THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0031

The State of New Hampshire

v.

Edward G. Proctor

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(3JX Argument)

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1. Was the evidence that the defendant undertook employment involving the care, instruction, or guidance of a juvenile sufficient, where the defendant, having accepted a landscaping job, employed the juvenile to assist him?

2. Was the jury instruction correct, where, taken in the context of the instructions, the court instructed the jury to determine whether the defendant "directly entered into an employment relationship with a minor child in which the Defendant was responsible for the supervision or management of the minor"?

3. Is RSA 632-A:10 unconstitutionally vague on its face or as applied, where the defendant knew that he was not allowed unsupervised contact with a juvenile, where he hired a juvenile and had unsupervised contact with him, and where the statute prohibited, in part, the defendant from undertaking "employment or volunteer service involving the care, instruction or guidance of minor children."

STATEMENT OF THE CASE

The Rockingham County grand jury indicted[1] the defendant with one count of violating RSA 632-A:10, I (2016) (amended 2017). Tr.: 9-10; DBA: A20.[2] After a one-day trial held on October 31, 2017, the jury returned a verdict of guilty. Tr.: 109-11. The court (*Delker*, J.) sentenced the defendant to between five and ten years of imprisonment, suspending two years of the minimum sentence and four years of the maximum sentence. DBA: A68. The suspended sentences were suspended for ten years from the defendant's release. DBA: A68.

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[1] According to the trial court's order, the defendant was charged with two counts of violating RSA 632-A:10, but one of the charges was dismissed by the State. *See* DBA: A1 n.1.

[2] "DB:_" refers to the defendant's brief and page number. "DBA:_" refers to the appendix to the defendant's brief and page number. "Tr.:_" refers to the trial transcript and page number. Other hearings are identified by the date, followed by "Tr.:" and the page number.

STATEMENT OF FACTS

A. The State's Case

The defendant is a convicted sex offender and, as such, was required to report to the Deerfield Police Department four times a year. Tr.: 44. When he reported to the department, he was required to initial questions and sign a form kept by the department. Tr.: 42. Among the sections that the defendant was required to initial, according to the department's administrative assistant, was the following:

> "I cannot undertake employment or volunteer service involving the care, instruction" … "or guidance of minor children, including, but not limited to service as a teacher, a coach, or a worker of any type in child athletics, a daycare worker, a boy or girl scout master, or leader, or worker, a summer camp counselor, or a worker of any type, a guidance counselor, or a school administrator of any type."

Tr.: 45 (quotation marks in original). Further, when the defendant was placed on parole, he signed a "prohibition of childcare services," pursuant to RSA 632-A, as well as an acknowledgment that his conditions of parole included no unsupervised contact with minors. Tr.: 57, 59.

The juvenile met the defendant in February 2016. Tr.: 30. At the time they met, the juvenile was 16. Tr.: 30. The two met through a neighbor in Hooksett who had hired the defendant to clear the neighbor's driveway. Tr.: 30. The defendant, who lived in Deerfield, did not want to drive to Hooksett "every time it snowed," so he hired the juvenile to do it for him. Tr.: 30-31.

In May 2016, the defendant hired the juvenile to help him with yard work. Tr.: 31. The defendant usually gave the juvenile a ride from his home in Hooksett. Tr.: 32. According to the juvenile, they drove to "one of [the defendant's] friend's businesses and [they] filled in potholes, pulled weeds, and laid down bark mulch basically." Tr.: 31. Although the juvenile had previously done yardwork, he said that he had never filled in potholes with gravel. Tr.: 35.

At "the very end of May," the juvenile stopped working for the defendant. Tr.: 33. The juvenile's mother told him that he could no longer work for the defendant and the juvenile sent the defendant a text telling him that he could no longer work for him. Tr.: 33.

In May 2016, the juvenile's mother typed the defendant's name into the sex offender registry. Tr.: 40. When the defendant's picture "popped up," the mother directed her son to tell the defendant that he could not work for him. Tr.: 40.

B. The Pretrial Motion to Dismiss and the Court's Ruling

On April 12, 2017, the defense filed a motion to dismiss the indictment, contending that the statute was facially invalid. DBA: A22. The defendant argued: (1) that RSA 632-A:10 "intrude[d] on the right to travel"; (2) that the statute was facially invalid; (3) that the statute was "facially vague"; (4) that the statute was unconstitutionally overbroad; (5) that the statute violated both the

federal and state constitutions; and (6) that the statute violated the privileges and immunities clauses of both constitutions. DBA: A22-A40. The State objected. DBA: A42.

On May 9, 2017, the trial court held a hearing on the motion to dismiss. 5/9/17 Tr.: 2-31. On May 26, 2017, the trial court issued an order denying the motion to dismiss. DBA: A1-A19. The trial court first found that the purpose of the statute was to "penalize[ ] those persons who have a felony conviction relating to child pornography or sexual assault of a minor from knowingly either applying for and accepting a position that involves the supervision or management of a minor, or directly entering into an employment relationship with a minor child." DBA: A7.

The court rejected the defendant's contention that the statute impermissibly restricted travel. DBA: A7-A8. It similarly rejected the petitioner's claim that the statute violated the Equal Protection clauses under the federal and state constitutions. DBA: A11-A14. The trial court found that the claim that the statute was overbroad failed because overbreadth generally applied to laws restricting First Amendment rights. DBA: A15 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

Finally, the court rejected the petitioner's contention that the statute was vague on its face and as applied. DBA: A15. The court found that the statute

provided sufficient notice that contact with a minor would be penalized. DBA: A17. The court further found that the statute was "sufficiently clear in its prohibition." DBA: A17.

C. The Motion to Dismiss

At the close of the State's case, the defense moved to dismiss the charge on the ground that there was no evidence that the crime took place in Rockingham County. Tr.: 67. After some argument, the State asked to reopen its case and the defense objected. Tr.: 71. The court allowed the State to reopen and the State recalled the juvenile, who testified that one of the landscaping jobs was in Northwood and that the defendant had also driven the juvenile to his house in Deerfield. Tr.: 73.

SUMMARY OF THE ARGUMENT

1. The petitioner did not preserve his claim that the evidence that the defendant undertook employment involving the care, instruction, or guidance of a juvenile was insufficient. At the close of the State's case, the defendant argued only that the State had not proven that the offense took place in Rockingham County. The motion to dismiss the charge did not preserve the sufficiency of the evidence claim because it raised an issue of statutory interpretation. Similarly, the objection to the jury instructions did not preserve the claim. Finally, the trial court did not commit plain error.

Further, the court's ruling on the motion to dismiss was not error. The statute specifically prohibits employment involving the "care, instruction or guidance of minor children." RSA 632-A:10, I. The defendant drove the juvenile to the work sites and gave him directions once there. Both the plain meaning of the words used in the statute, and the legislative history, support the trial court's ruling.

2. The jury instruction was not incorrect. The instruction, taken as a whole, correctly instructed the jury that "the definition of prohibition from childcare services… of persons convicted of certain offenses is that the Defendant either[:] … directly entered into an employment relationship with a minor child in which the Defendant was responsible for the supervision or management of the

minor." Tr.: 104. Given the purpose of the statute, the court correctly concluded that by accepting employment and then hiring the juvenile, the conduct fell within the meaning of the statute. The language simply clarified for the jury what that conduct was for purposes of their deliberations.

3. RSA 632-A:10 is not unconstitutionally vague on its face or as applied. Since this case does not involve First Amendment considerations, facial unconstitutionality is not relevant. And it is not unconstitutional as applied. The defendant knew that he had the obligation to register as a sex offender and yet he decided to "undertake employment or volunteer service involving the care, instruction or guidance of minor children." RSA 632-A:10, I.

ARGUMENT

I. THE CLAIM RAISED HERE IS NOT PRESERVED AND, IN ANY EVENT, THE STATUTE COVERS THE CONDUCT THAT RESULTED IN THE DEFENDANT'S CONVICTION.

The defendant was convicted under RSA 632-A: 10, I, which provides:

> A person is guilty of a class A felony if, having been convicted in this or any other jurisdiction of any felonious offense involving child sexual abuse images, or of a felonious physical assault on a minor, or of any sexual assault, he or she knowingly undertakes employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.

The defendant first contends that the evidence that he undertook employment involving the care, instruction, or guidance of a juvenile was insufficient. DB: 6. He argues: (1) that the unambiguous language of the statute does not prohibit the employment relationship in this case; (2) that the legislative history supports his interpretation of the statute; (3) that the rule of lenity should apply; and (4) that, if the issue is not preserved, the court committed plain error.

A. The issue is not preserved and any error was not plain.

"A motion to dismiss must state the specific ground on which it is based in order to preserve the issue for appeal." *State v. Guay*, 162 N.H. 375, 380 (2011) (citing *State v. Dodds,* 159 N.H. 239, 243–44 (2009)). Indeed, this Court has

determined that "where a motion to dismiss for insufficiency of the evidence was couched in general terms and did not specify that it was based on statutory interpretation, the defendant failed to preserve the issue for appeal." *Id.* (internal quotation marks omitted).

In this case, the defendant did not re-raise the challenge to the statute at the close of the State's case, challenging instead proof of jurisdiction. Although he contends that the motion to dismiss preserved the issue, DB: 1,the pretrial motion to dismiss was raised before any evidence was heard. As a result, the pretrial motion to dismiss cannot have challenged the sufficiency of the evidence. Similarly, the objection to the jury instructions, DB: 1, cannot have preserved the issue as the objection did not challenge the sufficiency of the evidence. *See* Tr.: 76-78 (objection based on the argument that the court was adding an element to the offense in its instructions).

Since the argument is not preserved, this Court must review the court's ruling under the plain error standard. *See Sup. Ct. R.* 16-A. The plain error rule should be invoked "sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result." *State v. Russell,* 159 N.H. 475, 489 (2009) (quotation omitted). For a successful plain error claim, "(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of

judicial proceedings." *Id.* at 489-90 (quotation omitted). The defendant cannot satisfy that test.

> When [an appellate court] evaluate[s] plain error [it] [is] not concerned with technical error or with prejudicial error. Nor can [it] trifle with the tactical decisions of counsel, with errors reflecting only mere inadvertence, or with matters that are, in their poorest light, only arguably wrong. The plain error doctrine, in short, does not permit [an appellate court] to consider the ordinary backfires—whether or not harmful to a litigant's cause—which may mar a trial record. The doctrine focuses [the appellate court's] attention only on blockbusters: those errors so shocking that they seriously affect the fundamental fairness and basic integrity of the proceedings conducted below. It follows that such errors are to be noticed only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice.

United States v. Griffin, 818 F.2d 97, 100 (1st Cir. 1987) (quotations, citation, and ellipsis omitted).

As the concurring opinion in *State v. Henderson*, 154 N.H. 95 (2006), noted:

> Usually, for an error to be plain, it must be in contravention of either Supreme Court or controlling circuit precedent. The lack of such precedent, however, does not prevent a finding of plain error if the error was, in fact, clear or obvious based on the materials available to the [trial] court.
>
> In the absence of controlling precedent of either this court or the Supreme Court, the [trial] court is granted more discretion under the plain error standard simply because the less guidance there is, the smaller the realm of decisions that would be clearly or obviously wrong under current law. There is ultimately, however, a limit to what the [trial] court can do, even under plain error review, and, for example, in the statutory construction context, it is possible that the construction of the statute proffered by the [trial] court departs so far from the text that it is clearly incorrect as a matter of law.

Id. at 99 (quoting *United States v. Lachowski,* 405 F.3d 696, 698–99 (8th Cir. 2005)). Since the argument relied on statutory construction, the alleged error by the trial court cannot have been plain, absent controlling precedent from this Court. Since this Court has not interpreted the statute to exclude the conclusion reached by the trial court, there is no controlling precedent and the trial court's interpretation of the statute was not clearly incorrect as a matter of law. *Id.* at 99. Furthermore, as demonstrated below, there was no error because the charged conduct fell within the statute's scope.

B. The employment was prohibited by the statute.

The defendant next contends that the conduct is not proscribed by RSA 632-A:10. DB: 10.

The trial court found that the defendant's employment of the juvenile was prohibited by the statute. The trial court's statutory construction is reviewed *de novo*. *State v. Mayo*, 167 N.H. 443, 450 (2015). This Court will first "examine statutory language, and, where possible, [it will] ascribe the plain and ordinary meanings to the words used." *State v. Kardonsky*, 169 N.H. 150, 153 (2016) (citing *State v. Maxfield*, 167 N.H. 677, 679 (2015)). This Court will "interpret legislative intent from the statute as written and will not consider what the

legislature might have said or add language that the legislature did not see fit to include." *Id.*

RSA 632-A:10, I restricts a sex offender from "knowingly undertak[ing] employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type." Giving these words their ordinary meaning, the evidence was sufficient to show that the defendant "undert[ook] employment … involving the care, instruction or guidance of minor children." *Id.* He not only employed the juvenile to clear the neighbor's driveway, he gave him rides to the landscaping locations and instructed him on how to fill the potholes. Tr.: 31-32, 35. Transporting the juvenile by automobile obviously involved caring for him. *Cf. In re: J.H.*, ___ N.H. ___, 188 A.3d 1030, 1033-34 (2018) (father's "erratic driving while with the children, and his willingness to open a can of beer while driving with the children" drew into question his ability to "care" for them (internal quotation marks omitted)).

The defendant argues that the phrase "to undertake employment" means "accepting employment, not providing it." DB: 10. This interpretation, however, would not exempt the defendant from the statute. "When a term is not defined in a

statute, [this Court will] look to its common usage, using the dictionary for guidance." *Bedford School District v. State*, ___ N.H. __ (Aug. 17, 2018). "Undertake" means "to take in hand," "enter upon" and "set about." *Webster's Third New International Dictionary* 2491 (unabridged ed. 2002). The word "undertake" is not limited to the meaning of "accept," but is more broadly understood. The defendant certainly "took in hand," "entered upon," and "set about" the landscaping tasks with the juvenile.

But even if it were so narrowly construed as to be restricted to accepting employment, the defendant's argument is still unavailing. It is clear that he undertook employment when he agreed to provide landscaping services to the residence in Norwood. It is also clear that, as part of that employment, he hired the juvenile, who he not only supervised, but drove to the work site. As a result, by undertaking the yard work, he assumed the care, instruction, and guidance of the juvenile.

The defendant then contends that, because New Hampshire prohibits age discrimination, the trial court's ruling is inconsistent with that premise. DB: 12. He argues that this Court "should reject any interpretation of RSA 632–A:10, I that compels employers to discriminate based on age." DB: 12. But that is not what the statute does nor is it what it was intended to do. It has nothing to do with age discrimination. Rather, it seeks to restrict a registered sex offender from

accepting employment which will put him in close proximity to children. The restriction is not on the child because of his age; the restriction is on the defendant because of his criminal record.

The defendant next contends that, under the principle of *ejusdem generis*, the phrase "including, but not limited to" should be read to include only the types of activities listed after the phase, *i.e.*, "service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type." DB: 12; RSA 632-A:10, I. As a landscaper, he argues, his employment is sufficiently different from those listed and cannot be included as a field in which his contact with children should be prohibited. He concludes that the statute could not apply to "activity that only incidentally involves minors," including work at a fast-food restaurant or at a retail shop. DB: 14. He suggests that any employer who knowingly hired a sex offender while also hiring juveniles could be prosecuted as an accomplice. DB: 14-15.

This argument is too broad. The suggestion that a sex offender could not work at McDonald's with juveniles avoids the requirement of the statute that the position involve the "care, instruction or guidance of minor children." RSA 632-A:10, I. The work at a fast food restaurant might involve incidental contact with

minors; it might also involve their direct supervision. If the contact were incidental, then it might not be covered by the statute, but that is not the case here.

The defendant was the employer, he knew of his status, and yet he offered employment to the juvenile. As a result, the fact that he worked as a landscaper does not change the fact that he took affirmative steps to be sure that his employment would bring him in close contact with a juvenile. Indeed, he accepted the landscaping employment and then offered the juvenile part of the work, suggesting that he may have intended to use the employment as a vehicle for allowing otherwise prohibited contact.

This Court has held that "the use of the phrase 'including, but not limited to' in a statute limits the application of that statute to the types of items therein particularized." *In the Matter of Fulton & Fulton,* 154 N.H. 264, 267 (2006). As traditionally understood and applied, *ejusdem generis* provides that "where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012).

> But in 1973 the editors of a leading American treatise, *Sutherland Statutes and Statutory Construction,* ill-advisedly amended its traditional explanation with this statement: "Where the opposite sequence is found, i.e., specific words following general ones, the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated."

Id. at 204 (citation omitted).

This Court's analysis in *State v. Beauchemin*, 161 N.H. 654 (2011), is helpful in applying this doctrine. There, although the statute only listed "meat, carrion, and honey," as examples of luring animals, this Court concluded that "whole kernel corn and a salt-rich mineral block [we]re both food or ingestible substances that [we]re capable of luring or attracting coyote, fur-bearing animals, game birds, or game animals." *Id.* at 658. This Court noted that the general phrase "provide[d] the parameters of the nature of the specific enumerated words." *Id.* Applying the principle of *Beauchemin* here, the general phrase of the statute in this case, "undertak[ing] employment or volunteer service involving the care, instruction or guidance of minor children," therefore, provides the parameters of the ensuing list. Since the defendant undertook employment involving the care, instruction, and guidance of the juvenile, his conduct is covered.

In the alternative, this Court could conclude that the word "include" is nonexclusive. "The Presumption of Nonexclusive 'Include'" provides that use of "[t]he verb *to include* introduces examples, not an exhaustive list." Scalia, *supra,* at 132. Under this theory, by using the phrase "including, but not limited to," lawmakers signal their intent to defeat the "Negative Implication" canon, which provides that the "expression of one thing implies the exclusion of others." *Id.* at 107. The General Court's use of the phrase "including, but not limited to" in RSA 632-A:10, I, demonstrates that the terms that follow are offered in illustration, not

limitation. *Cf. State v. Wilson*, 169 N.H. 755, 762 (2017) (discussing the application of the doctrine).

This view is consistent with the ruling of the trial court, which concluded that the professions listed were "nonexhaustive" in that the gravamen of the statute was "care, instruction, and guidance." DBA: A6. The trial court concluded that the common strain of the words "envision[ed] a person of authority or one with supervisory power." DBA: A6. The trial court concluded that the defendant indeed had supervisory authority. DBA: A6-A7.

Moreover, the overall statutory scheme supports the trial court's ruling. *State v. Small*, 99 N.H. 349, 351 (1955) (noting that "the rule of *ejusdem generis* is neither final nor exclusive and is always subject to the qualification that general words will not be used in a restricted sense if the act as a whole indicates a different legislative purpose in view of the objectives to be attained"). For example, RSA 632-A:2 repeatedly prohibits defendants from using positions of authority or superior strength in the course of a sexual activity. *See* RSA 632-A:2, I(a) (superior physical force); RSA 632-A:2, I(g) (therapeutic relationship); 632-A:2, I(n) (victim is incarcerated or on probation). The victim's relative inequality, therefore, was part of the statutory scheme. The prohibition against seeking employment that would allow an offender to supervise a juvenile, a situation

which involves a similar inequality of positions, supports the interpretation that the statute intended to prohibit the conduct involved here.

This is particularly clear after reviewing the obligations of sex offenders to register. *See* RSA chapter 651-B: 1 (2016 & Supp. 2017). Offenses against children are specifically enumerated in the statute adopting the obligation to register. *See* RSA 651-B:1, VII ("Offenses against a child"); *see also* RSA 651-B:4, I ("Any sexual offender or offender against children residing in this state shall report in person to the local law enforcement agency.") It would be absurd to require a sex offender to register, in part to protect children from being preyed upon, and then not to prohibit the offender from hiring juveniles.

C. The legislative history does not support his interpretation of the statute.

The defendant contends that the legislative history supports his contention that the legislature did not intend to prohibit convicted sex offenders from hiring and supervising juveniles in a situation in which the contact was unsupervised. DB: 15. The legislative history does not support his contention, however.

Representative David Pierce, one of the sponsors of the bill, told the Senate Committee on Public Institutions, Health, and Human Services that the purpose of the bill was to tell "previously convicted child molesters" "to keep their hands off New Hampshire children." DBA: A55. Representative Emma Wheeler, who

spoke in support of the bill, expressed the bill's purpose, stating, "We feel very strongly that people should not be working for day care centers, or in the schools, or any of the other places where they come into contact with children." DBA: A59. Al Rubega, who assisted in drafting the legislation, DBA: A60, gave the committee a series of examples of sex offenders becoming involved with children during the course of employment, concluding: "In a study done by the University of Pennsylvania in 1984, it showed that almost half the offenders used their occupation as the major access route to the child victims. They use their occupation as an authority figure to control the child." DBA: A61.

When the bill was considered by the Senate, a similar consensus was apparent. Senator White told the Senate Committee that the bill would "prohibit[ ] people who have been convicted of child pornography from engaging in any activity with children." DBA: A66. The bill would "take[ ] them out of being school counselors and Boy Scout leaders and anything that would bring them in connection with children." DBA: A66.

The use of the phrase "any activity with children" would clearly cover the defendant's actions. He drove the juvenile to the worksite and supervised him while they both worked. This kind of unsupervised contact with the juvenile was clearly within the scope of the legislation.

D. The rule of lenity should not apply.

The defendant asks this Court to apply the rule of lenity. DB 20. "The rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously." *State v. MacLeod,* 141 N.H. 427, 434 (1996). "Although the rule of lenity may serve to resolve ambiguity, it cannot be used to create ambiguity." *Id.*

RSA 632-A:10, I is unambiguous in its application to the defendant's conduct. Since the legislature repeatedly addressed concerns regarding a sex offender's access to children, it is clear that, when the statute was written, legislators had in mind exactly the unsupervised contact that the defendant created by hiring the juvenile. The unsupervised contact presented here poses a potential danger to the juvenile. The defendant was alone with him in the drive to the work site and while working during the day. The rule of lenity should not apply when the statute unambiguously prohibited this behavior.

In short, the defendant's argument that his conduct was not covered by the statute or that the statute is flawed is unpersuasive. The trial court's ruling on these claims should be affirmed.

II. THE JURY WAS PROPERLY INSTRUCTED.

The defendant next contends that the trial court's jury instruction was incorrect. DB: 19. He argues that the trial court "permitted the jury to find [him] guilty on the basis that he 'directly entered into an employment relationship with a minor child.'" DB: 20. He contends that this allowed the jury to convict the defendant for work that "only incidentally involve[d] employees who are under eighteen." DB: 20.

This Court will "review the trial court's decision as to whether or not a particular jury instruction is necessary, and the scope and wording of jury instructions, for an unsustainable exercise of discretion." *State v. Littlefield*, 152 N.H. 331, 341 (2005). This Court reviews a challenged jury instruction "in the context of the court's entire charge." *State v. Fitanides*, 141 N.H. 352, 354 (1996).

As noted above, RSA 632-A: 10, I criminalizes conduct when a sex offender "knowingly undertakes employment… involving the care, instruction or guidance of minor children." In advance of trial, the State filed proposed jury instructions to which the defense raised no objection. Tr.: 79. Before the jury was instructed, the court and counsel met to discuss the instructions that had been drafted by the court. Tr.: 76. The defense read the proposed jury instructions aloud:

> "This means the State must prove that the Defendant, either; one, applied for and accepted a position that involved a supervision or management of a minor," which tracks the language of the statute.

> And then the Court adds a second element, "Two, or directly entered into an employment relationship with a minor child."

Tr.: 76.

The defense challenged the second part of this instruction, arguing "that the first part of the Court's instruction mirrors the statute, and it is proper; however, the evidence presented to this jury would be in direct contradiction to what the Court is seeking to add, with respect to prong 2." Tr.: 78. The defense contended that the court was "adding an element." Tr.: 78. The defense then offered the opinion that the court, by adding a prong, was depriving the defendant of due process. Tr.: 78.

The court responded: "[A]s I've got these instructions, prong 1, that is that you applied for and accepted a position involving supervision or management of a child is fine, but that's a - you're saying is an accurate translation, or interpretation of the term undertook employment, but that being the hiring authority is not? In other words, being the person who hired the minor is not encompassed within that concept of undertook employment?" Tr.: 78. The defense responded, "[B]ut clearly it is defined as to what the intent of this statute was, scout master, summer camp workers, school superintendents, teachers, boy scouts." Tr.: 79.

The State interjected that the defense had been put on notice when the State had filed the proposed jury instructions. Tr.: 80. The State contended that "really what the statute is designed to protect against is someone who has one of these

predicate convictions from being in a position of power over a minor child, and that's why it says, including, but limited to, and gives a list." Tr.: 81. The State pointed out that the juvenile "testified that nobody else was working with them. The [d]efendant hadn't hired anybody else. There was nobody else supervising or being involved in the employment process. It was him and the [d]efendant, and the [d]efendant was telling him what to do." Tr.: 81.

The court responded:

> I think my order on the motion to dismiss was adequately clear, in terms of that concept undertook employment includes both the applying for and accepting a job, as well as the hiring of minors, so I think it includes both sides of that coin, and that was pretty clear - not pretty - that was - I think was explicit in the interpretation of the statute, as set forth in the motion to dismiss, and is consistent, I think, with the extensive discussion in [*State v.*] *Wilson*[, 169 N.H. 755 (2017)] about the meaning of this statute.

Tr.: 82. The court modified the instructions to "add language to the second prong of this definition… saying directly entered into an employment relationship with a minor, in which the [d]efendant was responsible for the supervision or management of a minor." Tr.: 83. The trial court continued: "I think without that simply hiring a minor, and then having nothing more directly to do with that child, I'm not sure that that violates the statute." Tr.: 83.

The court then instructed the jury:

> So for this offense the State must prove; number 1, the [d]efendant was convicted of the crime of sexual assault; and number 2, that he was convicted - that after he was convicted of the crime of sexual

> assault the [d]efendant undertook employment involving the care, instruction, or guidance of a minor child; and number 3, the [d]efendant acted knowingly with respect to these prior [two] elements.
>
> So part of the definition of prohibition from childcare services convicted - of persons convicted of certain offenses is that the [d]efendant either[:] number 1, applied for, and accepted a position that involves supervision or management of a minor; or number 2, directly entered into an employment relationship with a minor child in which the [d]efendant was responsible for the supervision or management of the minor.

DB: 19; *see also* Tr.: 104.

Taken as a whole, the jury instructions accurately represented the elements of the offense. The court correctly concluded that the statute was designed to prohibit the situation presented here: the defendant accepted employment that he knew would present him with the opportunity to supervise a juvenile without any other people present. In that regard, the court made the distinction urged by the defendant in his brief clear when it asked, "[D]o you agree that simply hiring a minor, and that being the end of it, like - if you're the CEO of McDonalds and you hire a minor, or your company hires minors to work, would you be in violation there if you weren't directly involved in the care, supervision, and guidance of a minor?" Tr.: 81. The court correctly concluded that such indirect supervision was distinguishable from the situation presented here.

Moreover, the instruction was consistent with the plain language of the statute and its legislative intent, as discussed in Section I of this brief. Since the

statute contemplated the defendant's conduct, the court acted within its discretion in instructing the jury as it did.

III. RSA 632-A:10 IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED.

The defendant next contends that the statute is unconstitutionally vague both on its face and as applied. DB: 22. He contends that the trial court erred in dismissing the facial vagueness ground on the ground that the trial court concluded that no fundamental right was involved. DB: 25. He also argues that the trial court erred when it declined to find that the statute was vague as applied. DB: 26.

"A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality." *State v. MacElman*, 154 N.H. 304, 307 (2006); see *also State v. Smagula,* 117 N.H. 663, 666 (1977) ("It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible."). In addition, "[m]athematical exactness is not required in a penal statute, nor is a law invalid merely because it could have been drafted with greater precision." *State v. Porelle,* 149 N.H. 420, 423 (2003) (quotation omitted).

"A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *MacElman*, 154 N.H. at 307 (citing *State v. Gatchell,* 150 N.H. 642, 643 (2004)). The specificity required

to uphold a statute "need not be contained in the statute itself, but rather, in the context of related statutes, prior decisions, or generally accepted usage." *Porelle,* 149 N.H. at 423 (2003) (quotation omitted).

Under the federal constitution, "the vagueness doctrine rests upon the Due Process Clauses of the Fifth and Fourteenth Amendments and applies solely to legislation which is lacking in clarity and precision." *State v. Gaffney*, 147 N.H. 550, 553 (2002). As in the New Hampshire Constitution, under the federal constitution, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *see also United States v. Hussein*, 351 F.3d 9, 14 (1st Cir. 2003).

At the outset, the trial court was correct in concluding that the challenge to the statute did not involve a fundamental right. DB: 22. The trial court correctly concluded that "merely claiming that a statute affects a fundamental right – without making the connection between the right allegedly implicated and the underlying constitutional purpose of that right – improperly attempts to extend

constitutional protections to areas traditionally unprotected." DBA: 14. The court concluded that the argument, that the defendant's rights under the Equal Protection Clause of the Constitution, had not been implicated. DBA: 14. The trial court noted that the legislature could properly "draw a line" regarding sex offenders contacts with juveniles. DBA: 14.

Although the defendant relies on *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), for his contention that his case involves a fundamental right, *Dimaya* is distinguishable. That case involved the deportation of an alien who "ha[d] resided lawfully in the United States since 1992" but had been convicted of first-degree burglary. *Id.* at 1211. The Court noted that "deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence.'" *Id.* at 1213. The Dimaya court reiterated that it had "long ago held that the most exacting vagueness standard should apply in removal cases." *Id.* The fact that the defendant was facing deportation supported his contention that his fundamental rights were being implicated much stronger and, therefore, strengthen his claim of facial vagueness. This Court reached the same conclusion in *Porcello*. *See Porcello*, 149 N.H. at 423 (noting that, because the statute "implicate[d] the fundamental right to freedom of movement"). In contrast, restrictions on sex offenders do not implicate fundamental rights. *Cf. Doe v. State*,

167 N.H. 382, 398 (2015) (registration of sex offenders is regulatory, not punitive).

The defendant argues that the people of New Hampshire "did not enact" the prohibitions adopted by the trial court because they did not, through their representatives, prohibit "those with certain convictions from hiring minors or entering [into] an employment arrangement involving the supervision or management of minor teenagers." DB: 24 (internal quotations omitted). He then contends that the trial court usurped the legislative function in directing otherwise.

But his reliance on *Dimaya* is misplaced. *Dimaya* involved the meaning of the terms "aggravated felony" and "crime of violence" for purposes of a federal immigration statute. *Id.* The Court based its decision on the conclusion that it was too difficult to measure the "serious risk" of violence posed by the indeterminate "crime of violence." *Id.* at 1214-15. Dimaya had been convicted of first-degree burglary under the laws of California, *id.* at 2011, a crime which includes entry into a dwelling "whether occupied or not," Cal. Penal §459. The potential for a burglary to be a crime of violence is, of course, greatly reduced if the dwelling is not inhabited. The language used in the federal statute, therefore, is not clear. In that regard, *Dimaya* is distinguishable.

The statute at issue here prohibits a sex offender from "knowingly undertak[ing] employment or volunteer service involving the care, instruction or

guidance of minor children." RSA 632-A:10, I. As discussed above, "undertake" is a commonly understood word which does not require the same kind of judgment call that the Court criticized in *Dimaya*. Further, the statute, and its statutory history, prohibit the employment involving the "care, instruction, or guidance" of juveniles, which, as discussed above, included the defendant's employment with the juvenile. The trial court was not called upon to interpret the meaning of "serious risk" or "crime of violence." It merely looked at the meaning of the words in the statute.

Nor is his contention that the statute is void for vagueness persuasive. DB: 24. He asserts that "undertake employment" is impermissibly vague because an ordinary person would not understand that it meant "not only accepting employment, but also providing it." DB: 24. As noted above, however, "undertake" does not mean "accept." But even if it did, by undertaking this employment, the defendant accepted employment in which he apparently needed assistance and then elected to hire the juvenile. In that regard, the employment did not "merely … happen to employ minor teenagers." DB: 24. To the contrary, he made the decision to hire the juvenile as he accepted the employment. In short, this was not mere coincidence, as the defendant suggests. In that regard, the coincidence of hiring a sex offender and a juvenile at McDonald's, DB: 25, is easily distinguishable.

Finally, the defendant contends that enforcement of the statute, if given the trial court's interpretation, "would be largely left to the whim of police, prosecutors, and juries." DB: 25. He contends that prosecutions "would be arbitrary and random at best, and targeted against disfavored groups at worst." DB: 25. He offers no description of these hypothetical "disfavored groups." The group that is affected by the statute, contrary to his contention, is defined by the statute and includes any person who "having been convicted in this or any other jurisdiction of any felonious offense involving child sexual abuse images, or of a felonious physical assault on a minor, or of any sexual assault." RSA 632-A:10, I. The defendant falls within this clearly defined group; the statute was not arbitrarily enforced against him.

Indeed, just the fact that he was required to register as a sex offender provided him with some notice. *See* RSA 651-B:1, VII ("Offenses against a child"); *see also* RSA 651-B:4, I ("Any sexual offender or offender against children residing in this state shall report in person to the local law enforcement agency."); *cf. Kitze v. Commonwealth*, 475 S.E.2d 830, 832 (Va. 1996) ("The purpose of the [Sex Offender] Registry is: to assist the efforts of law-enforcement agencies to protect their communities from repeat sex offenders and to protect children from becoming the victims of repeat sex offenders by helping to prevent

such individuals from being hired or allowed to volunteer to work directly with children.").

Noteworthy is the fact that the statute did not prohibit the defendant from hiring the juvenile to clear the juvenile's neighbor's driveway. That act was not charged, nor would it be chargeable under the statute. The defendant could hire the juvenile for the snow removal job because there is nothing on the record that he was involved in the supervision, guidance, or care of the juvenile in that situation. The landscaping job, however, was a different matter: he drove the juvenile to the work site and had unsupervised contact with him throughout the day, directing the juvenile in his tasks. If the defendant had simply continued to run his landscaping business without attempting to employ the juvenile, he would not have violated the statute. It was his decision to have unsupervised contact with a juvenile, which he knew was prohibited by the terms of his parole, Tr.: 57, 59, and which is clearly prohibited by the statute, that prompted the charge brought here.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 3JX oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that two copies of the foregoing were mailed this day, postage prepaid to counsel of record at the following address:

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