

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

LAW COURT DOCKET NO. Ken-25-458

STATE OF MAINE
Appellee

v.

CHAD T. McDOUGAL
Appellant

ON APPEAL from the Kennebec County
Unified Criminal Docket

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The State's instant motion to revoke Chad McDougal's probation alleged (1) new criminal conduct of domestic violence assault; and (2) failure to complete a certified domestic violence intervention program after he was dismissed from his program upon arrest for those new assault-allegations. (A42). McDougal denied the allegations, and a hearing was held.

At the hearing, the State's case was based on the complainant's 9-1-1 call, her written statements to police, and her statements to various medical providers. She did not testify. None of her statements were corroborated with independent investigation from Detective Behr, who based his entire probable cause affidavit on her statements. (Tr. 30, 32-33). McDougal's probation officer, meanwhile, had no personal information to add supporting the complainant's claims. (Tr. 41-43). The State introduced no photographic evidence supporting or corroborating her allegations.

I. The complainant told multiple stories about how the altercation began.

Via her hearsay statements, the complainant recounted many differing stories about a vicious attack against her. Her first written statement recounted that "it all started" when, at 2:30 a.m., she decided to "go threw [sic]" defendant's phone "to see why he was acting so guilty." (SX 2 at 1). She wrote that when she found evidence that defendant had "been meeting" another woman, she decided to wake up defendant and confront him. (SX 2 at 1.). In her second written statement three months later, the complainant instead claimed that the fight began the night before when, supposedly, the

two discussed a statement made by one of her former romantic partners. (SX 3).

II. The complainant told inconsistent stories about possible injuries to her eyes.

She also told various stories about her many alleged injuries. On February 1, she told dispatch in her 9-1-1 call that McDougal “had blacked [her] eye” by punching her. (SX 1 ca. 00:35). The responding officer, however, noted no black eye and included in his report that he had no knowledge of any injury until several days later when she complained to him that her injuries had not be properly “document[ed].” (SX 6). Medical staff who examined her on February 4 specifically concluded that her eyes were unremarkable. (SX 4 at 4).

That day, the complainant told doctors that, rather than a punch, defendant had hit her in the face with a phone. (SX 4 at 2). On February 6, she wrote a seven-page statement detailing their alleged confrontation but failed to mention getting hit in the face. (SX 2). Yet later, in her May 6 statement, she claimed that McDougal “hit me in the face plenty of times.” (SX 3). McDougal’s grandmother, meanwhile, testified that she saw the complainant less than twelve hours after the alleged assault, and that she had no marks on her and appeared to be perfectly fine. (Tr. 63).

III. The complainant told multiple competing stories about whether she was strangled.

At her February 4 visit to Gardiner Family Medicine, the complainant denied strangulation. (SX 4 at 1) (“Was not strangled ... per patient.”). There likewise appears to have been no medical evidence of strangulation. (SX 4 at

5) (reporting, about the complainant's neck: "[n]on tender, no lesions or ecchymosis"). But in her February 6 written statement to police, the complainant claimed, "[Defendant] was choking me on and off that night," adding that defendant picked her up by the throat a "few times." (SX 2 at 2). The day after writing her statement, February 7, she called Gardiner Family Medicine and asked to change her records to include strangulation. (SX 4 at 1). She also reported "a strangulation attempt" to doctors on February 11. (SX 5 at "22"). Three months later, in her May statement, she omitted any mention of strangulation, alleging only a kick to the stomach. (SX 3).

IV. The complainant inconsistently described injuries to her torso.

The complainant also sought treatment for back pain from Gardiner Family Medicine on February 4, claiming that McDougal had kicked her in the back and dropped her onto her back from four feet off the ground. (SX 4 at 2). Her examining doctor observed tenderness around her spine but no swelling or bruising anywhere. (SX 4 at 5). The complainant was prescribed ibuprofen, Tylenol, hot compresses, and a stretching regimen. (SX 4 at 1-2). On February 6, she told police she was seen for muscle strains, (SX 6 at 2), but her written statement contains no reference to being hit in the stomach or back. (SX 2). On February 9, she went to Maine General Express Care for worsening back pain, and the physician's assistant who examined her noted that she had muscular back pain and prescribed a muscle relaxer and suggested some strengthening exercises. (DX 1 at 1).

V. The complainant blamed defendant for problems with her IUD that, turns out, was already problematic before the alleged assault.

On February 11, the complainant told the women's health nurses who were examining her IUD placement that she experienced "multiple blows" to the abdomen. (SX 5 at "22"). In May, she wrote that defendant had "kicked [her] in the lower stomach" and caused her IUD to become dislodged. (SX 3). However, months earlier, the complainant was already concerned that her IUD was out of place based on her January 21 OBGYN appointment. (SX 5 at "22-24"). At that appointment, her nurse could not find her IUD strings and so ordered an ultrasound for February 11 to confirm its placement. (SX 5 at "22-25").

VI. Defendant testified that the complainant fabricated her allegations because she was jealous of his relationship with another woman.

McDougal's testimony told an entirely different story in which the complainant fabricated the entirety of her allegations against him. He testified that he woke up late in the morning to the complainant angrily packing his bags because she had gone through his phone and seen his texts with his son's mother. (Tr. 49-50). According to McDougal, these texts were about coordinating his son's planned weekend visit, but the complainant is displeased with his relationship with his son's mother and preferred that McDougal have no communication with her. (Tr. 53). The complainant then left the house, and McDougal attempted to de-escalate the situation over text, without success. (Tr. 53-54). When the complainant came back inside, she was "fuming," so he left. (1Tr. 54). As he was packing up to leave, he

testified, she was on the phone and told him that she was going to get him arrested and have him put in jail. (1Tr. 55).

VII. The court determined that defendant violated the terms of his probation.

After the hearing, the Kennebec County Unified Criminal Docket (Dieterich, J.) concluded that McDougal violated an unspecified condition of his probation. The court revoked his probation and sentenced him to 180 days' incarceration. Pursuant to M.R. App. P. 19, McDougal filed with this Court a memorandum in support of a certificate of probable cause. This Court issued a certificate of probable cause on three issues, and this appeal follows.

ISSUES PRESENTED FOR REVIEW

1. Does the reliability test upheld in *State v. James*, 2002 ME 86, 797 A.2d 732, violate a defendant's rights under the Fourteenth Amendment of the United States Constitution?
2. If not, does *James* remain persuasive law in light of the federal balancing standard regarding the admissibility of hearsay at probation revocation hearings?
3. If *James* continues to be good law, were the statements admitted at McDougal's probation revocation hearing sufficiently reliable under the *James* test?

ARGUMENT

I. The reliability test of *State v. James* violates defendants' due process rights under the Fourteenth Amendment of the United States Constitution.

A. Summary of the argument

Due process has always required courts to accord defendants at revocation hearings “the right to confront and cross-examine adverse witnesses.” *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973), quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972). Due process has always conditioned this confrontation right in only one manner: “unless the hearing officer specifically finds good cause for not allowing confrontation.” *Id.* Maine has traditionally implemented the “good cause” exception by allowing a judge to determine whether out-of-court statements are sufficiently “reliable” to warrant dispensing with the confrontation right. This is erroneous for at least three reasons.

First, modern conceptions of the confrontation right have clarified that confrontation is a procedural, rather than substantive, right. Take, for example, one of the *James* test’s criteria for evaluating reliability – whether the declarant has a “bias or motive to fabricate.” 2002 ME 86, ¶ 16. How, other than via cross-examination, is that bias or motive to be demonstrated? “Reliability” is to be determined by the crucible of cross-examination, not presumed absent cross-examination.

Second, Maine’s test is one-sided. It queries only the nature of the hearsay, ignoring the reasons why the State has not produced the declarant for cross-examination. Here, the declarant was sitting in the courtroom. It

is difficult to imagine a “good cause” for the court to dispense with confrontation given that fact, yet under the *James* test, the court needed not concern itself with this side of the equation. Indeed, due process – fair play by the State – must discriminate between situations where the State chooses not to call a witness for tactical reasons and situations where its witness is legitimately unavailable. Failure to even consider the equities, let alone balance them, violates *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Third, procedural due process also requires inquiry into the defendant’s interests in the process at issue. *James* and the decisional law on which it relies do not differentiate between technical violations based on hearsay and new criminal conduct based on hearsay, or between revocations threatening but minimal penalty and revocations threatening substantial terms of imprisonment. This shortcoming again flunks *Mathews*.

Maine’s current interpretation of due process rights at probation hearings unconstitutionally permits the introduction of some – indeed, most, in practice – hearsay evidence without confrontation. These cases must be overruled and replaced with a broad balancing test grounded in Due Process Clause doctrine measuring “good cause” and whether it exists on a case-by-case basis.

B. Preservation and standard of review

This court reviews de novo both rulings about confrontation and due process. *State v. Sheppard*, 2024 ME 84, ¶ 20, 327 A.3d 1124 (Confrontation Clause); *State v. Gordon*, 2019 ME 9, ¶ 12, 246 A.3d 170 (Due Process Clause). Defendant preserved his arguments at the hearing,

contending that there was no “good cause” to deny confrontation in this case. (Tr. 10-11).

C. Analysis

Before turning to the Fourteenth Amendment, defendant orients the Court to the current state of related Maine jurisprudence.

1. Maine currently employs a “reliability” test when weighing the right to confront at probation hearings.

The Law Court first addressed confrontation rights for probationers in *Caron*. It stated that “the use of ‘hearsay’ evidence is, per se, consistent with constitutional fundamental fairness ‘due process’ guarantees as applicable to a proceeding to revoke a probation.” *State v. Caron*, 334 A.2d 495, 498 (Me. 1975). In effect, this holding placed the burden on defendants to prove they have the constitutional right to cross-examine hearsay witnesses, notwithstanding *Scarpelli*’s command that confrontation is due “unless” the judge “specifically” excuses it. 411 U.S. at 786. *Caron* then blessed the “minor use of hearsay” with the caveat that if hearsay was “unreasonably abundant and its **substantive** reliability highly suspect,” a decision resting on such evidence may violate due process. *Id.* Defendant has highlighted the word “substantive,” as this reasoning is discordant with the procedural nature of the confrontation right.

In *James*, the Court expanded on *Caron*’s reliability prong. The Court held that the question of hearsay admissibility at probationary hearings “turns upon whether that evidence was inherently reliable.” *James*, 2002 ME 86, ¶ 13. The Court set forth a two-step process for determining

reliability. “The first step in analyzing the reliability of proffered evidence is to determine whether the evidence would be admissible under the rules of evidence; that is, whether the evidence is excluded from hearsay under the rules or falls within a firmly rooted hearsay exception.” *Id.* ¶ 14. If proffered evidence is excluded as hearsay or falls within a traditional hearsay exception, it may be admitted at the hearing against the defendant. *Id.* If it does not, at *James’s* second step, the statement’s “reliability must be independently examined” by the court:

A variety of factors may be considered at this level of analysis, including: (1) whether the hearsay evidence is corroborated, in whole or part, by live testimony presented at the probation violation hearing or an admission by the probationer; (2) the source of the hearsay, including the potential for bias or motive to fabricate; and (3) whether the hearsay evidence is sufficiently detailed.

Id. ¶ 15 (citations omitted). *James* also stated that decisions based on unreasonably abundant and highly suspect hearsay “will” violate due process. Compare *Caron*, 334 A.2d at 498 (stating that decisions based on unreasonably abundant and highly suspect hearsay “may” violate due process).¹

¹ Although *James* furthered *Caron’s* limitation on unreasonably abundant hearsay by stating such hearsay *will* violate due process if it is highly suspect, it implicitly abrogated *Caron’s* test in another way. Whereas *Caron* required both unreasonable abundance *and* limited reliability, if hearsay passes the *James* reliability test for admission, it does not matter how abundant it is. The *Caron* test therefore collapses completely into the *James* reliability test.

James presents Maine’s version of a “reliability” test – one of two types of tests courts have used for determining when unconfrosted hearsay is permissible at probation revocation hearings. *See, e.g. Curtis v. Chester*, 626 F.3d 540, 545 (10th Cir. 2010) (discussing the split between federal courts of appeal on this issue). Other courts employ a “balancing” test, in which, typically, they must “balance the defendant’s interests in confronting a hearsay declarant against the government’s showing of ‘good cause,’ that is to say, the government’s countervailing interests in presenting the evidence without the declarant’s presence.” *People v. Gray*, 533 P.3d 519, 528 (Calif. 2023); *see United States v. Taveras*, 380 F.3d 532, 536 (1st Cir. 2004) (balancing test required by federal rule of procedure “tracks” the requirements of due process).

This split between balancing and reliability tests springs from the interpretation of *Scarpelli* and formed long before the modern epoch of Confrontation Clause doctrine. But especially since *Crawford v. Washington*, 541 U.S. 36 (2004), it is apparent that reliability tests are incompatible with the procedural nature of confrontation, which reveals their insufficient protection of due process. Ultimately, *James* is highly incongruent with Supreme Court cases on this issue.

Several courts forbid revocations based solely on uncorroborated hearsay. *E.g., Russell v. State*, 982 So.2d 642, 646 (Fla. 2008); *Collins v. State*, 897 A.2d 159, 160 (Del. 2006); *People v. Coupe*, 124 A.D.3d 1141, 1142 (N.Y. 3d App. Dep’t 2015); *cf. Commonwealth v. Durling*, 551 N.E.2d 1193, 1199 (Mass. 1990) (stating that uncorroborated and unreliable hearsay cannot form the basis for revocation). Whatever its decision, this Court should consider giving some guidance on whether uncorroborated hearsay can serve as the sole basis for a revocation.

2. Reliability tests such as *James*’ are consistent with neither the Due Process Clause nor constitutional conceptions of confrontation.

The Confrontation Clause limits itself to “criminal prosecutions,” U.S. Const. amend VI, and because probation revocations are not traditionally thought of as criminal prosecutions, *see Scarpelli*, 411 U.S. at 789, *Crawford*, by itself, may not mandate abrogation of existing revocation frameworks. *E.g.*, *State v. Johnson*, 287 842 N.W.2d 63, 73 (Neb. 2014), citing *Peters v. State*, 984 So.2d 1227, 1231 (Fla. 2008); *but see* Esther K. Hong, *Friend or Foe: The Sixth Amendment Confrontation Clause in Post-Conviction Formal Revocation Proceedings*, 66 S.M.U. L. REV. 227, 259-270 (2013) (arguing history supports Confrontation Clause’s application to probation revocation hearings). Courts instead typically query the Due Process Clause to determine when the confrontation right inheres at probation hearings. But the line is not black and white. Naturally enough, *James* itself was premised on a then-prevailing understanding of what the Confrontation Clause meant by confrontation.

Logically and textually, the act of “confrontation” in the Fifth and Fourteenth Amendment context surely means nothing different than under the Sixth Amendment. That is, while the Confrontation Clause and due-process-derived “confrontation” may have different bounds – *e.g.*, when confrontation must be accorded – in substance, once the right inheres, “confrontation” looks the same in both contexts. *State v. Rose*, 171 P.3d 253, 259 (Idaho 2007) (“*Crawford* may be said to apply to probation revocation proceedings in the sense that it defines what confrontation is.”). Otherwise,

the *Scarpelli* Court’s use of the term “confrontation” would be a peculiar choice apt to confuse. If the Court had meant something else, it no doubt would have said so rather than used the same loaded term for disparate purposes. *Cf. Gray*, 533 P.3d at 530-31 (*Crawford* informs the due-process analysis).

The meaning of “confrontation” in Sixth Amendment cases such as *Crawford* guides any analysis of what nature of confrontation due process guarantees – *i.e.*, the purposes and values of confrontation.² Thus, there is much to take from the Court’s recognition that, the “ultimate goal” of “confrontation” may be

to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The [Confrontation] Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61. The procedural, rather than substantive, nature of confrontation makes even more sense when remembering that *Scarpelli* was a case about what procedure is due to probationers.

² *James* itself implicitly makes this connection, citing the then-controlling pre-*Crawford* line of Sixth Amendment cases stemming from *Ohio v. Roberts*, 448 U.S. 56 (1980). *James*, 2002 ME 86, ¶ 14.

Crawford thus illustrates that reliability is an end rather than a means. The means to that end is confrontation and cross-examination. As defendant pondered above, how, absent cross-examination, might a defendant establish an out-of-court declarant's bias or motive to fabricate – one of the *James* factors for determining whether confrontation is due?³ How can a judge “independently examine” reliability, without permitting the very means by which defendants establish unreliability? The process established by *James* is inherently one-sided. It allows the State to build its case for “reliability” without exposure to the crucible that might undermine its showing. That is a far cry from *Scarpelli's* holding that probationers enjoy the right to confrontation “unless” a judge “specifically” finds good cause to suspend it.

Reliability (especially when determined without the opportunity for establishing unreliability) is not, in and of itself, the sort of “good cause” that can override the Fourteenth Amendment. Rather, analyzing “good cause” necessitates a holistic determination, not a one-sided showing. It counts *both* the defendant's interest in cross-examination *and* the State's need to bypass it. Foundational case-law about procedural due process, after all, requires a true balancing test. *Mathews v. Eldridge* sets forth its own balancing test for determining what process is afforded to those who face adverse government action. To determine constitutionally sufficient procedure, courts are generally required to weigh three key factors:

³ The court criticized defendant for making only some “inchoate claim of bias.” (Tr. 13).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. Most notably, *Mathews* is a true balancing test; it requires consideration of “the Government’s interest,” which is entirely absent from *James*. And *Mathews* weighs the individual’s varying interests; *James* treats all probationers the same, whether they face years or just weeks behind bars, and whether the revocation is for “new criminal conduct” or mere technical noncompliance.

Doctrinally, as the *James* reliability test interprets due process rights, it should map neatly onto the *Mathews* framework as a more specific application of *Mathews* to the probation revocation setting.⁴ But it fails to do so. First, it appears to analyze only *Mathews*’ risk of erroneous deprivation factor with its reliability examination. See *James*, 2002 ME 86, ¶ 15. Thus, even when a defendant’s interest is extremely high, and there is little to no additional government burden on the State to produce a witness for cross-examination, the *James* test treats these critical due process factors as irrelevant to the analysis.

⁴ *Mathews* and *Scarpelli* were both authored by Justice Powell, and the composition of the Court in both decisions was identical.

Any court that purported to analyze the bounds of due process by evaluating only one *Mathews* factor would be overturned, and the same should happen here. What is more, *James* ignores the spirit of due process jurisprudence as well as its letter. As the Supreme Court has stated, it does not “require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey*, 408 U.S. at 481. But instead of taking a balancing approach on a case-by-case basis, *James* takes a highly prescriptive, inflexible approach, and at its first step it prescribes a one-size-fits-all exception for anything that falls within “a firmly rooted hearsay exception”.⁵ *James*, 2002 ME 86, ¶ 14.

James’s incongruence with *Mathews* is because *James* is the true progeny of Confrontation Clause doctrine, not Due Process Clause doctrine. Its test for determining when it is appropriate for the State to introduce hearsay evidence without calling a witness is essentially a restating of Confrontation Clause principles as they stood in 2002. *See James*, 2002 ME 86, ¶ 14, citing *Roberts*, 448 U.S. at 66. At that time, *Roberts* stood for the proposition that statements of non-appearing witnesses were admissible under the Confrontation Clause if they bore adequate “indicia of reliability.” 448 U.S. at 66. It also held that “[r]eliability can be inferred without more in

⁵ Shall the *James* test be frozen in 2002? Since it was published, several new hearsay exceptions and exemptions have been added to the books, *e.g.*, *State v. Engroff*, 2025 ME 83, ¶¶ 43-58, 345 A.3d 91, and, at the same time, courts have stopped determining whatever might be “firmly rooted hearsay.” Are these new hearsay-allowances “firmly rooted”, and how does one even tell? Here again, the overlap between Sixth- and Fourteenth-Amendment confrontation is relevant to the issues before the Court.

a case where the evidence falls within a firmly rooted hearsay exception.” 448 U.S. at 66. Given this background, it is unsurprising that *James* is inconsistent with due-process doctrine and leads to unconstitutional outcomes. Respectfully, that was always the case, and *Crawford* has only made the *James* Court’s doctrinal fallacy plainer.

On the other hand, balancing tests that weigh all interests map neatly onto due process doctrine in this area. Again, *Scarpelli* held that defendants have “the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).” 411 U.S. at 786. Many courts have naturally interpreted this line to put the burden on the State to offer some reason why confrontation is not necessary or desirable. *E.g.*, *State v. Miller*, 326 N.E.2d 259, 262 (Ohio 1975). By its language – stating the right first and then afterwards adding a caveat in a separated parenthetical – the most natural reading of *Scarpelli* is that it endorses a framework establishing a presumption of cross-examination that the State might then overcome via the proper showing. Such would accord with how the Supreme Court generally treats the State’s attempt to limit constitutional rights in other contexts. *See United States v. Rahimi*, 602 U.S. 680, 691 (2024) (when the Government regulates . . . constitutional rights, it bears the burden to “justify its regulation.”); *cf. United States v. Jackson*, 636 F.3d 687, 695-96 (5th Cir. 2011) (“[T]he government bears the burden of defeating [the defendant’s] properly raised Confrontation Clause objection by establishing that its evidence is nontestimonial.”).

But this is the opposite of *Caron* and *James*, which both explicitly state that hearsay is “per se” admissible. *James*, 2002 ME 86, ¶ 13, citing *Caron*, 334 A.2d at 498. Under these cases, as under *Roberts*, admissibility of hearsay is framed as an evidentiary issue rather than one of constitutional rights. Defendants have the burden to overcome per se admissibility by showing first that the evidence is not covered by a traditional hearsay exception, and then that it is insufficiently reliable to serve as a basis for revocation. McDougal’s case and the past twenty-four years of state court practice illustrate *James*’s near-insurmountable presumption *against* the constitutional right to cross-examine witnesses. And its unconstitutionality is now recognized by the majority of this country’s courts.

3. Reliability tests such as *James* are now the minority rule.

The majority of courts that have squarely addressed *Scarpelli*’s confrontation standard have adopted balancing tests. Meanwhile, the courts that have explicitly rejected balancing have done so with faulty, unconvincing reasoning.

Balancing is currently adopted in every single federal circuit court of appeal. *See United States v. Jones*, 818 F.3d 1091, 1099 (10th Cir. 2016). The pace of adoption was accelerated by the 2002 revisions to the Federal Rules of Criminal Procedures, which explicitly mandate a balancing test in its Committee Notes. *See Taveras*, 380 F.3d at 536 (“[T]he 2002 amendments to Rule 32.1 reveal that the procedural protections established by Rule 32.1(b)(2)(C) were designed to track the due process rights

established for parolees in *Morrissey*....”); see *United States v. Doswell*, 670 F.3d 526, 530 (4th Cir. 2012) (basing its adoption of the balancing test on the 2002 rule revisions); Fed. R. Crim. P. 32.1 (advisory committee’s notes to 2002 amendment). Where, as here, the Federal Rules purport to comply with Supreme Court precedent on a constitutional provision incorporated against the states, committee notes have significant persuasiveness. Of course, the existence of Rule 32.1 obviates federal courts’ need to expound on the constitutional necessity undergirding the rule.

However, balancing tests are by now the standard in twenty-two states. *Gray*, 533 P.3d 519, 528; *State v. Martin*, 522 P.3d 841, 846 (Or. 2022) (en banc); *State v. Mosley*, 179 A.3d 350, 362-63 (N.J. 2018); *State v. Eldert*, 125 A.3d 139, 147-48 (Vt. 2015); *Johnson*, 842 N.W.2d at 72; *State v. Guthrie*, 257 P.3d 904, 915-16 (N.M. 2011); *Rose*, 171 P.3d at 259; *Williams v. Lawrence*, 540 S.E.2d 599, 603 (Ga. 2001); *State v. Beck*, 619 N.W.2d 247, 250-52 (S.D. 2000); *State v. Dahl*, 1990 P.2d 396, 401 (Wash. 1999); *State v. Tate*, 989 P.2d 73, 75 (Utah Ct. App. 1999); *State v. Casiano*, 667 A.2d 1233, 1239-40 (R.I. 1995); *State v. Wade*, 863 S.W.2d 406, 408-09 (Tenn. 1993); *State v. Yura*, 825 P.2d 523, 530 (Kan. 1992); *State ex rel. Mack v. Purkett*, 825 S.W.2d 851, 855 (Mo. 1992); *Moody v. Cunningham*, 503 A.2d 819, 822 (N.H. 1986); *Mason v. State*, 631 P.2d 1051, 1056 (Wyo. 1981); *Anaya v. State*, 606 P.2d 156, 160 (Nev. 1980); *Miller*, 326 N.E.2d at 262; *State v. Crespo*, 211 A.3d 1027, 1033 (Conn. App. 2019); *McDaniels v. State*, 451 P.3d 403, 407 (Alaska Ct. App. 2019); *Goforth v. State*, 767 S.W.2d 537, 538 (Ark. Ct. App. 1989).

Reliability tests are less common and are utilized in only nine other states and the District of Columbia. *See Commonwealth v. Hartfield*, 51 N.E.3d 465, 475 (Mass. 2016); *Hampton v. State*, 203 P.3d 179, 185 (Okla. Ct. Crim. App. 2009); *Reyes v. State*, 868 N.E.2d 438, 442 (Ind. 2007); *Young v. United States*, 863 A.2d 804, 808 (D.C. 2004); *People v. Renner*, 748 N.E.2d 1272, 1276 (Ill. App. 2001); *Bailey v. State*, 612 A.2d 288, 293 (Md. 1992); *State v. Stotts*, 695 P.2d 1110, 1120 (Ariz. 1985); *Commonwealth v. Colon*, 102 A.3d 1033, 1040 (Pa. Super. 2014); *State v. Michael*, 891 So. 2d 109, 114 (La. Ct. App. 2005); *State v. Johnson*, 679 N.W.2d 169, 173-174 (Minn. Ct. App. 2004).

Two states, Indiana and Oklahoma, have explicitly rejected calls to adopt a balancing test, *see Hampton*, 203 P.3d at 185; *Reyes*, 868 N.E.2d at 442, but these decisions are ill-considered. *Reyes* and *Hampton*'s reasoning is based on policy considerations and since-superseded federal circuit court opinions. Now, all federal courts employ balancing tests; twenty-two states and the federal courts use balancing without any apparent difficulty; and, policy arguments about the administrative burden of granting greater confrontation rights were foreclosed by the Supreme Court in footnote in *Scarpelli*.⁶

⁶ An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the

Leaving aside eight states⁷ that have either ambiguous, unclear, or undecided doctrine, the other state approaches are even more constitutionally dubious than *James*. By their case-law, five states appear to permit the per se introduction of hearsay at probation hearings. *State v. Burkett*, 2021 MT 112N, ¶ 13, 486 P.3d 689 (table) (Mont. 2021); *Barker v. Commonwealth*, 379 S.W.3d 116, 130 (Ky. 2012); *State v. Hemmes*, 740 N.W.2d 81, 86 (N.D. 2007); *Randle v. State*, 228 So. 3d 334, 337 (Miss. Ct. App. 2017); *State v. Pauling*, 639 S.E.2d 680, 682 (S.C. Ct. App. 2006). Five states, meanwhile, have inexplicable jurisprudence completely side-stepping *Scarpelli*'s holdings. These states permit the blanket introduction of hearsay evidence subject only to the limitation that revocations cannot be based entirely on hearsay. *Russell*, 982 So.2d at 647; *Collins*, 897 A.2d at 161; *State v. Farmer*, 234 N.W.2d 89, 91 (Iowa 1975); *Wright v. State*, 292 So.3d 1136, 1139 (Ala. Crim. App. 2019); *People v. Simpson*, 155 A.D.3d 1246,

conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.

Scarpelli, 411 U.S.at 782, n. 5.

⁷ *State ex rel. Wisconsin Dep't of Corr., Div. of Cmty. Corr. v. Hayes*, 22 N.W.3d 916, 924 (Wisc. 2025) (permitting both balancing and reliability tests); *Cunningham v. State*, 673 S.W.3d 280, 290 (Tex. App. 2023) (acknowledging a split over whether the full Confrontation Clause applies); *State v. Jones*, 876 S.E.2d 407, 410-11 (N.C. 2022); *Henderson v. Commonwealth*, 736 S.E.2d 901, 906-07 (Va. 2013); *People v. Loveall*, 231 P.3d 408, 414-15 (Colo. 2010); *People v. Breeding*, 772 N.W.2d 810, 818-19 (Mich. Ct. App. 2009) (declining to adopt either test); *State v. Brown*, 600 S.E.2d 561, 564-65 (W. Va. 2004); *State v. Quelnan*, 767 P.2d 243, 246 (Haw. 1989).

1247 (N.Y. App. Div. 2017). This standard originates from antiquated doctrine concerning sufficiency of evidence in administrative proceedings, *see Consol. Edison Co. of New York v. N.L.R.B.*, 305 U.S. 197, 230 (1938); *Carroll v. Knickerbocker Ice Co.*, 113 N.E. 507, 508-09 (N.Y. 1916), and has little relevance to questions about whether hearsay may be admitted without confrontation.⁸

4. Consistent with due process doctrine, this Court should adopt a broad balancing test.

Although Maine should abolish the *James* reliability test and replace it with a balancing test, not all balancing tests are the same. Consistent with due process doctrine, this Court should adopt a balancing test that obligates lower courts to flexibly address a wide variety of factors in the analysis.

Unsurprisingly, the many state and federal courts that have adopted balancing tests posit different formulations of how factors should be balanced. Nonetheless, every balancing test includes the third factor – the government’s reasons for not producing a witness and interest in not permitting cross-examination. But some states do not explicitly address *Mathews*’ first factor – the private interest at stake – on a case-by-case basis.

⁸ This Court should not, as these and other courts do, confuse the procedural due process attendant to the admission of evidence with the due process protections that apply to the tribunal’s ultimate decision. *Scarpelli* concerns the procedure governing the admission of evidence. *James*’ reliability test does as well. On the other hand, *James*’ proscription against unreasonably abundant and highly suspect hearsay also establishes a due process standard governing the ultimate decision. *See James*, 2002 ME 86, ¶ 13, citing, among other cases, *Heal v. Maine Employment Sec. Comm’n*, 447 A.2d 1223, 1226 (Me. 1982)).

Rather, they engage in a very narrow due process balancing process that only evaluates reliability and reasons for not producing the witness. *See, e.g., Casiano*, 667 A.2d at 1239 (“The determination of good cause has generally rested on the reliability of proffered substitute evidence and the state’s explanation of why confrontation was undesirable or impractical.”); *Yura*, 825 P.2d at 530.

Ignoring the relevance of the private interest in each case is inconsistent with *Mathews* and out of step with many other courts’ broad balancing tests. The private interest at stake varies from defendant to defendant and should be relevant to due process concerns when making judgments in particular cases. A notable example in this regard is *State v. Mosley*, 179 A.3d 350, 363 (N.J. 2018), which in turn adopted considerations set forth in *Walker v. United States*, 117 F.3d 417, 420 (9th Cir. 1997):

(1) the importance of the evidence to the court’s finding; (2) the probationer’s opportunity to refute the evidence; (3) the consequences for the probationer of the court’s finding; (4) the difficulty and expense of procuring witnesses; and (5) the traditional indicia of reliability borne by the evidence.

(brackets and quotation marks omitted). Points (1), (2), and especially (3) speak to how important confrontation is to the defendant at bar, in ways not contemplated by other tests. *Cf. Mason*, 631 P.2d at 1056 (“Both the defendant and the social system have a stake in making sure the factual determination in a revocation hearing is not an arbitrary one but is based on facts which pass the *Morrissey*, truth-seeking test of cross-examination....”).

A flexible procedure calling “for such determination as the particular situation demands,” *Morrissey*, 408 U.S. at 481, doubtlessly calls for a precise “determination of the...private interest that [will be] affected by government action.” *Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). That is how procedural due process works but, again, *James* omits to take such account.

Permitting a broad review guarantees due process in each case, and this will benefit the judicial system as much as defendants. It is common sense that defendants who are likely to face minimal sanctions for, say, technical violations of their probation might not have the same confrontation rights as defendants who face full revocation of very lengthy sentences, or as defendants in cases where new criminal conduct is alleged (as here). In the case of the former, a broad balancing test would tip the scales towards permitting speedy and inexpensive probation revocation hearings without strict adherence to confrontation principles. *See Scarpelli*, 411 U.S. at 788 (“But due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.”). For the latter cases, due process concerns should weigh in favor of permitting confrontation to ensure a lengthy incarceration is not imposed without first rigorously testing the evidence’s accuracy via cross-examination. The same principle would put on opposite ends of the balancing spectrum those cases where the State introduces evidence of someone’s “general character while on probation,” *Anaya*, 606 P.2d at 158, versus hearsay evidence regarding substantive violations.

II. Even if constitutional, Maine should abandon *James*' reliability test, in keeping with the vast majority of federal and state courts.

The constitutional case against reliability tests like *James*' is clear. But even if this Court believes that *James* is constitutional, *Crawford* has sufficiently changed the landscape of confrontation to prompt this Court to abandon *James* in favor of a balancing test. This Court has already established a precedent of looking to Confrontation Clause doctrine in determining the nature of due process confrontation rights at probation hearings, see *James*, 2002 ME 86, ¶ 14, and it makes sense to do so again here.

Even if constitutional, Maine should abandon its reliability test, first of all, because of how poorly it works. The *Crawford* court explained this in some detail, noting that “[r]eliability is an amorphous, if not entirely subjective, concept,” *Crawford*, 541 U.S. at 63, and citing numerous examples demonstrating that whether a “statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.” *Id.* Especially relevant here, the Supreme Court cited rulings on opposing sides of *James*' third factor – with one finding a statement reliable because it was detailed, and another because it was “fleeting.” *Id.*, quoting *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001). McDougal could cite his own case as another example of illogical subjectivity. *See infra*. It seems unlikely that all

– or even most – judges would make the same reliability finding as the court below.

Beyond the unworkability of reliability tests, the other relevant lesson from *Crawford* is its distinction between testimonial and non-testimonial statements. In “criminal prosecutions,” U.S. Const. amend. VI, the first cannot be admitted absent confrontation, but the second may be regulated by rules of evidence. *See Crawford*, 541 U.S. at 68. This distinction traces to the history of the Clause, but also finds support in its text, which limits its application “to ‘witnesses’ against the accused – in other words, those who ‘bear testimony.’” *Crawford*, 541 U.S. at 51, quoting 2 N. Webster, *An American Dictionary of the English Language* (1828).

Although the “full panoply” of constitutional rights does not apply in probation revocation hearings, *Morrissey*, 408 U.S. at 475, it is notable that the Maine Legislature has explicitly granted defendants the right “to confront and cross-examine witnesses against the person.” 17-A M.R.S. § 1812(2). That right, respectfully, is currently nullified by this Maine courts’ antiquated conception of what it means to be a “witness against the person.” In congruence with the will of the Legislature and the principles of confrontation enumerated in *Crawford* principles, this Court should embrace a comprehensive balancing test. Under a due-process balancing test, whether a statement is testimonial or non-testimonial can and should be a relevant factor to determine the scope of confrontation rights.

III. The court's admission of statements against McDougal was erroneous even under the *James* standard.

Assuming the continued applicability of the *James* reliability test, admission of the complainant's statements violated McDougal's confrontation rights.

To recap, *James* sets forth a two-step test when determining whether hearsay statements may be introduced without confrontation. *See James*, 2002 ME 86, ¶¶ 14-15. Hearsay statements may be introduced if they "would be admissible under the rules of evidence; that is, whether the evidence is excluded from hearsay under the rules or falls within a firmly rooted hearsay exception." 2002 ME 86, ¶ 14. If not, courts must then independently examine their reliability by examining a "variety of factors," such as whether the hearsay was corroborated by live testimony, the "source of the hearsay, including the potential for bias or motive to fabricate," and how detailed the hearsay statements are. 2002 ME 86, ¶¶ 14-15. *James* provides one final limitation on hearsay evidence: It may not be "unreasonably abundant and its substantive reliability highly suspect," or decisions based on it will violate due process. 2002 ME 86, ¶ 13.

In this case, tracking those considerations: (A) the alleged victim's statements were uncorroborated by any other live testimony at the hearing; (B) there was evidence that the alleged victim had motive to fabricate; and (C) the inconsistent and contradictory nature of her statements decisively cut against their reliability – though, by its letter, the *James* standard neglects to account for such reliability-deficits. Further, the State's entire case was

built on uncorroborated, inconsistent hearsay. Admitting the complainant's evidence and basing revocations on it was therefore improper under *James*.

A. The complainant's hearsay statements were entirely uncorroborated.

If proffered evidence does not come within a traditional hearsay exception, Maine courts first analyze the evidence's reliability by assessing whether it was corroborated by live testimony at the hearing or the probationer's admission. *See* 2002 ME 86, ¶ 15. Here, live testimony contradicted the complainant's hearsay claims rather than corroborating them. Accordingly, this factor should have weighed against the admission of her statements – and strongly.

The only witnesses the State called were defendant's probation officer and the District Attorney's detective investigator, Christian Behr. McDougal's probation officer provided no information regarding the complainant's claims. (Tr. 41-43). Detective Behr, meanwhile, testified that he had "investigated" the allegations and applied for a warrant approximately six weeks after the supposed incident by merely inserting the complainant's statements into a probable cause affidavit. (Tr. 30). During the course of his "investigation," Detective Behr interviewed no witnesses other than the complainant, collected no photographic evidence from her to substantiate her claims, and never even saw her in person to confirm the existence of any injuries. (Tr. 32-33). At the hearing, Detective Behr was nothing more than a badge-wearing mouthpiece for the complainant's hearsay.

On the other hand, defendant denied harming her, and McDougal's grandmother testified that she saw the complainant less than twelve hours after the alleged assault, and that the complainant had no marks on her and appeared to be perfectly fine. (Tr. 63).

B. There was evidence that the complainant had motive to fabricate.

The second factor courts must consider under *James* is “the source of the hearsay, including the potential for bias or motive to fabricate.” 2002 ME 86, ¶ 15. Here, evidence from suggests that the declarant – the complainant – was highly biased and had motive to fabricate.⁹ This factor should have weighed against admitting her statements, not to mention basing a decision on them.

The complainant's initial statement illustrates her potential for bias, on its face. Her first written statement recounted that “it all started” when, at 2:30 a.m., she decided to “go threw [sic]” defendant's phone “to see why he was acting so guilty.” (SX 2 at 1). She wrote that when she found evidence that defendant had “been meeting” another woman, she decided to wake up defendant and confront him. (*Id.*). Putting aside the fact that the complainant later completely changed her story about how this alleged fight

⁹ It is worth noting another problem with *James*: When, exactly, is defendant supposed to come forward with evidence of a declarant's bias or motive to fabricate? Does he bear a burden to so preview his defense before the revocation hearing? If such is not evinced until the hearing, and the declarant is not present at that hearing, has the defendant forfeited the right to confront the declarant, notwithstanding his prior inability to explore the declarant's bias and motives?

started, a discovery that your partner and the father to your 10-month-old child might be cheating on you would be a devastating revelation. A person in such circumstances is certainly not the unbiased, neutral, disinterested reporter whose word courts can reflexively credit.

McDougal gave more context to his accuser's jealous motives for fabrication in his testimony. He testified that he woke up late in the morning to her angrily packing his bags, because she had gone through his telephone and seen his texts with his son's mother. (Tr. 49-50). According to McDougal, these texts were about coordinating his son's planned weekend visit, but the complainant does not approve of his relationship with his son's mother and would prefer that McDougal have no communication with her. (Tr. 53). The complainant then left the house, and McDougal attempted to de-escalate the situation over text, without success. (Tr. 53-54). When she came back into the house "fuming," he gathered his belongings to leave. (Tr. 54). At that point, he testified, she was on the phone and told him that she was going to get him arrested and have him put in jail. (Tr. 55). This testimony should have weighed very heavily against admitting his accuser's hearsay statements or basing a decision on them.

C. The contradictory nature of the statements undermines their reliability.

Although courts may evaluate "a variety of factors," the final enumerated *James* factor is whether the proposed evidence is "sufficiently detailed." 2002 ME 86, ¶ 15. The complainant's statements were quite detailed, but their significant, often contradictory, detail properly weighs

against their admissibility. Major inconsistencies run throughout her statements, casting serious doubt upon their reliability.

She is inconsistent about nearly everything. As alluded to above, her first statement asserts that the alleged altercation started because she thought she had discovered McDougal cheating on her, while her written statement three months later contradicts this. In her second telling, she states that “[i]t all started” the night before when, supposedly, the two discussed a statement made by one of *the complainant’s* former romantic partners. (SX 3).

She is also consistently inconsistent about the source and extent of her claimed injuries. Regarding facial injuries, on February 1, she told dispatch in her 9-1-1 call that McDougal “had blacked [her] eye” by punching her. (SX 1 ca. 00:35). This was the sole injury and offense she reported to dispatch. But the responding officer noted no black eye and noted in his report that he had no knowledge of any injury until several days later when she complained to him that her injuries had not been properly “document[ed].” (SX 6). And the medical staff who examined her on February 4 specifically concluded that her eyes were fine. (SX 4 at 4: noting no edema or ecchymosis around her eyes). This is somewhat surprising, because she had told doctors that defendant had hit her in the face with a phone. (SX 4 at 2). But her inconsistency continues. Two days later, on February 6, she wrote a seven-page statement detailing their alleged confrontation but failed to mention getting hit in the face – with a phone, fist, or anything else. (SX 2). Then, in

her much shorter May 6 statement, she claimed that McDougal “hit me in the face plenty of times.” (SX 3).

Even more alarming are her various statements about strangulation. At her February 4 visit to Gardiner Family Medicine, she denied strangulation. (SX 4 at 1, noting she “[w]as not strangled...per patient,” 2, “[d]enies...being strangled”). There likewise appears to have been no medical evidence of strangulation. (SX 4 at 5, noting no petechia, tenderness or bruising on neck or throat). Yet in her February 6 written statement, the complainant suddenly claimed that defendant was “choking [her] on and off that night,” and picked her up by the throat a “few times.” (SX 2 at 2). The day after writing her statement, February 7, she called Gardiner Family Medicine back and asked that her records be changed to include strangulation. (SX 4 at 1, noting that the complainant had denied strangulation “multiple times”). She also reported strangulation to doctors on February 11. (SX 5 at “22”). Three months later, in her May statement, she completely omits any allegation that McDougal had strangled her that night. (SX 3).

Her descriptions of her back (or, sometimes, stomach) pain are also inconsistent. After not telling dispatch or the responding officer anything about such injuries, (SXs 1 & 6), she sought treatment for back pain from Gardiner Family Medicine on February 4, claiming that McDougal had kicked in the back and dropped her onto her back from four feet off the ground. (SX 4 at 2). Her examining doctor observed tenderness around her spine but no swelling or bruising anywhere. (SX 4 at 5). She was prescribed

ibuprofen, Tylenol, hot compresses, and a stretching regimen. (SX 4 at 1-2). Then, on February 6, the complainant told police she was seen for muscle strains, (SX 6 at 2), and her written statement contains no specific mention of having been hit in the stomach or back. (SX 2). On February 9, she went to Maine General Express Care for worsening back pain, and the physician's assistant who examined her noted that she had muscular back pain and prescribed a muscle relaxer and suggested some strengthening exercises. (DX 1 at 1). But on February 11, the complainant told the women's health nurses who were examining her IUD-placement that she experienced "multiple blows" to the abdomen. (SX 5 at "22"). And in May, she wrote that defendant "kicked [her] in the lower stomach" and caused her IUD to become dislodged. (SX 3). Yet the evidence that McDougal dislodged her IUD is incredibly thin. The complainant was already concerned that her IUD was out of place, based on her January 21 OBGYN appointment. (SX 5 at "22-24"). At that appointment, her nurse could not find her IUD strings and so ordered an ultrasound for February 11 to confirm its placement. (SX 5 at "22-25").

D. The complainant's unconflicted hearsay was inadmissible under *James*.

The complainant's statements were the sole evidence capable of supporting the case against McDougal, but the court should never have admitted them, even under *James*. In *James* itself, the Court concluded that it was error to rely on completely uncorroborated statements from a hearsay witness with a potential motivation to fabricate. 2002 ME 86, ¶ 17. If the

complainant's statements to McDougal about getting him arrested, coupled with all the medical documentation contradicting her ever-changing stories nevertheless survives *James'* reliability test, it is difficult to imagine what would not. Even under *James'* lenient interpretation of due process requirements, this was an abuse of discretion.

CONCLUSION

James sets forth an unconstitutional test based on outdated Confrontation Clause doctrine. The Court must overrule *James* and replace it with a broad balancing test grounded in Due Process Clause doctrine and principles. But even under *James'* unconstitutional standard, the lower court's decision cannot stand and must be vacated.

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Respectfully submitted,

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CERTIFICATES OF FILING & SERVICE

I have filed this brief, and served opposing counsel, as listed on the service list, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara