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

LAW COURT DOCKET NO. And-25-463

STATE OF MAINE
Appellee

v.

JAMES R. FOOTMAN Jr.
Appellant

ON APPEAL from the Androscoggin County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. The court committed prejudicial error by admitting evidence about the 7-Eleven.

A. The ruling violated Rule 404(b) and this Court's case-law.

The State asks the Court to extend *State v. Connors*, 679 A.2d 1072 (Me. 1996), a decision that is already, with all respect, on the fringe,[1] to uncharted territory. Mr. Connors confessed to the two crimes; we have nothing like that, just ubiquitous sneakers and a dime-a-dozen utility-knife. 679 A.2d at 1074. The State repeats the court's legal error; our case and *Connors* are not "directly on point." (*See* A24). We have neither the same calling-card nature nor assurance that robber #2 is even defendant.

The State's gesture to *State v. Brown*, 1998 ME 129, 712 A.2d 513 doesn't help its argument. *Brown* was about the joinder of dozens of burglaries, thefts and robberies. There was quite clear evidence that Brown was involved, including trial testimony from a coparticipant in all of the burglaries who

> provided detailed accounts of his participation with Brown in each of the nineteen incidents alleged in Brown's indictment. [The coparticipant] testified, *inter alia*, that he and Brown recruited other men to drive them to and from the crime scenes,

[1] At page 32 of the Blue Brief, defendant noted a commentator's polite disapproval of *Connors*. Justice Glassman's dissent, too, is convincing.

> usually in exchange for the stolen loot; that they always wore black clothing during the crimes; that they wore gloves during most of the crimes; that they frequently targeted businesses with safes; that they generally carried police scanners and two-way radios during the crimes' that all of the crimes took place at night, usually between midnight and sunrise; and that during home burglaries they covered the victim's faces with pillows or newspapers.

1998 ME 129, ¶ 3. The coparticipant's testimony "was corroborated" by numerous other witnesses. *Id.* ¶ 3. In its brief opinion, the Court noted three times how "detailed" the coparticipant's testimony was. *Id.* ¶¶ 3, 10 n. 8. Even then, the *Brown* Court endorsed merely: "[E]vidence of many or all of his offense ***may*** have been admissible even at separate trials." *Id.* ¶ 9 (emphasis added).

In contrast, we have two offenses, not dozens. We have no admissions. We have no eyewitness testimony from robbery #2, let alone a coparticipant's. We do not have "detail"; we have ubiquity.[2] To hearken back to the Blue Brief (at 27-28), there is nothing more than a red hat.

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[2] The State objects at the inclusion of the *photographs* on pages 28-30 of the Blue Brief. *See* Red Br. 16 n. 1. At the very least, the *citations* to the articles containing those photographs are properly before the Court. It seems a fool's errand to permit the Court access to the latter while forbidding display of the images in a manner that aids the Court's review. *See* M.R. App. P. 14(c) (Court shall suspend its rules when "[i]n the interest of expediting decision upon any matter").

Rule 7A(a)(2)(A) is more appropriately read to prohibit a party from representing that an image in a brief is record evidence. Reading it to forbid

B. The 7-Eleven evidence violated Rule 403.

The State's 403-analysis is focused on undue prejudice, and certainly that is part of defendant's argument. But defendant also made arguments about "a trial within a trial",[3] "cumulative evidence" and "juror confusion." They have gone unrebutted.

The 7-Eleven evidence added nothing the State did not already have. All of the second day of trial's evidence concerned the 7-Eleven robbery. It was cumulative – except for the prejudice, that is. Jurors would logically be confused about which offense defendant was on trial for, whether they could convict him for either robbery, or how they might consider evidence about the second robbery.

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inclusion of images used as an "analytical visual" – *i.e.*, an interpretive tool – would leave this Court behind the emerging consensus that such usage is desirable. *See* Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systematizing the Decision to Use Visuals as Legal Reasoning*, 20 LEGAL WRITING: J. LEGAL WRITING 57, 64 (2015) (describing such usage as "walk[ing] the reader through some aspect of legal reasoning with the use of a chart, graph, photograph, or other visual element"). Indeed, such a bar would be counter to the Court's own practice of using illustrative figures in its opinions. *E.g.*, *Longview Hotel Condo. Ass'n v. Pearl Inn Condo. Ass'n*, 2024 ME 69, ¶¶ 3, 6, 29, 322 A.3d 1213.

[3] The State has pointed to defendant's subsequent plea to the 7-Eleven robbery. Red Br. at 10-11, 20 n. 3. This adds depth to the 403-argument. On remand, were the State to again seek to introduce evidence of the 7-Eleven robbery, the court would be obligated to permit defendant to introduce evidence about why he pleaded guilty to it – *e.g.*, mitigation of sentencing exposure via a concurrent-time offer. *Cf. Missouri v. Frye*, 566 U.S. 134, 144 (2012) (noting how plea-bargaining creates incentives for pleading). Quite a waste of time would ensue.

There's also a real risk here for future defendants. If this passes muster, what is to stop the State from rehearsing its case against a defendant in trial #1, prompting the defendant to offer a defense to it, so as to get a dry-run and a preview of the defense before trial #2?

At bottom, though, the analytical flaw undermining trial court and the State, is their overestimation of the probative value of the 7-Eleven robbery. All it showed is that someone wearing similar shoes and holding a similar box-cutter committed two separate robberies. That does not help establish that it was defendant.

C. The State has not argued harmlessness.

The State has effectively conceded harm, omitting to brief otherwise. *See State v. Rhoades*, 2026 ME 23, ¶ 33 n. 9 ____ A.3d ____; *United States v. Murguia-Rodriguez*, 815 F.3d 566, 572 (9th Cir. 2016) ("As a general and consistent rule, when the government fails to argue harmlessness, we deem the issue waived and do not consider the harmlessness of any errors we find.") (quotation marks and citation omitted). He has not pursued any obvious-error claims. *But see* Red Br. 19-21.

Yes, defendant could have received a limiting instruction. However, his "strategic choice" to decline one did not occur in a vacuum. He could either draw more attention to the bell that had just been rung or ask jurors to kindly, if at all possible, pretend they hadn't heard the bell. In either case, because of the court's erroneous evidentiary ruling, he was prejudiced. That is defendant's point: The court's error placed him in a no-win situation, between a rock and a hard place.

Jurors were not instructed to confine their deliberations to the Big-Apple robbery. They were not instructed that they must unanimously agree on *either* robbery #1 *or* robbery#2. They were not instructed that – even were it cognitively do-able – they could consider the 7-Eleven robbery only

for “identity” purposes. They were not instructed that they were forbidden from drawing the propensity inference. They were left to convict defendant as a scapegoat for the scourge of robberies of Lewiston convenience stores.

Second Assignment of Error

II. The court committed multiple errors necessitating resentencing.

The State has rightly conceded that the court erred by docking defendant for a lack of acceptance of responsibility. Red Br. 22-23. As it agrees, the remedy is resentencing. *Id.*

Defendant also argued that the court erred setting a basic sentence in the "moderate" range. Blue Br. at 39, 42-43. For good reason – below, the State advocated for a basic sentence 50% less than the top of the range chosen by the court, *see State's Sentencing Memorandum* at 2 – the State's brief contains no argument to the contrary. This point is therefore conceded, also. *See United States v. Walker*, 918 F.3d 1134, 1152-54 (10th Cir. 2019) (deeming government-appellant's unbriefed argument about substantive reasonableness of sentence to be waived). The Court shall mandate that, upon resentencing, the court recalibrate its basic sentence to that of a low-range robbery – five years less than it identified.

Defendant does not doubt that the court was within its right to penalize him for conduct he committed because of his addiction. He contends, rather, that the court cannot punish him for being an addict. Blue Br. 41-42. Our facts indicate both of these things happened. Indeed, the State seems to agree that the court increased defendant's sentence because of his "struggle with addiction." Red Br. 24. That is unconstitutional (and therefore also a misapplication of principle). *See Gregg v. Georgia*, 428 U.S. 153, 172 (1976) ("[I]t is 'cruel and unusual' to impose any punishment at all for the mere

status of addiction."); *cf. State v. Scarpati*, 2023 Ariz. App. Unpub. LEXIS 849 ** 30-32, 2023 WL 6475926 ** 10-11 (Ariz. Ct. App. 2023) (vacating sentence because court aggravated sentence because of the defendant's addiction).

Remand for all three sentencing maladies is appropriate.

CONCLUSION

For the foregoing reasons and those in the Blue Brief, this Court should vacate defendant's convictions, or, in the alternative, vacate defendant's sentence, then remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

April 22, 2026

/s/ Rory A. McNamara

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CERTIFICATES OF FILING & SERVICE

I have filed this brief, and served opposing counsel, as listed on the service list, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara