

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2020-0053

State of New Hampshire

v.

Matthew Gedney

SUPPLEMENTAL MEMORANDUM ON CASES CITED  
DURING ARGUMENT

Counsel for Matthew Gedney respectfully submits this memorandum related to cases cited during oral argument that had not been cited in the parties' briefs.

As grounds for this Motion, it is stated:

1. The State kindly provided undersigned counsel with the citations for cases that were mentioned during oral argument on April 14, 2021.
2. This Court granted undersigned counsel time to read the cases and to respond.
3. The State's cases fall into two categories. First, the State cites several cases that relate to whether courts can consider acquitted conduct during sentencing. Those cases are: United States v. Frederickson, 988 F.3d 76 (1st Cir. 2021); United States v. Watts, 519 U.S. 148 (1997); and State v. Cote, 129 N.H. 358 (1987). The other category of cases cited by the State are cases that address whether restitution can be ordered when the jury issues a split verdict. Those cases are: State v. Schwartz, 160 N.H. 68 (2010) and State v. Lewis, 214 P.3d 409 (Ariz. Ct. App. 2009).
4. The first category of cases has little applicability here, as they do not address restitution. The question raised in this case is not whether a sentencing court may consider acquitted conduct; rather the issue is whether the restitution statute allows for an order of

restitution under the facts of this case. This statutory construction issue is distinct from the issue of what a sentencing court may consider when imposing sentence.

5. The second category of cases is more relevant to the issue here. In Schwartz, the defendant was charged with second-degree assault and simple assault. Schwartz, 160 N.H. at 70. The second-degree assault charge alleged that he caused bodily injury to the victim “by striking or stomping him repeatedly under circumstances manifesting an extreme indifference to the value of human life.” Id. (quotation omitted). The simple assault charge alleged that he caused unprivileged physical contact by hitting the victim. Id. He was convicted of simple assault but acquitted of second-degree assault. Id. at 70-71. He was ordered to pay restitution for the victim’s medical expenses in treating a broken jaw and facial lacerations. Id. This Court held that restitution was proper because the alleged offense, assault through unprivileged contact by hitting, caused the victim’s economic loss. Id. at 72.

6. Similarly, in Lewis, the defendant and perhaps one other person fired at a home from a car. Lewis, 214 P.3d at 323. A person was struck and required medical care. Id. The defendant was charged with aggravated assault with a deadly weapon, aggravated assault causing serious physical injury, and drive-by shooting. Id. The jury convicted him of drive-by shooting, acquitted him of causing serious physical injury, and hung on the assault by deadly weapon charge. Id. He was ordered to pay restitution for the shooting victim’s medical expenses. Id. The conviction for drive-by shooting represented a finding by the jury that the defendant intentionally discharged a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure. Id. at 324. The court held that Lewis’s actions of possessing a gun, firing it in the direction of the house and the victim, and control of the car from which shots were fired directly caused the victim’s economic loss. Id. at 326.

7. Schwartz and Lewis differ from Mr. Gedney's case because in those cases, the defendants were convicted of committing acts that were a necessary and direct precursor to the victims' economic losses. Schwartz was convicted of hitting his victim and Lewis was convicted of shooting towards a person or home. Thus, restitution was appropriate for medical expenses incurred by the person hit and the person shot.

8. However, here, Mr. Gedney was convicted of conspiracy. As the jury was instructed, the *actus reus* of the offense of conspiracy is the defendant's agreement to commit a crime. T2 74. The jury was then instructed to find that at least one of the alleged overt acts was committed. T2 76-77. Thus, the crime of which he was convicted did not necessarily include an act that was a necessary and direct precursor to the victims' need for counseling. Restitution is not authorized given Mr. Gedney's crime of conviction.

WHEREFORE, Mr. Gedney asks this Court to reverse the order of restitution and remand for further proceedings consistent with this Court's order.

Respectfully submitted,

By /s/ Stephanie Hausman  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum is being timely provided to the Criminal Bureau of the State of New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Stephanie Hausman  
Stephanie Hausman

DATED: April 26, 2021