

# MAINE STATE LEGISLATURE

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May 10, 2005

Honorable Janet T. Mills  
House of Representatives  
Two State House Station  
Augusta, ME 04333-0002

RE: L.D. 548 (122<sup>nd</sup> Legis. 2005)

Dear Representative Mills:

Attorney General Rowe has asked that I respond to your letter of April 19, 2005 in which you raise questions about constitutional and other issues regarding L.D. 548, "An Act to Enhance the Prosecution of Child Pornography Cases." L.D. 548 (hereinafter "the bill") contains two separate proposals. I will address each in turn.

Proposed Affirmative Defenses to the Crimes of Dissemination of Sexually Explicit Material and Possession of Sexually Explicit Material

The bill would create a new affirmative defense for both the current crimes of dissemination of sexually explicit material, 17-A M.R.S.A. § 283(1) (Supp. 2004), and possession of sexually explicit material, 17-A M.R.S.A. § 284(1) (Supp. 2004). See Subsection 3 of the bill. Proposed new section 286 creating the affirmative defenses provides as follows:

§ 286. Affirmative defense

It is an affirmative defense to section 283 or section 284 that the alleged minor depicted in the sexually explicit material is not an actual person or is not a minor.

When in the Maine Criminal Code, as here,

... the statute explicitly designates a matter as an "affirmative defense," the matter so designated must be

proved by the defendant by a preponderance of the evidence.

17-A M.R.S.A. § 101(2) (1983). Consequently, proposed section 286 would require that at the trial of a defendant charged with some form of the crimes of dissemination of sexually explicit material or possession of sexually explicit material, it would be incumbent upon a defendant who chooses to use the affirmative defense to demonstrate to the jury by a preponderance of the evidence that the person depicted in the sexually explicit material is either not in fact an actual person – *i.e.*, not a real human being (17-A M.R.S.A. §2(20) (1983)) – or is not in fact a minor.

Turning to the two crimes to which this affirmative defense is to have application – namely, sections 283 and 284 of the Criminal Code – each form of these two substantive crimes as defined by the Maine Legislature includes as a factual “element” that the victim depicted in the sexually explicit material be an *actual person*<sup>1</sup> and that the person be *under a specified age*.<sup>2</sup> The Due Process Clause of the Fifth Amendment to the United States Constitution requires the State of Maine to prove each element of every crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *State v. Davis*, 384 A.2d 45, 47 (Me. 1978). The Maine Criminal Code expressly requires nothing less. 17-A M.R.S.A. § 32 (1983);<sup>3</sup> *see also State v. Kim*, 2001 ME 99, ¶ 9, 773 A.2d 1051, 1055 (“... the State bears the burden of proving each element of the charge beyond a reasonable doubt, and the court must instruct the jury on the elements of the crime and the State’s burden of proof”). Where, as here, the Legislature has chosen to make the facts of “actual person” and “age” elements of both crimes and thus facts relative to which the State of Maine must bear the full burden of persuasion, the proposed affirmative defense seeking to place upon the defendant a burden to disprove these same facts is an apparent violation of federal due process and wholly inconsistent with the

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Unlike the federal counterpart that criminalized sexually explicit material depicting virtual children (18 U.S.C. §2256(8)(B)) as well as actual children (18 U.S.C. §2256(8)(A)), Maine’s crimes require that the depiction be of an actual child. Hence, when the United States Supreme Court struck down the federal virtual children provision as substantially overbroad and in violation of the First Amendment, *Ascroft v. Free Speech Coalition*, 535 U.S. 234 (2002), Maine’s crimes were unaffected by that decision.

Although both section 283 and 284 require that the sexually explicit material depict “a minor,” the elementally required actual age is not uniform. For purposes of paragraphs A and B of subsection 1 of section 283, the “minor” must be “a person who has not attained 18 years of age.” 17-A M.R.S.A. § 281(2). For purposes of paragraphs C and D of subsection 1 of section 283, the “minor” must be “less than 12 years of age.” For purposes of paragraphs A and B of subsection 1 of section 284, the “minor” must not have “in fact attained 14 years of age.” For purposes of paragraphs C and D of subsection 1 of section 284, the “minor” must not have “in fact attained 12 years of age.”

Both of the factual elements at issue here are “elements of the crime” because they are “attendant circumstances” within the meaning of 17-A M.R.S.A. § 32.

express mandate of section 32 of the Criminal Code.<sup>4</sup> Or stated in a slightly different manner, the Maine Legislature cannot, consistent with federal due process<sup>5</sup> and section 32, treat a fact simultaneously as both an element of a crime and as the basis for an affirmative defense to that crime.<sup>6</sup>

Proposed Victim Age Change in the Class D Form of the  
Crime of Possession of Sexually Explicit Material

The bill would raise the age of a victim depicted in the sexually explicit material from under 14 years of age to under 16 years of age as to the Class D form of the crime of possession of sexually explicit material, 17-A M.R.S.A. § 284(1)(A) (Supp. 2004).<sup>7</sup> See Sections 1 and 2 of the bill. Although not immediately apparent from the bill itself, elevation of the statutory age ceiling by two years to include 14 and 15 year-old victims potentially impacts upon the current statutory permissive inference contained in subsection 3 of section 284. Subsection 3 provides as follows:

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. (Emphasis supplied)

Pursuant to subsection 3, the basic fact to be inferred is the age of the victim depicted in the sexually explicit material. The permissible inference is that such age can be inferred from the depiction itself.

Two preliminary points need to be identified. First, as a matter of federal due process, in any criminal case a rational connection must exist between the basic fact and

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<sup>4</sup> Additionally, any jury instructions provided by a trial court under these circumstances would be contradictory and confusing, since a trial court would presumably be instructing the jury that, on the one hand, the State of Maine has the burden to prove the two facts of "actual person" and "age" beyond a reasonable doubt while, on the other hand, the defendant has the burden of disproving the existence of one or both of these same two facts by a preponderance of the evidence.

Due process requirements are the same under the Maine and United States Constitutions. *State v. Anderson*, 1999 ME 18, ¶ 9, 724 A.2d 1231, 1234; *see also State v. Smith*, 366 A.2d 865, 868 Me. 1976) (due process requirements relative to a statutory inference are the same under both Constitutions).

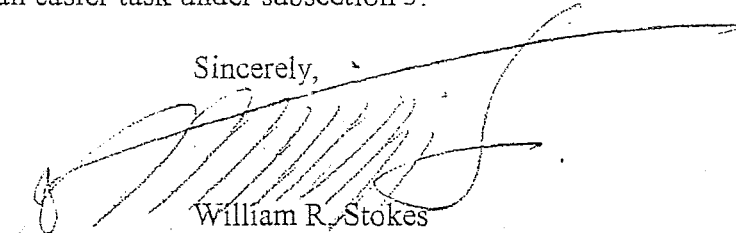
Although it is possible that a state might, within constitutional limitations, modify its statutory definition of a crime so as to convert what was previously a fact element into an affirmative defense, given the two facts at issue that does not appear feasible here. *Compare, e.g., Patterson v. New York*, 432 U.S. 197 (1977) with *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (in the context of the crime of murder and the affirmative defense to murder of extreme emotional distress).

The Class C form of this crime addressing a victim under 12 years of age, 17-A M.R.S.A. 284(1)(C) (Supp. 2004), is unaffected by this proposal.

the presumed or inferred fact. *Leary v. United States*, 395 U.S. 6, 38 (1969); *see also State v. McNally*, 443 A.2d 56, 59 (Me. 1982). Second, as a matter of evidentiary rule, submission of the question of the existence of a presumed or inferred fact to a jury is made contingent upon a trial court finding that "a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find . . . the presumed fact [inferred fact] beyond a reasonable doubt." M.R.Evid. 303(b); *see also McNally*, 443 A.2d at 59, n. 3 and 4; Field & Murray, *Maine Evidence* §§ 303.2 and 303.4 at 80 and 82 (2000 ed. 1999).

Applying both the federal due process requirement and Rule 303(b) to the statutory permissible inference in subsection 3, the validity and evidentiary weight of the inference is arguably strongest when the depiction is that of a prepubescent child or a child approaching puberty and arguably weakest when the depiction is that of an adolescent approaching adulthood. If the core impetus for the proposed inclusion of both 14 and 15 year-old minors is to criminalize and prosecute depictions relative to these two added age groups, the application of subsection 3 to such cases is questionable, particularly in light of Rule 303(b) given the difficulty of inferring the age of an adolescent approaching adulthood. On the other hand, if the core impetus for the age ceiling change is instead to facilitate successful prosecutions relative to children under 14, as currently, the application of subsection 3 appears enhanced, since it eliminates the current requirement that the State prove beyond a reasonable doubt that the depicted minor be in fact under 14 – *i.e.* not yet 14, 15 or approaching 16. Instead, in proving the minor to be under 14, the State need only distinguish the under 14 victim from a 16 or older minor, arguably an easier task under subsection 3.

Sincerely,



William R. Stokes  
Deputy Attorney General  
Chief, Criminal Division

WRS:bjw