STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. KEN-24-341

STATE OF MAINE,

Appellee

v.

DENIS LEMIEUX,

Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET
COUNTY OF KENNEBEC

APPELLANT'S REPLY BRIEF

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I. The post-conviction review law does not foreclose the Court from considering a conviction under a facially unconstitutional statute.

i. Petgrave *does not support the proposition that post-conviction review is the exclusive means of attacking an unconstitutional conviction.*

The State cites *Petgrave v. State*, 2019 ME 72, for the proposition that Mr. Lemieux cannot attack his underlying conviction during a probation revocation proceeding. (Appellee's Br. at 9.) But that case involved a very different procedural posture and actually supports Mr. Lemieux's arguments because, according to *Petgrave*, the exclusivity of the post-conviction review statute does not apply when a defendant asserts a violation of a fundamental right.

Petgrave involved a challenge to a ruling on a motion for probation revocation, which challenge was based on ineffective assistance of counsel, not a challenge to an underlying conviction. *See Petgrave*, 2019 ME 72, ¶ 5. The procedural problem in that matter arose because, although the Court acknowledged that the defendant had a right to effective assistance of counsel, there was not an obvious avenue for relief because the defendant could not assert his argument on direct appeal or in a motion for post-conviction relief. *See id.* The Court remedied

this by allowing defendants in such situations to move for a new trial under Rule 33 of the Maine Rules of Unified Criminal Procedure and to argue that the "interest of justice" requires retrial of the probation revocation. *See id.*

Mr. Lemieux does not allege ineffective assistance of counsel during his probation revocation hearing, so the holding in *Petgrave* is not directly analogous. Unlike that defendant, if Mr. Lemieux's constitutional defense were barred, it would be pursuant to the exclusivity provision of the post-conviction review statute, 15 M.R.S. section 2122. And on that point, *Petgrave* lends itself to his argument.

Petgrave recognized an exception to section 2122 exclusivity when a claim for relief involves denial of a fundamental right. The Court stated:

> Section 2122 further states that the post-conviction review chapter is "construed to provide relief for those persons required to use this chapter as required by the Constitution of Maine, Article I, Section 10." *Id.* Article I, section 10 of the Maine Constitution states, in pertinent part, that "the privilege of the writ of habeas corpus *shall not be suspended*, unless when in cases of rebellion or invasion the public safety may require it." (Emphasis added). Thus, where the writ of habeas corpus was available pursuant to article I, section 10 to protect fundamental rights—including the right to effective assistance of counsel—the rule of construction stated in section 2122 confirms that habeas corpus relief remains available for Petgrave because he is not a person who is "required to use this chapter," 15 M.R.S. § 2122, to address his claims of ineffective assistance of counsel in the context of a probation revocation matter.

Id. at ¶ 12. Thus, while section 2122 generally replaces habeas corpus, its exclusivity provision does not apply to a defendant who asserts a fundamental

right, because to do so might deny the constitutional privilege of the writ of habeas corpus. Thus, because the defendant in *Petgrave* asserted denial of a fundamental right, section 2122 did not preclude him from relief under through an avenue other than the post-conviction review law, which in his case was a Rule 33 motion. *See id.* at 14.

Like the defendant in *Petgrave*, Mr. Lemieux sought relief based on denial of a fundamental right. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1997) (identifying the freedom of speech as a "fundamental right"). Like the defendant in *Petgrave*, Mr. Lemieux was not bound to the confines of Maine's post-conviction review law.[1] Mr. Lemieux's constitutional defense was not barred and the trial court should have considered it on the merits.

ii. Allowing a probationer to challenge an underlying conviction would not create moral hazard.

In declining to test the validity of Mr. Lemieux's conviction, the trial court worried that entertaining challenges to underlying convictions during a probation proceeding would create a perverse incentive. (A. at 59.) Probationers who violate the terms of their probation, the court reasoned, would have an opportunity to challenge their convictions while those who abide by those terms could not. The State makes that same argument in its brief. (Appellee Br. at 10.)

[1] This reading of *Petgrave* is consistent with the holding of *State v. Johnson*, the case relied upon by the trial court, where a fundamental right was not at issue. *See* 2012 ME 39, ¶ 15 ("In this case, Johnson does not claim that he was denied the right to counsel.").

But the premise of this reasoning is unsound. In Maine, probationers can seek post-conviction review of their convictions whether or not they violated their probation. *See* 15 M.R.S. § 2124. Although probationers facing revocation will need to assert their defense more urgently, they do not entitle themselves to a remedy that could not be achieved on a safer path. It therefore would not make sense for a probationer to violate their probation, thereby exposing themselves to imprisonment, for the opportunity to mount a challenge that could be mounted by safer means.

iii. Because the constitutional question raised by Mr. Lemieux raises questions about the trial court's jurisdiction, it must be addressed.

Even courts that generally preclude defendants from challenging underlying convictions during probation proceedings have acknowledged that questions of subject matter jurisdiction require special consideration. *See United States v. Teran*, 98 F.3d 831, 833 (5th Cir. 1996). In *Teran*, for example, the government moved to revoke the probation of a defendant who had been convicted under the federal Assimilated Crimes Act for an offense that was punishable by two years under Texas law but was treated as a misdemeanor offense during the defendant's plea and sentencing in federal court. *See id.* In response to the motion to revoke probation, the defendant argued that his underlying sentence was invalid because it had been imposed by a magistrate judge who, by law, did not have jurisdiction over felonies. *See id.* at 834.

The government argued that the defendant could not collaterally attack his underlying conviction during a probation revocation proceeding. *See id.* The Fifth Circuit Court of Appeals did not directly resolve the issue because it determined that the magistrate judge did in fact have jurisdiction over the matter. *Id.* However, it noted that although defendants generally cannot dispute the validity of an underlying conviction during a probation revocation, challenges based on subject matter jurisdiction require a different analysis:

> The Government contends that the issue of the magistrate judge's subject matter jurisdiction over the underlying conviction cannot be raised in the context of an appeal of a probation revocation, but must be attacked in a 28 U.S.C. § 2255 proceeding. This Court has previously addressed a seemingly comparable problem in *United States v. Francischine*, in which we decided that the validity of an underlying conviction cannot be challenged in a probation revocation proceeding, but must be collaterally attacked in a § 2255 proceeding. 512 F.2d 827 (5th Cir.), *cert. denied,* 423 U.S. 931, 96 S.Ct. 284, 46 L.Ed.2d 261 (1975). However, that decision addressed the appropriateness of a § 2255 proceeding for reasons other than jurisdiction. *Id.* at 828–29. The question to be examined in *Francischine* regarding the validity of the underlying conviction did not require a revoking court to examine the competency of the convicting court to hear the original case. A thorough search does not reveal a decision in any circuit holding that the jurisdiction issue must be brought in a § 2255 proceeding. We decline to address this issue and assume for purposes of this case that the appellant is not barred from raising the issue of jurisdiction.

See id. at 833 n.1. Thus, even while acknowledging that a defendant generally cannot collaterally attack an underlying conviction, the court left open the question of whether an exception must be made for jurisdictional concerns.

Like the defendant in *Teran,* Mr. Lemieux has raised a doubt about whether the court that imposed a probated sentence had the authority to do so. Indeed, Mr. Lemieux's concern, that his conviction was entered under a constitutionally-defective statute, seems even more pressing than the more technical concern at issue in *Teran*.

As the court in *Teran* recognized, defenses based on lack of subject matter jurisdiction are given special status. Whenever a court wields its power, it must do so with the certainty that it has the authority to do so. For that reason and unlike other defenses, subject matter jurisdiction can be raised at any point during a court proceeding. *See* M.R.U. Crim. P. 12(b)(2); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."). When Mr. Lemieux raised doubts about the constitutionality of Maine's terrorizing statutes and his underlying conviction, the trial court should have addressed the issue because, if that statute is void, then the court lacked the authority to enforce it. *See Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, 506 F.Supp.3d 1242, 1245 (M.D. Fl. 2020) ("Because the Court is without authority to enforce an unconstitutional statute, the Court lacks subject matter jurisdiction over this action.").

II. The terrorizing statutes fail under a traditional constitutional analysis.

The State argues that an overbreadth analysis is the only means of invalidating Maine's terrorizing statutes. (Appellee Br. at 15.) In fact, overbreadth is a doctrine invoked only when a statute has a "plainly legitimate sweep" but would also touch protected speech. *See U.S. v. Stevens*, 559 U.S. 460, 474 (2010) (noting overbreadth as a "second type of facial challenge" employed as an alternative to traditional facial challenges). Before conducting an overbreadth analysis, the Court should apply a traditional analysis, which merely requires that it determine whether the terrorizing statutes are consistent with the Constitution. *See id.* ("Deciding this case through a traditional facial analysis would require us to resolve whether these applications of § 48 are in fact consistent with the Constitution.").

Contrary to the State's characterization, Mr. Lemieux does not argue "that if a statute touches, at all, any protected speech it is, therefore, unconstitutional." (Appellee Br. at 14.) Consistent with precedent applying a traditional facial challenge, statutes that discriminate imperfectly may nonetheless survive if they are susceptible to a saving interpretation, that is, an interpretation that limits their scope to touch only unprotected speech. *See State v. Hotham*, 307 A.2d 185, 186 (Me. 1973) (citing *Gooding v. Wilson*, 405 U.S. 518 (1972)).

As explained in Mr. Lemieux's brief, a saving interpretation is not possible due to the specific language of Maine's terrorizing statutes, which cannot accommodate the *mens rea* required by *Counterman*. (Appellant Br. at 10.) Those statutes are different in that respect from the suspect statute in *Counterman*, which was silent as to whether a threat needed to be made with some level of criminal intent. *See Counterman v. Colorado*, 600 U.S. 66, 70 (2023). The fact that Colorado's statute survived *Counterman*, therefore, is not helpful to the question presented here because Maine's terrorizing statutes are not merely silent on the issue of criminal intent; they unambiguously disclaim the need to prove a *mens rea*. (Appellant Br. at 10.)

III. The terrorizing statutes would fail under an overbreadth analysis.

Maine's terrorizing lacks a "plainly legitimate sweep," and, for that reason, weighing legitimate and illegitimate applications under an overbreadth analysis would be an academic exercise. However, it is worth noting that concerns about the terrorizing statute are not limited to "convoluted hypothetical" cases. Rather, those statutes permit the government to regulate speech in precisely the manner that concerned the Supreme Court in *Counterman*.

Maine's terrorizing statutes would criminalize unintentionally threatening speech. It is not difficult to imagine how this overcriminalizes speech, especially in an internet age where dissemination is global and context is often difficult to

decipher. Indeed, Justice Sotomayor, concurring with the majority in *Counterman*, expressed concerns that could easily be addressed directly to Maine's terrorizing statutes:

> Rapid changes in the dynamics of communication and information transmission" have led to equally rapid and ever-evolving changes "in what society accepts as proper behavior." Different corners of the internet have considerably different norms around appropriate speech. Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a larger audience.
>
> Without sufficient protection for unintentionally threatening speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics, or for unreflectingly using language he read in an online forum. "[A] drunken joke" in bad taste can lead to criminal prosecution. In the heat of the moment, someone may post an enraged comment under a news story about a controversial topic. Another person might reply equally heatedly. In a Nation that has never been timid about its opinions, political or otherwise, this is commonplace.

Counterman, 600 U.S. at 87–88 (2023) (citations omitted). These are not "convoluted hypotheticals." They are everyday scenarios. Justice Sotomayor, noting that "First Amendment vigilance is especially important when speech is disturbing, frightening, or painful," raised serious concerns about statutes such as Maine's that would criminalize unintentionally threatening speech. *See id.*

Thus, even if the Court applied an overbreadth analysis, which, as explained above, is unnecessary, Maine's terrorizing statutes would be unconstitutional on their faces. Those statutes allow the State to police speech in a way that would chill

the free exchange of ideas. *See id.* at 75 ("[A]n important tool to prevent that outcome—to stop people from steering 'wide of the unlawful zone'—is to condition liability on the State's showing of a culpable mental state."). The ubiquity of emotionally charged discourse, often aired in online forums, raises the possibility of discriminatory enforcement against certain political, religious, or cultural groups, especially those on the fringe of society. *See id.* at 88 ("Members of certain groups, including religious and cultural minorities, can also use language that is more susceptible to being misinterpreted by outsiders. And unfortunately yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous."). The breadth of Maine's statutes is especially concerning because it allows prosecutions not only when a listener feels threatened, but when another person perceives a communication as a threat. Thus, someone with very little context about a communication—perhaps someone scrolling social media in search of incriminating speech—could sound the alarm that results in a prosecution.

CONCLUSION

This dispute concerns the intersection between the finality of judgments and subject matter jurisdiction. Although the concern for the finality of judgments is valid, it cannot create jurisdictional power that never existed. *See U.S. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) (explaining that lack of subject matter

jurisdiction can render a judgment void "where a court wrongly extends its jurisdiction beyond the scope of its authority."). Had the trial court examined the pressing constitutional issue, which it was bound to do, it would have concluded that Mr. Lemieux's sentence was void and unenforceable, and disposed of the State's motion accordingly.

The State seems to accept the indisputable fact that Maine's terrorizing statutes lack the *mens rea* that must be used to distinguish protected speech from "true threats." But the State fails to explain how its proposed fix, allowing the trial court to simply add the element even though the Legislature unambiguously removed it, would respect the separation of powers that precludes the judiciary from rewriting statutes to achieve a constitutional result. *See United States v. Stevens*, 559 U.S. 460, 481 ("We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place.").

Based on the foregoing arguments, Appellant respectfully asks this honorable Court to Reverse and Remand the trial court's ruling on the State's Motion for Probation Revocation.

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Respectfully submitted,

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