

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Text of Relevant Authorities.....	iv
Question Presented	1
Statement of the Case and of the Facts.....	2
Summary of Argument.....	3
Argument	
I. THE DEFINITION OF “LOADED PISTOL OR REVOLVER” DOES NOT ENCOMPASS A PISTOL THAT CONTAINS NEITHER CARTRIDGES NOR A MAGAZINE, EVEN IF A MAGAZINE CONTAINING CARTRIDGES IS NEXT TO THE FIREARM.....	4
Conclusion	10
Appendix.....	A1-A11

TABLE OF AUTHORITIES

Page

Cases

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 7

In re Alex C., 161 N.H. 231 (2010)..... 7

People v. Gordian, 99 A.D.3d 538 (N.Y. App. Div. 2012)..... 8

State v. Dansereau, 157 N.H. 596 (2008)..... 9

State v. Farrow, 140 N.H. 473 (1995) 7

State v. Gardner, 162 N.H. 652 (2011)..... 5

State v. Hatt, 144 N.H. 246 (1999)..... 8

State v. Matton, 163 N.H. 411 (2012) 5

State v. McKeown, 159 N.H. 434 (2009)..... 5

State v. Pratte, 158 N.H. 45 (2008) 6

State v. Weyant, 990 So. 2d 675 (Fla. Dist. Ct. App. 2008) 8

State v. Williams, 143 N.H. 561 (1999) 5

State v. Wong, 125 N.H. 610 (1984)..... 6

Statutes

N.Y. Penal Law § 265.00.15..... 8

Fla. Stat. § 790.258-9

RSA 159:4..... passim

RSA 625:11, V 8

TABLE OF AUTHORITIES

Page

Other Authorities

3 N. Singer & J.D. Singer, Statutes and Statutory Construction (7th ed. 2008) 9
Webster’s Third New International Dictionary (unabridged ed. 2002) 4-5

Constitutional Provisions

N.H. CONST. pt. I, art. 15 6
U.S. CONST. amends. V, XIV 6

TEXT OF RELEVANT AUTHORITIES

159:4 Carrying Without License. – No person shall carry a loaded pistol or revolver in any vehicle or concealed upon his person, except in his dwelling, house or place of business, without a valid license therefor as hereinafter provided. A loaded pistol or revolver shall include any pistol or revolver with a magazine, cylinder, chamber or clip in which there are loaded cartridges. Whoever violates the provisions of this section shall, for the first such offense, be guilty of a misdemeanor. For the second and for each subsequent violation of the provisions of this section, such person shall be guilty of a class B felony, provided such second or subsequent violation has occurred within 7 years of the previous conviction.

QUESTION PRESENTED

Does the definition of “loaded pistol or revolver” encompass a pistol that contains neither cartridges nor a magazine, where there is a loaded magazine located next to it and which is easily accessible?

Issue preserved by the defense’s Expedited Motion to Dismiss, the State’s Objection to Defendant’s Expedited Motion to Dismiss, and the trial court’s Interlocutory Transfer Without a Ruling. App. 1-11. *

*Citations to the record are as follows:
“App.” refers to the appendix to this brief.

STATEMENT OF THE CASE AND OF THE FACTS

On May 8, 2012, Manchester Police Officer John Cunningham executed a search warrant on Oriol Dor's vehicle. App. 2, 7, 9. During the search, Cunningham opened the glove compartment and found a pistol. Id. The pistol did not have a cartridge in the chamber, nor was there a magazine inserted into the magazine well. Id. He found a magazine that contained cartridges in the glove compartment next to the pistol. Id. The cartridges were of the kind and type used in the pistol. App. 2.

Dor was subsequently charged in the 9th Circuit Court – Manchester District Division with one class A misdemeanor count of Carrying Without License, contrary to RSA 159:4. App. 1, 7, 9. He moved to dismiss the complaint, arguing that the facts alleged did not constitute a crime under RSA 159:4. App. 7-8. The State objected. App. 9-11. The trial court (Michael, J.) thereafter transferred the question presented in Dor's brief, without ruling, to this Court. App. 1-6.

SUMMARY OF THE ARGUMENT

Under RSA 159:4, a loaded pistol or revolver includes “any pistol or revolver with a magazine, cylinder, chamber or clip in which there are loaded cartridges.” Id. (emphasis added). This Court should construe the word “with” to mean “joined to.” This definition provides clarity and reflects the intent of the legislature. Interpreting the word “with” to mean “near to” would make the statute impermissibly vague and would create illogical and absurd results. Should this Court conclude that the statute as written is ambiguous, it should apply the rule of lenity in favor of Dor’s proposed construction.

I. THE DEFINITION OF “LOADED PISTOL OR REVOLVER” DOES NOT ENCOMPASS A PISTOL THAT CONTAINS NEITHER CARTRIDGES NOR A MAGAZINE, EVEN IF A MAGAZINE CONTAINING CARTRIDGES IS NEXT TO THE FIREARM.

RSA 159:4 states, in relevant part, that

[n]o person shall carry a loaded pistol or revolver in any vehicle or concealed upon his person, except in his dwelling, house or place of business, without a valid license therefor as hereinafter provided. A loaded pistol or revolver shall include any pistol or revolver with a magazine, cylinder, chamber or clip in which there are loaded cartridges. . . .

The first sentence of RSA 159:4 prohibits carrying a loaded pistol or revolver in certain situations. RSA 159:4. “Loaded” is the past participle of the verb “load,” which means “to put a load in (a device or piece of equipment),” such as to “place a charge or cartridge in the chamber of a firearm.” Webster’s Third New International Dictionary 1325 (unabridged ed. 2002). Thus, reference to a “loaded” pistol signifies one into which a cartridge has been placed in the chamber.

However, the second sentence of RSA 159:4 modifies the customary meaning of the word “loaded.” Thus, a “loaded pistol or revolver” also includes “any pistol or revolver with a magazine, cylinder, chamber or clip in which there are loaded cartridges.” RSA 159:4 (emphasis added). In other words, while the customary definition of “loaded” is that a cartridge is actually chambered in the firearm, this language modifies that definition to include, for example, a pistol that does not actually contain a chambered cartridge, but which holds a magazine into which cartridges have been placed. The issue is whether the magazine containing cartridges must be inserted into the

magazine well in order for the pistol to be “loaded,” or, as in this case, can be near the pistol.

The interpretation of a statute involves a question of law, which this Court decides *de novo*. State v. Gardner, 162 N.H. 652, 652-653 (2011) (citation omitted). This Court is the final arbiter of legislative intent as expressed in the words of the statute considered as a whole. State v. Matton, 163 N.H. 411, 412 (2012) (citation omitted). When interpreting a statute, this Court will “first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.” State v. Beauchemin, 161 N.H. 654, 658 (2011) (citation omitted).

However, this Court will look beyond the statute when its language permits more than one reasonable interpretation. State v. Williams, 143 N.H. 559, 561 (1999). This Court’s 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. Accordingly, [this Court] interpret[s] a statute in the context of the overall statutory scheme and not in isolation.” State v. McKeown, 159 N.H. 434, 435-436 (2009) (citation omitted).

The word “with” is defined in a variety of ways, although two definitions are most relevant here. “With” can mean “joined to” or “near to.” Webster’s Third New International Dictionary 2626 (unabridged ed. 2002). Faced with this choice, the Court should construe “with” to mean “joined to.” That way, whenever a magazine containing cartridges is inserted into the magazine well of a pistol, the pistol is considered “loaded.” This provides a clear and uniform

definition of a “loaded pistol or revolver.” It thus makes RSA 159:4 easily comprehensible and reduces the risk of arbitrary enforcement.

Several considerations support this reading of the statute. The definition of “loaded pistol or revolver” undoubtedly includes a pistol or revolver with a cartridge in the chamber, and it also includes a revolver with a cartridge in the cylinder. Both a chamber and a cylinder are attached to the firearm. This attribute of physical attachment provides evidence that the legislature intended to restrict certain unlicensed persons from having a pistol or revolver that actually contains cartridges, whether they are actually chambered or are in a cylinder, magazine, or clip.

On the other hand, if “with” is interpreted to mean “near to,” several problems arise. Such an interpretation would render the statute impermissibly vague. N.H. CONST. pt. I, art. 15; U.S. CONST. amends. V, XIV. “A criminal statute is void for vagueness when it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” State v. Wong, 125 N.H. 610, 621 (1984) (citation and quotations omitted). “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.” State v. Pratte, 158 N.H. 45, 48 (2008) (citations and quotations omitted). The United States Supreme Court explained that

[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and

unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (citations omitted).

The vagueness problem arises because the word “near” is imprecise. The concept is both relative and elastic. Citizens, police officers, and courts would be forced to contend with the question of how “near” a magazine has to be to an empty pistol in order for the pistol to be considered “loaded.”

Interpreting “with” to mean “near to” also distorts the customary meaning of “loaded” to such an extent as to be illogical. This Court seeks to avoid a construction that produces a seemingly illogical result. State v. Farrow, 140 N.H. 473, 476 (1995). Under such an interpretation, a “loaded” pistol could contain no cartridges whatsoever. Thus, what would commonly be considered an unloaded pistol would in fact be deemed “loaded.”

Further, interpreting “with” to mean “near to” creates absurd results, which this Court likewise avoids when construing a statute. In re Alex C., 161 N.H. 231, 235 (2010) (citation omitted). Under such a reading, an empty pistol “near” a magazine filled with cartridges would be “loaded,” while, paradoxically,

an empty revolver “near” loose cartridges would be unloaded.¹ Further, under such a definition, a pistol would be considered “loaded” even if it were empty and in a locked container, but a full magazine was adjacent to the locked container. This would be true even if the locked container and full magazine were locked in the trunk of a car. Moreover, if a “loaded pistol or revolver” is interpreted to mean any pistol “near” a magazine in which there are loaded cartridges, then an empty pistol would be considered “loaded” if it were “near” a full magazine for an entirely different firearm.

Other sources offer little in the way of interpretive help. While State v. Hatt, 144 N.H. 246 (1999) stands for the proposition that even an unloaded handgun constitutes a "deadly weapon" as defined by RSA 625:11, V, in the context of RSA 159:4, criminal liability rests in part on whether a handgun is loaded or unloaded. Further, whether a pistol is “loaded” under RSA 159:4 does not depend on mere simultaneous possession of a firearm and ammunition. But see People v. Gordian, 99 A.D.3d 538 (N.Y. App. Div. 2012) (citing N.Y. Penal Law § 265.00.15) (defining a loaded firearm as including an empty firearm which is possessed by someone who, “at the same time, possesses a quantity of ammunition which may be used to discharge such firearm”). The definition of “loaded” in RSA 159:4 likewise does not include language relating to how quickly the pistol may be employed. But see State v. Weyant, 990 So. 2d 675, 676 (Fla. Dist. Ct. App. 2008) (citing Fla. Stat. §

¹Similarly, a pistol containing an empty magazine that is “near” loose cartridges would also be considered unloaded, despite the fact that a cartridge could be directly placed into the chamber of the firearm.

790.25) (permitting certain persons to possess a firearm “in the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use.”). Moreover, undersigned counsel’s research has not revealed any legislative history related to RSA 159:4 that is pertinent to this issue.

If any doubt or ambiguity remains after consideration of the above points, this Court should apply the rule of lenity in favor of Dor’s proposed construction. “[T]he rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously.” State v. Dansereau, 157 N.H. 596, 602 (2008) (citation and quotation omitted). “This rule of statutory construction generally holds that ambiguity in a criminal statute should be resolved against an interpretation which would increase the penalties or punishments imposed on a defendant.” Id. (citation and quotation omitted). “It is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.” Id. (citation and quotations omitted). “[W]hen a court is faced with two reasonable interpretations of a criminal statute and congressional intent is ambiguous, the doctrine of lenity requires the court to adopt the less punitive alternative.” 3 N. Singer & J.D. Singer, Statutes and Statutory Construction § 59.4 at 189 (7th ed. 2008). Applying the rule of lenity in this case leads to the conclusion that a “loaded pistol or revolver” does not include an empty pistol that is next to a loaded magazine. Accordingly, this Court should answer the transferred question in the negative.

CONCLUSION

WHEREFORE, Mr. Dor respectfully requests that this Court answer the transferred question in the negative.

Counsel requests fifteen minutes of oral argument before a full panel of this Court.

Respectfully submitted,

James B. Reis, #14236
Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301

James B. Reis #14236

DATED: January 22, 2013