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

LAW COURT DOCKET NO. Pen-24-248

**STATE OF MAINE**
**Appellee**

v.

**ROCHELLE GLEASON**
**Appellant**

ON APPEAL from the Penobscot County
Unified Criminal Docket

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# BRIEF OF APPELLANT

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## INTRODUCTION

In this prosecution for selling fentanyl that was consumed and resulted in a death, there were two trial errors:

(I) A few months ago, the Supreme Court explicitly disapproved this Court's decision in *State v. Mercier*, 2014 ME 38, 87 A.3d 700. *Smith v. Arizona*, 602 U.S. 779, 789 n. 2 (2024). *Smith* rejected the notion that a forensic expert "may testify as to her own opinion and the facts on which that opinion is based without testifying to the truth of those facts," mentioning, and overturning, *Mercier*. *Mercier*, 2014 ME 28, ¶ 13 (quotation marks and citation omitted). Rather, because such testimony *is* offered for the truth, the Confrontation Clause encompasses the "right to confront the person who actually did the lab work, not a surrogate merely reading from her records." *Smith*, 602 U.S. at 800.

In our case, such a "surrogate" – one who conducted none of the testing of the drugs which the State claims led to the decedent's death – was permitted to testify in lieu of those who actually undertook the testing. To overrule defendant's confrontation objection, the State invited the trial court to apply the now-defunct reasoning of *Mercier*. And the lower court seemingly did so, evoking a standard akin to that of M.R. Evid. 703.

Respectfully, that ruling, as well as the *Mercier* Court's rationale, is no longer tenable given *Smith*. This Court should reverse and, in the process, formally abrogate *Mercier* and the reasoning upon which it was based.

(II) The statute of conviction contains, as an element, "Death of another person is in fact caused by the use of one or more scheduled drugs."

There was uncontroverted evidence that kratom – a *non*-scheduled drug – was present in the decedent's body at a lethal dose. In fact, in closing, the prosecutor even stated, "I'm not saying kratom didn't kill [the decedent]…."

Yet, the court denied defendant's request for a concurrent causation instruction per 17-A M.R.S. § 33(2). Given the evidence about the non-scheduled kratom, such an instruction was necessary to ensure that jurors evaluated lawful causation – that is, a death caused only by scheduled drugs. The court's instruction, especially when coupled with the State's argument about this element, failed to convey what was legally required.

## STATEMENT OF THE CASE

After a multi-day jury trial, defendant was convicted of aggravated trafficking of scheduled drugs causing a death, 17-A M.R.S. § 1105-A(1)(K) (Class A). Thereafter, the Penobscot County Unified Criminal Docket (Mallonee, J.) imposed an eighteen-year carceral sentence, suspending all but eight years of that term for the duration of four years' probation. This appeal follows.

### I. The State's case

Because defendant does not present a sufficiency-of-the-evidence challenge, she recites "the facts in a balanced manner" that presents an objective view of the evidence. *United States v. Rodriguez*, 115 F.th 24, 33 n. 1 (1st Cir. 2024) (quotation marks and citations omitted). To aid the Court's decision-making, she separately discusses the record evidence as to each element of the offense. *See* 17-A M.R.S. § 1105-A(1)(K).

### A. There is evidence that defendant trafficked fentanyl to the decedent.

The decedent[1] "had a drug problem." (1Tr. 53). Those who knew him, including his daughter, testified that the decedent made frequent, brief stops at residences at which defendant and her sister stayed. (1Tr. 58-59, 64, 112-15). Via Facebook, defendant and the decedent regularly communicated about fentanyl, according to a trooper who reviewed those communications. (2Tr. 319-21).

After work on October 16, 2021, defendant and his daughter went to visit his dying grandfather "for the last time." (1Tr. 119-20). They left the retirement home around 6 p.m. and headed to a residence in Bangor that the daughter knew to be a location where defendant and her sister sometimes stayed. (1Tr. 120-21).

Just before 1 p.m. that day, defendant had left a voice message to the decedent, informing him that she had some "dark, dark shit that is expensive but worth it." (2Tr. 369). Subsequent messages, according to the trooper who interpreted them for the jury, detail defendant's plan to purchase fentanyl from defendant. (2Tr. 369-74). Those communications – a combination of voice and text-based messages – arguably demonstrate that the decedent travelled to defendant's sister's residence in Bangor sometime near 6 p.m. (2Tr. 369-75). The decedent instructed defendant, "Got my kid with me so keep it DL" – perhaps slang for being secretive. (2Tr. 374-75).

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[1] By using this appellation, defendant intends no disrespect to the victim. Rather, she endeavors to afford him and his family as much privacy as possible.

The daughter testified that, outside the residence, the decedent told her to wait in the car. (1Tr. 121). She watched as her father went to the door and exchanged money with defendant for "something." (1Tr. 121-22).

They proceeded to their home in Bradley, where, after saying good night to one another, the decedent entered his bedroom for the night. (1Tr. 123).

### B. While there is evidence that the decedent may have died because he used fentanyl, there is also evidence that he may have died of using kratom, a non-scheduled drug.

The decedent's blood contained potentially lethal doses of both fentanyl and kratom. (3Tr. 636-41). The two substances are, in fact, synergistic, "meaning that they are going to exacerbate the effect of the other drug," making it "more likely" that, in combination, they would cause seizures and cardiac arrythmia leading to death. (3Tr. 639-40). Importantly, kratom is not a controlled substance. (2Tr. 440).

Given the ratio of fentanyl to fentanyl-metabolite in the decedent's blood, the medical examiner believed that he died shortly after consuming it. (3Tr. 631-32). In addition to the lack of indicia of trauma or natural disease, these toxicology results formed the basis for the deputy chief medical examiner's conclusion that "[t]he cause of death was acute intoxication due to the combined effects of [f]entanyl and [kratom][2]." (3Tr. 642-43).

[2] The record suggests that kratom is the colloquial name for mitragynine. (3Tr. 656-57). Defendant uses "kratom" for the sake of consistency and because it's easier to spell and pronounce.

### C. There is evidence that the particular fentanyl defendant sold to the decedent was a contributing factor to his death.

The daughter testified that their house was small, and she did not remember hearing her father talk on the phone that night. (1Tr. 148-49). She was sure that nobody came to visit that night, and she was awake until about midnight. (1Tr. 123-24).

A responding officer searched the decedent's en suite bathroom, finding brownish powder and rolled up paper, which later tested positive for fentanyl and heroin. (2Tr. 288-92; 3Tr. 579-80; SXs 14-16, 17-A, 29). The officer also located another suspicious substance, but it was eventually determined not to contain any controlled substances. (2Tr. 291-92; 3Tr. 580; SXs 17-B, 18, 29). Other than a pipe with marijuana residue on it, there were no other substances of apparent evidentiary value elsewhere in the home. (2Tr. 293-96).

The medical examiner agreed that fentanyl such as that found in the decedent's blood would "have necessarily contributed" to the death. (3Tr. 643-44, 668).

### D. There is evidence that fentanyl is a schedule W drug.

Fentanyl is a schedule W drug. (3Tr. 578). In fact, the parties arguably stipulated as much. (5Tr. 858-59, 946, 948, 949).

## II. Legal wranglings

Reserving many of the pertinent details for the argument, defendant here only previews those objections and issues.

### A. Defendant objected that she was denied the opportunity to confront the individuals who conducted the tests which identified and quantified the substances in the decedent's blood.

The State presented Chelsey Deisher, a toxicologist from NMS labs, to present evidence about the results of the blood-tests. (2Tr. 427-28, 432; SX 3). Ms. Deisher testified that both fentanyl and kratom were present in the decedent's blood, and in what amounts, referring to State's Exhibit 3, the toxicology report. (2Tr. 435-40).

During cross-examination of Ms. Deisher, counsel began to ask questions about the testing of the samples, but Deisher revealed that she had not conducted that testing. (2Tr. 456). This led to the Confrontation Clause objection that this Court is now reviewing. (A22; 2Tr. 456-57). The parties conducted a *voir dire* of Deisher outside of the earshot of jurors. (2Tr. 460-83). Ms. Deisher confirmed:

- She merely "reviewed the raw data" produced by the testers. (2Tr. 460-61).
- In order for the test results to be accurate, "there is a particular process that must be followed…." (2Tr. 463).
- When reviewing the data produced by others, Ms. Deisher is "relying upon the assumption that all the testing sequences and processes were properly followed…." (2Tr. 464).
- The testers prepare the samples, operate the instruments, and conduct a review of the resulting data. (2Tr. 471-72). Preparing

the sample entails performing the extraction according to the proper technique. (2Tr. 473).

Defense counsel characterized Ms. Deisher's role: "She seems to be someone who came in to report the results of tests performed by others...." (2Tr. 483). He contended that defendant was entitled to examine "the forensic analyst, the person who actually engaged in the testing ... so [that] the testing process, not the results, are subject to inquiry and investigation." (2Tr. 484). In counsel's view, "there are standards that need to be followed by the analyst that [Ms. Deisher] can't speak to because she wasn't present, and that would have an impact on the results...." (2Tr. 492-93).

Below, *see* **ARGUMENT** I.B., defendant details the court's decision to overrule the confrontation objection and related motion for a mistrial.

### B. Defendant requested a concurrent causation instruction pursuant to 17-A M.R.S. § 33(2), but the court denied that request.

At the appropriate time, defense counsel asked the court to instruct jurors in the law of concurrent causation. (A27-A29; 5Tr. 845-52); *see* 17-A M.R.S. § 33(2). Specifically, defense counsel argued that the undisputed evidence that kratom was present in the decedent's blood at a lethal level generated such an instruction. (5Tr. 848). In the **ARGUMENT** below, *see* II.A. & B., defendant further addresses counsel's preservation of this issue and the court's stated rationale for denying the proposal.

## ISSUES PRESENTED FOR REVIEW

I. Did the trial court err by permitting the toxicologist to offer testimony relying on the test results procured by other, non-testifying lab analysts, in violation of the Confrontation Clause?

II. Did the court's jury instruction erroneously neglect to relate that jurors must find that defendant's conduct was sufficient by itself to cause the decedent's death?

## ARGUMENT

### *First Assignment of Error*

### I. The trial court erred by permitting the toxicologist to offer testimony relying on "the raw data" procured by other, non-testifying lab analysts, in violation of the Confrontation Clause.

This Court's decision in *Mercier* is out of line with the Sixth Amendment. Yet, the ruling of the court below was reached in reliance on *Mercier* and its logic. The appropriate remedy is either vacatur or remand for further proceedings – in that order of suitability.

#### A. Preservation and standard of review

Towards the end of Ms. Deisher's testimony, this exchange occurred:

Q. And that's when [the blood] came to you?

A. I would not have performed the testing at all. I just reviewed the results.

Q. You didn't test?

A. I did not.

Q. All you are doing is reviewing results by somebody else?

A. That's right.

[Defense counsel]: Can we be seen at sidebar, Judge?

(A22; 2Tr. 456). At sidebar, defense counsel stated, "We have got a [C]onfrontation [C]lause issue...." (A22; 2Tr. 457). Counsel sought a number of remedies, asking to strike Deisher's testimony and for a mistrial. (2Tr. 457).

Apprised of the nature of the objection, the court permitted *voir dire* of Ms. Deisher. (*See* 2Tr. 460-83). Afterwards, defense counsel renewed his confrontation objection, arguing that defendant was entitled to question "the person who actually engaged in the testing." (2Tr. 483-85). The State countered, offering that M.R. Evid. 703 applied and citing *Mercier*, 2014 ME 28 for the proposition that one forensic expert could review another's report and testify about what the first expert found so long as doing so yielded an "independent opinion" from the latter expert. (2Tr. 485-89). Defense counsel rejoined, "there are standards that need to be followed by the analyst that [Deisher] can't speak to because she wasn't present, and that would have an impact on the results...." (2Tr. 492-93).

Because this series of events made known to the judge what defendant sought, and the basis for it, this argument is preserved. M.R. U. Crim. P. 51. This Court's review is therefore de novo. *State v. Gagne*, 2017 ME 63, ¶ 32, 159 A.3d 316.

### B. Trial court's reasoning

Citing M.R. Evid. 703, the court stated, "This is clearly the type of information upon which experts rely in issuing their opinions." (A26; 2Tr. 491). Regarding the confrontation issue, the court reasoned:

> [Ms. Deisher] is a live witness with technical expertise within an organization who has gathered together information from a number of different actors within that organization, and she is in a position both critically to assess it, and to explain it, and to be subjected to cross-examination on it.
>
> Therefore, she will be allowed to testify.

(A26; 2Tr. 492). Notwithstanding the ruling, defense counsel asked that the objection be preserved, to which the court assented. (2Tr. 493).

### C. Analysis

The trial court's reasoning, respectfully, is demonstrably erroneous. First, rules of evidence – including Rule 703 – do not trump the strictures of the Confrontation Clause. Second, the prosecution cannot skirt a defendant's confrontation rights by simply offering testimony from an expert whose "independent" opinion is based on data "gathered" by "a number of different actors." Additionally, because the error is not harmless beyond a reasonable doubt, defendant addresses the appropriate remedy.

#### 1. M.R. Evid. 703 does not trump the Confrontation Clause.

In *Smith*,[3] the State of Arizona made an argument mirrored by the court's reasoning in our case: Rule 703 eliminates any problem stemming

[3] *Smith*, of course, is availing, notwithstanding its intervening publication, because any defendant whose conviction is not yet "final" (*i.e.*, meaning the direct appeal hasn't been exhausted) may claim the benefit of a

from the admission of statements made by others when offered through an expert, so long as those statements are the sort relied upon by like experts. *Smith*, 602 U.S. at 793-94. The Court disagreed. Rather, the Confrontation Clause is implicated when "a statement is admitted for its truth." *Id.* at 794. And "[e]videntiary rules" such as Rule 703 "do not control [that] inquiry." *Ibid.* "[F]ederal constitutional rights are not typically defined – expanded or contracted – by reference to non-constitutional bodies of law like evidence rules." *Ibid.* This is particularly the case with Rule 703, the Court noted, because of its modern adoption and the fact that the rule "was understood from the start to depart from past practice." *Id.* at 794 n. 4.

Simply, if the Confrontation Clause is implicated, no rule of evidence can defeat its distinct requirements. Though presenting somewhat different circumstances, ours is but another example of the general principle this Court recently reiterated: "'[E]vidence that would otherwise be admissible under an exception to the hearsay rule may be barred by the Confrontation Clause.'" *State v. Judkins*, 2024 ME 45, ¶ 16, 319 A.3d 443, quoting *State v. Metzger*, 2010 ME 67, ¶ 8, 999 A.2d 947.

**2. Surrogate testimony does not avoid confrontation problems.**

As demonstrated by the arguments made before the trial court, *Mercier* is erroneously deployed to defeat confrontation arguments

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newly announced constitutional principle. *Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) (The "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").

advanced in Maine courts. However, *Smith* corrected *Mercier's* misstatement, making clear that, when a surrogate expert purports to offer but an "independent opinion" based on testing undertaken by others, the others' statements are offered for the truth of the matter asserted, implicating the Confrontation Clause. 602 U.S. at 792.

In *Smith*, state prosecutors presented one expert's testimony of another's work. While the testifying expert was "familiar with the lab's general practices, [he] had no personal knowledge about [the non-testifying analyst's] testing of the seized items." *Id.* at 796. The testifying witness "could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what [the non-testifying analyst] had reported about her work in the lab — that she had performed certain tests according to certain protocols and gotten certain results." *Id.* at 798. Because "'[t]he whole point'" of surrogate testimony is to establish a reliable basis for the testifying expert's opinion, the Confrontation Clause's "alarms begin to ring." *Id.* at 793, 795.

To hold otherwise, the Court noted, would mean "no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted." *Id.* at 799. Such a mistaken view of the confrontation right had permitted the testifying witness to become the "mouthpiece" of the non-testifying analyst: "He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained." *Id.* at 800.

*Mercier* and the ruling below do not survive *Smith*. In recent weeks, the Court has summarily reversed state courts that have reasoned to the contrary. *See Gordon v. Massachusetts*, 2024 U.S. LEXIS 4407, 2024 WL 4529799 (Oct. 21, 2024) (GVR in light of *Smith*); *Seavey v. Texas*, 2024 U.S. LEXIS 4320, 2024 WL 4486345 (Oct. 15, 2024) (GVR in light of *Smith*). Respectfully, were this Court not to heed *Smith*, it would likely become the next appellate court to face such a result.

### 3. There are three options available to this Court: vacatur, for two different reasons, and remand for further proceedings.

Because of the constitutional nature of this claim, the State can avoid the remedy of vacatur only if it can prove that the court's error was harmless beyond a reasonable doubt. *Judkins*, 2024 ME 45, ¶ 20. The identity and quantity of the substances within the decedent's blood was a central issue at trial. Yet, Ms. Deisher confessed that she was unable to know whether the actual testers properly conducted the tests that yielded those results. (2Tr. 496-97). Their errors may have produced inaccurate results. (2Tr. 463). In a case such as ours, where the State must prove both that "[d]eath of" the decedent was "in fact caused by the use of … scheduled drugs" and that "the scheduled drug trafficked by the defendant is a contributing factor" to that death, the State's omission to present a qualified witness presents significant problems.

Massachusetts provides an example of the importance of defendants' ability to confront lab workers. Concurrent with the Massachusetts appellate courts unconstitutional limitations on the Confrontation Clause – reversed

by the Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Gordon*, *supra* – at least one lab analyst in that state engaged in breathtaking fraud and misconduct. *See*, *e.g.*, *Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298 (2017). In 2017, the Supreme Judicial Court was forced to dismiss over 21,000 criminal cases because of the scandal. Massachusetts Supreme Judicial Court, *Press Release: Supreme Judicial Court Dismisses Over 21,000 Cases Affected by the Breach at the Hinton State Laboratory Institute*, available at: https://www.mass.gov/news/supreme-judicial-court-dismisses-over-21000-cases-affected-by-the-breach-at-the-hinton-state-laboratory-institute (accessed Nov. 21, 2024). Among the lessons to be learned from our neighbor to the south: Cross-examination of the analysts who actually performed the testing is of vital importance both to individual defendants but also to the integrity of the criminal justice system.

Defendant realizes that, in addition to hearsay (*i.e.*, offered for the truth), the Confrontation Clause is triggered by testimonial statements. The court below made no ruling whether the testers' statements – *e.g.*, that they followed the proper procedures which yielded the results Ms. Deisher's analysis relied upon – are testimonial. This is a result of the State's strategic choices.

Before the trial court, the State made no argument at all about whether the statements were testimonial. Thus, this Court should do as it routinely does when a defense attorney fails to make an argument: It should vacate, holding that the State's omission to make any argument about the

testimonial prong of confrontation jurisprudence constitutes abandonment of any such argument it might have made. *Cf. State v. Adams*, 2019 ME 132, ¶¶ 17, 19 n. 7, 9, 214 A.3d 496 (declining to review two separate confrontation arguments because defense counsel had not presented them below). After all, the burden to establish compliance with the Confrontation Clause lies upon the State, and it simply did not carry that burden here. *State v. Liggins*, 978 N.W.2d 406, 419 (Iowa 2022); *Smith*, 602 U.S. at 801 (remanding for state court to determine whether prosecution forfeited potential argument about testimonial nature); *see also Melendez-Diaz*, 557 U.S. at 324-25 (Confrontation Clause imposes a burden upon the prosecution).

Assuming that this Court does not hold the State to its forfeiture, the next most suitable remedy, again, is to vacate, though for a different reason. The merits clearly militate in defendant's favor. In *Melendez-Diaz*, the Court held that a lab analyst's test results are clearly testimonial when "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" 557 U.S. at 311, quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004). As evidenced by the practice of NMS labs, testified to by Ms. Deisher, "[w]e can safely assume that the analysts were aware of" the evidentiary purpose of those results. *Cf. Melendez-Diaz*, 557 U.S. at 311. Certainly, NMS lab analysts know that they are creating data for toxicologists such as Ms. Deisher so that they may then testify in reliance upon those results. *See* SX

3 (listing recipient of toxicology report as Maine's chief medical examiner[4]); 2Tr. 432-33, 441, 454 (Ms. Deisher testifying that "the client" is the medical examiner).

Finally, should this Court not see fit to vacate, remand for further proceedings is the next, albeit least, appropriate remedy. Because the State made no argument below about whether the statements in question are testimonial, the record does not contain whatever defense counsel might have developed on that score. Appellate courts in like circumstances rightly refrain from invocation of the so-called right-for-the-wrong-reason doctrine. *See Yanmar Co., Ltd. v. Slater*, 386 S.W.3d 439, 448 (Ark. 2012) ("Although this court may affirm a circuit court's decision for an alternative reason on the basis that the circuit court may have reached the right result but the reason stated for the decision is wrong, we will not do so when an issue was never raised below. This is so because we must determine the issues upon the record that was made in the circuit court, and issues not raised below cannot serve as the basis for a decision in this court.") (internal citations and quotation omitted); *Harris v. Commonwealth*, 576 S.E.2d 228, 231 (Va. Ct. App. 2003) (Right-for-wrong-reason doctrine "may not be used if the correct reason for affirming the trial court was not raised in any manner at trial. In addition, the proper application of this rule does not include those cases

[4] The medical examiner, of course, is part of the "multi-disciplinary team" working to prosecute homicides. *See* Office of the Maine Attorney General, *Homicides*, available at https://www.maine.gov/ag/crime/crimes_we_prosecute/homicides.shtml (accessed Nov. 21, 2024); *see also* 5 M.R.S. § 200-A (endowing AG with authority to create criminal division that prosecutes all homicides).

where, because the trial court has rejected the right reason or confined its decision to a specific ground, further factual resolution is needed before the right reason may be assigned to support the trial court's decision."). Were this to be the Court's preferred remedy, remand for further evidence is necessary.

***Second Assignment of Error***

## II. The court's jury instruction erroneously neglected to relate that jurors must find that defendant's conduct was sufficient by itself to cause the decedent's death.

There was record-evidence that the decedent may have died from consumption of a lawful substance, kratom. The court's failure, in these circumstances, to give a concurrent causation instruction – *i.e.*, an instruction that the fentanyl alone must be sufficient to cause the death – likely led to confusion among the jurors. It was not enough, as the State seemed to routinely argue, that the fentanyl perhaps trafficked by defendant *contributed* to the death. Rather, jurors first had to find beyond a reasonable doubt that the sole scheduled drug found in the decedent's blood caused his death, and the court's instructional omission muddied this requirement.

### A. Preservation and standard of review

Before the jury instructions were delivered to the jury, defense counsel requested that the court instruct the jury in 17-A M.R.S. § 33(2): "In cases in which concurrent causation is generated as an issue, the defendant's conduct must also have been sufficient by itself to produce the result." (A27-A29;

5Tr. 845-52). Overruled, counsel objected when the court's final instructions did not convey that principle. (A31; 5Tr. 959).

Therefore, this argument is preserved. This Court will review whether the requested instruction (1) stated the law correctly; (2) was generated; (3) was neither misleading nor confusing; and (4) was not otherwise related to the jury. *State v. Hanscom*, 2016 ME 184, ¶ 10, 152 A.3d 632. Further, to garner remedy, the omission must have been prejudicial. *Ibid*. Throughout its analysis, this Court will construe the elements of the applicable offense de novo. *State v. Siracusa*, 2017 ME 84, ¶ 6, 160 A.3d 531.

### B. Trial court's reasoning

The court denied the request:

> I realize now as we have gone through this conversation that as I read Section 33(2), I was thinking of concurrent alternative, but really it isn't, it is concurrent and it does therefore, seems to me, dovetail it with 1105(1)(k) so it is not a – it is a contributing factor, it could be a concurrent factor if it were in fact true the [k]ratom caused the death and [f]entanyl did not. That would not be a concurrent cause, that would be a different cause and not generate an instruction under 33(2) so I will forgo that instruction.

(A29; 5Tr. 853).

### C. Analysis

Defendant's analysis adheres to the legal standard this Court employs to determine the propriety of a jury instruction.

#### 1. The proposed instruction correctly states the law.

There are four elements, which defendant here highlights with preceding roman numerals, in the statute of conviction:

> [i] A person is guilty of aggravated trafficking in a scheduled drug if the person violates section 1103[5] and:
>
> **[ii] Death of another person is in fact caused by the use of one or more scheduled drugs,**
>
> [iii] the scheduled drug trafficked by the defendant is a contributing factor to the death of the other person
>
> [iv] and that drug is a schedule W drug.

17-A M.R.S. § 1105-A(1)(K) (emphasis added). The requested jury instruction was necessary to correctly inform jurors of the State's burden to prove the bolded, second element: that the decedent's death was caused by scheduled drugs.

The plain language of this element – and that is what controls, *Siracusa*, 2017 ME 84, ¶ 6 – is patent: The State must prove beyond a reasonable doubt that *scheduled* drugs – not something else – caused the death. When there are other potential factors – for example, *non*-scheduled drugs – that may have caused the death, concurrent causation comes into play. *Cf. State v. Athayde*, 2022 ME 41, ¶ 46, 277 A.3d 387 (concurrent causation is generated when such a theory is "a reasonable hypothesis").[6]

In such cases – *i.e.*, when concurrent causation is generated – "the defendant's conduct must also have been sufficient by itself to produce the

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[5] 17-A M.R.S. § 1103(1-A) provides that "a person is guilty of unlawful trafficking in a scheduled drug if the person intentionally or knowingly trafficks in what the person knows or believes to be a scheduled drug, which is in fact a scheduled drug...." "Traffick" has a statutory definition. 17-A M.R.S. § 1101(17).

[6] Unlike 17-A M.R.S. § 33(1), which contains the exclusionary preamble "Unless otherwise provided," there is no provision in § 33(2) which limits the applicability of concurrent causation.

result." 17-A M.R.S. § 33(2). Defendant's proposal to include this language was an accurate statement of the law.

Respectfully, the court, following the State's invitation, conflated elements ii and iii. The former unambiguously requires the State to prove that the decedent died of scheduled-drug consumption. The latter – that the *specific* scheduled drug trafficked by the defendant was "a contributing factor to the death" – comes into play only once it has been established beyond a reasonable doubt that the decedent in fact died of scheduled-drug consumption. If the State does not first prove that the death was in fact caused by the use of scheduled drugs, jurors never reach element iii.

The court's construction elides element ii, rendering it a nullity. Why would the legislature bother to include element ii if not to require proof beyond a reasonable doubt that *scheduled* drugs killed the decedent? Certainly, had the legislature instead intended to permit convictions based on proof that the drug trafficked by a defendant was merely a "contributing factor" to a death otherwise caused by something other than scheduled drugs, it could have easily done so. To do so, it would have simply omitted element ii. It did not do so for a reason, and, therefore, this Court cannot read element ii out of the statute.

In Maine, causation has a particular legal meaning. Among other requirements, it necessitates proof that "the defendant's conduct" was "sufficient by itself to produce the result." 17-A M.R.S. § 33(2). To hold otherwise would be to enforce something less than the legislature enacted – the opposite of the strict construction of criminal statutes.

### 2. The issue of concurrent causation was generated.

Concurrent causation is generated when, in the light most favorable to the defendant, the record "would make concurrent causation a reasonable hypothesis." *Athayde*, 2022 ME 41, ¶ 46. Here, a State's witness confirmed that kratom is *not* a scheduled drug. (2Tr. 440); *see also* 17-A M.R.S. § 1102 (not listing kratom as a scheduled drug). And, according to the deputy chief medical examiner, the decedent had consumed a potentially lethal amount of kratom. (3Tr. 640-41). The prosecutor himself told jurors, "I'm not saying kratom didn't kill him, it sure didn't help him…." (5Tr. 935). Certainly, there is a reasonable basis to conclude that the decedent died from consuming kratom – a non-scheduled drug.

What's more, defense counsel sought to highlight this defense in his closing argument:

> Now, the [m]edical [e]xaminer came in and told us that unfortunately [the decedent] had fatal amounts of kratom in him as well, and that the kratom has much the same impact on the body [f]entanyl does, and so basically the [m]edical [e]xaminer's conclusion was, we wouldn't be able to tell which of these substances caused death. The State got him to opine, well, there was more of this that that so that probably had a bigger impact. We didn't hear anything nor will you hear anything about kratom being a scheduled drug, but the judge will instruct you that of course [f]entanyl is, and one of the requirements here, the legal requirements that you must find proven beyond a reasonable doubt is that [the decedent] died as a result directly from the use of one or more scheduled drugs, he had to have died from scheduled drugs, not from other drugs that he may have obtained gosh knows where more substances.
>
> It is insufficient in order to find guilt here to preclude that [f]entanyl had a contributing factor if you don't otherwise find that his death was but for caused by scheduled drugs, the scheduled drug was the cause of death, but yet the [m]edical

> [e]xaminer said there was enough kratom in him he couldn't tell the difference.

(5Tr. 921-22). What defense counsel lacked, after his proposed instruction was rejected, is the proper legal instruction that defendant's conduct was itself sufficient to lead to the death.

### 3. The requested jury instruction was neither confusing nor misleading.

Having established a legal entitlement to the instruction he proposed, defendant questions whether it should matter that a legally sound instruction might be confusing. After all, jury instructions routinely detail "complex legal issues." *Cf. State v. Baker*, 2015 ME 39, ¶ 21, 114 A.3d 214. The fact that such an instruction "is difficult for a legal scholar to follow, let alone a lay juror," does not somehow eliminate the necessity for it. *Cf. State v. Mann*, 2005 ME 25, ¶ 15, 868 A.3d 183 (Saufley, C.J., dissenting). And, regardless of the complexity, "[j]urors are presumed to understand the instruction." *State v. Benner*, 654 A.2d 435, 437 (Me. 1995). In short, defendant doubts the wisdom of giving this factor much if any weight.

However, it is a moot point; the appropriate instruction in this case is not difficult to grasp. Regarding the element in question (*i.e.*, element ii), this is straightforward:

> The State must prove that the death was in fact caused by the use of one or more scheduled drugs. For the State to establish such causation, you must find beyond a reasonable doubt that defendant's conduct was sufficient by itself to cause the death.

Anticipating an argument from the State that such an instruction is somehow misleading when paired with the following element – element iii, *supra* – defendant continues so as to show how the two elements fit together:

> And, if you find such causation as I have just defined it, you must also determine whether the State has proven beyond a reasonable doubt that the particular scheduled drug defendant trafficked, if you find that he did traffick such a scheduled drug, was a contributing factor to the death.

Compared to the convoluted instructions given in self-defense cases, for example, such an instruction is eminently doable.

#### 4. The proposed instruction was not otherwise related to the jury.

Nowhere did the court's instructions convey the necessity of a jury finding that defendant's conduct was itself sufficient to case the death. This omission dovetails with the final inquiry in this assignment of error: prejudice.

#### 5. It is not highly probable that omission of the proposed instruction had no effect on the verdict.

Absent proper jury instruction, the State was left free to, with all due respect, misstate the elements of the offense:

> I ask you not to get confused about it because there is a report from the pathologist that says, due to the combined effects of [f]entanyl and kratom, and he told you why that is, everything in the body is within the body at the same time, they are all interacting, they all interact, they just do and so the question then becomes, did the [f]entanyl contribute to that?

(5Tr. 934; *see also* 5Tr. 895, 907). Again, the prosecutor admitted, "I am not saying kratom didn't kill him, it sure didn't help him...." (5Tr. 935). To the extent that this suggests that a non-scheduled drug – kratom – may lawfully

serve as a basis for proving element ii, that is absolutely incorrect. Rather, only *scheduled* drugs are sufficient to establish element ii. Defendant's trafficking of *scheduled* drugs must have been sufficient to cause the death. Having been shot down in his attempt to obtain an instruction in accordance with § 33(2), defense counsel was unable, in his closing argument, to correct this misstatement. "It is well established that failure to instruct the jury on a theory of a defense having rational support in the evidence constitutes reversible error." *State v. Bisson*, 491 A.2d 544, 546 (Me. 1985).

A final note is in order: The two assignments of error in this brief are intertwined. Defendant was not able to confront the individuals who conducted the identification and quantification of the drugs in the decedent's bloodstream. In such circumstances, to hold that the instant assignment of error presents but a harmless error because of those very same identifications and quantifications is to double the prejudice to defendant. Such evidence is constitutionally lacking and should not serve to deny defendant of relief on this issue.

## CONCLUSION

For the foregoing reasons, this Court should vacate defendant's conviction or, in the alternative, remand for further proceedings not inconsistent with its mandate.

Respectfully submitted,

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/s/ Rory A. McNamara

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**CERTIFICATE OF SERVICE**

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

/s/ Rory A. McNamara