

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0464

State of New Hampshire

v.

Timothy Barr

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

BRIEF FOR THE DEFENDANT

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QUESTIONS PRESENTED

1. Whether RSA Chapter 649-A, entitled “Child Sexual Abuse Images,” violates the rights to freedom of speech guaranteed by the State and Federal Constitutions when it is used to prosecute individuals for creating and privately possessing images that chronicle their own lawful, consensual sexual relationship.

Issue preserved by Barr’s motion to dismiss, T* 183–87, 195–96, 200, his memorandum in support of the motion, A14, the State’s oral objection, T 188, 193–95, 197, its written objection, A19, and the court’s ruling, T 199–201.

2. Whether the prosecutor’s assertion, in opening statement, that sexual activity was “unnatural” for A.L. opened the door to evidence that A.L. had previously engaged in sexual activity with other partners.

Issue preserved by Barr’s motion to admit the evidence, T 41–48, the State’s objection, T 42–43, 45, 47, and the court’s ruling, T 48.

* Citations to the record are as follows:
“A” refers to the appendix to this brief;
“T” refers to the transcript of trial on June 11 and 12, 2018.

STATEMENT OF THE CASE

In September 2017, the State obtained from a Carroll County grand jury nine indictments charging Barr with manufacturing a child sexual abuse image and two indictments charging him with possessing a child sexual abuse image. A3–A13. At the conclusion of a two-day trial on June 11 and 12, 2018, the jury found Barr guilty of two counts of manufacturing a child sexual abuse image and one count of possessing a child sexual abuse image. T 279, 282. The jury found Barr not guilty of the remaining eight indictments. T 280–82. In July 2018, the court (Ignatius, J.) sentenced Barr to three consecutive 12-month terms in the house of corrections. A23–A28. The sentences on the manufacturing convictions were stand-committed; the sentence on the possession conviction was suspended. A23–A28. The court also placed Barr on probation for two years following his release. A23–A26.

STATEMENT OF THE FACTS

Timothy Barr and A.L. met in the spring of 2016 when they worked together at Dairy Queen in Conway. T 126–27, 144. As co-workers, they “talked a little bit now and then.” T 144. Barr and A.L. then lost touch until the spring of 2017. T 144.

A.L. had turned sixteen over the winter. T 117, 125. Although Barr was older than A.L.¹, she thought he was good-looking and wanted to date him. T 113, 146, 148. She didn’t really care about the age difference. T 147. In the spring of 2017, A.L. sent a friend request to Barr on Facebook, but he did not respond. T 144–45. She then sent a second friend request, which Barr accepted. T 145.

A.L. went to see Barr at his work. T 146. They “chatted . . . about what he’d been up to and what was going on . . . in [their] lives.” T 146. In June or July of 2017, after several conversations and meetings, they kissed. T 128, 147.

At some point thereafter, A.L. and Barr’s relationship became sexual. T 129–30, 148. A.L. wrote to Barr, “I don’t want to lose you and see you with someone else.” T 62, 169, 179–80. At trial, A.L. described the relationship in more casual terms, characterizing Barr as “one of my . . . players” and “a guy to sleep with.” T 142–43, 176.

¹ At trial, there was no evidence as to Barr’s age. The indictments list Barr’s date of birth as March 1987, A3–A13, which would make him thirty years old in the summer of 2017.

A.L. and Barr sometimes took photographs and videos of their sexual activity. T 130–31, 133, 135, 148, 164. It was usually A.L. who took the photographs, but Barr took photographs and video as well. T 133, 148–49, 164–65. For A.L., photographing sexual activity “really wasn’t a big deal.” T 165. She testified that she knew other girls at school who “did stuff like that all the time.” T 165.

When A.L. and Barr were apart, he sometimes asked her to send him sexually explicit photographs and videos of herself. T 140–41, 165, 177–78. A.L. sometimes agreed, and sometimes declined. T 130–32, 165, 178–79. In one video, A.L. said to Barr, “This is for you. This hurts me. I love you. You better love me back, you little bitch.” T 31, 38, 140, 170, 172, 233.

A.L. and Barr’s relationship ended when her parents discovered it. T 135. A.L.’s parents called the police, who searched A.L.’s phone, Barr’s phone and Barr’s email account, where they found the text messages, photographs and videos referenced above. T 53–57, 67–82, 113–14, 123.

When the police interviewed Barr, he cooperated fully. T 68, 73, 87–88. There was no evidence that Barr shared the photographs or videos with anyone else. T 90.

The State charged Barr with nine counts of manufacturing child sexual abuse images and two counts of possession of child sexual abuse images. A3–A13. Barr’s

defense was that these images were not the type that the child-sexual-abuse-image statute was meant to prohibit and that an acquittal would be fair and just. T 40–41, 228–29, 235–36, 239–40. He emphasized that his sexual relationship with A.L. was consensual and legal, and that he did not share the images with anyone. T 39–41, 229, 231, 234–35, 237, 239.

The court instructed the jury, “Even if you find that the State has proven each and every element of the offense charged beyond a reasonable doubt you may still find the Defendant not guilty if you have a conscientious feeling that a not guilty verdict would be a fair and just result in this case.” T 255. The jury found Barr guilty of three counts and not guilty of the remaining eight counts. T 279–82.

SUMMARY OF THE ARGUMENT

1. The State and Federal Constitutions protect the right to freedom of speech, which includes both expressive conduct and the right to receive information. Content-based prohibitions on speech are presumptively unconstitutional; they are invalid unless they fall within a First-Amendment exception or are narrowly tailored to serve a compelling government interest. Under modern case-law, “child pornography” is not an independent First-Amendment exception; it is merely a specific application of the general exception for speech that is an integral part of criminal conduct. Here, the images were not an integral part of any criminal conduct and the “Child Sexual Abuse Images” statute, as applied, was not narrowly tailored to any compelling government interest.

2. A party opens the door to otherwise inadmissible evidence by introducing evidence, or making an assertion, that is either (a) itself inadmissible and prejudicial, or (b) admissible but misleading. Here, the State’s assertion that A.L.’s sexual activity with Barr was “unnatural” for her — implying that she was sexually inexperienced — was inadmissible and prejudicial. Even if it was admissible, it was misleading. Either way, it opened the door to evidence that A.L. had previously engaged in sexual activity with other partners.

I. AS APPLIED, RSA CHAPTER 649-A VIOLATES THE RIGHT TO FREEDOM OF SPEECH BECAUSE THE IMAGES AT ISSUE WERE CREATED AND PRIVATELY POSSESSED BY BARR AND A.L. TO CHRONICLE THEIR OWN LAWFUL, CONSENSUAL SEXUAL RELATIONSHIP.

When the State rested, Barr moved to dismiss the indictments. T 183. In a memorandum filed in support of his motion, Barr argued that, as applied, RSA Chapter 649-A violates Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution. A14; T 183. He noted that, because A.L. was sixteen years old, the underlying consensual conduct was lawful and thus, the images did not depict “sexual abuse.” A17; T 186. He further noted that there was no evidence that Barr disseminated any of the images. A17–A18; T 186.

The State filed a written objection the following day. A19, T 195. It acknowledged that, in “New Hampshire[,] the legal age of consent for sexual activity is 16 years old.” A20. It argued, however, that “the legislature has stated that children, those under the age of 18, may not be the subject of sexual images.” A20. In response, Barr reiterated his argument that “[h]e has a [F]irst [A]mendment right to possess images [that] are not of activity that is itself unlawful or abusive.” T 196.

The court referred to “the question of whether [RSA Chapter 649-A is] unconstitutional on its face,” found that it

was constitutional “given these circumstances,” and denied Barr’s motion. T 199–200. Barr immediately clarified that he was not arguing that RSA Chapter 649-A was facially unconstitutional, but that “the statute was unconstitutional as applied in this case.” T 200. The court explained that it had inadvertently referred to Barr’s argument as a facial challenge and thanked Barr for the clarification. T 200–01. “Still,” the court ruled, “that doesn’t change the holding.” T 201. By finding RSA Chapter 649-A constitutional as applied, the court erred.

Part I, Article 22 of the New Hampshire Constitution provides, “Free speech . . . [is] essential to the security of Freedom in a State: [It] ought, therefore, to be inviolably preserved.” It provides “at least as much protection” as the First Amendment to the United States Constitution. State v. Allard, 148 N.H. 702, 706 (2002).

The First Amendment provides, “Congress shall make no law . . . abridging the freedom of speech.” The right to freedom of speech applies to the states through the Fourteenth Amendment. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

The First Amendment protects not only the right to give information, but “the right to receive information” as well. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982). Thus, it embraces the “right of listeners to listen, viewers to view, [and] readers

to read.” 1 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech § 2:73 (2018). Nor is the First Amendment limited to “the use of language”; it “also includes expressive conduct.” Id. § 4:14.

This Court reviews questions of constitutional law de novo. State v. Gibson, 170 N.H. 316, 319 (2017).

A. The statute is a content-based regulation on speech

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719, 1746 (2018). Even “the most hideous and offensive of expressions” is protected, 1 Smolla, supra, § 4:9, and “governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content,” Becerra, 138 S. Ct. at 2371.

Thus, the starting point in evaluating a First-Amendment challenge is determining whether the regulation is content-based or content-neutral. Id. “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

“Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter.” Id. RSA Chapter 649-A is one of them. It prohibits the possession, distribution or manufacture of particular images based on their subject matter. RSA 649-A:2–:3-b.²

B. Content-based regulations require strict scrutiny, unless an exception applies.

“As a general matter,” content-based laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” Becerra, 138 S. Ct. at 2371. A content-based law can only escape strict scrutiny if it falls within an “exception[]” — one of “a few limited” and “traditional” “areas” of speech receiving less or no constitutional protection. Brown v. Entm’t Merchs. Ass’n, 564 U.S. 786, 790–91 (2011).

C. The images here do not fall within any exception.

In defining those areas of speech receiving less or no constitutional protection, the Supreme Court’s approach has

² As originally enacted in 1983, RSA Chapter 649-A applied to images of sexual activity involving children under the age of sixteen. Laws 1983, 448:2. In 2008, the legislature amended the statute to cover images of sexual activity involving anyone under the age of eighteen. Laws 2008, 323:1. According to a statement of intent issued by the House Criminal Justice and Public Safety Committee, the change was made “to make the age consistent with other references in the criminal code.” A22. No further explanation was provided. Even today, however, the Chapter’s Declaration of Findings and Purposes continues to state that the statute is intended to prohibit “visual representations of children under the age of 16 engaged in sexual activity.” RSA 649-A:1, II.

evolved over the decades. As detailed below, the Court's older cases suggested that there were discrete categories of speech, such as "fighting words" and "child pornography," that fell outside the protection of the First Amendment simply because the "value" of the speech was so slight and the government's interest in prohibition so strong. Over time, however, the Court has abandoned the approach that balances the "value" of the speech against the government's interest in prohibition. Instead, it now requires a close causal connection between the speech at issue and some other crime. Modern cases no longer envision "child pornography" as a freestanding, independent exception to the First Amendment, but rather as a specific application of a more general exception: speech that forms an integral part of criminal conduct.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), epitomizes the old approach. There, the defendant was convicted for calling the Rochester City Marshall "a God damned racketeer," and "a damned Fascist" and for stating that "the whole government of Rochester are Fascists or agents of Fascists." Id. at 569–70. After this Court affirmed his conviction, the defendant appealed to the United States Supreme Court. Id. at 569.

The Supreme Court resolved the challenge by "simply list[ing] certain classes of speech as outside the First Amendment's coverage." 1 Smolla, supra, § 2:70. These

included “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Chaplinsky, 315 U.S. at 572. Because the defendant’s statements about city employees were “fighting words,” the Court held, they were not protected by the First Amendment. Id. at 574. Essentially, “the Court raised the old cliché of the Wild West, ‘Dem’s fightin’ words!’ to a matter of constitutional principle.” 1 Smolla, supra, § 10:32. “The Court offered ‘precious little analysis of why [the named] classes [of speech] were unprotected,’” id. § 2:70; it merely asserted that “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Chaplinsky, 315 U.S. at 572.

Chaplinsky’s approach still held some sway when the Court first considered child pornography. In New York v. Ferber, 458 U.S. 747 (1982), the defendant sold two films that depicted young boys masturbating. Id. at 752. He was convicted under a state statute that prohibited, among other things, selling a motion picture that depicts sexual conduct by an individual younger than sixteen years old. Id. at 750–52.

The defendant did not dispute that the films he sold necessarily involved sexual abuse, and he did not argue that the First Amendment protected the creation of such material. Id. at 762 (“the constitutionality of” “statutes outlawing the employment of children in these films and photographs” “has not been questioned”). Instead, he argued that the First Amendment protected its distribution. Id. at 753.

In resolving the defendant’s challenge to the statute, the Supreme Court began by quoting Chaplinsky. Id. at 754. It then set forth five reasons for excepting child pornography from the First Amendment. Id. at 756–64. These rationales fell within two categories. Id.

The first three rationales related to the connection between child sexual abuse and the resulting images. Id. at 756–62.

First, the Court noted that “a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling” and that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” Id. at 757 (quotation omitted).

Second, the Court noted that “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways.” Id. at 759. “First,” it noted, “the materials

produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." Id. "Second," the Court noted, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." Id. The Court rejected the defendant's argument that only "legally obscene" material should be subject to prosecution, noting that the obscenity standard "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." Id. at 761.

Third, the Court noted that that the First Amendment does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." Id. at 761-62.

The last two rationales advanced by the Court related to the "value" of the material at issue. Id. at 762-64.

First, the Court found that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis." Id. at 762.

Second, the Court asserted that "it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so

overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.” Id. at 763–64.

To a lesser extent, the Court relied on Chaplinsky’s approach in Osborne v. Ohio, 495 U.S. 103 (1990). There, the defendant possessed four photographs depicting a nude, adolescent boy posed in a sexually explicit position. Id. at 107. The defendant contended that the First Amendment protected the private possession of child pornography. Id. at 108.

The Supreme Court rejected his argument, relying primarily on the rationale, set forth in Ferber, that the creation of child pornography necessarily involves child abuse. Id. at 111. But the Court also cited Ferber’s observation that “the value of permitting child pornography has been characterized as ‘exceedingly modest, if not de minimis.’” Id. at 108.

To varying degrees, the analyses in Ferber and Osborne followed the approach set forth in Chaplinsky. Just as the Court in Chaplinsky suggested that “fighting words” was a discrete and independent category of speech, which, because of its “slight social value,” fell outside the First Amendment’s protection, so too did the Court in Ferber and Osborne suggest that “child pornography” was a discrete and independent category of speech, which, because of its

“exceedingly modest, if not de minimis” “value,” also fell outside the First Amendment’s protection.

That method of First-Amendment analysis, however, is no longer valid. Chaplinsky’s “mechanical and conclusory approach to the First Amendment, based upon the mere recitation of ‘certain well-defined and narrowly limited classes of speech,’ has now largely been discredited and abandoned.”¹ Smolla, supra, § 2:70. “Indeed, many of the classes of speech identified in Chaplinsky now receive substantial amounts of First Amendment Protection.” Id.

Brandenburg v. Ohio, 395 U.S. 444 (1969) foreshadowed the Court’s shift away from Chaplinsky’s categorical balancing approach and towards requiring a connection between the speech and some other crime. In Brandenburg, the leader of a Ku Klux Klan group was prosecuted under a “Criminal Syndicalism” statute for using racial epithets at a televised rally and stating, “[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.” Id. at 445–46.

The Supreme Court did not ask whether the appellant’s speech qualified as “fighting words,” nor did it weigh “the social interest in order and morality” against the “value” of the speech at issue. Instead, it held that “the constitutional guarantees of free speech and free press do not permit a State

to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Id. at 447. Because the statute did not require a close causal connection between the prohibited speech and “imminent lawless action,” the Court held that it was unconstitutional. Id. at 448–49.

Brandenburg establishes that “[t]he ‘fighting words’ doctrine is really not a freestanding First Amendment test at all, but rather a specific topical application of the general principles of Brandenburg,” 1 Smolla, supra, § 10:31, namely, that the First Amendment only excepts speech that bears a close, causal connection with some other crime. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), and State v. Zidel, 156 N.H. 684 (2008), suggest that the same is true of “child pornography.”

In Ashcroft, various plaintiffs challenged a federal statute that prohibited the possession or distribution of “sexually explicit images that appear to depict minors but were produced without using any real children.” Id. at 239, 243. The government argued that the First Amendment does not protect such images because “harm flows from the content of the images, [although] not from the means of their production.” Id. at 242.

“In the case of the material covered by Ferber,” the Court noted, “the creation of the speech is itself the crime of child abuse.” Id. at 254. “Where the images are themselves the product of child sexual abuse, Ferber recognized that the State had an interest in stamping it out without regard to any judgment about its content.” Id. at 249. “The production of the work, not its content, was the target of the statute.” Id. “Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were ‘intrinsically related’ to the sexual abuse of children. . .” Id. “[T]he speech had what the Court in effect held was a proximate link to the crime from which it came.” Id. at 250. “The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.” Id. at 251.

The Court continued, “In contrast to the speech in Ferber, speech that itself is the record of sexual abuse, the [statute at issue] prohibits speech that records no crime and creates no victims by its production,” in other words, speech that “is not ‘intrinsically related’ to the sexual abuse of children.” Id. at 250. Citing Brandenburg, the Court held that the federal statute was unconstitutional because there was not a substantial connection between the images at issue and “child abuse.” Id. at 253.

In Zidel, the defendant, a photographer at a children's camp, possessed images of the heads and necks of minor females superimposed upon nude adult females engaged in sexual activity. Zidel, 156 N.H. at 685. He was convicted of possession of child pornography. Id. at 684. After a thorough review of Ferber, Osborne and Ashcroft, this Court held that the statute, as applied, violated the First and Fourteenth Amendments, because the images were not "the product of sexual abuse," id. at 693 (quoting Ashcroft, 535 U.S. at 249), and because the defendant "merely possess[ed]" the images, id. "[H]owever distasteful, reprehensible, and valueless this conduct might seem," this Court held, "the First Amendment protects the individual's right to observe what he pleases." Id. at 694 (citation and ellipsis omitted).

Ashcroft and Zidel suggest that "child pornography" is not an independent, free-standing exception to the First Amendment, but rather a specific application of a more general exception for speech that is closely connected with an illegal act. United States v. Stevens, 559 U.S. 460 (2010), makes this point clear.

In Stevens, the defendant sold videos of pit bulls engaged in dogfights and attacking other animals. Id. at 466. Although dogfights were illegal throughout the United States by 2010, the videos depicted dogfights in Japan or were from the 1960's and 1970's, and the defendant claimed that these

dogfights were legal at the time and place the videos were created. Id. at 466, n.2. He was convicted under a federal statute that criminalized the creation, sale or possession of certain depictions of animal cruelty “if that conduct violates federal or state law where the creation, sale, or possession takes place.” Id. at 465.

The government invoked Chaplinsky’s categorial, balancing approach. It analogized depictions of animal cruelty to child pornography and argued that, like child pornography, “depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment” because their “societal costs” outweigh “the value of the speech.” Id. at 467–68, 470.

The Supreme Court rejected that view of the First Amendment, calling it “startling and dangerous.” Id. at 470. “The First Amendment’s guarantee of free speech,” the Court held, “does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.” Id. “Most of what we say to one another,” the Court observed, “lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from Government regulation.” Id. at 479.

In Ferber, the Court clarified, it did not exempt the images at issue from First Amendment protection “on the

basis of a simple cost-benefit analysis,” *id.* at 471, but rather because the “[t]he market for child pornography was ‘intrinsically related’ to the underlying abuse, and was therefore ‘an integral part of the production of such materials, an activity illegal throughout the Nation,” *id.* (quoting *Ferber*, 458 U.S. at 759, 761). “*Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech” — that “used as an integral part of conduct in violation of a valid criminal statute” — “and [the Court’s] subsequent decisions” — *Osborne* and *Ashcroft* — “have shared this understanding.” *Id.* The Court went on to strike down the ban on certain depictions of animal cruelty, noting that “[a] depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful.” *Id.* at 475–76.

The cases cited above make clear that speech is not excluded from the First Amendment merely because it can be categorized as “fighting words,” “animal cruelty,” “child pornography,” or, with just one exception³, any other label for speech of low “value.” Rather, the First Amendment only

³ “In many respects, . . . the march of modern First Amendment jurisprudence has been the slow demise of *Chaplinsky*. . . The singular huge and striking counterexample, however, is obscenity.” 2 Smolla, *supra*, § 14.8. Here, the State never alleged — and the jury never found — that the images were obscene. And, even if they were obscene, governments cannot prohibit the private possession of material based on its obscenity. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

excludes speech that bears a close causal connection to criminal activity.

The images at issue here depicted lawful consensual activity. Thus, the images did not fall within the First-Amendment exception for material that is “an integral part of conduct in violation of a valid criminal statute.”

D. As applied, the statute does not pass strict scrutiny.

To pass strict scrutiny, a law must be justified by “compelling state interests” and must be “narrowly tailored” to serve those interests. Becerra, 138 S. Ct. 2361. Some government interests are stronger than others. 1 Smolla, supra, § 4:19.

Governments have “the strongest case for regulating speech that poses risks of physical harm.” Id. Thus, the State undoubtedly has a compelling interest in prohibiting speech that is inherently related to child abuse. As noted above, however, the images here are not related to any child abuse. To the extent the State invokes its interest in preventing child abuse, the “Child Sexual Abuse Images” statute, as applied here, is not narrowly tailored.

Governments have a lesser interest in preventing “relational harm.” Id. Thus, the civil cause of action for “publication of private facts” can co-exist with the First Amendment. 3 Smolla, supra, § 24:2. The tort “involves the

publication of true facts that the common law regards as private and, essentially, nobody's business." Id. § 24:5.

Although publication of private facts has historically been a tort, legislatures have recently enacted criminal statutes that prohibit the unauthorized publication of private sexual images. In 2016, for instance, the New Hampshire legislature enacted RSA 644:9-a, which makes the "nonconsensual dissemination of private sexual images" a class B felony.

Barr concedes that the State has a compelling interest in prohibiting the nonconsensual public dissemination of sexual images. The State may also have a compelling interest in prohibiting even the consensual public dissemination of sexual images of sixteen- and seventeen- year-olds.

The images at issue here depicted A.L. and Barr's "private sexual affairs," the dissemination of which may have caused relational harm to both A.L. and Barr. Id. Had either A.L. or Barr publicized the images without the other's consent, that individual could validly be prosecuted under RSA 644:9-a.

But here, neither A.L. nor Barr publicized the images.⁴ Barr privately possessed the images, and there was no

⁴ It was the State, by deciding to pursue prosecution in this case, that caused the private images here to be disseminated to several law-enforcement officers, court-personnel, lawyers and jurors within A.L. and Barr's small community. When the State published the images to the jury, one juror recognized A.L. as a friend of her cousin. T 94-108.

evidence that he took any steps to distribute them. While someone other than A.L. or Barr may call the images pornography, “one man’s pornography may be another’s keepsake.” Giano v. Senkowski, 54 F.3d 1050, 1056 (2d Cir. 1995). For A.L. and Barr, the images here were not “pornography”; they were a chronicle of their own lawful, intimate relationship.

The State lacks any compelling interest in prohibiting individuals from creating and privately possessing images chronicling their own lawful, intimate relationships. To the extent the State invokes its interest in preventing the relational harm that may result from the public dissemination of such images, RSA Chapter 649-A, as applied here, is not narrowly tailored.

II. BY FALSELY IMPLYING THAT A.L. WAS SEXUALLY INEXPERIENCED, THE STATE OPENED THE DOOR TO EVIDENCE OF HER SEXUAL HISTORY.

In her opening statement, the prosecutor told the jury:

The Defendant, the adult, used [A.L.]. He directed her to obtain images and videos of a sexually explicit nature. She was unsure of how to act, so he made sure to tell her where and how to stand, what to wear, how to stroke or suck on his penis, actions that were unnatural to [A.L.] who was nearly half his age.

T 32–33. At the conclusion of the prosecutor’s opening statement, Barr’s attorney raised the prosecutor’s statements in a sidebar conference. T 41–42. He informed the court that A.L. told investigators that she had previously engaged in sexual relationships with others and had taken sexually explicit photographs. T 41–42. Barr’s lawyer told that court that, prior to the prosecutor’s opening statement, he had not intended to introduce evidence of this activity, recognizing that under the “rape shield” statute, “[he] didn’t think it was appropriate.” T 42. Barr’s lawyer argued, however, that the prosecutor’s assertion that sexual activity was “unnatural” to A.L. “opened the door for some questioning of her.” T 42. Barr’s lawyer reiterated, “I would absolutely not to be trying to bring this in, if the State had not made that statement in opening.” T 42.

The prosecutor objected. T 42. She argued that A.L.'s statements to investigators were "hearsay," adding that "she had taken no oath and no privilege." T 42. The prosecutor denied that her opening statement created any misimpression about A.L.'s sexual experience, asserting, "You can clearly see in the video, it's unnatural for her." T 42-43. The prosecutor noted that, in the video, Barr communicated his preferences regarding A.L.'s performance of fellatio. T 42-43. According to the prosecutor, "If this were a natural thing she would do, he would not have to correct both her hand placement, and where his penis is, and how she's sucking." T 43.

Barr's lawyer noted that "[j]ust because she's not doing it the way he would best like" doesn't mean that it was "unnatural to her." T 43. The word "unnatural," he observed, "clearly carries the intimation that this is the first time she's ever done it." T 43.

The court agreed that "unnatural" was "kind of a loaded word and in retrospect it probably would have been better to say it differently." T 43-44. It nevertheless denied Barr's motion to introduce evidence that he was not A.L.'s first sexual partner. T 44.

Barr's lawyer then clarified his offer of proof, informing the court that A.L. described for investigators "two other prior sexual relationships that she had before . . . Barr." T 44. Barr's lawyer also informed the court that A.L. told

investigators that “this [was] . . . the sixth time that she ha[d] taken or had pictures of her, or posed for pictures. . .” T 44. The prosecutor, in response, asserted that her use of the word “unnatural” was a reference to fellatio, not photography.⁵ T 45. The court reiterated its denial of Barr’s motion. T 46.

In further discussion, the State argued that Barr’s attorney should not be able to question A.L. about sexually explicit photographs she took with prior partners because, “We don’t even have these other photographs. . . So we’re going to speculate about photographs we can’t show anyone?” T 48. The court again reiterated its denial of Barr’s motion. T 48. By doing so, the court erred.

This Court reviews trial court rulings on the admissibility of evidence for an unsustainable exercise of discretion. MacDonald v. Jacobs, ___ N.H. ___ (Jan. 15, 2019). The question is whether the ruling was clearly untenable or unreasonable to the prejudice of the appellant’s case. Id.

New Hampshire Rules of Evidence 401 and 402 exclude irrelevant evidence. New Hampshire Rule of Evidence 412, moreover, generally prohibits “evidence of prior consensual

⁵ The prosecutor’s explanation hardly excuses her assertion. The State charged Barr with a crime based solely on the images; the sexual activity was entirely lawful. Needless to say, it is improper for a prosecutor to implore the jury to find the defendant guilty of the charged crime based on the fact that he in engaged in other, lawful activity.

sexual activity between the victim and any person other than the defendant.” Under the opening-the-door doctrine, however, evidence that is otherwise inadmissible may become admissible. State v. DePaula, 170 N.H. 139, 146 (2017). The assertions a party makes in its opening statement may open the door. State v. Nightingale, 160 N.H. 569, 579 (2010). The opening-the-door doctrine has two components: curative admissibility and specific contradiction. DePaula, 170 N.H. at 146.

Here, Barr’s primary argument is that the State’s assertion that sexual activity was “unnatural” for A.L. referenced inadmissible prejudicial evidence, and thus, it opened the door to A.L.’s prior sexual activity under the curative admissibility doctrine. Alternatively, Barr argues that, if the State’s assertion referenced admissible evidence, it created the misimpression that A.L. was sexually inexperienced, and thus, it opened the door to A.L.’s prior sexual activity under the specific contradiction doctrine.

“The ‘curative admissibility’ doctrine applies when inadmissible prejudicial evidence has been erroneously admitted, and the opponent seeks to introduce testimony to counter the prejudice.” DePaula, 170 N.H. at 146. Under Rules 401, 402 and 412, the sexual history of an alleged victim is generally inadmissible. Here, whether the sexual activity depicted was “natural” or “unnatural” for A.L. had no

relevance to any of the charges, and there was no valid reason for the prosecutor to make this assertion in her opening statement. By doing so, the prosecutor referenced inadmissible evidence.

The evidence was also prejudicial. Rule 412 is grounded in the recognition that the presence or absence of an alleged victim's sexual history is generally irrelevant. The purpose of the rule is not to allow a prosecutor to provoke the jury's hostility against the defendant by insinuating that he has defiled a pure, virginal victim. To the contrary, the rule rejects the notion that an alleged victim's sexual "purity" is somehow related to the existence of a crime or the defendant's culpability. By invoking this outdated and sexist idea, the prosecutor's opening statement prejudiced Barr.

The evidence that Barr proffered would have countered the prejudice to Barr without injecting any additional prejudice. By negating the inference that A.L. was sexually inexperienced, the evidence would have removed any hostility that jurors may have felt toward Barr as the result of the prosecutor's innuendo. There is, moreover, no reason to believe that the jury would have viewed A.L. with hostility due to her prior sexual activity. A.L. was sixteen years old; she was entitled to choose whether, and with whom, to engage in sexual activity. Allowing Barr to elicit evidence that Barr was not A.L.'s first sexual partner would merely have eliminated

the prejudice caused by the prosecutor's improper assertion. By preventing Barr from eliminating the prejudice caused by the State's opening statement, the court erred.

If this Court concludes that the prosecutor's assertion that sexual activity was "unnatural" for A.L. did not reference inadmissible evidence, Barr's proffered evidence was admissible under the specific-contradiction doctrine. That doctrine "applies more broadly to situations in which a party introduces admissible evidence that creates a misleading advantage for that party, and the opposing party is then permitted to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage." DePaula, 170 N.H. at 146.

Here, the prosecutor's assertion that sexual activity was "unnatural" for A.L. was designed to imply that she was sexually inexperienced; there is no other credible explanation. It is of no moment that the prosecutor did not expressly assert that A.L. was sexually inexperienced. As this Court has repeatedly recognized, an assertion need not be explicit to open the door; "the door can be opened by inferential conclusions." Id. at 148 ("Although the defendant did not explicitly state that he was, as the State claimed, a 'wide-eyed innocent,' the defendant's testimony intimated that he was 'innocent' in the sense that he was unaware of the true purpose of the group's . . . visit"). To hold otherwise would

invite litigants to inject inadmissible evidence and mislead juries without consequence, so long as they do so by innuendo rather than explicit assertion.

The impression that A.L. was sexually inexperienced was misleading. As Barr proffered, A.L. reported to investigators that she had had “two other prior sexual relationships . . . before . . . Barr.” T 44. Finally, the misimpression created an advantage for the State. As noted above, the prosecutor misleadingly portrayed A.L. as sexually inexperienced precisely to provoke hostility toward Barr for engaging in lawful activity.

State v. Cannon, 146 N.H. 562 (2001) is analogous. In Cannon, the defendant was charged with aggravated felonious sexual assault. Id. at 563. He maintained that the sex was consensual. Id. At trial, the State elicited the alleged victim’s testimony that she objected to sex with the defendant because she had a boyfriend. Id. at 563–64. After the State rested, the defendant moved to call his cousin as a witness, who, he proffered, would testify that one or two weeks prior to the alleged assault, the alleged victim became sexually aggressive toward him and had sex with him. Id. at 564. The trial court excluded the cousin’s testimony, finding that its prejudicial effect “would have outweighed its probative value ‘on a very peripheral issue.’” Id.

This Court reversed. Id. at 567. It acknowledged that, “normally evidence of the complainant’s sexual history would be excluded pursuant to the rape shield doctrine.” Id. at 565. It also noted that the alleged victim “had no obligation to explain her reasoning for not consenting.” Id. It held, however, that “once she did so at the request of the State, the defendant was entitled to present evidence to refute her assertion.” Id. Thus, “the State opened the door to the admissibility of [the cousin’s] testimony when it asked the complainant why she [objected to sex with the defendant].” Id.

Here, similarly, neither the prosecutor nor A.L. had any obligation to explain her sexual history. Once the prosecutor did so — by asserting that the A.L.’s sexual activity with the defendant was “unnatural” for her — Barr was entitled to present evidence to refute that assertion. See State v. Lujan, 967 P.2d 123, 127 (Ariz. 1998) (“a victim’s prior sexual conduct [may] be admitted . . . when the prosecution has opened the door by asserting the victim’s chaste nature”); State v. Magallanez, 235 P.3d 460, 473 (Kan. 2010) (by eliciting the complainant’s testimony that she was a virgin at the time of the alleged sexual assault, “the State opened the door to the otherwise off-limits issue of [the complainant’s sexual history].”); State v. Robinson, 803 A.2d 452, 457 (Me. 2002) (“We . . . allow the admission of . . . evidence [of a

victim's sexual history] when the prosecution has 'opened the door' by offering evidence of the victim's chastity.”).

By preventing Barr from countering the misleading advantage caused by the State's opening statement, the court erred.

CONCLUSION

WHEREFORE, Timothy Barr respectfully requests that this Court reverse.

Undersigned counsel requests fifteen minutes oral argument.

The appealed decisions were not in writing and therefore are not appended to the brief.

This brief complies with the applicable word limitation and contains 6,638 words.

Respectfully submitted,

By /s/ Thomas Barnard
Thomas Barnard, #16414
Senior Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: March 21, 2019

A P P E N D I X

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**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

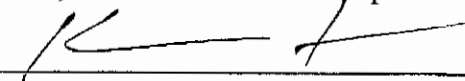
of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 9th day of July 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

(F) MANUF CHILD SEX ABUSE IMAGES
N.H. RSA 649-A:3-b

in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant recorded and saved a digital recording (20170709_164211) of himself receiving fellatio from A.L (DOB 01/12/2001) while she was on her knees in front of him.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney

This is a true bill.



Foreperson

| | |
|---------------|---|
| Name: | <u>Timothy Barr</u> |
| DOB: | <u>03/23/1987</u> |
| Address: | <u>44D Linderhoff Golf Rd, Bartlett, NH03812</u> |
| RSA: | <u>N.H. RSA 649-A:3-b</u> |
| Offense level | <u>Special Felony (15-30 years in the NHSP, \$4,000 fine)</u> |
| Dist/Mun Ct: | <u>/</u> |

212-2017-CR-229 _____

CHARGE ID: 1407262C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 11th day of July 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

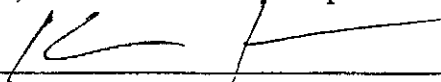
(F) POSS CHILD SEX ABUSE IMAGES

N.H. RSA 649-A:3

in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Procured, possessed, or controlled;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant received an Facebook message on July 11, 2017 from A.L (DOB 01/12/2001) that contained a picture of A.L. in a t-shirt and panties with her hand inside her underwear.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney

This is a true bill.



Foreperson

| | |
|---------------|--|
| Name: | Timothy Barr |
| DOB: | 03/23/1987 |
| Address: | 44D Linderhoff Golf Rd, Bartlett, NH03812 |
| RSA: | N.H. RSA 649-A:3-b |
| Offense level | Class A Felony (7 ½ -15 years in the NHSP, \$4,000 fine) |
| Dist/Mun Ct: | |

212-2017-CR-229 _____

CHARGE ID: 1407263C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

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(DOB: 03/23/1987)**

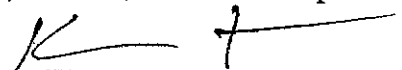
of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

(F) MANUF CHILD SEX ABUSE IMAGES
N.H. RSA 649-A:3-b

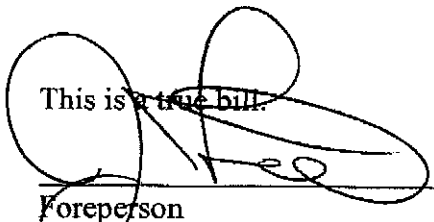
in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant created and saved a digital image (20170628_103502) of himself receiving fellatio from A.L (DOB 01/12/2001) and she was holding his penis in her right hand.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney



Foreperson

| | |
|---------------|---|
| Name: | <u>Timothy Barr</u> |
| DOB: | <u>03/23/1987</u> |
| Address: | <u>44D Linderhoff Golf Rd, Bartlett, NH03812</u> |
| RSA: | <u>N.H. RSA 649-A:3-b</u> |
| Offense level | <u>Special Felony (15-30 years in the NHSP, \$4,000 fine)</u> |
| Dist/Mun Ct: | _____ |

212-2017-CR-229 _____

CHARGE ID: 14210940

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

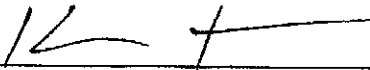
of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

(F) MANUF CHILD SEX ABUSE IMAGES
N.H. RSA 649-A:3-b

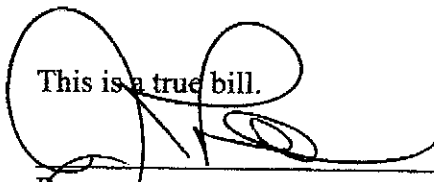
in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant created and saved a digital image (20170628_103457) of himself receiving fellatio from A.L (DOB 01/12/2001) and she was holding his penis in her right hand.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney


This is a true bill.

Foreperson

Name: Timothy Barr
DOB: 03/23/1987
Address: 44D Linderhoff Golf Rd, Bartlett, NH03812
RSA: N.H. RSA 649-A:3-b
Offense level Special Felony (15-30 years in the NHSP, \$4,000 fine)
Dist/Mun Ct: _____

212-2017-CR-229 _____

CHARGE ID: 1421095C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

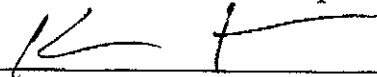
(F) MANUF CHILD SEX ABUSE IMAGES

N.H. RSA 649-A:3-b

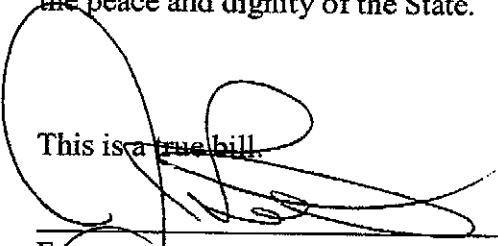
in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant created and saved a digital image (20170628_103452) of himself receiving fellatio from A.L (DOB 01/12/2001) and she was holding his penis in her right hand.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney


This is a true bill.

Foreperson

Name: Timothy Barr
DOB: 03/23/1987
Address: 44D Linderhoff Golf Rd, Bartlett, NH03812
RSA: N.H. RSA 649-A:3-b
Offense level Special Felony (15-30 years in the NHSP, \$4,000 fine)
Dist/Mun Ct: _____

212-2017-CR-229 _____

CHARGE ID: 1421096C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

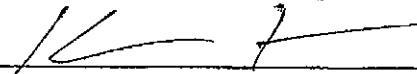
of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 8th day of July 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

(F) POSS CHILD SEX ABUSE IMAGES
N.H. RSA 649-A:3

in that:

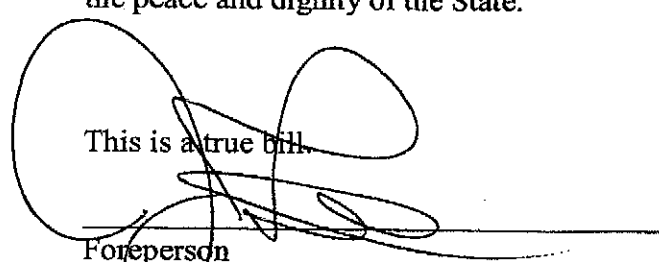
1. The defendant, Timothy Barr;
2. Knowingly;
3. Procured, possessed, or controlled;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant received an email on July 8, 2017 from A.L (DOB 01/12/2001) that contained a video of A.L. completely naked seated on a toilet with her fingers in her vagina.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney

This is a true bill.



Foreperson

| | |
|---------------|--|
| Name: | Timothy Barr |
| DOB: | 03/23/1987 |
| Address: | 44D Linderhoff Golf Rd, Bartlett, NH03812 |
| RSA: | N.H. RSA 649-A:3-b |
| Offense level | Class A Felony (7 ½ -15 years in the NHSP, \$4,000 fine) |
| Dist/Mun Ct: | |

212-2017-CR-229 _____

CHARGE ID: 1421097C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
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of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

(F) MANUF CHILD SEX ABUSE IMAGES

N.H. RSA 649-A:3-b

in that:

1. The defendant, Timothy Barr;
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5. To wit, the defendant created and saved a digital image (20170628_103449) of himself receiving fellatio from A.L (DOB 01/12/2001) and she was holding his penis in her right hand.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney

This is a true bill.



Foreperson

| | |
|---------------|---|
| Name: | <u>Timothy Barr</u> |
| DOB: | <u>03/23/1987</u> |
| Address: | <u>44D Linderhoff Golf Rd, Bartlett, NH03812</u> |
| RSA: | <u>N.H. RSA 649-A:3-b</u> |
| Offense level | <u>Special Felony (15-30 years in the NHSP, \$4,000 fine)</u> |
| Dist/Mun Ct: | _____ |

212-2017-CR-229 _____

CHARGE ID: 1421090C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

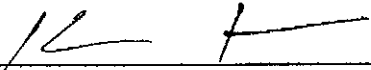
(F) MANUF CHILD SEX ABUSE IMAGES

N.H. RSA 649-A:3-b

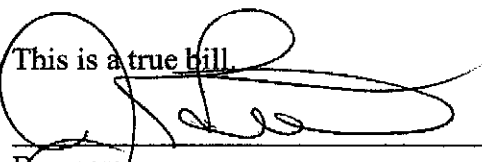
in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant created and saved a digital image (20170628_103506) of himself having the tip of his penis licked by A.L (DOB 01/12/2001) and she was holding his penis in her right hand.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney


This is a true bill.

Foreperson

| | |
|---------------|--|
| Name: | Timothy Barr |
| DOB: | 03/23/1987 |
| Address: | 44D Linderhoff Golf Rd, Bartlett, NH03812 |
| RSA: | N.H. RSA 649-A:3-b |
| Offense level | Special Felony (15-30 years in the NHSP, \$4,000 fine) |
| Dist/Mun Ct: | |

212-2017-CR-229 _____

CHARGE ID: 1421099C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

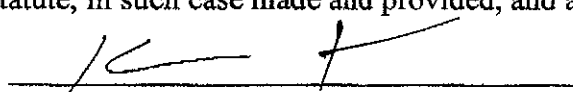
(F) MANUF CHILD SEX ABUSE IMAGES

N.H. RSA 649-A:3-b

in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant created and saved a digital image (20170628_103519) of himself receiving fellatio from A.L (DOB 01/12/2001) and she was holding his penis in her right hand.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney

This is a true bill



Foreperson

| | |
|---------------|---|
| Name: | <u>Timothy Barr</u> |
| DOB: | <u>03/23/1987</u> |
| Address: | <u>44D Linderhoff Golf Rd, Bartlett, NH03812</u> |
| RSA: | <u>N.H. RSA 649-A:3-b</u> |
| Offense level | <u>Special Felony (15-30 years in the NHSP, \$4,000 fine)</u> |
| Dist/Mun Ct: | _____ |

212-2017-CR-229 _____

CHARGE ID: 1421100C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

(F) MANUF CHILD SEX ABUSE IMAGES
N.H. RSA 649-A:3-b

in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant created and saved a digital image (20170628_103539) of himself receiving fellatio from A.L (DOB 01/12/2001) and she was holding his penis in her right hand while his left hand is on top of her head.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney

This is a true bill.



Foreperson

| | |
|---------------|--|
| Name: | Timothy Barr |
| DOB: | 03/23/1987 |
| Address: | 44D Linderhoff Golf Rd, Bartlett, NH03812 |
| RSA: | N.H. RSA 649-A:3-b |
| Offense level | Special Felony (15-30 years in the NHSP, \$4,000 fine) |
| Dist/Mun Ct: | |

212-2017-CR-229 _____

CHARGE ID: 1421101C

**THE STATE OF NEW HAMPSHIRE
INDICTMENT**

CARROLL, SS

SEPTEMBER TERM

At the Superior Court, holden at Ossipee, within and for the County of Carroll aforesaid, on the 29th day of September in the year of our Lord Two Thousand and Seventeen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon oath, present that

**TIMOTHY BARR
(DOB: 03/23/1987)**

of 44D Linderhoff Golf Rd, Bartlett, NH 03812, on or about the 28th day of June 2017 at North Conway in the County of Carroll in the State of New Hampshire aforesaid, did commit the crime of

(F) MANUF CHILD SEX ABUSE IMAGES

N.H. RSA 649-A:3-b

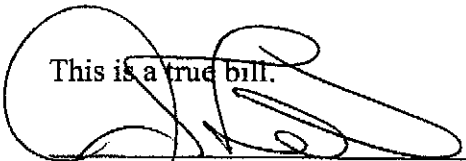
in that:

1. The defendant, Timothy Barr;
2. Knowingly;
3. Created, produced, manufactured, or participated in;
4. A visual representation of a child engaging in sexually explicit conduct;
5. To wit, the defendant created and saved a digital image (20170628_103547) of himself receiving fellatio from A.L (DOB 01/12/2001) and she was holding his penis in her right hand. His right calf is also visible in the picture.

Said acts being contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



Kimberly J. Tessari
Assistant County Attorney


This is a true bill.

Foreperson

| | |
|---------------|--|
| Name: | Timothy Barr |
| DOB: | 03/23/1987 |
| Address: | 44D Linderhoff Golf Rd, Bartlett, NH03812 |
| RSA: | N.H. RSA 649-A:3-b |
| Offense level | Special Felony (15-30 years in the NHSP, \$4,000 fine) |
| Dist/Mun Ct: | _____ |

212-2017-CR-229 _____

CHARGE ID: 1421102C

State of New Hampshire

v.

Timothy Barr

17-CR-229

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR DIRECTED
VERDICT OF ACQUITTAL**

NOW COMES the defendant, Timothy Barr, by and through counsel, Steve Mirkin, Esq., and in support of his Motion to Dismiss or for Directed Verdict of Acquittal at the close of the State's case and/or at the close of all the evidence herein, states as follows:

Conviction of the Defendant under any of the charges herein would violate the First Amendment, United States Constitution, and Part I, Art. 22 of the New Hampshire Constitution.

1. Defendant is charged with nine counts of Manufacturing Child Sex Abuse Images, RSA 649-A:3-b, and two counts of Possessing Child Sex Abuse Images, RSA 649-A:3. The images supporting the Manufacturing charges are eight still images and one video, taken by the Defendant on his cell phone¹ of A.L., who was then sixteen years of age, engaging in consensual sexual relations with him. The images supporting the Possession charges are one still image of A.L., clothed but with her hand inside the front of her underwear, and one video of A.L. nude and masturbating. Both times she was alone and set up the capturing of the images herself. Again, she was sixteen years of age at the

¹ For purposes of this memorandum Defendant will assume *arguendo* that the factual allegations herein were proven by the evidence, without necessarily conceding same.

time the images were created, and she created them and sent them to the defendant voluntarily. There is no allegation that the defendant disseminated any of these images to any other person, nor that he intended to do so, and no evidence which would have supported such an allegation.

2. The United States Supreme Court, in Stanley v. Georgia, 394 U.S. 557 (1969); upheld under the First and Fourteenth Amendments the individual's right to possess and observe in his/her own home, materials depicting sexual activity even though they might otherwise be considered "obscene" and therefore unlawful under a state statute.
3. The Supreme Court subsequently, in New York v. Ferber, 458 U.S. 747 (1982); and Osborne v. Ohio, 495 U.S. 103 (1990); drew an exception for child pornography, holding that notwithstanding First Amendment considerations, states were free to proscribe the mere possession of child pornography. This was so because the creation of photographs and films depicting sexual activity by children was considered intrinsically harmful to the child participants, and the existence of a market for such materials served to encourage the creation of more such images, and thus the sexual abuse of more children.
4. Congress then enacted, in 1996, the Child Pornography Prevention Act (CPPA). In Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); the Court held two provisions of the CPPA unconstitutional as beyond the categories of child pornography proscribed in *Ferber*. Specifically, the Court found that images appearing to depict minors in sexual activity but which were produced by other means, such as by using youthful-looking adults or by computer imaging

technology, could not be barred under *Ferber* because no actual children were harmed or abused in the making of such materials. The Court rejected the Government's arguments that such images, even if not created through the actual recording of unlawful activity, should nonetheless be banned because of their potential future use for unlawful purposes, such as to encourage pedophiles' appetites or to assist them in seducing children; the Court held that absent a showing of a direct link between the questioned speech and imminent illegal conduct, the First Amendment impingement was unacceptably overbroad.

5. The New Hampshire Supreme Court relied heavily on *Ashcroft* in *State v. Zidel*, 156 NH 684 (2008). In that case, the defendant had taken (as part of his summer camp job) photographs of fifteen-year-old girls engaged in innocent activity. He then photoshopped images of their heads and faces from those photos onto images of naked adult bodies engaged in sexual activity. The evidence was that he created those images only for his own personal enjoyment, and he was charged with nine counts of Possession of Child Sex Abuse Images under RSA 649-A:3.²
6. In reversing his convictions, the Court found that RSA 649-A:3 was unconstitutional as applied to Zidel under these circumstances. The Court traced the development of First Amendment law as relates to child pornography, in much greater detail than this memorandum, through *Stanley*, *Ferber*, *Osborne* and *Ashcroft*. In the end, the Court analogized the photoshopped

² Although his actions were discovered when he gave a CD-ROM with the challenged images to his supervisor, that was apparently inadvertent and Zidel was not charged with disseminating child pornography.

images in that case to computer-generated images as referenced in *Ashcroft*, and found that the Constitution prohibited the criminal prosecution for such images when they did not depict actual children engaged in sexually abusive activity³. Significantly, the Court cited the legislative purpose provision in RSA 649-A:1, to the effect that “[t]he legislature finds that there has been a proliferation of exploitation of children through their *use as subjects in sexual performances*.” 156 NH at 262 (emphasis by Court). The Court restated that the images charged in that case were not, in fact, depictions of children in sexual performances.⁴

7. *Zidel* still represents the state of the law in New Hampshire. Its statutory analysis was cited with approval by the Florida Court of Appeals, Second Circuit, in *Parker v. State*, 81 So.2d 451, 455 (Fla. App.2d 2011) (“a similar result under a statute remarkably similar to [the Florida Statute]”), although that case did not deem it necessary to reach the First Amendment issue.
8. The case at bar presents a similar, though admittedly not identical, issue to that addressed in *Zidel*. Here, A.L. is classified as an adult for purposes of engaging in consensual sexual conduct. The activities in which she is depicted in the various photos and videos, being consensual on her part, are lawful for her to engage in and, as to those in which Mr. Barr was engaged with her, his conduct is lawful as well. Thus, the activity depicted is not that of “sexual abuse”, but rather, that of lawful consensual sexual activity. Nor is there any indication, let

³ *State v. Cobb*, 143 NH 638 (1999), holding to the contrary, predated *Ashcroft* and to that extent would be impliedly, if not expressly, overruled by *Zidel*.

⁴ It should be noted that the defendant in *Zidel* also raised the New Hampshire Constitution, Part I, Art. 22, in support of his argument; the Court found at the outset that the case was controlled by existing First Amendment law and did not conduct a separate analysis under the State Constitution. 156 NH at 686.

alone allegation, that Mr. Barr engaged or attempted to engage in any of the activities as to these images which would have been proscribed under RSA 649-A:3-a, "Distribution of Child Sex Abuse Images." "[W]hen no part of the image is 'the product of sexual abuse,' *Ashcroft*, 535 U.S. at 249, and a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image." *Zidel*, 156 NH at 263.

9. It is therefore respectfully submitted that all the pending indictments herein must be DISMISSED or a verdict of Not Guilty directed by the Court, in that the statutes under which the charges were brought, RSA 649-A:3 and 649-A:3 (b) are unconstitutional as applied against him on the facts presented herein.

WHEREFORE, Defendant Timothy Barr respectfully prays the Court to grant his Motion, and for such further relief as may be just.

Respectfully submitted,



Steve Mirkin, Esq., Bar ID# 1771
New Hampshire Public Defender
408 Union Avenue
Laconia, NH 03246
(603) 524-1831

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this 4 day of June, 2018, to Kim Tessari, Esq., Assistant Carroll County Attorney.



Steve Mirkin, Esq.

STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

TIMOTHY BARR

Docket No. 212-2017-CR-229

STATE'S OBJECTION TO THE DEFENDANT'S MOTION TO DISMISS

NOW COMES the State of New Hampshire, by and through the Office of the Carroll County Attorney, and states as follows:

LEGAL ARGUMENT

A. THE DEFENDANT'S MOTION TO DISMISS IS UNTIMELY

1. The Defendant makes no claim that the State's evidence at trial was insufficient to meet all of the elements of all eleven charges. Instead the defendant briefed an issue of Constitutional law for his grounds to dismiss.

2. New Hampshire Rules of Criminal Procedure 15(b)(1) States

Pretrial Motions. The deadline for filing all pretrial motions other than discovery related motions, including but not limited to motions for joinder or severance of offenses, **motions to dismiss**, motions to suppress evidence, *Daubert* motions, and other motions relating to the admissibility of evidence that would require a substantial pretrial hearing, shall be sixty days after entry of a plea of not guilty or fifteen days after the dispositional conference, whichever is later.

3. The dispositional conference in this case was held on December 14, 2017. The defendant's motion was due at the latest by December 29, 2017. Here, the defendant filed an as applied Constitutional challenge at the closure of the State's case at trial on June 11, 2018. The defendant has provided no rationale for why his substantive motion was filed over five months after the deadline.

4. Typically, the State is entitled to 10 days to research and respond to motions such as these, here the State's time to respond was severely truncated due to the defendant's late raising of the issue. Additionally this issue does not appear to the State be an issue that was not previously contemplated by the defendant as defense counsel provided both the State and

Court with a written pleading mere moments before making oral argument. Again the defendant has provided no rationale or basis for why neither the State, nor Court, was provided a copy of the written pleading at the beginning of day to allow for prooper consideration. Instead the defendant engaged in an argument by ambush on a substantive issue.

B. The holding of State v. Zidel and its federal progeny are inapplicable to the present case.

5. The defendant cites State v. Zidel 156 NH 684, and the federal progeny that Zidel relied upon for the proposition that the NH RSA 649-A:3 and 649-A:3-b do not apply to the defendant. This argument is wholly without merit and the factual backgrounds of the cases could not be further apart.
6. In Zidel, the defendant, a camp worker, photoshopped the heads of 15 year old girls onto the naked bodies of adults engaged in sexual activity. The defendant was convicted on nine counts of Possession of Child Sexual Abuse Images. The New Hampshire Supreme Court overturned the convictions finding that the images were not depictions of children engaged in sexual performances.
7. Here, the defendant is charged with 9 counts of manufacturing and 2 counts of possession of Child Abuse Sexual Images. Unlike Zidel, where the defendant used photoshop to apply the heads of 15 year old girls to the bodies of adults, here the evidence demonstrates that the defendant photographed and video recorded himself engaged in sexual activity with a 16 year old girl, a child as defined by NH RSA 649-A:2.
8. Where in Zidel, the New Hampshire Supreme Court found that the photographs did not contain children engaged in sexual performances, here the photographs and images do. A.L is a child who was video recorded and photographed while directly engaged in sexual activity. This is nowhere near akin to A.L.'s head being digitally morphed onto the body of an adult. To draw that conclusion that two are comparable is a gross mischaracterization of the holding in Zidel.
9. Additionally, the fact that A.L. consented to the acts in the photographs and recordings does not mitigate the criminal nature of the defendant's acts. The New Hampshire the legal age of consent for sexual activity is 16 years old. However, nowhere does the legal age of consent confer upon a child the legal status of adult.
10. While the legal age of consent is 16 years old, the New Hampshire Legislature has defined the age of majority as 18 years old. This is reflected in the definitions section RSA 649-A:2. Additionally, in RSA 649-A:3 the legislature has stated that children, those under the age of 18, may not be the subject of sexual images or recordings. There is no conflict of law created by the two distinct age requirements. A child can engage in sexual activity, A child may not be the subject of sexual explicit recording or images.
11. The cases cited by the defendant do not apply to the facts in this case, as such the defendant's motion should be denied.

1. WHEREFORE, the State requests that this Honorable Court:

- A. Deny the Defendant's Motion without a hearing; or
- B. Hold a hearing on the matter; or
- C. Grant any other relief deemed proper and just.

June 11, 2018

Respectfully Submitted,
STATE OF NEW HAMPSHIRE



Keith D. Blair
Assistant County Attorney
New Hampshire Bar # 268028
Carroll County Attorney's Office
95 Water Village Road
Ossipee, NH 03864
(603) 539-7769

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State's Pleading has on this date been forwarded to Steve Mirkin, Esq. defense counsel, attorney for defendant.

June 11, 2018

Respectfully Submitted,
STATE OF NEW HAMPSHIRE



Keith D. Blair
Carroll County Attorney's Office

COMMITTEE REPORT

| | |
|-------------------|--|
| Committee: | CRIMINAL JUSTICE AND PUBLIC SAFETY |
| Bill Number: | SB495-FN |
| Title: | prohibiting Internet solicitation and exploitation of children. |
| Date: | April 22, 2008 |
| Consent Calendar: | NO |
| Recommendation: | OUGHT TO PASS WITH AMENDMENT |

STATEMENT OF INTENT

This bill, as it came from the Senate, increased penalties for possession of child pornography and for using the internet to entice a child to perform a sexual act. It also establishes penalties for manufacturers and distribution of images of a child engaging in sexual conduct. Finally, it permits law enforcement to verify the address of a sex offender through in-person contact at the offender's home or residence. When our Committee took the bill we made two changes. We changed "under the age of 16 years," to "under the age of 18 years" to make the age consistent with other references in the criminal code. The next change made was in adding a penalty to 649A:7, III to say that any person who violates a court order, or non-disclosure agreement by recopying, or publishing any visual representation of a child engaging in, or being engaged in sexually explicit conduct, shall be subject to prosecution under RSA 649:3.

Vote 16-0.

Rep. Stanley E Stevens
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

http://www.courts.state.nh.us

Court Name: Carroll Superior Court

Case Name: State v. Timothy Barr

Case Number: 212-2017-CR-229
(if known)

Charge ID Number: 1407262c

HOUSE OF CORRECTIONS SENTENCE

| | |
|---|--------------------------------|
| Plea/Verdict: <u>Guilty</u> | Clerk: |
| Crime: <u>Manufacture Child Sexual Abuse (incest)</u> | Date of Crime: <u>7/9/2017</u> |
| Monitor: <u>L. Towle</u> | Judge: <u>Ignatius</u> |

A finding of GUILTY/TRUE is entered.

This conviction is for a Felony Misdemeanor Violation of Probation

- The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.
- The defendant has been convicted of a misdemeanor, other than RSA 631:2-b or an offense recorded as Domestic Violence, which includes as an element of the offense, the use or attempted use of physical force or threatened use of a deadly weapon, and the defendant's relationship to the victim is:
 - (1) Current or former spouse (2) Parent (3) Guardian (4) Child in common
 - OR Cohabiting or cohabited with victim as a (5) spouse (6) parent (7) guardian
 - OR A person similarly situated to (8) spouse (9) parent (10) guardian

1. The defendant is sentenced to the House of Corrections for a period of 12 months

2. This sentence is to be served as follows:

Stand committed Commencing _____

Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____

_____ of the sentence is suspended during good behavior and compliance with all terms and conditions of this order. Any suspended sentence may be imposed after hearing at the request of the State. The suspended sentence begins today and ends _____ years from today or release on _____

(Charge ID Number)

_____ of the sentence is deferred for a period of _____

The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____

Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

Other: _____

3. The sentence is consecutive to 1421094c

(Charge ID Number)

concurrent with _____
(Charge ID Number)

4. Pretrial confinement credit: _____ days.

5. The court recommends to the county correctional authority:

Work release consistent with administrative regulations.

Drug and alcohol treatment and counseling.

Sexual offender program.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

- 6. The defendant is placed on probation for a period of 2 year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.
Effective: Forthwith Upon Release 1407262C
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 8 Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

OTHER CONDITIONS

- 9. Other conditions of this sentence are:
 - A. The defendant is fined \$ 4,000, plus statutory penalty assessment of \$ 960
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ ALL of the fine and \$ ALL of the penalty assessment is suspended for 2 year(s). *in release*
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ _____ to _____
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. The defendant's license privilege to operate in New Hampshire is revoked for a period of _____ effective _____
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ of today's date.
 - G. The defendant is ordered to have no contact with _____
either directly or indirectly, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or third parties.
 - H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - J. Other: Any restrictions or contacts with minors shall be in accordance with the Sex Offender Registry; defendant to obtain psych sexual assessment and comply with recommended treatment, if any; Assessment to be completed within 3 months of release, if not done previously; internet usage to be monitored by Probation in conformance with Sexual Offender Registry requirements.

Date 7/13/2018

Harry Ignat
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

http://www.courts.state.nh.us

Court Name: Carroll Superior Court

Case Name: State v. Timothy Barr

Case Number: 212-2017-CR-229 Charge ID Number: 1421094c
(if known)

HOUSE OF CORRECTIONS SENTENCE

| | |
|---|--------------------------|
| Plea/Verdict: Guilty | Clerk: |
| Crime: Manufacture of Child Sexual Images | Date of Crime: 6/28/2017 |
| Monitor: Towle | Judge: Ignatius |

A finding of GUILTY/TRUE is entered.

This conviction is for a Felony Misdemeanor Violation of Probation

The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

The defendant has been convicted of a misdemeanor, other than RSA 631:2-b or an offense recorded as Domestic Violence, which includes as an element of the offense, the use or attempted use of physical force or threatened use of a deadly weapon, and the defendant's relationship to the victim is:

(1) Current or former spouse (2) Parent (3) Guardian (4) Child in common
OR Cohabiting or cohabited with victim as a (5) spouse (6) parent (7) guardian
OR A person similarly situated to (8) spouse (9) parent (10) guardian

1. The defendant is sentenced to the House of Corrections for a period of 12 months

2. This sentence is to be served as follows:

Stand committed Commencing _____

Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____

_____ of the sentence is suspended during good behavior and compliance with all terms and conditions of this order. Any suspended sentence may be imposed after hearing at the request of the State. The suspended sentence begins today and ends _____ years from

today or release on _____

(Charge ID Number)

_____ of the sentence is deferred for a period of _____

The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____

Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

Other: _____

3. The sentence is consecutive to _____
(Charge ID Number)

concurrent with _____
(Charge ID Number)

4. Pretrial confinement credit: 3 days.

5. The court recommends to the county correctional authority:

Work release consistent with administrative regulations.

Drug and alcohol treatment and counseling.

Sexual offender program.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Name: State v. Timothy Barr

Case Number: 212-2017-CR-229

1421094C

HOUSE OF CORRECTIONS SENTENCE

PROBATION

- 6. The defendant is placed on probation for a period of 2 year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.
Effective: Forthwith Upon Release 1407262C
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 8. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

OTHER CONDITIONS

- 9. Other conditions of this sentence are:
 - A. The defendant is fined \$ 4,000, plus statutory penalty assessment of \$ 960
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10% service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ ALL of the fine and \$ ALL of the penalty assessment is suspended for 2 year(s) ^(duration of probation) _{release}
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ _____ to _____
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. The defendant's license privilege to operate in New Hampshire is revoked for a period of _____ effective _____
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ of today's date.
 - G. The defendant is ordered to have no contact with _____
 either directly or indirectly, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or third parties.
 - H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - J. Other:

any restrictions on contacts with minors shall be in accordance with the sex offender registry; defendant to obtain psychosexual assessment and comply with recommended treatment, if any, to be completed within 3 months of release if not done previously; unless otherwise to be monitored by Probation in conformance with sexual offender

Date Registry requirements.

Presiding Justice Amey Jones

7/13/2018

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: **Carroll Superior Court**

Case Name: **State v. Timothy Barr**

Case Number: **212-2017-CR-229**
(if known)

Charge ID Number: **1421097c**

HOUSE OF CORRECTIONS SENTENCE

| | |
|-----------------------------|--------------------------------|
| Plea/Verdict: Guilty | Clerk: |
| Crime: POSSESSION | Date of Crime: 7/8/2017 |
| Monitor: L. Towle | Judge: Ignatius |

A finding of GUILTY/TRUE is entered.

This conviction is for a Felony Misdemeanor Violation of Probation

The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

The defendant has been convicted of a misdemeanor, other than RSA 631:2-b or an offense recorded as Domestic Violence, which includes as an element of the offense, the use or attempted use of physical force or threatened use of a deadly weapon, and the defendant's relationship to the victim is:

- (1) Current or former spouse (2) Parent (3) Guardian (4) Child in common
OR Cohabiting or cohabited with victim as a (5) spouse (6) parent (7) guardian
OR A person similarly situated to (8) spouse (9) parent (10) guardian

1. The defendant is sentenced to the House of Corrections for a period of 12

2. This sentence is to be served as follows:

- Stand committed Commencing _____
 Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____
 ALL of the sentence is suspended during good behavior and compliance with all terms and conditions of this order. Any suspended sentence may be imposed after hearing at the request of the State. The suspended sentence begins today and ends 2 years from today or release on release.
 (Charge ID Number)

_____ of the sentence is deferred for a period of _____
 The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____

Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

Other: _____

3. The sentence is consecutive to _____ (Charge ID Number)
 concurrent with _____ (Charge ID Number)

4. Pretrial confinement credit: _____ days.

5. The court recommends to the county correctional authority:
- Work release consistent with administrative regulations.
 - Drug and alcohol treatment and counseling.
 - Sexual offender program.
 - _____

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

- 6. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.
Effective: Forthwith Upon Release _____
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 8. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

OTHER CONDITIONS

- 9. Other conditions of this sentence are:
 - A. The defendant is fined \$ _____, plus statutory penalty assessment of \$ _____
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ _____ to _____
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. The defendant's license privilege to operate in New Hampshire is revoked for a period of _____ effective _____
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ of today's date.
 - G. The defendant is ordered to have no contact with A. L. (DOB 1/12/2001) either directly or indirectly, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or third parties.
 - H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - J. Other: Any restrictions or contacts with minors shall be in accordance with the Sex Offender Registry; defendant to obtain psychosexual assessment and comply with recommended treatment; family assessment to be completed within 3 months of release if not done previously; Internet usage to be monitored by probation in conformance with Sexual Offender Registry requirements.

Date 7/13/2018

Presiding Justice Amy Lyman