

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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Law Docket No.: KEN-24-447

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State of Maine  
APPELLEE

v.

Heather Hodgson  
APPELLANT/DEFENDANT

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ON APPEAL FROM THE  
KENNEBEC COUNTY SUPERIOR COURT

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APPELLANT'S BRIEF

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## Table of Contents

Table of Contents.....	2
Table of Authorities.....	5
Introduction.....	7
Factual and Procedural History.....	7
Issues presented for review.....	24
I. Was there sufficient evidence to prove beyond a reasonable doubt that firing a bullet into the floor recklessly created a substantial risk of serious bodily injury, where the bullet was deliberately fired into the floor and was designed to disintegrate impact?.....	24
II. Did the Trial Court commit error by denying the Motion for Judgment of Acquittal on the charge of Endangering the Welfare of a Child, where there was no direct evidence the children were endangered?.....	24
III. Did the Trial Court err by denying the State's Rule 35 Motion, which asserted that the Court was required to impose a mandatory minimum sentence of one year?.....	24
IV. Were the Court's factual findings and evidence presented at trial sufficient to convict Heather of criminal threatening with a Dangerous Weapon?.....	25

<b>Argument.....</b>	<b>25</b>
<b>I. The State did not present sufficient evidence to prove beyond a reasonable doubt that firing a bullet into the floor recklessly created a substantial risk of serious bodily injury, because the bullet was deliberately aimed at the floor and designed to disintegrate on impact.....</b>	<b>25</b>
<b>II. The Trial Court erred by denying the Motion for Judgment of Acquittal on the charge of Endangering the Welfare of a Child, because there was no direct evidence the children were endangered.....</b>	<b>28</b>
<b>III. The Trial Court did not err by denying the State’s Rule 35 Motion seeking to impose a one-year mandatory minimum sentence pursuant to 17-A M.R.S. § 1604(3)(C).....</b>	<b>30</b>
a. <u>This Court should bar the State’s appeal on res judicia principles, because the State failed to directly appeal from an adverse ruling on this same issue at sentencing.....</u>	30
b. <u>The State failed to plead that the crime of Reckless conduct was committed “with the use of a firearm against” S [REDACTED].....</u>	32
c. <u>This element was not considered by the Court during deliberations and the Court did not make the findings in its verdict required to apply the mandatory minimum sentence.....</u>	34

<b>IV. The evidence presented at trial and the Court’s factual findings are not sufficient to convict Heather of Criminal Threatening with a Dangerous Weapon.....</b>	<b>35</b>
a. <u>The Court’s factual findings did not support a conclusion that it found beyond a reasonable doubt that Heather pointed the firearm at S[REDACTED].</u> .....	35
b. <u>The State failed to prove a critical element, because S[REDACTED] did not testify that he was subjectively placed in fear when Heather pointed the firearm at him, and no factual finding was made by the Court as to this element.</u> .....	37
CONCLUSION.....	39
CERTIFICATE OF SERVICE.....	40

## **Table of Authorities**

### **United State Supreme Court Cases**

<i>Alleyne v. United States</i> , 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) .....	32
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) .....	32

### **Maine State Cases**

<i>State v. Bilodeau</i> , 2020 ME 92, 237 A.3d 156.....	25
<i>State v. Cook</i> , 2010 ME 81, 2 A.3d 313.....	25, 35
<i>State v. Kline</i> , 2013 ME 54, 66 A.3d 581.....	22, 23, 34
<i>State v. Johnson</i> , 2006 ME 35, 894 A.2d 489.....	30, 31
<i>State v. Preston</i> , 2011 ME 98, 26 A.3d 850.....	26, 27
<i>State v. Thibodeau</i> , 686 A.2d 1063 (Me. 1996).....	37
<i>State v. York</i> , 2006 ME 65, 899 A.2d 780.....	37
<i>Wilmington Tr. Co. v. Sullivan-Thorne</i> , 2013 ME 94, 81 A.3d 371.....	31

### **Maine Revised Statutes**

17-A M.R.S. 35(3)(C).....	28
17-A M.R.S. § 152(1)(B).....	15
17-A M.R.S. § 152(1)(C).....	15
17-A M.R.S. § 208-B(1)(A).....	15

17-A M.R.S. § 208-B(1)(B).....	15
17-A M.R.S. § 209(1).....	37
17-A M.R.S. § 209-A(1)(A).....	15
17-A M.R.S. § 211-A(1)(A).....	15
17-A M.R.S. § 544(1)(C).....	15, 28
17-A M.R.S. § 1604(3)(C).....	15, 16, 21, 30, 31, 33
17-A M.R.S. § 1604(5)(A).....	15, 33, 37

### **Maine Rules of Unified Criminal Procedure**

M.R.U. Crim. P. 29.....	19
M.R.U. Crim. P. 35(a).....	24, 30, 31

## **INTRODUCTION**

The Appellant, Heather Hodgson (hereinafter “Heather”) appeals from convictions for Domestic Violence Reckless Conduct with a Dangerous Weapon (class C), Domestic Violence Criminal Threatening with a Dangerous Weapon (class C), and Endangering the Welfare of a Child (class D). In addition, at sentencing the State alleged that the Court was required to impose a mandatory minimum sentence of one year. The Court rejected this argument. The State missed their deadline to file a cross-appeal from this ruling. However, they filed a Motion for Correction of Sentence pursuant to M.R.U. Crim. P. 35(a), which was denied. The State then appealed from the denial of that Motion. The two appeals were consolidated.

## **FACTUAL AND PROCEDURAL HISTORY**

Heather and S█████ Hodgson met in July of 2017. (Vol I, Tr. at 15.)<sup>1</sup> They were married in July of 2018. (Vol I, Tr. at 15.) They have two children, A.H. and S.H., who were five and three years old, respectively, as of June 17, 2024. (Vol I, Tr. at 14.) They lived in a home in Oakland, Maine. (Vol I, Tr. at 15.) Heather was a stay-at-

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<sup>11</sup> The transcript from trial on 6/17/24, is referenced by the court reporter as Vol I. The transcript from the verdict on 6/18/24, is referenced as Vol II. The transcript from sentencing on July 29, 2024, is referenced as Tr. III.

home mom. (Vol I, Tr. at 109.) Prior to that she had worked as a teacher at Lawrence Junior High School as a coach for approximately 10 years. (Vol I, Tr. at 109.) They family lived in a split-level house, with the following layout:

when you come to the front door, you're going to go up upstairs about eight steps. To the right is the two bedrooms where the kids have their bedrooms. Straight off the stairs straight ahead is the bathroom. To the left is the living room and the kitchen. And then if you're to go downstairs, the same number of stairs. Turn right, you're in the garage. Turn left, there's a little closet, and then you're into our bedroom. And adjacent to the bedroom is [S██████]'s] office.

(Vol I, Tr. at 16-17.)

Heather and S██████ both had considerable training in the use of firearms. It was a hobby, and they also owned firearms for self-defense. (Vol. I, Tr. at 29-30.) S██████ had completed 17 training courses, and Heather had completed 21. (Vol. I, Tr. at 30.)

Heather and S██████ also had a rocky relationship, and there were multiple instances where they had arguments fueled by alcohol. On November 22, 2022, S██████ had been drinking and was angry, as he and Heather had an argument. (Vol I, Tr. at 112.) He was trying to find Heather's firearm, which scared her. (Vol I, Tr. at 112.) Heather called the police, and S██████ was removed from the house.



(Vol I, Tr. at 112.) S█████ then went on a drinking binge and left for Canada (where S█████'s family lived) for three days. (Vol I, Tr. at 114.) There was another argument in December where S█████ was intoxicated and started to insult Heather about keeping wedding dresses. (Vol I, Tr. at 114.) S█████ then swiped laundry into Heather's face, leaving her in shock. (Vol I, Tr. at 114.) S█████ left the house that night as well. (Vol I, Tr. at 114.) In fact, there were "[p]robably a dozen times" S█████ left the house to stay in a hotel as a result of an argument or fight. (Vol I, Tr. at 27.)

On the evening of February 2, 2023, S█████ drank enough tequila that he "wasn't feeling good," and "would like to have gotten sick, but I didn't. I just washed my face and went back downstairs..." (Vol I, Tr. at 18.)

The next day, February 3, 2025, S█████ stated that he was not going to drink anymore. For Heather, this was a "huge relief ...because we were drinking, like, every single night... (Vol I, Tr. at 115.) Heather herself also struggled with alcohol, especially when it was brought into the home. (Vol I, Tr. at 111.)

However, later in the day S█████ reconsidered, because "what had been happening in the past is, we would ... say that, but then in

the evening, we'd -- she'd say, good idea, and that meant, go get some alcohol. And so we would sit there and have our drinks." (Vol I, Tr. at 20.) So S█████ went and bought more alcohol - a 750-milliliter bottle of Captain Morgan at some point during the day. (Vol I, Tr. at 19.) When S█████ got home, Heather was "upset that I bought the alcohol right away," but then both had several shots. (Vol I, Tr. at 21.)

S█████ then took a work call around 5:30 p.m. (Vol I, Tr. at 21.) Heather was upset that S█████ was not available to eat dinner with the family. (Vol I, Tr. at 21.) Later when S█████ did join the family for dinner, he observed Heather drinking. (Vol I, Tr. at 22.)

As the evening progressed, the parties did their normal routine, such as getting the children down for bed, doing dishes, etc. (Vol I, Tr. at 22.) S█████ and Heather then sat down on the couch and began arguing about the work call. (Vol I, Tr. at 22.) Around 7:30 p.m., A.H. came out of his bedroom and said "whoa, whoa, who, whoa," in response to their argument. (Vol I, Tr. at 23.) Heather and S█████ were talking in stern voices but were not yelling. (Vol I, Tr. at 23.) S█████ then decided to go downstairs and lie down in the bedroom. (Vol I, Tr. at 23.)

A short while later Heather came down and asked that S█ dump out the alcohol. (Vol I, Tr. at 24.) S█ dumped out the alcohol and got into bed, but left the bottles in the sink. (Vol I, Tr. at 25.) Heather then asked that he bring the bottles to the recycling bin. (Vol I, Tr. at 26, 140.) S█ started calling Heather a bitch and cunt. (Vol I, Tr. at 147, Vol II, Tr. at 8.) He also took off his wedding ring and threw it at Heather. (Vol I, Tr. at 123, Vol II, Tr. at 9.) He then went upstairs, put the bottles in a trash bag, and took the bag outside to the trashcan at the end of the driveway. (Vol I, Tr. at 26.) When he left the house, S█ exited out the front door. (Vol I, Tr. at 116.) The recycling bin, where Heather expected the bottles to be put, was located in the garage, which was accessible from inside the house. (Vol I, Tr. at 26, 140)

Heather believed that S█ had left the house for the night. (Vol. Tr. I. at 142.) In the past when the couple had argued, S█ would go and stay in a hotel. (Vol I, Tr. at 27, 39.) S█ specifically kept a spare key in his vehicle for that purpose. (Vol I, Tr. at 118.) Also, when it was really cold out or bad weather, they would usually leave the trash near the door to take it out later. (Vol I, Tr. at 142.)

Therefore, Heather had every reason to believe that S█████ had left for the evening.

After S█████ left, Heather went to get her purse, which was hanging by the front door. (Vol. I, Tr. at 120.) She kept her handgun in the purse, and since she was going to be alone for the night wanted it nearby for protection. (Vol. I. Tr. at 120.) As she was retrieving her purse, the door opened suddenly and hit her. (Vol I, Tr. at 121.) Heather was shocked, and at first didn't know for sure who it was, although she assumed it was S█████. (Vol I. Tr. at 121.) The door then opened "really hard and aggressively" and hit Heather in her back. (Vol I. Tr. at 121-122.) Heather pulled out her firearm. (Vol. I Tr. at 121.) She saw S█████ coming into the house. (Vol. I Tr. at 122.) Heather would later testify:

And I was shocked and I was frightened, because the behaviors that I had seen with him putting the bottles in the sink and leaving them there, him throwing his wedding ring at me, and the aggressive, abusive name-name calling.

(Vol. I Tr. at 122.)

Heather was not pointing the gun at S█████. (Vol I, Tr. at 123.) Heather told S█████ he needed to leave, and S█████ said no. (Vol, I Tr. at 125.) S█████ then asks her if she had a gun, and she said yes. (Vol

I, Tr. at 124.) He asked if it was loaded, and she said yes. (Vol I, Tr. at 124.) They both went downstairs. Heather quickly positioned herself by the bed where the lockbox containing S■■■■'s gun was located. (Vol I, Tr. at 125.) She did this because she was afraid that he would try and access his firearm, due to his erratic behavior. (Vol I, Tr. at 131-132.)

S■■■■'s dresser was in the other room, which would have required him to turn right when he got into the bedroom. (Vol I, Tr. at 125.) Instead, he came toward Heather. (Vol. I. Tr. at 125.) S■■■■ "Looked really angry, and I just – I didn't know what he was thinking, so I didn't know what to do. I just felt scared." (Vol. I. Tr. at 126.) There was "no other reason for him to – to advance toward [Heather]," other than to get his gun. (Vol. I, Tr. at 130-131.) S■■■■ was also much larger than Heather, and she did not have any self-defense training in hand-to-hand combat. (Vol. I. Tr. at 132.)

Heather's firearm was loaded with hollow point ammunition. Heather knew from her training that upon impacting the floor, the bullet "would implode. It wouldn't go any further than where it hit, and it would just go into little pieces." (Vol. I. Tr. 127-128.) In response to questioning, Heather confirmed that the ammunition "is

designed to ... just mushroom and implode ... [b]ecause it doesn't go through walls ... [i]t hits something and stops..." (Vol I, Tr. at 128.) Heather had specifically chosen the ammunition because of these characteristics, stating:

I had asked my instructor for - if I would hurt my neighbors if there was in an intruder in my house and I had to use the gun. I didn't want to hurt my children. I didn't want to hurt my neighbors. But what would be the best thing to have in that tool for safety? And they said [the hollow point ammunition.]

(Vol. I Tr. at 128.)

Heather deliberately fired an aimed shot into the floor as a warning to S[REDACTED]. (Vol I, Tr. at 126.) Based on her training, she believed he would not be injured by the projectile because of its design characteristics. (Vol I, Tr. at 129.) In fact, S[REDACTED] was not injured. However, he tackled Heather and took the firearm away from her and then called 911. (Vol I, Tr. at 34.)

During this event, the children were upstairs in their rooms. (Vol I, Tr. at 129.) There was a locked gate at the top of the stairs, so there would've been no way for them to come downstairs." (Vol I, Tr. at 129.) Also, the children's bedroom is located above the garage, not the bedroom where the shot was fired into the floor. (*See body camera footage.*)

The police arrived. After speaking with S [REDACTED] and Heather, Heather was arrested, and eventually indicted on the following offenses:

Count 1: Attempted Elevated Aggravated Assault pursuant to 17-A M.R.S. § 152(1)(B), § 208-B(1)(A) (class B). S [REDACTED] was named as the alleged victim;

Count 2: Attempted Aggravated Assault pursuant to 17-A M.R.S. § 152(1)(C), § 208-B(1)(B) (class C). S [REDACTED] was named as the alleged victim;

Count 3: Domestic Violence Criminal Reckless Conduct with a Dangerous Weapon pursuant to 17-A M.R.S. § 211-A(1)(A), 1604(5)(A)<sup>2</sup> (class C). S [REDACTED] was named as the at-risk person;

Count 4: Domestic Violence Criminal Threatening with a Dangerous Weapon pursuant to 17-A M.R.S. § 209-A(1)(A), 1604(5)(A) (class C). S [REDACTED] was named as the alleged victim;

Count 5: Domestic Violence Reckless Conduct with a Dangerous Weapon pursuant to 17-A M.R.S. § 211-A(1)(A), 1604(5)(A) (class C). The children were named as the at-risk party;

Count 6: Endangering the Welfare of a Child pursuant to 17-A M.R.S. § 544(1)(C), (class D). The children were named as the at risk party.

Of note, 17-A. M.R.S. § 1604(3)(C), states:

If the State *pleads* and *proves* that a Class A, B or C crime was committed with the use of a firearm *against an individual*, the minimum sentence of imprisonment, which may not be suspended, is as follows:...

(C). in the case of a Class C crime, one year.

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<sup>2</sup> This citation refers to the statute that increases the sentencing class of a crime by one level if a dangerous weapon is used in the commission thereof.

(emphasis added.)

This statute is not cited in the indictment, nor does the indictment allege that Heather “use[ed] a firearm against” S[REDACTED]. (A. at 72.) It was simply not pled. As it pertains to a firearm, the language in Count 3 of the indictment states as follows: “On or about February 03, 2023, in Oakland, Kennebec County, Maine, Heather M. Hodgson did intentionally or knowingly place S[REDACTED] Hodgson in fear of imminent bodily injury with the use of a dangerous weapon, namely a firearm....” (A. at 72.)

A jury was selected in this matter on June 7, 2024. (A. at 4). However, on the day of trial Heather waived her right to a jury trial and elected to have a bench trial before the Honorable Justice William Stokes. (Vol I. Tr. at 4-8.) In addition, the State filed a dismissal as to Count I. (Vol I, Tr. at 11.)

The State’s first witness was S[REDACTED] Hodgson. His general testimony regarding the events of the evening were similar to Heather’s, up until he testified about going outside. S[REDACTED] testified that Heather demanded that he throw away the bottles. S[REDACTED] testified that he went upstairs, put the bottles in the trash, tied up



the bag, and left the house to put the items in the trash can at the end of the driveway. (Vol I, Tr. at 26.)

When he returned to the house, Heather would not let him in and was yelling at him to “get the F out,” and to leave. (Vol I, Tr. at 27.) S█████ testified that in the past he would simply leave the house for the night if there was an argument. (Vol I, Tr. at 27.) However, that night S█████ said he did not have his key, wallet, or cell phone and he wanted to get into the house and retrieve those items so he could leave. (Vol I, Tr. at 27.) S█████ then “forcefully” pushed the door open to get back inside to retrieve his things and saw Heather with her gun pointed at him. (Vol. I. Tr. at 28.)

S█████ went downstairs to get his keys and wallet. (Vol I, Tr. at 32.) According to S█████, Heather then retrieved S█████’s phone off the nightstand and threw it at him. (Vol I, Tr. at 33.) As he was looking for his phone, S█████ said Heather pointed the gun at him. (Vol I, Tr. at 33.) He testified that he then found his phone, turned around to leave, and heard a “bang.” (Vol I, Tr. at 34.) He then tackled Heather, took the gun, and called 911. (Vol I, Tr. at 34.) S█████ testified that he was “scared,” after “this incident,” seemingly referring to the gun being fired. (Vol I, Tr. at 37.)

At some point between the incident occurring and police arriving, S█████ took the time to contaminate the scene by removing the pieces of the bullet fragments and putting those on his desk. (Vol I, Tr. at 64-65.)

The State also called Oakland Police officer Adam Sirois, who responded to the 911 call. (Vol I, Tr. at 41.) He testified generally to his interactions with S█████ and Heather. He stated that both Heather and S█████ seemed impaired, but S█████ was not “overly impaired.” (Vol I, Tr. at 46.) The officer also testified about the risks associated with the round being fired into the floor. He agreed that it was unlikely a bullet fired into a concrete floor would “be able to go through a ceiling and hit someone on the upper level...” (Vol I, Tr. at 69.) He later testified that the “shrapnel” from the bullet could have caused an injury to S█████, but does not state whether that injury would likely be superficial or pose a risk of serious bodily injury. (Vol I, Tr. at 75.)

There was no other testimony offered by the State regarding ballistics, the particular characteristics of the bullet that was fired, how that bullet would react after being fired into concrete, or what the probability was that the round would have posed a risk of serious

harm to anyone after it disintegrated into the floor. The 911 recordings, multiple photographs, and the body camera video were all admitted in evidence. (Vol I, Tr. at 44, 49, 56.)

After the close of the State's case, the Defense moved for Judgment of Acquittal as to all remaining counts. See M.R.U. Crim. P. 29. The Court granted the Motion as to count 2, Attempted Aggravated Assault, finding that "the evidence is not sufficient for me to conclude that when the gun was discharged, that Ms. Hodgson intended to cause bodily injury to S[REDACTED]." (Vol I, Tr. at 103.) The Court denied the Motion as to count 3, Domestic Violence Reckless Conduct and count 4, Domestic Violence Criminal Threatening. (Vol I, Tr. at 104.) The Court granted the Motion as to Count 5, Reckless Conduct with a Dangerous Weapon as to the children. (Vol I, Tr. at 104.) The Court stated, "I just don't think the evidence is sufficient at this point to meet the standard that would justify a finding beyond a reasonable doubt that a-substantial risk was created to [the children] on the second floor." (Vol I, Tr. at 104.)

The Court denied the motion as to count 6, Endangering the Welfare of a Child. (Vol I, Tr. at 105.) The Court explained that this count did not require the State to prove there was a substantial risk,

only that Heather's conduct was reckless. (Vol. I. Tr. at 105.) The Court explained that, because this was a bench trial, it was using a different standard than if the case were tried to a jury. (Vol. I Tr, I at 106.) "I'm not deferring to the jury for credibility. I – I have to be satisfied that there's sufficient evidence from which I could find guilt beyond a reasonable doubt." (Vol I, Tr. at 106.)

Following the Motion for Judgment of Acquittal, the Defense called Heather Hodgson. (Vol I, Tr. at 108.) Heather testified consistently with the facts outlined *infra* at 7-14. The Defense then rested. (Vol I, Tr. at 165.) After the evidence was closed, the Defense again moved for Judgment of Acquittal, which was denied. (Vol I, Tr. at 168.)

During closing arguments, the Defense emphasizes that one of the primary reasons the State failed to meet its burden, was because there was no expert testimony at all regarding the trajectory of the bullet, the specific type of bullet, the environmental conditions, etc., all of which are necessary to determine whether the act of deliberately firing a round into the floor created a "substantial risk" of serious bodily injury. (Vol. I. Tr. at 189.) The Defense further explained:

And there's just so many variations in-between 0 degrees and 180 degrees, from you to the door, from 0 degrees horizontal to 90 degrees at the floor. You know, there's so many variations in-between. When does it change from a modicum of risk, a slight risk, a possible risk, a 50/50, a more likely than not, to a substantial risk? Where does it -- where does the substantial risk come in?

You really need a -- you really need a comprehensive analysis of the circumstances of that projectile and what -- what type of projectile, the environmental conditions, all of those factors, which just were never done.

(Vol I, Tr. at 202.)

Of note, at no point during the trial or closing arguments did the State ever request that the Court make findings pursuant to 17-A M.R.S. § 1604(3)(C), that Heather used a firearm against S [REDACTED] for the purpose of triggering the mandatory minimum sentence.

The Court delivered its verdict on July 18, 2024, and issued lengthy findings. (A. at 17-43; Vol II, Tr. at 3-22.) It found Heather guilty of count 3 (Domestic Violence Reckless Conduct), count 4 (Reckless Conduct Criminal Threatening), and count 6 (Endangering the Welfare of a Child). The Court also made express findings. (A. at 20-27.) Again, at no point did the State mention the application of any mandatory minimum sentences. The matter was then scheduled for sentencing.

The Defense and the State both submitted sentencing memorandum. For the first time, the State argued that a mandatory minimum sentence of one year was applicable. (Vol III, Tr. at 5.)

Sentencing was held on July 29, 2024. There were extensive arguments held regarding the application of the mandatory minimum sentence. (Vol. III. Tr. at 25, 54-74, 81-84.) The Court noted that, had the matter actually proceeded to a jury trial, a discussion about instructions may have taken place and the issue of whether a firearm was used “against an individual,” would have been submitted. (Vol III. Tr. at 54.) The Court indicated that it was not “focused on the issue of against an individual. I was focused on the elements as pled in the indictment.” (Vol III. Tr. at 55.)

The Defense then cites *State v. Kline*, 66 A.3d 581. (Vol III, Tr. at 55.) The Defense explains this was a case where a defendant was convicted of reckless conduct with a dangerous weapon, even though the jury was never presented with the issue of whether the firearm was used “against the person...” (Vol III. Tr. at 56.) The judge sentenced the defendant to the one-year mandatory minimum. The Law Court found this to be in error, as the predicate element had not

been submitted to the jury to determine if the element had been proven beyond a reasonable doubt. (Vol III. Tr. at 56.)

The Trial Court here acknowledged both that it had not considered the mandatory minimum, nor did it make any finding that a firearm was used “against an individual...” when it delivered its verdict. (Vol III. Tr. at 57.)

When it imposed sentence, the Court noted it had read *State v. Kline*, 2013 ME 54, and reviewed the recording of the verdict. (Vol III. Tr. at 81.) The Court went on to state again that, “...I’ll be frank with you, the reason I did not make that explicit finding is I didn’t think it was in front of me. And it was not brought to my attention...I think I’ve got to resolve the doubt in favor of Heather.” (Vol III, Tr. at 83.) The Trial Court did not impose a one-year unsuspended sentence. On count 3, Heather was sentenced to 3 years, with all but 90 days suspended, and 4 years of probation. She was sentenced to 90 days concurrent on counts 4 and 6. (A. at 14-16.)

The 21-day deadline to appeal was August 19, 2024. Heather filed her Notice of Appeal on August 1, 2024. (A. at 7.) The State missed the deadline to file a cross appeal.

Perhaps realizing it missed the deadline, on August 22, 2024, State then filed a Motion for Correction of Sentence (hereinafter “Rule 35 Motion”) pursuant to M.R.U. Crim P. 35(a), alleging that the sentence was illegal, because the Court was required to impose the mandatory minimum one year sentence. (A. at 11, 74.)

The Defense objected to the motion on various grounds, including that the Motion should be barred as this issue was already decided by the Trial Court at sentencing. (A. at 77.) The hearing on the Rule 35 Motion was held September 10, 2024. (A. at 11.) Ultimately, the Trial Court denied the Rule 35 Motion for the reasons articulated at sentencing. (A. at 63-66; 9/10/24 Tr. at 12-15.)

### **ISSUES PRESENTED FOR REVIEW:**

- I. Was there sufficient evidence to prove beyond a reasonable doubt that firing a bullet into the floor recklessly created a substantial risk of serious bodily injury, where the bullet was deliberately aimed at the floor and was designed to disintegrate on impact?
- II. Did the Trial Court commit error by denying the Motion for Judgment of Acquittal on the charge of Endangering the Welfare of a Child, where there was no direct evidence the children were endangered?
- III. Did the Trial Court err by denying the State’s Rule 35 Motion, which asserted that the Court was required to impose a mandatory minimum sentence of one year?<sup>3</sup>

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<sup>3</sup> Although the Appellant is not challenging this ruling, it nonetheless briefed the issue in anticipation of the State’s argument.



- IV. Were the Court's factual findings and evidence presented at trial sufficient to convict Heather of Criminal Threatening with a Dangerous Weapon?

### **ARGUMENT**

- I. **The State did not present sufficient evidence to prove beyond a reasonable doubt that firing a bullet into the floor recklessly created a substantial risk of serious bodily injury, because the bullet was deliberately aimed at the floor and designed to disintegrate on impact.**

The Trial Court erred by denying the Motion for Judgment of Acquittal as to the charge of Domestic Violence Reckless Conduct. This Court reviews the denial of a Motion for Judgment of Acquittal to determine if a fact finder could have rationally found each element of the crime proven beyond a reasonable doubt. *State v. Bilodeau*, 2020 ME 92, ¶ 10, 237 A.3d 156. “We review the denial of a motion for a judgment of acquittal under the same standard as a challenge to the sufficiency of the evidence...” *Id.* (Quotation and citations omitted.)

To convict a defendant, the charge must be proven beyond a reasonable doubt. Put differently, the factfinder must have “a conscientious belief that the charge is *almost certainly true*.” *State v. Cook*, 2010 ME 81, ¶ 14, 2A. 3d 313 (citations omitted, emphasis in original.)

The Court found that the State met its burden and convicted Heather of Reckless Conduct for the act of firing a bullet into the floor. (Vol II, Tr. at 12, 13, 16.) It was undisputed that this round was purposefully aimed at the floor as a warning shot.” (Vol I, Tr. at 74, 86, 206.) The Court also expressly found that Heather did not intend or want to hurt S[REDACTED]. (Vol II, Tr. at 15.) Furthermore, Heather had extensive training in firearms use. (Vol I, Tr. at 29-30.) Simply put, the firing of the gun was deliberate. Heather aimed the gun at the floor, and purposefully did not aim the gun at S[REDACTED] when she fired it.

The State failed to prove how shooting the gun at a floor, not at a person, created a substantial risk of serious bodily harm. Again, the key element here is *substantial* risk. Bullets are not magic. They travel where the firearm is aimed. A bullet that is not traveling toward a person poses no risk of harm, absent some risk of a ricochet where the round contains sufficient kinetic energy to cause serious bodily injury. This seemingly obvious fact was recognized by this Court when it stated, “[i]t is sufficient to note that a person can discharge a firearm in the direction of another person without actually creating a risk of serious bodily injury to that person, an element of reckless

conduct...” *State v. Preston*, 2011 ME 98, ¶ 11, n. 8, 26 A.3d 850. Such is the case here.

In addition, there was no bodily injury to S█████, much less serious bodily injury. These bullets were specifically designed to break apart on impact, so that they would not ricochet and hurt someone. Heather testified extensively to this fact. (Vol I, Tr. at 127-128.) As the photographs demonstrate, the bullet, in fact, disintegrated upon impact.

The State also questioned the officer about the risk of the “shrapnel.” Over objection, the State was only able to elicit that the shrapnel from the bullet “[c]ould have” caused an injury. (Vol I, Tr. at 75.) “Could have” caused an “injury” is not sufficient, to prove beyond a reasonable doubt, that shooting a disintegrating bullet into a floor creates a “*substantial risk of serious* bodily injury.” The State failed to conduct any forensic analysis or meaningful examination as to whether or not firing the same type of bullet into the floor created a substantial risk of serious bodily injury. In the absence of such testimony, and given the fact that there was no injury to S█████, the State failed to meet its burden of proof.

Accordingly, the Trial Court erred by failing to acquit Heather of count 3, Reckless Conduct with a Dangerous Weapon.

**II. The Trial Court erred by denying the Motion for Judgment of Acquittal on the charge of Endangering the Welfare of a Child, because there was no direct evidence the children were endangered.**

There was insufficient evidence to convict Heather of Endangering the Welfare of a child, and therefore the Court erred by denying Heather's Motion for Judgment of Acquittal as to this count.

A conviction for Endangering the Welfare of a Child required the State to prove that Heather: "[o]therwise recklessly endanger[ed] the health, safety or welfare of the child by violating a duty of care or protection." 17-A M.R.S. § 554(1)(C). In turn, reckless is defined as "consciously disregard[ing] the risk that a person's conduct will cause such a result." 17-A M.R.S. §35(3)(A). The statute goes on to state:

the disregard of the risk, when viewed in light of the nature and purpose of the person's conduct and the circumstances known to the person, must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation.

17-A M.R.S. § 35(3)(C).

The State failed to meet its burden here, because it could not prove there was any risk to the children. As a starting point, it bears noting that the Trial Court granted the Defense motion for Judgment of acquittal on count 5, Reckless Conduct with a Dangerous Weapon as to the children, because it found that the State had not proven that Heather's conduct created a "substantial risk of serious bodily injury" to the children. (Vol I, Tr. at 104.) Conversely, the Court explained it denied the Motion as to count 6, because the statute "does not require the creation of a substantial risk but [sic] reckless endangerment of the health, safety, and welfare of the child by violating a duty of protection." (Vol I, Tr. at 105.) In delivering the verdict, the Court said "[n]ow, I don't think there was a substantial risk of causing serious bodily injury .... but endangering does not need a substantial risk – that level of risk." (Vol II, Tr. at 21.)

There was no risk articulated to the children. The children were upstairs in the home, away from the area where the conflict between Heather and S [REDACTED] was unfolding. As was noted by the officer, the likelihood of the bullet hitting the floor and ricocheting through the ceiling and causing a risk to anyone upstairs was remote. (Vol I, Tr. at 69.) It was not even clear that that laws of physics would allow a

bullet fired from the downstairs bedroom to pass into any other room, especially a room at the other end of the house. As was testified to extensively, the bullets in Heather's gun were specifically designed to implode and break apart upon impact. (Vol I, Tr. at 127-128.) In fact, the bullet acted as designed and did break apart upon hitting the floor. (Vol I, Tr. at 209.)

How were the children endangered? This must be more than just a speculative or theoretical danger. The State must show that the children were placed in harm's way. They failed to do so.

**III. The Trial Court did not err by denying the State's Rule 35 Motion seeking to impose a mandatory minimum sentence pursuant to 17-A M.R.S. § 1604(3)(C).**

- a. This Court should bar the State's appeal on *res judicia* principles, because the State failed to directly appeal from an adverse ruling on this same issue at sentencing.

The Trial Court did not err by imposing a sentence of 90 days, instead of one year. M.R.U. Crim. P. 35(a) allows a court to correct an illegal sentence upon motion from either the State or a defendant, and may be made within one year of imposition of a sentence. However, principals of *res judicata* should apply in circumstances, such as those in this case, where the issue was already presented to the sentencing judge and a ruling was issued. Interpretation of the

“Rules of Criminal Procedure is a legal question that [the Law Court] reviews de novo.” *State v. Johnson*, 2006 ME 35, ¶ 9, 894 A.2d 489.

Res judicata prevents “a party and its privies ... from relitigating claims or issues that have already been decided. The doctrine of res judicata is grounded on concerns for judicial economy and efficiency, the stability of final judgments, and fairness to litigants.

*Wilmington Trust Co. v. Sullican-Thorne*, 2013 ME 94, ¶ 6, 81 A.3d 371 (internal quotations and citations omitted.)

Here, the State is appealing from the denial of its Rule 35 Motion, alleging that the Court was required to impose a mandatory minimum one year sentence pursuant to 17-A M.R.S. § 1604(3)(C). However, this issue was argued extensively at sentencing on July 29, 2024, and decided by the Court. The State had every opportunity to directly appeal from that ruling. The only conceivable reason for the State to have filed a Rule 35 Motion is because it missed the 21 day deadline to directly appeal. Under the unusual situation presented here, this Court should find that the State is precluded from appealing the denial of its motion.

- b. The State failed to plead that the crime of Reckless Conduct was committed “with the use of a firearm against” S[REDACTED].

A sentence of one year is only mandatory if the State both pleads and proves that “a Class ... C crime was committed with the “use of a firearm against an individual” ... 17-A M.R.S. § 1604(3)(C). As the Supreme Court held in *Alleyne v. United States*, 570 U.S. 99, 103, 133 S.Ct. 2151, 186 L.Ed 2d 314, “[a]ny fact that, by law, increases the penalty for a crime is an *element* that must be submitted to the jury and found beyond a reasonable doubt.” (internal quotations omitted, emphasis added.) This requirement applies to mandatory minimum sentences. *Id.* See also *Apprendi v. United States*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435. This requirement is rooted in the Sixth Amendment and the Due Process Clause. *Alleyne*, 570 U.S. at 104. Thus, to trigger a mandatory one-year sentence, the Constitution demands the State plead and prove that a “firearm was used against an individual.”

The language in the indictment states only that Heather created a substantial risk of serious bodily injury to S[REDACTED] “with the use of a firearm.” (A. at 72.) Creating a “substantial risk ... with the use of a



[firearm],” is not the same as pleading that a firearm was “us[ed] ... against an individual.”

In addition, the Indictment clearly cites the enhancement pursuant to 17-A M.R.S. § 1604(5)(A), which elevates the sentencing class because a firearm was used to create the substantial risk. (A. at 72.) This demonstrates that the State recognized that the use of a firearm was an element that needed to be pled. However, it did not cite the enhancement pursuant to 1604(3)(C). The failure to cite one statute, but not the other, also cuts against the State’s argument that the element was properly pled.

Had the State properly pled this issue, the Defense could have focused on defending against proof of this allegation. The Defense could have raised arguments at trial, including within a Motion for Judgment of Acquittal. It would have focused on this issue during summation. It may have influenced plea negotiations.<sup>44</sup> For these reasons, applying this enhancement after failing to put the Defense on notice would have violated Heather’s Due Process rights.

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<sup>44</sup> A record of the plea negotiations was placed on the record at the beginning of the trial. (Vol I, Tr. at 8-10.)

Therefore, the indictment was not sufficiently pled to trigger the mandatory minimum sentence.

- c. This element was not considered by the Court during deliberations and the Court did not make the findings in its verdict required to apply the mandatory minimum sentence.

This element was not proven at trial, because it was not presented to the Trial Court or contained in the verdict. This case is on all fours with *State v. Kline*, 2013 ME 54, 66 A.3d 581. In *Kline*, the Court imposed a one-year mandatory minimum sentence on the defendant following his conviction for reckless conduct with a dangerous weapon using a firearm. However, the specific element inquiring if the defendant used a “firearm against a person” was never submitted to the jury, nor was the jury asked to render a verdict on this element. *Id.* at 14. On appeal, the State candidly admitted that the failure to submit this issue to the jury was fatal. *Id.* at ¶ 14. The Law Court stated, “[b]ecause the parties agree that the court should reconsider the sentence not supported by the requisite *findings*, we do not discuss this issue further.” (*Id.*, emphasis added)

It is apparent from the record here that the State failed to submit this issue to the Court. The Court delivered its verdict on June 18, 2024. (A. at 17.) It made factual findings, and convicted

Heather of counts 3, 4, and 6. The Court did not render any decision as to whether the firearm was “use[d] against S[REDACTED].” As Justice Stokes noted repeatedly at sentencing, he had not even considered the issue and “was not aware that the State was actually trying to trigger a mandatory minimum sentence until the State’s [sentencing] memorandum...” (A. at 64.) This is the same situation as in *Kline*. The Trial Court ruled correctly when it found that, because it had not considered the element and had not made express findings, it was not bound by the mandatory minimum sentence.

For these reasons, the Court should either 1) not entertain the State’s appeal of the denial of the Rule 35 Motion, or 2) this Court should affirm the Trial Court’s ruling.

**IV. The Court’s factual findings and the evidence presented at trial were not sufficient to convict Heather of Criminal Threatening with a Dangerous Weapon.**

- a. The Court’s factual findings did not support a conclusion that it found beyond a reasonable doubt that Heather pointed the firearm at S[REDACTED].

To convict Heather, the Court was required to find her guilty beyond a reasonable doubt, i.e. that it had “a conscientious belief that the charge is *almost certainly true*.” *State v. Cook*, 2010 ME at ¶14 (citations omitted, emphasis in original.) In its verdict, the Court

specifically stated that it found Heather guilty of Domestic Violence Criminal Threatening, “not based on the same facts as the – as the discharge, but it’s based upon the pointing of the gun at him or certainly in his direction.” (A. at 32; Vol II, Tr. at 16.) This required the Court to find, beyond a reasonable doubt that Heather “pointed the gun at him” or “in his direction.” However, the Court’s own factual findings that preceded the verdict demonstrate that the Court itself was not convinced of these facts beyond a reasonable doubt.

The Court noted that there was a factual disagreement as to whether the firearm was pointed at the floor or at S [REDACTED] after he forced his way into the house. (A. at 24; Vol II Tr. at 8.) The Court stated, “I, of course, was not there, but it makes little sense to me that she would retrieve the gun and then – for some innocent purpose. I find that *if* she had the gun in her right hand, that it was at least pointed in his direction.” (A. at 24; Vol II, Tr. at 8.) (emphasis added.) In regard to the confrontation that occurred downstairs, the Court states, “[S]he says she never pointed [the firearm] at him. He claims that the muzzle was on him. I tend to believe that she did point the muzzle at him.” (A. at 25; Vol I, Tr. II at 9.)

Words such as “*if*” she, or “*tend to*” do not express the level of certainty required to find a fact is true beyond a reasonable doubt. Therefore, the Court’s own factual findings reflect that it did not find, beyond a reasonable doubt, that Heather committed the acts cited by the Court necessary to convict her of Criminal Threatening.

- b. The State failed to prove a critical element, because S [REDACTED] never testified that he was subjectively placed in fear when Heather pointed the firearm at him, and no factual finding was made by the Court as to this element.

To convict a defendant of Criminal Threatening with a Dangerous Weapon, the State must prove, beyond a reasonable doubt, that a defendant “intentionally or knowingly *places* another person in fear of imminent bodily injury with a dangerous weapon.” (17-A M.R.S. § 209(1), 1604(5)(A)) (emphasis added). This requires the State to prove that the victim was *subjectively* placed in fear. *State v. York*, 2006 ME 65, ¶ 11, 899 A.2d 780 (“evidence of a victim’s subjective fear will support a conviction for criminal threatening.”) In addition, it is completely irrelevant as to whether a defendant’s conduct would have objectively seemed threatening. *See generally, State v. Thibodeau*, 686 A.2d 1063, 1064 (objective reasonableness not “an essential element of criminal threatening.”)

As a reminder, the Court stated that the conviction for Criminal Threatening was *only* based upon the allegation that Heather pointed the firearm at S[REDACTED]. Assuming *arguendo*, that Heather did point the Firearm at S[REDACTED], he never testified that he was placed in fear of imminent bodily injury in connection with either the events on the landing or in the bedroom, which were the only times he testified Heather pointed the firearm at him.

In regard to the incident on the landing, S[REDACTED] testified that he was “shocked,” but “wasn’t too shocked that there was that level of aggression.” (Vol I, Tr. at 35.) Furthermore, according to S[REDACTED], Heather was screaming at him to leave. (Vol I, Tr. at 27, 28.) But when Heather pointed the gun at him, rather than leave, he went downstairs to “get his stuff.” (Vol I, Tr. at 29.) He also noted that Heather’s finger was not on the trigger, but rather along the slide. (Vol I, Tr. at 28.) He certainly did not respond like he was afraid.<sup>5</sup>

Regarding the interaction downstairs where S[REDACTED] claims Heather pointed a gun at him, S[REDACTED] stated that, “I knew I was in

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<sup>5</sup> S[REDACTED] later stated that he was “scared” during the “incident.” (Vol I, Tr. at 37.) However, the context of this statement indicates that he was referring to his emotions *after* the firearm was discharged, not when the firearm was pointed at him.

trouble...” (Vol I, Tr. at 35.) However, this general statement does not establish that S█████ was placed in fear.

Finally, the Trial Court made no factual finding that S█████ was actually placed in fear as a result of Heather pointing the firearm at him. (A. at 33-34; Vol II, Tr. at 17-18.) When delivering its verdict, the Court postulated that when you are drinking and point a gun at someone, “I think you are placing that person in imminent fear of bodily injury.” (Vol II, Tr. at 18.) This statement by the Court indicates that it was opining on what it felt would be an *objective* response under the circumstances. However, to convict Heather, the Court was required to find that S█████ was *subjectively* placed in fear as a result of Heather allegedly pointing the firearm at him. It did not make this finding.

For these reasons, the Court lacked sufficient evidence to convict Heather of Criminal Threatening with a Dangerous Weapon.

### **CONCLUSION**

Wherefore, the Appellant respectfully request that the Court vacate the convictions in this matter.

Respectfully Submitted,

/s/ Scott F. Hess

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**CERTIFICATE OF SERVICE**

I, the Undersigned, do hereby certify that on February 12, 2025, I caused to be served upon all parties an electronic copy of the brief, by emailing the parties below.

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