STATE OF MAINE
ANDROSCOGGIN, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. And-24-525

STATE OF MAINE

v.

ROBERT J. HART

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE,

STATE OF MAINE

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STATEMENT OF FACTS & PROCEDURAL HISTORY

The following evidence was established at the October 9, 2024, "Rule 11"[1] conditional plea to Count 1 (Tampering with a Victim, Class B),[2] Count 3 (Domestic Violence Criminal Threatening/Priors, Class C),[3] and Count 5 (Unlawful Possession of Scheduled Drugs, Class C).[4] (A. at 25-27, 62-64, 143-44; Rule 11 Tr. at 23-34.)

On November 6, 2022, the victim called 911 around 2:30 a.m. to report that Robert Hart, her ex-boyfriend, was outside of her hotel room in Auburn, had threatened her and told her that "he was going to kill" her. (Rule 11 Tr. at 23.) Multiple officers from the Auburn Police Department responded. (*Id.*) As Officer Travis Barnies pulled into the hotel parking lot, he observed a vehicle matching the description of the vehicle the victim gave to dispatch drive into the Auburn Walmart parking lot. (Rule 11 Tr. at 24.) The hotel's parking lot and Walmart parking lot are near each other and would take less than two minutes to drive between. *Id.* The victim initially appeared distraught and showed

[1] *See* M.R.U. Crim. P. 11.

[2] 17-A M.R.S. § 454(1-B)(A)(2) (2026).

[3] 17-A M.R.S. § 209-A(1)(B)(1) (2026). The State represented to the plea court (*Archer, J.*) as part of the Rule 11 factual colloquy the certified judgment and commitment orders to establish Hart's prior domestic violence convictions to elevate the Domestic Violence Criminal Threatening to the felony level. (Rule 11 Tr. at 32.)

[4] 17-A M.R.S. § 1107-A(1)(B)(3) (2026).

officers messages on Facebook from Hart. (Rule 11 Tr. at 25.) She then asks officers if she can take her dog up to her hotel room to not interfere with the interview, which she does. *Id.* Officer Barnies described the victim as having "clammed up" when she came back downstairs. (Rule 11 Tr. at 31.)

At the same time that this happened, other Auburn officers make contact with Hart in a vehicle in the Walmart parking lot. *Id.* While officers speak with Hart, he uses his cell phone for a significant portion of the twelve minutes and five seconds of the body camera footage. *Id.* The body camera footage time frame overlaps between when Hart uses his cell phone and when the victim speaks with officers and goes up to her hotel room. (Rule 11 Tr. at 25-26.)

The victim's Facebook messages provided to Officer Barnies included messages received from Hart and whose username is "Robert" between 2 and 3 a.m. on November 6. (Rule 11 Tr. at 26.) Some of the messages included Hart saying "I'm coming over right now. We have some things to talk about. . . . I will hunt you down on Bartlett Street and beat you to a bloody p[ulp] . . . if you don't have my f****** money when I get there." *Id.* He continues at 2:08 a.m., "Do not f****** play with me. I will kill everyone in that f****** room. . . . Yeah, you'll see me show up, kick the door of the f****** hinges and shoot everyone in the f**** room. . . . Over a measly $100. . . ?" (Rule 11 Tr. at 27.)

At 2:11 a.m., Hart called her, which she does not answer. *Id.* At 2:43 a.m., Hart says, "What happened? I guess you saw about that now, didn't we? Too scared to answer the door. What? You up in there with whoever?" *Id.* The victim responds. (Rule 11 Tr. at 27-28.) Hart continues, "You look stupid right now. I was trying to apologize and make up for my . . . mistake, and you won't even allow me to do that. Why not? Because your only priority in life is smoking crack. What a waste of a beautiful woman." (Rule 11 Tr. at 28.)

Hart then says, "I have hard and soft, and I was going to let you try to cook the sauce to see how good you are. LOL. You want me to send a picture? I'm at the Walmart parking lot right now." *Id.* The victim responded, "Cops are fucking here," and Hart replies, "I'm going to jail. I have work on me. Thanks a lot. I'm sorry it came to this. I almost feel like you set me up. Can you please do something? Say you overreacted. WTF? Please. [The victim's name] please." *Id.* The victim responds, "I . . . do this. WTF? I'm trying." *Id.* Officer Nicholas Gagnon would have testified that "work" is a drug-related term. (Rule 11 Tr. at 33.) Hart continues messaging, "They're saying you said I threatened you. I'm surrounding by police in the Walmart parking lot. Can you tell me what's going on please? This is serious." *Id.* The victim says "I told them I overreacted." *Id.*

Hart responds, "We're not supposed to have contact," and the victim says, "[w]hich you have done. As yet, here I am, trying to save your ass." *Id.* Hart

responds, "I'm going to go to jail for this. There's no saving me now. I love you." (Rule 11 Tr. at 29.)

Additionally, surveillance video from the hotel in Auburn captured Hart wearing the same clothing that he was wearing within an hour of officers arriving at the Walmart parking lot. *Id.* The video shows Hart going down a stairwell and leaving the hotel building, with the victim coming down with her dog shortly thereafter in the same clothing she wore with Officer Barnies. (Rule 11 Tr. at 29-30.) Moreover, at the time that this occurred, Hart was on probation for Tampering with a Victim involving this same victim and where a no-contact condition with this victim was in place. (Rule 11 Tr. at 30.)

As a result of Hart's conduct, he was arrested and transported to the Androscoggin County Jail where he was processed in and went through a scanner. (Rule 11 Tr. at 32.) The scanner alerted corrections officers that there was "some obstruction or something in the area between his buttocks or glutes." (Rule 11 Tr. at 33.) Hart removed the obstruction that was a "sandwich baggie." *Id.* Auburn police presumptively tested the substances retrieved from Hart's person, which resulted in one bag testing presumptively positive for cocaine base and weighed 5.5 grams, another tested presumptively positive for cocaine and weighed 1.4 grams, and another bag tested presumptively positive using the reagent test for methamphetamines weighing 2.5 grams total bag

weight. *Id.* The State also obtained certified results from the Department of Health and Human Services "HETL" laboratory showing that Hart possessed cocaine hydrochloride and cocaine base in the amount of 4.8445 grams. *Id.*

I. The Motion to Suppress

On March 15, 2023, Hart filed a preliminary motion to suppress that was supplemented on June 30, 2023. (A. at 65-77.) A hearing on that motion was held on July 11, 2023. (A. at 7-9, Docket Record at 4-5.)

At the beginning of that hearing, the State put on the record that it agreed to the suppression and exclusion of Hart's statements to law enforcement officers from the twelve minute and five second portion of body camera footage except for purposes of the rule of completeness, cross-examination, or in the State's rebuttal case, as well as the search of his cell phone. (Suppression Hearing Tr. at 4-6.)

Amongst other issues raised by Hart,[5] the State did, however, contend that the search of Hart's person at the Androscoggin County Jail after he was arrested, and the subsequent discovery of illegal drugs on his person, did not violate the Fourth Amendment. (Suppression Hearing Tr. at 10-16, 147-48.)

[5] Hart did not specifically challenge the issue of the search of his person in the motions to suppress (A. at 65-77, referring to "any statements" made and the "evidence illegally seized" pertained to the search of his phone), but did, however, contend at the motion hearing that because "there was not probable cause to issue the probation hold . . . it was an unlawful arrest, the drugs fond on him in the jail should be suppressed" (Suppression Hearing Tr. at 7).

Although this could have been made clearer by the State during the beginning of the proceeding, the State specifically argued that the search of Hart at the Androscoggin County Jail was a search that began when he was fully clothed and then removed the bag himself. (*Id.* at 147-48.) The State relied on *Florence v. Bd. of Chosen Freeholders of Burlington*, 566 U.S. 318 (2012), for the legal basis that the search was not violative of his Fourth Amendment right. (*Id.* at 148.)

Relevant to the issue raised by Hart on appeal (Blue Br. at 35-37), the State introduced testimony from Corrections Officer Daniel Levesque that Hart was booked into the Androscoggin County Jail on November 6, 2022, around 4 or 5 a.m. (Suppression Hearing Tr. at 9-10.) CO Levesque was familiar with Hart and always ask questions about drugs when someone is booked to find them before further intrusive searches are done as they "don't want drugs entering the jail," in part, because "inmates . . . have died of overdoses," and for officer safety reasons. (*Id.* at 10-11.)

When CO Levesque asked Hart whether he had any drugs on him, Hart nodded his head half up and down, but on clarification shook his head no. (*Id.* at 12.) Hart put on his inmate uniform and then went through a "body scanner . . . an x-ray machine." (*Id.* at 13-14.) Another corrections officer indicated that he "could see an anomaly in [Hart's] lower region." (*Id.* at 14.) CO Levesque asked Hart again if he had anything on him and he said he did and agreed to

give it to staff. *Id.* Hart then removed "a bag from behind his buttocks and threw it on the floor." *Id.* That bag, containing "some type of white powder," was then placed in an envelope, then a plastic bag, and turned over to the Auburn Police Department. (*Id.* at 15.) "Later, when [CO Levesque] was talking with [Hart] in the holding cell, he asked Hart if he knew what it would be. And [Hart] said, cocaine and possibly meth. . . . he said he was embarrassed cause this was the first time he had ever . . . come in with drugs on him." (*Id.* at 16.) On cross-examination, CO Levesque did not advise Hart of his *Miranda* rights and was unaware of that had occurred at any time during the search. (*Id.* at 17.)

The motion court (*Clifford, A.R.J.*) determined that "when [Hart] went to the jail, he has no right to - - privacy of the drugs and he [was] admitted to jail. There's no right to privacy when you resist the searches at the jail. The jail cannot tolerate . . . the inmates having drugs. . . . So I'd deny the motion." (Suppression Hearing Tr. at 10-17, 147-48, 159, A. at 51.) Following the hearing, Hart filed a motion to reconsider on July 19, 2023, which was denied by the court (*Clifford, A.R.J.*). (A. at 8, Docket Record at 5; A. at 53-55.)

II. Jury Selection, Victim Trial Preparation Meeting, and the Superseding Indictment.

Prior to jury selection, on December 21, 2023, the State sent defense counsel an offer that expired at jury selection, which included a plea to a new

count of Domestic Violence Criminal Threatening/Priors (Class C). (A. at 112, email 12-21-2023.) On January 4, 2024, jury selection was held (*Stewart, J.*) for charges contained in the Indictment. (A. at 59-61; 1-4-24 Jury Sel. Tr. at 1, 29; A. at 11, Docket Record at 8.) Trial was scheduled for January 22 to 24, 2024. (Jury Sel. Tr. at 30.) On January 21, the jury trial was continued due to defense counsel's illness when he notified the court that he was ill over the weekend before trial.[6] (2-5-24 Tr. at 3.)

After the trial had been continued, on January 24, 2024, the State alerted defense counsel, relevant to the issues on appeal, that (1) the victim had been under subpoena for the January trial dates (2-5-24 Tr. at 30);[7] (2) undersigned counsel for the State and a victim-witness advocate met with the victim for trial preparation on January 19th where she informed the State—for the first time—that the assault by Hart occurred in Cumberland County not Androscoggin County and informed defense counsel that it would not proceed with the assault allegations before the jury but would do so at the motion to revoke probation

[6] As defense counsel put on the record at the February 7, 2024, hearing, he "take[s] chemotherapy 21 days a month," which "makes [him] immunocompromised" and he was "on [his] back." (2-7-24 Tr. at 11.)

[7] To the extent that the prosecutor had an obligation to and failed to arrest the victim at the trial preparation meeting on January 19, as the State put on the record at the February 5, 2024, hearing, the State attempted to get "a sergeant with the Auburn Police Department, who [was] involved in the underlying investigation, to be able to meet with us in case something came up that needed to be disclosed, but he was not able to do so." (Blue Br. at 15, 29; 2-5-24 Tr. at 32.)

hearing; and (3) the State intended to present to the February grand jury "charges of Tampering, DV Criminal Threatening/Priors, and the three counts of drug possession" because the State was "substituting the DV Criminal Threatening for the currently indicted DV Terrorizing, which [the State would] have to dismiss in light of the U.S. Supreme Court decision, *Counterman*[,] . . . and not for a sufficiency of the evidence issue but for the legal issue concerning the Terrorizing statute's mens rea requirement." (A. at 118; email on 1-24-24.)

Defense counsel responded objecting to the State's intent to seek a superseding indictment. (A. at 113-19.) On February 6, 2024, the Androscoggin County grand jury returned a Superseding Indictment, which included the counts referenced by the State in the email to defense counsel, as well as an alternative count of Tampering with a Victim (Class B) pursuant to 17-A M.R.S § 454(1-B)(A)(1) (2026). (A. at 62-64.) The following day, a hearing was held (*Stewart, J.*) regarding the circumstances around the Superseding Indictment. (2-7-24 Hearing Tr.) At that hearing, the State put on the record information surrounding the reasons why it sought the Superseding Indictment.[8]

[8] It is unfortunate that this transcript contains a significant amount of "indiscernible" references. Undersigned counsel has not obtained the audio recording of the proceeding to confirm if those references are, in fact, indiscernible. Notwithstanding the poor quality of the transcript, when read in conjunction with the 2-5-2024 and 2-8-2024 transcripts and emails between the attorneys prior to the return of the superseding indictment (A. at 112-22), the substance of the proceeding is made more clear.

The State informed the court that it gave defense counsel advanced notice that it would be seeking a superseding indictment; it removed the assault counts because of the loss of jurisdiction; and the Domestic Violence Terrorizing count was "substituted" for the "criminal threatening based on priors" due to *Counterman v. Colorado* and *State v. Labbe* "that was decided on the 31st of January," which is relevant because "footnote 24" of the *Labbe* opinion "indicate[d] [to the attorney for the State] that the Maine's terrorizing statute would not have counted as well." (2-7-24 Tr. at 3; *see also* 2-5-24 Tr. at 21-23, 31.) The State also noted that the day after docket call the attorneys spoke "about how to resolve the matters" and "one of the proposals that we came up with that [the State] agree[d] to" would have resulted in Hart pleading to a domestic violence "criminal threatening" count. (2-7-24 Tr. at 3.)

Further, as to the Tampering counts, the State made clear that "there is no new evidence that has been added." (*Id.* at 4, 7-8.) Responding to a question by the court, the State stated that it had "only informed [defense counsel] of the terrorizing" as a "substituti[on for] the criminal threatening," and that it did not believe that it had informed defense counsel of the "alternative theory of tampering." *Id.* The State did note that it was the "same subsection" but "different paragraph of the same . . . statute." (*Id.* at 5.) Additionally, the State put on the record the information regarding victim's statements involving loss

of jurisdiction for the assaults. (2-5-24 Tr. at 19-21.) The State indicated that it "inten[ded] to move forward" and was "not trying to delay this process." (2-7-24 Tr. at 8-9.)

On February 8, 2024, at jury selection, the court, on request by Hart, continued trial to allow him time to file motions and prepare. (A. at 13, Docket Record at 10; 2-8-24 Jury Selection Tr. at 2, 6-8, 12-15.)

III. Hart's Motions to Dismiss on Double Jeopardy and Presumptive Vindictive Prosecution Grounds.

On March 28, 2024, Hart filed two motions: a Motion to Dismiss "due to Presumptive Prosecutorial Vindictiveness" (A. at 79-91), and a Motion to Dismiss the Superseding Indictment due to Double Jeopardy (A. at 92-95). (A. at 14-15, Docket Record at 11-12.) The State filed memoranda of opposition. (A. at 15, Docket Record at 12; A. at 96-128.) On April 5, 2024, Hart filed a motion for discovery requesting "[a]ll emails exchanged between the prosecutor on this case and law enforcement or other state employees regarding communications around this case." (A. at 15, 46; Docket Record at 12.)

On April 9, 2024, a hearing was held on these motions (*Archer, J.*). (*See generally* 4-9-24 Tr.; A. at 15.) The court denied Hart's discovery request determining that it was incredibly broad, it "encompasse[d] huge amounts of work product," and that Hart was "not entitled to discovery in this matter"

because he had not provided "any objective evidence to support evidence of prosecutorial vindictiveness." (4-9-24 Tr. at 28, A. at 45; A. at 46, Order on Motion for Discovery.) After taking the remaining two motions under advisement, on April 10, 2024, the court issued a 13-page written decision denying Hart's Motions to Dismiss.[9] (4-9-24 Tr. at 51; A. at 32-43.)

On the presumptive vindictive prosecution issue, first, the court concluded that Hart was not entitled to an evidentiary hearing "because he failed to carry his initial burden of pointing to specific facts that raise a likelihood of vindictiveness." (A. at 38, Order Denying Motions to Dismiss at 7.) The court did not find that Hart's Double Jeopardy right had attached so it concluded that that right "cannot form the basis for any prosecutorial vindictiveness claim." (A. at 39, Order at 8.) The court then turned to whether Hart's additional grounds raised—the motion for discovery sanctions, motion to continue the trial, "in addition to all other prior motions filed in the case"—could evidence the exercise of a right for which the State punished Hart by seeking the Superseding Indictment. (A. at 39-40, Order at 8-9.)

The court found that the "State's pursuit of the Superseding Indictment, even considering all of the surrounding circumstances, does not establish a

[9] On appeal, Hart does not challenge the Court's Order denying his Motion to Dismiss the Superseding Indictment due to Double Jeopardy although it is part of the conditional plea. M.R.U. Crim. P. 11(a); (Blue Br. at 21-34; A. at 143-444.)

'sufficient likelihood of vindictiveness' to warrant imposition of the presumption." (A. at 41, Order at 10.) The court found that the State "substituted" the Domestic Violence Terrorizing with the Domestic Violence Criminal Threatening count "based upon those same threats against the same named victim" because the State "concluded that the terrorizing statute in the original indictment was unconstitutional in light of *Counterman* and gave advance notice by email to defense counsel of the issue." (*Id.*) In so doing, the court cited to the email communication between the parties on December 21, 2023. (*Id.*; A. at 112.) The court concluded, discussing *U.S. v. Young*, 955 F.2d 99, 108 (1st Cir. 1992), that there was "a legitimate reason why the State would substitute" those charges," particularly after the Law Court signaled the statute's unconstitutionality in *Labbe*." (A. at 42, Order at 11.)

The court continued and addressed the State's inclusion of a second Tampering charge in the Superseding Indictment, and determined that the "two charges represent alternative theories of the same offense, and the State included the second charge after concluding that it may be more reflective of the alleged conduct." (*Id.* citing to 2-7-24 Tr. at 5-8.) Moreover, the court found that "neither tampering charge is more serious than the other and, even if convicted of both counts, the [c]ourt could not impose consecutive sentences upon [Hart]." (*Id.*, citing to 17-A M.R.S. § 1608(1)(A) (2026).) Thus, the court

determined that Hart "has not raised circumstances that reveal a sufficient likelihood of vindictiveness." (A. at 42, Order at 11.) In so doing, Hart "failed to present objective evidence of prosecutorial vindictiveness and the State has offered objective reasons for pursuing the Superseding Indictment." (A. at 43, Order at 12.) Neither party requested further findings of the court's Order pursuant to M.R. Civ. P. 52(a).

IV. <u>The Conditional Plea.</u>

Following the court's rulings, on October 8, 2024, the parties held a judicial settlement conference (*Cole, J.*), and reached a plea agreement. (A. at 20.) The next day, the court accepted Hart's conditional guilty plea to charges in the Superseding Indictment, to which the State agreed in writing, as follows:

On Count 1 (Tampering), a sentence of 10 years all suspended with 3 years of probation consecutive to the motion to revoke probation in PENCD-CR-2021-672; Counts 3 (Domestic Violence Criminal Threatening/Priors) and 5 (Unlawful Possession of Scheduled Drugs) a sentence of 27 months concurrent with PENCD-CR-2021-672. (A. at 21-22, 143-44.) The remaining counts in the Superseding Indictment were dismissed. (A. at 21.)

The conditional plea confirmed in writing that there were three grounds available for appellate review and certified by the parties that the harmless error doctrine was inapplicable. (A. at 144.) The three grounds for appellate

review were the trial court's denial of three motions: the Motion to Dismiss for Presumptive Vindictive Prosecution, Motion to Dismiss the Superseding Indictment Due to Double Jeopardy, and the Motion to Suppress. (A. at 144.)

Following the court's acceptance of the conditional plea[10] and imposition of sentence, Hart timely appealed.[11] (A. at 23-24.)

[10] The admission to and sentence on the motion to revoke probation in PENCD-CR-2021-00672 is not subject to this appeal as it was not part of the conditional plea. (A. at 21-23, 25-27, 143-44.) That sentence was a partial revocation of 27 months with probation to continue. (A. at 143; Rule 11 Tr. at 3-4.)

[11] Robert Hart had previously filed a notice of appeal that he moved to dismiss on the same date as the conditional plea. (And-24-186, Appellant's Motion to Dismiss the Interlocutory Appeal (Without Prejudice); A. at 17, Docket Record at 14.) This Court dismissed the appeal "for want of prosecution" because Hart failed to file a brief on or before October 9, 2024, nor did he file a motion to enlarge time to file the brief, and the motion to dismiss the appeal was not signed. (Order Dismissing Appeal, dated Oct. 17, 2024, And-24-186). The State assumes that this appeal was dismissed without prejudice.

STATEMENT OF THE ISSUES

I. Whether, when reviewed for clear error and de novo, the trial court erred by finding and concluding, as supported by competent record evidence, that Hart failed to establish a sufficient likelihood of presumptive vindictive prosecution.

II. While the State clarifies that it does not intend to use Hart's statements to the corrections officers at the Androscoggin County Jail during the search of his person, whether the motion court otherwise erred by denying Hart's motion to suppress and determining that he did not have a right to privacy at the Jail.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of conviction for Robert J. Hart following his entry of the conditional pleas to Counts 1, 3, and 5 of the Superseding Indictment. The State did not presumptively vindictively prosecute Hart. As to Hart's statements made to a corrections officer at the Androscoggin County Jail, the State clarifies that—were this Court to vacate his conditional plea and convictions—if the matter went to trial the State would *not* seek to admit Hart's statements to the corrections officer during the booking process and search of his person except in the State's rebuttal case, for cross-examination, or for rule of completeness purposes. Otherwise, the suppression court did not err by determining that Hart did not have a right to privacy at the Androscoggin County Jail and the subsequent search of his person was constitutionally permissive.

ARGUMENT[12]

I. The State did not Vindictively Prosecute Mr. Hart.

The motion court's (*Archer, J.*) denial of Hart's Motion to Dismiss the Superseding Indictment Due to Presumptive Prosecutorial Vindictiveness is one of the three preserved grounds for appeal pursuant to the conditional plea, which could have occurred only if the "attorney for the State consents to entry of the conditional plea," M.R.U. Crim. P. 11(a)(2). (A. at 21, 144.)

Hart's preserved claim of presumptive prosecutorial vindictiveness appears to be an issue of first impression before this Court. As such, adopting the United States Court of Appeals for the First Circuit's standard, this Court should apply a bifurcated review: "ancillary factual findings [are reviewed] for clear error and relevant legal determinations de novo." *U.S. v. Bucci*, 582 F.3d 108, 115 (1st Cir. 2009).[13] Where there is no motion for further findings, this

[12] The State declines to address Hart's personal arguments contained in pages 39 to 45 of the Blue Brief, which are not adopted by opposing counsel (Blue Br. at 38 n.17). The State denies Hart's personal contentions and rests on this Brief and underlying record to rebut Hart's arguments contained therein.

[13] Although not subject to the express terms of the conditional plea, M.R.U. Crim. P. 11(a)(2), and therefore should not be addressed by this Court, Hart appears to take aim at the trial court's denial of his motion for discovery on the issue of prosecutorial vindictiveness. (Blue Br. at 33; A. at 143-44.) Were this Court to address this issue, it should review that decision for an abuse of discretion. *U.S. v. Bucci*, 582 F.3d 108, 113 (1st Cir. 2009). Even if reviewed for an abuse of discretion, the motion court (*Archer, J.*) did not abuse its discretion by denying Hart's motion for discovery (A. at 45-46, 4-9-24 Tr. at 11, 17-18 28) by determining that Hart made an "incredibly broad" request that was "somewhat tailored" and "encompasse[d] huge amounts of work product," and did "not conclude that there is any objective evidence to support evidence or prosecutorial vindictiveness." (A. at 45, 4-9-24 Tr. at 13, 28.)

Court "will infer that the court found all the facts necessary to support its judgment if those inferred findings are supportable by evidence in the record." *State v. Connor*, 2009 ME 91, ¶ 9, 977 A.2d 1003.

"To invoke the presumption of vindictiveness, [this Court] must find that a reasonable likelihood of vindictiveness exists—that is, that the second indictment was 'more likely than not attributable to the vindictiveness on the part of' the [State]." *U.S. v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002) (quoting *Alabama v. Smith*, 490 U.S. 794, 801 (1989).

"In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his [or her] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Id.* at 363.

"[I]t is difficult to make such a showing [of presumptive vindictive prosecution] pretrial, however, in light of the broad discretion afforded the prosecutor to determine who should be prosecuted and for what crime, and the presumption that the prosecutor has exercised that discretion in good faith."

Bucci, 582 F.3d at 112. "[C]ourts should go very slowly in embracing presumptions of prosecutorial vindictiveness in pretrial proceedings." *U.S. v. Stokes*, 124 F.3d 39, 45 (1st Cir. 1997).

"A vindictive prosecution—one in which the prosecutor seeks to punish the defendant for exercising a protected statutory or constitutional right—violates a defendant's Fifth Amendment right to due process." *U.S. v. Jenkins*, 537 F.3d 1, 3 (1st Cir. 2008) (citing *U.S. v. Goodwin*, 457 U.S. 368, 372 (1982)). "A defendant may establish a vindictive prosecution either (1) by producing evidence of actual vindictiveness or (2) by demonstrating circumstances that reveal a sufficient likelihood of vindictiveness to warrant a presumption of vindictiveness. If a defendant raises a presumption of vindictiveness, the prosecutor may rebut the presumption by showing objective reasons for its charges." *Jenkins*, 537 F.3d at 3 (internal citation omitted).

A defendant must show that there is a 'realistic likelihood' of vindictive motivation. *U.S. v. Safavian*, 644 F.Supp.2d 1, 12 (D. D.C. 2009) (quoting *Goodwin*, 457 U.S. at 384). Moreover, the vindictiveness must be "applicable in all cases." *Goodwin*, 457 U.S. at 381. "Courts must examine the totality of the objective circumstances to determine whether it is likely that the decision to prosecute was a result of vindictiveness." *U.S. v. Ji*, 662 F.Supp.3d 424, 431 (E.D. N.Y. 2023) (quotation marks omitted).

"If the defendant can point to specific facts that raise a likelihood of vindictiveness a district court must grant an evidentiary hearing on the issue. On the other hand, there must be some evidentiary predicate and merely chanting the mantra of prosecutorial vindictiveness gets a defendant nowhere." *U.S. v. Cameron*, 658 F.Supp.2d 241, 244 (D. Me. 2009) (quotation marks and internal citations omitted). "It is hornbook law that a federal court may dismiss an indictment if the accused produces evidence of actual prosecutorial vindictiveness sufficient to establish a due process violation, or even if he demonstrates a likelihood of vindictiveness sufficient to justify a presumption." *Stokes*, 124 F.3d at 45.

As the U.S. Supreme Court recognized in *Goodwin*, 457 U.S. at 380-82, 384,

> 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 [or she] *may simply come to the 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. *Thus, a change in the charging decision made after an initial*

> *trial is completed is much more likely to be improperly motivated than is a pretrial decision*.
>
> . . . .
>
> A prosecutor should remain free before trial to exercise the broad discretion entrusted to him [or her] to determine the extent of the societal interest in prosecution. *An initial decision should not freeze future conduct*. As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.
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> . . . .
>
> There is an opportunity for vindictiveness . . . however, that a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule. . . . The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is not warranted.

(Emphasis added and emphasis in original.)

The Court also recognized the practical limitations of prosecutors,

> We recognize that prosecutors may be trained to bring all legitimate charges against an individual at the outset. Certainly, a prosecutor should not file any charge until he [or she] has investigated fully all of the circumstances surrounding a case. To presume that every case is complete at the time an initial charge is filed, however, is to presume that every prosecutor is infallible—an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources. Moreover, there are certain advantages in avoiding a rule that would compel

> prosecutors to attempt to place every conceivable charge against an individual on the public record from the outset.

Id. at 382 n.14; *see also* M.R. Prof. Cond. 3.8 (Special Responsibilities of a Prosecutor).

"'[E]vidence of suspicious timing alone does not indicate prosecutorial animus.'" *Bucci*, 582 F.3d at 114 (quoting *U.S. v. Cooper*, 461 F.3d 850, 856 (7th Cir. 2006)). A "prosecutor's 'persistence is not per se vindictive.'" *U.S. v. Goguen*, 2021 WL 2581586 at *11 (D. Me. 2021) (quoting *U.S. v. Jimenez*, 505 F.Supp.3d 14, 15 (D. Mass. 2020)). Nor does "the mere bringing of a new indictment with added counts is not in itself vindictive behavior, nor does it raise a presumption of vindictiveness sufficient to require investigation of grand jury minutes." *Young*, 955 F.2d at 108 (citing *Goodwin*, 457 U.S. at 382).

"[T]he classic situation where courts will apply a presumption of prosecutorial vindictiveness is the government's decision to file more severe charges following a defendant's successful appeal of a conviction." *Goguen*, 2021 WL 2581586 at *11. "A charging decision does not levy an improper 'penalty' unless it results solely from the defendant's exercise of a protected legal right, rather than the prosecutor's normal assessment of the societal interest." *Goodwin*, 457 U.S. at 380 n.11.

In the post-conviction context, the U.S. Supreme Court held that due process of law was offended, and thus the presumption of prosecutorial vindictiveness was found, where a defendant was convicted of misdemeanor charges and pursued his statutory right to appeal the conviction and obtain a de novo trial but was nevertheless subjected to "a significantly increased potential period of incarceration" when the prosecution brought felony charges for the same conduct for which the defendant was convicted of a misdemeanor offense. *Blackledge v. Perry*, 417 U.S. 21, 22, 27-29 (1974).

Then, in *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978), the Court addressed for the first time allegations of prosecutorial vindictiveness in the pretrial context, and held that the "Due Process Clause . . . did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the" original offense. *Goodwin*, 457 U.S. at 377 (citing, quoting, and discussing *Bordenkircher*, 434 U.S. 357 (1978)).

Courts, therefore, apply a more stringent assessment of a defendant's presumptive vindictive prosecution claim when brought in the pretrial setting compared to the post-conviction stage. It is presumably why, for instance, the United States Court of Appeals for the Second Circuit has concluded that "[t]his court has consistently adhered to the principle that the presumption of

prosecutorial vindictiveness does not exist in a pretrial setting." *U.S. v. Stewart*, 590 F.3d 93, 122-23 (2nd Cir. 2009).

A. The Timing of the Superseding Indictment was Based on the Continuance of Trial, which Occurred Solely Because of Defense Counsel's Illness.

To receive the more favorable analysis, Hart attempts to frame his circumstances as "not truly a 'pretrial' situation" and suggests that because the Superseding Indictment was obtained after the jury was selected but before seated and sworn, his case is more akin to post-trial analyses. (Blue Br. at 22, 25-26, 28.) This characterization misses the mark and intersects with Hart's Double Jeopardy claim that is not being appealed despite the conditional plea. (A. at 144; Order Denying Motions to Dismiss at 8, A. at 39.)

To begin with a foundational understanding of terms, "trial" is defined as "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding." *Trial*, Black's Law Dictionary 1735 (10th ed. 2015). A "jury trial" means "[a] trial in which the factual issues *are determined* by a jury, not by the judge." *Id.* at 1736. "Pre" is a prefix and Latin for "prae" to mean "earlier than: prior to: before." *Merriam-Webster's Collegiate Dictionary* 975 (11th ed. 2003).

The State acknowledges that the trial court's ultimate legal conclusion that Hart failed to present objective evidence of prosecutorial vindictiveness—

i.e., that the Superseding Indictment was more likely than not attributable to the vindictiveness on the part of the State, *Gary*, 291 F.3d at 34—is reviewed de novo, *Bucci*, 582 F.3d at 115. However, the State's action asserted to be presumptively vindictive must be tied to the exercise of a legal right. *Goodwin*, 457 U.S. at 373. Hart's now-asserted legal right appears to be his more general right to a jury trial. (Blue Br. at 22-23.) This is quite different from what Hart asserted at hearing on his Motion to Dismiss for Vindictive Prosecution.

There, he primarily argued that his Double Jeopardy right had attached and the State acted vindictively in a manner adverse to his Fifth Amendment Double Jeopardy right, his motion for discovery sanctions, and motion to continue the trial, as well as "all other prior motions filed." (Order Denying Motions to Dismiss at 8, A. at 39; Defendant's Motion to Dismiss Superseding Indictment . . . Due to Presumptive Prosecutorial Vindictiveness at 4, A. at 82; 4-9-24 Tr. at 42-45.)

This becomes relevant to this Court's de novo review because the Superseding Indictment was returned *pretrial*—before the jury was seated and sworn to trigger attachment of Hart's double jeopardy right and before he was "subjected to the risk of being convicted."[14] *U.S. v. Green*, 556 F.2d 71, 72 (D.C.

[14] Hart's Motion to Dismiss the Superseding Indictment Due to Double Jeopardy only referenced the Federal Double Jeopardy Clause, however, this Court "interpret[s] the Double Jeopardy Clauses

Cir. 1977). Because the jury selected in January was never administered the trial oath,[15] Hart's double jeopardy right never attached, and the case remained in pretrial status. (1-4-24 Jury Selection Tr. at 3.)

Turning to the facts at hand, even if Hart's argument is construed as correlating the vindictive prosecution claim with the exercise more broadly of his constitutionally protected right to a jury trial[16] (1) the case was continued after jury selection but before trial in January due to defense counsel's illness and not because of or at the request by the State and when the victim was under subpoena (Docket Record at 9; 2-5-24 Tr. at 3, 30); (2) the State agreed to the exclusion of evidence on the Defendant's motion to suppress (Order on Motion to Suppress dated 7-11-23; Suppression Hearing Tr. at 4-7); (3) the State remained ready to try the case (2-7-24 Hearing Tr. at 3, 8-9; 2-8-24, Jury Selection Tr. at 9-11); (4) no new evidence was introduced or formed the basis of the Superseding Indictment that would have required the defense to conduct

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of the Maine and the United States Constitutions as coterminous." *State v. Shirey*, 2020 ME 136, ¶ 5 n.2, 242 A.3d 1103; (A. at 92, Motion at 1).

[15] As U.S. Magistrate Nivison opined in the Recommended Decision after review of Hart's federal complaint on the Double Jeopardy issue, "[Hart] thus essentially relies on what amounts to be an alleged conspiracy among court personnel and perhaps others involved in the case to destroy or conceal evidence regarding the empanelment and oath." Recommended Decision After Review of Complaint, Robert James Hart v. Justice Jennifer Archer, et al., 2:24-cv-00140-JAW, at *8 (D. Me., May 10, 2024) (aff'd by U.S. Dist. Ct. D. Me. Judge Woodcock).

[16] Hart cites to no constitutional provision for his implicit assertion.

further investigations into additional factual information (2-7-24 Hearing Tr. at 4); (5) the State did not pull the offer that was made on December 21, 2023—*before* the Superseding Indictment was returned—but was rejected by Hart when he made a counteroffer on February 8, 2024 (A. at 62, 112, 121); and (6) the State alerted defense counsel that it had intended to seek a superseding indictment prior to so doing but after the continuance had occurred (Docket Record at 9, A. at 12; emails on 1-24-24, A. at 113-19; 2-7-24 Hearing Tr. at 4). Importantly, nothing prevented the Defendant from exercising his Sixth Amendment right to a jury trial instead of pleading guilty by way of a conditional plea.

B. The Superseding Indictment does not Contain Charges of Increased Severity from the Original Indictment.

As Hart must concede (Blue Br. at 31), the Superseding Indictment does not contain charges of increased severity from the original Indictment. (*Compare* Superseding Indictment, *with* Indictment; A. at 59-64.)

As to the Tampering allegations, both counts are Class B offenses. 17-A M.R.S. § 454(1-B) (2026). The sole reason the State added the alternative Count 2 of Tampering with a Victim is as an alternative theory of the case to be presented to the jury. (2-7-24 Hearing Tr. at 4). In fact, the day after docket call, defense counsel and undersigned counsel for the State discussed resolution of

the case. (A. at 11, Docket Record at 8; email 12-21-23, A. at 112; Order Denying Motions to Dismiss at 10, A. at 41.) During that conversation, defense counsel suggested that the State had charged the Defendant with the incorrect version of the Tampering statute and that the facts better fit with the "testify inform falsely" language than with the "withhold testimony, information or evidence" language. *Compare* 17-A M.R.S. § 454(1-B)(A)(1), *with id.* § 454(1-B)(A)(2).

The State took the opportunity with the given continuance, which occurred through no fault of or request by the State, to present to the grand jury charges that were more reflective of the conduct and that gave the jury options to consider surrounding the Tampering allegations when the matter proceeded to trial. This is because, as the State prepared in the time leading up to trial, the focus of the facts and arguments began to solidify and came more sharply into focus. As the Court in *Goodwin*, 457 U.S. at 381, reflected,

> 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 [they] 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 have not 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. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

Furthermore, Hart misapplies the law governing consecutive sentences because the convictions are in fact based on conduct arising from the same criminal episode, a sentencing court could not, as a matter of law, impose multiple sentences of imprisonment, which is precisely what the trial court concluded. 17-A M.R.S. § 1608(1), (2) (2026); (Order Denying Motions to Dismiss at 11, A. at 42.)

Hart also raises the spectre of vindictiveness because a prosecutor in Cumberland County who would have jurisdiction, 30-A M.R.S. §§ 254, 272(1) (2026), could charge him with the assault allegations. (Blue Br. at 31-32; Counts 2 and 3 of the original Indictment, A. at 59-60.) However, this possibility remains regardless of whether the State had sought a Superseding Indictment or because the State would have had to dismiss those counts on the day of trial in January had it not been continued due to defense counsel's illness. (Docket Record at 9, A. at 12; 2-5-24 Hearing Tr. at 3.)

C. The Domestic Violence Terrorizing Count was Substituted by the Domestic Violence Criminal Threatening Count Based on an Intervening Change in Law and was Discussed

with Defense Counsel as Part of Plea Negotiations Prior to the Superseding Indictment.

Importantly, Hart omits from his Brief evidence essential to analyzing the presumptive vindictive prosecution claim both for clear error and on de novo review: prior to seeking the Superseding Indictment, the State expressly informed defense counsel that the reason for substituting the Domestic Violence Terrorizing with the Domestic Violence Criminal Threatening count was because of this Court's decision in *State v. Labbe*, 2024 ME 15, ¶¶ 38-57, 314 A.3d 162, which analyzed and discussed *Counterman v. Colorado*, 600 U.S. 66 (2023), which was decided on January 31, 2024, *after* trial was continued due to defense counsel's illness on January 21, and before trial was scheduled to begin on February 14, 2024. (Email 1-24-24 at 114-15; Order Denying Motions to Dismiss at 10, A. at 41; Docket Record at 9, A. at 12.)

The State's concern about the constitutional validity of Maine's terrorizing statute was highlighted by this Court in *State v. Labbe*, although this Court noted that it was not called upon to address the validity of Maine's terrorizing and domestic violence terrorizing statutes in light of *Counterman* where those statutes establishing criminal offenses "based directly on the content of the defendant's speech" and "defined without any *mens rea* requirement." 2024 ME at ¶ 57 n.24, 314 A.3d 162.

The State also informed defense counsel of the *Counterman*/*Labbe* issue to protect the Defendant's First Amendment right and, as a result, did not seek to prosecute the Defendant for Domestic Violence Terrorizing. (Emails at A. 112-19.) The substitution of charges is also consistent with the State's pre-trial offer that included a resolution on a new count of Domestic Violence Criminal Threatening (A. at 112); and the State did not pull the offer made after docket call after the return of the Superseding Indictment, but, instead, Hart rejected the offer and made a counteroffer that was ultimately rejected by the State (*compare* email dated 12-21-23, A. at 112, *with* email dated 2-8-24, A. at 121; 2-8-24, Jury Selection Tr. at 3-5, 7-8, 11).

This is consistent with the motion court's findings that the State substituted the Domestic Violence Terrorizing count with the Domestic Violence Criminal Threatening count after the State "concluded that the terrorizing statute in the original indictment was unconstitutional in light of *Counterman*, and gave advance notice by email to defense counsel of the issue. The State was not hiding the ball or being sneaky in its pursuit of substitute charges. In fact, in the December 21, 2023, email with defense counsel, the State raised the possibility of [Hart] pleading to a new Count 8 charging Domestic Violence Criminal Threatening." (Order Denying Motions to Dismiss at 10-11 (citing to 12-21-23 email, A. at 112), A. at 41-42); *see Young*, 955 F.2d at 108

(determining that "Young's motion to dismiss the charge on the ground that the embezzlement statute was unconstitutional offers an obvious, and legitimate, reason why the prosecutor would want to add other, less controversial, charges to the indictment").

Additionally, both counts were Class C crimes enhanced based on prior domestic violence assault convictions, and a plea offer was discussed that included Hart pleading to the Domestic Violence Criminal Threatening after docket call. (A. at 11, Docket Record at 8; A. at 112, email dated 12-21-23; Order Denying Motions to Dismiss at 10, A. at 41.)

Here, the State did what the United States District Court for the District of Maine highlighted, in part, as what the government did not do in *U.S. v. Tobin*, 598 F.Supp.2d 125, 131 (D. Me. 2009): the State cited to a "material change in the law" and did "communicate[] . . . its intent to pursue . . . charges[.]" Moreover, unlike the government in *Tobin*, the State did not seek the Superseding Indictment after a successful vindication of an appeal or other motion hearing. *Id.* at 131.

When reviewed objectively for clear error and de novo, the totality of the circumstances cannot be said to be vindictive. The trial court did not clearly err by finding, in the totality of the circumstances, that Hart failed to present objective evidence that it was reasonably likely that the State presumptively

vindictively prosecuted Hart by seeking and obtaining the Superseding Indictment. *Ji*, 662 F.Supp.3d at 431 ("Courts must examine the totality of the objective circumstances to determine whether it is likely that the decision to prosecute was the result of vindictiveness." (quotation marks omitted)). As such, the trial court did not err as a matter of law by denying Hart's Motion to Dismiss the Superseding Indictment Due to Presumptive Prosecutorial Vindictiveness as he did not demonstrate a sufficient likelihood of vindictiveness to warrant a presumption of vindictive prosecution. *Jenkins*, 537 F.3d at 3; (A. at 41, 43, Order Denying Motions to Dismiss at 10, 12.)

II. <u>While the State Erred by Including Reference to Hart's Statements to Correction Officers During the Search at the Jail as Part of the Plea Colloquy and Agrees to the Exclusion of those Statements, the Motion Court did not Err by Denying the Motion to Suppress.</u>

The motion court's (*Clifford, A.R.J.*) denial of Hart's Motion to Suppress is preserved as one of the three grounds for appeal pursuant to the conditional plea. M.R.U. Crim. P. 11(a)(2). (A. at 48, 65-77, 144.) As part of that conditional plea, Hart pled guilty to Count 5 Unlawful Possession of Scheduled Drugs (cocaine base) (Class C) (A. at 25-27, 63.) Hart filed a motion to reconsider the denied motion to suppress, as the court concluded that the "court's denial of the Motion to Suppress did not rely on the evidence referenced in the motion to reconsider." (A. at 53, 55.) Hart's motion to reconsider did not include a

motion for further findings. (A. at 53.) On appeal, Hart challenges only the statements made to correction offers at the Jail. (Blue Br. at 35.)

This Court "review[s] the factual findings supporting the denial of a motion to suppress for clear error, and . . . review[s] ultimate conclusions of law de novo. [This Court] will affirm if any reasonable view of the evidence supports the court's denial of the motion to suppress." *State v. McLain*, 2025 ME 87, ¶ 12, 345 A.3d 141. Where there is no motion for further findings, this Court "will infer that the court found all the facts necessary to support its judgment if those inferred findings are supportable by evidence in the record." *Connor*, 2009 ME at ¶ 9, 977 A.2d 1003. "In this review, [this Court] will not substitute [its] judgment as to the weight or credibility of the evidence for that of the fact-finder if there is evidence in the record to rationally support the trial court's result." *Id.* As part of the parties' conditional plea, the parties certified that the case "is not appropriate for application of the harmless error doctrine." M.R.U. Crim. P. 11(a)(2).

To clarify, the State agrees that Hart's *statements* to law enforcement officers, including corrections officers, after the twelve minute and five second mark in the body camera footage are excluded at trial. *See, e.g.*, *State v. Fleming*, 2020 ME 120, ¶ 31, 239 A.3d 648; (Suppression Hearing Tr. at 4-6). However, the State maintains that the correction officers' *search* of Hart at the

Androscoggin County Jail and subsequent finding of illegal drugs was constitutionally permissive. *See e.g.*, *Florence v. Bd. Of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 324-25, 330, 339 (2012) (holding that the Fourth Amendment is not offended when correctional officers conduct visual searches of inmates); (Rule 11 Tr. at 32-35). It was error for the State to have referenced Hart's statements during the Rule 11 colloquy; however, those statements were made during the plea in addition to the evidence surrounding the search, chain of custody, presumptive testing by Auburn police, and subsequent testing of the drugs by the Department of Health and Human Services lab. *Id.*

Based on the facts presented to the suppression court, the motion court did not clearly error by finding and, when reviewed de novo, did not err by determining that "when [Hart] went to the jail, he has no right to - - privacy of the drugs and he [was] admitted to jail. There's no right to privacy when you resist the searches at the jail. The jail cannot tolerate . . . the inmates having drugs. . . . So I'd deny the motion." (Suppression Hearing Tr. at 10-17, 147-48, 159, A. at 51.)

While the State concedes error during the Rule 11 factual colloquy in the inclusion of Hart's statements to law enforcement surrounding his belief of the substance found on his person and statements surrounding that belief to law enforcement when booked at the Androscoggin County Jail, agrees that those

statements should be suppressed, and that the harmless error doctrine does not apply, the plea was otherwise sufficiently based in facts to support the conviction for Count 5 Unlawful Possession of Scheduled Drugs excluding Hart's statements. *See State v. Weyland*, 2020 ME 129, ¶ 29, 240 A.3d 841 ("We have never required strict compliance with Rule 11 in order to uphold a guilty plea. Rather, a guilty plea is vitiated only if the total record fails to establish adequately a factual matrix by which the plea is affirmatively shown to have been voluntarily and understandingly made.") (internal citations, alterations, and emphasis omitted); (A. at 25-27, Rule 11 Tr. at 32-34). As a result, this concession does not change the validity of the conditional plea to Count 5.

If this Court were to grant Hart's appeal and vacate his conditional plea and subsequent convictions, the State clarifies that Hart's statements to the corrections officers are excluded at trial in the State's case-in-chief except for purposes of cross-examination, the rule of completeness, or rebuttal. (Suppression Hearing Tr. at 6.) The State would seek to admit the evidence pertaining to the search of Hart's person at the Androscoggin County Jail and subsequent recovery of and testing of the illegal drugs as permitted by the motion court's order.

CONCLUSION

For the foregoing reasons, the State of Maine respectfully requests that this Court affirm the judgment and conviction and motion court's orders at issue on appeal.

Dated: January 16, 2026

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CERTIFICATE OF SERVICE

I, Katherine M. Hudson-MacRae, certify that I will simultaneously with the electronic filing of this Brief, electronically served a copy of the "Brief of Appellee" to the Appellant's attorney of record, Rory A. McNamara, Esq., at rory@drakelawllc.com. Following acceptance of the electronic filing of this Brief, I further certify that I will mail two copies, postage prepaid, of the "Brief of the Appellee" to the Appellant's attorney of record, Rory A. McNamara, Esq., P.O. Box 143, York, Maine, 03909.

Dated: January 16, 2026

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