THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0104

State of New Hampshire

v.

Eduardo Lopez, Jr.

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT-SOUTH

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# BRIEF FOR THE STATE OF NEW HAMPSHIRE

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THE STATE OF NEW HAMPSHIRE

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(15-minute oral argument)

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## Statutes



## Constitutional Provisions

## ISSUE PRESENTED

Whether a stand-committed sentence of an aggregate of 45 years of imprisonment to life imprisonment, imposed on a person who, at the time of the offense was seventeen years old, is a *de facto* life sentence.

## STATEMENT OF THE CASE

In 1994, this Court upheld the defendant's convictions for first-degree murder, RSA 630:1–a (1986), first-degree assault, RSA 631:1 (1986 & Supp.1993), attempted first-degree assault, RSA 629:1 (1986), RSA 631:1, and robbery, RSA 636:1 (1986 & Supp.1993). *State v. Lopez*, 139 N.H. 309, 309-10 (1994). The charges stemmed from a series of crimes committed by the defendant on March 23, 1991. *Id.* at 310. Upon conviction, the defendant, who was seventeen years old at the time of the offense, was sentenced to life without the possibility of parole. *Petition of the State of New Hampshir*e, 166 N.H. 659, 662 (2014).

In 2014, this Court held that the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), was retroactive. *Petition of the State of New Hampshire*, 166 N.H. at 662. The United States Supreme Court ultimately agreed. *Montgomery v. Louisian*a, 577 U.S. __, 136 S.Ct. 718 (2016). Because *Miller* ruled that a mandatory sentence of a life without parole on a juvenile was unconstitutional, the court scheduled the defendant for resentencing.

## STATEMENT OF FACTS

### A. Facts

On March 23, 1991, the defendant "approached Roscoe Powers on a Main Street sidewalk in Nashua. The [defendant] pointed a gun at Powers and asked him for money." *State v. Lopez*, 139 N.H. 309, 310 (1994). Powers ran, and the defendant "chased after him, catching up with him as Powers slipped on the ice." *Id.* The defendant shot Powers in the chest. *Id.* Despite this injury, Powers "managed to keep moving," and the defendant "continued to pursue him." *Id.* When Powers "drew a knife and turned to confront [him], [the defendant] was gone." *Id.* Powers survived the assault, but less than an hour later, the defendant "approached Robbie Goyette and a friend as they sat in a car." *Id.* The defendant "pointed a gun and asked the two for money. Goyette refused and drove off." *Id*. The defendant "ran alongside the car and shot Goyette in the neck, killing him." *Id.*

Nashua Police Officer Thomas MacLeod, who had a description from witnesses, searched the area for possible suspects. *Id.* As he "combed the neighborhood," he "heard a loud scream coming from a building on Spring Street, approximately two blocks away from the shootings." *Id.* As the officer neared the building's entrance, the defendant "emerged from the doorway and walked toward him." *Id.* Since the defendant fit the description the officer had been given, "and was carrying a three or four foot long wooden hand rail," the officer told him to stop. *Id*. The defendant ignored the command and the officer "drew his gun and ordered him to drop the hand rail." *Id.*

The defendant responded, "'F--- you. I am not dropping the stick. You're going to have to shoot me.'" *Id.* Officer MacLeod told the defendant "that he did not want to shoot him and, holstering his gun, took some steps toward [the defendant]." *Id*. The defendant "swung the stick at [Officer] MacLeod, striking his shoulder and breaking the hand rail in two." *Id.* The officer grabbed him and "the two fell to the ground, struggling." *Id.* "The two stood up, and [the officer] pushed [the defendant] against the side of the building." *Id.* The defendant "grabbed [Officer MacLeod's] throat" and told him that he would kill him if he did not let him go. *Id.* The officer "eventually succeeded in handcuffing him with the help of another officer." *Id.* at 311.

The defendant was wearing an empty shoulder holster. *Id.* The defendant's gun "was found in a nearby parking lot, but the manufacturer's box for the gun, and [the defendant's] fingerprints on the gun manual inside the box, were found in the building in which [the defendant] was first seen." *Id.*

### B. Pre-Hearing Pleadings

On September 17, 2017, the State filed a recommendation of a sentence of forty years to life in prison on the first-degree murder charge. DA4.[1] The aggregate term of the proposed sentences was 51½ years to life imprisonment. DA4; DA40.

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[1] Citations to the record are as follows:
"DB_" refers to the defendant's brief and page number.
"AD__" refers to the addendum to the defendant's brief and page number.
"DA_" refers to the appendix to the defendant's brief, filed separately, and page number.
"SA_" refers to the addendum to the State's brief and page number.

On October 23, 2017, the defense filed a motion asking the court to apply the *Miller* factors because the proposed sentence was a *de facto* life sentence. DA24. The defense contended that any sentence longer than 35 years of incarceration was a *de facto* life sentence. DA24-A25. As a result, the defense argued, the State should have to prove that the defendant was "incorrigible" in order to justify its proposed sentence. DA27. Attached to the defendant's pleading was an article that examined the life expectancies for juveniles serving life sentences in the Michigan prison system. DA29.

The State filed an objection, arguing that the proposed sentence was not a life sentence. DA 31. It contended that the Michigan article was flawed and that the court should rely on the national vital statistics reports issued by the Center for Disease Control. DA42-A45. The State attached the relevant charts. DA52.

On December 4, 2017, the State filed a sentencing memorandum. SA 67. The State argued that the defendant had committed "intentional violent crimes" and not "spontaneous impulsive acts." SA 80. The State pointed out that the defendant had armed himself with a deadly weapon and made "adult decisions for money." SA 81. He had tried to harm a police officer in order to escape. SA 81. The State pointed out that, when he testified at trial, the defendant blamed the Powers shooting on a friend, Valence Ray. SA 80. The defendant also testified that Ray had murdered Goyette. SA 80. He testified that Ray, who also testified at trial, had lied. SA 84.

In its memorandum, the State contended that the *Miller* mitigating factors were not mandatory, but that, even if they were, the State could

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"T_" refers to the sentencing hearing transcript and page number.

address each of them. SA 81. First, the State argued that the defendant's crimes were not the result of immaturity or a failure to appreciate the risks and consequences, and that his actions bore this contention out. SA 82. After shooting Powers, but before going back to see if Powers had died, he changed his clothing cut his hair, and shaved his beard and mustache to alter his appearance. SA 82.

Second, the State pointed out that the consideration of home environment was not a mitigating factor. The defendant had parents who worked, supported him, and loved him. SA 83. He was not compelled or even encouraged to commit crimes. SA 83.

Third, the State argued that the circumstances of the offense were not mitigating factors. SA 83. He acted alone and there was no peer or family pressure. SA 83.

Fourth, the State pointed out that the case did not involve "incompetencies associated with youth." SA 83. The defendant could assist his lawyers at trial and there was no evidence that his age had affected the charging decisions in the case. SA 83. Finally, the State argued that its recommended sentence considered the possibility of rehabilitation. SA 84.

The State then listed the aggravating factors in the case, which included: (1) that the defendant was armed; (2) that he used a deadly weapon - a piece of wood – in assaulting the police officer; (3) that there were multiple victims and that he chased two of them down; (4) that the victims were strangers and "innocent targets of opportunity"; (5) that the defendant expressed no remorse; (6) that he attempted to hide evidence; (7) that he put others at risk by firing his weapon in public places; and (8) that he lied on the witness stand. SA 84.

The State examined the goals of sentencing under New Hampshire law, concluding that the proposed sentence met all of them: (1) punishment; (2) rehabilitation; and (3) general and specific deterrence. SA 85. The State also looked to similar cases and the impact that the crimes had had on the surviving victims. SA 88-90.

On December 8, 2017, the defendant filed a memorandum summarizing the testimony and evidence presented at the defendant's trial. SA 153.

### C. The Hearing

After the *Montgomery* case was decided, the resentencing court set the case for hearings in preparation for the resentencing. On December 13 and 14, 2017, the resentencing court (*Smukler*, J.) heard from those who were deeply affected the defendant's crimes: Thomas MacLeod, now a retired detective from the Nashua Police Department; Carol Goyette Murphy, and Meri Goyette Reid.

Detective MacLeod recounted his efforts to place the defendant under arrest, his decision not to use deadly force, and the defendant's threats as the detective struggled to subdue him. T 82. He said that, once arrested, the defendant was "extremely argumentative, combative and threatening, which all was captured on surveillance video inside the station." T 82. He said that, as a husband and a father, he was "very concerned the Defendant could be released back into society, thereby placing [the detective's] family and [him] in potential jeopardy of harm." T 83.

The court heard from Goyette's sister Carol, who said that, at the time of his murder, her brother had "a wife, son, parents, and five siblings who loved him. He was a hardworking, honest, family man who had a great sense of humor and loved his family." T 83. At the time that the defendant killed Goyette, Goyette's son had just celebrated his first birthday. T 83. Another sister, Meri Reid, read a letter from Goyette's sister Robin. T 84. Meri Reid also read an impact statement from Goyette's widow who said, that when the defendant was sentenced, she had been "assured that life without parole meant just that in the state of New Hampshire." T 87. She acknowledged that no one knew that the law would change, but that now it was "necessary for [the family], who [were] a part of [Goyette's] life, to relive that time, that pain yet again." T 87. She wrote that the family "still suffer[ed] to this day, longing to see Robbie's smile, hear his laugh, feel the love that he so openly showed to those around him." T 88.

The State then read three statements from family members who could not attend the hearing. T 89. The State read the statements of two of Goyette's bothers, as well as a statement from his widow's sister. The widow's sister recalled being called by her sister the night of the murder, asking if she could babysit. T 92. The widow told her that Goyette "had been shot in the head and was probably brain dead." T 92. She felt, as she heard this, that she "was in the throes of a nightmare," a nightmare that had "never ended." T 92.

The defense called Dr. Stuart Gitlow, an addiction and forensic psychiatrist, T 104-05, and Dr. Antoinette Elizabeth Kavanaugh, a clinical and forensic psychologist, T 132.

The defense asked Dr. Gitlow about the effects of a .16 blood alcohol content, which was the defendant's blood alcohol content at 12:20 a.m. on the early morning after the murder. T 107. The doctor answered that a person with that amount of alcohol would be "unable to think clearly, unable to focus to concentrate, to attend an issue." T 107. If a person had little experience with alcohol, he would probably be asleep; a person who drank alcohol daily "might have lesser effects at .16, but [the effects would] be quite noticeable." T 108. The latter would be "fatigued, disinhibited. The individual would be rambling, slurring speech, and again, still unable to focus on the discussion." T 108. The defense played a few minutes of the defendant's booking video taken in the early morning after the murder and the doctor said that the defendant's demeanor was consistent with that of a person who had a BAC of .16. T 110-12.

The doctor said that it was "difficult" to determine what the defendant's BAC was at the time of the murder. T 112. Even though the murder took place between 8:15 and 8:30 p.m., and the defendant was arrested between 10:00 and 10:30 p.m., the doctor could not determine BAC because he did not know when the defendant had taken his first or last drink. T 113.

Dr. Gitlow said that the defendant used both marijuana and alcohol "for a period of several years prior to the murder, during his teenage years." T 114. This, according to the doctor, would have affected his "wisdom and maturity." T 115.

Dr. Kavanaugh said that she reviewed "thousands of pages of records" and met with the defendant "on two occasions for a total of nine hours." T 148. She interviewed both of the defendant's younger brothers. T

148. She also interviewed the woman who was the defendant's girlfriend at the time of the offense. T 170.

According to Dr. Kavanaugh, the defendant's mother was a nurse and his father drove a truck. T 156-57. The parents were frequently not home, leaving the defendant to be a "supervising quasi-parent" in a project that Dr. Kavanaugh said was "dangerous, violent, and there were a lot of drugs." T 157. She testified that the defendant's parents had a history of domestic violence. T 155. His father did not drink alcohol at home, but was frequently drunk when he came home. T 155-56. The family lived in the Chelsea, Massachusetts housing project. T 157. The doctor statated that the defendant attempted to intervene to protect his mother. T 161.

Dr. Kavanaugh stated that the defendant began using alcohol at age 8 and marijuana between the ages of 12 and 14. T 168. When the defendant was 15 years old, the family moved to Nashua. T 162. The family moved because the defendant "got in trouble with the police because he was stealing cars." T 162. His parents sent him to stay with relatives in California and, when he stayed there, he developed a good relationship with his uncle. T 162-63. When he returned from California, the family had already moved. T 163. The defendant had "a learning disorder, so that was part of it, but he also had some behavioral problems. And those escalated once he moved" to Nashua. T 164.

Dr. Kavanaugh said that the defendant "felt horrible all the time that [he had] been in prison for how [he had] impacted [the victims'] families. [The defendant was] very aware of how his behavior has impacted the families of his victims, and he feels regret and remorse for his behavior that evening." T 173; *see also* T 193 ("[N]ow he's remorseful and he's

regretful, and he understands how his behavior impacted people other than himself which is really important developmentally.").

The defendant also told her that, when he testified in his defense at trial, "it was all a lie." T 174. He lied on the stand because he wanted to go home. T 176. The doctor characterized the defendant's decision to lie as "immature and adolescent thinking." T 175.

The doctor noted that, when he was found guilty, the defendant "cursed, and turned over the table, and he just completely acted inappropriate in court." T 176. She said that this "reflected denial of what he had done and the impact of what he had done." T 177.

The doctor said that the defendant had matured in prison. T 190. He had obtained his GED. T 192. While in prison, "he took an HVAC course that required almost 300 hours of training. He also took another certification course, and he was also involved in the music program." T 192. He held jobs in prison. T 206. According to the doctor, the defendant's family regularly visited him at the prison. T 199-200.

The doctor gave the defendant the *Miller* Forensic Assessment of Symptoms Test (M-FAST). T 211. According to the test, "[t]here was no indication that he was malingering psychological symptoms." T 212. He was also given the Inventory of Offender Risk Needs and Strengths test (IORNS) and she concluded that any concerns raised by those results were "all addressable." T 212-15. She conceded, however, that if the defendant were immediately released, "he would need guidance and supervision" and that if he "were not released, he should receive programs to help him prepare for release." T 218.

The defendant also completed the Childhood Trauma Questionnaire and took the Psychopathic Personality Inventory Revised test. T 218-19. The results on the psychopathic personality test persuaded her that "compared to other male offenders his age, his overall level of psychopathic traits [was] not clinically significant. So he [did not] rank high in the clinically significant range for psychopathic trait." T 221. The defendant, the doctor concluded, did not have a "deep-seated" tendency for violence. T 225. Since being in prison, the defendant had "bettered himself in a pro-social" way. T 227.

On cross-examination, the doctor admitted that the defendant told her that he had lied on the witness stand at his trial because "he thought that other people were lying," including the police officer who had booked him. T 239. She acknowledged that the defendant told her that Powers had used a racial slur before the defendant shot him, but there had been no testimony to that effect at the trial. T 243-44. The State challenged her conclusion that the defendant's family was dysfunctional by using his answers on the Childhood Trauma Questionnaire. T 250-51. On one of the tests, the defendant had scored in the 99th percentile as a potential reoffender. T 257-58. On the overall risk index, he was in the 92nd percentile. T 259. On the IORNS test, the doctor said, the defendant "scored high on the manipulative, high on the impulsivity, and average on anger detachment." T 262.

Dr. Kavanaugh agreed that the defendant filled out a questionnaire in which he stated that that he got "high or drunk' once a week or more while in prison. T 269. For a length of six years, he repeatedly broke prison

rules because he wanted to be transferred to a Massachusetts prison where there were more privileges and better food. T 275-77.

Dr. Kavanaugh said that the defendant bought the gun that he used to shoot Powers and murder Goyette as a "fashion statement." T 280, 286. But on cross-examination, she was confronted with trial testimony that suggested that he selected a gun that was "strong enough to stop somebody" and that he bought hollow point ammunition and a holster that could be concealed. T 282-84.

After Dr. Kavanaugh had finished testifying, the resentencing court heard from the defendant's mother, T 314-15, and his brother Aaron, T 320-26. The defense also read letters from the defendant's brother Jason, and Aaron's wife. T 316-20.

The defendant also addressed the court, expressing remorse for killing Goyette and wounding Powers. T 344-45. The defendant apologized to the court for upending the table and cursing at the jurors when the foreman announced the verdicts. T 346. He expressed a desire to be contributing member of society by working to support his family and by coaching youth basketball and football in Nashua. T 347.

After the hearing, both parties filed supplemental pleadings. SA 36, 124.[2]

The State recounted the testimony of the defendant's two experts, noting that Dr. Gitlow "could offer no definitive opinions regarding the defendant's level of intoxication at the time of his crimes in 1991. He could

[2] The defendant's memorandum is dated December 8, 2017, but the case summary shows that the memorandum and supporting materials were filed on January 29, 2018.

also not confirm that the defendant suffered any cognitive deficits due to drug or alcohol use as a minor in 1991." SA 128. The State dismissed his testimony as "speculative opinions." SA 128.

The State contended that Dr. Kavanaugh was pro-defendant and not objective. SA 129. The State wrote: "No true independent expert would have ignored evidence directly refuting the defendant's version of his crimes, i.e., that his crimes were unplanned and spontaneous, and due to childhood issues and alcohol." SA 129. The State argued that her "opinions about the tests she administered to the defendant and their meaning reflect bias and a lack of thoroughness and should be given little weight." SA 131. The State then analyzed each of the tests, pointing out each inconsistency or deficiency. SA 131-34.

The State turned to the defendant's disciplinary record in prison, arguing "that the defendant continued to commit disciplinary infractions after he was an adult." SA 135. The State emphasized that '[t]hose infractions included violent offenses, which Dr. Kavanaugh attempted to minimize by stating multiple times on direct examination that they were assaults on fellow inmates versus staff." SA 136. The State contended that the defendant had failed to take full responsibility for his crimes, SA 137, and pointed out that the impact on the defendant's three victims was "lasting." SA 139.

On January 29, 2018, the defense filed its sentencing memorandum. SA 36. The defense asked the court to impose a sentence of 27 years to life imprisonment. SA 41. It contended that a sentence that was the equivalent to life without parole required the court to find that the defendant was one of "the incorrigible few." SA 43.

The defense stated that the *Miller* case required the court to consider the "mitigating qualities of youth." SA . In 1991, the defense contended, the defendant "displayed" "the 'hallmark features' of youth." SA 45. The defense contended that the defendant did not "anticipate that his actions would lead to a situation where people would end up harmed and killed." SA 45. The memorandum noted that adolescence is a time of "extreme emotional change and upheaval." SA 46. The defense argued that the defendant's home environment "failed to provide him [with] the supervision, safety, and structure that a child needs." SA 48. The defense pointed out the role that alcohol had played in the offense. SA 51. The memorandum emphasized the defendant's capacity for reform and rehabilitation. SA 54. The defendant, the memorandum contended, had accepted responsibility for his actions and had expressed remorse. SA 58.

The defendant had a "big supportive family" which would give him support upon his release. SA 60. The defense argued that his age made reoffending unlikely; it wrote that "every year he ages makes him less likely to reoffend and thus makes him less of a danger." SA 63.

### D. The Resentencing Court's Decision

On January 30, 2018, the trial court resentenced the defendant. T 357. The court also issued a written order. AD45.

At the hearing, the court imposed a sentence of 45 years to life in prison on the first-degree murder charge. T 358. The court observed that it could not change the remaining sentences, but noted that the police officer who apprehended him was a "hero" who "could easily have taken [the defendant's] life," but who "refrained from doing it." T 359. The court

observed that Goyette's murder was "part of a course of conduct." T 362. The court expressed skepticism about the usefulness of Dr. Kavanaugh's psychological tests, T 364, but gave credit for the "turnaround" that had taken place over the defendant's incarceration, T 364.

In its written order, the court first declined to consider that the defendant had acted purposefully because he was acquitted of premeditated first-degree murder. AD47. The court then turned to the defendant's argument that, if the court imposed a lengthy sentence, it would be a *de facto* life sentence and, therefore, the *Miller* factors should apply. AD49.

The court concluded: (1) that the *Miller* factors do apply to *de facto* life sentences, AD51; (2) that the Center for Disease Control tables provided a reliable basis for projecting life expectancy, AD53-AD54; (3) that a 45-year to life sentence was not a *de facto* life sentence, AD54; and (4) that because the sentence was not a life sentence, the court "need not find that the defendant [was] a 'rare,' 'irreparably corrupt[ ]' type of juvenile," AD55.

## SUMMARY OF THE ARGUMENT

I. The resentencing court did not impose a *de facto* life sentence when it imposed a sentence of 45 years for the defendant's conviction for first-degree murder. The possibility of release at age 62 is not a life sentence. A stand-committed sentence of an aggregate of 45 years, imposed on a person who, at the time of the offense was seventeen years old, is far from a *de facto* life sentence. The resentencing court did not exceed its discretion in determining that it was not.

II. The resentencing court did not err in relying on statistical data in determining life expectancy. The defendant raised the issue of life expectancy and the State responded with the CDC actuarial tables. The court relied on these tables to resolve this issue. The defendant provided no personal information – other than the fact of his imprisonment - that would suggest that the tables would inaccurately represent his life expectancy. The court's reliance on the information provided, therefore, was not misplaced.

## ARGUMENT

### I. A SENTENCE THAT PROVIDES THE OPPORTUNITY FOR RELEASE AT AGE 62 IS NOT A *DE FACTO* LIFE SENTENCE.

The defendant first contends that a 45-year sentence imposed on a defendant who was seventeen years old at the time of the offense, and therefore, would be eligible for release at age 62, is a *de facto* life sentence. DB 15. He argues, therefore, that the trial court was required to find that he is "irreparably corrupt." DB 15-16.

This Court reviews a trial court's sentencing decision under the unsustainable exercise of discretion standard. *State v. Lambert*, 147 N.H. 295, 296 (2001) (adopting the "unsustainable exercise of discretion" standard for reviewing an imposed sentence). "To show that the trial court's decision is not sustainable, 'the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case.'" *Id.* (quoting *State v. Johnson*, 145 N.H. 647, 648 (2000)).

A sentencing court must consider "whether the sentence will meet the traditional goals of sentencing, namely, punishment, deterrence, and rehabilitation." *State v. Willey*, 163 N.H. 532, 541 (2012); *see also State v. Surrrell*, 171 N.H. 82, 85 (2018) ("The legislature has vested in the trial court the power to adapt sentencing to best meet the constitutional objectives of punishment, rehabilitation and deterrence—within these parameters, the judge has broad discretion to assign different sentences, suspend sentence, or grant probation.") (Internal quotation marks and citation omitted)). This Court will consider whether the record "establishes an objective basis sufficient to sustain the discretionary judgment made."

*State v. McGinty*, No. 2015-00009, 2015 WL 11071112, *1 (N.H. Nov. 18, 2015) (unpublished) (citing *State v. Lambert*, 147 N.H. 295, 296 (2001)).

The United States Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012), held that the Eighth Amendment to the United States Constitution did not permit "a sentencing scheme that mandate[d] life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. In *Montgomery v. Louisiana*, 136 S.Ct. 718, 736 (2016), the Court made the *Miller* ruling retroactive. Both cases noted that a juvenile offender was, in significant ways, different from an adult offender and, therefore, may be less culpable. *Miller*, 567 U.S. at 471-72; *Montgomer*y, 136 S.Ct. at 736 ("[C]hildren are constitutionally different from adults in their level of culpability"); *see also Graham v. Florida*, 560 U.S. 48, 69 (2010) ("It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.").

The *Miller* court relied on "children's diminished culpability and heightened capacity for change." It concluded that "sentencing juveniles to this harshest possible penalty [*i.e.*, life without parole] [would] be uncommon." *Miller*, 567 U.S. at 479. Courts, therefore, should distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id*. at 479-80.

Although *Montgomery* also addressed the concept of "irreparable corruption," it did not suggest that, absent proof of irreparable corruption, a juvenile must be released early enough to live a fulfilling life. *See* DB 25. Nor did *Montgomery* specify the age by which release was required in order

to live a fulfilling life. To the contrary, the *Montgomery* court simply stated that the defendant should be allowed to show that he was not irreparably corrupt and that his "hope *for some years* of life outside prison walls must be restored." *Montgomer*y, 136 S.Ct. at 735-36 (emphasis added).

The defendant's repeated suggestion that he is entitled to be eligible for release so that his life will be meaningful is simply without legal support. *See, e.g.,* DB 24 (release at "an advanced age" can only expect release will be "a hard struggle for subsistence followed, within a few years, by death"), DB 27 ("release at an age where he could still earn, by an honorable life, a meaningful measure of reconciliation"), DB 31 ("release at an age where there remains a chance of fulfillment"). But this is simply not what either *Miller* or *Montgomery* promises.

Further, the defendant addresses the seriousness of his offense almost in passing. DB 9. But the seriousness of the offense was very much on the mind of the resentencing court. When the court imposed the sentence of 45 years to life in prison, it cited several factors, including the forbearance of the police officer who it found would have been justified in shooting the defendant. The court noted that it could not resentence the defendant for assaulting the officer but said that it would have imposed a "heavier sentence" for that act. T 359. The court said that it would have imposed consecutive sentences for the Powers assault and the assault on Officer MacLeod. T 359. In making these observations, the court clearly weighed the serious of the offenses against the mitigating factors, including the defendant's efforts at rehabilitation. T 363-64.

The resentencing court concluded that the *Miller* factors did not apply because a 45-year to life sentence was not a *de facto* life sentence,

AD54. Although the defense contended that the CDC tables were not good measures of life expectancy, the court found that the CDC tables were "authoritative on the issue of life expectancy." AD53. The court noted that other courts had relied on them. AD53. The court rejected the contention that incarceration would reduce the defendant's life expectancy from 38 additional years (using the CDC tables) to only seven additional years (using a document prepared by the ACLU). AD54. In doing so, it acted within its discretion.

Notably, the defense presented no evidence that would have called these conclusions into question. Aside from the Michigan ACLU study on prisoners in the Michigan prisons, the defendant offered no conflicting evidence about life expectancy. Although the appendix to the memorandum included letters from friends and family and both experts' reports in its sentencing memorandum appendix, it offered nothing to contradict the conclusion that the defendant was in reasonably good health and could expect to live to an age that would be consistent with the CDC tables.

The court's findings are fully supported by the sentencing memoranda filed by both parties and the testimony presented at the hearing. The findings are, therefore, entitled to deference from this Court as is the sentence. *Lambert*, 147 N.H. at 296.

The defendant notes that, after the *Miller* and *Montgomery* cases were decided, a number of states enacted legislation setting parole eligibility for juveniles who commit homicide at any point between 15 and 30 years. DB 28-29 n.2. Setting aside the wisdom of this approach for the moment, these statutes only apply to defendants who have committed a single homicide. *See, e.g.*, Ariz. Rev. Stat. §13-751(A)(2) ("If the

defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years *if the murdered person* was fifteen or more years of age and thirty-five years *if the murdered person* was under fifteen years of age or was *an unborn child*.") (emphasis added); A.C.A. § 5-10-101(a)(1)(B) ("In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of *a person*...") (emphasis added); 11 Del. C. 4204A ("any offender sentenced to a term of incarceration for murder first degree when *said offense* was committed prior to the offender's eighteenth birthday…) (emphasis added). *See also* N.J.S.A. §2C:11-3a(3) ("any person causes the death of *a person*") (emphasis added); N.J.S.A. §2C:11-3b(1) ("Murder is *a crime* of the first degree…") (emphasis added). The statutes do not offer the same lenity to a juvenile who is guilty of several violent crimes in addition to first-degree murder and crimes committed against multiple victims in separate episodes.

And the statutes do not promise release, only the possibility of release upon a hearing. Indeed, in Florida, a consideration in eligibility for release is whether the defendant was "a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person." Fla. Stat. Ann. §921.1402(6)(d). Under the Florida statute, the defendant, who was not a "relatively minor participant" in these crimes, would not expect release after 35 years.

In addition, New Hampshire has not adopted legislation of this nature and this Court will generally decline to "undertake the extraordinary step of creating legislation where none exists." *In re Blanchflower*, 150 N.H. 226, 229 (2003) ("[M]atters of public policy are reserved for the

legislature.") (internal quotation marks and citation omitted). Moreover, the United States Supreme Court did not set an eligibility deadline in either *Miller* or *Montgomery*. The trial court, therefore, acted within its discretion when it decided that for his involvement in first-degree murder, first-degree assault, attempted first-degree assault, and robbery, the defendant should not be eligible for parole before age 62. T 360.

## II. THE COURT USED THE APPROPRIATE ACTUARIAL TABLES.

The defendant also contends that the resentencing court erred in calculating life expectancy. He criticizes the court's use of a life-expectancy based approach. DB 35-36. He points out, for example, that because women live longer than men, a life-expectancy approach could penalize a person simply based on gender. DB 35-36. He points out that the approach cannot "discern the mostly unknown and unknowable future medical conditions" of a juvenile convicted of murder. DB 36.

There are four problems with this contention. First, the issue of life expectancy was raised in the defendant's October 23, 2017 memorandum. DA 24. This is tantamount to criticizing the court for making an error after inviting the court to make it. *See State v. Goodale*, 144 N.H. 224, 227 (1999) ("Under the 'invited error" doctrine, a party may not avail himself of error into which he has led the trial court, intentionally or unintentionally.") (internal quotation marks, bracket, and citation omitted)).

Of course, the defense had no alternative to raise the claim because it wanted the resentencing court to apply the *Miller* factors and to impose a sentence 16½ years shorter than that recommended by the State. But to criticize the court for listening to the argument raised by the defense and then countered by the State, DA 31-35, is simply ill placed.

Second, to the extent that the argument raises disparity in life expectancies between races, DB 35-36, no evidence was presented to the trial court that suggests that the defendant's life expectancy is shorter than what was reflected on the CDC tables.

Third, the argument ignores the sentencing court's discretion in relying on information to guide the imposition of sentence. *State v. Kimball*, 140 N.H. 150, 151 (1995) ("A trial court has broad discretion 'in choosing the sources and types of evidence on which to rely in imposing sentence.'") (Citation omitted)); *see also Trammell v. State*, 62 So.2d 424, 431 (Miss. 2011) ("[T]he trial court's imposition of a sentence is proper where the trial court takes into consideration the defendant's life expectancy and all the relevant facts necessary to fix a sentence for a definite term of years reasonably expected to be less than life.") (internal quotation marks and citation omitted)).

Fourth, the defendant does not provide an alternative means for determining what a *de facto* life sentence actually would have been in this case. He relies on a California Supreme Court opinion that criticizes the use of the CDC tables. DB 34-35 (citing *People v. Contreras*, 411 P.3d 445 (Cal. 2018)). Setting aside the fact that neither defendant in *Contreras* was charged with, or convicted of, first-degree murder, *id.* at 446, the reliance on this case is misplaced.

The defendants in *Contreras* apparently did not raise the issue of an actuarial computation of life expectancy, or at least presented no evidence that conflicted with the prosecution's evidence. *Id.* at 451 ("At sentencing, the prosecution introduced evidence of statistical life expectancies, and neither defendant presented evidence demonstrating shorter life expectancy in prison.").

Moreover, both of the sentences imposed in *Contreras* – 50 and 58 years - exceeded that imposed by the resentencing court in this case. *Id.* at

446. Indeed, the second offender would not have been eligible for release until he was 74 years old. *Id.*

As a matter of persuasive authority, *Contreras* is impossible to apply here because the California Supreme Court only addressed the use of the CDC tables, but did not explain what other factors were before the sentencing court. As noted above, reliance on the CDC table was but one factor considered by the resentencing court.

Finally, although *Contreras* was decided after the resentencing in this case, it is clear from the resentencing court's order that it considered the weaknesses in the tables and turned to other jurisdictions for help in determining the most reliable source of information. AD53. Recognizing the weaknesses in the data, the court concluded that the CDC data was "the most reliable alternative presented." AD53. In contrast, there is no indication that the trial court in *Contreras* weighed the strengths and weaknesses of the data presented by the State. *Id.* at 451 ("The record in this case contains no findings by the trial court on these matters.").

As noted earlier, the defense provided the resentencing court with no information that might have caused the court to question the accuracy of the CDC table as applied to him. It simply asserted that a sentence of 35 years would not be a *de facto* life sentence, but the State's proposed 51-year sentence would be. In the absence of any conflicting information, the trial court properly considered the CDC tables to resolve the issue that the defendant had raised.

It might be another matter if the resentencing court had limited the parties in their presentation of evidence or had declined to consider an argument raised by the defense. But it did not do so. *Cf. State v. Highs*, 194

A.3d 1181, 1189 (Vt. 2018) (noting that the sentencing court "made no explicit refusal to consider any relevant mitigating factors" in affirming the sentence imposed). Further, the court's use of the CDC table was but one source of information used in imposing sentence. It heard from the defendant's family, as well as those people who had suffered from his crimes. It heard the testimony of two defense experts. And the court listened to both the defendant's accomplishments and the misdeeds during his incarceration. From the court's remarks at sentencing, it was clear that the court followed New Hampshire law by considering many factors in reaching its sentencing decision.

In short, the defendant has not shown that the trial court's imposition of sentence was an unsustainable exercise of discretion. This Court should affirm its decision.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

November 2, 2020

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## CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,714 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

November 2, 2020 */s/Elizabeth C. Woodcock*
Elizabeth C. Woodcock

## CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Christopher M. Johnson, Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

November 2, 2020 *<u>/s/Elizabeth C. Woodcock</u>*
Elizabeth C. Woodcock

## ADDENDUM TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE
SUPERIOR COURT- SOUTH

HILLSBOROUGH, SS DECEMBER TERM, 2017

STATE OF NEW HAMPSHIRE

v.

EDUARDO LOPEZ

93-S-621-24

**DEFENSE'S SENTENCING MEMORANDUM**

NOW COMES, the accused, Eduardo Lopez, through his counsel, Pamela K. Jones and Paul Borchardt, and respectfully requests that this Honorable Court sentence him in accordance with this memorandum. As basis for this request the accused offers the following information for the Court's consideration in determining sentencing.

## I. PRELIMINARY STATEMENT AND STATEMENT OF THE LAW

Eduardo "Eddie" Lopez was 17 years old when, in 1991, he was arrested and charged with first-degree murder and various other charges. At trial he was convicted of first-degree murder for knowingly causing the death of Robert Goyette while committing a robbery and was given the mandatory sentence of life without parole. He received 17 ½ to 35 years for the remaining crimes.

This memorandum will discuss the legal framework for which the court must turn to in making its sentencing decision. In particular, this memorandum will go through the *Miller* factors which detail the "mitigating qualities of youth" that the court must consider in sentencing a youth who has committed murder. *Miller v. Alabama*, 567 U.S. 460 (2012). This memorandum will also review Eddie's institutional history and his demonstrated maturity and rehabilitation.

To assist the court in its sentencing decision attached to this memorandum will be a social history, specific interviews with Eddie Lopez, two reports rendered by our experts, and relevant studies. In addition, this memorandum will refer to disciplinary reports obtained by Eddie while in prison and certificates he completed. These are attached to this memorandum for the courts review.

Defense counsel intends to call two expert witness, Dr. Gitlow and Dr. Kavanaugh, at the sentencing hearing to testify. Finally, defense counsel will make an oral argument at the sentencing hearing and request time for Eddie to address the court as well as several family members.

Since Eddie was sentenced, in 1991, the law regarding juveniles has evolved. In *Roper v. Simmons* the U.S. Supreme court recognized that criminal conduct committed by a juvenile is "not as morally reprehensible as that of an adult." 543 US 55, 570 (2005). The Court went on to recognize and gave controlling legal significance to three fundamental differences between adults and adolescents. First "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. These qualities often result in impetuous and ill-considered actions and decisions." Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressures, [than are adults]." Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id* at 569. These considerations in *Roper* led the Court to hold that due to juveniles diminished culpability; they cannot be subjected to the death penalty. *Id.* The Court also banned life without parole sentences for such adolescents in non-homicide cases, *Graham v. Florida*, 560 U.S. 48 (2010). In *Graham* the court stated "A state is not required to

guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 68.

In 2012 the United States Supreme Court declared that sentencing a juvenile who commits murder to a mandatory life sentence without parole violates the Eighth Amendment's prohibition against cruel and unusual punishment because it bars the Judge from adequately taking into account the "mitigating factors of youth" *Miller v. Alabama*, 567 U.S. 460, 465,474 (2012). In particular, the Court observed the "hallmark features" of youth- namely, immaturity and impetuosity, susceptibility to influence and malleability- render youth categorically less culpable for the offense they commit. *Id.* at 477. Lesser culpability is to be considered in rendering a proportionate sentence. *Id.*

Although Miller does not categorically ban life without parole sentences for juveniles, "[given] all we have said . . . about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 479 [emphasis furnished]. Sentences must be proportionate to the juvenile's diminished moral culpability. *Id.* "Youth is more than a chronological fact." Id. at 476 (citation omitted). As such, adolescents under eighteen who commit murder are inherently "less deserving of the most severe punishments," Id. (quoting Graham v. Florida, 560 U.S. at 68), so that imposing a life without parole sentence on a juvenile, even in a murder case, should be "uncommon." Finally, in 2015 the U.S. Supreme Court held that "In light of what this court has said in *Roper, Graham, and Miller* about how children are constitutionally different from adults in their level of culpability, however prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not,

their hope for some years of life outside prison walls must be restored." *Montgomery v. Louisiana*, 136 S. Ct. 718 (2015).

The Eddie Lopez who appeared before the Court in 1992 was a reckless, impulsive and volatile adolescent who had a significant substance use issue and was emotionally incapable of dealing with what he had done. Seventeen-year-old Eddie wanted to be a tough guy, a bad boy, and he did not think about his actions or the consequences of those actions. He acted immaturely, recklessly and with impulsively.

Eddie Lopez is now forty-two years old. Eddie has lived longer in prison than out. Now with the benefit of reflection and maturity he understands the horrible decisions he made on the day of the murder and takes full responsibility for all that he did. Eddie has worked hard to earn the respect of his family and extended family, as well as his fellow inmates during his many years of imprisonment. Eddie has stayed connected to his mother, father and two younger brothers. For the last twenty-six years his family regularly visited with him and talked to him over the phone. While in prison Eddie watched his younger brothers grow up while he too was also growing up. Eddie's family has grown in size. He has built relationships with his brother's wives and the many nieces and nephews that have been born. He is a proud Uncle and has connections to all of his nieces and nephews. Eddie has pursued ways to better himself while in prison despite the fact that he did not have any hope of ever being released. He has maintained friendships with people who knew him before he went to prison. He has earned many educational and occupational certificates. Eddie's development since he appeared before the Court twenty-six years ago is real, not speculative, and consistent with recent scientific discoveries.

Re-sentencing Eddie now allows this Court to take advantage of hindsight as well as recent advances in neuroscience and social science which were not available to the Court before. Eddie's growth testifies to the wisdom of *Miller's* conclusion that adolescent crimes are often the product of the "transient qualities of youth," *Id.* at 472, rather any irremediable character flaw. Giving Eddie a sentence that affords him a meaningful opportunity for release is not a gamble for the court. In this instance the court is not faced with predicting the future. The court will see evidence of Eddie's demonstrated maturity and rehabilitation through this memorandum, as well as the expert reports, testimony, and letters of support from family members and friends who knew Eddie then and now. Most importantly the court will not be gambling in sentencing Eddie as his demonstrated maturity and rehabilitation can be seen through his record at the prison as well as when he speaks at the sentencing. This resentencing does not have the same risk which confronts the court when the court is faced with a young person who has just committed the crime. In Eddie's case the court has the benefit of seeing 26 years of a life and proven character. For 20 of those years Eddie had no hope of ever getting out of prison, believing he would die in prison.

The defense submits this sentencing memorandum setting forth the relevant sentencing factors to be considered pursuant to the United States Supreme court's holding in *Miller v. Alabama*, 567 U.S. 460 (2012). The argument at sentencing will be based on this memorandum and the attached exhibits, as well as the pleading, papers and records in this action, and any evidence or oral arguments submitted prior to and on the date of the sentencing hearing.

In accordance with *Miller*, Eddie, now petitions this Court to resentence him to a term of years that allows him a "meaningful opportunity for release based on demonstrated maturity and rehabilitation." *Id.* at 478(citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)). In light of the new calculus that applies to youth at sentencing, and considering Eddie's age at the time of the crime, his individual circumstances, and his growth and transformation over the last 26 years, **Eddie respectfully requests a sentence of 27 years to life, and for all other charges to be concurrent to that sentence**. This is a sentence that would both comply with the directives of *Miller v. Alabama* and further the aims of punishment, deterrence, and rehabilitation. In support thereof, he states as follows:

## II. LEGAL FRAMEWORK

### A. *Miller v. Alabama* Requires the Court to Consider the "Mitigating Qualities of Youth.

To ensure proportionality, the sentencing court must give "great weight" to youth and its attendant qualities, as well as other mitigating factors. *Miller*, 567 U.S. at 471-472. *Miller* requires that a juvenile, who has committed a homicide, have an individualized sentencing based on the following factors:

(1) **his age at time of offense and its hallmark features including immaturity, impetuosity, and a failure to appreciate consequences;**
(2) **his family and home environment, from which a youth cannot extricate himself; including evidence of child abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance;**
(3) **the circumstances of the offense, including the role of the juvenile and the extent to which peer pressure was involved; or any substance abuse, may have affected petitioner and his conduct;**
(4) **the incompetence's of youth that may have disadvantaged him in dealing with the police or participating in the criminal proceedings; for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his capacity to assist his own**

**attorneys"; and**

(5) **and his capacity for reform and rehabilitation, to be considered when sentencing a juvenile who commits murder.** *Miller*, at 477- 478.

A court's failure to consider each of these categories of mitigation with great weight violates the Eighth Amendment of the United States Constitution. *Id.* at 479. These factors will be reviewed in this memorandum. The following memorandum explores all such factors.

### B. A Sentence of Life Without Parole or the Equivalent Must Be Reserved For "The Rare Juvenile Offender Whose Crime Reflects Irreparable Corruption"

The Court in *Miller* reaffirmed its long-standing commitment to considering the status of children when construing their rights under the Constitution, asserting "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 461. The Court observed that regardless of their crimes, children are less culpable and have greater prospects for reform because of their "hallmark features." *Id.* at 471. Specifically, children are less mature and thus prone to "recklessness, impulsivity and heedless risk-taking," *Id.* (citing *Roper*, 543 U.S. at 569); children are more "vulnerable to . . . negative influences and outside pressure," *id.* (quoting *Roper*, 543 U.S. at 569); and finally, children are "less fixed" in their character and consequently more capable of change than adults, *Id.* (quoting *Roper*, 543 U.S. at 570). *See also Graham*, 560 U.S. at 89. These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders." *Miller*, 567 U.S. at 472. As such, children are "less deserving of the most severe punishments" and sentencing courts "cannot proceed as though they were not children." *Id.* at 472, 473.

The *Miller* Court also grounded its holding in a line of capital cases requiring individualized consideration at sentencing, on the premise that life without parole for children is akin to the death penalty. *Id.* at 475. Like capital defendants, then, children should have "the opportunity to advance...any mitigating factors" so that life without parole is "reserved only for the most culpable defendants committing the most serious offenses." *Ibid.*

Taking these precedents together, the United States Supreme Court was ultimately concerned about the high risk of disproportionality posed by mandatory sentencing schemes: "[b]y removing youth from the balance — by subjecting a juvenile to the same life-without- parole sentence applicable to an adult — these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 470. In short, judgments to keep children in prison for the rest of their lives or the functional equivalent should be individualized and reserved for the incorrigible few.

## III. ARGUMENT

Given the United States Supreme Court's explicit caution against re-imposing a sentence of life without parole on a child barring evidence of "irreparable corruption," resentencing Eddie to a term of natural life or the equivalent would not be appropriate or constitutional. The question for the Court to decide is therefore: What term of years would be the appropriate sentence for Eddie, taking into account all of the factors set forth in *Miller*? As set forth below, the evidence in mitigation is considerable.

### A. Factor 1 – The Age of the Youth at the Time of Offense and the Hallmark Features of Youth

The first *Miller* factor to consider is the juveniles age at time of the offense and its hallmark features including immaturity, impetuosity, and a failure to appreciate consequences and risk. At the time of the homicide Eddie was 17 years old by one month and three days. Eddie turned 17 on February 20, 1991 and the murder was on March 23, 1991. Eddie showed his immaturity and failure to appreciate consequences evidenced in his choices on the day and night of the murder.

While quantitative data and anecdotal evidence have long established that adolescence is a period of profound physical and emotional transformations, more recent scientific breakthroughs now show that the brain itself changes rapidly during the second decade of life, especially as it relates to regions associated with inhibition, calibration of risk and reward and emotional regulation. *See* Ex. 1 (Laurence Steinberg, "*Cognitive and Affective Development in Adolescence*," *TRENDS IN COGNITIVE SCIENCES* vol. 9, pp. 68, 69 (February 2005)). Put another way, a youth's character is in a constant state of evolution throughout his adolescence. Relative to adults, adolescents are less developed in their capacity to coordinate emotion, intellect and behavior while weighing long-term goals and consequences. *Id.* Whether the result of cognitive development or simple psychosocial immaturity, adolescents are also much more impulsive and "present-focused" than adults. *See* Laurence Steinberg & Elizabeth Scott, "*Less Guilty by Reason of Adolescence*," AMERICAN PSYCHOLOGIST, 1009, 1012 (December 2003)). Their risk- reward meter is calibrated differently and they place greater emphasis on immediate gratification with little regard to long-term consequences. *Id.* As the full import of these developmental changes continues to reveal itself, the accumulating evidence affirms what common sense and the United States Supreme Court have long established: youth are

different. *See* Steinberg, *supra*, "*Cognitive and Affective Development in Adolescence,*" pp. 68-69.

In March1991, while participating in the underlying crimes, Eddie displayed each of the "hallmark features" of youth: Youthful immaturity, impetuosity, and present-oriented thinking played a crucial role in Eddie's decision to commit two different robberies and the eventual murder, all while carrying a loaded gun and being severely intoxicated. It is consistent with youthfulness that Eddie would not anticipate that his actions would lead to a situation where people would end up harmed and killed. Nor was Eddies' calculation of risk equivalent to that of an adult.

On the day of the murder Eddie knew he was going to Job Corp the following Monday and this was his last chance to party with his friends. Eddie referred to his plans that night as a "last Harrah party". He drank excessively and used drugs. Eddie was also focused on the fight he recently had with his girlfriend. While parting with friends he decided he wanted to talk with his girlfriend one last time and to get change to call her. While looking for pay phone on Main St. in Nashua he recklessly carried a gun, that was loaded, while he was drunk and high. It is clear from Eddie's actions on that night that he was only thinking in the present and failed to consider any risks or consequences for his behavior. It is clear how poorly his risk-reward meter was working when he encountered one of his victims, Roscoe Powers, on the night in question. In interviews from the expert and defense Eddie admits he wanted change and got into it with Roscoe. While engaging with Roscoe, Eddie thinks nothing of pointing his gun at Roscoe and then shooting at him. Eddie, when asked about this, says "he pulled out his gun" and "there was no thinking." Eddie acted impulsively as he was focused to get change for the pay phone,

however possible, to call his girlfriend.

When confronted soon after the murder by an Officer again Eddie had no ability to appreciate risks, which was exacerbated by his intoxicated state along with his immaturity. From trial transcripts we read that Eddie tells the officer he will have to shoot him and Eddie grabs a stick to assault the officer. Later after Eddie was arrested, again we witness in the booking video just how immature and impetuous he is when he is talking to the police. He tells the police while being booked that he is going to shoot them when he gets out of here and he will see them on the street. His actions are utter nonsense fueled by immaturity, and impulsivity worsened with his intoxication. Finally, we see Eddie's impulsivity and lack of maturity or impulse control when the verdict is read at his trial. He tosses the defense counsel table and gestures expletives at the jury.

Adolescence is also a period of extreme emotional change and upheaval. Emotional shifts in adolescents are much more frequent and dramatic than in adults. *Id.* at 1013. "Compelling neurobiological evidence" demonstrates that the brain's regulatory system undergoes a more gradual, linear maturation over the course of adolescence. Steinberg, *Adolescent Development*, at 466; see, e.g., Nat'l Research Council, *supra,* at 92, 96-99; Steinberg, Laurence, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78, 83 (2008) (hereinafter, Steinberg, *Risk- Taking*). This means that adolescents have a qualitatively higher neurological inclination to engage in risky activity, while at the same time a qualitatively lower ability to control impulses or accurately assess future consequences. The ability to regulate and assess increases only gradually as adolescents age. *See*, e.g., Steinberg, Laurence, *A Dual Systems Model of Adolescent Risk-Taking*, 52 Developmental Psychobiology 216 (2010); Geier & Luna, *supra*, at 215-18. "Adolescents

develop an accelerator a long time before they can steer and brake." Gopnick, Alison, *What's Wrong With the Teenage Mind,* Wall ST. J., Jan. 28, 2012.

Dr. Kavanaugh discusses normal adolescent development in her forensic evaluation of Eddie and in particular discusses risk taking of adolescents. (pg. 30) She states, "In this particular case, the principal of reward bias in concert with his being intoxicated can explain why Mr. Lopez Jr. would not have appreciated the potential risk to himself or others involved in having a weapon". (pg. 30).

Studies further show that emotionally-charged situations exacerbate this discrepancy, leaving teenagers—especially young men—even less able to exercise the regulatory functions of the brain in the very contexts when they might need them most. *See*, e.g., Nat'l Research Council, *supra*, at 92-93; Figner, Bernard et al., *Affective and Deliberative Processes in Risky Choice*, 35 J. Experimental Psychol. 709, 709 (2009). Eddie's ability to exercise the regulatory functions of his brain is clearly exacerbated by the fact that we know Eddie was very intoxicated and had a blood alcohol level of .16 at the time of the breathalyzer test at the police station. In Dr. Gitlows' report, an expert for defense, he states "A blood alcohol level of .16 in an individual with some tolerance, as Mr. Lopez was likely to have, would still cause significant impairment of judgement, self-control, attention, focus, concentration, reasoning, and memory".

Ultimately, developmental imbalance explains why "adolescence is a time of inherently immature judgment." Steinberg, *Adolescent Develo*pment at 467. Although teenagers might seem as intelligent as adults, "their ability to regulate their behavior in accord with these advanced intellectual abilities is more limited." *Id.* Adolescents overvalue immediate rewards and are less future-oriented when compared to adults; they

are more impulsive, more susceptible to emotion and stress, and less likely to perceive the consequences of their actions, especially negative ones. *See Id.* at 468-70; Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, page 46 (2005). Again all of the above is only exaggerated by Eddie's level of intoxication.

As I have indicated through the above discussion each of these well-understood "hallmark features" of adolescent development is present in this case. Precisely as neuroscience predicts, Eddies' character was not "fixed" at adolescence. To the contrary, Eddie has matured significantly over the last 26 years, demonstrating that he not only could change (as the United States Supreme Court has repeatedly acknowledged), but that he did change. *See Miller*, 567 U.S. at 471 (quoting *Roper,* 543 U.S. at 570); *see also Graham*, 130 S. Ct. at 2026.

**B. Factor 2 – Family and Home Environment**

The second *Miller* factor to consider is his family and home environment, from which a youth cannot extricate himself. In *Miller* the Court stressed the importance of evaluating this factor involving a juvenile's social context. At sentencing, the Court must also take into account Eddie's family and home environment, including any "evidence of childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance." *See Miller*, 567 U.S. at 477. The environment in which Eddie grew up failed to provide him the supervision, safety, and structure a child needs.

The subject of how Eddie grew up was often difficult for him to discuss with his

counsel and the forensic expert. Eddie made clear he never wanted to blame his parent or family in any way for what he ultimately did. Despite some significant issues in his upbringing he never wants to blame his parents for what happened. Dr. Kavanaugh in her evaluation noted that the dysfunctional elements in his family environment did not represent an extreme level of family dysfunction. She did say that "the dysfunctional elements that were present are noteworthy and include Mr. Lopez Jr.'s self-concept, the environment in which he grew up in and his relationship with his father. From a clinical perspective, it seems his chronic use of substances may have been his attempt to extricate himself from his family environment."

Eddie clearly had a poor self-concept which stemmed from his relationship with his father and led to him finding solace in friends and alcohol outside of the home. As we see from the forensic evaluation Eddie felt he received the message, mostly from his father, that he was not on par with his younger brothers both academically or physically and as a result he felt like the black sheep in the family. Yet despite this Eddie often found himself put into the role of a substitute parent and had to act older than he actually was. At a very young age Eddie was responsible for getting his brothers ready for and off to school as well as making sure they got to their sports activities acting as a father figure. He also was the care taker after school.

Where Eddie spent his formative years is a critical consideration in how his environment had an effect on his overall emotional and mental development. It cannot be ignored that Eddie spent most of his early years, till about fifteen and a half years old, living in the Chelsea Projects in Boston in the late 80's early 90's. The Chelsea projects were a place where poverty was rampant, violence was normal, and gang presence and

drugs were a given. It was not unusual to witness violence and see drug deals in the Chelsea projects. In interviewing Eddie and his brothers regarding growing up in Chelsea projects, they referred to the above as a normal part of living where they did. In Dr. Kavanaugh's report Eddie's mother explained living in Chelsea projects as "you'd see drunk people, high people, and prostitution. It wasn't a place that I wanted to raise my children." Jason, Eddies brother, described living in Chelsea as, "there was a lot of gang activity, drug dealing, and stuff like that."

Eddie experienced domestic violence in the home between his mother and father and he also was subject to physical violence at the hands of his father. Dr. Kavanaugh in her forensic evaluation stated "In her clinical opinion, the level of violence within the household is a relevant factor to consider when attempting to understand the family that he grew up in". In addition to the domestic violence there was a significant substance abuse issue with Eddie's father. We know from interviews of all family members that Eduardo Sr. routinely drank and spent significant time at the bar instead of with his family. This lead to arguing and fighting between the parents as well as Eddie and his father as Eddie was taking on a substitute parent role as a result of his father's actions.

Dr. Kavanaugh utilized each of the *Miller* factors in her forensic evaluation of Eddie. In the section on this particular factor she noted that Eddie "had additional factors that impacted his functioning at the time of arrest" beside the normal differences between how adolescents and adult brains function. She stated "It was unlikely he was functioning as one would expect given his age alone, or compared to a same age peer who had not had these factors in life. These factors include chronic stress related to his growing up in dangerous public housing, his substance abuse history, his mental health issues and his

relationship with his parents."

Eddie had no way of extricating himself from the dysfunction of his family and the housing situation he grew up in. The family substance use history had a very negative effect on Eddie's own substance use. Eddie learned the way to deal with things was to get away from the family and drink. Eddies' substance use is most likely a biological and environmental factor that is difficult to extricate himself from. In one of the interviews with Eddie he stated "when he would go out at night he would drink and smoke so he could chill and release all the bullshit that was inside me." Eddie said that he never drank at home. Eddie's family and home environment had a negative impact on his development and decision making as an adolescent.

**C. Factor 3 – Circumstances of the Offense**

The third *Miller* factor to consider is the circumstances of the offense, including the role of the juvenile and the extent to which any familial or peer pressure or any substance abuse was involved and may have affected the juvenile and his conduct.

Much of what has already been discussed in factor 1 contributes to this factor as well. The circumstances of Eddie's upbringing, along with where he lived and his substance use issues, led to him finding negative peer groups and delinquent prone friends. The circumstances of the night in question and the results were tragic and terrible. There is nothing Eddie can do to take it back and no explanation of peer pressure and substance use issues will excuse what happened that night. I use this factor to try and explain the unexplainable. As there is no explaining the assaults and death of the victim.

Dr. Kavanaugh in her review of this factor stated "A key component to

understanding the circumstances of the offense is understanding the role alcohol played in it. Understanding the role alcohol played does not excuse his behavior but helps to explain why a 17-year-old who had a very limited criminal record could commit such horrific crimes." Eddie demonstrated a susceptibility to peer influence and reliance on alcohol in the commission of the offense. During the events that unfolded on March 23, 1991, Eddie went to his older friends Valence Ray's house to party with every intention of getting drunk and high. He knew his older peer, Valence Ray, would provide a place and the means to get drunk and high as he always had. We know this all to be true from testimony at trial of Edgar Cruz and Valence Ray about the partying. Eddie's substance use issues and desire to use trumped any rational thinking. Additionally, Eddie had just acquired a gun through the help of his older peer, Valence Ray and his sister, as Eddie was too young to buy a gun. Only one month before the murder Eddie had been kicked out of his home for getting a tattoo and Eddie went to live with Valence Ray for a few weeks where he was able to drink and use drugs regularly.[1]

At trial Valence Ray testifies that on the day in question he and Eddie were getting drunk and that at some point they left to go shoot the gun together while still drinking.[2] Valence Ray also testified that after they returned from shooting the gun, but before Eddie left again by himself, they continued to drink.[3] These above factors along with juvenile thinking led to the horrible events on March 23, 1991. Peer influence and involvement certainly played a part in what happened on this terrible day. The ability to resist the desire for alcohol and drugs, provided to him by his older peer and with shelter

[1] See Social History
[2] Transcript of testimony form June 16, 1993 page 49.
[3] Id.

to enjoy them, would have been unlikely for a seventeen-year-old in Eddies' position. Again all of the above explanation is in no way meant to minimize Eddie's decisions that night but only to bring context to this particular factor evaluating the circumstances of the offense and the role of substance abuse and peer influence.

**D. Factor 4 – Incompetence's of Youth**

The fourth Miller factor to consider is the incompetence's of youth that may have disadvantaged him in dealing with the police or participating in the criminal proceedings. The one thing that is very clear regarding this factor is that because of the incompetence's of youth mainly immaturity, present time thinking, as well as impetuosity, it is very hard for an adolescent to contemplate a plea deal that involves spending their life in prison or big numbers that practically seem like life. The adolescent's diminished decision making capacity frequently prevents him from adequately considering his attorney's advice or the merits of a plea bargain. This often results in the adolescent going to trial and receiving a lengthier sentence than an adult who would more likely accept a plea bargain under similar circumstances. *Miller v. Alabama*, 567 U.S. 460, 477 (2012) We know this is absolutely true for Eddie in reviewing the attached social history, expert report and various interviews that he struggled with understanding the realities of what he was facing. He immaturely thought that if he had a trial he would have a better chance of going home. He was experiencing a serious level of denial along with memory issues about what he had done and his immature thinking ruled his decisions. Eddie thought testifying and lying would get him home, this demonstrates the incapacities of youth. When discussing why he did not take a deal, Eddie expressed he just could not imagine 35 years away and really did not believe that it could or would happen.

### E. Factor 5 – Capacity for Reform and Rehabilitation

The fifth *Miller* factor to be considered is a juvenile's capacity for reform and rehabilitation. In *Montgomery* the court stated "the opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 136 S. Ct. 718 (2015). Eddie's maturation largely follows the arc of development described by Dr. Kavanaugh in her evaluation, where she discusses adolescent development, and other neuroscience. But as in any individual case, it is impossible to define with any degree of certainty the extent to which biology, human persistence, and the right opportunities each contributed to Eddie's development. Nonetheless, clearly the opportunities for programs in prison, Eddie was able to participate in, played a role in his rehabilitation as well as the amazing family support that Eddie has had while in prison.

Eddie is 43 years old today. Since he was incarcerated at age 17, Eddie has demonstrated his capacity for rehabilitation. The gradual reckoning with his choices, fallacies and circumstances of his youth have propelled Eddie towards bettering himself and committing to being a better person who can give back in some way even though he can never bring back the person he killed or change the hurt he has caused.

Before Eddie went to the New Hampshire State Prison (NHSP) he was first housed, immediately following his arrest, at the Youth Development Center as he was only 17 (formerly known as YDC and now known as SYSC). While at YDC Eddie experienced DT, delirium tremors, which shows how severe his drinking problem really was.[4] At YDC Eddie was detoxed with medical supervision. This is seen through the

[4] DOC NHSP records titled Social Summary, dated 7/7/1993

intake records from NHSP. On the day Eddie turned 18 he was transferred to Valley Street jail where he stayed until after the trial and the guilty verdict. Counsel requested records from both YDC and Valley Street jail but they no longer existed.

With no hope of ever getting out of prison and struggling to bring himself to believe he had actually killed someone, Eddie still pursued education and work opportunities. There was an initial adjustment period but once he acclimated he pursued bettering himself. Eddie spent his first six years of prison in the NHSP. Those first years were difficult as he began to deal with the prospect of spending the rest of his life in prison. The first six month or more he spent in the specialized housing unit (SHU). This meant that he was only out of his cell approximately 3 hours a day and most of his time was spent in isolation. When an inmate first arrives at the NHSP they are often put in SHU initially and if the crime is murder they stay there from 6 months to a year. It is no coincidence that Eddie experiences a spike in disciplinary reports when he gets out of SHU and goes into general population. You can see from the chart in Dr. Kavanaugh's evaluation the spike in disciplinary reports is when Eddie is 20. This is when he would have been released from SHU into general population.

Eddie was transferred to a Massachusetts prison in 1999. At this point Eddie was 25 years old and you can see that his disciplinary reports went down considerably at this point and for the most part stayed low. As the neuroscience teaches Eddie began to mature. He started to have a reckoning and what he refers to as a reality check. As he matured he realized he had choices to make and he began to be honest with himself about who he had been and what he had done. This was a turning point for Eddie and it can be

seen, through disciplinary and progress reports, that Eddie began to mature and make better decisions.

In her evaluation of Eddie, Dr. Kavanaugh stated "In my clinical opinion Mr. Lopez Jr. presents with many factors that weigh in favor of his rehabilitation. These factors include his age and maturity, the decreased rate at which he acquired institutional write-ups and his involvement in programming in prison." She went on further to say that another indicator of his maturity is the pattern of his disciplinary reports while in prison "Mr. Lopez Jr. earned 71% of his write-ups during his first five years of his incarceration. In comparison he earned 12% of his total write ups during the decade predating *Miller v. Alabama.* In my clinical opinion, the decrease in write-ups and the timing of this decrease indicates maturation and, what I imagine is going to be more important to the court, indicated he was maturing absent an external motivation to do so." Over the course of 26 nearly 27 years Eddie has received a total of 42 disciplinary reports. It is important to note that fewer than 10% of these write ups were for violence and fewer than 10% were for drugs or alcohol. In 2013 Eddie received a write up after not having any write ups since 2011. He received only 2 write ups in 2011. The write up Eddie received in 2013 was on July 29, 2013. The Superior court decision that Miller was retroactive came out on July 29, 2013 and Eddie's sentence was vacated and he was now entitled to a sentencing hearing. Upon hearing this news Eddie had an anxiety attack. Eddie described this to Dr. Kavanaugh as, "I had a chance to go home.... I had an anxiety attack. I couldn't stop crying. I was in shock." He told counsel and Dr. Kavanaugh a friend in the prison gave him a pill to calm his nerves and promptly told on him. Eddies mother called counsel on that very night to tell them what happened. Eddie has only

earned one write up since then, in 2016 for being out of place. This write up was found to be a minor disciplinary ticket.

From the time Eddie entered the NHSP his record shows that he sought out employment and vocational training opportunities. While in prison Eddie obtained his GED, held a job consistently, engaged in programing such as HVAC courses that led to being certified, to a cabinet making course, an auto mechanic course and involvement in the music department. As a result of the music classes Eddie learned how to play the bass and became part of the prison band. He was able to play bass at special events at the prison. Most if not all of what Eddie has accomplished at the prison occurred before the *Miller* decision. Eddie's engagement in opportunities at the prison when he had no hope of ever being released shows his ability for personal growth and development even under difficult circumstances and is evidence that he has matured and rehabilitated. Here is a brief history of some of the things Eddie accomplished while in prison. The programming and certificates include (to name a few):

- 780-hour Auto Mechanic class, 1997
- 260-hour Cabinet Making Apprentice 1 course with 19 Modules, 1998
- Preventive Behavior Seminar, 1999
- Auto Body Class (not completed because he transferred to MA DOC), 1999
- GED, 2000
- Cognitive Skills Program, 2000
- Four-week introduction to treatment program, 2001
- Training on Alternatives to Violence Seminar, 2004

- Ten Modules of the Life Skills Program Commitment to Change, 2007
- HVAC licensing course, 2009
- Certificate Echo Institute, 2010
- Certificate for Electrical Training, Benchmark of Academic excellence, 2010

While in prison Eddie has consistently maintained a job no matter what institution he has been housed at. He has had jobs as a runner, at the gym, the library, and woodworking to name a few. There were numerous progress reports included in his prison records obtained and are referred to in more detail in Dr. Kavanaugh's forensic evaluation and attached to this memo. These progress reports show Eddie was well adjusted, got along with staff, and had no management concerns. In September 2010 the Massachusetts DOC said in a personalized plan that his risk for violence's and recidivism was low.[5] All of the above provides evidence of Eddie's capacity to change and rehabilitate.

## IV. ACCEPTANCE OF RESPONSIBILITY

During the early years in prison Eddie has expressed that he was in total denial about what he did. He struggled with coming to grips with the reality that he actually killed someone. Eddie's denial was complicated by the fact that he had little independent memory of the actual murder due to his intoxication on that night. He remembered other things but not the murder. It was a struggle to take responsibility for something that you could not believe you would ever do or would not allow yourself to believe you would

[5] Progress report dated 9/15/2010 (attached to memo)

ever do. The actual memory issues only complicated this and made it easier to stay in denial. Eddie said he went through the trial holding on to the belief that he did not do it and this was the only way he thought he could ever go home. Eddie says he was so afraid of losing his family if he was really a murderer. But over time he began to remember things and come to grips with the fact that he did kill a man as well as the other crimes that night. Eddie tells Dr. Kavanaugh that as he realized he did kill Mr. Goyette he hated himself.[6] In our ongoing interviews of Eddie, he said that it took about three to four years before he really was able to accept or own that he had actually killed a man. Eddie said "when I realized I did it I was heartbroken because I took someone's life: that was not me, not who I am."[7] Eddie says that at this time he struggled with depression and substance use while dealing with the truth of what he had done. It was around this time that Eddie was moved from NHSP to a MA prison. Eddie describes this time as a reckoning and when he really had a reality check about who he had been and who he was. This was a turning point for Eddie in terms of fully accepting what he had done. Eddie says in the early days in MA prison he had to face his demons and accept what he could not change.

In Dr. Kavanaugh's report on page 23 she asks Eddie to reflect on his behaviors on the day of the murder and he responded "it has been horrible… living with the fact that I caused so much pain to a family is the worst pain you could have…I felt bad for his family. They lost a son, a brother, a father, and a husband and I am the cause of that."

## V. RE-ENTRY PLAN IF GIVEN THE OPPORTUNITY

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[6] Dr. Kavanaugh's forensic evaluation pg. 24
[7] Eddie interviews – Social History

Eddie is fortunate to have solid people in his life to help his transition if he is granted a lesser sentence and eventual parole. As you see from the picture book we have provided for the court, Eddie has a big supportive family. He would start his new life in Nashua, NH where he has exceptional support. He would live with his mother and father with both brothers and their families living only a few minutes away. Since Eddie received his HVAC license in prison his brother's Jason and Aaron have a friend with an HVAC business that would give Eddie a job. Eddie would participate in AA and other substance use counseling if paroled as he is fully aware of what a temptation this will be for him. Eddie's mother has already begun collecting names of counselors that Eddie could go to and AA meeting schedule's.

Mr. Robert Vargas, who has provided the court with a letter, is planning to be a mentor for Eddie as he would transition home and adjust. He is committed to helping Eddie through his transition as he is a former inmate who served a lengthy sentence and can understand what Eddie would be facing. He will support Eddie in every way as he makes his transition. It is a testament to the man Eddie has become in prison that his family and other people are committed to his success.

## VI. SPECIFIC DETERRENCE AND RISK OF RECIDIVISM

The Court will consider the safety of the community when it sentences Eddie Lopez. Part of protecting the community should involve considering the risk that Eddie will reoffend. The defense will argue the scientific literature supports three points. First, the severity of a crime is not a significant factor in determining whether a defendant will reoffend. Common sense may suggest that the severity of a defendant's crime would show a particular defendant presents greater danger than other defendants who commit lesser

crimes, but the science shows that this assumption is not correct. Second, a defendant's prior criminal history is a highly significant predictor of recidivism, so Eddie's lack of a criminal record before March 23, 1991 shows he is much less of a danger than other defendants with a significant record. Third, the other highly significant factor is Eddie's age. A 43-year-old man, as Eddie is today, presents far less of a risk of recidivism that he did at age 17. The passage of time has greatly reduced Eddies' risk to the community.

Predicting recidivism is, at best, an inexact and rough science. The sheer number of variables prevent any easy answers. Further, most research on recidivism rates understandably focuses on the recidivism of sex offenders. As Eddie is not a sex offender, and nothing suggests he has any sexual issues, research on recidivism issues specific to sex offenders offers the Court little to no guidance.

Two reports are attached to this memorandum. First, attached in Section 5 of the Appendix, is a **meta-analysis article** summarizing other studies analysis of factors that affect rates of recidivism. Journal of Consulting and Clinical Psychology, Vol. 66, No. 2, 348-362. This article focuses on sex offender recidivism rates, but includes many factors that bear on recidivism that have nothing to do with sex offenses. The salient points are the tables on pages 354 and 355, which list the factors of nonsexual violent recidivism and general recidivism and their correlation with recidivism. Second, attached as **Exhibit US Sentencing Commission Report**, also in Section 5 of the Appendix, is a report from the United States Sentencing Commission studying recidivism rates of federal offenders. The salient points of this report are the graphs summarizing the effects of criminal history on pages 6 through 8 and the analysis of offender characteristics on pages 11 through 15.

The severity of Eddie's offenses does not mean he is more likely to reoffend than other, more typical defendants. The Sentencing Commission notes, on page 13, that "there is no apparent relationship between the sentencing guideline final offense level and recidivism risk… the recidivism rates are essentially the same, regardless of the offender's offense severity under the sentencing table." The meta-analysis does not specifically list the severity of the crime as a factor, but the length of a sentence (which is a rough indicator of the severity of a defendant's crime) has an insignificant correlation rate. This finding cuts against common sense, but it is supported by the empirical research on the matter.

Both studies show the tremendous importance of criminal history in recidivism rate. Pages 6 and 7 of the Sentencing Commission's report show the recidivism rate increases rapidly as federal Criminal History Categories and Points increase. The Sentencing Commission's report, on page 13, notes that "there is no apparent relationship between the sentencing guideline final offense level and recidivism risk." The final guidelines offense level takes into account many factors about the crime and the defendant, but the severity of the crime is a very important factor in the final guidelines level. This suggests that the severity of the crime is not an important factor in determining whether a defendant will reoffend, contrary to conventional wisdom.

The defense does not argue that Eddie has never committed a crime before March 23, 1993. As a juvenile he stole cars and used illegal drugs repeatedly. The defense also acknowledges that juvenile delinquency has been shown to be a highly significant predictor of reoffending, so if this behavior is juvenile delinquency it cuts against the defense's argument. Considering what his actual Criminal History calculation under the federal guidelines is beyond counsel's ability, but his prior uses of illegal drugs and theft of cars

should not push him from an offender with no record to considering him as someone with a substantial record. Eddie's history before March 23, 1993 is best characterized as an offender who has never experienced the power of a criminal sentence to change an offender's behavior through punishment, treatment and the threat of more punishment if the offender does not follow through with the treatment[8]. His history suggests he is less of a danger to reoffend than the Court may have assumed.

Perhaps the most important variable that will determine if Eddie will reoffend is his age. Simply put, every year he ages makes him less likely to reoffend, and thus makes him less of a danger. The meta-analysis tables list age as one of the most important factors. Exhibit 9 of the Sentencing Commission's Report (page 28 of 38) shows that the risk of an offender under 21 reoffending is 35.5%. The risk of a 31 to 35-year-old offender reoffending is 23.7%. This is the greatest decline in recidivism rates for any 10-year age difference. Simply put, incarcerating Eduardo Lopez for his 20's greatly reduced his risk of reoffending and each of the 13 years he has served since turning 30 has produced a steady but steadily smaller reduction in his recidivism rate.

The studies included also show that some factors have surprisingly small effect on a defendant's recidivism rate. For example, the meta-analysis notes that anger problems, which Eddie undoubtedly had at age 17 and age 19, have a slight negative correlation with nonsexual violent recidivism rate of -.09 (page 354), and a slight positive correlation with general recidivism of .09. General psychological problems have no correlation whatsoever with violent recidivism. General family problems have a very slight correlation with general

[8] The defense argues in this memorandum that Eduardo Lopez has used his time in prison to change his behavior as much as he could.

recidivism of .07, and a negative relationship with a father (which Eddie undoubtedly had at age 17; the relationship has improved with time) has a nearly negligible correlation with general recidivism of .02.

Eddie presents a significantly smaller risk of reoffending than one would anticipate at first glance. The severity of these crimes does not show an elevated risk of Eddie reoffending. The most important risk of Eddie reoffending in 1993 was his young age; he is no longer young.

## VII. CONCLUSION

This Court today has the opportunity to consider mitigation factors and evidence never previously considered in determining the appropriate sentence to impose on Eddie Lopez. Taken together, the expert reports and testimony, the demonstrated maturation and rehabilitation through the DOC records, as well as the letters and words from family and friends, it conclusively demonstrates that Eddie is not the "rare juvenile offender whose crimes reflect irreparable corruption" and who requires a sentence of life without parole or the equivalent. *Miller,* 567 U.S. at 479. The Court has before it over two decades of data providing insight into Eddie's character as both a child and an adult. The evidence shows a grown and matured person today who has shed immaturity, impulsivity, and recklessness of his youth, and has taken full responsibility for his actions. He has learned to resist peer pressure, control impulsive thinking and behavior, and reject criminality. All of this is evidenced by his disciplinary records and achievement while in prison. Eddie is a forward- looking person with goals and hopes and dreams. He has the support and love of his family to assist him in realizing his goals.

Punishment should be "graduated and proportioned." *Roper,* 543 U.S. at 560. Again, *Miller* holds that the "transient qualities" of youth render adolescents less "morally" responsible than adults who commit the same crimes. *Id.* at 470, 471. While this by itself does not detract from the heinousness of the crime, it compels a court to render a punishment proportionate to the adolescent's reduced moral responsibility and that is reflective of his greater potential for maturation and rehabilitation. *Id.* Eddie Lopez's growth testifies to the wisdom of *Miller's* conclusion that adolescent crimes are often the product of the "transient qualities of youth." *Id.* at 471, rather any irremediable character flaw. Eddie's potential for maturation has been realized and his ability to rehabilitate only continues to be seen through his actions. In recently talking to the mother, Mrs. Goyette, of the murder victim she said "it is up to the court but she does not feel that Eduardo should be there (in prison) any longer." She said she "feels sorry for him and his family. I can't help but feel for them (his family), it could've been one of my kids that did that, you know how teenagers are."[9]

The sentence we are recommending recognizes that the acts must be punished, and severely, without losing sight of the fact that the once juvenile offender, Eddie, was not acting from a fixed, deviant character and has shown his innate capacity for growth.

As such, the accused requests that the Court above adopt his recommended sentence as the sentence for this case.

WHEREFORE, counsel for the accused respectfully requests that this Honorable Court:

A. GRANT this motion and impose the accused's requested sentence;

[9] Investigator interview of Meri Goyette, report dated 11/14/17.

B. If the Court is not willing to grant this motion on its face, hold a hearing on the record and make written findings of fact and rulings of law sufficient for use in appellate proceedings as recommended by case law. See State v. McGlew, 139 N.H. 505, 508 (1995); see also State v. Simonds, 135 N.H. 203, 207 (1991); and

C. Grant such further relief as justice may require.

Respectfully submitted,

Pamela K. Jones
Public Defender
Bar #: 18943
Paul Borchardt
Public Defender
Bar #:

**CERTIFICATE**

The above signed counsel certifies that this pleading has been forwarded to the Attorney General on the 6th of December, 2017.

Pamela K. Jones

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS. DECEMBER TERM, 2017
Southern District
226-1993-CR-00621; 00622; 00623; 00624

The State of New Hampshire

v.

Eduardo Lopez, Jr.

**STATE'S SENTENCING MEMORANDUM**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and respectfully provides this Memorandum in support of its sentencing recommendations.

## I. PRELIMINARY

1. On September 3, 1993, the defendant, nineteen-year-old Eduardo Lopez, Jr., following a jury trial, was convicted of first-degree murder, first degree assault, attempted first degree assault, and robbery. Those convictions all stemmed from a series of three separate incidents that occurred on March 23, 1991, when the defendant was seventeen-years-old. The defendant was sentenced to life without parole and the New Hampshire Supreme Court affirmed his conviction on December 30, 1994. See State v. Lopez, 139 N.H. 309 (1994).

2. In 2012, the United States Supreme Court ruled that mandatory life without parole sentences for killers under the age of 18 were unconstitutional. See Miller v. Alabama, 567 U.S. 460 (2012). In a later decision, the Supreme Court clarified that its decision in Miller was retroactive. See Montgomery v. Louisiana, 577 U.S. __, 136 S.Ct. 718 (2016). In light of those two decisions, the defendant is entitled to a new sentencing hearing. That hearing is scheduled to take place on December 13 and 14, 2017.

3. Based on the facts adduced at trial, discovery, other comparable cases, the applicable law, and this memo, all of which provide pertinent information on the particular background and character of the defendant at the time he committed his crimes, as well as the particular nature and circumstances of those crimes themselves, the State is asking the Court to impose the following sentences:

| **Charge** | **State's recommended sentence** |
|---|---|
| First-degree murder (knowing in commission of robbery) (victim: Robert Goyette) (93-S-621-F) | 40 years to life, stand committed. |
| First-degree assault (victim: Roscoe Powers) (93-S-623-F) | 7 ½ - 15 years, stand committed and consecutive to 621-F. |
| Robbery (victim: Roscoe Powers) (93-S-622-F) | 7 ½ - 15 years, concurrent to 623-F. |
| Attempted first-degree assault (victim: Ofr. Thomas McLeod) (93-S-624-F) | 4 - 8 years, stand committed and consecutive to 621-F, and 623-F |
| Total of all sentences | 51 ½ years to life |
| Pretrial confinement credit as of December 14, 2017 | 9033 days (24 years, 8 months, 22 days) |

## II. ARGUMENT

### A. The facts of this case justify imposing the State's recommended sentences.

4. All of the defendant's convictions stem from a series of acts purposely and knowingly committed by the defendant with the goal of obtaining money and escaping capture. The facts surrounding those events justify at least the sentence requested by the State. Those facts were presented at trial and are as follows:

On Saturday, March 23, 1991, at approximately 8:50 p.m., Roscoe Powers was walking along Main Street in Nashua. T1. 104; 106.[1] As he passed the Stage Door Salon, the defendant, Eduardo Lopez, Jr., approached him, stuck a handgun in his chest and said, "You know what this is." T1. 106. Then, the defendant asked Powers for money. Id. Powers told the defendant he did not have any money, backed away, and then ran. T1. 106; 109. Powers found it hard to run with cowboy boots on and ice "all over the place." T1. 109.[2] He ran into traffic and dodged cars before slipping and falling. Id. As he was trying to get up, the defendant caught up with him and shot him in the chest at close range. T1. 109; T3. 110. Despite being shot and in pain, Powers managed to get up and run away. T1. 110. The defendant continued after Powers. Id. Powers tried to protect himself from the defendant and pulled out a knife and yelled. T1. 111. As he turned around, the defendant was gone. T1. 111.

John Stowe was looking out the front window of the Stage Door Salon and witnessed the confrontation. T1. 61-67. At first, Stowe saw Roscoe Powers walking down the street. T1. 61-62. As Powers got close to where Stowe was located, Stowe saw a man come "out of nowhere" and stop

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[1] "T1" is the trial transcript for June 15, 1993. "T2." is the trial transcript for June 16, 1993. "T3" is the trial transcript for June 17, 1993. "T4." is the trial transcript for June 18, 1993. "T5." is the trial transcript for June 21, 1993. "V" is the transcript of the June 23, 1993 verdict. Copies are attached.

[2] Officer Lavoie testified that it was "snowy and sleety, windy," that night. T1. 152.

Powers. T2. 62. Stowe saw Powers moving around, almost like "he was trying to get away from the other guy." T1. 63. At some point, Powers "took off across Main Street." T1. 66. He tried to run away from the other man and was zig-zagging as he did. T1. 67. The other man was chasing after Powers. Id. Stowe lost sight of the two men and then the man that had been chasing Powers reappeared. T1. 69. That man was running away down the street "at a pretty good clip," and never fell as he ran away. T1. 70.

Stowe went outside and saw Powers in the street. T1. 71. Stowe went up Powers, who was in pain, and saw that he had a gunshot wound. Id. Stowe told Powers that he was not going to die and ran back inside the Salon to get some towels to put on Powers's wounds. T1. 71-72.

Later that night, Stowe gave a statement to the police, T1. 77, and the following day, he identified the defendant from a photo array as the man who had confronted and later shot Powers. T1. 80, 95.

Approximately one hour after Powers was shot, Robbie Goyette parked his black Saab on West Pearl Street, just around the corner from Main Street. His wife Ellen was in the front passenger seat and their friend, Matthew Sullivan, was sitting in the back. T2. 7. Mrs. Goyette got out of the car and went into a nearby restaurant while the other two remained in the car. T2. 8.

As Robbie and Matthew sat in the car talking, the defendant approached the passenger's side of the car. T2. 9-10. Even though it was sleeting out, Goyette rolled the window down to see what the defendant wanted. T2. 8, 10. The defendant pointed a handgun into the car and said something about money. T2. 11. Goyette shook his head at the defendant and said, "No way." T2. 12. Goyette then put the car in gear and attempted to drive off. Id. The defendant ran alongside the car and fired one shot, hitting Goyette in the right side of the neck. T2. 12, 24. The car rolled into a telephone pole and came to a stop. T2. 12. When Sullivan emerged from the car seconds later, the

defendant had run off and was nowhere to be seen. T2. 13, 99-101. Goyette later died from the gunshot wound. T2. 24.

Bernadette Haight was sitting in her car with her husband on the corner of East Pearl Street and Main Street waiting for a traffic light. T2. 97. She said that the weather was "bad" that night and that it was "freezing rain." T2. 98. While waiting for the traffic light, her husband drew her attention to what appeared to be a car accident up ahead on West Pearl Street where a car had driven up on the sidewalk. T2. 98. Within seconds, she saw a man running away from the scene and crossing Main Street. T2. 99-101. The man was not staggering and there was nothing distinctive about how he moved. T2. 105. She described the man as young, about 5'5" or 5'7" in height wearing a sweatshirt with a hood. T2. 103-05. She described the sweatshirt as either red and black or red and blue. T2. 105.

Nashua Police Officer Thomas MacLeod responded to the scene of the shooting on West Pearl Street. T2. 111. This shooting took place about an hour after the first one where Roscoe Powers had been shot. T2. 112, 160.[3] After being briefed on the two shootings, he was assigned to conduct a search for the shooter who had been described as a black or Puerto Rican male who was armed with a gun and wearing sneakers and jeans that were ripped in the front. T2. 112-13.

During the course of his search, Officer MacLeod heard several screams coming from the upstairs of an apartment building on 16 Spring Street, located just one block from the scene of the second shooting. T2. 115-16. As Officer MacLeod approached to investigate, the defendant came down the stairs and out of the building carrying a "large piece of wooden stick," three to four feet long. T2. 116-17. The defendant started walking towards Officer MacLeod, who ordered him to

[3] The first shooting (Powers) was at about 9:00 p.m. and the second shooting (Goyette), was at about 10:00 p.m. T2. 160.

stop. T2. 118. The defendant did not stop. Id. Officer MacLeod drew his gun, pointed it at the defendant, and ordered him to stop and to drop the wooden stick. Id. The defendant responded, "Fuck you, I am not going to drop the stick. You're going to have to shoot me if you want me to." T2. 118-19.

The officer explained that he had no intention of shooting the defendant but simply wanted to find out what had occurred inside the house. T2. 119. The defendant repeated that he would not drop the stick and that the officer would have to shoot him. Id. Instead, Officer MacLeod holstered his gun and walked toward the defendant to try to subdue him. Id. The defendant smashed the wooden stick over the officer's shoulder, breaking it in two. T2. 120. A struggle ensued and Officer MacLeod was eventually able to gain some control over the defendant by holding him up against the wall of the house. T2. 120. Given the strength of the defendant's resistance and fearing the possibility that he might escape, Officer MacLeod decided to wait for assistance before attempting to handcuff the defendant. T2. 120. In the meantime, he struggled to maintain control over the defendant who was trying to choke him and threatening to kill him. T2. 122. The defendant told Officer McLeod that he wanted "to get in the blue car across the street" and drive to Boston. Id.

During this altercation, Officer MacLeod saw that the defendant was wearing an empty shoulder holster. T2. 121. Fearing for his safety, he asked the defendant where the gun was. Id. The defendant said, "It's upstairs." Id. Officer McLeod also noticed that the defendant was concealing a glass "Tropicana glass bottle" inside of his jacket. Id. As Officer McLeod tried to use his radio to call for help, the defendant told him he "better not call any fucking cops over here." T2. 122. Officer James Lima arrived shortly thereafter. T2. 124. He and Officer MacLeod handcuffed

the defendant and placed him in a police cruiser. T2. 125. The defendant continued to resist, kicking and screaming, as he was transported to the police department. T2. 125.

Back at the police station, Officer MacLeod assisted with the booking process for the defendant. T2. 135-37. The defendant was uncooperative during the process, initially refusing to walk. T2. 150. The defendant also fell on the floor. T2. 135-36. Officer MacLeod did not notice an odor of alcohol from the defendant, or that his speech was slurred, or that his eyes were bloodshot or glassy. T2. 157.[4] Eventually, the defendant's demeanor changed back to how he had been when Officer MacLeod encountered him earlier. T2. 136.

As part of the booking process, Officer MacLeod also conducted an inventory search on the defendant. T2. 136. Some of the items seized from the defendant included a bottle that had been inside his jacket and the shoulder holster he had been wearing. T2. 142. After the defendant was booked and searched, Detective Seusing swabbed the defendant's hands to use for a forensic test. T2. 174-76. Officer Frenier was present during this process. T2. 179.

Later, Detective Seusing accompanied Officer Healey to give the defendant an intoxilyzer breath test. T2. 182. Prior to that test, the defendant was warned about putting his hands in his mouth in case he had any alcohol on his fingers, which could cause the test results to "go higher." T2. 185. The test was administered at 12:22 a.m. and yielded a .16 BAC reading. T2. 184, 195.

The police who searched the scene of the two shootings found two .25 caliber cartridge casings, one at each scene. T2. 214. The police also found a handgun smashed to pieces in a parking lot near the defendant's home at 16 Spring Street. T2. 226-29.[5] While searching the

[4] Officer James Lima responded and assisted Officer MacLeod that night at the scene with the defendant. T2. 158-65. He did not notice any odor of alcohol or any slurred speech during his encounter with the defendant. T2. 173.

[5] The handgun was found one house away from the defendant's home. T4. 41.

defendant's home, Officer Peter Bouchard observed what appeared to be footprints in the slush and snow on the roof of the defendant's residence. T3. 38-39.

Firearms expert Roger Klose examined the defendant's gun. T3. 90. During that examination, he observed that the gun's serial number "had been removed by some type of a filing or a grinding process." T3. 93. Klose was able to restore the serial number and determined that it matched the serial number on the gun box found in the defendant's home. T3. 93-95. Klose also determined that two projectile casings, one from the scene of each shooting, as well as the bullets recovered from two of the defendant's gunshot victims, Robbie Goyette and Roscoe Powers, were all fired from that gun. T3. 110-15. The manufacturer's box for that gun was found hidden under the stairs in the basement of the defendant's residence. T3. 3-7. The defendant's fingerprint was found on the gun manual inside the box. T3. 6, 75-76.

Alan Reedy, owner of Sportsman Trading Company in Amherst, recalled two recent transactions he had with a man later identified as the defendant. T2. 128-32, 141-42. First, he remembered selling a .25 caliber Titan handgun to Lillian Ray on February 6, 1991, but that she only paid some of the cost and the defendant paid him the balance. T1. 122-37. The reason the defendant paid the balance was because Ray was actually buying the gun for the defendant, not herself. T2. 31.[6]

During the sale, Reedy remembered the defendant asking if the firearm's caliber "would be strong enough to stop somebody." T1. 129. Reedy told the defendant it would be "if the shot was placed properly." Id. The defendant also asked about ammunition for the gun. Id. Valence Ray also bought the defendant ammunition for the gun at K-Mart later on. T2. 33.

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[6] The defendant later admitted that he went to the Sportsman Trading Company to buy a gun and also bought a holster. T4. 37-38.

Several weeks later, the defendant returned to the Sportsman Trading Company to buy a holster for the previously purchased .25 caliber Titan handgun. T1. 130-31.[7] During that visit, the defendant told Reedy that he wanted a holster that "could be hidden." T. 131. In addition to a holster, the defendant also told Reedy that he was interested in a specific type of ammunition for the gun he had purchased. T1. 132. The defendant said that he wanted a "[p]rotection round," meaning some "hollow point" ammunition. T1. 132-33.[8] Mr. Reedy said that there was another man with the defendant during the transaction, but that man remained silent the whole time. T1. 133.

On March 23, 1991, about a month and a half after buying a gun, the defendant was at his friend Valence Ray's apartment on Temple Street in the downtown area of Nashua. T2. 39. He, Ray and another friend, Edgar Cruz, were drinking rum mixed with orange juice. T2. 38-39. Edgar eventually left. T2. 39-40. At some point, the defendant asked Ray if he wanted to go down behind the senior citizen's building on Temple Street to shoot the defendant's gun. T2. 40. Ray and the defendant then walked to the area behind the senior center, loaded the gun and shot the gun at signs. T2. 40-41. The defendant loaded the clip in the gun and Ray "put one in the chamber." T2. 40. Both Ray and the defendant took turns firing the gun. T2. 41. At one point, the defendant "said he wanted to shoot a moving target." Id. They stopped shooting and returned to Ray's apartment after they heard police sirens. T2. 41-43.

Selina Gerow, Valence Ray's girlfriend, came over to the apartment later that day and observed Ray and the defendant drinking alcohol from an orange juice container. T2. 43-44, 74-75. The defendant also had a gun that night, which he was carrying in a shoulder holster. T2. 43-44, 76-77, 78. Gerow knew the gun belonged to the defendant because Lillian Ray, Valence Ray's sister,

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[7] Prior to buying a holster, the defendant carried the gun in his pocket "at first." T2. 32.

[8] "This type of ammunition is designed to open up on impact, causing larger wounds." State v. Jones, 774 N.E.2d 1163, 1170 (Ohio 2001). Thus, hollow point ammunition is "a particularly deadly form of ammunition." Id. at 1185.

had bought it for him. T2. 78. Gerow had also seen the defendant with the gun before "letting the clip in and out." T2. 77.

During the course of the evening, the defendant left the apartment twice. T2. 44, 49, 78, 83. The first time, he put on the shoulder holster with the gun in it under his jacket, and was gone for about an hour or forty-five minutes, during which Ray and Gerow watched a movie. T2. 44, 46. Upon his first return, the defendant was acting nervous and was carrying the orange juice bottle. Id. He told Ray and Gerow that he "tried to rob somebody" on Main Street. T2. 46, 80. The defendant explained that the man "wouldn't give him [(the defendant)] his money" and he eventually told the man he was going to shoot him. T2. 46-47. The defendant said that the man "pulled a knife on him" and the defendant chased the man across the street and then shot the man in the stomach. T2. 46-47, 80.

After explaining to Ray and Gerow what had happened on and around Main Street, the defendant then shaved his hair, mustache, and beard. T2. 48, 81. Ray then attempted to hide the gun from the defendant while he was shaving his face and head. T2. 49.[9] The defendant demanded that Ray put the gun back "because he didn't want [Ray] to get in trouble." T2. 49. The defendant left a second time and said he was going to see if the man he had shot was dead. T2. 49, 82, 83. The defendant was still wearing his gun in the shoulder holster when he left. T2. 49, 82-83. He also changed his jacket before he left. T2. 44-45, 83.

The defendant returned about twenty minutes or a half hour later. T2. 84. He was acting real scared. T2. 50. The defendant told his friends that he had shot a man in a black Saab in his head. T2. 50, 85. The defendant said he "didn't mean to do it" and he didn't "know why he did it." T2. 50. The defendant said there was somebody else in the Saab that would be able to identify him. Id.

[9] Gerow also helped the defendant shave his head. T2. 82.

The defendant said that the man he shot was dead. Id. Ray saw the defendant's gun on the counter during this discussion; it was the same gun that Lillian Ray had purchased for the defendant. T2. 50.

Ray told the defendant to "dismantle the gun and throw it in the river." T2. 51. The defendant responded that he wanted to leave and "get out of Nashua." T2. 51, 85. He then asked Gerow if he could use her car to leave town. T2. 52, 86. When she refused, the defendant left to go home. T2. 52, 86. Before leaving, he told Ray that he would write to him. T2. 86. The defendant spent fifteen or twenty minutes with Ray and Gerow before leaving. T2. 86.

The defendant lived with his parents and two younger brothers at 16 Spring Street. T3. 138. According to his mother, Carmen Aguirre, he returned home that evening after 10:00 p.m., drunk and not acting like himself. T3. 141-43. She noticed that he had shaved his beard and mustache that day. T3. 153. She also told investigators that the defendant was "begging" her to give him her car keys. T3. 154. She had previously told the police that he wanted the car keys to go to Chelsea, Massachusetts that night and that he ultimately left the home with a stick in his hand.[10] T3. 154-57.

The defendant testified at trial. T4. 1. He was 19 years old at the time. T4. 2. The defendant said that he "vaguely" remembered "the events of the day" he was arrested. T4. 3. However, the defendant proceeded to give a very detailed account of what he did that morning, including a trip he took with Valence Ray and Edgar Cruz to buy alcohol. T4. 4-5. The defendant claimed that after purchasing alcohol he and his friends went back to Ray's house to drink. T4. 6. He estimated that it was two or three o'clock in the afternoon when that happened. Id.

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[10] The defendant lived in Chelsea, Massachusetts with his family before they relocated to Nashua in 1989. T3. 137-38

The defendant said that he and his friends left Ray's house at some point in the late afternoon "to shoot a gun." T4. 7-8. The defendant said that they were all "drunk" when they went to go shoot the gun. T4. 9. However, he testified at trial that the gun had "[s]even [bullets] in the clip and one in the chamber." Id. The defendant confirmed that he had a holster for the gun, but claimed that he only had it "for like a fashion statement." T4. 7. He claimed he kept the holster at "Ray's home." T4. 8.

After shooting the gun that first time, the defendant returned to Ray's home. T4. 10. Edgar Cruz left and the defendant said that he and Ray went back out and "shot the gun again." Id. The defendant testified that they fired about "eight [shots] in total." Id. After that, they returned to Ray's house where the defendant said they "loaded up again." T4. 11.

The defendant testified that he and Ray later left the house and that he had an "orange juice container with the liquor in it" and Ray had the gun. Id. The defendant claimed that they left the house to call "some girls" and "were really drunk." T4. 12. However, the defendant still testified as to many details about his interaction with Roscoe Powers. T4. 12-15. That testimony included details about what he said to Powers and what Powers said to him. T4. 14. The defendant told the jurors how he threatened Powers to get money, and told Powers that he was going to "take a bottle and crack it over his head." Id. The defendant described in detail what Powers said to him in response. Id. The defendant claimed that Powers began to run and that he chased him, and so did Ray. T4. 15. After that, the defendant said he heard a gunshot and ran back to Ray's house. Id. The defendant never testified that he stumbled or fell at any point during that encounter. Id.

Back at Ray's house, the defendant testified that Ray told him "that he chased the guy and the guy pulled out a knife and he shot him." T4. 16. The defendant said he was "scared" because

Powers had seen him, so he started shaving and cut his hair. T4. 16-17.[11] The defendant gave details about what he was thinking during the time and what he did, including drinking. T4. 17-19. The defendant claimed that he told Ray he needed to leave and that he should steal a car and go "somewhere." T4. 19. After that, the defendant said that Ray grabbed a screwdriver and the two left the apartment. Id. The defendant said that he and Ray left the apartment because the defendant was going to go to his mother's house to ask her for her "car keys and take the car keys." T4. 22. The defendant said that Ray had the gun when they left. T4. 19.

The defendant testified in detail about leaving Ray's apartment, including how the two walked and the streets they were on. T4. 22. The defendant claimed that Ray was behind him and then he "heard a gunshot." T4. 22. The defendant testified that he "ran" across the street and "back to Ray's house." T4. 22-23. The defendant never testified that he stumbled or fell at any point during that period. Id. The defendant said that he got to Ray's house and Ray told him that "he just shot some guy in the head" and that the guy had been in a "Saab." T4. 23-24. The defendant described the conversation between he and Ray about the shooting and how the defendant said he "was getting out of there." T4. 24. The defendant also testified about his conversation with Ray about what to do with the gun. Id. After that, the defendant said that he left and went back to his home. Id.

After he got home, the defendant told his mother he "wanted to leave." T4. 25. He claimed he did not remember much of what occurred at home because he "was just way too drunk." Id. Despite that claim, the defendant testified as to details of his time at home with his mother and their conversation. Id. The defendant also claimed that he did not have a gun or dispose of one. T4. 25-

[11] The defendant shaved his beard, mustache, and hair. T4. 33.

26. The defendant testified that he did not remember leaving the house or grabbing a stick. T4. 25. However, he testified that he did remember going "down the stairs." T4. 26.

The defendant said that he was drunk that night, but probably had been that drunk before. Id. Despite his claims about being drunk, the defendant testified that he was "positive" he did not kill anybody or shoot anyone. Id. The defendant was just as positive that he did not change his clothes that night. T4. 27.

On cross-examination, the defendant claimed that Alan Reedy, Valence Ray and Selina Gerow all lied during their testimony. T4. 35-36. Unlike them, the defendant asserted that he was telling the truth and did not have a gun or shoot anyone that night. T4. 29, 35. The defendant said that "Ray did." T4. 33. However, the defendant admitted that he would "do anything" to avoid getting in trouble for shooting someone. Id.

As for his memory, contrary to his claimed memory about his own actions, the defendant testified that he remembered "every single incriminating thing that Valence Ray did." T4. 33-34. The defendant acknowledged that he must have assaulted Officer MacLeod, but claimed that he did not remember because he was drunk. T4. 34, 46. However, the defendant said that he was drunk "all the time" and admitted that he was "used to alcohol." T4. 44.

After closings and deliberations, the jury convicted the defendant of all the charges except the premeditated count of first-degree murder. V. 1-9. The defendant flipped over a table and swore after the verdict was announced. V. 9.

5. Based on all these facts, the State's recommended sentence is appropriate. The defendant committed a series of intentional violent crimes on March 23, 1991. These were not spontaneous, impulsive acts. Instead, with each victim, the defendant made sure he had armed himself with a deadly weapon beforehand, and then used the weapon on each of his three victims.

The circumstances of the murder and the other crimes the defendant committed back in 1991 had little to do with his age. Instead, the defendant made adult decisions to commit crimes for money and then tried to harm a police officer to escape capture. There was nothing "juvenile" about the defendant or his crimes.

**B. The mitigating factors discussed in *Miller* are not mandatory here, but even if they are considered, they are not compelling in this case.**

6. The Miller Court's decision that mandatory life without parole sentences for juveniles are unconstitutional means that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." Miller, 132 S. Ct. at 2475. The majority discussed the rationale for its decision and the sentencing factors that should be considered when considering a life without parole sentence for a juvenile murderer:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuousness, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Miller, 132 S. Ct. at 2468 (citations omitted).

7. In this case, since the State is not asking the Court to impose "the harshest possible penalty for juveniles," i.e., a life without parole sentence or its functional equivalent, Miller does not mandate consideration of its mitigating sentencing factors here. Regardless, the State will still address those factors in the event the Court considers them in this case:

***Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuousness, and failure to appreciate risks and consequences.***

As stated, the State is not seeking life without parole. The defendant will have an opportunity for release at his minimum parole date, depending on his behavior. In addition, the defendant will have the option to request a sentence reduction prior to parole, pursuant to RSA 651:20.

There is no credible evidence that the defendant's crimes and the murder he committed were due to his immaturity or being impetuous. On the contrary, the defendant was deliberate in his crimes and did things in advance to help facilitate them, such as buying a gun, ammunition and a holster, and removing the serial number from the gun.

The evidence shows that the defendant also appreciated the risks and consequences of his crimes and the murder he committed that night. After the defendant tried to rob and then shot Roscoe Powers, his first victim that night, the defendant told Selina Gerow and Valence Ray what he had done to Powers. He specifically told Gerow and Ray that he had shot a man and was going to go back out to see if the man was dead. Before going back out though, the defendant took steps to ensure that he would not be caught. Those steps included changing his clothing and his appearance, including shaving his beard and mustache and cutting his hair. Later, after shooting and killing his second victim that night, the defendant also tried to get rid of the murder weapon, hide the gun box, and use a car to flee the State. All those actions confirm that the defendant appreciated the risks and consequences of his actions.

***It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional.***

The defendant's "family and home environment" are not substantially mitigating factors. He had a mother and father who loved him and worked. At times his home life was challenging, but nothing about his family and home environment compelled him to commit his crimes or encouraged him to do so. There was also nothing about his family life that could be described as "brutal."

***It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.***

The "circumstances of the homicide offense" are not mitigating for the defendant. As the facts clearly show, the defendant bought a gun in advance to commit crimes for money. He was alone when he committed all three of his crimes; his family and friends were not there. The defendant's conduct was also voluntary and in no way the product of "familial and peer pressures."

In sum, the defendant's conduct accurately reflects the absence of youthful infirmities that could have played a role in what the defendant himself chose to do.

***Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.***

There is no evidence that the defendant could have been "charged and convicted of a lesser offense" in this case but for "incompetencies associated with youth." Likewise, there is no evidence that the defendant had an inability to deal with the police or prosecutors that affected the charges against him. Finally, there is also no evidence that the defendant was incapable of assisting his own attorneys based on his age. In fact, the defendant took the witness stand in his own defense.

***And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.***

The State is not seeking a mandatory life sentence here. Therefore, the defendant will have the opportunity for parole and release, as well as the chance for an even earlier release pursuant to RSA 651:20. Accordingly, the State's recommended sentence takes into account the "possibility of rehabilitation."

8. Based on the facts of this case, even if the Court considers the Miller factors, they are not sufficiently mitigating to justify imposing the defendant's recommended sentence in light of the many aggravating factors in this case.

**C. The aggravating factors weigh in favor of the State's recommended sentence.**

9. The defendant's crimes and his conduct on March 23, 1991, reflect several aggravating factors that weigh in favor of the State's recommended sentence, including:

The defendant went out looking to commit a violent theft on two occasions, each time armed with a deadly weapon, a firearm,

The defendant used a deadly weapon, a stick, to commit a crime against a police officer,

The defendant attacked multiple victims (three in all), chasing down two of them,

The defendant's victims were completely unknown to him, and were completely innocent targets of opportunity,

The defendant never expressed remorse after he attacked his victims,

The defendant attacked a police officer who was acting in the line of duty,

The defendant attempted to avoid apprehension by changing his appearance,

The defendant attempted to dispose of the murder weapon and hide evidence in the case,

The defendant put others at risk by firing a gun in public on two separate occasions, and

The defendant lied on the witness stand at trial and placed blame for shooting two other people on someone else.

10. The defendant's crimes and the actions he took to facilitate them were deliberate and calculated. He had a purpose in mind when he attacked his first two victims, steal money. With respect to his last victim, that attack was done with the purpose to try and escape. Each crime was committed distinct from the other, with separate victims. The defendant had ample time to reflect on his actions between each crime but instead, chose to commit additional crimes. Accordingly, the facts and aggravating factors justify the State's recommended sentence.

**D. Principles of sentencing law in New Hampshire justify imposing the State's recommended sentence.**

11. The Miller case did not take the place of New Hampshire's established sentencing law and factors. Instead, Miller merely held that a **mandatory** life without parole sentence could not be imposed on a juvenile without considering other factors as well. Therefore, Miller requires this Court to do what all courts do in other criminal cases in New Hampshire, which is engage in individualized sentencing.

12. The three-part test for sentencing is well-settled under New Hampshire law. "The legislature has vested in the trial court the ability to adapt sentencing to best meet the constitutional objectives of punishment, rehabilitation and deterrence." State v. Henderson, 154 N.H. 95, 97 (2006). No single factor is essential to justify a particular sentence in a case so long as the trial court considers all three goals. See State v. Wentworth, 118 N.H. 832, 842 (1978) ("The real purpose of all sentencing is to reduce crime. This theoretically can be done by rehabilitating the individual defendant so he will not offend again. Another way is to punish the individual defendant in the hope that he will be deterred from repeating his crime. Moreover, by punishing the individual

defendant, others may be deterred from committing crimes. Whichever sentence is thought to be likely to reduce the most crime is the proper sentence to impose.").

13. As to punishment, the New Hampshire Supreme Court has held that "retribution...remains a societal goal," and that the legislature may properly conclude that certain criminal conduct is so serious that the offender "must be isolated from society for the remainder of his life." State v. Farrow, 118 N.H. 296, 303 (1978). Accordingly, since this Court has broad discretion to determine the sentence in this case, it could also conclude that the defendant must be punished by being "isolated from society for the rest of his life." Id. Certainly a murder committed in the context of two other serious crimes is potentially worthy of a life sentence. However, that is not the punishment the State is asking the Court to impose in this case.

14. As to rehabilitation, the State's proposed sentence provides the defendant with an opportunity for rehabilitation in prison and after his release. The defendant may continue to avail himself of programs and opportunities in prison to try and better himself and assist with his eventual parole request and/or request for a potential sentence reduction pursuant to RSA 651:20.

15. Deterrence, both general and specific (i.e., individual), is another factor to consider in this case. New Hampshire courts have long acknowledged that general deterrence is a legitimate consideration in imposing sentence for a particular offense. See State v. Dumont, 122 N.H. 866, 868 (1982) ("[I]t is clear that society's legitimate concern with the public danger of thefts involving firearms increases the need for general deterrence of such offenses, and serves as an adequate justification for imposition of a more severe penalty. Thus, New Hampshire judges have generally dealt more severely with offenses involving firearms."); State v. Darcy, 121 N.H. 220, 225 (1981) ("The real purpose of all sentencing is to reduce crime, and our Constitution recognizes deterrence as a legitimate purpose of sentencing."). In the seminal case of State v. Wentworth, 118 N.H. 832

(1978), the New Hampshire Supreme Court discussed the role of general deterrence in sentencing in more detail:

> Contrary to defendant's assertion, the emphasis on deterrence in this case is not inconsistent with N.H. Const., pt. I, art. 18, which states in part that "the true design of all punishments (is) to reform, not to exterminate mankind." It should be noted that this constitutional language sanctions "punishment" as a method of reforming the criminal. See State v. Farrow, 118 N.H. 296 [] (1978). This same language also recognizes deterrence as a valid purpose of sentencing; the implication is that reform will result from the deterrent effect of punishment. General deterrence is also recognized in other language in the article when it states that if the same "severity is exerted against all offenses, the people are led . . . to commit the most flagrant with as little compunction as they do the lightest offenses." Id. Rehabilitation, which in the modern sense of the word includes counseling and training, is not a constitutional requirement. The defendant in this case is an educated, highly motivated individual with no prior record and with no apparent criminal tendencies apart from the practice of civil disobedience to accomplish what he considers to be an important goal. He is not in need of rehabilitation in the modern sense of the word. The State, however, does need to deter repetition of this offense both by the defendant and others. Both individual and general deterrence were important considerations for the imposition of sentence in this and related cases. To accomplish these purposes, the sentence needed to be more severe than in ordinary criminal trespass cases. In deciding on the degree of severity to obtain the necessary deterrent effect, the trial judge was entitled to consider the dedication and motivation of the offender who would not likely be deterred by a lighter sentence, but who with others might be induced by a more severe sentence to use lawful, instead of unlawful, means to protest. The object is not to stifle protest, but to deter unlawful conduct.

Wentworth, 118 N.H. at 842-43.

16. In Wentworth, the New Hampshire Supreme Court concluded that so long as a trial court does not fail to consider the circumstances of the particular individual defendant in imposing its sentence, "[g]eneral deterrence is a permissible consideration." Id. at 843. In the context of this defendant's crimes, general deterrence is appropriate. Other like-minded or situated potential criminals must be warned that if they engage in similar conduct, they too will be met with swift and severe punishment. The sentence requested by the State aids in that goal.

17. Specific or individual deterrence is also an important consideration in this case. The facts clearly demonstrate that this defendant had no regard for the lives of others on March 23, 1991. He decided to kill and maim for money and was not afraid to risk his life and the lives of others to fulfill his own needs and desires. Therefore, considerations of specific/individual deterrence weigh in favor of the State's requested sentence.

18. Finally, a particular sentence may be imposed in order to instill confidence in the criminal justice system. The New Hampshire Supreme Court recognized that this was a valid sentencing factor even in the absence of rehabilitation or deterrence. In Darcy, the Court observed:

> Many persons who are incarcerated for having committed homicide are not dangerous. They committed their crimes, as did this defendant, under a set of circumstances which are not likely to recur. It may be argued that a crime of this nature, committed in the heat of passion, is not likely to be deterred by imprisonment. Yet it is recognized that there are some crimes for which imprisonment may properly be thought to be the appropriate sentence even though it may not have a deterrent effect; otherwise, the seriousness of the crime would be unduly depreciated.

Darcy, 121 N.H. at 225-26. The Court also stated that "public confidence in the system of justice" is an "important consideration" in sentencing. Id. at 225. Sentencing the defendant to a significant prison sentence instills "public confidence in the system of justice" by sending the message that crimes against innocent people will not be tolerated and that there are significant consequences, even though those consequences are lessened when the perpetrator is a juvenile.

19. These considerations and the others already mentioned, justify imposing the State's recommended sentence in this case.

**E. Comparable cases**

20. In almost all criminal cases in New Hampshire, the trial court has discretion as to the actual sentence that will be imposed, and such is the case here. The exercise of that discretion

involves considering the facts of the case, the victims, the defendant, and the goals of sentencing, to determine the appropriate sentence. In addition, trial courts may look to other similar cases for guidance in sentencing. While those other cases are not binding, they can prove informative for the trial court. Accordingly, the State offers three cases involving crimes committed by young men in Nashua, for this Court's consideration.

21. In the 2015 Nashua case of State v. John Goff, the seventeen-year-old defendant and his friend attacked a stranger, and stabbed that man multiple times, killing him. In the Goff case, like this case, Mr. Goff was charged with knowing first-degree murder in the commission of a robbery. Mr. Goff later decided to plead guilty to second-degree murder and conspiracy to commit robbery. A contested sentencing hearing was held and the Court sentenced Mr. Goff to forty-five years to life on the murder charge, with five years of the minimum suspended, and a consecutive suspended seven and one-half years to fifteen years on the conspiracy charge.[12] In Goff, unlike this case, there was one victim, not three.

22. In the 2011 Nashua case of State v. Matthew Packer, the nineteen-year-old defendant got into an argument with three strangers as he drove by in a car. The defendant stopped, got out of the car, and after confronting the three people stabbed and killed one man, stabbed another woman who was present, and injured a third woman who was also present. Mr. Packer was eventually charged with first-degree murder and other related charges. He eventually pleaded guilty to second-degree murder for killing one victim, and two counts of first-degree assault, one for each of his other two victims. At a contested sentencing hearing, the Court sentenced Mr. Packer to forty-five years to life on murder charge, with the possibility of ten years off of his minimum sentence for good behavior, including no major disciplinary infractions and other conditions, six to fifteen years on a

[12] A copy of the returns from the court is attached as State's Exhibit #1.

first-degree assault charge, and one to seven years on a second, first-degree assault charge.[13] The total sentence was fifty-two years to life. As in this case, the defendant in Packer also attacked three victims who were strangers to him. Unlike this case though, all three of Mr. Packer's victims were attacked during the same, brief incident. Mr. Packer was also diagnosed with PTSD.

23. In the 2010 Nashua case of State v. Brandon Nye, the nineteen-year-old defendant attacked his ex-girlfriend's new boyfriend with a knife, and stabbed him to death. Mr. Nye was charged with first-degree murder and other alternative counts of murder. He later decided to plead guilty to second-degree murder. Mr. Nye was sentenced to a fully negotiated thirty-five years to life on the murder charge.[14] In Nye, unlike this case, there was one victim, not three. In addition, Mr. Nye had significant mental health issues. He tried to kill himself after the murder, was found incompetent to stand trial and later competent, and was diagnosed with PTSD and possibly schizophrenia.

24. Although the State has not located a case with identical facts to the instant case, the three cases cited about provide the Court with some useful guidance in sentencing this defendant. As those three cases illustrate, in a case where there is a single victim, a sentence of at least thirty five years to life, and up to forty-five years to life is reasonable for a negotiated plea on a murder charge. In this case though, the defendant victimized three people, not one. That fact, along with all the other facts stated in this memorandum, weighs in favor of the State's recommended sentence.

[13] A copy of the returns from the court is attached as State's Exhibit #2.
[14] A copy of the returns from the court is attached as State's Exhibit #3.

**F. Victim impact weighs in favor of the State's recommended sentence.**

25. The defendant victimized three people and their families on March 23, 1991. His first victim, Roscoe Powers, was run down and then shot. His second victim, Robbie Goyette, was pursued and then murdered. His third victim, Officer MacLeod, was attacked with a stick. All suffered at the hands of the defendant and Robbie Goyette's family still lives with the consequences of the defendant's actions today.

26. Murder cases are painfully unique when it comes to all other crimes. Unlike other crimes where restitution may make a theft victim whole or time will heal an assault victim's physical injuries, the complete and permanent loss of a family member's life can never be made right. The victim is gone forever and his family members bear the brunt of that loss for the rest of their lives. The defendant will get out of prison someday, but the ramifications of what he did to Robbie Goyette will resonate for his family for years afterward. As such, it is only just that the defendant serves a significant sentence for the life he took, and the two others he almost took.

## III. CONCLUSION

27. The evidence against the defendant is overwhelming; there is no doubt that he committed the crimes he was convicted of. The evidence also confirms that he willingly chose to commit violent acts against random and innocent victims. Far from being corrupted by others, the defendant acted on his own. He was no follower who acted at the behest of others due to immaturity and peer pressure.

28. Taken together, the facts of this case and aggravating factors identified in this pleading, justify imposing at least the State's recommended sentence. In making its recommendation, the State acknowledges that mitigating factors are present as well. Specifically, the defendant's age, substance abuse issues, and family background. But the State took these

factors into account by recommending less than a life or life without parole sentence. Therefore, no additional leniency is warranted. Moreover, as to the mitigator of age, although the defendant's age in itself is a mitigator, the crimes that he committed reflect few if any of the attendant characteristics of youth that a Court may consider when determining what sentence is fair and appropriate. Therefore, for all the reasons stated the defendant should be sentenced as requested by the State.[15]

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General

December 4, 2017

Jeffery A. Strelzin, NH Bar ID# 8841
Senior Assistant Attorney General
New Hampshire Attorney General's Office
Homicide Unit
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3671

Erin E. Fitzgerald, NH Bar ID# 268006
Attorney

[15] The State may supplement the arguments and facts in this memo after the December 2017 hearing.

**CERTIFICATE OF SERVICE**

I certify that a copy of this pleading has been provided to Paul Borchardt, Esquire and Pamela Jones, Esquire.

December 4, 2017

Jeffery A. Strelzin

[1351670]

# EXHIBIT 1

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Jonathan Goff**
Case Number: **226-2015-CR-00179**

Name: **Jonathan Goff, HCHOC 445 Willow Street Manchester NH 03103**
DOB: **January 23, 1998**

Charging document: Indictment

| **Offense:** | **Charge ID:** | **RSA:** | **Date of Offense:** |
|---|---|---|---|
| 2nd Degree Murder | 1321056C | 630:1-b | March 12, 2015 |

Disposition: Guilty/Chargeable By: Plea

**A finding of GUILTY/CHARGEABLE is entered.**

Conviction: Felony

Sentence: see attached

January 12, 2017 — Date
Hon. Lawrence M. Smukler — Presiding Justice
Marshall A. Buttrick — Clerk of Court

### MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison.** Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

January 12 2017

Attest: Marshall A Buttrick
Clerk of Court

### SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

J-ONE: ☒ State Police ☐ DMV

C: ☒ Dept. of Corrections ☒ Offender Records ☐ Sheriff ☐ Office of Cost Containment
☒ Prosecutor Peter R. Hinckley, ESQ ☐ Defendant ☒ Defense AttorneyJulia M. Nye, ESQ
☒ Sentence Review Board ☐ Sex Offender Registry ☐ Other _____ ☐ _____ Dist Div. _____

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Hillsborough Superior Court Southern District

Case Name: State of New Hampshire v. Jonathan Goff

Case Number: 226-2015-CR00179 (if known) Charge ID Number: 13210560

## STATE PRISON SENTENCE

| | |
|---|---|
| Plea~~/Verdict~~: Guilty Plea | Clerk: Marshall A. Buttrick |
| Crime: Second Degree Murder, RSA 630:1-b, I(a) | Date of Crime: March 12, 2015 |
| Monitor: | Judge: Larry M. Smukler |

A finding of GUILTY/TRUE is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

X 1. The defendant is sentenced to the New Hampshire State Prison for not more than LIFE, nor less than 45 YEARS. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

X 2. This sentence is to be served as follows: X Stand committed X Commencing forthwith

☒ 3. 5 years of the minimum sentence and None of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 45 years from ☒ today **or** ☐ release on _____ (Charge ID Number)

☐ 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☐ 5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☐ 6. The sentence is ☐ consecutive to _____ (Charge ID Number(s))

☐ concurrent with _____ (Charge ID Number(s))

X 7. Pretrial confinement credit: 670 days.

☐ 8. The Court recommends to the Department of Corrections:

- ☐ Drug and alcohol treatment and counseling
- ☐ Sexual offender program
- ☐ Sentence to be served at House of Corrections
- ☐ _____

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Name: State of New Hampshire v. Jonathan Gott

Case Number: 226-2015-CR00179, Charge ID Number ;

STATE PRISON SENTENCE

## PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: ☐ Forthwith ☐ Upon Release _____

☐ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

## OTHER CONDITIONS

X 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____

☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR

☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.

☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for ____ year(s).

**A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.**

☐ B. The defendant is ordered to make restitution of $ _____ to _____

☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

☐ Restitution is not ordered because: _____

X C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☒ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the

☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service and provide proof to ☐ the State or ☐ probation within _____ days/within _____ months of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

X I. The defendant and the State have waived sentence review in writing or on the record.

X J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other: _____

1/12/17
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
Southern District

DECEMBER TERM, 2016

226-2015-CR-179

1321056C

**FELONY COMPLAINT AND WAIVER OF INDICTMENT**

WHEREAS, the within named defendant has waived indictment and applied to the Superior Court for prompt arraignment upon the complaint herein set forth;

NOW, therefore, the Attorney General for the State of New Hampshire upon oath does hereby complain that:

**JONATHAN GOFF**
**(DOB: 1-23-1998)**

of Nashua, in the State of New Hampshire, on or about March 12, 2015, at Nashua in the County of Hillsborough aforesaid, with force and arms, did commit the crime of

**SECOND DEGREE MURDER**
(RSA 630:1-b, I(a))

in that Jonathan Goff did knowingly cause the death of Benjamin Marcum by stabbing him with a knife.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

WHEREFORE, the State of New Hampshire prays that the within named Defendant may be held to answer to this complaint, and that justice may be done.

Dated: December 22, 2016

Peter Hinckley (Bar ID #18708)
Senior Assistant Attorney General

11/2/17
Plea of GUILTY

STATE OF NEW HAMPSHIRE
MERRIMACK, SS.

Personally appeared before me, Peter Hinckley, who signed the above complaint and made oath based on information and belief that the above complaint is true.

Notary Public/Justice of the Peace

My Commission Expires:

ANNIE M. GAGNE
Justice of the Peace - New Hampshire
My Commission Expires March 9, 2021

Name: Jonathan Goff
DOB: 1/23/1998
Address: Hillsborough County House of Corrections
Manchester, New Hampshire
RSA: 630:1-b, I(a)
Dist/Mun Ct: N/A

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Jonathan Goff**
Case Number: **226-2015-CR-00179**

Name: **Jonathan Goff, HCHOC 445 Willow Street Manchester NH 03103**
DOB: **January 23, 1998**

Charging document: Indictment

| **Offense:** | **Charge ID:** | **RSA:** | **Date of Offense:** |
|---|---|---|---|
| Robbery - Weapon or SBI | 1181700C | 636:1 | March 12, 2015 |

Disposition: Guilty/Chargeable By: Plea

**A finding of GUILTY/CHARGEABLE is entered.**

Conviction: Felony

Sentence: see attached

January 12, 2017
Date

Hon. Lawrence M. Smukler
Presiding Justice

Marshall A. Buttrick
Clerk of Court

J-ONE: ☒ State Police ☐ DMV

C: ☒ Dept. of Corrections ☐ Offender Records ☐ Sheriff ☐ Office of Cost Containment
☒ Prosecutor Peter R. Hinckley, ESQ ☐ Defendant ☒ Defense Attorney Julia M. Nye, ESQ
☒ Sentence Review Board ☐ Sex Offender Registry ☐ Other _____ ☐ _____ Dist Div. _____

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Hillsborough Superior Court Southern District

Case Name: State of New Hampshire v. Jonathan Goff

Case Number: 226-2015-CR00179 Charge ID Number: 1181700C
(if known)

## STATE PRISON SENTENCE

| | |
|---|---|
| Plea~~Verdict~~: Guilty Plea | Clerk: Marshall A. Buttrick |
| Crime: Conspiracy to Commit Robbery, RSA 636:1, I(a) & III(a); RSA 629:3, I | Date of Crime: March 12-13, 2015 |
| Monitor: | Judge: Larry M. Smukler |

A finding of GUILTY/TRUE is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

X 1. The defendant is sentenced to the New Hampshire State Prison for not more than 15 YEARS, nor less than 7½ YEARS. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

X 2. This sentence is to be served as follows: X Stand committed X Commencing forthwith

X 3. 7½ YEARS of the minimum sentence and 15 YEARS of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins 10 years from release on 226-2015-CR00179, Charge ID Number 1181698C

☐ 4. ~~today and ends~~ _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☐ 5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

X 6. The sentence is X consecutive to 226-2015-CR00179, Charge ID Number

☐ concurrent with _____
(Charge ID Number(s))

☐ 7. Pretrial confinement credit:

☐ 8. The Court recommends to the Department of Corrections:

- ☐ Drug and alcohol treatment and counseling
- ☐ Sexual offender program
- ☐ Sentence to be served at House of Corrections
- ☐ _____

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Number: 226-2015-CR00179, Charge ID Number 1181700C

STATE PRISON SENTENCE

## PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release _____
☐ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

## OTHER CONDITIONS

X 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By _____ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ _____ of the fine and $ _____ of the penalty assessment is suspended for ____ year(s).
**A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.**

☐ B. The defendant is ordered to make restitution of $ _____ to _____
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: _____

X C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _____ hours of community service and provide proof to ☐ the State or ☐ probation within _____ days/within _____ months of today's date.

☐ G. The defendant is ordered to have no contact with _____ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

☐ H. Law enforcement agencies may ☐ destroy the evidence ☐ return evidence to its rightful owner.

X I. The defendant and the State have waived sentence review in writing or on the record.

X J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ K. Other: _____

1/12/17
Date

Presiding Justice

THE STATE OF NEW HAMPSHIRE
INDICTMENT

HILLSBOROUGH, SS.
Southern District

JANUARY TERM, 2016

At the Superior Court, holden at Nashua, within and for the County of Hillsborough aforesaid, on or about the 20th day of January in the year of our Lord two thousand and sixteen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**JONATHAN GOFF**
(DOB: 1/23/1998)

of Nashua, in the State of New Hampshire, on or about March 12, 2015, and March 13, 2015, at Nashua in the County of Hillsborough aforesaid, did commit the crime of

226-2015-CR-179
1181700C

**Conspiracy to Commit Robbery**
(RSA 636:1, I(a) & III(a); 629:3, I)

in that with the purpose that the crime of robbery while actually armed with a deadly weapon be committed, a crime defined by statute, Jonathan Goff agreed with Stephan Peno and/or Keven Kiro to commit or cause the commission of the crime of robbery while actually armed with a deadly weapon, and one or more of the following overt acts was committed by one of the conspirators in furtherance of the conspiracy:

1. Jonathan Goff, Stephan Peno, and Keven Kiro met at 39 ½ Palm Street, Nashua; or
2. While at 39 ½ Palm Street, Nashua, Jonathan Goff, Stephan Peno, and or Keven Kiro talked about committing a robbery; or
3. Jonathan Goff, while at 39 ½ Palm Street, placed a knife in Stephan Peno's hand; or
4. Jonathan Goff armed himself with a knife before leaving 39 ½ Palm Street; or
5. Jonathan Goff, Stephan Peno, and Keven Kiro walked together from 39 ½ Palm Street, Nashua to the area of the Heritage Trail bike path between Palm and Ash Streets in Nashua; or
6. Stephan Peno assaulted Benjamin Marcum by striking him about the face, head, and/or chest with his fist; or
7. Stephan Peno assaulted Benjamin Marcum by stomping on his head; or

1/12/17
A True Bill of Guilty

HSCS-JAN21'16AM11:17

8. Jonathan Goff assaulted Benjamin Marcum by stabbing him in the head, torso, leg, and shoulder; or

9. Jonathan Goff assaulted Benjamin Marcum by kicking him in the head; or

10. Jonathan Goff and/or Stephan Peno took Benjamin Marcum's wallet from his person without his authorization; or

11. Stephan Peno attempted to destroy and/or conceal Benjamin Marcum's wallet by discarding it in a dumpster; or

12. Jonathan Goff attempted to conceal the knife with which he stabbed Benjamin Marcum by hiding it in a waste receptacle.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Peter Hinckley
Assistant Attorney General

This is a true bill.

Foreperson

Name: Jonathan Goff
DOB: 1/23/1998
Address:
RSA: 636:1, I(a) & III(a); 629:3, I
Offense level: A Felony
Dist/Mun Ct: N/A

# EXHIBIT 2

# THE STATE OF NEW HAMPSHIRE
## INDICTMENT

HILLSBOROUGH, SS. JANUARY TERM, 2012
Southern District

At the Superior Court, holden at Nashua, within and for the County of Hillsborough aforesaid, on the 17th day of January in the year of our Lord two thousand and twelve

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

226-2011-CR-770

**MATTHEW PACKER**
**(DOB: 5/10/1992)**

554977C

of Nashua, in the State of New Hampshire, on or about October 9, 2011, at Nashua in the County of Hillsborough aforesaid, with force and arms, did commit the crime of

VSS

***Second Degree Murder***

(RSA 630:1-b, I(a))

in that Matthew Packer knowingly caused the death of Paul Frontiero by stabbing him multiple times with a knife.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Michael S. Lewis
Assistant Attorney General

Plea Guilty
7/26/13
Judge Nicolosi

This is a true bill.

1-17-2012

Foreperson

HSCS-JAN18'12PM 2:59

| | |
|---|---|
| Name: | Matthew Packer |
| DOB: | 5/10/1992 |
| Address: | Valley Street, Manchester, New Hampshire 03103 |
| RSA: | 630:1-b, I(a) |
| Offense level: | Felony |
| Dist/Mun Ct: | N/A |

Plea: Guilty
Date: 7/26/2013
Judge: D. Nicolosi

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Hillsborough County Superior Court - Southern District

Case Name: State v. Matthew Packer

Case Number: 226-2011-CR-770 Charge ID Number: 554977 C
(if known)

## STATE PRISON SENTENCE

| | |
|---|---|
| Plea/Verdict: Guilty | Clerk: Michael Scanlon |
| Crime: 2nd Degree Murder - Knowing | Date of Crime: 10/9/2011 |
| Monitor: D. Boucher | Judge: Nicolos; J. |

A finding of GUILTY is entered.

☐ If this box is checked, the defendant is a member or veteran of the armed forces.

☐ The presentence investigation report prepared under RSA 651:4 was considered by the Court.

☒ A presentence investigation report was waived by: ☒ Defendant and State ☒ Court

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than life year(s) (months), nor less than 45 year(s) (months). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☐ 2. This sentence is to be served as follows: ☒ Stand committed ☐ Commencing _____

☐ 3. _____ of the minimum sentence is suspended

_____ of the maximum sentence is suspended

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within _____ years of today's date.

☐ 4. _____ of the sentence is deferred for a period of _____. Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

☐ 5. _____ of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☐ 6. The sentence is ☐ consecutive to _____

☐ concurrent with _____

☒ 7. Pretrial confinement credit: 679 days.

☐ 8. The Court recommends to the Department of Corrections:

☐ A. Drug and alcohol treatment and counseling

☐ B. Sexual offender program

☐ C. Sentence to be served at the House of Corrections

☐ D. _____

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: _____

Case Number: _____

STATE PRISON SENTENCE

## PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: ☐ Forthwith ☐ Upon Release _____

☐ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 5 days in response to a violation of a condition of probation.

☐ 11. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

## OTHER CONDITIONS

☑ 12. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence.

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____

☐ The defendant shall also pay the time payment fee of $25.00.

☐ The fine, penalty assessment and any fees shall be paid:

☐ Now ☐ By _____ ☐ Through the Department of Corrections as directed by the Probation/Parole Officer.

☐ $ _____ of the fine is suspended.

☐ $ _____ of the penalty assessment is suspended.

☒ B. The defendant is ordered to make restitution of $ 6744.25 plus statutory 17% administrative fee

☐ Through the Department of Corrections as directed by the Probation/Parole Officer

☒ Through the Department of Corrections on the following terms:

Victims Assistance Compensation Committee

☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

☐ Restitution is not ordered because:

_____

☐ C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Under the direction of the Probation/Parole Officer, the defendant shall tour the

☐ New Hampshire State Prison

☐ House of Corrections

☐ E. The defendant shall perform _____ hours of community service under the direction of

☐ Probation/Parole Officer

☒ F. The defendant has waived sentence review in writing or on the record.

☒ G. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☒ H. Other: The defendant may petition the court to suspend 10 years of his minimum term if he has had no disciplinary infractions in prison after today's date involving violent or assaultive conduct, possession of weapons or gang related activity.

8/21/2013 Diane M. Nicolosi

NHJB-2115-S (07/16/2010)

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: (603) 883-6461
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Matthew R Packer**
Case Number: **226-2011-CR-00770**

Name: **Matthew R Packer, HCHOC 445 Willow St Manchester NH 03103**
DOB: **May 10, 1992**

Charging document: Indictment

| Offense: | Charge ID: | RSA: | Date of Offense: |
|---|---|---|---|
| *First Degree* Assault | 554978C | 631:1 | October 09, 2011 |

Disposition: Guilty/Chargeable By: Plea T/N: ____

**A finding of GUILTY/~~CHARGEABLE~~ is entered.**
Conviction: Felony

Sentence: see attached

August 21, 2013 — Date
Diane M. Nicolosi — Presiding Justice
Marshall A. Buttrick — Clerk of Court

### MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison.** Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

August 21, 2013 — Date
Attest: Marshall A. Buttrick — Clerk of Court

### SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date
Sheriff

C: ☒ State Police ☐ DMV ☒ Dept. of Corr. ☒ Offender Recs ☒ Sheriff ☒ Sentence Review Board
☒ HCHOC ☒ Pros. Atty ☒ Defense Attorney Julia M. Nye, ESQ
☒ Office of Cost Cont. ☐ Sex Offender Registry ☒ Other Nashua PD ☐ Nashua Dist Ct. 11-6969

**THE STATE OF NEW HAMPSHIRE**
INDICTMENT

HILLSBOROUGH, SS. JANUARY TERM, 2012
Southern District

At the Superior Court, holden at Nashua, within and for the County of Hillsborough aforesaid, on the 17th day of January in the year of our Lord two thousand and twelve

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

226-2011-CR-770

**MATTHEW PACKER**
**(DOB: 5/10/1992)**

554978C

of Nashua, in the State of New Hampshire, on or about October 9, 2011, at Nashua in the County of Hillsborough aforesaid, with force and arms, did commit the crime of

VSJ

***First Degree Assault***

(RSA 631:1)

in that Matthew Packer knowingly caused bodily injury to Kathryn Libby with a deadly weapon by stabbing her multiple times with a knife and/or slashing her face with a knife.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Michael S. Lewis
Assistant Attorney General

Plea - Guilty
7/26/13
Judge - Nicolosi

This is a true bill.

1-17-2012 2012-JAN18 12PM 3:00

Foreperson

Name: Matthew Packer
DOB: 5/10/1992
Address: Valley Street, Manchester, New Hampshire 03103
RSA: RSA 631:1
Offense level: Felony, Class A
Dist/Mun Ct: N/A

Plea: Guilty
Date: 7/26/2013
Judge: D. Nicolosi

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Hillsborough County Superior Court - Southern District

Case Name: State v Matthew Packer

Case Number: 226-2011-CR-770 (if known) Charge ID Number: 554978 C 554977 C

## STATE PRISON SENTENCE

| | |
|---|---|
| Plea/Verdict: Guilty | Clerk: Michael Scanlon |
| Crime: First Degree Assault - Kelly Libby | Date of Crime: 10/9/2011 |
| Monitor: D. Boucher | Judge: Nicolosi, J. |

A finding of GUILTY is entered.

☐ If this box is checked, the defendant is a member or veteran of the armed forces.
☐ The presentence investigation report prepared under RSA 651:4 was considered by the Court.
☒ A presentence investigation report was waived by: ☒ Defendant and State ☒ Court

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than 15 year(s) (months), nor less than 6 year(s) (months). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☒ 2. This sentence is to be served as follows: ☒ Stand committed ☐ Commencing _____

☐ 3. _____ of the minimum sentence is suspended
_____ of the maximum sentence is suspended
Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within _____ years of today's date.

☐ 4. _____ of the sentence is deferred for a period of _____. Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

☐ 5. _____ of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is ☒ consecutive to 226-2011-CR-770 (CID 554977C)
☐ concurrent with _____

☐ 7. Pretrial confinement credit: _____ days.

☐ 8. The Court recommends to the Department of Corrections:
☐ A. Drug and alcohol treatment and counseling
☐ B. Sexual offender program
☐ C. Sentence to be served at the House of Corrections
☐ D. _____

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: _____

Case Number: _____

STATE PRISON SENTENCE

## PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release _____
☐ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 5 days in response to a violation of a condition of probation.

☐ 11. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

## OTHER CONDITIONS

☐ 12. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence.

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____
☐ The defendant shall also pay the time payment fee of $25.00.
☐ The fine, penalty assessment and any fees shall be paid:
☐ Now ☐ By _____ ☐ Through the Department of Corrections as directed by the Probation/Parole Officer.
☐ $ _____ of the fine is suspended.
☐ $ _____ of the penalty assessment is suspended.

☐ B. The defendant is ordered to make restitution of $ _____ plus statutory 17% administrative fee.
☐ Through the Department of Corrections as directed by the Probation/Parole Officer
☐ Through the Department of Corrections on the following terms:
_____
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because:
_____

☐ C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Under the direction of the Probation/Parole Officer, the defendant shall tour the
☐ New Hampshire State Prison
☐ House of Corrections

☐ E. The defendant shall perform _____ hours of community service under the direction of
☐ Probation/Parole Officer

☒ F. The defendant has waived sentence review in writing or on the record.

☒ G. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ H. Other: _____

8/21/13
Date

Presiding Justice

Diane M. Nicolosi

NHJB-2115-S (07/16/2010)

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: (603) 883-6461
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Matthew R Packer**
Case Number: **226-2011-CR-00770**

Name: **Matthew R Packer, HCHOC 445 Willow St Manchester NH 03103**
DOB: **May 10, 1992**

Charging document: Indictment

| Offense: | Charge ID: | RSA: | Date of Offense: |
|---|---|---|---|
| *First Degree* Assault | 596527C | 631:1 | October 09, 2011 |

Disposition: Guilty/Chargeable By: Plea T/N: ____

**A finding of GUILTY/~~CHARGEABLE~~ is entered.**
Conviction: Felony
Sentence: see attached

August 21, 2013 — Date
Diane M. Nicolosi — Presiding Justice
Marshall A. Buttrick — Clerk of Court

## MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison.** Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

August 21, 2013 — Date
Attest: Marshall A. Buttrick — Clerk of Court

## SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date
Sheriff

C: ☒ State Police ☐ DMV ☒ Dept. of Corr. ☒ Offender Recs ☒ Sheriff ☒ Sentence Review Board
☒ HCHOC ☒ Pros. Atty ☒ Defense Attorney Julia M. Nye, ESQ
☒ Office of Cost Cont. ☐ Sex Offender Registry ☒ Other Nashua PD ☐ ____ Dist Ct. ____

# THE STATE OF NEW HAMPSHIRE
## INDICTMENT

HILLSBOROUGH, SS. JANUARY TERM, 2012
Southern District

At the Superior Court, holden at Nashua, within and for the County of Hillsborough aforesaid, on the 17th day of January in the year of our Lord two thousand and twelve

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

226-2011-CR-770
596527C

**MATTHEW PACKER**
**(DOB: 5/10/1992)**

of Nashua, in the State of New Hampshire, on or about October 9, 2011, at Nashua in the County of Hillsborough aforesaid, with force and arms, did commit the crime of

JSS

***First Degree Assault***

(RSA 631:1)

in that Matthew Packer knowingly caused bodily injury to Jill Arnold with a deadly weapon by cutting her in the throat with a knife.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Plea: Guilty
7/26/13
Judge Nicolosi

Michael S. Lewis
Assistant Attorney General

This is a true bill.

1-17-2012
HSCS-JAN18'12PM JHR

Foreperson

Name: Matthew Packer
DOB: 5/10/1992
Address: Valley Street, Manchester, New Hampshire 03103
RSA: RSA 631:1
Offense level: Felony, Class A
**Dist/Mun Ct: N/A**

Plea: Guilty
Date: 7/26/2013
Judge: D. Nicolosi

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Hillsborough County Superior Court - Southern District

Case Name: State v Matthew Packer 546527 e

Case Number: 226-2011-CR-770 Charge ID Number: _____ e
(if known)

## STATE PRISON SENTENCE

| | |
|---|---|
| Plea/Verdict: Guilty | Clerk: Michael Scanlon |
| Crime: First Degree Assault - Jill Amdd | Date of Crime: 10/9/2011 |
| Monitor: D. Boucher | Judge: Nicolosi, J. |

A finding of GUILTY is entered.

☐ If this box is checked, the defendant is a member or veteran of the armed forces.

☐ The presentence investigation report prepared under RSA 651:4 was considered by the Court.

☒ A presentence investigation report was waived by: ☒ Defendant and State ☒ Court

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than 7 year(s) (months), nor less than 1 year(s) (months). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☒ 2. This sentence is to be served as follows: ☒ Stand committed ☐ Commencing _____

☐ 3. _____ of the minimum sentence is suspended

_____ of the maximum sentence is suspended

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within _____ years of today's date.

☐ 4. _____ of the sentence is deferred for a period of _____.
Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

☐ 5. _____ of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is ☒ consecutive to 226-2011-CR-770 (CID 554977C + CID 554978C)
☐ concurrent with _____

☐ 7. Pretrial confinement credit: _____ days.

☐ 8. The Court recommends to the Department of Corrections:
- ☐ A. Drug and alcohol treatment and counseling
- ☐ B. Sexual offender program
- ☐ C. Sentence to be served at the House of Corrections
- ☐ D. _____

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: _____

Case Number: _____

STATE PRISON SENTENCE

## PROBATION

☐ 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: ☐ Forthwith ☐ Upon Release _____

☐ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 5 days in response to a violation of a condition of probation.

☐ 11. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

## OTHER CONDITIONS

☐ 12. The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence.

☐ A. The defendant is fined $ _____ plus statutory penalty assessment of $ _____

☐ The defendant shall also pay the time payment fee of $25.00.

☐ The fine, penalty assessment and any fees shall be paid:

☐ Now ☐ By _____ ☐ Through the Department of Corrections as directed by the Probation/Parole Officer.

☐ $ _____ of the fine is suspended.

☐ $ _____ of the penalty assessment is suspended.

☐ B. The defendant is ordered to make restitution of $ _____ plus statutory 17% administrative fee

☐ Through the Department of Corrections as directed by the Probation/Parole Officer

☐ Through the Department of Corrections on the following terms:

_____

☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

☐ Restitution is not ordered because:

_____

☐ C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Under the direction of the Probation/Parole Officer, the defendant shall tour the

☐ New Hampshire State Prison

☐ House of Corrections

☐ E. The defendant shall perform _____ hours of community service under the direction of

☐ Probation/Parole Officer

☒ F. The defendant has waived sentence review in writing or on the record.

☑ G. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☐ H. Other: _____

8/21/13
Date

Diane
Presiding Justice Diane M. Nicolosi

8/21 cc: Sheriff, DAG VSJ, ID HSP

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: (603) 883-6461
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us



## RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Matthew R Packer**
Case Number: **226-2011-CR-00770**

Name: **Matthew R Packer, HCHOC 445 Willow St Manchester NH 03103**
DOB: **May 10, 1992**

Charging document: Indictment

| Offense: | Charge ID: | RSA: | Date of Offense: |
|---|---|---|---|
| Second Degree Murder | 554977C | 630:1-B | October 09, 2011 |

*Disposition:* Guilty/Chargeable By: Plea T/N: ____

**A finding of GUILTY/~~CHARGEABLE~~ is entered.**
Conviction: Felony
Sentence: see attached

August 21, 2013 — Date
Diane M. Nicolosi — Presiding Justice
Marshall A. Buttrick — Clerk of Court

## MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison.** Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

August 21, 2013 — Date
Attest: Marshall A Buttrick — Clerk of Court

## SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date
Sheriff

C: ☒ State Police ☐ DMV ☒ Dept. of Corr. ☒ Offender Recs ☒ Sheriff ☒ Sentence Review Board
☒ HCHOC ☒ Pros. Atty ☒ Defense Attorney Julia M. Nye, ESQ
☒ Office of Cost Cont. ☐ Sex Offender Registry ☒ Other Nashua PD ☐ Nashua Dist Ct. 11-6969

# EXHIBIT 3

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Hillsborough County Superior Court-Southern District
Case Name: State of New Hampshire v. Brandon Nye
Case Number: 226-2010-CR-02022; Charge ID Number: 379372C
(if known)

**STATE PRISON SENTENCE**

| | |
|---|---|
| Plea: Guilty | Clerk: Burtch |
| Crime: Second Degree Murder (Knowing) | Date of offense: 8/23/2010 |
| Monitor: Neill | Judge: Colburn |

A finding of GUILTY is entered.

❑ If this box is checked, the defendant is a member or veteran of the armed forces.

❑The presentence investigation report prepared under RSA 651:4 was considered by the Court.

X A presentence investigation report was waived by: X Defendant and State ❑Court

X 1. The defendant is sentenced to the New Hampshire State Prison for not more than life nor less than 35 year(s). There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

X 2. This sentence is to be served as follows: X Stand committed X Commencing immediately

❑ 3. _____ of the minimum sentence is suspended
_____ of the maximum sentence is suspended
Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing brought by the State within _____ years of today's date.

❑ 4._____ of the sentence is deferred for a period of _____.
Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

❑ 5._____ of the minimum sentence may be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

❑ 6. The sentence is ❑ consecutive to _____
❑ concurrent with

X 7. Pretrial confinement credit: 922 days.

❑ 8. The Court recommends to the Department of Corrections:

❑ A. Drug and alcohol treatment and counseling

❑ B. Sexual offender program

❑ C. Sentence to be served at the House of Corrections

❑ D._____

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: State of New Hampshire v. Brandon Nye
Case Number: 226-2010-CR-02022
STATE PRISON SENTENCE

**PROBATION**

❑ 9. The defendant is placed on probation for a period of ___ year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.

Effective: ❑ Forthwith ❑ Upon Release _____

❑ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

❑ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 5 days in response to a violation of a condition of probation.

❑ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

**OTHER CONDITIONS**

X 12 . The following conditions of this sentence are applicable whether incarceration is suspended, deferred or imposed or whether there is no incarceration ordered at all. Failure to comply with these conditions may result in the imposition of any suspended or deferred sentence.

❑ A. The defendant is fined $_____ plus statutory penalty assessment of $_____

❑ The defendant shall also pay the time payment fee of $25.00.

❑ The fine, penalty assessment and any fees shall be paid:

❑ Now ❑ By _____ ❑Through the Department of Corrections as directed by the Probation/Parole Officer.

❑$ _____of the fine is suspended

❑$ _____of the penalty assessment is suspended

❑ B. The defendant is ordered to make restitution of $_____ plus statutory 17% administrative fee

❑Through the Department of Corrections as directed by the Probation/Parole Officer

❑Through the Department of Corrections on the following terms:

❑At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution

❑Restitution is not ordered because:

X C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

❑ D. Under the direction of the Probation/Parole Officer, the defendant shall tour the

❑New Hampshire State Prison ❑House of Correction

❑ E. The defendant shall perform _____hours of community service under the direction of

❑Probation/Parole Officer

☒ F. The defendant has waived sentence review in writing or on the record

X G. The defendant is ordered to be of good behavior and comply with all the terms of this sentence

X H. Other: The defendant is to have no contact with the victim's family and Erin Allwood.

3/1/13
Date

Presiding Justice

Jacalyn A. Colburn

860568

**THE STATE OF NEW HAMPSHIRE**
**INDICTMENT**

HILLSBOROUGH, SS. NOVEMBER TERM, 2010
Southern District

At the Superior Court, holden at Nashua, within and for the County of Hillsborough aforesaid, on the 23rd day of November in the year of our Lord two thousand and ten

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**BRANDON NYE**
**(DOB: 12/21/1990)**

226-2010-CR-2022
CID 379372C

of Nashua, in the State of New Hampshire, on or about August 23, 2010, at Nashua in the County of Hillsborough aforesaid, with force and arms, did commit the crime of

*Second Degree Murder*
(RSA 630:1-b, I(a))

in that, Brandon Nye knowingly caused the death of Brandon Gaudette by stabbing him multiple times with a knife.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

Arraignment
Plea: Not Guilty
Date: 12/10/2010
Judge: J. Colburn
Monitor: D. Boucher
Clerk: M. Bunnemeyer
This is a true bill.

Foreperson

Jeffery A. Strelzin
Senior Assistant Attorney General

March 1, 2013
Plea: Guilty
Judge Colburn
T. Neill – Monitor

| | |
|---|---|
| Name: | Brandon Nye |
| DOB: | 12/21/90 |
| Address: | Valley Street. Manchester, New Hampshire 03103 |
| RSA: | 630:1-b, I(a) |
| Offense level: | Felony |
| Dist/Mun Ct: | N/A |

DOB: **December 21, 1990**

Charging document: Indictment

| **Offense:** | **Charge ID:** | **RSA:** | **Date of Offense:** |
|---|---|---|---|
| Second Degree Murder | 379372C | 630:1-B | August 23, 2010 |

Disposition: Guilty/Chargeable By: Plea T/N: 459-2010cr5273

**A finding of GUILTY/CHARGEABLE is entered.**

Conviction: Felony

Sentence: see attached

March 01, 2013
Date

Jacalyn A. Colburn
Presiding Justice

Marshall A. Buttrick
Clerk of Court

## MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison.** Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

March 1, 2013
Date

Attest: Marshall A. Buttrick
Clerk of Court

## SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

C: ☒ State Police ☐ DMV ☒ Dept. of Corr. ☒ Offender Recs ☒ Sheriff ☒ Sentence Review Board
☐ Defendant ☒ Pros. Atty Jeffery Alan Strelzin, ESQ ☒ Defense Attorney Edward L. Cross, Jr., ESQ
☒ Office of Cost Cont. ☐ Sex Offender Registry ☐ Other _____ ☒ Nashua Dist Ct. 459-2010-cr-5273

NHJB-2572-S (07/01/2011)

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS. JANUARY TERM, 2018
Southern District
226-1993-CR-00621; 00622; 00623; 00624

The State of New Hampshire

v.

Eduardo Lopez, Jr.

**STATE'S SUPPLEMENTAL SENTENCING MEMORANDUM**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and respectfully provides this Supplemental Sentencing Memorandum in support of its sentencing recommendation in this case.

## I. PRELIMINARY

1. On September 3, 1993, the defendant, nineteen-year-old Eduardo Lopez, Jr., following a jury trial, was convicted of first-degree murder, first-degree assault, attempted first-degree assault, and robbery. Those convictions all stemmed from a series of three separate incidents that occurred on March 23, 1991, when the defendant was seventeen-years-old. The defendant was sentenced to life without parole and the New Hampshire Supreme Court affirmed his conviction on December 30, 1994. See State v. Lopez, 139 N.H. 309 (1994).

2. In 2012, the United States Supreme Court ruled that mandatory life without parole sentences for killers under the age of 18 were unconstitutional. See Miller v. Alabama, 567 U.S. 460 (2012). In a later decision, the Supreme Court clarified that its decision in Miller was retroactive. See Montgomery v. Louisiana, 577 U.S. __, 136 S.Ct. 718 (2016). In light of those two decisions, the defendant was entitled to a new sentencing hearing. That hearing took place on December 13 and 14, 2017.

3. The parties previously filed sentencing memorandums with the Court. This memorandum is intended to supplement the State's original memorandum and address issues and testimony from the December hearing.

4. Based on all the facts and the applicable law in this case, the State is asking the Court to impose the following sentence:

| **Charge** | **State's recommended sentence** |
|---|---|
| First-degree murder (knowing in commission of robbery) (victim: Robert Goyette) (93-S-621-F) | 51 ½ years to life, stand committed. Concurrent to the sentences imposed in 93-S-622-F, 93-S-623-F, and 93-S-624-F. |
| Pretrial confinement credit as of February 8, 2018 | 9820 days (26 years, 10 months, 17 days) |

## II. ARGUMENT

### A. The testimony and opinions of the defendant's experts do not support the defendant's sentencing request.

5. The defendant presented the Court with expert testimony at the December hearing in order to try to substantiate his sentencing request. That testimony supplemented the experts' reports that had been provided to the Court with the defendant's sentencing memorandum. The State will

address each expert's testimony and his and her report, and explain why the expert reports and testimony are not significantly mitigating for the defendant and do not weigh in favor of the defendant's requested sentence.

1. **Defense Expert - Dr. Stuart Gitlow**

6. The defendant presented testimony from Dr. Stuart Gitlow to supplement his expert report and discuss substance abuse and the potential effects of the use of drugs and alcohol on a minor such as the defendant. Essentially though, Dr. Gitlow's report and testimony consisted of speculation that was not supported by the facts because he was not provided all of the trial transcripts by defense counsel.

7. As the Court heard at the hearing, defense counsel decided what information to provide Dr. Gitlow for his review. Defense counsel only gave Dr. Gitlow one transcript from the 1993 trial, that of Detective Seusing. They did not give Dr. Gitlow any of the trial transcripts from all the other witnesses who provided testimony about all the steps the defendant took before, during, and after his crimes that showed clear thinking and planning, and significant cognitive skills. For example, Dr. Gitlow was not provided any of the evidence about the steps the defendant took to secure a gun that could kill, ammunition that was lethal, and a holster to hide the gun. In addition, Dr. Gitlow was not provided the testimony about the steps the defendant took to hide his connection to the gun before his crimes (serial number erased), and the steps he took after to evade capture and hide evidence (changed jackets, shaved mustache and beard, cut hair, hid the gun box, broke up and disposed of gun, attempted to flee area). All that evidence contradicted the defendant's claim that he was developmentally delayed and suffered cognitive deficits due to drug and alcohol use. It also contradicted Dr. Gitlow's opinion that the defendant was operating at the level of a 12 or 13 year old at the time of his crimes. That opinion was purely speculative since Dr. Gitlow confirmed that he

had never reviewed any of the defendant's medical records or any brain or cognitive tests that showed the slightest cognitive deficits on the defendant's part.

8. Further, the testing results from Dr. Kavanaugh, the other defense expert, also contradicted the defendant's claim, and Dr. Gitlow's speculation, that the defendant suffered from cognitive deficits as the result of drug or alcohol use. Dr. Kavanaugh administered a test to the defendant called the IORNS (Inventory of Offender Risks, Needs and Strengths).[1] Within the Scoring Summary Form, is a section called the IORNS Subscale Classification Table. The last scale in that table is called the Personal Resources Scale. Within that scale is a subscale called "Cognitive/Behavioral Regulation." The defendant's score on that subscale put him in the "average" range. That score contradicts the defendant's claim that he suffered any cognitive deficits as a result of his prior drug or alcohol use, or even his current use in prison.[2]

9. Finally, Dr. Gitlow could offer no definitive opinion as to whether the defendant was impaired by alcohol at the time of his crimes in 1991. Dr. Gitlow admitted that due to the time lag between the three crimes and the blood alcohol test, the defendant's blood alcohol level could have been anywhere from zero to .20 at the time of the murder. As the Court can see from the trial transcripts, the evidence regarding what the defendant said and did before, during and after the two shootings he committed that night proves that he was most likely not impaired by alcohol during the commission of those two crimes. In addition, Dr. Gitlow admitted that he was not provided any of the trial testimony about all the stressful physical activity the defendant engaged in before he was seen on the booking video. Therefore, Dr. Gitlow agreed at the hearing that some of the defendant's

[1] A copy of the IORNS scoring summary form was admitted as State's Exhibit #2 at the hearing.

[2] According to the defendant's disciplinary record and test answers, he continues to use drugs and alcohol in prison.

behavior on that video could have been due to exhaustion and the defendant being uncooperative, as opposed to solely alcohol consumption.

10. In sum, Dr. Gitlow could offer no definitive opinions regarding the defendant's level of intoxication at the time of his crimes in 1991. He could also not confirm that the defendant suffered any cognitive deficits due to drug or alcohol use as a minor in 1991. Last, despite what he put in his report, Dr. Gitlow confirmed on cross-examination that the defendant's actions in 1991 could have been solely the result of the defendant's desire to rob people for money and have nothing to do with alcohol consumption. Accordingly, Dr. Gitlow's speculative opinions are not mitigating for the defendant and do not justify imposing the defendant's recommended sentence.

**2. Defense Expert - Dr. Antoinette Kavanaugh**

11. The defendant also presented a report and testimony from Dr. Antoinette Kavanaugh regarding the differences between adults and minors, her opinions regarding the Miller factors, tests she administered to the defendant, and the results of interviews she conducted with the defendant, his family, and an ex-girlfriend. At the hearing, it was apparent that Dr. Kavanaugh ignored facts and evidence or did not consider them, dismissed test results that would not help the defendant obtain a reduced sentence, and failed to confront the defendant with his potential lies or contradictions. Essentially, based on her report and testimony, Dr. Kavanaugh was less than thorough and diligent, and in effect acted as an advocate for the defendant's case and not as a true independent expert.

12. Dr. Kavanaugh's defense-bias was evident at the start of her cross-examination at the hearing when she confirmed she was not working on any cases for the prosecution in New Hampshire and was only working on defense cases. Similarly, Dr. Kavanaugh confirmed that she has never worked on a case with the prosecution in the past five years. The Court also witnessed the

difference in the way Dr. Kavanaugh answered the State's questions at the hearing versus how she answered the defense's questions, and can consider that as further evidence of bias. Other evidence of bias and a lack of thoroughness were evident in the selective manner Dr. Kavanaugh considered facts and evidence, or simply ignored them. A prime example is on page three of Dr. Kavanaugh's report where she summarized Valence Ray's trial testimony. Nowhere in that summary is there mention of the fact that Ray testified that on the morning of the murder, the defendant said he wanted to shoot a moving target during target practice with the murder weapon. The defendant made that statement just hours before he did in fact, shoot two moving targets in the form of his first two victims that night. Despite that uncontradicted evidence, Dr. Kavanaugh did not mention it in her report or on direct examination. As the Court can also see from her report, she also failed to confront or question the defendant about that evidence. No true independent expert would have ignored evidence directly refuting the defendant's version of his crimes, i.e., that his crimes were unplanned and spontaneous, and due to childhood issues and alcohol. The fact that Dr. Kavanaugh ignored that evidence and chose to leave it out of the first few pages of her report demonstrates her lack of thoroughness and diligence, and her bias in favor of the defendant that renders her report and opinions untrustworthy.

13. Additional evidence of Dr. Kavanaugh's bias and lack of thoroughness was evident when she opined regarding the circumstances surrounding the crimes the defendant committed. At the hearing it became apparent that Dr. Kavanaugh ignored aspects of the defendant's crimes that did not weigh in the defendant's favor. For example, the Court heard that Dr. Kavanaugh believed that the defendant did not plan to rob his victims with a gun and merely had the gun and holster as a fashion statement. As the Court heard, in reaching those conclusions Dr. Kavanaugh gave no consideration to the following evidence contained in the trial transcripts: the defendant's purchase of

the gun and attendant statements about its lethality a month and a half before the murder, the defendant's requests for especially lethal ammunition, the defendant's purchase of a holster for his gun that could be concealed, erasing the gun's serial number, and the defendant's statement during target practice the morning of the murder that he wanted to shoot a moving target. That evidence contradicted Dr. Kavanaugh's testimony that there was no evidence of premeditation and that the defendant had no criminal motive in buying the gun and holster. She also failed to question or confront the defendant with any of that evidence; further proof of her bias in favor of the defendant and her lack of thoroughness.

14. As her report and testimony made clear, Dr. Kavanaugh ignored or discounted the fact that the defendant took steps after his crimes to hide what he had done and escape capture. That evidence included: changing his jacket, shaving his mustache and beard, cutting his hair, hiding the gun box, breaking up the gun and throwing it off the roof, and trying to secure a car to leave the State. Rather than considering that this evidence showed the defendant was thinking clearly after his crimes, Dr. Kavanaugh opined that he was not thinking clearly and was acting emotionally, without thought. She also failed to question or confront the defendant with that evidence; further proof of her bias in favor of the defendant and her lack of thoroughness.

15. At the hearing, the Court heard that the defendant changed his story about the circumstances surrounding the attack on his first victim. In his interview with Dr. Kavanaugh, which took place twenty five years after his attack on Roscoe Powers, the defendant said that he had attacked Powers after Powers used a racial slur against the defendant. A true independent expert would have been dubious of the defendant's new claim that made his first victim look bad, especially since it was not disclosed until twenty five years later, when the defendant was trying to make himself look sympathetic to gain a sentence reduction. Dr. Kavanaugh also failed to take into

account the fact that the defendant had extensively perjured himself at trial to make himself look good and make someone else look bad, and guilty. Instead, Dr. Kavanaugh simply accepted the veracity of the defendant's new claim and did not question or confront the defendant with that new fact, despite the fact that the trial testimony did not support it, and none of the defendant's friends or family that Dr. Kavanaugh interviewed ever mentioned it. That was another example of her bias in favor of the defendant and her lack of thoroughness.

16. At the hearing, the Court learned that there were three prison records in the defendant's file that stated he was "gang-affiliated." Dr. Kavanaugh asked the defendant about gang involvement and he denied any. Despite the prison records, Dr. Kavanaugh accepted the defendant's denial about gang involvement and took no steps to confirm whether his denial was true. For example, she did not contact the prison officials who reported the defendant's gang-affiliation and she did not request additional records. A true independent expert would have been much more diligent in resolving the inconsistency between the defendant's prison records and his denial of gang involvement, especially with a defendant who perjured himself at trial and had a significant interest in hiding any potential gang involvement to help gain a sentence reduction. That was another example of Dr. Kavanaugh's bias in favor of the defendant and her lack of thoroughness.

17. Similarly, Dr. Kavanaugh's opinions about the tests she administered to the defendant and their meaning reflect bias and a lack of thoroughness and should be given little weight. In her report and in her hearing testimony Dr. Kavanaugh emphasized "dysfunctional aspects" of the defendant's childhood and ignored evidence to the contrary that showed that his childhood was not as dysfunctional and traumatic as she would like the Court to believe. For example, the Court heard at the hearing that the defendant actually scored in the "average" range on four of the five scales on

the Childhood Trauma Questionnaire (CTQ), belying the idea that his childhood was "brutal" and to blame for his crimes. However, those "average" test results were not brought out during Dr. Kavanaugh's direct examination; that information had to be conveyed to the Court by the State during cross examination. The defendant also did not include a copy of the CTQ questions and answers in his sentencing memorandum or admit a copy at the hearing during Dr. Kavanaugh's direct examination. Instead, the State admitted a copy during cross examination where the many positive aspects of the defendant's childhood were highlighted.[3] As the State said at the hearing, it is not arguing that the defendant's childhood was perfect. However, Dr. Kavanaugh exaggerated the unpleasant aspects of the defendant's childhood and ignored other evidence, including her own test results that showed the defendant's childhood was "average" and was not as dysfunctional as the defense or Dr. Kavanaugh portrayed it to be.

18. As to the IORNS test, Dr. Kavanaugh failed to mention in her report or on direct examination the many troubling scores the defendant achieved on that test that reflected poorly on him. Dr. Kavanaugh also did not mention those scores in her report or on direct examination either. The defense also failed to include a copy of the IORNS scoring summary form in its sentencing memorandum.[4] Those are significant omissions because the IORNS test was designed to detect factors associated with a risk of recidivism and Dr. Kavanaugh and the defense portrayed the defendant as someone who was rehabilitated and at a low risk for recidivism. Despite the stated purpose of that test, in both her report and on direct examination at the hearing, Dr. Kavanaugh did not address the "very high" score the defendant achieved for procriminal attitudes in the criminal orientation scale, the "high" score the defendant achieved in the psychopathy scale for

[3] The State admitted a copy at the hearing as State's Exhibit #1.

[4] The State admitted a copy at the hearing as State's Exhibit #2.

manipulativeness, the "high" score the defendant achieved in the hostility subscale in the aggression scale, the "very high" score the defendant achieved in the aggressive behaviors subscale in the aggression scale, and the "very high" scores the defendant achieved in the negative friends and negative family subscales in the negative social influences scale. Presumably, Dr. Kavanaugh failed to discuss those scores in her report, with the defendant, or on direct examination because the results were unfavorable to the defendant and did not weigh in favor of a reduced sentence. Her failure to do so is evidence of significant deficiencies in her work on this case and her bias in favor of the defendant.

19. Dr. Kavanaugh's report and her hearing testimony also revealed significant lapses in connection with the administration of the MMPI-2-RF. At her deposition and on cross-examination at the hearing, Dr. Kavanaugh admitted that the MMPI is designed to aid in the assessment of a person's mental health issues and personality factors. A copy of the interpretative report of the defendant's testing results was admitted by the State during cross-examination at the hearing because Dr. Kavanaugh left it out of her report.[5] That report was also left out of the defendant's sentencing memorandum. In addition, during Dr. Kavanaugh's direct examination, she did not discuss the many negative findings about the defendant's personality that were reflected on pages eight and nine of the MMPI report; the State had to highlight those during cross examination at the hearing. Likewise, Dr. Kavanaugh omitted from her report the many negative findings contained on pages ten and eleven of the MMPI report, which dealt with potential disorders and treatment issues. Most troubling was the fact that in her report and on direct examination, Dr. Kavanaugh failed to mention the seventeen critical responses detailed on pages eleven and twelve of the MMPI report.

[5] The State admitted a copy at the hearing as State's Exhibit #3.

According to the critical responses section on page eleven of the MMPI report, the critical responses "have been designated by the test authors as having critical items content that may require immediate attention and follow-up." Despite that caveat, and the content of the defendant's critical responses, Dr. Kavanaugh did not address them in her report, or on direct examination. Most importantly, as the Court heard during cross-examination, Dr. Kavanaugh did not even discuss them with the defendant, even though in some of those responses the defendant admitted that: (231) he can easily make other people afraid of him and sometimes does it for the fun of it, (266) he has a drug or alcohol problem, and (297) once a week or more he gets high or drunk. Dr. Kavanaugh and the defense claimed at the hearing that the defendant was a changed man who was rehabilitated and no longer a danger to society. However, there were many negative findings on the MMPI as well as the defendant's own answers that contradicted those claims. Dr. Kavanaugh essentially ignored or downplayed the significance of the MMPI's negative findings and failed to follow-up with the defendant about his answers to questions that showed he was not rehabilitated and was still committing crimes, even in prison. Those are significant lapses that call into question Dr. Kavanaugh's thoroughness and bias.

20. Last, Dr. Kavanaugh opined at her deposition and on direct examination in court that she had watched the defendant's booking video. She testified that based on the booking video, the defendant appeared intoxicated to her and that the blood alcohol test helped confirm his level of intoxication. The impression she left during her direct examination was that she had watched the entire video. However, it was not until cross-examination that Dr. Kavanaugh admitted that she had not watched the entire booking video, including the section with the breath test. As the Court heard during cross-examination, Dr. Kavanaugh admitted that she did not know that the defendant repeatedly disobeyed the officer's directives prior to the administration of the breath test that

included telling the defendant not to put his hands/fingers in his mouth because that would cause the breath test to go higher. Dr. Kavanaugh's explanation for missing that evidence was that she could not open the entire video file. So instead of being diligent and obtaining another copy, she took no steps to obtain a viewable version. Therefore, she ignored the existence of potentially relevant evidence. Dr. Kavanaugh also rendered an opinion on the stand, under oath, that relied on the results of a breath test, without revealing the limitations of that opinion, i.e., that she had never watched the breath test video. That is more evidence of her lack of thoroughness and bias.

21. In sum, Dr. Kavanaugh failed to consider key established facts about the defendant's actions on March 23, 1991, and actions he took in the weeks beforehand that contradicted his claims about the events surrounding his crimes. She also failed to follow-up with or question the defendant about the many troubling test results that called into question the defendant's claim that he was rehabilitated. Instead of acting as a true independent expert, she acted as an advocate who rendered opinions without a full understanding of the facts and chose to ignore facts and test results that did not advance the defendant's cause. As such, her lack of thoroughness and her obvious bias in favor of the defendant negates or lessens the weight that should be accorded her opinions in this case. See People v. Henriquez, 2014 Ill. App. Unpub. LEXIS 2385, *3 (noting lower court's determination that Dr. Kavanaugh's testimony was "incredible" and that "no credible evidence existed" to support her opinion in the matter).[6]

**B. The defendant's actual and likely disciplinary record does not weigh in favor of his sentencing request.**

22. The defendant's expert, Dr. Kavanaugh, discussed his disciplinary record in her report and at the sentencing hearing and downplayed the nature and extent of the record. Contrary to her

[6] A copy of this decision is attached as an exhibit to this memorandum.

claims though, the actual and likely disciplinary record does not support a finding that the defendant has been rehabilitated.

23. First, if the Court reviews the defendant's disciplinary record outlined in Dr. Kavanaugh's report, it will see that the defendant continued to commit disciplinary infractions after he was an adult. Those infractions included violent offenses, which Dr. Kavanaugh attempted to minimize by stating multiple times on direct examination that they were assaults on fellow inmates versus staff. Regardless, the defendant's disciplinary record shows that he continued to behave poorly and act violently at times in his teens, twenties and thirties. That is not consistent with someone who has been fully rehabilitated as the defendant claimed.

24. Second, the defendant told Dr. Kavanaugh, and it is reflected in her report, that he committed disciplinary infractions, including an act of violence, in order to manipulate prison officials to transfer him. The first time the defendant wanted a transfer he said he gave prison officials in New Hampshire six years of problems in order to get a transfer to Massachusetts. As the Court learned during cross-examination at the hearing, the defendant told Dr. Kavanaugh that he had wanted that transfer because of racial issues. However, the defendant told his parents he wanted that transfer because Massachusetts had better privileges and food, and the racial issues would be better.[7] Regardless of the true reasons the defendant wanted the transfer, he violated prison rules to manipulate prison officials into doing what he wanted; transferring him to Massachusetts. According to Dr. Kavanaugh's report, the defendant manipulated prison officials into transferring him again in 2011, by assaulting another inmate. The defendant's manipulation of prison officials to gain transfers in his twenties and thirties is consistent with the findings on the IORNS test where

[7] This is also another example of an inconsistency in what the defendant told Dr. Kavanaugh that she ignored and did not follow up on.

he scored "high" in manipulativeness in the psychopathy scale. That manipulative conduct is also inconsistent with the defendant's claim of complete rehabilitation.

25. Last, the defendant admitted on the MMPI test that he was still using drugs and alcohol in prison. That admission is consistent with his disciplinary record that shows drug and alcohol use in prison, as recently as 2013, at age 39. However, on cross-examination, Dr. Kavanaugh admitted that the defendant's disciplinary record does not reflect the true extent of his infractions since he is using drugs and alcohol in prison more frequently than his write-ups reflect. Accordingly, the defendant's conduct is inconsistent with a claim of rehabilitation.

26. Despite Dr. Kavanaugh's attempt to minimize the defendant's disciplinary record, that record confirms that the defendant's criminal conduct is not unique to him being a juvenile. While his record is not extreme, that record and his expert's test results confirm that he has continued to commit acts of violence and use drugs and alcohol in prison in his teens, twenties, thirties and forties. Some of that behavior was deliberate and committed to facilitate two prison transfers, thereby confirming what his test results showed, the defendant has not been fully rehabilitated and is manipulator at times. However, the defendant has not only manipulated prison officials, he has also manipulated his friends and family.

C. **The defendant has failed to accept full responsibility for all his crimes.**

27. The defendant addressed the Court at the sentencing hearing and expressed remorse for his actions. In his sentencing memorandum, the defendant also claimed that he "takes full responsibility for all he did." Def's. Memorandum, at pg. 4. However, what the defendant said in his memorandum and in the courtroom is contradicted at times by what he has said and done outside the courtroom.

28. The defendant's claim that he has accepted full responsibility for his crimes is at odds with his attempts to blame his first victim. As the Court heard at the hearing, for the first time after twenty five years the defendant claimed to his expert that Roscoe Powers called him a racial slur before the defendant chased Roscoe down and shot him. That was a claim the defendant did not make to his friends immediately after he shot Roscoe, despite seeing them right after shooting Roscoe and telling them many details about the shooting he had just committed. Likewise, the defendant never testified to the making of that slur during trial, and no other witness did either. Finally, in twenty six years the defendant has never told his friends or family members that Roscoe Powers used a racial slur against him. The defendant is an admitted perjurer with a significant motive to make himself look better to the Court at the expense of his victims. Demeaning his victim by attributing the use of a racial slur to him is not consistent with remorse or a full acceptance of responsibility on the defendant's part.

29. The defendant also cannot credibly claim to have accepted full responsibility for his crimes and shown true remorse when he never told his family or friends the details about "all he did." As the Court heard during the sentencing hearing, the defendant has never told his friend, Vanessa Johannes, what he did on March 23, 1991. Likewise, the defendant never told his brother Jason or his parents what he did to his three victims. As for his brother Aaron, the defendant's lawyer had to tell him about the defendant's crimes; it did not come from the defendant. This lack of candor on the defendant's part was dismissed by the defendant's expert as simply his way of preserving his access to "resources." In other words, the defendant chose to hide the details of his crimes from the people closest to him for fear he would lose their support, financial and otherwise. Therefore, the defendant cannot credibly claim full acceptance of responsibility and true remorse and at the same time enlist the support of his family and friends to aid him in his release from

prison, while at the same time refusing to tell them the details of the crimes that put him in prison. That conduct contradicts the defendant's claims, and those of his expert and lawyers, that he "takes full responsibility for all he did" and is truly remorseful. Instead, it is manipulative conduct consistent with his IORNS testing results and what he did to prison officials on two separate occasions to gain transfers. Accordingly, the Court should be skeptical of the defendant's claims regarding acceptance of responsibility and remorse for his victims.

**D. Victim impact.**

30. The defendant's sentencing proposal is unreasonable because it does not reflect the true consequences of the murder of Robbie Goyette and ignores the defendant's other victims from before and after the murder.

31. The defendant shot one man, killed another, and attacked a police officer on March 23, 1991. The Court was able to hear for itself at the sentencing hearing just some of the impact of those crimes on the defendant's victims. The State will not recount that except to note that what the defendant did to his three victims has had, and will have, lasting negative effects on them. Each of the defendant's victims deserves justice; none should be forgotten or ignored in the consideration of a sentence for the defendant.

32. As the Court is aware, most murders in New Hampshire only involve one victim. However, that was not the case here. The murder the defendant committed in 1991 was the second crime that he had committed that night; there were two other victims as well. Although separated by time, each of the defendant's three victims suffered at the defendant's hands because of his original plan to commit robberies for money. Officer MacLeod was attacked because the defendant was trying to escape the consequences of what the defendant had done to his first two victims.

Therefore, Robbie Goyette's murder cannot be viewed in isolation and the defendant's victims before and after the murder cannot be ignored as the defendant proposes. Instead, the crimes the defendant committed before and after the murder, which are all connected, are aggravating factors that weigh in favor of a greater sentence for the murder and support the State's recommended sentence.

**E. Comparable cases.**

33. Despite the fact that the Court will only be resentencing this defendant on the murder charge, the State's recommended sentence of 51 ½ to life is still the minimum appropriate sentence here.

34. In its sentencing memorandum, the State referred the Court to three similar cases with comparable sentences to the one recommended in this case. On the contrary, the defendant did not provide the Court with any comparable New Hampshire cases where a teenaged murderer who also committed violent crimes against other people around the time of the murder, received a total sentence of only twenty seven years to life after trial. That weighs against the reasonableness of the defendant's sentencing request.

35. In all three cases the State cited in its memorandum, those defendants had been charged with first-degree murder but pled down to second-degree murder. This defendant though is being sentenced on a first-degree murder charge, which means his sentence must reflect the greater level of the crime. In addition, in all three of the comparable cases cited by the State, those defendants pled guilty, which justified imposing a lesser sentence. See State v. Fraser, 120 N.H. 117, 122-23 (1980) (a defendant who pleads guilty may be afforded "a proper degree of leniency"). Further, none of those other defendants took the witness stand and lied under oath, something this

defendant did and that merits a greater sentence. See State v. Burgess, 156 N.H. 746, 762 (2008) (a court may consider "a defendant's false trial testimony as a sentencing factor").

36. Therefore, based on all the facts of this case and comparing it to the other three cases the State cited in its sentencing memorandum, the State's recommended sentence is appropriate here and should be imposed.

**F. The articles contained in the defendant's sentencing memorandum do not weigh in favor of his sentencing request.**

37. The defendant provided several articles in his sentencing memorandum in support of his requested sentence. The State will address some of those articles and their lack of applicability to this case.

38. The defendant cited an article in his memorandum entitled "Teens Impulsively react rather than retreat from Threat." The essence of the article is that "impulsive behavior during adolescence is as likely to occur in the presence of threat as reward cues." Presumably, the defendant included that article because he wants the Court to believe that what he did back in 1991 was just an impetuous reaction devoid of any conscious decision making.

39. As the Court can see from the facts of this case, the defendant did not impulsively react to any threats from his first two victims on March 23, 1991, rather than retreat. In fact, he was the only threat that night. He was the one that chased down two separate victims that night and shot them. The first victim was just walking down the street when the defendant targeted him while the second one was just sitting in his car. Neither victim was a threat to the defendant, which means the article cited by the defendant has no relevance to his sentencing proceedings.

40. Another article the defendant included to help justify his sentencing recommendation was entitled, "Peers increase adolescent risk taking by enhancing activity in the brain's reward

circuitry." The thrust of that article is that "adolescents, but not adults, exhibited increased risk taking when observed by their peers."

41. The facts in this case are clear that "peers" had nothing to do with the defendant's crimes on March 23, 1991. No peer was with him when he committed his three crimes and no peer encouraged him to commit his crimes. Therefore, contrary to the article cited by the defendant, the defendant did not engage in "risk taking when observed" by his peers, which means the article has no relevance to his sentencing proceedings.

42. Another article cited by the defendant in his memorandum is entitled, "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines." In that article, there is a section entitled "Recidivism and Offender Characteristics." A review of that section reveals that this defendant has many of the characteristics cited in that article that are consistent with a higher risk of recidivism. That is consistent with the defendant's scores on the IORNS test; the test that was designed to detect factors associated with a risk of recidivism. His scores on that test confirmed that he presents a significant risk for recidivism: Static Risk Index (99%), Criminal Orientation (93%), Aggression (97%), Dynamic Need Index (91%), and Overall Risk Index (92%). Therefore, the article the defendant cited actually supports the State's sentencing recommendation and not the defendant's.

43. The last article included in the defendant's sentencing memorandum is entitled: "Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Rates." This study from almost twenty years ago is directed primarily at "[a]ssessing chronicity…for clients whose sexual behaviors have brought them into conflict with the law." Clearly the present case has nothing to do with the defendant's "sexual behaviors," which limits the applicability of this study to the present case. In addition, the few relevant sections of that article are not helpful for the defendant.

According to that article, "nonsexual violent recidivists tended to be young, unmarried and of minority race." That is all criteria that fit this defendant. The article also stated that recidivists tended to "have a history of antisocial behavior as juveniles and adults." Again, that criteria also fits the defendant since he has engaged in antisocial behaviors in his teens, twenties, thirties and forties.

44. In sum, most of the articles the defendant cited in his sentencing memorandum actually support the State's sentencing recommendation and not the defendant's.

**G. The mitigating factors discussed in *Miller* are not mandatory here, but even if they are considered, they are not compelling in this case.**

45. In this case, since the State is not asking the Court to impose "the harshest possible penalty for juveniles," i.e., a life without parole sentence or its functional equivalent, Miller does not mandate consideration of its mitigating sentencing factors here. Regardless, the State will still address those factors based on the additional evidence from the sentencing hearing in the event the Court considers them in this case:

***Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuousness, and failure to appreciate risks and consequences.***

As stated, the State is not seeking life without parole. The defendant will have an opportunity for release at his minimum parole date, depending on his behavior. In addition, the defendant will have the option to request a sentence reduction prior to parole, pursuant to RSA 651:20.

There is no credible evidence that the defendant's crimes and the murder he committed were due to his immaturity or being impetuous. On the contrary, the defendant was deliberate in his crimes and did things in advance to help facilitate them, such as buying a gun, ammunition and a holster, and removing the serial number from the gun.

The evidence shows that the defendant also appreciated the risks and consequences of his crimes and the murder he committed that night. After the defendant tried to rob and then shot Roscoe Powers, his first victim that night, the defendant told Selina Gerow and Valence Ray what he had done to Powers. He specifically told Gerow and Ray that he had shot a man and was going to go back out to see if the man was dead. Before going back out though, the defendant took steps to ensure that he would not be caught. Those steps included changing his clothing and his appearance, including shaving his beard and mustache and cutting his hair. Later, after shooting and killing his second victim that night, the defendant also tried to get rid of the murder weapon, hide the gun box, and use a car to flee the State. All those actions confirm that the defendant appreciated the risks and consequences of his actions. Therefore, there is nothing mitigating about this factor for the defendant other than the fact he was 17 years old at the time of his crimes.

***It prevents taking into account the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional.***

The defendant's "family and home environment" are not substantially mitigating factors. He had a mother and father who loved him and worked. At times his home life was challenging, but nothing about his family and home environment compelled him to commit his crimes or encouraged him to do so. Instead, as the Court heard at the hearing, the defendant scored "average" in four of the five scales on the Childhood Trauma Questionnaire. As that score and the facts confirm, while the defendant's home life was dysfunctional at times, it was far from a "brutal" environment. Therefore, this factor is moderately mitigating for the defendant.

***It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.***

The "circumstances of the homicide offense" are not mitigating for the defendant. As the facts clearly show, the defendant bought a gun in advance to commit crimes for money. He was

alone when he committed all three of his crimes; his family and friends were not there. The defendant's conduct was also voluntary and in no way the product of "familial and peer pressures." Therefore, this factor is not mitigating for the defendant.

***Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.***

There is no evidence that the defendant could have been "charged and convicted of a lesser offense" in this case but for "incompetencies associated with youth." Likewise, there is no evidence that the defendant had an inability to deal with the police or prosecutors that affected the charges against him. Finally, there is also no evidence that the defendant was incapable of assisting his own attorneys based on his age.

The defense claimed at the hearing that the defendant's age somehow prevented him from rationally considering a plea offer in this case. First, the State is unaware that any plea offer was actually made and the defendant has not provided proof of any. And second, the defendant has provided no evidence that the defendant's age had anything to do with rejecting a hypothetical plea offer. As the Court can see from the three cases the State referenced in its sentencing memorandum, young men, even seventeen-year-olds, are capable of considering and accepting a plea offer at numbers greater than the thirty-five year sentence the defense referenced at the hearing. The State could cite other examples of young and even adolescent murderers who have pled guilty rather than go to trial in New Hampshire. However, that is not necessary since this defendant has provided no evidence that being seventeen years old created any impediment to considering or accepting a plea offer. Therefore, this factor is not mitigating for the defendant.

***And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.***

As the Court knows, the State is not seeking a mandatory life sentence here. Therefore, the defendant will have the opportunity for parole and release, as well as the chance for an even earlier release pursuant to RSA 651:20. Accordingly, the State's recommended sentence takes into account the "possibility of rehabilitation." Therefore, this factor is not mitigating for the defendant.

46. Based on the facts of this case and the evidence from the sentencing hearing, even if the Court considers the Miller factors, they are not sufficiently mitigating to justify imposing the defendant's recommended sentence in light of the evidence of his crimes and the many aggravating factors in this case.

## III. CONCLUSION

47. The evidence against the defendant is overwhelming; there is no doubt that he committed the crimes he was convicted of. The evidence also confirms that he willingly chose to commit violent acts against random and innocent victims. Far from being corrupted by others, the defendant acted on his own. He was no follower who acted at the behest of others due to immaturity and peer pressure. Moreover, as to the mitigator of age, although the defendant's age in itself is a mitigator, the crimes that he committed reflect few if any of the attendant characteristics of youth that a Court may consider when determining what sentence is fair and appropriate. On the contrary, the facts of this case, the aggravating factors, and the requirement for justice weigh in favor of imposing at least the State's recommended sentence in this case.

48. At the close of her sentencing argument, defense counsel read a quote to the Court regarding mercy. The State's recommendation reflects the concept of mercy since the State took into account mitigating factors in this case and as a result, did not ask for a life without parole or life

sentence despite the many justifications for both. However, mercy is not the only concept applicable to sentencing the defendant. There are other factors as well, such as punishment, rehabilitation and deterrence; mercy does not trump them all. And finally, the concept of mercy also applies to the victims in this case and their entitlement to justice.

49. While the defendant appeared in Court with a beard and was alleged to look older than his two younger brothers, whatever toll time has taken on him pales in comparison to the toll his crimes have taken on his victims. Robbie Goyette's family did not get to see Robbie in Court at the sentencing hearing, and they never will. Officer Thomas MacLeod lives in fear of the defendant's release and is haunted by his encounter with the defendant and the decisions he made that night. Therefore, to the extent the Court considers mercy in this case it should also do so for the victims as well. They too are deserving of the mercy the defendant wants for himself. They too are deserving of justice for all that was done to them and who was taken from them. Accordingly, the State leaves the Court with this quote by Lois McMaster Bujold:

*"The dead cannot cry out for justice. It is the duty of the living to do so for them."*

50. For all the reasons stated, the Court should impose the State's recommended sentence.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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January 5, 2018

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**CERTIFICATE OF SERVICE**

I certify that a copy of this pleading has been mailed to Paul Borchardt, Esquire, and Pamela Jones, Esquire.

January 5, 2018

Jeffery A. Strelzin

[1894943]

# *People v. Henriquez*

Appellate Court of Illinois, First District, Second Division

October 28, 2014, Decided

No. 1-12-2312

**Reporter**
2014 IL App (1st) 122312-U *; 2014 Ill. App. Unpub. LEXIS 2385 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RLANDO ***HENRIQUEZ***, Defendant-Appellant.



**Subsequent History:** Appeal denied by *People v. Henriquez, 2015 Ill. LEXIS 669, 392 Ill. Dec. 368, 32 N.E.3d 676 (Ill., May 27, 2015)*

**Prior History:** [**1] Appeal from the Circuit Court of Cook County. No. 99 CR 8281. Honorable Diane Gordon Cannon, Judge Presiding.

*People v. **Henriquez**, 383 Ill. App. 3d 1143, 968 N.E.2d 217, 2008 Ill. App. LEXIS 4269, 360 Ill. Dec. 138 (Ill. App. Ct. 1st Dist., 2008)*

**Disposition:** Affirmed.

## Core Terms

sentence, withdraw, guilty plea, admonish, trial court, witnesses, reduction, appropriate remedy

**Judges:** JUSTICE LIU delivered the judgment of the court. Justices Neville and Pierce concurred in the judgment.

**Opinion by:** LIU

## Opinion

**ORDER**

**[*P1]** *Held*: Where defendant entered a negotiated guilty plea and was not admonished of the accompanying mandatory supervised release (MSR) term, the trial court did not abuse its discretion in reducing defendant's sentence by three years, rather than permitting him to withdraw his plea.

**[*P2]** Defendant ***Orlando Henriquez*** and five co-defendants, who are not parties to this appeal, were charged in connection with the March 2, 1999, murder of Michael Marchany. On May 13, 2002, defendant entered a negotiated guilty plea to first degree murder and attempted armed robbery in exchange for concurrent, respective terms of 45 and 15 years' imprisonment.

**[*P3]** On appeal, this court granted defendant's motion for summary remand on the basis of inadequate guilty plea admonishments. After the case was remanded and the trial court provided the necessary postplea admonishments, defendant filed a motion to withdraw his guilty plea alleging that he lacked the intellectual ability to understand **[**2]** the plea or its consequences. The trial court ordered that defendant be examined to determine his fitness at the time of his guilty plea, and he was evaluated by Dr. Roni Seltzberg, who reported in a letter to the court her conclusion that he was fit to stand trial at the time of his plea. At the hearing on defendant's motion, defendant presented the testimony of Dr. Antoinette

Kavanaugh, who found "sufficient reason to doubt that [defendant] had a comprehensive understanding *** of what the plea meant and its consequences" at the time of his plea. The court, however, found that Dr. Kavanaugh's testimony was incredible, and that no credible evidence existed to show that defendant was not aware of the consequences of his plea. The court denied the motion, defendant appealed, and this court affirmed that order. *People v. Henriquez, 383 Ill. App. 3d 1143, 968 N.E.2d 217, 360 Ill. Dec. 138 (2008)* (unpublished order under Supreme Court Rule 23).

**[*P4]** On May 26, 2009, defendant filed the *pro se* post-conviction petition at bar. In it, he alleged that his public defender was operating under a conflict of interest because defendant had alleged the ineffectiveness of a prior counsel from the same office, and that the trial court failed to admonish him that he **[**3]** would be subject to a three-year term of mandatory supervised release (MSR) at the conclusion of his sentence. The trial court dismissed the petition as frivolous and patently without merit on September 15, 2009. Defendant appealed, and this court entered an order remanding the case for further proceedings because defendant's petition was summarily dismissed more than 90 days after the deadline for doing so. *People v. Henriquez*, No. 1-09-2849 (2010) (dispositional order).

**[*P5]** Upon remand, defendant's *pro se* petition was withdrawn, and appointed counsel filed a *Rule 651(c)* certificate (*Ill. S. Ct. R. 651(c)* (eff. Dec. 1, 1984)), a supplemental petition, and defendant's affidavit. Defendant asserted that he would not have pleaded guilty had he been admonished on the MSR term, and requested that he be allowed to vacate his plea. The State filed an answer on April 26, 2012, conceding that defendant did not receive a proper admonishment on the MSR term, and that his sentence should be reduced by three years as a result. The State contended that this remedy was appropriate because this was a 1999 case, and it would be prejudiced if defendant was permitted to withdraw his plea more than 13 years after the crime occurred.

**[*P6]** At **[**4]** the hearing on defendant's motion, defendant stated that he did not want a reduction in his sentence to account for the MSR term of which he was not admonished, and, instead, reiterated his request to withdraw his guilty plea. The State responded that defendant was not necessarily entitled to his choice of remedy, arguing:

> "While great consideration is given to what the defendant wants, the issue of whether or not the State would be unduly prejudiced in trying a case at this late date is one this court can consider. *** [O]bviously we are talking about a situation here where the crime happened in 1999. We are now 13 years later.
>
> The State would be unduly prejudiced in trying to try this case now. Witnesses disappear. Both police and civilians memories fade. And to try to properly try this case now would unduly prejudice the State."

**[*P7]** On July 24, 2012, the circuit court issued a written order denying defendant's request to withdraw his guilty plea, and instead ordered a three-year reduction of his sentence.

**[*P8]** In this appeal, defendant asserts that he received a more onerous sentence than he agreed to, and that he should therefore be able to withdraw his plea pursuant to *People v. Whitfield, 217 Ill. 2d 177, 840 N.E.2d 658, 298 Ill. Dec. 545 (2005)*. He contends that the three-year **[**5]** sentence reduction is an inadequate remedy and that his preference to withdraw his plea should have been given "considerable, if not controlling, weight." *Whitfield, 217 Ill. 2d at 205*, quoting *Santobello v. New York, 404 U.S. 257, 267, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)* (J. Douglas concurring).

**[*P9]** As an initial matter, the State contends that this court should not entertain defendant's *Whitfield* claim, as he did not raise it on direct appeal or in his previous motions to withdraw his plea. Our supreme court, however, rejected a similar argument in *Whitfield, 217 Ill. 2d at 188*. In concluding that there was no procedural default, the

*Whitfield* court emphasized two facts: (1) the trial court did not admonish defendant about MSR; and (2) defendant did not learn about the imposition of MSR until he was in prison, sometime after the time to directly appeal had expired. *Whitfield, 217 Ill. 2d at 188*. Accordingly, the supreme court found that defendant "could not have raised the error in a motion to withdraw his plea or a direct appeal" (*Whitfield, 217 Ill. 2d at 188*) and addressed the merits of his claim. We reach the same conclusion here.

**[*P10]** It is undisputed that defendant was not admonished about the MSR term, and there is no evidence that he could have raised the issue in a prior filing because there is no indication that he had knowledge of the issue since the trial court failed **[**6]** to apprise him of the MSR term that gives rise to his claim. Accordingly, we find no procedural default, and address the merits of defendant's claim that the trial court erred by not granting him the remedy of his choice.

**[*P11]** Defendant specifically asserts that the trial court should have permitted him to withdraw his guilty plea, rather than reduce his sentence by three years, based on the court's failure to admonish him regarding his MSR term under *Whitfield, 217 Ill. 2d at 195*. The State concedes that a *Whitfield* violation occurred, but maintains that the reduction in defendant's sentence is the appropriate remedy under the circumstances of this case.

**[*P12]** Defendant initially requests that this issue be reviewed *de novo*, framing it as whether the court followed the law in consideration of defendant's request to withdraw his plea. The State disagrees, observing that this is an appeal from a hearing at the third stage of post-conviction proceedings. It thus contends that the court's determinations must be upheld unless they are manifestly erroneous, and, in the case of a *Whitfield* violation, the court may exercise its discretion in determining an appropriate remedy. We agree.

**[*P13]** In *Whitfield*, the supreme court held that **[**7]** where defendant pleads guilty in exchange for a specific sentence pursuant to a negotiated plea agreement and the court fails to admonish him that a mandatory supervised release (MSR) term would be added to that sentence, the sentence imposed is more onerous than what defendant agreed to, in breach of the plea agreement and in violation of due process. *Whitfield, 217 Ill. 2d at 195*. The supreme court found that two remedies exist when defendant has not received the benefit of his bargain: (1) the promise must be fulfilled, or (2) defendant must be allowed to withdraw his guilty plea. *Whitfield, 217 Ill. 2d at 195*. Although the supreme court found that defendant's preference should be given significant weight, it also indicated that the ultimate decision regarding the "'fashioning of an appropriate remedy" is "largely a matter of the exercise of the sound discretion of the court according to the circumstances of each case.'" *Whitfield 217 Ill. 2d at 204*, quoting *United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978)*. The supreme court then found that a sentence reduction, the relief sought by defendant, was the appropriate remedy. *Whitfield, 217 Ill. 2d at 203-05*.

**[*P14]** In subsequent cases, however, where defendant's preferred remedy is to withdraw his plea rather than receive a sentence reduction, this court has examined the record to determine whether permitting **[**8]** that remedy would be unduly prejudicial to the prosecution. *People v. Smith, 406 Ill. App. 3d 879, 894, 941 N.E.2d 975, 347 Ill. Dec. 106 (2010)*; *People v. Chamness, 373 Ill. App. 3d 492, 495, 869 N.E.2d 291, 311 Ill. Dec. 617 (2007)*. In *Smith*, this court considered the contention that the trial court erred by not granting defendant the relief of his choosing based on the court's failure to admonish him regarding his MSR term. *Smith, 406 Ill. App. 3d at 893*. Defendant in *Smith* pleaded guilty to murder for the beating and death by drowning in a bathtub of a two-year-old child, and was sentenced to 32 years in prison. *Smith, 406 Ill. App. 3d at 879*. Defendant's guilty plea came during the middle of his trial, after the State had presented the bulk of its case, including the testimony of nine witnesses. *Smith, 406 Ill. App. 3d*

at 881.

**[*P15]** When defendant later attempted to withdraw his guilty plea based on the court's failure to admonish him of the MSR term, defendant argued that, even though 10 years had elapsed since the victim's death, the State would not be prejudiced because the witnesses, or a transcript of their prior testimony, would be available for use at trial. *Smith, 406 Ill. App. 3d at 894*. This court found, however, that "[e]ven assuming such evidence is available, either form of evidence would be a poor substitute for live testimony presented by witnesses with fresh memories." *Smith, 406 Ill. App. 3d at 894*. We therefore concluded that, "[e]ven affording defendant's preference considerable weight, the **[**9]** trial court did not err under these circumstances in finding that reducing defendant's sentence was more appropriate than permitting defendant to withdraw his guilty plea and start anew. Defendant has received the bargain of his benefit and can claim no prejudice." *Smith, 406 Ill. App. 3d at 894*.

**[*P16]** We find the facts of this case even more compelling than those in *Smith*, where even more time has passed since the victim's death and there are no transcripts of prior testimony which could provide a substitute for the live testimony of witnesses. We therefore conclude that, under these circumstances, the trial court did not err in finding that reducing defendant's sentence was the appropriate remedy. *Smith, 406 Ill. App. 3d at 894*.

**[*P17]** Defendant alternatively requests that his case be remanded for specific findings on what prejudice, if any, the State would face if he were permitted to withdraw his plea. In support, he cites *Chamness, 373 Ill. App. 3d at 495*, where this court determined that the record was insufficient to determine whether retrial would prejudice the State, and remanded the case for the trial court to make that determination. We find *Chamness* distinguishable from the case at bar.

**[*P18]** Here, unlike *Chamness*, the record indicates a number of reasons from which the court could **[**10]** have reasonably determined that a retrial would prejudice the prosecution. This was a capital case, and defendant was charged along with five co-defendants. The parties' discovery answers indicated 67 possible witnesses for the State, and 57 for the defense, including civilians, police officers, and an expert in neuropsychology. Even if those witnesses were still available more than 13 years after the crime at issue, their current testimony would be affected by the passage of time, and "a poor substitute for live testimony presented by witnesses with fresh memories." *Smith, 406 Ill. App. 3d at 894*. We therefore decline defendant's request to remand for specific findings, and affirm the order of the circuit court of Cook County.

**[*P19]** Affirmed.

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THE STATE OF NEW HAMPSHIRE

Superior Court - Southern District

HILLSBOROUGH, SS. November TERM, 2017

STATE OF NEW HAMPSHIRE

v.

Eduardo Lopez
#93-S-620-24

Defense's Memorandum Summarizing the Trial

Eduardo Lopez submits this memorandum to summarize and help guide the Court through the trial. This memo is not the defense's sentencing memorandum. Rather, this memo will outline the evidence at trial and attempt to aid the Court by identifying the portions of the trial transcript most relevant to decide on a proper sentence for Mr. Lopez. The defense submits this separately from the sentencing memorandum to limit the length of the sentencing memorandum and present these arguments in more manageable units for the Court.

1. Eduardo Lopez was charged with alternate counts of first-degree murder, first-degree assault, and attempted first-degree assault. He will be re-sentenced starting on December 13, 2017.

2. The Court has several sources of information at hand. First, the Court has the transcript of the trial itself[1]. This is by far the best source of information the Court has. The only negative about the transcript is its length, which is considerable. The Court also has the New Hampshire Supreme Court opinion, 139 N.H. 309 (1994), which has a one-page summary of the trial. The opinion's positive value is that it is authoritative; the opinion's

[1] The Court should have the trial transcript. It was transferred to this Court from the Supreme Court. If it is not in this file it will be found in 15-CV-018, a post-conviction petitions for a writ of habeas corpus.

negative value is that it is not comprehensive. The Court may also have a transcript of a suppression hearing held on May 24, 1993. The suppression hearing has lesser value to the Court. While there was a sentencing hearing for the non-first-degree murder charges, the defense did not request a transcript of that hearing in its Notice of Appeal, so to the defense' knowledge such a transcript does not exist.

3. The Court also has the pleadings and orders in 15-CV-018, *Eduardo Lopez v. Warden* and the order in that case. That case was a petition for a new trial based on a *Brady* claim, which was denied. The discussion of the *Brady* claim itself has little value for the Court, but in litigating the *Brady* claim the parties both discussed the evidence and respective arguments at trial. The Court's order in 15-CV-018 has a more extensive summary of the evidence at trial than the Supreme Court's opinion, and it may aid this Court to review the order before diving into the trial transcript itself.

4. Finally the Court has the booking video of Eduardo Lopez. This video is a few hours long total. A CD with the video is enclosed.

5. From this point, this memo will summarize the evidence at trial. This memo will first summarize the testimony of the most important witnesses, then outline the other testimony at trial. As the verdict settles whether Eduardo Lopez or someone else committed these crimes, this memo will skim over the testimony and disputes over whether Eduardo Lopez was the person who committed the crimes, such as testimony about seized clothing and fingerprints.

<u>Testimony of Eduardo Lopez</u>

6. The most important testimony in the trial, for the sentencing hearing, is Eduardo Lopez's testimony at T 6/18 1-49[2]. He testified that Valence Ray shot Roscoe Powers and Robert Goyette. This was a lie. The defense will address why he lied later, both in the defense's sentencing memorandum and at the sentencing hearing.

7. Specifically Eddie testified that he went over to Valence Ray's the afternoon before the shootings. T 6/18 4. He and Ray drank a significant amount that afternoon and evening, and they shot Eddie's gun. T 6/18 9.

8. Eddie testified that he and Ray were walking in downtown Nashua when they encountered Roscoe Powers, who they did not know. Ray said they should go start trouble with him to pass the time. T 6/18 12. Eddie went up to Powers and asked him for a quarter. When Powers said he did not have one, Eddie threatenedd to take a bottle and crack it over Powers's head. Eddie testified he said this for fun. T 6/18 14. Powers ran away, then Ray chased after him. Eddie testified he heard a gunshot. He fled to Ray's house. Ray showed up shortly thereafter and said Powers drew a knife, then Ray shot him. T 6/18 15-16.

9. Eddie also testified that Ray shot Robert Goyette. He said that he and Ray were walking in downtown Nashua when they saw a car. Eddie had intended to steal the car, to flee Nashua, but was too scared to actually break into the car. T 6/18 20-21. They both continued walking, with Ray behind Eddie. Then Eddie heard a gunshot. He again fled to Ray's house, and again met Ray there. Ray said that he shot someone in the head. T 6/18 22-23.

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[2] The trial transcript is separated by the date of testimony, and consecutively-paginaged only for each day. So "T" refers to the date of the testimony and then the page in the transcript of that day's testimony.

10. After that Eddie testified he doesn't remember what happened. He remembered holdign his mother and her saying that she loved him. T 6/18 25. He testified he did not remember grabbing the 2x4, or anything that happened after he went down the stairs, which would include his encounter with Officer MacLeod and his arrest. T 6/18 26.

Roscoe Powers's Testimony and John Stowe's Eyewitness Testimony of Powers's Shooting

11. Powers testified that he walked down Main Street when he saw someone standing by the Stage Door hair salon on Main Street[3]. T 6/15 106. The person he saw was Eddie Lopez. Powers testified Eddie approached him and said "do you have any money." Eddie came up close to Powers and pointed a gun at Powers's chest. Powers said he did not have any money. T 6/15 106.

12. Powers testified that he backed away, then started running. He said he "ran down the sidewalk" then "ran into the traffic, dodging cars" then came back around and ended up back where he first met Eddie, where he slipped and fell. Eddie chased after him the whole time. T 6/15 109. Powers said that he tripped and fell, then as he was getting up Eddie shot him in the chest. T 6/15 108-09. Powers continued to get up and pulled out a buck knife. He waved the knife around, but could not see Eddie. T 6/15 111. A driver named John Stowe then stopped and gave Powers a drive to the hospital. T 6/15 112.

13. Stowe also testified at trial. He said he saw Powers walking in front of the Stage Door when Eddie Lopez came out of nowhere and stopped Powers. T 6/15 62. Eddie and Powers came face to face and started "dancing around, almost like [Powers] was trying to

[3] Powers testified this happened around 9 p.m. T 6/15 105. That time estimate is probably not accurate, based on other more reliable time estimates.

get away from [Eddie]."[4] Stowe, watching this, told his wife that he thought there was a drug deal going on, so he called 911. T 6/15 63. Then Stowe saw Powers run away, first across Main Street, then back across Main Street, then he ran down the street and Stowe lost sight of him. Stowe saw Eddie chasing after Powers until he lost sight of them both. T 6/15 67. A few seconds later Stowe saw Eddie running across Main Street towards Temple Street, then disappear behind a building. T 6/15 69-70. Powers never saw Eddie holding the gun. T 6/15 87.

14. Stowe saw Powers lying on the street and went to him. He saw Stowe had a gunshot wound, and saw a knife by his side. T 6/15 71-72.

15. Powers testified that he had drank 5 to 6 beers before the shooting. T 6/15 119.

Testimony of Robert Goyette's Shooting

16. Matthew Sullivan was a friend of Robert Goyette and his wife, Ellen. He saw them at the Stable Pub in Nashua around 5 p.m. on March 23, 1991. T 6/16 4. They all drank a few beers until about 7:15 or 7:30, when they left to go to Sullivan's apartment. They all got into Robert Goyette's car, a 1985 Black Saab. T 6/16 5. After a few stops, they drove to Martha's Tavern on Main Street. Robert parked outside Martha's. Ellen Goyette got out of the car; Robert and Sullivan stayed in the car, talking and planning to go to another place. T 6/16 8. Goyette was in the driver's seat, and Sullivan in the rear seats.

17. As they were parked Sullivan saw Eduardo Lopez approaching the car. When Eddie got within about 10 feet Sullivan told Robert to roll down the window, as this person wanted something. T 6/16 10. Sullivan could not understand what Eddie said to them,

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[4] Stowe describes Powers as "the cowboy" because Powers was wearing a black hat and cowboy boots, and describes Lopez as "the black male" or "the other guy."

except he heard Eddie say the word "money" and noticed Eddie holding a gun in his hand. T 6/16 11.

18. Robert then put the car in gear and started to drive away. Sullivan testified he was watching the gun as Robert drove away, and said "probably three, four feet and shot him." Sullivan said he saw the flash of the gun and immediately after the car stops accelerating because Robert had been shot. The car went across the street and hit a police on the sidewalk. T 6/16 12. Sullivan waited two seconds after the car crashed, then looked out of the car and could not see Eddie. T 6/16 13.

19. The Chief Medical Examiner, Dr. Roger Fossum, did not testify. The parties agreed to a stipulation of the autopsy results. The stipulation stated that one bullet entered the right side of Robert's neck and passed through his skull, lodging beneath his upper left jawbone. This gunshot caused Robert Goyette's death. T 6/16 24-25.

Testimony of Eduardo Lopez's Mother, Carmen Aguirre, Who Saw Him Before his Encounter with Officer MacLeod

20. Carmen Aguirre, Eddie's mother, saw Eddie at about 10:10 p.m. on March 23, 1991. She had been home for about two hours watching TV when she heard him call out her name. T 6/17 141. She got up and walked to the living room, where she saw Eddie slumped on a chair. His eyes were glazed, glassy and small. Carmen testified he did not look like himself. He looked drunk. T 6/17 142.

21. Carmen asked Eddie what happened. Eddie tried to talk, but could not. Carmen could not tell what he was trying to say. She tried to hold him up, but he could not stand on his feet. T 6/17 143. Eventually Carmen carried Eddie into the kitchen. They paced back

and forth across the kitchen. At one point Eddie mentioned a car. Carmen again asked him what happened, and could not understand his response. T 6/17 145.

22. Eddie then got upset and punched the glass entrance door to the kitchen. Eddie went out of the apartment and Carmen followed. Eddie kept saying things that did not make any sense. Carmen tried to hold him up. She testified f she didn't hold him "he would fall or he would get hit by a car. He couldn't even walk." Then Eddie slipped out of her hands and fell down the apartment stairs. T 6/17. Eddie then left the apartment building.

23. Carmen looked outside and saw a police officer outside. She did not see what happened between Eddie and the Officer, who would have been Officer MacLeod, because she was too upset and crying. T 6/17 149.

Officer MacLeod's Testimony

24. Officer Thomas MacLeod is the officer who found Eddie and whom Eddie attacked with a large wooden stick. In 1991 MacLeod was a patrol officer and had been for five years. T 6/16 110. MacLeod responded to the scene of the shooting of Robert Goyette, was given a description of Eduardo Lopez by the Sergeant on scene and ordered to search the area for Eddie. T 6/16 111-12. As he was walking down Spring Street Officer MacLeod heard a loud scream. T 6/16 115. He followed this scream to 16 Spring Street, where he saw Eduardo Lopez coming down the front stairs. T 6/16/ 116.

25. MacLeod testified that Eddie was holding a large wooden stick. Throughout the trial, and even in the attempted first-degree assault indictment, the item Eddie held is referred to as a stick, probably because that is the word MacLeod used to describe it, but the word "stick" is a little misleading as it implies something smaller than the piece of wood

Eddie held. MacLeod testified the stick was three to four feet long and looked like a piece of a wooden hand rail. T 6/16 117.

26. MacLeod ordered Eddie to stop. Eddie did not stop. MacLeod then drew his gunand ordered Eddie to stop. Again Eddie did not stop. T 6/16/ 118. Eddie said "fuck you I am not going to drop the stick. You're going to have to shoot me if you want me to." MacLeod said he did not intend to shoot Eddie. Eddie repeated that he would not drop the stick. MacLeod then put away his gun and decided to physically subdue Eddie. T 6/16 119. As MacLeod approached Eddie swung the stick and hit MacLeod in the shoulder, breaking the stick in two. MacLeod then grabbed Eddie and took him to the ground. MacLeod then stood Eddie up and pushed him twoards the front of the house. MacLeod intended to hold Eddie against the house wall until backup arrived. T 6/16 120. Eddie struggled with MacLeod. He pushed his hand up against MacLeod's throat. MacLeod said that this caused him "some discomfort and difficulty breathing." T 6/16 121.

27. Officer MacLeod noticed that inside Eddie's jacket were a shoulder holster, with no gun inside, and a glass bottle with some orange fluid inside it. MacLeod asked Eddie where the gun was; Eddie replied that is was upstairs. T 6/16 121. Eddie said that MacLeod better let him go. Eddie said that he just wanted to get in the car across the street and go to Boston. As MacLeod tried to use his radio to call for backup, Eddie said MacLeod "better not call any fucking cops over here."[5] T 6/16 122.

28. MacLeod saw a cruiser drive by and signaled for the officers in the cruiser to help him. The officers handcuffed and arrested him. T 6/16 124-25. MacLeod estimates Eddie

[5] MacLeod was a police officer in full uniform, so Eddie telling an officer not to call the cops over is odd. This may reflect the degree of Eddie's intoxication. This is similar to Eddie's threats in the booking video, where the Court may also find he is not fully aware he is talking to the police.

was arrested around 10:30 p.m. T 6/16 125. Eddie continued to struggle, kick and flail as the officers drove him to the Nashua Police Station. 6/16 128.

29. The defense's cross-examination of MacLeod, T 6/16 144-58, mostly focuses on what is shown in the booking video. The defense questioned MacLeod about how drunk Eddie was. The booking video is better evidence of Eddie's intoxication than this questioning.

Testimony of Valence Ray and Selina Gerow

30. Valence Ray[6] testified that he saw Eddie before the shooting of Roscoe Powers, then between the shootings of Powers and Robert Goyette, then after Robert's shooting before Eddie was arrested.

31. Around 4 p.m. on March 23 Eddie, Ray and Edgar Cruz bought a fifth of Bacardi rum. They argued about who would get some orange juice to mix with the run. T 6/16 37. Eventually they began drinking. Each of them had a 16 oz. glass, half-filled with rum and then mixed with the orange juice. T 6/16 38. After this they filled the orange juice bottle with the remainder of the rum. T 6/16 39. Then each of them did an additional shot.

32. Ray and Eddie then went out to shoot the gun at some signs behind a building. They continued to drink as they shot the gun. T 6/16 43. After this they returned to Ray's apartment, where they drank more. Selina Gerow came over to Ray's apartment around this time.

33. Eventually Eddie left the apartment with the bottle and his gun. Ray testified he was gone for 45 minutes to an hour. When he returned Eddie told Ray that he had tried to rob

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[6] The Court may see Ray referred to as Ray Valence. Ray called himself "Ray Valence" because he disliked his first name. T 6/16 26.

someone on Main Street. T 6/16 46. Ray testified that Eddie stayed for a little while, then left. Before he left he shaved his hair, mustache and beard. T 6/16 48.

34. Eddie later returned to Ray's apartment. Ray testified that Eddie acted really scared and said he just shot someone in a Saab. Eddie said he hadn't meant to do it, and didn't know why he did it. T 6/16 50. Gerow's testimony was substantially similar to Ray's about the two times Eddie came back to the apartment.

The Police Investigation

35. The police traced the purchase of the gun. They discovered that on February 26, 1991, Lillian Ray had purchased the gun from Sportsman's Trading Company in Amherst. Valence Ray and Eduardo Lopez were with her then. T 6/15 124-6. Eddie[7] asked the clerk about the power of the gun and what ammunition it used. T 6/15 129. On a later day Ray and Eddie came back to the store. Eddie bought a holster for it. T 6/15 131.

36. The police searched Goyette's car. They found an empty bullet casing behind the front passenger seat. T 6/16 205. They also found a bullet casing near 121 Main Street, which would be where Roscoe Powers was shot. T 6/16 206.

37. At about 11:30 p.m. Detective Seusing performed an atomic absorption test on Eddie's hands. T 6/16 176. This tested for the presence of gunpowder residue on Eddie's hands. T 6/16 177.

38. The police showed John Stowe a photo array, and Stowe picked out Eddie Lopez. T 6/15 96-97.

39. The gun was found in a parking lot by 41 East Pearl Street. T 6/16 227.

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[7] Testimony about the clerk's picking Eddie in the police photo array is at 6/15 142. Valence Ray describing the gun purchase is at 6/16 32.

40. There is about 100 pages of fingerprint testimony on June 17. This testimony was important at the trial, but has minimal importance for sentencing.

The Breathalzyer Results and Arguments About Eddie's Intoxication

41. Eddie blew into the Breathalyzer around 12:20 a.m. He blew a .16 BAC. T 6/16 184. The parties disputed the meaning of the Breathalyzer result and, more generally, Eddie's level of intoxication.

42. The defense, in its opening, specifically asked the jury to "listen carefully to the evidence you will hear about the alcohol consumption, and about the impact that had on [Mr. Lopez]. Listen carefully to all the evidence that suggests that Eddie Lopez doesn't know what happened that night." T 6/15 54. The State, in its opening, told the jury "you'll hear that the defendant drank that night. There is no dispute about that." T 6/15 45. The State argued that Lopez was not so drunk that he did not know what he was doing. T 6/15 45-46.

43. The parties advanced different interpretations of the booking video. In closing the defense said that the video showed Eduardo dragged in by the police, almost unconscious from intoxication. T 6/21 83-84. The State argued, in its closing, that Eduardo was not drunk; instead he was cocky, cunning and soberly belligerent to the police. The State also disputed the defense's claim that Lopez was drunk based on him blowing a .16 BAC. T 6/21 99. The State argued "we don't even know if that's an accurate reading." Id.

44. There is some evidence of how much Eddie had drank from the container with the alcohol in it at various points that night. John Stowe saw the container at the Stage Door and estimated it was ½ to ¾ full. T 6/15 89. The bottle was admitted into evidence,

but counsel could find no testimony of how full it was when the Nashua Police seized it during Eddie's arrest.

WHEREFORE Eduardo Lopez, by and through counsel, respectfully requests this Honorable Court give him an appropriate sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul Borchardt, hereby certify that a copy of the foregoing Motion has been forwarded this 5th day of December 2017 to the Attorney General's Office.

Paul Borchardt