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MAINE PROSECUTORS ASSOCIATION
MAEGHAN MALONEY, PRESIDENT

"An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine"
Before the Joint Standing Committee on Judiciary
Public Hearing Date: April 10, 2024
Testimony in Support of LD 2290 as Amended

Senator Carney, Representative Moonen and Honorable members of the Joint Standing Committee on Judiciary. My name is Maeghan Maloney, I am the District Attorney of Kennebec and Somerset Counties and the President of the Maine Prosecutors Association. I am here to testify in support of LD 2290 as amended.

In the first regular session, this Legislature passed LD 765 that gave a statutory hearsay exception to forensic interviews conducted at Child Advocacy Centers as long as a list of prerequisites are met for admissibility purposes. This was passed after hearing from experts about the traumatic affect and harm the criminal justice system places on children that are sexual assault survivors. The law still requires the child be available for cross examination, but this new process is less harmful for these children while still adhering to all of a defendant's constitutional rights.

Since this law is procedural in nature, the research that was conducted during the drafting of the bill led us to believe that once the law was passed it could be used upon its effective date and all children would be afforded the ability to have their detailed forensic interview played for the judge or jury. This did happen in two trials already. However, on March 21, 2024, a Judge in Cumberland County and a Justice in York County both ordered in two separate cases that the new law could not be utilized pursuant to 1 M.R.S. § 302 because the law did not explicitly state the intent was to apply to pending cases. The two Courts relied on *State v. Beeler*[1] that a statute can't be utilized for pending actions unless expressly stated. *Beeler* also infers that pending actions start at the time the crime was committed.[2] After reading the two Orders and the authority cited by the Judges, we are in agreement that the law needs to be amended to be utilized now or even in the near future. If the law is not fixed, the reality is that children going through the criminal justice process a decade from now still will have to testify in front of their abuser, a room full of strangers, and tell the most intimate and traumatic parts of their life without the utilization of the new law. For example, if a 6 year old child was sexually assaulted on October 24, 2023, waits until she is 16 to disclose the

[1] 2022 ME 47, 281 A.3d 637.
[2] "Because there is nothing in the amendments suggesting that the Legislature intended that they apply to pending proceedings, we conclude that the 2018 statute, which was in effect at the time the crime was committed, is the applicable version here." 2022 ME 47, ¶ 1, n.1, 281 A.3d 637

abuse – as delayed disclosure of child sexual abuse is VERY common- immediately has a forensic interview done, and goes to trial a year after her disclosure, the law you passed in 2023 would still not be available to this victim even though the year would be 2034. We are talking about years and years of children being put through a process unnecessarily when we know that best practice is the law you all enacted.

It is fair to all to have the new law apply to pending actions. The law is procedural and would apply to pending actions if enacted in the rules of evidence or if it was a judiciary created rule. For example, for any trials that are currently happening, both the prosecution and defense are using the most recent edition of the Maine Rules of Evidence even though the conduct could have occurred years ago. Also, when the Judiciary creates its own procedural evidentiary rules, like the "first complaint rule[3]", those new judiciary created rules can be utilized in pending cases.

Even without the new law, forensic interviews can be admitted as evidence depending on how the trial plays out. This means no matter what, defense attorneys should be notifying their clients that there the forensic interview can be admitted into evidence and played for the fact finder.[4] No argument can be made that by having the law apply to pending actions would put defense in a surprised position since there is always a chance the forensic interview can be admitted through a different path. However, the new law gives more consistency and reliability to the admissibility of this vital evidence. The law also mandates that a Motion in *Limine* has to be filed if a party wants to admit the forensic interview. This puts everyone on notice that a party is seeking to introduce the forensic interview into evidence.

Lastly, the amendment to LD 2290 is constitutionally sound. The *ex post facto* clause of Maine's Constitution and the US Constitution are interpreted similarly and are coextensive. Since this is a procedural evidentiary law that does not affect the factors set forth in *State v Proctor*[5] or *State v Letalien*[6], the *ex post facto clause* is not implicated. In the two Orders by the Judges in Cumberland and York County, both have already ruled that utilizing the new law in pending cases would NOT be an *ex post facto* law as "16 M.R.S. § 358 is procedural in nature and acts as a statutory exception to M.R. Evd. 802."

For all these reasons, the Maine Prosecutors Association supports LD 2290 as amended.

With appreciation,
Meghan Maloney

[3] *State v. Fahnley*, 2015 ME 82, 119 A.3d 727.
[4] In *State v. Adams,* 2019 ME 132, 214 A.3d 496, the State admitted the forensic interview into evidence pursuant to Me. R. Evid. 803(5) –Recorded Recollection- since the child no longer had a memory of the details of the sexual abuse she had given in the forensic interview.
[5] 2020 ME 107, 237 A.3d 896.
[6] 2009 ME 130, 985 A.2d 4.