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INTRODUCTION

This appeal is made by the Appellant as a final attempt to have his day in court before a jury of his peers. The facts and procedural history of this complex case come down to a simple concept, that the Appellant's assertions of innocence and request for a trial have been ignored by both his own attorneys and the Superior Court sitting in Cumberland County. The Appellant asks that you grant his single, reasonable wish– a jury trial.

PROCEDURAL HISTORY

On July 9, 1998, the Appellant was indicted for the following crimes: violating the sales representative licensing requirement of a broker/dealer (32 M.R.S.A. § 10301(1)), selling or offering an unregistered security (32 M.R.S.A. § 10401), and making untrue statements in offering to sell or purchase a security (32 M.R.S.A. § 10201(1)). [Appendix 20-21 (hereinafter "App.").] These are Class C crimes in the State of Maine. *Id*. On April 14, 2000, the Appellant entered conditional guilty pleas to all three of the counts charged in the Indictment. *See* April 14, 2000 transcript at 5. This first plea was entered before Justice Paul Pierson. *Id*. On September 19, 2000, the Appellant moved to vacate his conditional guilty plea. [Appendix 37-38.] On November 9, 2000, argument was heard before Justice Pierson on the Defendant's Motion to Vacate. November 9, 2000 Transcript. Justice Pierson granted the Appellant's Motion to Vacate. *See* November 9, 2000 Transcript at 3-5; [App. 38.] Appellant entered a second

guilty plea on February 12, 2001. *See* February 12, 2001 Transcript. Thereafter, and with the undersigned as new counsel, the Appellant filed a Motion to Withdraw His Second Guilty Plea Pursuant to M.R. Crim. P. 32(d) on July 3, 2001. [App. 39-43.] A hearing was held on the Appellant's Motion to Withdraw on November 5, 2001. *See* November 5, 2001 Transcript. By Order of November 20, 2001, the Court, Justice Nancy Mills presiding, denied Appellant's Motion to Withdraw His Guilty Plea. [App. 14-17.] Thereafter, Appellant filed a Motion to Enforce the Prior Order of the Court (Justice Pierson, presiding) and Strike the Defendant's Guilty Plea and Plea Agreement on February 8, 2002. On February 27, 2002, counsel for the Appellant moved for recusal of Justice Mills. [App. 49-50.] On February 27, 2002, there was a hearing on the Motion to Strike and Motion to Recuse Justice Mills. *See* Transcript of February 27, 2002 hearing. On February 27, 2002, Justice Mills issued orders denying Appellant's Motion to Strike and Enforce the Order of the Court, and denying Appellant's Motion to Recuse, both for reasons stated on the record in the February 27, 2002 hearing. February 27, 2002 hearing transcript. [App. 18-19.]

FACTUAL BACKGROUND

This case should be reviewed against the backdrop of the 1990's, where more wealth than ever was generated by the Dow Jones and NASDAQ stock indexes. At that time, fortunes were made on paper, all through the magic of stock ticker symbols. The markets seemed to go only higher and higher. Everyone talked incessantly about stock value, increases in earnings, their purchases, and

sales. People were seemingly making money out of thin air. Given that backdrop, it is easier to understand how the Appellant, with years of experience selling mutual funds and insurance, bought into what turned out to be a massive Ponzi scheme. That Ponzi scheme was put together by Randall Garrett and Brian Sims, both of whom were later indicted, and along with Michael Doyle and Dennis Dancoes, the only four out of many, convicted for their involvement. [App. 29.] The Appellant, at no time, was aware that what he was selling was a Ponzi scheme. [App. 30; February 12, 2001 Transcript, p. 13.] The Appellant did, however, know and respect Randall Garrett. February 12, 2001 Transcript, p. 13. Mr. Garrett was a former manager with A.L. Williams, a company who employed the Appellant for several years. Randall Garrett recruited the Appellant to sell the "joint venture investment" at issue. *Id.* at 12-13.

Doyle also relied on another individual, a well-respected member of the business community in Texas, Mike Murphy, who was selling the joint venture investments. Mr. Murphy recommended them to the Appellant as a good product which he, Murphy, was selling. On information and belief, Mr. Murphy, along with all the other sales representatives recruited by Mr. Garrett to sell the joint venture investments have never been charged with any criminal conduct. Mr. Murphy did, however, sink into deep clinical depression upon finding out that the investment was in reality a Ponzi scheme.

Relying on these two highly respected individuals in the field, the Appellant began marketing the investment. There is no question that all the sales

personnel nationwide, and the investors themselves, were blinded by the prospect of sharing in making huge sums of money, like many others in the United States at that time. In truth, no one really knew how such large amounts of money were being made on the stock exchange, and obviously no one cared. Greed was a powerful, and blinding, motivating factor.

In October of 1996, Mr. Doyle was contacted by Stephen Diamond of the Maine Securities Commission relating concerns about the "investment" sales. February 12, 2001 Transcript, p. 18. Doyle answered Diamond's questions, and voluntarily agreed to stop making sales until it was confirmed that what he was selling was a security. [App. 22.] Interestingly, the Appellant was only charged for sales made after October of 1996. [App. 20-21.] This is because the State concedes, as it must, that the Appellant did not know much about the "investment" at all, and certainly not that it was a security prior to that time.

Mr. Doyle sought legal representation from Ralph Dyer, and Dennis Dancoes retained Peter DeTroy. The attorneys set a course to prohibit the State from speaking with their clients. This included a very expansive Freedom of Information Act suit. [App. 59-62.] This left the Appellant in a confused state, however, with his attorneys, on one hand, warding off contact with the State, and his personal belief, on the other hand, that the investments were valid, whether they were securities or not. At no time did Mr. Doyle ever perceive that both he and his clients would lose their "investment."

In January, 1997, Mr. Doyle was told by Randall Garrett, from Texas, that this was the last chance to invest, that more investment was necessary to ensure payment to all investors and that Mr. Doyle might open himself up to lawsuits if he didn't notify prior investors of this last opportunity to make money. February 12, 2001 Transcript, p. 20. Both Doyle and Dennis Dancoes consulted Peter DeTroy, who recommended that they contact a securities attorney because he was still unclear as to whether what they were selling was a security. [App. 27-28.]

Nevertheless, blinded by greed, a belief in the investments, and needing a return for investors, Mr. Doyle made the mistake of taking money from eight investors from January to April, 1997. February 12, 2001 Transcript, p. 21. At least five of the eight investors had invested in this fund before. *Id.* at 21.

When the Appellant later found out the investment was a Ponzi scheme, he was in a state of shock and disbelief. Immediately, Mr. Doyle paid back $8,500 to one investor.

Also prior to indictment, Mr. Doyle met with and gave a statement under oath to the State authorities. February 12, 2001 Transcript, p. 23. He spoke with and cooperated with the U.S. Justice Department. *Id.* He was not indicted until a year later by the State. [App. 20-21.]

Of the eight investor victims, this Court should note that Mr. Doyle suffered the greatest personal financial loss, in the amount of $90,000. November 5, 2001 Transcript, pp. 83-84. That loss speaks loudly to Mr. Doyle's absolute belief in the product he was selling.

After his indictment, the Appellant retained David Van Dyke, of Berman & Simmons, to represent him. The Appellant was clear in his communication to Attorney Van Dyke (hereafter, "predecessor counsel") that he wanted a jury trial in this matter. [App. 30-31; November 5, 2001 Transcript, p. 14.] He felt that he could attack the *mens rea* elements of the crimes charged. That is, that the sales were not knowing violations of securities law. [Addendum 1-3.] Further, the Appellant was convinced that the issue of whether or not the "investment" sold was a "security," could also be successfully attacked at a jury trial.

Predecessor counsel was not willing to participate in gaining a jury trial for the Appellant. On advice of Predecessor counsel, the Appellant entered a conditional guilty plea that was later vacated. [App. 37-38.] The Appellant continued to maintain that he wanted a trial. [App. 30-31; November 5, 2001 Transcript, p. 14.] On the date of jury selection, February 12, 2001, predecessor counsel spent approximately two to three hours pressuring Doyle to enter another guilty plea. [November 5, 2001 Transcript, p. 16.] Predecessor counsel "strongly urged Mr. Doyle to plead guilty and after some resistance, some considerable resistance on his part, he did so." *See* November 5, 2001 transcript at 33. As the Appellant reports, predecessor counsel simply told him that if he did not plead guilty, that by Friday of that week he would be in Thomaston spending the next two years being sexually assaulted. See November 5, 2001 transcript p. 65. With no other apparent choice, Doyle agreed to plead guilty.

Thereafter, the Appellant went to predecessor counsel office. November 5, 2001 Transcript, p. 18. He asked to go through several banker's boxes worth of files to try to find documents that may be helpful to him. November 5, 2001 Transcript, p. 18. His concern at that point was that predecessor counsel, who seemed completely unprepared at jury selection and only ready to enter a guilty plea for him, had simply not done the work necessary to prepare the case for trial. In fact, he hadn't. Doyle found at least four documents that could have been helpful to him at trial. [App. 23-28.] Significant among these documents is a January 9, 1997 letter from Ralph Dyer to Michael Doyle calling the State's investigation a "bogus misuse of administrative authority," and instructing the Appellant to keep in contact with his clients. [App. 26.] Also significant was a January 17, 2001 letter from Peter DeTroy stating that he was still not aware of whether or not the "investment" was a "security" and referring Dancoes to other counsel. [App. 27-28.] Predecessor counsel response to these documents when confronted with them by the Appellant, was that they were "troublesome." November 5, 2001 Transcript pp. 23, 72.

Feeling at that point that he essentially had been sold down the river by an attorney who refused to prepare for and secure a trial, Doyle sought other counsel. Thereafter, undersigned counsel filed motions to withdraw Doyle's appeal before his sentencing, and motions to strike his guilty plea and enforce Justice Pierson's prior court order. [App. 39-43]; [App. 44-48.] Both motions were denied on

November 20, 2001 and February 27, 2002. [App. 14-17; App. 18.] The denial of these motions is the subject of this appeal.

STATEMENT OF THE ISSUES

I. Was it error for the Superior Court to deny the Appellant's Motion to Withdraw His Guilty Plea despite his assertions of innocence, the lack of prejudice to the State, and the liberal standard of withdrawing pleas before sentencing?

II. Was it improper for Justice Mills to refuse to comply with a binding order by Justice Pierson based on her own, subjective view that it was better fro the Appellant?

III. Was Appellant's plea agreement violated when Justice Cole recused himself and the sentencing justice?

SUMMARY OF ARGUMENT

> Justice has nothing to do with expediency. Justice has nothing to do with any temporary standard whatever. It is rooted and grounded in the fundamental instincts of humanity.
>
> Woodrow Wilson

The Appellant moved before sentencing to withdraw his guilty plea. [App. 39-43.] He did so because of his strong and steadfast assertions of innocence, as to a number of issues the State was required to prove at trial. [App. 30-31]; Addendum 1-3.] Despite his assertions of innocence, the court refused to liberally allow withdrawal of the guilty plea as precedence suggests. Further, a prior order by Justice Pierson was in effect at the time of the vacating of the first conditional plea, that required that the Court not accept any further negotiated pleas. November 9, 2002 Transcript, pp. 4-5; [App. 38.] The entry of Doyle's second

guilty plea was a negotiated plea in contravention to the law of the case. Defendant's Motion to Strike that Plea and Enforce Justice Pierson's Order, therefore, should, have been granted.

ARGUMENT AND AUTHORITY

I. APPELLANT SHOULD HAVE BEEN AFFORDED THE OPPORTUNITY TO WITHDRAW HIS SECOND GUILTY PLEA

Precedent in Maine, as well as instructive federal standards, suggests that when an Appellant attempts to withdraw a guilty plea before sentencing, that the withdrawal be liberally granted in his favor. *State v.* Hillman, 749 A.2d 758, 761 (Me. 2000). Here, that liberal withdrawal was not granted in the Appellant's favor, and should have been. As a result, the Appellant should have been allowed to withdraw his second guilty plea.

A. The Facts and Circumstances of Appellant's Entry of a Second Guilty Plea Meet Maine's Four Factor Test For Withdrawal of a Guilty Plea

Maine Rule of Criminal Procedure 32(d) allows a Defendant to withdraw a guilty plea prior to the imposition of the sentence. Maine case law has developed a four factor analysis in determining whether a guilty plea should be withdrawn, which is:

1. The length of time between entering the plea and seeking to withdraw it;
2. The potential prejudice to the State;
3. The Defendant's assertions of innocence; and
4. Any deficiency in the proceeding at which the Defendant entered the plea in accordance with Me. R. Crim. P 11.

Hillman, *supra* at 761. In evaluating the factors relative to the withdrawal of a guilty plea, the Court should grant relief liberally. *Id*. at 760. Not all of the factors must be met to withdraw the plea. *Id.* In fact, some courts have chosen to focus merely on one factor if it seems primary. *See Generally*, *State v. Lambert*, 775 A.2d 1140 (Me. 2001).

B. Instructive Federal Precedent Holds That an Appellant Should be Allowed to Withdraw His Guilty Plea Prior to Sentencing When the Appellant Asserts His Innocence, There is no Substantial Prejudice to the Government, and the Appellant Has Reason For Withdrawal

The federal standard for withdrawing a guilty plea is found in F.R.C.P. Rule 32(e), which states:

> If a motion to withdraw a plea of guilty or *nolo contendere* is made before sentence is imposed, the Court may permit the plea to be withdrawn if the Defendant shows any fair and just reason.

F.R.C.P. 32(e).

The focus of the federal precedent is whether there is "fair and just reason" for plea withdrawal. *Id.* In making that determination, the federal courts evaluate three factors:

1. Does the Defendant assert her innocence?
2. Would the government by prejudiced by withdrawal?
3. The strength of the Defendant's reason for withdrawal of the plea.

U.S. v. Brown, 250 F.3d 811 (3rd Cir. 2001). In evaluating the three-pronged inquiry, a federal court should liberally allow withdrawal of a guilty plea in favor of an Appellant.[1] *U.S. v. Daniels*, 821 F.2d 76 (Me. 1987).

The concept expressed in federal practice is to liberally allow the withdrawal of a guilty plea before sentence to more fully protect the rights of the accused. As the Ninth Circuit explained:

> This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused trial by jury.

Kadwell v. United States, 315 F.2d 667, 670 (9th Cir. 1963).

The liberality of the federal withdrawal standard is instructive in this matter. The concept in *Kadwell* that the accused's jury trial right is paramount to all else is a concept that reaches farther than the strictures of mandatory versus persuasive precedent. As the Supreme Court of North Dakota remarked:

> In order to fully afford a criminal defendant the right to a jury trial, we urge trial courts to err on the side of liberal allowance on withdrawal of guilty pleas prior to sentencing.

State v. Millner, 409 N.W. 2d. 642, 644 (N.D. 1987).

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[1] The federal view that the withdrawal of a guilty plea should generally be freely allowed is very prevalent in the federal courts. *See U.S. v. Young*, 424 F.2d 1276; *U.S. v. De Cavalcant*, 449 F.2d 139, *cert denied*, 404 U.S. 1039; *U.S. v. Tabory*, 462 F.2d 352; *U.S. v. Savage*, 561 F.2d 554; *U.S. v. Presley*, 478 F.2d 163; *U.S. v. King*, 618 F.2d 550; *U.S. v. Del Valle-Rojas*, 463 F.2d 228; *U.S. v. Erlanborn*, 483 F.2d 165; *U.S. v. Hancock*, 407 F.2d 337; *U.S. v. Rogers*, 289 F. Supp. 726 (1968, D.C. Conn.); *U.S. v. Statten*, 408 F.2d 559 (1969, C.A. 3 Pa.); *U.S. v. Boyance*, 258 F. Supp. 935 (1966, D.C. Pa.); *U.S. v. Fina*, 289 F. Supp. 288 (1968 D.C. Pa.); *U.S. v. Tivis*, 302 F. Supp. 581 (1969, D.C. Tex.); *Kadwell v. United States*, 315 F.2d 667 (1963, C.A. 9 Nev.).

C. Synthesis of the Law and the Facts of This Case Suggest That the Appellant Should Have Been Allowed to Withdraw His Second Guilty Plea

In analyzing whether the trial court erred in refusing to allow Appellant to withdraw his guilty plea, we will analyze the Maine withdrawal test in light of the facts of this case. That said, the Appellant continues to urge this Court in reviewing the withdrawal standards to apply the liberal withdrawal precedent generally employed by the federal courts.

i. The Length of Time Between the Appellant's Entry of a Guilty Plea and His Second Motion to Withdraw Was Not Unduly Burdensome

The Appellant asserts that although several months lapsed between his entry of a guilty plea and his motion to withdraw it, that the time span is reasonable in light of the circumstances of his case. The Appellant entered his second guilty plea February 12, 2001. *See* February 12, 2001 Transcript. His motion to withdraw that guilty plea was filed on July 3, 2001. [App. 39-43.] Justice Mills specifically found that this time period worked in the Appellant's disfavor. [App. 15.]

Appellant would suggest that this 5 month period of time between his plea and attempted withdrawal is not unduly burdensome, however, in considering that during that time period, the Appellant had to fire predecessor counsel and hire the undersigned. Undersigned counsel needed time to meet with the client, understand the nature of this complex securities case, understand the facts of the case, and then put together a cogent motion to withdraw the plea. The five months

between the entry of the plea and the motion to withdraw, therefore, is reasonable, and in no way unduly burdensome.

ii. The State Would Not Be Prejudiced By The Withdrawal of The Appellant's Guilty Plea

The State faced no prejudice by the withdrawal of the Appellant's guilty plea, despite their claims. At the November 5, 2001 hearing on the Motion to Withdraw, the Court asked the Attorney for the State whether the State would face any prejudice if Doyle's plea was withdrawn. *See* November 5, 2001 transcript p. 100. Assistant Attorney General Homans claimed she would be prejudiced, claiming the following reasons:

> At this point the witnesses have been prepared twice for this case. There are several witnesses who really don't want to participate in this, don't want to go through the trauma of preparing again.
>
> One of the witnesses was one of Mr. Doyle's two girlfriends at the time. And she went bankrupt as a result of this. She has since gotten back on her feet. But this preparing for this case brings her to tears, she does not want to do this again. I think she would but there is a tremendous amount of stress that has been placed on some of these people.
>
> There is another witness in Florida, whose health is poor, who has already traveled to Maine once for the motion to dismiss and does not want to come again. He lives in Maine in the summer. I don't think I can convince him to come again. I couldn't for the last trial. That was Omar Norton.
>
> And there is another witness who lives in North Carolina. This would be her third trip. She is almost 70, her third trip to Maine in this case.

> And I have another witness in the Mid West who is now simply too old to come.
>
> **So the State could put on a case. I would – I would not ever say that we could not try this case,** simply saying that we have prepared twice, Mr. Doyle has been on the verge of trial twice, and both times has changed his mind and to put people through this a third time, I'm not sure is merited at this point.

November 5, 2001 transcript, pp. 100-102, emphasis added.

Cases focusing on prejudice to the State focus primarily on the State's ability to continue to have witnesses available for trial. For example, in *Hillman*, *supra*, the case involved a charge of unlawful sexual contact and assault on a young boy. *Hillman,* supra at 759. *Hillman* entered a plea and later attempted to withdraw it. *Id* at 759. There, the State successfully argued that it would be prejudiced by the plea withdrawal because of the impact it would have on the victim and his family if the emotional wounds associated with the case were opened up again. *Id* at 760. Even in that case, with such a serious impact on a young victim and his family, the Court stated it would not have **"seriously compromised the State's case by affecting the ability of the State to present its evidence."** *Id* at 761, emphasis added.

Here, the State would not have been prejudiced by the withdrawal of the Appellant's guilty plea. Most of the State's witnesses were still available, and would have been available at trial. In fact, most of those witnesses appeared at sentencing to speak. Clearly it would not be unduly burdensome for the State if the plea was withdrawn.

Rather, the State did not want to proceed. It already had a guilty plea, and considered the matter closed. Unfortunately, the Court did the same. The fact that the matter was considered closed by the State and the Court does not mean that Appellant's rights, before sentencing, to withdraw his guilty plea, are abolished. Although we agree that withdrawing the plea and trying this case would create extra work in the court system, that extra work is not as important as protecting the accused's right to a jury trial. The State had its witnesses available, and its evidence available. Withdrawal of the Appellant's second guilty plea before sentencing would not be a "serious compromise to their case sufficient to show prejudice on the State's part."

In fact, Assistant Attorney General Homans admitted as much at the November 5, 2001 hearing when she stated: "so the State could put on a case. I would – I would not ever say that we could not try this case . . . " November 5, 2001 transcript p. 101. In essence, Assistant Attorney General Homans expressed that withdrawing the plea would be an inconvenience. But in doing so, she admitted that the State **could try the case**. *Id.* As a matter of law as expressed in *Hillman*, therefore, there was no prejudice to the State because their case was not "seriously compromised." *Hillman, supra* at 761.

iii. Appellant Has Continuingly and Constantly Protested His Innocence Throughout the Course of This Matter

The next consideration, and the one Appellant urges is most important, is the fact that he has protested his innocence throughout the course of this matter.

[App. 30.] As predecessor counsel correctly stated, "[h]e clearly did not know he was selling to his trusted customers a scam." November 5, 2001 Transcript, p. 17.] The State admits that the Appellant continues to protest his innocence in their sentencing memo. The Appellant has, in fact, stated "throughout this entire process, I have stated that I am innocent . . ." [App. 30.][2]

The question that is undoubtedly troubling for this Court, is how the Appellant entered two guilty pleas while at the same time protesting his innocence? The answer is simple. On each occasion, the Appellant was pressured into pleading guilty by counsel. [App. 31.] This pressure was asserted as a result of Appellant's counsel's lack of preparedness for trial, and counsel's profound belief that the Appellant would not prevail at trial. *See Generally*, November 5, 2001 transcript; [App. 31; App. 33.] In essence, Appellant had a lawyer who did not adequately prepare for trial on two occasions, and then strong-armed the Appellant into pleading guilty.

---

[2] Justice Mills opined that the Appellant's Rule 11 proceeding before her made it clear that he did not protest his innocence. [App. 16.] During Mr. Doyle's Rule 11 hearing with Justice Mills, the following exchange occurred:

> THE COURT: (Are you) pleading guilty, Mr. Doyle, because you are guilty and for no other reason?
>
> THE DEFENDANT: **Apparently, your Honor.**

February 12, 2001 Hearing Transcript, p. 30.

This plea by Mr. Doyle that he was "apparently guilty" is hardly a strong indication of a lack of innocence. *Id.* at 30.

This is not simply a bald assertion by the undersigned. Rather, it is based on statements made by predecessor counsel in open court. Predecessor counsel stated:

> What happened here was I absolutely strongly urged Mr. Doyle to plead guilty, and after some resistance, so considerable resistance on his part, he did so.

November 5, 2001 Transcript, pp. 15-16.

In his affidavit, predecessor counsel stated:

> I strongly argued (with the Appellant) for plea as opposed to trial; indeed, I have seldom I my career so strenuously argued against a client's stated preference for trial. In retrospect, it is clear to me that Mr. Doyle truly wanted to go to trial.

[App. 33.]

While Defendants in criminal cases have attorneys – in part - to listen to their advice, in this case, that advice was based primarily on predecessor counsel's lack of preparedness for trial. Certainly, in the final analysis, while the attorney has the right to offer his opinions, he does not have the right to dictate whether a defendant should, or should not, exercise her right to trial. When that advice is based on lack of preparedness, it is even less trustworthy.

Again, predecessor counsel's lack of preparedness for her trial is not an out-of-the-blue assertion by the undersigned, but is rather based on predecessor counsel's own testimony. Predecessor counsel candidly admitted, for example, that one day before trial that he had not at all prepared to proceed. November 5, 2001 transcript, pp. 33-34. He noted that he would have spent the whole evening

preparing for trial. *Id* at 34. When pressed, however, predecessor counsel admitted that one cannot prepare a securities case in one night. *Id.* at 45. He did not prepare a jury voir dire, despite jury selection that day. *Id.* at 18. Predecessor counsel did not prepare a trial notebook. *Id.* at 33. He did not hire a private investigator, but did the investigations himself. *Id.* at 35. He did not hire a securities expert. He had not prepared Doyle for his direct examination the next day. *Id.* at 46. In fact, he had not even met with the Appellant since his first plea had been vacated. *Id.* at 63. He did not forward Doyle discovery for review. He did not meet with or otherwise interview lay witnesses.[3] *Id.* at 46. He had not prepared or located character or reputation witnesses for the Appellant. *Id.* at 46. He had not explored any impeachment evidence for Peter DeTroy, including Attorney DeTroy's involvement with the Attorney General's Office. *Id.* at 46. He did not prepare a written motion in limine. [App. 34.] Predecessor counsel did not prepare exhibit lists. [App. 34.] Predecessor counsel, by his own admissions, was simply unprepared.

The Appellant had never been involved in the criminal justice system before, and did not know how it worked. He did not understand what was proper

[3] It is worth noting that the Appellant had several witnesses, including some of the alleged victims, who were ready and willing to go to bat for the Appellant at trial. The Appellant had strong character witnesses: David Kerr, DDS and Paul Rosenblum. [App. 51-54.] Both individuals speak of Doyle's reputation in the community for trustworthiness. *Id.* Further, several of the victims did not want to see the Appellant convicted. [App. 55-56.] Some of the victims would have been able to speak to the *mens rea* elements of the crimes charged. Thomas Reynolds, for example, stated that "[I]t is my belief that Michael did not knowingly violate any law." [App. 57.] Carol Nale stated that "I believe Michael Doyle is as much a victim of this fraudulent scheme as are the rest of us." [App. 58.] Certainly, these witnesses, if developed, would have been very beneficial to Mr. Doyle at trial. Despite this, predecessor counsel only planned on having the Appellant and possibly Ralph Dyer testify. November 5, 2001 Transcript, p. 36.

trial preparation, and instead, relied on counsel. November 5, 2001 Transcript, p. 87. He did so to his detriment.

This took place despite the fact that Doyle had been clear with predecessor counsel that he wanted to go to trial. [App 30-31.] November 5, 2001 Transcript, p. 14. That said, by the time he was in court, he realized that predecessor counsel was simply not prepared to go forward. [App. 31.] The Court, lacking any patience with Mr. Doyle at this point, was either going to force him to go forward at that point, or plead guilty. [App. 30-31.] Faced with the dilemma of going forward with counsel who was totally unprepared and unwilling to try the case, Doyle bowed to the pressure of pleading guilty. [App. 30-31.] Doyle then took it upon himself to review materials at his attorney's office, that had not been provided to him. November 5, 2001 Transcript, p. 18. Based on that review, Appellant located materials which directly supported his innocence. [App. 23-28.]

In essence, the Appellant's entry of a guilty plea was as a result of pressure and not his own desire to try this case. This pressure was applied by his own attorney who simply did not want to, nor was prepared to, try the matter. **Despite that, his attorney even after being fired, has agreed that the Appellant consistently maintained his innocence.** November 5, 2001 Transcript, p. 17. [App. 30-31.] The fact that Doyle has maintained his innocence throughout the course of these matters, which again has been admitted by the State in their sentencing memorandum, suggests strongly that he should have been allowed to withdraw his guilty plea. The simple fact that he was coerced by unprepared

counsel into pleading does not mean he did not assert his innocence. Mr. Doyle has asserted his innocence from day one, and continues to do so until this day. All he has ever wanted, is counsel to give him his day in court before a jury of his peers.

iv. The Rule 11 Proceedings Were Deficient as Appellant's Plea Was Essentially Coerced and, Therefore, Involuntary

The Appellant's plea in this case was involuntary in that it was coerced. We've already suggested that predecessor counsel was unprepared for trial, and subsequently pressured the Appellant into pleading a second time. In the Appellant's own words, he was "terribly pressured." [App. 31.] Even predecessor counsel has admitted that "I have seldom in my career so strenuously argued against a client's stated preference for trial." [App. 33.]

Also underlying the pressure was predecessor counsel's concern about cross examining Peter DeTroy and Ralph Dyer. Again, Doyle's position was that an effective cross-examination of Doyle's prior counsel could show that the charged conduct was not knowing. In other words, Doyle could say to the jury, "if two well respected lawyers didn't know this was a security, how could I?"

Again, undersigned counsel does not begrudge predecessor counsel from respecting or admiring Peter DeTroy and Ralph Dyer. If predecessor counsel has a relationship with Dyer and/or DeTroy that would have made him uncomfortable

in cross-examining them, that is certainly understandable.[4] But at the same time, when the very liberty of an individual is at stake, it is counsel's duty to zealously represent his client, even if it means attacking through cross-examination pillars of the community.

That is how the Appellant found himself pleading guilty to a crime he did not commit. Predecessor counsel's unpreparedness and lack of willingness to go to trial despite the Appellant's request to try the case culminated in an eleventh hour pressure sale at jury selection for Doyle to plead guilty. [App. 31.] Doyle, after several hours of arguing, bowed to the immense pressure, and entered his plea. [App. 31; App. 33.] As a result of the coercive tactics by predecessor counsel, Doyle's plea was not voluntary and, therefore, Rule 11 proceedings were deficient.

Underlying any analysis on a motion to withdraw should be the concept that the Court should err on the side of caution. As we have suggested, this caution should be employed liberally and should have been employed here. All Mike Doyle has ever wanted is his day in court before a jury of his peers, and he has not gotten it. At each turn, lawyers and judges have told him that the right to a

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[4] Some examples of the tentativeness exhibited by predecessor counsel in facing the cross-examination of DeTroy or Dyer are found in the November 5, 2001 Hearing Transcript. There, for example, predecessor counsel wanted to do the investigatative work in the case himself, "especially when it was Peter DeTroy." November 5, 2001 Hearing Transcript, p. 35. He calls DeTroy a "pillar of the legal community." November 5, 2001 Hearing Transcript, p. 24. He says it would have been "perilous to call several individuals of some renown in our community liars." November 5, 2001 Hearing Transcript, p. 24. Predecessor counsel admitted that certain avenues of cross examination of DeTroy were "not on my radar screen." November 5, 2001 Hearing Transcript, p. 46.

jury trial does not apply to him or to his case. We are urging this Court to tell him differently.

II. THE COURT VIOLATED THE LAW OF THE CASE BY ALLOWING AN OPEN PLEA

While predecessor counsel was still representing the Appellant, he moved to withdraw the Appellant's first guilty plea. [App. 37-38.] On November 9, 2000, a hearing was held on Appellant's Motion to Vacate the Guilty Plea before Justice Pierson. *See* November 9, 2000 Transcript. Defendant had previously entered a conditional guilty plea on April 14, 2000 before Justice Pierson. *See* April 14, 2000 Transcript.

There was a hearing on the Motion to Vacate, at which time the court rendered it's Order. The Order states:

> After hearing and review, the Court grants the Defendant's motion to withdraw the plea. The matter is placed back on the trial list – a not guilty plea is entered. The Court also indicated on the record that NO negotiated pleas will be accepted by the Court. Any change of plea must be open. The Court is to give this case priority in scheduling, but not to be set before December 6, 2000.

[App. 38 (*emphasis included*).]

Obviously, the strong language in the written Order by Pierson against allowing negotiated pleas is clear. Justice Pierson felt strongly enough about this Order to underline and capitalize that "NO" negotiated pleas will be accepted by the Court. This strong language was further reinforced by Justice Pierson at the hearing, when he stated:

> THE COURT: And I want to make it very clear that if the Court grants the withdrawal, there will be no negotiated pleas in this matter. Any pleas that are entered will be just open pleas period. You're free to argue for whatever you think is appropriate. State's free to argue whatever they think is appropriate because there will be **no negotiated deals**.
>
> Does your client understand that? If you want to take a few minutes and talk to him, you can, but that's a matter of record and that's the **law of the case**.

November 9, 2000 transcript, pp. 4-5.

Despite Justice Pierson's clear Order, extensive negotiations took place between AAG Amy Homans and predecessor counsel. *See Generally*, February 27, 2002 Transcript. These negotiations included plea bargaining, in chambers' meetings with various justices. *Id.* As the result of those negotiations, a negotiated plea was ultimately agreed upon, and Mr. Doyle entered a plea of guilty on February 12, 2001, before Justice Mills. *See* February 12, 2001 transcript. The substance of that negotiated plea was that the State would argue for a sentence of two years, nine months, with all but two years suspended and four years probation. *Id.* at 8. Under the agreement, Appellant was permitted to argue for less than the State's recommended sentence. *Id.* at 8.

> The February 12, 2001, colloquy included:
>
> THE COURT: All but two years to be served in jail and four years' probation when you are released from jail. And is it the two years only that is a cap?
>
> MR. VAN DYKE: Yes.

> THE COURT: And your attorney is going to argue for less than two years and nine months for an underlying sentence, your attorney is going to argue that you should spend fewer than two years in jail initially and your attorney is going to argue for fewer than four years probation; do you understand that?
>
> THE DEFENDANT: Yes, your honor.

February 12, 2001 Transcript, p. 8.

Subsequently, undersigned counsel moved to strike the Appellant's second guilty plea on February 8, 2002. [App. 44-48.] This Motion to Strike was a separate motion from undersigned counsel's previous Motion to Withdraw. At a hearing on the matter, Justice Mills refused to strike and enforce Justice Pierson's prior Order. See February 27, 2002 Transcript. In doing so, she stated, without examining the laws related to the law of the case doctrine, that she refused to not strike the plea. *See Generally,* February 27, 2002 Transcript, pp. 20-21. The reason for Justice Mills' refusal to strike the plea was that it was more fair ultimately to the Appellant. *Id.* at 20-21. Justice Mills' reasoning was that because the plea was actually better in her view for Mr. Doyle, that she was not bound by Justice Pierson's Order.

A. The Plea Entered Into By Doyle In February, 2001 Was a Negotiated Plea

It's anticipated that the Attorney for the State will argue that the second plea entered by the Appellant was not a negotiated plea, but an open plea. This simply is not the case.

The concept of an open plea in the State of Maine is explained in the case of *State v. Isley*, 604 A.2d 17 (Me. 1992). There, the Court explained the following in a footnote:

> The entry of a "open plea" by a Defendant advises the Court that no proposed disposition of the case has been reached by the State and the Defendant for the Court's consideration.

Id. at 20.

The open plea concept is not a Maine novelty. Other states sufficiently express similar definitions in relation to the meaning of an open plea. For example, Delaware case law suggests that an open plea is entered when a Defendant pleads guilty without receiving any promises from the State in return. See *People v. Wilk*, 124 Del. 2d. 93 (1988).

In the instant proceedings, the Appellant clearly did not enter an "open plea" since the State promised to recommended a sentence of two years, nine months, all but two years suspended. February 12, 2001 Transcript, p. 8. The Court, in allowing Doyle's second plea, recognized that the plea was negotiated and, in fact, represented to the Appellant in open court that it could not exceed the two year cap that was negotiated. *Id.* at 4. The Court, however, had the right to reject the negotiated plea, as it should have done under the law of the case doctrine. M.R. Crim. P. 11(a)(e).

B. <u>By Accepting and Refusing to Strike the Appellant's Second Plea, the Court Incorrectly Violated the Law of the Case Doctrine as it Related in This Matter to the Acceptance of No Negotiated Pleas</u>

As Justice Pierson correctly suggested, his Order that there be no negotiated pleas accepted by the Court is "the law of the case." This precedent is strongly entrenched in the law and public policy. In the State of Maine,

> . . .[t]he doctrine of the "law of the case" rests on the sound policy that in the interest of finality and intra-court comity a Superior Court justice should not, in subsequent proceedings involving the same case, overrule or reconsider the decision of another justice. (citation omitted.)
>
> . . .
>
> The rule does not serve as a complete bar to reconsideration of an issue when the prior ruling is provisional or lacks clarity, or the error is of such character that it should be corrected at trial.

Monopoly, Inc. v. Aldrich, 683 A.2d 506, 510, *quoting*, *Grant v. Saco*, 436 A.2d 403 (Me. 1981); *United Airlines v. Hewin Travel*, 622 A.2d 1163 (Me. 1993).

The law of the case doctrine is not one to be taken lightly here. It is the very law of the case power that allows courts to have any binding effect with their orders. As the First Circuit explained:

> Though the power exists to reopen the points of law already decided, it is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, error to prevent a manifest injustice. The doctrine of the law of the case is normally a salutary one in the interest of economy and effort and of narrowing down the issues in successive stages of litigation. In the absence of exceptional circumstances, it would be unfortunate if on second

> appeal counsel felt free to argue *de novo* as a matter of course the points decided on previous appeal.

White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940).

Here, Justice Mills accepted a negotiated plea. See February 12, 2001 Transcript, p. 8. The acceptance of that plea was in contravention to the clear and unambiguous law of the case set by Justice Pierson. [App. 38; November 9, 2000 Transcript, pp. 4-5.] When this was brought to Justice Mills' attention in relation to a Motion to Strike, she ignored it in favor of her subjective belief as to what was good for the Defendant. February 27, 2002 Hearing Transcript, pp. 20-21. Despite the clear law of the case precedent, Justice Mills took it upon herself to decide that it was more beneficial to the Appellant for her to ignore the law of the case. *Id.* Clearly, the standard applied by Justice Mills is not the appropriate standard in making a determination as to whether the previous law of the case was binding. It is the Defendant's sole responsibility to determine what is best for him – not the judge. As the First Circuit noted, failure to apply the law of the case must be due to "manifest necessity," and "exceptional circumstances." *White, supra* at 317. Here, no manifest necessity to ignore the law of the case existed. Rather, the Appellant sought to enforce a binding order of the Court, and it was ignored based on Justice Mills' own determination as to what was good for the Appellant. Such a determination was improper, and Justice Pierson's Order should have been enforced. In enforcing Justice Pierson's Order, Justice Mills

should have struck the Appellant's February, 2001, guilty plea. As a result, Justice Mills' refusal to strike the plea should be vacated on this appeal.

III. THE APPELLANT'S PLEA SHOULD HAVE BEEN WITHDRAWN BECAUSE JUSTICE COLE RECUSED HIMSELF, VIOLATING THE APPELLANT'S PLEA AGREEMENT

Part of the plea bargain negotiated for the Appellant was that Justice Roland Cole would be the Appellant's sentencing judge if he pled guilty. February 27, 2002 Transcript, p. 24. This became part of the bargain because Justice Cole had indicated to the Appellant that he would likely impose a sentence of county jail time if he performed the sentencing. *Id.* at 24. AAG Homan's agreed that was part of the plea bargain, stating that "it was clearly a major part of the Defendant's pleading that day, was that Justice Cole was going to do the sentencing…" *Id*. at 28. Justice Cole recused himself from the case, however. *Id*. at 32.

In Justice Cole's stead, Justice Paul Fritzsche presided over the sentencing. He gave the Appellant an unsuspended sentence of fourteen (14) months. Because Justice Cole did not perform the sentencing, the Appellant's plea bargain was violated. As a result, he should have been allowed to withdraw his plea, but he was not.

CONCLUSION

Predecessor counsel has quite correctly called this case a "tragedy." November 5 Hearing Transcript, p. 17. That people lost money may be tragic, but it is equally tragic that a man who has consistently proclaimed his innocence cannot get a jury trial. That tragedy can be remedied here, however, by granting

this appeal, withdrawing the Appellant's plea, and remanding this matter to the Superior Court for trial.

Dated this 14th day of June, 2001, at Portland, Maine.

____
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CERTIFICATE OF SERVICE

I, Thomas F. Hallett, Esq., hereby certify that I have caused two copies of the Brief of Appellant Michael Doyle to be served upon the following party by depositing said copy in the United States mail, postage prepaid, addressed as follows:

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Dated this 14th day of June, 2001, at Portland, Maine.

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ADDENDUM

32 M.R.S.A. § 10201(1)……………………………………………..……1-2

32 M.R.S.A. § 10301(1)……………………………………………………….3

32 M.R.S.A. § 10401…………………………………………………………..4