STATE OF MAINE
ANDROSCOGGIN, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. And-22-317

STATE OF MAINE,

APPELLEE

v.

JACOB R. LABBE SR.,

APPELLANT

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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STATEMENT OF FACTS

The following evidence was established at trial on July 25-26, 2022. (*See generally* Trial Tr.; A. 15.)

The victim and Labbe were married for approximately five years, in a relationship for nine years, and have a son together. (Trial Tr. 140-41.) In 2017, Labbe violated a prior court order by having contact with the victim "numerous times." (Trial Tr. 141.) This caused her to be "very stressed out" and, in 2019, "almost miscarried." (Trial Tr. 142.) Labbe was "out of the area for around three years" and returned November 5, 2019. *Id.* While he was away, the victim had been in communication with Labbe about their shared son, and their communications were, "for the most part," friendly. (Trial Tr. 202.) On November 15, 2019, the victim and Labbe had what began as "[f]riendly" conversations about their son, and the victim let Labbe see their son at Labbe's mother's house. (Trial Tr. 142-43.) Sometime after November 15th, however, Labbe started reaching out by phone and text involving things unrelated to their son. (Trial Tr. 144.)

On November 19, 2021, the victim had packed-up Labbe's belongings to "be done with it" and, when she dropped off his things, the interaction with Labbe was "[n]ot very good." (Trial Tr. 162-65.) The victim, who was pregnant at the time, could not lift Labbe's packed belongings so her boyfriend dropped

them off on the porch. *Id.* At that time, Labbe "made a comment that he should break his legs," although that was not included in her written statement. (Trial Tr. 165, 189.) This was upsetting to the victim who experienced "heightened anxiety" and "distress," and it caused some complications for her pregnancy. (Trial Tr. 166, 173-74.)

Nevertheless, the weekend of November 15, 2019, the victim dropped her son off with Labbe who hugged her in front of her boyfriend "like a possessive thing, like I was his possession not, you know, it was nice to see you." (Trial Tr. 142, 144-45.) The victim testified that it was upsetting to her and her boyfriend. (Trial Tr. 145.)

After, the victim's calls and messages to Labbe went unanswered and "it started being weird. Like Friday I didn't get to say goodnight to my son, which I always say goodnight to my son, and Saturday I didn't really get to talk to him and then Sunday he didn't want to give him back to me." (Trial Tr. 145, 154-55, 206.) The victim was concerned about the welfare of her son because, by Saturday, she had not heard from anyone. (Trial Tr. 145, 154-55.) She testified that her son needed medicine to sleep due to insomnia and was worried about him being given his medication properly and doing prayers before bedtime, a practice they did every night. (Trial Tr. 145-46.) The victim was the sole caregiver for their son. (Trial Tr. 146.)

When the victim's mother tried to pick-up her son from Labbe, Labbe wouldn't give their son to her. (Trial Tr. 152-53.) The defense attempted to elicit testimony from the victim that her mother was intoxicated at that time (Trial Tr. 207), which the victim denied (Trial Tr. 153, 208). Ultimately, the victim asked officers with the Lewiston Police Department to help and, later that evening, their son was returned to the victim. (Trial Tr. 153-54.)

After the victim got her son back from Labbe, she testified that her son's behavior was upsetting to her because her "son is a very energetic person, and when he came home he was very lethargic, withdrawn, not like communicating, laying on the couch, acting like he was extremely sick." (Trial Tr. 241.) At some point, she had a conversation with Labbe and asked if their son was getting his medication—clonidine—for his ADHD that "kind of slows him down so that way his body can rest and he can sleep. Before when he didn't have it, my son wouldn't sleep at all." (Trial Tr. 242.) Labbe "admitted to taking [their] son's medication, ingesting it and then asked [her] why [she] gave that to [their] son." (Trial Tr. 243.) She was worried because she didn't know if there would be any withdrawal symptoms or whether their son would be hurt. *Id.* She testified that her son not receiving his medication appropriately was concerning because "[t]hey don't keep refilling it just because you don't have it or it comes up

missing, you know, so then my son went a couple days without having it for insurance to actually allow me to have it." (Trial Tr. 243-44.)

Because of what happened that weekend, the victim obtained a protection from abuse order on November 19, 2019. (Trial Tr. 155-56, 244.) The victim held her son back from school for "the majority of that week at least" because she was "scared that [Labbe] or his family could go over and get him at any time because nothing was in place." (Trial Tr. 156.)

On November 20, 2019, Lewiston Police Department Officer Keith Caouette met with the victim who reported that she had received some harassing phone calls and text messages, and was "upset, frustrated because she had gotten a protection order that hadn't been served yet," and asked police to speak with Labbe's family members to "stop the receiving the phone calls and text messages." (Trial Tr. 78-79.) Those calls and text messages were "nonstop all from [Labbe's sister's] phone but . . . some of them were from Jacob, some of them were from [his sister]." (Trial Tr. 83.) Officer Caouette unsuccessfully tried to serve Labbe with the temporary protection from abuse order. (Trial Tr. 79-80.)

That same day the victim received text messages from Labbe about him getting more of his belongings and told the victim that, "[y]ou['re], gonna fuck yourself over in the courts." (Trial Tr. 175.) The victim testified that her

boyfriend had called Labbe to "tell him to stop because he was calling repeatedly or texting my phone, and it was stressing me out and he just – he wanted it to stop." (Trial Tr. 175-76.) Labbe then texted the victim "[w]hy do you have him call me just to get me going" and "I hope your boyfriend is a cop," which the victim took to mean Labbe was "untouchable[.]" *Id.*

While she was waiting for Labbe to be served with the protection order, the victim felt "scared, nervous that he'd show up." (Trial Tr. 157.) And, she reported to the police being harassed, receiving "[c]razy text messages, his sister attacking [her] also, phone calls." *Id.* She reported that Labbe "texted [her] all the time" and received "private calls, no name calls, calls from his new number . . . calls from his sister's number." (Trial Tr. 157-59.) The victim identified that Labbe was the sender of some of the text messages that she had received from Labbe's sister and mother's numbers because of how he speaks. (Trial Tr. 160.) She also answered a call from a private number and knew it was Labbe because she "could hear someone breathing and then [she] hung up and then [she had] another call where he talks right . . . off[.]" *Id.* And, in one of the calls from a private number, the victim answered, recorded, and identified Labbe as the person calling. (Trial Tr. 161-62.)

Then, on November 27, 2019, Auburn Police Department Officer Tyler Barnies had tried to serve Labbe with the protection order but, initially, Labbe's

sister said he wasn't home and did not live there. (Trial Tr. 86-87.) Minutes later, however, he made contact with Labbe directly and served him with the protection order, which was also admitted at trial. (Trial Tr. 88-91.) That protection order contained a condition that prohibited Labbe from having any contact with the victim and "from threatening, assaulting, molesting, harassing, or otherwise disturbing the [victim's] peace." (Trial Tr. 88-89.) The order was only issued on behalf of the victim, and denied on behalf of their son. (Trial Tr. 90.) Officer Barnies testified that he made clear to Labbe that the conditions were in effect until the hearing date. (Trial Tr. 91.) Officer Barnies did not recall Labbe having any questions about the protection order. (Trial Tr. 94.) Labbe understood the conditions of the protection order and that the order was in effect at that time. (Trial Tr. 99, 102.)

On December 3, 2019, Lewiston Police Department Officer Ryan Gagnon met with the victim who was upset and "[v]ery demonstrative, like just frustrated" and reported "another violation for the protection from abuse order from" Labbe. (Trial Tr. 110-11.) "[O]nce again, Jacob had violated the protection from abuse order" and the victim "was frustrated . . . [s]he was just kind of at her wit's end like what am I going to do?" (Trial Tr. 111.) The victim showed Officer Gagnon text messages and a recording from December 2 and 3, 2019, *after* Labbe had been served with the protection order. (Trial Tr. 113.) In the

recording, Labbe tried to talk to the victim on speakerphone, and texted the victim a phrase that both of them had tattooed on themselves. *Id.* The victim also showed Officer Gagnon numerous missed calls. *Id.* On cross-examination, Officer Gagnon testified that the victim blocked Labbe's sister and mother to avoid contact. (Trial Tr. 116.) Moreover, Officer Gagnon heard in the audio recording the victim telling Labbe to "leave us – you know, leave me alone, stop calling." (Trial Tr. 118.)

The victim testified that after she became aware that Labbe had been served with the protection order, he continued to contact her, including sending her a message, "I didn't want you to block. Can we communicate without others being involved." (Trial Tr. 176-77.) The victim testified that she had "blocked pretty much his whole family, anybody that was in communications with him because he had reached out to friends of mine and his – his friends and family had reached out to me." (Trial Tr. 178.) She had blocked him on "social media . . . Facebook, all these phone numbers." *Id.*

Still, after Labbe had been served, the victim received text messages from an unsaved number in her phone. *Id.* She testified that Labbe "made up accounts that [she had] never seen before[.]" *Id.* The victim identified Labbe as the sender of the messages because of "how he talks . . . because he talks weird at times, so I know that that was him because we've, I mean, been together for years, and if

we were arguing or something and he wasn't answering text messages, he would just reply X, Y, Z." (Trial Tr. 178-79.)

On December 2, she received a text message that said "amore eterno," which she testified means "eternal love in Italian" and was unique to her relationship with Labbe because they're "both Italian and we have a friend that's Italian, speaks Italian and [s]he ha[s] it tattooed on [her] shoulder . . . for us." (Trial Tr. 179-80.) Labbe continued to contact the victim after that, including through Facebook, phone calls, and calling her from his mother's phone because "his mom never called [her]." (Trial Tr. 180-82.)

The victim was "scared" because Labbe had continued to contact her even after being served with the protection order. (Trial Tr. 183.) Since that didn't work, she took other steps to try to keep Labbe away from her, including by "block[ing] everything possible. I mean, I've called the cops numerous times. They said he was served. I mean, I reached out to the D.A.'s office to talk to who used to be here . . . to be like, what do I do, he's not following orders," and changed her phone number "[n]umerous times[.]" *Id.* She described the impact that this had on her causing her to be "constantly on edge," including through to the trial three years later. (Trial Tr. 184.)

Between November 15 and December 3, Labbe's behavior caused the victim to feel, "[u]nsafe, scared for [her] family. . . even though this is an order."

Id. She felt that Labbe "didn't abide by any of" the court orders, (Trial Tr. 184, 187), and felt like she "couldn't leave the house because, you know what I mean, anything could happen" (Trial Tr. 244).

In addition to witness testimony, call notes were admitted showing that the victim called police multiple times from November 17, 2019, to December 3, 2019. (Tr. 64-71.) The State also admitted text messages sent by Labbe to the victim after a cell phone extraction had been performed on her phone. (Trial Tr. 124, 131.) In total, 314 items were tagged as responsive to the search of the victim's phone for contact between her number and the phone numbers provided that were identified as being associated with Labbe. (Trial Tr. 114, 125-26.)

PROCEDURAL HISTORY

On December 13, 2019, the State filed a complaint with an accompanying affidavit seeking an arrest warrant for charges of Domestic Violence Stalking (Class C) and two counts of Violation of a Protection Order (Class D). (A. 1.)

Jacob Labbe Sr. had an initial appearance (*Delahanty, J.*) on that Complaint on December 30, 2019. (A. 1-2.) On March 2, 2020, the Androscoggin County Grand Jury indicted Labbe on the same three counts contained in the Complaint: Domestic Violence Stalking (Class C) that occurred on or about or between November 15, 2019, and December 3, 2019, and two counts of Violation of a Protective Order (Class D) that occurred on or about December 2, 2019, and December 3, 2019. (A. 34-35.) Labbe was arraigned on the Indictment on December 4, 2020, to which he pled not guilty. (A. 5.) After appearing on multiple trial lists beginning in May of 2021, a jury was finally selected on July 7, 2022, and trial was held on July 25 and 26, 2022. (A. 7-15; *see generally* Trial Tr.)

Prior to trial, the State filed a Motion in Limine seeking a ruling as to the admissibility of Labbe's relationship history with the victim, including prior conduct for which Labbe was convicted involving violation of bail conditions and his recent release from incarceration. (A. 15; 7/20/22, State's Motion in Limine.) That motion was granted by the court (*Stewart, J.*). (A. 15.)

The morning of trial, the defense raised a facial and as applied challenge to the constitutionality of the stalking statute, but wasn't "sure [the court] could rule on this until [it] hear[d] the evidence[.]" (Trial Tr. 12-13, 15.) The court stated that it "strikes me as a jury issue" but that it could be renewed "at the end of the State's case," which the defense indicated it would. (Trial Tr. 15-16.)

At trial, the victim testified that in 2017, there "was a court order in effect that said that [Labbe] couldn't have any contact" with the victim and that he violated the order "[n]umerous times" causing the victim to be "[v]ery stressed out." (Trial Tr. 141-42.) At the end of the victim's direct testimony, the court gave a limiting instruction regarding the 2017 conduct that was agreed to by the defense, and which the court edited until the defense agreed that it was "better" and "fair." (Trial Tr. 24-26, 187-88.) That instruction provided,

> [T]here was some evidence brought out regarding some contact or alleged contact back in 2017. I want to give you what we call a limiting instruction as [it] pertains to that alleged contact in 2017.
>
> That evidence of alleged contact with [the victim] in 2017 is not being offered and you are not to consider it for whether or not [Labbe] has acted in conformity therewith. Such prior conduct, rather, has been offered for and you are to consider it only for the purpose of the effect, if any, the alleged contact may have had on [the victim].

(Trial Tr. 188.) The court repeated that instruction as part of the final jury instructions. (Trial Tr. 281-82.)

The State also introduced testimony that Labbe was "away, out of the area" for a period of time before November of 2019. (Trial Tr. 5-6, 7-9, 16-18, 142, 146, 201, 225.) The State asked the victim whether she "ha[d] any feelings about [Labbe] not abiding by court orders" to which the victim responded, "He didn't abide by any of it. He was supposed to be on house arrest and ---." (Trial Tr. 184.) The court sustained the defense's objection. *Id.* There were no other references to "house arrest" during trial.

On cross-examination, the victim responded to a question about whether she had any of Labbe's money with "I had said when he got out I would give him some money so that way – when he came home so that way I could help him." (Trial Tr. 217-18.) The defense did not move for a mistrial until later (Trial Tr. 232, 237), which was denied by the court (Trial Tr. 234, 238).

As part of Labbe's motion for judgment of acquittal raised during trial, Labbe argued the following:

> I'm going to raise the same defense that I did before in the previous case, which is the de minimis defense. The – and this kind of ties into what I said this morning is what you've heard today, I just don't think --- even if it is considered stalking, it is not the type of stalking that the statute was intended to prohibit, which ties me into the motion of acquittal upon the fact that now we've

> heard the evidence, I renew my as applied and facially constitutionally vague argument that no reasonable, ordinary person would know this conduct was stalking but that Mr. Labbe would have had no way of being advised that this was stalking. So my – the motion of acquittal is only based on the stalking charge. I make it for the others as well, actually, the de minimis I would apply to the PFAs as well.

(Trial Tr. 248.) After argument from the State, the court ruled,

> Where the motion has been admitted as a regular motion for acquittal, I think constitutional argument and de minimis argument, even though they're different, all the State concepts, I can address them the same way in that in this case the State has to prove that there was a course of conduct directed at [redacted] that would cause a reasonable person to suffer serious inconvenience or emotional distress.
>
> What I think we're left at is -- and that may be why you're making this constitutional argument – is you're trying to compare how this type of conduct meets those elements. I think, frankly, what you're struggling with is this a crime that – is this type of conduct a crime? That, quite frankly, is going to be left for the jury to decide. I think that's going to be left for them to determine whether or not this particular type of – I don't want to say repeated phone calls but the nature of the phone calls meet that element of what a reasonable person would find to be serious inconvenience or emotional distress.
>
> Again, I heard you[r] interpretation. I think it's still a jury question. I don't see where it would be appropriate to take this away from the jury and this is dealing with just Count I.

> Count II and III. As far as the de minimis, I would add this, that if the jury makes that finding that this is the type of conduct that would cause a reasonable person to suffer serious inconvenience or emotional distress, I think that, by definition, would take it away from being de minimis. There has to be that type of finding. . . . So the motions are denied.

(Trial Tr. 249-50.)

On July 26, 2022, the jury convicted Labbe on all three counts. (A. 15; Trial Tr. 347-48.) On July 28, 2022, Labbe filed a Motion for a New Trial, which was heard at sentencing on September 21, 2022. (A. 15, 16, 36-37.) The Motion for a New Trial raised two primary issues: that the stalking statute is unconstitutionally vague and that the court erred, pursuant to M.R. Evid. 403 and 404(b), by admitting at trial evidence of Labbe's 2017 conduct violating a court order, that he was "absen[t] from the area for three years," and had been on house arrest and recently "got out." (A. 36-37.) The court denied the motion, (Sentencing Tr. 5-8), and Labbe did not file a motion for further findings or clarification. The court sentenced Jacob Labbe Sr. on Count 1 Domestic Violence Stalking to two-and-a-half years, and on Counts 2 and 3, both Violations of Protection Orders, to one year concurrent to Count 1. (A. 17-23; Sentencing Tr. 5-8, 55.) Labbe filed a timely notice of appeal.[1] (A. 18.)

[1] Labbe also petitioned the Sentencing Review Panel for leave to appeal the sentence, which was denied on December 13, 2022. (A. 18-19; Oder Denying Leave to Appeal from Sentence.)

STATEMENT OF THE ISSUES

I. Whether Maine's stalking statute, 17-A M.R.S. § 210-A (2022), is unconstitutionally vague.

II. Whether there was sufficient evidence for the jury to convict Labbe of Domestic Violence Stalking.

III. Whether Labbe's conduct, when reviewed for obvious error and sufficient to convict beyond a reasonable doubt, was nevertheless de minimis.

IV. Whether the trial court abused its discretion and clearly erred by admitting evidence that Labbe had previously violated court orders that prohibited contact with the same victim and that he had been "away" for years before the crimes occurred.

SUMMARY OF THE ARGUMENT

First, when reviewed de novo, the stalking statute, 17-A M.R.S. § 210-A (2022), is not unconstitutionally vague.

Next, there was sufficient evidence for the jury to convict Labbe of Domestic Violence Stalking.

Additionally, because Labbe failed to properly, timely raise the de minimis motion to dismiss, when reviewed for obvious error, there was no error where the court denied the motion when Labbe orally raised the de minimis argument during the motion for judgment of acquittal at trial.

Finally, the court did not abuse its discretion or clearly err by permitting the introduction of evidence that Labbe had been "away" for years before the crimes occurred or that he had previously violated court orders in 2017 by having contact with the victim, especially where a limiting instruction was given that was satisfactory to the defense.

ARGUMENT

I. Maine's stalking statute, 17-A M.R.S. § 210-A (2022), is not unconstitutionally vague.

Labbe argues that the stalking statute is unconstitutionally vague[2] because his conduct could not have constituted a "course of conduct" where he had not seen his son for three years because he was in prison, communicated to the victim about obtaining clothing for his release, and texting the victim "non-threatening messages." (Blue Br. 8-9.)

This Court reviews "the constitutionality of a statute de novo, beginning with the presumption of the statute's constitutionality." *State v. Malpher*, 2008 ME 32, ¶ 18, 947 A.2d 484. Because a statute is presumed constitutional, Labbe bears "the burden of establishing its infirmity," *State v. Reckards*, 2015 ME 31, ¶ 4, 113 A.3d 589, by "demonstrat[ing] that the statute has no valid application or logical construction," *State v. Nisbet*, 2018 ME 113, ¶ 17, 191 A.3d 359.

"In a void-for-vagueness challenge, [this Court] do[es] not analyze the statute to ascertain if its valid on its face, but instead assess the challenge 'by testing it in the circumstances of the individual case and considering whether

[2] It is not clear to the State whether Labbe is raising both a facial and an as applied challenge to the constitutionality of the statute. *Compare* Blue Br. 6, *with* Blue Br. 9. In any event, this Court's decisions make clear that in a "void-for-vagueness" challenge, this Court does "not analyze the statute to ascertain if it is valid on its face, but instead assess[es] the [statute] . . . in the circumstances of the individual case[.]" *E.g.*, *In re J.*, 2022 ME 34, ¶ 22, 276 A.3d 510.

the statutory language was sufficiently clear to give the defendant adequate notice that his conduct was proscribed.'" *Reckards*, 2015 ME at ¶ 4, 113 A.3d 589 (quoting *State v. Aboda*, 2010 ME 125, ¶ 15, 8 A.3d 719). To find a statute unconstitutionally vague, this Court must conclude that a criminal statute "fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Nisbet*, 2018 ME 113, ¶ 17, 191 A.3d 359. "Legislation will not be void for vagueness if any reasonable construction will support it." *Reckards*, 2015 ME 31, ¶ 5, 113 A.3d 589. Neither the United States Constitution nor the Maine Constitution require "objective quantification, mathematical certainty, and absolute precision." *Ouellette v. Saco River Corridor Comm'n*, 2022 ME 42, ¶ 15, 278 A.3d 1183. Rather, this Court looks to meanings of terms "by examining the plain language definition or common law definition." *Nisbet*, 2018 ME 113, ¶ 18, 1919 A.3d 359 (quotation marks omitted).

Title 17-A M.R.S. § 210-A(1)(A) (2022)[3] establishes as a Class D crime:

(1) A person is guilty of stalking if:

[3] Jacob Labbe Sr. was convicted of Domestic Violence Stalking pursuant to 17-A M.R.S. § 210-C (2022), (A. 34), however, that statute provides that a person "is guilty of domestic violence stalking if . . . the person violates section 210-A and the victim is a family or household member as defined in Title 19-A, section 4002, subsection 4." Because that statute cites to 17-A M.R.S. § 210-A (2022) for the substantive definition of stalking more generally, the State analyzes that statutory language as it is the language challenged by Labbe and not the family and household member elements identified in section 210-C, which is not an element in dispute by the defense.

(A) The actor intentionally or knowingly engages in a course of conduct directed at or concerning a specific person that would cause a reasonable person:

(1) To suffer serious inconvenience or emotional distress;

(2) To fear bodily injury or to fear bodily injury to a close relation;

(3) To fear death or to fear the death of a close relation;

(4) To fear damage or destruction to or tampering with property; or

(5) To fear injury to or the death of an animal owned by or in the possession and control of that specific person.

Subsection (2) defines the following terms "unless the context otherwise indicates:"

A. "Course of conduct" means 2 or more acts, including but not limited to acts in which the actor, by any action, method, device or means, directly or indirectly follows, monitors, tracks observes, surveils, threatens, harasses or communicates to or about a person or interferes with a person's property. "Course of conduct" also includes, but is not limited to, threats implied by conduct and gaining unauthorized access to personal, medical, financial or other identifying or confidential information.

B. "Close relation" means a current or former spouse or domestic partner, parent, child, sibling, stepchild, stepparent, grandparent, any person who regularly resides in the household or who within the prior 6 months

regularly resided in the household or any person with a significant personal or professional relationship.

C. [Repealed.]

D. "Emotional distress" means mental or emotional suffering of the person being stalked as evidenced by anxiety, fear, torment or apprehension that may or may not result in a physical manifestation of emotional distress or a mental health diagnosis.

E. "Serious inconvenience" means that a person significantly modifies that person's actions or routines in an attempt to avoid the actor or because of the actor's course of conduct. "Serious inconvenience" includes, but is not limited to, changing a phone number, changing an electronic mail address, moving from an established residence, changing daily routines, changing routes to and from work, changing employment or work schedule or losing time from work or a job.

Here, Labbe intentionally or knowingly engaged in a course of conduct directed at the victim that caused her, and would have caused a reasonable person, to suffer serious inconvenience or emotional distress. There was sufficient record evidence that Labbe engaged in two or more acts, "including but not limited to acts in which the actor, by *any action, method, device or means, directly or indirectly* follows, monitors, tracks observes, surveils, *threatens*, *harasses or communicates to or about a person* or interferes with a person's property." 17-A M.R.S. § 210-A(2)(A) (emphasis added).

This was accomplished by Labbe repeatedly contacting the victim by phone calls and text—despite her telling him and his family to stop contacting her, blocking him and his family, and changing her phone number. (Trial Tr. 78-79, 83, 113, 118, 130-31, 157-62, 175-76, 178-84.) As the State noted in its rebuttal closing, the victim received "seven private calls between November 28 and December 3;" five texts from Labbe; "three calls from his new number;" and two calls from Labbe's mother's number. (Trial Tr. 331.)

The effect of Labbe's direct communications to the victim was real. Between November 15 and December 3, 2019, the victim was "scared:" she took steps to try to keep Labbe away, including by "block[ing] everything possible. I mean, I've called the cops numerous times. They said he was served. I mean, I reached out to the D.A.'s office to talk to who used to be here . . . to be like, what do I do, he's not following orders," and changed her phone number "[n]umerous times[.]" (Trial Tr. 183.) She not only took steps to cut-off contact with Labbe, but she sought and obtained a protection from abuse order. (Trial Tr. 91.) And, even *after* being served with a protection from abuse order, Labbe continued to repeatedly contact the victim, including by using private numbers or his sister's phone. (Trial Tr. 113-14, 160-62, 174-81.)

In short, despite all of the victim's efforts, Labbe persisted in his obsession with contacting the victim.

The evidence also established that the victim suffered both "serious inconvenience" and "emotional distress." 17-A M.R.S. § 210-A(1)(A)(1). Labbe's behavior caused the victim not only psychological stress such as "heightened anxiety" and "distress," but physical complications with the victim's pregnancy. (Trial Tr. 166, 173-74.)

All of this began when Labbe had their son for a weekend around November 19, 2019, and didn't respond to the victim's calls and messages about their son. (Trial Tr. 145, 152-55, 206.) It got to the point that the victim needed law enforcement to assist with getting her son back. (Trial Tr. 154-55.) And, when her son was returned, he appeared "very lethargic, withdrawn, not like communicating . . . acting like he was extremely sick." (Trial Tr. 241.) Ultimately, Labbe "admitted to taking [their] son's medication, ingesting it and then asked [her] why [she] gave that to [their] son." (Trial Tr. 243.)

Labbe's actions between November 15, 2019, and December 3, 2019, caused the victim to feel, "[u]nsafe, scared for [her] family. . . even though this is an order." (Trial Tr. 184.) She felt that Labbe "didn't abide by any of" the court orders, (Trial Tr. 184, 187), and she "couldn't leave the house because . . . anything could happen." (Trial Tr. 244.) She described being "constantly on edge" even three years later. (Trial Tr. 184.) The victim "was just kind of at her wit's end[.]" (Trial Tr. 111.)

Moreover, when considering the effect of Labbe's course of conduct on the victim and whether it caused serious inconvenience or emotional distress, her history with Labbe is important: he was convicted of violating a court order multiple times that prohibited him from contacting the victim, which caused her to be "very stressed out." (Trial Tr. 141-42.)

Contrary to Labbe's position (Blue Br. 8-9), and despite his failure to address the breadth of his continued contact with the victim, the plain language of the stalking statute covers a broad range of conduct not just limited to following or tracking someone. 17-A M.R.S. § 210-A(2)(D), (E). For instance, the plain language of "course of conduct" specifically includes, "but [is] not limited to" conduct "by any action, method, device or means, directly or indirectly . . . threatens, harasses, or communicates to or about a person[.]" *Id.* § 210-A(2)(A). Here, Labbe repeatedly texted and called the victim, which constitutes acts by any action, method or device, that directly harasses and/or communicates to the victim thereby violating the plain language of the stalking statute. *Id.* (Trial Tr. 111-14, 116, 124, 130, 157-62, 178-83.)

As the trial court stated at the hearing on the motion for a new trial, context matters when evaluating whether a defendant causes someone to suffer "serious inconvenience or emotional distress." (Sentencing Tr. 6-8.) The court stated that "the whole point of the statute is to just get individuals to stop

doing things that are causing serious inconvenience or emotional distress. And when we wrap our head around that, it can, in the right circumstances, be really a pretty benign statement that could still violate this." (Sentencing Tr. 7.)

Importantly, the court stated that "this case represents . . . that you could have a pretty benign statement, but when there has been an ongoing, longstanding history of it, being told to stop, and then also even having another court order, it still happens. That's when enough is enough, and it violates the statute." (Sentencing Tr. 8.)

In short, Maine's stalking statute has a reasonable construction based on the facts of this case that supports its interpretation and was sufficiently clear to give Labbe adequate notice of the criminalization of his conduct. *Reckards*, 2015 ME 31, ¶¶ 4-5, 113 A.3d 589.

II. There was sufficient evidence for the jury to convict Labbe of Domestic Violence Stalking.[4]

Labbe argues that that the evidence established at trial was insufficient to convict him of Domestic Violence Stalking because he "did not follow or track" the victim, he "wanted to see his son and get his clothing," and did so in "a non-threatening manner." (Blue Br. 9-10.)

[4] Labbe does not raise a sufficiency of the evidence challenge as to the convictions of Counts II and III for Violation of a Protection Order and, as such, those should be considered waived. *State v. Thomes*, 1997 ME 146, ¶ 13, 697 A.2d 1262. (*See* Blue Br. 4, 9-10.)

A challenge to the sufficiency of the evidence is reviewed "'in the light most favorable to the State to determine whether the trier of fact rationally could have found beyond a reasonable doubt every element of the offense charged.'" *State v. Thomas*, 2022 ME 27, ¶ 30, 274 A.3d 356 (quoting *State v. Smen*, 2006 ME 40, ¶ 7, 895 A.2d 319). "Fact finders are permitted to draw all reasonable inferences from the evidence and the weight to be given to the evidence and the determination of witness credibility are the exclusive province of the jury." *Thomas*, 2022 ME 27, ¶ 30, 274 A.3d 356 (quotation marks, alterations, and internal citations omitted).

With this deferential standard of review, the breadth of record evidence presented established all elements of Domestic Violence Stalking, 17-A M.R.S. § 210-C(1).[5] (*Supra* at 1-9, 20-23.) Labbe repeatedly contacted the victim despite her request of him to stop, despite blocking him on social media and by phone, and in spite of the protection order. (Trial Tr. 91, 116, 155-62, 178-84, 244.) The victim testified about how she felt between November 15, 2019, and December 3, 2019, and the emotional and psychological effect of Labbe's actions. (Trial Tr. 111, 142, 145, 166, 173-76, 184-87, 241, 244.) Officer Gagnon also testified that the victim was "frustrated . . . she was just kind of at

[5] Labbe does not contest that he had a qualifying prior conviction that elevated the offense from a Class D Domestic Violence Stalking to a Class C Domestic Violence Stalking. *Compare* 17-A M.R.S. § 210-C(1)(A) (2022), *with* 17-A M.R.S. § 210-C(1)(B) (2022).

her wit's end like what am I going to do?" (Trial Tr. 111.) Call logs were admitted that showed the victim's repeated contact with law enforcement seeking help (Trial Tr. 64-71), and text messages and phone calls were admitted showing Labbe's repeated contact (Trial Tr. 124, 130, 313).

As such, when the record evidence is viewed as a whole in the light most favorable to the State, there was sufficient evidence for the jury to rationally find every element of Domestic Violence Stalking was proven by the State beyond a reasonable doubt.

III. Because Labbe untimely raised the de minimis argument during his oral motion for judgment of acquittal at trial, it was not obvious error for the trial court to deny his motion.

Labbe contends that his conduct was, at most, de minimis as to Domestic Violence Stalking and Violations of a Protection Order. (Blue Br. 12-14.)

This Court normally reviews a trial court's de minimis analysis for an abuse of discretion. *State v. Kargar*, 679 A.2d 81, 83 (Me. 1996). When, however, an issue is not preserved, this Court reviews for obvious error. M.R.U. Crim. P. 52(b). To rise to the level of an obvious error, it must "be (1) an error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, [this Court] will set aside a jury's verdict only if [it] conclude[s] that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings." *State v. Penley*, 2023 ME 7, ¶ 22, --- A.3d --- (quotation marks and

internal citation omitted). "An error is plain if the error is so clear under current law that the trial judge and prosecutor were derelict in countenancing it even absent the defendant's timely assistance in detecting it." *State v. Dolloff*, 2012 ME 130, ¶ 36, 58 A.3d 1032 (quotation marks and internal citation omitted). The ultimate task is to determine "whether the defendant received a fair trial." *State v. Lajoie*, 2017 ME 8, ¶ 15, 154 A.3d 132.

Here, Labbe raised—for the first and only time—a de minimis argument at the same time that he orally moved for a judgment of acquittal pursuant to M.R.U. Crim. P. 29(a). (Trial Tr. 247-48.) That approach is not contemplated by the de minimis statute, which requires "upon notice to or motion of the prosecutor and opportunity to be heard." 17-A M.R.S. § 12 (2022). Additionally, the de minimis argument was not renewed in Labbe's Motion for a New Trial or Acquittal. (A. 36-37.) This Court should, therefore, review for obvious error.

Moreover, because Labbe failed to seek further findings after the court's ruling on his motion for a new trial (A. 36-37), this Court also reviews all evidence in the light most favorable to the trial court's ruling. *See State v. Connor*, 2009 ME 91, ¶ 9, 977 A.2d 1003 ("On review after a hearing in which the court has stated its findings, and there has been no motion for further findings, we will infer that the court found all the facts necessary to support its judgment if those inferred findings are supportable by evidence in the record.").

The defense's brief argument at trial focused largely on the language contained in section 12(1)(B). (Trial Tr. 248.) Labbe vaguely referenced a "de minimis defense," more generally applied it to the two counts of Violation of a Protection Order, and more specifically argued that the conduct established at trial was not "the type of stalking that the statute was intended to prohibit." *Id.* Now, Labbe raises both a section 12(1)(B) and (C) argument. (Blue Br. 13-14.)

Maine's de minimis statute, 17-A M.R.S. § 12 (2022), provides:

> 1. The court may dismiss a prosecution if, upon notice to or motion of the prosecutor and opportunity to be heard, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds the defendant's conduct:
>
>   A. Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the crime; or
>
>   B. Did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
>   C. Presents such other extenuations that it cannot reasonable by regarded envisaged by the Legislature in defining the crime.
>
> 2. The court shall not dismiss a prosecution under this section without filing a written statement of its reasons.

The practice contemplated by section 12 is for the defense to file a written motion to dismiss in advance of trial so that this issue is appropriately raised

before the court, and so that the State can be adequately prepared to respond. That was not followed in this case. (Trial Tr. 248.)

To analyze a de minimis motion to dismiss, "trial courts should be given broad discretion in determining the propriety of a *de minimis* motion." *Kargar*, 679 A.2d at 83 (italics in original). This Court has recognized that "an objective consideration of surrounding circumstances is authorized" and set forth a variety of factors to be considered:

> the background, experience and character of the defendant which may indicate whether he knew or ought to have known of the illegality; the knowledge of the defendant of the consequences to be incurred upon violation of the statute; the circumstances concerning the offense; the resulting harm or evil, if any, caused or threatened by the infraction; the probable impact of the violation upon the community; the seriousness of the infraction in terms of punishment, bearing in mind that punishment can be suspended; mitigating circumstances as to the offender; possible improper motives of the complainant or prosecutor; and any other data which may reveal the nature and degree of the culpability in the offense committed by the defendant.

Id. at 84. Applying the obvious error standard here, it cannot be said that Labbe did not receive a fair trial. *Lajoie*, 2017 ME 8, ¶ 15, 154 A.3d 132.

First, it was not an error for the court to not explicitly apply the *Kargar* factors where the oral motion summarily made by Labbe at the motion for

judgment of acquittal—during trial—conflates a Rule 29(a) motion and a de minimis motion to dismiss. (Trial Tr. 248.) This is unlike in *Kargar*, 679 A.2d at 83, where the defense moved to dismiss the case on de minimis grounds *before* trial. There, the court held a bifurcated jury-waived trial, with the trial phase heard first, then a hearing on the de minimis motion where the defense presented witnesses. *Id.* Here, the defense not only failed to timely raise the issue, but it presented insufficient evidence and argument that Labbe's conduct was de minimis. 17-A M.R.S. § 12(1).

But, were this Court to determine that it was plain error for the trial court to not explicitly apply the *Kargar* factors, that error did not affect Labbe's substantial rights nor can it be said that the trial court's failure was such an error that it seriously affected the fairness and integrity or public reputation of trial where Labbe only raised the argument during a motion for judgment of acquittal. *Penley*, 2023 ME 7, ¶ 22, --- A.3d ---.

Thus, inferring that the trial court found all facts necessary to support the denial of the motion for judgment of acquittal and de minimis argument, *Connor*, 2009 ME 91, ¶ 9, 977 A.2d 1003, the court determined that it was appropriate for the jury to decide "whether or not this particular type of – I don't want to say repeated phone calls but the nature of the phone calls meet that element of what a reasonable person would find to be serious

inconvenience or emotional distress." (Trial Tr. 251.) The court continued, "I don't see where it would be appropriate to take this away from the jury and this is dealing with just Count I." *Id.* And, similarly as to Counts 2 and 3, "that if the jury makes that finding that this is the type of conduct that would cause a reasonable person to suffer serious inconvenience or emotional distress, I think that, by definition, would take it away from being de minimis. There has to be that type of finding." *Id.*

Moreover, as to section 12(B), Labbe's conduct here *actually* caused the harm sought to be protected by the stalking statute and was not trivial: the victim was "scared," obtained a protection order, tried blocking Labbe and his family, and changed her phone number multiple times. (Trial Tr. 91, 116, 155-56, 183.) Because of Labbe's conduct, the victim was "constantly on edge" and felt unsafe. (Trial Tr. 184, 187.)

As to section 12(C), Labbe's conduct fell squarely within the plain language of the stalking statute, 17-A M.R.S. § 210-A(1)(A)(1), and was reasonably foreseen by the Legislature. *See Doe v. Roe*, 2022 ME 39, ¶ 18, 277 A.3d 369 (in matters of statutory interpretation, if a statute is unambiguous, this Court will interpret the statute according to its plain meaning). The legislative history supports this interpretation.

When section 210-A was amended in 2007, the Joint Standing Committee on Criminal Justice and Public Safety characterized the "Act to Amend the Laws Governing Stalking" as a bill that "expands the course of conduct" so criminalized. Joint Standing Committee on Criminal Justice and Public Safety, L.D. 1873, 66 (July 2007). This amendment added to the stalking statute much of the language that is in effect today. *Compare* P.L. 1995, ch. 668 § 3 (eff. July 4, 1996), *with* P.L. 2007, ch. 685, § 1 (eff. July 18, 2008). Moreover, Public Law 2007, ch. 685, § 3, expressly provided the "Legislative intent" for that amendment to the stalking statute:

> The Legislature finds that stalking is a serious problem in Maine and nationwide. Stalking can lead to death, sexual assault, physical assault and property damage. Stalking can involve persons who have had an intimate relationship as well as persons who have had no past relationship. Stalking can result in great stress and fear in the victim and often involves severe intrusions on the victim's personal privacy and autonomy. *Stalking can have immediate and long-lasting impact on the quality of life and safety of the victim and persons close to the victim.*
>
> By enacting these amendments, *the Legislature intends to better protect victims from being intentionally harassed, terrified, threatened or intimidated by individuals who use a wide variety of methods to track, threaten and harass their victims. The goal is to authorize effective criminal intervention before stalking behavior results in serious physical and emotional harm*.
> . . .

> *The new provisions are drafted broadly to capture all stalking activity. . . .* In the future, new technologies not currently imagined will be used to the same ends. The Legislature intends that the use of such new technology be covered by this legislation.

(Emphasis added.) Labbe's conduct fell squarely within the protections sought to be afforded to the victim by the Maine Legislature and is not de minimis.

Furthermore, applying the factors announced in *Kargar*, 679 A.2d at 84, at the time of the motion for judgment of acquittal, the court knew that Labbe had a 2017 conviction for a Class C Violation of Condition of Release for having contact with the same victim and had just been released from prison having served a sentence for that conduct, which suggests that Labbe knew or should have known of the consequences; the court had heard the evidence in the State's case-in-chief, including the harm caused to the victim and son; and knew the nature of the continued, repeated contact by Labbe despite the victim telling him to stop, blocking his calls, changing her numbers, and obtaining a protection order. (*Generally* Trial Tr.; 7/20/2022, State's Motion in Limine.)

As such, it was not obvious error for the court to deny Labbe's motion for judgment of acquittal based, in part, on a de minimis argument.[6]

[6] If, however, this Court were to conclude that the trial court committed obvious error by failing to consider the *Kargar* factors, the State respectfully requests that this Court affirm the conviction on the other grounds and remand the case back to the trial court to provide the court with the opportunity to make the findings if so required. *State v. Kargar*, 679 A.2d 81, 83 (Me. 1996).

IV. The court did not abuse its discretion or clearly err by admitting evidence of Labbe's prior conduct involving violations of court orders for having contact with the same victim and that he had been "away" for years before the crimes occurred.

Labbe argues that the court erred by admitting evidence of his 2017 violations of a court order prohibiting contact with the same victim, evidence that he was "away" for years, and references to Labbe being on "house arrest" and that he recently "got out." (Blue Br. 10-12.)

This Court "review[s] a trial court's decision to admit evidence of prior bad acts, pursuant to M.R. Evid. 404(b), for clear error, and its M.R. Evid. 403 determination for an abuse of discretion." *State v. Pillsbury*, 2017 ME 92, ¶ 22, 161 A.3d 690.

Rule 404(b) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." It does not, however, identify the limited admissibility of prior acts. M.R. Evid. 404(b) restyling note, Nov. 2014. Me. Judicial Branch website/Rules & Administrative Orders/Rules (last visited Feb. 15, 2023). "Evidence of prior bad acts is admissible, however, if offered to prove identity, intent, knowledge, motive, opportunity, plan, preparation, or absence of mistake." *State v. Anderson*, 2016 ME 183, ¶ 13, 152 A.3d 623. When evaluating such evidence, "[t]he issue is

whether there is some sort of logical or experiential 'nexus' between the prior acts and the act charged other than a general propensity on the part of the defendant to commit such acts." Field & Murray, Maine Evidence § 404.8 at 153 (6th ed. 2007); *see also U.S. v. Landry*, 631 F.3d 597, 602 (1st Cir. 2011) (outlining a two-part test to determine whether prior act evidence has "special relevancy" beyond propensity by looking at the "temporal relationship of the other act and degree of similarity to the charged crime").

Ultimately, evidence admitted on grounds other than those precluded by Rule 404(b) are still subject to Maine Evidence Rule 403 and may be excluded where "the probative value is substantially outweighed by the danger of . . . unfair prejudice." M.R. Evid. 403.

Here, evidence of Labbe's 2017 violations of court orders by having contact with the victim and that Labbe was "away" before November of 2019 was admitted to show whether the victim suffered "serious inconvenience" or "emotional distress" as required by 17-A M.R.S. § 210-A(1)(A)(1), (2)(D), (E); and was admitted to show motive, intent, opportunity, and a prior relationship between Labbe and the victim. (Trial Tr. 5-9; 7/20/2022, State's Motion in Limine; A. 15). It was not admitted to show that Labbe had a propensity for violating court orders pertaining to contact with the victim, nor did the unfair

prejudice substantially outweigh the probative value, M.R. Evid. 403, because the court only permitted a general reference to court orders. (Trial Tr. 7-9.)

The trial court did not abuse its direction or clearly err by admitting this evidence. The court spent a great deal of time at the start of trial discussing why and how this evidence should be introduced; it carefully crafted a limited, generic description of Labbe having violated prior court orders pertaining to the victim rather than permitting any specific evidence that it was a "VCR or violation of protection order or that he was in jail at any particular time." (Trial Tr. 1-9.)

The court further articulated its rationale at the hearing on Labbe's motion for a new trial:

> [A]s for allowing evidence of prior conduct . . . this does go to the victim's state of mind, specifically to some of the elements that – which [the State] had to prove in the stalking case, largely, allowing the jury to know that there had been prior orders in place that the defendant violated, causing the victim stress, going specifically to those elements of emotional distress and/or serious inconvenience[.]
>
> So we sanitized it at trial that he'd been out of the area when he was serving his sentence. We let the jury know that he was just out of the area, which was the way we navigated as to why was there now this conduct that was – contact that was being initiated in November. . . . And so we – we sanitized that, I think, appropriately.

> And then otherwise – although, it certainly might have been prejudicial to the defense that there were prior orders in place the defendant violated causing her stress. Again, its not unduly or that does not violate the 403 standard, and it was obvious the State needed to prove.
>
> . . .
>
> As for the . . . just the overall point here is that the State had to prove emotional distress and serious inconvenience. Her testimony, we learned about at trial, was -- she was quoted as saying, what am I going to do? What am I supposed to do? Kind of leaving the overall message that court orders weren't stopping the defendant, again, going to those issues of emotional distress.

(Sentencing Tr. 5-6.)

Moreover, the court's limiting instruction—which the defense requested—provided thoroughly sufficient guardrails to ensure that the jury properly considered this evidence. (Trial Tr. 24-26, 188.) Additionally, the court caught that "we flew right through" testimony about the 2017 contact but didn't give the limiting instruction at that time. (Trial Tr. 171.) The defense was satisfied with the court instructing as part of the final jury instructions, however, the court insisted on providing that instruction "during the evidence," and ultimately did. (Trial Tr. 171-72, 188.)

Interestingly, although the defense argues it was error for the court to permit the introduction of this evidence, the defense started the trial with its

opening statement that he "want[ed] to touch briefly on the State's reference to Mr. Labbe violating previous court orders. And the judge is going to give you an instruction on that, that you can't consider his *violation of prior protection orders* in determining whether he committed this offense." (Trial Tr. 60 (emphasis added). Then, at closing argument, wanted to "just clear up a mistake I made in opening. . . . I was thinking about the protection order arguments and I said there'll be evidence of [Labbe] violating prior protection orders. I meant to say court orders. That's what you heard from the evidence so my apologies on that." (Trial Tr. 307.)

Nor can it be said that any unfair prejudice was somehow "compounded" by the admission of testimony that Labbe was on "house arrest" or that he "got out." (Blue Br. 11-12.) As to the victim's testimony that Labbe was on "house arrest," those words were uttered once at trial, to which the defense timely objected and the court sustained. (Trial Tr. 184.) There were no other references to "house arrest" during trial, and the defense did not ask for any other remedy.

As to the victim's testimony that Labbe "got out," that testimony came out on cross-examination by the defense when she was asked whether she had any of Labbe's money, which the victim denied. (Trial Tr. 217-18.) The defense did not object or move to strike, but did move for an untimely mistrial later in trial

(Trial Tr. 232), which was denied by the court (Trial Tr. 234). The court noted that "we don't know it's not that it was clearly stated, got out of jail," and offered a limiting instruction to not interpret that comment, which the defense declined. (Trial Tr. 234-35.)

Additionally, the court returned to the defense's motion for a mistrial and stated that "certainly there's always a risk of drawing further attention to it, but one of [the] statements was made during direct exam. So certainly [we] weren't going to lurch to the sidelines then. And the other statement about house arrest, I don't recall when that was being made but certainly understand why we didn't . . . bring a lot of attention to it at . . . those times." (Trial Tr. 256-57.) The court asked whether Labbe wanted the limiting instruction repeated as to the 2017 contact, which he requested and the court gave. (Trial Tr. 257-58, 281-82.)

At the hearing on the Motion for a New Trial, the court ruled on the prejudice of these two statements:

> But there were the two comments that – I think it was [the victim] . . . [t]here was a sentence she made using the term 'house arrest,' and she also used, I think 'when he got out.' Those, I think, are the two the defense is complaining . . . about. Those certainly were slips of the tongue.
>
> I'm not, however, persuaded that the jury knew exactly what was meant by those because it wasn't direct testimony of [the] house arrest condition . . . it was just one of those terms almost in – in slang. And I'm . . . not

> satisfied that the jury was influenced in any way when you look at the context of the entire trial.

(Sentencing Tr. 6.)

In sum, the court did not abuse its discretion or clearly err by permitting the introduction of evidence that Labbe was "away" for three years before the conduct occurred or that he had previously violated court orders involving contact with the same victim.

CONCLUSION

For the foregoing reasons, the State of Maine respectfully requests that this Court affirm the judgment of conviction.

Dated: February 16, 2023

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CERTIFICATE OF SERVICE

I, Katherine M. Hudson-MacRae, certify that I have mailed two copies, postage prepaid, of the "Brief of the Appellee" to the Appellant's attorney of record, Verne E. Paradie, Jr., Esq., 472 Main Street, Lewiston, Maine 04240, and one copy by electronic mail to vparadie@lawyers-maine.com.

Dated: February 16, 2023

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