State of New Hampshire
Supreme Court

NO. 2005-0521

2006 TERM

JULY SESSION

STATE OF NEW HAMPSHIRE

V.

DAVID VOGEL

RULE 7 APPEAL OF FINAL DECISION OF
BELKNAP COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT DAVID VOGEL

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

FEDERAL CASES

NEW HAMPSHIRE CASES

OTHER STATES' CASES

NEW HAMPSHIRE CONSTITUTION, STATUTES & RULES

SECONDARY SOURCES

QUESTIONS PRESENTED

1. Did the court err by instructing the jury that the parental privilege defense is not available when a parent causes bodily injury while disciplining his child?
   Preserved: 2 *Trn.* at 301, *et seq.*

2. Did the court err in failing to instruct the jury about which party bears the burden of proving the elements of the parental privilege defense, and about what level of proof is necessary, even though the error was not brought to the court's attention during trial?
   Preserved: Defendant's Motion to Set Aside Verdict and Demand for New Trial

3. Was there insufficient evidence to convict Mr. Vogel of assaulting his child when the acts occurred during reasonable discipline, and when there was no proof that the use of force created a risk of death, serious bodily injury, or substantial pain?
   Preserved: Trial, *passim*

STATEMENT OF THE FACTS

David Vogel was residing in Alton, New Hampshire with his wife Tina and their six children, who range in age from 7 to adult. Mr. Vogel is engaged in a variety of business ventures, which he runs from a computer in an upstairs bedroom of their home.

On March 31, 2004, Tina was away relaxing at a spa. Mr. Vogel was home with the four youngest children, Baron (12), Ethan (7), Caitlyn (8), and also Evan (14), who, because of his history of psychological issues, violent behavior, and encounters with the police, was home from his specialized boarding school. Also present was the family's housekeeper, Janice Hanscom.

Mr. Vogel played with the children when they came home from school, and then went back to work upstairs with a promise to later take them out to dinner. 1 *Trn.* at 215. Around suppertime, there was some disagreement among the children about either where or when to eat. All of the witnesses testified that there was a pillow fight among the children on the main floor of the house. *Trn.* at 42 (Baron), 93 (Evan), 117 (Ethan), 130 (housekeeper), 217 (Mr. Vogel).

Believing that it was getting out-of-hand, and worried that the oldest boys might hurt the two youngest children, Mr. Vogel intervened. *Trn.* at 112 (testimony of Evan), 216 (testimony of Mr. Vogel).

In the background of this family drama are some issues with 14-year-old Evan. According to several of the witnesses, he has some psychological and behavioral problems, including a history of violence, use of weapons, and police contact, and lives away from the family at a special school. *Trn.* at 72, 106-07, 223, 225.

When Mr. Vogel broke up the pillow fight, he encountered obstinance from Baron, who is generally quiet and pleasant. *Trn.* at 132, 138. Evan, however, as is apparently his nature, *Trn.* at

133, 225, may have been encouraging Baron's defiance. *Trn.* at 225.

In any event, as a parent Mr. Vogel consistently worried that Baron would turn out like Evan, and Baron's obstinance provoked these concerns. *Trn*. at 134, 252. Believing that moderate corporal punishment is consistent with western civilization, *Trn*. at 273, Mr. Vogel slapped him on the cheek. *Trn*. at 288-89.

What exactly happened next cannot be discerned from the record because the witnesses' testimony is inconsistent. It is possible to glean, however, that there were two separate incidents. The first, begun by Baron burping in a way that Mr. Vogel perceived as purposely provocative, occurred in the foyer. Mr. Vogel and Baron were on the floor, then Baron kicked Mr. Vogel off of him, and finally Baron smashed Mr. Vogel into a wall or door. None of this, however, became part of the criminal charges. *Trn.* at 75-76, 83-84, 87, 92- 96, 231.

Mr. Vogel testified he tried to retreat, *Trn*. at 221, but according to the witnesses, Baron then picked up a stool and threw it at Mr. Vogel, *Trn.* at 51, 78, 95-96, 116, 119, 121, which hit Mr. Vogel in the arm and drew blood. *Trn*. at 197, 201, 277, 288. According to Baron and all witnesses, Mr. Vogel responded by pushing Baron into a chair in the livingroom and slapping Baron several times on the face with the palm of his hand. *Trn*. at 48-49, 79, 95-97, 127, 130, 153, 224. During this, according to the housekeeper, Mr. Vogel was telling Baron, "You're not gonna end up like Evan, you're not gonna be a psycho like your brother, you're not gonna turn out like Evan." *Trn*. at 134. Mr. Vogel also told Baron to behave and that it is not appropriate for a boy to "raise his hand to his father." *Trn.* at 221-22.

It is unclear how many times Mr. Vogel slapped Baron. Both Baron and Evan testified they did not know how many times Baron was slapped. *Trn.* at 49, 97. Seven-year old Ethan

said it was "like 60." *Trn*. at 121. The housekeeper, who came into the room just after the slapping had begun, testified it was five or six times. *Trn*. at 131. Mr. Vogel recollected a total of seven slaps: one after Baron defiantly burped at him, *Trn.* at 218, three after Baron threw the stool, *Trn.* at 221, and then four more after Baron threw another object, *Trn.* at 222, for a total of seven. *Trn*. at 228-29.

The housekeeper, who had previously been in the kitchen but went to the livingroom when she heard the commotion, stepped between Mr. Vogel and Baron and ended the slaps by putting her hand on Mr. Vogel's shoulder and telling him to stop. *Trn.* at 50, 80, 101, 123, 131, 222.

At that point, Baron went into what Mr. Vogel called "a sociopathic state." *Trn.* at 197. Baron either threw or threatened to throw a number of items at Mr. Vogel including several boots, *Trn.* at 219, perhaps a pool cue, a fire poker, a wooden *objet d'art*, or a screwdriver, and threw a shovel at Mr. Vogel's window. *Trn.* at 81, 98, 133, 135, 222-23, 290. The fracas subsided when the housekeeper persuaded the boys to give her the screwdriver and to not go to the kitchen to fetch a knife, *Trn*. at 133, 135. Mr. Vogel returned upstairs. *Trn*. at 132, 223.

Baron's injuries from the incident were limited to bruises. Immediately after the slaps, Baron's face was red and swollen, and he was crying. *Trn.* at 100, 131, 136, 156. The housekeeper testified that there was no blood coming from Baron's face, nose, or lip, *Trn.* at 157, but that she put ice on his face until he fell asleep. *Trn.* at 132, 136. The housekeeper saw no reason to call an ambulance, but did call Tina, the mother who was away on vacation. *Trn.* at 132, 136.

Baron's bruises began to appear a few hours later, about the time Tina came home, *Trn*. at 60, 101-02, 136, and she took Baron to the hospital at about 10:30 P.M. *Trn.* at 168. Treatment,

according to Tina (no medical personnel testified), was ice and Tylenol. *Trn*. at 169. The bruises lasted about two weeks. *Id.*

Regarding the pain it caused him, Baron testified, "I can't really remember." *Trn*. at 66.

STATEMENT OF THE CASE

Mr. Vogel was charged with 3 assaults:

- Felony second degree assault. Knowingly cause bodily injury, "bruises and swelling," to a child under 13, "by repeatedly striking . . . in the face with his hands." RSA 631:2, I(d). INDICTMENT 04-S-298 (Aug. 5, 2004), *appx*. at 27.

- Misdemeanor simple assault. Knowingly cause unprivileged physical contact with a person "by striking him about the face." RSA 631:2-a, I(a). INFORMATION 04-S-276 (July 16, 2004), *appx*. at 28.

- Misdemeanor simple assault. Recklessly cause bodily injury, "contusions and bruises," to a person "by striking him about the face." RSA 631:2-a, I(b). INFORMATION 04-S-275 (July 16, 2004), *appx*. at 29.

The three assaults were charged as alternative theories – Mr. Vogel could be sentenced for just one of the three. *See State v. Flynn*, 151 N.H. 378, 385 (2004). He was found guilty of all three by a Belknap County jury (*Larry M. Smukler*, J.). For the felony Mr. Vogel received a sentence of 1 to 7 years, committed, with requirements of counseling. No sentence was imposed for the two misdemeanors.

Mr. Vogel's trial counsel filed a notice of appeal. After appellate counsel appeared in this Court, appellate proceedings were stayed for several months while the parties attempted to reach a negotiated disposition. During that time, Mr. Vogel asked the superior court to set aside his verdict and grant a new trial, which was denied. MOTION TO SET ASIDE VERDICT AND DEMAND FOR NEW TRIAL (Mar. 7, 2006), (omitted from appendix due to voluminousness and limited usefulness here); NOTICE OF DECISION (Mar. 20, 2006), *appx*. at 33. This appeal resumed, and a motion to add appellate questions was granted.

SUMMARY OF ARGUMENT

Mr. Vogel first notes the parental prerogative to use force to discipline their children, firmly rooted in Anglo-American jurisprudence, is statutorily recognized in New Hampshire. He then points to the instructions used here, which he argues undermined the parental privilege defense by informing the jury, contrary to New Hampshire law, that the defense is not available when a parent causes bodily harm to a child.

Mr. Vogel then points out that the court did not instruct the jury regarding which party bears the burden of proving the parental privilege defense, and the level of proof necessary. He compares this failure to established New Hampshire law which requires an adequate instruction. He argues that despite his trial attorney's neglect in requesting the instruction, the error should be recognized by this court.

Finally, Mr. Vogel concedes that although there was sufficient evidence to convict him of the crimes charged *without* the parental privilege defense, the State made little or no effort to rebut the defense. He argues that had the correct instruction been provided, the evidence is not capable of proving guilt beyond a reasonable doubt and that his convictions should therefore be reversed.

ARGUMENT

I. Court's Instruction on Causing Bodily Injury Directed a Verdict for the State

A. Parents May Use Force as Long as They Do Not Create a Risk of Death, the Injury They Inflict Is Not Serious, and the Pain They Cause Is Moderate

It is well recognized that parents have a fundamental liberty interest in maintaining familial relationships with their children, *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), and the right "to direct the upbringing and education of children under their control." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925). Providing discipline and punishment is among the rights of parents.

Discipline and punishment includes the use of reasonable force to control the child's behavior. *See* Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense – Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413 (all 50 states allow reasonable parental corporal punishment of children). *See also* William Blackstone, *Commentaries on the Laws of England* 120, 440 (1768) (Oxford Reprint 1966) ("[B]attery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or a master, gives moderate correction to his child, his scholar, or his apprentice.") (Parent "may lawfully correct his child, being under age, in a reasonable manner. For this is for the benefit of his education.").

The New Hampshire Legislature has codified these rights by statute entitled "Physical Force by Persons With Special Responsibilities":

> A parent, guardian or other person responsible for the general care and welfare of a minor is justified in using force against such minor when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct.

RSA 627:6, I (teachers and others who care for minors included in statute). *In re Ethan H.*, 135

N.H. 681, 688 (1992) ("This statute merely codified the 'well-recognized precept of Anglo-American jurisprudence that the parent of a minor child or one standing *in loco parentis* was justified in using a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare.'"). The Legislature has also codified the "necessity" defense, into RSA 627:3, "competing harms," which the defendant here also claimed. *State v. Dorsey*, 118 N.H. 844 (1978).

A parent may be subject to criminal prosecution, however, if discipline or punishment exceed the bounds of reason. *State v. Leaf*, 137 N.H. 97 (1993) (defendant struck child more times than was reasonably necessary). The New Hampshire Legislature has codified this limitation: "The justification . . . does not apply to the malicious or reckless use of force that creates a risk of death, serious bodily injury, or substantial pain." RSA 627:6, IV.

Thus parents in New Hampshire may use force in disciplining or punishing their children as long as they do not create a risk of death, the injury they inflict is less than "serious," and the pain they cause is moderate. Patricia E. Weidler, *Parental Physical Discipline in Maine and New Hampshire: an Analysis of Two States' Approaches to Protecting Children from Parental Violence*, 3 WHITTIER J. CHILD & FAM. ADVOC. 77, 113 (2003) ("New Hampshire laws permit parents to hit, slap, grab, squeeze, spank, and beat their children."). Moreover, the use of force may be directed toward both past and future behavior. The statute allows force "necessary to *prevent* or *punish* . . . misconduct." RSA 627:6, I (emphasis added).

B. Parents May Cause Bodily Injury in Disciplining Children

"Serious bodily injury" is defined as "harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body." RSA 625:11, VI. Bodily injury that is not "serious" is injury short of this definition, and includes cuts and bruises. *See, e.g., State v. Saucier*, 128 N.H. 291, 294 (1986).

Thus, in *Ingraham v. Wright*, 430 U.S. 651, 657 (1997), the United States Supreme Court found that a teacher acted reasonably when his student "was subjected to more than 20 licks with a paddle while being held over a table in the principal's office," which resulted in a hematoma and missing school for several days. And in *State v. Wilder*, 748 A.2d 444, 455 (Me. 2000), the Maine Supreme Court (where the law is similar to New Hampshire's, *see* Weidler, *Parental Physical Discipline in Maine and New Hampshire*, 3 WHITTIER J. CHILD & FAM. ADVOC. at 102), found that when a father grabbed his son on three occasions of discipline hard enough to cause "transient pain" and "temporary bruises," he acted reasonably, and thus reversed his convictions for assault. *Wilder*, 748 A.2d at 455; *see also Moakley v. State*, 547 So.2d 1246 (Fl. App. 1989) (parent struck his 8-year old daughter on the buttocks with a belt and leaving bruises; court held evidence not sufficient to support conviction); *State v. Kaimimoku*, 841 P.2d 1076 (Haw. App. 1992) (parent slapped 17 year-old daughter and punched her on her shoulder with a closed fist causing bruising and a scratch; court held evidence not sufficient to support conviction); *State v. Deleon*, 813 P.2d 1382 (Haw. 1991) (father hit 14 year-old daughter six to ten times with belt causing pain and bruises lasting a week; court held evidence not sufficient to support conviction); *State v. Miller*, 746 So.2d 118 (La.App.1999) (parent slapped daughter causing "several knots on her head and forehead, bruises on her body, and scratches on her throat"; court held evidence not

sufficient to support conviction – but subsequently pinning child down and choking beyond "reasonable discipline" and therefore sufficient for conviction); *State v. Ivey,* 648 N.E.2d 519 (Ohio App. 1994) (parent whipped 10-year-old son on buttocks and legs with belt leaving welts and bruises; court held evidence not sufficient to support conviction); Annotation, *Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis*. 89 A.L.R. 2d 396 (numerous cases cited).

In the present case the court instructed the jury regarding the defense of parental use of disciplinary force as follows:

> A parent responsible for the general care and welfare of a minor is privileged to use force against a minor when and to the extent he reasonably believes it necessary to prevent or punish such minor's misconduct. The privilege does not apply to the malicious or reckless use of force that creates a risk of death, serious bodily injury, or substantial pain.

2 Trial Trn. at 338. Although initially this is an accurate statement of the defense, the court went on to give the jury several incorrect instructions that undermined the defense. The judge told the jury:

- "This charge, however, involves an allegation that the defendant knowingly caused bodily injury. A parent may not knowingly cause bodily injury to a child as is alleged in the second degree assault indictment." *2 Trial Trn.* at 339.
- "A parent may not recklessly cause bodily injury to a child." *2 Trial Trn.* at 337.
- "Bodily injury means harm to the body of another person to any – in any degree." *2 Trial Trn.* at 336.

Thus, the Court effectively instructed the jury that while there is a parental privilege to discipline a child, that privilege *cannot apply* if the parent causes *any injury* to the child. This is an incorrect statement of the law.

The court apparently based its view of the law on *State v. Leaf*, 137 N.H. 97 (1993) (during bench conference, court apprized parties: "I think *State v. Leaf* governs that the [parental use of force] privilege does not allow a parent to knowingly cause bodily injury while – to a charge that the parent knowingly caused bodily injury, which is what the second degree-assault is." *2 Trial Trn.* at 302.).

In *State v. Leaf*, the defendant, who raised the parental privilege defense, was convicted of second degree assault for having caused "multiple bruises to his stepson by striking his back, buttocks and thighs with a belt" when the defendant discovered that the child had hidden dirty dishes rather than wash them as instructed. On appeal the "sole issue raised by the defendant . . . is the sufficiency of the evidence to convict." *Leaf*, 137 N.H. at 97. This Court wrote:

> For the defendant's use of force to have been justified, he must have reasonably believed it necessary to prevent or punish his stepson's misconduct. The operative word is "reasonable," which is determined by an objective standard. A belief which is unreasonable, even though honest, will not support the defense.

Leaf, 137 N.H. at 99 (citation omitted). This Court noted that the defendant testified he intended "to strike the child only three times" but in fact struck him ten times. It thus found that his belief was not reasonable, and affirmed the conviction.

The court here in Mr. Vogel's case understood *Leaf* to mean that the parental "privilege does not allow a parent to knowingly cause bodily injury." But *Leaf* says nothing about that; implicit in *Leaf* is precisely the opposite. If Mr. Leaf had struck the child only three times, reasonably believing it was the amount of force necessary, even if bruises were caused, the use of force would have been permissible.

Leaf is in accord with the body of New Hampshire law on this matter. *See Petition of*

Jane Doe, 132 N.H. 270, 277 (1989) (mother, who hit son twice for misbehavior resulting "in a swollen lip and a bruise on the head" not liable for abuse because "reasonable forms of corporal punishment . . . do not threaten the well-being of the child"); *In re Ethan H.*, 135 N.H. 681, 686-87 (1992) (mother who "intentionally struck her 6 year-old son with a belt across his bare buttocks about 6 times, causing linear bruises which were still visible after 5 days" not liable for abuse because legislature "established as policy that reasonable corporal punishment is allowable"); *In re Juvenile 2002-209*, 149 N.H. 559, 564 (2003) (father, who allegedly slapped three-year old daughter, resulting in facial bruises, not liable for abuse as injuries caused no harm).

C. Court Improperly Directed a Verdict of Guilt

It is thus clear that there are circumstances in which a parent may lawfully cause bodily injury to a child. In Mr. Vogel's case, the court told the jury the opposite – that a parent may not cause bodily injury to a child – and that as a matter of law once the defendant caused a bruise, he could not rely on the parental justification defense, RSA 627:6, or the competing harms defense. RSA 627:3. Because it was undisputed that the child was bruised, and the defense did not contest that blows had been struck by the parent, the instruction unlawfully amounted to a directed verdict of guilt. *See State v. Johnson*, 134 N.H. 498 (1991) (resisting application of *res judicata* in criminal case as it would violate due process right to require state prove all elements of crime beyond a reasonable doubt). Accordingly, Mr. Vogel's convictions should be reversed.

II. Court Failed to Provide the Jury Instructions About Who had the Burden to Prove or Disprove Defenses and About the Standard of Proof as to Defenses

It is elementary that the state must prove beyond a reasonable doubt every essential element of the offenses charged against a defendant. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *State v. Wentworth*, 118 N.H. 832 (1978).

"When evidence is admitted on a matter declared by [the criminal] code to be . . . [a] defense," however, "the state must disprove such defense beyond a reasonable doubt." RSA 626:7, I(a). Thus, when the court allows a defendant to plead a statutory defense, the burden does not flip – the State must still disprove its elements. And the level of proof is the same as the elements of the crime – beyond a reasonable doubt. *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998) ("[W]hen a defendant has presented sufficient evidence to raise the issue of entrapment for the jury, proof that the defendant was not entrapped effectively becomes an element of the crime.").

Mr. Vogel plead two statutory defenses – "Physical Force by Persons with Special Responsibilities," RSA 627:6, I, and "Competing Harms," RSA 627:3, I. *See* 8/9/04 *Trn*. at 4, 8; NOTICE OF DEFENSE (Dec. 14, 2005). The court accepted them both, *see* NOTICE OF DECISION (Feb. 2, 2005), and at trial there was evidence reasonably tending to indicate the existence of both, such that Mr. Vogel was entitled to have the judge instruct the jury that the burden of disproving them was the State's. *See State v. Cooper*, 135 N.H. 258 (1992) (lack of consent is defense which requires State to prove consent); *United States v. Gamache*, 156 F.3d 1 (1st Cir. 1998) ("A criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it.") (citing *Mathews v. United*

States, 485 U.S. 58, 65 (1988)).

The court's error was in failing to instruct the jury of the State's burden concerning the defenses. A review of the instructions given to the jury confirms that the court provided the standard instruction on the State's burden of proof regarding each element of each of the crimes charged. *2 Trial Trn.* at 334-38. But there simply is no mention in the instructions about the State's burden to disprove the defenses, nor about the level of proof necessary.

The jury was thus left with no guidance as to whether it was Mr. Vogel who had the burden to prove his defenses, whether the State had the burden to disprove them, or (regardless of who should bear the burden) what was the standard of proof as to the defenses. In the absence of such an instruction, it is likely – or at least possible – that the jury assumed it was Mr. Vogel's burden to prove his defenses, or that the State bore a burden lower than beyond a reasonable doubt, or some other assumption.

The failure to provide a proper instruction requires reversal of the conviction. *See United States v. Gamache,* 156 F.3d 1 (1st Cir. 1998).

III. Failure to Instruct About Burden of Proof as to Defenses Was Error That Should be Addressed

During trial, Mr. Vogel's attorney neglected to object to the faulty instruction, or to request a correct instruction, regarding who bears the burden of proof as to defenses and the level of proof required. During the time this appeal was stayed, Mr. Vogel filed a pleading in the superior court requesting that these matters be addressed, and alleging both ineffective assistance of counsel and plain error. MOTION TO SET ASIDE VERDICT AND DEMAND FOR NEW TRIAL (Mar. 7, 2006). The motion was denied. NOTICE OF DECISION (Mar. 20, 2006), *appx.* at 33.

By whatever procedural route is appropriate, this Court should reach the merits of this issue, and reverse Mr. Vogel's conviction on the grounds that the jury was given no guidance on which party bore the burden of proof, and the level of proof necessary, regarding Mr. Vogel's defenses.

A. Motion to Set Aside Verdict

A motion to set aside a verdict is granted "for the reasons of mistake, partiality, or corruption," *Broderick v. Watts*, 136 N.H. 153, 162 (1992) (distinguishing standard if request is based on a verdict against the weight of the evidence), or if prejudice has been caused by one of those factors. *Ricard v. Prudential Ins. Co. of America*, 87 N.H. 31 (1934).

Here there was a mistake of law – the jury was not instructed regarding the level of proof as to Mr. Vogel's defenses, and which party bears the burden. It prejudiced Mr. Vogel because the jury convicted him even though the State made no effort to disprove his defenses. His convictions should thus be set aside.

B. Motion for New Trial

A motion for a new trial is granted "when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable." RSA 526:1. Any doubt regarding whether a party had a fair trial must be resolved in favor of granting a new trial. *Hopley v. Chronicle & Gazette Publishing Co.*, 94 N.H. 171, 174 (1946).

Although a new trial will not be granted when there is merely speculation that the jury misunderstood its instructions, *Thayer v. Stevens*, 44 N.H. 484 (1863), "where there seems to be a strong probability that the charge may have been understood to state an erroneous rule" of law, the verdict will be set aside. *Saloshin v. Houle*, 86 N.H. 132 (1933).

Here there was an accident, a mistake, or a misfortune, in that the jury was not instructed regarding the level of proof as to Mr. Vogel's defenses, and which party bears the burden. Because the jury convicted Mr. Vogel even though the State made no effort to disprove his defenses, there is a strong probability that the charge was not properly understood. In these circumstances Mr. Vogel could not have received a fair trial, and he should therefore get a new one.

C. Ineffective Assistance of Counsel

Relief based on ineffective assistance of counsel is granted when counsel is deficient, and the deficiency prejudiced the defendant's case. *State v. Flynn*, 151 N.H. 378 (2004).

"Deficient" means that the attorney "made such egregious errors that he or she failed to function as the counsel that the . . . Constitution guarantees," *State v. Dewitt*, 143 N.H. 24, 29 (1998) (brackets omitted), or that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Breest v.*

Perrin, 125 N.H. 703, 706 (1984) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

"Prejudice" means that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Breest*, 125 N.H. at 706 (quoting *Strickland*, 466 U.S. at 686).

In *State v. Henderson*, 141 N.H. 615 (1997), the attorney submitted a jury instruction that included an attempted crime in addition to the burglary charged in the indictment. This Court held that the mistake was prejudicial because the defendant testified he swung at the victim; the testimony was irrelevant under the indictment, but was an admission of guilt under the mistaken instruction. *See also State v. Prevost*, 141 N.H. 559 (1997).

There is no question here that trial counsel was deficient: he failed to request an instruction on the most basic tenet of criminal law – that the State has the burden of proof beyond a reasonable doubt – and there is no possible strategic explanation for the failure. Indeed, even after hearing the incorrect instruction, he offered no objection. There is no way to know what standard the jury applied to the elements of Mr. Vogel's defenses, but it is reasonable to believe the jury misunderstood the law. Thus Mr. Vogel was prejudiced in that there is a reasonable probability that the outcome is not reliable.

Mr. Vogel received ineffective assistance of counsel, in violation of his state and federal rights. U.S. CONST. amds. 5, 6 & 14; N.H. CONST. pt. I, art 15. His convictions should therefore be reversed.

D. Plain Error

Under this Court's plain error rule, the court considers "the following four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. *State v. Taylor*, 152 N.H. 719 (2005); SUP.CT.R. 16-A; SUPER.CT.R. 102-A. The plain error rule applies to improper jury instructions. *See State v. Emery*, 152 N.H. 783 (2005).

In the context of jury instructions, error arises if "the jury, considering the instructions as a whole, was misled." *United States v. Pappert*, 112 F.3d 1073, 1076 (10th Cir. 1997). An error is plain if it is contrary to settled law. *United States v. Gilberg*, 75 F.3d 15, 18 (1st Cir.1996) (court may reverse for plain error only if the error "was or should have been 'obvious' in the sense that the governing law was clearly settled to the contrary") (cited in *Emery*, 152 N.H. at 787). A plainly erroneous jury instruction affects a defendant's "substantial rights" when the instruction does not clearly and succinctly state the elements necessary for conviction. *See State v. Doolittle*, 896 S.W.2d 27 (Mo. 1995). The fairness and integrity of a defendant's trial is "seriously affected" when the defendant has presented evidence of a defense which is then undermined by an instruction that ignores it. *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998) ("[T]he fairness or integrity of a defendant's trial is 'seriously affected' when the defendant has presented substantial evidence in support of an affirmative defense which has been undermined by an erroneous instruction."); *State v. Haycock*, 146 N.H. 5 (2001) (error to not provide jury with charge regarding defense of others after defendant presented "'some evidence'" to support a rational finding in favor of the defense"); *c.f., Johnson v. United States*, 520 U.S. 461, 469 (1997) (failure to submit the issue of materiality to jury in perjury prosecution not seriously affect

integrity of proceeding when evidence on materiality "overwhelming").

In Mr. Vogel's case, the law is settled that once a defendant has put forth "some evidence" – but "more than a 'minutia or scintilla of evidence'" – of a defense, the court "must grant a defendant's requested jury instruction on a specific defense." *Haycock*, 146 N.H. at 9 (2001); RSA 626:7, I(a). It is thus "obvious" that "the governing law was clearly settled to the contrary" of the court's action. *Gilberg*, 75 F.3d at 18.

The error here affected the fairness and integrity of the proceeding. An erroneous jury instruction that leads to a conviction where an important element may not have been found against a defendant strikes at the root of the criminal justice system – the presumption of innocence until there is proof beyond a reasonable doubt – and Mr. Vogel's substantial rights. Without an instruction as to who must prove or un-prove the defense, and what amount of evidence is necessary to do so, it would be natural for a jury to place the burden on the defendant. A jury, following the given instructions to the letter, might easily determine that the State had proven each element of the offense beyond a reasonable doubt and that Mr. Vogel had failed to meet his burden of proving his defenses. The deficient instruction thus brings the integrity and fairness of the proceeding and the verdict into question.

The situation presented in *United States v. Duran*, 133 F.3d 1324 (10th Cir. 1998), is similar to Mr. Vogel's. In *Duran* the defendant sold drugs to an undercover FBI agent, but presented sufficient evidence to state the defense of entrapment because the agent was the one who suggested the sale. Although the court's instruction to the jury misstated the government's burden of proof as to the defense, the defendant's lawyer neglected to object. The court found it settled that "the law of entrapment requires the government, not the defendant, to prove

predisposition" to commit the crime. *Id.* at 1332. The court also found that the misleading instruction affected substantial rights because a "legally incorrect jury instruction on the principal elements of the offense or a defense . . . affect[s] the outcome of the trial proceedings." *Id.* at 1333. Finally, the court found that:

> the district court's plain error seriously affected the fairness, integrity, and public reputation of Duran's trial because it allowed the jury to reach a conviction without requiring the government to prove all of the elements in the case beyond a reasonable doubt. In light of the revered status of the beyond-a-reasonable-doubt standard in our criminal jurisprudence, a jury instruction that allows a conviction where one important element may not have been found against the defendant by such a standard cannot be overlooked.

Id. at 1334. The court thus ordered a new trial.

E. By Whatever Procedural Route, Failure to Properly Instruct the Jury Should Result in Reversal of Mr. Vogel's Convictions

Whether procedurally this court reaches the merits of the deficient instruction by the defendant's motion to set aside the verdict, his motion for a new trial, his allegation of ineffective assistance of counsel, or on plain error, Mr. Vogel's was not provided a fair trial as a result of the neglect to properly instruct the jury. Accordingly, the issue should be reached and his convictions should be reversed.

IV. The Evidence Was Not Sufficient to Convict Mr. Vogel

Without his defenses, there easily was sufficient evidence to convict Mr. Vogel of the three assaults with which he was charged. Mr. Vogel testified, admitting he hit his son Baron in the face a total of seven times, and there was undisputed evidence it caused bruises. Had the jury been instructed on his defenses, however, the evidence falls short.

A. Instructions on Defenses Would Have Included the Elements of the Parental Privilege Defense

A full instruction on the parental privilege defense would have told the jury that it is the State's burden to prove, beyond a reasonable doubt, that Mr. Vogel did not reasonably believe the use of force was necessary to prevent or punish his child's misconduct. This justification does not apply, the jury would be told, if it were to find Mr. Vogel maliciously or recklessly used force which created a risk of death, serious bodily injury, or substantial pain. *See* RSA 627:6, I & IV.

B. Jury Would Have Found That Parental Privilege Defense Applied

The State offered no evidence that Mr. Vogel used force maliciously or recklessly.

Even if it did, there was no evidence that his use of force created a risk of death or serious bodily injury. Serious bodily injury is defined as "any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body." RSA 625:11, VI. The State offered no evidence the slaps caused any risk of this sort of injury.

Likewise, there was no evidence that Mr. Vogel's use of force created substantial pain. The only evidence the State offered on the matter was Baron's testimony that he "can't really remember" how much pain the slaps caused. *Trn.* at 66. In any event, reasonable jurors know

that slaps which cause bruises do not result in "substantial" pain, but just moderate or "transient" pain. *State v. Wilder*, 748 A.2d 444, 455 (Me. 2000).

Thus, had the jury been properly instructed, it would have found that the parental privilege defense applied.

C. Jury Would Have Found Mr. Vogel's Use of Force was Reasonably Necessary to Prevent or Punish Misconduct

The parental privilege defense looks both forward and backward. A parent may discipline his child to either "prevent" or "punish" misconduct. Despite the prosecutor's misstatement of the law, *2 Trn.* at 323, the defense thus recognizes both anticipatory and retrospective discipline.

Mr. Vogel testified, and was heard saying to Baron during the slapping, that he was concerned that Baron would follow the example of his older brother Evan, whose behavioral problems kept him from living at home with his family, landed him in a special school, and involved the police. Mr. Vogel's thus reasonably believed his use of force was necessary to prevent misconduct.

There was testimony from several witnesses that Baron took specific action that was being punished – Baron burping in a way Mr. Vogel perceived as purposely provocative, throwing a stool and other objects. During the slaps witnesses heard Mr. Vogel telling Baron that it is not appropriate for a boy to "raise his hand to his father." *Trn.* at 134, 221-22. Mr. Vogel's thus reasonably believed his use of force was necessary to punish misconduct.

If a parent intends reasonable discipline, but then allows his action to go beyond his intentions, the parental privilege provides no cover. *State v. Leaf*, 137 N.H. 97 (1993) (defendant intended three strikes, but committed ten). Mr. Vogel's actions here, however, were

within his intentions, and were objectively reasonable. He first got involved because he was concerned that the pillow fight had escalated to a point where the older boys might hurt the younger girl. Mr. Vogel did not just angrily let loose a volley of blows. He slapped once after a defiant gesture, three times after Baron threw a stool, and four more times after the child threw something else. The three sets of slaps were punctuated by specific misconduct. This shows reasonable action, not uncontrollable abuse.

Even if Mr. Vogel were on the cusp of following into unreasonableness the defendant in *State v. Leaf*, the housekeeper intervened. According to her testimony, she broke up the incident by merely putting her hand on Mr. Vogel's shoulder and telling him to stop. *Trn.* at 131. He stopped and went upstairs. The ease with which Mr. Vogel was drawn away further shows parental concern rather than criminal unreasonableness.

The State's burden to disprove the elements of the parental privilege defense is beyond a reasonable doubt. Had the jury been instructed regarding the parental privilege – told it was the State burden to prove and the high level of proof required – Mr. Vogel could not have been found guilty. Because there is insufficient evidence of guilt, this Court should reverse his convictions.

CONCLUSION

For the foregoing reasons, Mr. Vogel respectfully requests this honorable Court to reverse his convictions.

Respectfully submitted,

David Vogel
By his Attorney,

Law Office of Joshua L. Gordon

Dated: July 13, 2006

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

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for David Vogel requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on July 13, 2006, copies of the foregoing will be forwarded to Stephen Fuller, Esq.

Dated: July 13, 2006

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

APPENDIX