

SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Yor-26-12, SRP-26-11

STATE OF MAINE
Appellee

v.

PHILIP A. FRYMAN
Appellant

ON APPEAL from the York County Unified Criminal Docket

APPELLANT'S BRIEF

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Statement of the Case

Following four days of trial proceedings, the jury found the defendant, Philip Fryman, guilty of six counts of gross sexual assault and one count of unlawful sexual contact.¹ The court (Moskowitz, J.), principally sentenced Philip to 25 years' prison, all but 18 years suspended, followed by six years of probation. (A: 30-31).

I. The State's case

A. The family dynamic

Philip and Tiffani [REDACTED] were married in 2005. (1Tr. 83).² At the time, Tiffani had three children: T.S., T.N. and [REDACTED]. (1Tr. 83). T.S. was born in May 1999 and T.N. was born in June 1997. (1Tr. 83). The family lived for "about a year" in Sanford, Maine. (1Tr. 86, 155). Then, in July 2010, they moved to North Berwick, Maine. (1Tr. 86).

In 2010 and 2011, Tiffani was working and going to nursing school. (1Tr. 86-88). She was away from home a lot. (1Tr. 90-91). Philip

¹ Counts 2, 3, 20, and 21 alleged a violation of 17-A M.R.S. § 253(1)(B) (Class A). Counts 19 and 31 alleged a violation of 17-A M.R.S. § 253(2)(H) (Class B). Count 32 alleges no violation of Maine law. (A: 38, 42, 43, 45).

² Proceedings on May 27, 2025 are designated "1Tr." May 28, 2025 is "2Tr." May 29, 2025 is "3Tr." May 30, 2025 is "4Tr."

homeschooled the children. (1Tr. 93-94). Grandparents were frequent, unannounced visitors. (1Tr. 155-56; 2Tr. 212).

The family often went to church. (1Tr. 91). The children were free to go out; they had friends; they had Sunday school teachers; and they went to summer camp for a week. (2Tr. 52-54).

If something was going on in the house that was troublesome to the children, Tiffani expected that they would tell her. (1Tr. 147). Tiffani never discouraged the children from telling her anything, especially if they were being physically harmed. (1Tr. 147, 168-69). The children went to doctor's appointments, and Tiffani never received a report of suspected maltreatment or abuse. (1Tr. 170-71).

Tiffani, being a nursing student, was trained to recognize signs of sexual abuse, saw "absolutely nothing" to indicate that T.S. and T.N. were being sexually abused. (1Tr. 164-66). Tiffani never saw the girls shying away from Philip. (1Tr. 172). Tiffani thought that T.S. was a "typical teenager," although in 2017, years after the alleged abuse, she started having "a little more attitude" and had become "mean." (1Tr. 139, 2Tr. 34).

The abuse alleged in the indictment occurred in 2010 and 2011, and in those years T.S. and T.N. were about 10 and 12 years old, respectively. (A: 33). T.S. and T.N. first reported the abuse to Tiffani in August 2018, and at that time, they were both adults.

B. August 2018

About a week before T.S. accused Philip of sexually abusing her, T.N. saw that T.S. was on a video chat with “some guy.” (2Tr. 18-19). Philip and Tiffani grounded T.S. from using her phone. (2Tr. 20). T.S. had been video-chatting with a boyfriend “for multiple months.” (2Tr. 124). T.S. sent inappropriate pictures to this man. (2Tr. 188).

In August 2018, Tiffani received an e-mail confirming the receipt of a bus ticket. (1Tr. 95, 97). Tiffani asked T.S. about it. (1Tr. 100-01). T.S. confessed that she purchased the ticket, and she said that she planned to move to Buffalo, New York, with her boyfriend. (*See e.g.* 2Tr. 30, 179). Tiffani was unaware that T.S. even had a boyfriend, or that she knew anyone in New York. (2Tr. 25-26).

Confronted with the bus ticket, T.S. began acting “odd” and “bizarre.” (2Tr. 39). T.S. claimed that Philip told her she had to leave, but that was untrue; Philip said that T.S. needed to be more respectful,

and Tiffani agreed with that sentiment. (2Tr. 37). T.S. pointed her finger at Philip and said, “You’ve never been a father to me.” (2Tr. 39). T.S. declared, “I don’t care what you say, I’m going to get on that bus and leave for Buffalo no matter what....I’m leaving on Saturday.” (2Tr. 40). Philip left the room. (2Tr. 42).

After Philip left, T.S. brought up other grievances. (2Tr. 42). She complained that “way back when,” her parents blamed her brother for breaking a chair when, in fact, T.S. and T.N. broke the chair. (Tr. 42). T.S. said that Philip was mean. (2Tr. 43). T.S. (who was 19 years old at the time) said that Philip promised to get her “the best Barbie doll that there was for her birthday” and he never did. (2Tr. 43). T.S. was upset; she was wringing a towel, red faced, stomping her foot, and it looked like she might have a stroke. (2Tr. 41, 200-01). T.S. said that Philip is “mean when you’re gone,” and Tiffani said that was probably because “you guys do stuff that you’re not supposed to be doing.” (1Tr. 104). Nothing about T.S.’s behavior made sense to Tiffani. (1Tr. 105). T.S. said, “Do you know [he’s] having sex with us? Well, do you?” (1Tr. 105).

Tiffani left to find Philip, who was outside. (1Tr. 105). When she returned to the house, T.S. was in her room shoving clothes in a bag.

(1Tr. 130). T.S. declared, “I’m packing this bag, and I’m going.” (1Tr. 130). Philip likewise came into the house, collected his own belongings, and left. (1Tr. 131).

Tiffani packed T.S. into the car and drove to T.N.’s workplace. (1Tr. 131). T.N. told Tiffani that Philip had sexually assaulted her, also. (3Tr. 25). Days later, T.S. left for Buffalo. (2Tr. 48). T.S. was an adult, so Tiffani had no authority to prevent her from leaving. (2Tr. 49).

C. T.S.

1. According to T.S., Philip first abused her around the time she started puberty in May 2010. (1Tr. 127-28; *see also* 2Tr. 174; 3Tr. 6). Philip told, T.S., “your Mom told me you were having some problems and that you were just hurting. I’m going to make it better....” (2Tr. 128). Philip touched T.S.’s breasts under her clothing. (1Tr. 155).

2. A different time, Philip called T.S. to come to his bedroom; she was in the kitchen. (2Tr. 156). Philip told T.S. to lay down on the bed, and he touched her vagina with his fingers before penetrating her vagina with his penis. (2Tr. 156).

3. A different time, Philip “fingered” T.S. with “lube” in her anus and vagina, before penetrating her anus with his penis. (2Tr. 158-59).

4. A different time, Philip bent T.S. over the bed in the master bedroom and penetrated her vagina with his penis. (2Tr. 160). Philip “finished” in an article of clothing near the bed. (2Tr. 160).

5. T.S. testified that there were “multiple [other] occasions” where Philip would touch her vagina under clothing. (2Tr. 171).

6. One time, when Philip touched T.S.’s vagina, he started touching himself under his clothes, as well. (2Tr. 171).

According to T.S., Philip told her not tell anyone what was happening. (2Tr. 160-61). T.S. never told Tiffani about what was happening because she did not want to upset her mother or disrupt the household. (2Tr. 160-61, 183).

D. T.N.

1. According to T.N., the first time, Philip came into her bedroom, woke her up, and told her to come downstairs. (3Tr. 28). Philip told her to undress, told her it would hurt, and then he inserted his penis into T.N.’s vagina. (3Tr. 28). This happened in Sanford, Maine. (3Tr. 27, 30).

2. Another time, Philip taught T.N. how to kiss. (3Tr. 31). After that, Philip made T.N. undress, and then Philip inserted his penis into

T.N.'s vagina. (3Tr. 33-34). This happened in Sanford, Maine. (3Tr. 30, 43).

3. On a different occasion, Philip told T.N. to come to the bathroom, where he forced T.N. to touch his penis with her mouth. (3Tr. 44-46). T.N. was "probably like 13, 14, maybe" when that happened. (3Tr. 45). The lights were off but the flashlight on Philip's phone was on. (3Tr. 45).

4. Another time, when the family was living in North Berwick, Philip told both T.S. and T.N. to come into the master bedroom, and he told them to undress. (3Tr. 47-50). Philip penetrated T.N.'s vagina with his penis while he kissed T.S. (3Tr. 50-51).

5. Another time, when the family lived in North Berwick, Philip came into the bedroom that T.S. shared with T.N. (2Tr. 162). T.N. was sleeping. (2Tr. 162). T.S. watched as Philip touched T.N.'s butt and vagina with his hands before penetrating T.N.'s vagina with his penis. (2Tr. 163). T.N. did not move; T.S. assumed that T.N. was asleep. (2Tr. 163). T.S. pretended to be asleep herself. (2Tr. 163).

II. The defense case

The defense emphasized the lack of any corroborating physical evidence;³ the lack of any contemporaneous reporting of abuse to anyone; T.S.'s apparent need for a justification to leave home and move to Buffalo with her boyfriend; the frequent unannounced visits to the home by the grandparents; the implausibility of vaginal penetration without awakening; and Tiffani's testimony that despite her medical training, she never saw any indication that either girl was abused, all discussed *supra*.

Philip will develop additional facts, as necessary, within each assignment of error.

³ Tiffani testified that she never observed semen stains on the girls' clothing or on the bedsheets. (2Tr. 56-57). T.S. testified that when Philip used condoms, he disposed of them in the wastebasket in the bedroom he shared with Tiffani. (2Tr. 223). Tiffani never saw any used condoms around the house. (2Tr. 57-58).

Argument Summary

1. Count 32 simultaneously alleges that Philip subjected T.S. to sexual contact before her twelfth birthday and on her twelfth birthday, and therefore, it fails to allege a violation of Maine law. The age of twelve distinguishes 17-A M.R.S. § 255-A(E-1) (less than 12 years of age) and 17-A M.R.S. § 255-A(E) (less than 14 years of age). The defect is jurisdictional in nature. Because the charge fails to allege a violation of 17-A M.R.S. § 255-A(E-1), the trial court lacked jurisdiction to enter a conviction for 17-A M.R.S. § 255-A(E-1).

2. Count 3 alleges that Philip engaged in a sexual act with T.N. before her fourteenth birthday. T.N. testified that the abuse happened when she was “13, 14, maybe.” The evidence is in equipoise, and equipoise is tantamount to reasonable doubt. Count 3 violates the due process guarantee of legally sufficient proof.

3. Count 31 alleges that Philip was the step-parent of T.S. and responsible for her long-term care, and that he engaged in a sexual act with her before her eighteenth birthday in North Berwick. Count 20 alleges that Philip engaged in a sexual act with T.S. before her fourteenth birthday, during the same time and in the same location as Count 31.

The State never specified whether the grand jury's factual basis for Count 31 was different than Count 20, or whether Count 31 was an alternative way of proving Count 20. Merger is required to avoid a double jeopardy violation.

4. Counts 2, 3, 20, and 21 violate the Due Process Clause's fair notice guarantee. Counts 2 and 3, and Counts 20 and 21, are identically worded and there is no way to differentiate between them. They track the statutory language but otherwise fail to describe the act in question. Vacatur is the remedy.

5. Counts 2, 19, 20, 31, and 32 violate the Due Process and Double Jeopardy Clauses. Neither the indictment nor the amended bill of particulars describes the *actus reus* with specificity. The State presented evidence of at least two sexual acts that could have formed the basis for each of those charges. The factual basis for the jury's verdict is not discernable on this record. The Due Process and Double Jeopardy Clauses do not countenance such ambiguity. Vacatur is required.

6. The trial court admitted copious amounts of other-act evidence because it believed that the State was "entitled" to its introduction. This was wrong as a matter of law and the court erred by

abdicating its gatekeeper role. Other-act evidence was not relevant to any of Rule 404(b)'s permissible purposes or necessary, and it was unduly prejudicial. Had the trial court adhered to its pretrial ruling excluding other-act evidence, double jeopardy problems would not have occurred. Vacatur of all counts, with a remand for further proceedings is necessary.

7. The sentencing calculus punished Philip for politely disagreeing with the jury's verdict. Courts may not punish people for lawfully exercising First Amendment rights. Resentencing is required.

Each argument is presented in the alternative.

Count 2	Fourth, Fifth, Sixth Assignments of Error
Count 3	Second, Fourth, Sixth Assignments of Error
Count 19	Fifth, Sixth Assignments of Error
Count 20	Fourth, Fifth, Sixth Assignments of Error
Count 21	Fourth, Sixth Assignments of Error
Count 31	Third, Fourth, Fifth, Sixth Assignments of Error
Count 32	First, Fifth, Sixth Assignments of Error

First Assignment of Error

Count 32 is jurisdictionally defective.⁴

Argument

May 29, 2011 was T.S.'s twelfth birthday. Count 32 alleges:

On or between May 29, 2010 and May [REDACTED], 2011, in North Berwick, YORK County, Maine, PHILIP A. FRYMAN, being at least three years older than T.S., dob [REDACTED]/1999, not his spouse, did intentionally subject T.S., dob [REDACTED]/1999, who was in fact **less than 12 years of age**, to sexual contact.

A: 45; emphasis added. The age of twelve differentiates 17-A M.R.S. § 255-A(1)(E) (victim less than 14) and 17-A M.R.S. § 255-A(1)(E-1) (victim less than 12). On [REDACTED], 2011, T.S. was not “less than 12 years of age.” The charge, on its face, fails to state a violation of Maine law.

T.S.'s birthday is not a disputed fact; it is a fact that the grand jury determined. *State v. Strong*, 2013 ME 21, ¶ 12, 60 A.3d 1286 (an indictment is subject to dismissal only if the materials facts are not in dispute). T.S.'s age is an essential element of the offense. *State v.*

⁴ A jurisdictional defect in an indictment may be raised for the first time on appeal. *Cf. State v. Levasseur*, 538 A.2d 764, 766 (Me. 1988). This court reviews jurisdictional issues de novo. *Cf. State v. Sloboda*, 2020 ME 103, ¶ 4, 237 A.3d 848.

Hodgdon, 2017 ME 122, ¶ 14, 164 A.3d 959; *State v. Westgate*, 2016 ME 145, ¶¶ 19, 23, 148 A.3d 716.

The statutory citation contained within the caption is inconsequential. A statutory citation captioned outside the body of the charge “is no part of the grand jury’s finding” and “will not ‘save’ an otherwise fatally defective indictment.” *State v. Pierce*, 438 A.2d 247, 254 (Me. 1981).

“[A]n indictment is subject to dismissal for failure to state an offense only when the facts alleged on its face fail to make out an offense against the State, ‘which strips the court of jurisdiction to try the accused.’” *Strong*, 2013 ME 21, ¶ 12 (quoting *State v. Storer*, 583 A.2d 1016, 1020-21 (Me. 1990)); *see also* *See e.g.* Me. Const. Art. I, § 7 (“No person shall be held to answer for...[an] infamous crime, unless on a presentment or indictment of a grand jury....”).

Because Count 32 fails on its face to allege a violation of 17-A M.R.S. § 255-A(1)(E-1) (victim under 12), the trial court lacked jurisdiction to enter a conviction for 17-A M.R.S. § 255-A(1)(E-1). The remedy is to vacate the conviction on Count 32.

Second Assignment of Error

The State failed to prove Count 3.⁵

Argument

Count 3 alleges gross sexual assault involving T.N., “who had not in fact attained the age of 14 years.” (A: 38). This allegation concerns “genital to mouth” contact. (A: 171). T.N. testified about one such incident. *See* Stmt. of the Case, Section D, part 3; 3Tr. 44-46. T.N. said she was “probably, like 13, 14, maybe” when that happened. (3Tr. 45).

Age is a material element of gross sexual assault. *State v. Standring*, 2008 ME 188, ¶ 13, 960 A.2d 1210. The Due Process Clause requires the State to prove every material element beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320-21 (1979). Drawing all reasonable inferences in favor of the verdict, if the evidence “gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction.”

⁵ Philip preserved this issue by moving for a judgment of acquittal. (3Tr. 87, 90). The court denied the motion. (A: 48-49). “[N]o matter what standard of review we apply, if the evidence is not sufficient to allow a fact-finder to rationally find the defendant’s guilt beyond a reasonable doubt, then the resulting conviction cannot be deemed free of reversible error.” *State v. Kendall*, 2016 ME 147, ¶ 13, 148 A.3d 1230.

O’Laughlin v. O’Brien, 568 F.3d 287, 301 (1st Cir. 2009) (quoting *United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995)).

Accepting T.N.’s testimony as true, T.N.’s age at the time in question – before or after her fourteenth birthday – is in equipoise. T.N. could not be more specific, and nothing else in the record elucidates.⁶ The State failed to prove beyond a reasonable doubt that the conduct alleged in Count 3 occurred before her fourteenth birthday. The trial court erred by denying Philip’s motion for judgment of acquittal on that charge.

⁶ Count 3 alleged that the conduct occurred in Sanford, on or about “January 1, 2010 to July 1, 2010.” (A: 38). The prosecutor testified that the conduct in question occurred in Sanford, but T.N. never said that. (3Tr. 44). At any rate, T.N. said she lived in Sanford from “2010 to about 2012.” (3Tr. 64). T.N. turned 14 years old in 2011.

Third Assignment of Error

Count 31 merges with Count 20.⁷

Argument

Count 20 alleges a violation of 17-A M.R.S. § 253(1)(B) (victim under 14) (Class A) through “genital to genital contact.” (A: 42, 171). Count 31 alleges a violation of 17-A M.R.S. § 253(2)(H) (family member, under 18) (Class B) through “genital to genital contact.” (A: 45, 171).

Counts 20 and 31 concern the same location, time, and generic conduct. (A: 42, 45, 171). During the relevant time, Philip was T.S.’s step-father and T.S. was under 14 years old. (Tr. 1Tr. 121, 145). Count 31 could be intended to capture conduct that Count 20 does not. Or Count 31 could be intended as an alternative means for proving Count 20.⁸

Rule 7(c) of the Maine Rules of Criminal Procedure permits the State to charge multiple counts “as alternative charges for the same criminal act.” *Robinson*, 1999 ME 86, ¶ 12. But convicting a defendant

⁷ Despite no objection, the error “must be seen as obvious error” and corrected. *State v. Armstrong*, 2019 ME 117, ¶ 25, 212 A.3d 856; *see also State v. Robinson*, 1999 ME 86, ¶ 14, 730 A.2d 684.

⁸ The facts found by the grand jury pertaining to either Count 20 or 31 are unknown.

of multiple crimes for the same criminal act violates double jeopardy. *State v. Murphy*, 2015 ME 62, ¶¶ 27-28, 124 A.3d 647. Ambiguity over the factual basis for a criminal conviction also violates double jeopardy and necessitates action. *See generally United States v. Stefanidakis*, 678 F.3d 96, 100 (1st Cir. 2012) (We find no double jeopardy violation if “the record contains facts sufficient to supply a rational basis for finding that [separate convictions] were predicated on different conduct.”); *State v. Paquin*, 2020 ME 53, ¶ 27, 230 A.3d 17 (“[T]he jury might have found that separate incidents formed the basis of its verdicts on Counts 5 and 30, [but] we cannot know that, and will not assume it.”).

When “the State presents its alternative counts based on one criminal act, court action to consolidate the duplicative counts is appropriate to assure that a person cannot be convicted or punished more than once for the same criminal act.” *Murphy*, 2015 ME 62, ¶ 28 (internal citation omitted). The remedy is to remand the case so the trial court may select an operative count (Count 20), merge the alternative count (Count 31), and enter a final sentence on the merged charge. *Id.* at ¶ 28.

Fourth Assignment of Error

Counts 2, 19, 20, and 31 violate the Due Process Clause’s fair notice guarantee. Vacatur is required.

I. Preservation and standard of review⁹

A. Preservation

1. **Necessary context.** New Hampshire and Maine separately charged Philip with abusing T.S. and T.N. (*See e.g.* 1/9/23 Tr. 152). When the Maine case struggled to launch, New Hampshire commenced its prosecution, but that, too, was beset with problems, mentioned *infra*.

2. **The charges are “just blurred in each other.”** Over three years before the trial began, Philip cautioned that the charges are “just blurred in each other.” (5/16/22 Tr. 5).

3. **Mistrials declared after other-acts testimony.** In January 2023, the trial court declared a mistrial after Tiffani testified that “multi-states” were investigating the allegations of abuse. (1/9/23 Tr. 151; 1/10/23 Tr. 17). Subsequently, a court in New Hampshire twice declared mistrials because the witnesses either testified about uncharged

⁹ This preservation section applies to the Fourth, Fifth, and Sixth Assignments of Error.

conduct allegedly occurring in New Hampshire, or that charges were pending in Maine. (A: 59, 113-14).

4. The court ordered the State to elect conduct corresponding to each charge. On May 12, 2025, the State dismissed 25 counts of criminal activity, leaving seven for trial. (A: 53-55). Philip requested a bill of particulars for the six counts of gross sexual assault. (A: 72). The trial court assented. (A: 72). The court ordered: “I want [the prosecution] to provide a bill of particulars reciting...a specific act that you’re alleging with respect to each of those six charges.” (A: 73).

5. The court ruled that other-acts evidence was inadmissible, and it cautioned the State against “shenanigans.” Also on May 12, 2025, the trial court denied the State’s motion in limine to admit “evidence of sexual assaults that occurred outside” Maine. (A: 63, 126-32). The State observed that “[t]he last times that this has been brought to trial, either here or in New Hampshire, there has been unfortunate mention of the fact that another jurisdiction was proceeding against the Philip for similar behavior. And it has caused mistrials, admittedly.” (A: 55). The State explained that its motion in limine was intended to address “what happens if this happens again.” (A: 56). The

State argued that “if one of the victims were to reference...the events that ...occurred outside of the State,” then the remedy would be “a limiting instruction as opposed to declaring a mistrial.” (A: 56).

Philip responded that the introduction of other-act evidence must be preceded by “proof” and “a hearing” pursuant to M. R. Evid. 104(b), so that the court could fulfill its “gatekeeper” role. (A: 57). Philip reminded the court that as part of that hearing, it would have to evaluate whether the other-act evidence satisfied the strictures of Rules 404(b) and 403 of the Maine Rules of Evidence. (A: 58).

The court ruled that Rule 404(b)’s permissive purposes – motive, plan, absence of mistake, opportunity, relationship and/or intent – were *not* at play. (A: 62-63). Lack of mistake was evident from the number of charges; gross sexual assault had “no mental state,” and motive and plan were something that the State could argue without other-acts evidence. (A: 62-63). The court ruled: “I don’t find that the State’s motion in limine is at all persuasive, and I’ll deny the motion.” (A: 63). The court admonished that it would not “countenance any shenanigans” by the State; it would not “tolerate” any mention of out-of-state charges or

allegations; and that “if it happens again,” the court would likely declare “a mistrial with a dismissal with prejudice.” (A: 63).

6. The State’s bill of particulars failed to quell double-jeopardy concerns, and the court ordered it to file a new one. The parties were back in court on May 21, 2025, because the State filed a non-compliant bill of particulars. (A: 79). The court told the State that “what you filed really wasn’t helpful [and] didn’t assist at all in trying to pinpoint what the alleged sexual act is with respect to those...six counts [of gross sexual assault].” (A: 79).

Philip reiterated that “the purpose [of] the bill of particulars...is to avoid double jeopardy, create unanimity, and avoid surprise.” (A: 80). Philip noted that even with the bill of particulars, “I don’t know how a jury’s going to determine what act was committed when and to determine unanimity.” (A: 81). Philip pleaded, again: “[U]nless we get more specificity, I think we’re really going to have problems with determining double jeopardy.” (A: 82). The court agreed. (A: 82)

The court added that it would give “a unanimity instruction for sure,” but also that the State must “be able to specifically allege what the specific sexual act is with respect to the six counts involving gross sexual

assault.” (A: 82-83). The court reiterated: “I am going to require the State, which it should have been done, to name the specific sexual acts that the State is alleging with respect to [the gross sexual assault charges.]. That shouldn’t be hard for the State to do.” (A: 83). The court commanded:

[T]he statements that were made by the two alleged victims sometimes referenced a number of different kinds of sexual acts, *two or sometimes maybe even three, during a period of time.*

So the State’s going to have to select a sexual act that it intends to proceed on with respect to these six charges of gross sexual assault.

(A: 84; emphasis added).

Philip emphasized that without a proper election by the State, no one would have any idea what qualified as “uncharged conduct,” meaning, other-act evidence. (A: 84-85). This was so, “because all of these counts mimic each other” and, referring to the dismissed counts, Philip added, “I can’t tell the difference between what exists and what doesn’t exist any longer.” (A: 85). Again, Philip warned, the situation “not only creates double jeopardy; it creates the problem we’re trying to

avoid,” *i.e.* testimony about other-act evidence, which the court specifically prohibited. (A: 85).

The court likewise observed that in the discovery, the alleged victims “reference a number of different sexual acts during [the] time period [identified in the indictment].” (A: 86-87). The court ordered: “[T]he State is able to specify the specific sexual acts with respect to those six counts, and I’m going to require the State to do that. There’s no reason why it can’t do that.” (A: 87). And for the umpteenth time, the State was told that it must elect to avoid “the problem of potential double jeopardy.” (A: 87). The court explained:

[T]he State takes some risks when it charges these kinds of sexual crimes in a very broad way without identifying specific sexual acts, especially when you have a number of charges...because there is no real understanding among anybody as to what the State is talking about with respect to a particular count and what behavior is alleged.

(A: 87-88). The court told the State that if it failed to do as ordered, it would “dismiss this matter with prejudice.” (A: 88).

7. The State’s second bill of particulars. On May 22, 2025, the State filed an amended bill of particulars, (A: 171), which, as

explained below, did nothing to address the trial court's concerns and only made matters worse. Trial commenced three days later.

8. Mid-trial, the court permitted the State to introduce other-act evidence, believing that the State was “entitled” to admit such evidence. Soon after T.S. began testifying, Philip moved for a mistrial. (A: 93). Philip said the State was “introducing acts that aren’t charged” and it reminded the court, “[w]e litigated this is the motion in limine.” (A: 94). Philip implored, “I am unprepared to defend against these other allegations that are being made.” (A: 98).

The court said, repeatedly, that the State was “entitled” “to elicit evidence at trial that is not necessarily charged in the indictment.” (A: 100, 102, 103, 104). Reversing itself, the court reasoned that “the known 404(b) reasons,” *e.g.* “lack of mistake, relationship with the parties, opportunity and motive...those kinds of things,” *supported* the admission of uncharged conduct that occurred in Maine. (A: 103, 104-05, 109).

Philip countered that nothing was automatically admissible under Rule 404(b), and it reminded the court of its “gatekeepers’ function.” (A: 106, 114). Philip also reminded the court of its previous ruling:

I can’t see how 404(b) is relevant because of the bill of particulars. ... [T]hat was specifically made so that there

would be no mention of uncharged conduct. ... And [the court was] very clear. I'm not going to have this mischief again, where they're saying things that are not charged and give them a bill of particulars specifying the dates in which they're going to limit the testimony. ... [A]nd that's what I understood coming in, that there were limited to the bill of particulars...that the testimony would be framed by these bill of particulars.

(A: 107). Philip implored, "I'm really knocked on my rear end here, frankly." (A: 117). The court replied, "Yeah." (A: 117).

B. Standard of review

Whether Philip's right to fair notice was violated is a question of law, which this Court will review de novo. *See generally State v. Sylvain*, 200 ME 5, ¶ 10, 814 A.2d 984 (constitutional questions reviewed de novo).

II. The legal framework

Criminal indictments provide fair notice and protection against double jeopardy. *Russell v. United States*, 369 U.S. 749, 763 (1962); *State v. Pierce*, 438 A.2d 247, 250 (Me. 1981). An indictment satisfies the fair notice guarantee if it "sufficiently apprises the defendant of what he must be prepared to meet." *Russell*, 369 U.S. at 763 (cleaned up); *Pierce*, 438 A.2d at 250 (The test is "whether an accused of reasonable and normal intelligence would, by the language of the indictment, be adequately

informed of the crime charged and the nature thereof, so that he could properly prepare his defense to the accusation....”). An indictment protects against double-jeopardy if “the record shows with accuracy to what extent he may plead a former acquittal or conviction.” *Russell*, 369 U.S. at 764; *Pierce*, 348 A.2d at 250 (The indictment must protect the accused “against a subsequent prosecution for the same cause.”).

The concepts are mutually exclusive; an indictment may guard against double-jeopardy, but fail to provide adequate notice, and vice versa. *Russell*, 369 U.S. at 764. This claim of error concerns the fair notice guarantee; the next addresses double-jeopardy.

A. An indictment must “descend to the particulars”

The Sixth Amendment’s fair notice guarantee is incorporated against the States. *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005) (Collecting cases and observing: “While the federal right to a grand jury indictment has never been found to be incorporated against the states, courts have found that the due process rights enunciated in *Russell* are required not only in federal indictments but also in state criminal charges.”); *Pierce*, 438 A.2d at 255 (recognizing *Russell*’s application in Maine).

“It is an elementary principle of criminal pleading”¹⁰ that the indictment “must state the specifics – it must descend to particulars.” *Russell*, 369 U.S. at 765; *United States v. Cruikshank*, 92 U.S. 542, 558 (1875); *Pierce*, 438 A.2d at 251 (indictment sufficient because it “did provide some particulars” of the act alleged); *See Valentine*, 395 F.3d at 638 (“After an extensive search, we cannot find one court that has actually considered the issue and upheld the use of multiple identically-worded and factually-indistinguishable counts”).

A “cryptic” indictment, which fails to apprise the accused “with reasonable certainty, of the nature of the accusation against him,”

¹⁰ “[T]hese principles have been well-established for some time.” *Valentine*, 395 F.3d at 631 n. 1. Obviously, these constitutional requirements do not disappear in child sexual assault cases. While it is true that *some* very young child sexual assault victims may “have only a limited perception of time and limited faculties to define specific dates and times of the traumatic sexual abuse they endured,” it is often possible for the child to describe “different locations (bedroom, living room, parents’ room, siblings’ room), different sexual actions (fellatio, vaginal penetration, anal penetration), different times of day (early morning, after school, in the middle of the night),” etcetera, as a way to differentiate events and charges. *Id.* at 632, 633-34; *see e.g. State v. West*, 504 A.2d 622, 624 (Me. 1986) (an indictment that tracked the statutory language of attempt and unlawful sexual conduct, and which described the overt act as “rubbing the victim’s bottom in a sexual manner,” adequately informed the defendant of the crime charged and the nature thereof). T.S. and T.N. had no difficulty with differentiation.

“requires the defendant to go to trial with the chief issue undefined” and “enables his conviction to rest on one point and the affirmance of the conviction to rest on another.” *Russell*, 369 U.S. at 766. This erroneously “gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.” *Id.* at 766. It impermissibly leaves “the prosecution free roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.” *Id.* at 768. The Due Process Clause does not abide such “uncertainty and unfairness.” *Id.* at 766.

Even if a single criminal charge complies with fair-notice requirements, when there are “no distinctions made” between charges, in a multi-count indictment, and no “attempt to lay out the factual bases of [the multiple] separate incidents that [allegedly] took place,” serious due process problems arise. *Valentine*, 395 F.3d at 632-33.

One, it becomes “incredibly difficult for the jury to consider each count on its own,” when “the criminal counts [are] not connected to distinguishable incidents.” *Id.* at 633.

Two, when multiple criminal counts are “not anchored” to “distinguishable criminal offenses,” the defendant has “little ability to

defend himself.” *Id.* at 633. In such a situation, the defendant cannot defend against any particular charge; rather, he must assert his innocence as to all the charges. *Id.* at 633-34.¹¹ See e.g. *United States v. Bortnovsky*, 820 F.2d 572, 574-575 (2d Cir. 1987) (Defendants were charged with submitting false insurance claims for burglary losses when no burglary occurred; the court agreed that “without specifically being informed of the dates of the phony burglaries and the identity of the false documents, either in the indictment or the bill of particulars, [defendants] were unable to prepare adequately for trial and, in fact, were forced to establish their innocence by proving that eight of the burglaries put before the jury...actually occurred.”).

B. Tracking the statutory language is not always enough.

An indictment can fail to provide fair notice even though “it may follow the language of the statute.” *Russell*, 369 U.S. at 765 (quoting *United States v. Simmons*, 96 U.S. 360, 362 (1877)). An indictment that employs statutory language “may be used in the general description of an

¹¹ Obviously, a jury unanimity instruction is no panacea. The point of the fair-notice requirement is to enable a defendant to meet the charges *before* the jury retires to deliberate.

offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.” *Id.* at 765 (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)).¹² Again, these are “basic principles of fundamental fairness.” *Id.* at 765-66.

C. Neither discovery nor a bill of particulars can save a defective indictment.

It is true that “[o]ne purpose of a bill of particulars is to help a defendant prepare an adequate defense by narrowing the scope of the State’s proof.” *State v. Walker*, 506 A.2d 1143, 1147 (Me. 1986). Likewise, discovery can inform the nature of the charge. *State v. Flynn*, 2015 ME

¹² In *State v. Saucier*, 421 A.2d 57, 58 (Me. 1980), this Court instructed that “[a]n indictment that charges in the language of the statute is sufficient *if* it adequately provides a defendant of reasonable and normal intelligence with a clear identification of the crime and conduct charged.” (Emphasis added). *Saucier* creates no bright-line rule that statutory language will *always* provide adequate notice. *Pierce*, 438 A.2d at 255, confirms that the opposite is true: “Undoubtedly, the language of a statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.” *See also State v. Tracy*, 400 A.2d 758, 759 (Me. 1979) (“statutory language [may] be used in criminal pleadings provided that sufficient additional facts are alleged to apprise the accused adequately of the criminal act charged.”)

149, ¶ 28, 127 A.3d 1239. But it is also true that “[t]he availability of a bill of particulars or the feasibility of discovery...will not ‘save’ a fatally defective indictment.” *Pierce*, 438 A.2d at 256; *Russell*, 369 U.S. at 770 (collecting cases demonstrating that it is a “settled rule that a bill of particulars cannot save an invalid indictment.”).

“To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure.” *Russell*, 369 U.S. at 770; *Paquin*, 2020 ME 53, ¶ 27 (refusing to assume what the grand jury found). “For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.” *Id.* at 770; *see also* Me. Const. Art. I, § 7 (guarantee of grand jury presentment). This concern is acute in Maine, where criminal defendants have no broad right to access transcripts of grand jury proceedings and no way to verify that a prosecutor’s *post hoc* election is faithful to the grand jury’s findings. *State v. Moore*, 2023 ME 18, ¶ 16, 290 A.3d 533.

III. Application

Counts 2 and 3 of the indictment are identically worded.¹³ (A: 38). They track the statutory language, but neither is “accompanied with a statement of the facts and circumstances [necessary] to inform defendant of the specific offense.” *Russell*, 369 U.S. at 765 (quoting *Hess*, 124 U.S. at 487). They do not “descend to particulars.” *Id.* at 765. Counts 2 and 3 offend the Due Process Clause’s fair notice guarantee. Vacatur is required.

Same for Counts 20 and 21, which are also identically worded.¹⁴ (A: 42-43). They track the statutory language but fail to descend to particulars. Counts 20 and 21 also offend the Due Process Clause’s fair notice guarantee. Vacatur is required.

¹³ They provide: “On or between January 01, 2010 and July 01, 2010, in Sanford, YORK County, Maine, PHILIP A. FRYMAN, did engage in a sexual act with T.S., dob. [REDACTED]/1997, not his spouse, who had not in fact attained the age of 14 years.” (A: 38).

¹⁴ They provide: “On or between July 01, 2010 and July 31, 2011, in North Berwick, YORK County, Maine, PHILIP A. FRYMAN, did engage in a sexual act with T.S., dob [REDACTED]/1999, not his spouse, who had in fact not attained the age of 14 years.” (A: 42-43).

Fifth Assignment of Error

Counts 2, 19, 20, 31, and 32 offend the Due Process and Double Jeopardy Clauses.¹⁵ Vacatur is required.

I. Standard of review

This Court will “review de novo whether a criminal prosecution violates the constitutional prohibitions against double jeopardy.” *State v. Hayward*, 2017 ME 33, ¶ 15, 156 A.3d 734 (cleaned up).

II. The legal framework

The Fifth Amendment’s requirement that criminal charges provide defendants with the ability to protect themselves from double jeopardy applies to the States through the Due Process Clause. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

In *Russell*, the Court found that the indictments, which alleged the defendants’ failure to answer questions before a congressional subcommittee, was specific enough to protect against double jeopardy. *Id.* at 764. Each individual charge “set out not only the times and places of the hearings at which the [defendants] refused to testify, but also

¹⁵ Philip makes no state constitutional argument. *Michigan v. Long*, 463 U.S. 1032, 1042-42 (1983).

specified the precise questions which they...refused to answer.” *Id.* at 764. Plus, the defendants “could rely upon other parts of the present record in the event that future proceedings should be taken against them.” *Id.* at 764; *State v. Gifford*, 595 A.2d 1049, 1052 (Me. 1991) (“An indictment will protect a defendant against further jeopardy if, read together with the evidence presented at trial and any parol evidence, it makes clear the offense for which the defendant has been placed on trial.”).

For example, in *Valentine*, 395 F.3d at 628, the defendant was charged with 20 “carbon-copy” counts of child rape, each of which was identically worded so that there was no differentiation among the charges, and 20 counts of felonious sexual penetration, each of which was also identically worded. The prosecution did not distinguish the factual basis of these charges in the indictment, in the bill of particulars, or even at trial. *Id.* The Sixth Circuit found a double jeopardy violation because it could not be sure “what factual incidents were...decided by [the] jury.” *Id.* at 635. “As the charges were not linked to differentiated incidents, there is resulting uncertainty as to what the trial jury actually found.” *Id.* at 636. The court held: “[I]f prosecutors seek multiple charges against

a defendant, they must link those multiple charges to multiple identifiable offenses. Due process requires this minimal step. Courts cannot uphold multiple convictions when they are unable to discern the evidence that supports each conviction.” *Id.* at 636-37.

III. Application

To illustrate, Count 3 alleges a generic violation, which tracks the statutory language but otherwise fails to “descend to particulars.” (A: 38). The State’s amended bill of particulars states that this charge contemplates “genital to mouth contact.”¹⁶ (A: 171). T.N. testified that on *one* occasion, Philip forced her to touch his penis with her mouth. *See* Stmt. of the Case, Section D, Part 3; 3Tr. 44-46 (bathroom; phone flashlight on). Count 3 protects Philip from double jeopardy (although it must be vacated for other reasons, *see* Stmt. of the Case, chart).¹⁷

¹⁶ For purposes of this assignment of error only, Philip assumes that the amended bill of particulars accurately reflects the grand jury’s findings and not the prosecutor’s post hoc imagined differentiation.

¹⁷ Likewise, Count 21 fails to “descend to particulars.” (A: 43). However, the amended bill of particulars says that Count 21 concerns “genital to anal” contact, (A: 171), and T.S. testified about *one* incident involving that conduct. *See* Stmt. of the Case, Section C, Part 3; 2Tr. 158-59). Thus, Count 21 likewise raises no double-jeopardy problems.

Count 2 is a different story. Count 2 tracks the statutory language but otherwise fails to “descend to particulars.” (A: 38). The amended bill of particulars says this charge contemplates “genital to genital contact.” (A: 171). T.N. testified about two incidents, in Sanford, during the time alleged in the indictment, that involved genital to genital contact. *See* Stmt. of the Case, Section D, Parts 1 and 2; 3Tr. 27-30 (describing one such incident); and 3Tr. 31-34, 43 (describing another such incident). The State never specified a factual basis for Count 2. The verdict sheet is no help. The factual basis for the jury’s verdict is unknown on this record.

Same with Count 19. Count 19 tracks the statutory language but fails to “descend to particulars.” (A: 42). The amended bill of particulars says this charge contemplates “genital to genital contact.” (A: 171). The jury heard about two incidents, in North Berwick, during the time alleged in the indictment, involving genital to genital contact. *See* Stmt. of the Case, Section D, Parts 4 and 5; 3Tr. 47-51 (describing one such incident); and 2Tr. 162-163 (describing another such incident). The State never specified a factual basis for Count 19. The verdict sheet is no help. The factual basis for the jury’s verdict is unknown on this record.

Counts 20 and 31 also track the statutory language, but neither “descends to particulars.”¹⁸ (A: 42, 45). The amended bill of particulars says that both Count 20 and Count 31 contemplate “genital to genital contact,” in North Berwick, during the same time period. (A: 171). T.S. testified to two incidents, in an unspecified location, and at an unspecified time, that involved Philip penetrating her vagina with his penis. *See* Stmt. of the Case, Section C, Parts 2 and 4; 2Tr. 155-56 (describing one such incident); and 2Tr. 160 (describing another). The State never specified a factual basis for Counts 20 or 31. The verdict sheet is no help. The factual basis for the jury’s verdicts is unknown on this record.

Count 32 uses statutory language but otherwise fails to “descend to particulars.” (A: 45). The amended bill of particulars says that Count 32 concerns “touching of her genitals.” (A: 171). T.S. testified about one incident, which occurred at an unspecified time and in an unspecified location, that involved Philip touching her genitals without penetration. *See* Stmt. of the Case, Section C, Part 6; 2Tr. 171. T.S. additionally

¹⁸ Again, it is unclear whether Count 31 is intended as an alternative means of proving Count 20. *See* Second Assignment of Error.

testified that there were “multiple [other] occasions” where Philip touched her vagina under clothing, as well. *See* Stmt. of the Case, Section C, part 5; 2Tr. 171. Under existing Maine caselaw, such “multiple occasions” testimony can itself independently support a criminal conviction. *State v. Reynolds*, 2018 ME 124, ¶¶ 24-25, 193 A.3d 168. In addition to the “multiple occasions” testimony, T.S. said that nearly every episode of penetration was preceded by Philip touching her vagina. *See* Stmt. of the Case, Section C, parts 2 and 3; 2Tr. 155-56 and 2Tr. 158-59. Any component of this testimony – *e.g.* testimony about a specific time when Philip touched her vagina, 2Tr. 171; testimony about “multiple [other] occasions,” 2Tr. 171; or testimony about genital touching that preceded vaginal or anal intercourse, 2Tr. 156, 2Tr. 158-59 – could have formed the factual basis for the conviction. The State never specified a factual basis for Count 32. The verdict sheet is unhelpful. The factual basis for their verdict is unknown on this record.

The due process and double jeopardy clauses do not tolerate any of this ambiguity. The proper remedy is to vacate these counts.

Sixth Assignment of Error

The trial court erred by admitting other-act evidence. The remedy is vacatur of all counts with a remand for further proceedings.

I. Standard of review

This Court will “review the trial court’s decision to admit evidence pursuant to Rule 404(b) for clear error and its determination pursuant to Rule 403 for an abuse of discretion.” *See e.g. State v. Pratt*, 2015 ME 167, ¶ 23, 130 A.3d 381. This Court has never said why different standards of review apply to two evidentiary rules; or what the difference is between “clear error” and “abuse of discretion” in this context. *See generally* Hon. Andrew M. Mead, *Abuse of Discretion: Maine’s Application of a Malleable Appellate Standard*, 57 Me. L. Rev. 519, 525 (2005) (The term “abuse of discretion” “is used with considerable abandon by...courts to the point where it has almost no meaning.”); *see also generally United States v. Anonymous Appellant*, 85 F.4th 576, 579 n. 4 (1st Cir. 2023) (clear-error and abuse-of-discretion is, in some circumstances, “a distinction without a difference.”).

Interpretation of the rules of evidence is a question of law subject to de novo review; the application of a rule is reviewed for an abuse of

discretion. *United States v. Munoz-Franco*, 487 F.3d 25, 34 (1st Cir. 2007). “If the admission or exclusion of a piece of evidence occurs as a result of an error of law, that is a per se abuse of discretion.” *United States v. Sampson*, 486 F.3d 13, 42 (1st Cir. 2007). These standards should apply here.

II. The legal framework

The State is not entitled to the admission of its evidence. Rather, trial judges are the “gatekeepers” of evidence, imbued with the authority to “prevent the jury from learning” certain information. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); *State v. Davis*, 2018 ME 116, ¶ 27, 191 A.3d 1147 (“[T]rial courts serve an important ‘gatekeeping function,’ admitting only evidence that is relevant and competent, and that a jury could determine is reliable.”).

Rule 404(b) of the Maine Rules of Evidence provides that evidence may not be offered to show a propensity to commit certain acts, but it may be admissible for other purposes, *i.e.* “to demonstrate motive, intent, identity, absence of mistake, or the relationship of the parties.” *State v. Aldrich*, 2026 ME 8, ¶ 42, __ A.3d __.

Evidence that satisfies Rule 404(b) must also satisfy Rule 402's relevancy requirement. "[A] lack of dispute or concession of a central allegation may significantly reduce the probative value of particular evidence and, thus, call its admissibility into question." *United States v. Kilmartin*, 944 F.3d 315, 335 (1st Cir. 2019). "[T]he probative value of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point." 22 Charles A. Wright & Kenneth A. Graham, Jr., *Federal Practice and Procedure*, § 5250 (1978); *see also e.g. United States v. Ford*, 839 F.3d 94, 109-110 (1st Cir. 2016) (courts should weigh the risk of unfair prejudice against the proponent's need for the evidence).

Additionally, evidence admitted pursuant to Rule 404(b) is "still subject to exclusion under M. R. Evid. 403 if its probative value was substantially outweighed by the danger of unfair prejudice to [the] defendant." *Aldrich*, 2026 ME 8, ¶ 43.

III. Application

One, court was right – the first time – to prohibit other-act evidence as a trial management tool, under the circumstances. The admission of other-act evidence caused mistrials in Maine and New Hampshire. The

exclusion of other-act evidence would have forced the State to identify a single factual basis for each charge, which would have avoided double jeopardy problems.

Two, the court was right – the first time – that the State did not need other-acts evidence. Motive was irrelevant here. Opportunity and the relationship of the parties was uncontested. And even if the State were required to prove knowledge or intent – an open question, *see State v. Idris*, 2025 ME 17, ¶¶ 12-13, 331 A.3d 419; *State v. Ashley*, 490 A.2d 226, 229 (Me. 1985) – no one claimed that any sexual activity was reckless or inadvertent. The other-acts evidence was not probative of any of Rule 404(b)’s permissible purposes, but it was unduly prejudicial, obviously, for two reasons: (1) the other-acts themselves were criminal; and (2) the admission of other-acts violated Philip’s constitutional rights by creating due process and double-jeopardy problems. The State was not entitled to the admission of its other-acts evidence. The trial court erroneously abdicated its gatekeeping role.

Three, the trial court’s willingness to reverse its own ruling *mid-trial* without any apparent justification for doing so was manifestly unfair. As trial counsel explained, the mid-trial reversal undermined his

ability to identify the basis for the charges, impaired his ability confront the veracity of the (unidentified) other-acts evidence, and undermined his ability to mount a robust defense. The remedy is to vacate the judgment and remand for further proceedings.

Seventh Assignment of Error

The trial court relied on an impermissible aggravating factor when calculating Philip's sentence. A remand for resentencing is required.

I. Preservation and standard of review

Philip did not testify at trial. He said this at sentencing:

THE DEFENDANT: I just wanted to say thank you for your time and your effort in this case that everyone has done and – done their job, and – I'm trying to think of the words I want to say. And thank you for your time today. And I just want you to know that I disagree with it. And thank you for your time.

THE COURT: You – you disagree with the verdict, I take it?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you.

THE DEFENDANT: Thank you, sir.

(A: 119).

At the second step of the *Hewey* analysis, the court found:

Another aggravating factor is [Philip's] lack of remorse. He's in a difficult position...but he had an opportunity to express remorse. And he did just the opposite in his statement that he disagreed with the jury's verdict. He's certainly free to do that. It's his absolute right to do that, but

it demonstrates that he lacks remorse. And that's an important factor that the Court looks at in the second phase of the analysis.

(A: 121); *State v. Hewey*, 622 A.2d 1151 (Me. 1993). The court set the maximum sentence at 25 years' prison. (A: 122).

At the third step of the *Hewey* analysis, the court found:

[Philip's] lack of remorse caused me a little bit of pause because remorse, it seems to me, is the most important factor that the Court looks at in determining whether somebody has good prospects for rehabilitation. After all, if you're...not remorseful for what you've done, you're not likely to be rehabilitated because you...just don't accept the fact that you were convicted by a jury beyond a reasonable doubt. And you don't have a lot of...seems to me, good prospects for rehabilitation.

(A: 123). The court imposed an aggregate sentence of 25 years' prison, all but 18 years suspended, followed by six years of probation. (A: 124).

The argument advanced on appeal is new. This Court's review is for obvious error. *State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147.

II. The legal framework

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)); see also *Minnesota v. Murphy*, 465 U.S.

420, 434 (1984) (a defendant cannot be punished for exercising the right to remain silent); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (a defendant cannot be punished for exercising his right to appeal); *State v. Glover*, 2014 ME 49, ¶ 13, 89 A.3d 1077 (“The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.”) (quoting *Gruenwald v. United States*, 353 U.S. 391, 425 (1957) (Black, J., concurring)). Philip had a constitutional right to put the prosecution to its proof at a jury trial, and he has a constitutional right to think whatever he wants. U.S. Const. amend. I, VI.

III. Application

Maine courts may not punish people for their thoughts. A criminal defendant is constitutionally entitled to politely disagree with the jury’s verdict. Maybe a defendant thinks that the verdict was wrong as a matter of fact. Maybe a defendant thinks that the verdict was contaminated by legal errors. Obviously, a defendant has a constitutional right to appeal his conviction, which necessarily reflects his disagreement with the outcome. Plainly, disagreement with the jury’s verdict does not *ipso facto* evince a lack of remorse and, frankly,

any suggestion to the contrary is wrong. Respectfully, this Court must put an end such nonsense. It is not an isolated occurrence.

It is hornbook law that a criminal defendant can simultaneously be guilty as a matter of law, and innocent as a matter of fact. *See Herrera v. Collins*, 506 U.S. 390, 398 (1993) (recognizing the difference). Research suggests that many such persons exist. *See e.g. United States v. Quinones*, 313 F.3d 49, 63-65 (2d Cir. 2002) (collecting evidence that innocent people have been executed).

It is equally plain that no competent defense attorney would permit a client who maintained innocence at trial and intended to appeal to “show remorse” or “take responsibility” at sentencing. *See e.g. United States v. Rogala*, 1992 U.S. App. LEXIS 27824, **8-9 (6th Cir. 1992) (“[g]iven petitioner’s desire to maintain his innocence and seek an appeal, trial counsel’s advice to maintain innocence on the presentence report was the only reasonable course of action” and it “constitutes valid trial strategy.”).

Most importantly, judges must recognize their limited ability to accurately perceive the internal thoughts and feelings of others. Humility is in order:

Lack of remorse is a subjective state of mind, difficult to gauge objectively since behavior and words don't necessarily correlate with internal feelings. In a criminal context, it is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt. To allow the government to highlight an offender's "lack of remorse" undermines those safeguards.

United States v. Davis, 912 F. Supp. 938, 946 (E.D.La. 1996); *see also* *United States v. Grayson*, 438 U.S. 41, 51 (1978) (quoting *United States v. Hendrix*, 505 F.2d 1322, 1236 (2d Cir. 1974)) ("The effort to appraise 'character' is, to be sure, a perilous one, and not necessarily an enterprise for which judges are notably equipped by prior training.").

In *State v. Coleman*, 2024 ME 35, ¶ 26, 315 A.3d 698, this Court said "that the lack of remorse expressed in allocution may be considered as a factor in sentencing." This statement needs much greater refinement. Punishing Philip for failing to think or feel the way a judge thinks he should is legally – and existentially – wrong. The proper remedy is to remand this case for resentencing.

Conclusion

Philip requests the relief identified within each assignment of error.

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Certificate of Service

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

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Yor-26-12, SRP-26-11

State of Maine

v.

Philip Fryman

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