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

LAW COURT DOCKET NO. Pen-24-248

STATE OF MAINE
Appellee

v.

ROCHELLE GLEASON
Appellant

ON APPEAL from the Penobscot County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

Introduction **4**
Argument **5**
First Assignment of Error
I. The proper remedy for the prejudicial Sixth Amendment error is vacatur. 5
A. This Court should vacate because the State did not create a record adequate to support admissibility. 5
B. This Court should vacate because the State has not developed a legal argument in support of admissibility. 7
Second Assignment of Error
II. Omission of a concurrent-causation instruction was prejudicial error. 10
A. The proposed instruction accurately reflects the law. 10
B. Concurrent causation was a reasonable theory. 11
C. The camel: How the other instructions understated the State's burden. 11
D. The omission was prejudicial. 12
Conclusion **13**
Certificate of Service **14**

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Byrd v. United States, 584 U.S. 395 (2018) 7
Crawford v. Washington, 541 U.S. 36 (2004) 5
Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) 9
Smith v. Arizona, 602 U.S. 779 (2024) 5, 9

Cases

Evans v. State, 2020 ME 36, 228 A.3d 156 7
State v. Clark, 2024 N.C. App. LEXIS 962, 2024 WL 4941632 (N.C. Ct. App. 2024) 9
State v. De St. Croix, 2020 ME 142, 243 A.3d 880 8

State v. Hale, 2024-Ohio-5579 (Ohio 1st Div. App. 2024) 9
State v. Hemminger, 2022 ME 32, 276 A.3d 33 8
State v. Kelley, 2025 ME 1, 325 A.3d 1168.. 7
State v. Kibbe, 2017 ME 231, 175 A.3d 653 6
State v. Lepenn, 2023 ME 22, 295 A.3d 139.. 8
State v. Mercier, 2014 ME 28, 87 A. 3d 700 5
State v. Ouellette, 2024 ME 29, 314 A.3d 253 6
State v. Page, 2023 ME 73, 306 A.3d 142.. 6
State v. Radley, 2002 ME 150, 804 A.2d 1127 6
State v. Wai Chan, 2020 ME 91, 236 A.3d 471... 8
United States v. Jackson, 636 F.3d 687 (5th Cir. 2011) 5

Statutes

17-A M.R.S. § 1105-A(K) 10, 12
17-A M.R.S. § 33(1)... 12
17-A M.R.S. § 33(2)... 11, 12

Constitutional Provisions

U.S. CONST., Amend. IV 7
U.S. CONST., Amend. VI 5, 6

Other Authorities

https://dictionary.cambridge.org/us/dictionary/english/forensic (February 4, 2025). 8

INTRODUCTION

I. As the State has conceded both that the court erred and that, on the existing record, such error is not harmless, defendant simply addresses the proper remedy: vacatur, for multiple reasons. But that discussion is academic; the court's other error requires vacatur regardless.

II. The State's analysis, with all due respect, is defeated by its mistaken contention that "but for" causation is as exacting as "sufficient by itself" causation. As defendant illustrates below with an analogy about a camel, *infra* at 11-12, they are not the same, and the court's omission to instruct the jury in the latter understated the State's burden in a manner and to a degree prejudicial to defendant.

ARGUMENT

First Assignment of Error

I. The proper remedy for the prejudicial Sixth Amendment error is vacatur.

A. This Court should vacate because the State did not create a record adequate to support admissibility.

There's a disconnect between the State's proposed remedy – remand to determine whether the statements are "testimonial"– and the reason it offers in support – *Smith*[1] "intervene[d] and abrogate[d]" prior Confrontation Clause jurisprudence, Red Br. 14. While *Smith* no doubt changed this Court's jurisprudence à la *Mercier*,[2] it in no way provides "new guidance" about the testimonial-prong. *But see* Red Br. 14 n. 14. Rather, the State had twenty years' notice that the Confrontation Clause is triggered only by testimonial statements. *See Crawford v. Washington*, 541 U.S. 36 (2004). Thus, in the only regard that matters, our case does not present some "unusual circumstance." *But see* Red Br. 14.

The State, as the proponent of the challenged statements, bore the burden of establishing that its evidence satisfies the Confrontation Clause. *United States v. Jackson*, 636 F.3d 687, 695 (5th Cir. 2011) ("[T]he government bears the burden of defeating [the defendant's] properly raised Confrontation Clause objection by establishing that its evidence is

---

1 *Smith v. Arizona*, 602 U.S. 779 (2024).

2 *State v. Mercier*, 2014 ME 28, 87 A. 3d 700.

nontestimonial.").[3] Its request for a remand implicitly recognizes that it failed to satisfy that burden. Instead, it asks for a re-do.

"Having failed to meet its burden, there is no basis upon which to allow the State a second attempt to prove those facts." *State v. Kibbe*, 2017 ME 231, ¶ 10 n. 5, 175 A.3d 653; *cf. State v. Radley*, 2002 ME 150, ¶¶ 16-19, 804 A.2d 1127 (vacating convictions when State – the proponent of evidence – neglects to make factual record supporting admission). How would a contrary ruling look? For example, henceforth when this Court rules that a defendant didn't quite make the showing he needed to obtain some legal benefit, will he, too, get the same re-do to supplement the record that the State now seeks for itself? *Cf. State v. Ouellette*, 2024 ME 29, ¶¶ 18-19, 314 A.3d 253 (upholding denial of motion to suppress, rather than remanding, where record was not "developed" below); *cf. State v. Page*, 2023 ME 73, ¶ 22 n. 9, 306 A.3d 142 (upholding convictions, rather than remanding, where record is not "sufficiently developed" to support the defendant's equal protection claim). To see the shoe on the other foot is to see just how ill-fitting the State's preferred remedy is.

---

[3] To be clear, the defense bore no burden to "raise[]" the testimonial nature of the statements. Regardless, counsel's repeated objections that Ms. Deisher's statements violated the Confrontation Clause *did* necessarily put the State on notice that *all* prongs of the confrontation analysis were in play. *But see* Red Br. 13 (noting that "neither party raised an argument" whether the statements were testimonial).

Likewise, the trial court, too, had ample opportunity to decide whether the statements were testimonial. Judges not uncommonly base their rulings on multiple rationales so as to inoculate against appellate courts reaching contrary conclusions. *But see* Red Br. 13 & n. 14 (contending that the trial court must make the "initial determination" as to testimonial nature).

The Maine defense bar has taken notice of this Court's recent, frequent holdings that defendants have "waived" arguments by failing to develop them below. So far, the State appears to have been largely exempted from this burgeoning body of waiver and forfeiture case-law. *See*, *e.g*., *State v. Kelley*, 2025 ME 1, ¶¶ 10, 18, 325 A.3d 1168 (declining to construe prosecutor's statement that, "the State 'concede[d] for the purposes of the motion to suppress that [Kelley] ha[d] a reasonable expectation of privacy' in the vehicle," as a waiver of "standing")[4] (brackets in *Kelley*). Ours is just the latest case of an attorney omitting to make a potential legal argument and develop a factual record to support it. If that attorney were a defense lawyer, this Court's recent decisional law suggests, such an omission would doom his or her client. Here, the State asks for a different outcome, and defendant respectfully points out that procedural rulings must satisfy the "appearance of fairness" or else the whole system is "irredeemably tarnished." *Evans v. State*, 2020 ME 36, ¶ 6, 228 A.3d 156.

B. This Court should vacate because the State has not developed a legal argument in support of admissibility.

As for the merits, should this Court decide it appropriate to reach them, the State offers a footnote and cites no decision of this or any other court. *See* Red Br. 13-14 n. 14. Again, this is the sort of argument that, when

---

[4] Defendant's point is that Fourth Amendment "standing" is "waiveable" because it is non-jurisdictional. *Byrd v. United States*, 584 U.S. 395, 411 (2018) ("Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim.").

offered by a defense lawyer, is rightly deemed "waiver." *Cf. State v. Lepenn*, 2023 ME 22, ¶ 1 n. 3, 295 A.3d 139 (defendant waives argument that is "raised only in a cursory manner in two footnotes"); *cf. State v. De St. Croix*, 2020 ME 142, ¶ 11 n. 6, 243 A.3d 880 (defendant waived argument that is "referenced only briefly in a footnote of his brief"); *cf. State v. Hemminger*, 2022 ME 32, ¶ 15 n. 6, 276 A.3d 33 (declining to address the defendant's "undeveloped" argument presented only in a footnote); *cf. State v. Wai Chan*, 2020 ME 91, ¶ 18 n. 10, 236 A.3d 471 (declining to reach the defendant's argument, raised in "a footnote in his brief," because it is not "fully developed"). This Court should hold the same here: The State has waived, for lack of development, any argument about the merits on the record it created below.

Anyway, Ms. Deisher is a *forensic* toxicologist. 2Tr. 429. "Forensic," as confirmed by the Cambridge Dictionary, means "related to scientific methods of solving crimes, involving examining the objects or substances that are involved in the crime."[5] Particular to our case, Ms. Deisher testified that she reviews the "case history" and that she knows that "the client" was the Maine medical examiner – clearly a forensic function. 2Tr. 429, 432-33, 441, 454. Yet, the State doubts that NMS analysts are cognizant of the evidence-making nature of their work. *See* Red Br. 13-14 n. 14.

To the contrary, it is inconceivable that the analysts who produced the data upon which Deisher testified could be either so obtuse or perfectly

---

[5] https://dictionary.cambridge.org/us/dictionary/english/forensic (February 4, 2025).

walled-off so as to be unaware that their statements were being produced "for use at a later trial" – which is the legal standard. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009). Other courts – including some since *Smith* was decided – have recognized as much. *E.g.*, *State v. Hale*, 2024-Ohio-5579, ¶ 65 (Ohio 1st Div. App. 2024) ("[T]he statements made by the non-testifying BCI analysts and relied on by the testifying analysts, Dailey and Schepeler, in rendering their opinions qualify as testimonial."); *State v. Clark*, 2024 N.C. App. LEXIS 962, * 10, 2024 WL 4941632, * 4 (N.C. Ct. App. 2024) ("Ms. Fox's hearsay statements contained in her report and relied upon by Mr. Cruz-Quiñones, without independent testing, are testimonial as a matter of law."). This Court should join them.

Second Assignment of Error

II. Omission of a concurrent-causation instruction was prejudicial error.

Defendant responds to the four thrusts of the State's argument, countering that (A) a concurrent-causation instruction was available at law; (B) such an instruction was generated; (C) the court's other instructions actually understated the State's burden; and (D) that omission was prejudicial.

A. The proposed instruction accurately reflects the law.

Respectfully, defendant is not sure what to make of this portion of the State's argument. On one hand, the State begins its analysis with a concession: "The State agrees that Gleason's requested instruction stated the law correctly…." Red Br. 15. A bit further on, however, it argues that the requested instruction is "incompatible with the modern overdose statute." Red Br. 16. It implies that giving the requested instruction would somehow create "absurd, illogical, or inconsistent results." Red Br. 17. It even suggests – without any support – that a preamble to a different subsection (§ 33(1): "Unless otherwise provided…) somehow modifies § 33(2).

To the extent the State has not waived by concession any contention that the requested instruction is incorrect as a matter of law, defendant again highlights the relevant element of 17-A M.R.S. § 1105-A(K):

> Death of another person is in fact caused by the use of one or more scheduled drugs….

It is difficult to conceive of plainer language; it unambiguously excludes from its ambit any deaths caused by other than scheduled drugs. It is this element,

and this element alone, that defendant has claimed is subject to 17-A M.R.S. § 33(2). *See* Blue Br. 26-27 (defendant's proposed instruction).

There is nothing at all absurd or illogical about the legislature requiring proof that the State prove that a death was caused by *only* scheduled drugs and nothing else. To the contrary, it would surely flout legislature's intent to construe the statute to criminalize deaths "in fact caused by the use of" *non*-scheduled goods – *e.g.*, alcohol, sugar, salt, or any number of other unhealthy substances. The State effectively recommends that this Court simply ignore this element and do just that.

B. Concurrent causation was a reasonable theory.

On appeal, the State contends: "The totality of the record does not support a conclusion that concurrent causation was a reasonable hypothesis." Red Br. 16. At trial, though, the State argued, "I'm not saying kratom didn't kill him, it sure didn't help him…." 5Tr. 935. When the prosecutor himself argues that kratom may have killed the decedent, it seems more than reasonable for jurors to harbor doubts that the death was "in fact caused" by scheduled drugs. Defendant had every right, under the law, to focus the jurors' attention on this prong, but the court's erroneous instruction both obscured and lightened that load.

C. The camel: How the other instructions understated the State's burden.

The State's argument here is that the court's instructions adequately covered its burden vis-à-vis causation because they required a jury finding "that scheduled drugs were the but-for cause of [the decedent's] death." Red

Br. 18. And, it asserts, "but for" causation is "more restrictive" than the instruction defendant sought. Red Br. 18. Defendant thinks the State has this backward: "But for" causation is far easier to establish than is "sufficient by itself" causation. *Compare* 17-A M.R.S. §§ 33(1) *with* (2).

To illustrate: The straw that finally breaks an overburdened camel's back might well be the "but for" cause of the poor animal's death; but that does not mean that the final straw would have been "sufficient by itself" to cause the camel's death during its healthier days. Normally, a singular straw would not cause a death; it is not often "sufficient by itself" to do so. No doubt, these different standards are why the legislature recognized a need to enact *both* subsections (1) and (2). They are not expressive of the same thing, and as the camel vignette reveals, "but for" is certainly not "more restrictive" than "sufficient by itself" causation. *But see* Red Br. 18. The court therefore understated the State's burden by omitting the requested instruction.

D. The omission was prejudicial.

Other than a miniscule amount of marijuana, fentanyl was the only scheduled drug in defendant's blood. 2Tr. 437-38. In these circumstances – *i.e.*, where there was only one scheduled drug at play and where a non-scheduled substance was also present in fatal quantity – it was confusing for the jury to hear only a "but for" instruction and a "contributed to" instruction. Indeed, jurors were repeatedly primed by the prosecution to be on the lookout for evidence that fentanyl merely "contributed" to the death. *E.g.,* 5Tr 895. But, to satisfy the "in fact caused" element of 1105-A(K), more

was required. They needed to find that the fentanyl was alone sufficient to cause the death, and the court's instructions neglected to convey as much.

One of the primary lines of defense was the idea that the State offered insufficient evidence, as defense counsel put it, "that [the decedent] died directly from the use of one or more scheduled drugs." 5Tr. 921-22. Having been denied the "sufficient by itself" instruction he requested, however, counsel could not use that language in closing. He thus lacked a suitable rejoinder to the prosecutor's "just contributed" argument, and the court's instructional error only made it worse.

CONCLUSION

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

Respectfully submitted,

February 4, 2025

/s/ Rory A. McNamara

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

ATTORNEY FOR ROCHELLE GLEASON

CERTIFICATE OF SERVICE

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

/s/ Rory A. McNamara