

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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No. 2017-0143

State of New Hampshire

v.

Bailey P. Serpa

BRIEF FOR THE DEFENDANT

Rule 7 Mandatory Appeal from a Decision on the Merits
in the Strafford County Superior Court

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(15 Minute Oral Argument Requested)

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U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

N.H. Const. Pt. 1, Art. 18.

[Penalties to be Proportioned to Offenses; True Design of Punishment.]

All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.

N.H. Const. Pt. 1, Art. 33.

[Excessive Bail, Fines, and Punishments Prohibited.]

No magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

Text of Relevant Authorities (continued)

**RSA 632-A:4 (2017)
Sexual Assault**

I. A person is guilty of a class A misdemeanor under any of the following circumstances:

(a) When the actor subjects another person who is 13 years of age or older to sexual contact under any of the circumstances named in RSA 632-A:2.

(b) When the actor subjects another person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age to sexual contact where the age difference between the actor and the other person is 5 years or more.

(c) In the absence of any of the circumstances set forth in RSA 632-A:2, when the actor engages in sexual penetration with a person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 4 years or less.

II. A person found guilty under subparagraph I(c) of this section shall not be required to register as a sexual offender under RSA 651-B.

III.

**RSA 649-B:4 (2017)
Certain Uses of Computer Services Prohibited.**

I. No person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to commit any of the following:

(a) Any offense under RSA 632-A, relative to sexual assault and related offenses.

(b) Indecent exposure and lewdness under RSA 645:1.

(c) Endangering a child as defined in RSA 639:3, III.

II. (a) A person who violates the provisions of paragraph I shall be guilty of a class A felony if such person believed the child was under the age of 13, otherwise such person shall be guilty of a class B felony.

(b) A person convicted under paragraph I based on an indictment alleging that the person has been previously convicted of an offense under this section or a reasonably equivalent offense in an out-of-state jurisdiction shall be charged as a class A felony. If the indictment also alleges that the person believed that the child was under the age of 13, the person may be sentenced to a maximum sentence not to exceed 20 years and a minimum sentence not to exceed 10 years.

Text of Relevant Authorities (continued)

RSA 649-B:4 (2017) (continued)

(c) If the person has been previously convicted 2 or more times for an offense under this section or a reasonably equivalent statute in another state, the person may be sentenced to a maximum term not to exceed 30 years.

III. It shall not be a defense to a prosecution under this section that the victim was not actually a child so long as the person reasonably believed that the victim was a child.

**RSA 651-B:1, IX (eff. January 1, 2017)
Definitions**

....

IX. "Tier II offender" means a sexual offender or offender against children who is required to register pursuant to RSA 651-B:1, V(d) or RSA 651-B:1, VII(e), or is required to register as a result of any of the following offenses:

(a) RSA 169-B:41, II; RSA 632-A:3, I; RSA 632-A:3, II; RSA 632-A:3, IV if the victim was 13 years of age or older but less than 18 years of age; RSA 633:2; RSA 633:3; RSA 633:7; RSA 639:3, III; RSA 645:1, II; RSA 645:1, III; RSA 645:2; RSA 649-A:3; RSA 649-A:3-a; RSA 649-A:3-b; RSA 649-B:3; RSA 649-B:4; RSA 650:2, II; or RSA 644:8-g.

(b) A law of another state, territory, tribal territory, or the federal government reasonably equivalent to a violation listed in subparagraph (a).

(c) Any out-of-state offense for which the offender is required to register in the state where the conviction occurred and the division determines the offender is a tier II offender.

(d) The offender is required to register as a result of more than one sexual offense or offense against a child.

(e) Any offense not listed in subparagraph (a) where the court determined the offender is a tier II offender and required the offender to register.

....

Question Presented

1. Whether an 18 year old defendant who is convicted of using a computer to solicit sex from a person less than 4 years his age is subject to the lifetime registration requirement in RSA 651-B.

Issue preserved by Defendant's Objection to State's Motion for a Plea and Sentencing Hearing, arguments at the defendant's sentencing hearing, and the trial court's decision on the record and "Notice of Requirement to Register as Sexual Offender". App. at 19-23; SH 3-6, 23-25; DB 20-21; NOA 3, 10-11.¹

¹ Citations to the record are as follows:

"NOA" refers to the defendant's Notice of Appeal.

"DB" refers to the defendant's brief.

"App." refers to the Appendix to the defendant's brief.

"MH" refers to the transcript of the Motion Hearing held on November 7, 2016.

"SH" refers to the transcript of the Sentencing Hearing held on February 16, 2017.

Statement of Facts and Statement of the Case

On March 9, 2015, a Strafford County Grand Jury indicted the Defendant, Baily Serpa, for Certain Uses of Computer Services Prohibited (RSA 649-B:4). App. at 1. The indictment charged that, between November 1 and November 13, 2014, Serpa:

.... did commit the crime of CERTAIN USES OF COMPUTER SERVICES PROHIBITED, in that he knowingly utilized a computer on-line service or internet service to seduce, solicit, lure, or entice a child, A.H. (DOB 5/21/1999)[,] to engage in sexual assault as defined by RSA 632-A....²

Id. (Indictment 219-2015-CR-00158 (Charge Id# 1055288C)).

Serpa, whose date of birth is May 11, 1996, is 3 years and 11 days older than A.H. *See id.* At the time the offense was committed, Serpa, was approximately 18½ years old, and A.H. was approximately 15½ years old. *Id.*; SH 4.

On May 14, 2015, Serpa entered into a written felony diversion agreement (“Diversion Agreement” or “Agreement”) with the State. *See* Order on the State’s Motion for Plea and Sentencing Hearing (hereafter the “01/26/17 Order”), App. at 4-5. Among other things, the Agreement required that Serpa “[c]ommit no new crimes and be of good behavior for the period of the diversion program.” *See id.*, App. at 5.

However, in June of 2016, Serpa was charged with seven crimes stemming from two incidents in May of 2016, when Serpa stole alcohol, soda, and Band-Aids from a Walmart store

² At the time of sentencing, the defendant waived an offer of proof as to the factual allegations supporting the indictment. SH 11-12. Although it is not part of the appellate record, the investigating officer’s Incident Report relates that Serpa and A.H. had a private Facebook message correspondence, “with Serpa encouraging AH to meet him for sex....”

in Rochester, New Hampshire. *See id.*, App. at 6; MH 5. As a result of the new conduct, the State moved to terminate the Diversion Agreement and, consistent with the terms of the Agreement, have the superior court schedule the matter for a plea and sentencing hearing. *Id.*, App. at 6. Serpa objected to the Diversion Agreement's termination and took the position that under the Agreement an intermediate sanction, rather than termination, was appropriate. Defendant's Objection to State's Motion for A Plea and Sentencing Hearing (hereafter "Objection"), App. at 16-25. Serpa contended that, among other things, terminating the Agreement meant he would be obligated to plead to the felony indictment and would effectively require him to register for life as a Tier II sexual offender because of the new conduct. *Id.*, App. at 11-12, 19-23. Serpa argued that lifetime registration was an absurd and unjust application of the relevant criminal code provisions, and that it violated the state and federal prohibitions on disproportionate punishments. *Id.*

The superior court (Howard, J.) granted the State's motion and ordered the clerk to schedule Serpa's matter for a plea and sentencing hearing. *See* 01/26/17 Order, App. at 15. In its ruling, the superior court declined to address the registration requirement, finding that the issue was not yet ripe for review. *Id.*, App. at 11-12.

On February 16, 2017, as provided for in the Agreement, Serpa pleaded guilty to the indictment charging him with Certain Uses of Computer Services Prohibited. SH 21; App. at 1-3. The State recommended the default sentence set forth in the Agreement, which was 6 months in the house of corrections, all suspended for 2 years, and mental health treatment. SH 12; App. at 2-3. As the State noted at Serpa's sentencing hearing, the default sentence did not include a

requirement that Serpa register as a sexual offender. *See* SH 5. The defendant renewed his arguments that requiring registration was “an absurd and unjust result and [an] unconstitutionally excessive penalty.” SH 3-6, 23-24. The superior court (Howard, J.) imposed the recommended sentence but declined to rule that the registration requirement was not required in Serpa’s case. SH 6, 23. The court notified Serpa that he was required to register as a sexual offender and the clerk read to Serpa and served him with a Notice of Requirement to Register as a Sexual Offender. SH 24-25; DB 20-21.

This appeal follows.

Summary of Argument

That Serpa must register for life as a sex offender for *soliciting* sex from A.H., but would not be required to register at all had he in fact *engaged in* sex with A.H., is patently absurd and is unjust. The legislature did not intend this result, and has put into place a statutory scheme designed to eliminate the registration requirement for teen defendants who engage in sex with another person under 16 where there is an age difference of 4 years or less. Requiring Serpa to register for life as a sex offender is inconsistent with the intent of the overall legislative scheme.

As applied to Serpa, the registration requirement is also unconstitutional, because it imposes a far more severe penalty for an attempted act than for a completed offense. The result is that a defendant like Serpa, who used a computer to ask a 15 year old to have sex, is a felon and must register as a sex offender for life, while a similar defendant who actually engages in sexual penetration with a similar victim can be convicted of a misdemeanor only, and is specifically excluded from any registration requirement. Such an extreme disparity in sentencing is barred by the Eighth Amendment and Part 1, articles 18 and 33 of the New Hampshire Constitution, which prohibit grossly disproportionate sentences.

For these reasons, this Court should reverse the decision of the trial court and vacate the requirement that Serpa register for life as a sexual offender. This Court should also remand Serpa's case to the superior court with a mandate that Serpa's sentence not exceed the sentence authorized in RSA 632-A:4, I(c).

Argument

I. THE DEFENDANT, WHO WAS 18 AND USED A COMPUTER TO SOLICIT SEX FROM A PERSON LESS THAN 4 YEARS YOUNGER, SHOULD NOT BE REQUIRED TO REGISTER FOR LIFE AS A SEXUAL OFFENDER.

This appeal raises two fundamental questions: First, whether, under New Hampshire law, an 18 year old who uses a computer as a medium to propose sex with a 15 year old is required to register as a sex offender. Second, if he is, whether this statutory requirement of lifetime registration is barred by the state and federal constitutions.

Serpa was convicted of Certain Uses of Computer Services Prohibited, contrary to RSA 649-B:4, I(a). App. at 1-3; SH 22. The relevant portion of that statute provides that:

I. No person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another person believed by the person to be a child, to commit any of the following:

(a) Any offense under RSA 632-A, relative to sexual assault and related offenses.

RSA 649-B:4, I (2017). Unless the person has certain prior convictions or the child is under age 13, a violation of RSA 649-B:4 is a class B felony. *See* RSA 649-B:4, II.

In Serpa's case, the indictment charged that he:

knowingly utilized a computer on-line service or internet service to seduce, solicit, lure, or entice a child, A.H. (DOB 5/21/1999)[,] to engage in sexual assault as defined by RSA 632-A....

App. at 1.

Serpa, is 3 years and 11 days older than A.H. *See id.* (indictment). At the time the offense was committed, Serpa was approximately 18½ years old, and A.H. was approximately

15½ years old. *Id.*; SH 4.

It was undisputed that the “sexual assault” provision applicable in Serpa’s case is RSA 632-A:4, I(c). *See* SH 5. That statute provides that:

I. A person is guilty of a class A misdemeanor under any of the following circumstances:

....

(c) In the absence of any of the circumstances set forth in RSA 632-A:2, when the actor engages in sexual penetration with a person, other than the actor's legal spouse, who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 4 years or less.

RSA 632-A:4, I(c).

A person, like Serpa, who is convicted under RSA 649-B:4 is designated a Tier II sexual offender, and is required to register for life. *See* RSA 651-B:1, IX(a) (defining “Tier II offender”) and RSA 651-B:6, I (“All tier II or tier III offenders shall be registered for life.”).

However, RSA 632-A:4 provides that:

A person found guilty under subparagraph I(c) of this section shall not be required to register as a sexual offender under RSA 651-B.

RSA 632-A:4, II (emphasis added). Thus, had Serpa in fact violated RSA 632:4, I(c) and been convicted of that offense, he would neither be a felon nor required to register as a sexual offender.

The result, that Serpa must register for life as a sex offender for *soliciting* sex from A.H., but would not be required to register at all had he in fact *engaged in* sex with A.H., is patently absurd and is unjust. As applied to Serpa, this punishment is also grossly disproportionate

because it imposes a far more severe penalty for an attempted act than for the completed offense.

A. The legislature did not intend for defendants like Serpa to register as sexual offenders; to read the applicable statutes differently leads to an absurd and unjust result that is inconsistent with the overall statutory scheme.

In matters of statutory interpretation, this Court is the final arbiter of legislative intent as expressed in the words of the statute considered as a whole. *State v. Clark*, 151 N.H. 56, 57 (2004). This Court has emphasized that it will construe provisions of the Criminal Code according to the fair import of their terms and to promote justice. *In re Petition of State of New Hampshire*, 152 N.H. 185, 187 (2005). The Court first looks to the plain language of the statute to determine legislative intent. *State v. Hull*, 149 N.H. 706, 709 (2003). Where more than one reasonable interpretation of the statutory language exists, this Court will review legislative history to aid in its analysis. *In re Petition of the State of New Hampshire* at 187.

New Hampshire courts have long held that all parts of a statute are to be construed together “to effectuate its overall purpose” and to avoid absurd or unjust results. *State v. Maxfield*, 167 N.H. 677, 679 (2015); *see also, Bodge v. Hughes*, 53 N.H. 614 (1873) (“[I]t is not to be presumed that an absurd or unjust result was intended”). Words and phrases of a statute are not considered in isolation, “but rather within the context of the statute as a whole.” *Maxfield* at 679. This enables the Court “to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.” *Id.*; *cf. State v. Fedor*, 168 N.H. 346, 350, (2015) (construing specific statutory terms within the Controlled Drug Act so as to carry out, not defeat, the manifest objective sought by the statute —

the regulation of controlled drugs in all of its aspects).

Here, the statutory language of RSA Chapter 651-B requires that a person convicted of violating RSA 649-B:4 must register as a sexual offender, and that the period of registration is for life. RSA 651-B:1, IX(a); RSA 651-B:6, I. However, RSA 632-A:4, I(c) and II are equally clear, and exclude from the registration requirement persons who engage in sexual penetration with another person who is less than 4 years younger than the defendant. *Id.* To read these two sections together leads to the conclusion that the legislature enacted a general registration requirement, but then carved out an exception to that general requirement when the actors were teenagers less than 4 years apart. In Serpa's case, the exception to the registration requirement should apply because, although he used a computer to solicit A.H. to engage in sexual assault, none of the circumstances set forth in RSA 632-A:2 were alleged and the age difference between them is less than 4 years.

This intent can also be discerned from the legislative history.

In the 2003 legislative session, the legislature rewrote RSA 632-A:4. Until that time, a person was guilty of misdemeanor sexual assault only if he subjected another person 13 years of age or older to sexual contact. *See* RSA 632-A:4 (2003). Engaging in sexual penetration with a person who was between 13 and 16 years old was a class B felony, regardless of the age of the defendant. *See* RSA 632-A:3, II (2003).

However, effective January 1, 2004, RSA 632-A:4 included a new paragraph, similar to the current version, that made it a misdemeanor when, in the absence of any of the circumstances set forth in RSA 632-A:2, a defendant engages in sexual penetration with a person, other than a

legal spouse, “who is 13 years of age or older and under 16 years of age where the age difference between the actor and the other person is 3 years or less.” RSA 632-A:4, I(b) (2004). The 2004 reworking of RSA 632-A:4 also included a paragraph providing that such a person “shall not be required to register as a sexual offender under RSA 651-B.” RSA 632-A:4, II. A 2008 amendment to RSA 632-A:4 substituted “4 years” for “3 years” in what is now section I(c).³

At the same time as the 2003 changes to RSA 632-A:4, the legislature amended RSA 651-B:1 to define as a “sexual offender” only persons who violated section I(a) of RSA 632-A:4. *See* RSA 651-B:1, III (2004); 2003 Laws, Chapter 316. In the years that followed, there were a series of amendments to RSA Chapter 651-B, but never including within that chapter a registration requirement for persons who violated the provision of RSA 632-A:4 cited above.

That, in the course of these amendments, the legislature did not also amend RSA 649-B:4 to explicitly remove the registration requirement for defendants such as Serpa renders it an anomaly, not a deliberate act.

At an April 29, 2003 Senate Judiciary Committee hearing on House Bill 615, the Committee struggled with how making certain offender information public might impact those convicted of statutory rape offenses. *See* N.H. Senate Judiciary Committee, *Hearing Report* HB 615, (Chapter 316, 2003 Session); App. at 26-40. John Stephen, then the Assistant Commissioner of the Department of Safety attempted to assuage those concerns in the course of his testimony:

I understand there are some issues here about can a sixteen-year-old who has sexual intercourse with a fifteen-year-old, can that be

³ A 2005 amendment added to Paragraph I a new subparagraph (b) and redesignated what was subparagraph (b) as (c).

on the [public sexual offender] list? Under the law, if we are talking felonious sexual assault, yeah, that could happen. But, as a prosecutor, that person, there has to be more to it than just that action of sexual penetration because those offenses, looking at the track record, are not on the list at all. What happens is that sixteen and fifteen-year-old, there is some other negotiated settlement, something is worked out.

....

There is also another bill pending where there is a four year age difference and there is an attempt to make that, I believe, a misdemeanor offense. If that passes, that issue that I think you are grappling with would make it much easier in terms of having the public get the most information and to protect their safety.

Id., App. at 34.

Senator Joseph A. Foster, then Vice Chair of the Judiciary Committee, also asked Assistant Commissioner Stephen about the impact of another pending bill that sought to make sexual penetration between actors less than four years apart in age a misdemeanor rather than a felony, and to exclude such defendants from the registration requirement:

Senator Joseph A. Foster, D. 13: One further question. Say HB 278 passes or stays on the table because we continue to have concerns about registering people that that bill is intending to address, any suggestions of what we should do?

Assistant Commissioner Stephen: Yes. I'm glad you asked that question, Senator. I would merely look at some of the language in that bill and I would just, *if you feel the age difference, pick an age difference that, on a policy matter, that this means that the defendant is not a child perpetrator, per se. If that's what the policy is, then allow, pick that age and put it into the 615 bill that says anyone of this age difference is not going to be on that public list.*

I'm telling you from my research and the information I just gave you now, where the difference is less than three years of age, you

don't see it. These sex offenders are not getting convicted of sexual assault. So, that wouldn't be a problem as far as we're concerned and *I'm sure we can work out that language to tie it into this bill.*

Id., App. at 36-37 (emphasis added).⁴

This exchange demonstrates that the Senate Judiciary Committee was concerned with legislation that would require a person of a young age who was not generally harmful to children to register as a sex offender. The Committee looked to the Department of Safety for help crafting this exception to the registration requirement. However, the suggestions of the Assistant Commissioner did not fully consider how this policy goal would impact teen offenders charged with acts other than sexual assault, such as RSA 649-B:4.

Serpa's use of a computer to solicit A.H. to engage in sex should not trigger a registration requirement because, like an actual sexual assault under RSA 632-A:4, I(c), none of the circumstances set forth in RSA 632-A:2 were alleged and the age difference between them is less than 4 years.

B. As applied to Serpa, the penalty for violating RSA 649-B:4 is grossly disproportionate when compared with the penalty for violating RSA 632-A:4, I(c).

Even if the statutory analysis led to the conclusion that Serpa must register, this requirement would be a grossly disproportional result under our constitutions, because it imposes a much greater sentence and penalty for an attempted offense than it does for the completed offense.

⁴ The bill discussed, HB 278, was vetoed by the Governor and did not become law. However, the substance of that bill was adopted in HB 615, discussed above.

The Eighth Amendment's prohibition of cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” *Roper v. Simmons*, 543 U.S. 551, 560 (2005). That right, the Supreme Court has explained, “flows from the basic precept of justice that punishment for crime should be graduated and proportioned” to both the offender and the offense. *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (citations and quotations omitted); *see also, Solem v. Helm*, 463 U.S. 277, 290 (1983) (“we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”)

Part 1, article 18 of the New Hampshire Constitution similarly provides that:

[A]ll penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.

N.H. Const. Pt. 1, art. 18. Article 18 provides at least as much protection of individual rights as that established under the Eighth Amendment in *Solem v. Helm*. *State v. Dayutis*, 127 N.H. 101, 106 (1985). For a sentence to violate Part I, article 18 of the State Constitution it must be “grossly disproportionate to the crime.” *Id.* (quotation omitted). *State v. Bird*, 161 N.H. 31, 40 (2010). Sentences that are grossly disproportionate to the crime also violate our state constitutional prohibitions against cruel and unusual punishments. N.H. Const. Pt. I, art. 33; *See State v. Wentworth*, 118 N.H. 832, 843 (1978).

“Few would dispute that a lesser included offense should not be punished more severely

than the greater offense.” *Solem*, 463 U.S. at 293 (citing examples). “It also is generally recognized that attempts are less serious than completed crimes.” *Id.*

Under New Hampshire’s Criminal Code, “the general rule is that attempts are subject to the same penalties as the completed crimes,” *State v. Elbert*, 125 N.H. 1, 15–16 (1984), but they are not punished more severely. *See* RSA 629:1, IV (“The penalty for attempt is the same as that authorized for the crime that was attempted, except that in the case of attempt to commit murder the punishment shall be imprisonment for life or such other term as the court shall order.”); RSA 629:2, IV (“The penalty for criminal solicitation is the same as that authorized for the crime that was solicited, except that in the case of solicitation of murder the punishment shall be imprisonment for a term of not more than 30 years.”); RSA 629:3, IV (“The penalty for conspiracy is the same as that authorized for the crime that was the object of the conspiracy, except that in the case of a conspiracy to commit murder the punishment shall be imprisonment for a term of not more than 30 years.”). The exception to this is that the special rule for inchoate crimes to commit murder is more lenient than the general rule. RSA 629:1; *see also, Elbert* at 15–16.

Even in the context of recidivists – which this defendant is not – some proportionality in punishment must apply, and some penological interest must be served. *Solem* at 279 (lifetime imprisonment for uttering a false check for \$100, the defendant’s seventh nonviolent felony, was “grossly disproportionate” and violated the Eighth Amendment).

However, in the case of sexual assault between a defendant age 18 and another person age 15, the defendant who actually engages in sexual penetration is treated more leniently than the defendant who sends a text message or email soliciting it.

A defendant who is convicted under RSA 649-B:4 is a felon, is designated a Tier II sexual offender, and is required to register for life. *See* RSA 651-B:1, IX(a); RSA 651-B:6, I. This Court, in *Doe v. State*, 167 N.H. 382 (2015), determined that, because the legislature has “incrementally increase[ed] the burdens and intrusiveness of the registration system with each amendment” to RSA Chapter 651-B, the registration requirements are “punitive in effect.” *Id.* at 411.

Under RSA Chapter 651-B, Tier II offenders must register for life, but after 15 years may petition the superior court to be removed from the public list. RSA 651-B:6, I, III(a)(2). *Doe* at 395. Thus, Serpa must report in person, at least 2 times per year, for life. RSA 651-B:4, I(b). The reporting must be done at within five days of his birthday, and within five days of every six months thereafter. *Id.* Serpa must fill out a form and provide detailed information, including his height, weight, tattoos or markings, vehicle information, addresses, all online identifiers, and more. RSA 651-B:4, III and B:4-a. He must also inform the authorities within five days if any of this information changes. RSA 651-B:5, I. Each time Serpa reports, he can be photographed, and may be fingerprinted and required to give a DNA sample, if he has not previously done so. RSA 651-B:4, IV. He must also respond to letters or in-person address verifications twice per year, and respond to any home visit that the local police choose to make. RSA 651-B:3, IV.

The information that Serpa is required to report, such as his current address, personal features, exceeds the information contained in his criminal record and will be available on the internet for at least 15 years. RSA 651-B:3, III, An offender who is required to register, but negligently fails to comply with the requirements, is guilty of a misdemeanor. RSA 651-B:9, I. An offender who knowingly fails to comply is guilty of a class B felony. RSA 651-B:9, II. Thus, Serpa must not only register for the rest of his life, but is subject to criminal penalties if he fails to do so. *See* RSA 651-B:9, I-III.

A person Serpa's age convicted of engaging in sexual penetration with another person under 16, where the age difference is less than 4 years, would be guilty of a misdemeanor only, would not be subject to any of the requirements listed above, and would not be subject to criminal penalties for failing to comply.

That RSA 632-A:4 clearly contemplates the defendant's age, whereas RSA 649-B:4 does not, is also a factor to consider.

Serpa was 18 at the time of the offense, and admittedly not a juvenile under New Hampshire's delinquency statutes. *See* RSA 169-B:2, IV, VI. Nevertheless, the provisions of RSA 632-A:4, I(c), which limit the age difference to 4 years, result in this section being applicable only to defendants who are 19 or younger. In finding that life without parole should not be automatically applied to persons under 18, the Supreme Court emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. *Miller*, 567 U.S. at 471. Because juveniles have diminished culpability and greater prospects for reform, "they are less

deserving of the most severe punishments.” *Id.* This reasoning is instructive here because even older teens possess a “lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.” *Roper*, 543 U.S. at 569 (quotations omitted). Additionally, a teen’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievable depravity.” *Miller*, 567 U.S. at 471 (quotations and citations omitted).

That the registration requirement is imposed *unequally* upon offenders – i.e., that an 18 year old charged under RSA 649-B:4 must register for life, whereas an 18 year old charged under RSA 632-A:4, I(c) is not required to register at all – signals that it is grossly disproportional as applied. *See Solem*, 463 U.S. at 291 (a proportionality analysis under Eighth Amendment should be guided by objective criteria, including the sentences imposed on other criminals in the same jurisdiction). This Court should therefore find that imposing a lifetime registration requirement on Serpa violated the protections of the Eighth Amendment and Part 1, articles 18 and 33 of the New Hampshire Constitution.

Conclusion

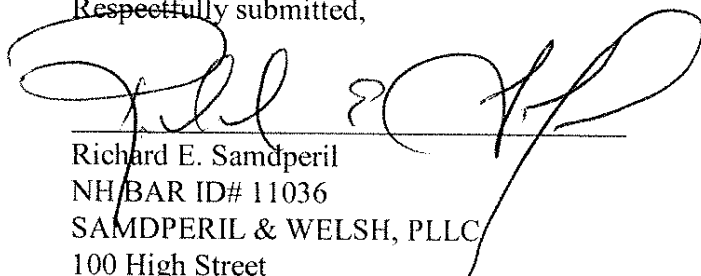
WHEREFORE, the Defendant, Baily P. Serpa, respectfully prays this Honorable Court reverse the decision of the trial court, vacate the requirement that he register as a sexual offender, and remand for sentencing under the limits set forth in RSA 632-A:4.

Fifteen minutes of oral argument is requested.

I, Richard E. Samdperil, counsel for the appealing party, do hereby certify that the appealed decision is in writing and is appended to the brief. S. Ct. R. 16(3)(i).

DATED: August 1, 2017.

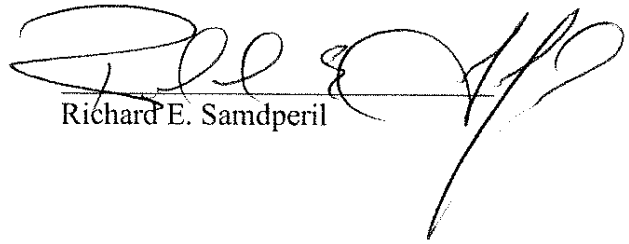
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard E. Samdperil', is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF SERVICE

I, Richard E. Sandperil, do hereby certify that two (2) copies of the foregoing Brief has been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 1st day of August, 2017.



Richard E. Sandperil

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

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

NOTICE OF REQUIREMENT TO REGISTER AS SEXUAL OFFENDER

Case Name: **State v. Bailey P Serpa**
Case Number: **219-2015-CR-00158**

Defendant DOB: May 11, 1996
Defendant Address: 8 Gerrior Dr Nottingham NH 03290

1. I understand I have been convicted of a sexual offense or an offense against a child that requires me to be registered with the Department of Safety, Division of State Police, Sex Offender Registry pursuant to RSA 651-B.

2. I understand that the court will send a copy of this notice to the Department of Safety, Division of State Police, Sex Offender Registry.

3. I further understand that I have a duty to report in person to the local law enforcement agency where I reside (if I reside in New Hampshire) within 5 business days after my release, or within 5 business days of establishing residence, employment, or schooling in New Hampshire. Failure to do so may lead to my arrest and to a felony conviction.

4. If I am not a resident of New Hampshire and do not have a principal place of employment in this state, I understand that I must register in person at the Department of Safety in Concord.


5. If I am being released into the community today, I understand I am also obligated to indicate the address where I plan to reside. That address is:

8 Gerrior Drive
Nottingham, NH 03290


I certify I have received a copy of this notice.

02/16/17
Date

2/16/17
Date



Signature of Defendant



Signature of Court Official
Witnessing Signature

Case Name: State v. Bailey P Serpa

Case Number: 219-2015-CR-00158

NOTICE OF REQUIREMENT TO REGISTER AS SEXUAL OFFENDER

NOTE – An individual charged with committing one or more of the offenses listed below, including an accomplice to, or an attempt, conspiracy or solicitation to commit any of these offenses, is required to register if the charge resulted in a conviction, a finding of guilty by reason of insanity, or an adjudication as a delinquent when the court finds that the juvenile must register.

RSA 135-E	Civil Commitment as a Sexually Violent Predator
RSA 169-B 41, II	Intentional Contribution to Delinquency
RSA 630:1,I(e)	Capital Murder
RSA 630:1-a,1(b)(1)	First Degree Murder
RSA 632-A:2	Aggravated Felonious Sexual Assault
RSA 632-A:3	Felonious Sexual Assault
RSA 632-A:4,I(a)	Sexual Assault
RSA 632-A:4,I(b)	Sexual Assault (actor 18 years or older)
RSA 632-A:4,III	Sexual Assault
RSA 633:1	Kidnapping (victim under 18 years old)
RSA 633:2	Criminal Restraint (victim under 18 years old)
RSA 633:3	False Imprisonment (victim under 18 years old)
RSA 639:2	Incest (victim under 18 years old)
RSA 639:3, III	Endangering the Welfare of a Child
RSA 644:9, I(a)	Violation of Privacy
RSA 644:9, III-a	Violation of Privacy
RSA 645:1, I	Indecent Exposure & Lewdness (2 nd offense within 5 years)
RSA 645:1, II	Indecent Exposure and Lewdness (victim under 18 years old)
RSA 645:1 III	Indecent Exposure and Lewdness (victim under 18 years old)
RSA 645:2,	Prostitution & Related Offenses (victim under 18 years old)
RSA 649-A:3	Possession of Child Sexual Abuse Images
RSA 649-A:3-a	Distribution of Child Sexual Abuse Images
RSA 649-A:3-b	Manufacture of Child Sexual Abuse Images
RSA 649-B:3	Computer Pornography Prohibited
RSA 649-B:4	Certain Uses of Computer Services Prohibited
RSA 650:2, II	Obscene Matter