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

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. There are objective indicia of vindictiveness.

Before addressing the handful of arguments pressed by the State, defendant disagrees with a portion of the State's framing of the applicable legal standard.

The State cites a D.C. Circuit decision for the proposition that a presumption of vindictiveness arises only when "'the second indictment was more likely than not attributable to the vindictiveness on the part of the State.'" Red Br. 25 (cleaned up), quoting *United States v. Gary*, 291 F.3d 30, 34 (D.C. Cir. 2002). However, this Court adheres to First Circuit decisional law. *State v. Gardner*, 509 A.2d 1160, 1163 (Me. 1986). And the First Circuit requires a defendant to raise merely a reasonable doubt that the State acted in good faith. *United States v. Peterson*, 233 F.3d 101, 105 (1st Cir. 2000); *United States v. French*, 2015 U.S. Dist. LEXIS 157594 ** 13-14, 24, 2015 WL 7455568 ** 5, 8 (D.Me. Nov. 23, 2015) (Woodcock, J.). That standard is both applicable and satisfied here.[1]

[1] Though defendant did not develop a state constitutional argument below, it is noteworthy that the Maine Constitution provides a more robust protection against vindictiveness than does the Fourteenth Amendment. *See State v. Violette*, 576 A.2d 1359, 1360-61 (Me. 1990).

A. The timing of the superseding indictment is indicative of vindictiveness.

Much of the State's argument is premised on its contention that the superseding indictment came "pretrial."[2] It invites an extrapolation: Because, in its view, our situation is pretrial, and because case-law says that pretrial vindictiveness is difficult to establish, there's no vindictiveness here. Respectfully, the State has fallen victim to the same analytical error that doomed the trial court's analysis.

Clearly, our case is nowhere near any "pretrial" case the State has cited. *While* the jury remained empaneled and with only *eight days* before opening statements, the State obtained a superseding indictment. The Red Brief contains no mention of the cases, cited at pages 27-28 of the Blue Brief, expressing that even less curious timing suggests "a last minute ploy" and looks "a bit suspect." *Colorado Supreme Court. Hampton v. Dist. Ct. in and for Jefferson Cnty.*, 605 P.2d 54, 57 (Colo. 1980); *United States v. Johnson*, 299 F. Supp.3d 909, 918 (M.D. Tenn. 2018). Nor does it mention Justice Stewart's *actual* "sensitiv[ity] 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 indicia of something quite far off the typical "pretrial" course.

Regardless, no either/or black-letter line needs to be drawn. The Supreme Court has already recognized the possibility of a showing of pretrial

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[2] *Black's Law Dictionary* notwithstanding, in Maine, "trial" typically connotes jury selection. *Cf. State v. Tenney*, 2003 ME 100, ¶ 9, 828 A.2d 755 ("[W]e hold that for purposes of Rule 43, a trial has been commenced in the presence of the defendant when the defendant is present at jury selection.").

vindictiveness "in an appropriate case." *United States v. Goodwin*, 457 U.S. 368, 384 (1982). The objective indicia of vindictiveness here are far beyond those discussed in *Goodwin*. Ours is "an appropriate case."

B. The superseding indictment increased defendant's sentencing exposure.

Defendant faced more prison than he **legitimately** faced before the superseding indictment. The State's dismissals were not the product of discretionary tenderness or deal-making; they were the result of an unconstitutional statute and a lack of jurisdiction. They did not result from plea negotiations. *Compare Goodwin*, 457 U.S. at 379-80 (presenting a case in which "a prosecutor may forgo **legitimate** charges already brought in an effort to save the time and expense of trial"). That distinguishes our case: The State increased defendant's **legitimate** sentencing exposure *after* jury selection and *while* the jury was empaneled. Relatedly, by its own admission, the possibility "remains" that defendant will be prosecuted in Cumberland County for the assaults he allegedly committed therein. Red Br. 36.[3] Defendant is obviously worse off than he was the day before the superseding indictment.

[3] Though defendant hopes that the State's is correct that "the law governing consecutive sentences," Red Br. 36, forbids imposition of consecutive terms for any such assault conviction, given their alleged occurrence earlier in the day in a separate county, he nonetheless remains concerned about the possibility that a fact-finding judge might disagree. *See State v. Gessner,* 2021 ME 41, ¶ 20, 255 A.3d 1041 (such a finding is reviewed only for clear error).

C. Defendant exercised numerous rights – *e.g.*, to have a trial, to have the jury he selected decide the case, to have a speedy trial, to cross examine the complainant about bias, etc.

The State professes some difficulty identifying which right defendant invoked, triggering the superseding indictment. Red Br. 32 ("Hart's now-asserted legal right appears to be his more general right to a jury trial."). Certainly, defendant's desire to have a trial, rather than plead guilty, is one[4] of the rights defendant sought to exercise. But it is not the only one.

After belatedly learning that it lacked jurisdiction to prosecute the assaults, the State was between a rock and a hard place. Defendant enjoyed a significant advantage. The State could neither prove those assault-charges nor, while the jury remained empaneled, dismiss them without the defendant's consent. *See* M.R. U. Crim. P. 48(a) (prosecutor may not *nolle prosequi* during trial without the defendant's consent); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869) (at common law, prosecutor may *nolle prosequi* only before jury is empaneled). The State would likely have been unable to prosecute any replacement charges in a subsequent trial. *See* 17-A M.R.S. § 14 (separate trials for same criminal episode require court approval). By simply pressing on to trial – by insisting on his "right to have his trial completed by a particular tribunal," *Crist v. Bretz*, 437 U.S. 28, 36 (1978) – defendant was both forcing the State to proceed to trial on charges

[4] *Goodwin* does not hold that a defendant's desire to have a trial is *irrelevant* to a vindictiveness-inquiry. Rather, it observes that insistence on a trial is not, typically, by itself, sufficient to warrant a presumption of vindictiveness.

it could not prove and making it unlikely that they'd later be able to add more charges. The State had incentive to induce defendant to assent to a continuance of the trial out of February – *i.e.*, to a different petit jury.

Another wrinkle underscores as much. Defendant vehemently demanded a speedy trial. Blue Br. 13-14 n. 5 (documenting demands). The State knew – because it had already been denied one – that the court was unlikely to grant a continuance at its request because, in the words of Justice Stewart, "the optics" of a continuance would not look good. (1/4/24 Tr. 26). If it were to salvage important parts of its prosecution, the State needed defendant to cease his request for a speedy trial and assent to a continuance beyond the February calendar. That is what he eventually succumbed to.

Before the State obtained the superseding indictment, defendant complained to the court that the prosecutor had not had the complainant arrested at their trial-preparation meeting. (A140). The defense contended that this occurrence evinced a biased prosecution, and the court observed that such "does cut, at some level or another, to credibility." (2/5/2024 Tr. 24-32). Defendant thus invoked his Sixth-Amendment right to meaningfully cross-examine the complainant in a manner that impugned the prosecutor: He alleged that the prosecutor knowingly omitted to arrest the complainant; "there's no reason that she wasn't arrested;" and that such raises issues of "bias." (2/5/2025 Tr. 24-25). This is both potentially verdict-swaying and, to a prosecutor, a personal attack.

In sum, the situation placed such a burden on the State as to support an implication that the superseding indictment was motivated by

prosecutorial vindictiveness. *Cf. United States v. LaDeau*, 734 F.3d 561, 569 (6th Cir. 2013) ("[T]he 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.").

D. The supposedly innocuous reasons for the superseding indictment don't help the State.

Counterman was decided ***225 days*** before the State obtained the superseding indictment. *Counterman v. Colorado*, 600 U.S. 66 (2023). Nearly ***five months*** before the State obtained the new indictment, this Court invited amicus briefing on the impact of *Counterman*, stating its understanding that "the First Amendment requires a subjective mens rea – at a minimum, recklessness – with respect to the effect that the conduct … had upon the victim."[5] *Law Court invites amicus briefs on constitutionality of Maine's stalking statute as applied in light of a recent U.S. Supreme Court decision*, State v. Labbe (Sept. 11, 2023). ***Four months*** before the superseding indictment, the same prosecutor from our case filed a brief in this Court, observing that *Counterman* had limited the State's ability to "prosecute [a defendant] because of the *content* of the calls and text messages of [his] calls and text messages…." *Supplemental Brief of Appellee State of Maine*, State v. Labbe, And-22-317, 2023 WL 10364281 * 19 (Oct.

[5] The then-alleged terrorizing clearly required no such finding. (A60) ("did communicate a threat … and the natural and probable consequence of the threat was to place [the complainant] in reasonable fear….").

10, 2023) (emphasis in original). In other words, long before trial, there was no doubt that the terrorizing charges were not viable.[6]

As for the assault charges, yes, they apparently became untenable when the State finally investigated its case. However, the investigation came weeks *after* jury selection. It came 14 months *after* defendant's first speedy-trial demand. (*See* Blue Br. 26-27 n. 11). It is difficult to see how such belated investigation helps the State's argument. To a defendant demanding a speedy trial, such a tardy evaluation of jurisdiction seems vindictive.

E. The nature of the remedy

Two points necessitate discussion. First, on remand, defendant is entitled to discovery[7] and an evidentiary hearing. The court's denial of the former was premised on its erroneous conclusion:

> I do not conclude that there is any objective evidence to support evidence of prosecutorial vindictiveness, and so under the case law, I do not find that the defendant is entitled to discovery in this matter.

(4/9/24 Tr. 28). That ruling is inseparable from the gravamen of this appeal. The court ruled as it did about discovery *because* the court erred on the issue presented in this brief.

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[6] In fact, the parties discussed as much before jury selection. The prosecutor wrote to defense counsel, "I had told you before the date of jury selection that the DV terrorizing count would need to be dismissed because of *Counterman*." (A116).

[7] Defendant sought "any information that is relevant to why they filed this new superseding – this new superseding indictment." (4/9/24 Tr. 25).

This reveals a due process shortcoming. The court considered the State's evidence in defense of its superseding indictment, concluding that such "rebutted" any notion of vindictiveness. (A41). But that, in tandem with the denial of discovery and an evidentiary hearing, put the cart before the horse. Having made a prima facie showing, defendant was entitled to discovery and a hearing *before* the court might determine that the showing had been rebutted. *See State v. Thompson*, 2017 ME 13, 154 A.3d 614 (error to allow State opportunity to rebut an initial *Franks* showing before holding a *Franks* hearing).

Lastly, the State mistakenly asserts that the probation-revocation – PENCD-CR-2021-00672 – is "not part of the conditional plea." Red Br. 21 n. 10. However, on page A143 and A144 of the Appendix, the State's signature appears on the *Conditional Plea* entered into by the parties. The probation matter is noted three times on that document, including in the case-caption. On remand, therefore, defendant shall have the opportunity to withdraw his admission – the benefit of the bargain. *See* M.R. U. Crim. P. 11(a)(2).

Second Assignment of Error

II. The State has conceded non-harmless error.

Defendant argued that his statements to jail officials should have been suppressed. The State "agrees that those statements should be suppressed, and that the harmless error doctrine does not apply…." Red Br. 42-43.

CONCLUSION

This Court should vacate the court's conclusion that defendant failed to make a sufficient showing to presume vindictiveness. It should remand so that defendant might withdraw his pleas, issuing a mandate for the court to order discovery and an evidentiary hearing on the issue of vindictiveness.

Separately, the Court should vacate and remand so that defendant may choose to withdraw his pleas, in light of the court's suppression-order error.

Respectfully submitted,

February 6, 2026

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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