

**OFFICE OF POLICY AND LEGAL ANALYSIS  
BILL ANALYSIS**

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**TO: Members, Joint Standing Committee on Criminal Justice and Public Safety**

**FROM: Jane Orbeton, Legislative Analyst**

**DATE: March 25, 2021**

**LD: 536 An Act To Amend the Maine Criminal Code**

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**Summary**

This bill is submitted by the Criminal Law Advisory Commission.

Senator Deschambault sponsored the bill and spoke in favor of it at the public hearing. Additional people testifying, who brought to the attention of the committee specific issues that will be included below, include John Pelletier, chair of the Criminal Law Advisory Commission (CLAC), Michael Kebede for the ACLU, Kathryn Slattery for the Maine Prosecutors Association (MPA) and Tina Nadeau for the Maine Association of Criminal Defense Lawyers (MACDL). District Attorney Todd Collins, from Aroostook County, and Kent Avery, AAG and chair of the Sex Offender Management and Risk Assessment Advisory Commission (SOMRAAC) provided written testimony.

**Part A**

Part A of the bill addresses the authority of the judge to order a concurrent or nonconcurrent (consecutive) sentence for a person who has a prior conviction with a term of imprisonment that is being served or that is stayed.

MACDL and ACLU oppose Part A.

MPA supports Part A.

**Part A governs sentencing when a person is under a sentence on another crime as follows:**

1. For a person who is being sentenced for a crime committed while that person is serving a term of imprisonment, current law requires this sentence to be nonconcurrent. Part A, in Title 17-A, section 1609, subsection 1, does not change this. A person on supervised community confinement is sentenced under this provision.
2. For a person who is being sentenced for a conviction of attempt to commit a crime while that person is serving a term of imprisonment, current law requires this sentence to be nonconcurrent. Part A, in Title 17-A, subsection 1, does not change this. A person on supervised community confinement is sentenced under this provision.
3. For a person who is subject to an undischarged term of imprisonment who is being sentenced for a crime committed during a stay of execution of a term of imprisonment,

under current law this sentence must be concurrent. Part A, in Title 17-A, section 1609, subsection 2, gives the judge discretion to order a concurrent or nonconcurrent sentence.

4. For a person who is being sentenced for a crime committed after failure to report after a stay of execution, under current law the sentence must be concurrent. Part A, in proposed Title 17-A, section 1609, subsection 2, gives the judge discretion to order a concurrent or nonconcurrent sentence.

5. For a person who is being sentenced for a conviction of failure to report as ordered after a stay of execution, under current law the sentence must be concurrent. Part A, in proposed Title 17-A, section 1609, subsection 2, gives the judge discretion to order a concurrent or nonconcurrent sentence.

### **Comparison to Committee amendment to LD 2037 from 129<sup>th</sup> Legislature**

Part A differs as explained below. The committee amendment contained in Part F an annual report from the Maine Information and Analysis Center to CJPS on the performance of the MIAC. An annual report form MIAC is the subject of LD 12 in the 130<sup>th</sup> Legislature.

### **Part A in Majority Committee Amendment to LD 2037, 129<sup>th</sup> Legislature**

Part A of the majority committee amendment allows the judge in sentencing a person in circumstances 1 through 5 above to order a sentence that is concurrent or nonconcurrent (consecutive). If a nonconcurrent sentence is ordered, the first sentence may be interrupted by tolling, with the result that the nonconcurrent sentence begins immediately and continues to its end. At that point the first sentence resumes and runs until its end. No portion of the nonconcurrent sentence may be suspended. This is the text of the committee amendment to LD 2037 as it relates to Part A of LD 536:

*Sec. A-3. 17-A MRSA §1609-A is enacted to read:*

### **§ 1609-A. Discretionary sentence**

*Notwithstanding section 1608, when an individual subject to an undischarged term of imprisonment is convicted of a crime committed while in execution of any term of imprisonment, is convicted of a crime committed during a stay of execution of any term of imprisonment, is convicted of a crime committed after failure to report after a stay of execution of any term of imprisonment or is convicted of failure to report as ordered after a stay of execution of any term of imprisonment, the court may order that the sentence is not concurrent with any undischarged term of imprisonment. If the court orders that the sentence is not concurrent, the court may order that any undischarged term of imprisonment be tolled and service of the nonconcurrent sentence commence immediately, and the court shall so order if any undischarged term of imprisonment is a split sentence. No portion of the nonconcurrent sentence may be suspended. Any nonconcurrent sentence that the convicted individual receives as a result of an order entered pursuant to this section must be nonconcurrent with all other sentences.*

## **Part B**

Part B corrects an inconsistency in the laws on restitution. When the victim for whom restitution is being collected cannot be found, Title 17-A, section 2009 requires the prosecuting attorney to forward those funds to the Treasurer of State to be handled as unclaimed property. But if the Department of Corrections is collecting restitution and the victim cannot be located DOC is required to inform the court and the court determines the distribution of the funds. Part B resolves this conflict by having DOC forward the collected restitution to the Treasurer of State to be handled as unclaimed property.

MPA supports Part B.

### **Information from Anna Black, Maine DOC**

*Currently, the MDOC does not hold funds when victims cannot be located as specified under Title 17-A section 2016. Rather MDOC follows Title 17-A section 2009 which requires the restitution funds in these cases to be turned over to the Treasurer, where they are treated as abandoned (unclaimed) property.*

*As you know, the point of the bill is to make Title 17-A section 2016 consistent with section 2009 and the MDOC's practice of following section 2009.*

*Since 2005 MDOC has sent a total of \$64,323.95 to the Treasurer to be handled as unclaimed property for those victims, who, after due diligence, were unable to be located.*

*Currently there is a total of \$58,061.29 pending to be sent to the Treasurer.*

*Combining total sent and total pending that: \$122,385.24.*

## **Part C**

Part C corrects an error that dates back to 2001 in the kidnapping law, Title 17-A, section 301. Each crime in the Criminal Code should be in a separate unit of the law (a section, subsection, paragraph or subparagraph). The error is in section 301, subsection 1, paragraph A, subparagraph 3, which reads that the actor knowingly restrains another person with the intent to "inflict bodily injury upon the other person or subject the other person to conduct defined as criminal in chapter 11." Chapter 11 is sexual assaults. This error matters because a person convicted under Title 17-A, section 301, subsection 1, paragraph A, subparagraph 3 is required to comply with the requirements of the Sex Offender Notification and Registration Act and to register for the offender's lifetime. This is legally correct for a person convicted of kidnapping with the intent to commit a sexual assault under Title 17-A, chapter 11. It is not legally correct for a person convicted of kidnapping with the intent to inflict bodily injury.

Part C separates the 2 variants of kidnapping into an amended subparagraph 3 and a new subparagraph 3-A. Part C then corrects the Sex Offender Notification and Registration Act to reflect the separation into subparagraphs 3 and 3-A, so that the sex offender is subject to the Act and non-sex offender will not be subject to that Act. Similarly, Part C corrects Title 37-B, section 504, subsection 4, paragraph H, on eligibility for internment in the Maine Veterans' Memorial Cemetery System so that the non-sex offender will not be excluded from eligibility and the sex offender will be excluded. Under current law the non-sex offender must register and comply for life and is ineligible for the veterans' cemetery. This is a mistake in drafting Title 17-A, section 301, subsection 1, paragraph A, subparagraph 3.

MACDL and MPA support Part C.

## **Part D**

Part D amends the law that protects people who call for emergency help or administer naloxone in the situation of a drug-related overdose or who suffer an overdose. This law protects the caller from: (1) a drug possession prosecution if the grounds for the charge are obtained as a result of the call for assistance; and (2) from prosecution for a violation of probation. Note that the first protection is for a drug possession crime. The second protection is for a probation violation charge but it is not limited to drug possession. The protection is from prosecution for violation of probation for any reason, including drug possession, bank robbery or gun possession if the grounds for prosecution are obtained as a result of the call or administering Narcan or the overdose. Part D narrows the probation violation protection to a charge of violation of probation for drug possession.

MACDL, SOMRAAC and MPA support Part D.

## **Part E**

Part E repeals Title 17-A, section 257 in the sentencing laws that requires the judge to treat certain factors, if present, as increasing the risk of repeat offenses by the person. Section 257 reads:

### **§257. Factors aiding in predicting high-risk sex offenders for sentencing purposes**

1. In assessing for sentencing purposes the risk of repeat offenses by a person convicted of a crime under chapter 11, a court shall treat each of the following factors, if present, as increasing that risk:

- A. The victim of the crime is prepubescent;
- B. The victim of the crime is the same gender as the offender;
- C. The victim of the crime is a total stranger to the offender; and
- D. The offender has been previously convicted of a crime under chapter 11 or previously convicted in another jurisdiction for conduct substantially similar to that contained in chapter 11.

A court may also utilize any other factor found by that court to increase the risk of repeat offenses by a person convicted of a crime under chapter 11.

MACDL, MPA and ACLU support Part E.

The committee asked for information on predicting recidivism of sex offenders. The text excised from an email from Dr. Debra Baeder, clinical director of the DHHS Office of Behavioral Health reads:

Here is what I have ascertained about current thinking in the empirical literature about victim/perpetrator gender in sex offenses:

- Most sex offenders are male. There is much more research with respect to male sex offending than female sex offending. I presume the sentencing enhancements apply to both male and female offenders, which could prove problematic. For example sex offense recidivism rates are much lower for female offenders – greatly increasing the risk of misclassifying any given female offender as high risk and therefore subject to sentencing enhancements. Risk factors are also different for female sex offenders, although as I said, less is known about risk factors for female offenders.
- Much of the empirical literature regarding risk factors pertains to male offenders as is true of risk assessment tools.


- That said, most well-respected sex offending risk assessment tools (based almost exclusively on the empirical literature pertaining to men) include having had a male victim...without specific reference to the gender of the perpetrator. Data suggests, however, that having had a male victim is not a proven risk factor for sex offense recidivism for female offenders.
- If one were to dig deeper, what appears to be more robust with respect to future male sex offending is having *exclusively* male victims, especially if the male offender perpetrates against children.

So there is a consensus that either ever having had or having had exclusively male victims is an important risk factor for male sex offender recidivism, but not for female sex offender recidivism. With respect to the sentencing enhancements, I am not sure how that risk factor morphed into the notion that the perpetrator and the victim being of the same gender matters...except that most sex offenders are male and male victims matter. The latter is not the same as the former, particularly when you extrapolate to female sex offenders. Needless to say, there is nothing in the empirical literature to suggest that female sex offense recidivism is in any way tied to having female (same gender) victims.

What is important to note, and may have some bearing on sentencing enhancements, is that sex offending is also related to both general and violent non-sexual recidivism. But none of the static or dynamic risk factors associated with general or violent non-sexual recidivism have much of anything to do with the gender of the victim for either male or female sex offenders.

Bottom line John, for male sex offenders, a risk factor for sex offense recidivism is ever having had or having had exclusively male victims, with the latter being more robust, particularly for those males who perpetrate against children.”

Thank you. Debbie

  
 Debra Baeder Ph.D., ABPP – Forensic  
 Clinical Director  
 Office of Behavioral Health

**INFORMATION REQUESTED:**

1. Regarding Part B, Kathryn Slattery was asked for information on the amount of restitution collected by the Department of Corrections and the prosecutors for which they are unable to locate the victim.

2. Regarding Part E, information was requested from the State Forensic Service regarding the predictive value of the factors listed in Title 17-A, section 257. See above.

## Orbeton, Jane

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**From:** Kathryn M Slattery <kmslattery@yorkcountymaine.gov>  
**Sent:** Friday, March 26, 2021 12:29 PM  
**To:** Orbeton, Jane  
**Subject:** Unclaimed restitution - LD 536

Hi Jane -

Here is what I have so far from the other DA's. I have not heard from District 2 or District 6.

District 8: As for "unclaimed property":  
December 2020 \$2427.36  
March 2021 \$3902.88  
Estimated amount remaining to send \$8000.00

District 5:  
Penobscot approximately \$29,000  
Piscataquis approximately \$2,000

D4 total sent to unclaimed property for 2021=\$7,255.48.

D3: Dormant checks in 2018 (2016/2017/2018) \$4,828.97  
Dormant checks in 2020 (2012, 2013, 2016, 2018, 2019 and some 2020) \$2,146.25

District 7: 0  
District 1: \$6,599.62.

Let me know if you need anything else - and I will forward any additional information I receive.  
Have a great weekend!  
Kathy Slattery

**Policy Decisions Presented by LD 536, An Act to Amend the Maine Criminal Code**  
(Prepared by Jane Orbeton, OPLA Analyst, March 25, 2021)

**1. Part A – Whether to change some mandatory concurrent and nonconcurrent sentencing to discretionary for crimes committed by a person while serving a sentence that includes imprisonment?**

**Under current law**, when a person is being sentenced for a crime committed while the person is serving a sentence for a prior crime, the judge is required to impose a nonconcurrent sentence if the person is in prison and a concurrent sentence if the person is out of prison on a stay.

**In Part A**, CLAC proposes to give the judge discretion to decide concurrent or nonconcurrent if the person is out of prison on a stay.

**In LD 2037 in the 129<sup>th</sup> Legislature** CJPS voted 12-1 to give the judge discretion to decide concurrent or nonconcurrent in all cases.

**2. Part B – Whether to transfer all unclaimed restitution funds to the Treasurer of State to be handled as unclaimed property?**

**Under current law**, when the victim cannot be located, a prosecutor who collects the funds must turn them over to the Treasurer as unclaimed property and, when DOC collects the funds, DOC must petition the court for a decision on disposition of the funds.

**In Part A**, CLAC proposes to require DOC to turn over unclaimed restitution funds to the Treasurer as unclaimed property.

**3. Part C – Whether to separate kidnapping with the intent to commit bodily harm from kidnapping with the intent to commit a sexual assault?**

**Under current law**, because 2 variants of kidnapping are listed together in Title 17-A, section 301, subsection 1, paragraph A, subparagraph 3, a person who commits kidnapping with intent to commit bodily harm is subject to the Sex Offender Management and Notification Act and is ineligible for internment in the veterans' cemetery.

**In Part C**, CLAC proposes to separate these 2 variants of kidnapping so that a person who commits kidnapping with intent to commit bodily harm will not be subject to the Sex Offender Management and Notification Act and will be eligible for internment in the veterans' cemetery. A sex offender would still have to comply with SORNA and would still be ineligible for internment in the veterans' cemetery.

**4. Part D – Whether to narrow the protection from prosecution for a probation violation in an overdose situation under the safe harbor law from protections from any probation violation to protection only from a violation based on drug possession?**

**Under current law**, under the safe harbor law a person who calls for help or overdoses is protected from a probation violation charge if the grounds for the charge are obtained as a result of the call for help or the overdose.

**In Part D**, CLAC proposes to narrow the protection from protection from any probation violation to protection from a probation violation for possession of drugs.

**5. Part E – Whether to repeal the requirement that a judge in a sentencing for a sexual assault must treat as increasing the risk of recidivism the following: that the victim is prepubescent, that the victim and offender are of the same gender, that the victim is a stranger to the offender and that the offender has a prior conviction for a sexual assault?**

**Under current law**, a judge in a sentencing for a sexual assault must treat as increasing the risk of recidivism the following: that the victim is prepubescent, that the victim and offender are of the same gender, that the victim is a stranger to the offender and that the offender has a prior conviction for a sexual assault.

**In Part E**, CLAC proposes to repeal this requirement to treat certain factors as increasing the risk of recidivism.