

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0680

State of New Hampshire

v.

Seth Hinkley

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
COOS COUNTY SUPERIOR COURT

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**BRIEF FOR THE STATE OF NEW HAMPSHIRE**

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THE STATE OF NEW HAMPSHIRE

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(15-minute oral argument)

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**ISSUE PRESENTED**

Whether the defendant's confession was rendered involuntary when the police officer simply told him that having sex with a person who had reached the age of consent was not a crime and whether this statement of fact constituted a promise of immunity.

## **TEXT OF RELEVANT AUTHORITIES**

### **United States Constitution, Amendment V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **N.H. Constitution, Part 1, Article 15:**

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject 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; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

### **STATEMENT OF THE CASE**

On June 29, 2018, the Coos County grand jury indicted the defendant on four counts of aggravated felonious sexual assault. RSA 632-A:2, I(a); SA 36-39.<sup>1</sup> The defense filed a motion to suppress statements that he made to a Berlin Police Officer in a recorded interview the previous February. SA 41. On October 21, 2019, after an evidentiary hearing, the trial court granted the motion to suppress on the ground that the officer had given the defendant immunity for an element of the offense. SA 66.

This State's appeal followed.

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<sup>1</sup> "SA\_" refers to the State's appendix to this brief. The transcripts of the suppression hearing are identified by the date, followed by "T \_\_\_" and the page number.

## STATEMENT OF FACTS

### **A. The Hearing on the Motion to Suppress**

#### **1. The State's Case**

Berlin Police Officer Adam Marsh first met the defendant in November 2016, 8/6/19 T 9, when the defendant was 17. The defendant's adopted father had contacted the police about "some issues involving his conduct in the house, issues involving other children in the house." 8/6/19 T 9. After talking with Officer Marsh, the defendant apologized to his parents. 8/6/19 T 10, 88. The officer returned to the family's house in May 2017 when his mother called the police because the defendant refused to go to school. 8/6/19 T 12. The officer saw the defendant about a week after that. 8/6/19 T 13-14.

The officer understood that the defendant suffered from "some mental health issues." 8/6/19 T 10. At no time during these encounters did the defendant appear to have trouble understanding the officer. 8/6/19 T 11. And the officer had no trouble understanding the defendant. 8/6/19 T 11.

On December 28, 2017, the victim's grandmother, who was also her legal guardian, came to the police station to report that the victim had been sexually assaulted. 8/6/19 T 15. The victim identified the defendant as her attacker. 8/6/19 T 15. The victim was mentally "slow." 8/6/19 T 31.

On January 9, 2018, during a Child Advocacy Center (CAC) interview, the victim told the interviewer "that she was indeed sexually assaulted by Seth Hinkley." 8/6/19 T 16.

She said that he put his penis in her vagina and touched her boobs. There was also discussion about him trying to digitally penetrate her and she stopped him. She also described incidents

about when he tried to have sexual intercourse with her when she told him, no, stop, stop. She made inferences and described times when she pushed him away or was trying to push him away from - from her during those encounters.

8/6/19 T16-17. The officer recalled:

She specifically talked about one particular encounter. She did say that there were two encounters she had initially reported to Lt. Daisey. She had said it was September and November 2017. And apparently this was a period of time when Seth was living at the house with them. So she specifically had said that there was one that happened in the bathroom. She talked about him bringing her into the bathroom or being in the bathroom with her. And forcing her to have sexual intercourse during that time. She remembers hitting her face off of the bathroom sink during that encounter. So she specifically remembered that by that description.

8/6/19 T 17. She said that her guardian had “walked in on them” and told the defendant to “get out.” 8/6/17 T 18. The guardian confirmed this account. 8/6/19 T 18.

After the CAC interview, Officer Marsh contacted the defendant and “asked him to come to the police department, which he did voluntarily.”

8/6/19 T 19. The defendant came to the department on February 6, 2018 and Officer Marsh took him upstairs to a conference room. 8/6/19 T 19. Lieutenant Lemoine was also present. 8/6/19 T 19.

Officer Marsh asked the defendant for his consent to record the conversation and the defendant agreed. 8/6/19 T 20-21. The court admitted a transcript of the interview as a full exhibit. 8/6/19 T 5; *see also* SA 85.

The officer then read the defendant his *Miranda*<sup>2</sup> rights, which he said that he understood and initialed the form. 8/6/19 T 21; *see also* SA 87-88. The form was admitted as a full exhibit. 8/6/19 T 41. Officer Marsh told the defendant that the door was unlocked and that he could leave at any time. 8/6/19 T 21; *see also* SA 87.

At the “onset” of the interview, the defendant was “very aware of the reasons why” the police had asked him to come to the department. The officer recalled:

[The defendant]told [him] that DCYF had been involved with him and the [victim’s] family. And he told [him] that DCYF had actually gone to the high school to speak with him. He told me specifically it was child protective services worker Michele Santy who had a conversation with him about the alleged incident involving [the victim]. Which he initially denied. He said he had not had any contact, he did not abuse anyone in the house.

8/6/19 T 23. The transcript of the interview supports this testimony. *See* SA 89 (SETH HINKLEY: “DCYF called me and said I had to leave because they – someone called them and made a false acculat – accusations about me that weren’t true... Like I touched them sexually... And I, you know, did stuff to them that was painful, abusive sexually. And I never did anything like that.”).

The defendant recalled that he met the victim on October 14, 2015 at the “rec department”. 8/6/19 T 24. They “started dating, [he said] that they were boyfriend and girlfriend.” 8/6/19 T The victim’s guardian “wasn’t really comfortable at first with that relationship.” 8/6/19 T 24. He talked to

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

the victim “about not cheating on him and not being with other guys and things like that.” 8/6/19 T 24.

Officer Marsh asked if he was ever alone with the victim. 8/6/19 T 25. The defendant initially denied being alone with her, but later admitted that there were “multiple occasions when he and [the victim] were alone in the house.” 8/6/19 T 25.

The defendant denied having had sexual intercourse with the victim. 8/6/19 T 25-26. Officer Marsh told him that the victim had made a statement to the contrary and had told the police that she was “sexually assaulted in fact, and that it was against her will, and she did not consent to sexual intercourse on multiple occasions.” 8/6/19 T 26.

The defendant told the officer that the victim was too young. 8/6/19 T 26. He explained that the victim was 17 years old and that he was 18 years old. 8/6/19 T 26. Officer Marsh told him that the age of consent in New Hampshire was 16 years old. 8/6/19 T 26. The officer told the court: “I was trying to outline the fact that, basically, I wasn’t there to make the decision whether he could have sex with her or not. That wasn’t the reason why I was talking to him.” 8/6/19 T 27.

According to the officer, the defendant then admitted to having had sexual intercourse with the victim two or three times a week. 8/6/19 T 28. However, he denied that the intercourse was against her will. 8/6/19 T 28. He said that they had sex in the bathroom and in the living room. 8/6/19 T 28-29.

The officer asked the defendant why the victim would lie about the assaults. 8/6/19 T 31; SA 107. He responded, “[S]he wouldn’t.” 8/6/19 T 31; SA 107.

The defendant then also admitted that he had engaged in non-consensual sex with the victim. 8/6/19 T 30. The defendant “remembered on numerous occasions trying to put his hand into her pants and she would tell him no.” 8/6/19 T 32. He initially denied hitting her, but later admitted that he “did hit her during some of the sexual encounters.” 8/6/19 T 32. The defendant said that he “felt bad because something to the effect of her being upset about it.” 8/6/19 T 34.

Officer Marsh “offered him the ability to write an apology letter to [the victim], to which he agreed and wrote an apology letter saying that he was sorry” for what he had done. 8/6/19 T 37. The officer read the defendant’s letter aloud. 8/6/19 T 38. The defendant wrote: "Dear [victim’s name], I’m sorry for everything I’ve done to you and put you through. I’m sorry for making you do things you didn’t want [ ] to do, and I’m sorry for the abuse. Seth." 8/6/19 T 38 (internal quotation marks omitted).

Asked about whether he had used the “Reid technique” in interviewing the defendant, the officer said that he was familiar with it, but that he did not “use one specific technique to conduct interviews.” 8/6/19 T 40. He said that the Reid technique includes minimizing the seriousness of the offense. 8/6/19 T 71 (OFFICER MARSH: “If somebody is talking about something that is the subject matter of your investigation you minimize that particular subject matter so that the person is more apt to engage in conversation about the subject matter.”).

## **2. The Defendant’s Case**

Dr. Dennis Becotte testified for the defendant. 8/6/19 T 102. He had a doctorate in psychology and was a licensed psychologist in the State of

New Hampshire. 8/6/19 T 103. His specialty was forensic psychology, which, he said, is when “psychological science intersects with legal area.” 8/6/19 T 104. The trial court recognized the doctor as an expert forensic psychologist, as well as an expert on the voluntariness of confessions. 8/6/19 T 112.

Dr. Becotte saw the defendant in December 2018 for a “general psychological mental health evaluation,” and in May 2019 for a “voluntariness evaluation.” 10/11/19 T 4. In May, he gave the defendant some intelligence tests. According to the doctor, the defendant “scored a verbal IQ of 81, which is at the 10th percentile, a nonverbal IQ score of 78, which is at the 7th percentile, and then, his overall IQ composite was a 76, which puts him at the 5th percentile.” 10/11/19 T 13-14.

The doctor then began to discuss confessions, notably false confessions. A “coerced compliant” false confession occurs when a person is “coerced to comply with the suggestions by the interrogators because they want to escape.” 10/11/19 T 29. In this situation, “police often minimize the legal wrongfulness of the offense, while emphasizing and insinuating that the alleged perpetrator was morally blameless, [and] suspects may confess to any interrogation, believing that, even though they are admitting to the offense, the punishment will not be all that great.” The doctor said that this category of confession applied to the defendant. 10/11/19 T 30.

Doctor Becotte then described the two Gudjonsson scales: the Suggestibility Scale and the Compliance Scale. The Suggestibility Scale measures “interrogative suggestibility.” 10/11/19 T 31. The Compliance Scale measures a person’s compliance with authority, “going along with

authority figures.” 10/11/19 T 32. The doctor said that, out of 100 people, only 15 would be more suggestible than the defendant. 10/11/19 T 33. Out of 100 people, only 2 would be more compliant than the defendant. 10/11/19 T 34.

The doctor said that he had originally thought that the defendant actually believed his confession. 10/11/19 T 39. But when asked, the defendant “continued to deny that he did it and that he was forced to confess, and he was mad at himself for confessing.” 10/11/19 T 39. The defendant told the doctor that he confessed because he “had had enough, he didn’t want to be in the room anymore, he didn’t want to listen to what they said any more, so he just agreed to it.” 10/11/19 T 39.

On cross-examination, the doctor said that it was “difficult” to say exactly when the defendant’s confession became, in his view, involuntary, but he “would say page 16.” 10/11/19 T 159.

### **B. The Defendant’s Recorded Interview**

The trial court relied on the transcript of the defendant’s interview in writing its order. SA 66. In the transcript, the defendant told the officer that the victim “used to be [his] girlfriend. SA 89. He denied that he had been “intimate” with the victim but agreed that he had hugged and kissed her, adding that he thought that the use of the word “intimate” meant sexually intimate. SA 95. Asked if he had engaged in sexual intercourse, the defendant said he had not because “[s]he was too young” and he “didn’t want to.” SA 95. He said that the victim was 17 and he was 18, to which Officer Marsh responded, “Is there anything illegal about that?” SA 96. The defendant responded that he wanted to be “on the safe side.” SA 96.

The officer then told him that the victim had said otherwise, but that he was “not going to be in trouble” if he had sexual intercourse with her because she was “over the age of 16. That’s the age of consent.” SA 96. At that point, knowing that the victim had told the police that they had been intimate, the defendant admitted the same. SA 96-97.

The defendant also acknowledged that the victim’s guardian had walked in on them on one occasion and the officer responded that what he had said was “very consistent” with what he had learned. SA 99. Then Officer Marsh told him that the victim had said that there were “a couple of occasions when she got upset” with the defendant and that she did not see their relationship as a “boyfriend/girlfriend” relationship. SA 100. Although the officer talked about occasions when “signals [may have been] crossed,” he was explicit that the victim said that the sexual intercourse was not consensual. SA 101.

The officer then asked why the victim would lie about the assaults and the defendant said that she would not. SA 107. It was after this statement that the defendant made his admissions that he had forced sexual intercourse on the victim. SA 17.

### **C. The Court’s Order**

On October 21, 2019, the court suppressed the defendant’s statements. SA 74. The court wrote: “Officer Marsh went far beyond making accurate statements of fact when he twice assured the defendant that the defendant would ‘not... be in trouble if you told me that you had sex with her.’” SA 72. The court continued: “While it may be true that the defendant could not be prosecuted for engaging in consensual intercourse

with the [victim], sexual penetration is one of the elements of each of the charged offenses in this case.” SA 72. The court then concluded that the officer’s “assertions that the defendant would not be in trouble if he confessed to having consensual sex with the [victim] were not simply statements of fact,” but “constituted promises of immunity from at least one element of the charged offenses.” SA 72. This “promise of immunity” was, in the court’s view, “tantamount to a promise of immunity from the offenses themselves.” SA 72-73.

The court found it “significant that Officer Marsh did not tell the defendant that he would not be in trouble if he admitted to having ‘consensual’ sex with the [victim].” SA 73. Instead, the court found, the officer “unequivocally asserted, without qualification or limitation, that the defendant would not be in trouble if he confessed to having sex with the [victim].” SA 73. The court ruled that the defendant’s admission that he had engaged in sexual intercourse with the victim was “involuntary,” and he suppressed the admission, as well as all of the statements that followed. SA 73-74.

On October 25, 2019, the State filed a motion to reconsider. SA 75. It argued that the court had misapprehended the law and the facts of the case when it concluded that Officer Marsh had made a promise of immunity to the defendant. SA 77. It also argued that the court misapprehended the record when it concluded that the defendant’s admissions were induced by the assertion that the age of consent was 16. SA 79-81. The defense objected. SA 83. On November 6, 2019, the court denied the motion to reconsider. SA 82.

### **SUMMARY OF THE ARGUMENT**

The trial court erred when it found that the defendant's confession was involuntary because the police officer promised him immunity. The police officer made no promise of immunity and this factual finding by the court was mistaken. The trial court also erred when it found that the officer had promised immunity for an element of the offense. Immunity cannot be given for an element of an offense. It can only be given for the entire offense and, in this case, the officer did not give the defendant immunity for aggravated felonious sexual assault. Further, immunity cannot be given for a lawful act.

Finally, the officer's statement about the age of consent did not overbear the defendant's will and render his confession involuntary. The defendant confessed after he was confronted with the victim's allegations and after he realized that she was not lying about what had happened.

## ARGUMENT

### **THE TRIAL COURT ERRED BECAUSE THE DEFENDANT'S CONFESSION WAS NOT RENDERED INVOLUNTARY WHEN THE POLICE OFFICER TOLD HIM THAT HAVING SEX WITH A PERSON WHO HAD REACHED THE AGE OF CONSENT WAS NOT A CRIME.**

The defendant's confession was not rendered involuntary when the police officer told him that having sex with a person who had reached the age of consent was not a crime. The trial court's order in that regard is erroneous for three reasons: (1) the statement of fact was not a promise of immunity; (2) immunity cannot be given for an element of the offense or for a legal act; and (3) the defendant's confession was not induced by the discussion about the age of consent in giving his confession.

#### **A. Standard**

"A determination of the voluntariness of a confession is a question of fact for the trial court to decide." *State v. McDermott*, 131 N.H. 495, 500 (1989) (citing *State v. Wood*, 128 N.H. 739, 742 (1986)). The trial court's ruling is "entitled to stand unless it is contrary to the manifest weight of evidence." *State v. Chapman*, 135 N.H. 390, 399 (1992) (citing *State v. Lewis*, 129 N.H. 787, 791 (1987)). In reviewing the legal analysis, however, this Court applies a *de novo* standard. *State v. Cowles*, 152 N.H. 369, 371 (2005).

Two situations are relevant to determine the voluntariness of the defendant's confession in this case. The first is when a defendant's confession is not prompted by a promise of immunity. Under those circumstances, this Court will review the trial court's ruling under a totality

of the circumstances test. The second is when the defendant is promised immunity and the confession is made in reliance on the promise. Under those circumstances, the confession is *per se* involuntary.

“When considering what impact a [non-immunity] promise had in overbearing the will of a suspect, courts must give qualitative, rather than quantitative weight to the promise.” *State v. Rezk*, 150 N.H. 483, 488 (2004) (citation and internal quotation marks omitted). If the promise does not involve confidentiality or immunity, this Court applies a “totality of the circumstances test.” *Id.* “Under the ‘totality of the circumstances’ test, the existence of a promise made to the defendant is not dispositive.” *State v. Reynolds*, 124 N.H. 428, 434 (1984) (citation omitted). “Rather, all the facts must be examined and their nuances assessed to determine whether, in making the promise, the police exerted such an influence on the defendant that his will was overborne.” *Id.*

Moreover, a promise of leniency is not always the same as a promise of immunity. *United States v. Bye*, 919 F.2d 6, 9-10 (2d Cir. 1990) (“[T]he mere mention of the possible sentence facing a defendant and the benefits to be derived from cooperation [does not] convert[ ] an otherwise proper encounter between the police and the accused into a coercive and overbearing experience.”); accord *People v. Johnson*, 674 N.E.2d 844, 848 (Ill. Ct. App. 1996) (“[W]here promises or suggestions of leniency have been made, the confession is not necessarily inadmissible.”) (internal quotation marks and citation omitted)) . “A specific promise of leniency should the defendant confess is akin to a threat of harsher punishment should the defendant remain silent.” *Rezk*, 150 N.H. at 490. Under those circumstances, relevant factors include: “(1) the nature of the promise; (2)

the context in which it was made; (3) the characteristics of the individual defendant; (4) whether the defendant was informed of his *Miranda* rights; and (5) whether counsel was present.” *Rezk*, 150 N.H. at 488.

In contrast, “a confession made in reliance upon a promise of confidentiality or a promise of immunity is *per se* involuntary.” *State v. Carroll*, 138 N.H. 687, 691 (1994). The totality of the circumstances test “does not apply to promises of confidentiality or promises of immunity from prosecution.” *State v. Parker*, 160 N.H. 203, 209 (2010); *see also* *State v. McDermott*, 131 N.H. 495, 501 (1989) (“A confession made in reliance upon a promise of confidentiality or a promise of immunity is involuntary and coerced under the State Constitution.”). This *per se* rule is limited “to promises of confidentiality or promises of immunity from prosecution.” *Rezk*, 150 N.H. at 487. The test is whether the defendant's will was overborne. *Lynnum v. Illinois*, 372 U.S. 528, 534 (1963).

In reviewing the trial court’s findings, this Court will ask whether the confession was the “‘product of an essentially free and unconstrained choice’ and was not ‘extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influences.’” *McDermott*, 131 N.H. at 500 (quoting *State v. Copeland*, 124 N.H. 90, 92 (1983)); *see also* *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (same). The “however slight” language “has never been applied” with “wooden literalness.” *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir. 1967).

An express or direct promise of leniency is an “unequivocal guarantee.” *State v. Talayumptea*, 341 P.3d 20, 23 (N.M. 2014). An implied

promise “occurs when the accused could reasonably have inferred a promise going to the punishment for the crime to be confessed.” *Id.* at 24.

Finally, use of minimization techniques does not render a confession invalid. *State v. Hernandez*, 162 N.H. 698, 706 (2011). “[F]riendly police conduct does not alter the voluntariness of a defendant’s statements.” *Hernandez*, 162 N.H. 676.

## **B. Argument**

### **1. The officer did not promise or imply a promise of immunity.**

The trial court’s factual finding that the officer offered the defendant immunity is not supported by the record. The officer never promised the defendant immunity. In fact, he never promised the defendant anything in exchange for his confession. He simply told him the state of the law.

Absent a direct or implied promise concerning the allegations of aggravated felonious sexual assault, the trial court should have viewed the defendant’s statements under the totality of the circumstances test. *See State v. Copeland*, 124 N.H. 90, 92 (1983) (confession should not be “obtained by any direct or implied promises”); *see also Commonwealth v. Mandle*, 492 N.E.2d 74, 76 (Mass. 1986) (“[N]o specific or implied promises [were] made to the defendant save the conditional promise, which the judge recognized as ‘slight,’ that, if he demonstrated good faith by revealing the location of the weapon, then the district attorney would discuss leniency.”) (emphasis in original)). A hope for leniency is not the same as a direct or implied promise. *See State v. Decker*, 138 N.H. 432, 437

(1994) (“[A] hope on the defendant’s part does not rise to the level of an implied promise.”).

The trial court found that the officer “went far beyond making accurate statements of fact” by telling the defendant that he would not be “in trouble” if he admitted having sex with the victim. SA 72. But the court did not apply the *Rezk* factors that would have placed the statement in context. *Rezk*, 150 N.H. at 488. Immediately preceding that statement, the officer said:

At this point I told you that you you’re not in trouble if you had sex with her, okay. It’s your girlfriend. She’s over the age of 16. That’s the age of consent.

Um – and so, I mean, she’s telling us that, yeah, we had sex on a few occasions, so I am trying to kind of delve into that and then some other stuff that we were told – um – because you’re not going to be in trouble from me if you told me that you had sex with her.

SA 96.

When the officer’s statement is considered in this context, it is clear that he was explaining to the defendant that consensual activity with the victim, by itself, did not violate the law. This did not constitute a promise, implied or otherwise. The defendant could not have “reasonably have inferred a promise going to the punishment for the crime to be confessed.” *Talayumptea*, 341 P.3d at 23; *see also Johnson*, 674 N.E.2d at 848 (A promise of leniency “must be coupled with a suggestion of a specific benefit that will follow if defendant confesses.”).

Other courts have reached the same conclusion. *See United States v. Novak*, 884 F.3d 400, 411 (2d Cir. 2018) (officer’s statements that he was

“not looking even to come after you on this” and “I’m not looking to come after you” did not constitute a promise or implied promise of immunity) (internal quotation marks omitted)); *Agee v. White*, 809 F.2d 1487, 1494 (11th Cir. 1987) (statement “you have nothing to worry about” made by officer after defendant’s “repeated denial of any wrong doing” was not an implied promise of immunity); *Gary v. State*, 471 N.E.2d 695, 698 (Ind. 1984) (“Vague and indefinite statements by the police... are too indefinite to constitute the type of an inducement that renders a confession involuntary.”).

It was in this context that the defendant admitted that he had been intimate with the victim, after he had been told that the victim was not underage and that she had admitted the sexual activity herself. The defendant was promised nothing, although he may have felt relief that consensual sexual activity, without more was not a crime. *Cf. Smith v. State*, 103 A.3d 1045, 1059 n.10 (Md. Ct. Spec. App. 2014) (“[C]onsent may be a defense to sex offense charges involving an adult victim, and, accordingly, a reasonable layperson might confess to consensual conduct if the victim was an adult.”).

The officer then urged the defendant to be “up-front” and “straight up” with him. SA 96. But in doing so, he “merely exhort[ed] the defendant to be truthful,” *Parker*, 160 N.H. at 211, and he did not make any promises and he certainly did not promise immunity for forcible sexual assaults.

Having found that there was a promise of immunity, and therefore involuntary *per se*, the trial court did not apply any of the *Rezk* factors, 150 N.H. at 488. The court did not consider the “nature of the promise,” *i.e.*, that consensual sex would not get the defendant “in trouble.” *Id.* It took the

remark entirely out of its context. *Id.* Although the defendant had some learning issues, the court did not find that these rendered him incapable of understanding the allegations or the questions posed to him. *Id.*; *see also* SA 66-74 (order on suppression relies entirely on immunity finding). The defendant was informed of his *Miranda* rights. *Id.* The only factor that might have cut against the voluntariness of the confession was that the defendant did not have a lawyer in the room. *Id.* On this record, the trial court failed to place the officer's statement in context, instead finding that the statement of fact was a promise of immunity.

It is true that the officer used minimization techniques. He said that there might have been a "misconception" between the defendant and the victim about their relationship. SA 100. The officer said that, although the victim had said that she did not consent, the officer did not think that the defendant was a "sexual predator." SA 101. He said that men could be aggressive and that it was sometimes "hard for us to stop." SA 102. But minimization and "friendly police conduct" do not provide a basis for suppression. *Hernandez*, 162 N.H. at 706.

In short, Officer Marsh did not offer the defendant immunity for aggravated felonious sexual assault and the trial court erred in suppressing the confession.

**2. Immunity cannot be given for an element of an offense or for a legal act.**

The trial court committed legal error when it found: (1) that the statement about the age of consent gave immunity for an element of the offense; and (2) that immunity could be promised for a lawful act.

First, although the trial court found that this statement gave the defendant immunity for an element of the offense, it cited no legal support for this view of immunity. Indeed, it is hard to imagine how someone could be granted immunity for an element of an offense without being granted immunity for the offense itself. This the officer did not do. *See Commonwealth v. Jordan*, 785 N.E.2d 368, 374 (Mass. 2003) (“The touchstone [for proffer immunity] is whether the police ‘assured’ the defendant that his confession would aid his defense or result in a lesser sentence.”). Indeed, if immunity could be granted for an element, it could extend well beyond the criminal activity of which the police were aware at the time. *Cf. Hall v. State*, 851 P.2d 1262, 1269 (Wyo. 1993) (“[T]he fact that [the defendant] may have been granted immunity with respect to the offense of conspiracy to commit first-degree murder would not *ipso facto* encompass a grant of immunity for the offense of aiding and abetting first-degree murder,” which has different elements.).

Many crimes under New Hampshire law contain elements which are not, by themselves, illegal. For example, in order to convict for driving under the influence, the State must show that the defendant “drove or attempted to ‘drive a vehicle upon any way’ while he was ‘under the influence of intoxicating liquor.’” *State v. Ducharme*, 167 N.H. 606, 617 (2015) (citing RSA 265–A:2, I). It is not unlawful to drive and it is not unlawful to drive on a way. But assuring a person that driving is not illegal *per se* is not the same as giving immunity for driving under the influence of alcohol. The trial court’s understanding of a promise of immunity was simply incorrect as a matter of law.

As noted above, the statement was simply an accurate statement of the law. *Cf. State v. Wood*, 128 N.H. 739 (1986) (“‘misleading advice’ on the definition of rape” was not an implied promise that a confession would help the defendant and did not render the confession involuntary). It, therefore, follows that an adult cannot ordinarily be prosecuted for having consensual sexual relations with another adult. Absent some element that would transform that act into a crime, a promise of immunity for a legal act is simply illusory. *Cf. Kastigar v. United States*, 406 U.S. 441, 453 (1972) (noting that transactional immunity grants “*immunity from prosecution for the offense to which [the] compelled testimony relates*”) (emphasis added).

To sum up: the trial court committed legal error when it concluded that immunity could be given for an element of the offense or that it applied to lawful conduct.

**3. The defendant was not induced into confessing to aggravated felonious sexual assault by the assurance that the victim was of legal age.**

Finally, the trial court ignored the fact that the defendant knew what the accusations were and told the officer as much at the outset of the interview. *See* SA 89 (SETH HINKLEY: “DCYF called me and said I had to leave because they – someone called them and made a false acculat – accusations about me that weren’t true... Like I touched them sexually... And I, you know, did stuff to them that was painful, abusive sexually. And I never did anything like that.”). The police officer did nothing to dissuade the defendant from this understanding, which was largely accurate. *Cf. State v. Carroll*, 138 N.H. 687, 695 (1994) (Defendant’s contention that he

did not know he was a suspect, and therefore his confession was involuntary, “strain[ed] credulity.”)

As noted above, “under the ‘totality of the circumstances’ test, the existence of a promise made to the defendant is not dispositive.” *Reynolds*, 124 N.H. at 434. Rather, this Court must determine “whether, in making the promise, the police exerted such an influence on the defendant that his will was overborne.” *Id.*; see also *State v. Tardiff*, 374 A.2d 598, 601 (Me.1977) (“A confession, otherwise freely and voluntarily made, is not vitiated by a[n improper] promise of leniency unless such promise was the motivating cause of the confession.”).

As already explained, no promise of leniency was made in this case. The information that 16 years old was the age of consent was not a promise of leniency. Indeed, it was only after the defendant began to describe his relationship with the victim that the issue of the age of consent arose. He told the officer that the victim “used to be [his] girlfriend.” SA 59. Nothing that the officer said could have overborne his will. *Reynolds*, 124 N.H. at 434.

Although the officer said that he had used parts of the Reid technique, 8/6/19 T 39, he did not overstate the State’s case or minimize the seriousness of the offense. He repeated what the victim had said to explain the strength of the State’s case, SA 104-05, and he told the defendant that the victim said that the sex was not consensual, SA 106-07. *Cf. United States v. Jacques*, 744 F.3d 804, 812 (1st Cir. 2014) (rejecting defendant’s claim that officers “overbore his will through their use of the ‘Reid technique,’ including exaggerating their evidence and minimizing the gravity of his suspected offense, in obtaining a confession”); *but see*

*Commonwealth v. Baye*, 967 N.E.2d 1120, 1130 (Mass. 2012) (suppressing a confession where the troopers “exaggerated the strength of the evidence against the defendant, while simultaneously minimizing the moral and legal gravity of his alleged crimes”). Throughout the interview, the officer was sympathetic to the defendant, *see* SA 101-02, 105-06, but he never told him that non-consensual sexual intercourse was lawful or that he would not be prosecuted for it.

It is clear that the defendant understood this. Confronted with the victim’s specific account of one sexual assault, the defendant interrupted and said, “That never happened.” SA 104. The fact that the defendant understood the difference between consensual sex and sexual assault is important. *See Wood*, 128 N.H. at 741 (“[T]he defendant appeared to understand [consent] to be the point of the discussion when he gave his statement to the police. In his statement, the defendant admitted having sexual intercourse with the alleged victim, but contended that it was consensual.”).

In that regard, the *Agee* decision is instructive. In *Agee*, the officer told the defendant that he had “nothing to worry about” after the defendant denied his involvement in a double homicide. *Agee*, 809 F.2d at 1489. In rejecting the contention that the statement was an implied promise of immunity, the United States Court of Appeals for the Eleventh Circuit wrote:

Even if, as appellant asserts, the interrogating officer stated at the end of the first interrogation both that appellant might be needed as a prosecution witness and that appellant had “nothing to worry about,” such statements cannot be construed as an implied promise of immunity from prosecution. To the

contrary, because the comments immediately followed appellant's repeated denial of any wrongdoing, the more likely implication was that appellant would not face prosecution so long as his account of the event proved true. At most, the officer's statements were ambiguous, noncommittal remarks prompted by the officer's own impression of appellant's statement.

*Id.* at 1494.

The same is true here. The defendant denied engaging in sexual relations with the victim until her learned that those actions, without more, were not criminal. The defendant's will was not "overborne" by the officer's statement. *Reynolds*, 124 N.H. at 434. Put another way, his confession was not made in reliance on the alleged promise of immunity. *Carroll*, 138 N.H. at 691. To the contrary, he denied that the sexual relations were nonconsensual until the officer asked why the victim would lie.

It was this exchange, and not the discussion about the age of consent, that prompted the confession. It appears that the defendant felt guilty when he realized that persisting in his denials would cast the victim as a liar. *Cf. People v. Neal*, 72 P.3d 280, 293 (Cal. 2003) ("[T]he apparent pressure that defendant's guilty conscience exerted upon him" weighed in favor of finding the confession voluntary); *State v. Mabe*, 864 P.2d 890, 894 (Utah 1993) (guilty conscience prompted confession); *People v. Veal*, 500 N.E.2d 1014, 1018 (Ill. Ct. App. 1986) (The defendant's confession was not a response to a promise of leniency, but "because he had a guilty conscience and because he knew he had been discovered."); *see also State v. Carroll*, 138 N.H. 687, 693 (1994) ("[W]hile a confession made in

reliance on such promises [of immunity] is involuntary, a confession motivated by other factors is not.”).

The elapse of time between the discussion about the age of consent and the defendant’s admission bears this out. The discussion about the age of consent took place on page 16. The defendant’s admission took place on page 23. The interview began at 12:46 p.m. and concluded at 1:30 p.m. SA 86, 124. The entire transcript is 41 pages long, including a cover page and a certification page. SA 125. The admission of criminal activity, SA 107, did not follow immediately after the officer’s assurance about consensual sex, SA 96.

In short, no promise was made and the defendant’s will was not overborne. The trial court erred in finding otherwise.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests this Honorable Court to reverse the judgment below.

The State certifies that the appealed decision is in writing and is appended to this brief.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

GORDON J. MACDONALD  
ATTORNEY GENERAL

August 21, 2020

*/s/Elizabeth C. Woodcock*  
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**CERTIFICATE OF COMPLIANCE**

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,420 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 21, 2020

*/s/Elizabeth C. Woodcock*  
Elizabeth C. Woodcock

**CERTIFICATE OF SERVICE**

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

August 20, 2020

/s/Elizabeth C. Woodcock  
Elizabeth C. Woodcock

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Count 1  
RSA 632-A:2,I(a)  
Offense: Aggravated Felonious Sexual Assault  
CLASS S Felony  
Information Use Only

Superior Court Case: 214- 2018-CR-84  
Charge ID: 1514239C

THE STATE OF NEW HAMPSHIRE

COOS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 29th day of June, in the year of our Lord Two Thousand Eighteen

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

SETH HINKLEY

DOB: 05/21/1999

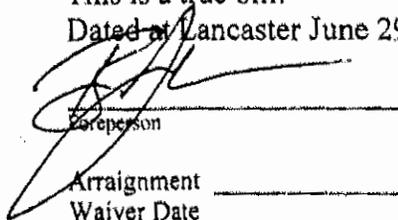
of or formerly of 749 Hillside Avenue, Berlin, NH 03570, between the 1<sup>st</sup> day of July 2017 and the 31<sup>st</sup> day of December 2017, at Berlin, in the County of Coos, aforesaid

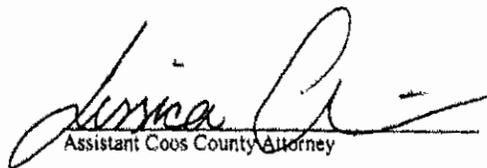
did commit the crime of **Aggravated Felonious Sexual Assault- Domestic Violence**, in that he knowingly engaged in sexual penetration with F.T., an intimate partner, through the application of physical force, and superior strength by vaginally penetrating F.T. with his penis while F.T. said "no" and attempted to push him off of her body,

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Dated at Lancaster June 29, 2018

  
\_\_\_\_\_  
Foreperson

  
\_\_\_\_\_  
Assistant Coos County Attorney

Arrestment \_\_\_\_\_  
Waiver Date \_\_\_\_\_  
Formal Date \_\_\_\_\_  
Plea of Not Guilty \_\_\_\_\_  
Clerk \_\_\_\_\_

Change(s) of Plea \_\_\_\_\_  
Date(s) \_\_\_\_\_  
Judge \_\_\_\_\_  
Reporter \_\_\_\_\_  
Clerk \_\_\_\_\_

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Count 2  
RSA 632-A:2,I(a)  
Offense: Aggravated Felonious Sexual Assault  
CLASS S Felony  
Information Use Only

Superior Court Case: 214- 2018-CR-84  
Charge ID:

1514240C

THE STATE OF NEW HAMPSHIRE

COOS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 29th day of June, in the year of our Lord Two Thousand Eighteen

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

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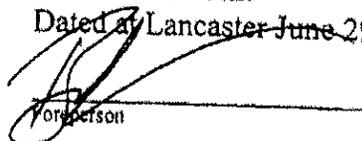
of or formerly of 749 Hillside Avenue, Berlin, NH 03570, between the 1<sup>st</sup> day of July 2017 and the 31<sup>st</sup> day of December 31<sup>st</sup> 2017, at Berlin, in the County of Coos, aforesaid

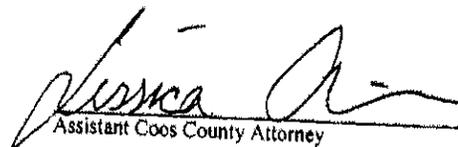
did commit the crime of **Aggravated Felonious Sexual Assault- Domestic Violence**, in that he knowingly engaged in sexual penetration with F.T., an intimate partner, through the application of physical force, and superior strength by digitally penetrating F.T.'s vagina after she said "no" and repeatedly attempted to push his hand away,

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Dated at Lancaster June 29, 2018

  
Foreperson

  
Assistant Coos County Attorney

Arraignment \_\_\_\_\_  
Waiver Date \_\_\_\_\_  
Formal Date \_\_\_\_\_  
Plea of Not Guilty \_\_\_\_\_  
Clerk \_\_\_\_\_

Change(s) of Plea \_\_\_\_\_  
Date(s) \_\_\_\_\_  
Judge \_\_\_\_\_  
Reporter \_\_\_\_\_  
Clerk \_\_\_\_\_

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2018 JUN 29 P 2:35

Count 3  
RSA 632-A:2,1(m)  
Offense: Aggravated Felonious Sexual Assault  
CLASS S Felony  
Information Use Only

Superior Court Case: 214- 2018-CR-84  
Charge ID:

1514241C

THE STATE OF NEW HAMPSHIRE

COOS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 29th day of June, in the year of our Lord Two Thousand Eighteen

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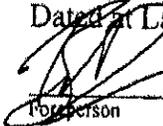
of or formerly of 749 Hillside Avenue, Berlin, NH 03570, between the 1<sup>st</sup> day of July 2017 and the 31<sup>st</sup> day of December ~~4<sup>th</sup>~~ 2017, at Berlin, in the County of Coos, aforesaid

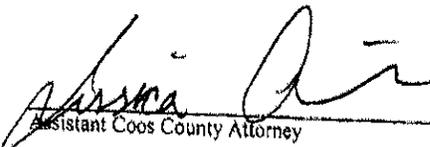
did commit the crime of **Aggravated Felonious Sexual Assault-Domestic Violence**, in that he knowingly engaged in sexual penetration with F.T., an intimate partner, by vaginally penetrating F.T. with his penis, when F.T. indicated through speech or physical conduct that she did not consent to said penetration,

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Dated at Lancaster June 29, 2018

  
\_\_\_\_\_  
For person

  
\_\_\_\_\_  
Assistant Coos County Attorney

Arrestment \_\_\_\_\_  
Waiver Date \_\_\_\_\_  
Formal Date \_\_\_\_\_  
Plea of Not Guilty \_\_\_\_\_  
Clerk \_\_\_\_\_

Change(s) of Plea \_\_\_\_\_  
Date(s) \_\_\_\_\_  
Judge \_\_\_\_\_  
Reporter \_\_\_\_\_  
Clerk \_\_\_\_\_

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2018 JUN 29 P 2:35

Court 4  
RSA 632-A:2,I(m)  
Offense: Aggravated Felonious Sexual Assault  
CLASS S Felony  
Information Use Only

Superior Court Case: 214- 2018-CR-84  
Charge ID: 1514242C

THE STATE OF NEW HAMPSHIRE

COOS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 29th day of June, in the year of our Lord Two Thousand Eighteen

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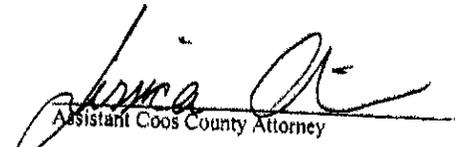
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This is a true bill.

Dated at Lancaster June 29, 2018

  
Foreperson

  
Assistant Coos County Attorney

Arrestment \_\_\_\_\_  
Waiver Date \_\_\_\_\_  
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Clerk \_\_\_\_\_

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Judge \_\_\_\_\_  
Reporter \_\_\_\_\_  
Clerk \_\_\_\_\_

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Count 5  
RSA 632-A:2,I(m)  
Offense: Aggravated Felonious Sexual Assault  
CLASS S Felony  
Information Use Only

Superior Court Case: 214- 2018-CR-8  
Charge ID: 1514243C

THE STATE OF NEW HAMPSHIRE

COOS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 29th day of June, in the year of our Lord Two Thousand Eighteen

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

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DOB: 05/21/1999

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did commit the crime of **Aggravated Felonious Sexual Assault- Domestic Violence**, in that he knowingly engaged in sexual penetration with F.T., an intimate partner, by vaginally penetrating F.T. with his penis and slapping her in the face with his hand, when F.T. indicated through speech or physical conduct that she did not consent to said penetration,

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Dated at Lancaster June 29, 2018

For person

Arraignment \_\_\_\_\_  
Waiver Date \_\_\_\_\_  
Formal Date \_\_\_\_\_  
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Assistant Coos County Attorney

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Clerk \_\_\_\_\_

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2018 JUN 29 P 2:35

THE STATE OF NEW HAMPSHIRE  
COÖS, S.S. SUPERIOR COURT  
STATE OF NEW HAMPSHIRE  
V.  
SETH HINKLEY  
214-18-CR-84

**MOTION TO SUPPRESS DEFENDANT'S STATEMENTS**

NOW COMES the Defendant, Seth Hinkley, by and through counsel, Melissa Lynn Davis, and respectfully requests that this Honorable Court suppress involuntary statements made by Mr. Hinkley to officers of the Berlin Police Department on February 6, 2018 in violation of his constitutional rights under the New Hampshire Constitution, part I, article 15 and the U.S. Constitution, Amendment V. In support of his Motion, Mr. Hinkley states the following:

**FACTS**

1. All of the facts in this Motion come from discovery provided by the State and a psychological evaluation by Dr. Dennis Becotte provided by counsel for Mr. Hinkley to the State.
2. Mr. Hinkley is charged with five counts of Aggravated Felonious Sexual Assault for conduct occurring between July 1, 2017 and December 31, 2017. The charges allege conduct to include applying physical force to F.T. by digitally and vaginally penetrating her after she said "no" and attempting to push him off of her, penetrating her digitally and vaginally without her consent, and vaginally penetrating her without consent after slapping her in the face.
3. On February 6, 2018, Officer Adam Marsh and Lt. Jeff Lemoine of the Berlin Police Department asked Mr. Hinkley to meet them at the Berlin Police Department.
4. Mr. Hinkley was 18 years old at the time of the interview, still in high school in Berlin, New Hampshire. He attended the interview alone, without a parent or guardian and without counsel. Mr. Hinkley has a long history of significant mental health problems and treatment. He suffered trauma with significant abuse and neglect by his biological parents at a young age. His adoptive mother reports that he was developmentally delayed as a child and had an Individualized Education Program (IEP) throughout his time in

school requiring a tutor be with him at all times. As a child he was diagnosed with ADHD, possible Bipolar Disorder, possible Autism, Pervasive Developmental Disorder or possibly Childhood Disintegrative Disorder. His IQ measured somewhere between 75 to 84, but he had significantly impaired visual and verbal memory. At age 16 he was diagnosed with Post-Traumatic Stress Disorder (PTSD) from the significant neglect he experienced at an early age by his biological parents. He was prescribed a variety of mental health medications throughout his childhood, but last took them about 7 months before his interview with police. Since leaving high school in 2017, prior to graduation, Mr. Hinkley has lived with his adoptive parents. He has held four jobs in his life, the longest being for 3 months because he has difficulties following directions and a long history of gastrointestinal problems.

5. After a psychological evaluation by Dr. Dennis Becotte in December 2018, he was diagnosed with Autism Spectrum Disorder, Without intellectual or language impairment, Requiring support. Dr. Becotte wrote in his report, "Mr. Hinkley demonstrates significant social communication deficits, which is the hallmark of Autism Spectrum Disorder.... While perhaps not a textbook case of severe Autism, this Examiner suggests that Mr. Hinkley's Pervasive Developmental Disorder of childhood has now morphed in adulthood into a higher-functioning individual on the Autism Spectrum. Intelligence testing has revealed that he likely has Low Average intelligence and thus, his Autism will be without accompanying intellectual or language impairment. However, he does need support and supervision as he has been unable to work full time and demonstrate the ability to live independently in the community.
6. It appears from the recording of Mr. Hinkley's interview at the Berlin Police Department that Officer Marsh had prior interactions with Mr. Hinkley while he was in school. The timing and details of these interactions are not entirely clear from the recorded interview. Counsel for Mr. Hinkley has filed a motion requesting a deposition of Officer Marsh to inquire about his prior interactions with Mr. Hinkley and knowledge of his education and mental health issues.
7. Upon his arrival at the police department at the officers' request on February 6, 2018, Officer Marsh tell Mr. Hinkley that he was not under arrest and that he was free to leave. According to Officer Marsh, Mr. Hinkley says he understands. The officers then escort

him to a conference room where Mr. Hinkley consents to the interview being audio recorded. Officer Marsh then reads Mr. Hinkley his Miranda rights. Mr. Hinkley indicates in writing that he understands each of his rights and signs a waiver of those rights.

8. Immediately after waiving his rights, Officer Marsh tells Mr. Hinkley, "So, Seth I'm gonna cut to the chase here. We've met before. Mostly school issues, attendance at school and things like that and around the house, but this is a little different." Transcript of February 6, 2018 audio recorded interview of Seth Hinkley at Berlin PD, p. 4-5. Officer Marsh then begins to question Mr. Hinkley about his relationship with F.T. and Mr. Hinkley immediately tells him that there've been false accusations against him. Trans., p. 5. Officer Marsh asks what false accusations he's talking about and Mr. Hinkley says, "like I touched them sexually. I've never done that in my life... And, I, you know, did stuff to them that was painful, abusive sexually. And I never did anything like that."
9. After Mr. Hinkley's denials, Officer Marsh continues to question him about his relationship with F.T., how it started, how he moved into her home with her family, and how often they were alone together. Trans., p. 7-11. He then asks Mr. Hinkley if he ever had intercourse with F.T. and he says "No. She was too young, and I didn't want to." Trans., p. 11. Officer Marsh asks how old she was and he says that "she was 17 and I was 18." Trans., p. 12. Officer Marsh asks Mr. Hinkley if there's anything illegal about that and he says he doesn't know, but he "wanted to be on the safe side." Id.
10. Officer Marsh then tells Mr. Hinkley,

I'll be honest with you, okay. I told you I want to be up front with you, and I want you to do the same with me... We're being told something completely different. Okay? And there's no reason why a person would lie about that unless they were trying to cover something up. And at this point I told you you're not in trouble if you had sex with her, okay. It's your girlfriend. She's over the age of 16. That's the age of consent. Um – and so, I mean, she's telling us that yeah, we had sex on a few occasions, I'm just trying to kind of delve into that and then some other stuff that we were told – um – because you're not gonna be in trouble from me if you told me that you had sex with her. Id.

11. Officer Marsh then asks Mr. Hinkley again if he had “intercourse” with F.T., he says, “yeah”, and admits to having intercourse two to three times a week with F.T. Trans., p. 12-13.
12. Officer Marsh asks Mr. Hinkley how sex came up between the two of them and he responds, “we just said do you want to have it, and we just did it.” Trans., p. 13. Officer Marsh asks if they always talked about it beforehand and he tells him “yes, I always told her that I’m always gonna wear a condom no matter what.” Trans., p. 14. Officer Marsh then asks about whether there was ever a time when F.T.’s mom walked in on them having sex. Mr. Hinkley says that it happened one time and describes how F.T.’s mother walked in on them while they were having sex in the bathroom and how she was very mad and told him to “Get the up and go home.” Trans., p. 15.
13. Officer Marsh then attempts to confront Mr. Hinkley again by saying, “there is one thing though that’s different, okay, and I’ll be frank with you here, and this is why I knew that this happened, okay, and that is because Faye was interviewed in a very special setting... so she’s saying... that there are a couple of occasions when she got upset with you, that she didn’t want to have sex with you. She’s [also] pointing to two specific occasions when – because she doesn’t talk about your relationship like it’s a boyfriend/girlfriend situation.” Trans., p 16.
14. Officer Marsh goes on to tell him that there may have been some “confusion” between the two of them about what was going on in their relationship. He says to Mr. Hinkley, “I think we can both agree that Fay is a little slow” and Mr. Hinkley agrees. Id. Officer Marsh goes on to say, “Okay. And she’s on that border, you know, of understanding things and not understanding things. And I think that definitely factors into her decision making. Would you agree with me?” Mr. Hinkley responds, “yeah.” Trans., p. 16-17. Officer Marsh continues,

[s]o level with me here... She’s telling us that there were several occasions when she told you, you know, I really don’t want to have sex with you and you did it anyway. Um, and I think that may be that difference between you and her. I think there was some signals that were crossed there. She talked about two specific occasions. One was the bathroom incident when she said that, you know, she really didn’t want to have sex, um, you know, and that it happened. And there

was another occasion specifically later on when you two had sex when you got on top of her, and she was like no, I don't want to do this Seth, and you were like well, we're gonna do it because you were kind of like committed, you know what I mean. Trans., p. 17

15. Officer Marsh goes on to say,

And that's what I want to ask you about here today because I think that there's a big difference between being like a sexual predator... like a violent sexual predator and letting yourself and your emotions get overrun sexually, and I think that's probably what happened. You know, everyone makes mistakes, and I think this is just one of those mistakes that you made. I think as men we get aggressive you know sexually, and it's hard for us to stop. And I think that's probably what happened to you because I know you've got other issues. There's other things that have happened to you emotionally and you know, mentally that affect you. I've talked to you about your issues before. Trans., p. 17-18.

16. Officer Marsh then asks Mr. Hinkley if there were occasions when F.T. told him "like no, I really don't want to do this?" And Mr. Hinkley tells him that it happened "once every once in a while... Like once a month." Trans., p. 18. Officer Marsh asks if ever there were times where she pushed him to stop him and he responds that it happened "once every two months." Trans., p. 19. Officer Marsh then asks if she ever punched or scratched him and he replies that she punched him several times, "Whenever we were out in the open like she just winded up and slapped me." Id. Officer Marsh asks if there were times where she was trying to push him off during sex and Mr. Hinkley says, "No." Trans., p. 20.

17. Officer Marsh tells Mr. Hinkley that F.T. was very specific about this in her interview and said that "she really didn't want to have sex with you, that you got her pants off, that you put your penis inside of her and that you had sex with her, and she's saying that definitely happened. She was trying to push you off. And so that's definitely something that I want to hash out right now because I think that probably happened." Id.

18. Mr. Hinkley tells him, "that never happened." Id.

19. Officer Marsh then goes on to remind Mr. Hinkley how he initially lied to him about having sex with F.T. and that he's now admitted that they had sex multiple times and

claims that Mr. Hinkley has admitted that there were occasions where they had sex after she said no. Officer Marsh goes on to say,

I want you to be honest and open with me because in order to move forward if there are walls in the way, you can't get beyond those walls. You can't get any better, and you can't fix the problems. Because there are problems here. And so I need you to be honest here, okay, with me because I told you I don't think you're a sexual deviant. I don't think that you're out there raping a whole bunch of people. I think you made a mistake. You've made a few. And I think some of those mistakes were the times when she's telling you no and also physically telling you no but your emotions go the best of you. You have a habit of doing that, letting your emotions get the best of you, don't you? That's who you are. And a lot of times we can't change that. That's just who we are. That's our physical makeup. And the reason I know that about you Seth, is because I've sat in your bedroom... and we've talked about all the problems you were having with people out there emotionally... in the house and stuff like that, so there have been a lot of things that have happened to you over the course of your life, and I don't know if you've ever been sexually abused? Trans., p. 21-22.

20. Mr. Hinkley then tells him that he was sexually abused by his father. Officer Marsh responds by saying, "I think that also may factor in here. I think that also may be a reason why this has happened to you. Statistically speaking, that is a known fact, that people have been sexually abused often fall into that category that they have a hard time controlling those impulses." Trans., p. 22. He continues to tell Mr. Hinkley that "because you've had that experience beyond all that other stuff, that's the real reason and root of the problem of sexual problems. You have a sexual problem." Trans., p. 23.
21. Officer Marsh then asks Mr. Hinkley how many times he thinks F.T. physically pushed him to tell him no. He answers, "maybe once or three, once or three times a month." Id.
22. Mr. Hinkley then goes on to admit a series of details about his sexual encounters with F.T. He admits to continuing to have sex with her for a short time after she pushes him and tells him to stop and continuing to put his fingers in her vagina after she pushed his hand away. Trans., p. 26-30.
23. Officer Marsh then goes on to tell Mr. Hinkley that,

[S]o I think because of your mental issues that you have, you have some obstacles you know. You have some problems here. And because of those obstacles, those problems that you have, I think that's affecting you personally, you know. I don't want to speak for you, but I think that's what's happened here you know and so I want to make sur that we're getting everything from you because it will help me to kind of figure out and develop a framework of what we can do to figure out what's wrong with Seth, what happened with Seth. And that's important moving forward. Like I said, we need to move forward... [y]ou're a human being, Seth. Everybody makes mistakes, and you're no different than any other human being out on this planet. So I really want to make sure that we're delving into these incidents, that you're telling me everything. So if there's an occasion when you accidentally hurt her because it – remember, she's been interviewed... I want to make sure that you're not lying to me again because you've already lied to me once – actually twice. And where a person's lied – there are reasons why you do that. You're afraid, and you're scared, and I – I get that. But let's look at it in a positive light, Seth. Let's look at it together in a positive light. You've come a long way in this room here today in a short amount of time because you were honest and forthcoming, and you told me the truth, okay. I will take those things into consideration. Okay. So what I don't want to happen, Seth, is for you to lock up right now and decide that I'm not telling him anything else because we have a good dialogue going, you and I right here. I'm not a bad guy. I'm just trying to do my job. Okay? I'm trying to do what's right. And, in my eyes, what's right is to help Fay, okay, and to help the situation and move forward... In order to do that I think there's some things that you need to share with me that you haven't shared with me yet, and I'm just waiting – waiting to hear 'em, okay. I can't – I can't physically grab whatever you're thinking about in your brain and pull it out, okay. That takes for you to tell me. So if there's something – because I can tell by the look on your face and by your eyes – I've been doing this a long time, talking to people, interviewing okay. So just be straight and level with me alright. So during these occasions when you were having sex with her were there other things that happened that you haven't told me yet? Trans., p. 31-33.

24. Mr. Hinkley responds, "Yeah. I hit – I hit her." Asked when that happened and he said, "once in a blue moon." Trans., p. 33. When pressed for more details, Mr. Hinkley gives limited responses and then says that he can't remember.
25. Officer Marsh then asks Mr. Hinkley to write an apology letter to F.T. and tells him, "I think that would be important because moving forward obviously I think that it would help not only you, but I think it would help for us to understand how you feel because you say you feel bad about it, but obviously this would really show me that you do feel bad about it." Trans., p. 38.
26. Mr. Hinkley then writes a letter that states, "Dear [F.T], I'm sorry for everything I've done to you and put you through. I'm sorry for making you do things you didn't want to do, and I'm sorry for the abuse."
27. After the interview concluded, Officer Marsh asked Mr. Hinkley if he finished school. He told him he did not, but plans to and that he left school just before graduating. He asked Mr. Hinkley if he had any trouble understanding anything we had discussed and he replied, "no." Officer Marsh asked if he had anything else he wanted to share and he said shared everything and said that after speaking with Officer Marsh, he felt "extremely better." Mr. Hinkley then left the police department.
28. The State indicted Mr. Hinkley on these charges almost five months later.

#### LAW AND ARGUMENT

29. Under Part I, Article 15 of the New Hampshire Constitution, for a defendant's statements to be admissible at trial, the State must prove beyond a reasonable doubt that they were provided voluntarily. State v. Cloutier, 167 N.H. 254, 258 (2015). "To be considered voluntary, a confession must be the product of an essentially free and unconstrained choice and not extracted by threats, violence, direct or implied promises of any sort, or by exertion of any improper influence. Thus, a confession is involuntary if it is the product of a will overborne by police tactics, or of a mind incapable of conscious choice." Id. (quotations and citations omitted). "The decision to confess must be freely self-determined, the product of a rational intellect and a free will." In re Wesley B., 145 N.H. 428, 430 (2000) (quoting State v. Reynolds, 124 N.H. 428, 434 (1984)).

30. In order to determine the voluntariness of a confession, the Court must “examine the totality of the circumstances, including ‘the characteristics of the accused and the details of the interrogation.’” Id. (quoting State v. Belonga, 163 N.H. 343, 351 (2012)). “The Court should look at the factual circumstances surrounding the confession, the psychological impact on the defendant, and the legal significance of how the defendant reacted, in order to determine whether the police exerted such an influence on the defendant that his will was overborne.” State v. Hall, 148 N.H. 671, 672 (2002) (quoting State v. Aubuchont, 147 N.H. 142, 146 (2001)).
31. However, in New Hampshire, a confession made in reliance upon a promise of immunity is involuntary and coerced under the State Constitution. State v. McDermott, 131 N.H. 495, 500 (1989); see also, State v. Copeland, 124 N.H. 90, 92 (1983) (statements exacted by direct promises are involuntary); State v. Parker, 160 N.H. 203, 209 (2010) (the totality of the circumstances test, however, does not apply to promises of confidentiality or promises of immunity from prosecution).
32. In this case, Officer Marsh told Mr. Hinkley that he would not be in trouble if he had sex with F.T. because she was over the age of consent and his girlfriend. He then began to refer to allegations made by F.T. to police, but told Mr. Hinkley that “I’m just trying to delve into that and then some other stuff that we were told because you’re not gonna be in trouble from me if you me that you had sex with her.” Trans., p. 12. Mr. Hinkley then immediately admitted to having sex with F.T. after specifically denying it right before Officer Marsh told him he wouldn’t be in trouble.
33. Officer Marsh’s statements were a clear promise of immunity from prosecution and all statements made by Mr. Hinkley subsequent are *per se* involuntary and must be suppressed.
34. Should the court not consider Officer Marsh’s statements to be promises of immunity, or should it not agree that all of the statements following were a product of these promises, then an analysis of the totality of the circumstances occurring during this interrogation should also lead to the determination that Mr. Hinkley’s admissions were involuntary.
35. The promises by Officer Marsh that Mr. Hinkley would not be in trouble if he admitted to having sex with F.T. are also promises of leniency. The existence of promises of leniency or threats of harshness are to be considered by the court in determining the

voluntariness of statements. State v. Rezk, 150 N.H. 583, 487-488 (2004). Promises of leniency are not *per se* inadmissible. Instead the court must consider a number of factors to consider when determining whether a promise or a threat made a confession involuntary, including “1) the nature of the promise; 2) the context in which it was made; 3) the characteristics of the individual; 4) whether the defendant was informed of his Miranda rights; and 5) whether counsel was present.” Id. at 488. “Under the totality of the circumstances test, the existence of a promise made to the defendant is not dispositive. Rather, all the facts must be examined and their nuances assessed to determine whether, in making the promise, the police exerted such an influence on the defendant that his will was overborne. When considering what impact a promise had in overbearing the will of a suspect, courts must give qualitative, rather than quantitative weight to the promise. Even a single factor may inevitably lead to a conclusion that under the totality of circumstances a suspect’s will was overborne and the confession was not therefore a free and voluntary act.” Id.

36. Officer Marsh told Mr. Hinkley twice that he would not be in trouble if he admitted to having sex with F.T. These promises immediately prompted Mr. Hinkley to admit having sex with F.T., despite earlier denials. Mr. Hinkley did make admissions after waiving his Miranda rights, but he was without the presence of counsel while doing so. The promises made to him were given by someone known to Mr. Hinkley, someone who had previous knowledge of his personal history including mental health issues, someone who acted as though he could be trusted. Mr. Hinkley’s history of significant mental health conditions and Low Average Intelligence are relevant to Mr. Hinkley’s decision to rely upon the promises made by Officer Marsh and confess to incriminating information.
37. The weight of all of these factors supports the conclusion that the statements made by Mr. Hinkley in response to these promises and as a result of these promises were involuntary and must be suppressed.
38. In addition to Officer Marsh’s promises, the Court should consider additional circumstances present in that interrogation room in determining the voluntariness of Mr. Hinkley’s statements.
39. The New Hampshire Supreme Court has considered several cases related to the voluntariness of a defendant’s statements and weighed a number of factors in examining

the totality of the circumstances surrounding these confessions to determine their admissibility.

40. In finding the statements made by a juvenile to be involuntary, the New Hampshire Supreme Court in Wesley B., placed weight on the fact that the juvenile was an “educationally impaired youth of low average intelligence” who made eventually made incriminatory statements after continued denials without a parent present and without being informed of his charges. 145 N.H. at 431-432. Similarly, in State v. Wilmot, 162 N.H. 148, 153 (2012), the Court valued a defendant’s educational abilities, demonstrated by “very good grades” and graduation from high school in determining his statements to be voluntary.
41. The Court in Wesley B. went on to consider the mental and developmental conditions of the confessor in determining voluntariness. “If a person suffers from a mental or developmental condition that impairs that person’s ability to comprehend his or her choices, that impairment must be factored into a court’s determination of voluntariness. The due process clause of the State Constitution requires us to label, as involuntary, the statements of an individual who, because of a mental condition, cannot make a meaningful choice. However, mental illness does not, as a matter of law, render a confession involuntary. Rather the trial court must determine whether, given the totality of the circumstances, the defendant’s statements were the product of a rational intellect and a free will.” Wesley B., 145 N.H. at 430-431 (quoting State v. Damiano, 124 N.H. 742, 747 (1984)).
42. The Court has also stated in a separate case that, “[a]lthough proof of a deranged or deficient mental state may be highly significant in determining whether any given police conduct was overbearing in its effect, mere proof that a defendant’s confession or admission was the product of his own mental condition is not a sufficient basis to exclude the confession or admission from evidence at trial.” State v. Chapman, 135 N.H. 390, 400-401 (1992). “Unless the official conduct is coercive... [or deceptive] when considered in relation to the confessor’s mental condition and capacity, and unless the coercion or deception induces the confession by overbearing or circumventing the confessor’s will, there are no grounds to treat the confession as anything but voluntary...” Id. at 400.

43. In State v. Bilodeau, the New Hampshire Supreme Court stated that “[u]nder the Due Process Clause, we consider a person’s mental or developmental condition if it impairs his capacity for self-determination or his ability to resist police coercion. The defendant may not be able to make a meaningful choice to confess or may have a heightened vulnerability to what otherwise would be acceptable police tactics.” 159 N.H. 759, 762 (2010) (quotations and citations omitted).
44. Essentially, whether the interview was coercive should be measured by the nature of the interview within the context of the defendant’s abilities. See, Wesley B., 145 N.H. at 431.
45. Mr. Hinkley is a person of Low Average Intelligence who has a history of being diagnosed with several mental health conditions, including ADHD, PTSD, and Autism. Mr. Hinkley was still in high school when he was interviewed by the Berlin officer. He had an IEP throughout his entire educational career in the Berlin schools and, for much of that time, a tutor who accompanied him to every class. During his interrogation he sat in a room alone with two police officers, without the presence of a parent or guardian or counsel, and without the aid of any tutor. The police never explained to Mr. Hinkley that he was being charged with any specific crimes, never defined the crime of Aggravated Felonious Sexual Assault, and never explained what kinds of conduct during sexual activity can lead to criminal charges. Mr. Hinkley denied the accusations against him several times during the interview. Each time he did so, Officer Marsh used interrogation techniques designed to gain confession.
46. Whether an officer’s decision to mislead or minimize the liability of certain conduct affects the voluntariness of a defendant’s statements should be considered when the defendant is someone of low intelligence and suffers from significant mental health conditions. In State v. Hernandez, 162 N.H. 698, 706 (2011), the Court found that minimization techniques used by the police on someone with “at least average intelligence” did not lead to the production of involuntary statements. “Police are not prohibited from misleading a suspect.” Id. However, their comments should not be so deceptive as to overbear the will of the defendant or deprive him of a conscious choice. See, State v. Hall, 148 N.H. 671, 673 (2002).
47. In this case, Officer Marsh told Mr. Hinkley,

I think there's a big difference between being like a sexual predator, you know what I mean, like a violent sexual predator and, you know, letting yourself and your emotions get overrun sexually, and I think that's probably what happened. You know, everybody makes mistakes, and I think this is just one of those mistakes that you made. I think as men we get aggressive, you know sexually, and it's hard for us to stop. *And I think that's probably what happened to you because I know you've got other issues. There's other things that have happened to you emotionally and you know, mentally that affect you. I've talked to you about your issues before.* Trans., p. 17-18 (emphasis added).

48. Immediately after Officer Marsh made these statements, he asked Mr. Hinkley, "So there were occasions when she told you like no, I really don't want to do this?" And Mr. Hinkley responded, "Um-hum." Officer Marsh asked how many times it happened and Mr. Hinkley said, "like once ever once in a while" and then after being asked again how often said, "like once a month." Trans., p. 18.
49. Officer Marsh's minimization of the liability of continuing to have sex with someone after they have indicated that they do not consent through words or actions led Mr. Hinkley to recant previous denials and make admissions to the charged conduct. In essence, Officer Marsh told Mr. Hinkley that he wouldn't be liable for his conduct because it didn't rise to the level of a sexual predator, a person who inarguably did something wrong, that it's normal for men to get aggressive during sex and it's hard for them to stop, and that it is especially hard for Mr. Hinkley because of his history of problems.
50. Later in the interview, Mr. Hinkley again specifically denied ever forcing F.T. to have sex with him after she allegedly pushed him off. Trans., p. 20. Officer Marsh's immediate response to Mr. Hinkley's denial was,

There are problems here. And so I need you to be honest here, okay, with me because I told you I don't think you're a sexual deviant. I don't think that you're out there raping a whole bunch of people. Okay? I think you made a mistake. You've made a few. And I think some of those mistakes were the times when she's telling you no and also physically tell you now but your emotions go the best of you. *You have a habit of doing that, letting your emotions get the best of*

*you don't you? That's who you are. And a lot of times we can't change that. That's just who we are. That's our physical makeup. And the reason I know that about you Seth, is because I've sat in your bedroom... and we've talked about all the problems you were having with people out there emotionally, problems... so there have been a lot of things that have happened to you over the course of you're life... Trans., p. 21-22.*

51. Officer Marsh then goes on to tell Mr. Hinkley that his sexual abuse as a child by his father is the reason "this happened to him" because "people that... fall into that category... have a hard time controlling those impulses." Again, Officer Marsh told Mr. Hinkley he was not liable for his conduct because he was genetically predisposed to having a difficult time controlling his impulses, it's not his fault, he was just born that way.
52. Immediately after giving Mr. Hinkley this information, Officer Marsh asked how many times F.T. physically pushed him during sex to tell him no and Mr. Hinkley admits to "once or three times a month." Id. He went on to admit to penetrating her digitally after she has pushed him and told him to stop. Trans., p. 24, 29.
53. Near the end of the interview, Officer Marsh told Mr. Hinkley,
 

So I think because of your mental issues that you have, you have some obstacles you know. You have some problems here. And because of those obstacles, those problems that you have, I think that's affecting you personally, you know. I don't want to speak for you, but I think that's what's happened here you know and so I want to make sur that we're getting everything from you because it will help me to kind of figure out and develop a framework of what we can do to figure out what's wrong with Seth, what happened with Seth. And that's important moving forward. Like I said, we need to move forward... [y]ou're a human being, Seth. Everybody makes mistakes, and you're no different than any other human being out on this planet. So I really want to make sure that we're delving into these incidents, that you're telling me everything. So if there's an occasion when you accidentally hurt her... Trans., p. 31-33.
54. This line of questioning specifically preyed upon the relationship between Officer Marsh and Mr. Hinkley that developed during school. Officer Marsh, someone he has interacted

with in school before, someone who implies can be trusted to help as he had in the past, again limits Mr. Hinkley's liability by telling him Mr. Hinkley that he's just like every other human being on the planet who makes mistakes and that they're going to develop a framework to figure out how to help him move forward.

55. These types of statements that minimize the legal consequences of certain conduct become coercive, deceptive and overbearing of a person's will when that person is cognitively limited and suffers from mental illness, especially when that person is talking to someone they have trusted in the past to lead them in the right direction. It is not surprising that every time Officer Marsh tells Mr. Hinkley that his liability for this type of conduct is limited because he's not a predator, because he's got problems, because he's genetically predisposed, because he's a human who makes mistakes, Mr. Hinkley's will is overridden and his initial denials become the admissions sought by Officer Marsh.
56. Considering the totality of the circumstances occurring in this interrogation, including the characteristics of the accused and the details of the interrogation, this Court must find Mr. Hinkley's statements involuntary.

WHEREFORE, Mr. Hinkley respectfully requests that this Honorable Court:

- A. Suppress all statements made by Mr. Hinkley during his February 6, 2018 interview; or
- B. Schedule a hearing on this Motion; and
- C. Grant any further relief the Court deems just and equitable.

Respectfully Submitted,

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Melissa Lynn Davis #17098  
 New Hampshire Public Defender – Coöds  
 134 Main St., Suite 300  
 (603) 444-1185

**Certificate of Service**

I hereby certify that a copy of this Objection has been forwarded to Assistant County Attorney, Jessica Cain, Esq. on this \_\_\_\_ day of March, 2019.

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Melissa Lynn Davis

## STATE OF NEW HAMPSHIRE

Coös, SS.

Superior Court

State of New Hampshire

v.

Seth Hinkley

Superior Court Case: 214-2018-CR-00084

Charge ID: 1514239C, 15142401C, 1514241C; 1514242C, 1514243C

**STATE'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS DEFENDANT'S STATEMENTS**

NOW COMES the State of New Hampshire, by and through the Office of the Coös County Attorney, Jessica L. Cain, Assistant Coös County Attorney and objects to the defendant's motion to suppress defendant's statements and in support of its objection, states as follows:

**Procedural Background**

1. The defendant was indicted by a Grand Jury in the Coös Superior Court on five charges of Aggravated Felonious Sexual Assault- Domestic Violence on June 29, 2018.
2. On August 8, 2018, defense counsel filed an ex parte motion requesting funds for a mental health evaluation of the defendant.
3. The final pretrial in this case was originally scheduled for November 5, 2018.
4. Defense counsel has moved to continue the final pretrial three times.
5. On October 23, 2018, the defendant moved to continue on the basis that the mental health evaluation had yet to be completed. Despite the fact that the defendant had more than two months to complete the evaluation, the State assented to the continuance.
6. On December 7, 2018, Dr. Becotte, a psychologist hired by defense counsel, completed a psychological evaluation of the defendant at the Public Defender's office.
7. On December 19, 2018, Dr. Becotte completed his report on that evaluation.
8. On December 26, 2018, the defendant again moved to continue the case, this time because Attorney Davis had entered an appearance in the case and wanted time to get up to speed on the case. The State again assented to the continuance.

9. On February 15, 2019, defense counsel again moved to continue the final pretrial on the basis that it had not received the audio recording of the defendant's interview with Ofc. Adam Marsh of the Berlin Police Department.
10. The Court granted the defendant's motion over the State's objection.
11. On April 11, 2019, defense counsel provided Dr. Becotte's report to the State.
12. On April 22, 2019, defense counsel filed three motions: a motion for the deposition of Adam Marsh, a motion to suppress the defendant's statements, and a motion to continue the final pretrial.
13. Although the State was hesitant to assent to a further continuance against the wishes of the victim in this case, the State did assent to the continuance to allow for time to potentially depose Dr. Becotte regarding his report that the defense decided to provide four months after it had been generated.
14. The Court granted the defendant's motion to continue and final pretrial is now scheduled for July of 2019.

#### Facts<sup>1</sup>

15. On December 28, 2017, the Berlin Police Department received a report of sexual assault. On this date, the victim, F.T., arrived to the police department with her aunt and grandmother to speak with Ofc. Adam Marsh about her report.
16. F.T. advised that her ex-boyfriend, Seth Hinkley, had sexually assaulted her on at least two occasions between July 1, 2017 and December 28, 2017.
17. Due to F.T.'s age and developmental delays, Ofc. Marsh referred her to the Child Advocacy Center where she was interviewed in further detail on January 9, 2018.
18. During her interview at the CAC, F.T. disclosed that the defendant had forced her into sexual intercourse, had digitally penetrated and groped her, and had physically abused her during their relationship.
19. F.T. further advised that she did not consent to these relations on numerous occasions and described in detail how she had told the defendant "no" and even pushed him off of her on some of these occasions. F.T. advised that these actions on her part did not prevent or stop the defendant from continuing the assaults.
20. On February 6, 2018, Ofc. Marsh called the defendant and asked that he come to the police department to talk with him about the case. The defendant was told upon arrival that "he was not under arrest and was free to leave, which he said he understood." Marsh, Nar. p. 1, ¶ 1 (Mar. 9, 2018).

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<sup>1</sup> The facts in this section are contained within the discovery provided to defense counsel by the State.

21. At the time of the interview, the defendant was 18 years-old and had been expelled from high school but was looking to obtain his GED.
22. Ofc. Marsh then brought the defendant to the conference room where he was interviewed on audio recording. Lt. Lemoine was also present for the interview.
23. At the beginning of the interview, Ofc. Marsh asked the defendant for his name, address, date of birth, and phone number. The defendant was able to answer these questions with ease.
24. Ofc. Marsh then advised that the interview was being recorded and asked the defendant if he understood that and if he was okay with it to which the defendant responded in the affirmative.
25. Ofc. Marsh then explained that the door to the conference room was closed for their privacy but wasn't locked and that the defendant was free to leave at any time. The defendant advised that he understood.
26. Ofc. Marsh then advised the defendant that he was not under arrest and not being detained and made sure the defendant understood that fact.
27. Ofc. Marsh then went over a Miranda rights form with the defendant who verbally indicated that he understood each of the rights being read to him. After reading through the form, the defendant initialed next to each of the rights that had been read to him, further confirming that he understood each of these rights.
28. The defendant then wrote his address, date of birth, the date of the interview, and signed his name on the form. *See Attachment C.*
29. Ofc. Marsh then told the defendant ". . . I'm gonna cut to the chase here. We've met before." *See Attachment A (p.4).*
30. Ofc. Marsh later references a past conversation they had in the defendant's bedroom at 749 Hillside Avenue in Berlin. *See Attachment A (p.22).*
31. Ofc. Marsh asks the defendant about his relationship with the victim and about the time he spent living with her when the defendant, unprompted, states that he was kicked out of the victim's home because someone called DCYF and made "false accusations" about him. *See Attachment A (p.5).*
32. The defendant acknowledged that he knew the allegations to be concerning his physical and sexual abuse of members of the victim's family.
33. Ofc. Marsh then asks the defendant whether his relationship with F.T. was intimate to which the defendant denies ever having intercourse.
34. The defendant advised that he had been 18 years-old and F.T. had been 17 years-old during their relationship and he wasn't sure if that was legal. At this time, Ofc. Marsh advised ". . . you're not in trouble if you had sex with her, okay. It's your girlfriend. She's over the age of 16. That's the age of consent." *See Attachment A (p.12).* Ofc. Marsh

continued to say “. . .you're not gonna be in trouble from me if you told me that you had sex with her.” *Id.*

35. The defendant then admits that he did in fact have intercourse with the victim on many occasions. The defendant then advised that he had intercourse with F.T. “a couple times a week” and told Ofc. Marsh about a time where F.T.’s grandmother walked in on him and F.T. having intercourse in the bathroom. The defendant advised that he was in the bathroom with F.T. brushing her hair when F.T. “pulled [him] down” and said she wanted to have sex with him. *Id.* at p.15. This version of events is in stark contrast to the version given by F.T. who claims she was pulled into the bathroom by the defendant before her grandmother came in and stopped it.
36. The defendant described having intercourse with F.T. in the living room and on F.T.’s bed but leaves out the occasions where he penetrated F.T. without her consent and/or physically abused her.
37. Ofc. Marsh then explains that F.T. is saying something different and has advised that there were times she didn’t want to engage in certain sexual conduct and that the defendant proceeded to engage in this conduct despite her objection. Ofc. Marsh asked why F.T. would lie about this to which the defendant responded “she wouldn’t.”
38. The defendant goes on to admit that he had engaged in intercourse with F.T. after F.T. had told him “no” and advised that this happened “like once a month. *Id.* at p.18.
39. Ofc. Marsh then asks if there were ever times where F.T. was attempting to push the defendant off of her during intercourse. The defendant replied “no” and when questioned about a specific incident that F.T. had described as her trying to push the defendant off of her, the defendant stated “that never happened.” *Id.* at p.20.
40. Ofc. Marsh then spoke to the defendant about lying to him and advised him of what F.T. was alleging. The defendant eventually admits that there were occasions where he had continued penetrating F.T. after she had said “no” and even physically pushed her away. The defendant also admits to slapping F.T. when she tried to resist penetration and persistently engaging in digital penetration while F.T. repeatedly pushed his hand away.
41. The defendant told Ofc. Marsh that he felt bad about what he had done to F.T. and at Ofc. Marsh’s suggestion, wrote her a letter apologizing for his conduct. *See Attachment B.*
42. At the conclusion of the interview which lasted approximately forty-five minutes, Ofc. Marsh asked the defendant if he had “. . .any trouble understanding anything we talked about here today?” to which the defendant responded that he had not. *See Attachment A (p.39).*

Law

43. Under Part I, Article 15 of the New Hampshire Constitution, for a defendant's statement to be admissible at trial, the State must prove beyond a reasonable doubt that it was voluntary. *State v. Wilmot*, 163 N.H. 148, 151(2012). Whether a confession is voluntary is initially a question of fact for the trial court. *State v. Rezk*, 150 N.H. 483, 486 (2004).
44. "To be considered voluntary, a confession must be the product of an essentially free and unconstrained choice and not extracted by threats, violence, direct or implied promises of any sort, or by exertion of any improper influence." *State v. Cloutier*, 167 N.H. 254, 258 (2015) *citting*; *State v. Zwicker*, 151 N.H. 179, 186, 855 A.2d 415 (2004).
45. A confession is involuntary if it is "the product of a will overborne by police tactics, or of a mind incapable of conscious choice." *State v. Hernandez*, 162 N.H. 698, 706 (2011).
46. "In determining the voluntariness of a confession, we examine the totality of the circumstances, including 'the characteristics of the accused and the details of the interrogation.'" *Cloutier*, 167 N.H. at 258. (quoting *State v. Belonga*, 163 N.H. 343, 35 (2012)).
47. Under the State Constitution, the standard by which the voluntariness of a confession is judged is whether it is the "'product of an essentially free and unconstrained choice' and was not 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" *State v. McDermott*, 131 NH 495, 500 (1989) (quoting *State v. Damiano*, 124 N.H. 742, 747, 474 (1984)).
48. "Under the Due Process Clause, we consider a person's mental or developmental condition if it impairs his capacity for self-determination or his ability to resist police coercion." *State v. Blodeau*, 159 N.H. 759, 762 (2010).
49. "[P]roof of a deranged or deficient mental state may be highly significant in determining whether any given police conduct was overbearing in its effect. Mental illness, however, "does not, as a matter of law, render a confession involuntary." *State v. Hammond*, 144 N.H. 401, 405 (1999); *See also*, *State v. Dumas*, 145 N.H. 301, 761 (2000) (holding there is "no per se rule that a person with low intelligence cannot waive his Miranda rights."); *In re Sanborn*, 130 N.H. 430, 439, (1988) ("an inquiry into a confessor's mental condition can never be dispositive in applying the constitutional concept of voluntariness.").
50. Unless law enforcement "conduct is coercive or deceptive when considered in relation to the confessor's mental condition and capacity, and unless the coercion or deception induces the confession by overbearing or circumventing the confessor's will, there are no grounds to treat the confession as anything but voluntary for fourteenth amendment purposes." *State v. Chapman*, 135 N.H. 390, 400(1992).

Argument

- I. Ofc. Marsh's statement that the defendant will not be in trouble if he had sex with F.T. is not a "promise of immunity" from being prosecuted for sexually assaulting F.T. under the Constitution.
51. As stated above, Ofc. Marsh did tell the defendant that he would not be in trouble for admitting to having had intercourse with F.T.
52. Ofc. Marsh's statement was accurate. F.T. and the defendant were both over the age of consent and had engaged in consensual intercourse on multiple occasions. The defendant has not been charged in relation to those occasions.
53. The defendant admitted only to having consensual intercourse with F.T. after Ofc. Marsh advised that he would not be in trouble for that. The defendant then admitted only to having sexual intercourse with F.T. a "couple times a week" and did not mention having intercourse or penetrating F.T. without her consent.
54. The defendant only confessed to assaulting F.T. after Ofc. Marsh told him that F.T. had already disclosed these assaults, which she had.
55. The defendant has only been charged with assaulting F.T., not for consensually having intercourse with her which is the only conduct that Ofc. Marsh told the defendant that he would not get in trouble for.
56. Therefore, Ofc. Marsh's statement does not qualify as a "promise of immunity" under the constitution. Even if the statement did constitute a promise, the defendant's further denial of assaulting F.T. even after Ofc. Marsh made the statement proves that the defendant did not rely on said statement in later confessing to his criminal conduct.
- II. The defendant's confessions were made voluntarily under the totality of the circumstances.
57. The defense argues that Ofc. Marsh's minimization of "the legal consequences of certain conduct" became "coercive, deceptive and overbearing of a person's will" due to the defendant's "mental illness" and the fact that Ofc. Marsh is someone he "trusted in the past to lead them in the right direction," Def. Mot. to Supp. P. 15, ¶54.
58. First and foremost, the State is not aware of any discovery relating to the defendant's assertion that Ofc. Marsh is someone he "trusted in the past to lead [him] in the right direction," or the defenses' characterization of Ofc. Marsh as "... someone who had previous knowledge of his personal history including mental health issues, [and] someone who acted as though he could be trusted." *Id.* at p.10, ¶ 36.
59. The discovery provided by the State only indicates that Ofc. Marsh has met with the defendant in his bedroom at 749 Hillside Avenue in Berlin on a prior occasion. In the interview, Ofc. Marsh references discussing things like the defendant's attendance at school and his issues at home with his adoptive father, Dana. *See* Attachment A (p.4, 22).

60. There is no evidence, at least that the State is aware of, that Ofc. Marsh had knowledge of the defendant's "personal history. . . mental health issues" or that the defendant viewed him as someone that could be "trusted to lead him in the right direction."
61. Unless defense counsel provides evidence to support these assertions, the State requests that the Court disregard them.
62. Secondly, New Hampshire case law overwhelmingly supports Ofc. Marsh's minimization of the defendant's conduct as not inherently coercive.
63. In *State v. Hernandez*, the Court found that an officer's minimization technique during an interview of the defendant was not inherently coercive and upheld the defendant's confession even though the defendant had admitted to smoking marijuana and consuming four beers that day. 162 N.H. 698, 700(2011).
64. In so ruling, the Court held "[a]lthough the detectives admittedly used minimization techniques and were 'friendly' to the defendant, the police are not prohibited from misleading a suspect, and friendly police conduct does not alter the voluntariness of a defendant's statements." *Hernandez*, 162 N.H. 698, 706.
65. The defense argues that ". . . whether an officer's decision to mislead or minimize the liability of certain conduct affects the voluntariness of a defendant's statements should be considered when the defendant is someone of low intelligence and suffers from significant mental health conditions." Def. Mot. to Sup. p. 12, ¶46.
66. The defense does not cite any legal authority for this standard, nor is any support provided for the contention that the defendant is of "low intelligence" or suffers from "significant" mental health conditions.
67. The defense did however reference a psychological evaluation of the defendant generated by Dr. Dennis Becotte, a psychologist frequently hired by the defense, in which the defendant is classified as being of "average" intelligence, albeit, on the lower end of average.
68. Nothing in Dr. Becotte's evaluation indicates that the defendant's mental health conditions would in any way impair his ability to freely and voluntarily waive his *Miranda* rights and subsequently confess to his criminal conduct.
69. Dr. Becotte diagnosed the defendant with "high functioning autism" but continues to state that the defendant has "no intellectual or language deficits associated with this disorder."
70. Dr. Becotte described the defendant as "attentive and able to listen to questions. . ." and stated that he "responded appropriately throughout the lengthy interview." Further, Dr. Becotte reported that the defendant "was asked to summarize the conditions and limits of confidentiality in his own words and was able to do so without problem."

71. As stated above, the Court should only “consider a person’s mental or developmental condition if it impairs his capacity for self-determination or his ability to resist police coercion.” *Bilodeau*, 159 N.H. 759 at 762.
  72. The New Hampshire Supreme Court has upheld confessions obtained from a defendant who had been admitted to the Secure Psychiatric Unit of prison, and suffered from depression, suicidal ideation, hallucinations, mood disorders, and an anti-social personality disorder (*Bilodeau* 159 N.H. at 559), a defendant who had a blood alcohol content of .13 at the end of a three hour interview (*Chapman*, 135 N.H. at 393), a defendant who was described as “borderline mentally retarded” (*State v. Dumas*, 145 N.H. 301, 302(2000)), and a defendant with borderline psychiatric disorder. (*State v. Damiano*, 124 NH 742, 747(1984)).
  73. Also worth noting, the Court in *Damiano* found the defendant’s argument she had a previous relationship with the officer as a confidential informant in an unrelated matter, and was therefore friendly with the officer, unpersuasive. *Id.*
  74. This case is easily distinguished from *In re Wesley* in which the defendant was an 11 year-old juvenile who had been found to be “just competent” to stand trial and was “slow,” “fidgety” and “had trouble paying attention” during his interview with police. *In re Wesley B.*, 145 NH 428, 429 (2000).
  75. In this case, the defendant is an adult who was able waive his rights both verbally and in writing, he was able to focus and respond to questioning throughout the entire interview, articulate his remorse for his criminal conduct in a letter to the victim, and was able to acknowledge that he understood everything that had been discussed during the interview.
  76. Additionally, Ofc. Marsh was friendly throughout the interview, made it clear to the defendant that he was free to leave at any time, and was thorough in his review of the defendant’s *Miranda* rights.
  77. Therefore, the defendant’s confession was voluntary under the totality of the circumstances and should not be suppressed.
- III. The defendant’s motion is untimely under N.H. Superior Court Rule 15(b)(1).
78. Aside from the merits, the defendant’s motion to suppress is untimely under Superior Court Rule 15(b)(1).
  79. Rule 15(b)(1) clearly states that all pre-trial motions, including motions to suppress, shall be filed within “sixty days after entry of a plea of not guilty or fifteen days after the dispositional conference, whichever is later.”
  80. The defendant was arraigned on this matter on July 27, 2018.
  81. The dispositional conference on this matter was held on August 20, 2018.
  82. The defendant is clearly past both of these deadlines and has offered no basis for its late request.

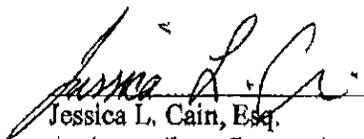
83. The defendant has had the entirety of the State's discovery since July of 2017 aside from the recording of the defendant's interview which it has had since January.
84. Therefore, the defendant's motion to suppress should be denied both on its merits and based on its untimely filing.

WHEREFORE, the State requests that this Honorable Court:

- A. DENY the defendant's motion; or  
B. HOLD a hearing on the matter; or  
C. Grant any other relief deemed proper and just.

April 25, 2019

Respectfully Submitted,  
STATE OF NEW HAMPSHIRE



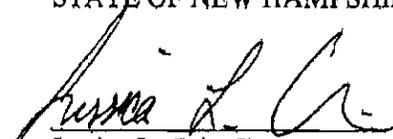
Jessica L. Cain, Esq.  
Assistant Coos County Attorney  
NH Bar # 267676  
Office of the Coos County Attorney  
55 School Street, Suite 141  
Lancaster, NH 03584

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has this day been forwarded to Melissa L. Davis, NH Public Defender, 134 Main Street, Lancaster, NH 03584, counsel for the defendant.

April 25, 2019

Respectfully Submitted,  
STATE OF NEW HAMPSHIRE



Jessica L. Cain, Esq.  
Office of the Coos County Attorney

**THE STATE OF NEW HAMPSHIRE**

COÖS, SS.

SUPERIOR COURT

No. 214-2018-CR-84

State of New Hampshire

v.

Seth Hinkley

**ORDER ON MOTION TO SUPPRESS DEFENDANT'S STATEMENTS**

The defendant in this case, Seth Hinkley, is charged with five (5) counts of aggravated felonious sexual assault. On April 22, 2019, the defendant filed a motion to suppress statements he made to the police on February 6, 2018, arguing that his statements were not made voluntarily. (Index #25.) The State objects. (Index #27.) On August 6, 2019 and October 11, 2019, the Court conducted hearings on the Motion to Suppress Defendant's Statements. At the hearings, the parties submitted exhibits and presented testimony from Berlin Police Officer Adam Marsh and Dennis Becotte, Ph.D. Based on the parties' arguments, the evidence presented, and the applicable law, the Court finds and rules as follows.

**I. Factual Background**

The following facts are derived from the testimony of Officer Marsh as well as the audio recording, (State's Ex. 9), and transcript, (State's Ex. 1), of the defendant's February 6, 2018 interview at the Berlin Police Department. The Court finds that the transcript is an accurate representation of what was said during the interview and, for ease of reference, cites to the transcript ("Tr.") rather than the audio recording. On December 28, 2017, the complainant and her grandmother visited the Berlin Police

CLERK'S NOTICE DATE

10/22/19CC: Cain  
Davis  
VWC

Department to report the crimes alleged in this case. On January 9, 2018, at the Child Advocacy Center ("CAC"), a forensic interviewer questioned the complainant about her allegations against the defendant. Officer Marsh remotely observed the complainant's CAC interview, although he did not participate in the interview. Based on the complainant's allegations, Officer Marsh contacted the defendant by telephone and asked him to come to the police department to talk.

The defendant reported to the Berlin Police Department between noon and 1:00 p.m. on February 6, 2018. Upon arriving at the police department, the defendant signed in and was then escorted to an upstairs conference room where he was interviewed primarily by Officer Marsh. Lieutenant Jeff Lemoine, of the Berlin Police Department, was also present in the conference room, but he asked only a few questions. Counsel for the defendant was not present during the interview, and the defendant was not accompanied by anybody else. The interview commenced at 12:46 p.m. and lasted until 1:27 p.m., a total of about 41 minutes.

At the beginning of the interview, Officer Marsh identified the parties present in the conference room and informed the defendant that the interview was being recorded. (Tr. at 2.) The defendant assented to the recording. (Tr. at 3.) Officer Marsh next informed the defendant that the door to the conference room was closed for privacy only, that the door was not locked, and that the defendant was free to leave at any time for any reason. (Id.) Officer Marsh then reviewed the defendant's Miranda rights with him. (Tr. at 3-4.) The defendant acknowledged that he understood his Miranda rights, and he signed a waiver of rights form. (Tr. at 3-4; State's Ex. 3.)

Officer Marsh asked the defendant how he knew the complainant, and the defendant responded that the complainant used to be his girlfriend. (Tr. at 4–5.) Officer Marsh asked the defendant if he was living with the complainant while they were dating, and the defendant explained that he was living at the complainant's home until somebody made a false accusation to the New Hampshire Division for Children, Youth and Families ("DCYF"). (Tr. at 5.) When asked what the false accusations were, the defendant stated that they involved allegations that he had sexually touched the complainant and other members of her family. (Tr. at 5–6.) In response to follow-up questions from Officer Marsh, the defendant described his interactions with the DCYF case worker who informed him of the allegations against him. (Tr. at 6–7.)

Officer Marsh next asked to talk about the defendant's relationship with the complainant. (Tr. at 7.) Officer Marsh asked the defendant several questions about how he and the complainant started dating, when they started dating, and why they started dating. (Tr. at 8–9.) Officer Marsh next asked the defendant about the time he spent living at the complainant's house, including questions about the interior layout of the house and how often the defendant was alone with the complainant. (Tr. at 9–11.)

Officer Marsh asked the defendant if, on the few occasions he had been alone with the complainant, the two of them had been intimate with one another. (Tr. at 11.) The defendant initially responded that they had not. (Id.) Officer Marsh clarified his question by asking whether the defendant had kissed or hugged the complainant. (Id.) The defendant replied, "Yes," and then explained, "Sorry. I thought you meant sexually." (Id.) Officer Marsh responded, "Okay. Well, I mean did you ever have intercourse with

her?" (Id.) The defendant answered, "No . . . She was too young, and I didn't want to. . . She was 17, and I was 18." (Tr. at 11-12.)

Officer Marsh asked the defendant, "Is there anything illegal about that?" and the defendant responded, "I didn't know, but I just wanted to be on the safe side." (Tr. at 12.) Officer Marsh then made the following assertions to the defendant:

Okay. I'll -- I'll be honest with you, okay. I told you I want to be up-front with you, and I want you to do the same with me. . . . Um -- we're being told something completely different. Okay? And there's no reason why -- um -- unless they were trying to cover something up.

And at this point I told you you're not in trouble if you had sex with her, okay. It's your girlfriend. She's over the age of 16. That's the age of consent.

Um -- and so, I mean, she's telling us that yeah, we had sex on a few occasions, so I'm just trying to kind of delve into that and then some other stuff that we were told -- um -- because you're not gonna be in trouble from me if you told me that you had sex with her.

Because she's being very specific about dates, times, occasions when you two did have sex, so I want to -- I want to stop before we go too far because I want you to get ahead of this before this rests on your shoulders and -- and eventually hurts you -- um -- because we're the police here.

This isn't -- I'm not your dad, okay? Um -- I'm not [the complainant's] dad, okay. I'm a police officer. So before you go lying and/or half-truths or whatever, okay, I need you to be up -- up-front and straight up -- straight up with me, okay?

(Id.)

Officer Marsh then asked, "there were occasions when you had intercourse with her." (Id.) The defendant answered, "Yeah." (Tr. at 13.) The defendant's answer was plainly made in reliance upon Officer Marsh's statement that the defendant would not be in trouble for saying that he had sex with the complainant. Officer Marsh then asked the defendant a series of questions about when he had intercourse with the complainant,

how frequently, and where. (*Id.*) The defendant answered the officer's questions, explaining that he and the complainant had intercourse about two or three times per week in a variety of locations in the complainant's house. (*Id.*) Officer Marsh then questioned the defendant extensively about his sexual encounters with the complainant, eventually asking him about the complainant's allegations of sexual assault. (*See* Tr. at 13–17.) Throughout the remainder of the interview, Officer Marsh's questions and the defendant's answers all related back to the defendant's admission that he had engaged in sexual intercourse with the complainant.

## II. Analysis

The defendant now moves to suppress the statements he made to the police on February 6, 2018, arguing that they were obtained in violation of his rights under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. (*See* Def.'s Mot. at 1; ¶ 29.) The defendant specifically contends that Officer Marsh's assertions that he would not be in trouble if he confessed to having sex with the complainant constituted a promise of immunity from prosecution. (*Id.* ¶¶ 31–33.) As such, the defendant argues that his statements were not made voluntarily. (*Id.*) The State objects, arguing that Officer Marsh's assertions did not constitute a promise of immunity, but a statement of fact that the defendant could not be prosecuted for having consensual sex with the complainant. (*See* State's Obj. ¶¶ 51–56.) Because the State Constitution provides the defendant with at least as much protection as the Federal Constitution, the Court will analyze the defendant's constitutional claims under the State Constitution, citing to federal opinions for guidance only. *See State v. Daniel*, 142 N.H. 54, 57 (1997).

"Under Part I, Article 15 of our State Constitution, the State must prove that the defendant's statements were voluntary beyond a reasonable doubt." State v. Rezk, 150 N.H. 483, 486 (2004); see also N.H. CONST. pt. 1, art. 15 ("No subject shall be . . . compelled to accuse or furnish evidence against himself."). "Whether a confession is voluntary is initially a question of fact for the trial court." Rezk, 150 N.H. at 486. "In determining whether a confession is voluntary, [the Court] look[s] at whether the actions of an individual are the product of an essentially free and unconstrained choice or are the product of a will overborne by police tactics." Id. at 487 (quoting State v. Hammond, 144 N.H. 401, 404 (1999)). "In making this determination, [the Court] examine[s] the totality of all surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Id. (quotation omitted).

"A confession made in reliance upon a promise of confidentiality or a promise of immunity is [per se] involuntary and coerced under the State Constitution." State v. McDermott, 131 N.H. 495, 501 (1989). Such promises are "dispositive of the issue of voluntariness" and, therefore, are "categorically different" from all other types of promises. Rezk, 150 N.H. at 487; McDermott, 131 N.H. at 501.

In this case, it is undisputed that Officer Marsh asserted to the defendant twice that he would not be in trouble if he admitted to having sex with the complainant. The Court must therefore determine whether those assertions constituted a promise of immunity from prosecution. The State correctly observes that Officer Marsh's statements of fact regarding the age of consent in New Hampshire were "accurate." (State's Obj. ¶ 52.) The assertions made by Officer Marsh were in direct response to the defendant's apparent misunderstanding about the age of consent in New Hampshire.

Officer Marsh correctly explained that persons 16 years of age and older can consent to sexual intercourse. As both the defendant and the complainant were over the age of 16, the defendant could not be charged with a crime if he admitted to engaging in consensual sexual intercourse with the complainant.

The State's argument, however, overlooks the fact that Officer Marsh went far beyond making accurate statements of fact when he twice assured the defendant that the defendant would "not . . . be in trouble from me if you told me that you had sex with her." (Tr. at 12.) While it may be true that the defendant could not be prosecuted for engaging in consensual intercourse with the complainant, sexual penetration is one of the elements of each of the charged offenses in this case. See RSA 632-A:2, 1 ("A person is guilty of the felony of aggravated felonious sexual assault if such person engages in sexual penetration with another person under any of the following circumstances . . . "); State v. Melcher, 140 N.H. 823, 825 (1996) ("Sexual penetration is a material element of any aggravated felonious sexual assault offense under RSA 632-A:2."); see also N.H. Criminal Jury Instructions Drafting Committee Version at 111, 123 (N.H. Bar Assoc., Sept. 2010) (providing that the State must prove the "defendant engaged in sexual penetration with another person"). At trial, the State will be required to prove, beyond a reasonable doubt, that the defendant engaged in sexual penetration with the complainant. Therefore, Officer Marsh's assertions that the defendant would not be in trouble if he confessed to having sex with the complainant were not simply statements of fact. Instead, Officer Marsh's assertions constituted promises of immunity from at least one element of the charged offenses. Because the State is required to prove all the elements of the charged offenses beyond a reasonable doubt, Officer

Marsh's promise of immunity from at least one of the elements was tantamount to a promise of immunity from the offenses themselves.

Additionally, the Court finds it significant that Officer Marsh did not tell the defendant that he would not be in trouble if he admitted to having "consensual" sex with the complainant, as the State contends. Rather, Officer Marsh unequivocally asserted, without qualification or limitation, that the defendant would not be in trouble if he confessed to having sex with the complainant. Immediately thereafter, and plainly relying upon Officer Marsh's assertions, the defendant confessed to having intercourse with the complainant. "In this case, to allow the government to revoke its promise after obtaining incriminating information obtained in reliance on that promise would be to sanction governmental deception in a manner violating due process." McDermott, 131 N.H. at 501. Accordingly, the Court rules that the defendant's confession that he had intercourse with the complainant was involuntary, and it must therefore be suppressed as it violated his rights under the State Constitution.

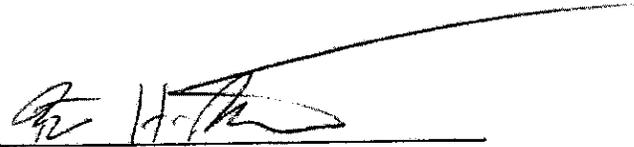
Furthermore, the Court finds that the statements the defendant made after he first confessed to having intercourse with the complainant were derivatively obtained through a prior violation of the defendant's constitutional rights. Accordingly, the Court rules that those statements are fruits of the poisonous tree and must likewise be suppressed. See State v. Orde, 161 N.H. 280, 268 (2010); State v. Gravel, 135 N.H. 172, 184 (1991).

**III. Conclusion**

For the foregoing reasons, the Court GRANTS defendant's motion to suppress statements, both oral and written, made or given to the police on February 6, 2018.

So ordered.

Dated: 10/21/19



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Peter H. Bornstein  
Presiding Justice

**STATE OF NEW HAMPSHIRE**

Coös, SS.

Superior Court

State of New Hampshire

v.

Seth Hinkley

Superior Court Case: 214-2018-CR-00084

Charge ID: 1514239C, 15142401C, 1514241C, 1514242C, 1514243C

**STATE'S MOTION TO RECONSIDER**

NOW COMES the State of New Hampshire, by and through the Office of the Coös County Attorney, Jessica L. Cain, Assistant Coos County Attorney and moves this to Court to reconsider its order granting the defendant's Motion to Suppress and in support of its motion, states as follows:

**Background**

1. The defendant has been indicted on five counts of Aggravated Felonious Sexual Assault.
2. The charged conduct arose from allegations made by F.T. to the police on December 28, 2017 and to a forensic interviewer at the Child Advocacy Center on January 9, 2018.
3. On February 6, 2018, the defendant confessed to much of the charged conduct during a voluntary interview with police.
4. On April 22, 2019, the defendant moved to suppress the defendant's statements to police alleging in relevant part that the defendant's confessions were made in reliance on the following statements made by Det. Mash towards the beginning of the interview:

“Okay. I’ll-I’ll be honest with you, okay. I told you I want to be up-front with you, and I want you to do the same with me, okay? . . . Um—we’re being told something completely different. Okay? And there’s no reason why—um—a person would lie about that, okay—um—unless they were trying to cover something up. And at this point I told you you’re not in trouble if you had sex with her, okay. It’s your girlfriend. She’s over the age of 16. That’s the age of consent. Um—and so, I mean, she’s telling us that yeah, we had sex on a few occasions, so I’m just trying to delve into that and then some other stuff that we were told—um—because you’re not gonna be in trouble from me if you told me that you had sex with her. Because she’s being very specific about dates, times, occasions when you two did have sex, so I want to—I want to stop before we go too far because I want you to get ahead of this before this rests on your shoulders and—eventually hurts you—um—because we’re the police here. this isn’t—I’m not your dad, okay? Um—I’m not [Victim]’s dad, okay. I’m a police officer. So before you go lying and/or half-truths or whatever, okay, I need you to be up-front and straight up- straight up with me, okay?”

Tr. p. 12

5. The State filed its objection on April 25, 2019.
6. On August 6, 2019 and October 11, 2019, the Court held a hearing on the defendant’s motion.
7. On October 21, 2019, the Court granted the defendant’s motion to suppress statements made by the defendant during his February 6, 2018 interview with police.
8. For the reasons stated below, the State respectfully requests this Court reconsider.

#### **Standard of Review**

9. A court has discretion to reconsider and revise an order, or take other appropriate action, if a party files a motion stating “. . .with particular clarity, points of law or fact that the court has overlooked or misapprehended.” N.H. R. Crim. P. 43(a).
10. To preserve issues for appeal to the New Hampshire Supreme Court, an appellant must have given the trial court the opportunity to consider such issues. *Id.*

### Law and Argument

- I. The Court misapprehended the law and the facts in this case when it categorized Det. Marsh's assertions as a promise of immunity and the defendant's subsequent confessions as involuntary.
11. The voluntariness of a confession is examined under the totality of the circumstances. *State v. Hernandez*, 162 N.H. 698, 703 (2011) (noting that, if a promise of confidentiality is involved, the confession is involuntary).
  12. In determining if a confession is involuntary, a court must determine "whether the actions of [the] individual are the product of essentially free and unconstrained choice." *State v. Rezk*, 150 N.H. 483, 487(2004).
  13. Among the factors the court may consider are the police officer's compliance with *Miranda*. *State v. Bilodeau*, 159 N.H. 759, 764 (2010).
  14. "Minimization techniques" do not render a confession invalid. *Hernandez*, 162 N.H. at 706.
  15. Voluntariness turns on "whether the will of the defendant [has] been overborne so that the statement is not a free and voluntary act." *Procunisy v. Atchley*, 400 U.S. 446, 453 (1971).
  16. In this case, a number of factors demonstrate that the confession was voluntary.
  17. The defendant was given his *Miranda* rights. The tone of the interview was cordial. *Hernandez*, 162 N.H. at 706. The defendant was told he was free to leave and advised the officers that he understood this fact.
  18. Nonetheless, this Court concluded that the officer's statement that the age of consent was 16, rendered the subsequent confessions involuntary. In doing so, this Court misapprehended the law.
  19. In its October 21, 2019 Order, the Court noted that "sexual penetration" is an element of the charged conduct under RSA 632-A:2 and that Det. Marsh's assertions "constituted promises of immunity from at least one element of the charged offenses."
  20. The New Hampshire Supreme Court has addressed promises of immunity and confidentiality in the following contexts: a promise by police to only charge certain

crimes and not others, *State v. Rezk*, 150 N.H. 483, 491 (2004); a promise not to charge another suspect, *id.*; a police officer's assurance that whatever is said can "stay between me and you," *State v. Parker*, 160 N.H. 203(2010); a promise that the defendant's statements would not leave the DEA's office, *State v. McDermott*, 131 N.H. 495, 501 (1989); and a police officer's response to a defendant's assertion that he did not want to go to jail "then tell us the truth," *State v. Carroll*, 138 N.H. 687,693 (1994).

21. All of these cases involve a law enforcement officer promising or implying confidentiality or promising or implying that the suspect will not be charged with specific criminal offense(s) if the suspect confesses.
22. Here, Det. Marsh's statements that the defendant would "not be in trouble" and that it was "not illegal" to have intercourse with the victim did not offer immunity for a criminal offense.
23. These are simple statements of fact. It would not have been illegal for the defendant to have had consensual intercourse with the victim. In fact, both the defendant and the victim have admitted to having consensual sex for which the defendant has not been charged.
24. The Court went on to state ". . . Officer Marsh's promise of immunity from at least one of the elements was tantamount to a promise of immunity from the offenses themselves."
25. The Court's reliance on the admission to an element of the offense, which is not by itself a crime, is misplaced.
26. The part of the offense that made the charges criminal was the use of violence. Det. Marsh never told the defendant that the use of violence was not criminal. In fact, the defendant knew that the use of violence was what had prompted the police investigation as he said so early on in the interview.
27. The Court's reliance on this analysis is simply misplaced. Immunity does not hinge on a single element of an offense. *Cf. State v. Burris*, 170 N.H. 802, 807 (2018) (transactional immunity "affords immunity from prosecution for offenses.") (internal citation and quotation marks omitted)). It therefore follows that a person cannot be promised immunity for something that is not an offense.

28. Immunity is frequently linked with the potential for incrimination. *Cf. Kastigar v. United States*, 406 U.S. 441, 448 (1972). The defendant's initial answers to the information provided by the officer were not incriminating. He admitted to having sexual intercourse with the victim which, as the officer had told him, was legal. He did not incriminate himself until much later in the interview.
29. The State has been unable to find any case law that holds to the contrary and the Court did not cite any supporting authority in its order. The Court therefore was incorrect in concluding that an assurance that an act was not criminal constituted an implied promise of immunity for a criminal act.

II. The Court misapprehended the facts when it determined the defendant's admissions were induced by Det. Marsh's previous assertions.

30. Even if Det. Marsh's statement did constitute a "promise of immunity," a finding of involuntariness is only required when the confession is made in reliance on such a promise. *State v. Carroll*, 138 N.H. 687,693 (1994). "In other words, while a confession made in reliance on such promises is involuntary, a confession motivated by other factors is not." *Id.*
31. Here, the Court determined that the defendant relied on Det. Marsh's statements not only in admitting to consensual intercourse, but also to forcing the victim into having intercourse, assaulting her during intercourse and forcibly penetrating her with his fingers.
32. This determination misapprehends the facts in this case.
33. The defendant voluntarily went to the police department to be interviewed and was aware of exactly what the police wanted to speak to him about. In fact, the defendant told police that he had been kicked out of the victim's residence where he had been living due to the "false accusations" that he ". . . did stuff to them that was painful, abusive sexually." (Tr. p. 5).
34. After discussing the defendant's relationship with the victim and his living arrangements during the relationship, Det. Marsh asked the defendant if he and the victim had ever had intercourse. (Tr. p. 11).

35. The defendant denied ever having intercourse with the victim claiming that “she was too young and I didn’t want to.” *Id.*
36. Det. Marsh then explained that the victim was of the age of consent and that the defendant wouldn’t be in trouble “at this point” if he tells him he had sex with her. (Tr. p. 12).
37. Det. Marsh’s statements were in direct response to the defendant’s assertion that the victim was too young to consent to sex. Further, by saying that the defendant would not be in trouble “at this point,” Det. Marsh informed the defendant of the law, but he did not assure him that he would not be in further trouble if the facts developed further.
38. The Court’s order appears to overlook the fact that the defendant was aware of at least the context of the allegations coming into the interview. Therefore, the defendant understood that Det. Marsh’s statements only applied to consensual intercourse and was said in direct relation to the age of consent.
39. The defendant’s understanding of Det. Marsh’s statements is evidenced throughout the entire interview.
40. Following Det. Marsh’s statements, the defendant agreed, initially, that the victim objected. (Tr. 18-19). But he continued to deny the specific allegations until after he had agreed that the defendant would not lie. (Tr. p. 23).
41. For example, after discussing how often the two had intercourse, Det. Marsh asked the defendant if there were times where the victim had tried to push him off of her to which the defendant said “no.” (Tr. p. 20).
42. Det. Marsh advised the defendant that the victim had a different version of events in relation to a particular incident. “She really didn’t want to have sex with you—um—that you got her pants off, that you put your penis inside of her and that you had sex with her, and she’s saying that definitely happened. She was trying to push you off.” *Id.*
43. The defendant responded definitively, “that never happened.” *Id.*
44. Throughout the interview, the defendant continued to deny specific allegations made by the victim such as: hitting her during intercourse when she would resist, persisting in intercourse when she attempted to push him off of her, persisting in digitally penetrating

her when she would remove his hand from her body and making her cry during the assaults.

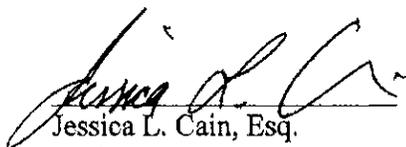
45. The fact that the defendant continued to deny specific allegations made by the victim even after admitting to having intercourse with her shows that shows that his motivations for later admitting to these same accusations were entirely independent of Det. Marsh's previous statements regarding age of consent.
46. Therefore, this Court misapprehended the facts in this case when it found that the defendant's confessions were induced by Det. Marsh's previous assertions regarding the age of consent.

WHEREFORE, the State requests that this Honorable Court:

- A. GRANT the State's Motion; or  
 B. HOLD a hearing on the matter; or  
 C. Grant any other relief deemed proper and just.

October 25, 2019

Respectfully Submitted,  
 STATE OF NEW HAMPSHIRE



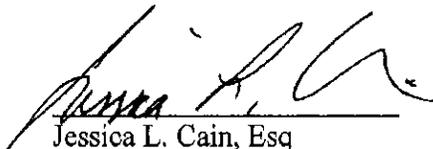
Jessica L. Cain, Esq.  
 Assistant Coos County Attorney  
 NH Bar # 267676  
 Office of the Coos County Attorney  
 55 School Street, Suite 141  
 Lancaster, NH 03584

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has this day been forwarded to Melissa L. Davis, NH Public Defender, 134 Main Street, Lancaster, NH 03584, counsel for the defendant.

Respectfully Submitted,  
 STATE OF NEW HAMPSHIRE

October 25, 2019



Jessica L. Cain, Esq.  
 Office of the Coos County Attorney

**THE STATE OF NEW HAMPSHIRE**

**COÖS, SS.**

**SUPERIOR COURT**

No. 214-2018-CR-84

State of New Hampshire

v.

Seth Hinkley

NOV 06 2019

**ORDER ON STATE'S MOTION FOR RECONSIDERATION**

On October 21, 2019, the Court issued an order granting the Defendant's Motion to Suppress Defendant's Statements. This matter is now before the Court on the State's Motion for Reconsideration, to which the defendant objects. Having considered the parties' arguments and the applicable law, the Court concludes that it has not overlooked or misapprehended any point of law or fact. See N.H. R. Crim. P. 43(a). Accordingly, the Court DENIES the State's Motion for Reconsideration.

So Ordered.

Date: 11/6/19

  
\_\_\_\_\_  
Hon. Peter H. Bornstein  
Presiding Justice

CLERK'S NOTICE DATE  
11/6/19  
cc: Cain  
Davis  
Wick

COÖS, S.S.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

SETH HINKLEY

214-18-CR-84

NOV 05 2019

**OBJECTION TO STATE'S MOTION TO RECONSIDER COURT'S ORDER ON  
DEFENDANT'S MOTION TO SUPPRESS STATEMENTS**

NOW COMES the Defendant, Seth Hinkley, by and through counsel, Melissa Lynn Davis, and respectfully requests that this Honorable Court deny the State's Motion to Reconsider its Order granting the Defendant's Motion to Suppress Statements. In support of his Motion, Mr. Hinkley states the following:

**FACTS**

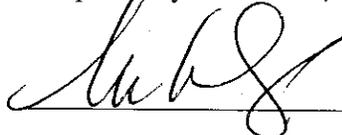
1. On October 21, 2019, the Honorable Judge Bornstein issued an Order granting the Defendant's Motion to Suppress.
2. On November 1, 2019, the State filed a Motion to Reconsider the Court's Order arguing that the Court misapprehended the facts of this matter when coming to its conclusion.
3. As part of the litigation in this matter, both the audio and written transcript of interrogation of Mr. Hinkley by officers of the Berlin Police Department. The Court in its order relied upon the statements made by both Mr. Hinkley and the officers in making its ruling. It is not possible that it misapprehended the facts when there is no dispute as to what they were.
4. In its Motion to Reconsider, the State fails to reference evidence other than the words spoken by Mr. Hinkley and Detective Adam Marsh on the audio recording. Additionally, the State fails to make any arguments that it had not previously made as part of its original objection to the Defendant's Motion.
5. The State's argument in its Motion to Reconsider is based on assumptions and inferences about how Mr. Hinkley understood the clear words of Detective Marsh when he told Mr. Hinkley that he would not be in trouble if he admitted to having sex with F.T.

6. It is the State's burden to prove beyond a reasonable doubt that Mr. Hinkley's statements were voluntary. State v. Cloutier, 167 N.H. 254, 258 (2015). A confession made in reliance upon a promise of immunity is involuntary and coerced under the State Constitution. State v. McDermott, 131 N.H. 495, 500 (1989). The Court properly noted that all statements made after Detective Marsh's promise of immunity were fruits of an unconstitutional and involuntary interrogation. Nothing about the State's Motion to Reconsider adds additional facts or law to this analysis.
7. In addition, the State had 10 days to file a Motion to Reconsider the Court's Order. The deadline was October 31, 2019. The Motion was filed November 1, 2019. The State has not put forth any argument as to why its late filing should be accepted.
8. Finally, should the Court reconsider its October 21, 2019 ruling, Mr. Hinkley asks that the Court consider the other arguments made in his Motion to Suppress.

WHEREFORE, Mr. Hinkley respectfully requests that this Honorable Court:

- A. Deny the State's Motion to Reconsider the Court's Order on Defendant's Motion to Suppress; or
- B. Schedule a hearing on this Motion; and
- C. Grant any further relief the Court deems just and equitable.

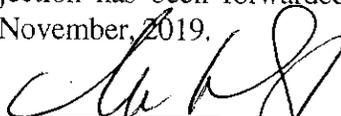
Respectfully Submitted,



Melissa Lynn Davis #17098  
 New Hampshire Public Defender – Coös  
 134 Main St., Suite 300  
 (603) 444-1185

**Certificate of Service**

I hereby certify that a copy of this Objection has been forwarded to Assistant County Attorney, Jessica Cain, Esq. on this 5<sup>th</sup> day of November, 2019.



Melissa Lynn Davis

STATE OF NEW HAMPSHIRE

COOS, SS.

SUPERIOR COURT

\* \* \* \* \*

STATE OF NEW HAMPSHIRE

v.

214-2018-CR-84

SETH HINKLEY

\* \* \* \* \*

TRANSCRIPTION OF BERLIN, NEW HAMPSHIRE POLICE  
DEPARTMENT RECORDED INTERVIEW WITH SETH HINKLEY ON  
FEBRUARY 6, 2018.

TRANSCRIBED BY:

BERLIN, NEW HAMPSHIRE POLICE DEPARTMENT  
RECORDED INTERVIEW WITH SETH HINKLEY  
CONDUCTED BY OFFICER ADAM MARSH  
AND LIEUTENANT JEFF LEMOINE

OFFICER MARSH: This is Officer Adam Marsh of the Berlin Police Department. Date today is Tuesday, February 6. The time is about 1246 hours. Presently I am in the conference room at the Berlin Police Department. And in the room with me I have?

LIEUTENANT LEMOINE: Lieutenant Jeff Lemoine, Berlin Police Department.

SETH HINKLEY: And Seth Hinkley.

OFFICER MARSH: Okay. And, Seth, how do you spell your last name?

SETH HINKLEY: S -- um -- sorry. H --

OFFICER MARSH: It's okay.

SETH HINKLEY: H-I-N-K-L-E-Y.

OFFICER MARSH: All right. And date of birth?

SETH HINKLEY: Um -- 05/21/1999.

OFFICER MARSH: Okay. And address where you live?

SETH HINKLEY: Um -- 749 Hillside.

OFFICER MARSH: Okay. And -- um -- telephone number to get in touch with you?

SETH HINKLEY: Um -- (603) 752-5442.

OFFICER MARSH: Okay. And you see this black device on the table?

SETH HINKLEY: Yes.

OFFICER MARSH: You understand that's a digital recorder --

SETH HINKLEY: Yes.

OFFICER MARSH: -- and that's recording our conversation --

SETH HINKLEY: Yes.

OFFICER MARSH: -- here today? You said you were okay with that?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. You understand the door is closed just for our privacy?

SETH HINKLEY: Yes.

OFFICER MARSH: It's not locked. You can leave at any time for any reason.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. Um -- you're not under arrest. You're not being detained. Do you understand that?

SETH HINKLEY: Okay.

OFFICER MARSH: Okay. So I want to go over your Miranda rights form with you before I go into anything with you.

SETH HINKLEY: Okay.

OFFICER MARSH: And the reason being is because I know you said you understood you weren't under arrest or being detained, but some people -- um -- don't understand that.

I want to make sure that you're aware of what your rights are, okay? So basically it says that you have the right to remain silent. Do you understand that?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. Two says anything I say can and will be used against me in a court of law. Do you --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- understand that? Three says I have the right to talk to a lawyer and have one present while I'm being questioned.

SETH HINKLEY: Yes.

OFFICER MARSH: Do you understand that? Four says if I cannot afford to hire a lawyer, one will be appointed to

represent me before any questioning if I wish. Do you understand that?

SETH HINKLEY: Yes.

OFFICER MARSH: And five says I can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand that?

SETH HINKLEY: Yes.

OFFICER MARSH: So, Seth, I'll have you just initial on those lines there for me.

(There is a pause.)

OFFICER MARSH: Okay. Very good. So the bottom portion of this form is the waiver of rights portion, and it basically says that you've read the above statement of your rights, you understand what they say, you -- um -- willingly waive them, and make a statement, meaning that you'll talk with me.

You don't have to write anything down. I do not want an attorney at this time. I understand and know what I am doing. No promises and/or threats have been made -- made to you of any kind or any pressure of any kind has been used against you.

So if you agree with that, you'd sign here, and then just put your address, date of birth, and the date today, please.

(There is a pause.)

SETH HINKLEY: What's today?

OFFICER MARSH: Um -- 2/6/18. Okay. Any questions on anything we've gone over so far?

SETH HINKLEY: No.

OFFICER MARSH: Okay. Great. Okay. So, Seth -- um -- I'm gonna cut to the chase here. We've met before.

SETH HINKLEY: Yeah.

OFFICER MARSH: Um -- mostly school issues, attendance at school, and things like that -- um -- around the house -- um -- but this is a little different. Um -- let me ask you

how you know Fay Tremblay?

SETH HINKLEY: Um -- she used to be my girlfriend.

OFFICER MARSH: Okay. And you say used to be.

SETH HINKLEY: Yeah.

OFFICER MARSH: Um -- how long ago was it that you -- you -- two dated?

SETH HINKLEY: About two months ago. Recently Rene passed away, and she didn't -- didn't want to be with anybody, so I laid back and let her do her thing.

OFFICER MARSH: Okay. And who's Rene?

SETH HINKLEY: Um -- her dad.

OFFICER MARSH: Her dad. Okay. And -- um -- were you staying with Fay at the time?

SETH HINKLEY: Yeah, I was.

OFFICER MARSH: Okay.

SETH HINKLEY: I was living there, and then D.C.Y.F. called me and said I had to leave because they -- someone called them and made a false accula -- accusations about me that weren't true.

OFFICER MARSH: Let's talk about that. What false accusations are you talking about?

SETH HINKLEY: Like I touched them sexually. I've never done that in my life. I abused Rene. I've never done that in my life. And I, you know, did stuff to them that was painful, abusive sexually. And I never did anything like that.

OFFICER MARSH: All right. And when you say them -- 'cause you're saying you touched them sexually.

SETH HINKLEY: Them --

OFFICER MARSH: When you say them --

SETH HINKLEY: -- the Tremblays.

OFFICER MARSH: Okay. And when you say them, who are you

including in that?

SETH HINKLEY: Fay, Leeann -- um -- Brenda and Rene.

OFFICER MARSH: Okay.

SETH HINKLEY: All of them.

OFFICER MARSH: Okay. So this isn't the first time that you've heard about --

SETH HINKLEY: No.

OFFICER MARSH: -- this. Okay. Who did you talk to from D.C.Y.F.?

SETH HINKLEY: Um -- Michelle.

OFFICER MARSH: She came to the house to talk to you?

SETH HINKLEY: Yeah.

OFFICER MARSH: And what house did she come to talk to you at?

SETH HINKLEY: Um -- she didn't come to the house. She came to the -- um -- she went to the school, and she wanted me to meet -- meet me there, so I went there.

OFFICER MARSH: Which school?

SETH HINKLEY: The high school.

OFFICER MARSH: The high school. Okay. So were you staying at the house with them or were you living there?

SETH HINKLEY: I was living there.

OFFICER MARSH: Okay. And how long were you living there for?

SETH HINKLEY: For about two months.

OFFICER MARSH: And that was on Grafton?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. What months were those?

SETH HINKLEY: Um -- I don't believe -- I do believe it's

August and September.

OFFICER MARSH: So what happened that led to you leaving the house?

SETH HINKLEY: Nothing. It just came -- it just was the phone call.

OFFICER MARSH: The phone call?

SETH HINKLEY: About D.C.Y.F. and the false accusations about --

OFFICER MARSH: But that didn't happen until later.

SETH HINKLEY: Yeah.

OFFICER MARSH: So what prompted you to leave in September?

SETH HINKLEY: I don't know. I really don't. I have no clue what was going on at the time.

OFFICER MARSH: When did you talk to Michelle Santi (phonetic) at the school?

SETH HINKLEY: Um -- about the end of September. Exactly the end of September.

OFFICER MARSH: Okay. What was that conversation like? Bring me up to speed on that.

SETH HINKLEY: Um -- I was really mad because I didn't know what was going on, and I didn't feel like it was re -- like grownupish to decide on the person that called because they didn't give a name. They didn't give the right information. They didn't know how high -- high I was. They didn't describe me at all.

OFFICER MARSH: What do you mean how high -- how high you were?

SETH HINKLEY: Like they call -- they said I was four, six, and I'm actually four, 11.

OFFICER MARSH: Okay.

SETH HINKLEY: I mean, I'm five, 11. Sorry.

OFFICER MARSH: Five, 11, yeah. Okay. Okay. So let's talk about the relationship that you and Fay had. You said

you were boyfriend/girlfriend.

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay. And how did you determine that, like that you were dating?

SETH HINKLEY: Like I told her like if you want to be with me, you know, I have -- you know, I do respect you, but I don't like cheaters. I don't like liars. So I told her that if I see you with a guy, that's it. We're done.

OFFICER MARSH: Okay.

SETH HINKLEY: And she hasn't understand that. So I saw her multiple times with a guy, and they were touching. They were kissing. So I just let it go because it's no -- no point of, you know.

OFFICER MARSH: Um-hum. Where did you see them touching or kissing? Where did that happen?

SETH HINKLEY: Like they were hugging. That kind of touching.

OFFICER MARSH: Okay.

SETH HINKLEY: Um -- it was at a park --

OFFICER MARSH: Okay.

SETH HINKLEY: -- up by her house.

OFFICER MARSH: Okay. And when did you meet Fay? How long have you known her?

SETH HINKLEY: Um -- it was actually October 14th, 2015.

OFFICER MARSH: Okay. How do you remember that date?

SETH HINKLEY: Because it was -- um -- a very special day. It was my mom and dad's wedding anniversary.

OFFICER MARSH: Okay. Okay. So you meet her. How do you meet her?

SETH HINKLEY: Um -- we went -- we had a meeting at the rec center --

OFFICER MARSH: Okay.

SETH HINKLEY: -- right --

OFFICER MARSH: Right over here?

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay.

SETH HINKLEY: I remember that Brother has a bus stop there. Well, used to.

OFFICER MARSH: Okay. So you have feelings for her --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- and you guys decide that you're gonna start dating.

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. Who makes that determination?

SETH HINKLEY: Brenda. She -- she didn't feel comfortable with it at first, but then once she got to know me, she was like all right. I know it's a guy. He's not a bad kid.

OFFICER MARSH: Okay.

SETH HINKLEY: And he let us date.

OFFICER MARSH: Okay. So you kind of move into the house in August?

SETH HINKLEY: Yeah.

OFFICER MARSH: You have all your stuff there.

SETH HINKLEY: Yeah.

OFFICER MARSH: You're living there. Okay. So talk to me about where it was that you stayed. Like what -- what was the living arrangement like? Did you --

SETH HINKLEY: I had my own room.

OFFICER MARSH: Okay. And where was that?

SETH HINKLEY: Off of the kitchen.

OFFICER MARSH: Okay. Downstairs?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. And where was -- um -- Fay's room?

SETH HINKLEY: Um -- in the living room at the time because Rene couldn't make the stairs no longer.

OFFICER MARSH: Okay. So where did he sleep?

SETH HINKLEY: Um -- with Fay with her mom and Leeann. They all slept in the living room. It was a big -- it's a big living room.

OFFICER MARSH: Okay. Was it like cordoned off with something or was it separated in any way?

SETH HINKLEY: No, it's just one big, open room.

OFFICER MARSH: Okay. So there wasn't like a towel, sheet, blanket --

SETH HINKLEY: No.

OFFICER MARSH: -- or anything hanging or anything? Okay. And so he was sick. What was he sick with?

SETH HINKLEY: Um -- I don't know. I didn't ask Brenda because it really wasn't my business, so.

OFFICER MARSH: Okay. And so were there occasions when you and Fay were by yourself in the house?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. And how many occasions do you think that happened on?

SETH HINKLEY: Not a lot.

OFFICER MARSH: Okay.

SETH HINKLEY: We were always with someone.

OFFICER MARSH: So there were never occasions when you were --

SETH HINKLEY: No.

OFFICER MARSH: -- by yourself?

SETH HINKLEY: No, no. We were always with someone unless they had to go somewhere like to a store or --

OFFICER MARSH: Okay. Was Rene mobile? Did he --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- leave the house and stuff?

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay. Um -- so how many times do you think you were with Fay alone in the house?

SETH HINKLEY: About two or three occasions.

OFFICER MARSH: Okay. And of those two or three occasions, you two got intimate --

SETH HINKLEY: No.

OFFICER MARSH: -- with one another?

SETH HINKLEY: No.

OFFICER MARSH: Okay. Well, you say no. Um -- you talked about an occasion when you saw her like hugging and kissing --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- a guy. Okay. So did you hug and kiss her?

SETH HINKLEY: Oh, yes.

OFFICER MARSH: Okay.

SETH HINKLEY: Sorry. I thought you meant sexually.

OFFICER MARSH: Okay. Well, I mean did you ever have intercourse with her?

SETH HINKLEY: No.

OFFICER MARSH: Okay. And --

SETH HINKLEY: She was too young, and I didn't want to.

OFFICER MARSH: How young was she?

SETH HINKLEY: She was 17, and I was 18.

OFFICER MARSH: Okay. Is there anything illegal about that?

SETH HINKLEY: I didn't know, but I just wanted to be on the safe side.

OFFICER MARSH: Okay. I'll -- I'll be honest with you, okay. I told you I want to be up-front with you, and I want you to do the same with me. Okay?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- we're being told something completely different. Okay? And there's no reason why -- um -- a person would lie about that, okay -- um -- unless they were trying to cover something up.

And at this point I told you you're not in trouble if you had sex with her, okay. It's your girlfriend. She's over the age of 16. That's the age of consent.

Um -- and so, I mean, she's telling us that yeah, we had sex on a few occasions, so I'm just trying to kind of delve into that and then some other stuff that we were told -- um -- because you're not gonna be in trouble from me if you told me that you had sex with her.

Because she's being very specific about dates, times, occasions when you two did have sex, so I want to -- I want to stop before we go too far because I want you to get ahead of this before this rests on your shoulders and -- and eventually hurts you -- um -- because we're the police here.

This isn't -- I'm not your dad, okay? Um -- I'm not Fay's dad, okay. I'm a police officer. So before you go lying and/or half-truths or whatever, okay, I need you to be up -- up-front and straight up -- straight up with me, okay?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- there were occasions when you had intercourse with her.

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay. How many times did you have intercourse with her?

SETH HINKLEY: Maybe -- two or three times a --

OFFICER MARSH: Okay. Were those the -- how many?

SETH HINKLEY: Two or three times a week. Sorry.

OFFICER MARSH: A week. Okay.

SETH HINKLEY: Sorry.

OFFICER MARSH: Okay. Um -- and talk about that with me. I mean, was that in your bedroom? Did it happen in a specific room?

SETH HINKLEY: No, it happened in the living room.

OFFICER MARSH: Okay. And so that was like her area?

SETH HINKLEY: Yeah.

OFFICER MARSH: You said she was like sleeping there. Was there a specific spot that you --

SETH HINKLEY: No.

OFFICER MARSH: -- were sleeping with her?

SETH HINKLEY: No.

OFFICER MARSH: Okay. Like tell me where you normally had sex with her.

SETH HINKLEY: Like on a couch, on a bed. It didn't matter.

OFFICER MARSH: So there was a bed in the living room?

SETH HINKLEY: Yeah. There was two.

OFFICER MARSH: Was one of them her bed?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. And did you ever ejaculate in her?

SETH HINKLEY: No.

OFFICER MARSH: Okay. And talk about like how you two talked about having sex. Like how did that come up, and when did you first have sex with her?

SETH HINKLEY: We just said do you want to have it, and we just did it.

OFFICER MARSH: Okay.

SETH HINKLEY: That's all.

OFFICER MARSH: When was the first time that you had sex with her, do you think?

SETH HINKLEY: Um --

OFFICER MARSH: You've known her since 2015, you said.

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay.

SETH HINKLEY: About December of 2015.

OFFICER MARSH: Okay. Okay. And during these times when you had sex did you always talk about it before or --

SETH HINKLEY: Yes, I --

OFFICER MARSH: -- was there ever --

SETH HINKLEY: -- I always told her that I'm always gonna wear a condom no matter what.

OFFICER MARSH: Okay. So you always wore a condom?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. And were there any occasions, however, that it just kind of happened?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. So there was no discussion about like --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- let's have sex or whatever.

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay. Did Brenda ever walk in on you?

SETH HINKLEY: Yeah. Once.

OFFICER MARSH: Okay. Let's talk about that.

SETH HINKLEY: Um -- we were in the bathroom. I was combing her hair at first, and then she started getting horny and stuff. And she pulled me down, and I was like, "What are you doing?" And she's like, "I want to have sex with you." And I was like, "Okay. Fine. As long as we don't get caught, but I got to go put a condom on."

And I was like okay. So we start doing it, and Brenda comes downstairs, and she walks in and says, "Get the up, and go home." She was very mad. I could see it in her eyes.

OFFICER MARSH: Okay.

SETH HINKLEY: So I had to go home.

OFFICER MARSH: Okay. And where was -- when she opened the door where were you two? Like --

SETH HINKLEY: Right -- like right at the door.

OFFICER MARSH: Okay. Were you on the ground?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. And both of you had been having sex --

SETH HINKLEY: Yes.

OFFICER MARSH: -- already? Okay. Um -- was there another occasion later when Brenda talked to you about having sex with her daughter or that it came up or whatever?

SETH HINKLEY: Not that I'm aware of.

OFFICER MARSH: Okay. Okay. So this is what I wanted to talk to you about -- um -- 'cause everything that you're telling me now is very consistent with what I'm being told, okay.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- there is one -- um -- thing, though, that's different, okay, and I'll be -- I'll be frank with you here, and this is why I knew that this happened, okay, and that is because Fay was interviewed, okay, in a very special setting, okay.

And she had this interview, and during the interview the person interviewing her told her about intercourse with you, having sex with you -- um -- and being touched by you -- um -- so she's saying, however, that there are a couple of occasions when she got upset with you; that she didn't want to have sex with you. Um -- that's one difference.

The other is that she's pointing out two specific occasions when -- because she doesn't talk about your relationship like it's a boyfriend/girlfriend situation.

So that's why I asked you about that because, you know, I think sometimes there's a misconception on whose idea it is, you know, to like get together, you know what I mean --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- be boyfriend/girlfriend and stuff, and I think there was some confusion on that between you two. There was -- you were living there.

SETH HINKLEY: Yep.

OFFICER MARSH: You know what I mean? And so you were kind of her roommate/boyfriend.

SETH HINKLEY: Um-hum.

OFFICER MARSH: You know what I mean? And so there was some -- there was a little bit of confusion there -- um -- but I think -- I think we can both agree that Fay is a little slow.

SETH HINKLEY: Yes.

OFFICER MARSH: Okay.

SETH HINKLEY: Very.

OFFICER MARSH: Okay. And she's on that border, you know, of understanding things and not understanding things.

SETH HINKLEY: Um-hum.

OFFICER MARSH: And I think that definitely factors into her decision-making. Would you agree with me?

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay. So level with me here. Because she's -- I'll be honest with you. She's telling us that there were several occasions when she told you, you know, I really don't want to have sex with you -- um -- and you did it anyway.

Um -- and I think that may be that difference between you and her. I think there was some signals that were crossed there. Um -- she talked about two specific occasions. One was the bathroom incident when she said that, you know, she really didn't want to have sex -- um -- you know, and -- and that it happened.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- and there was another occasion specifically later on when you two had sex when you got on top of her, and she was like no, I don't want to do this, Seth, and you were like well, we're gonna do it -- um -- because you were kind of like committed, you know what I mean?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- that's what I want to ask you out here today because I think that there's a big difference between being like a sexual predator --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- you know what I mean, like a violent sexual predator and, you know, letting yourself and your emotions get -- overrun you --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- sexually, and I think that's probably what happened.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- you know, everybody makes mistakes,

and I think this is just one of those mistakes that you made. Um -- I think as men we get aggressive, you know --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- sexually, and it's hard for us to stop. And I think that's probably what happened to you because I know you've got other issues. There's other things that have happened to you --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- um -- emotionally and -- um -- you know, mentally that affect you. I've talked to you about your -- your issues before.

SETH HINKLEY: Um-hum.

OFFICER MARSH: So do you agree with me when I -- when I say that?

SETH HINKLEY: Yeah. Um-hum.

OFFICER MARSH: Okay. So there were occasions when she told you like no, I really don't want to do this?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. How many times do you think that happened?

SETH HINKLEY: Like once every once in a while.

OFFICER MARSH: Once every once in a while. Like how often do you think that happened?

SETH HINKLEY: Like once a month.

OFFICER MARSH: Once a month?

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay. So you're horny --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- and you want to have sex with her.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- and you tell her, and she says no, I really don't want to have sex with you --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- um -- and you did --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- have sex with her. Okay. Were there ever any occasions where she was like pushing you --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- like stop? How many occasions do you think that happened?

SETH HINKLEY: Like, again, once every two months --

OFFICER MARSH: Okay.

SETH HINKLEY: -- like --

OFFICER MARSH: Did it ever get like real heated?

SETH HINKLEY: No.

OFFICER MARSH: Like did she ever like hit you or punch you, scratch you?

SETH HINKLEY: Well, yeah. She punched me several times.

OFFICER MARSH: Okay.

SETH HINKLEY: Whenever we were out in the open like she just winded up and slapped me.

OFFICER MARSH: What do you mean out in the open?

SETH HINKLEY: Like when we're with someone she always has this thing where she wants to go and like show off to her friends --

OFFICER MARSH: Um-hum.

SETH HINKLEY: -- and say I'm -- I'm the -- um -- I'm the male-type person.

OFFICER MARSH: Yeah.

SETH HINKLEY: Like the person in charge. So -- and she proved it. She just hit me.

OFFICER MARSH: Okay.

SETH HINKLEY: Like no -- out of nowhere. No reason. She just did it.

OFFICER MARSH: Okay.

SETH HINKLEY: And I asked her several times why did you do that? And every time I ask her she doesn't -- she has no answer.

OFFICER MARSH: Right. I'm -- I'm talking about the occasions when you were --

SETH HINKLEY: Oh.

OFFICER MARSH: -- sexual with her.

SETH HINKLEY: No.

OFFICER MARSH: Okay. Um -- were there occasions, though, that she -- beyond saying no that she was like trying to push you off of her?

SETH HINKLEY: No.

OFFICER MARSH: Um -- because she's saying that there was one specific occasion when -- it was after the bathroom incident.

SETH HINKLEY: Um-hum.

OFFICER MARSH: And she was very specific about this and said that you were sexual. You were horny. She really didn't want to have sex with you -- um -- that you got her pants off, that you put your penis inside of her and that you had sex with her, and she's saying that definitely happened. She was trying to push you off. And so that's definitely something that I want to hash out right now because I think that probably --

SETH HINKLEY: That never happened.

OFFICER MARSH: That probably happened. So let me -- let me back up here. When you first came in --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- and you sat down, and we started talking, okay -- um -- you lied to me, okay --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- off the bat -- right off the bat, and that was something that obviously we got through that, okay --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- together, and that was the -- the fact that you said no, we never -- we never had sex, okay. Now, we're at this point where okay, you've admitted that yeah, I mean, you've had sex with her a bunch of times --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- since 2015 in December, and that yeah, there were occasions when she told you no --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- that you had sex with her anyway. Um -- and I understand why you're probably a little bit gun-shy at this point, but I'm telling you this because I don't want you to lie to me again. Okay?

SETH HINKLEY: Um-hum.

OFFICER MARSH: I want you and I to be straight with each other because every time you tell a lie you put up a wall, and when you put up that wall, Seth, somehow that wall's got to come down because eventually it will. Um -- and I don't want there to be separation between you and I right now, okay.

SETH HINKLEY: Um-hum.

OFFICER MARSH: I want you to be honest and open with me, because in order to move forward if there are walls in the way, you can't -- you can't get beyond those walls. You can't get any better, and you can't fix the problems.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Because there are problems here. Um -- and so I need you to be honest here, okay, with me because I told you I don't think you're a sexual deviant. I don't

think that you're out there raping a whole bunch of people. Okay?

SETH HINKLEY: Um-hum.

OFFICER MARSH: I think you made a mistake. Um -- you've made a few. And I think some of those mistakes were the times when she's telling you no and also physically telling you no -- um -- but your emotions got the best of you. You have a habit of doing that, letting your emotions get the best of you --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- don't you? That's who you are. And a lot of times we can't change that. That's just who we are. That's our physical makeup. And the reason I know that about you, Seth, is because I've sat in your bedroom at Hillside, 749, and we've talked about all the problems you were having --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- with people out there emotionally, problems with Dana in the house and stuff like that, so there have been a lot of things that have happened to you over the course of your life, and I don't know if you've ever been sexually abused.

SETH HINKLEY: Um -- I have.

OFFICER MARSH: Okay.

SETH HINKLEY: My dad.

OFFICER MARSH: Okay. And, Seth, I think that also may factor in here. I think that also may be a reason why this has happened to you. Statistically speaking, that is a known fact, that people that have been sexually abused often fall into that -- that category that they have a hard time controlling those impulses.

SETH HINKLEY: Um-hum.

OFFICER MARSH: If I'm your father and I have a genetic disposition -- so let's just say eye color, okay, an ocular hue. I have a -- I have a blue eye. Okay. You probably, because it's a recessive trait, may have a blue eye.

It's the same in this situation with sex. Um -- because

our mental makeup also sometimes is a genetic disposition. If I think a certain way, my children may also think a certain way because that's just a genetic --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- disposition. Does that make sense?

SETH HINKLEY: Um-hum.

OFFICER MARSH: And because you've had that experience beyond all that other stuff, that's the real reason and root of the problem of sexual problems.

SETH HINKLEY: Um-hum.

OFFICER MARSH: You have a sexual problem.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. Um -- so I think there were occasions when Fay was having sex with you, and she didn't want to have sex with you. And she was trying to tell you beyond just telling you no.

SETH HINKLEY: Um-hum.

OFFICER MARSH: There's no reason for her to lie. She doesn't gain a thing. Why would she lie about that?

SETH HINKLEY: She wouldn't.

OFFICER MARSH: Okay. So how many times do you think she physically pushed you to tell you no?

SETH HINKLEY: Maybe once or three -- once or three times a month.

OFFICER MARSH: Okay. Since December of 2015?

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay. So how physical did she get with you when you were -- when she was telling you no?

SETH HINKLEY: Just pushed me.

OFFICER MARSH: So like if you're on top of her, she's pushing --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- pushing you? And this is like vaginal sex --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- you're having with her? Okay. Were there ever occasions when she was like performing oral sex on you that happened, too, that you like were holding her on there while she's trying to back off or anything like that?

SETH HINKLEY: Hun-un.

OFFICER MARSH: Or times when you were trying to insert your fingers in her vagina that --

SETH HINKLEY: Um-hum.

OFFICER MARSH: There were times that --

SETH HINKLEY: That, yeah.

OFFICER MARSH: Okay. How many times do you think she pushed you away when you were trying to --

SETH HINKLEY: Once or --

OFFICER MARSH: You remember specifically once?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Do you remember when that happened?

SETH HINKLEY: Hun-un. That -- it's always been blurry.

OFFICER MARSH: Okay. As far as like time?

SETH HINKLEY: Yeah.

OFFICER MARSH: Is that because of the length of time that you've --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- been with her? Like kind of --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- hung with her? Okay. I mean, do you feel sorry for what you did?

SETH HINKLEY: Hell yeah.

OFFICER MARSH: Okay.

SETH HINKLEY: If I could get another chance, I would friggin' pay -- like no. I would try to be a better guy to her.

OFFICER MARSH: Okay.

LIEUTENANT LEMOINE: What would you say to Fay if she was right here?

SETH HINKLEY: I would say I'm sorry for everything I've done.

OFFICER MARSH: Okay.

SETH HINKLEY: I'd probably break down crying.

OFFICER MARSH: Okay. And that leads me to my next -- the next thing which -- um -- I'm gonna offer you here, and I think it will help you. It's sometimes therapeutic to people. Um -- before we talk about -- um -- a little bit more because I think there may be a little bit more, and I just want to make sure there's nothing left on the -- unsaid because it will help you personally.

Um -- I want to offer you the ability to write an apology letter to her. Is that something you think you want to do? Okay. Before I let you do that -- um -- let's talk about the occasions when you had sex with her. I mean, so -- that she didn't want to.

SETH HINKLEY: Um-hum.

OFFICER MARSH: These were all in Grafton Street?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay.

LIEUTENANT LEMOINE: When you were living there?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. So how many times during those

months when you were living there -- you said August to September. Are you sure about those dates?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay.

LIEUTENANT LEMOINE: Of last year or the year before?

SETH HINKLEY: No, this -- uh -- last year.

OFFICER MARSH: 2017?

SETH HINKLEY: Yes.

LIEUTENANT LEMOINE: Okay.

OFFICER MARSH: And so how many times do you think in the year 2017 that you were with her during those months --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- in the house that you had sexual contact with her when she was either telling you no or pushing you away physically?

SETH HINKLEY: Like I said, I --

OFFICER MARSH: One to three times a month?

SETH HINKLEY: Yeah.

OFFICER MARSH: Is that what you had said?

SETH HINKLEY: Yeah.

OFFICER MARSH: So six times because August and September?

SETH HINKLEY: Um-hum.

OFFICER MARSH: At least six times. Um -- what was going through your mind? Because she told you the first time.

SETH HINKLEY: She's like -- first of all, she's like, "I want to have it," and then when we got undressed she's like, "Never mind. I don't want it." But I was already horny at the time --

OFFICER MARSH: Right.

SETH HINKLEY: -- so I couldn't help myself.

OFFICER MARSH: Right. So your penis was erect.

SETH HINKLEY: Yeah.

OFFICER MARSH: You were --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- ready to have sex with her.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. And so was she like getting dressed?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Like trying to get dressed at the time?

SETH HINKLEY: No, she -- actually she just sat there.

OFFICER MARSH: Okay. And so what did you do?

SETH HINKLEY: And I was just wondering what she was doing.

OFFICER MARSH: Okay.

SETH HINKLEY: So I asked her.

OFFICER MARSH: Did you ever get angry at her because she was like not help -- helping you out? You know what I mean?

SETH HINKLEY: No, I never got angry.

OFFICER MARSH: Okay. You didn't hit her or anything like that --

SETH HINKLEY: No.

OFFICER MARSH: -- did you? Okay. Um -- did you threaten her --

SETH HINKLEY: No.

OFFICER MARSH: -- at all? Okay. Um -- so she was sitting there. Did you like kind of like push her down onto the bed or like bend her over?

SETH HINKLEY: No, she was just laying there.

OFFICER MARSH: Okay. And so you got on top of her, and then that was when she stopped -- like started --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- pushing you like --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- stop, please. What was -- what was she saying to you?

SETH HINKLEY: Just stop.

OFFICER MARSH: Okay. And you continued to --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- have sex with her? Um -- how long do you think those times lasted as far as --

SETH HINKLEY: Not long.

OFFICER MARSH: Okay. Is it because you felt bad about what you were doing?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. Were you wearing a condom during those times --

SETH HINKLEY: Yes.

OFFICER MARSH: -- or did you not have time?

SETH HINKLEY: I had -- I had a condom.

OFFICER MARSH: Okay. Um --

LIEUTENANT LEMOINE: Vaginal intercourse?

SETH HINKLEY: Um-hum.

OFFICER MARSH: You said there were a few occasions, though, that you digitally, by your fingers --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- you put your fingers inside of her vagina --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- when she said no? How did she stop you or try to stop you?

SETH HINKLEY: Like she just took my hand out, and that's when I said okay.

OFFICER MARSH: Okay. How many times do you think she did that?

SETH HINKLEY: A lot.

OFFICER MARSH: Okay. Like on one occasion?

SETH HINKLEY: Um-hum.

OFFICER MARSH: ~~Okay. So you were trying to get your~~  
fingers in her vagina --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- and it wasn't -- wasn't working; try again; she pushed your hand away.

SETH HINKLEY: The third time she just threw my hand away, and I was like okay.

OFFICER MARSH: Okay.

SETH HINKLEY: Whatever.

OFFICER MARSH: Um -- did she ever like get up, throw things at you, or --

SETH HINKLEY: Not that I'm aware of.

OFFICER MARSH: -- hit you --

SETH HINKLEY: No.

OFFICER MARSH: -- or anything like that? Okay. Did she ever yell for help or anything like that?

SETH HINKLEY: No, not that I'm aware of.

OFFICER MARSH: Okay. Did she ever cry because she was so

upset?

SETH HINKLEY: No, not that I'm aware of.

OFFICER MARSH: Okay. And, you know, I'm just trying to -- like I say --

SETH HINKLEY: I know.

OFFICER MARSH: -- I'm just trying to get everything -- everything from you because when we hold things in, Seth --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- um -- and you know as well as I do what I'm about to tell you, okay, that affects a person. Okay. Whether you've been through a traumatic experience like you have, you've been -- you've had bad experiences sexually --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- it sounds like. You've -- you've been raped, you said. And that was by your father?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- how long ago was that?

SETH HINKLEY: Um -- when I was a baby. A baby baby.

OFFICER MARSH: Okay. So you don't remember --

SETH HINKLEY: No.

OFFICER MARSH: -- anything like that, but still you were told about it.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Who told you about it?

SETH HINKLEY: Um -- my mom.

OFFICER MARSH: Okay.

SETH HINKLEY: Not Paula but my real mother.

OFFICER MARSH: Your real mom. Where is your real mom?

SETH HINKLEY: Um -- Manchester.

OFFICER MARSH: How about your dad?

SETH HINKLEY: Um -- he lives in Berlin.

OFFICER MARSH: Your biological father? Who is it?

SETH HINKLEY: Chuck Brundige (phonetic).

OFFICER MARSH: Okay. And so he -- um -- had sex with you, I guess?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. How old were you? You said you were a baby?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Do you know how old?

SETH HINKLEY: A year old. Two years. Like a year old.

OFFICER MARSH: Okay.

SETH HINKLEY: I don't remember what my mom said.

OFFICER MARSH: Okay. And you know he had other issues and still does. He battles with -- um -- alcoholism --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- as you probably -- probably know. I know Chuck pretty well. You know, so I think because of your mental issues that you have, you have some obstacles, you know.

You have some problems here. And because of those obstacles, those problems that you have, I think that's affecting you personally, you know. I don't want to speak for you, but I think that's what happened here --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- you know, and so I want to make sure that we're getting everything from you because it will help me to kind of figure out and develop a framework of what we can do to figure out what's wrong with Seth, what happened with Seth. And that's important moving forward. Like I said, we need to move forward. That's why we can't build

those walls between you and I, right?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- you're a human being, Seth. Everybody makes mistakes, and you're no different than any other human being out on this planet. So I really want to make sure that we're delving into these incidents, that you're telling me everything.

So if there's an occasion when you accidentally hurt her because it -- remember, she's been interviewed. There was a conversation that took place with a forensic interviewer. Forensic interviewers are trained to extract all the information from a person, and they're trained to interview people who are victims of sexual abuse.

SETH HINKLEY: Um-hum.

OFFICER MARSH: And I personally sat in on that interview. Behind the scenes. I was watching it from a TV. So I wasn't in the interview room, but I was watching the interviewer talk with Fay.

So there's a lot of stuff that she told us about things that happened, and so obviously when there's a lot of discrepancies between what you're saying and what she was saying in that room that day, I want to make sure that you're not lying to me again because you've already lied to me once -- actually twice.

And where a person's lied -- there are reasons why you do that. You're afraid, and you're scared, and I -- I get that. But let's look at it in a positive light, Seth. Let's look at it together in a positive light.

You've come a long way in this room here today in a short amount of time because you were honest and forthcoming, and you told me the truth, okay. I will take those things into consideration. Okay.

So what I don't want to happen, Seth, is for you to lock up right now and decide that I'm not telling him anything else because we have a good dialogue going, you and I, right here.

SETH HINKLEY: Um-hum.

OFFICER MARSH: I'm not a bad guy. I'm just trying to do my job. Okay?

SETH HINKLEY: Um-hum.

OFFICER MARSH: I'm trying to do what's right. And, in my eyes, what's right is to help Fay, okay, and to help the situation and move forward. Forward progress.

SETH HINKLEY: Um-hum.

OFFICER MARSH: In order to do that I think there's some things that you need to share with me that you haven't shared with me yet, and I'm just waiting -- waiting to hear 'em, okay. I can't -- I can't physically grab whatever you're thinking about in your brain and pull it out, okay.

SETH HINKLEY: Um-hum.

OFFICER MARSH: That takes for you to tell me. So if there's something -- because I can tell by the look on your face and by your eyes -- I've been doing this a long time, talking to people, interviewing --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- okay. So just be straight and level with me, all right?

SETH HINKLEY: Um-hum.

OFFICER MARSH: So during these occasions when you were having sex with her were there other things that happened that you haven't told me yet?

SETH HINKLEY: Yeah. I hit -- I hit her.

OFFICER MARSH: Okay. When did that happen?

SETH HINKLEY: Um -- once in a blue moon.

OFFICER MARSH: Okay. When on the occasions do you think that happened? Was that that August or September --

SETH HINKLEY: When she started being physical.

OFFICER MARSH: Okay. Was that the first time? The second time?

SETH HINKLEY: The first time.

OFFICER MARSH: That was the first time.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. How did you hit her? What do you mean by that?

SETH HINKLEY: Like I slapped her.

OFFICER MARSH: Okay. Across the face?

SETH HINKLEY: Um-hum.

OFFICER MARSH: What did she do when you did that?

SETH HINKLEY: She started crying, and then I felt bad.

OFFICER MARSH: Okay. Did you -- did you still finish? Did you have sex --

SETH HINKLEY: No.

OFFICER MARSH: -- with her? Okay.

SETH HINKLEY: That's when I said, "That's enough."

OFFICER MARSH: But you were having sex with her at the time that you hit her?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. Um -- were there other occasions when you like screamed at her or just yelled at her --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- and told her, you know --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- stop, you know, stop crying or, you know --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- let's -- let's finish or something like that? Do you remember specifically what you told her?

SETH HINKLEY: No.

OFFICER MARSH: Okay. Um -- were there any -- any other

things that happened in the room with her when you were doing this?

SETH HINKLEY: Hun-un.

OFFICER MARSH: Okay.

SETH HINKLEY: That's all I can remember.

OFFICER MARSH: You didn't pull her hair or --

SETH HINKLEY: No.

OFFICER MARSH: -- slap her or -- but from behind or slap her on her butt or -- you know, obviously beyond just sexual things to enhance your --

SETH HINKLEY: Hun-un.

OFFICER MARSH: -- sexual experience? Um -- did you insert anything else into her --

SETH HINKLEY: Hun-un.

OFFICER MARSH: -- when this was happening?

SETH HINKLEY: Not that I'm aware of. I can't -- I don't remember a lot.

OFFICER MARSH: How come?

SETH HINKLEY: Because I haven't been there for over four -- four months --

OFFICER MARSH: Okay.

SETH HINKLEY: -- so I really don't remember anything.

OFFICER MARSH: Were there any occasions outside of the house when you were having sex with her like outside in another house or outside outdoors or --

SETH HINKLEY: No.

OFFICER MARSH: -- at a different location that any of this stuff happened?

SETH HINKLEY: We never left the house. I know this for a fact because Brenda was very strict, and she told me no going anywhere where I can't see you.

OFFICER MARSH: Did she know you were having sex with her?

SETH HINKLEY: No.

OFFICER MARSH: Okay. So when she walked in on you obviously she knew --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- and that's when she threw you out. Was that when you left the house from the --

SETH HINKLEY: No.

OFFICER MARSH: -- last time?

SETH HINKLEY: No.

OFFICER MARSH: How long did you stay in the house after that?

SETH HINKLEY: Um -- this was before I moved in.

OFFICER MARSH: It was before you moved in?

SETH HINKLEY: Yes.

OFFICER MARSH: Whenabouts do you think that happened?

SETH HINKLEY: Um -- that -- I can't remember. I really can't.

OFFICER MARSH: Okay. Was it hot out?

SETH HINKLEY: Yes.

OFFICER MARSH: Okay. So it was summertime, you think? Okay. Was there anybody else? You said Leeann --

SETH HINKLEY: Yes.

OFFICER MARSH: -- lives in the house.

SETH HINKLEY: Yes.

OFFICER MARSH: How old is Leeann?

SETH HINKLEY: Um -- 13.

OFFICER MARSH: Okay. Did you ever have relations with Lee -- um -- Leeann?

SETH HINKLEY: Hun-un. No.

OFFICER MARSH: You didn't. Did you think about it?

SETH HINKLEY: No.

OFFICER MARSH: Okay.

SETH HINKLEY: I know this for a fact because I'm not like that.

OFFICER MARSH: Okay. Okay. How about anybody else that we haven't talked about here today in this room that you had sex with that you had a similar experience with?

SETH HINKLEY: She's the only one I had intercourse with.

OFFICER MARSH: She's the only one you had intercourse with?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Okay. And you're being honest with me when you tell me that?

SETH HINKLEY: Yes, this is complete honesty.

OFFICER MARSH: Okay. Um -- is there anything else that you think is important for me to know that you haven't told me about any of the things that have happened --

SETH HINKLEY: No.

OFFICER MARSH: -- between you and Fay or --

SETH HINKLEY: I'm pretty sure I've told you everything.

OFFICER MARSH: Pretty sure?

SETH HINKLEY: I know I -- sorry. I know I've told you everything.

OFFICER MARSH: Okay. All right. Because what I'd like to do, like I told you, I'd like to offer you that ability to write an apology letter to her.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- I think that would be important. Um -- because moving forward obviously I think that it would help -- um -- not only you, but I think it would help for us to understand how you feel because you say you feel bad about it, but obviously this would really show me that you do feel bad about it.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Because saying and feeling are two different things. You know what I mean?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Yep. So if you want to go ahead and do that, Seth, we can move forward.

(There is a pause.)

OFFICER MARSH: Have you told anybody else about this?

SETH HINKLEY: No. I was too scared.

OFFICER MARSH: Okay. Do you have a therapist or anything?

SETH HINKLEY: No.

(There is a pause.)

OFFICER MARSH: Okay. So I'm just gonna read it -- um -- out loud just so that -- um -- I can hear it here. It says, "Dear Fay, I'm sorry for everything I've done to you and put you through. I'm sorry for making" --

SETH HINKLEY: You do things.

OFFICER MARSH: -- "you do things you didn't want to -- want to do, and I'm sorry for the abuse." Okay. Did you want to sign your name --

SETH HINKLEY: Yeah.

OFFICER MARSH: -- and write your name there? Okay. Perfect. Okay. Um -- I appreciate you doing that, Seth.

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- I do. So -- um -- are you working right now?

SETH HINKLEY: No.

OFFICER MARSH: You're not working.

SETH HINKLEY: Currently looking for a job.

OFFICER MARSH: Okay. And did you finish school?

SETH HINKLEY: Yes.

OFFICER MARSH: You did finish school. So you -- you graduated?

SETH HINKLEY: No. That --

OFFICER MARSH: Get your GED?

SETH HINKLEY: I did finish school, but I had to go because they kicked me out.

OFFICER MARSH: Okay.

SETH HINKLEY: And I didn't have the time to get -- get my diploma.

OFFICER MARSH: How far are you from graduating? How many credits do you need? Do you know?

SETH HINKLEY: Not very far.

OFFICER MARSH: Okay. Do you -- um -- have aspirations to do that?

SETH HINKLEY: Um-hum.

OFFICER MARSH: That's probably not a bad idea moving forward. Um -- I ask you that because did you have any trouble understanding anything that we talked about here today?

SETH HINKLEY: No.

OFFICER MARSH: Okay. Um -- so that's good. I appreciate you doing this --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- writing the apology letter because, again, I think that helps you. Do you feel a little bit

better?

SETH HINKLEY: Yeah.

OFFICER MARSH: Okay.

SETH HINKLEY: Extremely better.

OFFICER MARSH: That's good. And -- um -- being honest is half the battle, Seth --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- you know, so I'm gonna give you one more opportunity before you leave the room here today. If there's anything that you want to tell me, this is the time to tell me before you walk out those doors. Um -- it's important that you -- you do that so that I can understand where you're coming from --

SETH HINKLEY: Um-hum.

OFFICER MARSH: -- and we can move forward because you got to get beyond this, and the only way to get beyond it is by being 100 percent truthful. Okay?

SETH HINKLEY: Um-hum.

OFFICER MARSH: Um -- I don't want you walking out that door having regrets because that can -- that can affect you.

SETH HINKLEY: I have no regrets. I told you everything --

OFFICER MARSH: Okay.

SETH HINKLEY: -- I -- I know.

OFFICER MARSH: Okay. And I appreciate that. All right. Lieutenant, any questions?

LIEUTENANT LEMOINE: No, I'm good.

OFFICER MARSH: All right. So what I'm gonna do -- thank you. Thank you, Seth. I appreciate that. I'm going to end the recording. The time now is 1:30 -- excuse me -- 1:27.

(The interview was concluded.)

## C E R T I F I C A T E

I, Debra L. Mekula, a Licensed Court Reporter and Justice of the Peace in and for the State of New Hampshire, do hereby certify that the foregoing, to the best of my knowledge, skill and ability, is a true and accurate transcription of the Berlin, New Hampshire Police Department recorded interview with Seth Hinkley conducted by Officer Adam Marsh and Lieutenant Jeff Lemoine.

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