

STATE OF NORTH CAROLINA)	IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE)	DISTRICT COURT DIVISION
)	
STATE OF NORTH CAROLINA)	
)	MEMORANDUM
V.)	MOTION TO DISMISS
)	MOTION TO SUPPRESS
)	
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)	

Defendant, by and through undersigned counsel, respectfully submits the following memorandum and summary of authorities in support of Defendant's motion to Dismiss the charges or Suppress intoxilyzer results. As grounds for this motion, defendant shows the following:

1. N.C. Gen. Stat. § 20-16.2 requires that qualified chemical analyst: shall inform the person orally and also give the person a notice in writing that:
 - (1) The person has a right to refuse to be tested.
 - (2) Refusal to take any required test or tests will result in an immediate revocation of the person's driving privilege for at least 30 days and an additional 12-month revocation by the Division of Motor Vehicles.
 - (3) The test results, or the fact of the person's refusal, will be admissible in evidence at trial on the offense charged.
 - (4) The person's driving privilege will be revoked immediately for at least 30 days if:
 - a. The test reveals an alcohol concentration of 0.08 or more;
 - b. The person was driving a commercial motor vehicle and the test reveals an alcohol concentration of 0.04 or more; or
 - c. The person is under 21 years of age and the test reveals any alcohol concentration.
 - (5) The person may choose a qualified person to administer a chemical test or tests in addition to any test administered at the direction of the charging officer.
 - (6) The person has the right to call an attorney and select a witness to view for him or her the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time when the person is notified of his or her rights.

2. In the present case, upon information and belief, the Defendant speaks only Spanish. The officer did not inform the defendant of the rights orally in Spanish, and the officer did not provide a written notice in Spanish of these rights.
3. It is the policy and procedure of the law enforcement officers *not* to *consistently* provide the refusal rights orally in Spanish, or give written notice in Spanish.
4. Failure to inform the defendant orally in Spanish and provide written notice in Spanish violates the North Carolina Constitution, The United States Constitution, and North Carolina General Statutes.
5. The flagrant violations of defendant's rights requires dismissal of the case pursuant to N.C. Gen. Stat. § 15A-954(4) ("The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.").

DUE PROCESS

6. When the State is obligated to provide notice, the State must provide notice in a manner reasonably calculated to apprise the party of the information. *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) ("[T]he notice must be of such nature as reasonably to convey the required information.").
7. The North Carolina Court of Appeals has defined "notice" in the context of criminal cases where the defendant's omission, or failure to act, results in a penalty, and where the State has reason to believe the defendant has a limited ability to understand. When the State has the duty to provide notice and when the State has reason to believe the person has limited understanding, actual notice tailored to the particular circumstances of the person with limited understanding is required. *State v. Young*, 140 N.C. App. 1, 7, 535 S.E.2d 380, 384 (2000) (quoting *In re Lamm*, 116 N.C. App. 382, 386, 448 S.E.2d 125, 128 (1994) stating "the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard").
8. In the present case, the application of N.C. Gen. Stat. § 20-16.2 to defendants who are known to speak only Spanish is unconstitutional because the State has taken no measures reasonably calculated to inform the defendants of their rights orally and in writing.
9. In addition, The State has not tailored notice to the capacities and circumstances of those

who must be informed and notified of their rights.

EQUAL PROTECTION OF THE LAW

10. In the present case, the failure to notify defendants orally and in writing of their rights in a language they understand happens most often with Spanish speaking residents who compose a significant and substantial minority of motorists in this County.
11. No steps have been made to translate the rights into Spanish and audio record those rights in order to orally inform Spanish speakers of their rights.
12. The Equal Protection Clause forbids the State from denying any person of the equal protection of the laws of the State. U.S. Const. Amend. 14.
13. An application of N.C. Gen. Stat. § 20-16.2 that protects the statutory rights of English speakers, while not providing the same protection to non-English speakers violates the 14th Amendment of the United States Constitution.
14. A Statute cannot be enforced in a discriminatory manner unless there is a compelling state interest justifying such discriminatory treatment.

NORTH CAROLINA STATUTORY AND CONSTITUTIONAL REQUIREMENTS

15. Failure to provide the refusal rights is a clear violation of N.C. Gen. Stat. § 20-16.2.
16. Failure to provide advise the rights makes the test inadmissible in court. *State v. Gilbert*, 85 N.C. App. 594 (1987), *State v. Shadding*, 17 N.C. App. 279, 194 S.E.2d 55 (1973).
17. Furthermore, the definition of “informed orally and given notice in writing,” may be construed from cases which define “willfull refusal” to comply with the intoxilyzer. A “willful refusal” has been defined within the meaning of *G.S. 20-16.2(c)* occurs where a motorist:
 - (1) is aware that he has a choice to take or to refuse to take the test;
 - (2) is aware of the time limit within which he must take the test;
 - (3) voluntarily elects not to take the test; and
 - (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test. *Etheridge v. Peters*, 301 N.C. 76, 269 S.E.2d 133 (1980); *Mathis v. NCDMV*, 71 N.C. App. 413, 322 S.E.2d 436 (1984).
18. Furthermore, whether there is a statutory violation in the administration of the rights does not depend on whether the defendant ultimately refused the test or blew into the

intoxilyzer. *State v. Abdereazeq*, 122 N.C. App. 727; 471 S.E.2d 445 (1996).

“We note defendants ground their motions to dismiss solely on an alleged procedural defect in the notification of their statutory rights. This alleged procedural defect occurred, if at all, prior to the time defendants elected whether or not to submit to chemical analysis. It follows therefore that the factual distinction between the defendants who submitted to chemical analysis and those who refused such analysis is without legal consequence to the resolution of the present issue.” *State v. Abdereazeq*, 122 N.C. App. 727; 471 S.E.2d 445 (1996).

19. Read together, these cases show that the test for the administration of statutory rights is an “awareness” test that requires the defendant to act “knowingly.” And, there is no difference between refusal cases or cases where there are breath results - when you are determining procedural defects in the notification of statutory rights.
20. Failure to adequately provide notice of these rights requires suppression of the test results. *State v. Gilbert*, 85 N.C. App. 594 (1987).
21. Without an intoxilyzer result the case must be dismissed for failure to provide statutory and constitutional rights, prejudice is presumed as a matter of law. *State v. Ferguson*, 90 N.C. App. 513, 519, 369 S.E.2d 378, 382 (1988) (“The denial of access to a witness in this case -- when the State's sole evidence of the offense is the personal observations of the authorities -- would constitute a flagrant violation of defendant's constitutional right to obtain witnesses under N.C. Const. Art. I Sec. 23 as a matter of law and would require that the charges be dismissed.”)

Respectfully submitted, this ___ day 200__

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I served the foregoing motion upon the State of North Carolina by first class United States mail, postage prepaid as follows.

Assistant District Attorney
In charge of District Court
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This ___ day of _____, 200__

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