

TESTIMONY OF MEAGAN SWAY, ESQ.

Ought to Pass – LD 1603

**An Act to Implement the Recommendations of the Committee to Ensure  
Constitutionally Adequate Contact with Counsel**

JOINT STANDING COMMITTEE ON JUDICIARY

April 19, 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 at the ACLU of Maine, a statewide organization committed to advancing and preserving civil rights and civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, we urge you to support this bill. And, while all parts of the bill deserve support, we are particularly supportive of section A-7, that provides consequences when the state violates a defendant's right to consult with their attorney privately.

Access to counsel is among the most important of the rights guaranteed to citizens by the Sixth Amendment to the United States Constitution. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying Sixth Amendment obligations to states under Due Process Clause of Fourteenth Amendment). Access to effective counsel includes the right to have confidential conversations with one's attorney without the government overhearing what is said. For too many people in Maine, access to private conversations with their defense attorney is treated as a privilege for the few instead of a constitutional right for all: as one report found, jails in Androscoggin, Aroostook, Franklin, Kennebec, Penobscot and York counties recorded almost 1,000 phone calls that jailed defendants made to counsel between June 2019 and May 2020.<sup>1</sup>

One of the premises of our legal system is that if you break the law, there are consequences. Yet when it comes to government officials violating the rights of defendants to speak with their attorneys in confidence, practically speaking, there are currently not serious

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<sup>1</sup> Samantha Hogan, Maine lawmakers consider making jail phone calls to lawyers free, *The Maine Monitor*, March 5, 2023, accessible at <https://www.themainemonitor.org/maine-lawmakers-consider-making-jail-phone-calls-to-lawyers-free/>.

consequences imposed. This undermines the perception of fairness and actual fairness in the legal system. Section A-7 of this bill would make it so that attorney-client communications intercepted by the government are not admissible in a criminal proceeding, and any person who improperly intercepts that communication cannot appear as a witness in a criminal case against the defendant, if the government actor had notice that the person with whom the defendant was having a conversation was their lawyer. We hope that Section A-7 will incentivize government actors—jails, prisons, district attorneys and police—to put into place protective mechanisms so that they do not violate defendants' rights when it comes to speaking with defense counsel.

We ask you to support this legislation to ensure guardrails are put into place so that defendants' rights to speak privately with their attorneys are honored. Thank you for your time.