THE STATE OF NEW HAMPSHIRE

SUPREME COURT



1994 TERM

JANUARY SESSION

No. 92-516

The State of New Hampshire

v.

Jason Carroll

On Appeal From A Judgment Of The
Hillsborough 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 minutes)

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STATE'S ERRATA

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and states that the fourth line from the bottom of page three of its brief, filed January 5, 1994, should read as follows:

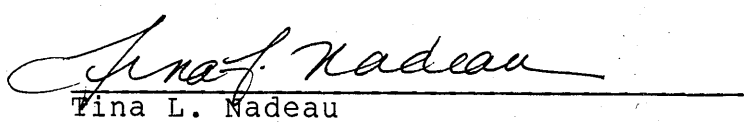
Johnson, her fourteen-year-old daughter, Melanie Eaton, and her

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Jeffrey R. Howard
Attorney General



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January 7, 1994

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to Eric R. Wilson, Esquire and Steven L. Maynard, Esquire, counsel of record.

Tina L. Nadeau

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## ISSUES PRESENTED

1. Whether the trial court properly ruled that the defendant's non-custodial confession was voluntary beyond a reasonable doubt where no promises were made that induced the confession and where the confession was a product of the defendant's free and unconstrained choice.

2. Whether the defendant failed to preserve the claim that his statement "I want to go home" made at the end of the November 25th, tape-recorded confession constituted an assertion of his right to remain silent that the police did not scrupulously honor.

## STATEMENT OF THE CASE

In January, 1990, the defendant was indicted along with co-defendants Anthony Pfaff and Kenneth Johnson, for capital murder, first degree murder, kidnapping, and conspiracy to commit murder. (N.O.A. (A), p. 2).[1/] After a hearing, the Superior Court dismissed the capital murder charge, finding that statute unconstitutional. (Id.). This Court affirmed the dismissal. State v. Johnson, 134 N.H. 570 (1991).

In February, 1992, a jury convicted the defendant of conspiracy to commit murder but acquitted him of kidnapping. (N.O.A. (A), p. 3). The jury was unable to reach a verdict on first degree murder and the court consequently declared a mistrial. (Id.).

In May, 1992, the defendant was re-tried on the first degree murder charge. The jury found him guilty of second degree murder, a lesser-included offense. (N.O.A. (B), p. 3). The Court (Murphy, J.) sentenced the defendant to serve 6 to 15 years stand committed for conspiracy to commit murder and 40 to life stand committed for second degree murder, the sentences to be served consecutively. (N.O.A. (A), p. 1, N.O.A. (B), p. 1).

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1/ References to the record are as follows:
"N.O.A. (A)" and "N.O.A. (B)" refer to the defendant's Notices of Appeal.
"A.N.O.A. (A)" refers to the Appendix of the defendant's Notice of Appeal.
"Mo." refers to the suppression hearing (September, 1991) with volume numbers corresponding to each successive day of the hearing.
"T." refers to the transcript of the second trial (April, 1992) with volume numbers corresponding to each successive day of trial.

STATEMENT OF FACTS

On Friday, July 29, 1988, at approximately 8:00 a.m., Sharon Johnson's strangled and stabbed body was discovered at a construction site in Bedford, New Hampshire. (T. I, pp. 67, 71; V, p. 57). Her assailants had dragged Sharon behind a gravel pile and had left her pregnant body lying in the mud near a small pond on the site. (T. V, pp. 15, 101, 114, 125). She was clothed in maternity jeans and a bra, which had been sliced open with a knife. (T. V, pp. 15, 49).

Thirteen stab wounds covered Sharon's chest. A single stab wound to her back penetrated the lung, causing it to collapse. (T. V, pp. 30, 31). Sharon's face was extremely swollen and several small, hemmorhaged capillaries were apparent, indicating manual strangulation. (T. V, pp. 21, 52, 57). The condition of Sharon's body upon autopsy suggested that she likely died during the mid to late evening hours of Thursday, July 28, 1988. (T. V, p. 37).

Later that morning, police seized Ken Johnson's car from his home in Bow. (T. V, p. 115). Police observed mud covering the exterior of the vehicle. (T. V, p. 116-17). The next day, at approximately 6:00 a.m., a Manchester police officer discovered Sharon's green Subaru parked behind Sears at the Mall of New Hampshire. (T. V, p. 118).

In July, 1988, Sharon Johnson lived in Bow with her husband, Ken Johnson, her seventeen-year-old daughter, Melanie Eaton, and her step-daughter, Julie Johnson. (T. VI, pp. 43-44). Sharon worked as a quality control inspector for Digital Corporation. (T. I, pp. 55-57). On July 28, 1988, Sharon left work at approximately 6:15

p.m. to shop for baby clothes. (T. I, p. 42). She was wearing a white tee-shirt designed with teddy bears and rattles on its front. (T. I, p. 32). Before she left for the day, Sharon told one co-worker that a man named Bob had called earlier and had asked her to meet him at the Bedford Mall. (T. I, p. 23). His stated purpose for the meeting was to repay a $4000.00 loan he owed her husband, Ken Johnson, and to show her some real estate. (T. I, pp. 23, 24, 27). On several occasions during the month prior to her death, Sharon attempted to meet with Bob but each attempt proved unsuccessful. (T. I, p. 26).

Sometime after she left Digital, Sharon was seen browsing in a woman's apparel store at the Mall of New Hampshire. (T. I, pp. 50, 51). Stephanie Hunter, the store's clerk, noticed an extremely pregnant woman, whom she identified from a photograph as Sharon Johnson, standing near the jewelry counter sometime between 5:30 p.m. and 8:30 p.m. that night. (T. I, pp. 50, 51). Ms. Hunter observed that Sharon was wearing a white shirt with teddy bears and carried a plastic identification card attached to her pocket book. (T. I, p. 50).

**Meanwhile**, as she did every Tuesday and Thursday evening, Sharon's daughter, Melanie, prepared to attend a weight watchers meeting with her aunt Diane. (T. VI, pp. 45, 47). Before Melanie left, however, and for the first time since she had been to weight watchers, Ken Johnson asked that Melanie take her step-sister, Julie, to the meeting so that he could window shop. (T. VI, p. 46). After the meeting ended, Melanie's uncle drove both she and Julie home.

They arrived at about 8:00 p.m. and neither Sharon nor Ken were at home at that time. (T. VI, pp. 48, 49). Although Ken had arranged to meet a friend that evening to discuss a business project, he never arrived, nor did he call to cancel the meeting. (T. VI, pp. 37, 38). He finally returned to his home in Bow at 10:00 p.m. (T. VI, pp. 48, 49). Sharon, however, did not return that evening and Melanie learned the next day that her mother had been murdered.

Subsequent police investigation revealed that Ken Johnson gambled. (T. VI, pp. 11, 12). He began placing bets with a man named Craig Maxfield some time during the fall of 1987. (T. VI, pp. 7, 12). Originally, Ken would bet between $100 and $200 on college and professional football games. (T. VI, p. 12). As time progressed, Ken began to place larger bets ranging from $500 to $1000 per game. (T. VI, p. 13). By January, 1988, Ken had accrued $5800 in gambling debts. (T. VI, pp. 13). In April, 1988, two months before Sharon's death, Ken gave Maxfield an undated check for $5800. (T. VI, pp. 14). Maxfield was unable to cash the check, however, since Ken Johnson's account never contained sufficient funds. (T. VI, p. 15).

Maxfield had no further contact with Ken Johnson until after Sharon's murder when Johnson telephoned him. (T. VI, p. 17). During their conversation, Ken asked Maxfield whether he had ever mentioned Bob's last name or had described the car Bob drove. (T. VI, p. 23). Maxfield had never met Bob. (Id.).

The ensuing investigation produced no significant leads and in January, 1989, Sergeant Roland Lamy was assigned to review the case

and to explore new avenues of investigation. (Mo. I, p. 5). As part of his effort, Sgt. Lamy contacted co-defendant Tony Pfaff, whom Lamy learned was the father of Lisa Johnson's baby. (Mo. I, p. 6). During their telephone conversation in March, 1989, Pfaff revealed that on July 29, 1988, Ken Johnson had solicited him to move Sharon's green Subaru from Don's Sports center to the Mall of New Hampshire in Manchester. (Mo. I, p. 7). Pfaff thereafter agreed to assist the police with the investigation, and unsuccessfully confronted Ken Johnson in an attempt to implicate him in the murder of his wife. (Id.).

In the following months, the police sought further background information about Pfaff and learned that at the time of Sharon's murder Pfaff and the defendant worked together at High-Tech Fire Systems cleaning kitchen exhaust equipment. (Mo. I, p. 8). Review of the employment records revealed that the defendant did not report to work as scheduled on July 28, 1988, the night before Sharon Johnson's body was discovered. (Id.).

Following their inspection of Pfaff's work records, Sgt. Lamy and State Police Sergeant Neal Scott interviewed Scott MacDonald, crew chief at High-Tech. (Mo. II, p. 22). They learned that on July 28, 1988, MacDonald, Dwayne Bartlett, Tony Pfaff and Jason Carroll were scheduled to work at a Burger King in Boston. (T. IV, p. 126; Mo. II, pp. 40-41). MacDonald planned on meeting Pfaff at his home on Route 28, but instead agreed to pick him up at Merchant's parking lot in Hooksett after Pfaff informed MacDonald that he would not be home that night. (T. IV, p. 122). When Pfaff failed to show up at

Merchant's, MacDonald drove to the Webster House where he customarily picked up Dwayne Bartlett. (T. IV, p. 123). He arrived at approximately 10:15 p.m. (Id.). Just as MacDonald was leaving the Webster House, Pfaff opened the door of MacDonald's van and jumped inside. (T. IV, p. 125). After turning onto Webster Street, MacDonald observed the defendant's gold Mazda about a half a block from the Webster house. (T. IV, p. 125).

Along with Dwayne Bartlett and Scott MacDonald, the police also decided to interview the defendant in an effort determine what he knew about Pfaff. (Mo. I, p. 8; II, p. 41). After learning that the defendant's mother was employed as a Bedford police officer, Sgt. Lamy, as a courtesy, called Detective Dana Finn of the Bedford Police Department on Friday, November 24, 1989, and asked him to schedule an interview with the defendant. (Mo. I, pp. 9, 10). At approximately 1:30 p.m. that day, Det. Finn, Sgt. Lamy and Sgt. Scott arrived at the National Guard Armory where the defendant and his father worked. (Mo. I, pp. 10, 13; IV, p. 96). At the time, the police did not consider the defendant a suspect and thus did not conduct further investigation into his background before the interview. (Mo. I, pp. 10, 11).

The defendant's commander, Captain Morse, agreed to let the officers speak with the defendant and led them to a lunch room where Sgt. Lamy, Sgt. Scott and Det. Finn were introduced to the defendant. (Mo. I, p. 12). Captain Morse did not participate in the interview but was, however, invited to remain with the defendant while the officers questioned him. (Mo. I, p. 13). After consulting with the defendant, Morse decided not to stay. (Id.).

Sgt. Lamy then disclosed the purpose of the meeting and reviewed generally the facts of the case. (Mo. I, p. 13). He told the defendant that the police were pursuing an investigation into the death of Sharon Johnson who had been murdered in July, 1988. (Mo. II, p. 86). Lamy further explained that the investigation thus far had revealed that he and Pfaff worked together at the time of Sharon's death. (Mo. I, p. 13). The defendant confirmed that he had worked with Pfaff and told the detectives that he was familiar with the Johnson homicide through various newspaper accounts and discussions with his mother. (Mo. I, p. 13; II, p. 42).

Shortly after the police obtained general information about the defendant's background, his mother, Karen Carroll, unexpectedly entered the lunch room to leave her son a set of car keys. (Mo. I, pp. 14, 15; II, p. 43). The detectives introduced themselves to Mrs. Carroll, explained the purpose of the interview, and invited her to stay with the defendant while they questioned him. (Id.). After conferring with her son, the defendant told her it was not necessary for her to remain. (Id.).

In response to questioning about his activities during the early evening hours of July 28, 1988, the defendant acknowledged that he met Pfaff at Meineke Muffler on Elm Street in Manchester. (Mo. I, p. 15). At that time, Pfaff was driving a green Subaru and claimed the car belonged to a girlfriend. (Id.). Pfaff asked the defendant to follow him to the Mall of New Hampshire where Pfaff was to leave the Subaru. (Id.). The defendant told the police that he agreed and upon arriving at the Mall, observed Pfaff park the car in the Sear's

parking lot and remove from it a blueish-green bag. (Mo. I, pp. 15, 16). The defendant then drove Pfaff to the Webster house where he was to be picked up for work. (Mo. I, p. 16). At Pfaff's request, the defendant delivered the bag to an apartment where Pfaff was living. (Id.). The defendant thereafter reduced this statement to writing. (Id.; State's Exhibit 52, attached in State's Appendix at 1).

After completing the statement at 3:15 p.m., the defendant left the lunch room, unescorted, and went to the men's room. (Mo. I, p. 18; II, 44). Upon the defendant's return, Sgt. Lamy pointed out that the he neglected to include the information regarding the blueish-green bag in his written statement. (Mo. I, 19). Consequently, the defendant produced a second statement clarifying the omission. (Id.; State's Exhibit 53, attached in State's Appendix at 2).

Sgt. Lamy questioned the defendant further regarding certain inconsistencies contained in the statements and asked him to explain why he failed to report to work on the night of July 28, 1988. (Mo, I, p. 20; II, p. 46). The defendant became emotional, nervous and shook visibly. He appeared to be "[re]living what had happened[.]" (Mo. I, 20; II, 181, 199). Such behavior prompted the officers to conclude that the defendant knew more about the homicide than he had thus far admitted. (Mo. I, pp. 20, 21).

As a consequence of the further questioning, the defendant gave a third statement in which he disclosed that he had assumed the role of a ficticious character named "Bob" at Pfaff's request. (Mo. I, p.

21; II, p. 47). Pfaff told the defendant that "Bob" allegedly owed Ken Johnson some money and was to meet Sharon at the Mall so that she could collect the debt. (Mo. I, p. 21). The defendant also stated that he followed Pfaff who drove Sharon from the Mall of New Hampshire to the sandpit where her body was discovered the next day. (Mo. I, p. 22; II, p. 48). Although Sgt. Lamy did not consider the defendant in his custody at that time, he issued Miranda warnings as a cautionary measure when the defendant indicated that he may have been present at the scene of the crime. (Id.). Reading verbatim from a standard State Police Miranda card, Lamy explained each of the defendant's rights one at a time. (Mo. I, pp. 23, 24; II, p. 49; State's Exhibit 46). When asked, the defendant indicated that he understood each right and stated his willingness to continue answering questions. (Mo. I, pp. 24, 25; II, pp. 49, 50, 195). At no time did the defendant exhibit confusion about the rights as Lamy explained them, nor did he ask the sergeant any clarifying questions. (Id.).

After agreeing to continue the interview, the defendant told the detectives that once he arrived at the pit, he observed a bearded man stab Sharon in the back. (Mo. I, p. 26). The defendant then fled the scene and later met Pfaff at Meineke after which he helped Pfaff transport Sharon's green Subaru to the Mall of New Hampshire. (Id.).

After hearing this most recent version of events, Sgt. Lamy asked the defendant to complete another written statement. (Mo. I, p. 27). The defendant indicated that he was too upset, and agreed to let Sgt. Scott prepare the statement. (Mo. I, p. 27; II, 50; State's

Exhibit 54, attached in State's Appendix at 3-4). Ultimately, the defendant was able to compose himself sufficiently to provide a written statement in his own handwriting. (Mo. I, p. 28; II, p. 51; State's Exhibit 55, attached in State's Appendix at 5-8). Before doing so, Sgt. Scott again warned the defendant of his Miranda rights, reading them from the top portion of the statement form. (Mo. II, p. 52; State's Exhibit 55). Sgt. Scott reviewed the warnings individually after which the defendant placed his initials next to each enumerated right indicating his understanding. (Id.). Having his rights in mind, the defendant agreed to continue with the statement and signed the waiver portion of the form specifically acknowledging his willingness to complete the statement. (Mo. II, p. 53; State's Exhibit 55). After he composed this final statement, he reviewed its contents and made a few corrections where necessary. (Mo. II, p. 54).

Soon thereafter, the defendant told the police that he was tired and requested that they continue their questioning on another day. (Mo. I, pp. 28, 31). Captain Leo Morency, who had arrived at the armory sometime after the interview, called the defendant's parents and asked them to respond to the armory. (Mo. I, p. 29; II, p. 191; III, pp. 12, 13). When the defendant's parents arrived, the detectives informed them of the nature of the defendant's statements and expressed their belief that the defendant knew more about the homicide than he was willing to divulge. (Mo. I, p. 30; II, p. 55). Sgt. Lamy agreed with the Carrolls to continue the questioning on the following Monday. (Mo. I, p. 31). At that time, the detectives

provided their business cards to the Carrolls and invited the defendant to contact them should any problems arise. (Mo. I, pp. 31, 32; II, p. 55). To facilitate communication over the weekend, Sgt. Lamy offered to call the Carroll residence periodically to let them know where he could be reached. (Mo. I, p. 32). Shortly thereafter, the defendant left the armory with his parents. (Id.).

The following morning, Saturday, November 25, 1989, while the defendant was out shopping with his mother, Sgt. Lamy telephoned the Carroll residence and spoke with Jack Carroll. (Mo. I, pp. 33, 34). As he had stated the night before, Sgt. Lamy informed Mr. Carroll that he would be out for several hours and could be reached through State Police Headquarters if necessary. (Mo. I, p. 34). Later that morning, the defendant and his mother returned from shopping and joined Mr. Carroll at the kitchen table to discuss the events of the previous evening. (Mo. III, pp. 98, 101, 102). During the conversation, the defendant became angry and declared as false the statements he made to police the night before. (Mo. III, 102). He then attempted to contact Sgt. Lamy but was unsuccessful. (Id.). As a result, the defendant's mother called Bedford Police Captain Leo Morency on her son's behalf. (Mo. IV, p. 21).

In response to Mrs. Carroll's call, Captain Morency drove to the Carroll home and spoke with the defendant. (Mo. III, 17, 18). The defendant informed Captain Morency that he wished to recant his previous statements. (Mo. III, 19). Before Captain Morency permitted the defendant to continue, he advised him of his Miranda

warnings, which the defendant appeared to understand. (Mo. III, pp. 19, 59, 60). When Morency asked the defendant if he wished to waive his rights, the defendant asked what he meant by waiver. (Mo. III, p. 60). Consistent with the information the defendant received the night before, Morency explained that to waive his rights meant that he understood them and was willing to continue speaking with the police. (Mo. III, 61). After Morency provided the clarification, the defendant indicated that he understood and was willing to talk with the police further. (Id.).

During the conversation, Lamy returned the defendant's call and spoke with Captain Morency, who informed the sergeant of the defendant's wish to recant. (Mo. I, pp. 35, 36; III, p. 24). At Lamy's request, Morency asked the defendant if he was willing to respond to the police station for an interview. (Mo. I, 36). The defendant agreed and drove himself and his mother to the Bedford Police Department. (Mo. IV, p. 23).

The defendant met with Sgt. Lamy and Captain Morency at approximately 1:30 p.m. in Captain Morency's downstairs office at the station, while Mrs. Carroll completed some paper work upstairs. (Mo. I, p. 37; III, p. 106, 107). Sgt. Lamy reminded the defendant of his Miranda rights, although he did not specifically re-advise him of each individual right at that time. (Mo. I, p. 37). The defendant continued to deny any knowledge of the homicide, and upon Sgt. Scott's arrival at 2:00 p.m., indicated that he was afraid to tell the truth. (Mo. I, p. 38; II, p. 52). Sgt. Lamy challenged the defendant's recantation and called the defendant a liar. (Mo. III,

pp. 28, 29). Shortly thereafter, the defendant requested the presence of his mother. (Mo. II, p. 57).

After discussing the pros and cons of permitting Mrs. Carroll to attend the interview, Sgts. Scott and Lamy decided to grant the defendant's request in an effort to further the defendant's voluntary state of mind. (Mo. I, pp. 39, 40; Mo. II, pp. 57, 58). Sgt. Lamy then met with Mrs. Carroll and explained the precarious nature of her son's request. (Mo. I, 39). Specifically, he told Mrs. Carroll that she would enter Morency's office as the defendant's mother and would not be acting in any capacity on behalf of the investigators. (Mo. I, 40). Lamy further instructed her that should she ask the defendant any questions, she was to do so as a mother and not as a police officer. (Mo. I, pp. 40, 41).[2/]

Meanwhile, Sgt. Scott and Captain Morency remained in Morency's office with the defendant during which time the defendant admitted that the statements he made the night before were true. (Mo. II, pp. 58, 59). Sgt. Lamy then entered the room with Karen Carroll at

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[2/]The defendant notes that Karen Carroll's testimony directly conflicts with Sgt. Lamy's on this score and commends the Court's attention to her claim that Sgt. Lamy instructed her to actively participate in the interview. (Def. Br. at 7). Mrs. Carroll's credibility is at best, suspect. Indeed, the trial court found that her testimony regarding other issues "boggle[d] the imagination" and "strain[ed] credulity". (A.N.O.A. (A), p. 39). Among other difficulties apparent in her rendition of certain facts was Mrs. Carroll's admission that she had previously made false statements to help her son. (Id. at 40.) Moreover, the trial court made a specific factual finding consistent with Sgt. Lamy's testimony that Mrs. Carroll was to be present during the interview as the defendant's mother. (Id. at 37). Any reliance on her testimony, therefore, is completely unpersuasive.

approximately 2:50 p.m., and informed the defendant that his mother was present as his mother and not as a police officer. (Mo. I, p. 41; II, p. 59; III, p. 37). Discussion continued about the defendant's involvement in the murder. The defendant told the investigators that a fourth person was present at the scene and that Ken Johnson had choked and stabbed Sharon. (Mo. II, p. 61). Shortly after the defendant offered the additional information, Captain Morency activated a tape-recorder and recorded the remainder of the interview. (Mo. II, p. 60; III, pp. 31, 34; State's Exhibits 56 and 60).

During the interview, the defendant implicated himself in the homicide explaining that, in exchange for $2000 he agreed to help Pfaff murder Sharon. (Exhibit 60, pp. 19, 31). The night before the murder, Pfaff asked the defendant to assume the role of a fictitious character named "Bob", presumably to lure Sharon to the Bedford sand pit. (Id. at 2, 31, 34, 35). The defendant explained that he and Pfaff met Sharon at the Mall of New Hampshire where the defendant introduced himself as "Bob". (Id. at 3, 35). From there, Pfaff drove Sharon in her car to the sand pit while the defendant followed in his truck. (Id.). The defendant told the police that when the three arrived at the site, they walked into the pit where they were met by Johnson. (Id. at 4, 35). Sharon and Johnson began to argue about whether Johnson had fathered her baby. (Id. at 5, 6). As Sharon stood with her back to the defendant, he stabbed her with his knife. (Id. at 20, 21, 37). After the defendant inflicted the first blow, he, Pfaff and Johnson each stabbed her several more times.

(Id. at 60, 20, 21). Later, the defendant met Pfaff at Meineke and moved Sharon's car to the automotive side of the mall. (Id. at 12).

A review of the tape-recording demonstrates the intensity of the interview and the emotional tenor which resulted from probing questioning. The defendant's mother actively participated throughout interview, during which the exchange occasionally became heated. Sgt. Lamy, Karen Carroll and the defendant each raised their voices as the interview progressed. Often times, the defendant cried and openly expressed his desire to tell the truth. (Id. at 1, 8, 18, 19, 28). Although highly charged, the tone of the interview reflected the gravity of the defendant's ultimate admissions. Generally, the emotional aspects of the interview flourished on those occasions when the defendant was preparing to admit significant inclupatory facts. Despite the intensity of certain identifiable points in the interview, the defendant at all times responded appropriately to questions.

Although the defendant had received Miranda warnings earlier that day, had arrived at the police station voluntarily and had not been restrained or arrested, Sgt. Lamy advised the defendant again of his right to remain silent. (Id. at 27). The warnings were provided at approximately 3:34 p.m., just as the defendant prepared to repeat his version of events. (Id.). The tape reflects the defendant's clear, affirmative responses to the investigators' questions regarding his understanding of his rights and his willingness to continue answering questions. (Id.).

Near the end of the interview, and after having fully confessed, the defendant stated that he was tired, that he was anxious to "get it over with" and that he wanted to go home. (Id. at 38). In apparent exhaustion, the defendant repeated his desire to go home. (Id.). The investigators told the defendant to relax, interpreting his statement as an expression of his wish that he had never become involved in the murder. (Id. at 38, 39; Mo. I, pp. 44, 45). The defendant answered a few more inconsequential questions before the interview ended shortly thereafter. (Exhibit 60, pp. 38-40).

At some point during the interview, Karen Carroll indicated that she possessed the knife her son had identified as the murder weapon. (Id. at pp. 36, 37). Consequently, the investigators asked both she and the defendant to sign consent to search forms, which they did. (Mo. II, p. 62). Mrs. Carroll then accompanied Sgt. Scott and Captain Morency to her home where she produced the knife from her bedroom bureau drawer. (Mo. II, p. 64). After retrieving the knife, Mrs. Carroll and the two investigators returned to the Bedford Police Department where the defendant completed a written statement containing the information he had provided earlier. (Mo. II, p. 65). At the top of each page of the defendant's statement appeared the Miranda warnings of which the defendant was again advised. (Mo. II, 66; State's Exhibit 57, attached in State's Appendix at 9-13). The defendant exhibited no confusion when reading his rights and appeared to understand them. (Mo. II, pp. 66, 67). At the conclusion of his written statement, the defendant returned home with his parents, stating he was too tired to provide diagrams of the crime scene. (Mo. II, p. 67).

The next afternoon, November 26, 1989, the defendant and his mother went to the State Police headquarters in Concord. (Mo. II, pp. 68, 69). There, the defendant drew several diagrams of the crime scene including the sand pit, the adjacent road and the location of the vehicles as they were parked on the night of the murder. (Mo. II, pp. 69-72). Throughout this exercise, the defendant appeared calm and collected. (Mo. II, p. 70). The defendant agreed to meet again with the detectives the next morning and returned home with his mother after completing the drawings. (Mo. II, p. 73).

On Monday, November 27, 1989, the defendant reported, as planned, to the Bedford Police Department where he spoke with the detectives. (Mo. I, 51, 52). During this conversation, the defendant provided additional details regarding his involvement in the murder. (Mo. II, p. 74). Specifically, he told Sgt. Lamy that he and Pfaff forced Sharon into her car, that Ken Johnson had not stabbed Sharon, that he received $5,000 for participating in the murder, and that he and Pfaff travelled to Bow, New Hampshire, in the defendant's truck where Pfaff collected the money. (Mo. II, pp. 74, 75).

Following those statements, Sgt. Scott, Captain Morency and Corporal David Eastman conducted a final tape recorded interview with the defendant. (Mo. II, p. 75). The interview began with the administration of the Miranda warnings. (State's Exhibit 59; State's Exhibit 61, pp. 1, 2). As he had during the previous interviews, the defendant stated that he understood each of his rights and was willing to answer the detectives' questions. (Exhibit 61, p. 2).

Later that afternoon, the defendant agreed to accompany detectives to the sand pit where he confronted Pfaff in the presence of several police officers and recounted the facts of the murder. (Mo. I, p. 54). Pfaff had agreed to meet the detectives in New Hampshire to discuss the Sharon Johnson homicide but was unaware that the defendant had provided a detailed confession. (Id.). After this meeting, the defendant returned to the police department and had very little contact with the detectives for the remainder of the day. (Id.).

During this time, Sgt. Lamy interviewed Pfaff and periodically confirmed certain facts with the defendant as Lamy's interview with Pfaff progressed. (Mo. I, pp. 55, 56). While the defendant waited in the building with his parents, he spoke with New Hampshire State Police Sgt. Kevin O'Brien, who asked the defendant how long he had intended to conceal the fact of his involvement in the murder. (Mo. II, p. 149). The defendant responded that "he couldn't have held it in much longer. That he wanted to tell somebody. That it bothered him, what had happened." (Mo. II, pp. 149, 150). When Sgt. O'Brien asked why he participated in the murder, the defendant stated that he would do anything to help a friend. (Mo. II, p. 150).

In the early morning hours of November 28, 1989, both the defendant and Pfaff were formally charged with capital murder. (Mo. II, p. 144). Later, the defendant agreed to accompany the police to Rhode Island where he unsuccessfully attempted to confront and implicate Ken Johnson. (Mo. I, p. 57; II, p. 151).

On December 15, 1989, the defendant's parents met with Sgts. Lamy and Scott to discuss the chronology of events surrounding the defendant's confessions. (Defendant's Exhibit UU; Defendant's Exhibit VV). The purpose of the meeting, which was memorialized on tape, was to rebut the anticipated constitutional challenge regarding the voluntariness of the defendant's statements. (Defendant's Exhibit VV, p. 1240). During the conversation, Mrs. Carroll acknowledged that her presence during the defendant's November 25, 1989 interview was to provide support as a mother. (Id. at 1218, 1219). Additionally, she stated that the police had made no promises to extract a confession from her son. (Id. at 1234). Her only concern during the interview was that the defendant tell the police the truth about the murder. (Id.).

## SUMMARY OF THE ARGUMENT

I. The defendant's November 25th tape-recorded confession was a product of his rational intellect and was not induced by improper police coercion. The voluntariness of a confession must be determined from the totality of the circumstances. As such, this Court will refuse to upset the trial court's finding unless contrary to the manifest weight of the evidence. No such error occurred in this case.

The defendant, a 19-year-old high school graduate, was aware of the nature of the investigation, and was not considered a suspect when first approached by police. On November 25th, the defendant initiated contact with the police and drove himself to the department. While at the station, the defendant was neither restrained nor arrested and left the station with his mother at the end of the day.

Before the defendant confessed, Captain Morency advised him of his rights under Miranda and ensured that the defendant understood each right and was willing to talk with the police. During the confession, the defendant was appropriately responsive to questions. Repeatedly, he indicated his desire to tell the truth and unburden his conscience. Additionally, the police permitted the defendant's mother to attend the interview as soon as the defendant requested her presence. Although the tone of the interview was emotionally charged, the defendant remained capable of exercising self-determination. Based on the totality of the circumstances, the trial court properly ruled the confession voluntary.

The defendant's claims to the contrary are without merit, since neither Sgt. Lamy's entrieties to tell the truth, nor Karen Carroll's

statements constituted promises of any kind. Even if Lamy's or Karen Carroll's comments could be construed as promises, they were not sufficiently critical to overbear the defendant's will, causing him to confess falsely.

Moreover, since Karen Carroll was not acting as a police agent, as the trial court properly found, her conduct is not attributable to the State. Thus, whatever statements she made could not constitute police coercion. Even if she were an agent, however, her participation is but one factor to consider. In weighing the totality of the circumstances, the trial court properly found that Karen Carroll's behavior did not circumvent the defendant's will. A review of the tape-recording demonstrates the defendant's ability to make an unconstrained, autonomous decision to confess.

II. Because the defendant failed to argue that the police violated Mosley by continuing their questioning after he said, "I want to go home," he has waived appellate review of that issue. Neither in his motion to suppress nor in his request for findings of fact does the defendant argue, as grounds for suppression, that the police failed to scrupulously honor a Miranda assertion. Thus, the issue is waived.

Even if properly before this Court, application of Mosley to the facts of this case is inappropriate, since the defendant was never in custody on November 25th. Given his non-custodial status, he was not entitled to the protection of Miranda which Mosley seeks to guard. Thus, even if he had asserted his right to remain silent, the police were not obliged to cease questioning.

## ARGUMENT

I. THE TRIAL COURT PROPERLY RULED THAT THE DEFENDANT'S NON-CUSTODIAL CONFESSION WAS VOLUNTARY BEYOND A REASONABLE DOUBT WHERE NO PROMISES WERE MADE THAT INDUCED THE CONFESSION AND WHERE THE CONFESSION WAS A PRODUCT OF THE DEFENDANT'S FREE AND UNCONSTRAINED CHOICE.

The defendant claims that improper police coercion induced his November 25th confession, rendering the statement involuntary and thus inadmissible under the fifth and fourteenth amendments to the federal constitution and part I, article 15 of the New Hampshire Constitution. (Def. Br. at 13).[3/] The circumstances surrounding the confession, however, belie his claim and in fact demonstrate that the confession derived not from improper police behavior, but rather from the defendant's considered choice to admit his complicity in the murder. Therefore, the trial court properly found that the defendant's confession was voluntary beyond a reasonable doubt.

A statement is voluntary unless it was induced by coercive or deceptive police conduct which overbore or circumvented the defendant's will. In re Sanborn, 130 N.H. 430, 439-40 (1988). As such, the State must prove that 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

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[3/] As well, the defendant appears to argue that the November 27, 1989, confession was involuntary. (Def. Br. at 13). Nowhere in his brief, however, does he substantiate such claim except to say in one sentence that the involuntary nature of the November 25th confession renders all subsequent statements inadmissible. (Def. Br. at 25). Given the defendant's complete failure to brief the issue, this Court should not consider any apparent claim that the November 27th confession was coerced and involuntary. See, e.g. State v. Hale, 136 N.H. 42, 45 (1992).

implied promises, however slight, [or] by the exertion of any improper influence.'" State v. Copeland, 124 N.H. 90, 92 (1983) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973), and Bram v. United States, 168 U.S. 532, 542-43 (1897)).[4/] Not all inducements or promises, however, are sufficiently coercive to mandate the exclusion of a confession. State v. Wood, 128 N.H. 739, 741 (1986). Because "[f]ew criminals feel impelled to confess to the police purely of their own accord, without any questioning at all[,]" courts need not ask "whether the confession would have been made in the absence of the interrogation." Fenton, 796 F.2d at 604.

Moreover, interrogators may constitutionally employ some psychological tactics in eliciting confessions which may assist in the defendant's decision to confess. Fenton, 796 F.2d at 605. The inquiry then becomes, not whether the interrogator's statements caused the confession, but rather whether the statements "were so manipulative or coercive that they deprived [the defendant] of his

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[4/] Despite the quoted language from Bram, a recent United States Supreme Court decision specifically limited its effect and ruled that the passage does not state the standard for determining the voluntariness of a confession. Arizona v. Fulmante, 111 S.Ct. 1246, 1251 (1991). Instead, the Court stated that a determination of voluntariness depends on the totality of the circumstances. Id., at 1252. Even before Fulmante was decided, the majority of jurisdictions recognized that not every official promise renders a resulting confession involuntary. See Miller v. Fenton, 796 F.2d 598, 608 (3rd Cir.), cert. denied, 479 U.S. 989 (1986); United States v. Pinto, 671 F. Supp. 41, 52-59 (D. Me. 1987). Rather, the test for voluntariness turns on an examination of all the circumstances, including the existence of any promises. Pinto, 671 F. Supp at 52. Only where the promise or inducement is sufficiently critical to break the defendant's resistance will the confession be deemed involuntary. Id., at 55. See also United States v. Jackson, 918 F.2d 236, 242 (1st Cir. 1990) (same).

ability to make an unconstrained, autonomous decision to confess." Id. Thus, in assessing voluntariness of a particular confession, the court must review the "'totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation.'" State v. Damiano, 124 N.H. 742, 747 (1984) (quoting Schneckloth, 412 U.S. at 226). The trial court's determination of voluntariness is a factual finding which this Court has refused to overturn unless the decision is contrary to the manifest weight of the evidence. State v. McDermott, 131 N.H. 495, 500 (1989). But see, Fulmante, 111 S.Ct. at 1252 (the ultimate issue of voluntariness is a legal question).

The defendant can establish no such manifest error here. Before issuing its order, the court conducted a five day suppression hearing during which it heard testimony from eight witness including the defendant's parents. In addition, the court listened to a tape-recording of the November 25th interview conducted at the Bedford Police Department and reviewed several of the defendant's written statements.

Many factors support the trial court's decision, among them the defendant's personal characteristics and background. No mental infirmity deprived the defendant of his ability to think and reason. Indeed, the defendant was of normal intelligence. He was nineteen years old at the time police questioned him and had obtained his G.E.D. while in the military. (Mo. III, p. 83; IV, p. 98). He worked at the National Guard Armory as a mechanic and had previously worked at the Bedford Police Department cleaning cars. Thus, he was

accustomed to working among authority figures. (Mo. 1, p. 12; III, p. 57; IV, p. 98). As well, the defendant's responsive answers to questions asked during the interrogation, demonstrate that he "was not disadvantaged by youthful ignorance or the naivete born of inexperience." Fenton, 796 F.2d at 606.

Additionally, circumstances leading up to the defendant's confession support the trial court's voluntariness determination. When the police first questioned the defendant on November 24th, he was not in custody. In fact, at the end of the interview, the defendant left the armory with his parents and went home. Despite his non-custodial status, the police twice informed him of his Miranda rights; a factor which weighs heavily in favor of voluntariness. See Berkemer v. McCarty, 468 U.S. 420, 433, n. 20 (1984) ("cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

Because of his contacts with detectives on the 24th, the defendant felt comfortable enough to reinitiate communication with them the next day in an effort to recant his previous statement. (Mo. IV, p. 21). When Captain Morency arrived at the Carroll home, he again warned the defendant of his rights. Aware of the seriousness of the investigation, the defendant agreed to speak with the police and drove himself to the police department. (Mo. IV, p. 23). See Beasley v. United States, 512 A.2d 1007, 1016 (D.C. App. 1986), cert. denied, 482 U.S. 907 (1987) (defendant's understanding of interrogation's thrust supports voluntariness of confession).

The voluntary nature of the defendant's contacts with the police continued. At the station, the defendant met with detectives and Captain Morency, a person with whom the defendant was familiar enough to call "Leo" during the interrogation. (State's Exhibit 60, p. 13). Throughout the questioning, the defendant was neither physically restrained nor instructed to stay at the police department. In an effort to further sustain the voluntary quality of the interview, Sgt. Lamy brought the defendant's mother into the interview room, as soon as the defendant requested her presence. Furthermore, he specifically explained first that Mrs. Carroll was entering as the defendant's mother and not as an agent of the State. Such action ensured the voluntary state of the defendant's mind. Indeed, a refusal to fulfill the defendant's request would have undermined a voluntariness finding. United States v. Rigsby, 943 F.2d 631, 636 (6th Cir. 1991), cert. denied, 112 S.Ct. 1269 (1992). See also People v. McDaniel, 619 N.E.2d 214, 226 (Ill. App. 1993) (fact that defendant had access to family supports finding of voluntariness).

The tape-recorded interview itself demonstrates that the defendant's confession was compelled by a deep sense of guilt and not improperly induced by police coercion. Repeatedly, the defendant expressed his desire to confess, stating, "I do understand that I have to want to be truthful, I want to be truthful. I want to be truthful," (State's Exhibit 60, at 28), "I have to let it go," id. at 1, "I want so much to get this over with," id. at 11, "It's not gonna be easy like this, just to spit it out, I can't, I want to so much." Id. at 19. When Sgt. Lamy implored the defendant to tell the truth,

he responded, "I'm telling the truth Sergeant. I don't want to go through no more bullshit. I just want to get this over and out of my life." Id. at 8; all strong evidence that the impetus behind the defendant's confession was his desire to relieve a guilty conscience.

Nor was the interrogation coercively lengthy. Sgt. Lamy arrived at the police department at approximately 1:30 p.m. at which time he challenged the defendant's recantation. (Mo. I, p. 37). After an hour and twenty minutes, Karen Carroll entered the room at the defendant's request and shortly thereafter the tape recorder was activated. (Mo. I, p. 41). The recorded portion of the confession lasted a little under an hour and ended at approximately 3:49 p.m. (State's Exhibit 60, p. 41). The entire period of questioning encompassed 2 1/2 hours and was not "a process of interrogation . . . so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extortion of an involuntary confession." Stein v. New York, 346 U.S. 156, 184 (1953).

Although obviously emotional, the tenor of the interrogation did not "detract from the coherence and responsiveness" the defendant displayed throughout. State v. Pilcher, 472 N.W.2d 327, 334 (Minn. 1991). See also Fenton, 796 F.2d at 612 (emotional breakdown of defendant at end of interview indicated a desire to "make a clean breast of it" and was not a result of police coercion). Indeed, the defendant raised his voice to Lamy when he disagreed with certain facts; hardly the behavior of a man susceptible to police coercion. Although Sgt. Lamy's tone was occasionally strong, and the defendant

at times cried, the circumstances indicate that the defendant was nonetheless capable of exercising self-determination. See United States v. Chalan, 812 F.2d 1302, 1305, 1307-08 (10th Cir. 1987) (despite coercive and somewhat accusatory tone of interview, confession found voluntary where no one threatened, physically mistreated or forced defendant to remain in tribal governor's office); Fenton, 796 F.2d at 612, n. 13 (defendant's emotional collapse at end of interview natural response to revealing participation in heinous crime).

Perhaps the most compelling evidence indicating the defendant's voluntariness was his discussion with Sgt. Kevin O'Brien on November 27th, two days after the tape-recorded statement at issue. That night, after the defendant provided a second tape-recorded statement, he met with Sgt. O'Brien. When asked, the defendant told O'Brien that he couldn't have kept his involvement a secret much longer. (Mo. Vol. II, p. 149). The defendant said that the murder bothered him and he wanted to tell somebody. (Id. at 149, 150). When questioned as to why he took part in the murder, the defendant explained that would not back down from helping a friend. (Id. at 150). Such behavior does not indicate that the confession was a product of coercion, but rather that it resulted from a rational decision to purge his conscience.

In addition, throughout the evening of the 27th the defendant remained calm, composed and cooperative. (Mo. Vol. II, p. 76). He was appropriately responsive to the police and exhibited no confusion about the procedures leading up to his eventual arrest.

Significantly, when the defendant was finally arrested and charged with capital murder, he did not protest his arrest claiming the police had duped him into confessing by falsely guaranteeing him immunity.

Despite the foregoing evidence, the defendant claims his confession was involuntary because: (1) the police promised the defendant immunity in exchange for his confession (Def. Br. at 18, 20); (2) the police promised to protect the defendant from Ken Johnson in exchange for his confession (Def. Br. at 25-27); (3) Karen Carroll's involvement in her son's interrogation constituted "psychological pressure" which improperly induced the defendant's confession (Def. Br. at 21, 22, 29); and, for the first time on appeal, (4) the police falsely assured the defendant that he was merely a witness and not a target of the homicide investigation (Def. Br. at 30). Each claim, however, invests selected portions of the transcript with meaning bereft of context and ignores the totality of circumstances supporting the trial court's finding.

The defendant first argues that the trial court failed to consider a specific promise of immunity reflected in the following portion of the transcribed confession:

K/Carroll: The longer . . .

Carroll: I know Ma.

K/Carroll: . . . you put off telling the truth, the harder it is gonna be, and the worse it is gonna be on yourself because you still have a chance to save your ass, my dear. I don't want to see you go to prison . . . that would . . .

Carroll: I don't want to go to prison either Ma.

Lamy: Then, be truthful.

K/Carroll: Then, tell us every God Damned thing you know. (State's Exhibit 60, p. 28); (Def. Br. at 18).

Nowhere in the transcript submitted during the suppression hearing did Lamy's words, "then tell the truth" appear. (Compare State's Suppression Hearing Exhibit 5, attached in State's Appendix at 30, with State's Second Trial Exhibit 60, p. 28). Nor did the defendant, during that hearing, direct the court's attention to the alleged promise that he now urges this court to find. (A.N.O.A. (A), pp. 2-16; Defendant's Request for Findings and Rulings, attached in State's Appendix at 78-86). Instead, the focus of the defendant's claims turned on accusations that Sgt. Lamy specifically offered the defendant's parents immunity and/or specific terms of imprisonment for their son in exchange for his cooperation, claims which the trial court firmly rejected. (A.N.O.A. (A), pp. 39, 40). Indeed, the first time the defendant submitted an amended transcript to the court was just prior to Sgt. Lamy's testimony during the second trial. (T. I, pp. 5-9) (compare State's First Trial Exhibit 60, attached in State's Appendix at 66, with State's Second Trial Exhibit 60, p. 28). Despite the defendant's discovery that the original transcript may have been incorrect, he never attempted to renew his motion to suppress before either trial. Given the defendant's utter failure to commend the court's attention to the alleged promise, he cannot now claim that the trial court committed error by failing to consider the above-quoted language. See State v. Wood, 132 N.H. 162, 165 (1989)

(this Court refused to consider grounds of objections not specified or called to the trial court's attention); State v. Cassell, 129 N.H. 22, 22-23 (1986) (same). Thus, the defendant is precluded from raising the argument for the first time on appeal.

Even assuming this contention is properly before the Court, it is factually overstated and legally inconsequential. First, although the second jury received copies of the transcripts containing Lamy's alleged statement, there is nothing in the record to suggest that the transcript accurately reflected the tape-recording. At best, the record indicates nothing more than a concession by the State to include the disputed language in an effort to avoid further argument on the subject. (T. I, pp. 5-9).

Second, it strains logic to suggest that the phrase "then be truthful" constitutes a promise of immunity which conveyed an assurance not to prosecute.[5/] At no time did Lamy tell the defendant that he would not be prosecuted or imprisoned. At best, Sgt. Lamy's alleged comment constitutes an exhortation to tell the truth, conduct which the defendant concedes is universally held proper. State v. Geldart, 111 N.H. 219, 220 (1971) (police assurance that "if he cooperated things would probably go better for him" did

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[5/] The defendant intimates that Karen Carroll's statement, "I don't want to see you go to prison," constitutes a promise of immunity. A mother's words of comfort, uttered as an expression of her understandable desire that her son remain free, hardly imply an immunity offer. Aptly, the trial court rejected this claim, recognizing that in making such statements, Karen Carroll "appears to act in the fashion that a mother would in like circumstances." (A.N.O.A. (A), p. 38).

not render defendant's subsequent confession involuntary); United States v. Vera, 701 F.2d 1349, 1363-64 (11th Cir. 1983) (officer properly told defendant truth could help him); State v. Pinard, 514 A.2d 468, 469 (Me. 1986) (same).

Third, the defendant had received Miranda warnings before coming to the police department which included an admonition that anything he said would be used against him in court. He was again reminded of those rights just before Lamy initiated further questioning at the station. Thus, from the start, the defendant knew that he could be prosecuted for his involvement in the Johnson murder. See Fenton, 796 F.2d at 609 (advising defendant of Miranda rights significantly dissipates coercive effect of implied promise).

Finally, whatever the technical meaning of Lamy's statement, it could not possibly have induced the confession since the defendant had already revealed the most damning admissions earlier in the interrogation. (State's Exhibit 60, p. 20). Even a direct promise, regardless of its pernicious nature, cannot induce a confession that precedes it. State v. Beckley, 600 A.2d 294, 296 (Vt. 1991) (promise not to charge defendant of three admitted offenses did not induce confession since defendant had already offered admissions before officer made promise); Rowe v. State, 421 So.2d 1352, 1355 (Ala. App. 1982) (where defendant confessed before police made offer, promise could not have induced confession even though taped statement was completed after promise was made). As the statements at issue were made after the defendant admitted to the murder, they could not have extracted the confession.

The defendant's reliance on State v. McDermott, supra, does not dictate a contrary result. In that case, although the confession was rendered involuntary, DEA agents, in an ongoing relationship with the defendant as a confidential informant, specifically and directly promised him that any incriminating statements he provided regarding an unsolved murder would remain confidential. Id., 131 N.H. at 498, 499. By contrast, no such agreement was spelled out to the defendant in this case.

Additionally, the relationship between the defendant and the police in this case was qualitatively distinct from that described in McDermott. Unlike the DEA's contact with McDermott, the only reason the police sought to interview the defendant here was to discover what information he had about Tony Pfaff. They were not interested in enlisting the defendant's services as a paid informant. In McDermott, however, the agents needed to know everything about the defendant's criminal background to use him as an informant and witness. Thus, McDermott's continued employment depended on providing such information. Finally, the DEA agents never advised McDermott of his Miranda rights and in fact specifically assured him that their failure to do so would further protect him from prosecution for the murder. McDermott, 131 N.H. at 499. Conversely, the police here repeatedly warned the defendant of his Miranda rights, eventually suspecting and ultimately expecting he would be charged with murder.

The defendant contends as well, that Sgt. Lamy improperly induced the confession by promising the defendant protection from Ken

Johnson, his co-conspirator. (Def. Br. at 27). He grounds his argument on the following statements, exerpted from the 41 page confession:

> Lamy: . . . And if you're afraid, and you tell us what you're afraid of, include Mr. Johnson, we can take care of protecting you. We can't take care of protecting something we don't understand.

(State's Exhibit 60, p. 17).

> Lamy: Again we are putting the cart before the horse. Protection for your safety is commensurate on you convincing us that you want to be truthful. You haven't done that to me.

(State's Exhibit 60, p. 18)

> Lamy: Look, I understand that, we already told you, if you get to the bottom dollar here and tell us the truth, we will then discuss your safety with your mother here and we will take care of it. Let's not put the care (sic) before the horse. Let's find out what you are afraid of, of telling us.6/

(State's Exhibit 60, pp. 29, 30).

First, Lamy's statements do not convey a definite promise to provide protection in exchange for a confession. In response to the defendant's expressed fears about Ken Johnson, Lamy appropriately informed the defendant that the police must first understand the nature of any perceived threats before discussing protection against them. Although he may have assured the defendant that some conversation regarding safety would occur in the future, he offered no guarantee that the police would protect him from Johnson.

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6/As with the alleged immunity promise, this statement occurred after the defendant admitted he stabbed the victim and could not, therefore, have induced the confession.

Even if this Court finds that Lamy specifically offered to protect the defendant, such promise did not render his resulting confession involuntary. Because a determination of voluntariness depends on the totality of circumstances surrounding the confession, not every promise will render a confession involuntary. Unless the promise induced the confession, no constitutional transgression occurs. Thus, even a specific promise to guarantee the defendant's safety in prison may not deprive the statement of its voluntary character "absent circumstances which create a substantial risk that [the] defendant might falsely incriminate himself." People v. Johnson, 576 N.Y.S.2d 407, 409 (1991). See also State v. Foster, 739 P.2d 1032, 1037-39 (Or. 1987) (confession found voluntary based on totality of circumstances though police told defendant that they could not protect him from hostile members of the community unless he told the truth about the murder); Terry v. LeFevre, 862 F.2d 409, 413 (2nd Cir. 1988) (where defendant's fear of personal injury originated from his own knowledge, experience and reflection and not from exploitation by police, confession found voluntary). Here, Lamy's isolated comments made during an hour long interview did not induce the defendant to confess.

By way of analogy, the court in Fenton, supra rejected a similar claim challenging the voluntariness of a confession. There, the defendant argued that his confession was improperly extracted as a result of a detective's promise to provide psychiatric assistance. Id. at 608. Although the detective's statement constituted a direct promise regarding treatment, the court found that it did not overbear

the defendant's will to resist. Id., at 610. In delineating the factors relevant to a voluntariness determination, the court noted a distinction between "promises of leniency in the imminent criminal proceedings against the defendant and promises of help with some collateral problem." Id. The latter type are less likely to overcome the defendant's ability for self-determination than are direct promises not to prosecute.[7/]

The defendant relies on Arizona v. Fulmante, supra, to support his claim that Sgt. Lamy's alleged promises of protection impermissibly coerced his confession. Review of that decision, however, reveals flaws in the defendant's analysis. In Fulmante, the defendant became friends with a fellow inmate and state agent. Id., 111 S.Ct. at 1250. During his stay at the prison, rumors began that the defendant was the suspect in a child-murder. Id. As a result, the prison population became increasingly hostile. In exchange for information about the murder, the state agent offered to protect the defendant from his fellow inmates. Id. Consequently, the defendant confessed to the murder. Id.

While the Supreme Court upheld the state court's finding of involuntariness, it noted circumstances attendant at the time of the confession that are wholly absent here. Among the most distinguishing was the immediate threat of harm Fulmante faced at the hands of other prisoners. Id., 111 S.Ct. at 1252. Indeed, he had

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7/Even direct promises of leniency may not render a confession involuntary as long as the promise does not overbear the defendant's will. Id., 796 F.2d at 608.

already been receiving rough treatment from them. Thus, the state court found that the defendant's life would be in jeopardy if he failed to confess. Id. No such imminent danger existed in the present case.

Additionally, Fulmante possessed a low to average intelligence and had dropped out of school in the fourth grade. Id., 111 S.Ct at 1252, n. 2. He was short in stature, slight in build and ill-adapted to prison life, seeking protective custody at times. Id. Because of the stress of prison life, he was once admitted to the psychiatric hospital. Id. These factors combined to create an atmosphere of coercion that the Supreme Court found sufficient to overbear the defendant's will. Id., 111 S.Ct. at 1253. In contrast, the trial court here, weighing the totality of the circumstances, and viewing the tape-recording as a whole, determined that the defendant suffered no such weakness that would leave him susceptible to police coercion. (A.N.O.A. (A), pp. 37-40).

The defendant next makes the ungrounded contention that Sgt. Lamy misrepresented the defendant's status in the investigation and "falsely assured the defendant that he was not the target." (Def. Br. at 29). The defendant remarkably finds such a guarantee in the following statements:

Lamy: . . . you can tell us the part you did.

(State's Exhibit 60, p. 7).

Lamy: [The jury] will hear a voice that we will identify as Jason Carroll. A person that we are looking to, to help us bring forth those people . . .

Carroll: Who did it.

> Lamy: who actually did this entire, ugly, unforgiveable horrendous act and they will have to conclude if Jason Carroll has the decency to express any remorse and that expression must come forth by a willingness to tell the truth.

(State's Exhibit 60, p. 15).

> Lamy: . . . You sound like a criminal, not a guy who has made a terrible mistake.[8]

(State's Exhibit 60, p. 19).

The defendant's attempt to impugn the trial court's order in this regard is unavailing for several reasons. First, the defendant never raised the claim in the trial court and has therefore waived its review on appeal. See State v. Horne, 136 N.H. 348, 349 (1992); State v. Kiewart, 135 N.H. 338, 348 (1992).

Second, a review of the cited portions of the transcript upon which the defendant relies reveals his misinterpretation of Lamy's statements. As he did throughout the interrogation, Sgt. Lamy appealed to the defendant's conscience in an effort to encourage him to confess. See Fenton, 796 F.2d at 605 (police may properly "play on suspect's sympathies or explain that honesty might be the best policy" in encouraging truthful confession). Similarly, the statements quoted above, far from explicitly informing the defendant that he was not a target, merely implored the defendant to tell the truth. Indeed, the trial court, who reviewed the entire

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[8]The defendant also claims that Karen Carroll's statement "You are the link they need to put Johnson and Pfaff behind frigging bars" constituted a similar guarantee. The trial court, rejecting this contention, ruled that Karen Carroll's comments "were not inducements but the statements of a mother trying to learn the truth." (A.N.O.A. (A), p. 45; State's Appendix at p. 82).

tape-recording, did not invest the excerpted language with the import the defendant now urges. This Court should not supplant the trial court's finding with its own interpretation of the statements, since the trial court considered the disputed evidence in light of all the testimony presented. Copeland, 124 N.H. at 92 (finding by trial judge, who stands in best position to weigh the credibility of the witnesses will not be overturned unless contrary to weight of the evidence).

The only authority the defendant cites in support of his position actually punctuates the factual weakness of his argument. In United States v. Goldstein, 611 F.Supp. 626 (D.C. Ill. 1985), investigators approached the defendant at his place of business and questioned him about a theft. During their interview, the defendant asked several times about his status in the investigation and questioned whether or not he should seek the services of a lawyer. Id., at 628, 629. Avoiding his inquiries about the lawyer, the investigator's "direct response falsely indicated the criminal investigation had been completed and he was interested in Goldstein's answers only for the purpose of recovering the goods to make restitution to the theft victims." Id. at 631. That factual finding stands in stark contrast to the statements uttered in the present case.

Furthermore, other factors motivating the court's decision in Goldstein included a finding that the investigators had specifically threatened the defendant by stating that "[People who do not cooperate] end up ah, how they say, ah sliding up the saw backwards

the whole way through. . . ." Id. at 632. (Brackets in original). The defendant cannot, and indeed does not, cite to any threat of such a serious nature in this case. Finally, the investigators in Goldstein never advised the defendant of his Miranda warnings, a factor the court considered significant in its determination. As stated earlier, the defendant here was informed of his rights repeatedly throughout the course of the weekend.

Perhaps recognizing that Sgt. Lamy's remarks did not render his confession involuntary, the defendant finally complains that Karen Carroll's participation in the interrogation exerted psychological pressure sufficient to coerce his confession. In forging this argument, the defendant claims that, irrespective of Karen Carroll's status as a state agent, certain promises she made to her son improperly contravened his rights under the constitution. Pertinent state and federal authority resoundingly defeat the defendant's claim.

It is well-settled that "in the absence of some overreaching official conduct that produces the confession, there is no State action and, consequently, no violation of the fourteenth amendment." In re Sanborn, 130 N.H. at 440. See also State v. Pierce, 130 N.H. 7, 10 (1987) ("'. . . the Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion."') (citations omitted); Colorado v. Connelly, 479 U.S 157, 164 (1986) ("Absent police conduct causually related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."). As such, "[t]he most outrageous behavior by a

private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." Connelly, 479 U.S. at 166. Thus, the defendant's contention that "[w]hether or not Karen Carroll was acting on behalf of the State of New Hampshire does not alter the involuntariness of the defendant's confession" is wholly unsupported in law. (Def. Br. at 21).

On the contrary, the relevant inquiry is whether Karen Carroll's conduct was "'so pervaded by governmental involvement that it los[t] its character as such and invoke[d] the full panoply of constitutional protections.'" People v. Jemmott, 535 N.Y.S.2d 84, 86 (1988) (citations omitted). The trial court found that it did not. Specifically, the court ruled that, "questioning by Karen Carroll was not inspired by the State and was on her own initiative." (A.N.O.A. (A), p. 45). Further, it refused to grant the defendant's requested factual finding that Sgt. Lamy enlisted Karen Carroll's help as a police officer to interrogate the defendant. (State's Appendix at 81; A.N.O.A. (A), pp. 45, 46). Instead, the court found that before Sgt. Lamy and Karen Carroll entered Morency's office, Lamy clearly advised her that she would be present as the defendant's mother and not as an agent of the State. (A.N.O.A. (A), p. 37). Finally, the court noted that while Karen Carroll assumed an active role in the interview, her participation was consistent with the actions of any similarly situated mother. (A.N.O.A. (A), pp. 38, 45). Since none of Karen Carroll's behavior is attributable to the State, her participation during the interrogation could not cause a constitutional violation.

In an attempt to rebuff the trial court's findings, the defendant cites to a short exchange occurring immediately after Lamy advised the defendant again of his Miranda warnings, and claims that the exchange proves Karen Carroll's role as a state agent:

> Lamy: Your mother is here in a dual role as a mother
> . . .
>
> Carroll: And a professional.
>
> Lamy: And a professional, she is also a witness to what is going on here.

(State's Exhibit 60, p. 27; Mo. II, pp. 129, 130).

Contrary to the defendant's contention (Def. Br. at 22), Lamy described Karen Carroll's dual role as a a mother and a witness to the confession. That Karen Carroll happened also to be a professional, which her son properly recognized, does not thereby make her a state agent. Indeed, the defendant's own comments at the end of the interview belie his claim that he considered his mother a police officer. In a sincere expression of remorse, the defendant exclaimed, "I can't relax, Sergeant, (INA), I get involved with these two guys, that I did not want to get involved with (INA) and I did this to my mom, and my family oh my God." (State's Exhibit 60, p. 39). Hardly the statements of a man confused about the role of his mother.[9/]

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[9/] The defendant quotes extensively from portions of Sgt. Lamy's testimony in an attempt to demonstrate that the defendant held certain impressions about the content of the interrogation. (Def. Br. at 19, 24, 28). Whatever interpretation Sgt. Lamy may have had, however, is completely irrelevant to a determination of the defendant's state of mind. Moreover, contrary to the defendant's
(footnote continued onto next page)

The defendant cites several out-of-state cases in urging this Court to hold the exclusionary rule applicable to private individuals. (Def. Br. at 21, 22). Each case, however, lacks legal analysis and three of the four were decided before the United States Supreme Court's explicit contrary holding in Connelly. Even assuming the cases are somehow comprehensible in light of Connelly, the rule in New Hampshire, requiring governmental action as a predicate for excluding a confession, is set out in Pierce and Sanborn and should be followed here to uphold the trial court's ruling.

As even the defendant is constrained to recognize, however, whatever status his mother may have enjoyed, her participation is but one factor to consider in the totality of events surrounding the confession. People v. Andricopulos, 516 N.E.2d 302 (Ill. App. 1987); (Def. Br. at 22). A review of the tape recording as well as the record of the suppression hearing reveals that the trial court properly considered all relevant circumstances, including Karen Carroll's participation, and properly ruled that the defendant voluntarily confessed.[10/]

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Footnote #9 continued from previous page

bold assertions, no evidence whatsoever was presented at the hearing regarding the defendant's impressions. (Def. Br. at 23, 24). Indeed, the trial court consistently sustained the state's objections to questions regarding the defendant's interpretation of Lamy's statements. (Mo. Vol. II, pp. 125-27).

10/At pages 32-33 of his brief, the defendant makes a somewhat convoluted argument that Lamy's alleged promises rendered his subsequent Miranda waiver invalid. It appears that the defendant (footnote continued onto next page)

II. THE DEFENDANT FAILED TO PRESERVE THE CLAIM THAT HIS STATEMENT "I WANT TO GO HOME" MADE AT THE END OF THE NOVEMBER 25TH, TAPE-RECORDED CONFESSION CONSTITUTED AN ASSERTION OF HIS RIGHT TO REMAIN SILENT THAT THE POLICE DID NOT SCRUPULOUSLY HONOR.

The defendant contends at page 35 of his brief, that the detectives' failure to cease questioning when he indicated a desire to go home constituted a Miranda violation, thus rendering his subsequent statements inadmissible. In support, the defendant specifically relies on Michigan v. Mosley, 423 U.S. 96, 102-04 (1975) (defendant who invokes right to silence during custodial interrogation may nonetheless be recontacted by police as long as right to cut off questioning was "scrupulously honored"). (Def. Br. at 35). A review of the defendant's pleadings, the State's response and the trial court's order, however, demonstrates that the defendant never raised the Mosley issue below. Consequently, this Court should not consider his claim for the first time on appeal.

Before trial, the defendant filed a Motion to Suppress challenging the admission of his various statements on several

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Footnote #10 continued from previous page

is confusing two related concepts. Miranda, which serves the fifth amendment, is designed to curb police transgressions by requiring interrogators to adequately advise and to properly secure a waiver of Miranda rights, before questioning a custodial suspect. Miranda v. Arizona, 384 U.S. 436, 467-69, 475-77 (1966). In contrast, fourteenth amendment due process requires that all resulting confessions be voluntary and condemns "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect [that] are so offensive to a civilized system of justice." Miller v. Fenton, 474 U.S. 104, 109 (1985). Thus, a purely voluntary confession can nonetheless be kept from the jury where the police fail to advise or secure a waiver of those rights. Whatever the defendant attempts to argue here, the voluntariness of his waiver is amply supported by the evidence.

grounds. (A.N.O.A. (A), pp. 1-16). Nowhere in his motion, however, did the defendant claim that the police failed to scrupulously honor an assertion of his right to remain silent in contravention of Miranda. Indeed, the focus of the defendant's challenge to the November 25th statements was an attack on their voluntary nature; an inquiry entirely separate from a challenge based on a Miranda violation. (A.N.O.A. (A), pp. 14, 15). See Pierce, 130 N.H. at 8 (voluntariness of waiver of rights to silence and presence of counsel, as guaranteed under Miranda, constitutes independent basis for excluding involuntary confession taken in violation of fourteenth amendment due process guarantee).

The defendant's waiver of the Mosley issue is further highlighted upon review of his request for findings of fact and rulings of law. While the defendant clearly characterized his comment, "I want to go home," as a request to end the questioning, (State's Appendix at 82) (a conclusion which the trial court specifically rejected (A.N.O.A. (A), p. 46)), the only legal significance he ascribed to the remark was to demonstrate the involuntariness of the confession. (State's Appendix at 80, ¶ E). The entire nine page document is void of any reference to Mosley.

Appropriately, neither the State's response, (State's Appendix at 87-119) nor the trial court's order considered whether the detectives scrupulously honored any fifth amendment assertion the defendant may have made. Rather, both only addressed the significance of his remarks in the context of determining whether the defendant was in custody and whether his ultimate confession was

voluntary. Indeed, the trial court, in addressing each of the defendant's arguments, specifically introduced them serially, setting forth the parameters of each claim by paragraph. (A.N.O.A. (A), pp. 30-40). None of the paragraphs includes a Mosley analysis.

Thus, the defendant's appellate recourse to the Mosley argument is unavailable because this Court has refused to consider a claim on appeal that the defendant has failed to raise below.[11/] State v. Burley, 137 N.H. 286, 289 (1993) (arguments raised for first time on appeal not entitled to review); State v. Horne, 136 N.H. at 349 (argument that evidence should be suppressed not considered on appeal, since defendant argued for dismissal below). Indeed, even closely related appellate issues are deemed waived if not first presented and argued before the trial court. See State v. Dube, 130 N.H. 770, 772 (1988) (relevancy issue deemed waived where only issue raised below was hearsay); State v. Cassell, 129 N.H. at 23 (defendant precluded from raising issue on appeal where trial counsel objected to flight instruction on ground that it improperly equated defendant's actions with flight, rather than ground that it required jury to infer consciousness of guilt from flight). Where, as here, a defendant does not even mention, let alone argue, an issue before the trial court, he is precluded from raising it for the first time on appeal.

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11/Nor does the defendant adequately brief the applicability of the four Mosley factors to each successive confession, beyond merely concluding that his alleged assertion requires the suppression of "all" statements taken thereafter. (Def. Br. at 42). See State v. Laurie, 135 N.H. 438, 442, cert. denied, 113 S.Ct. 245 (1992). Such glancing treatment of the issue is insufficient to trigger appellate review. State v. Hermsdorf, 135 N.H. 360, 365 (1992).

Assuming the argument is properly before this Court, application of Mosley to the facts of this case is inappropriate, since the defendant here was not in custody at the time of the interview.[12/] A defendant is entitled to the protections afforded by Miranda only when the police engage him in custodial interrogation. State v. Sheila Portigue, 125 N.H. 338, 343 (1984). Because the defendant was not entitled to receive Miranda warnings, his alleged assertions could not prevent the police from continuing the interrogation. Portigue, 125 N.H. at 345; Laurie, 135 N.H. at 441, 442 (when suspect in custody exercises right to terminate questioning, police must scrupulously honor suspect's desire to remain silent).

The trial court found that the defendant was not in custody, noting specifically that:

> On November 25, 1989, it was the defendant's own idea that he speak to the police again, he initiated the telephone call to the investigators, he drove to the police station himself, had freedom of movement throughout the day, spoke to his mother outside the presence of police officials, and afterwards went home once again with his family when the questioning terminated.

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12/ Without reference to persuasive authority, the defendant claims that the state constitution "requires that he be afforded protection consistent with the principles of Miranda" regardless of his non-custodial status. (Def. Br. at 39, 40). Such an argument seeks "to extend Miranda beyond its conceptual justification, on the basis of an argument divorced from factual reality." State v. Lewis, 129 N.H. 787, 796 (1987) (defendant's decision to seek counsel was not the invocation of any Miranda rights since at time of assertion defendant was not in custody and therefore not entitled to Miranda protections).

(A.N.O.A. (A), p. 32). Since the record amply supports this finding, the defendant cannot establish that it is contrary to the manifest weight of the evidence. State v. Carpentier, 132 N.H. 123, 126 (1989).

Finally, even if the defendant enjoyed protection under Miranda at the time of the interview, his remarks did not constitute an invocation of the right to silence. At worst, the statements indicated an expression of frustration and a wish that he had not involved himself in the stabbing. Such an expression is not surprising in light of the burden the defendant carried; concealing his participation in the murder of a pregnant woman. Viewed in the context of the entire interview, the defendant's comments did not express a desire to end the questioning. See State v. Chapman, 135 N.H. 390, 394 (1992) (in determining whether statements constitute and invocation of the right to silence, court views statements within context of entire conversation). Moreover, the record reveals no evidence that the defendant "ma[d]e any movement or gesture" that might have indicated a desire to terminate the interview. Chapman, 135 N.H. at 398. As such, the trial court properly denied the defendant's motion to suppress.

## CONCLUSION

For the foregoing reasons, the State of New Hampshire respectfully requests that this Honorable Court affirm the decision below.

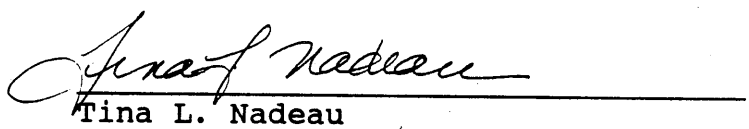
The State requests 15 minutes for oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Jeffrey R. Howard
Attorney General



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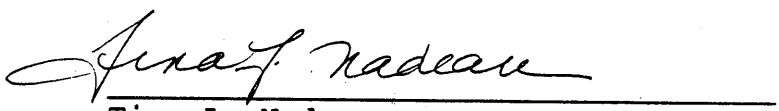
January 5, 1994

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to Eric R. Wilson, Esquire, and Steven L. Maynard, Esquire, counsel of record.



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