THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0693

State of New Hampshire

v.

Jean Claude Mfataneza

Appeal Pursuant to Rule 7 from Judgment
of the Merrimack County Superior Court

BRIEF FOR THE DEFENDANT

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(Oral argument waived)

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QUESTION PRESENTED

Whether the court erred in denying the motion *in limine* seeking the exclusion of the breathalyzer test results.

Issue preserved by defense motion, the State's objection, the hearing on the motion, and the court's ruling. A1-A22; M 1-65.*

* Citations to the record are as follows:
"A" refers to the Appendix to this brief;
"C" refers to the transcript of the trial held on June 29, 2017, in the Circuit Court, District Division;
"M" refers to the transcript of the hearing on the motion *in limine*, held on November 1, 2017;
"T" refers to the transcript of the stipulated-facts trial, held on November 6, 2017.

STATEMENT OF THE CASE

The State charged Jean Claude Mfataneza with aggravated driving while intoxicated and with an alternative-theory count of driving under the influence of alcohol. A24-A25. The State subsequently also charged Mfataneza with driving without a valid license. C 3. All charges arose out of an incident in the parking lot of an apartment complex in Concord on December 12, 2016. Mfataneza stood trial first in the Sixth Circuit Court (District Division) and was convicted. C 58. For aggravated driving while intoxicated, the court (Spath, J.) sentenced him to ninety days with all but five days suspended for one year, to a fine of $750 plus a penalty assessment of $180, and to various other terms. C 60. For operating without a valid license, the court sentenced Mfataneza to a suspended fine of $150. C 61.

Mfataneza noted a *de novo* appeal for trial in the superior court. In the superior court, Mfataneza filed a motion *in limine* seeking to exclude the results of a station-house breathalyzer test, arguing that the State could not demonstrate that he understood the information on the administrative license suspension form. A12-A20. After a hearing, the court (McNamara, J.) denied the motion. A1-A11. At the conclusion of a stipulated-facts trial, the court convicted Mfataneza on both charges. T 12. The court re-imposed the same sentence for aggravated driving while intoxicated that was pronounced in the circuit court. A26-A31.

STATEMENT OF THE FACTS

Jean Claude Mfataneza arrived in the United States in 2012 as a refugee from the Democratic Republic of the Congo by way of a camp in Burundi. M 44, 53. Mfataneza's first language is Kinyarwanda, and he is also fluent in Swahili. M 39, 44-45. As detailed in the argument section below, Mfataneza speaks only a little English, and cannot read the language. At the time of the hearing, Mfataneza had a job at a warehouse "separat[ing] some stuff and count[ing] it." M 51.

On the afternoon of December 12, 2016, while backing out of a parking place in the Royal Gardens parking lot, Mfataneza's car hit the back of a plow truck driven by Dawn Wilson, the property manager at the apartment complex. M 26, 36; T 6. In the car was Mfataneza and another man. M 40. The plow truck was not damaged but, believing Mfataneza to be intoxicated, Wilson called the police. T 6. Mfataneza apologized to Wilson. C 7.

When the police arrived on the scene, an officer, Almedin Dzelic, asked Mfataneza to perform field sobriety tests. M 10, 26. Mfataneza agreed and, in the judgment of the officer, failed the tests. M 12, 26-29; T 6-7. When asked how much he drank that day, Mfataneza answered that he had two beers. M 26, 56-57. At one point, Mfataneza said that he had not been driving the car, M 26, though he explained at the evidentiary hearing that he meant that he had not driven it on that occasion on the roads but was merely moving it in the parking lot out of the way of the snow plow. M 55-56. A second officer, Melissa Pfefferle, transported Mfataneza to the police station. M 12-13.

When they arrived at the police station, Pfefferle reviewed the administrative license suspension form with Mfataneza. M 13. When asked by the officer what language he spoke, Mfataneza answered "English," but he answered that he could not read English. M 13, 18. The officer read the items on the form, pausing after each to ask Mfataneza whether he understood. M 13-14. Mfataneza answered in the affirmative by nodding his head. M 14. The officer did not confirm Mfataneza's understanding in any other way, such as by asking him to explain the items in his own words. M 18. Nevertheless, Pfefferle testified that she had the impression that Mfataneza understood her words. M 15. At the end of that process, Mfataneza took a breathalyzer test. M 14. Another officer told Mfataneza how to do the test and observed no irregularities in Mfataneza's performance. T 7-8. The test disclosed a blood alcohol level of .30. T 8.

SUMMARY OF THE ARGUMENT

The court erred in denying Mfataneza's motion to exclude the breathalyzer test result. First, the court erred in interpreting New Hampshire law to require only that the police use reasonable methods or take reasonable measures to try to communicate the information on the ALS form in a way the driver would understand. Rather, the law requires that the driver understand the ALS warnings, at least in the sense that no deficit in understanding be attributable to a language barrier. Second, the court erred in concluding that Mfataneza in fact understood the statements on the ALS form.

I. THE COURT ERRED IN DENYING THE MOTION TO EXCLUDE THE RESULTS OF THE BLOOD ALCOHOL TEST.

Alleging a violation of RSA 265-A:8 and the due process clauses contained in Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution, Mfataneza filed a motion *in limine* to exclude a blood alcohol measurement obtained using a breathalyzer machine. A12-A20. Central to his argument was the contention that he had not understood the information read to him by the officer. A14-A17; M 58-62. The principal obstacle to comprehension cited by Mfataneza was his limited command of English. A16-A17. Secondarily, he cited his degree of intoxication. A17-A18. The State objected, arguing that Mfataneza understood the information. A21-A22; M 6.

After an evidentiary hearing, the court issued an order denying the motion. A1-A11. The court treated the motion as raising first a question of statutory interpretation involving whether the statute required merely that the police officer recite the specified information to the arrestee, or rather additionally required that the arrestee understand that information. After reviewing decisions from courts in other states, the court concluded that the statute did not make the validity of the arrestee's choice depend on evidence that the arrestee understood the information. Instead, the State need only show that the officer "reasonably conveyed the implied consent warnings based upon the objective conduct of the officer." A9. On the facts of this case, the court found that Pfefferle reasonably conveyed the warnings. A10. In a footnote, the court concluded in the alternative that, even if the statute

required evidence that Mfataneza understood the warnings, the court would find that he had. A10. Finally, the court also rejected the argument that Mfataneza's degree of intoxication could support a finding of lack of actual knowledge.[1] A10-A11. In denying the motion, the court erred.

When called upon to interpret a statute, this Court looks first to its text, construing it if possible in accord with its plain meaning. State v. Serpa, __ N.H. __, 187 A.3d 107, __ (2018) (slip op. at 2). The Court interprets "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." Id. Further, the Court interprets "statutes in the context of the overall statutory scheme and not in isolation." State v. Moran, 158 N.H. 318, 321 (2009). To that end, the Court aims to "effectuate the statute's overall purpose and to avoid an absurd or unjust result." State v. Paige, 170 N.H. 261, 264 (2017). However, the Court has also recognized that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." State v. Dor, 165 N.H. 198, 205 (2013) (citation omitted) (emphasis in original). When construing statutes, this Court employs a *de novo* standard of review. Serpa, 187 A.3d at __ (slip op. at 2).

RSA 265:A-4 codifies the principle that any person who drives a vehicle on the ways of the state "shall be deemed to have given consent to physical tests and examinations for the purpose of determining whether such person is

[1] On appeal, Mfataneza does not pursue the claim that his intoxication rendered him unable to understand the ALS information.

under the influence of intoxicating liquor . . . ." See also State v. Barkus, 152 N.H. 701, 708 (2005) (referring to statute as New Hampshire's "implied consent" law). RSA 265-A:8 provides that before a test is performed, the law enforcement officer shall

> (a) [i]nform the arrested person of his or her right to have an additional test or tests of his or her blood made by a person of his or her own choosing; (b) [a]fford the arrested person an opportunity to request such additional test; and (c) [i]nform the arrested person of the consequences of his or her refusal to permit a test at the direction of the law enforcement officer.

RSA 265-A:8, I(a) – (c). The statute further provides that if the officer "fails to comply with the provisions of this section, the test shall be inadmissible as evidence in any proceeding before any administrative officer and court of this state." RSA 265-A:8, III.

Accordingly, Pfefferle read to Mfataneza in English the six statements listed on the form under the heading "Administrative License Suspension Rights/Violations and Misdemeanors." A23; M 14. These included, among other points, the following:

> You have been arrested for an offense arising out of acts alleged to have been committed while you were driving under the influence of alcohol or drugs.
>
> You are being asked to submit to a test or tests, at the discretion of a law enforcement officer, in order to determine the alcohol or drug concentration in your system. You may be asked to perform a breath, blood or urine, or physical test, or any combination of these.
>
> You have the right to a similar test or tests of blood, urine or breath taken by a person of your own choosing at your own expense. Upon your request, you

> will be given the opportunity for such additional tests. You also have the right to obtain a portion of our sample of your breath, blood, or urine for testing at your own expense.

A23; M 46-47.

This Court has not previously published an opinion in a case involving RSA 265-A:8 and a defendant who does not speak fluent English. Nevertheless, several pertinent principles emerge from the Court's implied consent jurisprudence. A "healthy driver arrested for DWI has no constitutional right to refuse to provide a sample for a blood alcohol test." State v. Cormier, 127 N.H. 253, 257 (1985). However, the implied consent law creates "a statutory right to refuse to render a sample for a blood alcohol test." State v. Denney, 130 N.H. 217, 220 (1987). The legislature has "attached two strings" to the exercise of the statutory right of refusal: "the imposition of a civil penalty in the form of revocation of a driver's license," and a provision for the admissibility of evidence of the driver's refusal. Cormier, 127 N.H. at 258. Given the existence of that choice and those consequences, one purpose of the implied consent statutory scheme is to "ensure that an arrested individual makes an informed decision concerning whether or not to submit to a blood alcohol content test." State v. Dery, 126 N.H. 747, 752 (1985); see also State v. Jenkins, 128 N.H. 672, 675 (1986) (referring to statute as enacting a duty "to educate" drivers as to certain specific matters). Due process implications arise when an officer fails to give the statutorily-prescribed warnings, and the driver's refusal is later introduced in evidence. Denney, 130 N.H. at 222.

In separate sections below, Mfataneza addresses each of the trial court's rationales for denying the motion. Section A presents the argument that New Hampshire law requires the State to prove that the driver understood the information contained in the ALS form statements, in the sense that any deficit in understanding was not caused by the driver's inability to understand English. Section B presents the argument that the court erred in finding that Mfataneza in fact understood the contents of the ALS form.

A. New Hampshire law obliges the State to prove that no deficit in English-language fluency caused the driver to fail to understand the statements on the ALS form.

The trial court identified three broad approaches to the issue of what must be shown with respect to the communication by police to an arrested person of the ALS information. A7-A9. First, some jurisdictions require only that "the warning be given," such that nothing need be shown about the driver's understanding. A7 (citing Furcal-Peguero v. State, 566 S.E.2d 320, 324 (Ga. App. 2002); People v. Wegielnik, 605 N.E.2d 487, 489-91 (Ill. 1992)). Those courts reach that minimalist interpretation of the statutory requirement by emphasizing the statutory purpose of "making the highways safe." A7. Adopting a variant of that approach, some courts recognize that a defendant must understand only that the officer has asked the defendant to take a test but need not understand the warnings about the consequences of refusal. A7 (citing Yokoyama v. Comm'r of Public Safety, 356 N.W.2d 830, 831 (Minn. App. 1984); Martinez v. Peterson, 322 N.W.2d 386, 388 (Neb. 1982)).

A second approach requires more than that the officer merely perform the ritual of reading the information to the driver. Rather, this approach focuses on whether the officer used reasonable methods or took reasonable measures to try to communicate the information in a way the driver would understand. A7-A8 (citing State v. Piddington, 623 N.W.2d 528, 538 (Wis. 2001); State v. Garcia, 756 N.W.2d 216, 222 (Iowa 2008)). As the trial court noted, courts following this approach recognize two purposes underlying the relevant statutes: (1) to make the roads safe from impaired drivers; and (2) to inform drivers in these circumstances of the nature and implications of the choice given them by the implied consent statute. A7. Faced with a question of first impression under New Hampshire law, the trial court adopted this second approach.

A third approach requires that the driver understand the ALS warnings, at least in the sense that no deficit in understanding be caused by a language barrier. See State v. Marquez, 998 A.2d 421 (N.J. 2010) (adopting this approach). This approach does not allow a driver to plead a failure to understand caused by intoxication. Marquez, 998 A.2d at 438. For the reasons stated below, this Court should construe the New Hampshire statutes as adopting this approach.

In several relevant respects, the New Jersey statutory scheme resembles New Hampshire's. New Jersey has an implied consent law that deems drivers on public roads to have given their consent to chemical tests for blood alcohol content when reasonably suspected of driving while intoxicated. Marquez, 998

A.2d at 423 (citing N.J.S.A. 39:4-50.2). Like New Hampshire law, the New Jersey statute bars the police from forcibly extracting a sample pursuant to that implied consent, and thus empowers a driver to revoke the implied consent. N.J.S.A. 39:4-50.2(e). Given that need for the driver's cooperation in the provision of a sample, New Jersey law provides that the "police officer shall inform the person tested of his rights" if the person provides a sample, and also of the consequences of refusing to submit to a test. Marquez, 998 A.2d at 423-24; N.J.S.A. 39:4-50.2(d) & (e). The consequences include loss of driver's license for a period that varies in length depending on the driver's prior record, as well as a fine.

The trial court noted a procedural difference between the laws of New Jersey and New Hampshire. A8-A9. In New Jersey, the allegation that a driver refused to provide a sample is initiated by a summons, adjudicated in a municipal court, and when proven results in a conviction for violating the refusal statute. Marquez, 998 A.2d at 426. At the municipal court trial, the State bears the burden of proving: (1) that the arresting officer had probable cause to believe the driver was under the influence; (2) that the person was arrested for driving while intoxicated; (3) that the officer asked the driver to submit to a chemical breath test and informed the driver of the consequences of refusing to do so; and (4) that the person refused to submit to the test. Marquez, 998 A.2d at 432; N.J.S.A. 39:4-50.4a (a). In view of the "quasi-criminal" nature of proceedings alleging a refusal to submit to a test, the New Jersey Supreme Court held unconstitutional the statute's establishment of the

preponderance-of-the-evidence burden of proof, instead requiring that the State bear the burden of proving the four elements beyond a reasonable doubt. State v. Cummings, 875 A.2d 906 (N.J. 2005).

However, when in Marquez it had to decide whether a language barrier to understanding had any legal significance, the New Jersey Supreme Court did not rely on the quasi-criminal character of that state's adjudicatory procedures. Rather, the Marquez court focused on the statutory language of the implied consent and refusal statutes. Because the considerations the Marquez court cited are sound and equally applicable to the New Hampshire statutory scheme, this Court should follow that reasoning and adopt the Marquez rule.

The Marquez court noted first that the statute requires the police to "inform the person arrested of the consequences of refusing to submit to such test . . . ." Marquez, 998 A.2d at 430-31 (quoting N.J.S.A. 39:4-50.2(e)). The New Hampshire statute likewise uses the word "inform" in a substantially identical phrase: "inform the arrested person of the consequences of his or her refusal to permit a test at the direction of the law enforcement officer." RSA 265-A:8, I(c).

Construing the word "inform," the Marquez court cited dictionary entries defining the word as meaning "to communicate knowledge to," and "to make acquainted." Marquez, 998 A.2d at 434. It also cited the following further definition: "inform implies the imparting of knowledge, especially of facts or events necessary to the understanding of a pertinent matter." Id. The Marquez court accordingly concluded that

> By its own terms, therefore, the statute's obligation to 'inform' calls for more than rote recitation of English words to a non-English speaker. Knowledge cannot be imparted in that way. Such a practice would permit Kafkaesque encounters in which police read aloud a blizzard of words that everyone realizes is incapable of being understood because of a language barrier. That approach would also justify reading aloud the standard statement to a hearing-impaired driver who cannot read lips. We do not believe that the Legislature intended those absurd results. Rather, its directive that officers 'inform,' in the context of the implied consent and refusal statutes, means that they must convey information in a language the person speaks or understands.

Marquez, 998 A.2d at 434. That reasoning applies equally in the context of the New Hampshire statutory scheme. See ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 761 (2011) (rejecting proposed interpretation involving "absurd results . . . not contemplated or required by" statute there at issue).

Next, analyzing the New Jersey statute and caselaw interpreting it, the Marquez court held that, to prevail in a refusal prosecution, the State must prove that the officer asked the driver to take the test and informed the driver of the consequences of refusal. Marquez, 998 A.2d at 431-34. New Hampshire law likewise requires the police to inform the driver of those rights. RSA 265-A:8, I(a) – (c). Also, a failure by New Hampshire police to provide the requisite information may prevent the State from enforcing the license-loss consequences of refusal. See RSA 265-A:31, II(d) & (f) (defining issues at ALS hearing as including whether driver refused to submit to test requested by police, and whether police informed driver of consequences of refusal).

The New Jersey court proceeded to cite indications in legislative history and prior caselaw to the effect that the police's statutory obligation to inform drivers of the consequences of refusal was intended to serve the goal of communicating information to suspected drivers. Id. at 434-36. Such indications appear in New Hampshire caselaw. See Dery, 126 N.H. at 752 (purpose to "ensure that an arrested individual makes an informed decision concerning whether or not to submit to a blood alcohol content test"); Jenkins, 128 N.H. at 675 (referring to statute as enacting a duty "to educate" drivers as to certain specific matters). New Hampshire legislative history contains no substantive record of the discussions surrounding the adoption of the statute in which the legislature first enacted the law now codified at RSA 265-A:8 (Prerequisites to Tests).[2]

Rejecting the "reasonable efforts" approach taken by some states, the New Jersey court noted that the legislature had not enacted language requiring the police merely to make reasonable efforts. Marquez, 998 A.2d at 434 n. 8. The same may be said of the New Hampshire statutory scheme. When interpreting statutes, this Court will not add words the legislature did not see fit to include. In the Matter of Neal & DiGiulio, __ N.H. __, 184 A.3d 90, 93 (2018).

[2] See Laws 1965, ch. 238:1. That Prerequisites to Tests statute was first codified in RSA 262-A:69-c. Subsequent re-organizations of the motor vehicle code moved it first to RSA 265:87, and later to RSA 265-A:8. The statute in its current form is, for present purposes, substantially identical in content to the statute as first enacted in 1965.

Ultimately, the Marquez court concluded that, "[i]n essence, reading the standard statement to motorists in a language they do not speak is akin to not reading the statement at all." Marquez, 998 A.2d at 435. Moreover, it "makes no sense that English speakers will be acquitted if incomplete warnings are read to them in English, yet foreign-language speakers can be punished on the basis of empty warnings that fail to inform them." Id. When the police omit or misstate the implied consent warnings to English-speaking drivers, courts recognize that the police failure deprives the driver of "the opportunity to make a knowing and intelligent decision whether to take an evidentiary blood alcohol test." State v. Wilson, 987 P.2d 268, 272-74 (Haw. 1999) (citing cases to same effect). No reason exists to abandon the goal of affording an opportunity for a knowing and intelligent decision simply because the driver in question does not understand English.

As already noted, the New Jersey approach does not imply that a driver can avoid the consequences of refusal by presenting evidence of a degree of intoxication so great as to preclude understanding. Marquez, 998 A.2d at 438. Thus, "it is not necessary for the State to prove that the driver actually understood the warnings on a subjective level." Id. Rather, if

> properly informed in a language they speak or understand while sober, drivers can be convicted under the implied consent and refusal statutes. Voluntary, excessive drinking cannot and does not void the statutes. Indeed, that type of voluntary behavior is fundamentally distinct from a person's utter lack of ability to understand a foreign language.

Marquez, 998 A.2d at 438. Under the New Jersey rule, moreover, defendants "who claim that they do not speak or understand English must bear the burden of production and persuasion on that issue." Id. at 438.

For all the reasons stated above, this Court should resolve the interpretive question by holding that, to discharge their obligations under RSA 265-A:8, the police must read (or provide in writing) the ALS warnings in a language the driver understands.

B. The record does not reflect that Mfataneza's English-language skills enabled him to understand the ALS warnings.

In the footnote in which it announced its alternative rationale, the trial court wrote:

> Moreover, though not necessary to the Court's decision, the Defendant has not borne the burden of persuading the Court that he did not understand the language in which the warnings were given. See Marquez, 998 A.2d at 438. In addition to telling the police officer that he understood the English language, his conduct in attempting to mislead the police officer about the amount of liquor he had to drink and about whether or not he was driving a vehicle, as well as his ability to understand and perform the field sobriety tests compel a conclusion that he did in fact understand the English language. . . . Even if the law required a finding that the Defendant understood the implied consent warning, the Motion *in Limine* would be denied.

A10.

When reviewing a pre-trial ruling, this Court will accept the trial court's findings of fact "unless they lack support in the record or are clearly

erroneous." State v. Washburn, __ N.H. __, 184 A.3d 894, 898 (2018); see also In re E.G., __ N.H. __ (August 17, 2018) (slip op. at 5) (deferring to trial court's findings "of historical fact unless they are contrary to the manifest weight of the evidence"). Here, for the reasons stated below, applying that standard of review of findings of fact, this Court must reverse the trial court's finding that Mfataneza spoke English well enough to understand the warnings.

Testimony at the hearing on the motion *in limine* established that both police officers had previously communicated with Mfataneza in English, even when he was drunk, though only to the extent of conversations involving such simple words as "hi," "go to bed," or "leave her [Mfataneza's wife] alone." M 9, 24-25, 33-34. They testified that, in response, Mfataneza "would say he would just go to bed and sleep." M 25. The officers acknowledged that Mfataneza spoke only a "broken" and accented English. M 9, 20, 25.

Apartment manager Wilson testified that "sometimes it seems [Mfataneza] understands what [apartment complex staff are] saying to him." M 37. She noted that he would report job changes and repair orders for his apartment, such that "we're able to understand that a little bit." M 37, 39. However, when Wilson sits down with Mfataneza for his more involved "annual meeting" as required by federal housing rules, they use an interpreter. M 39-40. She added that Mfataneza understands English better than his wife, who doesn't understand the language at all. M 38.

Officer Dzelic testified that, on the day in question, when he asked how much he had to drink, Mfataneza replied, "two beers." M 26. When Dzelic

asked what had happened at the scene, Mfataneza answered that he wasn't driving. M 26. Mfataneza then agreed to "take some tests." M 26-27. When explaining how to perform the field sobriety tests, the officers used words and physical demonstrations. M 11, 27-32. Dzelic testified that Mfataneza "didn't appear to have any difficulty in understanding" the demonstrations and instructions, as he followed them. M 27-28. These involved simple commands, and Mfataneza repeated back Dzelic's words of instruction. M 27-28.

At the police station, Pfefferle asked Mfataneza what language he spoke, and he answered "English." M 13. She testified that she "believed" she asked him the same question again while asking whether he spoke Kinyarwanda or Swahili,[3] and got the same answer. M 13. When she asked whether he could read English, Mfataneza said "no." M 13, 18. Pfefferle then read the ALS form in English to Mfataneza, pausing after each line to ask if he understood. M 13-14. Mfataneza nodded affirmatively. M 13-14. Pfefferle acknowledged that "most of his answers were one-word answers. It wasn't like a dialogue back and forth conversation." M15. At the end of that process, Mfataneza signed the form and marked the box indicating agreement to take the test. M 14. Given Mfataneza's inability to read English, the process of selecting the box to check necessarily was facilitated by Pfefferle. At no point did Pfefferle try to test Mfataneza's understanding, as by asking him to explain back the information she had read to him. M 18.

[3] Pfefferle testified that the police have reasonably immediate telephone access to interpreters in those African languages. M 19-20, 33. Dzelic noted also that the police can often find, from within the immigrant community present at the scene, a person able to interpret. M 33.

Mfataneza testified that he was not fluent in English and spoke "a little bit to help [himself] out." M 45. When asked at the hearing to listen to and explain, without the benefit of an interpreter, some of the statements on the ALS form, Mfataneza could not understand or explain them. M 46-47. At the hearing, the prosecutor posed the following simple questions to Mfataneza without using the interpreter to translate either the question or the answer:

Q. Do you work?

A. Yes.

Q. What's your job?

A. Concord, New Hampshire.

Q. What do you do for work?

A. I work in warehouse.

Q. I'm sorry, I ---

A. Warehouse.

Q. --- warehouse, okay.

A. Warehouse.

. . .

Q. What do you do at the warehouse?

A. We separate some stuff and count it.

Q. Uh-huh.

A. After that, we wrap machine.

Q. What's the name of the company?

A. Or Meadows Industry.

Q. Did you take some classes at community college?

A. No.

Q. Manchester Community College? Southern New Hampshire Services, did you get a certificate from them?

A. No.

Q. You were in the newspaper once, remember?

A. Yes.

Q. The Concord Monitor?

A. Yes.

Q. They did a story about you?

M 50-52. At that point, the prosecutor resumed questioning Mfataneza through the interpreter. M 52.

In response to police officer testimony about Mfataneza's apparent understanding, defense counsel elicited Mfataneza's testimony that in the African countries in which he had spent most of his life, one has to be polite, respectful, and compliant in interactions with a police officer. M 50. Mfataneza testified that he had not understood everything the officers were saying to him. M 50.

Several considerations combine to render unsustainable the trial court's factual findings. First, by all accounts, Mfataneza spoke only a "broken" English. The fact that he could understand simple English phrases like "go to bed" thus does not imply that he could understand the much more abstract, legalistic, and complex vocabulary of the ALS rights form. For the same reason,

Mfataneza's ability to discern the movements required of him during the field sobriety tests (FST's) does not signify an ability to understand English on the level of the ALS form, because the language of FST instruction was simple and was supplemented by the officer's physical demonstration of the required movements.

Second, the court erred in concluding that Mfataneza's answers to Dzelic manifested a degree of comprehension that proved Mfataneza to possess the requisite English-language skills. The ability to answer an officer's question falsely, when the answer is "two beers" or a denial of driving, may show an understanding that driving under the influence is a crime. It does not, though, prove the speaker's possession of English-language skills sufficiently developed to understand the concepts of the implied consent statutory scheme as expressed on the ALS form.

Third, in these circumstances, Mfataneza's choice of English, when asked by an obviously non-Swahili- or -Kinyarwanda-speaking police officer, demonstrates not so much Mfataneza's competence in English as his culturally-ingrained impulse to oblige the officer by putting her to as little trouble as possible. The fact that he did not go so far in obliging the officer as to claim an ability to read English does not defeat the point. A false claim to be able to read would become embarrassingly indefensible the moment the officer asked Mfataneza to read the form aloud or initial the appropriate box. Mfataneza could hope, though, to carry off a false claim to understand the

spoken English of the ALS form through sheer passive agreeableness, nodding his head and saying "yes" whenever asked to do so.

For all these reasons, the record does not support a finding that Mfataneza understood English at the level of the ALS form. This Court must therefore reverse the trial court's clearly erroneous finding to the contrary.

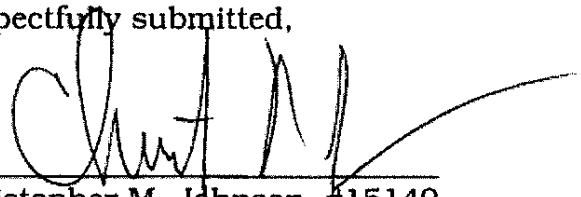
CONCLUSION

WHEREFORE, Mr. Mfataneza respectfully requests that this Court reverse his conviction for aggravated driving while intoxicated.

Oral argument waived.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

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33 Capitol Street
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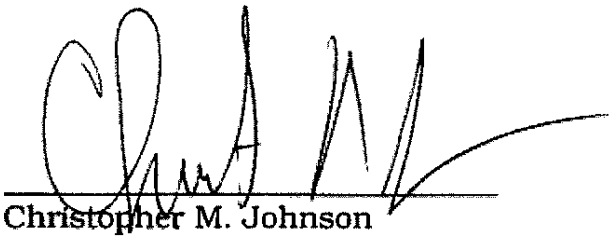

Christopher M. Johnson

DATED: August 30, 2018

APPENDIX

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The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

State of New Hampshire

v.

Jean Claude Mfataneza

No. 2017-CR-703

ORDER

The Defendant, Jean Claude Mfataneza, is charged with the offense of Aggravated Driving While Intoxicated. He has filed a Motion *in Limine*, seeking to exclude the results of a chemical test given to him shortly after his arrest on December 12, 2016. The State objects. For the reasons stated in this Order, the Defendant's Motion *in Limine* to Exclude Administrative License Suspension Form and Breath Test Results is DENIED.

I

The Defendant was arrested for driving while intoxicated on December 12, 2016. Following his arrest, he was transported to the police station where a police officer read him his rights under the so-called "implied consent" law which provides, in substance, that any person who operates a motor vehicle upon the ways of the State consents to a test of his blood, breath, or urine for alcohol or controlled drugs for the purpose of determining whether any such person is under the influence. See RSA 265-A:4. RSA 265-A:8 provides that before any test of a person's blood, urine, or breath is given, a law enforcement officer must:

(a) Inform the arrested person of his or her right to have an additional

test or tests of his or her blood made by a person of his or her own choosing;

(b) Afford the arrested person an opportunity to request such additional test; and

(c) Inform the arrested person of the consequences of his or her refusal to permit a test at the direction of the law enforcement officer.

RSA 265-A:8, I (a), (b), (c). The statute also provides that if the law enforcement officer fails to comply with the provisions of the statute, the results of the test shall be inadmissible as evidence in any proceeding before any administrative officer or court of this State. RSA 265-A:8, III.

After his arrest, and while at the police station, the Concord police advised the Defendant of his rights under RSA 265-A:4 and he agreed to take the test. It was determined that his blood alcohol concentration was approximately 0.30. He has filed a Motion *in Limine* to exclude the results of the test, alleging in substance that because of his lack of proficiency in English and because of his intoxication, he could not understand the officer's explanation of his rights under the implied consent law, and therefore, under RSA 265-A:8, the results of the test may not be admitted into evidence.

An evidentiary hearing was held on November 1, 2017. Because the statute seems to establish a prerequisite for admission of the test results, and as a practical matter it is difficult to prove a negative, the Court placed the burden on the State to prove the requirements of RSA 265-A:8 were satisfied.

II

Both arresting police officers testified. The initial encounter with the Defendant was made by Officer Almedin Dzelic. Officer Dzelic has been a member of the Concord Police Department for 13 years. He knew the Defendant prior to his arrest. He had met

him as a result of a number of calls, had spoken to him, and had observed him while he was intoxicated. Officer Dzelic testified he had "no issues talking to him" or communicating with him prior to the date of the arrest. He recognized that the Defendant speaks broken English and that he never had difficulty issuing instructions that the Defendant would follow such as "go to bed" or "leave your wife alone." On December 12, 2016, Officer Dzelic was called to the Concord Gardens, an apartment complex located in Concord, New Hampshire. He was told the Defendant had backed his car into a pickup truck in the complex's parking lot. After a brief conversation, he asked the Defendant how much he had to drink and the Defendant said, "two beers." He also said that he was not driving. Officer Dzelic told the Defendant there was a witness who observed him driving. The Defendant then agreed to take field sobriety tests. Officer Dzelic explained and also demonstrated the tests to the Defendant. While the Defendant had no difficulty doing any of the tests, he appeared very intoxicated and performed poorly. He did poorly on the HGN test. He staggered doing the walk and turn test and was too impaired to do the one leg stand test; in fact, he almost fell when he tried to do it. The Defendant was then placed under arrest.

Officer Michelle Pfefferle was also called to the scene of the accident. She too has been an officer at the Concord Police Department for 13 years. When she arrived at the scene, the Defendant was talking to Officer Dzelic. She observed him take and fail the field sobriety tests. Since Officer Dzelic was going off duty, Officer Pfefferle took the Defendant into custody to process. Because she is assigned to the Concord Heights area, Officer Pfefferle knew the Defendant and dealt with him frequently, at least once a month. She had spoken with him on a number of occasions involving issues with his wife and children.

She had also spoken to him while he was intoxicated prior to the day she arrested him. She believes he communicates fairly well. She testified he will still speak to her in English even when he is intoxicated.

After she took him to the police station, Officer Pfefferle placed the Defendant in a holding cell; she asked him what language he spoke and he said English. She repeated her question a second time and he again told her English. He said he couldn't read English, so she read him the Administrative License Suspension ("ALS") form, which was introduced as an exhibit at the hearing. Lines 1 through 6 of the form track the rights provided under RSA 265-A:4. Officer Pfefferle read each line to the Defendant, and asked him if he understood it, and he nodded his head "yes" for each line. She read him line 7, which states, "I have been informed of my rights," and he signed it. The form also contains two boxes: one says, "I agree to the requested testing," and the second states, "I refuse the requested testing." The Defendant agreed to the test and signed the form.

Officer Pfefferle stated the Defendant never indicated that he had any difficulty understanding her. She also testified that she saw nothing to indicate that he did not understand her. While the Concord Police Department does not have interpreters available, they do have the ability to call 911 and obtain an interpreter for a person who does not understand English. Officer Pfefferle testified there are a number of immigrants from Africa living in the Concord Gardens complex who typically speak either Kinyarwanda or Swahili. She testified that she uses the 911 service for interpreters "all the time."

Dawn Wilson, who works at Concord Gardens, also testified. She was driving the truck that the Defendant backed into. She testified that she knows the Defendant and

deals with him once or twice a month. He pays rent to the complex using so-called "section 8 vouchers," which apparently are benefits provided by the government. She testified that she can understand him unless he has been drinking and she believes he understands leases and property issues. However, she admitted that he has had an interpreter help him when looking at the lease.

The Defendant also testified. He came to the United States from Congo as a refugee approximately five years ago with his wife and two children. He is fluent in both Kinyarwanda and Swahili. He testified that he speaks some English and had a translator for the hearing. He testified that he cannot read English but admits he signed the ALS form. He claims that he signed the ALS form because in Congo and Burundi, where he lived after leaving Congo as a refugee before coming to the United States, he is required to do what police officers tell him to do.

On cross-examination, the Defendant answered a few questions in English and testified that he worked in a factory in Concord, New Hampshire. Most of his testimony, however, was given through a translator. Through the translator, the Defendant admitted he told the police officer that he was not driving and said that he did so because he wasn't driving on a road, but only in a parking lot. Although the testimony was overwhelming that the Defendant was intoxicated, and in fact, he is arguing that part of the reason the Motion *in Limine* should be granted is because of the level of his intoxication, he insisted that he only had two beers.

III

The Defendant makes two arguments: first, he argues that his lack of proficiency in English indicates he did not understand and did not knowingly, voluntarily and

intelligently waive the rights and consequences in the ALS form, and second, he argues he was so intoxicated that he could not knowingly, voluntarily and intelligently waive his ALS rights. The Defendant analogizes his situation to a defendant asked to waive his rights under Miranda and cites cases to suggest that the Court should consider the mental and physical conditions of the Defendant to determine whether a valid waiver has occurred. (Def.'s Mot. *in Limine* ¶ 16.) However, the Court believes there is a distinction between the standards applicable to the waiver of ALS rights and the waiver of constitutional rights to counsel and against self-incrimination.

The implied consent law provides that any person who operates a motor vehicle upon the highways of the State is deemed to have consented to chemical tests to determine the amount of controlled drugs or alcohol in his blood. See RSA 265-A:4. Thus, the New Hampshire Supreme Court has held that the act of submitting to a breath test "is voluntary because the very act of driving on New Hampshire's public roads implies consent to take the test." State v. Barkus, 152 N.H. 701, 708 (2005) (quotation omitted). The major premise of the law is that it "will aid the prosecution of the guilty and the protection of the innocent." State v. Gallant, 108 N.H. 72, 76 (1967). Although a person is deemed to have consented to a test, the statute provides that before a law enforcement officer may administer any test, the officer must inform the arrested person of his right to have an additional test or tests made by a person of his choosing, afford an opportunity to request such additional test, and inform him of the consequences of the refusal to permit a test. RSA 265-A:8. If a person refuses the test, evidence of the refusal may be admitted in evidence and the person will be subject to loss of license. See RSA 265-A:10, :14.

Most of the few cases in this State addressing the validity of consent to chemical

testing involves whether or not a defendant was informed of the consequences of the test. See, e.g., Hess v. Turner, 129 N.H. 491 (1987); State v. Denney, 130 N.H. 217, 223 (1987). The New Hampshire Supreme Court has never dealt with the issue of whether a defendant subjectively understood the explanation of his right to refuse a test and the consequences of refusing. However, implied consent laws exist throughout the United States, and cases outside New Hampshire have specifically addressed this issue.

Some courts have focused on the law's purpose in making the highways safe by encouraging suspected persons to take the test and have held that the statute requires only that the warning be given, and not that the driver understand the consequences of a refusal. See, e.g., Furcal-Peguero v. State, 566 S.E.2d 320, 324 (Ga. Ct. App. 2002); People v. Wegielnik, 605 N.E.2d 487, 489–91 (Ill. 1992). Other states have taken the view that because of the law's policy to assist in obtaining evidence regarding impaired driving, a driver need only understand that he or she has been asked to take a test and need not understand the consequences of the refusal or be able to make a reasoned judgment. See, e.g., Yokoyama v. Comm'r of Public Safety, 356 N.W.2d 830, 831 (Minn. Ct. App. 1984); Martinez v. Peterson, 322 N.W.2d 386, 388 (Neb. 1982).

A more reasoned approach is taken by other courts, which recognize multiple purposes to the implied consent law. The Wisconsin Supreme Court has held that the purpose behind the Wisconsin implied consent law is not only to combat drunk driving, but to advise the accused about the nature of the driver's implied consent rights. State v. Piddington, 623 N.W.2d 528, 538 (Wis. 2001). In that case, the Wisconsin court noted that while "there is a functional similarity between the implied consent and Miranda warnings, there are significant distinctions that dictate that an accused driver need not

comprehend the implied consent warnings for the warnings to have been reasonably conveyed." Id. at 539. The "Miranda rules do not apply because the request to submit to a chemical test does not implicate testimonial utterances." Id. (quotation omitted). The court reasoned:

> Consequently, there are no rights that the arrestee can or must knowingly and intelligently waive before the chemical testing proceeds, and no concomitant need for the accused driver to understand the warnings.
>
> In consideration of the differences between the implied consent warnings and the Miranda warnings, the determination of whether the law enforcement officer reasonably conveyed the implied consent warnings is based upon the objective conduct of that officer, rather than upon the comprehension of the accused driver. This approach ensures that the driver cannot subsequently raise a defense of "subjective confusion," that is, whether the implied consent warnings were sufficiently administered must not depend upon the perception of the accused driver. Whether the implied consent warnings have been reasonably conveyed is not a subjective test; it does not "require assessing the *driver's perception* of the information delivered to him or her."

Id. at 539–40 (emphasis in original) (quotation & citation omitted).

Similarly, the Iowa Supreme Court has held that the purpose of the Iowa implied consent law is not merely to obtain evidence to combat drunk driving, but is also to "advise accused drivers of the consequences of submitting to or failing the chemical test." State v. Garcia, 756 N.W.2d 216, 222 (Iowa 2008). Thus, the Iowa Supreme Court has held that to fulfill the purpose of providing an accused driver a basis for evaluation and decision-making, the law enforcement officer "must use reasonable methods that reasonably convey the implied consent warnings, in consideration of circumstances facing him or her." Id. at 222–23.

The Court also finds the decision of the New Jersey Supreme Court in State v. Marquez, 202 N.J. 485, 998 A.2d 421 (2010) helpful. Under New Jersey law, refusal to

consent to a chemical test is a crime and therefore the State must prove intent. But where a defendant claims he does not understand the language in which the warnings were given, he must bear the burden of production or persuasion on the issue because that information is peculiarly within the possession of the defendant, not the State. Id. at 438–39.

The New Hampshire implied consent law not only has the purpose of combating drunk driving, but to ensure "protection of the innocent" by requiring the officer to explain the opportunity to have additional testing. See Gallant, 108 N.H. at 75–76. Therefore, it requires more than merely reading the implied consent warnings to a criminal defendant. Contra Furcal-Peguro, 566 S.E.2d at 324; Wegielnik, 605 N.E.2d at 489–90. Unlike the Minnesota and Nebraska courts, the New Hampshire Supreme Court has explicitly held that a defendant must be informed of the direct, although not the collateral consequences, of refusing to take a chemical test. Compare Hess, 129 N.H. at 492–94, with Yokomaya, 356 N.W.2d at 831, and Martinez, 322 N.W.2d at 388. But the New Hampshire Supreme Court has squarely held that questioning under the implied consent law does not require that the defendant be afforded counsel. State v. Greene, 128 N.H. 317, 319–20 (1986).

The Court believes that the decisions of the Wisconsin and Iowa Supreme Courts express the position that the New Hampshire Supreme Court would take if the issue were squarely presented to it. The Court must therefore apply these principles to the facts the Court has found, and determine whether or not Officer Pfefferle "reasonably conveyed the implied consent warnings based upon the objective conduct of the officer . . . rather than upon the comprehension of the accused driver." See Garcia, 756 N.W.2d at 222.

IV

A

Officer Pfefferle knew the Defendant and had spoken with him in the past. She had dealt with the Defendant before his arrest on a frequent basis—approximately once a month. From her interactions with him, and from speaking with him, she believed the Defendant understood the English language. Most importantly, the Defendant told her not once, but twice, that he spoke the English language While she had telephonic translation services available to her, to require a defendant who wished to answer questions in English to use the service might have resulted in frustration and led to a lack of cooperation.[1] . Considering the circumstances, the Court finds that Officer Pfefferle reasonably conveyed the implied consent warnings to the Defendant.

B

The Defendant also argues that the Court should find that he did not validly consent to the test because he was too intoxicated to consent. This argument cannot succeed as it rests upon the Defendant's confusion of the protection of constitutional rights and assertion of implied consent rights. Constitutional standards do not apply because the request to submit to a chemical test does not implicate testimonial statements; "consequently, there are no rights that the arrestee can or must knowingly and

[1] Moreover, though not necessary to the Court's decision, the Defendant has not borne the burden of persuading the Court that he did not understand the language in which the warnings were given. See Marquez, 998 A.2d.at 438. In addition to telling the police officer that he understood the English language, his conduct in attempting to mislead the police officer about the amount of liquor he had to drink and about whether or not he was driving a vehicle, as well as his ability to understand and perform the field sobriety tests compel a conclusion that he did in fact understand the English language. Under all the circumstances, and based upon the objective conduct of the officer, the Court concludes Officer Pfefferle "reasonably conveyed the implied consent warnings" to the Defendant. See Garcia, 756 N.W.2d at 222. Even if the law required a finding that the Defendant understood the implied consent warning, the Motion *in Limine* would be denied

intelligently waive before the chemical testing proceeds, and no concomitant need for the accused driver to understand the warnings." Piddington 623 N.W.2d at 539.

Moreover, courts have generally held that it is not a defense for a driver to claim he was too drunk to understand the implied consent warnings. The New Jersey Supreme Court has stated that excessive drinking, which is a voluntary behavior, is fundamentally distinct from person's lack of ability to understand a foreign language. See, e.g., Marquez, 998 A.2d. at 438. One purpose of the implied consent law has been enacted to aid the prosecution of guilty drunk drivers. Gallant, 108 N.H. at 76. Under the Defendant's interpretation of RSA 265-A:8 if a person is arrested because an officer has probable cause to believe that he was driving under the influence of intoxicating liquor, but the person is so intoxicated that he cannot understand the implied consent warnings, the person is relieved from the consent he has given, by statute, to a chemical test while driving and also relieved of any negative consequences for refusing the test. Such an interpretation would be patently inconsistent with the purposes of the implied consent law. Statutes cannot be interpreted in a way which will produce an absurd result. State v. Maxfield, 167 N.H. 677, 681 (2015).

It follows that the Defendant's Motion *in Limine* must be DENIED.

SO ORDERED

11/6/17
DATE

Richard B. McNamara,
Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. MERRIMACK COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

JEAN MFATANEZA

217-17-CR-703

MOTION IN LIMINE TO EXCLUDE ADMINISTRATIVE LICENSE SUSPENSION FORM AND BREATH TEST RESULTS

NOW COMES the defendant, Jean Mfataneza, by and through counsel, Kathryn Cox Pelletier, Esq., and respectfully requests this Honorable Court to exclude as evidence at trial the Administrative License Suspension form ("ALS"), and with such exclusion, to deem that any evidence obtained from the test of Mr. Mfataneza's breath with the Intoxilyzer 5000 (hereinafter "Breath Test") is inadmissible at trial.

As grounds therefore, the defendant states that admission of the ALS, and the Breath Test, would be in violation of RSA 265-A:8. See State v. Denney, 130 N.H. 217 (1987). Furthermore, admission of such results would violate his rights to due process under Part I, Article 15 of the New Hampshire Constitution and Amendment V of the United States Constitution.

I. FACTS

1. Mr. Mfataneza was originally charged in the Concord District Court with one count of Aggravated Driving While Intoxicated, and one alternative theory count of Driving Under the Influence of Alcohol.

2. At a bench trial on June 29, 2017, Judge Kristin Spath found Mr. Mfataneza guilty of Aggravated Driving While Intoxicated, and dismissed the alternative theory. After this

finding, Mr. Mfataneza appealed to a jury in the Merrimack County Superior Court.

3. At trial in Concord District Court, evidence was presented that Mr. Mfataneza was pulling his car out of a parking space in a parking lot, and that he backed his car into a plow truck that was actively removing snow from the lot.

4. The Concord Police Department arrived and administered Field Sobriety Tests at the scene, and later administered the Breath Test at the police station.

5. After the field sobriety tests, but before the Breath Test, Officer Melissa Pfefferle asked Mr. Mfataneza if he spoke English, and he responded "yes." Officer Pfefferle asked if he spoke Kinyarwandan or Swahili, and he responded he spoke English. Officer Pfefferle did not offer the services of an interpreter, despite the fact that she recognized that Mr. Mfataneza may be more comfortable in an alternate language. When she asked if Mr. Mfataneza read the English language, he stated "no."

6. Officer Pfefferle reviewed the Administrative License Suspension (ALS) form with Mr. Mfataneza. She read the words verbatim to him and asked if he understood after each line one through six. Mr. Mfataneza responded "yes." Officer Pfefferle did not check to see if Mr. Mfataneza could explain any of the rights or consequences explained on the form.

7. Officer Christian Lovejoy then showed Mr. Mfataneza the form and asked if he understood, to which he nodded and stated "yes." Officer Lovejoy then confirmed he signed the form, and again Mr. Mfataneza replied "yes."

8. Officer Almedin Dzel then administered Field Sobriety Tests in English, after which point Officer Lovejoy administered the Breath Test in English.

9. Mr. Mfataneza's only spoken words appear to be "yes" and "no," indicating that his understanding and ability to speak the English language is very limited. The ALS form references "an offense arising out of acts alleged to have been committed while you were

driving under the influence," and that the test is "at the discretion of a law enforcement officer." These phrases, and others, were not explained to Mr. Mfataneza in his native language, and the form was signed by Mr. Mfataneza without the benefit of an interpreter.

10. Mr. Mfataneza requires a Swahili or Kinyarwandan interpreter in court and to meet with counsel to discuss the pending charges.

II. ARGUMENT

A. The ALS and Breath Test are Inadmissible Without A Sufficient Understanding of the Rights and Consequences Explained Therein

11. Inherent in the provisions of RSA 265-A:8 is the premise that the subject must understand his or her rights prior to the test, otherwise the results would be inadmissible. The ALS form "DSMV 426" cannot be admitted at trial without sufficient proof of it's veracity. See RSA 265:A-8 (explaining requirements for ALS form completion). This form must be sworn to by the Officer before a Justice of a Peace prior to being admitted into evidence. Id.

12. Before a breath test is taken, an Officer must inform the subject of the test of his or her rights to have additional tests by a person of his or her choosing, must give the subject an opportunity to make such a request, and must inform the subject that a refusal to take the test will result in consequences. RSA 265-A:8(1)(a)-(c). "If the law enforcement officer . . . fails to comply with the provisions of this section, the test shall be inadmissible as evidence in any proceeding before any . . . court of this state." R.S.A. 265-A:8(III).

13. RSA 265-A:8(III) clearly puts the obligation on the Officers and administrators of the Breath Test to sufficiently explain the rights and consequences to the subject prior to administration of the test, and gives the Officers or administrators incentive to make sure they are properly explained or the results will not be admissible against the subject in any administrative hearing or court in New Hampshire. Officer Pfefferle's apparent knowledge that Mr.

Mfataneza's native language was not English, Mr. Mfataneza's acknowledgment that he could not read the English language, and the very basic responses of "yes" and "no" all questions indicate that Mr. Mfataneza was merely appeasing the Concord Officers. This evidence is not sufficient to demonstrate that Mr. Mfataneza understood any of the rights and consequences which Officers must explain to him prior to administration of the Breath Test.

B. The ALS and Breath Test are Inadmissible, just as A Miranda Waiver is Inadmissible Unless it is Knowingly, Voluntarily, and Intelligently Made

14. The results of a test of a person's blood, urine, or breath for alcohol content are not admissible in any court without a valid understanding of the rights and consequences explained in the ALS waiver, much as a defendant's statements are not admissible at trial without proof by the State that a knowing, voluntary, and intelligent waiver of Miranda rights was made. Cf. RSA 265:A-8(III) (requiring Officer to inform defendant or rights and consequences to take or to refuse the Breath Test prior to it's administration in order for the test results to be admissible in court), with State v. Zysk, 123 N.H. 481 (1983) (acknowledging that [b]efore the State can introduce a defendant's statement into evidence, the State must prove beyond a reasonable doubt that the defendant knowingly, intelligently, and voluntarily waived his Miranda rights"). In cases involving Miranda rights, a written waiver is not required as long as the rights explained therein were understood and waived knowingly, intelligently, and voluntarily in order for a defendant's statement to be admissible at trial. Id. Similarly, it is the rights and consequences contained within the ALS form that must be explained to the defendant by the Officer in order for the Breath Test to be admissible at trial. RSA 265-A:8(III).

15. In order to be valid, a waiver of rights must be knowingly, intelligently, and voluntarily made, and the physical and mental conditions of a defendant can determine whether a waiver

is voluntary. See State v. Sullivan, 130 N.H. 64, 69 (1987) (stating "[u]nless an accused understands his rights, there can be no voluntary, intelligent, knowing waiver.") (quoting State v. Noel, 119 N.H. 522, 525 (1983).

16. "[T]he issue of whether a waiver is knowing and intelligent is one of fact, to be decided on a case-by-case basis, and no single factor will determine its resolution as a matter of law." State v. Zurita, 133 N.H. 719, 725 (1990). The "mental and physical conditions [of the defendant] are crucial in determining whether a knowing, intelligent, and voluntary waiver has occurred." State v. Zysk, 123 N.H. 481, 486 (1983) (citing State v. Noel, 119 N.H. 522, 525 (1983).

i. Mr. Mfataneza's Lack of Proficiency in English Indicates he Could not Understand, and did not Knowingly, Voluntarily, or Intelligently Waive the Rights and Consequences in the ALS

17. In cases involving immigrants like Mr. Mfataneza, the ability of the defendant to understand his or her rights in English will be scrutinized. See State v. Zurita, 133 N.H. 725. The court in Zurita considered the defendant's contention that his status as a recent immigrant from Chile indicated the waiver of Miranda in English was not valid. Id. at 724-25. The defendant in Zurita's ability to affirm that he understood each right, to ask a question regarding the right to remain silent, and his ability to dictate a two page confession to officers in English indicated a sufficient understanding of the English language to make an intelligent waiver. Id. Testing the defendant's understanding of the rights was not necessary in Zurita because the defendant had exhibited these other indications that he was able to converse proficiently in English. Id.

18. In cases involving juveniles, a waiver of Miranda must be given in language that a child can understand if the waiver is ~~to be considered~~ knowing, voluntary, and intelligent. State v. Benoit, 126 N.H. 6, 19 (1985). The court in Benoit recognized that a Judge may consider a waiver under the totality of the circumstances, but required each Judge to make findings on

the specific factors, including whether the waiver was given in language understandable to the child, in order to determine whether a waiver was validly executed. Id. at 17-18.

19. Mr. Mfataneza did not execute an intelligent waiver of his rights. Although the ALS form was properly sworn, it was not properly administered. Mr. Mfataneza was essentially being agreeable with Officers: consistently giving one word, "yes" answers, and only stating "no" once when he indicated he could not read English. He did not make any further statements in English, or give any other indicators that he was proficient in the English language.

20. Mr. Mfataneza was not offered the services of an interpreter when Officer Pfefferle reviewed the ALS form. Officer Pfefferle did not simply the language in the ALS form but rather read the form verbatim to Mr. Mfataneza. Officer Pfefferle did not test Mr. Mfataneza's understanding of the English language despite her concerns that Mr. Mfataneza might not speak the language. Officer Pfefferle knew that Mr. Mfataneza did not read in English, knew that he spoke Kinyarwandan or Swahili, and observed Mr. Mfataneza was unable to engage in a conversation in English beyond "yes" and "no." Officer Pfefferle was obligated under RSA 265-A:8 to make sure Mr. Mfataneza had a sufficient understanding of the rights and consequences in the ALS prior to having him sign the form stating "I have been informed of these rights" in order for the Breath Test to be admissible at trial. See State of NH.., Department of Safety, Division of Motor Vehicles, Form DSMV426 (Rev. 05/15).

i. According to the State, Mr. Mfataneza was Intoxicated and Therefore Could not Understand and did not Knowingly, Voluntarily, and Intelligently Wavie the rights and consequences in the ALS

21. Finally, the totality of the circumstances test requires this court to consider factors other than Mr. Mfataneza's limited English language ~~skills to determine~~ that he did not execute a valid wavier on his ALS form. An individual's mental and physical condition are also important to determining whether a valid waiver of rights has been made. See State v. Noel, 119 N.H. 522,

b

526 (1979) (determining waiver of Miranda was valid when confronted with conflicting evidence of defendant's sobriety).

22. Intoxication is one factor to consider to determine whether a valid wavier was made. State v. Gagnon, 139 N.H. 175, 176 (1994) (citing State v. Sullivan, 130 N.H. 64, 69 (1987) (stating "[u]nless an accused understands his rights, there can be no voluntary, intelligent, knowing waiver.") (quoting State v. Noel, 119 N.H. 522, 525 (1983)).

23. In Gagnon, an officer testified that the defendant was "obviously intoxicated." The defendant never indicated he did not understand what was happening when speaking to police officers, and also made statements that he did not understand his rights. Id. Although the court determined the waiver was invalid even without the high level of intoxication, it was a factor to consider in determining whether the waiver of Miranda was knowing, voluntary, and intelligently made. 139 N.H. at 178; see also State v. Zysk, 123 N.H. at 486 (determining that although intoxication is an important factor to consider, the inconsistent evidence of the defendant's sobriety was sufficient to determine the waiver was valid and statement was voluntary).

24. According to the evidence at the bench trial in Concord District Court, Mr. Mfataneza was under the influence of alcohol with a blood alcohol level of .30 at the time he took the Breath Test. He smelled like alcohol, could not walk, was unsteady, and according to Officer Dzel, was unable to complete field sobriety tests due to his intoxication. Unlike the inconsistent evidence of sobriety in Gagnon, in this case, according to the State, Mr. Mfataneza was drunk. Given this high level of intoxication, and with his already limited understanding of English, under the totality of the circumstances, Mr. Mfataneza was unable to understand the rights and consequences in the ALS form, and therefore was unable to validly sign that he had been informed of those rights prior to taking the breath test with officer Lovejoy.

III. CONCLUSION

25. Officer Pfefferle reviewed the ALS form in English, with a defendant that did not demonstrate any real proficiency in English, and with a defendant who did demonstrate significant signs of impairment from alcohol and whose Breath Test result was .30. Mr. Mfataneza did not have a sufficient understanding of the rights and consequences outlined in the ALS form, and because Officer Pfefferle did not effectively communicate the rights and consequences as required by RSA 265-A:8(I)(a-c), the results of the subsequent breath test are inadmissible pursuant to RSA 265-A:8(III).

WHEREFORE, Mr. Mfataneza respectfully requests this Honorable Court:

A. Exclude the ALS form, and the results of his subsequent breath test, from evidence because under the totality of the circumstances Mr. Mfataneza's limited English proficiency and intoxication at the time indicate he was unable to make a knowing, voluntary, and intelligent waiver of the rights and consequences explained therein; or

B. Conduct a colloquy of Mr. Mfataneza prior to trial to determine whether a knowing, voluntary, and intelligent waiver was made; and

C. Grant any further relief as is necessary and just.

Respectfully submitted,

Kathryn Cox Pelletier, Esq.
N.H. Bar #266514
N.H. Public Defender
10 Ferry Street, Suite 202
Concord, NH 03301
603-224-1236

CERTIFICATE OF SERVICE:

I hereby certify that a copy of this MOTION IN LIMINE has been forwarded to the Merrimack County Attorney's Office on this 17 day of October, 2017.

Kathryn Cox Pelletier, Esq.

THE STATE OF NEW HAMSPHIRE

MERRIMACK, SS. SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

V.

JEAN MFATANEZA

17-CR-703

OBJECTION TO MOTION IN LIMINE

NOW COMES, The State of New Hampshire, by and through the Office of the Merrimack County Attorney, Wayne P. Coull, Assistant Merrimack County Attorney, and respectfully objects to the above captioned motion and in support thereof states:

1. The defendant was convicted in the Circuit Court of Aggravated DWI. The defense now challenges the admission of the ALS and BAC test results claiming the defendant was not sufficiently apprised of his rights to establish he knowingly consented to the breath test.

2. The Concord Police responded to a report of an intoxicated driver. The defendant had backed his car into a truck. The driver of the truck, who is also the apartment manager where the defendant lives and familiar with him, called the police. The police spoke with the defendant upon arrival. The defendant was pretty obviously impaired. The police asked if he would agree to field sobriety testing and he did. The defendant ultimately failed the tests because he was impaired. However the defendant made efforts to pass the tests. This of course means the officers were able to converse with him and explain the tests and the defendant understood them enough to try and complete the tests. He was asked what language he speaks and he said "English." The defendant told the officers he cannot read English but can speak it. The Officers arrested the defendant and took him to the station. The defendant was advised of his ALS rights. After each line was read to him, the defendant said he understood. He took the breath test after agreeing to it and indicting he agreed to the test on the standard form.

3. He blew a .30 BAC on the breath test.

4. The Concord police effectively communicated with the defendant so that he could knowingly and intelligently engage in the ALS process. The Court should consider the totality of the conversation and exchange with the defendant and the officers. There is no legal requirement to provide interpreters in common police encounters. State v. Zurita, 133 N.H. 725 (1990)

5. Additionally, the State objects to the characterization of this as a motion in limine. The motion is really a motion to suppress because it seeks to in fact suppress a statement of the defendant. The motion is untimely under Rule 15 of the Superior Court Rules of Criminal Procedure.

WHEREFORE, The State respectfully requests that this Honorable Court:

A. Deny the defendant's motion to suppress; and,

B. Hold a hearing on this matter; and,

C. Grant such other and further relief as this Honorable Court deems just and proper.

October 18, 2017

RESPECTFULLY SUBMITTED

_____

Wayne P. Coull

Assistant County Attorney

I hereby certify that a copy of this pleading was forwarded, on the above date Katheryn Cox Pelletier Esq., Counsel for the Defendant.

_____

Wayne P. Coull

Assistant County Attorney

STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
DIVISION OF MOTOR VEHICLES

23 Hazen Drive, Concord, NH 03305

John J. Barthalmes
Commissioner of Safety
Richard C. Bailey, Jr
Director of Motor Vehicles

407869

Date of Arrest: 12/12/16

Date of Service: 12/12/16

Name: Jean Mfatanezza
[AND ALIASES]

Date of Birth: 1/1/82

Mailing Address: 27 Concord Corduroy Apt 3 Concord NH

License #: 01MAJS2011 State

Summons #:

I. ADMINISTRATIVE LICENSE SUSPENSION RIGHTS/VIOLATIONS AND MISDEMEANORS
(circle Y or N) **16+ Passenger: Y N OHRV: Y N COMM. VEH: Y N COMM. DRIVER: Y N HAZMAT: Y N BOAT: Y N**

1. You have been arrested for an offense arising out of acts alleged to have been committed while you were driving under the influence of alcohol or drugs.
2. You are being asked to submit to a test or tests, at the discretion of a law enforcement officer, in order to determine the alcohol or drug concentration in your system. You may be asked to perform a breath, blood or urine, or physical test, or any combination of these.
3. You have the right to a similar test or tests of blood, urine or breath taken by a person of your own choosing at your own expense. Upon your request, you will be given the opportunity for such an additional test(s). You also have the right to obtain a portion of our sample of your breath, blood, or urine for testing at your own expense.
4. If you submit to a blood, urine or breath test which shows an alcohol concentration of 0.08 or more (or if you are under age 21, of 0.02 or more), your New Hampshire driver's license/operating privileges, non-resident operating privilege, and boating privileges in this state will be suspended.
5. If you refuse to take a test or tests, the refusal can be admissible in court.
6. If you refuse to submit to a test requested by the officer, your New Hampshire driver's license/operating privileges, non-resident operating privilege, and boating privileges in this state will be suspended.
7. I have been informed of these rights.

Defendant

8. ☒ I agree to the requested testing. ☐ I refuse the requested testing.

Defendant

☐ Defendant refused to sign (check if applicable)

Officer/Witness

II. ORDER OF SUSPENSION **THIS IS YOUR OFFICIAL NOTICE OF SUSPENSION**

☐ FAILURE TO SUBMIT - Because you failed to submit to testing, the Department of Safety hereby suspends your driving and boating privileges, effective thirty (30) days from today

☐ ILLEGAL LEVEL - Because the tests which were taken indicated an alcohol concentration of 0.08 percent or more (or 0.02 or more, if you are under 21), the Department of Safety hereby suspends your driving and boating privileges, effective thirty (30) days from today.

Results indicated _____ percent alcohol concentration in your system.

III. SURRENDER OF NEW HAMPSHIRE DRIVER'S LICENSE

By law, the officer is required to take your NH license. (If license is not included, indicate reason): _____

IV. TEMPORARY DRIVING PERMIT

☐ This entire notice is valid as a temporary driving permit. However, it shall become invalid if detached, defaced or a suspension, revocation or expiration takes effect within the period of issue. Valid only through 12:01 am thirty (30) days after date of service (see above).

☒ No temporary permit issued because operator does not have a valid New Hampshire license or did not surrender his New Hampshire license.

V. OFFICER'S REPORT

I, Melissa Pfeffer (officer's name) of the Concord Police Department 35 Green St Concord NH 03301 (complete/current mailing address)

hereby swear that I requested a test pursuant to RSA 265-A:4 and that Jean Mfatanezza (Driver's name)

☐ Refused to submit to testing ☒ Submitted to testing which disclosed an alcohol concentration of .130 percent.

☐ I received blood/urine test results on _____ (date).

Officer's Signature

Personally appeared and sworn to before me this 12th day of December year 2016

Notary Public/Justice of the Peace or Commissioner of Deeds) My Comm Exp 2-20-18

DEPT. OF SAFETY COPY

DSMV428 (Rev. 05/15)

Case Number: 424 16 CR 5793 Charge ID: 13145191

The State of New Hampshire
COMPLAINT

☐ VIOLATION	BYLAW ☒ MISDEMEANOR ☒ CLASS A ☐ CLASS B	FELONY ☐ CLASS A ☐ CLASS B ☐ UNCLASSIFIED

You are to appear at the: **6th Circuit - District Division - Concord Court,**
address: **32 CLINTON ST , CONCORD, NH**
in: **MERRIMACK County**
at: **8:15 AM**
on: **12/28/2016**

Under penalty of law to answer to a complaint charging you with the following offense:

THE UNDERSIGNED COMPLAINS THAT: PLEASE PRINT

Last Name	First Name	Middle Initial
MFATANEZA	JEAN CLAUDE	
Address	City	State / Zip
27 CONCORD GARDENS	CONCORD	NH 03301

Sex	Race	Height	Weight	Eye Color	Hair Color
M	B	5 1 0	1 2 0	BLACK	BLACK

DOB	License #:	OP License State
01/01/82	01MAJ82011	NH

☐ COMM. VEH. ☐ COMM. DR. LIC. ☐ HAZ. MAT. ☐ 16+PASSENGER

AT: CONCORD GARDENS, CONCORD NH
On 12/12/2016 at 3:01 PM in the above county and state, did commit the offense of:
RSA Name: AGGRAVATED DRIVING WHILE INTOXICATED
Contrary to RSA: 265-A:3
Inchoate:
(Sentence Enhancer):

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:

drive
~~operate~~ a motor vehicle upon a way, to wit, Concord Gardens ~~visitor~~ Parking lot, in said Concord, while having ~~a BAC~~ of .16 or more;
an alcohol concentration

2016 DEC 23 A 11:44

against the peace and dignity of the State.

☐ SERVED IN HAND

Melissa Pfaffenberg — Concord PD
Complainant Signature — Complainant Printed Name — Complainant Dept.

Making a false statement on this complaint may result in criminal prosecution.

Oath below not required for police officers unless complaint charges class A misdemeanor or felony (RSA 592-A:7.I).
Personally appeared the above named complainant and made oath that the above complaint by him/her subscribed is, in his/her belief, true.

Date — Justice of the Peace

NHJB-2962-D (05/20/2015)

Case Number: 424161R5793 Charge ID: 1314520C

The State of New Hampshire

COMPLAINT

☐ VIOLATION	MISDEMEANOR ☐ CLASS A ☒ CLASS B	FELONY ☐ CLASS A ☐ CLASS B ☐ UNCLASSIFIED

You are to appear at the: **6th Circuit - District Division - Concord Court,**
address: **32 CLINTON ST , CONCORD, NH**
in: **MERRIMACK County**
at: **8:15 AM**
on: **12/28/2016**

Under penalty of law to answer to a complaint charging you with the following offense:

THE UNDERSIGNED COMPLAINS THAT: PLEASE PRINT

Last Name	First Name	Middle Initial
MFATANEZA	JEAN CLAUDE	
Address	City	State / Zip
27 CONCORD GARDENS	CONCORD	NH 03301

Sex	Race	Height	Weight	Eye Color	Hair Color
M	B	510	120	BLACK	BLACK

DOB	License #:	OP License State
01/01/82	01MAJ82011	NH

☐ COMM. VEH. ☐ COMM. DR. LIC. ☐ HAZ. MAT. ☐ 16+PASSENGER

AT: CONCORD GARDENS, CONCORD NH
On 12/12/2016 at 3:01 PM in the above county and state, did commit the offense of:
RSA Name: DRIVING WHILE INTOXICATED
Contrary to RSA: 265-A:2
Inchoate:
(Sentence Enhancer):

And the laws of New Hampshire for which the defendant should be held to answer, in that the defendant did:
drive
~~operate~~ a motor vehicle upon a way, Concord Gardens ~~visitor~~ Parking lot, in said Concord, while under the influence of intoxicating liquor;

2016 DEC 23 A 9:11

against the peace and dignity of the State.
☐ SERVED IN HAND

Melissa Pfeffer — Concord PD
Complainant Signature — Complainant Printed Name — Complainant Dept.

Making a false statement on this complaint may result in criminal prosecution.

Oath below not required for police officers unless complaint charges class A misdemeanor or felony (RSA 592-A:7.I).
Personally appeared the above named complainant and made oath that the above complaint by him/her subscribed is, in his/her belief, true.

Date — Justice of the Peace

NHJB-2962-D (05/20/2015)

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. MERRIMACK COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE

V.

JEAN MFATANEZA

217-17-CR-703

MOTION TO ADOPT AND STAY SENTENCE

NOW COMES the defendant, Jean Mfataneza, by and through counsel, Kathryn Cox Pelletier, Esq., and respectfully requests this Honorable Court adopt the sentence as imposed by the Concord District Court following the original bench trial in this matter, on June 29, 2017 by Judge Spath. A proposed sentencing order is attached hereto. The sentence previously imposed was as follows:

1. Aggravated Driving Under the Influence
   A. 90 Days House of Corrections, all but 5 days suspended for 1 years of Good Behavior;
   B. 18 months Loss of License, 6 months may be suspended upon completion of the Impaired Driver Care Management Program (IDCMP);
      a. Loss of License took effect on June 29, 2017 upon a Guilty finding in district court;
      b. IDCMP timelines will not run unless and until Mr. Mfataneza is released from incarceration;
   C. $750 fine plus $180 penalty assessment;
   D. 24 months of an Ignition Interlock Device upon reinstatement of license by the Department of Motor Vehicles.
2. The State, per Wayne Coull, takes no po ..ı on this motion.

WHEREFORE, Mr. Mfataneza requests that this Honorable court adopt the sentencing order attached to this motion, reflecting the sentence as outlined above.

Respectfully submitted,

Kathryn Cox Pelletier, Esq.
N.H. Bar #266514
N.H. Public Defender
10 Ferry Street, Suite 202
Concord, NH 03301
603-224-1236

CERTIFICATE OF SERVICE:

I hereby certify that a copy of this MOTION TO SENTENCE AND TO STAY PENDING APPEAL has been forwarded to the Merrimack County Attorney's Office on this 13th day of November, 2017.

Kathryn Cox Pelletier, Esq.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **State v. Jean Claude Mfataneza**
Case Number: **217-2017-CR-00703 429-2016-CR-05793**

Please be advised that on November 14, 2017 Judge McNamara made the following order relative to:

Motion to Adopt and Stay Sentence - GRANTED

November 15, 2017

Tracy A. Uhrin
Clerk of Court

(490)

C: Kathryn Cox Pelletier, ESQ; Wayne P. Coull, ESQ

029176

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

SUPERIOR COURT

Court Name: Merrimack Superior Court

Case Name: State v. Jean Claude Mfataneza

2017 NOV 13 PM 3 21

Case Number 217-17-CR-703 Charge ID Number: _____

AGGRAVATED DWI SENTENCING ORDER - MISDEMEANOR

Plea/Verdict: **Guilty**	Clerk:
Crime: **Aggravated DUI**	Date of Crime: **12/12/2016**
Monitor:	Judge: **McNamara**

The defendant having been found guilty of the Class A Misdemeanor of Aggravated DWI under RSA 265-A, **the following sentence is imposed:**

I. **COMMITMENT TO HOUSE OF CORRECTIONS** RSA 265-A:18, I (b)(3)

The defendant is committed to the House of Corrections for 90 days / _____ months (not less than 17 consecutive days) ~~of which 12~~ ALL BUT 5 DAYS days shall be suspended.

The balance of the sentence is suspended for _____ months / 1 years during good behavior and compliance with all terms and conditions of this order.

☐ The sentence is ☐ consecutive to _____

☐ concurrent with _____

☑ Pretrial confinement credit: 0 days

This sentence is to be served as follows: ☑ Stand committed ☐ Commencing _____

II. **FINE:**

☑ Fine of $ 750.00 (not less than $750.00)(RSA 265-A:18,I (b)(1)); plus the penalty assessment of $180.00 to be paid:

☐ Now ☐ By _____ OR ☑ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.

☐ $ _____ of the fine and $ _____ of the statutory penalty assessment is suspended for _____ year(s).

A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

III. **REFERRED TO AN IMPAIRED DRIVER CARE MANAGEMENT PROGRAM (IDCMP)**

The defendant is referred to an IDCMP to schedule a full substance use disorder evaluation. A condition of the suspension of any portion of the sentence shall be that within 30 days of release from the county correctional facility, the defendant shall schedule a substance use disorder evaluation, complete the required substance use disorder evaluation within 60 days of release, and comply with the service plan developed. The IDCMP shall administer the substance use disorder evaluation and shall develop the service plan from that substance use disorder evaluation. Any portion of the suspended sentence to the county correctional facility may be imposed if the defendant does not comply with all the requirements of this order or becomes noncompliant with the service plan during the suspension period.

IV. LICENSE/PRIVILEGE TO DRIVE REVOCATION

A. The defendant's ☑ driver's license ☐ privilege to drive shall be revoked for 18 months / _____ years (not less than 18 months nor more than 24 months (RSA 265-A:18, I (b) (5))

The defendant may seek suspension of up to 6 months of this license revocation upon confirmation from the IDCMP that the defendant is in full compliance with the service plan and on the conditions that an interlock device be installed for the period of the suspended sentence in addition to any period required in accordance with RSA 265-A:36 and that all fees have been paid. RSA 265-A:18, I (b)(5)(A). To seek a suspension of the license revocation imposed in this order, the defendant must file a written motion with the clerk of court and send a copy of that motion to the prosecutor. All such requests should be filed 30 days before the date on which the defendant is seeking the return of the license/privilege to drive.

B. Pursuant to RSA 265-A:36, I, the defendant shall be required, after the period of license revocation, to install an interlock device as defined in RSA 259:43-a in any vehicle registered to the defendant or used by the defendant on a regular basis. The interlock is ordered to be installed for _____ months / 2 years (not less than 12 months nor more than 2 years).

Installation and monitoring costs for the interlock device shall be paid by the defendant.

V. PROBATION

The defendant is placed on probation for _____ months / _____ years (not more than 2 years – RSA 651:2,VI (b) upon the usual terms of probation and any special terms of probation determined by the probation officer; and, as further conditions of probation, the defendant shall comply with all orders contained herein, including compliance with any counseling orders or after-care requirements imposed by the IDCMP which the defendant attends. **Violation of probation may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period."

VI. RESTITUTION

☐ The defendant is ordered to make restitution of $ _____ plus statutory 17% administrative fee:

☐ Through the Department of Corrections as directed by the Probation/Parole Officer

☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

☐ Restitution is not ordered because: _____

VII. FURTHER ORDERS

A. The defendant shall not operate a motorboat on the waters of this state for the same period as the loss of driving privileges. RSA 265-A:20

B. The defendant shall not operate a motor vehicle until the New Hampshire Division of Motor Vehicles restores his license or right to operate.

C. Defendant is required to pay all fees arising from services provided by IDCMP and its referrals for the service plan.

D. If this sentencing order allows the defendant to seek the return of the license/right to operate, the defendant must file a written motion with the clerk of court and send a copy of that motion to the prosecutor. This motion should be filed 30 days before the date on which the defendant is

seeking the return of the license/right to operate.

E. The defendant is ordered to be of good behavior, and comply with all the terms of this sentence

F. If a portion of the fine or penalty assessment was suspended, that suspension is conditioned upon the defendant's compliance with all orders contained in this sentence.

VIII. OPTIONAL ORDERS

A. ☐ The defendant is ordered to submit to random urinalysis and drug testing as deemed appropriate. RSA 265-A:18, I (a)(6)(B)

B. ☐ The defendant shall complete the following community service:

C. ☐ The defendant shall make the following restitution/payment of emergency response fee RSA 153-A:

D. ☐ The defendant shall abide by the following restrictions on activity and behavior:

E. ☐ Law enforcement agencies may ☐ destroy the evidence in this case ☐ return evidence in this case to its rightful owner.

F. ☑ Other:

This sentence is stayed pending appeal to the Supreme Court of New Hampshire. Loss of license was effective June 29, 2017. IDCMP timelines will begin if and when defendant is released from the HOC.

11/14/17
Date

Presiding Justice