

TESTIMONY OF MEAGAN SWAY, ESQ.

LD 765 – Ought Not to Pass

**An Act to Permit Recordings of a Protected
Person to Be Admissible in Evidence**

Joint Standing Committee on Judiciary

March 15, 2023

Senator Carney, Representative Moonen and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Meagan Sway, and I am policy director for the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, I urge you to oppose LD 765, legislation that would erode the Sixth Amendment rights of people charged with crimes.

If enacted, this bill would create a new exception to the hearsay rule. Under the hearsay rule, an out-of-court statement submitted for the truth of the matter asserted is inadmissible in court against a person charged with crime. The hearsay rule exists to protect our constitutional right to confront witnesses against us in criminal prosecutions, enshrined in the Confrontation Clause of the Sixth Amendment to the federal constitution.

The Confrontation Clause is a “bedrock procedural guarantee” that “applies to both federal and state prosecutions.” *Crawford v. Washington*, 541 U.S. 36, 42 (2004) As the Supreme Court pointed out in *Crawford v. Washington*, the “primary object” of the Confrontation Clause’s protection is against statements made by an accuser out of court to government officials, including police. *Id.* at 53. Such testimonial evidence is squarely at issue here. The fact that the government official in question has 32 hours of training when asking the witness to make testimonial statements, “is not an antidote to the confrontation problem, but rather the trigger that makes the Clause’s demands most urgent.” *Id.* at 66.

If this bill passed, recorded interviews of people younger than eighteen or adults eligible for protective services would be admissible in court against people in criminal prosecutions if, (1) those interviews were conducted by a “forensic interviewer,” and (2) the protected person is available to be cross-examined.

A rule like this would undermine a foundational principle of fair criminal trials: that the burden of proving the crime and calling witnesses rests with the state, not on the defense. This bill would make the defense – not the state – responsible for calling the pre-recorded witness for cross-examination. Moreover, this would ensure that witnesses would essentially be allowed to testify twice in the same trial (once through a pre-recorded video, and again in court).

The Confrontation Clause is a crucial protection that has been a feature of legal systems since Roman times. It is the best way the legal system has devised to confront witnesses against the accused to get at the truth and protect defendants from wrongful convictions. Because LD 765 undermines this core constitutional protection, we ask that you vote *ought not to pass*.