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

LAW COURT DOCKET NO. And-24-525

STATE OF MAINE
Appellee

v.

ROBERT J. HART
Appellant

ON APPEAL from the Androscoggin County
Unified Criminal Docket

BRIEF OF APPELLANT

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

ATTORNEY FOR ROBERT J. HART

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INTRODUCTION

This conditional-plea appeal presents two issues:

I. *After* a jury was selected for defendant's trial – and *while* that jury remained empaneled awaiting trial – the prosecutor presented new charges to the grand jury. The superseding indictment, which was not based on new evidence, forced defendant to assent to a continuance of the trial, despite his speedy-trial demands. It forced him to assent to the release of the jury he had selected. In the circumstances, the last-minute charging decision raised a reasonable doubt that the prosecutor acted in good faith. Therefore, defendant was entitled to discovery and an evidentiary hearing about the possibility of prosecutorial vindictiveness.

II. The suppression court committed legal error in denying defendant's motion to suppress his statements to jail officials about the nature of the substance found on his person. Two recent decisions from this Court demonstrate that those statements were unambiguously the product of custodial interrogation. Because they were not preceded by *Miranda* warnings, they must be suppressed from the State's case-in-chief.

STATEMENT OF THE CASE

Across two dockets, defendant and the State negotiated a conditional plea: on ANDCD-CR-2022-02559, defendant pleaded guilty to tampering with a victim, 17-A M.R.S. § 454(1-B)(A)(2) (Count I) (Class B); domestic violence threatening, 17-A M.R.S. § 209-A(1)(B)(1) (2021)[1] (Count III) (Class C); and unlawful possession of cocaine base, 17-A M.R.S. § 1107-A(1)(B)(3) (Count V) (Class C); on PENCD-CR-2021-00672, defendant admitted a probation violation. In exchange for defendant's pleas, the State dismissed three counts. The Androscoggin County Unified Criminal Docket (Archer, J.) principally imposed a 27-month to-serve period of imprisonment on the revocation count, consecutive to a fully suspended 10-year term of prison subject to three years' probation. This appeal follows.

I. The State's evidence

The State proffered that, on November 6, 2022, a female called 9-1-1. (R11 Tr. 23). She reported that defendant had just been outside her room at the Marriott, threatening to kill her, in violation of a court-imposed no-contact order. (R11 Tr. 23). She added, "He tried to kill me today." (R11 Tr. 23).

A responding officer made contact with the female outside the hotel, while others located defendant at the nearby Walmart. (R11 Tr. 23-24). Police suspected that, as they spoke with them at their respective locations, the female and defendant may have been communicating with one another

[1] After the conduct at issue, § 209-A was amended, but no changes were made to subsection 1. *See* P.L. 2023, ch. 465, §§ 7, 8 (effective Oct. 25, 2023).

via their cellphones. (R11 Tr. 25-26). Their text-messages, which the State later obtained, suggest that defendant may then have been in possession of cocaine and cocaine base. (R11 Tr. 27-28).[2]

Once police arrived at their locations, defendant texted the complainant, asking, "Can you please do something? Say you overreacted." (R11 Tr. 28). The female responded, "I told them I overreacted." (R11 Tr. 28). An officer conversing with the complainant noted that, about this time, she "clammed up." (R11 Tr. 31).

Defendant was arrested, based on a probation officer's determination that he had contact with the female, counter to his conditions. (*See* R11 Tr. 14, 23 28, 30). At the jail, after making statements to law enforcement, defendant was found to be in possession of a bag containing some substance. (R11 Tr. 32-34). The State proffered that, had there been a trial, it would have called corrections officers to testify that defendant "told" the officers that the substance in the bag contained crack cocaine and methamphetamine. (R11 Tr. 33).

II. Motion to suppress

Defendant moved to suppress certain evidence for a handful of reasons,[3] one of which he continues to press on appeal: his statements to jail

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[2] Had the matter proceeded to trial, the State conceded, evidence obtained from defendant's phone would be inadmissible because it was unlawfully obtained. (MTS Tr. 5-6) (Prosecutor: "The State is agreeing, however, that … the search of his phone should be excluded in the State's case-in-chief, in any event, at the PV hearing and at trial in the new docket.").

[3] In addition to his argument that evidence was unlawfully obtained from his phone, defendant argued: that "[a]ny and all" of his statements to

officials about the narcotics found on his person were made without warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The court (Clifford, A.R.J.) held an evidentiary hearing on the motion, after which it ruled from the bench.

Mostly, the hearing centered on defendant's initial encounter with police in the Walmart parking lot before he was arrested. In addition to investigating officers' testimony, the State offered footage from the officers' body cameras.

However, the State also presented testimony from a corrections officer who recalled that, when defendant arrived at the jail, the officer asked him whether he was in possession of any drugs. (MTS Tr. 10-12). The officer added, "I initially had asked [defendant] if he had anything, any drugs on him, including marijuana. And he initial – he kind of had a nod at first." (MTS Tr. 12). "He just kind of ... looked at me and did ... like a half nod...." (MTS Tr. 12). The officer added, "So then I tried to clarify and asked him a second time if – if he had anything, and he shook his head no." (MTS Tr. 12).

The officer "pat searched" defendant, finding no drugs. (MTS Tr. 13). After defendant changed into jail attire, the officers had him proceed through a body scanner. (MTS Tr. 13-14). They observed "an anomaly in [defendant's] lower region." (MTS Tr. 14). That prompted an officer to again

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police were involuntary and made in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); and that police lacked probable cause to arrest him. (A65; MTS Tr. 7).

ask defendant "if he had anything, and he said he did. And he agreed to give it to us." (MTS Tr. 14). Defendant retrieved a bag for the officers. (MTS Tr. 14-15).

One officer asked defendant what the bag contained: "And [defendant] said that he did not know, and that was not his." (MTS Tr. 16). Later, though, an officer "asked [defendant] if he knew – knew what it would be. And he said, cocaine and possibly meth." (MTS Tr. 16). The officer testified, "I had told him he would have been better off telling me at first if he had something. And he said he was embarrassed cause this was the first time he had ever got – come in with drugs." (MTS Tr. 16).

On cross-examination, defense counsel elicited from the officer that the officer had not "given" defendant *Miranda*. (MTS Tr. 17). The officer was unsure whether anyone had so warned defendant. (MTS Tr. 17). Another police officer who participated in the arrest testified that he, too, did not "read [defendant] *Miranda*" at any point. (MTS Tr. 74, 85). No further evidence about "*Miranda*" was adduced.

The State conceded that, after the 12:05-mark in their encounter with defendant – *i.e.*, well prior to the events at the jail – *Miranda* warnings were necessary. (*See* MTS Tr. 5-8, 148).

In their oral post-hearing arguments – they presented no written arguments – the parties did not discuss this particular issue,[4] focusing

[4] As to the drugs themselves, the State argued that they were obtained pursuant to either a search incident to arrest or an "administrative search," or were obtained in a manner that did not implicate any expectation of privacy defendant might have. (MTS Tr. 147).

instead on their primary arguments. The court, too, respectfully, overlooked the issue of defendant's statements at the jail. Ruling from the bench, it did not address that aspect of the suppression motion. (A49-A52). Its handwritten order, scrawled on the bottom of one of defendant's motions to suppress, noted simply:

> Probable cause for probation hold
>
> Except for period of time agreed to by State, defendant not in custody, not under interrogation

(A48).

Soon thereafter, though, defense counsel filed a *Motion to Reconsider Denial of Motion to Suppress*. Counsel noted that, because the court had ruled from the bench, it had not viewed the body-camera footage after the 12:05-minute mark – the point after which, the State conceded, there was a *Miranda* violation and involuntary consent (at least as to the exchange in the parking lot). (A53). That portion had been admitted, but not played, at the suppression hearing. (*See* MTS Tr. 65-66, 69-70). During the excerpt that the court did not view, there were important exchanges touching on defendant's *Miranda*-ensured rights:

- Defendant complained to an officer that he was being "interrogated," and he observed that he was being detained, such that he was not free to leave. (SX 1 ca. 19:05). The officer disagreed, contending, "Interrogation works when you're in handcuffs, under arrest, and you have no ability to leave under your free will, right?" (*Id.*).

- Defendant stated, "I just need to ask right now, like, if you're interrogating me or if this is questioning like without an attorney – this is not illegal?" (*Id*. ca. 36:30). The lead officer explained that defendant did not currently have such rights. (*Id*.).

Respectfully, the court seems to have missed the problem occasioning the motion to reconsider, summarily denying that motion and writing: "Court's denial of the motion to suppress did not rely on the evidence referenced in the motion to reconsider." (A55).

III. Things get messier: the lead-up to trial and the eventual superseding indictment

Six months after the motion to suppress was denied, on January 4, 2024, the parties finally convened for jury selection. (*See*, *generally*, 1/4/24 Tr.). Trial had been specially set for January 22, 2024, following the November 2023 docket call. (*Id*. 19-21, 30). At jury selection, however, the State sought a continuance, because its two investigating officers would not be available for the January trial, as they were scheduled to be out on paternity leave. (*Id*. 19, 21). The court (Stewart, J.) denied the State's request, finding that "the optics" of a continuance would not look good because defendant had filed a speedy-trial demand very early into the case[5]

[5] The demand was filed on December 2, 2022 – that is, less than a month after defendant's arrest and before the indictment. *See Speedy Trial Request* of Dec. 2, 2022. He reiterated this demand several times. *See* A137 (complaining of oppressive pretrial delay and opposing delay); *Motion for Writ of Habeas Corpus* of March 15, 2023 (complaining of being held without bail); Defendant's (pro se) letter to court of July 26, 2023 (complaining of delay, pretrial incarceration); Defendant's (pro se) letter to court of Sept. 18, 2023 (complaining of delays causing "oppressive pretrial

and had already been in custody for fifteen or so months. (*Id*. 26.). It would "just be fundamentally unfair" to change the trial-date, the judge stated. (*Id*. 26.).

As the jury was selected that day, defense counsel put on the record his "understanding" that the State would not be proceeding on the terrorizing count, (original) Count IV. (*Id*. 27). The prosecutor did not object or seek to "correct" defense counsel's understanding. (*Id*. 27-28). Indeed, in informing the jury pool about the charges defendant faced, the court omitted any mention of terrorizing. (*Id*. 29). Documents later submitted to the court indicated that the parties had discussed the unviability of the terrorizing count before the jury selection. (A116).

Before trial began, however, defendant, acting pro se,[6] filed a motion for discovery sanctions and a request for an emergency hearing. (1/17/24 Tr. 2). Mr. Hart argued that the State had failed to timely produce a lab report about the purported drugs found on his person, despite such being subject to automatic discovery. *See Defendant's Motion for Discovery Sanctions and/or Summary Judgment* at 2-3. According to the defense, the State had also untimely made discovery of portions of the investigating officers' body-camera footage. (1/17/24 Tr. 6-7). But the court (Stewart, J.)

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incarceration"); Defendant's (pro se) letter to court of Oct. 10, 2023 (complaining of lack of speedy trial, urging "NO MORE DELAYS!!!").

[6] At defendant's request, the court permitted defendant leave to represent himself as "lead counsel," retaining appointed counsel as a sort of co-counsel. *See Defendant's Motion to be Lead Counsel* of Dec. 29, 2023, with order granting (Stewart, J.) of Jan. 3, 2024).

found only a "technical" discovery violation, and it decided against imposing any sanction whatsoever. (*Id*. at 32-34).

That same day, the prosecutor reiterated that the State was not proceeding with Count IV, the terrorizing count. (*Id*. 38-39).

The parties next convened on the record on February 5, 2024, when it was represented that the trial had been postponed because defense counsel had suddenly fallen ill. (2/5/24 Tr. 3). The court noted, "It was continued with the hope, which remains a hope, that we'll be able to use that same jury that was impaneled, and we've notified [the jurors] of that." (2/5/24 Tr. 3). Defendant personally and quite vehemently objected to the continuance, pro se. *Defendant's (pro se) Objection to Continuance* of Jan. 24, 2024.

Through counsel, defendant had also filed a motion "in limine," alleging that the prosecutor had recently met with the complainant and that, at that meeting, she did not have the complainant arrested, despite the existence of an outstanding arrest warrant. (*See* A140-A142). Alleging selective prosecution, the defense sought dismissal or exclusion of the complainant's testimony, contending that the prosecutor's "neglect" deprived defendant of the opportunity of impeaching the complainant's credibility at trial. (*Id*.). While not inclined to dismiss the case, the court (Stewart, J.) expressed its willingness to permit the defense to introduce evidence about the State's relationship with the complainant: "I think what has gone on here all does cut, at some level or another, to credibility." (2/5/24 Tr. 35).

The prosecutor related another important result of her meeting with the complainant on January 19: the alleged assaults had occurred in

Cumberland, not Androscoggin County, depriving the prosecution of jurisdiction of the assault counts. (*Id.* 19-22). Had the State gone to trial on January 22, the prosecutor would have been forced to dismiss those counts – (original) Counts II and III. (*Id.* 21, 22). In total, the State would be unable to proceed on three of the counts in the original indictment. However, it planned to present new charges to a grand jury. (*Id.* 21).

Importantly, though, the trial was to begin February 14 *with the same jury* that had been selected. (*Id.* 3, 35-36). Defense counsel verified that fact, on the record. (*Id.* 35-36).

Notwithstanding the imminence of trial, two days later – on February 7 – the parties were back on the record to discuss the superseding indictment the State had just obtained. The prosecutor brought a second tampering count – a Class-B. (*See* A62). Also new was a domestic violence threatening count, replacing the terrorizing count. (*Id.*). As the State's attorney acknowledged, "there is no new evidence" to support the new charges. (2/7/24 Tr. 4).

Because the differences are important to an issue on appeal, defendant here compares the original and superseding indictments in table-form:

	Original	***Superseding***
Count I	Tampering, Class B	Tampering, Class B
Count II	Aggravated Assault, Class B	Tampering, Class B
Count III	D.V. Assault, Class C	D.V. Threatening, Class C
Count IV	D.V. Terrorizing, Class C	Possession (methamphetamine), Class C

Count V	Possession (methamphetamine), Class C	Possession (cocaine base), Class C
Count VI	Possession (cocaine base), Class C	Possession (cocaine), Class D
Count VII	Possession (cocaine), Class D	N/A

Defense counsel represented that the superseding indictment changed the defense theory, and he sought dismissal "in full." (*Id*. at 13-14). For one, defense counsel put on the record:

> We have already set the jury. And how we selected the jury was directly related to the charges in the indictment pending at the time. If we have known that (indiscernible) around the assault charges and – and additional charge of criminal threatening, we would have – I mean – and that's meaning the evidence that – that led to the dismissal of the assault charges. We would have approached jury selection differently.

(*Id*. 10). The court continued to state its "intention" "to salvage this same jury." (*Id*. 22-24). In other words, trial remained set for February 14. (*Id*. 2).

Defense counsel insisted: "We don't want a continuance, Your Honor." (*Id*. at 20). "[W]e don't want to continue this case. We're ready to go forward. My client's been waiting to go to trial. We are not asking for a continuance." (*Id*. 15). The court remarked that it was "sensitive to the fact of how things may appear, Mr. Hart, and particularly with the change in

charge [indiscernible][7] at this late hour." (*Id.* 16). While not telegraphing how it would rule on such a motion, the court pondered aloud defendant's right to a speedy trial. (*Id.* 16-20).

After thinking about things overnight, however, defendant more fully recognized the perils of plowing ahead. At docket call on February 8, defense counsel told the court that defendant felt "he has no choice at this point but to continue the trial." (2/8/24 Tr. 2). "[W]e cannot go forward with such late notice on this. The super[s]eding indictment radically changes how we would approach our defense. We need time for that." (*Id.* 6). The defense needed time to, among other things, research and prepare arguments about prosecutorial vindictiveness. (*Id.* 5-6). Defendant personally remarked that his request for the continuance was "forced because of the super[s]eding indictment." (*Id.* 15). The court continued trial. (*Id.* 14).

On March 28, 2024, defendant, through counsel, filed *a Motion to Dismiss the Superseding Indictment due to Presumptive Prosecutorial Vindictiveness*. The motion contended that federal due process had been violated because, the prosecutor had "obtain[ed] the [s]uperseding [i]ndictment after the [] jury had been selected, sworn and empaneled…" (A82). The defense represented that the new indictment "can only be interpreted as vindictive because it exposed Mr. Hart to an additional 10

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[7] In the 29-page transcript of this hearing, there are 290 instances of "indiscernible" statements – an average of ten such instances per transcript-page. *But see* M.R. U. Crim. P. 27(a); Me. Admin. Order JB-12-01, Recording of Trial Court Proceedings (Notwithstanding desire to achieve "efficiencies," court-recording processes "must always safeguard the quality of justice and of the resulting record.").

years of potential incarceration." (A89). Because the superseding indictment was pursued and obtained "only after the Defendant had asserted his right to have a t[ria]l and actually begun that trial by picking a jury that was empaneled and sworn in," the motion continued, the prosecutor's conduct appeared to be "retaliatory" – a penalty for choosing a trial. (A91). Defendant also sought discovery on the matter, including the prosecutor's communications with state officials regarding this prosecution. (A46).[8]

The court (Archer, J.) heard argument on the motion alleging vindictiveness and the related request for discovery. Asked by the court what distinguishes this case from every case in which a prosecutor seeks a superseding indictment, defense counsel noted, among other things, "the fact that the jury had been selected...." (4/9/24 Tr. 43).

The next day, the court entered a written order denying defendant's motions. It concluded that defendant was "not entitled to an evidentiary hearing on his motion because he has failed [to] carry his initial burden of pointing to specific facts that raise a likelihood of vindictiveness." (A38). It was "apparent to the Court that the Defendant intends to undertake a fishing expedition...." (*Id.*). This was in accord with its ruling, at the hearing, that because he offered no "objective evidence to support evidence [sic] of prosecutorial vindictiveness," defendant was not "entitled to discovery in this matter." (4/9/24 Tr. 28).

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[8] Defense counsel later cabined the request: "[W]e are not looking for the case -- or for the State to open up its entire case. We just want to – we would like to have any information that is relevant to why they filed this new superseding – this new superseding indictment." (4/9/24 Tr. 25).

Turning to the merits, "the [c]ourt beg[an] its analysis with the understanding that a change in charging decision made prior to trial is much less likely to be improperly motivated than one made after trial." (A40). It continued to characterize the superseding indictment as a "pretrial" development. (*Id.*). "[A]ll of the surrounding circumstances" failed to establish any likelihood of vindictiveness, it concluded. (A41).

Even if such a presumption had been generated, the court added, "the State has rebutted the presumption by showing objective reasons for its actions and the charges." (*Id.*).

IV. The conditional plea

On October 9, the parties' memorialized their agreement, specifying that defendant reserved the right to appeal the court's rulings on the three motions.[9] (A143-A144). They stated as much on the record, too. (R11 Tr. 5-6, 22). As required by rule, the parties certified that the harmless-error doctrine is inapplicable on appeal. *See* M.R. U. Crim. P. 11(a)(2).

[9] In addition to those two discussed in this appeal, the third was entitled, "Motion to Dismiss the Superseding Indictment Due to Double Jeopardy."

ISSUES PRESENTED FOR REVIEW

I. Did the court err by concluding that defendant had failed to present objective indicia of vindictive prosecution when, after a jury was selected and while it remained prepared to hear the case, the prosecutor obtained a superseding indictment replacing charges that would otherwise have been dismissed, thereby forcing defendant to assent to a continuance?

II. Did the suppression court err by apparently denying defendant's motion to suppress defendant's statements to jail officials that were made without *Miranda* warnings?

ARGUMENT

First Assignment of Error

I. The court erred by concluding that defendant had failed to present objective indicia of vindictive prosecution when, after a jury was selected and while it remained prepared to hear the case, the prosecutor obtained a superseding indictment replacing charges that would otherwise have been dismissed, thereby forcing defendant to assent to a continuance.

A. Preservation and standard of review

This argument is preserved, *see* A79-A91, A129-A134, and is therefore subject to bifurcated review: Review of "any ancillary factual findings" is for clear error whereas consideration of "relevant legal determinations" is de novo. *United States v. Bucci*, 582 F.3d 108, 115 (1st Cir. 2009).

B. Analysis

Trial was set. A jury had been selected and was ready to hear the evidence. By its own admissions, at that trial, the State would have had to concede defeat on three of its counts – one Class-B and two Class-Cs – and dismiss them. Defendant had just accused the prosecutor of selective prosecution, an issue, the court signaled, which was ripe for exploration at trial.

This appeal comes down to whether, in these circumstances, it is reasonable to presume that what happened next could evince vindictiveness by the prosecutor. Defendant maintains that the prosecutor's decision to then seek and obtain a superseding indictment, while the trial was just days away and while the jury the parties had already picked remained empaneled, thereby increasing defendant's potential punishment, based on no new

evidence, raises a reasonable doubt that the new charges were brought in good faith. Because the motion court erred in deciding otherwise, remand for discovery and an evidentiary hearing is necessary.

1. Legal standards

It is a violation of due process for an individual to "be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). To effectuate this protection, an individual can either demonstrate "actual" vindictiveness or "presumptive" vindictiveness. *Id*. at 380-81. Defendant continues to proceed under the latter theory, though it could evolve once he obtains the discovery and evidentiary hearing he is due.

Courts presume that prosecutors make charging decisions in good faith. *United States v. Peterson*, 233 F.3d 101, 105 (1st Cir. 2000). "To rebut this presumption and obtain an evidentiary hearing on the issue, the defendant must allege facts (1) tending to show selective prosecution, and (2) raising a reasonable doubt about the propriety of the prosecution's motive." *Ibid*. To obtain discovery, a defendant must first make "a prima facie showing of a likelihood of vindictiveness by some evidence tending to show the essential elements of the defense." *United States v. One 1985 Mercedes*, 917 F.2d 415, 421 (9th Cir. 1990); *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir. 1989) ("if he introduces some evidence tending to show the existence of the essential elements of the defense.") (quotation marks omitted).

Though every claim of vindictiveness is to be evaluated according to its unique circumstances, the Court has held that certain fact-bound situations do not warrant a presumption of vindictiveness. In *Goodwin*, for example, the defendant was charged by a prosecutor who lacked authority to prosecute felonies (*i.e.,* she could prosecute only misdemeanors) and was before a magistrate who, by statute, lacked authority to conduct jury trials. 457 U.S. at 371. When Mr. Goodwin demanded a jury trial, the case had to be transferred to a different prosecutor and a different judge. *Ibid.* After reviewing the case, the new prosecutor increased the charges, including a felony. *Ibid.*

The Court held that such circumstances, by themselves, did not warrant a presumption of prejudice. Its reasoning is important:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a **pretrial** setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, **once a trial begins** – and certainly by the time a conviction has been obtained – it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination,

on the basis of that information, of the extent to which he should be prosecuted.

Id. at 381 (emphasis added). "A prosecutor should remain free **before trial** to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *Id*. at 382 (emphasis added).

While, in the "appropriate case," even a pretrial superseding indictment might raise a presumption of vindictiveness, such a presumption is not warranted across the board. *Id*. at 384. Other courts have interpreted *Goodwin* to mean that "the likelihood that a defendant's exercise of his rights will spur a vindictive prosecutorial response is indexed to the burden that the defendant's conduct has placed on the prosecution." *United States v. LaDeau*, 734 F.3d 561, 569 (6th Cir. 2013). Defendant now turns to the particulars of his situation.

2. Application of facts to the law

i. The State brought new charges *while* the jury was empaneled and trial was imminent.

Defendant begins with what, respectfully, is the court's significant analytical error: Ours was not truly a "pretrial" situation. The jury was empaneled. Quite unlike *Goodwin*, where there was no trial imminent at the time the prosecution obtained the new indictment, here, the trial was just days away. Defendant contends that these are, in fact, remarkable

circumstances. Our superseding indictment came *midtrial*.[10] *See* M.R. U. Crim. P. 43 (implying that "the trial" includes "the impaneling of the jury").

Defendant notes that the timing alone changes the analysis. Following the logic of *Goodwin*, by this time, the State should have known the ins and outs of the case or forever held its peace. In fact, by the day of jury selection, recall, the parties did know that the State would not be proceeding on the terrorizing count. (1/4/24 Tr. 27-28). This was reiterated again before the scheduled trial, on January 17. (1/17/24 Tr. 17).

For regular observers of Maine courts, the lateness of the State's recognition of its need to dismiss the assault charges for lack of jurisdiction might be familiar though entirely avoidable.[11] Yet, there was nothing new

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[10] Indeed, the events fell into a procedural no-man's-land. Had the jury been sworn, defendant would have been able to plead a jeopardy bar. *Crist v. Bretz*, 437 U.S. 28, 29 (1978). Manifest necessity would not have justified a mistrial. *Cf. United States v. Jorn*, 400 U.S. 470 (1971) (no manifest necessity when reason for mistrial is simply to benefit the prosecution). And the State would not have been able to dismiss the charges without prejudice, absent defendant's (quite unlikely, by that point) consent. *See* M.R. U. Crim. P. 48(a).

[11] The State of Maine has an unfortunate habit of conducting meaningful pretrial interviews/investigations only days before trial, undermining many goals of the rules of procedure. *Cf. State v. Hassan*, 2018 ME 22, 179 A.3d 898 (evidence obtained from State's belated "pretrial interview" some three and a half years post-indictment and four days before trial, is not discovery violation); *State v. Dennis*, 2024 ME 54, 320 A.3d 396 (State's belated testing of evidence, some 11 and a half months after arrest and six days before trial, is not discovery violation). "[A]ll too often, new information is obtained on the eve of trial." *Id.* ¶ 35 (Stanfill, C.J., concurring); *State v. William Bradbury*, Pis-25-160 (pending) (just days before trial, State produces evidence that it had in its possession for many months).

Such belated investigation about something as fundamental as jurisdiction, while par for the Maine course, borders on unconscionable when a defendant who has demanded a speedy trial has been incarcerated

about the charge the State levelled in lieu of those charges – (new) Count II. *Cf*. *LaDeau*, 734 F.3d at 571 (presumption of vindictiveness more appropriate when government brought new charges only *after* its case deteriorates). To those subject to restrictive bail conditions and a year-plus-long prosecution, the State's failure to investigate its proof until the eve of trial sure does evince recklessness if not outright enmity.

Beyond *Goodwin*, there is precedent for the notion that late-in-the-game timing such as this case is objectively indicative of vindictiveness. A federal judge has determined that even less-curious-than-ours circumstances[12] are "a bit suspect." *United States v. Johnson*, 299 F. Supp. 3d 909, 918 (M.D. Tenn. 2018) (government obtained a third superseding indictment months after the judge suggested it should do so, just a few days before the pretrial-motions deadline, and over a month before jury selection). So has the Colorado Supreme Court. *Hampton v. Dist. Ct. in and for Jefferson Cnty.*, 605 P.2d 54, 57 (Colo. 1980) (addition of charges "immediately" before trial "suggests a last minute ploy to circumvent the requirements of the speedy trial provisions," thereby raising a case of prima facie vindictiveness). Rightly so, Justice Stewart expressed his concern: He

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for 15 months. Such state-wide practice evinces a structural indifference to the rights of defendants placed in limbo by the threat of unlawful prosecutions. It is also a significant waste of judicial resources.

[12] Ultimately, the *Johnson* court, however, declined to find presumptive vindictiveness because, among other things, the third superseding indictment did not change the fact that the government still had to conduct two separate trials against the defendant. 299 F. Supp. at 919. As defendant will discuss momentarily, that is *not* the case for us.

was "sensitive to the fact of how things may appear" in light of the new charges at "this late hour." (2/7/24 Tr. 16). These are not normal circumstances, and other judges can see that, objectively.

At common law, a prosecutor enjoyed virtually unchecked discretion to suddenly *nolle prosequi* a case until more prosecution-friendly circumstances were attained. Even then, however, such discretion existed only "**before** the jury is empanelled for the trial of the case." *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869) (emphasis added). Federal Rule of Criminal Procedure 48(a), effective in 1946, further cabined a prosecutor's discretion to hit the re-do button. As reflected by M.R. U. Crim. P. 48(a), at the very least, the defendant must also "consent" to a dismissal filed "during trial." Absent such a requirement, courts have come to realize, a prosecutor may, at the last minute, opt out of an imminent trial for any host of tactical reasons. *Cf. United States v. Salinas*, 693 F.2d 348 (5th Cir. 1982) (disapproving *nolle prosequi* so prosecution can obtain superseding indictment because prosecutor doesn't like the jury that was selected). Rule 48(a) is relevant for us because it demonstrates the potential for prosecutorial "harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy." *Id.* at 351 (quotation marks and citation omitted). Following the logic of 48(a), last-minute recharging constitutes, as a matter of law, "harassment" of one degree or another.

The timing alone is objective proof tending to establish vindictiveness. Defendant is therefore entitled to obtain discovery and an evidentiary

hearing about why, if the State knew it would not be proceeding on (original) Count IV, it did not earlier seek a superseding indictment on that count. He is entitled, too, to the same so he may explore why the new tampering charge could not have been brought earlier. Defendant next proposes some objectively ulterior reasons for the last-minute superseding indictment

ii. The stakes: a separate trial and possible disqualification

What were the stakes at this point? Absent either a guilty plea from defendant or his assent to a continuance of the pending trial, the State would have needed a *second* trial, albeit it in another district, in order to obtain any assault convictions. Obviously, had defendant pleaded to those charges prior to the prosecutor's discovery of the jurisdictional issue during the belated trial interview on the eve of trial, such separate trials would not have been necessary. *Cf. Goodwin*, 457 U.S. at 383 (presumptive vindictiveness more appropriate when defendant occasions "duplicative expenditures of prosecutorial resources"). Defendant's repeated refusal to accept a plea deal – including to the assault charges – is *relevant* to (if not, in isolation, dispositive of) these circumstances. *See* A112 (discussing some of the failed plea-negotiations).

Don't forget, also, defendant's allegation that the prosecutor was selectively choosing not to prosecute the complainant, as evidenced by the State's failure to arrest her during the pretrial meeting, notwithstanding the existence of an arrest warrant. As the judge correctly suggested, this was an area ripe for examination at trial. *See Davis v. Alaska*, 415 U.S. 308 (1974)

(a defendant has a right to confront witnesses against him regarding status of criminal charges to the extent it relates to potential bias); *accord Delaware v. Van Arsdall*, 475 U.S. 673 (1986). It is not entirely implausible that such circumstances might have even necessitated the prosecutor's disqualification from the case. *See* M.R. Professional Conduct 3.7(a); *see People v. Paperno*, 429 N.E.2d 797, 802 (N.Y. 1981) (The "decision to allow the defense to call the prosecutor as a witness rests in the sound discretion of the trial court.").

Together, these are miles from the prosecutor's interests at stake in *Goodwin*. Absent a plea, the State could no longer prove two of its three lead counts. Absent a continuance – which defendant would never have assented to – the State would have been unable to proceed with those counts at the imminent trial. Defendant's point is simple: It *at least* "raise[s] an eyebrow" that the prosecutor's new charges, forcing defendant to assent to a continuance, assent to the disempanelment of the jury,[13] and eventually enter guilty-pleas, were brought to penalize the exercise of his defense. *Cf. United States v. Tuitt*, 68 F.Supp.2d 4, 18 (D.Ma. 1999) (describing standard to obtain discovery in selective prosecution cases as whether there is a prima facie showing that "raise[s] an eyebrow"). Again, he is therefore entitled to discovery and an evidentiary hearing.

[13] Defendant had a constitutional right to have his "trial completed by a particular tribunal." *Crist*, 437 U.S. at 36 (quotation marks omitted).

iii. The severity of the charges

Defendant acknowledges, as he must, that, compared with the original indictment, the superseding indictment threatens a facially lesser maximum carceral term. But this is misleading, he argues, for two reasons, both related to jurisdiction.

First, the prosecutor could not bring replacement charges for the jurisdiction-less counts because she lacked legal authority to do so. Such circumstances are quite different from a prosecutor opting not to bring charges she otherwise might have lawfully pursued in her discretion. The omission of the assault charges is not the result of tenderness or prosecutorial restraint of any stripe. It is a reflection, rather, of the legal fact that such charges are not possible, at least from the prosecutor here. And that's a related problem: What's now to stop a prosecutor in Cumberland County, where jurisdiction for the assault allegations properly lies, from pursuing those charges?[14] Who is to say, in other words, that the other shoe will not yet drop?

Just as the prosecution, it turns out, lacked legal authority to bring the original assault charges to begin with, it likewise lacked jurisdiction to replace them with like substitutes. The original counts were null and void *ab*

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[14] Vindictiveness claims are not specific to a singular prosecutor; they refer to "actions by 'the State' rather than, 'the prosecutor.'" *Thigpen v. Roberts*, 468 U.S. 27, 31 (1984); *see United States v. Meyer*, 810 F.2d 1242, 1248 (D.C. Cir. 1987), vacated, 816 F.2d 695, reinstated, 824 F.2d 1240 (D.C. Cir. 1987) ("We view their actions in conjunction, and we view the process of which they are a part as a whole. To do otherwise would be to ignore that the desire to punish defendants for exercising their legal rights arises more often from institutional than from personal wellsprings.").

initio. This is a necessary corollary to the notion, endorsed by this Court, that a defendant is simply never exposed to jeopardy when the trial court lacks subject-matter jurisdiction to undertake what would otherwise constitute jeopardy. *See State v. Shirey*, 2020 ME 136, ¶ 8, 242 A.3d 1103. The logic goes, defendant never faced any risk from the jurisdiction-less counts. Thus, the legal fiction must continue, those initial charges do not count in a comparison with the severity of charges he faced after the superseding indictment.

With those two counts erased from the original indictment, defendant was lawfully charged with only one Class-B offense, three Class-C offenses, and one Class-D. Had they resulted in consecutive sentences, these counts might have yielded a total term of imprisonment of one day shy of 26 years. The superseding indictment alleged two Class-B offenses, three Class-Cs, and a Class-D, potentially permitting a sentence of up to a day less than 36 years' prison. The point is, the superseding indictment sought a ten-year increase in punishment from that *lawfully threatened* by the original indictment. The ten-year increase is the result of one of the prosecutor's new charges, Count II.

3. The court's legal errors contributed to its conclusion, and the errors are not harmless.

To recap, (i) the court erroneously framed the circumstances. This was not truly a "pretrial" charging decision. Such reasoning ignores the imminency of trial, the existence of the jury and defendant's speedy-trial demands. (ii) The court likewise omitted to account for the plausibly

vindictive motivations behind the new indictment. The State was in an unenviable position, faced with the necessity of dismissing three of its counts should defendant not relinquish his right to have the jury that had already been selected decide his fate. It might have had to – and still might choose to – pursue another trial. Finally, (iii), the court erred by omitting to recognize that the superseding indictment threatens more punishment than that lawfully threatened by the original indictment – and more, still, given the ongoing possibility of prosecution in Cumberland County. Taken together, these errors affected the court's determination that defendant did not come forward with objective indicia of vindictiveness.

The court also made a procedural error. It evaluated the State's justifications for the new charges without first affording defendant an opportunity to obtain discovery or convene an evidentiary hearing. Rather, defendant was entitled to such opportunities simply by virtue of his "prima facie showing of a likelihood of vindictiveness by some evidence tending to show the essential elements of the defense." *One 1985 Mercedes*, 917 F.2d at 421. The court's error is akin to holding a "pre-*Franks* hearing" at which the State is permitted to rebut the defense's allegations of impropriety without first allowing defendant the necessary process to demonstrate that impropriety. *Cf. State v. Thompson*, 2017 ME 13, ¶ 26, 154 A.3d 614.

Via their conditional plea agreement, the parties have certified that the harmless-error doctrine cannot be applied to this appeal. Defendant simply adds one point, which can anyway be fully hashed out on remand. A successful claim of vindictiveness warrants dismissal of *all* counts – the new

ones *and* the original ones. *Meyer*, 810 F.2d at 1249. Any lesser remedy "would remove the deterrent effect of the doctrine of prosecutorial vindictiveness — a doctrine which the Supreme Court designed to be largely prophylactic in nature." *Id*. at 1249, citing *Blackledge v. Perry*, 417 U.S. 21, 26 (1974). "If in cases of vindictive prosecution the trial court judge may only dismiss the additional charge, the prosecutor will have nothing to lose by acting vindictively." *Id*. at 1249.

Second Assignment of Error

II. The court erred by apparently denying defendant's motion to suppress defendant's statements to jail officials that were made without *Miranda* warnings.

A. Preservation and standard of review

Preserved rulings on motions to suppress are reviewed for clear error as to factual findings, and, as to conclusions, de novo. *State v. McLain*, 2025 ME 87, ¶ 12, ____ A.3d ____. This issue was preserved by defendant's motions to suppress, (A65-A78), the record developed at the suppression hearing, and via defendant's motion to reconsider and the parties' conditional plea. (A53).

B. Analysis

Defendant begins by noting that there is some ambiguity about whether, at the suppression hearing, the State conceded that defendant's statements to corrections staff must be suppressed. On one hand, the State conceded "that after the 12 minute and 5 second mark, **any** subsequent conversations with law enforcement as well as the search of [defendant's] phone should be excluded in the State's case-in-chief…." (MTS Tr. 5-6) (emphasis added). On the other hand, at the same hearing, the parties – led by the State – bothered to develop evidence about defendant's statements to officials at the jail, including whether they were *Mirandized*. (MTS Tr. 9-17). Tellingly, at the Rule-11 hearing, the State seemed to indicate that it "would have also introduced [at trial]" jail staff's testimony that defendant "told corrections officers" that he possessed crack and methamphetamine. (MTS

Tr. 32-33).[15] That assertion is at odds with the notion that the State conceded that such statements should be suppressed. Thus, defendant turns now to the merits.

Given the circumstances – defendant was being processed into jail – and the State's earlier concession that, even in the parking lot, defendant was in custody, the sole relevant question is whether defendant was subject to "interrogation." There seems no dispute or doubt that he was "in custody," in other words. The question of interrogation, fortunately, is easily decided based on two recent decisions from this Court.

In *State v. Fleming*, 2020 ME 120, 239 A.3d 648, this Court noted Supreme Court case-law defined "interrogation" to include both "'express questioning'" and also "'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" 2020 ME 120, ¶ 26, quoting *Rhode Island v. Innis*, 446 U.S. 391, 301 (1980). When a corrections officer conducting a strip-search asked who owned the bag of drugs wrapped around the defendant's penis, "the C.O. *should have known*" that an incriminating response was likely forthcoming. *Fleming*, 2020 ME 120, ¶ 31. Thus, *Fleming* had been subjected to unwarned custodial interrogation. *Id.* ¶¶ 31-33.

Likewise in *State v. Hernandez-Rodriguez*, 2025 ME 9, 331 A.3d 354. There, an officer located a substance on a suspect's person, and asked, "Little

[15] Defendant, of course, welcomes the State's concession, should the undersigned have overlooked it.

bit of coke?" *Hernandez-Rodriguez*, 2025 ME 9, ¶ 7. This Court held that the suspect's answer – "Yeah, coke. That's the coke." – was the product of interrogation. *Id.* ¶¶ 33-34. As in *Fleming*, the officer "should have known" that his question was likely to elicit an incriminating response. *Id.* ¶ 33.

These holdings are dispositive here. Once the officers observed "an anomaly" in defendant's "lower region," they should have known that any further questioning would likely yield an incriminating response. Individuals do not commonly secrete other than contraband their "lower regions," and possessing contraband in prison is a crime. 17-A M.R.S. § 757(1)(B). All of defendant's subsequent statements must, therefore, be suppressed from the State's case-in-chief. *See Harris v. New York*, 401 U.S. 222, 224-26 (1971).

CONCLUSION

For the foregoing reasons, this Court should remand and permit defendant to withdraw his pleas and admission,[16] and it should further vacate the order on defendant's motion to suppress, to extent that order does not suppress defendant's statements made to jail officials.

Respectfully submitted,

November 14, 2025

[16] Even were M.R. U. Crim. P. 11(a)(2) to be construed not to contemplate conditional pleas to probation violations, plea agreements are nonetheless subject to "contract principles," *State v. Russo*, 2008 ME 31, ¶ 14, 942 A.2d 694 (quotation marks omitted), such that the only way to accord defendant the benefit of the bargain negotiated by the parties is to permit him leave to withdraw his admission.

/s/ Rory A. McNamara[17]

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

ATTORNEY FOR ROBERT J. HART

CERTIFICATE OF SERVICE & FILING

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

[17] Counsel is certifying that only the above arguments are presented in accordance with M.R. Professional Conduct 8.2(a). Per the Court's (Connors, J.) order entered October 14, 2025, counsel clarifies that counsel "does not adopt" defendant's *pro se* "brief" attached hereto. *Cf. State v. Williams*, 2020 ME 17, ¶¶ 25-27, 225 A.3d 751.

To the Honorable Maine Supreme Judicial Court,

You have before you an opportunity to make right an egregious injustice which has taken place not only in this specific case, but without correction, will continue indefinitely for the unforseeable future.

Granted, this appeal is based solely on three points alone, but these three points are only the tip of an iceberg containing a multitude of constitutional infractions, unethical behavior on the part of elected officials and dirty, reprehensible small-town politics which deprive individuals such as myself of basic rights such as due process, fundamental fairness and the guarantee of adequate assistance of counsel in a criminal proceeding.

What I am about to write to you is not my personal opinion on what has been done to me. What I'm writing is all factual information that occured over the course of my prosecution.

1.) Vindictive Prosecution

I was selectively and vindictively

prosecuted by A.D.A. Katherine Hudson-MacRae in such a vehemently despicable way that she herself should be prosecuted for the manner in which she did it. I now firmly believe that my so-called defense attorney, Seth Levy, was an active and willing participant, but that is for a separate proceeding other than the one before you.

I was selectively prosecuted because the State's key witness against me, Krista Zegouros, was permitted to waltz in and out of the D.A.'s office with an outstanding felony warrant for her arrest. MacRae chose not to have Zegouros arrested not only because she was a witness against me, but also because Zegouros was a witness in a homocide investigation which is still ongoing to this very day. For fear of losing out on Zegouros' testimony in both cases, the Androscoggin County D.A.'s office allowed Zegouros to rack up a litany of drug charges while on a deferred disposition for crimes involving drug possession. MacRae even admitted in open court that Zegouros appeared to be under the influence of narcotics while being interviewed. This took place less than a week before my trial was set to begin. At this time, Zegouros

divulged to MacRae that the alleged assault did not even take place in Androscoggin County, therefore forcing MacRae to dismiss her most serious charges against me, after a jury had been selected and empaneled, without my consent and without leave of court, all in violation of Rule 48(a) of both the Maine State and Federal rules of court. So how vindictive is vindictive? MacRae explicitly tried to make it impossible for me to appeal the Rule 48(a) infraction in this very appeal! I strongly urge this court to consider the Rule 48(a) infraction as falling under the umbrella of vindictive prosecution simply because there is no gray area here. The superseding indictment was brought during trial after I had filed a nearly 75 page complaint with the Board of Overseers of the Bar against MacRae, filed two motions for discovery sanctions against MacRae because Levy refused to on my behalf and I refused a plea offer. Furthermore, knowing she would lose her case against me, MacRae conspired with Levy and he called out

sick nearly a week before my trial was set to begin! How can anyone on this planet know they're going to be sick five days in advance?

It was the only way they could get the continuance they so desperately needed. Two of the officers scheduled to testify at trial were on paternity leave. The State could not be sure if Zegouros would even appear and the toxicologist who prepared the toxicology report concerning the alleged drugs found on my person was not on the witness list for trial and that alone would have violated my 6th amendment right to confrontation. Even if convicted of the drug possession charges at trial, those convictions would've had to have been reversed on appeal due to that error alone. That left MacRae with nothing at all. No convictions. She'd already been denied a continuance and so, as a "professional courtesy" Levy called out sick, giving MacRae the opportunity to draft a superseding indictment, flagrantly in violation of Rule 48(a), hoping nobody would notice, but I did. I hounded Levy to do something about it and he dragged his feet for nearly 10 months while I sat,

a victim of oppressive pretrial incarceration. Then, after sitting without bail for 23 months, they came to me with an offer that appeared, on it's face, as if I would only serve a few more days and then be released. Little did I know (because Levy never explained to me) that I would still have to serve nearly four more months since people on probation holds don't get presentencing good time credits. I was duped. Manipulated and hustled by people who were sworn to ethical obligations. Judges who turned blind eyes to a man demanding a fair shake.

Ultimately, I ask you this... Why does my conditional plea agreement specifically exclude a Rule 48(a) argument?

If I sound jaded, it's because I am. I now despise a system I once believed in. I am plagued by thoughts and nightmares of revenge and retribution. This has taught me that vigilante justice is real and it is completely acceptable to break the rules in order to enforce them. That foul play is okay as long as you don't

get caught and no one is above the law aside from those sworn to enforce it. This prosecution traumatized me in ways that I cannot explain. That's just the vindictive part.

2.) Double Jeopardy.

The superseding indictment contained two separate counts of tampering based on a single course of conduct. Had I been convicted of both, I would've received two punishments for the same alleged crime. The entire indictment was illegal to begin with as it was brought during trial and deprived me of the right to be informed of the charges against me. I was never arraigned on it and never had the opportunity to argue for bail.

3.) The Suppression Hearing.

Justice Clifford determined that probable cause existed for my arrest even when the police and probation did not until they forced me to surrender the passcode to my cell phone under the threat of an arrest. Also, the prongs of a

custodial interrogation were met as soon as I was ordered to get out of my car. This was way before the twelve minute mark on the video. First, express questioning expected to elicit an incriminating response occured. Ofc. Fossignol says to me, "What happened over at the Marriot? You didn't threaten anyone over there?".

Then, I'm ordered out of my vehicle and searched while surrounded by police. My freedom is restricted and I am therefore in custody. Even after invoking my right to counsel, I am interrogated and forced to speak to an on call P.O. who is an extension of law enforcement. This is after I have clearly invoked my Fifth amendent right to remain silent, but again, the only person held responsible for anything at all in this entire situation is me.

Thank you for your time.

Robert Hart