No. _____

SUPREME COURT OF THE UNITED STATES

DICKENS ETIENNE,
Petitioner,

v.

MICHELLE EDMARK
NH STATE PRISON, WARDEN
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Donna J. Brown, Esq.
First Circuit #1179586
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, NH 03101
603-669-4140

Counsel for Petitioner Dickens Etienne
Appointed Under the Criminal Justice Act of 1964

APPENDIX TABLE OF CONTENTS

United States Court of Appeals
For the First Circuit

No. 20-2067

DICKENS ETIENNE,

Petitioner - Appellant,

v.

MICHELLE EDMARK, Warden, NH State Prison,

Respondent - Appellee.

Before

Barron, Chief Judge,
Kayatta and Montecalvo, Circuit Judges.

JUDGMENT

Entered: April 20, 2023

We have reviewed the record and the petitioner's request for a certificate of appealability ("COA"). The request for a COA on petitioner's ineffective assistance of counsel claim is denied. The state court concluded that counsel's failure to investigate petitioner's mental health records did not prejudice the petitioner. See Strickland v. Washington, 466 U.S. 668, 687-92 (1984). The district court found that this conclusion was not unreasonable, and we see no debatable claim to the contrary. As the state court observed, any evidence of mental illness at the time of the shooting or in the period thereafter would not have been strong: the State's expert witness opined that the petitioner, Dickens Etienne ("Etienne"), had not been suffering from schizophrenia in 2004; and while Etienne's expert witness was of the opposite view, the state court found the State expert's testimony to be more persuasive. That factual finding is presumed to be correct, and the petitioner has the burden of showing by clear and convincing evidence that that presumption should not apply. See 28 U.S.C. § 2254(e)(1). We see no debatable claim that petitioner has met that heavy burden.

Furthermore, we see no debatable claim that the state court unreasonably concluded that any evidence of mental illness, if presented, would have undermined the petitioner's claim of self-defense or defense of another. The state court observed that a strategy focusing on Etienne's mental health had the potential to undermine his claim that he had acted in self-defense and/or defense of

another. The court reasoned: "The strategic focus of this case was self-defense and defense of others, not mental health. A person with an unsound, paranoid mind is not likely to be found to have acted reasonably. Arguing that Etienne was paranoid [] could lead to the parallel argument that he was paranoid about the victim's respect for him and actions with his girlfriend, an inference that would not have bettered Etienne's [claim of self-defense.]" State Court decision at pp. 29-30. We see no debatable claim that this conclusion was unreasonable. See Lang v. DeMoura, 15 F.4th 63, 69-70 (1st Cir. 2021) (no prejudice where counsel would not have advanced claim of insanity, even if defense had been investigated, because claim of self-defense was better strategy).

As for the claim presented pursuant to Brady v. Maryland, 373 U.S. 83 (1963), consideration of this claim will require a review of the trial transcripts. We have carefully perused the district court docket, however, and although the parties appeared to be under the impression that the trial transcripts had been filed there, we see no indication on the docket that those transcripts ever were filed. Rule 5(c) of the Rules Governing § 2254 Cases provides for the filing of all relevant transcripts. Both parties cited extensively to the trial transcripts in their filings (thereby indicating that they viewed them as relevant), so the transcripts should have been filed in the district court in accordance with Rule 5(c). This apparent omission has left us unable to engage in meaningful consideration of the claim under Brady v. Maryland, 373 U.S. 83 (1963). See Turner v. United States, 137 S. Ct. 1885 (2017) (concerning materiality of undisclosed information).

Accordingly, we allow the request for a COA on the Brady claim, vacate the judgment of the district court as to the Brady claim only, and remand for reconsideration of petitioner's petition in a manner consistent with Rule 5(c) and any other applicable rules. We deny the request for a COA on the ineffective assistance claim.

We express no opinion at this time as to the merits of petitioner's claim, the timeliness of the petition, or whether or to what extent proceedings up to this point have worked a forfeiture of any relevant procedural issues. The motion for appointment of counsel is denied as moot.

By the Court:

Maria R. Hamilton, Clerk

cc:
Hon. Steven J. McAuliffe
Daniel Lynch, Clerk, United States District Court for the District of New Hampshire
Donna J. Brown
Michael G. Eaton
Dickens Etienne
Elizabeth Christian Woodcock

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Dickens Etienne,
Petitioner

v.

Case No. 18-cv-1156-SM
Opinion No. 2020 DNH 184

Michelle Edmark, Warden,
New Hampshire State Prison,
Respondent

O R D E R

On January 28, 2004, Dickens Etienne shot an acquaintance, Larry Lemieux, in the back of the head. Lemieux died instantly. Etienne was tried and convicted of first-degree murder and his conviction was affirmed on appeal to the New Hampshire Supreme Court. He brings this petition seeking habeas corpus relief from that conviction. See 28 U.S.C. § 2254. Respondent moves for summary judgment on both claims advanced in Etienne's petition, asserting that, as a matter of law, he is not entitled to the relief he seeks. Etienne objects.

For the reasons discussed, respondent's motion for summary judgment is granted and Etienne's amended petition for habeas corpus relief is denied.

Standard of Review

Since passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and its amendments to 28 U.S.C. § 2254, the power to grant federal habeas relief to a state prisoner with respect to claims adjudicated on the merits in state court has been substantially limited. A federal court may not disturb a state conviction unless one of two conditions is met. The first is when the state court's adjudication of the petitioner's federal constitutional claims "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). A habeas petitioner seeking relief under that provision faces a substantial hurdle since any "determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner must "rebut[] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Alternatively, habeas relief may be granted if the state court's resolution of the federal constitutional issues before it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court explained the

distinction between decisions that are "contrary to" clearly established federal law, and those that involve an "unreasonable application" of that law as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The Court also noted that an "incorrect" application of federal law is not necessarily an "unreasonable" one.

> [T]he most important point is that an unreasonable application of federal law is different from an incorrect application of federal law . . .. Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 410-11 (emphasis in original). Finally, it probably bears noting that a state court need not rely upon, nor need it even cite, Supreme Court precedent in order to avoid resolving a petitioner's claims in a way that is "contrary to" or involves

an "unreasonable application of" clearly established federal law. See Early v. Packer, 537 U.S. 3, 8 (2002) ("Avoiding these pitfalls does not require citation of our cases - indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.") (emphasis in original).

So, to prevail under section 2254(d)(1), the habeas petitioner must demonstrate that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). In short, "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Id. at 102-03 (citation and internal punctuation omitted). As the Harrington Court noted, AEDPA's amendments to section 2254(d) present a significant barrier for those seeking habeas relief and impose upon this court a highly deferential standard of review.

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state

> proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Harrington, 562 U.S. at 102 (citation omitted).

Only as to federal claims that were presented to the state court but neither adjudicated on the merits nor dismissed by operation of a regularly-applied state procedural rule, may this court apply the more petitioner-friendly de novo standard of review. See, e.g., Clements v. Clarke, 592 F.3d 45 52 (1st Cir. 2010) ("In contrast, a state court decision that does not address the federal claim on the merits falls beyond the ambit of AEDPA. When presented with such unadjudicated claims, the habeas court reviews them de novo.") (citation omitted).[1]

With those principles in mind, the court turns to Etienne's petition and the State's motion for summary judgment.

[1] It is, perhaps, important to note that "unadjudicated claims" are different from claims that were resolved on the merits, but without any explanation. See generally Wilson v. Sellers, 138 S.Ct. 1188, 1192 (2018) ("[W]hen the relevant state-court decision on the merits, say, a state supreme court decision, does not come accompanied by [any] reasons . . . . [w]e hold that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale.) (emphasis supplied). See also Ylst v. Nunnemaker, 501 U.S. 797 (1991).

Background

Etienne's habeas corpus petition advances two claims. First, Etienne asserts that his trial counsel was ineffective for failing to recognize that he suffered from a mental health condition and for neglecting to have him undergo a psychiatric evaluation – something he says likely would have revealed that, at the time of his trial in 2004, he suffered from a severe mental illness. Armed with that information, says Etienne, trial counsel could have better explained to the jury his inculpatory post-shooting behavior and/or negotiated a favorable plea agreement with the State. In his second claim, Etienne asserts that the State withheld from him material impeachment evidence concerning a trial witness – conduct he claims violated his constitutionally protected right to due process.

The factual backdrop to Etienne's murder conviction is set forth in detail in the New Hampshire Supreme Court's decision affirming that conviction. See State v. Etienne, 163 N.H. 57 (2011). In brief, the pertinent facts are as follows. On January 28 of 2004, Etienne and several other men had gathered outside an apartment in Manchester, New Hampshire. Two of those men – Lemieux and Pierre – began arguing. Both men (as well as others, including Etienne) were armed. According to the New Hampshire Supreme Court:

> Lemieux [the victim] arrived . . . and walked onto the porch with his hands in his pockets. He approached Pierre so they stood face to face, about six inches apart. . . . the defendant [Etienne] and [others] stood in the area behind Lemieux. Pierre's gun was in his waistband, and [Etienne's] gun was plainly visible in his hand.
>
> Witness accounts differed as to what was said next.
>
> * * *
>
> The witnesses all agreed that the defendant [Etienne] and Pierre spoke to each other in Haitian Creole, and then the defendant stepped behind Lemieux, raised his gun, and shot Lemieux in the head behind his right ear. Lemieux's hands were inside his jacket when he was shot. He died immediately.
>
> After the shooting, the group dispersed. The defendant, Pierre and Rivera drove toward Massachusetts. At some point, while they were still in New Hampshire, Pierre got out of the car. The defendant and Rivera continued to Rivera's brother's home in Brighton, Massachusetts, where the defendant showered and changed his clothes. He and Rivera then visited the defendant's sister's home, where he gave her a bag of his soiled clothing and spoke with her about being his alibi for the shooting. He telephoned [another friend] from a Massachusetts number and told her he was at his sister's home in Boston, and that he had heard about what had happened at the apartment. The defendant left his sister's home at 3 p.m., after approximately twenty minutes there, and drove to the Brighton Reservoir where he threw his gun, magazine and bullets onto the ice.

State v. Etienne, 163 N.H. 57, 67 (2011). Etienne was indicted for the murder of Lemieux. Despite his earlier denials of any involvement in the shooting, at trial, Etienne claimed to have acted in self-defense, as well as in the defense of another.

Following an eight-day jury trial, Etienne was convicted of first-degree murder. He was sentenced to life in prison, without the possibility of parole.

Etienne appealed to the New Hampshire Supreme Court. Among the issues he raised was a claim that the State failed to disclose impeachment evidence relating to one of the trial witnesses against him: Jose Gomez. That impeachment evidence was a letter from the New Hampshire Attorney General's Office, recommending that Gomez receive a suspended sentence on state drug charges unrelated to Etienne's murder case. The State's failure to disclose that information, said Etienne, violated his constitutionally protected right to due process.

The New Hampshire Supreme Court found that the undisclosed evidence was, indeed, favorable to Etienne. Nevertheless, the court concluded, "beyond a reasonable doubt, that the evidence would not have altered the outcome because even if the impeachment had caused the jury to disregard Gomez's testimony altogether, there was overwhelming additional evidence of premeditation before the jury." State v. Etienne, 163 N.H. at 92. Accordingly, the court held that Etienne's rights under neither the State nor Federal Constitution were violated.

In December of 2012, Etienne filed a motion for new trial in state court (construed as a petition for habeas relief). In it, he advanced several challenges to his conviction. Approximately two and one-half years later, during the summer of 2015, Etienne was, for the first time, diagnosed with schizophrenia, paranoid type, by a staff psychiatrist at the New Hampshire State Prison. Although Etienne appears to have been diagnosed with depression following a suicide attempt in his teens, the 2015 diagnosis – nearly 11 years after his first-degree murder trial - was the first time a medical provider reported that he suffered from more serious mental illness. In the wake of that diagnosis, Etienne amended his state habeas petition to include claims asserting that trial counsel was ineffective for failing to investigate his mental health condition and neglecting to obtain a mental health evaluation.

Subsequently, in the summer of 2017, the state habeas court held a three-day evidentiary hearing on Etienne's petition for a new trial. Several witnesses appeared and testified, including Etienne's two trial attorneys. The court also heard testimony from two mental health experts: Dr. Albert Drukteinis, for the petitioner, and Dr. Allison Fife, for the State. Additionally, Etienne submitted to the court the written "Psychological

Evaluation of Dickens Etienne" prepared by Dr. Drukteinis (document no. 3-12).

In a detailed and well-reason order, the state habeas court denied Etienne's petition. State v. Etienne, No. 216-2004-CR-1717 (N.H. Sup. Ct. Jan. 23, 2018) (document no. 3-5). The New Hampshire Supreme Court declined to accept Etienne's appeal. Etienne then petitioned this court for relief under 28 U.S.C. § 2254.

Discussion

In his Amended Petition for Writ of Habeas Corpus (document no. 28), Etienne advances two claims:

> Claim 1 That he was denied effective assistance of counsel when trial counsel failed to investigate his mental health records and consult with a mental health expert, depriving him of non-inculpatory reason for his post-incident behavior and/or depriving him of an opportunity for a favorable plea bargain.
>
> Claim 2 That his federal constitutional rights were violated when the State withheld favorable impeachment evidence regarding one of the State's key trial witnesses.

Id. at 1 (emphasis supplied). As noted above, the New Hampshire Supreme Court considered, and rejected, Claim 2 on direct appeal. Six years later, the state habeas court considered, and

rejected, Claim 1 in Etienne's post-conviction proceedings. Those two state court decisions are the focus of Etienne's pending petition.

Parenthetically, the court notes that earlier in these proceedings, the State moved to dismiss Etienne's petition on grounds that it was not filed in a timely manner. The court denied that motion, without prejudice, concluding that while the arguments raised by the State likely had merit, resolving them (and, more particularly, Etienne's claimed entitlement to equitable tolling based upon mental illness) would require significant time, resources, and effort. Etienne v. Edmark, 2020 WL 211100, 2020 DNH 008 (D.N.H. Jan. 14, 2020) (document no. 19) at 7-8 ("[I]t is unlikely that the court can resolve the respondent's motion to dismiss solely on the record presently before the court. Rather, an evidentiary hearing would probably be required, as would the testimony of psychiatric experts (who would, of course, first have to examine Etienne and review more than twenty years of his medical records)"). Consequently, the court concluded that, "a more efficient approach to resolving Etienne's claims would be to bypass the timeliness issue for now in favor of exploring the merits of his claims, returning to the timeliness issue if there appears to be any substantive merit to

his petition." Id. at 8. The court now turns to the merits of those claims.

I. Claim One – Ineffective Assistance of Counsel.

In the first of his two claims, Etienne focuses on his schizophrenia diagnosis – made more than ten years after the murder trial – and says his attorneys were ineffective for having neglected to investigate his mental health records and for failing to "discover" his mental illness. He adds that if counsel had obtained such information, they could have used it: (a) to explain to the jury his inculpatory post-shooting conduct (i.e., flight from the scene; disposal of the murder weapon; lies to the police; and a series of letters written from jail that undermined his claims of self-defense); and/or (b) to negotiate a favorable plea agreement with the State.

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that his or her counsel provided constitutionally deficient representation and that the petitioner suffered actual prejudice as a result. See Strickland v. Washington, 466 U.S. 668, 687 (1984). As to each of those essential elements, the petitioner bears a substantial burden of proof:

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.
>
> With respect to prejudice, a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Harrington, 131 S.Ct. at 787–88 (citations and internal punctuation omitted) (emphasis supplied). Given the foregoing requirements, "surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 130 S.Ct. 1473, 1485 (2010). Etienne has failed to do so.

Etienne does not seem to take serious issue with the habeas court's application of governing constitutional law (indeed, there is no suggestion in the record that the habeas court misunderstood or misapplied that law). Instead, Etienne challenges the court's factual findings that:

> (a) "reasonably competent trial counsel would not have pursued the evidence [of Etienne's mental health] based on the totality of what was known and the viable defenses [available to them]," State Habeas Decision at 24; and
>
> (b) even if trial counsel could have obtained a "useful" diagnosis of Etienne's mental health condition, "the court does not find there is a reasonable probability that the verdict would have been different." Id. at 28.

In short, the state habeas court concluded that Etienne's attorneys did not provide constitutionally deficient representation and, even if their conduct had fallen short of constitutional minimums, Etienne suffered no prejudice as a result. Etienne has failed to demonstrate that either of those presumptively-correct findings amounts to an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). See also 28 U.S.C. § 2254(e)(1). Rather, those conclusions are amply supported by the record.

A. Counsel was not Ineffective.

By way of background, the court notes the following about Etienne's mental health. In October of 1995, he was admitted to Faulkner Hospital following an overdose of pills and detergents – an apparent suicide attempt when he was 18 years old. As the habeas court noted, this was his first and only hospitalization.

The are no records of any prior mental health history. Hospital records noted the death of Etienne's father earlier that year, as well as the accidental death of one of his close friends just a week earlier. Treatment focused on his depression, which seemed related to his personal losses and stress. He reported no psychotic symptoms and did not appear psychotic. He reported no prior psychiatric admission or outpatient treatment. Etienne did, however, reveal to his caregivers a significant criminal history, which included, among other things, charges for attempted murder when he was just 13 for his alleged role in a Haitian gang-related shooting. The state habeas court noted those incriminating revelations when explaining why, if disclosed, such medical records might prove more harmful than helpful to Etienne.

Two years later, in 1997, Etienne was charged with attempted murder and first-degree assault arising from a shooting in Nashua, New Hampshire. He was tried four times before eventually securing an acquittal in November of 2001. The court recounts those multiple criminal trials for this reason: throughout the numerous and lengthy judicial proceedings associated with his four criminal trials (and at least one appeal), Etienne's mental status was never questioned, either in the context of his competency to stand trial or as a potential

mitigating factor for his alleged conduct. Similarly, in his criminal trial on witness tampering charges (which followed his 2004 murder trial), no questions concerning his mental health or competency to stand trial were raised. If Etienne was, as suggested by Dr. Drukteinis, suffering from some sort of "prodromal schizophrenia" when he shot Larry Lemieux in 2004, he concealed its symptoms well from his family, friends, and most importantly, his lawyers.

After conducting the evidentiary hearing, the state habeas court rejected Etienne's claim that his trial attorneys provided constitutionally deficient representation whey they failed to recognize his claimed mental illness in 2004. The court concluded that trial counsel were not actually aware of any potential mental health issues. Moreover, because evidence of any potential mental illness at the time was so diffuse and well-concealed, it could not be said that counsel should have recognized that he might be mentally ill. In support of those conclusions, the habeas court noted, among other things, that:

> 1. [Etienne] was diagnosed for the first time with schizophrenia by Paul Brown, MD. On August 4, 2015, Etienne informed Dr. Brown that he began hearing voices in 2013. Suffice it to say that his presentation in 2015 was markedly different from what his lawyers described in 2004. State Habeas Decision at 10.

2. "The information known to the lawyers that might have prompted the collection of records was not suggestive of a mental illness that would have resulted in a change of strategy or a supplement to the defense. There is no credible argument that the shooting was a product of mental illness or that Etienne's mental illness impacted his mental state at the time of the shooting, nor was mitigation an issue." Id. at 23.

3. "Landry [trial counsel] had a long-term relationship with Etienne during which he gleaned no evidence of mental illness. Mirhashem [co-counsel] shared this view, and indicated that he was particularly sensitive to raising issues if there was anything to note. The investigator, who enjoyed the best relationship with Etienne and worked very closely with him due the restriction on Etienne keeping his discovery, brought no concern to the lawyers about Etienne's ability to work on his case or his behavior." Id. at 23.

4. Trial counsel interviewed approximately fifty people who knew Etienne, "only one of whom even remotely suggested some paranoia, fairly weak evidence at that." Id. at 24.

5. Etienne's hospitalization for a suicide attempt when he was a minor occurred in the context of his having been depressed about the death of his father. He did not present with symptoms of mental illness. Additionally, that incident took place many years before the events at issue in the murder trial. Id. at 25.

6. "Of the many lawyers representing Etienne, not one has had him evaluated or noted a mental health issue, including the lawyer who represented him in the witness tampering case in 2011, the very conduct [i.e., threatening letters from jail while awaiting his murder trial] Etienne now alleges would have been explained by his mental illness." Id. at 27 (emphasis supplied).

> 7. "Although Etienne's [habeas] lawyer culled out every record reference to support a claim that mental illness was the cause of the petitioner's behavior, given the amount of time the records span, from 1995 to the end of 2004, there is little to warrant concern about delusions or paranoia having influenced his behavior pending trial. The majority of the information points to depression, as was diagnosed in 1995, and there was no evidence that he was experiencing auditory hallucinations in 2004. The hints of schizophrenia were buried far too deep for the lawyers to have seen them during this period." Id. at 27 (emphasis supplied).

Finally, the court credited the expert testimony of Dr. Fife over that of Dr. Drukteinis. The court acknowledged Dr. Drukteinis's opinion that "Etienne is currently suffering from schizophrenia as diagnosed by [the prison doctor] and likely was suffering from at least prodromal schizophrenia at the time of the 2004 trial." Id. at 19. Nevertheless, the court noted that "Dr. Fife did not share Dr. Drukteinis' view." Id. at 20.

> Dr. Fife recognized that schizophrenia is progressive and could wax and wane, but she saw no evidence that a psychotic disorder was active at the time of the 2004 trial. She indicated that it can be difficult to know if a person is concealing symptoms when they do not self-report. However, from her current interviews with Etienne and the records she reviewed from the period around 2004, Dr. Fife stated that she could not conclude that mental health symptoms were present at the time of trial that would have interfered with Etienne's ability to work with his attorneys. She noted that the records lack evidence of a contemporaneous mental illness that would explain or attempt to explain the actions Etienne took around 2004.

Id. at 21 (emphasis supplied). The court found Dr. Fife's testimony and opinions more persuasive than those of Dr. Drukteinis and, as it was entitled to do, relied more heavily upon her testimony.

The state habeas court properly recognized that, "the question is not whether the defense could have found some evidence to support an argument that the petitioner was mentally ill, but rather whether, given what was before the lawyers, a reasonably competent lawyer would have pursued the evidence based on the totality of what was known and the viable defenses." Id. at 24. The court answered that question in the negative. That conclusion, which is amply supported by the record and consistent with Supreme Court precedent, is fatal to Etienne's ineffective assistance claim. See, e.g., Knight v. Spencer, 447 F.3d 6, 15 (1st Cir. 2006) ("It is only where, given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it, that the ineffective assistance prong is satisfied.") (emphasis supplied; citation and internal punctuation omitted). For that reason, Claim 1 of his petition fails.

B. Etienne was not Prejudiced.

Despite concluding that Etienne's attorneys did not provide constitutionally deficient representation, the state habeas court went on to consider Etienne's claim that he was prejudiced by his lawyers' failure to investigate his mental condition: that is, his assertion that the result of his murder trial would have been different because, armed with such information, he could have either negotiated a plea agreement with the State or explained to the jury why he engaged in such incriminating post-shooting behavior.

The state habeas court sustainably rejected that claim as well. Among other things, the court found:

1. "The court accepts the lawyers' testimony that Etienne never authorized his lawyers to negotiate a plea bargain or expressed a desire to accept one given the likely result of release from prison when Etienne was in his fifties, a daunting thought when there was a reasonable chance of freedom. This is not a circumstance where the lawyers advised their client to plead guilty and the advice was refused or the client was persisting on going to trial in the face of insurmountable odds. Rather, the lawyers' and Etienne's evaluations of the case were in line and logically based on what was known when the decision was made. The fact that Etienne was convicted does not render the assessment of the strengths and weaknesses of the government's case incompetent." Id. at 33.

2. "Etienne also alleges that counsel was ineffective for failing to develop background

> information with which to negotiate a plea bargain. However, as discussed above, Etienne never expressed an interest in a plea bargain and never authorized his lawyers to seek one. He was not a neophyte to the criminal process. The lawyers evaluated the strength of the State's case with him. Their efforts were rightly put towards trial preparation, and the court takes no issue with the attorneys' view of this case being a triable one. There was ample evidence supportive of the defense, which would have resulted in Etienne's freedom had the jury believed it. In fact, after sitting through the whole trial, as did the jury, Etienne still rejected a plea to manslaughter [which the State offered after closing arguments]." Id. at 35 (emphasis supplied).

3. "Had the petitioner been evaluated or mental health concerns been shared, the State would have been privy to all the information contained in the records, good and bad, including the petitioner's early gang involvement, the attempted murder [when he was just 13], the theft, and his prior probationary period. The negative information contained in the records would likely have outweighed any sympathy that could have been engendered by identifying Etienne as mentally ill. The court is hard pressed to see how that information would have resulted in more favorable treatment by the State or an acceptable plea bargain." Id.

As an aside, it is unclear how Etienne believes evidence of his (potential) mental illness in 2004 might have prompted a more favorable offer than the one actually made by the State. Despite having the benefit of knowing all the evidence of his guilt that was presented to the jury, Etienne still rejected the State's offer of a plea to manslaughter.

The court need not belabor the point. The factual conclusions reached by the habeas court are amply supported by the record. And, more importantly, Etienne has not shown, by clear and convincing evidence, that the state habeas court's adjudication of his federal constitutional claims "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). See generally Yeboah-Sefah v. Ficco, 556 F.3d 53, 66 (1st Cir. 2009) ("AEDPA sets out a separate and exacting standard applicable to review of a state court's factual findings. The state court's factual findings are 'presumed to be correct' unless the petitioner rebuts this 'presumption of correctness' with 'clear and convincing evidence.'") (quoting 28 U.S.C. § 2254(e)(1)).

II. Claim Two – Exculpatory Evidence.

On direct appeal of his murder conviction, Etienne claimed "that he was denied access to exculpatory information by the State in violation of his due process rights under the United States and New Hampshire Constitution." Etienne, 163 N.H. at 88. As noted above, the undisclosed evidence was a letter from the New Hampshire Attorney General's Office, recommending that Jose Gomez (a witness called by the State in Etienne's murder trial) receive a suspended sentence on state drug charges. Id.

at 87. It probably bears noting that the proffer letter was not related in any way to Etienne's murder trial or Gomez's expected testimony at that trial; it pertained solely to drug trafficking charges against Gomez and his efforts to reduce his sentence by sharing with the Manchester Police Department his "knowledge of illegal drug activities in the Manchester area." See Id.

The New Hampshire Supreme Court resolved that claim against Etienne, concluding that although he had shown that the withheld evidence would have been favorable to his defense (to impeach Gomez's credibility), such evidence would not have altered the outcome of the trial:

> We [like the trial court] conclude that the undisclosed evidence would not have altered defense counsel's strategy, which centered on impeachment of Gomez. We also find, beyond a reasonable doubt, that the evidence would not have altered the outcome because even if the impeachment had caused the jury to disregard Gomez's testimony altogether, there was overwhelming additional evidence of premeditation before the jury.

Id. at 92. Etienne disagrees and asserts that the New Hampshire Supreme Court deprived him of his constitutional rights when it "found that the new impeachment evidence regarding Gomez was cumulative of other evidence and the State could have proved premeditation without the testimony of Gomez." Amended Petition at 20-21. Specifically, he argues that:

> The state court's determination of the facts on this issue is unreasonable because it relies on trial counsels' attempts to establish that Gomez got a "deal," while failing to consider the fact that these attempts failed. The decision is also an unreasonable application of the facts, as it fails to consider the resulting prejudice from the State's vouching for Gomez's credibility in their closing argument. Contrary to the state court finding, Gomez's testimony was unparalleled in supporting the State's argument that Mr. Etienne committed first degree murder. Gomez claimed that prior to the shooting, Mr. Etienne said, "it's a wrap" and that he was going to "merk" Lemieux and that these terms meant that Mr. Etienne was going to kill Lemieux.

Petitioner's Memorandum (document no. 36) at 15.

The court disagrees. As the New Hampshire Supreme Court noted, counsel's efforts to impeach Gomez did not "fail." They were, in fact, quite successful. The withheld evidence would have merely bolstered their impeachment of him. Moreover, the New Hampshire Supreme Court did not misapprehend the potential value of the undisclosed impeachment evidence. Indeed, it recognized that:

> The defense strategy included an argument that Gomez was not a credible witness because he had, in all likelihood, received a "deal" on his drug charges. The defense questioned Gomez extensively about his belief that he had received no such deal, established the actual sentence Gomez received, and attacked the sentence by implying that it was inadequate in light of Gomez's criminal history and the charges he had been facing. The defense also argued during its closing that Gomez's testimony was not credible

> because he had received an insufficient sentence for his drug charges and had become part of the prosecution's "team."
>
> The proffer letter, if disclosed, would have provided evidence that Gomez had attempted to cooperate with the State on the unrelated drug charges, and would have supported the defendant's assertion that Gomez had allegedly joined the prosecution's team. It would not have established that Gomez received any consideration for his testimony at the defendant's trial.

Etienne, 163 N.H. at 92. Overall, the court concluded that counsel's multi-pronged impeachment of Gomez was quite effective and evidence of his efforts to cooperate in an unrelated case of his own was only one aspect of that assault on his credibility:

> The defendant challenged Gomez's credibility in several additional respects. Gomez testified while wearing his New Hampshire State Prison clothing and fielded questions from both parties about the sentence he was serving at the time. He discussed his actions with regard to possessing a firearm and hiding Lemieux's gun, the charges leading to his imprisonment, as well as the lies he had apparently told to police on prior occasions. Gomez's cooperation with the State to receive consideration in an unrelated case, therefore, was only one of the areas in which the defense attempted to discredit him, and the remaining avenues of impeachment were unaffected by the undisclosed information.

Id. at 92-93 (emphasis supplied). And, finally, the court found that, "Gomez's testimony at trial, while providing some evidence of premeditation, was not the primary, exclusive, or crucial evidence on that element. . . [M]any witnesses testified to the

events leading up to the homicide, to the circumstances of the homicide, and to the defendant's actions thereafter." Id. at 93.

Those factual findings are amply supported by the record. While Etienne plainly disagrees with some, if not all, of them, he has not rebutted the presumption of correctness afforded to those findings by clear and convincing evidence. Necessarily, then, Claim 2 of his petition also fails.

Conclusion

Etienne's habeas corpus petition is, in essence, an effort to relitigate factual findings that were resolved against him by both the New Hampshire Supreme Court and the state habeas court. Having reviewed the record, as well as the arguments advanced by counsel, the court necessarily concludes that he has not overcome the presumption of correctness afforded to those findings. See 28 U.S.C. §§ 2254(d)(2) and (e)(1). Nor has he demonstrated that either state court's resolution of the federal constitutional issues before it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

For the foregoing reasons, as well as those set forth in the respondent's legal memoranda, the respondent's Motion for Summary Judgment (**document no. 24**) and its Supplemental Motion for Summary Judgment (**document no. 33**) are granted. Respondent's Motion to Dismiss Claim Two of the Petition (**document no. 31**) is denied as moot. Etienne's Amended Petition for a Writ of Habeas Corpus (**document no. 28**) is denied.

The Clerk of Court shall enter judgment in accordance with this order close the case.

Because Etienne has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the court declines to issue a certificate of appealability. Petitioner may, however, seek such a certificate from the court of appeals under Federal Rule of Appellate Procedure 22(b). See Rule 11, Federal Rules Governing Section 2254 Cases (2010); 28 U.S.C. § 2253(c).

SO ORDERED.

Steven J. McAuliffe
United States District Judge

October 21, 2020

cc: Donna J. Brown, Esq.
Elizabeth C. Woodcock, Esq.

THE STATE OF NEW HAMPSHIRE APR 0 2 2018

SUPREME COURT

In Case No. 2018-0093, State of New Hampshire v. Dickens Etienne, the court on March 29, 2018, issued the following order:

Notice of appeal is declined. See Rule 7(1)(B).

Under Supreme Court Rule 7(1)(B), the supreme court may decline to accept a notice of discretionary appeal from the superior or circuit court. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who considered this matter believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Hicks, Lynn, Bassett, and Hantz Marconi, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
Merrimack County Superior Court, 216-2004-CR-01715
Honorable Diane M. Nicolosi
Donna J. Brown, Esquire
Appellate Defender
Elizabeth C. Woodcock, Esquire
Sean R. Locke, Esquire
File

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

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

NOTICE OF DECISION

File Copy

Case Name: **State v. Dickens Etienne**
Case Number: **216-2004-CR-01715**

Enclosed please find a copy of the court's order of January 23, 2018 relative to:

Order

January 24, 2018

Tracy A. Uhrin
Clerk of Court

(003)

C: Offender Records; Elizabeth C. Woodcock, ESQ; Donna Jean Brown, ESQ; Sean R. Locke, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

State of New Hampshire

v.

Dickens Etienne

Docket No. 216-2004-CR-1715

ORDER

Dickens Etienne seeks a new trial based on alleged ineffective assistance of counsel during his 2004 criminal trial on a first degree murder charge. He alleges his lawyers failed to 1. investigate and review his mental health records and take follow-up steps; 2. prepare for and seek a negotiated plea bargain; 3. object to the introduction of his pre-arrest declination to speak with the police about whether he shot the victim in defense of others and self; and 4. request special questions during *voir dire* about possible racial bias. He raises his claims under part 1, article 15 of the New Hampshire Constitution and the, 5th, 6th and 14th Amendments to the United States Constitution. Etienne also contends that his mental health constitutes newly discovered evidence and, under RSA 526:1, a new trial should be granted. Finally, he urges this court to revisit the Supreme Court's finding of harmless error in his direct appeal, State v. Etienne, 163 N.H. 57 (2011). The State objects.

A hearing was held on June 29 and 30, and July 31, 2017. The State and Etienne presented expert testimony about schizophrenia and Etienne's mental health history before and after the murder trial. Etienne's trial attorneys, Behzad Mirhashem and Timothy Landry, testified, as did Etienne. Numerous exhibits were introduced,

including the transcripts from the 2004 trial, the parties' expert reports, records from the NH State Prison, the Hillsborough County House of Corrections and Faulkner Hospital, and the depositions of Mirhashem from 2008 and 2017. Pending at the time of hearing were the State's motion for summary judgment and Etienne's Objection. Post-hearing memoranda were filed by both sides in August and September, 2017, and the parties incorporated their arguments previously made in the summary judgment motion and objection. The motion for summary judgment is DENIED, as material issues of fact are in dispute, including but not limited to whether sufficient indicia existed that Etienne was mental ill during trial preparation such that his lawyers should have investigated and consulted with an expert. After consideration of the evidence, the parties' pleadings and arguments, and the applicable law, the court DENIES the motion for new trial on the merits.

Factual background

Etienne fatally shot Larry Lemieux in the head on January 28, 2004. The shooting took place mid-day on the porch of a multi-family residence where Etienne and a number of the witnesses had lived or socialized. Etienne was arrested the next day and detained at the Hillsborough County House of Corrections pending trial. He was initially charged with second degree murder, but, on July 15, 2004, the State indicted him for first degree murder. Dickens Etienne was convicted of first degree murder on November 23, 2004.

In the summer of 2015, while at the New Hampshire State Prison, Etienne exhibited symptoms of a mental illness, including paranoia and hearing voices talking to him and about him. After being tested for malingering, Dr. Brown, a staff psychiatrist at

the prison, diagnosed Etienne with schizophrenia, paranoid type. This was the first time he was diagnosed with schizophrenia, approximately eleven (11) years from his conviction when he was in his mid-thirties. There is no credible claim that Etienne's mental status at the time of the offense would have given rise to a challenge to the State's proof of *mens rea*, mitigated the level of offense at trial, or served as a basis for an insanity defense. Nor is there a credible argument that discovery of the records or a schizophrenia diagnosis would have effected the admissibility of inculpatory evidence.

Pre-trial Hospitalization

On October 30, 1995, Etienne was admitted to Faulkner Hospital as a result of an overdose of pills and detergents, an apparent suicide attempt when he was 18 years old.[1] He was discharged on November 3, 1995. This was his first and only hospitalization. The records reflect no prior history of mental health treatment. His friend and aunt, with whom he lived, expressed shock and puzzlement about his actions. They noted the recent loss of his father on January 13, 1995 and school pressures. Etienne reported the death of a friend in a bus accident in the week or so prior. Etienne consistently denied he wished to die and explained his suicide "gesture" on his desire to see what it would be like to be dead, communicate with his deceased mother and father about their deaths, and see the reactions of his friends and family. His ideas about dying came from reading magazines and newspapers and viewing

[1] The Faulkner records list Etienne's date of birth as May 8, 1977 and refer to him being 18 years old at the time of admission. However, all other records, including the court, jail and prison records, have his date of birth as May 8, 1979. According to a March 15, 2004 file note, Etienne told Mirhashem that he had lied about his age by two years -- that he was 24 not 26 years. The court questions the correctness of the note and whether it should have read that he was 26 not 24, consistent with Mirhashem's testimony, because if Etienne were 24 in March, 2004, the 1979 date of birth on the jail, prison and court records would have been correct, so there would have been no lie to correct. If, however, he were born on May 8, 1977, as reported to Faulkner, he would have been 18 years old when admitted to Faulkner, which would be consistent with the substance of the reports that he was in the twelfth grade and worrying about moving into adulthood. The court expects, therefore, that the year of his birth is 1977.

television about near death experiences. All of his complaints while at Faulkner focused on depression, most of which seemed related to his personal losses. He reported no psychotic symptoms and did not appear psychotic. He reported no prior psychiatric admission, outpatient treatment, suicide gestures or attempts or any suicidal ideation.

While hospitalized, Etienne described his arrest at 13-years old for attempted murder during which he carried a sawed-off shot gun while retaliating as part of a Haitian gang. He reported having been shot in the ankle when he was 16, an injury he complained about while incarcerated at the house of corrections. He had been on probation for theft and, for the two years since it had terminated, voluntarily kept up weekly contact with his probation officer. He was a high school senior, and maintained a part time job as an assistant cook. He had familial and social supports, including a friend on whom he relied when he was depressed, and a girlfriend of two years. In addition to his losses, it was noted that he had low self-esteem and concerns about moving into adulthood, but had goals for the future. He was ultimately diagnosed with an Axis I Adjustment Disorder with mixed emotional features and no Axis II diagnosis. The records are devoid of any comment on behavior that could be construed as psychotic or paranoid. The recommendations upon discharge were for Etienne to follow-up with Brighton Allston Mental Health and a mentor/mentee program. It is unclear whether he followed this advice. There is some reference in jail records to treatment with Prozac for three years for depression and headaches, but no record verification was obtained from any mental health center.

Previous Criminal Trials

In 1997, Etienne was charged with attempted murder and first degree assault. Etienne ultimately was tried four times. He was incarcerated from 1997 to 2001 when he was finally acquitted. He was represented by Landry during the first three trials with various lawyers serving as co-counsel, including Stuart Horowitz and James Quay. He was represented by new counsel during his last trial.

The first trial ended in a mistrial, because an FBI agent failed to disclose material information about the case to the defense. The second trial ended in a hung jury. The third trial resulted in a guilty verdict, which was later vacated due to misconduct on the prosecutor's part. The fourth trial resulted in an acquittal. Ultimately, Etienne served five years for a crime for which he was eventually acquitted.

Jail Records Pre-Conviction

Hillsborough County House of Corrections Records

The court reviewed records from the Hillsborough County House of Corrections from September 2, 1997 to December 8, 1998. A form, entitled Receiving Screening/Health Assessment, dated September 2, 1997, reflects that Etienne was not taking any medication upon entry into the jail; his behavior, history or physical appearance did not suggest a risk of suicide, assault, or psychiatric condition; he had attempted suicide two years prior; he was not feeling suicidal or depressed; and he indicated only that he had been treated by a psychiatrist or mental health provider when hospitalized in Boston two years prior.

A form, entitled Dispensary Card, provided a chronology of Etienne's complaints, assessments and care during the fifteen-month period. As with the screening form, it is

noted that Etienne informed jail personnel that he never had any significant medical or psychiatric treatment and was not on any medication. Because of the high profile nature of his alleged crime, he was placed on behavioral watch for the first week or so. Nothing of concern was noted. A note, dated March 27, 1998, indicates, upon Etienne's complaint of a headache, that he had a three-year history of headaches related to depression and had been treated with Prozac prior to his pretrial incarceration. In sum, the records reflected no complaint or treatment while incarcerated for any mental health issue, including depression, nor were there any complaints or observations that would suggest paranoia or audiovisual hallucinations or suicidality.

The court also reviewed records from March 21, 2001 to November 9, 2001. A Medical History and Screen form, dated March 21, 2001, reflects that Etienne indicated affirmatively that he had had a prior hospitalization or treatment for a psychiatric problem and had considered or attempted suicide, but had no current feelings of depression, sadness, desire to harm himself or others, and was not hearing voices. A form, entitled Master Problem List, dated the same date, noted a diagnosis for ADHD for which he took Ritalin for a period ending in 1996 (not reflected in the 1995 records from Faulkner Hospital or anywhere else).

The court reviewed the 2001 Interdisciplinary Progress Notes for the seven plus-month period. On admission, Etienne denied any mental health issues, and initially even denied a suicide attempt in 1995, but then admitted it saying, "I was only 16 years old, I wanted to see what it felt like." On April 22, 2001, Etienne submitted a Health Services Request Form indicating that he was stressing due to the trial date coming up. It is noted by the nurse that he was looking at "35 – 70 years." The Assessment does

not note any mental health issue; rather what is identified is: "Reality." On May 27, 2001, he reported to mental health that he had suicidal ideations at times and occasional audiovisual hallucination of conversations, resulting in the start of a behavioral watch without incident. On August 27, 2001, he was placed on behavioral watch due to suicidal ideations until September 5, 2001. There were no complaints by Etienne of audiovisual hallucinations or any observation of unusual behavior. On August 27, 2001, a social worker indicated that Etienne's mood was depressed, and he reported on a scale of 0 to 10 that he was at an 8 for depression. He reported attempting suicide three times, once "at home" in 1995 by cutting wrists (inconsistent with the Faulkner reports), and two times while at the NH State Prison. Etienne "reported [the] upcoming trial on September 10 as his 4th trial." On August 29, 2001, he reported to the social worker continued suicidal ideation at times. He also reported hearing voices at times, but seemed evasive. On August 30, 2001, the psychologist noted that Etienne was "subdued" and "clearly focused on his upcoming trial in [two weeks] as he is looking [at] significant time if found guilty." He denied suicidality or any hallucinations. On September 5, 2001, he denied suicidality or audiovisual hallucinations.

The court also reviewed the House of Corrections records from January 29, 2004 to November 23, 2004. A January 30, 2004 Medical History and Screen form indicates Etienne reported that he had been diagnosed with Bipolar disorder in 1989 (he would have been 10 or 12 years old and no such report was given to Faulkner or to the jail or prison previously, nor is it reflected in any other record) and had been treated for a psychiatric problem in 1995 with no current treatment. He reported no feelings of

depression, sadness, desire to harm himself or others, and was not hearing voices. His mental health screening on the same date reflected his report of only one suicide attempt in 1995 and no current issues, and included observations that he was not acting or talking in a strange manner, such as being unable to focus attention or hearing or seeing things that were not there. He indicated that he had suffered a significant loss in the prior six months, that being the "murder" of his friend on January 28, 2004.

The court reviewed the Interdisciplinary Progress Notes spanning Etienne's detention for the eleven-month period before his transfer to the NH State Prison following his homicide conviction and sentencing. On March 26, 2004, it was reported that Etienne threatened suicide by hanging due to his girlfriend informing him she was going to end the relationship; however, he denied he made such statements. Nonetheless, he was placed on behavioral watch until March 29 with no concerning or unusual behavior noted.

From May 4 to May 21, 2004, Etienne was placed on special watch for allegedly swallowing a razor blade. No foreign body, however, was found or observed on x-ray despite his representation that he had not defecated, and he consistently denied discomfort or pain. On May 7, 2004, he was observed smiling and acting appropriately. A psychologist's note, dated May 8, 2004, indicates that Etienne was smiling and offered to shake the doctor's hand. Etienne denied he had swallowed the razor blade as a suicide attempt, but explained that he was told to swallow it, but refused to say by whom, and that he and other inmates did so to draw attention to the beatings they received from correctional officers on second shift. He told a friend on the telephone that he tried to commit suicide by swallowing a razor blade to see where you go from

here. He reported that he had swallowed razors before while at the New Hampshire State Prison and in Haiti and had eaten glass without bad consequences (Etienne came to the U.S. according to the Faulkner Hospital records when he was 8 years old). No hallucinations were reported, and no apparent delusions or paranoid behavior were noted.

A social worker's note, dated May 11, 2004, indicated appropriate behavior and no issues to report. The same social worker noted, on May 13, 2004, Etienne's report of a depressed mood "due to legal charges and prospect of a lengthy prison sentence." He also reported "auditory hallucinations, for years [and that v]oices "sometime" tell inmate to hurt himself." The psychologist noted, on May 21, 2004, there was no evidence of any thought disorder, and that Etienne spoke of wanting to re-unite with his pregnant girlfriend and was future oriented. Etienne reported working on his legal issues and had an expectation of meeting with his lawyers that day and seemed hopeful for release. Etienne also indicated that he had sold a lot of drugs and had a desire to move away from Manchester to avoid "personal vendettas." Significantly, the psychologist noted that the 1995 Faulkner Hospital "records were reviewed and show[ed] no evidence of hallucinations during that [inpatient] stay." Throughout the eighteen-day observation, nothing unusual was observed about Etienne's conduct or behavior.

New Hampshire State Prison Records

According to Dr. Drukteinis and Dr. Fife, prison records generated in 1998, after Eitenne was convicted of attempted murder and pending appeal, reflect two suicide attempts or gestures (attempted hanging and swallowing a razor) and an incident when

he smeared feces in a day room. Dr. Fife indicated this behavior is not typical of schizophrenia, and could have been born of a number of causes, including anger and attention seeking. According to Dr. Fife, in 2001, Etienne reported auditory and visual hallucinations, but refused treatment with medications. No "clear psychosis" was noted.

Etienne transferred to the State Prison on November 23, 2004 following his first degree murder conviction and sentencing. He was admitted to the Secure Psychiatric Unit ("SPU") on June 23, 2015, his first admission, after overdosing on trazadone while at the Secure Housing Unit ("SHU') and exhibiting bizarre behavior while at the medical unit. He was diagnosed for the first time with schizophrenia by Paul Brown, MD. On August 4, 2015, Etienne informed Dr. Brown that he began hearing voices in 2013. Suffice it to say that his presentation in 2015 was markedly different from what his lawyers described in 2004.

Concerns about Lawyers and Failure to Follow Advice

In June 1998, during an attorney-client meeting, Etienne expressed concern that he had been misinformed about the substance of a motion. His indicated his mother was hiring private counsel, and although he did not want new counsel, he was so bothered by the misinformation that he did not know what to do. Landry offered to file a motion for status of counsel. The following day Landry and Etienne met again and Etienne expressed concern the public defenders worked for the State instead of working on his behalf and had released confidential information to the State. Counsel explained the public defender system and the source of Etienne's misunderstanding about the motion for mistrial. Etienne's concerns were apparently alleviated, because he eventually contacted Horowitz and indicated he did not want new counsel.

In May 2001, Etienne asked the court to dismiss his public defenders by filing a motion to that end. He represented that he had filed a professional conduct complaint against Landry, of which Landry had no recollection, and that he had an "irreconcilable Client-Lawyer relationship with Attorney Landry and Attorney Quay and numerous disagreements[.]" In granting the motion, the court noted that this was the first motion of its kind filed.

Etienne wrote a letter, dated March 8, 2004, to his lawyers, Buzz (likely Behzad) and Landry expressing concern that Mirhashem had released confidential information to the State. Apparently when trying to negotiate an acceptable bail arrangement, defense counsel had informed the prosecutor that Etienne's record was minimal and included only a resisting arrest and detention conviction. The resisting arrest conviction was later noted during the bail hearing by the prosecutor. Assuming the source of information was his counsel, Etienne was upset by what he believed was a breach of confidentiality. The letter was received by Mirhashem and Landry on March 11, 2004.

A memo from Mirhashem to Landry, dated March 15, 2014, noted that Etienne told Mirhashem that he had lied about his age by two years and he was not stupid because he is black. Mirhashem assured Etienne they did not believe black people were stupid or that he was stupid. The memo also reflected that Etienne was still talking and calling people against his lawyers' advice.

A memo, dated April 8, 2004, indicated that Etienne talked to Cameo Jette every day and was advised not to discuss the case with her. The memo also noted a question whether Etienne wanted other counsel and options were discussed.

All of these complaints must have been addressed, because Mirhashem testified that if Etienne had asked for new counsel, they would have requested a status of counsel hearing, which did not occur. Counsel remained in place.

Conduct Pending Trial

Before Etienne's first degree murder trial, he sent a series of letters to various recipients, including the Manchester Union Leader, governor, and presiding judge. The letter to the newspaper is not available, although the printed article contains some information about its content. It was published early on in the case, around the time of the probable cause hearing. He accused the Manchester police of misconduct, including trying to frame him by bribing people with large sums of money to plant drugs or guns around him to get him for "such charges." He professed his love for the victim, and contended that he protected him like a son and would not harm his friends. He did not discuss any details of the shooting or name a perpetrator.

By letter postmarked July 23, 2004, Etienne sought the assistance of Governor Benson. Etienne described the defense he intended to present at trial, that of defense of others and self, and suggested that the prosecution was racially biased. He also explained that his initial lies to the police were born of distrust due to prior interactions with the Manchester police.

In July 2004, Etienne wrote a letter to the judge presiding over his case. Etienne asked the judge to recuse himself, because he believed the judge was racially biased. He also outlined his defense and his distrust of the Manchester police to explain his initial lie about his whereabouts when the shooting occurred, as he did to Governor Benson.

Etienne also communicated to his friends via letter and phone calls. He made two calls to Autumn Millette just days after the shooting giving different lies about his whereabouts and denying the shooting. In February, Etienne signed to Gomez that "P" was the shooter while both were in a holding cell at district court. He wrote a letter to Gomez, dated February 7, 2004, indicating that a Massachusetts compatriot was in New Hampshire to make sure no one testified against him and directing Gomez to tell witnesses to keep their mouths shut. He wrote to Hannaford in February identifying the witnesses who were lying about him being the shooter and urging her to tell Pierre to keep his mouth shut, not to talk to the police, and to see what he could do about David Garcia, an eye witness. He accused the police of trying to "take his life" by falsely convicting him. He wrote another letter to her in March identifying Pierre as the shooter. By August, he wrote to her changing his story admitting he shot Lemieux, but claiming he did it in defense because Lemieux went for the gun. He told her to tell Pierre to "come forward and tell the truth," the truth being that Lemieux had the handgun when he was shot.

Etienne wrote a series of letter to his girlfriend, Jette, the first within days of his arrest, directing her to share statements of two adverse witnesses from discovery with other friends. She testified Etienne spoke with her by telephone every day for the first three weeks and thereafter two times per week until May. According to a psychologist note, it appears they broke up by late May. In March and April, he wrote letters that he had people in prison and friends from Chicago who would make sure witnesses would not talk or testify against him and discussed who would and would not testify. In a number of letter he discussed who was on his "list," assumedly a hit list. By the end of

May, he began discussing the defense of self or others, but still denied he was the shooter and suggested it was Pierre. He wrote to Pierre at one point and told him to say that the victim's friend, LaTorre Johnson, was the shooter.

In sum, variously in his communications, Etienne lied about his involvement in the shooting, pointed a finger at others for the victim's death, complained that the police were trying to get him for a crime he did not commit, enlisted others to deliver information about the case and directions to his compatriots, and manipulated and threatened witnesses aimed at getting people to refuse to testify or testify falsely.

Post-Trial

Etienne was convicted of numerous witness tampering charges in 2011 that were brought in connection with his efforts to influence the testimony of witnesses before the homicide trial. He was represented by Harry Starbranch. Apparently, he was not evaluated nor was a mental health defense raised to explain his conduct.

On January 26, 2005, the first motion for new trial was filed on Etienne's behalf by Mirhashem and Landry in which he alleged the State withheld favorable exculpatory evidence regarding a "deal" Gomez had with the State on unrelated drug charges and that the State suborned perjury when Gomez testified he had no deal and received no consideration for his testimony. The motion was denied. No mental health issue was raised.

On September 12, 2007, Etienne filed a *pro se* motion for new trial, alleging ineffective assistance of counsel. He raised questions about his trial attorneys' alleged failure to call certain witnesses, empanel an unbiased jury, seek recusal of the judge, conduct proper discovery, and allow Etienne to testify. James Moir, Esquire, was

appointed to represent him, and supplemented the motion. On April 2, 2009, Etienne filed an unsuccessful motion to recuse Judge Barry, claiming he had had an intimate relationship with the trial judge's daughter in 2003. The motion was denied. Moir also filed a motion to withdraw at Etienne's request, which was also denied. No mental health issue was raised.

Mirhashem Testimony

Behzad Mirhashem testified at deposition and during the motion hearing. He presently has little recollection of his 2004 discussions with Etienne and much of his case memory came from document review. He endorsed the importance of a relationship of trust between lawyer and client, and although he did not recall having the strongest relationship with Etienne, he believed it was sufficient to provide effective representation. He was confident he would have assessed the strength of the case with Etienne, and believed they had a good case and Landry was confident they would win. Mirhashem testified that he had no specific memory of telling Etienne not to write letters or communicate with others about his case, but it was his practice to do so and believes he would have. In deposition, he affirmed that others clients have ignored that advice and some clients have written to the media and judges against his counsel.

Mirhashem saw no reason to request records for purposes of mitigation or plea, because Etienne never had an interest in anything but a trial from day one. He expected a State's offer would have been in the range of thirty plus years to life and a sentence from Judge Barry on a second degree plea would have been a life sentence. He did not strongly counsel Etienne to pursue a plea bargain or argue against Etienne's choice for trial as he might with a client who is wrongly evaluating the strength of the

government's case. In counsel's view, Etienne's was a very triable case with State's witnesses who had credibility issues and eye witnesses whose testimony substantiated the defense, even when weighed against the inculpatory evidence. During deliberations, the State raised the possibility of a plea to manslaughter, and Mirhashem may have suggested negligent homicide. Mirhashem was absolutely sure he would have discussed this exchange with Etienne even though it was not documented.

Mirhashem was not aware of the social history report dated November 20, 1998 prepared by a defense investigator during the attempted murder case.[2] He had no knowledge of Etienne having been hospitalized in 1995, but did not think he would have obtained the records based on a nine-year old suicide attempt. He was unimpressed that suicide records of such long past would have had "much explanatory power in terms of why he was writing letters 10 years later." 2017 Dep. at 104-05. He was not prepared to say even in retrospect that presenting a diagnosis of bipolar or paranoid schizophrenia to explain Etienne's communications would have been better than presenting the testimony of the correctional officer about conditions of confinement.

Most significantly, Etienne did not self-report any mental illness or prior hospitalization to Mirhashem. Mirhashem noted that, as a criminal defense attorney, he is much attuned to looking for any signs of mental incompetence. He testified that if Etienne had reported auditory hallucinations, he would have requested an evaluation.

---

[2] The court notes that the information in the report is very inconsistent with the history Etienne provided to his treatment providers and with reality. For example, it is reported that he stayed at Faulkner Hospital for 60 days, when in reality it was 3. It is reported that his mother is alive and parented him until he was 15 years old. When admitted to Faulkner he was living with his aunt, because his mother had died when he was two years old and his father and stepmother had recently passed away. It is reported that his younger sister, Dia, attempted suicide after their mother left, but it was reported elsewhere that this occurred when Dia was 14 years old. Finally, it is reported that his earliest memories are living with his parents in Brighton, MA, yet he reported to his treatment providers that he came to the US from Haiti when he was eight. Etienne also told his lawyers in 1998 that his mother was going to hire a private lawyer for him, despite the fact that his mother and stepmother were deceased.

He was aware Etienne had a difficult childhood, but did not endorse that he experienced "trauma." His interactions with Etienne around 2004 showed no signs of mental illness that would have triggered a request for a competency hearing or the pursuit of an insanity defense. Although he recognized that Etienne's letters contained what Etienne may have believed would exculpate him, he did not see the actions to be based on reason and logic. However, he did not believe the letters and communications were a product of some kind of mental illness or delusional in a clinical sense. Without self-reported mental illness or clear symptoms, Mirhashem questioned whether he would have thought it necessary to look farther into Etienne's mental health records, particularly given that Etienne was insisting on a speedy trial. The trial was held approximately ten months from Etienne's indictment, which was very fast and required more than a dozen depositions and the interview of some fifty witnesses. Etienne kept pushing Mirhashem and Landry to keep the trial moving and the State from continuing it. Mirhashem stated at the hearing that although they could not do everything, they did what was necessary to be prepared and still hold to their client's wish for a speedy trial.

Mirhashem also noted that, because Etienne insisted he would not enter into a plea bargain, there was no point in pursuing mental health records for use in mitigation. This is especially true because Etienne was charged with first degree murder, which carries a mandatory sentence of life without parole. The State did not make any plea offer until deliberations when they offered a plea to manslaughter. Mirhashem was confident he would have relayed that offer to Etienne.

Mirhashem also testified that he did not believe that it would have been a good idea for Etienne to testify at trial, and he would have advised against it. He was clear,

however, that he would not have told Etienne he could not testify, and the decision rested with Etienne. He prepares clients to testify only if there is a possibility that a client will do so, but Etienne never had such intent. The existence of the series of letters to the Union Leader, Judge Barry, Governor Benson, and witnesses in his case, as well as the original alibi claim, were all part of the reason Mirhashem thought Etienne should not testify. The chance was too great that having Etienne testify would allow the State to ask questions that would be damaging to Etienne, making not testifying the safer course. Moreover, counsel believed that Louis Pierre's testimony would be sufficient to establish that Etienne shot in defense of Pierre and himself.

In 2004, Mirhashem may not have been aware of a cross-racial identification instruction for *voir dire*, and he was not sure he had ever heard the phrase "implicit bias."

Landry Testimony

Timothy Landry was the person who had had the most contact with Etienne for eight years pre- and post-conviction for first degree murder. Although Etienne's case was one of the first homicide cases he handled, he had been a public defender for over a decade when he tried the case.

Landry was adamant that Etienne had no interest in a plea bargain or in testifying. He recalls Etienne rejecting the possibility of a manslaughter plea during trial. He indicated that Etienne believed testifying in his own defense equated to being a "snitch," which was contrary to his code. He recognized Etienne's February 23, 2004 letter to him directing him to arrange a sit down with the prosecutor so he could provide evidence against others on multiple crimes, but said this was very early on when

Etienne was still claiming alibi, and he would have counseled Etienne against the meeting. He believed it was at best a momentary lapse in Etienne's firm desire to go to trial. The court notes that Etienne, despite his contrary testimony, could not provide any details on cross-examination about the incidents or people about whom he allegedly was interested in providing evidence against, including the person serving a life sentence for a murder he did not commit.

Landry testified that he had a relationship of mutual respect with Etienne. There were times, however, when Etienne had difficulty grasping complex legal issues and when he would resist an unfavorable assessment of an issue, which would result in some conflict. However, their discussions were always polite. He was aware of the social history report, including the Faulkner hospitalization, and the suicidal behavior while detained that was in discovery. In retrospect, he testified he would have done nothing differently, even in light of the records and the information developed post-trial, and that introduction of evidence of paranoia would have undermined the defense presented.

Expert Witness Testimony

Dr. Drukteinis, for the petitioner, and Dr. Allison Fife, for the State, testified regarding Etienne's mental health, and the reports of the doctors were introduced. Dr. Drukteinis opined that Etienne is currently suffering from schizophrenia as diagnosed by SPU and likely was suffering from at least prodromal schizophrenia at the time of the 2004 trial. He points to behaviors during the pretrial period when Etienne engaged in what he describes as conduct that was irrational and undermining of his defense, specifically his distrust of his lawyers and failure to follow their advice about

communicating with others about his case. Ultimately, he concluded that Etienne's "schizophrenia contributed to paranoia about his attorneys and his irrational and at times self-incriminating actions, and those actions can now be more easily understood in light of his mental illness." Exh. 10, page 9. He opined that at least a "subclinical form" of schizophrenia was evident in 2004, and a "potential mental state issue should have been considered" and a comprehensive psychiatric evaluation should have been done. Id.

Dr. Fife did not share Dr. Drukteinis' view. She interviewed Etienne twice. During his interviews with Dr. Fife, Etienne was "pleasant, cooperative, comfortable" and appropriately careful with his responses related to the 2004 trial. He consistently and clearly attributed his behavior before and during the 2004 trial as the result of being "young and inexperienced" and too cocky and foolish. He admitted that he did not listen to his attorneys and now regrets sending the letters to the Union Leader, Governor Benson, and Judge Barry. He denied he was experiencing any auditory hallucinations during and before the trial.

Although Dr. Fife did not observe current symptoms of schizophrenia, she did conclude Etienne likely had a schizoaffective disorder lying on a spectrum between schizophrenia and a mood disorder. She did not note the flat affect in Etienne's face normally associated with schizophrenia even when medicated, and commented that his interactions with people in court were not consistent with schizophrenia. Dr. Fife concurred with Etienne self-reported diagnosis of antisocial personality. Antisocial personality disorder results in a pattern of actions taken against societal norms and in disregard for other persons or property. She also noted that Etienne could suffer from

post-traumatic stress disorder resulting from corporal punishment and difficult childhood experiences, but she could not reach a definitive diagnosis.

Dr. Fife recognized that schizophrenia is progressive and could wax and wane, but she saw no evidence that a psychotic disorder was active at the time of the 2004 trial. She indicated that it can be difficult to know if a person is concealing symptoms when they do not self-report. However, from her current interviews with Etienne and the records she reviewed from the period around 2004, Dr. Fife stated that she could not conclude that mental health symptoms were present at the time of trial that would have interfered with Etienne's ability to work with his attorneys. She noted that the records lack evidence of a contemporaneous mental illness that would explain or attempt to explain the actions Etienne took around 2004.

Analysis

The law concerning a claim for ineffective assistance of counsel is settled: to demonstrate a violation of this right, the defendant must show that his trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. State v. Eschenbrenner, 164 N.H. 532, 539-540 (2013); State v. Fecteau, 140 N.H. 498, 500 (1995)(quotation omitted). The standard for determining whether a defendant has received ineffective assistance of counsel is the same under the Federal and State Constitutions. State v. Whittaker, 158 N.H. 762, 768 (2009).

To assert a successful claim for ineffective assistance of counsel a defendant must show, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the

case. State v. McGurk, 157 N.H. 765, 769 (2008). To satisfy the first prong, the defendant must show that counsel made such egregious errors that he or she failed to function as the counsel guaranteed by the State Constitution. Id. The New Hampshire Supreme Court affords broad discretion to trial counsel when determining a trial strategy, and "indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Hall, 160 N.H. 581, 584-585 (2010). The New Hampshire Supreme Court has stated that it will give a "high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions counsel must make." State v. DeWitt, 143 N.H. 24, 32 (1998). In order to prevail, a defendant must show that no competent lawyer would have made the same decisions. State v. Brown, 160 N.H. 408, 413 (2010).

To satisfy the second prong, the defendant must demonstrate actual prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different if competent legal representation had been provided. McGurk, 157 N.H. at 762. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. Id. To obtain relief, a defendant must establish that there is a reasonable probability that the verdict would have been different to demonstrate actual prejudice. State v. Chace, 135 N.H. 209, 213 (1990).

The first question presented is whether counsel was ineffective for failing to pursue a mental health investigation and specifically whether they should have garnered records from the Hillsborough County House of Corrections, State Prison and Faulkner Hospital and had a psychological evaluation performed.

A.

Petitioner must first establish that counsel's representation was constitutionally deficient for failing to do further investigation into the petitioner's mental health history by obtaining records from Faulkner Hospital, the Hillsborough County House of Corrections and the NH State Prison. The court does not find that a responsible lawyer would necessarily have done so. The information known to the lawyers that might have prompted the collection of records was not suggestive of a mental illness that would have resulted in a change of strategy or a supplement to the defense. There is no credible argument that the shooting was a product of mental illness or that Etienne's mental illness impacted his mental state at the time of the shooting, nor was mitigation an issue. As far as Landry knew the petitioner had but one commitment to Faulkner Hospital for a suicide attempt nine years prior with no other known history of treatment and a questionable suicide attempt when he supposedly swallowed a razor. Mirhashem knew even less because Etienne was not forthcoming in his interviews. Etienne consistently reported to the jail and the prison that he had no current mental health issue and no current use of medication or treatment, and he received no treatment while incarcerated. He reported the same to his lawyers, which was consistent with his presentation throughout the case.

Landry had a long-term relationship with Etienne during which he gleaned no evidence of mental illness. Mirhashem shared this view, and indicated that he was particularly sensitive to raising issues if there was anything to note. The investigator, who enjoyed the best relationship with Etienne and worked very closely with him due the restriction on Etienne keeping his discovery, brought no concern to the lawyers about Etienne's ability to work on his case or his behavior. The lawyers had some fifty

people interviewed who knew Etienne, only one of whom even remotely suggested some paranoia, fairly weak evidence at that. In a pretrial interview, Jette, Etienne's girlfriend, told police Etienne could be jealous of others, including the victim, but she had no suspicion that he would kill him. She testified that Etienne believed other people were "snitching" on him, although in her view there was nothing to tell. Etienne's fear, however, that someone might inform on him was probably not unfounded given his involvement in drug trafficking, home invasions, and gang activity. It is far from unusual for law enforcement to garner evidence from one criminal facing consequences about others to better his or her plight. Nor is it unusual that one man might be jealous of the success of another with the opposite sex, which apparently the victim greatly enjoyed.

Furthermore, the content of Etienne's communications in large part was logical and goal directed -- to manufacture evidence and lie to provide himself an alibi; to point to others who may have had a motive and opportunity to kill the victim; to threaten and manipulate others to withhold inculpatory evidence; and finally, when all else failed, to use existing facts to develop a self-defense and defense of others claim. Although these efforts were inadvisable and self-defeating, the court does not agree they were irrational.

The question is not whether the defense could have found some evidence to support an argument that the petitioner was mentally ill, but rather whether, given what was before the lawyers, a reasonably competent lawyer would have pursued the evidence based on the totality of what was known and the viable defenses. The court answers this question in the negative. The Faulkner records, about which Attorney Landry was aware, were already two years old when he first met Etienne and nine years

old when his representation of Etienne on the murder case commenced. The incident occurred when Etienne was 18 years old, shortly after he lost his father, his only living biological parent, his stepmother, and a good friend. He did not present with any symptoms of mental illness or evidence of tangential or delusional thinking in his dealings with his lawyers or the defense investigator. He was fully engaged in his defense. He was able to understand and discuss his case logically, even if at times he disagreed. These were relationships with significant face to face time, and neither the investigator nor the lawyers, both of whom were very experienced, committed public defenders with significant involvement with mentally ill clients, developed any concern about Etienne's mental health. Although the stakes are higher, the preparation and presentation of a murder case does not differ from other serious felonies. The court found Landry credible and non-defensive and, to the extent there were memory lapses, they were consistent with the passage of time. The court puts much greater weight on their layperson assessments given the amount of contact they had with Etienne, particularly Landry, than on Etienne's self-serving testimony.

The court also does not give as much weight to Etienne's post-charging behavior as illustrative of mental health symptoms as he and Dr. Drukteinis do. The distrust of public defenders and conflict about strategic decisions are far from unusual given the lack of legal sophistication of most defendants and the incredible stress faced by someone charged with a crime as serious as homicide. Mirhashem testified at his second deposition that he has had hundreds of clients question whether public defenders work for the state. Nor is it uncommon for people engaged in criminal behavior to believe the worst of law enforcement or lack confidence in the justice

system, particularly someone with Etienne's background. This included police contact very early on in his life, youthful gang involvement, and two derailed attempted murder trials due to law enforcement misconduct. In fact, his friends shared his view. Garcia testified that he left the porch and ran after the shooting because "[he knew] how the Manchester Police Department was and [he] believed that [if they] stayed there that they would frame [them] no matter what [and] [e]veryone there would go to jail." TT 3, 185.[3] Gomez testified that per the "rules of the street," "you're supposed to keep your mouth shut and that "the only time we don't tell the truth is when we are talking to the cops." TT 2, 228. Rivera also lied to the police, TT 5, 11, as did Jenna Battistelli. TT 4, 103. The letters to the judge and governor occurred after the charges were elevated on July 15, 2004 from second degree to first degree murder, which undoubtedly and understandably would have increased Etienne's level of anxiety and desperation increased given the possibility of a life sentence. In addition, the court is not prepared to presume that a black man's view of racial bias is irrational and without foundation. Although Etienne's actions were far from helpful to his case, our jails and prisons would be much less populated if sound judgment were the hallmark of criminals.

In addition, perhaps most significantly, the court found Dr. Fife's opinion more persuasive than the petitioner's expert's conclusions. Dr. Fife testified that in her view mental health symptoms were not present at the time of trial that would have interfered with Etienne's ability to work with his attorneys or have driven his decisions to lie, manipulate and threaten witnesses. The court agrees. This was the path Etienne chose even before his contact with his lawyers when he fled, manipulated and lied to his friends, girlfriend and the police about not being present at the shooting, and disposed

[3] Reference is to the Trial Transcript, Day 3, Page 185, which will be the format used in this Order.

of highly incriminating evidence. Those actions and his later choices were more likely born of criminal thinking than paranoia or delusional thinking. In fact, the conduct continues. The court found Etienne's testimony unconvincing that he would have considered testifying, plea bargaining, and providing truthful information to the attorney general, or that he was unaware of the manslaughter offer until after conviction.

Drukteinis testified that the seeds of the mental illness would have been present – but the operative word is seeds. Although Etienne's lawyer culled out every record reference to support a claim that mental illness was the cause of the petitioner's behavior, given the amount of time the records span, from 1995 to the end of 2004, there is little to warrant concern about delusions or paranoia having influenced his behavior pending trial. The majority of the information points to depression, as was diagnosed in 1995, and there was no evidence that he was experiencing auditory hallucinations in 2004. The hints of schizophrenia were buried far too deep for the lawyers to have seen them during this period.

It is also doubtful, given Dr. Fife's testimony, an evaluation would have resulted in a clear diagnosis of a thought disorder in 2004. Of the many lawyers representing Etienne, not one has had him evaluated or noted a mental health issue, including the lawyer who represented him in the witness tampering case in 2011, the very conduct Etienne now alleges would have been explained by his mental illness. Etienne was assessed by mental health providers in the jail and prison on numerous occasions and was never diagnosed or treated. He was closely watched at times without any demonstration of paranoid or delusional behavior or tangential thinking. His affect was noted as being social and smiling, unlike the flat affect Dr. Fife described for someone

experiencing symptoms of schizophrenia. A psychologist reviewed the Faulkner records upon Etienne's historical report of auditory hallucinations and found no evidence of a thought disorder in the records or by observation.

Despite his representation, the court is not persuaded that Etienne would have authorized his lawyers to obtain a mental health evaluation. He was adamant about moving forward as quickly as possible and rejected consideration of experts. Although a defendant can be compelled to participate in a competency or sanity evaluation, neither of which was relevant to Etienne's circumstance, this is not true of a psychiatric evaluation arranged to fish for potentially exculpatory evidence not central to the defense.

B.

Even if the petitioner had met his burden of proof on the first prong of the ineffective counsel test to show that an evaluation with the records should have been done and may have resulted in a useful diagnosis, the court does not find there is a reasonable probability that the verdict would have been different. Therefore, Etienne has failed to meet his burden to demonstrate actual prejudice for purposes the ineffective assistance claim or for a new trial, even if the mental health records could be considered newly discovered evidence. See State v. Abbott, 127 N.H. 444, 449 (1985).

Etienne argues that with an expert opinion he would have been able to explain to the jury that his inculpatory communications and actions after the shooting were not the product of a guilty mind, but rather were the product of a mentally ill mind. Further, he blames his untreated mental illness for his lack of trust of his attorneys and failure to follow their advice, such that he was deprived of his right to counsel. As discussed

above, the court was not convinced that his actions would have been any different had he been diagnosed with prodromal symptoms of a thought disorder. The court finds that Etienne was an arrogant and manipulative man, who was under a tremendous amount of stress given his isolation in jail and the consequences he would face upon a loss at trial. Furthermore, Etienne set his course before his lawyers were even sufficiently involved to effect it by giving a false alibi, disposing of evidence, and tampering with witnesses, all prearrest. Many of the letters were written in the first months of detention, including the one to the newspaper, to his friends, and to his lawyers directing them to set up a meeting with the attorney general's office. The development of a relationship with any client takes time, as would an evaluation by an expert. Overall, the court finds Etienne's actions show the folly of youth and antisocial thinking, not paranoia.

Finally, even if the evidence had been discovered and a favorable expert opinion had been obtained to support his current theory, the court is not convinced that the introduction of Etienne's schizophrenia would have resulted in a different verdict or positively impacted the jury's view of the case. Significantly, Etienne's conduct and the content of the letters about his actions during the homicide were not delusional, tangential or paranoid. They provided logical, self-serving explanations for his behavior, which were consistent with his defense of the moment. Although the introduction of the corrections officer's testimony about the conditions of confinement likely was not terribly effective in explaining Etienne's inculpatory conduct, evidence of mental illness would not have been any more so and would have been potentially damaging. This evidence would have been inconsistent with the image the defense was trying to present, that of

a reasonable clear-minded individual who was presented with the risk of deadly harm, which he did not provoke and to which he was entitled to respond. The strategic focus of this case was self-defense and defense of others, not mental health. A person with an unsound, paranoid mind is not likely to be found to have acted reasonably. Arguing that Etienne was paranoid about the police, witnesses and his lawyers could lead to the parallel argument that he was paranoid about the victim's respect for him and actions with his girlfriend, an inference that would not have bettered Etienne's case. In short, the argument would not have been strong.

Furthermore, had Etienne argued that his intense distrust of the police came from mental illness, arguably the door would have been opened to show the reasons beyond mental illness that could have served as a foundation for that distrust, including having been charged and tried four times for attempted murder and been targeted as a drug dealer and burglar. Etienne's contact with law enforcement was far from minimal despite his lack of a significant adult criminal record. As a juvenile he had been on probation for two years and had been found culpable for theft and a gang related attempted murder, and as an adult was convicted of resisting arrest and charged with a number of home invasions. He also admitted that he was selling a lot of drugs and, thus, it was reasonable that he was a police target and had an adversarial relationship with the police.

Etienne also contends that his mental illness could have served to mitigate the offense and been used to negotiate a favorable plea bargain. If his mental health history were raised, however, the prosecutors would have been privy to the Faulkner records. The records included information that would have put Etienne in an even worse light,

including his involvement in the gang related attempted murder, circumstances much like those in the first degree murder case. In addition, they would have learned he had already been on probation for two years, arguably portending a lack of future success at rehabilitation. The onset of schizophrenia, according to both experts, is late teens to early twenties. This juvenile conduct then predated the onset of his schizophrenia, lending to an argument that he was incorrigible and not someone warranting sympathy.

Even if the jury would have been presented with a less inculpatory explanation for his conduct and beliefs about law enforcement and the judge, the weight of the evidence would have been minimal. Etienne lied to everyone: his friends, lawyers, jailers, and girlfriend about his involvement in the shooting. There was no apparent distrust of Ms. Jette, Heather Metsch, Amy Hannaford, Toni Webber, Jose Gomez or Autumn Millette, yet he lied to and manipulated them as well. This conduct is consistent with antisocial thinking, immaturity and consciousness of guilt.

Finally, the court concludes the State's evidence supported the verdict even without the evidence that was generated by Etienne after he was represented by counsel. The Supreme Court outlined the case in detail, and this court refers the reader to its opinion for a fuller understanding. Suffice it to say that the testimony of Johnson, Garcia, and Gomez, in particular, evidenced premeditation and motive, as did the victim's fear of his death at the hands of Etienne or Pierre and his angry communications with Etienne before the murder. Mirhashem indicated that Gomez' testimony was stronger than expected, something a lawyer cannot control. The fact that Etienne's gun was out and ready to fire, he moved his gun to this shooting hand, spoke in Haitian Creole to Pierre just before shooting, and Pierre, not the defendant, was very

upset after the shooting all bolstered the State's case, as did the fact that no bullet was chambered in the victim's gun as he stood alone amidst friends of Etienne and Pierre. The angle and placement of the shot, execution style, and Etienne's flight, deceit the day of and in the weeks after the shooting, and disposal of evidence were powerful pieces of evidence inconsistent with his defense. This is not to say the evidence of Etienne's witness tampering, views on the police, and changing stories did not add to the State's case. Rather, the court simply notes that Etienne had damaged him case long before his lawyers could intervene.

C.

The petitioner argues that his lawyers' failure to obtain an evaluation and treatment for his mental illness deprived him of his right to counsel due to the absence of a relationship of trust and confidence. The court does not find this claim credible. The court accepts the testimony of Mirhashem and Landry that the lawyer-client relationship was sound, if not perfect, and that Etienne was actively involved in his case. His lawyers met with him many times. An investigator, with whom he had even more contact, reviewed the voluminous discovery with him in person. The defense advanced was viable even in light of Etienne's conduct after the shooting. Landry testified that looking back on the case, with knowledge of the Faulkner records and Etienne's suicidal behavior, he would not have obtained the records or introduced mental health information at trial for the reasons previously discussed. His view is logical and convincing.

Etienne points to three actions he alleges would have differed had he been treated and trusted his lawyers: 1. He would have taken his lawyers' advice about not

communicating about his case with others; 2. He would have accepted a plea bargain to manslaughter with a 10 – 20 year sentence; and 3. He would have testified. The court did not find Etienne's testimony credible. First, as discussed above, the court is not convinced that the petitioner's post-arrest conduct was related to his mental health issues; therefore, treatment would not have changed his choices. Secondly, the court accepts the lawyers' testimony that Etienne never authorized his lawyers to negotiate a plea bargain or expressed a desire to accept one given the likely result of release from prison when Etienne was in his fifties, a daunting thought when there was a reasonable chance of freedom. This is not a circumstance where the lawyers advised their client to plead guilty and the advice was refused or the client was persisting on going to trial in the face of insurmountable odds. Rather, the lawyers' and Etienne's evaluations of the case were in line and logically based on what was known when the decision was made. The fact that Etienne was convicted does not render the assessment of the strengths and weaknesses of the government's case incompetent. Despite the Supreme Court's comments on the quantity of incriminating evidence, the lawyers are the only ones truly able to evaluate the quality of the evidence and the likelihood of a jury accepting or rejecting witness testimony. Lawyers cannot predict the future. Further, although Landry was more confident than Mirhashem about the outcome of a trial, the court does not find he made any guarantee or indicated a win was "in the bag." Finally, Etienne followed his lawyers' advice not to testify, which the court finds was reasonable advice and would not have changed with a closer relationship. The challenges Etienne would have faced on cross-examination would have been the same.

D.

Etienne also questions his lawyers' advice not to testify, which he accepted and now in retrospect regrets. First, the court does not give credit to the claim that Landry and Mirhashem did not leave the decision to Etienne[4] or that the advice would have been any different had the records been obtained. The advice of counsel was soundly based on the evidence before them and their assessment of Etienne. As explained by Landry, not only would Etienne have been pressed to explain his lies to the police, his flight, and the witnesses tampering, he would have been grilled on his oral and written communications post-arrest.[5] Although the jury heard this information in the State's case in chief, if Etienne had testified the damaging evidence would have been presented twice and at the end of the trial. His testifying would have highlighted his dishonesty, focusing away from the evidence that counsel reasonably evaluated as justifying his use of deadly force. Etienne did not present at the motion hearing as a particularly honest man, and there is no reason to believe the trial jury would have found otherwise. Conventional wisdom is that a defendant who chooses to testify can lose a winning case if his impression is a bad one.

Finally, on cross-examination, Etienne's history with the victim would have been elicited, highlighting a motive for the murder. His testimony also would risk opening the door to other criminal behavior the parties agreed to keep out. Landry and Mirhashem believed the focus should stay to the extent possible on the positive evidence of self-defense offered by Pierre and others, rather than on Etienne's dishonest and criminal

---

[4] In denying Etienne's previous motion for a new trial, this court specifically rejected Etienne's claim that his lawyers refused to allow him to testify. State v. Etienne, Hills. Cty. Super. Ct. No., 2004-S-1715 (March 10, 2010) (Order, Barry, J.)

[5] To the extent Etienne is arguing that he would have followed his lawyers' advice had the relationship been better and then he could have testified with fewer hurdles, the court already rejected the argument that investigation and an evaluation would have altered the course.

conduct. The strategy was sensible. The court defers as it must to the strategy of counsel and will not indulge in retrospective analysis.

E.

Etienne also alleges that counsel was ineffective for failing to develop background information with which to negotiate a plea bargain. However, as discussed above, Etienne never expressed an interest in a plea bargain and never authorized his lawyers to seek one. He was not a neophyte to the criminal process. The lawyers evaluated the strength of the State's case with him. Their efforts were rightly put towards trial preparation, and the court takes no issue with the attorneys' view of this case being a triable one. There was ample evidence supportive of the defense, which would have resulted in Etienne's freedom had the jury believed it. In fact, after sitting through the whole trial, as did the jury, Etienne still rejected a plea to manslaughter.

Moreover, even if the records had been obtained, they would not have served the purpose Etienne assumes. The Faulkner records would not likely have bettered the petitioner's chances for a plea bargain. Had the petitioner been evaluated or mental health concerns been shared, the State would have been privy to all the information contained in the records, good and bad, including the petitioner's early gang involvement, the attempted murder, the theft, and his prior probationary period. The negative information contained in the records would likely have outweighed any sympathy that could have been engendered by identifying Etienne as mentally ill. The court is hard pressed to see how that information would have resulted in more favorable treatment by the State or an acceptable plea bargain. The fact of the matter is that the petitioner had a triable case, he was not interested in spending decades in jail (the likely

result of any plea to second degree murder) and even when the option of a manslaughter plea was on the table, he did not accept it.

F.

The petitioner contends that his lawyers made an egregious error by failing to raise a constitutional challenge to Detective Willard's testimony that Etienne pre-arrest declined to provide a written statement, terminated the interview because he said he wanted to check on the status of his friends, and indicated that he would not tell the detective if he had shot Lemieux, even if it had been in self-defense. He cites State v. Cassavaugh, 161 N.H. 90, 100 (2010) in support. He also contends that the lawyers erred by not requesting a curative instruction.

At hearing, Mirhashem questioned whether, even under current law, Etienne could have been found to have unequivocally asserted his right to remain silent. However, the court need not address the issue, because the petitioner cannot meet the second prong of the ineffective assistance of counsel test to show a reasonable probability the outcome of the trial would have been different if the jury had not heard his statements. Etienne did not deny he acted in self-defense, so his statement did not undercut his defense. He indicated he would not tell the police even if he had acted in self-defense, consistent with his statements that he did not trust the police to treat him fairly. Furthermore, by the time this exchange took place, Etienne had already lied to the police about his presence at the shooting scene, fled to Boston, disposed of the gun, concocted evidence to support his false alibi, and suspiciously inserted himself at the police station to find out the status of his compatriots. Given the quantity of

evidence demonstrating consciousness of guilt, the complained of evidence would have had little if any added evidentiary value.

G.

The petitioner's final claim is that his lawyers were ineffective for failing to ask for jury instruction on racial bias. He cites a number of publications addressing the issue and references an instruction by a federal judge educating the jury on the existence of "implicit biases" and urging them to "resist jumping to conclusions based on personal likes and dislikes, and generalizations, gut feelings, prejudices, sympathies, stereotypes and biases." The articles cited were published in 2013 and 2015, long after Etienne's trial.

The defense has cited no case law in support of its argument that such questions should have been requested. Notably, the Supreme Court has declined to require questions about racial bias even where the defendant and alleged victim of a violent crime are of different ethnicities, leaving the matter to be determined on a case by case basis. State v. Fernandez, 152 N.H. 236, 238 (2005). The court finds that the address if the issue was adequate. The defense entered into an agreement with the State for the judge to inquire specifically about any beliefs or opinions a juror might have about interracial couples. Although this was a more specific question than one aimed generally at racial bias, it, combined with the required question about impartiality, would serve to spark the jury's consideration of race and its impact on a juror's ability to be fair and neutral. The decision of how a jury should be screened is a strategic one. Here, the victim and the defendant were both black men. Therefore, there is no likelihood that the juror would have a negative bias toward the defendant versus the victim in deciding

which one was the aggressor. The court does not find the lawyers' focus on the interracial relationships and not on general racial bias to be an egregious error.

Conclusion

Based on the foregoing, the court concludes that the defendant has failed to demonstrate any egregious error on the part of his lawyers or any reasonable probability that the outcome of his case would have been different if they had taken the steps he asserts they should have. Further, the standard for a new trial under RSA 526:1 has not been met, and the petitioner has failed to demonstrate that justice was not done. The motion, therefore, is denied.

SO ORDERED.

Date: 1/23/2018

Diane M. Nicolosi
Presiding Justice

163 N.H. 57
Supreme Court of New Hampshire.

The STATE of New Hampshire
v.
Dickens ETIENNE.

Nos. 2004–833, 2006–919.
|
Argued: May 12, 2011.
|
Opinion Issued: Dec. 21, 2011.

Synopsis

Background: Defendant was convicted in the Superior Court, Hillsborough, Northern–Judicial District, Barry, J., of first-degree murder. Defendant appealed.

Holdings: The Supreme Court, Conboy, J., held that:

reasonable necessity is required for the defensive use of deadly force;

assuming that jury instruction incorrectly defined the elements of self-defense or defense of another, the error was harmless;

assuming trial court erred in admitting witness's testimony regarding a dispute between defendant and victim, error was harmless;

new trial was not warranted on basis of failure to disclose exculpatory evidence;

defendant was not entitled to a new trial on basis of newly discovered evidence of witness's alleged perjury; and

trial court's decision not to grant witness immunity for the purpose of investigating his purported perjury did not violate defendant's due process rights under State and Federal Constitutions.

Affirmed.

Dalianis, C.J., concurred in part, dissented in part, and filed opinion.

Attorneys and Law Firms

****529** Michael A. Delaney, attorney general (Susan P. McGinnis, senior assistant attorney general, on the brief and orally), for the State.

Christopher M. Johnson, chief appellate defender, of Concord, on the brief and orally, for the defendant.

Opinion

CONBOY, J.

***64** The defendant, Dickens Etienne, appeals his conviction, following a jury trial, for the first-degree murder of Larry Lemieux. *See* RSA 630:1–a, ****530** I(a) (1996 & Supp.2005). On appeal, he argues that the Superior Court (*Barry,* J.) erred by: (1) incorrectly defining the elements ***65** of self-defense or defense of another in its jury instructions; (2) permitting hearsay testimony; (3) failing to order a new trial based upon perjured testimony of a State's witness and the State's failure to disclose exculpatory information; and (4) failing to order the State to immunize a witness for the purpose of ascertaining the extent of his perjured testimony. We affirm.

I. Facts

The jury could have found the following facts. In January 2004, the defendant lived in a second-floor apartment at 265 Central Street in Manchester with his girlfriend, Cameo Jette, his friend, Israel Rivera, and Jette's friend, Jenna Battistelli. The defendant's other friends included Louis Pierre, Jose Gomez, Michael Roux and David Garcia. The defendant and Pierre were particularly close, because Amy Hannaford was then pregnant with the defendant's child, and her sister, Jennifer Hannaford, had three children with Pierre. The defendant and his friends were also acquainted with Larry Lemieux and Lemieux's friend, Latorre Johnson. The defendant was known as "D" among his friends and acquaintances.

Tensions developed between Lemieux and the defendant after Lemieux "hit on" Jette in December 2003, asking, "what somebody like [Jette was] doing with somebody like 'D.' " The defendant, upset, informed Lemieux that he was not permitted to be in the apartment or around

Jette unless he was present. Around the same time, the relationship between Lemieux and Pierre also became strained. Lemieux had briefly dated Jennifer Hannaford, who lived one floor above the defendant in the Central Street apartment building. Although their relationship ended in December 2003, Lemieux continued to visit with Hannaford and her children, and Pierre had concerns about Lemieux being around his children.

In January 2004, Lemieux told Tina Gobis, whom he was dating, that he was going to have to leave town because either the defendant or Pierre was going to kill him. Lemieux told Autumn Millette, another woman he was seeing, that he had a "bad feeling" that the defendant did not like him. Battistelli overheard the defendant and Pierre discussing that Lemieux would "get his some day." The defendant later told Gomez that he was thinking about killing Lemieux.

In the late evening of January 27, 2004, Lemieux went to the defendant's apartment. The defendant was not at home, as he, Pierre, Roux and Garcia had gone to Foxwoods Casino in Connecticut. Rivera answered the door and informed Lemieux that he was not allowed to enter. At approximately 2 a.m. on January 28, Lemieux went upstairs to Jennifer Hannaford's apartment, where he attempted to sexually assault her. Rivera called the defendant and Pierre and informed them of what had occurred in Hannaford's apartment.

***66** The defendant was upset when he learned what Lemieux had done, and told Rivera not to allow Lemieux back into the house. The defendant, Pierre, Roux and Garcia did not return to Manchester immediately because it was snowing, but the defendant and Pierre made several telephone calls to people in Manchester who were close to Lemieux, including Nancy Vaillancourt, at whose apartment Lemieux was staying.

When Lemieux awoke later that morning he spoke with Johnson by telephone. Johnson told him that the defendant was looking for him, and had called Johnson to ask if Lemieux had "disrespected" him by going to the Central Street apartment ****531** when he was not there and by saying "f* * * 'D' " or "forget about 'D.' " After that conversation, Vaillancourt overheard an aggravated Lemieux yelling into the telephone, "I'll shoot the fair one with any of y'all bitch ass niggers." According to multiple witnesses, this phrase indicated that Lemieux was willing to have a "fist fight" with whoever was on the telephone. While the defendant, Pierre, Roux and Garcia were returning to Manchester from Foxwoods, Lemieux called Garcia's cellular telephone to speak with the defendant and Pierre. The defendant asked whether Lemieux had called him a "bitch" or a "bitch ass nigger." Lemieux responded in the negative, but Pierre and the defendant appeared upset and angry.

Lemieux left Vaillancourt's apartment driving Johnson's car, picked up Johnson and drove to Gobis's apartment. On the way there, Johnson heard Lemieux say into the telephone, "I'll be there," and Lemieux told him he had been speaking with Pierre. While at Gobis's apartment, Lemieux received a telephone call. Gobis heard Lemieux say, "[Y]es, I did call you a bitch ass nigger," and that he was on his way to Central Street. Once off the telephone, Lemieux told Gobis that he had been speaking to the defendant and that the defendant threatened to kill him. Lemieux then returned to Johnson's car and resumed telephone contact with the defendant, who was still on his way from Foxwoods. Although the defendant was already at the Bedford toll plaza, he told Lemieux that they were approaching Nashua, a lie Garcia believed was intended to allow them to arrive at the Central Street apartment before Lemieux. Lemieux told Pierre he was going to Central Street. The defendant telephoned Gomez and said that Lemieux had been disrespectful to him and "We have to wrap him up," meaning kill him. The defendant told Gomez to meet him on Central Street and bring a gun.

The defendant, Pierre, Roux and Garcia reached the Central Street apartment first. Jennifer Hannaford and her children were returning from grocery shopping, and Pierre told her to bring them upstairs right away. Inside the apartment, Pierre retrieved a .44–caliber pistol and some bullets from Rivera and the defendant retrieved his .9–millimeter Ruger pistol. ***67** Battistelli overheard that Lemieux was on his way and that Gomez was also on his way, in a cab. The men went down to the front porch of the building, though Roux did so reluctantly.

Lemieux arrived shortly thereafter and walked onto the porch with his hands in his pockets. He approached Pierre so they stood face to face, about six inches apart. Roux stood in the doorway leading to the porch while the defendant, Rivera and Garcia stood in the area behind Lemieux. Pierre's gun was in his waistband, and the defendant's gun was plainly visible in his hand. Witness accounts differed as to what was said next. Rivera heard, "So you want to shoot the fair one?" and heard either Pierre, Garcia or Roux ask, "Why you reaching?" Garcia reported hearing Lemieux say, "F* *k it. We can just shoot it out." Neither Johnson nor Pierre testified to hearing

any of these statements. Pierre testified that he understood that, if Lemieux did not have a bullet in the chamber of his gun, he would have to take action to do so. (When Lemieux's gun was found, it was loaded, but there was no bullet in the chamber, and the slide would have to have been pulled in order to load the chamber.) The witnesses all agreed that the defendant and Pierre spoke to each other in Haitian Creole, and then the defendant stepped behind Lemieux, raised his gun, and shot Lemieux in the head behind his right ear. Lemieux's hands ****532** were inside his jacket when he was shot. He died immediately.

After the shooting, the group dispersed. The defendant, Pierre and Rivera drove toward Massachusetts. At some point, while they were still in New Hampshire, Pierre got out of the car. The defendant and Rivera continued to Rivera's brother's home in Brighton, Massachusetts, where the defendant showered and changed his clothes. He and Rivera then visited the defendant's sister's home, where he gave her a bag of his soiled clothing and spoke with her about being his alibi for the shooting. He telephoned Jette from a Massachusetts number and told her he was at his sister's home in Boston, and that he had heard about what had happened at the apartment. The defendant left his sister's home at 3 p.m., after approximately twenty minutes there, and drove to the Brighton Reservoir where he threw his gun, magazine and bullets onto the ice.

Around 6:30 p.m., the defendant visited the Manchester home of his friend Heather Metsch, who told the defendant she had heard that he had shot Lemieux. He responded that he had not been in Manchester at the time, and called his sister to have her verify that he had been in Boston with her that afternoon. After asking Metsch whether he should "go down to the police station to clear his name," the defendant left.

Upon arriving at the police station, the defendant approached Detective Sergeant Enoch Willard and said he was there to check on his friends' bail status. He told the detective that he had heard his friend Lemieux had been ***68** shot in the back of the head, and that Garcia and all of his friends were under arrest. He added that he had not been there. The officer asked how he knew Lemieux had been shot in the back of the head and the defendant explained that his friend Heather had heard it on the news. The defendant sought information on the arrest and bail status of his friends, as well as Johnson, who was not a friend. When asked why he wanted to bail out Johnson if the two were not friends, the defendant stated that he wanted to bail everyone out to find out what had happened. The defendant terminated the fifty-five minute interview with the detective by stating that because he thought the detective believed him to be guilty of killing Lemieux, he was ending the conversation. The defendant left the station and met up with Jette. When they returned to the police station to check on Gomez's bail status, the defendant was arrested.

The defendant and Gomez next saw one another in the holding area at the Manchester District Court. At that time, the defendant indicated to Gomez that Pierre had killed Lemieux, that Garcia and Johnson were the only witnesses, and that Gomez needed to kill Johnson.

In February and March of 2004, the defendant sent letters to Amy Hannaford, Gomez and Jette. In his letters to Hannaford, he initially insisted that he was not involved with the murder, but later asserted that he shot Lemieux in defense of himself or Pierre. The defendant also wrote Hannaford, "Tell Autumn for what it's now worth I did not kill Larry and that I knew Larry was going to get killed two weeks before that, and that's why on that day I try calling him so many times to tell him not to meet with 'P.' " The defendant's early letters to Jette likewise insisted that he was not there, and that Jette could confirm it. In his letters to all three recipients, the defendant blamed Lemieux's death on various people, including Pierre, Johnson, and the first responders who attempted to resuscitate Lemieux.

The letters also included statements indicating the defendant sought to intimidate ****533** witnesses against him. His letters to Gomez stated that his brother was coming into town to make sure that no one testified against him, that he believed that Garcia and Johnson were lying about his involvement in Lemieux's death, and that Gomez was smart enough to know that people were trying to set them against each other. The defendant also wrote that Pierre, Roux and Gomez should get into trouble so that they would be transferred to his prison unit so the group could get their stories straight. The defendant asked Amy Hannaford to tell Pierre that the only people "telling lies" were Garcia and Johnson, and that he wanted to see what Pierre could do about Garcia. In April 2004, the defendant sent Jette a letter telling her to stay away from a particular house because his "boys from Boston" were "here to make sure no one show[ed] up in court" and ***69** that they were "out to do anything." He asked Jette to "please stay away from the people that used to know me for about two months. I go to trial in two months."

The police interviewed Rivera on April 28, 2004. Rivera initially denied being present when Lemieux was killed, but then stated that he had been there but had not seen what happened. When asked directly who shot Lemieux, Rivera at first could not speak, his body shook and he broke down crying. Eventually he admitted that the defendant shot Lemieux and he led the police to the reservoir in Brighton.

In a May 2004 letter to Jette, the defendant told her to tell Johnson's brother that he had done a good job of looking out for the defendant because he had received word from Johnson that he was not going to testify, and, therefore, "that hit [was] off." He wrote in later letters to Jette that Pierre, Rivera and Roux were saying they were not present when Lemieux was shot, that Rivera and Gomez were "keeping it real" with him, that Johnson had "changed his mind," and that Garcia wanted to change his mind. Finally, the defendant wrote to Jette that the person who killed Lemieux had been "justified" in shooting him because Lemieux had tried to rape Jennifer Hannaford and had said he was returning with a gun.

Despite his earlier denial that he was Lemieux's killer, the defendant wrote letters in July 2004 to the Governor and to a superior court judge in which he claimed that he shot Lemieux in self-defense after Lemieux pulled out a gun. In an August 2004 letter, the defendant asked Amy Hannaford to tell Pierre to "tell them the truth"—*i.e.,* that Lemieux had had his hand on a gun when he was shot. The defendant wrote that this would be of more help to him than trying to get Pierre to be quiet.

In July 2004, the defendant was indicted for the first-degree murder of Lemieux. At trial, he claimed to have acted in self-defense and defense of another. The jury found the defendant guilty as charged. Following trial, the defendant learned of information leading him to believe that the State had withheld evidence regarding Gomez's cooperation with the Attorney General's Office on an unrelated case and that Gomez had committed perjury during the trial. Based on this information, he filed motions for a new trial, for a *Richards* hearing, *see State v. Richards,* 129 N.H. 669, 673–74, 531 A.2d 338 (1987), and to pierce the attorney-client privilege. The trial court denied all three motions. We accepted the defendant's discretionary appeal from those rulings, which we address along with the defendant's arguments in his mandatory appeal from his first-degree murder conviction.

***70** *II. Jury Instructions*

"The purpose of the trial court's charge is to state and explain to the jury, ****534** in clear and intelligible language, the rules of law applicable to the case." *State v. Hernandez,* 159 N.H. 394, 400, 986 A.2d 480 (2009). "When reviewing jury instructions, we evaluate allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." *Id.* "We determine whether the jury instructions adequately and accurately explain each element of the offense and reverse only if the instructions did not fairly cover the issues of law in the case." *Id.* "Whether a particular jury instruction is necessary, and the scope and wording of jury instructions, are within the sound discretion of the trial court, and we review the trial court's decisions on these matters for an unsustainable exercise of discretion." *Id.* "To show that the trial court's decision is not sustainable, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case." *State v. Lambert,* 147 N.H. 295, 296, 787 A.2d 175 (2001) (quotation omitted). However, "[t]he interpretation of a statute is a question of law, which we review *de novo.*" *State v. Kousounadis,* 159 N.H. 413, 423, 986 A.2d 603 (2009).

Prior to trial, both the defendant and the State submitted proposed jury instructions on defense of self and defense of another. The defendant objected to certain aspects of the State's proposed instructions, including: (1) that a defendant may use only the amount of force that he reasonably believes is necessary to defend against deadly force; and (2) that a defendant may not rely upon self-defense if he, the third person, or he and the third person acting together, had provoked the use of deadly force. The trial court noted the defendant's objections, but gave instructions that were consistent with the State's proposals. The defendant now argues that the jury instructions constituted structural error, requiring reversal. We address the defendant's two claims of error in turn.

A. The Necessity for the Use of Deadly Force

The trial court instructed the jury as follows:

> The defendant must reasonably believe that the amount of force he used was necessary for self-defense or defense of others. A person is not permitted to use excessive force in self-defense, only a reasonable amount of force. The defendant can use the amount of force which he believed was necessary under the circumstances as long as, at the time, there were reasonable grounds for his belief.

***71** The defendant argues that this instruction was erroneous because " nothing in the language of RSA 627:4, II, ... requires that the actor's use of deadly force be necessary, in the sense that no lesser, non-deadly force would suffice to prevent harm from the attacker's use of deadly force." He contrasts RSA 627:4, II (2007), which defines when a person is justified in using deadly force, with RSA 627:4, I (2007), which defines when a person may use non-deadly force. As to non-deadly force, the legislature explicitly provided that a person may defensively "use a degree of such force which he reasonably believes to be necessary," but as to deadly force it did not provide such a necessity requirement. RSA 627:4, I. Thus, the defendant asserts, the legislature deliberately omitted the necessity requirement in the application of defensive deadly force because it did not wish to require a person faced with deadly force to have to determine, at risk of legal culpability, the degree of force necessary to counter the attack. The defendant contends, therefore, that the trial court's jury instruction, which included a necessity requirement not explicitly mandated in the ****535** statute, reduced the State's burden of proof and requires reversal.

The State responds that the self-defense statute does not reflect a clear intent to abrogate the common law governing the permissible use of deadly force. It argues: "To the contrary, [the statute] actually seems to embrace the common-law principle of necessity by limiting the circumstances under which deadly and non-deadly force may be used and by attempting to strike a balance between legitimate defense and the needless sacrifice of human life." The State adds that "the plain language of the statute explicitly requires that a person not resort to the use of 'deadly force' unless that person has first determined whether 'he and the third person can, with complete safety' either '[r]etreat from the encounter,' RSA 627:4, III(a), '[s]urrender property to a person asserting a claim of right thereto,' RSA 627:4, III(b), or '[c]omply with a demand that he abstain from performing an act which he is not obligated to perform,' RSA 627:4, III(c)." The State concludes that the legislature, by applying these limitations to the use of deadly force, but not non-deadly force, did not clearly signal its intent to eliminate the common-law requirement that the actor's use of deadly force be necessary.

> Resolving this dispute requires that we interpret pertinent Criminal Code provisions. The interpretation of a statute is a question of law, which we decide *de novo*. *State v. Brown,* 155 N.H. 590, 591 [927 A.2d 493] (2007). In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. *State v. Gallagher,* 157 N.H. 421, 422 [951 A.2d 130] (2008). We construe the Criminal Code "according to the fair import of [its] terms and to promote justice." RSA 625:3 ***72** (2007). In doing so, we must first look to the plain language of the statute to determine legislative intent. *State v. Formella,* 158 N.H. 114, 116 [960 A.2d 722] (2008). Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent. *Id.* Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. *State v. Lamy,* 158 N.H. 511, 515 [969 A.2d 451] (2009). Accordingly, we interpret a statute in the context of the overall statutory scheme and not in isolation. *Id.*

State v. McKeown, 159 N.H. 434, 435–36, 986 A.2d 583 (2009).

RSA 627:4, II(a) (2007) sets forth the circumstances, relevant to this case, under which deadly force may be used:

> II. A person is justified in using deadly force upon another person when he reasonably believes that such other person:
>
> (a) Is about to use unlawful, deadly force against the actor or a third person....

RSA 627:4, III (2007) (amended 2011)[1] sets forth limitations upon the use of deadly force. It provides:

> ****536** III. A person is not justified in using deadly force on another to defend himself or a third person from deadly force by the other if he knows that he and the third person can, with complete safety:
>
> (a) Retreat from the encounter, except that he is not required to retreat if he is within his dwelling or its curtilage and was not the initial aggressor; or
>
> (b) Surrender property to a person asserting a claim of right thereto; or
>
> (c) Comply with a demand that he abstain from performing an act which he is not obliged to perform; nor is the use of deadly force justifiable when, with the ***73** purpose of causing death or serious bodily harm, the actor has provoked the use of force against himself in the same encounter.
>
> (d) If he is a law enforcement officer or a private person assisting him at his direction and was acting pursuant to RSA 627:5, he need not retreat.

In contrast, with regard to non-deadly force, RSA 627:4, I, provides in pertinent part:

> A person is justified in using non-deadly force upon another person in order to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful, non-deadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose.

The statute as a whole is thus susceptible of at least two reasonable interpretations: Either the restrictions placed upon the use of deadly force implicitly indicate that reasonable necessity under the circumstances is required for the defensive use of deadly force, or the explicit requirement of reasonable necessity in the non-deadly force provision, and not in the deadly force provision, implies that reasonable necessity is not required for the use of deadly force in the specific circumstances set forth in the statute. Our analysis is grounded in the irrevocable consequences of the use of deadly force: The explicit statutory requirement of reasonable necessity for the defensive use of *non-deadly* force recognizes that there are infinite degrees of force potentially available —none of which, by definition, would result in death; the implicit requirement of reasonable necessity in the defensive use of *deadly* force recognizes that *any* amount of such force may result in death.

We acknowledge that the competing interpretations are supported by various canons of statutory interpretation. The defendant's interpretation is supported by the principle *expressio unius est exclusio alterius,* the expression of one thing in a statute implies the exclusion of another. *See City of Manchester v. Sec'y of State,* 161 N.H. 127, 133, 13 A.3d 262 (2010) ("The force of the maxim *expressio unius est exclusio alterius* is strengthened where a thing is provided in one part of the statute and omitted in another." (quotation and brackets omitted)). However, the State's interpretation of the statute, also the interpretation supported by the commentary to the Model Penal Code, *see Model Penal Code* § 3.04 cmt. 2(a), 2(a) n. 1, at 35 (1985) (interpreting statutes such as ours as implicitly "demand [ing] belief ***74** in the necessity of the defensive action," and viewing the statute's implicit necessity requirement as "the consequence of a condition that the actor must have endeavored to avoid the combat or the injury by means other than the application of force"), is supported by numerous competing canons of statutory interpretation, and we ultimately ****537** find that interpretation more persuasive. "Maxims of interpretation based on customary language usage, such as the rule that expression of one thing implies the exclusion of another, have been held to have less weight when their application would produce a result in derogation of common law." 3 N. Singer & J.D. Singer, *Statutes and Statutory Construction* § 61.2, at 340–43 (7th ed. 2008) (footnotes omitted); *see Bolduc v. Herbert Schneider Corp.,* 117 N.H. 566, 568, 374 A.2d 1187 (1977).

"Statutes which impose duties or burdens or establish rights or provide benefits not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the effect which makes the least, rather than the most, change in the common law." 3 N. Singer & J.D. Singer, *Statutes and Statutory Construction* § 61.1, at 314 (7th ed. 2008). "We have often stated that we will not interpret a statute to abrogate the common law unless the statute clearly expresses that intent." *State v. Elementis Chem.,* 152 N.H. 794, 803, 887 A.2d 1133 (2005) (quotation omitted); *see also State v. Hermsdorf,* 135 N.H. 360, 363, 605 A.2d 1045 (1992) ("In enacting legislation, the legislature is presumed to be aware of the common law: we will not construe a statute as abrogating the common law unless the statute clearly expresses such an intention." (quotations omitted)).

Our common law has long required reasonable necessity to justify the use of deadly force.

> The immense value at which the law appraises human life makes it legally reasonable that the destruction of it, as a means of averting danger, should be resorted to only when the danger is immense in respect of consequences, and exceedingly imminent in point of time.... On the question of the reasonable necessity of his act, the insufficiency and impracticability of other more tardy and less vigorous kinds of defen[s]e are to be considered.

Aldrich v. Wright, 53 N.H. 398, 407 (1873). In other words,

> a person is generally justified in using deadly force upon another only if such force is necessary to protect himself (or another) from the use of unlawful deadly force or an imminent threat to life or basic bodily integrity. Implicit in this rule are the notions: (1) that ***75** deadly force should be used only when, and to the extent, "necessary"; and (2) that the force used in response to the threat should not be excessive in relation to the harm threatened.

State v. Warren, 147 N.H. 567, 569, 794 A.2d 790 (2002) (citations omitted). As we have previously stated, "Defensive force, in its kind, degree, and promptness, is measured by the consequence of using it, and the consequence of not using it: it should be proportioned to the apparent danger, viewed in

the light of those consequences contrasted with each other." *Aldrich,* 53 N.H. at 402. "When force, purely defensive at first, increases and becomes more than is reasonably necessary for defen[s]e, the excess is aggressive and not defensive." *Id.* "When resistance starts beyond the reasonable necessity of the case, it may be divisible into two parts; so far as it is reasonably necessary, it is resistance; so far as it is not reasonably necessary, it is aggression." *Id.*

In our interpretations of the self-defense statute, we have looked to the common law for its balance of the right to defend oneself and the restrictions upon that right based upon "the general principle that the law places great weight upon the sanctity of human life in determining the reasonable ****538** necessity of killing a human being." *Warren,* 147 N.H. at 569, 794 A.2d 790 (quotation omitted). In *State v. Pugliese,* 120 N.H. 728, 731, 422 A.2d 1319 (1980), we held, "We are not persuaded that the legislature's use of the term 'dwelling' was meant to restrict the common-law privilege to use deadly force in self-defense without retreating. Absent a clearer legislative indication, we will not construe a statute to change the common law." Most recently, in *State v. Vassar,* 154 N.H. 370, 910 A.2d 1193 (2006), we reasoned that the "jury could have concluded from the testimony that the defendant reasonably believed deadly force was *necessary* to stave off the threat of 'unlawful, deadly force,' " and that the defendant was therefore entitled to a self-defense instruction. *Vassar,* 154 N.H. at 374, 910 A.2d 1193 (quoting RSA 627:4 II(a)) (emphasis added).

The defendant's arguments in this case are similar to those in *Warren,* in which the defendant's literal reading of RSA 627:4 led him to argue that he was entitled to a jury instruction that he was justified in using deadly force against his roommate even if he believed that his roommate was about to use only non-deadly force against him. *Warren,* 147 N.H. at 569, 794 A.2d 790. We found that the defendant's literal reading of the statute "would be inconsistent with the general principle that the law places great weight upon the sanctity of human life in determining the reasonable necessity of killing a human being," and that "such a result would be absurd." *Id.* at 569, 794 A.2d 790 (quotation omitted). The relevant statutory provision was RSA 627:4, II(d) (1996), which states that "[a] person is justified in using deadly force upon ***76** another person when he reasonably believes that such other person ... [i]s likely to use any unlawful force in the commission of a felony against the actor within such actor's dwelling or its curtilage." We rejected the defendant's argument and acknowledged "the well-established common law principle that a person is generally justified in using deadly force only to meet the use of unlawful deadly force or an imminent threat to life or basic bodily integrity." *Warren,* 147 N.H. at 569, 794 A.2d 790. In applying the necessity requirement, we concluded that the "defense of dwelling" justification for the use of deadly force did not apply where the assailant was a cohabitant. *See id.* at 569–71, 794 A.2d 790. Thus, in *Warren* we looked to the common law in construing the language of the statute that on its face did not contain a necessity requirement.

A further indication of the legislature's intent not to abrogate the longstanding requirement of reasonable necessity is found in the actions the legislature has undertaken in the wake of *Warren.* The legislature has amended RSA 627:4 twice since *Warren,* and the amendments did not vitiate our holding that the deadly force provision implicitly required reasonable necessity. *See* 2B N. Singer & J.D. Singer, *Statutes and Statutory Construction* § 49.5, at 35 (7th ed. 2008) ("[P]rinciples of stare decisis weigh heavily in favor of a judicial interpretation, since the legislature has power to change the law from what a court has construed it to be." (quotation omitted)); *id.* § 49.5, at 107 ("If the legislature has amended portions of a statute, but has left intact the portion sought to be construed, the legislature has declared an intent to adopt the construction placed on the statute by the administrative agency."); *id.* § 49.10, at 142–44 ("Where action upon a statute or practical and contemporaneous interpretation has been called to the legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness. Likewise, legislative action by amendment or appropriations with respect to other ****539** parts of a law which have received a contemporaneous and practical construction may indicate approval of interpretations pertaining to the unchanged and unaffected parts of the law."); *see also State v. Moran,* 158 N.H. 318, 323, 965 A.2d 1024 (2009) ("If we had incorrectly construed the statute in [our earlier interpretation thereof], the General Court would presumably have clarified the text in the course of the five subsequent amendments."); *State v. Deane,* 101 N.H. 127, 130, 135 A.2d 897 (1957) ("The statute on which this repeated practical construction has been placed by the Bench and Bar, has been re-enacted by the Legislature without change in RSA 502:24, and constitutes a legislative adoption of its prior judicial interpretation." (quotation omitted)). The legislature's decision ***77** not to amend the pertinent provisions of RSA 627:4 in light of *Warren* indicates

the legislature's adoption of our long-standing interpretation of the statute.

> An interpretation which preserves rights or benefits enjoyed under the common law is favored where the result avoids absurdity, retroactivity, unconstitutionality, is in keeping with good policy, is consistent with the purpose of the legislation, or is evident from a consideration of the statute read as a whole and in conjunction with other related statutes.

3 N. Singer & J.D. Singer, *Statutes and Statutory Construction* § 61.2, at 340–43 (7th ed. 2008) (footnotes omitted).

Here, the rule supporting interpretation of a statute to avoid or minimize its abrogation of the common law is supported by public policy. Under the defendant's reading of the statute, even if a person faced with a situation other than those specifically set forth in RSA 627:4, III knew that he could, "with complete safety," take some action short of using deadly force to protect himself or another from the use of deadly force, he would still be justified in taking a human life. Given the constitutional recognition of the natural right to life, and the great weight that law and society place on the sanctity of human life, *see, e.g., State v. Grierson,* 96 N.H. 36, 40, 69 A.2d 851 (1949) ("This maxim of retreating to the wall is a statement of fact properly illustrating the weight to be given to the sanctity of human life in determining the reasonable necessity of killing a human being"), the legislature most likely did not intend this result. We decline to infer from the legislature's silence regarding the reasonable necessity requirement in the deadly force provision of the justification statute that New Hampshire citizens have the right to kill when it is not necessary under the circumstances.

Given our common law and the canons of statutory interpretation, we do not find that the legislature has expressed an intent to abrogate the deeply entrenched principle that in order for a killing to be justified, it must be reasonably necessary under the circumstances. *Cf. State v. Chrisicos,* 159 N.H. 405, 409–10, 986 A.2d 654 (2009) (noting that the legislature is free to amend the statute as it sees fit, should it disagree with our interpretation). Accordingly, we conclude that the trial court's instructions requiring reasonable necessity for the defensive use of deadly force were not erroneous.

B. Provocation of the Attacker's Use of Force

The trial court instructed the jury, as proposed by the State, as follows:

> ***78** A person does not—a person also does not have the right to use deadly force on another to defend himself or a third person if, one, with the purpose of causing death or serious bodily harm, the defendant provoked the use of force against himself or a third person in the same encounter. Or, two, with the purpose ****540** of causing death or serious bodily harm, the third person provoked the use of force against himself in the same encounter or, three, if acting together, with a purpose of causing death or serious bodily harm, the defendant or third person provoked the use of harm [*sic*] against the defendant or the third person in the same encounter.

The defendant argues that these instructions erroneously advised the jury that he did not have the right to use deadly force if a third person—here, Pierre—provoked the encounter. Thus, the defendant argues, the State's burden of proof was improperly "narrowed," resulting in structural error, requiring reversal.

RSA 627:4, III provides, in pertinent part, that the use of deadly force is not justifiable "when, with the purpose of causing death or serious bodily harm, the actor has provoked the use of force against himself in the same encounter."

The statute addresses only provocation by the actor and makes no reference to the effect of provocation by a third party. Thus, to the extent that the actor provoked the encounter, whether alone or in concert with a third person, the use of deadly force is not justifiable. We have previously addressed the issue of provocation by a defendant. *See State v. Bashaw,* 147 N.H. 238, 240, 785 A.2d 897 (2001) ("A defendant does not lose the right to use deadly force in self-defense, however, unless he uses words to bring about a fight in which he intended at the outset to kill or seriously injure his opponent."); *State v. Gorham,* 120 N.H. 162, 164, 412 A.2d 1017 (1980) ("[I]f the jury concluded after the court's instruction that a defendant's use of words alone to bring about a fight in which he intended at the outset to kill his opponent was sufficient to destroy his legal defense, they were correct."). We have not, however, addressed the specific issues raised here: whether a third person's provocation alone would be sufficient to bar the defense, and whether the defendant must reasonably believe in the third person's innocence before deadly force in defense of the third person may be justified.

This case does not present us with a proper opportunity to decide the boundaries of the defense of others justification, as neither party argued, either at trial or on appeal, that Pierre, the person the defendant was purportedly defending when he killed Lemieux, had provoked the use of force; both parties at trial focused their arguments on the issue of provocation by the *defendant.* Thus, the State asserts that, even if the ***79** instruction regarding provocation by a third person was error, the error was harmless because it did not relieve the State of its duty to disprove, beyond a reasonable doubt, that the defendant acted in defense of himself or another. Citing *Kousounadis,* 159 N.H. at 428–29, 986 A.2d 603, the defendant counters that a trial court's failure to instruct on an element of an offense constitutes structural error, and asserts that we must similarly regard an instruction that effectively relieves the State of part of its burden of disproving a defense.

"Not all constitutional errors ... are subject to harmless error analysis. Some errors require outright reversal. Thus, we must first determine whether the error at issue is subject to harmless error analysis." *Kousounadis,* 159 N.H. at 427, 986 A.2d 603.

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather ****541** than on the virtually inevitable presence of immaterial error.

State v. O'Leary, 153 N.H. 710, 714, 903 A.2d 997 (2006) (citation and quotation omitted). "There are instances, however, when the error is so prejudicial that reversal is required without regard to the evidence in a particular case." *Id.* (quotation omitted). Errors fall into one of two categories: (1) structural defects; or (2) trial errors. *See State v. Ayer,* 150 N.H. 14, 24, 834 A.2d 277 (2003) (citing *Arizona v. Fulminante,* 499 U.S. 279, 308–12, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

> A structural defect affects the very framework in which a trial proceeds. Such defects arise from errors that deprive a criminal defendant of the constitutional safeguards providing a fair trial; therefore, if the trial proceeds after such an error occurs, justice will not still be done. When a structural defect exists, a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair. In contrast, a trial error occurs during the presentation of a case to a jury and can be quantitatively assessed in the context of other evidence in order to determine whether the error was harmless beyond a reasonable doubt. A structural defect, however, infects the entire conduct of the trial from beginning to end, and therefore constitutes an irreparable injustice that cannot be cured by jury instructions.

Ayer, 150 N.H. 14, 24, 834 A.2d 277 (brackets, quotations and citations omitted).

> ***80** Errors that partially or completely deny a defendant the right to the basic trial process, such as the introduction of a coerced confession, the complete denial of a defendant's right to counsel, or adjudication by a biased judge, rise to the level of fundamental unfairness, thereby obviating consideration of the harmless error doctrine.

State v. Dupont, 149 N.H. 70, 75, 816 A.2d 954 (2003).

"[W]e have never clearly defined any single analytical framework for determining which constitutional errors are or are not subject to harmless error analysis." *Kousounadis,* 159 N.H. at 427, 986 A.2d 603. "Generally, if a defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Id.* (quotation, brackets and ellipsis omitted). We have, however, held that an erroneous jury instruction relieving the State of its burden of proving an element of the offense constitutes structural error. *See, e.g., Kousounadis,* 159 N.H. at 429, 986 A.2d 603 ("[u]nder our State Constitution, a jury instruction that omits an element of the offense charged is an error that partially or completely denies a defendant the right to the basic trial process, and thus is not subject to harmless error analysis" (brackets, quotations and citation omitted)); *State v. Hall,* 148 N.H. 394, 400, 808 A.2d 55 (2002) (holding jury instruction amounting to presumption of defendant's mental state, the only element at issue, "requires reversal of the defendant's conviction and is not amenable to harmless error analysis"); *State v. Williams,* 133 N.H. 631, 633–34, 581 A.2d 78 (1990) (holding that in a securities fraud case, instructing jury that certain transferred interests "were securities" was akin to directing a verdict for the State on an element of the offense charged, requiring reversal without regard to the weight of the evidence).

"[P]art I, article 15 of the New Hampshire Constitution entitles a criminal defendant to a jury determination on all the *factual elements* of the crime charged." ****542** *State v. Soucy,* 139 N.H. 349, 351, 653 A.2d 561 (1995) (emphasis added).

> Once evidence of self-defense is admitted, an instruction is required even if the evidentiary support is "not

> overwhelming," [*State v. Hast,* 133 N.H. 747, 749, 584 A.2d 175 (1990)], because the State bears the burden of disproving this statutory defense beyond a reasonable doubt, *see* RSA 626:7, I(a) (1996); *cf. State v. Soucy,* 139 N.H. 349, 352–53 [653 A.2d 561] (1995) (discussing the evidentiary support requiring a jury instruction on a defense that the State must disprove beyond a reasonable doubt). Moreover, when evidence of self-defense is admitted, conduct negating the defense becomes an element of ***81** the charged offense, *see* RSA 625:11, III(c) (1996), which the State must prove beyond a reasonable doubt, RSA 625:10 (1996).

State v. McMinn, 141 N.H. 636, 645, 690 A.2d 1017 (1997). In *Soucy,* we analyzed the relative burdens when the defendant has raised a defense. *See Soucy,* 139 N.H. at 352, 653 A.2d 561 (ruling that trial judge's exclusion of supervening causation evidence from jury consideration was error rendering the trial fundamentally unfair, and, therefore, not subject to harmless error analysis). *Soucy's* analysis of the parties' differing burdens and of what must be submitted to the jury under Part I, Article 15 of the New Hampshire Constitution therefore informs our analysis here.

> A pure defense is a denial of an element of the offense, while an affirmative defense is a defense overriding the element. The former must be negated by the State by proof beyond a reasonable doubt and must be submitted to the jury for determination. The latter need not be negated by the State.

Id. at 352–53, 653 A.2d 561 (citations omitted). Our Criminal Code provides that self-defense or any "[c]onduct which is justifiable under [RSA chapter 627] constitutes a defense to any offense," RSA 627:1 (2007), and "[w]hen evidence is admitted on a matter declared by this code to be ... [a] defense, the state must disprove such defense beyond a reasonable doubt." RSA 626:7, (I)(a) (2007). The legislature has thus determined that self-defense and defense of others constitute pure defenses, and, thus, negating such a defense becomes an element of the offense that the State must prove beyond a reasonable doubt.

This case does not share the infirmity common to *Kousounadis, Hall, Soucy* and *Williams,* in which the trial court's jury instructions effectively denied the defendant the jury's determination as to a factual element of the offense. *See, e.g., Kousounadis,* 159 N.H. at 428–29, 986 A.2d 603 ("The failure to instruct the jury on one element of a crime is thus indistinguishable from a directed verdict, and deprives a defendant of his right to a jury trial.... [T]rial by jury means determination by a jury that *all elements* were proved" (quotation, citation, and parenthesis omitted)). *Compare State v. Bundy,* 130 N.H. 382, 383, 539 A.2d 713 (1988) ("Under the facts of this case, the trial court's supplemental charge could not possibly have invaded the jury's exclusive fact-finding province.") *with State v. Jones,* 125 N.H. 490, 494, 484 A.2d 1070 (1984) (finding that a judge's instruction probably had the effect of superseding the exercise of the jurors' own judgment contrary to Part I, Article 15 of the New Hampshire Constitution). In the cases where we found the court's instructions constituted structural error, it is clear that the jury did not decide all of the elements of the offense, either because the ***82** element was not submitted to the jury, ****543** *Kousounadis,* 159 N.H. at 428–29, 986 A.2d 603, or because "the judge, and not the jury, determined an essential element of the crime," *Williams,* 133 N.H. at 634–35, 581 A.2d 78, by withholding evidence on an issue, *Soucy,* 139 N.H. at 352, 653 A.2d 561, or by creating a mandatory presumption on an element, *Hall,* 148 N.H. at 398–99, 808 A.2d 55.

Here, the jury charge placed the "burden of proving guilt ... entirely on the State." Specifically as to the "defense of others" justification, the court charged the jury: "[T]he State must prove beyond a reasonable doubt that the defendant did not act in self-defense or in defense of others. If you have a reasonable doubt as to whether the defendant acted in self-defense or in defense of others, you must find the defendant not guilty." The trial court's instruction went on to present the jury with three factual provocation alternatives, any one of which would negate the defense, if such provocation were undertaken with the purpose of causing death or serious bodily harm: (1) "the defendant provoked the use of force against himself or a third person in the same encounter," or (2) "the third person provoked the use of force against himself in the same encounter," or (3) "acting together, ... the defendant or third person provoked the use of harm [*sic*] against the defendant or the third person in the same encounter."

Assuming, without deciding, that factual alternative (2), allowing the jury to find that the State had disproved the defense if it proved provocation by a third person, constituted an erroneous statement of law, we nonetheless conclude that the defendant's conviction was based upon the jury's finding that the State had proven all elements of the offense beyond a reasonable doubt. *See Kousounadis,* 159 N.H. at 428, 986 A.2d 603 ("Harmless error analysis depends upon the existence of a verdict of guilty beyond a reasonable doubt on the elements of the crime. The appellate court must assess the possibility that the error affected the jury's verdict. If there

is no verdict on an element of the crime, it is not possible to conclude that the error did not affect the verdict." (quotation omitted)).

First, we conclude that the error could not have affected the verdict because neither the defense nor the State argued to the jury that the third party, Pierre, had provoked the encounter. The State, the party that would stand to benefit from the error if it had argued that Pierre's provocation vitiated the defendant's justification defense, argued that the Pierre/Lemieux dispute was a red herring and that the defendant was the person who provoked Lemieux to fight.

Further, the evidence does not support a finding that Pierre alone provoked the encounter. It was the defendant who was upset to learn that Lemieux had defied him by going to his apartment when he was not there and who told Rivera not to allow Lemieux back into the house. Although, in ***83** response to the news from Manchester, both the defendant and Pierre made telephone calls to people who were close to Lemieux, it was the defendant who telephoned Johnson looking for Lemieux. While Johnson overheard Lemieux say into the telephone, " I'll be there," and understood that Lemieux had been speaking with Pierre, it was the defendant who threatened to kill Lemieux, as Lemieux told Gobis. It was the defendant who lied to Lemieux about his distance from Manchester in order to allow the defendant and his friends to arrive on Central Street before Lemieux. It was the defendant who asked Gomez to meet the defendant on Central Street and to bring a gun with which to "wrap up" Lemieux. It was the defendant who was waiting on the porch ****544** with a gun plainly visible in his hand. And ultimately, it was the defendant who stepped behind Lemieux and fired the only shot in the encounter.

Thus, we conclude that the jury instructions properly assigned to the State the burden of proof as to all elements of the offense. To the extent the instructions erroneously advised the jury that the State could disprove self-defense or defense of others by establishing a third party's provocation of the encounter, the record establishes beyond a reasonable doubt that such instruction did not contribute to the defendant's conviction. *Compare State v. Reid,* 134 N.H. 418, 423, 594 A.2d 160 (1991) (finding where the jury "was instructed that it could convict the defendant if he *should have known* the individual effecting the arrest was a law enforcement official, the jury may have convicted the defendant on this lesser standard," and reversal was required pursuant to Williams). Thus, even assuming that the court's instructions as to third party provocation were erroneous, the error was not structural, and therefore is subject to harmless error analysis.

"To establish that an error was harmless, the State must prove beyond a reasonable doubt that the error did not affect the verdict." *O'Leary,* 153 N.H. at 714, 903 A.2d 997. Because we have concluded above that the defendant's conviction was based upon the jury's finding that the State had proven all elements of the offense beyond a reasonable doubt, regardless of any error in the provocation instruction, we find that the State has met this burden. *See id.*

III. Admission of Gobis's Testimony Regarding a "Dispute"

During the testimony of Tina Gobis, the State asked, "Did Larry Lemieux ever tell you whether or not there was any source of dispute or tension between him and ... [the defendant]?" The court sustained the defense's objection to that question after Gobis answered in the affirmative. The prosecutor then asked, "[H]ow did you know there was any sort of dispute between the defendant and Larry Lemieux?" The court overruled ***84** the defense's objection to this question and Gobis testified that Lemieux had told her. When the defense objected and further moved to strike Gobis's response, the prosecutor explained that he did not offer the evidence for the truth of the matter asserted, but only to show that Lemieux had made the statement. The court denied the defense's motion to strike.

The defendant argues that this evidence was erroneously admitted because it does not fall within any hearsay exception, and if it was not admitted for its content, then its probative value was minimal, while its prejudicial value was significant. He asserts that "the jury likely used the evidence for the hearsay purpose of proving enduring hostility between Etienne and Lemieux," an important and contested issue at trial. The State responds that even if the admission of this testimony was error, it was harmless beyond a reasonable doubt because the testimony was cumulative as to the animosity between Etienne and Lemieux, and because other evidence of guilt was overwhelming.

"An error is not harmless unless the State proves beyond a reasonable doubt that it did not affect the verdict." *Id.* "In determining whether the State has met its burden, we consider the strength of the State's evidence presented at trial, as well as the character of the excluded evidence, including whether the evidence was inconsequential in relation to the State's evidence." *Id.* "An error may be harmless beyond a reasonable doubt if the alternative evidence of the defendant's

****545** guilt is of an overwhelming nature, quantity or weight and if the inadmissible evidence is merely cumulative or inconsequential in relation to the State's evidence of guilt." *Id.*

Assuming without deciding that there was error here, we agree with the State that it was harmless. As to the specific issue of hostility between Lemieux and the defendant, the record contains ample evidence of animosity between the two. Autumn Millette, another romantic partner of Lemieux, testified without objection that Lemieux had previously said that he had a "bad feeling" because the defendant did not like him. Gomez testified that there was a dispute between Lemieux and the defendant in the weeks leading up to the shooting, that the defendant said that he had heard that Lemieux was "[t]alking a lot of s* *t" about him and threatening to do something to him, and that the defendant had been angry after Lemieux "hit on" Jette while belittling the defendant. Gomez also testified that the defendant said he was considering killing Lemieux, and finally that he needed to kill him. Garcia testified that the defendant and Lemieux had a dispute in late December or early January and that there was tension between them. He also testified that the defendant had been upset and had ***85** several conversations, including with Lemieux and Garcia, about the situation between Lemieux and Jette, that the defendant had been upset about the calls from Central Street, and that the defendant had been concerned because Jette was afraid of Lemieux. Battistelli testified, without objection, that the defendant and Pierre had discussed that Lemieux would "get his some day" and that the defendant had been upset about Lemieux flirting with Jette. She further testified that there had been a dispute at Central Street in the hours leading up to the murder. Johnson testified, without objection, that the defendant had asked whether Lemieux had gone to Central Street and "disrespect[ed] him," and that the defendant had sounded upset while inquiring whether Lemieux had said "f* * * 'D' " or "forget about 'D.' " Gobis herself testified, without objection, that Lemieux had told her that he was going to leave town because either Pierre or the defendant was going to kill him, and that on the day of the murder the defendant had "threatened to kill him."

The record thus contains overwhelming alternative evidence of the developing animosity between the defendant and Lemieux, without consideration of Gobis's objected-to statements.

Further, other evidence overwhelmingly established the defendant's guilt. On the day Lemieux was killed, the defendant gave himself time to prepare to kill Lemieux by telling Lemieux he was much farther from Manchester than he truly was. He asked Gomez to meet him at Central Street and to bring a gun. The defendant and his friends armed themselves. The defendant waited for Lemieux with a gun clearly visible in his left hand. After Lemieux arrived and began arguing with Pierre, the defendant then moved the gun to his right hand, said something to Pierre in Haitian Creole, stepped behind Lemieux, raised his arm, and shot Lemieux at a downward angle behind the right ear. The careful placement of the shot prevented the bullet from hitting Pierre, who was face to face with Lemieux, and resulted in Lemieux's instantaneous paralysis and rapid death.

The defendant then fled the scene, took a shower, put on clean clothing, gave his soiled clothing to his sister, talked about her providing him with an alibi, and disposed of the gun, magazine, and bullets. He first also lied and repeatedly changed his story to conform to the discovery. He ****546** claimed that he had been in Boston at the time of the murder and had learned from his friend Heather upon his return to Manchester that Lemieux had been shot and his friends were in custody. He then said that he had left Manchester around the time of the murder. He wrote to Jette that Lemieux had drawn first, but the person who killed Lemieux in self-defense was not him, and that he had been present when Pierre killed Lemieux. He also admitted that he had known Lemieux was going to be killed. He then finally claimed ***86** that he had killed Lemieux because Lemieux had pulled out a gun. He also threatened, bribed, intimidated, and put "hits" on the witnesses who were not saying what he wanted. These facts were all "evidence of the defendant's consciousness of guilt." *State v. Bean,* 153 N.H. 380, 387, 897 A.2d 946 (2006); *see also State v. Littlefield,* 152 N.H. 331, 335, 876 A.2d 712 (2005) (flight demonstrates consciousness of guilt).

In light of the alternative evidence establishing the dispute and animosity between the defendant and Lemieux, as well as the overwhelming evidence of the defendant's guilt, Gobis's testimony was cumulative, and the State has established that the error, if any, was harmless beyond a reasonable doubt.

IV. Motion for New Trial

The defendant asserts that the trial court erred in denying his motion for a new trial. He argues that the State failed to disclose exculpatory evidence relating to a plea bargain concerning Gomez and that Gomez committed perjury.

A. Background

On January 20, 2005, the defendant filed a motion for a new trial, alleging that: (1) the State withheld exculpatory evidence; and (2) Gomez, a material prosecution witness, provided perjured testimony at trial. Thereafter, he moved for a *Richards* hearing, *see Richards,* 129 N.H. at 673–74, 531 A.2d 338, and to pierce Gomez's attorney-client privilege. Over Gomez's objection, the trial court held a *Richards* hearing, during which Gomez asserted his Fifth Amendment right against self-incrimination in response to several areas of questioning. The defendant asked the court to order the State to provide immunity to Gomez for the purpose of exploring his allegedly perjured trial testimony. In an order dated September 12, 2006, the trial court denied the motion for a new trial, and found that it was "unnecessary to immunize Gomez or to penetrate the attorney-client privilege to ascertain the extent to which Gomez claims he committed perjury."

At trial, Gomez presented testimony that the defendant argues was material in establishing the premeditation element of his first-degree murder conviction, and, therefore, Gomez's credibility was a major issue at trial. The defendant contends that Gomez's credibility was bolstered by his trial testimony that he was testifying without the benefit of any immunity, plea deals or offers of leniency. The defendant claims that the State, during closing argument, relied upon this purported lack of a plea deal and argued that Gomez had no motive to lie because he had not received any consideration from the State.

***87** The State acknowledges that, at the time of his testimony, Gomez had pleaded guilty to, and been sentenced on: (1) charges alleging falsifying physical evidence and being a felon in possession of a handgun following Lemieux's murder; and (2) charges involving drug trafficking, which the State asserts were unrelated to the prosecution of Lemieux's murder. The falsifying physical evidence and felon in possession of a handgun charges related to Lemieux's murder and were prosecuted by ****547** Jennifer Sandoval, of the Hillsborough County Attorney's Office; the drug charges were prosecuted by Susan Morrell, of the New Hampshire Attorney General's Office. At the defendant's trial, Gomez testified regarding the sentences he had received for both sets of charges. After the defendant's trial was concluded, defense counsel learned of a proffer letter from the Attorney General's Office recommending a suspended sentence on Gomez's drug charges and referencing Gomez's "attempts to cooperate with the State."

On December 4, 2004, Gomez met with defense investigator Kathy Tinklepaugh and told her that "perjury was done," that he was "asked to do it," and that he had spoken with the defendant after the trial. On December 7, 2004, the defendant's trial counsel obtained from the Attorney General's Office the proffer letter, dated June 30, 2004, between Susan Morrell and Gomez's counsel, Adam Bernstein. Attorney Morrell explained the letter's contents to the defendant's trial counsel as follows:

> Mr. Gomez did not receive any consideration for his "cooperation" in the matter of *State v. Dickens Etienne.* At no time was he offered, or given any consideration in connection with Etienne's case.
>
> The consideration to which I refer in the [June 30, 2004] letter was to a proffer conducted on May 7, 2004 at the Manchester Police Department. The subject matter of our interview pertained to Mr. Gomez's knowledge of illegal drug activities in the Manchester area.

The State's alleged withholding of this purportedly exculpatory evidence and Gomez's allegedly false testimony formed the basis of the defendant's motion for a new trial, which was grounded in Part I, Article 15 of the New Hampshire Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and RSA 526:1 (2007).

The standards that the trial court applies to a motion for new trial differ depending upon the basis for the motion. Here, the defendant argues both that the letter from Morrell to Gomez's counsel constituted exculpatory ***88** evidence that the prosecution failed to provide, and that Gomez's assertion that he perjured himself constituted newly discovered evidence. We address each in turn.

B. Failure to Disclose Exculpatory Information

The defendant contends that he was denied access to exculpatory information by the State in violation of his due process rights under the United States and New Hampshire Constitutions. We first address his claim under the State Constitution, *State v. Ball,* 124 N.H. 226, 231, 471 A.2d 347 (1983), citing federal opinions for guidance only, *id.* at 232–33, 471 A.2d 347.

> Part I, Article 15 of our State Constitution provides that no citizen "shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life,

liberty, or estate, but by the judgment of his peers, or the law of the land." The "law of the land" is synonymous with "due process of law." *Bragg v. Director, N.H. Div. of Motor Vehicles,* 141 N.H. 677, 678 [690 A.2d 571] (1997). This due process right imposes on the prosecutor the "duty to disclose evidence favorable to the accused where the evidence is material either to guilt or to punishment." *State v. Lucius,* 140 N.H. 60, 63 [663 A.2d 605] (1995). An investigating officer or other law enforcement official in possession of favorable evidence is subject to this same duty. *See id.*

****548** *State v. Dewitt,* 143 N.H. 24, 33, 719 A.2d 570 (1998). "Generally, to secure a new trial, a defendant must prove that the prosecution withheld evidence that is favorable and material." *Id.* "If, however, the defendant establishes that the prosecution *knowingly* withheld favorable evidence, the burden shifts to the State to prove beyond a reasonable doubt that the omitted evidence would not have affected the verdict." *Id.*

Thus, the defendant has the initial burden to show that the evidence withheld by the State was favorable. *State v. Shepherd,* 159 N.H. 163, 170, 977 A.2d 1029 (2009). "Favorable evidence includes that which is admissible, likely to lead to the discovery of admissible evidence, or otherwise relevant to the preparation or presentation of the defense." *Dewitt,* 143 N.H. at 33, 719 A.2d 570. "Favorable evidence may include impeachment evidence." *Shepherd,* 159 N.H. at 170, 977 A.2d 1029.

Once the defendant proves that the evidence is favorable, the next issue is whether the State knowingly withheld the evidence. If the defendant carries this burden, there is a presumption that the evidence is material and the burden shifts to the State to prove, ***89** beyond a reasonable doubt, that the undisclosed evidence would not have affected the verdict. *See State v. Lucius,* 140 N.H. 60, 63–64 [663 A.2d 605] (1995). If, however, the defendant fails to prove the State knowingly withheld the evidence, then the defendant retains the burden to prove that the evidence is material. *See Dewitt,* 143 N.H. at 35 [719 A.2d 570]. When the defendant retains the burden to prove materiality, we apply the federal standard; *i.e.,* the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [*United States v.*] *Bagley,* 473 U.S. [667,] 682 [105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)]; *see Dewitt,* 143 N.H. at 33 [719 A.2d 570].

Shepherd, 159 N.H. at 170–71, 977 A.2d 1029.

"We initially address whether the defendant here met his burden to prove that the undisclosed information is favorable," *id.* at 171, 977 A.2d 1029, bearing in mind that "our inquiry in this due process analysis is not whether the evidence is admissible, but instead whether it is favorable —*i.e.,* whether it would have helped the defense in the preparation or presentation of its case." *Id.*

At trial, the defense cross-examined Gomez extensively about his belief that he had received no deal on the drug charges, and attacked his sentence by implying it was inadequate in light of his criminal history and the charges he had been facing. In his closing argument, defense counsel argued that Gomez's testimony was not credible because he had received an allegedly insufficient sentence on his drug charges, and asserted repeatedly that Gomez had become part of the prosecution's "team." The letter from the Attorney General's Office to Gomez's counsel, stating that "[t]he fact that this recommendation is for a suspended sentence reflects consideration for [Gomez's] attempts to cooperate with the State," would have strengthened the defense's argument and given greater weight to its assertions that Gomez had, in fact, received a plea deal. Under these circumstances, the defendant has satisfied his burden of showing that the undisclosed evidence was favorable.

"We next consider whether the State knowingly withheld the exculpatory evidence." *Id.* The trial court found that the prosecution, represented by Attorneys ****549** David Ruoff and Charles Keefe, had not "knowingly" withheld the evidence, since they "were completely unaware of the existence of the proffer, and therefore, could not have knowingly withheld the evidence from the defendant." The court found that while the omission was potentially negligent, it did not rise to the level of "knowingly," as the term is used in the criminal context. The trial court rejected the defendant's argument that Attorney Morrell's knowledge of the existence of the proffer ***90** letter must be imputed to Attorneys Ruoff and Keefe pursuant to *State v. Lucius,* 140 N.H. 60, 63, 663 A.2d 605 (1995). The trial court reasoned that the " knowingly" requirement must apply to the withholding of the evidence, not simply its existence. Since no one person in the Attorney General's Office knew not only of the existence of the evidence, but also of its value as impeachment evidence and that it was not provided to the defense, the court concluded that the prosecution had not "knowingly withheld" the evidence for burden-shifting purposes. *See Laurie,* 139 N.H. at 330, 653 A.2d 549. The trial court relied on our holding in *Dewitt,* 143 N.H. at 35,

719 A.2d 570, where "law enforcement had the information both prior to and at trial." Despite acknowledging that it was "clear that the State withheld the evidence," we remanded for a determination of "whether the State *knowingly* withheld" it, and did not apply *Laurie's* more stringent burden of proof. *Dewitt,* 143 N.H. at 35, 719 A.2d 570 (emphasis added).

The trial court reached its decision without the benefit of our decision in *Shepherd.* There we held that a prosecution expert witness's redaction of a report constituted evidence "knowingly withheld" by the State, although the trial court's findings of fact suggested that the attorneys who prosecuted the case with the incomplete report had not become aware of its redaction until after trial. *Shepherd,* 159 N.H. at 167–68, 171, 977 A.2d 1029. *Shepherd* is the most recent of a line of cases, of which *Dewitt* is the only outlier, imputing knowledge to the State when favorable evidence is within the control of the prosecutor or in the possession of a law enforcement agency charged with the investigation and presentation of the case. *See id.; Petition of State of N.H. (State v. Theodosopoulos),* 153 N.H. 318, 320, 893 A.2d 712 (2006); *Lucius,* 140 N.H. at 63, 663 A.2d 605; *Laurie,* 139 N.H. at 327, 330, 653 A.2d 549; *cf. State v. Lavallee,* 145 N.H. 424, 427, 765 A.2d 671 (2000) (prosecutor's duty to produce exculpatory evidence extends only to evidence in prosecutor's possession or in possession of law enforcement agency charged with investigation and presentation of the case).

Imputing knowledge among attorneys in the same office is a shorter leap than we have already taken in *Shepherd, Theodosopoulos,* and *Lucius.* Moreover, for purposes of conflicts of interest, we impute knowledge among attorneys in the same firm. *See N.H. R. Prof. Conduct* 1.10(a); *ABA Model Code of Prof'l Conduct R.* 1.0 cmt. [3] (2004). We consider the public defender and the appellate defender to be attorneys in the same "firm." *State v. Veale,* 154 N.H. 730, 732, 919 A.2d 794 (2007), *modified on other grounds by State v. Thompson,* 161 N.H. 507, 20 A.3d 242 (2011). The criminal division of the Attorney General's Office likewise would constitute a firm. *See ABA Model Code of Prof'l Conduct R.* 1.0 cmt. [3] (2004); *see also* ***91** *Veale,* 154 N.H. at 731, 919 A.2d 794 (noting that we look to the ABA Model Code Comments for guidance in interpreting our own rules of professional conduct).

Further, as noted by the defendant, there are numerous cases from other jurisdictions imputing knowledge among attorneys in the prosecutor's office. *See, e.g.,* ****550** *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Diallo v. State,* 413 Md. 678, 994 A.2d 820, 837 (2010); *State v. Landano,* 271 N.J.Super. 1, 637 A.2d 1270, 1287 (App.Div.1994).

Accordingly, we conclude that the knowledge of any attorney in the criminal bureau of the Attorney General's Office should be imputed to the State for purposes of determining whether the State "knowingly withheld" exculpatory evidence here.

Although no single attorney knew both that Gomez had given and received consideration on his drug charges and that he was testifying as a witness for the State in the defendant's homicide prosecution, Attorney Morrell knew of Gomez's plea bargain on his drug charges, and Attorneys Keefe and Ruoff knew both that Gomez would be an important prosecution witness in the homicide case, and that showing that he had received favorable treatment from the State would be favorable to the defense. Thus, the defendant established that the State possessed the information regarding Gomez's cooperation with the State on the drug charges. As we have concluded, the evidence of Gomez's proffer letter was favorable to the defendant. The parties agree that the State did not disclose the letter to the defendant prior to trial, so we will assume that the information was "withheld." Assuming the State knowingly withheld favorable evidence, "the burden then shifts to the State to prove, beyond a reasonable doubt, that 'the undisclosed evidence would not have affected the verdict.' " *Shepherd,* 159 N.H. at 171–72, 977 A.2d 1029 (quoting *Laurie,* 139 N.H. at 330, 653 A.2d 549). "Not every nondisclosure is necessarily error, and a conviction need not be set aside unless a nondisclosure had an influence on the jury." *State v. Breest,* 118 N.H. 416, 419, 387 A.2d 643 (1978). "Materiality therefore is the key to the problem." *Id.*

"Nondisclosed, exculpatory evidence is material under the New Hampshire Constitution unless the State proves, beyond a reasonable doubt, that the undisclosed evidence would not have affected the verdict." *Lucius,* 140 N.H. at 63–64, 663 A.2d 605. In this case, the trial court found that, "even assuming the State knowingly withheld the evidence pertaining to the consideration Gomez apparently received for his drug charges, ... the State has demonstrated beyond a reasonable doubt that such evidence would not have affected the verdict."

We have not previously stated the standard of review for such a materiality determination. The defendant contends that we should treat the ***92** trial court's determination as a mixed

question of law and fact and review it *de novo*. Because the State does not argue otherwise, we will do so in this case.

The trial court found that the undisclosed information was favorable in that it "would have served to impeach Gomez's credibility," but ultimately found that it was not material for three reasons: (1) it was "cumulative" because the defense succeeded on cross-examination of Gomez in achieving all that it could have achieved through the use of the undisclosed evidence; (2) it was not material because the defense had other avenues of impeachment by which to challenge Gomez's credibility; and (3) it was not material because Gomez's testimony was not the "primary, exclusive, or crucial evidence" of the element of premeditation.

We likewise conclude that the undisclosed evidence would not have altered defense counsel's strategy, which centered on impeachment of Gomez. We also find, beyond a reasonable doubt, that the evidence would not have altered the outcome because even if the impeachment had ****551** caused the jury to disregard Gomez's testimony altogether, there was overwhelming additional evidence of premeditation before the jury.

The defense strategy included an argument that Gomez was not a credible witness because he had, in all likelihood, received a "deal" on his drug charges. The defense questioned Gomez extensively about his belief that he had received no such deal, established the actual sentence Gomez received, and attacked the sentence by implying that it was inadequate in light of Gomez's criminal history and the charges he had been facing. The defense also argued during its closing that Gomez's testimony was not credible because he had received an insufficient sentence for his drug charges and had become part of the prosecution's "team."

The proffer letter, if disclosed, would have provided evidence that Gomez had attempted to cooperate with the State on the unrelated drug charges, and would have supported the defendant's assertion that Gomez had allegedly joined the prosecution's team. It would not have established that Gomez received any consideration for his testimony at the defendant's trial. Cf. *State v. Bader,* 148 N.H. 265, 272–73, 808 A.2d 12 (2002) (upholding trial court's determination of an absence of "sine qua non" on the part of the State in return for its witness's testimony and allowing cross-examination of the witness "regarding the terms and his understanding of his plea agreement, even if that understanding differed from the actual agreement").

The defendant challenged Gomez's credibility in several additional respects. Gomez testified while wearing his New Hampshire State Prison clothing and fielded questions from both parties about the sentence he was serving at the time. He discussed his actions with regard to possessing a ***93** firearm and hiding Lemieux's gun, the charges leading to his imprisonment, as well as the lies he had apparently told to police on prior occasions. Gomez's cooperation with the State to receive consideration in an unrelated case, therefore, was only one of the areas in which the defense attempted to discredit him, and the remaining avenues of impeachment were unaffected by the undisclosed information. *See United States v. Dumas,* 207 F.3d 11, 16 (1st Cir. 2000) ("Impeachment evidence, even that which tends to further undermine the credibility of the key Government witness whose credibility has already been shaken due to extensive cross-examination, does not create a reasonable doubt that did not otherwise exist where that evidence is cumulative or collateral."); *Breest,* 118 N.H. at 421, 387 A.2d 643 (had evidence of the witness's deal with the State been disclosed, it would not have affected the jury's determination of the credibility or character of the witness "who had already been shown to have been a convicted criminal and anything but a pillar of society").

Furthermore, Gomez's testimony at trial, while providing some evidence of premeditation, was not the primary, exclusive, or crucial evidence of that element. *Cf., e.g., Shepherd,* 159 N.H. at 172, 977 A.2d 1029 ("The State's case hinged on [the complaining witness's] credibility.... The undisclosed evidence could have led to a line of impeachment questioning that may have affected the verdict."); *Dewitt*, 143 N.H. at 34, 719 A.2d 570 ("The usefulness of impeachment evidence is particularly apparent in this case where only the complaining witness and the defendant have actual knowledge of the circumstances surrounding the alleged assault."); *State v. Dedrick,* 135 N.H. 502, 508, 607 A.2d 127 (1992) ("When the reliability of a given witness may well be determinative of guilt ****552** or innocence, nondisclosure of evidence affecting credibility falls within the *Brady* rule." (quotation and brackets omitted)). Here, Gomez's credibility was not determinative of the defendant's guilt or innocence. Unlike cases, for example, in which only one officer heard an unsolicited confession, *Laurie,* 139 N.H. at 332, 653 A.2d 549, or a witness's testimony was the only evidence tending to show that the victim intended to kill the defendant, *Dedrick,* 135 N.H. at 509, 607 A.2d 127, here many witnesses testified to the events leading up to the

homicide, to the circumstances of the homicide, and to the defendant's actions thereafter.

We note that the materiality standard "is not a sufficiency of evidence test," *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and in an inquiry to determine materiality, "the fact that other evidence might be sufficient to find the defendant guilty is not dispositive." *Laurie,* 139 N.H. at 332, 653 A.2d 549. "To determine whether the failure to disclose the evidence requires reversal, we must review the evidence in light of the role [Gomez's] testimony played in the trial, and in light of the relationship of the evidence to the defendant's ***94** trial strategy." *Laurie,* 139 N.H. at 332, 653 A.2d 549. "The absent evidence 'must be evaluated in the context of the entire record.' " *Id.* (quoting *United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). We therefore consider the other evidence in the record to determine the effect that impeachment of Gomez by means of the undisclosed letter might have had.

"The elements of premeditation and deliberation require proof beyond a reasonable doubt of some reflection and consideration upon the choice to kill or not to kill, and the formation of a definite purpose to kill." *State v. Patten,* 148 N.H. 659, 660–61, 813 A.2d 497 (2002) (citation and quotation omitted). "While the object of the requirement is to rule out action on sudden impulse, no particular period of premeditation and deliberation is required." *State v. Elbert,* 125 N.H. 1, 12, 480 A.2d 854 (1984). If the amount of time has been "sufficient for some reflection and consideration ... it matters not how brief it is." *State v. Greenleaf,* 71 N.H. 606, 614, 54 A. 38 (1902).

Even if the impeachment evidence had been disclosed and the jury had been convinced to disregard Gomez's testimony at trial, there remained overwhelming evidence of the defendant's premeditation and deliberation. Prior to the homicide, the relationship between the defendant and Lemieux was tense. Lemieux told Gobis that either the defendant or Pierre was going to kill him. Battistelli overheard the defendant and Pierre discussing that Lemieux would "get his some day." The defendant banned Lemieux from his home because of Lemieux's interaction with Jette.

The night before the murder, the defendant was upset when he learned that Lemieux had defied him by going to his apartment and had attempted to sexually assault Jennifer Hannaford, the aunt of his then-unborn child and the mother of Pierre's children. The defendant proceeded to telephone people in Manchester who might know where Lemieux could be found. Gobis testified that the defendant and Lemieux had argued on the telephone, and that Lemieux told her that the defendant "threatened to kill him."

Garcia testified that on the day of the shooting, the defendant was upset and angry, and that the defendant had lied to Lemieux about when they would be arriving at Central Street because he wanted to get there before Lemieux did. Garcia further testified that the defendant had asked ****553** Gomez to go to Central Street. The defendant retrieved his .9–millimeter Ruger pistol, Pierre obtained a gun and Rivera gave Pierre bullets. The men behaved as though they expected a fight: Pierre told Jennifer Hannaford to take the children upstairs shortly before the murder, and Roux was reluctant to go outside to meet Lemieux.

Garcia testified that the defendant had been holding the gun in his left hand when Lemieux arrived, that he moved the gun to his right hand, said ***95** something to Pierre in Haitian Creole, and then moved behind Lemieux and shot him. Johnson and Rivera both also testified that the defendant moved behind Lemieux, pointed the gun at him, and then shot him. The medical examiner testified that the bullet severed Lemieux's spinal cord and immediately ended his life.

The record also contained letters the defendant had written in which he told Amy Hannaford and Jette that he had known that Lemieux was going to be killed. Detective John Patti testified, without objection, that in February 2004, Gomez told Detective Patti that Gomez and the defendant had discussed bringing Lemieux to Foxwoods for a "wood ride," meaning they would murder Lemieux during the ride, and that the defendant had said, "It's a wrap," meaning that Lemieux was going to be killed.

The jury was thus presented with overwhelming evidence, aside from Gomez's testimony, that the defendant purposely, with deliberation and premeditation, killed Lemieux. *See Elbert,* 125 N.H. at 12, 480 A.2d 854. The State has shown beyond a reasonable doubt that disclosure of Gomez's immunity agreement and plea deal in the other cases would not have affected defense counsel's strategy or the ultimate verdict.

Because the record supports the trial court's finding that "while Gomez's testimony may have bolstered the State's case, it was not of such a nature that further impeachment by the proffer letter would have altered the result," we affirm

the trial court's denial of the defendant's motion for new trial based on the State's alleged failure to disclose exculpatory information. In light of the fact that the State Constitution affords greater protection than does the Federal Constitution, *see Laurie,* 139 N.H. at 330, 653 A.2d 549, we reach the same result under the Federal Constitution.

C. Gomez's Alleged Perjury

The defendant asserts that he is entitled to a new trial on the basis that Gomez's testimony was perjured, both as to his plea bargain with the State and, more broadly, as to his testimony inculpating the defendant. The defendant's arguments are based both in the discovery of "new evidence," namely, Gomez's post-trial statement that he had committed perjury, and in the nondisclosure of the evidence refuting Gomez's statements that he was not testifying pursuant to a deal with the State. The State responds that Gomez did not commit perjury, and even if Gomez's testimony was not truthful, his false statements were not material. The trial court agreed with the State, finding that Gomez had not lied as to whether he received consideration from the State, that his testimony reflected only his "discontent with the sentence he did receive," and that, even if he had testified falsely, his false statements were not material.

***96** We first note the different standards applicable to the State's knowing use of perjured testimony and its unwitting use of such testimony. If the State's use of any perjured information was knowing, then the test is that set forth in *Laurie,* ****554** as discussed above; if, however, the State unwittingly presented perjured testimony, and the testimony was discovered to be false after trial, then the test is the one applicable to any motion based upon newly discovered evidence. *See United States v. Connolly,* 504 F.3d 206, 211–13 (1st Cir.2007) (comparing the federal standard for a motion for new trial based upon newly discovered evidence with the more defense-favorable standard when exculpatory evidence has been withheld); *United States v. Huddleston,* 194 F.3d 214, 217 (1st Cir.1999) (holding where prosecutor's use of perjurious testimony was unwitting, a motion for a new trial "should be treated in the same manner as any other newly discovered evidence"); *Bader,* 148 N.H. at 284–85, 808 A.2d 12 (distinguishing *State v. Yates,* 137 N.H. 495, 629 A.2d 807 (1993), since "[t]hat case provides that a new trial is warranted where the prosecution knowingly presented false or perjured testimony [and t]here is no basis for such a conclusion in this case").

The authority for granting a new trial based upon newly discovered evidence is statutory. RSA 526:1 provides: "A new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable."

> It is well settled that the questions involved in an application for a new trial are questions of fact entirely within the jurisdiction of the superior court. Accordingly, we will not overturn the trial court's determination of whether a new trial should be granted in a particular case unless there has been an [unsustainable exercise of discretion].

State v. Jaroma, 139 N.H. 611, 613, 660 A.2d 1131 (1995) (quotation omitted); *see Lambert,* 147 N.H. at 296, 787 A.2d 175 (explaining unsustainable exercise of discretion standard).

> To prevail on a motion for a new trial based upon newly discovered evidence, the defendant must prove: (1) that he was not at fault for failing to discover the evidence at the former trial; (2) that the evidence is admissible, material to the merits and not cumulative; and (3) that the evidence is of such a character that a different result will probably be reached upon another trial.

State v. Cossette, 151 N.H. 355, 361, 856 A.2d 732 (2004) (citations omitted). "Recanted testimony is a species of newly discovered evidence for purposes of a new trial motion." *Bader,* 148 N.H. at 282, 808 A.2d 12 (quotation omitted).

***97** "The question of whether a new trial should be granted on the basis of newly discovered evidence is a question of fact for the trial court." *State v. Williams,* 142 N.H. 662, 668, 708 A.2d 55 (1998) (quotations omitted). "We will sustain the trial court's decision unless it conclusively appears that a different result is probable, so that the Trial Court's conclusion is clearly unreasonable." *Id.* (quotation omitted). Moreover,

> It is a question of fact for the trial court as to whether newly discovered evidence suggesting perjury by a prosecution witness demands a new trial. Where the overriding question is the possible impact of newly discovered evidence on the credibility of a key prosecution witness, we must affirm the findings of the trial court so long as there is evidence to support them.

Bader, 148 N.H. at 283, 808 A.2d 12 (quotation omitted).

In this case, the evidence suggesting perjury beyond the plea information stems from Gomez's conversation with Kathy Tinklepaugh, an investigator working with the public

defender on the defendant's case. Tinklepaugh testified that ****555** Gomez told her that "perjury was done" and that "[h]e was asked to do it." She further testified that Gomez had conversed with the defendant about Gomez's testimony after the defendant's conviction, and that Gomez was coming forward because "he wanted to make it right," clarifying that "[the defendant] may have done it but he didn't do it the way they wanted people to see it." The defendant argues that, since Gomez spoke of how the defendant "may have done it," Gomez's admission of perjury referred to testimony about Lemieux's killing, and, since Gomez was not present at the shooting, his perjury related to his incriminating testimony about the defendant's premeditated plan to kill Lemieux.

As to the circumstances of the shooting, the trial court found no false testimony by Gomez, noting that his testimony had been consistent from mere weeks after the shooting through the time of the trial, and was substantially corroborated by letters written by the defendant himself and by the testimony of other witnesses. The trial court further noted, "It is apparent from the police reports that Gomez testified at trial because the defendant had threatened his family," and found Gomez's credibility bolstered by his admissions of lying to police regarding his possession of a gun and the act of hiding Lemieux's gun. It also noted that, following the trial, Gomez considered the defendant his "little brother," as evidenced in letters between Gomez and the defendant. The court found that Gomez had not committed perjury but that, "even assuming Gomez committed perjury at trial, ... the defendant has not demonstrated that Gomez's perjured testimony would have affected the outcome of the trial." The record supports the trial court's findings and conclusions.

***98** When the purported new evidence is a recantation by a prosecution witness, the third prong of the three-prong test applicable to newly discovered evidence will not be met if the trial judge finds as a threshold matter that the recantation is not credible. *State v. Mills,* 136 N.H. 46, 51, 611 A.2d 1104 (1992); *see also People v. Minnick,* 214 Cal.App.3d 1478, 263 Cal.Rptr. 316, 318 (1989) (in deciding motion for new trial based upon recantation, trial judge determines whether new evidence is credible, then whether different result on retrial is probable). The trial judge here found that Gomez had not committed perjury, noting that he had "on multiple occasions, provided virtually the same story regarding the homicide." Furthermore, the court noted, "his trial testimony was corroborated by multiple other pieces of evidence, including letters written by the defendant himself and the testimony of other witnesses." The record supports the trial court's determination as to Gomez's original account, and thus, its skepticism as to his recantation. *See Connolly,* 504 F.3d at 214 ("It is well established that recantations are generally viewed with considerable skepticism.")

In addition, Gomez's "testimony at trial was also corroborated by several other witnesses, mitigating the significance of any possible recantation." *United States v. Walker,* 25 F.3d 540, 549 (7th Cir.1994); *see also Connolly,* 504 F.3d at 217 n. 6 ("[T]he force of impeachment evidence is diminished when the witness's testimony is supported by substantial corroborating evidence."). Thus, Gomez's "recantation, like many jailhouse recantations, lacked any meaningful indicia of reliability and, therefore, was properly regarded as highly suspicious." *Connolly,* 504 F.3d at 215 (quotations omitted). We also consider the fact that "no evidence has been presented suggesting that [Gomez] himself ****556** would be willing, under oath, to admit to perjury." *Id.* at 216.

Even assuming that the recantation was credible, it was not "of such a character that a different result will probably be reached upon another trial." *Cossette,* 151 N.H. at 361, 856 A.2d 732.

> We do not believe that due process demands a hearing to determine the credibility of every recantation of testimony. Only recantations of material testimony that would most likely affect the verdict rise to the level of a due process violation, if a state, alerted to the recantation, leaves the conviction in place.
>
> ....
>
> It is our belief that the perjured testimony which will trigger a due process violation must be of an extraordinary nature. It must ***99** leave the court with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.

Bader, 148 N.H. at 286, 808 A.2d 12 (quotation and brackets omitted). "For newly discovered evidence to warrant a retrial in a criminal case, the existence of the required probability of reversal must be gauged by an objectively reasonable appraisal of the record as a whole, not on the basis of wishful thinking, rank conjecture, or unsupportable surmise." *United States v. Natanel,* 938 F.2d 302, 314 (1st Cir.1991). As we discussed above, the evidence presented to the jury, even in the absence of Gomez's trial testimony, overwhelmingly supported a finding of guilt beyond a reasonable doubt. *See Connolly,* 504 F.3d at 216–17 ("[E]ven assuming that the recantation were true, it would not prove very much.... [The

witness's alleged recantation] gave no indication that the appellant was innocent of the charged crimes. In this sense, his recantation, if believed, would merely be impeaching and, consequently, would have a limited effect upon the outcome of a new trial in which substantial corroborating testimony existed."). Under these circumstances, it was not unreasonable or untenable for the trial court to conclude that the purported new evidence was not of a character that would alter the result upon retrial, and we therefore affirm that decision.

D. Failure to Grant Immunity to Gomez

Finally, the defendant argues that the trial court erred by failing to compel the State to immunize Gomez in order to learn the extent of his purportedly exculpatory testimony, thus violating the defendant's due process rights under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. "We analyze the defendant's due process claim under our State Constitution, and reference federal case law only to aid in our analysis." *State v. Kivlin,* 145 N.H. 718, 721, 766 A.2d 274 (2001) (quotation omitted). Because our analysis above is dispositive of this claim, we will be brief.

Although "situations could arise in which to deny immunization from prosecution would deprive a defendant of due process on the facts of his case," *State v. Rogers,* 159 N.H. 50, 57, 977 A.2d 493 (2009) (quotation and brackets omitted), in order to establish a due process violation, the defendant must meet a two-part test:

> First, "no such violation will be recognized ... without a showing by the defendant that the testimony sought would be directly exculpatory or would present a highly material variance from the ***100** tenor of the State's evidence." *State v. Monsalve,* 133 N.H. 268, 270 [574 A.2d 1384] (1990). Second, "if the defendant demonstrates that his case falls within these narrow circumstances, we then decide whether, on the facts of the defendant's ****557** case, the executive branch's refusal to immunize a defense witness denied the defendant a fair trial." *Kivlin,* 145 N.H. at 721 [766 A.2d 274] (quotation and ellipses omitted).

Rogers, 159 N.H. at 57, 977 A.2d 493 (brackets omitted).

> The first part of our analysis, whether the proffered testimony was directly exculpatory or of a highly material variance, requires the defendant to meet a high burden. In conducting our review, we look to whether the proffered testimony would have prevented the defendant's conviction. *Kivlin,* 145 N.H. at 722 [766 A.2d 274]; *State v. MacManus,* 130 N.H. 256, 259 [536 A.2d 203] (1987); *see Blissett v. Lefevre,* 924 F.2d 434, 441–42 (2d Cir.1991) (stating defendant must make showing that the testimony is material, exculpatory and not cumulative, as well as that he cannot obtain the evidence from another source), *cert. denied,* 502 U.S. 852 [112 S.Ct. 158, 116 L.Ed.2d 123] (1991). Furthermore, a variance from the tenor of the State's evidence is only "highly material" when the variance is irreconcilable with the State's case. *State v. Winn,* 141 N.H. 812, 816 [694 A.2d 537] (1997).

Id. at 58, 977 A.2d 493.

The trial court concluded that "even if Gomez committed perjury at trial and his entire testimony is excised, there was a wealth of evidence from which the jury reasonably could have found premeditation and deliberation." We agree.

Regardless of what Gomez would have testified to, in light of the other evidence of the defendant's guilt, he could not have offered "the sort of exculpatory evidence that would have prevented the defendant's conviction," *Rogers,* 159 N.H. at 58, 977 A.2d 493. Even a complete recantation by Gomez "could not place the defendant elsewhere or preclude the possibility that the defendant" committed the crime of which he was convicted. *Id.* Thus, we conclude that the trial court's decision not to grant Gomez immunity for the purpose of investigating his purported perjury did not violate the defendant's due process rights under the State Constitution. As the State Constitution provides at least as much protection as the Federal Constitution under these circumstances, *see Kivlin,* 145 N.H. at 721, 766 A.2d 274, we reach the same result under the Federal Constitution.

Affirmed.

***101** DUGGAN, HICKS and LYNN, JJ., concurred; DALIANIS, C.J., concurred in part and dissented in part.

DALIANIS, C.J., concurring in part and dissenting in part. Because I believe that the trial court erred in instructing the jury regarding the amount of force the defendant was permitted to use in self-defense or defense of others, I respectfully dissent from Part II(A) of the majority's thoughtful opinion. I concur, however, in the remainder of the opinion.

The trial court instructed the jury, in pertinent part, as follows:

> The defendant must reasonably believe that the amount of force he used was necessary for self-defense or defense of others. A person is not permitted to use excessive force in self-defense, only a reasonable amount of force. The defendant can use the amount of force which he believed was necessary under the circumstances as long as, at the time, there were reasonable grounds for his belief.

The circumstances, relevant to this case, under which deadly force may be used are set forth in RSA 627:4, II (2007):

> ****558** A person is justified in using deadly force upon another person when he reasonably believes that such other person:
>
> (a) Is about to use unlawful, deadly force against the actor or a third person....

At the time of the events at issue in this case, RSA 627:4, III (2007) (amended 2011) set forth the following limitations upon the use of deadly force:

> A person is not justified in using deadly force on another to defend himself or a third person from deadly force by the other if he knows that he and the third person can, with complete safety:
>
> (a) Retreat from the encounter, except that he is not required to retreat if he is within his dwelling or its curtilage and was not the initial aggressor; or
>
> (b) Surrender property to a person asserting a claim of right thereto; or
>
> (c) Comply with a demand that he abstain from performing an act which he is not obliged to perform; nor is the use of deadly force justifiable when, with the purpose of causing death or ***102** serious bodily harm, the actor has provoked the use of force against himself in the same encounter.
>
> (d) If he is a law enforcement officer or a private person assisting him at his direction and was acting pursuant to RSA 627:5, he need not retreat.

In contrast, with regard to non-deadly force, RSA 627:4, I (2007) provides, in pertinent part:

> A person is justified in using non-deadly force upon another person in order to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful, non-deadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose.

Deciding whether the trial court's instructions were erroneous requires us to construe RSA 627:4. The interpretation of a statute is a question of law, which we decide *de novo. State v. McKeown,* 159 N.H. 434, 435, 986 A.2d 583 (2009). In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. *Id.* We construe the Criminal Code according to the fair import of its terms and to promote justice. RSA 625:3 (2007). In doing so, we must first look to the plain language of the statute to determine legislative intent. *McKeown,* 159 N.H. at 435, 986 A.2d 583. Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent. *Id.* Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. *Id.* Accordingly, we interpret a statute in the context of the overall statutory scheme and not in isolation. *Id.* at 436, 986 A.2d 583.

The language of the statute, I believe, is plain and unambiguous. The use of the word "necessity" in the non-deadly force provision shows that the legislature knows how to include a "necessity" requirement when it intends to do so. *See Correia v. Town of Alton,* 157 N.H. 716, 719, 958 A.2d 992 (2008). By not including a "necessity" requirement in the deadly force provisions, the legislature unambiguously provided that such a requirement does not apply when a person is faced with the use of deadly force against him. We should not impose such a requirement, for to do so would be to add words that the legislature did not see fit to include. *See State v. Villeneuve,* 160 N.H. 342, 347, 999 A.2d 284 (2010) (court will not add words that ****559** the lawmakers did not see fit to include). Furthermore, we can be confident that the legislature considered the issue of limitations upon the use of defensive deadly force because it specifically listed the limitations it intended to apply in RSA 627:4, III. Its ***103** failure to include a necessity limitation further demonstrates its intent that no such limitation apply, for "[n]ormally the expression of one thing in a statute implies the exclusion of another." *Appeal of Campaign for Ratepayers' Rights,* 162 N.H. 245, 251, 27 A.3d 726 (2011) (quotation omitted). The force of this familiar canon of statutory construction is strengthened when, as here, the limitation at issue was included in one part of the statute but omitted in another. *City of Manchester v. Sec'y of State,* 161 N.H. 127, 133, 13 A.3d 262 (2010).

The majority contends that the statute is susceptible of at least two reasonable interpretations, but fails to identify any ambiguous language in the statute that would support its position. Rather, it relies upon canons of statutory construction, legislative history, and public policy grounds to impose an additional limitation upon the defensive use of deadly force that appears nowhere in the statutory language. This is contrary to our well-established rule that absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent. *See, e.g., McKeown,* 159 N.H. at 435, 986 A.2d 583.

Moreover, even if I agreed that we should look beyond the statute's plain language, in my opinion, the legislative history does not support the majority's analysis. Although the majority notes that the Model Penal Code commentary supports the State's interpretation in this case, it fails to address the fact that the legislature specifically declined to adopt the very language of the Model Penal Code that does so.

RSA 627:4 (2007 & Supp.2010) (amended 2011) was adopted in 1971 as part of the revision of the Criminal Code, Laws 1971, 518:1.

> The revised Criminal Code was recommended by the Commission to Recommend Codification of Criminal Laws (Commission), which was created by legislative directive in 1967. Laws 1967, ch. 451. In April 1969, the Commission, chaired by Chief Justice Frank R. Kenison, issued the Report of Commission to Recommend Codification of Criminal Laws (Report) providing a comprehensive draft revised Criminal Code, *see Report* at iv, and included comments that detail the source of the recommended language for each draft section, *see, e.g., id.* at iii.
>
> In the Report, the Commission identified its "basic aim" as "produc [ing] a more concise and simplified criminal law than now applies in this state." *Id.* at iv; *see also N.H.S. Jour.* 1641–42 (1971). In performing this task, the Commission reviewed draft laws and comments from a wide variety of sources, but "found especially useful the Model Penal Code, the Michigan Revised Criminal Code, Final Draft—September 1967, and the New York Penal Law, 1967." *Report, supra* at iii.

***104** *State v. Kousounadis,* 159 N.H. 413, 424–25, 986 A.2d 603 (2009).

Thus, the Commission had before it Model Penal Code § 3.04, which provides in relevant part:

> **(1) Use of Force Justifiable for Protection of the Person.** Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that *such force is immediately necessary* for the purpose of protecting ****560** himself against the use of unlawful force by such other person on the present occasion.
>
> **(2) Limitations on Justifying Necessity for Use of Force.**
>
> ...
>
> (b) The use of deadly force is not justifiable under this Section unless the actor believes that *such force is necessary* to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat....

Model Penal Code § 3.04 (1985) (emphasis added). As the emphasized language makes clear, the Model Penal Code requires that the amount of force used in response to *both* non-deadly force and deadly force must be "necessary." The Commission did not adopt the Model Penal Code language, however. Instead, it recommended the following, in pertinent part:

> **572:4 Physical Force in Defense of a Person.**
>
> I. A person is justified in using non-deadly force upon another person in order to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful, non-deadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose....
>
> II. A person is justified in using deadly force upon another person when he reasonably believes that such other person is about to use unlawful, deadly force against the actor or a third person, or is likely to use any unlawful force against the occupant of a dwelling while committing or attempting to commit a burglary of such dwelling, or is committing or about to commit kidnapping or a forcible sex offense....

Report, supra at 20. This language reflects the distinction seen in the statute before us today—the actor must believe that the degree of ***105** defensive non-deadly force employed is "necessary" to defend himself or a third person from the use of unlawful non-deadly force, while the use of defensive deadly force against the use of unlawful, deadly force is not so limited. The comments of the Commission reveal that it

chose not to adopt the Model Penal Code's language, that it intentionally made distinctions between the use of deadly force and non-deadly force, and that it was fully aware that the explicit "necessity" limitation on the amount of force applied only to the use of non-deadly force:

> This section is a modification of § 615 of the Michigan Revised Criminal Code, Final Draft, and undertakes to clarify and articulate the law relating to self-defense as well as the circumstances in which force may be used against another even in the absence of some aggression against the actor. Distinctions are made between the use of deadly and non-deadly force, terms which are defined in section 572:9.
>
> Both sorts of force may be used in defense of a third person as well as in defense of the actor. Paragraph I provides the general rule that in order to repel *unlawful and non-deadly force an amount of force necessary for the purpose may be used.* The provisions of I(a)-(c) deal with situations where it would generally be agreed that the general rule ought not to apply.
>
> The use of deadly force is governed by broader criteria than preservation of the actor or a third person. Paragraph II sanctions its use to prevent kidnapping or a forcible sex offense and against burglars who are likely to use *any* personal violence. Paragraph II(a)-(d) deals with rules concerning limitations on the defensive use of deadly force....

****561** *Report, supra* at 20–21 (first emphasis added). Accordingly, the legislative history demonstrates that language that would have imposed a "necessity" requirement upon the use of deadly force to defend against deadly force was considered and rejected by the Commission. Instead the Commission, and the legislature thereafter, adopted language imposing such a limitation only upon the use of non-deadly force to defend against non-deadly force. Thus, the legislative history demonstrates that the plain language of the statute accords with the legislature's intent.

The majority looks to the common law to support its position, noting that we have often stated that we will not interpret a statute to abrogate the common law "unless the statute clearly expresses that intent." *State v. Elementis Chem.,* 152 N.H. 794, 803, 887 A.2d 1133 (2005) (quotation omitted). For the ***106** reasons set forth above, even if I were to apply this canon of statutory construction, I would conclude that the statute "clearly expresses that intent." Furthermore, it is axiomatic that the purpose of canons of statutory construction is to divine legislative intent. Where, as here, the legislative history clearly reveals the legislature's intent, I see no need to consider this canon.

The majority also contends that when there is doubt about the meaning or intent of a statute, effect should be given that makes the least change to the common law. *See* 3 N. Singer & J.D. Singer, *Statutes and Statutory Construction* § 61.1, at 314 (7th ed. 2008). I agree that we have looked to the common law in the past to construe an ambiguous statutory term, *see, e.g., State v. Pugliese,* 120 N.H. 728, 731, 422 A.2d 1319 (1980) (court looked to common law in deciding whether the term "dwelling" in the self-defense statute includes curtilage), as well as when a literal reading of the self-defense statute led to an absurd result, requiring us by necessity to construe the statute other than in accord with its plain language, *see State v. Warren,* 147 N.H. 567, 569, 794 A.2d 790 (2002). In my view, however, neither these cases nor the canons of statutory construction relied upon by the majority support engrafting onto the statute a limitation from the common law that the legislature chose not to include. Such action could be justified *only* if the plain language of the statute led to an absurd result—but it does not, and the majority does not contend otherwise. As the defendant argues in his brief:

> RSA 627:4, II(a) permits the use of deadly force in defense of self or another only when the actor reasonably believes that an attacker "is about to use unlawful, deadly force." To require in addition that the actor use non-deadly force unless deadly force is necessary to avoid the danger would demand a complicated mental calculation under highly stressful and urgent conditions. Under such a rule, the actor not only must reasonably ascertain whether the attacker is about to use deadly force, but also must contemplate the range of possible responses and select an effective, non-deadly option. The legislature could reasonably choose not to require that second calculation.

Because the plain language of the statute does not lead to an absurd result, I believe that we should not stray from the plain meaning of the words used by the legislature. *See Warren,* 147 N.H. at 568, 794 A.2d 790.

Next, the majority relies upon the legislature's actions in the wake of *Warren,* stating that it has amended RSA 627:4 twice "and the amendments did not vitiate our holding that the deadly force provision implicitly required reasonable necessity." The holding of *Warren,* however, as stated ***107** ****562** in the opinion itself, was simply that "RSA 627:4, II(d) does not justify the use of deadly force against an assailant when the assailant is a cohabitant of the home." *Id.* at 572, 794 A.2d 790. At issue in *Warren* was the use of *deadly*

force against an assailant using only "unlawful force" in the defendant's dwelling. *Id.* at 568, 794 A.2d 790. We concluded "that a person is not entitled to use *deadly* force to repel a *non-deadly* attack in the person's home where the assailant is a cohabitant." *Id.* at 571, 794 A.2d 790. Thus, the legislature's failure to "vitiate" the holding of *Warren* at most supports the conclusion that the legislature agrees that deadly force may not be used to repel a non-deadly attack by a cohabitant in the person's dwelling. This tells us nothing about the legislature's view on the issue presented by this case, which involves the use of deadly force to repel a deadly attack.

Finally, I note that it is "the province of the legislature to enact laws defining crimes." *State v. Rix,* 150 N.H. 131, 134, 834 A.2d 273 (2003) (quotation omitted). The legislature has determined that "[n]o *conduct* or omission constitutes an offense unless it is a crime or violation under [the Criminal Code] or under another statute." RSA 625:6 (2007) (emphasis added). When self-defense or defense of others is raised as a justification, it becomes a material element of the charged offense. RSA 625:11, IV (2007). By creating a necessity requirement that does not appear in the statute, the majority has taken conduct that would not constitute an offense under the Criminal Code as written, and made it criminal. While it may be necessary for this court to construe Criminal Code provisions contrary to their plain meaning when the literal language of the statute leads to an absurd result, *see Warren,* 147 N.H. at 568, 794 A.2d 790, the majority admits that interpreting the statute in this case in accordance with its plain language is "reasonable." Accordingly, I would hold that the trial court erred in its instructions to the jury regarding the amount of force the defendant was permitted to use in defense of self or others.

All Citations

163 N.H. 57, 35 A.3d 523

Footnotes

1 The legislature's most recent amendment to the statute, effective November 13, 2011, removes the duty to retreat when the actor is "anywhere he or she has a right to be" and was not the initial aggressor. This change does not affect our analysis. Although it could be read to reduce the efficacy of the State's argument that the requirement of retreat constitutes a balance implicit in the use of deadly force, it also undermines the defendant's argument that the legislature intended to remove necessity from the deadly force analysis, since the legislature saw fit to amend the duty to retreat, rather than explicitly remove necessity from the analysis after *State v. Warren,* 147 N.H. 567, 794 A.2d 790 (2002), discussed below.