STATE OF MAINE
CUMBERLAND, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO.: Cum-25-217

STATE OF MAINE,

Appellee

v.

JODY FLYNN,

Appellant

ON APPEAL FROM THE CUMBERLAND COUNTY UNIFIED CRIMINAL DOCKET

REPLY BRIEF OF THE APPELLANT JODY FLYNN

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ISSUES PRESENTED

1. Whether the convictions should be reversed where the State proved its case largely through hearsay admitted in violation of the Sixth Amendment's Confrontation Clause.

2. Whether – even if nominally admissible under evidence rules – the sheer volume and centrality of hearsay rendered the trial fundamentally unfair in violation of the Fourteenth Amendment's Due Process Clause.

ARGUMENT

1. The State was allowed to prove its case almost entirely through hearsay evidence, in violation of Ms. Flynn's Due Process and Confrontation Clause rights.

In its brief, the State argues that the defense has failed to provide examples of evidence of hearsay that prejudiced the Appellant. (Appellee's Brief at 28.) Contrary to the State's arguments, the entire trial transcript is saturated with overruled objection rulings allowing in evidence "not for the truth of the matter." Space does not permit here a complete itemization of all of the dozens of instances where this occurred. We will pick out a few by way of example but invite the Court's clerks to comb through the record and come up with their own count.

Early in the testimony of the State's first witness, an alleged investment victim named Richard Henry, the State sought to introduce information about potential wealthy investors that was based on hearsay. The Court ruled: "It's being offered for the purpose of what representations were made to this person. Maybe a corrective instruction, but, I mean, what representations were made are not being offered for the truth of the representations; it's being offered for what she said to him, which is part of the case." (Trial Transcript at 71.)

Mr. Henry was then allowed to testify about the hearsay statements of potential New York big-money investor Peter Halloran. Upon further objection, the Court gave the jury what it considered to be a corrective instruction: "Statements by Mr. Halloran to Ms. Flynn are what are known as hearsay if they're being offered for the truth of the matter, in other words, whether what Mr. Halloran said is true or not. I'm not admitting it for that purpose. I'm admitting it for the purpose of what Ms. Flynn said to Mr. Henry. In other words, it's not being offered for the truth of what Mr. Halloran said; it's being offered to show what was said to Mr. Henry as part of this transaction." (Id. at 72-73.)

This line of objections continued dozens of times throughout the trial, to the point that the defense was reduced to merely stating: "Same objection." The trial justice repeated the same "corrective instruction" over and over, asking jurors to act as robots and not human beings and somehow parse the not-for-the-truth-of-the-matter grounds for which it was purportedly being introduced, from the devastatingly prejudicial effect of the out of context out-of-court declarations.

Alleged victim Rich Henry was allowed to testify to hearsay information about failed investments. (Id. at 110-111.) The same objection brought the same "curative instruction": "So the jury will please disregard

his last answer regarding other information. When I do – when I give you a curative instruction like I did earlier like the instruction telling you not to consider evidence for a certain purpose or if I ask you to disregard the answer, it's important – it's no longer evidence in the case, and it's important to disregard it. Thank you." (Id. at 111.)

The same overruled objection and same supposedly curative instruction came up again at trial transcript pages 163-167, concerning hearsay information about tomatoes: "Members of the jury, Exhibit No. 12 contains – it's another email from the defendant to Mr. Henry, and it contains information that would have necessarily come from others. It's not being admitted for the truth of that information, so there's nothing here that indicates that anything that is said in Exhibit No. 12 is true or isn't true. The only purpose of its admission is to show the recommendations that the defendant was making as of the time of this email. You're not to consider it for anything other than that." (Id. at 167.)

And a few pages later, during a discussion about the progress of an entity known as "Pharos": "This is a similar thing. In other words, there are representations made or statements made by Ms. Flynn. To the extent that she is quoting someone else, it would be hearsay if it's being admitted for the truth of the matter; therefore, it's only being admitted to show what Miss

Flynn was telling Mr. Henry. To the extent there's information about Pharos that Ms. Flynn has gotten from somewhere else, the evidence here is not probative one way or the other of the truth of that." (Id. at 171.)

By page 176 of the trial transcript – on Day One of a six day jury trial – the objections and over-rulings had already become rote:

Mr. Bernstein: I move for the admission of State's 21.

Mr. Howaniec: I believe we addressed this previously, Your Honor. Same objection.

The Court: Oh, okay. Objection's overruled. Admitted.

(Id. at 176.)

At page 180 of the transcript – we are still in Day One of the six day trial – the State sought to introduce an email with extensive hearsay information about U.S. Soils:

Mr. Bernstein: Move for admission of State's 26.

Mr. Howaniec: Your Honor, this is – I might just keep making the same objection here because not all of them, I think, are identical, but this really is sort of the same objection I've been making here.

The Court: Are you asking –

Mr. Howaniec: There's a ton of hearsay in this.

The Court: Right. So let me just read it for a minute.

Okay. Are you asking for the same instruction?

Mr. Howaniec: Yes, Your Honor.

The Court: So, members of the jury, Exhibit 26 is the same category. It contains a lot of information from other people who are out-of-court declarants, therefore, it would be – that's normally – hear-say if it's being admitted for the truth of what they're saying. Here it's being admitted only for the purpose of showing what Ms. Flynn is telling Mr. Henry. Whether the – whether what the other people are saying is true or not, one way or the other, you're not to consider because that person's not testifying, at least yet, to date, so you shouldn't consider the things that are being said by others as true. One way or the other, true or not, you're only to consider this as evidence of what the defendant was saying to Mr. Henry.

Mr. Bernstein: Thank you, Your Honor.

By Mr. Bernsten:

Q. Exhibit 27. Is that an e-mail?

The Court: 26 is admitted on those – with that caveat.

Mr. Bernstein: Thank you, Your Honor.

(Id. at 180-182.)

Moments later, Exhibit 27 was admitted, over objection, "subject to the same caveat." (Id. at 182.)

At page 214:

Mr. Bernstein: Move for admission of State's 31.

Mr. Howaniec: Same objection, Your Honor, and request the

same instruction.

The Court: Okay. 31 is admitted subject to the same instruction.

(Id. at 214.)

And again at page 215. And 216. And 217. And 218. And 219. And 220. And 221. And 222.

One hearsay exhibit was admitted after another, with the Court not even bothering to recite the curative instruction: "It's admitted subject to the same instruction." (Id. at 222.)

Late in the afternoon of the first day of trial, it was clear that this problem was weighing on the trial justice's mind:

The Court: First of all, Attorney Howaniec, at the close of trial, when I make my instructions, if you want to pose an instruction. I talk to the jury about how to consider evidence, about how to consider this stuff, whether or not they should be considering it at all for anything, if they have – they have offered evidence that the State was – fraud, your objection other than stringing along.

(Id. at 223-224.)

By the very end of the first day, everyone was tired. By now, as dozens of more exhibits are being introduced, the judge is just saying: "Let's just go to the e-mails and introduce it subject to those instructions."

(Id. at 227.) More of the hurried "same limiting instructions" came in at pages 229-230, 233, 234, 235, 236, 237, 240, 241-242, 243, 244,

All of this hearsay information came in, over objection, *on just the first day of a six day trial.* Dozens of additional similar instances of hearsay continued to come in, over objection, over the course of a trial that lasted over a week. We could go through all of the overruled objections over the remaining week of trial but would probably not be able to document them within the page restrictions of the appellate rules.

By the end of the first day of trial, as the defense continued to argue that the State was "bootstrapping" its case, things got so bad that the trial justice essentially threw up his hands and said this could all be litigated in a Rule 29 motion at the end of the State's case:

> Mr. Howaniec: They're telling us David Melina's not coming.
>
> The Court: That turns out to be the case and and they don't have any witnesses, then you make your Rule 29 motion.

(See bench conference at trial transcript pages 183-190.)

The evidence was admitted, not even with a curative instruction. Neither David Melina nor basically any other corroborating witnesses appeared on behalf of the State. The judge nonetheless still denied our Rule 29 motion.

The State was allowed to introduce some 69 exhibits during the trial, almost all of them based entirely on hearsay. This case involved out of state business enterprises, some with multiple employees. The State failed to produce virtually any of the parties involved in these enterprises, including an individual named David Melina, who was the CEO of Icy Gulch Resources. It was through this hub company that most of the investor money passed. The State had designated Mr. Melina as a witness, and made it clear that it intended to produce him as a witness for the state. Ms. Flynn's defense was based heavily on the proposition that it was Mr. Melina, not Jody, who had played loose with investor funds. The Court appointed fifth amendment counsel to Mr. Melina. The State's star witness, Peter Halloran, testified that he had become very suspicious of Mr. Melina and "we had concluded that there was quite likely a lot of fraud involved in the company early on." (Id. at 892.) Asked if he saw any evidence that Jody was involved in any such fraud, Mr. Halloran said: "No, not at all." (Id.)

The State ultimately backed down at the last minute and decided not to call Mr. Melina. Who can blame them? It had been allowed to bootstrap its case through a mountain of hearsay evidence, arguing successfully that none of it was being offered for the truth of the matter.

At some point the tsunami of hearsay evidence renders a criminal trial unfair. We have been heartened by the U.S. Supreme Court's attention to the hearsay rule and its impact on the Confrontation Clause in *Smith v. Arizona*, 602 U.S. 779 (2024), and how it has impacted such Maine cases as *State v. Thomas,* 2025 ME 34 (2024), and *State v. Gleason*, 2025 ME 52 (2025). Hopefully the dark American era of shortcutting the centuries-old hearsay rule, which has undoubtedly resulted in the convictions of thousands of innocent people, is coming to an end. It *should* be difficult for the government to convict an accused of a crime, or to take away their babies. This case involved evidence that was almost entirely out of state. It would have been difficult to get their witnesses here. That is too bad for them. This should not be a problem for the defense.

The Confrontation Clause bars admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny invalidate convictions built on unconfronted testimonial statements, including lab reports and codefendant confessions; resulting errors are subject to *Chapman* harmless-error review and are often prejudicial where the hearsay is central to the State's case.

Even when evidence rules would allow hearsay, due process prohibits evidence that is so unreliable or prejudicial that it renders the trial fundamentally unfair. The Supreme Court has recognized this "fundamental fairness" constraint repeatedly, and courts have found due process violations where hearsay dominates or where the State selectively leverages hearsay. *Darden v. Wainwright*, 477 U.S. 168 (1986).

Where the prosecution's proof consists substantially of out-of-court statements taken for evidentiary use, the Constitution requires confrontation. *Crawford* rejected reliability-based admission of testimonial hearsay; without unavailability and prior cross-examination, such statements must be excluded. A trial suffused with testimonial hearsay thereby denies the bedrock right of confrontation. *Crawford, supra.*

Admission of evidence can violate due process if it "so infected the trial with unfairness" that the conviction is a denial of due process. *Darden, supra*; *Estelle v. McGuire,* 502 U.S. 62 (1991); *Dowling v. United States*, 493 U.S. 342 (1990). The Supreme Court has also recognized due-process concerns when hearsay rules are applied mechanically or unevenly to skew the fact-finding process (e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973).

The Maine Supreme Court has been robust in protecting the rights of defendants to confront their accusers. *State v. Judkins*, 2024 ME 45 (Me. 2024); *State v. Sheppard*, 2024 ME 84 (Me. 2024); *State v. Hassapelis*, 1993 ME 118 (1993); and *State v. Rees*, 2000 ME 55 (Me. 2000).

CONCLUSION

For all the foregoing reasons, the Appellant moves that the Court vacate the guilty convictions in the above matter, and grant such further and other relief as the Court deems just and appropriate under the circumstances of this case.

Dated: October 21, 2025

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CERTIFICATE OF SERVICE

I, James P. Howaniec, attorney for the Appellant, certify that I have made service of the foregoing Brief of the Appellant by sending a copy via email this date to:

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