STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

APPEAL TO THE LAW COURT DOCKET NO. KNO-17-294

EDWARD ARBOUR

Appellant

v.

DEPARTMENT OF CORRECTIONS

Appellee

ON APPEAL FROM KNOX COUNTY SUPERIOR COURT

SUPPLEMENTAL BRIEF OF PETITIONER/APPELLANT MR. EDWARD ARBOUR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

MAINE CONSTITUTION

UNITED STATES SUPREME COURT CASES

MAINE CASES

FEDERAL CASES

MAINE STATUTES

STATE ADMINISTRATIVE REGULATIONS

MAINE RULES

OTHER SOURCES

STATEMENT OF FACTS & PROCEDURAL HISTORY

Appellant Edward Arbour ("Mr. Arbour") was asleep in bed at 10:30 p.m. on December 16, 2016, when Correctional Officer William Mayer ("prison guard") banged on the window of Mr. Arbour's prison cell to wake him and tell him he had mail. (Appendix, hereafter A., 7, 11.) Mr. Arbour, who has a severe medical condition that can result in seizures, had been asleep in the bottom bunk of a cell he shared at Maine State Prison with a cellmate. (A. 7, 16.) The prison guard wrote in his report that it was the inmate in the top bunk who responded to his banging on the window, but he attributed those responses to Mr. Arbour in his recommendation to discipline Mr. Arbour. (A. 7, 11.) Mr. Arbour responded to being awoken for mail by saying, "doing fucking mail at 10:30 at night, this is fucking bullshit." (A. 11.) To that, the prison guard questioned whether he would give Mr. Arbour his mail. (A. 11.) Mr. Arbour responded, "don't fucking threaten me with my mail." (A. 11.) The prison guard decided at that point in the exchange that he would charge Mr. Arbour with prison disciplinary offenses of "Disorderly Behavior" and "Harassment, General." (A. 11.) The prison guard then gave Mr. Arbour his mail and told him to "have a good night." (A. 11.) Mr. Arbour responded to that by saying, "yeah, rub it all over your fucking chest." (A. 11.)

Mr. Arbour pleaded "not guilty" to both charges when he appeared before a disciplinary hearing officer on January 6, 2017. (A. 16.) The hearing officer

allowed Mr. Arbour only one witness, his cellmate, who testified about which of them slept in which bunk in their cell. (A. 16.) The hearing officer refused Mr. Arbour's request that his accuser, the prison guard, be called as a witness. (A. 8.) The hearing officer also refused Mr. Arbour's request to ask the sole witness questions and told Mr. Arbour to "shut up." (A. 8.) The hearing officer found Mr. Arbour guilty of "Harassment, General," but not guilty of "Disorderly Behavior." (A. 16.) The hearing officer based his decision on the prison guard's report: "In the report[,] the officer is very clear about what was said." (A. 16.) Mr. Arbour was "found guilty" (A. 16) and sentenced to 20 days of solitary confinement on January 6, 2017. (A. 18.) He appealed on January 19. (A. 8.) Mr. Arbour was notified on February 1 that the deputy warden had denied his administrative appeal without a hearing and was moved the same day to disciplinary segregation. (A. 8.) Mr. Arbour was moved back from disciplinary segregation to the general prison population on February 23. (A. 8.) The prison guard, hearing officer, and deputy warden work for the Appellee, the Maine Department of Corrections ("Department"). (A. 8, 11, 16.)

Mr. Arbour, acting *pro se*, petitioned the Knox County Superior Court for judicial review of final agency action pursuant to M.R. Civ. P. 80(C) and 5 M.R.S. §§ 11001-11008 on February 25, 2017. (A. 4-10.) The Superior Court filed Mr.

Arbour's petition for judicial review on March 6.[1] (A. 1.) The Superior Court denied Mr. Arbour's appeal on June 19, 2017. (A. 3.) In its denial, the Superior Court focused on the factual dispute about which cellmate slept in which bunk and held that there was "competent evidence in the record to support the officer's finding." (A. 3.) The Superior Court did not address the procedural violations and constitutional violations that Mr. Arbour raised. (A. 3, 8-10.)

Mr. Arbour, again acting *pro se*, timely appealed to this Court on July 10, 2017. (A. 2.) This Court subsequently ordered counsel be assigned to Mr. Arbour for supplemental briefing and oral argument.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

I. Does the First Amendment of the U.S. Constitution and/or Article I, Section 4 of the Maine State Constitution protect an individual prisoner's speech such as in this case?

II. Does punishing a prisoner under a prison disciplinary regulation that defines harassment as "harassment by words, gesture, or other behavior of any person" violate the prisoner's due process rights under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 6-A of the Maine State Constitution because it is unduly vague and lacks reasonable specificity?

[1] Although not raised below, Mr. Arbour's petition for judicial review of final agency action was docketed by the Superior Court on March 6, 2017, 33 days after Mr. Arbour was notified that his administrative appeal had been denied by the deputy warden of the prison on February 1, 2017. The Maine Administrative Procedure Act requires that a petition for judicial review "shall be filed within 30 days after receipt of notice if taken by a party to the proceeding of which review is sought." 5 M.R.S. § 11002(3). The record is unclear on whether Mr. Arbour filed his petition in the prison mail system three days before the 30-day period had run to be deemed timely filed under the prisoner mail box rule. *See Martin v. Dep't of Corr.*, 2018 ME 103, ¶¶ 19-21, 14, __ A.3d __. Counsel did not notice this issue until August 7, 2018, three days before the deadline to file this supplemental brief. Appellant has filed a motion to allow him to supplement the record to clear this up.

III. Is a prisoner's statutory due process right to an impartial hearing, 34-A M.R.S. § 3032(6), violated when the prison disciplinary hearing officer refuses to allow the prisoner to call his accuser, a prison guard, as a witness at the hearing?

IV. Do these three statements – "doing fucking mail at 10:30 at night, this is fucking bullshit;" "don't fucking threaten me with my mail;" and "rub it on your fucking chest" – constitute harassment as defined in a prison disciplinary regulation when they are spoken by a prisoner in response to a prison guard who woke him in the night to deliver mail?

SUMMARY OF THE ARGUMENT

Prison officials and the Maine Department of Corrections violated Mr. Arbour's constitutional rights in two ways when they punished him for words spoken to a guard who woke him late at night by banging on his prison cell window. First, even as a prisoner, Mr. Arbour has a constitutionally guaranteed right under the First Amendment of the U.S. Constitution and Article I, Section 4 of the Maine State Constitution to speak freely and raise grievances about mistreatment by the government. By punishing him for responding to the guard's unexpected banging on his window, prison officials violated Mr. Arbour's free expression rights. Although Mr. Arbour swore when he complained of being awoken, no prison guard – even one with delicate sensibilities – could reasonably consider that language to be so likely to provoke a violent response as to warrant depriving Mr. Arbour of his constitutional protection.

Second, prison officials violated Mr. Arbour's constitutionally guaranteed right to due process under the Fourteenth Amendment of the U.S. Constitution and

Article I, Section 6-A of the Maine State Constitution by finding he violated a Prisoner Discipline regulation that was so vaguely defined in the Department of Corrections' policies and procedures that no one, including Mr. Arbour, effectively had advance notice that such conduct was prohibited. The prison regulation defines the offense of "Harassment, General," for which Mr. Arbour was punished, only as "[h]arassment by words, gesture, or other behavior of any person" and provides no further definition of "harassment." Such a recursive definition fails the "reasonable specificity" requirement that the Law Court imposed for prison regulations in *Clark v. Dep't of Corr.*, 463 A.2d 762, 766 (Me. 1983), and is therefore unconstitutionally vague.

Beyond those constitutional violations, prison officials violated Mr. Arbour's statutory due process right to an impartial hearing, as guaranteed under 34-A M.R.S. § 3032(6), by unreasonably and arbitrarily preventing him from calling as a witness the guard who banged on his cell window to wake him. This was an abuse of discretion.

Lastly, prison officials erred by finding that Mr. Arbour's conduct violated the prison disciplinary regulation prohibiting harassment. Even using the Department's preferred dictionary definition of "harassment," the conduct would have to create an unpleasant or hostile situation for the person being harassed. The

record in this case includes insufficient evidence that the situation was unpleasant or hostile.

STANDARD OF REVIEW

For arguments I. and II., this Court reviews legal conclusions, including constitutional free speech and due process issues, de novo. *See State v. Heffron*, 2018 ME 102, ¶ 11, __ A.3d __ (free speech); *State v. Olah*, 2018 ME 56, ¶ 17, 1984 A.3d 360, 366 (due process). For arguments III. and IV., this Court reviews the reasonableness of administrative agency decisions for abuse of discretion or clear error. *See Stein v. Criminal Justice Acad.*, 2014 ME 82, ¶ 23, 95 A.3d 612, 620-21.

ARGUMENT

I. The First Amendment of the U.S. Constitution and/or Article I, Section 4 of the Maine State Constitution protects an individual prisoner's speech such as in this case.

If Mr. Arbour had been abruptly awoken in the night outside the prison context, there can be no doubt that punishing him for what he said – "doing fucking mail at 10:30 at night, this is fucking bullshit;" "don't fucking threaten me with my mail;" and "rub it on your fucking chest" (A. 11.) – would violate his rights under the First Amendment of the U.S. Constitution and Article I, Section 4 of the Maine State Constitution rights. Anyone woken up at 10:30 at night by someone banging on the darkened window of their bedroom would be well within

his or her rights to respond with the same language that Mr. Arbour used. Even for someone in prison, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Prisoners may not be denied a means of expression, *id.* at 90-91. Their expression may not be infringed solely on a basis of content, *id.* at 89-90. Mr. Arbour was protected by the First Amendment and Article I, Section 4 to protest when the prison's mailman startled him awake for an unnecessarily late, nighttime delivery. The hearing officer who disciplined Mr. Arbour emphasized that the basis for his decision was simply what Mr. Arbour said: "In the report[,] the officer is very clear about what was said." (A. 16.) By punishing Mr. Arbour for responding to the guard's latenight mail delivery, the Department wrongfully deprived him of his constitutionally guaranteed right to free expression.

A. None of the free speech exceptions in the Supreme Court's prison First Amendment cases apply to Mr. Arbour's case because his case does not deal with ensuring prison safety or maintaining the effective operation of prison facilities.

The First Amendment forbids laws "abridging the freedom of speech . . . ." U.S. Const. amend. I. Prisoners retain those rights, though "the Constitution sometimes permits greater restrictions of such rights in a prison than it would allow elsewhere." *Beard v. Banks,* 548 U.S. 521, 528 (2006). In a series of cases from 1974 to the most recent in 2006, the U.S. Supreme Court has defined the circumstances in which prisoners' First Amendment rights may be limited.

In *Pell v. Procunier*, 417 U.S. 817, 827-28 (1974), the Court upheld a rule that prohibited journalists from interviewing specific inmates face-to-face based on the purpose of keeping visitations to a manageable level, and because journalists had other means of communication for the purpose of journalism, such as by mail. This limitation on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct involves only his individual right to speak in response to a guard and does not involve the press or visitors.

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977), the Court upheld bans on group meetings of prisoners and bulk mailings to prisoners for the purpose of forming a prisoners' labor union. Many of the prisoners' "associational rights are necessarily curtailed by the realities of confinement" if prison officials "can reasonably conclude that such associations ... possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment." *Id.* This limitation on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct does not involve any association with other prisoners, whether through group meetings or otherwise.

In *Bell v. Wolfish*, 441 U.S. 520, 550-51 (1979), the Court upheld a prohibition on hardcover books being mailed from sources other than retail book providers because the prohibition was a "rational response by prison officials to an

obvious security problem" of books being used to smuggle contraband into the prison. This limitation on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct did not involve receiving books by mail or smuggling anything.

In *Turner v. Safley*, U.S. 482 U.S. at 90-93, the Court upheld a prison mail rule banning correspondence between inmates within the prison system for four reasons. First, the mail rule banning prisoner-to-prisoner correspondence was designed to control communication of escape, assault, and violent plans. *Id.* at 91. Second, the rule did not deprive prisoners of other means of written expression. *Id.* at 92. Third, the ramification of allowing prisoner-to-prisoner correspondence would compromise the ability of prison officials to maintain security in the prison. *Id.* Fourth, there were "no obvious, easy alternatives" to prohibiting prisoner-to-prisoner correspondence. *Id.* at 93. The limitation imposed in *Turner* on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct did not involve prisoner-to-prisoner correspondence.

In *Thornburgh v. Abbott*, 490 U.S. 401, 415-16 (1989), the Court upheld prison censorship regulations that allowed prison officials to reject certain publications mailed to prisoners from outside the prison because the regulations were not aimed at suppression of a particular doctrine but rather allowed prison officials to make judgments on publications "solely on the basis of their potential

implications for prison security." This limitation on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct did not involve receiving publications by mail nor implicate prison security.

In *Shaw v. Murphy*, 532 U.S. 223, 231 (2001), the Court held that prisoners do not receive augmented protection under the First Amendment to provide legal advice to other prisoners beyond the protection otherwise afforded to prisoner speech because doing so "would undermine prison officials' ability to address complex and intractable problems of prison administration." This limitation on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct did not involve him giving legal advice to another prisoner, nor does he seek augmented rights.

In *Overton v. Bazzetta*, 539 U.S. 126, 133-36 (2003), the Court held that prison regulations limiting visitation of prisoners by outsiders were justified because they were rationally related to the legitimate interests of prison officials in maintaining internal security, protecting child visitors, and preventing future crimes. This limitation on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct did not involve visitation by outsiders.

Beard, 548 U.S. at 531-32, the Court's most recent prison speech case from 2006, upheld a prison policy restricting access to newspapers, magazines, and photos for prisoners in a high-security supermax facility because the policy was

justified by the need for prison officials to provide incentives for difficult prisoners to improve their prison behavior. This limitation on prisoners' First Amendment rights does not apply to Mr. Arbour's case because his conduct did not involve receipt of newspapers, magazines, or photos nor was he in a high-security supermax facility.

None of the free speech exceptions in the Supreme Court's prison First Amendment cases apply to Mr. Arbour's case. All of the exceptions dealt with ensuring prison safety or maintaining the effective operation of prison facilities by restricting certain specific contact or communication with other prisoners or with outsiders. The only thing Mr. Arbour did was say twenty-six words, four of which were "fucking" and one was "bullshit." There was just simply speech: No conduct, no interaction with anyone other than the guard who woke him, nothing that falls outside of the right to free speech that prisoners retain even when incarcerated.

B. Mr. Arbour's speech is permitted and protected under the First Amendment of the U.S. Constitution and Article I, Section 4 of the Maine State Constitution because what he said was personal viewpoint speech, not group conduct with other prisoners.

Prisoners' First Amendment rights may be limited only in situations in which the full protection of the First Amendment would compromise prison safety and effective operation of prison facilities. The Court has otherwise left prisoners' First Amendment rights intact, affording prisoners the same protection as those outside the prison walls.

The Court most directly addressed a prisoner's right to individual viewpoint expression in *Jones (supra, p. 8)*, where it distinguished core protected speech of an individual from the conduct of a group of prisoners who solicited fellow inmates to join a prisoner labor union. *Jones*, 433 U.S. at 131-32. The prison imposed severe restrictions on prison-organizers of a prisoner labor union after the plaintiffs had already attracted 2,000 prisoner members at 40 different prisons through bulk mailings to prisoners and group meetings of prisoners. *Id.* at 122. In upholding those restrictions, the Court reasoned that "[s]olicitation of membership itself involves a good deal more than the simple expression of individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited activity." *Id.* at 131-32.

Here, Mr. Arbour's speech is in the more highly-protected individual expression category of prisoner speech rather than activity by a group of prisoners. He was only responding to the guard who had first addressed him. There were no other prisoners involved. (A. 11.) On the night of December 17, 2016, the guard initiated the incident, demanding Mr. Arbour's attention by banging on his cell window to wake him up and then beckoning him to the door to get his mail. (A. 11.) It was only in response that Mr. Arbour said what he said. (A. 11.) Mr. Arbour

did not collaborate with any other inmates[2] during the exchange with the guard. (A. 11.) As the Court in *Jones* distinguished between individual viewpoint expression and the group activity of the plaintiff prisoners in that case, this Court should distinguish between Mr. Arbour's individual protected speech and the more highly restricted right of prisoners to associate with others in group conduct.

In the context of prisoners' rights, "[i]ndividual expressions of protest or criticisms also pose less of a generic threat to prison security than does organized group activity. Thus, unless individual complaints pose a realistic danger to security, they ought to be permitted under *Jones*." 2 Michael B. Mushlin, Rights of Prisoners § 6:25 (5th ed. 2017). The American Bar Association's Standard on Treatment of Prisoners states in Section 23-7.5(d) that "[c]orrectional authorities should not subject prisoners to retaliation or disciplinary action based on their constitutionally protected communication and expression." Am. Bar. Ass'n, *Standards on Treatment of Prisoners*, ABA Standards for Criminal Justice, 213 (3rd ed. 2011), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf.

[2] Although Mr. Arbour shared the cell with another inmate, the record includes no indication that Mr. Arbour interacted that night with his cellmate or that his cellmate spoke during the incident. (A. 11.)

Because Mr. Arbour's speech was core, personal viewpoint speech rather than lesser-protected group conduct with other prisoners, his speech is permitted and protected under the First Amendment and under Article I, Section 4. Mr. Arbour should not have been disciplined for exercising his constitutionally protected speech.

C. The Law Court's holding in *State v. John W.* protecting speech directed at a police officer applies to Mr. Arbour's case because the situations and audience in the two cases are similar.

Article I, Section 4 of the Maine State Constitution[3] is similar to the First Amendment of the federal Constitution, protecting "the people against governmental encroachment on their freedom of speech." *State v. John W.*, 418 A.2d 1097, 1101 (Me. 1980).

The Maine State Constitution is no less restrictive than the federal Constitution. *Op. of the Justices*, 306 A.2d 18, 21 (Me. 1973). The Law Court has left open the question of whether the free speech provision of Section 4 will always be found coextensive with its federal counterpart or whether the free speech provision in Section 4 may be broader in some contexts than its federal

[3] "Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of people in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact." Me. Const. art. I, § 4.

counterpart. *City of Portland v. Jacobsky*, 496 A.2d 646, 649 (Me. 1985). And while this case does not require the Court to interpret the state constitutional rights as giving greater protection to Mr. Arbour than we believe the federal Constitution already provides, the Law Court has afforded people greater protection under different sections of the Maine State Constitution.[4] So if the Court believes that the First Amendment protections do not require a reversal of the disciplinary findings against Mr. Arbour, the Court should take this opportunity and extend greater protection under Article I, Section 4 to the free speech of prisoners.

The Law Court has never decided a prisoner free speech claim, either on First Amendment grounds or under Article I, Section 4 of the Maine State Constitution. The Law Court has held in *Jacobsky*, 496 A.2d at 649, that obscene speech is not protected, and held in *John W.*, 418 A.2d at 1108, that yelling obscenities at a police officer is protected. Those cases provide guideposts for addressing free speech in the prison context.

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[4] *See, e.g., Martin v. Dep't of Corr.*, 2018 ME 103, ¶¶ 10, 19-21, 14, __ A.3d __ (adopting the prisoner mailbox rule as required under the open courts provision and due process clause of the Maine Constitution though the rule was not required under the federal Constitution); *State v. Sklar*, 317 A.2d 160, 165-66 (Me. 1974) (holding that the Maine Constitution requires that even criminal defendants accused of so-called "petty crimes" punishable by less than six months in jail have a right to a jury trial whereas the federal Constitution extends the right of a jury trial only to defendants accused of more serious offenses); *State v. Collins*, 297 A.2d 620, 625-27 (Me. 1972) (holding that the Maine Constitution requires the state to prove to a higher standard – beyond a reasonable doubt – than under the federal Constitution – preponderance of the evidence – that a criminal defendant's confession was voluntary before it can be admissible).

Jacobsky held that though the First Amendment of the federal Constitution and Article I, Section 4 of the Maine State Constitution are different, they are not so different that Maine should adopt a different test for whether speech is so obscene as to deprive it of constitutional protection. *Jacobsky*, 496 A.2d at 648-49. The Court applied the federal definition of "obscene," as a legal term of art. But that word, in that context, is very specific and technical, and it is not applicable to the term that can be used as an adjective to describe the character of the words used by Mr. Arbour – words that are "obscenities."

The Law Court applies a different test for whether speech with obscenities, or swear words, are constitutionally protected than it applies for speech that is obscene. *See John W.*, 418 A.2d at 1101 & n. 2. In *John W.*, this Court reversed the adjudication of a juvenile who had been charged with disorderly conduct for hollering the following statements at a police officer: "I want to know what the hell is going on;" "[h]ey, turn around and come back here;" "[h]ey, you fucking pig, you fuckin' kangaroo;" and "[f]uck you." *Id.* at 1103. In its analysis, the Court characterized the language in those statements as "coarse and vulgar" yet "so commonplace as to be devoid of any prurient content" that it could not be considered obscene speech. *Id.* at 1101 n. 2. Instead, the Court analyzed the juvenile's speech under the fighting words doctrine first established under federal First Amendment law. *Id.* at 1101 (citing *Chaplinsky v. New Hampshire*, 315 U.S.

568, 572 (1942)). Under the fighting words doctrine,[5] statutes may "prohibit only 'face to face words plainly likely to cause a breach of peace by the addressee, words whose speaking constitute a breach of the peace by the speaker.'" *John W.*, 418 A.2d at 1104 (quoting *Chaplinsky*, 315 U.S. at 573). When police are targets of words that might be considered fighting words, the words would have to be even more provoking to be considered fighting words. *John W.*, 418 A.2d at 1106 (citing *Lewis v. City of New Orleans,* 408 U.S. 913 (1972)). "Epithets directed at police officers are not fighting words merely because they might be so if directed at some other person. The nature of the experience, training, and responsibilities of police officers must be considered in determining whether a given defendant's language constituted fighting words." *John W.*, 418 A.2d at 1107.

In this case, Mr. Arbour was disciplined for saying the words "bullshit" and "fucking" to a prison guard. Prison guards, like police officers, are mandated by Maine law to have completed extensive training at the Maine Criminal Justice Academy to become certified.[6] Specifically, prison guards must have completed

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[5] The classic fighting words doctrine from *Chaplinsky* defined it as (1) words that "by their very utterance inflict injury" or (2) words that "tend to incite an immediate breach of the peace." *Chaplinsky*, 315 at 572. The first prong of that definition has since become outmoded, so that under the modern fighting words doctrine courts now apply only the second prong. *See, e.g., Purtell v. Mason*, 527 F.3d 615, 623-24 (7th Cir. 2008) (citing a string of post-*Chaplinsky* cases in which the Supreme Court suggests without expressly holding that the "inflict injury" prong of *Chaplinsky* is no longer operative); Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. Rev. 1533, 1548 (2017) (the Court "has – from all appearances – abandoned the notion that certain words are subject to regulation on the theory that 'their very utterance' causes harm.").

[6] Me. Criminal Justice Acad., Training: Basic Corrections, https://www.maine.gov/dps/mcja/training/basiccorrections/index.htm (last visited August 1, 2018)

200 hours of basic criminal justice training at the academy, pass the Basic Corrections Certification Exam, and complete an additional eighty hours of field training before they may begin work.[7] Because of the experience, training, and responsibilities of prison guards and police, and because prison guards and police both deal with criminal offenders more frequently than other people, the holding in *John W.* that police must have thicker skin than other people should also apply to prison guards. *John W.* applies to Mr. Arbour's case, the language in question in the two situations is similar, the audience is similar (though the provocation of Mr. Arbour by his audience is greater than in *John W.)*, and the outcome of Mr. Arbour's case should be the same as in *John W.* Mr. Arbour's speech is constitutionally protected. Like the juvenile in *John W.* who said what he said to a police officer, Mr. Arbour said what he said to a prison guard. Requiring prisoners to abide by an Emily Post standard of etiquette, where swear words must not be spoken to avoid offending the listener,[8] is unrealistic in the prison setting and in any event violates both the First Amendment of the federal Constitution and Article I, Section 4 of the Maine State Constitution.

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[7] *Id.*

[8] *See* The Emily Post Institute, Men's Manners: How People View Us, http://emilypost.com/advice/mens-manners-how-people-view-us/ ("Being careful to choose our words so we don't offend our listeners is a lesson we all need to learn periodically. If you're not sure if swearing will bother someone, be considerate and hold your tongue.").

In sum, Mr. Arbour's speech is not obscene in the sense prohibited in *Jacobsky*. His words were commonplace obscenity, which taken in light of *John W.*, must be protected under Article I, Section 4 of the Maine State Constitution.

II. Punishing a prisoner under a prison disciplinary regulation that defines harassment as "harassment by words, gesture, or other behavior of any person" violates the prisoner's due process rights under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 6-A of the Maine State Constitution because it is unduly vague and lacks reasonable specificity.

The Department's definition of "Harassment, General" – as "harassment by words, gesture, or other behavior of any person"[9] – is so vague that prisoners, including Mr. Arbour, "must guess at its meaning and cannot determine, in advance, how to conduct themselves to comply with the rule." *State v. McCurdy*, 2010 ME 137, ¶ 16, 10 A.3d 686, 690. Mr. Arbour's disciplinary conviction should be reversed because punishing him under such a vaguely written regulation violates his due process guaranteed by both the United States and Maine Constitutions. *Id.*

"No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const. amend. XIV. The Maine Constitution similarly states that "[n]o person shall be deprived of life, liberty or property without due process of law . . . ." Me. Const. art. I, § 6-A. "The touchstone of due

[9] 03-201 C.M.R. ch. 10, § 20.01 (2016), online at http://www.maine.gov/sos/cec/rules/03/chaps03.htm.

process is protection of the individual against arbitrary action of the Government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Disciplining a prisoner under an unduly vague regulation is a violation of due process.

The Department of Corrections has the authority to regulate prisoner conduct so long as it is clearly written to give prisoners advance notice of what conduct is prohibited. *See* 34-A M.R.S. § 3032. That statute grants the Department authority to punish state prisoners who violate the Prisoner Discipline rules that it adopts, *see* 03-201 C.M.R. ch. 10, § 20.01 (2016); 34-A MRSA 3032(3)-(6). Prison officials may "adopt rules describing disciplinary offenses and punishments in facilities under the general administrative supervision of the department and establishing a fair and orderly procedure for processing disciplinary complaints." *Id.* § 3032. Although the statute does not state how explicit the rules must be, the statute requires the Department to establish rules that "ensure the high maintenance of a high standard of fairness and equity." *Id.* § 3032(1). The Law Court construed the former 34 M.R.S. § 531, which was repealed in 1984 and replaced by 34-A M.R.S. § 3032,[10] to require the Department to establish rules with "reasonable

[10] 34-A M.R.S. § 3032 contains much of the same language of the repealed statute. For example, in the preamble, the language is identical as the preamble from 34 M.R.S. § 531: "The commissioner shall adopt rules describing disciplinary offenses and punishments in facilities under the general administrative supervision of the department and establishing a fair and orderly procedure for processing disciplinary complaints." Likewise, 34-A M.R.S. 3032(1) contains the same language as the repealed statute: "The rules shall ensure the maintenance of a high standard of fairness and equity."

specificity, whenever possible, to give an inmate fair warning to conform." *Clark*, 463 A.2d at 766. Reasonable specificity "serves the underlying purpose of the statute in reducing the risk of arbitrary administration of prison rules and regulations." *Id.*

In *Clark*, the Law Court held that a prison regulation, "Misuse of State Property," was unduly vague as applied to a prisoner who was punished for a contraband item that the prisoner's locker-mate had left in a shared locker. *Id.* The Court reasoned that the regulation did not adequately warn or give notice to the prisoner that he would be held strictly liable for unauthorized items in the locker assigned to him even if the items were not left there by him. *Id.* at 766-67. The Court relied on the state statute that reinforces the due process requirement that prison rules be written with "reasonable specificity, whenever possible, to give an inmate fair warning to conform." *Id.* at 766.

In *Raynes v. Dep't of Corr.*, 2010 ME 100, ¶¶ 2-8, 5 A.3d 1038, 1039-40, a prisoner contended he was given insufficient notice that he would lose the grandfathered privilege to possess certain personal property while incarcerated if he admitted to violating other prisoner disciplinary regulations. The Law Court

held that the prisoner had in fact been aware through a memo issued by the Department that prison policy for grandfathering rules had changed.[11] *Id.* ¶ 17.

Here, unlike *Raynes*, the record gives no indication that the Department had issued any advisory opinion or informational memo to tell prisoners, like Mr. Arbour, what kind of conduct it meant to prohibit through the "Harassment, General" regulation. Rather, the Department asserts that the word "harassment" is a commonly understood term. (Resp'ts' Br. 5.) However, its definition of "Harassment, General" as "[h]arassment by words, gesture, or behavior of any person" only says the same thing twice. The Department then partially quotes the Merriam Webster Dictionary definition of "harass" as, "[t]o create an unpleasant or hostile situation for especially [sic] by uninvited and unwelcome verbal or physical conduct." (Resp'ts' Br. 5.) The Department left out the beginning prong of that dictionary's definition, "to annoy persistently." *Harass*, Merriam Webster, https://www.merriam-webster.com/dictionary/harass (last visited August 2, 2018). The Department's omission captures the divide among different definitions of "harassment" on whether or not the conduct must be repeated, persistent behavior or not. Other dictionaries provide different definitions of harassment, which

[11] The Court reasoned that because the regulation did not limit the prisoner's constitutional rights, it was unnecessary to evaluate whether the regulation was "validly related to legitimate penological interests." *Raynes*, 2010 ME 100, ¶ 17, 5 A.3d 1038 (quoting the "reasonable relationship" test for due process violation claims in the prison context from *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

suggests that, contrary to the Department's assertion, harassment is not a commonly understood term, even among dictionary editors.[12]

Too many modern prison regulations are "so vague, ambiguous, or outright nonsensical on their face that much interpretive power inevitably rests with the prison disciplinary committee charged with their enforcement." 2 Michael B. Mushlin, Rights of Prisoners § 10:2 (5th ed. 2017). To counter that problem, the American Bar Association, in Section 23-4.1(a) of its Standard Treatment for Prisoners, encourages that "correctional administrators and officials should promulgate clear written rules for prisoner conduct, including specific definitions of disciplinary offenses, examples of conduct that constitute each type of offense, and a schedule indicating the minimum and maximum possible punishment for each offense." Am. Bar. Ass'n, *Standards on Treatment of Prisoners*, ABA Standards for Criminal Justice, 101 (3rd ed. 2011), available at

[12] On one hand, some dictionaries define harassment as repeated or persistent conduct, constituting a pattern of behavior. *See Harass*, Dictionary.com, http://dictionary.com/us/dictionary/american/harass (last visited August 2, 2018) (to disturb persistently; torment, as with troubles or cares; bother continually; pest; persecute") *Harass*, Macmillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/harass (last visited August 2, 2018) ("to keep annoying or upsetting someone, for example, by criticizing them, attacking them, or treating them in a way that is offensive to them"). On the other hand, some dictionaries do not define harassment as requiring repeated or persistent behavior. *See Harass*, www.google.com (last visited August 2, 2018) ("subject to aggressive pressure or intimidation"); *Harass*, Collins Dictionary, https://www.collinsdictionary.com/dictionary/english/harass (last visited August 2, 2018) ("to trouble, worry, or torment, as with cares, debts, repeated questions, etc."). Somewhere in the middle, Black's Law Dictionary defines harassment as "usually" being repeated or persistent. *Harassment*, Black's Law Dictionary (10th ed. 2014) ("words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose; purposeful vexation").

https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf.

The Maine Legislature defines harassment in different ways for different contexts. In the civil Protection from Harassment context, harassment is defined as as either (1) "three or more acts of intimidation, confrontation, physical force or the threat of physical force" or (2) "a single act of conduct" that violates another person's civil rights, or one of twenty-three specific criminal offenses, such as murder, assault, kidnapping or rape. 5 M.R.S. § 4651(2)(A)-(C). In the criminal context of offenses against public order, the law defines harassment as (1) a person engages in "any course of conduct with the intent to harass, torment or threaten another person" after having been warned by a law enforcement official not to do so or (2) an adult prisoner who engages in "any course of conduct with the intent to harass, torment or threaten another person" after having been forbidden by prison officials from doing so. 17-A M.R.S. §§ 506-A(1)(A)(1)(a), 506-A(2). Both sections require prior warning of the conduct alleged to be harassing.

Here, Mr. Arbour was found to have violated a prison disciplinary regulation that so lacked reasonable specificity that one has to guess at its meaning. He had no fair warning of how to conform, or to determine how to comply with the Department's eventual construction of the rule. Because Mr. Arbour was punished

under such a vague rule, the Department violated his right to due process under both the federal and Maine's Constitutions.

III. A prisoner's statutory due process right to an impartial hearing, 34-A M.R.S. § 3032(6), is violated when the prison disciplinary hearing officer refuses to allow him to call his accuser, a prison guard, as a witness at the hearing.

Prison officials violated Mr. Arbour's statutory due process right to an impartial hearing, 34-A M.R.S. § 3032(6), by unreasonably and arbitrarily preventing him from calling as a witness the prison guard who banged on his cell window to wake him and who filed the disciplinary complaint against him.

Although prison officials may adopt disciplinary rules and punish prisoners for violating those rules, they may do so only through "a fair and orderly procedure for processing disciplinary complaints." *id.* § 3032. Prison officials must conduct an impartial hearing in front of an administrative officer before imposing punishment. *Id.* § 3032(6). The minimum requirements for an impartial hearing include that a prisoner accused of a disciplinary infraction must be "entitled to call one or more witnesses, which right may not be unreasonably withheld or restricted." *Id.* § 3032(6)(D). Due process requires "notice of the issues, an opportunity to be heard, the right to introduce evidence and present witnesses, the right to respond to claims and evidence, and an impartial fact-finder." *Jusseaume v. Ducatt*, 2011 ME 43, ¶ 12, 15 A.3d 714. "Because due process guarantees the right to respond to evidence, an adjudicator must afford a party the opportunity to rebut

or challenge evidence offered against him or her." *Id.*; *see In re Dustin C.*, 2008 ME 89, ¶ 7, 952 A.2d 993, 995.

Here, the disciplinary hearing officer refused Mr. Arbour's request that the prison guard who accused him of harassment be called as a witness. (A. 8.) The Department does not contest the fact that Mr. Arbour asserted his right to call the prison guard as a witness. (Resp'ts' Br. 2.) Maine only employs prison guards on a full-time basis,[13] so this prison guard could have been made available to testify on a regular day when he was on duty. Because the prison guard could easily have been made available to testify, the hearing officer's decision to exclude the prison guard was unreasonable, arbitrary, and contrary to the statutory requirement set forth in 34-A M.R.S. § 3032(6)(D). Without the prison guard's testimony, the hearing officer had no way of assessing with the benefit of cross examination and testimony who was telling the truth other than the guard's written report. There was no way to evaluate the claim that the words tended to incite a fight or breach of the peace. Because the hearing officer relied entirely on the guard's written report as the basis for his decision to discipline Mr. Arbour, (A. 16), the Superior Court erred in concluding that the hearing officer "saw and heard from the witnesses and was in a superior position to assess who was telling the truth." (A.

[13] Me. Criminal Justice Acad., Training: Basic Corrections, https://www.maine.gov/dps/mcja/training/basiccorrections/index.htm (last visited August 1, 2018).

3). The hearing officer, in fact, did not see or hear from the key witness in the case at all.

Because the hearing officer's decision to exclude the testimony of the prison guard at Mr. Arbour's disciplinary hearing was arbitrary and unreasonable, the Department violated Mr. Arbour's statutory due process right to an impartial hearing.

IV. These three statements – "doing fucking mail at 10:30 at night, this is fucking bullshit;" "don't fucking threaten me with my mail;" and "rub it on your fucking chest" – do not constitute harassment as defined in a prison disciplinary regulation when they are spoken by a prisoner in response to a prison guard who woke him in the night to deliver mail.

The Department clearly erred in its finding that Mr. Arbour harassed the prison guard who woke him because, even based on the guard's version of events, Mr. Arbour's conduct does not meet the Department's preferred dictionary definition of harassment.

A finding of fact is clearly erroneous "if there is no compelling evidence in the record to support it; if the fact-finder clearly misapprehended the meaning of the evidence; or if the finding is so contrary to the credible evidence that it does not represent the truth of the case." *Adoption of Isabelle T.*, 2017 ME 220, ¶ 30, 175 A.3d 639.

The Department has asserted that the word "harass" is commonly understood term that is partially defined in one dictionary as, "[t]o create an

unpleasant or hostile situation for [sic] especially by uninvited and unwelcome verbal or physical conduct." (Resp'ts' Br. 5.) Even assuming for the sake of argument that this is the commonly understood definition, the record contains no evidence that these statements by Mr. Arbour were "uninvited;" to the contrary, they were prompted by the guard. There is no evidence that Mr. Arbour created a hostile situation for the guard. And while the words may be unpleasant, that alone is not sufficient for discipline. The hearing officer at Mr. Arbour's disciplinary hearing based his decision on only one piece of evidence against Mr. Arbour – the prison guard's report. (A. 8, 16.) The guard was the one who initiated the incident by knocking on Mr. Arbour's cell window to tell him that he had mail though he was in bed. (A. 11). The guard did not characterize the situation as unpleasant or hostile in his report and did not testify at the disciplinary hearing. (A. 8, 11.)

Without any evidence, let alone compelling evidence, that Mr. Arbour created an unpleasant or hostile situation for the guard, the Department clearly erred in finding that Mr. Arbour harassed the guard.

CONCLUSION

For the foregoing reasons, Mr. Arbour respectfully asks this Court to reverse the disciplinary conviction imposed on him by the Department for violating his free speech rights under the First Amendment of the U.S. Constitution and Article I, Section 4 of the Maine State Constitution; for violating his due process rights

under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 6-A of the Maine State Constitution; for violating his statutory right to an impartial hearing under 34-A M.R.S. § 3032(6); and because what he said was not harassment as defined in the Department's prisoner disciplinary regulations.

Dated: August 10, 2018

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CERTIFICATE OF SERVICE

I, Scott Dolan, student attorney at the Cumberland Legal Aid Clinic, under the supervision of E. James Burke, Esq., do hereby certify that on this date I have served two copies of this brief by depositing them in the U.S. Mail, postage prepaid, addressed as follows:

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