

STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0381

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EDWARD WHITE v. STATE OF NEW HAMPSHIRE

APPELLANT'S RULE 7 DISCRETIONARY APPEAL
FROM JUDGMENT OF THE HILLSBOROUGH SUPERIOR COURT
NORTHERN DISTRICT

Edward White, Appellant
By and through counsel

Michael J. Iacopino, Esq. (Bar No. 1233)
Jenna M. Bergeron, Esq. (Bar No. 21137)
Brennan, Lenehan, Iacopino, & Hickey
85 Brook Street
Manchester, NH 03104
(603) 668-8300

Written Brief by Attorneys Bergeron and Iacopino
Oral Argument by Attorney Iacopino

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QUESTIONS PRESENTED

1. Did the Trial Court Err in Denying Mr. White's Petition For Relief From Registration Requirements of RSA 651-B:6? Add. p. 1-5; App. p. 7-36, 44-73.¹
2. Did the Trial Court Err in Failing to Give Due Weight to the Testimony and Report of Petitioner's Expert, Dr. Carol Ball, and in Relying on a Misinterpretation of Dr. Ball's Report to Deny Mr. White's Petition? T. p. 87, 93; App. p. 19-27, 56-64.
3. Did the Trial Court Err in Substituting its Own Unqualified Judgment For the Uncontroverted Testimony of Dr. Ball and in Relying on Facts Outside of the Evidentiary Record? T. p. 9-53; App. p. 19-27, 56-64; Add. p. 5.
4. Did the Trial Court Err in Considering Acquitted Conduct in Denying Mr. White's Petition? T. p. 21-24, 26, 49-50, 56, 70-72, 89; Add. p. 2, fn. 1.
5. Did the Trial Court Err in Faulting Mr. White For the Inability to Corroborate His Testimony with Records Due to the Age of the Convictions and Records? T. 64, 75, 90-92.

¹ Citations to the records will be as follows:

"Add." refers to the Addendum to this Brief containing the written decision of the trial court.

"App." refers to the Appendix to this Brief bound by separate cover.

"T." refers to the Transcript of the April 25, 2017 Hearing on Mr. White's Petition for Relief from the Registration Requirements of RSA 651-B.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR
REGULATIONS INVOLVED IN THE CASE**

STATUTES

RSA 651-B: 6. DURATION OF REGISTRATION

I. All tier II or tier III offenders shall be registered for life.

II. All tier I offenders shall be registered for a 10-year period from the date of release, provided that any such registration period shall not run concurrently with any registration period resulting from a subsequent violation or attempted violation of an offense for which the person is required to register.

III.

(a)

(1) Except as provided in paragraph V, all tier III offenders shall remain on the public list contained in RSA 651-B:7 for life.

(2) A tier II offender may petition the superior court to have his or her name and information removed from the public list. The petition shall not be filed prior to the completion of all the terms and conditions of the sentence and in no case earlier than 15 years after the date of release. The petition shall be accompanied by a risk assessment prepared by a qualified psychiatrist or psychologist at the offender's expense. The court may grant the petition if the offender has not been convicted of any felony, class A misdemeanor, sex offense, or offense against a child, has successfully completed any periods of supervised release, probation, or parole, and has successfully completed an appropriate sex offender treatment program as determined by the court. If the court denies the petition, the offender shall not file another petition for 5 years from the date of denial.

(3) A tier I offender may petition the superior court to have his or her name and other information removed from the public list. The petition shall not be filed prior to the completion of all the terms and conditions of the sentence and in no case earlier than 5 years after the date of release. The petition shall be accompanied by a risk assessment prepared by a qualified psychiatrist or psychologist at the offender's expense. The court may grant the petition if the offender has not been convicted of any felony, class A misdemeanor, sexual offense, or offense against a child, has successfully completed any periods of supervised release, probation, or parole, and has successfully completed an appropriate sex offender treatment program as determined by the court.

(b) Prior to granting any petition to remove an offender from the public list, the court shall provide notice to the county attorney who prosecuted the case, the victim advocate, and the victim or victim's family, and permit those parties to be heard on the petition. Prior to any decision granting the application, the court shall provide the victim with the opportunity to address the court. The victim may appear personally, or by counsel, or may provide a written statement to reasonably express his or her views concerning the offense, the person responsible, and the need for maintaining the registration requirement. The judge shall consider the statements of the victim pursuant to this section when making a decision regarding the application. The judge shall grant the application, after a hearing, only where, in the opinion of the court, removal from the registration requirements will assist the individual in the individual's rehabilitation and will be consistent with the public welfare.

IV. Registration of any juvenile required to register pursuant to RSA 651-B:1, XI(a)(3) or (4) shall end when the juvenile turns 17 years of age unless the court which adjudicated the juvenile as a delinquent retains jurisdiction over the juvenile pursuant to RSA 169-B:4, V, in which case registration of the juvenile shall end when the court terminates jurisdiction over the juvenile's case. When the registration of a juvenile terminates, the department shall remove information relating to the juvenile from the SOR system and records of the juvenile's registration shall be handled in accordance with RSA 169-B:35 and RSA 169-B:36.

V.

(a) Any tier II or tier III offender who was convicted prior to the establishment of the sex offender registry may petition the court to be relieved from the registration requirements under this chapter. The petition shall include the petitioner's current address and information about each conviction for which he or she is required to register, including the nature of the offense, the sentence imposed, and the court and the jurisdiction in which the petitioner was convicted. The petition shall be accompanied by a certified copy of the petitioner's criminal history record from each jurisdiction in which he or she is required to register. The petition shall not be filed prior to the completion of all the terms and conditions of the sentence, including any period of supervised release. The petition shall also be accompanied by a risk assessment prepared by a qualified psychiatrist or psychologist at the offender's expense, which indicates that the petitioner is not a danger to the public and no longer poses a risk sufficient to justify continued registration. The petition shall be filed in the county where the most recent predicate conviction occurred, except if the most recent predicate conviction occurred in another state or jurisdiction, the petition shall be filed in the county where the petitioner resides. Such petition shall not be filed as or addressed as part of a criminal case.

(b) Prior to granting any petition to relieve an offender from the registration requirements under this chapter, the court shall hold a hearing on the petition. The court shall provide notice of the hearing at least 60 days prior to the hearing to the county attorney, the department of safety sex offender unit, and the department of

corrections. The county attorney shall use reasonable efforts to notify the victim or victim's family. The court shall permit those parties to be heard on the petition. The victim may appear personally, or through a representative, or may provide a written statement expressing his or her views concerning the offense, the person responsible, and the need for maintaining the registration requirement. The judge shall consider the statements of the victim when making a decision regarding the petition.

(c) The court may grant the petition if the offender has not been convicted of any subsequent offense requiring registration, has successfully completed any period of supervised release, probation, or parole, has successfully completed an appropriate sex offender treatment program as determined by the court, and has demonstrated that he or she is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration. If the court denies the petition, the offender shall not file another petition for 5 years from the date of denial.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Appellant, Edward G. White (“Mr. White”) filed a Petition for Relief From Registration Requirements of RSA 651-B:6 (the “Petition”) in the Hillsborough Superior Court Northern District on or about December 22, 2016. App. p. 7-36, 44-73.² The State of New Hampshire did not file an objection to the Petition. T. p. 6-7. A Hearing on Mr. White’s Petition was held on April 25, 2017. See generally T. p. 1-97; Add. p. 3. On or about May 31, 2017, the lower court (Abramson, J.) denied Mr. White’s Petition. Add. pp. 1-5. This Appeal followed.

II. FACTS

The Appellant, Edward G. White, appeals the May 31, 2017 denial of his Petition for Relief From Registration Requirements of RSA 651-B:6 in the Hillsborough Superior Court Northern District. Add. p. 1-5.

Mr. White was convicted of two counts of Indecent Assault and Battery on a Child under the age of fourteen years in the Plymouth County Superior Court in Massachusetts on or about June 5, 1986. App. p. 1, 7, 13, 20, 30, 34, 38, 44, 50, 57, 67, 71, 92, 97, 101, 103; T. p. 54, 56, 70-72; Add. p. 2. The convictions were the result of a jury trial and involved statutory violations of Massachusetts General Laws c. 265, § 13B prohibiting the intentional, unprivileged, and indecent touching a child under the age of fourteen. App. p. 7, 44; T. p. 49-50, 55-56, 90-99, 101-103. Mr. White was also charged

² It should be noted that Mr. White initially also filed a Motion for Leave to Proceed Anonymously and to File Portions of Petition and Exhibits Under Seal. App. p. 1-6; 38-43. Upon the State’s Objection to the Motion to Proceed Anonymously, Mr. White filed a Withdrawal of John Doe Request and the case proceeded under the case name, In the Matter of Edward White, Case No. 216-2016-CV-00902. App. p. 74-75. The trial court’s Order however refers to the case as Edward White v. State of New Hampshire. See Add. 1-2.

with, but acquitted of, Rape of a Child under Massachusetts General Laws c. 265, § 22A. App. p. 29-32, 66-69, 90-94, 101-103; T. p. 21-24, 26, 49-50, 56, 70-72, 89; Add. p. 2, fn. 1. Mr. White's convictions occurred before the establishment of the sex offender registry in New Hampshire. App. p. 7, 44; T. p. 58, 95; see also Add. p. 2-3.

As a result of these convictions, Mr. White was sentenced to two 2 ½ year sentences in the House of Corrections. App. p. 1, 7, 13, 29-36, 38, 44, 50, 66-73, 91-94, 96-99, 101-103; T. p. 56. Mr. White served approximately three years of his combined five year sentence and was placed on parole in May 1988 for a term of two years. App. p. 1, 8, 13, 20, 38, 45, 50; T. p. 38, 56-57, 74; Add. p. 2. Mr. White successfully completed all of the terms required by his sentences and parole in or around May 1990. App. p. 1, 8, 13, 38, 45, 50, 57; T. p. 38, 57, 74; Add. p. 2. Mr. White also completed an appropriate sex offender treatment program with the Clearview Center of New England in Tyngsboro, Massachusetts. App. p. 2, 8, 14, 20, 22, 39, 45, 51, 57, 59; T. p. 19-20, 35-37, 58, 74, 80, 91-92. Upon completion of required sexual offender treatment with Clearview Center, Mr. White voluntarily chose to stay on for additional individual counseling and, in total, remained in treatment for nearly three years. T. p. 74, 85. Records from Clearview Center were attempted to be obtained however had been destroyed due to their age. T. p. 19, 36-37, 64, 75, 90-92; App. p. 14, 22, 51, 59. Since his convictions, Mr. White has had no subsequent criminal record. App. p. 2, 6, 8, 14, 17, 23, 39, 45, 51, 54, 60, 101-103; T. pp. 5, 6, 12, 26-27, 40, 62, 94. Mr. White is not under any sentence of probation, parole or other supervision as the result of a criminal conviction. App. p. 1, 8, 13, 38, 45, 50, 101-103; see also T. p. 62, 94. As a result of his 1986 convictions, which predated the establishment of the NH sex offender registry, Mr.

White is currently required to register as a Tier 3 sexual offender in New Hampshire. App. p. 1, 8, 13, 38, 45, 50; T. p. 58-59.

The New Hampshire Department of Safety shows no record of criminal history for Mr. White. App. p. 17, 54. At the time of the filing of Mr. White's Petition, Mr. White had not been convicted of a subsequent offense that requires registration and had not been denied relief from the registration requirements of RSA 651-B within five years prior to the date of filing his Petition. App. p. 9, 14, 46, 51; T. p. 62-64, 69. In support of his Petition, Mr. White filed a Report of Risk Assessment and Sexual Evaluation (the "Risk Assessment") prepared by Carol J. Ball, Ph.D. App. p. 19-27, 56-64; see also T. p. 9-53. Dr. Ball's risk assessment concludes that Mr. White is currently at minimal risk of reoffending and therefore does not meet the criteria for continued listing on the sex offender registry in New Hampshire. App. p. 26, 63; T. p. 16-17, 92; Add. p. 3-4. The Risk Assessment indicates that the Mr. White is not a danger to the public and no longer poses a risk sufficient to justify continued registration. App. p. 26, 63; T. p. 17, 92; Add. p. 3-4.

During the April 25, 2017 hearing on Mr. White's Petition, the State informed the trial court that it had complied with the victim's rights statute and made efforts to locate the victim. T. p. 3-5. At the outset of the hearing, the State and the trial court acknowledged that there is presently lacking a set standard for what factors a trial court may or should consider in making the determination as to whether a Petitioner under RSA 651-B:6, V poses a risk sufficient to justify continued registration. T. p. 7-8.

Dr. Ball testified at the April 25, 2017 hearing regarding the contents of the Risk Assessment, her analysis of Mr. White, and her conclusions as to whether he poses a risk

sufficient to warrant continued registration. T. pp. 9-53; Add. p. 2-4. The State produced no opposing expert and no witnesses during the hearing. See generally T. p. 1-97. Dr. Ball has a PhD in psychology and is a licensed psychologist in the Commonwealth of Massachusetts. T. pp. 9-10; App. p. 76-84. Dr. Ball holds positions within the State of New Hampshire relating to evaluations and determinations of sexual offenders. T. p. 9. Specifically, Dr. Ball has a contract position with the New Hampshire Department of Health and Human Services to serve on the multi-disciplinary team, which is a panel of three experts who consider cases that come before them from the Department of Correction and make determinations as to whether those cases should go forward for civil commitment. T. p. 9.

Dr. Ball explained that as part of the Risk Assessment she performed, Mr. White came to her office in August of 2016 and met with her for four hours for a clinical interview and psychologic and sexual interest testing. App. p. 21, 58; T. p. 11, 18. The goal of interview and testing was to determine if Mr. White poses a risk sufficient to justify continued registration on the sexual offender registry. App. p. 20, 57; T. p. 18. Of the four hour assessment period, approximately an hour and a half was spent on the Abel assessment and the personality testing. T. p. 27-28. Dr. Ball's examinations included the Abel assessment and the Million Clinical Multiaxial Inventory-III ("MCMI-III"). App. p. 21, 23-25, 58, 60-62; T. p. 11-17, 51; Add. p. 4. Dr. Ball explained that the interview portion of her risk assessment includes a diagnostic clinical interview including information about the individual's history, background, family history and current stability in the community. T. p. 11. The interview includes an assessment of whether there has been any criminal activity other than the offenses at issue or any substance

abuse. T. p. 11. The testing portion of the risk assessment, Dr. Ball explained, includes two examinations – a psychological inventory that measures mental health issues, looking specifically for any sort of serious anti-social types of characteristics (MCMI-III) and a sexual interest test which measures sexual interest patterns known as the Abel assessment. T. p. 11-12. Dr. Ball explained that the risk assessment is focused on behavior post-conviction. T. p. 18-19.

Dr. Ball noted that Mr. White's criminal convictions occurred more than thirty (30) years ago, Mr. White has had no other criminal charges nor accusations of sexual misconduct since that time, he has been consistently employed since his release, he is hard working, has been in a very successful and long-standing marriage, has demonstrated no evidence of substance abuse at all, and has a serious health condition which "in some ways is a factor that mitigates his probable re-offending in any way because he's really in very poor health." T. p. 12, 26-27, 47; see also App. p. 19-27, 56-64. Dr. Ball testified that Mr. White suffers from "very high blood pressure" and that he "had heart surgery and a stent put in his heart and he has . . . serious problems with his blood pressure particularly and danger of stroke." T. p. 13. Dr. Ball testified that, upon psychological testing, she concluded that there was "no discernable mental illness or personality disorder of any sort. He seems to be a man who has some dependency needs. He is not assertive. He's really a passive gentleman. But there's nothing to diagnose him in our criteria for any kind of mental illness or personality disorder." T. p. 13; see also T. p. 44, 51-52. Dr. Ball explained that one of the personality traits exhibited by Mr. White is a self-defeating trait. App. p. 24, 61; T. p. 51-52. Dr. Ball explained that an individual who feels guilty and/or remorseful about his or her past actions would fit this category.

T. p. 51-52. As a result of the personality test (MCMI-III), Dr. Ball explained that Mr. White's results indicate that Mr. White is someone who is "somewhat avoidant, who . . . blames himself, is self-critical and sometimes feels that he's been unfairly treated by others. I think that maybe we could extrapolate here the fact that he's on this registry and he is sometimes discriminated against by the community for that reason." T. p. 42-43.

With respect to the Abel assessment, Dr. Ball testified that the assessment measures sexual interest patterns and is used as a screening tool for cases that involve a history of sexual misconduct. T. p. 13. It requires a person to complete a questionnaire and to rate 160 slides while his or her responses are recorded and analyzed. App. p. 24, 61. Dr. Ball explained: "In this case, Mr. White had some deviant interests in children. But the whole profile is somewhat questionable, and I really questioned whether the test is actually valid. So I reported those, but I'm not putting a lot of weight on that just because the profile reads a bit unusual." T. p. 13. Dr. Ball further explained that:

The test itself measures visual reaction time. The person is not aware that they're being – that's what's being assessed. But they're in front of a computer looking at photos of people. These are not pornography, but pictures of people in bathing suits and so forth. There's almost 200 photos in – of people in different ages, and then those photos are categorized by age when it's analyzed. So if the person looks at a category of photos a little bit longer, than we – from our research, we understand that they might have an interest in that particular category. So in this case, he had sort of a diverse interest in some of those photos and nothing very dramatic in any of them. So although it's – by technical standards it was valid, I question the profile and I – I'm not sure if he did not understand the instructions or what but the test was questionable and – so I didn't put as much weight on that as I might.

T. p. 14 (emphasis added); see also Add. p. 4. Dr. Ball opined that the particular test was not needed for her assessment in light of all of the other aspects of Mr. White's assessments including his history of thirty years of good citizenship. T. p. 14; App. p. 25,

62. Dr. Ball testified that no one test is infallible and she felt Mr. White's other results and personal attributes outweighed this portion of the Abel assessment results. T. p. 14-15, 47.

Dr. Ball further explained that Mr. White scored quite low on the cognitive distortion scale. T. p. 15. The cognitive distortion scale involves, in addition to looking at photos, a lengthy sexual history questionnaire asking about, among other things, fantasies and behaviors. T. p. 15. One of the scales measures attitudes of people who have been known to engage in sexual activity with children. T. p. 15. Dr. Ball explained that the cognitive distortion scale is used to determine if a person harbors attitudes that sexual offenders tend to harbor. T. p. 15. Dr. Ball explained that if the cognitive distortion scale is high, it means the person does harbor those attitudes and beliefs. T. p. 15. If the cognitive distortion scale is low, that means the person does not. T. p. 15. With respect to questions presented on the scale to determine if a person justifies his/her prior conduct, Mr. White scored very low meaning that he did not attempt to justify his conduct. T. p. 15-16. Dr. Ball testified that Mr. White's score on the cognitive distortion scale was twelve percent (12%). T. p. 46; App. 24-25, 61-62. Dr. Ball explained that this score is not "problematic". App. p. 25, 62; T. p. 46-47, 93.

Overall, Dr. Ball noted that within the Abel assessment, the two portions – visual reaction time and the cognitive distortion scale – were inconsistent within the assessment. T. p. 16. Dr. Ball explained that the assessments are used as one data point in a number of factors she considers in making a determination of whether a person has a likelihood to re-offend. T. p. 20. Dr. Ball concluded that, upon conducting the interview and psychological testing, "Mr. White is at a very low risk to re-offend." T. p. 16-17; see also

App. p. 26, 63. Dr. Ball added, “[g]iven his age, his health and he has 30 years of pro-social behavior in the community, *I don’t believe he is any serious risk and it’s probably not even a discernable risk.*” T. p. 17 (emphasis added). Dr. Ball indicated that, “this is the lowest risk that [she] can express.” T. p. 17.

Dr. Ball testified, in her professional opinion, Mr. White is currently at minimal risk of reoffending and is not a danger to the public. App. p. 26, 63; T. p. 16-17. Dr. Ball testified that she based her professional opinion on a variety of information, including, but not limited to, assessments she performed on Mr. White and interviews with him. T. p. 16-17, 26-27. Dr. Ball’s analysis included consideration of the fact that, since his conviction, Mr. White has maintained long-term and healthy relationships, has remained in a long-term and healthy marriage, has maintained steady employment, and has not reoffended. App. p. 19-27, 56-64; T. p. 12, 16-17. Dr. Ball further testified that other significant factors in her analysis included the fact that Mr. White has high blood pressure and a heart condition, has had major heart surgery, and that he is required to carry nitroglycerin with him at all times. T. p. 12-13. Dr. Ball further offered that Mr. White’s age was a factor in analyzing the risk of recidivism, and stated that the recidivism rate for offenders such as Mr. White is nearly zero by age 60. App. p. 25-27, 62-64; T. p. 16-17, 33, 47. Mr. White was 60 years old, nearing age 61, at the time of the hearing. App. p. 20, 57; T. p. 53-54, 73.

Mr. White testified regarding his crime, his convictions, his health issues, the impact that lifetime sex offender registration has had on his life, and his life post-conviction. See generally T. p. 53-86. With respect to his health issues, Mr. White indicated that he has been diagnosed with high cholesterol, suffers from high blood

pressure for which he must take four different medications including nitroglycerin, which he must keep on his person at all times, and for which he has a ventilator, and that he had a “blockage underneath the oxygen part of [his] heart” and has had a stent put into his heart. T. p. 55. Mr. White testified that he is presently employed part-time with Enterprise and that, prior to working for Enterprise, Mr. White worked at Winco Identification Corporation for twenty-six years, leaving that employment due to his heart condition. T. p. 62-63, 73-74, 84-85. Mr. White testified that he has been married to his current wife since 1993. T. p. 64, 78. With respect to his criminal conduct, Mr. White explained that his convictions resulted from over-the-clothing touching of his daughter. T. p. 65, 72; App. p. 23, 60. Mr. White testified that he is very emotional and overcome with shame and guilt as a result of his conduct, that his parental rights over his children were terminated as a result thereof, and that, although he wishes he could make amends, he has stayed away from the victim and much of his family since the time of the crimes. T. p. 65-66. Mr. White testified that, apart from working, he assists his wife with shopping, enjoys golf and bicycling. T. p. 77, 94. Mr. White explained that since his conviction over thirty years ago, his goal in life has been to be a model citizen and to do the right thing. T. p. 66-67. Mr. White testified that he believes removal from the sexual offender registration requirements would assist him in that regard. T. p. 67. Mr. White further explained that his requirement to register as a sexual offender has impacted his ability to find housing and has caused him emotional turmoil. T. p. 65-68.

The court ultimately concluded that Mr. White had failed to meet his burden under RSA 651-B:6 and denied Mr. White’s Petition. Add. p. 4; see generally Add. 1-5.

SUMMARY OF ARGUMENT

The trial court's denial of Mr. White's Petition for Relief from the Registration Requirements of RSA 651-B:6 constitutes an unsustainable exercise of discretion warranting reversal and remand. First, the trial court failed to understand the statutory grounds upon which Mr. White sought relief, noting in the record that she believed relief was not afforded to Tier III sexual offenders. See T. p. 61. Next, the trial court failed to give due weight to the uncontroverted expert testimony of Dr. Carol Ball, and impermissibly supplanted her own unqualified judgment as to the interpretation of psychological exams for that of the qualified examining expert. The trial court further relied on a flagrant mischaracterization of Dr. Ball's analysis and conclusions in denying the Petition, specifically stating that Dr. Ball had not identified whether Mr. White's score on the cognitive distortion scale was "problematic" when, in fact, Dr. Ball had specifically articulated in her report that Mr. White's score was not problematic. The trial court relied on this mischaracterization and made its own finding that the score was "at minimum, somewhat problematic." Add. p. 4-5. The trial court additionally considered acquitted conduct in making its determination of whether Mr. White had satisfied the requirements of RSA 651-B:6 and improperly faulted Mr. White for his inability to produce records which were no longer in existence due to the passage of time. The trial court's ruling should therefore be reversed and remanded.

ARGUMENT

I. **THE TRIAL COURT UNSUSTAINABLY EXERCISED ITS DISCRETION IN DENYING MR. WHITE'S PETITION FOR RELIEF FROM THE REGISTRATION REQUIREMENTS OF RSA 651-B:6**

In Doe v. State, 167 N.H. 382, 411-12 (2015), this Court held that certain offenders whose sexual offenses predated the establishment of the New Hampshire sexual offender registry may be subject to the registration requirements only if they are afforded an opportunity to demonstrate that they no longer poses a risk sufficient to justify continued registration. In Doe, this Court left it to the “legislature, or to the department of safety, to fashion, by statute or by regulation, the particulars of the hearing process, with the caveat that the hearing must be conducted with reasonable promptness and must meet standards of fundamental fairness.” Id. at 412; T. p. 7-8. In response to this Court’s invitation, the legislature amended RSA 651-B:6 to include paragraph V, outlining the process for tier II and III offenders, convicted prior to the establishment of the sex offender registry in New Hampshire, to seek relief from the registration requirements of RSA 651-B:6. See T. p. 61.

Pursuant to RSA 651-B:6, V, Petitions for relief from the registration requirements of RSA 651-B:6 must include “the petitioner’s current address and information about each conviction for which he or she is required to register, including the nature of the offense, the sentence imposed, and the court and the jurisdiction in which the petitioner was convicted.” RSA 651-B:6, V(a). The petition must be accompanied by a certified copy of the petitioner’s criminal history record from each jurisdiction in which he or she is required to register. Id. The petition “shall not be filed prior to the completion of all the terms and conditions of the sentence, including any

period of supervised release.” Id. The petition must “also be accompanied by a risk assessment prepared by a qualified psychiatrist or psychologist at the offender’s expense, which indicates that the petitioner is not a danger to the public and no longer poses a risk sufficient to justify continued registration.” Id. Prior to granting any petition to relieve an offender from the registration requirements of RA 651-B:6, the court is to hold a hearing on the petition and provide notice of the hearing to the county attorney, the department of safety sex offender unit, and the department of corrections. RSA 651-B:6, V(b). The county attorney shall use reasonable efforts to notify the victim or victim’s family, and the court must permit those individuals to be heard on the petition if they so choose. Id. The victim may appear personally, or through a representative, or may provide a written statement expressing his or her views concerning the offense, the petitioner, and the need for maintaining the registration requirement. Id. Statements of the victim are to be considered in making a decision regarding the petition. Id.

The “court may grant the petition if the offender has not been convicted of any subsequent offense requiring registration, has successfully completed any period of supervised release, probation, or parole, has successfully completed an appropriate sex offender treatment program as determined by the court, and has demonstrated that he or she is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration.” RSA 651-B:6, V(c). If the petition is denied, the offender shall not file again for 5 years from the denial. Id.

The court reviews decisions of the trial court on an “unsustainable exercise of discretion” standard. State v. Lambert, 147 N.H. 295, 296 (2001). “To show that the trial court’s decision is not sustainable, ‘the defendant must demonstrate that the court’s

ruling was clearly untenable or unreasonable to the prejudice of his case.” Id. (citing State v. Johnson, 145 N.H. 647, 648 (2000)); RAL Auto. Grp., Inc. v. Edwards, 151 N.H. 497, 499 (2004); State v. Elementis Chem., Inc., 152 N.H. 794, 800 (2005); In re Peirano, 155 N.H. 738, 750 (2007); Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 210 (2009); State v. Davidson, 163 N.H. 462, 472 (2012); Axenics, Inc. v. Turner Constr. Co., 164 N.H. 659, 669 (2013). “To be reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party.” RAL Auto. Grp., 151 N.H. at 499 (citing Arcidi v. Town of Rye, 150 N.H. 694, 704 (2004)). In considering whether there is an unsustainable exercise of discretion, the Court is “really deciding whether the record establishes an objective basis sufficient to sustain the discretionary judgment made.” Elementis Chem., 152 NH at 800. In determining matters of equity, the trial court must exercise its discretion “not in opposition to, but in accordance with established principles of law.” Clapp, 159 NH at 210 (citations and quotations omitted).

Here, the trial court unsustainably exercised its discretion in denying Mr. White’s Petition for Relief from the Registration Requirements of RSA 651-B:6. Mr. White appropriately filed his Petition containing all of the statutory requirements pursuant to RSA 651-B:6, V. Specifically, Mr. White’s Petition included his current address, information about his convictions for which he is required to register, including the nature of the offense, the sentence imposed and the court and jurisdiction in which he was convicted. App. p. 7-10, 44-47. The Petition was accompanied by a certified copy of Mr. White’s criminal history record from each jurisdiction in which he is required to register. App. p. 17, 54. The Petition was filed after the completion of all the terms and

conditions of his sentence, including any period of supervised release, and was accompanied by a risk assessment prepared by a qualified psychologist, Dr. Ball, which indicates that he is not a danger to the public and no longer poses a risk sufficient to justify continued registration. App. p. 7-36, 44-73. The county attorney made appropriate efforts to reach the victim, and a hearing was held on the matter. T. p. 3-5; see generally T. p. 1-97. Mr. White presented the testimony of Dr. Ball, a qualified psychologist who had performed an appropriate risk assessment and concluded that he is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration. T. p. 9-53. Evidence presented by Mr. White was uncontroverted. The evidence before the trial court established that Mr. White “has not been convicted of any subsequent offense requiring registration, has successfully completed any period of supervised release, probation, or parole, has successfully completed an appropriate sex offender treatment program as determined by the court, and has demonstrated that he . . . is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration.” See RSA 651-B:6, V(c); see generally T. p. 1-97; App. 1-103.

Not only did Mr. White meet each and every statutory requirement for relief, he presented uncontroverted evidence thereof, and the State, while arguing that Mr. White could not meet his burden, failed to file an Objection to the Petition and failed to present any evidence which would contradict or call into question the evidence presented by Mr. White.

A. The Court Failed to Understand the Statutory Relief Afforded by RSA 651-B:6

At the outset, it should be noted that the trial court held a fundamental misunderstanding of the statutory criteria under which Mr. White sought relief at the time

of the hearing. T. p. 60-62, 69. Specifically, the court stopped Mr. White's direct examination and called counsel to the bench upon Mr. White testifying that he is presently required to register as a Tier III sexual offender in the State of New Hampshire. T. p. 59-60. The court noted her understanding that relief was not available to Tier III offenders, "unless they've changed the statute". T. p. 60. Counsel for Mr. White explained to the court that after this Court's decision in Doe, the legislature enacted RSA 651-B:6, V to afford an avenue for relief to those sexual offenders whose offenses predated the enactment of the sex offender registry in the State of New Hampshire. T. p. 61, 94-95. The court replied "All right. Thank you. State budget doesn't allow for the new Criminal Code. I'll have to look into that." T. p. 61. When Mr. White's counsel offered to provide a copy of the statute to the court, the court declined. T. p. 69. It should be noted that Mr. White's Petition specifically and repeatedly referenced his request for relief pursuant to RSA 651-B:6, V. App. p. 7-10, 44-47. Further, the court declined to accept a Request for Findings of Fact and Rulings of Law prepared by Mr. White's counsel which would have again articulated the appropriate statutory criteria for the court. T. p. 95. While, in and of itself, it is troubling that the court was unaware of the statutory provisions under which Mr. White had sought relief prior to trial, it is more so alarming that the trial court failed to apply the appropriate statutory criteria and analysis to this case in issuing its ruling.

B. The Trial Court Erred in Failing to Give Due Weight to the Testimony and Report of Petitioner's Expert, Dr. Carol Ball, and in Relying on a Misinterpretation of Dr. Ball's Report to Deny Mr. White's Petition

The trial court unsustainably exercised its discretion when it failed to give due weight to the testimony and report of Petitioner's expert, Dr. Carol Ball, and in relying on

a misinterpretation of Dr. Ball's testimony and report in its ruling. In denying Mr. White's Petition, the trial court appeared to discredit the testimony of Dr. Ball despite having no evidence in the record to challenge or contradict her conclusions. See Add. p. 4 (trial court questioning Dr. Ball's decision to give little weight to outlier results rather than re-administer or administer alternative tests). The trial court further mischaracterized and misinterpreted Dr. Ball's testimony and report in rendering its ruling.

i. The Trial Court's Ruling Resulted From a Mistake of Fact

In denying Mr. White's Petition, the trial court wrote:

Second, on the Cognitive Distortion Scale – a test that measures “beliefs and attitudes often held by men who justify their sexual behavior with underage [children]” – petitioner scored a twelve (12) percent . . . Although Dr. Ball indicated a score of over forty (40) percent was “highly problematic,” **she did not testify what range of scores would lead to an individual being labeled as “problematic” or “somewhat problematic.”** . . . When considered in combination with his Ab[el] Assessment results, **the Court finds petitioner's twelve percent score is, at minimum, somewhat problematic.**

Order, p. 3-4 (Emphasis added).

Dr. Ball's report however states:

On the Cognitive Distortion Scale, a scale that measures beliefs and attitudes often held by men who justify their sexual behavior with underage males or females, Mr. White's score was 12%. A score of 40% or above is in the “highly problematic” range. **Mr. White's score is not considered to be problematic.**

App. p. 24-25, 61-62 (Emphasis added); T. p. 46-47, 93. Dr. Ball clearly analyzed Mr. White's score on the Cognitive Distortion Scale and indicated that it was not “problematic”. App. p. 24-25, 61-62; T. p. 46-47, 93. Further, to the extent that the trial court questioned this conclusion, Mr. White's counsel brought to the court's attention,

and clarified for the record, that Dr. Ball had made this finding. T. p. 87, 93.

Specifically, the trial court had stated on the record in reference to the meaning of a score of forty percent on the cognitive distortion scale, “I believe she [Dr. Ball] said [40% is] highly problematic. We don’t know what problematic is.” T. p. 87. Mr. White’s counsel specifically pointed the court to Dr. Ball’s report noting, “[t]here was some argument in the Prosecutor’s closing argument . . . that his cognitive distortion scale was at 12 percent and a score of 40 is highly problematic. *The next sentence there actually says that Mr. White’s score is not considered to be problematic. That was the finding of the test.*” T. p. 92-93. This evidence was uncontroverted. The State did not call an expert witness to challenge this evidence, nor to challenge Dr. Ball’s analysis of the scores on assessments she performed. The trial court rather supplanted its own unqualified judgment on what the score meant for the judgment of a qualified professional.

It is clear that the trial court’s ruling resulted, in part, from a glaring mistake of fact. The court relied upon, as fact, that the Petitioner’s expert had not opined as to whether his score of 12% on the cognitive distortion scale was considered problematic when, in fact, Dr. Ball had specifically indicated that Mr. White’s score was not problematic. App. p 25, 62; T. p. 46-47, 93; Add. p. 4-5. Under these circumstances, the trial court’s ruling was clearly untenable or unreasonable to the prejudice of his case, and must be reversed and remanded. See Lambert, 147 N.H. at 296; RAL Auto. Grp., 151 N.H. at 499.

ii. The Trial Court Failed to Credit the Uncontroverted Testimony of Dr. Ball

In addition to mischaracterizing Dr. Ball’s report, testimony, conclusions and findings, the trial court failed to consider Dr. Ball’s testimony regarding the other

considerations in her analysis and findings. Namely, the trial court failed to consider that Mr. White has demonstrated longstanding stability in the community. App. p. 19-27, 56-64; T. p. 11-12. The trial court did not consider Dr. Ball's analysis that Mr. White has maintained long-term and healthy relationships, has remained in a long-term and healthy marriage, has maintained steady employment, and has not reoffended – all factors Dr. Ball indicated had contributed to her ultimate conclusion that Mr. White is at a minimal risk to reoffend and therefore does not warrant continued listing on the sex offender registry. See generally App. p. 19-27, 56-64; T. p. 12-13, 16-19, 26-27, 47, 92.

C. The Trial Court Erred in Substituting Its Own Unqualified Judgment For The Uncontroverted Testimony Of Dr. Ball And Relied On Facts Outside Of The Evidentiary Record

The trial court's reliance on facts outside of the evidentiary record and its substitution of judgment for that of a qualified expert constitutes an unsustainable exercise of discretion warranting reversal of the court's ruling and remand.

The trial court not only failed to credit Dr. Ball's testimony that Mr. White's poor health makes him less likely to reoffend, but also substituted her judgment for that of the uncontroverted testimony of Petitioner's expert witness. Add. p. 5. Specifically, the trial court wrote, "While Dr. Ball also testified that [P]etitioner's poor health makes him less likely to reoffend, *the Court is unpersuaded. Petitioner appeared to be in good health at the hearing* and testified that he has numerous hobbies, including active ones, such as golf and bicycle riding." Add. p. 5, fn. 4.

Generally, the Court is guided by the rule that "the trier of fact is in the best position to measure the persuasiveness and credibility of evidence and is not compelled to believe even uncontroverted evidence . . . Furthermore, it [is] within the discretion of the trial judge to resolve conflicts in the evidence. The trial court could accept or reject

such portions of the evidence presented as [it finds] proper, including that of the expert witnesses." DeLuca v. DeLuca, 152 N.H. 100, 102 (2005) (citations and quotations omitted); State v. Dodds, 159 N.H. 239, 247 (2009) (“[a]s the trier of fact, the jury [is] in the best position to measure the persuasiveness and credibility of evidence and [is] not compelled to believe even uncontroverted evidence.”). While the court is not bound to accept evidence simply because it is uncontroverted, it may not go outside of the evidentiary record and insert evidence into the record. See In re Rokowski & Rokowski, 168 N.H. 57, 61 (2015) (noting that a trial court “cannot go outside of the [evidentiary] record except as to matters judicially noticed . . . Doing so is ‘inconsistent with the established role of the trial court in adversary litigation.’”); Morse v. Allen, 45 N.H. 571, 572 (1864); see In re Schrag, 464 B.R. 909, 914 (Bankr. D. Or. 2011) (“It is a basic principle of jurisprudence . . . that the court may not introduce its own evidence into a proceeding.”). In Rokowski, this Court ruled that the lower court had erred in relying on its own internet research on Zillow.com to ascertain the value of a martial home and determine a valuation date in a divorce proceeding. In re Rokowski & Rokowski, 168 N.H. 57, 59, 61 (2015). The Court explained that:

It is axiomatic that a trial court cannot go outside of the [evidentiary] record except as to matters judicially noticed . . . Doing so is inconsistent with the established role of the trial court in adversary litigation . . . Under New Hampshire Rule of Evidence 201, the circumstances under which a judge may judicially notice a fact are limited . . . Under Rule 201, [a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Id. at 61 (citation and quotations omitted). The Court concluded that Zillow's "Zestimate" is not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id.

Here, the trial court substituted its own, unqualified judgment of Mr. White's health, based solely upon observation in one isolated court proceeding, for the uncontroverted judgment of a qualified professional who had worked extensively with Mr. White in determining that his poor health makes him less likely to reoffend. The court further disregarded Mr. White's own testimony as to his health issues. The trial court introduced its own observations of Mr. White into the determination of whether he has met the statutory requirements for relief, thus relying on evidence outside of the evidentiary record. The trial court's consideration of facts outside of the evidentiary record is erroneous and constitutes an unsustainable exercise of discretion warranting reversal. The trial court's observations, like the Zillow "Zestimate" at issue in Rokowski "is not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id. at 61.

The State did not present an opposing expert to challenge Dr. Ball's assessments or contradict her conclusions. The trial court relied on its own observations of Mr. White which were not properly part of the evidentiary record. It is untenable for a judge to substitute her own judgment on the health of a witness in the face of the testimony of the witness and the testimony of a qualified professional. The trial court further failed to consider uncontroverted testimony that Mr. White has high blood pressure and a heart condition, has had major heart surgery, and that he is required to carry nitroglycerin with him at all times – considerations which Dr. Ball included in her analysis and findings. T.

p. 13. The trial court wholly disregarded this testimony despite having no evidence in the record to the contrary, and used its own observations – much like the research in Rokowski – to discredit the sworn testimony of a qualified expert.

The trial court further failed to consider Dr. Ball’s analysis of Mr. White’s age as a factor in analyzing the risk of recidivism and the research she cited on this point. Dr. Ball’s report notes that “by age 60 the recidivism rate for child molesters such as Mr. White was nearly zero.” App. p. 26, 63; see also T. p. 11-13. The Court made no mention of this in its Order and disregarded Dr. Ball’s testimony on this point. The trial court’s reliance on its own observations outside of the evidentiary record over the uncontroverted testimony of an expert witness was “clearly untenable or unreasonable to the prejudice of his case”. Lambert, 147 N.H. at 296; RAL Auto. Grp., 151 N.H. at 499. The ruling must therefore be reversed and remanded.

D. The Trial Court Erred in Improperly Considering Acquitted Conduct

During the Hearing, questioning by State was allowed regarding the charge of Rape of a Child, for which Mr. White was acquitted. T. p. 21-24, 56, 70-72. Mr. White’s counsel clarified for the record that Mr. White had been charged with, but not convicted of, the Rape of a Child offense, however questioning by the State was allowed to continue on this point. T. p. 22, 56, 70-72. The court stated on the record that the allegations, for which Mr. White was acquitted, “[were] relevant to the Court’s determination.” T. p. 22. While the trial court was careful to note that Mr. White had not been convicted of that charge and that it would be improper to consider such charges as any kind of propensity evidence, the court’s Order appears to rely on this charge in making a determination that Mr. White had failed to meet his burden to demonstrate that he no longer poses a risk sufficient to warrant continued registration. Add. p. 2; see also

T. p. 89. Specifically, the Court noted in its Order that Mr. White had also been “charged with, but acquitted of, having nonsexual sexual intercourse with his daughter, who at the time, was under the age of sixteen.” Add. p. 2.

The trial court’s role in considering whether to grant or deny petitions for relief pursuant to RSA 651-B:6, V is to determine whether the petitioner has demonstrated that he or she is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration. See RSA 651-B:6. This Court has not delineated which factors the trial court may properly consider in making such a determination. Mr. White contends that it was error for the trial court to consider his acquitted conduct in assessing whether he has met the requirements for relief from the registration requirements of RSA 651-B:6, V. Specifically, it was error to allow the State to pose questioning on conduct for which Mr. White had been acquitted and to consider such evidence in making a determination as to whether Mr. White had satisfied his burden under RSA 651-B:6.

Whether acquitted conduct may properly be considered by the trial court in considering whether a petitioner has sufficiently demonstrated that he or she is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration has not been answered by this Court. This Court has however indicated that a trial court may not consider criminal conduct for which the defendant was acquitted for purposes of sentencing. State v. Cote, 129 N.H. 358, 376 (1987); see also State v. Gibbs, 157 N.H. 538, 540 (2008). The Court has explained that:

it [is] disingenuous at best to uphold the presumption of innocence until proven guilty, a principle that is axiomatic and elementary, and [whose] enforcement lies at the foundation of the administration of our criminal law, . . . while at the same time punishing a defendant based upon charges in which that presumption has not been overcome.

The presumption is not a presumption of not guilty or guilty only by a preponderance. It is a presumption of *innocence*, and innocence means *absence* of guilt.

Cote, 129 N.H. at 375 (internal citations and quotations omitted)(emphasis in original).

The Court has further articulated a difference between situations in which acquitted conduct is considered for a punitive purpose, such as sentencing, and those situations in which acquitted conduct is considered to make an independent judgment of compliance, such as imposition of a suspended sentence. See Gibbs, 157 N.H. at 540-41. The consideration of Mr. White's acquitted conduct in this instance was punitive and erroneous. The trial court's ruling should be reversed and remanded.

E. The Trial Court Improperly Considered That Mr. White's Testimony Could Not Be Corroborated With Records

In its Order the trial court wrote: "Petitioner represented that during his parole he successfully completed a sex offender treatment program . . . because of the passage of time, there are no probation records available to corroborate Petitioner's representation." Add. p. 2. The trial court further appeared to take issue with Mr. White's inability to produce documentary evidence of his sexual offender treatment program and parole records - records in excess of 25 years - during the Hearing, inquiring as to what efforts were made to locate the records. T. p. 90-91. In Doe, this Court held that certain offenders whose sexual offenses predated the establishment of the sexual offender registry may be subject to the requirements only if they are afforded an opportunity to demonstrate that they no longer poses a risk sufficient to justify continued registration. 167 N.H. at 411-12. In response to Doe, RSA 651-B:6, V sets forth the procedure for such a person to seek removal from the registry. The legislature, in enacting the statute, as well as this Court in Doe, surely contemplated that if it was only applicable to those

offenders whose offenses predated the enactment of the registry, records would be unavailable for several offenders/potential petitioners. Consideration of Mr. White's inability to produce records which were no longer in existence was error. Mr. White had testified to the completion of the terms of his sentence and sexual offender treatment and provided a sworn affidavit to the court indicating as much. The court further failed to consider that Mr. White's testimony had to have been accurate in light of his criminal history. Mr. White's record noted no parole violations. App. p. 9; T. p. 90-92.

CONCLUSION

In this case the uncontroverted evidence presented to the trial court demonstrated that Mr. White is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration. The record before the trial court does not establish an objective basis sufficient to deny statutory relief to Mr. White. In this case the trial judge did not rely on objective evidence to deny the Petition. Rather, the trial court substituted her own unqualified opinion that was based on a misunderstanding of both the psychological science and the law to deny the Petition. The trial court was simply wrong in its interpretation of the cognitive distortion test where the only expert psychologist to testify said that Mr. White's score was not "problematic." Additionally the trial court, without psychological authority, chose to second-guess the only expert to testify for not re-performing portions of the psychological test to which the expert, in her judgment, accorded little weight. There was no objective basis for the trial judge to make such a finding.

In Doe, this Court invited the legislature to "to fashion, by statute or by regulation, the particulars of the hearing process, with the caveat that the hearing must be

conducted with reasonable promptness and must meet standards of fundamental fairness.” Doe, 167 N.H. at 412. The legislature responded by enacting RSA 651-B: V. In drafting the statute, consistent with the requirement of fundamental fairness, the legislature specifically provided that a risk assessment must be prepared by a qualified psychiatrist or psychologist. Dr. Ball was the only qualified person to testify. Her testimony was neither rebutted nor controverted. In this case the trial judge eviscerated the concept of fundamental fairness by substituting her own unqualified opinions for the considered study and judgment of an expert who held qualifications required by the statute. See RSA 651-B:V. This is an unsustainable exercise of discretion.

Because there is no objective basis for the trial court’s ruling, denial of the Petition was an unsustainable exercise of discretion. The trial court’s Order must be REVERSED and REMANDED with instructions to grant the requested relief.

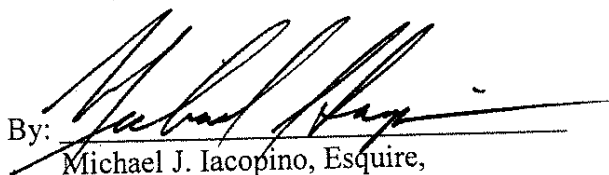
REQUEST FOR ORAL ARGUMENT

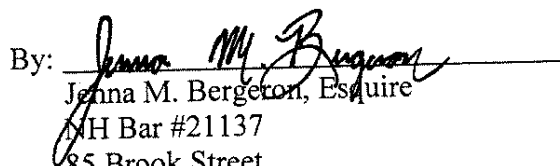
Mr. White requests fifteen (15) minutes for oral argument. Michael J. Iacopino (N.H. Bar 1233) will argue for Mr. White.

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

Respectfully submitted,
Edward White, Appellant
By and through his attorneys,
Brennan, Lenehan, Iacopino & Hickey

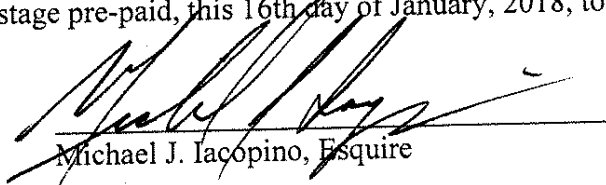
Dated: January 16, 2018

By: 
Michael J. Iacopino, Esquire,
NH Bar #1233
85 Brook Street
Manchester, NH 03104
(603) 668-8300

By: 
Jenna M. Bergeton, Esquire
NH Bar #21137
85 Brook Street
Manchester, NH 03104
(603) 668-8300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief, and the Appendix thereto, have been mailed, first-class, postage pre-paid, this 16th day of January, 2018, to Dianne Martin, Esquire.


Michael J. Iacopino, Esquire

APPELLANT'S ADDENDUM TO BRIEF

Trial Court's May 31, 2017 Notice of DecisionAdd. 1
Trial Court's May 31, 2017 Order (Abramson, J.).....Add. 2

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

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

May 31, 2017

FILE COPY

Case Name: In the Matter of Edward White
Case Number: 216-2016-CV-00902

You are hereby notified that on May 31, 2017, the following order was entered:

RE: FINAL ORDER:

See Order attached. (Abramson, J)

W. Michael Scanlon
Clerk of Court

(849)

C: Hillsborough County Attorney's Office; Department of Safety; Department of Corrections; Michael J. Iacopino, ESQ

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

Edward White

v.

State of New Hampshire

Docket No. 216-2016-CV-00902

ORDER

Petitioner, Edward White, brings the instant petition seeking to be relieved of his duty to register as a sexual offender in the State of New Hampshire. The State objects. The Court held a hearing on April 25, 2017, at which it heard the testimony of clinical psychologist Carol J. Ball and petitioner. After consideration of the arguments, pleadings, and the applicable law, the Court finds and rules as follows.

In 1985, petitioner was convicted in Plymouth, Massachusetts of two counts of indecent assault and battery. (Hr'g Ex. B.) The charges arose from allegations that petitioner sexually assaulted his eight-year-old daughter.¹ Petitioner served three years in the Billerica House of Corrections and was subsequently placed on parole in May 1988. (Id. at 1, p. 2.) Petitioner represented that during his parole he successfully completed a sex offender treatment program.² (Id.) On January 1, 1994, petitioner, as a New Hampshire resident, became subject to lifetime registration as a sexual offender for the foregoing convictions. see RSA 632-A:11-:19 (1993) (repealed and recodified at

¹ Petitioner was also charged with, but acquitted of, having nonconsensual sexual intercourse with his daughter, who at the time, was under the age of sixteen.

² Because of the passage of time, there are no parole records available to corroborate petitioner's representation.

RSA 651-B:1-12 by Laws 1996, 293:2), and was later classified as a Tier III offender, see Laws 2008, 334:1.

In Doe v. State of New Hampshire, 167 N.H. 382 (2015), the New Hampshire Supreme Court held that Tier II and III offenders whose sexual offenses predated the establishment of the sexual offender registry—such as petitioner—may be subject to its requirements *only if* they are afforded an opportunity to demonstrate that they no longer pose a risk sufficient to justify continued registration. Prompted by the foregoing, the legislature recently enacted RSA 651-B:6, V, which reads, in pertinent part, as follows:

(a) Any tier II or tier III offender who was convicted prior to the establishment of the sex offender registry may petition the [C]ourt to be relieved from the registration requirements. . . . The petition shall be accompanied by a certified copy of the petitioner's criminal history . . . [and] a risk assessment prepared by a qualified psychiatrist or psychologist at the offender's expense, which indicates that the petitioner is not a danger to the public and no longer poses a risk sufficient to justify continued registration.

(b) . . . The victim may appear personally, or through a representative, or may provide a written statement expressing his or her views concerning the offense, the person responsible, and the need for maintaining the registration requirement. The [C]ourt shall consider the statements of the victim when making a decision regarding the petition.

(c) The [C]ourt may grant the petition if the offender has not been convicted of any subsequent offense requiring registration, has successfully completed any period of supervised release, probation, or parole, has successfully completed an appropriate sex offender treatment program as determined by the court, and has demonstrated that he or she is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration.

Petitioner maintains the instant petition pursuant to this provision, asserting that he no longer poses a risk sufficient to justify continued registration. As indicated above, the Court held a hearing on April 25, 2017, at which it heard the testimony of Dr. Ball, who opined that petitioner "is currently a minimal risk to reoffend and therefore does not

meet criteria for continued listing on the Sex Offender Registry." (Hr'g Ex. 1, p. 8.) In arriving at her conclusion, Dr. Ball considered petitioner's background and administered two tests aimed at assessing petitioner's personality and sexual interests.³

As a preliminary matter, the Court notes that in her testimony, Dr. Ball questioned the validity and reliability of the tests she administered to petitioner. However, rather than re-administering the tests or administering alternative tests, Dr. Ball testified that she instead gave the test results little weight in arriving at her conclusion. Nevertheless, because the Able Assessment and the MCMI-III were the only tests administered to petitioner to evaluate his personality and sexual interests, the Court will consider the results in determining whether petitioner has met his burden.

After review of the foregoing and all of the evidence presented, the Court finds petitioner has failed to meet his burden under RSA 651-B:6. First, the Able Assessment, which is designed to gauge an individual's sexual interests, showed that petitioner has a sexual interest in prepubescent females. (Id. at 6.) This test result is especially troubling given petitioner's 1985 conviction arose from the sexual assault of his daughter who, at the time, was a prepubescent female. Second, on the Cognitive Distortion Scale—a test that measures "beliefs and attitudes often held by men who justify their sexual behavior with underage [children]"—petitioner scored a twelve (12) percent. (Id. at 6–7.) Although Dr. Ball indicated a score of over forty (40) percent was "highly problematic," she did not testify what range of scores would lead to an individual being labeled as "problematic" or "somewhat problematic." (Id. at 7.) When considered

³ The assessment tests administered were the Millon Clinical Multiaxial Inventory-III ("MCMI-III") and the Able Assessment of Sexual Interest ("Able Assessment").


in combination with his Able Assessment results, the Court finds petitioner's twelve percent score is, at minimum, somewhat problematic.⁴

Therefore, given the above test results, the Court finds petitioner has failed to demonstrate that he is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration. Accordingly, his petition is DENIED.

SO ORDERED.

5/31/17

Date



Gillian L. Abramson
Presiding Justice

⁴ While Dr. Bal. also testified that petitioner's poor health makes him less likely to reoffend, the Court is unpersuaded. Petitioner appeared to be in good health at the hearing and testified that he has numerous hobbies, including active ones, such as golf and bicycle riding.