THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0551

State of New Hampshire

v.

Brian Eldridge

Appeal Pursuant to Rule 7 from Judgment
of the Merrimack County Superior Court

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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2. Whether the court erred by requiring Eldridge to waive his defense under RSA 318-B:28-b, to get a jury instruction on the lesser-included offense of possession of drugs.

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* Citations to the record are as follows:
"A" refers to the appendix containing relevant pleadings;
"AD" refers to the appendix containing the orders from which Eldridge appeals;
"M1" refers to the transcript of the motion hearing held on September 28, 2017;
"M2" refers to the transcript of the motion hearing held on March 20, 2018;
"M3" refers to the transcript of the motion hearing held on March 21, 2018;
"SH" refers to the consecutively-paginated transcript of the suppression hearing, held over three days in January and February, 2018;
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TEXT OF RELEVANT AUTHORITIES

318-B:2 Acts Prohibited. –

I. It shall be unlawful for any person to manufacture, possess, have under his control, sell, purchase, prescribe, administer, or transport or possess with intent to sell, dispense, or compound any controlled drug, or controlled drug analog, or any preparation containing a controlled drug, except as authorized in this chapter.

I-a. It shall be unlawful for any person to manufacture, sell, purchase, transport or possess with intent to sell, dispense, compound, package or repackage (1) any substance which he represents to be a controlled drug or controlled drug analog, or (2) any preparation containing a substance which he represents to be a controlled drug or controlled drug analog, except as authorized in this chapter.

I-b. It shall be unlawful for a qualifying patient or designated caregiver as defined under RSA 126-X:1 to sell cannabis to another person who is not a qualifying patient or designated caregiver. A conviction for the sale of cannabis to a person who is not a qualifying patient or designated caregiver shall not preclude or limit a prosecution or conviction of any person for sale of cannabis or any other offense defined in this chapter.

II. It shall be unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing that it will be used or is customarily intended to be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled substance.

II-a. It shall be unlawful for any person, at retail, to sell or offer for sale any drug paraphernalia listed in RSA 318-B:1, X-a.

III. It shall be unlawful for any person to place in any newspaper, magazine, handbill,or other publication any advertisement, knowing that the purpose of the

advertisement, when viewed as a whole, is to promote the sale of objects intended for use or customarily intended for use as drug paraphernalia.

IV. In determining whether an object is drug paraphernalia under this chapter, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) Statements by an owner or by anyone in control of the object concerning its use;

(b) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

(c) The proximity of the object, in time and space, to a direct violation of this chapter;

(d) The proximity of any residue of controlled substances;

(e) The existence of any residue of controlled substances on the object;

(f) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows intend to use the object to facilitate a violation of this chapter; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this chapter shall not prevent a finding that the object is intended for use as drug paraphernalia;

(g) Instructions, oral or written, provided with the object concerning its use;

(h) Descriptive materials accompanying the object which explain or depict its use;

(i) National and local advertising concerning its use;

(j) The manner in which the object is displayed for sale;

(k) Direct or circumstantial evidence of the ratio of sales of the objects to the total sales of the business enterprise;

(*l*) Whether the object is customarily intended for use as drug paraphernalia and the existence and scope of other legitimate uses for the object in the community; and

(m) Expert testimony concerning its use.

V. No person shall obtain or attempt to obtain a controlled

drug:
(a) By fraud, deceit, misrepresentation, or subterfuge;
(b) By the forgery or alteration of a prescription or of any written order;
(c) By the concealment of a material fact;
(d) By the use of a false name or the giving of a false address; or
(e) By submission of an electronic or on-line medical history form that fails to establish a valid practitioner-patient relationship.
VI. No person shall willfully make a false statement in any prescription, order, report, or record required hereby.
VII. No person shall, for the purpose of obtaining a controlled drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, practitioner, or other authorized person.
VIII. No person shall make or utter any false or forged prescription or false or forged written order.
IX. No person shall affix any false or forged label to a package or receptacle containing controlled drugs.
X. Possession of a false or forged prescription for a controlled drug by any person, other than a pharmacist in the pursuance of his profession, shall be prima facie evidence of his intent to use the same for the purpose of illegally obtaining a controlled drug.
XI. It shall be unlawful for any person 18 years of age or older to knowingly use, solicit, direct, hire or employ a person 17 years of age or younger to manufacture, sell, prescribe, administer, transport or possess with intent to sell, dispense or compound any controlled drug or any preparation containing a controlled drug, except as authorized in this chapter, or to manufacture, sell, transport or possess with intent to sell, transport or possess with intent to sell, dispense, compound, package or repackage (1) any substance which he represents to be a controlled drug or controlled drug analog, or (2) any preparation containing a substance which he represents to be a controlled drug or controlled drug

analog, except as authorized in this chapter. It shall be no defense to a prosecution under this section that the actor mistakenly believed that the person who the actor used, solicited, directed, hired or employed was 18 years of age or older, even if such mistaken belief was reasonable. Nothing in this section shall be construed to preclude or limit a prosecution or conviction for a violation of any other offense defined in this chapter or any other provision of law governing an actor's liability for the conduct of another.

XII. A person is a drug enterprise leader if he conspires with one or more persons as an organizer, supervisor, financier, or manager to engage for profit in a scheme or course of conduct to unlawfully manufacture, sell, prescribe, administer, dispense, bring with or transport in this state methamphetamine, lysergic acid diethylamide, phencyclidine (PCP) or any controlled drug classified in schedule I or II, or any controlled drug analog thereof. A conviction as a drug enterprise leader shall not merge with the conviction for any offense which is the object of the conspiracy. Nothing in this section shall be construed to preclude or limit a prosecution or conviction of any person for conspiracy or any other offense defined in this chapter.

XII-a. It shall be unlawful for any person to knowingly acquire, obtain possession of or attempt to acquire or obtain possession of a controlled drug by misrepresentation, fraud, forgery, deception or subterfuge. This prohibition includes the situation in which a person independently consults 2 or more practitioners for treatment solely to obtain additional controlled drugs or prescriptions for controlled drugs.

XII-b. It shall be unlawful for any person to knowingly obtain, or attempt to obtain, or to assist a person in obtaining or attempting to obtain a prescription for a controlled substance without having formed a valid practitioner-patient relationship.

XII-c. It shall be unlawful for any person to, by written or electronic means, solicit, facilitate or enter into any agreement or contract to solicit or facilitate the dispensing of

controlled substances pursuant to prescription orders that do not meet the federal and state requirements for a controlled drug prescription, and without an established valid practitioner-patient relationship.

XII-d. It shall be unlawful for any pharmacy to ship finished prescription products, containing controlled substances, to patients residing in the state of New Hampshire, pursuant to any oral, written or online prescription order that was generated based upon the patient's submission of an electronic or online medical history form. Such electronic or online medical questionnaires, even if followed by telephonic communication between practitioner and patient, shall not be deemed to form the basis of a valid practitioner-patient relationship.

XII-e. It shall be unlawful for any pharmacist to knowingly dispense a controlled substance pursuant to any oral, written, or electronic prescription order, which he or she knows or should have known, was generated based upon the patient's submission of an electronic or online medical history form. Such electronic or online medical questionnaires, even if followed by telephonic communication between practitioner and patient, shall not be deemed to form the basis of a valid practitioner-patient relationship.

XII-f. It shall be unlawful for any person to prescribe by means of telemedicine a controlled drug classified in schedule II through IV, except as provided in RSA 318-B:2, XVI, (a) and (b).

XIII. Nothing in this section shall be deemed to preclude or limit a prosecution for theft as defined in RSA 637.

XIV. It shall be an affirmative defense to prosecution for a possession offense under this chapter that the person charged had a lawful prescription for the controlled drug in question or was, at the time charged, acting as an authorized agent for a person holding a lawful prescription. An authorized agent shall mean any person, including but not limited to a family member or caregiver, who has the intent to deliver the controlled drug to the person for whom the drug

was lawfully prescribed.
XV. Persons who have lawfully obtained a controlled substance in accordance with this chapter or a person acting as an authorized agent for a person holding a lawful prescription for a controlled substance may deliver any unwanted or unused controlled substances to law enforcement officers acting within the scope of their employment and official duties for the purpose of collection, storage, and disposal of such controlled drugs in conjunction with a pharmaceutical drug take-back program established pursuant to RSA 318-E.
XVI. (a) The prescribing of a non-opioid controlled drug classified in schedule II through IV by means of telemedicine shall be limited to prescribers as defined in RSA 329:1-d, I and RSA 326-B:2, XII(a), who are treating a patient with whom the prescriber has an in-person practitioner-patient relationship, for purposes of monitoring or follow-up care, or who are treating patients at a state designated community mental health center pursuant to RSA 135-C or at a Substance Abuse and Mental Health Services Administration (SAMHSA)-certified state opioid treatment program, and shall require an initial in-person exam by a practitioner licensed to prescribe the drug. Subsequent in-person exams shall be by a practitioner licensed to prescribe the drug at intervals appropriate for the patient, medical condition, and drug, but not less than annually.
(b) The prescribing of an opioid controlled drug classified in schedule II through IV by means of telemedicine shall be limited to prescribers as defined in RSA 329:1-d, I and RSA 326-B:2, XII(a), who are treating patients at a SAMHSA-certified state opioid treatment program. Such prescription authority shall require an initial in-person exam by a practitioner licensed to prescribe the drug and subsequent in-person exams shall be by a practitioner licensed to prescribe the drug at intervals appropriate for the patient, medical condition, and opioid, but not less than annually.

RSA 318-B:28-b Immunity From Liability. –
I. As used in this section:
(a) "Drug overdose" means an acute condition resulting from or believed to be resulting from the use of a controlled drug which a layperson would reasonably believe requires medical assistance.
(b) "Medical assistance" means professional services provided to a person experiencing a drug overdose by a health care professional licensed, registered, or certified under state law who, acting within his or her lawful scope of practice, may provide diagnosis, treatment, or emergency services for a person experiencing a drug overdose.
(c) "Requests medical assistance" shall include a request for medical assistance as well as providing care to someone who is experiencing a drug overdose while awaiting the arrival of medical assistance to aid the overdose victim.
II. It shall be a defense to an offense of possessing or having under his or her control, a controlled drug in violation of RSA 318-B:2 that a person in good faith and in a timely manner requests medical assistance for another person who is experiencing a drug overdose. A person who in good faith and in a timely manner requests medical assistance for another person who is experiencing a drug overdose shall not be arrested, prosecuted, or convicted for possessing, or having under his or her control, a controlled drug in violation of RSA 318:B-2, if the evidence for the charge was gained as a proximate result of the request for medical assistance.
III. It shall be a defense to an offense of possessing or having under his or her control, a controlled drug in violation of RSA 318-B:2 that a person who is experiencing a drug overdose, in good faith and in a timely manner, requests medical assistance for himself or herself. A person who in good faith requests, or is the subject of a good faith request for medical assistance, shall not be arrested, prosecuted, or convicted for possessing, or having under his or her control, a controlled drug in violation of RSA 318-B:2, if the evidence for the charge was gained as a proximate result of the request for

medical assistance.
IV. (a) Nothing in this section shall be construed to limit the admissibility of evidence in connection with the investigation or prosecution of a crime involving a person who is not protected as provided in paragraphs II or III.
(b) Nothing in this section shall be construed to limit the lawful seizure of any evidence or contraband.
(c) Nothing in this section shall be construed to limit or abridge the authority of a law enforcement officer to detain or place into custody a person as part of a criminal investigation, or to arrest a person for an offense not protected by the provisions of paragraphs II or III.
V. No later than January 1, 2016, the commissioner of the department of health and human services shall develop and make available on the department's public Internet website, information for the public explaining the meaning and applicability of the provisions of this section.

STATEMENT OF THE CASE

A Merrimack County grand jury indicted Brian Eldridge, charging four crimes discovered on the night of May 3-4, 2017, when Eldridge overdosed on drugs, prompting a call for emergency medical help. A3-A6. First, the State charged possession of a controlled drug – fentanyl – with the intent to sell. T 5; A3. In addition, the State charged Eldridge with being a felon[1] in possession of a firearm, relating to a disassembled handgun found in the apartment. T 5; A4. Finally, the State brought two charges accusing Eldridge of being a felon in possession of a dangerous weapon, with each charge referring to a different switchblade knife. T 5-6: A5-A6.

Eldridge stood trial over four days in March 2018. The defense asked, with respect to the possession-of-drugs-with-intent-to-sell charge, for an instruction on the lesser-included offense of possession of drugs. Because the evidence would support a rational finding on that charge, the court (Kissinger, J.) indicated that it would give the instruction, but only if the defense waived the statutory provision granting immunity from conviction for drug possession of a person who is the subject of a good-faith call for overdose medical assistance. See RSA 318-B:28-b. The defense objected to being put to that choice, but when the court ruled that it

[1] The parties stipulated that, at the relevant time, Eldridge had a prior felony conviction. T 468, 534.

would not give the lesser-included offense instruction without a waiver, the defense chose to have the lesser-included offense instruction.

The jury acquitted Eldridge of possession of drugs with intent to sell, and of the two counts alleging possession of the switchblade knives. T 559-61. It convicted Eldridge of the lesser-included possession charge and of being a felon in possession of a firearm. Id. For felon in possession of a firearm, the court sentenced Eldridge to three-and-a-half to seven years, all suspended for ten years, and allocated Eldridge's pre-trial confinement credit to that sentence. S 45-46; A86-A87. For possession of drugs, the court pronounced a consecutive, stand-committed, twelve-month term, commencing on the day of sentencing, with a recommendation for work release and other rehabilitative programming, and to four years of probation following release. S 42-46; A84-A85.

STATEMENT OF THE FACTS

Around 10:00 p.m. on May 3, 2017, Katelyn Glidden called 911 to report that her boyfriend, Brian Eldridge, had overdosed on drugs and was not breathing. T 30-31, 66, 69, 73, 393, 396. Police and emergency medical responders went to the scene where, with Narcan, the medical responders revived Eldridge. T 31, 45-46, 74-75.

In the apartment, the police found drug paraphernalia, including Ziploc bags, a scale, a spoon, a syringe, and 9.7 grams of fentanyl. T 48, 85, 106, 113-14, 120, 256-59, 282, 289-93, 315-16, 337-38, 355, 430-33, 453, 467. They also found a substantial amount of cash, some of it in the pocket of the pants Eldridge was wearing. T 55. Ultimately, in various places in the apartment and on Eldridge, the police found a total of approximately $8600. T 55, 127-28, 304, 308, 357, 369-70; S 24.[2] In addition, tucked in the back of a television stand, the police found two switchblade knives. T 245-54, 425. Finally, and also near the television, the police found ammunition and a box containing a disassembled firearm. T 47-48, 175-83, 233-38, 262-66.

After the medical personnel left, police questioned Eldridge. T 48-53. Eldridge said that he had overdosed on

[2]In an effort to show that Eldridge earned the money by selling illegal drugs, the State elicited testimony that, at booking, Eldridge said he worked for a roofer. T 126, 128. The State then called a manager from that roofing company to testify that Eldridge had last worked there in October 2016, at a wage of $18.50 per hour. T 160, 163-64.

"dope," a term that could signify heroin or fentanyl. T 52, 391-92. He denied knowledge of the drug-related paraphernalia found in the apartment, and further said that he didn't know whether there were drugs in the apartment. T 53-54. When asked about the box containing the disassembled gun, Eldridge said that "it was only pieces of a gun." T 54, 86-87.

The police discovered evidence indicating that several other people used the apartment from time to time, most of whom were known to the police as being drug-involved. T 53, 82-83, 89-92, 97, 393-94, 397-401, 435-36, 461. When asked who lived in the apartment, Eldridge replied that "he lived there himself." T 54.

SUMMARY OF THE ARGUMENT

1. The court erred in denying the defense motion to dismiss the charge alleging possession of drugs with intent to distribute. This Court should interpret the immunity defense codified in RSA 318-B:28-b as applying to offenses involving possession as an essential element. The defense therefore applied to the charge of possession of drugs with intent to distribute.

2. The court erred in imposing an additional and not-statutorily-authorized condition on getting a lesser-included-offense instruction defining simple possession of drugs. Specifically, the court erred in requiring Eldridge to waive the immunity defense codified in RSA 318-B:28-b as a condition for getting the lesser-offense instruction to which Eldridge was otherwise indisputably entitled. Because Eldridge was convicted of an offense for which he has immunity, this Court must reverse that conviction.

3. The court erred in denying Eldridge's motion to suppress. The emergency-aid doctrine did not justify the police in entering the apartment initially. During that initial illegal entry, the police made observations that contributed to the grant of the search warrant. The fruits of that subsequent search must be suppressed.

I. THE COURT ERRED IN DENYING THE MOTION TO DISMISS THE CHARGE ALLEGING POSSESSION WITH INTENT TO SELL.

Before trial, the defense moved to dismiss the indictment charging possession of drugs with intent to sell. A7-A16. The motion cited RSA 318-B:28-b, a recently-enacted statute conferring immunity for criminal liability in certain circumstances involving a request for medical assistance for a person experiencing a drug overdose. A11-A13. Counsel argued that the statute conferred immunity both with respect to the felon in possession of weapons charges, and the possession of drugs with intent to sell charge. Id. The State objected, arguing, as relevant here, that the statute confers immunity only as to drug charges, and even then only when the State charges possession, not when the State charges possession with intent to sell. A17-A35.

The court convened a hearing on the motion, M1 2-17, at which the defense submitted supplemental legislative history materials. M1 2-3; A36-A55. By a written order, the court denied the motion. AD19-AD24. In so ruling, the court concluded that the plain language of the statute conferred immunity only with respect to a charge of possession of drugs. AD22-AD23.

On appeal, Eldridge challenges that ruling only with respect to the charge alleging possession of drugs with intent to sell. Had the trial court properly dismissed that charge,

there would have been no occasion to give the lesser-included-offense instruction on the simple possession charge of which Eldridge ultimately was convicted. This Court must therefore reverse that drug possession conviction.

RSA 318-B:28-b, I, defines the phrases "drug overdose," "medical assistance," and "requests medical assistance." The parties agreed that Eldridge experienced a drug overdose and as a result became the subject of Glidden's good-faith request for medical assistance. M 3. Moreover, it was clear that the evidence supporting the prosecution of Eldridge was obtained as a result of Glidden's request for medical assistance. See RSA 318-B:28-b, III (barring arrest, prosecution, or conviction for charges as to which immunity attaches, "if the evidence for the charge was gained as a proximate result of the request for medical assistance"). The only issue, therefore, was whether the statute granted immunity for the crimes charged against Eldridge.

RSA 318-B:28-b, II establishes a defense for a person who calls seeking help for another person. Here, that paragraph would apply in a prosecution of Glidden. Paragraph III begins by establishing the same immunity for callers who themselves have overdosed. That provision would have applied had Eldridge had the wherewithal, after overdosing, to call for help. Paragraph III continues by

enacting the principle applicable here, in a prosecution of Eldridge after a call by Glidden:

> A person who . . . is the subject of a good faith request for medical assistance, shall not be arrested, prosecuted, or convicted for possessing, or having under his or her control, a controlled drug in violation of RSA 318-B:2, if the evidence for the charge was gained as a proximate result of the request for medical assistance.

RSA 318-B:28-b, III.

Paragraph IV establishes certain limiting principles. One provides that "[n]othing in this section shall be construed to limit or abridge the authority of a law enforcement officer to detain or place into custody a person as part of a criminal investigation, or to arrest a person for an offense not protected by the provisions of paragraphs II or III." RSA 318-B:28-b, IV(c).

The dispute here concerns whether paragraph III confers immunity only with respect to the offense of simple possession of drugs, as the State argued and the court found, or rather confers immunity against prosecution for crimes defined by having the *actus reus* of possession of drugs. If the latter, the immunity extends to indictments alleging possession of drugs with an intent to sell, as charged here. For the reasons set forth below, this Court must interpret the

statute as conferring immunity for crimes of possession with intent to sell.

The dispute raises a question of statutory interpretation. "The interpretation of a statute is a question of law, which [this Court] reviews *de novo*." State v. Mfataneza, __ N.H. __ (May 10, 2019) (slip op. at 3). When called upon to interpret a statute, this Court looks first to the language of the statute, construing it if possible in accord with its plain and ordinary meaning. State v. Horner, 153 N.H. 306, 309 (2006). "During this exercise, [the Court] can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include." Mfataneza, __ N.H. __ (slip op. at 3). Further, the Court interprets "statutes in the context of the overall statutory scheme and not in isolation." State v. Moran, 158 N.H. 318, 321 (2009). To that end, the Court aims to "effectuate the statute's overall purpose and to avoid an absurd or unjust result." State v. Paige, 170 N.H. 261, 264 (2017).

Insofar as a statute is ambiguous, this Court must look to legislative history. ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011). If a statute is open to more than one reasonable interpretation, this Court will look to the underlying policy considerations that motivated the legislature in enacting and amending the statute. State v. Hull, 149 N.H. 706, 709 (2003).

Finally, "the rule of lenity comes into play . . . when a statute is ambiguous and resort to legislative history does not resolve the ambiguity." Paige, 170 N.H. at 266. This Court has explained:

> [T]he rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously. 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. It is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. By applying the rule of lenity, we reject the impulse to speculate regarding a dubious legislative intent, and avoid playing the part of a mind reader.

State v. Dansereau, 157 N.H. 596, 602 (2008) (quotations and citations omitted).

As quoted above, the operative language of paragraph III declares that a person "shall not be arrested, prosecuted, or convicted for possessing, or having under his or her control, a controlled drug in violation of RSA 318-B:2. . . ." RSA 318-B:2, in turn, defines several drug-related crimes. For example, paragraph I of that statute provides that:

> [i]t shall be unlawful for any person to manufacture, possess, have under his

> control, sell, purchase, prescribe, administer, or transport or possess with intent to sell, dispense, or compound any controlled drug . . . .

RSA 318-B:2, I. Other paragraphs define additional crimes. See, e.g., RSA 318-B:2, I-a (similar, but not identical, prohibitions stated with respect to substances represented to be controlled drugs); RSA 318-B:2, I-b (prohibiting certain persons from selling cannabis); RSA 318-B:2, II ("… deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia . . ."); RSA 318-B:2, II-a (sell or offer for sale drug paraphernalia).

Clearly, the immunity provision of RSA 318-B:28-b does not cover all offenses enumerated in RSA 318-B:2. For example, it does not afford immunity to a prosecution for selling drugs. By its plain terms, though, the immunity provision covers persons charged with possessing drugs. The relevant indictment charged Eldridge with possessing drugs. A3. The fact that it also alleged the mental state of intending to sell does not alter the fact that the State accused Eldridge of committing a crime of possession. For that reason, this Court should conclude that the immunity statute barred this prosecution.

The trial court regarded as self-evident the view that the proper analysis differentiated between "possessing" and "possessing with intent." AD22-AD23. Eldridge acknowledges

that charges of possession and possession with intent to sell implicate different sentencing provisions. See RSA 318-B:26, I (defining sentences for, *inter alia*, possession with intent to sell) & RSA 318-B:26, II (defining sentences for, *inter alia*, possession). Resolution of the present dispute depends on what distinction the legislature intended to matter here. If the legislature focused on the mental state element, the statute's words would indicate a purpose to treat possession and possession with intent to sell differently for purposes of the immunity provision. However, if the legislature focused on the conduct or *actus reus* element, the statute's words would indicate a purpose to treat possession and possession with intent alike as covered by the immunity provision, and thus as excluding from the scope of the immunity statute only other conduct, such as selling drugs. If there is ambiguity, the Court must examine the statute's legislative history.

Several considerations combine to resolve the interpretive question in Eldridge's favor. First, as originally introduced, the bill that became RSA 318-B:28-b explicitly excluded charges of possession with intent to sell from the scope of the immunity grant. See A48 ("Nothing in this section shall prevent a person from being charged with trafficking, distribution, or possession of a controlled substance with intent to distribute under RSA 318-B"). However, that provision did not survive in the statute as

enacted. See Forster v. Town of Henniker, 167 N.H. 745, 754-56 (2015) (examining legislative history, and attributing significance to absence, from final bill as enacted, of provision present in earlier draft).

Second, when it enacted RSA 318-B:28-b, the legislature also enacted a paragraph setting forth its intent as follows:

> It is the intent of the general court to encourage a witness or victim of a drug overdose to request medical assistance in order to save the life of an overdose victim by establishing a state policy of protecting the witness or victim from arrest, prosecution, and conviction for the crime of possession of the controlled drug that is the agent of the overdose. It is the intent of the general court to provide immunity from arrest, prosecution, or conviction for possessing, or having under his or her control, a controlled drug in violation of RSA 318-B:2, where medical assistance has been requested for someone experiencing an overdose.

Laws 2015, ch. 218:1.

That statement of intent reproduces the operative language that appears in RSA 318-B:28-b, III. Eldridge calls the Court's attention to the first sentence, which expresses the life-saving purpose of the statute. See Mfataneza, __ N.H. __ (slip op. at 3) ("Our 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"). The legislative history likewise is replete with statements emphasizing the life-saving purpose of the statute. See, e.g., N.H.S. Jour. 1258, 1260 (2015) (statements of Senators Pierce and Kelly to that effect).

Given the relative ease with which the State can prosecute a person found to possess drugs with the crime of possession with intent to distribute, an interpretation of the immunity provision that excludes such charges from its scope would substantially weaken the statute's encouragement of calls for medical assistance. This Court should therefore eschew that interpretation.

Third, this Court should reject the argument, advanced by the State, that certain comments made during the committee hearings support the State's interpretation. In its objection, the State called attention to comments indicating that the statute would afford no defense to "drug dealers," and would protect only those "who possess drugs, not drug dealers." A22. Two considerations defeat the implication the State would draw.

First, statements in the legislative history show that the legislature intended to limit the scope of the immunity, but the limits were understood as drawing a line between drug possession offenses covered by immunity on the one hand,

and other offenses not so covered, on the other. Thus, Senator Kelly spoke about an amendment intended to limit the scope of immunity in the following terms:

> I think the amendment in your packet was over reaching and this amendment truly limits the immunity as it says to those who are really a witness and helping a victim to survive and would be immune from any kind of arrest[,] prosecution[, and] conviction for possessing or having under his or her control a controlled drug in violation. So the language that was taken out was any thought or anyone would think that they would have immunity from such things as domestic violence or rape or murder. So this has truly been limited to that kind of immunity.

N.H.S. Jour. 1261 (2015).

Second, the statute as ultimately enacted respects the spirit of the "drug dealer" exclusion comments, in that it does not immunize persons charged with selling drugs. Unless and until the State can prove that a defendant actually sold drugs, the label "drug dealer" does not fit. Persons charged only with possessing drugs, while having an as-yet unconsummated intent to distribute, remain protected by the statutory grant of immunity.

Finally, to the extent that any ambiguity remains, this Court must rely on the rule of lenity. In the present circumstance, resort to the rule of lenity supports adoption of

the more expansive interpretation of the immunity provision, so as to narrow the scope of criminal liability.

II. THE COURT ERRED IN REQUIRING THE DEFENSE TO WAIVE THE STATUTORY DEFENSE AS A CONDITION FOR GETTING A LESSER-INCLUDED-OFFENSE INSTRUCTION ON SIMPLE POSSESSION.

On several occasions before and during trial, the parties discussed whether, and on what conditions, the defense could obtain a lesser-included-offense instruction defining the crime of possession of drugs. See, e.g., M2 13-16; M3 6-8; T 60-63, 134, 268-77, 378-80, 385, 487-503. The State argued that, if the defense sought such an instruction, Eldridge must first waive any right to the immunity codified in RSA 318-B:28-b. M2 16. In the State's view, such an instruction, without a waiver, would improperly offer the jury the opportunity to return a guilty verdict that the law does not authorize.

The defense objected to having to waive immunity as a condition of the lesser-included-offense instruction. T 62-63, 270-76, 490-98. In the defense's view, that requirement improperly rewarded the prosecution for having overcharged Eldridge. With a waiver requirement, two defendants who are similarly situated in that the State can only prove possession, will be treated differently vis-à-vis the RSA 318-B:28-b defense simply if, in one case, the State charged possession with intent. That charging decision will have enabled the State to cancel the statutorily-enacted principle granting immunity in possession cases.

The court sided with the State. T 268-77, 378-80, 487-90, 499-500. All agreed that the evidence would support a rational jury in convicting on simple possession while acquitting on possession with intent. T 61-62. Accordingly, on the merits of the evidence, Eldridge was entitled to the lesser-included-offense instruction. However, the court imposed an additional condition – waiver of the RSA 318-B:28-b immunity defense – before it would give the requested lesser-included-offense instruction. Faced with that requirement, Eldridge chose to get the instruction, and the court conducted a colloquy with him on his understanding of the court-required waiver condition. T 501-03.

In due course, the court gave a lesser-included-offense instruction to the jury. T 543. The jury ultimately acquitted Eldridge on the charge of possession with intent to sell and convicted on the lesser-included offense. T 559-60. In requiring the waiver as a condition for the lesser-included-offense instruction, the court erred. Because Eldridge stands convicted of an offense for which, under RSA 318-B:28-b, he has a complete defense, this Court must reverse that conviction.

Nothing in RSA 318-B:28-b authorizes a court to require a waiver in these circumstances. On the contrary, the statute's language is clear – a person who is the subject of a good faith request for medical assistance "shall not be

arrested, prosecuted, or convicted" for possessing a controlled drug. RSA 318-B:28-b, III. If the statute said only "arrested or prosecuted," some basis might exist for focusing on the charging decision rather than on the verdict. Indeed, an early version of the statute described the immunity as preventing a person from being "cited, arrested, or prosecuted" for possession of a controlled drug. A47.

However, as enacted, the statute also bars *conviction* for possessing a controlled drug under the circumstances here. This Court construes statutes as written and will not ignore, or treat as surplusage, statutory language the legislature saw fit to enact. Mfataneza, __ N.H. __ (slip op. at 3); see also Forster, 167 N.H. at 754-56 (examining legislative history and attributing significance to absence, from final bill as enacted, of provision present in earlier draft). A fatal flaw, therefore, in the trial court's ruling is that it treats the statute as if it covered only persons "arrested or prosecuted," when in fact the legislature considered enacting such language but ultimately determined that the provision would protect persons from being "arrested, prosecuted, *or convicted.*" (Emphasis added).

In rejecting the defense view, the court first cited State v. LaPlante, 117 N.H. 417 (1977). T 60. In that case, a defendant charged with attempted murder requested a lesser-included-offense instruction on attempted manslaughter. Id.

at 417. The trial court gave the instruction, and the jury acquitted on the greater charge while convicting on attempted manslaughter. Id. After the trial, the defendant moved to set aside the verdict on the ground that the offense of "'attempted manslaughter' is a logical impossibility." Id.

This Court declined to reach the merits of the question about the legal existence of a crime of attempted manslaughter. Id. at 418. In that case, the defendant took both of two opposing positions on the same question. In the trial court, by requesting the instruction, the defendant implicitly asserted the logical coherence of attempted manslaughter. In the Supreme Court, the defendant argued the opposite view – that the crime did not exist. In rejecting LaPlante's claim, this Court in effect invoked the "invited error" doctrine. See T 276, 379-80 (prosecutor characterizing LaPlante and Eldridge's position as alike implicating invited error); see also State v. Goodale, 144 N.H. 224, 227 (1999) (citing LaPlante as invited error case). Thus, the LaPlante Court held that, "[h]aving himself requested the instruction of which he presently complains, the defendant may not now successfully assert error on the part of the trial judge." LaPlante, 117 N.H. at 418.

Eldridge's case does not involve invited error. Unlike LaPlante, Eldridge alleges no flaw in the lesser-included-offense instruction he requested, and he does not argue that

the trial court erred in giving it. Rather, Eldridge argues that the court erred in imposing an additional condition on giving the instruction. Therefore, unlike LaPlante, Eldridge is not asserting on appeal a position opposite to the one he took in the trial court. Rather, Eldridge consistently alleges error in the court's insistence on imposing an additional condition on the giving of that instruction – the waiver of the RSA 318-B:28-b defense. LaPlante affords no support for the trial court's ruling.

The trial court proceeded further to examine decisions from Massachusetts, New Jersey, and Vermont. T 268-77. See Commonwealth v. Shelley, 80 N.E.3d 335 (Mass. 2017); State v. Short, 618 A.2d 316 (N.J. 1993); State v. Delisle, 648 A.2d 632 (Vt. 1994). Those courts took distinct approaches to the issue presented when a defendant requests a lesser-included-offense instruction covering a crime for which the defendant has a complete statutory defense. In each case, the defense asserted the statute of limitations. Thus, each of the cases involved a defendant charged with murder after the passage of a sufficiently long time that the lesser-included offense of manslaughter would, if charged by the State, have been barred by the statute of limitations.

The trial court adopted the Massachusetts approach represented by Shelley. Shelley starts from the proposition that lesser-included-offense instructions, when supported by

the evidence, enhance the rationality of jury deliberations. Shelley, 80 N.E.3d at 337-38. Indeed, at least in capital cases, that proposition has the weight of the Federal Constitution behind it. Beck v. Alabama, 447 U.S. 625, 633-38 (1980). Lesser-included-offense instructions decrease the risk that a jury, though finding the charged offense an ill-fit for the evidence, will nevertheless convict out of a feeling that outright acquittal fits the case even less well. Short, 618 A.2d at 320. As the Court in Beck observed:

> it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Beck, 447 U.S. at 634 (quoting Keeble v. United States, 412 U.S. 205, 212-13 (1973)) (emphasis in original).

The next step in Shelley's analysis drew inspiration from Spaziano v. Florida, 468 U.S. 447, 454-57 (1984), overruled on other grounds by Hurst v. Florida, 136 S.Ct. 616, 623-24 (2016), in which the Court qualified the Beck principle. Shelley, 80 N.E.3d at 338-39. Spaziano presented the murder/manslaughter-statute-of-limitations pattern. The Supreme Court concluded in that circumstance that deliberative rationality was not enhanced by a lesser-included-offense instruction, absent a waiver of the statutory defense, because the instruction, without a waiver, would lead a jury falsely to believe that a verdict convicting on the lesser-included offense would result in a judgment of conviction. Spaziano, 468 U.S. at 455-57. Spaziano, therefore, held that the Federal Constitution did not obligate a trial court, in a capital case, to give a lesser-included-offense instruction in that situation, absent a waiver of the statutory defense.

New Jersey follows a different approach. In Short, the New Jersey Supreme Court likewise acknowledged the role lesser-included-offense instructions play in ensuring a fair trial. Short, 618 A.2d at 319-20. The defendant received a manslaughter lesser-included-offense instruction, but the jury was told of the statutory defense and of the consequence that a verdict on that instruction would not result in the entry

of a conviction. Id. at 318. The defendant appealed, arguing that the court erred in giving that consequence instruction.

The New Jersey Supreme Court agreed, reasoning that the consequence instruction "all but invited the jury to disregard the manslaughter instruction," and thus, on a case-by-case basis, to nullify the protection of the duly-enacted statute of limitations. Short, 618 A.2d at 321-22. The court accordingly was "unable to conclude that the Legislature intended to weaken the strength of the bar of the statute of limitations in criminal cases generally or, more specifically, to do so with respect to unindicted lesser included offenses." Short, 618 A.2d at 321.

In so ruling, the court distinguished Spaziano. Under applicable Florida law, Spaziano's jury was informed, prior to deliberations, of the possible punishment attaching to each of the possible verdicts. Short, 618 A.2d at 322 (discussing Florida law). In that circumstance, having told the jury about the available punishments, the court would deceive the jury if it did not also say that one of the guilty-verdict options would not result in any punishment. In New Jersey, by contrast, the court does not tell the jury about possible punishments; on the contrary, the jury is told not to consider the possible punishments in deciding guilt or innocence. Id. In this respect, New Hampshire law resembles that of New Jersey,

and not that of Florida. T 533 (instruction telling jury not to consider possible punishment, in deliberating on guilt).

More generally, the New Jersey Supreme Court rejected the Spaziano reasoning on its own terms, as failing to respect the principle that a criminal defendant should not be forced to choose between two mutually-compatible substantive legal rights. Short, 618 A.2d at 323. "A defendant's right to a fair trial cannot be conditioned on his or her giving up a vested right to a statute of limitations defense, and a defendant's vested right to a statute of limitations defense cannot be conditioned on his or her giving up the right to a fair trial." Id. (citing State v. Muentner, 406 N.W.2d 415 (Wis. 1987)).

The court rejected the criticism that its holding endorsed the "tricking" or "deceiving" of juries. Short, 618 A.2d at 323. "Rather it requires the careful guiding of juries so that they will be biased neither for nor against the defendant." Id. Because "the core of the jury's duty is to determine criminal culpability, not punishment," and because informing the jury of the punishment-related consequences of the statute of limitations risks prejudice as described above, courts should withhold that information from juries, just as in a wide variety of evidentiary contexts, information is withheld from juries in order better to ensure a reliable verdict based on proper information. "The trial court's task is to let the jurors know what they need to know in order to

make a fair decision on criminal liability in accordance with applicable law, not to give them whatever information they might want in order to assure the imposition of criminal punishment." Id. at 324.

Eldridge contends first, for the reasons stated by the New Jersey court, that this Court should adopt this approach. The New Jersey approach finds support also in Muentner, in which the Wisconsin Supreme Court reached the same conclusion for similar reasons. Muentner, 406 N.W.2d at 421-23; see also Shelley, 80 N.E.3d at 340-47 (Budd, J., dissenting) (arguing propriety of that approach).

The Vermont Supreme Court adopted a third approach, occupying the conceptual space between the New Jersey and Massachusetts approaches. The Vermont approach embraces the Spaziano concern about misleading the jury and addresses it by including a consequence instruction along with the requested lesser-included-offense instruction. Delisle, 648 A.2d at 638-39. However, the Vermont approach does not follow the Massachusetts rule of requiring the defendant to waive the statutory defense to get the lesser-included-offense instruction. Rather, a Vermont jury will receive, in addition to the lesser-included-offense instruction, a consequence instruction telling the jury that, if it returns a verdict on the statute-of-limitations-barred lesser-included

offense, the court will not enter a judgment of conviction. Id. at 639-41.

The Vermont court acknowledged the formal separation of juries from sentencing, but worried that "the jury's role cannot be completely separated from punishment." Id. at 639. The court expressed faith in juries with respect to the concern about case-by-case nullification of the statute of limitations. "The judicial system depends upon jurors to be fair and forthright during deliberations. It assumes that jurors will follow instructions and scrupulously apply the law contained in those instructions to the facts found." Id.

However, the court refused to adopt the Spaziano position. "We are not convinced, however, that a defendant should be forced to choose between obtaining an instruction on a lesser-included charge and waiving the statute of limitations for that offense." Id. at 640. Indeed, having rejected the New Jersey approach because it lacked sufficient faith in juries, the Vermont court could hardly then say that the jury should not be entrusted with information about the consequences of a verdict on the lesser-included offense.

In effect, the choice between the three rules amounts to a referendum on a judiciary's attitude towards juries. The Massachusetts rule embodies a principle of extreme distrust of juries. Thus, in discussing the Vermont rule, the Massachusetts court in Shelley feared that a consequence

jury instruction would fail to serve its purpose because "the jury face[s] the same all-or-nothing proposition that exists in the absence of the lesser-included-offense instruction, except now the jury have been instructed that such conduct constitutes a crime for which the defendant will not be punished." Shelley, 80 N.E.3d at 340.

In effect, the Massachusetts approach assumes the following propositions about juries to be true: 1) juries perform less reliably in all-or-nothing deliberative environments; 2) juries will think about, and factor into deliberations, criminal punishment and the consequences of the verdict, even though told not to do so; and 3) if told of the lesser-included-offense option but also told of the consequence of a verdict on that option, juries will fail to respect the complex policies embodied in the existence of a lesser-included-offense statute and in the statute of limitations, and will regard themselves as back in the all-or-nothing situation.

It is not, however, this Court's practice to distrust juries to such an extent. Rather, this Court presumes that jurors will follow jury instructions. State v. Boggs, 171 N.H. 115, 124 (2018); State v. Russo, 164 N.H. 585, 591 (2013). No reason exists to presume that juries will not follow the instruction not to consider issues of sentence when deciding

guilt. Nor does any reason exist to presume that jurors would fail to follow a Vermont-style consequence instruction.

The New Jersey approach treats juries with greater respect. That approach, like every approach, begins with the proposition that juries perform less reliably in all-or-nothing deliberative environments. However, where the Massachusetts approach presumes that juries will improperly consider sentencing consequences in guilt deliberations even though instructed not to do so, the New Jersey approach respects juries to the extent of expecting them to follow that instruction. Therefore, the New Jersey approach supports the giving of a lesser-included-offense instruction and sees no need to add a Vermont-like consequences instruction.

The Vermont approach also respects juries more than does the Massachusetts approach. While it shares the Massachusetts fear that juries will improperly consider sentencing implications, it parts ways with Massachusetts skepticism by accepting that jurors can hear a consequence instruction without embarking on a mission to nullify the statute of limitations. Rather, upon hearing a lesser-included-offense instruction and a consequence instruction, jurors will have a rich sense of the legal policies that, in combination, have constructed the situation. With that sense, the jury will apply the law defining the various criminal offenses to the facts of the case.

For all the reasons stated above, Eldridge contends first that this Court should adopt the New Jersey-Wisconsin approach. Counsel proposed a jury instruction embodying that approach, A83; T 495, and the court erred in refusing it. Alternatively, if not persuaded to adopt the New Jersey approach, this Court should, for the reasons expressed above, follow the intermediate position expressed by the Vermont rule. Counsel also proposed a jury instruction embodying that approach, A82; T 495, and the court erred in refusing it.[3] This Court should, in either case, reject the trial court's adoption of the Massachusetts approach.

Finally, in addition to the considerations described above, one further feature of the case counsels against adopting the Massachusetts approach. Unlike all of the out-of-jurisdiction cases described above, Eldridge's case does not involve the murder/manslaughter-statute-of-limitations fact pattern. Most significantly, Eldridge's case differs in that the statutory defense here is not rooted in the statute of limitations, but rather in the "Good Samaritan" immunity of RSA 318-B:28-b.

[3] That proposed instruction embodied the Vermont approach by telling the jury that, even if they found the elements of possession of drugs, they must acquit if they also found that the evidence relied on by the State to prove the offense was "gained as a proximate result of the good faith request for medical assistance for the defendant. . . ." A82. As noted above, there was no dispute in this case that the police obtained the evidence as a proximate result of Glidden's good-faith request for medical assistance.

The distinction matters because there is a fundamental difference between the purposes served by a statute-of-limitations defense, on the one hand, and the "Good Samaritan" defense, on the other. Statutes of limitations "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they are made for the repose of society and the protection of those who may during the limitation have lost their means of defence." United States v. Marion, 404 U.S. 307, 322 (1971) (citation and quotation marks omitted). Also, statutes of limitation grant repose to people who, after committing a crime in the past, have reformed and built productive lives that society prefers not to disrupt with belated conviction and punishment. Neither purpose aims to create incentives directing people's future actions.

By contrast, the "Good Samaritan" defense exists to promote socially-desirable behavior, in seeking to remove or narrow any cost-benefit, criminal-exposure analysis that might inhibit a person from calling for medical help. However, a person who should have that incentive to call because the State can prove only simple possession, may nevertheless lose it if mindful of the unpredictable occurrence of prosecutorial over-charging. In that way, the statute's intended promotion of the socially-desirable incentive to call is weakened if, through overcharging, the State can cancel the immunity.

Because statutes of limitation do not exist to create incentives for future behavior, there is no comparable need to shelter people in that context from the vicissitudes of unpredictable prosecutorial charging behavior. Thus, even if the Massachusetts approach has some appeal as a rule applicable in the murder/manslaughter-statute-of-limitations context, that appeal does not transfer to the present dispute. For this reason also, this Court should not adopt the Massachusetts rule in construing the "Good Samaritan" statute, even if it wishes to leave open the question of what rule might apply in the murder context.

III. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS EVIDENCE SEIZED DURING AN UNLAWFUL SEARCH.

Before trial, the defense moved to suppress evidence seized by the police during a search of the apartment. A56-A67. The State objected. A68-A81. The court convened an evidentiary hearing, held over three days. SH 1-229. By a written order, the court denied the motion. AD3-AD18.

Evidence at the suppression hearing established the following facts. On the night of May 3, 2017, Glidden called 911 to seek medical care for Eldridge, her boyfriend, who had just overdosed. AD4. She reported that he was not conscious, not breathing, and turning purple. Id. Concord Fire Department (CFD) medical personnel and the police responded to the scene, with CFD and a police officer entering the apartment simultaneously at about 10:15 p.m. Id. CFD medical personnel immediately began treating Eldridge, while the police officer spoke with Glidden. AD4-AD5.

A manager of the New Hampshire 911 system testified that, at the relevant time, a 911 policy provided that an "unattended death will have police notification, in addition to an ambulance request." AD6-AD7. As interpreted by 911 policymakers, a person reported as being unconscious, not breathing, and turning purple "is considered to be in cardiac arrest and constitutes an unattended death." AD7. Testimony at the hearing established that, at the time of the report of

Eldridge's overdose, the police did not carry or administer Narcan; their function in responding to such scenes was to provide security for the emergency medical team. SH 13-15, 18-21, 35-38, 109.

Additional police officers soon arrived and took up positions in the apartment while the medical responders treated Eldridge. AD5. One officer saw drug-use paraphernalia, and CFD medical responders called police attention to items in the apartment, including drugs and drug paraphernalia, and the box containing the disassembled gun. AD5-AD6.

Though the medical responders departed the scene at 10:40 p.m., soon after reviving Eldridge, the police remained. AD6. Officers briefly questioned Eldridge, before telling him that they intended to seek a warrant to search the apartment, and that he needed to leave. Id. Eldridge asked to change his urine-stained pants before leaving, and was allowed to do so. Id.; SH 156. However, when he removed money from a pocket, the police required him to leave the money in the apartment. AD6; SH 156. Eldridge left at about 11:00 p.m., and the police remained in and around the apartment for about four and half hours, while preparing to seek a search warrant. AD6. The warrant-application process was finally completed about 3:30 a.m., and just after 4:00 a.m. the police began to search the apartment. AD 4. During that search, they seized

drugs, drug paraphernalia, the disassembled gun, and other items. Between the time of the initial police response to the overdose report, and the completion of the search at 7:00 a.m. the following morning, twelve Concord police officers responded to Eldridge's apartment. AD6. Of those, only three were present during the brief initial period when CFD provided medical treatment to Eldridge. Id.

Eldridge advanced several suppression arguments. First, he contended that the initial police entry into the apartment with the medical responders was improper, as no reasonable basis existed to justify the police presence. A61-A62. Second, he argued that, during the time the police were present in the apartment before the departure of the medical responders, the police exceeded the scope of their security mission by looking into the containers the medical responders handed the police. A62. In connection with both arguments, Eldridge further contended that the use of the fruits of those unlawful searches in the search-warrant application invalidated the warrant and the subsequent post-warrant search. A64-A65. Third, Eldridge argued that the "Good Samaritan" immunity provision codified in RSA 318-B:28-b required the suppression of the items seized in the search. A63-A64.

On appeal, Eldridge pursues only the first argument – that the police did not have a lawful basis initially to enter the

apartment, and the observations and information obtained as a result of that entry must be stricken from the warrant application. Without that information, the police lacked probable cause, and the fruits of the subsequent warrant-based search must be suppressed.

In response, with respect to the lawfulness of the police's initial entry, the State first argued that the emergency-aid doctrine justified the police action. A75-A76. The State also contended that the need to provide security for the medical responders also justified the initial police entry into the apartment. A76-A77. Finally, the State invoked the doctrine of consent, arguing that Glidden's 911 call for aid operated as consent to the police entry. A77.

In its order denying the motion, with respect to the defense argument challenging the lawfulness of the initial entry, the court relied on the emergency-aid doctrine. AD8-AD16. "When reviewing a trial court's ruling on a motion to suppress, [the Court] accept[s] the trial court's factual findings unless they lack support in the record or are clearly erroneous[] and . . . review[s] its legal conclusions *de novo*." State v. Socci, 166 N.H. 464, 468 (2014). In denying the motion here, the trial court erred.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." Id. at 469 (quotation omitted).

The same is true under the State Constitution. "Under Part I, Article 19, warrantless entries are *per se* unreasonable and illegal unless they fall within one of the exceptions to the warrant requirement." State v. Pseudae, 154 N.H. 196, 199 (2006). The New Hampshire Constitution "provides greater protection than does the Fourth Amendment of the Federal Constitution." State v. Seavey, 147 N.H. 304, 306 (2001).

"The search of a home is subject to a particularly stringent warrant requirement because the occupant has a high expectation of privacy." State v. Robinson, 158 N.H. 792, 797 (2009); see also Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) ("It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (quotation omitted)); Steagald v. United States, 451 U.S. 204, 211 (1981) ("the Fourth Amendment has drawn a firm line at the entrance to the house" (quotation omitted)). "The solicitous protection that the New Hampshire and Federal Constitutions afford to the home must be preserved because at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Seavey, 147 N.H. at 308-09 (quotation omitted).

"The State has the burden of proving by a preponderance of the evidence that the warrantless entry fell

within one of the narrow, judicially-crafted exceptions." Robinson, 158 N.H. at 797. "[E]xceptions to the warrant requirement must remain closely tethered to their underlying justifications lest they become incompatible with the fundamental principles secured by the Constitution." Id. "[E]xceptions to the warrant requirement are few in number and carefully delineated and . . . the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Welsh, 466 U.S. at 749-50 (quotation and citation omitted).

The emergency-aid exception applies when police officers perform duties "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." State v. MacElman, 149 N.H. 795, 798 (2002) (citation and quotation marks omitted); see also Pseudae, 154 N.H. at 202 (applying doctrine). This Court has adopted a three-part test to determine whether a situation fits within the emergency-aid exception:

> The State must show: (1) the police have objectively reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) there is an objectively reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched; and (3) the search is not

> primarily motivated by intent to arrest and seize evidence.

Id. (quotation omitted).

The United States Supreme Court has similarly identified an emergency-aid exception to the Fourth Amendment warrant requirement, although that Court has not relied upon the three-part test outlined in MacElman. Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (concluding "one exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury," and holding such an exigency was present where the officer could hear and see a fight in progress inside a home); Michigan v. Fisher, 558 U.S. 45, 47-48 (2009) (describing the exception set out in Brigham City as the "emergency aid exception," and holding that the officers' entry into the home was justified where the officers observed "violent behavior inside" the residence).

As noted above, the first condition on the applicability of the emergency-aid doctrine requires the existence of an emergency and an immediate need for the assistance of the police in responding to that emergency. Here, the trial court began by finding that an emergency existed, given Eldridge's overdose and consequent medical crisis. AD9. Eldridge concedes the emergency but contends that it was not an emergency as to which the police brought any needed skills,

given the simultaneous arrival of the medical responders who, unlike the police, were equipped with Narcan. Thus, the State failed to establish the second part of the doctrine's first prong: an immediate need for the assistance of the police to enter the apartment.

The trial court proposed to address that problem first by citing the 911 policy of notifying the police. AD10-AD11. Eldridge takes no issue with the policy as such. It may be that, in many communities in the state, the police are likely to arrive much sooner than an emergency medical response team, and in such events, a quick police response is better than a slower medical response. However, the fact that 911, as a matter of general policy, notifies both the police and emergency medical responders in such cases does not, in every individual case, automatically justify the police in entering a residence in which their help is not, at the time of their arrival, needed to address the emergency. See Bray v. State, 597 S.W.2d 763 (Tex. Crim. App. 1980) (finding warrantless entry and search unconstitutional when medical personnel had already responded to overdose call). As this Court made plain in Pseudae, the question of whether the police, having responded to a scene, may further enter a home depends on the particular circumstances. Pseudae, 154 N.H. at 201-02. Because the police had nothing to offer in terms of resolving the medical emergency, one cannot

conclude, as the trial court concluded, AD11, that their entry was not primarily motivated by an intent to seek evidence of a crime.

At one point in the order, the court noted and credited police officer testimony that "police presence is necessary to not only attend to the immediate emergency, but also to secure the scene and to protect CFD and others from dangers commonly associated with responding to overdose calls or being present in an apartment where drug use occurs." AD11. On the facts of this case, that rationale also must fail.

First, there is no evidence that the CFD responders here felt any hesitation in entering, or need for the security the police might offer. So far as the record reflects, CFD did not request a police presence, nor did CFD ask the police to enter the apartment rather than wait outside should some problem warranting security support arise. The security rationale, thus, amounts to a claim that there is an automatic or invariable need for security in all such cases.

This Court must reject that claim. As a matter of general constitutional principle, Fourth Amendment doctrine requires analysis of the facts of the individual case. See, e.g., State v. Mouser, 168 N.H. 19, 23 (2015) (describing curtilage analysis as "fact-sensitive"). In a few circumstances, courts have recognized that a specific fact pattern so inevitably involves some safety-related consideration as to remove the

need to prove the presence of that consideration in the particular case. See, e.g., Pennsylvania v. Mimms, 434 U.S. 106 (1977) (authorizing police officers, without any case-specific justification, to order drivers stopped for traffic violation out of car); Maryland v. Wilson, 519 U.S. 408 (1997) (extending Mimms rule to passengers); but see Terry v. Ohio, 392 U.S. 1 (1968) (requiring showing of case-specific reasonable, articulable suspicion to justify officer-safety-motivated pat frisk).

The establishment of those exceptional *per se* rules, however, has often involved a showing of frequent danger. See, e.g., Mimms, 434 U.S. at 110 (citing study showing that "approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile"). Here, the record contains only a conclusory assertion that emergency medical responders always require police security, not only near at hand, but indeed inside the home in which medical treatment is administered. No evidence was cited to show that homes to which medical responders are summoned are places of inevitable or even frequent danger. Moreover, *per se* rules tend also to apply when the police are intruding on a place, like a car, subject to lesser constitutional protection. See id. at 111 (describing as "de minimis" the additional intrusion associated with having a stopped driver step out of

a car). In Eldridge's case, the police intrusion involves the most-highly protected area – a home.

Second, this Court must also reject the claim that a police presence in the apartment was necessary to protect unspecified "others" who might be on the scene. There was no cause to worry that members of the general public might wander into Eldridge's apartment in the middle of the night while CFD medics treated him. The only other person present, aside from the police, the CFD, and Eldridge, was Glidden, the person who requested emergency medical assistance. The police had no reason to think she was in immediate danger from Eldridge or anybody else.

The court thus erred in ruling that the police acted lawfully in entering the apartment initially. Had the police not entered the apartment, they would not have made the observations that led to the issuance of the warrant. Without the authority of the warrant, the police would not have found the disassembled gun and the drugs they charged Eldridge with possessing. The erroneous denial of the motion to suppress therefore requires reversal of Eldridge's convictions.

CONCLUSION

WHEREFORE, Mr. Eldridge respectfully requests that this Court reverse both convictions, on the authority of the third argument, and his drug possession conviction, on the authority of either of the first two arguments.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

Some of the appealed decisions are in writing and those are appended to the brief.

This brief complies with the applicable word limitation and contains 9176 words.

Respectfully submitted,

By /s/ Christopher M. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Christoper M. Johnson
Christopher M. Johnson

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