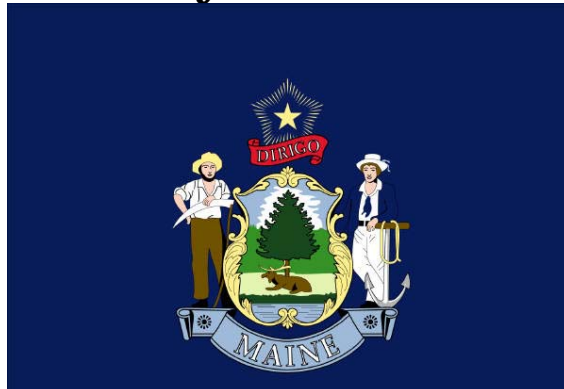


# The Maine Law Enforcement and Prosecutors Manual on Child Exploitation Crimes

## Statutory and Case Law



**NATIONAL LAW CENTER  
FOR CHILDREN AND FAMILIES**



## **National Law Center for Children and Families' Preface to the 2008 Second Edition**

It is our honor at the National Law Center for Children and Families to provide this second edition of the Maine State Manual. This manual is an update and refinement of the legal manual produced by the National Center for Missing and Exploited Children (NCMEC) in 2004.

The National Law Center is a non-profit law center formed in 1991 and based in Alexandria, Virginia. It has since served as an agent of change and education in the area of child sexual exploitation. The NLC is proud to continue that service today in seminars and through its website, [www.nationallawcenter.org](http://www.nationallawcenter.org). In addition to these projects, the National Law Center has entered into a partnership with the NCMEC to update these existing 25 manuals. Over the next few years we will update these existing manuals and create new manuals for prosecutors and law enforcement professionals to use in the defense of children and families.

Additionally, the manual would not have been completed were it not for the support of NCMEC's Legal Staff and L.J. Decker, NLC Law Clerk (3L Georgetown University Law Center), Christien Oliver, NLC Law Clerk (JD George Washington School of Law 2008), Tara Steinnerd, NLC Law Clerk (3L Catholic University School of Law), Michael Bare (Valparaiso University School of Law), Amanda Rekow (University of Idaho College of Law), Leigh Darrell (University of Baltimore School of Law), Aeri Yum (University of Hawaii Richardson School of Law), Aimee Conway (Suffolk University Law School), Jennifer Allen (University of Hawaii Richardson School of Law), Judith Harris (University of Hawaii Richardson School of Law), Lianne Aoki (University of Hawaii Richardson School of Law), Jeffrey Van Der Veer (University of Colorado School of Law), and Kelly Higa (University of Hawaii Richardson School of Law).

The Editors,

National Law Center for Children and Families  
June 2008

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# **MAINE**

## *Topic Outline*

### **I. OFFENSES DEFINED**

#### **A. Attempt Crimes**

1. General Attempt
2. Attempted Solicitation

#### **B. Criminal Restraint**

#### **C. Gross Sexual Assault**

#### **D. Gross Sexual Misconduct**

#### **E. Indecent Liberties**

#### **F. Online Enticement/Solicitation for Travel With the Intent to Engage in Sex With a Minor**

#### **G. Rape**

1. Elements
2. "Sexual Intercourse" Defined

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1. Elements
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1. Employer Searches
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### **A. Jurisdictional Nexus**

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**IV. DISCOVERY AND EVIDENCE**

**A. Timely Review of Evidence**

**B. Defense Requests for Copies of Child Pornography**

**C. Introduction of E-mails into Evidence**

1. Hearsay/Authentication Issues
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1. Sexual Act With a Minor
2. Mental Illness and Tolling

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### **I. Psychologist-Patient Privilege**

1. Confidentiality
  - a. Patient's Rights
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## **V. AGE OF CHILD VICTIM**

### **A. Proving the Age of the Child Victim**

### **B. The Defendant's Knowledge of the Age of the Child**

1. Child Pornography
2. Sexual Abuse of Minors

## **VI. MULTIPLE COUNTS**

### **A. What Constitutes an "Item" of Child Pornography?**

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### **A. Specific Offenses**

1. Gross Sexual Misconduct: Age of Offender
2. Sexual Abuse of Minors

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  - a. Of Offender
  - b. Of Victim

2. Consent
3. Diminished Capacity
  - a. Addiction to the Internet
  - b. Insanity
4. First Amendment
5. Impossibility
  - a. Factual
  - b. Legal
6. Manufacturing Jurisdiction
7. Outrageous Conduct
8. Researcher
9. Sexual Orientation

### **VIII. SENTENCING ISSUES: ENHANCEMENT**

#### **A. Age**

1. Age of Offender
2. Age of Victim

#### **B. Distribution/Intent to Traffic**

#### **C. Pattern of Activity for Sexual Exploitation**

#### **D. Relationship to Victim**

#### **E. Sadistic, Masochistic, or Violent Material**

#### **F. Use of Computers**

#### **G. Number of Images**

### **IX. SUPERVISED RELEASE**

# MAINE

## *Case List by Court*

### I. United States Supreme Court

- *Franks v. Delaware*, 438 U.S. 154 (1978)

### II. Supreme Judicial Court of Maine

- *Fitch v. Doe*, 869 A.2d 722 (Me. 2005)
- *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005)
- *Hart v. State*, No. CR-03-482, 2006 Me. Super. LEXIS 21 (Me. Super. Ct. Feb. 9, 2006)
- *McAfee v. Cole*, 637 A.2d 463 (Me. 1994)
- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)
- *State v. Barclay*, 398 A.2d 794 (Me. 1979)
- *State v. Benner*, 385 A.2d 48 (Me. 1978)
- *State v. Bourgeois*, 639 A.2d 634 (Me. 1994)
- *State v. Butt*, 656 A.2d 1225 (Me. 1995)
- *State v. Connors*, 679 A.2d 1072 (Me. 1996)
- *State v. Crowley*, 714 A.2d 834 (Me. 1998)
- *State v. Edward C.*, 531 A.2d 672 (Me. 1987)
- *State v. Friel*, 508 A.2d 123 (Me. 1986)
- *State v. Gallant*, 531 A.2d 1282 (Me. 1987)
- *State v. Jackson*, 697 A.2d 1328 (Me. 1997)
- *State v. Jacques*, 558 A.2d 706 (Me. 1989)
- *State v. Jordan*, 694 A.2d 929 (Me. 1997)
- *State v. Lehman*, 736 A.2d 256 (Me. 1999)
- *State v. Lux*, 740 A.2d 556 (Me. 1999)
- *State v. Miller*, 252 A.2d 321 (Me. 1969)
- *State v. Monahan*, No. CR-00-677, 2003 Me. Super. LEXIS 34 (Me. Super. Ct. Mar. 5, 2003)
- *State v. Pfeil*, 720 A.2d 573 (Me. 1998)
- *State v. Robinson*, 139 A.2d 596 (Me. 1958)
- *State v. Roman*, 622 A.2d 96 (Me. 1993)
- *State v. Stanley*, 745 A.2d 981 (Me. 2000)
- *State v. Stevens*, 510 A.2d 1070 (Me. 1986)
- *State v. Sweet*, 745 A.2d 368 (Me. 2000)
- *State v. Thomes*, 697 A.2d 1262 (Me. 1997)
- *State v. Thompson*, 695 A.2d 1174 (Me. 1997)
- *State v. Turner*, 766 A.2d 1025 (Me. 2001)



- *State v. Valentine*, 443 A.2d 573 (Me. 1982)
- *State v. Wallace*, 431 A.2d 613 (Me. 1981)
- *State v. Webster*, 955 A.2d 240 (Me. 2008)
- *State v. Weeks*, 761 A.2d 44 (Me. 2000)
- *State v. Wright*, 890 A.2d 703 (Me. 2006)

# MAINE

## *Topic Outline With Cases*

### **I. OFFENSES DEFINED**

#### **A. Attempt Crimes**

##### **1. General Attempt**

- *State v. Miller*, 252 A.2d 321 (Me. 1969)

##### **2. Attempted Solicitation**

- *State v. Miller*, 252 A.2d 321 (Me. 1969)

#### **B. Criminal Restraint**

- *State v. Benner*, 385 A.2d 48 (Me. 1978)
- *State v. Butt*, 656 A.2d 1225 (Me. 1995)

#### **C. Gross Sexual Assault**

- *State v. Thompson*, 695 A.2d 1174 (Me. 1997)

#### **D. Gross Sexual Misconduct**

- *State v. Edward C.*, 531 A.2d 672 (Me. 1987)

#### **E. Indecent Liberties**

- *State v. Miller*, 252 A.2d 321 (Me. 1969)
- *State v. Robinson*, 139 A.2d 596 (Me. 1958)

#### **F. Online Enticement/Solicitation for Travel With the Intent to Engage in Sex With a Minor**

##### **1. Elements**

- *State v. Webster*, 955 A.2d 240 (Me. 2008)

##### **2. “Computer” Defined**

- *State v. Webster*, 955 A.2d 240 (Me. 2008)

## **G. Rape**

### **1. Elements**

- *State v. Stevens*, 510 A.2d 1070 (Me. 1986)

### **2. “Sexual Intercourse” Defined**

- *State v. Stevens*, 510 A.2d 1070 (Me. 1986)

## **H. Sexual Abuse of Minors**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

## **I. Sexual Exploitation of a Minor**

### **1. Elements**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

### **2. “Minor” Defined**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

## **J. Sexually Explicit Materials**

### **1. Dissemination of Sexually Explicit Materials**

- *State v. Weeks*, 761 A.2d 44 (Me. 2000)

### **2. Possession of Sexually Explicit Materials**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

### **3. “Sexually Explicit Conduct” Defined**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

### **4. Virtual/Simulated Child Pornography**

- *State v. Monahan*, No. CR-00-677, 2003 Me. Super. LEXIS 34 (Me. Super. Ct. Mar. 5, 2003)

## **K. Transporting Minor for Purposes of Prostitution**

No state cases reported.

## **II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE**

### **A. Search Warrants**

#### **1. Probable Cause**

- *State v. Lux*, 740 A.2d 556 (Me. 1999)

##### **a. Magistrate's Finding of Probable Cause**

- *State v. Crowley*, 714 A.2d 834 (Me. 1998)
- *State v. Gallant*, 531 A.2d 1282 (Me. 1987)

##### **b. Informants**

- *State v. Lux*, 740 A.2d 556 (Me. 1999)

##### **c. Specificity of Warrant**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

##### **i. Computer Evidence**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

##### **ii. Broad or Generic Terms**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

##### **d. The Defendant's Burden**

- *Franks v. Delaware*, 438 U.S. 154 (1978)
- *State v. Friel*, 508 A.2d 123 (Me. 1986)

##### **e. Appellate Review**

- *State v. Crowley*, 714 A.2d 834 (Me. 1998)
- *State v. Gallant*, 531 A.2d 1282 (Me. 1987)

#### **2. Scope of Search: Unreasonable Searches**

- *State v. Barclay*, 398 A.2d 794 (Me. 1979)

**3. Staleness**

- *State v. Wright*, 890 A.2d 703 (Me. 2006)
- *State v. Crowley*, 714 A.2d 834 (Me. 1998)
- *State v. Friel*, 508 A.2d 123 (Me. 1986)

**B. Anticipatory Warrants**

No state cases reported.

**C. Methods of Searching**

No state cases reported.

**D. Types of Searches**

**1. Employer Searches**

No state cases reported.

**2. Private Searches**

No state cases reported.

**3. Civilian Searches**

No state cases reported.

**4. University-Campus Searches**

No state cases reported.

**E. Computer Technician/Repairperson Discoveries**

No state cases reported.

**F. Photo-Development Discoveries**

- *Hart v. State*, No. CR-03-482, 2006 Me. Super. LEXIS 21 (Me. Super. Ct. Feb. 9, 2006)

**G. Criminal Forfeiture**

No state cases reported.

**H. Disciplinary Hearings for Federal and State Officers**

No state cases reported.

**I. Probation and Parolee Rights**

No state cases reported.

**III. JURISDICTION AND NEXUS**

**A. Jurisdictional Nexus**

No state cases reported.

**B. Internet Nexus**

No state cases reported.

**C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction**

**1. State**

No state cases reported.

**2. Federal**

No state cases reported.

**3. Concurrent**

No state cases reported.

**D. Interstate Possession of Child Pornography**

No state cases reported.

**IV. DISCOVERY AND EVIDENCE**

**A. Timely Review of Evidence**

No state cases reported.

**B. Defense Requests for Copies of Child Pornography**

No state cases reported.

**C. Introduction of E-mails into Evidence**

**1. Hearsay/Authentication Issues**

No state cases reported.

**2. Circumstantial Evidence**

No state cases reported.

**3. Technical Aspects of Electronic Evidence Regarding Admissibility**

- *State v. Turner*, 766 A.2d 1025 (Me. 2001)

**D. Text-Only Evidence**

**1. Introduction into Evidence**

- *State v. Webster*, 955 A.2d 240 (Me. 2008)

**2. Relevance**

No state cases reported.

**E. Evidence Obtained from Internet Service Providers**

**1. Electronic Communications Privacy Act**

- *Fitch v. Doe*, 869 A.2d 722 (Me. 2005)

**2. Cable Act**

- *Fitch v. Doe*, 869 A.2d 722 (Me. 2005)

**3. Patriot Act**

**a. National Tap and Trace Authority**

No state cases reported.

**b. State-Court-Judge Jurisdictional Limits**

No state cases reported.

**F. Statute of Limitations**

**1. Sexual Act With a Minor**

- *McAfee v. Cole*, 637 A.2d 463 (Me. 1994)

**2. Mental Illness and Tolling**

- *McAfee v. Cole*, 637 A.2d 463 (Me. 1994)

**G. Prior Bad Acts**

**1. Inadmissible**

- *State v. Bourgeois*, 639 A.2d 634 (Me. 1994)
- *State v. Connors*, 679 A.2d 1072 (Me. 1996)
- *State v. Jackson*, 697 A.2d 1328 (Me. 1997)
- *State v. Jacques*, 558 A.2d 706 (Me. 1989)
- *State v. Jordan*, 694 A.2d 929 (Me. 1997)
- *State v. Roman*, 622 A.2d 96 (Me. 1993)
- *State v. Stanley*, 745 A.2d 981 (Me. 2000)
- *State v. Thomes*, 697 A.2d 1262 (Me. 1997)
- *State v. Valentine*, 443 A.2d 573 (Me. 1982)
- *State v. Wallace*, 431 A.2d 613 (Me. 1981)

**2. Admissible**

- *State v. Bourgeois*, 639 A.2d 634 (Me. 1994)
- *State v. Connors*, 679 A.2d 1072 (Me. 1996)
- *State v. Jackson*, 697 A.2d 1328 (Me. 1997)
- *State v. Jordan*, 694 A.2d 929 (Me. 1997)
- *State v. Roman*, 622 A.2d 96 (Me. 1993)
- *State v. Thomes*, 697 A.2d 1262 (Me. 1997)
- *State v. Valentine*, 443 A.2d 573 (Me. 1982)
- *State v. Wallace*, 431 A.2d 613 (Me. 1981)

**3. Relevance**

- *State v. Jackson*, 697 A.2d 1328 (Me. 1997)
- *State v. Jordan*, 694 A.2d 929 (Me. 1997)



#### **4. Unfair Prejudice**

##### **a. Exclusion of Evidence**

- *State v. Connors*, 679 A.2d 1072 (Me. 1996)
- *State v. Jackson*, 697 A.2d 1328 (Me. 1997)
- *State v. Roman*, 622 A.2d 96 (Me. 1993)
- *State v. Thomes*, 697 A.2d 1262 (Me. 1997)
- *State v. Wallace*, 431 A.2d 613 (Me. 1981)

##### **b. “Prejudice” Defined**

- *State v. Jackson*, 697 A.2d 1328 (Me. 1997)
- *State v. Thomes*, 697 A.2d 1262 (Me. 1997)

#### **5. Appellate Review**

- *State v. Bourgeois*, 639 A.2d 634 (Me. 1994)

### **H. Child Testimony**

- *State v. Robinson*, 139 A.2d 596 (Me. 1958)
- *State v. Roman*, 622 A.2d 96 (Me. 1993)

### **I. Psychologist-Patient Privilege**

#### **1. Confidentiality**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

##### **a. Patient’s Rights**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

##### **b. Psychologist’s Duties**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

##### **c. After Termination of Treatment**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

**d. In Written and Oral Reports**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

**e. Discussions With Other Professionals**

**i. Clinical or Consulting Relationships**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

**ii. Scientific or Professional Relationships**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

**f. Exceptions**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

**2. Disclosure Without Consent**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

**3. Confidential Communications**

- *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

**V. AGE OF CHILD VICTIM**

**A. Proving the Age of the Child Victim**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

**B. The Defendant's Knowledge of the Age of the Child**

**1. Child Pornography**

No state cases reported.

**2. Sexual Abuse of Minors**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

**VI. MULTIPLE COUNTS**

**A. What Constitutes an “Item” of Child Pornography?**

- *State v. Weeks*, 761 A.2d 44 (Me. 2000)

**B. Issues of Double Jeopardy**

No state cases reported.

**VII. DEFENSES**

**A. Specific Offenses**

**1. Gross Sexual Misconduct: Age of Offender**

- *State v. Edward C.*, 531 A.2d 672 (Me. 1987)

**2. Sexual Abuse of Minors**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

**B. General**

**1. Age**

**a. Of Offender**

- *State v. Edward C.*, 531 A.2d 672 (Me. 1987)

**b. Of Victim**

- *State v. Webster*, 955 A.2d 240 (Me. 2008)

**2. Consent**

No state cases reported.

**3. Diminished Capacity**

**a. Addiction to the Internet**

No state cases reported.

**b. Insanity**

No state cases reported.

**4. First Amendment**

- *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005)

**5. Impossibility**

**a. Factual**

No state cases reported.

**b. Legal**

No state cases reported.

**6. Manufacturing Jurisdiction**

No state cases reported.

**7. Outrageous Conduct**

No state cases reported.

**8. Researcher**

No state cases reported.

**9. Sexual Orientation**

No state cases reported.

## **VIII. SENTENCING ISSUES: ENHANCEMENT**

### **A. Age**

#### **1. Age of Offender**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

#### **2. Age of Victim**

No state cases reported.

### **B. Distribution/Intent to Traffic**

No state cases reported.

### **C. Pattern of Activity for Sexual Exploitation**

- *State v. Sweet*, 745 A.2d 368 (Me. 2000)
- *State v. Pfeil*, 720 A.2d 573 (Me. 1998)

### **D. Relationship to Victim**

- *State v. Lehman*, 736 A.2d 256 (Me. 1999)

### **E. Sadistic, Masochistic, or Violent Material**

- *State v. Sweet*, 745 A.2d 368 (Me. 2000)

### **F. Use of Computers**

No state cases reported.

### **G. Number of Images**

No state cases reported.

## **IX. SUPERVISED RELEASE**

No state cases reported.

# MAINE

## *Case Highlights*

*Fitch v. Doe*, 869 A.2d 722 (Me. 2005)

The Cable Act and the Electronic Communications Privacy Act do not apply to cable operators or Internet service providers where the court orders the release of subscriber information.

*Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005)

The First Amendment does not protect defendant when neutral principles of law are applied to members of the clergy in order to protect children from alleged sexual abuse.

*Franks v. Delaware*, 438 U.S. 154 (1978)

Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a search-warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment of the U.S. Constitution requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*Hart v. State*, No. CR-03-482, 2006 Me. Super. LEXIS 21 (Me. Super. Ct. Feb. 9, 2006)

Sexually explicit photographs of children found by a store clerk whose job it is to develop photos can be admitted into evidence once authenticated.

*McAfee v. Cole*, 637 A.2d 463 (Me. 1994)

A claim based on a sexual act with a minor accrues when the plaintiff discovers or reasonably should discover the harm.

*Seider v. Board of Examiners of Psychologists*, 762 A.2d 551 (Me. 2000)

Because Seider, a psychiatrist, elicited personal information from the mother of an abuse victim and spoke to the mother about the mother's personal history, her background, her own sexual abuse, and her treatment history, a professional relationship was in fact established; therefore, the mother was entitled to confidentiality privileges.

*State v. Barclay*, 398 A.2d 794 (Me. 1979)

Any search is *per se* unreasonable if it lacks two essential elements: (1) the existence of probable cause; and (2) the prior determination of such probable cause by a neutral and detached magistrate whose determination is reflected in the issuance of a search warrant.

*State v. Benner*, 385 A.2d 48 (Me. 1978)

Maine's "criminal-restraint" statute contains provisions applicable specifically to parents and others applicable only to "non-parents."

*State v. Bourgeois*, 639 A.2d 634 (Me. 1994)

Similar threats or acts against others are relevant if there is a sufficient nexus between the evidence sought to be introduced and the elements of the crime charged.

*State v. Butt*, 656 A.2d 1225 (Me. 1995)

Maine's statute regarding criminal restraint by a parent has two subsections, one that requires a violation of a custody decree and another that has no such provision.

*State v. Connors*, 679 A.2d 1072 (Me. 1996)

Evidence of a prior bad act may be admissible due to its signature-like similarity to another bad act.

*State v. Crowley*, 714 A.2d 834 (Me. 1998)

In determining whether probable cause exists, the magistrate applies the "totality-of-the-circumstances" test.

*State v. Edward C.*, 531 A.2d 672 (Me. 1987)

Maine's "gross-sexual-misconduct" statute does apply to a sexual act between two children, both under the age of 14.

*State v. Friel*, 508 A.2d 123 (Me. 1986)

Whether past circumstances disclose a probable cause that is still continuing at the time of the request for a search warrant is not determined merely by the passage of time, but may also depend upon the circumstances of each case.

*State v. Gallant*, 531 A.2d 1282 (Me. 1987)

In reviewing a magistrate's probable-cause determination, the court's inquiry is limited to whether there was a substantial basis for the magistrate's finding of probable cause.

*State v. Jackson*, 697 A.2d 1328 (Me. 1997)

Witness testimony as to prior bad acts was admissible because it served the legitimate purpose of showing intent at the time of the killing.

*State v. Jacques*, 558 A.2d 706 (Me. 1989)

Evidence of previous sexual abuse, while generally inadmissible, may be admitted for the limited purpose of showing that someone other than the defendant was responsible for the child victims' unusual sexual knowledge.

*State v. Jordan*, 694 A.2d 929 (Me. 1997)

Testimony about the prior bad acts the defendant committed toward his estranged wife months or years earlier was not relevant to show the defendant's motive, intent, or state of mind at the time he allegedly pointed a gun at a law-enforcement officer.

*State v. Lehman*, 736 A.2d 256 (Me. 1999)

A search warrant that permits a search of “all computer equipment and computer-related equipment” is constitutional because a warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit.

*State v. Lux*, 740 A.2d 556 (Me. 1999)

Probable cause exists when the officers’ personal knowledge of facts and circumstances, in combination with any reasonably trustworthy information conveyed to them, would warrant a prudent person to believe that the container seized holds either contraband or evidence of a crime.

*State v. Miller*, 252 A.2d 321 (Me. 1969)

Unbuttoning a child’s dress and exposing oneself are more than mere preparation. Instead they constitute overt acts intended to contribute to the obtaining of an illegal result – taking indecent liberties with and indulging in indecent and immoral practices with a child.

*State v. Monahan*, No. CR-00-677, 2003 Me. Super. LEXIS 34 (Me. Super. Ct. Mar. 5, 2003)

Virtual child pornography is constitutionally sound under M.R.S.A. § 2924(1)(F). Apparently and actually being engaged in sexual conduct is equally harmful to the child depicted in sexually explicit images.

*State v. Pfeil*, 720 A.2d 573 (Me. 1998)

Where sentencing for multiple counts of gross sexual assault exceeded normal sentencing, excessive sentencing allowed because defendant agreed to sentencing.

*State v. Robinson*, 139 A.2d 596 (Me. 1958)

When it becomes clear that child witnesses are sly and willful, great care and caution must be exercised in order that the respondent may not be convicted on flimsy and insufficient evidence.

*State v. Roman*, 622 A.2d 96 (Me. 1993)

Evidence of prior sexual acts between the defendant and the victim was probative of the relationship between the parties and in turn shed light on the defendant’s motive, intent, and opportunity to commit the crimes with which he was charged.

*State v. Stanley*, 745 A.2d 981 (Me. 2000)

Evidence of a person’s character or of a person’s bad acts is generally not admissible to prove that the person acted in conformity therewith.

*State v. Stevens*, 510 A.2d 1070 (Me. 1986)

Maine’s rape statute is gender-neutral, contemplating male as well as female victims.



*State v. Sweet*, 745 A.2d 368 (Me. 2000)

Where defendants had a history of sexually assaulting, and the crimes were particularly heinous in that the victims were special needs children, the sentences were properly determined to fall in the upper tier of sentences for Class A gross sexual assaults.

*State v. Thomes*, 697 A.2d 1262 (Me. 1997)

Because the defendant's defense was that he did not commit the charged offenses, evidence of his motive was relevant to establish that he and not someone else was the perpetrator.

*State v. Thompson*, 695 A.2d 1174 (Me. 1997)

Testimony as to prior sexual abuse was admissible because of its probative nature on such issues as opportunity and the relationship between the defendant and the victims.

*State v. Turner*, 766 A.2d 1025 (Me. 2001)

E-mail evidence of defendant was properly admitted as probative of identity of author of a particular e-mail and was not so voluminous or prejudicial as to be inadmissible.

*State v. Valentine*, 443 A.2d 573 (Me. 1982)

Since intent was an issue at trial, evidence showing the defendant's conduct was knowing and intentional was properly admitted.

*State v. Wallace*, 431 A.2d 613 (Me. 1981)

Evidence of the first, uncharged crime had high probative value in proving the defendant's guilt of later crimes for which he was charged; therefore, the evidence of prior bad acts was admissible.

*State v. Webster*, 955 A.2d 240 (Me. 2008)

A chat log from instant-messaging conversations over the Internet was introduced as sufficient evidence in that it was a true and accurate representation of the chat logs as they occurred on-line between defendant and the person defendant believed to be under fourteen years of age.

*State v. Weeks*, 761 A.2d 44 (Me. 2000)

Disseminating child pornography over the Internet is prohibited. Where defendant possessed sexually explicit photos of children under the age of eighteen on his computer, defendant was charged for one count of possessing sexually explicit material for each sexually explicit photo on defendant's computer.

*State v. Wright*, 890 A.2d 703 (Me. 2006)

Child pornography found on defendant's computer was not stale by the time police officers applied for a search warrant eighty days later, and thus, probable cause to issue the warrant was supported.

# MAINE

## *Offenses Defined*

### I. Attempt Crimes

#### A. General Attempt

- Whoever attempts to commit an offense and does anything toward it, but fails or is interrupted or is prevented in its execution can be charged with an attempted crime. *Me. Rev. Stat. Ann. tit. 17, § 251.*  
– *State v. Miller*, 252 A.2d 321, 324 (Me. 1969).
- To constitute an attempt, there must be something more than mere intention or preparation. There must be some act moving directly towards the commission of the offense after the preparations are made.  
– *State v. Miller*, 252 A.2d 321, 324 (Me. 1969).
- In order to constitute the offense of an attempt to commit a crime, the attempt must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party.  
– *State v. Miller*, 252 A.2d 321, 324 (Me. 1969).

#### B. Attempted Solicitation

- Mere solicitation alone does not constitute an attempt to commit a crime.  
– *State v. Miller*, 252 A.2d 321, 324 (Me. 1969).

### II. Criminal Restraint

- A person is guilty of criminal restraint if, being the parent of a child under the age of 16, and knowing he or she has no legal right to do so, he or she:
  - (1) takes, retains, or entices the child from the custody of his or her other parent, guardian, or other lawful custodian with the intent to remove the child from the State or to secrete him or her and hold him or her in a place where he or she is not likely to be found; or
  - (2) takes, retains, or entices the child from the custody of his or her other parent, guardian, or other lawful custodian, whose custodial authority was established by a court of the state of Maine, in the state in which the child is residing with his or her legal custodian with the intent to remove the child from that state or to secrete him or her and hold him or her in a place where he or she is not likely to be found.*Me. Rev. Stat. Ann. tit. 17-A, § 303(1).*  
– *State v. Benner*, 385 A.2d 48, 49 n.1 (Me. 1978).  
– *State v. Butt*, 656 A.2d 1225, 1226 (Me. 1995).

- Maine Revised Statute Annotated § 303(1)(A) does not prohibit a parent from taking his or her child. Rather, it prohibits the taking of a child from the custody of the other parent with the purpose of secreting and holding the child in a place where the child is not likely to be found, with the knowledge that the parent has no legal right to do so. The plain language of Maine Revised Statute Annotated § 303(1)(A) does not require a violation of a custody decree for there to be a violation of its provisions. In contrast, Maine Revised Statute Annotated § 303(1)(B) provides explicitly that the custody of a parent or a lawful custodian must be established by a court in the state of Maine in order for there to be a violation of that section.  
– *State v. Butt*, 656 A.2d 1225, 1227 (Me. 1995).

### **III. Gross Sexual Assault**

- A person is guilty of gross sexual assault if that person engages in a sexual act with another person and the other person has not in fact attained the age of 18 years and the actor is a parent. *Me. Rev. Stat. Ann. tit. 17-A, 253(2)(H)*.  
– *State v. Thompson*, 695 A.2d 1174, 1176 n.1 (Me. 1997).

### **IV. Gross Sexual Misconduct**

- A person is guilty of gross sexual misconduct if he or she engages in a sexual act with another person and the other person, not his or her spouse, has not in fact attained his or her 14th birthday. *Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(B)*.  
– *State v. Edward C.*, 531 A.2d 672, 673 n.1 (Me. 1987).

### **V. Indecent Liberties**

- Whoever, having attained his or her 21st birthday, takes any indecent liberty or liberties or indulges in any indecent or immoral practice or practices with the sexual parts or organs of any other person, male or female, who has not attained his or her 16th birthday, either with or without the consent of such male or female person, or whoever, having attained his or her 21st birthday, induces or procures any person who has not attained his or her 16th birthday to take any indecent liberty or liberties or to indulge in any indecent or immoral practice or practices with the sexual parts or organs of any person, male or female, other than the said person who has not attained his or her 16th birthday, shall, upon conviction thereof, be punished by imprisonment at hard labor for not less than one year nor more than 10 years. *Me. Rev. Stat. Ann. tit. 17, § 1951*.  
– *State v. Miller*, 252 A.2d 321, 323-24 (Me. 1969).  
– *State v. Robinson*, 139 A.2d 596, 596 (Me. 1958).

### **VI. Online Enticement/Solicitation for Travel With the Intent to Engage in Sex With a Minor**

#### **A. Elements**

- A person is guilty of the Class D crime of soliciting a child by computer to commit a prohibited act if he or she is at least sixteen years of age, knowingly uses a computer to solicit, entice, persuade or compel another person to meet with the actor, knows or believes that the other person is less than fourteen years of age, and is at least three years older than the expressed age of the other person, and the actor possesses the intent to engage in either a sexual act, sexual contact, or sexual exploitation of a minor with the other person. If the other person is less than twelve years of age, and the actor is at least three years older than the expressed age of the other person, then the charge becomes a Class C crime. *Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(A)*.  
- *State v. Webster*, 955 A.2d 240 (Me. 2008).

#### **B. “Computer” Defined**

- Computer is defined as an electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device. *Me. Rev. Stat. Ann. tit. 17-A, § 431(2)*.  
- *State v. Webster*, 955 A.2d 240 (Me. 2008).

### **VII. Rape**

#### **A. Elements**

- A person is guilty of rape if he or she engages in sexual intercourse with any person, not his or her spouse, who has not in fact attained his or her 14th birthday. *Me. Rev. Stat. Ann. tit. 17-A, § 252(1)(A)*.  
- *State v. Stevens*, 510 A.2d 1070, 1071 (Me. 1986).

#### **B. “Sexual Intercourse” Defined**

- Sexual intercourse is defined as any penetration of the female sex by the male sex organ. *Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(B)*.  
- *State v. Stevens*, 510 A.2d 1070, 1071 (Me. 1986).

### **VIII. Sexual Abuse of Minors**

- A person is guilty of sexual abuse of a minor if, having attained the age of 19 years, the person engages in a sexual act with another person, not the actor’s spouse, who has attained the age of 14 years but has not attained the age of 16 years, provided that the actor is at least 5 years older than the other person. *Me. Rev. Stat. Ann. tit. 17-A, § 254(1)*.  
- *State v. Lehman*, 736 A.2d 256, 259 n.3 (Me. 1999).

## **IX. Sexual Exploitation of a Minor**

### **A. Elements**

- A person is guilty of sexual exploitation of a minor if knowing or intending that the conduct will be photographed, he or she intentionally or knowingly employs, solicits, entices, persuades, uses, or compels another person, not his or her spouse, who is in fact a minor, to engage in sexually explicit conduct. *Me. Rev. Stat. Ann. tit. 17, § 2922.*  
– *State v. Lehman*, 736 A.2d 256, 258 n.1 (Me. 1999).

### **B. “Minor” Defined**

- A minor is a person under 18 years of age. *Me. Rev. Stat. Ann. tit. 17, § 2921(3).*  
– *State v. Lehman*, 736 A.2d 256, 258 n.1 (Me. 1999).

## **X. Sexually Explicit Materials**

### **A. Dissemination of Sexually Explicit Materials**

- A person is guilty of dissemination of sexually explicit material if he or she intentionally or knowingly disseminates or possesses with intent to disseminate any book, magazine, print, negative, slide, motion picture, videotape, computer data file, or other mechanically, electronically, or chemically reproduced visual material which depicts any minor, who the person knows or has reason to know is a minor, engaging in sexually explicit conduct. *Me. Rev. Stat. Ann. tit. 17, § 2923(1).*  
– *State v. Weeks*, 761 A.2d 44, 46 (Me. 2000).
- Disseminating child pornography over the Internet is prohibited.  
– *State v. Weeks*, 761 A.2d 44, 46 (Me. 2000).

### **B. Possession of Sexually Explicit Materials**

- A person is guilty of possession of sexually explicit material if that person intentionally or knowingly transports, exhibits, purchases, possesses any book, magazine, print, negative, slide, motion picture, videotape, or other mechanically reproduced visual material that the person knows or should know depicts another person engaging in sexually explicit conduct, and the other person has not in fact attained the age of 14 years or the person knows or has reason to know that the other person has not attained the age of 14 years. *Me. Rev. Stat. Ann. tit. 17, § 2924(2).*  
– *State v. Lehman*, 736 A.2d 256, 258 n.2 (Me. 1999).

### **C. “Sexually Explicit Conduct” Defined**

- Sexually explicit conduct means any of the following acts:
  - (1) sexual act;
  - (2) bestiality;
  - (3) masturbation;
  - (4) sadomasochistic abuse for the purpose of sexual stimulation;
  - (5) lewd exhibition of the unclothed genitals, anus, or pubic area of a person.  
An exhibition is considered lewd if the depiction is designed for the purpose of eliciting or attempting to elicit a sexual response in the intended viewer; or
  - (6) conduct that creates the appearance of the acts in paragraphs (1) and (4) and also exhibits any uncovered or covered portions of the genitals, anus, or pubic area.

*Me. Rev. Stat. Ann. tit. 17, § 2924(1).*

*– State v. Lehman, 736 A.2d 256, 258 n.2 (Me. 1999).*

### **D. Virtual/Simulated Child Pornography**

- The depiction of a child who only appears to be engaged in sexual conduct can be as harmful as the depiction of a child actually engaged in sexual conduct. Under M.R.S.A. § 2924(1)(F), virtual child pornography is constitutionally sound.  
*- State v. Monahan, No. CR-00-677, 2003 Me. Super. LEXIS 34 (Me. Super. Ct. Mar. 5, 2003).*

## **XI. Transporting Minor for Purposes of Prostitution**

No state cases reported.

# MAINE

## *Search and Seizure of Electronic Evidence*

### I. Search Warrants

#### A. Probable Cause

- Probable cause exists when the officer’s personal knowledge of facts and circumstances, in combination with any reasonable trustworthy information conveyed to them, would warrant a prudent person to believe that the container seized holds either contraband or evidence of a crime.  
– *State v. Lux*, 740 A.2d 556, 558 (Me. 1999).
- Probable cause to search exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place.  
– *State v. Lux*, 740 A.2d 556, 558 (Me. 1999).
- The quantum of proof necessary to establish probable cause is less than the level of fair preponderance of the evidence.  
– *State v. Lux*, 740 A.2d 556, 558 (Me. 1999).

#### 1. Magistrate’s Finding of Probable Cause

- In determining whether probable cause exists, the magistrate applies the “totality-of-the-circumstances” test.  
– *State v. Crowley*, 714 A.2d 834, 836 (Me. 1998).
- The totality-of-the-circumstances test requires the issuing magistrate simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him or her, including veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.  
– *State v. Crowley*, 714 A.2d 834, 836-837 (Me. 1998).
- The magistrate’s finding of probable cause is to be made upon the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.  
– *State v. Crowley*, 714 A.2d 834, 836 (Me. 1998).  
– *State v. Gallant*, 531 A.2d 1282, 1284 (Me. 1987).

## 2. Informants

- An informant's tip, corroborated by the agents' own knowledge and observations, may provide the foundation for determining probable cause.  
– *State v. Lux*, 740 A.2d 556, 558-59 (Me. 1999).

## 3. Specificity of Warrant

- A warrant must describe the property to be seized with such particularity that an executing officer will be able to identify it with certainty. The warrant can leave nothing to the discretion of the executing officer as to what is to be taken.  
– *State v. Lehman*, 736 A.2d 256, 260 (Me. 1999).
- Article I, Section 5, of the Maine Constitution requires that a warrant make a "special designation" of the place to be searched.  
– *State v. Lehman*, 736 A.2d 256, 260 (Me. 1999).
- The issue of whether the search warrant lacks the required specificity as to the place and items to be searched is an issue of constitutional adequacy that is reviewed *de novo*.  
– *State v. Lehman*, 736 A.2d 256, 260 (Me. 1999).

### a. Computer Evidence

- When a warrant is issued to seize all computer software and hardware to recover computer images, courts have refused to conclude that the warrant is unconstitutional because of a failure to particularly describe the items to be seized.  
– *State v. Lehman*, 736 A.2d 256, 260 (Me. 1999).

### b. Broad or Generic Terms

- A warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit.  
– *State v. Lehman*, 736 A.2d 256, 260 (Me. 1999).

## 4. The Defendant's Burden

- A defendant who seeks to challenge the legality of a search or seizure conducted under a properly issued and executed warrant, has the burden of proving the illegality.  
– *State v. Friel*, 508 A.2d 123, 127 (Me. 1986).



- If a defendant establishes by a preponderance of the evidence that a false statement made knowingly, intentionally, or with reckless disregard for the truth was included in a probable-cause affidavit, and if it was material to establish probable cause, the false information must be excised from the affidavit.  
– *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978).

## 5. Appellate Review

- In reviewing a magistrate’s action, the appellate court does not make a *de novo* determination, but rather their inquiry is limited to the question of whether there was a “substantial basis” for the magistrate’s finding of probable cause.  
– *State v. Crowley*, 714 A.2d 834, 836 (Me. 1998).  
– *State v. Gallant*, 531 A.2d 1282, 1284 (Me. 1987).
- The reviewing court reads the affidavit with all reasonable inferences that may be drawn to support the magistrate’s determination.  
– *State v. Crowley*, 714 A.2d 834, 836 (Me. 1998).  
– *State v. Gallant*, 531 A.2d 1282, 1284 (Me. 1987).

## B. Scope of Search: Unreasonable Searches

- Any search is *per se* unreasonable if it lacks two essentials:  
(1) the existence of probable cause; and  
(2) the prior determination of such probable cause by a neutral and detached magistrate whose determination is reflected in the issuance of a search warrant – this latter requirement of a search warrant being expendable only if there are exigent circumstances in which procurement of a warrant would have a strong likelihood of frustrating the fulfillment of the governmental interest in conferring the probable cause to intrude upon the private property.  
– *State v. Barclay*, 398 A.2d 794, 797 (Me. 1979).

## C. Staleness

- Whether past circumstances disclose a probable cause that is still continuing at the time of the request for a search warrant is not determined merely by the passage of time, but may also depend upon the circumstances of each case. According, Maine courts have refrained from prescribing a *per se* rule fixing a mandatory maximum time within which a search warrant must be sought after the occurrence of events relied on to show probable cause.  
– *State v. Crowley*, 714 A.2d 834, 836 (Me. 1998).  
– *State v. Friel*, 508 A.2d 123, 127 (Me. 1986).

- The discovery of child pornography on defendant's computer was not stale by the time police officers applied for a search warrant eighty days later, and thus, probable cause to issue the warrant was supported.  
-*State v. Wright*, 890 A.2d 703 (Me. 2006)
- Stale information should be considered in conjunction with the affidavit as a whole and may be freshened by other corroborating statements in the affidavit.  
- *State v. Crowley*, 714 A.2d 834, 837 (Me. 1998).

## **II. Anticipatory Warrants**

No state cases reported.

## **III. Methods of Searching**

No state cases reported.

## **IV. Types of Searches**

### **A. Employer Searches**

No state cases reported.

### **B. Private Searches**

No state cases reported.

### **C. Civilian Searches**

No state cases reported.

### **D. University-Campus Searches**

No state cases reported.

## **V. Computer Technician/Repairperson Discoveries**

No state cases reported.

## **VI. Photo-Development Discoveries**

- Photo developer at a store turned in film negatives to the police upon discovery of defendant's sexually explicit images of defendant and two young boys. The photographs were admitted into court where the State authenticated the evidence.  
- *Hart v. State*, No. CR-03-482, 2006 Me. Super. LEXIS 21 (Me. Super. Ct. Feb. 9, 2006).

**VII. Criminal Forfeiture**

No state cases reported.

**VIII. Disciplinary Hearings for Federal and State Officers**

No state cases reported.

**IX. Probation and Parolee Rights**

No state cases reported.

# MAINE

## *Jurisdiction and Nexus*

### **I. Jurisdictional Nexus**

No state cases reported.

### **II. Internet Nexus**

No state cases reported.

### **III. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction**

#### **A. State**

No state cases reported.

#### **B. Federal**

No state cases reported.

#### **C. Concurrent**

No state cases reported.

### **IV. Interstate Possession of Child Pornography**

No state cases reported.

# MAINE

## *Discovery and Evidence*

### **I. Timely Review of Evidence**

No state cases reported.

### **II. Defense Requests for Copies of Child Pornography**

No state cases reported.

### **III. Introduction of E-mails into Evidence**

#### **A. Hearsay/Authentication Issues**

No state cases reported.

#### **B. Circumstantial Evidence**

No state cases reported.

#### **C. Technical Aspects of Electronic Evidence Regarding Admissibility**

- Evidence of defendant's e-mail and written letters were properly admitted as probative of identity of author or a particular e-mail and were not so voluminous or prejudicial as to be inadmissible.  
- *State v. Turner*, 766 A.2d 1025 (Me. 2001).

### **IV. Text-Only Evidence**

#### **A. Introduction into Evidence**

- Chat logs introduced as evidence were sufficient where witness testified that they were a true and accurate representation of the chat logs as they occurred on-line between the defendant and the person defendant believed to be under fourteen years of age, that the chat logs had not been tampered with, and witness testified as to the method of storing the chat logs in a data center and three proxy servers.  
- *State v. Webster*, 955 A.2d 240 (Me. 2008).

#### **B. Relevance**

No state cases reported.

## **V. Evidence Obtained from Internet Service Providers**

### **A. Electronic Communications Privacy Act**

- The Electronic Communications Privacy Act was enacted by Congress to protect Internet privacy and contains similar language to the Cable Act.  
- *Fitch v. Doe*, 869 A.2d 722 (Me. 2005).

### **B. Cable Act**

- The Cable Communications Policy Act of 1984 (The Cable Act) restricts cable operators from releasing information about their subscribers. The Cable Act was inapplicable where defendant gave prior written or electronic consent to cable operator to disclose information “to comply with criminal or civil legal process.” In response to a court order, cable operator was permitted to release personal information about the subscriber as long as the cable operator gave notice to the subscriber.  
- *Fitch v. Doe*, 869 A.2d 722 (Me. 2005).

### **C. Patriot Act**

#### **1. National Trap and Trace Authority**

No state cases reported.

#### **2. State-Court-Judge Jurisdictional Limits**

No state cases reported.

## **VI. Statute of Limitations**

### **A. Sexual Act With a Minor**

- A claim based on a sexual act with a minor accrues when the plaintiff discovers or reasonably should discover the harm. *Me. Rev. Stat. Ann. tit. 14, § 752-C*.  
- *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994).
- Actions based upon sexual intercourse or a sexual act with a person under the age of majority must be commenced within 12 years after the cause of action accrues, or within 6 years of the time the person discovers or reasonably should have discovered the harm, whichever occurs later. *Me. Rev. Stat. Ann. tit. 14, § 752-C*.  
- *McAfee v. Cole*, 637 A.2d 463, 466 (Me. 1994).

## B. Mental Illness and Tolling

- Mental illness under the tolling statute refers to an overall inability to function in society that prevents plaintiffs from protecting their legal rights.  
– *McAfee v. Cole*, 637 A.2d 463, 466 (Me. 1994).

## VII. Prior Bad Acts

### A. Inadmissible

- Evidence of a person's character or of a person's bad acts is generally not admissible to prove that the person acted in conformity therewith. *Me. R. Evid. 404(b)*.  
– *State v. Bourgeois*, 639 A.2d 634, 636 n.5 (Me. 1994).  
– *State v. Connors*, 679 A.2d 1072, 1073 n.3 (Me. 1996).  
– *State v. Jackson*, 697 A.2d 1328, 1331 (Me. 1997).  
– *State v. Jordan*, 694 A.2d 929, 931 (Me. 1997).  
– *State v. Roman*, 622 A.2d 96, 98 (Me. 1993).  
– *State v. Stanley*, 745 A.2d 981, 984 (Me. 2000).  
– *State v. Thomes*, 697 A.2d 1262, 1264 (Me. 1997).  
– *State v. Valentine*, 443 A.2d 573, 578 (Me. 1982).
- Evidence of prior bad acts is not admissible against a defendant in a criminal prosecution if its sole relevance is to establish the accused's propensity to commit crimes. *Me. R. Evid. 404(b)*.  
– *State v. Wallace*, 431 A.2d 613, 615 (Me. 1981).
- Past sexual behavior of a victim, including evidence of sexual abuse by others, if generally not admissible. *Me. R. Evid. 412*.  
– *State v. Jacques*, 558 A.2d 706, 707 (Me. 1989).

### B. Admissible

- Evidence revealing other crimes is relevant if it casts light upon the nature of the act for which the defendant is being prosecuted, by showing motive, intent, knowledge, absence of mistake, common scheme, identity, or a system or general pattern. *Advisers' Note, Me. R. Evid. 404(b)*.  
– *State v. Jackson*, 697 A.2d 1328, 1331 (Me. 1997).  
– *State v. Roman*, 622 A.2d 96, 98 (Me. 1993).  
– *State v. Thomes*, 697 A.2d 1262, 1264 (Me. 1997).  
– *State v. Valentine*, 443 A.2d 573, 578 (Me. 1982).  
– *State v. Wallace*, 431 A.2d 613, 616 (Me. 1981).
- Evidence of other crimes or wrongs may be admissible if it is relevant to specified facts and propositions involved in the case. *Me. R. Evid. 404.4*.  
– *State v. Connors*, 679 A.2d 1072, 1074 (Me. 1996).  
– *State v. Jordan*, 694 A.2d 929, 931 (Me. 1997).

- Similar threats or acts against others are relevant if there is a sufficient nexus between the evidence sought to be introduced and the elements of the crime charged.  
– *State v. Bourgeois*, 639 A.2d 634, 638 (Me. 1994).
- Evidence of prior uncharged acts of sexual contact between the accused and the victim may be admissible if probative of relationship, opportunity, motive, and preparation.  
– *State v. Roman*, 622 A.2d 96, 98 (Me. 1993).
- Evidence of a defendant’s prior or subsequent sexual relations with a victim is admissible to show the relationship between the parties or the intent of the defendant.  
– *State v. Roman*, 622 A.2d 96, 98 (Me. 1993).
- Maine courts have upheld the admissibility of evidence of a prior bad act due to its signature-like similarity to another bad act.  
– *State v. Connors*, 679 A.2d 1072, 1074 (Me. 1996).

### **C. Relevance**

- The trial court has broad discretion to weigh the relevance of evidence against the danger of unfair prejudice to the defendant.  
– *State v. Jackson*, 697 A.2d 1328, 1331 (Me. 1997).
- Evidence of prior bad acts is relevant if it casts light on the nature of the act for which the defendant is being prosecuted, by showing motive, intent, knowledge, absence of mistake, common scheme, identity, or a system or general pattern. *Advisers’ Note, Me. R. Evid. 404(b)*.  
– *State v. Jordan*, 694 A.2d 929, 931 (Me. 1997).

### **D. Unfair Prejudice**

#### **1. Exclusion of Evidence**

- Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Me. R. Evid. 403*.  
– *State v. Connors*, 679 A.2d 1072, 1074 (Me. 1996).  
– *State v. Jackson*, 697 A.2d 1328, 1331 n.2 (Me. 1997).  
– *State v. Roman*, 622 A.2d 96, 98 n.3 (Me. 1993).  
– *State v. Thomes*, 697 A.2d 1262, 1265 (Me. 1997).  
– *State v. Wallace*, 431 A.2d 613, 616 (Me. 1981).

#### **2. “Prejudice” Defined**



- Prejudice means more than simply damage to the defendant's cause; the rule is intended to proscribe evidence that has an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.  
 – *State v. Jackson*, 697 A.2d 1328, 1331 (Me. 1997).  
 – *State v. Thomes*, 697 A.2d 1262, 1265 (Me. 1997).

## **E. Appellate Review**

- Trial-court evidentiary rulings are reviewed for clear error or an abuse of discretion.  
 – *State v. Bourgeois*, 639 A.2d 634, 636 (Me. 1994).
- Wide discretion is accorded to the trial court's determinations on the relevancy of the proffered evidence, as well as to its evaluation of any unfair prejudice that may result from the admission of the evidence.  
 – *State v. Bourgeois*, 639 A.2d 634, 636 (Me. 1994).

## **VIII. Child Testimony**

- Every person is competent to be a witness except as otherwise provided in the Maine Rules of Evidence. *Me. R. Evid. 601(a)*.  
 – *State v. Roman*, 622 A.2d 96, 100 (Me. 1993).
- A person is disqualified to be a witness if the court finds that:
  - (1) the proposed witness is incapable of expressing him- or herself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him or her;
  - (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth;
  - (3) the proposed witness lacked any reasonable ability to perceive the matter; or
  - (4) the proposed witness lacks any reasonable ability to remember the matter.*Me. R. Evid. 601(b)*.  
 – *State v. Roman*, 622 A.2d 96, 100 (Me. 1993).
- A child of any age is presumed competent to testify as a witness unless disqualified under Maine Rule of Evidence 601(b).  
 – *State v. Roman*, 622 A.2d 96, 100 (Me. 1993).
- When it becomes clear that child witnesses are sly and willful, great care and caution must be exercised in order that the respondent may not be convicted on flimsy and insufficient evidence.  
 – *State v. Robinson*, 139 A.2d 596, 598 (Me. 1958).

## **IX. Psychologist-Patient Privilege**

## **A. Confidentiality**

- The duty of maintaining confidentiality is established at the very start of the relationship.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 (Me. 2000).

### **1. Patient's Rights**

- A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition, including alcohol or drug addiction, among the patient, the patient's physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family. *Me. R. Evid. 503(b)*.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 557 n.9 (Me. 2000).

### **2. Psychologist's Duties**

- Psychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult, recognizing that confidentiality may be established by law, institutional rules, or professional or scientific relationships. *APA Code of Conduct Principle 5.02 (1992)*.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 n.5 (Me. 2000).

- The psychologist shall safeguard the confidential information obtained in the course of practice, teaching, research, or other professional services. With few exceptions, the psychologist shall disclose confidential information to others only with the informed written consent of the client. *AASPB Code of Conduct § III(E)(1)*.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 n.6 (Me. 2000).

### **3. After Termination of Treatment**

- The psychologist shall continue to treat as confidential information regarding a client after the professional relationship between the psychologist and the client has ceased. *AASPB Code of Conduct § III(E)(12)*.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 n.6 (Me. 2000).

### **4. In Written and Oral Reports**

- In order to minimize intrusions on privacy, psychologists include in written and oral reports, consultations, and the like, only information germane to the purpose for which the communication is made. *APA Code of Conduct Principle 5.03*.  
– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 n.57 (Me. 2000).
- Psychologists discuss confidential information obtained in clinical or consulting relationships, or evaluative data concerning patients, individual or organizational clients, students, research participants, supervisees, and employees, only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters. *APA Code of Conduct Principle 5.03*.  
– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 n.7 (Me. 2000).

## 5. Discussions With Other Professionals

### a. Clinical or Consulting Relationships

- Psychologists may discuss confidential information obtained in clinical or consulting relationships, or evaluative data only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters. *APA Code of Conduct Principle 5.03(b)*.  
– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 n.8 (Me. 2000).

### b. Scientific or Professional Relationships

- Psychologists may discuss with persons with whom they establish a scientific or professional relationship:
  - (1) the relevant limitations on confidentiality, including limitations where applicable in group, marital, and family therapy; and
  - (2) the foreseeable uses of the information generated through their services.*APA Code of Conduct Principles 5.01(a)(1)-(2)*.  
– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 556 n.8 (Me. 2000).

## 6. Exceptions

- If a court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged with respect to the particular purpose for which the examination is ordered unless the court orders otherwise. *Me. R. Evid. 503(e)(2)*.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 557 n.9 (Me. 2000).

- There is no privilege under this rule as to communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, or of any party claiming, through or under the patient or because of the patient's condition, or claiming as a beneficiary of the patient, through a contract to which the patient is or was a party, or after the patient's death, in any proceeding which puts the condition in issue. *Me. R. Evid. 503(e)(3)*.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 557 n.9 (Me. 2000).

## **B. Disclosure Without Consent**

- Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose, such as:
  - (1) to provide needed professional services to the patient or the individual or organizational client;
  - (2) to obtain appropriate professional consultation;
  - (3) to protect the patient or client or others from harm; or
  - (4) to obtain payment for services, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.

*APA Code of Conduct Principle 5.05.*

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 558 n. 10 (Me. 2000).

## **C. Confidential Communications**

- A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family. *Me. R. Evid. 503*.

– *Seider v. Board of Examiners of Psychologists*, 762 A.2d 551, 557 (Me. 2000).

# MAINE

## *Age of Child Victim*

### **I. Proving the Age of the Child Victim**

- The age of the person depicted may be reasonably inferred from the depiction. Competent medical evidence or other expert testimony may be used to establish the age of the person depicted. *Me. Rev. Stat. Ann. tit. 17, § 2924(4)*.  
– *State v. Lehman*, 736 A.2d 256, 258 n.2 (Me. 1999).

### **II. The Defendant’s Knowledge of the Age of the Child**

#### **A. Child Pornography**

No state cases reported.

#### **B. Sexual Abuse of Minors**

- It is a defense to a “sexual-abuse-of-a-minor” prosecution that the actor reasonably believed the other person to have attained his or her 16th birthday. *Me. Rev. Stat. Ann. tit. 17-A, § 254(2)*.  
– *State v. Lehman*, 736 A.2d 256, 259 n.3 (Me. 1999).

# MAINE

## *Multiple Counts*

### **I. What Constitutes an “Item” of Child Pornography?**

- Each sexually explicit image of minors constitutes one count of possessing sexually explicit materials. Where defendant possessed 975 sexually explicit images of children under the age of eighteen on his computer, defendant was charged with 975 counts of possessing sexually explicit materials. Where defendant’s computer evidenced forty-seven transactions of file exchanges involving images of children, defendant was charged with forty-seven counts of disseminating sexually explicit materials.

- *State v. Weeks*, 761 A.2d 44 (Me. 2000)

### **II. Issues of Double Jeopardy**

No state cases reported.

# MAINE

## *Defenses*

### I. Specific Offenses

#### A. Gross Sexual Misconduct: Age of Offender

- A child under 14 years of age can be prosecuted for gross sexual misconduct.  
– *State v. Edward C.*, 531 A.2d 672, 673 (Me. 1987).

#### B. Sexual Abuse of Minors

- It is a defense to a “sexual-abuse-of-a-minor” prosecution that the actor reasonably believed the other person to have attained his or her 16th birthday.  
17-A M.R.S.A. § 254(2).  
– *State v. Lehman*, 736 A.2d 256, 259 n.3 (Me. 1999).

### II. General

#### A. Age

##### 1. Of Offender

- A child under 14 years of age can be prosecuted for gross sexual misconduct.  
– *State v. Edward C.*, 531 A.2d 672, 673 (Me. 1987).

##### 2. Of Victim

- Actual mistake of age is not a defense where defendant believed other person to be under the age of fourteen years and attempted to engage in a sexual act with other person. It is irrelevant that the other person was not actually less than fourteen years of age, and actually indicates defendant’s culpable state of mind.  
-- *State v. Webster*, 955 A.2d 240 (Me. 2008).

#### B. Consent

No state cases reported.

#### C. Diminished Capacity

##### 1. Addiction to the Internet

No state cases reported.

**2. Insanity**

No state cases reported.

**D. First Amendment**

- It is not a violation of the First Amendment to apply neutral principles of law to members of the clergy in order to protect children from alleged sexual abuse.

-- *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005).

**E. Impossibility**

**1. Factual**

No state cases reported.

**2. Legal**

No state cases reported.

**F. Manufacturing Jurisdiction**

No state cases reported.

**G. Outrageous Conduct**

No state cases reported.

**H. Researcher**

No state cases reported.

**I. Sexual Orientation**

No state cases reported.



# MAINE

## *Sentencing Issues: Enhancement*

### **I. Age**

#### **A. Age of Offender**

- The sentencing class for a violation of the “sexual-abuse-of-minors” statute is one class higher if the actor was more than 10 years older than the other person. *Me. Rev. Stat. Ann. tit. 17-A, § 254(3)(A)*.  
– *State v. Lehman*, 736 A.2d 256, 259 n.3 (Me. 1999).

#### **B. Age of Victim**

No state cases reported.

### **II. Distribution/Intent to Traffic**

No state cases reported.

### **III. Pattern of Activity for Sexual Exploitation**

- Where defendants had a history of sexually assaulting children, and the crimes were particularly heinous in that the victims were special needs children, the sentences were properly determined to fall in the upper tier of sentences for Class A gross sexual assaults.  
– *State v. Sweet*, 745 A.2d 368 (Me. 2000).
- Where defendant agreed to sentencing, excessive sentencing allowed for defendant who was charged with multiple counts of gross sexual assault.  
– *State v. Pfeil*, 720 A.2d 573 (Me. 1998).

### **IV. Relationship to Victim**

- The sentencing class for a violation of the “sexual-abuse-of-minors” statute is one class higher if the actor knew the person was related to the actor within the second degree of consanguinity. *Me. Rev. Stat. Ann. tit. 17-A, § 254(3)(B)*.  
– *State v. Lehman*, 736 A.2d 256, 259 n.3 (Me. 1999).

### **V. Sadistic, Masochistic, or Violent Material**

- Where child victims were exposed to sex, alcohol, and pornography, and were subjected to physically intrusive sexual activities, sentences met the criteria

for the upper tier of sentences for Class A gross sexual assaults, even if defendants did not engage in precipitous violence toward the victims.  
- *State v. Sweet*, 745 A.2d 368 (Me. 2000).

**VI. Use of Computers**

No state cases reported.

**VII. Number of Images**

No state cases reported.

**MAINE**  
*Supervised Release*

No state cases reported.