THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0551

State of New Hampshire

v.

Brian Eldridge

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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ISSUES PRESENTED

I. Whether the trial court properly denied the defendant's motion to dismiss based on the immunity provision of RSA 318-B:28-b, where the defendant was charged with possession of a controlled drug with the intent to sell, rather than simple possession of a controlled drug.

II. Whether the trial court properly required the defendant to waive the immunity provision of RSA 318-B:28-b where the defendant requested that the trial court give the jury instruction on the lesser included charge of possession of a controlled drug.

III. Whether the trial court properly denied the defendant's motion to suppress where the Concord Police Department entered the defendant's apartment, along with emergency medical personnel, following a call from the defendant's girlfriend in which she stated that the defendant was unconscious, not breathing, and turning purple.

STATEMENT OF THE CASE

In June of 2017, a Merrimack County Grand Jury returned four indictments charging the defendant, Brian Eldridge, with one count of possession of a controlled drug (fentanyl) with the intent to sell, one count of felon in possession of a firearm, and two counts of felon in possession of a deadly weapon. DA A3-A6[1]; *See* RSA 318-B:2; RSA159:3; RSA 625:11.

The trial court (*Kissinger*, J.) denied a motion to dismiss based on the immunity provision of RSA 318-B:28-b as the defendant was charged with possession of a controlled drug with the intent to sell, rather than simple possession of a controlled drug. AD 3. The trial court (*Kissinger*, J.) also denied a motion to suppress challenging the warrantless entry by officers into the defendant's apartment, pursuant to the emergency aid exception to the warrant requirement.[2] AD 19.

At trial, the trial court (*Kissinger*, J.) required the defendant to waive the immunity provision of RSA 318-B:28-b based on the defendant's request for a jury instruction on the lesser included offense of simple

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[1] Citations to the record are as follows:
"DA" refers to the appendix other than the appealed decision to the Defendant's brief;
"SH 1-3" refers to the transcript of the suppression hearing held in the underlying matter on days 1-3 ;
"AD" refers to the appendix of the appealed decision to the Defendant's brief; "T 1-4" refers to the transcript of trial on days 1-4;
"TS" refers to the sentencing transcript; and
"DB" refers to the Defendant's brief.

[2] As the trial court denied the motion to suppress on the grounds of the emergency aid exception, the arguments regarding consent and the need to provide security were not reached. AD 19. In the event that this Court finds that the emergency aid exception is not applicable, the State asks this Court to remand this matter to the trial court so that the trial court may make findings of facts and rulings related to the applicability of the remaining arguments put forth by the State before the trial court.

possession of a controlled drug. T3 488. The jury returned convictions against the defendant for simple possession of a controlled drug and felon in possession of a firearm. TS 560-61. On possession of a controlled drug, the trial court sentenced the defendant to a twelve-month House of Correction sentence, to run consecutive to the defendant's sentence on the felon in possession of a firearm charge, with four years of probation. TS 42-46. On the felon in possession of a firearm charge, the trial court sentenced the defendant to three-and-a-half to seven years in the New Hampshire State Prison, all suspended for ten years. TS 45-46.

This appeal followed.

STATEMENT OF FACTS

The trial court made the following factual findings: On May 3, 2017, at approximately 10:15 p.m., personnel from the Concord Fire Department and the Concord Police Department responded to 28 Pierce Street in Concord. AD 4; SH1 5-6. They responded based on a 911 call made by Kaytelin Glidden who reported that her boyfriend, later identified as the defendant, was not conscious, not breathing, and turning purple. *Id*. Personnel from the Concord Fire Department arrived simultaneously with Officer Gorham of the Concord Police Department. AD 4; SH1 7.

At the time of the response, the New Hampshire 911 System had a policy in effect that stated, "An unattended death will have police notification, in addition to an ambulance request." AD 6-7; SH2 72. Someone who is not conscious, not breathing, and turning purple, like the defendant in this instance, is considered to be in cardiac arrest and qualifies as an unattended death for purposes of the policy. AD 7; SH2 53.

Concord Fire Department personnel proceeded directly to the living room to treat the defendant, while Officer Gorham spoke with Ms. Glidden in the kitchen. AD 4; SH1 7. Though Concord Police Department did not provide medical assistance, they would have if necessary. AD 11; SH1 14. While in the residence, Officer Gorham noticed a burnt spoon on the stove, which he knew to be a sign of drug use, and a used needle on the floor next to the defendant. AD 4-5; SH1 8; SH1 10-11. Officer Levesque arrived on scene shortly after Officer Gorham. AD 5; SH1 18; SH2 111. While standing in the entryway to the defendant's residence, a member of the Concord Fire Department handed Officer Levesque a fabric bag from the

living room. AD5; SH2 118. The bag was open when Officer Levesque received it. AD 5; SH2 119. Using his flashlight, but without manipulating the bag, Officer Levesque observed multiple baggies, consistent with drug packaging, in the fabric bag. AD 5; SH2 119-20. Officer Levesque also saw a small black pouch containing pills in the top compartment. AD 5; SH2 119. Additionally, a member of the Concord Fire Department handed Officer Levesque a large wooden box, in an open position, also found in the living room. AD 5; SH2 120-21. The box contained a small, clear bag containing a white substance, syringes, spoons and a lighter. AD 5; SH2 121; SH2 124.

The Concord Fire Department successfully revived the defendant. AD 5; SH2 127. While members of the Concord Fire Department were still in the defendant's residence, Officer Levesque entered the defendant's living room and began looking around, with the aid of his flashlight. AD 5-6; SH2 127. Officer Levesque noted multiple locked boxes, a safe under the living room table, a backpack with a small lock, ammunition containers, and a scale. AD 6; SH2 128, 143. A member of the Concord Fire Department pointed out to Officer Levesque a gun case on a shelf in the living room. AD 6; SH2 146-47. The case was somewhat transparent, and Officer Levesque could see the contents of the case, including ammunition and a gun barrel, without touching or manipulating the case. AD 6; SH2 146; SH2 149.

The defendant ultimately refused transport to the hospital and Concord Fire Department personnel cleared the scene. AD 6; SH2 127. Shortly thereafter, the Concord Police Department officers on scene learned that Concord detectives intended to apply for a search warrant for the

defendant's residence. AD 6; SH2 155. Officer Levesque informed the defendant and told the defendant that he needed to leave the residence. AD 6; SH2 155-56. Prior to leaving, the defendant changed his pants. AD 6; SH2 156. As he did so, Officer Levesque observed the defendant remove a large amount of money from the pants the defendant had been wearing. *Id.*

SUMMARY OF THE ARGUMENT

I. The trial court properly denied the defendant's motion to dismiss based on the immunity provision of RSA 318-B:28-b, where the defendant was indicted with possession of a controlled drug with the intent to sell, as opposed to simple possession of a controlled drug. The immunity provision of RSA 318-B:28-b was intended to protect drug users, not drug sellers, and, in light of the charge, the prosecution was proper.

II. The trial court properly required the defendant to waive the immunity provision of RSA 318-B:28-b where the defendant requested that the trial court give the jury an instruction on the lesser included charge of possession of a controlled drug. To have given the lesser included instruction without requiring a waiver of the immunity provision would have been to ask the jury to deliberate on a charge for which a conviction could not enter, which would undermine the rationality of the jury system.

III. The Concord Police Department properly entered the defendant's apartment, pursuant to a policy, along with emergency medical personnel, following a call from the defendant's girlfriend in which she stated that the defendant was unconscious, not breathing and turning purple. In light of the circumstances, the police officers' entry was proper under the emergency aid exception to the warrant requirement.

ARGUMENT

I. The trial court properly denied the defendant's motion to dismiss pursuant to the immunity provision of RSA 318-B:28-b where the defendant was charged with possession of a controlled drug with the intent to sell.

The trial court properly found that the immunity of provision of RSA 318-B:28-b did not apply to the defendant, as he was charged with possession of a controlled drug with the intent to sell, rather than simple possession of a controlled drug. The plain language of RSA 318-B:28-b makes clear that the immunity provision does not apply to the crime of possession of a controlled drug with the intent to sell. Although the plain language eliminates any need to review legislative history as an aid to construction, the legislative history does not support an argument that the Legislature intended the inclusion of possession of a controlled drug with the intent to sell under the immunity provision.

"The interpretation of a statute is a question of law, which [the Court] reviews *de novo*." *State v. Mfataneza*, __ N.H. __ (May 10, 2019) (slip op. at 3). When examining the language of a statute, the Court must "ascribe the plain and ordinary meaning to the words used." *State v. Formella*, 158 N.H. 114, 116 (2008). The Court must construe provisions of the Criminal Code "according to the fair import of their terms and to promote justice." *Id*. Additionally, the Court must "first look to the plain language of the statute to determine legislative intent." *Id*. Absent an ambiguity, the Court must "not look beyond the language of the statute to discern legislative intent." *Id*. In considering the plain language of the statute, the Court must "neither consider what the legislature might have

said nor add words that it did not see fit to include." *In re Search Warrant (Med. Records of C.T.),* 160 N.H. 214, 220 (2010).

RSA 318-B:28-b, III provides that no person who is the subject of a good faith request for medical assistance shall be "arrested, prosecuted or convicted for possessing, or having under his or her control, a controlled drug in violation of RSA 318-B:2…" Part of this statutory language – "possessing, or having under his or her control a controlled drug" – mimics one of the drug-related acts prohibited by RSA 318-B:2 (titled "Acts Prohibited"). In addition to mere possession of a controlled drug, RSA 318-B:2 prohibits a number of other discrete acts:

> 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 analog, or any preparation containing a controlled drug, except as authorized in this chapter.

See RSA 318-B:2, I. Aside from the act of possessing (actually or constructively) a controlled drug, RSA 318-B:28-b neither mentions nor incorporates by reference the other acts prohibited by RSA 318-B:2 – selling, purchasing, prescribing, administering, dispensing, compounding, and possessing with intent to sell. The statutory scheme does not contemplate these crimes as different levels of sentencing, but rather, as separate and distinct crimes. A plain reading of RSA 318-B:28-b, consistent with the rules of statutory construction, therefore, establishes that immunity does not extend to the crimes of selling, purchasing, prescribing, administering, dispensing, compounding, or possessing with intent to sell a controlled drug, or any other crime not listed in its text. *See State v. Simone*, 151 N.H. 328, 330 (2004) ("Normally, the expression of one thing in a

statute implies the exclusion of another… [S]tatutory itemization indicates that the legislature intended the list to be exhaustive."); *see also* RSA 318-B:28-b, IV(c) (referring to persons who are "not protected from [arrest or prosecution] by the provisions of paragraphs II or III."). Essentially, the plain language of RSA 318-B:28-b provides immunity from arrest, prosecution, and conviction only for the crime of possession of a controlled drug.

Contrary to the defendant's assertion, the acts of possessing a drug and possessing a drug with the intent to sell are distinct criminal offenses. The grammatical structure of RSA 318-B:2 – in particular, the placement of commas in between each prohibited act and the use of the conjunction "or" – demonstrates that the Legislature intended each act to be stand as a discrete criminal offense. *See Marcotte v. Timberlane/Hampstead School Dist.*, 143 N.H. 331, 338-39 (1999) ("According to normal rules of English punctuation, the placement of commas between each element enumerated … generally dictates that the elements are to be read as a consecutive series of discrete items."). Further underscoring the fact that they are distinct crimes, the penalties provisions of the Controlled Drug Act, RSA 318-B:26 imposes different penalties for the crime of possessing a controlled drug and of possessing a controlled drug with the intent to sell.

The plain language of RSA 318-B:28-b reflects the legislature's intent to establish these as distinct crimes and only one of them (possession of a controlled drug) is listed in RSA 318-B:28-b. *See State v. Addison*, 161 N.H. 300, 306 (2010) ("When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent."). Had the legislature intended to provide immunity for

possession with intent, manufacturing a controlled drug, selling a controlled drug, or any other crime for that matter, it would have listed those crimes in paragraphs II and III of the statute. The fact that the Legislature failed to do so, choosing instead to list only the act of possessing a controlled drug, confirms that no other crimes are subject to the statute's limited grant of immunity. *See State v. Gubitosi*, 157 N.H. 720, 724 (2008) ("[Courts] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language it did not see fit to include."); *In re Search Warrant*, 160 N.H. at 220 (noting that the interpretation of a statute must not be done so as to add words not included by the legislature); *Simone*, 151 N.H. at 330 ("Normally, the expression of one thing in a statute implies the exclusion of another … [S]tatutory itemization indicates that the legislature intended the list to be exhaustive."). Accordingly, RSA 318-B:28-b did not provide a basis to dismiss the indictment charging the defendant with possession of fentanyl with the intent to sell.

To the extent the statutory language is at all ambiguous, the legislative history underlying RSA 318-B:28-b clearly establishes that the legislature did not intend to shield drug dealers, manufacturers, and other serious drug offenders from arrest or criminal prosecution. *See Cloutier v. City of Berlin*, 154 N.H. 13, 17 (2006) ("When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent."). The "Legislative Intent" section of Senate Bill 147 (later combined with House Bill 270 to form RSA 318-B:28-b) describes RSA 318-B:28-b as protecting the witness or victim of a drug overdose "from prosecution and conviction for certain crimes," not all crimes or even

all drug-related crimes. *See* 2015 NH SB 147. The Senate Judiciary Committee's hearing notes from March 15, 2015, further indicate that RSA 318-B:28-b was not intended to shield drug dealers and other serious drug offenders from criminal prosecution, even if they are the recipient of a request for medical assistance. James Vara, a key author of the bill, testified that the proposed law applied only to those who possess drugs, not drug dealers. *See* Senate Committee Notes dated March 15, 2015 at p. 5.

A plain and logical reading of RSA 318-B:28-b consistent with well-recognized principles of statutory interpretation, establishes that it provides immunity only for the crime of possession of a controlled drug. The other discrete crimes prohibited by the Controlled Drug Act – dispensing, manufacturing, compounding, selling, and possessing with intent to sell – are completely absent from the text of RSA 318-B:28-b, presumed to be purposely absent, and could not be part of the statute's limited grant of immunity absent legislative amendment. To the extent that the statute is at all ambiguous, the law's legislative history underscores that the law provides only limited immunity and that it was not designed to immunize drug dealers, manufacturers or other serious drug offenders.

In light of the clarity afforded by the plain language of RSA 318-B:28-b, and the accompanying legislative history, there is no need for the Court to consider the rule of lenity. The policy considerations highlighted by the defendant do not trump the plain language and clear intent of the statute. Given the language of the statute, the defendant's indictment and prosecution for possession of a controlled drug with the intent to sell was proper.

II. The trial court properly required the defendant to waive the immunity provision of RSA 318-b:28-b where the defendant requested the lesser included possession jury instruction.

The trial court properly required the defendant to waive the immunity provision of RSA 318-B:28-b in response to the defendant's request for an instruction on the lesser included crime of possession of a controlled drug. The defendant's challenge, at its core, invokes procedural due process.[3] N.H. Const. pt. I, art. 15; U.S. Const. Amend. 14. Though the State is not aware of any decisional law concerning this specific issue – waiver of a statutory immunity as a condition to a lesser included instruction – the United States Supreme Court has confirmed that requiring waiver of a statute of limitations as a condition to a lesser included instruction comports with federal constitutional due process, while the better reasoned decisions from other state courts confirm the same as a matter of state constitutional due process.

Due process concerns itself with the fairness of the procedure furnished to the defendant. As this Court has articulated the concept, "[t]he ultimate standard for judging a due process claim is the notion of fundamental fairness. Fundamental fairness requires that government conduct conform to the community's sense of justice, decency, and fair play. [The Court's] threshold determination in a procedural due process claim is whether the challenged procedures concern a legally protected

[3] The State notes that the defendant's brief neither cites the federal or state due process constitutional provisions, nor does the defendant's question presented or argument explicitly address the due process issue. However, as the out-of-state cases cited by both parties identify this issue as a due process question, the State undertakes that analysis herein.

interest." *State v. Veale*, 158 N.H. 632, 637 (2009). New Hampshire follows the federal holding, as outlined in *Beck v. Alabama*, 447 U.S. 625 (1980), regarding lesser included instructions, in that, "In general, a defendant charged with one offense is entitled to have the jury consider any lesser-included offenses." *State v. Cameron*, 121 N.H. 348, 350 (1981).

As a matter of federal due process, that right, however, is not absolute. *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Spaziano*, in which the statute of limitations had run for all applicable charges except the capitol murder charge, the United State Supreme Court upheld the trial court's refusal to give the lesser included instructions for a defendant who refused to waive the statute of limitations defense, stating: "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Id*. at 455. The *Spaziano* Court acknowledged its prior *Beck* decision, enshrining the fairness of giving lesser included instructions at least in capitol cases, but observed that *Beck* found that a lesser included instruction would lead to "enhanced rationality and reliability [that] the existence of the instruction introduced into the jury's deliberations." *Id.* Thus, the *Spaziano* Court differentiated between the fairness of "lesser included offense instruction[s] in the abstract, … [and] the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." *Id*. The Court concluded that "[w]here no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Id.* The Court rejected the defendant's proposed outcome, that the jury be instructed on a crime for which the defendant could not be convicted, stating that, "we are unwilling to close our eyes to

the social cost of the petitioner's proposed rule. *Beck* does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice." *Id*. at 456. "Such a rule not only would undermine the public's confidence in the criminal justice system, but it also would do a serious disservice to the goal of rationality…" *Id*.

From there, the Court debated whether it was better for the defendant to have the choice between the lesser included and asserting the defense, in *Spaziano* a statute of limitations defense, or forcing the defendant to waive the defense. *Id*. Balancing the defendant's right to a lesser included instruction against the need for rationality and the importance of maintaining confidence in the jury system, the Court concluded that the better outcome was for the defendant to be given the choice, and found no error by the trial court in refusing to give the lesser included instruction, where the defendant chose not to waive the statute of limitations defense. *Id*. Notably, a majority of states have adopted the *Spaziano* holding as it relates to this issue. *See People v. Burns*, 647 N.W.2d 515, 519-20 (Mich. App. 2002) (citing *People v. Nunez*, 745 N.E.2d 639 (Ill. App. 1 Dist. 2001); *State v. Boyd*, 543 S.E.2d 647 (W. Va. 2000); *State v. Timoteo*, 952 P.2d 865 (Haw. 1997); *State v. Yount*, 853 S.W.2d 6 (Tex. Crim. App. 1993); *People v. Brocksmith*, 604 N.E.2d 1059 (Ill. App. Ct. 1992); *State v. Lambrechts*, 585 A.2d 645 (R.I. 1991); *State v. Keithley*, 464 N.W.2d 329 (Neb. 1990); *U.S. v. DeTar*, 832 F.2d 1110 (9th Cir. 1987); *U.S. v. Williams*, 684 F.2d 296 (4th Cir. 1982).

This Court has often observed that the due process requirements of Part I, Article 15 of the New Hampshire Constitution are at least as

protective of the rights of the accused as the Fourteenth Amendment of the United States Constitution. *State v. Farrell*, 145 N.H. 733, 740 (2001). And, while this Court has not dealt with this specific set of circumstances, it has refused to suborn the inherent futility in allowing charges to go to the jury for which the defendant cannot be punished. *See State v. LaPlante*, 117 N.H. 417 (1977) (cited by the trial court below). In *LaPlante*, the defendant requested a lesser included instruction on attempted manslaughter and then, after conviction, argued for reversal on appeal that, as such a crime did not exist, his conviction must be reversed. This Court unequivocally rejected the defendant's effort to employ his lesser included instruction right to frustrate the jury system, stating 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." *Id.*

The due process logic of *LaPlante* guides the analysis of the waiver the defendant challenges in this appeal. Similar to the defendant in *LaPlante*, the defendant in this appeal sought to use the lesser included instruction to escape all liability by enticing the unwitting jury into convicting him for a nonexistent crime. The defendant requested the instruction for simple possession, a crime from which the defendant and trial court acknowledged he was immune, and the defendant objected to the required immunity waiver, arguing that if convicted of possession, a conviction and sentence would enter that the defendant would then appeal. *See* T3 at 493 ("If they find him guilty of the possession, at that point, we understand the Court may say, well, I'm going to – you've been found guilty, the guilty verdict stays in place. At some point, you'll be sentenced on it, but that then in part two becomes, you know, an appeal issue. The

State will still get its guilty finding – a sentence, but it would allow Mr. Eldridge the opportunity to appeal the situation, you know, should the verdict have been set aside or not."). Had the trial court acceded to the defendant's request to give the lesser included instruction without requiring a waiver, the situation before this Court would have been identical to that in *Laplante*: the defendant would have succeeded in obtaining an instruction for a crime he would then seek to reverse on appeal on the basis of immunity. *Id*. The defendant, in essence, similar to the *Laplante* defendant, sought to have his cake and eat it too. As in *Spaziano*, while a defendant generally has a right to a lesser included jury instruction, that right yields when it would result in an irrational process.

To the extent that it does not govern the state due process analysis, *Spaziano* guides it. *See Commonwealth v. Shelley*, 80 N.E.3d 335, 338 (Ma. 2017)(referred to by the trial court below). *Shelley* rejected a state due process challenge to a trial court's condition of a lesser included instruction upon waiver of a statute of limitations defense to that lesser included charge. *Id.* at 338 ("We conclude that due process in Massachusetts does not require more than the Federal rule articulated in *Spaziano*."). The Supreme Judicial Court of Massachusetts agreed, under the Massachusetts Constitution, that requiring the waiver of immunity following a request for the lesser included instruction "[struck] the best balance between protecting the rationality of the [jury] process and a defendant's due process rights." *Id.* at 338. The Supreme Judicial Court of Massachusetts observed that, to ask the jury to deliberate on a charge for which the defendant could not be convicted, would mislead them, lead to an irrational process, and possibly "have the deleterious effect of undermining the jurors' faith in the court

system." *Id*. at 339. The *Shelley* Court concluded that "due process as a matter of State constitutional law does not require a judge to deceive the jury by instructing them on a lesser included offense for which the defendant cannot be found guilty." *Id.* at 338-39.

This Court frequently looks to Massachusetts' interpretation of its constitution in analyzing New Hampshire constitutional issues. In light of the similarity of the due process constitutional provisions in New Hampshire and Massachusetts, the *Shelley* holding is especially significant. *See Opinion of the Justices*, 143 N.H. 429 (1999) ("Because much of the New Hampshire Constitution was taken from the Massachusetts Constitution, this court gives weight to interpretations of relevant portions of the Massachusetts Constitution when interpreting similar New Hampshire provisions.").

The *Shelley* court, as well as the trial court, affirmatively rejected the alternative approaches outlined in *State v. Short*, 618 A.2d 316 (N.J. 1993) (defendant did not have to waive statute of limitations defense and jury deliberated on the lesser included charge without knowledge of the defendant's immunity) and *State v. Delisle*,[4] 648 A.2d 632 (Vt. 1994) (defendant did not have to waive statute of limitations defense and jury was told that the defendant had a defense to the lesser included). The trial court correctly balanced the right to a lesser included instruction and the need for a rational jury process not built on fiction and deception. *Spaziano*, 466

[4] The *Delisle* approach should not be considered. Instructing the jury on the lesser included crime, while also instructing them that if they elect to convict on the lesser included the defendant will not be punished, "all but invite[s] the jury to disregard the [lesser included] instruction." *Short*, 618 A.2d at 316.

U.S. at 456 (emphasizing that the right to a lesser included instruction "does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice."); *Shelley*, 80 N.E.3d at 338-39 ("[D]ue process as a matter of State constitutional law does not require a judge to deceive the jury by instructing them on a lesser included offense for which the defendant cannot be found guilty."). The court in *Short*, whose rule the defendant urges, rejected the reasoning of *Spaziano*, stating "*Spaziano* overlooks the fundamental injustice entailed in forcing a defendant to choose between two critical substantive rights." *Short*, 618 A.2d at 323. But the *Short* Court overlooks a critical, third interest that *Spaziano* identified, namely, that given the overarching importance of preserving the rationality of the jury process, the proper balance allows the defendant a choice rather than hold that in all instances defendants may not be entitled to lesser included instructions where they have a defense to the lesser included crime. 468 U.S. at 456.

Nothing about *Spaziano's* and *Shelley's* reasoning is remarkable in the sense that due process routinely allows these types of choices in other instances. For example, a defendant who chooses to exercise his right to testify in his own defense cannot then invoke his right against self-incrimination when cross-examined by the prosecutor on matters relevant to the crime charged. Additionally, a defendant who chooses an attorney with a conflict must choose between their right to counsel of their choice and the right to an attorney of undivided loyalty. *See United States v. Stein,* 410 F. Supp. 2d 316, 323 (S.D. New York 2006). In each of these instances, defendants must elect among important rights by way of balancing their interests against preservation of the integrity of the judicial

process. In short, a defendant should not be allowed to manipulate his rights to create situations that allow him to have it both ways.

Spaziano also clarifies the reality of the "choice" outlined in *Short* that ultimately justified the *Short* court's decision to allow for a lesser included instruction where the defendant has an absolute defense to the lesser included charge. *Spaziano*, 468 U.S. at 455. The *Spaziano* Court had "no quarrel with [the defendant's] general premise that a criminal defendant may not be required to waive a substantive right as a condition for receiving an otherwise constitutionally fair trial." *Id*. Where the Court took issue, and where the reasoning of *Short* fails, is that the lesser included instruction alone is not what is essential to a fair trial; it is "the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." *Id*. Viewed through the correct analytical lens, a lesser included instruction only makes sense where it enhances the rationality of the jury's deliberations. To give a lesser included instruction where the defendant has a defense to the lesser included crime is an empty exercise and injects a level of irrationality into the jury process that leads to a loss of confidence in the jury system.

Here, where the defendant had an absolute defense to the crime of possession of a controlled drug, to have instructed on that crime without obtaining a waiver of the immunity from the defendant would have injected irrationality into the jury's deliberations, that properly overrode whatever right the defendant could claim to two statutory rights. The right to the lesser included instruction is not absolute, nor does it exist in a vacuum. The ability to exercise that right depends upon, and must be accompanied by, a level of rationality and reasonability that is undermined when a jury is

asked to deliberate on crimes which do not exist for purposes of the particular defendant. *Id*. at 455-56. The distinction between *Spaziano* and *Short*, in terms of whether a jury is informed of or considers the punishment of a particular charge is, by the *Short* court's own description, "a subtle distinction", and was not the focus of the decision in *Spaziano*. 618 A.2d at 323. Rather, the *Spaziano* Court focused on the rationality of not having juries deliberate on crimes that do not, for the purpose of the particular defendant, exist, and the potential social costs in terms of undermining juries' faith in the system. 468 U.S. 455-56.

The trial court's requirement of the defendant to waive the immunity defense as a condition to a lesser included instruction meets federal due process standards (*Spaziano*), and best serves New Hampshire due process in light of *LaPlante*, buttressed by Massachusetts' construction of Massachusetts due process (*Shelley*). While defendants are generally entitled to a lesser included instruction, that right is not absolute, but must be balanced against the interests of preserving the rationality and reliability of the jury process. Here, as in *Spaziano* and *Shelley*, the defendant could not be convicted of the lesser included charge of simple possession. Federal due process does not require "that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty." *Spaziano*, 447 U.S. at 456. New Hampshire state due process should not require the deception that federal due process rejects. *Shelley*, 80 N.E.3d at 338-39 ("due process as a matter of state constitutional law does not require a judge to deceive the jury by instructing them on a lesser included offense for which the defendant cannot be found guilty."). To have asked the jury

to deliberate on the lesser included charge would have been irrational and is not required by due process.

Finally, the defendant argues, based on the language of RSA 318-B:28-b, III which precludes conviction for possession of a controlled drug, that the trial court erred because a defendant who meets the statute's immunity requirements cannot be convicted of possession. But, as mentioned above, defendants routinely waive rights and defenses to which they are otherwise constitutionally or statutorily entitled, consistent with due process. *See State v. Labrie*, 171 N.H. 475 (2018) (waiver of right to confront); *State v. Ploof*, 165 N.H. 113 (2013) (waiver of right to be present at trial); *State v. Blomquist*, 153 N.H. 216 (2006) (waiver of right to bifurcated trial); *State v. Gordon,* 148 N.H. 681 (2002) (waiver of right to jury trial); *State v. Justus*, 140 N.H. 413 (1995) (waiver of right to speedy trial); *State v. Plante*, 133 N.H. 384 (1990) (waiver of *Miranda* rights); *State v. Ward*, 118 N.H. 874 (1978) (waiver of right to counsel); *State v. Herbert*, 108 N.H. 332 (1967) (waiver of indictment); *Acevedo-Ramos v. U.S.*, 961 F.2d 305 (1st Cir. 1992) (waiver of statute of limitations). Nothing in the language of RSA 318-B:28-b, III makes the immunity unwaivable or prohibits defendants from waiving. By itself, therefore, the defendant's argument does not comport with the actual statutory language, and, in light of the above discussion regarding the balancing of rights, the trial court properly allowed the defendant the choice of waiving the immunity or not receiving the lesser included instruction.

III. The trial court properly denied the defendant's motion to suppress the evidence obtained from the defendant's apartment because the officers entered the apartment pursuant to the emergency aid exception to the warrant requirement.

The trial court properly found that Concord Police Department Officers were justified in entering the defendant's apartment to assist with the defendant's drug overdose pursuant to the emergency aid exception to the warrant requirement. Based on the testimony of Officers Gorham and Levesque, the trial court found that the facts supported the officers' entry without a warrant in light of "objectively reasonable grounds that there [was] an emergency at hand and an immediate need for their assistance for the protection of life or property." *State v. MacElman*, 149 N.H. 795, 798 (2003). "When reviewing a trial court's ruling on a motion to suppress, [this Court] accept[s] the trial court's factual findings unless they lack support in the record or are clearly erroneous. [This Court's] review of the trial court's legal conclusions, however, is *de novo*. *State v. Rodriguez*, 157 N.H. 100, 103 (2008). For the reasons discussed below, this Court must affirm the trial court's ruling.

Part I, Article 19 of the New Hampshire Constitution prohibits "unreasonable searches and seizures of [an individual's] person, [their] houses, [their] papers, and all [their] possessions. N.H. Const. pt. I, art. 19. "A warrantless search is *per se* unreasonable and invalid unless it comes within one of a few recognized exceptions." *State v. Cora*, 170 N.H. 186, 190 (2017). "The search of a home is subject to a particularly stringent warrant requirement because the occupant has a high expectation of privacy." *State v. Pseudae*, 154 N.H. 196, 199 (2006). "The State bears the

burden of proving by a preponderance of the evidence that such an entry falls within one of these exceptions." *State v. Gay*, 169 N.H. 232, 240 (2016).

In this case, the officers lawfully entered the home pursuant to the emergency aid exception to the warrant requirement. The emergency aid exception requires the State to show that:

> (1) the police have objectively reasonable grounds 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.

MacElman, 149 N.H. at 798.

The standard of objectively "[r]easonable grounds is a lower standard than the probable cause required for an ordinary search or seizure." *Id*. at 799. Additionally, "[the] emergency aid exception's defining characteristic is urgency, not the existence of criminal conduct, and there is no logical need to additionally consider probable cause." *State v. Ball*, 185 A.2d 21 (D.C. App. 2018) (citations omitted). In *Brigham City, Utah v. Stuart*, the United States Supreme Court found that serious injury or a need for medical attention constitutes grounds for the "protection of life or property", holding:

> One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

547 U.S. 398, 403 (2006) (citations omitted).

At the time of the 911 call, the New Hampshire 911 system operated under an internal policy that required police and ambulance notification. AD 6-7; SH2 72. The police responded to a 911 call stating that the defendant was not conscious, not breathing, and turning purple. AD 4; SH1 5-6. Those statements gave the police an "objectively reasonable ground [to believe] that there [was] an emergency at hand…" *MacElman*, 149 N.H. at 798. In fact, the defendant's girlfriend's description suggested cardiac arrest. AD 7, SH2 53. *See Stricker v. Cambridge*, 710, F.3d 350, 359—60 (6th Cir. 2013) ("[A] 911 call on behalf of an injured party and affirmative evidence that someone may be or could be hurt can each contribute substantially to an objectively reasonable belief in the existence of a medical emergency."); *Wilson v. San Francisco*, No. C-95-2165, 1996 WL 134919, at *2 (N.D. Cal. March. 18, 1996) ("[I]f the 9-1-1 system is to serve its purpose of providing the public with prompt assistance in emergencies, responding officers should not be deterred from treating situations to which they are called as emergencies." (citing *United States v. Warden*, 886 F. Supp. 813, 817 (D. Kan. 1995)). And, while "overdose is not a talisman that authorizes warrantless searches[,] [s]ome reported overdoses will involve emergencies that justify a warrantless search." *Bray v. Texas*, 597 S.W.2d 763, 768 (Tex. Crim. App. 1980).

Under the second prong of the emergency aid exception, "the State must prove that the police had an objectively reasonable basis, approximating probable cause to believe that the emergency was associated with the area to be searched." *MacElman*, 149 N.H. at 799. Concord police

officers and emergency medical personnel had probable cause to believe that the defendant was in the apartment based on the 911 call from the defendant's girlfriend. AD 4; SH1 5-6. The defendant was in the apartment, and, therefore, the emergency was intimately associated with the apartment.

The third prong requires a showing that the search or entry was not "*primarily* motivated by intent to arrest and seize evidence." *MacElman*, 149 N.H. at 799 (emphasis added). Here, officers were dispatched, and made entry, pursuant to a standing policy of the New Hampshire 911 System that stated, "An unattended death will have police notification, in addition to an ambulance response." AD 6-7; SH2 72. The defendant's condition, as described by his girlfriend, qualified as an unattended death for purposes of the policy. AD 7; SH2 53. The trial court also found that, "the police presence [was] necessary to not only attend to the immediate emergency, but also to secure the scene and protect Concord Fire Department and others from dangers commonly associated with responding to overdose calls or being present in an apartment where drug use occurs." AD 11.

In contesting that the State's evidence meets this prong, the defendant argues that this situation called for an abandonment of that policy, that the police officers offered nothing in terms of the medical emergency, and that any security function provided by law enforcement was unnecessary. Policies, such as the one described above, exist, in part, to ensure the safety of the responding medical personnel. While the defendant points in hindsight to the lack of security issues in this particular situation as evidence that the police entered the apartment impermissibly, the benefit

of hindsight was obviously not available to these responders, nor do we know how the situation may have been different had law enforcement not been present. What the record does reflect is that, after being revived by emergency medical personnel, the defendant was alert and oriented enough to the point that he was able to leave the apartment. AD 5-6; SH2 127; SH2 156. The apartment contained weapons, ammunition, significant cash, and drugs sufficient for the trial court to find that the defendant presented a risk of physical harm to responding emergency personnel once he became conscious and aware that strangers, whom he had not invited, were inside his apartment where he had stored his illegal contraband. *See People v. Simpson*, 65 Cal. App. 4th 854, 862 (1998) ("Particularly where large quantities of illegal drugs are involved, an officer can be certain of the risk that individuals in possession of those drugs, which can be worth hundreds of thousands and even millions of dollars, may choose to defend their livelihood with their lives…"). This is not a situation such as *Bray v. State*, 597 S.W.2d 763 (Tex. Crim. App. 1980), in which law enforcement arrived after emergency medical personnel had attended to the individual and were in the process of leaving. Nor is it similar to *State v. Pseudae*, 154 N.H. 196, 201-02, in which the person requiring assistance was already in custody when police arrived. Instead, law enforcement and emergency medical personnel arrived simultaneously, and law enforcement stayed on scene, pursuant to a standing policy and to serve a security purpose while emergency medical personnel attended to the defendant. Finally, the trial court also found that while the law enforcement personnel on scene did not provide medical aid to the defendant, they would have if necessary. AD 11; SH1 14. Ample evidence supported the trial court's determination that the

law enforcement personnel on scene were not "primarily motivated by intent to arrest and seize evidence", but rather to aid and provide security. *MacElman*, 149 N.H. at 800.

While this Court has articulated that the search or entry cannot be "primarily motivated by intent to arrest and seize evidence", the United States Supreme Court has elaborated on that prong as it relates to the subjective intent of the officers involved. *Id*. In *Brigham City*, in which the court upheld a warrantless entry under the emergency aid exception, the United States Supreme Court held that, "An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action." *Brigham City*, 547 U.S. at 404 (quotations omitted). That Court, in declaring the entry lawful, noted that, "It therefore does not matter here — even if their subjective motives could be so neatly unraveled — whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence." *Id*. at 405. Applying that standard to these facts, even assuming that the New Hampshire 911 policy and providing security were second to searching for evidence of a crime, "the officer's subjective motivation is irrelevant." *Id*. at 404.
In this instance, the police were justified in entering the defendant's apartment based on their objectively reasonable belief that someone in the apartment needed assistance. When officers entered the defendant's apartment, they were acting reasonably pursuant to the emergency aid exception to the warrant requirement, and in accordance with New Hampshire 911 Policy.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

THE STATE OF NEW HAMPSHIRE

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October 15, 2019

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CERTIFICATE OF COMPLIANCE

I, Danielle H. Sakowski, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,574 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 15, 2019

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CERTIFICATE OF SERVICE

I, Danielle H. Sakowski, hereby certify that a copy of the State's brief shall be served on Christopher M. Johnson, Chief Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

October 15, 2019

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