The Intersection of Statutory Rights: Massachusetts Adopts Pick and Choose Approach for Criminal Defendants

“I believe . . . that forcing a defendant to make a choice between the application of one statute or the other, when he or she is entitled to both, undermines, rather than protects, the rationality of the process, and elevates the speculative concerns of a jury over the statutory rights of a defendant.”1

I. INTRODUCTION

Massachusetts grants criminal defendants certain statutory rights and protections.2 Among those are the right to an affirmative defense invoking the statute of limitations, as well as a jury instruction on a lesser-included offense.3 The statute of limitations seeks to protect a defendant against prosecution after an established time period has passed.4 Likewise, policy favors instructing a jury on lesser offenses to “afford . . . a less drastic alternative than the choice between conviction of offense charged and an acquittal,” which can be strategic for both prosecutor and defendant.5

While these statutory rights are typically straightforward, a conflict arises when the two rights are applied simultaneously.6 This can be illustrated in a first-degree murder trial.7 A defendant may request an instruction on the lesser-included offense of manslaughter; however, the six-year statute of limitations

2. See id. at 340 (majority opinion) (outlining two statutory protections afforded to criminal defendants).
period may have passed. Courts are conflicted about how to address this intersection of statutory rights; once instructed on the lesser time-barred charge, the defendant will raise the affirmative statute of limitations defense against the lesser charge.

Currently, states approach this issue in several different ways, and thus created the following rules: the Spaziano rule, the Short rule, and the Delisle rule. The Spaziano rule holds that a defendant must waive his or her statute of limitations right in order for the judge to provide the jury with instructions on a lesser offense. The Short rule allows both statutory rights to apply concurrently, and acquits the defendant if found guilty of a time-barred lesser offense. In a similar approach, the Delisle rule also allows both rights to prevail, but will inform the jury of the consequence a guilty verdict has on the lesser offense.

In Commonwealth v. Shelley, Massachusetts incorrectly adopted the Spaziano rule requiring defendants to pick one right over the other. In Part II, this Note explores the history and policy considerations of the two statutory rights, and the concerns each court contemplated in establishing its respective rule. Then, in Part III, this Note analyzes why Massachusetts erred in adopting the Spaziano rule and how the rule undermines the importance of these two statutory rights. Finally, this Note concludes that the Short rule should be the law in Massachusetts, and suggests legislative enactment of such rule.

8. See Adlestein, supra note 6, at 202 (explaining defendant’s right to request time-barred, lesser offense).
9. See id. at 204 (discussing questions arising when court asked to apply both statutory rights).
10. See Commonwealth v. Shelley, 80 N.E.3d 335, 338 (Mass. 2017) (listing three rules arising from this issue); see also Spaziano, 468 U.S. at 449-50 (stating rule formed at trial level and affirmed by Supreme Court); Short, 618 A.2d at 324 (overruling trial courts instruction and adopting new rule); Delisle, 648 A.2d at 634 (announcing new rule informs jury of statute of limitations consequence).
11. See Spaziano, 468 U.S. at 450 (holding lesser-offense instruction conditional upon waiving statute of limitations defense).
12. See Short, 618 A.2d at 319 (holding defendant entitled to both rights).
15. See id. at 336 (concluding defendant must waive statute of limitations defense to instruct lesser offense of manslaughter). The issue of how to apply these rights concurrently first arose in Massachusetts in Commonwealth v. Bougas, when a defendant appealed his conviction of a time-barred lesser-inculded offense. See 795 N.E.2d 1230, 1233 (Mass. App. Ct. 2003). The Appeals Court of Massachusetts recognized this undecided issue but left it open, determining that the defendant waived his right to the statute of limitations defense. Id. at 1234.
16. See infra Part II (discussing history and policies surrounding three rules).
17. See infra Part III (analyzing approach Massachusetts took in adopting Spaziano rule).
18. See infra Part IV (suggesting Massachusetts legislature adopt Short rule approach).
II. HISTORY

A. Statutory Rights Involved

1. Background and Policy Purpose of the Statute of Limitations

The statute of limitations is a fixed time period after which an offense may not be prosecuted, acting as either an affirmative defense or a jurisdictional bar.\(^1\) This distinction—affirmative defense versus jurisdictional bar—is significant, in that, if enacted as an affirmative defense, the defendant may invoke that right, may choose not to raise it, or may waive the right completely.\(^2\) In contrast, if a state enacts this to be a jurisdictional bar, a defendant may raise the issue at any time during trial, and the court is without jurisdiction to try the offense.\(^3\)

The statute of limitations reflects a legislature’s judgment that after a certain period of time, the state is not going to convict a defendant of that crime.\(^4\) When enacting a particular statute of limitations, a legislature considers the crime’s severity and the nature of the evidence involved.\(^5\) The limitations period reflects the desire to prosecute a crime while evidence is reasonably fresh to avoid the

\(^1\) See G. Robert Blakey, *Time-Bars: RICO-Criminal and Civil-Federal and State*, 88 Notre Dame L. Rev. 1581, 1632 n.72 (2013) (contrasting waivable affirmative defenses and jurisdictional bars under various statutes of limitations). Most states, and the federal government, hold that the statute of limitations is a defense that must be asserted by a criminal defendant at trial. *See id.* In a jurisdictional bar state, the statute of limitations prohibits a prosecutor from bringing an action. *Id.; see State v. Delisle, 648 A.2d 632, 646 (Vt. 1994) (Johnson, J., concurring) (contrasting Vermont’s statute, stating prosecutions commenced after limitations period “shall be void”).*

\(^2\) See 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.5(a) (4th ed. 2018), Westlaw CRIMPROC § 18.5(a) (outlining different views regarding effect of statute of limitations in criminal trial); Blakey, supra note 19, at 1632 n.72 (providing examples of different states’ approaches regarding ability to waive statute of limitations). Some states treat silence as a waiver of the defense, while others only permit waiver if expressed by the defendant. *See Tim A. Thomas, Annotation, Waivability of Bar of Limitations Against Criminal Prosecution, 78 A.L.R. 4th 693, § 2(a) (1990) (analyzing different states’ approaches to statute of limitations). Thomas considers the scenarios in which a prosecutor may manipulate the waiver of the statute of limitations, using *Spaziano* as an example. *See id.* § 2(b). A prosecutor may charge a higher crime if the limitations period has run on lesser crimes to attempt to persuade a defendant to waive that right. *See id.* This bargain is beneficial for a defendant facing serious charges, as well as the prosecutor to increase probability of conviction. *See id.*

\(^3\) See Thomas, supra note 20, § 2(a) (explaining how courts treat jurisdictional statute of limitations). States who hold waiver of statute of limitations as impermissible treat the defense not as an actual defense, but rather jurisdictional in nature. *See id.* In a jurisdictional bar state, a criminal statute of limitations prevents the offense from being charged, and further renders the court without subject matter jurisdiction. *See id.*

\(^4\) See Powell, supra note 4, at 129 (outlining legislative rationales in enacting statute of limitations). The legislature takes into account evidentiary concerns such as eroded memories or witness unavailability, to protect fair and accurate trials. *Id.*

\(^5\) See Vance Eaton & Joseph Berry, *Is Justice Delayed Justice Denied?,* S.C. LAW., July 2016, at 47, 48 (detailing policy reasons for enacting statute of limitations). Severe crimes are allotted a longer period of time to prosecute, while misdemeanors have a shorter statute of limitations. *Id.* Evidentiary concerns are also taken into consideration, worrying that facts become obscure over time. *Id.* The statute of limitations reflects a legislature’s judgment that no amount of evidence is sufficient, past this point of time, to convict the alleged offender. *See Powell, supra note 4, at 129 (describing rationale of statute of limitations).*
possibility of erroneous conviction or an inability for a defendant to challenge evidence.\textsuperscript{24} Public policy not only seeks to protect defendants from claims that are too old to litigate, but it also compels prosecutors to take action.\textsuperscript{25}

In addition to policy concerns regarding prosecutor and defendant, the statute of limitations period also reflects a societal interest.\textsuperscript{26} The purpose of criminalizing an act is to prevent the act from occurring, punish the perpetrator, and protect society.\textsuperscript{27} Enacting a specified time period during which the perpetrator can no longer be convicted suggests the legislative intent that these societal interests—that criminalized the behavior in the first place—are no longer a priority.\textsuperscript{28} Enacting a statute of limitations for a criminal offense vests a right in the defendant to no longer be punished for that crime after a specified period of time.\textsuperscript{29}

\textsuperscript{24} See \textit{Model Penal Code} § 1.06 explanatory note (A M. LAW INST. 2018) (commenting on background of statute of limitations enactment). Legislatures recognize that it is difficult to preserve physical evidence over time as it may be hard to track down witnesses, if still alive, and witnesses who are available may not remember the events as they once did. \textit{See id.} With respect to physical evidence, if passage of time caused deterioration, it would deny the defendant an opportunity to test it independently. \textit{See Powell, supra note 4, at 129.}

\textsuperscript{25} See \textit{Model Penal Code} § 1.06 explanatory note (balancing interests of society against preserving fair trial); David Marusarz, Note, \textit{Never Hanging Defendants out to Dry: Preserving the Policy Behind the Statute of Limitations in Money Laundering Conspiracies}, 45 VAL. U. L. REV. 253, 273-77 (2010) (describing public policy purposes balance interests of prosecutors, defendants, and society). Despite the ultimate effect of allowing a guilty party to go free, the many objectives protecting fairness at trial seem to outweigh this concern. \textit{See Model Penal Code} § 1.06 explanatory note. The Model Penal Code identifies reasons legislatures have enacted criminal statutes, then rebuts those reasons, explaining after time passes there is no longer an interest in prosecution. \textit{See id.}

\textsuperscript{26} See \textit{Model Penal Code} § 1.06 explanatory note (listing public policy reasons taken into consideration for statute of limitations). In addition to evidentiary issues that occur with the passage of time, the legislature should also take into account societal interests, or lack thereof. \textit{See id.}

\textsuperscript{27} \textit{See id.} (rebuiting need for criminal sanctions after period of time); \textit{see also Commonwealth v. Shelley, 80 N.E.3d 335, 341 (Mass. 2017) (Budd, J., dissenting)} (explaining limitations period reflects policy choice to let some individuals go unpunished). After a certain period of time, the reasons for punishment are “no longer desirable.” \textit{Shelley, 80 N.E.3d at 341 (Budd, J., dissenting).} Legislatures recognize that, among other things, the community needs finality of a criminal case, and hope that after a period of time a criminal may redeem himself or herself. \textit{See id.}

\textsuperscript{28} See \textit{Model Penal Code} § 1.06 explanatory note (outlining diminished need to protect society from criminal after passage of time). If the individual who committed a crime since refrains from doing so, the societal interest of rehabilitation is no longer necessary. \textit{See id.} On the other hand, an individual who continues to commit crimes can be convicted of the more recent offense, further eliminating the need to protect society from the offense that occurred prior. \textit{See id.} Further, the retributive impulse which society may feel when a crime occurs, diminishes over time as the offense becomes forgotten. \textit{See id.} A final consideration is to promote repose in the community, further adding to the value of finality. \textit{Id.}

\textsuperscript{29} \textit{See Toussie v. United States, 397 U.S. 112, 114 (1970) (discussing purpose of statute of limitations); LAFAVE ET AL., supra note 20, § 18.5(a) (acknowledging statute of limitations prevents prosecution of old crime); Adlestein, supra note 6, at 200 (explaining effect of statute of limitations); see also Shelley, 80 N.E.3d at 341 (Budd, J., dissenting) (highlighting importance of statute of limitations as a defendant’s right). The statute of limitations vests a right in the defendant that ensures the defendant will no longer be convicted of a crime, which should not be subject to relinquishment. \textit{See Shelley, 80 N.E.3d at 341 (Budd, J., dissenting).}
2. **Background and Policy Purpose of a Lesser-Included Offense Instruction**

Lesser-included offenses are those necessarily included in the offense charged. A defendant may be convicted of a crime, though not expressly charged with that precise crime, if its elements are included in the charged offense. When a defendant or prosecutor requests a lesser-included offense instruction, a judge must instruct if evidence permits a finding on that offense. The instruction’s purpose is to afford the jury a less drastic option than the ordinary two—conviction or acquittal.

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30. See Michael H. Hoffheimer, *The Future of Constitutionally Required Lesser Included Offenses*, 67 U. PITT. L. REV. 585, 588 (2006) (acknowledging jury’s right to convict less serious crime). Two approaches exist to determine whether a lesser-included offense is necessarily included. *Id.* at 593. Some statutes require a judge to determine whether a less serious crime was committed at the same time as the charged offense. *Id.* Other states, as well as the federal government, require that the elements of a less serious crime are included as elements of the crime charged. *Id.*

31. See *id.* (stating elements of crime charged include elements of less serious crime); Pflaum, *supra* note 5, at 295 (suggesting nearly impossible to commit greater offense without committing lesser offense); see also, e.g., MASS. GEN. LAWS ch. 278, § 12 (2019) (describing partial verdict, allowing jury to acquit crime charged and convict on residue); VT. STAT. ANN. tit. 13, § 14 (2019) (allowing conviction of lesser-included offense if supported by evidence); FLA. R. CRIM. P. 3.510 (2018) (stating prosecution may convict defendant of crime necessarily included in charged offense). The Model Penal Code states that an offense is included in the charged offense when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or (b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or (c) it differs from the offense charged only in the respect that a less serious injury or risk of injury in the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

**MODEL PENAL CODE § 1.07(4)(a)-(c) (AM. LAW INST. 2018).** A lesser offense is included in the greater offense if the proof necessary to establish the charged offense will also establish the elements of the lesser crime. *See id.* at cmt. 5.

32. See Commonwealth v. Gould, 603 N.E.2d 201, 205-06 (Mass. 1992) (articulating when judge must instruct lesser offense). A judge may refuse to instruct a lesser-included offense if evidence provides no rational basis that a jury would acquit defendant of the charged offense, and find defendant guilty of the lesser-included crime. *Id.*; see Pflaum, *supra* note 5, at 299 (contrasting different jurisdictions’ evidence requirement). Jurisdictions have different standards for what amount of evidence is required to permit a lesser-included offense instruction. *Pflaum, supra* note 5, at 299. Some courts require the jury instruction where any evidence of a lesser-included offense is presented, no matter how tenuous, while others require the evidence to be substantial. *Id.*

33. See Pflaum, *supra* note 5, at 291 (explaining issues with “all-or-nothing” approach). A jury may be hesitant to convict the defendant of the charged offense and question whether the prosecutor has proved each element of the crime beyond a reasonable doubt. *Id.* However, the same jury may be convinced the defendant committed the act, and does not want to return a finding of not guilty. *Id.* at 290. Lesser-included offense instructions give the jury an additional consideration that acts as a middle ground for the all-or-nothing choices. *See id.* at 300. This instruction also prevents wrongful convictions if a jury is hesitant to find a defendant not guilty, and prevents letting a guilty party go for a prosecutor’s failure to prove the charged crime beyond a reasonable doubt. *See id.* at 291. The lesser-included offense “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” Beck v. Alabama, 447 U.S. 625, 634 (1980) (explaining possible constitutional issues raised when judge refuses to instruct lesser offense).
In *Beck v. Alabama*, the Supreme Court reviewed a conviction of a capital crime, which the legislature statutorily prohibited courts to instruct juries on lesser-included offenses. Evidence at trial supported a lesser charge of felony murder; the defendant’s testimony recounted that the killing was unintentional and unexpected. The state of Alabama conceded that this evidence supports charging a lesser crime due to the absence of the requisite mens rea—*intentional* killing—needed to prove the crime charged. The Supreme Court reversed the conviction, and held the statute unconstitutional because the jury was unable to consider the lesser-included offenses that were clearly supported by evidence. The Court described this statutory right as a “procedural safeguard” in situations where evidence unquestionably establishes guilt of some offense, but casts reasonable doubt as to one element of the charged offense. The Court concluded that the failure to give a third, less drastic option between conviction or acquittal, undoubtedly enhances the risk of unwarranted or erroneous convictions.

Additionally, public policy favors instructing juries on lesser-included offenses. The instruction may equally benefit both parties: As the defendant, it is useful to have a less serious crime instructed to cast doubt on the charged offense; as the prosecutor, having another charge instructed may increase the

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34. 447 U.S. 625 (1980).
35. See id. at 630 (explaining evidence supported lesser offense, but statute prohibited instruction).
36. See id. (reciting facts of trial). The defendant further stated it was his accomplice who struck and killed the victim unexpectedly. See id.
37. See id. (finding evidence supports lack of intent by defendant). The defendant was convicted of the capital offense and sentenced to death. See id.
38. See *Beck*, 447 U.S. at 635-37 (holding lesser-included offenses must be instructed).
39. See id. at 637 (describing importance of defendants’ statutory right).
40. See *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (holding lesser-included offenses necessary to fair trial). The Court reversed the defendant’s conviction on the merits because the jury’s decision could not be relied upon, and guilt beyond a reasonable doubt was uncertain. See Adlestein, supra note 6, at 219-20 (analyzing *Beck*). *Beck* seems to elevate the lesser-included offense statutory right to a constitutional level; however, the Court did not comment whether such right is required by due process. See id. at 220-21. Arguments are frequently made that interpret the Court’s reasoning in *Beck* to apply to situations outside of the death penalty context. See id. at 220.
41. See Commonwealth v. Woodward, 694 N.E.2d 1277, 1283-84 (Mass. 1998) (holding error in judge’s refusal to instruct lesser offense). It is in the public’s interest to permit a jury to convict on a lesser offense that is established by evidence, rather than an offense not fully established. See id. at 1283.
likelihood of a conviction. Putting all possibilities in front of the jury, rather than an all-or-nothing decision, seeks to guarantee a fair trial.

While the lesser-included offense doctrine serves the purpose of ensuring fair trials, attorneys began using this (or not using it) as a trial strategy. Typically a defendant will want the instruction because it may result in a mitigated verdict, but if the case is particularly weak, the absence of an instruction may force the jury to acquit. In that situation, it is strategic for a prosecutor to request the lesser offense be instructed to increase the chance of a conviction. Whether a trial strategy or an attempt to avoid wrongful conviction, lesser-included offenses are a notable right vested in the defendant through statute.

### B. When the Rights Conflict: The Emergence of Three Rules

Massachusetts first encountered this intersection of statutory rights in Shelley, when the defendant requested the lesser-included offense of involuntary manslaughter, even though the statute of limitations had run. The prosecutor acknowledged that the evidence supports a finding of both first-degree murder (the charged offense) and involuntary manslaughter, but maintained that the defendant would have to waive his right to the statute of limitations defense. The trial judge applied the Spaziano rule, declining to adopt the defendant's other

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42. See Commonwealth v. Shelley, 80 N.E.3d 335, 337 (Mass. 2017) (detailing policy considerations for both prosecutor and defendant); State v. Short, 618 A.2d 316, 319 (N.J. 1993) (explaining jury typically convicts lesser offense if instructed). The lesser-offense instruction casts reasonable doubt on the greater crime because “the elements of the lesser crime bear on or implicate defenses to the greater crime.” See Short, 618 A.2d at 319. Likewise, if a prosecutor unexpectedly fails to establish the crime charged beyond a reasonable doubt, the lesser offense gives another, less drastic, option for the jury to consider outside of an acquittal. See Janis L. Ettinger, In Search of a Reasoned Approach to the Lesser Included Offense, 50 BROOK. L. REV. 191, 192 (1984) (expanding on value of lesser-included offense when prosecutorial proof weak for charged offense).

43. See Short, 618 A.2d at 319 (identifying lesser-offense instruction essential to core of guarantee to fair trial); Pflaum, supra note 5, at 326 (emphasizing importance of third option for jury). “Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear . . . to preclude such an instruction would raise difficult constitutional questions.” Keeble v. United States, 412 U.S. 205, 213 (1973) (addressing complicated constitutional rights, issues if deprived of instructions).

44. See Pflaum, supra note 5, at 300 (defining all-or-nothing trial strategy).

45. See id. at 301 (explaining defendant’s “gambling” strategy, intentionally omitting instruction request).

46. See id. (detailing lesser-included offense request strategy). On the other hand, a prosecutor may feel the case is particularly strong, and will forego any requests in hope that the jury will convict on the greater charge. See id.

47. See supra note 27 and accompanying text (detailing statutory provisions on lesser-included offenses).


two proposals. The defendant did not wish to waive his right to the statute of limitations defense, and consequently the judge did not instruct the jury on the lesser-included offense. On appeal, the Massachusetts Supreme Judicial Court (SJC) recognized that the defendant’s request for a time-barred lesser-included offense instruction “present[ed] a complication that [the SJC] has not addressed.”

I. Spaziano v. Florida

The first, most prevalent rule arising from this conflict began in Florida. The defendant, Spaziano, was indicted for first-degree murder—a capital offense in Florida. At trial, the court informed the defendant it would instruct the jury on lesser-included offenses if Spaziano would waive his statute of limitations defense on those three offenses. Spaziano refused to waive the statute of limitations, and the judge instructed the jury only on first-degree murder, with the jury later finding the defendant guilty.

On appeal, Spaziano argued the court’s refusal to instruct the jury on lesser-included offenses was a reversible error, and he should not have to waive a substantive right to receive a constitutionally fair trial. The Court disagreed

50. See Shelley, 80 N.E.3d at 337 (discussing procedural history). The court notes the defendant presented “two ostensibly more protective rules from other jurisdictions,” that the trial judge declined to adopt. See id.
51. See id. at 337-38 (discussing defendant’s refusal to waive right to statute of limitations defense).
52. See id. at 337 (questioning how court should treat time-barred lesser-included offense instruction requests).
53. See Adlestein, supra note 6, at 222 (designating Spaziano Court first to consider conflict); Hoffheimer, supra note 30, at 609 (explaining facts of Spaziano introduced new source of error); see also Brief for Defendant-Appellant, supra note 49, at 15-16 (listing majority states adopting Spaziano rule).
54. See Spaziano v. Florida, 468 U.S. 447, 450 (1984) (reciting facts leading to trial), overruled by Hurst v. Florida, 136 S. Ct. 616 (2016). At the time, the limitations period for a noncapital offense was two years, but there was no statute of limitations for a capital offense. See id.
55. See id. (describing trial court’s decision on lesser-included offense instruction). The judge would have instructed the jury on the noncapital offenses of attempted first-degree murder, second-degree murder, third-degree murder, and manslaughter. See id. Nevertheless, the defendant would not waive his right to the statute of limitations for such crimes, which at the time was a two-year period for any noncapital offenses. See id. (explaining time period of indictment relative to statute of limitations for noncapital crimes); see also Fla. Stat. § 775.15 (2019) (detailing limitations period for specified offenses). The limitations period for such crimes has since changed in Florida, extending the time period for most crimes, but still allowing a capital offense to be charged without limitation. § 775.15. But see Adlestein, supra note 6, at 224-25 (discussing Spaziano Court’s flawed reasoning). The Florida Supreme Court held that the statute of limitations acts as a jurisdictional bar on lesser-offense convictions; however, the trial court presented the option of waiver to the defendant. See id. There is a question of whether the Supreme Court then affirmed the trial judge’s reasoning in allowing for a waiver despite state law, or the high court’s reasoning, that the statute of limitations bars instruction on the offenses. See id.
56. See Spaziano, 468 U.S. at 450-51 (stating jury verdict). The jury was initially deadlocked with its only two choices, first-degree murder or an acquittal. See id. at 450. The judge encouraged them to “resolve their differences and come to a common conclusion,” and thus a guilty verdict was returned. See id. at 450-51.
57. See id. at 452 (reciting defendant’s issue on appeal); see also Beck v. Alabama, 447 U.S. 625, 627 (1980) (deciding whether lesser-included offense instruction required). Beck reached the Supreme Court to
that *Beck* required courts to instruct juries on lesser-included offenses, but rather, focused on the reliability factor that such an instruction would afford.\(^{58}\) In *Beck*, the Court held that a statute eliminating lesser-included offense instructions was unconstitutional.\(^{59}\) Because Spaziano could not be convicted of the time-barred, lesser-included offenses, the Court reasoned that such an instruction would introduce distortion in the fact-finding process, rather than enhance the reliability of a fair trial.\(^{60}\) Ultimately, the Court affirmed the rule set at trial, and opined that instructing the time-barred lesser-included offenses—without a waiver of the statutory right—tricks the jury and undermines the public’s confidence in the criminal justice system.\(^{61}\) The *Spaziano* rule was thus created, asserting time-barred lesser-included offense instructions are contingent upon waiving the statute of limitations defense.\(^{62}\)

2. State v. Short

This statutory conflict arose again about ten years later in New Jersey, resulting in a new rule—first at the trial level and then again in the state supreme court.\(^{63}\) The defendant, Short, was charged with first-degree murder, and accordingly requested a lesser-included offense instruction to the jury.\(^{64}\) The
trial judge instructed the jury on multiple lesser-included offenses, but, against Short’s objection, further instructed the jury that if convicted of such lesser offenses, Short would be acquitted due to the expired limitations period. The jury returned a guilty verdict on murder, the original charged offense.

Short appealed, arguing the jury instruction should not contain warnings that the conviction of a lesser offense would go unpunished. Short maintained that by warning the jury he would go unpunished if convicted of the time-barred offenses, the court effectively guaranteed he would not be convicted of those lesser offenses. The New Jersey Supreme Court agreed, holding that defendants are entitled to both statutory rights, and the “securement of one should not have been conditioned on the relinquishment of the other.”

Warning the jury of an acquittal is contradictory to the purpose of the lesser-offense instructions, leaving the jury with the same predicament of guilty or innocent, and undermining the policy of instructing the jury on these lesser offenses in the first place.

The New Jersey court distinguished itself from Florida and the Spaziano decision, in that it did not weigh the jury’s role so heavily when constructing this rule—New Jersey juries are not to consider punishment in deliberations.

aggravated manslaughter, reckless manslaughter, and murder. See id.; see also N.J. STAT. ANN. § 2C:1-6(b) (2019) (setting time limitations for enumerated crimes); § 2C:1-8 (establishing law of lesser-included offense instruction).

65. See Short, 618 A.2d at 318 (explaining trial court’s decision to notify jury of time-barred offense).

66. See id. (summarizing trial court’s guilty conviction for charged crime).

67. See id. at 318-19 (discussing issue on appeal). The Appellate Division of New Jersey affirmed the trial court’s approach, and subsequently the Supreme Court of New Jersey granted further appeal. See id. at 319.

68. Short, 618 A.2d at 318-19 (explaining defendant’s argument on appeal). The defendant further argued the policy behind lesser-included offense instructions, and stated any advantage he would have had was nullified when the court told the jury defendant would go unpunished. See id.; see also Pflaum, supra note 5, at 300 (describing policy considerations behind lesser-included offense instructions). Lesser-included offenses give the jury a third option, which is less drastic than the choice between conviction or acquittal. See Pflaum, supra note 5, at 300.

69. State v. Short, 618 A.2d 316, 319 (N.J. 1993) (reversing lower court’s decision). The New Jersey Supreme Court agreed with Short’s argument that the trial court essentially guaranteed the jury would not convict of a lesser offense, because of the warning he would go unpunished for the crime. See id. The trial court attempted to uphold both statutory rights; however, the effect the instruction had was a relinquished right to the lesser offenses. See id. at 319, 321.

70. See id. at 322 (explaining error in warning jury of statute of limitations). The court articulated how a jury would disregard these instructions by stating, “[j]urors who believe that a defendant has killed his wife are hardly likely to return a verdict of manslaughter knowing that [the] defendant will go free if they do.” Id. The court believed such a warning to the jury undermined the reasonable doubt standard by eliminating any deliberation the jury would have had between the offenses and abridging his right to a fair trial. See id. By giving the jury only the choice between convicting defendant of the charged offense and acquittal, the jury may not accord the defendant the full benefit of the reasonable doubt standard. See Pflaum, supra note 5, at 326 (discussing benefits of lesser-included offense instruction). Even when the jury doubts the defendant’s guilt, without the option of a lesser-included offense the jury is more likely to resolve their doubts in favor of conviction. See id.

71. See Short, 618 A.2d at 322 (distinguishing case from Spaziano). In Florida, the jury is informed of the punishments for each offense, and Spaziano involved a capital offense. See id. In New Jersey, the jury is not
Regardless of this distinction in jury role, the court further disagreed with the reasoning in Spaziano altogether, and held that a fair trial cannot be conditioned on a defendant giving up a vested right to receive the benefit of another. The court additionally noted that the Spaziano rule “overlooks [a] fundamental injustice” that arises from forcing a defendant to choose between fundamental rights. The statute of limitations is more than merely an affirmative defense, and the court disagrees that it has the ability to unilaterally nullify that protection. The New Jersey Supreme Court thus established the Short rule: Both statutory rights can prevail, unaccompanied by warning the jury, and results in an acquittal upon conviction of a time-barred offense. In doing so, the court based its decision on principles of a defendant’s right to a fair trial, and strayed from the idea that such a rule would cause jury deception.

3. State v. Delisle

During a trial for first-degree murder, a Vermont court instructed the jury on first and second degree, but because the statute of limitations for manslaughter had run, informed the jury they must acquit if the state failed to prove each element of murder, regardless of proof beyond a reasonable doubt that the defendant, Delisle, killed the victim. Delisle appealed, arguing the court should have explicitly instructed on the charge of manslaughter, and then informed the apprised of the various punishments, and should not consider the punishments when determining guilt or innocence. The court also disputed the dictum in Spaziano that the jury would be tricked or deceived if the trial court were to allow both statutes to apply concurrently. The Supreme Court of Wisconsin decided this issue similar to New Jersey, and held that “the running of the statute of limitations does not preclude the jury from reaching a verdict convicting the defendant of a crime; it rather precludes the trial court from entering a judgment of conviction on the finding of guilt.”

72. See Short, 618 A.2d at 323 (labeling Spaziano rule “fundamental injustice”).

73. See id. (disagreeing with Spaziano’s reasoning), see also John Caher, New Lesser Offense Rule for Jury Charges Adopted; Requesting Defendant Cannot Argue Statute of Limitations, N.Y. L.J., Oct. 29, 2003, at 20, 20 (describing new rule adopted by New York court). The New York Court of Appeals adopted a new rule that once a defendant requests a charge on a lesser-included offense, he or she automatically forfeits any statute of limitations defense. See Caher, supra, at 20. The court recognized the potential abuse of power this rule affords the prosecution. See id. If a prosecutor fails to charge in a timely manner, they may overcharge the defendant, effectively manipulating the defendant into waiving the statute of limitations on the lesser crimes, and allowing a jury to deliberate on all charged instructed. The New York rule differs from Spaziano, in the sense that it must ensure that the crime indicted is based on legally sufficient evidence. See id. Only then will the court allow a defendant to effectively forfeit their statute of limitations right. See id.

74. See Short, 618 A.2d at 320 (applying policy considerations to Spaziano rule’s reasoning). The court also looks into legislative intent when enacting the statute of limitations, and proposes that the legislature did not intend anything less protective than the time enumerated in the statutes. See id.


76. See id. at 322 (holding new rule embodies fair trial principles).

77. See State v. Delisle, 648 A.2d 632, 635 (Vt. 1994) (reciting trial court proceeding). The court essentially, yet discreetly, instructed the jury on the time-barred lesser-included offense, but informed them even a finding of guilty on that offense would result in an acquittal. See id.
jury to acquit if they found him guilty of that charge only.78 Concluding that the evidence did support a finding of manslaughter, the Supreme Court of Vermont was faced with the issue of how to instruct a time-barred lesser-included offense.79 Consequently, the court held that a defendant may forego an instruction on the time-barred offense, or obtain an instruction on such offense, which would inform the jury that because the limitations period has run, they must acquit the defendant if the evidence would support a conviction of the lesser crime only.80

In deciding upon this rule, the Vermont court adopted most of the reasoning from Spaziano to prevent misleading the juries.81 Even with this reasoning, the court strayed from the ultimate decision in Spaziano and still upheld using the statutory rights simultaneously.82 The court reasoned that lesser-included offense instructions are beneficial to sharpen the definitions of the potential convicted crimes, and allows the jury to compare the elements of each; this result can be reached without deceiving the jury as to the result of such conviction.83 Unpersuaded by the majority opinion in Short, Vermont upheld both rights, allowing the instruction of a time-barred lesser-included offense accompanied by a warning that an acquittal would result.84 In effect, the court upheld both principles contemplated by the Spaziano and Short rules: Courts must protect a defendant’s right to a fair trial while also ensuring the jury is fully informed.85

78. See id. at 637 (addressing defendant’s argument on appeal). The trial court refused to instruct the jury in this manner unless the defendant waived his statute of limitations bar. See id. Delisle refused, and thus the jury was explicitly instructed on first-degree and second-degree murder only, or else an acquittal. See id. On appeal the State rebutted Delisle’s argument, claiming he cannot “have his cake and eat it too”—referring to the election of two statutory rights. See id. The statute of limitations in Vermont is a jurisdictional bar rather than an affirmative defense. See VT. STAT. ANN. tit. 13, § 4503 (2019) (stating law of proceeding beginning after time limitation). The statute writes that proceedings after the time limitation has run “shall be void.” Id. The concurrence challenges Vermont’s new rule that a defendant may waive the statute of limitations when in fact it acts as a jurisdictional bar (unwaivable), and further undermines all policy behind the enacted statute. See Delisle, 648 A.2d at 645 (Johnson, J., concurring) (calling majority opinion “flawed compromise”).

79. See Delisle, 648 A.2d at 638 (expressing undecided issue presented to court).

80. See id. at 639-40 (asserting new rule for courts to apply).

81. See id. at 638 (sharing Spaziano Court’s concern). The court explains that without informing the jury of the consequence of a time-barred lesser-included offense, it would be misleading and undermine the public’s confidence in the criminal justice system. See id.

82. See supra note 80 and accompanying text (stating new rule).

83. See State v. Delisle, 648 A.2d 632, 640 (Vt. 1994) (contrasting new rule against Spaziano and Short). The court recognized that New Jersey rejected this rule. See id. The court opined that while the juries in Vermont also do not consider punishment, the rule that does not warn the jury is deceptive and unnecessary. See id. The court disagrees that a judge should “pull the wool over the jurors’ eyes” and lead the jury to believe they have a choice in conviction, when they do not. See id.; see also Spaziano v. Florida, 468 U.S. 447, 456 (1984) (expressing concern about deceiving jury), overruled by Hurst v. Florida, 136 S. Ct. 616 (2016).

84. See Delisle, 648 A.2d at 639-40 (reciting new rule holding).

85. See supra note 83 and accompanying text (discussing principles of both rules).
C. Massachusetts’s Adoption of the Spaziano Rule

When this statutory conflict first arose in Massachusetts, the court left the issue undecided, asserting the defendant effectively waived the statute of limitations. Shelley resolved the issue, adopting the Spaziano rule. The majority concluded that a defendant is not entitled to a lesser-included offense instruction if the defendant cannot be convicted of that offense, therefore requiring the statute of limitations to be waived. The court articulates the Spaziano rule as striking the best balance between the process’s rationality and the defendant’s due process rights.

With regard to the Short rule, the court acknowledged it is “maximally protective of the defendant’s rights,” but maintains the rule undermines the jury’s role in expressing judgment. Due to the jury’s awareness of an acquittal, the court described the Delisle rule as the all-or-nothing situation the jury would face anyhow, absent a lesser-included offense instruction. With this analysis, the court concluded the trial judge correctly applied the Spaziano rule, as requested by the Commonwealth. The resulting rule defends the speculative concerns about deceiving the jury, over two statutory rights afforded to the defendant.

86. See Commonwealth v. Bougas, 795 N.E.2d 1230, 1234 (Mass. App. Ct. 2003) (concluding statute of limitations waived by defendant). In Bougas, the defendant was convicted of a time-barred lesser-included offense, but the court found the statute of limitations was effectively waived. See id. at 1233-34. In Massachusetts, the statute of limitations affirmative defense is waived if not raised. See id. at 1234. The court addressed the arguments set out in Spaziano, but also recognized the policy purposes of both statutory rights; however, left the issue undecided. See id. at 1233-34.
88. See id. at 336 (holding statute of limitations requires waiver to instruct lesser-included offense).
89. See id. at 338 (agreeing with balance Spaziano rule creates). The court agrees that a jury cannot rationally find a defendant guilty if the defendant will go unpunished, and further finds it deceptive to instruct the jury otherwise. See id. at 338-39. The statute of limitations must be waived to prevent misleading the jury, and further to assure the defendant will actually go punished for an offense instructed. See id. at 339. The dissenting justice challenges adopting this rule, and ponders why the court is placing the jury’s speculative concerns over the criminal defendant’s statutory rights. See id. at 347 (Budd., J. dissenting).
90. See id. at 339 (majority opinion) (challenging Short rule). The court’s major concerns with the Short rule are jury deception and how the public’s opinion of the court system will be affected. See id. The court contrasts the “deception” here, to keeping evidence from a jury, for example, to further some compelling point of public policy or maintain reliability. See id.
91. See Shelley, 80 N.E.3d at 340 (articulating problem with Delisle rule). The court recognized that the rule intends to afford greater protection to the defendant while avoiding deceiving the jury, but disagreed with the rule’s effect. See id.
92. See id. (affirming trial court’s decision).
III. ANALYSIS

The rule adopted by the SJC places the jury’s speculative concerns over a defendant’s statutory rights.94 Both the Spaziano and Shelley opinions reason that instructing a lesser-included offense, which a defendant cannot be convicted of, misleads the jury and undermines the public’s confidence in the court system.95 Nevertheless, information significant to the question of guilt is kept from the jury all the time.96 The jury’s role is fact finding alone, and a lesser-included offense instruction may expose a key element missing from the charged offense.97 A defendant may be charged with first-degree murder—when evidence supports a lesser crime—due to the charge coming five or six years after the offense was committed.98 Evidence could likely support a finding that the defendant did in fact kill the victim, but that it was committed in the heat of passion or provocation.99 By adopting the Spaziano rule, that option is not only eliminated from jury consideration, but also further removes a significant right from the defendant.100 Only once the jury determines the facts, does a judge attach legal significance or punishment.101 The Short court correctly articulates that its holding does not trick or deceive a jury; rather, the rule carefully guides juries, and ensures there is no bias for or against the defendant.102

Massachusetts incorrectly applied the Spaziano rule because, unlike juries in Florida, Massachusetts’s juries may not consider the legal consequences of its verdict.103 Affording a jury a lesser-included offense instruction, which a

94. See id. (asserting adoption of Spaziano rule untenable).
96. See Shelley, 80 N.E.3d at 344-45 (Budd, J., dissenting) (emphasizing other situations where jurors “kept in . . . dark”). The majority opinion even recognized that evidence is kept from a jury to further compel public policy, nevertheless, the majority also articulated that this situation would not be deceptive. See id. at 339 (majority opinion).
97. See id. at 343-44 (Budd, J., dissenting) (reciting role of jury); supra note 33 and accompanying text (describing policy reasons for lesser-included offense statutes).
98. See Adlestein, supra note 6, at 203 (articulating situation in which evidence supports lesser offense not before jury).
99. See id. (illuminating instance where evidence supports something less than crime charged).
100. See id. at 202-04 (addressing concerns faced when statutory rights conflict). The defendant in such a situation may very well be convicted of a lesser offense if the court were permitted to instruct. See id. However, with the statute of limitations overriding the time-barred offense, the defendant is deprived of a right that he or she is statutorily entitled to. See id.
101. See Commonwealth v. Shelley, 80 N.E.3d 335, 344 (Mass. 2017) (Budd, J., dissenting) (explaining statute of limitations not factual inquiry for jury). A Massachusetts jury is only to consider the facts of the case, and not the legal consequences of each offense, to avoid result-oriented verdicts. See id.
102. See State v. Short, 618 A.2d 316, 323 (N.J. 1993) (stating jury may not consider evidence which would prejudice defense). The Short court further reiterates the jury’s role is fact finding, and not to consider punishments for each offense. See id.
103. See Shelley, 80 N.E.3d at 344 (Budd, J., dissenting) (asserting jurors do not consider legal consequence during deliberation); see also id. at 344 n.6 (noting Florida informs jury consequence of guilty verdict).
defendant is statutorily permitted to request, further ensures that a jury gives full weight to the reasonable doubt standard.\textsuperscript{104} Massachusetts juries’ role most similarly reflects the role of those in New Jersey, the state that established the \textit{Short} rule.\textsuperscript{105} In deciding the case, the New Jersey Supreme Court contrasted the Florida decision and noted in New Jersey the jury should not be influenced by the result of its verdict, nor distracted from its chief function.\textsuperscript{106}

Instead, Massachusetts adopted the approach of a state whose juries, in a death penalty proceeding, are informed of the punishments that accompany each of the offenses instructed to it.\textsuperscript{107} In that scenario, it may be reasonable for a court to hold that instructing the jury on an offense without a punishment may have an impact on its decision or cause confusion.\textsuperscript{108} However, this is not the law in Massachusetts and therefore, the resulting rule should instruct the jury on the lesser-included offense, and allow a judge to handle the consequence the statute of limitations bears on that verdict.\textsuperscript{109} When a jury is afforded all options upon which it may find a defendant guilty, it may plausibly find, as a matter of fact, that the defendant is guilty of some lesser offense than originally charged.\textsuperscript{110} If the evidence leads a jury to convict on a lesser charge, the judge will bar sentencing due to the running of the statute of limitations, and the defendant will be acquitted as a matter of law.\textsuperscript{111}

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\item[104.] See \textit{supra} note 42 and accompanying text (describing lesser-included offense instructions cast reasonable doubt on charged offense).
\item[105.] See \textit{supra} notes 97-103 and accompanying text (comparing Massachusetts and New Jersey laws to Florida); \textit{see also} State v. Muentner, 406 N.W.2d 415, 423 (Wis. 1987) (straying from \textit{Spaziano} decision). The court in \textit{Muentner} did not adopt the \textit{Spaziano} rule because juries in Wisconsin do not consider punishment. \textit{See Muentner}, 406 N.W.2d at 423. For that reason, the court held that \textit{Spaziano} was inapplicable. \textit{See id.}
\item[106.] \textit{See Short}, 618 A.2d at 322 (distinguishing holding from \textit{Spaziano} rule).
\item[109.] \textit{See Shelley}, 80 N.E.3d at 346 (Budd, J., dissenting) (maintaining court relied too heavily on \textit{Spaziano}).
\item[110.] \textit{See Muentner}, 406 N.W.2d at 423 (explaining running of statute of limitations does not mean offense ceases to exist); \textit{see also} Adlestein, \textit{supra} note 6, at 239 (describing resulting rule from \textit{Muentner}). Simultaneous application of the two statutes does not result in a conflict; the barrier to conviction does not preclude a trial judge from instructing the jury on the lesser-included offenses. \textit{See Muentner}, 406 N.W.2d at 423.
\item[111.] \textit{See Muentner}, 406 N.W.2d at 423 (holding jury instruction on time-barred lesser-offense necessary). The \textit{Muentner} court explained that this option does not deceive or trick the jury as expressed in \textit{Spaziano}. \textit{See id.} The jury has a choice of crimes for which they may find, as a matter of fact, the defendant committed. \textit{See id.} Once the jury finds those facts, its job is done. \textit{See id.} The court further explained this concept is unrelated to the jury system, but rather focuses on the policy considerations of the statutes:

These policies relate to the statute of limitations. The legislature has determined that misdemeanors have a three year limitation period. Since the Defendant here was found, as a matter of fact, only to be guilty of two counts of a misdemeanor offense, it follows that he may not be convicted since the limitations period for the offense expired.

\textit{Id.} (explaining judge precluded from entering judgment even with jury finding of guilty).
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The two statutes do not include any language that implicates they cannot be used concurrently.\textsuperscript{112} Statutory interpretation requires the court to accept the plain meaning of the statute if the language is clear and unambiguous.\textsuperscript{113} Likewise, criminal statutes are to be construed in favor of the defendant, not the Commonwealth of Massachusetts.\textsuperscript{114} Justice Budd, in her dissenting opinion, discerns that the statute’s language predicted this intersection of rights when writing the lesser-included offense statute.\textsuperscript{115} The statute reads: “If a person indicted for a felony is acquitted by the verdict of part of the crime charged, and is convicted of the residue, such verdict may be received and recorded by the court, and thereupon the defendant shall be adjudged guilty of the crime, \textit{if any}.”\textsuperscript{116} Using the phrase “\textit{if any}” indicates there may be situations in which a jury finds a defendant guilty, but the court will not adjudge him or her guilty, nor render punishment for the crime.\textsuperscript{117}

In \textit{Short}, the court reasoned that the legislature did not intend the statute of limitations to become anything less protective than the time period imposed, and this bar on conviction includes a lesser-offense charge.\textsuperscript{118} The court further noted even if the statutes are ambiguous, the legislature’s intent cannot have been to weaken the statute of limitations in criminal cases, especially in the face of an unindicted lesser-included offense.\textsuperscript{119} This statutory interpretation led to the conclusion that a defendant’s right to a fair trial cannot be conditioned on relinquishing a vested right.\textsuperscript{120}

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112. See Shelley, 80 N.E.3d at 343 (Budd, J., dissenting) (interpreting application of the statutes together).
114. See id. (stating language of statutes does not indicate either right conditioned on relinquishment of other).
115. See id. at 342-44 (suggesting legislature predicted time-barred lesser-included offense convictions).
116. See MASS. GEN. LAWS ch. 278, § 12 (2019) (emphasis added) (outlining lesser-included offense law); Shelley, 80 N.E.3d at 344 (Budd, J., dissenting) (interpreting statute to allow acquittal of time-barred lesser-included offense).
117. See Shelley, 80 N.E.3d at 344 (Budd, J., dissenting) (asserting legislature predicted verdicts may go unpunished due to statute of limitations). The dissent also suggests an alternative to adopting the \textit{Spaziano} rule. See id. at 347 n.15.
119. See id. at 321 (reasoning implausible legislature intended to weaken bar of statute of limitations).
120. See id. at 323 (holding \textit{Spaziano} rule overlooks fundamental injustice in forcing defendant to choose between substantive rights).
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The Spaziano rule further undermines, and even eliminates, the policy purposes that were contemplated in enacting each statute.\textsuperscript{121} Many factors are considered when a legislature enacts a particular time period for which a person can no longer be convicted of a crime.\textsuperscript{122} For example, the crime of manslaughter, often a lesser-included offense of first-degree murder, has a statute of limitations of six years.\textsuperscript{123} It cannot be required that a defendant waive the statute of limitations defense, when the legislature anticipated that after six years evidence is not reasonably fresh, memories are eroded, and witnesses are unavailable—increasing the risk of erroneous conviction.\textsuperscript{124} Further, enacting a six-year limitation period is a legislative judgment that society is not going to convict this defendant of the crime any longer.\textsuperscript{125} If a jury finds this lesser offense to be the crime the prosecution has proved beyond a reasonable doubt, the policy considerations behind the statute of limitations should remain in full force, not disappear.\textsuperscript{126}

The Delisle rule attempted to apply the statutes simultaneously, while avoiding the jury deception concern faced in Spaziano.\textsuperscript{127} However, in doing so, the court inadvertently suggested the jury ignore the lesser-included offense instruction.\textsuperscript{128} The purpose of lesser-included offense instructions is to afford

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\item See id. (asserting court unpersuaded by Spaziano decision); supra Part II.A (discussing background and policy purposes of two statutory rights).
\item See supra notes 25-28 and accompanying text (listing factors legislature considers in enacting statute of limitations).
\item See MASS. GEN. LAWS ch. 277, § 63 (2019) (stating statute of limitations for manslaughter); Commonwealth v. Shelley, 80 N.E.3d 335, 337 (Mass. 2017) (articulating procedural history leading to defendant’s request for manslaughter instruction).
\item See supra notes 26-27 (accepting some crimes will go unconvicted after period of time); see also Shelley, 80 N.E.3d at 341 (Budd, J., dissenting) (reiterating statute of limitations vests right to evade punishment); supra notes 20, 73 (discussing possible misuse of prosecutorial power). A prosecutor may misuse the requirement that a defendant waive the statute of limitations by overcharging in the attempt to force that defendant to waive his or her statute of limitations right. See supra notes 20, 73.
\item See supra notes 23-24 and accompanying text (acknowledging legislative decision allowing crimes to go unpunished after period of time).
\item See supra note 42 and accompanying text (explaining lesser-included offenses cast reasonable doubt or implicate defense to crime charged). It is also worth noting that Massachusetts’s statute of limitations is not a jurisdictional bar, rather it is an affirmative defense. See supra notes 19-21 and accompanying text (outlining difference between jurisdictional bar and affirmative defense). Therefore, the court is not without jurisdiction to instruct the jury on the offense, and it is the defendant who may raise or waive the defense. See id.
\item See State v. Delisle, 648 A.2d 632, 638, 640-41 (Vt. 1994) (sharing Spaziano concern of jury misleading, but enacting different rule).
\item See id. at 645 (Johnson, J., concurring) (suggesting jury instruction invites conviction on greater offense, producing opposite result). Informing the jury that a verdict of guilty will result in the defendant going unpunished effectively ensures the jury will not find the defendant guilty of that lesser-included offense. See id. This produces the opposite result the policy intended. See id. In constructing this rule, the Vermont Supreme Court made a compromise between the two statutes when no compromise was necessary. See id.; see also Shelley, 80 N.E.3d at 340 (asserting Delisle rule invites jury to disregard lesser-included offense instruction); State v. Short, 618 A.2d 316, 321-22 (N.J. 1993) (maintaining informing jury of legal consequence eliminates value of lesser-included offense instruction).
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the jury a less drastic option than conviction or acquittal. A jury’s belief that the defendant may have committed a lesser crime than the one charged generates reasonable doubt on the charged offense, and may demonstrate the prosecution has not proved every element. However, the Vermont Supreme Court eliminated this possibility of jury consideration when it informed the jury the defendant would go unpunished for the lesser-included offense. This, in effect, gives the jury the all-or-nothing options it faced without the option of a lesser-included offense. If a jury believes a defendant committed some crime, knowing the defendant will go unpunished on the lesser-included offense will likely compel the jury to convict on the higher charge. While the Spaziano Court was concerned that the alternative option—not informing the jury of its verdict’s consequence—suggested jury deception, this concern cannot outweigh the statutory protections that the legislature afforded to criminal defendants.

To avoid “result-oriented” verdicts, the role of Massachusetts juries is to find facts, leaving the judges to attach legal consequences post-verdict. The Delisle rule, while appearing protective, is flawed in the sense that it allows the jury to consider the legal consequence of the statute of limitations. The Short rule provides the maximum protection for defendants’ rights. This rule allows both statutory rights to apply simultaneously, while upholding the policy considerations the legislature contemplated for each right. The Short rule further places the defendant’s statutory rights over the jury’s speculative concerns, ensuring a defendant’s right to a fair trial outweights any potential juror disappointment.

129. See supra note 33 and accompanying text (acknowledging lesser-included offenses give jury additional consideration).
130. See supra note 33 and accompanying text (describing lesser-included offense instruction uphold full benefit of reasonable doubt standard); see also Short, 618 A.2d at 319 (explaining important purpose of instructing lesser-included offense).
132. See id. (asserting Delisle approach produces all-or-nothing result, against policy purpose of lesser-included offense).
133. See id. at 345-46 (Budd, J., dissenting) (maintaining juror potential disappointment cannot outweigh defendant’s statutory rights).
134. See Shelley, 80 N.E.3d at 343-44 (Budd, J., dissenting) (distinguishing role of jury from role of judge in Massachusetts).
135. See State v. Delisle, 648 A.2d 632, 645 (Vt. 1994) (Johnson, J., concurring) (establishing flaw in majority opinion); see also Shelley, 80 N.E.3d at 340 (refusing to adopt Delisle rule in Massachusetts); State v. Short, 618 A.2d 315, 324 (N.J. 1993) (overturning trial court’s rule reflective of Delisle). The trial court in New Jersey originally instructed the jury in the same manner of the Delisle rule, prior to Vermont deciding its case. See Short, 618 A.2d at 318-19.
136. See supra text accompanying notes 104-106, 118-119 (stating Short rule maximally protective).
137. See Short, 618 A.2d at 323-24 (discussing policy purposes in deciding case).
138. See id. at 324 (discussing policy behind enacting rule); see also Commonwealth v. Shelley, 80 N.E.3d 335, 347 (Mass. 2017) (Budd, J., dissenting) (agreeing with Short, and characterizing Spaziano rule “Hobson’s
While *Beck* declined to elevate the right to lesser-included offense instruction to a constitutional level, depriving a defendant of such a request—when he or she is otherwise entitled—may present due process violations. A defendant has a constitutional right to a fair trial, and to present a defense; a lesser-included offense of the crime charged acts defensively in that it may cast doubt or reveal a missing element, allowing a jury to acquit the defendant of the crime charged and convict on the residue. Allowing both rights to prevail provides the defendant the full benefit of the reasonable doubt standard, and maintains the defendant’s constitutional right to a fair trial.

IV. CONCLUSION

The adoption of the *Spaziano* rule in Massachusetts undermines two fundamental rights afforded to criminal defendants. Both statutes were enacted to ensure that a defendant receives a constitutionally required fair trial. The SJC has set a precedent that permits—and essentially requires—a defendant to relinquish one statutorily vested right in order to receive the benefit of another. The Massachusetts court focused heavily on jury speculation, rather than the ultimate purpose behind the enactment of these statutes.

It is unfair to ignore the policy purposes behind two statutes, which are beneficial for a criminal defendant, in order to give the appearance of candidness to a jury. As portrayed by the *Short* rule, the statutes do not have to be in conflict. If a jury is afforded all options upon which it may find a defendant guilty, it is not impractical to allow it to find as a matter of fact that the defendant is guilty of some lesser crime than originally charged. If such evidence leads that jury to convict on a lesser charge, the judge will bar sentencing due to the statute of limitations running, and the defendant will be acquitted as a matter of law. This method allows the fairness of the lesser-included offense right to compel the full benefit of the reasonable doubt standard, while still preserving the legislative judgment that this crime is no longer punishable. It is critical that the legislature...
create or add language to these statutes to reflect how the two statutes successfully be applied concurrently, to avoid impending wrongful or erroneous convictions.

Kelleigh Sullivan