THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0104

STATE OF NEW HAMPSHIRE

v.

BRIAN WATSON

DEFENDANT'S APPEAL PURSUANT TO RULE 7 FROM A DECISION OF THE BELKNAP COUNTY SUPERIOR COURT

BRIEF FOR THE DEFENDANT

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(15 minutes for oral argument)

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ISSUES PRESENTED

1. Whether the trial court erred by allowing Dr. Daniel Insenschmid to testify about the tests performed on evidence obtained at the scene of Mr. Tilton-Fogg's death, including the results of those tests, when Dr. Isenschmid did not handle, examine, or otherwise test such evidence or supervise those who actually did, thereby depriving Mr. Watson of his right to confront the witnesses against him as guaranteed by the 6th and 14th Amendments to the United States Constitution and Part 1, Article 15 of the New Hampshire Constitution. This issue was preserved by Mr. Watson's Motion to Bar Introduction Of Toxicology Results, filed with the trial court on July 29, 2016 and by contemporaneous objection at trial. TT 248.
2. Whether the sentence imposed by the trial court, 20 years to life with 5 years of the minimum suspended, was disproportionate given the nature of the offense, in violation of Part 1, Article 18 of the New Hampshire Constitution. This issue was preserved in Mr. Watson's Response to State's Sentencing Memorandum, filed on February 6, 2017.
3. Whether the trial court erred by not suppressing statements made by the Defendant, Brian Watson, when he had not made a knowing, intelligent and voluntary waiver of his right to remain silent as required by the 5th and 14th Amendments to the U.S. Constitution and Part 1, Article 15 of the New Hampshire Constitution. This issue was preserved in Mr. Watson's Motion to Suppress, filed on April 21, 2016.
4. Whether the trial court erred by not suppressing statements made after Brian Watson had attempted to end the interrogation and such attempts were not honored by the police officers involved in violation of by the 5th and 14th Amendments to the U.S. Constitution

and Part 1, Article 15 of the New Hampshire Constitution. This issue was also preserved in Mr. Watson's Motion to Suppress, filed on April 21, 2016.

STATEMENT OF THE CASE

After a jury trial, Mr. Watson was convicted of one count of Sale of a Narcotic Drug with Death Resulting.

At trial, the State introduced testimony from Dr. Daniel Isenschmid, who was qualified as an expert. Dr. Isenschmid testified about the results of tests performed by analysts in the lab where he works. However, he did not actually conduct any of the testing performed in this case, nor did he supervise the analysts who did. At trial he testified regarding the procedures generally used by the lab's analysts when testing samples. He testified that he did not witness such protocols actually being followed by the analysts at NMS Labs. He testified regarding the results of the lab analysts who had conducted those tests. By allowing Dr. Isenschmid to testify in this manner without the testimony of the analysts who actually conducted the tests of the samples in question, the trial court deprived Mr. Watson of his right to confront his accusers as guaranteed by the 6th Amendment to the U.S. Constitution.

After his conviction, Mr. Watson provided the trial court information on sentences received by similar defendants in the past few years here in New Hampshire. The trial court sentenced Mr. Watson to a stand committed term of 20 years to life with 5 years of the minimum suspended. This sentence is much more severe than the sentences received by other defendants in this State who were convicted of the same crime in the past few years. Given the disproportionate length of the sentence compared to other similarly situated defendants, it follows that Mr. Watson's rights under the New Hampshire Constitution were violated by the imposition of his current sentence.

Prior to trial, Mr. Watson moved to suppress statements he made while in police custody as he had not made a knowing, voluntary and intelligent waiver of those rights. During that interrogation, Mr. Watson attempted to stop the police questioning. However, the officers present at the interrogation would not allow him to do so. Instead, they continued to question Mr. Watson despite his efforts to end the interview. In doing so, the detectives violated Mr. Watson's rights under both the State and Federal Constitutions.

STATEMENT OF FACTS

Mr. Watson was arrested by officers from the Tilton Police Department on May 8th, 2015, for Sale of a Controlled Drug. Interview, p. 1. [1] He was informed of his "Constitutional Rights" and claimed to understand them. Id. He was interrogated at the Tilton Police Department after his arrest. Id. Prior to that interrogation, Det. Nate Buffington confirmed that Mr. Watson was "willing to sit here and listen to what [the officers] [had] to say." Id. The officers then told Mr. Watson that they had been investigating him for "selling drugs." Id. They then asked questions regarding where Mr. Watson lived, his children and their custody situation, and other people who lived or spent time at his home. See Id. 2-4.

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[1] Citations are as follows:
"Interview" refers to a transcribed copy of the interview of Mr. Watson conducted by Det. Buffington and Det. Kydd-Keeler of the Tilton Police Department on May 8, 2015. This transcript is listed as Appendix A in Mr. Watson's Motion to Suppress, filed on April 21, 2016.
"TT" refers to the trial transcript.
"Sent. Hrg." refers to the transcript of the Sentencing Hearing Before the Honorable James D. O'Neill, III, Judge of the Superior Court, held on February 7, 2017.
"Response to Sent. Memo" refers to Defendant's Response to State's Sentencing Memorandum, filed on February 6, 2017.
"Order" refers to the Order issued by the trial court on July 28, 2016 on Mr. Watson's Motion to Suppress (Hearing held July 20, 2016).
"State's Exhibit 17" refers to the Toxicology Report issued by NMS Labs on April 21, 2015.

After the officers had inquired into Mr. Watson's living arrangements, Det. Buffington reiterated the fact that they were at the police department "for a sales case." Id. 4. Det. Buffington told Mr. Watson that they (the officers) wanted "to learn [if] Brian Watson [was] selling drugs to go on extravagant vacations; to go on trips or [was he] trying to get buy." Id. Detective Buffington indicated that the police were interested in such things "[c]ause there's a big difference in what [they were] looking for." Id.

The interrogation continued, with Mr. Watson admitting he had started selling heroin "after [he] lost his job which was January 30th." Id., 5. Mr. Watson went on to state that he "had to fight off...foreclosures" and "everything else and [he was] trying to keep his home." Id. Mr. Watson recounted to officers how his use, as well as his girlfriend Teena Bryson's use, of heroin led to him selling heroin in an effort to maintain their habits and still satisfy his monthly financial obligations. See Id. 6-7.

As the questioning progressed, Det. Buffington asked Mr. Watson how many different people he sold heroin to, and Mr. Watson indicated the number was somewhere between five and ten. See Id. 7-8. Mr. Watson was asked about the logistics of how he procured heroin and if he was selling to anyone else. See Id. 10. He was also asked about the fact that "some of [his] text messages....talk[] about the Fentanyl that's in the heroin." Id. 11. When asked how he ascertained if any of the heroin contained fentanyl, Mr. Watson indicated that "[i]t has a different taste to it." Id. 12.

After interrogating Mr. Watson about his alleged sales of narcotics, Det. Buffington showed him a picture and asked if he could identify the person in the image. Id., 13. Mr. Watson indicated that he could not identify the person and Det. Buffington informed him it was a photograph of "Seth Tilton-Fogg dead." Id. Det. Buffington went

on to tell Mr. Watson that the picture of Mr. Tilton-Fogg "[i]s a result of your drugs." Id. Mr. Watson then attempted to speak but was cut off three different times by Det. Buffington, who told him "don't talk for a second. Okay." Id.

Det. Buffington then revealed part of the evidence the police had collected in this matter. See Id., 14. He told Mr. Watson to "listen to me for a second because where you go from here...is going to be very huge for the rest of your life." Id. Upon reiterating the fact that the police had obtained text messages as evidence against Mr. Watson, Det. Buffington cut him off again as he tried to respond and asked him about how Mr. Watson had learned of Mr. Tilton-Fogg's death. Id. Mr. Watson responded that he had learned from "Nick Chase." Id. Following that exchange, Mr. Watson continued to answer questions relating to the sale of drugs to Mr. Tilton-Fogg as well as his reactions to the news that he was found dead from what appeared to be a narcotics overdose. See Id. at 14-24.

At trial, Dr. Daniel Isenschmid testified regarding the results forensic toxicology testing performed on samples of Mr. Tilton-Fogg's blood. See TT, 243-285. He was qualified as an expert witness over Defense Counsel's objection, referencing its Motion to Bar Introduction Of Toxicology Reports. TT at 248. He offered an overview of the procedures that employees of the lab are required to follow when receiving, storing and testing for samples coming into the lab from another state. See TT 249-253.

Dr. Isenschmid was asked to identify a document marked as State's Exhibit 17. TT at 253. He identified the document as "the report that was issued on the toxicology testing of Mr. Seth Tilton-Fogg." Id. He was later asked if "based on his review of the analyst's work" he had "reach[ed] a conclusion as to the levels of toxic substances ...in

Seth Tilton-Fogg's blood." TT 256-257. Dr. Isenschmid said that he reviewed the analysts' work and found three compounds. Id. at 256-257. He stated that "[o]ne was a breakdown of marijuana, and then we also found fentanyl [and] its metabolite breakdown product norfentanyl." Id. at 257. When asked if he found anything in Mr. Tilton-Fogg's urine, Dr. Isenschmid responded "[w]e have a presumptive positive in urine for cannabinoids, which is marijuana, and then for opiates, which are drugs such as morphine, heroin , codeine, basically drugs within that class." Id. He testified that "the level of fentanyl [in Seth Tilton-Fogg's blood] was 21 nanograms per milliliter." TT 258. He also stated that "the norfentanyl concentration was 2.2 nanograms per milliliter." TT 260. He affirmed that the toxicology "report accurately reflect[ed] his conclusions or findings in this case." Id. at 257.

He stated that he "was not" asked to determine what caused Mr. Tilton-Fogg's death. Id. at 264. He then testified that he was "actually asked to review the toxicology findings from the blood samples and urine samples [he] received from the medical examiner." Id. During cross-examination, Dr. Isenschmid testified that he "did not do any of the laboratory work" associated with Mr. Watson's case. Id. at 265. He indicated that there were "12 people handling, at some point in time" the samples received from the medical examiner in this case. TT 267. He also testified that he is "not a supervisor of people in the laboratory." *Id.* Dr. Isenschmid stated that "the work [he] did on this case was to actually review all of the testing results that were generated by the laboratory." Id.

After his conviction, Mr. Watson was sentenced to 20 years to life in the New Hampshire State Prison, with 5 years of the minimum and none of the maximum suspended. See Sent. Hrg., p. 69. He was granted "pretrial confinement credit of 451

days." Id. He was also fined $250,000 and ordered to pay restitution to the family of Mr. Tilton-Fogg. See Id. at 69-70.

SUMMARY OF THE ARGUMENT

Mr. Watson was denied his right to confront the witnesses against him, in violation of his constitutional rights under both the State and Federal Constitutions. The State introduced testimony regarding the substances found in samples of Seth Tilton-Fogg's blood and urine through Dr. Daniel Isenschmid despite the fact that he did not perform or supervise any of the tests conducted on those samples. He testified generally to the quality control procedures, but did not testify that such procedures had actually been followed in the preparation and testing of the samples in this case.

Dr. Isenschmid did not testify that he had witnessed the analysts receive the samples. He did not say that he observed anyone performing the tests, calibrating the machinery, or otherwise insuring that quality control protocols were followed. Dr. Isenschmid indicated that at least twelve people had been involved in the receipt and testing of those samples. None of those people who actually handled the samples, tested the samples, and recorded the results of the tests testified at trial, thereby depriving Mr. Watson of his 6th Amendment right to confront his accusers.

The sentence imposed by the trial court in this matter was unconstitutional as it was disproportionate to sentences handed down for the same conduct. Mr. Watson was sentenced to the New Hampshire State Prison for 20 years to life, with 5 years of the minimum suspended. Evidence produced by Mr. Watson at sentencing indicated that number was excessively high in relation to sentences received by other defendants convicted of the same crime. This is especially true when considering the fact that Mr.

Watson's only criminal conviction is for a DWI. Mr. Watson received a 20 year sentence despite the fact that other recently convicted defendants who were engaged in interstate drug trafficking, violating terms of probation, or causing the deaths of multiple people received much less time for conviction on the same types of charges. Because he was sentenced so harshly in relation to others who committed the same offense yet had more substantial criminal records, Mr. Watson's rights under Part 1, Article 18 of the New Hampshire Constitution were violated.

Mr. Watson's rights were violated when he was interrogated without making a knowing, intelligent, and voluntary waiver of his right to remain silent. At the onset of his interrogation, the police indicated that they had gone over Mr. Watson's rights with him and he verbally agreed. He also agreed to listen to what the officers had to say to him at that point. There is no evidence, except the testimony of the arresting officers, that one of the rights which they spoke of with Mr. Watson was his right to remain silent. As such, there is no way to know for sure if Mr. Watson was actually informed of such rights. Given that the State did not prove, beyond a reasonable doubt, that Mr. Watson was actually informed of his right to remain silent, statements made by Mr. Watson during interrogation should be suppressed.

Mr. Watson's rights under Miranda v. Arizona, 384 U.S. 436 (1966), were also violated when his conduct indicated he wanted to end the interrogation at the Tilton Police Department. Police officers are required to end an interrogation if a suspect indicates in "any manner" that he wishes for questioning to cease. Id. at 473-474. In this case, the detectives initially questioned Mr. Watson about his alleged sale of drugs. However, once the topic turned to the death of Mr. Tilton-Fogg, Mr. Watson became

apprehensive about questioning. When he tried to speak, he was interrupted by the officers and told [d]on't talk for a second." Mr. Watson attempted to speak after that, but was cut off by detectives who were discussing the evidence they had already obtained and the gravity of the consequences he faced. Following that exchange, the Detectives immediately resumed the interrogation, despite Mr. Watson's attempts to cut off questioning when first confronted with photos of Mr. Tilton-Fogg.

LEGAL ARGUMENT

I. Mr. Watson was denied his right to confront the witnesses against him when the trial court allowed Dr. Daniel Isenschmid to testify as to the results of testing conducted by other analysts as NMS Labs.

In the present case, Mr. Watson was denied his right to confront the witnesses against him as guaranteed by the 6th Amendment to the U.S. Constitution. Mr. Watson was denied his confrontation rights when the State presented results from the testing performed on Mr. Tilton-Fogg's blood through a witness, Dr. Isenschmid, who did not participate in such testing.

As part of the investigation into Mr. Tilton-Fogg's death, the medical examiner sent samples of his blood and urine to NMS Labs for testing. According to Dr. Isenschmid, there were at least twelve people at the lab who were involved with the testing process or handled the samples in question. TT 267. He testified that he was not involved in the testing of the samples or the supervision of those who did. See Id. at 265. Neither the analysts who performed the testing nor their supervisors were called to testify regarding their findings. Dr. Isenschmid testified generally about the quality control procedures the lab employs when receiving and testing samples. See Id. 249-253.

However, he did not testify that he had witnessed such procedures being followed when the samples in this case were received and tested.

The U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." Amd. VI, *U.S. Const.* Under the New Hampshire Constitution, "[e]very subject shall have a right...to meet the witnesses against him face to face." Part 1, Art. 15, *N.H. Const.*

The U.S. Supreme Court held that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." Crawford v. Washington, 541 U.S. 36, 54 (2004). "Rather, the right...to be confronted with the witnesses against him, *Amdt. 6*, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* (internal quotations omitted). The Court held that "the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It **commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing it in the crucible of cross-examination.**" Crawford v. Washington, 541 U.S. 36, 61-62 (2004) (emphasis added).

In a case dealing with the confrontation of forensic analysts, the U.S. Supreme Court found that "[f]orensic evidence is not uniquely immune from the risk of manipulation." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009). The Court noted that "because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, the sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." Id., (internal brackets

omitted). The Court added that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." Id. "Confrontation is one means of assuring accurate forensic analysis. While it is true...that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst." Id. The Court further noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst but the incompetent one as well." Id., 319. It also stated that "there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology- the features that are commonly the focus in the cross-examination of experts." Id., 321. Furthermore, the Court held that "if a particular guarantee of the Sixth Amendment is violated, no substitute procedure can cure the violation, and no additional showing of prejudice is required to make the violation complete." Bullcoming v. New Mexico, 564 U.S. 647, 663 (2011).

The U.S. Supreme Court held that "the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Bullcoming v. New Mexico, 564 U.S. 647, 649 (2011). "The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.*, 652.

The Court noted that "[t]he Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like other constitutional

provisions – is binding, and we may not disregard it at our convenience." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009). It later held that "[i]f a particular guarantee of the Sixth Amendment is violated, no substitute procedure can cure the violation, and no additional showing of prejudice is required to make the violation complete." Bullcoming v. New Mexico, 564 U.S. 647, 663 (2011).

This Court has held that "[i]n the context of expert testimony, the Confrontation Clause is meant to prohibit experts from acting merely as transmitters of the testimony of others." State v. McLeod, 165 N.H. 42, 56 (2013). The Court found that "[s]o long as an expert applies his training and experience to the sources before him and reaches an **independent judgement,** ...the expert's opinion will be an original product that can be tested through cross examination, and thus will not violate a defendant's rights under the Confrontation Clause." Id. at 54 (emphasis in original)(internal brackets and quotations omitted).

Mr. Watson was denied his right to confront the witnesses against him when the trial court allowed Dr. Isenschmid to testify about the results of tests performed on Mr. Tilton-Fogg's blood and urine instead of requiring the analysts who actually conducted and/or supervised the testing to do so. This inability to cross-examine the actual analysts who performed the testing prevented Mr. Watson from inquiring as to whether or not the quality control procedures, spoken to generally by Dr. Isenschmid, were actually followed in the preparation and testing of the samples relating to this particular case or whether such testing was even performed.

Dr. Isenschmid provided information about the procedures that lab analysts at NMS Labs are supposed to follow when analyzing samples. See TT 249-253. However,

he did not testify that such procedures were followed in this particular case. He testified about how specimens are received by the lab. He testified that NMS employees "document the condition of the box, the seals, [and] the specimens themselves." TT 250. He stated that once that information is logged into a computer "the testing process begins, [and] the samples actually stay within the forensic specimen area." Id. He did not testify that he was the one who received the specimens in this case, documented their condition or logged them into the computer system.

Dr. Isenschmid stated that "to do the test, we actually get another tube, and we label that tube and a portion of that original sample is transferred to that label too on the chain of custody and that's what's taken to the laboratory of analysis." Id. He went on to say that "[t]he sample that goes for testing goes into the lab, and it's documented who made that transfer to the tube, and who received it." Id. He did not testify that he performed or witnessed the transfer of the samples or observe any amendments to the chain of custody documentation. Dr. Isenschmid stated that "finally, after all the laboratory testing is complete a toxicologist such as myself will then review the entire case in the context of all the work that was done to issue a final report that's provided back to the client." Id.

Dr. Isenschmid was asked to "tell the jury a little bit about the **actual testing on these particular samples**." Tr. 255 (emphasis added). He responded by stating that there are "basically three different screening tests we use." Id. 255-256. He stated that "one test for testing for alcohols" is "gas chromatography, and it's basically a system that's commonly used throughout forensic toxicology testing for basically alcohols." Id. He then stated that "another test, called immunoassay, which screens for classes of drugs, in

this case such as cannabinoids [are used] for the screening for marijuana." Id. He then explained that "the main thing we use in the expanded panel is an instrument called liquid chromatography time-of-flight mass spectrometry" and described it as "basically a technique, which we use to search for the actual molecular weight of a particular compound." Id. Still, while Dr. Isenschmid may have provided an overview of what tests **should have been performed**, his response did not indicate that he conducted the testing, supervised the testing, or otherwise witnessed the **actual testing performed on these particular samples**.

Dr. Isenschmid was asked about the review process associated with such testing. He testified that "when a test is done the initial person that reviews the results will check several things." TT 251. Dr. Isenschmid indicated that the person conducting this review "will check to see that the procedure was properly calibrated." Id. He stated that "the first person that reviews the data that comes off the instrument actually checks to make sure that all of the calibrations and controls worked properly so that in fact the case that was tested can be reported for the findings that were in it." Id. He did not testify that he had conducted or observed such a review or that he knew whether such a review had occurred in the manner he described.

He then testified that a "secondary review person...check[s] to see what all the data that the first reviewer put into the computer system was all properly transmitted and properly entered before those results can be released for review by a toxicologist." Id., 251-252. Dr. Isenschmid indicated he was the toxicologist who reviewed the data in this case. TT 252. He did not testify that a secondary review was actually conducted, who conducted that review, or that he had observed such a review. Nor did he verify that all

of the data that the first reviewer put into the system was properly transmitted and properly entered in this specific case.

Dr. Isenschmid was asked "[w]hat actual testing was done with respect to the samples in this case." TT 255. He replied that "the medical examiner requested that we do an expanded post-mortem toxicology panel. That tests for about 230 different drugs and alcohol. And that was done in this case." Id. However, as noted before, Dr. Isenschmid did not actually perform or oversee the testing of the samples in this case. For that matter, he did not review the findings of the tests until after they had (or should have) been reviewed by the first and second reviewers he described.

Dr. Isenschmid testified that testing showed that THC, fentanyl and norfentanyl were found in Mr. Tilton-Fogg's blood and urine samples. In doing so, he impliedly represented that the samples were received in the proper manner, that the samples were not compromised in any way, that certain tests were actually performed on those samples, that the machines used in the testing were properly calibrated, and that the analysts who performed the testing did so according to NMS Lab protocols and provided accurate and honest results. Such "representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination." Bullcoming v. New Mexico, 564 U.S. at 660. Yet Mr. Watson was unable to cross-examine **anyone** who performed or witnessed such tests and reviews as the State did not produce them. Instead, Dr. Isenschmid was allowed to relay the findings of the analysts to the jury despite the fact that he was not involved in the process of receiving the samples, testing the samples or recording the results of those tests.

The State did not call the analyst(s) who tested the samples in this case. Of it had, Mr. Watson would have had the opportunity to ask them about their observations at the time of testing. He could have inquired about the integrity of the sample. He could have asked if the tests were performed pursuant to lab protocols. He could have asked the analyst(s) if they actually conducted certain tests. Because the analyst(s) were not called, Mr. Watson was denied his right to confront the witnesses against him.

When asked, on cross, if he knew whether any of the analysts who worked with the samples in this case had any disciplinary issues, Dr. Isenschmid that "[i]t's something the quality assurance department would know, and they would deal with." TT 266. Thus, Dr. Isenschmid conceded that he could not vouch for the credibility of any of the dozen or so people who had been involved in testing the samples in this case. Had Mr. Watson been allowed to cross-examine the analysts who actually handled the samples and tested them, he would have been able to question them, not only about their interactions with the samples and testing devices, but also about past issues regarding competency or disciplinary problems as well.

Dr. Isenschmid affirmed that "based on the analysis of Seth Tilton-Fogg's blood [he] could...conclude that [Mr. Tilton-Fogg] had ingested fentanyl." TT 262. However, this conclusion was not an independent judgement reached when he applied his training and experience to the data. The first page of the report that Dr. Isenschmid referred to in his testimony lists the compounds reportedly found in Mr. Tilton-Fogg's blood (Delta-9 Carboxy THC, Fentanyl, Norfentanyl, Opiates and Cannabinoids), the amounts of such substances (measured in nanograms per milliliter), and the "matrix sources" of the sample (blood or urine). See State's Exhibit 17. The only expertise needed to reach the

conclusion that Mr. Tilton-Fogg had ingested fentanyl was the ability to read at a grade school level. As such, Dr. Isenschmid was not offering his own independent opinion, rather, he was "merely acting as a transmitter for testimonial hearsay." State v. McLeod, 165 N.H. 42, 52 (2013).

Because the State did not produce the analyst(s) who actually conducted the tests used as evidence against Mr. Watson, he was denied his constitutional right to confront his accusers face-to-face.

II. The trial court erred when it imposed a sentence disproportionate to the nature of the offense for which Mr. Watson was convicted.

Mr. Watson was given a sentence of 20 years to life in the New Hampshire State Prison, with 5 years of the minimum suspended. The New Hampshire Constitution states "[a]ll penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason." Part 1, Art. 18, *N.H. Const.*

The sentence handed down by the trial court in this matter was disproportionate to other sentences recently received by similarly situated defendants in this state. Mr. Watson cites multiple cases in his Response to State's Sentencing Memorandum. Mr. Watson received a sentence of 20 years to life, stand committed with 5 years of the minimum suspended, despite the fact that his prior record consists only of a conviction for DWI.

Meanwhile, the defendant in State v. Kevin Manchester, (226-2016-CR-0187), only received a sentence of 10-40 years for the sale of illegal drugs with death resulting. See Response to State's Sent. Memo. In that case, the defendant "had a significant prior

record and actually was involved [in the] interstate sale of fentanyl between New Hampshire and Massachusetts." Id.

The defendant in State v. Michael Millette, (215-2015-CR-0203), was "convicted of sale of a controlled drug with death resulting" and was sentenced to "10 to 30 years in the New Hampshire State Prison, with 2 ½ years off the minimum." Id. In State v. Jennifer Landry, (218-2013-CR-0063), the defendant was "convicted of sales of a controlled drug with death resulting, two (2) counts of violation of probation and possession of a controlled drug" yet was only sentenced to a term of "8 years to life." Id. Also, in State v. Kristie Naplitano, (211-2009-CR-0310), the defendant was convicted of conspiracy to distribute methadone with death resulting, bail jumping, violation of probation and issuing bad checks. Id. She received a sentence of 6 to 12 years in the New Hampshire State Prison. See Id. In State v. Lorant Dosi, (218-2010-CR-1999), the defendant was sentenced to 8 to 20 years in prison for a death resulting from drug sales despite having "a significant drug history and violations of probation." Id.

In State v. Edward Costello, (211-2008-CR-0013), the defendant received a 15-40 year with 2 years of the minimum suspended. See Id. It was known that Mr. Costello was "a significant distributor of drugs." Id. Mr. Costello was found to have distributed drugs to "Jeremy Copp, who later sold those drugs to the deceased." Id. The defendant in State v. Jeremy Copp, (211-2008-CR-0014), was sentenced to 5 to 15 years in the New Hampshire State Prison for death resulting from sales on drugs. Id.

Two of the longer sentences cited in Mr. Watson's sentencing response saw the imposition of 15-year minimum sentences. In one of those, State v. Benjamin Bundy, (217-2016-CR-0532), the defendant was actually responsible for the death of two (2)

individuals. Id. Meanwhile, in State v. Karen Mekkelson, (211-2011-CR-0158), the defendant "originally...received a 15 to 30 year sentence, which was vacated when new evidence was discovered that someone else was involved in the distribution as well." Id. Ms. Mekkelson's sentence was later "reduced to 3 ½ to 7 years at the New Hampshire State Prison." Id.

The facts in this case, viewed in relation to aforementioned cases, make it clear that the 20 year sentence imposed by the trial court is disproportionate to other sentences handed down for the same conduct. Unlike the defendants in Manchester and Costello, Mr. Watson does not have a significant criminal history. In fact, except for this offense, he has no prior drug convictions at all.

Though Mr. Watson's bail was revoked, he did not attempt to jump bail as did the defendant in State v. Kristie Napolitano. Nor was he found guilty of violating probation as was that defendant in that case or the defendants in State v. Jennifer Landry or State v. Lorant Dosi.

By all accounts, Mr. Watson was not a major distributor of drugs. The evidence provided indicates that he only sold to about five (5) people. State's Sentencing Memorandum, para. 7. He had only been involved in such activities for about two months prior to his arrest. Interview at 11. There is no evidence that Mr. Watson ever crossed state lines in either the purchase or sale of any drugs. As such, he should not be compared to other defendants who have been engaged in such activities for longer periods of time over a larger geographical area.

Mr. Watson did have his bail revoked for having contact with Teanna Bryson, however, such revocation is no more serious than the violations of probation committed

by multiple defendants who later received shorter sentences that Mr. Watson for death resulting convictions. See Response to State's Sent. Memo. That the defendants in those cases violated probation shows that they were under the supervision of the Department of Corrections when they committed other offenses. Despite those facts, none of the defendants cited in Mr. Watson's response who had violated probation was sentenced to a minimum term of more than ten years in prison as a result of convictions for Sale of Drugs with Death Resulting. See Id.

The defendant in State v. Benjamin Bundy is one example cited where the sentence resembles Mr. Watson's: 15 years to life. See Id. However, that defendant was actually found responsible for the death of **two** people, not just one as in Mr. Watson's case. In State v. Mekkelson, the trial court imposed a 15-year minimum for a death resulting from the sale of drugs. This sentence "was vacated when new evidence was discovered that someone else was involved in the distribution [of the drugs] as well." Id. at para. 3(k). For that matter, someone else was involved in the distribution of drugs in this case as well.

At trial, Det. Buffington testified that Teanna Bryson was "definitely" responsible for setting up the first drug deal with Mr. Tilton-Fogg. TT at 521. He stated that a Facebook message from March 22, 2015, was "no doubt...Teanna communicating with Seth." TT at 522. He testified that she "refer[red] to the material that she's trying to sell as fire." Id. He testified that she was responsible for "telling Seth the prices." Id. When asked by Defense Counsel if Teanna was "in control of this whole deal" from March 22nd and 23rd (2015), Det. Buffington replied "yes, 100 percent." Id.

At Mr. Watson's sentencing hearing, Det. Nate Buffington agreed, on cross-examination, that "it was Teanna Bryson, a known individual to the deceased in this case, that actually set up the first deal" with Mr. Tilton-Fogg. Sent. Hrg. at 24. He affirmed that Teanna Bryson "indicated to Seth that it was her phone number that she was giving to Seth, even though it comes up as Brian [Watson]." Id. at 25. Det. Buffington also conceded that "she was actually knowledgeable of the product and she was actually pitching the product to Seth" in the week or two prior to his death. Id.

Teanna Bryson testified that she initiated contact with Mr. Tilton-Fogg on Facebook and offered to supply him with drugs. See TT 306-7. She also stated that she told him "I am good and deliver, and it's the best shit you will ever do. It's beyond fire." TT 307. When asked on why she contacted Mr. Tilton-Fogg she replied "[i]t was my idea, but I was doing it to get rid of stuff for [Brian Watson]." Id.

Based on testimony both at sentencing and at trial, it is clear that Teanna Bryson was, at the very least, involved in the distribution of the drugs that resulted in Mr. Tilton-Fogg's death. According to testimony from Det. Buffington, it is clear that Ms. Bryson was involved in not only marketing the product to prospective buyers, but also in setting the prices, determining the quantity, and facilitating the meetings where the transactions took place.

To the extent that the involvement of another person in State v. Mekkelson warranted the vacation of that defendant's sentence, then the same logic should hold true for Mr. Watson given the evidence of Ms. Bryson's extensive involvement in the distribution of the fentanyl to Mr. Tilton-Fogg.

The New Hampshire Constitution states that "[w]here the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses." Part 1, Art. 18, *N.H. Const.* Mr. Watson's response to the State's sentencing memo highlights the distinctions between him and others who have been convicted of the same offense. As noted, Mr. Watson is not a major drug distributor nor one who has been active for a long period of time. Furthermore, his criminal record is negligible when compared to many of the other defendant's cited in his response. Given his lack of criminal history, the small scale and timeframe of his distribution and the fact that his sales were facilitated by another person, Mr. Watson's sentence is disproportionate to sentences received by others convicted of the same crime who do have substantial criminal records or who have been involved in large scale (or interstate) drug trafficking for a longer period of time.

The trial court's sentence essentially sends the message that Mr. Watson is the worst of the worst as far as defendants who have been convicted of the same crime. However, that simply is not the case. Mr. Watson was involved in distribution to a small group of people, in an attempt to make ends meet and support a recently formed habit. He was not involved in interstate drug trafficking to a large group. He was not on probation at the time of the offense. He was not a felon nor had he ever served time in prison. He was not convicted of causing multiple deaths as a result of drug sales. Therefore, he should not be sentenced any more harshly than a similar defendant who was involved in interstate drug trafficking. He should not be sentenced to more time than similar defendants who have been convicted of violating probation and bail jumping.

His sentence for causing the death of one person should not be greater than the sentence received for causing the death of two people. If anything, he should be sentenced to less than a 15 year minimum, especially when considering his lack of criminal history and the nature of his distribution, i.e. to friends and acquaintances of him and Teeana Bryson, and that fact that Ms. Bryson was instrumental in helping him set up sales.

III. Mr. Watson did not make a knowing, intelligent and voluntary waiver of his right to remain silent.

The U.S. Constitution states that "[n]o person shall be...compelled in any criminal case to be a witness against himself." Amd. V, *U.S. Const.* This provision is applicable to the State of New Hampshire through the 14th Amendment to the U.S. Constitution. The New Hampshire Constitution provides that "[n]o subject shall be...compelled to accuse or furnish evidence against himself." Pt. 1, Art. 15, *N.H. Const.* This right to be free from self-incrimination is commonly referred to as the right to remain silent.

Before commencing a custodial interrogation, police officers are required to inform persons of their constitutional right to remain silent and have an attorney present during questioning. See Miranda v. Arizona, 384 U.S. 436 (1966). "[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). The Court identified interrogation as any "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." Id., 301.

A suspect may waive these rights "provided the waiver is made voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444. The Court later held that "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent." North Carolina v. Butler, 441 U.S. 369, 375-

376 (1979). However, under the New Hampshire Constitution, there is a presumption "that a defendant does not waive any constitutional rights, and a heavy burden rests with the State to prove otherwise." State v. Gravel, 135 N.H. 172, 176 (1991). It is "the State's responsibility to prove beyond a reasonable doubt that the defendant voluntarily, knowingly and intelligently waived his constitutional rights." Id. at 178.

In order to prove that a defendant properly waived his rights, the State must show that the waiver was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 413, 421 (1986). A court may find that a suspect's Miranda rights have been waived "[o]nly if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension" regarding such a waiver. *Id.* The U.S. Supreme Court also held that "the mere fact" that a defendant "signed a statement which contained a typed-in clause stating that he had full knowledge of his legal rights does not approach the knowing and intelligent waiver required to relinquish constitutional rights." Miranda, 384 U.S. at 492 (internal quotations omitted).

The present case lacks even a writing signed by Mr. Watson indicating he had been informed of his rights and properly chose to waive them. Det. Buffington only mentioned going over Mr. Watson's rights while he was being arrested. Interview, 1. Mr. Watson indicated that he understood the rights that were discussed. Id. While one might assume the discussion of Mr. Watson's rights dealt with his Miranda rights, there is no evidence indicating the nature of the rights alluded to by Det. Buffington. As noted before, the State is required to prove the "requisite level of comprehension" on Mr.

Watson's part in order for the Court to find the right properly waived. Moran v. Burbine, 475 U.S. at 421. The State has not provided evidence of such comprehension.

The only evidence provided is a vague statement made by Det. Buffington about going over Mr. Watson's "Constitutional Rights" on the side of the road. Interview at 1. At a suppression hearing, Det. Kydd-Keeler testified that he informed Mr. Watson of his Miranda rights. See Order at 4. Det. Buffington testified that "he observed Det. Kydd-Keeler read the defendant his rights, but that he could not remember specifically hearing the defendant's responses." Id. Thus, nothing in the text of the interview or testimony of the officers indicates to what extent, if any, Mr. Watson actually understood those rights as they related to his situation at the time. As such, Mr. Watson's waiver of his right to remain silent cannot be considered knowing and intelligent. Therefore, any statements made during the interrogation, and any evidence obtained as a result of such interrogation, must be suppressed.

Mr. Watson did not indicate by speech or conduct that he wished "to open up a more generalized discussion relating directly or indirectly to [further criminal] investigation." Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983). Assuming, *arguendo*, that Mr. Watson was properly informed of his Miranda rights and comprehended such rights enough to make a valid waiver of such rights, he never indicated that he actually wished to answer any of the detective's questions. Mr. Watson was asked if he was "**willing to sit here and listen to what [the detectives had] to say.**" Interview, 1 (emphasis added). Though Mr. Watson responded affirmatively to that request, he "did not evince a willingness and a desire for a generalized discussion about the investigation." State v. Gravel, 135 N.H. at 179. Mr. Watson merely agreed to listen to

what the detectives had to say. The detectives never said that they would be asking Mr. Watson questions after he listened to them. They never asked him if he would be willing waive his right to remain silent and answer their questions or if he wanted an attorney present. Instead, they asked him to listen to what they had to say. By simply agreeing to listen to the detectives, Mr. Watson did not waive his right to remain silent.

As noted earlier, a defendant is not presumed to waive any rights and the burden is on the State to prove otherwise. Id. at 176. Mr. Watson's willingness to listen to the officers should not be construed as a waiver of his right to remain silent. Indeed, the act of effectively listening to someone (generally) requires silence on the part of the person who is listening. Thus, a suspect who has only expressed a willingness to listen to a detective has indicated that he desires to remain silent (so that he may hear what is said). Even if such willingness to listen is not considered an invocation of the right to remain silent, the fact remains that Mr. Watson never made a valid waiver of his right to remain silent. Because such a waiver cannot be presumed, the State is required to prove both that Mr. Watson waived his rights and that such a waiver was voluntary, knowing and intelligent. The State has not proven that any waiver by Mr. Watson, was both uncoerced and made with the required level of comprehension of his rights. Therefore, any statements made by Mr. Watson while in custody must be suppressed as such evidence was obtained in violation of his constitutional rights.

IV. Mr. Watson's right to cut off questioning was not scrupulously honored by the detectives who interrogated him after his arrest.

In deciding *Miranda*, the U.S Supreme Court held that "[i]f the individual indicates in **any manner**, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.*, 473-474 (emphasis added). In a

subsequent case, the Court concluded "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was scrupulously honored." Michigan v. Mosley, 423 U.S. 96, at 104 (1975) (internal quotations omitted). The New Hampshire Supreme Court has "similarly concluded that whenever a suspect in custody exercises his option to cut off questioning, the police must scrupulously honor the suspect's desire to remain silent." State v. Gribble, 165 N.H.1, at 10 (2013).

In Mosley, the defendant was informed of his Miranda rights and indicated that he did not want to talk about certain robberies for which he was under investigation. Upon his doing so, the detective "immediately ceased the interrogation, and did not try to either resume the questioning or in any way persuade Mosley to reconsider his position." *Id.*, at 104. Later, "[a]fter an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder." *Id.* At that interrogation, "[h]e was given full and complete Miranda warnings" and "thus reminded again that he could remain silent and could consult with a lawyer." *Id.*

In holding that the defendant's rights in Mosley had not been violated, the Court found that it was "not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Id.*, 105-06. Unlike Mosley, here the police refused to stop an interrogation when Mr. Watson indicated that he wanted to. Instead, the officers persisted in attempting to elicit incriminating responses from Mr. Watson.

Mr. Watson was arrested for sale of a narcotic drug and initially interrogated about that charge. Assuming, *arguendo*, that Mr. Watson knowingly, intelligently and voluntarily waived his right to remain silent, the fact still remains that his right to cut off questioning was not scrupulously honored. As such, any statements made after the introduction of the photo of Mr. Tilton-Fogg should be suppressed.

The first twelve (out of twenty-four) pages of the transcribed interview with Mr. Watson were devoted solely to the sales charges. See Interview 1-12. When the detectives showed Mr. Watson a picture of Mr. Tilton-Fogg, the nature of the interview changed and Mr. Watson's hesitation to answer such questions is noticeable in the text of the interview. Interview at 13.

Prior to being shown the picture of Mr. Tilton-Fogg, Mr. Watson had been somewhat cooperative with the detectives. However, once he was shown the image, Det. Buffington stated that Mr. Tilton-Fogg's death was a result of Mr. Watson's drugs. Id. At that point, Mr. Watson tried four different times to speak, yet Det. Buffington refused to let him finish any of his sentences. See Id. While Det. Buffington was telling him to not "talk for a second", he did not remind him of his right to remain silent or otherwise review the Miranda warnings with him. Instead, he ordered Mr. Watson to remain quiet while he reviewed some of the evidence regarding the new allegations, launched into a monologue aimed at pressuring him into speaking about such allegations, and then resumed the interrogation about the death of Mr. Tilton-Fogg. Id. at 13-14.

Mr. Watson's right to cut off questioning was not scrupulously honored in this case, as required under Miranda. It should be noted that the officers had no issue with him speaking and did not interrupt him throughout the first half of the interview. See

Interview, pp. 1-12. Mr. Watson was cooperative during that time. However, when the topic turned from sales of drugs to death resulting from drugs, Mr. Watson clearly became uncomfortable. He tried to say something to the detectives, but to no avail. Det. Buffington interrupted him multiple times and never let him finish his sentence. Id. at 13. Thus, while he never expressly said he wanted to quit the interview, the fact remains that he never got a chance to. If he was trying to stop the interrogation, such an effort was futile as Det. Buffington obviously had no intention of stopping. Regardless of what was said, Mr. Watson's conduct indicated that he was not comfortable speaking about the death of Mr. Tilton-Fogg. Under Miranda officers are required to stop an interrogation if a suspect indicates "in any manner" that he wishes for the interrogation to cease. Miranda v. Arizona, 384 U.S. at 473-474. In this case, the detectives refused to give Mr. Watson a chance to end the interrogation, even though he displayed obvious apprehension at going forward. Such apprehension, at the very least, indicated that Mr. Watson was uncomfortable talking about the death of Mr. Tilton-Fogg. As such, the police should have allowed him to speak instead of speaking over him and cajoling him into continuing the interrogation.

Instead of allowing Mr. Watson to finish his sentences after being shown the photo of Mr. Tilton-Fogg, Det. Buffington spoke to him in a way designed to pressure him into continuing to speak. Id. Among other things, Det. Buffington told him to "be very careful" and that "where you go from here...[i]s going to be very huge for the rest of your life." Id. After that, the interview continued, despite the fact that Mr. Watson had previously indicated a level of discomfort at discussing such matters. Therefore, because

he was not allowed to stop the interview, any statements made by Mr. Watson after the being shown the photo of Mr. Tilton-Fogg must be suppressed.

CONCLUSION

Mr. Watson's right to confront his accusers in open court was denied when the State was allowed to introduce reports of toxicology reports through an individual who did not actually conduct the tests or at least observe the performance of such tests. As such, he was denied his right under both the State and Federal Constitutions to cross-examine those involved in producing or procuring the evidence used against him at trial. The witness the State did provide had no direct knowledge of whether required protocols were actually followed.

The sentence imposed in this case is disproportionate to sentences handed down for those convicted of similar offenses. Mr. Watson was sentenced to a term of imprisonment that far exceeded recent sentences imposed on defendants convicted of the same crime. He received that sentence despite the fact that he has almost no criminal history, that Teanna Bryson was instrumental in the distribution of the drugs, and that most of his customers, if not all, were actually friends and acquaintances of Ms. Bryson. Because he was sentenced so harshly in relation to others convicted of the same offense, Mr. Watson's sentence is disproportionate to the nature of the offense and should be deemed a violation of Part 1, Article 18 of the New Hampshire Constitution.

Mr. Watson's right were violated when the detectives in this case interrogated him without first obtaining a valid waiver of his right to remain silent. While the State produced evidence that Mr. Watson had been read his rights, it did not prove beyond a reasonable doubt that he understood such rights. As such, any waiver cannot be

considered knowing, voluntary and intelligent. Therefore, this Court should suppress statements made by Mr. Watson during his interrogation at the Tilton Police Department.

Mr. Watson's rights were also violated when the detectives refused to stop the interrogation even though his actions indicated that he did not want to talk about the death of Mr. Tilton-Fogg. Once confronted with a photo of Mr. Tilton-Fogg, Mr. Watson tried on multiple occasions to say something to the officers, yet was cut off while detectives tried to keep the interrogation going. He eventually gave in to their ploy and resumed talking with them, making inculpatory statements that were used against him. Because his right to cut off questioning was not scrupulously honored, the Court should suppress statements made in violation of this right.

REQUEST FOR ORAL ARGUMENT

Mr. Watson requests 15 minutes of oral argument before the full court.

Respectfully Submitted,

BRIAN WATSON
By his attorney

August 23, 2017

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CERTIFICATE OF SERVICE

State of New Hampshire
Merrimack County, SS.

I, Mark L. Sisti, hereby certify that two (2) copies of the foregoing Brief were forwarded on this 23rd day of August, 2017 to Steven Fuller, Esq. of the Attorney general's Office, 33 Capital Street, Concord, NH 03301.

Mark L. Sisti, Esq.

SUPPLEMENT
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THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. SUPERIOR COURT

State of New Hampshire

v.

Brian Watson

Docket No. 15-CR-163

ORDER

Hearing held (7/20/16) on the defendant's Motion to Suppress (filed 4/21/16) and the State's Objection to same (filed 4/29/16). Subsequent to review, the Court renders the following determination(s).

By way of brief background, the defendant, Brian Watson, stands indicted on one (1) count of Sale of a Controlled Drug Death Resulting, contrary to RSA 318-B:26, IX, and one (1) count of Sale of a Controlled Drug, contrary to RSA 318-B:2, I.[1] Jury selection is scheduled to commence on Monday, August 1, 2016. The defendant moves to suppress evidence purportedly unlawfully obtained, and the State objects.

BACKGROUND

During the course of the suppression hearing, the Court received the testimony of Detective Bryan Kydd-Keeler ("Detective Kydd-Keeler") and Detective Corporal Nathan Buffington ("Corporal Buffington"), both of Tilton Police Department ("TPD"). The Court also received various exhibits into evidence. Based on the above, the Court finds the following relevant facts.

[1] This matter has been consolidated for trial with the case docketed 211-2015-CR-164, in which the defendant stands indicted on one (1) count of Possession of a Controlled Drug, also contrary to RSA 318-B:2, I.

On May 8, 2015, at around 5:30PM, Detective Kydd-Keeler and Corporal Buffington made contact with the defendant, who was driving on School Street in Tilton, New Hampshire. The officers, who were driving an unmarked police cruiser, activated their blue lights and stopped the defendant's vehicle. Detective Kydd-Keeler, who was riding in the passenger's seat of the cruiser, exited the cruiser and made contact with the defendant. Detective Kydd-Keeler informed the defendant that he was under arrest on an active warrant for Sale of a Controlled Drug and asked the defendant to exit his vehicle. The defendant complied, and Detective Kydd-Keeler cuffed him with his hands behind his back. Detective Kydd-Keeler conducted a pat-down search of the defendant's pants and then informed the defendant that he was going to inventory the defendant's vehicle before having it towed. While Detective Kydd-Keeler was making this initial contact with the defendant, Corporal Buffington called in the traffic stop.

Detective Kydd-Keeler informed the defendant that he was going to read the defendant his constitutional rights. Detective Kydd-Keeler did so using a "Miranda Warning" card that he kept in his wallet. See (St.'s Ex. 2) (example of card). This card contained a list of five individual rights, see (id.), and Detective Kydd-Keeler read the defendant each right, one at a time. After reading the defendant each right, Detective Kydd-Keeler asked the defendant if he understood the right that he had been read. The defendant indicated that he understood each right in question.

Corporal Buffington then made contact with the defendant. Corporal Buffington informed the defendant that law enforcement was aware that the defendant had picked up drugs in Manchester, New Hampshire, earlier that day, and asked the defendant whether there were drugs in the vehicle. While on the side of the road, the defendant indicated that he was an out-of-work engineer and that he was temporarily selling drugs to make ends meet.

The defendant was then transported to the Tilton Police Station by a transporting officer and was placed in a holding cell. Detective Kydd-Keeler and Corporal Buffington arrived a few minutes later. Corporal Buffington booked the defendant, at which time he indicated to the defendant that he was being charged with Sale of a Controlled Drug. At that time, law enforcement was also investigating the charge of Sale of a Controlled Drug Death Resulting, but neither Corporal Buffington nor Detective Kydd-Keeler informed the defendant of this fact.

While booking the defendant, Corporal Buffington asked the defendant whether he wanted to speak with law enforcement. At first, the defendant indicated that he "wasn't sure." A few moments later, Corporal Buffington asked the defendant again whether he wanted to speak with law enforcement, and the defendant agreed to do so. Corporal Buffington and Detective Kydd-Keeler brought the defendant to an interview room. At the hearing, both officers described the interview room as a small room with a table and three chairs.

Corporal Buffington started to interview the defendant. At the outset of this interview, Corporal Buffington and the defendant had the following exchange:

> CORPORAL BUFFINGTON: Brian, you are here at the police department. You are in custody. You were arrested today for sales of a controlled drug. You were arrested on the side of the road. During that time, Detective Keeler and I did go over your constitutional rights with you, correct?
>
> DEFENDANT: Yes.
>
> CORPORAL BUFFINGTON: Okay, and you understood all of those rights at the time?
>
> DEFENDANT: Yeah.
>
> CORPORAL BUFFINGTON: And understanding those rights, you're willing to sit here and hear what we have to say, correct?
>
> DEFENDANT: Yep.
>
> CORPORAL BUFFINGTON: Okay.

(St.'s Ex. 1.)[2] Corporal Buffington then conducted an interview of the defendant. During the first portion of the interview, Corporal Buffington focused his questions on the charge for Sale of a Controlled Drug. The defendant made several potentially inculpatory statements with respect to this charge.

Midway through the interview, Corporal Buffington showed the defendant a photograph of a deceased body. Corporal Buffington indicated to the defendant that law enforcement had evidence demonstrating that the individual depicted in the photograph died as a result of drugs that the defendant sold to him. This was the first time that Corporal Buffington or any other law enforcement officer indicated to the defendant that he was a suspect in an investigation into a potential Sale of a Controlled Drug Death Resulting charge. The remainder of the interview focused on the death of this individual and the defendant's potential involvement. During this time, the defendant made several inculpatory statements. After the interview, the defendant was arrested on the Sale of a Controlled Drug Death Resulting charge.

At the suppression hearing, Corporal Buffington and Detective Kydd-Keeler testified substantially to the above. Detective Kydd-Keeler testified that in reading the defendants his rights, he followed the same procedure that he does in every case. For his part, Corporal Buffington testified that he observed Detective Kydd-Keeler read the defendant his rights, but that he could not remember specifically hearing the defendant's responses. Both officers conceded, however, that they never had the defendant fill out or sign a waiver of rights form.

Both Detective Kydd-Keeler and Corporal Buffington further testified that the defendant was not handcuffed during the interview and that the defendant did not seem overly emotional or angry during the interview. The officers also estimated that no more than a half hour passed

[2] State's Exhibit 1 is an audio recording of the interview of the defendant conducted by Corporal Buffington and Detective Kydd-Keeler at the Tilton Police Station on May 8, 2015. To the extent quoted herein, this interview has been transcribed by the Court based on this audio recording.

between when the defendant was initially arrested and when the interview at the Tilton Police Station commenced. The interview itself took approximately a half hour from start to finish. See (id.).

DISCUSSION

The defendant seeks to suppress evidence purportedly obtained in violation of his rights under Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, the defendant seeks to suppress any inculpatory statements that he made during his interview with Corporal Buffington and Detective Kydd-Keeler, contending that he did not knowingly, voluntarily, and intelligently waive, among other things, his rights to remain silent and to have an attorney present. The State objects and contends that the defendant knowingly, voluntarily, and intelligently waived these rights.

The Court first addresses the defendant's arguments under the State Constitution and cites federal precedent only to aid in its analysis. State v. McKenna, 166 N.H. 671, 676 (2014), cert. denied, 135 S. Ct. 1504 (2015) (citing State v. Ball, 124 N.H. 226, 231–33 (1983)). "As a general rule, two conditions must be met before Miranda . . . warnings are required: (1) the suspect must be 'in custody'; and (2) [he] must be subject to 'interrogation.'" In re B.C., 167 N.H. 338, 342 (2015) (citing Miranda v. Arizona, 384 U.S. 436, 478 (1966)). Here, the parties do not dispute that the defendant was subject to a "custodial interrogation" as contemplated by our precedent at the time he gave the statements in question.

Under Part I, Article 15, before the State may offer statements made by the defendant during a custodial interrogation into evidence, it must "prove beyond a reasonable doubt that the defendant was warned of his constitutional rights, that he waived those rights, and that any subsequent statements were made knowingly, voluntarily and intelligently." State v. Zwicker,

151 N.H. 179, 186 (2004) (citation omitted). "To be considered voluntary, a confession must be the product of an essentially free and unconstrained choice and not extracted by threats, violence, direct or implied promises of any sort, or by exertion of any improper influence." Id. (citation omitted).

Upon review, the Court concludes that the State has demonstrated beyond a reasonable doubt here that the defendant was read his Miranda rights. It is undisputed in the record that Detective Kydd-Keeler read the defendant these rights from the "Miranda Warning" card that he kept in his wallet. Indeed, Detective Kydd-Keeler stated that the followed the same procedure with the defendant that he follows every time he reads an individual his Miranda rights, and Corporal Buffington testified that he personally observed Detective Kydd-Keeler reading the defendant his rights. As such, the Court finds that the State has proven beyond a reasonable doubt that the defendant was warned of his constitutional rights in this case.

The Court further finds that the State has demonstrated beyond a reasonable doubt that the defendant waived his constitutional rights, and that his statements were made knowingly, voluntarily, and intelligently. Detective Kydd-Keeler testified that after reading the defendant each right, he asked the defendant if he understood the right in question and that the defendant responded in the affirmative. Similarly, at the start of the interview, Corporal Buffington asked the defendant whether the officers had gone over the defendant's constitutional rights, whether the defendant understood all of those rights, and whether the defendant was willing to "sit here and hear what we have to say." The defendant answered in the affirmative to each of those questions and proceeded, during the course of the interview with the officers, to make several inculpatory statements. Based on this evidence, the Court finds that the defendant's waiver of

his rights and the statements that he ultimately made during the interview were knowing, voluntary, and intelligent.

The defendant raises, either explicitly in his motion or implicitly through his questioning at the suppression hearing, several arguments as to why he believes his statements should be suppressed. First, the defendant contends that his statements were not knowing, voluntary, and intelligent because neither Corporal Buffington nor Detective Kydd-Keeler informed him that they were actively investigating him with regards to a potential Sale of a Controlled Drug Death Resulting charge when they commenced the interview. Alternatively, the defendant seemingly argues that he should have been reread his Miranda rights at the point when focus of the interview shifted from the Sale of a Controlled Drug charge to the Sale of a Controlled Drug Death Resulting investigation. This argument is unavailing in light of our established precedent, as our Supreme Court has specifically stated that Miranda imposes no requirement upon law enforcement to "warn about the specific charges that prompt the questioning." State v. Jones, 125 N.H. 490, 493 (1984) (citing United States v. Campbell, 431 F.2d 97 (9th Cir.1970)); see also State v. Pyles, 166 N.H. 166, 169 (2014) (quoting Jones, 125 N.H. at 493). As such, it was not improper for Corporal Buffington and Detective Kydd-Keeler to question the defendant regarding a Sale of a Controlled Drug Death Resulting without first informing the defendant that they suspected him of that offence.

Next, the defendant contends that the State has failed to meet its burden beyond a reasonable doubt here because Corporal Buffington and Detective Kydd-Keeler never had the defendant fill out a waiver of rights form. The Court is unaware of any precedent that requires the production of such a form in order for the State to prove that a suspect was read his rights and that his waiver was valid. Instead, a court must reach this determination based upon a totality of

the circumstances. See State v. Plch, 149 N.H. 608, 617 (2003) (citation omitted) ("Whether a waiver was knowing, intelligent and voluntary is determined by the totality of the circumstances."). The Court finds that the State has met its burden here based on the totality of the circumstances for the above-stated reasons.

The defendant argues that his statements during the interview should be suppressed because neither Corporal Buffington nor Detective Kydd-Keeler reread the defendant his Miranda rights prior to commencing the interview. The Court is, once again, unaware of any precedent supporting such a requirement. And to the extent that such precedent did exist, it could only be supported in the context where a considerable amount of time passed between when a suspect was initially read his rights and when the interview took place. Here, the defendant was read his rights just a half hour prior to the start of the interview. And prior to commencing the interview, Corporal Buffington specifically asked the defendant whether he remembered having been read his rights and whether he understood same. In light of these circumstances, the Court accordingly finds that there was no need for Corporal Buffington or Detective Kydd-Keeler to reread the defendant his rights before starting the interview.

The defendant contends that Corporal Buffington and Detective Kydd-Keeler's failure to ask him whether he was willing to answer questions during the interview means that any statements he gave were not knowing, voluntary, and intelligent. To this end, the defendant notes that Corporal Buffington asked him whether he was "willing to sit here and hear what we have to say" rather than whether he was willing to answer questions. The defendant seemingly contends that this is not enough to support a finding of a valid waiver. The Court disagrees. It was objectively clear, under the circumstances, that Corporal Buffington and Detective Kydd-Keeler intended to conduct an interview of the defendant when they brought him into the

interview room. Indeed, Corporal Buffington indicated that he asked the defendant during booking whether he was willing to speak with law enforcement. That Corporal Buffington did not specifically ask, once in the interview room, whether the defendant was willing to answer questions does not invalidate the defendant's waiver of his rights or otherwise render any of the statements that he have involuntary. As such, this argument also fails.

Finally, the defendant contends that his allegedly equivocal statements, including his statement during booking that he "wasn't sure" whether he wanted to speak with police, constitute an invocation of his right to remain silent. The Court disagrees. In State v. Sundstrom, 131 N.H. 203 (1988), our Supreme Court held that a suspect's equivocal statements of "I don't know" and "there's no hurry" in response to an officer asking whether the suspect wanted a lawyer present did not constitute an invocation of that suspect's right to counsel. See id. at 206–08. In Sundstrom, the Court noted that officers may not actively discourage or thwart a defendant from exercising his constitutional rights, but also need not actively clarify equivocal statements made by the suspect. Id. at 207. Here, as in Sundstrom, the officers did not coerce the defendant into speaking against his will, but instead deferred to the defendant as to whether he wished to invoke any of his rights under the Part I, Article 15. As such, his equivocal statements did not, in and of themselves, rise to the level of an invocation of such rights.

In light of the above, the Court is not persuaded by any of the defendant's arguments in favor of suppression. As such, the Court finds that the defendant's statements here were knowing, voluntary, and intelligent.

CONCLUSION

In sum, the Court finds that the State has proven beyond a reasonable doubt that the defendant was read his Miranda rights, that he waived such rights, and that his statements to

Corporal Buffington and Detective Kydd-Keeler were knowing, voluntary, and intelligent. Consequently, the Court finds no basis to suppress these statements. The defendant's Motion to Suppress is accordingly DENIED, consistent with the above.

SO ORDERED.

7/28/16
Date

James D. O'Neill, III
Presiding Justice