

STATE OF MAINE  
YORK, ss.

SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT  
DOCKET NO: YOR-24-68

STATE OF MAINE,  
Appellee

V.

CALIXTE FLEURY  
Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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## **STATEMENT OF THE ISSUES**

- I. Whether 17-A M.R.S. §1101(2021) retroactively applies to Fleury's conduct committed in September of 2020 where 1 M.R.S. §302 states that "[a]ctions and proceedings pending at the time of the passage, amendment, or repeal of an Act or ordinance are not affected thereby" and the legislature did not include any clear and unequivocal language in the passage of 17-A M.R.S. 1101(2021) making it applicable to pending proceedings**
- II. Whether the definition of "trafficking" in 17-A M.R.S. 1101(2018) violated Fleury's right to due process where the alleged violation was not raised below and there was no deprivation of a protected right.**

## **SUMMARY OF THE ARGUMENTS**

I. 1 M.R.S. §302 governs when reviewing whether a statutory amendment applies retroactively. 1 M.R.S. §302 specifically states “Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby.” Therefore, retroactive application of a statutory amendment is barred unless there is clear and unequivocal language included in the amendment stating it is to apply to pending matters. Here, in proposing and passing PL 2015, c. 346 §1, which went into effect October 18, 2021, the legislature did not add new language—instead, it merely deleted certain provisions of 17-A M.R.S. §1101. The trial court, in instructing the jury on the definition of trafficking contained in 17-A M.R.S. §1101(17) (2018), properly stated the law as it applied to Fleury given his offense occurred on September 18, 2020, and the subsequent amendment to 17-A M.R.S. §1101 did not include any language which made it retroactive.

II. State action need only be reasonably related to a legitimate state interest if the state action does not implicate either a fundamental right or fundamental liberty interest. *Doe v. Williams*, 2013 ME 24, ¶¶65-66, 61 A.3d 718. Because Fleury cannot identify a fundamental right or liberty interest at stake here, 17-A M.R.S. §1101(17) (2018) need only be reasonably related to a

legitimate state interest. Therefore, since Fleury has no recognizable right to possess fentanyl, and because 17-A M.R.S. §1101(17) (2018), which defines the term “to traffick” and went into effect on September 19, 2019, is reasonably related to the legitimate state interest of eliminating the unlawful possession and sale of fentanyl, Fleury cannot establish a substantive due process claim.

## **PROCEDURAL HISTORY**

Calixte Fleury (hereinafter “Fleury”) was charged by way of a superseding indictment dated November 7, 2023. (Appendix (hereinafter “A.”) 17-19.) Therein, Fleury was charged with five counts—Aggravated Trafficking in Scheduled Drugs<sup>1</sup>, Unlawful Trafficking in Scheduled Drugs<sup>2</sup>, Possession of Scheduled Drugs<sup>3</sup>, Class C, Criminal OUI<sup>4</sup>, and Criminal Forfeiture<sup>5</sup>. (A. 17-19.) Fleury was arraigned on the superseding indictment on December 11, 2023, at which time he entered pleas of not guilty to counts 1, 2, 3, and 4, as well as a denial of count 5. (A. 6.)

Following a jury trial held on December 13, 2023, verdicts of guilty were returned on Counts 1, 2, 3, and 4. (Tr. 187-188.) A sentencing hearing was then held on January 19, 2024. (Sentencing Hearing (hereinafter “SH.”) 3.) Fleury, following argument, was sentenced to 7 years, with all but 4 years suspended, followed by 4 years of probation. (SH. 33.)

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<sup>1</sup> 17-A M.R.S. §1105-A(1)(M)(2017).

<sup>2</sup> 17-A M.R.S. §1103(1-A)(A)(2017).

<sup>3</sup> 17-A M.R.S. §1107-A(1)(B)(8)(2017).

<sup>4</sup> 29-A M.R.S. §2411(1-A)(A)(2009).

<sup>5</sup> 15 M.R.S. §5826(2019).

## **STATEMENT OF FACTS**

At approximately 2:30AM on September 18, 2020, a motor vehicle crash occurred on I-95 in Kittery. (Transcript (hereinafter "Tr.") 38-40.) A bystander who witnessed the crash immediately called 9-1-1 to report the incident. (Tr. 38.) Sergeant (hereinafter "Sgt.") Thomas Pappas of the Maine State Police responded to the call and located a Jeep crashed into a tree approximately 100 yards off the highway. (Tr. 45.)

Sgt. Pappas, upon approaching the vehicle, located Fleury in the driver's seat of the vehicle. (Tr. 49.) Sgt. Pappas then made contact with Fleury who stated he had struck the sidewalk while driving. (Tr. 50.) During the interaction, Sgt. Pappas specifically noted the smell of alcohol on Fleury's breath, as well as a bag of pills in the driver's side door pocket. (Tr. 50.) Sgt. Pappas noted the pills initially looked like Oxycodone 30 milligram tablets. (Tr. 50.) The pills were seized, and Fleury was transported for an Intoxilyzer test. (Tr. 50.)

Sgt. Pappas testified, however, that an Intoxilyzer test could not be completed because the machine was not working. (Tr. 51.) Fleury was informed of the situation and, upon request, consented to a blood draw. (Tr. 51-52.) A blood technician was called in but, while waiting, Fleury requested to use the bathroom. (Tr. 52.) Prior to allowing him to

use the bathroom, Sgt. Pappas searched Fleury's person and located 20 grams of suspected fentanyl powder secreted in his groin area. (Tr. 53.)

Sgt. Pappas also located approximately \$908.10 in U.S. Currency on Fleury's person which was also seized. (Tr. 55.)

The seized pills were then reexamined more closely by Sgt. Pappas who noted inconsistencies that led him to believe the 53 and one-half pills were pressed fentanyl, not Oxycodone as originally suspected roadside. (Tr. 69.) The pills, suspected fentanyl powder, and Fleury's blood sample were ultimately sent to the Health and Environmental Testing Laboratory (hereinafter "HETL") for confirmatory testing. (Tr. 91-92.) HETL confirmed that the chemical composition of one of the pills tested at random contained fentanyl and Tramadol, the 18.04 grams of seized powder contained fentanyl, and Fleury's blood alcohol content was 0.093 grams per 100 milliliters of blood. (Tr. 91-92, 113, 118.)

On December 13, 2023, a jury trial was held. (Tr. 5) Counsel for Fleury, in his opening statement, claimed there was "zero other evidence—other evidence corroborating that [Fleury] was engaged in trafficking but merely that he possessed [the] drugs." (Tr. 35.) Upon conclusion of Fleury's opening statement, counsel for the State immediately requested a side bar. (Tr. 35.)

There, the State raised that Fleury's opening statement was misleading as to the definition of "trafficking" and stated "I just want to make sure it's heard that Attorney Gale is on the same page, that the definition of trafficking is, in fact, possession of two or more grams." (Tr. 36.) Counsel for Fleury agreed, stating "I understand that. At the time that this event occurred, that was the definition." (Tr. 36.)

Following the close of evidence, the Trial Court held a conference with the parties regarding proposed jury instructions. (Tr. 141.) Counsel for Fleury objected to the Trial Court's intention to define trafficking as "to possess two or more grams of that drug." (Tr. 142.) The Trial Court overruled the objection, stating: "But I do believe the State gets to choose its theory to pursue under the statute. It's chosen the theory of possession of two grams or more of fentanyl powder." (Tr. 142-143.) The Trial Court further noted "The Court believes strongly that, if I were to provide every definition, that can misdirect, mislead, and confuse the jury, and I am not going to do that." (Tr. 143.)

The Trial Court instructed the jury that "[t]raffick means to possess 2 grams or more of fentanyl powder or 90 or more individual bags, folds, packages, envelopes, or containers of any kind containing fentanyl powder." (Tr. 161.) The Trial Court further instructed "I've given the law to you as I get

it from the Maine Legislature and the Maine Supreme Judicial Court. Whether I agree with the law or not is totally irrelevant. It's just as irrelevant whether you agree with the law or not." (Tr. 173.)

## ARGUMENT

**I. The trial court properly instructed the jury on the definition of trafficking in 17-A M.R.S. §1101(2018) because 17-A M.R.S. §1101(2021) does not retroactively apply to Fleury.**

This Court “review[s] de novo whether a statutory amendment will be applied retroactively or prospectively.” *State v. Tripp*, 2024 ME 12 ¶13, 314 A.3d 101 (quoting *MacImage of Me., LLC v. Androscoggin Cnty.*, 2012 ME 44, ¶21, 40 A.3d 975). However, when an action is pending and the applicable statute to that action is amended “the legislatively created rule of construction set forth in 1 M.R.S. §302 (2023) applies.” *Tripp*, 2024 ME at ¶13, 314 A.3d 101 (quoting *State v. Beeler*, 2022 ME 47, ¶1 n.1, 281 A.3d 637). Specifically, 1 M.R.S. §302 provides that:

The repeal or amendment of an Act or ordinance does not affect any punishment, penalty, or forfeiture incurred before the repeal or amendment takes effect, or any action or proceeding pending at the time of the repeal or amendment, for an offense committed or for recovery of a penalty or forfeiture incurred under the Act or ordinance repealed or amended. Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby.

“[A]bsent clear and unequivocal language to the contrary” section 302 provides a rule of construction and is controlling.” *Tripp* 2024 ME at ¶13, 314 A.3d 101 (quoting *Reagan v. Racal Mortg., Inc.*, 1998 ME 188, ¶7, 715 A.2d

925). Thus, to determine whether an amended criminal statute retroactively applies to pending litigation, this Court has consistently examined "(1) whether the Legislature expressed the intent to make the statute retroactive in its application and, if so, (2) whether that retroactive application [of the statute] violates any provisions of the Maine Constitution." *Tripp*, 2024 ME at ¶15, 314 A.3d 101 (internal quotations omitted).

In *Tripp*, for example, this Court addressed whether a recent amendment to 17-A M.R.S. §1111-B applied retroactively to matters pending at the time of the amendment. *Id.* at ¶16. There, the defendant argued that a superseding indictment handed down after the applicable statute was amended should be dismissed as the new version of the statute barred prosecution for the conduct alleged. *Id.* at ¶12. However, this Court, relying on *State v. Alley*,<sup>6</sup> ruled that the "punishment, penalty or forfeiture" is incurred at the time the offense is committed and given section 302, the "statutory amendment [did] not affect any penalties that were incurred before the amendment took effect, nor [did] it apply to crimes committed prior to the time the amendment was enacted." *Tripp*, 2024 ME at ¶ 15, 314 A.3d 101 (quoting *State v. Shepley*, 2003 ME 70, ¶9, 822 A.2d 1147). Therefore, *Tripp*'s

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<sup>6</sup> 263 A.2d 66 at 69 (Me. 1970).

argument failed upon the first prong of whether there was clear and unequivocal language contained in the amended version of §1111-B to overcome 1 M.R.S. §302. *Id.* at ¶16.<sup>7</sup>

Likewise, in *State v. Rosario* this Court addressed a challenged jury instruction which provided that “‘traffick’ was defined to include...to possess 2 grams or more of fentanyl powder or 90 or more individual bags, folds, packages, envelopes or containers of any kind containing fentanyl powder.” 2022 ME 46, ¶31, 280 A.3d 199, 208. There, the defendant, like Fleury, was alleged to have violated 17-A M.R.S. §1105-A(1)(M)(2017). *Id.* at ¶31. This Court, in reviewing the provided jury instruction, stated the operative definition of “traffick” in effect at the time the offense was committed included possession of a certain quantity of fentanyl and, therefore, “it was relevant whether [the defendant] possessed fentanyl powder.” *Id.*

Therefore, Fleury’s “punishment, penalty or forfeiture” was incurred at the time his offenses were committed on September 18, 2020. (Tr. 38-40.) The operative definition of trafficking in effect at that time was clear—to “possess 2 grams or more of fentanyl powder...” 17-A M.R.S. §1101(17)(F), eff. Sept. 19,

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<sup>7</sup> This Court did not address the second prong of its analysis regarding whether the retroactive application of the amended statute would violate any provision of the Maine Constitution because the clear language of the law prohibited retroactive application to pending matters. *Tripp*, 2024 ME at ¶16, 314 A.3d 101.

2019. The legislature, in passing PL 2015, ch. 346, §1, which went into effect October 18, 2021, did not indicate the amended statute should be retroactively applied to pending matters. The trial court, just as it did in *Rosario*, properly instructed the jury on the definition of trafficking as it applied to the matter at hand. (Tr. 161.) Furthermore, just as in *Tripp*, this Court need not examine whether retroactive application would violate the Maine Constitution as the clear and unequivocal language of the law barred retroactive application of PL 2015, ch. 346, §1.

**II. 17-A M.R.S. §1101(2018) was constitutionally valid as applied to Fleury.**

This Court “review[s] de novo a challenge to the validity of a statute as a matter of law.” *State v. Letalien*, 2009 ME 130, ¶15, 985 A.2d 4, 12 (internal citations omitted). “A statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity.” *Kenny v. Dep’t of Human Servs.*, 1999 ME 158, ¶7, 740 A.2d 560, 563. “The substantive due process rights of the United States and Maine Constitutions are coextensive.” *Doe v. Williams*, 2013 ME 24, ¶65, 61 A.3d 718. Therefore, when a substantive due process claim is made, “analysis turns on whether the challenged state action implicates a fundamental right.” *Id.* This Court has

stated a “state action [that] infringes on a fundamental right or fundamental liberty interest...must be narrowly tailored to serve a compelling state interest.” *Id.* at ¶66. However, if the state action does not implicate either a fundamental right or fundamental liberty interest, the state action will be upheld if it merely is “reasonably related to a legitimate state interest.” *Id.*

Fundamental rights and liberties have been specifically defined as those rights expressly delineated in the Bill of Rights as well as the right to marry, to have children, to oversee the education and upbringing of one’s children, to use contraceptive devices/methods, to bodily integrity, to abortion, and to marital privacy. *Id.* at ¶65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997)). The courts, therefore, “must be cautious in recognizing fundamental rights that have not been clearly established” as it would intrude on “the arena of public debate and legislative action.” *Glucksberg*, 521 U.S. at 720 (1997).

In *Doe v. Williams*, for example, this Court determined no fundamental right or interest was infringed upon by the passage and enforcement of SORNA of 1999. 2013 ME 24, ¶68, 61 A.3d 718. Specifically, this Court refused to recognize an extension of the right to privacy to include the right of individuals to keep conviction information private. *Id.* at ¶67. Therefore, the substantive due process claim was denied as there was no fundamental right

or interest at stake, and the action was related to a legitimate state interest of disseminating truthful and accurate information of a non-confidential nature.

*Id.* at ¶¶67-68.

Here, Fleury has not raised a fundamental right or interest which has been infringed upon by the definition of “trafficking” the legislature passed in 17-A M.R.S. 1101(17) (2018). Because there is no fundamental right or interest to possess certain quantities of fentanyl, and since no fundamental right or interest can be expanded to encapsulate the right to possess certain quantities of fentanyl, the appropriate test to apply is the same as in *Doe v. Williams*—that is, is there a legitimate state interest addressed by the state action. 2013 ME 24, ¶¶66, 61 A.3d 718.

The legitimate state interest here is addressing the ongoing opioid epidemic in Maine. See Maine Executive Order #2 FY 19/20 (Feb. 6, 2019), An Order to Implement Immediate Responses to Maine’s Opioid Epidemic. The statute at hand, 17-A M.R.S. 1101(17) (2018), defining trafficking as “to possess 2 grams or more of fentanyl powder or 90 or more individual bags, folds, packages, envelopes, or containers of any kind containing fentanyl powder[,]” is reasonably related to that state interest of reducing and/or eliminating the availability of illegal opioids.

Given Fleury's inability to identify a fundamental right or liberty, the application of 17-A M.R.S. 1101(2018) to Fleury's case did not violate his substantive due process as it was reasonably related to advancing the legitimate state interest of curtailing the opioid epidemic in Maine.

**CONCLUSION**

The State respectfully requests, based upon the foregoing reasons, Fleury's convictions be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Kyle Myska, Esq., Assistant Attorney General, do hereby certify that I have mailed two copies of the foregoing “BRIEF of APPELLEE” to Fleury’s attorney of record, Michelle King, Esq.

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