THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0602

State of New Hampshire

v.

Bruce Moore

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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(10 minutes, 3JX)

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3
ISSUE PRESENTED 5
STATEMENT OF THE CASE AND FACTS 6
SUMMARY OF THE ARGUMENT 13
ARGUMENT 14
The alarm system that the victims installed after the defendant burgled their home came within the definition of "economic loss," and therefore awarding restitution for it was proper. 14
CONCLUSION 28
CERTIFICATE OF COMPLIANCE 29
CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Cases

In the Matter of Carr & Edmunds, 156 N.H. 498 (2007) 24

In the Matter of Clark & Clark, 154 N.H. 420 (2006) 24

Petition of the State of New Hampshire (*State v. Milner*),
159 N.H. 456 (2009) 25

State v. Armstrong, 151 N.H. 686 (2005) 15

State v. Bent, 163 N.H. 237 (2012) 14

State v. Brooks, 164 N.H. 272 (2012) 26

State v. Burke, 162 N.H. 459 (2011) 26

State v. Burr, 147 N.H. 102 (2001) 15, 16, 21, 22

State v. Christy, 383 P.3d 406 (Or. Ct. App. 2016) 17, 18

State v. Eno, 143 N.H. 465 (1999) 14, 15

State v. Fleming, 125 N.H. 238 (1984) 14

State v. Gibson, 160 N.H. 445 (2010) 14

State v. Labrie, No. 2017-0265, slip op. (N.H. June 7, 2019) 26

State v. Oakes, 161 N.H. 270 (2010) 27

State v. Pinault, 168 N.H. 28 (2015) 16

State v. Proctor, 171 N.H. 800 (2019) 24

State v. Queever, 887 N.W.2d 912 (Wis. Ct. App. 2016),
rev. denied, 896 N.W.2d 362 (Wis. 2017) 17, 18, 19, 20

State v. Schwartz, 160 N.H. 68 (2010) 17

State v. Shannon, 155 N.H. 135 (2007) 14, 15, 16, 17

State v. Steckler, 237 P.3d 882 (Or. Ct. App. 2010) 18

Statutes

RSA 625:3 (2016) 15, 27
RSA 635:1 (2016) 6
RSA chapter 651 14
RSA 651:61-a (2016) .... passim
RSA 651:61-a, I (2016) 17, 20, 23
RSA 651:61-a, II 17, 22, 23, 25
RSA 651:62 (2016) .... passim
RSA 651:62, III (2016) .... passim
RSA 651:62, III(a) 11, 15, 25, 26
RSA 651:62, III(c) 25State
RSA 651:62, V (2016) 15
RSA 651:63, I 21
Wis. Stat. § 973.20(1g)(a) 19
Wis. Stat. § 973.20(1r) (2017–18) 19

Other Authorities

Black's Law Dictionary (11th ed. 2019) 16
Black's Law Dictionary (10th ed. 2014) 16

ISSUE PRESENTED

Whether a restitution order was proper on the grounds that the alarm system the victims installed after the defendant burgled their home came within the definition of "economic loss."

STATEMENT OF THE CASE AND FACTS

On December 7, 2017, in the Rockingham County Superior Court, the defendant, Bruce Moore, pleaded guilty to one count of burglary as a class B felony. Sent. Hr'g 24–26;[1] *see* App'x 3; RSA 635:1 (2016). Specifically, the defendant pleaded guilty to entering the home of the victims—a married couple—in Stratham, New Hampshire, on February 18, 2016, "without license or privilege to enter with the purpose to commit the crime of theft therein." Sent. Hr'g 24. The court sentenced the defendant to a term of 3½ to 7 years, all suspended for 10 years with conditions, to run consecutively to sentences that the defendant was already serving for convictions in Florida and Maine. Sent. Hr'g 26, 27; App'x 4.

At the plea and sentencing hearing, the defendant agreed that he owed $1,250 in restitution, representing two insurance deductibles that the victims had to pay in connection with the personal and business property that the defendant had stolen from the victims' home. Sent. Hr'g 10–11, 12. The State also asked for restitution covering the cost of an alarm system that the victims had installed in their home after the burglary. Sent. Hr'g 11.

The defendant objected to including the cost of the alarm system as restitution. Sent. Hr'g 12. He argued that buying an alarm system was the victims' personal choice, but not a necessary result of the burglary, as

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[1] References to the transcript of the sentencing hearing will be made as "Sent. Hr'g __."
References to the transcript of the restitution hearing will be made as "Rest. Hr'g __."
References to the defendant's brief will be made as "Def. Br. __."
References to the appealed decision of the superior court will be made as "App. Dec. __"
References to the defendant's appendix containing documents other than the appealed decision will be made as "App'x __."

medical care or mental health services would be. Sent. Hr'g 12–13. The State argued that the inclusion of an alarm system was reasonable, and that the restitution statute left "some room for some individual choices." Sent. Hr'g 13–14. The court decided to cap the potential restitution amount at the State's total amount of $3,373.64, and to continue the case just on the issue of restitution to give the parties the opportunity to file pleadings on that issue. Sent. Hr'g 14, 17–19, 27; *see* App'x 6.

The State filed a memorandum of law on January 4, 2018. The State argued that

> [t]he [victims'] sense of security in their home was destroyed by the defendant's actions. They subsequently installed a home security system as a direct result of the defendant's actions in an effort to diminish the mental insecurity associated with the crime. The installation of a home security system was a direct result of the defendant's criminal behavior and bears a significant relationship to the offense since the offense was an unauthorized entry into the home. The remedial action for the defendant's criminal behavior was to install a home security system just as the remedial action for the mental anguish caused by a physical or sexual assault is to engage in mental health counseling. There is a causal connection here and a significant relationship between the defendant's criminal actions and the requested restitution that would compensate the victims for the cost of installing a home security system.

App'x 8–9. The State also argued that awarding restitution for the alarm system was "in accordance with the legislative statement of purpose contained in the criminal code." App'x 9.

Objecting to the State's restitution request, the defendant argued that restitution for the alarm system was not permitted under RSA 651:62.

App'x 10, 11. He argued that the victim's "choice to install a residential burglary alarm system [was] not a direct result of [the defendant's] criminal act," and therefore it did not constitute an "economic loss" as that term was defined in RSA 651:62. App'x 11. The defendant defined the alarm system as a "subjective remedial measure" and argued that the court should not have to weigh the reasonableness of such measures in order to decide what is reasonable for purposes of restitution. App'x 11–12.

On February 21, 2018, the court issued an order in which it undertook an analysis of RSA 651:62, III to determine whether the purchase of the alarm system was a "direct result" of the defendant's crime, such that the cost of the alarm system would be included as an "economic loss" as defined by that statute. App'x 14–18. After considering case law from other jurisdictions that have decided the issue both ways, the court determined that "[g]iven the unsettled nature of the law in this area," the record in this case was "insufficient to decide whether the victims' installation of a security system … occurred as a 'direct result' of [the d]efendant's criminal conduct." App'x 17. Therefore, the court ordered that an evidentiary hearing be scheduled. App'x 17–18.

The hearing took place on April 5, 2018, and the sole witness at the hearing was one of the victims, the husband. Rest. Hr'g 10. He testified that on the evening after the burglary, his wife returned home to find doors open and a screen door ripped almost off its frame. Rest. Hr'g 15. It appeared that the burglars had tried to kick in both a side door and a back door, but failed to gain entry that way, and then broke a window in the kitchen. Rest. Hr'g 15.

The victim described the effect the burglary had on him: “I felt awful. I didn’t feel safe. I couldn’t sleep. My wife couldn’t sleep. Never happened to us before. It’s … not a pretty sight to go in and see your house totally destroyed and then watch the police come in and fingerprint it …. It’s just—it’s unbelievable.” Rest. Hr’g 16. It took a couple of days to get the doors repaired so that they could be closed, and the victims changed the locks. Rest. Hr’g 16. The victims would lie awake at night, worrying that someone could be trying to break in, “jigg[l]ing the back door ….” Rest. Hr’g 18. The burglary caused the husband to feel “[a]nger[,] [d]isgust[,] [a] sick feeling in [his] stomach.” Rest. Hr’g 26. Indeed, he was “[s]till a little bit angry” at the time of the restitution hearing. Rest. Hr’g 26. He did not, however, seek psychological treatment. Rest. Hr’g 27.

The victims contracted with ADT to have an alarm system installed because, in the victim’s words, “Door locks aren’t enough.” Rest. Hr’g 17. The new alarm system posted constant video of the victims’ driveway, which was recorded and saved, and which the victims could view over the Internet. Rest. Hr’g 19. The system also included noise sensors, door sensors, and “glass break sensors.” Rest. Hr’g 19. The victim explained that if the alarm was triggered and he failed to enter the proper code, ADT would immediately notify the police. Rest. Hr’g 19. The contract showed that over the course of three years, the alarm system, including installation and monitoring, would cost the victims $2,123.64. Rest. Hr’g 20, 21.

The victim testified that they had not contemplated purchasing an alarm system until the burglary. Rest. Hr’g 21. He felt safer and less angry after the alarm was installed. Rest. Hr’g 28. Nevertheless, even after the

alarm system was installed, the victims' sense of security was not completely restored. Rest. Hr'g 18; *see also* Rest. Hr'g 28–29.

After the victim's testimony, the State argued that the alarm system was necessary to return some sense of security to the victim and to make him feel safer after having his and his wife's home violated. Rest. Hr'g 32. The defendant argued, however, that restitution was limited to "economic loss," and that the alarm system was not defined as an "economic loss" because it did not "redress," "fix," or "remediate" any damage caused directly by crime. Rest. Hr'g 33–34 (citing RSA 651:62 (2016)). Rather, the alarm system was meant to prevent the same type of crime from happening again in the victim's home. Rest. Hr'g 35. He argued that getting an alarm system was a personal choice, for which he should not have to pay restitution. Rest. Hr'g 35–36.

In its order granting restitution for the cost of the security system, the court ruled that the State had proved "by a preponderance of the evidence that the installation of the security system [was] 'causally connected' to [the d]efendant's unauthorized entry into [the victims'] home." App. Dec. 6. The court reasoned that the victim "would have never purchased the security system 'but for' [the d]efendant's burglary." App. Dec. 7. The court concluded that "based on the factual record, … there [was] a sufficient causal connection between the criminal act and the installation of the security system, and therefore a 'direct result' exist[ed]." App. Dec. 7.

"Moreover, the [c]ourt [found] that the installation of a security system [bore] a significant relationship to the offense of burglary." App. Dec. 7. The court cited the victim's testimony that they could not sleep at

night, that he feared that his wife could come home to find burglars in the home, and that "these anxieties caused him to enter into a contract with ADT for security services." App. Dec. 7. The victim "further explained that door locks were not enough to make him feel secure in his home, and that he would often lie awake at night fearing that someone might break in while he was sleeping." App. Dec. 7. Thus, the security system was necessary to "help[] remediate the anxiety and trauma that was inflicted upon him as a result of [the d]efendant's criminal conduct." App. Dec. 8. The court also concluded that "under the facts of this case, the short-term installation of a security system to mitigate the mental trauma caused by a burglary [was] comparable to a victim's receipt of mental health counseling." App. Dec. 8.

The court then turned to the language "including but not limited to" in RSA 651:62, III(a) to determine whether it could award restitution. In doing so, it applied the canon of statutory construction that statutes are meant to apply in light of the legislature's intent and the policies that the statute was meant to further. App. Dec. 11. Citing the statement of purpose expressly set out in RSA 651:61-a, the court concluded that "the phrase 'including but not limited to' as it is used in [paragraph] III(a) means exactly what it says—restitution in this matter *is not limited to* the types of items specifically enumerated." App. Dec. 11–12. Rather, "the statute's stated purpose evinces a legislative intent that the specific items listed in [paragraph] III(a) be offered in illustration, not limitation." App. Dec. 12. Applying this reasoning, the court concluded that "on the unique facts of this case, [the victims'] installation of a security system was both a direct result of the burglary and a reasonable charge incurred for a reasonably

needed product, service or accommodation as contemplated by the statute." App. Dec. 12.

SUMMARY OF THE ARGUMENT

A court may order restitution to a victim to compensate the victim for an "economic loss," defined as "out-of-pocket losses or other expenses incurred as a direct result of a criminal offense …." RSA 651:62, III (2016). Here, the court properly included in its restitution order the cost of an alarm system that the victims had installed at their home after the defendant committed the burglary. The defendant's burglary caused the victims to suffer from mental trauma, the decision to install the alarm system was the direct result of the burglary, and the victims would not have installed it but for the burglary. An analysis of the plain language in RSA 651:62, III, taking into account the clear legislative intent set out in RSA 651:61-a (2016) demonstrates that restitution in this case was proper.

ARGUMENT

The alarm system that the victims installed after the defendant burgled their home came within the definition of "economic loss," and therefore awarding restitution for it was proper.

"Determining the appropriate amount of restitution is within the discretion of the trial court." *State v. Gibson*, 160 N.H. 445, 450 (2010); *see also State v. Fleming*, 125 N.H. 238, 241 (1984) ("[c]alculation of the appropriate restitution amount has been left to the court"). When seeking restitution, the State "bears the burden of proving that the defendant is … responsible for the victim's loss." *State v. Shannon*, 155 N.H. 135, 139 (2007). "'[T]he State must prove by a preponderance of the evidence that the loss or damage is causally connected to the offense and bears a significant relationship to the offense.'" *Gibson*, 160 N.H. at 450 (quoting *State v. Eno*, 143 N.H. 465, 470 (1999)); *accord State v. Bent*, 163 N.H. 237, 238–39 (2012). "In reviewing [a] trial court's ruling, [this Court] accept[s] [the trial court's] factual findings unless they lack support in the record or are clearly erroneous." *Shannon*, 155 N.H. at 137; *accord Bent*, 163 N.H. at 239. Here, the trial court's findings are well supported by the record.

The defendant makes several arguments in support of one general claim: that the superior court erred in finding that the victims' alarm system came within the definition of "economic loss" for purposes of the restitution statute. Def. Br. 16. The defendant's claim thus requires this Court to interpret the restitution statutes in RSA chapter 651.

> The interpretation of a statute is a question of law, which [this Court will] review *de novo*. In matters of statutory interpretation, [this Court is] the final arbiter of legislative

> intent as expressed in the words of the statute considered as a whole. [This Court will] first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. [Its] goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.

Shannon, 155 N.H. at 137–38. This Court will also "construe all parts of a statute together … to avoid an absurd or unjust result." *State v. Burr*, 147 N.H. 102, 104 (2001). And finally, "[a]ll provisions of [the Criminal C]ode shall be construed according to the fair import of their terms and to promote justice." RSA 625:3 (2016).

The legislature has authorized restitution as a tool to "compensate a victim for economic loss …." RSA 651:62, V (2016).

> "Economic loss" means out-of-pocket losses or other expenses incurred as a direct result of a criminal offense, including: … Reasonable charges incurred for reasonably needed products, services and accommodations, including but not limited to charges for medical and dental care, rehabilitation, and other remedial treatment and care including mental health services for the victim ….

RSA 651:62, III(a). "Accordingly, the defendant may be held liable for economic losses directly resulting from the factual allegations that support the conduct covered by the … conviction." *Eno*, 143 N.H. at 470; *accord State v. Armstrong*, 151 N.H. 686, 687 (2005). The question in this appeal is simply whether the victims' decision to install an alarm system was a "direct result" of the burglary, and whether it was a "reasonable charge" for a "reasonably needed product[or] service[]."

The defendant argues that restitution for the alarm system is not "compensation" in the sense that it would return the victims to the state

they were in before the burglary, but rather it would result in a windfall for the victims by increasing their home equity. Def. Br. 18, 20–21, 25–26. He further argues that "[b]ecause restitution in criminal cases is more limited than damages in civil cases, and because the victim could not obtain reimbursement for the security system in a civil case, the court erred by ordering such reimbursement in a criminal case." Def. Br. 21. Proper interpretation of the relevant terms, and of the statutory scheme as a whole, however, demonstrates that the alarm system was properly included.

"The plain language of the restitution statute clearly and unambiguously requires a causal connection between the criminal act and the economic loss or damage." *State v. Pinault*, 168 N.H. 28, 32 (2015). However, neither the legislature nor this Court has ever defined exact parameters for what defines a "direct result" of a defendant's crime. *See id.* at 31–32 (declining "to develop a test for determining the outer limits of the connection that must exist between harm or loss, on the one hand, and criminal conduct, on the other"). Therefore, this Court should look to the plain meaning of the terms. "Direct," in this context, means "[f]ree from extraneous influence; immediate …." *Black's Law Dictionary* (11th ed. 2019). "'Result' is defined, in relevant part, as 'a consequence, effect, or conclusion.'" *Pinault*, 168 N.H. at 32 (quoting *Black's Law Dictionary* 1509 (10th ed. 2014)).

But beyond the plain language, as stated above, a proper interpretation of any statute must also take into account "the policy sought to be advanced by the entire statutory scheme." *Shannon*, 155 N.H. at 138; *see also Burr*, 147 N.H. at 104 (this Court will "construe all parts of a statute together to effectuate its overall purpose"). Under the statutory

scheme here, restitution is meant not only to compensate the victim, but also "to reinforce the offender's sense of responsibility for the offense, to provide the offender the opportunity to pay the offender's debt to society and to the victim in a constructive manner, and to ease the burden of the victim as a result of the criminal act." RSA 651:61-a, I (2016). Further, the legislature has made it clear that it "intend[ed] that court[s] increase, to the maximum extent feasible, the number of instances in which victims receive restitution." RSA 651:61-a, II. Indeed, this Court has similarly made it clear that "[c]ourts are to presume that a defendant responsible for a victim's loss will pay restitution." *State v. Schwartz*, 160 N.H. 68, 71 (2010), *quoted in Pinault*, 168 N.H. at 31; *see also Shannon*, 155 N.H. at 138–39 (this Court "conclude[d] that the legislature intends courts to presume that a defendant responsible for a victim's loss will pay restitution to the victim").

For application of these principles to this case, this Court should look to *State v. Christy*, 383 P.3d 406 (Or. Ct. App. 2016), and *State v. Queever*, 887 N.W.2d 912 (Wis. Ct. App. 2016), *rev. denied*, 896 N.W.2d 362 (Wis. 2017). In *State v. Christy*, Christy's sentence for burglary and theft included restitution for the victim's new "home security system to safeguard her from [the] defendant." *Christy*, 383 P.3d at 407. Under Oregon precedent,

> a court may award restitution for expenses incurred by a victim in implementing security measures in response to a defendant's crimes—provided, of course, that there is evidence sufficient to support a finding that the defendant's criminal activities were a "but for" cause of the expenses that the victim incurred, and any other applicable criteria for an award of restitution are satisfied.

Id. The court went on to hold that the defendant's burglary was a "but for" cause of the victim's need for a security system:

> The victim testified that she had lived in her house for 29 years without need for a security system and that, but for [the] defendant's criminal conduct, she would not have needed one, given the particular community in which she lived. However, [the] defendant's criminal conduct of breaking into her house and the likelihood that he would repeat it upon his release from jail made it necessary to install a security system so that she could live safely in her own house, in view of the threat posed by [the] defendant.

Id. at 408. The court concluded that this evidence "permit[ted] a finding of the necessary causal link between the defendant's crimes and the expenses incurred by a victim for a security system …." *Id.* Importantly, although the victim testified that she feared the defendant specifically, the court put no special reliance on that fact to find that the burglary was a "but for" cause of the victim's decision to install a security system. *See id.* (contrasting the *Christy* facts with those in *State v. Steckler*, 237 P.3d 882 (Or. Ct. App. 2010), in which a robbery was deemed not to be a "but for" cause of the decision by the victim—a pharmacy—to install a new security system because the victim was going to install the system anyway to comply with DEA requirements). What was important was that it was the defendant's criminal act that directly led the victim to take the action she did.

In *State v. Queever*, the victim installed a security system after several similar burglaries and thefts in her home because she wanted to identify the burglar. *Queever*, 887 N.W.2d at 914, 916. Footage from the security camera led to Queever's apprehension and conviction on one count of attempted burglary. *Id.* at 914. Queever contested having to pay

restitution for the security system, however, on the grounds that it had been installed before he committed the crime on which he was sentenced. *Id.* at 914–15, 917.

The relevant Wisconsin statute allows restitution "to any victim of a crime considered at sentencing …." *Id.* at 915 (quoting Wis. Stat. § 973.20(1r) (2017–18)). The term "'crime considered at sentencing' means 'any crime for which the defendant was convicted and any read-in crime.'" *Id.* (quoting Wis. Stat. § 973.20(1g)(a)). Under Wisconsin law, "[b]efore a court may order restitution, a causal nexus must be established between the 'crime considered at sentencing' and the victim's alleged damage." *Id.* (quotation marks omitted). "In proving causation, a victim must show that the defendant's criminal activity was a substantial factor in causing damage." *Id.* (quotation marks omitted). "The defendant's actions must be the precipitating cause of the injury and the harm must have resulted from the natural consequences of the actions." *Id.* (quotation marks and brackets omitted). These requirements of a "causal nexus," "a substantial factor," and a "precipitating cause" resulting in "natural consequences" are similar to the "direct result" requirement under New Hampshire law.

The court went on to interpret the relevant statutory language liberally in light of the purposes underlying the restitution statute: "to return crime victims to the position they were in before the defendant injured them." *Id.* at 917 (quotation omitted). It noted that the Wisconsin statute—like New Hampshire's—"reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *Id.* (quotation omitted). Furthermore, the Wisconsin court "recognized that [the restitution statute] creates a

presumption that restitution will be ordered in criminal cases." *Id.* (quotation omitted). *Cf.* RSA 651:61-a, I ("establish[ing] a presumption that the victim will be compensated by the offender who is responsible for the loss"). Given these principles, the court held that it was correct for the trial court to take Queever's entire course of conduct into account, and held that "when such costs are requested as restitution, they are recoverable if a causal nexus is established between the costs and the entire course of the defendant's criminal conduct considered at sentencing." *Id.* at 918.

In this case, the victim testified that immediately after the burglary, he "felt awful. [He] didn't feel safe. [He] couldn't sleep. [His] wife couldn't sleep." Rest. Hr'g 16. He testified that they would lie awake at night, worrying that someone was "jigg[l]ing the back door …." Rest. Hr'g 18. The burglary caused him to feel "[a]nger[,] [d]isgust[,] [and a] sick feeling in [his] stomach," and he was "[s]till a little bit angry" at the time of the restitution hearing. Rest. Hr'g 26. He also testified that they had not thought about buying an alarm system until the burglary, and that he felt safer and less angry after the alarm was installed. Rest. Hr'g 21, 28.

In its order granting restitution, the superior court concluded that the victim "would have never purchased the security system 'but for' [the d]efendant's burglary," that "there [was thus] a sufficient causal connection between the criminal act and the installation of the security system, and therefore a 'direct result' exist[ed]." App. Dec. 7. The court also concluded that the security system was necessary to "help[] remediate the anxiety and trauma that was inflicted upon him as a result of [the d]efendant's criminal conduct." App. Dec. 8. And further, "the short-term installation of a security system to mitigate the mental trauma caused by a burglary [was]

comparable to a victim's receipt of mental health counseling." App. Dec. 8. Thus, as the superior court properly determined, the purchase of the alarm system was "a direct result of [the defendant's] criminal offense." *See* RSA 651:62, III.

The defendant relies on *State v. Burr*, 147 N.H. 102 (2001), to support his argument that payment for an alarm system cannot be considered "compensation" under the restitution statute. Def. Br. 19. The decision in *Burr*, however, does not support the defendant's claim.

Burr was convicted of multiple counts of animal cruelty and was ordered to pay restitution to CVHS, the agency that rescued the dogs. *Burr*, 147 N.H. at 103. Burr "moved to dismiss the restitution order[, however,] on the ground that CVHS had received donations directly related to [Burr's] case that exceeded the amount of CVHS['s] claimed losses." *Id.* (quotation marks omitted). "The sole issue for [this Court's] consideration on appeal … [was] whether the voluntary public donations that CVHS received constitute[d] 'compensation' under RSA 651:63, I." *Id.*

After construing the entire scheme underlying the restitution statutes, this Court concluded that "[w]hen the victim has obtained a civil judgment against the defendant, any restitution ordered and paid must be deducted from the amount of that judgment," and "[w]hen the victim has been indemnified for his or her loss *by a collateral source subrogated to the rights of the victim*, the defendant may be ordered to pay restitution to the collateral source." *Id.* at 104 (emphasis added). This Court then held that "[g]iven this statutory scheme, voluntary public donations [were] not 'compensation' within the meaning of the statute." *Id.*

This Court explained that "[t]o hold otherwise would thwart the overall purpose of the restitution statute, which is to rehabilitate the offender, …. [and] would enable a defendant to escape his or her obligation to make the victim whole simply because the public has sympathy for the victim." *Id.* Therefore, this Court affirmed the restitution order "[i]n light of the legislative directive that [courts should] 'increase, to the maximum extent feasible, the number of instances in which victims receive restitution' …." *Id.* at 104–05 (quoting RSA 651:61-a, II). The holding of *Burr*, then, is that voluntary contributions from the public are not "compensation" under RSA 651:62, and that to define them as such would defeat the purpose of restitution set out in RSA 651:61-a.

Burr is inapposite to the instant case, however, because the victims here have not received any outside donations to defray the cost of the alarm system, and there is no claim that there is a collateral source of funds. Rather, since the funds are meant to come from the defendant as restitution, *Burr* does not hold that they cannot constitute "compensation." Given the clear intent and purpose behind the restitution statutes as set out in RSA 651:61-a, this Court should so hold in this case.

The defendant argues that "new security measures purchased by a victim to guard against future crimes are not a 'direct result' of the prior criminal offense" by contrasting the installation of an alarm system with the rekeying of locks, even though both measures are aimed at preventing another burglary in the future. *See* Def. Br. 27–31. He also contrasts the act of taking precautions against future crimes generally and the post-crime installation of surveillance equipment that was meant to prevent similar crimes by the same defendant. Def. Br. 33–36. Absent the victims' fear of a

specific perpetrator, the defendant argues, "a generalized feeling of insecurity" is too attenuated to be considered a "direct result" of the defendant's crime. Def. Br. 37.

As argued above, regardless of whether the alarm system was meant to protect the victims from the defendant or from burglars generally, the defendant's burglary of the victims' home was the "but for" cause of the victims' decision to install the security system. In either event, the cost incurred in installing the system is an "economic loss" because it is a "direct result" of the defendant's crime. This conclusion is consistent with a reading of the restitution statutes to "increase, to the maximum extent feasible, the number of instances in which victims receive restitution," RSA 651:61-a, II, with the "presumption that the victim will be compensated by the offender who is responsible for the loss," and with the legislature's intent "to ease the burden of the victim as a result of the criminal act," RSA 651:61-a, I.

The defendant next argues that "[t]he doctrine of *ejusdem generis* also suggests that the restitution statute does not authorize an order for payments that place the victim in a better financial position than the victim would be in had the offense not occurred." Def. Br. 21. This Court has

> articulated the principle of *ejusdem generis* in two ways…. [I]t provides that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned. [This Court has] also stated that the doctrine provides that, when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words.

> Under either articulation, the general words are construed to apply only to persons or things that are similar to the specific words.

State v. Proctor, 171 N.H. 800, 806 (2019) (internal quotations and citations omitted). In particular, "[w]hen the legislature uses the phrase 'including, but not limited to' in a statute, the application of that statute is limited to the types of items therein particularized." *In the Matter of Clark & Clark*, 154 N.H. 420, 423 (2006) (citations omitted), *quoted in In the Matter of Carr & Edmunds*, 156 N.H. 498, 504 (2007). However, the doctrine should not be applied to defeat the express purpose of the statute.

The defendant argues that a security system is unlike medical care or mental health services, and therefore it "is not 'of the same type' as the examples listed in RSA 651:62, III," because "[t]he purpose of medical care, dental care, rehabilitation or mental health services is not to minimize the risk that the crime will occur again, but to treat or mitigate the adverse effects from the first time the crime occurred." Def. Br. 22, 23. The defendant does not foreclose the possibility, however, of allowing restitution for an alarm system if, for example, "a mental health professional had evaluated the victims and recommended that they purchase a security system to treat what the court described as their 'mental trauma.'" Def. Br. 24. He argues, however, that they needed psychological evaluations and a professional recommendation before the alarm system could be covered by the statute. Def. Br. 25.

First, there is no requirement that the victim needed to have a professional diagnosis in order to testify about the emotional trauma that the burglary caused him and his wife to suffer. There is also no such

requirement before the victim could testify about how the alarm system went a substantial way to easing his state of mind, and helping both him and his wife feel more secure in their own home, after the defendant's crime caused them to suffer mental trauma and a loss of their sense of security. The victim's testimony, described in detail above, made it clear that the installation of the alarm system was necessary to mitigate the effects of the trauma that the defendant caused.

Second, the plain language of RSA 651:62, III makes it clear that restitution under subparagraph III(a) must include more than just "[t]he value of damaged, destroyed, or lost property," because that restitution is specifically provided for in subparagraph III(c). *See State v. Burke*, 162 N.H. 459, 461 (2011) (this Court "must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words" (quoting *Petition of the State of New Hampshire* (*State v. Milner*), 159 N.H. 456, 457 (2009))). Rather, subparagraph III(a) provides specifically for "[r]easonable charges incurred for reasonably needed products, services and accommodations, *including but not limited to* charges for medical … and other remedial treatment and care including mental health services" "incurred as a direct result of a criminal offense …." (Emphasis added.)

The superior court's treatment of the phrase "including but not limited to" is significant. The court interpreted that statutory phrase consistently with the legislature's express intent "that the court increase, to the maximum extent feasible, the number of instances in which victims receive restitution." RSA 651:61-a, II (quoted in App. Dec. 11). "In light of this stated purpose, the [c]ourt [found] that the phrase 'including but not

limited to' as it is used in [subparagraph] III(a) means exactly what it says—restitution in this matter *is not limited to* the types of items specifically enumerated." App. Dec. 11–12. "Put simply, the [c]ourt [found] that the statute's stated purpose evinces a legislative intent that the specific items listed in [subparagraph] III(a) be offered in illustration, not limitation." App. Dec. 11. For all the reasons given in this brief, this Court should adopt that reasoning: Under the specific circumstances of this case, defining the cost of the alarm system as an "economic loss" is consistent with both the language and the purpose of the entire statutory scheme.

For similar reasons, this Court should reject the defendant's resort to legislative history. The defendant suggests that nothing in the legislative history of RSA 651:62 "suggests that the legislature intended [to] authorize ordering payments that place victims in a better financial position than they would be in had the crime not occurred[,] …. ordering defendants to pay for new security assets purchased after the crime[,] …. [or] ordering defendants to pay for new security measures to protect against future unrelated crimes." Def. Br. 38–39.

This Court will not consult legislative history absent ambiguity in the language of a statute. *State v. Labrie*, No. 2017-0265, slip op. at 19 (N.H. June 7, 2019). For the same reason, the rule of lenity does not apply. *Id.*; *see State v. Brooks*, 164 N.H. 272, 292 (2012) ("The rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously." (Brackets and quotation omitted.)). Here, the legislature made the purpose of the statute unambiguous in RSA 651:61-a. To the extent that the language of RSA 651:62, III is less than plain, its interpretation must be guided by

RSA 651:61-a and RSA 625:3 ("All provisions of this code shall be construed according to the fair import of their terms and to promote justice."). *Cf. State v. Oakes*, 161 N.H. 270, 286 (2010) (court was within its discretion to require the defendant to pay restitution for the victim's future counseling costs where nothing in the restitution statutes "precludes a trial court from ordering a defendant to pay restitution for future economic losses caused by his or her crime").

In sum, the victims' decision to install the alarm system was the direct result of the defendant's crime. The victims would not have installed the system—and thus would not have had that expense—but for the burglary and the mental trauma that the defendant caused. Therefore, it was within the court's discretion to include that expense in its restitution order.

CONCLUSION

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

The State requests a ten-minute oral argument on the 3JX docket.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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August 2, 2019

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CERTIFICATE OF COMPLIANCE

I, Stephen D. Fuller, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,067 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 2, 2019 *_/S/Stephen D. Fuller_*
Stephen D Fuller

<u>CERTIFICATE OF SERVICE</u>

I, Stephen F. Fuller, hereby certify that a copy of the State's brief shall be served on, Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 2, 2019

<u>/S/Stephen D. Fuller</u>
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