

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0104

State of New Hampshire

v.

Eduardo Lopez, Jr.

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough (South) Superior Court

REPLY BRIEF FOR THE DEFENDANT

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QUESTION PRESENTED

Whether the court unlawfully imposed a sentence constituting the *de facto* equivalent of lifetime imprisonment.

Issue preserved by the parties' pleadings, the hearing on the issue, and the court's orders. S 2-41; DB 45-55; A3-A55.*

* Citations to the record are as follows:

"DB" refers to Lopez's opening brief, which includes as a supplement the trial court's order containing the decisions Lopez appeals;

"SB" refers to the State's brief;

"A" refers to the separate appendix to Lopez's opening brief, containing relevant pleadings;

"S" refers to the consecutively-paginated transcript of the sentencing hearing held in December 2017 and January 2018.

STATEMENT OF THE CASE AND FACTS

In his opening brief, Lopez advances two claims that the trial court erred, as a matter of law, in deciding that a forty-five-year minimum term is not the *de facto* equivalent of lifetime imprisonment. First, he contends that the sentencing court erroneously interpreted the Constitution as guaranteeing only consideration for release before actuarially-projected death, rather than consideration for release at an age at which, if released, a defendant still has a realistic opportunity to build a meaningful, post-prison life. DB 14-37. Second, he contends that, even if the sentencing court correctly construed the Constitution as establishing only a right to consideration for release before the age of projected death, it erred in its manner of calculating that age. DB 37-41.

This reply brief makes three points. First, it responds to the State's use of the unsustainable-exercise-of-discretion standard of review. Second, this brief updates Lopez's opening brief by calling the Court's attention to two pertinent, recently-decided cases from appellate courts in other states. Third, the brief responds to the invited-error argument made by the State in connection with the claim focusing on the manner of calculating life expectancy.

I. A STAND-COMMITTED SENTENCE WITH A MINIMUM TERM OF FORTY-FIVE YEARS CONSTITUTES THE *DE FACTO* EQUIVALENT OF LIFE IMPRISONMENT WITHOUT PAROLE, AND THUS CANNOT BE IMPOSED IN THE ABSENCE OF A FINDING OF INCORRIGIBILITY.

A. The applicable standard of appellate review.

The State describes Lopez’s claim as one subject to deferential appellate review. Accordingly, the State’s brief speaks of the sentencing court as “not exceed[ing] its discretion,” SB 21, and cites to the “unsustainable exercise of discretion” standard of State v. Lambert, 147 N.H. 295, 296 (2001). SB 22-23. In proposing that standard of review for the claim here, the State errs.

Lopez does not argue that his sentence, though within lawful limits, was unwisely chosen. He disputes no finding of fact, and he does not claim that the court erroneously weighed any considerations specific to his case. This appeal instead poses a legal question of general significance: how to define the boundary between sentences that are the *de facto* equivalent of lifetime imprisonment, and sentences that are not? To answer that question, this Court must resolve an interpretive dispute about the content of the constitutional rights described in Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

For the reasons set forth in his opening brief, Lopez contends that the sentencing court imposed an illegal sentence, as being the *de facto* equivalent of lifetime

imprisonment imposed on a juvenile offender not found to be incorrigible. Lopez’s claim thus raises a pure question of law, and this Court owes no deference to a trial court’s interpretation of governing Supreme Court precedent. On the contrary, this Court applies *de novo* review to questions of law. See State v. MacElman, 154 N.H. 304, 307 (2006) (“The issues before us on appeal present questions of constitutional law, which we review *de novo*”).

B. Recent relevant appellate decisions.

Section B of Lopez’s opening brief calls attention to statutes and judicial opinions from other jurisdictions that shed light on the interpretive dispute raised in this case. Footnote four on page thirty collects cases in which courts have held that lengthy term-of-years prison sentences constitute the *de facto* equivalent of lifetime imprisonment. To that list, this brief now adds two recently-decided cases. See Williams v. State, __ P.3d __, 2020 WL 5996442 (Kan. App., October 9, 2020) (Slip op. at 13-14) (holding that term of fifty years to life constitutes *de facto* equivalent of lifetime imprisonment); State v. Kelliher, __ S.E.2d __, 2020 WL 5901213 (N.C. App., October 6, 2020) (Slip op. at 14-16) (same). Because those courts confronted longer sentences than Lopez faces, they had no need to decide whether a forty-five-year term also constitutes the *de facto* equivalent of lifetime imprisonment. The Kelliher court, however, did

confirm that a sentence of twenty-five years to life would not constitute the *de facto* equivalent of lifetime imprisonment. Id. (slip op. at 15).

C. Invited error.

With respect to the manner of calculation of life expectancy, the State first cites an invited-error case in support of the contention that Lopez raised too late his challenge to the use of the CDC tables. SB 28. As set forth in Lopez’s opening brief, the parties litigated, and the sentencing court decided, that question on the merits. DB 37-38. This Court must likewise do so.

Invited error occurs when a party “makes ‘an intentional relinquishment or abandonment’ of a [right].” United States v. Mitchell, 85 F.3d 800, 807 (1st Cir. 1996) (citing United States v. Olano, 507 U.S. 725, 733 (1993)). Stated differently, the doctrine “precludes appellate review of error into which a party has led the trial court, intentionally or unintentionally.” State v. Richard, 160 N.H. 780, 785 (2010).

For example, in State v. Goodale, 144 N.H. 224, 226-27 (1999), the defense in the trial court asked to depose certain prosecution witnesses, and argued only that it had demonstrated sufficient need for those depositions, thus triggering the trial court’s discretionary authority to order depositions. On appeal, the defense made a new and entirely different argument – that the witnesses in question were

experts and thus the trial court had no discretion to deny the depositions. This Court held that the invited error doctrine applied. Having urged one position in the trial court, a party cannot on appeal take a contrary position.

Nothing resembling such a circumstance occurred in Lopez's case. Lopez argued in the trial court the same point with respect to the CDC tables that he argues on appeal. This Court must accordingly reject the State's invited-error argument.

CONCLUSION

WHEREFORE, for the reasons stated above as well as those given in Mr. Lopez's opening brief and those to be offered at oral argument, Mr. Lopez requests that this Court vacate his sentence.

This brief complies with the applicable word limitation and contains approximately 1,050 words.

Respectfully submitted,

/s/ Christopher M. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Elizabeth Woodcock of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson

Christopher M. Johnson

DATED: November 19, 2020