

**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**

---

**REPLY BRIEF OF  
APPELLANT/DEFENDANT**

---

**Sean R. List, Esq. NH Bar #266711  
Lehmann Major List, PLLC  
6 Garvins Falls Road  
Concord, NH 03301  
603-715-8882  
[sean@nhlawyer.com](mailto:sean@nhlawyer.com)  
Attorney for the Appellant/Defendant**

**Michael J. Zaino, Esq. NH Bar #17177  
Law Office of Michael J. Zaino, PLLC  
P.O. Box 787,  
Hampton, NH 03843  
603-910-5146  
[michael@zainolaw.net](mailto:michael@zainolaw.net)**

**TABLE OF CONTENTS**

Introduction.....5

    A. The Appellee’s Inclusion of Irrelevant Facts.....5

    B. Case Law Cited by the Appellee Does not Provide a Definition of “Firearm” in Consideration of Exempted Antiques.....7

    C. The Federal Definition of Firearm, Which Excludes Antiques, Has Existed Since 1968 and Constitutes the “Plain and Ordinary Meaning” of the Term.....10

    D. The Appellee’s Argument that FFL’s can Verify the Background of an Antique Purchaser Separate from a NICS Check is Absurd.....11

    E. The Appellee’s Public Policy Arguments are Irrelevant.....12

    F. The Appellee’s “Collector” Argument is Absurd.....14

    G. The Appellant Argues that State Law Defers to Federal Law Regarding Ownership and Possession of Antiques, Not that Federal Firearms Law is Preemptive of State Law.....15

Conclusion.....16

Certifications.....17

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGES</b>
<i>State v. Beaudette</i> , 124 N.H. 579 (1984).....	7,8
<i>State v. Beckert</i> , 144 N.H. 315 (1999).....	13
<i>State v. Mohammed</i> , 159 N.H. 559 (2009).....	13
<i>State v. Smith</i> , 166 N.H. 40 (2014).....	9
<i>State v. St. John</i> , 129 N.H. 1 (1986).....	8,9
<i>State v. Taylor</i> , 136 N.H. 131 (1992).....	8
<i>State v. Wilson</i> , 169 N.H. 755 (2017).....	11

**FEDERAL STATUTES/REGULATIONS**

18 U.S.C. 921.....	6,7,9,10,13,15
18 U.S. C. 922.....	10,11
27 C.F.R. §478.11.....	6,7,9,10,13,15,16
27 C.F.R. §478.102.....	10,11
27 C.F.R. §478.124.....	10,11
27 C.F.R. §478.141.....	10,11,13
28 C.F.R. §25.2.....	12
28 C.F.R. §25.6.....	10,11,12
28 C.F.R. §25.11.....	11,12

**NEW HAMPSHIRE STATUTES**

RSA 159:1.....7,8,9,14,15

RSA 159:3.....11,13

RSA 159:3-a.....11

RSA 159:7.....11,12

RSA 159:19.....14

RSA 159-D:1.....10

RSA 625:11.....14

RSA 637:11.....8

## INTRODUCTION

The Appellant Defendant submits this Reply Brief to the Appellee's Brief, pursuant to Sup. Ct. R. 16(7), in order to provide clarification relevant to the issues at hand.

### A. The Appellee's Inclusion of Irrelevant Facts

Given that the nature of the appeal before this honorable Court involves purely questions of law, the factual allegations contained within the Appellee's Brief, particularly at pages eight through eleven, are largely irrelevant. *See Brief of the Appellee State of New Hampshire ("Appel. B."),* p. 8-11, October 6, 2021. The references to such things as Mr. Parr's alleged methamphetamine possession and recordings of jail calls only serve to possibly taint the Court's image of the Defendant Appellant. *Id.* It must further be noted that, as depicted in the transcript of the November 10, 2020, hearing in Merrimack Superior Court, a reversal of the lower Court's decision in this matter will not alter the Defendant's sentence. *Appendix to Defendant Appellant's Brief ("Apx."),* p. 106, July 23, 2021. A reversal would simply remove the Defendant's wrongful conviction for being a felon in possession of a firearm. *Id.*

The Appellee claims that at the April 29, 2020, hearing on the Motion to Dismiss: "Defense counsel presented an image that he claimed represented 'the antique revolver at issue in this matter.' MT8. The image presented, however, was of a 'Colt 1851 Navy, Robert E. Lee Commemorative Edition,

36 Caliber,’ SA3, which is a different caliber and model than the Handgun—a replica ‘.44 caliber . . . model 1851 Reb Nord Navy Sheriff.’” *Appel. B.*, p. 12, fn.6. Apart from being irrelevant to the issues at hand<sup>1</sup>, the Appellee failed to note the reason the State was able to provide the make, model and caliber of the antique depicted in the slideshow image is because those identifying details were included on the slide. *Appellee’s Appendix*, p. 3.<sup>2</sup> Indeed, the antique replica underlying Mr. Parr’s conviction for felon in possession of a firearm is a replica of the Colt Model 1851 Navy, just as defense counsel represented at the hearing on the Motion to Dismiss:

So the first slide that I want to show to you, on the left side, you’ll [see] what is a Colt 1851 Navy Robert E. Lee Commemorative Edition. I’m sorry. I’m looking to the right, so sometimes I may not project my voice perfectly. The reason that I display that is[,] the antique revolver at issue in this matter. . . . **that is [a] replica of this particular firearm.**

*Apx.* at 27.

Lastly, the Appellee’s correction to the Superior Court’s reference to the antique replica at issue, which the Superior Court called a “muzzleloader,” is immaterial and irrelevant to the definition of “antique revolver”. *Appel. B.*, p. 13, fn.8; *See also* RSA 159:1 (antique includes **any**

---

<sup>1</sup> The firing mechanism utilizing black powder, percussion caps and musket balls is relevant- not make, model or caliber. *See* 159:1; 18 USC §921(a)(16); 27 CFR § 478.11.

<sup>2</sup> The Appellee’s Appendix crops slideshow images on page three that were fully viewable on the PowerPoint projection presented at the April 29, 2020, hearing.

pistol or revolver utilizing “an early type of ignition,” including percussion); 18 USC §921(a)(16); 27 CFR § 478.11. The Appellee’s representation to the Court that the antique replica at issue “can fire up to six rounds in quick succession” is irrelevant to the law, subjective and unsupported by the record.<sup>3</sup> *Id.* at p. 13, fn.8, p. 25.

The Appellee’s factual representations that are either irrelevant to the legal issues subject to appeal or are misstated should be disregarded by the Court.

**B. Case Law Cited by the Appellee Does Not Provide a Definition of “Firearm” In Consideration of Exempted Antiques**

The Appellee cites four New Hampshire cases in support of its argument that the definition of “firearm” should blanketly include any weapon that is capable of discharging a shot by gunpowder. *Appel. B*, p. 23. None of the cases cited by the Appellee involve antiques, nor do they evaluate the specific carve out in RSA 159:1, regarding the ownership and transfer of antique revolvers in a manner consistent with federal law. Each case cited by the Appellee is easy to distinguish from the matter at hand:

- ***State v. Beaudette***, 124 N.H. 579, 581 (1984)- The Court reversed the Defendant’s conviction where the charged weapon was a pellet

---

<sup>3</sup> The technology utilized in a black powder, cap and ball, antique replica revolver pales in comparison to modern firearms in terms of both speed and reliability, providing a reasonable basis for the different treatment under state and federal law. *See* 18 USC §921(a)(3) & (16). Further, a quick internet search demonstrates that multiple companies make air guns that fire projectiles up to .45 caliber in semi-automatic platforms at much higher velocities than black powder replica revolvers. Air guns do not meet the Superior Court’s definition of “firearm” because they propel projectiles with compressed air rather than the action of an explosive. *Apx.* at 74.

gun using pneumatic force and therefore did not meet the definition of firearm. At the time the *Beaudette* case was decided, the language regarding antique pistols and revolvers in RSA 159:1 had not yet been added. *Apx.* at 92. The language of RSA 159:1 relevant to the instant case, which permitted Mr. Parr's possession of the antique consistent with federal law, was added by the passage of HB 1305 in 1992. *Id.*

- ***State v. Taylor*, 136 N.H. 131, 134 (1992)**- The Court affirmed the conviction of the Defendant for theft of a firearm pursuant to RSA 637:11. The stolen gun was a Colt Model 1911- a semi-automatic firearm using modern, fixed, centerfire ammunition. *Id.* The Defendant challenged the conviction on the basis that the State did not prove the firearm was operable and “the bullets were so corroded at the time of the offense that ‘it was almost impossible to get them out of the clip.’” *Taylor*, 136 N.H. at 132. The Court held that even if proof of current operability was required, the evidence of recent target shooting was enough to meet that burden. *Id.* at 134.

- ***State v. St. John*, 129 N.H. 1, 2 (1986)**- The firearm at issue was a Dan Wesson .357 Magnum Revolver, using modern, fixed, centerfire ammunition. Federal brand ammunition was found to be in the Defendant's possession. *Id.* at 4. The Defendant appealed, arguing that the definition of “firearm” was not provided to the jury. *Id.* at 3. The Court affirmed the Trial Court's decision that the jury instruction was not necessary because the



evidence submitted demonstrated there was no valid argument that the gun was anything other than a firearm. *Id.* at 4.

- **State v. Smith, 166 N.H. 40, 43 (2014)**- The Defendant challenged a conviction of receiving stolen property in the form of a modern .44 caliber Smith & Wesson revolver and a semi-automatic .380 ACP Sig Sauer pistol on the basis that the jury was not instructed to find that the stolen property consisted of firearms. The Court upheld the conviction, finding that the evidence, which included testimony from a firearms expert, was overwhelming and undisputed. *Id.* at 43.

The instant case is the first time in New Hampshire jurisprudence that the Supreme Court is asked to determine whether an antique revolver is permitted to be possessed by a felon, in a manner consistent with federal law, according to RSA 159:1. The federal definition of “firearm” is as follows:

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).

In the case history provided by the Appellee, the Court was not asked to make the determination at issue here. If the Supreme Court is to decide that antique revolvers fall within the definition of “firearm” according to

New Hampshire law, it will almost certainly cause significant changes in manner of sale and availability of items federally defined as “antique firearms.” *See* 18 U.S.C. §921(a)(3) and (16); 27 CFR §478.11 and §478.141(d).

**C. The Federal Definition of Firearm, Which Excludes Antiques, Has Existed Since 1968 and constitutes the “Plain and Ordinary Meaning” of the Term**

In New Hampshire, like in most states, the process of buying a firearm primarily concerns requirements set forth by federal law. When an individual purchases a firearm, said individual must complete ATF Form 4473 and submit to a background check through the federal National Instant Criminal Background Check System (“NICS”). 27 CFR § 478.102. The NICS check is completed directly by the FBI when the purchased firearm is a long gun, and is completed by the Department of Safety, Permits and Licensing Unit (the “Gun Line”) when the purchased firearm is a handgun. RSA 159-D:1 et. seq. In either circumstance, the process is dictated by federal law. 28 CFR §25.6(d).

An individual or business must be a Federal Firearm Licensee (“FFL”) in order to engage in the business of selling firearms. 18 USC §922 (a)(1)(A). Federal law requires that an FFL must review an acceptable form of state or federal identification in the process of completing the Form 4473, to verify both the age and residency of the purchaser. 27 CFR §

478.102(a)(3); 27 CFR §478.124 (c). When speaking to the regulation of firearms, the plain and ordinary meaning of “firearm” excludes antiques. 18 USC §922(a)(3).

**D. The Appellee’s Argument that FFLs Can Verify the Background of an Antique Purchaser Separate from A NICS Check is Absurd.**

The Appellee argues that the Court should not read RSA 159:7 in the process of interpreting the meaning of “firearm” for the purpose of RSA 159:3. *Appel. B.*, p. 38. This flies in the face of the well-settled rule of statutory construction that statutes must be interpreted “in context of the overall statutory scheme and not in isolation.” *State v. Wilson*, 169 N.H. 755, 760 (2017). The notion that the Court cannot review RSA 159:7 in interpreting RSA 159:3 is further undermined by the Appellee urging the Court to review RSA 159:3-a in forming its interpretation. *Appel. B.*, p. 41, fn.18.

Merchants will face significant criminal liability pursuant to RSA 159:7 if the Court decides that antiques constitute “firearms” because merchants are prohibited from utilizing NICS to complete a background check on an antique buyer but will be committing a felony under state law if they sell an antique to a felon. *See* 28 CFR § 25.6 (“FFLs may initiate a NICS background check **only in connection with a proposed firearm transfer** as required by the Brady Act. **FFLs are strictly prohibited from initiating a NICS background check for any other purpose.**”)(emphasis added); *See*

also 28 CFR § 25.11. The Appellee attempts to minimize the risk faced by merchants by claiming that because merchants must verify identity and age when selling a firearm, they can “utilize similar tools” to verify that a prospective purchaser is not a felon. *Appel. B.*, p. 39. The Appellee provides no suggestion as to the tools merchants can allegedly use. *Id.*

Notwithstanding the Appellee’s unsupported arguments, there is no viable tool for a merchant to utilize, other than NICS, to determine whether a prospective purchaser is a felon. RSA 159:7 is not specific to felony convictions in New Hampshire, making it nearly impossible for a merchant to make such a determination without the comprehensive database search completed by NICS. *See* 28 CFR §25.6. The State Gun Line is bound to follow federal law as a Point of Contact for NICS, meaning it is also unable to legally process background checks concerning antiques. *See* 28 CFR §25.2 & §25.6. Therefore, if the Court determines that antique pistols and revolvers are “firearms” for purposes of RSA 159, then merchants face a decision: stop selling antiques or risk a felony conviction under RSA 159:7.

**E. The Appellee’s Public Policy Arguments are Irrelevant**

The Appellee makes public policy arguments to forward an erroneous contention that classifying antique pistols and revolvers as non-firearms would lead to absurd results. *Appel. B.*, p. 25-29. More specifically, it is unimaginable to the Appellee that an antique, black powder revolver, utilizing technology approximately 150 years obsolete, could be owned by a

felon when state statute restricts “less dangerous hand-to-hand weapons such as a ‘slungshot, metallic knuckles, billies, stiletto, switchblade knife, sword cane, . . . blackjack, dagger, [and] dirk-knife.’” *Id.* at 25. Not only are the claims of being “less dangerous” unsubstantiated, state law doesn’t prohibit many other potentially dangerous items, including “ranged weapons,” from being owned by felons, such as: crossbows, bows and arrows, swords, machetes, chainsaws and spearguns. *See* RSA 159:3 et. al.

If the exclusion of antiques from the definition of “firearm” is to be considered absurd, then the Gun Control Act of 1968, and each federal firearm law passed thereafter<sup>4</sup>, created absurd results. 18 U.S.C. §921(a)(3) and (16); 27 CFR §478.11 and §478.141(d). This is clearly not the case. It is entirely consistent with the purpose of RSA 159:3 to restrict felons from possessing a firearm but not restrict their possession of an antique revolver so long as it is not used as a deadly weapon. Pursuant to *State v. Mohamed*, 159 N.H. 559, 561 (2009), which post-dates *State v. Beckert*, 144 N.H. 315, 318 (1999) by ten years and interprets current law, an item becomes a deadly weapon “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.”

---

<sup>4</sup> The Gun Control Act has been amended and/or supplemented with a litany of federal firearms laws, each of which has left the exemption of antiques in place, including, but not limited to, the Firearm Owner’s Protection Act (1986), the Gun-Free School Zones Act of 1990, the Brady Handgun Violence Prevention Act (1993), and the Federal Assault Weapons Ban (1994, expired 2004).

Lastly, the Appellee erroneously argues that individuals would be permitted to carry antique revolvers into courthouses if an antique is not a “firearm” pursuant to state law. *Appel. B.*, p. 25, fn. 12. This argument fails to account for the prohibition of not just firearms being carried into courthouses, but “any other deadly weapon as defined in RSA 625:11, V.” RSA 159:19. Further, the Court can take notice that courthouse security policies restrict items far broader than RSA 159:19. For example, at the Superior Court level, individuals are prohibited from entering a courthouse with anything that could be used as a weapon, including scissors, knitting needles and nail clippers. See <https://www.courts.nh.gov/our-courts/superior-court/criminal/what-do-when-you-arrive-courthouse>. No matter how the Court decides the instant case, antique revolvers will not be permitted inside of courthouses.

**F. The Appellee’s “Collector” Argument is Absurd**

The Appellee argues that RSA 159:1 does not permit Mr. Parr to own an antique revolver consistent with federal law because he has not proven that he is an “antique or arms collector.” *Appel. B.*, p. 31. The term “antique or arms collector” is not a term defined under state or federal firearms law. See 18 USC §921. Federal law speaks to collectors of curios and relics, but not antiques. *Id.*

The Appellee argues that Mr. Parr is not a “collector” because “he merely own[ed] a replica revolver” which the Defendant did not prove “had

any sort of personal or historical significance to him.” *Appel. B.*, p. 32. To accept such an argument is to absurdly find that RSA 159:1 permits a felon to own multiple antiques that the State deems to be of significance but prohibits a felon from starting a collection with a single antique the State subjectively determines is insignificant.

The Appellee further argues that Mr. Parr cannot be considered a collector because he did not meet the State’s expectations regarding care for the antique. *Id.* Conditioning criminal liability on such arbitrary factors would render the statute unconstitutionally vague while producing absurd results.

**G. The Appellant Argues that State Law Defers to Federal Law Regarding Ownership and Possession of Antiques, Not that Federal Firearms Law is Preemptive of State Law**

The Appellant has made no argument that federal law preempts State firearms law based upon express or field preemption. The Appellee spends a significant portion of its brief shadowboxing preemption arguments that the Appellant did not make. *Appel. B.*, p. 32-37. The Appellant argues that RSA 159:1 expressly permits Mr. Parr’s ownership or transfer of an antique pistol or revolver so long as the ownership/transfer complies with federal law, which it did.

Federal law does not prohibit the ownership of antique firearms (including replicas) by felons. *See* 18 U.S.C. 921(a)(3) and (16); 27 CFR

478.11 and 478.141(d). Therefore, Mr. Parr was permitted to possess an antique revolver under the express terms of RSA 159:1.

### **CONCLUSION**

As argued in Appellant's original brief, and further clarified here, the Trial Court's interpretation of RSA 159 is constitutionally unsustainable because it renders statutory language meaningless, superfluous, and vague. Therefore, for the reasons stated in Appellant's original brief and those stated within this reply brief, the Appellant prays that this Honorable Court will reverse the trial court's order dated May 29, 2020.



**CERTIFICATIONS**

We hereby certify that the within reply brief complies with Sup. Ct. R. 26(7) and contains 2,907 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix.

We hereby certify that copies of the foregoing were forwarded to the NH Attorney General's Office, as counsel for the State by electronic service.

Respectfully submitted,  
Justin Parr,  
By his attorneys,

Date: October 26, 2021

By: /s/ Sean R. List  
Sean R. List, Esq.  
NH Bar No. 266711  
Lehmann Major List, PLLC  
6 Garvins Falls Road  
Concord, NH 03301  
(603)715-8882  
sean@nhlawyer.com

/s/Michael J. Zaino  
Michael J. Zaino, Esq.  
NH Bar No. 17177  
Law Office of Michael J.  
Zaino, PLLC  
P.O. Box 787,  
Hampton, NH 03843  
(603)910-5146  
michael@zainolaw.net