

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2020-0234

State of New Hampshire

v.

Carley Williams

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE  
NINTH CIRCUIT COURT – DISTRICT DIVISION – MILFORD

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**BRIEF FOR THE STATE OF NEW HAMPSHIRE**

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THE STATE OF NEW HAMPSHIRE

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(Oral argument waived)

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**ISSUES PRESENTED**

I. Whether the trial court correctly determined, by a preponderance of evidence, that the defendant committed identity fraud as described in RSA 638:26.

II. Whether the trial court satisfied the requirements of due process when it held the defendant's final sentencing hearing telephonically.

## STATEMENT OF THE CASE AND THE FACTS

On April 12, 2017, Carley Williams (“the defendant”) pleaded guilty to one count each of unsworn falsification and false report to law enforcement, stemming from a “demonstrably false” report to law enforcement. DA<sup>1</sup> 25. The defendant received a suspended sentence of twelve months in the House of Corrections. DA 25. The court deferred the sentence for one year and then suspended it for one year, both conditioned on good behavior. DA 25. On April 5, 2019, the defendant was arrested for theft by unauthorized taking and later convicted of the same. DA 25. It is undisputed that this conviction violated the terms of the suspended sentence. DA 25.

### **A. The State’s first motion to impose and motion to reconsider**

On June 4, 2019, the State brought a motion to impose the suspended sentence. On November 4, 2019, the court (*Steckowych, J.*) held a hearing on the motion. DA 26. The defendant argued that she was the primary caregiver for her brother and that his medical concerns required constant care. HMI 11. Through counsel, the defendant alleged that her brother could not walk, suffered from incontinence, and had constant pain.

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<sup>1</sup>Citations to the record are as follows:

“DA \_\_” refers to the addendum to the defendant’s brief and page number;

“DB \_\_” refers to the defendant’s brief and page number;

“EH \_\_” refers to the transcript of the two-part evidentiary hearing held on February 3, 2020 and March 2, 2020, and page number;

“HMI \_\_” refers to the transcript of the November 4, 2019, hearing on the State’s motion to impose the suspended sentence and page number;

“SA \_\_” refers to the addendum to the State’s brief and page number;

“SH \_\_” refers to the transcript of the April 6, 2020 telephonic sentencing hearing and page number.

HMI 11. The defendant further alleged that her sister could provide some care during the weekend, but not during the week. HMI 11. As a result, the defendant claimed that she was providing “the lion’s share of the care for him.” HMI 12.

According to the defendant, imposing her suspended sentence would create a substantial hardship. A lengthy incarceration in the House of Corrections would cause her to lose her apartment and leave her brother homeless. HMI 12. The defendant brought a woman named Malea Perry to the hearing. HMI 11. Ms. Perry confirmed the defendant’s claims. HMI 16.

The court afforded the defendant’s testimony great weight, explaining, “your brother shouldn’t suffer significantly because you’ve made some bad choices here. And it sounds like he’s in a dire situation and in need of care.” HMI 17. Based on the defendant’s claims about her brother, the court imposed only ten days of the twelve-month sentence. HMI 20-21.

On November 26, 2019, the State filed a motion to reconsider the decision to impose only ten days of the suspended sentence. The State argued that the defendant had lied to the court about the extent of her brother’s medical problems, as well as the amount of care she was providing to him. DA 30. On December 17, 2019, the court held a hearing on the State’s motion to reconsider. The defendant failed to appear. HMI 24. Her counsel represented that the defendant’s “ride had fallen through” due to inclement weather. HMI 24. The court issued a warrant for her arrest. HMI 26.

On February 3, 2020, the court (*Derby, J.*) held an evidentiary hearing on the pending motions. According to defense counsel, the



defendant's brother would give testimony that corroborated the defendant's claim that she was his caregiver. But the defendant's brother was in the hospital and unavailable for the hearing. The court decided to take testimony from the State's witnesses and call the defendant's brother at a later date.

The State first called Barbara Emond, the property manager at the defendant's apartment complex. EH 18. Ms. Emond testified that she lived onsite in the apartment directly adjacent to the defendant's unit. EH 19. She testified to seeing the defendant's brother early in the defendant's tenancy. According to Ms. Emond, he walked with a cane, but walked on his own. EH 21. She testified that he would leave the apartment three or four times a day and walk to the nearby convenience store to buy beer. EH 21-22. Ms. Emond testified that the defendant had never added her brother to the lease and that the defendant had explained that this was because he only stayed with her three to four days a week.

Approximately three weeks after she moved in, the defendant inquired about whether her boyfriend, Billy Mackey, could move into the apartment with her. EH 22. The defendant completed the required paperwork and Mr. Mackey moved into the defendant's apartment on October 8, 2019. EH 22. Ms. Emond testified that she did not see the defendant's brother again after Mr. Mackey moved into the residence. EH 23. Ms. Emond testified that it was her understanding that the defendant's brother and boyfriend did not get along and would not have lived in the apartment together. EH 20.

The State then called Officer Stephen Rush of the Milford Police Department ("MPD"). Ofc. Rush testified that on November 7, 2019, the

defendant had reported to the MPD that her witness at the hearing on the motion to impose, Ms. Malea Perry, had stolen money from the defendant's wallet during the November 4, 2019 hearing. DA 30; EH 34.

In an effort to prove the theft, the defendant provided copies of text messages between herself and Ms. Perry to MPD. EH 34. These texts appear to have incriminated the defendant as well as Ms. Perry. These texts, however, tended to incriminate the defendant. In one, for example, Ms. Perry stated that the defendant had "lied to the judge." DA 30, EH 34. When officers from MPD followed-up with Ms. Perry about the theft, they asked her what she had meant when she accused the defendant of lying to the court. Ms. Perry informed the officers that, contrary to the defendant's claims, the defendant's brother does not live with the defendant and the defendant does not care for him. EH 35. Rather, the defendant's brother lived with Ms. Perry and her mother during the relevant time period. EH 35.

Officers from MPD also spoke with another of the defendant's siblings, Christopher Williams. He informed the officers that his brother was approximately 90% recovered from back surgery. EH 35-36. Mr. Williams confirmed that his brother was living with Ms. Perry and her mother, not the defendant. DA 30; EH 35-36. Finally, Ofc. Rush testified that the defendant had fabricated text conversations between herself and her brother that purported to corroborate the defendant's claims. EH 38-39.

#### **B. The State's second motion to impose**

Because the defendant's brother was unavailable to testify, the court continued the remainder of the hearing until March 2, 2020. Before the

hearing resumed, the State, on February 7, 2020, filed a second motion to impose the suspended sentence. In this motion, the State alleged that the defendant had committed a new crime of identity fraud (RSA 638:26). The State alleged that on December 11, 2019, the defendant had called the MPD, posing as Malea Perry, in an attempt to obtain confidential information. DA 32. Specifically, the defendant had asked about an outstanding warrant for Ms. Perry's arrest. DA 32.

When the hearing resumed on March 2, 2020, the court first dealt with the remaining issues carried over from the first part of the hearing, then addressed the new motion. The defendant's brother, for whom the hearing had been continued, refused to testify on his sister's behalf. According to defense counsel, "he doesn't want anything to do with this and he's not -- he hasn't been talking to us over the last week." EH 59.

After the parties rested on the motion to reconsider, the court took it under advisement and heard testimony related to the second motion to impose the suspended sentence. The State called three witnesses. The first witness was Jason Johnson, the director of communications and record keeper at Milford Area Communications ("MAC"). MAC is the public safety dispatch center for the Milford area. EH 65.

Mr. Johnson testified that dispatch received a call on December 11, 2019, which was recorded and later sent to MPD. EH 66-67. Mr. Johnson also testified to MAC practices regarding warrants. He testified that MPD warrants are not available to the general public. EH 67. He testified that the dispatch center would not provide information about a person's warrant status over the phone to a non-law enforcement entity or other third party. EH 67-68. He further testified that if someone called to ask about their own

warrant status, that person would be redirected to the police department. EH 68. Finally, Mr. Johnson testified that they consider all warrants confidential and would not include them in response to an RSA 91-A right-to-know request. EH 69.

On cross-examination, Mr. Johnson explained that the policy of confidentiality comes from multiple law enforcement sources. At the federal level, the FBI's Criminal Justice Information Systems ("CJIS") establishes confidentiality requirements. At the state level, Johnson explained that everything that comes through the State Police Online Telecommunications System ("SPOTS") is considered confidential and "under no circumstances shall any information obtained from SPOTS be given to anyone other than a law enforcement officer properly authorized by his or her department." EH 72.

The State next called Ofc. Rush. Ofc. Rush testified that he knew the defendant from multiple cases over the years. EH 73. He then testified that he reviewed the December 11, 2019, call to dispatch. EH 74. The State played the dispatch call for the court. EH 74. Although the caller claimed to be Malea Perry, Ofc. Rush testified that, unlike the caller, Ms. Perry has an Hispanic accent. EH 75. He additionally testified that the phone number the caller provided to dispatch was the defendant's number and that he had used that number to reach the defendant in the past. EH 76. Ofc. Rush further testified that, in his opinion, the caller was actually the defendant pretending to be Ms. Perry. EH 76.

Finally, Ofc. Rush testified that MPD arrest warrants are not available to the general public. EH 77. He also confirmed that they are treated as confidential, and if a third party were to call the department to

ask for information about an arrest warrant, he would never provide that information. EH 77. On cross-examination, he was asked only whether Malea Perry had an arrest warrant outstanding, and Ofc. Rush confirmed that she did. EH 77.

The State's final witness was detective Sergeant Andrew Fowle of the MPD. Sgt. Fowle confirmed that he knew the defendant from her previous encounters with law enforcement. EH 79. Sgt. Fowle testified that he had received the call from dispatch advising him that "someone has called in asking about whether or not they had a warrant for their [own] arrest and they were requesting a call back." EH 79-80. The caller claimed to be Malea Perry. EH 80. At the hearing, the State played the dispatch recording for Sgt. Fowle, who testified that, in his opinion, the voice on the call belonged to the defendant. EH 80.

Sgt. Fowle further testified that when he had initially received the call from dispatch, he found Malea Perry's phone number in the police department's internal records – not using the callback number that the caller had given dispatch – and spoke with the real Malea Perry. She informed him that she had not contacted dispatch. EH 80

Sgt. Fowle again confirmed that MPD arrest warrants are not available to the general public, that they are treated as confidential, and that information about an outstanding arrest warrant would not be provided to a third party. EH 81. On cross-examination, Sgt. Fowle explained that he would share warrant information with another law enforcement agency in the proper circumstances. EH 83. He also testified that he might share the information with the subject of the warrant under some circumstances, if he could confirm their identity. EH 84.

Following witness testimony, the court heard arguments from the parties. Without conceding that it was the defendant on the dispatch call, defense counsel argued that the information the defendant had sought, warrant information about Ms. Perry, was not “confidential information” as that term applies to the identity fraud statute. EH 89. The defendant emphasized the fact that the warrant information had been discussed in open court. EH 89-90. The defendant argued in particular that no statute made warrant information confidential. EH 90-93, 95. The State argued that a specific statute was not necessary to make something confidential under RSA 638:26. EH 96. The MPD would not provide information about an issued, but unexecuted, arrest warrant to the general public. EH 96.

### **C. The trial court’s order on pending motions**

On March 26, 2020, the court issued an order on the pending motions in this case. The court first addressed the State’s motion to reconsider. Based on the State’s witnesses, particularly the testimony from the property manager, Ms. Emond, the court determined that “the defendant greatly exaggerated the extent to which she was necessary for her brother’s care up to and before November 4, 2019.” DA 26. The court drew a negative inference from the brother’s unwillingness to testify, granted the State’s motion to reconsider, and vacated the earlier order imposing a ten-day sentence. DA 26.

Turning to the State’s second motion to impose, the court first determined that the State had proved by a preponderance of evidence that the defendant made the phone call in which she pretended to be Ms. Perry. DA 27. The court based this determination on the following: (1)

comparisons between the voice in the dispatch call to a recording of the defendant speaking in an earlier hearing; (2) “credible testimony that Ms. Perry has an accent and the person on the December 11, 2019 phone call did not have an accent;” (3) “the caller also stumbled before giving the *defendant’s* phone number as a call-back number and saying that the number was the number of the person the caller ‘stole from.’” The court noted that this statement represented “a level of candor and admission that would not ordinarily be expected from a criminal suspect;” and (4) “the defendant is the only person who could possibly have the right combination of information and motive to attempt the phone call.” DA 26-27.

The court then ruled that the police witnesses had testified credibly that the existence of an unexecuted arrest warrant is confidential information about the person who is the subject of the warrant. DA 27. The court noted, “there was sufficient evidence about the regular business practice of obtaining and executing arrest warrants prior to the actual arrest and the filing of charges, that any unexecuted arrest warrant against Ms. Perry would not have been revealed to a member of the general public over the phone.” DA 27.

The court was unpersuaded by the defendant’s argument that public disclosure of an arrest warrant after it has been executed nullifies its earlier confidential nature. DA 27-28. Therefore, the court ruled that the State had proved by a preponderance of evidence that the defendant had committed identity fraud and breached the conditions of good behavior mandated by her suspended sentence. DA 28. The court ordered the clerk to schedule a new sentencing hearing. DA 28.

**D. Telephonic sentencing hearing**

Around this time, the case stalled due to the state of emergency in response to the COVID-19 pandemic. As a result, the court held a telephonic hearing to announce the sentence from the second motion to impose on April 6, 2020. SH 1-3. The defendant objected to proceeding with a telephonic hearing. SH 3-4. The State countered that a hearing was unnecessary because the parties had already participated in an in-person evidentiary hearing on this matter. SH 4.

The court agreed with the State that the two-part hearing had provided the defendant with fair opportunity to adjudicate the issue in person. SH 6. The court had already determined, prior to the telephonic hearing, how much of the suspended sentence to impose. The only remaining question was the defendant's report date. SH 6. Ultimately, the court sentenced the defendant to serve seventy days of the suspended sentence, with ten days credited for time served. SH 13-14. In light of the COVID-19 pandemic, the court set a report date of June 26, 2020, which could be reassessed upon the defendant's motion. SH 14.

This appeal followed. The trial court stayed the case pending appeal. On July 20, 2020, the defendant moved for bail pending appeal. SA 33. On July 23, 2020, the court granted the defendant bail pending appeal. SA 34. The defendant remains free on personal recognizance pending the outcome of this appeal. SA 35.



### **SUMMARY OF THE ARGUMENT**

I. The trial court correctly found that the State had proved, by a preponderance of evidence, that the defendant committed identity fraud under RSA 638:26. Contrary to the defendant's claim, the statute does not require the State to prove that a specific law makes the sought information "confidential." It is sufficient that the keeper of that information treats it as confidential and has not made it available to the general public. However, if this Court disagrees and holds that a specific law or rule is necessary, RSA 106-B:14, RSA 106-B:14-a, and RSA 106-B:14-b designate information related to outstanding warrants confidential.

II. Due process did not require the court to hold the defendant's final sentencing hearing in person. The court had previously held a two-part evidentiary hearing during which the defendant was permitted to testify, present witnesses, and cross-examine the State's witnesses. In addition, although the final sentencing hearing was held telephonically, the defendant was present at the hearing and, again permitted to speak.

## ARGUMENT

### **I. THE TRIAL COURT CORRECTLY FOUND, BY A PREPONDERANCE OF EVIDENCE, THAT THE DEFENDANT COMMITTED IDENTITY FRAUD UNDER RSA 638:26.**

#### **A. Standard of review**

“A suspended sentence may be revoked . . . upon proof by a preponderance of the evidence of a violation of the condition upon which the sentence was suspended.” *State v. Weeks*, 141 N.H. 248, 251 (1996). “When . . . the condition was to be of good behavior, the State's burden of proof is satisfied either by establishing the fact of a criminal conviction for the acts which constitute the violation or by proof of the commission of the underlying acts.” *Id.* (quotation omitted). This Court reviews a trial court's decision to impose a suspended sentence for an unsustainable exercise of discretion. *State v. Gibbs*, 157 N.H. 538, 540 (2008). To the extent that this case involves statutory interpretation, this Court reviews the trial court's statutory interpretation *de novo*. *State v. Mayo*, 167 N.H. 443, 450 (2015).

#### **B. The existence of an unexecuted warrant meets the definition of “confidential information. . . that is not available to the general public” established under RSA 638:26.**

“In matters of statutory interpretation, [this Court is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole.” *State v. Formella*, 158 N.H. 114, 116 (2008). This Court will first “examine the statutory language, and, where possible, [will] ascribe the plain and ordinary meanings to the words used.” *State v.*

*Kardonsky*, 169 N.H. 150, 153 (2016) (citing *State v. Maxfield*, 167 N.H. 677, 679 (2015)). This Court “interpret[s] 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.*

RSA 638:26 reads in relevant part:

- I. A person is guilty of identity fraud when the person:
  - (d) Poses as another person, without the express authorization of such person, with the purpose of obtaining confidential information about such person that is not available to the general public.

On appeal, the defendant argues that information related to an unexecuted warrant is not “confidential information,” as that term appears in RSA 638:26. According to the defendant’s interpretation, information “is confidential only when declared so by law.” This interpretation has no basis in the statute or the common usage of the word “confidential.”

Despite the defendant’s attempt to parse the phrase “confidential information. . . that is not available to the general public” (DB 13), the phrase, considered as a whole, does not require a specific statutory grant of confidentiality. It simply denotes that the information sought must be confidential, *i.e.* secret, and then defines the contours of the secret nature of the information. By its plain terms, the statute internally defines confidential information as information that is “not available to the general public.” Whatever other definitions exist, therefore, are irrelevant to the construction of RSA 638:26.

The defendant does not contend with the statute’s internal definition of confidential. Instead, he argues that the term is undefined and turns to

dictionary definitions for support. In support of his novel interpretation of “confidential information,” the defendant points to the Black’s Law Dictionary definition of “confidential communication.” The definition of confidential communication is “privileged communications such as those between spouses physician-patient, attorney-client, confessor-penitent, etc.” This definition, argues the defendant, “implies that communications, or information, is confidential only when declared so by law.”

But “confidential communication” is a legal term of art that applies to specific types of communication between parties with special relationships and has no relevant application to this statute. Further, the defendant conflates the terms communication and information to reach his conclusion. Even assuming, *arguendo*, that privileged communications are only confidential when declared so by law, the defendant has provided no reason why this should apply to all confidential information.

Even if the defendant is correct that “confidential information” is undefined in the statute, she has not explained why “confidential communication” furnishes the proper definition when Black’s Dictionary specifically defines “confidential (of information).” This more relevant dictionary definition supports the conclusion that information about unexecuted warrants is confidential. Black’s definition of “confidential” reads in relevant part: “(Of information) meant to be kept secret; imparted in confidence <confidential settlement terms>. *Black's Law Dictionary* (11th ed. 2019). Nothing in this definition mandates that information must be designated confidential by law. *Black’s* specific example for the word, “confidential settlement terms” reinforces this point. When settlement

terms are confidential, it is typically by agreement of the parties, not because some statute or court rule makes the terms confidential.

Likewise, *Webster's Third New International Dictionary* defines "confidential" as "communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly disseminated : private, secret." Similar to the *Black's* definition, nothing in *Webster's* definition denotes that information is confidential only when designated as such by statute or rule. Information is confidential when it is intended to be kept secret, or access to such information is limited.

**C. If this Court determines the defendant's interpretation of RSA 638:26 is correct, New Hampshire statute does make information regarding outstanding warrants confidential.**

Even if this Court determines that a specific law or rule is required to designate information "confidential," such laws do exist in New Hampshire, as the State's witness, Jason Johnson, explained in his testimony. Although he did not cite to the specific statutes, Mr. Johnson referred to the policy of providing warrant information only to law enforcement upon proper request. This policy derives from several statutes.

First, under RSA 106-B:14 criminal history record information "shall not be disclosed to any individual or public or private agency" except in situations enumerated by the statute, such as a request by law enforcement or the subject of the record. Information related to warrants is included in the definition of "criminal history record information." RSA 106-B:1, III. Notably, RSA 106-B:1 also defines "public criminal history record information," which does not include warrant information.

In addition, RSA 106-B:14-b refers to the dissemination of information related to warrants. It reads in relevant part:

The division of state police, or its designee, may record and update on its computer system on a daily basis the name of any person for whom there is an outstanding arrest warrant or capias issued for criminal or civil non-support, including failure to appear in connection with child support enforcement proceedings. *The information recorded shall be made available upon request to all local and state law enforcement agencies and officers.*

(Emphasis added). RSA 106-B:14-a establishes the same procedures for misdemeanors.

These statutes allow information related to outstanding warrants to be shared among law enforcement agencies upon request, but makes no such recourse to members of the general public. If it did, there would be no need to specify the manner in which law enforcement can obtain the information. The law, therefore, permits departments to maintain the confidentiality of warrant information, as long as they provide access to other law enforcement bodies.

The defendant further argues that the practice of some police departments to make their outstanding warrants public in “Most Wanted” lists somehow nullified the confidentiality of this warrant. MPD does not publicize their outstanding warrants and did not publicize this warrant. Whatever mechanism other police departments use to apprehend warrant subjects does not diminish the MPD’s ability to keep their outstanding warrants confidential, so long as they provide the warrant information to other law enforcement pursuant to RSA 106-B:14-a RSA 106-B:14-b.

Finally, contrary to the defendant's claim, the fact that witnesses later discussed the warrant in court does nothing to diminish its initial confidential nature. As the trial court noted, the officers were on the stand and under an oath to tell the truth when they answered questions about the warrant. DA 27-28. Necessary candor to the court about confidential matters is not comparable to disclosure of those matters in a phone call with an individual of unverified identity. It is sufficient that the warrant information was confidential at the time the defendant impersonated Ms. Perry and sought it.

## II. THE TRIAL COURT SATISFIED THE REQUIREMENTS OF DUE PROCESS BEFORE IT IMPOSED THE DEFENDANT'S SUSPENDED SENTENCE.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution states, “nor shall any State. . . deprive any person of life, liberty, or property without due process of law.” U.S. CONST. Amend. XIV. Likewise, Part I, Article 15 of the State Constitution provides, in relevant part: “No subject shall be ... deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land....” N.H. Const. pt. I, art. 15. “Law of the land in this article means due process of law.” *State v. Veale*, 158 N.H. 632, 636, *cert. denied*, — U.S. —, 130 S.Ct. 748 (2009). This Court reviews questions of constitutional law *de novo* and first considers arguments under the State Constitution, relying on federal law to aid its analysis. *State v. Martinko*, 171 N.H. 239, 242 (2018).

“The ultimate standard for judging a due process claim is the notion of fundamental fairness.” *Veale*, 158 N.H. at 637. “Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play.” *State v. Mwangi*, 161 N.H. 699, 703 (2011). When depriving a defendant of conditional liberty, such as imposing a suspended sentence, this Court has held that procedural due process requires six things:

- (1) written notice of the conduct which triggers the sought-after incarceration;
- (2) disclosure to the defendant of the evidence against him;
- (3) the opportunity to be heard in person and to present witnesses and evidence;
- (4) the right to confront and cross-examine adverse witnesses;
- (5) a statement in the record by the court indicating in substance the evidence relied upon



and the reasons for imposing commitment; and (6) representation by counsel, to be appointed by the court if the defendant is indigent.

*Id.* at 704.

Thus, a defendant has a due process right to a hearing before a court can impose a suspended or deferred sentence of incarceration. *Id.* See, also, *Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982). At this hearing, the court must afford the defendant “the opportunity to be heard in person and to present witnesses and evidence.” *Mwangi*, 161 N.H. at 704. “By affording a defendant this opportunity, courts seek to ensure an accurate fact-finding process as well as an informed and just decision.” *State v. Flood*, 159 N.H. 353, 355 (2009).

But due process guarantees are not rigid. “[T]he requirements of due process are flexible and call for such procedural protections as the particular situation demands.” *Veale*, 158 N.H. at 642. “The degree of procedural protection required varies and must be determined with reference both to the individual right or expectation in question and to the public interest that justifies a limitation on the right.” *Baker v. Cunningham*, 128 N.H. 374, 379 (1986).

The defendant appears to argue that she was denied the opportunity to be heard in person. But the record belies this claim. Prior to the onset of the COVID-19 pandemic and accompanying restrictions to in-person hearings, the court afforded the defendant a two-part, in-person evidentiary hearing. In addition to permitting the defendant the opportunity to testify and present her own witnesses and cross-examine the State’s, the court

partially continued the hearing to give the defendant's brother the opportunity to testify on her behalf.

During this two-part hearing, the court had the opportunity to observe the defendant and gauge her testimony, demeanor, and credibility, as well as that of the other witnesses. Following the evidentiary hearing, the court reviewed the evidence, conducted its own research, and wrote a thorough order explaining why it was imposing part of the defendant's sentence. DA 25-28. Throughout these proceedings, counsel represented the defendant. Based on these facts, the trial court plainly "ensure[d] an accurate fact-finding process as well as an informed and just decision. *Flood*, 159 N.H. at 355.

At the final telephonic sentencing hearing, the court explained its intention to announce a sentence based on the evidentiary hearing. SH 3. The predominant purpose of this hearing was to announce the sentence that the court had already determined and set an appropriate report date given the developing COVID-19 pandemic. Nevertheless, the court gave the defendant yet another opportunity to speak on her own behalf. SH 8-10. Weighed against the public interest in continuing the administration of justice, while limiting the spread of COVID-19, the record reflects that the court satisfied the requirements of due process prior to this hearing and the defendant was not entitled to further due process protections at this stage.

Moreover, under similar circumstances, this Court has found that the State Constitution is at least as protective of defendants' rights as the Federal Constitution. *Mwangi*, 161 N.H. at 706 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). *Mwangi* concerned parole revocation, but this Court has identified a comparable liberty interest whenever the

court retains power to impose incarceration at a later time, including suspended sentences, parole revocations, probation violations, and violations of conditional release, among others. *Stapleford*, 122 N.H. 1083, 1088 (1982).

Therefore, the defendant is not entitled to relief under the U.S. Constitution. Similar to the State Constitution, the U.S. Constitution entitles a defendant to an in-person hearing before the court may revoke a conditional grant of liberty. *Morrissey*, 408 U.S. at 489; *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). However, neither the State, nor the Federal Constitution requires multiple in-person hearings and the trial court's in-person evidentiary hearing satisfied the defendant's due process rights under both state and federal law.

**CONCLUSION**

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

The State waives oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

JOHN M. FORMELLA  
ATTORNEY GENERAL

May 14, 2021

/s/Zachary L. Higham  
Zachary Higham  
N.H. Bar No. 270237  
Assistant Attorney General  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301-6397  
(603) 271-3671

**CERTIFICATE OF COMPLIANCE**

I, Zachary L. Higham, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,338 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

May 14, 2021

*/s/Zachary L. Higham*  
Zachary Higham

**CERTIFICATE OF SERVICE**

I, Zachary L. Higham, hereby certify that a copy of the State's brief shall be served on Stephanie Hausman, Deputy Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

May 14, 2021

/s/Zachary L. Higham  
Zachary Higham

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From:

07/23/2020 16:00

#248 P.001/003

9<sup>th</sup> Circuit~District Division-Milford  
4 Meadowbrook Drive  
MILFORD NH 03055  
1-855-212-1234



# Fax

MILFORD P.D.

**To:** Atty. Borchardt **From:** ERICA @ 9<sup>th</sup> Circuit-District Division-MILFORD

**Fax:** \_\_\_\_\_ **Pages:** 3 (Including cover)

**Phone:** \_\_\_\_\_ **Date:** 7/23/20

**Re:** CARLEY Williams **CC:** \_\_\_\_\_  
2016-707

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Motion-Granted.



From:

07/23/2020 16:00

#248 P.002/003

THE STATE OF NEW HAMPSHIRE

9th Circuit - District Division - Milford

HILLSBOROUGH, SS.

July TERM, 2020

STATE OF NEW HAMPSHIRE

v.

Carley Williams  
#16-CR-707

RECEIVED

JUL 20 2020

MILFORD DISTRICT COURT

Motion for Bail Pending Appeal

Carley Williams respectfully requests the Court grant her bail pending appeal. The Supreme Court has accepted her discretionary appeal. A copy of the Supreme Court's acceptance order is attached.

RSA 597:1-a, states that "[a]ny person who has been found guilty of a misdemeanor and who is awaiting imposition or execution of sentence, or who has been sentenced to a term of imprisonment and who has filed an appeal shall, before the conclusion of the appellate proceeding, be released upon compliance with the provisions of RSA 597:2." The defense requests the Court order her release per the terms of RSA 597:1-a.

WHEREFORE Carley Williams, by and through counsel, respectfully requests this Honorable Court grant her release on bail pending the conclusion of the appeal and grant whatever further relief the Court deems just and equitable.

Respectfully submitted,

/S/ Paul Borchardt  
Paul Borchardt  
N.H. Bar No. 14874

RECEIVED

JUL 20 2020

MILFORD DISTRICT COURT

From:

07/23/2020 16:01

#248 P.003/003

New Hampshire Public Defender  
44 Franklin Street  
Nashua, NH 03060  
(603) 598-4986

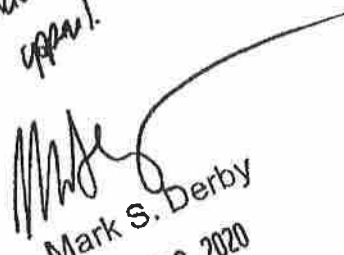
CERTIFICATE OF SERVICE

I, Paul Borchardt, hereby certify that a copy of the foregoing Motion has been forwarded this 16th day of July 2020 to the Milford Police Department (representing the State in the Circuit Court) and the Attorney General's Office (representing the State in the Supreme Court).

/s/ Paul Borchardt

Paul Borchardt

*Motion granted.  
Defendant shall be released on P.R.  
bail, good behavior, pending completion of  
the appeal.*



Mark S. Derby

JUL 23 2020

N.H. Circuit Court  
9th Circuit - Milford

# The State of New Hampshire

Hillsborough County

Ninth Circuit Court  
District Division - Milford

<sup>2016-</sup>  
Docket No. 458-~~20-20~~ (CR) CV. LT-234

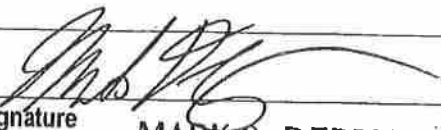
\_\_\_\_\_, plaintiff  
 State v. Carly Williams., defendant

## ORDER ON \_\_\_\_\_

11-2-2020 Deferred sentence hearing not held because  
case is on appeal. Case remains open under P.R. bail granted  
on 7-23-2020 pending appeal.

NOV - 2 2020

Date

  
Signature

MARK S. DERBY

Printed Name of Judge