THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0693

State of New Hampshire

v.

Jean Claude Mfataneza

STATE'S MEMORANDUM OF LAW IN LIEU OF BRIEF

STATEMENT OF THE CASE

The State charged the defendant, Jean Claude Mfataneza, with aggravated driving while intoxicated and an alternative-theory count of driving while intoxicated for an incident that occurred in Concord on December 12, 2016. DA[1] 24–25; RSA 265-A:2; RSA 265-A:3. The State subsequently charged him with driving without a valid license. CT 3. The defendant was convicted of all charges following a trial in the Sixth Circuit Court—District Division—Concord (*Spath*, J.). CT 58. The defendant filed a *de novo* appeal for trial in Merrimack County Superior Court. DB 2. He then filed a motion *in limine* to exclude the Administrative License Suspension ("ALS") form and the blood alcohol breath test ("breath test") administered after his arrest. DA 12–20. The State objected to that motion, and the trial court (*McNamara*, J.) denied it. DA 21–22; DA 1–11. After a stipulated-facts bench trial, the trial court convicted the defendant on all charges. ST 1–12.

This appeal followed.

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[1] DA refers to the defendant's appendix at the end of his brief; DB refers to the defendant's brief; CT refers to the June 29, 2017 Circuit Court trial transcript; MHT refers to the November 1, 2017 motion hearing transcript; ST refers to the November 6, 2017 stipulated-facts trial.

STATEMENT OF THE FACTS

A. Facts elicited at motion hearing

At a hearing on the defendant's motion *in limine*, Officer Melissa Pfefferle of the Concord Police Department, Officer Almedin Dzelic of the Concord Police Department, the property manager of Concord Gardens, Dawn Wilson, and the defendant testified. MHT 7–57. During the hearing, the following facts were elicited.

On December 12, 2016, officers from the Concord Police Department were dispatched to the Concord Gardens apartment complex to respond to a call of driving while intoxicated. MHT 25. Officer Dzelic arrived at the scene and saw that a sedan had backed into a pickup truck. MHT 25. Based on his conversation with Ms. Wilson, he concluded that the defendant had been the operator of the sedan. MHT 26. Officer Dzelic believed the defendant was intoxicated, and asked him if he was willing to take a field sobriety test. MHT 26. The defendant agreed, and Officer Dzelic administered the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. MHT 26–29. Officer Dzelic explained each test beforehand, and testified that the defendant appeared to understand his instructions. MHT 27–29. The defendant performed poorly on the tests, and Officer Dzelic concluded that he was intoxicated. MHT 27–29. After the defendant nearly fell over during the walk-and-turn test, and started to fall during the one-leg stand, Officer Dzelic stopped the test out of concern for the defendant's safety. MHT 29.

Officer Pfefferle, who had also responded to the scene, took the defendant into custody and transported him to the police station for processing. MHT 12. Before reading the defendant the ALS form, Officer Pfefferle asked him twice which language he spoke and the defendant replied "English" both times. MHT 13. Officer Pfefferle then read the defendant the ALS form, line by line. MHT 13. After reading each line, she asked the defendant if he understood. MHT

13. For lines one through six on the ALS form, the defendant affirmatively nodded his head to indicate he understood. MHT 14. After line seven, he marked the signature line to indicate he had been informed of the rights contained in the ALS form. MHT 14; DA 23. On line eight, the defendant marked the box agreeing to the breath test. MHT 14; DA 23. The defendant gave no indication that he failed to understand any aspect of this process. MHT 14–15.

Both Officer Pfefferle and Officer Dzelic testified that they had interacted with the defendant on a regular basis before the incident on December 12, 2016. MHT 8–9, 24. Officer Pfefferle testified that "[s]ometimes there's been issues with his children, or wife" and that "[s]ometimes we've been called because he's been intoxicated and outside and needs assistance." MHT 9. While the defendant spoke in broken English, Officer Pfefferle testified that he "usually underst[ood] what [I was] saying, even in times when [he was] intoxicated [he would] talk to me in English." MHT 9. Officer Dzelic testified that he "never had any issues communicating" with the defendant and that he would respond to anything Officer Dzelic asked him. MHT 25. Although Ms. Wilson testified that the defendant's English comprehension could be affected by the amount of alcohol he had consumed, she had always been able to talk to him without a translator. MHT 37–38.

The defendant testified that in the African countries where he lived, when law enforcement asked you something, "you [couldn't] say no." MHT 50. He then stated that in this country, he had to respect and be polite to law enforcement. MHT 50. This testimony, however, was at odds with the record. When Officer Dzelic arrived at Concord Gardens, the defendant claimed that he only drank two beers. MHT 26. The breath test he took at the police station reported a blood alcohol content of .30, showing that the defendant drank significantly more than he had represented. ST 8. The defendant also told Officer Dzelic that he was not the operator of

the sedan. MHT 26. Ms. Wilson contradicted that testimony because she saw the defendant operating the vehicle. MHT 26.

B. Procedural background of the defendant's motion *in limine*

On October 11, 2017, the defendant filed a motion *in limine*, seeking to exclude the ALS form and breath test from trial. DA 12. He argued that the ALS form and breath test were inadmissible because he did not have a sufficient understanding of the "rights and consequences" related to the test, as required by RSA 265-A:8. DA 14. The defendant analogized the ALS form and breath test to a *Miranda* waiver. DA 15. He then asserted that because he could not understand English and was intoxicated at the time, he did not knowingly, voluntarily, and intelligently waive his rights under the ALS form. DA 16–18.

On November 1, 2017, the trial court held an evidentiary hearing on the defendant's motion *in limine*. MHT 1. Before and after the witness testimony, the parties argued the merits of the motion *in limine* based on the evidence provided to the court. MHT 3–7, 58–65. The trial court took the matter under advisement. MHT 65–66.

On November 6, 2017, the trial court issued an order denying the defendant's motion. DA 1–11. Because this Court has not yet addressed this question, the trial court looked to other jurisdictions for guidance and found a three-way split of authority. DA 7–9. The first approach requires that the warning be given, but not that the driver understand the consequences of a refusal. *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). As this approach is not at issue in this case, it does not merit a discussion here.

The second approach was taken by courts which recognized that the implied consent law had multiple purposes, including combating drunk driving and advising the accused of his

implied consent rights. *State v. Piddington*, 623 N.W.2d 528, 538 (Wis. 2001). New Hampshire's implied consent statute was enacted to achieve these two purposes. *State v. Gallant*, 108 N.H. 72, 76 (1967). In *Piddington*, the Wisconsin Supreme Court reasoned that implied consent warnings need not rise to the level of the *Miranda* rules, because "the request to submit to a chemical test does not implicate testimonial utterances." *Piddington*, 623 N.W.2d at 539. Thus, the test of whether a law enforcement officer reasonably conveyed implied consent warnings hinges on the "objective conduct of that officer, rather than upon the comprehension of the accused driver." *Id.* The Iowa Supreme Court took the same approach. *State v. Garcia*, 756 N.W.2d 216, 222 (Iowa 2008). The trial court adopted this approach as consistent with New Hampshire law. DA 9.

The third approach discussed by the trial court was taken by the New Jersey Supreme Court in a 2010 case. *State v. Marquez*, 998 A.2d 421 (N.J. 2010). In New Jersey, refusal of a chemical test is a crime and the State must prove the four elements of the offense.[2] *Id.* at 432. 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 that issue." *Id.* at 438.

After describing the three approaches, the trial court emphasized that, in addition to combating drunk driving, the implied consent law has the purpose of ensuring protection of the accused by requiring the officer to explain the opportunity to have additional testing. *State v. Gallant*, 108 N.H. 72, 76 (1967). The trial court found that the law requires more than reading the implied consent warnings to a criminal defendant. *Furcal-Peguero*, 566 S.E.2d at 324;

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[2] The four elements of refusal in New Jersey are "(1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test." *Marquez*, 998 A.2d at 432 (citing N.J.S.A. 39:4-50.2(e), 39:4-50.4a(a); *State v. Wright*, 527 A.2d 379, 380 (N.J. 1987)).

Wegielnik, 605 N.E.2d at 489–91. It also pointed out that this Court has held that a defendant must be informed of the direct, but not the collateral consequences, of refusing to take a chemical test. *Hess v. Turner*, 129 N.H. 491 (1987). Based on these principles, the trial court concluded 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." DA 9.

The court rejected the defendant's argument regarding his lack of proficiency in English, holding that, under the circumstances, Officer Pfefferle reasonably conveyed the implied consent warnings. The court then rejected the defendant's intoxication argument, concluding that his reading of RSA 265-A:8—as relieving an intoxicated person from implied consent—would be contrary to the purpose of the statute and that "[s]tatutes cannot be interpreted in a way which will produce an absurd result." *State v. Maxfield*, 167 N.H. 677, 681 (2015).

ARGUMENT

THE MOTION IN LIMINE TO EXCLUDE THE ALS FORM AND BREATH TEST WAS PROPERLY DENIED BECAUSE RSA 265-A:8 REQUIRES ONLY THAT AN OFFICER REASONABLY CONVEY IMPLIED CONSENT WARNINGS AND THE DEFENDANT DEMONSTRATED ENGLISH-LANGUAGE COMPREHENSION SUFFICIENT TO UNDERSTAND THE WARNINGS

On December 12, 2016, Officer Pfefferle acted reasonably and followed proper protocol when she reviewed the ALS form with and administered the breath test to the defendant, satisfying the statutory requirements under RSA 265-A:8. This Court should affirm the trial court's decision for two reasons.

First, RSA 265-A:8 requires law enforcement officers to inform persons arrested for drunk driving of the right to refuse the breath test and the consequences of such a refusal. The language of the provision, along with the dual purpose of the statute to combat drunk driving and protect the accused, properly led the trial court to adopt the approach taken by the courts in Iowa and Wisconsin. DA 9. The approach adopted by those courts analyzed whether the officers

"reasonably conveyed the implied consent warnings based upon the objective conduct of the officers . . . rather than upon the comprehension of the accused driver." DA 9. *See also Garcia*, 756 N.W.2d at 222; *Piddington*, 623 N.W.2d at 539. This Court should adopt the trial court's analysis, as it is the most compelling interpretation of the text and purpose of New Hampshire's informed consent statute.

Second, the record demonstrates that the defendant's understanding of English was sufficient for him to grasp the ALS warnings. Both Officer Pfefferle and Officer Dzelic interacted with the defendant on multiple previous occasions, and were always able to effectively communicate with him in English. MHT 8–9, 24–25. On the day of the incident, Officer Pfefferle twice asked the defendant what language he spoke, and the defendant replied "English" both times. MHT 13. Officer Pfefferle read the defendant the form and stopped to ask if he understood after each line. MHT 13–14. He responded in the affirmative each time she asked. MHT 14. The record establishes that the defendant then signed the form, knowingly waiving his rights and agreeing to a breath test. MHT 14. Officer Pfefferle fully complied with the requirements of RSA 265-A:8. Thus, this Court must affirm.

A. New Hampshire law requires the State to prove only that the officer reasonably conveyed the implied consent warnings, not that the accused driver understood them.

The trial court correctly interpreted RSA 265-A:8 as imposing the requirement that a law enforcement officer must reasonably convey the implied consent warnings. This interpretation follows the text of the statute and strikes the proper balance between the purposes of reducing drunk driving and ensuring an arrested person's implied consent rights. This question is a matter of first impression before this Court. Based on its established principles of statutory interpretation, this Court should adopt the trial court's reasoning and affirm.

"The interpretation of a statute is a question of law, which [this Court] review[s] de novo." *State v. Balch*, 167 N.H. 329, 332 (2015). "[This Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole." *Id.* "When [it] interpret[s] a statute, [it] look[s] first to the statute's language, and, if possible, construe[s] that language according to its plain and ordinary meaning." *Id.* This Court will "not read words or phrases in isolation, but in the context of the entire statutory scheme." *Id.* The "goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *Id.* "[It] will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* "[This Court] do[es] not presume that the legislature would pass an act leading to an absurd result, however, and [it] will consider other indicia of legislative intent where the literal reading of a statutory term would compel an absurd result." *State v. Gallagher*, 157 N.H. 421, 423 (2008).

Under New Hampshire's implied consent law, "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." RSA 265-A:4 (2017). This 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). Nonetheless, the statute requires a law enforcement officer to take certain steps to advise the person of his or her rights. RSA 265-A:8. The officer must inform the arrested person of his right to have an additional tests, afford an opportunity to request additional tests, and inform him of the consequences of the refusal to take a test. RSA 265-A:8. Evidence of a refusal may be admitted in court and the person may lose his license. RSA 265-A:10, 14.

The plain language of RSA 265-A:8 requires an officer to communicate the warnings to the arrested person. The section requires the law enforcement officer to "[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(c). The statute does not require the officer to communicate with the arrested person in his native language or even to ensure the person fully understands the warnings. In the absence of such language, it is fair to conclude that the statute requires the officer to reasonably convey the warnings. This Court has previously limited the application of the statute, holding that law enforcement officers are required to inform the arrested person of the direct consequences of refusing the breath test, but not the collateral consequences. *State v. Denney*, 130 N.H. 217, 221 (1987). "[W]hen the police stop drivers they suspect are intoxicated, they have no duty beyond that prescribed by RSA 265[-A:8] to educate those drivers who are unaware of the law." *State v. Jenkins*, 128 N.H. 672, 675 (1986). Thus, the Court has stated that law enforcements officers are under no duty beyond those clearly provided for by the statute. And the statute is unambiguous.

But if this Court concludes that the meaning of "inform" is ambiguous, it may look beyond the text to resolve the ambiguity. This Court has held that "[w]hen statutory language is ambiguous . . . we will consider legislative history and examine the statute's overall objective and presume that the legislature would not pass an act that would lead to an absurd or illogical result." *STIHL, Inc. v. State of N.H.*, 168 N.H. 332, 334–35 (2015) (quoting *Favazza v. Braley*, 160 N.H. 349, 351 (2010)). This Court interprets "statutory provisions in the context of the overall statutory scheme." *Id.* at 335.

There is no substantive legislative history regarding RSA 265-A:8.[3] The New Hampshire statutory scheme's overall objective is both to combat drunk driving and to ensure protection of the accused by requiring the arresting officer to explain the driver's right to additional testing and the consequences of refusing the test. *Gallant*, 108 N.H. at 75–76.

Based on this dual purpose, this Court should adopt a "reasonable efforts" standard to help define the word "inform" in the statute. In other words, "reasonable efforts" would not constitute "words the legislature did not see fit to include," but the definition of an ambiguous term in the statute. *In the Matter of Neal & DiGiulio*, __ N.H. __, 184 A.3d 90, 93 (2018). While imposing an affirmative duty of law enforcement to ensure the driver understands the ALS warnings does not rise to the level of "an absurd or illogical result," it would impose an improper burden on arresting officers. Officer Pfefferle complied with the requirements of the statute by informing the defendant and making efforts to ensure he understood the ALS form and its consequences. Nothing more is required. Accordingly, this Court must affirm.

The *Piddington* case, interpreting the Wisconsin statute, is helpful. The court in *Piddington*[4] stated that "the person [who is requested to submit to a chemical text] shall be orally informed by the law enforcement officer," then went on to detail the warnings that must be conveyed. *Piddington*, 623 N.W.2d at 537. The *Piddington* court found the word "inform" to be ambiguous and looked "beyond the text to its scope, history, context, subject matter, and purpose to determine the legislature's intent." *Id.* at 538 (citing *UFE, Inc. v. LIRC*, 548 N.W.2d 57, 60 (1996)). The court found that the Wisconsin implied consent law had the dual purpose of combating drunk driving and advising accused drivers of their rights. *Id.* at 538.

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[3] *See* 1965 N.H. Laws 238:1.

[4] The statute was amended in 2005. 2005 Wis. Laws 413. The introduction now reads: "At the time that a chemical test specimen is requested under sub. (3) (a), (am), or (ar), the law enforcement officer shall read the following to the person from whom the test specimen is requested. . . ." Wis. Stat. § 343.305(4).

The New Hampshire statute shares that dual purpose. *Gallant*, 108 N.H. at 75–76. Additionally, the *Piddington* court distinguished implied consent rights from *Miranda* rights, reasoning that "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." *Piddington*, 623 N.W.2d at 539. This Court made a similar observation in *State v. Ducharme*, writing that, "in the context of an arrest for driving under the influence, 'a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*.'" 167 N.H. 606, 614 (2015) (quoting *State v. Goding*, 128 N.H. 267, 274 (1986)).

Similarly, the Iowa implied consent statute requires that the officer "advise" the arrested person of the consequences of refusing the test. Iowa Code § 321J.8(1). The Iowa Supreme Court has found that the statute has the dual purpose of reducing drunk driving and advising the driver of the consequences of refusing to take a breath test. *Garcia*, 756 N.W.2d at 221–22. It found the shared purpose of the Iowa and Wisconsin laws to be persuasive, and held that the Wisconsin rule successfully implemented that goal. *Garcia*, 756 N.W.2d at 222. Thus, it adopted the Wisconsin rule requiring the arresting officer "under the circumstances facing him or her at the time of the arrest to utilize those methods which are reasonable, and would reasonably convey the implied consent warnings." *Id.* (quoting *Piddington*, 623 N.W.2d at 534–35. Based on the similar purposes of the New Hampshire, Wisconsin, and Iowa statutes, as well as the parallel reasoning of each state's court in implied consent cases, this Court should adopt the Wisconsin and Iowa approaches.

The defendant, however, urges the Court to adopt the New Jersey approach. DB 11. Under New Jersey law, a driver's refusal to consent to a blood alcohol test results in a quasi-criminal proceeding and the State has the burden of proving the four elements of the offense

beyond a reasonable doubt. *Marquez*, 998 A.2d at 432; N.J.S.A. 39:4-50.4a(a); *State v. Cummings*, 875 A.2d 906 (N.J. 2005)). Conversely, in New Hampshire, a refusal may be admissible in a proceeding against the person for driving under the influence and that person may lose his license. RSA 265-A:10, 14. This difference in the procedure and effect of refusing a breath test means that the New Jersey approach is incompatible with New Hampshire law.

The defendant also argues that because the New Hampshire and New Jersey statutes both require that the officer "inform" the person arrested for drunk driving of the consequences of refusing a breath test, this Court's analysis of the text would be identical to that conducted by the *Marquez* court.[5] DB 13–14. *See also* RSA 265-A:8, I(c); N.J.S.A. 39:4-50.2(e). However, a statutory requirement to "inform" the arrested person of the consequences of refusal does not create an affirmative duty on the officer to discover the arrested person's preferred language and communicate the implied consent warnings in that language. Such an expansive reading of "inform" would place a heavy burden on law enforcement that is not envisioned by the statute.

Because the New Hampshire implied consent statute shares the purposes and procedural structure of the Wisconsin and Iowa statutes, this Court should affirm.

B. Even if the defendant's understanding was required, his comprehension of the English language was sufficient to grasp the implied consent warnings.

Even if the statute requires the law enforcement officer to communicate the ALS warnings to the arrested person in a language he understands, the defendant's comprehension of English was sufficient to meet this standard. Under the New Jersey regime, the defendant has the burden of production and persuasion regarding whether he speaks the language in which the

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[5] While the defendant points to similarities between the New Hampshire and New Jersey statutes, including the fact that a driver gives informed consent by driving on public roads and that drivers have some protections from police forcibly extracting a sample, they are tangential to the central issue in this case: how to define a law enforcement officer's duty to inform.

officer while giving the warnings. *Marquez*, 998 A.2d at 438. As the evidence in the record shows the defendant understood English, he has not met his burden and this Court should affirm.

The record demonstrates that the defendant understood the English language. First, Officer Pfefferle and Officer Dzelic had both interacted with the defendant frequently in the past and their conversations showed that the defendant understood the English language. MHT 8–9, 24–25. Officer Pfefferle testified that she could communicate with the defendant "[f]airly well" and that he "usually understands what I'm saying, even in times when he's been intoxicated he'll talk to me in English." MHT 9. Officer Dzelic testified that he "never had any issues communicating with him" and that "anything that I ask he would respond." MHT 25. He went on to state that if he needed some kind of action taken, the defendant "would just do it." MHT 25. Officer Dzelic testified that in the past, he would ask the defendant to go to bed and leave his wife alone, and that the defendant "would say he would just go to bed and sleep." MHT 25. These previous interactions clearly show that the defendant understands English.

Second, the defendant told Officer Pfefferle twice that he spoke English. Before reading the defendant the ALS form, she asked him what language he spoke and he replied that he spoke English. MHT 13. Officer Pfefferle then asked him again what language he spoke and he again said English. MHT 13. Importantly, this question was open-ended, without suggesting the correct answer. The defendant's ability to answer an open-ended question in English suggests that he has a reasonable understanding of the language. After asking twice whether the defendant could speak English, Officer Pfefferle asked him whether he could read English and he responded that he could not. MHT 13. The defendant's ability to distinguish between speaking and reading English again suggests that he comprehended the language. Officer Pfefferle read the defendant the ALS form, asking after each line whether he understood. MHT

13–14. The defendant nodded to acknowledge he understood after each line. MHT 14. He then marked line seven to indicate he had been informed of the rights detailed in lines one to six and line eight to agree to the breath test. MHT 14; DA 23. Again, these responses illustrate the defendant's grasp of the English language. Further, as the trial court pointed out, "[w]hile 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." DA 10. The officer's decision, based on the representations made by the defendant, to proceed in English was entirely reasonable.

Third, the defendant's conversations with Officer Dzelic when he first arrived at the scene and during the field sobriety tests support the conclusion that the defendant spoke English. Officer Dzelic asked the defendant how much he had to drink, and he responded that he had two beers. MHT 26. Officer Dzelic then asked what happened, and the defendant said that he was not driving. MHT 26. Although the defendant testified that he was polite and cooperative with law enforcement because of his experiences in African countries, his misleading answers to the officer suggest otherwise. MHT 50; MHT 26. Officer Dzelic then explained and guided the defendant through the horizontal gaze nystagmus, walk-and-turn, and one-leg stand tests in English. MHT 26–29. While the defendant struggled with the tests due to his intoxication, Officer Dzelic had no problem communicating with him in English. MHT 26–29. As the trial court found, the defendant's "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." DA 10, n.1. Accordingly, this Court must affirm.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm.

The State waives oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATE OF SERVICE

I hereby certify that I have sent two copies of the State's memorandum of law to counsel for the defendant, Christopher M. Johnson, by first-class mail postage prepaid, at the following address:

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October 15, 2018

Sean R. Locke