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

LAW COURT DOCKET NO. Ken-24-329

STATE OF MAINE
Appellee

v.

Irineu B. Goncalves
Appellant

ON APPEAL from the Kennebec County Unified Criminal Docket

BRIEF OF APPELLANT

Jamesa J. Drake #5194
Attorney for Appellant
Drake Law, LLC
P.O. Box 56
Auburn, Maine 04212
(207) 330-5105
jdrake@drakelawllc.com

Table of Contents

Introduction **7**

Jurisdictional Statement **8**

Statement of the Case **8**

I. Procedural history 8

II. Historical facts 9

A. The State's case 9

B. The defense case 16

III. The verdict 19

Argument Summary **22**

Argument **23**

First Assignment of Error **23**

I. Preservation and standard of review 24

A. The sentence imposed 24

B. Defendant's argument at sentencing 26

C. The standard of review 27

II. Legal framework 30

III. Application 38

Second Assignment of Error **41**

I. Preservation and standard of review 41

II. Legal framework 42

III. Application 44

Conclusion **48**

Table of Authorities

Cases

Borden v. United States, 141 S.Ct. 1817 (2021) 46

California v. Brown, 479 U.S. 538 (1987) 29

Eddings v. Oklahoma, 455 U.S. 104 (1982) 30, 32, 33, 34

Gall v. United States, 522 U.S. 38 (2007) 43

Holguin-Hernandez v. United States, 589 U.S. 169 (2020) 27

In re Winship, 397 U.S. 358 (1970) 42

Jones v. Mississippi, 593 U.S. 98 (2021) 34

Kansas v. Carr, 577 U.S. 108 (2016) 36

Lockett v. Ohio, 438 U.S. 586 (1978) .....*passim*

Maynard v. Nygren, 332 F.3d 462 (7th Cir. 2003) 28

Payne v. Tennessee, 501 U.S. 808 (1991) 35

Penry v. Lynaugh, 492 U.S. 302 (1989) 29

Porter v. McCollum, 558 U.S. 30 (2009) 29

Rosales-Mireles v. United States, 585 U.A. 129 (2018) 29

Skipper v. South Carolina, 476 U.S. 1 (1986) 36

Smith v. Spisak, 558 U.S. 139 (2010) 34

State v. Bennett, 2015 ME 46, 114 A.3d 994 27

State v. Dobbins, 2019 ME 116, 215 A.3d 769 27

State v. Dumont, 507 A.2d 164 (Me. 1986)..... 42

State v. Gantnier, 2012 ME 123, 55 A.3d 404..... 42

State v. Hewey, 622 A.2d 1151 (Me. 1993) 23

State v. Pabon, 2011 ME 100, 28 A.3d 1147 28

State v. Pozzuoli, 1997 ME 91, 693 A.2d 745..... 42

State v. Seamon, 2017 ME 123, 165 A.3d 342 ..... 42, 43

State v. Soucy, 2006 ME 8, 890 A.2d 719..... 42

State v. Watson, 2024 ME 24, 319 A.3d 430 27

Tennard v. Dretke, 542 U.S. 274 (2004) 35, 36

United States v. Brown, 316 F.3d 1151 (10th Cir. 2003)..... 28

United States v. Gonzalez-Huerta, 403 F.3d 727 (10th Cir. 2005)..... 28

United States v. McMath, 559 F.3d 657 (7th Cir. 2009)..... 28

United States v. Smith, 2024 U.S. App. LEXIS 829, 2024 WL 139565 (Jan. 2024 8th Cir. 2024)..... 43

United States v. Tsarnaev, 595 U.S. 302 (2022) 34

Verizon New England, Inc. v. Pub. Utils. Comm'n, 2005 ME 16, 866 A.2d 844..... 27

Voisine v. United States, 579 U.S. 686 (2016)..... 46

Williams v. New York, 337 U.S. 241 (1949) 31

Statutes

15 M.R.S. § 1 6

15 M.R.S. § 1092(1)(A) 6

15 M.R.S. § 2115 6

17-A M.R.S. § 152(1)(A) 6

17-A M.R.S. § 2(5) 40

17-A M.R.S. § 201 6

17-A M.R.S. § 207(1)(A) 41

17-A M.R.S. § 208-D(1)(A) 6

17-A M.R.S. § 208-D(1)(D) 6

17-A M.R.S. § 209-A(1)(A) 6

17-A M.R.S. § 210-B(1)(A) 6

17-A M.R.S. § 752-A(1)(A) 6

17-A M.R.S. § 9 6

18 U.S.C. § 3593 33

4 M.R.S. § 57 6

Other Authorities

Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 41 (2013) 31

Rules

M. R. App. P. 28B(b)(1) 6

Constitutional Provisions

U.S. Const. amend. VIII.....*passim*

U.S. Const. amend. XIV .....*passim*

Introduction

On June 14, 2023, defendant strangled the mother of his children, [redacted]. Two bystanders were unable to stop the attack. When the police arrived, they employed an extraordinary amount of force to subdue defendant and, in the process, an officer was injured. Before the jury-waived trial began, defendant pleaded guilty to, *inter alia*, aggravated assault, teeing-up the primary factual issue of whether defendant's mental state, at the time of the event, supported a charge of attempted murder. Following a three-day trial and extensive factual findings by the court (Murphy, J.), defendant was found guilty of all outstanding charges.

On appeal, defendant mounts a federal constitutional challenge to the trial court's treatment of mitigating evidence at sentencing. Separately, he argues that the trial court's finding of one of the three aggravating sentencing factors was unsupported by legally sufficient evidence, rendering his sentence unconstitutional in this regard, as well.

Jurisdictional Statement

The trial court had jurisdiction over this criminal prosecution. 15 M.R.S. § 1 and 17-A M.R.S. § 9. The trial court entered a final Judgment and Commitment on July 10, 2024, and defendant timely filed a notice of appeal on July 11, 2024. M. R. App. P. 28B(b)(1). This Court has jurisdiction over final judgments in criminal cases. 15 M.R.S. § 2115 and 4 M.R.S. § 57.

Statement of the Case

I. Procedural history

Defendant was indicted by a grand jury as follows:

- Count 1: Attempted Murder, 17-A M.R.S. §§ 152(1)(A), 201
- Count 2: Aggravated Assault, 17-A M.R.S. § 208-D(1)(D)
- Count 3: Aggravated Assault, 17-A M.R.S. § 208-D(1)(A)
- Count 4: Domestic Violence Terrorizing, 17-A M.R.S. § 210-B(1)(A)
- Count 5: Domestic Violence Criminal Threatening, 17-A M.R.S. § 209-A(1)(A)
- Count 6: Assault on an Officer, 17-A M.R.S. § 752-A(1)(A)
- Count 7: Violation of a Condition of Release, 15 M.R.S. § 1092(1)(A)

On the morning of the first day of trial, the court accepted defendant's *Alford* guilty pleas to Counts 2 and 7, and the State

dismissed Counts 3 and 4, leaving Counts 1, 5, and 6 for trial. (A:29). Defendant waived his right to a jury trial in writing and, following three days of proceedings, the court found defendant guilty as charged. The court's Findings After Bench Trial appears at Appendix 29-46. ("Findings"). The recitation of historical facts tracks (and truncates) the court's Findings and adds citations to the record.

II. Historical facts

A. The State's case

Defendant and [redacted] are the parents of two children and have been in a relationship "off and on" for five years. (A:30; Tr. 65). On the evening of June 14, 2023, Ms. [redacted] played in a pick-up soccer game while a family member watched the children. (A:30; Tr. 67, 70). As she was driving away after the soccer game, Ms. [redacted] spotted defendant walking along the side of the road; she agreed to give him a ride to the hotel where he was staying. (A:30; Tr. 69). When they arrived at the hotel, defendant and Ms. [redacted] sat in the parking lot and talked. (A:30; Tr. 70-71). When Ms. [redacted] received a text message from another man, defendant grew angry and demanded answers from Ms. [redacted] about the state of their relationship. (A:30;

Tr. 70-71). Once defendant cooled off, Ms. [redacted] gave him a hug and he got out of the car. (A:30-31; Tr. 71).

Defendant paused, standing next to the car between the door and the car, and he refused to close and door and go on his way. (A:31; Tr. 71). Ms. [redacted] attempted to end the encounter, but defendant pleaded with her to come inside the hotel. (A:31; Tr. 71-72). Eventually, Ms. [redacted] put the car in reverse and pulled her foot off the brake while slowly trying to maneuver away from defendant. (A:31; Tr. 72). Ms. [redacted] told defendant that she needed to get home to their children, but defendant refused to leave. (A:31; Tr. 71-72). Ms. [redacted] put her car in drive to try and move forward and leave. (A:31; Tr. 72). Ms. [redacted] described things like this:

> [H]e is standing in the doorway with the door opened and I put my car in reverse and I am trying to like inch – I put my foot off the brake, I am rolling backwards to try and like move around him, he is standing here and he won't shut the door. I put my car in drive and I am telling him like, I got to go, I need to leave, and take my foot off the brake and my car starts to like – I turn my wheel, starts to point the other way and that's – he jumps back in the car.

(Tr. 72).

Defendant got back in the car, shut the door, and started staring at Ms. [redacted]. (A:31). Defendant told her, "I am going to kill you this time, I am going to kill you now." (A:31; Tr. 73). Defendant put his right hand on Ms. [redacted]'s throat, pushed her back into the seat, and pushed on her trachea as if to crush it. (A:31; Tr. 73). Ms. [redacted] immediately started coughing up blood. (A:31; Tr. 73). Defendant continued to push Ms. [redacted] into the seat with his left hand while bracing himself against her seat with one knee on the passenger's seat and his other foot on the floor. (A:31; Tr. 73).

Ms. [redacted] could not breathe, and it felt to her like defendant was trying to rip her throat out. (A:31; Tr. 73-74). Ms. [redacted] tried to defend herself – at one point she grabbed defendant's testicles and squeezed them as hard as she could – but defendant was undeterred and continued to crush her neck with both hands. (A:31-32; Tr. 74).

Despite this, Ms. [redacted] was able to open her car door, and she was able to take a few breaths when defendant repositioned his hands to better maintain his grip. (A:32; Tr. 74). When she could, Ms. [redacted] screamed for help as loudly as she could. (A:32; Tr. 74). At one point, a van drove by and Ms. [redacted] screamed to the van driver, "He is going

to kill me!" (A:32; Tr. 75). Ms. [redacted] heard the van driver tell defendant to stop what he was doing to her. (A:32; Tr. 75).

After considerable effort, Ms. [redacted] was able to free herself from her seatbelt and she landed on the ground next to the car. (A:32; Tr. 75). Defendant punched Ms. [redacted] in her face, ear, and in the back of her head. (A:32; Tr. 75-76). Defendant also pinned Ms. [redacted] down to the pavement, put his knees on her chest, and began again to strangle her. (A:32; Tr. 76). Ms. [redacted] felt as though her head might explode, and she tried to buck defendant off her, but she was unable to; defendant just stared into her eyes. (A:32; Tr. 76).

Ms. [redacted] lost feeling in her hands and feet, and her hearing started to fade. (A:32; Tr. 76). She told herself to stay awake and, "if you see white light, don't go there, I was just thinking about my kids." (A:32-33; Tr. 76-77).

Eventually, Ms. [redacted] regained feeling in her extremities, opened her eyes, and heard "commotions." (A:33; Tr. 77). She saw the paramedics and identified herself. (A:33; Tr. 77). She was transported to the hospital where she was treated for her injuries; she was released to go home and recuperate the same night. (A:33; Tr. 82-83).

Various exhibits introduced by the State and admitted at trial depict Ms. [redacted]'s injuries. (A:33). She suffered injuries to her face, eyes, lips, chin, arms, back, shoulders, inside her mouth, and on both sides of her hands. (A:33; *see e.g.* Tr. 133-136). Dried blood is smeared on her face; her nose is fractured; and obvious and extensive bruising is visible on her face, extremities, back, and shoulder. (A:33; Tr. 133-136). Days later, Ms. [redacted] returned to the hospital after experiencing pain behind her eyes and dizziness, and she learned it was likely she suffered a concussion. (A:33; Tr. 84, 234).

Three people witnessed the attack.[1] (A:34). The aforementioned van driver got out of his car and yelled at defendant to stop hurting Ms. [redacted]. (A:34; Tr. 210-11, 214-15). Defendant told the van driver that he (defendant) had a gun and that he would kill the van driver and then he would kill Ms. [redacted]. (A:34; Tr. 215). The van driver retreated to his vehicle, called 911 and the front desk at the hotel, and he filmed part of what he saw after the police arrived. (A:34; Tr. 211, 219).

---

[1] Defendant refers to these bystanders as the "van driver" and "hotel clerk," to protect their privacy.

The hotel clerk working at the front desk received a call that a woman was being attacked behind the hotel. (A:34; Tr. 105-6). The clerk went to assist; she implored defendant to stop what he was doing and not ruin his life. (A:34; Tr. 107). At the time, defendant had his thumbs on Ms. [redacted]'s throat, and she was unconscious. (A:34; Tr. 107). The clerk even grabbed defendant's backpack and tried to pull him off Ms. [redacted]. (A:34; Tr. 107). She was able to pry one of defendant's hands away momentarily, but her efforts were exhausting and as soon as she released defendant's hand, he resumed choking Ms. [redacted]. (A:34; Tr. 108). The clerk thought that Ms. [redacted] was likely dead. (A:34; Tr. 110).

Officer Whitley of the Waterville Police Department arrived on the scene and he also saw the attack. (A:34; Tr. 117). Defendant fought with Officer Whitley; the hotel clerk saw defendant biting the officer. (A:34; Tr. 109, 119-22). The hotel clerk also heard Officer Whitley scream repeatedly at defendant, "Let go of my gun! Let go of my gun!" (A:34; Tr. 109). Officer Whitley described his fight with defendant as one of the most difficult he has experienced as a law enforcement officer. (A:35; Tr. 136). The video recording taken by the van driver shows Officer Whitley

repeatedly ordering defendant to stop resisting and to place his hands behind his back. (A:35; State's Exhibit 4). Defendant refused, took swings at the officer, and tried to buck him off. (A:35; State's Exhibit 4).

A second police officer, Officer Hodges, also arrived on the scene and she sprayed defendant with pepper spray twice. (A:35; Tr. 156). Officer Whitley tased defendant twice. (A:35; Tr. 142-43). They were unable to subdue defendant until a third police officer arrived to assist. (A:35; Tr. 144). Officer Witley testified that the first time he tased defendant, 50,000 volts of electricity went through defendant's body. (Tr. 143). Officer Witley explained things this way:

> Q: Okay. 50,000 volts and that wasn't enough , right?
>
> A: No.
>
> Q: Okay. What I mean that's not enough, that wasn't enough to subdue him to a point where you could put handcuffs on him, right?
>
> A: Correct.
>
> Q: You are punching him in the face, you are assaulting him, you are using the pepper spray, you use 50,000 volts, that didn't get things done, then you deployed it again, so that's another 50,000 volts, correct?
>
> A: Yes.

Q: Okay. He has got a hundred thousand volts in him and it still wasn't enough in order to subdue him, correct?

A: Yes.

(Tr. 143-44).

A search of defendant's backpack revealed a knife, but no firearm. (A:35; Tr. 148). No weapons were brandished or used in the altercation. (A:35; Tr. 148-49).

B. The defense case

The centerpiece of the defense case was Dr. Peter Donnelly's testimony. Dr. Donnelly is "an experienced and well-qualified clinical psychologist who has conducted approximately a thousand forensic evaluations." (A:36; Tr. 289).

Dr. Donnelly interviewed defendant for about three hours. (A:36; Tr. 293). Dr. Donnelly asked defendant what happened on the day in question, and defendant said that after the argument at the hotel – and specifically, when Ms. [redacted] "tried to run him over" – he felt threatened for his safety. (A:37; Tr. 300). Defendant remembered getting back in the car, but after that, he had no memory of what happened. (A:37; Tr. 300, 303-04).

After speaking with defendant and reviewing discovery materials, Dr. Donnelly opined that during the attack, defendant "was in a different state in which people were having a hard time reaching him, people had been yelling at him and he was nonresponsive to either physical or auditory commands." (A:38; Tr. 306). Dr. Donnelly described it as defendant going "into a traumatic response where he sort of went into a fight mode." (A:38; Tr. 306). Dr. Donnelly ruled out substance use, a seizure disorder, or other medical event, and the concluded that two things could explain defendant's conduct. (A:38; Tr. 307). The first was that this was a classic case of "blind rage." (A:38; Tr. 307).

The other possibility is that defendant experienced a "dissociative episode" where he began "operating autonomically, just sort of a neurologically autonomic response." (A:38; Tr. 307-8). Later, Dr. Donnelly seemed to connect the two concepts, suggesting that "at some point the car was engaged and [defendant] felt he was about to be run over and sort of had a – became enraged and went into a trauma response…for different people it could be flight, fright, or freeze, in this case it was fight." (A:38; Tr. 312). Dr. Donnelly explained that in a dissociative episode, a person's thinking, feelings, and actions – and even

their awareness of their surroundings – become disconnected, and he indicated that such episodes were recognized by experts in his field. (A:38; Tr. 310, 331).

Dr. Donnelly testified that being in a dissociative state would impair a person's ability to be "consciously…aware of what they were doing….[T]heir actions speak what they are doing, but their thought process is not there." (A:38; Tr. 311). When asked if a dissociative state impaired the ability to form any type of intent, Dr. Donnelly said, "[n]ot of a cognitive nature, no." (Tr. 328).

In support of the notion that defendant was experiencing a "dissociative episode," Dr. Donnelly cited Officer Whitley's statement that defendant "had a vacant gaze as if he weren't there." (A:38; Tr. 305-6). He noted the hotel clerk's statement to police that defendant "just looked at her blankly as if she wasn't there." (A:37; Tr. 99; Tr. 305-6). And again, the defense highlighted the fact that defendant was seemingly impervious to police commands, and the fact that the police employed an extraordinary amount of force – defendant was pepper-sprayed by the police twice, and he was tased by the police twice – and none of that seemed to affect him. (A:37; *see* Officer Witley's testimony cited *supra*).

Lastly, the defense highlighted omissions from the State's proof, namely the absence of Ms. [redacted]'s medical records documenting her injuries and treatment on June 14, 2023, the day of the attack. During closing, defendant argued, "there was no medical evidence definitively about – or expert opinion definitively offered to say, listen the mechanical forces that were applied in this case could have resulted in death at that time. We believe that's a critical element, critical evidence that should have been supplied by the State that wasn't." (Tr. 396).

III. The verdict

The court found that defendant "suffered from an abnormal condition of the mind on the date in question." (A:40). In support, the court noted that, "[a]s the law enforcement and eyewitnesses observed, [defendant] appeared 'blank' and 'expressionless.' He was essentially silent as he brutally attacked Ms. [redacted] and Officer Whitley. He showed no response to being repeatedly pepper-sprayed and twice tased with 50,000 volts of electricity." (A:40). The court also noted that witnesses described defendant's demeanor as "very weird,' and at times, it was as if he was not aware that other people were present." (A:41). But the court also found that defendant's abnormal condition of mind was

"not determinative" of whether he could form the requisite criminal intent. (A:41).

The court found that in the moments before the assault began, defendant believed that Ms. [redacted] was in a romantic relationship with another man; she told defendant that she did not think he was a good father; she said that she thought of defendant only as a "sperm donor;" and she told defendant she was looking to find a better father for their children. (A:41).

The court found that defendant reacted to Ms. [redacted]'s desire to end the counter "with rage and violence." (A:42). The rage "was extreme, and it resulted in significant injuries to Ms. [redacted] in particular." (A:42). According to the court, Ms. [redacted] "came close to death given the nature and duration of the strangulation and the brutal punches that landed on her face, head, and neck. She lost consciousness for periods of time, and her agonal breathing demonstrates how dire her condition was when law enforcement paramedics arrived." (A:42).

The court found it notable that despite the van driver's warnings, defendant "had the presence of mind to let him know not to interrupt the attack, or else he would be shot and killed along with Ms. [redacted]."

(A:42). According to the court, defendant "was focused on continuing his assault on Ms. [redacted] and would resist anyone who got in his way." (A:42). Defendant "signaled his intention" regarding Ms. [redacted] when he said to her before the attack began, "I am going to kill you this time, I am going to kill you now." (A:43).

Regarding the attempted murder charge, the court found:

> [T]here is evidence that supports Dr. Donnelly's opinion that [defendant] experienced a mental state that fits the definition of abnormal condition of mind. However, when viewing the record as a whole, the Court does not believe this evidence is sufficiently compelling to raise a reasonable doubt about [defendant's] mental state. His jealousy and rage may well have caused a distortion of reality. However, as noted in *Proia*, some distortions of reality "actually demonstrate that a defendant acted with the alleged culpable state of mind." *State v. Proia*, 2017 ME 169, ¶ 14, 168 A.3d 798.
>
> The statements uttered just moments before the brutal attack began speak volumes about the [d]efendant's state of mind. After he made these emphatic statements of intent, the strangulation and beatings began. And while it is not clear whether Ms. [redacted] was strangled for 3 minutes or 12 minutes, she was without oxygen long enough to lose consciousness and begin agonal breathing. [Defendant] was, as [the hotel clerk] said, "determined," and he was undeterred by warnings and significant physical force used against him. Evidence of the firmness of his intent is overwhelming on this record.

(A:44; full citation to *Proia* added). The Court found defendant guilty of attempted murder, domestic violence criminal threatening, and assault on an officer.[2] (A:43-46).

Argument Summary

1. The trial court seemingly believed that a defendant's abnormal condition of mind was mitigating only if it derived from a biologically based mental illness or developmental disability. But the categorical rejection of abnormal condition of mind caused by other conditions offends the Supreme Court's extensive Eighth and Fourteenth Amendment jurisprudence which prohibits such treatment of mitigating evidence. Because the trial court's failure to consider defendant's abnormal condition of mind, as a matter of law, contravenes *Lockett*, *Eddings*, *Trevino*, and their extensive progeny, the proper remedy is to vacate the judgment and remand for resentencing.

2. The trial court found as an aggravating factor – one of only three aggravating factors – that defendant "assaulted" the hotel clerk. But that did not happen, either as a matter of law or as a matter of

[2] Because defendant does not challenge his conviction or sentence on Counts 5 or 6, he respectfully refers this Court to the trial court's findings regarding those charges, which appears in the Appendix.

speaking. The hotel clerk initiated contact with defendant; *she* touched him, and in response, defendant ignored her. The fact that the clerk was "exhausted" from the contact that she started does not qualify as either "bodily injury" or "offensive physical contact." This, too, rises to the level of constitutional error. Neither the due process clause nor the Eighth Amendment tolerate a restriction on liberty based on unproven facts. Again, the proper remedy is to vacate the judgment and remand for resentencing.

Argument

First Assignment of Error

Defendant challenges the sentence imposed on Count 1, attempted murder. In particular, he argues that the sentencing court's treatment of mitigating evidence is at odds with clearly established Supreme Court case-law interpreting the Eighth Amendment. The Court has long admonished against the categorical exclusion of mitigating evidence, and it has stated repeatedly that a factfinder does not need to find mitigating evidence beyond-a-reasonable-doubt to use it in the sentencing calculus. Respectfully, and as explained in greater detail *infra*, the sentencing

court's treatment of abnormal condition of mind contravenes those principles.

I. Preservation and standard of review

A. The sentence imposed

At sentencing, the court set the basic sentence for the attempted murder charge at 25 years' prison. (A:22; Sent. Tr. 62). At the second step of the *Hewey* analysis, the Court gave defendant "credit" for having no criminal record; for accepting responsibility for some charges before trial; and for "having decent and humane relationships with people and his family, and he has a work ethic, he did keep a job." (A:23; Sent. Tr. 63-64); *State v. Hewey*, 622 A.2d 1151 (Me. 1993).

With respect "to the issue abnormal condition of mind" and whether that was mitigating for sentencing purposes, the trial court explained:

> ***With respect to the issue of abnormal condition of mind*** because I know that that is – was the central defense in this case and ***I would like to be able to tell you with confidence what that phrase means in our law, but I am not able to do that, I don't know…any jurist who could tell you exactly what it means***. Sometimes it means that somebody has schizophrenia, a biologically-based mental illness. Sometimes it means that somebody has a head injury. Sometimes it means that somebody has developmental disabilities and they have difficulty or they are incapable of

> forming intent in committing a crime. And sometimes it can mean that they dissociate.

(A:23; Sent. Tr. 64).

Then, crucially for our purposes here, the court explained the mitigating value of suffering from an abnormal condition of mind:

> In this case, the Court found based primarily on the State's witnesses, that the defendant did experience an abnormal condition of mind, ***not based upon a biologically based mental illness*** because the defense agrees there is no mental health history here, but it was noteworthy to the professional witnesses as well as the lay witnesses, that it seemed that [defendant] was impervious to efforts made by a number of people to restrain him, to tase him, to subject him to extreme levels of electronic voltage and he didn't make a sound when these vicious attacks were going on. So I don't fault at all the defense for raising that issue and ***attempting to raise reasonable doubt,*** but as the parties know the Court concluded that this is one of those cases where actually the abnormal condition of mind, as Doctor Donnelly I think said pretty clearly, there were two basic theories; one, is that it was a dissociative state, and the other theory is that it was blind rage, blind jealous rage, and frankly based upon the record and the history of the parties the Court believes that [is] what was going on was blind rage.
>
> And so the Court is not going to mitigate, or find as a mitigating factor the fact that there was an abnormal condition of mind. ***Had it been a biologically based mental illness, had it been a developmental disability over which he had some control, the Court might use***

> ***that as a mitigating factor, but under the circumstances the Court declines to use the abnormal condition of mind as a mitigating factor.***

(A:23; Sent. Tr. 65-66; emphasis added).

The court found as aggravating the fact that defendant assaulted the hotel clerk and threatened the van driver, as well as the impact of the attack on [redacted], "not just the physical injuries but the psychological injures." (A:24; Sent. Tr. 68-69). The court determined that "the aggravating factors outweigh the mitigating factors" and it set the maximum term of imprisonment on the attempted murder charge at 30 years' prison. (A:24; Sent. Tr. 70).

After considering, and articulating, a variety of penological goals, (A:25; Sent. Tr. 72-74), the Court suspended all but 18 years of the 30-year sentence, to be followed by four years' probation. (A:25; Sent. Tr. 74).

B. Defendant's argument at sentencing

Defendant urged the Court to impose a shorter prison term. More specifically, and regarding defendant's abnormal condition of mind in particular, defendant urged that "the most important [piece]" to be considered in calculating defendant's sentence "is that there is evidence

and there is expert opinion in this matter that shows that [defendant] likely was going through a dissociative state or altered state of mind during the offense." (Sent. Tr. 42). In defendant's view, this abnormal condition of mind made him less culpable than other defendants convicted of attempted murder. (Sent. Tr. 42). Defendant added: "We respect the Court's findings after trial. However, that doesn't mean the Court still cannot consider an expert's opinion when determining sentence, Your Honor." (Sent. Tr. 46).

C. The standard of review

Defendant maintains that this issue is adequately preserved. Defendant (a) alerted the court to the fact that it could consider his abnormal condition of mind as mitigating evidence; (b) he urged the court to find mitigating value in that evidence; and (c) by reminding the court that it could consider "an expert's opinion" despite the fact that the court's findings disagreed with the expert's conclusion regarding intent, defendant respectfully urged that a dissociative state could be mitigating even if it did not negate criminal intent beyond a reasonable doubt. Nothing more was required. "An issue is raised and preserved if there was a sufficient basis in the record to alert the court and any opposing

party to the existence of that issue." *Verizon New England, Inc. v. Pub. Utils. Comm'n*, 2005 ME 16, ¶ 15, 866 A.2d 844 (internal quotation omitted); *cf. Holguin-Hernandez v. United States*, 589 U.S. 169, 173 (2020) ("By informing the court of the action he wishes the court to take, a party ordinarily brings to the court's attention his objection to a contrary decision.") (internal citations omitted). Sentencing errors of federal constitutional proportion are viewed by this Court *de novo*. *State v. Dobbins*, 2019 ME 116, ¶ 51, 215 A.3d 769 ("On direct review such as this, we review only the legality, and not the propriety, of the sentence, and we do so *de novo*.").[3]

Alternatively, if this Court deems the error unpreserved – ostensibly because trial counsel neglected to inform the sentencing court that its treatment of mitigating evidence ran afoul of clearly established federal constitutional principles – then it will review the issue for obvious error. *Cf. State v. Watson*, 2024 ME 24, 319 A.3d 430 (reviewing an

---

[3] As was true in *Dobbins*, the Sentence Review Panel denied defendant's application for discretionary review. *Dobbins*, 2019 ME 116, at ¶ 51. Nevertheless, defendant may raise "a claim that the sentence is illegal, imposed in an illegal manner, or beyond the jurisdiction of the court, and the illegality appears plainly in the record." *State v. Bennett*, 2015 ME 46, ¶ 11, 114 A.3d 994 (cleaned up). The claims raised herein meets those criteria for the reasons explained *infra*.

unpreserved sentencing error for "obvious error."). Error is obvious "when there is (1) an error, (2) that is plain, and (3) that affects substantial rights." *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147. If these conditions are met, this Court must "also conclude that (4) the error seriously affects the fairness and integrity or public reputation of judicial proceedings" before vacating a judgment because of the error. *Id.*

"[A] mistake of law generally satisfies clear error, *de novo* or for that matter abuse of discretion review." *United States v. McMath*, 559 F.3d 657, 663 n.2 (7th Cir. 2009) (citing *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003)). Insofar as the fourth prong of the (federal) plain error test is concerned, the federal circuit courts "have not hesitated to exercise their discretion" to correct plain errors arising from sentencing where the "correct application of the sentencing laws would likely significantly reduce the length of sentence." *United States v. Brown*, 316 F.3d 1151, 1161 (10th Cir. 2003) (collecting cases); *see also United States v. Gonzalez-Huerta*, 403 F.3d 727, 757 (10th Cir. 2005) (en banc) (Briscoe, J., dissenting) (collecting cases and observing: "Although we did not quantify what would constitute a 'significant reduction' in the length of sentence, a review of relevant case law suggests that almost any

reduction in the amount of actual incarceration is sufficient to meet this definition."); *cf. Rosales-Mireles v. United States*, 585 U.S. 129, 132 (2018) (A miscalculation of the United States Sentencing Guidelines range that is plain and affects a defendant's substantial rights "will in the ordinary case…seriously affect the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief.").

II. Legal framework

As a general principal, mitigating evidence presented at sentencing "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J, concurring)). Relevant mitigation evidence includes mental health evidence. *Porter v. McCollum*, 558 U.S. 30, 42-43 (2009).

In *Lockett v. Ohio*, 438 U.S. 586 (1978), Chief Justice Burger, writing for the plurality, stated the rule that the Court has now wholeheartedly endorsed:

> We conclude that the Eighth and Fourteenth Amendments require that the sentencer…not be precluded form considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (favorably citing, and applying, the above-quoted passage from *Lockett* in the Court's majority opinion).

The *Lockett* Court reached that holding because the statute under which the defendant was sentenced did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, or her relatively minor part in the crime. *Lockett*, 438 U.S. at 597. A categorical prohibition on the consideration of certain types of mitigating evidence runs afoul of the concept of individualized sentencing. *Id.* at 601 (discussing the evolution of the Court's understanding that the Eighth Amendment requires punishment that is appropriate under the circumstances of the specific case, including the character and record of the individual offender).

Individualized sentencing is essential because "the definition of crimes generally has not been thought automatically to dictate what

should be the proper penalty." *Id.* at 602. When sentencing discretion exists (*i.e.* in the absence of any minimum mandatory penalties), the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant – *if not essential* – to the selection of an appropriate sentence." *Id.* at 602-03 (cleaned up; emphasis in original; quoting *Williams v. New York*, 337 U.S. 241, 247-48 (1949)).

More to the point, a categorical ban on the consideration of certain types of mitigating evidence offends the federal constitution:

> [A] statute the prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605. And while *Lockett* was a death penalty case, the Court hastened to add: "The considerations that account for the wide acceptance of individualized sentences in noncapital cases surely cannot

be thought less important than in capital cases." *Id.* at 605.[4] The Court reversed the sentence and remanded the case for further proceedings. *Id.* at 608-9.

A similar problem arose in *Eddings*. The sentencing court believed that it was prohibited, as a matter of law, from considering the defendant's "violent background," *i.e.* the defendant's family history, as mitigating evidence at sentencing. *Eddings*, 455 U.S. at 109, 113. The sentencing court also stated that although there was "no doubt that the petitioner has a personality disorder," "all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger," making him criminally responsible for his own conduct. *Id.* at 109. Likewise, regarding the defendant's background, the sentencing court said, "[f]or the same reason, the petitioner's family

---

[4] Indeed, there is no principled justification for limiting *Lockett* and its progeny to capital cases. *See e.g.* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 41, 42 (2013) ("[A]s it has in capital cases, familiarity with the mitigating force of social history may serve as a powerful basis for empathy and amelioration of overly punitive noncapital punishment."). Non-capital and capital sentencing both share the identical overarching penological goal of imposing a sentence that is sufficient, but not greater than necessary, to adequately punish the offender.

history is useful in explaining why he behaved the way he did, but it does not excuse his behavior." *Id.* at 110.

The Supreme Court found constitutional error. Reinterring the holding in *Lockett*, the Court admonished that a sentencing court may not be precluded from considering, as mitigating, any aspect of the defendant's character, or record, or any of the circumstances of the offense presented as a basis for a more lenient sentence. *Id.* at 110 (citing *Lockett*). Regarding the defendant's family background, the *Eddings* Court explained:

> The trial judge stated that 'in following the law,' he could not 'consider the fact of this young man's violent background.' …. From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence.

Id. at 112-13 (emphasis in original). So, too, with regard to the defendant's "personality disorder," the Supreme Court said. There again, the sentencing court believed that because it did not obviate criminal liability, it also could not constitute mitigating evidence. *Id.* But this was mistaken:

> We find the limitations placed…upon the mitigating evidence they would consider violated the rule in *Lockett*.

> Just as a state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. … The sentencer…may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-14; *accord Smith v. Spisak*, 558 U.S. 139, 144 (2010) (a sentencing judge may not refuse to consider or be precluded from considering any relevant mitigating evidence); *Jones v. Mississippi*, 593 U.S. 98, 116 (2021) (After *Lockett* and *Eddings*, "the sentencer will necessarily consider relevant mitigating evidence."); *United States v. Tsarnaev*, 595 U.S. 302, 320 (2022) (Concluding that 18 U.S.C. § 3593 passes constitutional muster because "[u]nlike the statute challenged in *Lockett* or the sentencer's decision challenged in *Eddings*, § 3593(c) does not put any category of mitigating evidence beyond the sentencer's purview."). The *Eddings* Court remanded the case for resentencing, with the instruction: "On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Eddings*, 455 U.S. at 117.

Another bedrock principal of the Court's Eighth Amendment jurisprudence relating to mitigating evidence is that a defendant is not

required to establish a nexus between the mitigating evidence and the criminal offense. For example, in *Tennard v. Dretke*, 542 U.S. 274 (2004), the Court admonished that "relevant mitigating evidence" is simply "evidence which tends logically to prove or disprove some fact or circumstances which a fact-finder could reasonably deem to have mitigating value." *Id.* at 284-85; *accord Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("We have held that a State cannot preclude the sentencer from considering any relevant mitigating evidence that defendant proffers in support of a sentence less than death…. [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances[.]"). The Court characterized this as a "low threshold for relevance." *Tennard*, 542 U.S. at 285.

Applying that test, the *Tennard* Court reiterated – and again, demonstrated that there is no requirement that mitigating evidence relate to the crime – that "even though petitioner's evidence of good conduct in jail did not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such evidence would be mitigating in the sense that it might serve as a basis for a sentence less than death." *Id.* at 285 (quoting *Lockett*, 438 U.S. at 604) (cleaned

up). Further illustrating the point, the Court admonished specifically that the lower court's explicit "nexus" requirement was erroneous: "Nothing in our [prior] opinion[s] suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence…unless the defendant also establishes a nexus to the crime." *Id.* at 287. Rather, "the question is simply whether the evidence" of mitigating factors is such "that it might serve as a basis for a sentence less than death." *Id.* at 287 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)). The Court remanded the case for further proceedings. *Id.* at 289.

Reinforcing the notion that the Eighth Amendment does not require a nexus between mitigating evidence and criminal activity, the Supreme Court has never required that a defendant establish mitigating factors beyond a reasonable doubt. Rather, the salient question is whether *aggravating factors* established beyond a reasonable doubt outweigh mitigating factors found to exist according to *any* standard of proof. *Cf. Kansas v. Carr*, 577 U.S. 108, 119 (2016) (approving of a jury instruction

that mitigating factors need only be proved by a preponderance of the evidence).

III. Application

Lockett, *Eddings*, *Tennard*, and its extensive progeny do not control – plainly, they are distinguishable on the facts – but they are highly instructive. They outline the federal constitutional requirements for a sentencer's consideration of mitigating evidence. Respectfully, additional instruction from this Court reinforcing these concepts is needed; not only because of the trial court's belief that no Maine jurist understands what "abnormal condition of mind" means, but because there is precious little caselaw from this Court about the treatment and evaluation of mitigating evidence (and to defendant's knowledge, no cases even citing to *Lockett*, *Eddings*, or *Tennard*).[5]

The trial court seemingly ran afoul of *Lockett* and *Eddings* when it categorically "decline[d] to use the abnormal condition of mind as a mitigating factor" because "under the circumstances," it was not "a

---

[5] The fact that Maine does not utilize the death penalty does not explain the omission. Plenty of other states that likewise eschew the death penalty have citations to these cases and have acknowledged the Eighth and Fourteenth Amendment requirements they announce.

biologically based mental illness" or "a developmental disability over which he had some control." *See* Sent. Tr. at 66.[6] Just as it was error for the trial court in *Lockett* to categorically reject the defendant's character, age, and lack of criminal intent as mitigating; and just as it was error for the trial court in *Eddings* to categorically reject the defendant's upbringing and mental health disorder as mitigating; so, too here.

A defendant's abnormal condition of mind does not need to be "biologically based" or based on "a developmental disability" before it can "be used" in mitigation, as a matter of law. (A:23; Sent. Tr. 66). Rather, as *Tennard* makes plain, such evidence simply needs to meet the low threshold of relevance, and here it plainly does. Again, the low threshold of relevance, in this context, simply means that it might serve as a basis for a sentencing reduction.

More specifically, the trial court seemingly rejected – categorically – the notion of an abnormal condition of the mind borne of "blind rage"

---

[6] The trial court said: "Had it been a biologically based mental illness, had it been a developmental disability over which he had some control, the Court might use that as a mitigating factor, but under the circumstances the Court declines to use the abnormal condition of mind as a mitigating factor." (A:23; Sent. Tr. 66).

as mitigating. Respectfully, this is error. Suppose, for example, that a parent learns that someone intends to harm his or her child, then goes into a "blind rage" and commits a crime against the person intending harm.[7] As a result of the parent's "blind rage," an expert concludes that he or she suffered from an abnormal condition of mind. No one would doubt that such circumstances are relevant and *highly* mitigating to the sentencing calculus. Indeed, the fact that a defendant was suffering from an abnormal condition of mind at the time of the offense is *inherently* mitigating, and its categorical exclusion as such constitutes an error in violation of the Eighth and Fourteenth Amendments. *Cf. Tennard*, 542 U.S. at 287 ("impaired intellectual functioning is inherently mitigating").

And to the extent that the trial court believed that defendant's abnormal condition of mind was not mitigating because it failed to obviate criminal intent, or that it was not mitigating because defendant failed to prove beyond a reasonable doubt that he suffered from a dissociative state, this, too, was wrong.[8]

---

[7] This is a hypothetical; obviously, these are not the facts of our case.

[8] The trial court said: "So, I don't fault at all the defense for raising [abnormal condition of mind at trial] and attempting to raise reasonable doubt, but as the parties know the Court concluded that this is one of

The proper remedy is to remand the case for resentencing.

Second Assignment of Error

The sentencing court erred when it found, as an aggravating sentencing factor, that defendant assaulted the hotel clerk.

I. Preservation and standard of review

At sentencing, the trial court explained:

> But there are two actual events that the Court finds from the trial evidence, that the Court has already made findings of credible testimony from the two, really remarkable individuals, who intervened to try to save the life of the victim in this case, and that would be the uncharged conduct of the defendant and ***the assault he made against [the hotel clerk]***, and the threat he made to [the van driver] to shoot him and kill him if he did anything to intervene and to interfere with the brutal attack on [Ms. [redacted]]. .... The Court will consider those two actors or events as aggravating factors in this case.

(A:24; Sent. Tr. 67-68). The Court found one additional aggravating factor, namely "not just the physical injuries but the psychological

---

those cases where actually the abnormal condition of mind, as Doctor Donnelly I think said pretty clearly, there were two basic theories; one, is that it was a dissociative state, and the other theory is that it was blind rage, blind jealous rage, and frankly based upon the record and history of the parties the Court believes that what was going on was blind rage." (A:23; Sent Tr. 65).

injuries" suffered by Ms. [redacted] – for a total of three aggravating factors – and then it determined "that the aggravating factors outweigh the mitigating factors," before setting the maximum sentence of imprisonment at 30 years. (A:24; Sent. Tr. 68-69).

Normally, this Court reviews the legality of a sentence *de novo*. *See State v. Briggs*, 2003 ME 137, ¶ 4, 837 A.2d 133 (reviewing the sentence *de novo* and stating that sentences may be reviewed on direct appeal for illegality). However, defendant did not object to the sentencing court's finding that he assaulted the hotel clerk. Accordingly, this Court will review this sentencing issue for obvious error. *See* Part I, First Assignment of Error, *supra*.

II. Legal framework

In Maine, the legal definition of assault requires, for our purposes,[9] "bodily injury or offensive physical contact to another person." 17-A M.R.S. § 207(1)(A). "Bodily injury" means "physical pain, physical illness or any impairment of physical condition." 17-A M.R.S. § 2(5). "Offensive physical contact" is "contact that a reasonable person would find offensive

[9] There are other ways, and other more egregious circumstances, that also constitute assault or assault in its aggravated form. 17-A M.R.S. § 207(1)(A) is the least culpable version of assault.

in the circumstances." *State v. Gantnier*, 2012 ME 123, ¶ 16, 55 A.3d 404. "Offensive physical contact" involves "something less than bodily injury" but more than "mere touching." *State v. Pozzuoli*, 1997 ME 91, ¶¶ 3, 7, 693 A.2d 745.

A sentencing court may consider uncharged conduct in sentencing provided that the information is factually reliable. *See State v. Soucy*, 2006 ME 8, ¶ 16, 890 A.2d 719 (citing *State v. Dumont*, 507 A.2d 164, 166-67 (Me. 1986)). This Court has generally approved of the use of such evidence. In *State v. Seamon*, 2017 ME 123, 165 A.3d 342, this Court said: "Facts regarding uncharged criminal conduct may be considered during sentencing in order to obtain a complete and accurate picture of the person to be sentenced. Information derived from the trial process is factually reliable because it is derived from sworn testimony of witnesses subject to cross-examination and observation by the court." *Id.* at ¶ 24 (internal citations omitted).

A sentence grounded on aggravating factors that are not proven offends the Eighth and Fourteenth Amendments. *Cf. In re Winship*, 397 U.S. 358, 364 (1970) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the

factfinder of his guilt."); *Gall v. United States*, 522 U.S. 38, 50 (2007) (a trial court commits procedural error when it "bas[es] a sentence on unproven, disputed allegations rather than facts."); *United States v. Smith*, 2024 U.S. App. LEXIS 829, *2, 2024 WL 139565 (Jan. 2024 8th Cir. 2024) (vacating and remanding for resentencing because the district court plainly erred when it based its sentence on unadmitted and unproven conduct).

III. Application

Defendant did not assault the hotel clerk, either as a matter of law or as a matter of speaking. The trial court made clear that insofar as the uncharged conduct was concerned, that it was relying on the "trial evidence" and its previous determination that the hotel clerk's testimony was "credible." (A:24; Sent. Tr. 67-68). This comports with *Seamon*, and defendant takes no issue with it, as such.

The problem, however, is that the hotel clerk's testimony does not support the trial court's conclusion that she was assaulted. In fact, under the hotel clerk's own telling (and there is no evidence to the contrary), *she* was the one who initiated contact and touched defendant, not the other way around. According to the hotel clerk, one especially notable

part of her encounter with defendant was that he did *not* appear to recognize her presence or even interact with her. The hotel clerk's testimony was very brief – so brief that it is recounted in pertinent part here:

> A; The first thing I did was run up to [defendant], and he had a backpack on and I grabbed the handle on the back of his backpack and started pulling on it, and I was saying his name, I was telling him to stop, he was killing her, and I also told him he was messing his life up, I was trying to say anything I could just to kind of get him to stop.
>
> Q: And you said you were pulling on his backpack. How hard were you pulling?
>
> A: I was using all my body weight.
>
> Q: Did it have any effect on him?
>
> A: He kind of loosened up one arm, one hand on her throat. I ended up getting really tired and had to let go and catch my breath and then he went and put [*sic*] so he had to hands once I let go at the time he put his hands back to her throat.
>
> Q: So to break that down a little bit. You are pulling on him very hard?
>
> A: Yes.
>
> Q: And he lets go with one hand?

A: Yes.

Q: And then you got tired?

A: Yes.

* * * * *

Q: Do you remember saying to the police that the defendant acted as if you weren't even there and that you felt that was weird to you?

A: I don't recall saying that that was weird to me but, yes, I did say that he – I felt like I wasn't there, he felt like I wasn't there [*sic*].

Q: So you are sitting there, you are interacting with him and trying to get him off Ms. [redacted] and in doing so he acted as if you didn't even exist, is that fair to say?

A; In a sense, yeah, you would think he would try to shrug me off or turn around and shrug me off, but he didn't, he just was determined, he focused on what he was doing.

(Tr. 107-8, 111-12).

Defendant takes no issue with the trial court's sentiment that if it weren't for the hotel clerk (and others), Ms. [redacted] "might not be alive today." (A:24; Sent. Tr. 68). Without a doubt, the hotel clerk's conduct was incredibly brave. Her bravery, however, cannot possibly be aggravating in terms of *defendant's* sentence – and anyways, that was

not what the trial court found. What the trial court found, erroneously, is that "the assault that [defendant] made against [the hotel clerk]" was aggravating. (A:24; Sent. Tr. 68).

But by her own telling, the hotel clerk was not assaulted. In fact, defendant never even touched her. *She* grabbed him and, to her surprise, defendant was seemingly impervious to her presence. Defendant's actions were directed exclusively toward Ms. [redacted], without deviation; according to the hotel clerk, it was as if she didn't even exist to defendant. Plainly, the fact that the hotel clerk's own efforts tired her out does not qualify as "bodily injury."[10]

The sentencing court found three aggravating factors. One of the three aggravating factors, frankly, did not exist. Respecting defendant's constitutional rights, the proper remedy is to remand the case for resentencing so that the trial court can re-do step two of the *Hewey*

---

[10] Defendant cautions that any conclusion by this Court that "exhaustion" is enough to meet Maine's statutory definition of assault will have far-reaching implications for *federal* sentencing. Such a statutory interpretation would take Maine's assault statute far afield from the construction considered by the Supreme Court in *Voisine v. United States*, 579 U.S. 686 (2016). *See also Borden v. United States*, 141 S.Ct. 1817, 1824-25 (2021) (explaining that *Voisine* rested on the notion that Maine's assault statute contemplated the "use" – *i.e.* the "active employment" – of force by the offender).

analysis and balance two aggravating factors against any mitigating factors.

Conclusion

Defendant requests that this Court vacate the judgment and remand the case for resentencing.

Respectfully submitted,

/s/ Jamesa J. Drake
Jamesa J. Drake # 5194
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105

Certificate of Service

This brief was served on opposing counsel as required by Rule 1E of the Maine Rules of Appellate Procedure.

/s/ Jamesa J. Drake
Jamesa J. Drake
Bar No. 5194
Drake Law LLC
P.O. Box 56
Auburn, Maine 04212
(207) 330-5105
jdrake@drakelawllc.com

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Ken-24-329

State of Maine

v.

Irineu B. Goncalves

Certificate of Word Count

This brief complies with the type-volume limitation of M.R.App.P. 7A(f)(1) because it contains 8,593 words, excluding the parts of the brief exempted by M.R.App.P.7A(f)(3).

I understand that a material misrepresentation can result in the Court striking the brief or imposing sanctions. If the Court so directs, I will provide a copy of the words or line print-out.

Dated: November 21, 2024

/s/ Jamesa J. Drake
Jamesa J. Drake
Bar No. 5194
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com