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

LAW COURT DOCKET NO. Ken-24-563

STATE OF MAINE
Appellee

v.

DONTE JOHNSON
Appellant

ON APPEAL from the Kennebec County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. The police lacked probable cause to effect an arrest of defendant.

The State's brief, respectfully, omits any mention of the single most important fact of the case: The officer who precipitated the arrest had little more than a hunch that the Volkswagen contained the suspect. He "could not identify the person [he] saw the night before as the person in the [Volkswagen]." (MTS 102). Even more attenuated: The officer "could not specifically say" that the person in the V.W. was the same individual he had seen in front of a building adjacent to the parking lot from which the V.W. pulled out a "few minutes" later. (A30; MTS 102).[1] The person who *might* have been the suspect *might* have been in the car, in other words.

The basis for the officer's suspicion? Some black skin and a bit of curly hair. (A30) (Justice Stokes: "top of the passenger's head and curly hair"). Based on *that*, was it reasonable for multiple police vehicles to swarm such a car, guns drawn, obstructing traffic in the middle of the busiest intersection in Augusta at 9 a.m. on a Saturday in June? Is it reasonable to embrace dangerous police tactics such as this in a state with a sky-high incidence of police-involved fatalities?

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[1] The State's brief contains a description of the officer's testimony that lacks important context. It reads, "Officer Guptill testified that the passenger in the case was the suspect who had fled the night before." Red Br. 10, citing MTS 46. While correct as far as it goes, it refers to the officer's identification *after* the arrest had occurred.

Defendant submits several reasonable alternatives: let the officer drive by the Volkswagen to see if he might more certainly identify the passenger; effect a traffic stop on the *side* of the road, *without* guns drawn, with the other police units *monitoring* rather than swarming; follow the Volkswagen to a safer location (*i.e.*, *not* the busiest intersection in the capital city) and conduct a stop there; etc. But going straight to the nuclear option, on these facts, is not reasonable. It is the kind of policework that kills people, especially Black and Brown people.

Recall, the State – the party with the burden to prove the lawfulness of its unwarranted arrest – adduced zero evidence that the suspect was armed or dangerous. If anything, their suspect was prone to *avoid* police encounters, not escalate them. This Court's case-law and the Fourth-Amendment-derived burden of proof, does not assume-away the State's duty to offer proof of its officer's supposed suspicions, if available. *See State v. Garland*, 482 A.2d 139, 145 (Me. 1984) ("[W]e cannot relieve an officer of the duty to actually testify respecting the bases for, and the nature of, his suspicions."). "[T]he naked fact that drugs are suspected will not support a per se justification for use of guns and handcuffs in a *Terry* stop." *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052-53 (10th Cir. 1994). The State failed to offer any.

The Fourth Amendment and its attendant exclusionary rule protect not only individual rights. They are the sole meaningful[2] check on out of control,

[2] Given the qualified-immunity doctrine, 42 U.S.C. § 1983 and other "secondary sanctions" are ineffective at deterring police misconduct and

unreasonable and dangerous policework. They serve to prevent "reckless" or "grossly negligent" police work, "overstepping," "misconduct," and "recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009); *James v. Illinois*, 493 U.S. 307, 319 (1990). In light of the data and the apparent uptick of "felony stops" in our state, *see* Blue Br. 23 n. 7, 31, this Court is called upon to deter dangerous police-civilian encounters not based on necessity and more than a mere hunch. A decision is needed that puts police on notice of the importance of prudent investigation and thoughtful evaluation of the need for a guns-a-blazin' encounter.

Ultimately, the State's divide-and-conquer approach to what's properly an evaluation of the whole circumstances loses the forest for the trees. All of this happened, not because the officer had trustworthy information that would warrant a prudent officer to believe his suspect was in the car, but because he merely thought the suspect might be in the car. That's the difference between probable cause – required by the law – and reasonable suspicion. The difference matters. Not only are rights at stake, lives are at stake.

"some even encourage police violation of suspects' rights." Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 477-78 n. 73 (Spring 2010).

Second Assignment of Error

II. The court abused its discretion in declining to dismiss the case.

Respectfully, the State's focus on *the trial* overlooks the real importance of the withheld evidence of the officer's reprimands. The real importance of that evidence was its utility at the *suppression hearing*. Had defendant had the reprimands then – and the State does not dispute that he should have – there's a reasonable probability the suppression issue would've been decided in defendant's favor.

As Judge Walker recently noted, such has "obvious" importance at even a run-of-the-mill suppression hearing. *United States v. Banks*, 2025 U.S. Dist. LEXIS 35118, * * 10-12, 12025 WL 642246, ** 4-5 (D. Me. Feb. 27, 2025) (Walker, J.). Here, the reprimands were even more important than in *Banks*. For us, the officer's past experience "fail[ing] to conduct a thorough investigation and collect the complete information before taking action in this search," (A119), went directly to the officer's penchant for policing without reasonable care or evidence. Given the exclusionary rule's application when officer's act with recklessness or recurring negligence, *see Herring*, 555 U.S. at 144, defendant was entitled to explore the officer's repeat disregard for the prudence required by the Fourth Amendment. *See* 17-A M.R.S. § 35 (recklessness involves the *conscious* disregard of a risk). The reprimand was evidence of a specific instance of the officer's conduct and therefore admissible. M.R. Evid. 405(b).

Nor is "inadvertence" – which the State pleads, Red Br. 16-17 – any saving grace. "Slipshod" discovery practice is deserving of the most serious sanction. *Cf. State v. Reed-Hansen*, 2019 ME 58, ¶ 18, 207 A.3d 191. To wit, here, the judge observed the Kennebec County District Attorney's Office's past noncompliance with discovery requirements of the sort violated here. (A65: "This is not the first case of Giglio problems in that DA's office."). Though it seeks to deflect to the "City of Augusta attorney," Red Br. 6, 17, the State's attorneys' are not absolved. It is they – the district attorney's office themselves – that are subject to rule-[3] and due-process[4] based discovery requirements, as well as the plain terms of Judge Worth's order. (A50). The gross negligence – recklessness, in fact[5] – of those below the State's trial attorneys is not mitigating.

Ultimately, the selection of a sanction is about whether a defendant has suffered prejudice. Defendant posits that there is a familiar metric that ought

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[3] "The obligation of the attorney for the State extends to matters within the possession or control of any member of the attorney for the State's staff and of any official or employee of this State or any political subdivision thereof who regularly reports or who, with reference to a particular case, has reported to the office of the attorney for the State." M.R. U. Crim. P. 16(a)(1).

[4] "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (citation omitted).

[5] Augusta's police department and their attorney felt it was their prerogative to take multiple months to "look at" the court's order. (*See* 5/3/24 Tr. at 15-16, 39-41).

to be applied to determine whether a court's sanction-ruling constitutes an abuse of discretion: Is there a reasonable probability that court's denial of a sanction affected the outcome of a proceeding? Here, defendant harkens to both the harmless-error standard and that utilized in the *Brady* context. *See Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). There can be no principled reason for upholding anything less than that necessary to remedy the State's slipshod discovery practices. *Cf. State v. Page*, 2023 ME 73, ¶ 14, 306 A.3d 142 (inquiry is whether harm resulting from violation is "mitigated – or not – by the trial court's ruling").

Defendant was not made whole. The withheld evidence went directly to whether the officer acted reasonably or recklessly. The State's suppression case was not overwhelming. Had it lost the suppression matter, the chances of its successful prosecution of defendant were somewhere between zero and a Hail Mary. While, maybe, a factfinding judge could still been persuaded by the State's suppression case, the reasonable-probability test does not permit an appellate court to "ignor[e] reasons she might not." *Wearry v. Cain*, 577 U.S. 385, 394 (2016) (per curiam). The inquiry, rather, is objective, and defendant need not establish, even by a preponderance, that the outcome would necessarily have been different. *Kyles*, 514 U.S. at 434. He's met that standard here, and the court's refusal to dismiss the case left him without remedy sufficient to salve the harm by the State's egregious noncompliance with court-rule, court-order and constitutional duty.

Third Assignment of Error

III. The court committed obvious error at sentencing.

The State rightly concedes the first and second prong of the obvious-error test. Defendant disagrees with its analysis as to the remaining elements.

As this Court recently held, a sentencing error affects substantial rights whenever "there is a reasonable probability that, but for the error, the sentencing court would have imposed a different, more favorable sentence." *State v. Goncalves*, 2025 ME 70, ¶ 46, ___ A.3d ___ (cleaned up). The court below identified only four aggravating factors. (A74). The first one it mentioned, which was also the longest by-words it mentioned, was the erroneous one. (A74). True, the court did end up reducing the basic sentence, finding that the mitigators outweighed the aggravators. But three aggravators is less than four aggravators, which leaves the Court to again recognize that "a sentence based in part on an impermissible consideration is not made proper simply because the sentencing judge considered other permissible factors as well." *State v. Moore*, 2023 ME 18, ¶ 25, 290 A.3d 533 (cleaned up).

As for the fourth prong, the State has conceded a sentencing illegality. It would hurt public confidence in the court system to expect, on one hand, lay citizens to know what the law is and conform to it, yet forgive a learned judge's ignorance of a well-worn provision of that same Title 17-A. Plus and again, it's difficult to conceive how the error could possibly have played no role in defendant's sentence. The State invites a holding that a judge's legal

error – a plain one, as the State itself acknowledges – that almost certainly resulted in a sentence longer than would otherwise have been imposed can be disregarded without injury to public confidence and judicial integrity. Defendant offers that this is unlikely, to say the least, and a proposition not worth testing, given the ease with which resentencing can be undertaken.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's convictions and remand with instructions to dismiss the indictment with prejudice, or, in the alternative, to grant defendant's motion to suppress the evidence obtained after the moment he was seized on June 5. Alternatively, this Court should vacate defendant's sentences and remand for resentencing.

Respectfully submitted,

August 20, 2025

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CERTIFICATE OF FILING AND SERVICE

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

/s/ Rory A. McNamara