

To be submitted by:
David Billingsley

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DAVID GREEN,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT
DAVID GREEN
Ind. No. 3611-2015

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT.....	iii
QUESTIONS PRESENTED	1
STATEMENT OF FACTS	2
ARGUMENT	6
DAVID GREEN’S SENTENCE WAS UNDULY HARSH AND EXCESSIVE BECAUSE HE STRUCK BACK AGAINST A PERSISTENT AGGRESSOR, AND MR. GREEN IS AGING AND IN POOR HEALTH, WARRANTING THE MINIMUM PRISON SENTENCE.....	6
CONCLUSION	14
ADDENDA.....	A1
Statement Pursuant to Rule 5531	A1
Printing Specification Statement	A2

TABLE OF AUTHORITIES

Cases

<i>People v. Crump</i> , 197 A.D.2d 414, 414–15 (1st Dep’t 1993)	8
<i>People v. Delgado</i> , 80 N.Y.2d 780, 783 (1992).....	6
<i>People v. Fernandez</i> , 84 A.D.3d 661 (1st Dep’t 2011)	6
<i>People v. Hill</i> , 34 A.D.3d 1130, 1132 (3d Dep’t 2006)	9
<i>People v. Matias</i> , 161 A.D.2d 292, 292 (1st Dep’t 1990)	7, 8
<i>People v. Notey</i> , 72 A.D.2d 279 (2d Dep’t 1980)	7, 13
<i>People v. Ocasio</i> , 110 A.D.3d 599, 599 (1st Dep’t 2013).....	9
<i>People v. Roldan</i> , 222 A.D.2d 132 (1st Dep’t 1996)	7, 8
<i>People v. Smith</i> , 222 A.D.2d 738, 738 (3d Dep’t 1995)	13
<i>People v. Walsh</i> , 101 A.D.3d 614 (1st Dep’t 2012)	9

Other Authorities

American Civil Liberties Union, <i>At America’s Expense: The Mass Incarceration of the Elderly</i> (June 2012)	10, 11
N.Y.S. Div. of Comm. Corrections & Supervision, <i>2012 Inmate Releases: Three Year Post-Release Follow-Up</i> (Dec. 2016)	11
Rachel Bedard, Lia Metzger, & Brie Williams, <i>Ageing prisoners: An introduction to geriatric health-care challenges in correctional facilities</i> , 98 Intl. R. Red Cross, 917-939 (2016)	10

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,

— against —

David Green,
Defendant-Appellant.

Ind. No. 3611-2015

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered on March 15, 2017, by Supreme Court, New York County. David Green was convicted after a guilty plea of one count of Manslaughter in the First Degree, N.Y. Penal Law § 125.20(1). Mr. Green received eight years in prison with five years of post-release supervision.

Justice Gregory Carro presided over the plea and sentencing. Timely notice of appeal was filed. No stay of execution has been sought. Mr. Green is currently serving his term of imprisonment.

QUESTIONS PRESENTED

Where David Green, an aging man in poor health, struck back against a persistent aggressor who died accidentally, was his prison sentence for manslaughter in the first degree of eight years unduly harsh and excessive?

STATEMENT OF FACTS

A. David Green Punched Alfredo Ramos After Mr. Ramos Swung at Him on the Subway, Causing Mr. Ramos to Fall, Hit His Head, and Die.

David Green recounted in a full statement to police that, on August 8, 2015, he encountered Alfredo Ramos on the platform of a subway stop. Written Summary of David Green's Statement attached to People's Voluntary Disclosure Form (hereinafter, "Green Statement") at

2. As Mr. Green helped a woman with a shopping cart up the stairs, Mr. Green saw Alfredo Ramos on the subway platform masturbating and making "kissing noises" toward passers-by. *Id.* Mr. Ramos began calling Mr. Green offensive names. *Id.*

Mr. Green confronted Mr. Ramos and told him to stop his disrespectful behavior. *Id.* Mr. Ramos responded by spitting and throwing punches at Mr. Green. *Id.* Mr. Green then warned him that if he hit did that again they would "have a problem." *Id.* Mr. Ramos punched at Mr. Green again. *Id.* As Mr. Green attempted to dodge him,

he was struck in the forehead. *Id.* Mr. Green then warned Mr. Ramos that if Mr. Ramos touched him again, Mr. Green would “hurt” him. *Id.*¹

Mr. Ramos swung at Mr. Green yet again. *Id.* Mr. Green punched Mr. Ramos two or three times using “jabs”, but only “as a way to distance himself.” *Id.* at 1-2. Mr. Ramos then “lunged” at Mr. Green. *Id.* at 1. Mr. Green ducked, and then returned with a “big punch” striking Mr. Ramos in the jaw, causing Mr. Ramos to fall backwards, hit his head and lose consciousness. *Id.* at 1-2. Mr. Green stated that he struck Mr. Ramos harder than at first so that Mr. Ramos “would leave [him] alone.” *Id.* at 2. After a few minutes, Mr. Green asked a station worker to get help, and left the station. *Id.* Mr. Ramos later died of his head injury. Crim. Compl. at 1. In his statement, Mr. Green admitted that “he should have just walked away,” and he was upset that he allowed himself to get into an altercation with Mr. Ramos. *Id.* at 1, 2.

On Sep. 14, 2015, Mr. Green was charged with manslaughter in the first degree, N.Y. Penal Law § 125.20(1), and resisting arrest, N.Y. Penal Law § 205.30. On March 1, 2017, Mr. Green pled guilty to

¹ The felony complaint alleged that a witness heard Mr. Green warn the aggressor, “[T]ouch me and I’ll break every bone in your body and I’ll take you down.” Crim. Compl. at 1. In his statement to police, Mr. Green denied making this statement. David Green Statement at 2.

manslaughter in the first degree, in exchange for a promised sentence of eight years in prison, with five years of post-release supervision, and received that sentence on March 15, 2017. P. 2-5; S. 3.²

B. Health, Substance Abuse and Criminal History

David Green was born on Sep. 12, 1957, and is now 61 years old. Presentencing Investigation Face Sheet (hereinafter, “PSI”) at 1. He has struggled with substance abuse for most of his life. At the age of nine, he was first given cocaine and wine by his uncle. Defendant’s Pre-Pleading Memorandum, dated Nov. 2, 2016 (hereinafter, “PPM”) at 1-2. After an injury during training led to his discharge from the Army in 1977, Mr. Green became severely depressed and fell deep into alcoholism and substance abuse. PPM at 3. It was during this time that Mr. Green, in his only previous felony, in 1980, shot and killed a man who had previously threatened him at a store where he worked, which had been robbed 13-14 times in the past. PPM at 3-4. In that case, Mr. Green pled guilty to manslaughter in the second degree and was sentenced to four to twelve years in prison. *Id.*

² Citations to “P” refer to the guilty plea on March 1, 2017. Citations to “S” refer to the sentencing on March 15, 2017.

While on parole, Mr. Green continued to struggle with substance abuse. PPM at 4. He began abusing crack-cocaine and heroin in the 1980s. *Id.* He was often homeless, and often in and out of jail on parole violations. *Id.* During this period he accumulated numerous misdemeanors convictions related to his substance abuse, including for criminal possession of a controlled substance, criminal trespass, fare-beating, petit larceny, and disorderly conduct. *Id.*; PSI at 3.

In more recent years, however, Mr. Green has been taking full advantage of programs to aid him in managing his sobriety, including those offered by the Fortune Society, HIV/AIDS Services Administration, HousingWorks, and U.S. Department of Veterans Affairs. PPM at 4.

Mr. Green suffers from diabetes, hypertension, cervical spondylosis, neuropathy and asthma. PPM at 4. He is also HIV-positive and sometimes requires a cane to walk. David Green Statement at 2; PPM at 4.

ARGUMENT

DAVID GREEN'S SENTENCE WAS UNDULY HARSH AND EXCESSIVE BECAUSE HE STRUCK BACK AGAINST A PERSISTENT AGGRESSOR, AND MR. GREEN IS AGING AND IN POOR HEALTH, WARRANTING THE MINIMUM PRISON SENTENCE.

David Green should have received the minimum prison sentence of five years. Mr. Green was defending himself against Alfredo Ramos's aggression. Mr. Green punched Alfredo Ramos only after Mr. Ramos ignored Mr. Green's other attempts to get him to leave him alone. In his statement to police, Mr. Green accepted responsibility for his part in Mr. Ramos's death. In addition, Mr. Green is aging and has serious health problems, making it an undue hardship to subject him to a lengthy prison sentence.

This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances . . . without deference to the sentencing court." *People v. Delgado*, 80 N.Y.2d 780, 783 (1992). The Court should consider "the nature of the crime, the defendant's circumstances, the need for societal protection, and the prospects for the defendant's rehabilitation." *People v. Fernandez*, 84 A.D.3d 661, 664 (1st Dep't 2011) (internal quotation omitted). The Court should also consider

these factors with a view toward imposing the "minimum amount of confinement" necessary. *People v. Notey*, 72 A.D.2d 279, 282-83 (2d Dep't 1980) (internal citation omitted).

This Court has reduced sentences in recognition of the reduced culpability of a defendant acting out of what he believed to be self-defense. *See People v. Matias*, 161 A.D.2d 292, 292 (1st Dep't 1990) (sentence was excessive where defendant was convicted of manslaughter after shooting the decedent, who "had a known history of threatening behavior directed at defendant and other tenants of [his] building..."); *see also People v. Roldan*, 222 A.D.2d 132, 136-141 (1st Dep't 1996) (sentence was excessive where defendant was a security guard who shot the decedent during a physical altercation, and decedent had been involved in numerous violent confrontations with security personnel in the past).

Here, Mr. Ramos provoked and physically attacked Mr. Green several times before Mr. Green punched him, and Mr. Green attempted unsuccessfully to respond proportionately. David Green Statement at 1-2. When Mr. Green demanded Mr. Ramos to stop masturbating publicly and making sexually aggressive gestures towards him and other

subway passengers, Mr. Ramos responded by trying to punch Mr. Green. *Id.* at 2. Not wanting to get into a physical altercation, Mr. Green warned Mr. Ramos to stop. *Id.* When Mr. Ramos persisted, Mr. Green punched Mr. Ramos “as a way to distance himself.” *Id.* When Mr. Ramos still persisted in attacking Mr. Ramos, it was only then that Mr. Green hit Mr. Ramos hard enough to cause him to fall over and hit his head, which proved fatal. *Id.* But the fatal blow was delivered only after Mr. Green’s efforts to respond proportionately to Mr. Ramos aggressive behavior had failed. As in *Matias* and *Roldan*, the fact that Mr. Ramos died was an unfortunately severe consequence of his forcing Mr. Green to feel that he needed to defend himself from a violent attacker.

This is not an excuse, as Mr. Green admitted that he “should have walked away,” but he certainly did not intend to kill Mr. Ramos. *Id.* Thus, Mr. Green’s culpability was significantly reduced. Mr. Green has also accepted responsibility for his part in the altercation by freely admitting his conduct in lengthy statements to the police following his arrest. *See, e.g., People v. Crump*, 197 A.D.2d 414, 414–15 (1st Dep’t 1993) (reducing sentence where “defendant freely accepted

responsibility for his actions, in his statements to the police and at sentencing”).

New York courts have also reduced sentences in the interest of justice due to a defendant’s advanced age and poor health, even in homicide or other very serious offenses. *See People v. Ocasio*, 110 A.D.3d 599, 599 (1st Dep’t 2013) (finding sentence for second degree murder excessive “[i]n view of defendant’s age and declining health”); *People v. Walsh*, 101 A.D.3d 614 (1st Dep’t 2012) (modifying defendant’s sentences as second felony offender to run concurrently with each other, in part due to his age and his poor health); *People v. Hill*, 34 A.D.3d 1130, 1132 (3d Dep’t 2006) (reducing defendant’s sentence for sexual abuse, in part due to his advanced age).

Mr. Green’s sentence is also unduly harsh because of his age and health status. Prisons are simply ill-equipped to handle the vastly increasing population of aging prisoners. Healthcare costs for aging prisoners are “staggeringly high” because of the increased need for staffing and healthcare, yet this typically only reflects the “constitutionally minimal level of care.” *See American Civil Liberties Union, At America’s Expense: The Mass Incarceration of the Elderly at*

28 (June 2012)³ (hereinafter, “Mass Incarceration of the Elderly”). This is because “[p]risons were designed with younger prisoners in mind and, as such, are often not suitably well-equipped to accommodate the varied needs of aging prisoners.” *Id.*; see also Rachel Bedard, Lia Metzger, & Brie Williams, *Ageing prisoners: An introduction to geriatric health-care challenges in correctional facilities*, 98 Intl. R. Red Cross, 917-939, at 919 (2016)⁴ (hereinafter, “Aging Prisoners”) (“Most correctional facilities were designed to restrict the liberty of young people, not to provide optimal care for the aged.”). Prison staff all too frequently “lack appropriate training and technical expertise and have not been properly trained to treat age-related illnesses, such as hearing loss, vision problems, arthritis, hypertension, and dementia.” *Mass Incarceration of the Elderly* at 28-29.

Aging prisoners also represent a drastically reduced public safety risk because they are not likely to re-offend, no matter what crime they have been imprisoned for. *Id.* at 21. From 1979-2004 nationwide, “a little over 2% of individuals ages 50-54 were arrested and almost 0% of

³ Available at https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf.

⁴ Available at <https://www.icrc.org/en/download/file/66200/irrc-903-12.pdf>

those age 65 and older were arrested.” *Id.* In the state of New York, from 1985-2012, when accounting for all prisoners of any age released between 1985-2012, 41.5% were returned to custody for a new offense or parole violation within three years, and 14.5% were returned for new offense. N.Y.S. Div. of Comm. Corrections & Supervision, *2012 Inmate Releases: Three Year Post-Release Follow-Up* at 16 (Dec. 2016).⁵ But for inmates aged 65 and over, both of these rates were much lower: only 14.7% were returned to custody for new offenses and parole violations, and only 3.9% were returned for a new offense. *Id.*

The combination of the increased health risks, ill-equipped facilities, and drastically reduced public safety risk from released inmates has led researchers to recommend various reforms that reduce the amount of time aging prisoners serve. For example, these may take the form of releasing aging prisoners earlier for medical reasons or enacting more lenient parole policies generally, or by reducing the lengths of sentence generally by repealing habitual offender and

⁵ Available at http://www.doccs.ny.gov/Research/Reports/2017/2012_releases_3yr_out.pdf

mandatory minimum laws. Aging Prisoners at 939; Mass Incarceration of the Elderly at 47-55.

Accordingly, this Court should allow Mr. Green to re-enter the community earlier. Mr. Green now is in his 60s, and he suffers from numerous major, chronic health problems, including diabetes, hypertension, cervical spondylosis, neuropathy and asthma, has trouble walking, and is HIV-positive. PPM at 4; David Green Statement at 2. As he continues to age, his health problems likely will worsen, and he may not be able to receive the care he needs in facilities that are not designed to handle people with his combination of age and medical infirmity.

Although Mr. Green has numerous misdemeanors and parole violations in his criminal history, his parole violations are from the 1980 and 1990s, when Mr. Green was struggling with severe substance abuse; accordingly the majority of his offenses are those commonly associated with thefts and misbehavior due to drug addiction. This case was not the result of Mr. Green's substance abuse, and at the time of the offense, Mr. Green was active in seeking treatment to stay clean by attending various substance abuse programs. *See People v. Smith*, 222

A.D.2d 738, 738 (3d Dep't 1995) (sentence reduced where drug addicted defendant "demonstrated commitment to rehabilitation" in part by "completing counseling classes and substance abuse programs"); PPM at 4. Mr. Green does have a previous manslaughter conviction. That case occurred 35 years prior to this one in unrelated circumstances, and during the earlier years of Mr. Green's substance abuse struggles. The several intervening decades and Mr. Green's efforts at rehabilitation and substance abuse treatment should reduce the weight of that case in this Court's determination of whether to reduce Mr. Green's sentence.

Given the Mr. Green's reduced likelihood of recidivism due to his age, his poor health, and Mr. Green's lessened culpability in defending himself, the "minimum amount of confinement necessary" is the statutory minimum prison term of five years. *Notey*, 72 A.D.2d at 282-83. Upon his release after serving that five years of imprisonment, Mr. Green still would remain under the supervision and control of DOCCS during his five years of post-release supervision. This Court should reduce his sentence in the interest of justice accordingly.

CONCLUSION

For the foregoing reasons, this Court should reduce Mr. Green's prison term to five years in the interest of justice.

Dated: New York, New York
February 20, 2019

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ADDENDA

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,

— against —

David Green,
Defendant-Appellant.

Ind. No. 3611-2015

Statement Pursuant to Rule 5531

1. The indictment number in the court below was 3611-2015.
2. The full names of the original parties were “The People of the State of New York” against “David Green.”
3. This action was commenced in Supreme Court, New York County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment rendered on March 15, 2017, by Supreme Court, New York County. David Green was convicted after a guilty plea of one count of Manslaughter in the First Degree § 125.20(1). Mr. Green received eight years in prison with five years of post-release supervision. Justice Gregory Carro presided over the plea and sentencing.
6. Mr. Green has been granted leave to appeal as a poor person on the original record and reproduced briefs.

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,

— against —

David Green,
Defendant-Appellant.

Ind. No. 3611-2015

Printing Specification Statement

1. The following statement is made in accordance with First Department Rule 600.10.
2. Mr. Green's brief was prepared with Microsoft Word 2010 with Garamond typeface 14 point in the body and 12 point in the footnotes.
3. The text of the brief has a word count of 2,360, as calculated by the processing system and is 14 pages.

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,

— against —

David Green,
Defendant-Appellant.

Note of Issue

Ind. No. 3611-2015

For the June 2019 Term

This is an appeal from a judgment rendered on March 15, 2017, by Supreme Court, New York County. David Green was convicted after a guilty plea of one count of Manslaughter in the First Degree § 125.20(1). Mr. Green received eight years in prison with five years of post-release supervision. Justice Gregory Carro presided over the plea and sentencing.

Notice of appeal filed: April 5, 2017
Record filed with Appellate Division: May 10, 2018

Note of issue filed by attorney for Defendant-Appellant.

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Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,

— against —

David Green,
Defendant-Appellant.

Affirmation of
Service

Ind. No. 3611-2015

David Billingsley, Esq., an attorney duly admitted to practice in the State of New York, hereby affirms the following under penalties of perjury:

1. I am associated with the Office of the Appellate Defender, which has been assigned to represent the defendant-appellant in the above-captioned case.
2. On February ___, 2019, I served a Note of Issue and Brief on the attorney for the respondent, the People of the State of New York, at the Office of District Attorney, One Hogan Place, New York, NY 10013 by mailing said copies in a depository designated by the United States Postal Service. Respondent has consented to service by mail on the date of filing.

Dated: New York, New York
February ___, 2019

David Billingsley

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,
— against —
David Green,
Defendant-Appellant.

Stipulation

Ind. No. 3611-2015

It is hereby stipulated and agreed, by and between the attorneys for Defendant-Appellant and Respondent, the People of the State of New York, that subject to the approval of the Court, that Defendant-Appellant's time to file a Brief in the above-captioned case be extended to March 18, 2019 for the June 2019 Term of the Court.

Dated: New York, New York
February __, 2019

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February 20, 2019

Clerk
Supreme Court of the State of New York
Appellate Division: First Department
27 Madison Avenue
New York, New York 10010

Re: People v. David Green
Ind. No. 3611-2015

Dear Madam:

I am submitting the following documents as part of the record on appeal:

1. Presentence Investigation Report, New York Cty. Indictment No. 3611-2015.
2. Defendant's Pre-Pleading Memorandum, dated Nov. 2, 2016.

These materials were not included with the record on appeal given to my office and are now being provided to this Court and the District Attorney under separate cover as part of the record in this case.

Sincerely,

David Billingsley
Staff Attorney

cc: District Attorney
New York County