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

SUPPLEMENTAL BRIEF OF APPELLANT

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INTRODUCTION

This supplemental brief presents one argument: the State's reliance on 16 M.R.S. § 358 violates the Maine state Confrontation Clause.

STATEMENT OF THE CASE

Because defendant, in his Blue Brief, has already discussed many of the pertinent facts, here, in this supplemental brief, he adds those facts made relevant by the addition of this new assignment of error.

I. Defendant objected to the admission of the Children's Advocacy Center video on Confrontation Clause grounds.

The day before trial began, the State moved *in limine* to introduce a videorecording of the complainant's "interview" at the Penquis Children's Advocacy Center ("CAC"). *See State's Motion in limine* of November 16, 2023. The State contended that the CAC video was admissible pursuant to the newly effective 16 M.R.S. § 358. *Ibid.*

The next morning, as trial began, defense counsel raised an objection that 16 M.R.S. § 358 "is unconstitutional from a confrontation perspective." (1Tr. 7). The court (Roberts, J.) recognized that defendant was raising a Confrontation Clause objection:

> So the first step that you wish to challenge is whether [the CAC video] may be even considered on the grounds of [c]onstitutionality regarding the confrontation clause.

II. Overruling defendant's objection, the court admitted significant portions of the CAC video.

(1Tr. 9-10). The court went on to rule:

> In terms of the confrontation clause, the Court is mindful that the [s]tatute requires that after playing the video the State have the victim on the stand, she will be subject to the same ability and

> same level of cross-examination as would be applied if she had given the same information in open Court as opposed to being presented on the CAC interview, so in the Court's view the confrontation clause is not triggered here. I am going to deny the request on the issue of the confrontation clause.

(1Tr. 11). Just prior to the CAC video being played for the jury, counsel renewed his objections.[1] (1Tr. 66-67).

Defendant here repeats that portion of his initial brief describing the resulting State's evidence, separating that which was admitted pursuant to § 358 and what which was introduced as trial testimony.

A. The CAC video

Mallorie first told the interviewer that, when she was seven years old, defendant "forced" her to remove her clothes. (SX 1, Clip 1 ca. 0:15 to 0:30). Defendant touched the girl's body-parts; he made her touch his, including once licking his penis. (*Id*. ca. 0:30 to 1:12; SX 1, Clip 3 ca. 3:05 to 3:30). At one point, defendant licked Mallorie's private part. (SX 1, clip 1 ca. 1:15 to 1:30). Defendant "tried" touching Mallorie with his penis and rubbing it against her privates. (*Id*. ca. 8:25 to 8:45, 9:55 to 10:20). Mallorie reported that defendant did this "a bunch," nearly every time she went to stay with him, which occurred most weekends. (*Id*. ca. 11:00 to 11:12).

One time, when she was seven or eight, Mallorie recalls being dropped off at defendant's apartment and defendant began to touch her chest. (*Id*. ca. 2:20 to 2:50). Mallorie believes this occurred in either 2020 or 2021, when

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[1] In addition to the Confrontation Clause argument, defendant raised various other objections to the admission of the CAC video. *See* 1Tr. 4-11, 23-24, 31-33, 38-41.

the weather was snowy – perhaps in March or February. (*Id.* ca. 3:30 to 3:55).

Mallorie also reported that defendant showed her how to rub his penis and had Mallorie do so with her hand. (SX 1, Clip 2 ca. 1:10 to 1:55). She recalled that his penis felt "wet and slimy." (*Id.* ca. 1:55 to 2:00).

Later in the interview, Mallorie recalled that "when it first happened," she was six and a half. (SX 1, Clip 3 ca. 0:25 to 0:30). "It happened a lot more when I was seven years old," she clarified. (SX 1, Clip 3 ca. 0:30 to 0:33). She stopped going to defendant's apartment by the time she was eight. (*Id.* ca. 0:33 to 0:40). She told the interviewer, "[I]t stopped when I was eight." (*Id.* ca. 1:13 to 1:18). These incidents did not take place every time Mallorie stayed with defendant. (*Id.* ca. 5:44 to 6:10).

During the final few minutes of those portions of the interview played for the jury, Mallorie alleged that she licked defendant's penis eight times. (*Id.* ca. 5:20 to 5:30).

B. Mallorie's trial testimony

Asked by counsel how often "it" happened, Mallorie testified, "I said it happened a lot of times." (1Tr. 111). However, according to Mallorie, "I never once said number eight." (1Tr. 111).

Mallorie testified that after the incidents at defendant's apartment, there occurred a time in Mallorie's home when defendant sat on her and began "touching" her "down there." (1Tr. 72-73).

Mallorie delayed telling her mother all of this; however, she did tell her twelve-year-old (as of trial) aunt and her thirteen-year-old stepsister. (1Tr.

73-74, 111-12). She was nervous and worried that nobody would believe her. (1Tr. 110).

ISSUE PRESENTED FOR REVIEW

Does the admission of the complainant's CAC video pursuant to 16 M.R.S. § 358 violate the Confrontation Clause of the Maine Constitution?

ARGUMENT

Second[2] 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.

For over two hundred years, the Confrontation Clause of ME. CONST. art. I, § 6 has required that testimonial statements be made in a defendant's presence, unless the declarant was unavailable. For over two hundred years, such statements were to be made at trial where jurors have the fullest possible opportunity to accurately evaluate the declarant's credibility. For example, corollaries of the Confrontation Clause – defendants' right to be present for their trials; the expectation that declarants offer evidence under oath; and the notion that witnesses testify more honestly while being confronted at trial – prevented the wholesale presentation at trial of out-of-court statements.

Section 358 has changed the norms of trials and confrontation, and in precisely the case-type where assessing credibility and reliability is most

[2] Defendant continues to press the first assignment of error, raised in his opening brief, arguing that the omission of a specific-unanimity instruction constitutes obvious error.

important. The statute permits a law enforcement team member – that is what a CAC interviewer is: a victims' advocate taking directions from investigators[3] – to ask questions, months or years before trial,[4] in a non-confrontational setting and in a manner designed to avoid inconsistencies. If this Court does not intervene now, interpreting the Maine Confrontation Clause as it has always been understood, there will be nothing to stop the evisceration of trials as we know them whenever the legislature wishes to put its thumb on the scales of justice.

A. Preservation and standard of review

Defendant's pretrial objections, documented in the Statement of the Case, served to preserve this argument. This Court reviews "'application of the Confrontation Clause de novo.'" *State v. Gagne*, 2017 ME 63, ¶ 32, 159 A.3d 316, quoting *State v. Tozier*, 2015 ME 57, ¶ 16, 115 A.3d 1240.

Defendant realizes that neither defense counsel nor the trial court specified whether the constitutional challenge and ruling arose under the Maine or United States constitution. However, under the primacy approach followed in Maine, courts "first examine the defendant's claim under the Maine Constitution and interpret the Maine Constitution independently of the federal Constitution." *State v. Reeves*, 2022 ME 10, ¶ 41, 268 A.3d 281. Maine courts "'proceed to review the application of the federal Constitution only if the state constitution does not settle the issue.'" *State v. Moore*, 2023

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[3] *See* 1Tr. 25-26.

[4] The timestamp on the video indicates that it was videorecorded on March 15, 2023 – approximately eight months before trial. *See* SX 1.

ME 18, ¶ 17, 290 A.3d 533, quoting *State v. Athayde*, 2022 ME 41, ¶ 20, 277 A.3d 387. Therefore, defendant assumes that the ruling concerns the Maine Constitution.

B. Trial court's reasoning

The court reasoned:

> In terms of the confrontation clause, the Court is mindful that the [s]tatute requires that after playing the video the State have the victim on the stand, she will be subject to the same ability and same level of cross-examination as would be applied if she had given the same information in open Court as opposed to being presented on the CAC interview, so in the Court's view the confrontation clause is not triggered here. I am going to deny the request on the issue of the confrontation clause.

(1Tr. 11).

C. Analysis

The Maine Constitution requires, except in circumstances not present here, that a complainant render her substantive complaints in person, definitely within the presence of the defendant. The Maine Confrontation Clause is, after all, predicated on ensuring credibility and reliability of the adversarial process. Many related rights and expectations are obliterated by the erosion of this process that is permitted by § 358.

1. The Maine Constitution mostly requires face-to-face direct testimony.

In 1879, this Court wrote that the "object" of § 6 "is to guard the accused in all matters, the proof of which depends upon the veracity and memory of witnesses, against the danger of falsehood or of mistake, **by bringing the witnesses when they give their testimony as to such matters face to face with him.**" *State v. Frederic*, 69 Me. 400, 401

(1879) (emphasis added). This face-to-face requirement, it is true, has been expressed in different ways by this Court; however, it has been expressed as early as 1859 and during our lifetimes. *See State v. Learned*, 47 Me. 426, 434 (1859) ("It is a right belonging to the humblest to meet his accuser face to face...."); *see also State v. Scholz*, 432 A.2d 763, 767 (Me. 1981) ("At the heart of this guarantee is a defendant's right to compel the witness to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.") (quotation marks omitted), quoting *Ohio v. Roberts*, 448 U.S. 56, 78 (1980) (Brennan, J., concurring). These, of course, are unambiguous statements that § 6 requires the State to bring its witnesses before the defendant "when they give their testimony" – not just cross-examination. Such history is a testament to the continuation of the face-to-face principle expressed in the Massachusetts Declaration of Rights, Part First, Article XII.

In fact, in one case, this Court held that confrontation encompasses the right to be present with a complainant when she levels her allegations that will be viewed by the jury. In *Twist*, this Court considered the issue of whether a child (6 years old) witnesses could be videotaped so that the State could show their testimony at trial in lieu of trial testimony.[5] *State v. Twist*, 528 A.2d 1250 (Me. 1987). Importantly, in that case, **the defendant was**

[5] Though *Twist* explicitly rests on the Law Court's interpretation of the federal Confrontation Clause, it is nonetheless telling because the Court found no "extraordinary circumstances" to reach the § 6 argument defendant presented on appeal. *See Twist*, 528 A.2d at 1255 n. 7.

present during the videorecording, sitting behind a one-way mirror so that the complainant could not see the defendant. 528 A.2d at 1254. Of the face-to-face requirement, the *Twist* Court wrote:

> this would include affording the defendant his confrontation rights at the videotaping session itself; not just the right of cross-examination through competent counsel, but the right to see and be seen by the witnesses, face to face.

Id. at 1256.

The Law Court did uphold the videotaping, but only because "it is clear that these children would have suffered severe psychological and emotional damage if they had been required to face the defendant when they gave their testimony in front of the videocamera," *ibid*. – a finding neither required by § 358 nor made in our case.

Rather, what is important is that the Maine Constitution requires "not just the right of cross-examination through competent counsel, but the right to see and be seen by the witnesses, face to face" and "at the videotaping session itself." *Twist*, 528 at 1256; *see also State v. Crooker*, 123 Me. 310, 312, 122 A. 865, 866 (1923) (§ 6 means, *inter alia*, that witnesses "are to be made visible to the accused so that he shall have the opportunity to see and to hear them"). In 1906, this Court repeated that § 6 had a separate purpose, in addition to cross-examination: "that of 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 (1906). This requirement could be dispensed with, for example, "where it cannot be obtained," such as when the declarant is deceased. *Ibid*.

The foregoing is supported by a textual examination of § 6, which guarantees the right "[t]o be confronted **by** the witnesses against the accused." (emphasis added). Two things are important: the provision is formulated in the passive voice, and it uses subtly different language than the Sixth Amendment (conferring the right "to be confronted **with** the witnesses against him.") (emphasis added). Defendant suggests that the passive formulation is a textual indication that the Maine Constitution protects more than merely the right to cross-examine a witness: It imposes an *obligation* for the witness, when available, to level her allegations via direct examination.

Relatedly, "by" suggests that the witness against a defendant must take some action; "with," in comparison, suggests merely the opportunity to confront a witness (*i.e.*, cross-examination). *See* Jeremy A. Blumenthal, *Reading the Text of the Confrontation Clause: 'To Be' or Not 'To Be'*, 3 U. PENN. J. CONST. LAW 722, 737 n. 119 (2001) (suggesting that "confronted by" implies "a literal face-to-face confrontation" more so than does "confronted with"). A defendant with the right to be confronted "by" the witnesses against him maintains the right to insist that his accuser "'cannot hide behind the shadow.'" *Cf. Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988).

Defendant contends that the foregoing indicate that the Maine Constitution generally requires *all* of a witness's testimonial statement to be made in a courtroom or, at the very least, while in the actual presence of the defendant.

2. The Maine Confrontation Clause is meant to ensure reliability, yet § 358 severely undermines reliability.

Frederic declared that the "object" of the Maine Confrontation Clause is to "guard…against the danger of falsehood or of mistake." 69 Me. at 401. Several historical measures of reliability, however, are undercut by permitting a complainant to make her allegations pursuant to § 358.

For example, the right to be present for one's trial is eviscerated when the substantive parts of that trial are instead videorecorded months or years earlier. *See State v. Jones*, 580 A.2d 161, 162-63 (Me. 1990) ("Called the Confrontation Clause, one of the most basic of the rights [§ 6] guarantees is the right of the accused to be present at every stage of the trial."); *see also State v. Pullen*, 266 A.2d 222, 228 (Me. 1970) ("The right of a criminal defendant to be present throughout his trial must be interpreted in the light of his constitutional privilege providing him with the right … to be confronted by the witnesses against him."). As the Supreme Judicial Court of Massachusetts has reasoned, such a right is weakened by out-of-court testimony-by-videotape. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 372-73 (Mass. 1988). This right, post-§ 358, is now merely the right to *watch a video of* the most important part of trial.

Relatedly, "[a] public trial may benefit [a defendant] in that witnesses may testify more truthfully…." *Pullen*, 266 A.2d at 228. By comparison to in-court testimony, as anyone familiar with YouTube or TikTok can attest, exaggerating in front of a videocamera is seemingly commonplace.

Indeed, the ability to assess credibility is dealt a considerable blow. Obscured by poor camera angles and bad audio quality, disoriented to the jury by seat-position and ballcap, the complaining witness in our case was not made available for easy assessment of credibility as one would be, just feet away from the jury, in a courtroom. *Bergstrom*, 524 N.E.2d at 371 ("Underlying the confrontation guarantee is the concept that a witness is more likely to testify truthfully if required to do so under oath, in a court of law, and in the presence of the accused and the trier of fact."); Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 ME. L. REV. 283, 358 (1990) ("In my view, there is a clear relationship between the face-to-face confrontation at trial and the reliability of an accuser's testimony.").

It is one thing to make allegations to a friendly CAC interviewer trained in best practices for avoiding eliciting contradictions; it is another to level those same allegations in a court of law, after swearing an oath, in the presence of the person against whom the allegations are made. It used to be jurors' job to tell whether, in those solemn circumstances, a complainant should be believed. Section 358 has changed that requirement, reliability be damned.

The key components of the complainant's statements – those parts that satisfy the elements of the offense – are unsworn. Historically, this Court has strongly disapproved of unsworn evidence, and it should be particularly alarmed by this innovation. *Pease v. Burrowes*, 86 Me. 153, 170, 29 A. 1053, 1060 (1893) ("A jury may not distinguish between the statements of

strangers made out of court and not under the sanction of an oath, and testimony given under oath before them. If allowed to hear both, they are apt to consider both; therefore the admission of such evidence cannot be excused as immaterial and harmless.").

Then there is the one-sided nature of a new trial subject to § 358. As the highest court of Delaware has reasoned, arrangements like that permitted by § 358 effectively shift the burden of production:

> [T]he burden is shifted to the defendant to call the witness and it thus appears to the jury, regardless of technicalities of cross-examination and formal vouching for the witness, that the defendant is sponsoring the witness or refusing to sponsor him. That burden is not fair. If the State carried its position to its logical extreme, the State could rest its case without calling a single eyewitness to any pertinent fact. That is not a trial as we know it. The State should not be able to rest its case without calling the witnesses it relies upon to prove it. This is particularly true when the State relies on witnesses who have obvious vulnerability as to credibility.

Keys v. State, 337 A.2d 18, 23-24 (Del. 1975). This notion is doubly worrisome when it comes to child complainants. Defendants already must use "kid gloves" so as not to upset jurors' sensibilities. When the prosecution is not required to elicit anything uncomfortable but instead is permitted to ask only softball questions, the imbalance falls into starker relief.

The unusual arrangement procured by § 358, only applicable to the "victim," "mark[s] the defendant's cards in advance." *United States v. Cox*, 871 F.3d 479, 495 (6th Cir. 2017) (Sutton, J., concurring). The use of such "guilt-suggestive technology" implies that complainants are entitled to special protections – bordering on a presumption of believability – previously unheard of in courtrooms. *Ibid.* Section 358 thus tilts the scales.

By weakening jurors' ability to assess credibility, § 358 threatens the very right to a jury trial. Why bother convene twelve jurors in person if the key testimony will be given years earlier, out of the courtroom? It used to be that the jury had the best perspective to evaluate witnesses' credibility. For CAC interviewees, that is no longer so. Absent meaningful direct examination of the sort that has always been required, only the CAC interviewer can be said to have the superior vantage.

3. Section 358 violates the Maine Confrontation Clause.

Section 358 discards two pillars of the Maine Confrontation Clause. Direct testimony is constitutionally required to be conducted in the presence of a defendant and, unless certain prerequisites[6] are established, the jury, too. This undermines the second pillar: The ability of the Maine Confrontation Clause to ensure reliable assessment of witnesses' credibility is significantly hamstrung by § 358. Indeed, the trial process as we've known it for two hundred years or more is abandoned, negating the importance of the burden of production, testimony under oath, and the right of defendants (not to mention the public) to be present at trials. Section 358 takes us to the precipice of a new kind of trial, one in which the State may, after a little legislative finagling, present slickly produced videorecordings of its most important witnesses' "testimony," taken months or years before trial. This Court, respectfully, should not welcome this innovation. Rather, it must

6 Essentially, unavailability is required.

guard the truth-assessing qualities of confrontation that are the foundation of our justice system.

Given its pervasive role at trial, admission of the CAC video was not harmless beyond a reasonable doubt.

CONCLUSION

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

Respectfully submitted,

August 14, 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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