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TESTIMONY OF MEAGAN SWAY, ESQ.

Oppose in Part - LD 2290

**An Act to Correct Inconsistencies, Conflicts and Errors in the Laws of Maine**

Submitted to the

JOINT STANDING COMMITTEE ON JUDICIARY

April 10, 2024

Senator Carney, Representative Moonen, and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Meagan Sway, and I am the 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. I am here today to testify in opposition to LD 2290, insofar as it unfairly advantages prosecutors by applying a recently-adopted hearsay exception retroactively, thereby implicating the the prohibitions in the Maine and U.S. Constitutions against ex post facto laws (also called the “ex post facto clause”).

Last session, this committee passed LD 765, An Act to Establish an Exception to the Hearsay Rule for Forensic Interviews of a Protected Person. As the title suggests, this law creates a new exception to the general rule prohibiting hearsay (an out-of-court statement submitted to prove the truth of the matter asserted). We objected at the time, because (1) the rule against admitting hearsay exists to protect defendants’ Sixth Amendment confrontation rights, (2) the hearsay exception as crafted imposed new burdens on defendants to call witnesses to defend their innocence, and (3) the hearsay exception as crafted gives the state the ability essentially call a witness to the stand twice to testify, which could lead jurors to assign more weight to that testimony than would otherwise be warranted.

Now, a portion of the errors bill before you would apply the law you passed (over our objections) to cases that were already pending at the time the law was made effective. In other words, this law would change the rules for cases where the prosecution has already initiated its

case, in ways that advantage the prosecution. We object to this provision because of the constitutional prohibition on ex post facto laws.

Generally speaking, there are four types of laws that implicate the prohibition on ex post facto laws:

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

*Carmell v. Texas*, 529 U.S. 513, 522 (2000) (quoting *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798) (Chase, J.) (emphasis original)). The hearsay law at issue in this bill is in the fourth category.

In *Carmell*, the Supreme Court explores on at some length the types of evidentiary change that would violate the ex post facto clause and those that would not. The Court there states, “We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause.... Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case.” *Id.* at n.23. But, in our analysis, the hearsay exception here is not “evenhanded,” as it only serves to benefit the state, by allowing prosecutors to present a witness twice. While ordinarily the burden rests with the government to call witness—because people accused of crimes are entitled to the presumption of innocence—this change shifts the burden to the accused to call the relevant witness.

The cases at issue with this hearsay law are heartbreaking, and the desire to do justice understandably great. But, true justice depends on fundamental fairness. Because we do not believe that the portion of LD 2290 amending 16 M.R.S.A. §358 is consistent with the ex post facto clause, we ask you to omit it from the final bill.