cumulatively those dates are roughly encapsulated within Informations #55 and #56, there is nothing in the record to suggest a distinction between acts occurring from September 1, 2010 to August 31, 2011 and those occurring from September 1, 2011 to August 31, 2012; that is, there is nothing in the record to suggest the artificial breakpoint the State created between August 31 and September 1, in 2011. The prosecutor's recitation of the evidence does not even mention 2011, and there is no evidence of any change in victim, location, sexual variant, or any other pattern-breaking conduct. Informations #55 and #56 together are therefore a single pattern.

Also giving the most conviction-generous reading to the evidence regarding the successive dates of Informations #56 and #57, at most there was a short gap in conduct, but then a resumption with no change in conduct, making that break also artificial. Informations #56 and #57 together are also part of a single pattern, comprised of the conduct set forth in the three Informations.

Overall, Mr. Martinko's conduct was one continuous pattern spanning three years. The purpose of the pattern statute is to allow the State to prosecute where a victim cannot recall

[4]RSA 632-A:1, I-c: "'Pattern of sexual assault' means committing more than one act under RSA 632-A:2 or RSA 632-A:3, or both, upon the same victim over a period of 2 months or more and within a period of 5 years."

incidents and dates with exactitude, not to give an overzealous prosecutor leave to break one pattern into many, merely to increase punishment. *See State v. Krueger*, 146 N.H. 541, 543-44 (cautioning prosecutors against overzealously charging multiple offenses for a single event); John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015) ("When the government wants to impose exceptionally harsh punishment on a criminal defendant, one of the ways it accomplishes this goal is to divide the defendant's single course of conduct into multiple offenses that give rise to multiple punishments.").

II. A Single Crime Was Arbitrarily Charged as Three Separate Informations and Therefore the Informations Were Multiplicitous

The double jeopardy provisions of the federal and state constitutions present several related, but distinct, issues. U.S. CONST., amd. 5[5]; N.H. CONST. pt. 1, art. 16[6]; *State v. Hannon*, 151 N.H. 708, 713 (2005).

> The Double Jeopardy Clause … serves three primary purposes.… Third, it protects against multiple punishments for the same offense. This case involves an alleged violation of the third category of protection. In determining whether a defendant is subject to multiple punishments for the same offense, [this court] must determine the unit of prosecution intended by the legislature. When a statutory provision is ambiguous, the rule of lenity demands that all doubt be resolved against turning a single transaction into multiple offenses and thereby expanding the statutory penalty.

State v. Jennings, 155 N.H. 768, 776-77 (2007) (quotations and citations omitted, paragraphing altered); *seel also State v. Bailey*, 127 N.H. 811, 814 (1986); *Valentine v. Konteh*, 395 F.3d 626, 634 (6th Cir. 2005) (States "do not have the power to prosecute one for a pattern of abuse through simply charging a defendant with the same basic offense many times over."). Based on its reading of the pattern sexual assault statute,[7] this court has determined that the "unit of prosecution" for pattern sexual assault allegations is the pattern itself. *State v. Richard*, 147 N.H. 340, 342 (2001); *State v. Fortier*, 146 N.H. 784, 791 (2001) (legislature intended pattern statute to "criminalize a continuing course of sexual assaults, not isolated instances.").

The law regarding how to determine whether the prosecutor's chosen unit of prosecution

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[5]U.S. CONST., amd. 5: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[6]N.H. CONST. pt. 1, art. 16: "No subject shall be liable to be tried, after an acquittal, for the same crime or offense."

[7]RSA 632-A:2: "A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age."

unduly subjects a defendant to double jeopardy is probably not susceptible of ready harmonization, *State v. Locke*, 166 N.H. 344, 353 (2014) ("We invite parties in future cases to ask us to reconsider our double jeopardy jurisprudence consistent with the principles of *stare decisis*, and to suggest a formulation of the double jeopardy test to be applied under our State Constitution."); *State v. Lynch*, 169 N.H. 689, 707 (2017) (same), though some have tried. *See* George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1 (1985) (analysis of United States Supreme Court cases demonstrating difficulty of determining unit of prosecution, and proposing five part test); Jeffrey M. Chemerinsky, *Counting Offenses*, 58 DUKE L.J. 709 (2009) (noting four possible analyses; suggesting application of lenity, incorporation of Eighth Amendment principles, and caution regarding habitual offender statutes); John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015) (observing historical trend toward weak double jeopardy jurisprudence, suggesting ameliorating ambiguities by application of traditional Eighth Amendment principles, a rejuvenated lenity jurisprudence, and strict construction of penal statutes); Jack Balderson, Jr., *Temporal Units of Prosecution and Continuous Acts: Judicial and Constitutional Limitations*, 36 SAN DIEGO L. REV. 195 (1999) (suggesting reversal of current presumptions, and creation of presumption against multiple prosecutions unless there is clear legislative intent to the contrary); Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965) (identifying evidentiary test and behavioral test); Michelle A. Leslie, *State v. Grayson: Clouding the Already Murky Waters of Unit of Prosecution Analysis in Wisconsin*, 1993 WIS. L. REV. 811 (1993) (suggesting legislative intent should control).

Easily discernable from the jurisprudence, however, is that multiple patterns alleged against a defendant must reflect actual distinct patterns found in the evidence. *Jennings*, 155 N.H. at 768 (multiple pattern indictments reflecting multiple variants of sexual assault); *Fortier*, 146

N.H. at 784 (two pattern indictments reflecting two victims); *Krueger*, 146 N.H. at 541 (multiple indictments reflecting multiple acts appearing in video); *State v. DeCosta*, 146 N.H. 405 (2001) (multiple pattern indictments reflecting escalating conduct); *State v. Castine*, 141 NH 300, 305 (1996) (multiple pattern indictments reflecting escalating conduct); *State v. Wilbur*, N.H. Sup.Ct. No. 2011-0627 (Dec. 14, 2012) (unreported) (multiple pattern indictments reflecting patterns of conduct occurring in multiple locations); *State v. Spinner*, N.H. Sup.Ct. No. 2005-0692 (Jan. 31, 2008) (unreported) (multiple pattern indictments where "each indictment involved different acts of sexual assault").

While this court has allowed small differences to constitute separate patterns, it has nonetheless demanded that there be some material differences in the acts to justify separate pattern allegations.[8] In *Richard*, 147 N.H. at 343, this court allowed ten pattern counts regarding a single victim because "each charged a particular variant of sexual assault different from that charged in the other pattern indictments." In *Jennings*, 155 N.H. at 776, this court specified that one group of assaults occurred in 2002 and 2003 in Nashua, another occurred in 2003 and 2004 at Wellesley Street in Milford, and the third occurred in 2004 and 2005 at King Street in Milford. This court then allowed the three pattern counts regarding the single victim because "the pattern indictments allege[d] three separate sets of acts during three discrete time periods at three different locations." *Jennings*, 155 N.H. at 778.

The superior court in Mr. Martinko's case distinguished *Jennings* on the basis that the differing locations was not a decisional characteristic, ORDER ON MOTION TO VACATE PLEA

[8]Because the purpose of the pattern statute is to allow for inexactitude by young or inarticulate victims, this court has approved pattern prosecutions where the alleged dates are inexact, *State v. Lakin*, 128 N.H. 639 (1986), and where there is overlap between the alleged pattern and alleged discrete acts. *State v. Fortier*, 146 N.H. 784 (2001); *see also State v. Ericson*, 159 N.H. 379 (2009); *State v. Hannon*, 151 N.H. 708 (2005).

AND SENTENCES at 9 (June 7, 2017), *Addendum* at 36 (location "distinction is not decisional, that is, it is not material"), and therefore found no double jeopardy violation here.

First, in *Jennings*, location was indeed decisional. Second, the point, which the superior court appears to have missed, is that there was *some* non-arbitrary difference among the *Jennings* indictments, such that multiple patterns could be distinguished, and that the differing patterns alleged in the indictments reflected the differing patterns appearing in the evidence.

In Mr. Martinko's case, the State alleged three pattern Informations. Cumulatively, the alleged patterns began on September 1, 2010, and ended on October 31, 2013. The dates the State chose to begin and end each pattern between the cumulative start and end dates, however, do not appear to reflect any pattern-centered difference in the evidence. The three identical Informations alleged the same act of sexual assault, against the same victim, in the same location. The only difference among them was the start and end dates, but nothing in the record evidence suggests those start and end dates were at the start or end of any distinct patterns.

To be constitutionally valid, the charged patterns cannot be arbitrarily disconnected from the evidence. Because the distinctions in this case are arbitrary, the patterns alleged against Mr. Martinko violated his State and Federal Constitutional protections against double jeopardy.

Moreover, this court should consider adopting the dissent's position in *Jennings*, which would hue closer to the legislative language, and require any pattern that occurs within the five-year statutory timeframe to be charged as a single pattern. *Jennings*, 155 N.H. at 779 (Dalianis, J., dissenting). Because Mr. Martinko's conduct was contained within a three-year period, he should not have been charged for more than a single pattern.

III. Ineffective Assistance of Counsel

Because Mr. Martinko's constitutional rights were violated, his plea-and-sentencing counsel was ineffective.

> 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. A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective. To satisfy the first prong of the test, the performance prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness.... To satisfy the second prong, the prejudice prong, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. Brown, 160 N.H. 408, 412-13 (2010) (quotations and citations omitted).

The superior court assumed that if Mr. Martinko's "defense attorney had advised him that his pleas were in violation of the Double Jeopardy Clauses of the New Hampshire and United States constitutions, he would not have entered pleas of guilty," and that thus "the second prong of the ineffective assistance test, concerning whether the result would have been different, has been met." ORDER ON MOTION TO VACATE PLEA AND SENTENCES at 3 (June 7, 2017), *Addendum* at 36. That Mr. Martinko's three sentences are to be served consecutively, moreover, makes the prejudice manifest. *See Krueger*, 146 N.H. at 544 (prejudice mitigated where multiple convictions consolidated for sentencing).

Regarding the first prong, however, the superior court held that because, in its view, Mr. Martinko's pleas did not violate double jeopardy, there was no ineffective assistance. It therefore dismissed Mr. Martinko's motion to vacate his pleas. ORDER (June 7, 2017).

Given that the superior court's finding regarding double jeopardy was in error, however, it misjudged the ineffective assistance claim, and this court should reverse.

CONCLUSION

For the foregoing reasons, this court should hold that Mr. Martinko's pleas violated his State and Federal protections against double jeopardy, and that his trial counsel therefore provided ineffective assistance. This court should thus reverse two of the three convictions, and remand for re-sentencing on the remaining Information.

REQUEST FOR ORAL ARGUMENT

Although this matter is controlled by *Jennings,* there may be residual ambiguity regarding the specificity with which criminal pattern allegations must be reflective of the patterns in the evidence. Accordingly, oral argument will be informative.

Respectfully submitted,

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Dated: December 8, 2017

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on December 8, 2017, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: December 8, 2017

Joshua L. Gordon, Esq.

ADDENDUM