THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Han-23-466

STATE OF MAINE
Appellee

v.

CRAIG A. WOODARD
Appellant

ON APPEAL from the Hancock County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

There are four errors in this case, only the first going to the conviction, the others all concerning sentencing:

(I) The court's self-defense instructions entirely omitted provisions encompassing defendant's theory of self-defense. Specifically, even though defendant stated that he shot the gun in order to defend his family, the jury was never instructed that such use of force in defense of third persons was lawful. And the judge omitted to instruct that there is no duty upon those present in dwelling places, as the evidence suggests defendant's family were, to retreat therefrom. The remedy is vacatur.

(II) The court erred statutorily and constitutionally by starting its final-sentence calculus at four years' unsuspended prison-time. The requisite facts were neither pled nor proven, and the court's error is reversible on multiple theories.

(III) Defendant was 30 years old at the time of the shooting. The court found that such an advanced age was an aggravating factor, which defendant argues is both improper and unlawful. If this Court disagrees, virtually all defendants in ours, the grayest state in the country, will be subject to increased sentences simply because they are adults in adult criminal court.

(IV) The court also improperly increased defendant's sentence by attributing to defendant arguments made in defense counsel's sentencing memorandum. This practice comports with neither the purposes of sentencing, notions of judicial economy, nor the goal of finality.

Each of the sentencing errors necessitates remand for resentencing.

JURISDICTIONAL STATEMENT

The trial court had jurisdiction over the criminal prosecution by virtue of 15 M.R.S. § 1 and 17-A M.R.S. § 9. A judgment of conviction was entered onto the docket on November 17, 2023, (A9), and defendant noticed this appeal the same day, (A11). *See* M.R. App. P. 2B(b). Therefore, the Court has jurisdiction pursuant to 15 M.R.S. § 2115 and 4 M.R.S. § 57.

STATEMENT OF THE CASE

After a brief jury-trial, defendant was convicted of three counts: elevated aggravated assault, 17-A M.R.S. § 208-B(1)(A) (Class A) (Count I); aggravated assault, 17-A M.R.S. § 208(1)(B) (Class B) (Count II); and assault, 17-A M.R.S. § 207(1)(A) (Class D) (Count III). Thereafter, the Hancock County Unified Criminal Docket (Larson, J.), imposed a principal sentence of 12 years' prison, suspending all but five years of that term for the duration of three years' probation. However, apparently noticing its error, the court later amended its judgment, merging the convictions to avoid a double jeopardy violation. This Court (Horton, J.) retroactively permitted leave for the court to take that action. By order dated January 31, 2024, the Sentence Review Panel granted leave for defendant to appeal the propriety and legality of his sentence.

I. Defendant shot Forrest Dale in the buttocks while Dale was on or approaching defendant's property.

Forrest Dale and defendant had "scheduled a fight" with one another to take place in May 2020. (Tr. 33). They had "met" on Facebook, Forrest testifying at trial – without objection – that defendant had been "going off"

about Forrest's religion, tormenting Forrest about Forrest's deceased father and an "incredibly traumatic" situation regarding Forrest's son. (Tr. 34-35). Forrest added, again without objection, that defendant "tried to burn down" the house of one of Forrest's friends. (Tr. 35).

According to Forrest, defendant invited Forrest to come to [redacted] [redacted] in Bucksport, where defendant resided, for a fist-fight with defendant. (Tr. 36-37). Forrest accepted, telling defendant, "I will be standing on public property, on the road in front of your house, and you can come down, and you can fight me." (Tr. 37). Forrest swore he would not have brought a firearm to the fight because he is a felon. (Tr. 37).

So, after work on May 7, Forrest, his former high-school friend, the friend's wife, and Forrest's roommate whom, according to Forrest – and not subject to an objection – defendant had previously "threatened to kill" – ventured to Bucksport. (Tr. 37-38).

When the foursome arrived at defendant's address, Forrest testified, he yelled at defendant to come fight. (Tr. 41). Defendant and his father stood outside near the RV. (Tr. 40-41). According to Forrest, defendant kept urging Forrest to come closer towards the house and RV, something Forrest did not want to do because his understanding was that if one engages in a fight on public rather than private property, "you're pretty well safe." (Tr. 41-44). Forrest refused to go farther than half the distance defendant wanted him to go up the driveway. (Tr. 44). He announced that was far enough, and that he was leaving because defendant refused to come fight him. (Tr. 44-45).

When Forrest said that, defendant stepped behind a tree, grabbed a gun and fired three shots. (Tr. 45). The first hit the ground, and the second "whizzed by" Forrest's head. (Tr. 45). Forrest testified,

> I was like, well, it's time to run. And I'm an ultra marathon runner. I've run a thousand miles for charity. I became known as the real life Forrest Gump. So I then turned and started running as fast as I could. And I am fast. I am real fast. And I – in – in a couple seconds, I can cover a lot of distance. And I heard bang, and then I heard bang, and it felt like a balloon popped in my leg....

(Tr. 45). Forrest was struck "just below" his buttock. (Tr. 45); *see also* Tr. 48-49 ("in" the buttock).

II. The nature of Forrest's injury

Forrest immediately thought that he had been struck in the femoral artery. (Tr. 48). Forrest stuck a finger in the wound, which caused pressure to build up and made him feel like a truck was sitting on top of him. (Tr. 49). He got in the car with his friends, and they sped off towards the hospital. (Tr. 50). A 9-1-1 dispatcher arranged for them to meet a police officer en route, and the officer assured Forrest he would be okay, although application of the tourniquet was "excruciating." (Tr. 50-51).

Aftercare for "a bullet wound is ten to a hundred times worse" than being shot, Forrest testified. (Tr. 52-53). He still has a scar. (Tr. 53). He has not returned to running marathons. (Tr. 53-54).

III. The defense

Defendant lives at [redacted] with father, his father's wife, defendant's girlfriend, who is the mother of defendant's daughter, and defendant's daughter. (Tr. 70). Defendant received Forrest's threat to kill

defendant's family by burning their home. (SX 1 ca. 13:00). Defendant showed his father text messages sent by Forrest in which Forrest "threaten[ed] to – to burn – to kill everybody and burn down the house and the RV." (Tr. 71). The father was "quite alarmed" and concerned. (Tr. 71). With only a few minutes until Forrest's anticipated arrival, the father called the local police department and reported that "trouble was brewing, something was gonna happen." (Tr. 71-72). When police did not respond in time, the father again called police, warning them that "something bad was gonna happen." (Tr. 74).

Defendant warned his girlfriend of the possibility of "gunshots." (SX 1 ca. 17:00). The father testified that he was panicked because his granddaughter (defendant's daughter) and her mother (defendant's girlfriend) were located in the RV parked in the driveway. (Tr. 82). Given the fast-developing situation, he may have been unaware that, after defendant alerted his girlfriend to the danger, the girlfriend and defendant's daughter entered the house. (SX 1 ca. 17:05). Either way, defendant was thinking, "If this guy's going to come here and try and kill my family, I can shoot him – pretty plain as day." (SX 1 ca. 19:00).

When the car arrived out in front of the driveway, defendant's father observed Forrest "yelling and screaming" alongside a woman, outside the car, who was "egging on" Forrest. (Tr. 76). The father ran upstairs to retrieve a shotgun, thinking to himself, "this is not gonna be good." (Tr. 76). Forrest kept "strutting up the driveway" as he called defendant a "fucking faggot." (Tr. 77-78).

Suddenly, about 80 feet up the driveway, Forrest reached behind his back, as if he were reaching for something in his belt. (Tr. 78). When Forrest approached a large rock in the driveway, defendant fired two warning shots. (Tr. 80). Then two more. (Tr. 80). Only after the fourth shot did Forrest retreat a bit before turning again towards defendant and his father. (Tr. 80-81). At that point, there were two more shots, the father recalls. (Tr. 81). Forrest probably ran 60 feet or so. (Tr. 82). The father himself fired a warning shot, too, because of the threats he had seen directed at the family. (Tr. 82-84).

IV. The legal importance of self-defense

The court agreed that there was sufficient evidence to generate self-defense. (Tr. 90). However, defense counsel made a tactical decision to decline a Section-104-defense-of-premises defense, explaining on the record:

> One of the items, I've explained to my client, is Section 104, which is defense of property. There certainly is some evidence in the case that the threat was made to commit arson. Essentially, the same standards apply as in 108. I've decided that it's in his best interests not to make the case seem more complex than it is, and so I'm not raising a 104 defense along with other items. That's my judgment. It's a strategy call.

(Tr. 95). Clearly understanding that defense counsel intended to waive only an instruction as to § 104, the court asked defendant, personally, whether he was okay with counsel's plan. (Tr. 95-97). The judge explained to defendant that defendant's lawyer "certainly has you covered and protected with regard

to the self-defense deadly force instruction, which I'll be reading to the jury and what the State has to prove to overcome that defense."[1] (Tr. 96).

In closing, the State developed a theory to rebut the notion of self-defense:

> What justification, what self-defense would allow [defendant] to shoot a fleeing victim who's 1,500 feet away from his home? None.
>
> And there's some suggestion that [defendant] was protecting his home or protecting people in his home. You can wade through all those self-defense instructions. I've been a lawyer for 30 years. It's still very difficult to wrap my head around them, but it's your job to apply the law to the facts. But there was some indication that it's required that a person retreat if they can re – re – if I can – if the State can demonstrate to you they can retreat in complete safety, then they don't get to use self-defense.
>
> [Defendant] didn't make any effort to retreat. Dad said he's sitting in a chair. He's outside the RV. Mr. Dale told you he reached behind some trees – there was a table sitting outside, and he had a handgun. [Defendant] had a handgun. He picked it up. No evidence at all that [defendant] even made an effort to retreat into his RV. So the State has demonstrated to you that he did not attempt to retreat.

(Tr. 123-24).

As defendant will more fully discuss below, the court's instructions about the self-defense justification were seriously flawed in two related manners. First, the court neglected that defendant was entitled to use deadly force to repel Forrest's use of force against defendant *or a third party*. Clearly, as he told police soon after the shooting, defendant shot Forrest to

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[1] Further indication that defendant was proceeding on a theory of defense of his family is found in defense counsel's repeated arguments, in his motion for judgment of acquittal, that the State lacked evidence to overcome proof about defendant's need to use force to defend "his family." (A84-85).

defend his family. (SX 1 ca. 19:00). Second, the court neglected to instruct that *there is no duty for anyone to retreat if the person being protected is present in a dwelling place*. The only evidence in the record is that defendant's girlfriend and daughter were inside the house or the RV at the time of the shooting.

V. Sentencing

Over defendant's objection, (A83), the court ruled that the mandatory-minimum time-to-serve provision of 17-A M.R.S § 1604(3) applied to defendant:

> The Court also notes that although in his sentencing memorandum, [defense counsel] stated that the minimum mandatory four-year sentence does not appeal, the Court does find that the four-year sentence does apply. There was a firearm used against the person. Clearly, the indictment states that. There was a firearm, a handgun used against a person, Forrest Dale.

(STr. 31). Believing that it was required to impose at least four years of unsuspended time, the court sentenced defendant to five years unsuspended. (STr. 31).

There are two "aggravating factors" found by the court which are subject to appeal. First, the court identified that defendant's age at the time of the shooting – 30 years old – was an aggravating factor because, "This was not a youthful indiscretion." (STr. 29). Second, the court aggravated defendant's sentence because of the sentencing memorandum filed by defense counsel, even though counsel stated,

> I have no complaints, except when my work is used to judge my client. My sentencing memorandum is my work. It's not my

> client. It's my best work at attempting to assist the Court. If it's offensive, I should be held accountable for that and not my client.

(STr. 18). The court, however, found "that there was an actual statement by the defendant in the sentencing memorandum. The Court does find that there was a lack of responsibility and remorse in that statement." (STr. 29). The judge added:

> [I]t's the statement that he makes in this sentencing memorandum that has the most concern for the Court. He refers to [the shooting] as a misunderstanding, and even today he continues to refer to it as a misunderstanding. He blames the Bucksport Police Department for not taking it serious [sic], indicates that what he should have done is got a protection from harassment order. He also blames the defendant [sic] in his statement.

(STr. 29). Though the court ultimately determined that the mitigating factors outweighed the aggravating ones, these two aggravating factors necessarily nullified some portion of mitigation. (STr. 30-31).

ISSUES PRESENTED FOR REVIEW

I. Did the trial court commit obvious error by neglecting to instruct that deadly force may lawfully be used to protect a third person and that there is no requirement that anyone must retreat if the person being protected is present in a dwelling place?

II. Did the sentencing court unlawfully apply the mandatory-minimum sentencing provision, 17-A M.R.S. § 1604(3), despite the fact that qualifying facts were neither pleaded nor proven to a jury?

III. Did the sentencing court unlawfully and improperly increase defendant's maximum sentence because defendant was 30 years old at the time of the shooting?

IV. Did the sentencing court improperly increase defendant's maximum sentence because defendant's attorney held portions of defense counsel's sentencing memorandum to be defendant's "statements"?

ARGUMENT

First Assignment of Error

I. The trial court committed obvious error by neglecting to instruct that deadly force may lawfully be used to protect a third person and that there is no requirement that anyone must retreat if the person being protected is present in a dwelling place.

The defense was that defendant shot Forrest Dale to prevent Forrest from harming defendant's family. That was the threat which defendant found so concerning as to cause him to notify his girlfriend and their daughter. That was the threat that defendant explicitly told police motivated his shooting: "If this guy's going to come here and try and kill my family, I can shoot him – pretty plain as day." (SX 1 ca. 19:00). And that was the threat which spurred defendant's father to call the police – twice – and take up arms against Forrest.

Given these circumstances, the trial court's failure to instruct the jury that these facts might constitute lawful self-defense and provide a complete justification to the shooting is obvious error. Specifically, the court neglected

to instruct jurors that defendant could lawfully use deadly force to repel Forrest Dale from using deadly force against defendant's girlfriend and daughter – "3rd person[s]," in the language of § 108(2)(A)(1). Likewise, the court neglected to instruct jurors that there was no duty on defendant or anyone else to retreat if the jurors found that defendant was acting to defend his girlfriend and daughter in their home. *See* 17-A M.R.S. § 108(2)(C)(3)(a).

A. Preservation and standard of review

This error is not preserved. Therefore, this Court's review is for obvious error. *State v. Asante*, 2020 ME 90, ¶ 10, 236 A.3d 464. That means, this Court will inquire whether there is (1) error (2) that is plain (3) and that affects substantial rights, (4) such that it seriously affects the fairness or public reputation of judicial proceedings. *Ibid.*

B. Analysis

Defendant frames his discussion of this error in the obvious-error paradigm.

1. The court erred.

There are in fact two distinct components of the court's error: (i) its complete omission of instruction in the law of third-party self-defense, and (ii) its failure to instruct that there is no duty to retreat when the third-party is within a dwelling place.

i. There was no third-party self-defense instruction.

In Maine, deadly-force self-defense may be lawfully deployed in defense, not just of oneself, but in defense of a "3rd person." 17-A M.R.S. §

108(2)(A)(1). However, the court's twice-given formulation of § 108 failed to impart this principle:

> A person is justified in using deadly force upon another person when he reasonably believes that the other person is about to use unlawful deadly force **against him** and he reasonably believes that his use of deadly force is necessary to **defend himself.**

(Tr. 116, 146) (emphasis added).

In the light most favorable to defendant, *see State v. Sullivan*, 1997 ME 71, ¶ 6, 695 A.2d 115, the evidence certainly generated a claim of third-party defense. In fact, defendant expressly acted to protect his family. (SX 1 ca. 19:00) (Defendant: "If this guy's going to come here and try and kill my family, I can shoot him – pretty plain as day."). *State v. Sprague*, 617 A.2d 564 (Me. 1992) is analogous. In *Sprague*, a fist-fight broke out between the defendant and "the victim," in the defendant's home. 617 A.2d at 565. There was testimony that "the victim" struck the defendant's 14-year-old brother in the head with a metal folding-chair. *Ibid.* The Law Court held that it was obvious error not to instruct the jury in self-defense, including on behalf of/in defense of "a 3rd person." *Ibid.*

Given defendant's acknowledgment that he was acting to defend his family, failing to instruct the jury in the lawfulness of such action is akin to giving no self-defense instruction at all – a scenario long recognized as obvious error. *Cf. State v. Bard*, 2002 ME 49, ¶ 11, 793 A.2d 509 ("[O]ur precedents demonstrate that typically 'where self-defense is an issue essential to the defendant's case, the court's failure to instruct on self-defense pursuant to section 108 deprives the defendant of a fair trial and amounts to

obvious error.'" (quoting *State v. Davis*, 528 A.2d 1267, 1270 (Me. 1987)). This Court will likely not again see such a patent error.

ii. There should have been an instruction that there is no duty to retreat when the third person is in a dwelling place.

Typically, a defendant may not avail himself of deadly-force self-defense if he could, "with complete safety[,] [r]etreat from the encounter." 17-A M.R.S. § 108(C)(3)(a). That is the law in which the jury in our case was instructed. However, the facts generated a key caveat to the duty to retreat, and the court erred in not explaining it to the jury: If the person being protected is within his or her "dwelling place," there is no need to make any attempt to retreat. *Ibid.* Here, defendant's girlfriend and his daughter were present, either in the RV or in the main house, generating the need for an instruction about this exception to "the duty to retreat."

The court, however, did not explain this exception, both iterations of its self-defense instructions erroneously stating that defendant, personally, had a duty to retreat, if he could do so safely:

> [T]he State must prove beyond a reasonable doubt that..., the defendant knew **he could retreat** in complete safety from the encounter with Forrest Dale....

(Tr. 116, 147) (emphasis added).

There are two reported Maine decisions about a court's omission to instruct jurors about the dwelling-place exception to the duty to retreat. In *State v. Laverty*, 495 A.2d 831, 833 (Me. 1985), the Law Court held that it was obvious error for a court to fail to instruct about the exception, at least when the "variety of factual accounts put before the jury" might reasonably

have caused a jury to acquit. In *State v. Pabon*, 2011 ME 100, ¶ 38, 28 A.3d 1147 a divided Court held that such will not be obvious error when the testimony in support of such a theory is a "thin reed." Two justices, including then-Junior Justice Mead, dissented, reasoning that the evidence of self-defense in *Pabon* was stronger than the majority suggested. *Pabon*, 2011 ME 100, ¶¶ 40-44 (Silver, J., dissenting).

Back in our case, there is considerable evidence that defendant shot Forrest to defend his family in their home. Respectfully, it is difficult to conceive how this vital component of the applicable law could have been overlooked.

2. The errors are plain.

"An error regarding jury instructions is 'plain' if that error is so clear that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *State v. Lajoie*, 2017 ME 8, ¶ 15, 154 A.3d 132 (quoting *State v. Dolloff*, 2012 ME 130, ¶ 36, 58 A.3d 1032). Defendant contends that there are at least two reasons why, in the words of the standard set by this Court, the court below was "derelict." First, both of the faults would have been rectified if only the court had read the statute verbatim; neither involves a complex or nuanced issue of interpretation or application. *Cf. United States v. Olano*, 507 U.S. 725, 734 (1993) ("'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'"). Second, the error went to the heart of the defense, and, had the jury been properly instructed, it could not have found persuasive the State's argument about the duty to retreat. *Cf. State v. Thurlow*, 2019 ME 166, ¶ 15, 221 A.3d

548. In other words, the State's argument that defendant could have retreated with complete safety is legally irrelevant if he was acting to protect those present in a dwelling place.

3. The instructional errors affected substantial rights.

Errors affect substantial rights when, *inter alia*, they might reasonably have affected the outcome of trial. *State v. White*, 2022 ME 54, ¶¶ 29-37, 285 A.3d 262. For example, when, because of an instructional error, a "jury is not specifically instructed regarding the theory of the defense," there is almost surely obvious error. *See State v. Bahre*, 456 A.2d 860, 866 (Me. 1983). That is the case here: Defendant, proceeding on the defense theory that he shot Forrest to defend his family, did not have a jury instructed that such a theory represents lawful self-defense. *Cf. State v. Baker*, 2015 ME 39, ¶ 114 A.3d 214. Even if jurors believed defendant and wanted to vote to acquit based on his theory, the court did not explain the law that would have permitted them to do so. That constitutes obvious error. *See Bard*, 2002 ME 49, ¶ 16 ("The jury should have had the means and the authority to do that with a self-defense instruction.").

Not only was the instruction wrong, that error was exacerbated by the State's repeated argument that defendant had a duty to retreat.

4. Affirming convictions in these circumstances would tend to produce a manifest injustice.

In our case, the evidence and facts did not matter. That is, because they were not correctly instructed in the law, it did not matter whether jurors found defendant's case persuasive. Without the omitted instructions, they

simply could not have ruled for defendant. *Cf. State v. Villacci*, 2018 ME 80, ¶ 20, 187 A.3d 576 ("These errors in the jury instructions were highly prejudicial and tended to produce a manifest injustice, particularly given that Villacci's defense was focused in large part on the application of the statutory justifications."). Not without imperiling its hard-earned reputation can the Maine court-system uphold these convictions. *See Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

Second Assignment of Error

II. The sentencing court unlawfully applied the mandatory-minimum sentencing provision, 17-A M.R.S. § 1604(3), despite the fact that qualifying facts were neither pleaded nor proven to a jury.

When the State "pleads and proves" that the offense of conviction "was committed with the use of a firearm against an individual," there is a mandatory minimum four-year prison sentence that cannot be suspended. 17-A M.R.S. § 1604(3). Here, the court applied that minimum, over defendant's objection, despite the fact that the State neither pleaded nor proved this fact to a jury beyond a reasonable doubt. This is both a violation of § 1604(3) and the constitutional jury-trial rights. *See Alleyne v. United States*, 570 U.S. 99, 113-14 (2013) ("[T]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury."). Because this violation is either not amendable to harmlessness analysis or, in the

alternative, is not harmless beyond a reasonable doubt, resentencing is necessary.

A. Preservation and standard of review

This error is preserved by defendant's objection, in his sentencing memorandum, to the court's application of § 1604(3). (A83). This Court's review is de novo. *State v. Lopez*, 2018 ME 59, ¶ 13, 184 A.3d 880.

B. Analysis

Defendant outlines this error, highlighting (1) the court's statutory error, (2) its constitutional error, and (3) concluding that remand for resentencing is necessary.

1. The court erred statutorily.

"If the State pleads and proves that a Class A… crime was committed with the use of a firearm against an individual," an un-suspendable four-year minimum term of imprisonment must be imposed. 17-A M.R.S. § 1604(3)(A). The State neither pleaded nor proved the qualifying facts.

The indictment in this case alleged a violation of only 17-A M.R.S. § 208-B(1)(A) (not § 1604(3)):

> On or about May 07, 2020, in Bucksport, Hancock County, Maine, **CRAIG ALEXANDER WOODARD**, did intentionally or knowingly cause serious bodily injury to Forrest Dale with the use of a dangerous weapon, a handgun.

(A34). Thus, for about three and half years of pretrial posturing, including some plea-negotiations, defendant and the State were not on the same page

regarding potential sentencing exposure – a poor use of judicial resources.[2] *Cf. Alleyne*, 570 U.S. at 113-14 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant **to predict the legally applicable penalty from the face of the indictment.**") (emphasis added); M.R. U. Crim. P 18(b) ("Counsel and unrepresented defendants must be prepared to engage in meaningful discussion regarding all aspects of the case with a view toward reaching an appropriate resolution.").

Even had the State pleaded § 1604(3), there would nonetheless remain the problems that the trial judge neglected to instruct the jury to consider whether Count I (or any count, for that matter) "was committed with the use of a firearm against an individual," and that the jury made no such finding.[3] Instead, tracking the statute of conviction, the court prompted the jury to evaluate whether, in committing elevated aggravated assault, defendant "was using a dangerous weapon." (Tr. 111-12). In Maine, it is a "well-settled proposition that it is obvious error to fail to instruct on the elements of an offense" – exactly what the court omitted here. *State v. Begin*, 652 A.2d 102, 106 (Me. 1995). Moreover, the error has a constitutional dimension.

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[2] The docket record reflects that there were two dispositional conferences held preceding trial. (A4-5).

[3] There is no verdict sheet. However, the oral recitation of the verdicts, at Pages 150-51 of the transcript, the jury merely reported a general verdict of "guilty" to "the offense of elevated aggravated assault."

2. The court erred constitutionally – state and federal.

"Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 108. That is because the right to a jury-trial conferred by the Sixth Amendment and Art. I, § 6 is the right to have the jury decide, beyond a reasonable doubt, *all* facts that alter the prescribed sentencing range. *Id.* at 114-16. In contravention of that right, the court below took it upon itself to "find:" "There was a firearm used against the person." (STr. 31).

Permitting such judicial fact-finding will quickly erode the constitutional right to have a jury of one's peers decide the facts and apply the law. Inherent in that right is the possibility of inconsistent verdicts, including "through mistake, compromise, or lenity." *United States v. Powell*, 469 U.S. 57, 65 (1984). At worst, sidestepping the prerogative of the jury, as the judge did below, consumes the very right to a jury-trial; at best, it undermines defendants' strategy of holding out for their peers' "mistake, compromise, or lenity." *Ibid.*

3. Because the error is either not suitable for harmlessness analysis or is not harmless beyond a reasonable doubt, resentencing is necessary.

Long before the Supreme Court's reinvigoration of the jury-trial provisions of the Sixth Amendment, which started in earnest with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Maine case-law recognized that Art. I, § 6 guarantees the right to a right to have a jury determine whether statutory aggravating factors have been proven beyond a reasonable doubt. *State v.*

Ferris, 249 A.2d 523, 526-28 (Me. 1969). Leaving such questions to a judge, this Court has held, "is foreign to due process or governmental fair play and certainly results in the type of injustice to be frowned upon by a good and just order of criminal jurisprudence." *Id.* at 527.

Defendant believes that this tradition sets Maine courts apart from federal jurisprudence, by which a like Sixth Amendment error might be deemed harmless. *Cf. Hurst v. Florida*, 577 U.S. 92, 102 (2016). There are three reasons for this belief. First, if a trial court may harmlessly supplant the jury's findings about one element, what is to stop a judge, in lieu of the jury, from finding two, three or *all* the elements of the offense? Second, the federal principle that motivates federal courts' reasoning that a deprivation of the jury-trial right may be harmless is based on Chief Justice Rehnquist's decision in *Neder v. United States*, 527 U.S. 1 (1999). *Neder* held that the omission to instruct a jury about an element might be harmless so long as the record contains no "evidence that could **rationally** lead to a contrary finding with respect to the omitted element." 527 U.S. at 19 (emphasis added; quotation marks and citation omitted). But again, defendants' right to a jury trial is not confined to an expectation that his peers with act with hyper-rationality; rather, it contemplates the possibility of their mistake, compromise and lenity.[4] Those considerations are not accounted for by

[4] The probable results of deploying such a strategy are not amenable to easy evaluation, a fact that underscores the wisdom of structural-error status. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (structural errors are those "with consequences that are necessarily unquantifiable and indeterminate").

applying harmlessness analysis. Third, it should matter to this Court that "the Maine Legislature has gone further" than the Sixth Amendment requires in this area. *State v. Hastey*, 2018 ME 147, ¶ 40 n. 25, 196 A.3d 432; *see State v. Norris*, 2023 ME 60, ¶ 34, 302 A.3d 1 ("legislative history" is relevant to state constitutional analysis).

State v. Burdick, 2001 ME 143, ¶ 27, 782 A.2d 319 does not require otherwise. *Burdick* merely recognized what it had to as a matter of the Supremacy Clause and vertical stare decisis: Federal law recognizes the possibility that a Sixth Amendment violation is subject to the *Chapman* rule. *Burdick* did not decide anything about this Court's remedial powers pursuant to state law. *Cf. State v. White*, 2022 ME 54, ¶¶ 29-30, 34-37, 285 A.3d 262. Under state law, usurping a jury's prerogative "is foreign to due process or governmental fair play and certainly results in the type of injustice to be frowned upon by a good and just order of criminal jurisprudence." *Ferris*, 249 A.2d at 526. That certainly ought to qualify as injury to "substantial rights." *Cf. White*, 2022 ME 54, ¶¶ 34-37; M.R. U. Crim. P. 52(a).

Relatedly, defendant is before this Court by virtue of an M.R. App. P. 20 appeal. This Court's authority, pursuant to 15 M.R.S. § 2156(1-A), is to determine whether "relief *should be* granted." (emphasis added). The

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Also difficult to determine are the notice-related consequences of the State's omission to "plead" the qualifying facts of § 1604. Such a failure affects plea-negotiations and defendants' decisions about whether to have a trial and, if so, a trial by whom. *Cf. State v. Mullen*, 2020 ME 56, ¶¶ 19-20, 231 A.3d 429 (State violates M.R. U. Crim. P. 18(b) by undermining its purpose).

Sentence Review Panel process has statutory duties to accomplish regardless of harmlessness *vel non*: *e.g.*, promoting "respect for the law," "increasing fairness," correcting "sentences imposed without due regard" for sentencing law, and fostering "the development and application of" uniform sentencing criteria. 15 M.R.S. § 2154. To the extent errors like ours can be deemed harmless, this Court will neuter its statutory charge to accomplish such ends.

Arguendo, let's assume that the error *is* susceptible to harmless-error analysis. "Where constitutional violations are claimed to be harmless, a heightened standard applies, namely, that the error must be harmless beyond a reasonable doubt." *State v. Hassapelis*, 620 A.2d 288, 291 n. 4 (Me. 1993); *Chapman v. California*, 386 U.S. 18, 24 (1967). The State cannot satisfy that standard. Smack dab in the middle of its final-sentence discussion, the court overruled defendant's argument that four-year minimum of § 1604(3) should not apply. The record makes clear that the sentencing court – erroneously, we now know – began its final-sentence calculus at four years' unsuspended time. There are plenty of quite reasonable doubts that the court's selection of a five-year unsuspended term was influenced by its error.

Further, harmlessness analysis in Maine must account for more than just the State's evidence. Defendant does not know how to quantify the harm resulting from the lost opportunity to have jurors decide his case with leniency or compromise. However, the facts of this case are that two grown men foolishly engaged in petty but mutual disparagement. They recklessly

agreed to a fist-fight,[5] and Forrest Dale travelled with associates to defendant's and his family's residence after threatening to harm defendant and his family. In the ensuing mess, Forrest was shot in the buttocks. If ever a jury would want to reach a compromise verdict, this seems like the sort of case in which to do so. Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1583 (2011) (juries tend to return compromise verdicts "in the close cases").

But also, is this Court prepared to hold that it is "harmless" for the State to violate the notice-provision of § 1604(3), thereby undermining the efforts (at dispositional conferences) of its overburdened resources? Respectfully, if the Court wants to get from under the backlog, it must hold the State accountable for errors that waste the precious time of its too-few judges, clerks, marshals, prosecutors, defense lawyers, etc.

Third Assignment of Error

III. The sentencing court unlawfully and improperly increased defendant's maximum sentence because defendant was 30 years old at the time of the shooting.

The legislature, as in most states, has implemented a dual-track system: Generally, those under 18 years of age are not subject to the Criminal Code, whereas those 18 and older are. *See* 17-A M.R.S. § 10-A. The court's decision to increase defendant's sentence because he was not a child obliterates the obvious fact that the legislature meant the Code to apply to

5 Notwithstanding defendant's subsequent recission of this invitation.

adults, not to children who have comparatively reduced culpability. If permitted to do so, moreover, Maine courts will have recognized, for the first time, an "aggravating factor" that applies categorically to nearly all non-child defendants in Maine state courts. Such a practice would violate the principle of equal protection under the law, universally subjecting those 30 and older to lengthier carceral sentences than their slightly younger counterparts for no good reason.

A. Preservation and standard of review

On a sentence appeal such as this, this Court's review of a maximum sentence is for abuse of discretion. *State v. Freeman*, 2014 ME 35, ¶ 18, 87 A.3d 719.

B. Analysis

Defendant pursues two interrelated arguments, which he separates in recognition of this Court's dual capacity, in most cases, to opine on the propriety versus the legality of sentencing considerations. First, he argues that it is simply improper to aggravate a sentence because the offender was 30 years old at the time of the offense. Second, he contends that it is actually unlawful to do so.

1. Aggravation is improper.

It is for this Court, pursuant to its sentence-review capacity, to say whether an aggravating factor relied upon by a sentencing court is proper. *See* 15 M.R.S. § 2154(4) (Court is to "promote the development and application of criteria for sentencing which are both rational and just."); 15 M.R.S. § 2155(1) (Court is to consider what sentencing factors "are

recognized under law"). It should hold that a defendant's age – especially, when it is 30 years of age – is not a proper basis for aggravation.

Maine's population is on average the oldest in the United States; no state has a higher percentage of its citizens aged 18 or more. U.S. Census Breau, *Estimates of the Total Resident Population and Resident Population Age 18 Years and Older* (2023) Available at https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html (last accessed Feb. 15, 2024). That is quite a few people who, following the trial court's logic, are subject to an increased sentence for violation of any provision of the adult Criminal Code. The sheer scope of applicability of this "aggravating factor" should alone give this Court pause. Individualized sentencing is simply not served by such a categorical "factor" as advanced age.

In a way, counting a defendant's status as a 30-plus-year-old as an aggravating factor is a form of double-counting. After all, virtually no persons under 18 are subject to criminal penalties for violation of the Criminal Code. And those within a few years of that line may be saved – that is, have their sentence decreased to some degree – by a judge recognizing that youth is a basis for mitigation. *See* U.S.S.G. § 5H1.1; *cf. State v. Hamel*, 2013 ME 16, ¶¶ 6-10, 60 A.3d 783 (praising court's consideration of the defendant's "youth" – he was 21 years old – at the time of the offense as a mitigating factor). The overwhelmingly vast majority of the rest of the adults in criminal court, however, are subject, under the court's logic, to an increased sentence simply because, by virtue of their age, they are eligible for

adult rather than juvenile court. The legislature's determination that an adult is exposed to the range of carceral sentences set out in 17-A M.R.S. § 1604(1) *already* reflects the fact that a defendant has not committed "a youthful indiscretion," as the trial court put it. (STr. 29). Counting that fact again in the guise of an "aggravating factor" is redundant.

2. Aggravation is unlawful.

Such redundancy demonstrates that aggravation because defendant is 30 years old simply is not "rationally related to a legitimate state interest." *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). Indeed, aggravation in these circumstances works a virtually across-the-board increase in punishments for adults – in an adult-only statutory scheme – because a defendant is an adult.

In *State v. Houston*, 534 A.2d 1293, 1296 (Me. 1987), this Court noted the interplay between equal protection principles and the Criminal Code's stated purpose "to 'eliminate inequalities in sentences that are unrelated to legitimate criminological goals.'" (quoting 17-A M.R.S. § 1151(5) (1983)). Similarly, the legislature has directed this Court, in its sentence-review capacity, to "reduc[e] manifest and unwarranted inequalities among the sentences of comparable offenders." 15 M.R.S. § 2154(3). The *Houston* Court found ""no sound reason for punishing more harshly" a man's attack upon a female victim than a similar attack upon a male victim. 534 A.2d at 1297. Likewise, there is no legitimate purpose in increasing an adult criminal's sentence merely because he is 30 years old.

The remedy is to remand for resentencing at which the court does not aggravate defendant's sentence because of his status as a 30-year-old. *See* 15 M.R.S. § 2156(1-A).

Fourth Assignment of Error

IV. The sentencing court improperly increased defendant's maximum sentence because defendant's attorney held portions of defense counsel's sentencing memorandum to be defendant's "statements."

In a court system that on the one hand, values the finality of judgments and enjoys but scarce resources, but on the other, recognizes a defendant's constitutional right to collaterally attack such convictions and sentences on the basis of the ineffective assistance of counsel, does it make good sense for a judge to intentionally hold the errors or omissions of defense counsel against a defendant? Defendant suggests that it does not. Nowhere among the statutory "general purposes" of sentencing is there any desire expressed to sentence based on the performance of a defendant's lawyer. *See* 17-A M.R.S. § 1501. To the contrary, *intentionally* basing a defendant's sentence to any degree on the defendant's attorney's poor performance simply sets the case up for a petition for post-conviction review.

A. Preservation and standard of review

As in the previous assignment of error, review here is again for abuse of discretion. *Freeman*, 2014 ME 35, ¶ 18.

B. Analysis

Step Two of the *Hewey* analysis requires a court to "individualize each sentence" by considering "those factors peculiar to that offender." *State v. Hewey*, 622 A.2d 1151, 1154 (Me. 1993) (cleaned up). Here, though, the court's sentence is based in part on defense counsel's work – an improper consideration that appears nowhere in the body of statutory or decisional sentencing law. The judge's decision, of course, will have consequences. Should this Court not remand for imposition of a lesser sentence, defendant will have to resort to filing a petition for post-conviction review. Is there any doubt that that portion of defendant's sentence imposed as a result of defense counsel's memorandum – an optional filing – must be vacated in accordance with the Sixth Amendment? Will defendant already have served some or all of the resulting period of incarceration by the time he can have that claim litigated?[6] The court had before it an option to avoid these concerns; it abused its discretion in doing otherwise. Rather than penalizing them for their attorneys' mistakes, Maine judges must remain solicitous of defendants' rights.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's conviction or, in the alternative, vacate his sentence and remand for proceedings not inconsistent with its mandate.

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[6] This Court can take judicial notice of the delays – measured in years and months – in appointing counsel to represent petitioners in post-conviction review proceedings, not to mention the similarly lengthy delays in getting petitions decided on the merits.

Respectfully submitted,

March 4, 2024

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CERTIFICATE OF SERVICE

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel and counsel for other parties at the addresses provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Han-23-466

State of Maine

v.

CERTIFICATE OF SIGNATURE

Craig Woodard

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

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