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

LAW COURT DOCKET NO. Yor-24-503

STATE OF MAINE
Appellee

v.

RANDAL J. HENNESSEY
Appellant

ON APPEAL from the York County
Unified Criminal Docket

BRIEF OF APPELLANT

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INTRODUCTION

Numerous trial-errors undermined the believability of defendant's claim of imperfect self-defense:

I. Based on a faulty interpretation of M.R. Evid. 702, the trial court excluded a defense expert's testimony about the psychology of decision-making in circumstances like those faced by defendant.

II. The prosecutor, with all due respect, traversed several well-drawn lines, including, *inter alia*, the prohibition on attorneys expressing a personal opinion about a defendant's credibility and stating that defendant had lied on the stand in order to fabricate a claim of self-defense.

III. Over defendant's objection, the court permitted the State to elicit expert testimony to rebut defendant's version of the shooting, even though the witness had neither been designated as an expert nor produced any expert report noticing the substance of his rebuttal testimony.

IV. Again over defendant's objection, the court permitted the State to elicit, supposedly as evidence of defendant's "credibility," the fact that defendant was prohibited from possessing firearms.

V. Though defendant contends that each of the foregoing are reversible errors on their own, they are even more so cause for vacatur when considered cumulatively.

Defendant also presents a sentencing argument:

VI. Defendant's life sentence is the result of several sentencing improprieties.

STATEMENT OF THE CASE

After a jury-trial, defendant was convicted of intentional or knowing murder, 17-A M.R.S. § 201(1)(A) (Count I). Separately, the court (Mulhern, J.) convicted defendant of unlawfully possessing firearms, 15 M.R.S. 393(1)(C) (Count II). Thereafter, Justice Mulhern imposed a life sentence. This appeal, coupled with an M.R. App. P. 20 appeal, follows.

I. Defendant shot and killed Doug Michaud.

By September 2021, when the shooting occurred, defendant, his girlfriend and their two children had been renting an apartment in Mr. Michaud's multi-family building in Biddeford for several years. 2Tr. 12-13, 20-22; 4Tr. 111, 115-16. Michaud and his fiancé, Jamie, lived in the third-floor apartment above defendant and his family. 2Tr. 12-13.

Defendant and Michaud's relationship was often strained, with Michaud initiating the eviction process in 2019 only for the two to temporarily resolve their differences. 2Tr. 21-25; 4Tr. 129-32. By September 2021, however, their relationship had again soured, Michaud restarting the eviction process. 2Tr. 20-23; 4Tr. 131. Apparently, defendant and his girlfriend received the eviction paperwork by certified mail on September 14. 2Tr. 29-30; 3Tr. 129; 4Tr. 180-81. Upon receipt, defendant went upstairs hoping to speak with Mr. Michaud. 4Tr. 180-81. He yelled through the door – because Michaud and Jamie did not open it – to see whether Michaud would allow defendant's family, sans defendant, to remain in the apartment. 2Tr. 30, 51; 4Tr. 180-81.

Sometime after defendant relented and returned to his apartment, Mr. Michaud left the building for a vehicle inspection. 2Tr. 29, 31. Throughout these hours, defendant tried to reach Michaud by phone calls and text messages, and Michaud responded to some of the messages. 2Tr. 41, 56-57. One from Michaud, sent just after 3:02 p.m., read: "Dude you are way too much to handle. Threatening me. Also going through my stuff." 4Tr. 57. The State intimated that this referred to defendant allegedly telling Michaud, "[K]arma's a bitch, you'll get yours." 4Tr. 190-91, 193, 243. Michaud had indicated in the "notes page" of his phone that defendant said this to him just after 2 p.m. 4Tr. 191. Defendant repeatedly denied that he had done so. 4Tr. 190-91, 193, 243.

Jamie went outside to the front porch to meet Mr. Michaud when he arrived home from the inspection. 2Tr. 33. At the time, defendant was sitting atop the staircase inside the building, as Jamie had told him that Michaud would meet him up there. 2Tr. 34. Jamie felt defendant looked "confrontational." 2Tr. 35. Defendant was speaking "loudly and aggressively" as Michaud ascended the front porch. 2Tr. 35. Michaud shouted at defendant: "[I]t's one thing to harass me but you're not going to harass my pregnant girlfriend."[1]

Defendant, nonetheless, remained inside, atop the staircase. 2Tr. 38. After Michaud closed the front door, Jamie asked him to retrieve a package that had been left for her on the porch. 2Tr. 38-40. Suddenly, Jamie heard

[1] Jamie was seven months pregnant at the time. 2Tr. 29, 36, 182, 183; 4Tr. 209, 216.

defendant running down the stairs, the door opened, defendant appeared outside, shouted "Doug" and started firing a handgun. 2Tr. 39-40, 44-45. Jamie believed that defendant was "firing in the area of [Michaud's] chest." 2Tr. 42. Mr. Michaud fell to the porch floor, and Jamie knelt down to render aid. 2Tr. 43. Defendant, meanwhile, went back inside the building, closing the door behind him. 2Tr. 43.

Moments later, Jamie testified, defendant reemerged outside, approached Mr. Michaud, and shot him in the head. 2Tr. 43-44. Neighbors testified that, after the initial volley of shots, they believe they heard two more. 2Tr. 107-08, 116, 125. One witness claimed to have seen defendant fire at least two shots at Michaud and have then seen Michaud fall. 2Tr. 79-80. Another testified that he witnessed defendant climb onto a dirt bike, speed away, and say, "Welcome to Biddeford, bitch." 2Tr. 126-28, 132. After speeding through Biddeford, defendant surrendered into law enforcement's custody over the border in New Hampshire. 3Tr. 172-74, 182-83.

A medical examiner testified that Mr. Michaud, who was 6'3" and weighed 240 lbs., had been shot five times in the back. 3Tr. 35-37, 41-42. He estimated that those shots were fired from farther than three and a half feet away. 3Tr. 40. Entrance and exit wounds suggested that Mr. Michaud had been shot in the head, in a slightly upward direction, and without leaving any soot or stippling. 3Tr. 52.

II. Defendant testified that he acted in self-defense, albeit imperfect.

The night before the shooting, defendant testified, he and his friend were outside the building when Mr. Michaud walked past. 4Tr. 141. According to defendant, Michaud "was grabbing his waistline and kept pulling up on – around his belt area." 4Tr. 141. Though it was dark, defendant could make out that Michaud was smiling at him, and he believed that Michaud's movements were purposefully intimidating gestures towards a firearm. 4Tr. 142. Defendant assumed that Mr. Michaud was armed, and defendant was, in fact, intimidated. 4Tr. 142. He knew that Michaud had a gun-safe on the premises. 4Tr. 154, 253.

Mr. Michaud was a "big man," defendant noted, outweighing defendant by approximately 100 lbs. and towering over him by about half a foot. 4Tr. 142, 145-46. On the afternoon of September 14, defendant knew, Michaud was "enraged" because defendant had sent him a videorecording of defendant documenting Michaud's cluttered driveway and suggesting that it would be evidence in the eviction proceeding. 4Tr. 148. As Michaud arrived back at the building that day, defendant was afraid of what his reaction might be. 4Tr. 149.

When Michaud arrived, he soon entered the building. 4Tr. 151. Defendant wanted to plead with him to let his family remain. 4Tr. 151. Michaud yelled at defendant and began to climb the stairs, at the top of which defendant sat. 4Tr. 152. But Jamie pulled Michaud downstairs, Michaud remarking to defendant, "[Y]ou just wait, guy." 4Tr. 153-54. Defendant

understood this to be a threat, recalling the incident the night before when Michaud seemed to be gesturing towards a gun. 4Tr. 153-54. Given that interaction and his knowledge about the gun-safe, defendant felt it was a possibility that Michard was armed. 4Tr. 154.

Moments later, defendant descended the staircase and, from the threshold of the front door, told Michaud that he would not stand for the intimidations and would see him in court. 4Tr. 155-57. At that, Michaud lunged at defendant, drawing within a few feet of defendant as defendant retreated inside. 4Tr. 157-58. Defendant drew his gun and fired, fearing that Michaud would inflict serious injury. 4Tr. 158-59. Defendant acknowledges that he "panicked." 4Tr. 159. "[F]ear and adrenaline" took over as defendant pulled the trigger as quickly as he could. 4Tr. 159.

Defendant testified that, as Michaud observed the gun, he began to spin, "straight[ening] up" to defendant as the shots flew. 4Tr. 159-60. Defendant did not see Michaud fall as he scrambled to shut the door. 4Tr. 160. He remained inside for a few moments, shocked and in disbelief, only stepping back outside when Jamie screamed for help. 4Tr. 160-61. Still fearful that Mr. Michaud might be a threat, he approached Michaud so he could "pat him down." 4Tr. 161-62. Jamie reacted with fright, shoving defendant and causing defendant, who had his gun in a ready-position, to accidentally discharge the weapon. 4Tr. 161-62. The gun, defendant testified, had a "hair trigger." 4Tr. 162-63. Defendant fled in panic. 4Tr. 163.

III. Over defendant's objection, the court permitted the State to call an expert to rebut portions of defendant's account of the shooting.

Sgt. Rose of the Maine State Police's evidence response team testified as a lay witness during the State's case-in-chief. *See* 3Tr. 80. The State did not designate Rose as an expert, and his "report" made no mention of "blood spatter," the substance of his conclusions about such "spatter," or even the fact that he ever conducted an analysis about "spatter." 6Tr. 4-5; A119-20. Yet, the court permitted Rose to testify as an expert in such matters during the State's rebuttal case. 6Tr. 3-8.

During that presentation, Rose testified that defendant's version of the first volley of shots was "not consistent" with the physical evidence. 6Tr. 23. As to "the second shooting incident" – the shot to Mr. Michaud's head – Rose testified, based on his undisclosed analysis, "[Defendant] was not being accurate when he described where he was standing when he shot that last shot." 6Tr. 28.

IV. After the jury found defendant guilty, the court imposed a life sentence.

As he does with many of the pertinent procedural facts, defendant reserves for his **ARGUMENT**, below, a discussion of the court's sentencing analysis.

ISSUES PRESENTED FOR REVIEW

I. Did the court commit reversible error by excluding the expert testimony of Dr. Chuck Rylant?

II. Did the State commit reversible prosecutorial error?

III. Did the court commit reversible error by permitting a State's witness to testify in rebuttal without disclosing the nature of his testimony before trial?

IV. Did the court commit reversible error by permitting the State to elicit that defendant was prohibited from possessing a firearm in order to impeach his credibility?

V. Considered cumulatively, did the errors render defendant's trial unfair?

VI. Did the court improperly sentence defendant?

First Assignment of Error

I. The court committed reversible error by excluding the expert testimony of Dr. Chuck Rylant.

A. Summary of the argument

Based on an erroneous interpretation of M.R. Evid. 702, the trial court excluded Dr. Rylant's testimony. Such would have been crucial for jurors to understand the psychological processes faced by individuals in fight-or-flight situations like that in which defendant found himself. In other words, the excluded testimony was highly important to defendant's imperfect self-defense claim.

B. Preservation and standard of review

1. Defendant's objection was preserved.

On May 31, 2024, the defense designated Dr. Rylant as an expert, filing with the Court Dr. Rylant's report on the same day. A81-106. A few days later, the State moved *in limine* to exclude Rylant's testimony. A107. At a motions hearing on June 11, the State argued that Rylant's testimony was inadmissible "because nothing in his report contains any opinion whatsoever, as required." 6/11 Tr. at 10. Thus, according to the State, "there is no relevant evidence that he can provide to a jury." *Ibid.* Defense counsel responded that, per M.R. Evid. 702, an expert may testify in the form of an opinion *or otherwise*, and that this case presented an instance of "otherwise." *Id.* at 10. Counsel represented that Dr. Rylant would testify about the psychological dynamics of a fight-or-flight scenario, which was probative "in terms of a possible sort of manslaughter defense." *Ibid.*

Defense counsel was clear that Rylant would not offer an opinion about whether defendant, in his particular circumstances, was influenced by "amygdala hijack" because "[t]hat's a jury question." *Id.* at 13.

The court ruminated aloud about the practice "in essentially all of the prosecutions involving DV strangulation" whereby the State is permitted to call an expert (*e.g.*, Polly Campbell) about "strangulation generally" without eliciting her opinion about the case at hand. *Id.* at 14. But the court deferred ruling on Dr. Rylant's admissibility until trial. *Id.* at 15-16. At another pretrial hearing a week later, the court simply said that the admissibility of Rylant's testimony was "going to depend on whether [defendant] decides to testify or not." 6/17 Tr. at 12.

On the fourth day of trial, after defendant testified, the court took up the matter again. 4Tr. 263-71. The State again contended that because Dr. Rylant would not offer an opinion, his testimony was irrelevant. 4Tr. 263-65. Defense counsel repeated that Rule 702 did not limit expert testimony to only those cases in which the expert would offer an opinion. 4Tr. 266. Counsel added that, in light of defendant's testimony that he was in fear, it was relevant for the jury to hear from Dr. Rylant about the phenomenon of "amygdala hijack." 4Tr. 266. That, explained counsel, is "when the emotional center of the brain takes control of a person's ability to respond rationally to a threat," causing "an intense reaction that's out of proportion for the situation." 4Tr. 266-67. In other words, Rylant would not testify as to defendant's "conditions;" rather, he would help the jury "to understand

that these conditions, if they exist, can result in the – in what happened that night." 4Tr. 270.

The court ruled:

> Well, I think we need more here for this to be admissible. I agree with the [S]tate, there is **no opinion** here. And so if there [sic] is all Dr. Rylant is going to testify to, I don't think it's relevant. If he's – if he's going to go beyond this and render an opinion specific to this case and the [S]tate doesn't have proper notice of that, then that would be unfair.
>
> So this being the summary of his testimony, I don't find that there is a relevant **opinion** here, so I'm granting the [S]tate's–

4Tr. 270 (emphasis added). Defense counsel cut of the court midsentence, "He doesn't have to have an opinion, Your Honor." 4Tr. 270. Defense counsel again explained, Dr. Rylant's testimony was "relevant in terms of giving the jury an understanding of why these conditions can lead to emotional reactions that's [sic] out of proportion to the situation." 4Tr. 271. The court was unmoved: "I agree with the [S]tate's analysis. So the motion to strike Dr. Rylant is granted. He will not testify." 4Tr. 271.

Because these exchanges adequately apprised the court of the action defendant wanted the court to permit, and the basis for doing so, this assignment of error is preserved. M.R. U. Crim. P. 51.

2. This Court should review the court's interpretation of the rules of evidence de novo, and its application of those rules for abuse of discretion.

Respectfully, the standard of review this Court traditionally deploys when reviewing evidentiary rulings is unsound and out of step with those

employed by other appellate courts.[2] This case neatly exemplifies how that is so. There are at least two components of a judge's decision to admit or exclude evidence: (1) its identification/interpretation of the applicable rule of evidence, and (2) its application of that law to the facts. In our case, the court was required to first correctly interpret M.R. Evid. 401 and 702. As defendant will argue below, it failed to do so. Second, only after correctly identifying and interpreting the applicable rules, are courts typically accorded some measure of deference in applying those rules.

The Supreme Judicial Court is both inherently and statutorily endowed with the authority to say what court-rules mean. *See* 4. M.R.S. § 9-A; ME. CONST. Art. VI § 1. The identification and interpretation of rules is thus not subject to discretion accorded to lower courts, or else enforcement of those rules lack uniformity and consistency. As it does with other court-rules,[3] this Court must therefore review the identification and interpretation of rules de novo. Certainly, correct identification and interpretation of rules constitute quintessential matters of law, which this Court reviews de novo. *E.g.*, *White v. Real Deal Auto Sales & Serv. Ctr.*, LLC, 2024 ME 18, ¶ 8, 314 A.3d 189 ("We review questions of law de novo.").

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[2] For example: *State v. Mooney*, 2012 ME 69, ¶ 9, 43 A.3d 972 ("'We review a trial court's decision to exclude or admit evidence for an abuse of discretion or clear error.'"), quoting *State v. Waterman*, 2010 ME 45, ¶ 35, 995 A.2d 243.

[3] *Bridges v. Caouette*, 2020 ME 50, ¶ 10, 230 A.3d 1 (Law Court will "review the interpretation of Rules of Civil Procedure de novo"); *State v. St. Onge*, 2011 ME 73, 21 A.3d 1028 ("We review a court's interpretation of procedural rules de novo.").

To uphold its responsibility to say what the law is and means, and to ensure consistent application of that law, this Court should adopt de novo review of the identification and interpretation of rules of evidence. After that, it should then review the application of that law to the facts for abuse of discretion, as other courts do. *E.g.*, *United States v. Zarauskas*, 814 F.3d 509, 519 (1st Cir. 2016) ("We review the district court's legal interpretation of a rule of evidence de novo, but its decision to admit or exclude evidence solely for abuse of discretion."); *Elliott v. Piazza (In re Piazza)*, 2024 U.S. App. LEXIS 30636, * 5 n. 4, 2024 WL 4973301, * 3 n. 4 (3d Cir. 2024) ("To the extent the ruling involved a legal interpretation of the Federal Rules of Evidence, we review that part of the ruling de novo."); *Cisson v. C.R. Bard, Inc. (In re C.R. Bard, Inc.)*, 810 F.3d 913, 924 (4th Cir. 2015) (similar); *United States v. Guidry*, 456 F.3d 493, 501 (5th Cir. 2006) (similar); *United States v. Bloom*, 846 F.3d 243, 256 (7th Cir. 2017) (similar); *United States v. Walker*, 917 F.3d 1004, 1008 (8th Cir. 2019) (similar); *United States v. Taylor*, 2024 U.S. App. LEXIS 6128, * 3, 2024 WL 1108829, * 1 (9th Cir. 2024) (similar).

To the extent that this Court disagrees with defendant's proposed standard of review, he notes it should review thusly:

> We review a trial court's rulings on the admissibility of evidence for an abuse of discretion. *State v. Maine*, 2017 ME 25, ¶ 23, 155 A.3d 871. 'A court abuses its discretion in ruling on evidentiary issues if the ruling arises from a failure to apply principles of law applicable to a situation resulting in prejudice.' *Id.* (quotation marks omitted); *accord Koon v. United States*, 518 U.S. 81, 100,

> 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) ('A district court by definition abuses its discretion when it makes an error of law.')[.]

State v. Hussein, 2019 ME 74, ¶ 10, 208 A.3d 752 (citations and quotation marks in original).[4]

C. Analysis

Whichever standard of review this Court utilizes, it is plain that the court's exclusion of Dr. Rylant's testimony was erroneous. Because that ruling affected defendant's constitutional right to present a complete defense, the State must establish beyond a reasonable doubt that the error played no role in the outcome of the trial. It cannot do so, and the remedy is vacatur.

1. The court's ruling resulted from an error of law.

The court's ruling, cited above and located at Pages A24 through A25 of the Appendix, is premised on its determination that "there is no opinion here" so "I don't think it's relevant." 4Tr. 270; *ibid*. ("I don't find that there is a relevant opinion here, so I'm granting the [S]tate's [motion to exclude].").

This Court need not look far for authority establishing that this ruling was based on an erroneous conception of M.R. Evid. 702. Rule 702 itself plainly provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an

[4] To be clear, defendant agrees with *Hussein's* description of the abuse-of-discretion standard. However, he is unaware of the Court repeating this standard – in full – in the years since its issuance. *See*, *e.g.*, *State v. Sheppard*, 2024 ME 8, ¶ 14, 327 A.3d 1144 ("abuse of discretion").

> opinion **or otherwise** if such testimony will help the trier of fact to understand the evidence or to determine a fact in issue.

M.R. Evid. 702 (emphasis added). An advisers' note provides more context:

> The concluding phrase allowing the expert to testify 'in the form of an opinion or otherwise' is designed to allow an expert to give an exposition of relevant scientific or other principles in the form of statements of fact. *Cf. State v. Thomas*, 299 A.2d 919 (Me. 1973) (objection to expert's testimony 'presented as a statement of fact' as opposed to being 'only an opinion and not an observed fact' overruled; 'a hypertechnical exercise in semantics,' said the court).

Advisers' Note to former M.R. Evid. 702 (Feb. 2, 1976). Clearly, an expert need not give "an opinion;" his testimony is admissible if it constitutes anything else that "will help the trier of fact to understand the evidence or to determine a fact in issue." M.R. Evid. 702.

Not surprisingly, this Court has held exactly that:

> Pursuant to the Maine Rules of Evidence, a witness who has been qualified as **an expert is not limited to testifying in the form of an opinion**; rather, she may provide expert testimony in another form so long as it 'will help the trier of fact to understand the evidence or to determine a fact in issue.'

State v. Perry, 2017 ME 74, ¶ 18, 159 A.3d 840, quoting M.R. Evid. 702 (emphasis added). In *Perry*, the State's "strangulation expert" was permitted to testify even though "she did not give an opinion as to whether the victim had been strangled" and therefore had no "opinion" to render. 2017 ME 74, ¶ 19. It was appropriate, this Court held, for the lower court to admit such testimony in order to inform the jury about "the symptoms associated with

strangulation" and "how those symptoms occur as a result of an interruption in the flow of oxygen to the brain." *Ibid*.

If this Court affirms the reasoning below, it will simultaneously overturn its decisions permitting the State to admit testimony in its favor from "strangulation experts," *id*. ¶ 18; experts "concerning the protocols for interviewing child sexual abuse victims" *State v. Westgate*, 2020 ME 74, ¶ 25, 234 A.3d 230; and experts on "the subject of delayed disclosure," *State v. Paquin*, 2020 ME 53, ¶ 16, 230 A.3d 17 – none of whom testify as to "opinions" regarding the case at hand. *See Westgate*, 2020 ME 74, ¶ 25 (testimony about protocols admissible because it is *not* "an endorsement – from an experienced interviewer trained to identify sexually abused children – that the victim was truthful"); *see Paquin*, 2020 ME 53, ¶ 18 (testimony about delayed disclosure admissible because court "restrict[ed] the expert's testimony to the subject of delayed disclosure in general – as opposed to an opinion as to why the victim in this case may have made a late disclosure"). Incidentally, the inconsistency of the ruling below with the logic of *Perry*, *Westgate* and *Paquin* is all the more reason for this Court to adopt a de novo standard of review for the interpretation of rules of evidence. Clearly, consistency – and with it, the rule of law and the notions of blind justice – are at stake.

There can be no question that Dr. Rylant's proposed testimony, as foreshadowed in his report, satisfies the "low standard for relevance" under M.R. Evid. 401. *See In re M.S.*, 2014 ME 54, ¶¶ 10-11, 90 A.3d 443. Here are just a few of the things he would have testified to:

- He would have testified about "the psychological and physiological factors that affect decision making during use of force incidents. These human factors include fear, fight or flight, decision making and an amygdala hijack." A95;
- "Planning and implementation of survival tasks automatically triggers the brain to prepare the body to perform survival actions most efficiently, which impacts cognitive capacity in that moment. This process goes largely unnoticed until strong emotions are triggered, which is when it becomes apparent how significantly emotions impact cognitive processing." A97;
- "The fight-or-flight response encourages survival through automatic responses that trigger rapid and automatic behavior and operate largely outside a person's cognitive control." A97;
- "When untrained individuals perceive danger, they will typically react with a primitive and automatic fight-or-flight response." A97;
- "Research has shown that conscious deliberation does not account for all decisions and may only explain a minority of decisions."[5] A98;
- "Memories of fear-causing experiences[6] are created by the interaction of the cortex, thalamus, and amygdala. Areas of the thalamus

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[5] In addition to its relevance at trial, this evidence was relevant to the court's determination, at sentencing, that the shooting was premeditated in fact. *See* STr. 92-93.

[6] In addition to his fear of Mr. Michaud at the time of the shooting, Defendant testified that he was abused as a child. 4Tr. 109.

communicate with parts of the amygdala when processing fear-causing stimuli. The amygdala plays an important survival role because the sensory thalamus, sensory cortex, and hippocampus all send the amygdala unique data." A98;

- "The term 'emotional hijack' refers to the privileged position the amygdala has over the neocortex, which allows the amygdala to trigger an emotional response before the cortex has had the opportunity to completely understand the stimulus." A99;
- "The amygdala hijack is an immediate, overwhelming emotional response, that with the luxury of hindsight was excessive given the stimulus." A99.

This was all highly relevant to defendant's state of mind, perhaps most regarding whether defendant acted in imperfect self-defense. *State v. Hanaman*, 2012 ME 40, ¶ 13 n. 4, 38 A.3d 1278 ("If a defendant acted with imperfect self-defense, in that it may have been unreasonable for him to believe that deadly force was necessary, then the defendant cannot be held criminally liable for any crime requiring intention or knowledge of the actor, but he can be held responsible for a crime for which recklessness or criminal negligence suffices as the culpable mental state.") (citations and quotation marks omitted). In comparable situations – *e.g.*, "battered wife syndrome" – this Court has rightly recognized the relevance of expert testimony about fear to the issue of self-defense. *See State v. Anaya*, 438 A.2d 892, 894 (Me. 1981) ("W]here the psychologist is qualified to testify about the battered wife syndrome, and the defendant establishes her identity as a battered woman,

expert evidence on the battered wife syndrome **must** be admitted since it may have a substantial bearing on her perceptions and behavior at the time of the killing and is central to her claim of self defense.") (cleaned up; emphasis added). It should do the same here.

2. The court's error was not harmless.

Defendants in criminal cases have a constitutional right to present a complete defense.[7] U.S. CONST., AMEND. XIV; ME. CONST., Art. I § 6; *Crane v. Kentucky*, 476 U.S. 683, 690 (1984); *State v. Adams,* 2015 ME 30, ¶ 17, 113 A.3d 583. Because of the constitutional nature of the ruling below – it prevented defendant from fully presenting his imperfect self-defense case – this Court will reverse unless the exclusion of Dr. Rylant's testimony was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

While the evidence that defendant shot and killed Mr. Michaud was overwhelming, the evidence that he did so other than in imperfect self-defense was much less. Especially in tandem with the other errors undermining defendant's self-defense case, the exclusion of Dr. Rylant's testimony was not harmless beyond a reasonable doubt.

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[7] Incidentally, the constitutional nature of the rights at stake are further reason for this Court to review evidentiary rulings such as this de novo. *See United States v. Haines*, 918 F.3d 694, 697 (9th Cir. 2019) ("We also review de novo whether a district court's evidentiary rulings violated a defendant's constitutional rights.").

Second Assignment of Error

II. The State committed reversible prosecutorial error.

A. Summary of the argument

The prosecutor improperly expressed her opinion about the credibility of defendant as a witness; argued that, to believe defendant, the jury would have to determine that other witnesses had lied; and unlawfully commented on defendant's pretrial silence. Even though defense counsel omitted to object to these improprieties, the repeated and deleterious nature of the remarks constitutes obvious error.

B. Preservation and standard of review

Because defense counsel neglected to object to the numerous instances of prosecutorial error, this Court's review is for obvious error. *State v. Lowery*, 2025 ME 3, ¶ 31, ____ A.3d ____.

However, because the errors are of federal constitutional magnitude, there are additional considerations for this Court.[8] First, regarding the prosecutorial error as a whole, this Court must determine whether such error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly, v. DeChristoforo*, 416 U.S. 637, 643 (1974). Second, because the prosecutor's errors regarding defendant's silence, *see infra* C.1.iii, inhibited a "specific guarantee[] of the Bill of

[8] In other words, defendant is explicitly invoking his federal constitutional rights, should federal-court review become necessary. *Cf. Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (*per curiam*) (federal claim is preserved when "[t]he state-court brief was clear that the prosecutorial misconduct claim was based, at least in part, on a federal right.").

Rights," "this Court [must] take[] special care to assure that prosecutorial conduct in no way impermissibly infringes [that guarantee]." *Ibid.*; *see Darden v. Wainwright*, 477 U.S. 168, 182-83 (1986) ("right to remain silent" is among "specific rights").

C. Analysis

Adhering to the obvious-error rubric, defendant (1) combines together his discussion of the first and second prongs, followed by (2) a joint analysis of the third and fourth prongs. *See State v. Dolloff*, 2012 ME 130, ¶ 35, 58 A.3d 1032 (prongs are: (1) an error (2) that is plain, (3) affects substantial rights, and (4) which this Court should remedy).

1. Several instances of the State's argument and cross-examination of defendant were plainly erroneous.

For the sake of analysis, defendant separates the prosecutor's errors into three broad categories.

i. The prosecutor improperly expressed her personal opinion about the credibility of defendant.

It is black-letter law that a prosecutor shall not express an opinion about a defendant's credibility. There are many ways a prosecutor might traverse this prohibition, and the actions of the prosecutor in our case run the gamut – from "vouching" to outright stating that defendant lied on the stand.

Starting with perhaps the most blatant, the prosecutor made explicit her belief that defendant's claim of self-defense was nothing but "lies" and "manufactured" "fiction" "made up from whole cloth":

> You will be instructed that you can consider a witness's credibility, their bias, their lack of bias, their motive in their testimony. And I suggest to you[9] that what the defendant did on that witness stand was **fiction**. What he explained was **manufactured** to fit the self-defense statute. And try as he might he couldn't do it.
>
> And the law does not require that you sort out his **lies**. That's not how this works. Because if you don't believe him, you can dispense with self-defense. You don't have to figure out this belt buckle business. You don't have to figure out the gritting of his teeth going after him stuff. Because it was **made up from whole cloth**. It doesn't fit the physical evidence. It doesn't fit the ear witnesses. It doesn't fit the eyewitnesses.

6Tr. 84-85 (emphasis added). This came after the prosecutor had earlier asserted her personal belief that defendant's testimony was neither credible nor believable:

> And that explanation that he gave on that witness stand was **incredible**, **unbelievable** and inconsistent with throughout.

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[9] Throughout this portion of his brief, defendant underlines phraseology such as this because it represents a form of personal vouching. *See United States v. Nersesian*, 824 F.2d 1294, 1328 (2d Cir. 1987) ("[W]e stress that it is a poor practice, one which this court has repeatedly admonished prosecutors to avoid, for prosecutors to frequently use rhetorical statements punctuated with excessive use of the personal pronoun 'I'") (internal citation omitted); *see also United States v. Young*, 470 U.S. 1, 7 (1985) ("Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence.").

6Tr. 70 (emphasis added). These are unambiguous, bald-face expressions of the prosecutor's personal belief that defendant was not credible and lied on the stand.

In addition to such outright expressions of personal belief, throughout the State's closing argument, the prosecutor made numerous unmistakable allusions to her belief that defendant was lying:

- "He's spinning, he started firing, he said I was already pulling the trigger as he was spinning. But yet on direct examination he said, after the bullets were fired he spun. Inconsistent. Why? **Because he's making it up**, that's why." 6Tr. 77.
- "So I would suggest to you that Randal Hennesey has read the self-defense statute and **he has tried desperately to conform his testimony** to the physical evidence that was presented, to all the eyewitnesses and the ear witnesses, **he has tried to fit his testimony** into all of those things. And he couldn't even keep it straight." 6Tr. 72.
- "And I suggest to you that **he inserts** that crouching down business because he knows that Dr. Funte has testified that those bullets went into Doug's back in an upward trajectory, you heard that testimony." 6Tr. 64-65.
- "And then the defendant began to describe **what he thought would fit** the self-defense statute." 6Tr. 74.

- "He cannot **keep it straight**. And the details are important. And he could **not keep it straight**." 6Tr. 76.
- "And I suggest to you that in his testimony he used the word retreating five times. **Why?** Because **he knows what that self-defense statute says and he knows what he's got to say** in order to convince all of you that he was acting in self-defense." 6Tr. 72.
- "And **why does he say** he's got to pat him down? Because he's still got to be in fear under that self-defense statute. **He is trying to cram his testimony into that self-defense statute**. And **he's trying** but it's not working." 6Tr. 78-79.
- "He said I fired one round. I swear, were his words. And **why does he have to say that**? He **has to say that** because one round could be accidentally – accidentally shot but not two, right? He swore that he fired one shot." 6Tr. 81.

Each of the bolded words and phrases are unambiguous assertions that defendant was lying on the stand.

This Court has "repeatedly held that it is improper for a prosecutor to express an opinion on the credibility of a defendant." *State v. Casella*, 632 A.2d 121, 122-23 (Me. 1993). It is not just "lie" or "liar" or permutations thereof that are out of bounds; it is the assertion of *any* personal belief that a defendant is lying that is prohibited. *See Dolloff*, 2012 ME 130, ¶ 42 (characterizing prohibition as barring "[i]njecting **personal opinion**

regarding the guilt or credibility of the accused") (emphasis added). The prosecutor repeatedly crossed that line.

ii. The prosecutor improperly argued that, to believe defendant, the jury would have to believe that others were lying.

Since at least 1994, it has been improper for Maine prosecutors to argue that, in order to acquit a defendant, the jury must find that the State's witnesses were lying. That year, the Law Court held that it "constitutes serious obvious error and requires reversal" for a prosecutor to argue that either the testifying complainant or the testifying defendant must have lied. *State v. Tripp*, 634 A.2d 1318, 1321 (Me. 1994).[10] Since then, this Court has repeated that "whether conveyed in cross-examination or in final argument," it is improper for a prosecutor to create an impression that the jury may believe a testifying defendant only if the jury determines another witness lied. *State v. Goodwin*, 1997 ME 69, ¶ 5, 691 A.2d 1246.

Yet, here, the prosecutor crossed that line at least twice, arguing that jurors could believe defendant's testimony only if they first found that Jamie "lie[d]" or "made it all up":

- "Is [Jamie] credible? Is she worth your trust as jurors? Because if you were to find that she isn't, what that means is you believe him. You trust him. You trust what he did on that witness stand

[10] Here's the Court's description of the erroneous argument in *Tripp*: "In closing argument, the State here first said 'that nine-year old boy . . . told you the truth. He told you what happened to him. He told you what his father did to him.' The State then said 'it does all come down to [the victim] and Linwood Tripp, Sr., because one of them wasn't telling the truth. One of them was lying here to all of us.'" 634 A.2d at 1321 (ellipses in *Tripp*).

over her. Why? Because Jamie Wakefield is going to come in here and **lie** under oath and pin a murder charge on that guy? Absolutely not." 6Tr. 101.

- "Now what would you have to believe in order to believe his testimony? You would have to disbelieve Jamie Wakefield. You would have to disbelieve everything she said to you in this courtroom. **She made it all up is what you'd have to believe**. Because his testimony is quite different than hers." 6Tr. 81.

As the Ninth Circuit has held, this tactic is a form of prosecutorial "vouching." *United States v. Urie*, 183 Fed. Appx. 608, 611-12 (9th Cir. 2006) ("[T]he prosecutor's statements to the jury that it could convict Urie only if it believed the government's witnesses were lying constitute improper vouching."). Regardless of what it is called, as this Court has held in *Tripp* and *Goodwin*, it is improper.

iii. The prosecutor improperly questioned defendant about his pretrial silence.

Several times while cross-examining defendant, the prosecutor drew attention to the fact that, after being charged, defendant did not speak with police or the prosecutor herself:

> Q. My question to you is, you understand today on this witness box [what] you have to say in order to get a justification for self-defense that you believed Douglas Michaud was about to use deadly force on you?

A. Yes, ma'am.

Q. You understand that?

A. Yes, ma'am.

Q. And **that is the very first time you have said that**?

A. Because I haven't spoken to law enforcement.

Q. Is **that the very first time you've said that to me, to detectives**, today?

A. Today.

4Tr. 254 (emphasis added). At least twice previously, the prosecutor elicited similar testimony:

Q. **You never called law enforcement, did you?**

A. No, ma'am.

Q. **You never called them to tell them, hey, it was self-defense, did you**?

4Tr. 238 (emphasis added);

Q. And if you were acting in self-defense, sir, you've got nothing – no problems, there's no murder charge, right?

A. Can you repeat that, please?

Q. If you're acting in self-defense, you're justified. There's no murder charge. **You didn't call the police to tell them you were acting in self-defense, did you?** That is my question. **Did you call the police** –

A. No, ma'am.

Q. – **and tell them that**?

A. No, ma'am.

4Tr. 238-39 (emphasis added).

The U.S. Supreme Court had held that it is "fundamentally unfair and a deprivation of due process" for prosecutors to use a defendant's post-arrest silence "to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). This Court noted, in *Patton*, that the prohibition on silence-as-impeachment evidence applies equally to evidence of silence after a defendant[11] has either "been arrested or formally charged." *State v. Patton*, 2012 ME 101, ¶ 14, 50 A.3d 544. The Fourteenth Amendment was violated by the State's questioning of defendant in this manner. As much should have been plain to the trial judge and all attorneys involved.

2. The prosecutor's errors affected defendant's substantial rights and warrant vacatur.

Defendant has two contentions about whether the errors affected his substantial rights.

First, he contends that there is certainly a reasonable probability that the errors affected the outcome.[12] There were no *effective* curative instructions. "Generally speaking," in cases in which prosecutors have

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[11] In *Commeau*, this Court recognized that such tactics are "frowned on" even when directed towards defense witnesses other than defendants themselves. *State v. Commeau*, 409 A.2d 247, 249 n. 1 (Me. 1979).

[12] "Outcome" here could mean either an outright acquittal or, if defendant's actions were imperfect self-defense, a conviction for manslaughter rather than murder. The latter would necessarily have yielded a sentence far less than life-imprisonment.

asserted that a defendant has lied on the stand, "a mere pattern statement in the court's general charge" does not forestall injury. *State v. Smith*, 456 A.2d 16, 18 (Me. 1983). Rather, "[t]he impropriety of an assertion by the prosecutor conveying his personal view that the defendant has lied or is guilty, is considered serious enough to require an instruction addressed specifically to the improper assertion." *Ibid*. In like circumstances, detriment might only be avoided with instructions identifying the "'specific statements'" that are improper, doing so "'immediately after the damage was done.'" *Urie*, 183 Fed. Appx. At 612, quoting *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992). Certainly, the Court took no "special care," as required by federal constitutional law, *see DeChristoforo*, *supra*, to ameliorate the trampling on defendant's right not to "call" the prosecutor or law enforcement to keep them apprised of his version of events.

The question to be resolved by the jury was whether defendant was credible – especially in comparison to Jamie, the sole other eyewitness. All of the prosecutor's errors improperly impugned his credibility, and several of them buoyed Jamie's credibility. Had the jury instead believed defendant, they may well have had reasonable doubts that he acted other than in self-defense – either perfect or imperfect.

Second, even were this Court to determine that there is no reasonable probability that the errors affected the outcome, it should nevertheless reverse. *Cf. State v. White*, 2022 M3 54, ¶¶ 36-37, 285 A.3d 262. The conduct here crossed clearly established lines and, more importantly, it came in a high-stakes homicide trial, with media outlets bringing news of the trial

to Mainers' attention. To permit such errors would be to undermine criminal justice – and in precisely the case-type we expect to be the most fair and just. *Id.* ¶ 35 (collecting cases for the proposition that prosecutorial misconduct has "a debilitating effect on the entire judicial process"). To tolerate it here would be to welcome it everywhere.

"Special care," also, is due to defendant's right to remain silent. *See supra* II.B. Embodying that "special care," in Maine, even "unambiguous comments on a defendant's silence" warrant reversal notwithstanding the strength of the State's evidence. *White*, 2022 ME 54, ¶ 36. This Court should order a new trial to ensure this right.

Third Assignment of Error

III. The court committed reversible error by permitting a State's witness to testify in rebuttal without disclosing the nature of his testimony before trial.

A. Summary of the argument

After defendant testified, the State again called Sgt. Rose to testify. This time, in rebuttal, the State called Rose as an expert, not as a lay witness as during its case-in-chief. Despite producing no expert report about the "blood spatter" analysis Rose offered in rebuttal – or even any notice that he had conducted such an analysis and was proposed to be an "expert" in these matters – the State was permitted to do so. This violated the court's own scheduling orders and this Court's decisional law about discovery obligations. The error was highly prejudicial, too, because such trial-by-ambush left defendant with no opportunity to consult with his own expert who might have contradicted Rose's testimony.

B. Preservation and standard of review

Via its February 12, 2024 scheduling order, the court required the parties to designate expert witnesses by May 1, 2024. A150. Over the State's objection, in mid-April, the court enlarged the deadline to do so until May 31. A149.

Prior to defendant taking the stand, the State requested and received – over defendant's objection – leave for Sgt. Rose, a state police evidence technician, to break sequestration and sit in on defendant's testimony. 4Tr. 89-90. After defendant testified and the defense rested, the State offered

Rose to testify in rebuttal as an expert. 6Tr. 3-8, 13-15. The defense noted that, while Rose had been listed as a general witness, he had neither been designated as an expert nor did his report provide notice of his rebuttal testimony about blood spatter and shooting trajectory. 6Tr. 4-5.

The defense filed a motion *in limine*, attaching Rose's page-and-a-half long "report." The report, which this Court may review at Pages A119 through A120 of the Appendix, contains little more than a narrative description of his role placing placards and taking a laser-scan of the crime scene. The court itself ruminated that the "report" rendered no opinion – ironic, given its exclusion of Dr. Rylant's defense testimony for just that reason.[13] 6Tr. 5. Noting that Rose "was not a normal rebuttal witness," defense counsel objected, "We don't have any time to prepare our own expert, to allow us to at least cross-examine this individual or put ours on in surrebuttal." 6Tr. 6.

The State countered that it was "not required to provide what [it] will introduce in rebuttal, it's wide open." 6Tr. 6. Though it was under no obligation to do so, it contended, the State had made Rose's CV available to the defense over the weekend before Monday's testimony. 6Tr. 6.

Without offering any reasoning, the court ruled it would overrule the defense objection and permit Rose's testimony. 6Tr. 8, 14-15.

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[13] Notwithstanding the court's (accurate) assessment of Rose's "report," Rose's testimony was very much in the form of opinion.

Because this issue is preserved, this Court will review for abuse of discretion. *Anaya*, 456 A.2d at 1266 (decision to permit rebuttal evidence); *Lowery*, 2025 ME 3, ¶ 24 (discovery-violation sanction).

C. Analysis

There are two reasons why the court's ruling was erroneous. *First*, rebuttal evidence is limited to that which is necessary to counter something in a defendant's case that was reasonably unforeseeable beforehand, which is not the situation presented in our case. *Second*, even if evidence is proper for rebuttal, that fact does not relieve the State from its discovery obligations. If defendant is correct about either or both contentions, the court erred.

As for the first proposition, this Court has explained:

> The standard for determining whether a rebuttal witness should be allowed to testify when such witness's name was not timely identified is dependent on whether the testimony sought to be rebutted **could reasonably have been anticipated** prior to trial.

Rich v. Fuller, 666 A.2d 71, 74 (Me. 1995) (emphasis added), quoting 75 Am. Jur. 2d Trial § 371 (1991). As the First Circuit has explained, "The principal objective of rebuttal is to permit a litigant to counter new, **unforeseen** facts brought out in the other side's case." *Faigin v. Kelly*, 184 F.3d 67, 85 (1st Cir. 1999) (emphasis added). Strict application of this principle is necessary: "Otherwise the plaintiff could reverse the order of proof, in effect requiring the defendants to put in their evidence before the plaintiff put in his." *Braun v. Lorillard, Inc.*, 84 F.3d 230, 237 (7th Cir. 1996). Certainly, the State had long been on notice that defendant would likely testify that he shot Mr.

Michaud in self-defense – *e.g.*, by Dr. Rylant's expert report, to name just one such indication. The State should therefore have reasonably anticipated that Rose's opinions about the trajectory of the shots would be necessary to rebut defendant's testimony. Even if it did not know exactly how defendant would testify, it should have prepared an expert report from Rose so as to put defendant on notice so that the defense could prepare its defense accordingly.

Even assuming everything above is an incorrect statement of the law, this Court has held, "The fact that evidence otherwise discoverable pursuant to M.R. Crim. P. 16 is used solely for impeachment and is offered in the State's rebuttal case **does not relieve the State from its duty of disclosure**." *State v. Dechaine*, 572 A.2d 130, 135 (Me. 1990) (emphasis added). Here, both M.R. U. Crim. P. 16(2)(G) and the court's scheduling order required discovery of the substance of Rose's expert testimony. Such "disclosure is consistent with the purpose of discovery which is designed to enhance the quality of the pretrial preparation of both the prosecution and defense to the end of making the result of criminal trials depend upon the merits of the case." *Ibid.* (internal quotation marks and ellipses omitted).

This is not like other cases in which a defendant might quickly, on the fly, examine and prepare a defense against a late-disclosed piece of State's evidence. *Cf. State v. Dennis*, 2024 ME 54, 320 A.3d 396 (court orders State to make gun available for test-firing "ASAP"). Obtaining an expert opinion to counter the State's late-disclosed expert's evidence would have taken

weeks or months.[14] That is not the kind of disruption that should be tolerated in the middle of a homicide trial, certainly not where the point of discovery procedures is precisely to avoid trials-by-surprise and needless delays. There was but one appropriate sanction: Exclusion of Rose's rebuttal testimony.

As for prejudice, defendant has a few contentions. On its own, this is a particularly important point, as Rose provided the only substantial evidence favoring Jamie's version of events over defendant's. Without it, this was simply a he-said-she-said case. It is not, therefore, highly probable that the court's error played no role in the outcome of trial. *Cf. State v. Judkins*, 2024 ME 45, ¶ 21, 319 A.3d 443. Second, defendant again notes that, because of the lack of notice, he had no occasion or opportunity to prepare a surrebuttal case. Third, consider the stark incongruence: The court erroneously excluded defendant's expert *and* further erroneously admitted the State's expert's testimony. If part of the harmlessness analysis divines the public's perception of judicial fairness, the result is exceedingly harmful. *Cf. White*, 2022 ME 54, ¶¶ 34-36.

[14] Unlike the State, which enjoys a stable of expert witnesses at its beck and call, an indigent defendant in Maine must: identify and research potential experts in the field; contact those experts to verify their availability; have the expert estimate how much the services would cost; obtain MCPDS approval to hire the expert; collect and forward to the expert the relevant pieces of evidence, including the heretofore undisclosed "report" of Sgt. Rose; wait for the expert to fit his analysis into his busy schedule; decide whether to have the expert produce a report; offer the report to the State (so the State would not be surprised by its contents); and arrange for the expert to travel to Maine to appear at trial.

Fourth Assignment of Error

IV. The court committed reversible error by permitting the State to elicit that defendant was prohibited from possessing a firearm.

A. Summary of the argument

Over defendant's objection, the State was permitted to introduce evidence that defendant was prohibited from possessing a firearm, despite the bifurcated trial on that charge (*i.e.*, Count II). Moreover, the court admitted this irrelevant, prejudicial evidence without any limiting instruction, leaving jurors free to draw the forbidden propensity inference.

B. Preservation and standard of review

At a pretrial hearing, the parties briefly discussed the issue, with the court deferring ruling until trial. 6.11Tr. at 46-48. Just prior to defendant's testimony, the State sought permission to introduce evidence that, at the time of the shooting, defendant was prohibited by law from possessing a firearm. 4Tr. 94. The State contended that such was relevant to defendant's "credibility and veracity." 4Tr. 94. The defense objected,

> I'm trying to understand relevancy for the jury. They'll know he had a gun. They'll know that he shot the gun, et cetera, et cetera. How is that enhanced – how is that predicate fact necessary for the jury to understand those facts? I don't see the relevancy at all. And also it's – I think under 403 it's prejudicial.

4Tr. 96.

The State, in turn, reiterated its theory of relevancy:

> As to his credibility, Your Honor. I mean in committing this act, he's breaking the law not only by killing someone but

> also by possessing that firearm that he used to kill someone. So his credibility and his account is certainly at issue here. He is going to be testifying about all of what his account was that day. So I think it's squarely relevant to his credibility that he was breaking the law in the first place by possessing the gun. He knew he didn't have a right to a gun under Maine law. So I do think it's completely relevant to his credibility and veracity.

4Tr. 97.

Without explaining its reasoning, the court sided with the State: ("Well, I'm going to allow over the defense objection both the [S]tate to inquire regarding his status as a prohibited person [and the predicate convictions.[15]]"). 4Tr. 98; A63.

This Court reviews a court's "ultimate ruling on admissibility for an abuse of discretion," somehow separately – seemingly redundantly[16] – evaluating for clear error a court's determination that such evidence is relevant. *State v. Pratt*, 2020 ME 141, ¶ 11, 243 A.3d 469.

C. Analysis

Defendant's prohibited-person status is not relevant at all to his "credibility." In fact, it was not at all relevant, certainly not in an admissible, non-prejudicial manner.

After the court's ruling, defense counsel tried to preemptively take the sting out of the prohibited-person-status evidence, eliciting that defendant

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15 These convictions include burglary and theft. 4Tr. 83, 110.

16 With all due respect, why review at all for clear error when, anyway, this Court will thereafter conduct a second, more exacting, review for abuse of discretion?

knew he was barred from possessing firearms. 4Tr. 111. On cross-examination, the State elicited more:

Q. Okay. So instead of calling the police or getting out of there, you decided to go get a gun?

A. I don't like dealing with police officers, no.

Q. Okay. My question is, instead of doing that you decided to go get a gun?

A. I've had one, yes.

Q. You have one, even though you are not allowed to under Maine law; is that right?

A. Yes, ma'am.

Q. And you knew that?

A. Yes, ma'am.

Q. You were convicted of a felony that prohibits you for life –

A. Yes, ma'am.

Q. – from possessing a firearm?

A. Yes, ma'am.

Q. But you did it anyway?

A. Yes, ma'am.

4Tr. 205-06.

In *State v. Grant*, 394 A.2d 274, 275 (Me. 1978), this Court reversed several convictions, including attempted homicide, because the prosecutor's "cross-examination of the defendant injected inadmissible and prejudicial evidence to such a degree as to constitute reversible error." The prosecutor

in *Grant* elicited how the defendant was carrying a revolver in violation of Maine law and the laws of other states. 394 A.2d at 275. The Law Court held that there was "no rational nexus" "between the willful violation of gun control regulations" "and proof of the criminal intent requisite to convict the defendant of any of the crimes charged." *Id*. at 276. Since the evidence about the defendant's violation of gun laws instead impermissibly "went directly to the credibility of the defendant as a witness," this Court reversed. *Id*. at 275. In doing so, it implied that such evidence was probative only of "bad character or propensity" evidence. *Id*. at 276.

Grant demonstrates that, even in the 1970s, there were 401, 403 and 404(b) problems with testimony of the sort elicited in our case. Since then – and, as a reminder, the trial was held just a handful of months after the horrific shootings in Lewiston – our society has only developed a greater concern for "gun control." Vocal proponents of firearms regulation vehemently, and often emotionally, speak of the dangers of guns in the hands of convicted felons. Much more so than at the time of *Grant*, jurors are likely to react emotionally to the evidence that a defendant was prohibited from possessing firearms yet did so anyway.

On the other side of the ledger, there was no relevance to the fact that defendant was a prohibited person. Certainly, on direct-examination, defendant did not deny that he was prohibited; the State therefore had no basis to "impeach" his credibility. Moreover, it is difficult to conceive of an inferential chain other than this, which is prohibited: *Defendant possessed a*

firearm when he was not allowed to, which shows that he's someone who's apt to break the law. What else could jurors have taken from this evidence?

Defendant contends that, as in *Grant*, this error was not harmless. It was pure propensity evidence, and of a particularly prejudicial nature. As this Court has done in other homicide cases, it should vacate. *Cf. State v. Thongsavanh*, 2004 ME 126, ¶¶ 6-10, 861 A.2d 39.

Fifth Assignment of Error

V. Considered cumulatively, the errors rendered defendant's trial unfair.

For the sake of this argument only, defendant assumes that the Court has found that none of the errors he has demonstrated above alone justifies vacatur. This argument nonetheless asks the Court to consider the cumulative effect of those errors, as, together, they denied him a fair trial, in violation of the Fourteenth Amendment. *See United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021). Particularly important is the fact that each of the errors are interrelated in that they undermined defendant's version of the shooting.

Sixth Assignment of Error

VI. The court improperly sentenced defendant.

A. Summary of the argument

The sentence announced by the court is the result of several improprieties, including: (i) identifying *Shortsleeves*[17] factors without a "rational and just" basis for instead treating those factors at other steps of the sentencing analysis; (ii) unsoundly concluding that defendant's difficult childhood was in no way mitigating; and (3) imposing a life sentence when sentences of far less have been imposed for materially indistinguishable crimes.

B. Preservation and standard of review

In a sentence appeal such as this, review of a basic-sentence determination is "for misapplication of the law or of sentencing principles, or an abuse of the court's sentencing power." *State v. Ketcham*, 2024 ME 80, ¶ 35, 327 A.3d 1103. A court's selection of the maximum and final sentences is assessed for abuse of discretion. *Ibid.*

C. Analysis

Having reserved discussion of the sentencing facts, defendant here first succinctly touches on them. Then he discusses the nature of the sentencing court's improprieties: (i) the lack of objective criteria justifying the court's usage of certain facts – premeditation, proximity of a child, and defendant's status as a prohibited person – as *Shortsleeves* "gateway" factors rather than

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17 *State v. Shortsleeves*, 580 A.2d 145, 149-50 (Me. 1990).

merely Step One or Step Two factors; (ii) the holding that defendant's objectively difficult childhood was in no way mitigating; and (iii) imposing a life sentence that is disproportionate to other sentences imposed in materially similar circumstances.

1. The court sentenced defendant to life imprisonment.

The court found that the killing was premeditated, occurred while defendant's daughter was within the general vicinity, and was committed with a firearm, which, as a felon, defendant was prohibited from possessing. STr. 92-95. Counting each of these findings as *Shortsleeves* factors, the court set the basic sentence at life. STr. 96-97. It then determined that the aggravating factors outweighed any mitigating ones and imposed a life sentence. STr. 97-101. In doing so, the court concluded that defendant's objectively "difficult upbringing"[18] was, as a matter of law, not mitigating. STr. 97-98. The court reasoned: "[M]any people have difficult upbringings but they don't commit murders." STr. 97.

2. The sentencing improprieties

The errors in this case are the result of the limited decisional law establishing objective sentencing criteria. Lacking guidance, courts are imposing sentences that do not honor sentencing principles such as fairness,

[18] Defendant witnessed his father abuse his mother, the five-year-old defendant stepping between his parents in an effort to protect his mother. STr. 57. After one incident prompted defendant's mother to seek a protection order for the family, his father committed suicide. STr. 57. At age 16, defendant's step-father threatened to "take" defendant's younger sister and to leave defendant's mother if defendant did not move out of the family home, causing defendant to leave the home, drop out of school and become homeless. STr. 58.

see 15 M.R.S. § 2154(2) & M.R. U. Crim. P. 2; the elimination of unwarranted inequalities among the sentences of comparable offenders, *see* 15 M.R.S. § 2154(3); the development of objective criteria for sentencing, *see* 15 M.R.S. § 2154(4); and ensuring the sufficiency of the evidence on which a sentence is based are underserved. *See* 15 M.R.S. § 2155(2). Defendant turns to the specific examples.

i. No "rational and just" basis supports the court's usage of defendant's premeditation, prohibited-person status, and the proximity of defendant's daughter as *Shortsleeves* factors rather than Step One or Step Two factors.

15 M.R.S. § 2154(4) calls for the development of "rational and just" sentencing criteria. What "rationally" guides a judge's decision whether to count the findings relevant in our case as *Shortsleeves* factors rather than less-impactful Step One or Two factors? Defendant is aware of no jurisprudence from the Court guiding a judge's discretion about this very significant issue. Maine sentencing courts have variably utilized such findings at each of these three discrete analytical steps. Thus, such a consequential determination – on which decades of prison-time hinges – varies from one judge to the next, seemingly without rhyme or reason.

A review of the case-law reveals disparate treatment and wildly divergent sentences. Sticking only to reported Law Court decisions in which the Court stated the chosen basic sentence, defendant offers several examples. Sometimes, sentencing courts treat the combination of premeditation, prohibited status, and a child's proximity to the murder as

Step One factors (*i.e.*, not *Shortsleeves* factors).[19] Sentencing courts have done the same when finding premeditation, children's presence, and other could-be *Shortsleeves* factors.[20] And, the same has been true when courts have considered either premeditation or a child's proximity, in isolation.[21]

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[19] *E.g.*, *State v. Coleman*, 2024 ME 35, ¶ 12, 315 A.3d 698 (noting how trial court considered the defendant's premeditation, use of a firearm, and the presence of the defendant's and victim's daughter, just shy of age 2, at scene of shooting, close enough to see and hear shooting, in setting a basic sentence (*i.e.*, at Step One) rather than as *Shortsleeves* factors).

As former counsel for Mr. Coleman, the undersigned is aware that the sentencing court found that he was on bail at the time of the murder, *see* STr. 93 in And-23-149, which means he was likely prohibited from possessing a firearm. *See* 15 M.R.S. § 1026(3)(A)(8).

[20] *E.g.*, *State v. Nichols*, 2013 ME 71, ¶¶ 2, 8, 10, 72 A.3d 503 (noting how trial court considered the defendant's premeditation, use of a firearm, history of domestic violence, and the presence of the defendant's and victim's son, age 16, close enough to hear the gunshot and the victim scream, in setting a basic sentence (*i.e.*, Step One) rather than as *Shortsleeves* factors); *State v. Leng*, 2021 ME 3, ¶¶ 3, 4, 21, 23, 244 A.3d 238 (noting how trial court considered the defendant's premeditation, the murder's domestic-violence nature, and the presence of the defendant's and victim's two sons, age 10 and age 15, close enough to hear the gunshots, in setting a basic sentence (*i.e.*, at Step One) rather than as *Shortsleeves* factors); *see also State v. Weyland*, 2020 ME 129, ¶¶ 2-4, 36, 240 A.3d 841, (noting how trial court considered the defendant's "deliberate," focused" and "intentional" stabbing and the presence of the defendant's and victim's son and daughter, whose ages were not specified in the decision, at least one of whom was close enough to see the stabbing of the victim and attempt life-saving resuscitation, in setting a basic sentence (*i.e.*, at Step One) rather than as *Shortsleeves* factors).

[21] *E.g.*, *State v. Daly*, 2021 ME 37, ¶¶ 9, 44-45, 254 A.3d 426 (noting how trial court considered the defendant's premeditation in shooting death in setting a basic sentence (*i.e.*, at Step One) rather than a *Shortsleeves* factor); *State v. Rolerson*, 593 A.2d 220, 222-23 (Me. 1991) (same); *State v. Basu*, 2005 ME 74, ¶¶ 7, 25, 875 A.2d 686 (same, except that court also found another could-be *Shortsleeves* factor: murder for pecuniary gain); *State v. Williams*, 2020 ME 128, ¶ 58, 241 A.3d 835 (same, except that court also found another could-be *Shortsleeves* factor: murder of a police officer on duty); *State v. Hamel*, 2013 ME 16, ¶¶ 6, 9, 60 A.3d 783 (same, except the

In contrast, in at least one other case, the Law Court has noted and approved of the counting of the presence of children at an entirely different step – Step Two.[22]

What is the principle that guides a court in its determination of at which stage of the sentencing analysis it should consider such facts? Defendant is unaware of any such principle identified by the Law Court. Yet, the distinction is vital; if the court had instead counted these findings at Step One – let alone at Step Two – defendant would have surely received several decades[23] of prison-time but not a life sentence. Without such guidance, defendant's sentence is arbitrary and indicative of unequal treatment under the law. *See* Hon. Marvin E. Frankel, *Criminal Sentences: Law Without Order*, 5 (1972) ("[T]he almost wholly unchecked and sweeping powers we

court also found two other could-be *Shortsleeves* factors: there were two murders for pecuniary gain); *see State v. Diana*, 2014 ME 45, ¶ 39, 89 A.3d 132 (noting how trial court considered the presence of the victim's son, age 10, near the scene of the strangulation and, subsequently, the victim's corpse, in setting a basic sentence (*i.e.*, Step One) rather than a *Shortsleeves* factor); *see also State v. Gaston*, 2020 ME 25, ¶ 35 n. 13, 250 A.3d 137 (observing that trial court could have – but did not – increase the defendant's basic sentence because his two daughters, one age 9 and the other age 8, were present in the house at time of shooting death of their mother, the victim).

[22] *State v. Athayde*, 2022 ME 41, ¶¶ 3, 18, 277 A.3d 387 (noting how trial court considered the presence of the defendant's and victim's two daughters, age 3 and age 4, close enough to see and hear some of the fatal beating, as an aggravating (*i.e.*, Step Two) factor rather than a *Shortsleeves* factor); *see also Diana*, 2014 ME 45, ¶ 40 (observing that subjective impact of the defendant's conduct on the victim's son, who was in the proximity of the murder, may be counted at Step Two).

[23] At the time of sentencing, defendant had recently turned 34.

give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.").

ii. To uphold sentencing principles, a difficult childhood must always be mitigating to some degree.

After noting that defendant had a "difficult" childhood, the court held that such was not a mitigating factor because "many people have difficult upbringings but they don't commit murders." STr. 97-98. How does this square with this Court's jurisprudence, as well as that from around the country, routinely emphasizing that such an upbringing *is* mitigating? If accepted, doesn't the lower court's reasoning mean that *no* defendant convicted of murder could ever have his sentence mitigated because of his difficult upbringing?

As the Supreme Court has held,

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted). Indeed, this Court has repeatedly endorsed this principle.[24] Chalking up the divergent treatment of these similarly situated

[24] *E.g.*, *Hamel*, 2013 ME 16, ¶ 6 ("difficult childhood"); *Gaston*, 2021 ME 25, ¶¶ 15, 36 ("childhood experiences"); *Coleman*, 2024 ME 25, ¶ 12 ("difficult childhood"); *State v. Butsitsi*, 2015 ME 74, ¶ 27, 118 A.3d 222 ("exposure to violence during childhood"); *State v. Sweeney*, 2019 ME 164, ¶ 9, 221 A.3d 130 ("difficult childhood"); *State v. Coleman*, 2018 ME 41, ¶ 33 n. 10, 181 A.3d 689 ("terrible circumstances of his childhood"); *State v. Ormsby*, 2013 ME 88, ¶ 36, 81 A.3d 336 ("difficult childhood").

defendants to a judge's "discretion," respectfully, does not serve important sentencing principles premised on equal treatment under the law.

iii. As a result, defendant has been sentenced to life in prison for an offense objectively indistinguishable from others that have warranted sentences in the range of 40 to 50 years' prison.

A "sentencing court must begin its analysis by considering the offense itself, in as **objective** a manner as possible." *State v. Stanislaw*, 2011 ME 67, ¶ 9, 21 A.3d 91 (emphasis added). Respectfully, this Court's sentencing jurisprudence, rather than clarifying "objective" criteria, has often tolerated nearly unchecked subjective discretion in the selection of basic sentences.

For example, what meaningfully distinguishes the life-term basic sentence in this case from these other cases?

- *Nichols*, 2013 ME 71: After finding premeditation, use of firearm, domestic violence, and the proximity of the defendant's and victim's 16-year-old son close enough to hear the gunshot and the victim scream, the trial court selected a basic sentence of 40 years. ¶¶ 2, 10.
- *Coleman*, 2024 ME 35: After finding premeditation, use of firearm, and the proximity of the defendant's and the victim's nearly 2-year-old daughter close enough to hear the gunshots and see the shooting, the trial court selected a basic sentence of 40 years. ¶ 12.
- *Leng*, 2021 ME 3: After finding premeditation, domestic violence, and the proximity of the defendant's and the victim's

two sons, aged 10 and 15, close enough to hear the gunshots, the court selected a basic sentence of 50 to 55 years. ¶ 13.

- *Weyland*, 2020 ME 129: After finding "deliberate," "focused" and "intentional" conduct and the proximity of the defendant's and the victim's son and daughter, whose ages are unknown, at least one of whom was close enough to see the stabbing of the victim and to attempt life-saving intervention, the court selected a basic sentence of 45 years. ¶ 36.

Further, in *Hamel*, the sentencing court selected a basic sentence of 50 years for defendant's murders-by-shootings. 2013 ME 16, ¶ 6. The court there had found at least three could-be *Shortsleeves* factors: premeditation, multiple (two) victims, and that the defendant was motivated by pecuniary gain. *Id.* ¶¶ 6, 9.

At bottom, these disparate sentences – based on materially indistinguishable facts – violate principle, *see* 15 M.R.S. § 2154(3). At worse, they establish that defendant's sentence is unconstitutionally disproportionate. *See* ME. CONST., Art. I, § 9. Simply, defendant's sentence does not serve an interest in rehabilitation or in the limitation of correctional experiences; it actually *precludes* both. Defendant's sentence does not give fair notice; in fact, following the comparables above, it *undermines* any sense of notice. For the same reason, the sentence does not eliminate any inequalities or assist "just individualization;" it *creates* unjust inequalities unfounded by legitimate criminological goals. *See* 17-A M.R.S. §§ 1501(3)-(6), (8).

The review of comparable sentences reveals an inference of gross disproportionality. *See State v. Stanislaw*, 2013 ME 43, ¶ 29, 65 A.3d 1242. The resulting sentence, therefore, is not only improper and the result of misapplication of principle, it is also disproportionate and unconstitutional.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATES OF SERVICE & WORD COUNT

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).

I further certify that, minus those portions of the brief exempted from the word count per M.R. App. P. 7A(f)(3), this brief contains 11,982 words.[25]

/s/ Rory A. McNamara

[25] Defendant obtained leave of the Court to exceed the 10,000-word limit for an opening brief.