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

LAW COURT DOCKET NO. Cum-24-407

STATE OF MAINE
Appellee

v.

CHRISTOPHER DEROCHE
Appellant

ON APPEAL from the Cumberland County
Unified Criminal Docket

BRIEF OF AMICUS CURIAE MAINE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Jeremy Pratt, # 9966
President, MAINE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
P.O Box 17642
Portland, ME 04112
(207) 523-9869

Rory A. McNamara # 5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Cases

Statutes

Constitutional Provisions

Other Authorities

Scholarship

STATEMENT OF INTEREST OF AMICUS CURIAE

The Maine Association of Criminal Defense Lawyers (MACDL) is a non-profit organization consisting of more than 300 members. Since 1992, it has advocated for its members, Maine criminal defendants, and Mainers' individual rights.

INTRODUCTION

MACDL writes briefly and only about the importance of reversal of Mr. Deroche's convictions. Given the parties' ongoing dispute about the applicability of 15 M.R.S. § 1258-A, such a focus may seem to put the cart before the horse. Frankly, though, error is as clear as § 1258-A's plain language. "Shall" is mandatory.[1] "Conducted" connotes managing or leading.[2] There should be no real doubt, either, that ME. CONST. Art. I, § 7's explicit delegation to the Legislature renders that body's law superior to any court-rule contender.[3] It is not necessary to resort to the legislative history capably documented in the Gray Brief, but it anyway establishes the court's error.

Rather, MACDL's interest in this case is twofold: (1) to urge this Court to uphold the rule of law, notwithstanding the deprivation of necessary resources currently straining Maine courts; and (2) to convey the importance of attorney-led voir dire, which has been shown to be far superior to the judge-led variety at screening out prejudiced jurors.

---

1 1 M.R.S. § 71(9-A).

2 *See*, *e.g.*, Dictionary.com, "'Conduct' verb (used with object)" (July 9, 2025) (including, "manage," "direct as a leader," "lead," "guide").

3 "The Legislature shall provide by law a suitable and impartial mode of selecting juries...."

ARGUMENT

Violation of § 1258-A mandates remedy.

A. Reversal is necessary to ensure public perceptions of justice.

The court based its denial of leave for defense counsel to conduct voir-dire, in part, on its understanding "that Rule 24 has been the custom and the practice in this state since 1965 when this statute was – was passed." (5/30/24 Mot. Tr. at 12). Respectfully, this is astonishing: For sixty years, it has been our court system's "custom" and "practice" to ignore a duly enacted statute.

Lay jurors are instructed – and obligated – to follow the laws given to them by the Legislature and this Court, even should they find them ill-conceived or unfair. The notion that Maine trial judges, in contrast, may simply disregard a statute – sometimes without feeling the need to offer "any explanation" for doing so, *State v. Healey*, 2024 ME 4, ¶ 4, 307 A.3d 1082 – is anathema to Mainers' expectations of the justice system. At a moment when the Chief Justices of this Court and the United States Supreme Court are warning that the rule of law is "endangered," we should be redoubling our efforts to ensure that we are not eroding the public's precarious trust.

Of course, nor are there "custom and practice" exceptions to statutes. The Legislature quite often commands Maine courts to depart from custom and practice. Certainly, for example, the Legislature expects Maine courts to follow 16 M.R.S. § 358, despite the custom and practice, since time immemorial, of requiring complaining witnesses to level their accusations

under oath and in adversarial settings rather than by video recorded years prior to trial without the defendant, his counsel, or any oath. *Cf. State v. Twist*, 528 A.2d 1250, 1256-58 (Me. 1987) ("crucial that the setting in which the videotaping occurred simulated, as closely as possible, a full-fledged hearing;" "[o]f paramount importance is a consideration of whether the defendant, through competent counsel, adequately cross-examined the witnesses *when* they gave their prior testimony"; "[a]lso important" is whether the prior testimony was given under oath") (emphasis added). The Legislature no doubt expects Maine courts to enforce its notice-and-demand statutes, notwithstanding the custom and practice, prior to the enactment of 29-A M.R.S. § 2431, of requiring an expert-witness "as a prerequisite" to admission of Intoxilyzer reports. *Cf. State v. Tozier*, 2015 ME 57, ¶¶ 11, 14, 115 A.3d 1240. The distinguishing principle, surely, is not that judges must comply with only those statutes adverse to defendants, but they are free to disregard any statute that limits their own purview or burdens their own work-loads.

MACDL's members, working for and interacting with the public perhaps more than any other Maine attorney-organization's constituents, know firsthand that cynicism about, and mistrust of, the justice system fester among the public at unprecedented levels, particularly those from disadvantaged backgrounds. As canaries in the coal mines, MACDL is very concerned about this creeping trend, particularly at a time when Maine courts are struggling to deliver the services Mainers expect while also upholding the rights to which Mainers are entitled.

The court's ruling was also based, in part, on those struggles. Lawyer-directed voir dire, it explained, "increases the risk of a mistrial to such a degree that it would make it difficult for the Court to manage this docket, which is difficult enough as it is to get cases to trial." (5/30/24 Mot. Tr. at 11). MACDL sees the immense, frankly impossible, constraints the other branches have left upon Maine courts. But this is as fundamental as it gets: A trial judge cannot simply decline to follow the law because times are tough and there's no money left in the till.

The answer cannot be to suspend rights until sunnier days. Maine has already seen the functional cessation of the right to a speedy trial. *See Winchester v. State*, 2023 ME 23, ¶¶ 19, 20, 22 n. 8 & 9, 291 A.3d 707 (Maine courts cannot not deliver trials speedy enough to match even those which motivated separatists to call for separation from Maine). The right to counsel is weakened at the knees. *See Robbins et al. v. State of Maine et al.*, KENSC-CV-22-54 (Kenn. Sup. Ct.) & Ken-25-137. With good reason, MACDL worries what might be the next shoe to drop.

It seems, in other words, that our courts are failing so badly that, without more resources, they cannot comply with all laws. MACDL believes that this is another opportunity for this Court, as a matter of its supervisory authority, to convey that message to the other branches. Those holding the keys to the judges, marshals, clerks, facilities, technologies, etc. that Maine needs to sustain a hale and hearty do not seem to fully appreciate subtler messages.

B. Section 1258-A protects rights that are both significant and not easily amenable to harmless-error review.

A thought-experiment illustrates MACDL's point here: Imagine you must fly between Portland and Washington once a month for a year for business. Now, no airline is 100% safe, unfortunately. But which would you choose: the one with a 99.99% safety rating, or the one with something less – *any* amount less – say 99.94%? MACDL ventures that you'd be hesitant to pick the carrier with a track-record of having five more "safety incidents" per every ten-thousand flights.

Maine defendants hoping for twelve "safe" – *i.e.*, not prejudiced – jurors likewise bear significant risks, sometimes even the rest of their lives. Yet, they are forced to proceed with the riskier alternative. The data, both empirical and anecdotal, soundly demonstrates that judge-led voir dire places more unfit jurors sitting on juries. Attorney-led voir dire screens out partial jurors that judge-led voir dire fails to catch. While no system is perfect – just like the airlines – judge-led jury selection leads to far more unconstitutional trials than does counsel-led voir dire.

Seating just one biased juror is grounds for automatic reversal. *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). It is likewise structural error for a juror to sit, having failed to answer correctly a material voir dire question that would have provided a basis for a for-cause challenge. *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 556 (1984). "Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, [the Supreme Court] ha[s] required

reversal of the conviction because the effect of the violation cannot be ascertained." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). MACDL recites these precepts as a reminder of both the importance of juror impartiality and the near impossibility of assessing the impact of a singular unfit juror's participation in deliberations.

So what, this Court might think, isn't judge-led voir dire capable of ensuring litigants' right to an impartial jury? Consider the colorful self-assessment of a Massachusetts trial judge who once thought the same:

> I have, on countless occasions, asked the venire the sharply limited statutory questions and then supplemented those questions liberally with questions requested by the attorneys. Hands were raised; the court officer would accompany the prospective juror to sidebar where I would ask follow-up questions on the issue about which they had responded affirmatively. I asked; they answered. I probed further; they responded with more information. I would, in some instances, employ a gentle and respectful further inquiry; and the juror would maintain his or her position of impartiality. The result: I would often find that juror indifferent. Self-satisfied with my inquiry, I would sit back in my chair, smugly congratulating myself in having vetted a wonderfully impartial and available juror. And then, it began. An attorney would ask - sometimes in following up on a question I had raised, sometimes on another line of inquiry - but, in any event, a simple and completely

> appropriate question. Whatever judicial confidence I had was quickly stripped away. With but a single innocent question or two, the juror's impartiality was suddenly shattered. Passion flared; a story was blurted out about a close friend or immediate family member who had had a disturbing experience akin to the case at hand, and the juror was off and running with each sentence and declaration exposing more partiality, leaving me feeling embarrassed, deflated and indeed, truth be told, judicially impotent. My dream of judicial superiority to elicit the truth evaporated immediately, demonstrably, and publicly.

Hon. Dennis J. Curran, *Attorney-Directed Voir Dire Comes to Massachusetts: The Republic is Safe*, 22 Suffolk J. of Trial & App. Advocacy 1, 5-6 (2017). After having now "presided over hundreds of civil and criminal jury trials" in which he's permitted attorney-led voir dire, the same judge "can state the following with utter certainty: Jurors generally provide judges with socially desirable answers, but are far more likely to tell attorneys the truth." *Id.* at 5. Quoting the National Center for State Courts, Justice Curran noted that, after a year of experience with lawyer-directed voir dire, Massachusetts judges have recognized "that those jurors who were ultimately impaneled 'are more likely to be impartial.'" *Id.* at 23, quoting Nat'l Ctr. State Cts., *Implementing Attorney Participation in Voir Dire in the Superior Court of Massachusetts: A Judicial Education Project* 1 (Apr. 24, 2016).

Empirical studies have shown that Justice Curran's impressions reflect reality. *E.g.*, Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire*, 11 Law & Hum. Behav. 131 (1987) (experiment with 116 subjects supports notion that attorneys are more effective than judges in obtaining candid self-disclosures, perhaps by a rate of nearly twice as much); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 2, 258 (1980) (concluding that research about which form of voir dire – judge-led or attorney-led – yields more candid disclosure "militate[s] against a wholly judge-conducted voir dire"). A 2021 study demonstrated that minimal voir dire – one querying mock venirepersons' prior experiences with the legal system, their self-identification of biases, etc. – flagged only 2% of the venire as potentially biased. Jessica M. Salerno et al., *Voir Dire and Judicial Rehabilitation: The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45 Law & Hum. Behav. 4 (2021). In comparison, extensive voir dire – *i.e.*, questions "that an attorney might pose if given the opportunity to probe specific potential sources of bias rather than relying on jurors to self-identify" – turned up a whopping 42% with potentially disqualifying biases or prejudices. *Id*. Judge-led voir dire's sky-high failure-rate should readily clear any judicially recognized standard for prejudice, if there can even be such a thing.

And maybe there shouldn't. Structural error is most suitable for errors affecting basic rights in a way that undermines the very framework in which the trial occurs, rather than merely the trial itself. *Weaver v. Massachusetts*,

582 U.S. 286, 294-95 (2017). The structural-error designation is employed often, but not exclusively, when "the effects of the error are simply too hard to measure." *Id.* at 295-96. MACDL, above, obviously contends that the deleterious effects of a denial of lawyer-led voir dire *are* actually readily identifiable. It leads to significantly more unfit jurors deciding cases they should not be deciding. It leads to more unconstitutional trials.

Assuming this Court is unconvinced of that proposition, though, on what basis can this Court ever determine that such an error is harmless? Is there anything more than a hunch? Just faith in old-fashioned custom and practice? MACDL isn't aware of any principled basis for such an assumption, certainly not one on which a defendant's liberty should rest. Were this Court to nonetheless discern one, MACDL hopes to learn its contours to that future litigation can satisfy it and ensure that § 1258-A does not remain a right without a remedy.

CONCLUSION

For the foregoing reasons, this Court should publish a decision that vacates Mr. Deroche's convictions and unambiguously states that 15 M.R.S. § 1258-A is binding law.

July 10, 2025

Respectfully submitted,

MAINE ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
By its attorneys:

Respectfully submitted,

/s/ Jeremy Pratt
Jeremy Pratt, # 10116
President, MACDL
P.O Box 17642
Portland, ME 04112
(207) 523-9869

/s/ Rory A. McNamara
Rory A. McNamara, # 5609
DRAKE LAW LLC
P.O. Box 143
York, ME 03909
(207) 475-7810

CERTIFICATE OF FILING & SERVICE

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Overseers' email directory, in compliance with M.R. App. P. 1D(c), 1E, and 7(c).

/s/ Rory A. McNamara