THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2008-0945

State of New Hampshire

v.

Michael Addison
(Capital Murder)

Appeal Pursuant to RSA 630:5, XI(c): Proportionality Review

REPLY BRIEF FOR THE DEFENDANT

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(Thirty Minutes Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

QUESTION PRESENTED

1. Whether Addison's death sentence is comparatively disproportionate to those imposed in similar cases where defendants who did not have the purpose to kill a police officer, and were not found to pose a future danger to others in the future, were sentenced to serve life in prison.

The issue arises out of this Court's mandatory appellate review of Addison's death sentence.*

* Citations to the record are as follows:
"DB" refers to Addison's opening brief.
"SB" refers to the State's brief;
"App." refers to the Appendix to Addison's opening brief.

STATEMENT OF THE CASE AND FACTS

Addison relies primarily on the Statements of the Case and Facts in his opening brief, as well as the Statement of Facts included in the Appendix to the opening brief. App. D.

He makes two comments about the facts as reported in the State's brief.

First, the State relies on trial testimony by two officers who alleged that Addison, after he shot Officer Briggs, tried to shoot again. SB 6, 55. This testimony is in the record. That does not mean the event really happened. As set forth in Addison's Statement of Facts, the testimony is inconsistent with the physical evidence collected by the Manchester Police and analyzed by the State Police Crime Lab. App. D 55. It is inconsistent with the testimony of the only two officers who actually saw the shooting. App. D 53-56. Had the jury credited this testimony, it is unlikely that any juror would have harbored doubt with regard to the "purpose to kill" element.

Second, the State alleges that the jury found, as a non-statutory aggravating factor, that Addison made threats to kill police officers before the murder. SB 84. The State alleged no such aggravating factor, and the jury made no such finding. Had the jury credited the trial testimony to this effect offered by a string of felons and cooperating witnesses whose testimony is summarized in the Statement of Facts, App. D 45-46, the jury may well have found that Addison had the purpose to kill Officer Briggs. It did not.

SUMMARY OF THE ARGUMENT

Comparative proportionality review is not about whether the jury's decision to sentence Addison to death was rational. Nor is it about whether the decisions of other juries were rational. With regard to the first issue, the Court has already ruled that the jury's death sentence was not irrational. State v. Addison (Capital Murder), 165 N.H. 381, 561-62 (2013). With regard to the second, analyzing the rationality of the sentencing decisions of other juries would put the Court in the position of sitting as a "thirteenth juror" in those cases.

The Court's charge is to ensure that a capital defendant's death sentence is not aberrant when compared to sentences in similar cases. If the death sentence under review is highly unusual due to the predominance of life sentences in the universe, the death sentence, though it was lawfully imposed by a rational jury, is comparatively disproportionate.

The State purports to know why juries in its pool of ten cases sentenced defendants to life or death. It explains Addison's death sentence by virtue its of similarities to or differences from the cases in the pool. However, the State produced no evidence of patterns of characteristics common to life or death-sentenced cases. Absent such evidence, the State's approach relies on its subjective determinations as to why juries in a small pool of cases chose life or death sentences. It is not so much a methodology as it is an attempted rationalization. It is also not the disciplined, principled comparative review envisioned by this Court.

I. ADDISON'S DEATH SENTENCE IS COMPARATIVELY DISPROPORTIONATE TO THOSE IMPOSED IN SIMILAR CASES WHERE DEFENDANTS WHO DID NOT PURPOSELY KILL A POLICE OFFICER, AND WERE NOT FOUND TO POSE A DANGER TO OTHERS IN THE FUTURE, WERE SENTENCED TO LIFE IN PRISON.

A. Introduction.

The State characterizes counsel's methodology as unfaithful to the Court's Proportionality opinion, characterizes its own as faithful to it, and, using a pool of ten cases from four states, concludes that Addison's sentence is not disproportionate.

The State's analysis, however, undermines none of the methodological choices underlying Addison's brief or the conclusions reached in it. No other defendant who was convicted of knowingly killing a law enforcement officer was sentenced to death by a jury. There is no other such defendant in the inventory of 366 cases, and there is no such defendant among the ten cases on which the State focused. Addison's case is unique because the jury imposed the sentence of death despite specifically rejecting the purpose to kill. In no other case does the record show that a juror voiced doubt about the purposefulness of the murder for which the defendant was sentenced to death.

This case stands alone in that regard, despite the State's refusal to acknowledge the critical importance of this primary distinction between Addison's case and all others. In its brief, the State characterizes the murder of a police officer as, effectively, the worst of all crimes. SB 83. If offered as the State's value judgment, the point is not relevant to the task of comparative proportionality review. In any event, the statement is unsupportable and the

State cites no authority for it. The Legislature has never characterized the murder of a law enforcement officer as worse, or more death-worthy, than the other variants of capital murder, nor has it chosen to exempt the murders of police officers from the comparative proportionality review mandate. As this Court undertakes proportionality review, it must be open to the possibility that information gleaned from other cases in the universe may reveal that Addison's death sentence is comparatively disproportionate.

As stated in Addison's opening brief, the comparative data shows that juries view as the worst those law enforcement officer murders that are deliberate, premeditated, and purposeful. DB 54-55. This murder, based on this jury's findings, does not fit those descriptors, despite the State's dogged efforts at trial to persuade the jury otherwise. DB 3, 56-57, 63. Michael Addison's death sentence is disproportionate. This Court must vacate that sentence.

B. An Outline of the Reply Brief.

Counsel's methodology and comparative review process is set forth in the opening brief and will be discussed at oral argument. This brief will address:

-the State's "one case universe" argument;

-the practical and methodological concerns raised by reliance on mitigating factors;

-the State's case selection process;

-the State's analyses of the cases it selected; and

-the State's conclusion that Addison's sentence is not disproportionate.

C. The Proportionality Court Rejected a "One-Case Universe."

In Proportionality, an amicus in support of the State argued that because Addison's case is the first in which a New Hampshire jury sentenced a defendant to death, it cannot be disproportionate. Amicus Brief of the New Hampshire Association of Chiefs of Police, Inc., et al., at p. 18 (filed January 12, 2010). The State did not advocate this position in its Proportionality brief, and the Court rejected it, stating that it would compare Addison's case to out-of-state cases. State v. Addison, 160 N.H. 732, 778-79 (2010) ("Proportionality").

The State nonetheless presses a "one-case universe" argument. It characterizes New Hampshire's capital murder statute as unique in that a defendant can be put to death without the proof of his purpose to kill. SB 32-33. Under a strict reading of the "similar case" criterion, the State argues, there are no similar cases, and the universe for proportionality review is one case: Addison's. SB 31. In support of the argument that in a one-case universe, the sentence on review is automatically proportionate, the State cites a South Carolina case, the logic of which the Court has already rejected. SB 32; Proportionality, 160 N.H. at 776-77.

Aside from the fact that the Court has rejected the State's argument, there are two additional problems. First, proportionality review is a legislative mandate, and under New Hampshire's statute, it cannot be achieved without considering any other cases. RSA 630:5, XI(c) (court must consider "penalty imposed in similar cases"). Second, counsel disagrees that the result of "one-

case universe" review is, necessarily, that the defendant's death sentence is proportionate. It could instead mean that the Court cannot fulfill its appellate review obligation until and unless other "similar cases" are available. Thus, the death sentence would remain on direct appeal until some other cases arose that permitted the comparison required by the statute. The Court chose a universe of out-of-state cases to avoid such a result.

D. The Implementation of a Proportionality Analysis Based on Mitigating Factors Raises Practical and Methodological Concerns.

The State takes issue with counsel's decision not to employ mitigating factors in an analysis of the cases in Addison's inventory. SB 21-24. While the opening brief addresses this issue, DB 49-51, some further comments are warranted.

When counsel started to read cases in preparation for a proportionality analysis, two things became clear. First, information about the circumstances of the crime and aggravating factors was readily available, even when a published decision was otherwise sparing in detail or no published decision existed. Judges or other reliable reporters described the crime in sufficient detail to allow counsel note the presence or absence of certain characteristics. With that information, counsel could assess which factors recurred so as to create a pattern of verdicts demonstrating that juries do, or do not, generally impose death sentences in similar cases. That, after all, is the goal of proportionality review. Proportionality, 160 N.H. at 761 (death sentence disproportionate if "aberrant from, or substantially out of line with, a pattern of

jury verdicts which demonstrate that juries generally do not impose death in similar cases"); id. at 772 ("[W]e will determine whether a germane jury pattern emerges demonstrating that . . . juries generally do not impose a death sentence in capital murder cases similar to the defendant's.").

Second, mitigating factors and evidence were especially unavailable in life sentence cases. There are good reasons for why this is so. Where a capital defendant has been sentenced to life after a trial, he does not have the same appellate rights as a defendant sentenced to death. See RSA 630:5, X (stating that Court must review entire record if death sentence imposed). Nor does a life-sentenced defendant have the same ability or motivation to pursue collateral appeals of his convictions, which may, in turn, generate opinions that include additional factual information about the case. Even when a life-sentenced defendant does appeal, the parties have no need to review the mitigation case in their briefs, and the appellate court has no need to refer to mitigating facts in its opinon. The legal issues raised in a life sentence case, unlike a death sentence case, will rarely have an essential conection to the mitigation evidence.

As a result, information about mitigation is nearly non-existent in life sentence cases. Of the life sentence cases in Addison's inventory, thirty resulted in no appellate opinion. App. H. One-hundred and three cases resulted in opinions that contained no information about the mitigating evidence, and twelve discussed mitigating evidence in three paragraphs or less.

Only seven opinions contained a relatively detailed description of the defendant's mitigation case.[1]

The result is that, in more than 140 life cases, this Court has access to no, little, or a "Cliff's Notes" version of the mitigating evidence. If sufficient mitigation information is a prerequisite for inclusion in the pool, see Proportionality, 160 N.H. at 769 (Court contemplates reviewing "aggravating factors found by the jury and any mitigating factors considered"), those cases drop out of consideration. What remains is, effectively, a "death only" universe of comparison cases. This is inconsistent with one of the Proportionality Court's key procedural requirements for the comparison of "similar cases": the pool should reflect what juries did in both life and death sentence cases. Id. at 765-66 ("Considering only those capital murder cases in which juries actually imposed a death sentence would impede our ability to determine whether juries that faced the decision whther to impose a death sentence generally did not do so."). Because it would result in nearly every life sentence case being eliminated from consideration, the use of mitigating evidence is neither desirable nor methodologically sound.

The State's reliance on mitigating evidence raises other methological concerns. In proportionality review, the Court does not sit as a "thirteenth juror." It does not make value judgments about the weight or quality of mitigating evidence, nor does it speculate as to why juries did what they did. The Court, however, cannot look at the ten-case pool proposed by the State

[1] None of these cases is among the ten chosen by the State.

and, without making its own value judgments about the quality of mitigating evidence, or speculating, reach reliable conclusions as to why eight juries voted for death and two voted for life. Any such conclusion would be valid only if the State had access to mitigating evidence in a wide spectrum of both life and death sentence cases, and could demonstrate – as counsel did with aggravating features of police capital murder cases – that the presence or absence of certain factors correlated with life or death sentences. Due to the lack of available mitigating in life sentence cases, this is simply not possible.

In proportionality review, neither side has a burden of proof. Id. at 775. Both sides have an obligation to substantiate their positions, in accord with the principles set forth in the Proportionality opinion. As explained further below, the State's analysis fails to demonstrate, with the possible exception of extreme youth, that mitigating evidence correlates with sentencing outcomes. For example, mitigation in the form of evidence of the defendant's bad childhood appears in most of the ten cases in the State's pool. Such an omnipresent factor cannot explain jury decisions and divergent sentencing outcomes. The State's cases thus prove no point about the role of mitigating evidence in capital murder jury sentencing decisions.

E. The State's Case Selection Process is Flawed.

The State selected ten cases from four states: Arizona (two cases), Indiana (four), New Jersey (one), and Texas (three). It picked these states because in its view their statutes bore the closest resemblance to New Hampshire's, which does not require proof of the purpose to kill in a capital

murder prosecution. SB 33. However, the State's theory that these states are especially appropriate based strictly on their statutes' affinity with New Hampshire's is flawed on several fronts.

First, it appears that every defendant in the State's pool was charged with murdering an officer either "intentionally or knowingly," or "intentionally and knowingly." State v. Cruz, 181 P.3d 196, 216 (Ariz. 2008) ("intentionally or knowingly"); State v. Rose, 297 P.3d 906, 912 (Ariz. 2013) ("intentionally or knowingly"); Ind. Code Ann. §35-41-2-2 (setting forth "intentionally or knowingly" as mental state for capital murder); State v. Simon, 737 A.2d 1,7 (N.J. 1999) (murder was knowing and purposeful); Tex. C.C.P. Art. 19.02 (capital murder has mens rea of "intentionally or knowingly"); Garza v. Thaler, 909 F. Supp. 2d 578, 588 (W.D. Tex. 2012) (defendant committed murder "intentionally and knowingly"); Will v. State, 2004 WL 3093238 at *2-3 (Tex. Crim. App. 2004) (defendant shot officer ten times, firing several shots after the officer was down; murder described as brutal). The defendants were found guilty as charged in each case. Thus, no death-sentenced defendant in the State's pool was clearly found to have committed a merely knowing murder of an officer. In none of these cases did a jury impose a death sentence after specifically rejecting a proposed finding of a purpose to kill. For this reason, these cases do not differ appreciably from the hundreds of cases that the State ignores.

Second, in Indiana cases tried before 2002, the trial judge weighed aggravating and mitigating factors and imposed the sentence. DB 84-85;

Ritchie v. State, 809 N.E.2d 258, 266 (Ind. 2004). The Proportionality Court, however, decided to consider only jury sentencing decisions. Proportionality, 160 N.H. at 765. This fact disqualifies Dickens, SB 44-47, because he was convicted of capital murder and sentenced to life in prison under the pre-2002 version of the Indiana statute.

Third, the Arizona, Indiana and New Jersey statutes are different from New Hampshire's in ways that defeat the State's claim that those states are so uniquely similar as to justify only their inclusion in comparative proportionality review. Under Arizona law, prior crimes evidence is inadmissible and the State is not allowed to allege non-statutory aggravating factors. Ariz. Rev. Stat. Ann. §13-751; State v. Pandeli, 161 P.3d 557, 565 (Ariz. 2007) (no prior crimes evidence; State can only introduce certified copy of conviction). Victim impact evidence is not an aggravating factor, and that evidence is not admissible in the State's case-in-chief. State v. Bocharski, 189 P.3d 403, 415 (Ariz. 2007) (victim impact evidence strictly limited to rebuttal of mitigating evidence).

In Addison's case, however, the court admitted voluminous prior crimes and victim impact evidence, and the State benefitted from alleging over a dozen non-statutory aggravating factors. Indeed, the State exploited the difference in the amount of prior crimes evidence when comparing Addison's case to Cruz's. SB 40 (Addison's "aggravating factors were likely more compelling [than Cruz's] . . . since [Addison's] jury heard about his extensive prior criminal history, including his prior crimes of violence."). The key to the State's qualitative comparison is identifying the "footprint" of the cases, i.e., the unique facts that

form the basis for the comparison. SB 21. In conducting its comparison, the State ignores the impact of the differences between the Arizona and New Hampshire statutes: Addison's "footprint" contains more aggravating evidence and circumstances than any Arizona case possibly could. A qualitative comparison between Arizona and New Hampshire cases, employing the State's methodology, is unfair.

Indiana law is similar to Arizona's. It restricts the admission of victim impact evidence so that only one representative may speak, and only after the jury returns the defendant's sentence. Ind. Code Ann. §35-50-2-9(e). Indiana does not allow the State to rely on non-statutory aggravating factors. Ind. Code Ann. §35-50-2-9. Given these differences, it is unfair, based on evidence admitted in New Hampshire that is inadmissible in Indiana, to compare Addison's case to the Indiana cases in the way that the State suggests.

The differences between the New Jersey and New Hampshire statutes are even more significant, especially in light of the State's reliance on mitigating evidence. The former New Jersey capital murder statute limited the admission of victim impact evidence to one photo of the victim. N.J.S.A. §2C:11-3c(6). In addition, New Jersey law on burdens of proof was vastly different from New Hampshire's: a New Jersey capital defendant bore no burden to prove mitigating factors, and the State had to prove, beyond a reasonable doubt, that aggravating factors sufficiently outweighed mitigating factors. N.J.S.A. §2C:11-3c(2)(a). If Addison had the benefit of these standards, he may not have received a death sentence. Notwithstanding that contingency, a comparison

between Addison's case and a New Jersey case, without incorporating more of Addison's mitigating factors, is unfair.

The State's case selection analysis raises two additional questions. First, the State did not explain how it narrowed a pool of nearly eighty potential cases from these four states, to ten cases. SB 34 n.10. The end result of that process is not only a small pool,[2] but one in which life sentence cases have been excluded. See App. E 14 (Hudson (AZ)); App. E 127 (Nelson (NJ), Oliver (NJ)); App. E 128 (Rose (NJ)); App. E 177 (Adams (TX)); App. E 179 (Berry (TX)); App. E 198 (Price (TX)); App. E 199 (Quintero (TX)).

Second, the State includes cases involving teenaged defendants as "similar." SB 44-51. In fact, without teenaged defendants, every case in the State's pool would involve a death-sentenced defendant. The State ignores the fact that teens are intinsically different from adults in ways that render any comparison between them flawed. The United States Supreme Court recognized that teens and adults cannot legitimately be compared when it held that no one below age eighteen could face either a death sentence, or a mandatory sentence of life in prison without the possibility of parole. Miller v. Alabama, 132 S.Ct. 2455, 2468-69 (2012) (invalidating mandatory life without parole for juveniles based on intrinsic neurological and developmental

[2] The State notes that other courts have done comparative proportionality cases with fewer than ten cases. SB 34. As discussed in Addison's brief, DB 16-42, many of those courts do perfunctory review. Other states, like Connecticut and New Jersey, had access to transcripts and original source material in the comparison cases, and could conduct a more genuine comparison. That type of comparison cannot occur here, where so little is known about the nature of the mitigating evidence in the out-of-state comparison cases. Indeed, as discussed further below, some of the cases the State includes do no more than list or briefly describe alleged mitigating evidence. Such a scant description hardly even facilitates the type of value-driven analysis in which the State engages.

differences between juveniles and adults); Graham v. Florida, 560 U.S. ___, 130 S.Ct. 2011 (2010) (noting fundamental differences between brains of juveniles and adults); Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (noting that a child's character is not as well-formed as adult's, a child's traits are not as fixed, and a child's actions are less likely to be "evidence of irretrievabl[e] deprav[ity].").

F. The State's Analyis is Flawed.

Apart from its case selection methodology, the State's analysis of the cases it chose is flawed for several reasons.

First, the State's broad conclusions about the mitigating significance of such factors as youth, mental health and substance abuse are unfounded. The State argues that (1) these factors are absent in Addison's case; and (2) their absence means his sentence is not disproportionate. These conclusions are undermined by an examination of both the cases in the State's pool, and cases it chose not to include.

Regarding the cases in the pool, no defendant had a significant substance abuse history. In eight cases, there was no mention of substance abuse. Two defendants, Rose and Jeter, had minor involvement with drugs or alcohol, but there was no correlation between drug use and sentencing: Rose got death, and Jeter got life. SB 43-44, 49. Two other defendants, Pruitt and Williams, had extensive histories mental illness or related issues, but both were sentenced to death. SB 52-53, 74-75. If there is a correlation between

mitigating mental health evidence and life sentences, these cases do not illustrate it.

Youth was, at least superficially, a more significant feature. The two teenaged defendants, Dickens and Jeter, were sentenced to life. However, even this supposed link between a mitigating factor and a life sentence is tenuous. Jeter, who was nineteen at the time of the murder, got life. SB 49. Garza and Ritchie, each of whom was one year older than Jeter, were sentenced to death. SB 61 n.24, 71 n.27. No one could reasonably conclude that the fact Jeter was a year younger than the other two defendants played any role in the sentences they received.

Sentencing outcomes based on factors such as youth, mental illness and substance abuse are even less apparent when considering a broader pool of cases. Scores of defendants who are not teens have been sentenced to life. So have defendants who had no history of mental illness or impairment, and defendants who have no significant history of substance abuse. It is, however, exceedingly rare, as Addison's opening brief demonstrates, for defendants to be sentenced to death who, like Addison, lack specific factors often present in police murder cases. The State did not demonstrate that the existence of mitigating facts, alone or in combination, produces life sentences. Counsel demonstrated that certain aggravating facts, alone or in combination, produce patterns of life or death sentences. See Proportionality, 160 N.H. at 772 (Court "will determine whether a germane jury pattern emerges"). That information should drive this Court's comparative proportionality review.

Second, the State purports to compare Addison's case, using the mitigating factor metric, to others where the description of mitigating evidence is stunningly sparse. For example, in Cruz, there are two paragraphs of discussion about the mitigating evidence; one in which the court lists the factors, and one in which it makes a dismissive judgment about them. Cruz, 181 P.3d at 217. In Rose there is one paragraph. Rose, 297 P.3d at 922. In Simon, the court stated that the jury found and rejected several mitigating factors which are not described in the one-paragraph discussion.[3] Simon, 737 A.2d at 11. Without a detailed description or nuanced discussion of the mitigating evidence, any purported comparison to Addison's case is meaningless.

Third, the State's assumptions about aggravating factors are invalid because the ones on which it seemed to focus do not meaningfully distinguish police-involved capital murder cases. It relies on some factors, such as flight to avoid felony apprehension, that are so common as to be virtually ever-present. SB 38 ("Like the defendant, Cruz was trying to flee from a police officer. . . ."); see DB 58 (flight from felony apprehension, in itself, does not meaningfully distinguish cases). Nor does it appear to matter to juries whether a defendant brings his own gun, or disarms the officer and uses the officer's gun. SB 42 ("like the defendant, it was a handgun Rose had in his possession before the murder"); see DB 56 (fact that defendant used officer's gun did not make death

[3] The State ignores two New Jersey life sentence cases in which there is much more discussion about mitigating evidence. State v. Nelson, 715 A.2d 281 (N.J. 1998); State v. Rose, 548 A.2d 1058 (N.J. 1988) (summarized in App. 127-28).

or life sentence any more likely). As noted above, a factor present in so many of the cases in the universe does nothing to distinguish life-sentenced from death-sentenced cases, and so offers nothing to the task of comparative proportionality review.

At the same time, the State glosses over the significance of aggravating factors that are of tremendous importance. Defendants sentenced by juries who shoot an officer after he is already down, see SB 62 (describing Simon), have practically signed their own death warrants. DB 56; App. J. Defendants found to pose a future danger if not sentenced to death are, likewise, almost uniformly sentenced to death. DB 90-92. The State, however, gives short shrift to the significance of the fact that Addison's case had neither of these features.

G. Addison's Death Sentence is Disproportionate.

The State, using a sample of less than three percent of the relevant universe, attempts to rationalize why some defendants were sentenced to life, and others were sentenced to death. In effect, the State is trying to defend the jury's decision on value-laden grounds. It asks this Court to evaluate the rationality of a death sentence. That invitation misconstrues the nature of a careful comparative proportionality review.

What the State proposes is a perfunctory and undisciplined proportionality review. It has identified no patterns or defining characteristics across a series of jury verdicts that purport to distinguish defendants sentenced to death from those sentenced to life. Addison's opening brief did.

Based on that data, and based on those comparisons, Addison's case does not bear the features of those cases in which defendants are typically sentenced to death. It does bear the features of cases in which defendants are typically sentenced to life. Accordingly, as set forth in his opening brief, Addison's death sentence is disproportionate.

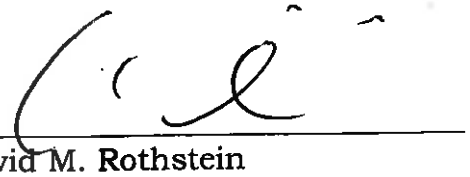
CONCLUSION

WHEREFORE, Mr. Addison respectfully requests that this Honorable Court vacate his death sentence because it is comparatively disproportionate, and enter a sentence of life in prison without the possibility of parole.

Undersigned counsel has requested thirty minutes of oral argument.

The appealed decision was not in writing.

Respectfully submitted,



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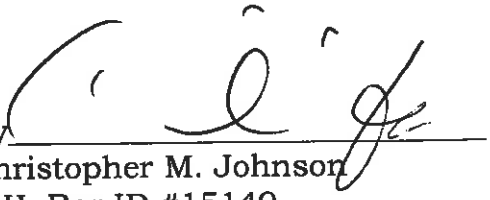

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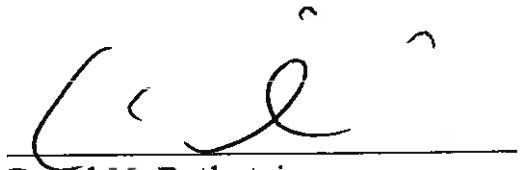

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DATED: December 22, 2014