THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0588

State of New Hampshire

v.

Amuri Diole

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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II. Whether the procedure contained in RSA 135-E:5 for civilly committing a person as a sexually violent predator after the person was found not competent to stand trial violates the Equal Protection Clause.

STATEMENT OF THE CASE

The respondent, Amuri Diole, was charged with four counts of aggravated felonious sexual assault (AFSA), four counts of criminal threatening, one count of first-degree assault, and one count of second degree assault. D Add at 32.[1] Prior to trial, the court (*Nicolosi*, J.) found that the respondent was not competent to stand trial and not reasonably likely to be restored to competency within 12 months. *Id*. The court also found that the respondent was dangerous. *Id*.

By an order of the court issued on July 11, 2022, the respondent was detained for up to 90 days to allow the State time to seek a civil commitment. *Id*. On July 25, 2022, the State filed a petition to have the respondent certified as a sexually violent predator (SVP) under RSA chapter 135-E. *Id.* The respondent moved for a jury trial, in which the rules of evidence would apply with full force, on the question of whether the respondent committed a sexually violent offense. D Add at 32-33. However, the respondent requested that the court decide the question of whether the respondent's incompetence affected the outcome of the jury trial. D Add at 33. The State ultimately objected to the respondent's

[1] Citations to the record are as follows:
"DB" refers to the respondent's brief;
"D Add" refers to the addendum to the respondent's brief;
"D App" refers to the appendix to the respondent's brief;
"T1" refers to the transcript of the first day of the bench trial held on September 20, 2022;
"T2" refers to the transcript of the second day of the bench trial held on September 21, 2022;
"MH" refers to the transcript of the motion hearing held on September 19, 2022; and
"S" refers to the transcript of the status hearing held on September 14, 2022.

motion. *Id*. On September 19, 2022, the court issued an order denying the respondent's motion for a jury trial. D Add at 32-43.

The court held a two-day bench trial on September 20 and 21 to determine whether the respondent committed a sexually violent offense and whether the respondent's incompetence impacted the outcome of the trial. D App at 227; T1 at 1; T2 at 127. On September 27, 2022, the court concluded that the State had proven beyond a reasonable doubt that the respondent committed a sexually violent offense and that his incompetence did not impact the outcome of the proceeding. D App at 227-243.

This appeal followed.

STATEMENT OF FACTS

A. Factual Background

The following facts were found by the trial court and are supported by the evidence adduced during the two-day bench trial, which was held to determine: (1) whether the respondent committed the charged AFSAs; and (2) whether the respondent's incompetence impacted the outcome of the bench trial. D App at 227, 236; *see* RSA 135-E:5. At trial, the court heard testimony from the victim, C.G., and the police officers that investigated this case. D App at 228. The court also received photographs of the scene and of the respondent, a knife found at the scene, a recording of C.G.'s 911 call, C.G.'s medical examination report and rape kit inventory form, and Sergeant Foster's body worn-camera footage. D App at 228.

On April 29, 2021, C.G., went to Don Quijote on Union Street in Manchester to get food for her family. D App at 229; T1 at 8, 10. C.G. was approached by the respondent, with whom she was unfamiliar, before she entered the restaurant. D App at 229; T1 at 11-12. The respondent offered C.G. heroin, which she declined before asking him if he had any marijuana. D App at 229; T1 at 12. The respondent said he did have marijuana and lit a "blunt" (*i.e.* a marijuana cigar). D App at 229; T1 at 12. C.G. went into the restaurant to place her order and then went to smoke marijuana with the respondent while her order was being prepared. D App at 229; T1 at 12-13. Accordingly, C.G. and the respondent walked toward a park that was adjacent to a cemetery and about 200 feet away from the restaurant. D App at 229; T1 at 13-14.

While they were walking, C.G. noticed that the respondent had an unsheathed knife in the pocket of his sweatshirt — she could see the handle and part of the blade. D App at 229; T1 at 14-15. Fearing for her safety, C.G. abruptly told the respondent that she had to leave. D App at 229; T1 at 15. The respondent then grabbed C.G. by the hair and, with the knife held to her throat, dragged her across the street into the cemetery and behind the mausoleum therein. D App at 229; T1 at 15-16. When C.G. tried to fight him off, the respondent punched her in the face several times, tore off her pants and underwear, and pinned her down while hitting her some more. D App at 230; T1 at 17-18.

The respondent forcibly inserted his penis into C.G.'s vagina while he had her pinned to the ground. D App at 230; T1 at 20-22. At first, C.G. tried to fight him off and begged him to let her go, but she eventually decided to stop fighting and wait until the respondent exhausted himself and then try to escape. D App at 230; T1 at 20-23. After assaulting C.G. "for some time," the respondent paused. App at 230; T1 at 22-23. C.G. pushed the respondent off her and ran toward the entrance of the cemetery, losing a sandal along the way. D App at 230; T1 at 23. The respondent caught C.G. before she made it out of the cemetery and struck C.G.'s head against a stone post during the ensuing struggle, causing C.G. to lose consciousness. D App at 230; T1 at 23-25. When C.G. regained consciousness, she was back behind the mausoleum with her legs pushed towards her head and the respondent was sexually assaulting her. D App at 230; T1 at 25-26.

The respondent eventually paused again, this time to tell C.G. that she was going to perform fellatio on him. D App at 230; T1 at 26. C.G.

refused, stating that her mouth was dry, and she needed to get a bottle of water from her purse. D App at 230; T1 at 27. The respondent let her go get the bottle of water, but C.G. instead retrieved her cell phone. D App at 230; T1 at 27-28. The respondent forced C.G. down and began raping her again, but C.G. managed to call 911 and tell the dispatcher that she was in a cemetery and "was at that very moment being sexually assaulted." D App at 230; T1 at 28. The 911 call was played for the court and submitted into evidence, and C.G. can be heard "crying out in pain" and "begging the [respondent] to stop." D App at 230-231; T1 at 28-29, 62-63, 70.

Multiple Manchester Police officers were dispatched to the cemetery. D App at 231; T1 at 65, 85-86, 96-97. Upon arrival, Sergeant Foster began walking towards the mausoleum before spotting C.G. lying down on the rear side of the structure. D App at 231; T1 at 65-66. When Foster called out to C.G. to ask if she was alright, she responded in the negative and ran towards another responding officer. D App at 231; T1 at 65-66. Foster caught up to C.G. and observed blood on C.G.'s palms and around her ankles. D App at 231; T1 at 66. It was "clear" from Foster's body-worn camera footage that C.G. had on a sweatshirt but was naked from the waist down; she was crying and distraught, and she was disheveled and wet from the rain. D App at 231. C.G. told Foster that the respondent assaulted her for two hours at the rear of the mausoleum, would not let her leave, and had knocked her out. *Id.*; T1 at 66-68.

While Foster attended to C.G., Detective O'Meara apprehended the respondent near the mausoleum. D App at 232; T1 at 96-97. O'Meara secured a body warrant, which was executed after the respondent was transported to the police station. D App at 232; T1 at 97-98. The search

involved taking approximately 20 DNA swabs from the respondent, photographing him, and taking his clothing. D App at 232; T1 at 99-101. O'Meara also found and took pictures of "what he believed to be blood on the respondent's underwear, which is apparent in the photographs." D App at 232; T1 at 101.

Back at the cemetery, Detective Amanda Smith photographed the crime scene. D App at 232; T1 at 86. Smith found and photographed an unsheathed knife behind the mausoleum and what appeared to be blood on the rear mausoleum pillars. D App at 232; T1 at 87, 90. Smith found and photographed a single sandal on one of the north-facing platforms of the mausoleum. D App at 232; T1 at 90. On the west side of the mausoleum, Smith found a pair of yoga pants, a pair of women's underwear, a jacket, broken jewelry, a backpack, and a sandal to match the one she had found previously. D App at 232-33; T1 at 90-91.

Based on that evidence, the court found "the proof" that "the [respondent] committed at least three episodes of forced non-consensual sexual penetration of C.G." to be "extremely compelling." D App at 233. The court "found all of the State's witness to be credible," D App at 234, had "no doubt that the [respondent] was the person who assaulted C.G.," *id*, and found C.G.'s account of events was corroborated by other evidence. D App at 236. Accordingly, the court found that the State had proven beyond a reasonable doubt that the respondent committed "at least three incidents of AFSA." *Id*.

B. Procedural History

After the respondent was charged with four counts of AFSA, amongst other crimes, the court found him not competent to stand trial and not reasonably likely to be restored to competency within 12 months. D Add at 32. The court also found the respondent dangerous and detained him for 90 days to allow the State to seek a civil commitment. *Id*. Thereafter, the State filed a petition to have the respondent certified as an SVP under RSA chapter 135-E. *Id*. The court scheduled a two-day trial to be held on September 20 and 21, 2022, to determine whether the State could prove beyond a reasonable doubt that the respondent committed the AFSAs he was charged with and whether the respondent's incompetence would affect the outcome of that trial. D Add at 32; *see* RSA 135-E:5.

On September 15, 2022, the respondent moved for a jury trial, governed by the rules of evidence, to determine whether the respondent committed the charged crimes. D Add at 33; D App at 6-12. The respondent's motion argued that the procedure enacted by RSA 135-E:5 violated his right to due process "by denying him the right to a jury trial before being found to have been 'convicted' of a sexually violent offense." D App at 8. The respondent also argued that his due process rights were violated by RSA 135-E:10 "expressly denying him the evidentiary protections of the rules of evidence." *Id*. In essence, the respondent argued that the State was required to prove beyond a reasonable doubt that the respondent committed a sexually violent offense before civilly committing

him as an SVP, and the rules that apply in criminal proceedings must be applied in this case in order to satisfy due process.[2] D App at 8-10.

The respondent next argued that RSA 135-E:5 violated his right to equal protection of the laws. D App at 11-12. The respondent contended that every person subject to an SVP petition that was competent to stand trial either pleads guilty to having committed a sexually violent offense or has that question adjudicated by a jury during a criminal trial. D App at 11. Accordingly, the respondent argued that he was being denied a jury trial "for no reason other than his lack of competence," which, he asserted, bore no "rational relationship" to a legitimate state interest.[3] *Id*.

The State was given leave to file an objection by September 19, 2022. D Add at 33. In its objection, the State argued that RSA 135-E:5 did not violate due process because the process created by that provision did not result in a "conviction" in the criminal context in which that word is typically used, and this Court had already upheld the evidentiary rules set out in RSA 135-E:10. D App at 13-17. The State contended that, because SVP proceedings are civil in nature, and because RSA 135-E provides significant procedural safeguards designed to prevent an erroneous deprivation of liberty, the statute did not violate due process by omitting a right to a jury trial. D App at 14-16. The State also asserted that it has "a

[2] During a status conference, defense counsel took the position that RSA "135-E essentially is a mechanism or a substitute for [a] criminal trial." S at 22. Counsel contended that his view of the statute was "supported by the fact that the standard is beyond a reasonable doubt." S at 22-23.

[3] Despite this assertion, defense counsel conceded during a hearing on the motion that RSA chapter 135-E is "designed for what" defense counsel thought was "a legitimate state interest." MH at 14.

strong interest in the commitment and treatment of sexually violent predators." D App at 18.

The State countered the respondent's equal protection argument by contending that, in the context of adjudicating an SVP petition, respondents that were found incompetent to stand trial were not similarly situated to those that were competent to stand trial. D App at 18-19. Accordingly, the State argued that no equal protection violation existed in this case. *Id*.

A hearing on the motion was held on September 19, 2022, the same day that the State filed its objection. MH at 1. At the outset of the hearing, the State announced its intent to withdraw its objection to the motion for a jury trial. *Id*. at 4. Subsequently, however, respondent's counsel clarified that he was seeking to "bifurcate [the] two issues" such that a jury would determine whether the respondent committed a sexually violent offense, and the court would determine whether the respondent's incompetency affected the outcome of the proceeding. *Id*. at 8; *see* RSA 135-E:5. Counsel also reiterated his request that the rules of evidence apply with full force during the proceeding. *Id*. at 8-9.

With a more complete understanding of what defense counsel was asking for, the State retracted its previously expressed intent to withdraw its objection, explaining that the State was "not agreeing to conduct the hearing as described by [the respondent's] counsel." MH at 15. When the State sought to withdraw its objection, it did not "inten[d] to sort of restructure the entire statute." *Id*. at 16. In short, the State was not agreeing to bifurcate the issues or to the Rules of Evidence applying in contradiction to the plain language of RSA 135-E:10. *See* MH at 30-32.

On September 19, 2022, the court issued an order denying the respondent's motion. D Add at 32-43. The court began by observing that its task at this preliminary stage of adjudicating the SVP petition was "to determine beyond a reasonable doubt whether the [respondent] committed the four AFSA counts" and the extent to which the respondent's incompetence affected the outcome of the proceeding. *Id*. at 32. The court also ruled at the outset that bifurcation of those determinations was "not possible" and not "consistent with the statutory scheme." *Id*. at 33. Having decided that "bifurcation is not an option," the court analyzed whether the respondent had "a jury trial right at all in connection with the preliminary question of whether he committed [ ] the offense(s)." *Id*. at 33-34.

The court first addressed the respondent's due process argument. *Id*. at 34-39. Applying this Court's precedents, the trial court looked to the nature of the case and the relief sought and asked whether the customary practice included a trial by jury before 1784. *Id*. at 34 (citing *Gilman v. Lake Sunapee Props.*, 159 N.H. 26, 30-31 (2009)). The court observed that SVP proceedings are civil, rather than criminal, in nature. *Id*. at 34-35. Additionally, the court noted that RSA 135-E:5, which applies specifically to individuals that were found not competent to stand trial, does not afford a right to have a jury determine whether they committed the sexually violent acts undergirding the SVP petition. D Add at 35. Thus, the court determined that the respondent's argument found "no purchase in common law or under statute." *Id*.

The court then analyzed the respondent's argument applying the three-part test articulated by this Court in *State v. Ploof*, 162 N.H. 609, 619 (2011). D Add at 36. Accordingly, the court considered: (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 governments interest. D Add at 36, (citing *Ploof*, 162 N.H. at 619).

Regarding the first inquiry, the court again noted that SVP proceedings are not criminal in nature. D Add at 36. Nonetheless, the court found that the private interest at stake was significant because the determination to be made under RSA 135-E:5 "could lead eventually to civil commitment," which is a loss of liberty. *Id*.

Turning to the second inquiry, the court ruled that RSA chapter 135-E provided sufficient safeguards to protect against an erroneous deprivation of liberty, even without affording a right to a jury trial. *Id*. at 37. The court observed that the statute affords individuals subject to SVP petitions the right to counsel; requires the State to prove that the person committed a sexually violent act beyond a reasonable doubt; provides the opportunity to present witnesses and cross-examine the State's witnesses; and provides a right to appeal the trial court's determination to this Court. *Id*. at 37-38. The court also noted that, even if the State carries its burden under RSA 135-E:5, the respondent would still be entitled to a trial before a jury under RSA 135-E:9 before he could be civilly committed as an SVP. *Id*. at 38. The court acknowledged that the Rules of Evidence did not fully apply to the proceeding, but pointed out that hearsay evidence was prohibited by RSA 135-E:10 unless it came within a recognized exception, or the court found circumstantial guarantees of trustworthiness. *Id*.

Looking to the third inquiry, the court found that the State had 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." *Id*. at 39. Ultimately, the court concluded that, "[o]n balance, RSA 135-E:5 provides sufficient safeguards such that its application does not violate the [respondent's] procedural due process rights." *Id*.

The court then addressed the respondent's equal protection claim. *Id*. at 40-43. The court asserted that "SVPs under RSA 135-E:2, [III](a), who are found guilty of a sexually violent offense, are not similarly situated to those under RSA 135-E:2, [III](c), who are found incompetent to stand trial" on criminal charges that could serve as the basis for a civil commitment. *Id*. at 40. The court stated that, although the statute uses the phrase "convicted of a sexually violent offense," the definitional section of the statute delineates the breadth of that phrase as it is used in RSA chapter 135-E and clearly brings the phrase "outside the criminal realm." *Id*. Thus, SVPs falling under RSA 135-E:2, III(a) have been convicted of a criminal offense, while SVPs falling under RSA 135-E:2, III(c) "have not and are not deemed criminals." *Id*. at 41.

Even if the two groups were similarly situated, the court explained, the difference in their treatment would be analyzed under rational basis review. *Id*. The court asserted that, here, 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." *Id*. at 42. The court also found that the State 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." *Id*. Further, the State had a legitimate interest

in allowing the court, as the finder of fact, to weigh the evidence in a process that was more streamlined than that which is provided by a full application of the Rules of Evidence "to ensure that this preliminary decision . . . proceeds efficiently." *Id*. Accordingly, the court ruled that RSA 135-E:5 satisfied rational basis review. *Id*. at 43.

In summary, the court ruled that the due process clause of the State and Federal Constitutions did not entitle the respondent to a jury trial or the strict application of the Rules of Evidence in determining whether he committed the AFSAs underlying the SVP petition. *Id*. No such right could be found in the common law or statute, and the statutory process did not "violate his state or federal rights to due process or equal protection." *Id*. Therefore, the respondent's motion was denied. *Id*.

SUMMARY OF THE ARGUMENT

The respondent's due process arguments fail because this Court has already held that due process does not require a jury trial in civil commitment proceedings, *In re Sandra H.*, 150 N.H. 634, 636 (2004), and that RSA 135-E:10 does not violate a respondent's due process rights. *Ploof*, 162 N.H. 609, 621. Although the private interests in this case are significant, the State's interest in protecting the public from and providing treatment to SVPs is also significant, as are the procedural safeguards provided by RSA chapter 135-E to protect against an erroneous deprivation of liberty. Accordingly, "on balance . . . the [respondent's] rights to procedural due process are not violated by the procedures set forth in RSA chapter 135-E." *Id*.

The respondent's equal protection argument fails because the classifications he has identified — people subject to SVP petitions that were competent to stand a criminal trial and those that were not competent to stand such a trial — are not similarly situated. Accordingly, the Equal Protection Clause does not apply to the respondent's claim. *See id*. at 626. Even if it did, however, RSA 135-E:5 passes rational basis review because the State has an important interest in protecting the public from and providing treatment to SVPs, whether they are competent to stand trial or not, and RSA 135-E:5 is directly related to that interest.

ARGUMENT

I. STATUTORY FRAMEWORK.

"In enacting RSA chapter 135-E, the legislature explicitly found that sexually violent predators have special treatment needs and present unique risks to society." *Ploof*, 162 N.H. at 627; *see* RSA 135-E:1. "The legislature also found that '[t]he existing involuntary commitment procedures for the treatment and care of mentally ill persons are inadequate to address the risk these sexually violent predators pose to society.'" *Id*., *quoting* RSA 135-E:1. "Accordingly, the purpose of RSA chapter 135-E is to both provide care and treatment to sexually violent predators and to protect society from such dangerous persons." *Id*.

A "Sexually violent predator" is defined as any person who: (1) has been "convicted of a sexually violent offense;" and (2) suffers 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.

A person has been "convicted of a sexually violent offense," for purposes of RSA chapter 135-E, if the person was: (1) adjudicated guilty of such an offense after a trial or guilty plea; (2) adjudicated not guilty of such an offense by reason of insanity; or (3) found incompetent to stand trial on a charge of a sexually violent offense and the court makes the findings required by RSA 135-E:5. RSA 135-E:2, III.

A "mental abnormality" means a mental condition affecting a person's emotional or volitional capacity which predisposes the person to commit sexually violent offenses. RSA 135-E:2, VII. "Likely to engage in

acts of sexual violence" means the person's propensity to commit acts of sexual violence is such that the person has serious difficulty in controlling his or her behavior thereby posing a potentially serious likelihood of danger to others. RSA 135-E:2, VI.

The ultimate determination of whether a person qualifies as an SVP is to be made by a jury, assuming a demand for a jury trial is made by the respondent or the State. RSA 135-E:9. The jury's verdict must be unanimous before a person may be committed as an SVP. RSA 135-E:11. The State has the burden of proving by clear and convincing evidence that the person is an SVP. *Id*.

The Rules of Evidence are generally inapplicable to SVP proceedings, but hearsay is not admissible unless it falls within a recognized exception to the rule against hearsay or the court finds that the evidence contains circumstantial guarantees of trustworthiness and the declarant is unavailable to testify. RSA 135-E:10. Hearsay evidence may never serve as "the sole basis" for committing a person as an SVP.[4] *Id*.

Respondents named in SVP petitions have an "absolute and unconditional" right to be represented by counsel "prior to and during any judicial hearing conducted under" RSA chapter 135-E. RSA 135-E:23. Such people also have the right to retain their own experts to perform mental health tests, evaluations, or examinations, and testify during the proceedings. RSA 135-E:9, IV.

[4] In this way, RSA 135-E:5 is more protective than the Rules of Evidence applicable to a criminal trial, which contains no prohibition against convictions obtained solely through admissible hearsay evidence.

If a unanimous jury or a court determines that a person qualifies as an SVP, that determination may be appealed to this Court. RSA 135-E:11, III. Additionally, a committed person "may file a petition for discharge at any time after commitment." RSA 135-E:14. If the commissioner or a designee determines that an SVP "is not likely to commit acts of sexual violence if discharged," the commissioner is required to notify the court and a hearing regarding the person's release will be held. RSA 135-E:13.

In short, before being civilly committed as an SVP, an individual has the right, with the assistance of counsel, to have a jury unanimously decide that he has been "convicted" of a sexually violent offense and that he has a "mental abnormality" such that the safety of other people is put at risk by his predisposition to commit sexually violent acts. In the vast run of cases, the first inquiry — whether the person has been "convicted" of a qualifying offense — is decided during an individual's criminal trial by the person pleading guilty, being adjudicated guilty, or being found not guilty by reason of insanity. Thus, that determination is not made by the jury empaneled in the SVP proceeding pursuant to RSA 135-E:9.

Of course, if a person is not competent to stand trial, then whether the person has been "convicted" of a sexually violent offense cannot constitutionally be determined in a criminal proceeding. Nevertheless, finding that a person is not competent to stand trial on criminal charges does not lessen the State's interest in providing SVPs long-term care and treatment or protecting the public from SVPs. To address that discrete set of circumstances, the legislature enacted RSA 135-E:5.

When the State seeks to civilly commit a person as an SVP after the person was found incompetent to stand trial, the court must order the

person to remain in custody for up to 90 days. RSA 135-E:5, I. The court must then hold a hearing to determine "whether the person did commit the act or acts charged." RSA 135-E:5, II. After "hearing evidence on [that] issue," the court must make "specific findings on whether the person did commit the act or acts charged beyond a reasonable doubt." *Id*. "In determining whether the state has met its burden," the court must "consider the extent to which the person's incompetence or developmental disability affected the outcome of the hearing." *Id*.

If the person's incompetence "substantially interferes with the person's ability to assist his or her counsel," then the court "shall not find the person committed the act or acts charged" unless the court concludes "beyond a reasonable doubt" that the person's incompetence could not have had a "substantial impact on the proceedings" considering the strength of the State's case. *Id*. If the court determines beyond a reasonable doubt that the person committed a sexually violent offense, that determination is appealable to this Court. *Id*.

Thus, as is the case in SVP proceedings involving people that were competent to stand trial, whether a person who was not competent to stand trial committed a sexually violent offense is determined by a factfinder other than the jury empaneled pursuant to RSA 135-E:9. However, since the constitution precludes that determination from being made in the criminal context due to the person's incompetence, the legislature has placed that responsibility with the court in the civil context.

II. STANDARD OF REVIEW

The respondent's arguments in this case pose a facial challenge to the constitutionality of RSA 135-E:5 and RSA 135-E:10. *See* DB at 15-28; *see also* DB at 14, n. 1 (stating that the respondent's challenge is lodged "as a facial challenge to the statute . . ."). Facial challenges to legislative Acts are, "of course, the most difficult challenge[s] to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[5] *Ploof*, 162 N.H. at 614. Thus, the respondent must carry a "heavy burden" to prevail. *Id*.

To the extent that this appeal requires this Court to interpret RSA chapter 135-E, the Court's review is *de novo*. *Id*. When reviewing a statute, this Court presumes it to be constitutional and will not declare it invalid except upon inescapable grounds. *Id*. In other words, this Court will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution. *Id*. When doubt exists as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality. *Id*. The party challenging a statute's constitutionality bears the burden of proof. *Id*.

In matters of statutory interpretation, this Court is the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. *Id*. When examining the language of a statute, this Court ascribes

[5] This Court has held that the "no set of circumstances" language articulated by the United States Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987) is "not intended to be a test that prescribes a specific method of determining constitutional validity," but rather "describe[s] the result of a facial challenge analyzed under the applicable constitutional standard." *N.H. Democratic Party v. Secretary of State*, 174 N.H. 312, 325 (2021).

the plain and ordinary meaning to the words used. *Id*. This court reads words and phrases not in isolation, but in the context of the entire statute and the entire statutory scheme. *Id*. When the language of a statute is plain and unambiguous, this Court does not look beyond it for further indications of legislative intent. *Id*.

III. RSA 135-E:5 DOES NOT VIOLATE THE RESPONDENT'S RIGHT TO DUE PROCESS.

The respondent grounds his first argument in procedural due process. "Three factors are considered in analyzing a procedural due process claim: (1) the private interest that will be 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." *Ploof*, 162 N.H. at 619. As this Court has recognized, the private interests at stake in civil commitment proceedings, loss of liberty and social stigmatization, are substantial and parallel to those at risk in the criminal context. *Id*. Accordingly, because the private interest at stake in this case is substantial, this Court must weigh the second factor, risk of an erroneous deprivation of those interests, against the third factor, the government's interest. *Id*.

The respondent argues that RSA 135-E:5 violates his right to due process because that provision "permits a 'conviction' without a trial by jury." DB at 15; *see* DB at 16-19. The respondent also contends that RSA 135-E:10 violates his right to due process because "the statute denies [respondents] the application of the rules of evidence;" because "the statute allows a conviction based upon propensity evidence;" and because "the

statute denies [respondents] the protection of medical and/or therapist privilege." DB at 15.

A. Due Process Does Not Require A Jury Trial In SVP Civil Commitment Proceedings.

The New Hampshire Constitution guarantees the right of trial by jury in all cases where the right existed at common law at the time of its adoption in 1784. *In re Sandra H.*, 150 N.H. at 636. "The right does not extend, however, to special, statutory or summary proceedings unknown to the common law." *Id*. Accordingly, for the respondent to have a constitutional right to trial by jury, the practice in New Hampshire at the time of the adoption of the State Constitution must have been to summon juries to determine involuntary civil commitments. *Id*.

Throughout the 1700s, New Hampshire had laws giving probate judges the authority "to make Inquisition" into whether a person was "'*non compos*' (insane)." *Id*. If the person was determined to be *non compos*, the judge would assign a guardian to care for the person and his or her estates. *Id*. "The practice throughout the 1700s, until the adoption of the New Hampshire Constitution, was that the probate judge determined the insanity of a person with the aid of the local 'Select Men,' not with the aid of a jury." *Id*. Moreover, because SVP proceedings are "special statutory proceeding[s], there is no constitutional requirement for a trial by jury in the commitment of" SVPs. *Id*. Accordingly, the respondent had a statutory right to a jury trial pursuant to RSA 135-E:9, but the respondent did not have a right to a jury trial derived from the State Constitution at any part of his SVP proceedings. *See id*.

In short, this Court has already held that due process does not require that a person be afforded a jury trial before they are civilly committed to the State's custody involuntarily. Nothing more is at issue in this case. Although the respondent in *Sandra H.* faced civil commitment due to her mental incapacity and the respondent in this case faces civil commitment as an SVP, that distinction is immaterial, assuming it even exists. *See* RSA 135-E:2, XII(b) (requiring finding of "mental abnormality or personality disorder.") The same private interests — loss of liberty and social stigmatization — were at issue for both respondents. Further, commitment proceedings under RSA chapter 135-C and RSA chapter 135-E are both special statutory proceedings.[6] And perhaps most importantly, historically analogous proceedings dating back to the adoption of the State Constitution did not require a jury trial.

The respondent's attempts to distinguish this Court's holding in *Sandra H.* are unavailing. The respondent contends that, unlike 135-C proceedings, "an RSA 135-E:5 hearing is quasi-criminal" because a "factfinder determines whether the respondent is guilty or innocent of a sexually violent offense." DB at 17. Indeed, the respondent avers that the very purpose of a hearing under 135-E:5 is "to determine guilt or innocence." DB at 18, 19. He asserts that there "is a direct historical analogue to such a hearing: the criminal jury trial." *Id*. Thus, the major premise of the respondent's argument is that a hearing conducted under

[6] The State notes that none of the other statutes related to involuntary commitment proceedings, including RSA chapter 135-C, RSA chapter 171-B, and RSA 172:13, II-III, provide a right to a jury trial.

RSA 135-E:5 is a quasi-criminal proceeding that is held for the purpose of adjudicating guilt or innocence. But that premise is mistaken.

It is beyond dispute that SVP proceedings are civil commitment proceedings. *See generally Ploof*, 162 N.H. 609. "In a civil commitment state power is not exercised in a punitive sense" and "a civil commitment proceeding can *in no sense* be equated to a criminal prosecution." *Addington v. Texas*, 441 U.S. 418, 428 (1979) (emphasis added). An SVP proceeding is not "quasi-criminal," as the respondent contends. Although RSA 135-E:5 provides significant safeguards against an erroneous deprivation of liberty akin to the ones used in criminal trials — such as the right to counsel, a right to appeal, and the most exacting burden of proof being placed on the State[7] — the provision of such safeguards does not transform SVP proceedings from civil commitment proceedings into "quasi-criminal" proceedings.

Nor is the purpose of an RSA 135-E:5 hearing to adjudicate guilt or innocence. The primary inquiry for the court under RSA 135-E:5 is whether the State has proven beyond a reasonable doubt that the respondent "did commit the act or acts charged." "Guilt," as that term is used in our criminal law, however, means something more than engaging in the physical conduct necessary to have committed the "act or acts" charged. RSA 135-E:5, II. "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand . .

[7] The United States Supreme Court has described the "beyond a reasonable doubt" standard, which is the burden the State bears under RSA 135-E:5, as having been "designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington*, 441 U.S. at 423.

. took deep and early root in American soil." *Morissette v. United States*, 342 U.S. 246, 251 (1952).

RSA 135-E:5 contains no *mens rea* requirement because, unlike the criminal laws, RSA chapter 135-E is not concerned with whether an SVP harbored a guilty mind when they committed a sexually violent act. Indeed, the statute's definitions of the phrase "[c]onvicted of a sexually violent offense," *see* RSA 135-E:2, III(a)-(c), demonstrates the statute's intent to ensure that no person is committed as an SVP absent a finding beyond a reasonable doubt that the person committed the conduct constituting a sexually violent offense, whatever the person's mental state. *See Ploof*, 162 N.H. at 623 ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.").

The common thread amongst SVPs who were adjudicated guilty, those who were adjudicated not guilty by reason of insanity, and those who were not competent to stand trial but were found to have committed the charged act pursuant to RSA 135-E:5, is a finding beyond a reasonable doubt that the respondent engaged in conduct constituting a sexually violent offense. Additionally, amongst those groups of people, only those who were adjudicated guilty in a criminal case are found to have had a guilty mind and, therefore, are exposed to criminal consequences. The readily apparent purpose of a hearing under RSA 135-E:5 is to safeguard against an erroneous deprivation of liberty by requiring the highest "degree of

confidence" in the "factual conclusions" underlying the petition before a person is committed as an SVP. *See Ploof*, 162 N.H. at 623.

RSA 135-E:5 serves as an additional predicate protection that is not available under any other involuntary admission scheme. A person found not competent to stand trial, not restorable, and dangerous, can be subject to one of three involuntary admission schemes. *See* RSA 135:17-a, V. Like RSA 135-E, a proceeding pursuant to RSA 171-B is only available[8] at the RSA 135:17-a, V stage, when a criminal conviction is impossible. At that procedural stage in the criminal matter, the person has already been designated as unable to be tried due to a lack of competence.

An RSA 135-E proceeding is no more "quasi-criminal" than an RSA 171-B proceeding that occurs at the same procedural stage in the criminal matter. An RSA 171-B proceeding, like an RSA 135-E proceeding, is civil in nature. However, unlike an RSA 135-E proceeding, an RSA 171-B proceeding does not provide the same predicate protection provided for in RSA 135-E:5.

For example, once a petitioner establishes the standards set out in RSA 171-B:2 by clear and convincing evidence, the person can be subjected to involuntary admission. RSA 171-B:2, I and II require only that "[t]he person has been charged with a felony . . ." and that a "district court, superior court, or grand jury has found that probable cause exists that the person committed the felony . . . ." Thus, under RSA chapter 171-B, the State must prove, by clear and convincing evidence and during the

[8] Although RSA 135-C is available in the context of a criminal matter pursuant to RSA 135:17-a, V, it is also available outside of that context, unlike RSA 135-E and RSA 171-B, which have no avenue for pursuit other than being triggered under RSA 135:17-a, V.

hearing that may result in involuntary admission, not during a separate predicate proceeding, that there was probable cause to believe the respondent committed a felony. By contrast, in an RSA 135-E:5 proceeding, which occurs prior to the proceeding in which the respondent could be involuntarily admitted, the State must prove beyond a reasonable doubt that the respondent committed the alleged acts. This additional predicate protection contained in RSA 135-E:5 surpasses the protections available in involuntary admission proceedings under RSA chapter 171-B, which, like RSA 135-E:5, are available only in the procedural posture presented in this case.

The predicate finding that the court makes pursuant to RSA 135-E:5 is no more "quasi-criminal" than the findings made pursuant to RSA 171-B, I-II that a person was charged with a felony based upon a finding of probable cause. The only difference is that a person is afforded even greater protections in the RSA 135-E:5 context.

In summary, SVP proceedings are statutorily created civil commitment proceedings. RSA chapter 135-E does not concern itself with whether an individual meets the elements required to be legally culpable of a crime because the statute's purpose is to protect the public from and provide treatment to the SVP, not to punish. To the extent that analogous proceedings existed at the time our Constitution was adopted, the respondents in those proceedings were not entitled to a jury trial. Further, this Court has already articulated the significant safeguards against an erroneous deprivation of liberty that are built into RSA chapter 135-E and the State's strong interest in protecting the public from and providing treatment to SVPs. *See Ploof*, 162 N.H. at 624.

Accordingly, the respondent's argument that RSA 135-E:5 is facially unconstitutional because it does not include a right to a jury trial, fails.

B. Due Process Does Not Require Strict Application Of The Rules Of Evidence In SVP Proceedings.

The respondent next argues that RSA 135-E:10 is facially unconstitutional because it limits the applicability of the Rules of Evidence in SVP proceedings. DB at 19-23. The respondent also contends that RSA 135-E:10 is unconstitutional because it "abrogate[s] the medical and therapist privileges." DB at 22.

Once again, this Court has already considered and rejected the respondent's argument that RSA 135-E:10 violates his right to due process by limiting the applicability of the Rules of Evidence. *See Ploof*, 162 N.H. at 620-621. In *Ploof*, this Court explained that the 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." *Id*. at 620. The Court observed that the Rules of Evidence are not applicable to various proceedings in New Hampshire. *Id*. However, in such proceedings, this Court has nonetheless required some degree of trustworthiness for evidence to be admissible. *Id*. To avoid interpreting RSA 135-E:10 in a manner that placed it in tension with the Constitution, this Court interpreted that provision "as requiring the trial court to admit only evidence that satisfies [the] basic requirements" that evidence have a certain degree of trustworthiness, relevance, and reliability. *Id*. at 621.

Further, this Court noted that the requirements of RSA 135-E:10 itself provide for the basic requirements of relevant and reliable evidence. *Id*. Specifically, propensity evidence is only allowed when it "is relevant to the issue of whether the person is [an SVP];" reports issued by the multidisciplinary team are inadmissible unless their "probative value substantially outweighs its prejudicial effect;" and hearsay is inadmissible unless it comes within a recognized exception or the court finds that it "contains circumstantial guarantees of trustworthiness and the declarant is unavailable to testify." *Id*. (quoting RSA 135-E:10, II-IV). Accordingly, this Court held that "the procedures under RSA 135-E:10 adequately protect the defendant's private interest against erroneous deprivation" and did not violate due process. *Id*.

The respondent seeks to avoid the precedential weight of *Ploof* by again resting upon the proposition that "the focus of a 135-E:5 proceeding *is* the determination of guilt," DB at 20, rather than the "the mental condition and dangerousness of the person sought to be committed," *Ploof*, 162 N.H. at 620; DB at 20. He contends that abrogating the rules of evidence "is logical in the context of a 135-E:9 hearing to determine whether a [respondent]" suffers from a mental abnormality or disorder that makes him likely to engage in sexually violent behavior.[9] DB at 20. However, the respondent asserts that because a hearing conducted under

[9] The State notes that the respondent's concession that RSA 135-E:10 is constitutional as applied to a proceeding under RSA 135-E:9 necessarily means that RSA 135-E:10 is not unconstitutional on its face. If a statute is unconstitutional on its face (*i.e.* by its very terms) then it cannot be constitutionally applied to any set of circumstances. Thus, it cannot be that RSA 135-E:10 is facially unconstitutional in an RSA 135-E:5 hearing but it is not facially unconstitutional in an RSA 135-E:9 hearing — the statute's terms do not change from one hearing to the next.

RSA 135-E:5 seeks to "determine guilt or innocence" and the "criminal law forbids the use of propensity evidence," RSA 135-E:10 is unconstitutional as applied in that context. DB at 21.

The respondent's proposition that RSA 135-E:5 is focused on adjudicating criminal culpability should be rejected for reasons already explained. The respondent's argument should also be rejected because it ignores the elementary principle of statutory construction that courts read words and phrases not in isolation, but in the context of the entire statute and the entire statutory scheme. *Ploof*, 162 N.H. at 614.

Reading RSA 135-E:5 and RSA 135-E:9 in isolation, the respondent erroneously contends that the provisions have "differing missions." DB at 21. That is not true when the provisions are read in the context of the entire statute and statutory scheme. Both provisions are pieces of the same puzzle and serve as component parts of the ultimate determination of whether a person qualifies as an SVP, which, in turn, serves the purpose of protecting the public from and providing care and treatment to SVPs. Accordingly, because RSA 135-E:5 is not concerned with adjudicating guilt or innocence in the criminal context, its incorporation of the evidentiary procedure set out in RSA 135-E:10 does not violate due process.

Relatedly, the respondent argues, in cursory fashion, that RSA 135-E:10 violates due process by abrogating the doctor-patient and therapist-patient privileges. DB at 22-23. The respondent contends that by abrogating those privileges "the statutory scheme again allows for [respondents] to be convicted of a sexually violent offense based upon propensity evidence." DB at 23. This argument, as it has been presented by the respondent, is simply an elaboration of the respondent's broader

argument challenging the constitutionality of RSA 135-E:10, *see* DB at 22-23, and it should be rejected for the same reasons.

This Court has already construed RSA 135-E:10 to require the trial court to "make initial determinations of relevancy and reliability" when admitting evidence at an SVP proceeding. *Ploof*, 162 N.H. at 620. This Court held that, given that construction, RSA 135-E:10 satisfies due process in that it adequately protects against an erroneous deprivation of liberty. *Id*. at 621. Accordingly, the limited admissibility of propensity evidence under RSA 135-E:10, II does not violate due process. The respondent has not asked this Court to revisit its holding in *Ploof* and has said nothing to detract from the *Ploof* Court's reasoning.

In conclusion, RSA 135-E:5 provides adequate safeguards to protect against an erroneous deprivation of the respondent's private interests. Additionally, the State has a "strong interest in protecting the public from, and providing care and treatment for, sexually violent predators." *Id*. at 624. This Court should "weigh heavily this factor and, on balance, conclude that the [respondent's] rights to procedural due process are not violated by the procedures set forth in RSA chapter 135-E." *Id*. Because the Federal Constitution does not provide any greater protection than the State Constitution with regard to the respondent's procedural due process claim, the same result should be reached under both. *Id*.

IV. RSA 135-E:5 DOES NOT VIOLATE THE RESPONDENT'S RIGHT TO EQUAL PROTECTION.

The respondent next argues that RSA chapter 135-E violates his right to equal protection because the statute affords "lesser procedural

protections to incompetent persons than to competent persons." DB at 24. Specifically, he contends that competent persons are afforded a jury trial and the Rules of Evidence in determining whether they committed a sexually violent offense while incompetent people are not. *Id*.

At its core, the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *Ploof*, 162 N.H. at 626. "Holding that persons who are not similarly situated need not be treated the same under the law is a shorthand way of explaining the equal protection guarantee." *Id*.

The level of scrutiny this Court applies to equal protection challenges to statutes "depends upon the type of legislative classification at issue." *Id*. Classifications based upon suspect classes or affecting fundamental rights are strictly scrutinized. *Id*. Intermediate scrutiny applies to discriminatory classifications involving "important substantive rights." *Id*. In all other cases, the court employs the rational basis test. *Id*.

This Court has held that "the rational basis standard applies" to challenges to RSA chapter 135-E alleging an equal protection violation on the basis that different procedures apply in different circumstances. *Id*. at 626-627; *see* DB at 25 (recognizing that rational basis is the applicable level of scrutiny in this case under *Ploof*). Under the rational basis standard, 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. The respondent must show that "the classification is arbitrary or without some reasonable justification." *Id*. "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." *Id*., *quoting Sandra H.*, 150 N.H. at 638.

As a threshold matter, there is no dispute that the classifications in this case are: SVP respondents that were competent to be tried criminally, and SVP respondents that were not so competent; the difference in treatment between these groups being that the latter is subject to RSA 135-E:5. *See* DB at 24. Accordingly, it is the State's position that the respondent's equal protection challenge fails because the classifications of people he has identified are not similarly situated within the context of SVP proceedings.

For those competent to stand trial criminally, an impartial factfinder has already determined beyond a reasonable doubt that the respondent committed a sexually violent offense when an SVP petition is filed. No such finding is made by an impartial factfinder before an SVP petition is filed against a respondent that was not competent to stand trial on criminal charges. Simply put, the reason for the disparate treatment between the two groups under RSA chapter 135-E and the reason the two groups are not similarly situated for equal protection purposes are one in the same — the two groups enter the SVP process in different ways and at different points.

The two groups are not similarly situated and, therefore, the Equal Protection Clause does not demand that they "be treated the same under the law." *Ploof*, 162 N.H. at 626. Accordingly, the respondent's equal protection challenge fails without application of any constitutional scrutiny because there is no "disparate treatment" which the Equal Protection Clause

protects against in this case and, thus, there is no violation of the equal protection guarantee to "justify." *Id*.

But even if the Court were to apply rational basis review, RSA 135-E:5 passes with ease. As previously explained, RSA chapter 135-E is intended to protect the public from and provide care and treatment to SVPs, which "the State has a strong interest in" doing. *Id*. at 624; *see Commonwealth v. Burgess*, 878 N.E.2d 921, 930 (Mass. 2008) (holding that "it is beyond question that the Legislature has a compelling interest in protecting the public from sexually dangerous persons.") The State also has a strong interest in ensuring that, before a person is committed as an SVP, an impartial factfinder has determined beyond a reasonable doubt that the person has committed a sexually violent offense. Those "interest[s] [are] not diminished when that person happens to be incompetent to stand trial." *Burgess*, 878 N.E.2d at 930.

RSA 135-E:5 is not only rationally related to those interests, it serves them directly. Indeed, it is the very mechanism chosen by the legislature to fulfill the purpose of the statute in the context of people who were not competent to stand trial without dispensing with a finding beyond a reasonable doubt by an impartial factfinder that the person committed the charged act. Further, the fact that SVP respondents who were competent to stand a criminal trial were afforded all of the constitutional protections that apply to such a trial does not make RSA 135-E:5 any less rationally related to the above-mentioned State interests. *See* DB at 25-28.

The respondent's argument on this point primarily attacks the rational basis analysis conducted by the trial court. DB at 25-28. Even assuming the trial court erred in its reasoning, which the State does not

concede, the court reached the right result under the rational basis standard and should be affirmed. *Long v. Long*, 136 N.H. 25, 29 (1992) (even assuming "court's reasoning was faulty," this Court could "affirm the result if a valid alternative ground for it exists.") Additionally, this Court's review of the trial court's order is *de novo*. *Ploof*, 162 N.H. at 614. Moreover, the respondent has leveled a facial challenge to RSA 135-E:5, not an as applied challenge, and he cannot succeed in wholly invalidating that provision merely by poking holes in the reasoning of the trial court's order. The respondent's argument is no answer to RSA 135-E:5's obviously rational relationship to legitimate State interests.

In conclusion, the Equal Protection Clause does not apply because the respondent has rooted his claim in the disparate treatment of two classes of people that are not similarly situated. Even if the disparate treatment did implicate the Equal Protection Clause, however, the difference in treatment was justified under the rational basis test. Accordingly, RSA 135-E:5 does not violate the respondent's right to equal protection of the law.

CONCLUSION

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

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

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July 25, 2023

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CERTIFICATE OF COMPLIANCE

I, Sam M. Gonyea, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,351 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.

July 25, 2023 *<u>/s/ Sam M. Gonyea</u>*
Sam M. Gonyea

CERTIFICATE OF SERVICE

I, Sam M. Gonyea, hereby certify that a copy of the State's brief shall be served on Jeffrey Odland, Esq., counsel for the respondent, through the New Hampshire Supreme Court's electronic filing system.

July 25, 2023 *<u>/s/ Sam M. Gonyea</u>*
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