THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0265

The State of New Hampshire

v.

Owen Labrie

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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ISSUE PRESENTED

Whether the trial court properly concluded that defense counsel's performance at trial was neither deficient nor prejudicial to the defendant but instead, the product of reasonable strategic choices and interpretations of state law.

STATEMENT OF THE CASE

A Merrimack County grand jury indicted the defendant, Owen Labrie, on three counts of aggravated felonious sexual assault (AFSA), three counts of sexual assault, one count of simple assault, two counts of endangering the welfare of a child, and one count of certain uses of computer services prohibited. Tr.:[1] 3-11; RSA 631:2-a (2016); RSA 632-A:2 (Supp. 2012) (amended 2014, 2017); RSA 632-A:4 (Supp. 2011) (amended 2014, 2017); RSA 639:3 (Supp. 2003) (amended 2016); RSA 649-B:4 (2016).

The AFSA indictments alleged that the defendant on or about May 30, 2014, knowingly engaged in sexual penetration with the victim, F.P., by inserting his penis into her genital opening without her consent, by inserting his penis into her genital opening before she had "an adequate chance to flee and/or resist," and by performing cunnilingus upon her without her consent. Tr.: 3-5. The sexual assault indictments alleged that on May 30, 2014, the defendant knowingly engaged in sexual penetration with the victim, who was under sixteen years of age but not more than four years younger than him, by inserting his penis into her genital opening, by inserting his finger into her genital opening, and by performing cunnilingus upon her. Tr.: 8-11.

One endangering the welfare of a child indictment alleged that on May 30, 2014, the defendant purposefully endangered the victim by inducing her to engage in sexual contact, which violated the duty of care he owed to her as a prefect at Saint Paul's School. Tr. 6-7. The other made similar allegations without the duty of care. Tr. 8. The simple assault indictment alleged

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[1] Tr.: refers to the August 2015 trial transcript.
STr.: refers to the transcript of the sentencing hearing.
MHTr.: refers to the February 2017 motion for new trial hearing transcript.
DBr.: refers to the defendant's brief.
DApp.: refers to the defendant's appendix.
DSupp.: refers to the supplement at the end of the defendant's brief.
SApp.: refers to the State's appendix.

that on May 30, 2014, the defendant knowingly had unprivileged physical contact with the victim by biting her chest. Tr.: 7.

The certain uses of computer services prohibited indictment alleged that, on or about May 28, 2014, through May 30, 2014, the defendant used a "computer online service and/or internet service" to seduce, solicit, lure, or entice the victim, who was a child under the age of sixteen, to commit an offense under RSA 632-A against her. Tr.: 5-6. The indictment specified (1) the Saint Paul's School email and Facebook as services that he used and (2) that he committed these acts knowingly. Tr. 6.

At the close of the State's case, the trial court (*Smukler*, J.) dismissed the endangering the welfare of a child offense that alleged that the defendant owed a duty of care to the victim because he was a prefect. Tr.: 825-26. After an eight-day jury trial, the jury acquitted the defendant of the three AFSA charges and the simple assault charge, but it convicted him on the remaining charges that were pending, including the computer use charge. Tr.: 1125-30. The trial court sentenced him to twelve months in the house of corrections, stand committed, and a consecutive term of one year for a misdemeanor sexual assault charge and three-and-a-half to seven years for the computer use charge. STr.: 73-74. The trial court also ordered him to pay restitution of approximately $8,000. STr.: 73-74.

After trial, the defendant moved to set aside his certain uses of computer services prohibited conviction. DApp.: A125-A148. The trial court denied that motion. DApp.: A149-A159.

On April 5, 2016, the defendant filed a motion for new trial, which he later supplemented on October 11, 2016. DApp.: A1-A49. The State objected. DApp.: A50-A86. Over three days in February 2017, the trial court held a hearing on the defendant's motion. MHTr.: 1-538. After the

hearing, the parties filed supplemental pleadings based upon the evidence produced at the hearing. DApp.: A87-A124. On April 19, 2017, the trial court denied the defendant's motion. DSupp.: 1-24.

This appeal followed.

STATEMENT OF FACTS

A. The Senior Salute.

On May 28, 2014, the defendant sent a "senior salute" to the victim. Tr.: 75, 347-48, 490, 531, 546, 571, 597. The "senior salute" is a tradition at Saint Paul's School in which students in their final year send invitations to younger students to get to know them better. Tr.: 73, 489, 511, 583. Although the invitation could be chaste in nature, it is widely viewed as an opportunity for final year students to meet and hookup or engage intimately with younger students. Tr.: 73, 345, 489, 511, 518, 542-46, 583, 632. Hooking-up can range from kissing an individual to sexual intercourse, and the term can be used synonymously with other terms such as slay, score, and pork. Tr.: 489, 511, 542-46, 568, 583, 632, 999. The terms all describe physical intimacy. Tr.: 584. Many of the witnesses testified that accepting a "senior salute" established an expectation of kissing or more. Tr.: 518, 568.

The defendant and some of his friends took the "senior salute" to a new level, making it a competition to "senior salute" or slay the most girls. Tr.: 490, 549, 569. Before he sent a "senior salute" to the victim, the defendant declared the months of April and May 2014 "slaypril" and "slay." Tr.: 585-87. He emailed several friends to announce the event and that he was creating "a list of potential girls [they] would enjoy getting to know better." Tr.: 527, 590-91. He worked with a friend, T.M., to build the list. Tr.: 592-93. The defendant, alone, included the victim's name on the list. Tr.: 593. In fact, her name was written in all caps. Tr.: 595. She was the only name on the list to be written in that manner. Tr.: 595.

The defendant had expressed a concerted interest in the victim. Tr.: 595. He told some friends that he wanted to "pork" the victim more than anyone else, even when those friends expressed concern as to the victim's age and level of physical maturity. Tr.: 529. On May 8,

2014, the defendant resent his list to his friends with the title "Still at large." Tr.: 1005. The victim's name remained included in all caps. Tr.: 1005.

On May 28, 2014, after receiving the defendant's "senior salute" the victim declined the invitation and told the defendant that she did not want "to climb the list of [first-year students] that have spent quality time with [the defendant]." Tr.: 79, 348-49, 490, 598; DA 16. She declined because she "thought his intentions were really really wrong" and that the defendant had bad intentions. Tr.: 79, 90. The defendant was upset by this. Tr.: 490, 546, 598. Undeterred, the defendant asked O.M., a friend and a first-year student who was in classes with the victim, to "put in a good word for him." Tr.: 490, 547. O.M. spoke with the victim and convinced her that the defendant was a good guy and that she should accept his "senior salute" invitation. Tr.: 81, 348-49, 491-92. When O.M. relayed the news to the defendant, the defendant was ecstatic. Tr.: 493, 495-97. The defendant promised O.M. "10,000 [blowjobs] and [to] get [him] fucked up the night of grad." Tr.: 495.

B. The Assault

The defendant then told the victim that he wanted to show her a cool view of the campus. Tr.: 660. He arranged to meet her at one of the school buildings around 9:15 p.m. on May 30, 2014. Tr.: 111. Before he departed, he told A.T. his plan. Tr.: 548. A.T. warned him to be careful because the victim is underage. Tr.: 548. The defendant had also told other friends that he was "slaying" the victim that night. Tr.: 531-32,[2] 1014-15.

The defendant convinced the victim to meet at the schoolhouse and enter into a neighboring building. Tr.: 111. The defendant led the victim to a maintenance room on the top

[2] That friend, M.S., later told police that the defendant had admitted to having sexual intercourse with the victim. Tr.: 757. At trial, M.S. denied that this had occurred and told the jury that the defendant "had hooked up" with the victim. Tr.: 531-32, 536.

floor and from there out onto the roof. Tr.: 115, 117. The victim loved the view from the roof, but the defendant wanted to go back inside quickly. Tr.: 117.

Upon return to the maintenance room, the assault began. Tr.: 118. The defendant started by kissing her and taking off some of her clothes. Tr.: 118. The victim stopped him from removing her bra and initially consented to his actions. Tr.: 120-21. The defendant then lowered her to the floor and pulled out a blanket for them. Tr.: 121. The victim was confused about what was going on and, not long after, began to resist some of the defendant's efforts. Tr.: 123, 124-29, 133-46. She stopped him from removing her underwear more than one time. Tr.: 127-28. She told him "No" when he lowered his face near her vaginal area and she pulled his face away. Tr.: 135-34. Undeterred, the defendant bit her on the breast, moved her underwear aside to digitally penetrate her vagina, licked and bit the area in and around her vagina, and penetrated her with his penis. Tr.: 129, 134, 135, 137, 139, 142. The victim recalled specific things the defendant told her. Tr.: 141. She recalled that partway through the sexual intercourse, the defendant reached for something. Tr.: 142-43. Eventually, the defendant moaned and the assault ended. Tr.: 143. The defendant dressed quickly and began to lead her out of the building. Tr.: 143. The victim's breast and vaginal area were in pain, but she followed him out. Tr.: 143-45.

C. Post-Assault

The victim told the first person she saw, a friend, G.H., that she had just had sex with the defendant . Tr.: 152. She testified that she had concerns about saying that the defendant had raped her because she feared G.H.'s reaction. Tr.: 152. She told friends in her dorm, including her close friend C.L., that the defendant had assaulted her. Tr.: 157. They encouraged her to contact the defendant to determine whether he used a condom. Tr.: 174, 353-54. She discussed her concerns with the defendant over Facebook and by email, and he acknowledged that he had

had sexual intercourse with her but put on a condom before he ejaculated. Tr.: 175-82; DA 27-29.

While the victim was concerned for her health and safety, the defendant was telling his friends that he had had sex with her. After the assault, he told O.M. and a group of guys that he had sex with the victim. Tr.: 497. O.M. confronted the defendant one-on-one and the defendant bragged again that he had had sexual intercourse with the victim and asked O.M. to "keep it on the down low." Tr.: 498. The defendant also told A.T. that he had sex with the victim by saying he had "boned" her. Tr.: 498-99. On a different occasion, the defendant told H.K. that he had had sex with the victim. Tr.: 572. The defendant also told T.M., who had helped him create the list, that he had had sexual intercourse with the victim. Tr.: 598-99. T.M. was not aware that the two were meeting and asked the defendant how things went from "no to bone." Tr.: 602. The defendant explained some of the details over Facebook messenger. Tr.: 603. The defendant later attempted to delete these conversations, among others. Tr.: 754.

Several days later, the victim disclosed to her family, and later police, that she had been sexually assaulted by the defendant. Tr.: 232, 334-35, 644. The victim went to Concord Hospital for an examination by medical staff trained in handling sexual assault cases. Tr.: 233-34, 336, 408, 450. The nurse found an abrasion around the victim's vagina. Tr.: 411, 422-23. This abrasion explained the pain the victim felt and was consistent with penetration. Tr.: 411, 422-23, 427. The medical staff also gathered swabs for a rape kit and the victim's mother turned over the victim's underwear to the Concord Police Department. Tr.: 337, 413. The underwear revealed the presence of sperm, prostate-specific antigen, and the defendant's DNA. Tr.: 779, 797, 805-06.

A couple of weeks later, in mid-June 2014, the Concord Police Department interviewed the defendant. Tr.: 659. The defendant downplayed the assaults and focused on himself and his accomplishments. Tr.: 659, 674, 679-80. He denied penetrating the victim but admitted to kissing her stomach and inner thighs. Tr.: 661-62, 668, 688. He claims the encounter ended soon after he put the condom on because he had a moment of reflection. Tr.: 661-62. He claimed that he left, with the condom still on, to go to an acapella performance. Tr.: 662, 666, 669, 689. He stated that he later took the condom off and threw it away in his dorm. Tr. 669, 689. He acknowledged, however, that his conversations about condom and birth control usage after the assault "look shitty." Tr.: 690. He also would only provide certain details, for example biting the victim's breast, after police told him they knew of the behavior. Tr.: 661, 682, 692.

D. Motion for New Trial.

On April 5, 2016, the defendant filed a motion for new trial in which he alleged that he received ineffective assistance of counsel. DApp.: A1-A28. Among the several allegations made in his motion, the defendant claimed that his trial team was ineffective for its "failure to challenge felony-certain uses of computer services prohibited." DApp.: A3-A18. His arguments addressed his trial team's: (1) performance pre-trial in failing to raise a First Amendment challenge; (2) proposed jury instructions in failing to argue that the statute requires deception or some "use of the special characteristics of on-line services" and that if acquitted of AFSA the jury must acquit the defendant of the computer crime; (3) decision not to request a bill of particulars that identified the specific communication(s) upon which the State would rely; (4) decision not to challenge the sufficiency of the evidence either before the trial court or the jury; and (5) decision not to argue for jury nullification or selective prosecution. DApp.: A3-A18.

Six months later, on October 11, 2018, the defendant filed a supplemental pleading in which he raised new allegations of ineffective assistance of counsel. DApp.: A29-A45. In this supplement he alleged that his trial team "failed to investigate the origins of the email communication forming the basis of the felony computer charge." DApp.: A30-A33. Specifically, he alleged that his emails using his St. Paul's School email account "never left the [school's] internal intranet server" and, according to post-conviction counsel, fell outside of the statute's prohibition. DApp.: A30. Thus, trial counsel was ineffective for not investigating the manner through which the email communications travelled. DApp.: A32-A33.

On February 2, 2017, the State filed its memorandum of law in opposition to the defendant's motion for new trial and responded to the defendant's arguments regarding the "computer-use charge." DApp.: A52-A68. Regarding the defendant's claim that his trial team failed to challenge the sufficiency of the State's evidence on the defendant's intent, the State explained the evidence adduced at trial regarding intent and that the trial team had taken steps through cross-examination and presentation of its own case to undermine claims that the defendant actually had or ever intended to have sexual intercourse with the victim. DApp.: A63-A66. Regarding the defendant's claim that his trial team failed to investigate or challenge the use of the school's intranet, the State explained that the defendant's contention lacked any supporting decisional law, and defied the plain meaning of the terms used in RSA 649-B:4 (2016), which, trial counsel concluded, included the communications in question. DApp.: A54-A58.

E. Post-Conviction Motion Hearing

In late-February 2017, the trial court held a three-day hearing on the defendant's motion for a new trial at which all members of his trial team, Attorneys Jaye Rancourt, Jay Carney, Samir Zaganjori, and Danya Fullerton, the defendant's investigator, Rebecca Dixon, and the Director of Information Technology for St. Paul's School, Scott Morin, testified. MHTr.: 1-538.

Attorney Carney, who served as the leader of the trial team, explained the team's strategy addressing the computer-use charge:

> There were three possibilities regarding a defense to that charge. The primary one was that we tried to very zealously contest the government's allegation that [the defendant] had engaged in any type of sexual activity with [the victim] that involved penetration. So we contested whether it had been forcible and we contested whether it had even occurred at all.
>
> My view was that if [the defendant] were acquitted of the forcible charges and what I'll term the consensual charges, then it was highly likely, if not almost certain, that the jury would acquit him on the computer charge, as well. The theory would be that [the defendant] would be asserting that he did not have the intent when he was setting up the meeting with [the victim] to engage in a sexual activity with her that involved penetration.
>
> The emails they exchanged prior to the encounter, I felt could be termed flirting between two people who knew each other, were interested in each other, were using sometimes flowery language on [the defendant's] part, and sometimes flirtatious language on [the victim's] part.
>
> [The defendant] would try to be like a romantic poet and [the victim] would be kind of cute, saying things like this will be our little secret.
>
> And so I didn't think there was any indication of nefarious intent on [the defendant's] part if you look at the communications prior to their meeting. If [the defendant] had forcibly raped [the victim], then I felt someone could infer that that was his intent in communicating with her to set up the meeting.
>
> If [the defendant's] intent were to have a sexual experience with [the victim] that included penetration, then it would be possible to conclude that that was his intent in sending a communication, setting up the meeting with her.
>
> So the jury's verdicts on those two sets of charges would be very much an indication of what the jury thought [the defendant's] intention was in setting up the meeting with [the victim].
>
> So if we focus on what actually happened during the meeting, then the computer charge would follow along.
>
> So that was how to attack that charge during the trial. And I think we went very vigorously the entire trial rebutting the evidence of forcible sexual activity and with [the defendant's] testimony in particular any type of sexual activity that involved penetration.

MHTr.: 468-70. Attorney Carney then explained the second and third considerations, which involved the purpose behind statutes like RSA 649-B:4 and how they would or should apply in circumstances like those presented in this case. MHTr.: 470-73.

Regarding the distinction between "intranet" and "internet" or "online service," Attorney Carney explained:

> All three of us [the trial team] looked at the statute, but as to the difference between an internet and an intranet, it never occurred to me. It was clear that their communications . . . were either by email or Facebook. And my knowledge of email and Facebook indicated to me that they met the statutory requirement of being that kind of communication device.

MHTr.: 466. He further opined that the communications fell into the categories covered by RSA 649-B:4. MHTr.: 466.

Attorney Zaganjori, who served as co-counsel during the trial, concurred in Attorney Carney's assessment of the situation. MHTr.: 326-31. He explained that the theory of the case from the outset was that the defendant neither had nor intended to have sexual intercourse with the victim. MHTr.: 315. Regarding the computer use charge, Attorney Zaganjori's view was that the trial team could best challenge the evidence by putting forward their theory of the case because if the jury concluded that sexual intercourse never occurred, then it would very likely conclude that the defendant never intended to have sexual intercourse with the victim. MHTr.: 328. To support that theory, the trial team relied upon how the terms the defendant used, such as "slay" and "pork," meant things other than sex and that the defendant never intended or indicated to anyone that he intended to have sex with the victim. MHTr.: 329. Attorney Zaganjori felt that "if the jury had credited [the defendant's] testimony that would have disposed of [the computer use] charge" and that the defendant's testimony was consistent with the trial team's theory. MHTr.: 329, 331.

Regarding the question of whether the communications fell within the scope of the statute, he described the statute as "sort of broad, probably intentionally broad." MHTr.: 326. In his view, the language of the statute "was fairly clear." MHTr.: 326. The fact that the St. Paul's School network had access to the internet was enough to satisfy the statute. MHTr.: 327. Attorney Zaganjori "generally didn't think there was any real question that Facebook messages and emails would qualify under the statute." MHTr.: 383. He further explained that he thought "online mean[t] connected to some type of network . . . based . . . on the plain language of the statute." MHTr.: 421-22.

Attorney Rancourt, who served as local counsel and performed several functions during trial, also did not give consideration to the argument regarding intranet usage until well after trial. MHTr.: 78. She explained that it was not until she had been drafting the supplement to the motion for new trial, before her disqualification, that a parent of a former St. Paul's School student contacted her and brought the question to her attention. MHTr.: 78. In hindsight, she felt that this is an issue that—had the attorneys been aware of it—should have been explored pre-trial. MHTr.: 79. She agreed that the distinction between the internet and the school's intranet was not "a simple thing to explore" and testified that this Court has never addressed her interpretation of the statute. MHTr.: 79-80. She even described the issue as "a novel legal issue that's never been litigated before." MHTr.: 82. Regarding the trial strategy, her testimony conflicted with that of Attorneys Carney and Zaganjori, in that she recalled them thinking that acquittal on the AFSA charge would lead to acquittal on the computer use charge. MHTr.: 87.

In addition to the trial team, Scott Morin testified regarding the computer network at St. Paul's School. MHTr.: 88-123. He described the network as the "SPS network" and that the school hosts the students' email system. MHTr.: 89-91. He explained that emails sent within the

SPS network travel over internal servers, but when users send emails from outside the SPS network or from within the SPS network to individuals outside of it, the emails travel over the internet. MHTr.: 92, 109. Both the email and the intranet appear to function as if they are normal internet services. MHTr.: 101-05. The intranet follows the same protocols for connecting and browsing that the internet uses and utilizes the same web browsers for access. MHTr.: 101-03. The email system follows standard protocols employed by any email service to send email. MHTr.: 104. A user cannot tell whether an email was sent or would be accessed over the intranet or the internet when sending and receiving messages. MHTr.: 107. Morin further explained that the school takes the network offline from midnight until six o'clock in the morning. MHTr.: 110.

Morin explained that at peak periods over one thousand devices could be connected to the SPS network at a time and that the network includes a diverse array of users, such as students, faculty, staff, and others with authorized access. MHTr.: 99-100. Morin agreed that access to the school's network posed the same dangers that users could face from access to the internet, such as cyberbullying , harassment, etc., and that the school took precautions to prevent that behavior. MHTr.: 116-19. In describing the network, he described a "seamless transition" from the SPS network to the internet. MHTr.: 105. Morin confirmed that the intranet is not a "closed universe system." MHTr.: 121. Instead, he explained that the intranet has access to the internet.[3] MHTr.: 121.

F. Post-Hearing Submissions and Disposition

After the hearing, the parties filed supplemental memoranda. DApp.: A87-A124. The State explained that "the defendant did not identify controlling legal authority overlooked by defense counsel that would have likely resulted in an acquittal." DApp.: A93-A94. The State

[3] The direct quotation is "Well, the internet has access to the intranet." MHTr.: 121. Given how he describes the intranet and internet, it seems like this may be a typographical error in transcription or misstatement. Regardless the comment shows the two are closely connected.

further addressed the intranet and internet distinction by noting that none of the attorneys involved recognized the issue until well after trial when a third party suggested the argument. DApp.: A95-A97. The State argued that Morin's testimony supports the conclusion that the SPS network, if not an "internet service," certainly qualifies as an "online service." DApp.: A95-A97. The defendant maintained his interpretation of the statute, that an intranet system falls outside the scope of RSA 649-B:4, and that trial counsel's strategy for addressing the computer use charge was deficient. DApp.: A100-A112.

On April 19, 2017, the trial court denied the defendant's motion for a new trial. Responding to the computer use charge arguments, the trial court found that the trial team's failure to challenge the sufficiency at the close of the State's case was not defective because it "would not have changed the outcome of the case." DSupp.: 6. The trial court further found that "the evidence presented at trial supported a finding that the defendant's conduct fell within the plain meaning of RSA 649-B:4." DSupp.: 9.

Regarding intent, the trial court made several relevant findings. First, it observed that a strategy based upon asking the jury to nullify the computer use charge would undermine the theory of defense because it would require counsel to acknowledge that the defendant may have committed one or more of the sexual assault offenses. DSupp.: 6-7. Second, it noted that its instruction required the jury to find that the defendant sent the messages to the victim with the intent of engaging in sexual penetration, which imposed a higher factual burden upon the State. DSupp.: 10. Third, it found that failure to request a bill of particulars was not deficient performance because RSA 649-B:4 does not require the jury to identify specific communications as the basis for conviction. DSupp.: 12. Instead, the entire online relationship can be considered.

DSupp.: 12. Fourth, it found that the defendant agreed with the strategy of "contesting all claims of sexual penetration" DSupp. 6-7.

Regarding the intranet argument, the trial court construed the question as one of whether the "intranet" is an "on-line service" under RSA 649-B:4. DSupp.: 15. The trial court looked to the common definition of "on-line" and found that it involved connecting computers together "directly or through a server." DSupp.: 15. The trial court concluded that St. Paul's School's intranet does exactly that and therefore, is an "on-line service." DSupp.: 15. The trial court further noted that concluding otherwise would produce an absurd result: the defendant's construction would allow anonymous adults to use the intranet to solicit minor students of the school without criminal liability under RSA 649-B:4, even though those adults would have committed a crime if they used an off-campus network to solicit minor students. DSupp.: 15-16.

SUMMARY OF THE ARGUMENT

The defendant has failed to carry his two-part burden to establish (1) that he received deficient assistance from trial counsel and (2) that, in absence of the deficiency, the outcome of his trial would likely have been different. The defendnat's trial team provided effective assistance in how they chose to address the question of intent regarding the RSA 649-B:4 (2016) charge. They elicited testimony supporting their argument that the senior salute was not strictly an invitation to have sex, but could invite a range of conduct. They elicited testimony that the defendant never intended to have sex with the victim and never expressed any such intention to others. They elicited testimony that the crude language the defendant sued described a range of non-sexual activities. They focused the jury on accepting the defendant's version of events, which included his denials that he ever intended to have sexual intercourse with the victim. This was not a situation in which the defense failed to challenge the State's case. The defense did so vigorously, and the defendant has failed to show how a more direct approach in opening and closing arguments would have led to a different result.

The trial team had no obligation to raise the defendant's novel argument regarding the interpretation of RSA 649-B:4. Effective assistance of counsel does not require a trial team to raise novel issues of statutory interpretation. If the trial team had done so, moreover, it would not have led to a different outcome because the defendant's interpretation of the statute is incorrect and because his communications over Facebook clearly fell within the scope of RSA 649-B:4. Accordingly, this Court must affirm.

ARGUMENT

THE DEFENDANT'S TRIAL TEAM EMPLOYED A REASONABLE STRATEGY THAT DID NOT PREJUDICE THE DEFENDANT BECAUSE IT CHALLENGED THE STATE'S THEORY OF THE CASE AND EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT REQUIRE RAISING UNSUPPORTED LEGAL CHALLENGES.

The defendant's trial team pursued a sound and well-reasoned trial strategy when it attacked the State's theory of the case by arguing that the defendant had never had sexual intercourse with the victim and presented evidence, through cross-examination and the defendant's testimony, that undermined the State's arguments regarding the defendant's intent in sending a senior salute to the victim. The trial team was never obligated to raise the novel theory that the defendant raised in his ineffective assistance of counsel claims regarding the intranet distinction. To the extent that trial counsels performance was defective, however, the defendant suffered no prejudice because sufficient evidence of his intent existed and because his novel theory lacks merit. Accordingly, this Court must affirm the trial court's decision.

"Both the State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel." *State v. Cable*, 168 N.H. 673, 680 (2016). "To prevail upon his claim, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." *Id.* (quotation omitted). Proving ineffective assistance of counsel "is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

"To meet the first prong of this test, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* (quotation omitted). This Court "judge[s] the reasonableness of counsel's conduct based upon the facts and circumstances of that particular case, viewed from the time of that conduct" because "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* (quotations omitted). "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." *Id.* (quotation omitted). "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." *Id.* (quotation omitted).

"To meet the second prong, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 681 (quotation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). A different result requires a conclusion that but for the unprofessional errors, the result would have been an acquittal. *Cf. State v. Breest*, 169 N.H. 640, 650-51 (2017) (explaining that a hung jury is neither a verdict nor a result of a trial for the purposes of showing a "different result"). "The prejudice analysis considers the totality of the evidence presented at trial." *Cable*, 168 N.H. at 681 (quotation omitted).

"Both the performance and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact." *Id.* (quotation omitted). "Therefore, [this Court] will not disturb the trial court's factual findings unless they are not supported by the evidence or are clearly erroneous as a matter of law, and [it] will review the ultimate determination of whether each prong is met *de novo*." *Id.* (quotation omitted). "On appeal, when [this Court] determine[s] that a defendant has failed to meet either prong of the test, [it] need not consider the other one." *Id.* (quotation omitted).

A. The defendant's trial team's strategy for addressing his intent when he sent the senior salute to the victim was an objectively reasonable strategy and even if it was not, it did not prejudice the defendant's case.

1. The defendant's trial team pursued an objectively reasonable strategy by adducing testimony to undermine the State's circumstantial evidence of the defendant's intent and emphasizing the defendant's credibility.

Defense counsel's strategy to challenge the question of the defendant's intent when he sent the victim a senior salute comprised three tracks: first, he elicited testimony from nearly every witness with knowledge that he never expressed a desire to have sexual intercourse with the victim; second, he elicited testimony from nearly every witness with knowledge that terms like "slay," "pork," "bone," and even "senior salute" describe conduct ranging from dating to sexual intercourse; and third, he endeavored to undermine the State's circumstantial case regarding his intent by arguing and demonstrating that sexual intercourse never occurred. Although the defendant did not make a detailed argument regarding RSA 649-B:4 (2016) during his opening and closing statements, the evidence elicited at trial coupled with trial counsel's statements regarding his credibility and intent during opening and closing statements produced an objectively reasonable trial strategy that is entitled to substantial deference. The defendant's arguments to the contrary are supported with the distorted view that hindsight provides and cannot serve as the basis for a claim of ineffective assistance of counsel. Accordingly, this Court must affirm.

Regarding the first prong, "[g]iven the strong presumption in favor of competence, the [defendant]'s burden of persuasion—though the presumption is not insurmountable—is a heavy one." *Chandler v. United States*, 218 F.3d 1305, 1314-15 (11th Cir. 2000) (en banc). Where the challenged conduct comprises strategic choices made by counsel, those choices are "virtually unchallengeable." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also Premo v. Moore*,

562 U.S. 115, 126 (2011) (holding that "substantial deference must be accorded to counsel's judgment"); *Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'").

"Strategy" means "no more than this concept: trial counsel's course of conduct, that was neither directly prohibited by law nor directly required by law, for obtaining a favorable result for his client." *Chandler*, 218 F.3d at 1314 n.14; *see also* Wayne R. LaFave, et al. 3 *Crim. Proc.* § 11.10(c) (3d ed. 2011) (explaining that a broad variety of informed choices by counsel fall in the "virtually unchallengeable" category including the decision not to pursue a particular type of challenge to the prosecution or the decision to focus on one of several fully investigated defenses). Thus, "where it is shown that a challenged action was, in fact, an adequately informed strategic choice, [courts] heighten [their] presumption of objective reasonableness and presume that the attorney's decision is nearly unchallengeable." *Bryan v. Mullin*, 335 F.3d 1207, 1223 n.23 (10th Cir. 2003) (quotation omitted).

Additionally, "[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." *Chandler*, 218 F.3d at 1316; *see also Parsley v. United States*, 604 F.3d 667, 672-73 (1st Cir. 2010) (crediting counsel's twenty years of experience as a criminal defense attorney when addressing claims of ineffective assistance of counsel). To surmount these various hurdles, "the defendant has to show that *no competent lawyer* would have engaged in the conduct of which he accuses his trial counsel." *Cable*, 168 N.H. at 680-81 (quotation omitted).

"[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the

broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003). "[A]rguments should sharpen and clarify the issues for resolution by the trier of fact but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Id.* at 6 (quotation and citation omitted); *see also Knight v. Spencer*, 447 F.3d 6, 18 (1st Cir. 2006) (acknowledging that defense counsel has a "wide latitude of discretion . . . to conduct the defense in the manner of his or her own choosing). In the context of closing arguments, "it might sometimes make sense to forgo [them] altogether." *Id.* (citing *Bell v. Cone*, 535 U.S. 685, 701-02 (2002)). "Judicial review of a defense attorney's summation is therefore highly deferential." *Id.*

Further, challenges to counsel's performance during arguments "must . . . be viewed in the context of the entire proceeding." *Knight*, 447 F.3d at 18. For example, cross-examination of witnesses or presentation of supporting evidence can mitigate counsel's failure to address certain evidence or issues in closing argument. *See Yarborough*, 540 U.S. at 6-7 (concluding that defense counsel acted reasonably when it chose to omit certain evidence that was ambiguous or may have backfired upon the defendant); *Knight*, 447 F.3d at 18 (explaining that counsel was not ineffective for failing to address the medical examiner's testimony in closing argument, in part, because of counsel's "very effective" cross examination of that witness). The context of the case can even support a decision by trial counsel to not present a closing argument at all. *See Bell*, 535 U.S. at 699-702 (looking to the sympathetic evidence defense counsel had put before the jury and the risk that a vigorous rebuttal from the government posed to the defendant when concluding that defense counsel was not ineffective for waiving closing argument).

The State's case for proving the defendant's intent when he sent his senior salute to the victim—and during their following communications—turned on circumstantial evidence. As this

Court has recognized, "[a] defendant's intent often must be proven by circumstantial evidence." *State v. Zubhuza*, 166 N.H. 125, 130 (2014); *see also State v. Thomas*, 168 N.H. 589, 603 (2016) ("Because persons rarely explain to others the inner workings of their minds or mental processes, one's culpable mental state must, in most cases, be proven by circumstantial evidence, and the fact finder may draw relevant inferences on the issue of intent from an accused's conduct." (Quotation and brackets omitted.)). In neither the initial senior salute nor any of the following communications, did the defendant explicitly proposition the victim for sexual intercourse. Instead, the State asked the jury to infer intent purely from circumstantial evidence, specifically the defendant's statements to friends leading up to the senior salute, the nature of what the senior salute entailed, the defendant's behavior while communicating with the victim and just before the assault, and his behavior after the assault to show his intent at the time he and the victim had communicated.

In both opening and closing statements, defense counsel made challenges to the defendant's intent. In his opening statement, defense counsel explained to the jury that senior salutes did not equate to a request for sexual intercourse and that students would send them seeking to spend time with other students platonically or to engage in romantic activities other than sexual intercourse. Tr.: 53-54. During closing argument, defense counsel minimized the defendant's statements to his friends after the assault by arguing that those friends had put words into the defendant's mouth and that the defendant was lying to sound more masculine. Tr.: 1066-68. Throughout both arguments, defense counsel emphasized that the resolution of the case turned on the credibility of both the victim and the defendant and that the defendant had presented a more credible demeanor and version of events. Tr.: 40, 1068-71.

Defense counsel's theory of the case and plan for attacking all of the allegations also aimed to undermine the State's theory for proving intent. At the hearing on the defendant's motion for a new trial, both trial attorneys explained that their plan was to deny that the defendant had ever engaged in sexual intercourse with the victim and they reasoned that "if [the defendant] were acquitted of the forcible charges and . . . the consensual charges, then it was highly likely, if not almost certain, that the jury would acquit him on the computer charge, as well." MHTr.: 468; *see also* MHTr.: 328. Essentially, defense counsel concluded that acquittal on the sexual assault charges strongly supported the inference that the defendant never intended to have sexual intercourse with the victim, a necessary element of the RSA 649-B:4 charge. MHTr.: 329-30; 468-70. Both attorneys appreciated that the jury could still convict the defendant on the RSA 649-B:4 charge even if it acquitted him of the sexual assault charges, but they viewed such a result as highly unlikely. MHTr.: 386, 468-70. Danger also existed in focusing too heavily on the computer use charge because it could risk an admission that the defendant did intend to have sexual intercourse with the victim. Thus, opening and closing statements focused heavily on refuting the sexual assault allegations. In addition to these considerations, trial counsel focused on undermining the State's arguments that language such as "slay," "pork," and "score" meant sexual intercourse. MHTr.: 329. Defense counsel adduced evidence, which, if accepted by the jury, would have supported acquittal by undermining the State's circumstantial evidence of the defendant's intent.

Defense counsel's efforts to undermine the State's circumstantial evidence continued vigorously during the direct examination of the defendant and cross-examination of the State's witnesses. Counsel elicited testimony from the defendant, that minimized his "crude" language by describing it as jokes and explaining that the terms described a "whole range" of activities.

Tr.: 874, 879-81. The defendant explained that he sent the senior salute to the victim because he "wanted to ask her out" and took her to the roof of one of the school buildings because he "thought it was a really beautiful view and [he] wanted to share it with [the victim]." Tr.: 883, 910. He testified that he brought the blanket so that they could lay down on the roof together and he brought the condom because he had always carried one since he started high school. Tr.: 914, 1040. He denied having sexual intercourse with the victim, expressed his surprise that the evening progressed toward the possibility of sexual intercourse, and emphasized to the jury that "it hadn't been [his] intention going into the night to have sex with [the victim]." Tr.: 936-37, 940.

While cross-examining the State's witnesses, defense counsel challenged the State's position that the defendant intended to have sexual intercourse with the victim. For example, defense counsel, through cross-examination elicited testimony from the defendant's friends that the defendant never expressed a plan or had an expectation that he would have sexual intercourse with the victim. *See*, *e.g.*, Tr.: 573. Defense counsel drew testimony from nearly every witness from St. Paul's School that acknowledged that the senior salute comprised a range of activities and that terms the defendant would use, such as "slay," "pork," and "bone," could describe a range of activities, not just sexual intercourse or sexual contact. *See*, *e.g.*, Tr.: 242 (having the victim acknowledge that the senior salute can entail a lot of activities), 364 (discussing senior salute), 499-500 (discussing "score," "slay," and defendant's goal to "kiss the most girls"), 555-59 (discussing "score," "slay," and "senior salute"), 573 (discussing "hook up"), 576-77 (discussing "slay" and "hook up" not meaning sexual intercourse).

Defense counsel filled their case with evidence that, if the jury accepted it, would undermine the State's circumstantial case regarding the defendant's intent. Counsel focused on

some of this evidence during both opening and closing arguments. Counsel also focused on presenting a case that would convince the jury that sexual contact and intercourse never occurred, which would further undermine the State's theory regarding the defendant's intent. Most importantly, however, counsel focused on the defendant's testimony and tried to convince the jury that the defendant was a credible witness. Part of the defendant's testimony included unequivocal statements that he never intended to have sexual intercourse or sexual contact with the victim when he sent her a senior salute. These efforts, coupled with the vigorous examination of witnesses, presented a case far different from those cited by the defendant. In the authority upon which the defendant bases his claims, defense counsel abandoned its duty to present contrary evidence or seriously attack the State's positions. *See*, *e.g.*, *Heard v. Addison*, 728 F.3d 1170, 1179 (10th Cir. 2013) (claiming trial counsel was ineffective "because she advised him to plead guilty to [a charge] without ever informing him that he could assert a defense that his conduct was not criminal under the statute" or researching to find such a defense, which was readily apparent); *Elliott v. Williams*, 248 F.3d 1205, 1206 n.1 (10th Cir. 2001) ("Counsel called no witnesses, presented no evidence, and waived closing argument. The case therefore went to the jury at the conclusion of the prosecution's case without [the petitioner's] counsel ever articulating a theory in defense of the state's charges."); *Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999) (confronting a situation in which defense counsel failed to object to an ineffective pleading and as a result the petitioner received an unlawfully enhanced sentence); *State v. Whittaker*, 158 N.H. 762, 774 (2009) (explaining that trial counsel's failure to consult with an expert deprived the defendant of a defense that could have been raised).

Defense counsel made strategic choices to focus the jury's attention in certain directions. Those choices were objectively reasonable choices. Defense counsel did not overlook a potential

defense and in fact, presented evidence to support the conclusion that the defendant never intended to have sexual intercourse with the victim when he sent her a senior salute. Therefore, defense counsel did not provide unconstitutionally deficient representation to the defendant.

2. Even if defense counsel's performance had been deficient, the defendant has failed to demonstrate how he suffered prejudice as a result of that performance.

Defense counsel's actions, even if deficient, did not prejudice the defendant's case to the extent that this Court should question its confidence in the jury's verdict. Both sides presented evidence that detailed the defendant's intentions when he sent the senior salute to the victim. The State contended that his intention was to engage in sexual intercourse with the victim, whereas the defendant's evidence tried to show that the defendant had nothing but innocent intentions when he sent the message. Ultimately, the jury rejected the defendant's denials and efforts to minimize his conduct, and had ample evidence from the State upon which it could rely.

The defendant does not point to any facts or law that show how a more detailed presentation of the RSA 649-B:4 charge would have changed the outcome from conviction to acquittal. The cases upon which the defendant relies are readily distinguishable. Three of the cases address situations in which defense counsel waived closing argument entirely. *See Lawhorn v. Allen*, 519 F.3d 1272, 1292-97 (11th Cir. 2008); *Ex parte Whited*, 180 So.3d 69, 86 (Ala. 2015); *People v. Wilson*, 911 N.E.2d 413, 421 (Ill. App. 2009); *but see Bell*, 535 U.S. at 701-02 (concluding that under the circumstances waiver of closing argument was a reasonable strategic choice). One case addressed a situation in chich defense counsel failed to address the merits of the case and, instead, focused on the constitutionality of the death penalty and assured the jurors that the defendant would not be executed. *Dobbs v. Turpin*, 142 F.3d 1383, 1389-91 (11th Cir. 1998). The final case addressed a situation akin to cumulative error, in which the

reviewing court considered all of counsel's errors across the guilt and punishment phases of a capital murder trial. *Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987).

The cases do not even remotely apply to this appeal in which defense counsel marshalled evidence that undermined the State's case and focused the jury's attention on particular pieces of evidence or testimony that would call into doubt the State's theory of the case. The jury had evidence before it that, had it found the evidence credible, would have supported acquittal.[4] The jury rejected that evidence and found that the State's case, itself replete with evidence that called into question the defendant's credibility, was more credible. Given that arguments by counsel are not evidence, *see State v. Mussey*, 153 N.H. 272, 281 (2006) (quoting the trial court's instruction that closing arguments "are not evidence"), it is unclear how a different argument by defense counsel would have resulted in an acquittal. Accordingly, this Court must affirm.

B. The defendant's trial team had no obligation to raise the novel question of whether an intranet falls within the scope of RSA 649-B:4 (2016), and even if it was so obligated, the failure to do so did not prejudice the defendant because the argument was meritless.

Defense counsel reviewed the text of RSA 649-B:4 and concluded that the plain language of the statute covered the defendant's communications with the victim on Facebook and over the St. Paul's School email system. The law does not obligate counsel to press a novel question of statutory interpretation with the trial court. Even if counsel should have raised the question, the failure to do so did not prejudice the defendant because he communicated with the victim over Facebook, which none dispute falls within the scope of RSA 649-B:4, and because his proposed interpretation is not supported by the plain language of RSA 649-B:4 or its legislative history. Accordingly, this Court must affirm.

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[4] As the State has argued in its brief for the defendant's direct appeal of his convictions, the evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that the defendant intended to engage in sexual intercourse with the victim when he sent the senior salute.

1. Defense counsel provided objectively reasonable assistance because effective assistance of counsel does not require counsel to raise novel and unsupported arguments.

Regarding the first prong, objectively reasonable performance does not compel defense counsel to file meritless motions or make futile objections. *See, e.g., United States v. Rushin*, 642 F.3d 1299, 1311 (10th Cir. 2011) ("If the motion underlying the ineffective-assistance claim . . . would have been meritless, then counsel's performance cannot be said to be deficient."). This principle extends to situations in which the defendant claims that trial counsel was deficient for failing to raise arguments that required the resolution of unsettled legal questions. *See, e.g., New v. United States*, 652 F.3d 949, 952 (8th Cir. 2011) ("This court has held that an attorney's failure to anticipate changes in the law does not constitute constitutionally ineffective assistance."); *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) ("[T]he rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized."); *Baez-Gil v. United States*, No. 12-CV-266-JL, 2013 WL 2422803, at *1 (D.N.H. June 4, 2013) ("Case law is uniform in holding that counsel does not fail to provide effective assistance by failing to contemplate, or choosing not to advance, a novel theory." (Quotation and brackets omitted)).

Essentially, providing effective assistance of counsel "does not require counsel to be clever or inventive, or to advocate a claim not yet announced in the law." *Baez-Gil*, 2013 WL 2422803, at *4. "Indeed, both the United States Supreme Court and the [United States] Court of Appeals [for the First Circuit] have held that defense attorneys who fail to detect and raise a novel argument have not rendered ineffective assistance." *Id.* at *11 (citing *Engle v. Isaac*, 456 U.S. 107, 131-34 (1982); *Choudry v. United States*, [No. 91-1949, 1992 WL 82459] (1st Cir. [Apr. 22,]1992) (unpublished); *United States v. Fusaro*, 708 F.2d 17, 26-27 (1st Cir. 1983)).

For example, in *Choudry*, the court concluded that defense counsel was not at fault for failing to raise novel claims of statutory construction. *Choudry*, 1992 WL 82459, at *3. In that case, the defendant alleged that trial counsel was ineffective for failing to challenge whether the *actus reus* underlying the charge, possession of rubber stamps that bore the likeness of one used to print permits, fell within the scope of a statute that barred possession of a "plate in the likeness of a plate designed for the printing of permits." *Id.* at *2. Although the court concluded that the defendant did not preserve the question for appellate review, it also considered the merits. *Id.* at *3. The court observed that the question of whether a rubber stamp could meet the definition of a "plate" had "yet to be decided either in this circuit, or in other circuits." *Id.* The court concluded that defense counsel did not err in failing to raise the claim. *Id.*

The question of whether the St. Paul's School network falls within the scope of RSA 649-B:4 is, similarly, an unsettled question of law.[5] In his brief, the defendant does not contend that the plain language of RSA 649-B:4 supports his interpretation of the statute, nor could he under any reasonable interpretation of the statute. DBr.: 35 ("The Court therefore faces a statute that is ambiguous."). Thus, defense counsel could not have, and did not overlook a potential defense based upon the plain and obvious meaning of the statute. At the hearing on the defendant's motion for new trial, the defendant's post-conviction counsel described this issue as "a novel issue in New Hampshire."[6] MHTr.: 386; *see also* 82 (Attorney Rancourt described the issue as "a

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[5] The defendant does not appear to contest that his communications with the victim over Facebook fall within the scope of RSA 649-B:4. Instead, he appears to minimize the significance of these communications as "a few brief logistical messages." DBr.: 29.

[6] Accepting the defendant's invitation to address novel statutory interpretation questions for the first time in a collateral attack on a jury verdict poses a unique problem because it would allow post-conviction counsel, with the benefit of hindsight, to comb the record, endeavoring to find some alleged error never addressed by the trial judge that could be used to set aside the verdict.

In the context of plain error analysis, this Court adopted an analysis that creates a heavy burden for appealing parties to prevent that exact behavior. *See State v. Noucas*, 165 N.H. 146, 152 (2013) (describing the preservation requirement and plain error rule). Plain error could never serve as a vehicle through which the defendant could

novel legal issue that's never been litigated before"). The evidence presented at the hearing demonstrated that at least five experienced criminal defense attorneys reviewed the law and evidence in the case and none considered this argument until a parent of a St. Paul's School student contacted post-conviction counsel to suggest it. MHTr.: 78, 383, 470-71. An experienced trial judge, moreover, reviewed the evidence, the statute, and the parties' arguments and rejected the defendant's interpretation of the statute and his intranet/internet distinction. DSupp.: 16. Defense counsel's performance was not objectively unreasonable because it did not pursue this novel and unsupported argument. Accordingly, this Court must affirm.

2. Even if defense counsel had a duty to raise this novel argument, the defendant suffered no prejudice because the Facebook communication, alone, supported the jury's verdict and the defendant's interpretation of the statute lacks merit.

Turing to the second prong, even if this Court concludes that defense counsel was deficient because they did not raise this novel argument, it still must affirm because the error did not prejudice the defendant for two reasons. First, the defendant also used Facebook, which he has never disputed falls within the scope of RSA 649-B:4, to facilitate his sexual assault of the victim by communicating with her through Facebook to arrange where and when he would meet her. Second, the defendant's novel interpretation of RSA 649-B:4 lacks merit.

The Facebook messages were not merely "brief logistical messages," as the defendant claims, but part of how he coordinated maneuvering the victim to a remote location to have sexual intercourse with her. In those messages, the pair arranged when they would meet and where they would meet. Notably, the defendant told the victim that "it might be a little crazy for

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advance this novel argument. *See State v. Pennock*, 168 N.H. 294, 312 (2015) (explaining that the error in statutory interpretation must be "plainly evident" from the language); *see also State v. Lucas* (Unpublished Order 3/19/2018) (explaining that an alleged error is neither clear nor obvious because the case is one of first impression). Thus, an ineffective assistance of counsel claim, which presents an equally heavy—if not heavier—burden for defendants, should not become a vehicle through which defendants can successfully raise novel statutory or constitutional claims in the first instance.

the [chapel] tower," which is where he had originally proposed to take her. SApp.: 1. Instead of canceling the plan, the defendant told the victim "but [I] can take you somewhere else that's pretty sweet." SApp.: 2. He later proposed meeting "outside the schoolhouse." SApp.: 3. From the schoolhouse, the defendant led the victim to the rooftop and utility room where the sexual assault occurred. In sending these messages over Facebook, the defendant plainly used an online or internet service to get the victim to show up at a specific place and time with the intent to have sexual intercourse with her, and thereby sexually assault her. His intent had not changed from when he sent the initial senior salute request. He wanted the victim in a remote location on campus to have sex with her. The chapel tower was unavailable so he used Facebook messages to get the victim to meet him at a different location. Thus, even if the intranet email communications fall outside the scope of RSA 649-B:4, the defendant still violated the statute because his Facebook messages plainly fall within the scope of RSA 649-B:4 and satisfy all of the necessary elements. Accordingly, this Court must affirm.

With respect to emails utilizing the St. Paul's School network, the plain meaning of RSA 649-B:4, I, includes the intranet as an "internet service" or an "on-line service." RSA 649-B:4, I, provides that "[n]o person shall knowingly utilize a computer on-line service, internet service, or local bulletin board service, to seduce, solicit, lure, or entice a child or another person believed by the person to be a child" to commit, among other things, an offense under RSA chapter 632-A, which includes sexual assault. Historically, this Court has construed RSA 694-B:4 "broadly, especially in light of the statutory scheme's overarching policy of preventing computer pornography, child exploitation, and abuse offenses committed by means of a computer." *State v. Jennings*, 159 N.H. 1, 8 (2009). For example, this Court interpreted the statute to include conduct

beyond using a computer to communicate with minors, but to also include using a computer to show pornography to a child while engaging in sexual penetration. *Id.*

"In matters of statutory interpretation, [this Court is] the final arbiter of legislative intent as expressed in the words of the statute considered as a whole." *State v. Czekalski*, 169 N.H. 732, 737 (2017). This Court "first examine[s] the language found in the statute and ascribe[s] the plain and ordinary meanings to the words used." *Id.* "If the statute's language is clear and unambiguous, [this Court] do[es] not look beyond it to discern legislative intent." *Id.* "Furthermore, [this Court] interpret[s] statutes in the context of the overall statutory scheme and not in isolation." *Id.* The Court's "goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *Id.* Review of questions of statutory interpretation is *de novo*. *Id.*

Turning to the plain language of the terms "on-line service, internet service, or local bulletin board service," it is apparent that these terms encompass an intranet service like the one used at St. Paul's School. Merriam-Webster's online dictionary defines the "Internet" to mean "an electronic communications network that connects computer networks and organizational computer facilities around the world." *Merriam-Webster*, http://www.merriam-webster.com /dictionary/Internet (last visited Oct. 18, 2018). This definition comports with how researchers and organizations define the Internet. *See, e.g.*, Barry Leiner, et al., *Brief History of the Internet* 2 (1997), available at https://www.internetsociety.org/wp-content/uploads/2017/09/ISOC-History-of-the-Internet_1997.pdf (explaining that "[t]he Internet today is a widespread information infrastructure"). By definition, the Internet and "internet services" are more than what a person may access or exchange on the World Wide Web, which is only one portion of the larger Internet that the public accesses through web browsers such as Internet Explorer. *See Merriam-Webster*,

https://www.merriam-webster.com/dictionary/World%20Wide%20Web (last visited Oct. 18, 2018) (defining "World Wide Web").

A "local bulletin board service" is an archaic service, once highly popular, whose use has declined significantly with the rise of the World Wide Web. *See* Ben Edwards, *The Lost Civilization of Dial-Up Bulletin Board Systems*, The Atlantic (Nov. 4, 2016), https://www.theatlantic.com/technology/archive/2016/11/the-lost-civilization-of-dial-up-bulletin-board-systems/506465/. A bulletin board system involves one individual to host the bulletin board system and allow others remote access to that person's computer so they can use the bulletin board system to post messages, play games, etc. *See id.* Thus, instead of networking the computers together, one person allows their computer to serve as a space where others can remotely communicate or engage in activities.

As the trial court found, Merriam-Webster defines "online" to mean "connected to, served by, or available through a system and especially a computer or telecommunications system (such as the Internet)" and also "done while connected to such a system." *Merriam-Webster*, http://www.merriam-webster.com/dictionary/online (last visited Oct. 18, 2018). This definition plainly shows that an online service is more than just the Internet or a local bulletin board service. It speaks more broadly to any activity performed while connected to "a computer or telecommunications system." The common vein across all of the different terms is that the services at issue allow for the easy and free exchange of information between users over a computer network.

The St. Paul's School network and intranet clearly fall within the scope of RSA 649-B:4. Merriam-Webster defines "intranet" to mean "a network operating like the World Wide Web but having access restricted to a limited group of authorized users (such as employees of a

company)." *Merriam-Webster*, http://www.merriam-webster.com/dictionary/intranet (last visited Oct. 18, 2018). Essentially, an intranet is a computer system or network that allows others access to resources that are closed off to those who are outside the network. This definition comports with the description of the network provided by Scott Morin. He detailed that the network users utilize the same browsers and services to access the intranet as they do to access the greater Internet. MHTr.: 101-03. Morin described the transition from use of the intranet services to the greater Internet as a "seamless transition," MHTr.: 105, and disagreed with the defendant's assertion that the intranet was a "closed universe system," MHTr.: 121. He did agree, however, that student usage of the intranet poses many of the same risks as their usage of the Internet and as such, the school created rules that govern usage of the intranet. MHTr.: 119.

Comparing the definition of intranet and the description provided by Morin, the St. Paul's School network folds neatly into the definition of both "on-line service" and "internet service." As an "on-line service," the St. Paul's School network and intranet comprise a computer or telecommunications system to which users can connect to exchange emails and other information with each other. Furthermore, the "seamless transition" between the intranet and greater-Internet along with the shared protocols demonstrate that the St. Paul's School network meets the definition of "internet service" because it is an electronic communications network that connects with other computer networks and services around the world. Because, based on the plain language of the statute and terms involved, the St. Paul's School network and intranet fall unabiguously within the scope of RSA 649-B:4, this Court need not consider the legislative history.

To the extent that the defendant minimizes the danger that the St. Paul's School network poses to students to suggest that it should not fall within the scope of RSA 649-B:4, this Court

must reject those arguments because they cannot withstand serious scrutiny. Although the network does not necessarily allow for anonymous usage, that does not meant that it cannot be abused by individuals, like the defendant, to engage in behavior RSA 649-B:4 was designed to prevent. Over the past year, St. Paul's School has acknowledged a history of sexual abuse of students by faculty members. *See, e.g.*, Scott Harshbarger, et al., *Independent Investigation of Sexual Misconduct at St. Paul's School* (May 20, 2017), https://sps.myschoolapp.com/ftpimages/36/download/download_2034339.pdf. Access to the St. Paul's School network would put students at greater risk for abuse because those faculty members can engage with the students secretly by using the network to communicate with students outside of a public space and groom students for sexual abuse. This is equally true for older students, like the defendant, who can use the network to reach many minor students and solicit them with the intention of having sexual intercourse with them. The lack of anonymity does not protect students from nefarious individuals who have the goal of finding minors to sexually abuse, it simply makes those individuals easier to detect. Therefore, this Court must reject the defendant's construction of RSA 649-B:4 and affirm.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court to affirm the trial court's decision.

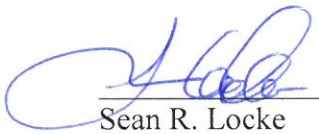
The State requests a fifteen-minute oral argument before the full court.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that I have sent two copies of the State's brief to counsel for the defendant, Christopher Johnson, Esquire, by first-class mail postage prepaid, at the following address:

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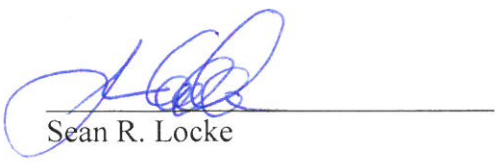

October 19, 2018

Sean R. Locke

APPENDIX TABLE OF CONTENTS

●●●○○ AT&T LTE 11:51 AM ☎ ᛒ 95%

< Back **Owen Labrie**

MAY 30, 4:27 PM

chessy how is your night looking

i have dinner from like 7-9

MAY 30, 4:44 PM

I also have a dinner then, but the rest of my night is pretty clear

MAY 30, 5:34 PM

golden

golden

it might be a little crazy for the tower

Type a message...

Aa

●●●○○ AT&T LTE 11:51 AM ☎ ᛒ 95%

< Back **Owen Labrie**

but i can take you somewhere else that's pretty sweet

/;et

jesus my chat isn't working

i'll let ya know on the book

when i'm back

That sounds perfect haha

we won't steal each other for the whole night

but it'll be sweet

Sounds good

MAY 30, 9:02 PM

Type a message...

Aa

●●●○○ AT&T LTE 11:51 AM ☎ ᛒ 95%

< Back **Owen Labrie**

MAY 30, 9:02 PM

are you back?

/let's go do something sweet

Yees I am

where should we meet

You pick, I'm in your hands

ahh

why don't i meet you outside the schoolhouse

front door

Perfect

Type a message...

Aa

●●●○○ AT&T LTE 11:51 AM ☎ ✱ 95%

< Back **Owen Labrie**

9:15?

Suree

MAY 30, 11:09 PM

¿que?

Liike a condom? Just incasee...

yeah

Haha okaay thanks

are you on the pill?

Nope

Type a message ...

Aa