

The Maine OUI Guide (3rd ed.)

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3rd Edition Foreword

The Maine OUI Guide project is funded by the Maine Bureau of Highway Safety and intended to be a helpful “quick resource guide” for law enforcement officers, hearings examiners, attorneys, judges, and various other stakeholders who are involved in the investigation and enforcement of Maine’s OUI Law.

For ease of reading, the concepts within are presented in chronological order according to how a typical impaired driving case is likely investigated and prosecuted. The “Guide” discusses commonly encountered situations in typical impaired driving scenarios and applies relevant case law, statutory law, law enforcement training material, and empirical data to assist practitioners.

Every reasonable effort has been made to provide accurate annotations, thorough research, comprehensive review, and a proper application of the concepts to facts. However, interpretations of this material differ, and impaired driving jurisprudence is an ever-changing body of law. Readers are encouraged to supplement any conclusions made here with their own independent research. We always welcome any feedback on how this guide can be improved.

Traffic Safety Resources Prosecutor Services are available to any of Maine’s impaired driving stakeholders. Please see our webpage at the Maine Bureau of Highway Safety for program and contact information.

<https://www.maine.gov/dps/bhs/law-enforcement/traffic-safety-resource-prosecutors>

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I. Maine OUI Statutory Scheme

A. Maine's Operating Under the Influence (OUI) Law: 29-A M.R.S.A. §2411

1. Generally

- OUI has two Elements:
 - (1) Operating a motor vehicle
 - (2) While either:
 - (a) Having an excessive BrAC or BAC (at or above 0.08) *or*
 - (b) Under the Influence of intoxicants.

The two prongs of the OUI statute provide two alternate ways to prove the crime. It can be proved using just one prong. Both prongs are not required. Further, the state may plead both prongs in the alternative.

State v. Pickering, 462 A.2d 1151 (Me. 1983): two prongs of OUI (referring to the old OUI law 1312-B) constitute one offense that can be proved two ways. The state may but does not need to elect to pursue either an over .08 case or an under the influence case and may charge in the alternative.

State v. Clark, 462 A.2d 1183 (Me. 1983): "It is now settled that subdivisions A and B of subsection 1312-B(1) [note that this is the old OUI statute] provide alternative means to prove the single crime of operating a motor vehicle while intoxicated."

2. Second Element (in Brief)

Regarding the second element, "*under the influence of intoxicants*" means:

- Being under the influence of alcohol, a drug other than alcohol, a combination of drugs, or a combination of alcohol and drugs. 29-A M.R.S.A § 2401(13).
- "Under the influence" means that someone's mental or physical faculties are impaired "however slightly or to any extent."

State v. Atkins, 2015 ME 162, 129 A.3d 952: To convict a person of OUI, the State must prove two elements beyond a reasonable doubt; (1) the person operated the motor vehicle; and (2) at the time of operation, the person was under the influence of an intoxicant – alcohol, drugs, or another intoxicant – or a combination of intoxicants. A person is under the influence if the person's physical or mental faculties are impaired however slightly or to any extent by the substance or substances the person has consumed. "A person may consume a substance by eating, drinking, inhaling or injecting it."

- Generally, a drug is any substance that can impair the ability of a person to safely operate a motor vehicle. See 29-A M.R.S. § 2401(4).
- A drug includes prescription drugs.

State v. Soucy, 2012 ME 16, ¶¶ 11, 13-14, 36 A.3d 910: “It is no defense that the defendant is under the influence of prescription drugs, even if taken as prescribed.” In this case, erratic operation and behavior, admission of recent ingestion of legally obtained prescription drugs, poor performance on sobriety tests, combined with a urine sample revealing the presence of said prescription drugs was sufficient evidence for the court to find impairment while operating a motor vehicle.

3. Strict Liability

- OUI is a Strict-Liability crime.
- There is no “State of Mind” requirement in the text of the law.

See State v. West, 416 A.2d 5, 8 (Me. 1980): “The crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs does not have a ‘culpable state of mind’ element.”

See State v. Burbank, 2019 ME 37, ¶ 29, 204 A.3d 851 (Alexander, J., concurring): The Law Court specifically did not decide whether ‘auto-brewery syndrome’ could be a successful defense to OUI. Justice Alexander in his concurrence would have decided the case on the grounds that auto-brewery syndrome is not a defense to OUI because involuntary intoxication is not a defense; Justice Alexander cited *State v. West*, 416 A.2d 5 (1980), as authority for his opinion.

4. Motor Vehicle

- Inclusive in the second element of OUI is that operation be of a motor vehicle.
- A motor vehicle is defined by 29-A M.R.S. § 101(42) as:
 - A self-propelled vehicle not operated exclusively on railroad tracks, but *does not* include:
 - A snowmobile as defined in Title 12, section 13001;
 - An all-terrain vehicle as defined in Title 12, section 13001, unless the all-terrain vehicle is permitted in accordance with section 501, subsection 8, or is operated on a way and section 2080 applies;
 - A motorized wheelchair, an electric personal assistive mobility device, or an electric bicycle.
 - An "electric personal assistive mobility device" is “a self-balancing, 2-nontandem-wheeled device, designed to transport only one person, with an electric propulsion system that limits the

maximum speed of the device to 15 miles per hour or less.” 29-A M.R.S. § 101(22-A).

- Note: “electric personal assistive mobility device” was excluded from the definition of a motor vehicle in 2002 by [L.D. 2018](#), Amendment A, of the 120th Maine Legislature, Second Regular Session. Regarding Amendment A, the legislative analyst wrote, “It would define an “electric personal assistive mobility device,” also known as a Segway, and create provisions governing its operation.” Todd Jorgensen, [Bill Summaries: Joint Standing Committee on Transportation, 2nd Regular Session, 120th Legislature](#), 472 (May 2002).
 - “‘Electric bicycle’ means a 2-wheel or 3-wheel bicycle with fully operable pedals and an electric motor of less than 750 watts that is a Class 1 electric bicycle, a Class 2 electric bicycle or a Class 3 electric bicycle as defined in this subsection.
 - A. “Class 1 electric bicycle” means an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling and that ceases to provide assistance when the bicycle reaches a speed of 20 miles per hour.
 - B. “Class 2 electric bicycle” means an electric bicycle equipped with a motor that is capable of being used exclusively to propel the bicycle but is not capable of propelling the bicycle at a speed of 20 miles per hour.
 - C. “Class 3 electric bicycle” means an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling and that ceases to provide assistance when the bicycle reaches a speed of 28 miles per hour.”
- 29-A M.R.S. § 101(22-B).

II. Pre-Arrest OUI Investigation

A. Who Can Arrest for OUI?

- Any Law Enforcement Officer (LEO) may arrest for OUI, whether on duty and in uniform, off duty, or in plainclothes.
 - Law enforcement officer" means any person who by virtue of public employment is vested by law with a duty to maintain public order, to prosecute offenders, to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes, or to perform probation functions or who is an adult probation supervisor. 29-A M.R.S.A. §2 (17).

- Nothing legally prohibits a plainclothes officer from making a traffic stop. However, citizens are not required to stop unless the officer is in uniform. 29-A M.R.S.A. §105 (1).

State v. Lemieux, 662 A.2d 211, 212-13 (Me. 1995): Off-duty officer not in uniform and in his private vehicle flashed his headlights to get a vehicle that was all over the road to pull over. The operator was impaired and later arrested for OUI. The presence or absence of an officer's uniform becomes significant only when the operator of a motor vehicle fails or refuses to stop.

Note: See 29-A M.R.S.A. § 2414(2) for the current failure to stop law: “A person commits a Class E crime if that person fails or refuses to stop a motor vehicle on request or signal of a uniformed law enforcement officer.”

State v. Swiek, 2008 ME 132, ¶ 8, 955 A.2d 255: On-duty, plainclothes officers made traffic stop in unmarked car. The Court said that 29-A M.R.S. § 105 does not condition an officer’s authority to conduct a terry-type stop of a motorist on that officer being in uniform.

- 17-A M.R.S.A. § 15 gives an LEO authority to make a warrantless arrest for OUI (a class D crime) if the crime was committed in the officer’s presence or if there are aggravating factors that make the OUI a felony.
- If the OUI was not committed in the officer’s presence (i.e. a crash investigation), 29-A M.R.S.A. § 2411(4) gives a law enforcement officer the authority to “arrest, without a warrant, a person the officer has probable cause to believe has operated a motor vehicle while under the influence of intoxicants if the arrest occurs within a period following the offense *reasonably likely* to result in the obtaining of probative evidence of an alcohol level or the presence of a drug or drug metabolite.” (emphasis added).
- 17-A M.R.S.A. § 16 does not give a private citizen authority to arrest for misdemeanor OUI.

B. Law Enforcement Training for Impaired Driving Investigation
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1. In General

- Operating Under the Influence cases are technical both to investigate and prosecute. They involve a significant amount of work and resources – especially for a misdemeanor level crime. While specialized training is not required to make an OUI arrest, not all officers have the same level of training in OUI investigation.

- The Maine Criminal Justice Academy’s (MCJA) Basic Law Enforcement Training Program (BLETP) provides foundational training for all its graduates in the *proficiency*¹ of the administration of the Standardized Field Sobriety Tests (SFSTs). It also provides training and *certification*² for Breath Testing Devices. Additionally, there are enhanced impaired driving investigation trainings sponsored by the National Highway Traffic Safety Administration (NHTSA) available that some, but not all, officers utilize.
- An officers training, expertise, or failure to comply with field sobriety testing procedures goes to the weight of the evidence and not to admissibility.

State v. Atkins, 2015 ME 162, 129 A.3d 952: “Our opinions in *Fay* and here establish that, subject to the court’s gatekeeping role established in Maine Rules of Evidence 401 to 403 and 601(b), any deficiencies in an officer’s training or expertise, or failure to strictly comply with prescribed procedures in making observations or conducting tests, go to the weight, but not the admissibility, of the officer’s testimony regarding observations of impairment.”

See **Taylor, Fay**, and **Hinkle** *infra* at J(1).

2. Summary of Typical OUI Investigation Trainings (SFST, ARIDE, DRE, Forensic Phlebotomy, Breath Test Device)

Below is a summary of the typical OUI investigation trainings that are available to officers:

(a) Standardized Field Sobriety Testing Proficiency (SFST)

- The Standardized Field Sobriety tests are a battery of field sobriety tests designed to be administered by police officers in the field to look for scientifically validated manifestations of divided attention impairment. The tests are: The Horizontal Gaze Nystagmus (HGN); the Walk and Turn (WAT); and the One Leg Stand (OLS). The tests evolved from scientific laboratory research conducted by contractors for NHTSA in the late 1970’s and early 1980’s. In addition to the scientific origins, the tests have been shown to be valid and reliable in numerous large-scale field studies conducted throughout the United States since the 1980’s.
- These field studies demonstrate the validity of the standardized field sobriety testing procedure at over 90%. Jack Stuster, *Development of a Standardized Field Sobriety Test Training Management System*, DOT HS 809 400, 1 (U.S. Department of Transportation 2001); Marcelline Burns et al., *A Florida Validation Study of the*

¹ For course completion in the SFST training class at the BLETP, officers are required to show proficiency at the time of training. However, this is a one-time requirement that, unlike a certification, is not renewed on an on-going basis.

² Upon completion of the MCJA breath testing device operation class, officers receive a certification which is good for three years and then expires unless the officer renews it. 29-A M.R.S. §2524 requires officers to have current certification in order to operate a breath testing device.

Standardized Field Sobriety Test Battery (U.S. Department of Transportation 1999); Marcelline Burns, Jack Stuster, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10*. DOT HS 808 839, (U.S. Department of Transportation 1998); Marcelline Burns, Ellen Anderson, *A Colorado Validation Study of the Standardized Field Sobriety Test Battery*, (U.S. Department of Transportation 1995).

- The training's official lesson plan is created by NHTSA and administered in Maine by the MCJA.
- For more on HGN see: [Horizontal Gaze Nystagmus: The Science and the Law](#), A Resource Guide for Judges, Prosecutors and Law Enforcement, 2nd Ed. National Traffic Law Center, February 2021.

(b) Advanced Roadside Impairment Detection and Evaluation (ARIDE)

- The Advanced Roadside Impairment Detection and Evaluation training is another NHTSA sponsored training. This training focuses on introducing the SFST trained and experienced road officer to the foundational concepts of drug impaired driving investigation and enforcement. While not nearly as extensive as the Drug Recognition Program, the ARIDE training focuses on identifying drug impaired drivers through the use of standardized field sobriety tests (as well as other tests) and introduces officers to the concepts and principles of the [Drug Impairment Evaluation Matrix](#).
- This training is conducted all over Maine by the MCJA. SFST proficiency is required for an officer to attend ARIDE Training.
- Reference Materials for the ARIDE training can be found [here](#) at the NHTSA's website.
- The Maine Bureau of Highway Safety also maintains a [reference](#) site on ARIDE training in Maine.

(c) The Drug Recognition Expert Program (DRE)

- The Drug Evaluation and Classification Program (DECP) trains and certifies police officers as Drug Recognition Experts (DREs). DREs are specially trained to investigate suspected drug impaired drivers by recognizing the signs and symptoms of drug impairment. Administered in all fifty of the United States, Canada, Hong Kong, and the United Kingdom by the International Association of Chiefs of Police. The program is support by NHTSA and [implemented in Maine](#) by the MCJA.

- The DRE protocol is a standardized and systematic method of examining a Driving Under the Influence of Drugs (DUID) suspect to determine the following: (1) whether or not the suspect is impaired; if so, (2) whether the impairment relates to drugs or a medical condition; and if drugs, (3) what category or combination of categories of drugs are the likely cause of the impairment. The process is *systematic* because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment. The DRE evaluation is *standardized* because it is conducted the same way, by every drug recognition expert, for every suspect whenever possible.

(i) DREs utilize a 12-step process to assess drug impaired suspects:³

1. Breath Alcohol Test

The arresting officer reviews the subject's breath alcohol concentration (BrAC) test results and determines if the subject's apparent impairment is consistent with the subject's BrAC. If the impairment is *not* explained by the BrAC, the officer requests a DRE evaluation.

2. Interview of the Arresting Officer

The DRE begins the investigation by reviewing the BrAC test results and discussing the circumstances of the arrest with the arresting officer. The DRE asks about the subject's behavior, appearance, and driving.

3. Preliminary Examination and First Pulse

The DRE conducts a preliminary examination, in large part, to ascertain whether the subject may be suffering from an injury or other condition unrelated to drugs. Accordingly, the DRE asks the subject a series of standard questions relating to the subject's health and recent ingestion of food, alcohol, and drugs, including prescribed medications. The DRE observes the subject's attitude, coordination, speech, breath and face. The DRE also determines if the subject's pupils are of equal size and if the subject's eyes can follow a moving stimulus and track equally. The DRE also looks for horizontal gaze nystagmus (HGN) and takes the subject's pulse for the first of three times. If the DRE believes that the subject *may* be suffering from a significant medical condition, the DRE will seek medical assistance immediately. If the DRE believes that the subject's condition is drug-related, the evaluation continues.

4. Eye Examination

The DRE examines the subject for HGN, vertical gaze Nystagmus (VGN), and a lack of convergence.

³ 12 Step Process. International Association of Chiefs of Police. (n.d.). <https://www.theiacp.org/12-step-process>.

5. *Divided Attention Psychophysical Tests*

The DRE administers four psychophysical tests: the Modified Romberg Balance, the Walk and Turn, the One Leg Stand, and the Finger to Nose test.

6. *Vital Signs and Second Pulse*

The DRE takes the subject's blood pressure, temperature, and pulse.

7. *Dark Room Examinations*

The DRE estimates the subject's pupil sizes under three different lighting conditions with a measuring device called a pupilometer. The device will assist the DRE in determining whether the subject's pupils are dilated, constricted, or normal.

8. *Examination for Muscle Tone*

The DRE examines the subject's skeletal muscle tone. Certain categories of drugs may cause the muscles to become rigid. Other categories may cause the muscles to become very loose and flaccid.

9. *Check for Injection Sites and Third Pulse*

The DRE examines the subject for injection sites, which may indicate recent use of certain types of drugs. The DRE also takes the subject's pulse for the third and final time.

10. *Subject's Statements and Other Observations*

The DRE typically reads *Miranda*, if not done so previously, and asks the subject a series of questions regarding the subject's drug use.

11. *Analysis and Opinions of the Evaluator*

Based on the totality of the evaluation, the DRE forms an opinion as to whether or not the subject is impaired. If the DRE determines that the subject is impaired, the DRE will indicate what category or categories of drugs may have contributed to the subject's impairment.

12. *Toxicological Examination*

The toxicological examination is a chemical test or tests that provide additional scientific, admissible evidence to support the DRE's opinion.

- Nothing in or about the DRE protocol is new or novel. The DRE protocol is a compilation of tests that physicians have used for decades to identify and assess alcohol and/or drug-induced impairment.
- The Drug Recognition Expert Manuals can be found [here](#); Additionally, the Maine Bureau of Highway Safety also Maintains a reference site of DRE training and certifications [here](#).

(d) Maine's Law Enforcement Forensic Phlebotomy Program

- Maine's Law Enforcement Forensic Phlebotomy Program is designed to train police officers in the skill of venipuncture to collect blood to be analyzed for forensic purposes.
- Modeled after Arizona's [Law Enforcement Phlebotomy](#) program, [Maine's program](#) stresses quality training in an educational setting and provides officer candidates with clinical opportunities.
- The question of admission of blood testing results from a law enforcement forensic phlebotomist is not directly addressed by the Maine Courts. An unpublished decision from Cumberland County regarding admission from a draw by a Maine Paramedic may be instructive. That case follows.

State of Maine v. David A. Smith, No.CR-08-7537, ¶¶ 15-15 (Me. Sup. Ct., Cum. Cty., Jun. 15, 2009): The Superior Court (Cumberland County, *Crowley, J.*)" found:

- (i) A paramedic was a qualified person under 29-A M.R.S §2524(1) due to his demonstrated competence in the field of venipuncture as a result of almost fifteen years of training and experience in the field;
- (ii) The law court has reiterated over the years that the legislature has established a firm policy of admissibility of blood-alcohol tests; and
- (iii) Even if the State did not comply with the statutory language, without any evidence of noncompliance beyond this technical noncompliance, the Court will admit the evidence of the blood test given the legislative policy to admit such tests in OUI cases.

(e) Breath Test Device Certification Training (BTD)

- The Breath Testing Device Certification training is required according to statute to qualify a person to collect an evidential breath sample using the Intoxilyzer instrument. The training is typically a two-day long class (actual course length may vary according to class size) that covers: the Intoxilyzer 8000 and 9000's instrument components; the concepts of breath testing, the actual testing procedures; the instrument specifications and messages and the legal and administrative procedures. An officer must complete a series of practical and written examinations to demonstrate competency on the Intoxilyzer in order to earn certification. That certification is good for three years. There is no certification grace period in Maine.
- The Maine Bureau of Highway Safety is responsible for the oversight of blood and breath testing in the State of Maine and owns all of the Intoxilyzer instruments; the Department of Health and Human Services, Health and Environmental Testing

Laboratory manages the testing programs, and the Maine Criminal Justice Academy is responsible for implementing the training and certification on these devices. 29-A M.R.S. §2524.

- The training’s official lesson plan was created by the MCJA using a group of subject matter experts from various agencies including: The Health and Environmental Testing Lab, The Maine Criminal Justice Academy, The Maine State Police, The Maine Bureau of Highway Safety, and others.
- More information of the BTD program can be found on the [Maine Bureau of Highway Safety’s](#) website.

C. Where and When Can a Law Enforcement Officer Make an Arrest for OUI? Territorial Applicability, Jurisdiction, and Time

1. Territorial Applicability

- There are no geographical restrictions on OUI within the State of Maine (i.e., the operation does not have to occur on a public way or even on a way to be a crime. An OUI arrest can be made anywhere within the State provided all the elements are met).
- Unlike *most* other 29-A violations (which can only be enforced on a public way) OUI is enforceable anywhere in the State including private roads, driveways, etc. *Compare, e.g.,* 29-A M.R.S. § 2411(1-A) (A) (no requirement that the operation must be on a public way), *with* 29-A M.R.S. 2557-A(1)(A) (“Operates a motor vehicle on a public way”) and 29-A M.R.S. 2101-A (“A person who knowingly authorizes . . . a vehicle . . . on a public way”); *see also State v. MacDonald*, 527 A.2d 758 (Me. 1987): (interpreting “operation” under the prior OUI law to include a private way; not that this is a different definition of operation than is in today’s law).

2. Jurisdictional Considerations

- Typically, LEOs arrest OUI offenders only within their respective jurisdiction, and, typically, LEOs are only sworn in within the jurisdiction where they work. Thus, a municipal law enforcement officer would have arrest powers only within their respective municipality; a county LEO has arrest powers only within the county where they are employed; while a state officer has statewide enforcement powers. *See* 30-A M.R.S. § 2671(2); 30-A M.R.S. § 404; 25 M.R.A. § 1502.
- However, there are several exceptions to the jurisdictional limits of a municipal officer or county deputy: (1) instances of mutual aid (one jurisdiction assisting an outside jurisdiction upon request) (30-A M.R.S. § 2674); (2) fresh pursuit (occasions where the officer develops suspicion in their respective jurisdiction but does not make the traffic stop until traveling into another jurisdiction) (30-A M.R.S.A. § 2671(2)(E) and 30-A

M.R.S. § 404); (3) officers who are sworn in to multiple jurisdictions, including following the provisions of 30-A M.R.S. § 2674 to obtain county-wide jurisdiction; (4) OUI felonies occurring in the officer's presence when the arrest is made as a private citizen (17-A M.R.S.A. 16 (1)(B)); and (6) "jointly planned collaborative activity" meeting the requirements of 30-A M.R.S. § 2674.

- Furthermore, the Law Court has upheld extraterritorial traffic stops when the officer acted reasonably in the situation.

State v. Jolin, 639 A.2d 1062, 1064 (Me. 1994): Evidence from extra territorial arrest based on probable cause not excluded where officer's actions were reasonable under the circumstances.

State v. Menard, 2003 ME 69, 822 A.2d 1143: The Court held that a Brunswick officer was justified in stopping a vehicle "in Topsham for suspicion of operating under the influence in Brunswick after observing suspicious operation in both municipalities, even though the most incriminating observations were made in Topsham." *Id.* ¶ 12. The officer requested a Topsham officer respond to his location, but then determined that the operation was so bad the driver could cause an accident, so the officer stopped the vehicle and approached the driver. The Topsham officer arrived about five minutes later and ultimately arrested the defendant for OUI.

State v. Turner, 2017 ME 185, 169 A.3d 931: The Court held that an officer acted reasonably when he legitimately traveled outside his jurisdiction and then observed another vehicle operating erratically outside his jurisdiction and stop in a parking lot, stopped to talk to the driver and then summoned an officer from the jurisdiction. The Court held this was reasonable because the officer did not intentionally disregard his territorial limits in an attempt to ferret out crime, therefore the exclusionary rule does not apply to exclude the evidence of the stop.

3. When May an Officer Arrest for OUI?

- OUI is generally a Misdemeanor however it does not need to occur in the presence of a law enforcement officer for an arrest to take place.
- "A law enforcement officer may arrest, without a warrant, a person the officer has probable cause to believe has operated a motor vehicle while under the influence of intoxicants if the arrest occurs within a period following the offense reasonably likely to result in the obtaining of probative evidence of an alcohol level or the presence of a drug or drug metabolite." 29-A M.R.S. §2411(4).

D. Operation as an Element of the Crime of OUI

1. In General

- The term “operation” is used in OUI jurisprudence both to signify the *element of operation* and to refer to *how* a vehicle was operated. Regarding proof of the element of OUI, the State must show only that the defendant operated the vehicle. It does not matter how the defendant operated the vehicle (i.e., the quality of the operation), only that the motor vehicle was operated by the defendant. The quality of operation will be discussed in Section E, below.
- *State v. Sullivan*, below, interprets the term operation, though it was so doing under the older OUI statute.

State v. Sullivan, 146 Me. 381, 384, 82 A.2d 629, 630–31 (1951): “According to popular acceptance, the meaning of the term ‘to operate a motor vehicle’ is the same as to ‘drive’ it. It usually means that a person must so manipulate the machinery that the power of the motor is applied to the wheels to move the automobile forward or backward.”

- For OUI and other “major offenses,” to “operate” is both to do it and to attempt to do it. 29-A M.R.S. § 2401(6) (“‘Operating,’ in any form, means operating or attempting to operate a motor vehicle.”).
- Further, a statement by a defendant that they were the operator is generally admissible and is, alone, sufficient proof of operation. 29-A M.R.S. § 2431(4).

Attempted operation, statements of operation, and proof of operation through circumstantial evidence are discussed in further detail below.

2. Attempted Operation

- In *Sullivan*, the Law Court expressly required proof of the elements of attempt that are currently required under Maine statutes: (1) intent to commit the crime, and (2) a substantial step towards completion. *See Sullivan*, 146 Me. at 384, 82 A.2d at 630-31; 17-A M.R.S. § 152.
- *Sullivan*, however, predates the 1993 definition of operation, which includes “attempting to operate.” That definition is: “Operating in any form means operating or attempting to operate a motor vehicle.” 29-A M.R.S.A. 2401(6).
- The Law Court followed the same framework, using the current definition of operation, in *State v. Deschenes* 2001 ME 136, ¶ 9, 780 A.2d 296 (“To support a finding of guilty of attempted OUI, therefore, the State must prove that the defendant took a substantial step toward the operation of a motor vehicle with the intent to operate that

vehicle.”).

- Thus, with the intent to operate, a suspect who takes a substantial step towards operation has *constructively operated* for purposes of 29-A M.R.S.A. § 2411. Here, *Deschenes* is illustrative:

State v. Deschenes, 2001 ME 136, ¶ 10, 780 A.2d 295: An officer’s observation of the defendant’s left hand on the steering wheel, his feet on the floor by the pedals, and his right hand attempting to insert a key into the ignition while saying, “I was just leaving” *is sufficient* to support a finding that Deschenes took a substantial step toward operating his vehicle and had the intent to drive.

3. Statements of Operation and Other Circumstantial Evidence:

- Operation (the element) can be proven by direct or circumstantial evidence. Typically, direct observations of the operation (by the officer or a witness) satisfies this element. However, the element of operation (even if not directly witnessed) may be proven through the attendant circumstances.
- Such circumstantial evidence can include a voluntary statement by the accused pursuant to 29-A M.R.S.A. §2431 (4) indicating they were the operator of the motor vehicle in question.
- 29-A M.R.S.A. § 2431 (4) “A statement by a defendant that the defendant was the operator of a motor vehicle is admissible in a proceeding . . . if it is made voluntarily and is otherwise admissible under the United States Constitution or the Constitution of Maine. The statement may constitute sufficient proof by itself, without further proof of corpus delicti, that the motor vehicle was operated by the defendant.”

State v. Shellhammer, 540 A.2d 780, 782 (Me. 1988): Holding a prior version of section 2431(4) to be a constitutional exercise of the Legislature’s power.

State v. Hayes, 675 A.2d 106 (Me. 1996): The Court held that there was sufficient evidence to convict the defendant of OUI based on the following facts: the defendant’s vehicle was driven into a ditch for no apparent reason and no sign the driver attempted to avoid the crash, no one else was in the vicinity of the crash, the passenger area was in disarray indicating no one was sitting there, the defendant appeared to be intoxicated, def. initially admitted to driving (but then changed his story), and the def. admitted to drinking too much.

State v. Burgess, 2001 ME 117, ¶ 14, 776 A.2d 1223: Concluding that an admission to driving on a public way was sufficient evidence to support a guilty verdict on a habitual offender charge.

State v. Deschenes, 2001 ME 136, ¶¶ 7-8, 780 A.2d 295: for an OUI committed shortly before the attempted OUI discussed above, the only proof of operation was Deschenes statement that he operated. This, the Law Court found, was sufficient under 29-A M.R.S. § 2431(4) and *Shellhammer*: “Deschenes's admission alone was therefore sufficient for the jury to find the element of operation proven for the May 26 offense.”

For general circumstantial evidence cases, see the following:

State v. Davis, 483 A.2d 740, 743 (Me. 1984): Upheld a prior Maine statute (the predecessor to 29-A § 2431(4)) that allowed a defendant’s statement about their date-of-birth to be used to prove their date of birth for prosecution for operating after revocation.

State v. Deering, 1998 ME 23, ¶ 13, 706 A.2d 582: Circumstantial evidence may support a criminal conviction.

E. Operation that is Indicative of Impairment

- The term “operation” is used regarding *how* the vehicle is driven. Some operation has been deemed indicative of impairment by the courts. In application, this means that officers who encounter this type of operation have begun collecting some (if not all) of the RAS needed to conduct a stop. Officers may also use their training, subjective knowledge and experience to determine what type of operation is indicative of impairment provided it is objectively reasonable.

1. Cases Where the Law Court Has Deemed the Operation to be Indicative of Impairment

State v. Dulac, 600 A.2d 1121, 1123 (Me. 1992): Noting that an extremely wide turn that leaves the travelled portion of the roadway can be considered erratic.

State v. Burnham, 610 A.2d 733, 735 (Me. 1992): Observations at about 12:45am of the defendant traveling between 10 to 15 mph slower than the speed limit and weaving between the center line and the breakdown lane (but never crossing).

State v. Cusak, 649 A.2d 16, 18 (Me. 1994): Operating below the posted speed limit, repeated drifting, crossing the lane lines.

State v. Bradley, 658 A.2d 236, 238 (Me. 1995): A crash caused by a failure to negotiate a turn with no known environmental factors, coupled with the driver having the smell of intoxicants on their breath is enough to establish probable cause for an OUI arrest.

State v. Webster, 2000 ME 115, ¶ 8, 754 A.2d 976: Concluding that an improper U-turn is a “driving maneuver suggest[ive] of impaired judgment.”

State v. Melanson, 2002 ME 145, ¶ 10, 804 A.2d 394: Speeding, weaving.

State v. Porter, 2008 ME 175, ¶¶ 2-3, 12, 960 A.2d 321: driving onto fog line, then over centerline by one foot, and then onto center and fog lines again (one time each) was sufficient for the stop based on suspicion of OUI.

State v. LaForge, 2012 ME 65, ¶¶ 4-5, 13, 43 A.3d 961: over the course of four miles, the officer observed “six line violations” of varying degrees (two onto yellow line, two of passenger-side tires crossing white fog line, and two of the driver’s side tires crossing the yellow line); this was sufficient for the stop based on suspicion of OUI.

State v. Morrison, 2015 ME 153, ¶¶ 3, 7, 128 A.3d 1060: despite road having potholes, the vehicle’s weaving back and forth and crossing the center of the road followed by the entire vehicle crossing the centerline was indicative of impairment (and sufficient for the stop based upon suspicion of OUI).

See also: The National Highway Traffic Safety Administration’s [The Visual Detection of Drunk Drivers](#), 2010 NHTSA DOT HS 808 677.

DWI DETECTION GUIDE
Weaving plus any other cue: p = at least .65
Any two cues: p = at least .50

PROBLEMS MAINTAINING PROPER LANE POSITION p=.50-.75

- Weaving
- Weaving across lane lines
- Straddling a lane line
- Swerving
- Turning with a wide radius
- Drifting
- Almost striking a vehicle or other object

SPEED AND BRAKING PROBLEMS p=.45-.70

- Stopping problems (too far, too short, or too jerky)
- Accelerating or decelerating for no apparent reason
- Varying speed
- Slow speed (10+ mph under limit)

VIGILANCE PROBLEMS p=.55-.65

- Driving in opposing lanes or wrong way on one-way
- Slow response to traffic signals
- Slow or failure to respond to officer's signals
- Stopping in lane for no apparent reason
- Driving without headlights at night*
- Failure to signal or signal inconsistent with action*

JUDGMENT PROBLEMS p=.35-.90

- Following too closely
- Improper or unsafe lane change
- Illegal or improper turn (too fast, jerky, sharp, etc.)
- Driving on other than the designated roadway
- Stopping inappropriately in response to officer
- Inappropriate or unusual behavior
- Appearing to be impaired

POST STOP CUES p .85

- Difficulty with motor vehicle controls
- Difficulty exiting the vehicle
- Fumbling with driver's license or registration
- Repeating questions or comments
- Swaying, unsteady, or balance problems
- Leaning on the vehicle or other object
- Slurred speech
- Slow to respond to officer/officer must repeat
- Provides incorrect information, changes answers
- Odor of alcoholic beverage from the driver

*p .50 when combined with any other cue:
 • Driving without headlights at night
 • Failure to signal or signal inconsistent with action

The probability of detecting DWI by random traffic enforcement stops at night has been found to be about three percent (.03).

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2. Operation: Not Indicative of Impairment

State v. Caron, 534 A.2d 978, 979 (Me. 1987): A brief, one-time occurrence of a common driving maneuver, not in violation of any traffic law, does not give rise to an objectively reasonable suspicion of criminal activity.

F. Anonymous Tips / Stop Based Upon Registration Check

1. Anonymous Tips

State v. Littlefield, 677 A.2d 1055, 1058 (Me. 1996): An anonymous tip with a vehicle description, plate number, location and direction of travel, along with an officer’s reasonable

basis for a belief that a vehicle did not belong in a driveway it was turning into (registered owner did not live there) was sufficient to provide a constitutional basis for a traffic stop. **State v. Fortin**, 662 A.2d 437, 439 (Me. 1993): Anonymous tips with concrete statements of time, place of occurrence and vehicle description coupled with officer's earlier observation is sufficient basis for suspicion for a stop.

State v. Sampson, 669 A.2d 1326, 1328 (Me. 1996): Tips can have an component of inferential reliability: an anonymous tip that an intoxicated driver had just gone through the Dunkin Donuts drive through, can be inferred to have come from a Dunkin Donuts employee. The specific information of the tip included "a description of Sampson's car, its location, the direction in which it was heading, and the license plate number." This was corroborated by "locating a car matching the description in close proximity to the area where it had been reported within two minutes of receiving the information."

State v. Lafond, 2002 ME 124, ¶¶ 9, 11-13, 802 A.2d 425: Anonymous tips must be reliable; officers must assess the informant's veracity and basis of knowledge; a tipster can be inferentially reliable; an officer can rely on an anonymous tip when there is subsequent corroboration.

State v. McDonald, 2010 ME 102, ¶ 7, 6 A.3d 283: "We have previously held that when an officer makes a traffic stop based on a detailed description of the vehicle and direction of travel and location" there was a sufficient confirmation reliability for the stop. (Citing and referring to *State v. Littlefield*, 677 A.2d 1055, 1058 (Me. 1996), which is noted above).

State v. Wilcox, 2023 ME 10, ¶¶ 12, 14, 288 A.3d 1200: there was RAS to stop a person under the community caretaker function when there was an anonymous tip that a brown Honda sedan had struck something and proceeded to a specific 7-Eleven store, the officer observed a brown Honda sedan at said 7-Eleven, saw that the sedan had "extensive" front end damage, and saw the defendant looking at his tire (before the Defendant starting to walk away and was ordered to stop).

2. Registration Checks

State v. Tozier, 2006 ME 105, ¶ 9, 905 A.2d 836: The law court found that a stop based upon the registered owner of the vehicle being suspended was reasonable when the officer did not have any indications that the registered owner was not, in fact, driving. Specifically, the court said, "[I]t is reasonable to suspect that the driver of a vehicle is its registered owner, absent indications to the contrary."

Kansas v. Glover, 589 U.S. ___, 140 S. Ct. 1183, 1186 (2020): When the officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running a vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

G. What Constitutes a Traffic Stop?

- A traffic stop is “a brief investigatory stop of a motor vehicle” which must be supported by reasonable articulable suspicion. **State v. Porter**, 2008 ME 175, ¶ 8, 960 A.2d 321.
- The Law Court has distinguished situations that are a seizure (e.g., a traffic stop) from those that are not (i.e., not a traffic stop).
- Additionally, both the United States Supreme Court and the Law Court have outlined the authority a police officer has during a traffic stop to direct and control the movements of the driver and passenger. *See infra* at I(1).

1. Not a Seizure

State v. Collier, 2013 ME 44, 66 A.3d 563: The Court held that a trooper did not seize a driver when the trooper followed the defendant as he drove into an empty parking lot, pulled alongside the defendant, rolled his window down and asked him what was going on, therefore the trooper did not need reasonable articulable suspicion.

State v. Moulton, 1997 ME 228, ¶ 9 704 A.2d 361: The Court held that a trooper did not seize a vehicle until the trooper asked for the driver’s license when he observed a car stopped in the roadway and blocking the travel lane, pulled his cruiser alongside the car without activating the cruiser’s blue lights, approached the vehicle and checked if the driver was all right. The Court, noting that the trooper did not block the vehicle from leaving, nor did he activate his blue lights, stated that the trooper’s “status as a police officer did not automatically transform his roadside inquiry into a ‘show of authority’ or a ‘restraint of liberty’ implicating constitutional protections.”

2. Was a Seizure

State v. Patterson, 2005 ME 26, ¶ 14, 868 A.2d 188: Upheld a trial court’s suppression of a stop of a parked vehicle in a University of Maine parking lot. A police officer observed the vehicle parked in a public parking lot for several minutes with the engine running. The officer without RAS, tapped on the window and said, “please roll down the window.” The Court held that “[b]ecause a reasonable person would not feel free to disobey an order from a police officer, [the officer’s] command constituted a seizure, and the evidence obtained thereafter was properly suppressed.”

H. Reasonable Articulable Suspicion for Traffic Stops

- A police officer needs “an objectively reasonable, articulable suspicion that either criminal conduct, a civil violation, or a threat to public safety has occurred, is occurring, or is about to occur” to stop a motor vehicle. **State v. Porter**, 2008 ME 175, ¶ 8, 960 A.2d 321.

- This suspicion must “be more than mere speculation or an unsubstantiated hunch.” *Id.* ¶ 11.
- In OUI cases the Law Court has distinguished cases where an officer has “reasonable, articulable suspicion” (RAS) and where an officer does not as the following cases illustrate:

1. RAS of OUI

State v. Brown, 675 A.2d 504 (Me. 1996): In the early morning hour, crossing the center line, striking the fog line, and the vehicle's very slow speed, were sufficient to find reasonable and articulable suspicion for the stop of the defendant's vehicle.

State v. Brown, 1997 ME 90, 694 A.2d 453: very slow operation of a vehicle (5 MPH in 25 MPH zone), the driver drinking from a silver can, and the driver then furtively attempting to hide the can when observing an officer was sufficient to show reasonable articulable suspicion for an investigatory stop of the vehicle.

State v. Morrison, 2015 ME 153, 128 A.3d 1060: The Court held that observation of a vehicle weaving back and forth, crossing the center of the road, and operating entirely in the opposite lane near the crest of the hill, even considering potholes in the road, was sufficient to establish reasonable, articulable suspicion.

State v. Eastman, 1997 ME 39, ¶ 2, 691 A.2d 179; ***State v. Wood***, 662 A.2d 919, 920 (Me. 1995). Both supporting the conclusion that some actual evidence of impairment or the smell of alcohol is not essential for articulable suspicion of OUI, because articulable suspicion is based on the totality of circumstances.

2. Traffic Infractions

State v. Hill, 606 A.2d 793 (Me. 1992): Held the officer was justified in stopping vehicle for not displaying a rear license plate when he did not observe the unilluminated license plate in the rear window until after the stop. Officer was further justified in ensuring the driver was licensed even after observing the license plate.

State v. Bolduc, 1998 ME 255, 722 A.2d 44: Held that a vehicle traveling 9 MPH above the posted speed limit was a traffic infraction that provided RAS to stop the vehicle.

State v. Webber, 2000 ME 168, ¶¶ 3,7-9, 759 A.2d 724: Stop based upon one brake light being broken or missing was justified; the Maine Motor Vehicle Inspection Manual is a series of rules promulgated by the Chief of the Maine State Police under Title 29-A, and a violation of those rules is a traffic infraction. Said Inspection Manual requires that a vehicle's original lights (including stop lamps) or their replacements be present and functioning; the Inspection Manual further requires that stop lamps emit a red light.

State v. Simmons, 2016 ME 49, 135 A.3d 824: Held that a game warden's uncontroverted observation of a vehicle making an “unnecessarily” wide right turn partially into the oncoming travel lane of an intersecting roadway provided the warden with reasonable articulable suspicion that a traffic infraction had occurred, which was sufficient to stop the vehicle.

State v. Violette, 2016 ME 65, ¶¶ 3-4, 138 A.3d 491: Traffic stop was valid based upon reasonable articulable suspicion of a violation of “29-A M.R.S. § 2079 (2015), which prohibits braking or accelerating that is ‘unnecessarily made so as to cause a harsh and objectionable noise.’”

3. Safety reasons

State v. Pinkham, 564 A.2d 318, 318-19, 320 (Me. 1989): the law court decided that an officer need not observe a traffic infraction or crime to stop a vehicle; instead, an officer could stop a vehicle based upon a reasonable articulable suspicion of safety concerns; it sent the case back to the district court for the lower court to decide whether a stop at 2:00 AM based upon a driver going straight from a right only lane (where a one-way road had three lanes: a left turn lane, a straight lane, and a right turn only lane) was a sufficient safety concern.

State v. Tarvers, 1998 ME 64, 709 A.2d 726: The Court held that an officer who was standing by with minor children on the side of the road, was justified in checking the sobriety of the driver that arrived to drive them home, based on his community caretaking function. “The reasonable suspicion standard can be justified by safety reasons alone if they are based on specific and articulable facts.”

State v. Warren, 2008 ME 154, 957 A.2d 63: Held that an officer had RAS of a violation of law and RAS of a safety concern when the officer observed a vehicle that was recently and illegally parked and observed the driver slumped over in the seat.

State v. Wilcox, 2023 ME 10, ¶¶ 12, 14, 288 A.3d 1200: there was RAS to stop a person under the community caretaker function when there was an anonymous tip that a brown Honda sedan had struck something and proceeded to a specific 7-Eleven store, the officer observed a brown Honda sedan at said 7-Eleven, saw that the sedan had “extensive” front end damage, and saw the defendant looking at his tire (before the Defendant starting to walk away and was then ordered to stop).

4. Line violations

State v. Porter, 2008 ME 175, ¶¶ 2-3, 12, 960 A.2d 321: driving onto fog line, then over centerline by one foot, and then onto center and fog lines again (one time each) was sufficient for the stop based on suspicion of OUI.

State v. LaForge, 2012 ME 65, 43 A.3d 961: An officer was following a vehicle on a curving, hilly road, and observed the vehicle drive onto the centerline twice, then later completely cross the fog line with his passenger-side tires twice, and then completely cross the centerline with his

driver-side tires twice more. The Court held that as a matter of law this was sufficient reasonable articulable suspicion of OUI to stop the vehicle.

State v. Morrison, 2015 ME 153, ¶¶ 3, 7, 128 A.3d 1060: despite road having potholes, the vehicle's weaving back and forth and crossing the center of the road followed by the entire vehicle crossing the centerline was indicative of impairment (and sufficient for the stop based upon suspicion of OUI).

State v. Caron, 534 A.2d 978, 979 (Me. 1987): One-time straddling of the center line for 25 to 50 yards with no oncoming traffic on an early morning "did not give rise to an objectively reasonable suspicion that criminal activity was involved." Trooper had testified that he suspected that the operator was either impaired or asleep.

4. Grounds insufficient for RAS

State v. Nelson, 638 A.2d 720 (Me. 1994): Not enough to entertain a reasonable suspicion of OUI when driver was witnessed consuming one beer over the course of an hour while sitting in the vehicle.

State v. LaPlante, 2011 ME 85, ¶ 22, 26 A.3d 337: The Court held a traffic stop should have been suppressed where a trooper observed one vehicle commit a traffic infraction at an intersection and then stopped another vehicle to inquire of the driver where the first vehicle went. "The investigation of a civil speeding offense [committed by someone else] does not justify the discretionary seizure of a motorist in the absence of reasonable articulable suspicion."

State v. Whitney, 2012 ME 105, 54 A.3d 1284: The Court held the officer did not have RAS for the stop when he pulled over a vehicle 90 minutes after a rollover accident where the driver left the scene and the stop was three to four miles from the scene of the crash. The Court held that the length of time from the accident, the randomness of the stop, the distance from the scene and the relatively minor misdemeanor crime of failing to report an accident, (because there was no evidence that anyone was injured), did not justify the intrusion of the defendant's liberty interests in freedom of movement.

I. Officer's Authority During a Stop or During a Suspect's Flight/Failure to Stop

- After a valid traffic stop, an officer may order the occupants of a motor vehicle.
- However, an officer must have a reasonable articulable suspicion of OUI to require field sobriety testing.
- If a suspect fails to stop for or flees from a misdemeanor or traffic violation stop and enters the suspect's own residence, the officer's ability to pursue in the residence is limited to when exigent circumstances exist. This might change when the suspect commits felonious conduct.

1. Officer's Authority During a Traffic Stop

Pennsylvania v. Mimms, 434 US 106 (1977): Occupants can be arbitrarily ordered out of the car after a valid traffic stop.

Maryland v. Wilson, 519 U.S. 408 (1997): The *Mimms* rule applies to passengers. Held: An officer making a traffic stop may order passengers to get out of the car pending completion of the stop.

However, in order to *require* field sobriety tests, officers must have subjective RAS of impairment that is objectively reasonable. In **State v. Sylvain**, 2003 ME 5, ¶ 18, 814 A.2d 984, the Law Court found that *bloodshot eyes and an admission of recently consuming two beers* was sufficient.

2. Failure to Stop or Flight from Traffic Stop

State v. Trusiani, 2004 ME 107, 854 A.2d 860: an officer was not justified in entering an unlocked garage when he received a report of an erratic driver, located the vehicle driving erratically, but was unable to stop it right away, observed the vehicle in a driveway two or three minutes later and then entered an unlocked garage door to locate the driver.

Lange v. California, 594 U.S. ___, 141 S. Ct. 2011, (2021): pursuit of a fleeing misdemeanor suspect does not always warrant entering their home; the officer pursuing a misdemeanor suspect must have exigent circumstances to enter the home; such exigent circumstances can include the flight but more is required. The court offers some examples of additional exigence, like: "to prevent imminent harms of violence, destruction of evidence, or [continued flight/] escape from the home."

J. Field Sobriety Testing (FSTs)

- An officer must develop RAS of OUI to ask the driver to perform field sobriety tests. "An officer deciding whether or not to ask an operator to demonstrate that the operator is not impaired in any way by the consumption of alcohol or drugs need only entertain a reasonable suspicion that impairment may exist." **State v. Sylvain**, 2003 ME 5, ¶ 16, 814 A.2d 984.
- Although administration of field sobriety tests is a seizure and RAS is required, field sobriety testing is part of an investigatory stop and is not an arrest. See **State v. Little**, 468 A.2d 615 (Me. 1983).
- Field sobriety testing is not a search. It is a "limited investigatory seizure" rendered reasonable, and thus compliant with the Fourth Amendment of the U.S. Constitution, when there is RAS of OUI. In other words, no consent is necessary for the performance of field sobriety testing, and field sobriety testing was admissible when the officer told

the defendant to perform field sobriety testing and “gave [the Defendant] no opportunity to decline.” *See State v. Wilcox*, 2023 ME 10, ¶¶ 16-17, 288 A.3d, 1200.

- Miranda warnings prior to field sobriety testing are not required. *See State v. McKechnie*, 1997 ME 40, ¶ 10, 690 A.2d 976.

State v. Boylan, 665 A.2d 1016 (Me. 1995): The smell of liquor on the defendant’s breath, his glassy and bloodshot eyes, and admission of drinking were sufficient reason to ask the defendant to submit to field sobriety tests.

State v. Simons, 2017 ME 180, 169 A.3d 399: Admission of drinking, fumbling with documents, smell of alcohol, and speeding are enough to support RAS to administer field sobriety tests.

State v. White, 2013 ME 66, 70 A.3d 1226: The Court held that the defendant was subject to an investigatory detention during HGN, not a de facto arrest because the HGN test was reasonable to advance the OUI investigation, the officer did not use blue lights, maintained distance from D, did not use any physical restraint and the entire interaction only lasted only 15 minutes.

State v. Wilcox, 2023 ME 10, ¶¶ 18, 20, 22-24, 288 A.3d, 1200: defendant claimed that there was not RAS of OUI such that an officer could require him to perform field sobriety testing. The court found that there was RAS when there was an anonymous tip of a crash and a potential impaired driver and the officer confirmed the crash, damage to the vehicle, location of the vehicle, and heard the defendant slur his speech.

1. Horizontal Gaze Nystagmus and Impairment Testing

- The Horizontal Gaze Nystagmus Test (HGN) is one of the Standardized Field Sobriety Tests approved by NTHSA.
- HGN is routinely used by police officers in Maine to make arrest decisions in OUI cases and has been upheld by the Law Court as a reliable test for making a probable cause determination and establishing guilt in criminal cases. *See State v. Taylor*, 1997 ME 81, 694 A.2d 907.
- *State v. Taylor*, 1997 ME 81, 694 A.2d 907 is the foundational Maine case that established the reliability of the use of HGN in OUI cases. The Court’s holding established several important principles on HGN testing, including:
 - Judicial notice of HGN’s reliability in making determinations of probable cause for arrest and for purposes of establishing criminal guilt in cases involving operating under the influence.
 - Judicial notice that HGN is caused by central nervous system depressants (such as alcohol).
 - In order to introduce evidence of HGN testing results, a proper foundation must be laid:
 - the officer must be trained in the procedure and
 - the test must be properly administered.

- The HGN test may not be used by an officer to quantify a particular blood alcohol level in an individual case.
- Several subsequent cases refined the holding in Taylor and gave officers and prosecutors more guidance on how to apply Taylor’s holding.

State v. Just, 2007 ME 91, 926 A.2d 1173: Held that the results of an HGN test are admissible only as circumstantial evidence of intoxication or impairment and that “the trial court did not err in allowing the officer to testify that [the defendant’s] performance of the HGN test showed evidence of impairment or intoxication.” Id. ¶ 17.

State v. Fay, 2015 ME 160, ¶ 7, 130 A.3d 364: Failure to follow NHTSA guidelines goes to the weight not the admissibility of the evidence. “A police officer’s failure to strictly adhere to the specific procedures promulgated by NHTSA does not render evidence regarding those field sobriety tests inadmissible or without value in determining whether a suspect is under the influence of intoxicants.”

State v. Hinkle, 2017 ME 76, 159 A.3d 854: An officer’s SFST training at the academy is sufficient training for foundation in HGN in adherence to Taylor.

State v. Simons, 2017 ME 180, 169 A.3d 399: The results of an HGN tests should be admissible if a proper foundation is laid for them. A proper foundation consists of two elements: evidence that the officer who administered the test is trained in the procedure, and evidence that the test was properly administered. (From State v. Taylor). An officer **does not have to be deemed proficient** to meet this requirement.

2. Cases Without Pre-arrest Impairment Testing

- While field sobriety testing (FST) is a standard tool used by officers to conduct OUI investigations, FSTs are not legally required in order to obtain probable cause to arrest a driver for OUI.
- The primary case that establishes this rule is **State v. Webster**, 2000 ME 115, ¶ 8, 754 A.2d 976 (holding an officer had probable cause absent/despite field sobriety testing based on the other observations the officer made about the driver’s impairment). Note: in *Webster*, the trial court found that the defendant “passed” (incorrect terminology) all three field sobriety tests, a finding that was not challenged and therefore accepted at the appeal level.
- The Law Court has decided a few cases that are instructive for officers in making an arrest decision in cases where field sobriety testing is not possible. In these cases, either probable cause for arrest or guilt of the crime of OUI was established from facts absent field sobriety testing.

State v. Webster, 2000 ME 115, ¶ 8, 754 A.2d 976: An illegal U-turn, admission of consuming one alcoholic drink four hours prior, combined with a currently strong smell of alcohol on the suspect’s breath (which could lead a reasonable officer to disbelieve the suspect’s statement of

drinking four hours ago was a cover up for more recent and substantial alcohol consumption) meets the probable cause standard *regardless* of FST evaluation.⁴

State v. Millay, 2001 ME 177, ¶16, 787 A.2s 129: fact of defendant’s refusal to perform field sobriety testing was admissible in trial, in part, because it was nontestimonial (and thus not violative of the 5th Amendment); defendant’s actual statement (the words he used) to refuse the field sobriety testing was likewise admissible as it was not compelled and the defendant was not in custody.

State v. McCurdy, 2002 ME 66, 795 A.2d 84: The court found the following facts were sufficient evidence to support a conviction for OUI: odor of intoxicants; flushed face; bloodshot eyes; admissions of drinking; and testimony from two officers that the defendant appeared to be impaired.

State v. Melanson, 2002 ME 145, 804 A.2d 394: The court found the following facts were sufficient evidence to support a conviction for OUI: speeding and weaving; odor of intoxicants; reddish eyes; uncooperative and refused SFSTs.

K. Probable Cause

- An OUI arrest must be based on probable cause. *See* M.R.S.A. 17-A § 15; M.R.S.A. 29-A § 2411(4).
- “Probable cause exists where facts and circumstances within the knowledge of the officers and of which they have reasonably trustworthy information would warrant a prudent and cautious person to believe that the arrestee did commit or is committing the . . . offense.” **State v. Parkinson**, 389 A.2d 1, 8 (Me. 1978).
- Probable cause is an objective standard, *see State v. Parkinson*, 389 A.2d 1, 8 (Me. 1978), based on what “an ordinarily prudent and cautious officer” would believe to be probable cause, and is not based on an officer’s subjective belief. **State v. Enggass**, 571 A.2d 823, 825 (Me. 1990).
- The “Collective Knowledge Rule” applies in OUI cases. **State v. Flint**, 2011 ME 20, ¶ 11, 12 A.3d 54.
- While there is no black letter law establishing the time frame that chemical testing evidence is available to establish probable cause in an OUI case, Maine does a statutory rule that governs and indicates that an arrest may occur (with PC) at any time following the offence when its reasonably likely to obtain chemical evidence.
 - M.R.S. 29-A §2411 (4) states A law enforcement officer may arrest, without a warrant, a person the officer has probable cause to believe has operated a motor

⁴ Note that while field sobriety tests were conducted in this case, the parties disagreed as to the suspect’s performance, and the suppression court found that the suspect had “passed” all three filed sobriety tests. *State v. Webster*, 2000 ME 115, ¶ 4, 754 A.2d 976.

vehicle while under the influence of intoxicants if the arrest occurs within a period following the offense reasonably likely to result in the obtaining of probative evidence of an alcohol level or the presence of a drug or drug metabolite.

- However, probable cause cannot be based on illegally obtained evidence. See ***State v. Cloutier***, 678 A.2d 1040 (Me. 1996).
- The Law Court has decided several fact-specific cases that give guidance to officers in determining whether they have probable cause to arrest for an OUI offense and when they do not.

1. Objective Standard for Probable Cause

State v. Enggass, 571 A.2d 823, 825 (Me. 1990): The Court held that probable cause is established by an objective standard and not on an officer's subjective belief about the presence of probable cause. An officer arrested a defendant for OUI after making several observations about his intoxication level and conducting several field sobriety tests, including an ALERT breath test (an earlier version of a PBT). The ALERT test results were suppressed, however the Court found that it was irrelevant if the officer "relied upon the breath test results in determining whether he had probable cause to arrest" because the other facts known to him would warrant "the belief of a prudent and cautious person' that defendant was operating under the influence."

2. Illegally obtained evidence cannot form the basis of probable cause

State v. Cloutier, 678 A.2d 1040 (Me. 1996): In this case, an officer arrested a defendant for OUI after conducting a traffic stop that was lacking in RAS. After the defendant bailed out of jail, the officer arrested the defendant a second time when she attempted to move her vehicle. Prior to the second arrest, the officer did not do FST's again or make any other independent observations of intoxication but based the arrest on the probable cause from the first OUI arrest. The Court held the first arrest was illegal because it was based on a traffic stop that was lacking in RAS, and the second arrest was based on information observed by the officer during the first arrest. Because illegally obtained evidence cannot form the basis of probable cause, the second arrest was lacking in probable cause.

3. Facts that are sufficient to establish probable cause for an OUI arrest

State v. Baker, 502 A.2d 489, 491 (1985): following facts were sufficient for probable cause: "A passenger in defendant's automobile lay dead beside the highway. Empty beer bottles littered defendant's car. Defendant smelled of alcohol and admitted to drinking. Defendant displayed slurred speech and bloodshot eyes and had appeared to stagger while at the scene. In addition, Tardif testified that for the purpose of evaluating probable cause, he had inspected the accident scene and had concluded that the accident occurred because defendant's car ran a stop sign."

State v. Enggass, 571 A.2d 823 (Me. 1990): Driving erratically, blood shot eyes, smell of intoxicants, “failing” several field sobriety tests, and an admission to drinking heavily are sufficient for probable cause for arrest.

State v. Boylan, 665 A.2d 1016 (Me. 1995): The smell of liquor on the defendant’s breath, his glassy and bloodshot eyes, and admission of drinking, and the defendant’s performance on the field sobriety tests, one clue on the WAT and one clue on OLS along with poor performance on written alphabet test, was sufficient to provide probable cause for the arrest.

State v. Bolduc, 1998 ME 255, 722 A.2d 44: The Court held that “[i]n the aggregate, the report that a truck with a similar style and color had recently been driving erratically on the same road, the smell of alcohol on [the defendant’s] breath, his admission that he had consumed two beers that evening, his slurred speech and glossy eyes, and his poor performance on a field sobriety test, warranted a reasonable officer to conclude that [the defendant] was driving while intoxicated.” *Id.* ¶ 9.

State v. Webster, 2000 ME 115, ¶ 8, 754 A.2d 976: An illegal U-turn, admission of consuming one alcoholic drink four hours prior, combined with a currently strong smell of alcohol on the suspect’s breath (which could lead a reasonable officer to disbelieve the suspect’s statement of drinking four hours ago was a cover up for more recent and substantial alcohol consumption) meets the probable cause standard *regardless* of FST evaluation.

State v. Flint, 2011 ME 20, 12 A.3d 54: The Court held that officers who observed a motorcycle pull into a parking lot of a closed business near the wood line, observed that his companion motorcyclist was intoxicated, smelled alcohol in the woods prior to locating the driver, and once locating the driver observed he was argumentative and unable to stand without assistance had probable cause to arrest the driver for OUI. *Id.* ¶ 13.

State v. Morrison, 2015 ME 153, 128 A.3d 1060: The Court held observations of an odor of alcohol coming from the driver, the driver’s bloodshot and droopy eyes, his “thick” speech, the driver’s admission of consuming two beers and failure on one of three field sobriety tests, was sufficient to establish probable cause to arrest.

4. Collective Knowledge Rule

State v. Flint, 2011 ME 20, ¶ 11, 12 A.3d 54: probable cause for OUI is determined by considering the facts and circumstances known to all officers (i.e., the Collective Knowledge Rule applies to OUIs).

L. OUI Drugs

- If a driver is impaired by a substance other than alcohol, it is standard practice that a drug recognition expert will conduct an evaluation on the driver to determine if they are impaired and the category of drug causing the impairment. See Nat'l Highway Traffic Safety Admin., Drug Recognition Expert Course, Participant Manual Session 4 p. 3 (2018).
- Maine Statutory Law provides the authority for drug impairment assessments, **29-A M.R.S.A §2525**, and case law has provided further guidance about prescription drug use and chemical testing for DRE assessments.
- A non-DRE officer or even a layperson can testify to their observations of “driver impairment or conduct and results of a field sobriety tests.” *State v. Atkins*, 2015 ME 162, ¶ 16, 129 A.3d 952.

1. Drug impairment assessments: 29-A M.R.S.A. § 2525.

1. Submission to test required. If a drug recognition expert has probable cause to believe that a person is under the influence of a specific category of drug, a combination of specific categories of drugs or a combination of alcohol and one or more specific categories of drugs, that person must submit to a blood or urine test selected by the drug recognition expert to confirm that person's category of drug use and determine the presence of the drug.
2. Admissibility of evidence. If a law enforcement officer certified as a drug recognition expert by the Maine Criminal Justice Academy conducts a drug impairment assessment, the officer's testimony about that assessment is admissible in court as evidence of operating under the influence of intoxicants. Test results showing a confirmed positive drug or metabolite in the blood or urine are admissible as evidence of operating under the influence of intoxicants. Failure to comply with any provision of this section does not, by itself, result in the exclusion of evidence of test results, unless the evidence is determined to be not sufficiently reliable.
 - *State v. Moulton*, 1997 ME 228, 704 A.2d 361: The Court interpreted §2525's reference to a drug impairment assessment to mean an assessment on “drugs other than alcohol”. “Indeed, the Legislature's express inclusion of the words ‘alcohol’ and ‘specific categories of drugs’ [in 29-A M.R.S.A § 2525] indicates that the Legislature intended those words to mean different things.” *Id.* ¶ 16.

State v. Atkins, 2015 ME 162, 129 A.3d 952: To convict a person of OUI, the State must prove two elements beyond a reasonable doubt; (1) the person operated the motor vehicle; and (2) at the time of operation, the person was under the influence of an intoxicant – alcohol, drugs, or another intoxicant – or a combination of intoxicants. A person is under the influence if the person's physical or mental faculties are impaired however slightly or to any extent by the substance or substances the person has consumed. “A person may consume a substance by

eating, drinking, inhaling or injecting it.” *Id.* ¶ 1 n. 1. M.R.S. 29-A §2525 only applies to OUI cases wherein a DRE examines the defendant and §2526 [the statute describing the certification requirements for a DRE] does not limit admissibility of evidence in drug impaired driving cases only to DRE trained officers. Therefore, a non-DRE officer (or even a layperson) could testify to their observations of “driver impairment or conduct and results of a field sobriety test.” *Id.* ¶ 16.

State v. Worster, 611 A. 2d 979 (Me. 1992): Operation indicative of impairment while smoking a marijuana cigarette combined with a “mildly wasted look” and “glassy and baggy eyes” is enough to confirm a conviction for Hunting Under the Influence (which is the same standard as driving under the influence).

2. Prescription Drugs and OUI

State v. Soucy, 2012 ME 16, 36 A.3d 910: Erratic operation and behavior, admission of recent ingestion of legally obtained prescription drugs, poor performance on sobriety tests, combined with a urine sample revealing the presence of said drugs – is sufficient evidence for the court to find impairment while operating a motor vehicle; “It is no defense that the defendant is under the influence of prescription drugs, even if taken as prescribed.” *Id.* ¶ 11.

State v. Curtis, 2003 ME 94, ¶ 3, 828 A.2d 795: The Court held that a driver could not use involuntary intoxication as a defense to OUI when the substance he used was his prescription medication, “[b]ecause OUI is not a crime requiring any specific intent, any intent defense is unavailing. . . . Thus, whether or not [the defendant’s] intoxication was involuntary is irrelevant to the determination of whether he violated the statute.”

3. Chemical Testing and drug impairment testing

Mohamud v. Secretary of State, Decision and Order Rule 80C Appeal, No. AP-21-002, (Andro. Cnty. Me. Sup. Crt August 30, 2021): proof, by preponderance, at BMV hearing that defendant was “impaired by drugs” did not require a blood test showing the active components of THC (blood test showing only the inactive metabolite carboxy-THC was sufficient)

Gilmartin v. Gwadowsky, No. AP-01-23, 2001 WL 1712676 (Me. Super. Aug. 16, 2001) (80 C Appeal): Establishes that if an officer has probable cause to believe the driver is under the influence of drugs other than alcohol, providing a breath sample does not fulfil the requirements of submitting to a chemical test.

“In light of this policy [giving a breath test prior to doing a drug evaluation] and because Officer Campbell believed Gilmartin was under the influence of drugs other than alcohol, the Intoxilyzer was only a component part of one test; to wit, the chemical test.” *Id.* at * 4.

M. Checkpoints

- In *State v. Leighton*, 551 A.2d 116, 119 (Me. 1988), the Court established that “OUI roadblocks are constitutional provided that officer discretion is limited, the intrusion on individual privacy interests is minimized, and a strong governmental interest is promoted.” *Id.* at 117.
- The Court applied a balancing test established in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), which “holds that in each case the determination whether a stop constitutes a constitutionally unreasonable seizure requires ‘balancing [the] intrusion on the individual’s Fourth Amendment interests against [the] promotion of legitimate governmental interests.’” *Id.* at 117.
- The Court used the following factors in evaluating the reasonableness of a roadblock stop:
 - “(1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.” *Id.* at 118. See also *State v. Kent*, 2011 ME 42, 15 A.3d 1286; *State v. Bjorkaryd-Bradbury*, 2002 ME 44, 792 A.2d 1082; *State v. McMahon*, 557 A.2d 1324 (Me. 1989).
- Maine statutory law also establishes that it is a felony to pass a roadblock in **29-A M.R.S.A. §2414. Refusing to stop for a law enforcement officer**. The statute defines ‘Roadblock’ as “a vehicle, a physical barrier or other obstruction placed on a way at the direction of a law enforcement officer.” **§2414 (1)(A)**. The statute makes it a Class C crime if a driver “without authorization, operates or attempts to operate a motor vehicle past a clearly identifiable police roadblock.” **§2414 (4)**. If the driver causes serious bodily injury to another person while passing or attempting to pass a roadblock, the statute considers this to be an aggravating factor and elevates it to a Class B crime. **§2414 (7)**.

State v. McMahon, 557 A.2d 1324 (Me. 1989): The Court held that a roadblock did not violate the defendant’s Fourth Amendment rights because the roadblock was well lit, was supervised, followed unwritten procedures established by the Chief of Police, the officers stopped the first four cars that approached the roadblock and did not have discretion over which vehicles were stopped and which were not, and the brief detention lasted only one to two minutes. “[W]e

reject McMahon's contention that the absence of written procedures, of advance notice to the public and of a showing by the State that there was no better way to apprehend an OUI driver renders this roadblock unreasonable." *Id.* at 1325–26.

State v. Lear, 1998 ME 273, 722 A.2d 1266: Conducting a U turn before entering a roadblock is not, by itself, sufficient to establish a reasonable articulable suspicion of criminal activity necessary to support a traffic stop.

State v. Kent, 2011 ME 42, 15 A.3d 1286: The Court vacated a trial court's order denying a motion to suppress a stop conducted at a roadblock because the State failed to meet its burden to demonstrate that the roadblock stop was actually planned or executed in a manner consistent with the Fourth Amendment.

State v. McPartland, 2012 ME 12, 36 A.3d 881: The Court upheld a stop of a vehicle at a roadblock when an officer participating in a roadblock at 2 A.M. observed a vehicle approach the roadblock at a high rate of speed and the driver admitted to consuming one drink and then referred the driver to a secondary screening area.

- **Caution:** The case was decided by a 4-3 decision. The dissent clarified that the objectively reasonable belief must be that the driver **is impaired**, not that the driver *has been drinking*. The dissent did not think the officer had an objectively reasonable belief in this case. Both the Court's and dissent's analysis seem to suggest that admission of drinking **alone is not sufficient** to provide an objectively reasonable belief of impairment to support sending a vehicle to secondary screening.

III. Post-Arrest OUI Investigations

A. Statutory Requirements for Chemical Testing

- Chemical testing is usually the final piece of the OUI investigation. The result of a chemical test provides the prosecutor with evidence to bolster the officer's observations of impairment.
- There are three types of chemical tests used in Maine: blood, breath and urine. **29-A M.R.S.A. §2401(3)**: "Chemical test" or "test" means a test *or tests* used to determine alcohol level or the presence of a drug or drug metabolite by analysis of blood, breath or urine.
- Chemical tests on blood and urine specimens must be submitted to the Department of Health and Human Services or to a qualified laboratory "for the purpose of conducting chemical tests to determine alcohol level or the presence of a drug or drug metabolite." **29-A M.R.S.A. § 2524 (4)**.

1. Who can collect samples:

- **Blood:** Specific medical personnel or any person whose “whose occupational license or training allows that person to draw blood samples” may draw a blood specimen. **29-A M.R.S.A. § 2524 (1).**
- **Breath:** “A person certified by the Maine Criminal Justice Academy as qualified to operate an approved self-contained, breath-alcohol testing apparatus may operate an apparatus to collect and analyze a sample specimen of breath.” **29-A M.R.S.A. § 2524 (3).**
- **Urine:** “A law enforcement officer or law enforcement agency employee of **the same sex** as the person providing the sample, or a health care practitioner, may observe the giving of a urine sample,” and the sample “may be collected only within a law enforcement or health care facility.” **29-A M.R.S.A. §2527(2).**

2. Equipment for taking specimens

- **Blood or urine:** collection kits having a stamp of approval affixed by the Department of Health and Human Services may be used in taking a sample specimen of blood or urine. Blood or urine samples may also be taken in any collection tube of the type normally used in a qualified laboratory, which is defined in Section 2524, paragraph 2. **29-A M.R.S.A. § 2524(5).**
- **Breath:** Approved breath-alcohol testing apparatus must have a stamp of approval affixed by the Department of Health and Human Services after periodic testing. That stamp is valid for no more than one year. **29-A M.R.S.A. § 2524(5).**
 - In ***State v. Adams***, 2014 ME 143, 106 A.3d 413, the Court held that if a defendant could make an initial showing of the reliability of a PBT, the defendant could admit the PBT test result to challenge the intoxilyzer result. The state could then offer evidence to show the PBT test was unreliable.

B. Case Law on Chemical Testing

The United States Supreme Court has defined several important rules for chemical testing.

First, chemical tests for impaired driving investigations **are searches** for purposes of the Fourth Amendment:

- ***Birchfield v. North Dakota***, 579 U.S. 438, 136 S. Ct. 2160 (2016), held that under the Fourth Amendment both breath and blood tests are searches. *See also* ***Vernonia School Dist. 47J v. Acton***, 515 U.S. 646, 652 (1995); ***Skinner v. Railway Labor Executives' Assn.***, 489 U.S. 602, 616–617 (1989); ***Schmerber v. California***, 384 U.S. 757, 767–768 (1966).
- ***Skinner v. Railway Labor Executives' Ass'n***, 489 U.S. 602 (1989), held that urine tests are searches. “Because it is clear that the collection and testing of urine intrudes upon

expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment.” *Id.* at 617.

Second, *Birchfield* established a **categorical rule** that breath tests are permissible as a **search incident to an arrest** for impaired driving. *Birchfield*, 579 U.S. at 474-76, 136 S. Ct. at 2184-85. *Birchfield* also held while that warrantless breath tests incident to arrest are permitted, warrantless blood tests are not. *Id.* This means an officer need not seek a search warrant prior to obtaining a breath sample from a driver under arrest for OUI.

However, an officer must either seek a search warrant or have a valid exception to the search warrant requirement prior to obtaining a blood test. What is unclear in this decision is whether a search warrant or an exception is required for urine testing or whether a warrantless urine test is permitted under a search incident to arrest. With that said, at least one Maine Superior Court decision has stated that urine testing requires a search warrant or warrant exception (just like blood testing). ***See State v. Wilson***, Order on Motion to Suppress, Docket No. CR-20160638 (Ken. Cnt. Super. Ct. May 15, 2017) (Stokes, J.).

Third, the Court decided two cases on **exigent circumstances** relating to blood testing.

- ***Missouri v. McNeely***, 569 U.S. 141 (2013): The natural metabolism of blood alcohol alone does not establish a per se exigency that would justify a blood draw without a warrant or consent.
 - However, the Court did suggest that the dissipation of alcohol from the blood stream with another factor could constitute exigent circumstances. “We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test.” *Id.* at 153.
- ***Mitchell v. Wisconsin***, 139 S. Ct. 2525, 2539 (2019): The Court held that police may, almost always, obtain from a driver a warrantless blood test to measure the driver's BAC without violating the Fourth Amendment when:
 - police have probable cause to believe a person has committed a drunk-driving offense and
 - the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test.

Also, the Court in *Birchfield* continued to uphold implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply with chemical testing. *Birchfield*, 579 U.S. at 474-76, 136 S. Ct. at 2184-85.

1. Breath

- While *Birchfield* and *Skinner* both established that breath testing is a search under the Fourth Amendment, the Maine Law Court has decided several cases establishing further rules for breath testing.

State v. Pickering, 462 A.2d 1151 (Me. 1983): accuracy and reliability of breath testing goes to weight and not admissibility at trial.

State v. Ifill, 560 A.2d 1075 (Me. 1989): The Court determined that the result of a breath test performed by use of an Alcohol Level Evaluation Roadside Tester (ALERT) device [an earlier version of a PBT] was inadmissible at an OUI trial. The Court held that accuracy of the test was not reliable and unlike other field sobriety tests that allowed the jury to make their own determination the ALERT device was not accurate and without an accurate result it was useless information for the jury. *Id.* at 1077.

State v. Anderson, 1999 ME 18, 724 A.2d 1231: “Due process under the Maine Constitution does not require preservation of a second breath sample.” *Id.* ¶ 9. (adopted the holding in *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) where the Supreme Court ruled that due process under the United States Constitution does not require the preservation of breath samples for breath analysis test results to be admissible in cases involving operating under the influence charges).

State v. Bavouset, 2001 ME 141, 784 A.2d 27: There is no right to counsel prior to administration of breath test. *See also State v. Jones*, 457 A.2d 1116, 1120 (Me.1983)

State v. Dominique, 2008 ME 180, 960 A.2d 1160: Statements made as a part of the routine processing required for administration of the breath test do not constitute interrogation for purposes of *Miranda*. In this case the Court held that the officer’s response, “No?” to the suspect’s voluntary statement that breath alcohol analysis would not work on him, did not constitute interrogation for *Miranda* purposes, but rather were administrative in nature and purpose and amounted to a follow-up question for clarification purposes. *Id.* ¶ 15.

State v. Tozier, 2015 ME 57, 115 A.3d 1240: The Court held that a “qualified witness” in 29–A M.R.S. § 2431(2)(D) is the officer who administered the test. In order to admit evidence of the results of a breath test, the State is **not required** to produce an **expert witness** to testify the functioning of the self-contained breath-alcohol testing equipment so long as the breath-alcohol testing equipment bears the required stamps of approval.

3. Blood

- The Maine Law Court cases on blood testing generally deal with one of the exceptions to the search warrant requirement, either consent or exigent circumstances. In the cases involving consent the Law Court decided whether the consent was voluntary. After the

U.S. Supreme Court’s decision in *Missouri v. McNeely* the Law Court decided three cases that established guidelines for officers in determining when exigent circumstances exist to obtain a blood sample without a search warrant.

- Perhaps the most noteworthy case decided post-*Birchfield/McNeely* is ***State v. Weddle***, 2020 ME 12, 224 A.3d 1035. In *Weddle*, the Court held that 29-A M.R.S.A. § 2522 was unconstitutional and overturned *State v. Cormier*, which had previously upheld the statute. Section 2522 directed police officers to draw blood from every driver involved in a fatal or potentially fatal crash. The Court held this statute violates the Fourth Amendment and police must seek a search warrant or have a valid exception to the search warrant requirement before seeking a blood test for an OUI even if the driver is involved in a fatal crash.

3. Urine

See State v. Wilson, Order on Motion to Suppress, Docket No. CR-20160638 (Ken. Cnt. Super. Ct. May 15, 2017) (Stokes, J.): found that urine test, because of the intrusiveness of it and the medical information that may be obtained from urine, was more similar to blood and not a valid search incident to arrest. Found, further, that the State had to obtain a warrant or prove a different warrant exception (e.g., consent or exigent circumstances) to obtain a valid, admissible urine sample.

C. Consent

State v. Boyd, 2017 ME 36, 156 A.3d 748: Because consent for a blood test must be voluntary and mere acquiescence to authority is not voluntary, evidence that a subject was cooperative and did not object to the blood draw “does not compel a finding of an objective manifestation of voluntary consent.” *Id.* ¶ 12.

- “[T]he statute [Maine’s ‘implied consent’ law 29-A M.R.S.A. §2521] no longer allows an adjudicator to imply a driver's consent to blood testing based merely on the driver's operation of a vehicle.” *Id.* ¶ 13.
- “To demonstrate that the consent exception to a warrant requirement applies; however, the State must prove, “by a preponderance of the evidence, that an objective manifestation of consent was given by word or gesture.” *Id.* ¶ 10 (quoting *State v. Bailey*, 2012 ME 55, 41 A.3d 535).

State v. LeMeunier–Fitzgerald, 2018 ME 85, ¶ 30, 188 A.3d 183: The Court held that consent to a blood test is valid when given after being read Maine’s implied consent warnings, because the law imposes a mandatory minimum sentence **only after an OUI conviction**, does not criminalize refusing the test, and does not increase a driver’s maximum exposure, reading a person the penalties for not complying with the statute do not invalidate consent.

State v. Ayotte, 2019 ME 61, 207 A.3d 614: The Court held that an OUI defendant who was taken to the hospital was able to make decisions about his medical care, and the officer testified credibly that the defendant signed the waivers knowingly and voluntarily therefore the trial court did not err in admitting the results of the blood test.

State v. Croteau, 2022 ME 22, 272 A.3d 286: consent was knowing and voluntary when a trooper asked defendant, who was receiving treatment at the hospital, if defendant “would be willing to provide some blood;” the defendant was found to be cognizant and coherent (shown via audio/video recording) despite the treatment occurring, and the facts that the informed defendant that the trooper was looking for evidence of impairment, in no way indicated that consent was necessary or mandatory, and had previously read the defendant his Miranda warnings all weighed in favor of consent

Note:

In Croteau, the Law Court, by footnote, referenced some instances that are likely insufficient for consent. They are as follows:

- (1) No consent shown when law enforcement officers were unable to recall how the defendant expressed his consent to testing. *State v. Sherman*, No. CUMCD-CR-17-30124 Unified Criminal Docket (Cumberland Cnty., Feb. 2, 2018).
- (2) No consent shown when, “after multiple unsuccessful efforts to obtain a breath sample for testing, law enforcement incorrectly informed the defendant that he would automatically lose his license if he did not agree to go to the hospital for a blood test.” *State v. West*, No. PENCDCR-19-147 Unified Criminal Docket (Penobscot Cnty., May 29, 2019).
- (3) No consent shown when: “(1) the defendant was under arrest; (2) the officer did not inform the defendant of the right to refuse testing; (3) the officer spoke of the test using mandatory terms, saying the test was “one of the steps [they] ha[d] to take”; and (4) the defendant merely acquiesced by saying, “let’s get this done,” and signing the consent form.” *State v. Veilleux*, No. CUMCD-CR-16-812, 2016 Me. Super. LEXIS 190 (Aug. 8, 2016).

State v. Croteau, 2022 ME 22, ¶137 n.6.

D. Exigent Circumstances

State v. Arndt, 2016 ME 31, 133 A.3d 587: The natural metabolism of alcohol combined with the passage of 90 minutes is exigent circumstances. The officer did not create the exigency.

State v. LeMeunier–Fitzgerald, 2018 ME 85, ¶ 15, n. 6, 188 A.3d 183: exigent circumstances might arise “due to the possible unavailability of a breathalyzer at the hospital, [a suspect’s] observed consumption of a bottle’s worth of pills . . . , and the potential dissipation of the evidence through treatment at the hospital.”

State v. Palmer, 2018 ME 108, 190 A.3d 1009: The Court held that because two and half hours had elapsed since the time of the crash and the defendant was about to go into surgery, the officer had exigent circumstances to obtain a blood sample without a search warrant.

State v. Martin, 2018 ME 144, ¶ 15, 195 A.3d 805: The Court held that exigent circumstances existed when the defendant caused the delay by interrupting the officer as he counted a large sum of money and then belching during three different wait periods. Because the delay was not caused by the officer and one- and one-half hours had passed since the traffic stop, it was “reasonable for the officer to be concerned that further delay would result in the loss of evidence.”

United States v. Manubolu, 13 F.4th 47 (2021): exigent circumstances for a blood draw was shown when “when pressing investigative responsibilities took his and other officers' attention, when he could not reach the on-call AUSAs to begin the telephonic warrant process, when the federal and state warrant procedures were protracted, when he reasonably estimated that the evidentiary reliability of [defendant's] BAC decreased as time wore on, and when health needs and other resource limitations prevented officers from immediately applying for a warrant”; in state courts, this is a persuasive (not binding) case.

E. Implied Consent

- Maine’s law does not imply consent; instead, it creates a duty for drivers to submit to chemical testing upon an officer’s probable cause of OUI. Maine statutory law requires a driver to submit to chemical testing “if there is probable cause to believe [the driver] has operated a motor vehicle while under the influence of intoxicants.” **M.R.S.A. 29-A §2521(1)**. Maine law further gives the officer guidance on which test to utilize. “A law enforcement officer shall administer a breath test unless, in that officer's determination, a breath test is unreasonable.” **M.R.S.A. 29-A §2521(2)**. If the officer finds a breath test is not reasonable, “another chemical test must be administered in place of a breath test.” *Id.* The law does give the driver a choice of using a physician to draw the blood if one is reasonably available. *Id.*
- A driver’s refusal to submit to chemical testing will “be considered an aggravating factor at sentencing if the person is convicted” of OUI as long as the officer first advises the driver of the consequences of the refusal. **M.R.S.A. 29-A §2521(3)**.

Although Maine’s law is named “Implied consent to chemical tests,” **State v. Boyd**, 2017 ME 36, ¶ 13, 156 A.3d 748, established that “the statute [Maine’s ‘implied consent’ law 29-A M.R.S.A. §2521] no longer allows an adjudicator to imply a driver's consent to blood testing based merely on the driver's operation of a vehicle.”

Further, in light of the United States Supreme Court decision in *Birchfield*, the Maine Law Court decided **State v. LeMeunier–Fitzgerald**, 2018 ME 85, 188 A.3d 183, which upheld Maine’s

statutes imposing a duty to submit to testing on drivers and providing for enhanced consequences if the driver did not submit to testing. *Id.* ¶¶ 31 – 32.

The Law Court has decided several cases about **reading implied consent warnings** prior to testing.

State v. Brann, 1999 ME 113, 736 A.2d 251: Court held that not reading implied consent prior to gaining consent for a blood test was not fundamentally unfair and not a violation of due process rights.

State v. Cote, 1999 ME 123, 736 A.2d 262: “In the absence of misleading assurances which may unfairly ‘trick’ the defendant, the failure to warn [while reading implied consent prior to chemical testing] of every consequence of refusal does not violate due process.” *Id.* ¶ 18.

State v. Chase, 2001 ME 168, 785 A.2d 702: A blood alcohol test cannot be suppressed because an officer failed to give the defendant the implied consent warnings.

State v. Bavouset, 2001 ME 141, 784 A.2d 27: Holding that the process was not fundamentally unfair when the defendant was sufficiently informed of the significant negative consequences of refusal and had been correctly informed of the consequences prior to the officer’s uncertain misstatement of the length of incarceration. The Court distinguished this case from its decision in ***State v. Stade***, 683 A.2d 164 (Me. 1996). In *Stade*, the Court upheld the suppression of a blood test because the officer who arrested the defendant misrepresented to the defendant the consequences of refusing the chemical test by telling him he could get a work permit and did not read the defendant the implied consent warnings.⁵ The Court held “the officer’s providing Stade with false information, coupled with the officer’s failure to read the implied consent form, was fundamentally unfair to Stade.” *Id.* at 166. “In contrast, Bavouset was correctly informed about the consequences of refusing the test and was not assured of anything given that [the officer] gave the incorrect information only after some time and with uncertain language.” *State v. Bavouset*, 2001 ME 141, ¶ 6, 784 A.2d 27.

⁵ In 1996 at the time of the Court’s decision in *State v. Stade*, M.R.S.A. 29-A 2521 (3), required reading implied consent to a driver prior to administering a blood test. This law was amended in 1997 to require reading implied consent only if the driver refuses to submit to testing.

F. When does a Driver Fail to Submit to Chemical Testing?

A person's failure "to submit to a chemical test is admissible in evidence on the issue of whether that person was under the influence of intoxicants" unless a law enforcement officer failed to give the warnings required under the implied consent law. **29-A M.R.S.A. §2431 (3)**.

The Court has decided a few cases that demonstrate when a driver fails to submit to chemical testing.

State v. Butler, 667 A.2d 108 (Me. 1995): A motorist's failure to submit to an Intoxilyzer test constitutes a refusal, notwithstanding his willingness to submit to a blood test.

Melevsky v. Sec'y of State, 2018 ME 46, 182 A.3d 731: The Court held that an unequivocal refusal of a breath test and an unclear refusal of a blood test, is a refusal to submit to a chemical test as a matter of law. The Court further held in this case the defendant's election not to withdraw his earlier unequivocal refusal of the breath test even after being read the implied consent form, particularly in view of his "might, might not" attitude toward the blood test that he requested, clearly constituted a "fail[ure] to submit to and complete a test." *Id.* ¶ 12. The Court stated, "Title 29-A M.R.S. § 2521 (2017), as currently written, does not empower a person suspected of operating under the influence to pick and choose that person's preferred method of testing, nor does it require a person to affirmatively and actually refuse both of the available tests before being deemed to have failed to submit to a test." *Id.* ¶ 10 n.2.

G. Miranda Issues

- Police are required to provide Miranda warnings to a person if they are "subject to interrogation while in police custody," **State v. Higgins**, 2002 ME 77, ¶ 12, 796 A.2d 50.
- "The United State Supreme Court has defined 'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Id.* (quoting *Thompson v. Keohane*, 516 U.S. 99, 107, 116 S. Ct. 457, 133 L.Ed.2d 383 (1995)).
- Ordinary traffic stops and field sobriety testing are not considered by the courts to be custodial, nor interrogation, therefore Miranda warnings are not required. See **State v. Lewry**, 550 A.2d 64, 65 (Me. 1988); **State v. McKechnie**, 1997 ME 40, ¶ 10, 690 A.2d 976; **State v. Bragg**, 2012 ME 102, ¶ 13, 48 A.3d 769
- However, some OUI investigations can become custodial based on the circumstances and then an officer must provide Miranda warnings prior to questioning the driver about the crime.

State v. Lewry, 550 A.2d 64, 65 (Me. 1988): An ordinary traffic stop to ask a few questions and conduct field sobriety tests on a driver suspected of OUI does not amount to custodial interrogation so as to require a warning of the driver's rights pursuant to Miranda.

Pennsylvania v. Muniz, 496 U.S. 582, 602-05 (1990): admission during trial of video evidence of post-arrest, custodial field sobriety testing was proper as field sobriety testing was non-testimonial (note also that the Court decided that the officer's questions of "do you understand" the particular field sobriety testing was not interrogation within the meaning of the fifth amendment).

State v. Rossignol, 627 A.2d 524 (Me. 1993): In this case, the Trooper was investigating a crash and the defendant was seated in his cruiser. He asked her questions for 20 minutes and she did not respond to the questions. The Trooper then read the defendant her Miranda rights and she answered questions. The Law Court held the Trooper did not wait long enough after defendant's invoking right to silence (by not answering questions) before he read her the Miranda Warnings.

State v. McKechnie, 1997 ME 40, ¶ 10, 690 A.2d 976: The results of the field sobriety tests are not communicative in nature. They are simply tests designed to reveal a "lack of muscular coordination" that may evidence impairment resulting from the use of alcohol. The tests do not elicit testimony. Because the Fifth Amendment only prohibits the compulsion of testimony, Miranda warnings need not have proceeded the tests.

State v. Millay, 2001 ME 177, 787 A.2d 129: Refusal to submit to FSTs is non-testimonial and is admissible as evidence without violating a defendant's Fifth Amendment rights.

State v. Warren, 2008 ME 154, 957 A.2d 63: Held that FSTs are used to determine probable cause and don't require Miranda warnings.

State v. Dominique, 2008 ME 180, 960 A.2d 1160: Statements made as a part of the routine processing required for administration of the breath test do not constitute interrogation for purposes of *Miranda*: Officer's response, "No?" to suspect's voluntary statement to the effect that breath alcohol analysis would not work on him, did not constitute interrogation for *Miranda* purposes, but rather amounted to follow-up question for clarification purposes, in line with routine processing naturally required for administration of the breath alcohol test. "[T]he officer's conduct did not generate the requirement of *Miranda* warnings because the questions he asked were administrative in nature and purpose. The officer's response, 'No?', was not a departure from the routine processing naturally required for an officer about to administer an intoxilyzer test." *State v. Dominique*, 2008 ME 180, ¶ 15, 960 A.2d 1160.

State v. Prescott, 2012 ME 96, 48 A.3d 218: The Court held that the statements a defendant made to an officer who arrived at her home to investigate a crash were not made while in custody. However, the statements made at the scene of the crash after the officer instructed the defendant to come with him to the scene of the crash were made while the defendant was

in custody and without a valid Miranda warning were made in violation of the defendant's Fifth Amendment rights.

State v. Bragg, 2012 ME 102, 48 A.3d 769: The Court held that Miranda warnings were not necessary because the statements were made during an investigatory detention when an officer questioned a driver at the scene of a crash after he noticed that the driver was exhibiting signs of intoxication, even though she was seated in the officer's cruiser. Further the Court held that the second statement made by the defendant was made in response to the officer's "matter of fact" communication about her BAC which is information she was legally entitled to have under 29-A § 2521(9) and did not constitute a statement reasonably likely to elicit an incriminating response. Importantly, the Law Court, in paragraph 13, also found that even if the defendant were in custody, the alphabet and counting tests would still be permissible because "a defendant's performance on field sobriety tests is nontestimonial in nature."

1. *Miranda* and DRE Evaluations:

State v. Wilson, Order on Motion to Suppress, Docket No. CR-20160638 (Ken. Cnt. Super. Ct. May 15, 2017) (Stokes, J.): the questions posed by the DRE after the defendant chose to invoke *Miranda* were not interrogation within the meaning of the 5th Amendment because the officer had no reason to know that they would invoke an incriminating response. The questions that the DRE asked were only the medical questions and those questions necessary for field sobriety testing (i.e., "do you understand this test as I have explained it to you?"). Note that the court found one of the DRE medical questions to be interrogation. That question was "are you under the care of a doctor or a dentist?" The question was interrogation, the court found, because the defendant had on multiple prior occasions mentioned that he was going to a methadone clinic (and thus under the care of a doctor for addiction), and the officer should have known that such an incriminating response would have been given. **This is persuasive, non-binding authority.**

2. Defendant's Constitutional Rights During Chemical Testing

State v. Jones, 457 A.2d 1116, 1120 (Me.1983): There is no constitutional or statutory requirement for police to give a driver an opportunity to consult with an attorney prior to chemical testing. *See also State v. Bavouset*, 2001 ME 141, 784 A.2d 27.

State v. Allen, 485 A.2d 953 (Me. 1984): Administrative questioning in connection with the enforcement of the implied consent laws is not interrogation as a matter of law. This included an inquiry into whether the defendant will submit to the blood alcohol tests and questions designed to determine whether the defendant understands his duty to submit to the test. "[T]he right to consult with an attorney does not attach when an OUI suspect is read the implied consent form and asked if he understands it." *Id.* at 956.

State v. Lane, 649 A.2d 1112 (Me. 1994): Defendant was not denied due process when she requested a blood test instead of a breath test, and then at the hospital refused consent for the

blood draw. “[T]he right due process affords one who has been arrested for operating under the influence is not the right to have a test sample taken, but only to have a reasonable opportunity to attempt to gather the desired evidence.”

H. Hospital Chemical Tests

- The results of a defendant’s chemical testing at a hospital facility may be admitted at an OUI trial or other proceeding if the test results are both relevant and reliable. **16 M.R.S. § 357.**
- The party offering the test results evidence will have to prove that the results are both relevant and reliable. *See State v. Googoo*, Decision and Order, No. CUM-CR-00-1031 (Me. Super. Ct. 2001) (refusing to admit hospital chemical tests when the state made an insufficient showing of reliability); *State v. Goucher*, Order on Pending Motions, No. CR-2017-1224 (Me. Super Ct. 2018) (admitting the hospital chemical tests and other evidence after finding that the state met its burden to show the testing relevant and reliable).

IV. Secretary of State Administrative Hearings

A. Authority to Suspend Driver’s License for OUI Arrest

The Secretary of State is an administrative agency within the State of Maine that oversees the Bureau of Motor Vehicles. The Bureau of Motor Vehicles is responsible, among other things, for licensing Maine drivers and maintaining driver’s license records. Additionally, 29-A M.R.S.A. §2461 (1) gives the Secretary of State the authority to suspend the right of nonresidents to operate a vehicle in the State of Maine for the same reasons “that action could be taken against a resident owner or operator of a vehicle registered in this State,” which subjects the nonresident to the same penalties as a resident would be subjected. **29-A M.R.S.A. §2461 (1) – (2).**

In order to maintain safety on Maine’s public ways, Maine statutory law provides the Secretary of State the authority to “immediately suspend a license of a person determined to have operated a motor vehicle with an excessive alcohol level,” which is defined as “operating a motor vehicle with an alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath.” **§2453 (1) – (3).** This authority also extends to immediately suspending drivers “determined to have operated a motor vehicle under the influence of drugs.” **§2453-A (4).**

B. Police Report Required

An officer is required to send the Secretary of State a report if he or she has probable cause to believe a person has committed OUI or “has violated the terms of a conditional driver's license, commercial driver's license or provisional license.” **29-A M.R.S. §2481(1)**. This report must be made under oath, i.e., notarized, and contain information that will identify the person who was charged, the reasons for the officer’s probable cause, and either a certification containing the results of the breath test or the information that the person failed to submit to a test. *Id.* “If the alcohol level test was not analyzed by a law enforcement officer, the person who analyzed the results shall send a copy of that certificate to the Secretary of State.” *Id.* This report must be submitted within 72 hours (excluding weekends and holidays), however even if it is filed later than this, “the Secretary of State shall impose the suspension, unless the delay has prejudiced the person's ability to prepare or participate in the hearing.” **29-A M.R.S. § 2481 (2)**.

If the driver is charged with OUI drugs, a drug recognition expert “who has probable cause to believe that a person was operating a motor vehicle under the influence of a specific category of drug, a combination of specific categories of drugs or a combination of alcohol and one or more specific categories of drugs” must submit a report made under oath to the Secretary of State. **29-A M.R.S. § 2453-A(2)**. This report must identify the driver and state the grounds for the drug recognition expert’s probable cause. **29-A M.R.S. § 2453-A(2)(A)–(B)**. Further, “[t]he person who analyzed the drug or its metabolite in the blood or urine” of the driver “shall send a copy of a confirmed positive test result certificate to the Secretary of State.” **29-A M.R.S. § 2453-A(3)**.

“The Secretary of State shall make a determination on the basis of the information required in the report,” which “is final unless a hearing is requested and held.” **29-A M.R.S.A. § 2481(3)**.

C. Hearing Procedures

In the case of an alcohol OUI, the scope of the hearing conducted by the Secretary of State must include whether the driver “operated a motor vehicle with an excessive alcohol level” and whether “[t]here was probable cause to believe that the person was operating a motor vehicle with an excessive alcohol level.” **29-A M.R.S. § 2453(8)**. In the case of a drug OUI the “scope of the hearing must include whether . . . [t]he person operated a motor vehicle with a confirmed positive blood or urine test for a drug or its metabolite” and whether “[t]here was probable cause to believe that the person was operating a motor vehicle while under the influence of a specific category of drug, a combination of specific categories of drugs or a combination of alcohol and one or more specific categories of drugs” and the driver “operated a motor vehicle under the influence of the confirmed drug.” **29-A M.R.S. § 2453-A(7)**. Proof

that a driver “operated a motor vehicle under the influence of the confirmed drug does not require the chemical test to show an *active* drug or drug metabolite.” ***Mohamud v. Secretary of State***, Decision and Order Rule 80C Appeal, No. AP-21-002, (Andro. Cnty. Me. Sup. Ct. August 30, 2021) (finding that a blood test showing only carboxy-THC, an inactive metabolite of cannabis, was sufficient) (emphasis added).

“Evidence admissible in a court under § 2431 [see Prosecutor’s Section below] is admissible in a hearing.” **29-A M.R.S. § 2484(1)**. The evidentiary standard that the Secretary of State uses to make an administrative determination by a preponderance of the evidence. **29-A M.R.S. § 2484(3)**. Further, hearing examiners can rely on hearsay in making a determination, “if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of their serious affairs.” ***D’Auteuil v. State***, No. Civ.A. AP-01-18, 2002 WL 1065583, *1 (Me. Super. Apr. 25, 2002).

1. Decision

The Secretary of State will determine after the conclusion of the hearing and can decide to “rescind, continue, modify or extend the suspension of a license.” **29-A M.R.S. § 2485(1)**. “When a suspension is effective, the Secretary of State shall require that the license be surrendered.” **29-A M.R.S. § 2485(2)**.

“If it is determined after hearing that there was not the requisite probable cause for the required elements of the offense, the Secretary of State shall immediately remove the suspension and delete any record of the suspension and the offense from the record.” **29-A M.R.S. § 2485(3)**.

This factual determination by the Secretary of State is independent of any other factual determination or “adjudication of civil or criminal charges arising out of the same occurrence,” and “disposition of those charges may not affect a suspension ordered by the Secretary of State.” **29-A M.R.S. § 2485(4)**.

D. Administrative Suspensions

1. Notice of Suspension

Once the Secretary of State receives this information from the officer, they must notify the driver of the license suspension, including the effective date, “the reason and statutory grounds for the suspension or revocation,” and that a copy of the police report will be provided upon request. **29-A M.R.S.A. § 2482 (1)(A)–(C), (2)(F)**. The notice must be sent either to the last name and address the driver provided to the Secretary of State, the address provided in the report of the law enforcement officer or served in hand. **29-A M.R.S. § 2482(1)(A)–(C)**. The

suspension or revocation may not be made effective less than 10 days after mailing the notice. **29-A M.R.S. § 2482(4).**

The Secretary of State will also immediately record a driver's suspension for OUI and send the driver written notice when it receives notice from the court. **29-A M.R.S. § 2451(1).**

2. Stay of the Suspension

A person can make a written request to the Secretary of State for a hearing on the suspension within 10 days from the effective date of the suspension. **29-A M.R.S. § 2483(1).** “[T]he suspension is stayed until a hearing is held and a decision is issued. **29-A M.R.S. § 453(5).** The Secretary of State is then required to hold a hearing within 30 days of the request. **29-A M.R.S. § 2483(2).** The stay will be continued if there is a delay in holding the hearing that is not caused or requested by the driver. **29-A M.R.S. § 2483(4).** However, if a delay occurs that is caused by the driver, the stay may be continued once, unless the suspension is due to the driver's failure to submit to a test, then the stay will not be continued, and the suspension will go into effect until the hearing. **29-A M.R.S. § 2483(4)–(4-A).**

3. Period of Suspension

License suspensions for administrative determinations for both an excessive alcohol level and operating under the influence of drugs is the same suspension period as if the person were convicted of OUI. **29-A M.R.S. § 2453(6)(A); 29-A M.R.S. § 2453-A(5)(A).** The period of administrative suspension is deducted from a court-imposed suspension if the suspension is for the same occurrence, or OUI arrest. **29-A M.R.S. § 2403; See also 29-A M.R.S. § 2453 (6)(C); §2453-A(5)(B).** However, the administrative suspension for failure to submit to a test is consecutive to the period of suspension imposed by the court for the same occurrence. **29-A M.R.S. § 2403.**

Upon a conviction for OUI, the Secretary of State shall suspend a driver's license for a minimum period of:

- One hundred fifty days (for a first offense within a 10-year period)
- Three years (for a second offense within a 10-year period)
- Six years (for a third offense within a 10-year period)
- Eight years (for a fourth offense or more within a 10-year period) or
- Ten years, if the person has a prior conviction for a Class B or Class C OUI offense. **29-A M.R.S. § 2451(3)(A)–(E).**
- “[T]he Secretary of State shall impose an additional suspension period of 275 days for any failure to submit to a chemical test or for OUI if the person was operating the motor vehicle at the time of the offense with a passenger under 21 years of age.” **29-A M.R.S. § 2451(5).**

There are enhanced penalties for drivers who hold a school bus operator endorsement and are convicted of OUI. “The Secretary of State shall . . . [p]ermanently revoke the school bus operator endorsement of any person convicted of OUI who operated a school bus . . . during the commission of the offense” **29-A M.R.S. § 2452(1)**. Further, they shall “suspend for a period of at least 3 years the school bus operator endorsement of any person convicted of a first OUI violation.” **29-A M.R.S. § 2452(2)**. Finally, the Secretary of State shall “[s]uspend for a period of at least 6 years the school bus operator endorsement of any person convicted of a 2nd or subsequent OUI violation within a 10-year period.” **29-A M.R.S. § 2452(3)**.

Courts have further outlined the Secretary of State’s authority to impose suspensions and have clarified that it is an administrative action, independent and separate from a judicial court action.

Benedix v. Secretary of State, 603 A.2d 473 (Me. 1992): The Court held that the Secretary of State had a statutory power to suspend a driver’s license based on their records and was **not limited by the actions taken by the court**. In this case the defendant was convicted of OUI and his license was suspended by the court for 90 days on the assumption that he was a first-time offender. The Secretary of State then suspended the defendant’s license administratively for one year because he had a prior conviction for OUI in a 6-year period.

State v. Harris, 1999 ME 80, 730 A.2d 1249: The Court held that if a person is convicted of operating after suspension, when the suspension was for OUI, that conviction stands even if the BMV eventually removes the suspension. The Court stated, “a license suspension remains in effect until the outcome of a hearing, even if the Hearing Examiner decides to remove the suspension after the hearing.” *Id.* ¶ 4. The Secretary of State’s authority to delete any record of a removed suspension from a person’s driving record does not include the authority to render the suspension void *ab initio*[from the beginning]. *Id.* ¶ 4.

DiPietro v. Secretary of State, 2002 ME 114, 802 A.2d 399: The Court held “[t]he recodification of the motor vehicle laws did not alter the law stated in *Benedix*.” *Id.* ¶ 9. Therefore, the Secretary of State had the authority to impose a longer sentence than was imposed by the court.

Gourdouros v. Secretary of State, Bureau of Motor Vehicles, 2006 WL 2959508 (Me. Super. Oct. 12, 2006): The court held that the Secretary of State is required to focus on the number of convictions within ten years not whether the person had convictions for previous offenses at the time a new offense was committed. In this case a driver was arrested for two OUI offenses within a week of each other and had not been convicted of the first OUI at the time of the second OUI offense. The district court imposed sentences on both OUIs as a first offense, while the Secretary of State imposed a second offense suspension on the second OUI conviction.

E. OUI Conditional License Violations

The Secretary of State shall suspend the license of a person who holds a conditional license because of a previous OUI conviction and receives an OUI conviction or the Secretary of State determines “has operated a motor vehicle while having an alcohol level of more than 0.00 grams per 100 milliliters of blood or 210 liters of breath” for a period of one year without a preliminary hearing. **29-A M.R.S. § 2457(1)(A)–(B)**. Furthermore, “[a] person who operates a motor vehicle with a conditional license shall submit to a test if there is probable cause to believe that person holds a conditional license and operated a motor vehicle with an alcohol level of more than 0.00 grams per 100 milliliters of blood or 210 liters of breath. **29-A M.R.S. § 2457(2)**.

A driver can request a hearing in writing and the suspension will be “stayed pending the outcome of the hearing.” **29-A M.R.S. § 2457(4)**. “The scope of the hearing must include whether . . . the person operated a motor vehicle with an alcohol level of more than 0.00 grams per 100 milliliters of blood or 210 liters of breath,” whether “[t]here was probable cause to believe that the person” was so operating and whether “[t]he person held a conditional license.” **29-A M.R.S. § 2457(4)(A)–(C)**.

F. Appeals

“The person whose license is suspended or other party may, within 30 days after receipt of the decision, appeal to the Superior Court. . . . If the court rescinds the suspension, it shall also order the Secretary of State to delete any record of the suspension.” **§29-A M.R.S. § 2485(5)**.

V. Court Cases: Prosecution and Trials

A. Evidence at OUI Trials

Maine has several statutes that particularly relate to proving the crime of OUI during a trial. The primary statute governing OUI evidence at trial is **29-A M.R.S.A. § 2431. Evidentiary rules.**

- **Test results** This subsection simply authorizes that “[t]est results showing a confirmed positive drug or metabolite presence in blood or urine or alcohol level at the time alleged are admissible in evidence.” **29-A M.R.S.A. § 2431(1)**. It further states that the evidence cannot be excluded because of a failure to comply with the implied consent laws, “unless the evidence is determined to be not sufficiently reliable.” *Id.*
 - In addition to the statutory mechanisms that allow for admission of a chemical test, a chemical test – or at least a breath test – is admissible upon a foundational showing of reliability (separate from the statutory provisions),

which showing of reliability may be made through the testimony of the state's chemist alone. *See State v. Beeler*, 2022 ME 47, ¶¶ 13-18, 281 A.3d 637.

- **Use of the analysis of blood, breath and urine**

- A certified or licensed laboratory can issue a certificate on the results of the chemical analysis they conducted on blood, breath or urine that determines the alcohol level or presence or a drug or drug metabolite. **29-A M.R.S.A. § 2431(2)(A)**. Additionally, a person qualified to operate a breath test may issue a certificate stating the results of the analysis. **29-A M.R.S.A. § 2431(2)(B)**.
- A certificate that is issued by either a lab or a breath test operator is prima facie evidence that the materials used were approved by DHHS and were “of a quality appropriate for the purpose of producing reliable test results.” **29-A M.R.S.A. § 2431(2)(C)(1)–(2)**. Further, the certificate is prima facie evidence that the sample is “the same sample taken from the defendant” and the results of the test are what is stated in the certificate. **29-A M.R.S.A. § 2431(2)(C)(3)–(4)**. A certificate is prima facie evidence that a person drawing blood is qualified and used the proper procedure for drawing a specimen. **29-A M.R.S.A. § 2431(2)(E)**.
- The defendant can request “a qualified witness testify to the matters of which the certificate constitutes prima facie evidence” and in that case “the certificate is not prima facie evidence” of the issues about which the defendant requested a qualified witness testify. **29-A M.R.S.A. § 2431(2)(D)**.
 - ***State v. Tozier***, 2015 ME 57, 115 A.3d 1240: The Court held that a “qualified witness” in 29–A M.R.S. § 2431(2)(D) is the officer who administered the test. In order to admit evidence of the results of a breath test, the State is not required to produce an expert witness to testify to the functioning of the self-contained breath-alcohol testing equipment so long as the breath-alcohol testing equipment bears the required stamps of approval.
- **Urine sample**: “Evidence that the urine sample was in a sealed carton bearing the Department of Health and Human Services' stamp of approval is prima facie evidence that the equipment was approved by the Department of Health and Human Services.”
- **Breath Test**: The results of the breath test “is prima facie evidence of an alcohol level,” while evidence that the breath testing equipment had a DHHS stamp of approval “is prima facie evidence that the equipment was approved” by DHHS. **29-A M.R.S.A. § 2431(2)(G)–(H)**. Additionally, “[e]vidence that materials used in operating or checking the operation of the self-contained breath-alcohol testing equipment bore a statement of the manufacturer or of the Department of Health and Human Services is prima facie evidence that the materials were of the composition and quality stated.” **29-A M.R.S.A. § 2431(2)(I)**. Finally, if these requirements are all met, then “[t]he prosecution is not required to produce

expert testimony regarding the functioning of self-contained breath-alcohol testing apparatus before test results are admissible.” **29-A M.R.S.A. § 2431(2)(K)**.

- 29-A M.R.S. § 2431(2)(H) and (I) and 29-A M.R.S. § 2431(2)(K) are evidentiary alternatives. When the state offers expert witness testimony under 2431(2)(K), it does not also need to offer evidence under 2431(2)(H) and (I), which are the statutory provisions allowing for testimony about lab certificates/stickers/stamps to show that the Intoxilyzer and equipment were approved by the lab. **See State v. Beeler**, 2022 ME 47, ¶¶ 13-18, 281 A.3d 637.
 - Admission of a certificate of analysis for a *breath test* does not violate the confrontation clause of the federal constitution because it is instrument generated and “merely ‘reports the results generated by a self-contained breath-alcohol testing [instrument].’” **State v. Beeler**, 2022 ME 47, ¶ 27, 281 A.3d 637.
 - Testimony of the presence of the lab approval sticker on the Intoxilyzer does not violate the confrontation clause because the sticker is nontestimonial. **State v. Beeler**, 2022 ME 47, ¶¶ 23-26, 281 A.3d 637:
 - Samples can be transferred to the laboratory by certified or registered mail and this “complies with all requirements regarding the continuity of custody of physical evidence.” **29-A M.R.S.A. § 2431(2)(J)**.
- **A person’s failure “to submit to a chemical test** is admissible in evidence on the issue of whether that person was under the influence of intoxicants” unless a law enforcement officer failed to give the warnings required under the implied consent law. **29-A M.R.S.A. § 2431(3)**. If this is not admitted into evidence “the court may inform the jury that no test result is available,” however if there is another reason there is no chemical test, “the unavailability and the reason is admissible in evidence.” *Id.*
 - **Statements made by the accused**. First, a person’s statement as to name or date of birth, is admissible and “constitutes sufficient proof by itself, without further proof of corpus delicti.” **29-A M.R.S.A. § 2431 (4)**. Further, “the name or date of birth contained on a driver’s license surrendered by that person” is also admissible. *Id.* Finally, a defendant’s voluntary and otherwise admissible statement “that the defendant was the operator of a motor vehicle ... may constitute sufficient proof by itself, without further proof of **corpus delicti**, that [a] motor vehicle was operated by the defendant.” *Id.*
 - **State v. Davis**, 483 A.2d 740, 743 (Me. 1984): Upheld the Maine statute (prior 29 §2298-B, current statute 29-A § 2431 (4)) that allowed a defendant’s statement about their date-of-birth to be used to prove their date of birth for prosecution for operating after revocation.
 - **State v. Shellhammer**, 540 A.2d 780, 782 (Me. 1988): Holding a prior version of section 2431(4) to be a constitutional exercise of the Legislature’s power.

- **State v. Burgess**, 2001 ME 117 ¶ 14, 776 A.2d 1223: Concluding that an admission to driving on a public way was sufficient evidence to support a guilty verdict on a habitual offender charge.
- **State v. White**, 2013 ME 66, 70 A.3d 1226: The Court held that 29–A M.R.S. § 2431(4) displaced the common law corpus delicti rule and that the defendant’s statements that he drove the vehicle were enough to establish that a crime had been committed.

1. Evidentiary Weight of the Chemical Test

Maine statutory law has defined the following evidentiary weight of different levels of alcohol per 100 milliliters of blood or 210 liters of breath *in the chemical tests*:

- **Level less than 0.05 grams.** “prima facie evidence that that person is not under the influence of alcohol.” **29-A M.R.S.A. § 2432(1).**
- **Level greater than 0.05 grams and less than 0.08 grams.** “it is admissible evidence, but not prima facie, indicating whether or not that person is under the influence of intoxicants to be considered with other competent evidence, including evidence of a confirmed positive drug or metabolite test result. **29-A M.R.S.A. § 2432(2).**
- **Level of 0.08 grams or greater.** In OUI cases, “a person is presumed to be under the influence of intoxicants if that person has an alcohol level of 0.08 grams or more of alcohol.” **29-A M.R.S.A. § 2432(3).**

Confirmed presence of drug or drug metabolite. “If a person has a trace amount of any drug or the metabolites of any drug within the person’s blood or urine in accordance with the drug reporting rules, standards, procedures and protocols adopted by the Department of Health and Human Services, it is **admissible evidence, but not prima facie**, indicating whether that person is under the influence of intoxicants to be considered with other competent evidence, including evidence of alcohol level.” **29-A M.R.S.A. § 2432(4).**

Note: that this statutory provision cannot be used when the OUI charge is based upon being “under the influence” (i.e., an impairment only – not a BAC - case) to allow testimony regarding Widmark formula calculations. See **State v. Souther**, 2017 ME 184, 169 A.3d 927 (affirming trial court’s decision that a defendant charged with “operating a motor vehicle under the influence of intoxicants” could not offer Widmark formula BAC calculations).

B. Forfeiture of Motor Vehicles for OUI

The State can seek forfeiture of a motor vehicle that was used to commit OUI. **29-A M.R.S.A. § 2421**. The law requires that the defendant be the sole owner-operator of that vehicle and the defendant was convicted of OUI **and** “a simultaneous offense of operating after suspension when the underlying suspension was imposed for a prior OUI conviction.” **29-A M.R.S.A. § 2421(1)(A)–(B)**. If another person can satisfy the court that they “had a right to possess that motor vehicle, to the exclusion of the defendant, at the time of the offense, the court will not issue the forfeiture. This was further established in *State v. One Blue Corvette*, 1999 ME 98, 732 A.2d 856, where the Court interpreted 29-A M.R.S.A. § 2421 based on its plain meaning and held that one of the elements the State must prove is that the defendant is the sole-owner operator of vehicle. If someone else is a joint owner of the vehicle, it precludes forfeiture.

Section 2421(2) further authorized a law enforcement officer to seize a vehicle operated by a sole owner when the owner commits OUI by operating under the influence of alcohol and was suspended for a prior OUI conviction. Further paragraph 8 authorizes a law enforcement officer to seize the vehicle without a court order if “[t]he seizure is incident to an arrest with probable cause for an OUI by the sole owner and the officer has probable cause to believe the vehicle is subject to forfeiture” or the vehicle is subject to a prior forfeiture judgement. **29-A M.R.S.A. § 2421(4)(A)–(B)**. The law enforcement agency must store the vehicle until the disposition of the case and maintain records about the vehicle that include whom they received the vehicle from, the authority for holding or disposing of the vehicle, to whom the vehicle was delivered and “[t]he date and manner of destruction or disposition of the motor vehicle.” **29-A M.R.S.A. § 2421 (6)–(7)**.

A motor vehicle that is the subject of lien can still be subject to forfeiture, but the lien holder still can collect their interest in the property. **29-A M.R.S.A. § 2421(3)**.

“At the request of the State, the court may issue, *ex parte*, a preliminary order to seize or secure a motor vehicle subject to forfeiture and to provide for custody.” **29-A M.R.S.A. § 2421(4)**. “The court may issue an order only on a showing of probable cause and after criminal complaints of OUI and OAS have been filed against the owner-operator.” *Id.*

Within 21 days of the seizure, “[a]n officer, department or agency seizing a vehicle shall file a report of seizure with the Attorney General or a district attorney having jurisdiction over the vehicle.” **29-A M.R.S.A. § 2421(7)**. The report must be [l]abeled ‘Vehicle Report’ and include . . . [a]description of the vehicle; [t]he place and date of seizure; [t]he name and address of the owner or operator of the vehicle at the time of seizure; and [t]he name and address of any other person who appears to have an ownership interest in the vehicle.” **29-A M.R.S.A. § 2421 (7)(A)–(D)**.

1. OUI Charging Instrument/Indictment

State v. Keith, 595 A.2d 1019, 1021 (Me. 1991): “When a sentence is imposed pursuant to a statutory provision that provides for an increased maximum sentence, or that limits the discretion of a sentencing court by requiring a mandatory minimum nonsuspendable sentence for a second or subsequent offense, *the prior offense or offenses must be alleged in the charging instrument and proved at trial.*” (emphasis added).

State v. Brooks, 656 A.2d 1205, 1206-07 (Me. 1995): The Court held that it is not necessary to allege the actual date of the prior conviction of a previous OUI, if a charging instrument “contains such plain, concise, and definite allegations of the essential facts constituting the offense as shall adequately apprise a defendant of reasonable and normal intelligence of the act charged, enabling him to defend himself and, upon conviction or acquittal, to make use of the judgment as the basis for a plea of former jeopardy, should the occasion arise.”

2. Motion to Suppress

State v. Maloney, 1998 ME 56, 708 A.2d 277: The Court held the defendant has the burden to prove standing at a motion to suppress; therefore the defendant has the burden to prove they were the person whose rights were violated. The identity of the defendant is not an issue the State must prove at a motion to suppress.

3. Accomplice Liability

State v. Stratton, 591 A.2d 246 (Me. 1991): The Law Court held that a person may be convicted as an accomplice to the crime of OUI.

State v. Perkins, 2019 ME 6, 199 A.3d 1174: The Court held that when a defendant is found guilty of being an accomplice to OUI, “the nondriver defendant's state of intoxication is wholly irrelevant to his guilt under an accomplice liability theory; he can be sober and still be found guilty.” *Id.* ¶ 15. In this case the Court upheld the defendant’s conviction when he was located in the driver’s seat five to ten seconds after the vehicle stopped but claimed that the passenger who was also intoxicated had been driving the vehicle which was registered to the defendant. The State offered two theories of criminal liability, either that the defendant had committed OUI or he was an accomplice to his intoxicated friend committing OUI.

4. Jury Selection

State v. Hemminger, 2022 ME 32, ¶¶ 3, 11-13, 276 A.3d 222: under the federal constitution, a juror was not impliedly biased (to prevent service on an OUI jury) when the juror’s father was injured in accident involving “female drunk driver” fifteen years earlier. The court found that the only two parallels between the current case and the one involving the juror’s father was

that the intoxicated diver was a woman. The juror’s circumstances were not so “extreme or extraordinary” to render it “highly unlikely that the average person could remain impartial.”

5. Concurrent Causation

State v. McLean, 2002 ME 171, ¶ 19, 815 A.2d 799: The Court upheld the trial court’s restricting the defendant from arguing during a trial for aggravated OUI that the passenger’s failure to wear a helmet was a concurrent cause of his injuries and the trial court’s denial of the defendant’s request for jury instructions on concurrent causation. The trial court instead read the statutory definition of causation in 17-A M.R.S.A. § 33 which includes the definition of concurrent causation. The Law Court held that “the victim's failure to wear a helmet was not a concurrent cause that could relieve the defendant of his criminal responsibility because without the occurrence of the motorcycle crash, [the victim] would not have been injured.”

D. Defenses to OUI

- The Law Court has decided several cases outlining the defenses that are available to the crime of OUI and those that are not.

1. Not Available to the Crime of OUI

Mistake of Fact

State v. Poole, 568 A.2d 830 (Me. 1990): The Court held that the mistake of fact defense negates mens rea, which does not need to be proved in an OUI, therefore it not available as a defense to OUI.

Necessity

State v. Poole, 568 A.2d 830 (Me. 1990): The Court held that necessity was a common law defense that was not codified in the criminal code, therefore it is not available as a defense to OUI (nor any other crime).

Mental Abnormality

State v. Griffin, 2017 ME 79, ¶ 14, 159 A.3d 1240: The Court held that abnormal condition of the mind is not a defense that is available for OUI. “Because OUI is a strict liability crime, the State was not required to prove a *mens rea*, and therefore evidence of an abnormal condition of the mind would not have applied here to negate any element of the crime.”

2. Available to the Crime of OUI

Competing Harms

State v. Knowles, 495 A.2d 335 (Me. 1985): The Court stated the competing harms defense is allowed in OUI cases as long as there is evidence to rationally support it.

State v. Poole, 568 A.2d 830 (Me. 1990): The Court held the competing harms defense is available to an OUI charge, but only if it is generated by the evidence.

State v. Caswell, 2001 ME 23, ¶ 12, 771 A.2d 375: The Court held that while the competing harms defense is available in OUI cases, the defense was not generated by the evidence in this case, even when viewed in the light most favorable to the defendant. The defendant testified that she was fleeing a sexual assault even though she drove to a convenience store where two officers were parked, purchased cigarettes and then drove away. “[T]he competing harms justification is not generated because a defendant claims to subjectively believe that a threat of imminent physical harm exists. . . . Instead, we require that for the competing harms justification to be generated, the evidence, viewed most favorably to the defense, must demonstrate ‘as a fact’ that physical harm was imminently threatened.”

State v. Lemieux, 2001 ME 46, 767 A.2d 295: The Court held that to use the competing harms defense the evidence “construed most favorably to the defendant, must be sufficient to make the existence of all facts constituting the competing harms justification a reasonable hypothesis for the fact finder to entertain.” *Id.* ¶ 3. In this case, the testimony that the defendant began driving the vehicle after a female who was driving the vehicle began having a panic attack and needed to get to the hospital, did not constitute testimony that the defendant needed to drive to avoid imminent physical harm to himself or another.

State v. Nadeau, 2007 ME 57, 920 A.2d 452: a competing harms defense was generated when the defendant testified that he, beginning outside of a bar, drove to flee from woman’s boyfriend and the boyfriend’s friends; the state, however, had disproved the defense beyond a reasonable doubt because the defendant drove one mile down Route 1 when he had already escaped the competing harm (the approach of the woman’s boyfriend and presumed subsequent assault) before he even left the parking lot and because the defendant made no use of the alternatives available to him (using his cellphone and honking his horn).

State v. Nobles, 2018 ME 26, 179 A.3d 910 (Me. 2018): where defendant admitted driving prior to a confrontation and denied consuming alcohol at any point, competing harms was unavailable to him as a defense for driving to escape the confrontation (as he had already driven at, presumably, the same or similar impairment level).

Entrapment

State v. Bisson, 491 A.2d 544 (Me. 1985): The Court stated the defense of entrapment is available in an OUI trial if it is generated by the evidence because entrapment does not negate a culpable state of mind but is, instead, a protection against coercive police tactics.

Involuntary Act

State v. Griffin, 2017 ME 79, ¶ 22, 159 A.3d 1240: The Court held that involuntary conduct is a defense that is available for OUI. “Although it is a factually unlikely circumstance that a person in the driver's seat was only operating the vehicle as a result of a reflex, seizure, or some other

act over which the person had no conscious control, it cannot be said that the defense can never apply to OUI.”

Insanity

State v. Griffin, 2017 ME 79, ¶ 9, 159 A.3d 1240: The Court held that the insanity defense is available for OUI. “The defense of insanity does not raise a reasonable doubt as to an element of the crime, but instead excuses a defendant from criminal responsibility even though the State can prove each element of the crime.”

E. Expert Testimony at Trial

State v. Richford, 519 A.2d 193 (Me. 1986): The Court held that in an OUI trial where no BAC level was alleged the District Court did not err in excluding testimony from an expert on the range of what defendant’s BAC could have been at the night of his arrest, because they failed to establish a link between that range and the level of impairment the defendant would have been at that range, which was the essential issue in the case.

State v. Rourke, 2017 ME 10, 154 A.3d 127: The Court upheld the trial court’s decision to exclude expert testimony regarding the expert’s conclusion that if a person is exposed to hydrocarbons they can give a false reading on a breath test, holding the expert testimony was not reliable, because the expert had not conducted the experiments on the Intoxilyzer 8000, which was the instrument used, and because there was no evidence to show whether the defendant had inhaled hydrocarbons.

State v. Souther, 2017 ME 184, 169 A.3d 927: 29-A M.R.S.A. § 2432 could not be used to overcome the pitfalls addressed in *Richford*, 519 A.2d 193: in an impairment only case, defendant could not offer Widmark formula BAC calculations and used Section 2432 to relate those calculations to impairment.

1. Widmark Formula

State v. Tibbetts, 604 A.2d 20 (Me. 1992): The Court held the State’s expert was qualified and his testimony on the *Widmark* formula was relevant and admissible in an OUI crash where the trooper did not arrive on scene for over two hours.

State v. Souther, 2017 ME 184, 169 A.3d 927: The Court held the *Widmark* formula is only admissible at trial if the defendant is charged with having an excessive BAC prong of the OUI statute, and the 0.05% BAC statutory standard regarding impairment is only relevant if there is “a scientific test administered contemporaneously with an arrest.” Based on this holding the Court upheld the trial court’s decision to not allow evidence on the *Widmark* Formula in an OUI trial where the defendant was charged under the impairment prong of the OUI statute because there was no chemical test. The Court reasoned that since there was no offer of proof to how the *Widmark* formula would show her level of impairment, and because the court has

previously held that .05% BAC is only prima facie evidence of non-impairment with “a scientific test administered contemporaneously with an arrest,” the trial court was correct in refusing to admit evidence on the *Widmark* formula.

F. Evidence Sufficient for Conviction

State v. Ellis, 651 A.2d 830 (Me. 1994): The Court held that there was evidence sufficient for conviction for OUI when the trial record contained evidence that the defendant was alone at an interstate rest stop, passed out behind the wheel of a vehicle running and in gear, admitted to drinking, had no empty cans in vehicle, “failed” the FSTs, and had a breath alcohol concentration of 0.14% BAC.

State v. Parkin, 2016 ME 67, ¶ 9, 138 A.3d 493: The following facts were sufficient to prove OUI: A witness heard a crash outside his residence and observed the defendant getting out of the driver’s seat, the defendant smelled of alcoholic beverages and was speaking loudly and slurring her speech, she had exaggerated movements, glassy and bloodshot eyes, was unable to complete the HGN test, she “failed” the walk and turn and one leg stand tests, and her BAC, measured two and half hours after the crash, was a .06%. “We note particularly the evidence that Parkin’s blood alcohol level was .06. When the evidence indicates that a defendant’s blood alcohol level was more than .05 but less than .08, the jury may consider it as relevant evidence, along with all of the other evidence presented, in deciding whether the defendant was intoxicated. 29–A M.R.S. § 2432(2) (2015).”

State v. Simons, 2017 ME 180, 169 A.3d 399: The Court held that speeding, admissions to drinking earlier in the evening, the smell of alcohol on his breath, fumbling when handling documents, stumbling when exiting the vehicle, and performing poorly on three field sobriety tests is sufficient evidence to find a person guilty of OUI beyond a reasonable doubt.

State v. Jordan, 599 A.2d 74, 76 (Me. 1996): “The arresting officer testified that Jordan exhibited difficulty in speaking and walking, had bloodshot eyes, and smelled strongly of alcohol. Jordan refused to undergo field sobriety tests and refused to take a blood-alcohol test. The evidence was sufficient to support the finding that Jordan was operating his motor vehicle while under the influence.”

G. Criminal Homicide Related to OUI Offenses

- Maine’s OUI statute includes an enhancement provision for OUI offenses that cause serious bodily injury or death. It further provides enhanced penalties for a defendant who commits OUI and has a previous OUI homicide conviction.
- OUI is a strict liability crime, so the State need not prove the defendant intended to commit the offense or even acted recklessly in committing the offense.
- Because OUI is a strict liability crime, the Court held in *Longley* that “[n]o culpable state of mind is required to establish the offense of operating under the influence of intoxicating liquor or drugs. Accordingly, a death caused by one operating a motor vehicle while under the influence is not *ipso facto* the result of recklessness or criminal negligence as these culpable states of mind are defined in the criminal code.” ***State v. Longley***, 483 A.2d 725, 732 (Me. 1984).
- If a person commits an OUI offense and causes **serious bodily injury** to another person, it is a Class C strict liability crime which is punishable “by a period of incarceration of not less than 6 months, a fine of not less than \$2,100 and a court-ordered suspension of a driver's license for a period of 6 years” none of which can be suspended. **29-A M.R.S. § 2411(1-A)(D)(1), (D-1)**.
- If a person commits an OUI offense and causes **the death of another person**, it is a Class B strict liability crime which is punishable “by a period of incarceration of not less than 6 months, a fine of not less than \$2,100 and a court-ordered suspension of a driver's license for a period of 10 years” none of which can be suspended. **29-A M.R.S.A. § 2411 (1-A)(D)(1-A), (D-2)**.
- If a person commits an OUI offense and has **a prior felony OUI conviction OR “a prior criminal homicide conviction involving or resulting from the operation of a motor vehicle while under the influence”** it is a Class B strict liability crime which is punishable “by a period of incarceration of not less than 6 months, a fine of not less than \$2,100 and a court-ordered suspension of a driver's license for a period of 10 years” none of which can be suspended. **29-A M.R.S.A. § 2411 (1-A)(D)(2), (D-2)**. This prior felony conviction can be at any time and need not have been within the last ten years. **29-A M.R.S. § 2411(1-A)(D)(2)**.
 - ***State v. Haste***y, 2018 ME 147, ¶ 30, 196 A.3d 432: In interpreting the “prior criminal homicide” option of elevating an OUI to a Class B, the Court wrote: “In relevant part, the enhancement provision of 29-A M.R.S § 2411(1-A)(D)(2) requires the State to prove beyond a reasonable doubt the existence of (1) a “prior criminal homicide conviction,” (2) that “involve[ed] or result[ed] from the operation of a motor vehicle while under the influence [of intoxicants].” The latter requirement is **a factual element** that the State must prove in the present prosecution and may do so by **offering extrinsic evidence** to establish that [a defendant’s] manslaughter conviction involved or resulted from his operation of a motor vehicle while he was under the influence of intoxicants.”
- Finally, Maine statutes **29-A M.R.S. §§ 2454** and **2455** provide guidance on driver’s license revocations for driver convicted of criminal homicide that involved the operation of a motor vehicle, including when it involved the driver being impaired by drugs or

alcohol, and the responsibilities of a prosecutor to report criminal homicide involving a driver impaired by alcohol to the Secretary of State.

VI. Sentences and Other Penalties

Maine statutory law outlines the permissible considerations the court can use in determining the appropriate sentence for an OUI conviction. **29-A M.R.S. § 2433(1)**. These considerations include “whether the defendant operated with a passenger under 16 years of age, the record of convictions for criminal traffic offenses, adjudications of traffic infractions or suspensions of license for failure to submit to a test.” *Id.*

The Law Court further outlined some other sentencing considerations described below:

State v. Vanassche, 566 A.2d 1077 (Me. 1989): The Court upheld the constitutionality of minimum mandatory 48-hour jail sentence for OUI convictions with a BAC over .15%.

State v. Cain, 2006 ME 1, 888 A.2d 276: The Court held it is not a violation of the Sixth Amendment for a court to consider prior OUI convictions in making a sentencing decision even if the prior OUI convictions are not alleged or proven, as long as the sentence remains within the statutory range for that crime. In other words: A court may consider prior OUI convictions in making a sentencing decision, even if the defendant is charged with a first offense OUI, as long as the sentence is not higher than the maximum sentence allowed under a first offense OUI conviction.

State v. Hemminger, 2022 ME 32, ¶¶ 14-24, 276 A.3d 222: under the federal constitution, a court may consider a defendant’s false testimony as an aggravating factor at sentencing, and the court need to make independent perjury findings.

While not for an OUI sentence, the following case involves the interplay of juvenile OUI and OAS:

State v. White, 2001 ME 65, 769 A.2d 827: The Court held that mandatory minimum sentence required in §2412-A(3) which requires an elevated sentence if convicted of OAS if the underlying suspension was for OUI or an OUI offense applies to suspension for the juvenile offense of operating a motor vehicle with any alcohol in their system.

A. Court Suspensions for OUI Offenses

1. Driver's License Suspensions

When the court suspends a driver's license for an OUI conviction they must inform the defendant of the suspension, and the defendant must acknowledge the suspension in a written form that the court provides. **29-A M.R.S.A. § 2434(1)–(2).**

Unless a stay of execution is granted, the court must take physical custody of the suspended driver's license, even if the license is from another state, but upon reasonable cause, the court can "allow a person who does not possess the license at the time of sentencing up to 96 hours to surrender that license." **29-A M.R.S. § 2434 (3),(7).** "Two additional days of suspension must be added for each day after the license surrender day that a person fails to surrender the license to the court." **29-A M.R.S. § 2434(8).**

The court can stay the suspension for a period of four hours from the time of sentencing, unless the defendant's license was administratively suspended and then restored by the Secretary of State for the same offense, "in which case the court may stay a suspension for up to 7 days." **29-A M.R.S. § 2434(4).** "[T]he period of suspension commences immediately on announcement of sentence." **29-A M.R.S. § 2434(8).**

If a person refuses to sign the acknowledgement of the suspension notice or "[w]ithout good cause, fails to surrender a license within the period of suspension," they commit a Class E strict liability crime. **29-A M.R.S. § 2434(10).**

"For purposes of this chapter, a prior conviction or action has occurred within the 10-year period if the date of the action or the date the sentence is imposed is 10 years or less from the date of the new conduct." **29-A M.R.S. § 2402.**

State v. Spiegel, 2013 ME 73, ¶ 12, 72 A.3d 519: The Court held that a license suspension, license revocation, or habitual offender classification predicated on a conviction that has been stricken on the basis of a violation of the Sixth Amendment right to counsel, "remains valid and enforceable through criminal sanctions unless the suspension, revocation, or classification is timely and successfully appealed and is set aside before the motor vehicle operation at issue."

2. Registration suspensions

"The court shall suspend the right to register a motor vehicle and all registration certificates and plates issued by the Secretary of State" for any person who is convicted of a second offense OUI. **29-A M.R.S. § 2416(1).** "The Secretary of State shall return the certificate of registration and plates to the defendant when the defendant's license and registration privileges have been restored." *Id.* However, "if a spouse or other family member regularly

using a vehicle subject to suspension of registration establishes to the satisfaction of the court that hardship will result from that suspension, the court need not suspend the registration certificates and plates or the right to register that vehicle.” **29-A M.R.S. § 2416(2)**.

State v. Horr, 2003 ME 110, ¶¶ 11-12, 831 A.2d 407: The Court held that “the Superior Court properly ordered [the defendant] to serve consecutive sentences because his criminal record is so serious,” and that the defendant’s convictions for habitual motor vehicle offender, operating under the influence, and driving to endanger were for unintentional crimes. “Unintentional crimes . . . have no criminal purpose and are therefore excluded from the limitation provided by section 1256(3)(B) [which “was intended to prevent consecutive sentences for offenses which were committed as a part of a single course of conduct during which there was no substantial change in the nature of the criminal objective.”].”⁶

3. Immigration Status at Sentencing

State v. Svay, 2003 ME 93, 828 A.2d 790: The Court held that “[t]he consequence of deportation may be considered by a sentencing court because, among other reasons, the impact that a particular sentence will have on the offender is relevant to the offender's likelihood of rehabilitation.” *Id.* ¶ 13.

VII. Relevant Miscellaneous Statutes

The following are miscellaneous statutes from Maine’s Motor Vehicle Title, 29-A, that are related to OUI cases:

- This statute allows medical personnel the option to report an OUI-related crash to police if they believe a patient operated a motor vehicle while under the influence of alcohol and releases them from liability and physician-patient privilege.

§2405. Optional reporting of drivers operating under the influence of intoxicating liquor or drugs

- 1. Persons who may report.** If, while acting in a professional capacity, a medical or osteopathic physician, resident, intern, emergency medical services person, medical examiner, physician's assistant, dentist, dental hygienist, dental assistant or registered or licensed practical nurse knows or has reasonable cause to believe that a person has been operating a motor vehicle, hunting or operating a snowmobile, all-terrain vehicle or watercraft while under the influence of intoxicants and that motor vehicle, snowmobile, all-terrain vehicle or watercraft or a hunter has been involved in an accident, that person may report those facts to a law enforcement official.

⁶ 17-A M.R.S.A. §1256(3)(B) was repealed in 2019. However, 17-A M.R.S.A. § 1608(2)(B) was enacted in 2019 with the same exact language.

2. **Immunity from liability.** A person participating in good faith in reporting under this section, or in participating in a related proceeding, is immune from criminal or civil liability for the act of reporting or participating in the proceeding.

Nothing in this section may be construed to bar criminal or civil action regarding perjury. In a proceeding regarding immunity from liability, there is a rebuttable presumption of good faith.

4. **Privileged or confidential communications.** The physician-patient privileges under the Maine Rules of Evidence and the confidential quality of communication under Title 24-A, section 4224 and Title 32, section 18393 are abrogated in relation to required reporting or other proceeding.

- This statute makes it a crime to be impaired by alcohol or drugs while being the licensed driver for a person operating with a learner's permit.

§1304. Learner's permits

Subsection (6): **Criminal offense.** A person commits a Class E crime if that person accompanies a permittee who is operating a vehicle on a public way and that accompanying person has impaired mental or physical functioning as a result of the use of intoxicating liquor or drugs.

- This statute allows a police officer to impound a vehicle for at least 8 hours if it was used in an OUI or OAS offense if the suspension was for OUI.

§2422. Impoundment of motor vehicles for OUI

1. **Impoundment of vehicle.** A motor vehicle may be seized if it is used by a person arrested for a violation of:
 - A. Section 2411 [Criminal OUI]; or
 - B. Section 2412-A [Operating while license suspended or revoked], when the suspension or revocation was for OUI or an OUI offense.
2. **Storage.** If a motor vehicle is seized, it must be held in secure storage by the seizing agency or at the direction of the arresting law enforcement officer.
3. **Release of vehicle.** The motor vehicle may be released after at least an 8-hour period and payment of any towing and storage fees.

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Lori Renzullo earned a Juris Doctor from the University of Maine School of Law and is a Maine licensed attorney. She also holds a Bachelor’s Degree in Criminal Justice from Husson University and an Associates Degree in Small Business Management from the University of Maine at Machias. Prior to her law school career, she served 15 years as a full time police officer at the Old Town Police Department in Maine. A graduate of the 7th Basic Law Enforcement Training Program at the Maine Criminal Justice Academy, Lori was assigned to patrol on the evening and midnight shift for six years. During those six years, she specialized in OUI enforcement, became a certified Drug Recognition Expert and an SFST Instructor at the Maine Criminal Justice Academy. In 2009, she was assigned to the Maine Drug Enforcement Agency (MEDA) where she worked as a special agent investigating both federal and state drug trafficking crimes for six years. In 2016, Lori was promoted to Sergeant and left MDEA to return to patrol. During her time as a patrol sergeant, she became a Drug Recognition Expert Instructor, a Breath Testing Device Instructor and served as the Field Training Officer supervisor for the Old Town Police Department. During law school she was certified as a student attorney and worked as a legal intern for the Penobscot County District Attorney’s Office-District V and the Maine Office of the Attorney General in the Criminal Division. She is currently studying for the Maine Bar Exam and will be serving as a Law Clerk in the Maine District Court in the Fall of 2022.

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David Kennedy currently serves as Maine's Judicial Outreach Liaison for Maine Bureau of Highway Safety's NHTSA-funded *Initiatives That Work* program. He serves in that function through his consulting firm, The Kennedy Group, LLC, a sub-contractor to Dirigo Safety.

Prior to retiring as a District Court Judge in 2014, he was a Magistrate in the Family Division; and had previous broad experience as a lawyer and public administrator. He has an A.B. degree from the College of the Holy Cross (1973), a J.D. degree from Boston University Law School (1976) and completed post-graduate seminars in mediation and facilitation at the Program of Negotiation at Harvard Law School (1995- 96). Together with Justice Andrew M. Horton he is a co-author of *Do Your Divorce Right; Straight Talk from Family Court Judges*.

The second and third editions (July 2022 and July 2023) were edited by Scot Mattox and:

Josh Saucier, Esq.

Maine Assistant Traffic Safety Resource Prosecutor

Josh is a Maine licensed attorney, who graduated from the University of Maine School in 2014. While in law school, Josh interned for the United States Attorney's Office for the District of Maine where he developed a passion for prosecution.

After graduation, Josh began his career back in his hometown of Millinocket by joining a private practice. While there, Josh specialized in real estate and municipal law, representing local towns and several timber companies. He left private practice in December of 2015 to join the York County District Attorney's Office.

As an Assistant District Attorney (ADA) in York County, Josh worked primarily out of the Springvale District Court and, eventually, became one of York County's Impaired Driver Special Prosecutors (IDSP). As an IDSP, he became a specialist and expert in OUI prosecution. In 2019, Josh joined the Penobscot County District Attorney's Office where, as an ADA, he focused on drug trafficking, domestic violence, and other serious felony cases.

Shortly (2 weeks) before the State of Maine's COVID-19 State of Emergency, Josh joined the City of Bangor as it's Assistant City Solicitor. While there, he helped navigate the City's response to the pandemic and assisted with all the City's legal matters before, in March of 2020, becoming the City's Acting City Solicitor. Josh joined Dirigo Safety in 2022 as an Assistant Traffic Safety Resource Prosecutor (TSRP).

We welcome your feedback. Please see our contact information on the following page.

Scot Mattox

Josh Saucier

Auburn, Maine

July 2023



Maine Traffic Safety Resource Prosecutor's Program

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Traffic Safety Resource Prosecutors (TSRPs) coordinate an inter-agency, multidisciplinary approach to the investigation and prosecution of impaired driving and other traffic crimes. They do so by providing training, education, and technical support to prosecutors and law enforcement personnel throughout their states and encouraging positive information sharing relationships and interagency cooperation to increase the effectiveness of traffic safety crime investigation and prosecution throughout Maine.

The TSRP program is funded by the [National Highway Traffic Safety Administration](#) and coordinated through the cooperative efforts of [The National Traffic Law Center](#) and the [National Association of Prosecutor Coordinators](#). Currently, there are TSRPs in all 50 states, the District of Columbia, and Puerto Rico.

The Maine Bureau of Highway Safety provides guidance and funding for Maine's TSRP positions. Maine's program is administered by [Dirigo Safety, LLC](#), a contractor for the [Maine Bureau of Highway Safety](#).

TSRP Services Available for Maine Law Enforcement and Prosecutors

1. Assistance as requested with investigations and prosecutions on anything in 29-A M.R.S but especially:
 - a. Impaired (alcohol, cannabis, and other drugs) driving crimes including fatal crashes.
 - b. Traffic safety crime conflict cases.
 - c. Traffic safety cases with novel issues.
 - d. Novel issue appeals (i.e., not just sufficiency of evidence etc.).
2. Fatal Crash review and charging decision discussion.
3. Assist with resources – research, expert witness review, case issue analysis.
4. Provide technical and specialty knowledge regarding police procedures, training, etc.
5. Training on any highway safety issue desired.
6. Liaison between law enforcement agencies and prosecutors on traffic related criminal investigations.
7. Email and phone consultations.