STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. CUM-24-407

STATE OF MAINE,
Appellee,

- against -

CHRISTOPHER DEROCHE,
Appellant,

Appeal from the Unified Criminal Docket for the
County of Cumberland and State of Maine

Appellee's Response to the Amicus Brief

Christopher J. Coleman
Attorney for the Appellee
Office of the District Attorney
Cumberland County
142 Federal Street
Portland, ME

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Introduction

15 M.R.S. §1258-A was not violated by the trial court in the above captioned case and reversal of Appellant's conviction is unwarranted. The Amicus brief filed by the Maine Association of Criminal Defense Attorneys (MACDL) wrongly suggests that Maine's trial courts have deliberately ignored 15 M.R.S. §1258-A for 60 years. Maine law is clear that attorneys do not have an absolute right to personally voir dire prospective jurors. That legal tradition involves multiple Law Court cases interpreting 15 M.R.S. §1258-A; it has not been ignored. Finally, the social science is unclear as to which mode of voir dire would have been superior in this specific case.

During the past 60 years the Law Court has addressed or interpreted 15 M.R.S. §1258-A multiple times. Maine's leading treatises on Criminal Practice explicitly endorses the reading of 15 M.R.S. §1258-A that was adopted by the trial court in this matter. The Amicus brief fails to cite *any* of those decisions or any of the leading interpretive scholarship. And yet, despite the unanimous weight of that precedent and scholarship, the Amicus brief in this matter asks this Court to brand the decision of the trial court an abuse of discretion for failing to anticipate the new interpretation of 15 M.R.S. §1258-A being peddled by MACDL and the Appellant.

The Amicus brief asks that this be done on the weight of no legal authority but rather on the strength of decades old social science and the ruminations of a

Massachusetts trial judge who himself would likely *never* allow Appellant's suggested voir-dire procedure in his courtroom.

Argument

1. Maine's Legal Authorities are Unanimous and Explicit in Their Interpretation of 15 M.R.S. § 1258-A.

This Court has repeatedly rejected the argument that 15 M.R.S. § 1258-A creates a right for attorneys to personally question prospective jurors during *voir dire*. Instead this Court has consistently approved of the predominant practice in Maine whereby the trial court initially questions the prospective jurors and then invites counsel to request additional questions for the court to ask.

In *State v. Bernier*, 486 A.2d 147, 149 (Me. 1985) the "presiding justice concluded that there was 'nothing peculiar or unusual' about the trial to warrant such deviation from the normal procedure; instead he elected to examine the jurors himself, relying in large part on the questions proposed by defense counsel." The Law Court was "simply unable to find any prejudice to the Defendant resulting from the Superior Court's refusal to allow defense counsel to conduct the jury voir dire… *If* there was error in not following the statute… it was harmless." *Id*. at 150.

In *State v. Bowman* this Court noted that trial courts have "considerable discretion over the conduct of juror voir dire," and emphasized that "we have stated on several occasions that it is within the Superior Court's discretion to conduct the voir dire of prospective jurors on its own without providing an

opportunity for counsel to question individual jurors themselves." *State v. Bowman*, 588 A.2d 728, 729-30 (Me. 1991). The Bowman Court further noted, "it is the court's responsibility to balance the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors." *Id.* (quoting *State v. Moody*, 486 A.2d 122, 125 (Me. 1984). Presumably Maine's Legislature has been aware of how the Law Court interprets 15 M.R.S. § 1258-A since the *Bernier* decision. If the Legislature felt that the Law Court misinterpreted their intent then it is reasonable to assume they would have amended 15 M.R.S. § 1258-A to clarify that intent by now.

Furthermore, the leading treatise on criminal practice in Maine has observed that despite 15 M.R.S. § 1258-A, "there is no absolute right of a party or counsel to question prospective jurors directly," and that "[i]t is virtually a universal practice in Maine for the court to conduct an initial examination of prospective jurors," after which "[t]he court usually will inquire of counsel whether they have additional questions they would like addressed to the jury panel and will also ask those questions if they are sufficiently germane to the jurors' qualifications." Cluchey & Seitzinger, *Maine Criminal Practice* § 24.2 at IV-53 (1994). That treatise explicitly addresses the perceived conflict between 15 M.R.S. § 1258-A and M.R.U. Crim. P. 24(a):

> "Should a party or counsel wish to address questions to prospective jurors directly, a request to that effect should be made to the trial court. While 15

> M.R.S. § 1258-A read in conjunction with Rule 24(a) would appear to support such a request, the Law Court has made clear that there is no absolute right of a party or counsel to question prospective jurors directly. By its terms, 15 M.R.S. § 1258-A requires that any direct questioning be done under the direction of the court. While the trial court may not arbitrarily refuse to allow direct questioning, it must maintain control of the questioning, ensuring that the questioning is relevant and does not prejudice prospective jurors. If counsel refuses to abide by the court's direction, it is appropriate for the court to refuse to allow counsel to question jurors directly".

Id.

In the above captioned case Appellant's refusal to disclose the nature of the questions he intended to ask at the hearing constituted "a second reason" that that the trial court denied the motion. A26, 12. That decision was not made "arbitrarily" under those circumstances. *State v. Rancourt*, 435 A.2d 1095, 1099 (Me. 1981).

In fact in 1967, a year after its passage Professor Harry Glassman explicitly addressed the perceived conflict between 15 M.R.S. § 1258-A and M.R.U. Crim. P. 24(a). He noted that "interpretation of Rule 24(a) has become somewhat clouded as a result of legislative action taken in the Special Session of the 102nd Legislature" wherein they passed 15 M.R.S. § 1258-A. Glassman, *Maine Criminal Practice* § 24.2 at 181 (1967). He reaffirms that "the usual procedure contemplated is that prospective jurors shall be questioned by the court rather than by counsel" but that the court must "permit the parties to submit additional questions to supplement the court's inquiry and if it deems the questions proper it shall direct such questions to the prospective jurors." *Id*. The treatise observes that:

> "All the statute *really* does is guarantee that counsel shall be permitted to ask the prospective jurors some questions; it does not prevent the court from first conducting its own examination of the prospective jurors. Since the voir dire examination must be conducted under the court's direction, it may certainly limit that examination to matters which have not been covered in its own examination."

Id. (emphasis added).

Additionally the Law Court has noted with approval two federal court of appeals opinions rejecting as "frivolous" the argument that there is a constitutional right to personally question prospective jurors in voir dire. *State v. Rancourt*, 435 A.2d 1095, 1100, n.3 (Me. 1981) (citing *United States v. Duke,* 409 F.2d 669, 671 (4th Cir. 1969), cert. denied 397 U.S. 1062; and then citing *United States v. Anderson,* 433 F.2d 856, 858 (8th Cir. 1970)).

2. The Social Science Relied Upon in the Amicus Brief is Dated, Controversial and More Nuanced than has been Suggested.

MACDL and Appellant cite three social science studies for the proposition that attorney-led voir dire has been empirically shown to be superior to judge-led voir dire at uncovering bias in prospective jurors.[1]

The first study is Susan E. Jones, *Judge-versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor,* 11 Law Hum. Behav. 131

[1] Susan E. Jones, *Judge-versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor,* 11 Law Hum. Behav. 131 (1987), David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 245 (1980) and Jessica M. Salerno et al. *Voir Dire and Judicial Rehabilitation: The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Juror's Decisions in Civil Cases*, 45 Law & Hum. Behav. 4, 336 (2021).

(1987) which offers little to support Appellant's position. It purports to measure the 'honesty' of prospective jurors using a 2 x 2 x 2 factorial design with two manipulations (*judge vs attorney as questioner* and *personal vs formal style of the questioner*). However, the study's epistemology has an important limitation: the dependent variable is the *consistency* of the prospective jurors attitudes when comparing their oral responses with their responses to a "Attitudes Toward Legal Issues Questionnaire" (A.T.L.I.Q.) which explored prospective juror's "attitudes towards issues previously acknowledged by the courts as proper areas of inquiry during the voir dire." *Id*. at 136. That is to say the study "operationalized 'honesty' as the degree of consistency between juror's pretest attitude scores" on the A.T.L.I.Q.s "and their public attitude reports obtained while subjects were participating in the voir dire." *Id*. at 134.

If prospective jurors changed their answers from the pretest questionnaire they were deemed to have less operationalized honesty, not because either the first or the second statement correlated or failed to correlate with reality, but because they were inconsistent with each other. The study measured a jurors candor in court against the yard stick of their presumed honesty when completing questionnaires, begging the question of whether the initial answer or the subsequent answer was a true expression of a personally held belief.

Running with the study's assumption, Appellee observes that in Appellant's case the trial court utilized two specialized questionnaires that specifically addressed the relevant issues, just as the ATLIQ sought to measure the attitudes relevant to the study.[2] In light of modern research it is understandable why the author would assume the answers to the questionnaire would be more accurate than oral responses in the inconsistent instances.

Research shows that the gaps between bursts of vocalization in face to face communication average around just 200 milliseconds. See: Tanya Stivers et al., *Universals and cultural variation in turn-taking in conversation*, 106 PNAS 10587 (2009). It is human nature to abhor an awkward silence and feel pressure to respond promptly when asked a question. Those quick face-to-face responses are typically less accurate than responses produced as a result of reflection, especially questions regarding a prospective jurors abidance to social norms. John Protzko & Claire M. Zedelius, *Rushing to Appear Virtuous: Time Pressure Increases Socially Desirable Responding*, 30 Psych. Sci. 1648 (2019).[3] Ironically research also shows

[2] The trial court noted that the questions were "cot coming from a judge, they're coming on a clipboard from clerks." A27-28, 12-13.

[3] The study utilized "1,500 participants drawn in a stratified way with unequal probabilities of selection so that participants resembled the nation's adult population" *Id*. at 1649. The authors note that "[c]omparison of the magnitude of socially desirable responses in the quick and slow conditions confirmed the hypothesized effect. Asking people to answer quickly causes them to give more socially desirable responses (m = 5.069, SD = 2.55) than asking them to answer slowly (M = 4.722, SD = 2.358)" and when participants were allowed "to answer as quickly or slowly as they pleased, the scores were the same as when participants were asked to answer slowly." *Id*. at 1650. In describing his findings for a press release published on the Association for Psychological Science's website on October 11, 2019 Protzko says "The method of 'answer quickly and without thinking', a long staple in psychological

that when one pauses for reflection their delayed response is likely to be perceived as insincerity. See: Ignazio Ziano & Deming Wang, *Slow Lies: Response Delays Promote Perceptions of Insincerity*, 120 J. Personality & Soc. Psych. 1457 (2021).

People are also at the mercy of a charismatic questioner whether they are conscious of it or not; the phenomenon of interviewer influence is well documented. The interviewer effect arises from various factors, such as the interviewer's characteristics, behavior, and interaction style, all of which can affect the quality of the data collected. See: Bradley T. West & Annelies G. Blom. *Explaining Interviewer Effects: A Research Synthesis.* 5 J. Surv. Stat. and Methodology, 175 (2017). The field of applied psychology tells us this means the "gender, age, race, and social status" of the attorney conducting voir dire may "shape the way participants respond." Neringa Kalpokas, & Jorg Hecker, J. *The Guide to Interview Analysis*. ATLAS.ti Research, Sec. 11 (2023) https://atlasti.com/guides/interview-analysis-guide. Should such vagaries as a questioner's personal demographics control the information being relied upon in composing a jury? Or are some aspects of voir dire best shielded from the interviewer effect by utilizing sophisticated questionnaires?

research, may be doing many things, but one thing it does is make people lie to you and tell you what they think you want to hear." The Journal of Psychological Science. *Under Time Pressure, People Tell Us What We Want to Hear*. https://www.psychologicalscience.org/news/releases/under-time-pressure-people-tell-us-what-we-want-to-hear.html. October 11, 2019.

Kalpokas & Hecker further explained what can occur during face to face interviews:

> "participants may feel exposed or uncomfortable sharing personal information in a setting where they are being directly observed by the interviewer. Moreover, power dynamics can play a significant role in shaping the interaction between the interviewer and participant. In many cases, the researcher holds a position of authority, which can influence the participant's responses. This imbalance may lead some participants to provide answers they believe the interviewer wants to hear, rather than expressing their true thoughts or experiences. Such dynamics can affect the quality and authenticity of the data collected."

Id. at Section 3. Alternatively when a person completes the trial court's questionnaires they do so in the privacy of their own home with ample time for reflection, no social pressure and an elimination of interviewer influence. While the *Jones* study shows a differential in the response variances between answers given under different modes of voir dire it also presupposes that all such oral voir dire is inferior to questionnaire based voir dire. That assumption correlates with the trial court's experience.[4]

Additionally, there are real questions about whether any of the conclusions contained in the *Jones* study can be extrapolated to the facts of this case. The ATLIQ only measured prospective jurors attitudes towards 1) the treatment of

[4] "And my experience reviewing thousands of these questionnaires such that I don't ever really want to do it again but having reviewed them, people are not shy, particularly on those questions involving sex crimes questionnaire and sex crimes with minors questionnaire in saying I can't be fair and impartial. And I think that the questionnaire does an enormous – takes an enormous step toward screening those." A28, 13.

minorities by the courts, 2) attitudes towards controversial sociolegal issues such as abortion and marijuana legalization, 3) attitudes towards courts, judges and lawyers and 4) attitudes regarding punishment and deterrence. Susan E. Jones, *Judge-versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 Law Hum. Behav. 131, 136 (1987). There were no questions about sexual assault generally or specifically the sexual assault of children. This is important because, remarkably the study found that the changes in answers supposedly precipitated by the different questioners (*Judge vs Attorney*) were not consistent across those four categories. *Id*. at 141. (*referencing* Table 3).

While some categories exposed moderate variances between responses to questionnaires and responses to the varying kinds of oral voir dires, the fourth category did not. In fact Table 4 illustrates that prospective jurors oral responses were *more consistent* with their questionnaire answers regarding deterrence through punishment *when those questions were posed by the judge*. *Id*. at 142. (emphasis added). Based on that it cannot be assumed that attitudes about or disclosure of experiences with sexual assault, which were not measured by this study, would result in a significant variance depending upon who asked the questions or which type of questioner would be associated with the greatest

variance.[5] The study shows that some types of questions *do* elicit more consistent responses when asked by the judge instead of the attorney. That raises serious questions about whether the conclusions of the study can be extrapolated to the context of the instant case.

The second writing, described as a study by the Amicus brief, is David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 245 (1980). That nearly half-century old analysis is a survey of studies, articles and statutes which either directly or indirectly pertain to the voir dire process. Some of that research even "indicates that the judge would be the more appropriate interviewer to elicit juror self-disclosure." *Id*. at 253. The authors further admit that the "research presented is not specifically addressed to the issue of juror self-disclosure" and that "application of the conclusions of this research to the setting of the courtroom involves extrapolation." *Id*. at 247.

This analysis exposes that cases like *State v. Rancourt*, 435 A.2d 1095 (Me. 1981), wherein attorneys abuse the process, are not outliers. One of the only empirical studies directly examining the voir dire process discussed by the analysis

[5]Even if the study had measured prospective jurors attitudes about sexual assaults and probed their willingness to discuss their experiences regarding sexual assault in 1987, it is questionable whether the then prevailing attitudes and experiences, and willingness or lack of willingness to discuss those attitudes and experiences, would still prevail in 2025. That is one example of the major limits the practice of statistical extrapolation faces in social science. Culture doesn't change predictably in ways that hard science fields can often rely on and even the best direct measurements are but a snapshot in time.

"concludes that attorneys use about eighty percent of voir dire time indoctrinating the jury panel." David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 250 (1980). (see: James A. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503, 522 n.7 (1965)). Based on that stunning statistic, Suggs & Sales admit that the fear attorneys will turn the voir dire process into "indoctrination in the pejorative sense" is "somewhat justified." *Id.* at 250. However the only remedy suggested by the authors is that "the persuasive attempts of one attorney will be counterbalanced by the other." *Id*. at 258.[6]

The Suggs & Sales analysis largely relies upon then University of California law professor Jon Van Dyke's article *Voir Dire: How Should it Be Conducted to Ensure That Our Juries are Representative and Impartial*, 3 UC Law SF CONST.Q. 65 (1976).[7] Professor Van Dyke notes that the attorney led voir dire "becomes a battle of wits that produces not the most impartial jury, but rather a group of the least interesting persons in the courthouse." *Id*. at 71. His ultimate conclusion is that the "important considerations are thus not who asks the

[6] The study also notes the empirical fact that when the judge is the questioner there is a "significant savings of time." *Id*. at 253.

[7] Professor Van Dyke's fascinating work of legal philosophy blended with empirical research is entitled *Voir Dire: How Should it Be Conducted to Ensure That Our Juries are Representative and Impartial*, 3 UC Law SF CONST.Q. 65 (1976) and it is cited favorably by Suggs & Sales a whopping seven times in their analysis.

questions, but what kinds of questions are asked and how the attorneys and the judge relate to each other." *Id*. at 89. (emphasis added).

The third study relied upon by Appellant and the Amicus brief is not a direct empirical study of whether attorney led voir dire or judge led voir dire is superior. The third study, Jessica M. Salerno et al. *Voir Dire and Judicial Rehabilitation: The Impact of Minimal versus Extended Voir Dire and Judicial Rehabilitation on Mock Juror's Decisions in Civil Cases*, 45 Law & Hum. Behav. 4, 336 (2021), did not simulate the courtroom experience in any meaningful way. As a result the author admits that there are "important limitations" to the study. *Id*. at 352. Because it "could not duplicate the setting and witnessing of the live events of a real trial" it was forced to substitute true attorney led voir dire for a questionnaire where the "questions included those that an attorney *might pose if given the opportunity* to probe specific potential sources of bias rather than relying on jurors to self-identify any views that might compromise their objectivity." *Id*. at 352, 341. (emphasis added).

The questions asked via questionnaire were similar to the two sexual assault related questionnaires in the instant case in that many of the questions "have been used by attorneys and jury consultants when helping to select juries in actual cases and have been approved for use in voir dire." *Id*. However, as in the first study none of the questions pertained to sexual assault generally or the sexual assault of a

child specifically. For that reason, applying the results of this study to the instant case would involve an extreme amount of extrapolation.

However, to the extent that such extrapolation is possible it largely weighs in favor of the procedure adopted by the trial judge in this case. The trial court's carefully crafted questionnaires coupled with the general oral voir dire by the court is much closer to the "Extended Voir Dire Measures" than the "Minimal Voir Dire Measures" described by the study. *Id*. at 341. The Minimal Voir Dire Measures (which are listed in full on Table 1 of the study) are essentially the general oral voir dire the trial court would conduct in any civil case. *Id.* Whereas the Extended Voir Dire Measures and the questionnaires in the instant case "probe specific potential sources of bias rather than relying on jurors to self-identify any views that might compromise their objectivity." *Id*. Rather than simply asking if a prospective juror feels bias the specialized questionnaires suggest specific circumstances, the involvement of a close friend or family member in a case involving sexual assault for instance, which might catalyze bias and then asks the prospective juror about their feelings in terms of those specific circumstances.

3. The Procedure Appellant Requested of the Trial Court would not be Allowed in the Court of the Hon. Dennis J. Curran.

When the trial court inquired as to the specific questions Appellant intended to utilize Appellant responded that to disclose such would be to "completely show

their hand" and that the questions must be kept secret so as not to "disclose aspects of the defense strategy in advance." A25, 5. The trial court noted that it was particularly problematic "if the questions are not vetted in advance and that the State has had an opportunity to object to it in advance." A26, 11-12.

Massachusetts Superior Court Rule 6 addresses jury selections in both criminal and civil cases. It requires parties to "submit in writing" the "proposed subject matters or questions for inquiry by the parties or trial judge." Mass. Super. Ct. R. 6(3)(a). Presumably this is done in part so the presiding jurist can determine whether the questions:

> "(i) seek factual information about the prospective juror's background and experience pertinent to the issues expected to arise in the case; (ii) may reveal preconceptions or biases relating to the identity of the parties or the nature of the claims or issues expected to arise in the case; (iii) inquire into the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed; and (iv) are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required." Mass. Super. Ct. R. 6(3)(c).

Judge Curran would also likely want to know the "proposed subject matters or questions for inquiry" so that he could ensure they were not questions "framed in terms of how the juror would decide this case (prejudgment), including hypotheticals that are close/specific to the facts of this case" or that "seek to commit juror(s) to a result, including, without limitation, questions about what evidence would cause the juror(s) to find for the attorney's client" or questions

"having no substantial purpose other than to argue an attorney's or party's case or indoctrinate any juror(s)" or which inquire "about the outcomes in prior cases where the person has served as a juror." Mass. Super. Ct. R. 6(3)(e). He would also likely want to ensure that they did not arbitrarily ask about a "juror's political views, voting patterns or party preferences" or a "juror's religious beliefs or affiliation." Mass. Super. Ct. R. 6(3)(d). Absent reasonable assurance that the questions were germane to the case, Judge Curran would almost certainly not allow a litigant to ask a jury venire undisclosed questions about undisclosed topics.

Conclusion

The unanimous weight of both case precedent and legal scholarship establishes that there is no absolute right of a party or counsel to question prospective jurors directly. The social science referenced in the Amicus brief is dated, speculative and overly reliant upon extrapolation. Those studies predate research suggesting judges or court administered questionnaires are superior to attorney led voir dire. Finally, despite his colorful ruminations, it is highly unlikely that Judge Curran, or any other Massachusetts jurist, would allow for the procedure requested by Appellant in this case. For those reasons the Appellee asks this Court not to overturn Appellant's conviction as urged by MACDL's Amicus brief.

DATED: 8/4/2025

/s/ Christopher J. Coleman
Christopher. J. Coleman, Esq.

CERTIFICATE OF SERVICE

I, Christopher Coleman, hereby certify that a true copy of the above Appellee's Response to the Amicus Brief was sent to Appellant's attorney Tyler J. Smith, Esq. and to MACDL's attorney Rory McNamara, Esq. by virtue of email this August 4, 2025.

DATED: 8/4/2025

/s/ Christopher J. Coleman

Christopher. J. Coleman, Esq.
Attorney for the Appellee
Cumberland County DA's Office
142 Federal Street
Portland, ME 04101
Phone: 207-871-8384
ccoleman@cumberlandcounty.org