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April 29, 2025

Senator Anne Carney, Chair
Representative Amy Kuhn, Chair
Joint Committee on Judiciary
5 State House Station, Room 438
Augusta, ME 04333

**RE: Updated Testimony Regarding Sponsor's Proposed Amendments to LD 1572: An Act Regarding Prosecution Standards for Nonfatal Strangulation or Suffocation in Domestic Violence Cases**

Dear Senator Carney, Representative Kuhn, and Honorable Members of the Judiciary Committee:

MACDL presents this testimony **in continued opposition** to the latest amended version of LD 1572.

We apologize for the summary response, as we were not consulted during the development of this amendment that completely replaces the original bill.

We would also hope to have the Criminal Law Advisory Committee have a chance to review this proposed amendment to weigh in on the issues it presents—as this Committee knows, CLAC is comprised of prosecutors, defense attorneys, and current and former judges. The last-minute nature of this amendment makes it hard to have a thorough, informed discussion about this current version of the bill today by those other than the people who were directly involved in this complete re-write.

Unlike the Maine Prosecutors' Association—which has a full-time Attorney General's Office-funded lobbyist to advocate for its positions—or the Maine Coalition to End Domestic Violence and other similar organizations with paid lobbyists and advocates, both CLAC and MACDL are completely volunteer organizations. We do the best we can with what time we have, but when we are not consulted and when substantial and important bills like this are dropped at the last minute, it puts us in a very difficult position to respond to such proposals in a timely fashion.

It is important for this Committee to hear the perspective of defense counsel and how proposals such as this would impact the people we are proud to represent—as "those people" could be anyone in this room, anyone loved one, literally anyone accused of crime.

**Part A:** We take no position on the proposed training requirements for prosecutors and judges. We don't believe prosecutors or judges need formal legislation for prosecutors to develop their own trainings in this area, but we really are not invested in what this Committee decides here. We are concerned that the language and requirements of this section would have not insignificant fiscal impact, but that again, is for someone else to concern themselves with.

**Part B:** This amendment would add the term "suffocation"—newly defined as "impeding the breathing or circulation of the blood of another person by intentionally, knowingly, or

recklessly applying pressure on the person's nose, mouth, or chest"—as a separate subsection, including "strangulation", for Aggravated Assault.

As section B-1 clearly demonstrates, the current statute defines Aggravated Assault, 17-A M.R.S. § 208 (2024), as "[b]odily injury to another under circumstances manifesting extreme indifference to the value of human life. Such circumstances include, but are not limited to, the number, location or nature of the injuries, the manner or method inflicted, the observable physical condition of the victim, or the use of strangulation." This is a non-exhaustive list of the factors to consider when deciding whether any one of which establishes that bodily injury was inflicted on a person "under circumstances manifesting extreme indifference to the value of human life." It limits alleged strangulation under this current statute for only those attempted strangulations that are so severe, it shows that the accused did not care whether the person allegedly strangled lived or died. The current statute is sufficient to cover the conduct targeted for criminalization. This proposal is unnecessary and confusing.

Additionally, this proposed definition of "suffocation" is far too broad, and adding any type of "strangulation" to its own definition, untethered to the "extreme indifference" standard, is unwarranted: Applying pressure to someone's nose or mouth for any length of time should not be the same as using a choking or strangulation force to do the same. Under this definition, covering someone's mouth while they scream for five seconds would be a Class B felony. This is much different from choking, using a weapon during an assault or true extreme indifference. The current assault statutes cover this conduct and if someone covers another person's mouth for a long enough period that it is actually suffocating them, then that would manifest extreme indifference.

There is no pressing or established need to further elevate this crime from Class B (maximum of 10 years' imprisonment) to Class A (maximum of 30 years' imprisonment) if there are prior convictions—including prior convictions for misdemeanor-level conduct. This would include misdemeanor convictions that do not even include violence, including Violation of a Protective Order (Class D), Domestic Violence Stalking (Class D), or Violation of Conditions of Release (Class A). This is unduly unnecessarily harsh and inconsistent by a long shot with how those cases would be sentenced currently. We should not use misdemeanor-level conduct to elevate a crime from a Class B felony (again, a maximum of 10 years' imprisonment) to a Class A felony (again, a maximum of 30 years' imprisonment).

For the most serious attempted strangulations and other aggravated assaults that demonstrate the intent to kill, prosecutors have and are currently pursuing Attempted Murder charges against the accused—which is a Class A offense. Elevating every alleged instance of Domestic Violence Aggravated Assault Class B with a prior domestic violence-related conviction (even misdemeanors) to Class A felonies is too much.

If prosecutors and judges could present data to this Committee that the current penalties imposed on people convicted of Class B Domestic Violence Aggravated Assault are inadequate—and that they are consistently imposing sentences at or near the statutory maximum, that would be surprising to us, as people who represent the accused charged with these very serious Class B felonies. Prosecutors are consistently pursuing Class B Aggravated Assault charges against people with enough tools in their toolboxes—they don't need the threatened bludgeon of a Class A felony to achieve justice.

**Part C:** Exceptions to the Maine Rules of Evidence should be developed by the Judicial Branch, in consultation with the Advisory Committee on the Rules of Evidence—which includes prosecutors, judges, and defense attorney—and which allows public comment and input on any proposed amendment. We get into dangerous territory when we allow the whims of public sentiment to dictate how courts are to conduct their business.

Questionable procedure aside, this proposal is unnecessary given the current non-exclusive language of M.R. Evid. 404(b).

The prohibition against using past "crimes, wrongs, or other acts" as admissible evidence to demonstrate that a person (including the accused) "acted in accordance with [his] character" is well-established as a factfinder (jury or judge) is supposed to determine whether a person committed the crime for which he stands accused—not just that he has a problematic past. The danger of prejudice—the accused is a "bad man with a bad past" so "he's probably guilty"—is too much to allow such evidence regarding one's propensity towards violence.

The current subdivision (b), as articulated in the Advisers' Note from 1976:

"[T]he subdivision *does not exclude* the evidence when offered for another purpose, **such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident**. Maine law is in accord. *State v. Aubut*, 261 A.2d 48 (Me. 1970) (evidence of attempt to utter forged instrument of same tenor on same day admissible to show knowledge of forgery); *State v. Wyman*, 270 A.2d 460 (Me. 1970) (evidence of other crime of precisely similar nature admissible to show intent; jury must be carefully instructed as to limited purpose)." (emphasis added)

"If, however, the presiding justice determines that such [prior bad acts or character] evidence is relevant and more probative than prejudicial, confusing, misleading, or cumulative, and that the evidence is offered for a purpose other than establishing character, he may, in his discretion, admit the testimony regarding threats." *State v. Pierce*, 474 A.2d 182, 185 (Me. 1984). Judges hands are not tied here.

Any competent prosecutor can currently, if the prior "bad acts" evidence can be used to demonstrate "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" in cases involving allegations of domestic violence. They may have to dig in and get creative, but their hands are not tied in this regard. This proposal is unnecessary and problematic.

What prosecutors should not be allowed to do is to use such "bad acts" evidence to have a jury prejudge the accused based on past behavior—this proposal would allow such "bad acts," which could involve mere allegations, to be admitted "for any purpose for which it is relevant." This would mark a sharp shift and departure from the Rules of Evidence and the rationale for the general prohibition against the use of character evidence. We cannot support such a radical change.

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For all these reasons, we ask that this Committee vote **ought not to pass** on this amended version of LD 1572.

Thank you for your consideration, for your attention to these important matters, and for allowing MACDL to weigh in on the amendment to this bill today.

Sincerely,

Tina H. Nadeau, Esq.
MACDL Executive Director