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

LAW COURT DOCKET NO. Pen-23-461

STATE OF MAINE
Appellee

v.

ANGELENA L. QUIRION
Appellant

ON APPEAL from the Penobscot County
Unified Criminal Docket

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

Two errors of constitutional magnitude, considered either separately or together, deprived defendant of substantial rights:

First, in open court during the defense closing argument, the State objected that counsel's contention that an alternative suspect owned some of the drugs was not supported by evidence. The court quite erroneously – there *was certainly* record-evidence to support counsel's argument – sustained the prosecutor's speaking objection in full earshot of the jury. As a result, jurors were barred, as a matter of law, from finding that someone else owned some of the drugs which defendant was charged with trafficking, even though the record supported such a finding. Defense counsel sought a mistrial but was denied. This Court should recognize the constitutional violation of defendant's rights to have an impartial jury decide the facts and to have his attorney make an effective closing argument. Moreover, under 14 M.R.S. § 1105, the judge's comment and related instruction cannot be deemed harmless.

Second, two key defense witnesses were excessively warned – threatened, one might reasonably say – by the prosecution not to testify. Because the Sixth and Fourteenth Amendments prohibit such warnings that "might" or "could well" drive defense-witnesses from the stand, in part or in full, defendant is entitled, at the very least, to a new trial. Unless the State is then prepared to immunize the witnesses it warned, entry of judgments of acquittal on Counts I through III may be required.

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 a judgment of conviction was entered onto the docket on September 19, 2023, (A12-14), defendant noticed this appeal on November 17, 2023, (A16). *See* M.R. App. P. 2B(b). Therefore, this Court has jurisdiction pursuant to 15 M.R.S. § 2115 and 4 M.R.S. § 57.

STATEMENT OF THE CASE

After a jury-trial, defendant was convicted of three counts of engaging in a "scheme or course of conduct," 17-A M.R.S. § 1106-A(1), of aggravated trafficking of Schedule W drugs, 17-A M.R.S. §§ 1105-A(1)(M) (fentanyl), (G) (methamphetamine), & (D) (cocaine) (Counts I-III) (Class A). She was further convicted of unlawful possession of hydromorphone, 17-A M.R.S. § 1107-A(1)(C) (Count IV) (Class D). The Penobscot County Unified Criminal Docket (Mallonee, J.) thereafter principally sentenced defendant to 30 years' prison, suspending all but 25 years of that term for the duration of four years' probation. This appeal follows.[1]

I. The State's case against defendant

The State conceded that it would be "cleanest" if the trial court treated the scheme-or-course-of-conduct provision it invoked, *see* 17-A M.R.S. § 1106-A(1), as an element of Counts I through III, such that the State was required to prove it as to each count beyond a reasonable doubt. (*See* Tr.

[1] Defendant sought leave to appeal the propriety of her sentence, but the Sentence Review Panel denied such leave by order dated January 30, 2024.

619-22). Its evidentiary presentation centered on three events on three separate occasions.

A. December 1, 2021

A Bangor Police Department officer pretextually stopped a Volkswagen Passat on the basis that its exhaust sounded loud. (Tr. 54). Actually, the officer was motivated by concerns of drug trafficking in the neighborhood. (Tr. 54).

Defendant was driving the Passat; the officer recognized a passenger to be an individual he had arrested just the month prior on suspicion of drug trafficking. (Tr. 57). After observing marijuana and an apparent "glass pipe that had white residue on it," the officer ordered everyone out of the vehicle so he could conduct a search. (Tr. 58-59). In a purse that had been on defendant's lap, police located drug-use paraphernalia, roughly $3,000 in cash, and 32 hydromorphone pills. (Tr. 59).

Elsewhere in the vehicle – seemingly her trunk, though it is difficult to follow from the transcripts – police found heroin/fentanyl, methamphetamine, cocaine, small plastic baggies, and a scale. (Tr. 64-72). The baggies and scale made the police suspect trafficking. (Tr. 73-77). On defendant's body, police found a firearm. (Tr. 77-78). Defendant acknowledged that the drugs were hers, she having recently purchased them for $500 – an amount that struck the police as low. (Tr. 84-85). Gross weights of 62.9 grams' heroin, 12.7 grams' methamphetamine, and 15.4 grams of cocaine were entered into evidence. (Tr. 98). A former Maine Drug

Enforcement Agency agent testified that, in his opinion, these drugs had a street value at the time of approximately $5,940. (Tr. 335-36).

B. January 20, 2022

Defendant bailed her boyfriend, William Simmons, out of Androscoggin County Jail. (Tr. 129-30). One of the fifty-dollar bills she gave to the bail commissioner, however, turned out to be counterfeit. (Tr. 131, 153). The bail commissioner dispatched police, who went outside to discuss the matter with defendant, parked outside. (Tr. 154).

Inside the car were defendant and Adam Jalbert. (Tr. 154-55). As the police approached the vehicle, Jalbert was "rummaging" through the trunk but "quickly" entered the front passenger seat as he noticed police. (Tr. 155). Officers proceeded to search defendant, Jalbert, and the vehicle based on their bail conditions. (Tr. 156-57). They collected fentanyl, methamphetamine, cocaine, and items associated with trafficking – *e.g.*, baggies, envelopes, and a scale. (Tr. 158-83). The fentanyl was bulk-wrapped, suggesting proximity to wholesale. (Tr. 173-74). The methamphetamine crystals were the largest the police had ever seen. (Tr. 176). In total, police seized about 495 grams of methamphetamine, 300 grams of fentanyl, and 278 grams' cocaine – all gross weights. (Tr. 208). The street value of these substances was estimated to be around $115,000. (Tr. 336-39).

Defendant claimed that the drugs were not hers; she blamed them on Jalbert. (Tr. 172-73). In particular, jurors heard that Jalbert acknowledged that some of the drugs – those located under the passenger seat – were his.

(Tr. 214). And defendant claimed that drugs found in a Walmart bag and a backpack belonged to Jalbert. (Tr. 215).

C. January 21, 2022

Armed with "a wealth of information" fed to them by Jalbert, police obtained a search-warrant for defendant's residence, 4 Bower Street in Bangor. (Tr. 269). They executed that search on January 21. (Tr. 271).

On the uninhabited third floor of the residence, police noticed a wall-safe hidden behind a painting. (Tr. 285, 302). Inside, along with pill bottles labelled "William Simmons" (*i.e.*, defendant's boyfriend), were over $30,500 in cash and amounts of fentanyl, cocaine, and methamphetamine. (Tr. 285-301). Nearly a kilogram of heroin/fentanyl was seized. (Tr. 291-92). Combined, the drugs found on this date were estimated to have a street value of $211,720. (Tr. 340-41).

D. Other evidence

Because the State charged a continuous "scheme or course of conduct," it was permitted, without M.R. Evid. 404(b) objection, to introduce evidence that portrayed defendant as a drug "queen-pin."

Eufemio Santana cooperated with the State in exchange for favorable treatment in his own case. (Tr. 549-50). Santana testified that defendant was a "bigger player" in Bangor at the time. (Tr. 556). According to Santana, defendant obtained the drugs from "highly placed sources" out of state, mostly in Massachusetts. (Tr. 569, 572). Though he personally wasn't defendant's "number one seller," he nonetheless claims that he sold quite a bit of fentanyl/heroin for defendant. (Tr. 561, 572). He claims that he was

bringing in nearly $45,000 per week in sales, though, on cross-examination, that testimony was muddied by Santana's acknowledgment that he was actually selling drugs for several people. (Tr. 573, 579-80).

II. The defense case

Absent direct proof of any sales, the State's case was vulnerable to attack. The defense plainly endeavored to generate reasonable doubts that defendant possessed (and, relatedly, trafficked in) as much of the drugs as possible. Also, the defense sought to suggest that defendant possessed the drugs only to use them, personally. In other words, defendant contended that she was merely present near the trafficking. A series of witnesses were important in this undertaking.

A. William Simmons

Defense counsel called attention to William Simmons because it was Simmons who, according to a defense witness, was the prolific dealer. (Tr. 716, 718-19). Defendant expected Simmons to testify at trial about "who owned the safe, whose drugs they were." (Tr. 469).

Shortly before trial, Mr. Simmons texted defense counsel, offering to help. (Tr. 1-2). Defense counsel "got the impression" that, if he testified, Mr. Simmons would provide testimony helpful to the defense. (Tr. 2-3). In fact, up to the day before trial commenced, the defense understood that the State would, in fact, call Simmons as a witness. (Tr. 469).

But on the first day of trial, the prosecutor reported that the State planned to release Mr. Simmons, who was present in the hallway, from the subpoena because Simmons had changed his account of things since the

proffer, and now, "would not be giving up anything on [defendant] and would be doing everything he could to undermine [the prosecution]," which, according to the prosecution, meant perjury.[2] (Tr. 3-4). The State was displeased that Simmons "would not do anything to help us" – the State. (Tr. 478).

So, on that first day of trial, the two prosecutors, a special agent, and a police officer met with Simmons in the hallway of the courthouse. (Tr. 479—80). They informed him that they believed he was preparing to commit perjury, so they would not be calling him as a witness. (Tr. 480).

To that point, Mr. Simmons had not been charged with anything related to the drugs at issue in this case. (Tr. 142). The State warned that things could change, though, if Simmons were to testify at defendant's trial and "inculpate himself on this." (Tr. 143). Moreover, the prosecutor added, this time with Simmons' lawyer present, were Simmons to testify inconsistent with his proffer, "then the State would certainly strongly consider filing appropriate charges for [perjury] as well." (Tr. 144).

After that exchange, Mr. Simmons texted defense counsel that he had to leave the courthouse and go to work but that he could return tomorrow. (Tr. 257). Defense counsel added, "if he is willing to testify, I intend to call him," noting that defendant personally wanted Simmons to testify. (Tr. 256-57). The State's attorney again added, were Simmons to testify, the State

[2] It is equally true, of course, that Mr. Simmons might not have offered perjured testimony. Rather, he might simply have intended to contradict his proffer statements, which themselves may have been inaccurate. It should have been left for a jury to decide.

intended to impeach him with recordings of his prior statements. (Tr. 258). The prosecutor predicted that his cross-examination of Simmons would be "lengthy." (Tr. 258).

On the third day of trial, defense counsel again returned to the matter, noting that defendant personally was still insistent that Simmons testify about who owned the drugs in the safe. (Tr. 469). The prosecutor again added that it was the State's position that Simmons, if called as a witness, would offer perjured testimony. (Tr. 478-79). Reading the tea leaves, defense counsel "guess[ed]" that Simmons would invoke. (Tr. 473). Counsel understood, from conversations with Simmons, that Simmons would "take the Fifth, Fifth, Fifth all day long."[3] (Tr. 471).

B. Seirra Strout

Simmons was not the only defense witness subject to warnings and, arguably, threats by the State. So was Seirra Strout. Now, Ms. Strout did ultimately testify for the defense, (*see* Tr. 687), but not without significant preceding threats by the prosecution.

Around the time the State learned that Ms. Strout might testify for the defense, law enforcement searched her jail cell and found traces of fentanyl. (Tr. 662). The prosecutor represented that he understood that "there's definitely going to be a drug-related felony of some sort presented against

[3] "[C]alling a witness to the stand in the face of his expressed intention to invoke his privilege against self-incrimination would have produced no relevant evidence, while inviting the jury to engage in unwarranted and impermissible speculation." *State v. Cross*, 1999 ME 95, ¶ 6, 732 A.2d 278 (quotation marks and citation omitted).

Ms. Strout in the near future." (Tr. 662-63). The prosecutor also made sure to get on the record that, armed with several prior statements from Ms. Strout, "[t]here's certainly the potential for her to give testimony inconsistent with other police records." (Tr. 663). And the prosecutor threatened that if Strout testified as he anticipated she might, "she would essentially be admitting to being potentially an accomplice to [] trafficking activities." (Tr. 663-64). The prosecutor stated: "now she has exposure to a new drug-related felony." (Tr. 664). All of this information, the prosecutor acknowledged, he had relayed to counsel for Ms. Strout. (Tr. 664).

Evidently having had enough, defense counsel objected: "Sounds like the State is threatening a witness. If the defense did this, it would be called tampering." (Tr. 664-65). Counsel complained of the "threat[s] and/or suggestions of prosecution" directed at Strout. (Tr. 665). The defense lawyer and the prosecutor argued whether Strout was "being threatened with anything." (Tr. 666). The trial court did nothing.

C. Adam Jalbert

During the defense's closing argument, the following exchange unfolded:

> Mr. Toothaker: [...] Did the State prove who owned this stuff, or did they just go, wow, this is a lot of drugs?
>
> And Mr. Jalbert's statement that he owned the drugs in the front and the comment that the – what are you doing, this is all part of the evidence. The Wal-Mart bags were Jalbert's.
>
> Mr. Horn: Objection, arguing facts not in evidence, Your Honor.

Mr. Toothaker: That was in evidence. That was exactly what the cop said.

Mr. Horn: That was not in evidence, Your Honor.

The court: The objection's sustained. Please move on.

(Tr. 861).

The court's ruling seemingly emboldened the prosecutor, who argued in rebuttal:

> And despite what Mr. Toothaker said during argument that we objected to, there's nothing in the record to suggest that Mr. Jalbert claimed ownership of the Wal-Mart bags. I do not know where that's coming from other than wishful thinking, but that was not in the testimony you heard.

(Tr. 891). After the rebuttal, defense counsel asked for a sidebar, where he objected: "[T]here was testimony about [defendant] stated Adam got into the car with two bags that looked like Wal-Mart bags. That was part of the testimony." (Tr. 896). Defense counsel sought a mistrial. (Tr. 897). The court stated, in pertinent part,

> I do not have an independent memory of all the testimony upon which these factual disputes are based, and so I'm unable to rule on that one way or another.[4] The instructions I'm going to give will emphasize that opening and closing are not evidence, as I've told them several times before, and that they will have to remember and evaluate the evidence given them.

(Tr. 898). The court later instructed jurors that whenever the court had sustained an objection, they were to "disregard" the objected-to "question,

[4] Of course, the court had *already* ruled – with or without an "independent memory" – that the evidence asserted by defense counsel in his closing argument was not in evidence.

answer or exhibit" and they "must not speculate" about what might have been otherwise. (Tr. 915).

ISSUES PRESENTED FOR REVIEW

I. Did the trial court err by denying defendant's motion for a mistrial after the court erroneously sustained the prosecution's objection that a portion of defense counsel's closing argument was not supported by the evidence, thereby constituting an incorrect authoritative judicial statement about the evidence, in violation of 14 M.R.S. § 1105?

II. Did the State err by repeatedly warning William Simmons and Seirra Strout of exposure to criminal charges and other unpleasantness should either testify discordantly with its case, thereby depriving defendant of her constitutional rights to compulsory process and due process?

ARGUMENT

First Assignment of Error

I. The trial court erred by denying defendant's motion for a mistrial after the court erroneously sustained the prosecution's objection that a portion of defense counsel's closing argument was not supported by the evidence, thereby constituting an incorrect authoritative judicial statement about the evidence, in violation of 14 M.R.S. § 1105.

The judge effectively – and erroneously – instructed the jury, as a matter of law, there was no evidence that Adam Jalbert owned any of the drugs found on January 20. In actuality, there was record-evidence that Jalbert told police some of the drugs were his, and defendant herself told

police that others were also Jalbert's. However, the court's ruling on the State's objection precluded jurors from so finding.

Maine case-law holds that such an error cannot be harmless. Even assuming it could be, however, the infringement on defendant's rights to have an impartial jury decide his case, and to have his lawyer make an effective argument to the jury, elevate the error to constitutional magnitude. Given the centrality of questions at trial about who owned the drugs, the court's mistake could not harmless beyond a reasonable doubt.

A. Preservation and standard of review

This issue is preserved by defense counsel's resistance to the State's objection to the defense closing argument and defense counsel's subsequent motion for a mistrial. This Court reviews the denial of a motion for a mistrial for abuse of discretion. *State v. Williams*, 2020 ME 128, ¶ 34, 241 A.3d 835. However, "[a]ny such expression by a court" of an "opinion upon issues of fact arising in a case" is generally "sufficient cause for a new trial at the request of the aggrieved party." *State v. Philbrick*, 669 A.2d 152, 156 (Me. 1995) (cleaned up; quotation marks and citations omitted); *see* 14 M.R.S. § 1105 ("[S]uch an expression of opinion is sufficient cause for a new trial if either party aggrieved thereby and interested desires it, and the same shall be ordered accordingly by the law court on appeal in a civil or criminal case.").

B. Analysis

Analytically, there are only one or two considerations. First, this Court must decide whether the trial judge erred. Respectfully, as she will

demonstrate below, the error is plain as day. Defendant presents an argument that this is all she must establish: Violations of § 1105, by statute, cannot be harmless. But, for the sake of argument, if she is incorrect in that interpretation of this Court's case-law, second, this Court must nonetheless decide whether the constitutional error is harmless beyond a reasonable doubt.

1. The court erred.

This Court should view this case as an opportunity to educate attorneys and judges about the proper process for raising objections to a party's closing argument and the stakes of doing otherwise. The State's objection, unfortunately, came in open court, in full eyeshot and earshot of the jurors: "Objection, arguing facts not in evidence, Your Honor." (Tr. 861). After defendant's lawyer responded that his assertion was supported by evidence, the prosecutor doubled down: "That was not in evidence, Your Honor." (Tr. 861). And, after the judge sustained the State's objection, the prosecutor chided defense counsel's "wishful thinking" and argumentation backed by "nothing in the record." (Tr. 891).

Again respectfully, none of this should have occurred in open court. *See Michaels v. State*, 773 So.2d 1230, 1231 (Fla. Dist. Ct. App. 2000) ("[A]ll trial lawyers know that so-called speaking objections are improper, as they constitute nothing less than unauthorized communications with the jury."). The stakes are simply too high given the nature of § 1105 and the constitutional protections it ensures. Counsel may object, seek permission to approach the bench, and state the particulars of their objections at sidebar.

Other than in the clearest of cases – which this certainly was not (at least not in the manner suggested by the court's ruling) – should a trial judge confronted with any such objection rule one way or the other on the merits. Rather, a judge should merely remind jurors that it is their recollection of the evidence, not counsels', that controls their deliberations.[5]

As a result, the court gave an authoritative statement about a contested issue of fact: There is *no* evidence that Jalbert owned the drugs on January 20. First, that is plainly wrong. Not only did jurors hear that Jalbert acknowledged owning some of the drugs, (Tr. 214), they heard that defendant claimed that the drugs were not hers – they belonged to Jalbert. (Tr. 172-73, 215). As a matter of law, though, jurors were told, by virtue of the sustained objection, that there was no such evidence. And they were told that their fact-finding had to be based "on the evidence presented."[6] (Tr. 900-01).

Second, it is wrong in a significant way. Since at least 1879, § 1105 has barred judicial comment on "controverted facts." *State v. Kessler*, 453 A.2d

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[5] Needless to say, such an admonition is even more appropriate in the eventuality that the judge has an incomplete or inaccurate memory about what was introduced into evidence, as evidently was the case here.

[6] As it applies to criminal defendants, this is an incorrect statement of law. Jurors may depend on the absence of evidence. *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972) (reasonable doubt may arise from "lack of evidence"). Moreover, such is constitutionally required: The presumption of innocence, as applied to our case, for instance, requires the jury to presume that the drugs were someone else's, even if there is zero evidence to "support" such a finding, unless and until the State adduces evidence of ownership beyond a reasonable doubt.

1174, 1176 (Me. 1983). This provision "implement[s] both the trial by jury and impartial trial guarantees of our Declaration of Rights...." *State v. Edwards*, 458 A.2d 422, 424 (Me. 1983). When judges traverse this line, they "usurp the jury function." *State v. Childs*, 388 A.2d 76, 80 (Me. 1978). If a judge must "admonish counsel" and "caution witnesses," "he must do so in a manner not to create a prejudice or to indicate an opinion on the facts." *State v. Dipietrantonio*, 152 Me. 41, 49, 122 A.2d 414, 419 (1956). "It is for the jury, and the jury alone, to determine the facts and to determine what witnesses said at trial." *Edwards*, 458 A.2d at 424. None of these scruples were honored here.

2. The judge's comment on the contested factual issue cannot be harmless.

Comment upon "issues of fact arising in the case" is not susceptible to harmlessness analysis, this Court has held, so long as the comment touches upon "controverted facts." *State v. Kessler*, 453 A.2d 1174, 1176-77 (Me. 1983). In such cases – that is, where the comment relates to "controverted facts" – § 1105 "has been interpreted" to mean what it says, *ibid.*:

> [The judge] shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such an expression of opinion **is sufficient cause for a new trial if either party aggrieved thereby and interested desires it**....

14 M.R.S. § 1105 (emphasis added). The legislature's plain language indicates that a defendant is entitled to a new trial simply upon violation. A violation alone, without consideration of prejudice, is "sufficient cause for a new trial."

Here, the court's comment was undoubtedly about a "controverted" fact: whether there was evidence that Adam Jalbert owned the drugs found on January 20. The fact that the parties disagreed about this evidence in their respective closing arguments underscores the ongoing contest over this issue. Therefore, the State is not entitled to the opportunity to prove that the court's error was harmless; vacatur is statutorily mandated.

Our case is like *Edwards*. There, the judge presented the jury with a chronology of events in evidence; the Law Court held that, precisely because [t]he matters in the chronology were disputed," the error could not be harmless. 458 A.2d at 425. Because the court's comment about the Jalbert evidence constituted a judicial comment on contested evidence, nor can the error in our case be harmless.

3. Alternatively, even if harmless-error analysis applies, on the facts, the error is not harmless beyond a reasonable doubt.

The error here undercut several of defendant's constitutional rights. Most obviously, it undermined defendant's right to a trial by an impartial jury. *Cf. Edwards*, 458 A.2d at 424. It further undermined defendant's right to have her lawyer make an effective closing argument. *Cf. Herring v. New York*, 422 U.S. 853, 858-60 (1975). Therefore, assuming for the sake of argument that the State has the opportunity to prove harmlessness at all, it must prove harmlessness beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Burdick*, 2001 ME 143, ¶ 29, 782 A.2d 319.

It cannot do so. The court erroneously invalidated the evidence that the drugs found on January 20 did not belong to defendant. The State correctly recognized that it had to prove a continuous scheme or course of conduct; hollowing out the middle of the three "incidents" upon which the State built this case might well have sunk the whole enterprise. Moreover, the court cut defense counsel at the knees, needlessly undermining his credibility in the eyes of the jurors. Did they believe anything counsel said once the judge indicated that he had strayed from the evidentiary record?

Second Assignment of Error

II. The State erred by repeatedly warning William Simmons and Seirra Strout of exposure to criminal charges and other unpleasantness should either testify discordantly with its case, thereby depriving defendant of her constitutional rights to compulsory process and due process.

When a judge or prosecutor excessively warns a potential witness of the potential consequences of testifying favorably to a defendant, thereby driving the witness from the stand or curtailing her testimony, the defendant's rights to call witnesses in her defense is unlawfully undermined. That is what happened in our case with William Simmons, who evidently decided against testifying after repeated admonitions that the State would prosecute him were he to testify, and Seirra Strout, who did testify, albeit after several warnings and/or threats that might well have caused her to shade her testimony in favor of the State. The remedy is remand to

determine whether Simmons might nonetheless consent to testify now. If not, the trial court must enter judgments of acquittal in defendant's favor.

A. Preservation and standard of review

This argument is partially unpreserved (as to Mr. Simmons) and partially preserved (as to Ms. Strout). As to Strout, counsel complained that the State was improperly threatening – tampering with, even – Strout. (Tr. 664-65). Such is reviewed de novo. *Cf. Hendrix v. State*, 82 So. 3d 1040, 1042 (Fla. Dist. Ct. App. 2011).

As to Mr. Simmons, the claim is reviewed only for obvious error. Obvious error is error that is plain, which affects substantial rights, and which this Court desires to remedy in order to uphold the integrity, fairness or public perception of the judicial system. *State v. Pabon*, 2011 ME 110, ¶ 26, 28 A.3d 1147.

B. Analysis

Defendant splits his analysis into separate discussions of (1) the nature of the constitutional violations here, and (2) the correct remedy for those errors.

1. Defendant's constitutional rights were violated by the prosecutor's repeated warnings to Mr. Simmons and Ms. Strout.

The Sixth and Fourteenth Amendments prohibit state actors from making threats or issuing warnings that "could well" drive a would-be defense witness from the stand. *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam); *State v. Fagone*, 462 A.2d 493, 496 n. 2 (Me. 1983) ("It is of no consequence that the witness here *might* have declined to testify anyway

had he been properly warned of his right against self-incrimination.") (emphasis in original). Simply, "[w]arnings concerning the exercise of the right against self-incrimination [...] cannot be emphasized to the point where they serve to threaten and intimidate the witness into refusing to testify." *Id.* at 497. This protection encompasses even witnesses who testify but perhaps curtail their defense-friendly testimony as a result of the excessive warnings or threats. *Cf. United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (witness testified but a violation nonetheless).

In *Webb* and in *Fagone*, the state actor was the judge. *Fagone*, 462 A.2d at 494-95; *Webb*, 409 U.S. at 95-96. But the prohibition extends to prosecutors, too. *Cf. Morrison*, 535 F.2d at 227-28. A mild warning of rights by a judge before a witness testifies is adequate solicitude. *Id.* at 227. Anything more is "completely unnecessary," *ibid.*, and, to repeat, if it "could well" or "might" make a witness decide not to testify, it is violative of a defendant's rights to compulsory and due process. *Webb*, 409 U.S. at 97-98; *Fagone*, 462 A.2d at 496 n. 2. It should also be kept in mind that it is a felony-level offense for anyone – including judges and prosecutors – to even "attempt[] to induce or cause" a witness "[t]o withhold testimony, information or evidence." 17-A M.R.S. § 454(1)(A)(2). Needless to say, this is not an area where there is or should be much leeway.

Some illustration helps. In *Fagone*, this Court reversed a conviction because the trial judge took it upon himself to warn a defense witness of the potential criminal liability he might incur by testifying. 462 A.2d at 494-95. Compared to our case, it was a relatively mild warning. In *Webb*, there was

a similar exchange, the judge threatening to personally see to it that, if the witness lied under oath, he would be prosecuted for perjury.[7] 409 U.S. at 95-96. In *Morrison*, the prosecutor repeatedly warned a witness about her rights and the possibility of a perjury charge; in the event the witness *did* testify but was permitted to invoke her right not to do so about several topics relevant to the defense. 535 F.2d at 225-26. In each of these cases, the court found a constitutional violation, vacating convictions.

Here, it is a fair reading of the record to infer that the State – its two prosecutors and two law enforcement agents – met with Simmons to tell him that, in their view, he should not testify unless he wished to risk criminal liability. Certainly, such warnings pervaded the parties' on-the-record discussion, and the message, it can be presumed, was also clearly delivered to Mr. Simmons by his attorney. As for Ms. Strout, her lawyer received the prosecutor's warnings (threats, in the eyes of defense counsel) and relayed them to the witness.

Mere "suggestions" of threats violate the Sixth and Fourteenth Amendments protections. *Cf. United States v. MacCloskey*, 682 F.2d 468, 479 (4th Cir. 1982) (prosecutor's "eleventh hour call" to witness's lawyer "suggesting" that witness should plead the Fifth). Here, there was nothing merely suggestive; the prosecutor outright stated that, should the witnesses incriminate themselves or offer what the State viewed to be "perjury," those witnesses would likely be prosecuted.

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[7] Of course, the judge in *Webb* did not have the ability, as he was not a prosecutor. No such limitation exists in our case, however.

2. As a matter of law, the violations cannot be harmless.

Many courts recognize that such violations, when committed by prosecutors or police, constitute structural error. *See*, *e.g.*, *United States v. Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979); *Morrison*, 535 F.2d at 229; *Demps v. State*, 416 So.2d 808, 810 (Fla. 1982). As the Fifth Circuit explained,

> One reason is that this due process violation will almost always be harmful, and it will be very difficult for a court to determine when it is not. This is because a court will seldom be able to determine exactly what evidence would have been brought out had the witness been allowed to testify freely.

Hammond, 598 F.2d at 1013. As a matter of public policy, too, structural error makes sense in Maine, where, after all, our state constitution strongly protects an individual's right to freely and voluntarily – without excessive warning or threat – decide whether to speak. *See State v. Rees*, 2000 ME 55, ¶¶ 4-8, 748 A.2d 976.

Nonetheless, should this Court disagree with its sister courts about structural error, the errors here would nonetheless require the State to satisfy the *Chapman* standard. 386 U.S. at 24. Here, both in isolation and in concert with the error established in the first assignment of error, the State cannot demonstrate beyond a reasonable doubt that there is no reasonable probability of a different outcome. Simmons' and Strout's testimony went to whether defendant possessed and trafficked drugs; they were apparently poised to swear that she did not.

In either case, reversal is necessary. But that is not the end of the story. The bell has been rung. Simmons and Strout have been irreversibly put on

notice of the State's intentions. Thus, in the event of a new trial, should either witness decline to testify or should there be other indicia that either witness is withholding testimony favorable to the defense, and should the State decline to immunize such a witness, the trial court shall enter a judgment of acquittal on all counts. *Cf. Morrison*, 535 F.2d at 229 (issuing such a mandate). These are the stakes; prosecutors do not have leeway to pressure witnesses to refrain from offering testimony favorable to the defense.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's convictions, and it should remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

March 22, 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 counsel for other parties at the addresses provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Pen-23-461

State of Maine

v.

CERTIFICATE OF SIGNATURE

Angelena L. Quirion

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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