



INNOCENCE PROJECT OF FLORIDA

Unlock the Truth

Innocence Project of Florida
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July 20, 2020

The Office of Executive Clemency
Florida Commission on Offender Review
4070 Esplanade Way
Tallahassee, FL 32399-2450

Re: Dustin Duty, Application for Commutation of Sentence

Dear Clemency Board Member:

On May 29, 2013, a perpetrator used a knife to rob Tiffany Saams. Following a show up identification at a gas station in the area, Dustin Duty was arrested for this crime and later charged and convicted.

Police aggravated the circumstances of an already suggestive show-up identification by forcing Mr. Duty to put on a shirt (as the victim said the perpetrator was wearing one), by asking the victim whether Mr. Duty was the person who robbed her, by surrounding him, and by moving him around to face her. Also, when officers interviewed Ms. Saam, they lied about what items they found on Mr. Duty, making her feel more confident in her misidentification.

Making an already bad situation worse, Mr. Duty's trial counsel failed to call his alibi witness—his boss Fred Davis—who could have provided critical information to undermine the State's case, most importantly, evidence that Mr. Duty was with Mr. Davis at the time Ms. Saams was robbed. Aside from counsel failing to call Mr. Davis, the investigating Detective lied at trial when he told the jury that Mr. Duty never gave him any names of alibi witnesses to investigate.

This letter is respectfully submitted in support of Dustin Duty's Application for Commutation of Sentence pursuant to Rule 17 of the Rules of Executive Clemency. Mr. Duty is serving twenty years for armed robbery in Fourth Judicial Circuit Case No. 13-CF-05095 stemming from the May 29, 2013 armed robbery of Tiffany Saams.

Pursuant to Rule 8(A) of the Rules of Executive Clemency, applicants are eligible for commutation only after completing one-third of their sentence, or one-half of their sentence if there is a minimum mandatory sentence. Mr. Duty has served seven years of a twenty-year sentence with a 15-year mandatory minimum, as such, he is not eligible under Rule 8(A); however, pursuant to Rule 17, Mr. Duty's case is one of exceptional merit and thus warrants consideration in any case.

This letter serves to provide a brief background and history of the case, as well as the evidence in support of Mr. Duty's innocence. It also includes a detailed transition plan to ensure a positive and successful reintegration back into free society (attached at Tab H). It is our hope that after your review, you will find his case worthy of clemency.

CASE FACTS

On May 29, 2013, Dustin Shane Duty ("Mr. Duty") was at work with his boss, Mr. Fred Davis ("Davis"). (E.H. pg. 24.)¹ Davis testified at a postconviction evidentiary hearing² that he is in the painting business and that work concluded that day sometime between 3:00 p.m. and 4:00 p.m. (E.H. p. 25). Following work, Davis dropped Mr. Duty off on the I-95 San Marco exit. (E.H. p. 25). Davis gave Mr. Duty ten dollars (\$10) before dropping him off (E.H. p. 25). Mr. Duty exited the vehicle without a shirt and left his hat behind in the vehicle. (E.H. p. 25–26). Mr. Duty walked four blocks south and stopped at a store to purchase a beer and a pack of cigarettes. He then walked further south toward the Safari Food Store. While drinking the beer, Mr. Duty spotted Officer Taylor sitting in his patrol car. (R. Vol. III, p. 223). Mr. Duty proceeded directly toward Officer Taylor. (R. Vol. III, p. 223) Officer Taylor exited the vehicle, pointed a gun at Mr. Duty, and placed him in handcuffs. (R. Vol. III, p. 223).

According to police records, Tiffany Saam ("Saam") called 911 at 3:37 p.m. to report a robbery on Cedar Street in Jacksonville, Florida. She described the suspect as a white male somewhere around five feet eleven inches tall and wearing a red Budweiser baseball cap, a green sweatshirt, and khaki cargo shorts. (R. Vol. III, p. 165). In her initial call to police, Saam stated that the suspect had light skin without a tan. Saam further described the suspect as being in his mid-thirties with light blue eyes. (R. Vol. III, p. 166). She stated that she did not see his shoes. (R. Vol. III, p. 167). Saam explained that the perpetrator used a serrated hunting knife during the robbery, and that she handed the perpetrator around one hundred and fifty dollars (\$150) from her wallet before he fled the scene. (R. Vol. III, p. 167). She stated that the incident occurred about five minutes before she made the call to police. (R. Vol. III, p. 168).

About thirty minutes after Davis dropped off Mr. Duty, Davis received a phone call from the police. (E.H. p. 26). According to Davis' phone records, this call was received at 4:32 p.m.³ (E.H. p. 26–27). The only question the officer asked during this call was whether Davis knew Mr. Duty. (E.H. p. 28). When Davis confirmed, the officer stated that Mr. Duty would not be working with Davis anymore because Mr. Duty "robbed a lady" and then he hung up. (E.H. p. 28-29). Police did not confirm whether Mr. Duty was with Davis earlier that day, nor did they confirm the time Davis dropped off Mr. Duty. (E.H. p. 28–29).

After speaking with Saam, police informed her that they found someone matching the description. (E.H. p. 49; R. Vol. III, p. 173, 229). Saam informed Mr. Duty's attorney, Brian Crick ("Crick"), before trial, that police made this suggestive comment during her deposition. Crick, however,

¹ The symbol "E.H." followed by the page number shall designate the transcript of the evidentiary hearing held September 26, 2018. The "R. Vol. ____" followed by page number shall designate the trial transcripts found in the record on appeal. The symbol "Hearing Ex. ____" followed by page number will refer to the exhibits submitted during the hearing.

² Prior to the hearing, Mr. Davis submitted an affidavit. That affidavit is attached at Tab A.

³ Fred David phone records, Attached at Tab B.

testified at the hearing under oath that he did not know about this “substantially more suggestive” comment until he was already in trial. (E.H. p. 95–96). Crick testified, erroneously, that at that point it was too late to file a motion to suppress. (E.H. p. 95–96). Nonetheless, Crick acknowledged that in her deposition Saam informed him of the suggestiveness of the show-up identification. The suggestive factors were (1) the police asked her whether Mr. Duty looked like the perpetrator; (2) Mr. Duty was surrounded by a number of officers; and (3) the police repositioned Mr. Duty so that he was facing Saam. (E.H. p. 94–95). Crick furthered acknowledged that he thought Saam’s show-up identification was inherently suggestive from the start. (E.H. p. 121).

Police drove Saam to the convenience store parking lot where Mr. Duty was being held. (E.H. p. 49; R. Vol. III, p. 173). From the backseat of the police cruiser, Saam saw Mr. Duty standing about 20 feet away in the parking lot “surrounded by a couple of cops.” (E.H. p. 49; R. Vol. III, p. 174). After being told by the officer that she needed to be sure of her identification, Saam responded, “I can’t be sure but, yes, it looks like the guy.” (E.H. p. 49). Saam felt like “the whole situation was a little pressured.” (E.H. p. 50). Saam confirmed that she did not see her assailant with a backpack (E.H. p. 51). Mr. Duty was made to remove his backpack before being shown to Saam. (E.H. p. 51).

During deposition Saam mentioned that Mr. Duty had a t-shirt on which helped her identify him. Crick, however, testified he was never aware that Mr. Duty, who was shirtless at the time police apprehended him, was made to put on a t-shirt during the show-up identification. (E.H. p. 96–98). Crick erroneously testified that Mr. Duty did not have a t-shirt on before or after the show-up identification. (E.H. p. 96–98).

Later at the police station, an officer showed Saam the knife⁴ recovered from Mr. Duty’s backpack. (E.H. p. 52). At this point, Saam told Detective Clement Gregory Nieto that she could not be sure that it was the knife used by her assailant. (R. Vol. III, p. 183). When she asked if the police found her money on Mr. Duty, one of the officers responded, “No, but there were narcotics found and [the police officer] wouldn’t be surprised if [Mr. Duty] had already spent it.” (E.H. p. 53). When Saam heard this from law enforcement, she felt “like it gave [her] confidence in the fact that this was the correct person.” (E.H. p. 56). She “definitely felt that it was an explanation as to where [her] money had gone.” (E.H. p. 59). Crick admitted that he failed to ask Saam if the police said anything to her after her identification. (E.H. p. 140–141).

Crick testified regarding several inconsistencies in Saam’s identifications: (1) Saam was not certain about the knife (E.H. p. 122); (2) Saam gave significantly different height descriptions of the assailant (E.H. p. 124); (3) Saam initially gave a very generic description of her assailant (E.H. p. 134); (4) Saam did not identify any distinguishing characteristics about her assailant (E.H. p. 135); and (5) Saam was not a hundred percent certain of her identification. (E.H. p. 137). Crick testified that he forewent filing a motion to suppress the identification and instead opted to challenge it at trial. (E.H. p. 139).

Police brought Mr. Duty to the police station for further questioning. Throughout the interview, Mr. Duty told Detective Nieto on thirteen occasions that he was at work, and that he wanted

⁴ Mr. Duty carried utility knife for work and this was the knife he had on him.

Detective Nieto to call his boss.⁵ Detective Nieto stated, “I am going to call your boss to verify that he dropped you off and what time he dropped you off.” Further into the interrogation, after Mr. Duty repeated the same story, Detective Nieto confirmed what Mr. Duty had told him by stating, “You said your boss’s card is in your bag?” to which Duty replied, “Yes.” When Mr. Duty asked if there were cameras to prove where he was, Detective Nieto replied, “You are in the south, they don’t have cameras on a street corner.” Following jury selection, Crick stated that he wished to play Mr. Duty’s police interrogation video “so that [he] would have the opportunity to use it on any cross-examination.” (R. Vol. II, p. 121). The Disclosure for the Interview Video Recording was filed at that time, without any objection from the prosecution. (R. Vol. I, p. 28). Crick called Detective Nieto as a witness at trial for the purpose of showing that Detective Nieto did not do “much of any follow-up.” (E.H. p. 89–90, 178). Crick acknowledged that Detective Nieto testified he was never told about any witnesses even though the interrogation video shows thirteen different occasions where Mr. Duty asked Detective Nieto to “please call [his] boss,” referring to Davis. (E.H. p. 180–181). Davis confirmed that apart from the one abrupt call, thirty minutes after dropping Mr. Duty off, he did not receive any call from law enforcement to give any information. (E.H. p. 29). The video was never played to the jury.

Police arrested Mr. Duty and held him for forty (40) days before charging him with a crime. (R. Vol. I, p. 11). On July 30, 2013, Mr. Duty was charged with Armed Robbery under § 812.13(2)(A). During this time, Mr. Duty wrote his appointed counsel, Crick, on three separate occasions. On two such occasions, Mr. Duty urged Crick to contact his alibi witness, Davis. On August 13, 2013, Mr. Duty filed a Judicial Notice informing the court that he had not heard from his trial counsel. (R. Vol. I, p. 17). On September 30th, 2013, Mr. Duty’s letter to Crick expressed concern that he had not heard from Crick for at least a month and that Crick had not conducted a single deposition.

Crick eventually deposed Saam on October 30, 2013, six months after Mr. Duty’s arrest. During this deposition, Saam explained that she was in the middle of texting her boyfriend “and really wasn’t being completely aware” of her surroundings when she noticed her assailant walking toward her. She further explained that when her assailant grabbed her, she “kind of in [her] peripheral saw the knife and it came up under [her] chin.” When asked for more information about the knife, Saam stated that she “never got like a really good look at it.” Crick confirmed Saam’s uncertainty about the knife in his testimony at the evidentiary hearing. (E.H. p. 122–123).

Prior to trial, Mr. Duty’s counsel only filed three motions: two Motions for Release and one Motion for a More Definite Address. (R. Vol. I, p. 8-11, 20-21). Mr. Duty’s counsel did not challenge the show-up identification, nor did he move to suppress any evidence relied on by the State to obtain a conviction. (*Id.*). Additionally, Crick did not inquire from any local businesses on San Marco Blvd. about the potential existence of surveillance videos even though Mr. Duty requested for his counsel and detectives to do so. (*Id.*).

Crick did, however, file a Disclosure to the Prosecution notifying the prosecution that the defense planned to call Davis—Mr. Duty’s boss—as an alibi witness. (R. Vol. I, p. 26). The judge listed “Fred Davis” as a potential testifying witness during jury selection while inquiring if any members of the panel knew or were related to potential witnesses in the case. (R. Vol. II, p. 17). Despite this initial disclosure, counsel never subpoenaed Davis, nor did he depose him.

⁵ Dustin Duty’s transcribed interview with police, Attached at Tab C.

Despite having listed Davis as a witness, who would have demonstrated that it was highly unlikely Mr. Duty could have committed the crime, defense counsel did not subpoena Davis nor call him to testify. Nonetheless, Davis voluntarily appeared at the courthouse ready to testify after defense counsel contacted him the day before, but counsel never called him to the stand. (E.H. p. 31–33). Additionally, defense counsel did not obtain Davis’ phone records, which would have demonstrated that Davis received a call from the police thirty minutes after Mr. Duty was dropped off and almost a full hour after the robbery. (E.H. p. 33).

Finally, Mr. Duty’s trial counsel never played the interview video for the jury even after successfully admitting it without objection. (E.H. p. 90–91). This video would have verified that Mr. Duty consistently notified Detective Nieto of an alibi witness and maintained his innocence throughout the entire interrogation. Importantly, the video would have impeached Detective Nieto’s testimony where he denied the existence of any additional witnesses. Crick acknowledged that Detective Nieto testified he was never told about any exculpatory witnesses by Mr. Duty. (E.H. p. 180–81). Mr. Duty’s interrogation video, however, contradicts this testimony by showing thirteen different occasions where Mr. Duty asked Detective Nieto to “please call [his] boss.” (E.H. p. 180–81).

The jury’s confusion at the close of trial was evidenced by a question submitted during deliberations. (R. Vol. I, p. 54). On December 17, 2013 at 5:45 p.m., the jury asked the following question: “The victim stated her assailant was dressed as a construction worker. Was the defendant employed and did he have an alibi for the time involved?” (R. Vol. I, p. 54). The court responded, “All the evidence has been presented. You will have to rely on your collective memories of that evidence.” (R. Vol. I, p. 54). This exchange clearly demonstrates the value of Fred Davis’ testimony, had he been called to testify at the trial. The jury subsequently convicted Mr. Duty. (R. Vol. I, p. 30). Citing the jury’s question, Mr. Duty’s counsel filed a Motion for a New Trial on February 13, 2014, and argued that the jury instructions were improper because the jury may have inaccurately shifted the State’s burden to the Defendant. (R. Vol. I, p. 93-94).

Leading up to the sentencing, in January 2014, Crick learned from Davis that he was trying to get phone records that could jog his memory about Mr. Duty’s timeline because Davis believed it was very possible that he dropped off Mr. Duty closer to 4:00 p.m. (E.H. 75–76). Upon hearing this, Crick believed that “maybe [Davis’] memory is just not accurate. You know, maybe we’ve got something here that can present . . . and we need a phone record to look into that.” (E.H. p. 81). Crick, however, did not attempt to obtain these records, but instead directed Davis to get them. (E.H. p. 81). Crick testified there was nothing indicating that Davis received a call from the police until he read Davis’ affidavit a while after sentencing. (E.H. p. 84). However, there is a record of the call by the police to Davis shortly after the crime noted in the public defender file intake form made as early as a few days after Mr. Duty’s arrest. (E.H. p. 106).

At sentencing, while discussing the Motion for a New Trial, Crick admitted that he had not obtained the phone records from Davis but was hoping that the records would provide clarity on the timeline. (E.H. p. 83; R. Vol I, p. 107). In response, the judge stated, “Did you not want to deal with it today, because you’re waiting on new evidence?” (R. Vol. I, p. 109). Crick did not ask for a continuance. Instead, Crick unilaterally decided to leave the issue for postconviction relief—a

time where Mr. Duty would be without the right to counsel or access to funds for investigation. (E.H. p. 83). Crick stated, “Your Honor, if the Court allows. . . we would submit [the Motion] for ruling on it today, and with the understanding that if there is any new evidence that we are able to present, that Mr. Duty can take the appropriate steps to address it at that time. And I think it would have to—at that point in time, it may have to be through a 3.850 motion.” (R. Vol. I, p. 111).

PROCEDURAL HISTORY

On July 10, 2013, Dustin Duty was charged with Armed Robbery in violation of Fla. Stat. § 812.13(2)(A). Following a trial in December 2013, a jury convicted him and he was sentenced to 20 years’ imprisonment on February 13, 2014.

The First District Court of Appeal affirmed his conviction and sentence. *Duty v. State*, 163 So. 3d 1184 (Fla. 1st DCA 2014). On March 12, 2015, Mr. Duty filed a Motion for Reduction of Sentence pursuant to Fla. R. Crim. P. 3.800(C). The Court denied the motion on September 22, 2017.

On September 11, 2015, Mr. Duty filed a *pro se* motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. Mr. Duty then engaged the Miami Law Innocence Clinic and the Innocence Project of Florida to represent him in his postconviction litigation, and counsel filed an amended motion for postconviction relief on January 26, 2017. On November 13, 2017, the State conceded that an evidentiary hearing was warranted. The trial court held an evidentiary hearing on September 26, 2018, and following written closing arguments, the trial court denied Mr. Duty’s motion on April 13, 2020. An appeal of this ruling is currently pending.

EVIDENCE OF INNOCENCE

Eyewitness misidentification is a leading cause of wrongful convictions.⁶ This is especially true where, as here, there is an improper show-up identification procedure. Mr. Duty’s trial counsel failed to challenge this show-up identification, and failed to present a strong alibi witness, resulting in Mr. Duty’s conviction. Evidence of Mr. Duty’s innocence is as follows:

- **Mr. Duty had an alibi witness who could have provided critical information to suggest he was not the perpetrator:** Davis testified that on May 29, 2013, the day of the offense in this case, Duty was working with him at a painting job in the Riverside area of Jacksonville. (E.H. p. 24-25). They ended work between 3 p.m. and 4 p.m. and Davis dropped off Mr. Duty at the San Marco Exit off Interstate 95, about 10-13 minutes from their job site. (E.H. p. 25). At the time Mr. Duty exited the vehicle, he asked Davis for some cash and Davis gave him \$10. (E.H. p. 25). Davis testified that when he got out of the vehicle, Duty was shirtless and he left his cap in Davis’ vehicle. (E.H. p. 26). Davis

⁶ See The Innocence Project, The Causes, at <http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification> (last visited August 24, 2018) (noting that “[e]yewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide). Furthermore, a U.S. Department of Justice study of 28 cases in which individuals were wrongly convicted and later exonerated by DNA testing found that in every case, except for homicides, the victim(s) had misidentified the defendant prior to and at trial. See Edward Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 15 (National Institutes of Justice, Office of Justice Programs, U.S. Department of Justice) (1996). The Department of Justice report states, “[I]n the majority of these cases, given the absence of DNA evidence at trial, the eyewitness testimony was the most compelling evidence. Clearly however, those eyewitness identifications were wrong.” *Id.*

stated that about 30 minutes after he dropped off Mr. Duty off, law enforcement called him and told him they had arrested Duty for robbing a lady at knifepoint. (E.H. p. 26, 28). Davis identified phone records that indicated he received a blocked call at 4:32 p.m. the day of the incident. (E.H. p. 26-27). Davis indicated that he always thought the call was about 30 minutes after he dropped off Mr. Duty. (E.H. p. 42). Contrary to the description of the victim, Duty was not wearing a sweatshirt or a hat when apprehended and the perpetrator did not possess a backpack or a tool belt, which Duty had—but that Duty left Davis' car shirtless and actually left his own hat behind upon exiting the vehicle. Because the crime was completed before 3:37 p.m, which was before Mr. Duty was dropped off in the area by Fred Davis, and also because Mr. Duty did not match the description of the perpetrator, Mr. Duty could not have been the assailant.

- **The investigating Detective lied when he told the jury that Mr. Duty never gave him any names of alibi witnesses to investigate:** An interrogation video the jury never saw proves that Nieto said he was going to call Duty's boss to verify his alibi. Further, during the video, Mr. Duty asked the Detective thirteen times to call his boss. Duty consistently maintains his innocence in the video and has no idea how he could have been ensnared in a crime he did not commit. A transcript of the video is attached at Tab (C)
- **Police aggravated the circumstances of the already-suggestive show-up:** Officers 1) forced Duty to put on a shirt to look like the described assailant even though the fact that Duty was shirtless should have indicated to them that he wasn't the assailant, 2) asked Saam whether Mr. Duty looked like the person who robbed her, 3) surrounded Duty suggesting his guilt, and 4) moved him around so that he was facing Saam. Saam noted that Mr. Duty was dressed differently than her assailant, as Duty wasn't wearing the green hooded sweatshirt (which she called a jacket) and red ball cap worn by the assailant during the crime. (E.H. 50). When she told the law enforcement officer of these discrepancies, the law enforcement officer disregarded these differences and the victim testified she felt pressured to give a firm "yes or no" as to whether Duty was the assailant. (E.H. 50). Additionally, she stated that the assailant did not have a backpack but Duty did. (E.H. 51). She was uncertain. That uncertainty, coupled with the fact that Mr. Duty's appearance was at odds with her description, should have led law enforcement to believe they had the wrong person in custody. Instead, however, they used unduly suggestive tactics to force an identification and falsely inflate Saam's confidence in her identification.
- **Officers lied to the victim, making her feel more confident in her misidentification:** Saam asked officers during her interview if they found her stolen money. They told her, falsely, that they found narcotics in the backpack and wouldn't be surprised if Mr. Duty had spent the money. In fact, there were no drugs found in Duty's backpack. Saam stated that when she was told Mr. Duty had drugs on him, that she felt that was an explanation as to where her money had gone. (E.H. 56). She continued that this gave her confidence that she had identified the correct person. (E.H. 56). Most importantly, Saam testified at the postconviction evidentiary hearing that she had since learned that Fred Davis provided a statement that he dropped Mr. Duty off in the area of the crime around 4:00 p.m., and that Mr. Duty was shirtless and left his hat in the vehicle at that time. (E.H. 58-59). She stated that her confidence in the identification was shaken and had she known of this information

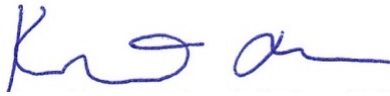
and that Dustin Duty did not have narcotics in his backpack in her deposition or at trial, she would not have been able to confidently make an identification. (E.H. 59). She also testified that she felt pressured into making an identification. (E.H. 59). The entire case turned on Ms. Saam's identification of Mr. Duty as the perpetrator. Without it, he would not have been tried and convicted.

Mr. Duty had the unfortunate circumstance of being in the wrong place at the wrong time, not unlike many wrongfully convicted individuals. The alibi evidence paired with the improper show-up identification, show that Mr. Duty did not commit the crime for which he was convicted.

RELIEF REQUESTED

Given his innocence, and the risk posed to him by the current COVID-19 health crisis affecting Florida's Department of Corrections institutions, we respectfully request you commute Mr. Duty's twenty-year sentence for armed robbery to time-served, and alternatively, should you believe it is warranted, grant a full pardon. This will ensure Mr. Duty's safety during this pandemic while we await further litigation steps related to the propriety of his conviction.

Respectfully submitted,



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Appendix

Affidavit of Fred Davis..... Tab A

Fred Davis’ phone records..... Tab B

Transcript of Dustin Duty interview with police..... Tab C

Transcript of postconviction evidentiary hearing..... Tab D

Certified copy of Indictment..... Tab E

Certified copy of Judgment and Sentence Tab F

Certified copy of Department of Corrections classification file⁷..... Tab G

Transition Plan..... Tab H

⁷ For ease of review, we’re providing a summary of the file, but can provide additional documentation upon request.

AMENDMENT
SENT AUGUST 7, 2020



Unlock the Truth

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August 7, 2020

ATTN: Michelle Whitworth
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Re: Innocence Project of Florida Clemency Application – DUSTIN DUTY

Dear Ms. Whitworth

On July 22, 2020, I filed five applications for executive clemency, including one for Mr. Dustin Duty.

I am writing to correct an error in the application. In our original application, we mistakenly noted that Mr. Duty had a mandatory minimum sentence; after receiving confirmation from DOC (enclosed), we can firmly state that he does **not** have a mandatory minimum sentence.

As such, he is eligible for review pursuant to Rule 8(A), as he has completed one-third of his 20-year sentence. We are still requesting expedited review pursuant to Rule 17.

I apologize for this error. Please feel free to contact me at the below phone number or email should you need additional information. I appreciate your time and attention.

Respectfully submitted,

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