THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0265

State of New Hampshire

v.

Owen Labrie

Appeal Pursuant to Rule 7 from Judgment
of the Merrimack County Superior Court

BRIEF FOR THE DEFENDANT

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TEXT OF RELEVANT AUTHORITIES

RSA 649-B:4 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.

QUESTION PRESENTED

Whether trial counsel rendered ineffective assistance with respect to the felony computer services prohibited charge.

Issue preserved by motion for a new trial, the State's response, Labrie's supplement to the motion, the hearing on the motion, the parties' post-hearing memoranda, and the court's order. A1-A124; H 1-538; Supp. 1-24.*

* Citations to the record are as follows:
"A" refers to the Appendix filed under separate cover;
"Supp." refers to the documentary supplement filed with this brief;
"T" refers to the transcript of the eight-day trial held in August 2015;
"S" refers to the transcript of the sentencing hearing held on October 29, 2015;
"H" refers to the transcript of the three-day post-conviction evidentiary hearing, held in February 2017.

STATEMENT OF THE CASE

In 2014, the State charged Owen Labrie with ten offenses arising out of his interaction with F.P., a fellow student at St. Paul's School ("SPS") in Concord, on May 30, 2014. T 3-11. Three indictments alleged aggravated felonious sexual assault, of which two specified intercourse and the third cunnilingus. The intercourse indictments constituted alternative theories, in that one alleged that F.P. indicated non-consent, while the second alleged penetration accomplished by surprise. A fourth indictment charged the felony of computer services prohibited, alleging that via school email and/or Facebook, Labrie used a computer online service and/or internet service to seduce, solicit, lure, or entice F.P. so that he could commit a sexual offense. T 5-6.

In addition, the State charged Labrie with misdemeanors. Two charged alternative theories of endangering the welfare of a child in inducing F.P. to engage in sexual contact, with one specifying that Labrie violated a duty of care arising out of his status as a prefect at the school, and the other alleging that the contact endangered F.P.'s health or safety. T 6, 8. Another information alleged simple assault, charging that Labrie bit F.P.'s chest. T 7. Three others alleged sexual assault on a theory of sexual penetration of a minor committed by a person no more than four years older than the minor. These three charges alleged intercourse, cunnilingus, and digital penetration. T 8-11.

After the State rested, the court dismissed the endangering-the-welfare charge predicated on a duty of care arising out of Labrie's status as a prefect. T

825-26. The jury acquitted Labrie of the aggravated felonious sexual assault charges and of the simple assault charge. T 1126-27, 1130. It convicted Labrie of the computer-use felony, of the remaining endangering-the-welfare misdemeanor, and of the three misdemeanor sexual assault charges. T 1125-30.

The trial court (Smukler, J.) sentenced Labrie to concurrent stand-committed terms of twelve months on three of the misdemeanors (endangering and two of the sexual assaults). S 75. On the felony computer-use charge, the court sentenced Labrie to a consecutive, suspended term of three and a half to seven years. S 76. As a consequence of that conviction, Labrie must register as a sex offender for life. State v. Serpa, __ N.H. __ (May 24, 2018); RSA 651-B:1, VII(b) & IX(a); RSA 651-B:6, I. On the remaining misdemeanor sexual assault, the court pronounced a suspended term of twelve months, concurrent with the felony. S 76. The court further sentenced Labrie to probation and to pay restitution, among other conditions. S 77-78.

Labrie filed a direct appeal in this Court, as well a motion for a new trial in the Superior Court, alleging ineffective assistance of counsel. A1-A49. After a three-day evidentiary hearing, the court (Smukler, J.) denied the motion. Supp. 1-24. This brief raises Labrie's claims of error in the denial of the motion for a new trial.

STATEMENT OF THE FACTS

During the academic year 2013-14, Owen Labrie was a senior and F.P. a freshman at SPS. Labrie, a scholarship student from a small town in Vermont, had an outstanding academic record at the school, was a captain of the soccer team and, as a prefect, held leadership responsibility. T 858-63. F.P. came from a family with links to SPS, as her father was an alumnus and her elder sister Lucy, whom F.P. much admired, was a senior in 2013-14. T 67, 69, 331, 341. In addition to her studies, F.P. was a member of the school's volleyball team and participated in musical programs. T 64-65.

Witnesses differed to some extent in describing F.P.'s relationship with Labrie. Labrie testified that he had warm feelings for her and that they had developed a light-hearted, somewhat flirtatious rapport. T 865-71, 923. He admired her sociable personality and thought she was pretty. T 867, 871. Labrie's roommate, Andrew Thomson, testified that Labrie "had a kind of crush" on F.P, and that she was friendly and flirtatious with Labrie. T 541-42, 551-52; see also T 615-17 (another friend's similar description of the relationship). F.P. testified that she and Labrie were only passing acquaintances, familiar with each other mostly because Labrie and Lucy had briefly dated. T 75-78, 245-48, 889-90.

Much attention at trial was devoted to the "senior salute," an informal tradition among SPS students. In a general sense, the tradition contemplated that a soon-to-graduate senior would invite, or be invited by, another student to spend time together. T 73, 241-42, 346-47, 364-65, 488-89, 505, 517-18,

542-44, 583, 882-83. When such an invitation led to a meeting, the tradition encompassed a broad range of possible activities. T 242, 543, 583. For example, the students might go for a walk, dine together, or engage in some other unremarkable activity. T 558. The tradition also could cover meetings involving sexual activity. T 518, 543, 568. A wide range of sexual behavior could fall within the tradition's boundaries, from kissing, to sexual contact, to sexual penetration. T 489, 518, 543, 558, 577, 1009. Given the breadth of the range of possibilities, some ambiguity about expectations characterized senior salute invitations. T 632.

The State contended that a senior-salute competition existed in 2014. One witness testified that Labrie and Thomson competed over who could kiss the most girls. T 500. Another claimed more generally to be aware of a competition over how many times seniors "hooked up with" different students. T 569. Thomson, Labrie, and other witnesses denied the existence of any such competition. T 550, 615, 731.

A few days before graduation, Labrie, then aged eighteen, sent an email to F.P., then aged fifteen, inviting her in flowery language to join him behind a locked door to enjoy a fine view. T 64, 79, 89, 208, 883-86. He testified that he hoped to show her a stairway in the school chapel, and did not intend or expect that their encounter would involve sexual penetration, though he thought perhaps they might kiss. T 884, 991-1019.

F.P. testified that she felt "disgusted" by the invitation, as were the friends to whom she showed it. T 79, 82, 91, 242-44. She thought Labrie

invited her because he wanted to "kiss [her] or something." T 90, 96-97, 365-66. She spoke with Lucy, who suggested ignoring the email. T 79, 93. On Thursday, May 29, F.P. sent Labrie an email saying that she and Lucy are close, and "although I would like to climb those hidden steps with you, I have to decline." T 95, 289. She added that she did not want to join the list of ninth graders who "have spent quality time with" Labrie. T 80, 92, 95, 889.

Labrie was a bit surprised that F.P. declined, but not particularly troubled or upset. T 546, 598, 883. He responded by email that her message was "one of the sassier emails" he had ever received, and he protested that the list to which she'd referred was "pretty much non-existent." T 891. He closed by telling her to do as she pleased and that he would have taken her to see the view "either way." T 80, 97. F.P. testified that she then regretted the tone of her response, but let the matter drop. T 98-100.

At Labrie's request, Owen MacIntyre, a freshman and mutual friend of Labrie and F.P., put in a good word with her. T 81, 102, 490-96, 892-93. F.P. reconsidered and sent an email asking Labrie's pardon for her earlier response and agreeing to meet him, provided the meeting would remain secret. T 81-82, 100-03, 251-53, 894. Further correspondence followed, beginning with an email and continuing via Facebook, in which Labrie and F.P. finalized their plans. T 104-11, 895-902. Labrie had access to a utility room/attic area of a campus building called the Lindsay Center, and they went there. T 665.

At about 9:15 p.m. on the Friday before SPS's Sunday graduation, Labrie and F.P. met and entered the Lindsay building by separate routes. T 112-13,

208, 903-04. Inside, they went upstairs to the utility room/attic, and through it onto the roof, where they looked at the view. T 113-17, 909-12. They then re-entered the utility room/attic, where they began to kiss. T 118, 912-15.

F.P. testified that Labrie removed her sweatshirt, and soon afterwards, her shirt. T 119. She felt "okay" with the removal of her sweatshirt, and "iffy" about the removal of her shirt, but allowed it. T 119. When he began to remove her bra, she stopped him. T 120. They continued to kiss, and she was "fine with that." T 121, 125. Indeed, she testified that she expected they would kiss when she accepted the invitation. T 242. At some point, Labrie guided her onto a blanket he brought. T 121-22. After a time, Labrie removed F.P.'s shorts and F.P. lifted her hips "to make it easier for him." T 126, 296-97, 732. Labrie's shirt was off and he started to remove her underwear. T 127. F.P. prevented him by holding it up. T 127-28. Labrie kissed her body, at one point "chewing" or "biting really hard" on her breast. T 129. F.P. testified that she felt then that she "had no control," and "like she couldn't say 'no.'" T 133. As a result, she said nothing. T 133. When Labrie's face was near her vaginal area, she said "no no no," "dragged his face upwards" and told him to "keep it up here." T 133-34.

She testified that Labrie at some point "stuck his face down there and performed oral sex." T 135. She also felt a finger and his penis penetrate her vagina. T 136-42. Though her underwear remained on, Labrie "pulled it aside." T 136. She testified that his conduct was not "okay" with her, but that she did not say anything. T 138. Labrie seemed frustrated at not being able to achieve full vaginal penetration, prompting him to "spit twice inside" her. T 142. She

perceived that he "fumbled with something," briefly withdrew his penis, and then re-inserted it. T 143. Eventually, he "stood up and started to get dressed." T 143. F.P. also dressed, and testified that she felt pain in her breast and vaginal area. T 144-45, 148, 154. Labrie kissed her and said words to the effect of, "well, that was fun." T 145. F.P. felt shocked by the experience and could not speak. T 145. Labrie said that they should leave separately, and F.P. told him to go first. T 145. Labrie did so, and she followed soon after. T 145-46.

Labrie testified that, after they first began to kiss, he removed F.P.'s sweatshirt and his own. T 916-17. He took a blanket from his backpack and they spread it on the floor. T 918-19. They lay on the blanket, kissing, rolling around and holding each other. T 919. During that time, they removed their shirts. T 919-21. Labrie had the impression that F.P. welcomed and enjoyed these activities. T 919-23. Once their shirts were off, they kissed each other's chest, though F.P.'s bra remained on. T 923-26. Labrie at one point moved a strap off F.P.'s shoulder, but she put it back in place. T 925-26. Labrie understood that F.P. did not want her bra removed, and he did nothing afterwards to remove it. T 926. At no point did she indicate discomfort. T 925.

They soon began "dry humping," pressing their bodies against each other. T 928-29. Labrie perceived mutual interest in that activity. T 928. Labrie had an erection, and thought that it would have been evident to F.P. T 929-30. He testified that she continued to manifest consent to their activities. T 930. At some point, Labrie removed his shorts and F.P.'s, the latter with her assistance via lifting her hips off the floor. T 931-33. They continued "dry humping" with

their underwear on. T 934-36, 939. Labrie kissed the area around her underwear, but never put finger, tongue, or penis in her underwear. T 936-39.

At one point, Labrie perceived their mutual arousal to be such that he thought they would have intercourse. T 937-39, 1022-23. He stood and went to find his wallet to get the condom he habitually kept there, and put it on. T 939-40, 1040. However, in the time it took to do so, Labrie partially lost his erection and had a second thought about the advisability of intercourse. T 940-41, 1024. He returned to the blanket and they resumed kissing, but their activity slowed and eventually stopped, without sexual penetration having taken place. T 941. As both had other plans for later, they checked the time and decided to dress and leave. T 941-43. As a concert in which Labrie was interested had already begun, their departure was relatively abrupt. T 943-44. They kissed once more and then, at F.P.'s suggestion, Labrie left first. T 944. On his way across campus, he noticed that the condom was still on, and that there was some moisture that he associated with "pre-ejaculate." T 945.

As F.P. left the building, she encountered Gus Hirschfeld, a freshman friend. T 149. She testified that she told him that she thought she had just had sex with Labrie. T 152. Hirschfeld seemed concerned and asked her if the encounter was consensual. T 152. She responded that she didn't know. T 152.

F.P. returned to her dorm, where she encountered other friends. T 154-57, 350-54. At some point that evening, F.P. told them that she thought she had had sex with Labrie. T 157. In their presence, she adopted an unconcerned demeanor. T 158-59, 165. F.P. testified that she continued to feel significant

vaginal pain for the next couple of days. T 165, 201, 205, 411, 422; but see T 324-25, 367-68, 459 (F.P. did not report discomfort to SPS nurse, to friend, or to doctor). A few days later, when F.P. was examined at the hospital, the nurse noted a small superficial abrasion in the posterior fourchette. T 422, 432-35.

Meanwhile, upon returning to his dorm after the concert, Labrie encountered boys curious to know what happened with F.P. T 948-49. Then, and in other conversations over the next days, Labrie described the interaction to male friends in words that implied intercourse. T 497-98, 549-50, 572-73, 599, 949, 977-78, 1030-31, 1036-38. The State emphasized a conversation between Labrie and Tucker Marchese in which, after Marchese asked how Labrie had gone "from no to bone," Labrie replied that he "pulled every trick in the book" and performed oral sex. T 602-03, 1032-33. At trial, Labrie testified that he misled his friends, preferring them to think that intercourse had happened, rather than that erection loss and second thoughts intervened. T 977-78, 1034, 1036-37.

Later during the night of their encounter in the Lindsay building, Labrie initiated a further email conversation with F.P., with a message saying: "[F.P.]. you're an angel. Much love, Owen." T 160, 953. F.P. testified that the message struck her as "skeevy" or "disgusting." T 160. Nevertheless, she responded: "You're quite an angel yourself, but would you mind keeping the sequence of events to yourself for now." T 161, 954. Labrie agreed and she replied, "thank you, my good man." T 162-64, 955-56.

After more discussion with friends, F.P. sent Labrie an email asking whether he was "using anything tonight," meaning a condom. T 174, 956. Labrie did not catch her drift, asking, "what." T 176, 957. F.P. clarified the condom reference, and Labrie answered "yeah." T 176-77, 957-58. F.P. replied, "ha ha okay thanks." T 178. Labrie then asked whether she was "on the pill." T 178, 958-59. She answered, "nope," prompting Labrie to say first, "Praise Jesus," and then: "I put it on like halfway through." T 178-80, 960. F.P. responded, "oh, okay," and then, after further consultation with friends, asked if he was sure. T 180. He answered "yes," and, "I think you're fine." T 180. Urged by her friends, F.P. pressed the matter, asking whether he knew for sure and if he put it on "like before or after [he] came." T 181-82, 960. Labrie said, "Ha ha ha, I put it on long before I knew I would." T 182. He added, "I would say you're good to go, but I guess it's your call." T 182-83. F.P. answered: "Ha, ha, sorry for all the technical stuff." T 183, 961. After a brief further exchange, Labrie said, "you're a gem. Let me know if there's anything I can do," to which F.P. replied, "you're not too bad yourself. I will." T 183-85, 961.

F.P. then said that she lost an earring during their encounter. T 185, 962. Labrie expressed sympathy, which F.P. acknowledged, prompting Labrie to send a "ha ha" message, amused by F.P.'s imperfect French. T 186-87, 963. A further exchange expressing amusement and mutual appreciation followed, during which each called the other a tease, using the French word. T 187-88, 964-65. F.P. then returned to the subject of the earrings, saying that they were her favorite pair. T 190, 965. Labrie offered to look the following day in the

Lindsay building. T 190. F.P. thanked him. T 190. After a further brief exchange, they wished each other good night and the message thread ended for the night with F.P. thanking him again for checking. T 192-96, 965-68.

F.P. testified that she tried to stay calm and in control in the following days, feeling that her family should focus on Lucy's graduation. T 152-54, 207. On Saturday, probably in the evening, F.P. told Lucy about her encounter with Labrie. T 212-14, 321. On Sunday morning, F.P. went to the school nurse to ask for the "Plan B" birth control pill. T 210, 320. The nurse asked who the boy was and whether the encounter was consensual. T 210, 322. F.P. declined to name the boy, T 329, but testified that, "through [her] tears, [she] said yes" to the question about consent because she had been tasked by her family with saving seats at the graduation ceremony, and did not want to open a time-consuming discussion with the nurse. T 210-11, 322, 325-27.

Also on Sunday, Labrie sent F.P. a longer message in which he expressed his best wishes for her next school year. T 216, 969-70. He then said that people had been saying "all kinds of things" to him that day, and he didn't want her sister to "leave with a bitter taste in her mouth." T 216. He hoped that when "a boy actually takes [F.P.'s] virginity," it would be "golden." T 216. He added, "there's a difference between making love and messing around. . . ." T 216-17. F.P. testified that she interpreted the message as "backtracking," and as an effort to manipulate her view of what happened. T 217.

Labrie also told her that he looked in Lindsay for her earring, without success. T 219, 968-70. F.P. replied: "Thank you so much for that, Owen.

Things have been difficult and I haven't been making the most pleasing decisions to Lucy recently and that makes me feel terrible. I hope for what you said, as well." T 219, 970. She closed by thanking him for looking for the earring. T 219, 970. Labrie answered by reporting that Lucy had punched him in the face the previous night. T 220, 971. F.P. answered that she was "so sorry. Lucy is very protective." T 220. He elaborated, "ha, ha, ha, all her friends ran after me. Never have I been attacked by so many crying, yelling girls." T 221, 971. F.P. replied, "Oh my God, that's every guy's worst nightmare, ha, ha, ha, and the emotions don't help at all." T 222, 224, 971-72. Further messages followed in which each reassured the other that the matter would "blow over." T 224, 972. F.P. answered Labrie's reassurance with a French-language message that translates as, "thank you, kind friend." T 224-25, 972. The conversation that day concluded with a few messages chatting about their Saturday night activities. T 225-26, 972-73.

In the following days, rumors about Labrie and F.P. spread among students. T 230, 374, 356, 605. After graduation, students in the younger grades remain on campus for a few days, finishing their end-of-semester exams. T 229. Upon seeing a public Facebook comment posted by a ninth-grade boy during the exam period, F.P. became very upset. T 230, 356-59, 373-74. She spoke that night with an adult dorm advisor, and on the advisor's recommendation, F.P. called her mother and reported that Labrie raped her. T 230-31, 334-35. F.P. met with Concord police on June 4. T 276, 644-48.

Meanwhile, Labrie and F.P. exchanged messages on June 3. T 226-27, 974. Labrie initiated the exchange by saying that friends called him to report "some rumors they heard." T 226. Labrie said that he would have called but didn't want to keep her up during exams, and he asked her to send a message in the morning. T 226, 974. He closed by saying, "for so many reasons we need to make sure people don't think the wrong thing. Sleep tight. Owen." T 226. F.P. replied saying, "things have gotten out of hand." T 227, 974. Labrie asked whether she wanted to talk, and added: "people have been saying some very scary things considering we never had sex. Since I'm not there, I have to trust you've got my back and you make sure the right people know what's actually up. Let me know if I can help/when it's all going to blow over." T 228, 974. A final message from Labrie followed on June 8, informing her of his return from a post-graduation trip to Montreal, and expressing the hope that "things have quieted down a little." T 228-29, 975-76. He also offered his best wishes for her next school year. T 229. F.P. testified that Labrie, and these last messages, disgusted and offended her. T 228-29. She thought that Labrie believed that he could manipulate her, a belief she testified was "dead wrong." T 229.

F.P's report led to a police investigation during which the police obtained the underwear F.P. wore on the night in question. T 648. A serological examination disclosed the presence of "a slight deposit in the crotch panel area of the underpants." T 777. The serologist found no sperm, but found evidence of the presence of a chemical found in semen. T 779. Fabric cut from the underwear was forwarded for DNA testing. T 781. The DNA analyst used a

procedure designed to detect even a small amount of sperm, by separating DNA collected from sperm from DNA collected from any non-sperm cells. T 794-96. Unlike the serologist's, the DNA analyst's techniques disclosed the presence of a "few" sperm. T 797. In the non-sperm-cell sample, the analyst found F.P.'s and Labrie's DNA. T 805-07, 814. In the sample that included sperm, the analyst found the DNA of at least three people, including male and female DNA. T 809, 818. Because of the number of contributors, the analyst could make no conclusion about the identity of the contributors. T 809-10. The analyst could not exclude the possibility that Labrie's DNA came from an enzyme in saliva. T 816-17.

The police contacted Labrie, and spoke to him first by telephone and then in person in Concord. T 658-92, 979-80. Labrie consistently maintained his innocence, denying any coercion or penetration during what he had perceived to be a mutual encounter. T 661-62, 688-91, 725, 980, 990, 1029.

In an effort to prove that Labrie intended that his encounter with F.P. involve sexual penetration, the State elicited evidence about conversations Labrie had with friends about his plans for senior salute generally and with respect to F.P. specifically. In a conversation in January 2014, Labrie responded to a question about who he wanted "to pork more than anyone" by naming F.P. T 529, 998. Labrie and Marchese testified that they collaborated on a list of female students they found attractive and would like to get to know better. T 590-95, 614, 682, 872-73, 1006-08. On that list, only F.P.'s name was written in all capitals. T 595, 1008.

Thomson testified that, just before Labrie left to meet F.P., Thomson told him "it probably wasn't a great idea" because F.P. was "a lot younger." T 548. After his encounter with F.P., in a conversation with Marchese, Labrie said that the F.P. "thing will blow over. Denied until I die tonight. Her friends forgave me, kind of." T 607. The State also attributed incriminating significance to the fact that, after F.P. went to the police, Labrie deleted parts of the conversations from his email or Facebook accounts. T 753-54, 1034-35.

Labrie challenged the claim that such words amounted to anything more that adolescent male bravado. T 998, 1005. He and Marchese testified that the list did not relate to any sexual conquest competition, and indeed denied that any such competition among senior boys existed. T 615, 682, 987. The list rather merely named students that he and Marchese thought attractive and interesting. T 872-73.

In response to the claim of coercion, the defense elicited F.P.'s testimony that, within about a day before meeting Labrie at the Lindsay building, she shaved her pubic hair. T 308-10. In a similar vein, the defense elicited testimony from Claudia Lopez-Balboa, F.P.'s close friend. Lopez-Balboa testified that F.P. said, before meeting Labrie, that she might be willing to go so far as fellatio and digital penetration. T 259-60, 344, 369-71, 376. At trial, F.P. denied remembering making that statement. T 265-67. She testified that, when she accepted Labrie's invitation, she contemplated, with respect to physical intimacy, only that they might kiss. T 104, 114, 242.

SUMMARY OF THE ARGUMENT

In two respects, trial counsel rendered ineffective assistance in defending against the computer services charge. First, counsel failed to present a defense to the *mens rea* element requiring the State to prove that, at the time Labrie communicated with F.P. via a computer service, he intended to engage in sexual penetration with her. Defense counsel never mentioned to the jury that charge or any defense to it either in opening statement, closing argument, or otherwise. Counsel's failure to speak to the charge reflected a view that the defense to that charge was covered by, or included within, the defense to the AFSA and misdemeanor charges. That view was legally erroneous. The error prejudiced Labrie. Though evidence was introduced that Labrie did not intend to engage in penetration at the time he communicated via computer with F.P., counsel's failure to marshal that evidence in Labrie's defense left the jury without any defense to consider in deliberating on the charge.

Second, counsel failed to present a defense to the *actus reus* element requiring the State to prove that Labrie used an "internet service" or "on-line service" to "seduce, solicit, lure, or entice" F.P. to engage in sexual penetration. F.P. agreed to meet Labrie as a result of MacIntyre's in-person solicitation and Labrie's emails on the SPS intranet. The SPS intranet does not constitute an "internet service." If the intranet is construed as an "on-line service," the statute is ambiguous. Resort to legislative history and purpose, as well as the rule of lenity, leads to the conclusion that the statute does not cover Labrie's conduct. Counsel's deficient failure to present this defense prejudiced Labrie.

I. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN CHALLENGING THE FELONY COMPUTER-USE CHARGE.

At trial, Massachusetts lawyers J.W. Carney and Samir Zaganjori represented Labrie, with local counsel Jaye Rancourt. H 14, 26, 31, 311-12, 319-20, 437. Also involved in a research and support capacity was Carney's associate, Danya Fullerton. H 13, 285-92.

In April 2016, Labrie filed a motion for a new trial, alleging ineffective assistance of counsel. A1-A28. Labrie argued that counsel "failed to subject the State's case on the [computer-use] felony charge . . . to any meaningful adversarial testing." A3-A18. The motion identified several respects in which counsel performed deficiently, including failing to confront the evidence at trial or to challenge the applicability of the charge to the facts of this case. A4.

First, Labrie noted that counsel acted under the "objectively unreasonable" belief that a computer-use conviction could not stand if the jury acquitted Labrie of the AFSA charges. A4-A5. Thus, counsel performed deficiently in failing to argue that the State introduced insufficient evidence to prove that, when Labrie sent the messages to F.P., he intended to engage in sexual penetration with her. A13-A15. Labrie also contended that counsel failed to "argue to the jury that Mr. Labrie did not possess the requisite intent to commit the [computer-use felony] at the time any e-mail and/or Facebook communication had occurred." A14. In short, Labrie argued that "[t]rial counsel never made any argument to the jury regarding this Computer Offense. They never argued in their opening statement, never cross-examined one witness regarding intent at the time e-mails or Facebook messages were sent, and

never argued in the closing argument regarding application of" the computer felony. A15.

The motion also asserted that counsel unreasonably neglected to investigate or present a defense focused on the fact that email messages between students with sps.edu addresses would not use the internet. A6-A9. In a later-filed supplement, Labrie elaborated on that claim. A29-A49.

The State objected. A50-A86. The court convened a three-day evidentiary hearing, after which Labrie, A99-A124, and the State, A87-A98, each filed a memorandum. On April 19, 2017, the court denied the motion. Supp. 1-24.

The Sixth Amendment to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution guarantee criminal defendants the right to the effective assistance of counsel. Courts analyze allegations of performance ineffectiveness under the standard announced in Strickland v. Washington, 466 U.S. 668 (1984), and most recently applied by this Court in State v. Candello, 170 N.H. 220 (2017). See also State v. Kepple, 155 N.H. 267, 269 (2007) (same analysis applies under state constitution as under federal constitution). To prevail, the defendant must show "first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." State v. Collins, 166 N.H. 210, 212 (2014).

To satisfy the deficient performance prong, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." Candello, 170 N.H. at 225. "The proper measure of attorney performance

remains simply reasonableness under prevailing professional norms." State v. Whittaker, 158 N.H. 762, 768 (2009) (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)). "To meet this prong of the test, the defendant must show that counsel made such egregious errors that she failed to function as the counsel the State Constitution guarantees." Candello, 170 N.H. at 225. This Court affords "a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make." Id. To prevail, the defendant "must overcome the presumption that trial counsel reasonably adopted her trial strategy." Id. Courts therefore make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id.

"To satisfy the second prong, the prejudice prong, the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Collins, 166 N.H. at 213. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citation and quotation marks omitted). The same "reasonable probability of a different result" standard applies to the definition of "materiality" for Brady purposes. See Strickland, 466 U.S. at 694 (equating prejudice prong with Brady materiality analysis). Under that standard, "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

Id. In making its determination, this Court considers "the totality of the evidence presented at trial." Collins, 166 N.H. at 213.

This Court reviews factual findings with deference, but the ultimate legal conclusions *de novo*. Candello, 170 N.H. at 226. Here, only the court's legal conclusion is in dispute. Thus, its ruling will be reviewed *de novo*.

In separate sections, this brief presents two claims alleging ineffective assistance with respect to the computer charge. Section A argues that trial counsel was ineffective in failing to contest the *mens rea* element. Section B argues that counsel was ineffective in failing to contest the *actus reus* element of use of the internet or an on-line service.

A. Counsel rendered ineffective assistance in failing adequately to present a defense to the mental state element.

In discussions with counsel, Labrie consistently recounted the version of events to which he testified at trial. H 314-15, 439-40. As relevant to the computer charge, he told counsel "that he had not met with [F.P.] with the intention of having sexual intercourse." H 314; see also H 439-40 (to same effect). As relevant to the other charges, Labrie denied that F.P. expressed a lack of consent, and he denied that any sexual penetration occurred. H 315. Counsel accordingly proposed to contest all charges. H 315. With respect to the computer charge, at the post-conviction hearing, counsel described the defense theory as denying that, at the time Labrie sent F.P. messages, he intended to engage in sexual penetration with her. H 328-29, 365-66, 468-69.

However, at trial, counsel never mentioned that charge or Labrie's defense to it to the jury, either in opening statement, closing argument or

otherwise. H 508. Instead, in opening, counsel said the case turned only on two disputes: whether penetration occurred, and whether F.P. consented to any sexual contact. T 39-41. The prosecutor similarly focused on those disputes. T 1075, 1077. However, the prosecutor also specifically addressed the computer charge in opening statement and closing argument. T 37, 1085, 1089.

Defense counsel's failure even to mention the computer charge reflected a belief that it constituted a secondary, derivative part of the prosecution, rather than a charge that required a defense distinct from that made against the AFSA and misdemeanor sexual assault charges. Thus, Rancourt testified that Zaganjori expressed surprise about the verdict, saying that he had not thought the jury could acquit on the AFSA charges while convicting on the computer charge. H 86-87, 198. Zaganjori claimed that he had understood the possibility of conviction on the computer charge in the face of acquittal on the AFSA charges, but still said that he believed Labrie could be "convicted of the computer charge based on the misdemeanor sex offenses." H 386, 389. Carney testified that he thought it "highly likely, if not almost certain" that acquittals on the AFSA and misdemeanor charges would result in acquittal on the computer charge. H 468. Carney added that he thought it would be legally improper to enter a conviction on the computer felony if the jury acquitted of AFSA, even if it convicted of the misdemeanors. H 471-73.

That sense of the computer charge also found expression in the post-trial motion to set aside the felony verdict. A125-A148. While acknowledging that a "literal construction" of the statute could permit a conviction under these

circumstances, the motion argued that the conviction conflicted with legislative intent as manifested in statutory context and legislative history. A128. Counsel also cited the Cruel and Unusual Punishments Clause, focusing on the oddity of lifetime registration attributable to Labrie's use of a computer, when the underlying misdemeanor does not require registration at all. A129-A130. The court ultimately denied the motion on the merits and because not timely presented. A149-A159.

The claim of deficient performance centers on counsel's failure to communicate to the jury any defense to the computer charge. That failure cannot be attributed to the lack of a plausible defense. On the contrary, counsel acknowledged the existence of a *mens rea* defense if the jury concluded that, at the time Labrie sent F.P. messages via a computer, he did not intend to engage in sexual penetration with her. H 328-29, 365-66, 468-69. Moreover, that defense had an evidentiary basis in testimony that Labrie denied intending, when he sent the messages, to engage in sexual penetration with F.P. T 662, 993.

An attorney performs deficiently by failing to "raise an important, obvious defense without any imaginable strategic or tactical reasons for the omission." Prou v. United States, 199 F.3d 37, 48 (1st Cir. 1999). "By definition, the proper functioning of the adversarial process contemplates the presentation of adverse views of the evidence so that the factfinder in a given case can make an informed determination as to what the facts were so they could be applied to the law." Elliott v. Williams, 248 F.3d 1205, 1209 (10th Cir. 2001); see also

State v. Whittaker, 158 N.H. 762, 772-75 (2009); Heard v. Addison, 728 F.3d 1170, 1180-83 (10th Cir. 2013).

As noted, counsel explained their failure to communicate any defense specific to the computer charge as rooted in a belief that the defense to the other charges covered the computer use charge. Counsel defended against the AFSA charges by denying that F.P. manifested a lack of consent, and they defended the misdemeanor charges by denying penetration. That approach raises the question whether, as a matter of law or fact, a jury could acquit on the AFSA charges and/or the misdemeanor charges but still convict on the computer charge. Counsel performed deficiently in so discounting that possibility as to cause them to fail even to mention the computer charge.

First, the statutes in question plainly permit acquittal on AFSA charges and conviction on a computer charge. A jury that found that F.P. did not manifest a lack of consent would acquit, as Labrie's jury did, on the AFSA charges. The issue of consent, however, has no bearing on the computer charge. RSA 649-B:4, I(a) criminalizes the act of "knowingly utiliz[ing] a computer on-line service . . . to seduce, solicit, lure, or entice a child to commit . . . [a]ny offense under RSA 632-A . . . ." RSA 632-A:4, I(c) criminalizes consensual sexual penetration of a minor older than thirteen, when perpetrated by a person no more than four years older than the minor. Thus, consensual sexual penetration under the circumstances alleged here would count as the intended offense for purposes of RSA 649-B:4.

Second, the statutes plainly permit acquittal on a misdemeanor sexual assault charge but conviction on a computer charge. To convict on the computer charge here, the jury had to find only that, at the time he sent F.P. messages via a computer, Labrie intended to engage in sexual penetration with her. Serpa, __ N.H. at __ (slip op. at 5) (crime prohibited by RSA 649-B:4 "is complete when the defendant uses the internet in an effort to solicit a child to engage in sexual activity") (quoting State v. Moscone, 161 N.H. 355, 360 (2011)). The State did not need to prove that sexual penetration ultimately happened. For that reason, a defense denying penetration would not defeat the computer charge. Thus, as a matter of law, the consent and non-penetration components of the defense theory do not cover the computer charge, in that success on them does not ensure acquittal on the computer charge.

That independence of the computer charge from the other charges is confirmed not only by the fact that a jury could convict on the computer charge even if it acquitted on the other charges, but also by the fact that a jury could acquit on the computer charge even if it convicted on AFSA and misdemeanor sexual assault charges. In other words, failure of the defenses to AFSA and misdemeanor sexual assault would not necessarily imply the failure of the *mens rea* defense to the computer charge. In that scenario, a jury would find a lack of proof that, at the time Labrie sent the messages, he intended sexual penetration, while also finding that, at some point in the Lindsay building, Labrie engaged in non-consensual sexual penetration.

Insofar as the failure to communicate a defense to the computer charge reflected a belief that it was so logically linked with the other charges as to be subsumed within, or derivative of, them, counsel misunderstood the law. A lawyer performs deficiently in making decisions based on an erroneous understanding of the law. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. 263, __, 134 S.Ct. 1081, 1089 (2014). As of the time of trial, counsel's legal research file contained nothing pertinent to RSA 649-B:4. H 81-84, 162, 166-67, 304, 353. Courts have found deficient performance where a lawyer's ignorance of the law impairs the defense. Whittaker, 158 N.H. at 773-74; State v. Thompson, 161 N.H. 507, 530 (2011); United States v. Carthorne, 878 F.3d 458, 466-69 (4th Cir. 2017); People v. Wright, 488 N.E.2d 973, 979 (Ill. 1986); State v. Sidzyik, 871 N.W.2d 803, 808 (Neb. 2015); Ramirez v. State, 301 S.W.3d 410, 416-18 (Tex. App. 2009).

For all the reasons stated, the Court must rule that counsel rendered deficient performance in failing to communicate the need to focus on Labrie's mental state with respect to penetration *when he sent the messages*. Counsel should plainly have told the jury that it could only convict if it could find, beyond a reasonable doubt, that Labrie intended, when he sent the messages, to lure F.P. to engage in sexual penetration.

That deficient performance prejudiced the defense. The prejudice prong poses the question whether there is a reasonable probability of a different

result on the computer charge if counsel had communicated to the jury the mental state defense to that charge, and cited the evidence supporting it. For several reasons, this Court must conclude such a reasonable probability exists.

First, counsel's failure to communicate the defense to that charge greatly reduced the chance of acquittal on it. "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial." Herring v. New York, 422 U.S. 853, 858 (1975). As the Supreme Court has observed:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. . . . The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Id. at 862 (citations omitted).

Here, where the prosecutor addressed the computer charge while defense counsel said nothing about it, the adversary process did not function as to that charge. Courts have found ineffective assistance where, in closing, counsel fails, without strategic justification, to advocate for a defense to a charge. See,

e.g., Lawhorn v. Allen, 519 F.3d 1272, 1292-97 (11th Cir. 2008); Dobbs v. Turpin, 142 F.3d 1383, 1389-91 (11th Cir. 1998); Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987); Ex parte Whited, 180 So. 3d 69 (Ala. 2015); People v. Wilson, 911 N.E.2d 413 (Ill. App. 2009); see generally Annotation, Adequacy of defense counsel's representation of criminal client regarding argument, 6 A.L.R.4th 16 (1981). Without effective advocacy communicating the content of the defense, there is a substantial risk that jurors will not recognize grounds for acquittal, and thus would not give those grounds due deliberation.

Second, the State did not have overwhelming evidence of guilt as to Labrie's intent when he sent the messages. Even if, in the face of contrary testimony, one construes Labrie's use of such words as "pork" and "slay" as referring specifically to penetration, the words can as readily reflect adolescent bravado as a settled prior intention to engage in penetration with F.P. Similarly, the presence of a condom in his wallet does not conclusively prove an intention to engage in penetration when Labrie sent the messages, especially given testimony that he always had a condom in his wallet. Ultimately, to prevail, Labrie need only undermine confidence in the verdict.

That burden he meets. At no point did Labrie confess to intending penetration at that time. Indeed, in his statement to the police and in his testimony at trial, he denied it. Moreover, other witnesses testified that the senior-salute tradition, even when it involved sexual contact, did not necessarily involve penetration. One witness to whom Labrie spoke about his hope of meeting with F.P. noted that Labrie did not say he planned to have

intercourse. T 573. And Thomson testified that, upon his return after seeing F.P., Labrie seemed "surprised" to have had intercourse with F.P. T 549-50.

It is no answer to say that the other verdicts prove that the jurors did not believe Labrie. The verdicts reflect that the jury believed F.P. with respect to whether penetration ultimately occurred, but they also reflect that the jury believed Labrie with respect to whether she communicated non-consent or was penetrated by surprise. As shown above, the conclusions underlying the AFSA and misdemeanor verdicts have no necessary link with a finding one way or the other with respect to Labrie's intent at the time he sent the messages. Thus, the other verdicts do not indicate what the jury would have found had counsel communicated the *mens rea* defense to the computer charge.

This Court must conclude that counsel's failure to communicate the defense was deficient, and that the deficiency prejudiced Labrie's defense.

B. Counsel rendered ineffective assistance in failing to present an *actus reus* defense focused on the nature of the SPS intranet computer network.

To violate RSA 649-B:4, I(a), a person must "utilize a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice a child" to commit a sexual offense. Labrie's invitation, F.P.'s refusal, and his reply were conveyed on their SPS email accounts. Then, after MacIntyre's in-person intervention induced F.P. to accept Labrie's invitation, F.P. contacted Labrie via email to tell him so. He replied likewise by email, and thus did they make their agreement to meet. After making that agreement but before meeting, they exchanged a few brief logistical messages on Facebook.

At the post-conviction hearing, SPS technology director Scott Morin testified that the school hosts its internal email system on its own servers. H 89-92. The SPS network is a closed system, in the sense that the school controls and limits who can have an account. H 121. When students send emails to each other on their SPS accounts, the messages do not leave the SPS network if the student connects via wifi or a device linked by "hardwire" to the network. H 91-92, 96-97.[1] SPS computer users can access the internet, except during a late-night period when access is cut, and except with respect to certain kinds of websites the school chooses to block. H 93-94, 101-02. SPS students and staff can also send email to, and receive email from, non-SPS email addresses, a function involving the internet. H 92. Morin testified that, with respect both to email and to internet access, the school uses the same fundamental protocols "that are used throughout the internet" so as to create a seamless experience for the SPS user. H 102-05.

The jury heard no evidence about the nature of the SPS computer system. Counsel did not consider the possibility of a defense based on the intranet character of the network. H 326-27, 357, 366, 380-83, 465-66, 510, 517-21. Zaganjori testified that, even after learning about the SPS system, he saw no viable defense, believing that the statute covered the intranet. H 421-22. Rancourt, however, believed the issue worthy of exploration. H 78-81. In

[1] A cell phone user with an SPS account could connect to the network using a cellular network. In that circumstance, an email message between SPS users would employ the internet via a cell phone company. H 108-11. However, wifi is broadly available on the campus to SPS account holders, thus reducing the need to use cellular data transmission while on campus. H 100-01, 122. Labrie had no smart phone, and so the cellular option was not available to him. H 127.

any event, "defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence." Whittaker, 158 N.H. at 775.

Counsel's failure to recognize and advance a viable defense, without a strategic justification, constitutes deficient performance. Prou, 199 F.3d at 48. RSA 649-B:4, I, does not criminalize all efforts to solicit, lure, entice, or seduce a minor for sexual penetration, but only efforts undertaken via a "computer on-line service" or "internet service." If, under otherwise identical circumstances Labrie contacted F.P. by telephone, by letter, or in-person, RSA 649-B:4 would not apply to his conduct. To decide whether the SPS network falls within the statutory definition, this Court must construe the statute.

When called upon to interpret a statute, this Court looks first to its text, construing it if possible in accord with its plain meaning. Serpa, __ N.H. at __ (slip op. at 2). The Court interprets "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. Further, the Court interprets "statutes in the context of the overall statutory scheme and not in isolation." State v. Moran, 158 N.H. 318, 321 (2009). To that end, the Court aims to "effectuate the statute's overall purpose and to avoid an absurd or unjust result." State v. Paige, 170 N.H. 261, 264 (2017). However, the Court has also recognized that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective

must be the law." State v. Dor, 165 N.H. 198, 205 (2013) (citation omitted) (emphasis in original).

When a statute is ambiguous or silent, this Court will look to legislative history and to the policy considerations that motivated the legislature to enact the statute. ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011); State v. Hull, 149 N.H. 706, 709 (2003). Finally, "the rule of lenity comes into play . . . when a statute is ambiguous and resort to legislative history does not resolve the ambiguity." Paige, 170 N.H. at 266. This Court has explained:

> [T]he rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously. This rule of statutory construction generally holds that ambiguity in a criminal statute should be resolved against an interpretation which would increase the penalties or punishments imposed on a defendant. It is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. By applying the rule of lenity, we reject the impulse to speculate regarding a dubious legislative intent, and avoid playing the part of a mind reader.

State v. Dansereau, 157 N.H. 596, 602 (2008) (quotations and citations omitted). When construing statutes, this Court employs a *de novo* standard of review. Serpa, __ N.H. at __ (slip op. at 2).

This case calls on the Court to decide whether the statutory language - "a computer on-line service, internet service, or local bulletin board service" - covers the SPS network. Nobody has suggested that "local bulletin board service" could cover an intranet email network. The parties instead focused on "computer on-line service" and "internet service."

The term "internet service" does not apply to an intranet system like SPS's. The legislature chose "internet," not "intranet." The terms describe distinct kinds of networks. See, e.g., Intel Corp. v. Hamidi, 71 P.3d 296, 326 (Cal. 2003) (Mosk, J., dissenting) (distinguishing "open communication in the public 'commons' of the Internet from unauthorized intermeddling on a private, proprietary intranet"); Austin Bd. of Realtors v. E-Realty, Inc., 2000 U.S. Dist. LEXIS 23695, *2 (W.D. Tex., Mar. 30, 2000) ("intranet is basically an internal Internet designed to be used within the confines of a company, university, or organization. What distinguishes an intranet from the freely accessible Internet is that an intranet is private"). Consistent with that distinction, our legislature has enacted statutes using the word "intranet." See RSA 21-G:38, I (referring to "the state's internal intranet system"). Indeed, the legislature has distinguished between "internet" and "intranet" systems. See RSA 21-R:7, IV (referring to "[e]merging Internet and 'intranet,' or limited network, technologies"). Fidelity to the principle that courts may not add words the legislature chose not to enact requires this Court to honor the legislature's choice by not adding "intranet" to the statute.

This Court must also reject the notion that "on-line services" covers closed, local systems. In addressing this question, the superior court quoted Merriam-Webster's on-line dictionary as defining "on-line" as "connected to, served by, or available through a system and especially a computer or telecommunications system (as the Internet)." Supp. 15 (citing Merriam-Webster, https://www.merriam-webster.com/dictionary/on-line). The court

also cited Dictionary.com's first definition – "operating under the direct control of, or connected to, a main computer." Supp. 15 (citing http://www.dictionary.com/browse/on-line?s=t). Dictionary.com's second definition equally deserves mention: "connected by computer to one or more other computers or networks, as through a commercial electronic information service or the Internet."

In general, this Court interprets statutes so that all words have distinct meaning and application, for only thus can a construction avoid making any statutory words superfluous. Merrill v. Great Bay Disposal Serv., Inc., 125 N.H. 540, 543 (1984). Here, that principle requires that each term - "on-line service," "internet service," and, for that matter, "local bulletin board service" – cover some factual situation that the other terms do not reach. For example, if one construes "on-line service" so broadly that it includes the internet, then the "internet service" becomes superfluous, as redundant of "on-line service."

The interpretive problem here is that there is no way to read the three statutory terms so that each has separate application and none is a wholly-included subset within another. It is significant that the dictionary definitions of "on-line service" illustrate the term's meaning by reference to the internet. On any plausible reading, "on-line service" is either synonymous with "internet service," or is so broad that it covers the internet and intranet services, in which case the separate statutory term "internet service" is superfluous. Indeed, this Court has used language that appears to treat "internet" and "on-

line" as synonymous. See, e.g., State v. Lacasse, 153 N.H. 670, 671-74 (2006) (referring to conversation in internet chat room as an "on-line conversation").

The Court therefore faces a statute that is ambiguous because its terms do not permit any interpretation that avoids making at least one of them superfluous. Moreover, the statute is ambiguous on precisely the point in dispute here – whether the legislature intended RSA 649-B:4, I, to apply to communications on the SPS intranet network. Had the legislature intended to cover email communications regardless of whether hosted on the internet or on an intranet system, it could have said so in plain terms. See, e.g.. O.C.G.A. §16-12-100.2(e)(1) (Georgia statute expressly covering "computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, e-mail, or instant messaging service . . . .")

As noted, when required to construe an ambiguous statute, the Court will consult legislative history. When it enacted RSA 649-B:4, the legislature did not also enact a statute making it a crime to solicit a child via telephone, letter, or in-person contact. RSA 639:3, criminalizing endangering the welfare of a child, already accomplished that. Instead, the legislature recognized that features of computer on-line or internet use required additional criminal penalties. State v. Jennings, 159 N.H. 1, 7-8 (2009). The legislature also expanded the criminalized conduct beyond RSA 639:3's "solicitation" to include luring, enticing, and seducing. State v. Farrington, 161 N.H. 440, 448 (2011).

The legislative history discloses two features of computer use that motivated enactment of RSA 649-B:4. First, proponents focused on the

opportunity presented by computer communications for offenders to approach a child behind a veil of anonymity. See, e.g., A162-A163 (statement of Rep. MacAuslan noting that in chat rooms, people can "assume identities other than their own . . . . Someone who claims to be 15 with freckles and braces, could easily be 35 with non-standard sexual preferences"); see also Serpa, __ N.H. at __ (slip op. at 5) (noting that "such individuals can use the technology to mask their identities . . . ."); Farrington, 161 N.H. at 449 (citing interpretations of similar federal statute referring to "computer-provided threat of anonymous one-to-many communications by a sexual predator"). Second, offenders can use computers and the on-line/internet world to fascinate children, grooming them to be vulnerable to sexual exploitation. Jennings, 159 N.H. at 6-7 (citing legislative history of similar federal statute noting "particular concern . . . that pedophiles may use a child's fascination with computer technology as a lure to drag children into sexual relationships").

That account of the statute's history and purpose supports Labrie's claim that it does not apply to intranet email networks. Such networks do not afford the opportunity for anonymity that exists in communications sent via open internet sites. Also, the mere use of intranet email poses little risk of fascinating children with advanced computer technology. These considerations support the conclusion that the legislature neither envisioned nor intended that an email sent by an SPS senior to an SPS freshman inviting her to meet him would fall within the scope of RSA 649-B:4, I.

In rejecting Labrie's post-trial motions, the superior court adopted both of two mutually inconsistent views of statutory interpretation. On one hand, the court rejected as an "absurdity" the claim that the statute should be read literally to exclude communications on intranet systems. Supp. 15-16. In that regard, the court could conceive of no reason why the legislature, having chosen broadly to prohibit efforts via the internet or an on-line service to lure a minor to engage in penetration, would care whether the email in question was hosted by Google or by an SPS intranet server. Id. In that way, the court looked past plain statutory language to legislative history and purpose.

On the other hand, when it earlier denied Labrie's motion to set aside the verdict, the court rejected the argument that, in enacting the statute, the legislature was motivated by a concern about offenders taking advantage either of the internet's cloak of anonymity, or of its capacity to let would-be abusers send sexually-explicit material. On that occasion, the court emphasized that the legislature could have, but did not, enact words limiting the reach of the statute to cases involving anonymity or sexually-explicit communications. A155. It therefore declined to examine the statute's history or purpose. A154-A155. Both views cannot be correct.

Because the legislature attached such significant consequences – a felony conviction and lifetime sex offender registration – to a conviction under RSA 649-B:4, I, the Court must conclude that the legislature intended to cover only the kinds of computer networks or services that could justify those consequences because they pose such distinctive risks and dangers to

children. Email sent on an intranet network does not pose those dangers. The legislature therefore did not intend to cover it.

Finally, to the extent that ambiguity remains after examination of legislative history, this Court must apply the rule of lenity. Dansereau, 157 N.H. at 602. Applying that rule, the Court must resolve interpretive ambiguity in favor of a defendant, and conclude that RSA 649-B:4, I, does not apply in cases where a defendant uses only an intranet email function.

Counsel's failure to present that *actus reus* defense satisfies Strickland's deficiency prong. The analysis's second prong requires courts to consider the question of prejudice: whether there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. For several reasons, this Court must conclude that there was.

First, as described above, counsel neglected entirely to inform the jury about the intranet nature of the SPS network. This is not a case in which a defendant alleges ineffective assistance on the ground that, while the gist of the defense was presented, counsel erred by not presenting it more skillfully. Here, rather, counsel presented no evidence about the nature of the SPS network.

Second, the fact that Labrie and F.P. exchanged brief logistical messages on Facebook does not defeat the claim. RSA 649-B:4, I, criminalizes the act of using the internet to "seduce, solicit, lure, or entice" a child. The Court defined the phrase, "seduce, solicit, lure, or entice," as words that "draw upon the common theme of tempting, attracting or leading someone astray." Farrington, 161 N.H. at 447. Here, it was Labrie's intranet emails, as crucially

supplemented by MacIntyre's in-person conversation with F.P., that led her to agree to meet with Labrie. The later Facebook messages dealing with logistics formed no part of the means Labrie used to "seduce, solicit, lure, or entice" F.P. to meet him. She had already agreed to the meeting before the first Facebook message.

If the Court interprets the statute as described above, prejudice necessarily follows, for Labrie would have prevailed as a matter of law on the *actus reus* element requiring use of an "internet service" or "on-line service." See State v. Fennell, 133 N.H. 402, 407-09 (1990) (ineffective assistance for failing to move to dismiss charge as to which State introduced insufficient evidence). At a minimum, even if there is a factual question for the jury about whether the logistical Facebook messages constitute using the internet to "seduce, solicit, lure, or entice," there is a reasonable probability that Labrie would have prevailed, given the trivial role those messages played in the process of seducing, soliciting, luring or enticing F.P. Counsel's failure to present that defense thus prejudiced Labrie, and this Court must reverse the felony conviction.

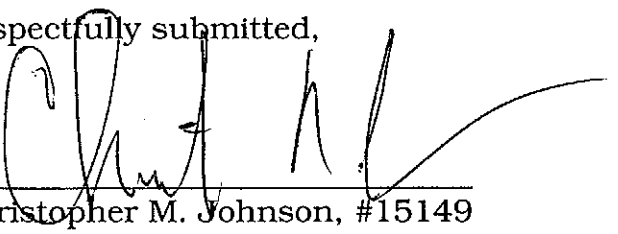
CONCLUSION

WHEREFORE, Mr. Labrie respectfully requests that this Court reverse his felony conviction.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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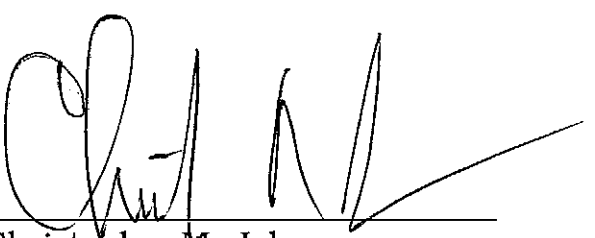

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Christopher M. Johnson

DATED: June 8, 2018

S U P P L E M E N T

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

The State of New Hampshire

v.

Owen Labrie

No. 14-CR-617

ORDER

The defendant, Owen Labrie, was tried on one count of certain uses of computer services prohibited ("computer uses"), three counts of aggravated felonious sexual assault ("AFSA"), three counts of sexual assault, two counts of endangering the welfare of a child, and one count of simple assault. The court dismissed one of the counts of endangering the welfare of a child after the close of the state's case. Thereafter, the jury returned not guilty verdicts on all the AFSA counts and the count of misdemeanor simple assault, and verdicts of guilty on the remaining counts—the felony of computer uses, the three misdemeanor sexual assaults, and the misdemeanor endangering the welfare of a child. Before the court is the defendant's motion for new trial based on ineffective assistance of counsel. The state objects. The court heard evidence on February 21-23, 2017. Because the defendant has failed to sustain his burden of showing that his trial counsels' performance was constitutionally ineffective, his motion is DENIED.

The defendant's trial was held in August 2015. The jury heard the following evidence pertinent to the defendant's motion. In the spring of 2014, the defendant was an 18-year-old senior and the victim was a 15-year-old freshman at St. Paul's School in Concord, New Hampshire. Shortly before the defendant's graduation, he sent the victim a series of e-mails and Facebook messages inviting her to come with him to a secluded area of campus. The victim eventually

agreed, and the two went to a restricted area of the school's Lindsay Building, where the defendant engaged in three acts of sexual penetration with her: penile penetration, digital penetration, and cunnilingus.

The defendant was represented by Attorneys J.W. Carney, Jr. and Samir Zaganjori.[1] Because neither attorney is admitted to practice in New Hampshire, they retained local counsel – Attorney Jaye Rancourt—who filed a motion to admit *pro hac vice* counsel, which the court duly granted. On July 31, 2015, the defendant filed an *ex parte* motion asking the court to allow Attorneys Carney and Zaganjori to represent him at trial without requiring Attorney Rancourt to be present every day. After discussing the motion with all counsel during the final pretrial conference, the court granted the motion.

In support of his request for a new trial, the defendant presented the testimony of local counsel Rancourt.[2] Attorney Rancourt testified at length, and at times emotionally, about her role on the trial team. Initially, Attorney Rancourt believed that she would serve as co-counsel at trial. She participated in a mock trial in Massachusetts[3] and other trial preparation with that expectation. At the final pretrial conference, Attorney Rancourt learned for the first time about Attorney Carney's motion requesting that she be excused from the requirement that she attend every day of trial and that Attorney Zaganjori would be replacing her as trial co-counsel. Attorney Rancourt had reservations, many of which were not shared with the court. She did, however, send a letter

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[1] Attorney Danya Fullerton also worked on the defendant's case as an associate at Attorney Carney's law firm. Attorney Fullerton's work on the case consisted primarily of research and organizing discovery.

[2] The attorney witness filed the motion for new trial on behalf of the defendant. Given the issue and the attorney witness's status as part of the defendant's trial team, the state moved to disqualify. The attorney witness objected. The court granted the state's motion and disqualified the attorney witness. *See* Order of May 24, 2016. The attorney witness filed a motion for reconsideration, which the court denied. *See* Order of June 14, 2016. The attorney witness then sought *mandamus* review by the New Hampshire Supreme Court. The Supreme Court denied the attorney witness's request without prejudice.

[3] Attorney Carney also testified about the mock trial, including a description of extremely effective cross-examination of the defendant by an outside consultant brought in to take the role of the prosecutor. Attorney Carney testified that this mock cross-examination was critical to the defendant's substantive and emotional preparation for his "live" trial testimony.

to the defendant specifying her concerns. The defendant acknowledged receipt of the letter and, notwithstanding Attorney Rancourt's expressed concerns, agreed to waive her presence at trial. Despite the court's agreement to the request to excuse and the defendant's waiver, Attorney Rancourt was present for approximately one-half of the trial and participated in many critical phases, including jury selection and the chambers conference on jury instructions. Also, notwithstanding her concerns, Attorney Rancourt did not believe that she was providing ineffective assistance or that she had to take further action at the time of her trial representation. With the benefit of hindsight, Attorney Rancourt has since changed her mind.

With the granting of the defendant's motion to excuse Attorney Rancourt's presence, the defendant's trial team was finalized. Attorney Carney acted as lead counsel. Attorney Zaganjori served as co-counsel. Attorney Rancourt was available to consult with the rest of the trial team and to act as needed. As indicated above, the jury ultimately returned verdicts of not guilty on the three AFSA counts and the simple assault, and verdicts of guilty on the counts of computer uses, sexual assault, and endangering the welfare of a child. The instant motion for a new trial based on ineffective assistance followed.

The defendant asserts that his trial counsel was ineffective. In support, the defendant cites Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. Under Part I, Article 15 of the New Hampshire Constitution, a criminal defendant is guaranteed "reasonably competent assistance of counsel." *State v. Brown*, 160 N.H. 408, 412 (2010) (quotation omitted). Because the state Constitution offers at least as much protection as the federal Constitution, the court will analyze the defendant's claims under the New Hampshire Constitution, using federal cases for guidance. *Gross v. Powell*, 132 N.H. 96, 100 (1989).

When analyzing a claim of ineffective assistance of counsel, the "analysis is the same under both the Federal and State Constitutions." *State v. Ayala*, 134 N.H. 346, 351 (1991). Both constitutions "measure the defendant's right to assistance of counsel under an objective standard of reasonable competence." *State v. Whitaker*, 137 N.H. 298, 301 (1993) (quotation omitted). To succeed on a claim of ineffective assistance of counsel, "a defendant must first show that his counsel's representation was constitutionally deficient, and, second, that counsel's deficient performance actually prejudiced the outcome of the case." *State v. Kepple*, 155 N.H. 267, 269–70 (2007). "A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective." *Brown*, 160 N.H. at 412.

When applying the first prong, courts begin with a strong presumption that counsel's conduct was reasonable, given the "limitless variety of strategic and tactical decisions that counsel must make" in practice. *State v. Faragi*, 127 N.H. 1, 5 (1985). "To satisfy the first prong, the defendant must show that counsel made such egregious errors that he or she failed to function as the counsel guaranteed by the State Constitution." *State v. McGurk*, 157 N.H. 765, 769 (2008) (internal quotations and citations omitted). Importantly, the court "will not second-guess the tactical decisions of defense counsel." *State v. Dennehy*, 127 N.H. 425, 428 (1985) (quotation omitted).

> Judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Brown, 160 N.H. at 412–13 (quotation omitted); *see also Strickland v. Washington*, 466 U.S. 668, 689 (1984).

To satisfy his burden on the second prong, "the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Brown*, 160 N.H. at 413 (quotation omitted). A reasonable probability is a probability that is "sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). In making this determination, the court considers "the totality of the evidence presented at trial." *Id.* (quotation omitted). The requirement that a defendant show there is a reasonable probability that the result of the proceeding would have been different means that the defendant must show that the verdict would have been different, but for his counsel's deficient performance. *State v. Chase*, 135 N.H. 209, 213 (1991); *see also Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (a defendant must prove "there is a reasonable probability that the verdict would have been different ... in order to demonstrate actual prejudice").

Having established the standard of review, the court turns to the defendant's claims. The defendant's primary attack is directed at his felony conviction on the charge of computer uses. The computer uses indictment alleged a violation of RSA 649-B:4, which provides in pertinent part:

> 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....

The defendant first asserts that trial counsel failed to challenge the computer uses indictment pre-trial. The defendant argues trial counsel did not challenge RSA 649-B:4 facially or as applied on First Amendment, dormant commerce clause, or due process grounds. The defendant, however, has not provided any support for his argument that RSA 649-B:4 is "facially" unconstitutional, nor has the defendant identified what would have been the basis for a pre-trial "as ap-

plied" challenge. As a result, the defendant has failed to establish that trial counsels' performance was constitutionally deficient as it relates to their alleged failure to challenge the computer uses indictment pre-trial. *See Sabinson v. Trustees of Dartmouth Coll.*, 160 N.H. 452, 459 (2010) (the court will not address arguments for which a party has "failed to provide adequately developed legal argument and legal support") (quotation omitted).

The defendant next asserts that trial counsel failed to challenge the application of the computer uses statute during trial. The defendant argues that this failure was ineffective because it did not allow a timely argument on the sufficiency of the evidence and it could not be used to support arguments for jury nullification or of selective prosecution. The court will address these claims in turn.

The defendant first asserts that counsels' failure to challenge the application of the statute during trial was ineffective because it was the appropriate procedural mechanism to raise a timely claim on the sufficiency of the evidence. The defendant did make this argument in his post-trial motion to set aside the verdict. The court rejected this argument in its October 20, 2015 order, ruling that the evidence presented at trial was "legally sufficient to support the jury's verdict of guilty on the computer uses indictment." Order of Oct. 20, 2015 at 6. Because the assertion of the claim of insufficiency during trial would not have changed the outcome of the case, counsels' failure to raise it at that time was not constitutionally defective.

The defendant next asserts that the submission of the claim during trial would have provided a basis to make a jury nullification argument. Both trial attorneys testified that such a defense would have been contrary to the trial strategy that followed from their conversations with the defendant. The defendant consistently denied all the charges against him. Both Attorney Carney and Attorney Zaganjori testified that the resulting trial strategy was to contest all claims of

sexual penetration. They further testified that the defendant never expressed anything but agreement with this strategy. Moreover, the court observes that a jury nullification argument is an appeal to the jury to return a not guilty verdict in the interest of justice notwithstanding its finding that the state had proved every element of the crime beyond a reasonable doubt. In the context of a sexual assault case, this would be an awkward argument. Counsels' decision to contest factually all indictments and not to make the inconsistent, awkward jury nullification argument is precisely the type of trial strategy that should not be second-guessed with the benefit of hindsight. *See Brown*, 160 N.H. at 412–13.

The defendant also claims that the assertion of the computer uses argument during trial would have provided a basis to make a selective prosecution argument. Attorney Carney testified that he considered selective prosecution to be a dangerous defense because he risked opening the door to the entry of highly prejudicial evidence against the defendant. Specifically, Attorney Carney was aware of evidence suggesting that the defendant had an aggressive sexual reputation on campus and that there was evidence that he had engaged in aggressive sexual conduct with female St. Paul's School students other than the victim in this case. This would have been damaging because the details of the aggressive sexual conduct with other students would have corroborated parts of the victim's testimony about her encounter with the defendant. Attorney Zaganjori likewise testified that he thought arguing selective prosecution would be a "longshot" defense and that there was no evidence of a comparable instance to the defendant's situation; to wit, conduct by one or more other St. Paul's School students involved with "senior salutes" who had been accused of forcible rape. This was a reasonable tactical decision. Thus, this court cannot appropriately apply hindsight to second-guess this trial strategy. The defendant has failed to sustain his burden of showing that his trial counsels' performance was constitutionally defective.

The defendant next asserts that trial counsel failed to request appropriate jury instructions on the computer uses charge. Specifically, the defendant argues that trial counsel should have requested jury instructions stating that: (1) a violation of RSA 649-B:4 requires the state to prove "that the defendant made use of the special characteristics of on-line services – for example, the ability to communicate with strangers while concealing one's identity . . ." and (2) if the jury were to acquit the defendant of the AFSA charges, it must also acquit him of the computer uses indictment. Def.'s Mot. for New Trial ¶ 11. Resolution of this claim requires the court, in part, to evaluate the merits of the defendant's argument. In this context, the defendant has not claimed and cannot claim that trial counsel failed to bring the identified issues to the attention of the court. After the jury returned the verdicts, the defendant made both arguments in his motion to set aside verdict. The court addressed these claims in its order denying the motion. *See* Order of Oct. 20, 2015.

As the October 20, 2015 order observed, the court instructed the jury regarding the computer uses indictment as follows:

> [The computer uses indictment] accuses the defendant of prohibited uses of computer equipment. The definition of this offense has three parts or elements. The state must prove each element beyond a reasonable doubt. Thus, the state must prove:
>
> > 1. The defendant utilized a computer on-line service and/or Internet service to seduce, solicit, lure or entice another person to engage in an act of **sexual penetration** with her;
> >
> > 2. The defendant actually believed that the person he was attempting to seduce, solicit, lure or entice was under the age of 16; and
> >
> > 3. The defendant acted knowingly.

(Emphasis added). As asserted in the defendant's motion for new trial, defense counsel did not object to these instructions.

The defendant correctly argues that his counsel failed to raise these issues in a timely manner. Indeed, the court's October 20, 2015 order first addressed his post-trial claims on that issue. A defendant cannot assert that a jury instruction was erroneous if he did not contemporaneously object to the instruction when first given to the jury. *State v. Kelly*, 160 N.H. 190, 194 (2010). Thus, for his challenge to be timely, the defendant was required to move to dismiss the computer uses indictment following the close of the state's case and object to the jury instructions when they were given to the jury. The defendant did neither. He presented his arguments on the computer uses indictment for the first time in his post-trial motion to set aside verdict. The court, therefore, determined that the defendant's motion to set aside verdict was untimely. It is important, however, that the court did not leave it there. It went on to address the merits of the defendant's claims. Specifically, the court concluded that the evidence presented at trial supported a finding that the defendant's conduct fell within the plain meaning of RSA 649-B:4. The court was not persuaded by the defendant's argument that the application of RSA 649-B:4 to the misdemeanor conduct proved by the state "would lead to an absurd result in view of the legislative intent." Order of Oct. 20, 2015 at 6. The court also rejected the defendant's argument that the statute "implies conditions of anonymity and age disparity." *Id.* at 7. Although these determinations were not made in the context of proposed jury instructions, the court can state with certainty that it would have rejected the jury instructions the defendant now argues trial counsel should have requested under the same reasoning. Thus, the defendant cannot sustain his burden on the second prong of his ineffective assistance claim—that the conduct prejudiced the outcome of the case.

Moreover, counsels' decision to accede to the jury instruction was not an egregious error of Constitutional dimension. As discussed in the court's order of October 20, 2015, an individual

can violate RSA 649-B:4 if he uses a computer on-line or Internet service with the intent to commit any offense under RSA 632-A. RSA 632-A offenses include acts of sexual contact.[4] *See* e.g. RSA 632-A:4, I(a) (one commits an offense under the statute by engaging in sexual contact with a person who is 13 years of age or older under any of the circumstances named in RSA 632-A:2 -the AFSA statute).[5] In view of the trial evidence and argument, however, the court elected to propose an instruction that required the state to prove that the defendant knowingly "utilized a computer on-line service and/or Internet service to seduce, solicit, lure or entice another person to engage in an act of **sexual penetration** with her." (Emphasis added). The jury instructions, therefore, imposed a higher factual burden on the state. *See* RSA 632-A:1, V (defining sexual penetration). Defense counsel recognized this. Attorney Zaganjori testified that he believed the jury instruction on the computer uses indictment was favorable to the defendant and it was one of the factors he considered in his decision not to object to the instruction. When filtering out the clarity of hindsight, counsels' decision falls within the "limitless variety of strategic and tactical decisions that counsel must make" under the circumstances that existed at the time. *Faragi*, 127 N.H. at 5.

In making this ruling, the court is not ignoring another issue related to timing. While the court's October 20, 2015 order did provide a detailed legal analysis in support of its ruling on the merits, it did so only after first ruling that the defendant's post-trial request was untimely. In the instant motion, the defendant has failed to present any new argument on the merits of these claims and, therefore, he must understand that his chances of persuading this court that its previ-

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[4] RSA 632-A:1, IV defines sexual contact as "the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including emissions, tongue, anus, breasts, and buttocks. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."

[5] At the time the jury instruction was given, the AFSA statute circumstances were before the jury on the pending AFSA charges. Additionally, there was evidence of sexual contact.

ous analysis was erroneous are somewhat less than perfect. Mindful of this, the defendant may have proffered the argument as a means of addressing a different concern—that the timing issue may foreclose his ability to obtain appellate review of the merits. In other words, on appeal, the Supreme Court could affirm this court's ruling on timing and decline to address the merits as either not necessary or not preserved. The court will assume that the failure to preserve an appellate argument can support a claim of ineffective assistance. *See Davis v. Sec'y for Dep't of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003) ("[W]hen a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved."). Nevertheless, given its analysis of the merits, this court cannot hold that the outcome would be different. Beyond that, this court must defer to the Supreme Court on the question of whether a claim of ineffective assistance is an appropriate procedural mechanism to bootstrap an appellate merits argument that is otherwise not preserved.

The defendant's next attack is directed at trial counsels' decision not to seek a bill of particulars to determine which specific communications the state was relying upon to prove the computer uses indictment. The defendant argues that without a bill of particulars, the state was "able to rely upon all e-mail and/or Facebook communications in argument to the jury that the Computer Offense had occurred," which "effectively relieved the State of its burden to establish Mr. Labrie's mental state at the time the relevant communication was sent." Def.'s Mot. for New Trial ¶ 23. The court is not convinced.

"The purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense and to enable him to prepare an intelligent defense." *State v. Sanborn*, 168 N.H. 400, 415 (2015) (quotation omitted). It is "a tool for clarifying an inade-

quate indictment or complaint." *Id.* (quotation omitted). When the state objects to providing a bill of particulars, one will not be required unless it is "shown to be necessary for the preparation of a defense or to preclude a later unconstitutional prosecution." *State v. Shaw*, 128 N.H. 490, 494 (1986) (quotation omitted).

Here, Attorney Carney testified that he rarely seeks a bill of particulars, and will only ask for one if there is an ambiguity in the allegations. He did not believe that was the situation here. Attorney Zaganjori likewise testified that he never thought a bill of particulars was needed in this case. Because the court agrees, the defendant cannot sustain his burden of showing that a failure to make such a request was either constitutionally deficient or prejudiced the outcome of the case.

The computer uses indictment specifies the timeframe of the offense as between May 29, 2014 through May 30, 2014 and alleges that the defendant used the St. Paul's School e-mail and/or Facebook to commit the offense. The defendant had an adequate opportunity to prepare—no e-mail or facebook message presented at trial was a surprise. The state need not have further specified which e-mail and/or Facebook messages it was relying upon to support the charges.

The defendant asserts that a bill of particulars would have required the state to specify the individual computer communications that constituted the crime. Thus, if the jury found that an unspecified disclosed communication was the one that solicited the victim to submit to an act of sexual penetration rather than one of the specified messages, the jury would have to acquit. Because this argument is not consistent with the law, defense counsel cannot be faulted for not making it. In *State v. Farrington*, 161 N.H. 440, 447 (2011) the court determined that there was sufficient evidence to support a RSA 649-B:4 conviction based on "the entire course of the online relationship between the defendant," the victim, and a friend of the victim posing as her, includ-

ing multiple computer chat sessions occurring over several months. In coming to this conclusion, the court viewed "the evidence in totality." *Id.* Likewise, the jury here could have considered all the defendant's e-mail and Facebook messages with the victim occurring between May 28, 2014 through May 30, 2014 to establish that the defendant knowingly utilized a computer on-line service and/or Internet service to seduce, solicit, lure, or entice the victim. As a result, the defendant has failed to establish that his trial counsels' performance was constitutionally defective when they decided not to request a bill of particulars.

The defendant's next claim was raised in his supplement to the motion for new trial. There, he asserts for the first time that his trial counsel failed to investigate whether the e-mail communications forming the basis of the computer uses indictment originated via an Internet service or an Intranet service.[6] The defendant argues that the difference is material because, according to the defendant, electronic communication over an intranet is not a violation of RSA 649-B:4.

In support of this claim, the defendant presented the testimony of Scott Morin, the director of information technology at St. Paul's School. Morin testified that St. Paul's School uses an intranet system, which is connected to the internet. According to the St. Paul's School student handbook on information technology, "[s]tudents have access to the School's intranet in their rooms. Public areas within the Library, common rooms, and the academic buildings also have intranet access. The School's growing list of intranet services includes online library catalog access, full electronic mail access ... and access to the School's web pages." Def.'s Exh. 26 at 1015.

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[6] The defendant does not argue, nor could he, that his Facebook messages were not sent using an internet service. Solely for purposes of its analysis here, the court will assume without deciding that the Facebook messages alone were insufficient to support the RSA 649-B:4 conviction.

While St. Paul's School hosts its students' e-mails on its intranet system, students may use their school e-mail account to send and receive e-mails to and from individuals outside the St. Paul's School intranet system. Morin testified that there is a "seamless" transition between e-mails on the St. Paul's School system and the internet. There are approximately one thousand e-mail addresses on the St. Paul's School system, which include addresses for students, alumni, faculty, and staff. In addition, guests may access the school's intranet system by using one of the available public computers on campus.

Attorney Carney testified that the internet/intranet distinction was not discussed among the defendant's trial team before the motion for new trial was filed and that the distinction never occurred to him despite having seen the student handbook. Attorney Zaganjori likewise testified that he did not research the difference between an internet system and an intranet system. While the record supports a finding that trial counsel failed to identify this issue, it does not follow that this failure was ineffective assistance. This is because the defendant's underlying assumption about the materiality of the internet/intranet distinction lacks merit.

RSA 649-B:4 prohibits the use of "a computer on-line service, internet service, or local bulletin board service to seduce, solicit, lure, or entice . . . ." Thus, under the plain language of the statute, internet communication is only one of the prohibitions. One can also be in violation of the statute by using a "computer on-line service" or "local bulletin board service." *See Merrill v. Great Bay Disposal Serv., Inc.*, 125 N.H. 540, 543 (1984) (all words of the statute must be given effect—the legislature is not presumed to use superfluous words). Assuming without deciding that an intranet seamlessly connected to the internet is not part of the internet and further that the St. Paul's School system was designed in a manner that did not allow any intranet message packets to use the seamlessly connected internet paths or otherwise "escape" the physical confines of

its system, the issue becomes whether the St. Paul School's intranet is an "on-line service" under RSA 649-B:4.[2]

The statute does not define "on-line service." When a term is not defined in a statute, the court look's "to its common usage, using the dictionary for guidance." *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 185 (2014). Merriam-Webster's online dictionary defines "on-line" as "connected to, served by, or available through a system and especially a computer or telecommunications system (as the Internet)." Merriam-Webster, https://www.merriam-webster.com/dictionary/on-line (last visited Apr. 17, 2017). The first definition of "on-line" in Dictionary.com is: "operating under the direct control of, or connected to, a main computer." Dictionary.com, http://www.dictionary.com/browse/on-line?s=t (last visited Apr. 17, 2017). The common element is that one computer is connected to one or more other computers either directly or through a server. There is no dispute here that e-mails transmitted via the St. Paul's School's intranet travel from the sender's computer through a connected server to a different computer operated by the recipient, which is likewise connected to the server. Thus, even if the defendant was using the school's intranet, rather than the internet, to send an e-mail to the victim, he was necessarily doing so via a connected computer system. This falls within the definition of an on-line service.

The absurdity of the defendant's argument is highlighted by adopting hypothetically the stereotype he employed in his 2015 motion to set aside verdict—that the statute is designed and limited to cases where there is age disparity and/or anonymity between a defendant and a victim. Under the defendant's interpretation, an anonymous 40-year-old who uses a campus terminal to solicit a 12-year-old child of a St. Paul's School staff member to engage in an act of sexual penetration is not committing a computer uses crime, whereas he would be committing that crime if

[2] The state makes no claim that the e-mails in question were posted on a computer bulletin board service.

he engaged in the same conduct by using a public terminal at an off-campus Internet Café or his own off-campus computer, both of which would convey the e-mail message via the internet. In either case, the e-mail travels via on-line connections from one computer to another and is seamlessly viewed and responded to in the same manner. *See, Weare Land Use Ass'n. v. Town of Weare*, 152 N.H. 510, 511-12 (2006) ("The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute.").

The defendant has failed to establish that counsels' investigation of the intranet/internet distinction could have had any effect on the outcome. Consequently, he cannot sustain his burden of showing that his representation was constitutionally defective on this issue.

Having addressed the defendant's attacks on counsels' performance on the computer uses indictment, the court turns to his remaining claims. Many are primarily directed at counsels' trial decisions with respect to the cross-examination of the state's witnesses. The court will address each of these claims in turn.

The defendant first asserts that his trial counsel failed to impeach three witnesses who were former classmates and friends of the defendant: Andrew Thomson, Henry Kremer, and Tucker Marchese. Thomson was also the defendant's roommate for three years while at school. These witnesses generally all testified about the defendant's statements about what he intended before the crime and what he said happened after the crime. Attorney Zaganjori testified that he did not believe the defendant's friends had a motive to lie about the defendant's statements, especially considering that many of the defendant's statements were in writing and that the defendant's trial testimony was consistent with those statements. Indeed, the defendant testified during trial that he wanted to boast to his friends about having sexual intercourse with the victim and that his statements to Thomson, Kremer, and Marchese were untruthful. He did not contend that

his friends testified falsely about the statements he made to them, but that he had lied to his friends. Thus, an attack on the credibility of any of these witnesses, even if successful, would have no effect as the making of the statements themselves was uncontested. Counsels' decision not to engage in unnecessary attacks on the credibility of these witnesses cannot be said to be constitutionally deficient trial strategy.

Trial counsel did attempt to impeach Thomson by asking about an alleged relationship he had with E.W., a 15-year-old girl. The state objected. A bench conference followed, during which the court sustained the state's objection. During a subsequent chambers conference, however, the court reconsidered and informed Attorney Carney that he could inquire into Thomson's alleged interactions with E.W. In his supplement to the motion for new trial, the defendant argues his trial counsel failed to engage in this cross-examination of Thomson, even when the court provided him with the opportunity to do so. Attorney Carney testified that following the chambers conference, he spoke with Thomson's attorney, who informed him that Thomson would deny that any misconduct with E.W. occurred and that he would deny he made any kind of deal with the state in exchange for his testimony at trial. As a result, Attorney Carney made the tactical decision not to press the matter further as he believed it would detrimentally impact his credibility with the jury if he were to recall Thomson just to have him deny the allegations against him. As counsel's strategic decision was not constitutionally deficient under the circumstances, the court cannot second-guess it.

The defendant further argues that trial counsel was ineffective because he failed to investigate the existence of any police or school investigation into Thomson's alleged actions. The court disagrees. It is apparent from the court's order dated February 1, 2017 (defendant's motion for discovery) that the state had already provided the defendant with all the information in its

possession regarding any investigation into Thomson. Trial counsel, therefore, did not err in failing to engage in a further investigation of Thomson's actions.

The defendant next asserts that his trial counsel was ineffective in his cross-examination of the victim. First, he argues that counsel failed to investigate the victim's social media accounts. Specifically, the defendant alleges he asked his trial counsel to obtain information from the victim's Facebook account that would have included a Facebook post about the victim and the defendant that greatly upset the victim, leading her to call her mother and claim that the defendant sexually assaulted her. Attorney Zaganjori testified that although he did not request the Facebook information immediately, once he did, the individual who supposedly had the information stated that she did not have anything to give him. As discussed below, trial counsel made the tactical decision not to pursue the matter further.

Attorney Carney testified that he made the tactical decision to try the case "tightly," *i.e.*, focus on the allegations and strictly limit the evidence that could be admitted. In doing so, trial counsel chose at times not to challenge the credibility of witnesses at every opportunity. Attorney Carney testified that his primary reason for deciding to try the case tightly was to avoid opening the door to the victim's prior consistent statements to her friends, which he viewed as particularly damaging. As the defendant acknowledges, there was other evidence provided to trial counsel indicating the victim reacted negatively to a Facebook post about her and the defendant, which trial counsel could have used to cross-examine the victim. Def.'s Mot. for New Trial ¶ 46. Trial counsel, however, did not want to suggest there had been an intervening reason to fabricate that could potentially open the door to the victim's prior consistent statements to her friends. These statements indicate that the victim informed several friends that she had sexual intercourse with the defendant almost immediately after it happened. State's Exh. 8. The introduction of this evi-

dence would have been contrary to the defense team's trial strategy of arguing that no sexual penetration had ever occurred. Indeed, trial counsel was successful in keeping this evidence from being admitted. Trial counsels' decision not to cross-examine the victim on this issue was a reasonable tactical decision, within the range of the "limitless variety of strategic and tactical decisions that counsel must make." *Faragi*, 127 N.H. at 5.

The defendant further argues that Facebook messages provided to the defendant in discovery indicated that the victim consented to the defendant's sexual overtures and conduct, and that an individual who spoke with the victim shortly after the events in the Lindsay building would have testified that the victim seemed "calm, collected, and relaxed" at the time. Def.'s Mot. for New Trial ¶ 47. He asserts that counsel was ineffective because he did not introduce these Facebook messages. Given that the defendant prevailed on the issue of consent—*e.g.*, he was acquitted of the AFSA charges alleging that the defendant engaged in sexual penetration when the victim indicated by speech or conduct that there was not freely given consent to the performance of the sexual act—the instant claim borders on frivolity. Apparently, counsel's tactical caution about opening doors and his decision not to introduce the identified evidence about the victim's demeanor shortly after she met with the defendant were not only reasonable, they were successful.[8] Consequently, the defendant cannot sustain his burden of showing either prong of his claim of ineffective assistance.

The defendant also argues his trial counsel failed to impeach the victim about her allegedly false testimony about prior senior salute invitations she had received from other individuals.

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[8] It is true that counsel was not successful in persuading the jury that the defendant did not engage in any acts of sexual penetration, which was the factual basis of the misdemeanor sexual assault charges. This does not support a claim of ineffective assistance, however, as the evidence of sexual penetration was compelling. This evidence not only included the testimony of the victim, but also, *inter alia*, the statements of the defendant himself, the forensic evidence, and the e-mail and messaging exchange between the defendant and the victim shortly after the crime about the use of a condom.

Having reviewed the record of the victim's testimony, the court is not convinced that the victim testified falsely regarding prior senior salute invitations. Instead, the victim appears to have appropriately responded to a leading question. Trial counsels' tactical decision not to challenge this testimony was not constitutionally deficient.

The defendant next argues that his trial counsel was ineffective because he failed to impeach the victim with photographs of her jumping on a trampoline the day after the incident with the defendant, which, the defendant alleges, shows that she was not as sore as she had testified. Attorney Carney testified that he decided not to confront the victim with the photographs because it would have provided her with the opportunity to discuss how she was feeling at the time, which in turn would have likely created juror sympathy for the victim. Attorney Carney also testified that he found the victim to be intelligent, dramatic, well prepared, and sympathetic.[1] He therefore tried throughout his cross-examination of the victim to limit any further jury sympathy toward her and to avoid appearing as if he was badgering her. This falls well within the range of reasonable strategic and tactical trial decision making. Thus, Attorney Carney's decision not to confront the victim with the photographs was not constitutionally deficient.

The defendant also argues that his trial counsel failed to present evidence from two friends of the victim's older sister who would have testified that the victim was gloating to her sister about the incident with the defendant. The probative value of this evidence, however, was as contradiction of the victim's testimony that her interactions with the defendant were not consensual. As discussed above, trial counsel successfully defended the AFSA charges. Consequently, trial counsels' decision not to counter the victim's testimony with testimony from her sister's friends cannot be ineffective because it did not affect the outcome.

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[1] The court is satisfied, based on its trial observations, that Attorney Carney's assessment had reasonable support.

In his supplement to the motion for new trial, the defendant also argues that his trial counsel was ineffective because he failed to investigate statements the victim made to her dorm advisor, Dr. Theresa Gerardo-Gettens. He asserts that these statements would have been additional impeachment ammunition. The court has reviewed the pertinent trial testimony. The victim testified that she was crying in her dorm room shortly after her encounter with the defendant. The state then asked the victim:

> Q And when you were crying in the dorm, what happened?
>
> A I was in my room inconsolable. An advisor in my dorm, whose apartment was right next to mine, her door was right next to mine, she came out of her apartment and knocked on my door and came in.
>
> Q Did she ask you to talk with her?
>
> A She took me into her apartment and sat me down and asked what was wrong.
>
> Q Okay. And when you were speaking with her, what did she want you to do?
>
> A When I was speaking to her, I still --
>
> MR. CARNEY: I object, Your Honor.
>
> THE COURT: The question is, what did she want you to do. That's overruled if she answers that question.
>
> THE WITNESS: She wanted me to call my parents.

Trial Tr. Vol. II, 230:22–231:11, Aug. 19, 2015.

The defendant argues this testimony "undoubtedly" left the jury with a false impression that the victim told Dr. Gettens she had been raped. Def.'s Supp. Mot. for New Trial ¶ 22. The court disagrees. The victim did not testify that she told Dr. Gettens she had been raped, nor does the above testimony reasonably lead to such an inference. Indeed, trial counsel successfully objected to the admission of the victim's substantive statements. Therefore, his decision to refrain from challenging the victim on her testimony regarding Dr. Gettens was not constitutionally deficient.

The supplement to the motion for new trial also asserts that the defendant's trial counsel was ineffective because he failed timely to request, investigate, or secure the victim's mental health records. The parties do not dispute that the defendant's trial counsel filed a July 31, 2015 motion for production and *in camera* review of the victim's mental health records and that the state subsequently provided some of the victim's mental health records to trial counsel. Attorney Carney testified that he reviewed the mental health records provided to him and that he did not believe they showed the victim was unable to perceive or recall what had happened to her when she was with the defendant. He also described his "conscious decision" to proceed carefully, respectfully, and sensitively during his cross-examination of the victim, due to her sympathetic nature. Attorney Carney testified that he carefully watched the jury during his cross-examination of the victim to gauge the jurors' reaction to his questions and that he adjusted his examination accordingly. Attorney Carney testified that he was also mindful of the timing of his examination, asking his most damaging questions at the end of a trial day to leave the jury with that overnight impression. Ultimately, Attorney Carney crafted an effective cross-examination of the victim; he successfully provided the jury with a basis to have a reasonable doubt about the state's evidence (consisting of the victim's testimony) on the pending AFSA charges. As a result, the defendant has failed to establish that Attorney Carney's tactical decision to refrain from using the victim's mental health records in his cross-examination of her was constitutionally defective.

In addition to asserting that counsel's tactical decisions regarding the treatment of the victim were ineffective, the defendant asserts that his trial counsel was ineffective because he failed to object to misstatements in the state's closing argument. Specifically, the defendant argues that counsel provided constitutionally ineffective representation when he did not interpose an objec-

tion to the state's argument that semen was found in the inside crotch panel of the victim's underwear. The relevant portion of the state's closing argument is as follows:

> And I want to address two things that you heard during trial. First, the sperm didn't seep through the underwear. Kevin McMann[10] (*sic*) told you the first thing he did with the underwear when he got it was examine it with an alternate light source. He examined it in search for semen with a fluorescent light. It wasn't on the outside of the underwear, it was only in one place, the interior crotch panel. There is no logical way to explain how semen got in the interior crotch panel of her underwear unless it involves a penis in her underwear or semen in her vagina.

Trial Tr. Vol. VII, 108:10–19, Aug. 27, 2015. Attorney Zaganjori testified that he did not believe the state's closing argument was impermissible. The court agrees.

"A prosecutor may draw reasonable inferences from the facts proven and has great latitude in closing argument to both summarize and discuss the evidence presented to the jury and to urge the jury to draw inferences of guilt from the evidence." *State v. Sylvia*, 136 N.H. 428, 431 (1992) (internal citation and quotations omitted). In describing how he examined the victim's underwear, McMahon testified:

> I took the underpants out of the cloth bag that they were collected [in] and I examined them just under normal room lighting, and I saw somewhat of a slight deposit in the crotch panel area of the underpants. I repeated that with a subsequent physical examination using an alternate light source, or a forensic light source.

Trial Tr. Vol. V, 77:14–19, Aug. 25, 2015. McMahon further testified that he subsequently took a cutting from the stained area of the underwear for testing. The testing revealed "a strong indication of the presence of semen in the crotch panel of the underpants." *Id.* at 79:7–8. A reasonable inference from this testimony is that semen was found in the interior of the crotch panel of the victim's underwear. Thus, an objection, even if interposed, would not have been successful. Because there was no error in the state's closing argument, counsels' decision not to interpose an objection was not constitutionally deficient and did not affect the outcome.

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[10] Kevin McMahon, a criminologist at the New Hampshire State Police Forensic Laboratory, testified as an expert witness for the state.

Finally, in his post-hearing memorandum, the defendant appears to argue that his trial counsel was ineffective when they sought to excuse Attorney Rancourt from trial: "While not raised as a specific point in earlier pleadings, Attorney Carney's request to excuse local counsel, thus relieving her of her obligation to be present and to oversee trial counsel's handling of the case, impaired the trial counsel's representation." Def.'s Closing Summation ¶ 47. As the defendant acknowledges, he has not plead an ineffective assistance of counsel claim based on Attorney Rancourt's excusal from trial in either his motion for new trial or his supplement to the motion for new trial. The court, therefore, will not consider this argument now. Moreover, as discussed above, the defendant agreed to waive Attorney Rancourt's presence and he has failed to establish that Attorneys Carney and Zaganjori were ineffective because of her limited presence.

Based on the foregoing, the court finds and rules that the defendant's trial team was comprised of highly experienced and prepared defense attorneys who, overall, made reasonable strategic and tactical decisions throughout the trial. The defendant has failed to sustain his burden of showing that his trial counsels' performance was constitutionally ineffective. Accordingly, the defendant's motion for new trial based on ineffective assistance of counsel is DENIED.

So ORDERED.

Larry M. Smukler

Date: April 19, 2017

LARRY M. SMUKLER
PRESIDING JUSTICE