THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0588

State of New Hampshire

v.

Amuri Dioli

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

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTION PRESENTED

Whether the trial court erred by denying Mr. Diole's request for a jury trial, including the application of the rules of evidence and statutory privileges, to determine whether he committed a sexually violent offense pursuant to RSA 135-E:5.

Issue preserved by motion of the defendant dated September 13, 2022 and denied by the trial court on September 19, 2022 by written order. App. 6-12, A32.*

* Citations to the record are as follows:
"A" refers to the addendum attached to this brief, containing the order from which Diole appeals;
"App." refers to the separate appendix to this brief, containing other relevant documents;

STATEMENT OF THE CASE

On March 29, 2021, Mr. Diole was arrested and charged with multiple counts of Aggravated Felonious Sexual Assault ("AFSA"). Trial counsel raised the issue of whether Mr. Diole was competent to stand trial. After an evidentiary hearing, the trial court (Nicolosi, J.) ruled that Mr. Diole was not competent to stand trial, not restorable within the statutory time period and dangerous.

Prior to Mr. Diole's release, on July 22, 2022, the State filed a petition to certify Mr. Diole as a sexually violent predator under RSA chapter 135-E. Pursuant to RSA 135-E:5, the court scheduled a hearing to determine whether Mr. Diole had committed a sexually violent offense. On September 13, 2022, Mr. Diole's counsel filed a motion seeking a jury determination of whether he had committed a sexually violent offense. Mr. Diole also requested that the rules of evidence apply at his trial. On September 19, 2022, the trial court denied Mr. Diole's motion in a written order.

On September 20 and 21, 2022, the trial court held a bench trial. On September 27, 2022, the trial court issued an order finding that the State proved that Mr. Diole committed AFSA beyond a reasonable doubt and further finding that Mr. Diole's incompetence did not affect the outcome of the proceeding. The trial court proceedings were stayed pending this appeal.

STATEMENT OF THE FACTS

At the RSA 135-E:5 hearing, the complainant, C.G., testified to the following facts:

On April 29, 2021, C.G. was living at a shelter on Lake Avenue in Manchester. App. 28. That afternoon, C.G. walked from the shelter to the Don Quijote restaurant on Union Street to purchase food. *Id.* at 29. Prior to entering the restaurant, a man she did not know, later identified as Mr. Diole, approached her and asked if she wanted heroin. *Id.* at 31. C.G. replied that she did not want heroin but asked if Mr. Diole had any marijuana. Mr. Diole said that he did and lit a "blunt" as he spoke with C.G. They agreed to walk to a nearby park to smoke marijuana together. *Id.* at 31-33.

Before going to the park, C.G. entered the restaurant to order food while Mr. Diole waited outside. When she emerged from the restaurant, the two began walking to the park. Once they reached the park, C.G. noticed a knife protruding from the pocket of Mr. Diole's sweatshirt. Upon seeing the knife, C.G. told Mr. Diole that she had to leave. *Id.*

At that point, Mr. Diole allegedly grabbed C.G., put the knife to her throat, dragged her across the street and forced her into the nearby Valley Street Cemetery. C.G. alleges that Mr. Diole then took her behind a mausoleum and sexually assaulted her. The assault lasted for hours, according to C.G., during which time, Mr. Diole stopped at one point and

began to laugh, telling C.G. that he "liked her big toe." App. at 41. C.G. alleges that she was able to break away from him on multiple occasions during this assault, but Mr. Diole would catch up with her after each escape, then physically assault her and resume the sexual assault. *Id.* at 42-45.

Finally, C.G. was able to retrieve her cell phone and call 911. *Id.* at 47. Manchester Police units ("MPD") arrived on scene soon after and located C.G., unclothed from the waist down, close to the entrance of the cemetery. *Id.* at 85. MPD located Mr. Diole shortly thereafter and arrested him without incident. *Id.* at 92.

Mr. Diole remained at Hillsborough County House of Corrections during the pendency of the criminal case. He was ultimately found incompetent to stand trial. His detention continued after the State petitioned to declare him a sexually violent predator pursuant to chapter 135-E. *Id.* at 4-5.

SUMMARY OF THE ARGUMENT

1. RSA 135-E:5 violates the due process clauses of the state and federal constitutions by subjecting incompetent defendants to a legal determination that they have committed a sexually violent offense without a jury trial, the protections of medical privilege, and the safeguards of the rules of evidence.

2. RSA 135-E:5 violates the equal protection clauses of the state and federal constitutions by denying incompetent defendants the right to a jury trial, protections of medical privilege, and the safeguards of the rules of evidence, which are afforded to all competent defendants.

I. RSA 135-E:5 VIOLATES DUE PROCESS

The United States Constitution guarantees that "no State shall… deprive any person of life, liberty, or property, without due process of law." *U.S. Const. amend. XIV*. The New Hampshire Constitution guarantees that "[n]o subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgement of his peers or the law of the land." *New Hampshire Const. Pt. 1 Art. 15*.

RSA 135-E:5 fails to meet these constitutional requirements.

A. <u>The Statutory Scheme</u>

In order to be declared a sexually violent predator, a defendant must be convicted of a sexually violent offense. *See* RSA 135-E:2, XII(a) (defining the term "sexually violent predator."). In order to be "convicted" of a sexually violent offense a defendant must be:

(a) Adjudicated guilty of a sexually offense after a trial, guilty plea, or plea of nolo contendere;

(b) Adjudicated not guilty by reason of insanity of a sexually violent offense; or

(c) Found incompetent to stand trial on a charge of a sexually violent offense and the court makes the finding required pursuant to RSA 135-E:5.

RSA 135-E:2, III.

Where a defendant has been declared incompetent to stand trial, RSA 135-E:5, I allows the State to detain the defendant for up to 90 days pending a hearing under that section. RSA 135-E:5 does not provide for a jury trial. Instead, at the RSA 135-E:5 hearing, the trial court must determine whether the defendant committed a sexually violent offense beyond a reasonable doubt. RSA 135-E:5, II lays out the procedure for that hearing:

> "The court shall first hear evidence and determine whether the person did commit the act or acts charged. *The hearing on this issue shall comply with all the procedures specified in this section.* After hearing evidence on this issue, *the court shall make specific findings on whether the person did commit the act or acts charged beyond a reasonable doubt*. In determining whether the state has met its burden, the court shall consider the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including the person's ability to assist his or her counsel by recounting the facts, identifying witnesses, testifying in his or her own defense, or providing other relevant information or assistance to counsel or the court. If the person's incompetence substantially interferes with the person's ability to assist his or her counsel, the court shall not find the person committed the act or acts charged unless the court can conclude beyond a reasonable doubt that the acts occurred, and that the strength of the state's case, including physical evidence, eyewitness testimony, and corroborating evidence, is such that the person's limitations could not have had a substantial impact on the proceedings. If, after the conclusion of the hearing,

> the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable to the supreme court on that issue. *If the person appeals, the person shall be held in an appropriate secure facility.* If the person does not appeal or if the appeal is unsuccessful, the court shall proceed as specified in this section.
>
> RSA 135-E:5, II. (emphasis added).

In addition to the procedural framework described in RSA 135-E:5, hearings under that section are also controlled by RSA 135-E:10, which applies to all 135-E proceedings. *See* RSA 135-E:10 (indicating that the rules and procedures described therein apply "in all civil commitment proceedings for sexually violent predators under this chapter."). Per RSA 135-E:10, I and II:

> I. The rules of evidence, doctor-patient privilege under RSA 329:26, privileges communications pursuant to RSA 330-A:32, or other similar statutes or rules shall not apply in proceedings under this chapter.
>
> II. The court may consider evidence of the person's prior conduct if such conduct is relevant to the issue of whether the person is a sexually violent predator.

Accordingly, pursuant to the plain language of 135-E:10, a trial court *may not* apply the rules of evidence at a

hearing under 135-E:5. On the other hand, the trial court *may* accept evidence that would otherwise be protected by medical privilege and *may* consider the defendant's prior criminal history in determining whether they committed the sexually violent offense in question.[1]

The above statutory scheme allows the State to hold a defendant for up to 90 days prior to a 135-E:5 hearing. *See* RSA 135-E:5, I. If the court enters a finding that the defendant committed the acts alleged, the defendant will continue to be detained pending appeal of that order. *See* RSA 135-E:5, II. Further, if a defendant declines to appeal the 135-E:5, II finding of guilt, he can continue to be detained. *See* RSA 135-E:5, III; *see also* RSA 135-E:7. As a practical matter, however, any finding under 135-E:5, II generally must be appealed by the defendant's counsel because the defendant will be unable to knowingly waive such an appeal given his or her incompetence. In any RSA 135-E:5 proceeding, therefore, a defendant's liberty is at stake.

Only after a finding that a defendant has committed a sexually violent offense may he be brought to trial on the ultimate issue: whether he is a sexually violent predator. *See* RSA 135-E:2, XII; *see also*, RSA 135-E:9. The defendant may

[1] Though the above challenge is lodged as a facial challenge to the statute respondent notes that in this case the trial court ruled that the rules of evidence did not apply and prior conduct could be considered. *See* Trial Court Order Aug. 30, 2022 at p.2 [App. 3-5].

request a jury decide whether he is a sexually violent predator. RSA 135-E:9, I.

B. The Requirements of Due Process

Liberty cannot be restricted without due process of law. The procedures set forth in 135-E:5 and 135-E:10 violate incompetent defendants' state and federal rights to due process.

RSA 135-E:5, in combination with RSA 135-E:10, violates due process protections in four ways. First, the statute permits a "conviction" without a trial by jury. Second, the statute denies defendants the application of the rules of evidence. Third, the statute denies defendants the protection of medical and/or therapist privilege. Fourth, the statute allows a conviction based upon propensity evidence.

Where a defendant challenges a statute on procedural due process grounds, this court considers three factors: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest. *See In re Eduardo L.,* 136 N.H. 678, 686 (1993). As to the first factor, this court has previously held that "the private interests at stake in civil commitment proceedings, loss of liberty and social stigmatization, are substantial and parallel those at risk in the criminal context." *In re Richard A.*

146 N.H. 295, 298 (2001). Where, as here, the private rights at stake are substantial, this court "weigh[s] the second factor, risk of erroneous deprivation of those interests, against the third factor, the government's interest." *State v. Ploof*, 162 N.H. 609, 619 (2011).

i. Failure to provide a jury trial

135-E:5 violates defendant's due process rights by failing to provide a jury trial. The jury trial right is fundamental to American democracy. Moreover, in the words of Blackstone, trial by jury is the "palladium" of justice and the institution best "adapted and framed for the investigation of truth." 3 *William Blackstone Commentaries 355* (The Legal Classics Library Special Edition 1765-1769).

Nevertheless, this court has previously approved the denial of jury trials in civil commitment proceedings. For example, *In Re Sandra H.*, 150 N.H. 634, 637 (2004) this court held that the State Constitution guarantees the right to a jury trial only where that right existed at the time of its adoption in 1784. In turn, the court found that jury trials were not required during involuntary commitments at the time of the founding. *Id.* As a result, the *Sandra H.* court held that jury trials are not required in commitment proceedings under chapter 135-C. *Id.* This holding, however, is distinct from the scenario at bar.

Unlike civil commitment under 135-C, the determination made in an RSA 135-E:5 hearing is quasi-criminal. Here, the factfinder determines whether the defendant is guilty or innocent of a sexually violent offense. There is a direct historical analogue to such a hearing: the criminal jury trial. Further, unlike a civil commitment proceeding under RSA 135-C, proceedings under RSA 135-E are open to the public. *Compare e.g.,* RSA 135-C:43 *with* RSA 135-E:15; *c.f. State v. Hudson*, 121 N.H. 6, 12 (1981) (indicating due process requirements are higher when dealing with "a person's liberty interests and his good name."). Additionally, the liberty interest at stake in SVP proceedings is greater than the liberty interest at stake in a 135-C proceeding. *Compare* RSA 135-C:57 (requiring treatment in the "least restrictive environment necessary to achieve the purposes of the treatment") *with* RSA 135-E:11, II (requiring that persons deemed SVP shall be held "at the secure psychiatric unit of the New Hampshire state prison or other similar facility controlled or contracted by the department of corrections").

This court has previously held that though "the private interests at stake in civil commitment proceedings parallel those at risk in the criminal context, [due process] does not compel identical procedural safeguards under the State Constitution." *Ploof*, 162 N.H. at 620 *citing Richard A.*, 146

N.H. at 298. In so deciding, the court explained that "[b]ecause the primary focus of an involuntary commitment proceeding is the mental condition and dangerousness of the person sought to be committed *rather than determination of guilt or innocence*, the full range of protections afforded by the State and federal due process provisions does not come into play." *Id.* (emphasis added). Contrastingly, here, the purpose of an RSA 135-E:5 hearing *is* to determine guilt or innocence. The conclusion of such a hearing may result in a conviction for purposes of 135-E and a public finding that the defendant has committed a sexually violent act.

Further, it cannot be said that the "primary focus," of a sexually violent predator commitment is "the mental condition and dangerousness of the person sought to be committed." *Id.* To be deemed a sexually violent predator, a defendant must meet two distinct criteria: i) be convicted of a sexually violent offense and ii) suffer from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, or treatment. RSA 135-E:2, XII. The statue, therefore, places the finding of guilt on equal footing with the defendant's mental condition and future dangerousness. As such, the defendant must be afforded a jury to make both determinations. *Compare* RSA 135-E:5, II (mandating a bench trial) *with* RSA 135-E:9, I

(providing a jury trial); *see also*, *In Re Detention of Greenwood*, 130 Wash. App. 277, 280 (2005) (noting incompetent defendant received jury trial to determine guilt or innocence under analogous Washington statute RCW 71.09.060(2)).

Given that the purpose of an RSA 135-E:5 hearing is to adjudicate an incompetent defendant's guilt or innocence, he must be afforded the most foundational due process protection: a trial by jury.

ii. Abrogation of the Rules of Evidence

RSA 135-E:10 prohibits the trial court from applying the rules of evidence at an RSA 135-E:5 hearing in violation of defendant's due process rights. *Compare* Mass. G.L. c. 123A § 15(vii) (affording incompetent defendants protection of the rules of evidence in analogous hearings). The United States Supreme Court has held that an individual's liberty interest may be overridden, even in a civil proceeding, only if "the confinement takes place pursuant to proper procedures and evidentiary standards." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

In *State v. Ploof*, the defendant argued that his due process rights were violated because he was not afforded the protection of the rules of evidence during his trial as to whether he was a sexually violent predator. *Ploof*, 162 N.H. at 620; *see also* RSA 135-E:9. This court affirmed, stressing that *Ploof* was not entitled to procedures identical to the

criminal process "because the primary focus of an involuntary commitment proceeding is the mental condition and dangerousness of the person sought to be committed rather than the determination of guilt or innocence." *Id.* Here, the focus of a 135-E:5 proceeding *is* the determination of guilt. Accordingly, defendants must be afforded the protection of the rules of evidence.

The *Ploof* court also held that, although the rules of evidence did not apply, the trial court's finding was reliable because the trial court maintained the inherent authority to limit evidence to that which was relevant and reliable. *Id* at 621. The logic of *Ploof* does not apply to the determination of guilt or innocence at issue in this case.

Abrogating the rules of evidence is logical in the context of a 135-E:9 hearing to determine whether a defendant "[s]uffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." RSA 135-E:2, XII(b). In this context, the phrase "likely to engage in acts of sexual violence," means "the person's *propensity* to commit acts of sexual violence is of such a degree that the person has serious difficulty in controlling his or her behavior as to pose a potentially serious likelihood of danger to others." RSA 135-E:2, VI (emphasis added). In the 135-E:9 context, the

factfinder, must therefore hear evidence concerning the defendant's mental health diagnoses and prior criminal history. Indeed, in the 135-E:9 context, the law explicitly *requires* the fact finder to consider this propensity evidence. *Id.* As a result, the rules of evidence and protections of medical privilege cannot apply in a 135-E:9 hearing.

Contrastingly, in a 135-E:5 hearing, the factfinder can determine guilt or innocence without resort to propensity evidence. In fact, in order to comport with due process, such determinations *must* be made without consideration of propensity evidence. Our criminal law forbids the use of propensity evidence to convict. In determining guilt or innocence, Rule 404(b) ensures a defendant will not be convicted based upon propensity evidence. That rule "is grounded in long-established notions of fair play and due process, which forbid judging a person on the basis of innuendoes arising from conduct which is irrelevant to the charges for which he or she is presently standing trial." *State v. Melcher,* 140 N.H. 823, 827 (1996).

Despite the differing missions of a 135-E:5 hearing and a 135-E:9 hearing, 135-E:10 makes no distinction between them. RSA 135-E:10 ("The rules of evidence, the doctor-patient privilege … shall not apply to proceedings under this chapter."). *Ploof* establishes that in chapter 135-E proceedings, the trial court may only exclude evidence that is

not relevant or reliable. As a result, at a 135-E:5 hearing, the trial court would be required to admit propensity evidence so long as it is relevant and reliable. For example, in a 135-E:5 hearing to determine whether the incompetent defendant committed AFSA by subjecting a person under the age of 13 to sexual penetration, a prior conviction for misdemeanor sexual assault for subjecting a person under the age of 13 to sexual contact would be admissible.[2]

Allowing propensity evidence runs contrary to basic notions of fair play and due process. Further, the admission of prior acts evidence risks "an erroneous deprivation" of defendants' liberty. While the government has a compelling interest in identifying and treating sexually violent predators, it does not have a compelling interest in identifying them through biased and inaccurate processes. RSA 135-E:5 violates due process by failing to provide defendants the protections of the rules of evidence.

iii. Abrogation of Medical and Therapist Privileges

Similarly, RSA 135-E:5 proceedings violate due process by abrogating the medical and therapist privileges. RSA 135-E:10 states that, "the doctor-patient privilege under RSA 329:26, privileged communications pursuant to RSA 330-

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[2] A misdemeanor sexual assault under RSA 632-A:4 is not a "sexually violent offense," for the purposes of RSA 135-E:3, XI.

A:32, or other similar statutes or rules shall not apply in proceedings under this chapter." *See also*, N.H. R. Evid. 503 (establishing patient's privilege under the rules of evidence). By abrogating the medical and therapist privileges, the statutory scheme again allows for defendants to be convicted of a sexually violent offense based upon propensity evidence.

For example, a defendant might through the course of mental health treatment – even court-ordered mental health treatment – be diagnosed with a paraphilic disorder or cluster B personality disorder. That diagnosis could in turn be used as substantive evidence of guilt at a 135-E:5 hearing to prove that the defendant committed a sexually violent offense.

Reading *Ploof* and RSA 135-E:10 together, if a defendant received such a diagnosis from a reputable provider, he would be unable to object to the diagnosis' admission given the evidence would be relevant and reliable. As with the abrogation of the rules of evidence discussed above, allowing this propensity evidence to convict runs contrary to basic notions of fair play and due process.

II. RSA 135-E:5 VIOLATES EQUAL PROTECTION

The Fourteenth Amendment to the United States Constitution and Part I, Articles 1, 12, and 14 of the New Hampshire Constitution demand equal protection under the law. Here, the statutory scheme violates incompetent defendants' rights to equal protection by affording lesser procedural protections to incompetent persons than to competent persons. Specifically, chapter 135-E allows competent persons to be declared a sexually violent predator only after being afforded a jury trial, the rules of evidence and and protection of medical privilege to determine if they have committed a sexually violent offense. Contrastingly, incompetent persons can be convicted of a sexually violent offense after a bench trial where they are not afforded the protections of the rules of evidence or medical privilege.

The equal protection guarantee is "essentially a direction that all persons similarly situated should be treated alike." *In re Sandra H.*, 150 N.H. 634, 637 (2004) (cleaned up). However, "persons that are not similarly situated need not be treated the same." *Id* at 638.

In assessing an equal protection claim, classifications based upon a suspect class or affecting fundamental rights are strictly scrutinized. *Id* at 637. Discriminatory classifications involving "important substantive rights," are

afforded intermediate scrutiny. *Id* at 638. In all other cases, the court employs the rational basis test. *Id.*

As a threshold matter, the defendant asserts that strict scrutiny should apply here because the disparate treatment affects a fundamental right: the defendant's liberty. The defendant recognizes, however, that this court appears to have adopted a rational basis test in *State v. Ploof.* 162 N.H. at 626-7. Accordingly, the defendant analyzes the disparate treatment under rational basis analysis, a test which the statute fails.

Under rational basis review, the party challenging the statute bears the burden of showing that the statutory classification does not bear a rational relationship to a legitimate state interest. *Id. at 627.* Here, the trial court identified two bases for providing disparate treatment to competent and incompetent defendants. First, the trial court found that "the State has a legitimate interest in identifying SVPs for the protection of the community, regardless of competence to stand trial and arguably more so." A42. Second, the trial court found that the State had an interest in RSA 135-E proceedings occurring "expeditiously," stating, "the State has a legitimate interest in allowing the Court, as the finder of fact, to weigh evidence using a more streamlined process than is provided by the rules of evidence to ensure

that this *preliminary decision*, during which a person may remain in jail, proceeds efficiently." A42 (emphasis added).

Neither rationale validates the statutory scheme. The trial court's observation that the State has a compelling interest in identifying SVPs is not a rationale for disparate treatment. The State's interest in identifying SVPs is independent from the defendant's competency. Further, the State's interest in identifying SVPs is compelling only to the extent that does so accurately. The risk of an erroneous determination is heightened, rather than diminished, where the defendant is incompetent and therefore cannot meaningfully participate in his own defense. As a result, contrary to the statutory scheme, it would be rational to provide incompetent defendants with more, rather than less, procedural safeguards.

The trial court's efficiency rationale also fails. First, there is nothing in the record to support the notion that a bench trial would have been meaningfully more "expeditious," than a jury trial. In this case, in fact, the parties announced that they were prepared for a jury trial.[3] *Id.* Further, in any proceeding under 135-E:5, the defendant's criminal case has necessarily been pending for months prior to the entering a finding that the defendant is not competent and not

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[3] The State later withdrew its assent to a jury trial. However, the State's change in position related solely to a disagreement regarding trial procedure and not on any argument that it would be inefficient to proceed before a jury.

restorable within the statutory timeframe.[4] *See, generally* RSA 135:17-a. In order for such a finding to occur, the defendant must be brought before the court, competency raised by counsel, the defendant examined by the Office of the Forensic Examiner, a report prepared by the examiner, an evidentiary hearing held, and a finding made by the trial court. If, after that entire process, the court enters a finding that the defendant is not competent and not restorable, then the State may move to have the defendant held up to an additional 90 days before an RSA 135-E:5 hearing may occur. *See* RSA 135-E:5, I. In sum, by the time any 135-E:5 hearing occurs, the matter will have been pending for months and the matter will not be meaningfully "expedited" by proceeding with a bench trial rather than a jury trial.

Second, the trial court's rationale for the desirability of a "streamlined," expeditious process rests on a mistaken formulation of the statutory scheme. In reaching its conclusion that a "streamlined," process is rational and desirable in an RSA 135-E:5 hearing, the Court determined: "the State has a legitimate interest in allowing the Court, as finder of fact, to weigh evidence using a more streamlined process than is provided by the rules of evidence to ensure

[4] In this case, for example, Mr. Diole was arrested and charged with AFSA on March 29, 2021. The order that he be held for 90 days pursuant to RSA 135-E:5, I issued on July 11, 2022. If the matter had proceeded to a jury trial on September 26, 2022, as contemplated by the parties, the State would have had more than fifteen months to prepare for a jury trial.

that this *preliminary decision* . . . proceeds efficiently." A42. (emphasis added). As discussed above, the determination that a defendant has committed a sexually violent offense is only "preliminary" to a finding that the person is an SVP in the sense that it occurs prior to any finding regarding the person's mental defect and likelihood to reoffend. Both findings, however, are necessary conditions of being declared a SVP and are of equal import.[5] *See* RSA 135-E:11, I (at SVP trial the State bears the "burden of proving by clear and convincing evidence that the person is a sexually violent predator."); *see also*, RSA 135-E:2, XII (defining sexually violent predator to include the finding that the person has been convicted of a sexually violent offense). Given that the determination made at a 135-E:5 hearing is central to the ultimate SVP determination, the State cannot have any legitimate interest in the hearing occurring expeditiously rather than accurately.

[5] By way of analogy, a probable cause hearing in the criminal courts is a "preliminary hearing," in the sense that it is a hurdle that must be cleared to bring the defendant before the Court but is not determinative of any ultimate issue. The 135-E:5 hearing, on the other hand, requires a determination that is dispositive of 50% of the ultimate issue. *See* RSA 135-E:2, XII(a).

CONCLUSION

WHEREFORE, Mr. Diole respectfully requests that this Court reverse the decision of the Superior Court and remand this matter for a jury trial to include the protections of the rules of evidence as well as medical and therapist privileges.

Undersigned counsel requests 15 minutes of oral argument.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains 4923 words.

Respectfully submitted,

By /s/ Jeffrey D. Odland
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CERTIFICATE OF SERVICE

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

/s/ Jeffrey D. Odland
Jeffrey D. Odland, Esq.

DATED: May 11, 2023

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THE STATE OF NEW HAMPSHIRE

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NORTHERN DISTRICT

SUPERIOR COURT

State of New Hampshire

v.

Amuri Diole

DMN 9/27/22

2022 CV 501
Docket No. 216-~~2015-CR-1382~~

ORDER ON DEFENDANT'S MOTION FOR JURY TRIAL

The defendant, Amuri Diole, was charged with four counts of Aggravated Felonious Sexual Assault ("AFSA"), four counts of Criminal Threatening, and one count each of First Degree and Second Degree Assault. The Court found the defendant not competent to stand trial, not reasonably likely to be restored to competency within 12 months, and dangerous. By Order issued on July 11, 2022, the defendant was detained for up to 90 days to allow the State to seek a civil commitment. Thereafter, on July 25, 2022, the State filed a petition to have the defendant certified as a sexually violent predator ("SVP") under RSA chapter 135-E.

As a preliminary matter, in order for the defendant, as an incompetent defendant, to be certified as an SVP under RSA 135-E:5, the Court must first hear evidence to determine beyond a reasonable doubt whether the defendant committed the four AFSA counts. In reaching its conclusion as to whether the defendant committed the act or acts, the Court must consider "the extent to which [his] incompetence . . . affected the outcome of the hearing." Id.

A hearing is scheduled for September 20 and 21, 2022. In the afternoon on September 15, 2022, the defendant moved for a jury trial, governed by the rules of

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evidence, to determine whether he committed the charged acts. The State was given leave to file an objection by September 19, 2022, and a hearing was held at 3:00 p.m.

At the hearing, the State indicated it had reconsidered and would not object to the jury request. Both parties represented that they were prepared to go forward with selection at the next scheduled draw on September 26, 2022, which the Court could accommodate. The defendant then modified his request and clarified that he sought a bifurcated trial for a jury to determine whether the State had proven the elements of the offense beyond a reasonable doubt, during which the rules of evidence would strictly apply, and leave to the Court the consideration of the extent to which his incompetence affected the hearing. The State, however, objected to bifurcation and to the strict application of the rules of evidence. In light of the lack of agreement on these points, it maintained its objection to the defense motion for jury trial.

Upon review of RSA 135-E:5, with bifurcation in mind, the Court concludes it is not possible or consistent with the statutory mandate. Although the Court engaged in discussion at the hearing about there being two findings to be made—one relating to commission of the acts and one relating to the impact the defendant's incompetency may have had on the process—in fact, only one ultimate conclusion is made: whether the person committed the sexual acts. To that end, the factfinder must consider the impact of the incompetency as part of the totality of the evidence, something only one factfinder can reasonably do.

Having decided that bifurcation is not an option, the Court considers whether Mr. Diole has a jury trial right at all in connection with the preliminary question of whether he

committed of the offense(s). The Court answers this question in the negative for the following reasons.

Legal Standard

"To resolve whether a party has a right to trial by jury in a particular action, [the Court] generally look[s] to both the nature of the case and the relief sought, and ascertain[s] whether the customary practice included a trial by jury before 1784." Gilman v. Lake Sunapee Props., 159 N.H. 26, 30–31 (2009). Under Part I, Article 15 of the New Hampshire Constitution, "[the] right to trial by jury has long been held to be the same as that enjoyed by criminal defendants at common law at the time of adoption of the constitution." Opinion of the Justices (DWI Jury Trials), 135 N.H. 538, 539-540 (1992).

Analysis

"Civil commitment proceedings are civil in nature and of a character unknown at common law. And, in such civil proceedings, unknown to the common law (as distinguished from ordinary civil and criminal cases), the use of a jury is a matter of legislative grant and not of constitutional right." People v. Rowell, 34 Cal. Rptr. 3d 843, 845–46 (Ct. App. 2005). The statute at issue—RSA 135-E:5—provides that, for a person charged with a sexually violent offense who has been found incompetent to stand trial:

> [t]he court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue shall comply with all the procedures specified in this section. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged beyond a reasonable doubt. In determining whether the state has met its burden, the court shall consider the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including the person's ability to assist

> his or her counsel by recounting the facts, identifying witnesses, testifying in his or her own defense, or providing other relevant information or assistance to counsel or the court. If the person's incompetence substantially interferes with the person's ability to assist his or her counsel, the court shall not find the person committed the act or acts charged unless the court can conclude beyond a reasonable doubt that the acts occurred, and that the strength of the state's case, including physical evidence, eyewitness testimony, and corroborating evidence, is such that the person's limitations could not have had a substantial impact on the proceedings. If, after the conclusion of the hearing, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable to the supreme court on that issue. If the person appeals, the person shall be held in an appropriate secure facility. If the person does not appeal or if the appeal is unsuccessful, the court shall proceed as specified in this section.

RSA 135-E:5, II (emphasis added). Thus, under RSA 135-E:5, the Court hears the evidence to determine if the defendant committed the charged acts, and also must consider in make the finding whether his incompetence substantially interfered with his ability to assist his counsel and, if it did, its impact on the hearing.

The statute also does not provide an option for a jury to make the determination, rather than a judge. See State v. Pratte, 158 N.H. 45, 47 (2008) (noting that the Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include").

Finding no purchase in common law or under statute, the defendant argues that, as written, RSA 135-E:5 violates his rights to procedural due process and equal protection under the United States and New Hampshire constitutions. The Court will consider each argument in turn.

I. Procedural Due Process

The defendant first argues that denying him the right to a jury trial, governed by

the rules of evidence, violates his right to procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution, as well as part I, article 15 of the New Hampshire Constitution. In addressing procedural due process claims, the Court considers three factors. See State v. Ploof, 162 N.H. 609, 619 (2011). The Court considers: (1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements. See id.

The balancing of the three factors comes out in the State's favor. First, the Court notes that proceedings under RSA 135-E are not criminal in nature. See id. at 620. Numerous courts interpreting SVP statutes similar to RSA chapter 135-E have found the same. See In re Commitment of Luttrell, 754 N.W.2d 249, 250 (Wis. Ct. App. 2008) (describing civil commitment as meant to protect the public and to treat SVPs, rather than to punish); see also People v. Washington, 287 Cal. Rptr. 3d 352, 362 (Ct. App. 2021). Accordingly, in SVP proceedings, "the full panoply of rights applicable in criminal cases do not apply." Washington, 287 Cal. Rptr. 3d at 359. The potential determination made under RSA 135-E:5 does not lead ineluctably to civil commitment, as the hearing is to determine whether the defendant committed the predicate offense and not whether the defendant should be civilly committed as an SVP, a determination left to a jury.

Nevertheless, the defendant's private interest is significant because this determination could lead eventually to civil commitment. "The private interests at stake in civil commitment proceedings, loss of liberty and social stigmatization, are substantial and parallel those at risk in the criminal context." Ploof, 162 N.H. at 619; see also Com.

v. Burgess, 878 N.E.2d 921, 928 (Mass. 2008). However, "[t]he fact that the private interests at stake in civil commitment proceedings parallel those at risk in the criminal context does not compel identical procedural safeguards under the State Constitution." Ploof, 162 N.H. at 620; see also Burgess, 878 N.E.2d at 928 ("Persons subject to civil commitment are not entitled to the same level of due process as individuals subject to incarceration for criminal wrongdoing.").

The Court next determines the process due under RSA chapter 135-E. See Ploof, 126 N.H. at 619. The defendant argues that the process provided by RSA 135-E:5 is insufficient and that he is entitled to a jury trial governed by the rules of evidence to determine whether he committed the charged AFSA acts. The Court disagrees, and finds the statute provides the defendant with sufficient safeguards. See Burgess, 878 N.E.2d at 929 (finding judge's determination of whether incompetent person committed predicate offense did not violate due process because, "even though the hearing is civil in nature, the Legislature has provided that it . . . include many rights to which a criminal defendant is constitutionally entitled").

First, RSA 135-E:23 provides that "[t]he right of a person sought to be committed as a sexually violent predator to legal counsel prior to and during any judicial hearing [is] absolute and unconditional." See Burgess, 878 N.E.2d at 375. Secondly and significantly, the law imposes the highest burden on the State: that, after the Court hears the evidence, it "shall make specific findings on whether the person did commit the act or acts charged beyond a reasonable doubt." RSA 135-E:5; Burgess, 878 N.E.2d at 375. Third, the statute incorporates safeguards enabling the person to "meaningfully contest" the Court's determination under RSA 135-E:5 in a timely manner.

In re Richard, 146 N.H. 295, 299 (2001). The person may appeal the Court's determination that the person committed the charged act(s) to the New Hampshire Supreme Court immediately after the finding. See RSA 135-E:5, III.

Finally, the hearing before a judge will be conducted with an opportunity for the defendant to cross-examine the State's witnesses and to summons witnesses in his defense. Although the Court does not minimize the critical nature of its decision whether the defendant committed an act constituting an aggravated felonious sexual assault in the criminal context, it notes that, if the Court finds the predicate offense was committed and the State can marshal sufficient evidence to prove prong two of the SVP definition, see RSA 135-E:2, XII (b), the defendant has a right to a jury trial before being civilly committed as an SVP. See RSA 135-E:9; Burgess, 878 N.E.2d at 378, n. 8.

The defendant also complains that the rules of evidence do not strictly apply to the civil commitment process. See RSA 135-E:10. While the defendant is not entitled to the protections of all of the rules of evidence, the Court notes they are not entirely relaxed. A person facing an SVP petition is provided with protections against the general use of hearsay in that it still must fall within one of the recognized exceptions or the Court must find it contains circumstantial guarantees of trustworthiness and the declarant is unavailable. See RSA 135-E:10; see also Ploof, 162 N.H. at 621 (finding that RSA 135-E:10 "adequately protect[s] the defendant's private interest against erroneous deprivation"). The middle tier protection will allow the defendant to see in person those witness whose out of court statements do not meet this reliability standard, no different than a criminal defendant is allowed.

Lastly, the State has a strong interest in protecting the public from sexual

predators, providing them treatment, and establishing a procedure for identifying sexual predators. See id. at 624. The State also has an interest in identifying sexual predators who are unable to face trial because they are not competent, perhaps even more so since, unlike a convicted sex offender, no punishment or rehabilitative efforts have occurred, no supervision will be in place through parole, and no sex offender registration will be required. See Burgess, 878 N.E.2d at 928 ("[T]he defendant's interest must, with appropriate safeguards, yield to the Commonwealth's paramount interest in protecting its citizens. We see no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens to be incompetent.").

Finally, the State has an interest in having a process for the introduction of evidence in the SVP context that is more streamlined and efficient than that provided when the full rules of evidence apply, especially since the Court is the finder of fact and the statute allows only a limited time for continued detention after the criminal charges are dismissed due to a defendant's incompetency. See Ploof, 162 N.H. at 620 (noting numerous procedures in which New Hampshire's rules of evidence do not apply and concluding that, given the process provided by the SVP statute, there is "no substantial risk in relying upon the district court's ability to consider the trustworthiness of the evidence"). As the gatekeeper, the Court is able to manage the introduction of evidence based on reliability and its importance to the process and, if evidence is admitted, weigh it accordingly. On balance, RSA 135-E:5 provides sufficient safeguards such that its application does not violate the defendant's procedural due process rights.

II. Equal Protection

The defendant also argues that RSA 135-E:5 violates his rights to equal protection under the Fourteenth Amendment to the United States Constitution and part I, articles 1, 12, 14, and 15 of the New Hampshire Constitution. In support of his argument, he contends that persons subject to the SVP process who are incompetent to stand trial are similarly situated to those who are competent to stand trial, the latter group being afforded a jury trial subject to the strict application of the rules of evidence for a determination of whether a sexual act was committed, the former not. He argues that competence does not justify the disparate treatment. The Court does not agree that the groups are similarly situated.

"The equal protection provisions of the State Constitution are designed to ensure that State law treats groups of similarly situated citizens in the same manner." McGraw v. Exter Region Co-op. Sch. Dist., 145 N.H. 709, 711 (2001). "Where a classification realistically reflects the fact that the [two groups] are not similarly situated in certain circumstances, and the legislation's differing treatment of the groups is sufficiently related to a government interest, it will survive an equal protection challenge." In re Sandra H., 150 N.H. 634, 638 (2004) (brackets in original).

SVPs under RSA 135-E:2, II(a), who are found guilty of a sexually violent offense, are not similarly situated to those under RSA 135-E:2, II(c), who are found incompetent to stand trial on SVP charges. Although the SVP law uses the phrase "convicted of a sexually violent offense," which on first blush implies criminality, the definitional section of the phrase delineates its breadth outside the criminal realm. See RSA 135-E:2(c) (the category includes persons "[f]ound incompetent to stand trial on a

charge of a sexually violent offense and the court makes the finding pursuant to RSA 135-E:5" that he committed the act). Those that fall under RSA 135-E:2, II(a) have been convicted of a criminal offense, while the group under RSA E:2, II(c) have not and are not deemed criminals. See In re Det. of Mines, 266 P.3d 242, 248 (Wash. Ct. App. 2011) (holding that defendant who pled guilty to SVP offense was not similarly situated to SVP respondents found incompetent to be tried for their predicate offense because the former faced criminal sanctions and was afforded criminal procedural protections); People v. Sweeney, 95 Cal. Rptr. 3d 557, 564–65 (Ct. App. 2009). With a criminal conviction for a felony sex crime come other extreme consequences, including significant prison sentences, lifelong stigma as a felon, a record not subject to annulment, and lifetime registration. Although the restriction of liberty is an outcome in the civil process, long-term treatment, not punishment and deterrence, is the focus. Further, under RSA 135-E:13 & :14, a petition for release may be filed at any time if the person is no longer likely to commit sexual acts of violence if discharged.

Moreover, even if the two groups were similarly situated, the defendant is challenging differential treatment of those competent to stand trial and those who are not. Competence is based on mental disease or defect, which is not a suspect classification. "Governmental classifications of the mentally ill have historically been analyzed under the rational basis test even when individual liberty was at stake." In re Det. of Williams, 628 N.W.2d 447, 453 (Iowa 2001); In re Interest of J.R., 762 N.W.2d 305, 323 (Nev. 2009) ("It is undisputed that mental illness is not a suspect class and that neither state courts nor federal courts apply strict scrutiny to challenges similar to [petitioner's]." (collecting cases)); Matter of Det. of P.P., 431 P.3d 550, 576 (Wash. Ct.

App. 2018) (applying rational basis to determine whether civilly committed people found incompetent to stand trial could be denied ability to become "good faith voluntary patients"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985). In addition, "[s]tate courts generally apply the rational[] basis test to sexually violent predator acts." In re Treatment and Care of Luckabaugh, 568 S.E.2d 338, 351 (S.C. 2002) (collecting cases).

Under this test, a statute is constitutional "if it is rationally related to a legitimate governmental interest." State v. Hollenbeck, 164 N.H. 154, 160 (2012). The rational basis test "contains no inquiry into whether legislation unduly restricts individual rights," nor does the Court independently examine the factual basis for the policy. Id. at 163. The court inquires only as to whether the State could "reasonably conceive to be true the facts upon which the [State's] interest is based." Cmty. Res. for Justice, Inc. v. City of Manchester, 154 N.H. 748, 757 (2007).

As indicated above, the State has a legitimate interest in identifying SVPs for the protection of the community, regardless of competence to stand trial and arguably more so. The State also has a legitimate interest in not subjecting to trial those under RSA 135-E:5 who are incompetent to stand trial and releasing non-criminals from custody expeditiously if the State cannot meet its burden under the SVP law. Further, the State has a legitimate interest in allowing the Court, as the finder of fact, to weigh evidence using a more streamlined process than is provided by the rules of evidence to ensure that this preliminary decision, during which a person may remain in jail, proceeds efficiently. In short, the different process afforded to those who have been convicted of a sexually violent offense as compared to those incompetent to stand trial for a sexually

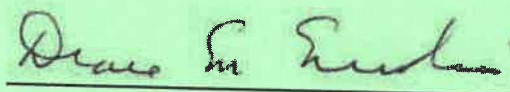
violent act is sufficiently related to the State's interest. See In re Sandra H., 150 N.H. at 638; State ex. Rel. Matalik v. Schubert, 204 N.W.2d 13, 17 (Wis. 1973) (finding a rational basis for a statutory procedure for determining temporary commitment of those not competent to stand trial without a jury, as compared to longer-term civil commitment in which a jury trial right is afforded, because the purpose "is to maximize rather than minimize the rights afforded criminally accused persons"); see also Schubert, 204 N.W.2d at 17 ("The procedure for declaring an alleged criminal defendant incompetent to stand trial stops the criminal process because the defendant is not mentally competent to look after his own interests and to cooperate in the preparation of his defense at trial."). In sum, the State has a rational basis for the procedures set forth in RSA 135-E:5. Accordingly, application of the statute does not violate the defendant's right to equal protection.

Conclusion

In conclusion, the defendant is not entitled to have a jury trial and/or the strict application of the rules of evidence to determine whether he committed the acts that would constitute aggravated felonious sexual assault. Such a right cannot be found in the common law or statute, nor does the statutory process violate his state or federal rights to due process or equal protection. The defendant's motion is accordingly **DENIED**.

SO ORDERED.

September 19, 2022



Diane M. Nicolosi, Presiding Judge