MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-23-198

State of Maine
Appellee

v.

Dylan Ketcham
Defendant/Appellant

On appeal from guilty verdicts and sentences in the Kennebec Superior Court

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BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Maine Cases:

Other State Jurisdictions:

Federal Cases:

Statutes:

Constitutional Provisions:

Miscellaneous:

PROCEDURAL HISTORY

The appellant, Dylan Ketcham, was indicted on July 24, 2020, on the following charges:

- Count 1: Elevated Aggravated Assault pursuant to Title 17-A M.R.S. § 208-B(1)(A) [R. 29].
- Count 2: Attempted Murder pursuant to 17-A M.R.S. §152, §201(1)(A) and §1604(5)(A)[R. 30].
- Count 3: Murder pursuant to 17-A M.R.S. §201(1)(A) and §1604(5)(A)[R. 31]. The indictment as to Count 3 was Amended on August 10, 2020. [R. 32].

On September 1, 2022, the State filed a Motion in Limine Regarding Statements of Jordan Johnson and Caleb Trudeau. [R. 33].[1] Dylan filed a similar motion on September 15, 2022. [R. 35]. On September 17, 2022, the trial judge (Murphy, J.), issued her ruling on the motions via email. [R. 24]. The case proceeded to trial the following Monday, September 19, 2022. [R. 16]. On September 22, 2022, a mistrial was declared. [R. 18].

[1] There were other motions in limine filed by both parties none of which are relevant to this appeal.

Dylan's second trial commenced on January 17, 2023. [R. 19]. On January 27, 2023, Dylan was found guilty on all counts. [R. 20]. On May 16, 2023, he was sentenced as follows:

- Count 1: A term of fifteen years to the Department of Corrections, concurrent with the sentence on Count 2. [R. 21].
- Count 2: A term of thirty years to the Department of Corrections with all but twenty years suspended and probation for four years to be served consecutive to the sentence on Count 3. [R.A. 21].
- Count 3: A term of forty-five years to the Department of Corrections. [R.A. 22].

Dylan filed a notice of appeal of his convictions and sentence on June 1, 2023, 2018. [R. 22]. Nevertheless, the Notice of Appeal of the sentence was not filed by way of an Application for Sentence Appeal, as required. Appellate counsel filed a motion for this Court to accept Dylan's Notice of Appeal as an Application for Sentence Appeal. This Court granted that motion on April 22, 2024, allowed Dylan's application for sentence review, and consolidated the sentence appeal with his direct appeal.

STATEMENT OF FACTS

Dylan Ketcham and Caleb Trudeau had known each other since kindergarten; they were like brothers growing up. [Jan. 24, 2023, Tr. 169]. In

January of 2020, Caleb had been friends with Jordan Johnson for approximately seven or eight years. [*Id*. at 170]. Jordan and Dylan were friends as well. On January 23, 2020, Dylan and Jordan exchanged a series of text messages; Jordan asked Dylan if he had any "Downtown to get rid of." [*Id*. at 131; Ex. 103, 01/23/2020, text at 21:30:00]. "Downtown" is a street name for heroin or some type of opiate. [Jan. 24, 2023, Tr. 132]. As the two continued to exchange messages about meeting up, Dylan became impatient with Jordan regarding timing, and Jordan became angry with Dylan. [Ex. 103, 01/23/2020, texts from 21:17:00 to 22:31:00]. Jordan said to Dylan "If u want to make a problem out of nothing I'll gladly meet u at big Apple, if not then shut the fuck up and wait for my call." [*Id*. at 01/23/2020, text at 21:51:00]. Dylan responded, "Dude I just said thank you for letting me know that it'll be 10 minutes, how is that pissing you off." [*Id*. at 01/23/2020, text at 21:54:00].

The next evening, in another series of text messages, Jordan accused Dylan of stealing his mother's bicycle from outside their home because Jordan had been unable to meet up with Dylan the previous night. [*Id*. at 01/24/2020, texts from 20:47:00 to 20:50:00]. Dylan emphatically denied taking the bicycle. [*Id*. at 01/24/2020, texts from 20:48:00 to 20:52:00].

Earlier that day, Jordan was also texting Caleb via the Facebook Messenger App while Caleb was working the 2:00 p.m. to closing shift at Pine State Beverage.

[Jan. 24, 2023, Tr. 168, 171]. Jordan talked about his desire to "smoke" Dylan to Caleb and Caleb responded that he would join:

> **Jordan**: word G, and if Dylan knocks on my door one more time I'm gonna destroy him.
>
> He did last night and I told him to gtfo here before I beat you with a bat. Hopefully he does it again w u here.
>
> **Caleb**: I'll beat the fuck out of him.
>
> **Jordan**: same bro, lmaooo. Kinda just want to tell him to come by and smoke him.
>
> **Caleb**: I will for you.

[*Id*. at 225].

Jordan later told Caleb that he wanted to fight Dylan over the missing bicycle. [*Id*. at 172-173, 205, 237]. Jordan told Caleb that he was "going to trash [Dylan] bad," was "going to beat the fuck out of" Dylan, and asked Caleb, "Can we really crack that kid, or what?" [*Id*. at Tr. 173]. Caleb replied that he was down for cracking Dylan. [*Id*. at 173]. During the same Facebook Messenger exchange about meeting up to fight Dylan, Jordan sent Caleb a text with the lyrics to a rap song entitled "Murder on my Mind." [*Id*. at 174, 233]. The lyrics stated "I got murder on my mind. On my mind. I got murder on my mind, I got murder on my mind. Young nigga world." [*Id*. at Tr. 233]. Caleb responded, "Fire song." [*Id*. at Tr. 233]. Continuing the same theme, Jordan texted, "Facts. Let's mop this kid guy. For real. Tired of him banging on my shitty door. It's already fucked up.

Yellow tape around his body, mood it's a homicide" and "Facts. I really -- I just really have murder on my mind, tonight, so the vibes r right." [*Id*. at 234]. Caleb responded by asking "Your ma got any down?" – a reference to whether Jordan's mother had any heroin. [*Id*. at 237].

In furtherance of his plan to fight Dylan, at approximately 10:44 p.m., Jordan set up a place for he and Dylan to meet – Water Street. [Ex. 103, 01/24/2020, texts at 22:44:00]. Jordan then sent Caleb a message encouraging Caleb to join him: "yeah, dude, I have Dylan meeting in town with me, I'm just waiting on you. Just crack him with me a few times. I'll make sure the spot is so secluded, no witnesses. I'll give you down. I know he took my mom's bike." [Jan. 24, 2023, Tr. 237]. Jordan continued, "N my mom just got off the phone with our landlord. He took it. He's smoked. He's full of shit and he knows I'm meeting him -- and he knows he is, I'm meeting him. If you wanna be with me that would be dope, if not no worries. He won't call the cops and no witnesses to see shit. Just three cracks and we gone." [*Id*. at 238-239]. Jordan then texted, "I'm going to crack silly dilly with his own bat," and attached a picture of a bat. [*Id*. at 240].

Later that evening, Jordan went to Caleb's house when Caleb's work shift ended. [*Id*. at 175]. They stayed at Caleb's house for a time and then went to Jordan's mom's house to buy drugs from Jordan's mother. [*Id*. at Tr. 176]. While at Jordan's mom's house, Jordan did heroin and Caleb did crack and heroin. [*Id*. at

178]. During this time, Jordan and Dylan were texting and calling each other. [*Id*. at 178-179, 246]. Dylan appeared calm in these conversations. [*Id*. at 210-211]. Jordan was very angry at Dylan, and his anger escalated throughout the evening. [*Id*. at 179, 211]. Caleb overheard Jordan and Dylan saying they were going to kick each other's asses. [*Id*. at 246].

At some point either Jordan or Dylan suggested meeting at Quimby Field in Gardiner, and Jordan and Caleb left Jordan's mom's house. [*Id*. at 180]. During the walk to Quimby Field, Jordan and Dylan were talking on the phone and Caleb could hear that both of them were angry. [*Id*. at 181]. As Caleb and Jordan approached Quimby Filed, the phone conversation between Jordan and Dylan ended when they saw Dylan walking up the road. [*Id*. at 182]. Dylan stopped in the road and Jordan approached him, while Caleb stayed out of sight. [*Id*. at 184-185]. According to Caleb's testimony at trial, when Jordan approached Dylan, Dylan put a gun to Jordan's forehead and motioned for him to start walking. [*Id*. at 184-185]. It was at that point, according to Caleb, that he made his presence known, much to Dylan's surprise, and ran toward Dylan. [*Id*. at 187-188]. Caleb ran past Jordan to tackle Dylan and put his hand on the gun. [*Id*. at 188-189]. At that time, the three guys had moved up the hill of Quimby Field. [*Id*. at 189]. Before Caleb was able to get the gun from Dylan's hand, the gun went off twice. [*Id*. at 189]. When the gun went off, Jordan was behind Caleb and once the gun

went off, Caleb no longer saw Jordan. [*Id*. at 189-190]. Jordan had been shot in the forehead. [Jan. 18, 2023, Tr. 87-89, 157, 165].

Despite his testimony at trial as to the series on events that led to Jordan being shot, Caleb told police officers in his first interview a few days after the incident that he and Jordan struggled with Dylan as they traveled down the roadway to the area where the shots were fired in an attempt to disarm Dylan. [Jan. 24, 2023, Tr. 211-212]. It was at that point, according to what Caleb initially told investigators, when Caleb heard the first gunshot. [*Id*. at 212-213]. Caleb, however, claimed at trial that he had lied to the police at the time he gave his statement. [*Id*. at 213-214].

Nevertheless, once the gun went off, Caleb chased Dylan up a snowy hill at Quimby Field. [*Id*. at 244]. Dylan was attempting to flee Caleb, but Caleb pursued him anyway. [*Id*. at 245]. Caleb claimed he pursued Dylan as Dylan ran away because he feared he too would be shot. [*Id*. at 245]. When Caleb caught Dylan, they struggled over the gun and Caleb was eventually able to get it from Dylan's hand by biting Dylan on the top of his head. [*Id*. at 189].

After the gun dropped into the snow, Caleb and Dylan both stood up and Dylan pulled a machete from his coat. [*Id*. at 190]. Caleb lunged at Dylan, grabbed the "sword," and redirected it toward Dylan. [*Id*. at 190, 218]. A DNA analysis of the knife revealed a profile consistent with Dylan and another source that was

inconclusive. [*Id*. at 72]. Caleb then ran away, off the snowbank, and into the road. [*Id*. at 191-192]. Caleb was unsure whether he was injured by the machete before he reached the roadway. [*Id*. at 191]. Once he reached the snowbank, he tripped and fell into the roadway facedown. [*Id*. at 191-192]. Dylan ran toward Caleb, who had put his hand up to ask Dylan to stop, and Dylan struck Caleb once on the arm with the machete. [*Id*. at 192]. Dylan then struck Caleb on the other arm, head, and neck – ultimately, Caleb was struck more than thirteen times. [*Id*. at 193-194].

Caleb went unconscious, then he woke up and called for help. [*Id*. at 194]. Galen Davis, who lived at 156 Lincoln Avenue, was awakened between 12:30 a.m. and 1:00 a.m. by a commotion and voices outside of his home. [Jan. 18, 2023, Tr. 47, 49]. Mr. Davis looked out of his upstairs front bedroom window and was able to see just to the end of his driveway – he could not see the parking lot of the ballpark. [*Id*. at 50]. Mr. Davis could see at the end of his driveway what appeared to be two people fighting – one was over the other and one was on the ground. [*Id*. at 52-53]. Mr. Davis did not see who started the fight. [*Id*. at 62-63]. It appeared that the person on top, who was wearing a tan, brownish colored Carhart-style jacket, was punching the other. [*Id*. at 53-54].

Mr. Davis went downstairs to further investigate and when he looked out of his window, he could see the person who had been in the top position walking towards the house down his walkway – the figure veered off before the house,

crossed Mr. Davis's lawn, and went out of sight. [*Id*. at 55]. A drip trail of Dylan's blood was found along this path. [*Id*. at 92-93; Jan. 24, 2023, Tr. 71]. The male who was left behind was screaming for help. [Jan. 18, 2023, Tr. 57]. Mr. Davis called 9-1-1, and then heard a big bang on his door. [*Id*. at 57]. Mr. Davis looked out and saw Caleb lying on his porch. [*Id*. at 57]. Mr. Davis could hear Caleb moaning and then ask for water. [*Id*. at 58-59].

Laura Smith, who lived at 160 Lincoln Avenue adjacent to Quimby Field, was awakened between midnight and 1:00 a.m. on January 25, 2020, when she heard the voices of three males whom she thought might be teenagers or in their early twenties. [*Id*. at 35, 39, 45]. The voices of the males sounded upset. [*Id*. at 41]. Ms. Smith also heard the sound of a chase of some sort, people running, and then a gunshot. [*Id*. at 39, 41-42]. After the gunshot, Ms. Smith heard one voice yell, "You fucking pussy." [*Id*. at 43]. After this, Ms. Smith heard one voice that sounded scared. [*Id*. at 43]. Ms. Smith called 9-1-1, but never looked out of her window, and therefore did not observe the beginning of the incident. [*Id*. at 43-45].

In the early morning hours of January 25, 2020, Officer Sean Dixon and Officer Alonzo Connor from the Gardiner Police Department were dispatched to the area of 156 and 160 Lincoln Avenue in Gardiner. [*Id*. at 69-70, 91-92]. Officer Dixon went to the porch of Mr. Davis's house where he attended to Caleb. [*Id*. at 70-71, 80, 83, 92]. Officer Dixon saw lacerations to Caleb's skull and arms – his

wrists were almost completely detached from his arms. [*Id*. at 71, 82, 86, 124]. Caleb said that Dylan Ketcham had caused his injuries. [*Id*. at 83, 95].

Simultaneously, other officers were searching the area and came upon Jordan lying face down in the snow. [*Id*. at 86, 93, 95, 105]. He was transported to a local hospital where he later died from a gunshot wound to his forehead. [*Id*. at 153, 157].

Brandon Melanson and Clayton Snelling, paramedics for the City of Gardiner, arrived and transported Caleb via ambulance to Maine General Hospital. [*Id*. at 84, 87, 118, 127]. At some point later Dylan was located close by, and the EMTs were asked to return to the area to assess a hand injury that Dylan had suffered. [*Id*. at 128]. Dylan sustained a deep cut to his left palm measuring three to four inches in length that required stitches. [Jan. 25, 2023, Tr. 59]. He also had a comminuted intra-articular fracture of the base of the proximal phalanx of the fifth digit, i.e., a broken bone in the area of the left pinky finger which created multiple fragments. [*Id*. at 59]. Dr. Flomenbaum, the Medical Examiner, testified that both of these injuries could both have been caused by deflecting a machete. [Jan. 18, 2023, Tr. 167, 170].

ISSUES FOR REVIEW

I. Whether the trial court erred by limiting the testimonial evidence of the Facebook Messenger texts between Jordan and Caleb to demonstrate Jordan's motive, state of mind, or intent, and by excluding the documentary evidence of those texts?

II. Whether the trial judge erred my failing to order a competency examination or hold a hearing on the issue where she was on notice that Dylan appeared "medicated," had a "flat affect," and was not responding to evidence and where these observations indicate that Dylan was not competent to knowingly and voluntarily waive his right to testify at trial and participate in his defense?

III. Whether the lower court abused its sentencing power when it sentenced Dylan to a *de facto* life sentence of seventy-five years with sixty-five to serve and the sentence offends the prevailing notions of decency?

ARGUMENT

I. THE TRIAL COURT ERRED BY LIMITING THE TESTIMONIAL EVIDENCE OF THE FACEBOOK MESSENGER TEXTS BETWEEN JORDAN AND CALEB TO DEMONSTRATE JORDAN'S MOTIVE, STATE OF MIND, OR INTENT, AND BY EXCLUDING THE DOCUMENTARY EVIDENCE OF THOSE TEXTS.

Because the trial court erred in limiting the testimonial evidence of the Facebook texts between Jordan and Caleb to showing Jordan's motive, state of mind, or intent, rather than to demonstrate Dylan's reasonable belief for the necessity of using deadly force, this Court must reverse the murder conviction. The trial court's additional error in excluding the documentary evidence of the Facebook texts between Jordan and Caleb – testimonial evidence of which the court had admitted for the limited purpose of showing Jordan's motive, state of mind, and intent – even though the court had admitted documentary evidence of similar texts between Jordan and Dylan, also warrants reversal of the murder conviction.

This Court reviews a ruling admitting or excluding alleged hearsay evidence for an abuse of discretion. *State v. Penley*, 2023 ME 7, ¶ 15, 288 A.3d 1183, 1190 (*citing State v. Tieman*, 2019 ME 60, ¶ 12, 207 A.3d 618, 622). When a court improperly excludes such evidence, this Court must determine whether the error is not harmless. *See* M.R.U. Crim. P. 52(a) ("Any error, defect, irregularity, or

variance that does not affect substantial rights shall be disregarded."). "A preserved error that is not of constitutional dimension is harmless 'if it is highly probable that the error did not affect the judgment.'" *See State v. Guyette*, 2012 ME 9, ¶ 19, 36 A.3d 916, 921 (*quoting State v. Mangos*, 2008 ME 150, ¶ 15, 957 A.2d 89; M.R.Crim. P. 52(a)). *See also Tieman*, 2019 ME at ¶ 18 (an error is only harmless if it is "highly probable the error did not affect the jury's verdict").

Here, the trial court's errors were not harmless because the excluded evidence went to the heart of Dylan's self-defense case. The issue of whether to admit Facebook Messenger texts between Jordan and Caleb on the day leading up to the incident, and if so, to what extent, was a hotly contested issue in this case. Prior to Dylan's first trial in September 2023, attorneys for both sides filed motions in limine seeking a ruling defining the perimeters of the admissibility of these texts. [R. 33, 35]. Defense counsel argued that the text messages were admissible not only to demonstrate Jordan's motive, state of mind, and intent, but also as evidence that Dylan had a reasonable belief that deadly force was necessary in his claim of self-defense or that Jordan was the initial aggressor, [R. 40; Sept. 16, 2022, Tr. 15, 19]. Nevertheless, the lower court ruled that the texts were admissible for the limited purpose of showing Jordan's motive, state of mind, and intent. [R. 24].

In addition, at the second trial, although the trial judge allowed Caleb to testify as to the content of some of the text messages, she excluded the text messages themselves, and would not allow the jurors to view the text messages when requested during deliberation. Both of these rulings were erroneous and require reversal.

A. The text messages between Jordan and Caleb should have been admitted for their substance to show that Dylan had a reasonable belief that he needed to use deadly force against Jordan.

Maine Rules of Evidence Rule 803(3) provides that hearsay evidence is admissible to show a "declarant's then-existing state of mind (such as motive, intent or plan)." As this Court has noted "a murder victim's state of mind is generally not probative of the *defendant's* state of mind and should not be admitted unless it is relevant to rebut a defense or justification that brings the deceased person's state of mind into question." *Penley*, 2023 ME at ¶ 16 (*citing Woods v. State*, 733 So. 2d 980, 987-88 (Fla. 1999) (referencing as examples arguments that the death resulted from self-defense, suicide, or accident)). Rule 803(3) also "allows evidence of statements of present intent to perform an act as a basis for an inference that the act occurred." *State v. Nile*, 566 A.2d 1087, 1088 (Me. 1989) (*citing State v. Mason*, 528 A.2d 1259, 1261 (Me. 1987)). Here, Dylan claimed self-defense at trial, so Jordan's state of mind and which party was the initial aggressor were directly relevant to his defense.

In general, for a claim of self-defense involving deadly force, "A person is justified in using deadly force upon another person:

> **A.** When the person reasonably believes it necessary and reasonably believes such other person is:
>
> **(1)** About to use unlawful, deadly force against the person or a 3rd person.

17-A M.R.S. § 108. Thus, Dylan's reasonable belief as to whether Jordan was about to use deadly against him was an element of his claim of self-defense. Nevertheless, the trial judge limited Caleb's testimony of the Facebook Messenger texts for the purpose of demonstrating Jordan's "intent, common plan or scheme, as well as their state of mind." [R. 24]. The court determined that the text messages could not be used substantively to aid Dylan's self-defense case to show that he had a reasonable belief that he needed to use deadly force, or to show that Jordan was the initial aggressor. [R. 24]. Specifically, when defense counsel attempted to question Caleb about text messages from Jordan about violence Jordan wanted to perpetrate against Dylan, the Court said:

> Mr. Smith, I think we are going to have to give a limiting instruction to the jury because you are confusing something very important here. Dylan doesn't know anything about this. So he can only use this for self-defense if he knew about it. That is the law of Maine. I allowed this for the limited purpose of showing their state of mind and their plan. That's different.
>
> So I think I -- the more I think about this, the more I have to give a limiting instruction. Because he has to believe force is reasonable based

> upon the circumstances known to him. That's the law. So I'm not going to allow this any further. All right.

[Jan. 24, 2023, Tr. 243]. Later, during deliberations, when the jury asked to see the text message exchanges between Jordan and Caleb, the trial judge instructed the jurors that the "Facebook messages . . . cannot be considered on the issue of self-defense as the defendant was not aware of these exchanges." [Jan. 25, 2023, Tr. 160]. The court further explained its ruling in not allowing the jury to view the text messages:

> Because they are -- they are not being admitted as substantive evidence -- well, they're being admitted for -- as I said to you at sidebar, I felt -- I feel compelled to give a limiting instruction because -- and you came close, frankly, Mr. Smith during your closing argument that I thought I might get -- you might draw an objection from the state, but they did not. Because the defendant was not aware of those exchanges they cannot be considered for the issues the jury has to grapple with, which is whether or not the defendant acted justifiably in self-defense. That's still the law in Maine. I admitted them for the limited purpose of showing plan, intent, motive. But I think the law is still the law that unless he knows about it, it doesn't go to the issue of self-defense.

[Jan. 25, 2023, Tr. 160-161]. This ruling to limit the cross-examination of Caleb on the substance of the texts, as well as the instruction, was error.

First, the trial judge's repeated finding that Dylan was not aware of Jordan's intent to do harm to him at the meeting because he was not privy to the text messages themselves is belied by the evidence in the texts between Jordan and Caleb. At one point Jordan writes to Caleb that "If Dylan knocks on my door one more time, I'm gonna destroy him. *** He did last night and I told him gtfo here

before I beat you with a bat." [*Id*. at 225]. Jordan's threat to Dylan the night before the incident that he would beat him with a bat directly addressed Dylan's reasonable belief that Jordan was willing to inflict deadly force upon him. Later in the text messages, Jordan acknowledges to Caleb that Dylan knew Jordan was mad at him for allegedly stealing the bike and that Jordan wanted to harm him: "my mom just got off the phone with our landlord. [Dylan] took it. **He's smoked. He's full of shit and he knows I'm meeting him -- and he knows he is, I'm meeting him."** [*Id*. at 238-239] (emphasis added). A reasonable inference from Jordan's statement is that Dylan knew Jordan was going to "smoke" him when they met up that night, because Jordan conveyed that message to Dylan either by phone or text message. These statements by Jordan were more than sufficient to provide a basis to admit the substance of the texts to demonstrate Dylan's reasonable belief that it was necessary to use deadly force against Jordan or that Jordan was the initial aggressor.

In addition, the evidence that Jordan had threatened to beat Dylan with a bat the day before the incident and wanted to "smoke" him at their meeting the night of the incident, provided evidence that Jordan acted in accordance with his state of mind and was thus inferential evidence that Jordan was the initial aggressor which rebutted Caleb's version of the incident. *See Nile*, 566 A.2d at 1088 (victim's statement to friend that she wanted to put defendant away for life improperly

excluded where it was admissible under Rule 803(3) to demonstrate her intent to seek revenge against the defendant); *Mason*, 528 A.2d at 1261 (reversing conviction where declarant's statement that he would "get even" with defendant was improperly excluded at trial where the evidence could support an inference that the declarant later "got even" by falsely accusing and testifying against the defendant).

Here, the jury were instructed in accordance with the self-defense law "that a person is justified in using deadly force upon another person when the person reasonably believes it necessary and reasonably believes such other person is about to use unlawful deadly force against the person." [Jan. 25, 2023, Tr. 134]. *See* 17-A M.R.S. § 108. Nevertheless, the court did not allow the jury to consider the content of Jordan's texts to Caleb for this purpose. [Jan. 25, 2023, Tr. 160]. This error was not harmless because it cannot be said that it is highly probable that prohibiting the jury from considering the texts messages for the issue of Dylan's reasonable belief that deadly force was necessary, did not affect the verdict. *See Mason*, 528 A.2d at 1261 (reversing conviction where error in excluding declarant's statement was not harmless because he was a principal witness and the evidence directly addressed his credibility); *Nile*, 566 A.2d at 1088 (error in excluding evidence was not harmless because she was a central witness and impeaching her credibility was important to the defense).

Additionally, the issue of who was the initial aggressor in the incident and Caleb's credibility as to how the shooting transpired were the central issues at trial. In fact, Caleb's telling of his version, which had changed numerous times from his first interview to his testimony at trial, [Jan. 24, 2023, Tr. 210-2018], was at the heart of Dylan's self-defense theory.

Even the trial judge expressed great reticence about excluding evidence of the text messages between Jordan and Caleb: "I – I'm troubled by the fact that I think the defendant might not get a fair trial unless the jury has the whole picture about what was going between this group of people. But I think it's more directly relevant to provocation and aggression than anything else, and that, to me, means I have to decide if there is self-defense in this case." [Sept. 16, 2022, Tr. 18]. The trial judge did ultimately determine that Dylan had a self-defense case, and so instructed the jury, but nevertheless limited the scope of the texts. [Jan. 25, 2023, Tr. 134]. The ruling to limit Jordan and Caleb's texts to Jordan's motive, state of mind, and intent, rather than as substantive evidence that Dylan had a reasonable belief that deadly force was necessary against Jordan, or that Jordan was the initial aggressor, so handcuffed the defense and was so relevant to the heart of the case against Dylan, that it cannot be deemed harmless. Consequently, this Court must reverse the murder conviction.

Even if the substance of Facebook Messenger texts was properly limited to motive, state of mind, and intent, once the substance was admitted, it was error to exclude the documentary evidence of the texts.

B. The documentary evidence of the text messages between Jordan and Caleb, the substance of which was admitted via Caleb's testimony to show Jordan's motive, state of mind, and intent, should have been admitted at trial similarly to the text messages between Jordan and Dylan.[2]

Although the trial judge properly allowed Caleb to testify as to the content of some of the Facebook Messenger texts between Jordan and Caleb to show motive, state of mind, and intent, she erred by excluding the documentary evidence of the text messages.

Hearsay statements of a declarant's then-existing state of mind are admissible in a criminal prosecution if they are "highly relevant and uttered in circumstances indicating its truthfulness above and beyond the reliability presumed of all statements of present mental state." *Penley*, 2023 ME at ¶ 15; M.R. Evid. 803(3). "The premise for admitting hearsay statements evidencing state-of-mind is that such statements are reliable because of their spontaneity and the resulting probable sincerity." *Horton v. Allen*, 370 F.3d 75, 85 (1st Cir. 2004) (quotation marks omitted).

[2] The prosecution did not challenge the authenticity of the Facebook Messenger texts. [Sept. 16, 2002, Tr. 14].

Here, although Caleb testified as to the substance of some of the Facebook Messenger texts between himself and Jordan, the trial judge did not admit the documentary evidence of those texts as an exhibit. [Jan. 24. 2023, Tr. 4]. Once the judge ruled that the messages were admissible under Rule 803(3), it was an error to not admit the documentary evidence. *See State v. Tieman*, 2019 ME at ¶ 15 (murder victim's Facebook Messenger texts admitted at trial to show her state of mind); *State v. Marquis*, 2017 ME 104, ¶ 17, 162 A.3d 818 (murder victim's authenticated text messages admitted at trial).

Whether to admit the text messages themselves and to allow the jurors to view the messages became a touchpoint during deliberations when the jury sent a note requesting to view the text messages between Jordan and Caleb and Jordan and Dylan. [Jan. 26, 2023, Tr. 159]. The court provided copies of the texts between Jordan and Dylan to the jury, but over objection, refused to allow the jurors access to the text exchanges between Jordan and Caleb:

> **MR. SMITH:** We're not going to send back the Facebook messages between Jordan and –
>
> **THE COURT:** Caleb.
>
> **MR. SMITH:** -- Caleb. Because --
>
> **THE COURT:** Because they are -- they are not being admitted as substantive evidence -- *** I admitted them for the limited purpose of showing plan, intent, motive. But I think the law is still the law that unless he knows about it, it doesn't go to the issue of self-defense.

MR. SMITH: And I think my objection is really that the -- the jury certain things, we're going of messages --

THE COURT: Correct.

MR. SMITH: -- which but we're getting a transcript.

THE COURT: Well, they were admitted because there was a Q and A. The content of the statements were.

MR. SMITH: Well, the content was.

THE COURT: Right. And –

MR. SMITH: Just like the content of the other stuff.

THE COURT: Fair enough.

MR. SMITH: And we're going to send back one set of messages but not the other. And my objection -- I guess I object to that.

THE COURT: Well, the others are -- the others are exception to a hearsay rule. But the others are not hearsay because they're admissions of a party -- of the defendant. That's why they're -- that's why they're going back. Any statement made by Dylan is going to be --

MR. SMITH: But the jury's question, and maybe I'm just losing it right at this point, but the jury's question is they want to see the messages.

THE COURT: They do. But I can't let them see it because I don't think -- under the law of Maine they are not allowed to consider that as evidence –

MR. SMITH: But we're assuming –

THE COURT: -- of his state of mind.

MR. SMITH: But we're assuming we know why they want to use it. They may think that it's relevant to some plan, maybe, or scheme, just as the Court admitted it for. And I think the Court wrongfully assumes

> that they're going to use it for some improper purpose. And the Court has already given instructions on all of this.
>
> **THE COURT:** Let's come off the record a second.

[Jan. 26, 2023, Tr. 161-163]. Despite defense counsel's best efforts, however, the court did not allow the jurors to view the documentary evidence of the text messages even though the content had been admitted to show motive, state of mind, and intent. The result of this ruling is that Dylan was prejudiced when the content **and** corresponding documentary evidence of texts between himself and Jordan was admitted at trial while only the content of text messages between Jordan and Caleb was admitted, which allowed the jury to infer that the evidence offered by the State had more credibility.

This error was not harmless because the jury specifically asked, during deliberations to see the documentary evidence, which indicates that these texts were a focus of the deliberations. *See State v. Judkins*, 2024 ME 45, ¶ ¶ 26-27 (*citing Guyette*, 2012 ME at ¶ 20 (improperly admitted hearsay statements were not harmless where jury requested to hear audio recording again during deliberations). Thus, it cannot be said that it is highly probable that prohibiting the jury from considering the documentary evidence of the texts between Jordan and Caleb did not affect the verdict, and the murder conviction should be reversed.

II. THE TRIAL JUDGE ERRED MY FAILING TO ORDER A COMPETENCY EXAMINATION OR HOLD A HEARING ON THE ISSUE WHERE SHE WAS ON NOTICE THAT DYLAN APPEARED "MEDICATED," HAD A "FLAT AFFECT," AND WAS NOT RESPONDING TO EVIDENCE AND THESE OBSERVATIONS INDICATE THAT DYLAN WAS NOT COMPETENT TO KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHT TO TESTIFY AT TRIAL AND PARTICIPATE IN HIS DEFENSE.

Because Dylan was incompetent at the time he declined to testify, any waiver of his constitutional right to testify was not voluntary or knowing and his conviction must be reversed. A criminal defendant has a constitutional right to testify in his own defense and meaningfully participate in the presentation of his case. *State v. Ericson*, 2011 ME 28, ¶15, 13 A.3d 777, 782. A defendant may waive the right to testify, but only if such waiver is voluntary and knowing. *State v. Tuplin*, 2006 ME 83, ¶ 14, 901 A.2d 792, 796. *See also McMann v. Richardson*, 397 U.S. 759, 766 (1970) (*quoting Brady v. United States*, 397 U.S. 742, 748 (1970)) (a waiver of a constitutional right "must be an intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences'"). When a defendant is incompetent, he cannot waive his constitutional rights. *State v. Thursby*, 223 A.2d 61, 66 (1966). "Competence to stand trial . . . means that the accused is capable of understanding the nature and object of the charges and proceedings against him, of comprehending his own condition in reference thereto, and of conducting in

cooperation with his counsel his defense in a rational and reasonable manner." *Clement v. State*, 458 A.2d 69, 71 (Me. 1983) (*quoting Thursby*, 223 A.2d at 66.

Here, on the morning of third day of trial, Dylan met with his attorneys, and thereafter informed the judge that he would not testify. [Jan. 25, 2023, Tr. 10-11, 15-17]. A few hours later, however, the trial judge made the following observation:

> So off the record the Court expressed some -- not concern exactly, but just shared some observations of the defendant's demeanor throughout the trial. And what I observed was that he seems to have a flat affect. He seems to be either medicated or shut down somewhat. He's not sleeping at the defense table but he is not reacting to evidence. I see him communicating with counsel on occasion.
>
> So I just wanted to ask if he had been evaluated or if the defense had any concern about his competence.

[*Id*. at 36]. Trial counsel responded:

> And up -- right up until the eve of trial we really had very little concern.
>
> But we share the Court's observations, we noticed the same things. And it's caused us a bit of concern throughout the trial. We've kept an eye on it. And as the Court has noted, we made a series of communications with him, I have made sure he is paying attention and understands what's happening. And we certainly brought him in to some of the decisions that have gone on throughout the trial. And to my mind throughout the trial he has been responsive and appropriate.
>
> And I think today we had a bit of an increased concern because of the way -- there's something about today, he really sort of seemed a little different. So we -- we had a very specific and lengthy conversation with him about that. And the -- I think the take away is after a good long discussion, both with him and after amongst the team, we believe that he is competent.

[*Id*. at Tr. 37-38].

As this Court set forth almost sixty years ago:

> [T]he initial responsibility of raising the question of incompetence of the accused to stand trial is on his counsel, [however,] if the trial court learns from observation, reasonable claim or credible source that there is genuine doubt of defendant's mental condition to comprehend his situation or make a defense, it is the duty of the court to order an inquiry concerning defendant's competence to stand trial.

Thursby, 223 A.2d at 68. Although "a trial court's decision not to inquire into an accused's competency is disturbed only for arbitrary action or abuse of discretion," *State v. Hewett*, 538 A.2d 268, 269 (Me. 1988) (*citing State v. Perkins*, 518 A.2d 715, 716, n.1)), in this case, the trial court abused its discretion by not ordering a competency evaluation and/or not conducting a competency hearing.

Specifically, 15 M.R.S. § 101-D provides that "Upon motion by the defendant or by the State, or upon its own motion, a court having jurisdiction in any criminal case may for cause shown order that the defendant be examined by the State Forensic Service for evaluation of the defendant's competency to proceed." Although Dylan had previously been evaluated by the State Forensic Service,[3] it is clear from the record that his condition had deteriorated over time and hit a low on the morning of the third day of trial. [Jan. 25, 2023, at 37-38]. The

[3] Dylan was evaluated prior to trial by Dr. Riley of the State Forensic Service for mental health issues or conditions that might explain his behavior on the night of the incident. [May 16, 2023, Tr. at 53-54].

trial judge noted that throughout the trial Dylan may have been medicated, that his affect was "flat," and that he was not **"reacting to the evidence."** [*Id*. at 36]. This trial attorney noted on the third day of trial that he had "an increased concern" for Dylan. [*Id*. at 37]. Based on those observations, the trial judge had a duty, beyond asking Dylan's attorneys to assess him, to inquire into Dylan's competency. 15 M.R.S. § 101-D. *Contrast State v. Comer*, 584 A.2d 638, 642–43 (Me. 1990) ("Although the trial court has a duty to make inquiries as to competence if it learns from observation or a credible source that there is a genuine doubt as to competence, . . .There was nothing to place the presiding justice on notice that Comer was incompetent to plead guilty because of psychological problems or his ingestion of drugs."); *State v. Vane*, 322 A.2d 58 (1974) (plea judge had no occasion to question defendant's competency to plead guilty because the issue of incompetency was never raised and judge conducted a full Rule 11 colloquy and was satisfied that the plea was voluntary and knowing). Unlike the aforementioned cases, the trial judge here was on notice that Dylan may have been medicated, that his affect was "flat," and that he was not **"reacting to the evidence."** [*Id*. at 36]. Such notice raised an issue as to Dylan's competency that required further inquiry. *State v. Gerrier*, 2018 ME 160 ¶ 8, 197 A.3d 1083, 1086 (the responsibility of addressing the defendant potential incompetency is "not limited to defense counsel, however, because the court also has a duty to order an inquiry into the defendant's

ability to proceed with the case if it 'learns from observation . . . that there is genuine doubt of defendant's mental condition to comprehend the situation or make his defense'") (*citing* 15 M.R.S. § 101-D (2017)). Failure to do so resulted in Dylan involuntarily and unknowingly waiving his right to testify in his own defense and prevented him from meaningfully participating in his defense. *See People v. Moore*, 78 AD. 2d 997, 998 (N.Y. App. Div. 1980) (reversing defendant's guilty plea because the plea judge failed to conduct a hearing as to defendant's competency despite defendant's testimony that he was taking valium and another medication at the time of the plea).

In this case, Dylan's testimony as to what occurred on the night of January 24th and into the morning hours of January 25th, was crucial to his claim of self-defense—without Dylan's version, the jury was left with the version of how the incident began that was put forth by Caleb Trudeau. Thus, Dylan's inability to voluntarily and knowingly waive his right to testify was crucial. That he ultimately did not testify may have significantly impacted the outcome of his case and denied him a fair trial. *Ericson*, 2011 ME at ¶15. Consequently, this Court must reverse the convictions.

III. THE LOWER COURT ABUSED ITS SENTENCING POWER WHEN IT SENTENCED DYLAN TO A DE FACTO LIFE SENTENCE OF SEVENTY-FIVE YEARS WITH SIXTY-FIVE TO SERVE AND THE SENTENCE OFFENDS THE PREVAILING NOTIONS OF DECENCY.

A. Because the lower court abused its sentencing power in sentencing Dylan to seventy-years in prison with sixty-five to serve and four years' probation, which was a de facto life sentence, this Court should remand for resentencing.

When reviewing the sentencing court's application of the *Hewey* analysis this Court reviews the basic sentence de novo for misapplication of principle and reviews the maximum sentence and the final sentence for an abuse of discretion. *State v. Williams*, 2020 ME 128, ¶ 56, 241 A.3d 835 (citations omitted). In addition, the Court also reviews all three statutory steps for whether the sentencing court disregarded the relevant sentencing factors or abused its sentencing power. *State v. Bentley*, 2021 ME 39, ¶ 10, 254 A.3d 1171, 1175.

> In conducting a statutory review of a criminal sentence this Court must consider:
>
> **1. Propriety of sentence.** The propriety of the sentence, having regard to the nature of the offense, the character of the offender, the protection of the public interest, the effect of the offense on the victim and any other relevant sentencing factors recognized under law.
>
> **2. Manner in which sentence was imposed.** The manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

15 M.R.S. § 2155.

In reviewing Dylan's sentence, this Court must also follow the statutory objectives for sentence review:

1. **Sentence correction.** To provide for the correction of sentences imposed without due regard for the sentencing factors set forth in this chapter;

2. **Promote respect for law.** To promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process;

3. **Rehabilitation.** To facilitate the possible rehabilitation of an offender by reducing manifest and unwarranted inequalities among the sentences of comparable offenders; and

4. **Sentencing criteria.** To promote the development and application of criteria for sentencing which are both rational and just.

15 M.R.S. § 2154. In so doing, this Court should conclude that Dylan's sentence does not meet these objectives, is an abuse of the lower court's sentencing power, and remand the case pursuant to 15 M.R.S. § 2156 (1-A). Although a court may follow the established sentencing procedures and principles, a sentence which is excessive will be vacated. *See State v. Frechette*, 645 A.2d 1128, 1129 (Me. 1994) (vacating four sentences of 20 years each imposed consecutively). In reviewing the propriety of a sentence, *see 15 M.R.S.A. § 2155(1)*, excessiveness is considered. *See* Daniel E. Wathen, *Disparity and the Need for Sentencing Guidelines in Maine: A Proposal for Enhanced Appellate Review*, 40 ME. L. REV. 1, 11 n.32 (1988).

Here, Dylan was sentenced to forty-five years on the murder charge, and thirty years with all but twenty years suspended and probation for four years on the attempted murder charge to be served consecutive to murder sentence. [R.A. 21-22].[4] Thus, his total sentence was seventy-five years with all but sixty-five years suspended. As this Court has noted, "it is possible that a sentence for a term of years could be the functional equivalent of a life sentence." *State v. Burdick*, 2001 ME 143, ¶ 40, 782 A.2d 319. In *Burdick*, although the Court declined to hold as a matter of law that a forty-year sentence given to a defendant who was fifty years old was a *de facto* life sentence, it did accept the lower court's assessment that the term of years sentence imposed "actually constitutes a life sentence." *Id*. at ¶ 25 & n.15. *See also State v. Goodale*, 571 A.2d 228, 229 (1990) (declining to view a seventy-five-year sentence as *de facto* life sentence because the illegality of the sentence was not clear on the record). Unlike the aforementioned cases, Dylan's consecutive sentences that total seventy-five years, do constitute a *de facto* sentence because the sentences do not provide him any meaningful opportunity for rehabilitation – a statutory sentencing objective. A number of other jurisdictions that have addressed this issue have determined that a sentencing a juvenile to a term of years, rather than a life sentence, may still violate the Constitution because

[4] He was also sentenced fifteen years on the elevated aggravated assault, concurrent with the sentence for attempted murder. [R. 21].

a long sentence may deny the individual a meaningful opportunity to have a life outside of prison.[5] *See, e.g.*, *State v. Haag*, 495 P.3d 241, 250 (Wash. 2021) (sentence of 46 years to life for a juvenile offender is a *de facto* life sentence); *People v. Buffer*, 137 N.E.3d 763, 774 (Ill. 2019) (finding that the juvenile defendant's sentence of 50 years was a *de facto* life sentence). Courts have reasoned that any sentence that "forecloses the defendant's release from prison for all or virtually all of his expected remaining life span" violates the Eighth Amendment. *See Williams v. United States*, 205 A.2d 837, 844 & n. 34 (and cases cited) (D.C. Ct. App. 2019). The predominate rationale is that any sentence that denies the offender "a genuine opportunity to demonstrate that he or she has been rehabilitated [or] to establish a meaningful life outside of prison" violates Federal and State Constitutions. *State v. Kelliher*, 873 S.E.2d 366, 370 (N.C. 2022).

The Maine legislature has recognized the importance of rehabilitation in the sentencing process. *See* 15 M.R.S. § 2154. Dylan's sentence of seventy-five years is effectively a *de* facto life sentence because it does not provide him with the opportunity to demonstrate that he has been rehabilitated – he will spend his entire adult life in prison. Thus, by sentencing Dylan to a *de facto* life sentence, the lower

[5] Here, although Dylan was not technically a juvenile when this offense occurred (he was approximately 21 years old), other states, including Massachusetts, have determined that the line between juveniles and adulthood is not a bright line that occurs at 18 years. *See Commonwealth v. Mattis*, 224 N.E. 3d 410, 425-428 (Mass. 2024) (and cases cited) (extending the age of juvenile status up to age 21).

court abused its sentencing power and ignored the statutory mandate to consider rehabilitation when sentencing him. Consequently, this Court must remand the case for resentencing.

B. Sentencing a twenty-one year old to a de facto life sentence offends prevailing notions of decency and violates the Maine Constitution.

This Court reviews the "legality and constitutionality of a sentence de novo." *State v. Lopez*, 2018 ME 59, ¶ 13, 184 A.3d 880. Article 1, section 9, of the Maine Constitution provides that "all penalties and punishments shall be proportioned to the offense; excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted. Me. Const. art. I, § 9. This Court has established a two-part test to determine whether a sentence violates article 1, section 9. *Lopez*, 2018 ME 59, ¶ 12 (citing *State v. Ward*, 2011 ME 74, ¶18 n.4, 21 A.3d 1033)). The Court first examines "whether a particular sentence is greatly disproportionate to the offense for which it is imposed." *State v. Dobbins*, 2019 ME 116, ¶ 52, 215 A.3d 769, 784. If it is not greatly disproportionate, this Court will "examine whether it offends prevailing notions of decency." *Id.* A sentence that fails either part of the test is unconstitutional. *State v. Hoover*, 2017 ME 158, ¶ 31, 169 A.3d 904, 912 (citing *State v. Frye*, 390 A.2d 520, 521 (Me. 1978)).

Because Dylan's sentence offends the prevailing notions of decency, it is unconstitutional pursuant to Article 1, sec. 9. As this Court has determined,

"[O]nly the most extreme punishment decided upon by the Legislature as appropriate for an offense could so offend or shock the collective conscience of the people of Maine as to be unconstitutionally disproportionate, or cruel and unusual." *State v. Asante*, 2023 ME 24, ¶ 12, 294 A.3d 131, 135, *as revised* (June 13, 2023) (citation omitted). In this case, Dylan's sentence does shock the collective conscience in a way that requires resentencing.

In *Mattis*, the Massachusetts Supreme Judicial Court recently examined at what age our youthful population should be subject to life in prison without the meaningful opportunity for parole. 224 N.E. 3d at 418. The court declined to adopt the United States Supreme Court's bright line rule that the age of eighteen draws the line between childhood and adulthood, and instead analyzed the state constitutional provision prohibiting "cruel and unusual punishments" with an eye toward "contemporary standards of decency." *Mattis*, 224 N.E. 3d at 420. The court examined updated research on the brains of "emerging adults" as well as the changing law in Massachusetts and other jurisdictions in determining what contemporary standards of decency are constitutionally required when sentencing this class of offenders. *Id*. As the court noted, "Advancements in scientific research have confirmed what many know well through experience: the brains of emerging adults are not fully mature. Specifically, the scientific record strongly supports the

contention that emerging adults have the same core neurological characteristics as juveniles have." *Mattis*, 224 N.E. 3d at 420.

To that end, while the United States Supreme Court struck down the death penalty and mandatory life without parole sentences for youth under 18, *see Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Graham v. Florida*, 560 U.S. 48, 82 (2010); *Roper v. Simmons*, 543 U.S. 551, 578 (2005), it also recognized that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Research now shows that older adolescents share the same physiological and psychological traits as juveniles, making them equally less culpable and less deserving of the most serious punishments meted out for adults. Indeed, researchers have established that the regions of the brain associated with the characteristics relied on in *Graham* and *Miller* continue to develop beyond age 18. *See* Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. Neuroscience 10937, 10937 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measured with Atlas-Based Parcellation of MRI*, 65 NeuroImage 176, 189 (2013). Older adolescents are now understood to be more like younger adolescents than adults, in that older adolescents are "more susceptible to peer pressure, less future-oriented and more volatile in emotionally

charged settings." Vincent Schiraldi & Bruce Western, *Why 21 Year-Old Offenders Should Be Tried in Family Court*, Wash. Post (Oct. 2, 2015), https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html, last accessed June 9, 2024. In the nineteen years since their 2003 article, Steinberg and Scott have also published numerous papers concluding that research now shows that the parts of the brain active in most crime situations, including those associated with characteristics of impulse control, propensity for risky behavior, vulnerability, and susceptibility to peer pressure, are still developing well into late adolescence and even for individuals above age 20. Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (2016) ("Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority." (citing Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 5 (2014))); *see also* Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. Med. & Phil. 256, 263 (2013). Additionally, a comprehensive 2019 report from the National Academies of Sciences explains this shift in the understanding of adolescence, noting that "the

unique period of brain development and heightened brain plasticity… continues into the mid-20s," and that "most 18–25-year-olds experience a prolonged period of transition to independent adulthood, a worldwide trend that blurs the boundary between adolescence and 'young adulthood,' developmentally speaking." Nat'l Acads. of Scis., Eng'g & Med., *The Promise of Adolescence: Realizing Opportunity for All Youth* 22 (2019), https://pubmed.ncbi.nlm.nih.gov/31449373/, latest accessed June 9, 2024.

The report concludes it would be "arbitrary in developmental terms to draw a cut-off line at age 18." *Id.*

A concurring opinion in *Mattis* succinctly noted that:

> Our experiment with scientific fact finding on the topic of adult brain development validates the graduated treatment of young persons reflected in our statutes. The court's careful review of this record is undisputed. In brief, it shows that neuroscientists see in their magnetic resonance imaging (MRI) scans corroboration for that which we experience in life; the brain characteristics of persons even years older than eighteen mirror those of persons under eighteen. The brain generally continues to develop through the mid-twenties. Until some ill-defined point in the third decade of life, adults, especially men, generally are more impulsive and their brains are more plastic than those of older adults.

Mattis, 224 N.E.3d at 441 (2024).

This Court too should address whether sentencing an offender who committed murder at the age of 21 to a functional life sentence offends the prevailing notions of decency when examined next to the undisputed scientific

evidence that young men, well into their twenties, are more similar to juveniles than adults. Here, Dylan was twenty-one years old when the incident occurred, and he had no prior criminal record. He is the precise example of an emerging adult who lacked impulse control and engaged in risky, juvenile behavior. He is worthy of the opportunity for rehabilitation. A finding that Dylan's sentence of seventy-five years is not in accordance with the evolving law and scientific evidence for sentencing of emerging adults and thus violates prevailing notions of decency would also give credit to the Legislature's mandate that courts consider "the possible rehabilitation of an offender." 15 M.R.S. § 2154.

Therefore, because Dylan's sentence of seventy-five years for the two convictions violates prevailing notions of decency, this Court must remand the case for resentencing.

CONCLUSION

For the reasons set forth herein, Dylan did not receive a fair trial in this matter and is entitled to a new trial. Every criminal defendant has the constitutional right to meaningfully participate in his trial and to knowingly and voluntarily waive other constitutional rights, such as the right to testify in one's own defense. Both the trial judge and defense counsel had concerns about Dylan during portions of his trial. Nevertheless, the trial judge did not order a competency examination or hold a competency hearing, and on the same Dylan "waived" his right to testify,

the trial judge noted that Dylan appeared medicated, his affect was "flat," and he "was not reacting to evidence."

Compounding this constitutional violation is the trial judge's error in limiting the admissibility of the text message exchanges between Jordan and Caleb such that the jury could not consider the substance of the texts as it related to Dylan's claim of self-defense, and not admitting the text messages as an exhibit thereby prohibiting the jury from viewing the text messages between Jordan and Caleb – the substance of which was admitted to show motive, state of mind, and intent – even though the jurors specifically asked during deliberations to view the messages.

Even if this Court does not order a new trial for the above reasons, it should at the least, remand for resentencing because Dylan's sentence of seventy-five years with all but sixty-five suspended is a *de facto* life sentence and offends prevailing notions of decency because Dylan was twenty-one years old at the time of the incident and evolving scientific evidence suggests that offenders of this age – emerging adults – are more like juveniles than adults when making life choices. Sentencing an "emerging adult" to a life sentence with no opportunity for rehabilitation or the possibility of a meaningful adult life outside of prison simply offends the Maine Constitution, and therefore Dylan should be resentenced to a

term of years that reflects his ability to rehabilitate and provides him the opportunity to do so.

Date: June 10, 2024

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CERTIFICATE OF SERVICE

I, Michelle R. King, attorney for Dylan Ketcham, hereby certify that on this date I made service of two copies of the foregoing brief and one copy of the Appendix, by email and mail, to the following counsel:

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