State of New Hampshire
Supreme Court

No. 2017-425

2017 TERM

DECEMBER SESSION

State of New Hampshire

v.

Reilly Leith

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM SUPERIOR COURT

BRIEF OF DEFENDANT REILLY LEITH

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STATEMENT OF FACTS

On September 21, 2013, Stephanie Boucher, a loss prevention officer employed by Kohl's in Newington, New Hampshire, was at work monitoring security cameras. Tr. 30-31. At about 6:25 p.m., she observed a female, later identified as Reilly Leith, enter the store with a large, red bag that appeared to be fairly empty. Tr. 32. Leith selected some junior shirts and pants and appeared to place the items in her cart without looking at the price tags. Tr. 32. She then walked to the beauty and jewelry department and selected some high-end beauty products. She appeared to look at the price tags before placing the items in her cart. Tr. 33-34. After this, she walked to the accessories and intimates department and selected some bras and placed them in her carriage. Tr. 34. As Leith headed for the misses department, Ms. Boucher's associate, Jessica Desjardins, cleaned out all the female fitting rooms, starting with the rooms closest to the misses department. Tr. 34. Leith selected some jeans and entered the misses fitting room. Tr. 35. After about 40 minutes, Leith left the fitting room and walked out of the store without paying for the merchandise. Tr. 37. Ms. Boucher confronted Leith on the sidewalk outside the store and identified herself as Kohl's loss prevention. Leith accompanied Boucher to the loss prevention office. Tr. 37. Leith apologized and returned the merchandise, including some clothing she had been wearing. Tr. 38. Boucher then gathered Leith's information, wrote a statement, and burned a copy of the surveillance video. Tr. 39. Boucher also prepared a document entitled, "Kohl's Evidence Inventory Form" that contained the quantity, description, and "value" of the items allegedly taken. Tr. 42; State's Exhibit 4. Soon after Boucher gathered this information and evidence, the police arrived. Boucher provided the information and evidence to the police. Tr. 82. Leith was arrested for Theft. Tr. 121.

STATEMENT OF THE CASE

On May 3, 2017, Leith was tried by a jury on one count of Theft By Unauthorized Taking. Tr. 1, 9. The Indictment alleged that (1) Reilly Leith knowingly, (2) exercised unauthorized control over various items including clothing and accessories, (3) the property of Kohl's, (4) said merchandise being valued in excess of $1,000, (5) with a purpose to deprive the owner thereof. Tr. 9.

From the start, Ms. Leith questioned whether the value of the items exceeded $1,000.

> So why that's important in this case is because we're talking about Kohl's and I'm sure some of you or all of you have shopped at Kohl's and the list price, the retail price, that they refer to in their opening statement is not necessarily what you pay at the cash register . . . There's no evidence in this case that they ran it through a cash register or did a price check to see what the actual sales price of those items were. And that's really the issue in this case, we're talking about $174 if you find beyond a reasonable doubt that they proved the full value in excess of $1,000 then you're going to have to return a – or you're going to be instructed that you should return a verdict of guilty. . . But if you decide that the state hasn't proven that beyond a reasonable doubt, if they haven't met that threshold of in excess of $1,000 then you're going to have to – the instructions say that you must return a verdict of not guilty. Do you understand that?

Tr. 29. When it came time to prove value, the state relied exclusively on State's Exhibit 4, a document entitled, "Kohl's Evidence Inventory Form." State's Ex. 4.

> Q When you took all of the property, what did you do when you took the property?
>
> A I gathered the evidence in inventory form and matched the tickets pertaining to the merchandise and gathered the product price for it and put it on an inventory form.
>
> Q And I'm handing you what has been pre-marked as State's Exhibit 4 for identification purposes. What is this document?
>
> A This is a list of all the evidence that was taken on September 21st, 2013.
>
> Q Who created this document?

A I did.

Q When did you create the document?

A On September 21st.

Q And is it a fair – this document has two pages?

A Yes.

Q And are both pages there?

A Correct.

Q Is this a fair and accurate copy of the document you created?

A It is.

Mr. Ollis: The State moves to strike ID and admit as a full exhibit, Your Honor.

Tr. 42-43.

Ms. Leith objected.

Mr. Hansen: I look at these and it has a price list on the right side. She just testified that she obtained those prices by checking the price tag – by looking at the price tag of the article and putting the price down.

The Court: Uh-huh.

Mr. Hansen: at least that's my understanding. So – first of all, there hasn't been – first of all, there's been no foundation established that she knows anything about prices of the articles other than what was on the retail price tag, so she is reading from a price tag.

The Court: Uh-huh.

Mr. Hansen: That's an out of court statement offered – and they're offering it to prove the value of the item which is a material element of the offense. That's hearsay. The price tag is – she's testifying to – the price tag is hearsay and she's testifying about what the price tag said, so that's hearsay, that's actually hearsay within hearsay. There's also – so that's the first objection. The second objection is, it's not – there's been no foundation shown regarding relevance. There's been no testimony that the

> retail price accurately reflects the sales price or the fair market value of the items, that's an additional objection . . .
>
> Third objection is they're basically trying to establish – they're actually trying to prove the contents of the price tag and that's a best evidence (sic). If you're going to prove a contents of a writing (sic), the original writing must be supplied.
>
> In addition to that there's a Sixth Amendment right to confrontation under the Sixth Amendment to the U.S. Constitution, Part 1, Article 15 of the New Hampshire Constitution. I can't cross-examine her – they're basically offering price tag evidence without offering the price tags. I can't cross-examine a price tag, so that inhibits my – I can't effectively cross-examine this witness as (sic) all if you let this stuff in. And so I would object to this exhibit or any testimony about these prices being elicited.
>
> The Court: Okay.

Tr. 43-45. Initially, the State claimed that State's 4 was not being offered for the truth of the matter asserted, i.e., the value of the items. Tr. 45-46. But after a break in the case, the State suggested that State's 4 would be admissible as a Business Record Exception pursuant to Rule 803(6). Tr. 49. After an extended discussion, Tr. 49-55, the trial court initially sustained Ms. Leith's hearsay objection. "[I]n terms of this document (State's 4) and I don't know what other questions you might be asking Ms. Boucher, I'm going to sustain the objection from the Defense until I hear a proper foundation." Tr. 55. But after an offer of proof from the State about price tags being "affixed by corporate," and the fact that the Inventory Form is created regardless of prosecution and given to corporate and to the police if needed, the trial court decided to allow the State to establish foundation pursuant to Rule 803(6). Tr. 56.

> Mr. Hansen: Just – that doesn't even come close to overcoming the issue here. The only knowledge that this witness has of the price are the price tags that are affixed by corporate.
>
> The Court: I understand what – your argument, but I'm going to allow it and you have your objection and you can feel free to appeal it.

. . .

> The Court: Under the exception 803.6 – so under 803.6 the Court finds that it is – based upon the offer of proof, business records exception and if they are able to establish the foundation that would be my ruling, but we'll see, I don't know what her answers are going to be or what questions will be asked.

Tr. 56-57. The State then attempted to lay a foundation. Tr. 58-71. On cross-examination, Ms. Boucher explained that she compiled the list of merchandise on State's 4 using the price tag or ticket on the clothing and/or merchandise. Tr. 75. She explained that the retail price tags are set by corporate and/or the vendors and that she did not have access to that information. Tr. 76. Nor did she have access to wholesale or retail price lists. Tr. 76. And she would not have known whether the merchandise was mismarked because she is not involved in ordering items. Tr. 77. Furthermore, she had no control over pricing. Tr. 77. And would not have known whether any of the items on State's 4 (Evidence Inventory Form) would have actually sold at the ticket or list price. Tr. 78. She testified that Kohl's sells clothing at "various clearance prices" from 30% to 90% off list price. Tr. 79. Moreover, with respect to State's 4 (Evidence Inventory Form), she testified that Kohl's prepares such a form in all shoplifting cases, recovered and non-recovered. Tr. 81. But they do not fill out the form if the shoplifter gets away with clothing with tags still attached. Tr. 82. They call the police soon after apprehending the shoplifter. Tr. 82. They do not fill out the form for merchandise less than $25 unless the individual has a child or weapon with them. Tr. 83. But all cases over $25 are prosecuted. Tr. 83. She clarified that when she referred to the price not changing, Tr. 62, she was referring to the retail or ticket price. Tr. 83. She testified that Corporate makes decisions about the actual sales price of an item. Loss prevention is not involved in setting the actual sales price. Tr. 84. She admitted that of the 30 items listed on State's 4 (Evidence

Inventory Form), she would not have known which items were on sale, except for premium products which do not go on sale. Tr. 84. She then clarified that only 5 out of the 30 items were premium products and would not have been on sale. Tr. 85. And she would not have known the actual sales price of the remaining 25 items, Tr. 86, because "Regardless of management our corporate level handles the pricing. They don't discuss or elaborate why items are priced certain prices or when they go on sale." Tr. 86. She also explained that prices can and are lowered by the onsite manager of Kohl's through the use of electronic signage. Tr. 93-95. Ms. Boucher concluded her testimony by explaining that the actual sales price of any item would not be known to either her or a cashier until actually scanned through the register.

> Q Okay. And at the – the cashier – based on your training and experience, the cashier, would they know that the item is on sale at that point?
>
> A Yes. At the register the items display a star next to the price as well as the original price plus the sale price.
>
> Q Okay.

Tr. 97. At the conclusion of Ms. Boucher's testimony, the State again tried to admit State's 4 as a full exhibit. Tr. 98. In response, Ms. Leith again objected. She objected based on relevance because there was no evidence that the price tags accurately reflected the actual sales price or market value of the items. Tr. 98. She objected based on hearsay, Tr. 98, and argued that the State had failed to establish a sufficient foundation for the Form to be admitted as a business record. Tr. 99. She objected based on best evidence. Tr. 102. She again objected to State's 4 based on her right to confrontation pursuant to the 6th Amendment and Part 1, Article 15, Tr. 104, and argued that the trial court's ruling amounted to burden shifting in violation of the 14th Amendment and Article 1, Section 15 of the New Hampshire Constitution. Tr. 104.

At the conclusion of the evidence, Ms. Leith moved to dismiss based on sufficiency of the evidence. Tr. 131.

SUMMARY OF ARGUMENT

When the trial court admitted State's 4 (Kohl's Evidence Inventory Form) on the issue of value, it did so in violation of several rules of evidence – relevancy, hearsay, best evidence, as well as Ms. Leith's constitutional right to confrontation, and by doing so, engaged in unconstitutional burden shifting.

When the trial court denied Ms. Leith's Motion to Dismiss based on sufficiency of the evidence, it erred because no rational trier of fact could have found the items were worth more than $1,000, even viewing the evidence in a light most favorable to the State.

ARGUMENT

Issues on Appeal

I. In a felony shoplifting case, whether the trial court erred when it admitted testimony and documentary evidence of price on the issue of value ($1,000 threshold) even though neither the clothes nor price tags were admitted in evidence, and over defendant's hearsay, best evidence, foundation, and 6th Amendment/Part 1, Article 15 (confrontation) objections, and whether, in doing so, the trial court engaged in unconstitutional burden shifting in violation of the 5th and 14th Amendments to the U.S. Constitution, and Part 1, Article 15 of the New Hampshire Constitution. TR 43-45, 98-104.

Hearsay, Competence, et al.

In this case, Ms. Boucher had no personal knowledge regarding value, one of the essential elements of the offense. In Stevens v. State, 262 P.3d 727 (Nev. 2011), the Supreme Court of Nevada reversed and remanded a conviction for grand larceny because a loss prevention officer "testified, over the defense's foundation, hearsay, and best evidence objections, that the stolen goods he recovered bore price tags adding up to $477. Neither the price tags nor duplicates of them were offered or admitted." Id. 729.

> An owner of property may testify to its value, at least so long as the owner has personal knowledge, or the ability to provide expert proof, of value. What the owner is not allowed to do is merely repeat another person's valuation. However, non-owners who are called to testify to property value must have some personal knowledge on which to base their estimate. Reading from the price tag on an item is not sufficient. Thus, absent foundation, most courts have held that the testimony of a security officer is incompetent to prove the value of stolen goods when it is based on the officer's recollection of the prices written on the price tags, because the security officer has no knowledge of the pricing system.

Id. at 731 (citations, ellipsis, quotations omitted).

In this case, Ms. Boucher did not even testify based on her own recollection of the price tags. Therefore, she was not a competent witness under the rules of evidence. The State did not even attempt to refresh Ms. Boucher's recollection. The State simply offered the Evidence Inventory From, an out of court statement, to prove the matter asserted – value.

Even in States that have considered a hearsay exception for price tags, it has been done based on a rationale that does not apply in this case. For example, in Robinson v. Commonwealth, 516 S.E.2d 475 (Va. 1999), the Virginia Supreme Court stated that

> [W]e think the common-sense approach to the problem is to recognize an exception to the hearsay rule in shoplifting cases permitting the admission into evidence of price tags regularly affixed to items of personalty offered for sale or, in substitution, testimony concerning the amounts shown on such tags when, as in this case, there is no objection to such testimony on best evidence grounds. While such evidence, when admitted, would suffice to make out a prima facie case of an item's value, the accused would retain full opportunity to cross-examine adverse witnesses and to present rebutting evidence on the issue of value. For example, if a store conducts a sale but computes the reduced price at the cash register rather than marking the change on the price tag, an accused would be entitled to rely upon the reduced price as evidence of the item's value.

Id. at 479. However, arguably, this holding is based on a faulty premise, as the dissent points out. But if not faulty, one that certainly does not apply in this case. In Robinson, the court stated that

> It is common knowledge that department and other stores regularly affix price tags to items of merchandise and that the tagged price is what a purchaser must pay to acquire an item, without the opportunity to negotiate a reduced price or to question how the tagged price was reached. Under these circumstances, the inherent unreliability of hearsay is not present. Therefore, it would be unreasonable and unnecessary to require that in each case a merchant must send to court not only a security person but also other personnel to establish the reliability of the information shown on a price tag affixed to an item that has been stolen.

Id. at 478 (citation and quotation omitted). However, in this case, the underlying rationale does not apply. The merchant in this case is Kohl's, a store generally known to sell merchandise at a 30% to 90% discount. Tr. 79. Contrary to the assumption in Robinson, someone who shops at Kohl's will generally not pay the price affixed to the goods being sold, as evidenced by this case where 25 out of 30 items were not necessarily being sold at the price affixed to the item, and prices are controlled by an onsite manager who manipulates the actual price by electronic signage without the knowledge of loss prevention or store cashiers who do not know what the actual price is until the item is scanned at the cash register. Tr. 93-97.

Burden Shifting

Even in Robinson, almost 20 years ago, the dissent described the faulty logic and suggested that by crafting such an exception to hearsay, the court had engaged in burden shifting.

> The majority effectively shifts the burden of proving the value of the merchandise at issue in a grand larceny shoplifting prosecution from the Commonwealth to a criminal defendant. In declaring that the "tagged price" of merchandise constitutes prima facie proof of its value, the majority essentially requires a criminal defendant to prove his innocence by disproving unreliable evidence of value. The majority apparently has not attended a "red dot" sale at Hecht's Department Store, the retail merchant involved in this appeal. It is common knowledge that, at these and other comparable sales, price tags often bear three or four different price markings. Under such circumstances, price tags are, if anything, an inherently untrustworthy form of evidence.

Id. at 479. The majority opinion in Robinson also assumes that the State's witnesses are competent to testify about the "reduced price at the cash register." Id., supra at 479. In the case at bar, the State did not produce any witnesses who would have been competent to testify about the actual sales price at Kohl's. Ms. Boucher specifically disqualified herself as that witness. According to Ms. Boucher, however, either the onsite manager at Kohl's or the cashier could have testified to the actual sales price of the various items in question. Requiring Ms. Leith to establish actual value, as opposed to retail value, amounted to burden shifting in violation of the duce process clauses in the State and Federal Constitutions. U.S. Amends. 5 & 14; Pt. 1, Art. 15.

Business Records Exception

The Kohl's Evidence Inventory Form (State's 4) should not have been admitted pursuant to N.H. R. Evid. 803(6), Records of Regularly Conducted Activity, because no one with knowledge of pricing transmitted the information to the Form. And even though Ms. Boucher testified that these forms are prepared in most shoplifting cases, most people do not shoplift. Therefore, the record (Evidence Form) is not a record "kept in the course of a regularly conducted activity" in the traditional sense. See State v. O'Maley, 156 N.H. 125, 136 (2007) ("Traditionally, the historical business records exception did not encompass records prepared for use in litigation, let alone records produced *ex parte* by government agents for later use in criminal prosecutions). Finally, the State failed to establish that "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness," pursuant to 803(6)(E). In this case, a loss prevention officer, whose job and continued employment and advancement rest upon her success in apprehending and prosecuting shoplifters created the record after investigating and apprehending Ms. Leith for

shoplifting. The circumstances surrounding the creation of the Evidence Inventory Form in this case are akin to a police officer investigating and prosecuting a case and are exactly why there is a law enforcement exception the Rule 803(8), Public Records exception to the hearsay rule. In addition, the "source of information" under 803(6)(E), i.e., the price tags were shown to be inherently unreliable and lacked the requisite trustworthiness contemplated by the rule.

Best Evidence

In Jennings v. Commonwealth, 779 S.E.2d 864 (Va. Ct. App. 2015), the court reversed and remanded two felony convictions for grand larceny based on best evidence. In Jennings, a loss prevention officer was permitted to testify, over defendant's best evidence objection, about the price tags attached to some jeans. The "Commonwealth did not offer a price tag into evidence, nor did [the loss prevention officer] testify about any knowledge of the price of the jeans, other than what she read on the price tags." Id. at 866.

In its opinion, the Jennings court cited to the Robinson decision, supra, and noted that

> The portion of this holding permitting testimony about price tags came with an explicit caveat, limiting it to situations where there is no objection to such testimony on best evidence grounds. This caveat is relevant here, because [the defendant] made just such an objection. Because he made that objection, the Commonwealth was required to admit the price tags themselves, or present some explanation for their absence.
>
> More recently, a panel of this Court decided Watkins v. Commonwealth, 1558-13-1, (Va. Ct.App. July 22, 2014). That case involved facts remarkably similar to those we confront today. In Watkins, the appellant was accused of stealing several pairs of jeans from a department store. Over the best evidence objection of the defendant's attorney, the Commonwealth elicited testimony from the loss prevention officer about the value of the jeans. The Commonwealth never offered a price tag or receipt into evidence, and never explained the absence of such evidence. We now hold as the panel in Watkins held: In order to overcome appellant's best evidence objection to the Commonwealth's request to admit the evidence concerning the contents of the price tags, the Commonwealth needed to produce into evidence the price tags themselves

> – or needed to provide an explanation why the price tags were unavailable at trial.

Jennings, supra, at 869.

In New Hampshire, "An original writing, recording, or photograph is required in order to prove its contents unless these rules or a statute provides otherwise." N.H. R. Evid. 1002. "A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." N.H. R. Evid. 1003. "An original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith; or (b) An original cannot be obtained by any available judicial process; or (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or (d) the writing , recording, or photograph is not closely related to a controlling issue." N.H. R. Evid. 1004. "The proponent may use a summary, chart, or calculation to prove the contents of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at reasonable time and place and the court may order the proponent to produce them in court." N.H. Evid. R. 1006.

In the case at bar, the State proved the contents of the various price tags without using the original writings, i.e., the price tags, in violation of Rule 1002. The State failed to offer any duplicates pursuant to Rule 1003. A "duplicate" is defined as "a counterpart produced by a mechanical, photographic, chemical, electronic or other equivalent process or technique that accurately reproduces the original." N.H. R. Evid. 1001 (e). The State failed to establish a

sufficient foundation for admission pursuant to Rule 1004, Admissibility of Other Evidence of Contents, because the State offered no evidence that the price tags were lost or destroyed or that the original price tags or even a copy of the price tags (as opposed to a hand-written compilation of retail pricing information, i.e., State's 4) could not be obtained by any available judicial process or that the writing, recording, or photograph was not closely related to a controlling issue. It was, after all, *the* controlling issue. And, in addition, if copies of the various price tags had been produced, presumably both parties could have conducted a price check of the items to find out what the actual price and/or market value was. Finally, the State failed to establish a sufficient foundation for admission of State's 4 (Kohl's Evidence Inventory Form) pursuant to Rule 1006, Summaries to Prove Content, because "the contents of voluminous writings" was not at issue and the clothing and original price tags could have been easily "examined in court."

Confrontation

"The Sixth Amendment's Confrontation Clause confers upon the accused in all criminal prosecutions the right to be confronted with the witnesses against him." Bullcoming v. New Mexico, 564 U.S. 647 (2011); see also, State v. Dilboy, 163 N.H. 760 (2012); N.H. Const.; Pt. 1, Art. 15.

> In a pathmarking 2004 decision, Crawford v. Washington, we overruled Ohio v. Roberts, 448 U.S. 56 (1980), which had interpreted the Confrontation Clause to allow admission of absent witnesses' testimonial statements based on a judicial determination of reliability. Crawford held that fidelity to the Confrontation Clause permitted admission of testimonial statements of witnesses absent from trial only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine[.] For testimonial evidence to be admissible, the Sixth Amendment demands what the common law required: unavailability of the witness and a prior opportunity for cross-examination. Melendez-Diaz, relying on Crawford's rationale, refused to create a forensic evidence exception to the rule. An analyst's certification

> prepared in connection with a criminal investigation or prosecution, the Court held is testimonial and therefore within the compass of the Confrontation Clause.

Id. at 658-59 (quotations and citations omitted).

In this case, the Kohl's Evidence Inventory Form was clearly prepared "in connection with a criminal investigation or prosecution" and, therefore, clearly "testimonial." Id. Ms. Boucher testified that they involve the police in all but a very limited number of shoplifting cases. She testified that she prepared the document in connection with her investigation into shoplifting while Ms. Leith was confined to the loss prevention office. She contemporaneously supplied the information to the police who arrested Ms. Leith for Theft. She had no personal knowledge of the information (price tags) contained within the report. Even in cases where the underlying information, e.g., machine produced data, is deemed reliable, "[t]his Court settled in Crawford that the obvious reliability of a testimonial statement does not dispense with the Confrontation Clause." Id. at 661. But in this case, the underlying information, i.e., price tags, were shown to be inherently unreliable.

In admitting State's 4 (Kohl's Evidence Inventory Form), the trial court violated Ms. Leith's right to confrontation. U.S. Const. 6 & 14; N.H. Const. pt. 1, art. 15.

II. Whether the trial court erred in denying Ms. Leith's motion to dismiss based on the sufficiency of the evidence. TR 131.

"To prevail on [a] challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." See State v. Gordon, 161 N.H. 410, 418 (2011) (citations omitted). "In determining whether the evidence was sufficient, however, we consider all the evidence, including evidence that was erroneously admitted." Id. (citation omitted). Since 25 out of 30 items listed on

State's 4 (Kohl's Evidence Inventory Form) could have been sold at 30% to 90% off retail, no rational trier of fact could have found the State proved value in excess of $1,000 beyond a reasonable doubt. If all items were sold at 100%, the total would have come to $1,174. If one were to subtract the premium items from the list (Grey Flexees $42, White Flexsees $42, Bremmen Miracle Cream $49, Levi's dark Blue Jeans $54, Levi's Light Denim Jens $54), the remaining items would total $933. Thirty percent of $933 is $279.90. One Thousand One Hundred Seventy-Four ($1,174) minus $279.90 is $894.10. This was not a felony even viewing the evidence in a light most favorable to the State.

CONCLUSION

Because the trial court violated several rules of evidence, as well as Ms. Leith's right to confrontation, and, in doing so, engaged in burden shifting, the case should be reversed and remanded.

Because the trial court failed to dismiss the felony indictment based on sufficiency of evidence, the case should be reversed and remanded.

Respectfully submitted,
REILLY LEITH
By and through counsel,

Date: January 3, 2018

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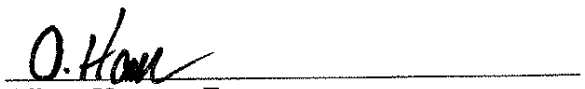
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Ms. Leith respectfully requests 15 minutes for oral argument.

I hereby certify that on this date a copy of the foregoing Brief was forwarded to counsel for the State, Stephen Fuller, Esq., New Hampshire Attorney General, 33 Capitol Street, Concord, NH 03301.

Date: January 3, 2018



Albert Hansen, Esq.