State of Maine	Supreme Judicial Court sitting as the Law Court Docket no. Pen-25-322
State of Maine, Appellee, v. James Welsh, Appellant.	Appeal from the Penobscot County Unified Criminal Docket in Bangor

Appellant's Reply Brief

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Summary of the Appellant's Arguments in Reply

This reply brief is going to address certain issues raised by the Appellee's brief because the time for oral arguments may not be adequate. *See* M.R. App. P. 7A(c).

(1) "Public place" does not have a clear meaning as plain text, and the statutory language involving a "motor vehicle on a public way" tends to support the Appellant's proposed definition. Also, it is not contradictory to argue that, to the extent that the statutory text's meaning can be clarified, the "place" at issue in this case is not "public."

(2) The kind of legislative history discussed in *Legassie* is a potentially misleading indication of legislative intent, whereas the plain text of the statute reflects the actual legislative will.

Appellant's Arguments in Reply

1.1 "Public Place" Ambiguity

1. This reply brief will generally follow the order of the arguments raised by the Appellee's brief.

2. The State's brief asserts that "public place," as used by the indecent conduct statute, is not ambiguous. *See* Red. Br. 9 – 13. However, this statutory term is undefined, and rational minds can differ about the distinctions between "public" and "private" places when reading the statute. In support, the brief cites, *inter alia*, *State v. Marquis*, 2023 ME 16, 290 A.3d 96, and that precedent merits further discussion. The Court in *Marquis* reiterated what it means by "ambiguous," *i.e.* "reasonably susceptible to different interpretations," *id.* ¶ 14 (quotation marks omitted), and the principle that the Court will not look beyond the plain text of an unambiguous statute to aid in its interpretation, *id.* ¶ 14. The Court concluded that the term "other official" is not ambiguous as used in the statute at issue, *id.* ¶ 15, but it then reviewed dictionary definitions, *id.* ¶ 16, discussed part of the legislative record, *id.* ¶ 17, and applied a canon of interpretation, *id.* ¶ 18, to explain its rationale. The undersigned counsel's reading of

this part of *Marquis* is that the Court did, in effect, consider "other official" to be ambiguous, but it simply did not agree with the appellant's argument that he was not included in the definition. It is otherwise difficult to reconcile the conclusion with the process used.

3. The Appellee's brief also expressed opposition to the use of legal dictionaries and quoted *Marquis*, Red Br. 10 – 11, but one of the definitions quoted in that decision is in fact from the eleventh edition of *Black's Law Dictionary*, *see Marquis* ¶ 16.

4. The State seems to misunderstand one of the Defendant's arguments: the ownership status of the building, *i.e.* whether it is privately owned, is not necessarily the sole reason that the hallway in question is a "private place." *See* Red. Br. 10. Rather, that status may be considered as one factor in favor of it being a private place.

5. Also, the motor vehicle variant of "private place" is easily distinguishable from the State's proposal that this hallway is a public place, *see id.* ("the statute does not differentiate between motor vehicles owned by individuals and those owned by various levels of government," *et cetera*), for at least two obvious reasons,

and whether a vehicle is privately owned is not of them. First, the most significant characteristic in the motor vehicle variant of indecent conduct is its occurrence on a "*public* way," 17-A M.R.S. § 854(2) (emphasis added), and, second, a person may be visible, while in a privately owned vehicle on a public way, to other persons who are traveling on that public way. Moreover, the motor vehicle statute's definitions distinguish "private way" from "public way" in terms of whether the way is owned by the government or a private owner and whether "the general public has a right to pass" or may have "use or passage" restricted. 29-A M.R.S. § 101(58) – (59). These definitions from Title 29-A, when read *in pari materia* with the indecent conduct statute, give further textual support to the Appellant's proposed interpretation of "private place" because "private way" clearly excludes locations to which the general public has a right, not a privilege, to access.

6. The Appellant is not suggesting that there is a third category of place that is neither "public" nor "private" for indecent conduct purposes. *See* Red. Br. 13. Instead, assuming *arguendo* that every location within Maine's territorial jurisdiction is either

private or public for purposes of this statute, the issue is how to categorize the place involved in this case.

7. Contrary to the State's position, *see* Red. Br. 13, it is not contradictory to argue that, to the extent that the meaning of "public place" can be clarified, the "place" at issue in this case is not "public." The full scope of "public place" for purposes of § 854 is far from clear, and hypothetically one day it may be interpreted in a different case to include quasi-public places like shopping malls. But it would require an implausibly expansive reading of "public place" to decide that element was present in the factual circumstances of this case.

2.1 Legislative History

8. The kind of legislative history discussed in *State v. Legassie* and reviewed in the Appellee's brief, *see* Red. Br. 14 – 15, is a potentially misleading indication of legislative intent, whereas the plain text of the statute reflects the actual legislative will.

9. This Court considered "[l]egislative testimony" in a prior interpretation of the indecent conduct statute, *State v. Legassie*, 2017 ME 202, ¶ 18, 171 A.3d 589, but, fortunately, this was a minor part of the legislative history that the Court considered.

Presumably, there is no way to know whether the legislators who voted to pass the bill heard these two individuals' testimony before they voted. Regardless, there is no rational basis to suppose that the legislators somehow endorsed these statements as non-statutory guides to interpretation of the chaptered law. *Cf. Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F. 2d 1, 6 – 8 and n. 1 (D.C. Circ. 1985) (Scalia, J., concurring) (reproducing part of U.S. Senate floor debate in which senator admits he has not read committee report to illustrate point that such reports are not useful interpretive aids).

10. The history of "*enacted* changes" that a legislature has "made to the relevant statutory text over time" is "the sort of textual evidence everyone agrees can sometimes shed light on meaning," unlike "unenacted legislative" materials "consisting of advocacy." *BNSF Railway Co. v. Loos*, 139 S. Ct. 893, 906, 586 U.S. 310 (2019) (Gorsuch, J., dissenting). The current version of § 854 is the product of different bills that passed Maine's legislature and then survived presentment to Maine's governor, *see generally* Me. Const. art. IV, part 3rd, § 2, whereas a legislator's or constituent's statement about a pending bill simply is not.

11. If the Legislature wants to include in its definition of "public place" certain areas within a private place that are shared by different households, such as hallways in apartment buildings, it has the collective ability to do so and to speak in clear language when it does. It has not done so, and the Court should not be tempted to conclude otherwise.

Conclusion

12. The terms "public place" and "private place" in the indecent conduct statute are ambiguous, but the location of the conduct in this case cannot reasonably be considered a public place. And if this court looks at the legislative record for § 854 it should confine its review to the changes in the actual statutory text.

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date

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