

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

STATE OF NEW HAMPSHIRE

v.

JUSTIN PARR

CASE NO. 2020-0570

**MANDATORY APPEAL PURSUANT TO RULE 7
MERRIMACK SUPERIOR COURT**

DOCKET NO. 217-2019-CR-00339

**BRIEF OF
APPELLANT/DEFENDANT**

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A. QUESTIONS PRESENTED

1. Whether the trial court erred in denying defendant's motion to dismiss indictments charging defendant with being a felon in possession of a "firearm" under RSA 159:3 based on the possession of an antique replica 44 caliber black powder pistol.

2. Whether the trial court erred in interpreting the prohibitions contained in RSA 159:3 and RSA 159:3-a to apply to antique pistols that federal law classifies as not being firearms pursuant to 18 USC §921(a)(3); 27 CFR § 478.11, et al, thereby creating an inconsistency between State and federal law.

3. Whether the trial court's construction and interpretation of RSA 159 renders the prohibitions contained in RSA 159:3. RSA 159:3-a and RSA 159:7 unconstitutionally vague.

4. Whether the trial court's construction and interpretation of RSA 159 is flawed by:

- A. Failing to construe provisions of the Criminal Code according to the fair import of their terms and to promote justice;
- B. Interpreting statutory provisions in isolation rather than in the context of the overall statutory scheme;
- C. Rendering statutory language meaningless, superfluous and/or redundant; or
- D. Construing RSA 159 in a manner that leads to absurd results.

**B. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES
& REGULATIONS**

NEW HAMPSHIRE CONSTITUTION

[Art.] 2-a. [The Bearing of Arms.] All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.

[Art.] 15. [Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

UNITED STATES CONSTITUTION

Article [II] (Amendment 2 - Bearing Arms)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article XIV (Amendment 14 - Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection)

1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for

President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, 15 and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. affects 2

3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

NEW HAMPSHIRE STATUTES, RULES OR REGULATIONS

RSA 159:1 Definition. – Appendix at 195.

RSA 159:3 Convicted Felons. – Apx. at 196.

RSA 159:3-a Armed Career Criminals. – Apx. at 197.

RSA 159:7 Sales to Felons. – Apx. at 198.

RSA 159:26 Firearms, Ammunition, and Knives; Authority of the State. – Apx. at 199.

RSA 625:11 – Apx. at 200.

UNITED STATES STATUTES, RULES OR REGULATIONS

18 USC §921 – Appendix at 201.

27 CFR § 478.11 – Apx. at 215.

27 CFR § 478.32 – Apx. at 228.

27 CFR 478.141 – Apx. at 233.

28 CFR § 25.6 – Apx. at 235.

28 CFR § 25.11 – Apx. at 239.

C. STATEMENT OF THE CASE AND FACTS

On April 12, 2019, several law enforcement and probation officers searched a home that was owned by the Appellant. At the time, the Appellant was on probation and was court ordered not to live at his home located at 403 Main Street in Andover, New Hampshire. *Appendix*, 116.

During the search, officers located and seized a replica Colt 1851 Navy revolver, which is a black powder “ball and cap” revolver defined as a non-firearm “antique” pursuant to federal law. The officers described the item as a “black powder handgun, an F.LLPIETTA .44 caliber.” *Id.*

The New Hampshire State Laboratory examined the item and described it as “one (1) .44 caliber F. Lli Pietta **black powder percussion cap revolver**, model 1851 Reb Nord Navy Sheriff, serial number 694208, with two (2) lead balls and two (2) powder charges removed from the cylinder.” *Id.* at 127, 192 (emphasis added).

The Appellant was charged with four felonies in the Merrimack County Superior Court. Two of the charged crimes, relevant to the instant appeal, were indictments as follows:

1690271C – Felon in Possession of a Deadly Weapon (RSA 159:3, I(a))

“Justin D. Parr knowingly, had in his possession or under his control, a black powder 44 caliber handgun.”

Id. at 8.

1690272C – Felon in Possession of a Firearm (RSA 159:3-a)

“Justin D. Parr knowingly, had in his possession or under his control, a black powder 44 caliber handgun.”

Id. at 9.

Initially, the Merrimack County Attorney’s Office had secured an indictment against Mr. Parr for possessing a “revolver” but, after the Defendant filed his first Motion to Dismiss, that indictment was substituted in favor of an identical charge referring to the antique as a “firearm” instead. *Apx.* at 3, 4, 22.

The Defendant subsequently filed his second Motion to Dismiss and the State objected. *Id.* at 10. After hearing extensive oral argument, the Court issued an Order denying the Motion on May 29, 2020. *Id.* at 20, 116. The Defendant filed a Motion for Reconsideration that was denied by the Court on June 9, 2020. *Id.* at 80, 95.

The Defendant subsequently entered into a stipulated facts bench trial on the relevant charges, preserving the right to appeal, and was found guilty of the charges related to the instant appeal. *Id.* at 96, 105-106, 194. The instant appeal followed.

D. SUMMARY OF ARGUMENT

The Trial Court's Order, denying the Defendant's Motion to Dismiss under date of May 29, 2020, misapprehended the statutory construction of RSA 159. RSA 159:1 clearly contains an exemption for the "ownership or transfer" of antique revolvers insofar as such ownership or transfer is consistent with federal law. Mr. Parr's ownership or possession of the black powder, cap and ball, replica Colt 1851 Navy Revolver is consistent with federal law, which classifies such as a non-firearm "antique" that can be possessed by a convicted felon who is otherwise prohibited from possessing "firearms." *See* 18 U.S.C. 921(a)(3) and (16); 27 CFR 478.11 and 478.141(d).

The Trial Court's interpretation of RSA 159 isolates RSA 159:1 from all other sections of the chapter, thereby rendering its operative language meaningless and superfluous in violation of basic tenets of statutory construction under state law. RSA 159:1 specifically states: "**Nothing in this section shall prevent antique pistols, gun canes, or revolvers from being owned** or transferred by museums, **antique or arms collectors**, or licensed gun dealers at auctions, gun shows, or private premises **provided such ownership or transfer does not conflict with federal statutes.**" (Emphasis added).

In addition to RSA 159:1, RSA 159:26 communicates the legislative intent of creating consistency between state law and federal law: "**To the extent consistent with federal law**, the state of New Hampshire shall have authority and jurisdiction over the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, firearms supplies, or knives in the state". RSA 159:26 (emphasis added). Under the Trial Court's reading of

RSA 159, state law is not just more restrictive than federal law, it is purely inconsistent with the operative definitions of federal law. *See* 18 U.S.C. 921(a)(3) and (16); 27 CFR 478.11 and 478.141(d).

The Trial Court's Order is the first time in New Hampshire jurisprudence that a Court has defined an "antique revolver" as constituting a "firearm" for any purpose, including for the purpose of criminal prosecution pursuant to RSA 159. Under this new interpretation, the criminal violations set out by RSA 159:3, RSA 159:3-a and RSA 159:7, are each rendered unconstitutionally vague in violation of the due process provisions of the N.H. Constitution, Part I, Art. 15, and the 14th Amendment to the U.S. Constitution, because "[people] of ordinary intelligence must necessarily guess at its meaning and differ as to its application". *See State v. Dor*, 165 N.H. 198, 203, (2013)(citing *State v. Wong*, 125 N.H. 610, 621 (1984).

Finally, the Trial Court's failure to interpret the statute in the context of the overall statutory scheme has created the absurd result of making the sale of a musket more rife with liability than the sale of a semi-automatic rifle, because it is a felony to sell a "firearm" to a felon under state law but firearm background checks, using the National Instant Criminal Background Check System ("NICS"), are unavailable to sellers of "antiques," as defined by federal law. RSA 159:7; 18 USC §921(a)(3)- (16); 28 CFR § 25.11. It is illegal to use NICS to run a background check related to the sale of an item that federal law deems to be an "antique" rather than a "firearm." *Id.*

E. STANDARD OF REVIEW

The instant appeal turns upon a claimed error of statutory interpretation and an argument that the interpretation made by the lower court rendered the applicable statutes unconstitutionally vague. Statutory interpretations are reviewed *de novo*. *JMJ Properties, LLC v. Town of Auburn*, 168 N.H. 127, 130 (2015) (citing *Eby v. State*, 166 N.H. 321, 341 (2014)). In matters of statutory interpretation, the Supreme Court is “the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.” *State v. Wilson*, 169 N.H. 755, 760 (2017)(citing *State v. Collyns*, 166 N.H. 514, 518 (2014)).

“ We construe provisions of the Criminal Code according to the fair import of their terms and **to promote justice**. We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. **We must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words**. Finally, we interpret a statute **in the context of the overall statutory scheme and not in isolation**.” *Wilson*, 169 N.H. at 760–61(emphasis added).

“It is a fundamental principle of statutory construction that whenever possible, **a statute will not be construed so as to lead to absurd consequences**. Thus, as between a reasonable and unreasonable meaning of the language used, **the reasonable meaning is to be adopted**.” *Id.* at 766 (citation omitted)

The New Hampshire Supreme Court also reviews claims of constitutional violations *de novo*. See *State v. Hynes*, 159 N.H. 187, 200, (2009); *State v. MacElman*, 154 N.H. 304, 307 (2006). “A statute can be impermissibly vague for either of two independent reasons:

(1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement.” *Id.* A statute is presumed to be constitutional unless the Court finds it must be invalidated on inescapable grounds. *See Hynes*, 159 N.H. at 200; *State v. Ploof*, 162 N.H. 609, 614 (2011).

F. ARGUMENT

I. The Trial Court’s Interpretation of RSA 159 Rendered Specific Statutory Language Meaningless, Disregarded the Statutory Scheme and Viewed Sections of the Statute in Isolation.

In the trial court’s May 29, 2020, Order, the fundamental tenants of reviewing the overall statutory scheme and giving effect to all words is ignored in favor of viewing bits and pieces of RSA 159 in isolation and finding that a portion of RSA 159:1 is simply unused excess. *Apx.* at 71.

Federal law specifically excludes “antiques” from the definition of “firearm,” thereby permitting individuals prohibited from owning firearms, such as felons, to own antiques. *See* 18 U.S.C. 921(a)(3) and (16); 27 CFR 478.11 and 478.141(d).

The term “**firearm**” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. **Such term does not include an antique firearm.**

18 USC 921(a)(3)(emphasis added).

The term “**antique firearm**” means—

(A)any firearm (including any firearm with a matchlock, flintlock, **percussion cap**, or similar type of ignition system) manufactured in or before 1898; or

(B)any **replica** of any firearm described in subparagraph (A) if such replica—

(i)is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii)uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C)any muzzle loading rifle, muzzle loading shotgun, or **muzzle loading pistol**, which is **designed to use black powder**, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term “antique firearm” shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

18 USC 921(a)(16)(emphasis added); 27 CFR § 478.11.

RSA 159:1 clearly contains an exemption for the “ownership or transfer” of antique revolvers, and conveys an intent to permit their ownership or transfer insofar as such activity does not violate federal law:

159:1 Definition. – Pistol or revolver, as used herein, means any firearm with barrel less than 16 inches in length. It does not include antique pistols, gun canes, or revolvers. An antique pistol, gun cane, or revolver, for the purposes of this chapter, means any pistol, gun cane, or revolver utilizing an early type of ignition, including, but not limited to, flintlocks, wheel locks, matchlocks, percussions and pin-fire, but no pistol, gun cane, or revolver which utilizes readily available center fire or

rim-fire cartridges which are in common, current use shall be deemed to be an antique pistol, gun cane, or revolver. **Nothing in this section shall prevent antique pistols, gun canes, or revolvers from being owned or transferred by museums, antique or arms collectors, or licensed gun dealers at auctions, gun shows, or private premises provided such ownership or transfer does not conflict with federal statutes.** (Emphasis added).

The trial court's May 29, 2020, Order concludes that the bolded portion of the above applies only to RSA 159:1 in isolation, and is irrelevant in regard to interpreting any other section of RSA 159, including sections 3 and 3-a. *Apx.* at 73-75. By making such a determination, the Court has rendered the language meaningless because RSA 159:1 is simply a definition section, and clearly does not "prevent" or restrict any activity at all. Therefore, according to the Court's Order, the legislature's stated intent to allow ownership or transfer of antique revolvers consistent with federal law, has no effect. *Apx.* at 73-75.

In the case of *State v. St. John*, the Supreme Court found that the trial court had accurately instructed the jury, in regard to a prosecution under RSA 159:3, when it gave the instruction:

A "[p]istol or revolver, as used herein, means any firearm with (sic) barrel less than 16 inches in length. **It does not include antique pistols or revolvers.**"

129 N.H. 1, 2, (1986) (*Citing* RSA 159:1), (emphasis added).

At the time the *St. John* case was decided, the last sentence currently contained in RSA 159:1 had not yet been added. *See Apx.* at 92-93 (Exhibit A, House Bill No. 1305 (CH. 273, Laws of 1992)). HB 1305, which passed in 1992, added the disputed language to RSA 159:1. *Id.* The final draft of HB1305 depicts that RSA 159:1 was intended to have

an effect on the rest of the Chapter. *Id.* It is clearly appropriate to interpret RSA 159:3 and 3-a “in the context of the overall statutory scheme and not in isolation,” which requires the application of the exemption contained within RSA 159:1. *Wilson*, 169 N.H. at 760–61.

The Trial Court erroneously concluded that “Mr. Parr maintains that because the charged handgun meets the definition for “antique,” the last sentence in section 1 exempts him from prosecution under the whole chapter.” *Apx.* at 74. Notwithstanding, Mr. Parr maintains that the last sentence of RSA 159:1 permits the “ownership or transfer” of antique pistols and revolvers insofar as such “ownership or transfer” does not conflict with federal law- not that it exempts him from the entire chapter. *See* 18 U.S.C. 921(a)(3) and (16); 27 CFR 478.11 and 478.141(d). For example, the antique pistol could certainly be considered a deadly weapon under RSA 159:3 “...if, in the manner it is used, intended to be used, or threatened to be used, it is known to be capable of producing death or serious bodily injury.” *State v. Mohamed*, 159 N.H. 559, 561(2009)(citing RSA 625:11, V (2007); *State v. Kousounadis*, 159 N.H. 413 (2009)). Prosecuting a felon for possessing a deadly weapon neither conflicts nor is it in any way inconsistent with federal law. *See* 18 USC §921, 18 USC §922. Making the finding that something is a deadly weapon does not exclusively involve “ownership or transfer,” but instead that the defendant engaged in a particular activity with the item in question. *Kousounadis*, 159 N.H. at 425; *Mohamed*, 159 N.H. at 561.

“‘Deadly weapon’ is defined in recognition of the fact that virtually anything, if used in a fitting manner, can cause death or serious injury. Whether there is a deadly weapon involved is, therefore, made to turn on how the actor proposes to use the thing he

wields.” Kousounadis, 159 N.H. at 425(citing *Report of Commission to Recommend Codification of Criminal Laws*, Chair Justice Frank R. Kenison (1967)).

Further, relevant federal law for purposes of “ownership” and “transfer” exclusively pertains to firearms and antique firearms. *See* 18 USC 921; 18 USC 922; 27 CFR § 478.11; 27 CFR § 478.32. It makes no mention of any of the following various items contained within RSA 159:3: “... slungshot, metallic knuckles, billies, stiletto, switchblade knife, sword cane,blackjack, dagger, dirk-knife, or other deadly weapon as defined in RSA 625:11, V.”

Looking at the fair import of the plain and ordinary meaning of RSA 159:1, within the context of the entire statute and considering the stated legislative intent, the Defendant cannot be guilty of engaging in the conduct alleged in Indictments 1690272C (Felon in Possession of a Firearm) and 1690273C (Armed Career Criminal), because his possession of the replica Colt 1851 Navy was consistent with federal law. *See* 18 U.S.C. 921(a)(3) and (16); 27 CFR 478.11 and 478.141(d). RSA 159:1 provides a “safe haven” for the narrow purpose of owning or transferring antique pistols or revolvers in a manner that complies with federal law, such as the conduct alleged against the Defendant in the aforementioned indictments. Therefore, the Trial Court erred, as a matter of law, when it issued its May 29, 2020, Order denying the Defendant’s Motion to Dismiss. *Apx.* at 71.

II. The Trial Court’s Interpretation of RSA 159, Which Renders Statutory Language Superfluous and Meaningless, Encourages Arbitrary Enforcement and an Unjust Result.

The Trial Court’s May 29, 2020, Order erroneously upheld the prosecution’s strategy of cleverly charging the antique revolver at issue as “a firearm,” thereby negating

the antique's specific statutory exclusion from the definition of "pistol or revolver." *Id.* The language of RSA 159:3 states that a convicted felon, such as the Defendant, is guilty of a class B felony if he:

Owns or has in his possession or under his control, **a pistol, revolver, or other firearm**, or slungshot, metallic knuckles, billies, stiletto, switchblade knife, sword cane, pistol cane, blackjack, dagger, dirk-knife, or other deadly weapon as defined in RSA 625:11, V;. (emphasis added)

If a prosecution can be brought forward under RSA 159:3, on the basis of arbitrarily calling an exempted antique revolver "a firearm" rather than what it actually is, then the inclusion of the terms "pistol, revolver" under RSA 159:3 is entirely superfluous. Under such an interpretation, anything that uses gunpowder and goes bang, whether modern or from the revolutionary war, is "a firearm," so the terms "pistol, revolver" have no effect at all. The logical interpretation of the statute is that the term "other firearm" is meant to include modern firearms consistent with the federal definition, such as shotguns and rifles using modern, fixed ammunition, that are not otherwise defined in the state statute. *See* RSA 159:3; 18 USC 921(a)(3)&(16).

As defined by RSA 159:1: "Pistol or revolver, as used herein, means [(1)] any firearm [(2)] with a barrel less than 16 inches in length. It **does not include antique pistols, gun canes, or revolvers.**" (Emphasis added). The replica Colt 1851 Navy at issue is an antique with a barrel less than 16 inches that the police identified as a "revolver". *Apx.* at 127, 192. Therefore, if the legislature intended for it to be considered a "firearm" inconsistent with federal law, it would not specifically be exempted from the definition of "[p]istol or revolver." RSA 159:1.

Interpreting the statute to permit the prosecution to secure a conviction by calling the replica Colt 1851 Navy antique revolver “a firearm” encourages arbitrary criminal enforcement and leads to absurd and unjust results in violation of principles that guide New Hampshire statutory interpretation. *Wilson*, 169 N.H. at 761, 766. (“We must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words.... It is a fundamental principle of statutory construction that whenever possible, a statute will not be construed so as to lead to absurd consequences.”) If the Court finds that the antique revolver at issue is an “other firearm” within the meaning of RSA 159:3, then the inclusion of the words “pistol and revolver,” as well as the exemption contained in RSA 159:1, are entirely superfluous.

Further, if the Court upholds the Trial Court’s Webster’s Dictionary definition of firearm as including: “a weapon from which a shot is discharged by gunpowder,” it leads to the absurd conclusion that many residential use fireworks are considered “firearms” under state law *Apx.* at 74. The Court can take notice that a firework expels a shot by gunpowder and, as is well established in the law, virtually anything can be used as a weapon. *Kousounadis*, 159 N.H. at 425; *see also* RSA 625 (“Deadly weapon” means any firearm, knife or **other substance or thing which**, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury”)(emphasis added).

Lastly, background checks for the sale of antique pistols and revolvers using the federal National Instant Criminal Background Check System “NICS” are strictly prohibited. 28 CFR § 25.6; 28 CFR § 25.11. Checks can only be performed on the transfer

of “firearms” according to the federal definition, which excludes antiques. 18 USC §921(a)(3)- (16). Utilizing the NICS system for an unauthorized purpose, such as transferring an antique, carries up to a \$10,000.00 fine and the revocation of access to the system. 28 CFR § 25.11. The Court can take notice that the State of New Hampshire maintains no background check system for firearms transfers independent of the federal NICS system. Therefore, without a background check available, gun dealers and regular retailers face the prospect of a felony conviction under RSA 159:7 (selling a firearm to a felon) without any means to run a background check. Such an interpretation leads to the absurd result of making it riskier for a dealer to sell a Revolutionary War musket than a semi-automatic rifle or handgun.

In order to avoid absurd results, the Court must read RSA 159 as a whole and within the context of the complexities contained in federal firearms law, particularly because RSA 159 makes clear reference to consistency with federal law. *See* RSA 159:1; RSA 159:26. Upon doing so, it becomes clear that Mr. Parr did not violate RSA 159:3 when he allegedly possessed an antique revolver.

III. The Court’s Isolated Interpretation of RSA 159:1 Renders RSA 159:3, 3-a and 7 Unconstitutionally Vague

The Trial Court’s interpretation of RSA 159:1 renders several provisions of the Chapter, including RSA 159:3, 3-a, and 7 unconstitutionally vague. “The underlying principle of vagueness is that no person should be held criminally responsible for conduct which he or she could not reasonably understand to be proscribed.” *Dor*, 165 N.H. at 202)(Quoting *State v. Pratte*, 158 N.H. 45, 48, (2008)); *See also* N.H. CONST. Pt. I, Art.

15. The Court looks to federal case law for guidance but “...will not undertake a separate federal analysis because the Federal Constitution affords no greater protection than the State Constitution with regard to whether a statute is unconstitutionally vague.” *State v. Saucier*, 128 N.H. 291, 297 (1986); (citing *Hill v. Colorado*, 530 U.S. 703, 732–33 (2000)); *See also* U.S.C.A. Const. Amend. V & XIV.

“A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *State v. Porelle*, 149 N.H. 420, 423 (2003)(citing *Hill*, 530 U.S. at 732). “A criminal statute is void for vagueness when it forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application.” *Dor*, 165 N.H. at 203 (*Citing Wong*, 125 N.H. at 621). An unconstitutionally vague statute fails to give “...clear notice to a person of ordinary intelligence of the precise conduct...” that would result in a violation. *MacElman*, 154 N.H. at 308.

Under the Trial Court’s interpretation contained within its May 29, 2020, Order, the criminal violations contained in RSA 159:3, 159:3-a and 159:7, are each unconstitutionally vague. *Apx.* at 71. Due to the antique revolver exemption and federal consistency provisions of RSA 159:1 (and the federal consistency provision of RSA 159:26), people of ordinary intelligence and even those with specialized knowledge in the field of firearms law can plausibly read the references to “firearm” under RSA 159:3, 159:3-a, and 159:7, as being inapplicable to antiques because the federal definition and RSA 159:1 each

specifically exempt antique revolvers. *See* 18 U.S.C. 921(a)(3) & (16); 27 CFR 478.11 and 478.141(d). The Court’s interpretation fails to put defendants, such as Mr. Parr, on notice of the “precise conduct” that would lead to a violation of the sections as required by Part I, Article 15 of the New Hampshire Constitution. *MacElman*, 154 N.H. at 308. This is particularly true where antique pistols and revolvers are sold by retailers and shipped directly to the doors of purchasers without a background check or ATF Form 4473 (because a background check of an antique is not permitted by federal law). *See* 18 USC §921(a)(3)-(16); 28 CFR § 25.6 & 25.11.

RSA 159:7 states:

No person shall sell, deliver, or otherwise transfer a pistol, revolver or any other firearm, to a person who has been convicted, in any jurisdiction, of a felony. Whoever violates the provisions of this section shall be guilty of a class B felony.

If “any other firearm” includes antiques, for which a background check is unavailable, an innocent seller can be convicted of a felony for unknowingly selling a musket to a felon. Further, without a *mens rea* included in RSA 159:7, the statute fails to put innocent transferors on notice of what they must do in order to avoid prosecution.

The Supreme Court has relied on the presence of a scienter or *mens rea* as the foundation of determining that a statute is not unconstitutionally vague. *See State v. Morabito*, 153 N.H. 302, 305 (2006); *See also MacElman*, 154 N.H. at 308 (“We have previously held that a scienter requirement in a statute ameliorates the concern that the statute does not provide adequate notice to citizens regarding the conduct that is proscribed.” (*citing Porelle*, 149 N.H. at 423); *see also Hill*, 530 U.S. at 732. “Applied to

each material element of the offense, the ‘knowingly’ scienter requirement diminishes the risk of an individual being prosecuted for conduct that she could not understand.” *MacElman*, 154 N.H. at 308.

In the instant case, no scienter or *mens rea* is present in RSA 159:7. The Trial Court’s Order states: “Although no mens rea is articulated in RSA 159:7, the State would be required to prove one at trial.” *Apx.* at 76-77. This provides little comfort and no curative effect to the unconstitutional vagueness. The *mens rea* to be proven under RSA 159:7 is unstated and could be any of the following: “purposefully, knowingly, recklessly, or negligently.” *Id.* The Trial Court’s interpretation absolutely fails to provide any semblance of constitutionally adequate notice. Part I, Article 15 of the New Hampshire Constitution requires that a criminal statute provide “...**clear notice to a person of ordinary intelligence of the precise conduct...**” that would constitute the criminal violation. *MacElman*, 154 N.H. at 308 (emphasis added).

It is not enough to state that some sort of *mens rea* would be applicable at trial, after arrest and prosecution is already underway, because the Defendant would not have been informed prior to prosecution as to how to avoid engaging in criminal conduct. Indeed, our system of justice requires that the “precise conduct” criminalized by statute be stated so that it may be avoided by a person of ordinary intelligence. *Id.*

Under the Court’s interpretation, RSA 159:7 simply states that if an individual transfers a firearm to a felon in violation of an invisible standard, they are guilty of a class B felony. This leads to the absurd result of retailers facing more potential liability transferring an antique, black powder musket, than a modern semi-automatic “assault rifle”

because modern firearms purchasers must receive NICS background check in accordance with federal law. 18 U.S. Code § 922(t). In practicality, the Court's decision will likely lead to many New Hampshire retailers ceasing the sale of antiques because the Court's Order makes it too risky.

The Florida case of *Weeks v. State*, 146 So. 3d 81, 83 (Fla. Dist. Ct. App. 2014) is analogous to the instant matter. In *Weeks*, the Court overturned a "felon-in-possession" conviction involving an antique replica because the statute failed to give adequate notice to the Defendant, and was therefore unconstitutionally vague regarding what antique replicas he could or could not possess. "In sum, we hold section 790.23 is unconstitutionally vague as to antique replica firearms because the phrases "firearm" and "antique firearm" defined in chapter 790, do not give adequate notice of what constitutes a permissible replica of an antique firearm which may be lawfully carried by a convicted felon; therefore, arbitrary and discriminatory enforcement of section 790.23 may result." *Weeks v. State*, 146 So. 3d 81, 85 (Fla. Dist. Ct. App. 2014).

"It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever reasonably possible." *Dor*, 165 N.H. at 202 (2013); *Ploof*, 162 N.H. at 620. The clear interpretation to achieve constitutionality in regard to RSA 159 would be to find that antique pistols and revolvers are exempt from RSA 159:3, 3-a, and 7, insofar as their ownership or transfer does not violate federal law, as the legislature intended by virtue of RSA 159:1 and 159:26.

G. CONCLUSION

The Trial Court's Interpretation of RSA 159 is legally and constitutionally unsustainable because it renders statutory language meaningless, superfluous, and vague. It leads to absurd conclusions and produces unjust results that encourage arbitrary criminal enforcement. The Trial Court's interpretation creates ripple effects far outside of the current case involving a single felon charged in relation to the possession of "a firearm". The Trial Court's interpretation, if not reversed, creates an entirely new danger of felony criminal prosecution for honest businesses and individuals throughout the State of New Hampshire. Every innocent person who sells a musket, muzzleloading rifle or black powder revolver now faces the potential of prison time despite having no ability to run a firearms background check on the buyer. This is an unthinkable result, clearly not intended by the legislature.

For the reasons stated herein, Defendant Justin Parr prays that this Honorable Court will reverse the Trial Court's Orders, dated May 29, 2020 (*Apx.* at 71), and June 9, 2020 (*Apx.* at 95), and grant his Motion to Dismiss.

H. REQUEST FOR ORAL ARGUMENT

The Plaintiff requests 15 minutes of oral argument to be given by his attorney, Sean R. List, Esq.

I. CERTIFICATIONS

I, Michael J. Zaino, hereby certify that on July 23, 2021, copies of the foregoing and the Appendix were forwarded to the NH Attorney General's Office, as counsel for the State by electronic service.

I, Michael J. Zaino, hereby certify that the appealed decision is in writing and is included in the Appendix to this brief.

I, Michael J. Zaino, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains less than 9,500 words. Counsel relied upon the word count of the computer program used to prepare this brief.

Respectfully submitted,
Justin Parr,
By his attorneys,

Date: July 23, 2021

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