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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0424

The State of New Hampshire

v.

James Jaskolka

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE 9TH CIRCUIT COURT–DISTRICT DIVISION–MANCHESTER

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
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(Oral argument waived)

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ISSUE PRESENTED

Whether the trial court properly denied the defendant's 2018 motion to vacate his 1991 conviction without a hearing where he did not request a hearing in the motion, he filed the motion almost 27 years after he pled guilty, and the court's entire file and any audio recordings had already been destroyed pursuant to a court rule.

STATEMENT OF THE CASE AND FACTS

On April 30, 1991, the Manchester Police Department arrested the defendant, James Jaskolka, and charged him with one misdemeanor count of simple assault on Linda Brown, who lived with him and was his intimate partner. DB 25; ADB 3-5; ASB 30.[1] *See* RSA 631:2-a (2016). The defendant appeared at his arraignment in the Manchester District Court, pled not guilty, and requested court-appointed counsel. The court granted his request and appointed counsel. DB 25; ADB 3.

On June 10, 1991, defense counsel presented the defendant with a negotiated plea offer from the State. The defendant accepted the offer and pled guilty to the misdemeanor charge. ADB 3; DB 25; ASB 30. The court then accepted his plea, found him guilty, and imposed the negotiated sentence of a $200 fine and a suspended term of ninety days in the House of Correction. DB 25; ADB 3; ASB 30. The court's docket card indicated that he pled guilty to a misdemeanor "[d]omestic assault." ASB 30.

Almost 27 years later, on May 8, 2018, the defendant filed a motion to vacate the conviction. ADB 3-7. He alleged that his trial was scheduled for June 10, 1991, that he met his court-appointed counsel for the first time on that date, and that "[t]hey consulted for only a few minutes before [he] agreed to plead guilty . . . ." ADB 3. The defendant next alleged that he "was not advised of his right to a jury trial, and more pointedly, that a conviction for domestic assault would prohibit him from ever purchasing, owning or

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[1] "ADB" refers to the bound appendix to the defendant's brief.
"ASB" refers to the appendix attached to the State's brief.
"DB" refers to the defendant's brief and the attached appendix.
"NOA" refers to the defendant's notice of appeal and the attached appendix.

possessing a firearm." ADB 3-4. The defendant then alleged that he "never knowingly and intelligently waived his right to a jury trial." ADB 4.

After that, the defendant explained that he had made arrangements to purchase a firearm in 2016, but the New Hampshire State Police and the Bureau of Alcohol, Tobacco, and Firearms (ATF) had then informed him "that he [was] not eligible to purchase the firearm because of the existence of what they interpret[ed] as a valid conviction for domestic assault in that it was an assault between intimate partners." ADB 4.

The defendant next noted that 18 U.S.C. § 921(a)(33)(B) provides, in relevant part:

> (i) A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] for purposes of this chapter, unless—
>
> ....
>
> (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.

ADB 4-5 (emphasis omitted) (quoting 18 U.S.C. § 921(a)(33)(B) (2012)). The defendant then alleged that if he had known he had a right to a jury trial on June 20, 1991, "he would have ... gone to trial ...." ADB 5. He argued that "[v]acating the conviction and scheduling this case for trial would not prejudice the State as Linda Brown still live[d] with [him] and c[ould] be served there." ADB 5.

The defendant argued that he was "directly attacking his conviction," so "the Supreme Court's decision in *Boykin*[*v. Alabama*], 395 U.S. [238,] 243[(1969)], require[d] an affirmative showing on the record that he entered his guilty plea knowingly, intelligently, and voluntarily." ADB 5 (quoting *Richard v. MacAskill*, 129 N.H. 405, 407 (1987)). He next noted that this Court has held that "[w]ithout a record of the trial court's inquiry into the voluntary and knowing character of a defendant's decision, acceptance of his plea will be treated as plain error." ADB 5-6 (quoting *State v. Arsenault*, 153 N.H. 413, 416 (2006)). ADB 6.

The defendant also noted that this Court has held that "'if there is no record or an inadequate record of the trial court's enquiries into the defendant's volition and knowledge, the burden rests on the State to respond to the defendant's claim by demonstrating to a clear and convincing degree that the plea was voluntary or knowing in the respect specifically challenged.'" ADB 6 (brackets omitted) (quoting *Arsenault*, 164 N.H. at 416). The defendant then argued that "there [was] NO record of [his] volition and knowledge ... of the right to a jury trial[, so] the only appropriate remedy [was] to vacate the conviction and schedule this case ... for trial." ADB 6. However, he did not request a hearing.

On June 5, 2018, the trial court (*Lyons* J.) denied the defendant's motion to vacate. DB 25-26. In doing so, the court first noted that the defendant filed the motion "27 years after the plea" and was arguing "that he was not informed that he had a right to a jury trial and, th[at] in the absence of a written waiver or record of the plea colloquy, the burden [was] on the State to demonstrate that the plea [was] voluntary and intelligent." DB 25. The court next took "judicial notice that after the Supreme Court's

ruling in *Boykin*[,] ... the district courts developed and used waivers of rights in misdemeanor cases," the public defenders also used the written waivers, and the "district court judges conducted plea colloquies before accepting the ... plea." DB 25. The court also noted that in 1992, this Court adopted Administrative Order 92-2, that it "required the [court] to retain records of proceedings and case files ... for [only] 7 years," and that the defendant's "entire file ... as well as any audio recording ha[d since] been destroyed." DB 25.

The court then held that the defendant's "decision to delay filing [the motion] until after the court system ha[d] destroyed the records of the case, then to argue that the burden shift[ed] to the State to prove waiver [was] 'fundamentally unfair.'" DB 26. The court also held that allowing a defendant to do so "would produce absurd results" because "every domestic violence conviction plea from 2010 and earlier would be subject to being vacated with the records that would satisfy the State[']s burden, having been destroyed where the Court kn[ew] with substantial certainty that there was an adequate record and plea colloquy." DB 26. The court then said that it was denying the "motion without hearing" because the defendant had "waited nearly two decades into the century following his guilty plea" to move to vacate his conviction. DB 26.

On June 15, 2018, the defendant filed a motion to reconsider. ADB 8-10. He first noted that the court had characterized his position as being that "in the absence of a written waiver or record of the plea colloquy, the burden [was] on the State to demonstrate that the plea [was] knowing, voluntary and intelligent." DB 8 (quoting ADB 25). He then argued that the court had erred in doing so because his position was, and always had been,

that "the burden shift[ed] to the State when there [was] a direct attack on the underlying conviction, as there was here." DB 9.

The defendant next noted that the court had assumed that if the record had still existed, "it would [have] necessarily … show[n] a full knowing waiver by [him]." DB 9. He argued that the court had erred in doing so because they did not "actually know [that], which [was] why [they kept] records rather than just having judicial assertions of what a non-existent record would show." ADB 9. The defendant then requested that the court "reconsider its decision and schedule … an Evidentiary Hearing on the record." ADB 10. However, he did not explain why he was requesting an evidentiary hearing. ADB 10.

On June 27, 2018, the trial court summarily denied the motion to reconsider. NOA 11. This appeal followed.

SUMMARY OF THE ARGUMENT

The defendant's argument that the trial court erred in denying his motion to vacate his plea is fundamentally flawed because he has relied on standards that apply only to direct attacks on guilty pleas, but he made a collateral attack on his plea. Furthermore, he did not preserve his arguments: (1) that the trial court erred in taking judicial notice of the practices and procedures of the court and public defenders in 1991; and (2) that it erred in denying his request for a hearing after it did so.

In any event, any error the court made in denying the request for a hearing was harmless because it had properly taken judicial notice of those practices and procedures. Even if the court had erred in doing so and in denying the defendant a hearing, the errors were harmless because the court had properly held that it would be fundamentally unfair to put any burden on the State to prove that the defendant had been aware of, and had validly waived, his right to a jury trial in 1991. The defendant had waited almost 27 years to collaterally attack his plea, he had no valid reason for waiting to do so, and by the time he did so, his entire court file and any records of the proceedings had already been destroyed pursuant to court rule.

Moreover, it would have been fundamentally unfair to require the State to try the case because, even if it could identify and find all the witnesses, it was likely that their memories had either faded or entirely disappeared. It was also unlikely that the State would be able to refresh their memories or to impeach or support their testimony because although the law required the police to keep the defendant's arrest report forever, it allowed them to destroy the remainder of his 1991 file after six years.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S 2018 MOTION TO SET ASIDE HIS 1991 GUILTY PLEA AND CONVICTION WITHOUT A HEARING BECAUSE HE NEVER EXPLAINED WHY HE WANTED A HEARING, AND THERE WAS NO NEED TO HOLD ONE BECAUSE HE HAD FILED HIS MOTION SO LONG AFTER HIS PLEA THAT IT WAS FUNDAMENTALLY UNFAIR TO REQUIRE THE STATE TO PROVE HE VALIDLY WAIVED HIS RIGHTS OR TO TRY HIM.

The defendant argues that the trial court erred in denying his motion to vacate his 1991 guilty plea and conviction without a hearing. DB 14-24. "Allowing withdrawal of a guilty plea rests within the sound discretion of the trial court, and [this Court] will not set aside its findings absent an unsustainable exercise of discretion." *State v. Davies*, 164 N.H. 71, 74 (2012) (quotation omitted). "To meet this standard, a defendant must demonstrate that the trial court's rulings were clearly untenable or unreasonable to the prejudice of his case." *State v. Guay*, 162 N.H. 375, 385 (2011). The defendant has failed to do so.

A. The defendant's argument that the trial court erred in denying his motion to vacate is fundamentally flawed because he has relied on standards that apply only to direct attacks on pleas, but he made a collateral attack.

The defendant argues that the trial court erred in denying his motion to vacate because "[i]f the record surrounding [his] plea did not 'affirmatively show' that [he] voluntarily and intelligently pled guilty, then he was entitled, as a matter of right to withdraw his plea." DB 15 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). The defendant next argues that "[i]n 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." DB 15 (citing *Boykin*, 395 U.S. at 242; *State v. Arsenault*, 153 N.H. 413 (2006); *St. Pierre v. Vitek*, 114 N.H. 766, 769 (1974)). The defendant later argues "that 'without a record of the Trial Court's enquiry into the voluntary and knowing character of [his] decision [to plead guilty], acceptance of his plea will be treated as plain error.'" DB 17 (quoting *Richard v. MacAskill*, 129 N.H. 405, 407 (1987)). The defendant's reliance on those standards is misplaced because they apply only to direct attacks on pleas, and contrary to his claim, his attack on his plea was not a direct attack. Instead, it was a collateral attack.

In *State v. Lopez*, 156 N.H. 193 (2007), this Court noted that the parties "agree[d] that if an appeal from a denial of a motion to withdraw a plea is part of the direct appeal from the conviction and sentence, then under the Federal Constitution, a defendant is entitled to court-appointed counsel," but federal law "does not afford a defendant a federal constitutional right to counsel when the defendant appeals a collateral challenge to a guilty plea." *Lopez*, 156 N.H. at 194. This Court "agree[d] with those principles," *id.*, and explained why it did so, *id.* at 194-97.

This Court then applied the federal principles to appeals in New Hampshire. *Id.* at 197. In doing so, this Court first noted that it "provide[s] mandatory review of every direct appeal from a criminal conviction," and that "[t]he review is merits-based." *Id.* This Court next noted that "such review applies whether the appeal follows a conviction arising out of a trial, or from a ... plea," and that "[t]he issues that might be raised by a person appealing directly from a guilty plea include ... whether an on-the-record

colloquy demonstrates that the plea was knowing, voluntary and intelligent . . . ." *Id.* This Court next held that if the "issues are raised in a motion for new trial filed after the acceptance of a plea but prior to sentencing, or a motion filed within ten days of sentencing, then a defendant filing a direct appeal of an adverse ruling upon the motion is ... entitled to court-appointed counsel." This Court then held that "[t]he contrary result obtains when a defendant collaterally challenges a guilty plea after the period for direct appeal has expired, and then seeks discretionary review in this [C]ourt . . . ." *Id.* Therefore, this Court's opinion in *Lopez* makes it clear that any attack on a guilty plea that is raised more than ten days after sentencing is a collateral attack.

Here, the defendant filed his motion challenging his guilty plea almost 27 years after the trial court accepted the plea and sentenced him, the trial court denied his motion, and the defendant then sought discretionary review of its adverse ruling in this Court. Therefore, his motion was a collateral attack on his guilty plea. *Id.*; *see also, e.g., Lipscomb v. United States*, 226 F.2d 812, 816 (8th Cir. 1955) ("A motion to vacate a judgment in a criminal case ... is a collateral attack on the judgment . . . ."); *State v. Martinko*, 194 A.3d 69, 72 (N.H. 2018) (Martinko filed his motion to vacate three years after he entered his plea, and this Court addressed it as a "collateral attack"); *Arsenault*, 153 N.H. at 416 (Arsenault filed his motion to vacate almost four years after he entered his plea, and this Court addressed it as "a collateral attack"). That being the case, the defendant's reliance on the standards that apply to direct attacks on pleas is misplaced, and his arguments applying them lack merit.

B. The defendant failed to preserve his arguments that the trial court erred in taking judicial notice, and that it erred in denying his request for a hearing after it did so.

The defendant argues that the trial court erred in taking "judicial notice that district court judges conducted plea colloquies before accepting the defendant's plea," DB 18, because New Hampshire Rule of Evidence 201(a) prohibited it from doing so, DB 18-19. He then argues that even if the court did not err in taking judicial notice, it erred in denying his post-decision request for a hearing because Rule 201(e) entitled him to a hearing upon request, DB 20-21. Those arguments are not preserved.

"The defendant, as the appealing party, has the burden to provide this [C]ourt with a sufficient record to decide his issues on appeal and demonstrate that he raised [them] before the trial court." *State v. Brooks*, 162 N.H. 570, 583 (2011). "The trial court must have had the opportunity to consider any issues asserted by the defendant on appeal ...." *State v. Mouser*, 168 N.H. 19, 27 (2015); *see also N.H. R. Crim. P.* 43(a).

In his motion to reconsider, the defendant did not object to the court's taking judicial notice, use the words "judicial notice," or cite Rule 201. He also did not explain why he was requesting, or thought he was entitled to, a hearing. DB 25-26. Therefore, the foregoing arguments are not preserved for appeal because he never gave the trial court an opportunity to consider them. *See State v. Saulnier*, 132 N.H. 412, 415 (1989) (holding that Saulnier's argument under the rules of evidence was not preserved because he never gave the trial court an opportunity to consider it or developed a record sufficient to decide it). That being the case, this Court

should not consider those arguments. *See State v. Blackmer,* 149 N.H. 47, 49 (2003) (this Court generally does not review unpreserved arguments).

C. Even if the defendant had preserved his judicial notice arguments, any error by the trial court in failing to afford him a hearing was harmless because the trial court had properly taken judicial notice of the practices and procedures of the court and the public defenders in 1991.

The defendant argues that the trial court erred in taking judicial notice here because "[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." DB 19 (citing *In the matter of Rokowski and Rokowski*, 168 N.H. 57, 61 (2015)). His reliance on this Court's opinion in *Rokowski* in support of that claim is misplaced.

In *Rokowski*, this Court held that the rules of evidence did not apply, but Rule 201 was instructive. *Rokowski*, 168 N.H. at 61. It then held that the trial court erred in conducting internet research and then relying, "in part, upon Zillow's 'Zestimate' to ascertain the [marital] home's value and choose a valuation date" because "Zillow's 'Zestimate' is not 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Id.* (quoting *N.H. R. Ev.* 201(a)).

In this case, the trial court did not rely on evidence it found on the internet or on any other outside source. Instead, it took judicial notice of the court's rules, practices, and procedures, and the actions routinely taken by public defenders who appeared in the court. According to an accepted treatise, "[a] court may take judicial notice of its own rules, and practices," "[l]ong established procedure," and "any action taken in court by counsel in

cases there pending." 31A C.J.S. *Evidence* § 91 (Dec. 2018 Update) (footnote references omitted).

In addition, on September 30, 1987, this Court amended District Court Rule 2.9, and the rule then explicitly provided:

> If a defendant charged with a crime elects to ... enter a plea of guilty or nolo contendere with or without counsel, a waiver and acknowledgment of rights form and certificate of the judge on a form prescribed by the Supreme Court *shall* be signed respectively by the defendant and the judge and filed with papers in the case. If the judge finds that a defendant acknowledges his rights and knowingly and voluntarily waives the same, but refuses to sign the waiver form, the judge shall so certify.

(Emphasis added.) The rule remained unchanged until this Court adopted New Hampshire Rule of Criminal Procedure 11 in 2016, which still requires trial courts to use written waiver and acknowledgment of rights forms and to conduct plea colloquies. *See N.H. R. Crim P.* 11(3); *see also* R. McNamara, 2 New Hampshire Practice, *Criminal Practice and Procedure* § 27.14 at 289 (2010) ("the District Court will require the defendant to fill out an Acknowledgment of Rights Form") (citing *Dist. Ct. R.* 2.9; *Richard v. MacAskill*, 129 N.H. 405 (1987)). Therefore, the trial court did not err in taking judicial notice that in 1991, the public defenders and the court used written waiver and acknowledgment of rights forms, and the court conducted plea colloquies with defendants. *Cf. United States v. Jennings*, 323 F.3d 263, 276 (4th Cir.) ("We have reviewed the procedure that Judge Herbert routinely employed ... to secure a defendant's waiver of his right[s] ... and are satisfied that the procedure meets constitutional minimums."), *cert. denied*, 540 U.S. 105 (2003). That being the case, even

if the trial court erred in failing to give the defendant "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed," *N.H. R. Ev.* 201(e), the error was harmless.

D. Even if the trial court had erred in taking judicial notice and in failing to hold a hearing after it did so, the errors were harmless because the trial court had properly held that the defendant's delay in filing the motion had made it fundamentally unfair to put any burden on the State.

"In a collateral attack, … a defendant's claim of an inadequate record in violation of *Boykin* is not, without more, sufficient to trigger review, and proof of a silent record, alone, is insufficient to require reversal." *Arsenault*, 153 N.H. at 416. Instead, "[t]o successfully mount a collateral attack, the defendant must describe the specific manner in which the waiver was in fact involuntary or without understanding, and must at least go forward with evidence sufficient to indicate that his specific claim presents a genuine issue for adjudication." *Id.* (brackets and quotation marks omitted).

In the usual case, "[i]f the defendant meets the initial burden, then the record's compliance with *Boykin* determines which party thereafter bears the burden of proof." *Id.* "If the face of the record indicates that the trial court affirmatively inquired into the knowledge and volition of the defendant's plea, then the defendant will bear the burden to demonstrate by clear and convincing evidence that the trial court was wrong and that his plea was either involuntary or unknowing for the reason he specifically claims." *Id.* (quotation marks omitted).

> On the other hand, if there is no record or an inadequate record of the trial court's enquiries into the defendant's

> volition and knowledge, the burden rests on the State to respond to the defendant's claim by demonstrating to a clear and convincing degree that the plea was voluntary or knowing in the respect specifically challenged.

Id. (internal quotation omitted).

"The stated principles are predicated on the assumption that the [State] has within its control the means to produce, or conveniently reconstruct, the record of a plea, which then can be expeditiously consulted to refute or credit the defendant's claims of invalidity." *Commonwealth v. Lopez*, 690 N.E.2d 809, 812 (Mass. 1998).

> A far different situation exists, however, when the defendant leaves his guilty pleas unchallenged for a lengthy period of time, so that the contemporaneous record of the plea is lost (by proper destruction of the stenographer's notes or erasure of the tape recording pursuant to court rules), and means of reconstruction are made impractical or impossible due to the death or retirement of judges and court reporters, the unavailability of witnesses, the inherent weaknesses and failures of recollection, and other factors commonly associated with the passage of time. At this point, the absence of a record, and the inability effectively to reconstruct it, may be directly attributed to the defendant's delay and may be said to be the defendant's fault. In such a case, the defendant's attack on his pleas ... necessarily proceeds on a basis extrinsic to the unavailable contemporaneous record.

Id. Thus,

> [a] defendant's naked claim that he did not receive a constitutionally adequate guilty plea colloquy does not automatically thrust upon the [State] the burden of proving the existence of a contemporaneous record establishing that the plea was entered knowingly and voluntarily. Rather, the initial burden is on the moving defendant to present some articulable reason which the motion judge deems a credible

> indicator that the presumptively proper guilty plea proceedings were constitutionally defective....

Id. (quotation omitted).

This case was not the usual case because the defendant filed his motion to vacate his guilty plea 27 years after he entered it and the court accepted it. By that point, the defendant's entire court file and any recordings of the proceedings had been destroyed pursuant to Administrative Order 92-2. That order provides, in relevant part:

> (1) The docket card shall be permanently retained and is recognized by the court as the official record for all cases where the original court file and any contents therein may be destroyed or caused to be destroyed.
>
> (2) Records of ... misdemeanors ... and any contents therein may be destroyed or caused to be destroyed at the end of seven years after final conviction provided no outstanding bench warrant or default exists.

ASB 32-33.

The defendant's docket card still exists. The entry on the docket card that concerns his 1991 case merely states: "April 30, 1991 Domestic assault (M) NG retr. G fd G 91-05617 $200 pd HOC 90 days susp." ASB 30. Thus, the docket card makes it clear that the trial court found the defendant guilty of a misdemeanor crime it concluded was a domestic assault. However, it does not shed any light on the issues of whether the defendant was advised of his right to a jury trial and validly waived that right. It also does not shed any light on the identities of the prosecutor, the defendant's appointed counsel, or the judge who took the plea. Therefore, it is clear that the defendant's delay in filing his motion created a situation where neither the

trial court nor the State could make any substantive determinations regarding the claims he raised from the existing record, and the State would face a near-impossible, if not impossible, task if it was required to recreate the record or to otherwise dispute the defendant's claims about his plea.

In *State v. Brenes*, 151 N.H. 11 (2004), this Court held that when a trial court record is destroyed pursuant to a "reasonable procedural rule designed to protect the orderly and efficient use of criminal justice system resources," and the rule disadvantages the defendant solely because he caused a delay, he "may have limited his own due process rights, but the justice system did not violate those rights." *Brenes*, 151 N.H. at 12 (quotation omitted). The circumstances here are different from those in *Brenes* because Brenes had fled after he was convicted by a jury, and the tape recording and notes of his trial had been destroyed pursuant to an analogous superior court administrative rule before he was sentenced, which prevented him from challenging the sufficiency of the evidence.

However, here, just as in *Brenes*, "[t]he current state of the record is of the defendant's own making," because he waited 27 years to challenge his guilty plea, and by that time, his entire file, including any recordings of his plea hearing, had been destroyed pursuant to "a reasonable procedural rule designed to protect the orderly and efficient use of criminal justice system resources." *Id.* (quotation omitted). Therefore, the trial court properly found that it would be fundamentally unfair to put the burden on the State to prove that the defendant had been advised of and validly waived his right to a jury trial. *See United States v. Hartsock*, 347 F.3d 1, 9 (1st Cir. 2003) (holding that "the prosecution will often not be able to offer any proof beyond the record of the prior conviction" because "[s]tate courts

routinely destroy supporting records," and that therefore, "requiring the government to shoulder the burden of persuasion would ... place an impossible burden on [it] to establish the existence of facts within the special knowledge of the defendant" (quotation omitted)).

The defendant argues that he is not responsible for the delay because "the issue only arose when [he] attempted to purchase a commemorative firearm." DB 23. However, the grounds for filing his motion to vacate his plea were not the ATF's and State Police's conclusions that he had a valid misdemeanor conviction for domestic violence that prohibited him from having a firearm. Instead, the grounds for filing his motion were "the factual and constitutional bases for [his] claim that the [motion] should be granted." *Wiley v. Miles*, 652 S.E.2d 562, 577 (Ga. 2007) (holding that the habeas court had erred in finding that "the 'grounds' for Miles's petition consisted of the harm [he] sought to avoid by having the 1965 guilty pleas invalidated, *i.e.*, enhancement of his federal sentence in 2002"). Therefore, the question is when those grounds arose.

The grounds the defendant raised in his motion to vacate his conviction were the factual circumstances surrounding the entry of his guilty plea in 1991, and the constitutional requirement that the plea be knowing, intelligent, and voluntary. Thus, the factual basis for the motion was complete as soon as he entered his plea in 1991, "and the constitutional basis existed long before that time." *Wiley*, 652 S.E.2d at 577 (holding that "[t]he factual basis for Miles's petition was complete as soon as the pleas were entered in 1965, and the constitutional basis existed long before that time"). Thus, although the defendant may not have perceived any need to

file his motion to vacate his conviction before 2018, he had no legally valid justification for waiting almost 27 years to do so. *Id.*

In addition, this Court has held that a court can disbelieve any part of a defendant's testimony about whether he was advised of and validly waived his constitutional rights at his plea hearing "even if no testimony was introduced to rebut it." *St. Pierre*, 114 N.H. at 769-70. In addition, as one federal court noted,

> self-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded state convictions. This rule makes sense. If a defendant could throw into doubt the validity of a prior conviction by merely filing a self-serving document alleging that it was unconstitutionally obtained, then the burden would in effect be the government's to establish the validity of all prior waivers of counsel and convictions. This might very well create judicial chaos, if all criminal convictions are considered void, until the government proves that they are not.

Cuppett v. Duckworth, 8 F.3d 1132, 1138–40 (7th Cir. 1993), *cert. denied*, 510 U.S. 1180 (1994). Therefore, when a defendant had grounds to, but failed to, challenge his conviction for many years, and offered no supporting evidence, other than an affidavit, in support of his claims, it is proper for a court to "refuse to reward [his] repeated delays in challenging his conviction by shifting the burden of proof to the [S]tate to establish its validity." *Id.* at 1140 (refusing to shift the burden to the State to establish a valid waiver of Cuppett's right to counsel where his conviction was over thirty years old, and he had never before moved to withdraw his plea, even though the United States Supreme Court had held that defendants were entitled to appointed counsel five months after he entered it).

Here, the defendant offered no evidence, other than his own self-serving statements and his affidavit, to support his claims that neither the court nor his appointed counsel advised him he had a right to a jury trial, that he did not sign anything before he entered his plea, that he did not know he had a right to a jury trial, and that he would have gone to trial if he had known he had that right. Therefore, the trial court did not have to credit or give any weight to those claims. *See St. Pierre*, 114 N.H. at 769-70 (holding that the habeas court "could disbelieve any part of [St. Pierre's] testimony [about not being advised of his constitutional rights at his plea hearing] even if no testimony was introduced to rebut it").

In fact, the trial court had good reason to disbelieve the defendant's claims about his plea hearing in 1991 because he was represented by appointed counsel, and by that time, the court rules had long required judges who took pleas in criminal cases to either obtain a signed waiver and acknowledgment of rights form from a defendant or certify on the record that they had made a determination that the defendant acknowledged and knowingly and voluntarily waived his constitutional rights, but refused to sign the written form. There is no indication on the docket card, which is now the only official record, that the defendant refused to sign the form. Therefore, the trial court had good reason to disbelieve his claims that neither his appointed counsel nor the plea court advised him of his right to a jury trial, and that he did not sign anything at his plea hearing.

Moreover, "[a] court may, in the exercise of its discretion, account for any prejudice that the State may suffer as part of its weighing of the equities of a plea withdrawal motion." *State v. Sarette*, 134 N.H. 133, 140 (1991). Given the defendant's extreme delay in filing his motion, his lack

of any legally valid excuse for waiting to do so, and the near-impossible task the State would face if it was required to recreate the record or otherwise prove the defendant knew of, and validly waived, his right to a jury trial, the trial court properly refused to place that burden on the State because doing so would have been fundamentally unfair.

It should also be noted that even if the State could identify all the witnesses, and they were still alive and could be located, it is likely that their memories of the events have either faded or entirely disappeared. It is also highly unlikely that the State would be able to refresh their recollections or to impeach or support their testimony because municipal police must retain "arrest reports … permanently," *see* RSA 33-A:3-a, CIII (Supp. 2018), but they may dispose of other records in closed criminal cases five years after the statute of limitations has passed, *see* RSA 33-A:33-a, CV, and the statute of limitations for a misdemeanor is one year, RSA 625:8, I(c) (2016). Therefore, it would also be fundamentally unfair to require the State to try the defendant's 1991 case over 27 years after the crime at issue occurred. *See Oksanen v. United States*, 362 F.2d 74, 79 (8th Cir. 1966) (holding that allowing Oksanen to withdraw his plea after "well over ten years" would not serve the ends of justice because "a trial after th[at] lapse of time would be a practical impossibility").

It should further be noted that the defendant makes much of the fact that the State failed to respond to his motion to vacate. DB 7, 10, 16, 23. However, the State's failure to do so did not prevent the trial court from considering the merits of the motion or give it any grounds to grant the motion. *See N.H. R. Crim. P.* 17(5) ("Failure to object shall not, in and of itself, be grounds for granting a motion."). The State's failure to respond to

the motion also did not prevent the trial court from ruling, as a matter of law, that the defendant's delay in filing the motion made it fundamentally unfair to require the State to prove that he was aware of, and validly waived his right to, a jury trial or to try the case. Accordingly, for all the foregoing reasons, the trial court did not err in denying the defendant's motion without a hearing.

CONCLUSION

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

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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Attorney General

January 16, 2019

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CERTIFICATE OF COMPLIANCE

I, Susan P. McGinnis, hereby certify that pursuant to New Hampshire Supreme Court Rule 22(2), this brief contains approximately 6,071 words, which is less than the total permitted by the rules of court. Counsel has relied on the word count of the computer program used to prepare this brief.

January 16, 2019

Susan P. McGinnis

CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that two copies of this brief was mailed this day, postage prepaid, to Gregory J. Ahlgren, counsel of record for the defendant, at the following address:

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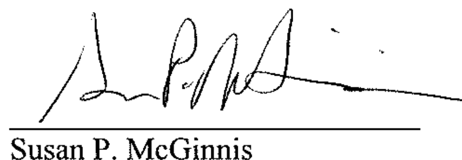
January 16, 2019



Susan P. McGinnis

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1. District Court docket card 30-31

2. Administrative Order 92-2 32–34

JASKOLKA	James DOB: 6-19-48	
Sept. 16, 1971	Non Inspection G. $5. pd	1317
May 5, 1975	speeding Nolo $25. pd	35045
Apr. 11 1978	non inspection G. $15. pd	62663
Jan 18 1979	non inspection G. $20. pd	72392
Feb. 11, 1982	Criminal Mischief G. $100. pd H of C	07774
	6 months susp. Appeal sentence	
Feb. 11, 1982	Criminal Trespass, NG. Nol Pros	07775
Feb. 11, 1982	Criminal Trespass, NG. retr. G $200. pd	07776
	H of C 30 days susp. (not to go w/in 100yds.*	
Feb. 11, 1982	Criminal Mischief G. $100. H of C	0777[illegible]
	6 months susp. ordered to pay damages	
	appeal from sentence	
	*of victim's residence)	
~~06/18/88~~	~~Poss. Narc. Drug (B) No plea~~ INDICTED	~~88-06831~~
May 9, 1990	Simple Assault (M) NG DISMISSED	90-06759
~~April 30, 1991~~	Domestic assault (M) NG retr. G fd G	91-05617
	$200 pd HOC 90 days susp.	

CASE RECORD CARD MANCHESTER DISTRICT COURT CRIMINAL DOCKET

13348 STATE V.

COUNSEL

SUMMONS NO. COMPL'NT.

DATE (MO. DAY YR.)	DOCKET ENTRIES
May 11, 1992	DWI (V) NG FD G $350. PD. Lic. susp. 92-06986
	6 mos. to attend REAP

R.H. LLEWELLYN CO., INC. MANCHESTER, N.H.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT OF NEW HAMPSHIRE

Administrative Order 92-2

Pursuant to RSA 502-A:27-a (Supp. 1990) and the Supreme Court of New Hampshire's rule-making authority thereunder, the Court orders that all clerks of District and Municipal Courts shall adhere to the following records management and retention policy.

(1) The docket card shall be permanently retained and is recognized by the court as the official court record for all cases where the original court file and any contents therein may be destroyed or caused to be destroyed.

(2) Records of felonies, misdemeanors, violations and any contents therein may be destroyed or caused to be destroyed at the end of seven years after final conviction provided no outstanding bench warrant or default exists.

(3) Juvenile records involving children in need of services and any contents therein shall be destroyed or caused to be destroyed after the child reaches 18 per RSA 169-D:25. All records pertaining to cases of delinquency, adjudicated abuse and neglect and any contents therein may be destroyed or caused to be destroyed at the end of five years after the child reaches 18. The Division for Children and Youth Services shall be provided thirty days notice in advance of files destruction for abuse and neglect records.

(4) Small claim records and any contents therein may be destroyed or caused to be destroyed 90 days after the occurrence of any of the following events:

a) transfer to the Superior Court for jury trial;

b) dismissal of the case;

c) entry of a non-suit; or

d) notice by the clerk of dismissal pursuant to District Court Rule 4.7(a).

In all other cases said records may be destroyed at the end of seven years after final judgment.

(5) Civil records and any contents therein may be destroyed or caused to be destroyed 90 days after the occurrence of any of the following events:

a) transfer to the Superior Court for jury trial;

b) dismissal of the case;

c) entry of non-suit; or

d) notice by the clerk of dismissal pursuant to District Court Rule 3.15.

In all other cases said records may be destroyed at the end of seven years after final judgment.

(6) Landlord tenant records and any contents therein may be destroyed or caused to be destroyed at the end of one year after final disposition.

(7) Domestic violence records and any contents therein may be destroyed or caused to be destroyed at the end of five years after final disposition, or after 90 days when the court relinquishes jurisdiction upon transfer of the file to Superior Court.

(8) The original cash receipt, cash disbursement journal records, and daily NCR tapes (source documents) are permanent records and must be retained indefinitely per RSA 502 A:27-b.

All other financial records must be retained for the current fiscal year and the preceding five fiscal years.

(9) All computer system documents and reports including case specific documents, working documents or reports, letters, memoranda, and managerial or financial reports may be destroyed or caused to be destroyed in accordance with guidelines provided by the Administrative Office of the Courts.

(10) Any method of destruction is permissable which reduces the file to an unusable or unreadable state acceptable to the Administrative Judge. Juvenile file destruction shall be supervised by court personnel. Recycling shall be given consideration for all materials.

(11) All other records destruction shall adhere to the general records destruction notification issued annually by the state archivist.

(12) The Administrative Office of the Courts may provide alternative permanent storage mediums for permanent records storage.

(13) Where destruction is permitted, the entire court file may be destroyed, except the docket card.

(14) The District Court Administrative Judge may direct that any files having the potential for historical significance shall be preserved.

July 13, 1992

ATTEST:
James F. Lynch, Director
Administrative Office of the Courts