THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0424

State of New Hampshire

v.

James Jaskolka

Rule 7 Appeal from Lower Court Decision on the Merits
9th Circuit - District Division - Manchester

BRIEF OF APPELLANT

Defendant James Jaskolka

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Oral Argument: waived

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I. When the defendant submitted a motion to vacate his 1991 misdemeanor conviction in the 9th Circuit - District Division - Manchester, together with an affidavit laying out a factual scenario which, if true, would justify vacating the conviction, did the Court (Lyons, J.) err in refusing to hold a hearing on the motion allowing the defendant an opportunity to be heard? (Lower Court Decision, pages 25-26 herein)

II. May a trial court rule on a defendant's factual claim without a hearing by simply taking judicial notice of facts within the personal knowledge of the individual judge as to what happened in most plea proceedings? (Lower Court Decision, pages 25-26 herein)

RULES INVOLVED

RULES OF EVIDENCE
ARTICLE II. JUDICIAL NOTICE
Rule 201. Judicial Notice

(a) Kinds of facts. A court may take judicial notice of a fact. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(b) Kinds of law. A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) regulations of governmental agencies, and (4) ordinances of municipalities and other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

STATEMENT OF THE CASE

This Appeal is taken after the denial of the defendant's Motion To Vacate Conviction dated June 5, 2018 (William Lyons, Justice), issued out of the 9th Circuit - District Division - Manchester (See attached Decision, pages 25-26).

The defendant, James Jaskolka, appeared in the then Manchester District Court on June 10, 1991 charged with the misdemeanor offense of simple assault. He entered a plea of guilty, was found guilty, and received a fine and a suspended sentence to the House of Correction (Motion to Vacate/Affidavit. Appendix pages 3-4).

On May 8, 2018, James Jaskolka forwarded to the 9th Circuit - District Division - Manchester a Motion To Vacate Conviction together with an affidavit alleging constitutional infirmities with his 1991 plea and conviction and seeking to have it vacated. No objection was filed by the prosecutor's office. On June 5, 2018 the 9th Circuit - District Division - Manchester, issued a written decision denying the motion without a hearing. The defendant filed a timely motion to reconsider (Appendix pages 8-10), requesting a hearing, which was denied on June 26, 2018. The defendant filed a timely appeal with the New Hampshire Supreme Court.

SUMMARY OF FACTS

The defendant is a 70-year-old military veteran who served two tours of active combat duty in Vietnam. On June 5, 1991 he appeared in the then Manchester District Court charged with misdemeanor simple assault. At that time domestic assault was not a separate crime in New Hampshire. Also, at the time, conviction of "domestic assault" was not a bar to the purchase or possession of a firearm. (Motion To Vacate Conviction/Appendix, page 4)

Mr. Jaskolka met with a person who he believes was his court appointed lawyer. He had never met this person previously. They consulted for only a few minutes before Mr. Jaskolka agreed to plead guilty in return for a fine of $ 200.00 and a suspended sentence of 90 days in the House of Correction. Mr. Jaskolka was not advised of his right to a jury trial, and therefore he never knowingly and intelligently waived his right to a jury trial. (Motion to Vacate Conviction/Appendix pages 3-4)

In 1996 the United States adopted the so-called "Laufenberg Amendment" 18 USC 922 (g) 9 which prohibits anyone:

"who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

In 2016 James Jaskolka became aware of an opportunity to purchase a commemorative firearm made available by the Veterans of Foreign Wars in a limited quantity to those who had served active tours of duty in Vietnam and been honorably discharged. He made arrangements to purchase this firearm by going to a local gun shop and filling out the required paperwork. Although he was originally approved and took possession of the firearm, he was subsequently informed by the New Hampshire State Police and by the ATF that he is not eligible to purchase this firearm because of the existence of what they interpret as a valid conviction for domestic assault in that his 1991 conviction was for an assault between intimate partners. (Motion to Vacate/Appendix, page 4).

He returned the firearm, consulted with counsel, and on May 8, 2018 filed a Motion to Vacate the 1991 conviction on the basis that he had not knowingly, intelligently and voluntarily waived his rights, including his right to a jury trial. That waiver is required under 18 USC 921 (33) in order for one to be considered as having been convicted of a crime of domestic violence. Specifically, 18 USC 921 (33) B provides in relevant part that:

(i) A person shall not be considered to have been convicted of such an offense [crime of domestic violence] for purposes of this chapter, unless—
(I) the person was represented by counsel in the case, or knowingly and

intelligently waived the right to counsel in the case; and
(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
(aa) the case was tried by a jury, or
(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

No objection or other answer was filed by the State to Mr. Jaskolka's motion and affidavit. The Court (Lyons, J) denied the motion without a hearing by written decision dated June 5, 2018 (hereinafter Decision). The Court noted that the 1991 court records had been destroyed but then took judicial notice that district court judges "conducted plea colloquies before accepting the defendant's plea." (Decision, page 25) A timely filed motion to reconsider requesting a hearing was also denied. This appeal followed.

SUMMARY OF ARGUMENT

A trial court, in accepting a plea from a defendant, has an obligation to assure that the defendant is making an intelligent, knowing, and voluntary plea and that the elements of the offense and the rights the defendant is waiving by entering the plea are fully explained to him and moreover, that he understands them.

If at some time subsequent to his plea and conviction a defendant steps forward and challenges his plea, then this Court has, in a number of well-crafted decisions, outlined a specific road map to be followed by the lower court to assess whether the challenged plea and conviction should be vacated.

In these decisions this Court has set forth a methodology to determine which party bears the initial burden of proof in such challenges. If the defendant is making a collateral attack on the prior conviction, for instance, such as when a defendant in the context of an OUIL, 2nd offense charge, challenges the first offense, possibly even one from another court, then the defendant bears the burden of describing the specific manner in which the original plea and waiver were without understanding or otherwise defective.

However, if the defendant makes a direct attack on the conviction in

the context of that case, then a host of well-settled United States Supreme Court cases and New Hampshire Supreme Court cases mandate that there be an affirmative showing on the record that the defendant entered his plea knowingly, intelligently and voluntarily, and that without such a record of the trial court's inquiry into these matters the plea will be treated as plain error.

In the ordinary course of events the 9th Circuit - District Division - Manchester court should have conducted a hearing on Mr. Jaskolka's motion where his factual allegations could have been flushed out. However, the court instead resolved the facts without a hearing by simply taking judicial notice that in Mr. Jaskolka's case in 1991 a district court judge must have "conducted plea colloquies before accepting the defendant's plea."

This was not a proper use of judicial notice, and exhibited a poor working knowledge of the doctrine or its use under New Hampshire Rule of Evidence 201(a). Moreover, once the Court took judicial notice on its own outside of the presence of the parties then under Evidence Rule 201 (e) the defendant was entitled to a hearing upon request, which request was made in his motion to reconsider.

The fact that evidence once held in the courthouse that may have shed light on Mr. Jaskolka's factual allegations no longer exists through no

fault of Mr Jaskolka's, should not bar Mr. Jaskolka from pursuing constitutional claims, any more than a defendant located in a jurisdiction where the courthouse has burned down should be barred from pursing legal claims, or a criminal defendant charged in a locale where the evidence has been lost or destroyed should be barred from pursuing a motion to suppress.

Mr. Jaskolka should have been afforded a hearing, which would have gone forward based on the best evidence available.

ARGUMENT

I. When Mr. Jaskolka filed a motion in the 9th Circuit - District Division - Manchester seeking to set aside his 1991 conviction on the basis of alleged constitutional infirmities with his plea and conviction, and submitted an affidavit setting forth a factual basis which, if established, warranted his plea and conviction being set aside, he was entitled to a hearing and an opportunity to testify in support of his allegations, and the Court was not justified in rejecting his factual allegations by making a contrary factual determination based on its own definition of "judicial notice" of what district court judges usually did in 1991.

On any review of a challenged guilty plea, the Court must first determine "whether the existing record of the case clearly indicates that the petitioner entered his plea knowingly and voluntarily." *Millette v. Warden NH State Prison* 141 N.H. 653, at 655 (1977). In the first instance the Court must review its own record, which includes any acknowledgment of rights form that the defendant executed, to assure that the said acknowledgment of rights form was accurate and that the defendant executed the correct form.

The United States Supreme Court has held that presuming a waiver

of constitutional rights from a silent record is impermissible. *Boykin v. Alabama*, 395 U.S. 238 (1969). A plea of guilty may not be considered voluntarily and intelligently made unless the record "affirmatively shows" that the plea of guilty was indeed intelligently and voluntarily made. *Boykin* at 243. If the record surrounding a plea did not "affirmatively show" that Mr. Jaskolka voluntarily and intelligently pled guilty, then he was entitled, as a matter of right, to withdraw his plea. *Boykin* at 242-243. See also *State v. Farris* 114 N.H. 355, at 358 (1974) ("since the defendant's plea of guilty is not shown by the record to have been 'intelligent and voluntary' [citations omitted], we conclude that justice requires that he be granted leave to withdraw his guilty plea and stand trial.")

In a direct attack by a defendant upon his plea the State has the burden of showing that the record indicates that a guilty plea was intelligently and voluntarily made whenever the validity of a plea is questioned. *Boykin* at 242: see also *St. Pierre v. Vitek* 114 N.H. 766, 769 (1974), *State v. Arsenault* 153 N.H. 413 (2006).

In the ordinary course of events when a defendant challenges the sufficiency of his knowledge underlying his prior plea the trial court schedules the issue down for a factual hearing. At the hearing which

party bears the burden of proof is determined by the procedural posture of the challenge. *Arsenault, supra* at 416.

However, none of that mattered here because Mr. Jaskolka was never given a hearing. The trial court instead denied the motion without a hearing. The trial court did not do this on the basis that Mr. Jaskolka's factual claim, even if true, would not have been sufficient to justify setting aside the plea. If the motion and affidavit had not set forth a sufficient ground to warrant setting aside the plea then the Court might have been justified in denying the motion without a hearing. However, the trial court instead denied Mr. Jaskolka's motion only after recognizing that there was no record to support the State's possible objection if the State had bothered to file one.

The Court justified its denial by taking judicial notice that if the non-existent record had in fact existed it no doubt would have supported the State's probable position, and thereby contradicted the defendant's. As alleged in the motion to reconsider, the Court apparently adopted these facts as an "article of faith."

II. In ruling without a hearing against Mr. Jaskolka's factual claims the 9th Circuit - District Division - Manchester was not entitled

to do so by taking judicial notice of what Courts usually did in 1991 because under New Hampshire Rule of Evidence 201 (a) that claim, that "district court judges conducted plea colloquies before accepting the defendant's plea" is neither a fact "(1) generally known within the territorial jurisdiction of the trial court [the city of Manchester, NH]" nor "(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," such as a treatise.

It is well established in New Hampshire that "without a record of the Trial Court's enquiry into the voluntary and knowing character of a defendant's decision [to plead guilty], acceptance of his plea will be treated as plain error." *Richard v. MacAskill* 129 N.H. 405 at 407 (1987) citing *Boykin,* Supra.

When the record of the plea is devoid of any evidence of the Court's enquiry into the defendant's knowledge the burden rests on the State "to respond to the defendant's claim by demonstrating to a clear and convincing degree (citations omitted) that the plea was voluntary or knowing in the respect specifically challenged." *MacAskill* at 408.

"In order for a plea to be knowing, voluntary and intelligent, the defendant must understand the essential elements of the crime to which

he is pleading guilty." *State v. Thornton* 140 N.H. 532 at 537 (1985). Under the holding of *Richard v. MacAskill* the record must affirmatively show that the trial court inquired into the defendant's knowledge.

Here, the trial court by-passed this requirement by taking "judicial notice that district court judges conducted plea colloquies before accepting the defendant's plea." (Decision, page 25). The sheer number of cases decided by this Court alone establishing a comprehensive procedure to be followed when district court judges have not done so, belies this assumption. If the trial court were correct, this Court's 2006 decision in *Arsenault, supra*, would not exist.

Under New Hampshire Rule of Evidence 201 (a) judicial notice can be taken of certain types of facts:

> A judicially noticed fact must be one not subject to a reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The first category applies to facts considered to be common knowledge within the locale of the court, here Manchester, New Hampshire. The procedure that district court judges generally followed in 1991 in accepting guilty pleas in misdemeanor cases may possibly be

generally known to criminal practitioners old enough to have been practicing back then, but is not something one can reasonably conclude is common knowledge on the streets of Manchester, New Hampshire.

The second category applies to facts contained in readily accessible and accepted treatises such as calendars, almanacs, Bureau of Labor Statistics publications, etc., which does not apply to what happened here.

A trial court may not take judicial notice of facts known to, or accessible by, the trial judge from personal knowledge or personal research not from an accepted treatise. "It is a basic principle of jurisprudence...that the court may not introduce its own evidence into a proceeding." *In The Matter of Rokowski and Rokowski* 168 N.H. 57 at 61 (2015).

Even if Judge Lyons were entitled to take judicial notice of his own personal recollections of plea procedures, it still would only be notice of what district court judges were *supposed* to do, perhaps even what they *usually* did. The existence of cases in which pleas have been successfully challenged belies his finding that Mr. Jaskolka is barred from pursuing constitutional claims because he, (Judge Lyons), has determined without hearing evidence that Mr. Jaskolka's claim is factually incorrect.

When competent criminal practitioners take on a case that charges a prior conviction as an element of the new charge, one of the first things they do is research the prior conviction. Apparently, Judge Lyons would consider that a waste of time.

III. Under New Hampshire Rule of Evidence 201 (e), once the lower Court on its own, and without a hearing, took "judicial notice" of what all district court judges did in 1991, and the defendant then timely filed a motion to reconsider this "finding" and requested a hearing, Rule 201 (e) mandated that in that situation "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." The Rule provides that such a request is proper even if made after the judicial notice was taken.

New Hampshire Rule of Evidence 201 is virtually identical to Uniform Rule 201 and Federal Rule of Evidence 201, which notes caution that the use of the process should not be used to capriciously deny a party rebuttal evidence, cross-examination, or argument.

Here the trial court took judicial notice on its own, outside the presence of either party, and without either a request from, or notice to,

either party. The use of judicial notice appearing in the Court's decision was a surprise to the defendant.

Rule 201 (c) entitles a court a to take judicial notice even without a request to do so. However, under Rule 201 (e), once the defendant received the Court's decision and learned it had taken judicial notice of what probably happened in 1991, he was "entitled, upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken."

When the defendant received the trial court's decision and learned what it had done, he timely filed a motion for reconsideration requesting a hearing.

IV The fact that there is no "written record" to support the State's position, and that the lack of such written record is the "result of the ordinary course of the business operation of the Court system" should not deprive Mr. Jaskolka of his right to pursue constitutional claims.

In the ordinary course of events, when a defendant files a motion claiming constitutional infirmities with a prior plea and conviction, and sets

forth a sufficient and legally recognized factual basis, the trial court will schedule the matter down for a hearing on the claims.

In this case the trial court refused a hearing in part because the defendant's file had been destroyed, noting that "the lack of a written record of the waiver of rights and guilty plea was a result of the ordinary course of business operation of the court system." (Decision, page 26.) Although noting that, "This practice is beyond the control of the prosecution," the court failed to note that it was equally beyond the control of Mr. Jaskolka. The trial court used the lack of a record to find, as a matter of law, that if the record did exist it would necessarily support the State, thereby justifying the use of judicial notice.

The trial court did not stop there. It went on to ascribe to the defendant some sort of nefarious or devious motive. "The decision to delay filing a motion to vacate a conviction until after the court system has destroyed the records of the case, then to argue that the burden shifts to the State to prove waiver is 'fundamentally unfair.'" (Decision at 26). The court chided the defendant for waiting "nearly two decades into the century following his guilty plea" to raise his claim.

There are three problems with this approach.

First, which party has the burden depends on the procedural

posture of the challenge. *Arsenault, supra* at 416.

Second, it insinuates, without evidence, that Mr. Jaskolka knew in 1991 of the issues with his misdemeanor plea, but cleverly lay in wait for 27 years until after the court record was destroyed before springing forth with his claim. It ignores the fact that the issue only arose when Mr. Jaskolka attempted to purchase a commemorative firearm.

Third, it assumes, almost as an article of faith, that if the record did exist it would necessarily support the State's objection if they had filed one.

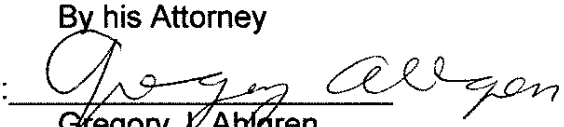
CONCLUSION

The decision of the 9th Circuit - District Division - Manchester should be reversed and a hearing scheduled on the defendant's motion to vacate his 1991 plea and conviction.

The appellant waives oral argument.

The decision from below which is being appealed from is attached to this brief.

Respectfully submitted
James Jaskolka
By his Attorney

November 30, 2018 By: 

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I hereby certify that I have on this date delivered two copies of this Brief to the Office of the New Hampshire Attorney General, counsel for the Appellee.

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The State of New Hampshire

HILLSBOROUGH, SS. **9th CIRCUIT-DISTRICT DIVISION-MANCHESTER**

STATE OF NEW HAMPSHIRE

v.

JAMES JASKOLKA

#456-1991-CR-5617

ORDER

The Manchester Police are alleged to have arrested the defendant in April of 1991 charging him with Simple Assault. The defendant pled not guilty at his arraignment and apparently applied for counsel. On June 10, 1991, the defendant entered an apparently negotiated plea to the charge with a fine and a suspended jail sentence.

Some 27 years after the plea, the defendant filed a Motion to Vacate the conviction. The defendant argues that he was not informed that he had a right to a jury trial and, the in the absence of a written waiver or record of the plea colloquy, the burden is on the State to demonstrate that the plea is knowing, voluntary and intelligent. Richard v MacAskill 129 N.H. 405 (1987).

The Court takes judicial notice that after the Supreme Court's ruling in Boykin v Alabama 395 U.S. 238 (1969) that the district courts developed and used waivers of rights in misdemeanor cases. Those waivers were used by public defenders when representing a criminal defendant on a plea. The Court takes judicial notice that district court judges conducted plea colloquies before accepting the defendant's plea.

The Supreme Court adopted a record retention rule. Administrative Order 92-2. That rule required the Court to retain records of proceedings and case files in the district/circuit court for 7 years. It appears that the clerical staff of the court following the rule and the entire file including complaint, appearances, waiver and bail bond as well as any audio recording has been destroyed. The defendant argues that the lack of any record of the waiver which the Court has taken notice did exist shifts the burden to the State under Richard v MacAskill.

In this instance, the lack of a written record of the waiver of rights and guilty plea was a result of the ordinary course of business operation of the court system. This practice is beyond the control of the prosecution. The decision to delay filing a Motion to Vacate a Conviction until after the court system has destroyed the records of the case, then to argue that the burden shifts to the State to prove waiver is "fundamentally unfair".

"The ultimate standard for judging a due process claim...is the "notion of fundamental fairness". State v. Denney, 130 N.H. 217, 220 (1987) quoting State v. Martin, 125 N.H. 672, 676 (1984) "fundamental unfairness" exists when:

> The procedure itself provides one party with a significant advantage, and places his opponent in a corresponding position of prejudice in the search for truth or the assessment of culpability: or when the procedure allows one party to reap the benefit of his own behavior in placing his opponent at an unmerited and misleading disadvantage...The essence of such fundamental unfairness lies...in the use of a procedure that produces the party's disadvantages or that allows an opponent to benefit from his own improper conduct in producing the disadvantage.

State v. Denney, at 228. See Appeal of Public Service Co. of New Hampshire 122 N.H. 1062, 1073 (1982); Appeal of Plantier, 126 N.H. 500, 509 (1985). The conduct of the defendant in this case would deprive the State of due process were the Court order the burden shifted to the State to prove waiver.

Indeed, the order would produce absurd results. Literally every domestic violence conviction plea from 2010 and earlier would be subject to being vacated with the records that would satisfy the States burden, having been destroyed where the Court knows with substantial certainty that there was an adequate record and plea colloquy.

In consequence, where defendant waited nearly two decades into the century following his guilty plea, the Court denies the motion without hearing.

June 5, 2018
Date

WILLIAM H. LYONS
Judge

Cc: Gregory Ahlgren, Esq.
Andrea Muller, Esq.

Date Mailed: 6/5/18