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

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. The Eighth Amendment forbids the categorical exclusion of mitigating evidence.

The U.S. Supreme Court has admonished, repeatedly, against the categorical exclusion of mitigating evidence as offensive to the Eighth Amendment. *See* Blue Br. at 30-38 (discussing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v Oklahoma*, 455 U.S. 104 (1982)).

Thus, the trial court committed an error of constitutional magnitude when it categorically refused to consider as mitigating an abnormal condition of mind brought about by "blind jealous rage." (A: 23; Sent. Tr. 65). As the trial court saw it, an abnormal condition of mind produced by "a biologically based mental illness" or "a developmental disability" "might" "qualify as a mitigating factor" but "under the circumstances," *i.e.* given that defendant's abnormal condition of mind was not the result of either such thing, "the Court decline[d] to use the abnormal condition of mind as a mitigating factor." (A:23; Sent. Tr. 66). Respectfully, the Court's categorical exclusion as mitigating of "blind jealous rage" is precisely what the Eighth Amendment forbids. (A: 23; Sent. 65).

The trial court's discussion of "a biologically based mental illness" or "a developmental disability" demonstrates how a proper mitigation analysis works. As the trial court noted, either of those things "might" qualify as mitigating, which comports with the mandate of individualized sentencing. In contrast, the "circumstance" of "blind jealous rage," in the trial court's view was not mitigating, and it made no allowance that it ever might be.

The error is not harmless.[1] As the State acknowledges, whether defendant's abnormal condition of mind was mitigating was "a primary argument in both written and oral arguments by the Defendant." (Red Br. 14). Nor could it be harmless given the requirements of Step 2 of the *Hewey* analysis. *State v. Hewey*, 622 A.2d 1151 (Me. 1993); *see also* 17-A M.R.S. § 1602(1)(B) (The sentencing court must consider "all other relevant sentencing factors, both aggravating and mitigating….").

The State concurs with defendant's recitation of federal constitutional law. (Red Br. 17: "The Defendant correctly outlines the

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[1] At one time, the federal appellate courts were divided on whether an error under *Eddings* was structural or subject to a harmless error analysis. *See Stokley v. Ryan*, 704 F.3d 1010 (9th Cir. 2012) (Reinhardt, J., dissenting from the denial of *en banc* review) (collecting cases). Defendant assumes *arguendo* that the error is not structural.

jurisprudence regarding factors nationally….”). Its lone rejoinder “is one word – consideration.” (Red Br. 17-18). According to the State, the trial court did consider whether “blind jealous rage” could ever qualify as mitigating, and then ultimately decided that it did not. *Id.*

Not so. The trial court *acknowledged* defendant’s argument that his abnormal condition of mind had mitigating value. But then, in violation of the federal constitution, the trial court rejected the argument out-of-hand. There can be no other explanation for the trial court’s comparison of categories of conditions: blind jealous rage (not mitigating, according to the trial court) versus biologically based mental illness (possibly mitigating) or developmental disability (also possibly mitigating).

Not only does the categorical exclusion of jealous rage as mitigating run afoul of the Eighth Amendment, but it also runs counter to Anglo-American jurisprudence, which views romantic jealous rage as classically mitigating. Historically, and still today, romantic jealously is mitigating even for murders:

> The traditional manslaughter for “crimes of passion” is…reflective of a tolerance of jealousy. Some version of this reduction is in force in every jurisdiction within the United States. While the reduction of murder to the lesser charge of

> manslaughter originated in England only in situations of physical attack or mutual combat, the common law eventually expanded it to include killings at the sight of adultery. As the Court of the Queen's Bench explained, "Jealousy is the rage of man, and adultery is the highest invasion of property. [A] man cannot receive a higher provocation." This law of provocation, which soon made its way into the United States legal system, eventually expanded in many jurisdictions to include not only the sight of adultery, but also homicide based on words conveying events that, if witnessed, would have been considered adequate provocation.

Jane Tucker, *NOTE: Taming the Green-Eyed Monster: On the Need to Rethink Our Cultural Conception of Jealousy*, 25 Yale J.L. & Feminism 217, 229-30 (2013) (cleaned up). Indeed, as the Blue Brief points out, violent rage borne of other causes may be highly mitigating, as well. *See* Blue Br. 40 (discussing a hypothetical parent who becomes violently rageful in response to threats directed at her child).

Blind rage, which is what Dr. Donnelley testified about, and what the trial court determined occurred, is perhaps even more mitigating. *See* A:23; Sent. Tr. 65 (The Court: "…based upon the record and the history of the parties the Court believes that what was going on was blind rage."). *Blind* rage connotes an abnormal condition of mind where, at a

minimum, clear thinking is impaired. *See e.g.* A:44 (The Court: "His jealousy and rage may well have caused a distortion of reality.").

The point is, not only did the trial court categorically reject an abnormal condition of mind caused by blind jealous rage as mitigating (as compared to an abnormal condition of mind caused by other conditions), which is sufficient to establish the Eighth Amendment violation; in doing so, the court rejected evidence that lawmakers, judges and juries have long considered highly mitigating, which simply underscores the error.[2]

This segues to defendant's alternative argument about the trial court's misallocation of the burden of proof.

II. Blind jealous rage can be mitigating even if does not completely negate the requisite *mens rea*.

The Supreme Court has also long held as part of its Eighth Amendment jurisprudence that a defendant is not required to establish a nexus between the mitigating evidence and the criminal offense; and to reinforce the point, the Supreme Court has never required that a

[2] In other words, this is not a case where the judge categorically rejected evidence as mitigating (constitutional error) that no one would ever plausibly find mitigating (harmless constitutional error).

defendant establish mitigating factors beyond a reasonable doubt. *See* Blue Br. 35-38 (discussing *Tennard v. Dretke*, 542 U.S. 274 (2004) and *Kansas v. Carr*, 577 U.S. 108 (2016)).

Thus, blind jealous rage may have mitigating value at sentencing even if, as the trial court found, the defendant failed to establish beyond a reasonable doubt that it completely obviated the requisite mental state. (A: 39-41, 44).

Nevertheless, the trial court seemingly refused to acknowledge the mitigating value of blind jealous rage because it did not altogether negate his criminal intent. The court explained at sentencing: "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, this is one of those cases where actually the abnormal condition of mind…frankly, based upon the record and the history of the parties the Court believes that what was going on was blind jealous rage." (A:23; Sent. Tr. 65). This, too, was error.

III. Remand is required

Defendant asks this Court to find harmful, constitutional error and to remand his case for resentencing. Moreover, if this Court finds that

the trial court's statements at sentencing are opaque as to its meaning or intent, then it should still remand this case so that the trial court may expound further and then, if necessary, proceed to resentencing. This is a very common remedy utilized by federal appellate courts. *See e.g. United States v. Figueroa-Roman*, 2024 U.S. App. LEXIS 17688, *8, 2024 WL 3458104 (1st Cir. July 18, 2024) ("[W]e find ourself unable to proceed to a meaningful review of aspects of this appeal without [the sentencing court's ambiguous statements] cleared up. And that is so even if we are on plain error review, given the potential for prejudice depending on the statement's intended meaning."); *United States v. Vieux*, 2024 U.S. App. LEXIS 28299, *7, 2024 WL 4708115 (1st. Cir. Nov. 7, 2024) ("[W]e have little choice but to vacate Vieux's sentence and remand for the District Court to clarify the sentences it imposed…"). Other examples abound.

Second Assignment of Error

The trial court found, as an aggravating factor, that defendant assaulted the hotel clerk. *See* Blue Br. at 41; A:24; Sent. Tr. 67-68. This was wrong, and the State concedes as much. *See* Red Br. 18 ("The State agrees that the trial court was incorrect when it found the Defendant assaulted [the hotel clerk]."). This also qualifies as an error of

constitutional magnitude. *See* Blue Br. 43-44 (discussing *In re Winship*, 397 U.S. 358 (1970) and *Gall v. United States*, 552 U.S. 38 (2007)). The Eighth and Fourteenth Amendments will not abide the loss of liberty based on wholly unproven facts. *Ibid.*

The State counters: the trial court's "erroneous reliance [on assault as an aggravating factor] should not impact the sentence as the sentence would have been aggravated regardless." Red Br. 18. Later, the State repeats: "Even if the trial court had not factored in anything associated with [the hotel clerk]…the Defendant's sentence would have been significantly elevated." (Red Br. 20). And later still, the State argues: "This Court should find that while the error was made, such error was harmless based on the exuberant [sic] aggravating factors that exist in the record." (Red Br. 20).[3]

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[3] Any sort of harmless-because-still-elevated standard, respectfully, simply does not work – either as a matter of law, *see infra*, or as a matter of practicality. Surely the State does not mean to say that a sentencing error (even one of federal constitutional proportion) is excused so long as this Court could somehow divine that the sentencing court would impose a sentence of any unknown length above the basic sentence. Such an argument presumes that all sentences above – say 25 years, the basic sentence in our case – are created equal, and plainly they are not. The difference of even a day matters, and is axiomatically harmful, to a defendant.

Defendant does not dispute the existence of other aggravating factors. But this is of no consequence whatsoever. The law doesn't say that a sentencing error is harmless if, but for the error, defendant would have received an "elevated" sentence, nonetheless.

What the law says is, a sentencing error is harmless if, but for the federal constitutional error, the prosecution can prove that the sentence would have remained the *same*. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (explaining that federal constitutional error is harmless only if the reviewing court can "declare a belief that it was harmless beyond a reasonable doubt"); *see e.g. United States v. Pérez-Ruiz*, 353 F.3d 1, 17 (1st Cir. 2003) (Because the sentencing error is of constitutional dimension, "the government must prove that the error was harmless beyond a reasonable doubt, or, to put another way, that it can fairly be said beyond any reasonable doubt that the assigned error did not contribute to the result of which the appellant complains."); *see also State v. Downs*, 2007 ME 41, ¶ 37, 916 A.2d 210 ("A sentencing error is harmless if the error did not affect the trial court's selection of the

sentence imposed.") (cleaned up).[4] The State cannot make that showing on this record.

Even ignoring the trial court's erroneous treatment of mitigating evidence, there is nothing in the record from which this Court could conclude that without one of the aggravating factors, defendant's sentence would be aggravated to precisely the same degree (or suspended in precisely the same manner). Basic math suggests otherwise. Unless the trial court assigned no weight at all to the alleged assault as an aggravating factor (and everything in the record suggests that it did the opposite), the supposed assault necessarily mattered to the court's

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[4] Respectfully, this Court is not at liberty to articulate a different harmless error standard for federal constitutional errors (including those occurring at sentencing), and to the extent that it has done so in some of the cases cited in the Red Brief, those decisions are wrong. (Red Br. 18-19). It is a bedrock principal of appellate law that a lower court may not design its own harmless error test for federal constitutional errors. Doing so plainly contravenes vertical stare decisis. For one thing, *Chapman* reached the Supreme Court on direct review of a state-court criminal judgment. For another, the only time a standard other than *Chapman* applies to federal constitutional error is on collateral review of a state-court criminal judgment under 28 U.S.C. § 2254. *See Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993); *Fry v. Pliler*, 551 U.S. 112, 116-17 (2007). For an example of how that works, with respect to an *Eddings* error *see McKinney v, Ryan*, 813 F.3d 798 (9th Cir. 2015).

ultimate sentencing determination. *See* Red Br. 14-16 (describing the *Hewey* analysis).

Conclusion

Defendant asks this Court to vacate the Judgment and remand his case for resentencing. Alternatively, defendant asks this Court to remand his case for further sentencing proceedings.

Respectfully submitted,

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

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