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March 20, 2007

The Honorable Jeremy Fischer
Maine House of Representatives
2 State House Station
Augusta, Maine 04333

RE: L.D. 275, An Act to Protect Child Victims of Sexual Abuse

Dear Representative Fischer:

In response to your request to review the constitutionality of L.D. 275, An Act to Protect Child Victims of Sexual Abuse, it is my opinion that a court would likely conclude that the proposed legislation is constitutional, provided it is properly applied. Should the Legislature decide to enact LD 275, we recommend clarifications to conform the language of the bill more closely to the requirements of the case law.

Relevant Case Law. As the bill summary recognizes, the United States Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004) dramatically changed the focus of Sixth Amendment confrontation clause jurisprudence from whether a hearsay statement contained "particular guarantees of trustworthiness" to whether the statement was "testimonial" or "nontestimonial." Different standards apply to the admissibility of statements in each category.

In *Crawford,* the Supreme Court did not define what it meant by the term "testimonial," but suggested that former trial testimony, grand jury testimony, and statements obtained during police interrogations would constitute testimonial statements. The Court held that before a "testimonial" out-of-court hearsay statement can be admitted at a criminal defendant's trial, the person who made the statement must be "unavailable" to testify at trial (due to, for example, death, incapacity, or invocation of a privilege) and the defendant must have had a prior opportunity to subject that person to cross-examination about the statement. On the other hand, if the out-of-court hearsay statement was "nontestimonial," then the two prerequisites for admissibility of testimonial statements under *Crawford* would not apply. The *Crawford* decision observed that "[m]ost of the hearsay exceptions covered statements that by their nature were not

testimonial," 541 U.S. 36, 56, and therefore such nontestimonial statements did not raise the same Sixth Amendment concerns as testimonial statements.

The United States Court of Appeals for the First Circuit subsequently clarified that even if the hearsay statement was considered nontestimonial, the statement would have to meet standards under the Sixth Amendment confrontation clause established by the Supreme Court in *Ohio v. Roberts,* 448 U.S. 56 (1980) in order to be admissible at trial. Specifically, the out-of-court nontestimonial statements would have to fall within either a "firmly rooted hearsay exception," (such as an excited utterance) or bear "particularized guarantees of trustworthiness." *Horton v. Allen,* 370 F.3d 75, 84 (1st Cir. 2005).

LD 275 and Recommended Changes. Turning to LD 275, the proposed legislation correctly focuses on the constitutional distinction between "testimonial" and "nontestimonial" statements. The bill, however, does not effectively expand the categories of out of court statements that would already be admissible under the Maine Rules of Evidence and the constitutional standards under *Crawford.* Indeed, subsection A of the bill, pertaining to "testimonial" statements, may be *more* restrictive than required by *Crawford* because it limits admissibility of statements to those recorded under oath in the presence of a judge or justice, whereas *Crawford* would admit unrecorded "testimonial" statements to if the prerequisites of unavailability and opportunity to cross-examine were met. Unless the bill is intended to further limit the admissibility of testimonial statements, we suggest that subsection A be rewritten to closely follow the standards expressed in the *Crawford* case.

Subsection B of the bill, pertaining to "nontestimonial" statements, appears to pass constitutional muster as drafted, assuming that the phrase "sufficient guarantees of trustworthiness" is interpreted in the same manner as set forth in the Supreme Court's *Roberts* test. In order to ensure that the subsection is constitutional and not more limited in scope than is required, we suggest that the bill be modified to expressly incorporate the *Roberts* requirements that the statement fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness" for admission at trial.

Because LD 275 would enact as statute case law requirements that are already binding on the courts, its purpose is unclear. There is, of course, some risk in putting case law standards in statute, in that further clarifications to the applicable constitutional standards may be made in future cases, creating inconsistency and requiring amendment to the statute. LD 275 does not attempt to reduce to statute the key distinction between testimonial and non-testimonial statements, nor should it do so as this is a matter for case by case determination by the trial court. This area will continue to evolve for some time into the future, given the variety of factual scenarios that can result in such statements

being proffered as evidence. For these reasons, you may wish to consider whether LD 275 is necessary.

Please let me know if my Office can provide any other information regarding the proposed bill.

Sincerely,

G. STEVEN ROWE
Attorney General