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

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. Defendant's right to hire counsel of his choice was violated.

The Red Brief offers several reasons why, in the State's view, there was no constitutional violation. (*See* Red Br. 3-5). Defendant addresses those arguments below. However, the State's briefing omits to discuss important aspects of the argument on appeal – *e.g.*, the applicability of de novo review; the constitutional magnitude of the issue and the legal standard for evaluating it; and vacatur of the convictions as the proper remedy. This Court should therefore deem any contrary positions that might have been presented by the State as abandoned, as defendant was entitled to the opportunity to address any hypothetical such arguments here, in this reply brief. *Cf. State v. Whitney*, 2024 ME 49, ¶ 18, ___ A.3d ____ (discussing party-presentation).

A. Defendant moved to return his funds in several cases, including HANCD-CR-2022-00196.

The State asserts that there is no error because defendant did not seek, in the case pursuant to which his funds were seized, to have those funds returned. This is flatly incorrect. On page A112 of the Appendix, this Court can see that defendant's motion argued that his funds being seized without a hearing violated his rights; this motion was filed under four separate docket numbers, *including* the "drugs" case, HANCD-CR-2022-00196. The State's contention, with all due respect, is a head-scratcher.

Anyway, five days after that motion was filed, when the parties' attorneys argued whether defendant was due the opportunity to have such an evidentiary hearing, *both* prosecutors for the State – its prosecutor in the two dockets underlying this appeal *and* the prosecutor handling the "drugs" case – were present to argue against such a hearing. (A55-A62). Yet, somehow, the State argues on appeal that defendant did not "bring the issue to the court in the context of his pending drug case." (Red Br. 3). Defendant certainly did that, and the State's multiple attorneys were there in opposition.

B. Defendant solicited the services of multiple defense attorneys.

It does not matter that Attorney Fenstermaker was suspended from the practice of law as of March 2023,[1] notwithstanding the State's contrary argument. (Red Br. 5). After all, as appointed counsel represented to the court at the time, "there was also another attorney that [defendant] wished to hire." (A64). Had the State not resisted defendant's right to have an evidentiary hearing on the matter, it would have known the identity of that attorney and seen documentary evidence of defendant's efforts to hire that attorney, and it may well have heard testimony from that still-practicing attorney about those efforts.

[1] Defendant's motions preceded – by months – Attorney Fenstermaker's suspension.

C. The United States Constitution requires that Maine courts implement a procedure by which a court can lift a pretrial freeze of a defendant's untainted assets.

The State boldly takes the position that Maine statutes trump constitutional dictates, arguing, "the UCD *justice* had no authority to usurp the role of the *jury* in determining the ownership of funds subject to a properly returned indictment." (Red Br. 4) (emphasis in original). That is incorrect as a matter of constitutional law.

In *Luis*, the Court wrote of the constitutional line between tainted and untainted assets: law enforcement may lawfully freeze only the former. *Luis v. United States*, 578 U.S. 5, 16 (2016). And, in *Kaley*, the Court recognized that courts "uniformly" permit defendants whose assets have been seized the opportunity to litigate whether such frozen assets are actually untainted. *Kaley v. United States*, 571 U.S. 320, 323-24 (2014). So far, only Maine – urged on by the State – stands alone in not recognizing this constitutional necessity.

There, of course, is simply no other way to ensure that a defendant who seeks to hire counsel of his choosing has the opportunity to do so. Waiting until after trial, as the State proposes, is obviously too late. A pretrial ruling is required, and Maine law provides for such via a "prompt post-seizure hearing." 15 M.R.S. § 5828(1). When the State argues, *see* Red Br. 4, that 15 M.R.S.§ 1526(4) requires a jury-trial, that is obviously – necessarily, in light of the constitutional cases defendant has cited – meant to apply to only those funds that have been first screened by a judge presiding over the pretrial

hearing required by the Sixth and Fourteenth Amendments when a defendant demands it.

It is of no moment that a Maine grand jury passed on the indictment for forfeiture. As the Court held in *Kaley*, "the tracing of assets is a technical matter far removed from the grand jury's core competence and traditional function—to determine whether there is probable cause to think the defendant committed a crime." *Kaley*, 571 U.S. at 331 n. 9. Therefore, the grand jury's determination that probable cause exists to support a forfeiture is not dispositive; appellate courts post-*Kaley* therefore read *Kaley* to permit defendants to challenge taint *vel non* before trial, notwithstanding the grand jury's forfeiture indictment. *See*, *e.g.*, *United States v. Gosney*, 2023 U.S. App. LEXIS 2549 * 14, 2023 WL 1434183 * 4 (11th Cir. 2023).

Furthermore, in Maine, unlike most jurisdictions (including federal courts), defendants have virtually no right to intervene or participate in the grand jury process, even by simply challenging improvident indictments. *See* M.R. U. Crim. P. 6(d) & (e). Yet, to the contrary, *Kaley* explicitly states that defendants must be accorded the opportunity to "litigate" whether the funds in question are actually tainted. *Kaley*, 571 U.S. at 323-24. In order to permit "litigation," a defendant must be able to offer evidence that establishes the lawful provenance of his frozen assets. The contrary – a system in which only the prosecution gets to present its one-sided evidence – does not suffice to ensure that defendants have the constitutionally protected right to hire their own lawyer.

Defendant certainly did not have the "'fair opportunity to secure counsel of his own choice'" to which he was entitled. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932). The uncontested remedy is remand for a new trial and the immediate return of the seized assets.

Second Assignment of Error

II. The omission of a specific-unanimity instruction is error.

ME. CONST. art. I, § 7 requires that jurors unanimously agree upon the acts that are the basis of a criminal conviction. But here, we must wonder, of what acts has defendant been convicted? We don't know, and more importantly, we have reasons to doubt that jurors agreed on any such acts. Certainly, they were not required by the court's instructions to do so, and their split verdicts demonstrate that the jury did not find defendant guilty of all of [A.'s] allegations.

A. The "restraint" offenses: Counts I, II and VI

The State contends that Count I did not require a specific-unanimity instruction because, in its view, defendant restrained [A.] for "a span of time." (Red Br. 7). Yet, in the Blue Brief (at 11-15), defendant catalogued all the rather distinct ways in which the State alleged "restraint." Because any one of these could have been "independently sufficient" to warrant a conviction for Count I, an appropriate instruction was necessary. *State v. Osborn*, 2023 ME 19, ¶ 34, 290 A.3d 558.

Defendant, respectfully, is not sure what to make of the State's argument about "subsummation." (Red Br. 7). Again, the jury might have held up one of a handful of any of the manifold acts of "restraint" alleged by the State as the basis for these convictions. If it did so – and there is reason to believe it might have – defendant did not receive the unanimous verdict guaranteed by § 7.

"Restraint" must also be sufficiently long to satisfy the statute. *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. When jurors are not required to agree upon which act or acts constitute "restraint," how likely is it that such a temporal requirement is satisfied? It is quite likely that a patchwork verdict is the result.

The State's contention that these counts are singular courses of conduct is belied by the evidence. There are multiple distinct acts of "restraint." That distinguishes *Rosario*, where there was but a singular act of drugs-trafficking. *State v. Rosario*, 2022 ME 46, ¶ 35, 280 A.3d 199. Here, some jurors could have been persuaded by evidence of some acts of "restraint" but not by others. And other jurors could have been persuaded by still other acts, not the same as their fellow jurors. That is not a continuing act; it is a patchwork.

B. The "assault" offenses: Counts V and XI

The State incorrectly asserts that Count V did not necessitate a specific-unanimity instruction because [A.] "described only one incidence which

could have given rise to" "circumstances manifesting extreme indifference" per 17-A M.R.S. § 208(1)(C). (Red Br. 8).

"Circumstances manifesting extreme indifference" is certainly an amorphous term; jurors could presumably find such circumstances whenever they are in the eye of the beholder. Moreover, by statute, each of the "around four" times [A.] claims defendant strangled her might have sufficed. (1Tr. 44-45; 74-75); *see* 17-A M.R.S. § 208(1)(C) (defining extreme indifference to include, *inter alia*, "the use of strangulation"). Case-law further supports the proposition that other, non-strangulation acts – *e.g.*, slamming [A.] against the furniture and punching her an unknown number of times in the face – could also have supported a finding of "extreme indifference." *Cf. Pelletier*, 2023 ME 74, ¶¶ 1, 5-8 (pushing to floor, striking in head, kicking, etc.); *State v. Townes*, 2019 ME 81, ¶¶ 2, 4, 208 A.3d 774 (punching in face, knocking to floor, kicking, etc.). In very similar circumstances, this Court has written of the "obvious need" for a specific-unanimity instruction. *State v. Villacci*, 2018 ME 80, ¶ 1 n. 1, 187 A.3d 576. As Count V was the lead count for sentencing purposes – by far (*i.e.*, 24 years' prison) – this omission carries a very high likelihood of prejudice.

C. The rest: Counts VIII,[2] XIII, XV

Which of the umpteen allegations against defendant did the jury find constitutes criminal threatening and endangering the welfare of [E.] We do

[2] In the Blue Brief at page 29, there is an erroneous subheading referring to Count VII, though, in the following analysis, Count VIII is discussed. Defendant apologies for the confusion. His argument pertains to Count VIII, not Count VII.

not know, and, given the split verdicts, defendant again hastens to add that it is unlikely that the jury unanimously accepted [A.'s] testimony across the board. And which of the guns – a total four of them were presented in the State's contradictory evidence – forms the basis for the conviction on Count XIII?

Third Assignment of Error

III. The court erred by not permitting a mental examination.

Without discussing the constitutional case-law on point, the State asserts that a judge has discretion to foreclose inquiry into a potential mitigating factor. It essentially argues that defendant failed to make a sufficiently personalized assertion of a need for a mental examination. But by arguing that defendant "did not even claim that ***he*** suffered from" a mental ailment, the State mischaracterizes the record. (Red Br. 12) (emphasis in original). When arguing for a Title 15 examination, defense counsel stated, "[I]t would be our contention that Mr. Witham may have – he may have gaps in his memory." (A75).

"[T]he 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). The State would deny defendant the opportunity to develop just such relevant evidence while, elsewhere in its brief, docking defendant for supposedly not "address[ing] any problems which led to his criminal

conduct."[3] (Red Br. 15). Ironically, the State does not seem to want defendant to have the opportunity to address his memory and mental health issues, or even identify them. Understanding defendant's background and health may well contextualize some of his behavior and lifestyle in a manner that permits better individualization of his sentence, and the court erred by precluding such inquiry as a matter of law (*i.e.*, not "relevant").

Fourth Assignment of Error

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

There are two separate arguments about the court's treatment of "acceptance of responsibility."

A. The court appears to have penalized defendant for having had a trial and losing.

"[Defendant] 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," said the lower court. (A88). Respectfully, the judge's statement confusingly conflates two distinct principles: false testimony and acceptance of responsibility. In either case, the court erred.

If the court meant to penalize defendant for offering false testimony, it did not do so lawfully. A court may not, in "a wooden or reflexive fashion," aggravate a sentence without individualized findings that a defendant gave

[3] In the State's sentencing memorandum (at 2), the State represented that it "cannot point to any mitigating factors that exist."

willfully and materially false testimony. *United States v. Grayson*, 438 U.S. 41, 52-55 (1978). There is no semblance of the court undertaking its "own assessment" of defendant's trial testimony, as would be required in order to impose such a sentencing penalty. *State v. Hemminger*, 2022 ME 32, ¶ 24 n. 11, 276 A.3d 33. In fact, the court did not find any false testimony.

Instead, it characterized defendant's decision to have a trial – at least one at which he was "found guilty" – as "a lack of acceptance of responsibility." A fair reading of this remark is that defendant's decision to have a trial was penalized. *Cf. State v Moore*, 2023 ME 18, ¶¶ 22-27, 290 A.3d 533; *State v. Chase*, 2023 ME 32, ¶¶ 27-32, 294 A.3d 154; *see also State v. Russell*, 2023 ME 64, ¶¶ 34-35, 303 A.3d 640. Resentencing is required.

B. The court increased defendant's sentence because, in his allocution, defendant did not accept responsibility.

"[Defendant's] statement to [E.] and Ms. Kidder today was not an acceptance of responsibility for the conduct of June 24th," said the court. (A88). In the Blue Brief (at 36-37), defendant argued that this violates defendant's federal privilege against self-incrimination. Defendant continues to so contend, though he recognizes this Court's intervening decision in *State v. Coleman*, 2024 ME 35, ¶ 26, ___ A.3d ____, by the principle of which defendant might be deemed to have waived that privilege. Nonetheless, defendant preserves this issue for federal court review, if necessary. *Cf. United States v. Whitson*, 77 F.4th 452 (6th Cir. 2023).

Fifth Assignment of Error

V. The court impermissibly and unlawfully aggravated defendant's sentence because defendant as 44 years old at the time of the offenses.

The court increased defendant's sentence because defendant was 44 – the median age of all Mainers. And when the State discusses the rationale that supposedly supports doing so, it mentions only defendant's criminal record. (Red Br. 15). But the Court already counted defendant's criminal history as an aggravating factor, *see* A84-A86; the recounting of the same thing under the guise of "defendant's age" is, under the State's logic, double counting.

Age remains a viable sentencing factor, though not in the way it was utilized by the court. A court may find mitigating circumstances when a defendant is either exceedingly young or old. But a court may not increase a sentence – in an adult criminal prosecution – simply because a defendant's brain is "presumably fully developed." (Red Br. 16). That, again, is double counting, and it adds nothing to the sentencing process that is not already accounted for.

Sixth Assignment of Error

VI. The court impermissibly and unlawfully aggravated defendant's based on acquitted conduct.

On the law, the State makes no attempt to argue that it is lawful for a court to consider acquitted conduct as a basis for increasing a defendant's

sentence. It has abandoned the opportunity to do so. *Cf. Whitney*, 2024 ME 49, ¶ 18.

Based on the court's findings – including that "[t]here were firearms involved" – the court increased defendant's basic sentence. (A84). If the judge had been strictly honoring the jury's verdicts, however, he would have noted their rejection of the notion that firearms were "involved" in the lead counts.

While it is accurate that the jury found that defendant unlawfully possessed firearms, it is counter the jury's verdict to say, as the judge did, that any other counts "involved" firearms. The State appeared to recognize this fact in its post-trial filings, describing it as "likely" that the jury found defendant used a baseball bat, not a firearm. (A120). Anyway, it would be redundant to the point of double counting for the court to note, as a factor increasing defendant's sentence, that a conviction for possession of firearms by a prohibited person "involved" firearms.

While it is correct that we cannot now know how much of a difference the court's unlawful consideration of firearms "involvement" made in the final sentence, that is the case for most all sentencing errors. The remedy is simply remand for imposition of a sentence not counting "involvement" of firearms.

CONCLUSION

For the foregoing reasons and those presented in the Blue Brief, this Court should vacate and remand, or, in the alternative, remand for resentencing.

Respectfully submitted,

July 16, 2024

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CERTIFICATE OF SERVICE

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

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
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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).

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