MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Was-24-231

State of Maine
Appellee

v.

Kailie Brackett
Defendant/Appellant

On appeal from a conviction in the Washington County Unified Criminal Court

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BRIEF FOR APPELLANT

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PROCEDURAL HISTORY

Defendant, Kailie Brackett, was indicted on May 18, 2022, on the charge of Murder pursuant to 17-A M.R.S. § 201(1)(A). [R. 44].[1] On September 7, 2023, the State filed a Motion *in Limine* to allow testimony of their purported expert in Forensic Podiatry, Dr. Michael Nirenberg. [R. 7]. After a hearing on December 1, 2023, the trial judge (Murray, J.) granted the State's motion. [R. 23].

On December 8, 2023, the first day of trial, counsel for Ms. Brackett moved *in limine* pursuant to Me. R. Evid. Rule 403 to exclude certain photos taken of the victim's body. [Tr. Vo. I: 3-9]. The court determined that State Exhibits 113 and 117, photographs of stab wounds on the victim, would be admitted and could be used during opening statements. [*Id*.]. Subsequently, several other photographs of the victim's postmortem body were also admitted over objection. [Tr. III: 31]. Defense counsel moved for a Judgment of Acquittal at the close of the State's case, [Tr. V: 190-193], and again at the close of all evidence. [Tr. Vol: VI: 242]. The motions were denied. [Tr. IX: 22].

On December 20, 2023, the jury found Ms. Brackett guilty of murder. [Tr. IX: 23]. On May 10, 2024, Ms. Brackett was sentenced to fifty-five (55) years with the Maine Department of Corrections. [Sent. Tr. 90]. Ms. Brackett filed a timely

[1] A co-defendant, Donnell Dana, was also indicted and was tried in the same proceeding as Ms. Brackett. The jury was deadlocked as to a conviction for Mr. Dana.

Notice of Appeal on May 22, 2024. [R. 15]. She also filed an Application for Sentence Appeal on May 29, 2024. [R. 15]. Ms. Brackett's Application for Sentence Appeal was allowed on July 29, 2024, and her sentence appeal was merged with her direct appeal.

STATEMENT OF THE FACTS[2]

Motion *in Limine* Forensic Podiatrist:

The motion judge heard the following testimony at the hearing on the State's Motion *in Limine*:

Dr. Michael Nirenberg is a clinical podiatrist who also does work in the field of forensic podiatry, for which he is certified. [Mot. Tr. 8, 10]. Dr. Nirenberg was, at the time of the hearing, the President of the American Society for Forensic Podiatry. [*Id*. at 9]. He is on the editorial board of a few journals relating to forensic science in his capacity as a forensic podiatrist and has published numerous articles on forensic podiatry. [*Id*. at 11, 14]. Dr. Nirenberg testified that he served as a Chair of an exploratory task group on gait analysis for the Organization of Scientific Area Committee (OSAC). [*Id*. at 12, 97]. Dr. Nirenberg testified that forensic podiatry relies upon generally accepted scientific principles regarding footprints because footprints have individuality. [Mot. Tr. 14-15]. However, forensic podiatry/footprint

[2] Additional facts may be set forth in the argument section as needed.

analysis has applied, but has not been accepted by, OSAC, the organization that establishes industry standards for forensic sciences. [Mot. Tr. 98, 104, 116].

Dr. Nirenberg described the steps and manner in which he formed his opinion in this case, which included the following; looking at photographs of the footprints found at the crime scene, giving instructions to the State Police about how to obtain a sock-clad footprint reference from Kailie and Mr. Dana, doing measurements of the footprints from the crime scene as well as Kailie's footprint, and looking at particular features in Kailie's footprint. [Mot. Tr. 24-29]. Ultimately, Dr. Nirenberg opined that there was:

> [A] moderate level of evidence to support the proposition that Ms. Brackett made the question footprints, with the footnote that, as footprints have not been proven to be unique, it is theoretically possible that a person or persons with a right foot with sufficient similarity to Ms. Brackett's right foot as to exhibit the same features in combination of features as Ms. Brackett's footprints could exist and could have made the questioned footprints.

[Mot. Tr. 33]. When questioned by defense counsel as to the scientific meaning of "moderate," Dr, Nirenberg replied, "it is unclear to me what moderate means. It's a form of strength, and if you look at the scale, it's a relative scale. So it does -- it means only what the scale shows." [*Id*. at 53]. In an attempt to clarify, defense counsel asked Dr. Nirenberg a series of questions:

> **Q.** What is the scientific measure of moderate as that word is used in your opinion?

A. It -- as explained in -- in both my report and in Appendix III, the strength of the conclusion is a combination of factors, including the commonality of the observed features in the experience of the analyst -- that's me -- and the limitations noted in the report. It's a (indiscernible), okay, of -- of me to provide the jury some additional information to think on my experience and knowledge and understanding, and it's corroborated by -- by the person who verified my report. It's not based on numerical data or statistical calculation, and all this is in my report.

Q. So there's no objective score or value that would allow another person to predictably come up with the same result here?

A. It's not -- it's not a numerical or statistical calculation. No.

***

Q. So there's no objective measure is what you're saying?

A. It's an opinion-based conclusion.

[Mot. Tr. 53-55].

Dr. Nirenberg further discussed the numerous limitations that resulted in his conclusion that there was only a "moderate amount of evidence to support" his conclusion that Kailie made the crime scene footprint:[3]

- The variation in cloth and thickness thereof between the socks used to make the bloody footprints at the crime scene and those socks provided by the Department of Corrections for Kailie to wear when making the reference footprints. [Mot. Tr. 58-59].

[3] These limitations were also set forth in Dr. Nirenberg's report that was submitted as an exhibit at the Motion *in Limine* hearing. [RA 76].

- The substrates used when making the footprint ─ blood at the crime scene versus the ink used on Kailie's sock-clad reference footprint. [*Id*. at 66].
- The footprint left at the crime scene was only a partial footprint – it was missing "half of the toe to heel." [Mot. Tr. 67]. As a result, Dr. Nirenberg could not use the Reel method, which is viewed as the "best method to measure a footprint." [*Id*. at 68]. According to article published by Dr. Nirenberg, the Reel method was developed to counter variances in measuring footprints: "The variety of approaches to footprint measurement suggests that the need for an approach with sufficient scientific rigor, which led Reel to lead the development of a two-dimensional linear measurement method, i.e. the Reel method." [*Id*. at 68].
- Kailie's weight at the time Kim was murdered and when Kailie gave the reference footprint were unknown, which could affect the comparison analysis of the socked footprints. [Mot. Tr. 81].

Dr. Alicia McCarthy testified at the hearing for the defense. [*Id*. at 101].[4] Dr. McCarthy had twenty-one (21) years' experience as a forensic scientist comparing patterns such as fingerprints, palm prints, tire marks, and footwear impressions. [*Id*. at 102-103]. She has an undergraduate degree in chemistry and statistics from the

[4] Dr. McCarthy's report was submitted as an exhibit at the *Motion in Limine* Hearing and can be found in the appendix at pages [105-113].

National University of Ireland and the following advanced degrees: A master's degree in forensic science from Strathclyde University in Glasgow, Scotland, a master's degree in criminal justice administration and an MBA from Husson University in Bangor, Maine, and a Ph.D. in forensic science from the University of Dundee in Scotland. [*Id*. at 102]. Dr. McCarthy sits on the OSAC footwear/tire subcommittee, which she described as "a standards group that's responsible for publishing standards in footwear and tire marks." [*Id*. at 103]. She also sits on the OSAC group on human factors, and "that's a group that was -- that receives all the different standards from all of the different subcommittees . . . looking for ways of reducing mitigating bias in the comparative sciences because these are a lot of times human decision making." [*Id*.]. Dr. McCarthy's testimony and report made it clear, as previously admitted by Dr. Nirenberg, that forensic podiatry has not been accepted by OSAC. [Mot. Tr. 104; RA 107].

Ultimately, Dr. McCarthy opined that Dr. Nirenberg's conclusion was not reliable for many of the same reasons Dr. Nirenberg recognized as limitations to his conclusion: his inability to use the industry standard Reel Technique for measuring the footprint from the crime scene, the unknown fabric of the bloody sock from the crime scene, [RA 109-110]; the crime scene footprints were processed with Leuco Crystal Violet (LCV) and the photographs of the footprints were not taken within the required time window, [RA 110-111]; which caused the lack of clarity in the

photographs as acknowledged in Dr. Nirenberg's report in the limitations section. [*Id.* at 76]. Finally, Dr. McCarthy found that the language used within Dr. Nirenberg's report was unclear and confusing and stated, "As an experienced pattern examiner, these terms are cause for alarm and appear very vague and subjective." [*Id.* at 112].

The motion judge granted the State's Motion *in Limine* finding that, "After having reviewed the evidence and the arguments of the parties, the Court is satisfied that Dr. Nirenberg's testimony is sufficiently reliable and is relevant under Rule 401 and is satisfied that his testimony will assist the jury in understanding footprint evidence and/or determining one or more facts in issue in this case." [RA 20].

Defendant's *in Limine* Request to Exclude Photographs:

At trial, counsel for Kailie and Mr. Dana moved *in limine* to exclude the State's Exhibits 113 and 117, two pictures of Kim's body that the State wished to use during its opening, for being overly prejudicial under Maine Rule of Evidence 403. [Tr. I: 5-7; RA 115, 117]. In denying the defense motion, the court found that "the charge is a charge of intentional and knowing, as well as depraved indifference murder. The evidence goes to the issue of depraved indifference arguably based

upon the number of wounds itself." [Tr. I: 8]. The court allowed the use of the pictures in opening statements.[5] [*Id*].

This issue was further litigated when the State moved to admit approximately thirty (30) other pictures taken by the medical examiner of Kim's corpse. [Tr. III: 3-10]. Defense counsel objected under Maine Rule of Evidence 403, due to the emotional effect the images would have on the jury, and that the evidence was cumulative and unnecessary, given there was no objection to some less disturbing pictures and the medical examiner's testimony would sufficiently explain the injuries. [*Id.* at 10-14]. The defense also noted that the medical examiner would likely testify that the victim died relatively quickly, and allowing pictures of post-mortem wounds would only further prejudice the jury without providing additional probative value. [*Id* at 17]. The State argued that because this was a depraved indifference case, the State "has to establish that the conduct that these individuals engaged in was so savage or so brutal or so heinous to – that their intent to cause death can be inferred from the conduct." [*Id.* at 20].

In ruling on the objection, the court noted that the thirty (30) or so pictures identified were overly cumulative and stated that it was prepared to allow four (4) or five (5) "representative photographs" of areas that would give a fair representation

[5] The State did not use either photo in their opening statement, but counsel for Mr. Dana did utilize both photos in his opening statement. [Tr. I: 50].

of the nature of the totality of the stab wounds without having numerous cumulative pictures of the same wounds. [Tr. III: 25-26]. After reviewing the offered pictures, the State offered and the court admitted, over objection, State Exhibits 111, 113, 114, 117, 128, and 131. [*Id.* at 31; RA 114-119].

Trial:

On April 20, 2022, Kailie Brackett and her best friend Kim Neptune[6] met up at the Farmer's Union in Perry, Maine – Kim was there buying scratch tickets and Kailie was buying groceries. [Tr. VI: 20-21]. Kim asked Kailie what she was doing, and Kailie invited Kim to drive to Eastport with her. [Tr. VI: 21]. Cellphone tower evidence for the phones of Kim and Kailie supported that the two best friends traveled to and from Eastport together between 4:22 p.m. to 5:00 p.m. [Tr. V: 35-37; State's Ex. 173, slides 11 & 12]. On that same evening, Kim visited her brother Sam Neptune around 8:00 p.m. and stayed for about fifteen to twenty minutes. [Tr. I: 100-1]. Later that evening, Kim messaged Kailie and asked if Kailie wanted to hang out – Kim arrived at Kailie's apartment around 9:00-9:30 p.m. [Tr. VI: 27]. Kim and Kailie smoked a joint together, took some recreational Xanax and

[6] Kailie testified at length about her friendship with Kim: They had been friends for approximately twenty years – they spent holidays together, saw each other approximately 28 to 29 days per month, and Kailie's son, Kevin, referred to Kim as Auntie Kimba. [Tr. VI: 16-19]. During those twenty years, the best friends never had one argument. [*Id.* at 19].

gabapentin, and watched TV. [*Id.* at 27-29]. Kim left Kailie's apartment around 10:55 p.m. and was planning to meet someone before going home. [*Id.* at 33].

After Kim left, Kailie stayed home, buying makeup online until the early morning hours before eventually falling asleep around 3:30 a.m. [*Id.* at 35-45]. During this time, Kailie had charges on her bank account at 12:23 a.m., 1:49 a.m., and 4:06 a.m. [Tr. IV: 248-9; Ex. KB-2]. She also received texts between 2:35 a.m. and 2:55 a.m. from Maelys, an online beauty brand, related to her empty online shopping cart and offering her coupons. [Tr. V: 66-68; Ex. KB-8]. Kailie also sent a text message out around this time. [Tr. V: 79]. That Kailie did not leave her apartment during this time was further supported by her neighbor's, Hope Dana's, video surveillance camera system, which was operational, faced Kailie's house, and generated no relevant footage on this night to the early morning of the following day. [Tr. IV: 126-130].

The next morning, April 21, 2022, Sam Neptune texted his sister without response. [Tr. I: 102]. Around 11:00 a.m. he went to her apartment to drop off batteries for her smoke detector — he did not enter her apartment because he was there as part of his job as the Assistant Supervisor for the Pleasant Point Housing Authority. [Tr. I: 75-76, 102-3]. Sam noticed that the door was deadbolted and he left the batteries near an outlet cover outside Kim's hallway door. [Tr. I: 103-104].

About an hour later, Kailie made the following transactions using Kim's debit card:

- A cash withdrawal of $500.00 at 11:55 a.m. from the First National Bank ATM in Eastport, [Tr. IV: 201-202; State's Ex. 169];
- A cash withdrawal of $203.50 between 12:02 p.m. and 12:06 p.m. from the Bangor Savings Bank ATM in Eastport, [Tr. IV: 205-207; State's Ex. 168];
- Purchases totaling $133.20 at the Family Dollar Store in Eastport, arriving at 12:43 p.m. and leaving the store at 1:34 p.m. [Tr. IV. 171-173; State's Ex. 97, 167].

She was not wearing a mask and was not otherwise disguised – she was wearing the same coat and hat at all three stops. [State's Ex. 167-168, 168-A, 169, 169-A].

Later, on the evening of April 21, 2022, when Sam still had not heard from Kim, he went to her apartment to check on her. [Tr. I: 107]. Sam let himself into Kim's apartment with a key she had given him – to Sam's knowledge, only he and Kim had a key to the apartment. [*Id.* at 91, 107]. When entering the apartment, Sam noticed that both the doorknob lock and the deadbolt lock were engaged. [*Id.* at 107]. Upon entering the apartment, Sam went to Kim's bedroom, noticing that it seemed in disarray – in sharp contrast to the condition Kim usually kept it. [*Id*. at 108-109]. Sam noticed Kim wrapped in a blanket and covered in cuts – she did not have a pulse. [*Id*. at 109-110]. After finding the body, Sam went back to his house because

he did not have his cellphone with him, and he needed to call 9-1-1 [*Id*. at 117]. After arriving at his house, Sam's girlfriend saw a police car and Sam then flagged it down – he then went back to Kim's apartment with Officer Matt Cummings of the Pleasant Point Police Department. [*Id*. at 117-8; 181].

Upon entering Kim's apartment building, Officer Cummings noticed a dark stain on the carpeted stairs leading up the Kim's apartment. [*Id*. at 183]. Officer Cummings observed dark staining on the bed and floor in Kim's bedroom that appeared to be blood and noticed Kim's body on the floor of the bedroom adjacent to the bed. [*Id*. at 183-4]. Officer Cummings called dispatch for more officers and called the Major Crimes Unit of Maine State Police. [*Id*. at 184-5]. Days later, once allowed back into Kim's apartment, Sam noticed that Kim's security camera was missing. [*Id.* at 122].

The foregoing investigation revealed the following: Kim's neighbor, Mellisa Martin, had a surveillance camera that covered the general area around Kim's house. [Tr. IV: 14]. The video coverage area did not extend to all paths between Kailie and Kim's house, such that Kim could take a path to Kailie's house and be undetected. [Tr. IV: 27]. Video footage showed Kim arriving home on her ATV on April 20, 2022, at 8:21 p.m. [Tr. IV: 17-18, 170-71; State's Ex. 170-B]. Ms. Martin also provided video from 12:17 a.m. on April 21, 2022, that showed the shadow of one or more people moving around outside of Kim's apartment. [Tr. IV: 20, 170-71;

State's Ex. 170-C]. Finally, there was video of an individual leaving the area of Kim's apartment around 8:07 a.m. on April 21, 2022. [Tr. IV: 21-22, 170-71; State's Ex. 170-D]. Ms. Martin said she did not recognize the person in the video, which she posted to Facebook and provided to the police. [Tr. IV: 14-15, 22-23].

The medical examiner determined that Kim was killed by sharp force injuries and resulting blood loss, and that a substantial amount of the blood loss was from a perimortem wound to her carotid artery. [Tr. III: Tr. 82-83]. She was stabbed additional times postmortem, and the medical examiner documented a total of 484 individual injuries. [*Id.* at 49, 81-82]. A variety of evidence was collected from Kim's apartment including DNA samples from blood stains on a doorknob and deadbolt of the interior door, and on a number of stairs leading up to Kim's apartment and inside her bedroom. [Tr. II: Tr. 7-8, 11-13]. Kim was the major contributor found in all of those swabs, but there were a number of minor contributors – co-defendant Donnell Dana was a minor contributor, and other unknown males were also contributors. [Tr. V: 141-147] Kailie's DNA was not present in any of the bloodstained swabs. [*Id.* at 141-147, 149-150]. A series of bloodstained footprints were found in Kim's bedroom – it was not clear if they were made by a sock-clad foot, or by footwear, but they were not sufficient for comparison. [Tr. II: 95-101, 173-174, 176-178; State's Ex. 64, 70-72]. Additional bloodstained footprints were on the carpeted stairs leading up to Kim's apartment.

[Tr. II: 11-13, 101-103; State's Ex. 28-34, 65-66]. Scrapings found under Kim's fingernails, which were possibly made as Kim fought her assailant(s), matched at least six different male DNA profiles, none of which matched Kailie. [Tr. III: 90-91; Tr. V: 149-150, 177-179]. No fingerprints suitable for comparison were found at the crime scene. [Tr. V: 87].

Approximately three or four days after Kim was found dead, another community member, Ruth Bassett, who lived near Kailie's house, claimed she saw Mr. Dana and Kailie putting a couple of trash bags into the back seat of their car, before entering the car with their son, Kevin, and driving off. [Tr. IV: 63-65]. Ms. Bassett, who admitted to having blurry eyesight at the time of this sighting, [*Id.* at 78], later called her neighbor, Rhonda Pehrson, and shared this information with her. [*Id.* at 74-76]. Ms. Bassett characterized the reservation community as one where everyone kind of gets in other people's business. [*Id*. at 82]. In fact, Mr. Dana and Kailie traveled to Bangor on that day, April 26, 2022, where they stayed for two nights while Kevin was getting surgery on his elbow at the Eastern Maine Medical Center. [Tr. V: 194; Tr. VI: 50-54]. Kailie admitted that she was loading multiple bags into her car prior to leaving for Bangor; the bags contained clothes and snacks for her and her son for their multiple day trip. [Tr. VI: 51-53].

Once Kailie became a person of interest in the State Police's investigation of Kim's murder, the police requested Facebook Messenger's data on communications

between Kailie and Kim. [Tr. IV: 244]. They saw five messages from Kailie to Kimberly on April 21, 2022, that were each unreadable, as Kailie used the "secret conversation" feature of Facebook Messenger, which erases messages after a certain time period. [*Id.* at 245; Tr. VI: 56-57]. This was because Kim had been dealing Xanax and wanted to keep their conversations relating to dealing, private so she preferred using the secret feature. [Tr. VI: 56]. Kailie also reported that in the days leading up to her murder, Kim had been attempting to cut out the middleman in her drug dealing business, Mildred Mitchell, and go directly to Mildred's supplier, Muwin Levesque. [*Id.* at 24-25].[7]

On April 29, 2022, Kailie's home and car were searched pursuant to a warrant. [Tr. III: 135-6, 138-9]. Officers found Kim's debit card, a receipt for a Family Dollar purchase, and $1,004.53 cash. [*Id*. at 139-142; State's Ex. 94-95, 97]. Kailie testified that, around April 20, 2022, she had almost ten thousand dollars in her bank account, and she had recently cashed the $1,300 in checks that officers later found in her wallet. [Tr. VI: 66-67; Tr. III: 143]. The murder weapon was never recovered. When Kailie's apartment was searched, not one shred of evidence that would be indicative of a bloody death was found. [Tr. III: 144-9].

[7] At trial, Hailie Levesque, Muwin's wife, testified that while she was shopping at the Farmer's Union on April 20, 2022, she overheard Kailie say, "something about how Kim stole money and how Kim was going to pay for it." [Tr. IV: 153-4]. Another person, Shelley Arsenault, an employee at the Farmer's Union, who Ms. Levesque noted was also nearby at the same time, [*Id*. at 154-5], stated that she had not overheard such a conversation. [Tr. V: 194-5].

Kailie explained that she frequently withdrew cash as a favor for Kim, who didn't have a car of her own. [Tr. VI. 59-62]. Kailie testified that on April 21, 2022, Kim needed $1,000.00 in cash for a drug deal that she was making on that day, and Kailie was doing her friend a favor by making the ATM withdrawals. [*Id*.]. Although Kailie had been doing errands for Kim more than monthly for years, the Maine State Police failed to retrieve bank records going back before the time Kim was murdered to demonstrate this pattern. [Tr. VI: 57-8; Tr. IV: 225, 238-240].

At trial, the State's witness, Dr. Michael Nirenberg, testified about the blood bloodstained, sock-clad footprints that were found on the stairs leading up to Kim's apartment. [Tr. II: 11-13, 102-3; State's Ex. 28-30; 66]. He explained his initial review of the footprints and a determination of the ones suitable for meaningful analysis, and the process of obtaining comparison footprints from Kailie and Mr. Dana. [*Id.* at 172-4]. He then explained the limitations of the footprints on the scene, and why he could not use the highly regarded Reel technique. [*Id.* at 176-8]. He also explained that, within forensic podiatry, footprints within five millimeters are considered to be "essentially the same due to limitations." [*Id.* at 178-9]. Dr. Nirenberg then explained that he compared sixty class features between Kailie and the crime-scene photos, and compared this method to a renowned anthropologist, who analyzed thirteen class features in his sock-clad research. [*Id.* at 181-2]. Dr.

Nirenberg explained that class features are features "that could occur in the general population. . . if somebody had a bunion, . . . [t]hat's one class feature. [*Id.* at 185].

In his analysis, Dr. Nirenberg found that fifty of the sixty class features he analyzed were shared between Kailie's foot and the crime scene footprints, and that none of the missing ten excluded Kailie. [*Id.* at 186-7]. He also noted that he found dissimilar class characteristics with Mr. Dana, but he did not count them. [*Id.* at 187]. He then used the European Network of Forensic Science Institutes scale and concluded that the footprint evidence showed a "moderate level of evidence to support the proposition that [Kailie] made the question footprints." [*Id.* at 195-6; 225]. Dr. Nirenberg described this scale as measuring the strength of the evidence – how strongly the evidence supports the proposition or the point of view that someone made those crime scene footprints. [*Id.* at 225]. Nevertheless, Dr. Nirenberg admitted that the European Network of Forensic Science Institutes, which issues best practice manuals and forensic guidelines and other supporting documents, does not issue any such guidelines for forensic podiatry. [Tr. II: 226-7].

In comparing the evidence and his resulting opinion, Dr. Nirenberg testified that "moderate level of evidence to support" his conclusion equated to "a thousand times less bigger than very strong" which is the highest level of support on the scale. [*Id.* at 235-6]. When asked to give a more specific scientific measurement or objective characteristics as to how he arrived at his conclusion, Dr. Nirenberg

testified: "it's a subjective opinion based on my knowledge, experience, and training." [*Id.* at 236-7]. He admitted that if somebody has different knowledge and training, they possibly could come up with a different response when analyzing these footprints. [*Id.* at 237].

In response to Dr. Nirenberg's testimony, the defense called Dr. Alicia McCarthy, a Doctor of Forensic Science and an experienced expert on footwear and tire comparisons. [Tr. V: 196-97]. She testified that the Organization of Scientific Area Committees for Forensic Science and the International Association for Identification did not recognize forensic podiatry as an accepted practice, despite Dr. Nirenberg's attempt to have the doctrine accredited. [*Id.* at 206-9, 212]. She stated that the barefoot comparison universal five-millimeter margin-of-error was not reliable, especially when compounded with the unknown sock-width in the case at hand. [*Id.* at 214-16, 225-7]. She discussed the European Network of Forensic Science Institutes' standard that Dr. Nirenberg used in his presentation, saying:

> [T]here's two types of conclusions in forensic science, narrative or verbal conclusions and then there's numerical conclusions. And DNA often has the luxury of giving a numerical statistic. In the comparative sciences, we don't have that. Um, so we have narrative or these types of conclusions. They don't go together. You either have one or the other. So, it seemed very arbitrary, unscientific, to come up with this, to go from one to the other as ten and then skip over two as a thousand. It wasn't based on anything scientific.

[*Id.* at 216-218]. She stated that his statement that there was 'moderate' evidence to support his conclusion was not scientifically derived as, among other reasons, "he

wasn't able to articulate on the stand earlier in the week how he came to his conclusion." [Tr. V: 218-19]. She also criticized Dr. Nirenberg's treatment of the photographs used to make his report, noting that Dr. Nirenberg "trusted that the photographs were taken correctly. He also had software and could have checked, but he – because of his lack of scientific training, he didn't know that that was a first step." [*Id.* at 233-8]. She concluded that Dr. Nirenberg did not provide the jury with a reliable and scientifically acceptable opinion as to the comparison between footprints, because he didn't follow a particular methodology, wasn't able to demonstrate how he came to his conclusion, there were unmitigated issues with the photography, and the error margin excluded variations in the socks. [*Id.* at 240].

At the close of evidence Kailie was convicted of murder. [Tr. IX: 23].

ISSUES FOR REVIEW

I. Whether the motion judge abused his discretion by allowing the state's forensic podiatry witness to testify when such testimony was not reliable and his opinion that there was a moderate level of evidence to support that Kailie made the sock-clad footprint in question was not helpful to the jury and only served to confuse them, and whether this Court should adopt the *Daubert* test for admissibility of expert testimony pursuant to Rule 702?

II. Whether the trial judge abused his discretion by admitting a total of six autopsy photographs, all of which showed bloody and graphic stab wounds, and which were unfairly prejudicial to Ms. Brackett?

III. Whether the prosecutor's improper closing argument, that misstated the cell tower evidence regarding Kim and Kailie's cellphones on the day Kim was murdered and misstated the opinion of the forensic podiatrist, constitutes obvious error requiring reversal?

IV. Whether the cumulative effect of the three above errors warrants vacatur?

V. Whether the trial judge improperly denied Ms. Brackett's motion for judgment of acquittal because the jury could not have rationally found that the state proved each element of murder beyond a reasonable doubt?

VI. Whether the lower court failed to consider the sentencing goals and mitigating factors when sentencing Kailie to fifty-five years in prison?

SUMMARY OF THE ARGUMENT

Since 2009, when the National Academy of Sciences issued a Report that called into question a number of forensic science disciplines for lacking in any scientific basis, committees/agencies have been tasked with setting standards for forensic sciences. One such committee, the Organization of Scientific Area Committees (OSAC), was created in response to the Report as is responsible for setting industry standards for forensic techniques and testing. Forensic podiatry,

which played a prominent role in Kailie's conviction, is not recognized as a forensic science by this organization. The subjectivity of Dr. Nirenberg's opinion and lack of black box studies to validate the field of forensic podiatry place this field squarely in the category of "junk science." Junk science has led to numerous wrongful convictions, and some states in recognition of this fact, have enacted laws allowing defendants the opportunity to have their cases reevaluated. Here, not only was the jury allowed to hear Dr. Nirenberg's opinion as to whether Kailie made the crime scene footprints, they were allowed to view six gruesome autopsy photos clear meant to inflame their emotions since there was no question that the murder was committed intentionally or with depraved indifference to human life. That these two factors significantly contributed to Kailie's conviction is clear based on the scintilla of evidence offered by the State to otherwise support their burden. This case must be examined closely to make sure Kailie is not added to a list of "junk science" convictions.

ARGUMENT

I. THE MOTION JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED DR. NIRENBERG TO TESTIFY AT TRIAL.

Maine Rule of Evidence 702, which governs the standard for admissibility of expert witnesses, provides that: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if such testimony will help the trier of fact to understand the

evidence or to determine a fact in issue." This Court set forth a test for determining whether expert testimony is admissible in *State v. Williams*, 388 A.2d 500 (Me. 1978). The test requires that the "proponent of expert testimony must establish that (1) the testimony is relevant pursuant to M.R. Evid. 401, and (2) it will assist the trier of fact in understanding the evidence or determining a fact in issue." *Searles v. Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶ 21, 878 A.2d 509, 515-16 (citing *Williams*, 388 A.2d at 504). Prior to this two-prong inquiry, the trial court must make a preliminary finding that the testimony meets a threshold level of reliability. *See State v. Bickart*, 2009 ME 7, ¶ 15, 963 A.2d 183, 188 (reaffirming the *Williams* test).

In *Bickart*, this Court determined that:

> [W]here expert testimony rests on newly ascertained, or applied, scientific principles, a trial court may consider whether the scientific matters involved in the proffered testimony have been generally accepted or conform to a generally accepted explanatory theory in determining whether the threshold level of reliability has been met. Nevertheless, a finding of general acceptance is not required.

Bickart, 2009 ME 7, ¶ 14 (internal citations omitted). Instead of requiring general acceptance in the scientific community, this Court set out a number of factors for the trial court to consider when determining reliability:

> (1) whether any studies tendered in support of the testimony are based on facts similar to those at issue; (2) whether the hypothesis of the testimony has been subject to peer review; (3) whether an expert's conclusion has been tailored to the facts of the case; (4) whether any other experts attest to the reliability of the testimony; (5) the nature of the expert's qualifications; and (6), if a causal relationship is asserted,

> whether there is a scientific basis for determining that such a relationship exists.

Searle, 2005 ME at ¶ 23.

This Court reviews a trial court's determination of the admissibility of expert testimony for an abuse of discretion. *State v. Smith*, 2024 ME 56, ¶ 24, 320 A.3d 405, 414. When reviewing under this standard, the Court must address whether the factual findings are supported by the record, whether the court understood the law applicable to its exercise of discretion, and whether the court's weighing of the applicable facts and law were within the bounds of reasonableness." *Bickart*, 2009 ME at ¶ 15.

A. Dr. Nirenberg's Testimony Was Unreliable Because His Opinion Lacked A Scientific Basis To Show A Causal Relationship and Is Thus Not Generally Accepted Within The Scientific Community, No Other Expert Testified As To The Reliability of Forensic Podiatry, and The Studies He Relied Upon In Forming His Opinion Were Not Based On Facts Similar To This Case.

Because Dr. Nirenberg's proposed testimony and opinion as to whether Kailie made the footprints located at the crime scene was unreliable, the trial court abused its discretion by admitting his testimony at trial. Specifically, an analysis of the factors set out in *Bickard*, weighed in favor of excluding Dr. Nirenberg's testimony:

No Scientific Basis for Determining the Relationship Exists/Not Generally Accepted in the Scientific Community.

Dr. Nirenberg's potential testimony addressed a possible "causal relationship" between the questioned footprints and Kailie: Did she cause the questioned

footprints. Proposed expert testimony regarding a causal relationship requires the proponent to prove "there is a scientific basis for determining that such a [causal] relationship exists." *See Bickart*, 2009 ME at ¶15. In terms of scientific basis, forensic podiatry is, at best, a fringe scientific discipline. In 2009, the National Academy of Sciences issued a report that examined a number of forensic science disciplines. *Strengthening Forensic Science in the United States: A Path Forward*, Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Aug. 2009, https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf, last visited Mar. 5, 2025 (NAS Report). The Committee was independent and consisted of members from "forensics community representing operational crime laboratories, medical examiners, and coroners; legal experts; and other scientists as determined appropriate." NAS Report at 1. The Committee was tasked by Congress to, *inter alia*, "make recommendations for maximizing the use of forensic technologies and techniques to solve crimes, investigate deaths, and protect the public" and "disseminate best practices and guidelines concerning the collection and analysis of forensic evidence to help ensure quality and consistency in the use of forensic technologies and techniques to solve crimes, investigate deaths, and protect the public." NAS Report at 2. Forensic Podiatry is so far on the fringe of scientific principles and outside of the mainstream of forensic sciences, that it was not even mentioned in the National Academy of Sciences Report. [Mot. Tr. 106; RA 108].

The NAS Report critiqued a number of forensic science disciplines and significantly changed the way courts viewed forensic evidence and ultimately led to the creation of an agency tasked with setting standards for examination of forensic evidence. [Mot. Tr. 105]. The Organization of Scientific Area Committees (OSAC) was created as a result of the NAS report, and of great significance to this case, does not recognize forensic podiatry as a forensic discipline. [RA 107-108]; OSAC Registry Implementation: FAQs, https://www.nist.gov/osac/osac-registry-implementation-faqs#:~:text=Answer%3A%20The%202009%20NAS%20Report,specifically%20to%20address%20this%20issue, last visited Mar. 5, 2025 ("The 2009 NAS Report identified the lack of consistent and uniformly high- quality standards across forensic science disciplines and across national, regional and local jurisdictions. OSAC was created in 2014 by the US DOJ and NIST specifically to address this issue"); [Tr. 104]. Even Dr. Nirenberg acknowledged at the motion hearing that forensic podiatry has not been accepted by OSAC, the agency tasked with setting standards for forensic sciences. [Tr. 98]. Consequently, as Dr. Alicia McCarthy explained in her report, "The field of forensic podiatry (the comparison of the shape of bare feet or socked feet) is not generally acceptable in the forensic science community." [RA 108].

The specific and significant limitations of forensic podiatry were highlighted during testimony at the motion hearing – the interpretation of the causal relationship

is highly subjective – As Dr. Nirenberg testified: "it's a subjective opinion based on my knowledge, experience, and training." [Tr. II: 236-237]. The lack of general acceptance and scientific basis is linked to the subjectivity involved in forensic podiatry and largely due to a lack of scientific studies, including black box studies, that would establish the reliability of forensic podiatry as on par with other accepted forensic disciplines, such as fingerprints, DNA. [RA 108]. As Dr. McCarthy noted in her report, "Because forensic podiatry is outside of mainstream forensic science, the discipline is not governed by NIST and OSAC in developing robust standards and there have been no black box studies carried out to determine the error rates or reliability of forensic podiatry comparisons." [*Id*.]. Most important on the issue of reliability is that "A black box study is a study of reliability." [Mot. Tr. 106]. Disciplines that require black box studies are disciplines that have a lot of human decision making, rather than machines that produce results – in other words, those that produce subjective opinions. [*Id*. at 117]. Dr. McCarthy testified that nearly all of the "human instrument forensic science disciplines" have gone through black box studies, and that black box studies are considered the gold standard for forensic reliability. [*Id*.]. Dr. McCarthy further explained that "Black box studies from a scientific perspective are considered the best reliability studies to determine who's reliable and who isn't." [*Id*. at 107]. Yet, in the case of forensic podiatry no black box studies have been performed, and thus the reliability of the associated subjective

opinions is highly questionable. [RA 108]. The main problem with such subjective opinions, especially when offered in court, is that they were "not historically grounded in scientific research and have been implicated in numerous wrongful convictions." Gary Edmond & Emma Cunliffe, *Cinderella Story? The Social Production of A Forensic "Science",* 106 J. Crim. L. & Criminology 219, 236 (2016). *See also* Katherine Judson, *Bias, Subjectivity, and Wrongful Conviction,* 50 U. MICH. J. L. REFORM 779, 780 (2017) ("Many have recognized the difficulty and potential for missteps when forensic science disciplines are developed to aid prosecutors in the courtroom, rather than based firmly in hard science. . . . In the absence of adequate data, there is more room for subjectivity, and therefore bias, to creep into the process," which can lead to wrongful convictions) (citing the NAS Report at 187). As one commentator noted:

> If the importance of the science goes up, however, so does the risk of wrongful conviction. If a conviction rests entirely, or nearly so, on unvalidated, misleading, or improper forensic science, it is of particular concern. When a field of forensic science is without safeguards for validity and reliability, expert witness testimony should either be kept from the jury (as in successful *Daubert* challenges) or, if the jury will hear it, the witnesses must make the shortcomings in the data absolutely clear.

Id. at 781.

Here, as Dr. Nirenberg readily admitted, his opinion was subjective: "it's a subjective opinion based on my knowledge, experience, and training." [*Id.* at 236-237]. The very subjectivity of Dr. Nirenberg's opinion makes it unreliable, and in

this case lead to a conviction based on scant circumstantial evidence. Because Dr. Nirenberg's testimony was highly unreliable, the trial court abused its discretion in allowing Dr. Nirenberg to testify.

No Other Experts Attested to the Reliability of Forensic Podiatry.

Dr. Nirenberg's opinion based wholly on "junk science" was contrasted by the testimony of Dr. Alicia McCarthy and lifelong forensic scientist. [Mot. Tr. 102-103]. Dr. McCarthy was highly critical of forensic podiatry and its reliability and specifically the reliability of Dr. Nirenberg's opinion in this case. [RA 108-112]. Dr. McCarthy opined that Dr. Nirenberg's conclusion was not reliable for many of the same reasons Dr. Nirenberg recognized as limitations to his conclusion: his inability to use the industry standard Reel Technique for measuring the footprint from the crime scene. [RA 76, 109-110].[8] Of note, was that Dr. Nirenberg could not use the Reel Technique, which he considered the best method for foot measurement, because there was only a partial footprint left at the crime scene, and the Reel Technique cannot be used when there is not a complete footprint. [Mot. Tr. 38, 68, 70]. The unknown fabric of the bloody sock from the crime scene and difference in sock thickness between the sock from the crime scene and the one worn by Kailie when she gave the reference footprint also made Dr. Nirenberg's opinion unreliable.

[8] Dr. Nirenberg testified he did not know the fabric of the crime scene sock because none was recovered, and that he did not inquire as to the fabric of the sock worn by Kailie when she gave her reference footprint. [Mot. Tr. 30, 58-62].

[RA 76, 110]. Dr. McCarthy also noted that the crime scene footprints were processed with Leuco Crystal Violet (LCV) and the photographs of the footprints were not taken within the required time window, which caused the lack of clarity in the photographs as acknowledged in Dr. Nirenberg's report in the limitations section. [RA 76, 110-111]. Dr. McCarthy noted that the crime scene photographs, and reference photographs of Kailie's foot were not taken with with the proper focal length, which caused distortion of the ball measurement and scaled images. [RA 111]. Finally, Dr. McCarthy noted that Dr. Nirenberg did not compare all suspects in this case, only the two suspects chosen by the detectives. [RA 111]. Dr. Nirenberg also listed this as a limitation in this case ("Number of questioned and reference footprints examined.") [RA 76]. This is particularly problematic because it leads to cognition bias that the NAS report highlighted and sought to eliminate through standardized forensic techniques. Gary Edmond & Emma Cunliffe, 106 J. Crim. L. & Criminology at 244-245.

In short, not only did Dr. McCarthy testify that forensic podiatry is not a recognized forensic science, but she also highlighted the many problems associated with Dr. Nirenberg's opinion – many of the same concerns raised in the NAS Report and that have led to wrongful convictions. Thus, the lower court abused its discretion when it allowed Dr. Nirenberg to testify as to his highly unreliable opinion.

Tendered Studies Were Not based on Similar Facts.

As Dr. Nirenberg readily admitted, the field of forensic podiatry is a small one. [Mot. Tr. 35]. Furthermore, while Dr. Nirenberg cited two studies relating statistics for the chance that two people in the population would have the same footprint, [Mot. Tr. 16], both of those studies related to barefoot footprints and not sock-clad footprints. [*Id*. at 92].[9] This is particularly important because Dr. Nirenberg also explained the limitations that a sock-clad footprint placed on his ability to analyze and form an opinion as to whether Kailie made the sock-clad footprint found at the crime scene. [Mot. Tr. 58-59]. Citing studies that did not involve sock-clad footprints is simply comparing apples to oranges – those studies are highly irrelevant. Because forensic podiatry is such a small field, even considering the few relevant studies that did include sock-clad footprints does not provide requisite evidence of reliability[10] – it's simply an untested field.

Because forensic podiatry is such a small field with very limited studies that are directly relevant to the facts in this case -- sock-clad footprints -- Dr. Nirenberg's opinion is not reliable, and the trial court abused its discretion by allowing Dr.

[9] Dr. Nirenberg noted that footprints are not unique, but cited a study by Kennedy of the Royal Canadian Mount Police that found the likelihood of a chance match is 1 in 1.27 billion and a study by Gregory Laskowski that placed the odds at 1 in 100,000. [Mot. Tr. 16].
[10] Dr. Nirenberg testified that "the use of footprints doesn't come up very often in criminal matters." [Mot. Tr. 18].

Nirenberg to testify. This Court need go no further in its analysis as the State did not meet its burden to demonstrate a threshold level of reliability.

Nevertheless, even if this Court were to find that the lower court did not abuse its discretion when it determined that Dr. Nirenberg's opinion was reliable, his opinion could not assist the trier of fact in this case.

B. Dr. Nirenberg's Opinion That There Was A Moderate Level Of Evidence To Support That Kailie Made The Sock-Clad Footprint In Question Was Not Sufficient To Assist The Trier Of Fact In Understanding The Evidence.

The second prong of the *Williams* test for admissibility pursuant to Rule 702 is that "it will assist the trier of fact in understanding the evidence or determining a fact in issue." *Searles*, 2005 ME at ¶ 21 (citing *Williams*, 388 A.2d at 504). "Expert testimony that is not reliable has 'no probative value,' and cannot 'satisfy the evidentiary requirements of relevance and helpfulness, and of avoidance of prejudice to the opposing party or confusion of the fact-finder.'" *State v. Rourke*, 2017 ME 10, ¶ 11, 154 A.3d 127, 13 (*quoting State v. Boutilier*, 426 A.2d 876, 879 (Me. 1981)).

The European Network scale employed by Dr. Nirenberg to conclude that there was a moderate level of support that Kailie made the footprints at the crime scene was developed for circumstances where results cannot be quantified (unlike DNA) and captures the strength of an opinion expressed as a verbal formulation. Gary Edmond & Emma Cunliffe, 106 J. Crim. L. & Criminology at 255 (citing Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification*

Science: What Expert Witnesses Say and What Factfinders Hear, 33 Law & Hum. Behav. 436, 448-51 (2009)). In circumstances where techniques have not been formally evaluated (i.e., validated), opinions expressed using such verbal formulations are speculative and potentially misleading. *Id*. (explaining that jurors and judges do not necessarily understand what forensic scientists intend to convey by their use of terms and testimony).

Dr. Nirenberg did not testify that it was more likely than not that Kailie caused the questioned footprint. His report explained the levels of support, stating: "As the categories of verbal expression move in either direction away from the midpoint of 'provides no assistance in addressing the issue,' they increase in size, each category being ten times bigger. The escalation of the strength of support or rejection to the next category therefore becomes progressively more demanding." [RA 82]. Starting from the top of the scale, they also become less demanding, such that a moderate level of support is 1000 less demanding than the top level "very strong evidence to support." [*Id*.]. More troubling, was that Dr. Nirenberg could not even define moderate, the very term upon which his opinion was based:

> Moderate, based on -- on the verbal expressions of support, it is -- it is unclear to me what moderate means. It's a form of strength, and if you look at the scale, it's a relative scale. So it does -- it means only what the scale shows. It's showing the -- the --the jury that we go from (indiscernible), moderate, moderately strong, strong, and very strong.

[Mot. Tr. 53]. This imprecision and uncertainty are both unscientific and unhelpful because they do not help the jury decide the issue before them – namely, whether it was Kailie who made the footprint found at the scene. A jury cannot possibly be helped by a definition that a purported expert cannot even define.

In addition, Dr. Nirenberg's inability to define the margin of error was unhelpful in assisting the trier of fact in reaching its conclusion because it provided no quantitative scientific measurement to explain his opinion. Dr. Nirenberg testified that his opinion was "not based on numerical data or statistical calculation, and all this is in my report." [Mot. Tr. 54]. Similarly, Dr. Nirenberg's Report outlined nine "limitations" to his "moderate" conclusion, [RA 76], but he was unable to testify as to the margin of error for each limitation. [Mot. Tr. 61-66]. His opinion was based on some amorphous definition of "moderate" and a margin of error that clumped together all of his nine limitations. This proposed testimony would be entirely unhelpful to the jury. Moreover, Dr. Nirenberg's repeated assertion that "The science uses plus or minus five millimeters," as a margin of error [Tr. Mot. 60, 63] overexaggerated his field by calling it a "science" and by doing so unduly gave credibility to a field that has not been established as a "forensic science." [Mot. Tr. 104; RA 90]. Judson, 50 U. MICH. J. L. REFORM at 781 ("In wrongful convictions, however, we often see unreliable methods or data and then a witness who testifies with more certainty than the science warrants.").

Finally, the motion judge analyzed the admission of Dr. Nirenberg's testimony on the issue of whether it was helpful to the jury pursuant to Rule 401 and Rule 403, which seemingly goes to the first prong under *Williams* – whether the proposed testimony is relevant. [RA 22 (*citing State v. Dwyer*, 2009 ME 127, ¶¶ 31-33, 985 A.2d 469). Nevertheless, the second prong analysis --whether the proposed evidence "will assist the trier of fact in understanding the evidence or determining a fact in issue" -- is a test derived directly from Rule 702. Therefore, the motion judge's analysis is erroneous, and his admission of Dr. Nirenberg's testimony was an abuse of discretion requiring reversal.

Alternatively, should this Court adopt the more stringent federal test for admissibility of expert testimony under Rule 702.

C. This Court Should Adopt The Test Set Forth In *Daubert v. Merrell Dow Pharmaceuticals* For Admissibility of Expert Testimony Pursuant to Rule 702 Because The Maine Standard Does Not Provide Enough Protection Against Admission of Testimony Based on "Junk Science" Principles.

This Court should reevaluate the test set forth in *Williams* in light of the National Academy of Sciences Report issued in 2009 that found that "No forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source," and adopt the federal standard as set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589–595 (1993).

In *Daubert*, the United States Supreme Court outlined five factors to be considered in evaluating whether testimony is sufficiently reliable to constitute scientific knowledge under the Federal Rules. *Daubert*, 509 U.S. at 589–595. The five factors are whether the scientific theory or process (1) has been generally accepted in the relevant scientific community; (2) has been, or can be, subjected to testing; (3) has been subjected to peer review and publication; (4) has an unacceptably high known or potential rate of error; and (5) is governed by recognized standards. *Daubert,* 509 U.S. at 593–594. Under *Daubert*, "the focus [of the reliability analysis] ... must be solely on principles and methodology, not on the conclusions they generate." *Daubert,* 509 U.S. at 595. Although the *Daubert* test, like the *Williams* test does not require "general acceptance" in the scientific community, *compare Daubert*, 509 U.S. at 594, *with State v. Bickart*, 2009 ME 7, ¶ 14, 963 A.2d 183, 187,[11] it does require "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue," *Daubert*, 509 U.S. at 592-593,[12] and that the scientific theory in question be

[11] Although in *Bickart*, this Court rejected the defendant's request that this Court adopt *Daubert,* 2009 ME 7, ¶ 19 & n.4, that decision preceded the NAS Report, which significantly changed the manner in which "scientific" evidence and testimony is received in courts.

[12] The vast majority of states have adopted the *Daubert* test – In fact, Maine is the only New England state that does not follow *Daubert*. *See 985 Associates, Ltd. v. Daewoo Elecs. Am., Inc.,* 945 A.2d 381, 385 (Vt. 2008) (adopting the *Daubert* standard); *Commonwealth v. Powell,* 877 N.E.2d 589, 596 (Mass. 2007) (same); *Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.,* 813 A.2d

"governed by recognized standards" when the purported expert is rendering testimony supposedly based on science. *Daubert*, 509 U.S. at 593-594. In adopting the *Daubert* test, courts have noted the necessity of excluding "junk science": "[T]he trial court's inquiry into expert testimony should primarily focus on excluding 'junk science'—because of its potential to confuse or mislead the trier of fact—rather than serving as a preliminary inquiry into the merits of the case." *985 Associates, Ltd.*, 945 A.2d at 385. Adopting a test to exclude testimony based on "junk science" is necessary as noted by the NAS Report, because as one scientific author noted, "Judges and juries were sometimes sending people to jail based on bogus science."[13] Kelly Servick, *Reversing the Legacy of Junk Science in the Courtroom*, Science, https://www.science.org/content/article/reversing-legacy-junk-science-courtroom, (last visited Mar. 1, 2025).

The more stringent *Daubert* test is necessary to prevent wrongful convictions in Maine based on such "junk science" and would align Maine with all of the other

409, 415 (N.H. 2002) (same); *Raimbeault v. Takeuchi Mfg. (U.S.), Ltd.*, 772 A.2d 1056, 1061 (R.I. 2001); *State v. Porter*, 698 A.2d 739, 743 (Conn. 1997) (same).

[13] In recognition of this pronouncement, some states enacted laws that allowed those convicted by questionable "science" to have their cases reevaluated. *See* Tex. Code Crim. Pro. art. 11.073 (effective Sept. 1, 2013).

New England states in adopting *Daubert*. Therefore, this Court should abandon the *Williams* test and adopt *Daubert*.

II. THE TRIAL JUDGE ABUSED HIS DISCRETION BY ADMITTING A TOTAL OF SIX AUTOPSY PHOTOGRAPHS, ALL OF WHICH SHOWED BLOODY AND GRAPHIC STAB WOUNDS, AND WHICH WERE UNFAIRLY PREJUDICIAL TO MS. KAILIE.

Because the six autopsy photographs admitted by the prosecution were unfairly prejudicial to Kailie, unduly cumulative, and caused the jurors to act on emotion rather than evidence, this Court must determine that the lower court abused its discretion by admitting the photographs. Prior to trial, Kailie moved *in limine* pursuant to Rule 403 to exclude gruesome autopsy photographs of Kim's corpse that demonstrated hundreds of stab wounds over her body. [Tr. I: 5-7; RA 115, 117]. The trial judge denied the defense motion and found that "the charge is a charge of intentional and knowing, as well as depraved indifference murder. The evidence goes to the issue of depraved indifference arguably based upon the number of wounds itself." [*Id.* at 8]. During the trial, four (4) more gruesome photographs were admitted over objection. [Tr. III: 3-14; RA 114, 116, 118, 119].

Maine Rules of Evidence provide that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Me. R. Evid. 403. This Court reviews the trial court's weighing of probative value against

the danger of unfair prejudice for an abuse of discretion. *State v. Sexton,* 2017 ME 65, ¶ 30, 159 A.3d 335. For purposes of Rule 403, prejudice "means an undue tendency to move the fact finders to decide the issue on an improper basis." *State v. Renfro*, 2017 ME 49, ¶ 9, 157 A.3d 775 (quotation marks omitted). "If the evidence has 'minimal significance,' for instance if 'it is probative only of uncontroverted facts' or 'its value is merely cumulative of other less prejudicial evidence,' the court must examine the evidence closely to determine whether to admit it." *State v. Michaud,* 2017 ME 170, ¶ 8, 168 A.3d 802, 805–806 (quoting *State v. Conner,* 434 A.2d 509, 512 (Me. 1981)). "The critical factor in this balancing test is the significance of the photograph in proving the State's case." *Conner,* 434 A.2d at 512.

Admittedly, the Rule does not protect a party from all prejudice, only *unfair* prejudice – the rule guards against "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *State v. Thongsavanh,* 2004 ME 126, ¶ 7, 861 A.2d 39, 41–42 (quoting *State v. Hurd,* 360 A.2d 525, 527 n. 5 (Me.1976)). Although gruesome and gory photographs are not automatically excluded, *United States v. Sampson,* 486 F.3d 13, 43 (1st Cir. 2007), courts should be cautious when evidence is shocking or heinous and, thus, likely to inflame the jury. *United States v. Varoudakis*, 233 F.3d 113, 122 (1st Cir. 2000). *See United States v. Casey*, 2013 WL 12190570, at *4 (D.P.R. Jan. 30, 2013), *aff'd*, 825

F.3d 1 (1st Cir. 2016) (evidence which is unduly cumulative or carries a risk of causing jurors to act based upon pure emotion should be excluded).

Here, as the prosecutor noted in her closing argument, there was "no dispute that whoever killed Kim intended to cause her death or engaged in conduct that demonstrated a depraved indifference to the value of human life." [Tr. VII: 18, 15-16]. The dispute arose as to who perpetrated the crime. [*Id*. at 19]. Nevertheless, the prosecution admitted not one or two, but six gruesome photographs of Kim's corpse showing hundreds of deep, bloody, tissue-exposed stab wounds, all showing essentially the same portion of Kim's corpse but from different angles. [RA 97-102]. While the prosecution "is entitled to present its case through evidence it deems most appropriate," *Sampson*, 486 F.3d at 43, it may not do so where they are of little significance in proving the State's case, *Conner*, 434 A.2d at 512, and when the evidence is unfairly prejudicial, unduly cumulative, or merely appeals to the emotions of the jurors, *Michaud*, 2017 ME 170, ¶ 8.

This is particularly true here because, unlike in some cases where the perpetrator is known and the issue is whether the killing was committed with depraved indifference, there was no dispute that Kim's killing was anything but intentional or committed with depraved indifference – the dispute was whether Ms. Brackett or Mr. Dana participated in the brutal crime. *See State v. Lockhart*, 2003 ME 108, ¶ 46, 830 A.2d 433, 448 (gruesome autopsy photographs were of

substantial probative value because they demonstrated that the defendant's conduct in killing his wife was not reckless, but rather intentional); *State v. Crocker*, 435 A.2d 58, 75 (Me. 1981) (photographs depicting condition of child tended to establish that defendant was acting either intentionally, knowingly, or in a manner that manifested a depraved indifference to the value of human life).

Furthermore, although the trial judge *sua sponte* advised the jurors prior to opening statements and again prior to the testimony of the medical examiner that they were about to observe graphic photographs of Kim's body, [Tr. I: 27; Tr. III: 39], he took no ameliorative steps to mitigate the prejudicial effect of the gruesome photographs. *Lockhart*, 2003 ME at ¶ 46 (no abuse of discretion in admitting autopsy photographs where trial judge took steps to mitigate the prejudicial effect of the photographs by restricting the placement of the enlargements of the photographs to the center of the courtroom, so as not to be directly in front of the jury, and directing the prosecutor to substitute smaller photographs for the enlargements to be used by the jury during its deliberations). Here, the gruesome photographs were on full display on a television screen within the courtroom further unfairly prejudicing Ms. Brackett. [Tr. I: 11-12; Tr. III: 73-78; RA 114-119].

There, because the trial judge abused his discretion by admitting the six gruesome autopsy photographs into evidence, which unfairly prejudiced Ms. Brackett, this Court must reverse her conviction.

III. THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT, THAT MISSTATED THE CELL TOWER EVIDENCE WITH REGARD TO KIM AND KAILIE'S CELLPHONES ON THE DAY KIM WAS MURDERED AND MISSTATED THE OPINION OF THE FORENSIC PODIATRIST, CONSTITUTES OBVIOUS ERROR REQUIRING REVERSAL.

When, as here, no objection is made to a prosecutor's statements at trial an obvious error standard of review is applicable. *State v. Wai Chan*, 2020 ME 91, ¶ 23, 236 A.3d 471; M.R.U. Crim. P. 52(b). The test for establishing obvious error has been concisely stated to include a showing by the defendant of "(1) an error, (2) that is plain, and (3) that affects substantial rights… [e]ven if these three conditions are met…a jury's verdict [is] only [set aside] if… (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." *State v. Dolloff*, 2012 ME 130, ¶ 35, 58 A.3d 1032, 1043 (Me. 2012) (internal citations and quotations omitted). *See also State v. Warner*, 2023 ME 55, ¶ 13, 301 A.3d 763, 767 (quoting *Wai Chan*, 2020 ME at ¶ 23) (the Court should set aside a jury's verdict if it concludes that the "error seriously affects the fairness and integrity or public reputation of judicial proceedings"). To show that an "error affected a defendant's substantial rights, the defendant has a significant burden of demonstrating a reasonable probability that the prosecutor's statement affected the outcome of the proceeding." *Wai Chan*, 2020 ME at ¶ 23 n.14 (quotation marks omitted). If error is found, "the comments of the prosecutor [are reviewed] as a whole,' looking 'at the incidents of misconduct both in isolation and in the aggregate." *State v. Clark*, 954

A.2d 1066, 1069 (Me. 2008) (internal citations omitted). *See also Warner*, 2023 ME at ¶ 14 (the Court's first step is to determine whether error occurred, and, if there was error, then "review the State's comments as a whole, examining the incidents of" error both alone and cumulatively).

Here, the State made comments to the jury during its closing remarks that constituted error. See *State v. White*, 2022 ME 54, fn.11 (Me. 2022) (using the term error in place of misconduct). "It is a 'well-established rule that the prosecutor has a responsibility to help ensure a fair trial, and although permitted to strike hard blows, may not strike foul one'" *State v. Lockhart*, 830 A.2d 433, 449 (Me. 2003) (internal citations omitted). The Rules of Professional Conduct place this burden on the shoulders of a prosecutor and state that a lawyer shall not:

> [I]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Rule 3.4(e). In making its argument to the jury the State "may employ wit, satire, invective and imaginative illustration in [its] arguments before the jury … but in this the license is strictly confined to the facts in evidence." *State v. Terrio*, 442 A.2d 537, 543 (Me. 1982) (admonishing the prosecutor's use of facts outside of the evidence).

One of the crucial protections provided to defendants at trial is that a prosecutor must not misrepresent material facts in the record. *Dolloff,* 2012 ME at ¶ 41 (enumerating several categories of statements counsel is prohibited from making at trial). "Prosecutors should avoid '[m]isrepresenting material facts in the record or making statements of material fact unsupported by any evidence.' In determining whether the prosecutor erred, the issue is 'whether the prosecutor's comment is fairly based on the facts in evidence.'" *State v. Farley*, 2024 ME 52, ¶ 36, 319 A.3d 1080, 1093 (internal citations omitted). *See also State v. Moontri,* 649 A.2d 315, 317 (Me.1994) ("A lawyer is permitted to argue on his analysis of the evidence, for any position or conclusion with respect to the matters stated therein, and the central question is whether the comment is fairly based on facts in evidence." (citation omitted) (quotation marks omitted)). The problem with giving a closing argument based on misrepresentation of facts is that "it urges or encourages the jury to make its decision based on something other than the facts that have been properly presented at trial and reasonable inferences that can be drawn from those facts." *Dolloff,* 2012 ME at ¶ 43.

Here, the prosecutor made two crucial misstatements in her closing regarding testimony at trial. First, addressing Dr. Nirenberg's opinion as to who made the bloody sock-clad footprints at the crime scene, the prosecutor stated that "Dr. Nirenberg concluded that there was a moderate level of evidence to support the

proposition that Kailie Brackett made the footprints. And just as there was a moderate level of evidence that Kailie Brackett made the footprints, he ruled out Donnell Dana as the creator of the footprint." [Tr. VII: 27]. This statement conflates the level of support as set forth by Dr. Nirenberg in his testimony, implying that the level of support that "ruled out" Dr. Dana was the same level of support that "ruled in" Kailie — a moderate level of support. Dr. Nirenberg's testimony was far from this statement. Dr. Nirenberg testified that "my conclusion was the evidence showed a **moderately strong level** of support for the point of view or the proposition that [Mr. Dana] did not make the crime scene footprints." [Tr. II: 188] (emphasis added). He further opined that "[t]he evidence shows a **moderate level** of support for the point of view or the proposition that Ms. Brackett made the footprints." [Tr. II: 196]. Dr. Nirenberg described the difference between these two levels of support by showing the jury a scale developed by the European Forensic Science Institutes. [Tr. II: 196-197, 226-227].[14] As described by Dr. Nirenberg, each level of support withing the scale is ten times bigger than the lower level — there is a "big jump" between a moderate level of support that Kailie made the footprint at the crime scene and a moderately strong level of support that Mr. Dana did not make the crime scene

[14] Slide 47 of Dr. Nirenberg's PowerPoint presentation demonstrates the same scale contained within his report found on page 82 of the Record Appendix.

footprint because with each verbal expression from the scale the strength of the evidence is reducing tenfold. [Tr. II: 231, 234-235].

The difference is not slight — because a lay person could easily see that Mr. Dana's reference footprint did not resemble the footprint found at the crime scene. [State's Ex. 192, slide 3, 4, 7]. By stating in her closing that "just as there was a moderate level of evidence that Kailie Brackett made the footprints, he ruled out Donnell Dana as the creator of the footprint," [Tr. VII: 27], the prosecutor led the jury to believe that Dr. Nirenberg's level of confidence was the same for the reference footprints of both Mr. Dana and Ms. Brackett — a statement that is wholly untrue. The prejudice in this misstatement is obvious:

- The jury was told by the prosecutor that a reference footprint, much closer in size to the one found at the crime scene, provided a moderate level of evidence to support that the person providing the reference footprint made the footprint at the crime scene. [State's Ex. 192, slides 3-6].
- The prosecutor also erroneously told the jury that a reference footprint, that was clearly dissimilar from the one found at the crime scene, also provided a moderate level of evidence to support that the person providing the reference footprint did not make the footprint at the crime scene. [State's Ex. 192, slide 3, 4, 7].

This misstatement, not based in evidence, could only serve to confuse the jury on an issue that was already riddled with confusion, and urged them to make a decision not based on the evidence before them. This error effected Kailie's substantial rights to have a fair trial and to have the jury decide her case based only on the evidence before them, and consequently the very integrity of her conviction must be questioned. *Dolloff*, 2012 ME at ¶ 35.

In addition, the prosecutor mischaracterized the cell tower evidence in her closing:

> We know that Kailie Brackett was at the Farmer's Union making a purchase for 25 dollars and some odd cents at 4:13 because we have the receipt. At that time, at 4:20, Kimberly Neptune's phone was hitting on towers in Eastport; and Kailie Brackett's cell phone was in Perry hitting on a cell tower there. And once her cell phone is in Eastport, then her -- so, if Kim's cell phone is in Eastport and Kailie Brackett's cell phone is in Perry, they are not together at the Farmer's Union.

[Tr. VII: 24]. The evidence at trial, however, was much more precise and nuanced.

- Kailie made a purchase at the Farmer's Union at 4:13 p.m. on April 20, 2022, [Tr. IV: 195-196; State's Ex. 174].
- Kailie's cellphone subsequently pinged for a Perry location at 4:18:26 p.m. and 4:20:15 p.m. There were no associate pings for Kim's cellphone whatsoever for 4:13 p.m., 4:18:26 p.m. or 4:20:15 p.m.
- Kim's cellphone pinged at 4:21:49 p.m. for a Dennysville location. There are no associated pings for Kailie's cellphone that correspond to this time.

- At precisely 4:22:42 p.m. both Kailie and Kim's cellphones ping for Eastport, the first time in this period that either cellphone pings in Eastport.
- Both cellphones were then in Eastport for the next twenty-two minutes, with Kim's first ping outside of Eastport occurring at 4:46:43 p.m. and Kailie's occurring at 4:45:47 p.m.

[State's Ex. 173, slides 11-12]. As such, there is no evidence whatsoever that Kim was not with Kailie at the Farmer's Union at 4:13 p.m. as the prosecutor claimed in her closing, because Kim's phone did not ping on a tower anywhere until 4:21:49 p.m. However, there was evidence, by way of Kailie's testimony and the cellphone records, that they were in Eastport together beginning precisely at 4:22:42 p.m. This mischaracterization of the evidence, which is clear from the record, encouraged the jury to disbelieve Kailie's testimony that she and Kim went to Eastport together, which was a significant piece of Kailie's defense at trial. [Tr. VII: 23-24]. The prosecutor's closing thus urged the jury to make a decision not based on the evidence before them. This error effected Kailie's substantial rights to have a fair trial and to have the jury decide her case based only on the evidence before them, and consequently the very integrity of her conviction must be questioned. *Dolloff*, 2012 ME at ¶ 35.

IV. EVEN IF NONE OF THE THREE ABOVE ERRORS, CONSIDERED INDIVIDUALLY, ALONE CONSTITUTES PREJUDICIAL ERROR, THE CUMULATIVE EFFECT OF THOSE ERRORS NONETHELESS WARRANTS VACATUR.

If none of the above errors separately warrants reversal, the total effect of those errors nonetheless violates due process. The cumulative-error doctrine comes into play when "the total effect of the errors found casts such a serious doubt on the fairness of the trial that the convictions must be reversed." *United States v. Guglielmini*, 384 F.2d 602, 607 (2d Cir. 1967) (cleaned up). The United States Supreme Court has repeatedly recognized that the cumulative effect of a trial court's errors, even if they are harmless when considered singly, may amount to a violation of due process requiring reversal of a conviction. *See United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008) (collecting cases).

In the aggregate, the above three errors denied Kailie a fair trial, as is guaranteed by the Maine and United States Constitutions. *See* ME. CONST., Art. I, §§ 6, 6-A; U.S. CONST., Amend. XIV; *State v. Hassan*, 2013 ME 98, ¶¶ 37-39, 55-62, 82 A.3d 86 (Jabar, J., dissenting) (discussing the cumulative-error doctrine); *Taylor v. Kentucky*, 436 U.S. 478, 487 n. 15 (1978) (finding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence"). Consequently, this Court must reverse Kailie's conviction.

V. THE TRIAL JUDGE IMPROPERLY DENIED MS. BRACKETT'S MOTIONS FOR JUDGMENT OF ACQUITTAL BECAUSE THE JURY COULD NOT HAVE RATIONALLY FOUND THAT THE STATE PROVED EACH ELEMENT OF MURDER BEYOND A REASONABLE DOUBT.

This issue is preserved by defense counsel's motion for judgment of acquittal at the close of the State's case, [Tr. V: 190], and again at the close of all evidence. [Tr. VI: 242]. This Court's reviews "the denial of a motion for judgment of acquittal by viewing the evidence in the light most favorable to the State to determine whether a jury could rationally have found each element of the crime proven beyond a reasonable doubt." *State v. Athayde*, 2022 ME 41, ¶ 41, 277 A.3d 287 (*quoting State v. Adams*, 2015 ME 30, ¶ 19, 113 A.3d 583).

Here, the jurors were properly instructed that to convict Kailie of murder the State must prove beyond a reasonable doubt:

> First, that the victim named in the indictment is dead. Second, that the defendant caused the victim's death, which means that the victim's death would not have occurred but for the defendant's conduct. And, third, that the defendant acted in one or more of three alternative ways when he or she caused the death, either intentionally or knowingly or by engaging in conduct that manifested a depraved indifference to the value of human life.

[Tr. VII: 121-122]. *See State v. Gaston*, 2021 ME 25, ¶ 25, 250 A.3d 137, 144 (discussing a proper murder instruction). As the prosecutor noted in her closing, there was no dispute that Kim was dead or that whoever killed her acted intentionally or knowingly or by engaging in conduct that manifested a depraved indifference to

the value of human life. [Tr. VII: 18, 15-16]. The dispute arose as to who perpetrated the crime. [*Id*. at 19].

The State's evidence as to whether it was Kailie that committed the murder was woefully inadequate, based on "junk science," and consisted of circumstantial evidence. Taking the testimony of the forensic podiatrist out of the equation, there was no evidence whatsoever that linked Kailie to the murder. The State's case was built upon speculation, unreasonable inferences, and smoke and mirrors:

- Of the approximately 144 items of evidence analyzed at the crime scene, not one directly implicated Kailie. [Tr. II: 22].[15]
- Kailie's DNA was not found at the crime scene.
    - The fingernail scrapings from under Kim's fingernails, most likely caused by scratching her assailants as she fought for her life, [Tr. III: 90-91], contained DNA from six (6) to nine (9) different individuals, all males. [Tr. V: 149-150, 177-179. No notable injuries or scratches were observed on Kailie when she was interviewed days after the murder.
    - Bloodstains on the doorknob contained DNA from unknown donors, all males. [Tr. V: 141-142].

[15] This excludes the footprint left at the crime scene discussed in section I.

- Nothing related to a crime scene was found at Kailie's home when it was searched ─ no blood, no DNA, no murder weapon [Tr. IV: 228-230]─ despite the medical examiner noting that whoever did the stabbing would probably be covered in a "good supply" of blood. [Tr. III: 88-89].
- The State's attempt to show that Kailie was seen in a video on April 18, 2022, outside of Kim's house, and that it was also her seen on a video leaving Kim's house on the morning on the murder on April 21, 2022, by demonstrating that she was wearing the same varsity-style jacket in each video was disproven when compared to the jacket found in her residence. Specifically, the jacket worn by the individual in the April 18th video was black and white with one stripe on the sleeve cuff and one on the bottom trim. [State's Ex. 170A]. The individual leaving Kim's apartment the morning of the murder was wearing a black and white jacket with two stripes on the sleeve cuff and two stripes on the bottom trim. [State's Ex. 170-D]. The jacket found at Kailie's residence had two stripes on the sleeve cuff and only one on the bottom trim. [KB 1-A, KB 1-B].
- Although Kailie was in possession of Kim's bankcard and admittedly took money from Kim's accounts on April 21, 2022, (the day of the murder), this was easily explained by Kailie's testimony that she frequently withdrew cash as a favor for Kim, who didn't have a car of her own. [Tr. VI. 59-62]. Kailie

testified that on April 21, 2022, Kim needed $1,000.00 in cash for a drug deal that she was making on that day, and Kailie was doing her friend a favor by making the ATM withdrawals. [*Id*.]. Tonia Smith, who helped in similar ways by going to the bank on Kim's behalf and giving her a ride into town when needed, testified that she had been given Kim's debit card in the past and also knew her PIN. [Tr. VI: 173-174].

Furthermore, there was significant other evidence that Kailie was at home at the time of the murder:

- Kailie's neighbor, Hope Dana, had an operable surveillance camera that covered the area of the door to Kailie's trailer. If Kailie had killed Kim and walked home along the path between their homes, Kailie would have been detected on the neighbor's video. [State's Ex. 2; State's Ex. 88]. However, she was not seen on video during the time in question. [Tr. IV: 126-130].
- An image of a receipt taken from Kailie's cellphone showed that she made a purchase online from a company called Maelys, an online beauty brand, at 2:59 a.m. [Tr. IV: 231; KB-2]. During this time, Kailie had charges on her bank account at 12:23 a.m., 1:49 a.m., and 4:06 a.m. [Tr. IV: 248-9; Ex. KB-2]. She also received texts between 2:35 a.m. and 2:55 a.m. from Maelys, related to her empty online shopping cart and offering her coupons. [Tr. V: 66-68; Ex. KB-8]. Kailie also sent a text message out around this time. [Tr.

V: 79]. Although this information does not definitively show that Kailie was at her own residence, it seems incredulous that she could be performing these functions while in the middle of a murder and a chaotic crime scene.

Furthermore, even if the forensic podiatrist's testimony was properly allowed in, his opinion that there was a "moderate level of support" that Kailie made the bloody footprint at the crime scene does not provide evidence beyond a reasonable doubt. Dr. Nirenberg struggled to define "moderate" – commonly defined as "average," or "tending toward the mean or average amount or dimension." Merriam Webster, https://www.merriam-webster.com/dictionary/moderate, last visited Mar. 4, 2025. He did ultimately agree that when viewed in conjunction with the highest level of evidence strength on the European scale, that "moderate" was 1000 times less than "very strong evidence," [Tr. II: 235], and that even this opinion was subjective and any two people looking at the same evidence could differ in their responses. [Tr. II: 237]. An "average" likelihood that Kailie made the footprints in question simply does not provide evidence to support a murder conviction beyond a reasonable doubt, not even when combined with the circumstantial evidence presented to the jury.

Thus, this evidence, even when viewed in the light most favorable to the State was insufficient for the jury to rationally determine Kailie's guilt beyond a reasonable doubt, and this Court must reverse the conviction.

VI. THE LOWER COURT FAILED TO PROPERLY CONSIDER THE SENTENCING GOALS AND MITIGATING FACTORS WHEN SENTENCING KAILIE TO FIFTY-FIVE YEARS IN PRISON AND THE CASE MUST BE REMANDED FOR RESENTENCING.

If this Court rejects Kailie's argument that she was wrongfully convicted, it must still remand the case for resentencing because the lower court failed to consider sentencing goals and mitigating factors when sentencing her. When sentencing an individual after a conviction for murder, the lower court must engage in a two-step process:

> **2. Crime of murder.** In imposing a sentence pursuant to section 1603 for the crime of murder, the court shall employ only the first 2 steps of the sentencing process as specified in subsection 1, paragraphs A and B.
>
> **A.** First, the court shall determine a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the individual.
>
> **B.** Second, the court shall determine the maximum term of imprisonment to be imposed by considering all other relevant sentencing factors, both aggravating and mitigating, appropriate to the case. Relevant sentencing factors include, but are not limited to, the character of the individual, the individual's criminal history, the effect of the offense on the victim and the protection of the public interest.

17-A M.R.S. § 1602(1)(A-B) & (2). *See also State v. Lovejoy*, 2024 ME 42, ¶ 25, 315 A.3d 744, 754. In doing so, the sentencing court must consider a number of goals:

> **1. Prevent crime.** Prevent crime through the deterrent effect of sentences, the rehabilitation of persons and the restraint of individuals when required in the interest of public safety;

> **2. Encourage restitution.** Encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served;
> **3. Minimize correctional experiences.** Minimize correctional experiences that serve to promote further criminality;
> **4. Provide notice of nature of sentences that may be imposed.** Give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;
> **5. Eliminate inequalities in sentences.** Eliminate inequalities in sentences that are unrelated to legitimate criminological goals;
> **6. Encourage just individualization of sentences.** Encourage differentiation among persons with a view to a just individualization of sentences;
> **7. Elicit cooperation of individuals through correctional programs.** Promote the development of correctional programs that elicit the cooperation of convicted individuals;
> **8. Permit sentences based on factors of crime committed.** Permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of:
> **A.** The age of the victim, particularly of a victim of an advanced age or of a young age who has a reduced ability to self-protect or who suffers more significant harm due to age;
> **B.** The selection by the person of the victim or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation, gender identity or homelessness of the victim or of the owner or occupant of that property; and
> **C.** The discriminatory motive of the person in making a false public alarm or report or an aggravated false public alarm in violation of section 509; and ***

17-A M.R.S. § 1501. "The court must consider the sentencing goals at each of the steps of the sentencing process and 'articulate which sentencing goals are served by the sentence.'" *State v. Watson*, 2024 ME 24, ¶ 22, 319 A.3d 430, 438–439 (*quoting State v. Reese*, 2010 ME 30, ¶¶ 17, 34, 991 A.2d 806, 8-13-814). The trial court is generally afforded "significant leeway" in determining which factors are

considered and the weight a factor is assigned. *State v. Bentley,* 2021 ME 39, ¶ 11, 254 A.3d 1171. Nevertheless, the lower court must "articulate which sentencing goals are served by the sentence" and must not "disregard significant and relevant sentencing factors." *Watson*, 2024 ME at ¶ 22.

This Court reviews the determination of the basic sentence (1) de novo for misapplication of legal principles, and (2) for an abuse of the court's 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 Kailie's sentence, this Court must 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.

In so doing, this Court should conclude that Kailie's sentence was improper and remand the case pursuant to 15 M.R.S. § 2156 (1-A).

Here, in setting the basic sentence at forty-five (45) years, the sentencing judge discussed depraved indifference for murder but cited only one sentencing goal: to eliminate sentencing inequalities that are unrelated to legitimate criminological goals. [Sent. Tr. 80, 87-88]. He made no attempt whatsoever to address the other factors. Moving to the second-step, the sentencing judge cited three aggravating factors: impact on the victim's family, conscious suffering by the victim, and Kailie's criminal history. [Sent. Tr. 89]. The judge weighed these factors against what he determined was the lone mitigating factor – that Kailie has a minor child. [*Id*. 90]. He did not discuss the considerable support that Kailie had from her family in friends. [*Id*.]. *See State v. Hayden*, 2014 ME 31, ¶ 21, 86 A.3d 1221, 1227 (the nature and existence of family support is a mitigating factor). In addition, the sentencing judge cited no sentencing goals when discussing step two. [*Id*. 88-90]. As in *Watson*, where the sentencing court failed to properly consider the sentencing goals, this Court must remand for sentencing consistent with the sentencing goals. *Watson*, 2024 ME at ¶ 34 ("Because of the importance of the liberty interest at stake in this matter and the need to ensure that due consideration is given to all relevant and proper sentencing factors—and no improper factors—when determining a

sentence, we further conclude that 'the error seriously affects the fairness and integrity or public reputation of judicial proceedings.'")

CONCLUSION

For the foregoing reasons, this Court must reverse the conviction.

Date: March 7, 2025

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CERTIFICATE OF SERVICE

I, Michelle R. King, attorney for Kailie Brackett, hereby certify that on this date I made service of the foregoing Appellant's Brief and Appendix, by email and U.S. mail, to the following counsel:

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