THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0355

State of New Hampshire

v.

Paulson Papillon

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
NORTHERN DISTRICT

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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**



**Rules**

## ISSUES PRESENTED

1. Whether the defendant's decision to waive counsel and proceed *pro se* in the midst of trial was knowing, intelligent, and voluntary, when the trial court had multiple discussions with the defendant about the consequences of his choice and the pitfalls of self-representation.

2. Whether the trial court unsustainably exercised its discretion when it allowed the State to elicit an admission to the charged murder and conspiracy to commit murder made by the defendant just prior to the murder's commission.

3. Whether the evidence was legally sufficient to support the defendant's convictions for second-degree murder and conspiracy.

## STATEMENT OF THE CASE

A Hillsborough County grand jury indicted the defendant, Paulson Papillon, on one count each of first-degree murder, second-degree murder, and conspiracy to commit murder. DB43-45, 47.[1] *See* RSA 630:1-a, I(a); RSA 630:1-b, I(b); RSA 629:3. Those charges arose out the shooting death of Michael Pittman in Manchester, New Hampshire, on November 3, 2015.

At the beginning of the third day of testimony in the trial, the defendant reported to the trial court through counsel that he wanted to represent himself. The court conducted separate colloquies with the defendant—one outside the presence of prosecutors, and another in open court—and accepted his decision to represent himself.

After a four-day trial, on March 15, 2018, the jury convicted the defendant of second-degree murder and conspiracy, and acquitted him of first-degree murder. DB38, DB46. The superior court (*Brown, J.*), sentenced the defendant to a stand-committed term of from thirty-three years to life on the second-degree murder conviction and a consecutive stand-committed term of ten years to thirty years on the conspiracy conviction. DB39-42. This appeal followed.

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[1] DA refers to the appendix of the defendant's brief.
DB refers to the defendant's brief.
T refers to the trial transcript.

## STATEMENT OF FACTS

### A. The State's Case

In October 2015, the defendant was selling narcotics in Manchester together with Adrien Stillwell, Michael Younge, and Nathaniel Smith, and was also supplying the other three with product to sell. T187-89, T446-47, T481-83. In addition, the defendant and his cohorts regularly would meet just to "hang out." T191, T447. One place in Manchester where they typically congregated was the Lowell Street apartment of Amber Domnitanu. T194, T445.

On October 21, 2015, the defendant was arrested and charged with several felony-level narcotics offenses. T360-61. That day, the defendant had sold heroin to Michael Pittman twice, including at the hotel where the arrest ultimately occurred. T197-98.

On October 26, 2015, the defendant was released on bail from his pending felony charges. T142, T374. The defendant believed that Pittman had "snitched" on him to the police, which resulted in his arrest. T198-99, T393, T448-49. Based on that belief, as well as the belief that if the informant were no longer available the pending felony charges would be dismissed, the defendant sought to have Pittman killed. T198-200, T449, T452.

To that end, on October 27, the defendant directed another person to post bail for Smith—who had been arrested—so that Smith could assist in Pittman's murder. T253, T375, T450-51, T483-84, T489. On several occasions, the defendant met with Stillwell, Younge, and Smith, and spoke with them about killing Pittman; Domnitanu overheard some of those

discussions. T198-201, T205-06, T453, T487-88, T510. The defendant offered to pay a bounty to the man who killed Pittman. T200-01. The defendant also supplied a revolver and bullets to the others. T208.

On Halloween, while at Domnitanu's apartment, the defendant repeated that he needed Pittman killed, noting an upcoming court appearance on his pending felony charges. T209, T453-54, T467. The defendant made plans to travel to a casino in Connecticut that evening, so that he would be seen on surveillance cameras and would have an alibi for the anticipated murder. T211, T253. The defendant had inmate costumes and masks for Stillwell, Younge, and Smith to wear, so that they could blend in with trick-or-treaters while looking for and murdering Pittman. T210, T453-55, T490. The three, however, thought the disguises foolish and did not wear them. T210.

Stillwell, Younge, and Smith looked for Pittman the evening of Halloween, in order to kill him. T211. Stillwell was armed with the revolver provided by the defendant, and Smith had a gun as well. T211. The trio went to the apartment building next to Pittman's residence on Granite Street in Manchester. T212. The three saw Pittman in his apartment building but decided not to kill him, believing it not opportune to do so. T213.

When the defendant learned that Stillwell, Younge, and Smith did not kill Pittman, he again emphasized that he needed Pittman dead "before he had court." T214. The defendant also expressed that if the other three did not carry out the murder, he would find someone else. T214. Around this same time, while at Domnitanu's apartment building with Stillwell and Younge, the defendant spoke with the fiancée of a man whom he knew and

who was jailed on pending narcotics charges. T505, T513. During that conversation, the defendant told the woman that to help out her fiancé she "can just do what I'm going to do. All I need is $1000 and my boys will take care of it . . . no 'snitch' no case." T513.

On both November 2 and 3, 2015, the defendant, Stillwell, Younge, and Smith remained in cellphone contact, the only two days when each of the four called or texted every one of the others. T127, T137, T142-43.[2] Shortly after 6:00 p.m. on November 3, Stillwell called the defendant, who immediately sent a text message to Stillwell. T146. At about that same time, surveillance cameras recorded Stillwell and Smith encountering Younge at a convenience store near where Pittman lived. T215, T217-20, T370. Stillwell and Smith told Younge that they were in the area to attempt to kill Pittman. T106, T216-18. Younge joined them as they walked to Pittman's apartment building. T216, T220, T371.

There, Pittman stood outside the building by a car. T221. Stillwell ran up to Pittman and shot with the revolver that the defendant had provided previously. T222. Stillwell, Younge, and Smith ran off. T65, T68-69, T72-74, T222. Within minutes of the shooting, Stillwell called the defendant. T147. Immediately after that call, the defendant texted Stillwell, Stillwell texted and then called the defendant, and the defendant sent another text message to Stillwell. T147-48. The defendant also called Domnitanu and told her to contact Pittman and relay to him that she had drugs to give to him. T458. When Domnitanu called Pittman's cellphone

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[2] Of those four cellphones, the police were able to recover, and obtain text message content from, only Smith's. T149.

number, his wife answered and told her that Pitman had been shot. T459. Domnitanu then called the defendant and informed him of the shooting. T459.

Pittman had been shot twice, with the fatal wound entering his upper back and lodging in his chest. T349-50, T352. He collapsed to the ground in an alley outside his home, where he died. T57-59. Police responded to the shooting within minutes, and recovered the revolver Stillwell used to kill Pittman from a parking lot near where he died. T85, T94-95. T354.

Stillwell, Younge, and Smith separated after the shooting. T223. Stillwell and Younge regrouped several blocks away and went together to Domnitanu's apartment. At about 8:00 p.m., the defendant—who earlier in the day had left the State, like he had done on Halloween—sent Smith a text message that he was "[o]n [L]owell [Street] got a mean pack [large quantity of drugs] for you." T155; T223, T226-29; T455-56, T491; St. Exh. 47. Smith responded that we would be arriving within minutes. T155.

Soon after Stillwell and Younge arrived at Domnitanu's apartment, the defendant returned, followed shortly by Smith. T230, T457, T463, T492. The four congregated in a bathroom so that others in the apartment could not overhear them. T230-31, T466. Upon learning that Pittman had been shot, the defendant gave the three other men money and drugs and announced that they could "get back to business" now that the suspected informant was dead. T231-32, T256, T464, T475.

The next morning, the defendant picked up Stillwell and Younge in a rented car, and the three drove to Connecticut in order to "get out of town." T233. Along the way, Stillwell and Younge discarded their

cellphones and the clothes that they had been wearing on the night of the shooting. T234-35. While in Connecticut, the defendant took Stillwell and Younge to a casino and a strip club, and paid their expenses. T234-35. After a few days, the three left Connecticut; the defendant returned to New Hampshire, while Stillwell and Younge stayed in Massachusetts. T237. Upon the defendant's return, he told the person whom he directed to provide Smith's bail that he had "killed [his] rat." T494-95.

On November 6, 2015, Smith was arrested and jailed on charges unrelated to Pittman's death. T378, T381. Three days later, the defendant was also arrested and incarcerated on charges unrelated to Pittman's death. T337, T377. On November 16, Stillwell was arrested and incarcerated on drug and gun charges unrelated to Pittman's death. T382-83. And, on November 19, after Younge saw photos of himself on the news, from surveillance camera stills taken on the night of the murder, he turned himself in. T389.

The defendant made numerous calls to his sister while incarcerated. T341-42, T553. In several of those calls, recorded with the defendant's knowledge, he and his sister changed the language in which they spoke from English to Haitian Creole. T386; St. Exh. 49A. In several of those calls, the defendant and his sister, after switching to Haitian Creole, discussed the murder investigation and Stillwell, Younge, and Smith. T557-58, T561-62.

In a translated call made two days after Stillwell's arrest, the defendant told his sister that he wanted to send Stillwell money. St. Ex. 49A. In calls made the day after the media published a photo of Younge in connection with the murder, the defendant told his sister, with respect to

Younge, "they [the police] don't know, but he didn't shoot/kill him"[3] and that "I told these guys don't show their faces nowhere." St. Exh. 49A. The defendant also expressed concern that "dudes are talking." St. Exh. 49A.

In translated calls made in the days following Younge's surrender to authorities, the defendant told his sister that the arrest made him "scared a little bit . . . [b]ut they don't know who shot/kill him" and that although Younge was arraigned for murder "he didn't shoot/kill anyone" and "there were other people there as well . . . he was not there by himself." St. Exh. 49A. The defendant also directed his sister to send Younge money because he "don't want [him] to talk." St. Exh. 49A.

In a subsequent translated call, the defendant's sister expressed concern that Smith was cooperating with the police, while the defendant talked about his uncertainty whether Smith had told the police about him. T577-78; St. Exh. 49A. That conversation continued in Haitian Creole:

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|---|---|
| Sister: | How much can he [Smith] say? |
| Defendant: | Huh? |
| Sister: | Mm-mm. How much can he say? |
| Defendant: | Huh? |
| Sister: | I say how much can he say? |
| Defendant: | Yes, that I made the guys go kill him. |

T591; St. Exh. 49A.

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[3] The person who translated what the defendant and his sister said in Haitian Creole explain that the term used could mean shoot or kill, depending on context. T577.

Also while incarcerated, the defendant discussed aspects of the Pittman murder with a fellow prisoner acquaintance. T523-26. In those discussions, the defendant expressed concern that he would be charged with murder even though he made sure that he was not present when the crime occurred. T529-31. The defendant admitted he sent two people who sold drugs for him to Granite Street to kill a person whom he suspected had informed for the police on pending drug charges, and that he received a call right after the shooting notifying him of the murder. T529-31. The defendant also expressed frustration that the men whom he had sent had been filmed by a nearby convenience store's surveillance cameras. T530. The defendant also noted that those others were incarcerated, expressed concern that they would inform against him, and explained that he wanted to bail them out of jail so that he could have them killed. T532, T535-36.

**B. The Defense Case**

According to Adrien Stillwell, in the fall of 2015 he, the defendant, Younge, and Smith all were separately selling narcotics, and the defendant would occasionally obtain narcotics for him to sell. T614-15, T620, T622-23. After the defendant was arrested and released on bail on felony drug charges, he spoke with Stillwell, Younge, and Smith about the open case. T631-34. As part of those discussions, the group believed that someone had assisted the police in connection with the defendant's arrest, and suspected Pittman. T634-37. But, according to Stillwell, there were no discussions about killing Pittman; instead, he and the others agreed to avoid Pittman and not sell him drugs. T615, T640-42, T652-53.

Stillwell testified that on November 3, he and Smith went together to the area of Pittman's home not to do anything to him, but instead to sell drugs at a nearby location, and on the way were joined by Younge. T615, T649-53. As Stillwell, Younge, and Smith neared Pittman's apartment building, Stillwell saw Pittman outside. T616. At that time, Stillwell "took it upon [himself] to . . . get rid" of Pittman. T652. Stillwell claimed that he decided at that moment to kill Pittman because Pittman owed him money from a drug exchange, and he thought that Pittman may be a police informant. T622. Stillwell approached Pittman, fired six shots at him from a revolver that he was carrying, and ran off, discarding the gun as fled. T616, T750.

Stillwell testified only because he was given immunity. T693. Stillwell acknowledged that because he was serving a sentence of life imprisonment without the possibility of parole, he could not be punished further for lying to help out his codefendant, and that he had no incentive to tell the truth. T704-05, T718.

## SUMMARY OF THE ARGUMENT

1. After the court below held separate colloquies with the defendant exploring his decision, made in the midst of trial, to waive counsel and proceed *pro se*, the court properly found that the defendant's decision was knowing, intelligent, and voluntary. When the trial court addressed the matter with the defendant, the court unambiguously cautioned him on the pitfalls of self-representation. Further discourse outlining the myriad functions of a litigant at trial was neither constitutionally required nor warranted by the facts known to the court. The decision was the defendant's to make, he made it, and the trial court accepted it only after frank discussion and during the trial, after the defendant had seen first-hand many of the functions and duties of trial counsel.

2. The trial court properly allowed the State to elicit the defendant's pre-murder statement that he had arranged for others to kill a suspected police informant against him. The statement was an admission to the charged conspiracy and murder, and the defendant's included offer to arrange a similar crime for the person with whom he spoke provided necessary context for the admission as well as the circumstances in which he voiced it. Even if admission of the statement at issue was error, it was harmless.

3. The evidence was legally sufficient to support the defendant's convictions for second-degree murder and conspiracy. As to the latter, despite the defendant's belief to the contrary, the necessary agreement did not have to be consummated on the night when the subject murder was

committed. And as to the former, there was no inconsistency between mutual conviction of conspiracy and the subject murder of that conspiracy under an extreme indifference theory, as the crimes and accompanying mental states are not mutually exclusive.

## ARGUMENT

### 1. THE TRIAL COURT PROPERLY FOUND THAT THE DEFENDANT MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS RIGHT TO COUNSEL.

The defendant claims that he did not validly waive his right to counsel during the trial, when he elected to proceed *pro se* with the assistance of standby counsel. Specifically, the defendant argues that although the trial court conducted a colloquy on the matter and despite the court's express finding to the contrary, his express and unambiguous waiver was not "knowing and voluntary." DB18. This claim lacks merit.

The defendant was represented at trial by two lawyers, Richard Guerriero and Theodore Lothstein, and counsel performed a myriad of courtroom functions in his presence. The lawyers conducted various pretrial hearings and three days individual *voir dire* of prospective jurors. *E.g.*, transcripts of proceedings, 1/18/18, 2/13/18, 2/27-28/18, 3/1/18. They gave preview and opening statements. T17-18, T32-45. They also presided over the State's presentation of thirteen witnesses in its case-in-chief, during which counsel questioned witnesses—including lengthy cross-examination of one of the cooperating conspirators—objected, and voiced various legal arguments. *E.g.*, T62-64, T97-99, T132-35, T182, T256-311, T326-28.

On the morning of the third day of evidence, defense counsel notified the trial court that the defendant wanted to proceed *pro se*. T410. In response, the court first had an *ex parte* colloquy with the defendant and counsel on the matter. T414-15. During the colloquy, the defendant confirmed that he wanted to represent himself, explaining that he and his

lawyers "have been bumping heads for a while." T415. The defendant went on to elaborate for the court:

> [H]e's just not objecting to the thing I want him to. So if he don't want to assist me and object to the things I need him to and ask questions that I've given him paper to, then I'll represent myself and I'll cross-examine the witness and do what I need to do to represent myself, Your Honor.

T415-16. After the defendant acknowledged an "irreconcilable breakdown" with counsel and reiterated that he wanted to represent himself, the court addressed him bluntly:

> So from me to you, you are being represented by two of the better or best defense counsel in the state with a tremendous amount of experience in matters of this nature and a broad range of criminal defense . . . If I were a defendant in a criminal case, I'd want counsel like these gentlemen next to you representing me. There are others, frankly, that I might consider, but these two would come to the top of the list. So what you're doing is you're trading, you know, the first string for, no offense, third string, fourth string, fifth string representation, because when you represent yourself, generally, not the best things happen.

T416-17. The court went on to note that the severity of the charges alone would compel many to "look[] for the best counsel to represent them. And you got them. And now you want to jettison them. And there are some significant legal issues that are going to be addressed between now and closing arguments and through closing arguments." T417. The defendant responded that he understood. T417.

Continuing with plain speak, the trial court explained to the defendant, "You know, you're like a horse race and you're coming around the last turn going for the finish line, and you want to get off and walk.

That's how I'm sort of looking at this. It's a constitutional right you have. So I'm not going to—I'm not treating this lightly." T418. When the court asked the defendant whether it was nevertheless still his intent to represent himself, he replied "Yes, Your Honor, 100 percent." T418. The court cautioned the defendant that although assigned counsel would still be available to assist him, they would not "stand up and object," and the defendant stated that he understood. T418-19.

The trial court then recessed to consider the matter further, and upon return to an open courtroom asked the defendant again whether he still intended to represent himself. T420. The defendant for at least the third time confirmed: "Yes, Your Honor. . . . There's no changing my mind." T420. The court found that the defendant's waiver was knowing and intelligent, and went on:

> [Y]ou understand that you will not be afforded counsel in the sense that you have had counsel up till [sic] now . . . . You'll have access to them on points of law that you might make inquiry of them or court procedure, but they're not obligated to whisper in your ear things to do or not to do. . . . So, really, they're an aide to you and, frankly, to the Court when it comes to procedure and things like that, that they might enlighten you as to certain fundamentals that you may not be able to navigate around or through. So you are prepared, I take it, to cross-examine witnesses until the State has rested and then you are—feel comfortable in presenting your case . . . and to take the necessary steps to object meaningfully if there are questions asked or things done by the State that you feel are inappropriate . . . . And to respond when the State objects to things that you might be doing that are not – do not comport with the rules of procedure or law. . . . And ultimately give a closing argument at the end of the case.

T421-22. The defendant answered that he understood, and that he had thought through the matter. T421-22. One of the defendant's trial lawyers then set forth the following, which the court told the defendant to "[l]isten carefully what—to what counsel is saying":

> The [d]efendant alone is responsible for the presentation and further preparation of his defense. Standby counsel is appointed to answer his questions of law and courtroom procedure. Standby counsel may bring to the—his attention matters beneficial to him, but we're under no obligation to do so. In other words, not affirmatively step in when he hasn't asked a question. And, in fact, I think if we did that, that might interfere with his right to . . . self-representation.

T424. At that point, the defendant began representing himself, with the assistance of standby counsel, until the jury rendered its verdict.

It is well-established that "a defendant has a constitutional right to represent himself, whether or not that representation will be to his detriment." *State v. Barham*, 126 N.H. 631, 639 (1985). Because the right to self-representation nullifies the right to counsel, a court must honor the assertion of the former and the necessary waiver of the latter only when the defendant "evinces an understanding of what the right to counsel encompasses, and asserts an unequivocal desire to relinquish it." *State v. Thomas*, 150 N.H. 327, 328 (2003). In order for a defendant's assertion of the right to self-representation to be effective, the assertion must be: (1) timely; (2) clear and unequivocal; and (3) knowing, intelligent, and voluntary. *State v. Towle*, 162 N.H. 799, 803 (2011); *State v. Ayer*, 154 N.H. 500, 516 (2006). On appeal, the defendant does not dispute that his asserted waiver of the right to counsel was timely, and also clear and unequivocal. Instead, the defendant argues that the trial court incorrectly

found, after conducting colloquy on the matter, that his decision to proceed *pro se* was knowing and intelligent.

A defendant's assertion of the right to self-representation is knowing and intelligent when the defendant is "literate, competent, and understanding, and . . . voluntarily exercising his informed free will." *Thomas*, 150 N.H. at 328 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). This Court has articulated no particular colloquy that a trial court must undertake in order to determine whether a defendant's exercise of his constitutional right to self-representation is knowing and intelligent. In fact, although personal discussion with a defendant is strongly preferred a court need not undertake any colloquy. *See Thomas*, 150 N.H. at 329-30. Colloquy or not, this Court approves of the assertion of that right when the evidence in the record demonstrates that the defendant was informed of and understood the consequences of proceeding *pro se*. *See, e.g., Thomas*, 150 N.H. at 329; *State v. Davis*, 139 N.H. 185, 189 (1994).

Here, the record amply establishes that the defendant's waiver of his right to counsel was knowing, intelligent, and voluntary.[4] At the start, the trial court engaged in multiple lengthy colloquies with the defendant on the matter. In those face-to-face discussions, the judge bluntly and repeatedly warned the defendant about the pitfalls of that decision, and spoke in plain language and in everyday terms. Specifically, the judge spoke of the high

[4] The defendant argues that "[t]he burden falls upon the State to prove that [he] knowingly and voluntarily waived his right" to the assistance of counsel at trial. DB20. It does not appear that this Court has announced the applicable burden for the raised claim. Nor need the Court do so here, as even under the defendant's proffered standard he does not prevail.

quality of the defendant's lawyers, noted that "significant legal issues" would be addressed in the future, and opined that "generally, not the best things happen" when a defendant proceeds *pro se*. T416-18. So too did the judge point out that the defendant would have to follow courtroom rules and procedure, including cross-examining witnesses, objecting, responding to objections, presenting a case, and making a closing argument. T418-19, T421-22.[5]

Moreover, the defendant was an active and engaged participant in the trial court's colloquies. The defendant time and again answered questions posed by the judge in a direct and responsive manner. *E.g.*, T420-22. In response to the trial court's thorough discourse on the various dangers and disadvantages of self-representation, the defendant unambiguously stated that he understood the explained consequences of self-representation and had thought through his decision, but nevertheless insisted on proceeding *pro se*. T417-22. The defendant also spoke on his own about his desire to proceed *pro se*, and articulated his particular reasons for making that decision, including his issues with counsel. *E.g.*, T415-16; *see Davis*, 139 N.H. at 191 (defendant's submitted motion to proceed *pro se* "reflected an understanding of the significance of the motion as well as disagreement over tactics with defense counsel, is evidence that he waived his right to counsel with 'eyes open'"). The defendant's own discussions on the issue of waiver, which reflected his understanding of the

[5] Although some of the trial court's discussions with the defendant on the issue of self-representation arose after the court had granted his motion to proceed *pro se*, "such discussion[s] with a defendant can serve to establish that a waiver was made knowingly and intelligently." *Davis*, 139 N.H. at 191.

roles he would assume without counsel's direct assistance, further demonstrated that his ultimate choice on the matter was knowing, intelligent, and voluntary.

It is significant that the defendant's application to proceed *pro se* occurred after two days of trial. At that point, the defendant had been present and with counsel during the presentation of evidence from over a dozen witnesses, as well as several days of individual *voir dire* and pretrial hearings. The defendant had witnessed first-hand the various day-to-day trial functions of his counsel, such as questioning witnesses and raising objections. From that exposure the defendant knew full well the types of activities he alone would have to undertake and the conduct expected of him going forward. And, his subsequent ability to object, make legal arguments, and formulate a defense, *see infra*, factually undermine his appellate complaint that further court exposition on these matters was required.

All of these circumstances align this appeal closely with this Court's decision in *State v. Davis*, 139 N.H. 185. *See Thomas*, 150 N.H. at 329-30 (noting that *Davis* decision set forth a "model colloquy for waiver of right to counsel"). *Davis* concerned whether the defendant made a knowing and intelligent waiver of his right to counsel. *Davis*, 139 N.H. at 191. In ultimately holding that such a valid waiver occurred, the Court cited to a colloquy between trial court and the defendant in which the court "engaged in a thorough discussion of the consequences of proceeding pro se." *Id.* The trial court in *Davis*, much like the trial court here, specifically reminded the defendant that he had the right to the assistance of counsel and that self-representation carried "certain disadvantages," including a

lack of knowledge of courtroom procedure and trial strategy. *Id.* at 187-88; *see Thomas*, 150 N.H. at 329 ("More than once, the trial court judges made the defendant aware of the dangers and disadvantages of self-representation. The judges repeatedly explained the responsibilities the defendant would assume if he elected to proceed *pro se*; he was also afforded many opportunities to reconsider his decision. Thus, while the defendant's decision to proceed *pro se* may have been to his detriment, it was knowing, intelligent and voluntary.") (citations and internal quotation marks omitted). Further, unlike the defendant in *Davis*, *see* 139 N.H. at 189, the defendant here had the advantage of watching first-hand the actual trial unfold, and the work required of counsel, prior to any discussion with the trial court on the matter of self-representation.

The defendant concedes that "a colloquy is not required," DB18, and further concedes that he "was advised of most of his legal obligations, and was advised that self-representation was a poor choice," DB22, but nevertheless challenges the colloquy undertaken as constitutionally deficient. Specifically, he faults the trial court for "fail[ing] to advise [him] in specific of the dangers of self-representation, specifically the need to understand court room procedure and the possible consequences of failure to follow procedure, the inability to formulate viable theories of defense, and inability and inexperience in court room skills." DB20. But as shown *supra*, the court did address with the defendant many of these very issues. That the court did not do so with the exactitude and particularity argued by the defendant on appeal does not undermine the colloquies actually given, particularly given that he provides no case law support that the constitution requires further exposition than the trial court provided.

Similarly unpersuasive is the defendant's complaint that the trial court "made no inquiry into [his] education, training, legal experience, or even mental health, beyond asking trial counsel if [he] was under the influence of drugs or alcohol in a manner affecting his cognition." DB20. Once again, the defendant cites to no authority requiring the trial court to make those inquiries. To the contrary, the colloquy approved in *Davis*, *see supra*, contained none of the inquiry now advocated by the defendant. The trial court had sufficient basis on which to assess the defendant's general intellect, including the defendant's own face-to face discussions with the court and articulated explanation for deciding to proceed *pro se*. Even a defendant with little education, no legal training or experience, or poor mental health, can make a knowing, intelligent, and voluntary—albeit likely unwise—choice of self-representation.

The defendant points to two remarks made by the prosecutor in closing argument as evidence of his inability to make a valid waiver of his right to counsel. DB21. Once in summation, the prosecutor, in noting how the defendant and his sister switched to speaking from English to Creole when discussing the charged murder in recorded calls, argued, "And as to those calls, he's not a complete idiot. He knew that the phones were recorded and investigators could listen in." T834. The prosecutor later, in outlining the various ways in which the defendant and his accomplices left evidence of their guilt to be found by investigators, quipped how such carelessness demonstrated that they were not "criminal masterminds." T842.

Plainly, the defendant's issue with the prosecutor's summation remarks—which he has not independently attacked on appeal—is wholly

irrelevant to the entirely separate issue of a knowing and intelligent waiver of the right to counsel. And, even were a lawyer's summation rhetoric to equate to a factual finding as to the defendant's intelligence, that it lay somewhere in the broad spectrum below "criminal mastermind" and above "not a complete idiot" does not establish intellectual capacity insufficient to make a valid waiver. An actual relevant indicator of the defendant's intellect was his ability to proceed *pro se*. In that regard, after the defendant began representing himself he made timely objections, raised legal arguments, questioned witnesses both on cross-examination and direct examination, and gave a coherent summation argument. *E.g.*, T469, T495, T511-13, T537, T592, T611, T779, T817. Although his performance was not up to par with that of an experienced lawyer—the result of a decision he freely made—it reflected a degree of general sophistication and knowledge of the trial process that underscore the knowing and intelligent nature of his choice.

Finally, the defendant's claim that he "was not provided any subsequent opportunity to reconsider" his decision to proceed *pro se*, DB21, misses the mark. The trial court had no obligation to check in with the defendant at any time to confirm whether he still wanted to proceed *pro se*. The record confirms that the defendant, who certainly was not shy about articulating his choice to proceed as his own lawyer, never broached the topic with the court or suggested that he wanted counsel reappointed. The trial court repeatedly inquired of the defendant during its colloquies with him when the defendant initially announced through counsel that he wanted to represent himself whether he reconsidered his decision, and

bluntly stated more than once that it was not a wise choice. No more was required or even warranted.

For all these reasons, the trial court properly found, after conducting colloquies on the defendant's expressed desire to represent himself, that his decision was knowing, intelligent, and voluntary.

## 2. THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION IN ALLOWING THE STATE TO INTRODUCE THE DEFENDANT'S ADMISSION REGARDING THE CHARGED CONSPIRACY AND MURDER.

The defendant argues that the State improperly elicited his statement to an acquaintance that he had hired others to eliminate the suspected police informant in his case. The trial court properly admitted the statement at issue as an admission to the charged conspiracy and murder, and in any event, any error was harmless.

During the course of the trial, the State called Julie Miranda to testify. Ms. Miranda recounted that in November 2015, while living in an apartment in Manchester, she became acquainted with a man whom she knew as "P" and identified in court as the defendant. T501-03. Ms. Miranda testified that she saw the defendant at her apartment building for a few months, and that rarely during that time period she would have "quick conversations" with him. T504. Ms. Miranda also recounted that the defendant was a friend of her ex-fiancé. T504-05.

Ms. Miranda testified that in early November 2015, she heard about the shooting death of Michael Pittman, whom she did not know. T505. Ms. Miranda then recounted that soon before she heard about Mr. Pittman's death, she had a conversation with the defendant about her ex-fiancé, who at the time was incarcerated. T511-12.

When Ms. Miranda was asked to tell the jury what she recalled about her conversation with the defendant, he objected, citing Rule 404(b). T512. At a subsequent bench conference, the prosecutor responded, "That's [not] extrinsic of [sic] the crime. I anticipate that she's going to say that Mr.

Papillon told her words to the effect of 'give me some money and I'll kill the 'snitch' like I'm going to be doing in my case.'" T512. The trial court overruled the defendant's objection, and Ms. Miranda gave the following testimony:

> Q. Now if you can tell the jurors the conversation that you have [with] the [d]efendant before Michael Pittman's shooting death.
>
> A. I was standing outside – well, standing at my doorway, and I was waiting for my daughter to come home. And P. came up to me. And my ex-fiancé had just gotten in big trouble for selling drugs. And he told me "you can do just what I'm going to do. All I need is $1000 and my boy will take care of it. And no "snitch," no case or no body, no case, or something like that. . . ."

T513. When the defendant made his remark to Ms. Miranda, he had just been seen with Stillwell and Younge. T514.

The defendant sought a mistrial based on Ms. Miranda's testimony, arguing that the evidence was inadmissible under Rule 404(b) because the evidence was used to attack his character and the State did not articulate its chain of reasoning for its admission. T809. The prosecutor responded by referring to the earlier bench conference on the matter:

> Mr. Papillon did come up to the bench and raise a 404(b) objection, and our response was that it was an admission by Mr. Papillon. It's *res gestae*. It's intrinsic to the offense for which he's charged. And even if it were to be considered 404(b), it's clearly relevant to motive and intent. But, again, it's an admission that he would offer to kill her "snitch" just like he was going to kill his "snitch." So it's an admission.

T810. The court denied the defendant's mistrial motion. T811.

Matters such as the admissibility of evidence generally fall within the trial court's broad discretion, and are reviewed on appeal for an unsustainable exercise of discretion subject to potential reversal only if the ruling below was clearly untenable or unreasonable to the prejudice of the defendant's case. *See State v. Nightingale*, 160 N.H. 569, 573 (2010). That deferential standard applies as well to a trial court's ruling on a motion for mistrial. *See State v. Ainsworth*, 151 N.H. 691, 698 (2005).

The defendant contends that the testimony at issue constitutes impermissible character evidence under New Hampshire Rules of Evidence Rule 404(b). DB 23-24. To the contrary, the evidence constitutes an admission. That is, the defendant in substance, and when heard in the proper and necessary context of the brief conversation as a whole rather than just the portion he cites on appeal, said that he had paid others to eliminate the police informant in his case. Given the timing of the remark, as well as the fact that the defendant had just been with Stillwell and Younge when he said it, the jurors could reasonably conclude that Michael Pittman was the "snitch" referred to by the defendant. In making his 404(b) challenge on appeal, the defendant ignores that the challenged remark was made as part of an unchallenged admission to the charged crimes.

Reviewed in this correct factual context, the relevant evidentiary construct is not Rule 404(b). This Court recognized a distinction between 404(b) evidence and the different type of direct evidence of guilt at issue here in *State v. Wells*, 166 N.H. 73 (2014). As the Court in *Wells* explained:

> Other act evidence is intrinsic, and therefore not subject to Rule 404(b), when the evidence of the other act and the

> evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged. Intrinsic or inextricably intertwined evidence will have a causal, temporal, or spatial connection with the charged crime. *See United States v. Hardy,* 228 F.3d 745, 748 (6th Cir. 2000) (characterizing evidence of "other acts that are inextricably intertwined with the charged offense" as "background evidence"). Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense. This type of evidence is admissible under the rationale that events do not occur in a vacuum, and the jury has a right to hear what occurred immediately prior to and subsequent to the commission of [the charged] act so that it may realistically evaluate the evidence.

*Id.* at 77 (internal quotations and citations omitted); *see, e.g., Nightingale,* 160 N.H. at 573-74 (in trial for felony sale of Oxycontin, conversation in which defendant received order for quantity of cocaine and said that she could not sell cocaine yet but would sell Oxycontin was not 404(b) evidence, but rather evidence "inextricably intertwined with evidence of the crime charged in the indictment.") (citation omitted).

A case employing the same evidentiary construct as this Court in *Wells,* but more factually on point is *Commonwealth v. Jackson,* 428 N.E.2d 289 (Mass. 1981). In a murder trial, the prosecution elicited testimony about statements the defendant made that implicated him in other murders in addition to the charged murder. *Id.* at 292-93. The Supreme Judicial Court began its analysis by noting that "[t]he admission is obviously relevant to the issue of who murdered [the victim of the charged murder], but it also constitutes evidence of the defendant's participation in

the murders of other women. [The witness]'s statements and the defendant's reply were admissible as an admission by the defendant that he killed [the victim]. Evidence that is otherwise relevant to the offense charged is not rendered inadmissible simply because it tends to prove the commission of other crimes." *Id.* at 292 (citations omitted). The Supreme Judicial Court acknowledged that "where evidence of other crimes is irrelevant to proof of the offense charged, this court has generally considered it inadmissible," but went on to conclude, "because the defendant, in his admission of the crime charged, admitted to other, unrelated crimes in a manner that rendered the admission unintelligible if references to the unrelated crimes were omitted, the entire admission was properly admitted in evidence." *Id.* at 292-93; *see, e.g., Vanzant v. State*, 422 S.E.2d 283, 284 (Ga. 1992) ("It is clear that defendant's reference to past cocaine sales was designed to explain his involvement in the crime charged and was an integral part of his statement to police. . . . Consequently, [the entirety of the] statement . . . was admissible regardless of whether or not the separate crimes to which [the defendant] confessed would otherwise be admissible as exceptions to the 'other transactions' rule.") (internal citations and quotations omitted); *People v. Irequi*, 618 N.Y.S.2d 97, 97-98 (App. Div. 2nd Dept. 1994) ("Since the defendant's admissions regarding the other crimes were inextricably intertwined with his statements pertaining to the crimes of which he was subsequently indicted, introduction into evidence of the entire pretrial statement was proper.").

Here, the challenged statement interwoven within the admission voiced by the defendant falls well within the ambit of intrinsic evidence not

governed by Rule 404(b). That statement was not mere "filler," or extraneous to the admission to the charged crimes that the defendant contemporaneously made, an admission that the defendant altogether ignores on appeal. Rather, the challenged statement was part and parcel of the admission.

To be sure, that admission would not have made sense without the challenged statement interwoven within it. Without that statement, the jurors would have been led to believe that the defendant made an admission to murder out of the blue and with no reason, to a person with whom he rarely interacted and to whom he seldom spoke. T504-05. Removing the challenged statement, the jurors would only have heard that the defendant said to that acquaintance, "[Y]ou can do just what I'm going to do . . . [N]o 'snitch' no case [or] no body no case." T513. That remark in itself would not have had the same permissible probative force without the challenged statement, which shed necessary light on what the defendant had conspired with and solicited others "to do" on his behalf. Thus, excising the challenged statement from what the defendant told the witness would have taken away its full and proper value as an admission of guilt to the charged crimes. For these reasons, the challenged statement provided necessary context, and thus was admissible intrinsic evidence.[6]

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[6] Because the statement at issue constitutes intrinsic evidence of the charged crimes, Rule 404(b) is not implicated, and the applicable test for admissibility is found in Rule 403. *See State v. Dion*, 164 N.H. 544, 552 (2013). Although the defendant mounted no such challenge either at trial or on appeal, the evidence at issue was admissible under that balancing. The State has discussed *supra* the high probative value of the entirety of the defendant's admission, of which the challenged statement was an integral part. So too, in context, did the defendant identify Stillwell as one of those who he had recruited to eliminate his informant, which further enhanced probativeness. In contrast, although the

Lastly, in an attempt to bolster his appellate argument the defendant attempts to equate the challenged statement here to evidence that the State unsuccessfully sought to admit pretrial of the defendant's postarrest attempts, after the charged crimes occurred, to have one of his charged coconspirators kill another suspected informant. DB23-26. It is a comparison of apples to oranges. The evidence excluded by the trial court clearly was evidence of other bad acts under Rule 404(b). Indeed, the State sought a pretrial ruling on the issue for that very purpose, and argued that it was admissible under Rule 404(b) as relevant as to the defendant's intent and the nature of his relationship with the coconspirator at issue. In stark contrast, the challenged statement was made while the defendant made reference to the very crimes with which he was charged, and shed correct context that established that what he said was in fact an admission of guilt.

Even if the admission of the defendant's inculpatory statement was error, it was harmless. "To establish that an error was harmless, the State must prove beyond a reasonable doubt that the error did not affect the verdict." *State v. Bazinet*, 170 N.H. 680, 686-87 (2018) (quotation omitted). First as to harmlessness, to the extent that the jurors would have given credence to the defendant's offer, so too would they have accepted the defendant's admission of arranging to kill his own informant. That is, there is no logical chain of reasoning by which the jury would have rejected the admission, but accepted the statement at issue and draw an

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statement was prejudicial in that it constituted an incriminating admission, such prejudice was neither undue, nor outweighing of probative value. Lastly, although the defendant claims that the evidence at issue was cumulative, DB 27, the defense vigorously challenged the credibility of the testimony of all the other witnesses who the defendant made incriminatory statements to or in the presence of.

impermissible character-based—rather than permissible guilt-based—inference from it.

Moreover, the evidence of the defendant's guilt of the conspiracy and murder of which he was convicted was overwhelming. The State presented testimony from one of the defendant's conspirators, as well as from others who overheard their plans to kill Michael Pittman and the defendant's reason for wanting the murder committed. *E.g.*, T198-206, T453, T487-88, T510. The jurors also heard the defendant's recorded acknowledgment to his sister, purposely voiced in a foreign language in order to evade comprehension, that he sent others out to kill the victim. St. Exh. 49A. In addition to this direct evidence of guilt, the jurors were presented with the telling extent of cellphone communications between the defendant and the self-admitted gunman just before and after the victim's murder, as well as the various steps that the defendant took after the murder to assist and conceal the person who effectuated the planned killing. *E.g.*, T146-48, T231-37, T256, T464, T475. And, the jurors also heard of a powerful motive possessed only by the defendant to harm the victim. *E.g.*, T198-99, T393, T448-49. For all these reasons, even if the trial court erred, the elicitation of the challenged statement was harmless beyond a reasonable doubt.

## 3. THE EVIDENCE OF THE DEFENDANT'S GUILT OF EXTREME INDIFFERENCE MURDER AND CONSPIRACY TO COMMIT MURDER WAS LEGALLY SUFFICIENT.

The defendant claims that the evidence was not legally sufficient to support his convictions of extreme indifference murder and conspiracy to commit murder. DB30. This claim lacks merit.

In order to prevail on a challenge to the sufficiency of the evidence supporting a verdict, "the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." *State v. Evans*, 150 N.H. 416, 424 (2003) (citing *State v. Hull*, 149 N.H. 706, 712 (2003); *State v. Chapman*, 149 N.H. 753, 758 (2003)). Guided by these well-familiar guiding principles, the evidence was legally sufficient to support both convictions, despite the defendant's claims to the contrary.

As to conspiracy, "the State must prove that the defendant and at least one other person agreed to commit a crime. . . . A tacit understanding between the parties to cooperate in an illegal course of conduct will warrant a conviction for conspiracy." *State v. Kilgus*, 128 N.H. 577, 586 (1986) (citations and internal quotation marks omitted). The State must "also show that one of the conspirators has performed an overt act in furtherance of the conspiracy." *Id.*

The jurors were presented with the defendant's clear motive to bring harm to the victim, to wit, the defendant's belief that the victim had informed on him, resulting in his open felony narcotics charges. *E.g.*, T198-200, T393, T448-49. As a result of that motive, held only by the

defendant, he met with his criminal associates—Adrien Stillwell, Michael Younge, and Nathaniel Smith—and solicited them to kill the victim. *E.g.*, T198-201, T205-06, T453, T487-88, T510. In addition to the defendant forming and carrying out various schemes in order to commit murder—including establishing an alibi for himself and providing to his conspirators the revolver ultimately used in the subject murder of the conspiracy—the defendant offered his cohorts money to kill the victim. *E.g.*, T209-11, T453-55, T467.

Immediately after the completed homicide, the gunman called the defendant, and later that evening the defendant provided him with money and drugs. *E.g.*, T231-32, T256, T464-66, T475. The defendant transported the gunman out of state in order to "lay low" during the police investigation into the killing. *E.g.*, T234-37. In addition to all these acts, the jurors heard the defendant's own admissions to others before and after the murder that he had solicited others to kill the suspected informant on his case. *E.g.*, T494-95, T513, St. Exh. 49A. From all of this direct evidence, as well as all of the reasonable inferences the evidence supported, the jurors had proof, well beyond a reasonable doubt, that the defendant entered into an agreement to kill Michael Pittman, and that in furtherance of that conspiracy the defendant or one of his conspirators committed at least one of the overt acts delineated in the indictment. DB44-45.

From this same evidence, the jurors had ample basis to conclude, beyond a reasonable doubt, that the defendant committed extreme indifference murder as an accomplice. That evidence established that the defendant set in motion and nurtured an inherently dangerous situation, to wit, inducing and commanding others to commit a murder on his behalf,

and supplying both financial incentive and a deadly weapon with which to do so. That established conduct on the defendant's part more than sufficed to constitute the requisite degree of enhanced recklessness necessary to sustain a second-degree murder conviction.

Turning to the defendant's particular attacks on evidentiary sufficiency, he argues, as to the conspiracy, that "[t]here was no meeting of the minds" to kill the victim between he and his charged coconspirators on the actual day when the murder occurred, and thus no requisite agreement. DB19, 29-30. In factual support of this argument, the defendant relies on the testimony of co-conspirator Michael Younge, who recounted that on the evening of the murder he fortuitously met up with co-conspirators Adrian Stillwell and Nathaniel Smith, and that he had no intent that evening to kill the victim. DB30.

The fallacy in the defendant's argument is his belief that the jury had to find that the charged conspiracy was committed on the same day when the subject murder of that conspiracy occurred, to wit, November 3, 2015. However, the jury did not have to so find because the State did not charge the agreement to kill the victim as an agreement to kill at a particular time or place. Indeed, the indictment alleged the relevant date of the charged conspiracy as "on or between October 8, 2015, and November 3, 2015." DB44. Consequently, that Younge had no plan or intent to kill the victim on the actual night of the murder does not defeat the existence of an effectuated conspiracy to commit that murder.[7]

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[7] In any event, even if jurors had to find that the conspiracy came into existence on November 3, there was ample evidence upon which they could make a finding. According to Younge, Stillwell and Smith told him when he fortuitously met them that

Turning to the second-degree murder count, the defendant contends that he could not lawfully be convicted of reckless second-degree murder. Specifically, he argues that the crime's required *mens rea* of recklessness is legally incompatible with the State's theory that he was an accomplice to the crime by soliciting the murder because the crime of criminal solicitation requires a purposeful *mens rea*. DB30-31. But the defendant proceeds from the fallacy that "solicitation" under the accomplice liability statute equates to the substantive crime of purposeful criminal solicitation. It does not. *See State v. Laporte*, 157 N.H. 229, 232 (2008) ("'Criminal solicitation' encompasses both the *acts reus* of 'soliciting' and the *mens rea* of having the 'purpose that another engage in conduct constituting a crime.' 'Solicits' or 'solicitation,' in contrast, refers solely to the *actus reus*.") (citation omitted). Similarly unavailing to the defendant's *mens rea* argument is the fact that he was convicted of murder as an accomplice rather than a principal. *See State v. Anthony*, 151 N.H. 492, 495 (2004) ("[A]ccomplice liability . . . requires proof (1) that the accomplice intended to promote or facilitate another's unlawful or dangerous *conduct*, and (2) that the accomplice acted with the culpable mental state specified in the

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they were in the area to look for the victim—the very target of multiple discussions with the defendant. *E.g.*, T106, T216, T220. When those three—who the defendant had solicited to commit the murder for him—encountered the victim, Stillwell shot him and immediately thereafter contacted the defendant, who subsequently gave Stillwell money and drugs and transported him out of state. *E.g.*, T147, T231-37. From this, the jury fairly could find a completed agreement between the defendant and at least Stillwell on November 3. That Younge on that particular day may not have harbored criminal intent is immaterial. *See State v. Blackmer*, 149 N.H. 47, 50 (2003) ("The crime of conspiracy does not necessarily require that both parties to the conspiracy possess criminal intent.").

underlying statute with respect to the result[].") (citations and internal quotation marks omitted; emphasis in original).

To the extent that the defendant suggests that the verdicts of conspiracy and reckless second-degree murder are repugnant because they involve different mental states, that suggestion lacks merit. First, as a matter of fact, the crimes did not have to occur at the same time, and thus the admittedly different *mens rea* required for their commission were not mutually exclusive. This is not a case in which the conspiracy at issue was to commit a crime the culpability of which is based upon the result of reckless conduct. *See State v. Donohue*, 150 N.H. 180, 186 (2003). As discussed above, the agreement was separate and distinct from the subject murder that ultimately was achieved, and the jurors could have concluded that while the defendant agreed to commit a murder, his actual accessorial conduct in connection with the murder ultimately committed by a coconspirator was extremely reckless rather than knowing or purposeful. In any event, it is well-established in New Hampshire that "the inconsistency of simultaneous jury verdicts against a single defendant on a multiple-count criminal indictment need not be rationally reconciled, and does not entitle the defendant to relief." *State v. Brown*, 132 N.H. 321, 328-29 (2005).[8]

[8] For the reasons articulated by this Court in *Brown*, 132 N.H. at 328-29, the defendant's belief that his acquittal of first-degree murder "indicat[ed] that the jury did not find that [he] intentionally took [the victim's] life," DB31, is factually and legally incorrect guesswork on his part.

The jury had ample basis upon which to find the defendant guilty of conspiracy to commit murder and reckless second-degree murder. This Court should not disturb that just and fair verdict.

## CONCLUSION

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

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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May 29, 2019

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## CERTIFICATE OF COMPLIANCE

I, Peter Hinckley, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,440 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.

May 29, 2019

/s/ Peter Hinckley

## CERTIFICATE OF SERVICE

I, Peter Hinckley, hereby certify that two copies of the State's brief shall be served on counsel for the defendant, Kelly E. Dowd, by first-class mail postage prepaid, at the following address:

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