Maine Supreme Judicial Court
Sitting as the Law Court

Docket No. Cum-24-407

State of Maine,

Appellee,

v.

Christopher Deroche,

Appellant.

On Appeal from the Maine
Superior Court, Cumberland County

Reply Brief

Tyler J. Smith, Bar No. 4526
LIBBY O'BRIEN KINGSLEY & CHAMPION, LLC
62 Portland Road, Suite 17
Kennebunk, ME 04043
(207) 985-1815
tsmith@lokllc.com

Attorney for Appellant Christopher Deroche

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I. Deroche did not waive his 15 M.R.S. § 1258-A argument.

The State argues that Deroche waived his request for attorney-led voir dire under 15 M.R.S. § 1258-A, because counsel did not disclose in advance the questions he intended to ask during attorney led voir dire. (Red Br. 7-8.) This argument is misplaced for two reasons.

First, the State waived its waiver argument. In *United States v. Delgado-Pérez*, the First Circuit explained that the prosecution may waive a waiver argument "by failing to raise an argument that a defendant's failure to take some action below waives that defendant's right to raise an issue on appeal[.]" 867 F.3d 244, 250 (1st Cir. 2017). In *Delgado-Pérez*, the Government argued on appeal that a defendant waived his right to appeal a decision on a motion to suppress because he failed to object to the Magistrate Judge's report and recommendation, later adopted by the District Court, denying a motion to suppress. *Id.* at 248-50. The First Circuit held that the Government waived this argument, because an appeal was discussed at the plea hearing and the Government failed to mention its position that, by failing to file an objection to the magistrate judge's report and recommendation, the defendant had waived his right to appeal the suppression ruling. *Id.* at 250. *See also United States v. Román-Huertas*, 848 F.3d 72, 77 (1st Cir. 2017) (holding that the

Government waived its argument that a defendant waived his objection to the total offense level calculation by stipulating to the calculation in his plea agreement or failing to file a timely objection, by failing to make those arguments with the District Court); *Barreto-Barreto v. United States*, 551 F.3d 95, 98 (1st Cir. 2008) (holding that the Government waived its argument on appeal that habeas relief was precluded by the petitioners' failure to raise their claims on direct appeal, by failing to include that argument in their response to the petition).

Much in the same way, the State waived its argument that Deroche waived his rights under section 1258-A when he did not state the questions he planned to ask during attorney-led voir dire. When denying Deroche's motion, the trial judge explained his concerns about a mistrial, observed that he was "interested to see that decision the State cited where the [L]aw [C]ourt was split when confronted with this statute," and that "maybe this will be the case that – there's a decision on this." (MT at 9 [A. 27].) Although the discussion expressly anticipated an appeal testing section 1258-A's impact, the State remained silent and failed to articulate its present position that Deroche waived his right to appeal. By remaining silent, the State waived its present position that Deroche waived his right to pursue attorney-led voir dire under section 1258-A by failing to state the questions he would ask.

Second, Deroche did not waive his ability to appeal the trial court's order denying the motion for attorney-led voir dire. "Waiver occurs when a defendant voluntarily, knowingly, and intentionally relinquishes or abandons a known right." *State v. True*, 2017 ME 2, ¶ 14, 153 A.3d 106. A waiver may be inferred from conduct—for example, a defendant may waive their right to testify by willfully absconding from the last day of trial and missing their opportunity to testify or refusing to follow the court's instructions to stop testifying to inadmissible matters, *see State v. Ericson*, 2011 ME 28, ¶ 18, 13 A.3d 777 and *State v. Chasse,* 2000 ME 90, ¶¶ 9-10, 750 A.2d 586, or their right to be present for trial by behaving disruptively, *State v. Murphy,* 2010 ME 140, ¶ 17, 10 A.3d 697. "[W]hen fundamental constitutional rights are at stake, 'every reasonable presumption is made against a finding of waiver.'" *True*, 2017 ME 2, ¶ 15 (quoting *State v. Tuplin*, 2006 ME 83, ¶ 16, 901 A.2d 792).

The State's argument that trial counsel "refused" to state the questions he would pose in attorney-led voir dire distorts the record. The trial court asked defense counsel what he expected would happen if it granted the motion. (Motion Hr'g Transcript (MT) at 3-4 [A. 25].) Defense counsel explained how he envisioned jury selection and stated that many questions would be based on defense strategy. (Motion Hr'g Transcript (MT) at 3-4 [A. 25].) The trial court inquired,

"[s]o you're really not in a position to go into the substance of the questions today?[,]" and counsel explained that he would "prefer not to" because doing so would show the defense's hand. (MT at 4-5 [A. 26].) Trial counsel was not directed to share the questions he would ask and did not "refuse" to share the questions he would ask. Plus, nothing in section 1258-A requires that counsel volunteer the questions to be asked in voir dire absent a directive from the trial judge. Without a directive from the trial court to state the intended questions and an accompanying refusal to comply, Deroche cannot be said to have "voluntarily, knowingly, and intentionally" relinquished or abandoned his request for attorney-led voir dire. *See True*, 2017 ME 2, ¶ 14.

II. The State misinterprets section 1258-A.

The State appears to argue (Red Br. 9-13) that section 1258-A is satisfied where the trial court affords counsel the opportunity to submit questions for the trial court's consideration. This is contrary to section 1258-A's plain language, reading that the trial court "shall permit voir dire examination to be conducted by the parties or their attorneys under its direction." 15 M.R.S. § 1258-A (emphasis added). In common parlance, a person "conducts" an act when the person performs the act. Thus, section 1258-A's language that "voir dire examination to be conducted by the . . . [the] attorneys" means that the attorneys are the ones

asking the questions. The remaining phrase, "under its direction," provides that the trial court retains authority to control the proceeding. *See*, *e.g.*, *State v. Rancourt*, 435 A.2d 1095, 1099 (Me. 1981) (holding that a trial court did not err when it initially allowed counsel to ask questions directly but stopped after counsel demonstrated an unwillingness to stop asking irrelevant or improper questions).

A unique Legislative history cements section 1258-A's plain language by showing that the Legislature understood section 1258-A to give lawyers the right to ask prospective jurors questions. Section 1258-A was passed as emergency legislation effective January 31, 1966, supported by a preamble stating that the legislation was "vitally necessary to protect the rights of those accused of crimes as well as those of the general public[.]" P.L. 1965, ch. 482, preamble.[1] The language ultimately codified as section 1258-A was included as the Judiciary Committee's amendment A to L.D. 1721 on January 26, 1966. Comm. Am. A to L.D. 1721 (102nd Legis. 1966).[2] The day after section 1258-A's effective date, the Legislature considered a proposal to repeal section 1258-A. Legis. Rec.—Senate at 400 (Feb. 1, 1966).[3] Advocating for that proposal, Senator Stern described section 1258-A as

[1] https://lldc.mainelegislature.org/Open/Laws/1965/1965_PL_c482.pdf
[2] https://lldc.mainelegislature.org/Open/LDs/102/102-LD-1721-CA_A_S401.pdf
[3] https://lldc.mainelegislature.org/Open/LegRec/102/Senate/LegRec_1966-02-01_SP_p0379-0406.pdf

giving the lawyers the right to ask prospective jurors questions and explained that the issue was "forcibly" brought to their attention:

> After we had given the Supreme Court certain rights in the matter of court procedure and rules, this particular bill that we enacted, *giving the lawyers the right to conduct voir dire*, that is the right to ask various questions of jurors, we passed that without asking judges anything about it, and at the time we felt it was a pretty good idea. Since then it has come to our attention forcibly that we are undoing all the good work we have previously done by letting judges conduct the procedure.

Id. at 400-01 (emphasis added). As Senator Harding later explained, the Chief Justice called him on the phone to discuss section 1258-A and voiced "individual feelings that are quite strong" about the law. *Id.* at 401; Legis. Rec.—Senate at 450 (Feb. 2, 1966)[4]. The Senate passed the proposal to repeal section 1258-A.

The next day in the House, Representative Richardson discussed the context in which section 1258-A was passed. Legis. Rec.—House at 485 (Feb. 2, 1966).[5] He explained that, before section 1258-A's effective date, "the presiding justice in his discretion could permit questions by the attorney or he could require the attorney to submit the questions to him, that is, to the judge, and the judge would conduct the voir dire examination." *Id.* Representative Brennan opposed succumbing to

[4] https://lldc.mainelegislature.org/Open/LegRec/102/Senate/LegRec_1966-02-02_SP_p0443-0457.pdf
[5] https://lldc.mainelegislature.org/Open/LegRec/102/House/LegRec_1966-02-02_HP_p0458-0497.pdf

external influence to change section 1258-A and observed that it "states plainly and simply the rights of citizens of this great State prior to I believe December 1, 1965." *Id.* at 488. That date, as explained by Representative Lund, was when the Legislature enacted legislation empowering the judiciary to proscribe rules of criminal procedure. *Id.* at 486-87. Representative Damon opposed repealing section 1258-A, explaining that it protects those facing criminal prosecution:

> At the time I signed [the law enacting section 1258-A] I had the sincere belief that this bill would provide certain safeguards which would go to individuals that are in court on a criminal matter. I stand by those convictions today. I do not feel that I was asleep. I do not feel that I was in error. I feel that I did the right thing for the man who is in the courtroom and I stand by those convictions.

Id. at 490. The Senate's proposal to repeal section 1258-A was indefinitely postponed in the House. *Id.* The Senate receded and concurred, leaving section 1258-A unchanged. Legis. Rec.—Senate at 450 (Feb. 2, 1966).

Although different legislators had different opinions on whether section 1258-A should be repealed, they all understood the same thing: section 1258-A as enacted gave lawyers the right to conduct voir dire. Indeed, as highlighted by Representative Brennan, attorney-led voir dire was the norm before the Supreme Judicial Court was vested with rulemaking authority. If section 1258-A simply meant that the attorneys could submit questions for judicial consideration, as the State contends, then the robust legislative debate would be nonsensical given the

law's limited impact on judicial proceedings. So too would be the external overtures to individual legislators that prompted the repeal-effort and were discussed in floor debate. Ultimately, the State's proposed construction of section 1258-A invites this Court to judicially enact the proposed repeal of section 1258-A that failed in the Legislature on February 2, 1966.

Finally, the State suggests that several cases from the 1980s and 90s support its proposed construction of section 1258-A. But these cases are not persuasive to the State's position. *Rancourt* observed that "[u]nder [section 1258-A], a trial justice may not arbitrarily refuse to allow counsel to conduct any voir dire examination." 435 A.2d at 1099. So, if anything, *Rancourt* supports Deroche's position that section 1258-A restricts a trial judge's authority to preclude counsel from conducting voir dire. Another case, *State v. Bowman*, decided on obvious error review, reads 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." 588 A.2d 728, 730 (Me. 1991). *Bowman* cites five cases for this pronouncement. Four of them did not mention section 1258-A. *See State v. Woodburn*, 559 A.2d 343, 344 (Me. 1989)*; State v. Lovely*, 451 A.2d 900, 901 (Me. 1982); *State v. Durost*, 497 A.2d 134, 136 (Me. 1985); *State v. Lambert*, 528 A.2d

890, 892 (Me. 1987). The final case, *State v. Bernier*, referred to section 1258-A but conducted no analysis of the statute's meaning, text, or history. 486 A.2d 147, 150 (Me. 1985). Instead, it decided there was no prejudice where the trial judge "incorporated in his own examination virtually all of the questions proposed by the Defendant's counsel," and counsel "made no objections to the procedure followed nor did he again attempt to invoke 15 M.R.S.A. § 1258-A." *Id.*

Thus, none of the prior decisions regarding voir dire or section 1258-A truly speak to what the statute means. Whatever minimal guidance these or other prior cases may give as to the meaning of section 1258-A, the issue deserves a fresh look. *See State v. Healey*, 2024 ME 4, ¶ 11, 307 A.3d 1082 (stating that the Law Court did not reach a majority opinion on whether a trial court "erred by failing to allow defense counsel to conduct voir dire examination of prospective jurors, as required by 15 M.R.S. § 1258-A").

III. Section 1258-A is constitutional.

The State suggests that section 1258-A potentially violates article I, section 7 and article VI, section 1 of the Maine Constitution. This analysis "begins with a presumption that the [section 1258-A] is constitutional." *State v. Mosher*, 2012 ME 133, ¶ 10, 58 A.3d 1070. As the party challenging section 1258-A's constitutionality, the State "has the burden to demonstrate convincingly [section 1258-A] conflicts

with the constitution." *Id.* (internal quotation omitted). As explained below, the State fails to do so.

Article I, section 7 of the Maine Constitution provides "[t]he Legislature shall provide by law a suitable and impartial mode of selecting juries, and their usual number and unanimity, in indictments and convictions, shall be held indispensable." Me. Const. art. I, § 7. Attorney-led voir dire is widely practiced in this country (and in some civil cases here in Maine), and the State fails to cite anything suggesting that this framework fails to provide a "suitable and impartial mode" of selecting juries. And as in *Rancourt*, if an attorney crosses the line, the trial court may exercise its authority to limit counsel's ability to ask questions. Moreover, nothing restricts the trial court from making its own voir dire inquiry of prospective jurors apart from allowing counsel to question prospective jurors. Thus, regardless of the parties' examinations, the trial court retains the power to examine prospective jurors and ensure that those ultimately seated are fair and impartial.

Next, article VI, section 1 of the Maine Constitution vests judicial power in the Supreme Judicial Court. Me. Const. art. VI, § 1. Separation of powers considerations are already addressed in pages 16-17 of the blue brief and are not repeated here. But one additional point generated from the State's brief bears

mentioning: as noted in the preceding paragraph, article I, section 7 of the Maine Constitution tasks "[t]he Legislature" with the duty of providing a suitable and impartial mode for selecting juries. Me. Const. art I, § 7. So even if judicial power includes some level of inherent or shared authority to set forth procedural rules as a general proposition, as the State postulates, the Maine Constitution specifically grants the Legislature the power to prescribe rules for voir dire.

IV. Disregarding section 1258-A was an abuse of discretion.

The State argues that the trial court did not abuse its discretion because it could not evaluate the proposed questions, used a questionnaire regarding sensitive issues, and articulated concerns about a mistrial.

The fundamental problem with this position is that a trial court has no discretion to violate a statute. 15 M.R.S. § 1258-A; *Rancourt*, 435 A.2d at 1099 ("[u]nder [section 1258-A], a trial justice may not arbitrarily refuse to allow counsel to conduct any voir dire examination"). To be sure, the trial court had discretion in terms of dictating the mechanics of how the process would unfold. But that is not what drove the decision below: the trial court denied the motion for attorney-led voir dire because it was concerned that a juror might say something

that could lead to a mistrial,[6] and that this risk is heightened if the State doesn't have the opportunity to object to questions in advance. (MT at 11-12.) The trial court then added that the process under M.R.U. Crim. P. 24 has been the custom and practice since 1965, and that the court would follow the rule and not the statute. (MT at 12-13.)

Thus, the trial court's denial of the motion for attorney-led voir dire was not part of the trial judge's authority to direct the proceeding, such as (for example) responding to an attorney's repeated failure to follow the trial court's direction, as in *Rancourt*. Instead, it was a policy disagreement with the section 1258-A requirement that courts allow the attorneys to conduct voir dire. And as to the State's concern about what it dubs "secret questions," the trial court never directed Deroche to disclose the questions to be asked, nor the subjects to be covered. As in the civil context, for example, the trial court could have directed Deroche to state the topics of inquiry so they could be vetted. *See*, *e.g.*, M.R. Civ. P. 47(a)(4)-(5) (identifying the methods for and conduct of attorney-led voir dire in civil cases). Although the extent of a trial court's authority to regulate the workings of attorney-led voir dire under section 1258-A is beyond the scope of this appeal, a

[6] In making this argument, the State fails to consider the trial court's power to issue a curative instruction in the event of an improper statement. *State v. Carrillo*, 2021 ME 18, ¶ 25, 248 A.3d 193.

blanket denial of attorney-led voir dire based on a judge's policy disagreement with section 1258-A exceeds any discretion the statute might afford.

V. Disregarding section 1258-A was not harmless.

The State argues that the error is harmless because no evidence proves that Deroche was tried by a partial jury. Much of the State's discussion focuses on whether attorney-led voir dire is mandated by the due process clause—an argument Deroche has not raised. In any event, an error is only harmless where it is otherwise "highly probable" that the verdict was unaffected. *State v. Dolloff*, 2012 ME 130, ¶ 34, 58 A.3d 1032. The State bears the burden of persuasion of showing harmless error, *id.*, and fails to do so here.

Courts have recognized voir dire as a tool to both reveal bias and enable counsel to more intelligently exercise peremptory challenges—even if the circumstances do not support a for-cause challenge. *See, e.g., Doroszko v. State*, 201 N.E.3d 1151, 1158 (Ind. 2023) (holding that the violation of the right to attorney-led voir dire was not harmless where it hampered counsel's ability to intelligently exercise peremptory challenges); *Whitlock v. Salmon*, 752 P.2d 210, 213 (Nev. 1988) (highlighting the "importance of counsel's voir dire as a source of enlightenment in the intelligent exercise of peremptory challenges"); *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988) (observing that "[j]uror attitudes revealed during voir dire may

indicate dimly perceived, yet deeply rooted, psychological biases or prejudices that may not rise to the level of a for-cause challenge but nevertheless support a peremptory challenge"); *De La Rosa v. State*, 414 S.W.2d 668, 671 (Tex. Crim. App. 1967) (holding that the right to attorney-led voir dire enables counsel to "form his own conclusion, after his personal contact with the juror, as to whether in counsel's judgment he would be acceptable to him or whether, on the other hand, he should exercise a peremptory challenge to keep him off the jury"). As explained in *Whitlock*, attorney-led voir dire furthers these goals in ways not possible by other means:

> Usually, trial counsel are more familiar with the facts and nuances of a case and the personalities involved than the trial judge. Therefore, they are often more able to probe delicate areas in which prejudice may exist or pursue answers that reveal a possibility of prejudice. Moreover, while we do not doubt the ability of trial judges to conduct voir dire, there is concern that on occasion jurors may be less candid when responding with personal disclosures to a presiding judicial officer. Finally, many trial attorneys develop a sense of discernment from participation in voir dire that often reveals favor or antagonism among prospective jurors. The likelihood of perceiving such attitudes is greatly attenuated by a lack of dialogue between counsel and the individuals who may ultimately judge the merits of the case. In that regard, we expressly disapprove of any language or inferences in *Frame* that tend to minify the importance of counsel's voir dire as a source of enlightenment in the intelligent exercise of peremptory challenges.

752 P.2d at 212-13.

Deroche was deprived of this important tool to which he was entitled under Maine law. He was instead limited to questionnaires on issues related to sexual assault, and general questioning of the entire pool by the judge which required the jurors to stand up before their peers with any affirmative responses to questions. For example, the trial judge told the entire pool that Deroche was presumed innocent, had no burden, and did not have to testify. (Jury Selection Transcript 6/4/2024 (JST) 8:19-9:7.) It then said that anyone "unwilling" or "reluctant" to apply "these basic principles of American and Maine law" should stand up in front of the courtroom. (*Id.*) Unsurprisingly, nobody stood.

Had the trial court not striped Deroche of his right to attorney-led voir dire, trial counsel could have further explored these important topics in an individual or panel-based setting, formed his own opinions based on personal contact, and made informed for-cause and peremptory challenges. This deprivation was especially damaging considering the stigma associated with the charge at issue: gross sexual assault of a minor victim. Jurors must be prepared for the possibility of believing that the defendant is *probably guilty* but still having to acquit due to the existence of a reasonable doubt. This makes intelligent and informed use of for cause and peremptory challenges even more important, and the deprivation of attorney-led voir dire even more prejudicial.

VI. The defense bears no "burden of persuasion" at trial.

The State's argument about the defense's so-called "burden of persuasion" at trial (Red Br. 23) ignores the presumption of innocence. A failure of proof defense, as was pursued below, contends that "the State has failed to meet its burden to establish beyond a reasonable doubt one or more of the elements of the crime charged." *State v. LaVallee-Davidson*, 2011 ME 96, ¶ 12, 26 A.3d 828. A reasonable doubt requires only a hypothesis of innocence that a reasonable person might entertain after conscientiously weighing the evidence—it does not require proof in and of itself. *See State v. Palumbo*, 327 A.2d 613, 616 (Me. 1974). The presumption of innocence alone is enough.

Arguing that a victim has no motive to lie is fair as far as it goes, but the State went further by suggesting to the jury that the *reason* it should find that the victim had no motive to lie was that "[t]here's been absolutely no evidence introduced suggesting that [the alleged victim] had any motive to lie." (TT3 at 96:5-13.) In other words, not that the State affirmatively proved a lack of a motive beyond a reasonable doubt, but that Deroche did not show otherwise. *State v. Lipscombe*, 2023 ME 70, ¶ 15, 304 A.3d 275. Although the prosecutor's comment was "reflective of the facts on the record" and "the final state of the evidence once both parties had closed" (Red Br. 22), it also implied to the jury that had such

evidence existed, Deroche would have offered it. Any other understanding defies common sense: other than Deroche, who would have introduced evidence suggesting that the alleged victim had a motive to lie? Jurors are instructed not to check their common sense at the door when entering the courtroom, and nor should we when evaluating the implication of the State's closing argument.

As for the evidentiary error, the State argues it was appropriate to admit evidence that Deroche told Detective Schaeffer that he could not think of a reason why the alleged victim would make up the allegations because it was "probative to his then existent state of mind and any facts he was aware of." Deroche's state of mind years after the alleged incident was not relevant, nor was his opinion on why the alleged victim might fabricate her story. M.R. Evid. 401. Indeed, the State fails to explain how Deroche's answer to Detective Schaeffer's question would constitute anything more than an inadmissible guess. M.R. Evid. 602. The only conceivable purpose in offering Deroche's statement is to highlight that Deroche cannot himself establish why the alleged victim would fabricate her story, contrary to the burden of proof and presumption of innocence.

VII. The burden shifting errors were not harmless.

The State's harmless error analysis is weak. The State essentially argues that it is impossible for there to be any harm because the trial court instructed the jury

on the burden of proof. That instruction is of little value, however, when the jury hears an improper comment by a prosecutor and the trial judge overrules the objection. The same principle applies to the testimony of Deroche's statement to Schaeffer, which was likewise admitted over objection. This reinforced the State's improper point that the jury should find that the alleged victim had no motive to lie because Deroche failed to show otherwise.

Beyond this, the State does not dispute that this was a close case. As explained in the opening brief, (i) the alleged victim significantly changed her story; (ii) Detective Schaeffer told the alleged victim's mother that he planned to ask the alleged victim about Deroche's scar on his upper thigh, allowing her to contaminate the upcoming interview; and (iii) the prosecution showed a recent photograph of Deroche's scar to the alleged victim just before trial, precluding the jury from considering whether the alleged victim could accurately describe the scar from memory. (Blue Br. 22-23.)

All the State can say is in response is that Deroche conducted an "aggressive" cross-examination of the alleged victim and investigator, and that the burden-shifting improprieties were but a small part of a long trial. As to the State's first point, trial counsel conducted professional and respectful cross-examinations of both witnesses exposing weaknesses in the State's case. Those weaknesses

reinforce that any error was *not* harmless. *See State v. Judkins*, 2024 ME 45, ¶ 25, 319 A.3d 443 (identifying the strength of the evidence as a factor in the harmless error analysis). As to the second point, the suggestion that this was a "long trial" is wrong. Only three witnesses testified, and the State's case in chief consisted of two witnesses and took about 5.5 hours inclusive of opening statements.[7] So if anything, the brevity of the trial further reinforces that any error was not harmless.

Respectfully submitted,

Dated: July 10, 2025

/s/ Tyler Smith
Tyler J. Smith, Bar No. 4526
Libby O'Brien Kingsley & Champion, LLC
62 Portland Road, Suite 17
Kennebunk, Maine 04043
(207) 985-1815
tsmith@lokllc.com

[7] On June 4, 2024, the jury was in the courtroom from 12:42 p.m. to 2:31 p.m. and 3:00 p.m. to 3:51 p.m. (2 hours 40 minutes) (TT1 at 6, 92, 96, 152.) The next day, the jury was in the courtroom from 9:16 a.m. to 9:55 a.m. (39 minutes), 10:38 a.m. to 11:25 a.m. (47 minutes), 1:09 to 2:19 p.m. (1 hour 10 minutes), and 2:41 to 2:54 p.m. (13 minutes). (TT2 at 32, 74, 90, 135, 153, 190, 194, 206.) The State then rested. On the final day of trial, the defense called one witness who finished testifying by 10:43 a.m.

Certificate of Service

I hereby certify that on the date stated below I caused an electronic copy of this document to be served on the following counsel via email. In addition, upon acceptance of this brief by the Court, two paper copies of this brief will be served on counsel for Appellee.

Counsel for Appellee
Sara Shannon, Esq.
Chris Coleman, Esq.
Assistant District Attorney
142 Federal Street
Portland, Maine 04101
shannon@cumberlandcounty.org
ccoleman@cumberlandcounty.org

Counsel for Amicus Curiae Maine Association of Criminal Defense Lawyers (Pending)
Rory McNamara, Esq.
Drake Law, LLC
P.O. Box 143
York, Maine 03909
rory@drakelawllc.com

Dated: July 10, 2025

/s/ Tyler Smith
Tyler J. Smith, Bar No. 427
Libby O'Brien Kingsley & Champion, LLC
62 Portland Road, Suite 17
Kennebunk, Maine 04043
(207) 985-1815
tsmith@lokllc.com

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Dated: July 10, 2025

/s/ Tyler Smith
Tyler J. Smith, Bar No. 427
Libby O'Brien Kingsley & Champion, LLC
62 Portland Road, Suite 17
Kennebunk, Maine 04043
(207) 985-1815
tsmith@lokllc.com