**Maine Supreme Judicial Court**
**Sitting as the Law Court**

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Docket No. Pen-24-303

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**State of Maine,**

*Appellee,*

v.

**John D. Schlosser,**

*Appellant.*

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On Appeal from the
Unified Criminal Docket, Penobscot County

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# Reply Brief

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### I. Whether an offense is a lesser included offense under 17-A M.R.S. § 13-A turns on the jury instructions for the principal crime.

The State does not dispute that, as instructed, the jury's conclusion that Schlosser trafficked in drugs necessarily means that the jury also found that Schlosser unlawfully possessed drugs. (Red Br. at 14-15.) Nor does the State dispute that Schlosser should be granted a new trial on the aggravating trafficking count, if he is correct that a lesser included offense instruction was generated. Instead, the State argues only that unlawful possession of scheduled drugs is not a lesser included offense of aggravated trafficking in scheduled drugs because the statutory definition of "traffick" includes ways that one can traffick in drugs without possessing drugs—even though none of those means were before the jury. The State continues, saying that "[e]ven if the trial court only provided one trafficking definition in the jury instructions, that does not alter how the offense is legally defined, or how it is defined in the indictment." (Red Br. at 15 (internal footnote omitted).)

The State is wrong. The statutory definition of a lesser included offense turns on how the proposed lesser included and principal offenses are "legally defined." 17-A M.R.S. § 13-A. In the context of a criminal trial, the legal definition of an offense is controlled by the jury instructions. And here, the jury instructions

limited the legal definition of "traffick" so that, unlike the defendant in *State v. Hardy*, Schlosser had to possess drugs in order to traffick in drugs.[1] 651 A.2d 322, 325 (Me. 1994) (holding that unlawful possession of scheduled drugs is not a lesser included offense of unlawful trafficking in scheduled drugs because one need not "possess" drugs to "traffick" in drugs). In other words, although the indictment contained no specific means of committing trafficking, "[the jury instructions] narrow[ed] the scope of the charged offense by eliminating alternative means and options within a means for committing" the offense. *State v. Couch*, 533 P.3d 630, 644 (Kan. 2023).

Measuring § 13-A's requirements against the jury instructions aligns with the purpose of providing a lesser included offense instruction. "When defendants have committed acts constituting only a lesser offense, failure to give lesser included offense instructions confronts juries with the dilemma of either convicting defendants of the higher (and improper) offense charged or acquitting them outright." Michael H. Hoffheimer, *Habeas Corpus Review of State Trial Court Failure to Give Lesser Included Offense Instructions*, 16 U. MICH. J.L. REFORM 617,

[1] The State notes that no explanation for the limitation on the definition of the term "traffick" appears in the record. (Red Br. at 15, n.4.) When discussing jury instructions, the trial judge asked the attorney for the State if he objected to limiting the definition of trafficking to possession plus intent. (A. 105-06.) The attorney for the State responded, "[t]hat's fine, your Honor." (A. 105-06.) The State, therefore, affirmatively waived any argument about the propriety of the trafficking instruction.

627 (1983). Indeed, the Supreme Court "has recognized that juries facing this dilemma are under considerable pressure to convict, and that the all-or-nothing choice tends to distort the truth-finding functions of juries and to undermine the reliability of jury verdicts." *Id.* (citing *Keeble v. United States*, 412 U.S. 205 (1973)); *see also Beck v. Alabama*, 447 U.S. 625, 637 (1980) (highlighting, in the capital offense context, the "risk of an unwarranted conviction" in the absence of a lesser included offense instruction). Thus, the reason to give a lesser included offense instruction is jury-centric and focuses on the actual decisions confronting a jury. Comparing the elements of the proposed lesser included offense to the principal offense's legal definition in the jury instructions is, therefore, consistent with the purpose of giving a lesser included offense instruction. Conversely, comparing the elements of the proposed lesser included offense to the principal offense's underlying statute conflicts with § 13-A's purpose, at least when the underlying statute contains alternative means for committing the crime that are unknown to the jury. And in this case, the latter approach arbitrarily deprived Schlosser of a lesser included offense instruction, even though the jury was categorically required to find that Schlosser possessed drugs in order to find that Schlosser trafficked in drugs.

## II. The State misapprehends the nature of its discovery violation when it failed to timely disclose S/A Vafiades in automatic discovery.

The State does not dispute or qualify the chronology of the discovery issues concerning S/A Vafiades's testimony: in short, that the State did not disclose S/A Vafiades as a witness until shortly before the trial and refused to provide an expert report. (*See*, *e.g.*, Blue Br. 10-11, 22-24; Red Br. at 4-5, 12-14.)[2] Instead, the State argues that no expert report was required because the trial court never ordered the State to provide an expert report, and therefore no violation of the discovery rules occurred.[3]

The State misses the point of Schlosser's argument, as well as this Court's discussion in *State v. Green*, 2024 ME 44, 315 A.3d 755. The defendant in *Green* argued that the State provided inadequate discovery about a drug recognition expert (DRE) by not providing a curriculum vitae or the scientific studies that the DRE's training and report were based on. *Id.* ¶ 13. This Court stressed the

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[2] Schlosser was arrested on May 30, 2023 and indicted on August 8, 2023. (A. 3, 5.) He filed a speedy trial motion on September 27, 2023 (A. 6.) The State then waited until March 2024 to disclose S/A Vafiades as a witness, and the subject matter of S/A Vafiades' testimony was not known to trial counsel until sometime in April 2024. (A. 30, 60; Trial Tr. 20:19-21:10.) Schlosser brought the matter to the Court's attention in May 2024, after his efforts to acquire an expert report from the State failed.

[3] The State disclaims that S/A Vafiades was an expert witness and maintains that the testimony was lay testimony. (Red Br. at 13.) This argument is waived, however, because the State has failed to make a developed argument in its brief about how the trial court abused its discretion when deciding that S/A Vafiades's testimony about the economics of the Bangor drug market was expert testimony rather than lay testimony.

importance of the State's discovery obligations to ensuring a fair trial, but ultimately rejected Green's arguments because it was "undisputed that the State provided Green with the DRE's report as part of automatic discovery, putting Green on notice that there was an expert involved in the case." *Id*. In other words, Green was not prejudiced because the State provided timely notice of an expert, allowing Green time to request a further report under the Maine Rules of Unified Criminal Procedure. But unlike the prosecution in *Green*, the State here provided no notice of S/A Vafiades until just before trial, in violation of the automatic discovery rules. M.R.U. Crim. P. 16(a)(2)(H) (requiring the names of all witnesses as automatic discovery); M.R.U. Crim. P. 16(b) (timing of automatic discovery). The fact that S/A Vafiades "did not have a narrative report" due to "the nature of [his] testimony and the lack of direct involvement with the case" does not change Rule 16(a)(2)(H)'s requirements that he be disclosed as a witness. Either way, S/A Vafiades was to be called as a witness and was required to be timely disclosed. And instead, the State chose to wait for eight months post-indictment to reveal S/A Vafiades' name as a witness—all while Schlosser sat in jail awaiting trial, and long after Schlosser demanded a speedy trial in September 2023. (A. 3, 5-6, 30, 60; Trial Tr. 20:19-21:10.)

To be sure, the State is generally not required to create an expert report unless ordered to do so. M.R.U. Crim. P. 16(d)(4). But a defendant cannot make a timely motion to compel preparation of an expert report when the State has not disclosed the identity of the expert or revealed the subject matter of the proposed expert's testimony. *Cf. Green*, 2024 ME 44, ¶ 13. *See also* M.R.U. Crim. P. 12(b)(3)(A) (requiring a defendant to serve pretrial motions related to discovery one day after the dispositional conference). And the State's effort to blame Schlosser is unconvincing. (Red Br. at 13 (asserting that "[i]f Schlosser truly wanted such a report," he should have accepted a continuance "instead of attempting to use the discovery rules to exclude evidence he believed to be inculpatory").) For one thing, Schlosser moved for a speedy trial in September 2023 (A. 5), yet the State still chose to unduly delay its case preparation and not reveal S/A Vafiades until well into 2024. Nor is there evidence that Schlosser was "attempting to use the discovery rules" to gain an unfair advantage and exclude unfavorable evidence, as the State seems to think. To the contrary, the trial court criticized *the State* for its "sharp practice." (Trial Tr. 21:23-26:3, A. 31-36.) By unduly delaying its disclosure of S/A Vafiades, the State left Schlosser with no reasonable options: Schlosser could either continue patiently waiting in jail for trial in contravention of his speedy trial rights because of the State's delayed case

preparation, or start the trial hampered by the lack of an expert report. By vacating, this Court will send the message that the State must timely prepare its case as contemplated by the structure of the Maine Rules of Unified Criminal Procedure, particularly with defendants who are detained pending trial on a Class A charge and who have demanded a speedy trial, as here. Otherwise, the State will continue to have little incentive to evaluate its need for experts until the last minute.

## III. The "sheer quantity" of drugs and the "remarkable level of activity" on Schlosser's phone go to the same sentencing factor: the scope of Schlosser's drug trafficking activity.

In the opening brief, Schlosser explained that the trial court double counted the scope of his drug-trafficking activity at step one and step two of the *Hewey* analysis. When setting the basic term of imprisonment on step one, the trial court relied on the serious nature of aggravated trafficking in scheduled drugs and the quantity of drugs on Schlosser's person. Then, when evaluating mitigating and aggravating factors on step two, the trial court stated that the high activity level on Schlosser's phone was an aggravated factor. Thus, the trial court double counted the scope of Schlosser's drug activity by considering it when determining the basic sentence, and considering it again as an aggravating factor.

The State's proffered distinction between the quantity of drugs and the number of customers is illusory when considering the *Hewey* framework. "In step

one, the court reviews factors relevant to the objective nature of the crime, while at the second step, it considers factors 'peculiar to [the individual] offender.'" *State v. Plummer*, 2020 ME 143, ¶ 13, 243 A.3d 1184 (quoting *State v. Hewey*, 622 A.2d 1151, 1154 (Me. 1993)). Although a sentencing court may consider the same facts at step one and two, it must do so for different purposes. *Id.* ¶ 14. For example, in *Plummer*, this Court held that a sentencing court did not double count a factor when it considered at step one the "commercial operation in terms of scale" of a drug trafficking operation, and at step two the defendant's "commercial motive"—in other words, the defendant's actions were not based on addiction but on "selfish, monetary gain." *Id.* ¶¶ 16-17. Unlike *Plummer*, the factor considered at steps one and two was the same: the scope of Schlosser's drug trafficking activity. Indeed, the trial court here even cited Schlosser's addiction and treatment as mitigating factors (Sent. Tr. 18:13-18), so it is not as if the sentencing court concluded that Schlosser had a commercial motivation as in *Plummer*. Thus, the scope of Schlosser's drug trafficking activities, whether framed in drug quantity or number of customers, is an objective factor that should have only been considered at step one of the *Hewey* analysis.

## IV. The State's suppression argument fails to consider that the officer needed reasonable suspicion that Schlosser had drugs on his person at the time of the search.

The State's various points on the suppression issue fail to consider the unique suspicion necessary to justify the search: that Schlosser had drugs *on his person* when searched. Not that Schlosser was allegedly trespassing; not that Schlosser was associated with drug users; and not even that Schlosser had recently used drugs. To the unique suspicion required, Officer Alvarado had only conjecture and speculation because Schlosser was merely walking through a parking lot. And while the State may criticize Schlosser's "attempt to attack the 'furtiveness' of his movement" (Red Br. at 12), it fails to account that Schlosser moved for specific findings on how his behavior was supposedly furtive. The trial court denied that motion, meaning that this Court cannot infer findings from the record. *Ehret v. Ehret*, 2016 ME 43, ¶ 12, 135 A.3d 101. And even if this Court could infer findings, the video does not suggest that Schlosser's response to Officer Alvarado was suggestive of possession of drugs, either individually or together with other facts known to the officer.

Respectfully submitted,

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## Certificate of Service

I hereby certify that on the date stated below I caused an electronic copy of this document to be served on the following counsel via email. In addition, upon acceptance of this brief by the Court, two paper copies of this brief will be served on the following counsel.

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