STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017–0692

State of New Hampshire

v.

Jeffrey R. Keenan

REPLY BRIEF OF APPELLANT JEFFREY R. KEENAN

APPEAL BY PETITION PURSUANT TO RSA 541:6
FROM THE FINAL ORDER OF THE
SALEM DISTRICT DIVISION OF THE TENTH CIRCUIT COURT
DOCKET NO. 473-2017-CR-02585
NOVEMBER 30, 2017
ROBERT STEPHEN, J.

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The threshold inquiry in resolving this case is whether R.S.A. 261:178 provide a clear answer to the question presented at trial: Does the statutory word "control" encompass the meaning "drive"? If yes, the conviction must stand; if not, it must be vacated.

The secondary inquiry is how any ambiguity should be resolved, whether by inquiries into legislative history, statutory purpose, state practice, or principles of lenity.

Keenan believes that this Court can easily resolve the threshold inquiry in his favor. As he explains at length in his opening brief, the plain language of the statute distinguishes between "driving" and "controlling." *Opening Brief* at 5–7. Moreover, the logical structure of the statute sustains this linguistic distinction. Keenan finds no ambiguity whatsoever.

The State, notably, does not make the mirror argument. Instead, it strains to find ambiguity. It argues, of course, against Keenan's interpretation, because

Keenan's would require the trial court to undertake a fact-based inquiry into "the meaning of the term 'control' as it applies to the driver's relationship to the vehicle." *State's Reply Brief* at 5. It proposes another, better, way of reading the statute: "[T]he phrase 'a vehicle owned or controlled by him' is more easily understood to refer only to the 'permit to be driven' language." *Id.* This reading, the State concludes, is "reasonable," as it liberates the trial court from doing the tedious work of finding facts and drawing legal conclusions from them. *Id.*

The practical effect of the State's argument, for purposes of this appeal, is to push this Court on to the secondary inquiry: "If this Court should determine that both these interpretations are sustainable, however, then it must conclude that the statute is ambiguous." And for guiding this inquiry, the State has the tools at hand: "legislative history," *id.* at 6, and the statute's "general purpose," *id.* at 7.

In due course, Keenan will examine the minute problems with the State's arguments regarding both of these approaches, but now he wishes to note that these two are not the only canons of construction that one can bring to battle. At least two others are observation of actual practice — how the executive has chosen to implement the law — and, most notably, the rule of lenity.

Let us first pay attention to the canon that should control this inquire — should this court find ambiguity in the statute — lenity. It is an ancient doctrine that is still alive, and for good reason: A criminal conviction is a powerful thing,

as it deprives a man not only of his freedom but also of his reputation. But it is also one that can be abused, as this Court well knows. The prototypically abusive scenario is this: The common reading of the statute, let's call it Interpretation A, is one that would lead to the defendant's conviction. Defendant hires a fancy lawyer who can demonstrate to the tribunal that another reading, Interpretation B, is plausible. Fancy Lawyer argues that, due to the "ambiguity," the statute fails to guide his client's conduct by causing confusion. This Court has been alert to this invocation of lenity and has rightly limited its reach. *See, e.g., State v. Paige*, No. 2016-0342 (2017) at 6.

Keenan's case is quite different. He is not manufacturing "ambiguity" so as to invoke lenity. To the contrary, the State is contorting the statute to find ambiguity so that it can force this Court to hear sound of the State's preferred canon: legislative history. *State's Reply Brief* at 6. And one can see why the State does so: It shows how legislation had, at one point, been proposed, legislation that would have made Keenan's argument even stronger, and notes that the General Court never voted on the bill.

This argument is flawed for at least three reasons. This first is that this reed, as they say, is too slender to bear the weight of the State's argument. All we know is that the statute could have been even more clear. We don't know why

the General Court never voted. Knowledge of that is left to the mists of many memories, 400, to be precise.

A greater flaw, formulaically speaking, is that this Court has proscribed such an analysis: "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include."
State v. Surrell, No. 2017-0246 (2018) at 3. The State acknowledges as much. *See State's Reply Brief* at 4.

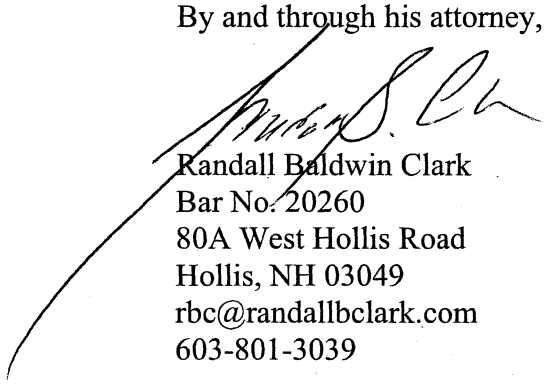
In fact, in a case that the State did not cite, this analytic avenue leads precisely where Keenan would (in the event of a finding of ambiguity) have this Court land: application of the rule of lenity. At this Court explained in *Paige*, lenity is the appropriate canon of construction after legislative history has failed to resolve the statute's ambiguity: "As we have previously explained, the rule of lenity comes into play only when a statute is ambiguous and resort to legislative history does not resolve the ambiguity." *Id.* at 3.

The State also discusses at length another canon this Court might invoke: "statutory purpose." Keenan finds the State's argument tortured and can respond only with his own countervailing argument: executive practice. As Keenan discusses at length in his opening brief, the open, notorious, and long-standing practice of the Executive, acting through the Department of Safety and Motor

Vehicles, is to allow motorists with a history of reckless driving to possess driving privileges independent of registration privileges upon a showing of adequate insurance. The gross disjunction of Executive practice from the presently purported "statutory purpose" belies the State's exegetical acrobatics.

In sum: This Court can and should find for Keenan as the language and logic of the statute — given the absence of an appropriate factual finding — cannot plausibly be construed to convict him. Should the Court nonetheless conclude that this statute is "ambiguous," it should invoke the rule of lenity to acquit Keenan, as the state's alternative interpretive canons are either analytically precluded or untethered to reality.

Respectfully submitted,
JEFFREY R. KEENAN,
By and through his attorney,



September 7, 2018

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CERTIFICATE OF SERVICE

I, Randall B. Clark, do hereby certify that I have served this day two copies of the preceding "Reply Brief of Appellant Jeffrey R. Keenan" upon the Attorney General of the State of New Hampshire via U.S.P.S. First-Class Mail at the following address: Department of Justice, 33 Capitol Street, Concord, NH 03301.

Date: September 7, 2018

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