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

LAW COURT DOCKET NO. Pen-24-37

STATE OF MAINE
Appellee

v.

SCOTT HAVENS
Appellant

ON APPEAL from the Penobscot County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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INTRODUCTION

(II)[1] On this Court's watch, will the Confrontation Clause of § 6 be so construed as to allow the wholesale introduction of videotaped interviews of parties' witnesses in lieu of direct examination? If this Court endorses 16 M.R.S. § 358, the legislature may exempt its favored witnesses from ever needing to present direct examination and its favored parties from ever needing to question witnesses at trial. Trials might then consist only of disfavored parties – criminal defendants, for example – attempting to rebut those out-of-court allegations.

(I) It appears that everyone – the judge, the prosecutor and the defense lawyer – simply neglected to notice the need for a specific-unanimity instruction. Certainly, nothing indicates that the defense *knowingly* declined one. In such circumstances, review is for obvious error, which is established here given the generic allegations and the due process-derived standard enunciated in *Reynolds*.

ARGUMENT

Second Assignment of Error

II. The admission of the complainant's CAC video pursuant to 16 M.R.S. § 358 violates the Confrontation Clause of the Maine Constitution.

In his supplemental brief, defendant contended that the Confrontation Clause of ME. CONST., Art. I § 6 requires face-to-face direct testimony, except when the declarant is unavailable to deliver it. Certain reliability-ensuring

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1 Defendant takes the assignments of error out of order.

safeguards – *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" – are defeated by § 358.

The State, in its response, simply contends that the state constitutional Confrontation Clause is satisfied "because the victim was present and available for cross examination…." (Red Br. 6).

Respectfully, the State is incorrect. While the Confrontation Clause of *the Sixth Amendment* might merely require the opportunity for cross-examination, a review of this Court's state constitutional jurisprudence demonstrates that face-to-face confrontation "when [the witnesses] give their testimony" is required. *State v. Frederic*, 69 Me. 400, 401 (1879), absent a few deeply rooted exceptions . The interests served by the Maine Confrontation Clause are upset by admitting a videotaped interview taken months or years before trial in lieu of meaningful direct examination.

Defendant stands by that analysis, uncontroverted by the State, and here merely rebuts the State's contention that the Maine Constitution requires nothing more than the opportunity for cross-examination.

A. The State's citations involve the Sixth Amendment.

The State contends that the "principle" that "the Confrontation Clause" requires nothing more than the opportunity for cross-examination "has been upheld by this Court on multiple occasions." (Red Br. 6). Defendant disagrees.

This Court, it is true, has previously said that *the Sixth Amendment* guarantees nothing more than the opportunity for cross-examination. Indeed, as a matter of federal law and vertical stare decisis, it had to say that: "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004). But this Court has never made such a determination as a matter of state law. Nor should it.

State v. Adams, 2019 ME 132, ¶¶ 1, 12, 19-22, 214 A.3d 496 and *State v. Gagne*, 2017 ME 63, ¶¶ 31-35, 159 A.3d 316 were explicitly decided on Sixth Amendment grounds. They contain zero state constitutional analysis; Though *Gorman* noted that, in addition to a Sixth Amendment claim, the defendant also made a state constitutional argument, that opinion contains only analysis of federal law, primarily *Crawford*. *State v. Gorman*, 2004 ME 90, ¶¶ 46-55, 854 A.2d 1164. By this Court's own standards, *see*, *e.g., State v. Moore*, 2023 ME 18, ¶¶ 18-20, 290 A.3d 533, *Gorman's* state constitutional "analysis" is certainly "undeveloped." None of the decisions cited by the State say anything of substance about state constitutional law.[2]

[2] 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. Footman*, 2023 ME 52, ¶ 9 n. 5, 300 A.3d 810; *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

Cases cited by defendant, however, establish that all of a witness's testimony needs to be made in court or at least in front of the defendant. *See, e.g.*, *Frederic*, 69 Me. at 401 ("by bringing the witnesses when they give their testimony as to such matters face to face with him"). In *Twist*, the Law Court held that confrontation "would include affording the defendant his confrontation rights at the videotaping session itself." *State v. Twist*, 528 A.2d 1250, 1256 (Me. 1987). Section 6's Confrontation Clause is about more than just the opportunity for cross-examination. *State v. Scholz*, 432 A.2d 763, 767 (Me. 1981) (face-to-face requirement, reliability); *State v. Herlihy*, 102 Me. 310, 313, 66 A. 643, 645 (1906) ("having a witness present before the tribunal which is engaged in the trial of the case"); *State v. Jones*, 580 A.2d 161, 162-63 (Me. 1990) ("the right of the accused to be present at every stage of the trial."). The State would have this Court ignore – overturn, in fact – the interpretation of the state Confrontation Clause that has existed since Maine's earliest days.

For the same reason, the State's citations to decisions from "across the country" have no bearing on this case. (Red. Br. 8). The courts in Louisiana, Alabama, South Carolina and North Dakota have not analyzed Art. I., § 6. *See State v. Eley*, 203 So. 3d 462, 469-71 (La. App. 1st Cir. 2016) (analyzing Sixth Amendment); *D.L.R. v. State*, 188 So. 3d 720, 725-27 (Ala. Crim. App. 2015) (same); *State v. Poulor*, 932 N.W.2d 534, 536-38 (N.D. 2019) (same);

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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.

State v. Whitner, 732 S.E.2d 861, 867 (S.C. 2012) (analyzing application state evidence rules for abuse of discretion).[3]

B. The State has abandoned any other arguments it might have made.

This Court has "long adhered to the principle of party presentation." *State v. Whitney*, 2024 ME 49, ¶ 18, 319 A.3d 1072. Therefore, any "'[i]ssues neither briefed nor pressed in argument are deemed waived and abandoned on appeal.'" *Ibid.*, *quoting State v. Barlow*, 320 A.2d 895, 898 (Me. 1974). Certainly, this Court has no power to make arguments that the Executive, in its discretion, has chosen not to advance. *See* ME. CONST. Art. III, §§ 1 & 2.

First Assignment of Error

I. The trial court committed obvious error by neglecting to give a specific-unanimity jury instruction.

A. The issue is not waived; review is for obvious error.

The State contends that defendant "waived his right to appeal the lack of a specific unanimity instruction...." (Red. Br. 9). Presumably, it refers to

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[3] Defendant disagrees with the State's implication, *see* State's Supp. Br. 2-3, that CAC interviewers are anything other than a law enforcement function, at least in this context. CAC's website acknowledges that the "goal" of their "multidisciplinary teams" is "to make sure all team members have the information they need to make sure they can prosecute a case...." Maine Network of Children's Advocacy Centers, *CAC Centers Help Families*, available at: https://www.cacmaine.org/cacs-work.html (accessed Oct. 15, 2024). These "teams" are "built around the idea that children and families deserve support and that offenders should be held accountable." *Ibid.* Only law enforcement, including Child Protective Services, may refer a child to CAC. *Id.* at *What is a CAC?,* available at: https://www.cacmaine.org/how-it-works.html (accessed Oct. 15, 2024). Regardless of whether or these goals are laudable, CAC interviewers are decidedly not impartial.

trial counsel's flippant response,[4] "None. Best I have heard," when the judge asked whether defense counsel had any objections to the jury instructions just given by the court. (Tr. 238).

This is a clear forfeiture of a better standard of review, not waiver. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S. at 733.

Nothing suggests that anyone contemplated the need for a specific-unanimity instruction, let alone intentionally relinquished such a known right. Thus, this Court routinely reviews for obvious error in like circumstances. *See*, *e.g.*, *State v. Rosario*, 2022 ME 46, ¶ 29, 280 A.3d 199 ("At trial, Rosario failed to object to the possession instruction and failed to request a specific unanimity instruction, and we therefore review for obvious error.); *State v. Chase*, 2023 ME 32, ¶ 13, 294 A.3d 154 ("The record contains neither a request for a specific unanimity instruction nor an objection to the court's jury instructions. Because the issue is unpreserved,

[4] Forfeiture and waiver are prudential doctrines, and it makes little sense to fault a defense attorney – who might later be subject to a petition for post-conviction review – for failing to catch exactly the same omitted instruction that the judge and prosecutor missed. Appellate review should instead be searching, absent an explicit waiver of a known right.

our review is for obvious error."). To the extent[5] *State v. Miller*, 2018 ME 112, ¶ 14 n. 6, 191 A.3d 356 suggests otherwise, it is doctrinally unsound and should be explicitly abrogated.[6]

M.R. U. Crim. P. 30(b) does not preclude obvious-error review, either. *See State v. Nason*, 383 A.2d 35, 36 (Me. 1978) (lack of jury instruction may be reviewed for obvious error notwithstanding lack of compliance with Rule 30(b)).

B. The circumstances required a specific-unanimity instruction.

Reynolds endorsed the prosecution of "generic" allegations of sexual abuse against a due process challenge, with one key caveat: "so long as the jury is properly instructed on specific unanimity." *State v. Reynolds*, 2018 ME 124, ¶ 23, 193 A.3d 168. The State would have this Court overturn *Reynolds sub silentio*, freeing the State to prosecute defendants for as many counts of abuse as possible without requiring the jury to differentiate one "generic" allegation from the next.

Requiring jurors to examine each allegation on a granular level forces jurors to wrestle with the evidence rather than returning a gut-level verdict.

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[5] *Miller's* statement that "Miller affirmatively approved of the jury instructions" is ambiguous. Does that mean – as it must to constitute an actual waiver under any established definition of that term – that, clearly understanding his right to such an instruction, Miller decided nonetheless to forgo one?

[6] Otherwise, defense lawyers will soon be trained not to respond to a judge's – unfair, in those circumstances – question about whether there are any objections to the given instructions, lest counsel unintentionally "waive" an instruction that they haven't even contemplated.

By having jurors look for certainty and unanimity in otherwise nondescript allegations, defense attorneys hope to encourage the jury to scrutinize a complainant's sparse and uneven testimony. This is particularly important in sexual abuse cases, where social opprobrium of defendants is at its peak and, therefore, knee-jerk verdicts are easier to reach than are verdicts grounded in the uncomfortable alleged details.

Here, via their note about the need for certainty about the dates of the allegations, the jury flagged for the court their inability to reach a consensus about discrete incidents. Instead of clarifying the need for such unanimity, the court unintentionally signaled that agreement and certainty about particular incidents was not necessary. If, as the State suggests, the jury agreed that defendant committed everything that was alleged, there would have been no reason for them to express concern about getting the dates right. The fact that they bothered to ask for clarification indicates that there was no such unanimity.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's judgment and remand for proceedings not inconsistent with its mandate.

Respectfully submitted,

October 16, 2024

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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

Scott Havens

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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