THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Was-25-276

STATE OF MAINE
Appellee

v.

NAKOMA V. POLCHES
Appellant

ON APPEAL from the Washington County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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First Assignment of Error

I. The court committed obvious error in neglecting to apply 15 M.R.S. § 1321(3).

The State has two arguments: (A) identification of defendant was not required, and (B) even if it was, the court's error was not prejudicial. *See* Red Br. 5, 8, 14 (former); Red Br. 5, 9-10, 14 (latter). Defendant disagrees on both points.

A. [redacted] was ineligible to testify remotely because "the positive identification of the defendant [wa]s required."

Straightforward statutory interpretation demonstrates that the State is incorrect.

First, consider the plain text. "Is required," clearly, is expansive language. The State's construction, though, would limit it thusly: No remote testimony shall be permitted "if the positive identification of the defendant is required, *in the State's determination*." 15 M.R.S. § 1321(3) (with State's implicit amendment emphasized). The State's construction would give it veto power over § 1321(3).[1]

Yet, this Court has spoken: Absent a stipulation or an affirmative defense, "positive identification" is *always* at issue. *State v. Donovan*, 2004 ME 81, ¶¶ 19-20, 853 A.2d 772. Apropos our case, this principle is so "even when the alleged victim identifies only the defendant as the perpetrator of a crime but the defendant claims no crime was committed." *Id.* ¶ 19. The

[1] No doubt there are many ways to prove identity; however, absent a stipulation or affirmative defense, such proof always "is required."

State's assertion – "There is no reasonable basis to assert that identity was an issue in this case based on the totality of the circumstances," Red Br. 8 – is therefore wrong as a matter of law, not just fact). Perhaps that is why the State's brief omits to even mention *Donovan* or other cases of its ilk, cited at Blue Br. 18-19. That State has no answer for them.

Anyway, just confined to our facts, "positive identification of the defendant [wa]s required." [redacted]'s "testimony," to put it mildly, was tenuous. She acceded to the interviewer referring to the perpetrator by another name, one meaning "grandmother." There was another male in the house, just through an open door. She said, "my uncle is not my uncle." It was plainly an issue at trial whether [redacted], who for the first half of the interview denied that "Uncle Nokomis" did anything improper, was certain about who assaulted her, if anyone.[2] In fact, the prosecutor felt it necessary to elicit from the law enforcement officer-witness that "the witness has identified the defendant." Tr. 66. Are we now to believe that the State elicited irrelevant evidence and had the court state that the "record reflects" that defendant had been identified for no reason?

Second, look to context. "The Legislature is presumed to be aware of the state of the law and decisions of this Court when it passes an act." *Bowler v. State*, 2014 ME 157, ¶ 8, 108 A.3d 1257 (quotation marks and citation omitted). Thus, when it enacted § 1321 in 2021, the Legislature knew that

[2] Defendant's theory was simply that of failure of proof. He contested [redacted]'s allegations on all accounts – not merely identity of the perpetrator *or* whether she was assaulted by anyone, but *both* of those propositions.

“"identity is always an issue in a criminal trial unless the defendant admits having engaged in the alleged criminal conduct and relies on a defense such as consent or justification." *Donovan*, 2014 ME 81, ¶ 20 (quotation marks and citation omitted). That knowledge guides this Court’s construction of “is required.”

Third, though it is unnecessary given the statute’s clarity, one might look to legislative intent. Two points are insightful. For one, consider former Representative Moriarty’s observation, noted at pages 19 and 20 of the Blue Brief: “I understand that a positive identification is required, that a child needs to come into the courtroom, and the D.A. needs to say, you know, ‘Is the person you’ve been speaking of present in the courtroom, can you point him out?’” (citation in Blue Brief). The State, in its brief, has not addressed this history – again, likely because there is no answer for it that accords with its argument on appeal.

Also, consider the differences between § 1321(3) and similar statutes enacted in other jurisdictions (discussed at Blue Br. 20-21). Those statutes allow for remote testimony *plus* a brief moment when the child comes into the courtroom to identify the defendant. Sub-section § 1321(3), in contrast, does not; it is a wholesale bar on remote testimony:

> Exception. This section does not apply if the defendant is an attorney pro se or if the positive identification of the defendant is required

15 M.R.S. § 1321(3). Our statute is contingent (“if” rather than “for purposes of” or “when”) and all-or-nothing. Presumptively, this is a purposeful

departure. The Legislature could have enacted a statute that allowed for remote testimony *and* a brief in-court identification of defendant. Its choice not to do so underscores its understanding that identification is always required, absent a stipulation or affirmative defense.

Finally, assuming arguendo there's still no clear-cut answer, the rule of lenity applies. "The rule of lenity requires a court to resolve an ambiguity in favor of a defendant when there is no clear indication as to the legislative intent." *State v. Stevens*, 2007 ME 5, ¶ 16, 912 A.2d 1229; *see In re Greening*, 9 P.3d 206, 212 (Wash. 2000) (en banc) (rule of lenity applies to procedural statutes); 25 Illinois Practice Series § 4:13 (March 2025 update) ("The rule of lenity applies to whether certain acts are illegal under a statute, or **what procedures are applicable**, or what sentences are appropriate.") (emphasis added). All canons of construction point the same way: The court erred.

B. Defendant incurred significant prejudice.

The State charts an interesting tack regarding prejudice: "[redacted] would probably freeze up," thereby depriving defendant of the ability to cross-examine her. Red Br. 9-10. The State's view, respectfully, is missing important context and it ignores the probable impact on jurors of an alleged victim's inability to face questioning from a defense lawyer.

The CAC interview was not admitted in a vacuum. Rather, to be admissible, as a matter of 16 M.R.S. § 358(3)(g), [redacted] had to be "available to testify or be cross-examined." If that prong should not be satisfied, the State cannot present the CAC video. M.R. Evid. 804(a) lays out several

definitions of "unavailable" that would apply in the event [redacted] cannot take the stand: she "refuses to testify;" she "[c]annot be present or testify … because of then-existing infirmity … or mental illness;" or she "[i]s absent" because the State "has not been able, by process or other reasonable means, to procure" her attendance. M.R. Evid. 804(a)(2), (4)-(5). In each of these cases, in other words, the State would be unable to introduce its CAC video. That would result in a judgment of acquittal.

A similar analysis results from the dictates of the Confrontation Clauses. If, as the State accepts is true, [redacted] could not testify on cross-examination, the State could not play the CAC video, this time as result of the Sixth Amendment and ME. CONST., Art. I. § 6. *See State v. Engroff*, 2025 ME 83, ¶ 58 ___ A.3d ___ ("We therefore hold that, like the Sixth Amendment, the Maine Confrontation Clause does not prohibit the admission of out-of-court statements **provided that the declarant is available for cross-examination about them**.") (emphasis added; internal citation to *Crawford v. Washington*, 541 U.S. 36, 59 n. 9 (2004) omitted)). Once again, we're talking about acquittal.

Finally, assume that, despite her mother's view, the trial court's findings, and the State's position on appeal, [redacted] *could* testify to some degree. What would her body language say to the jury? How much prodding would the attorneys – much like the CAC interviewer – have to undertake to elicit any memory from her? In assessing prejudice, courts cannot "emphasiz[e] reasons a juror might" find a witness credible "while ignoring reasons she might not." *Cf. Wearry v. Cain*, 577 U.S. 385, 394 (2016). In a

case where everything comes down to whether the jury can believe the complainant beyond a reasonable doubt, courts should not easily find no prejudice, especially given fragility of the other evidence against defendants such as that here. There's a reason why deference is given to fact-finders' assessments of credibility; this Court should allow them to exercise that prerogative.

Second Assignment of Error

II. The Confrontation Clause was violated.

At pages 25 through 32 of the Blue Brief, defendant argued that the court erred by concluding that the Confrontation Clause permitted [redacted]'s remote testimony so long as it made a necessity-finding pursuant to *Craig v. Maryland*, 497 U.S. 836 (1990). Respectfully, the State has misread that argument, writing, "The court went far beyond what the statute requires when determining whether to allow remote testimony...." Red Br. 12. Rather, defendant contends that merely satisfying *Craig's* requirement of a finding of necessity (for remote testimony) is not enough.

Per *Craig* – and this is where the trial court erred – the Confrontation Clause imposes *two* requirements:

> [A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only [1] where denial of such confrontation is necessary to further an important public policy and [2] **only where the reliability of the testimony is otherwise assured**.

497 U.S. at 850 (brackets, numbers and emphasis added. Reliability of the testimony was not "otherwise assured" in our case.

As a result of the State's briefing, defendant has no occasion to other than redirect the State to the argument he has already made. *See* M.R. App. P. 7A(c) (Reply briefs "must be strictly confined to replying to new facts

asserted or arguments raised in the brief of the appellee.").[3] To reiterate, *Craig* embodies the Clause's ground floor, and our facts fall well below it:

- Unlike *Craig*, where the State of Maryland undertook contemporaneous, exhaustive direct examination, here, the State presented its case almost entirely through a CAC video recorded a year prior.
- Unlike *Craig*, where the prosecution's questioning of child-witnesses was subject to the rules of evidence, here, the leading, prodding, repetitive, and, at times, asked-and-answered questioning of [redacted] in the CAC interview was subject to no evidentiary rules.
- Unlike *Craig*, where the remote testimony was sworn, here, the primary portion of the State's case – the CAC video – was unsworn. Further, [redacted] never even swore that what she said in the CAC video was true. Indeed, she said she didn't remember why she sat for the interview. Tr. 62. She was not visible to the jury when the video was displayed.

[3] Respectfully, this is an example of why it is important for the Court to hold that even appellees waive arguments by failing to brief them. Otherwise, Rule 7A(c) can be weaponized by appellees to interrupt appellants' presentations or to dodge adoption of an argument until first seeing the appellant's contentions, depriving the appellant of the opportunity to respond. *Cf. United States v. Clark*, 134 F.4th 480, 482 (7th Cir. 2025) (noting that reply briefs are "a substantial opportunity" and urging counsel "to recognize the importance of the briefing process and the significant role a tailored, efficient, and well-presented reply brief can play in an appeal."). Defendant now has no idea what the State's position on this argument will be come oral argument. The Court should consider any counter-argument waived.

- Unlike *Craig* where identification was not at issue (because there were numerous child-complainants and the Maryland statute provided for in-court identification), here, identification was at issue.
- Unlike *Craig*, where the child-witnesses testified from the judge's chambers, with attorneys present, here, [redacted] never set foot in a courthouse, testifying from the same CAC room in which she levelled her accusations, alongside the Victims'-Witnesses' Advocate, to whom she looked for help, without any attorneys or judge present.
- Unlike *Craig*, where the trial judge first conducted an inquiry into the child-witnesses' ability to testify truthfully and accurately, here, no such inquiry was undertaken.
- Unlike *Craig*, where the examination of the child-witnesses was thorough, here, [redacted] testified to virtually nothing of consequence.

Were this Court to affirm, it would be writing federal constitutional law far beyond *Craig*. Nothing here assures reliability. *Craig* does not control.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's conviction, and remand for further proceedings.

Respectfully submitted,

December 4, 2025

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CERTIFICATE OF SERVICE & FILING

I have filed this brief, and served opposing counsel, as listed on the briefing schedule and the Board of Bar Overseers' (email) directory, in compliance with M.R. App. P. 1D(c), 1E and 7(c).

/s/ Rory A. McNamara