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

LAW COURT DOCKET NO. And-25-364

STATE OF MAINE
Appellee

v.

DUANE D. HANSON
Appellant

ON APPEAL from the Androscoggin County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

(I) The victim told three different people that someone other than defendant assaulted her. The trial court excluded such testimony and did not permit defense counsel to argue that someone else was the assailant. Respectfully, such were fundamental errors, incorrect as a matter of both evidentiary and constitutional law.

(II) As substantive evidence of guilt, the court let the State introduce duplicitous assaults that allegedly occurred as much as four months apart from those charged in the indictment. This variance was prejudicial, as described below.

(III) In imposing a 28-year straight sentence, the court committed errors at each step of the analysis: (A) its basic-sentence analysis is statutorily and constitutionally erroneous because it counted conduct from multiple offenses; (B) it did not even mention obvious, traditionally mitigating evidence, despite defendant offering it as such; and (C) it seemingly required the defendant to establish the propriety of probation, double-counted certain "factors," and effectively elided the goal of rehabilitation.

STATEMENT OF THE CASE

After a nine-day jury trial, defendant was acquitted of a few charges and convicted of numerous offenses spanning two dockets: in ANDCD-CR-2025-01104, domestic violence aggravated assault, 17-A M.R.S. § 208-D(1)(D) (Class B) (Count II); domestic violence aggravated assault, 17-A M.R.S. § 208-D(1)(B) (Class A) (Count III); domestic violence aggravated assault, 17-A M.R.S. § 208-D(1)(A) (Class B) (Count IV); criminal restraint, 17-A M.R.S. § 302(1)(B)(1) (Class D) (Count VI); domestic violence stalking, 17-A M.R.S. § 210-C(1)(B)(1) (Class C) (Count VII); domestic violence criminal threatening, 17-A M.R.S. § 209-A(1)(B)(1) (Class C) (Count VIII); domestic violence assault, 17-A M.R.S. § 207-A(1)(B)(1) (Class C) (Count IX); violating condition of release, 15 M.R.S. § 1092(1)(A) (Class E) (Count X); in ANDCD-CR-2023-03119, domestic violence aggravated assault, 17-A M.R.S. § 208-D(1)(B) (Class A) (Count I) (2023); 17-A M.R.S. § 208-D(1)(D) (Class B) (Count III); domestic violence assault, 17-A M.R.S. § 207-A(1)(B)(1) (Class C) (Counts IV & V); domestic violence criminal threatening, 17-A M.R.S. § 209-A(1)(B)(1) (Class C) (Count VI); domestic violence stalking, 17-A M.R.S. § 210-C(1)(B)(1) (Class C) (Count VII); violating condition of release, 15 M.R.S. § 1092(1)(A) (Class E) (Counts VIII & IX). Thereafter, the Androscoggin County Unified Criminal Docket (Archer, J.) principally imposed a term of 28 years' straight prison. This appeal, consolidated with an M.R. App. P. 20 appeal, follows.

I. Victim was severely injured – but by whom?

Victim's injuries were absolutely horrific. A trauma surgeon described them:

> [S]he had pretty severe injuries. She had basically shattered multiple bones in her face. There was an injury to the eye socket, shattered, like, multiple bones in her face. Her nose was broken. She also had a large pneumothorax, which is basically where your lung collapses.

3Tr. 91-92. Her spleen was lacerated. 3Tr. 92. She had multiple rib fractures. 3Tr. 97. She remained in the hospital for three weeks. 3Tr. 90-91, 99.

The case came down to who caused those injuries.

A. The State contended that defendant assaulted Victim.

Victim testified that she and defendant met in May 2023. 1Tr. 213. They quickly moved in together. 1Tr. 216-17. She and defendant routinely used illicit drugs, "hustl[ing]" to obtain them while unemployed. 1Tr. 154.

1. The charged assaults constellated around dates in August and October.

Around August 21, Victim recalled, defendant "chok[ed] [her] out" to the point of a seizure. 1Tr. 225. He "hit" her multiple times in the face. 1Tr. 226. As a result, she suffered "a sore throat for a long time," and she still cannot sing certain notes. 1Tr. 228.

Another time, around October 12, Victim recalled defendant "beating" her. 1Tr. 235. Defendant held her down at knifepoint and told her he'd "cut

[her] vagina out and make sure [she] lived through it." 1Tr. 235. Defendant "choked" Victim with his hands and an article of clothing. 1Tr. 236. She urinated herself. 1Tr. 241. He held a machete to her head and threatened her. 1Tr. 236. After defendant finally fell asleep, Victim, afraid for her life, left and made the short walk to her brother's home. 1Tr. 238-39. There, she claimed that defendant caused her injuries. 1Tr. 241-42. However, she did not call the police or go to the hospital, because she was "scared." 1Tr. 243.

Several days later, though, Victim began emailing defendant. 2Tr. 6-7. She felt that "he never really wanted to hurt [her]," and she wanted him to know that she "was okay." 2Tr. 7. She "ended up" getting a ride to meet defendant at his grandmother's house. 2Tr. 7. When that happened, Victim's brother felt she had "played" him, obtaining money and clothes, then returning to defendant. 3Tr. 34.

Back with defendant, things resumed much as before. Victim testified, "[I]t seemed we're always hustling for crack cocaine." 2Tr. 8. They returned to their shared camper. 2Tr. 8.

October 28 was defendant's birthday – the reference point for the third set of charges. 1Tr. 204; 2Tr. 8. According to Victim, defendant became mad when she told him they could not have sex. 1Tr. 204-06. He suspected she was cheating on him. 1Tr. 205. Defendant punched Victim; he bit her; he cut her with glass from a bong; he "choked" her to unconsciousness. 1Tr. 206-07. Though she claimed that he struck her with a machete, the jury acquitted defendant of doing so. 1Tr. 207. Interspersed with brief reprieves, these assaults continued for the better part of three days. 1Tr. 207-08.

At one point, Victim's eyes were "seeping blood." 1Tr. 209. They bled for five hours, causing a smell that maddened defendant. 1Tr. 209-10. He made Victim clean up the blood, wiping what she could barely see. 1Tr. 210. The assaults ended on Halloween. 1Tr. 210.

The next morning, defendant took Victim to his grandmother's house. 1Tr. 197. "[E]verbody in his family came in [the bedroom] and sat down on the bed and talked to [her.]" 1Tr. 197. She testified that she told them all who "did it": defendant. 1Tr. 198. Defendant's grandmother, Victim testified, "cried with me about what happened. They knew it was [defendant] that did it." 1Tr. 198.

2. Over objection, the State was permitted to use evidence of other assaults as evidence of guilt.

Just before trial, the State reminded the court that it sought to elicit Victim's testimony that, about two weeks into their relationship – in June – defendant began assaulting her. 1Tr. 115. "[T]here was never time that she did not have a black eye." 1Tr. 115. The State contended that such evidence was close enough to be "on or about" the dates charged in the indictments – *i.e.*, substantive evidence of guilt. 1Tr. 115-16.

Defense counsel objected:

> [W]hen we prepare[d] for trial, we're – we've got two indictments, 19 counts, and they're centered around August 23rd, October 12th, and October 29th. And we were presented with a fair amount of discovery on that. We engaged a private investigator. We tried to interview witnesses.

1Tr. 117. It was too late, "two hours before trial," for the defense to learn that it must also defend against "other assaults, allegations that [defendant] was … always hitting her." 1Tr. 117. Counsel wondered aloud, "[W]hat are we defending against? What are we prepared for?" 1Tr. 117.

When the State began to elicit these alleged prior assaults, the defense objected. 1Tr. 217. The State again retorted that such evidence was admissible substantively because "it's an on or about." 1Tr. 217-19. Defense counsel replied, "June's outside of what I would consider the on-or-about date." 1Tr. 220.

The court ruled for the State: "[I]t is within that … reasonable time limit, on or about gets us there." 1Tr. 220. In other words, the prior assaults were truly duplicitous incidents, rather than 404(b) evidence subject to a limiting instruction. The court told counsel that it considered defendant's objection preserved. 1Tr. 220-21.

Victim proceeded to testify that defendant "first" beat her in mid to late June. 1Tr. 221-22. After one of the first occasions, after she "had gone unconscious and came to," defendant asked Victim whether "if he took it too far, if [Victim] wanted people to be able to find [her] and [her] kids to know what happened or if [Victim just wanted [] to be – just, like, disappear." 1Tr. 221-22. The assaults continued throughout the "whole summer." 1Tr. 222. She described the injuries she sustained in these early assaults – "contusions and lacerations and bruising." 1Tr. 224. She "always had black eyes" throughout her relationship with defendant. 1Tr. 229. Throughout the

course of the summer and fall, defendant strangled Victim to unconsciousness ten times. 1Tr. 240.

The State's closing began by reminding the jury of the events in June 2023:

> Thank you, Your Honor. Duane Hanson strangled Victim until she lost consciousness. When she came to, Duane asked her one question. Do your kids want to know where your body is or do you want to just disappear? That was the end of June of 2023.

8Tr. 47. It reminded the jury, "Victim also testified that Duane Hanson never let her go without a black eye since about the middle of June until November 1st of 2023." 8Tr. 51. And, it recounted, "Victim testified that she met Duane at the end of May of 2023, and the assaults started in June." 8Tr. 52. "Victim testified again that from June to November 1st of 2023, Duane Hanson always hit her in the face, always gave her black eyes, hit her in the forehead because he didn't want her to look good for anyone else." 8Tr. 52.

The court instructed the jury they could base their verdicts on any incident "suggested by the evidence in this case," so long as such was "reasonably near the date" charged. 8Tr. 19-20.

B. Three defense witnesses would have testified that, actually, Victim told them someone else caused her injuries. The court excluded this testimony.

The State moved in limine to exclude "alternative suspect evidence": Victim told four members of defendant's family that two or three females had caused her injuries. A161; 1Tr. 130-49, 159-66. "Victim said she had stolen crack and meth and two girls beat her up. And then, a guy named Casper

[phonetic] hit her in the face with a shovel." 1Tr. 133. Defense counsel proffered along these lines: Three family members – his grandmother, father and brother – would testify to Victim's statements. 5Tr. 95-97.

Having just asked Victim about these statements at its "trial prep meeting" a week prior to the first day of trial, the State reported that Victim would deny ever making them. 1Tr. 132-34. As a result, in the State's view, any testimony by the family members about Victim reporting being "jumped" by others was "all hearsay." 1Tr. 133. Moreover, the State argued, such was "not for impeachment purposes." 1Tr. 134. Rather, it was "collateral evidence." 1Tr. 135-36, 143-44. "They can couch it in impeachment, but it really is alternative suspect because then they can say, '[D]o you really believe that Victim was assaulted by Duane or by th[ese] other two girls and maybe a guy, maybe named Casper, maybe with a shovel?'" 1Tr. 144 (internal quotation marks added for clarity). Such was too "speculative" to be admissible. 1Tr. 144.

Defendant plied two separate theories of admissibility.[1] At a minimum, Victim's statements were admissible for impeachment. 1Tr. 138-39. If admitted only for that purpose, counsel repeatedly offered, the court could appropriately give the jury a limiting instruction. 1Tr. 140; 5Tr. 108.

[1] At various times, defense counsel asserted that defendant was not presenting such as substantive alternative-suspect evidence. *E.g.*, 1Tr. 134-35, 138-40; 5Tr. 99, 105, 108. However, counsel later clarified that defendant had separate theories of admissibility, one of which was substantive alternative-suspect evidence. 7Tr. 75-78, 83. The State and court consistently discerned these separate theories, State even contending that the impeachment-theory was merely a stalking horse for substantive alternative-suspect evidence.

Separately, counsel acknowledged, the defense sought to argue to the jury that "there's a reasonable doubt as to causation" without pointing to "a specific living human being at the time that did this to her." 1Tr. 141. Counsel contended, exclusion would deny defendant "due process of law." 1Tr. 141.

On the first day of trial, the court ruled tentatively: It would permit voir dire of Victim to determine whether she would admit telling the family members that others had "jumped" her. 1Tr. 148. "Defense is going to be stuck with that answer. And if it's an impeachment issue, then it ends there because my tentative ruling is that the Hansons are not going to be able to testify … on that issue because it's collateral." 1Tr. 148. Distinguishing in its mind the potential relevance for impeachment purposes and "an alternative suspect theory or evidence," the court wanted to "take care of [the latter] now":

> [I]f all we have for purposes of support for that – the theory that someone else did it is whatever [Victim] testifies to, then I'm – I'm going to rule on whether the defense can point fingers at unknown suspects, which the [L]aw [C]ourt's been very clear that the defense cannot.

1Tr. 149. The court anticipated that a brief voir dire of Victim "will take care of the impeachment issue and put to rest the alternative suspect issue to the extent it's still alive." 1Tr. 149. Via that voir dire, Victim denied telling the Hansons that anyone other than defendant caused her injuries. 1Tr. 155-56.

The court ruled it would permit the defense to inquire of Victim only *whether* she ever told anyone that persons other than defendant assaulted her. 1Tr. 162-63. It would not permit inquiry, in contrast, of the Hansons about Victim's contrary statements to them, believing such "collateral." 1Tr. 165-66. It reiterated its preliminary ruling about alternative suspect evidence: "[T]he offer of proof is insufficient under a huge line of cases." 1Tr. 165.

During her trial testimony, Victim again denied telling others that someone other than defendant had assaulted her. 2Tr. 39-40. However, Victim's daughter later testified that, between June and November, Victim explained her injuries by claiming that she had been "getting into fights with women," and one time reported "getting in a fight with people at the trailer park in Wilton." 2Tr. 57-58.

Just prior to the defense case, defense counsel again argued that the statements were relevant "for impeachment purposes." 5Tr. 98. Exclusion of such testimony, counsel stated, "would be a violation of my client's due process rights." 5Tr. 98.

The State countered that such was really "alternative suspect evidence," not impeachment-evidence. 5Tr. 103. "It is not a due process violation, as *Daly*[2] and *Mitchell*[3] are very clear." 5Tr. 103 (emphasis added to case-names). "[A]t its core, the reason they're impeaching her is to say,

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2 *State v. Daly*, 2021 ME 37, 254 A.3d 426.

3 *State v. Mitchell*, 2010 ME 73, 4 A.3d 478.

yep, it's really two guys and the girl that did it, and then maybe Casper, who then maybe hit her with a shovel." 5Tr. 104. The State continued to argue that the proposed testimony was inadmissible pursuant to "the two-step process" for "alternative suspect evidence." 5Tr. 104.

The court adopted the State's position, telling defense counsel, "[Y]ou're essentially raising an alternative suspect issue by inserting this information." 5Tr. 108. As the State saw it, "What they're trying to do is bend the impeachment evidence to get [i]n alternative suspect evidence." 5Tr. 110.

Again, the court ruled, reaffirming its prior, tentative ruling:

> I don't think this is an easy issue, to be honest with you. I think both sides – I understand where you're both coming from, but as I said to [defense counsel], I'm still stuck on the fact that, in my mind, this is – this testimony that – the specific testimony that you're seeking to elicit is only relevant and noncollateral if this is an alternative suspect case. And this is not an alternative suspect case. So I am back where I started and my prior ruling stands. The proposed elicited testimony is not admissible and will be excluded.

5Tr. 112.

While presenting the defense case, counsel twice received leave to lead his witnesses so they would not violate the court's order. 5Tr. 116-18, 127. Counsel renewed his objection, noting that his "preference" would be to elicit "what Victim said." 5Tr. 127. Given the court's rulings, the defense was able to

elicit only that the Hansons observed Victim's injuries, not what she told them about their causation. *E.g.*, 5Tr. 142-43.

Before closing arguments, the defense moved "to allow an alternative suspect case to preserve for the record any rulings on that so it's clear [they] haven't waived that argument for appeal." 7Tr. 75. The prosecutor acknowledged that the State "always" and "[a]ll along" understood defendant to be seeking alternative suspect evidence, rather than mere impeachment. 5Tr. 78-79.

Defense counsel added a final salvo, arguing that to the extent the court's evidentiary rulings were correct as a matter of state law, they nonetheless violated defendant's constitutional right to present his defense. 5Tr. 83.

The court repeated its prior rulings. 7Tr. 84. It added more detail, included at pages A100 through A103 of the appendix, and informing defense counsel: "I think it's preserved now, finally, and we don't need to address it again. It is preserved from this point forward and can be argued to the [L]aw [C]ourt." 7Tr. 86. Counsel represented that, had they been permitted to do so, they would have vigorously argued that someone else assaulted Victim. 7Tr. 75; 8Tr. 91-92.

C. There was some corroboration for the notion that someone other than defendant assaulted Victim.

Defendant's friend testified that she and defendant were together elsewhere in Maine during the last days of October into early November. 5Tr. 65-69, 75-77. The Hansons, too, remembered that defendant was on

the road "with a girl" for a prolonged period around that time. 5Tr. 139-40, 158.

Then there is Victim's daughter's testimony that "between June and November 1st of 2023" Victim had ascribed her injuries to "getting in[to] fights with women," mentioning a specific instance of a fight "with people at the trailer park in Wilton." 2Tr. 57-58. Of course, Victim's lifestyle – her addiction and lack of steady income – was not contested. *See* 3Tr. 27 (Victim's brother disapproves of "her lifestyle and her use of drugs"). She "hustled" for drugs. 1Tr. 154; 2Tr. 8.

A forensic pathologist testified that the wound to Victim's forehead was "very unlikely," or "pretty close to impossible," to have resulted from a fist-punch, as Victim contended. 7Tr. 11-12, 39-40. Rather, it was likely struck by "a significant blow from an object" – perhaps a shovel like that wielded by the drug-dealer. 7Tr. 12-13; *see* 7Tr. 41-42 (perhaps inflicted with an ax). Nor was Victim's story of how she sustained her splenic injury "medically likely." 7Tr. 14-15, 47.

Victim took nine months after defendant's arrest to allege that defendant was responsible. 3Tr. 154. The State was sufficiently concerned about that delay such as to seek to present "pseudo expert" testimony about how victims of domestic violence sometimes do not readily report their abusers. 3Tr. 128-56.

II. The court imposed a straight twenty-eight-year sentence.

Defendant details the sentencing facts below, for the sake of efficiency.

ISSUES PRESENTED FOR REVIEW

I. Did the court both abuse its discretion and commit constitutional error by excluding three witnesses' testimony that someone other than defendant assaulted her?

II. Did the court commit prejudicial error by permitting the State to obtain convictions based on uncharged conduct that allegedly occurred as much as four months apart from the charged offenses?

III. At each step of the sentencing analysis, did the court commit legal error or misapply principle?

ARGUMENT

First Assignment of Error

I. The court both abused its discretion and committed constitutional error by excluding three witnesses' testimony that someone other than defendant assaulted her.

A. Preservation and standard of review

The arguments – evidentiary, precedential and constitutional – were preserved by the exchanges detailed at pages 15 through 20, above, and reproduced in the Appendix at A37 through A103. The court itself noted it did not want to hear more from defendant, deeming his arguments preserved. 7Tr. 86; A103. Because this record adequately apprised the court of the action defendant wished it would take (admit the Hansons' statements about what Victim said) and the grounds for doing so (such were admissible for impeachment and as substantive alternative-suspect evidence), this Court will treat defendant's arguments herein as preserved. M.R. U. Crim. P. 51; 15 M.R.S. § 2117; *see also* M.R. Evid. 103(a).

Two standards of review are applicable. As to the piecemeal evidentiary rulings, review is for abuse of discretion. *State v. Cruthirds*, 2014 ME 86, ¶ 22, 96 A.3d 80. The larger question of whether defendant's Fourteenth- and Sixth-Amendment rights – *e.g.*, to present a defense, compulsory process and confrontation – were violated by the court's rulings is subject to de novo review. *State v. Mitchell*, 2010 ME 73, ¶ 23, 4 A.3d 478.

B. Analysis

Respectfully, this case is a prime example of just how distorted Maine's "alternative-suspect" law has become. Here, it led a trial court to exclude patently admissible testimony. Because Maine's "alternative-suspect" analysis is unnecessary and prone to misapplication, defendant invites this Court to abandon it in favor of unadorned application of the rules of evidence, including M.R. Evid. 403.

1. The court's rulings violated Maine evidentiary law.

Under the Rules of Evidence, Victim's statements were admissible because (i) they were probative of others' guilt (and, therefore, doubts about defendant's guilt); (ii) they were not hearsay, even if offered substantively; and (iii) they were unquestionably suited to impeach Victim's account of things.

i. Victims statements are sufficiently probative, neither speculative nor conjectural.

Defendant begins with the court's patent error: Certainly, a victim's statement that those other than the defendant assaulted her is not "speculative and conjectural." *Cf. State v. Jaime*, 2015 ME 22, ¶ 33, 111 A.3d 1050. Imagine a contrary holding: A victim's statement that defendant assaulted her, if recanted, is too "speculative" to be admitted, let alone support a conviction. This is counter to established law. "[O]ut-of-court statements by victims can be crucial evidence, either substantively or for impeachment purposes, in domestic violence cases." *State v. Kimball*, 2015 ME 67, ¶ 12, 117 A.3d 585. It is "not uncommon in prosecutions related to domestic violence, in which some victims refuse to testify, claim lack of

memory of traumatic events, become difficult to contact, **recant** allegations, or express a desire not to 'press' charges." *Id.* ¶ 11 (emphasis added) (collecting cases for "the pervasiveness of this issue").

The court's ruling would terminate that practice, or else enshrine two separate rules of evidence: one for the prosecution and a less accommodating one for the defense. In a he-said/she-said case, *of course* it is of central importance that she said he didn't do it. Such is a unified statement of opportunity, identity, causation and intent – *of someone else*. In that way, it is no different than a confession since disavowed.[4]

ii. Victim's statements are not hearsay.

Instead of probativeness, rather, the question of admissibility of a victim's prior statements about who assaulted her typically centers upon a hearsay-analysis. *Cf. id* ¶ 12. Defendant needs discuss only one exception.

As a matter of law, the statements are not even hearsay. They are Victim's prior statements identifying someone – *i.e.*, her female assailants and the drug-dealer who hit her with a shovel – whom she "perceived earlier." M.R. Evid. 801(d)(1)(C).[5] Just two points need clarification.

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[4] Compare the corpus delicti rule. A confession – even one not adopted at trial – may be sufficient to carry the State's burden beyond a reasonable doubt so long as there is merely anything else to suggest "a substantial belief" that "a crime was committed." *State v. Poulin*, 2016 ME 40, ¶ 8, 134 A.3d 886. Yet, the position of the State and court below suggests that such a confession is "speculative" and "conjectural."

[5] M.R. Evid. 801: (d) Statements that are not hearsay. A statement that meets one of the following conditions is not hearsay: (1) A declarant-witness's prior statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement ... (C) [i]dentifies a person as someone the declarant perceived earlier.

First, Rule 801(d)(1)(C) is availing even when "the person who testifies to the statement of identification is not the person who uttered it, so long as the latter also testifies and is available for cross-examination." *United States v. Elemy*, 656 F.2d 507, 508-09 (9th Cir. 1981) (collecting cases). Thus, the Hansons could offer non-hearsay testimony about whomever Victim previously identified, because Victim was later available to testify. Victims statements, of course, are admissible "regardless of whether her trial testimony is consistent or inconsistent with her recorded statement." *United States v. Calhoun*, 2023 U.S. Dist. LEXIS 32070, ** 2-3, 2023 WL 2244674, * 1 (E.D. Mich. 2023); *cf. United States v. Brink*, 39 F.3d 419, 424-26 (3d Cir. 1994), quoting *Weinstein's Federal Evidence*, ¶ 801(d)(1)(C)[01], at 801–222 (1993) ("'If at trial the eyewitness fails to remember or denies that he made the identification, the previous statements of the eyewitness can be proved by the testimony of a person to whom the statement was made, and the statement can be given substantive effect.'").

Second, "identifies" need not entail some formal process of identification such as lineup or photo display. *See Commonwealth v. Harrison*, 177 N.E.3d 190, 202-03 (Mass. Ct. App. 2021) (shooting victim's hospital-bed identification of "Rev" as man who shot him is not hearsay per 801(d)(1)(C)); *Calhoun*, 2023 U.S. Dist. LEXIS 32070, ** 2-3, 2023 WL 2244674, * 1 (9-1-1 caller's statements identifying shooter admissible). Indeed, 801(d)(1)(C) is meant to "minimiz[e] the barriers to admission of more contemporaneous identification." *United States v. Owens*, 484 U.S. 554, 562 (1998). Doing so "prevents cases falling through because the

witness can no longer recall the identity of the person he saw commit the crime." *Id.* (quotation marks and citation omitted). Simply, Victim's statements are not hearsay; they were admissible as substantive evidence.[6]

iii. Victim's statements are also admissible for impeachment.

Victim said she told the Hansons – and that they all "knew" – that defendant assaulted her. Yet, the Hansons were ready to testify that she was dead-wrong: She told them that two females and a drug-dealer assaulted her. This is textbook impeachment-by-contradiction, and, respectfully, the court's conclusion otherwise is extraordinary. *Cf. State v. Bedrin*, 634 A.2d 1290, 1292 (Me. 1991) ("[W]e have recognized that a witness may be impeached by evidence that she made an earlier, out-of-court statement inconsistent with her trial testimony.").

Defendant sympathizes with the trial court, as what seems to have tripped it up, respectfully, is this Court's "alternative-suspect" case-law, not elementary principles of impeachment. It excluded patently admissible impeachment evidence out of a concern that it would violate this Court's decisional law about "alternative suspects." It did so notwithstanding

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[6] Were it necessary, defendant could point to at least another exemption: M.R. Evid. 803(1). *See Commonwealth v. Marshall*, 749 N.E.2d 147, 153-54 (Mass. 2001) (statement of visibly upset victim who arrived at others' home two hours after assault, informing others of identity of assailant, is admissible as excited utterance).

Because the court ruled based on the "speculative" nature, rather than hearsay, at the very least, remand is appropriate for the "the necessarily fact-specific initial determination as to whether the statements at issue are" excited utterances. *State v. Gleason*, 2025 ME 52, ¶ 24, 339 A.3d 774.

defendant's repeated invitations to give limiting instructions. This demonstrates that courts have difficulty applying this Court's case-law, and a better course would be to simply evaluate "alternative-suspect" evidence as any other type of evidence: subject to the rules of evidence and nothing more.

Defendant now turns to why, even were his foregoing analysis entirely incorrect, the court nonetheless violated his federal rights.

2. The court's rulings violated defendant's federal constitutional right to a fair trial.

i. Constitutional principles: *Chambers*, *Washington* and *Davis et al.*

Two or three constitutional rights combine under the rubric of the sort of "fair trial" at issue in our case. In one vein are cases preserving the rights to present a defense and to call witnesses – *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Washington v. Texas*, 388 U.S. 14 (1967). A related tree of law shares roots in *Davis v. Alaska*, 415 U.S. 308 (1974) and similar decisions concerning the right to confront witnesses.

The right to present a defense:

Our case is not far off from *Chambers*. Mr. Chambers was arrested for the shooting-death of a police officer. 410 U.S. at 285-87. However, one Gable McDonald later confessed to Chambers' lawyers that it was he – McDonald – who shot the officer. *Id*. at 287-88. On three previous occasions, apparently, McDonald admitted to friends that he, not Chambers, was the shooter. After his arrest, though, McDonald withdrew his confessions. *Id*. at 288.

At the trial, Chambers attempted to elicit McDonald's confessions to the three friends. *Id*. at 292. But each of their proffered testimony about those confessions was excluded as hearsay, violative of the state's evidence rules. *Id*. at 292-93. And, while the Mississippi trial court admitted McDonald's confession to Chambers' lawyers, it applied the "voucher rule," denying Chambers leave to "challenge directly McDonald's renunciation of [that] prior confession." *Id*. at 291-92.

The Court reversed Chambers' conviction, determining that the state-court evidentiary rulings denied him two "elements of a fair trial": the ability to present witnesses – *i.e.*, those to whom McDonald had confessed – and the ability to cross-examine McDonald. *Id*. at 294-95. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." And the "diminution" of Chambers' ability "to 'sift'" [McDonald's] conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief," "call[ed] into question the ultimate 'integrity of the fact-finding process.'" *Id*. at 295, quoting *Berger v. California*, 393 U.S. 314, 315 (1969). Consequently, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*. at 302. The combined limitations on Chambers' evidentiary presentation "denied him a trial in accord with traditional and fundamental standards of due process." *Id2*.

Our case bears remarkable similarities. Defendant, of course, could not "'sift'" Victims "conscience" about her recantation of her statements that

other people assaulted her without first obtaining leave to introduce those statements – which was denied. As to the confrontation right, therefore, ours is actually worse than *Chambers*. In *Chambers*, at least the jury understood that McDonald had previously confessed before recanting. Our jury did not even know of Victim's prior denials that defendant assaulted her.

As to presentation of a defense, Victim's statements were obviously of central importance to defendant. *Cf*. *id*. at 297 ("To the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers."). Moreover, as in *Chambers*, there were "persuasive assurances of trustworthiness" and "considerable assurance[s]" of reliability:

- Like those in *Chambers*, Victims statements came "shortly after the" crime. *Id*. at 300.
- Like in *Chambers*, there existed "other evidence" that corroborated the confessions. *Id*. For example, the forensic pathologist testified that the wound to Victim's forehead was "very unlikely," or "pretty close to impossible," to have resulted from a fist-punch. 7Tr. 11-12, 39-40. Rather, the wound was likely struck by "a significant blow from an object" – perhaps a shovel such as that wielded by the drug-dealer. 7Tr. 12-13; *see* 7Tr. 41-42 (perhaps inflicted with an ax). And Victim's daughter's testimony that Victim had repeatedly told her that she had been "getting into fights with women," 2Tr. 57-58, further corroborates Victim's statements to the Hansons. Victims drug use and simultaneous difficulties paying to feed that addiction were not in dispute.

- Like in *Chambers*, here, the "sheer number" of witnesses prepared to testify about Victim's statements – three of them – "provided additional corroboration for each." *Chambers*, 410 U.S. at 300.
- As in *Chambers*, though *arguendo* (but see *supra*) not satisfying the hearsay rules, Victim's statements were "unquestionably against interest." *Id.* at 300-01. That is, Victim's statements "tended to … render invalid" any "claim" that she might raise against defendant, suggesting that she would have said them only if she "believed [them] to be true." *See* M.R. Evid. 804(b)(3)(A). Some quantum of reliability is inherent in the Rules' recognition of this exception.
- And, as in *Chambers*, "if there was any question about the truthfulness of the" the Hansons' accounts of Victim's statements, the State would have been free to inquire of Victim (and the Hansons, for that matter) about their veracity, such that the witnesses' "demeanor and responses [could be] weighed by the jury." *Id.* at 300-01. Instead, the judge weighed credibility.

The right to confront witnesses:

The right to confront includes the right to confront witnesses with evidence of their incredibility. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). "A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness." *United States v. Hale*, 422 U.S. 171, 176 (1975). An opportunity for such confrontation is constitutionally

mandated regardless of "the State's own interest as a matter of its own policy in the administration of criminal justice." *Davis*, 415 U.S. at 319.

ii. Constitutional principles in practice

That our case falls within the uprights of *Chambers* is further supported by other courts. Take, for example, the First Circuit's decision in *Pettijohn v. Hall*, 599 F.2d 476 (1st Cir. 1979). *Pettijohn* was convicted in Massachusetts state court of robbery, based "solely" on the victim's testimony. 599 F.2d at 477. However, another witness had seen the incident from a nearby window. *Id.* When shown a photo array, the eyewitness fingered someone other than Pettijohn. *Id.* The attending police officer remarked, "No, it's not." *Id.* "Not surprisingly, [the eyewitness] then selected the remaining photograph which depicted Pettijohn and stated, 'It's definitely that one.'" *Id.* at 478. "The police officer confirmed this second choice with the words, 'That's him.'" *Id.*

At trial, the defense wanted to introduce the eyewitness' identification of another man. *Id.* The trial court ruled that the prior identification was "irrelevant and inadmissible for the purpose of impeaching [the victim's] identification." *Id.* Defense counsel clarified that he sought to introduce the initial identification, not just for impeachment, but for substantive evidence. *Id.* Again, the defense was rebuffed, the court ruling that such was "'not material and not relevant.'" *Id.*

By the time the case reached the First Circuit, the issue was whether the state court's rulings violated Pettijohn's federal constitutional rights to

present a defense and call witnesses in service of that defense. *Id.* at 480-81.[7] The court began by acknowledging:

> Evidence that someone other than the defendant was identified as the criminal is not only probative but critical to the issue of the defendant's guilt. The prior identification could not have been more relevant and material to Pettijohn's defense; he could support his version of the event in no other way.

Id. at 480 (internal citations omitted). The initial identification "was clearly relevant for the purpose of direct testimony to establish a defense. Pettijohn desired to establish a sound defense by introducing evidence supporting an alternative rendition of the facts. [The eyewitness'] testimony concerning his initial identification was critically relevant for this task." *Id.*

The court addressed Supreme Court case-law: "If the Supreme Court cases of *Washington v. Texas* and *Chambers v. Mississippi* ... mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury." *Id.* at 481. The Commonwealth of Massachusetts failed to establish any "sufficiently compelling purpose" that would justify its application of the rules of evidence to exclude such important evidence. *Id.* at 481. Exclusion was also hypocritical, given common prosecutorial tactics: "If a recanted identification is sufficiently reliable for prosecutorial use, the

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[7] The issue of impeachment was not before the First Circuit. The eyewitness' identifications – both initial and "corrected" – had been suppressed as the product of suggestive police tactics. *Pettijohn*, 599 F.2d at 478. Thus, unlike our case, the impeachment of the declarant (the eyewitness) was not possible, let alone necessary, given the suppression.

state cannot claim that it is too unreliable when offered by the defendant." *Id.* ("A core purpose of the [S]ixth [A]mendment is that the defendant has the same rights to introduce evidence as the prosecution.").

Other courts have overridden their jurisdictions' hearsay rules when necessary to ensure the right to a fair trial. For example, a Florida appellate court ruled that the exclusion of a third-party's confession – since withdrawn – to the murder for which the defendant was on trial constituted constitutional error, even though correct as a matter of evidentiary rules. *Curtis v. State*, 876 So. 2d 13 (Fla. 1st D.C.A. 2004). The declarant's confessional statement was certainly against his interest, as in our case, but, also as in our case, the declarant was available to testify, negating Florida's version of our Rule 804. *Curtis*, 876 So.2d at 16, 18-19. The court admonished that, above the rules of evidence, "courts must also consider the constitutional effect of excluding evidence in a criminal trial." *Id.* at 19.

After discussing *Chambers* and other cases such as *Davis v. Alaska*, 415 U.S. 308 (1974), the Florida court opined that jurors should be allowed to hear and evaluate a confession, so long as there is other evidence to corroborate it. *Id.* at 19-23. After all, it makes no sense to "say that a confession is neutralized merely because it was recanted." *Id.* at 23. Exclusion of a confession in such circumstances "denie[s] the defendant his right to a fair trial." *Id.* at 23.

Frankly, what distinguishes our case from those like *Pettijohn* and *Curtis* only further erodes the trial court's ruling. First and succinctly, the lower court's ruling here *did* violate even the rules of evidence, unlike the

cases highlighted above. Surely, failure to abide by established rules is itself a blow to due process. Second, unlike the already-discussed cases in which the sole, yet significant, relevance was as substantive evidence of someone else's criminal responsibility, here the excluded evidence was doubly relevant. Victim's statements were highly relevant to impeach her testimony. In addition to infringing on defendant's right to present a substantive defense, the court also violated the Confrontation Clause.

Illustrative of the confrontation deprivation is *Blackston v. Rapelje*, 780 F.3d 340 (6th Cir. 2015). There, two witnesses testified to the effect that the defendant was guilty of murder. 780 F.3d at 344-46. However, the trial judge granted a new trial because of an error, the details of which are unimportant to us. *Id.* at 346. Before the second trial, the two witnesses recanted their testimony from the first trial. *Id.* Nonetheless, the prosecution again called them both as witnesses, and both were eventually deemed unavailable because of their refusal to answer the prosecution's questions. *Id.* at 346-47. As a result of their unavailability, the trial court permitted the prosecution to read into evidence the witnesses' testimony from the first trial. *Id.* at 347.

The defense thereafter sought to introduce the witnesses' prior statements disavowing that first-trial testimony. *Id.* at 347. But the trial court ruled those statements inadmissible pursuant to the state rules of evidence – hearsay and Rule 403. *Id.* at 347. The trial judge deemed the recantations "'unfairly prejudicial,' 'self-serving,' and 'suspect.'" *Id.* at 347.

The Sixth Circuit recounted clearly established federal law: "One of the important objects of the right of confrontation is to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." *Id.* at 349 (cleaned up), quoting *Berger*, 393 U.S. at 315. "A witness's own inconsistent statements are among these 'prototypical forms of bias'" subject to confrontation "because they undoubtedly provide valuable aid to the jury in assessing witnesses' credibility." *Blackston*, 780 F.3d at 349 (cleaned up), quoting *Harris v. New York*, 401 U.S. 222, 225 (1971). Such created for defendants a "clearly established right to confront witnesses with their own inconsistent statements and other 'prototypical forms of bias.'" *Id.* at 353 (cleaned up), quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). A defendant retains a Sixth-Amendment right to offer evidence of a witness' own words denying that the defendant committed the crime. *Id.* at 353-54.

iii. Application to our case

The State does not have interests justifying exclusion. It would have had ample opportunity to cross-examine the Hansons; it could have inquired of Victim in refutation of their testimony; it was free to develop other aspects of its case. In an eight-day trial, eliciting Victim's statements would have been but a drop in the bucket, time-wise. Nothing here justifies a ruling that eliminates *both* defendant's primary defense *and* his right to confront the complaining witness about her profoundly inconsistent statements.

The jury should have been able to decide whether Victim or the Hansons were more credible. Without hearing from the Hansons, though, jurors were never tasked with reconciling their competing statements. Defendant was

unable to present his defense – neither evidence of it nor argument about it. Because no firm interests, let alone compelling ones, *cf. Pettijohn*, 599 F.2d at 481, justify these impositions, defendant was denied a fair trial.

3. Neither the evidentiary nor the constitutional error is harmless beyond a reasonable doubt.

Because the errors here affected defendant's constitutional rights, the State must prove harmlessness beyond a reasonable doubt. *Cf. State v. Judkins*, 2024 ME 45, ¶ 22, 319 A.3d 443. Its record falls short.

Unquestionably, the exclusion of Victim's statements is not harmless as to everything she alleged to have occurred in late October and early November 2023. That the State's evidence was not overwhelming is demonstrated by the two acquittals in that case – Counts I and V. Clearly, those would not have occurred had the jury credited everything Victim claimed.

Nor is the erroneous exclusion harmless regarding the other counts alleged to have occurred in early October and August. Naturally, had the jury found reason to doubt Victim's account of the late-October incident, in light of her initial statements about what happened, they would likely harbor significant questions about her credibility regarding earlier allegations. It is also noteworthy that the State's capacious conception of "on or about" (*i.e.*, that events in June and July suffice as bases for the October charges, 1Tr. 217-21) contemplates jurors basing their verdicts on other than the dates charged by the indictments. Adopting the State's and court's reasoning, for all we know, the jury may have based convictions on the late-October allegations.

Moreover, consider the impact on sentencing. The court's basic-sentence analysis was ostensibly driven by the late-October events. It heavily aggravated defendant's sentence in light of what it viewed to be defendant's "incredible testimony" that was "necessarily rejected by the jury." STr. 55-56. But what if the jury got it wrong because the court erroneously excluded Victims statements? No such aggravation would be available, in that scenario. This Court should remand and allow a fully apprised jury, not a judge, to determine credibility and reliability. *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.").

Second Assignment of Error

II. The court committed prejudicial error by permitting the State to obtain convictions based on uncharged conduct alleged to have occurred as much as four months apart from the charged offenses.

A. Preservation and standard of review

This issue is preserved by defendant's objections, which are documented at pages 13 through 15 of this brief and at A104 through A109 of the Appendix. This Court's review is therefore de novo. *United States v. Prieto*, 812 F.3d 6, 11 (1st Cir. 2016).

B. Analysis

Our issue is one for which this Court has previously offered little guidance. It sits across two doctrines that are, in our circumstances, the same: duplicity and material variance.

"'Duplicity' is the joining in a single count of two or more distinct and separate offenses." *Wharton's Criminal Procedure*, § 5:12 (14th ed., May 2025 update). "If a crime is defined by the performance of one act, the count that alleges the crime must allege only that act." 54 Am. Jur. 2d Monopolies and Restraints of Trade § 476 (Nov. 2025 update). In many jurisdictions, it is not only charging instruments that might be duplicitous. Rather, even facially valid indictments are

> nonetheless duplicitous where the evidence presented to the grand jury or at trial makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict.

People v. Black, 65 A.D.3d 811 (N.Y. 3d App. Div. 2009) (quotation marks omitted).

In other jurisdictions, when the evidence offered in support of a single charge adduces numerous possible incidences of sufficient such conduct, it is referred to as variance. The First Circuit, for example, notes that both doctrines are "implicate[d]" when the prosecution offers evidence of a series of crimes in surplus of the charges. *United States v. Trainor*, 477 F.3d 24, 31 (1st Cir. 2007) (Lipez, J.). The two doctrines "draw[] from the same well." *Prieto*, 812 F.3d at 12 (Kayatta, J.). Whatever this Court chooses to call the problem, the analysis is the same: Is there a factual variance between the charging instrument and the trial evidence – by duplicity or otherwise – and, if so, has it prejudiced the defendant? *Id.*

The first inquiry is particularly simple in our case. Both the State and the court affirmed that the very reason for admitting the June/July/"whole summer" assaults was because they sufficed as "on or about" evidence. In other words, the jury was permitted to base their convictions on those incidents, as the State requested and the court permitted.

As for prejudice, there are numerous potential harms to scrutinize.

Notice of the charges is one such evil at issue in our case. *Cf. United States v. Pontz*, 132 F.4th 10, 27 (1st Cir. 2025). Defense counsel represented that the defense believed that the events charged were those alleged to have occurred on August 21, October 12 and October 29 and days immediately thereafter. 1Tr. 117. Counsel stated that the defense was not prepared to defend against the other dates. 1Tr. 117. When attempting to

identify alibis or find documentary evidence to disprove allegations, a two-to-four-month variance sprung at trial provides insufficient notice. This is both a due-process and Sixth-Amendment violation. *See Russell v. United States*, 369 U.S. 749, 760-71 (1962) (defendant entitled to knowledge of what "must be prepared to meet").

Variances, too, undermine the grand-jury right. *Cf. Stirone v. United States*, 361 U.S. 212, 217-18 (1960) (Variance "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury."). Were the grand jurors instructed to agree on one incident per charge, and what are the chances that the incidents and charges happen to align perfectly with those later considered by the petit jurors?

The next form of prejudice is the evidentiary ruling that would not have otherwise occurred. *Cf.* LaFave *et al.*, *Criminal Procedure* § 19.3(d) (Nov. 2025 update). The June/July/"whole summer" allegations were admitted as substantive evidence of guilt sans any limitation. That would not have occurred but for the State's variant evidence. Indeed, the State's alternative arguments for admissibility – "identity of the parties" and to establish a "domestic violence relationship" – are dependent on the propensity inference. *See* M.R. Evid. 404(b). Jurors were free to use this evidence for whatever purpose they chose – again, because of the court's error.

Another prejudice incurred is obfuscation "of a basis for appropriate sentencing" – *i.e.*, what did defendant do? *Cf. United States v. Shorter*, 809 F.2d 54, 58 n. 1 (D.C. Cir. 1987). Our statutory sentencing scheme is premised on precise identification of the nature of "the offense." 17-A M.R.S.

§ 1602(1)(A). Yet we routinely tolerate verdicts that make identification of "the offense" utter guesswork. Here, we don't even know whether "the offense" is in June, August, October or some other time. Given the court's struggles at sentencing, discussed below, the prejudice to defendant is evident. It penalized defendant for "the offense" as it viewed it, not as necessarily found by the jury.

Defendant discusses together two further interrelated forms of prejudice: limitation of review on appeal and a lack of double-jeopardy protection. LaFave *et al.*, *supra*, § 19.3(d). Defendant was acquitted of several offenses. Nobody can say which incidents align with the acquittals, or, for that matter, which align with the guilty verdicts. Any guesses are just that. Should his convictions be overturned – and he certainly believes they should be – what is the State's ability to retry him? When a jury "renders a guilty verdict that is later overturned," duplicity forces upon a defendant "a second trial that exposes him to double jeopardy insofar as it includes an offense on which the original jury would have acquitted if required to render separate verdicts." *Id.* An evidentiary ruling so perilous as to create this conundrum is error, or else it will repeat.

Relatedly, consider the first assignment of error, predicated on victim's statements about who assaulted her in late October. The duplicitous variance permitted any date – June, July, the "whole summer" – to establish the late-October convictions. A corollary: The late-October allegations, too, then, were "on or about" enough to serve as the basis for the August and early

October charges. The whole table is upset, leaving no certainty about what conduct defendant has not already been acquitted of.[8]

Defendant has been convicted of who knows what. He lacked notice that he would need to defend against a sizeable clump of the spaghetti on the wall. He was subjected to propensity evidence that the court permitted jurors to use for any purpose, including to establish his guilt. He lacks ability to specify precisely what he was acquitted of. These errors, together, are not harmless beyond a reasonable doubt. *Cf. Russell*, 369 U.S. at 760-71 (lack of notice is constitutional error); *see also Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007) (granting state convict habeas relief for right-to-notice claim).

[8] A final form of prejudice is possible in theory: conviction based on less than a unanimous verdict. Defendant concedes that the jury was properly instructed about the requirement of specific-unanimity and, therefore, he does not contend prejudice of this sort is likely on our facts.

Third Assignment of Error

III. At each step of the sentencing analysis, the court committed legal error or misapplied principle.

A. Preservation and standard of review

As to the errors in the court's basic-sentence analysis, defendant's contentions are preserved by virtue of his *Motion to Correct Sentence*, included in the appendix at A178, and his arguments at the hearing on that motion. A110. Defendant preserved his arguments as to matters of principle by requesting that the court reduce his sentence because his background is mitigating, and by requesting probation and suspension of part of his carceral sentence. A198.

Therefore, this Court will evaluate the statutory and constitutional claims de novo. *State v. Murray-Burns*, 2023 ME 21, ¶ 18, 290 A.3d 542. According to case-law, review of a maximum and final sentence is for abuse of discretion. *State v. Plummer*, 2020 ME 143, ¶ 10, 243 A.3d 1184. Defendant, however, is aware of no principled reason why maximum and final sentences are reviewed only by such a deferential standard while basic sentences are reviewed more fulsomely. *Id.* (basic sentence reviewed de novo for misapplication of principle). Given the Legislature's expansive remit to this Court, *see* 15 M.R.S. §§ 2154 & 2155, defendant requests de novo review, so as to better unify objective sentencing criteria.

B. Analysis

At step one, the court selected a basic sentence of 25-30 years' imprisonment. STr. 52-54. It then found that the aggravating circumstances

outweighed the sole mitigator it identified, warranting a 28-year maximum sentence. STr. 54-56. For a final sentence, the court determined no probation was appropriate, so it imposed the 28—year term straight. STr. 57-58.

Each of these determinations is marred by error or misapplication of principle.

1. The court misapplied principle and violated statutory and federal double-jeopardy law at step one.

The court's lead-count sentencing analysis went awry at step. By statute, a basic-sentence calculation is confined to evaluation of "the nature and seriousness of **the offense**…." 17-A M.R.S. § 1602(1)(A) (emphasis added). This court's case-law reiterates these parameters: "Factors extrinsic to the particular nature and seriousness of the specific offense at issue … are generally[9] not relevant considerations at this first step in the analysis…." *State v. Downs*, 2007 ME 41, ¶ 12, 916 A.2d 210. The court did not so limit itself.

The lead count, Count III in ANDCD-CR-2025-01104, resulted in a conviction for domestic violence aggravated assault. *See* 17-A M.R.S. § 208-D(1)(B). "The offense" of domestic violence aggravated assault requires proof of "serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ." *Id.*,

[9] Respectfully, to the extent this sentence of *Downs* is permissive – *e.g.*, "*generally* not relevant" – it is unlawful in light of the plain language of § 1602(1)(A).

incorporating 17-A M.R.S. § 208(1)(A-1). This is where the court erred; in selecting a basic sentence, it counted conduct that is not part of "the offense." Rather, the court aggregated other offenses with the offense-conduct for Count III.

So much is clear from the court's stated basic-sentence arithmetic, which references conduct that did not result in any "serious, **permanent** disfigurement or loss or substantial impairment of the function of any bodily member or organ":

> When Victim got to the hospital in Farmington, her whole face was purple and the size of a basketball. She had a huge gash down her forehead, scabs on the side of her face, **bite marks on her arms and ears**. Her eyes were bloodshot red. **Four of her ribs were broken**. **She had a ruptured spleen**. Multiple bones in her face were shattered. She had injuries to her eye socket and a **broken nose**.

STr. 52-53 (emphasis added). We can tell that these highlighted injuries must be from *other than* Count-III conduct. As a matter of law, they do not satisfy the requirements of § 208(1)(A-1) – they are not "the offense."

While defendant does not intend to diminish the severity of Victim's injuries, nonetheless:

- Victim's splenic injuries are not permanent. The trauma surgeon noted, "[W]e were able to manage it nonoperatively with observation." 3Tr. 93. The prosecutor reiterated this fact, 7Tr. 65-66, and remarked that

the spleen "was able to be cured on its own." 8Tr. 63. Needless to say, a "healed" injury is not a "permanent" injury.

- Broken bones – *e.g.*, a nose and ribs – are undoubtedly painful. However, absent some evidence to the contrary – which the State did not adduce – they are not "permanent."
- Are "bite marks" really the sort of "serious" "disfigurement" that the Legislature intended to suffice to create a Class-A offense punishable by 30 years' prison? Other courts suggest not. *Cf. State v. Williams*, 804 S.E.2d 570, 579 (N.C. Ct. App. 2017) ("bite-shaped discoloration, or scar" insufficient to constitute "serious permanent disfigurement").

Other offenses of conviction cannot be stacked upon "the offense" to increase the "nature and seriousness" of the lead-count. That much is clear from § 1602(1)(A). This is statutory error.

It is also federal constitutional error. Double jeopardy's prohibition on multiple punishments protects a defendant "against having the length of his sentence multiplied by duplicative consideration of the same criminal conduct." *Witte v. United States*, 515 U.S. 389, 405 (1995). Specifically, we have Class-C and Class-B offenses – *e.g.*, Counts II, IV, IX & X – being punished both separately and again via the inflation of the sentence on Count III. Because this inflation occurred at step one, unlike the Guidelines at issue in *Witte*, it is clear that the court twice counted conduct rather than both conduct *and* capacity for lawfulness, for example. *Compare* 17-A M.R.S. § 1602(1)(A) (consider only "the offense," not character) with *Witte*, 515 U.S. at 402-03 (Guidelines do "not seem to create this bright line distinction").

2. By omitting to even mention obvious, traditional mitigating factors, the court abused its discretion at step two.

Defendant's 17-month-old son was "brutally beat[en]" to death in 2008. STr. 40-41. Defendant was a teenager at the time. STr. 41. Defendant's son's death "messed him up mentally," according to a family friend. STr. 40. He was disappointed by what he viewed as the killer's minimal sentence. STr. 40-41. As the prosecutor correctly noted, defendant's "criminal history does appear to start around 2008." STr. 45-46. Indeed, all of defendant's convictions documented in the State's sentencing memorandum occurred in 2008 or after. A193.

Additionally, growing up, defendant "had a rough hand dealt to him." STr. 40. Both his parents were alcoholics; his mother abused him. STr. 40.

The court, however, didn't even address this background. *See* STr. 54-55. By failing to do so, it both committed procedural error and misapplied principle. *See State v. Watson*, 2024 ME 24, ¶ 22, 319 A.3d 430 (court must address all "significant and relevant sentencing factors'"); *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (notion that defendants from disadvantaged backgrounds are less culpable reflects a "belief, long held by this society"). Objective sentencing does not permit completely disregarding such obvious, traditional mitigating circumstances as these.

3. At step three, the court abused its discretion.

Sentencing courts have precious little guidance from this Court about what is to occur at step three. As this case demonstrates, there are more questions than answers.

i. What about double-counting?

At step two, the court "specifically focused on giving fair notice" and "particularly important here – the restraint of an individual when required in the interest of public safety." STr. 57. At step three, the court seemed to repeat this focus: "with an emphasis in this step upon the goals of providing notice of the nature of sentences that may be imposed for this type of conviction" and "recognizing the seriousness of domestic violence as a crime against both individuals and society."

At step two, naturally enough, the court weighed aggravating and mitigating factors. At step three, the court noted, "I considered again the aggravating and mitigating factors present in this case." STr. 57.

Is this all that a step-three analysis entails? A do-over of prior steps?

ii. Who bears which burdens?

Should probation eligibility be presumed? Should the State have to rebut that presumption? By what standard? Here, the court seemingly placed the burden on defendant: "There is nothing credible that leads me to conclude that he has any prospects for successful rehabilitation on probation." STr. 58.

And, once the burdens of production and persuasion are set, what is the objective (and therefore not arbitrary) standard to be satisfied?

iii. What's the objective standard?

Perhaps the most insightful benchmark from this Court to date is this: courts must "balance, among other interests, the need to acknowledge the seriousness of [the defendant's] criminal behavior against the goal of

rehabilitating her so that she is able to return to a crime-free life." *State v. Black*, 2007 ME 19, ¶ 12, 914 A.2d 723.

What happened, in our case, to "the goal of rehabilitating" defendant? His longest term in prison, prior to this, was 18 months. He had two prior "DV" convictions – one the same year as his son's death (when he was a teenager) and the most recent in 2014. He's suffered from addiction. He has mitigating mental health issues. STr. 54-55.

Should he behave while in custody, defendant will be released when he is 58.[10] Will it be better for future Mainers to receive into society an institutionalized 58-year-old or one who has been provided appropriate resources and the opportunity of rehabilitation? Charged, as it is, with the duty of facilitating rehabilitation, this Court should not, on this record, forgo that possibility. *See* 15 M.R.S. § 2154(3).

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's convictions, or, in the alternative, vacate defendant's sentences, then remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

December 29, 2025

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[10] https://apps1.web.maine.gov/cgi-bin/online/correctionssearch/detail.pl?mdoc_number1=79894

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CERTIFICATES OF FILING, SERVICE & WORD COUNT

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

I further certify that, minus those portions of the brief exempted from the word count per M.R. App. P. 7A(f)(3), this brief contains 9,965 words.

/s/ Rory A. McNamara