State of New Hampshire
Supreme Court

NO. 2020-0243

2020 TERM

AUGUST SESSION

John Doe

v.

New Hampshire Department of Safety

RULE 7 APPEAL OF FINAL DECISION OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF APPELLANT, JOHN DOE

August 13, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

New Hampshire Cases

Other States' Cases

New Hampshire Statutes

New York Statute

New Hampshire Administrative Rules

Secondary Authority

QUESTIONS PRESENTED

I. Does the State have the burden of proving conviction of a qualifying offense in order to place a person on the public sex offender registry?

Preserved: MOTION FOR REHEARING (Sept. 18, 2019), *Appx*. at 30; NOTICE OF APPEAL (July 16, 2019), exh. G, *Appx*. at 27; NOTICE OF APPEAL (Dec. 19, 2019), *Appx*. at 33; OBJECTION TO MOTION TO DISMISS (Jan. 13, 2020), *Appx*. at 47; *Trn.* at 15-19, 25.

II. Did the New Hampshire Department of Safety and the Superior Court err in finding that the State met its burden to prove a qualifying offense to place John Doe on the public sex offender registry?

Preserved: DOE'S MEMORANDUM OF LAW ¶ 6 (Mar. 22, 2019), *Appx*. at 17; MOTION FOR REHEARING (Sept. 18, 2019), *Appx*. at 30; NOTICE OF APPEAL (July 16, 2019), exh. G, *Appx*. at 27; MOTION FOR REHEARING (Sept. 18, 2019), *Appx*. at 30; NOTICE OF APPEAL (Dec. 19, 2019), *Appx*. at 33; OBJECTION TO MOTION TO DISMISS (Jan. 13, 2020), *Appx*. at 47; *Trn.* at 12-16, 20, 24-25.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

This case involves whether John Doe's 2002 conviction in New York of forcible touching, a conviction which did not result in his being placed on the sex offender registry in New York, nonetheless requires him to be placed on the public sex offender registry in New Hampshire.

Due to apparent charge bargaining with the New York prosecutor in 2002, and the imprecision with which New York courts report records of criminal convictions of that era, it is unclear exactly of what crime Doe was convicted.

The New Hampshire Department of Safety and the Superior Court improperly imposed on Doe the burden to prove that his offense did not qualify him for New Hampshire's public registry, rather than placing the burden on the State to prove it did, and improperly placed him on the public registry.

I. New York Proceedings

A. Charge Bargaining in New York Criminal Courts

Bemoaned or celebrated, plea bargaining is an established and unavoidable aspect of the criminal justice system. *Santobello v. New York*, 404 U.S. 257, 259 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged.").

> There are two basic kinds of plea-bargaining, charge-bargaining and sentence-bargaining. Charge-bargaining involves whether a defendant will plead guilty to the offense that has been alleged or to a lesser or related offense, and whether the prosecutor will dismiss, or refrain from bringing, other charges. Sentence-bargaining may be for binding or non-binding recommendations to the court on sentences,

> including a recommended "cap" on sentencing and a recommendation for deferred-adjudication probation.

Morgon v. State, 185 S.W.3d 535, 537-38 (Tex. App. 2006) (citations omitted).

Charge bargaining is well-recognized and widely used. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978) (in Kentucky); *Huff v. State*, 568 P.2d 1014, 1015 (Alaska 1977) ("'Plea, sentence or charge bargaining' is a process whereby the accused agrees to enter a guilty plea … in exchange for a reduced charge or what he might expect to be the imposition of a lesser sentence than he would receive if found guilty after trial."); *Hoskins v. Maricle*, 150 S.W.3d 1, 24 (Ky. 2004) ("A 'sentence bargain,' … does not involve dismissal or amendment of any charges but does involve a recommendation or agreement not to oppose a particular sentence.… A 'charge bargain,' … dismisses or amends one or more charges in exchange for a guilty plea to the reduced charges."); *People v. Killebrew*, 330 N.W.2d 834, 838 (Mich. 1982) ("charge bargaining [is when] [t]he prosecuting attorney may agree with the defendant to bring reduced charges or to dismiss certain charges or cases altogether. [A] sentence agreement [is when] [t]he prosecuting attorney, after conference with the defendant, may present to the court a sentence agreement stating that the parties agree that a specifically designated sentence is the appropriate disposition of the case."); *State v. Montiel*, 122 P.3d 571, 577 (Utah 2005) ("'charge bargains,' [are] those in which the prosecutor agrees to reduce or dismiss the original charge(s) in exchange for a guilty plea on some other charge(s).").

Policy considerations have sometimes resulted in bans or curtailment of charge bargaining. *See, e.g.,* RSA 262-42-a (prohibiting charge bargaining for holders of commercial drivers licenses in motor vehicle cases); RSA 265-A:21 (in DWI cases, requiring reporting where "the original charge is reduced to or

in any manner substituted with another charge or a nolle prosequi entered in exchange for an agreement to plead guilty or nolo contendere to another charge"); Roland Acevedo, *Is A Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987 (1995) (describing temporary local bans in New York, Alaska, and Texas).

In New York, charge bargaining has a 200-year history. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1035 (2000) (history of New York's "vigorous charge-bargaining practice"). As of 1995, "plea bargaining accounted for resolutions in approximately eighty-five percent of all Bronx [New York] felony prosecutions," and of those, about a quarter were charge-bargained – "disposed of by defendants pleading guilty to reduced felony charges." Acevedo, 64 FORDHAM L. REV. at 989, 1001.

B. 2002 Plea of Guilty to Sexual Offense in New York

In January 2002, John Doe[1] was charged with misdemeanor "forcible touching," in Brighton, New York, and in April he pleaded guilty.

The New York statute then in effect had two variants of forcible touching:

> A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person:
> 1. for the purpose of degrading or abusing such person; or
> 2. for the purpose of gratifying the actor's sexual desire.

N.Y. Penal Law § 130.52 (2002), exh. C, *Addendum* at 41.[2]

The materials made available to the State of New Hampshire and to Doe by the New York court[3] specify that Doe was *charged* under subsection 2 – "for the purpose of gratifying the actor's sexual desire." NY CRIMINAL HISTORY RECORD at 4 ("Cycle 003") (Mar. 18, 2019), exh. A-1, *Appx*. at 8, 11 (specifying charge for "PL 130.52 SUB 02").

All records of *conviction*, however, do not specify under which subsection Doe was convicted. All records cite the New York Penal Law, but only as section "130.52," with no subsection specified. *Id.* at 5; CERTIFICATE OF

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[1]John Doe is a pseudonym. This court has been apprised of his proper name and contact information. *See* MOTION FOR REHEARING AND REQUEST FOR CASE TO BE SEALED (Sept. 18, 2019), *Appx*. at 30; *Trn*. at 23.

[2]The New York statute was amended in 2003 and 2015, reorganizing elements and adding a subsection regarding touching on public transit. N.Y. Penal Law § 130.52 (2015), exh. D, *Appx*. at 32. Because Doe's conviction was in 2002, later amendments are not considered.

[3]An NCIC criminal record check was performed by the State of New Hampshire. Both parties sent investigators to the New York court, spoke to officials there, and learned that the court did not know further details and would not be able to find them. *Trn*. at 15; FIRST REPORT OF HEARINGS EXAMINER (June 18, 2019), exh. A, *Addendum* at 27; NOTICE OF APPEAL PURSUANT TO RSA 651-B:10 ¶6 (Dec. 19, 2019), *Appx*. at 33.

CONVICTION (Jan. 29, 2002), exh. A-3 atch. B, *Appx*. at 3; LETTER FROM NY JUSTICE COURT TO NH STATE POLICE (Mar. 18, 2019), exh. A-2, *Appx*. at 6. The State has conceded that the New York records do not disclose under which subsection Doe was convicted. MOTION TO DISMISS (Jan. 3, 2020) at 8-9, *Appx*. at 37; *Trn*. at 16. Following his plea, Doe was sentenced to "Conditional Discharge, NYS Surcharge of $125 and 1 year Order of Protection." LETTER FROM NY COURT; CERTIFICATE OF CONVICTION.

Doe was also charged with a different offense, under a separate statute, but it was withdrawn. CERTIFICATE OF CONVICTION ("W/drawn DA"), *Appx*. at 3; CRIMINAL HISTORY, *Appx*. at 11 ("not arraigned").

Thus, Doe was charged with two crimes. However, he pleaded guilty to one, while the other was simultaneously withdrawn by the prosecutor. FIRST REPORT OF HEARINGS EXAMINER at 2 (June 18, 2019), exh. A, *Addendum* at 27. There is no record of their negotiations, although the State has conceded that charge bargaining probably occurred. *Trn.* at 22.

Finally, New York has certified that Doe's conviction does not qualify him for that state's sex offender registry. LETTER FROM NEW YORK STATE SEX OFFENDER REGISTRY (July 13, 2017), exh. A-3 atch. A, *Appx*. at 4.

II. New Hampshire Proceedings

A. New Hampshire's Public and Private Sexual Offender Registries

New Hampshire's sex offender registry law groups offenders into three tiers, depending upon the severity of prior sexual offenses. RSA 651-B:1, VIII-X; *N.H. Admin.Rules* Saf-C 5501.15-.17. To be a valid predicate, the offender must have been "charged with an offense … that resulted in … conviction." RSA 651-B:1, XI(a)(1).

An out-of-state conviction is a countable predicate if it is "reasonably equivalent to a violation listed" in the statute. RSA 651-B:1, V(b); *N.H. Admin.Rules* Saf-C 5502.02(a) ("The elements of the offense under the law of the other jurisdiction shall be analogous to, but not necessarily exactly the same as, the elements of a New Hampshire offense listed in RSA 651-B:1, V(a), VII (a) or VII(b) to be deemed reasonably equivalent."); *Doe v. New Hampshire Dept. of Safety*, 160 N.H. 474 (2010). New Hampshire also reciprocally registers if "the offender is required to register pursuant to the law in the jurisdiction where the conviction occurred," RSA 651-B:1, V(c); *N.H. Admin.Rules* Saf-C 5502.02(c), but this does not apply to Doe because New York does not require him to register.

The New Hampshire registry is comprised of two separate lists maintained by the New Hampshire Department of Safety (NHDOS) – a public registry posted on the Department's website and available to everyone, RSA 651-B:7, IV; *N.H. Admin.Rules* Saf-C 5505.01, and a private "Law Enforcement List," access to which is restricted for "the performance of a valid law enforcement function." RSA 651-B:7, I; *N.H. Admin.Rules* Saf-C 5505.04; *see also Doe v. State*, 167 N.H. 382 (2015). One of the conditions which qualifies a person for the public list is conviction of "more than one sexual offense." RSA 651-B:7, III(a); *N.H. Admin.Rules* Saf-C 5505.01(a)(3).

When a person who may qualify for the list moves to New Hampshire, they are required to announce themselves to local law enforcement, and NHDOS sends them notification of registration requirements. RSA 651-B:4, I; *N.H. Admin.Rules* Saf-C 5503.04; *State v. Offen*, 156 N.H. 435 (2007). Failure to report is a crime. RSA 651-B:9. If the person believes they do not belong on the registry, they can request a "Reasonably Equivalent Offense Hearing" at NHDOS. *N.H. Admin.Rules* Saf-C 5502.04 & 5506.01.

If unsuccessful, the alleged registrant can file a motion for rehearing, which "shall be granted if it demonstrates that the [NHDOS's] decision is unlawful, unjust or unreasonable." *Admin.Rules* Saf-C 5506.05. The alleged registrant can appeal to the Merrimack County Superior Court, RSA 651-B:10; *N.H. Admin.Rules* Saf-C 5506.07; *see also White v. State*, 171 N.H. 326 (2018), which may vacate NHDOS's order for "errors of law" or if "the court is satisfied, by a clear preponderance of the evidence, … that such order is unjust or unreasonable." RSA 541:13; *In re Jean-Guy's Used Cars & Parts, Inc.*, 159 N.H. 38, 39 (2009).

B. "Reasonably Equivalent Offense Hearing" at Department of Safety

Not long ago, Doe moved to New Hampshire, settled in a stable relationship, and started a business. *Trn*. at 24-25. The State notified him of its belief that he was required to register on the public sex offender registry; Doe requested a hearing to contest the matter. LETTER FROM SCULIMBRENE TO DEPT. OF SAFETY (Feb. 27, 2019), exh. B, *Appx*. at 5; DOE'S MEMO OF LAW ¶ 6 (Mar. 22, 2019), *Appx*. at 17; STATE'S MOTION TO DISMISS (Jan. 3, 2020) at 1, *Appx*. at 37.

Doe has made several concessions:

- He has one prior predicate conviction on his record that requires him to be placed on New Hampshire's non-public sex offender registry. NY CRIMINAL HISTORY RECORD ("Cycle 001"); DOE'S MEMO OF LAW ¶ 2; *Trn.* at 12; FIRST REPORT, *Addendum* at 27.
- In 2002, he was charged under subsection 2 of N.Y. Penal Law § 130.52. NY CRIMINAL HISTORY RECORD ("Cycle 003"); *Trn.* at 12.
- In 2002, he was convicted of an offense in New York under an unspecified subsection of N.Y. Penal Law § 130.52. NY CRIMINAL HISTORY RECORD ("Cycle 003").
- If there were proof that his 2002 *conviction* was under subsection 2 of N.Y. Penal Law § 130.52, it would constitute a second predicate offense such that New Hampshire law would require that he be placed on the public registry. *Trn.* at 16, 25; OBJECTION TO MOTION TO DISMISS (Jan. 13, 2020), *Appx*. at 47.

There is no dispute that if Doe's conviction was under subsection 1 of N.Y. Penal Law § 130.52, not subsection 2, his name will not be placed on the public registry. Doe contends that because there is no record that he was convicted under subsection 2, the law requires him to be placed on the "Law Enforcement List" only, but not on the public registry.

There is a unique prejudice to having one's name on the public list. *Doe v. State*, 167 N.H. at 401, 404.

In May 2019, a "Reasonably Equivalent Offense Hearing," *see* *Admin.Rules* Saf-C 5502.02(b), was held at NHDOS, in which the Hearings Examiner viewed the New York statute, documents supplied by the New York court, and Doe's criminal history, which are contained as exhibits in the appendix to this brief. In June, NHDOS issued a First Report of the Hearings Examiner. FIRST REPORT, *Addendum* at 27.

In part to remedy a potential preservation issue,[4] and after Doe requested rehearing, a second hearing was held in October, and in November the Examiner issued a Second Report. MOTION FOR REHEARING (Sept. 18, 2019), *Appx*. at 30; SECOND REPORT OF HEARINGS EXAMINER (Nov. 22, 2019), exh. F, *Addendum* at 31. There are no transcripts of either hearing.

In its First Report, NHDOS held that Doe "has the burden of proving that the offense is not a reasonably equivalent [sic] and he has failed to sustain his burden based on the evidence presented." FIRST REPORT at 4, *Addendum* at 27. NHDOS wrote that the New York "certificate of conviction indicates that [Doe] was convicted of the same section that he was charged," and that "the mere fact that the subsection is not on all of the documents does not invalidate this finding without more evidence to the contrary." *Id.* at 3.

In its Second Report, NHDOS wrote:

> While the Government does have the initial burden to show why [Doe] is subject to certain registration requirements and to support their finding that the out-of-state offense is an equivalent offense, once they have made that initial showing, the burden is shifted to [Doe] to provide any evidence to the contrary. [Doe] in this

[4]NOTICE OF APPEAL (Dec. 19, 2019), *Appx*. at 33; MOTION TO DISMISS (Jan. 3, 2020), *Appx*. at 37; OBJECTION TO MOTION TO DISMISS (Jan. 13, 2020), *Appx*. at 47; *Trn*. at 2-14; SUPERIOR COURT ORDER at 3, 6 (Feb. 28, 2020), *Addendum* at 33 ("court declines to dismiss … on preservation grounds").

> matter has not provided any evidence that would undermine or challenge the determination made by the State.

SECOND REPORT at 1, *Addendum* at 31. NHDOS found that "[t]he evidence presented by the State supports a finding that [Doe's] conviction for a violation of New York Penal Code 130.52 Forcible Touching is an equivalent." *Id.* at 2. It concluded that "[s]ince [Doe] has not demonstrated that the Hearings Examiner's prior decision was unlawful, unjust, or unreasonable, the Motion for Rehearing must be denied." *Id.* (capitalization altered).

C. Superior Court Appeal

Doe appealed the NHDOS rulings to the Merrimack County Superior Court (*John C. Kissinger*, J.), which held a hearing in January 2020, a transcript of which is in this court's record. The Superior Court recognized that Doe's "New York criminal history record reveals that he was originally charged under subsection 2 of the New York statute.… However the record fails to specify the subsection of § 130.52 pursuant to which [Doe] was later convicted." SUPERIOR COURT ORDER at 2 (Feb. 28, 2020), *Addendum* at 33. The court ruled:

> The Department lists in its original hearing examiner report that it relied on [Doe's] criminal history record and certificate of conviction, both of which show [Doe] was charged specifically under subsection 2 and later convicted. Though there was no evidence to determine with absolute certainty whether [Doe] was convicted under subsection 1 or 2, given the absence of any competing evidence and given that the evidentiary standard is merely a "clear preponderance," the Court cannot find the Department's determination to have been unlawful, unjust, or unreasonable. The fact that [Doe] was charged under subsection 2 may reasonably have tipped the scales in the eyes of the hearing examiner. It is not the Court's role to reweigh the evidence at this stage of the proceedings. Consequently, the Court finds [Doe] has not alleged facts sufficient to set aside or vacate the Department's finding that his New York conviction for Forcible Touching is reasonably equivalent to a New Hampshire conviction for Sexual Assault.

Id. (citation omitted).

This appeal followed.

SUMMARY OF ARGUMENT

John Doe first argues that the State has the burden of proving that he was convicted of an out-of-state offense that qualifies him for the New Hampshire sex offender registry. He then argues that, regardless of which party has the burden of proof, the requisite predicate convictions for placement on the public registry were not proved.

ARGUMENT

I. NHDOS Unlawfully Demanded Doe Carry the Burden of Proof

In its First Report, NHDOS said Doe "has the burden of proving that the offense is not a reasonabl[e] equivalent." FIRST REPORT at 4, *Addendum* at 27. In its Second Report, NHDOS's position changed to a burden-shifting model:

> While the Government does have the initial burden to show why [Doe] is subject to certain registration requirements and to support their finding that the out-of-state offense is an equivalent offense, once they have made that initial showing, the burden is shifted to [Doe] to provide any evidence to the contrary.

SECOND REPORT at 1, *Addendum* at 31.

In the Superior Court, the State repeated the burden-shifting position: "[T]he State has the burden of proof, but once they've met that, it shifts to [Doe] to kind of prove to the contrary." *Trn*. at 17. The State alleged that even though Doe had no legal training, his New York conviction was 18 years antecedent, and the statute has changed at least twice, Doe "would know" what subsection of the New York statute he pleaded to, and should therefore have the burden to remember. *Trn.* at 18; MOTION TO DISMISS (Jan. 3, 2020) at 9, *Appx*. at 37.

There is nothing in the registry statute, nor the rules pursuant to it, suggesting that the alleged registrant has the burden of proof at any stage of the proceedings, whether initially (as in the First Report) or after a showing by the State (as in the Second Report). Rather, the rules say only:

> The scope of the hearing shall be limited to a determination of whether the offense in another jurisdiction is reasonably equivalent to an offense requiring registration under RSA 651-B and these rules.

Admin.Rules Saf-C 5506.01(b).

In NHDOS adjudicative proceedings generally, its rules provide that "[u]nless otherwise specified by law, the burden of proof shall be on the moving party." *Admin.Rules* Saf-C 203.28. Thus, for example, in habitual offender proceedings, also administered by NHDOS, "[t]he State has the burden of proving the 'existence' of all prior convictions that it relies upon to prove that the accused is a habitual offender." *State v. Ward*, 118 N.H. 874, 877 (1978).

Although Doe requested a hearing, the State is the party seeking action. NHDOS is tasked with registering offenders, keeping lists of offenders updated with certain information, and providing notice to alleged registrants. RSA 651-B:2, III; RSA 651-B:7, II; *White v. State*, 171 N.H. at 326. Thus, the State is the moving party at NHDOS, and accordingly has the burden of proof.

If it were otherwise, it would violate the alleged registrant's due process rights. The State could baselessly assert that a person had a qualifying conviction, thus making them prove a negative – that no such conviction existed. *See, e.g., Doe v. State*, 167 N.H. at 414 ("The ultimate standard for judging a due process claim is the notion of fundamental fairness"); *Petition of Bagley*, 128 N.H. 275, 287 (1986) (due process requirements for perpetrators of child abuse or neglect to be listed in DCYF registry); *Dover Mills Partnership v. Commercial Union Ins. Companies*, 144 N.H. 336, 339 (1999) ("It is appropriate to impose the burden on the insurance carrier to prove prejudice because the insurer is in the best position to establish facts demonstrating that prejudice exists. Moreover, to hold otherwise would require an insured to prove a

negative, a nearly impossible task."); *State v. Bartlett*, 43 N.H. 224, 230 (1861)[5].

For some categories of sexual offenders, there is a process through which a registrant can petition to get off the list, and that portion of the statute explicitly allocates the burden to the registrant. RSA 651-B:6, V(c) ("The court may grant the petition if the offender … has demonstrated that he or she is no longer a danger to the public and no longer poses a risk sufficient to justify continued registration."); *White v. State*, 171 N.H. at 326.

In habitual offender proceedings, for example, the statute explicitly established a burden-shifting regime, wherein after the State proved prior convictions, the defendant "shall have the burden of proving that the facts are untrue." *State v. Ward*, 118 N.H. at 878; *see also* RSA 318-B:22 (shifting burden to habitual offender to prove excuse); RSA 461-A:12, V & VI ("The parent seeking permission to relocate bears the initial burden of demonstrating [facts].… If the burden of proof … is met, the burden shifts to the other parent to prove [other facts]."). These examples shows that when the legislature intends a burden-shifting structure, it is capable. *State v. Pierce*, 152 N.H. 790, 792-93 (2005) (legislature's choice to not "repeal[] the burden shifting provision within the Controlled Drug Act").

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[5]*State v. Bartlett*, 43 N.H. 224, 230 (1861) held:

> In criminal causes, the trial is usually had upon a plea that puts in issue all the allegations in the indictment; and, upon every sound principle of pleading and evidence, the burthen is upon the prosecutor to sustain them by satisfactory proofs. A system of rules, therefore, by which the burthen is shifted upon the accused of showing any of the substantial allegations in the indictment to be untrue, or, in other words, to prove a negative, is purely artificial and formal, and utterly at war with the humane principle which, *in favorem vitæ*, requires the guilt of the prisoner to be established beyond reasonable doubt. Not only so, but, fairly considered, such a system derives no countenance from the rules which govern the trials of civil causes, inasmuch as in respect to all the allegations in the declaration, provided they are put in issue, the burthen of proof, in general, rests with the plaintiff.

In criminal cases, the burden is always on the State, *State v. Wentworth*, 118 N.H. 832, 838 (1978), and while the sex offender registry may not be a criminal punishment, it is a close relation. *See Doe v. State*, 167 N.H. at 382 (circumstances when registry considered punitive).

Because there is no statutory or rules-based grounds for placing the burden on the alleged registrant at a NHDOS "Reasonably Equivalent Offense Hearing," and because the State is the moving party, the State has the burden of proving reasonable equivalence. There is likewise no basis for burden-shifting, which appears to have been conceived by NHDOS without regard to any law.

NHDOS based its ultimate ruling on Doe's failure to make a showing that his 2002 New York conviction was not a registry-qualifying predicate offense. FIRST REPORT at 4, *Addendum* at 27 (Doe "failed to sustain his burden based on the evidence presented."); SECOND REPORT at 1, *Addendum* at 31 (Doe "has not provided any evidence that would undermine or challenge the determination made by the State."). It therefore misplaced the burden of proof on Doe, and because its decision was unlawful, unjust, and unreasonable, NHDOS must be reversed.

II. Equal Likelihood of Conviction under Two Subsections of New York Statute Would Fail to Meet Preponderance Standard in New Hampshire

In New Hampshire, an alleged registrant is "required to register" if he has been "charged with an offense … that resulted in … [c]onviction" of certain crimes. RSA 651-B:1, XI(a)(1). "'Conviction' means a finding, as determined by the court, of guilty." *Admin.Rules* Saf-C 202.01(i). Because the charge must "result" in a conviction, there must be proof of a qualifying conviction as a "result" of the charge. *Czyzewski v. New Hampshire Department of Safety*, 165 N.H. 109, 111 (2013) (language of registry statute interpreted "according to its plain and ordinary meaning").

A charge, however, does not amount to a conviction – an axiom regularly invoked in the standard criminal jury instructions. *See State v. Wentworth*, 118 N.H. at 839 ("The defendant enters this courtroom as an innocent person, and you must consider him to be an innocent person, … until the State convinces you beyond a reasonable doubt that he is guilty of every element of the alleged offense."). Accordingly, proof of being *charged* with subsection 2 of N.Y. Penal Law § 130.52 is not proof of being *convicted* of that subsection.

In a "Reasonably Equivalent Offense Hearing," "the standard of proof shall be by a preponderance of the evidence." *Admin.Rules* Saf-C 203.29. "'Proof by preponderance of the evidence' means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not to be true." *Id.*

"Since the preponderance of the evidence standard 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence,' evidence that fails to meet this standard is at least as likely to be false as it is true." *State v. Addison*, 165 N.H. 381, 590 (2013) (quoting *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring)) (citing 2 G. Dix et al., MCCORMICK ON EVIDENCE § 339, at 484 (6th ed. 2006)).

In 2002, Doe was charged with misdemeanor "forcible touching" under subsection 2 of N.Y. Penal Law § 130.52. But the records are silent on which subsection he was convicted under. Thus, there is an exactly equal chance that he was convicted under subsection 1 as under subsection 2. When the apparent charge bargaining is considered, it becomes even less likely that he was convicted under subsection 2. To be placed on the registry requires proof "more probable than not." There is nothing in the record, however, proving Doe's conviction was more probably under subsection 2 than subsection 1.

The State's argument that the charged subsection is corroboration of the conviction subsection – sufficient to meet the preponderance standard – ignores the likely charge bargaining that occurred in 2002. *See* STATE'S MOTION TO DISMISS at 8-9. The State's argument that Doe should have testified to fill in the gaps in its evidence ignores the impossibility of such a task, Doe's lack of legal training, the age of the New York conviction, and subsequent amendments to the New York statute. Moreover, demanding an alleged registrant testify to counter otherwise baseless allegations would require a look beyond the elements, which was barred in *Doe v. New Hampshire Dept. of Safety*, 160 N.H. 474, 477-78 (2010).

Regardless of which party has the burden of proof, there is nothing in the record to suggest it is more likely that Doe was convicted of subsection 2 rather than subsection 1. Accordingly, the NHDOS decision was unlawful, unjust, and unreasonable, and this court must reverse.

CONCLUSION

Because there is no way to know which subsection of New York's statute Doe was convicted of, proof of a reasonably equivalent crime cannot be produced. Accordingly, New Hampshire cannot place Doe's name on the public sex offender registry. To the extent there is ambiguity in the statute or rules regarding who has the burden of proof, especially given the closeness of the proof in this case and the significant prejudice stemming from a mistaken finding, this court should apply lenity to avoid an unlawful, unjust, and unreasonable result. *See State v. Lynch*, 169 N.H. 689, 708 (2017).

REQUEST FOR ORAL ARGUMENT

Because the issue raised in this appeal is of concern to all potential sex offender registrants in New Hampshire as well as the general public, and is a novel issue in this jurisdiction, this court should entertain oral argument.

Respectfully submitted,

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By his Attorney,
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Dated: August 13, 2020

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on August 13, 2020, copies of the foregoing will be forwarded to Christina M. Wilson, Assistant Attorney General; and to Anthony F. Sculimbrene, Esq.

Dated: August 13, 2020

Joshua L. Gordon, Esq.

ADDENDUM