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

LAW COURT DOCKET NO. Som-24-325

STATE OF MAINE
Appellee

v.

RAYMOND ELLIS JR.
Appellant

ON APPEAL from the Somerset County
Unified Criminal Docket

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

After a two-day jury trial, defendant was convicted of robbery, 17-A M.R.S. § 651(1)(E) (Class A) (Count I); criminal threatening with a dangerous weapon, 17-A M.R.S. § 209(1) & 17-A M.R.S. § 1604(5)(A) (Class C) (Count II); and theft, 17-A M.R.S. § 353(1)(A) (Class E) (Count IV). The Somerset County Unified Criminal Docket (Mullen, C.J.) thereafter found defendant guilty of illegal possession of a firearm, 15 M.R.S. § 393(1)(A-1) (Class C) (Count III). For sentencing purposes, Chief Justice Mullen merged Counts II and IV, and he imposed an aggregate sentence of 25 years' prison, suspending all but 20 years of that term for the duration of 4 years' probation. This appeal follows.

I. The State's case

On August 5, 2023, two individuals robbed the Big Apple convenience store in Madison. Surveillance footage depicts two masked figures dressed in black, one brandishing a shotgun and the other a handgun. (*See, e.g.*, SXs 3, 5). The sole occupant of the store, cashier Anthony Bonito, raised his arms in the air and opened the cash registers for the robbers, who took the cash. (*See* SXs 5, 6; 1Tr. 44). Mr. Bonito handed over his wallet to one of the robbers, when ordered to do so. (1Tr. 175). One robber took a few packs of cigarettes; another took a few Mountain Dew sodas. (1Tr. 58, 175-76).

A. The victim did not appear at trial.

Mr. Bonito did not appear at trial; apparently, by that time he was living out of state. (2Tr. 19). Though the trial judge ruled that the defense could not introduce Mr. Bonito's written statement "without [Bonito] here,"

(2Tr. 18-20), the court did permit the defense to play within the jury's earshot a four-second clip of Bonito's 9-1-1 phone call so as to refresh the lead detective's recollection about the substance of that call. (2Tr. 95-97). Thus, defense counsel argued to the jury that Mr. Bonito told 9-1-1 that the robbers were both White and neither had visible tattoos. (1Tr. 48-49; 2Tr. 97, 150). Defendant is Black and has several face tattoos, including just below his eyes. (*See* 1Tr. 13, 48; 2Tr. 150).

In light of the State's decision not to call Mr. Bonito as a witness, defendant made certain requests about jury instructions which, for the sake of brevity, are discussed below in the **ARGUMENT** section of this brief.

B. The State's case relied heavily on witnesses with credibility issues.

Two men testified against defendant in exchange for favorable treatment by the State: Jamison Laney testified in exchange for dismissal of the robbery charge he faced, (1Tr. 180, 186-87), and, in exchange for testifying, Seth Johnson was able to secure a merely 90-day carceral sentence. (1Tr. 106, 118-19). Neither witness impressed the judge, who remarked, "I didn't think that they were particularly good witnesses…." (STr. 160).

Seth testified that he, Jamison and defendant planned "to get the Big Apple," which was Jamison's idea. (1Tr. 95-96). According to Seth, defendant held a gun to his head to make Seth participate. (1Tr. 123-24). Seth's job was simply to "look out" while the other two committed the robbery. (1Tr. 97). Seth claimed that he drove the trio away from the scene

after the robbery. (1Tr. 101-02). In exchange, he was given a few packs of cigarettes. (1Tr. 102-03).

Jamison testified that they planned to rob the Big Apple. (1Tr. 169). He confessed to carrying the shotgun, claiming that defendant carried the handgun into the store. (1Tr. 171). According to Jamison, the shotgun was a black and brown break-action "single[-]shot"[1] model that been "bought off someone." (1Tr. 171-72). Inside the store, Jamison demanded cash from Mr. Bonito, including his wallet. (1Tr. 174-75).

A friend of defendant's wife testified that, a few weeks after the robbery occurred, she overheard defendant claim to have robbed the Big Apple with Jamison. (2Tr. 37-38). Jurors also heard, though, that the friend and defendant dislike one another. (2Tr. 39, 43, 65).

Defendant's wife sought to invoke her Fifth Amendment privilege against self-incrimination. (2Tr. 47-52). The court, however, ruled that she had no such privilege "because it's not being represented to me that she is saying anything that's going to incriminate her." (2Tr. 53). She thereafter testified that the morning after the robbery, defendant admitted to her that he participated in it. (2Tr. 60-61). Tempering this testimony, however, was the fact that, when Julie reported the confession to police, she and defendant were experiencing marital problems. (2Tr. 63).

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[1] Jamison's description of the shotgun – single-shot, black and brown, break-action – is at odds with the shotgun introduced in evidence and which the State claimed was used during the robbery. (*See* 2Tr. 2-6, 90-91, 97-98).

C. About three months later, law enforcement found defendant in possession of items similar to those used in the robbery.

In November, defendant was in possession of a ski mask/balaclava that was "similar" to that worn by Jamison during the robbery. (2Tr. 88-89). Defendant also possessed a black long-sleeve shirt that was "[p]otentially consistent" with the clothes worn by the robbers, though, everyone agreed, the robbers wore hooded sweatshirts. (2Tr. 89-90, 99-100). And defendant had a sawed-off shotgun that the lead detective felt was "very similar" to that used at the Big Apple months earlier, despite the dissimilarities noted in footnote 1. (2Tr. 90-91).

II. The defense, sentencing

A. In closing, the defense argued that Mr. Bonito was "the only credible person who was at the scene."

Defense counsel reminded the jury that Bonito had the opportunity – proximity and good lighting – to identify the robbers. (2Tr. 150). Therefore, counsel argued, Mr. Bonito's description – two White males without visible face-tattoos – should preclude a conviction. (2Tr. 150). Because of the legal rulings which defendant discusses below, that was all counsel was able to argue about Mr. Bonito.

B. The court increased defendant's sentence because it found, as an aggravating factor, that "firearms were brandished" during the crime.

After it selected a 20-year basic sentence, *see* STr. 13-14, the court went on to enumerate aggravating factors, stating, "Aggravating factors is the

fact that firearms were brandished, although thankfully not used, but as I said, they certainly could have been." (STr. 16). After enumerating other aggravating factors, the court declared that the maximum sentence was 25 years' prison. (STr. 17).

ISSUES PRESENTED FOR REVIEW

I. Should this Court overturn *State v. Brewer*, 505 A.2d 774 (Me. 1985), permit defendants in criminal trials to obtain a missing-witness jury instruction, and disapprove of the "no-inference" instruction given in this case?

II. Did the sentencing court err by counting the fact that "firearms were brandished" when the statute of conviction already requires proof that at least one of the robbers is "armed with a dangerous weapon?"

ARGUMENT

First Assignment of Error

I. This Court should overturn *State v. Brewer*, 505 A.2d 774 (Me. 1985), permit defendants in criminal trials to obtain a missing-witness jury instruction, and disapprove of the "no-inference" instruction given in this case.

There are two aspects of error in this case, both owing to the Court's decision in *Brewer*. On one hand, the objected-to "no-inference" instruction prevents jurors from fully implementing the presumption of innocence. Instructed not to "speculate" or "draw inferences" about why the State failed

to call the victim to testify, jurors were forbidden to do exactly what the presumption of innocence requires: infer that the State's evidentiary omissions do not support its case.

On the other hand, by declining to give a missing-witness instruction of the sort requested, Maine courts have diverted from common law practice permitting such an inference. *Brewer's* removal of the missing-witness inference from criminal defendants' arsenal thereby offends ME. CONST. Art. I, § 6's guarantee of a trial by "the law of the land." Moreover, such an instruction is needed to ensure that jurors understand that the presumption of innocence requires them to presume that the State's failure to introduce a witness as fundamental as the victim and sole disinterested eyewitness can be a reason to doubt the State's case.

This Court should overturn *Brewer*, only to the extent it denies criminal defendants the missing-witness instruction (other parties don't enjoy comparable rights); disapprove of the no-inference instruction given in this case, again to the extent that it applies to criminal defendants; and, because the cumulative effect of these instructional errors prejudiced defendant, vacate and remand.

A. Preservation and standard of review

During a charge conference, defense counsel requested a missing-witness jury instruction, noting that the State had not called Mr. Bonito as a witness. (2Tr. 25-26; A20-21). Counsel offered, as an appropriate exemplar, the following:

> You may also consider in your deliberations the unexplained failure of a party to present and [sic] obvious witness to corroborate other evidence which was presented in the case. If you find that a party has failed to call such a witness, you may, but you are not compelled to draw an inference that that witness would not corroborate the testimony given before you. This is an inference that you may draw, but you do not have to draw. That is up to you.

(2Tr. 27-28; A22-23). Counsel noted that this language was cited in Maine jurisprudence, reading from *State v. Whitman*, 429 A.2d 203, 207 (Me. 1981). (2Tr. 26; A21).

The court instead stated that it would give a "no inference instruction," instructing jurors not to engage in "speculation about what else might have been presented to them and that you're not to speculate on what other witnesses have been called or whatever evidence might have been presented." (A22-23; 2Tr. 27-28). Defense counsel objected, but the court overruled the objection. (A24; 2Tr. 29). The same objection was renewed just prior to the court instructing the jurors, (A42-43; 2Tr. 129-30), and again after the instructions were read. (A44; 2Tr. 177).

The court's objected-to instruction read:

> You must decide the case based on the evidence presented to you. You must not speculate on what other witnesses might have been called – on what other witnesses might have been called, or what other evidence might have been presented. And you must draw no inferences, unfavorable of favorable, by speculation about what else might have been presented to you. You must decide only from the evidence presented to you whether the facts at issue have been proven beyond a reasonable doubt.

(A51; 2Tr. 159); *see* Donald G. Alexander, *Maine Jury Instruction Manual* § 6-12 "Missing Witness: No Inference. Instruction" (2024 ed.).

Two standards of review are applicable. First, this Court reviews a *requested* jury instructions to determine whether it "'(1) stated the law correctly; (2) was generated by the evidence; (3) was not misleading or confusing; and (4) was not sufficiently covered in the instructions the court gave.'" *State v. Russell*, 2023 ME 64, ¶ 18, 303 A.3d 640, quoting *State v. Hanscom*, 2016 ME 184, ¶ 10, 152 A.3d 632. Before it vacates a judgment, this Court, additionally, discerns whether the omission of the requested instruction was prejudicial. *Russell*, 2023 ME 64, ¶ 18. Second, as to the *objected-to* (no-inference) instruction, this Court "review[s] jury instructions as a whole for prejudicial error, and to ensure that they informed the jury correctly and fairly in all necessary respects of the governing law." *State v. Solomon*, 2015 ME 96, ¶ 12, 120 A.3d 661.

B. Analysis

Both aspects of this issue – defendant's objection to the no-inference instruction and his request for a missing-witness instruction – revolve around this Court's decision in *Brewer*. *Brewer* both forbade courts from permitting any form of the missing-witness inference (*i.e.*, courts from instructing and attorneys from arguing) and instead ushered in an era wherein the objected-to no-inference instruction is given as a matter of course.[2] The following analysis therefore explains why *Brewer*, respectfully,

[2] Such commonplace usage of the no-inference instruction runs afoul of even the advice of the author of the *Maine Jury Instruction Manual*: "[It] should be used **only** when a missing witness issue has been improperly injected into a case." Alexander, *Manual*, *supra*, Comment to § 6-12.

was wrongly decided, overlaid by reference to this Court's standard of review for determining whether omission to give a requested instruction constitutes reversible error.

1. The requested instruction accurately reflects the presumption of innocence.

The presumption of innocence requires that jurors "speculate" or "imagine" or "presume" that someone else committed the crime. In our case, to honor that bedrock presumption, jurors must presume that someone else, not defendant, robbed the Big Apple with Seth and Jamison, even if there had been no evidence to support such a finding – in other words, even if they must "speculate" that is so. Thus, in criminal cases,[3] instructing jurors that they must confine their deliberations to "the evidence" and may not "speculate" about evidence not presented is to diminish the presumption of innocence. In short, that is why the instruction the court gave is inappropriate for our circumstances. *See Commonwealth v. Smith*, 733 N.E.2d 159, 160-63 (Mass. App. 2000) (jury instruction to base verdict "on the evidence presented to you" and without "speculation" negates the adverse inference defense counsel is implying); *see also United States v. Ramirez*, 714 F.3d 1134, 1139 (9th Cir. 2013) ("By instructing the jurors to disregard any uncertainty about why the prosecution didn't call a witness—who might have been the key witness—the court improperly inserted itself into the jury room and interfered with the jury's role as a factfinder.").

[3] As to other parties – those not entitled to the presumption of innocence (*e.g.*, parties in civil cases or the State in criminal cases) – the court's instruction is accurate.

On the other hand, the instruction the court declined to give – jurors may infer that the witness the State did not call, Mr. Bonito, would not support its case – is exactly what the presumption of innocence requires. Jurors must be free to assume that, in the absence of evidence offered by the State, someone else committed the crime.

The presumption of innocence, the Supreme Court has written, requires, in essence, an affirmative belief that someone else committed the crime:

> [The] presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced **to overcome the proof which the law has created**.

Coffin v. United States, 156 U.S. 432, 459 (1895) (emphasis added); *State v. Upham*, 38 Me. 261, 263 (1854) ("[T]he legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled…."), citing 1 Greenlf. Ev. §§ 34 and 35. This is a helpful conception of the presumption because it reminds us that, without resorting to what some might call "speculation," jurors cannot truly implement the presumption of innocence.

In that vein, as one scholar has shown, jury instructions requiring jurors to disregard "speculative" doubts are "tantamount to telling the jury not to consider any doubts at all." Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 142-43 (Nov. 1999). "Doubting, after all, is a matter of

speculation and imagination. It requires one to imagine alternative models consistent with the evidence." *Id*. at 143.

In contrast, the objected-to instruction in our case requires jurors to limit their deliberations to "the evidence," excluding any "speculation" about what else "might have been presented." This formulation is wrong, as a matter of constitutional law; reasonable doubt, after all, may arise "from the evidence **or lack of evidence**." *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972) (emphasis added; quotation marks omitted). However, the objected-to instruction states that doubts may arise only from "the evidence" rather than from the world of alternative explanations that, based on one's life experiences, a juror can imagine. In other words, the objected-to instruction suggests that a defendant must introduce evidence sufficient to raise doubts about the State's case. Literally, if the case must be decided based on only the evidence presented, a criminal defendant bears the burden of coming forward with evidence to generate doubts. *Cf*. Solan, *Refocusing the Burden*, *supra*, 108 (such an instruction "misfocuses the jury on the extent to which the defense has created doubt").

Considering that the primary reason the *Brewer* Court cast aside the missing-witness instruction was its belief that the instruction "distorts the allocation of proving the defendant's guilt," *Brewer*, 505 A.2d at 777, the since-implemented no-inference instruction's tendency to distort the very same allocation is both ironic and problematic. *Brewer's* course-correction went too far by precluding the missing-witness instruction when sought to benefit a defendant. As the First Circuit's pattern jury instruction

demonstrates, the missing-witness instruction remains sound so long as it is *applied against the prosecution*:

> If it is peculiarly within the power of **the government** to produce a witness who could give material testimony, of if a witness, because of [his/her] relationship to **the government**, would normally be expected to support **the government's** version of events, the failure to call that witness may justify an inference that [his/her] testimony would in this instance be unfavorable to the government. You are not required to draw that inference, but you may do so….

Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 2.12, Missing Witness (Feb. 6, 2024 update), available at https://www.med.uscourts.gov/pattern-jury-instructions (last accessed Sept. 19, 2024) (emphasis added); *see also id.* at Comment 3 (noting that all the First Circuit's missing-witness instructions have been regarding missing *government* witnesses). Thus, the *Brewer* Court's primary rationale for abandoning the missing-witness inference is simply not accomplished by its holding.

Brewer has actually harmed defendants. Forbidding defendants from utilizing the missing-witness inference has unconstitutionally taken away a defense tool dating to common law. In 1844, this Court wrote,

> Every one is presumed to wish to offer evidence which can operate in his favor, if it is attainable; and it is a settled principle, that unnecessary omission to do this, is a circumstance, which the jury may consider with other evidence in the case….

State v. McAllister, 24 Me. 139, 144 (1844). And "the accused" (unlike the State) enjoys a right to a trial by "the law of the land." ME. CONST. Art. I, § 6. "This 'law of the land' is not simply the existing statute law of the State, but, as has often been decided, it is the right of trial **according to the process**

and proceedings of the common law." *State v. Learned*, 47 Me. 426, 432-33 (1859) (emphasis added); *Thursby v. State*, 223 A.2d 61, 65-66 (Me. 1966) ("The due process clause, Article 1, Section 6, which guarantees a person against deprivation of life, liberty, property or privileges, except by 'judgment of his peers or the law of the land' secures to the individual the availability of **the process and proceedings of the common law**.") (emphasis added). *Brewer*, in this sense, violates the Maine Constitution to the extent that it applies to missing-witness instructions sought by criminal defendants.

Numerous jurisdictions retain the missing-witness inference, indicating that its application should not be unworkable in Maine, either. *See, e.g.*, *Pattern Criminal Jury Instructions for the District Courts of the First Circuit* § 2.12, *supra*; *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988); *Third Circuit Court of Appeals Model Criminal Jury Instructions* § 4.16, Missing Witness (April 2024), available at https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions (last accessed Sept. 19, 2024); *United States v. King*, 1998 U.S. App. LEXIS 13212 ** 39-40 (4th Cir. 1998); *United States v. Grant*, 683 F.3d 639, 650-51 (5th Cir. 2012); *United States v. Jones*, 1991 U.S. App. LEXIS 18820 ** 12-13 (6th Cir. 1991); *United States v. Cole*, 380 F.3d 422, 427 (8th Cir. 2004); *United States v. Ramirez*, 714 F.3d 1134, 1137 (9th Cir. 2013); *United States v. Hoenscheidt*, 7 F.3d 1528, 1531 (10th Cir. 1993); *United States v. Nahoom*, 791 F.2d 841, 846 (11th Cir. 1986); *United States v. Glenn*, 64 F.3d 706, 709-10 (D.C. Cir. 1995); *People v. Ford*, 754 P.2d 168,

180 (Cal. 1988); *Williams v. United States*, 90 A.3d 1124, 1127 (D.C. 2014); *Hardwick v. State*, 971 A.2d 130, 133 (Del. 2009); *Haliburton v. State*, 561 So. 2d 248, 250 (Fla. 1990); *State v. Mainaaupo*, 178 P.3d 1, 22 (Haw. 2008); *Harris v. State*, 182 A.3d 821, 832 (Md. 2018); *Commonwealth v. Williams*, 882 N.E.2d 850, 856 (Mass. 2008); *State v. Hill*, 974 A.2d 403, 412-13 (N.J. 2009); *People v. Savinon*, 100 N.Y.2d 192, 196 (N.Y. 2003); *State v. Francis*, 669 S.W.2d 85, 88-89 (Tenn. 1984); *State v. Blair*, 816 P.2d 718, 722-23 (Wash. 1991). Likewise, Maine's own pre-*Brewer* jurisprudence demonstrates no history of courts erroneously permitting criminal defendants to argue the missing-witness inference. *See, e.g.*, *State v. O'Donnell*, 131 Me. 294, 303, 161 A, 802, 806 (1932) (judgment affirmed); *State v. Silva*, 153 Me. 89, 101-02, 134 A.2d 628 (1957) (judgment affirmed); *State v. Pullen*, 266 A.2d 222, 228-29 (Me. 1970) (judgment affirmed); *State v. Bey*, 342 A.2d 292, 298 (Me. 1975) (judgment affirmed); *State v. Cugliata*, 372 A.2d 1019, 1032 (Me. 1977) (judgment affirmed); *State v. Hanks*, 397 A.2d 998, 1000 (Me. 1979) (judgment affirmed); *State v. Farris*, 420 A.2d 928, 935 (Me. 1980) (judgment affirmed); *State v. Wing*, 426 A.2d 1375, 1377-78 (Me. 1981) (judgment affirmed); *State v. Whitman*, 429 A.2d 203, 206-08 (Me. 1981) (inference erroneously permitted to *the State's* benefit). There seems to be no good reason[4] for denying criminal defendants a missing-witness jury instruction.

[4] In fact, other salutary purposes might be served by judicial readoption of the missing-witness inference. For example, in cases in which the State neglects to meet its discovery obligations, judges need a toolkit of potential sanctions short of outright dismissal. *Cf. State v. Dennis*, 2024 ME 54, ¶ 25

In sum, defendants have a common law-derived constitutional right to benefit from the missing-witness inference. The bedrock of criminal law, the presumption of innocence, depends on permitting jurors to infer that absent evidence is evidence that would hurt the State's case. The missing-witness instruction seems to have been abandoned as to criminal defendants without regard for these interests. In contrast, denying defendants such an instruction is unnecessary, as demonstrated by other jurisdictions' ability to so instruct jurors.

These circumstances provide appropriate cause to abandon *Brewer*, limited only to criminal defendants. *Stare decisis* is at its nadir when it comes to "rules governing procedures and the admission of evidence in the trial courts," as such infrequently "affect the way in which parties order their affairs." *Pearson v. California*, 555 U.S. 223, 233 (2009). Nor does *stare decisis* "compel [the Court] to follow a past decision when its rationale no longer withstands 'careful analysis.'" *Arizona v. Gant*, 556 U.S. 332, 348 (2009), quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Upon careful analysis, the combination of no missing-witness instruction plus the no-

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n. 16, 320 A.3d 396 (Stanfill, C.J.) (complaining that "all too often," obligatory discovery is "obtained on the eve of trial"). In addition to exclusion of evidence, the further sanction of a missing-witness instruction is one such option.

The practice of denying defendants a missing-witness instruction is logically incompatible with providing a spoliation instruction – a needed instruction given the inadequacy of remedies for the loss or destruction of evidence. *Cf. State v. Wai Chan*, 2020 ME 91, ¶ 9 n. 4, 236 A.3d 471 (noting possibility of spoliation instruction).

inference instruction of the sort given here distorts the allocation of the burden of proof and erodes the presumption of innocence.

2. A missing-witness instruction was generated by the evidence.

In *Bey*, the Law Court gave perhaps its fullest explication of the missing-witness standard:

> While the defendant had no duty, as such, to call a particular witness, his unexplained failure to present a witness who, if his defense is genuine, **might be expected to corroborate** that defense, is generally, at least, within the area of proper jury consideration. Similarly, the fact that the State has not called the witness who **would be expected to support** the State's claim of a defendant's untruthfulness is equally subject to proper comment. Except under circumstances of bad faith concerning the witness's absence or peculiar circumstances of unfairness, whether an inference can be drawn from the fact is usually an area of proper comment.

342 A.2d at 298 (emphasis added). This would-be-expected standard comports with that dating back to common law: "Every one is presumed to wish to offer evidence which can operate in his favor…." *McAllister*, 24 Me. at 144. As New York's highest court has explained,

> The rule is best understood by recognizing that the inquiry must be undertaken from the standpoint of the honest litigant. Thus, when a party truthfully presents a version of events, a factfinder **would expect** that party's friend or ally (if knowledgeable) to confirm it. If a witness that valuable does not appear to support the party's side—and if there is no good reason for the witness's absence—it is only natural to suppose (or as the law has it, infer) that the witness cannot honestly help the party.

Savinon, 100 N.Y.2d at 196-97 (emphasis added); *Commonwealth v. Schatvet*, 499 N.E.2d 1208, 1210 (Mass. 1986) ("can be expected"). Certainly, the victim, Mr. Bonito, who is the sole non-party eyewitness to the robbery, is someone a juror "would expect" the prosecution to introduce at

trial. *Cf. Ramirez*, 714 F.3d at 1138 ("When the government can call a key percipient witness, but relies instead on out-of-court statements, it's permissible for the jury to infer that the witness's testimony would have been unfavorable to the prosecution.") (cleaned up; quotation marks omitted).

3. The requested instruction was not misleading or confusing.

The successful deployment of the missing-witness instruction in a multitude of jurisdictions, including the federal courts operating within Maine, amply demonstrates that such an instruction is neither misleading nor confusing.

What is misleading and confusing, however, is the court's instructions that jurors may not "speculate" about what is not in evidence. As defendant has explained, *supra*, that statement is incompatible with the presumption of innocence. It is also confusing when coupled with the court's instruction that jurors may rely on their "reasonable inferences" and "circumstantial evidence." (2Tr. 157-59). Which is it? Are jurors allowed to infer that the State failed to call the victim because the victim would not corroborate the State's case, or aren't they? Are jurors permitted to use their "common sense," or aren't they?

4. The instructions the court gave did not cover the missing-witness inference.

As defendant has explained, the no-inference instruction given by the court is incompatible with the missing-witness instruction he sought; the two are opposites.

5. Omission of the requested instruction was prejudicial.

Above, defendant demonstrated that jury instructions denied him his § 6 right to a trial by the law of the land, as well as distorted the constitutional presumption of innocence. Therefore, the more stringent harmless-error standard – beyond a reasonable doubt – applies, rather than the "less stringent" conception. *See State v. Judkins*, 2024 ME 45, ¶¶ 20-21, 319 A.3d 443.

Because of the court's application of *Brewer*, defense counsel was unable to argue in closing that the victim's absence suggested that he would not identify defendant as one of the robbers. Identification, obviously, was the primary disputed issue at trial. The court itself noted that Seth and Jamison were not "particularly good witnesses." (STr. 16). There is reason to believe that, had he been at the trial, Mr. Bonito would not have identified defendant as one of the robbers. Surely, that nature of testimony tends to raise reasonable doubts.

Second Assignment of Error

II. The sentencing court erred by counting the fact that "firearms were brandished" when the statute of conviction already requires proof that at least one of the robbers is "armed with a dangerous weapon."

A. Preservation and standard of review

This issue is unpreserved. Therefore, this Court's review is for obvious error. *See State v. Butsitsi*, 2015 ME 74, ¶ 19, 118 A.3d 222.

B. Analysis

Defendant adheres to the obvious-error standard:

1. There was error.

Maine courts lack legal authority to "double-count" elements of the offense as aggravating factors. Under 17-A M.R.S. § 1602(1)(A) – the first step of the statutory sentencing process – the sentencing court, naturally enough, must consider the statute of conviction, placing a defendant's conduct on a continuum of seriousness based on all possible means of violating that statute. *State v. Downs*, 2007 ME 14, ¶ 7, 916 A.2d 210. Step Two then permits the court to weigh "all *other*" aggravating and mitigating circumstances. 17-A M.R.S. § 1602(1)(B) (emphasis added). Here, the sentencing court unlawfully counted an element of the offense a second time as an aggravating factor.

The statute of conviction, 17-A M.R.S. § 651(1)(E), establishes a Class A offense, distinguished from the Class B varietal, § 651(1)(B), by the fact that the former requires the State to prove that a robber "is armed with a dangerous weapon." In other words, the legislature has, according to its

prerogative to establish sentencing ranges, determined that utilizing a firearm during a robbery justifies a threefold (*i.e.*, thirty years as opposed to ten years) increase in sentencing exposure.

The court's decision to again count that same fact – that the robbers were utilizing a firearm – is therefore unlawful double-counting.

2. The error was plain.

Respectfully, the error here is plain, considering the unambiguous statutory language of both § 651(1)(E) and § 1602(1). Because the error "is so apparent that it can be identified based upon a simple and straightforward reading of the statute in question," it qualifies as plain. *See United States v. Cardona-Garcia*, 2024 U.S. App. LEXIS 20680 * 5, 2024 WL 3833285 * 2 (5th Cir. 2024) (per curiam).

3. The plain error affected substantial rights.

There is no doubt that the error affected the maximum sentence. *Cf. State v. Hall*, 2017 ME 210, ¶ 28, 172 A.3d 467 (third prong of obvious-error test satisfied when there is "reasonable probability" of a different outcome). The court increased defendant's sentence by five years, finding that the aggravating circumstances outweigh any mitigating circumstances. Some portion of that five-year increase is necessarily based on the court's error.

4. Resentencing is appropriate to uphold the fairness, integrity and public reputation of judicial proceedings.

This Court should zealously defend against any inkling that a trial judge has unlawfully sentenced a defendant. As Justice Breyer put it, unbridled discretion at sentencing is often "criticized, and rightly so, for

producing unfair disparities, including race-based disparities, in the punishment of similarly situated defendants." *Blakely v. Washington*, 542 U.S. 296, 332 (2004) (Breyer, J., dissenting). This Court should act to prevent the perception that "[t]he length of time a person spent in prison appear[s] to depend on 'what the judge ate for breakfast' on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence." *Ibid*. The way to guard against such perceptions is to rigorously apply our laws.

CONCLUSION

For the foregoing reasons, this Court should vacate and reverse for further proceedings not inconsistent with its mandate.

Respectfully submitted,

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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 at the address provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Som-24-325

State of Maine

v.

CERTIFICATE OF SIGNATURE

Raymond Ellis

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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