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

LAW COURT DOCKET NO. Ken-24-125

STATE OF MAINE
Appellee

v.

AARON C. ENGROFF
Appellant

ON APPEAL from the Kennebec County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The trial court erred by denying defendant's motion to dismiss pursuant to the speedy trial provisions of M.R. U. Crim. P. 48(b), ME. CONST. Art. I, § 6, and the Sixth Amendment.

The State has three contentions that, in its view, defeat defendant's speedy trial claims: (A) the need for a fixed-date trial so that the testimony of out-of-state witnesses can be procured effectively waives a defendant's right to a speedy trial; (B) there is no significant harm to the defense caused by introducing all of the complaining witness's allegations via a recording taken two years before trial rather than via direct examination at trial; and (C) either abuse-of-discretion or clear-error review is appropriate for constitutional speedy trial arguments. Defendant addresses each contention in turn.

A. The State posits a per se rule that a defendant's need for a date-certain trial waives that defendant's right to a speedy trial.

Over and over again in its brief, the State contends that any delay was caused by defendant's request to schedule a date-certain trial so that his out-of-state witnesses could appear. The State's position is that a defendant in Maine must choose between his constitutional right to compulsory process (and present a defense) and his constitutional right to a speedy trial. Respectfully, this Court should not hold that the enfeeblement of Maine state courts through deprivation of adequate resources sufficient to ensure *both* constitutional rights is acceptable.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Such "is a fundamental element of due process of law." *Ibid*. However, according to the State, if a Maine defendant wishes to rely on this right, he must first give up his right to a speedy trial. He cannot have both rights, according to the State.

Defendant realizes, as best he can, the extraordinary pressures placed on Maine's judicial branch, deprived by the other branches of sufficient resources. Nonetheless, the answer in times of crisis cannot be to bend and undermine a defendant's constitutional rights. Unless and until the other branches of government appreciate the dire straits our courts are in, neither will step forward to ensure they can deliver what is constitutionally required. Sweeping our shortcomings under the rug, as the State suggests, will only lead to continued – or worsening – inadequacies.

The National Center for State Courts "(NCSC") recognizes that a court system's "ability to hold trials on the first day they are scheduled (trial date certainty) is closely associated with timely case disposition." NCSC, *CourtTools*, *Measure Five: Trial Date Certainty*, 1 available at: https://www.ncsc.org/courtools/trial-court-performance-measures/measure-five-trial-date-certainty (accessed Oct. 15, 2024). The rule proposed by the State – a defendant's need for a fixed-date trial waives his right to "timely case disposition – is at odds with NCSC's guidance. Date-

certain trials are supposed to serve the interests of "timely case disposition," not foreclose the (constitutional) right to it. To the extent that this Court follows the State's reasoning, it will undermine its ability to timely process cases.

In fact, defense counsel was obligated to "make arrangements to minimize the burden on the subpoenaed person." M.R. U. Crim. P. 17(a). Does that not include asking the presiding court for a fixed-date trial so that out-of-state witnesses might not trek from home to court each day during the trailing-list trial period?[1] Does following Rule 17(a) "waive" a client's right to a speedy trial?

The State has not identified any case in which a defendant's need for a fixed-date trial acts as a waiver of the right to a speedy trial. That suggests, again, that Maine would be an outlier were it to force a defendant to choose between either having a speedy trial or having his witnesses available at that trial.

B. Bypassing meaningful direct examination of the complaining witness, whose recollection was clearly poor, was detrimental to the defense.

The State brushes aside any thought that the application of 16 M.R.S. § 358 could have had any adverse effect on the defense.

Its contention that "numerous rules of evidence could have led to the admissibility of [the CAC] video," Red Br. 17, is both rife speculation and a

[1] 16 M.R.S. § 251 permits witnesses to collect the bounty of $10 per each day's attendance and 22¢ per mile of travel (well below state and federal rates).

misstatement of evidentiary law. Certainly, no necessary foundation was established for any such alternative pathway to admissibility. The hearsay exceptions it proposes, moreover, are of highly dubious utility given our facts.[2] *See* Red Br. 30. Moreover, had these pathways actually been viable, there would have been no need for the legislature to enact 16 M.R.S. § 358.

The State also contends it matters that defendant had a copy of the CAC video "[s]ince the inception of this case." Red Br. 17. What the defense did not know, of course, is that the State would be allowed to admit the video in

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[2] M.R. Evid. 801(d)(1)(A) (prior inconsistent statement) is plainly inapplicable because the CAC interview was not given "under penalty of perjury."

M.R. Evid. 801(d)(1)(B) (prior consistent statement) is inapplicable because defense counsel assiduously avoided charging that Cadence's testimony was "recently" fabricated or improperly influenced. Anyway, any admission would have been limited by the principle that "only those portions of a witness's prior statement that are consistent with the witness's courtroom testimony may be deemed admissible at trial." *United States v. Finch*, 79 M.J. 389, 391 (C.A.A.F. 2020). In other words, at best (for the State) only discrete portions would be admissible to buttress Cadence's trial testimony, assuming she would testify in accordance with her interview.

M.R. Evid. 803(3) (then-existing condition) is a non-starter because the exception expressly disavows any "statement of memory or belief to prove the fact remembered or believed," meaning that the CAC video could not be admitted to prove sexual contact. Any residual relevance is limited: What does it matter what condition Cadence was in when she gave the CAC interview?

M.R. Evid. 803(5) (recorded recollection) applies only when a witness lacks a full and accurate memory – is the State suggesting that is the case? Plus, the interview was not made when the alleged conduct was "fresh" in Cadence's mind; it was recorded more than a year after the final alleged instance of sexual contact (of which, by the way, the jury acquitted defendant). *Compare State v. Adams*, 2019 ME 132, 214 A.3d 496 (interview recorded eleven days after final assault). Finally, given Cadence's pretrial recantations, there is good reason to believe that the interview does not "[a]ccurately reflect[]" her knowledge.

its entirety as substantive evidence. 16 M.R.S. § 358 wasn't even on the legislature's radar at "the inception of this case." Defendant's speedy trial demands subsequent to the law's enactment (but before its effective date) suggest that the defense was trying to avoid a trial at which § 358 was applicable. Indeed, the other issues presented by this appeal indicate that part of the defense was to see whether Cadence would level believable accusations at trial. Section 358 alone scuttled that plan.

Direct examination of a child witness might reveal "erratic responses, evidence of coaching, or a bare minimum of comprehension and verbal skills," among other deficits of reliability. Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 ME. L. REV. 283, 344 (1990). Obviously, such opportunity is lost when – as here – the State elicits nothing of substance via direct examination. In contrast, "cross-examination may be of limited value if the child can express only the bare essentials of the crime or, most troubling of all, if the child is recounting a story believed to be real, but which in fact is not." *Ibid*. There is simply no way that the admission of all of the State's evidence of the elements of the offense is not prejudicial.

C. Proper standard of review

The State appears to have misapprehended defendant's argument about the appropriate standard of review for the constitutional claims. Defendant does not contend that clear-error review is appropriate for a court's legal conclusions. *But see* Red Br. 10 n. 2. Rather, this Court should have plenary review of such conclusions – *e.g.*, whether a request for a date-

certain trial constitutes a speedy trial waiver and whether implementation of § 358 constitutes prejudice.

As for the standard of review for defendant's M.R. U. Crim. P. 48(b)(1) claim, defendant agrees that it is abuse of discretion. However, the State implies, *see* Red Br. 11-12, that a court's discretion is unlimited, free of legal guideposts. In contrast, defendant argues that, for the reasons explained on pages 24 and 25 of the Blue Brief, the court committed legal error in its analysis – a telltale indication of abuse of discretion. *Aponte v. Holder*, 610 F.3d 1, 4 (1st Cir. 2010) ("Any material error of law automatically constitutes an abuse of discretion.").

Second Assignment of Error

II. The trial court erred by admitting the CAC video over defendant's arguments pursuant to the Confrontation Clause of the Maine Constitution.

The State's analysis of the Maine Constitution depends entirely on other jurisdictions' laws. Zero of its citations discuss the Maine Constitution. Were a defendant to offer such an analysis, this Court would deem his argument waived. *Cf. State v. Tripp*, 2024 ME 12, ¶ 20 n. 9, 314 A.3d 101; *State v. Norris*, 2023 ME 60, ¶¶ 33-36, 302 A.3d 1; *State v. Moore*, 2023 ME 18, ¶¶ 17-20, 290 A.3d 533; *State v. Page*, 2023 ME 73, ¶ 18 n. 7, 306 A.3d 142; *State v. Savage*, Mem-23-99 * n. 1 (Sept. 21, 2023); *State v. Wai Chan*, 2020 ME 91, ¶¶ 18 n. 10, 36, 236 A.3d 471. This Court should apply the same standard to prosecutors, either ruling for defendant on the merits or, in the alternative, reversing without reaching the merits until a later case. The State's silence on the meaning of § 6 puts this Court in the uncomfortable

and unsavory position of carrying the State's water, and in our adversarial system.

Notwithstanding the State's invitation to adopt other jurisdictions' laws "without explaining what in the Maine Constitution would be the basis for doing so," *Chan*, 2020 ME 91, ¶ 18 n. 10, defendant addresses its contentions.

A. The State asks this Court to abandon numerous decisions holding that the Maine Constitution requires more than just cross-examination.

Defendant has seen the U.S. Supreme Court's statement, tucked away in a footnote in *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004), that, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Not only was that not the case for most of the history of the Sixth Amendment, *see, e.g., Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), it has never been the case for the Maine Constitution.

Rather, as defendant argued in the Blue Brief (pages 34-37), the Maine Constitution generally requires face-to-face Confrontation with the defendant for *all* of the witness's testimony, unless the witness is unavailable. *State v. Frederic*, 69 Me. 400, 401 (1879) was clear that this guarantee applies to witnesses' "testimony" without limitation. *State v. Twist*, 528 A.2d 1250, 1256 (Me. 1987) explicitly held that Maine's conception of confrontation requires "affording the defendant his confrontation rights at the videotaping session itself."

Relatedly, Maine's Confrontation Clause has among its purposes "having a witness present before the tribunal which is engaged in the trial of the case...." *State v. Herlihy*, 102 Me. 310, 313, 66. A. 643, 645 (1906). Limiting that stricture to just cross-examination would have been unthinkable to generations of Mainers and Law Court justices living in in the years before videorecording technology made possible § 358 and its ilk. *Of course*, in the view of those living in such an era, direct examination must also be in person. The lack of videorecording technology in those days simply made saying so unnecessary.

Perhaps the centerpiece of the State's argument is this Court's decision in *State v. Adams*, 2019 ME 132, 214 A.3d 496. However, *Adams* says nothing about the Maine Constitution, decided as it was based solely on the Sixth Amendment. 2019 ME 132, ¶¶ 1, 12, 19-21. Anyway, the State's assertion that "[a] robust direct was not required in *Adams*," Red Br. 23, is mistaken. At *Adams'* trial, the prosecutor conducted a thorough direct examination[3] – indeed, he *had to* in order to first establish that the victim could not "recall well enough to testify fully and accurately." *See* M.R. Evid. 803(5)(A). For the one criminal charge in *Adams*, the prosecutor expended nearly 20 pages of substantive questioning. For the six charges in our case, the softball direct examination stretched a mere 4.5 pages of testimony, covering none of the substantive allegations. *Adams* did not hold that the

[3] Counsel for defendant is also counsel for Mr. Adams on his pending appeal to this Court, Fra-24-348, so he knows that the transcripts of Mr. Adams' trial are now available in this Court's files.

Maine Constitution does not require meaningful direct examination, nor could it have on its facts.

Likewise, a defendant's reliability-ensuring interests – *e.g.*, the right to be present at one's trial, the right to a public trial, the right to have the credibility of witnesses fairly assessed, the right to face only sworn testimony, the right to have the State carry its burden to call its own witnesses, and the right not to be tried with "guilt-suggestive technology" – have not been addressed by the State. All, as defendant argued at pages 37-40 of the Blue Brief, are infringed by § 358.

B. Hearsay exceptions may violate the Confrontation Clauses.

The State argues, "Hearsay exceptions do not infringe the Confrontation Clause." Red Br. 21. But, as this Court recently reaffirmed (under the Sixth Amendment), "'evidence that would otherwise be admissible under an exception to the hearsay rule may be barred by the Confrontation Clause.'" *State v. Judkins*, 2024 ME 45, ¶ 16, 319 A.3d 443, quoting *State v. Metzger*, 2010 ME 67, ¶ 8, 999 A.2d 947. Rather, this Court – not the legislature and not the rules-committees – has the prerogative to say what the Maine Confrontation Clause permits.

Above, *see* **ARGUMENT** I.B at n. 2, defendant discusses the hypothetical applicability of other hearsay exceptions to our case. While it is perhaps conceivable that in some other case, *in addition to* meaningful direct examination (*i.e.*, testimony about all of the elements of each charged offense), a CAC video might be admissible at trial via a hearsay exception, in

whole or in part, that does not change the Confrontation Clause analysis. Unless the witness is unavailable, the State's favored witnesses do not get to prerecord their testimony so as to avoid direct examination in front of the defendant and the jury.

C. The State's policy arguments don't move the needle.

The State contends that "both this Court and the Supreme Court have held that the right of confrontation may be balanced against the psychological protection of child sex victims." Red Br. 19. To be clear, this Court has never "balanced" away the requirements of § 6's Confrontation Clause; that was the U.S. Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). Again, *Adams* says nothing about the state constitution.

Anyway, § 6 is unequivocal: "In *all* criminal prosecutions" – not just those which do not involve child victims – "the accused shall have a right … [t]o be confronted by the witnesses against the accused." ME. CONST. Art. I, § 6 (emphasis added). To "balance" away this right is to violate the oath taken by judges (and lawyers) to "support" the Maine Constitution. *See* ME. CONST. Art. IX, § 1; 5 M.R.S. § 5; 4 M.R.S. § 806. If this Court believes that § 6 should be "balanced," it will have recognized

> a defect in the Constitution – which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to 'widespread belief,' and thus null and void.

Craig, 497 U.S. at 870 (Scalia, J., dissenting). There is good reason, in the words of the State, that Maine "is far behind the rest of the country when it comes to statutory exceptions regarding child victim testimony": The Maine

Constitution simply does not permit such innovations as have so far been offered. Red Br. 24. A holding to the contrary would fundamentally alter § 6, opening the way to preferential treatment for those witnesses favored by those in power at any moment in time.

Third Assignment of Error

III. The trial court erred by denying defendant's motion to preclude the State from utilizing 16 M.R.S. § 358 on due process grounds.

The State implies that Maine state due process can be offended only by the withholding of evidence, the admission of involuntary statements, prosecutorial misconduct, or sentencing based on unreliable information. *See* Red Br. 27-28. To the contrary, Maine's due process guarantees "'governmental fair play.'" *State v. Le Blanc*, 290 A.2d 193, 197 (Me. 1972), quoting *State v. Munsey*, 152 Me. 198, 201, 127 A.2d 79, 81 (1956). It follows that when the government changes the rules of trial midstream, despite defendant's invocation of his right to be tried under the rules existing for the first 19 months of the pendency his case, it is unfair.

Without saying so, the State's position seems to be that the state constitutional protection of "vested rights" extends only to property rights. *See* Red Br. 28. As defendant explained, *see* Blue Br. 41-43, that contention should be dead on arrival, as the font of the "vested rights" doctrine is § 6 – explicitly a protection for "the accused" in criminal prosecutions.

Nor does it save the State that there was an evidentiary hearing at which the State satisfied the requisite prongs of 16 M.R.S. § 358(3). That the State can tick off criteria such as "[t]he recording is both visual and audio"

by a preponderance of the evidence does not somehow make the last-minute rule-change fair. Recall that the State did not signal its intent to rely on § 358 until two days before jury selection. Defense counsel objected that he had not expected the State to do so and was therefore unable to fully challenge the reliability of the CAC video. Having invoked his speedy trial rights some seven months prior, defendant clearly envisioned a trial at which the State could not sit back and push play.

Fourth Assignment of Error

IV. The trial court committed obvious error by admitting the CAC video pursuant to 16 M.R.S. § 358 when, at the time, the legislature had not made that provision retroactive.

The State has a creative, albeit unavailing, argument: M.R. Evid. 101(a) somehow made 16 M.R.S. § 358 retroactive. Respectfully, that is not so, and the remedy is retrial at which the CAC video is inadmissible via 16 M.R.S. § 358.

A. There was obvious error.

1 M.R.S. § 302 "'is controlling absent *clear and unequivocal* language to the contrary.'" *Tripp*, 2024 ME 12, ¶ 13 (emphasis added), quoting *Reagan v. Racal Mortg.*, 1998 ME 188, ¶ 7, 715 A.2d 925. To make a law retroactive, *the legislature* must express an intent to do so. *Tripp*, 2024 ME 12, ¶ 15.

At the time of trial, 16 M.R.S. § 358 neither cited § 302 nor explicitly stated that it was retroactive. The State does not argue to the contrary. Rather, it contends that a rule of evidence – M.R. Evid. 101(a) – works the same retroactivity. Without resorting to citation to Schoolhouse Rock, *the*

legislature[4] did not implement Rule 101(a); the Supreme Judicial Court, through its rules committee and inherent and statutory powers, *see* 4 M.R.S. § 9-A, did so. And the Supreme Judicial Court last amended the Maine Rules of Evidence on August 1, 2018, rendering unbelievable the notion that, somehow, the drafters of Rule 101(a) had the clairvoyance to make § 358 retroactive. Certainly, the fact that the legislature subsequently saw fit to amend § 358 makes it clear that even that body did not itself believe that M.R. Evid. 101(a) somehow made § 358 retroactive.

B. The error affected substantial rights and warrants reversal.

Had the court not erred, the CAC video would not have been admissible pursuant to § 358 and Cadence would have had to offer meaningful direct-examination testimony. Instead, literally *all* of the evidence establishing the elements of the offense came in via the CAC video.

Though the State contends that there is no "reasonable probability" of a different outcome, *see* Red Br. 36, there are strong indicia of prejudice. First, the jury did not entirely credit Cadence's testimony; it acquitted defendant of some charges, suggesting that the State's case was less than overwhelming. *Cf. State v. Baugh*, 504 P.3d 171, 178 (Utah App. 2022) (split verdict "suggests that the jury might have struggled with the evidence," supporting determination that error was prejudicial). Second, Cadence's two

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[4] Ironically, had the proponents of § 358 not made an end-run around the usual process for enacting court rules – *i.e.*, proposing them in this Court's rules-committees or bringing them to the Criminal Law Advisory Commission – M.R. Evid. 101(a) might well have made such a rule-based exception retroactive.

recantations prior to trial indicate a significant possibility that her trial testimony might differ from her CAC interview. Given what we know about memory, this possibility increases as it now approaches three years since Cadence sat for the CAC interview. Third, defendant was forced to choose between having a trial in January 2024 and having his attorney vet the CAC interview.[5]

Finally, the State has not responded to defendant's proposed remedy: a new trial at which the CAC interview may not be introduced via 16 M.R.S. § 358. That is what should have occurred, and this Court may order it now to restore defendant's rights. *See* 4 M.R.S. § 7; M.R. App. P. 1; M.R. U. Crim. P. 2. By omitting to respond to this proposed remedy, the State has waived the opportunity to do so. *See State v. Cummings*, 2023 ME 35, ¶ 15 n. 6, 295 A.3d 1227.

CONCLUSION

For the foregoing reasons and those presented in the Blue Brief, this Court should reverse with a mandate for (I) an order of dismissal; or (II) further proceedings at which 16 M.R.S. § 358 may not be utilized.

Respectfully submitted,

October 16, 2024

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[5] While the State notes that "Defendant had the CAC video from the outset of this case," Red Br. 37 n. 6, counsel was surprised at the State's last-minute invocation of 16 M.R.S. § 358. This Court's jurisprudence in recent years, *see*, *e.g.*, *State v. Dennis*, 2024 ME 54, ¶ 18 n. 9, 319 A.3d 443; *State v. Hassan*, 2018 ME 22, ¶ 19, 179 A.3d 898, implies that there is no duty for the prosecution to investigate its case before the eve of trial. Requiring something different from defense counsel would create a double standard.

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CERTIFICATE OF SERVICE

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel at the address provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
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CERTIFICATE OF SIGNATURE

Aaron C. Engroff

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

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