THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0143

The State of New Hampshire

v.

Bailey P. Serpa

STATE'S MEMORANDUM IN LIEU OF BRIEF PURSUANT TO SUPREME COURT RULE 16(4)(B)

STATEMENT OF THE CASE AND FACTS

A Strafford County grand jury indicted the defendant, Bailey Serpa, on one count of "knowingly utiliz[ing] a computer on-line service or internet service to seduce, solicit, lure, or entice a child," the victim, A.H., who was fifteen and a half years old at the time, "to engage in sexual assault as defined by RSA 632-A." DA 1; [1] RSA 649-B:4 (2016). The nature of the sexual assault at issue was that which is defined by RSA 632-A:4, I(c) (2016), "engag[ing] in sexual penetration with a person ... 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 four years or less." DA 5.

[1] DA refers to the defendant's separately bound appendix; DB refers to the defendant's brief; MHT refers to the November 7, 2016 motion hearing transcript; SH refers to the February 16, 2017 sentencing hearing transcript.

In lieu of a trial, the State and the defendant entered into a written felony diversion agreement. DA 4. The agreement provided the defendant with the opportunity to avoid a conviction and sentence so long as he adhered to the terms of the diversion. DA 4. As part of the agreement, the defendant admitted "that he knowingly utilized a computer service to seduce, solicit, lure or entice a child, [the victim], to engage in sexual assault." DA 5. The defendant agreed to waive his right to a jury trial and would enter a guilty plea if he violated the terms of the agreement. DA 5. One of the terms of the agreement was that the defendant "commit no new crimes and be of good behavior for the period of the diversion program." DA 5 (quotation and brackets omitted). "[B]eing of good behavior mean[t] that the defendant shall not be charged with any misdemeanor or felony crimes during the duration of [the] agreement." DA 5 (quotation omitted).

In June 2016, the defendant was charged with seven crimes stemming from at least two incidents in May 2016 when he stole items, including alcohol, soda, and Band-Aids, from a Walmart store in Rochester. DA 6. As a result, the State requested that the trial court schedule the matter for a plea and sentencing hearing. DA 6.

The defendant objected. DA 16–25. In his objection, he argued, among other things, that "[t]o impose a more serious penalty for attempted conduct than is permitted for the completed conduct is an absurd and unjust application of the

relevant criminal code provisions, and violates the State and federal constitutional bans on disproportionate punishments." DA 20. The basis for this argument was that his sentence for using an on-line service to seduce, solicit, lure, or entice a child would include a requirement that he register as a sex offender for life, and that contradicted the penalty for sexual assault, which did not require any registration. DA 21; *see* RSA 651-B:1 (2016); RSA 632-A:4, II (2016). He also argued, "Even if the legislature did intend such a bizarre result, imposing a felony conviction and the attendant penalties is unconstitutional because it imposes a disproportionate penalty for a less serious criminal act." DA 21–22.

The trial court (*Howard*, J.) held a hearing on this motion on November 7, 2016. MHT 1–25. It deferred ruling on the relevant arguments because the "issue [was] not ripe for decision at this stage in the proceedings." DA 12. The issue would not be ripe until a plea had been entered and a sentence had been imposed. DA 12.

In February 2017, the plea and sentencing hearing occurred. The defendant renewed his objection to the registration requirement, but did not raise any new arguments. SH 2–6. The trial court accepted the defendant's guilty plea and sentenced him to six months in the house of corrections, all suspended for a period of two years. SH 12–13, 23; DA 2–3. The defendant also received a notice that required him to register as a sex offender. DB 20–21. This appeal followed.

ARGUMENT

THE REQUIREMENT THAT THE DEFENDANT REGISTER AS A SEX OFFENDER AS PART OF HIS SENTENCE FOR USING AN ON-LINE SERVICE TO SEDUCE, SOLICIT, LURE, OR ENTICE A CHILD IS NEITHER AN ABSURD RESULT NOR AN UNCONSTITUTIONALLY DISPROPORTIONATE PUNISHMENT BECAUSE RSA 649-B:4 DEFINED AN OFFENSE DISTINCT FROM SEXUAL ASSAULT IN RSA 632-A:4.

The defendant pleaded guilty to a class-B felony under RSA 649-B:4 because he "knowingly utilized a computer on-line service or internet service to seduce, solicit, lure, or entice a child," the victim, who was fifteen and a half years old at the time, "to engage in sexual assault as defined by RSA 632-A." The defendant did not plead guilty to misdemeanor sexual assault as defined in RSA 632-A:4. He did not plead guilty to attempted misdemeanor sexual assault. He did not plead guilty to solicitation to commit misdemeanor sexual assault. He pleaded guilty to a categorically different offense from those to which he now compares his sentence.

RSA 649-B:4 requires more than the conduct criminalized by RSA 632-A:4 because it also requires using a computer on-line service or internet service to facilitate the seduction or solicitation to engage in sexual assault. The offense is not a lesser included offense of sexual assault. The offense is not merely a codification of attempted sexual assault or solicitation to commit sexual assault. Instead, the offense specifically targets individuals who use the internet or other online services to seduce or solicit sex from children. In passing the statute, the

legislature intended to create a more serious criminal offense for people who use the internet or other on-line services to facilitate their efforts to sexually exploit children because of the more serious threat those people pose to the public.

Despite this, the defendant contends that RSA 649-B:4 is either absurd or unconstitutional because he has been punished more severely for using the internet to solicit the victim to engage in sexual assault than he would have been had he committed sexual assault. This is a false comparison. It overlooks the fact that if he had used the internet to solicit sex from the victim and later had sex with the victim, then he would have committed, and could have been charged with, *two* separate offenses: (1) using the an online service to seduce, solicit, lure, or entice the child and (2) sexual assault: a class B felony with a registration requirement and a class A misdemeanor without a registration requirement. Thus, RSA 649-B:4 and RSA 651-B:1 are not absurd because this Court can interpret them in harmony with RSA 632-A:4. Moreover, RSA 649-B:4 does not create an unconstitutionally disproportionate penalty because it does not merely criminalize attempted sexual assault, but instead, it criminalizes using computer online services or internet services to seduce or solicit children to engage in certain sexual activities. Accordingly, the defendant's arguments are without merit and this Court must affirm.

A. The registration requirements of RSA 649-B:4 and RSA 651-B:1 exist in harmony with the lack of a requirement in RSA 632-A:4 because RSA 649-B:4 established a separate offense with unique elements that the legislature intended to have impose a more severe penalty.

Resolving the alleged conflict between these statutes requires this Court to engage in statutory interpretation. "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.* "[It] do[es] not read words or phrases in isolation, but in the context of the entire statutory scheme." *Id.* "[Its] 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).

RSA 649-B:4 provides that "[n]o 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." The law was enacted as part of the "Computer Pornography and Child Exploitation Prevention Act of 1998." RSA 649-B:1 (2016). Violations of the statute are class-B felonies when the victim is 13 years old or older. RSA 649-B:4, II(a). The plain language of this statute very clearly criminalizes using "a computer on-line service [or] internet service" to solicit a child to engage in *any* offense defined in RSA chapter 632-A. *See State v. Moscone*, 161 N.H. 355, 359 (2011) ("RSA 649-B:4, I(a), as charged, is comprised of four material elements: (1) the defendant must have utilized a computer on-line service, internet service, or local bulletin board; (2) in an attempt to seduce, solicit, lure, or entice; (3) a child or another person believed by the person to be a child; (4) for sexual penetration."). Moreover, the goal of the statute, as evidenced by the title of the act, is to prevent people from using computer services or the internet to sexually exploit children. It achieves this goal by creating new and distinct offenses for acts where the perpetrator uses computer services or the internet to sexually exploit children.

RSA 651-B:1, VII(b) (2016) defines "offense against a child" to include certain prohibited uses of a computer. RSA 651-B:1, IX (2016) classifies those convicted of certain prohibited uses of a computer as "Tier II offenders." RSA

651-B:4 (2016) establishes the duty for Tier II offenders to report and details such things as how frequently they must report and what information they must provide when they report. RSA 651-B:6 (2016) details how long a Tier II offender must remain on the registry and how they may petition for removal from the registry. The plain language of these statutes unambiguously states that individuals convicted under RSA 649-B:4 must register as Tier II offenders.

RSA 632-A:4, I(c) provides that it shall be a class A misdemeanor "when the actor engages in sexual penetration with a person … 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, II (2016) exempts those guilty of sexual assault under RSA 632-A:4, I(c) from the requirement to register as a sex offender. This is, theoretically,[2] the provision under which the defendant would have been charged had he engaged in sexual penetration with the victim. Had he succeeded, the plain language of the statute is clear that he would not have to register as a sex offender for his misdemeanor sexual assault conviction.

Contrary to the defendant's assertions, these statutes exist in harmony and requiring the defendant to register as a sex offender for his conviction under RSA 649-B:4 does not produce an absurd result. The legislature passed RSA 649-B:4 to discourage or prevent people from using computer or internet services to sexually

[2] Because the contact between the victim and the defendant never occurred, we have no way of knowing whether the defendant could have been charged with more severe offenses under RSA chapter 632-A.

exploit children. It viewed the usage of a computer or internet service for such purposes as particularly heinous and accordingly, imposed a more severe penalty for those convicted, including the requirement that those convicted must register as sex offenders. It did not pass RSA 649-B:4 simply to create a novel attempt statute. *Cf. Moscone*, 161 N.H. at 359 ("The statute does not incorporate the attempt statute nor reference its definition of attempt. Further, use of the word 'attempt,' in a criminal statute, does not automatically mandate that [this Court] appl[ies] RSA 629:1, I.").

This is not inconsistent with the fact that the legislature exempted those convicted under RSA 632-A:4, I(c) from the registration requirement because RSA 649-B:4 includes the added element of using a computer online or internet service to facilitate the sexual exploitation of a child, something the legislature clearly believed warranted a more severe penalty. Although the penalty may be more severe, the additional elements and the legislature's goal to prevent people from using computer online or internet services to facilitate the sexual exploitation of a child warrant that more severe penalty. Accordingly, this Court must affirm.[3]

[3] The defendant cites legislative history from a 2003 bill that amended the registration requirements under RSA chapter 651-B and RSA 632-A:4. This bill did not amend the requirement to register for convictions under RSA 649-B:4. Moreover, the plain language of the statutes in question is clear and unambiguous. Accordingly, the legislative history is irrelevant to the instant matter.

B. Given that RSA 649-B:4 is a separate offense with unique elements and that it serves a purpose different from RSA 632-A:4, the registration requirement does not make the defendant's sentence unconstitutionally disproportionate.

The requirement that the defendant register as a sex offender is not grossly disproportionate given his conviction under RSA 649-B:4. Because the defendant contends that his sentence has violated his constitutional rights, this Court reviews that decision *de novo*. *See State v. Capentino*, 166 N.H. 9, 21 (2014). This Court "must presume that the sentencing scheme is constitutional and we cannot declare it unconstitutional except upon inescapable grounds." *Id.* "For a sentence to violate the New Hampshire Constitution, it must be grossly disproportionate to the crime." *Id.* at 22.

The crime at issue in this case was not a lesser included offense of misdemeanor sexual assault. *See State v. Dayutis*, 127 N.H. 101, 105 (1985) ("Few would dispute that a lesser included offense should not be punished more severely than the greater offense." (Quotation omitted.)). Instead, as discussed above, RSA 649-B:4 presents an entirely separate offense, that has its own unique elements, and that the legislature enacted to address the unique problem created by adults using computer online and internet services to sexually exploit children. RSA 649-B:4 aims to prevent adults from using the internet to commit some of the most horrific crimes that occur.

To the extent that registration as a sex offender constitutes a punishment at all,[4] in this context it could be akin to a mandatory minimum sentence. This Court has routinely upheld mandatory minimum sentences, even where they may lead to harsh penalties because the Court has recognized that the legislature may restrict the independent exercise of judicial discretion.[5] *See, e.g.*, *State v. Bird*, 161 N.H. 31, 40 (2010); *State v. Dean*, 115 N.H. 520, 523–24 (1975).

Moreover, individuals registered as sex offenders must provide police with all "online identifiers," including

> electronic mail addresses, instant message screen names, user profile names on social media websites, and user profile names for Internet websites, gaming or mobile applications that have a primary purpose of engaging in two-way, person-to-person communication over the Internet with persons other than the issuer of the user name.

RSA 651-B:4-a (2016) (amended 2017). Thus, the registration requirement directly furthers RSA 649-B:4's goals by allowing law enforcement to be better able to monitor the online activities of those who have used the internet or other on-line services to exploit children. *See Dean*, 115 N.H. at 524 (explaining that the habitual offender statute furthers the statute's goals of promoting safety on the roadways). Accordingly, the requirement that a defendant register as a sex

---

[4] In the context of federal *habeas corpus* review, courts have routinely held that registration as a sex offender does not place a person in custody because "these sex offender registration requirements do not impair [a person's] ability to move to a different community or residence or condition such movements on approval by a government official. Nor do they prohibit [a person] from engaging in any legal activities." *Wilson v. Flaherty*, 689 F.3d 332, 338 (4th Cir. 2012) (quotations, citations, and brackets omitted).

[5] For Tier II offenders, they can petition for removal from the registry after fifteen years. RSA 651-B:6, III(a)(2) (2016).

offender does not constitute a disproportionate punishment and this Court must affirm.

To the extent that the defendant raises an argument premised upon the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S.460 (2012), he has failed to preserve this argument for appellate review because he did not raise it in the trial court. "As the appealing party, the defendant has the burden of providing this court with a record sufficient to demonstrate that he raised all of his appeal issues before the trial court." *State v. Whittaker*, 158 N.H. 762, 767 (2009). This Court has held that if the defendant attempts to raise alternative arguments or expand an argument for the first time on appeal, then that argument has not been preserved and this Court will not address it. *See, e.g., State v. Mouser*, 168 N.H. 19, 27–28 (2015) (holding that an appealing party cannot rely on a new theory that was not presented to or addressed by the trial court, unless such theory is raised in a motion for reconsideration); *Whittaker*, 158 N.H. at 767 ("The record provided on appeal fails to demonstrate that the defendant ever raised the same arguments that he raises here. [This Court], therefore, decline[s] to address them."); *State v. Young*, 144 N.H. 477, 484 (1999) (concluding that a defendant cannot change arguments on appeal from those argued at trial); *State v. Croft*, 142 N.H. 76, 80 (1997) (refusing to permit the defendant to expand the scope of his Rule 404(b) objection to include more than just relevance on appeal).

Here, the defendant argued that "imposing a felony conviction and the attendant penalties is unconstitutional because it imposes a disproportionate penalty for a less serious criminal act." DA 21–22. He never mentioned the *Miller* decision—which turned heavily on the unique status of juveniles in the criminal justice system—in his pleadings and did not raise the issue during the sentencing hearing. Thus, the defendant did not preserve this argument for appellate review and this Court should not consider it. Moreover, the issue in *Miller* concerned mandatory life sentences without the possibility of parole for juveniles. *Miller*, 567 U.S. at 465. Here, the defendant complains of an adult having to register as a sex offender with the possibility to petition for removal from the registry after fifteen years. The two situations are not even remotely comparable. 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

By its attorneys,

Gordon J. MacDonald
Attorney General

October 2, 2017

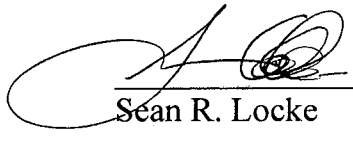
Sean R. Locke
N.H. Bar No. 265290
Assistant Attorney General
Criminal Justice Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
603-271-3671

CERTIFICATE OF SERVICE

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

Richard E. Samdperil
Samdperil & Welsh, PLLC
100 High Street
Exeter, NH 03833

October 2, 2017



Sean R. Locke