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

LAW COURT DOCKET NO. Han-23-421

STATE OF MAINE
Appellee

v.

JEFFREY WITHAM JR.
Appellant

ON APPEAL from the Hancock County
Unified Criminal Docket

BRIEF OF APPELLANT

Rory A. McNamara # 5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

Second Assignment of Error

Third Assignment of Error

Fourth Assignment of Error

TABLE OF AUTHORITIES

United States Supreme Court Cases

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

Scholarship

INTRODUCTION

(I) The trial court violated defendant's Sixth and Fourteenth Amendment right to hire a lawyer of his choosing. Defendant had the funds necessary to do so, until they were seized by the State. Defendant asked for an evidentiary hearing to establish that the funds were not tainted, but the trial court denied him such a hearing. Supreme Court case-law demonstrates that the court erred, necessitating vacatur or, in the alternative, remand.

(II) The State presented a potpourri of evidence, including several alleged acts of "restraint," multiple claimed "assaults," and numerous iterations of the remaining counts of conviction. The jury's evident compromise verdict, coming after lengthy deliberations and a stalemate, shows that the State's case was not universally believable. In these circumstances, the court's omission to instruct jurors about specific unanimity is obvious error requiring reversal.

(III) The trial court denied defendant's motion for a mental examination that defendant filed so that he might offer at sentencing mitigating information about his mental health history. The court ruled that such potential information was "not relevant," in violation of defendant's right to present mitigating information at sentencing.

(IV) The sentencing court improperly – illegally, also – increased defendant's sentence because defendant did not "accept responsibility." The first basis for doing so – because defendant had a trial and opted to testify – is just the sort of "wooden or reflexive" aggravation the Supreme Court has forbidden. The second basis – defendant's refusal to admit guilt at

sentencing – violates criminal law first-principles. The remedy is resentencing.

(V) The court also erred by increasing defendant's sentence because, at the time of the offenses of conviction, defendant was 44 years old. This is both improper and unlawful, and adopting the court's logic would lead to increased sentences for most defendants in Maine state court.

(VI) Finally, in setting defendant's basic sentence, the court found that the offenses "involved" the use of firearms. However, the jury's verdicts acquitted defendant of using firearms during these offenses. This Court should rule that a Maine judge may not override a jury's verdict and the presumption of innocence to increase a sentence based on allegations of which the defendant has been specifically acquitted.

JURISDICTIONAL STATEMENT

The trial court had jurisdiction over the criminal prosecution by virtue of 15 M.R.S. § 1 and 17-A M.R.S. § 9. After judgments of conviction were entered onto the docket on October 6, 2023, defendant noticed these appeals on October 16, 2023, (A29). *See* M.R. App. P. 2B(b). Thereafter, this Court (Horton, J.) granted permission for the trial court to dismiss Count V on docket HANCD-CR-2020-00816, and it consolidated the two dockets in this appeal. *See Order Consolidating Appeals and Retroactively Permitting Dismissal of a Count* of Nov. 1, 2023. Subsequently, the Sentence Review Panel granted leave for defendant to present an M.R. App. P. 20 appeal to the full Court. *See Order Granting Leave to Appeal Sentence* of Jan. 31, 2024.

This Court retains jurisdiction pursuant to 15 M.R.S. § 2115, 15 M.R.S. § 2154 *et seq*., and 4 M.R.S. § 57.

STATEMENT OF THE CASE

After a jury trial in docket HANCD-CR-2020-00618, defendant was convicted of two counts of kidnapping, 17-A M.R.S. § 301(1)(A)(4) (Class A) (Counts I & II); domestic violence aggravated assault, 17-A M.R.S. § 208-D(1)(D) (Class A)[1] (Count V); criminal restraint, 17-A M.R.S. §§ 302(1)(B)(1), 1604(3), (5)(A)-(B) (Class B) (Count VI); domestic violence criminal threatening, 17-A M.R.S. § 209-A(1)(B)(1) (Class B) (Count VIII); two counts of domestic violence assault, 17-A M.R.S. § 207-A(1)(B)(1) (Counts XI & XII); prohibited possession of a firearm, 15 M.R.S. § 393(1)(A-1) (2019)[2] (Class C) (Count XIII); criminal simulation, 17-A M.R.S. § 705(1)(E)(2) (Class C) (Count XIV); endangering the welfare of a child, 17-A M.R.S. § 554(1)(C) (Class C) (Count XV); criminal mischief, 17-A M.R.S. § 806(1)(A) (Class D) (Count XVII); and violation of a condition of release, 15 M.R.S. § 1092(1)(E) (Class E) (Count XVIII).

In docket HANCD-CR-2020-00816, defendant pleaded guilty to tampering with a witness, 17-A M.R.S. § 454(1-B)(A)(2) (Class B) (Count I). The Hancock County Unified Criminal Docket (Larson, J.) principally

---

[1] The court applied statutory enhancements, elevating several counts by a class-level. *See* 17-A M.R.S. §§ 1604(5)(A), (B).

[2] Amendments to § 393, though not applicable here, have since elevated the offense to Class B. *See* P.L. 2023, c. 491 § 1 (effective Oct. 25, 2023); *see State v. Myrick*, 436 A.2d 379, 382-83 (Me. 1981) (punishment inheres relative to the time of offense).

sentenced defendant to 24 years' prison, suspending all but 22 years of that term for the duration of six years' probation. This, a consolidated direct- and M.R. App. P. 20- appeal, follows.

I. The State's case against defendant

The State claimed that defendant kidnapped his then-girlfriend, [A.] and her daughter, [E.] who was six at the time, for portions of June 24 and June 25, 2020. During the alleged kidnappings, the State claims, defendant wielded multiple dangerous weapons, and is said to have assaulted [A.] in a multitude of ways and threatened both [A.] and [E.] several times.

A. Defendant allegedly restrained [A.] and [E.] multiple times.

[A.] and her daughter were living with defendant in defendant's home on Verona Island in June of 2020. (1Tr. 39-40). In the morning on June 24, defendant's dog got loose outside, which, according to [A.] made defendant mad. (1Tr. 41). Defendant blamed [A.] and he also expressed his anger over [A.] failure to complete a loan application that was due imminently. (1Tr. 41-42). Eventually, defendant asked [A.] to leave, despite their nearly five-years-long relationship. (1Tr. 42-43). Defendant "smashed" [A.] cell phone, rendering it inoperable. (1Tr. 44, 63, 95; 2Tr. 26).

[A.] testified that, after perpetrating a series of physical assaults on her, defendant then told her to put [E.] in the car and "wait for further directions." (1Tr. 46). [A.] did not think she and [E.] could safely flee to

the neighbors' home. (1Tr. 47). So, she complied, entering the car with [E.] (1Tr. 47-48).

1. Restraint while driving looking for the dog

They went for a drive, defendant behind the wheel and supposedly wielding a gun. (1Tr. 48). The jury's eventual verdicts – each of which found that no firearm was used – suggest they did not find [A.] testimony about a gun to be credible.[3] Nevertheless, she testified that defendant threatened to shoot her if she tried to signal for help. (1Tr. 48). Defendant, apparently still angry about the missing dog, yelled that he was going to shoot [A.] (1Tr. 48-49). At one point, defendant threatened [A.] that he would kill [E.] if [E.] did not "shut … up." (1Tr. 49-50).

2. Restraint in the car in the garage

Back at the house, defendant told [A.] to zip-tie [E.] hands and legs together, but [A.] was able to insist on not doing so. (1Tr. 50). Instead, they went into the garage, where defendant locked [A.] and [E.] in a car. (1Tr. 50-51). [A.] claimed that one could not unlock the car from the inside without the key-fob, which defendant had on his person. (1Tr. 51). They remained in the car for about 15-20 minutes, defendant watching them while holding onto his gun – so claimed [A.] (1Tr. 51).

---

[3] Of the counts of conviction, Counts I, VI & XV alleged the use of a "dangerous weapon, a firearm." Count VIII merely alleged "use of a dangerous weapon." (A93-97).

3. Restraint near the picnic table

After defendant released them from the car, [A.] and [E.] were ordered to a picnic table. (1Tr. 51-52). There, defendant kept yelling, "smash[ing]" a calamine lotion bottle into [A.] forehead. (1Tr. 53). The words "open" and "close" were imprinted on her skin. (1Tr. 53-54).

Defendant handed a gun to [A.] and told her to shoot him. (1Tr. 54). She refused to do so. (1Tr. 54). Defendant then, according to [A.] retrieved a nearby sawed-off shotgun and told [A.] and [E.] that he could take them both out with just one shot. (1Tr. 54). He asked [A.] whether she wanted to play Russian Roulette. (1Tr. 54). Suddenly, defendant took the gun from [A.] and told her to leave. (1Tr. 55-56).

While she was walking backwards, defendant threw the car keys at [A.] (1Tr. 56). But [A.] decided not to leave because, according to her, defendant had "both guns." (1Tr. 56-57).

4. Restraint by the pond

Instead, [A.] and [E.] walked over to the pond, about halfway down the driveway. (1Tr. 57). Here, [A.] testified, they did not try and escape because she was unsure whether defendant might try and shoot them. (1Tr. 57). Others soon arrived at the house, staying for upwards of an hour. (1Tr. 58).

5. Restraint by the play-set

They moved to the other side of the pond, in an effort to make [E.] feel calmer. (1Tr. 58). [A.] had hoped to jump in the vehicle of the visitors, but, because they were driving a pickup-truck, it was not a viable option for

escape. (1Tr. 59). The State intimated that, at this point, [A.] was still afraid that defendant might shoot them if they tried to flee. (1Tr. 59).

6. Restraint in the house

By this time, [E.] was getting cold outdoors. (1Tr. 60). So, they entered the home. (1Tr. 60). Inside, defendant said he was going for a motorcycle drive and to "shoot himself." (1Tr. 60). But he soon returned, sometime between 5 and 6 p.m. (1Tr. 61). Around 7 p.m., defendant made another short trip away from the home, returning about five minutes later. (1Tr. 61-62). [A.] still felt restrained, however, because she felt that defendant might have been monitoring her movements by security camera. (1Tr. 62-63).

The following day, defendant left the house for three or four hours. (1Tr. 63). When he returned, he told [A.] to take his credit cards and go buy a new cellphone. (1Tr. 63).

7. Restraint while out shopping

Before she and [E.] left to buy a new phone, defendant told [A.] to be back within an hour or else he would come looking for her. (1Tr. 63-64, 65). She decided not to go to the police department because defendant's "father had friends on the police department and would notify him." (1Tr. 64).

However, the new phone, once activated, connected [A.] with her friend Heather, to whom [A.] texted: "please call the cops, he has been holding us hostage and has beat me up." (1Tr. 65).

Back at the house, [A.] cooked dinner, but she and [E.] left quickly when [A.] friend, Carmen, appeared suddenly on the porch and drove them to safety. (1Tr. 65-66).

B. Defendant allegedly assaulted [A.] in several different manners.

According to [A.] throughout the ordeal, defendant committed several acts that a jury might have considered to be an assault:

- Defendant "threw" her "against the bureau and bashed [her] head off the mirror." (1Tr. 43-44).
- Defendant "chok[ed]" [A.] "around four" separate times. (1Tr. 44-45; 74-75).
- Defendant jammed a baseball bat against [A.] neck, which resulted in injuries for which [A.] was treated at the hospital. (1Tr. 46).
- Defendant punched [A.] in the face with a closed fist an unknown number of times. (1Tr. 74). According to [E.] defendant "was hitting [[A.] (2Tr. 24-25).
- Defendant "smashed" a calamine lotion bottle into [A.] forehead to the point where one could make out "open and close" on her skin. (1Tr. 53-54).
- Defendant once previously "hit" [A.] (1Tr. 156).

C. Defendant allegedly made several threats and endangered [E.] in multiple ways.

According to [A.] defendant made threats by:

- Telling [A.] and [E.] that they would not leave the house alive. (1Tr. 44).
- Telling her to put [E.] down or else be hit by a baseball bat; defendant even swung the bat, stopping just before he hit [A.] (1Tr. 45-46).
- Telling [A.] he would shoot her if she signaled for help. (1Tr. 48).
- Telling [A.] while they were in the car looking for the dog, that he was going to kill her. (1Tr. 49).
- Telling [A.] while they were in the garage, that he was going to kill her. (1Tr. 50).
- Telling [A.] to shut her kid up or else defendant would do it for her. (1Tr. 49-50).
- Showing [E.] and [A.] that the sawed-off shotgun was loaded, and telling them that he could "take out" both of them with one shot. (1Tr. 54).
- Telling [E.] that she would see his dead grandmother "soon enough." (1Tr. 55).
- Telling [A.] when she left to buy a cell phone, to return within an hour or else "he was going to come find [her]." (1Tr. 63).

According to [A.] defendant wielded two different firearms at different intervals during the assaults, restraints, and threats: a teal firearm, (1Tr. 48), and a sawed-off shotgun, (1Tr. 54). [E.] disagreed, however. She

testified that there was no teal gun; she said defendant had a "big black gun" and a "gray little gun." (2Tr. 25).

II. The jury returned split, apparently compromise, verdicts.

The jury retired to deliberate at 4:05 p.m. on the second day of trial. (2Tr. 235). Jurors opted to quit for the evening at about 6:15 p.m. (2Tr. 240). The next morning, the jury had a note for the judge, asking whether "if all jurors do not find the defendant guilty of that count, is he considered not guilty of that count[?]" (3Tr. 2-3). Just before 4 p.m. that day, the jury sent the court another note: "[W]e are split on 11 of the 14 counts. What should we do?" (3Tr. 17). After receiving some "observations" – *e.g.*, about how the length of their deliberations was not atypical – from the court, the jury returned to deliberate. (3Tr. 18-21). At 6:16 p.m., the jury reported that they remained deadlocked on one count. (3Tr. 22). At this point, the court asked for the verdicts and said it would declare a mistrial as to the deadlocked count.

On all counts alleging "the use of a dangerous weapon," the jury either outright acquitted defendant (Counts III, IV & VII) or specially found that the "dangerous weapon" used was not a firearm (Counts I, VI, VIII & XV). (3Tr. 31-34).

III. Sentencing

The court chose Count V as the lead count, selecting a basic sentence of 18 years' prison on that count. (STr. 45). Turning to aggravating factors, the court found several, including defendant's age: 44 years old, at the time

of the offense. (STr. 48). The court also identified a "lack of acceptance of responsibility" by defendant as another aggravating factor. (STr. 49). After weighing all the aggravating and mitigating factors, the court set a maximum sentence of 24 years' incarceration, suspending only two years of that term for a term of probation. (STr. 50).

As appropriate, defendant supplements these facts below.

ISSUES PRESENTED FOR REVIEW

I. Did the trial court violate defendant's Sixth and Fourteenth Amendment right to hire counsel of his choice?

II. Did the trial court commit obvious error by neglecting to give a specific-unanimity instruction?

III. Did the trial court err by denying defendant's motion for a mental examination?

IV. Did the sentencing court impermissibly and unlawfully aggravate defendant's carceral sentence because defendant did not accept responsibility?

V. Did the sentencing court improperly and unlawfully increase defendant's sentence because defendant was 44 years old at the time of the offense?

VI. Did the sentencing court unlawfully increase defendant's sentence because it found that "[t]here were firearms involved" in the offenses of conviction, despite the jury's findings that none of the offenses were committed with the use of a firearm?

ARGUMENT

First Assignment of Error

I. The trial court violated defendant's Sixth and Fourteenth Amendment right to hire counsel of his choice.

A defendant whose money is seized as a suspected criminal byproduct nonetheless retains the constitutional right to have a hearing to determine whether those funds were instead innocently obtained. Here, defendant repeatedly requested such a hearing, and he demanded relief in the form of a new trial after being forced to trial without a lawyer of his choice. His Sixth and Fourteenth Amendment rights were therefore violated. Defendant contends that the error is structural and the remedy is vacatur. In the alternative, this Court might remand, though the latter is an imperfect remedy for a violation that has already had an irreversible effect on defendant.

A. Preservation and standard of review

On January 13, 2023, defendant personally objected that "the government" had unlawfully seized $24,719 "w/o an immediate hearing on the propriety of said seizure," in violation of his due process rights and right to counsel. (A112). Freezing of these funds, he explained, prevented him from being able to retain counsel of his choice. (*Ibid.*).

Before the court five days later, appointed defense counsel stated, "I do have witnesses" to present on the issue of the funds. (A56). Counsel proffered: "those would be people who would testify as to the source of those

funds and the intended purpose of those funds." (*Ibid.*). Defense counsel reiterated, "the seizure of the assets on mere probable cause have [sic] interfered with [defendant's] constitutional right to the counsel of his choice." (A59). The State took the position that no evidentiary hearing was necessary; the nature of the funds, its attorneys argued, "are actually trial issues."[4] (A57). As discussed below, the court (Murray, R., J.) agreed with the State.

After trial but before sentencing, defendant renewed his request for a hearing, this time seeking a new trial, as well. (A63-69). The court (Larson, J.) again denied relief. (*Ibid.*).

B. Trial court's reasoning

The court (Murray, R., J.) ruled:

> [T]he Court is not interested in addressing the factual related dispute with regard to the funds themselves and what ties or purposes they may have had. That is, from the Court's perspective, issues that are trial related issues that are determined by ultimately the factfinder in the proceedings of trial as opposed to some kind of interim determination made by the Court. The – the assets that are now the subject of the seizure are assets envisioned to be the subject of a forfeiture under the provisions of Chapter 17 and Title 15. And the status of those assets at this time post grand jury review, the Court concludes that at this time, they are in the posture they need to be in and it would be inappropriate for a consideration of releasing those same assets in some kind of preliminary proceeding that is not envisioned or anticipated or outlined by and of the provisions of that same statutory provision.
>
> For those reasons, I think – and a consideration of the evidentiary presentation by individuals that may have some asserted type of claim to those assets in this kind of a proceeding prior to trial would have no value given the legal conclusion that

[4] Defendant faces still-pending drugs-related charges in docket HANCD-CR-2022-00196.

> the Court has made with regard to how the Chapter 517 provisions apply and now that would preclude any kind of a release of those funds at this time.
>
> For those reasons, the Court will deny the defendant's request for a review or release of those assets prior to trial.

(A51-52).

Justice Larson, acting post-trial, "found" that "there had already been a motion for having the funds returned, and that motion was denied by Justice Murray." (A65). Justice Larson doubled-down: "There was a hearing and it was determined by the – Justice Murray that those funds would be drug proceedings."). When defendant tried to explain otherwise to Justice Larson (recall, defendant's then-attorney did not represent him at the time of Justice Murray's ruling and was therefore unfamiliar with the details), Justice Larson cut him off: "[Y]ou has [sic] to have some pretty significant evidence to leave – to find otherwise, because I've reviewed the file, I know that's in the file, including file – docket number 2-196. I reviewed that file." (A67). Defendant did get to explain, without apparent effect on the court, "I was denied a hearing on the funds" and "I was literally denied the hearing altogether." (A68).

C. Analysis

Defendant first discusses the legal error, then segues to a discussion of the appropriate remedy for that error.

1. The availability of funds to hire an attorney of choice is a pretrial issue for the court's determination.

The State may, consistent with the Sixth and Fourteenth Amendments, obtain a pretrial freeze of assets "based on a finding of probable cause to

believe that the assets are forfeitable." *United States v. Monsanto*, 491 U.S. 600, 615 (1989). However, "[t]hat determination has two parts ...: There must be probable cause to think (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime." *Kaley v. United States*, 571 U.S. 320, 323-24 (2014).

Precisely because the grand-jury indictment reflects the first of these showings, defendants in this situation are not constitutionally entitled to "a judicial re-determination of the conclusion the grand jury already reached: that probable cause supports this criminal prosecution... ." *Id.* at 328. But the second requisite – *i.e.*, that the funds in question *are* actually connected to the offenses of indictment – presents a different story. Courts "have **uniformly** allowed the defendant to litigate the second issue stated above: whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Id.* at 324 (emphasis added); *see id.* at 346 (Roberts, C.J., dissenting) ("The Solicitor General concedes—and all Courts of Appeals to have considered the issue have held—that 'defendants are entitled to show that the assets that are restrained are not actually the proceeds of the charged criminal offense,' Tr. of Oral Arg. 45."). Maine Justices Murray and Larson stand alone in denying one.

After all, "the Sixth Amendment grants a defendant 'a fair opportunity to secure counsel of his own choice.'" *Luis v. United States*, 578 U.S. 5, 11 2016) (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932)); *see Caplin &*

Drysdale v. United States, 491 U.S. 617, 625 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire… ."). The question whether assets are tainted or untainted is, therefore, "not a technicality. It is the difference between what is yours and what is mine." *Luis*, 578 U.S. at 16. There is a "constitutional line" the State may not traverse: "That line distinguishes between a criminal defendant's (1) tainted funds and (2) innocent funds needed to pay for counsel." *Id.* at 22; *Honeycutt v. United States*, 581 U.S. 443, 451 (2017) (federal asset-forfeiture statute "applies to tainted property only").

Here, defendant asked for an opportunity to demonstrate – through documentary and testimony evidence – that the assets in question were "innocent funds needed to pay for counsel." Respectfully, it was constitutional error for the court below to plow ahead without permitting defendant the opportunity to establish those facts. It is also statutory error. *See* 15 M.R.S. § 5828.

Section 5828(1) specifies that anyone whose assets have been seized "has a right to a prompt post-seizure hearing." And a court is required to order the return of such assets that are invalidly seized. 15 M.R.S. § 5828(E)(1).[5] Lest § 5828 fall into unconstitutional desuetude, (E)(1) must encompass the right of persons to have assets returned to them if, after

[5] 15 M.R.S. § 5821(6) establishes the statutory requirements for the State to establish traceability: "furnished or intended to be furnished by any person in exchange for a scheduled drug …" or "used or intended to be used to facilitate any violation of Title 17-A, chapter 45."

hearing, the State cannot prove that the assets it has seized are tainted. *See Town of Baldwin v. Carter*, 2002 ME 52, ¶ 9, 794 A.2d 62 ("This Court is bound to avoid an unconstitutional interpretation of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements.") (cleaned up). Certainly, the continued seizure of funds that are untainted is unconstitutional. *Cf. Luis*, 578 U.S. at 22.

The two judges' faulty reasoning in denying otherwise – *i.e.*, the provenance of the funds is a "trial issue" – is utterly circular. It will be too late, come verdict-time, for a defendant to hire a lawyer with the funds he lawfully possessed until they were seized. Unable to hire the attorney he wanted, defendant was forced to "fall back upon publicly paid counsel, including overworked and underpaid public defenders." *Luis*, 578 U.S. at 21. Asset-freezes like this "render less effective the basic right the Sixth Amendment seeks to protect." *Id.* at 22. In contrast, the State has no comparable interest in freezes such as this. *Id.* at 19 ("Nor do the [State's] interests in obtaining payment of a criminal forfeiture or restitution order enjoy constitutional protection. Rather, despite their importance, compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system.").

Because the State did not prove what it was required to prove, despite defendant demanding a hearing on the issue, defendant's Sixth and Fourteenth Amendment rights, his comparable state constitutional rights, and his statutory rights (again, unless the § 5828 is unconstitutional) have been violated.

2. The remedy is a new trial.

Defendant was deprived his Sixth Amendment right to counsel of choice. "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). That error is structural. *Id.* at 148-51. There is no way to "unring" the bell which was sounded when defendant was forced to trial without his constitutionally protected choice of counsel.

The necessity of structural-error review is underscored by our circumstances. There is nothing the State can do to retroactively "remedy" its opposition to holding a "prompt" post-seizure hearing defendant demanded – and was statutorily entitled to. *See* 15 M.R.S. § 5826(1)(A) (hearing must be "prompt"). In similar circumstances, where courts have failed to hold timely asset-freeze hearings, courts have not remanded to conduct the hearing that took place; rather, they have simply ordered that the money be returned to the defendant. *See*, *e.g.*, *Murphy v. Fortune*, 857 So. 2d 370, 372 (Fla. App. Div. 2003) (remanding for return of $30,180 seized during traffic stop when State failed to hold timely hearing). Delay equals impairment of the ability of defendants – especially those who are incarcerated – to establish the untainted nature of their funds. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) (delay impairs ability to prepare defense, which "skews the fairness of the entire system."); *see also United States v.*

French, 904 F.3d 111, 120 (1st Cir. 2018) (where government resisted hearing, court would hold "staleness of memories" against government).

Moreover, the assets are presumed *not* to be forfeitable. *See United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."). "Having failed to meet its burden" to prove otherwise – indeed, having argued against the opportunity to do so – "there is no basis upon which to allow the State a second attempt to prove those facts." *Kibbe v. State*, 2017 ME 231, ¶ 10 n. 5, 175 A.3d 653. This is not amenable to harmless-error analysis, *see Gonzalez-Lopez*, 548 U.S. at 148-51, and there is only one adequate remedy: return of the assets and a new trial.

Second Assignment of Error

II. The trial court committed obvious error by neglecting to give a specific-unanimity instruction.

The verdicts are a hopeless muddle; defendant has no ability to particularly identify upon which allegations the jury based its verdicts. All that is clear is that they did not universally believe the State's case; several acquittals belie that notion. Most of the convictions, those grouped generally

into three categories, "restraint"[6], "assault,"[7] and "the rest"[8] were likely the result of numerous patchwork jury-votes rather than unanimity about which incidents were actually committed. The court's failure to require such specific unanimity is, in this split-verdict case, obvious error.

A. Preservation and standard of review

This assignment of error is unpreserved because of counsel's omission to object to the lack of a specific-unanimity instruction. Therefore, this Court's review is for obvious error. *See State v. Russell*, 2023 ME 64, ¶ 27, 303 A.3d 640.

B. Trial court's reasoning

The lack of objection has deprived us of the court's reasoning for omitting to give a specific-unanimity instruction. Regardless, the error is obvious.

C. Analysis

"A specific unanimity instruction explains to jurors that they are required to unanimously agree that a single incident of the alleged crime occurred that supports a finding of guilt on a given count. Thus, if the State alleges multiple instances of the charged offense, any one of which is independently sufficient for a guilty verdict as to that charge, specific

---

[6] Of the counts of conviction, Counts I, II and VI allege some sort of "restraint."

[7] Of the counts of conviction, Counts V and XI allege some sort of "assault."

[8] Of the counts of conviction, Counts VIII, XIII and XV allege threatening, firearm possession, and child endangerment.

unanimity instructions are proper." *State v. Osborn*, 2023 ME 19, ¶ 34, 290 A.3d 558 (quotation marks and internal citation omitted). Here, as outlined above in the Statement of the Case, there are multiple instances of each of three categories of offenses, each of which "is independently sufficient" to permit a conviction. *See ibid*. Because jurors obviously did not agree with the State's case across the board, the failure to instruct jurors about specific unanimity constitutes obvious error.

1. The verdicts on Counts I, II and VI might have resulted from some patchwork of votes about seven separate acts of "restraint."

In the Statement of the Case above, defendant described the seven separate incidents that jurors might have felt constitute "restraint." By law, they all needed to agree on one per count. They were not instructed to do so, and, given the circumstances, there is no reason to believe they would have done so.

[A.] testimony was not universally embraced. Some might have found it incredible, for example, that [A.] was "restrained" in a car for 20 minutes, even though she admitted that she did not try to unlock it from inside. (1Tr. 79). Some might have found their short drive to find the dog too insubstantial[9] an amount of time to support a kidnapping charge. Likewise, given the numerous opportunities for [A.] and [E.] to escape the supposed "restraint," it strains credulity to believe that jurors would have

[9] To constitute "restraint" of the sort alleged, a "substantial period" of time must elapse. *See* 17-A M.R.S. § 301(2)(C); 17-A M.R.S. § 302(B) (same definition of "restraint"); *see also State v. Pelletier*, 2023 ME 74, ¶¶ 21-24, 306 A.3d 614.

found that such restraint continued for the duration of the time [A.] claims to have been unfree to leave.

2. The verdicts on Counts V and XI might have resulted from some patchwork of votes about several separate acts of "abuse."

Described above, there are several acts that jurors might have found constitute "abuse:" being punched in the face with a closed fist multiple times; being smashed against the bureau; being "choked" on "around four" separate occasions; having a baseball bat jammed into one's neck, etc. In similar circumstances, this Court has observed that specific-unanimity instructions are required. *Cf. State v. Villacci*, 2018 ME 80, ¶ 1 n. 1, 187 A.3d 576. It should do so again here. There are several acts that might have constituted "circumstances manifesting extreme indifference," 17-A M.R.S. § 208(1)(C); *see* 17-A M.R.S. § 208-D(1)(D). Any one of the four "choking" incidents; the bashing and slamming about, *cf. Pelletier*, 2023 ME 74, ¶¶ 1, 5-8; the punching in the face, *cf. State v. Townes*, 2019 ME 81, ¶ 2, 4, 208 A.3d 774; and the baseball bat stuck in [A.] neck.

3. The verdicts on Counts VII, XIII and XV might have resulted from some patchwork of votes.

Which threat supports the jury's conviction on Count VIII? Which of the guns in evidence – the teal handgun, the black handgun, the gray handgun, or the sawed-off shotgun – supports Count XIII? What act – among a plethora of allegations – did the jurors find constitutes an endangerment to [E.] "health, safety or welfare" sufficient to lead to the conviction on Count XV?

4. The omission constitutes obvious error.

Since at least 2016, this Court has put lawyers and trial-judges on plentiful notice of the need for specific-unanimity instructions. *Cf. State v. Hanscom*, 2016 ME 54, 152 A.3d 632. The jury's unanimity about what incidents a defendant has committed is constitutionally required. *Id.* ¶ 16; ME. CONST. Art. I, § 7. Respectfully, the message is not being received. The third-prong of the obvious error test, this Court should hold, is satisfied because of the need to send a message to the bench and bar: *Give a specific-unanimity instruction as a matter of course*. *See State v. White*, 2022 ME 54, ¶ 35, 285 A.3d 262 ("[W]e are free to require a new trial based on our supervisory power regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated.").

Regardless, the instructional omission affected substantial rights under the traditional test. The evidence against defendant, as is demonstrated by the jury's deadlock and apparent compromise verdicts, was less than strong. Jurors clearly had reasonable doubts about [A.] testimony. The remedy is to vacate the convictions on Counts I, II, V, VI, VII, XI, XIII & XV and remand for proceedings not inconsistent with the mandate.

Third Assignment of Error

III. The trial court erred by denying defendant's motion for a mental examination.

On August 29, 2023, less than two weeks after he was convicted, defendant moved the court for a mental examination, pursuant to 15 M.R.S. § 101-D. When asked, about a month later, why he sought the examination, counsel for defendant explained that defendant sought the examination for sentencing purposes: to explore his mental health issues, including history of "blackouts." (A72-76). The State objected, arguing that a defense presentation of defendant's mental health status was "foreclosed by waiver" because, pretrial, defendant had stated that he did not plan to offer a mental health defense *at trial*. (A121). The court sided with the State, albeit for a different reason: evidence about defendant's blackouts "would not be relevant" at sentencing. (Tr. 9/22/ at 20-21).

A. Preservation and standard of review

Defendant's motion for a mental examination preserved this argument. *See* M.R. U. Crim. P. 51. Therefore, this Court will seemingly review for an error of law. *See State v. Barrett*, 577 A.2d 1167, 1169 (Me. 1990) (seemingly reviewing denial of motion for appointment of mental health expert de novo).

B. Trial court's reasoning

The court's reasoning is set forth in full the appendix. (A72-76). In short, the court felt that it would not be "relevant" for defendant to be examined.

C. Analysis

For "cause shown, a court may order a Title 15 mental health examinations, among other reasons, "with respect to any issue necessary for determination in the case, including the appropriate sentence." 15 M.R.S. § 101-D(3)(A). And, in terms of what is "relevant" at sentencing, the universe is quite expansive: "[T]he sentencing judge's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant – if not essential – to the selection of an appropriate sentence." *Lockett v. Ohio*, 438 U.S. 586, 602-03 (1978) (cleaned up; quotation marks omitted). Defendants have a constitutional right to have a court consider any relevant mitigating evidence; that right is violated when a judge precludes such evidence as a matter of law. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). In addition, an indigent defendant has a constitutional right to a psychological examination related to "significant factor[s]" at trial. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *McWilliams v. Dunn*, 582 U.S. 183, 195-99 (2017).

To say the obvious: M.R. Evid. 401 does not apply at sentencing hearings. *See* M.R. Evid. 101(b)(6). By "relevance," then, defendant assumes that the trial court meant potential impact; the court felt that confirmation that defendant has had mental health issues would not mitigate his sentence. But, absent the requested examination, what could the trial court have known about defendant's mental health to so assuredly preempt all inquiry into this field?

That is what the court did, too: cut off, as a matter of law, all inquiry into an avenue that might have led to the mitigation of defendant's sentence. Judges are not supposed to do that. *See Eddings*, 455 U.S. at 114. Such a ruling is not compatible with society's increased recognition of the difficulties faced by those suffering from mental health ailments, nor does it bode well for future litigants in this time of mental health crisis.

Defendant received a very lengthy sentence. He should have been given the opportunity to explore and develop information that might have reduced that term of imprisonment. When so much is at stake, it is error to rush things along to the detriment of a defendant.

Fourth Assignment of Error

IV. The sentencing court impermissibly and unlawfully aggravated defendant's carceral sentence because defendant did not accept responsibility.

A. Preservation and standard of review

Even though defendant might have presented this argument independent of the M.R. App.P. 20 process, *see State v. Chase*, 2023 ME 32, ¶ 28, 294 A.3d 154, leave was anyway granted. Either way, this Court reviews the determination of a maximum sentence for abuse of discretion, *ibid.*, and the constitutionality of a sentence de novo. *State v. Lopez*, 2018 ME 59, ¶ 13, 184 A.3d 880.

B. Trial court's reasoning

The court used "lack of acceptance of responsibility" in two manners, both of which, defendant argues, are both improper and unlawful:

> [1] Next, the Court wants to talk about acceptance of responsibility. Mr. Witham has every right, by the constitution of our founding fathers, to have a trial. He has every right to put the State to its burden. The Court cannot find Mr. Witham at fault for having a trial. However, he had his trial. The jury found him not to be credible and found him guilty of these offenses. So although he had a right to a trial, he also needed to have a trial where if he testified and he was found guilty, then the Court finds that to be a lack of acceptance of responsibility.
>
> [2] And also his statement to [E.] and Ms. Kidder today was not an acceptance of responsibility for the conduct on June 24th. It was apologizing for making them go through the trial, which he blames on others for not making his – not meeting his agreement, or accepting the offer that he said he would accept to the resolve this case.

(STr. 49; A88) (numbers and brackets added).

C. Analysis

There are two separate errors in the trial court's analysis, both impinging upon defendant's right to refrain from self-incrimination. First, without making any individualized findings about falsity or materiality, the court increased defendant's sentence in a "wooden or reflexive" manner, apparently believing that doing so was required because defendant testified at trial. Second, the court increased defendant's sentence because, in his allocution, he did not admit guilt. Federal decisions demonstrate that such is a violation of the privilege against self-incrimination.

1. It is unconstitutional to woodenly or reflexively aggravate a sentence because a defendant testified and was convicted.

A judge shall not aggravate a defendant's sentence simply because the defendant testified and was convicted by a jury; rather, the judge must make his "own assessment" of that testimony. *State v. Hemminger*, 2022 ME 32,

¶ 24 n. 11, 276 A.3d 33. Arguably, it is unconstitutional to aggravate a sentence in such "a wooden or reflexive fashion" without individualized findings that a defendant's "testimony contained willful and material falsehoods." *United States v. Grayson*, 438 U.S. 41, 52-55 (1978) (considering "constitutional argument[s]" vis-à-vis due process and right to testify). Here, the court appears to have believed that such an aggravation was mandatory: "So although he had a right to a trial, he also needed to have a trial where if he testified and he was found guilty, then the Court finds that to be a lack of acceptance of responsibility." (STr. 49; A88).

That brings up a second point: There is no finding whatsoever that defendant testified falsely or materially. Rather, the judge docked defendant for "a lack of acceptance of responsibility." In context, apparently the trial judge reasoned that, if a defendant who offers exculpatory testimony at trial is thereafter convicted (even of some but not all offenses), it is appropriate to increase the sentence, not for any material falsity, but because such testimony did not reflect "acceptance of responsibility." Of course, this is counter to black-letter law: A defendant may invoke the Fifth Amendment and "suffer no penalty for such silence." *Estelle v. Smith*, 451 U.S. 454, 464 (1981) (cleaned up; quotation marks omitted). This Court has rightly held that it is unlawful to increase a sentence because "if you get convicted after a trial, then you're showing no remorse, and that's a proper sentencing consideration." *State v. Moore*, 2023 ME 18, ¶ 27, 290 A.3d 533. A "fair reading" of the judge's reasoning case is the same: Defendant was penalized for not admitting his guilt. *Cf. ibid.*

2. The court impermissibly aggravated defendant's sentence because defendant did not admit his responsibility for the crimes.

A separate constitutional violation is apparent from the paragraph marked above [2]: The court penalized defendant because his allocution did not admit guilt, notwithstanding the fact that his right to refrain from self-incrimination – and to suffer no penalty for doing so – continued through sentencing. *Mitchell v. United States*, 526 U.S. 314 (1999).

Defendant's allocution did not include an admission of guilt, as defendant maintains his innocence and plans to avail himself of post-conviction litigation options. It was therefore a violation of defendant's right to remain silent to penalize his refusal to admit guilt. *Cf. United States v. Whitson*, 77 F.4th 452 (6th Cir. 2023); *Ketchings v. Jackson*, 365 F.3d 509 (6th Cir. 2004); *see also Griffin v. California*, 380 U.S. 609, 614 (1965) (forbidding any "penalty imposed by courts for exercising a constitutional privilege."); *Estelle*, 451 U.S. at 468.

It might be one thing for a judge to penalize a defendant for disparaging remarks – *i.e.*, things that a defendant *does* say during allocution. However, the court's words – that defendant's allocution "was not an acceptance of responsibility for the conduct on June 24th" – plainly penalizes defendant for what he did *not* say (*e.g.*, "I'm guilty."). It is the essence of both the privilege against self-incrimination and this Court's decisional law about the voluntariness of inculpatory statements that such a decision to stand on one's rights may not be penalized. *See State v. Hunt*, 2016 ME 172, ¶¶ 21-22, 151 A.3d 911 (voluntariness offended when

statement is compelled by threats). To approve, at the last moment of the criminal process, of judicial punishment for exercise of those rights, would render the guarantees hollow. *Griffin*, 380 U.S. at 614 (Such a penalty "cuts down on the privilege by making its assertion costly.").

3. The remedy is remand for resentencing.

Because a fair reading of the court's statements suggests that it was or could have been influenced by defendant's decision to have a trial and not admit guilt at the trial or at the sentencing, the remedy is remand for resentencing that in no way includes such an unlawful penalty. *Moore*, 2023 ME 18, ¶ 27; *Chase*, 2023 ME 32, ¶ 32.

Fifth Assignment of Error

V. The sentencing court improperly and unlawfully increased defendant's sentence because defendant was 44 years old at the time of the offense.

A. Preservation and standard of review

Because the Sentence Review Panel granted leave to appeal, this Court's review of the maximum sentence is for abuse of discretion. *Chase*, 2023 ME 32, ¶ 28.

B. Trial court's reasoning

The court increased defendant's sentence because "he was 44 years of age at the time of this incident." (STr. 48). The court continued,

> This is not a youthful misadventure, as much as this type of conduct can be described as a misadventure. He's a grown adult. If he had issues of this type he should have addressed them long

> before now, and this appears to be a continuing pattern of behavior for at least 15 years, because starting in 2005 is when he started violating protection orders and he has three violation of protection orders as well as two domestic violence incidents where he was convicted of domestic incidents.[10]

(STr. 48; A87).

C. Analysis

The trial court relied on an "aggravating factor" that applies to most Mainers – the vast majority of defendants in adult criminal courts. After all, 44 years of age is the median age in Maine. *See* https://datacommons.org/place/geoId/23/?utm_medium=explore&mprop=age&popt=Person&hl=en (last accessed Dec. 12, 2023). Following the court's logic, then, most defendants are eligible for an increased sentence simply because of their age.

The legislature has *already* accorded "weight" to adult defendants' age. Defendant, in other words, was subject to Class A and Class B sentencing ranges only because he was an adult when he committed the offenses of conviction. *See* 17-A M.R.S. § 10-A. While many courts nowadays *mitigate* sentences of those aged roughly 18-25, because emerging science reveals that their brains are not yet fully developed such as to warrant full adult criminal punishment, *c.f.*, *Miller v. Alabama*, 567 U.S. 460, 471-72 (2012), it is another thing to *aggravate* a defendant's sentence as a result of his age. *Cf. State v. Hamel*, 2013 ME 16, ¶¶ 6-10, 60 A.3d 783 (praising court's consideration of the defendant's "youth" – he was 21 years old – at the time

[10] Separately, the court also aggravated defendant's sentence because of his prior criminal record. (STr. 46-47).

of the offense as a mitigating factor). The statutory scheme already accounts for age.

Federal law, for example, permits downward departures, both for relative youth and to discourage unnecessary incarceration of the "elderly and infirm." *See* U.S.S.G. § 5H1.1 (*downward* departures permissible based on age). And decisional law reflects that 44 years of age is not a meaningful factor. *Cf. United States v. Jackson*, 30 F.3d 199, 202-03 (1st Cir. 1994) ("nothing sufficiently unusual" about 40 years of age). A ruling to the contrary in our case, again, would mean increased sentences for most all Mainers convicted of crime.

And that would be counter to this Court's obligation, pursuant to 15 M.R.S. §§ 2154, 2155 and 17-A M.R.S. § 1501(6), to individualize sentences. Age is already individualized by virtue of the defendant's appearance in adult criminal court and by the practice of reducing sentences for those (roughly) 25 years of age or less at the time of the crime. Far from individualization, application of the trial court's logic would increase sentences for most defendants in Maine courts. A holding to that effect would have far-reaching implications and really ought to be backed by legislative debate and resultant legislation, not a lone judge's whims.

Even then, there are constitutional hurdles. Redundantly increasing a defendant's sentence because he is the median age of all Mainers demonstrates that such aggravation is not "rationally related to a legitimate state interest." *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). The Equal Protection Clause of the Fourteenth Amendment requires at least such

a showing. One wonders what purpose – one not already served by 17-A M.R.S. § 10-A and the practice of reducing the sentences of those not sufficiently "adult" – the court's new-found aggravating factor serves.

In *State v. Houston*, 534 A.2d 1293, 1296 (Me. 1987), this Court noted the interplay between equal protection principles and the Criminal Code's stated purpose "to 'eliminate inequalities in sentences that are unrelated to legitimate criminological goals.'" (quoting 17-A M.R.S. § 1151(5) (1983)). Similarly, the legislature has directed this Court, in its sentence-review capacity, to "reduc[e] manifest and unwarranted inequalities among the sentences of comparable offenders." 15 M.R.S. § 2154(3). The *Houston* Court found "no sound reason for punishing more harshly" a man's attack upon a female victim than a similar attack upon a male victim. 534 A.2d at 1297. Likewise, there is no legitimate purpose in increasing an adult criminal's sentence merely because he is 44 years old.

Sixth Assignment of Error

VI. The sentencing court unlawfully increased defendant's sentence because it found that "[t]here were firearms involved" in the offenses of conviction, despite the jury's findings that none of the offenses were committed with the use of a firearm.

At trial, the State failed to prove that the kidnappings, the restraint, the threatening, and the child-endangerment were committed with a firearm. The jury rejected such theories. But, at sentencing, the court anyway found

that two firearms were "involved," increasing defendant's basic sentence by some quantum as a result of that judicial finding.

Respectfully, courts should not be permitted to discard jury-verdicts in this manner. Maine's jury-trial rights, as well as those of the federal constitution, should be construed to preclude judicial fact-finding that usurps a jury's verdicts.

A. Preservation and standard of review

Because the Sentence Review Panel granted leave to appeal, the selection of defendant's basic sentence should be reviewed for misapplication of principle. *State v. Nichols*, 2013 ME 71, ¶ 13, 72 A.3d 503. To be clear, undersigned counsel did *not* present this very argument to the Sentence Review Panel in defendant's *Supplemental Application for Leave to Appeal Sentence*, filed in mid-December 2023. At that early point, counsel, who did not represent defendant before the trial court, was unfamiliar with all of the facts of the case. Regardless, it is possible that the SRP noticed the issue independent of defendant's *Supplemental Application*.

However, were this Court disinclined to consider this issue pursuant to its sentence-review authority, *see* 15 M.R.S. § 2151 *et seq*., it might nonetheless consider whether it is lawful to base a sentence, in part, on judicial findings that are counter to a jury's verdict. *State v. Witmer*, 2011 ME 7, ¶¶ 5-7, 19, 10 A.3d 728 (considering similar argument on direct appeal).

B. Trial court's reasoning

In considering a basic sentence, the court specified several findings that it determined relevant, including:

> There were firearms involved, with two firearms recovered. One was a shotgun that was sawed off. One was a handgun and Mr. Witham was prohibited from possessing firearms.

(STr. 45; A84).

C. Analysis

This Court has not yet decided whether, as a matter of constitutional law, a Maine court may consider "acquitted conduct" at sentencing. *See Witmer*, 2011 ME 7, ¶ 24 ("[W]e need not determine whether there are any circumstances under which a Maine judge may consider acquitted conduct."). As a matter of federal law, too, the question is somewhat unsettled. Via *United States v. Watts*, 519 U.S. 148, 154-55 (1997), the Court has blessed the consideration of "acquitted conduct" against due-process and double-jeopardy challenges. But ever since, especially in light of subsequent Sixth Amendment jurisprudence, "[d]istinguished jurists have called *Watts* into question." *United States v. Karr*, 2022 U.S. App. LEXIS 12981, 2022 WL 1499288 * n. 1 (5th Cir. 2022) (per curiam) (collecting cases). Many, such as now-Justice Kavanaugh, agree: "Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial." *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc). Thus, on April 17, 2024, the United States Sentencing Commission voted

unanimously to exclude acquitted conduct from the "relevant conduct" federal courts may consider at sentencing. U.S.S.C., News Release: *Commission Votes Unanimously to Pass Package of Reforms Including Limit on Use of Acquitted Conduct in Sentencing Guidelines* https://www.ussc.gov/about/news/press-releases/april-17-2024 (last accessed April 30, 2024).

Nevertheless, in this sentencing appeal, the Court need not resolve the constitutional question. Certainly, when a judge usurps a jury's finding, thereby upending the presumption of innocence, a judge has abused his sentencing power in a manner that fails to "promote respect for law." *See* 15 M.R.S. § 2154(2). Decision after decision from this Court, after all, establishes that it is the jury's province to find the facts and adjudicate guilt. "The jury is the judge of the facts…." *State v. Park*, 159 Me. 328, 333, 191 A.2d 1, 4 (1963). And it is the acquitted defendant's right under the law to remain in repose of the presumption of innocence, all the more after acquittal. *See State v. Cote*, 129 N.H. 358, 374 (N.H. 1987) (""The inescapable point is that our law requires proof beyond a reasonable doubt in criminal cases as the standard of proof commensurate with the presumption of innocence; a presumption not to be forgotten after the acquitting jury has left, and sentencing has begun.").

Maine's right to trial by jury is more expansive than the federal version, owing in part to our forebearers' "characteristic jealousy of the magistrate and the strong impulse to a popular form of justice." Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial*

by Jury, 39 HARV. L. REV. 917, 969-975, 978, 979 (1926) (quoted in *State v. Sklar*, 317 A.2d 160, 167 (Me. 1974)). With such a background, the Law Court has repeatedly intervened to uphold the "unimpaired enjoyment of the right of trial by jury." *See*, *e.g.*, *State v. Gurney*, 37 Me. 156, 164 (1853); *Johnson's Case*, 1 Me. 230 (1821); *Saco v. Wentworth*, 37 Me. 165 (1853); *Sklar*, 317 A.2d 160; *State v. Ferris*, 249 A.2d 523, 527-28 (Me. 1969). Judges increasing sentences notwithstanding jury acquittals is but the latest usurpation of the right.

Unlike its federal counterpart, the Maine Constitution, Art. I, § 6 explicitly forbids "depriv[ation] of life, liberty, property or privileges, but by judgment of that person's peers or the law of the land." This language, owing to § 39 of the Magna Carta, is a tell-tale invocation. Lysander Spooner has identified that it means that, under the Magna Carta and "statutes subsequent to it," the jury, not the judge, was to fix the sentence. Spooner, *An Essay on the Trial by Jury*, Ch. III, § IV (J.P. Jewett and Co. 1852). While it may be one thing to vest Maine judges with sentencing authority, it is another thing altogether to permit judges to override the jury.

Increased liberty deprivations by virtue of judicial fact-finding at the preponderance level neither comport with § 6 nor satisfy the statutory requirement that a sentence derive from sufficient and accurate information. *See* 15 M.R.S. § 2155(2) (requiring this Court to consider "[t]he manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.").

CONCLUSION

For the foregoing reasons, this Court should, in this order, vacate defendant's convictions, or remand for further proceedings, or remand for resentencing.[11]

Respectfully submitted,

May 14, 2024

/s/ Rory A. McNamara

Rory A. McNamara, #5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
207-475-7810

ATTORNEY FOR APPELLANT-DEFENDANT

CERTIFICATE OF SERVICE

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

/s/ Rory A. McNamara

[11] Because, by agreement, the sentences imposed in HANCD-CR-2020-00816 may not exceed those imposed in HANCD-CR-2020-00618, *see* Tr. of July 22, 2022 at 63-65, resentencing should be on all counts.

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Han-23-421

State of Maine

v.

CERTIFICATE OF SIGNATURE

Jeffrey Witham Jr.

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

Name of party on whose behalf the brief is filed: **Jeffrey Witham Jr.**

Attorney's name: **Rory A. McNamara, *Esq*.**

Attorney's Maine Bar No.: **5609**

Attorney's email address: **rory@drakelawllc.com**

Attorney's street address: **P.O. Box 143, York, ME 03909**

Attorney's business telephone number: **207-475-7810**

Date: **5/14/2024**